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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.,	)	Supreme Court No. 20200122
Plaintiff-Appellee,	)	Ward County District Court
v.	)	Case No. 51-2016-CV-01678
Lavern Behm	)	
Defendant-Appellant.	)	

On Appeal from the Judgment entered February 13, 2020
Case No. 51-2016-CV-01678
County of Ward, North Central Judicial District
The Honorable Gary H. Lee, Presiding

BRIEF OF APPELLEE MONTANA-DAKOTA UTILITIES CO.

ORAL ARGUMENT REQUESTED

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[¶2] Whether the District Court erred in not awarding attorney's fees and costs under N.D.C.C. § 32-15-32 for a landowner's failed petition to the United States Supreme Court.

[¶3] Whether an award of attorney's fees and costs is appropriate under N.D.R.App.P. 38 for having to defend against the five constitutional issues raised in this appeal.

ORAL ARGUMENT REQUESTED

[¶4] Appellee Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., ("MDU") requests oral argument. In this appeal, Appellant Lavern Behm ("Behm") alleges a multitude of constitutional violations arising from this Court's decision in *Montana-Dakota Util. Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865. In so alleging, Behm seeks to overturn nearly every facet of how eminent domain proceedings have been conducted in North Dakota for the past century. Because of those implications, and because of the procedural complexity of this case, oral argument would be helpful.

STATEMENT OF THE CASE

[¶5] On September 7, 2016, MDU brought a Summons and Complaint seeking to exercise the right of eminent domain for a pipeline easement and an additional temporary construction easement over property owned by Behm. App. 5-7. The sought easements were necessary for constructing and operating a natural gas distribution pipeline. *Id.* Behm filed an Answer and Counterclaim on October 25, 2016, and MDU responded to the Counterclaim on November 9, 2016. App. 9-18.

[¶6] The District Court ordered a bifurcated trial, with a bench trial to determine whether MDU's proposed taking was necessary for a public use and, if so, a subsequent jury trial to determine the compensation owing to Behm. Docket ID #42 at ¶ 26. Following the bench trial, the District Court held that MDU's proposed taking was for a public use authorized by law, but the proposed taking was not necessary for that public use. App. 84-94. The District Court entered its Judgment, dismissing MDU's Complaint with prejudice and awarding Behm attorney's fees and costs. App. 110-132.

[¶7] On August 23, 2018, MDU filed a Notice of Appeal. App. 133-134. Behm filed a Notice of Cross-Appeal on August 31, 2018. App. 138-140. On May 16, 2019, this Court rendered its decision in *Montana-Dakota Util. Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865, concluding MDU's proposed taking was necessary for a public use authorized by law. On those conclusions, this Court reversed the Judgment and remanded to the District Court "for trial on eminent domain damages to be awarded to Behm." *Id.* at ¶ 19.

[¶8] On August 12, 2019, Behm petitioned the United States Supreme Court for a writ of certiorari. App. 155-187. On November 18, 2019, the United States Supreme Court denied Behm's petition. *Behm v. Montana-Dakota Util. Co.*, 140 S. Ct. 521 (2019).

[¶9] This action was remanded back to the District Court, which scheduled a jury trial for January 8, 2020. App. 222-224. Behm submitted proposed jury instructions on December 12, 2019, requesting to have the jury serve in an advisory capacity as to whether MDU's proposed taking was necessary for a public use. App. 194-216. Behm reiterated that request in his December 19, 2019 pretrial statement. App. 217-218. On January 3, 2020, the District Court denied Behm's request to so instruct the jury. App. 222-224.

[¶10] On January 7, 2020, MDU and Behm stipulated that the easements to be taken had a value of $1,000.00. App. 225-227. MDU and Behm further stipulated that Behm was to submit a motion for attorney's fees and costs under N.D.C.C. ch. 32-15 within fourteen days. *Id.* The District Court adopted that stipulation on January 7, 2020. App. 229.

[¶11] On January 8, 2020, Behm moved for attorney's fees and costs. Docket ID #154. Inclusive of the attorney's fees and costs associated with the his first appeal to this Court, Behm sought an aggregate amount of $49,561.78. App. 230-250. The District Court partially granted and denied the motion. *Id.* As is relevant to this appeal, the District Court denied the motion with respect to Behm's request for attorney's fees and costs associated with his failed petition to the United States Supreme Court. *Id.*

[¶12] On February 13, 2020, the District Court entered its Judgment. App. 252. MDU served Behm with Notice of Entry of Judgment on February 14, 2020. Docket ID #177-178. On April 13, 2020, Behm filed a Notice of Appeal. App. 255-259.

STATEMENT OF THE FACTS

[¶13] This Court previously set forth the full factual background of this dispute in its previous opinion. *See generally Behm*, 2019 ND 139, at ¶¶ 2-18. MDU will repeat the same only as is necessary for context in this appeal.

[¶14] BNSF Railway Company ("Burlington Northern") operates a railroad that runs roughly east-to-west through Sections 16 and 17, Township 155 North, Range 84 West, in Ward County, North Dakota. As a part of that operation, Burlington Northern uses a switch to turn locomotives and trains from one track to another. App. 34-35. That switch requires heating in the winter to keep free of ice and snow. *Id.* Burlington Northern initially used propane trucks to supply its heaters, which had unreliable availability. *Id.*

[¶15] MDU provides natural gas distribution utility services to the general public within its area of service. App. 29-33. As a part of those services, MDU operates a natural gas transmission line located to the south of Burlington Northern's switch location. *Id.* This main line runs east-to-west and is roughly parallel with Burlington Northern's railroad tracks. *See id.* Behm's property lies between the two, with Burlington Northern's railroad tracks and switch location to the north and MDU's main line to the south. *See id.*

[¶16] Burlington Northern requested that MDU supply it with natural gas for its heaters at the switch location. App. 34-35. To facilitate Burlington Northern's request, MDU sought a pipeline easement across Behm's property. App. 29-33. That easement would extend from Burlington Northern's railroad tracks and switch location on the northern terminus to MDU's transmission line on the southern terminus. *Id.* The sought pipeline easement had the following specific legal description:

> Pipeline Easement located in the NW¼ of Section 16, Township 155 North, Range 84 West of the 5th PM, Ward County, North Dakota, described as follows: The East 10 feet of the West 43 feet of that portion of said NW¼ lying southerly of the Burlington Northern Santa Fe Railroad right of way.

App. 5-7. That easement would be for a period of ninety-nine years, unless sooner terminated by MDU. *Id.* MDU also sought a temporary construction easement for purposes of constructing the pipeline. *Id.*

STANDARD OF REVIEW

[¶17] The only issues appropriate for review are whether the five constitutional issues raised by Behm in this appeal are procedurally and substantively appropriate for review, whether the District Court erred in interpreting and applying N.D.C.C. § 32-15-32, and whether an award of attorney's fees and costs is appropriate under N.D.R.App.P. 38. This Court's standards of review for these issues are well-established.

A. This Court has full authority to review whether a party has followed the appropriate procedure for raising constitutional challenges on appeal.

[¶18] A party raising constitutional issues on appeal must follow the appropriate procedure for doing so. When a party challenges the constitutionality of state law and the State of North Dakota or one of its representatives is not a party, N.D.R.App.P. 44 requires appropriate notice to the Attorney General. Whether a party has complied with N.D.R.App.P. 44 is for this Court's determination. *See Gray v. Berg*, 2016 ND 82, ¶ 13, 878 N.W.2d 79. The challenging party must also support the constitutional challenge with persuasive authority and reasoning; a failure to do so will result in a waiver. *Sorum v. Dalrymple*, 2014 ND 233, ¶ 15, 857 N.W.2d 96. Whether the challenging party has properly supported the constitutional claim is for this Court's determination. *Id.*

B. This Court has full authority to review whether the law of the case doctrine applies and whether a district court properly carried out the terms of a mandate from this Court.

[¶19] This Court has described the law of the case doctrine as follows:

> Generally, the law of the case is defined as the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. In other words, the law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and a party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal. The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms.

Rustad v. Baumgartner, 2020 ND 126, ¶ 6, 943 N.W.2d 786 (quoting *Carlson v. Workforce Safety & Ins.*, 2012 ND 203, ¶ 16, 821 N.W.2d 760) (citations and quotations omitted in

original). This Court retains authority to determine whether a district court scrupulously and fully carried out the terms of this Court's mandate on remand. *Id.*

C. This Court reviews awards of attorney's fees and costs pursuant to N.D.C.C. § 32-15-32 under the abuse of discretion standard.

[¶20] In eminent domain proceedings brought under N.D.C.C. ch. 32-15, a "court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include . . . reasonable attorney's fees for all judicial proceedings." N.D.C.C. § 32-15-32. The abuse of discretion standard governs this Court's review of a district court's award pursuant to N.D.C.C. § 32-15-32. *City of Medora v. Goldberg*, 1997 ND 190, ¶ 18, 569 N.W.2d 257. A district court "abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law." *Id.* As is further relevant, this Court reviews issues of statutory interpretation de novo. *Nelson v. McAlester Fuel Co.*, 2017 ND 49, ¶ 12, 891 N.W.2d 126.

D. This Court has full discretion to determine whether an award of attorney's fees and costs is appropriate under N.D.R.App.P. 38.

[¶21] This Court "may award just damages and single or double costs, including reasonable attorney's fees" if it determines an appeal is frivolous. N.D.R.App.P. 38. "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates bad faith in pursuing the litigation." *Gray*, 2016 ND 82, at ¶ 16. In considering a N.D.R.App.P. 38 request, "this Court must use its own discretion and judgment to decide whether there is any merit in the party's appeal." *Williams v. State*, 405 N.W.2d 615, 625 (N.D. 1987).

ARGUMENT

[¶22] While cast in the trappings of constitutional novelty and import, this appeal is little more than Behm's thinly guised attempt to undo the unfavorable decision he received from

this Court in the first appeal. Try as he may, this appeal does not provide Behm license to relitigate those issues he lost in the first appeal or license to litigate issues he failed to properly raise in the first appeal. An award of nominal attorney's fees and costs is appropriate under N.D.R.App.P. 38 because this appeal, as it concerns the five constitutional issues raised, is flagrantly groundless.

I. The five constitutional challenges raised are improper.

[¶23] Behm primarily devotes his briefing to five constitutional challenges. Despite the primacy of those challenges, Behm failed to abide by the basic procedure for asserting those challenges and Behm further failed to properly support those challenges.

A. Behm has provided no evidence he complied with N.D.R.App.P. 44.

[¶24] This Court's rules for how to challenge the constitutionality of state law are clear:

> If a party questions the constitutionality of a statute of the State of North Dakota in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the attorney general immediately upon the filing of the record or as soon as the question is raised.

N.D.R.App.P. 44. This Court routinely declines to address constitutional issues when a party has not complied with N.D.R.App.P. 44. *See, e.g., Glass v. Glass*, 2017 ND 17, ¶ 16, 889 N.W.2d 885; *Gray*, 2016 ND 82, at ¶ 13.

[¶25] Behm argues that N.D.C.C. ch. 32-15, as interpreted and applied by this Court, violates the United States and North Dakota Constitutions by allowing private corporations to exercise the State of North Dakota's eminent domain power under limited judicial review and without a jury. *See* Appellant's Br. at ¶¶ 37-43. These arguments directly challenge the constitutionality of N.D.C.C. ch. 32-15.

[¶26] Because neither the State of North Dakota nor its agency, officer, or employee acting in an official capacity is a party to this action, N.D.R.App.P. 44 required Behm to "give written notice to the attorney general immediately upon the filing of the record or as soon as the [constitutional] question is raised." Behm has not alleged, nor provided any evidence showing, he properly complied with N.D.R.App.P. 44. The Court should accordingly decline to address Behm's constitutional challenges for lack of compliance with N.D.R.App.P. 44. *Glass*, 2017 ND 17, at ¶ 16 (concluding that, because the appellant failed to provide "notice to the attorney general as required under N.D.R.App.P. 44," the Court would "decline to address [the appellant's] constitutional argument."); *Gray*, 2016 ND 82, at ¶ 13 (concluding that the appellant's constitutional "challenge is improper because nothing in the record indicates [the appellant] provided written notice to the attorney general regarding his challenge, as required by N.D.R.App.P. 44.").

B. Behm has failed to properly support his constitutional challenges.

[¶27] This Court has repeatedly advised that parties "asserting a constitutional claim must bring up the heavy artillery or forgo the claim." *Riemers v. O'Halloran*, 2004 ND 79, ¶ 6, 678 N.W.2d 547. Failure to provide any persuasive analysis supported by appropriate authority is insufficient to raise a viable constitutional challenge. *Id.* That failure accordingly results in a waiver of the constitutional issue for appellate purposes. *Id.*

[¶28] Despite this Court's repeated admonishments to bring in the "heavy artillery" for a constitutional attack, Behm brings a shotgun scattering of musings about what he thinks the relevant constitutional guarantees should entail. *See, e.g.,* Appellant's Br. at ¶ 31 (arguing the "presumption should be against the taking . . . ."); *id.* at ¶ 34 (arguing "the taking should not be allowed" when alternatives exist); *id.* at ¶ 39 (arguing the "burden

should be on the government or entity taking the property to" justify the taking); *id.* at ¶ 41 (arguing private takings "should not be allowed."); *id.* at ¶ 42 (arguing "the strict scrutiny standard should apply . . . ."); *id.* at ¶ 49 (arguing "the Seventh Amendment right to a civil jury trial should be recognized . . . and be incorporated to the states.") (emphasis added in all). As support, Behm rotely copies and pastes from his failed petition to the United States Supreme Court. Appellant's Br. at ¶ 36; App. 177-185. Behm's bare assertions about what he thinks the United States and North Dakota Constitutions should entail are insufficient to properly present a viable constitutional challenge, and the Court should refuse to address the same. *See Riemers*, 2004 ND 79, at ¶ 6.

II. The law of the case doctrine precludes consideration of all constitutional challenges Behm raised or could have raised in the first appeal.

[¶29] Even if Behm properly raised and supported his constitutional challenges, this Court still cannot consider those challenges on this appeal. Under the law of the case doctrine, a "party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal." *Rustad*, 2020 ND 126, at ¶ 6. The mandate rule, a specific application of that doctrine, "requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms." *Id.* On an appeal of a remanded case, this Court will not address issues "beyond the scope of the remand in the first appeal and that could have been raised in the first appeal." *State v. Lyon*, 2020 ND 34, ¶ 5, 938 N.W.2d 908; *see also Baatz v. State*, 2014 ND 151, ¶ 17, 849 N.W.2d 225; *Kortum v. Johnson*, 2010 ND 153, ¶ 10, 786 N.W.2d 702. "The law of the case doctrine is based upon the theory of res judicata, and is grounded on judicial economy to prevent

piecemeal and unnecessary appeals." *Glass v. Glass*, 2018 ND 14, ¶ 5, 906 N.W.2d 81 (quoting *Jundt v. Jurassic Res. Dev., N. Am., L.L.C.*, 2004 ND 65, ¶ 6, 677 N.W.2d 209); *Tom Beuchler Const. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987).

[¶30] The law of the case doctrine is clear—Behm cannot relitigate issues he raised or could have raised in the first appeal. Behm devotes the majority of his briefing to five constitutional issues. Behm, however, either raised or could have raised each of those constitutional issues in the first appeal.

[¶31] The first three of Behm's constitutional issues concern whether the proposed taking violates the federal takings and due process clauses. Appellant's Br. at ¶¶ 37-43. These issues are substantively the same as issues raised by Behm in the first appeal, specifically:

> (4) the failure of the District Court to find federal and state due process violations, including substantive due process;
> (5) the failure of the District Court to find a federal and state violation of improper taking; . . .
> (9) the failure of the District Court to find a federal substantive prohibition of the taking;

App. 138-140. This Court quickly dispelled with these issues, concluding Behm did "not specifically address any of them in his brief. We do not address inadequately briefed issues." *Behm*, 2019 ND 139, at ¶ 19. The facts relevant to these issues are the same now as they were during the first appeal. The law of the case doctrine precludes Behm from now providing the arguments he failed to properly brief in the first appeal.

[¶32] The final two of Behm's issues concern whether the United States and North Dakota Constitutions entitle Behm to a jury trial on the issues of whether the proposed taking is necessary for a public use. Appellant's Br. at ¶¶ 44-52. Behm did not raise any objection when the District Court bifurcated this eminent domain proceeding into a bench trial as to whether the proposed taking was necessary for a public use and, if so, a jury trial

as to the damages owing to Behm. Docket ID #42 at ¶ 26. After the District Court ruled in his favor following the bench trial, Behm again did not raise any issue with the bifurcation in the first appeal. *See* App. 138-140. It is only now, after suffering an adverse determination from this Court, that Behm takes issue with the bench trial. The alleged constitutional violations of Behm's right to a trial by jury were every bit as real at the time of the first appeal as they are now. Behm had every opportunity to raise the issue in the first appeal, but he did not. The law of the case doctrine precludes Behm from now raising that issue, thus foreclosing Behm's final two constitutional issues.

[¶33] Ostensibly recognizing the problems posed by the law of the case doctrine, Behm avers that "[w]e were successful below using state law and thus had no need to phrase [sic] federal law at that time." Appellant's Br. at ¶ 33. This is not a cogent explanation excusing Behm's failure to properly raise these constitutional issues in the first appeal. First, the avoidance canon of interpretation dictates that courts may consider possible constitutional infirmities in interpreting state law. *See Seiler v. N.D. Dep't of Human Servs.*, 2010 ND 55, ¶ 7, 780 N.W.2d 653; *Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶¶ 7, 16, 669 N.W.2d 82; *see also Black's Law Dictionary* 377 (10th ed. 2014). Second, the law of the case doctrine dictates that a party cannot forego arguments in the first appeal, lose that first appeal, and then raise the forewent arguments in a second appeal. *See Tom Beuchler Const.*, 413 N.W.2d at 339; *Knokel v. Amb*, 2020 ND 17, ¶ 20, 937 N.W.2d 540; *Matter of Estate of Johnson*, 2017 ND 162, ¶¶ 11-13 , 897 N.W.2d 921.

[¶34] These principles required Behm to bring the alleged constitutional issues to the Court's attention in the first appeal when the Court was interpreting and applying N.D.C.C. ch. 32-15. Behm had every opportunity to raise those issues, but failed either to properly

support those argument or raise them at all. *See* Appellant's Br. at ¶ 23 n.5 (admitting Behm raised constitutional issues in the first appeal). That Behm unsuccessfully limited his arguments in the first appeal does not somehow provide him a redo to now litigate those constitutional issues in this second appeal. The law of the case doctrine makes no allowance for improvident strategic decisions.

[¶35] This Court's decision on the first appeal was unambiguous and unequivocal. Because the proposed taking was necessary for a public use as a matter of law, this Court remanded solely "for trial on eminent domain damages to be awarded to Behm." *Behm*, 2019 ND 139, at ¶ 19. The District Court faithfully adhered to this Court's mandate, concluding the "only matter left for determination in this trial is the issue of eminent domain damages to be awarded to Lavern Behm." App. 223. Just as the District Court did, and just as this Court has repeatedly done in the past, this Court should decline to consider Behm's constitutional arguments, all of which exceed the scope of this Court's remand and offend the law of the case doctrine. To do otherwise encourages parties, such as Behm, to engage in piecemeal and unnecessary appeals at the expense of judicial economy and finality. *Glass*, 2018 ND 14, at ¶ 5.

III. Behm's constitutional arguments are meritless and ignore controlling precedent from the United States Supreme Court and this Court.

[¶36] Assuming, strictly arguendo, that the Court is willing to entertain Behm's constitutional arguments, stare decisis is dispositive. Stare decisis dictates that a court must generally follow earlier judicial decisions when the same points arise again in litigation. *Abbey v. State*, 202 N.W.2d 844, 852 (N.D. 1972). "The rule of stare decisis is grounded upon the theory that when a legal principle is accepted and established rights may accrue under it, security and certainty require that the principle be recognized and followed

thereafter." *Dickie v. Farmers Union Oil Co.*, 2000 ND 111, ¶ 13, 611 N.W.2d 168. "Where the rule is well known and has been acted on and established for a long time, it would be injudicious to make a change even though the court might reach a different conclusion if this matter were before it for the first time." *McGee v. Stokes' Heirs at Law*, 76 N.W.2d 145, 155 (N.D. 1956). "Stare decisis is of greatest importance where the construction of a provision of the Constitution itself is concerned." *Bulman v. Hulstrand Const. Co., Inc.*, 521 N.W.2d 632, 642 (N.D. 1994) (VandeWalle, C.J., dissenting).

[¶37] As noted above, Behm's arguments are conspicuously devoid of any discussion concerning relevant precedent. That absence is for good reason. While he apprises the Court at length about what he thinks the relevant constitutional provisions should require, Behm makes no attempt to apprise the Court as to what the United States Supreme Court and this Court have concluded those constitutional guarantees actually require. A century's worth of controlling precedent from the United States Supreme Court and this Court directly contradicts Behm's constitutional arguments.

A. The State of North Dakota's delegation of its eminent domain authority to private corporations does not violate the United States Constitution.

[¶38] Behm begins by arguing the State of North Dakota's delegation of its eminent domain authority to a private corporation violates the United States Constitution. Appellant's Br. at ¶¶ 37-39. The State of North Dakota's "power of eminent domain is one of the hallmarks of sovereignty." *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Tp.*, 2002 ND 83, ¶ 23, 643 N.W.2d 685. The State of North Dakota may, through appropriate legislation, delegate that power to private corporations. *See* 26 Am. Jur. 2d *Eminent Domain* § 23 (2020) (noting the "power of eminent domain may be delegated by the legislature."); 29A C.J.S. *Eminent Domain* § 26 (2020) (noting the "right

of eminent domain may, to the extent and for the purposes designated by statute or constitution, be exercised by private corporations, partnerships, or individuals."). As is relevant, the State of North Dakota has delegated its eminent domain power for those purposes codified at N.D.C.C. § 32-15-02. *See Behm*, 2019 ND 139, at ¶¶ 8-10.

[¶39] The United States Supreme Court has recognized that a sovereign's delegation of its eminent domain power to a private corporation or individual is permissible under the United States Constitution. *See Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529 (1894) (noting it was "beyond dispute" that Congress could delegate federal eminent domain authority to a private corporation consistent with the United States Constitution). As to states delegating their power of eminent domain to private corporations, the United States Supreme Court has specifically said "the power of appropriating [private property] may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested." *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878); *see also W. River Bridge Co. v. Dix*, 47 U.S. 507, 524 (1848) (noting the power of eminent domain "is admitted to appertain to the State legislatures, and may, without question, be delegated by them to the judicial tribunals, as it is often delegated to private corporations . . . ."). Behm cites no authority dictating a contrary result. Behm is simply wrong in arguing the State of North Dakota cannot delegate its eminent domain authority to private corporations consistent with the United States Constitution.

B. This Court's limited review of an exercise of delegated eminent domain authority does not violate the United States Constitution.

[¶40] Behm continues by arguing the limited standard for judicial review of a proposed taking, as set forth by this Court in the first appeal, again violates the United States Constitution. Appellant's Br. at ¶¶ 40-43; *see Behm*, 2019 ND 139, at ¶ 5. A taking's

propriety is, at essence, the product of legislative determination. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984); *Behm*, 2019 ND 139, at ¶ 9. That determination warrants judicial deference "because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Midkiff*, 467 U.S. at 244; *see also Behm*, 2019 ND 139, at ¶ 5. The accountability of political officials to the electorate primary—not strict judicial scrutiny—represents the primary mechanism for enforcing the constitutional public-use requirements. *See Hawaii Housing Auth.*, 467 U.S. at 239; *Behm*, 2019 ND 139, at ¶ 5. Accordingly, "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244; *Behm*, 2019 ND 139, at ¶ 5. While other constitutional commands dictate courts must be available to review the exercise of that legislative judgment, that role "is an 'extremely narrow' one." *Midkiff*, 467 U.S. at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). Consistent with that judicial reticence to actively interfere with legislative prerogative, the United States Supreme Court and this Court have articulated comparable standards for evaluating proposed takings. *Compare Nat. R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422 (1992) with *Behm*, 2019 ND 139, at ¶ 14.

[¶41] Behm, of course, does not address any of those principles. Behm's arguments are nothing more than an invitation for courts to interject judicial judgment into eminent domain proceedings, which this Court already rejected in this case. *Behm*, 2019 ND 139, at ¶ 17 (concluding the district court erred by substituting "its judgment for that of the condemning authority."). Due process requires meaningful judicial review. *See* 16D C.J.S. *Constitutional Law* § 2065 (2020) (noting eminent domain proceedings are "generally held

to constitute due process of law if they afford proper safeguards to the rights of the property owner to contest the taking of his or her property and to receive just compensation therefor."); *see also Arnegard v. Arnegard Twp.*, 2018 ND 80, ¶ 29, 908 N.W.2d 737 (noting the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). Due process does not require, nor permit, courts to freely substitute their judgment for that of the condemning authority. *See Midkiff*, 467 U.S. at 240; *Behm*, 2019 ND 139, at ¶ 17. The limited judicial review afforded by N.D.C.C. ch. 32-15 comports with due process, while Behm's preferred standard ignores longstanding and well-established separation of powers principles.

C. Neither the United States nor North Dakota Constitutions entitle a landowner to a trial by jury as to whether a proposed taking is necessary for a public use.

[¶42] Behm concludes his constitutional arguments by arguing the United States and North Dakota Constitutions entitle property owners to jury trials in eminent domain proceedings as to whether a proposed taking is necessary for a public use. Appellant's Br. at ¶¶ 44-52. Based upon the context, MDU understands Behm's argument to be that this Court's precedent allowing bench trials as to aspects of eminent domain proceedings violates U.S. Const. amend. VII and, also, N.D. Const. Art. 1, § 13. *See Central Power Elec. Co-op., Inc. v. C-K, Inc.*, 512 N.W.2d 711, 713 n.1 (N.D. 1994) (noting a "bench trial is held to determine public benefit and necessity, and a jury trial may be requested to determine damages."). Both the United States Supreme Court and this Court have concluded that landowners generally have no constitutional right to a trial by jury in eminent domain proceedings. *United States v. Reynolds*, 397 U.S. 14, 18 (1970) (noting "it has long been settled that there is no constitutional right to a jury in eminent domain

proceedings."); *Bigelow v. Draper*, 69 N.W. 570, 573-74 (N.D. 1896) (noting the "owner of property taken for public use has no constitutional right to submit to a jury any question arising in the proceedings, unless the constitution specifically so declares."); *but see* N.D. Const. Art. 1, § 16 (requiring compensation owing for a taking "be ascertained by a jury, unless a jury be waived."). Behm, again, is simply wrong in arguing he had a constitutional right to a trial by jury as to whether the proposed taking was necessary for a public use.

IV. Attorney's fees and costs incurred in petitioning the United States Supreme Court for a writ of certiorari are not collectable under N.D.C.C. § 32-15-32 or, alternatively, Behm's petition was improvident.

[¶43] Behm concludes by arguing the District Court erred in denying his request for attorney's fees and costs associated with his failed petition to the United States Supreme Court. Appellant's Br. at ¶¶ 53-58. This argument, while being the only issue of his appropriate for review in this appeal, is just as meritless as Behm's other arguments.

A. Section 32-15-32, N.D.C.C., does not allow attorney's fees and costs incurred in petitioning the United States Supreme Court.

[¶44] In eminent domain proceedings under N.D.C.C. ch. 32-15, a "court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include . . . reasonable attorney's fees for all judicial proceedings." N.D.C.C. § 32-15-32. Nothing within N.D.C.C. § 32-15-32 "in any way indicates any intent on the part of the Legislature to extend the application of those provisions to proceedings provided for outside of Chapter 32-15." *United Power Ass'n v. Moxness*, 267 N.W.2d 814, 817 (N.D. 1978) (emphasis added). This Court has consistently held that attorney's fees incurred pursuing actions related to, but independent of, an N.D.C.C. ch. 32-15 action are not collectable under N.D.C.C. § 32-15-32. *See id.* (holding attorney's fees incurred in N.D.C.C. ch. 49-22 proceedings before the Public Service Commission were not

collectable under N.D.C.C. ch. 32-15 even though each proceeding concerned the same electrical transmission line); *Arneson v. City of Fargo*, 331 N.W.2d 30, 39 (N.D. 1983) (holding attorney's fees incurred in prosecuting a negligence action were not collectable under N.D.C.C. ch. 32-15 even though each action concerned the same water control project). These cases are clear—N.D.C.C. § 32-15-32 only allows an award of attorney's fees and costs incurred by a landowner in an action under N.D.C.C. ch. 32-15.

[¶45] Notwithstanding this precedent, Behm moved for attorney's fees and costs incurred in his failed petition to the United States Supreme Court. The District Court concluded N.D.C.C. § 32-15-32 did not allow any such award, reasoning:

> Section 32-15-32, NDCC, limits the recovery of attorney's fees to those legal services related directly to the condemnation proceeding alone. Lavern Behm's petition for Writ of Certiorari to the United States Supreme Court does not satisfy this limitation. The three cited cases establish that legal fees are not allowed for proceedings brought outside of Chapter 32-15, NDCC. A petition to the United States Supreme Court is not a proceeding contemplated in Chapter 32-15, NDCC, any more than was a proceeding before the PSC to contest a siting decision, or an appeal from a summary judgment issue of negligence. . . . Section 32-15-32, NDCC, allows for the recovery of reasonable attorney's fees incurred in proceedings within that Chapter. It does not contemplate a recovery for all fees incurred for any proceeding not directly contemplated by the Chapter.

App. 242-243. The District Court's reasoning is correct.

[¶46] By seeking redress from the United States Supreme Court, Behm exclusively sought to avail himself of the protections provided by the United States Constitution. App. 163. Behm did not seek any remedy from the United States Supreme Court under N.D.C.C. ch. 32-15. *See* App. 155-187. And even if he had, federalism limitations dictated that the United States Supreme Court could not provide any relief under N.D.C.C. ch. 32-15. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 467 U.S. 138, 151 (1984) (noting the United States Supreme Court "concededly has no authority to

revise the North Dakota Supreme Court's interpretation of" state law); *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967) (noting "state law as announced by the highest court of the State is to be followed."); *see also Erie R. Co v. Tompkins*, 304 U.S. 64, 78 (1938).

[¶47] These limitations, again, are conspicuously absent from Behm's briefing. The foregoing makes clear that Behm's petition to the United States Supreme Court was not a "judicial proceeding" under N.D.C.C. ch. 32-15. As the District Court reasoned, a proceeding before the United States Supreme Court is no more a "judicial proceeding" under N.D.C.C. ch. 32-15 than is a proceeding before the Public Service Commission, as considered in *Moxness*, or a negligence action, as considered in *Arneson*. App. 242-243. While the appellate process afforded by the United States Supreme Court provides an additional avenue of redress, that avenue is solely born of federal, not state, law. The District Court correctly concluded that a "petition to the United States Supreme Court is not a proceeding contemplated in Chapter 32-15, NDCC . . . ." *Id.* at 242. The District Court, therefore, correctly denied Behm's request for attorney's fees and costs incurred in his failed petition to the United States Supreme Court.

B. The attorney's fees and costs sought by Behm in his failed petition to the United States Supreme Court are not collectable under N.D.C.C. § 32-15-32 because each are patently unreasonable.

[¶48] Assuming, arguendo, that the District Court erred in its interpretation, this Court should still affirm its refusal to award the requested attorney's fees and costs. A "court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include . . . reasonable attorney's fees for all judicial proceedings." N.D.C.C. § 32-15-32 (emphasis added). Behm makes no attempt to justify how incurring attorney's fees and costs in his failed petition was reasonable under the circumstances.

[¶49] This Court has articulated the standards under which courts are to evaluate the reasonability of requested attorney's fees allowed by fees-shifting statutes. *See City of Bismarck v. Thom*, 261 N.W.2d 640, 646 (N.D. 1977) *overruled on other grounds by Cass Cty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, 918 N.W.2d 371. Among other considerations, a court may consider "the character of the services rendered" and "the results which the attorney obtained . . . ." *Thom*, 261 N.W.2d at 646. The party seeking a fees award has "the burden of proving [its] entitlement to an award for attorney's fees just as [it] would bear the burden of proving a claim for any other money judgment." *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 19 n.4 (N.D. 1995) (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir.1974)).

[¶50] The District Court implicitly rejected the reasonability of the attorney's fees and costs that Behm sought. The District Court repeatedly cast aspersions upon the wisdom of Behm petitioning the United States Supreme Court. The District Court characterized Behm's petition as nothing more than "a side trip to a federal court." App. 239 (emphasis added). More specifically, the District Court concluded a "petition to the United States Supreme Court is an improvident act." App. 242 (emphasis added). While not explicitly so holding, the District Court's findings would have sustained the conclusion that the attorney's fees and costs requested by Behm were not reasonable in this action. *See Gissel v. Kenmare Tp.*, 512 N.W.2d 470, 478 (N.D. 1994) (affirming a district court's disallowance of fees under N.D.C.C. § 32-15-32 when those fees were, in part, associated with "an improvident appeal."); *cf. Matter of John T. Gassmann GST Trust*, 2017 ND 232, ¶ 11, 902 N.W.2d 723 (noting "[f]indings of fact are adequate if they provide this Court with an understanding of the court's rationale used in reaching its decision.").

[¶51] The realities of this case illustrate exactly why the attorney's fees and costs awardable under N.D.C.C. § 32-15-32 are not without limitation. Despite Behm's attempts at convolution, this matter is a straightforward and routine condemnation proceeding for easements that Behm stipulated had a value of $1,000.00. App. 225-227. Yet, Behm sought attorney's fees and costs in the aggregate amount of $49,561.78. App. 230-250. Simply because a fees-shifting statute exists does not allow a party to unreasonably incur attorney's fees and costs with the expectation that the same would be chargeable to an adversary. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (instructing that fees "that are not properly billed to one's client also are not properly billed to one's adversary" under a fees-shifting statute). It is bad enough that MDU had to incur its own attorney's fees and costs responding to Behm's improvident, failed side trip to federal court—N.D.C.C. § 32-15-32 does not also require MDU to finance Behm's misadventures.

[¶52] The attorney's fees and costs awardable under N.D.C.C. § 32-15-32 must be "reasonable." The District Court's findings are sufficient to sustain a conclusion that Behm's appeal to the United States Supreme Court was not reasonable. That Behm seems convinced this case provides a vehicle to overturn a century of precedent with which he disagrees does not allow Behm to litigate this matter as a subsidized hobbyhorse. The attorney's fees and costs incurred by Behm in his failed petition to the United States Supreme Court were not reasonable, and the District Court correctly refused to award the same. *Cf. Schmidt v. City of Minot*, 2016 ND 175, ¶ 16, 883 N.W.2d 909 (noting this Court "will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning.").

V. An award of costs and fees is appropriate under N.D.R.App.P. 38 for defending against the constitutional issues asserted in this appeal.

[¶53] This Court "may award just damages and single or double costs, including reasonable attorney's fees" if it determines an appeal is frivolous. N.D.R.App.P. 38. "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates bad faith in pursuing the litigation." *Gray*, 2016 ND 82, at ¶ 16. This Court has recognized:

> Frivolous appeals unjustly burden the resources of the court and the government. The devotion of limited resources and time to these meritless cases causes deserving litigants to wait. In addition, the opposite party is delayed in receiving the just benefits of the trial court's judgment until the appeal is concluded. Justice delayed is justice denied. Sanctions are imposed to deter such suits.

United Bank of Bismarck v. Young, 401 N.W.2d 517, 519 (N.D. 1987) (quoting *Stelly v. C.I.R.*, 761 F.2d 1113, 1116 (5th Cir. 1985)). This Court must use its own discretion and judgment to decide whether this appeal has any merit. *Williams*, 405 N.W.2d at 625.

[¶54] While having the right to appeal, Behm has no right to waste the judiciary and MDU's resources through this appeal largely committed to the constitutionality of the proposed taking. As discussed above, basic appellate procedure and the law of the case doctrine plainly foreclose consideration of those issues on this appeal because Behm could have, should have, but failed to properly raise those issues in the first appeal. Behm nevertheless commits the vast majority of his briefing to those constitutional issues. In that briefing, Behm does nothing to address what the United States Supreme Court and this Court have already held as to those issues, opting instead to pontificate about what he believes the United States and North Dakota Constitutions should require. Rule 38, N.D.R.App.P., precludes Behm from waisting this Court and MDU's resources having to consider and address procedurally barred and precedentially unsupported arguments.

[¶55] Consideration of this N.D.R.App.P. 38 request must also be taken in context. This case has now been pending for nearly four years. During that time, Behm's improvident side trip to the United States Supreme Court and now the appeal to this Court have significantly delayed the proposed pipeline project. That delay has prevented MDU from honoring its commitments to Burlington Northern. A party cannot, without consequence, litigate plainly foreclosed issues that serves no purpose other than delay and inflate costs to the opposing party. *Young*, 401 N.W.2d at 519.

[¶56] This Court's opinion on the first appeal was unambiguous and unequivocal. That Behm disagrees with that conclusion is not justification to waste this Court and MDU's time and resources with multiple appeals. This Court's opinion on the first appeal is not optional to Behm or somehow subject to review on this appeal. Because Behm's appeal of the constitutional issues found in his briefing is patently frivolous, MDU believes that an award of damages in some nominal amount, as the Court finds appropriate, would be warranted in this case under N.D.R.App.P. 38. At a bare minimum, and for the same reasons discussed above, MDU believes that no award of attorney's fees should be given for this second and largely unnecessary appeal. *See* N.D.C.C. § 32-15-32.

CONCLUSION

[¶57] Although Behm seeks to have the Court believe otherwise, this appeal is straightforward. Basic appellate standards and procedure bar this Court from considering any of the constitutional challenges—meritless as they may be—that Behm raises in this appeal. The District Court also correctly rejected Behm's request for an award of attorney's fees associated with his failed petition to the United States Supreme Court.

Finally, an award under N.D.R.App.P. 38 is appropriate concerning Behm's constitutional challenges because those challenges are frivolous.

[¶58] For the reasons set forth above, MDU respectfully requests the Court affirm the District Court's Judgment and enter an award of attorney's fees and costs in some nominal amount, as the Court deems appropriate, against Behm.

DATED this 16th day of July, 2020.

/s/ Zachary R. Eiken

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶59] This Brief contains 34 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: */s/ Zachary R. Eiken*
Zachary R. Eiken (#07832)

CERTIFICATE OF SERVICE

[¶60] I hereby certify that a true and correct copy of the Brief of Appellee Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., and was on the 16th day of July, 2020, served electronically on the following:

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