

## **APPENDIX**

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**APPENDIX A**

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**2020 ND 234**

**[Filed: November 19, 2020]**

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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	)
v.	)
	)
Lavern Behm,	)
Defendant and Appellant	)

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No. 20200122

Appeal from the District Court of Ward County, North  
Central Judicial District, the Honorable Gary H. Lee,  
Judge.

**AFFIRMED.**

Opinion of the Court by Tufte, Justice.

Zachary R. Eiken, Bismarck, N.D., for plaintiff and  
appellee.

Lynn M. Boughey, Mandan, N.D., for defendant and  
appellant.

**MDU v. Behm**  
**No. 20200122**

**Tufte, Justice.**

[¶1] Lavern Behm appeals from a judgment ordering Montana-Dakota Utilities Co. (“MDU”) to pay him \$17,443 in attorney’s fees and costs incurred in an eminent domain action. Behm argues his constitutional rights were violated in the eminent domain action and the district court erred by failing to award him some of the attorney’s fees he requested. We affirm.

I

[¶2] MDU brought an eminent domain action under N.D.C.C. ch. 32-15 to acquire an easement across Behm’s property for a 3,000-foot natural gas pipeline to service a Burlington Northern Santa Fe railroad switch. The district court bifurcated the proceedings between necessity of the taking and damages. Following a bench trial, the district court concluded that the “proposed pipeline is . . . a use authorized by Section 32-15-02, NDCC,” but that a taking of Behm’s property was not necessary for the public use under N.D.C.C. § 32-15-05.

[¶3] MDU appealed, and this Court reversed the district court’s decision that the proposed taking was not necessary for public use. *Montana-Dakota Utils. Co. v. Behm*, 2019 ND 139, ¶ 1, 927 N.W.2d 865. We remanded “for trial on eminent domain damages to be awarded to Behm.” *Id.* at ¶ 19.

[¶4] Behm petitioned the United States Supreme Court for a writ of certiorari asserting various constitutional

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violations related to the eminent domain action. His petition was denied. *Behm v. Montana-Dakota Utils. Co.*, 140 S. Ct. 521 (2019).

[¶5] On remand, Behm submitted proposed jury instructions and requested the court allow the jury to determine in an advisory capacity whether the taking was necessary and for a public use. The district court denied Behm's request for the jury instructions, ruling the issue of damages was the only issue left to be decided.

[¶6] The parties stipulated to the valuation of the easement, and the district court adopted the stipulation. Behm moved for attorney's fees and costs in the amount of \$49,561.78, including the fees incurred for the petition for writ of certiorari to the United States Supreme Court. MDU objected to the requested fees. The district court ordered MDU to pay Behm \$17,443 in fees and costs.

II

[¶7] Behm makes various arguments about the constitutionality of the eminent domain proceedings. He claims it is a violation of due process and the takings clause for the State to allow a private corporation to take property through eminent domain, for the State to disregard a finding that the taking is not necessary and allow the corporation to take the property on the corporation's finding the taking is necessary, and for the State to disregard findings of no public use and allow the corporation to take the property on its determination of a public use. He contends it is a violation of due process, the takings

clause, and the right to a jury to allow a taking without a jury determination that the taking is for a public use and that the taking is necessary.

[¶8] The law of the case doctrine and the mandate rule apply to Behm's arguments. This Court has explained:

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 cause 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, [t]he 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. . . . and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.



*Dale Expl., LLC v. Hiepler*, 2020 ND 140, ¶ 13, 945 N.W.2d 306 (quoting *Johnston Land Co., LLC v. Sorenson*, 2019 ND 165, ¶ 11, 930 N.W.2d 90).

[¶9] Behm submitted proposed jury instructions to the district court, requesting the court allow a jury to sit in an advisory capacity and determine whether the taking of his property was necessary and for a public use. He explained that allowing those issues to be presented to the jury would allow a complete record on appeal for the purpose of attempting to change state law. The district court denied Behm’s request for the proposed jury instructions. The court explained that the issue of the necessity of the taking and whether the taking was for a public use were previously tried and appealed and that the decision was reversed on appeal and the case was remanded for a trial on damages. The court concluded it must adhere to the mandate rule on remand, this Court’s mandate was clear, and the only matter left for determination was the issue of eminent domain damages to be awarded to Behm.

[¶10] In the prior appeal, we held the district court correctly concluded the proposed pipeline was for a public use, but the court erred in ruling the proposed taking was not necessary for a public use. *Behm*, 2019 ND 139, ¶¶ 10, 18. We reversed the judgment and “remand[ed] for trial on eminent domain damages to be awarded to Behm.” *Id.* at ¶ 19. We did not remand for a new trial on the issues of necessity and public use or for new arguments to be raised about the prior proceedings. The district court fully carried out our mandate’s terms.

[¶11] Furthermore, Behm’s arguments about the constitutionality of the eminent domain proceedings and whether a jury should have determined certain issues could have been raised in the district court before the prior appeal and to this Court in the first appeal. In the prior appeal, this Court acknowledged, “Behm lists ten issues in his cross-appeal but does not specifically address any of them in his brief. We do not address inadequately briefed issues.” *Behm*, 2019 ND 139, ¶ 19. These ten issues that we declined to review included, “Whether the district court erred in not finding a violation of federal and state constitutional rights by the proposed taking.” The constitutional arguments he makes in the current appeal could have been resolved in the first appeal had they been properly presented, and therefore they are barred by the law of the case doctrine.

[¶12] We conclude Behm’s constitutional arguments are precluded under the law of the case doctrine and the mandate rule.

### III

[¶13] Behm argues the district court abused its discretion by failing to award him attorney’s fees and costs related to his petition for writ of certiorari.

[¶14] We review the district court’s decision on costs and attorney’s fees in an eminent domain action for an abuse of discretion. *Lincoln Land Dev., LLP v. City of Lincoln*, 2019 ND 81, ¶ 20, 924 N.W.2d 426. A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading

to a reasoned determination, or if it misinterprets or misapplies the law. *Id.*

[¶15] Section 32-15-32, N.D.C.C., provides for costs and attorney's fees in an eminent domain case, stating:

The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include . . . costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new trial has been granted upon the application of the defendant and the defendant has failed upon such trial to obtain greater compensation than was allowed the defendant upon the first trial, the costs of such new trial shall be taxed against the defendant.

This Court has said the statute authorizes the district court to award reasonable attorney's fees for all judicial proceedings in an eminent domain action. *Lincoln Land*, 2019 ND 81, ¶ 22. We explained courts should consider a number of factors in deciding whether to award fees and costs in an eminent domain case, including the number of hours spent, the rate per hour, the character of the services rendered, the results obtained, the customary fee charged in the locality, and the ability and skill of the attorney. *Cass Cty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, ¶ 29, 918 N.W.2d 371; *see also City of Bismarck v. Thom*, 261 N.W.2d 640, 646 (N.D. 1977). We have also said, "[I]t is essential that the prevailing party, and the court, if need be, exclude any hours that are excessive,

redundant, or otherwise unnecessary.” *N.D. Dep’t of Transp. v. Rosie Glow, LLC*, 2018 ND 123, ¶ 11, 911 N.W.2d 334.

[¶16] Behm requested \$49,561.78 in attorney’s fees and costs for fees related to the prior appeal, the petition for writ of certiorari to the United States Supreme Court, and to resolve the issue of damages. The district court previously awarded Behm \$22,150 in attorney’s fees and costs before the prior appeal, and the court found MDU tendered payment for all fees associated with the initial phase of the trial. The court awarded Behm \$17,443 of the \$49,561.78 total request, including the fees and costs incurred for the prior appeal and subsequent proceedings in the district court. The court denied the attorney’s fees requested for contacts with individuals who were strangers to the proceedings and for communications between Behm’s attorney and office staff about billing matters and other financial matters. The court also denied any fees related to the petition for writ of certiorari. The court concluded N.D.C.C. § 32-15-32 allows for fees for all judicial proceedings, but that term does not include “a side trip” to a federal court, and the statute limits the recovery of attorney’s fees to legal services related directly to the condemnation proceeding alone. The court explained the petition to the United States Supreme Court was “an improvident act,” N.D.C.C. § 32-15-32 does not contemplate a recovery for all fees incurred for any proceeding not directly contemplated by the chapter, and therefore the fees would not be allowed.

[¶17] Section 32-15-32, N.D.C.C., gives the district court discretion to award “reasonable actual or statutory costs” and “reasonable attorney’s fees for all judicial proceedings.” We have limited recovery of attorney’s fees to litigation of claims asserting condemnation or inverse condemnation. *United Power Ass’n v. Moxness*, 267 N.W.2d 814, 817 (N.D. 1978) (reversing fee award for proceedings before the public service commission); *Arneson v. City of Fargo*, 331 N.W.2d 30, 39 (N.D. 1983) (affirming fee award limited to inverse condemnation and excluding litigation of negligence issues); *Gissel v. Kenmare Twp.*, 512 N.W.2d 470, 478 (N.D. 1994) (affirming as reasonable the district court’s reduction of requested attorney’s fees due to “overextended conferences and an improvident appeal”). Although the court explained its reasoning that the petition was an “improvident” “side trip” and therefore unreasonable to that extent, it further stated that Behm’s “petition to the United States Supreme Court is not a proceeding contemplated in Chapter 32-15.” If otherwise reasonable, the district court may award attorney’s fees for “all judicial proceedings,” including a petition for certiorari to the United States Supreme Court asserting takings claims under the United States Constitution. N.D.C.C. § 32-15-32. We will not set aside a correct result merely because part of the reasoning supporting that result was incorrect. *Schmidt v. City of Minot*, 2016 ND 175, ¶ 16, 883 N.W.2d 909. We conclude the district court did not abuse its discretion by denying as unreasonable the attorney’s fees and costs Behm requested related to the petition for writ of certiorari.

IV

[¶18] MDU requests an award of costs and fees on appeal under N.D.R.App.P. 38 for defending against the constitutional issues raised in the appeal. MDU contends Behm failed to properly raise the constitutional issues in the prior appeal, he did not adequately brief the issues in this appeal, he did not address current case law on these issues, and he wasted the Court's and MDU's resources with his unsupported arguments. In the previous appeal, we held that the district court erred in concluding the proposed taking was not necessary for a public use, and remanded for trial on eminent domain damages. *Montana-Dakota Utils. Co. v. Behm*, 2019 ND 139, ¶¶ 18-19, 927 N.W.2d 865.

[¶19] Rule 38, N.D.R.App.P., provides, "If the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." An appeal is frivolous "if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." *Frontier Fiscal Servs., LLC v. Pinky's Aggregates, Inc.*, 2019 ND 147, ¶ 21, 928 N.W.2d 449 (quoting *Witzke v. City of Bismarck*, 2006 ND 160, ¶ 19, 718 N.W.2d 586). Behm's appeal of issues we decided in the first appeal and beyond the scope of the remand for trial on damages meets this standard.

[¶20] We award MDU single costs and attorney's fees in the amount of \$500.

[¶21] We affirm the judgment.

[¶22] Jon J. Jensen, C.J.  
Daniel J. Crothers  
Jerod E. Tufte  
Allan L. Schmalenberger, S.J.  
David Nelson, S.J.

[¶23] The Honorable Allan L. Schmalenberger and the Honorable David Nelson, Surrogate Judges, sitting in place of VandeWalle, J., and McEvers, J., disqualified.

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**APPENDIX B**

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**JUDGMENT**

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

**[Filed: November 23, 2020]**

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

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Appeal from the district court for Ward County.

[¶1] This appeal having been heard by the Court at the September 2020 Term before:

[¶2] Chief Justice Jon J. Jensen, Justice Daniel J. Crothers, Justice Jerod E. Tufte, Surrogate Judge Allan L. Schmalenberger, sitting in place of Justice Gerald W. VandeWalle, and Surrogate Judge David W. Nelson, sitting in place of Justice Lisa Fair McEvers;



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[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that Appellee have and recover from Appellant costs and disbursements on this appeal under N.D.R.App.P. 39, to be taxed and allowed in the court below.

[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 41.

Dated: November 23, 2020

[SEAL]

By the Court:

Jon J. Jensen  
Chief Justice

ATTEST:

Petra H. Mandigo Hulm  
Clerk

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**APPENDIX C**

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**Filed 5/16/19 by Clerk of Supreme Court**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**2019 ND  
No. 20180321**

**[Filed May 16, 2019]**

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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, Appellant, and	)
Cross-Appellee	)
	)
v.	)
	)
Lavern Behm,	)
Defendant, Appellee, and	)
Cross-Appellant	)

---

Appeal from the District Court of Ward County,  
North Central Judicial District, the Honorable Gary H.  
Lee, Judge.

**REVERSED AND REMANDED.**

Opinion of the Court by Tufte, Justice.

Anthony J. Ford (argued) and Malcolm H. Brown (appeared), Bismarck, N.D., for plaintiff, appellant, and cross-appellee.

Lynn M. Boughey, Mandan, N.D., for defendant, appellee, and cross-appellant.

**Tufte, Justice.**

[¶1] Montana-Dakota Utilities Co. (“MDU”) appeals, and Lavern Behm cross-appeals, from a judgment dismissing MDU’s eminent domain action. Because the district court misapplied North Dakota law in concluding a taking was not necessary for a public use, we reverse and remand for trial on eminent domain damages to be awarded to Behm.

I

[¶2] MDU brought an eminent domain action under N.D.C.C. ch. 32-15 to acquire an easement across Behm’s property for a 3,000-foot natural gas pipeline to service a Burlington Northern Santa Fe (“BNSF”) railroad switch. The railroad switch must be heated to keep it operable during winter months. The switch is currently heated using propane from tanks that are serviced and refilled by truck. Winter weather occasionally prevents service trucks from accessing the tanks to refill the propane. BNSF requested service from MDU by gas pipeline, believing that natural gas by pipeline would increase reliability and decrease the cost associated with heating the switch. MDU claimed that other routes for the pipeline would be too expensive or might in the future require modification or removal of the pipeline.

[¶3] The district court bifurcated the proceedings between necessity and damages. Following a bench trial, the district court concluded that the “proposed pipeline is . . . a use authorized by Section 32-15-02, NDCC,” but that a taking of Behm’s property was not necessary for the public use under N.D.C.C. § 32-15-05. Relying on an 1883 California case for the proposition that “necessity cannot mean mere convenience,” the court explained:

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.

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.

. . . .

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.

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.

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.

The court further concluded that "[t]his 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."

II

[¶4] MDU argues the district court’s ruling that the proposed taking was not necessary contradicts North Dakota law.

[¶5] In *Brandt v. City of Fargo*, 2018 ND 26, ¶ 11, 905 N.W.2d 764, we recently restated the standard for a court’s review of questions of public necessity:

Under N.D.C.C. § 32-15-05(2), “the legislature has entrusted the right to review a determination of the question of necessity in an eminent domain action to the judicial branch of government.” *Oakes Mun. Airport Auth. v. Wiese*, 265 N.W.2d 697, 699 (N.D. 1978); *see also KEM Elec. Coop., Inc., v. Materi*, 247 N.W.2d 668, 670 (N.D. 1976); *Otter Tail Power Co. v. Malme*, 92 N.W.2d 514, 521 (N.D. 1958); *Cty. of Pembina v. Nord*, 78 N.D. 473, 477, 49 N.W.2d 665, 667 (1951). In *Wiese*, 265 N.W.2d. at 700 (citations omitted), this Court clarified the court’s role in determining public necessity:

To clarify the court’s role in the determination of the question of public necessity, we emphasize that the determination of a condemning authority to exercise the power of eminent domain for an authorized public use is solely a legislative or political question which is not subject to judicial review. . . . The 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. Much latitude is given to the condemning authority to determine the location and the extent of the property to be acquired, and a taking is not objectionable merely because some other location might have been made or some other property obtained that would have been as suitable for the purpose. 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.

[¶6] Behm’s primary issue in his cross-appeal is that this Court has misinterpreted our earlier eminent domain case law since the *Wiese* decision was rendered in 1978. According to Behm, the problem was exacerbated by dicta in *Cent. Power Elec. Coop., Inc. v. C-K, Inc.*, 512 N.W.2d 711, 714 n.2 (N.D. 1994), where this Court said in the course of dismissing for lack of jurisdiction, “[w]hen contested, necessity is generally found unless the condemnor acted arbitrarily, capriciously, in bad faith, or fraudulently.” Behm argues earlier cases such as *KEM Elec. Coop., Inc. v. Materi*, 247 N.W.2d 668 (N.D. 1976); *Otter Tail Power Co. v. Malme*, 92 N.W.2d 514 (N.D. 1958); *Bd. of Educ. of City of Minot v. Park Dist.*, 70 N.W.2d 899 (N.D. 1955); and *N. Pac. Ry. Co. v. Boynton*, 17 N.D. 203, 115 N.W. 679 (1908), stand for the proposition that the limited standard of review for bad faith, gross abuse of discretion, or fraud committed by the condemnor

applies only to the extent of a proposed taking and not to the necessity of the taking. Behm urges that we adopt an expanded judicial review of the necessity of taking so condemnors cannot “use any presumption or standard of proof to [countenance] a taking that is not first fully justified as necessary and for a proper public use.” To the extent he is not simply misreading our cases, Behm has not provided persuasive reasons for us to depart from the reasoning in more than 40 years of our precedent.

A

[¶7] Section 32-15-05(1), N.D.C.C., requires that before property can be taken from a landowner, it must appear “[t]hat the use to which it is to be applied is a use authorized by law.” MDU argues the district court correctly ruled that its proposed taking is for a public use authorized by law. Behm contends the district court did not find that the proposed taking was for a public use authorized by law, but instead that the taking was for the mere convenience of a single user, BNSF. We interpret Behm’s argument to be that the court erred in ruling the proposed taking was for a public use.

[¶8] The Century Code authorizes exercise of eminent domain for the following public uses:

Oil, gas, coal, and carbon dioxide *pipelines and works and plants for supplying or conducting* gas, oil, coal, carbon dioxide, heat, refrigeration, or power *for the use of any county, city, or the inhabitants thereof*, together with lands, buildings, and all other improvements in or upon



which to erect, install, place, maintain, use, or operate pumps, stations, tanks, and other machinery or apparatus, and buildings, works, and plants for the purpose of generating, refining, regulating, compressing, transmitting, or distributing the same, or necessary for the proper development and control of such gas, oil, coal, carbon dioxide, heat, refrigeration, or power, either at the time of the taking of said property or for the future proper development and control thereof.

N.D.C.C. § 32-15-02(10) (emphasis added); *see also* N.D.C.C. § 32-15-02(4) (including as “public uses” both “railroads” and “pipes for public transportation”).

[¶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.” *City of Medora v. Golberg*, 1997 ND 190, ¶ 8, 569 N.W.2d 257. 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.” *United States ex rel. Tenn. Valley Auth. v. An Easement and Right-of-Way Over 1.8 Acres*

*of Land, More or Less, in Maury Cty., Tenn.*, 682 F. Supp. 353, 358 (M.D. Tenn. 1988); *see also Carolina Tel. and Tel. Co. v. McLeod*, 364 S.E.2d 399, 401 (N.C. 1988); *Dyer v. Tex. Elec. Serv. Co.*, 680 S.W.2d 883, 885 (Tex. Ct. App. 1984); 2A J. Sackman, *Nichols on Eminent Domain* § 7.05[4][a] (3rd ed. 2018).

[¶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.”

## B

[¶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. § 32-15-01(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.”).

[¶12] In support of its decision, the district court relied on an 1883 California Supreme Court decision, *Spring Valley Water-Works v. San Mateo Water-Works*, 28 P. 447 (Cal. 1883), in which the court affirmed a decision refusing to allow a water corporation to condemn 28 acres of land:

Private property, contiguously situated to the works of a corporation, may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. “For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication.”

*Id.* at 449. Here, the district court reasoned that no necessity was shown because a pipeline crossing Behm’s property would only serve the convenience of MDU, which could select an alternative route for the pipeline, and the convenience of BNSF, which could continue to heat its railroad switch with propane.

[¶13] The district court’s analysis of the necessity of the public use is inconsistent with North Dakota law. Unlike in *Spring Valley Water-Works*, the easement sought by MDU is not a taking for “mere convenience.” In *Materi*, 247 N.W.2d at 671-72, we held that a showing of customer convenience in uninterrupted electric service and the condemnor’s convenience and safety in construction and maintenance was sufficient to render reasonable a conclusion in favor of a taking’s necessity. In *Spring Valley Water-Works* the court found it relevant to the necessity analysis “that it was entirely practicable for the plaintiff to construct on its own land, just above the land of defendant, the improvement for which it seeks to condemn the defendant’s land.” 28 P. at 450. In contrast, MDU does not own adjacent land on which it could construct a pipeline. We have held that “a taking is not objectionable merely because some other location might have been made or some other property obtained that would have been *as suitable* for the purpose.” *Brandt*, 2018 ND 26, ¶ 11, 905 N.W.2d 764 (quoting *Wiese*, 265 N.W.2d at 700) (emphasis added).

[¶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.” *Brandt*, 2018 ND 26, ¶ 11, 905 N.W.2d 764 (quoting *Wiese*, 265 N.W.2d at 700). In *C-K, Inc.*, 512 N.W.2d at 714, n.2, we said:

While we have said before that “landowner[s] may not object merely because some other location might have been made or some other

property obtained that would have been *as suitable* for the purpose,” *KEM*, 247 N.W.2d at 671, citing to *Otter Tail Power Co. v. Malme*, 92 N.W.2d 514, 521 (N.D. 1958) (emphasis ours), we have not held that this proposition stands when the property chosen for the route is *less suitable*. In light of the growing body of case law in the area of electromagnetic fields, see 8A Nichols, *Eminent Domain* ch. 26 (3d ed.), Landowners in this case may have a valid argument that alternate routes benefit the public with less private injury.

[¶15] Behm proposed two alternative routes for the pipeline. The first would run through BNSF’s current east-west railroad easement. The second would run along a north-south section line right of way adjacent to the route selected by MDU. MDU presented evidence that the first alternative route would add 18,000 feet of pipeline to the project at an additional cost of \$1,200,000. The second alternative route would result in MDU’s easement being subordinate to the public’s section line right-of-way easement with MDU being forced to accommodate at its expense any conflicts that might arise. We have acknowledged it is reasonable for a condemnor to consider possible future development in determining whether the property sought to be condemned is reasonably suitable for the project. *Malme*, 92 N.W.2d at 522 (“Experience had demonstrated that the location of the line far enough in on the land of the owner to avoid the necessity of moving the line in case of widening or the relocation of a road or highway was advantageous.”). The determination of necessity must always balance the

burden on the affected landowner and the benefit of the public use. A risk of future development or conflict with prior easements is one factor that may be considered. Although the particular property sought to be condemned “must be located in the manner which will be compatible with the greatest public benefit and the least private injury,” N.D.C.C. § 32-15-06, Behm has not demonstrated how MDU erred in weighing those interests.

[¶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.” *Brandt*, 2018 ND 26, ¶ 12, 905 N.W.2d 764. 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. Section 49-04-01, N.D.C.C., provides:

Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall be in all respects adequate, convenient, just, and reasonable, and without any unjust discrimination or preference.

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. To the extent that we have considered the members of the public served by the condemnor's proposed public use, we have said "convenience to the public becomes a necessity for the board of education in establishing a junior high school." *Bd. of Educ. of City of Minot*, 70 N.W.2d at 906.

[¶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." *Brandt*, 2018 ND 26, ¶ 11, 905 N.W.2d 764 (quoting *Wiese*, 265 N.W.2d at 700). 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.

[¶18] We conclude the district court erred in ruling MDU's proposed taking was not necessary for a public use.

### III

[¶19] Behm lists ten issues in his cross-appeal but does not specifically address any of them in his brief. We do not address inadequately briefed issues. *See, e.g., State v. Nice*, 2019 ND 73, ¶ 11, 924 N.W.2d 102. We reverse

the judgment and remand for trial on eminent domain damages to be awarded to Behm.

[¶20] Jerod E. Tufte  
Jon J. Jensen  
Carol Ronning Kapsner, S.J.  
Daniel J. Crothers, Acting C.J.

[¶21] The Honorable Carol Ronning Kapsner, Surrogate Judge, sitting in place of VandeWalle, C.J., disqualified. The Honorable Lisa Fair McEvers disqualified herself subsequent to oral argument and did not participate in this decision.



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**APPENDIX D**

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**Supreme Court No. 20180321  
Ward County Case No. 2016-CV-01678**

**[Filed June 7, 2019]**

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, Appellant, and Cross-Appellee	)
	)
v.	)
	)
Lavern Behm,	)
Defendant, Appellee, and Cross-Appellant	)
	)

Appeal from the district court for Ward County.

**JUDGMENT**

[¶1] This appeal having been heard by the Court at the February 2019 Term before:

[¶2] Acting Chief Justice Daniel J. Crothers, Justice Jerod E. Tufte, Justice Jon J. Jensen, and Surrogate Judge Carol Ronning Kapsner, sitting in place of Chief Justice Gerald W. VandeWalle. Justice Lisa Fair

McEvers disqualified herself subsequent to oral argument and did not participate in the decision.

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is REVERSED and REMANDED for further proceedings consistent with the opinion.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that 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., have and recover from Lavern Behm costs and disbursements on this appeal wider Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: May 16, 2019

By the Court:

/s/  
Acting Chief Justice

[SEAL]

ATTEST:

/s/ Penny Miller  
Clerk

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**APPENDIX E**

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**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT**

**CASE NO. 51-2016-CV-01678**

**[Filed July 20, 2018]**

---

Montana-Dakota Utilities Co., a	)
Division of MDU Resources Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)
	)

---

**JUDGMENT**

Based on the Order to Dismiss with Prejudice signed by the Honorable Gary H. Lee dated May 29, 2018, **Docket No. 65, IT IS HEREBY ORDERED AND ADJUDGED:**

¶1 The above action is one for eminent domain by a public utility.

¶2 The plaintiff, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., hereafter MDU, seeks to acquire an easement across the property of the defendant, Lavern Behm, to construct a natural gas pipeline. The Court bifurcated the case to first determine the necessity of the taking, and if necessity is established a second hearing would be held to determine damages.

¶3 The Court finds that MDU has failed to show a necessity for this taking, and the action is DISMISSED.

¶4 A trial was held on the necessity of the proposed taking on April 17, 2018, in the District Court, North Central Judicial District, Ward County, Minot, North Dakota. The plaintiff, MDU, appeared and was represented by counsel, Malcolm Brown, Bismarck, North Dakota; the defendant, Lavern Behm, appeared and was represented by counsel, Lynn Boughey, Bismarck, North Dakota. Gary H. Lee, District Judge, presided.

#### FACTS

¶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 128<sup>th</sup> 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 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.

¶8 Testimony and exhibits at trial demonstrate that MDU has obtained all necessary permits and approvals from State and federal governmental agencies for the pipeline.

¶9 Through the exercise of its powers of eminent domain, MDU proposes to take an easement and place its pipeline on the land owned by Lavern Behm. Lavern Behm objects to the taking.

#### ANALYSIS

¶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).

¶12 Under Section 32-15-05, NDCC, 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, and
2. That the taking is necessary to such use.

¶13 The public uses for which the power of eminent domain may be exercised are listed in Section 32-15-02, NDCC. Subsection 4 of that section provides:

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of any of the following public uses:

Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by roads, plank and turnpike roads, railroads and street railways, electric light plants and power transmission lines and canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and irrigating, draining, and reclaiming lands.

¶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.

¶16 The rule in North Dakota regarding the question of necessity derives from the 1896 case, Bigelow v. Draper, 6 ND 152, 69 NW 570 (1896). In that case, the North Dakota Supreme Court “determined that the legislature had seen fit to take it out of the power of the person or corporation to settle the question of necessity, and to trust the determination of the issue to the judicial branch of government.” Later, in the case of Otter Tail Power C. v. Malme, 92 NW2d 514, (ND 19518), the North Dakota Supreme Court wrote: “. . . it is nevertheless true that much latitude is given to the corporation vested with the right of acquiring property by eminent domain to determine the extent of the property necessary to be taken.” Malme, 92 NW2d at 521. The North Dakota Supreme Court further stated that a corporation vested with a right of acquiring property for a public use is also entitled to the some latitude in determining the selection and location of the route for the proposed easement. Where the corporation presents evidence showing the necessity for the taking of property for its transmission lines, the evidence indicates that the corporation vested with the power exercised good faith and used its best judgment in the selection of the route and the easement sought to be taken. Finally, however, the selection of the route must be compatible with the greatest public benefit and the least private injury Malme, 92 NW2d at 522.

¶17 When contested, necessity is found unless the condemner acted arbitrarily, capriciously, in bad faith, or fraudulently. Central Power Electric Cooperative,

Inc. v. K-C, Inc., 512 NW2d 711 (ND 1994). These determinations are made by looking at whether the route selected is compatible with the greatest public benefit in the least private injury. KEM Electric Cooperative, Inc. v. Materi, 247 NW2d 668, (ND 1976).

¶18 The Court believes, however, that necessity cannot mean mere convenience. Although a very old authority, the Court notes the case of Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 P 447 (1883), in which the California Supreme Court wrote:

Private property, contiguously situated to the works of a corporation, may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication.

The California Supreme Court further wrote that the word “necessity” has a great flexibility in its meaning.



It can mean a taking that is a mere convenience, or a taking that is indispensably necessary. The Court held that a taking for mere convenience was not authorized. As noted in North Dakota, necessity requires a balancing of the greatest public good against the least private injury. Central Power Electric Cooperative, Inc. v. C-K. Inc., 512 NW2d 711 (ND 1994).

¶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.

¶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.

¶21 128<sup>th</sup> 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 128<sup>th</sup> 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 128<sup>th</sup> 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 Folks 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.

¶29 The issue of just compensation need not be addressed. Based on the Order on attorney fees signed by the Honorable Gary H. Lee on July 14, 2018, **Docket No. 86, IT IS HEREBY ORDERED AND ADJUDGED:**

¶30 The above action was one for eminent domain.

¶31 Following a bench trial, the Court issued its Order denying the proposed taking. The Order was issued on May 29, 2018.

¶32 The defendant, Lavern Behm, has made a motion to recover attorney's fees and costs incurred in defending this action. The plaintiff, Montana-Dakota Utilities Company, hereafter MDU, has responded to the motion. Neither party requested a hearing in the matter.

¶33 The Court hereby awards attorney's fees in the sum of \$22,100, plus costs of \$50, filing fee.

#### ANALYSIS

¶34 Section 32-15-32, NDCC, provides in part:

The 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.

Lavern Behm, as the defendant in this action, is entitled to the recovery of his attorney's fees and costs pursuant to this Section.

¶35 The factors which the Court may consider when making an award of attorney's fees in an eminent domain proceeding are found in City of Bismarck v. Thom, 261 NW2d 640 (ND 1977); and North Dakota Department of Transportation v. Rosie Glow, LLC, 2018 ND 123,911 NW2d 334. Both cases make clear that the predominant factors for determining reasonable attorney's fees are the number of hours spent, and the rate per hour charged for those fees. The hourly rate may be adjusted upwards or downwards based on objective evaluation of the complexity and novelty of the litigation, the degree of skill displayed by the lawyer, customary fees charged in the area, and other factors. All factors must be considered, and no single factor is determinative.

#### TIME SPENT

¶36 Attorney Lynn Boughey, counsel for Lavern Behm, has submitted three billing statements which he presented to his client during the course of this litigation. The statements are broken down by date, followed by a brief description of the work performed, and lastly the amount of time spent on the task. The statements are reasonably detailed, and provide the Court with a fairly clear picture of the services rendered, and the time spent.

¶37 MDU does not take serious issue with the work or the billing statements as presented. The Court

however, will do its own independent review of the statements to determine if they are reasonable.

¶38 At the outset, most of the itemizations appear to be reasonable, and related to the preparation of the case for trial. The itemizations include conferences with the client, drafting pleadings, reviewing applicable law, consultations with opposing counsel, and other efforts reasonably necessary to move the case forward. The Court does not note any item which might appear to have required an unreasonably excessive amount of time.

¶39 There are, however, a number of entries which the Court will disallow.

¶40 Entries 10-4-16, and 10-5-16, involve contacts between attorney Boughey and Robert Hale. Robert Hale is a total stranger to these proceedings. Further, the contacts appear to have taken place before attorney Boughey had any contact with Lavern Behm. Contacts between attorney Boughey and a third person stranger to this litigation will not be allowed. .3 hours.

¶41 Entry 10-10-16, involves a contact between attorney Boughey and a Minot law firm. While not entirely clear from the entry, it appears that Lavern Behm may have either been a client of the Minot law firm, or there was some question whether Lavern Behm would be retaining the Minot firm or attorney Boughey. Regardless, the contact between attorney Boughey and the Minot law firm to determine representation of Lavern Behm is not a legal service advancing the cause. The entry is disallowed .5 hours.

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¶42 Entries 10-20, and 10-22, note communications between attorney Boughey and his staff regarding the payment of a retainer fee, and the deposit of that fee. Keeping track of retainers is a mere office function and is nothing more than part of an attorney's overhead. It does not constitute legal work.

¶43 Fees are not recoverable for clerical or secretarial activities such as file review, file maintenance, scheduling, or other routine matters. Youngblood v. Youngblood, 91 So3d 190 (Ct of App., 2d Dist. Fla 2012). Work by support staff must be substantive. Copying and other secretarial tasks are not recoverable as attorney's fees. Taylor v. the Chubb Group of Insurance Companies, 1994 OK 47, 874 P2d 806. Routine office work is deemed overhead, and should already be reflected in a lawyer's hourly rate. Hawaii Ventures, LLC v. Otaka, Inc., 116 Hawaii 465, 173 P3d 1122 (2007). .2 hours or disallowed.

¶44 For the reasons stated above, entries for 10-31-16, 11-to-16, 11-10-16, 12-5-16, 1-3-17, 3-14-17, 3-15-17, 4-11-17, 7-6-17, 12-3-17, and 4-3-18 likewise appear to be mere ministerial activities involving staff emails, routine filings, and other clerical or secretarial activities. 1.4 hours are disallowed.

¶45 Attorney Boughey has billed four hours for travel time. Generally, attorney travel costs and expenses may not be taxed as costs. Braunberger v. Interstate Engineering, 2000 ND 45,607 NW2d 904. Section 32-15-32, NDCC, allows reasonable attorney's fees for all judicial proceedings. One does not perform legal services when traveling. One is not engaged in a judicial proceeding when traveling. Further, attorney

Boughey knew from the outset that he was taking a case beyond his home jurisdiction. He accepted the responsibility for travel when he took on the case. Regardless of any agreement attorney Boughey may have had with Lavern Behm regarding these costs, it is not appropriate to make MDU carry that burden and pay for the extra time attorney Boughey assumed when he agreed to take the case outside of his home jurisdiction. The four hours of travel time, 4-16-18, and 4-17-18, are disallowed.

¶46 After review of the billing statement submitted, the Court disallows 6.4 hours.

¶47 Attorney Boughey has listed 74.4 hours. After the adjustments made above, the Court will approve 68 hours as attorney Boughey's reasonable time spent in this action.

#### HOURLY RATES

¶48 The next step in the analysis is determine the hourly rate for attorney Boughey. This rate may be adjusted upwards or downwards depending upon the applicability of the factors set forth in the Thom and Rosie Glow decisions cited above.

#### Character of the Legal Services Rendered

¶49 Attorney Boughey was the sole attorney working for Lavern Behm in this case. As a solo practitioner, everything that was done to prepare this case for trial was done by attorney Boughey. All pleadings, motions, briefs, and other submissions to the Court were handled by attorney Boughey. All Court appearances, and the trial itself were handled exclusively by



attorney Boughey. All contacts with opposing counsel, the client, potential witnesses, and the Court had to be done by attorney Boughey alone.

¶50 Attorney Boughey appears to have approached these duties and tasks in a highly professional and competent manner. The billing statements show that he attended to the tasks in a cost-effective and efficient fashion.

¶51 The services provided by attorney Boughey were delivered with the highest level of professional skill. This factor weighs in favor of increasing attorney Boughey's hourly rate.

#### Results Obtained

¶52 Justice Vogel wrote, in his dissent in Thom, that a lawyer may spend a lifetime working for that one magnificent hour. When that hour arrives he deserves more than piecemeal compensation City of Bismarck v. Thom, 261 NW2d 640 (ND 1977), J. Vogel, dissent. While attorney Boughey may have had better days in Court, and his one magnificent hour may not yet have arrived, the result in this case would no doubt be considered a good day for attorney Boughey and Lavern Behm. The results obtained were positive and substantial.

#### Complexity or Novelty of the Litigation

¶53 In most eminent domain cases the issue of necessity never arises. Generally, the sole issue in an eminent domain proceeding is just compensation for the taking.

¶54 In his brief in support of his motion for fees, attorney Boughey cites to recent United States Supreme Court authority to support his argument that questioning the necessity of a taking, and standing up to the often heavy-handed authority making the case for an eminent domain taking, is a relatively new and developing area of the law. The Court would tend to agree. Indeed, the Court had to reach back more than 100 years to find an obscure California authority which discussed a challenge to a private taking in any meaningful fashion. (This may be more of a reflection of the Court's limited research ability than anything else.)

¶55 Counsel for MDU relied upon North Dakota authority in support of the taking. That authority likewise was decades, if not a century old.

¶56 A challenge to the necessity of a taking may well be a newly developing area of the law. There is certainly a dearth of recent authority which stood out to support Lavern Behm's position. Attorney Boughey made a strong and positive argument based on limited to almost nonexistent legal authority. As President Theodore Roosevelt once said, the credit goes to the man in the arena; who spends himself in the worthy cause; who at best knows in the end high achievement, or at worst fails while daring; but, who is not numbered among the timid souls who neither know victory, nor defeat.

¶57 Attorney Boughey was willing to take on a cause few have dared. Rather than simply focusing on just compensation, he chose to fight the taking armed with little legal authority, and not much more than Lavern

Behm's unwillingness to bend. Attorney Boughey, on behalf of Lavern Behm, prevailed. All credit to the man in the arena.

#### Customary Fees Charged in the Location

¶58 Attorney Boughey agreed to charge Lavern Behm \$250 per hour. This is not an excessive fee in this area for an attorney with attorney Boughey's years of experience and reputation. The question is whether the Court should raise that fee. As noted above, attorney Boughey provided his legal services with the highest degree of professionalism and competence. He worked cost effectively and efficiently. He scored a total victory for Lavern Behm in a somewhat novel and evolving area law. When considering this, and the fees that others are charging in this area, the Court believes attorney Boughey is entitled to an increase in his overall hourly rate.

¶59 Attorney Boughey argues that he should receive a "Lodestar" increase of 50%. He billed his time at \$250 per hour, but asked the Court to increase that to an hourly rate of \$375 (250x1.5).

¶60 MDU does not object to the \$250 for our rate, but suggest that no addition to that hourly rate is necessary or appropriate.

¶61 There is some recent evidence which the Court will take into account regarding the customary fees charged in this region for eminent domain proceedings.

¶62 First, there is the North Dakota Department of Transportation v. Rosie Glow LLC, 2018 ND 123,911 NW2d 334, decision cited by both parties. In that case,

out-of-state attorneys from Oregon requested fees based on an hourly rate of \$300 per hour. The trial court did not see fit to question that rate, but did drastically reduce the number of hours approved for counsel's work. The North Dakota Supreme Court reversed the trial court on the number of hours, but no question was raised regarding the efficacy of the \$300 per hour figure.

¶63 Irwin v. City of Minot, 51 2012 CV 691, see also, Irwin v. City of Minot, 215 ND 60, 860 NW2d 849, was an inverse condemnation action. At the conclusion of the case Irwin's counsel made a motion for attorney's fees. Counsel for Irwin, Minot attorney Richard P. Olson, sought fees of \$325 per hour. Judge Stacy J. Louser reduced this rate to \$275 per hour. She did so for a number of reasons. First, attorney Olson is not a litigator, nor is eminent domain his area of expertise. Attorney Olson is a well-known and highly respected banking and transactional attorney-not a litigator in the field of eminent domain. Further, the case dragged on for four years, required a trip to the North Dakota Supreme Court, and in the end netted the Irwin's only \$12,500 above the original offer. As Judge Louser noted, this is far from a "strong victory."

¶64 Attorney Boughey enjoyed significantly greater success in a substantially shorter period of time. His fees for services should be at least equal to those of attorney Olson under the circumstances.

¶65 In another matter, North Dakota Department of Transportation v. Pennington, 31 2013 CV 94, attorney's fees were requested in an eminent domain action. In that case, attorney Dennis Johnson, Watford

City, filed an affidavit regarding customary fees. Attorney Johnson stated that a fee of at least \$300 per hour was a customary and prevailing fee in Western North Dakota for an eminent domain proceeding.

¶66 In that case, South Dakota attorney Mark Meierhenry appeared for the landowner. Attorney Meierhenry is a former Attorney General of South Dakota. Attorney Meierhenry has appeared and argued in the United States Supreme Court. He has broad litigation and appellate experience. He is a nationally recognized attorney in the field eminent domain. Attorney Meierhenry billed his time at \$360 per hour. His partner, Clint Sargent, billed his time at \$350 per hour. The Court reduced both fees to \$300 per hour, based primarily upon the abysmal results obtained in that case. A first trial ended in a mistrial. After a second trial, the jury verdict was far below that which was sought.

¶67 Attorney Boughey, who prevailed, should be at least equal to these attorneys given the results of the cases.

¶68 In another cause, North Dakota Department of Transportation v. Stubstad, 31 2013 CV 105, attorneys Meierhenry and Sargent were again counsel for the landowner in an eminent domain proceeding. In that case, the Court allowed attorney Meierhenry's fees to be charged at only \$250 per hour. This was due to his limited role in the litigation. However, attorney Sargent's fees were allowed at \$325 per hour. This was primarily due to a significantly better outcome in the litigation.

¶69 Attorney Boughey ought to be allowed an increase in his fees due to the factors noted above, and which would be further line with the fees charged in this area by other attorneys in similar litigation. As the prevailing party, and keeping in line with the customary fees allowed in the area to a successful litigant in an eminent domain proceeding, the Court will allow an increase of attorney Boughey's hourly rate to \$325 per hour.

¶70 Attorney's fees of \$22,100 are awarded (\$325 X 68 hours).

¶71 Attorney's fees, pursuant to Section 32-15-32, NDCC, are allowed in the sum of \$22,100.

¶72 Costs of \$50, filing fee, are approved.

¶73 Counsel for Lavern Behm shall prepare the appropriate Judgment for entry.

**¶74 IT IS THEREFORE ORDERED:**

¶75 [1.] The action by the [plaintiff], Montana-Dakota Utilities Co.[.], is hereby **DISMISSED**, with prejudice and with costs taxed and allowed according to law.

¶76 [2.] Plaintiff, Montana-Dakota Utilities Co., is ordered to pay attorney fees in the amount of \$22,100 and costs of \$50 to Defendant Lavern Behm's attorney Lynn Boughey, for a total amount of \$22,150. In the event that MDU does not make payment within 21 days of entry of judgment, counsel for Lavern Behm is authorized to either submit a monetary judgment that will be entered by the clerk upon receipt or a motion to compel payment.

App. 51

¶77 WITNESS the hand and seal of this Court, the Honorable Gary H. Lee presiding, North Central Judicial District, in the city of Minot, State of North Dakota, on this 20<sup>th</sup> day of July, 2018, Clerk of the District Court, County of Ward.

Signed: 7/20/2018 9:17:46 AM

/s/Darcy Duchsherer  
Clerk of the District Court

---

**APPENDIX F**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT NORTH CENTRAL  
JUDICIAL DISTRICT**

**Ward County Civil No. 51 2016 CV 1678**

**[Filed May 29, 2018]**

---

Montana-Dakota Utilities Co.,	)
a Division of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**ORDER**

[1] The above action is one for eminent domain by a public utility.

[2] The plaintiff, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., hereafter MDU, seeks to acquire an easement across the property of the defendant, Lavern Behm, to construct a natural gas pipeline. The Court bifurcated the case to



first determine the necessity of the taking, and if necessity is established a second hearing would be held to determine damages.

[3] The Court finds that MDU has failed to show a necessity for this taking, the action is DISMISSED.

[4] A trial was held on the necessity of the proposed taking on April 17, 2018, in the District Court, North Central Judicial District, Ward County, Minot, North Dakota. The plaintiff, MDU, appeared and was represented by counsel, Malcolm Brown, Bismarck, North Dakota; the defendant, Lavern Behm, appeared and was represented by counsel, Lynn Boughey, Bismarck, North Dakota. Gary H. Lee, District Judge, presided

#### FACTS

[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 128<sup>th</sup> 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.

[8] Testimony and exhibits at trial demonstrate that MDU has obtained all necessary permits and approvals from State and federal governmental agencies for the pipeline.

[9] Through the exercise of its powers of eminent domain, MDU proposes to take an easement and place its pipeline on the land owned by Lavern Behm. Lavern Behm objects to the taking.

#### ANALYSIS

[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).

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[12] Under Section 32-15-05, NDCC, 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, and
2. That the taking is necessary to such use.

[13] The public uses for which the power of eminent domain may be exercised are listed in Section 32-15-02, NDCC. Subsection 4 of that section provides:

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of any of the following public uses:

Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by roads, plank and turnpike roads, railroads and street railways, electric light plants and power transmission lines and canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and irrigating, draining, and reclaiming lands.

[14] The purpose of the proposed pipeline in this case is to my 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.

[16] The rule in North Dakota regarding the question of necessity derives from the 18% case, Bigelow v. Draper, 6 ND 152, 69 NW 570 (1896). In that case, the

North Dakota Supreme Court “determined that the legislature had seen fit to take it out of the power of the person or corporation to settle the question of necessity, and to trust the determination of the issue to the judicial branch of government.” Later, in the case of Otter Tail Power C., v. Malme, 92 NW2d 514, (ND 1958), the North Dakota Supreme Court wrote: “... it is nevertheless true that much latitude is given to the corporation vested with the right of acquiring property by eminent domain to determine the extent of the property necessary to be taken.” Malme, 92 NW2d at 521. The North Dakota Supreme Court further stated that a corporation vested with a right of acquiring property for a public use is also entitled to the some latitude in determining the selection and location of the route for the proposed easement. Where the corporation presents evidence showing the necessity for the taking of property for its transmission lines, the evidence indicates that the corporation vested with the power exercised good faith and used its best judgment in the selection of the route and the easement sought to be taken. Finally, however, the selection of the route must be compatible with the greatest public benefit and the least private injury. Malme, 92 NW2d at 522.

[17] When contested, necessity is found unless the condemnor acted arbitrarily, capriciously, in bad faith, or fraudulently. Central Power Electric Cooperative, Inc. v. K-C, Inc., 512 NW2d 711 (ND 1994). These determinations are made by looking at whether the route selected is compatible with the greatest public benefit in the least private injury. KEM Electric Cooperative, Inc. v. Materi, 247 NW2d 668, (ND 1976).

[18] The Court believes, however, that necessity cannot mean mere convenience. Although a very old authority, the Court notes the case of Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 P 447 (1883), in which the California Supreme Court wrote:

Private property, contiguously situated to the works of a corporation, may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public uses is in derogation of private right, and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication.

The California Supreme Court further wrote that the word “necessity” has a great flexibility in its meaning. It can mean a taking that is a mere convenience, of a taking that is indispensably necessary. The Court held that a taking for mere convenience was not authorized. As noted in North Dakota, necessity requires a balancing of the greatest public good against the least

private injury. Central Power Electric Cooperative, Inc. v. C-K, Inc., 512 NW2d 711 (ND 1994).

[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.

[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] 128<sup>th</sup> 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 128<sup>th</sup> 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 Boehm.

[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.



[29] The issue of just compensation need not be addressed.

[30] IT IS THEREFORE ORDERED:

[31] The action by the plaintiffs, Montana-Dakota Utilities Co. et al., is hereby DISMISSED, with prejudice and with costs taxed and allowed according to law.

[32] Counsel for Lavern Behm shall prepare the necessary Judgment.

[33] May 29, 2018

/s/Gary H. Lee

[34] H. Lee, District Judge

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**APPENDIX G**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT NORTH CENTRAL  
JUDICIAL DISTRICT**

**Ward County Civil No. 51 2016 CV 1678**

**[December 14, 2017]**

---

Montana-Dakota Utilities Co.,	)
a Division of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**ORDER**

[1] The above action is one for eminent domain.

[2] Both parties have made cross-motions for summary judgment. Lavern Behm has requested oral argument on the motions.

[3] All motions are DENIED.

### REQUEST FOR HEARING

[4] Ordinarily, when a party requests a hearing on a motion pursuant to Rule 3.2, NDROC, the Court must hold a hearing. Gosbee v. Martinson, 2008 ND App. 10, 701 NW2d 411. In this case, and for the reasons outlined below, the Court deems a hearing to be unnecessary.

### SUMMARY JUDGMENT

[5] The standards for granting summary judgment in North Dakota are well known, and will not be restated at length. However, summary judgment may be granted pursuant to Rule 56, NDR CivPro, when there are no material issues of law or fact, and a party is entitled to judgment as a matter of law. As the North Dakota Supreme Court has written many times, summary judgment is a procedural device for promptly resolving controversy on the merits if there are no genuine issues of material fact or inferences that can reasonably be drawn from disputed facts, or if resolving the factual disputes will not alter the result. Hallin v. Lyngstad, 2013 ND 168, 837 NW2d 888.

[6] A party moving for summary judgment has the initial burden of establishing that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Farmers Mutual Insurance v. Associated Electric and Gas, 2007 ND 135, 737 NW2d 253. The evidence must be viewed in a light most favorable to the party opposing summary judgment. A party opposing summary judgment must be given the benefit of all reasonable inferences to be

drawn from the evidence. Hasper v. Center Mutual Insurance, 2006 ND 220, 723 NW2d 409.

[7] A party opposing summary judgment may not rely upon his pleadings or unsupported conclusory allegations. A party opposing summary judgment must present competent admissible evidence, by affidavit or otherwise, that will raise the issue of material fact. Ward v. Bullis, 2008 ND 80, 748 NW2d 397. A party opposing summary judgment must serve and file a responsive pleading or other documents within 30 days. Rule 56, NDRCivPro. A failure to respond to a motion for summary judgment may subject the non-responding party to entry of an adverse judgment if it is appropriate to do so. Rice v. Chrysler Motors, 198 NW2d 247 (ND 1972).

#### FACTS

[8] The facts of this case are relatively straightforward. Lavern Behm owns real property. To the north side of his property the Burlington Northern Santa Fe Railroad has a right-of-way for its railroad. BNSF maintains a switch nearby. That switch needs to be heated and kept free of snow and ice for safe operations.

[9] In the past, BNSF kept the switch free of snow and ice by use of a propane heater. The propane was supplied from nearby tanks. The tanks required frequent filling, or replacement and other maintenance.

[10] To the south side of Lavern Behm's property, MDU maintains a natural gas line.

[11] MDU seeks to use the power of eminent domain to run a natural gas line beneath the surface of Lavern Behm's real estate. The pipeline would provide BNSF with a steady supply of natural gas to heat the switch, thereby relieving BNSF of the need to maintain, replace, or fill the nearby propane tanks.

[12] Lavern Behm objects to the taking.

[13] If the taking is to occur, Lavern Behm seeks damages as appropriate.

#### EMINENT DOMAIN

[14] Eminent domain is governed by Chapter 32-15, NDCC. It is aright to take private property for a public use. Section 32-15-01, NDCC.

[15] Among the many purposes for which the power of eminent domain may be used are:

Oil, gas, coal, and carbon dioxide pipelines and works and plants for supplying or conducting gas, oil, coal, carbon dioxide, heat, refrigeration, or power for the use of any county, city, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate pumps, stations, tanks, and other machine or apparatus and buildings, works, and plans for the purposes of generating, refining, regulating, compressing, transmitting, or distributing the same...

Section 32-15-02 (10), NDCC.

[16] MDU is a common pipeline carrier regulated by Chapter 49-19, NDCC. As a common pipeline carrier, MDU has the power of eminent domain. Section 14-19-12, NDCC.

[17] In general terms, there are two questions to be asked in an eminent domain proceeding: first, is the taking of private property for a public purpose necessary; and second, if so, what is the appropriate amount of compensation to be paid to the landowner?

[18] The second question, compensation, is always a fact question for the jury to determine. City of Devils Lake v. Davis, 480 NW2d 720, (ND 1992). The first question, however, the necessity of the taking, is triable to the Court alone, without a jury. Northern Pacific Railway Company v. Morton County, 131 NW2d 557 (ND 1964).

[19] MDU asserts that because it is a common pipeline carrier and has the power of eminent domain, and presumably because it falls within the ambit of Section 32-15-02 (10), NDCC and Section 49-19-12, NDCC, it may take the property of Lavern Behm. This is not the law. Merely falling into one of the purposes set forth in Section 32-15-02, NDCC, is insufficient to satisfy the requirements that the use must be necessary and public before property may be taken by eminent domain. Where the existence or nonexistence of the necessary public use is placed in issue, the issue becomes a fact question for the Court to determine. Square Butte Electric Co-op v. Hilken, 244 NW2d 519 (ND 1976).

[20] Before property can be taken it must appear that the use to which it is to be applied is a use authorized by law, and that taking is a necessary use. Section 32-15-05, NDCC. In making this determination no single factor is dispositive. Rather, the Court may consider the cumulative effect of the benefits, and whether that cumulative effect is sufficient to find a public use. Square Butte, 244 NW2d 519, Syllabus of the Court, paragraph five.

[21] The first question, whether the taking serves a necessary public purpose, involves an issue of material fact which cannot be determined on the basis of the present motions for summary judgment. The obvious consequence of that is that neither party may be granted a summary judgment. There is no reason for the Court to hold a hearing to reach this conclusion.

[22] A trial to the Court will need to be set to determine whether the taking of Lavern Behm's property by MDU through a power of eminent domain is necessary for a public use.

[23] IT IS THEREFORE ORDERED:

[24] The cross-motions for summary judgment are DENIED.

[25] The request for a hearing on the motions for summary judgment is DENIED.

[26] The Court will bifurcate the trial in this matter. The case will first be heard by the Court to determine the necessity of the taking for public use. If it is determined that the action should then go forward, a

second trial, before a jury, shall be scheduled to establish appropriate compensation.

[27] The pretrial conference presently scheduled for December 26, 2017, 9:00 AM, shall remain on the calendar, and shall be used as a scheduling conference to set discovery deadlines and trial dates. Counsel may appear at the scheduling conference by telephone.

[28] December 14, 2017

/s/Gary H. Lee

[29] Gary H. Lee, District Judge



---

**APPENDIX H**

---

[SEAL]

State of North Dakota  
DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT  
Ward County Courthouse  
315 3<sup>rd</sup> St SE PO Box 5005  
Minot ND 58702-5005

PRESIDING JUDGE

GARY H. LEE

*(701) 857-6637*

JUDICIAL REFEREE

CONNIE S.

PORTSCHELLER

*(701) 857-6645*

DISTRICT JUDGES

DOUGLAS L. MATTSON

*(701) 857-6635*

DISTRICT COURT FAX

*(701) 857-6649*

RICHARD L. HAGAR

*(701) 857-6639*

SCHEDULING

*(701) 857-6628*

TODD L. CRESAP

*(701) 857-6692*

UNIT COURT  
ADMINISTRATOR  
CAROLYN PROBST

*(701) 857-6625*

STACY J. LOUSER

*(701) 857-6633*

NOTICE OF TRIAL

App. 70

Parties:

Counsel:

MONTANA-DAKOTA  
UTILITIES CO. ET AL.

MALCOLM H BROWN

vs.

LAVERN BEHM

LYNN M BOUGHEY

Case No. 51-2016-CV-01678

The Court Trial in the above matter is scheduled for:

Date: April 17, 2018

Time: 9:00 AM

Place: Ward County Courthouse, Minot, North Dakota

Judge: Gary Lee

Time Set Aside: One day

Dated this 12th day of January, 2018

/s/Shannon Beck

Shannon Beck

Calendar Control Clerk

cc: Above Counsel (E-Served)

---

**APPENDIX I**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT NORTH CENTRAL  
JUDICIAL DISTRICT**

**Civil No. 5-2016-CV-01678**

**[Filed September 7, 2016]**

---

Montana-Dakota Utilities Co.,	)
a Division of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**COMPLAINT**

Plaintiff, for its Complaint against the Defendant,  
alleges as follows:

1. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., a natural gas and electric utility company, pursuant to the provisions of Chapter 32-15, N.D.C.C., intends to exercise the right of

eminent domain to acquire an easement over and across the following described real property:

**Pipeline Easement** located in the NW $\frac{1}{4}$  of Section 16, Township 155 North, Range 84 West of the 5<sup>th</sup> PM, Ward County, North Dakota, described as follows: The East 10 feet of the West 43 feet of that portion of said NW $\frac{1}{4}$  lying southerly of the Burlington Northern Santa Fe Railroad right of way.

**Temporary Construction Easement** located in the NW $\frac{1}{4}$ , of Section 16, Township 155 North, Range 84 West of the 5<sup>th</sup> PM, Ward County, North Dakota, described as follows: The East 30 feet of the West 73 feet of that portion of said NW $\frac{1}{4}$  lying southerly of the Burlington Northern Santa Fe Railroad right of way.

See attached exhibit.

2. Defendant is the record title owner of the lands to be subject of the easement.

3. Plaintiff intends to acquire said easement for the purpose of constructing a natural gas pipeline upon the lands of the Defendant referred to above, and to place, construct, reconstruct, use, operate, repair, inspect, maintain, remove and replace thereon a line or system for the purpose of distributing natural gas which is a utility use and a public use pursuant to the provisions of Chapter 32-15, N.D.C.C.

3. The easement shall be for a term of 99 years, unless sooner terminated by Plaintiff.

4. The easement shall also include the following rights in favor of the Plaintiff:

- (a) An easement 10 feet in width, being 5 feet left, and 5 feet right of the center line as laid out and/or surveyed, or as finally installed through, over, under and across the tract of land hereinafter described, for the purpose of installing and constructing thereon, and thereafter to operate, inspect, protect, maintain, repair, increase the capacity of, remove, replace and abandon in place, a gas pipeline or lines, including without limitation necessary pipes, equipment and fixtures, upon the above described tract of land.
- (b) Defendant agrees not to build, create or construct or permit to be built, created, or constructed, an obstruction, building, engineering works or other structures upon, over, or under the above described tract of land or that would interfere with said pipeline or lines or Plaintiff's rights hereunder. Plaintiff shall have the right, but not the obligation, to cut and clear trees and shrubbery from the above described tract of land.
- (c) Plaintiff, its successors and assigns, shall have the right at all reasonable times of ingress and egress to the above described premises across adjacent, lands of Defendant, his successors and assigns, at convenient points for the enjoyment of the aforesaid uses, rights, and privileges.

- (d) Plaintiff hereby agrees that it will pay any and all damages that may result to the crops, fences, buildings and improvements on said premises caused by constructing, reconstructing, inspecting, protecting, maintaining, repairing, increasing the capacity of, operating or removing said pipeline or lines. The damages, if not mutually agreed upon may be determined by three disinterested persons, one to be selected by Plaintiff and one by Defendant.

WHEREFORE, Plaintiff prays that the Court determine that Plaintiff has the right to acquire the property described herein for a public use; that the use by the Plaintiff of said property is a public use; that the amount of just compensation due the Defendant for his interest in the real property be determined; and that the Plaintiff have such other relief as to the Court seems just.

Dated this 7<sup>th</sup> day of September, 2016.

CROWLEY FLECK PLLP  
Attorneys for Plaintiff  
100 West Broadway Avenue, Suite 250  
P.O. Box 2798  
Bismarck, ND 58502-2798  
Tel. 701-224-7522

By: /s/Malcolm H. Brown  
Malcolm H. Brown (#02842)  
[mbrown@crowlcvfleck.com](mailto:mbrown@crowlcvfleck.com)

App. 75

Christopher K. LeCates (#07554)  
[clecates@crowleyfleck.com](mailto:clecates@crowleyfleck.com)

App. 76

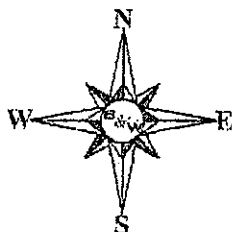
PIPELINE EASEMENT FOR MONTANA-DAKOTA  
UTILITIES CO., LOCATED IN THE NORTHWEST  
QUARTER (NW 1/4) OF SECTION 16, TOWNSHIP  
155 NORTH, RANGE 84 WEST OF THE 5TH P.M.,  
WARD COUNTY, NORTH DAKOTA.

\* \* \*

*[Fold-Out Exhibit, see next page]*



PIPELINE EASEMENT FOR MONTANA-DAKOTA UTILITIES CO., LOCATED IN THE  
NORTHWEST QUARTER (NW 1/4) OF SECTION 16, TOWNSHIP 155 NORTH,  
RANGE 84 WEST OF THE 5TH P.M., WARD COUNTY, NORTH DAKOTA.



GRAPHIC SCALE



( IN FEET )

1 inch = 100 ft.

LEGEND

○ FOUND IRON MONUMENT,  
SECTION/QUARTER CORNER

DESCRIPTION

Pipeline Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota, described as follows:

The East 10 feet of the West 43 feet of that portion of said Northwest Quarter lying southerly of the Burlington Northern Santa Fe railroad right of way (240 feet wide).

Temporary Construction Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota, described as follows:

The East 30 feet of the West 73 feet of that portion of said Northwest Quarter lying southerly of the Burlington Northern Santa Fe railroad right of way (240 feet wide).

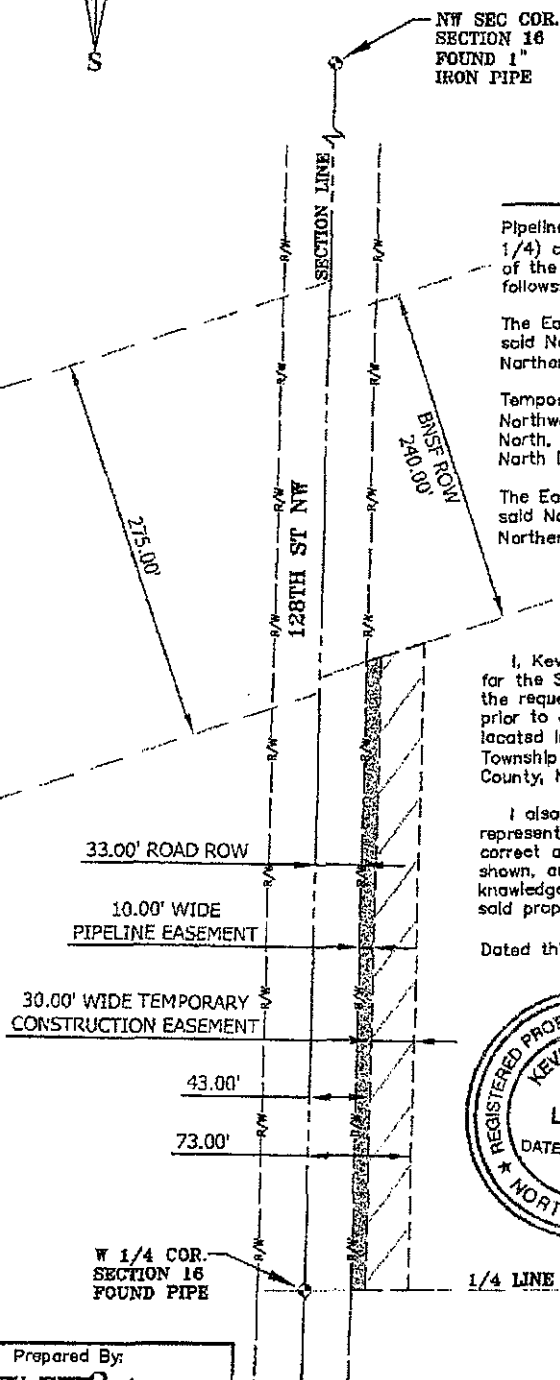
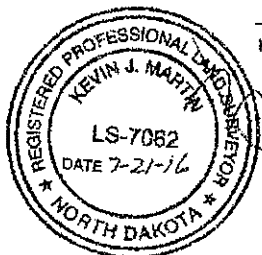
SURVEYOR'S CERTIFICATE

I, Kevin J. Martin, a Professional Land Surveyor in and for the State of North Dakota, do hereby certify that at the request of Montana-Dakota Utilities Co., did on or prior to July 6th, 2016, survey the Pipeline Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota.

I also hereby certify that this Easement is a correct representation of the survey, that all distances are correct and monuments are placed in the ground as shown, and that this Easement is to the best of my knowledge and belief, in all respects, a true description of said property.

Dated this 21<sup>st</sup> day of July, 2016

Kevin J. Martin, LS-7062



Prepared By:

**BARTLETT & WEST**

3456 E. Century Ave.  
Bismarck, North Dakota 58503  
701-255-1110  
FAX 701-255-1111  
www.bartwest.com

**MONTANA-DAKOTA**  
UTILITIES CO.  
A Division of BOKU Resources Group, Inc.  
In the Community to Serve

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**APPENDIX J**

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**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT NORTH CENTRAL  
JUDICIAL DISTRICT**

**Case No. 51-2016-CV-01678**

**[Filed October 25, 2016]**

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Montana-Dakota Utilities Co.,	)
a Division of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)
	)

---

**ANSWER AND COUNTERCLAIM**

¶ COME NOW THE DEFENDANT, Lavern Behm (Vern), by and through his counsel of record, Lynn Boughey, and for his Answer and Counterclaim to the Complaint of Montana-Dakota Utilities Co., a Division of MDU Resources, Group, Inc. (MDU), who alleges and states to the Court as follows:

**¶2 ANSWER**

**¶3 As to Para. 1 of the Complaint** in which MDU identifies itself and states its intention to acquire an easement through eminent domain over and across the listed property, **ADMITS** that MDU is a company that is attempting to use eminent domain to acquire the easement over and across the listed property, but **DENIES** that the taking and proposed easement should be granted or occur.

**¶4 As to Para. 2 of the Complaint** in which MDU asserts that Vern is the record title owner of the property at issue, Vern **ADMITS** that he is the record title owner of the property at issue.

**¶5 As to Para. 3 of the Complaint** in which MDU asserts it that it intends to acquire the easement for the purpose of a natural pipeline for the purpose of distributing natural gas, Vern **ADMITS** that this is indeed MDU's intention, but **DENIES** that the taking and proposed easement is for a valid public purpose and is instead a taking by a private entity and not a governmental entity.

**¶6 As to MDU's second Para. 3 of the Complaint** in which MDU asserts that the easement will last 99 years, Vern **DENIES** that the taking and proposed easement should be granted or occur, or that the length proposed should be allowed.

**¶7 As to MDU's Para. 4 subdivisions (a) and (b) of the Complaint**, in which MDU lists all of the restrictions that the easement will place on Vern and on his land, Vern **DENIES** that the taking and

proposed easement should be granted or occur, or that any of these restrictions should be allowed.

**¶8 As to MDU's Para. 4 subdivisions (c) of the Complaint** in which MDU lists Vern's right of ingress and egress across his adjacent lands at reasonable times and at convenient points above the described premises on his own land, Vern **DENIES** that the taking and proposed easement should be granted or occur, or that any of these restrictions should be applied, and asserts that he should have no restrictions to ingress, egress, or use of his land.

**¶9 As to MDU's Para. 4 subdivisions (d) of the Complaint** in which MDU asserts that it will pay any and all damages that may result in construction and other aspects of the pipeline, Vern **ADMITS** that MDU should be responsible for any damage done to the land (crops, fences, buildings, and improvements), Vern **ADMITS** that MDU should be responsible for any and all damages that may result in the placement of the pipeline on his land, but Vern **DENIES** that the taking and proposed easement should be granted or occur, or that any of these damages should occur, and further asserts that if any damages does occur, the value should be determined by a jury, not three disinterested persons.

**¶10 Action Brought by Non-Governmental Entity**  
Vern specifically alleges that the power of eminent domain should not be employed in this case because the entity bringing the action is not a governmental entity but instead a private entity using a governmental power that should be used only by a governmental

entity for purposes of public roads or infrastructure, and not to the benefit of private persons or entities.

**¶11 Proposed Use is Not a Public Use** Vern specifically alleges that the proposed use is not a public use but is instead for the benefit of two private entities, that is MDU and Burlington Northern Railroad, in violation of ND CONST. Art. I, section 16, N.D.C.C. Sections 32-15-01(1) and 32-15-04(3).

**¶12 Proposed Easement is Not Necessary Due to Alternative Viable Option – Use of Road Right of Way** Vern alleges that the use of the eminent domain power cannot be applied here in that the proposed easement is not necessary due to the fact that MDU has an alternative viable option of placing the natural gas line on the existing right of way along the road and as such it is improper to use eminent domain against Vern when it is not necessary, in violation of ND CONST. Art. I, section 16, N.D.C.C. Sections 32-15-01(2), 32-15-04(6), and 32-15-05(2).

**¶13 Proposed Easement is Not Necessary – Use of Propane Tanks** Vern alleges that the use of the eminent domain power cannot be applied here in that the proposed easement is not necessary due to the fact that MDU and Burlington Northern Railroad has an alternative viable option of placing of using propane tanks on the existing right of way along the rail road tracks (which is exactly what has occurred on the other side of the road) and as such it is improper to use eminent domain against Vern when it is not necessary, in violation of ND CONST. Art. I, section 16, N.D.C.C. Sections 32-15-01(2), 32-15-04(6), and 32-15-05(2).

**¶14 Failure to Negotiate** MDU has violated N.D.C.C. Section 32-15-06.1 by failing to make every reasonable and diligent effort to acquire property by negotiation or to take the steps required under subdivisions 2, 3, and 4 of this statute, and as such the Complaint should be dismissed.

### **¶15 COUNTERCLAIM**

**¶16 Damages and Just Compensation** In the event the easement or taking of the land occurs, Vern requests just compensation and damages as allowed under Chapter 32-15, and more specifically under Section 32-15-22.

**¶17 Award of Attorney Fees upon Taking of Land** Where the power of eminent domain is employed or attempted under North Dakota state law, the Court may award to the defendant reasonable attorney fees under Section 32-15-32 – and reasonable attorney fees are claimed by Vern in this matter.

**¶18 Award of Attorney Fees if Action is Dismissed or Easement Not Granted** Where the power of eminent domain is employed or attempted under North Dakota state law, and the easement or taking that is originally proposed is denied, not granted, or the Complaint is dismissed by the Court, then the defendant has the right to reasonable attorney fees under Section 32-15-35 – and reasonable attorney fees are claimed by Vern in this matter and reasonable attorney fees are claimed by Vern in this matter.

**¶19 Right to Jury Trial** Where the power of eminent domain is employed or attempted under North Dakota state law, the person opposing the use of the power of

eminent domain or the amount of damages has the right to a jury trial as to all issues, including

- 1) whether the easement or taking is for a public use;
- 2) whether the easement or taking is necessary;
- 3) whether the easement or taking is unnecessary due to viable alternatives;
- 4) the amount of damages; and
- 5) the amount of the award of attorney fees.

Vern asserts the right to a jury trial and a decision by a jury as to each of these issues under Section 32-15-13 and 32-15-22. In the event that the Court determines that the right to jury applies only to the assessment of damages, then Vern requests that the Court determine items 1, 2, 3, and 5, above.

#### **¶20 First Defense**

¶21 Vern asserts that the complaint fails to state a claim against defendant upon which relief can be granted.

#### **¶22 Second Defense**

¶23 Vern asserts that there is a failure to join a party under Rule 19, that is Burlington Northern Pacific Railroad, or in the alternative that Burlington Northern Pacific Railroad should be added as a party under Rule 20 in that there is a question of law and fact common to both the defendants and the plaintiff, and that is whether the taking is necessary due to viable alternatives to the taking.

**¶24 JURY TRIAL DEMANDED**

**¶25** WHEREFORE, Defendant Vern Behm requests the following relief:

1. That the Complaint be dismissed and reasonable attorney fees be awarded for failure to state a claim;
2. That the Court add any necessary or permissive party to the action;
3. That the Court determine that MDU does not have the right to acquire the property described in the Complaint because the use of the property is not for public use;
4. That the Complaint be dismissed and reasonable attorney fees be awarded due to any of the following:
  - a) action not brought by a governmental entity;
  - b) action not brought for a public purpose;\
  - c) action not necessary due to existing right of way on adjacent road;
  - d) action not necessary due to option of using propane tanks along existing right of way along railway.
5. Award of just compensation for any easement or taking.
6. Award of reasonable attorney fees.
7. If the use of the property is allowed, that the amount of just compensation be determined by the



appropriate entity, that is a jury or in the alternative a Court if a jury is not allowed by law;

8. Award of pre-judgment and post-judgment interest allowed by law;

9. Award of costs and disbursements; and

10. Any further relief granted by the Court in this matter that the Court deems just.

¶26 Dated this 25<sup>th</sup> day of October, 2016.

/s/Lynn Boughey  
Lynn Boughey (04046)  
lynnboughey@midconetwork.com  
Attorney for Lavern Behm  
P.O. Box 836  
Bismarck, ND 58502-0836  
(701) 751-1485

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**APPENDIX K**

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**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT NORTH CENTRAL  
JUDICIAL DISTRICT**

**Case No. 51-2016-CV-01678**

**[Filed November 9, 2016]**

---

Montana-Dakota Utilities Co.,	)
a Division of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**REPLY TO COUNTERCLAIM**

Plaintiff, for its reply to the Counterclaim of the Defendant, as follows:

[¶1] Plaintiff denies each and every allegation of Defendant's Counterclaim as is hereinafter admitted, qualified or explained.

[¶2] Admits that the Defendant is entitled to compensation as provided by the North Dakota Constitution and North Dakota law, and admits that the trial court has the discretion to award attorney's fees.

[¶3] Admits that the issue of just compensation should be decided by a jury.

[¶4] Specifically denies that Burlington Northern Pacific Railroad is a necessary party to the issues in this case.

WHEREFORE, the Plaintiff prays that the issue of just compensation be decided by the jury in this case, that the Court determine that the Plaintiff is entitled to the easement as requested in its Complaint, together with such other relief as to the Court seems just.

Dated this 9th day of November, 2016.

CROWLEY FLECK PLLP  
Attorneys for Plaintiff  
100 West Broadway Avenue, Suite 250  
P.O. Box 2798  
Bismarck, ND 58502-2798  
Tel. 701-224-7522

By: /s/ Malcolm H. Brown  
Malcolm H. Brown (#02842)  
[mbrown@crowleyfleck.com](mailto:mbrown@crowleyfleck.com)  
Christopher K. LeCates (#07554)  
[clecates@crowleyfleck.com](mailto:clecates@crowleyfleck.com)

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**APPENDIX L**

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**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT  
Civil No. 51-2016-CV-01678  
[Filed: December 18, 2019]**

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Montana-Dakota Utilities Co., a	)
Division of MDU Resources Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**PLAINTIFF'S PRETRIAL STATEMENT,  
WITNESS LIST, EXHIBIT LIST AND REQUEST  
FOR JURY INSTRUCTIONS**

**PLAINTIFF'S PRETRIAL STATEMENT:**

This is an action in eminent domain whereby the Plaintiff, Montana-Dakota Utilities Co., ("MDU") seeks to acquire property from the Defendant Lavern Behm. This project involves the installation of a natural gas

pipeline to provide natural gas to fuel a railroad switch heater of the BNSF railroad. Defendant's property is located south of the BNSF main line west of Berthold, ND. The proposed taking will involve a 10' permanent easement and a 30' temporary construction easement 447 feet in length to install a 4" pipeline. Defendant is not contesting that this project was for a public purpose, or that MDU does not have the right to use eminent domain to acquire the right-of-way. The only issue for trial is the amount of damages for the taking and severance, if any, to the Defendant's property by reason of this project. The measure of damages under North Dakota law is set forth in Pattern Jury Instructions C-75.05 and C-75.10.

WITNESS LIST:

Plaintiff intends to call the following witnesses at the trial of this matter in Ward County District Court, commencing on January 8, 2020:

- Curt Olson
- Joseph Ibach

EXHIBIT LIST:

Plaintiff intends to offer the following exhibits:

- Maps, photos and plats of subject area
- Ibach appraisal of damages

REQUEST FOR JURY INSTRUCTIONS:

Plaintiff requests the following jury instructions, suitably modified to reflect the acquisition by the Plaintiff, as follows:

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- C-1.30 Function of Pleadings
- C-1.40 Burden of Proof - Greater Weight of the Evidence
- C-75.01 Eminent Domain
- C-75.02 Purpose of Taking
- C-75.03 Propriety of Taking Not in Issue
- C-75.04 Burden of Proof (Eminent Domain)
- C-75.05 Just Compensation for Property Taken
- C-75.10 Severance Damages
- C-75.16 When Right to [Compensation] [and] [Damages] Accrues
- C-75.26 Evidence of Similar Sales Restricted
- C-75.30 Attorney's Fees and Costs in Eminent Domain
- C-80.01 Weight and Credibility
- C-80.05 Testimony of Expert
- C-80.08 Testimony of Landowner
- C-85.01 Statements by Counsel and Judge
- C-85.10 Duty to Accept Law from Court
- C-85.15 Fair Treatment Under the Law
- C-90.35 Verdict Awarding Compensation and Damages in Eminent Domain

Dated this 18th day of December, 2019.

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CROWLEY FLECK PLLP

Attorneys for Plaintiff

100 West Broadway Avenue, Suite 250

P.O. Box 2798

Bismarck, ND 58502-2798

Tel. 701-223-6585

By: /s/ Malcolm H. Brown

Malcolm H. Brown (#02842)

[mbrown@crowleyfleck.com](mailto:mbrown@crowleyfleck.com)

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APPENDIX M

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**BOUGHEY LAW FIRM**  
**Lynn M. Boughey**  
**Attorney and Counselor at Law**  
*P. O. Box 1202*  
*Mandan, ND 58554-1202*  
lynnboughey@midconetwork.com  
(701) 751-1485

**Thursday, December 12, 2019**

The Honorable Gary H. Lee     *filed via Odyssey only*  
Ward County Courthouse  
Minot, ND 58702-5005

**Re:   MDU v. Lavern Behm, Civ. No. 51-2016-CV-01678**

Your Honor:

Your scheduling order requires that we inform you in writing at least 14 days before the trial whether the case is going to trial, and if so, submit your instructions at that time. That deadline will be next Monday, December 23, 2019.

Because of the upcoming holidays, I am providing the Court notification now that the case is going to trial, and on this date I am submitting to you proposed jury instructions. I note that my proposed your instructions allow the jury, and an advisory capacity, to decide whether or not the taking of the property is necessary and for public use. Allowing these two issues – in



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addition to the compensation issue – to be presented to the jury *in its advisory capacity* will allow complete record on appeal, but the purpose of attempting to change North Dakota law and allow the jury to decide whether the taking is appropriate.

Sincerely,

/s/ Lynn M. Boughey

Lynn M. Boughey

Cc: Attorneys Malcom Brown via Odyssey

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**APPENDIX N**

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**PROPOSED JURY INSTRUCTIONS**

**51-2016-CV-01678**

**C - 75.01. Eminent Domain 2014**

MDU as a public utility is allowed the right to take property for public use. This right is known as eminent domain. However, before private property may be taken such taking must be necessary and for public use, and if the taking is necessary and for a public use just compensation must be paid.

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

3. Notwithstanding any other provision of law, 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.

4. For the purpose of this chapter, “condemner” means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use

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authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

NDCC 32-15-01

*Gissel v. Kenmare Tp.*, 512 NW2d 470, 474 (ND 1994)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**C - 75.03A. Public Use Defined**

‘Public use’ is considered ‘public benefit’ and it is not considered essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement in order that it constitute a public use. The requirements, as to public use, for a law embracing the taking of land are as follows:

‘(1) That it affect a community as distinguished from an individual;

‘(2) That the law controls the use to be made of the property;

‘(3) That the title so taken be not invested in a person or corporation as a private property to be used and controlled as private property; and

‘(4) That the public reap the benefits of public possession and use and that no one exercise control except the public.’

The benefits to the public may not be remote, indirect, incidental, or speculative to satisfy the constitutional public use requirement. They must be apparent and direct.

244 N.W.2d 535-536

*Square Butte Elec. Co-op. v. Hilken*, 244 N. W.2d 519, 535-536 (N.D. 1976)(Justices Sand and Vogel dissenting); *Square Butte Elec. Co-op. v. Hilken*, 219 N.W.2d 877 (N.D. 1974)(all five justices deciding that

defining ‘public use’ not necessary to the decision rendered); *Ferch v. Housing Authority of Cass County*, 59 N.W.2d 849, 79 N.D. 764 (N.D. 1953).

\* \* \* \* \*

#### **US CONST. FIFTH AMENDMENT**

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 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.

#### **US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

#### **ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

3. Notwithstanding any other provision of law, 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.

4. For the purpose of this chapter, “condemnor” means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

Before property can be taken it must appear:

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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.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

NDCC 32-15-13

*City of Minot v. Minot Highway Ctr.*, 120 NW2d 597 (ND 1963)

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 US 687, 755 (1999)

*Gissel v. Kenmare Twp.*, 512 NW2d 470, 477 (ND 1994) (cited by *City of Monterey v. Del Monte*)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_



**51-2016-CV-01678**

**C - 75.03. Propriety of Taking 2014**

In this case the [MDU] asserts that the taking of the property is necessary and for public use. The wisdom or propriety of the taking is [generally an issue left for the Court to decide. However, in order to assist me in making this decision, I will be asking you to determine through formal questions asked on the verdict form whether you the jury believe that this taking is necessary and for the for the public use.] The [other] issue for you to consider is the compensation and damages that should be awarded to the owner for the property taken.

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.
3. Notwithstanding any other provision of law, 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.
4. For the purpose of this chapter, "condemner" means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

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.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

NDCC 32-1 5-13

*City of Minot v. Minot Highway Ctr.*, 120 NW2d 597 (ND 1963)

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 US 687, 755 (1999)

*Gissel v. Kenmare Twp.*, 512 NW2d 470, 477 (ND 1994)  
(cited by *City of Monterey v. Del Monte*)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**51-2016-CV-01678**

**C - 75.04. Burden of Proof (Eminent Domain) 2014**

[In regards to the necessity of the taking or whether the taking is a public use, the burden is on MDU. As such MDU must prove, by the greater weight of the evidence, any entitlement to take the property.]

[In regards to any compensation you allow, the owner of the property must prove, by the greater weight of the evidence, any entitlement to [compensation] [and] [damages] and the amount of those damages.

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.
3. Notwithstanding any other provision of law, 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.
4. For the purpose of this chapter, "condemner" means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

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.
3. If already appropriated to some public use, that the

public use to which it is to be applied is a more necessary public use.

NDCC 32-15-22, -23

*City of Grand Forks v. Hendon/DDRC/BP, LLC*, 2006 ND 116, 715 NW2d 145

*City of Devils Lake v. Davis*, 480 NW2d 720, 725 (ND 1992)

*Dutchuk v. Bd. of County Comm'rs, Billings County*, 429 NW2d 21 (ND Ct. App. 1988)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**51-2016-CV-01678**

**C - 75.05. Just Compensation for Property Taken  
2014**

Just compensation for the property actually taken is the fair market value of that property and all improvements on that property, if any. You must determine that value as of the date of the [taking] [trial].

“Fair market value” is the highest price for which the property can be sold in the open market by a willing seller to a willing purchaser, neither party acting under compulsion and both exercising reasonable judgment.

In determining fair market value, you should consider past uses of the property, and all other uses for which it is suitable or adaptable and needed or likely to be needed in the reasonably near future, as will in reasonable probability affect its market value while it is privately owned. However, the owner is not entitled to compensation based on remote, speculative, uncertain, or mere possible use.

Elements affecting value that depend upon events which, while within the realm of possibility, are not fairly shown to be reasonably probable, should not be considered by you.

The determination of value in a condemnation proceeding is not a matter of a formula or artificial rules, but of sound judgment and discretion based upon your consideration of all the relevant facts in a particular case.

\* \* \* \* \*

## **US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

## **ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

### **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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

3. Notwithstanding any other provision of law, 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.

4. For the purpose of this chapter, “condemner” means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

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.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

NDCC 32-15-22, 23

See NDCC 24-01-01.1(27)

*Hultberg v. Hjelle*, 2 86 NW2d 448, 452 (ND 1979)

*City of Hazelton v. Daugherty*, 275 NW2d 624 (ND 1979)

*Chandler v. Hjelle*, 126 NW2d 141 (ND 1964)

App. 109

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**C - 75.10. Severance Damages Eminent Domain  
2015**

Because only a portion of the landowner's tract is taken, you must determine the severance damages, if any, that will accrue to the portion not [taken] [sought to be condemned]. Severance damages are measured by the loss in fair market value of the property affected.

[Severance damages can be allowed only where there is unity of use between the portion of the landowner's tract that is taken and the portion not taken. To constitute unity of use of property between two or more distinct parcels of land, there must be such connection or relation of adaptation, ownership, proximity, convenience, and actual and permanent use as to make the enjoyment of the portion taken reasonably and substantially necessary to the enjoyment of the portion not taken, in the most advantageous and profitable manner in the business of the unit for which they are used.]

The giving of instructions on severance damages must not be taken as a recognition that those damages exist. Whether severance damages exist and whether they are proximately caused by the taking are questions of fact for you to determine. If the portion of the property not [taken] [sought to be condemned] is not rendered any less valuable by reason of the taking, there is no financial loss and hence no damages resulting to that portion. Likewise, damages cannot be awarded if the claimed loss is not proximately caused by the taking.

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

NDCC 32-15-22

*City of Grand Forks v. Hendon/DDRC/BP*, 2006 ND 116, 9-10, 715 NW2d 145

*City of Jamestown v. Leever's Supermarkets, Inc.*, 552 NW2d 365, 374 (ND 1996)

*City of Devils Lake v. Davis*, 480 NW2d 720, 725 (ND 1992)

*Sauvegeau v. Hjelle*, 213 NW2d 381 (ND 1973)

App. 112

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**51-2016-CV-01678**

**C - 75.12. Damage to Business 2014**

You may award the landowner damages for any increased business expense or for damages to or loss of business. Discomfort, disturbance, inconvenience, and injury to business are compensable. [On the verdict form you will be asked to separate this amount from the value of the land itself.]

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16, 2nd Paragraph;**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.
3. Notwithstanding any other provision of law, 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.
4. For the purpose of this chapter, "condemner" means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

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.
3. If already appropriated to some public use, that the

App. 115

public use to which it is to be applied is a more necessary public use.

NDCC 32-15-22

*Little v. Burleigh County*, 82 NW2d 603, 613-14 (ND 1957)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_



**51-2016-CV-01678**

**C - 75.16. When Right to [Compensation] [and] [Damages] Accrues 2008**

The right to [compensation] [and] [damages] is deemed to have accrued at the date of the [taking] [trial]. Its actual value at that date is the measure of compensation for all property actually [taken] [to be taken] [and the basis of damages to the property not actually taken, but injuriously affected]. [Improvements put upon property after [month] [date] [year], the date of service of the summons, cannot be included in the assessment of [compensation] [or] [damages]].

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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. than according to the rules of the common law.

**ND CONST. ART. I, SEC. 16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

NDCC 32-15-23 ; 24-01-22

ND Const. § 16

*City of Devils Lake v. Davis*, 480 NW2d 720, 725 (ND 1992)

*Volkman v. City of Crosby*, 120 NW2d 18 (ND 1963)

*Kenner v. City of Minot*, 98 NW2d 901 (ND 1959)

*Little v. Burleigh County*, 82 NW2d 603 (ND 1957)

*Mayer v. Studer & Manion Co.*, 262 NW 925 (ND 1935)

**NOTE:** The date of taking controls where there has been a wrongful taking of the property or where there has been taking of property for right-of-way purposes.

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**51-2016-CV-01678**

**C - 75.18. Amount of Award of Severance or Consequential Damages 2014**

In the event [severance] [consequential] damages are awarded, the amount of those damages must [be whatever amount you consider those additional damages to be].

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC. 16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

**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. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

3. Notwithstanding any other provision of law, 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.

4. For the purpose of this chapter, “condemner” means a person empowered to take property under the power of eminent domain.

**32-15-05. What must appear before property taken.**

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.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

*City of Devils Lake v. Davis*, 480 NW2d 720 (ND 1992)

App. 120

*Dutchuk v. Board of County Comm. Billings County*,  
429 NW2d 21 (NDCt.App. 1988)

*City of Hazelton v. Daugherty*, 275 NW2d 624 (ND  
1979)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

**51-2016-CV-01678**

**C - 75.20. Consequential Damages 2014**

“Consequential damages” are damages to property caused by the construction of the proposed improvement, although no part of the property is taken for public use. It is not necessary that there be a direct injury to the property affected to warrant a recovery for consequential damages. It is sufficient that there be some direct, physical disturbance of a right, either public or private, that the property owner enjoys in connection with the property, and which gives to it additional value, by reason of which disturbance the property owner incurs a special injury with respect to the property in excess of that sustained by the public generally.

\* \* \* \* \*

**US CONST. SEVENTH AMENDMENT**

In Suits at common law, where the value in controversy shall exceed twenty dollars, 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, than according to the rules of the common law.

**ND CONST. ART. I, SEC.16:**

**Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . .

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.

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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.

NDCC 32-15-22

*Dutchuk v. Bd. of County Comm'rs Billings County*, 429 NW2d 21, 23 (ND Ct App 1988)

*United Power Assoc. v. Heley*, 277 NW2d 262 (ND 1979)

*Eck v. City of Bismarck*, 283 NW2d 193, 199 (ND 1979)

*Little v. Burleigh County*, 82 NW2d 603 (ND 1957)

*Wilson v. City of Fargo*, 141 NW2d 727 (ND 1966)

*Yegen v. City of Bismarck*, 291 NW2d 422, 426 (ND 1980)

Proposed by Vern Behm

ACCEPTED:    \_\_\_

REJECTED:    \_\_\_

MODIFIED:    \_\_\_

---

**APPENDIX O**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT**

**Ward County Civil No. 51 2016 CV 1678**

**[Filed: January 3, 2020]**

---

Montana-Dakota Utilities Co.,	)
	)
A Division of MDU Resources	)
	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**ORDER**

[1] The above action is one for taking by eminent domain. A jury trial is scheduled to begin on January 8, 2020.

[2] The defendant, Lavern Behm, has submitted proposed jury instructions which would allow a jury to



sit, in an advisory capacity, to determine whether the taking of Lavern Behrn's property is necessary and for a public use.

[3] The plaintiff, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., hereafter MDU, opposes the requested jury instructions, and the seating of an advisory jury on the issue of need and necessity for the taking.

[4] The proposed jury instructions are DENIED. The jury's sole role will be to determine eminent domain damages.

[5] This case was previously tried to this Court on the issue of the need and necessity of the taking of Lavern Behm's property by MDU. This Court determined that MDU had not established a public need or necessity, and that the proposed taking of an easement for the placement of a natural gas pipeline was for the convenience of a single user only. The Court's decision was appealed. The North Dakota Supreme Court REVERSED and REMANDED the case to this Court for trial on eminent domain damages to be awarded to Lavern Behm. Montana Dakota Utilities, Co. v. Behm, 2019 ND 139, 927 NW2d 865.

[6] This Court must adhere to the mandate rule on remand. That rule requires the trial court to follow the pronouncements of an appellate court on legal issues in subsequent proceedings of the case, and to carry the appellate court's mandate into effect and according to its terms. Law v. Whittet, et al., 2015 ND 16, 858 NW2d 636. The mandate of the North Dakota Supreme Court is clear. The matter of need and necessity is no

longer an issue. The only matter left for determination in this trial is the issue of eminent domain damages to be awarded to Lavern Behm.

[7] IT IS THEREFORE ORDERED:

[8] The requests by Lavern Behm for jury instructions, and an advisory jury on the issue of need and necessity are DENIED.

[9] January 3, 2020

/s/ Gary H. Lee

[10] Gary H. Lee, District Judge

---

**APPENDIX P**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT**

**Civil No. 51-2016-CV-01678**

**[Filed: January 7, 2020]**

---

Montana-Dakota Utilities Co., a	)
Subsidiary of MDU Resources Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)

---

**STIPULATION REGARDING VALUATION,  
ATTORNEY'S FEES AND ENTRY OF A FINAL  
ORDER OF CONDEMNATION**

[¶1] The parties hereto by and through their counsel stipulate and agree as follows:

[¶2] Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("MDU"), a natural gas and electric utility company, by the terms of this stipulation and Final Order of Condemnation (N.D.C.C.

§ 32-15-27) is granted an easement over and across the following described real property:

**Pipeline Easement** located in the NW1/4 of Section 16, Township 155 North, Range 84 West of the 5<sup>th</sup> PM, Ward County, North Dakota, described as follows: The East 10 feet of the West 43 feet of that portion of said NW1/4 lying southerly of the Burlington Northern Santa Fe Railroad right of way.

**Temporary Construction Easement** located in the NW1/4 of Section 16, Township 155 North, Range 84 West of the 5<sup>th</sup> PM, Ward County, North Dakota, described as follows: The East 30 feet of the West 73 feet of that portion of said NW1/4 lying southerly of the Burlington Northern Santa Fe Railroad right of way.

See attached Exhibit A.

[¶3] Lavern Behm is the record title owner of the lands to be subject of the easement.

[¶4] MDU intends to acquire said easement for the purpose of constructing a natural gas pipeline upon the lands of Lavern Behm referred to above, and to place, construct, reconstruct, use, operate, repair, inspect, maintain, remove and replace thereon a line or system for the purpose of distributing natural gas which is a utility use and a public use pursuant to the provisions of Chapter 32-15, N.D.C.C.

[¶5] The easement shall be for a term of 99 years, unless sooner terminated by MDU.

[¶6] The easement shall also include the following rights in favor of MDU:

- (a) An easement 10 feet in width, being 5 feet left, and 5 feet right of the center line as laid out and/or surveyed, or as finally installed through, over, under and across the tract of land hereinafter described, for the purpose of installing and constructing thereon, and thereafter to operate, inspect, protect, maintain, repair, increase the capacity of, remove, replace and abandon in place, a gas pipeline or lines, including without limitation necessary pipes, equipment and fixtures, upon the above described tract of land.
- (b) Lavern Behm agrees not to build, create or construct or permit to be built, created, or constructed an obstruction, building, engineering works or other structures upon, over, or under the above described tract of land or that would interfere with said pipeline or lines or MDU's rights hereunder. MDU shall have the right, but not the obligation, to cut and clear trees and shrubbery from the above described tract of land.
- (c) MDU, its successors and assigns, shall have the right at all reasonable times of ingress and egress to the above described premises across adjacent lands of Lavern Behm, his successors and assigns, at

convenient points for the enjoyment of the aforesaid uses, rights, and privileges.

- (d) MDU hereby agrees that it will pay any and all damages that may result to the crops, fences, buildings and improvements on said premises caused by constructing, reconstructing, inspecting, protecting, maintaining, repairing, increasing the capacity of, operating or removing said pipeline or Jines. The damages, if not mutually agreed upon may be determined by three disinterested persons, one to be selected by MDU and one by Lavern Behm.

[¶7] MDU shall pay Lavern Behm the sum of \$1,000.00 as the determination of value for the easement.

[¶8] Within 14 days after the execution of this stipulation, Lavern Behm's counsel will submit a motion to the Court for attorney's fees, MDU will have 14 days to provide a response and Lavern Behm's counsel will have seven days to file any reply brief.

[¶9] Lavern Behm retains any and all rights to appeal as to any issue in this case to the North Dakota Supreme Court as set forth by the North Dakota Rules of Appellate procedure, or by Petition for Certiorari to the United States Supreme Court.

[¶10] Upon the expiration of the time to appeal from this or previous or subsequent orders entered by the Court, or upon the conclusion of any appeal process, MDU may submit a Final Order of Condemnation to

the Court granting to MDU the easement described above.

Dated this 7<sup>th</sup> day of January, 2020.

/s/ Lavern Behm  
Lavern Belim

/s/ Lynn Boughey  
Lynn Boughey (04046)  
lynnboughey@midconetwork.com  
Attorney for Lavern Behm  
P.O. Box 1202  
Mandan, ND 58554-1202  
(701) 751-1485

Dated this 7<sup>th</sup> day of January, 2020.

MDU, a subsidiary of MDU Resources Group, Inc.

By: /s/  
Its: /s/

CROWLEY FLECK PLLP  
Attorneys for Plaintiff  
100 West Broadway Avenue, Suite 250  
P.O. Box 2798  
Bismarck, ND 58502-2798  
Tel. 701-224-7522

By: /s/ Malcolm H. Brown (#02842)  
Malcolm H. Brown (#02842)  
mbrown@crowleyfleck.com

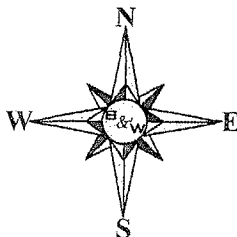
App. 131

PIPELINE EASEMENT FOR MONTANA-DAKOTA  
UTILITIES CO., LOCATED IN THE NORTHWEST  
QUARTER (NW 1/4) OF SECTION 16, TOWNSHIP  
155 NORTH, RANGE 84 WEST OF THE 5TH P.M.,  
WARD COUNTY, NORTH DAKOTA.

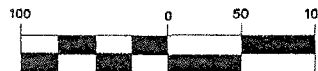
*[See Fold-Out Exhibit]*



PIPELINE EASEMENT FOR MONTANA-DAKOTA UTILITIES CO., LOCATED IN THE  
NORTHWEST QUARTER (NW 1/4) OF SECTION 16, TOWNSHIP 155 NORTH,  
RANGE 84 WEST OF THE 5TH P.M., WARD COUNTY, NORTH DAKOTA.



GRAPHIC SCALE



( IN FEET )

1 inch = 100 ft.

LEGEND

⊙ FOUND IRON MONUMENT,  
SECTION/QUARTER CORNER

DESCRIPTION

Pipeline Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota, described as follows:

The East 10 feet of the West 43 feet of that portion of said Northwest Quarter lying southerly of the Burlington Northern Santa Fe railroad right of way (240 feet wide).

Temporary Construction Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota, described as follows:

The East 30 feet of the West 73 feet of that portion of said Northwest Quarter lying southerly of the Burlington Northern Santa Fe railroad right of way (240 feet wide).

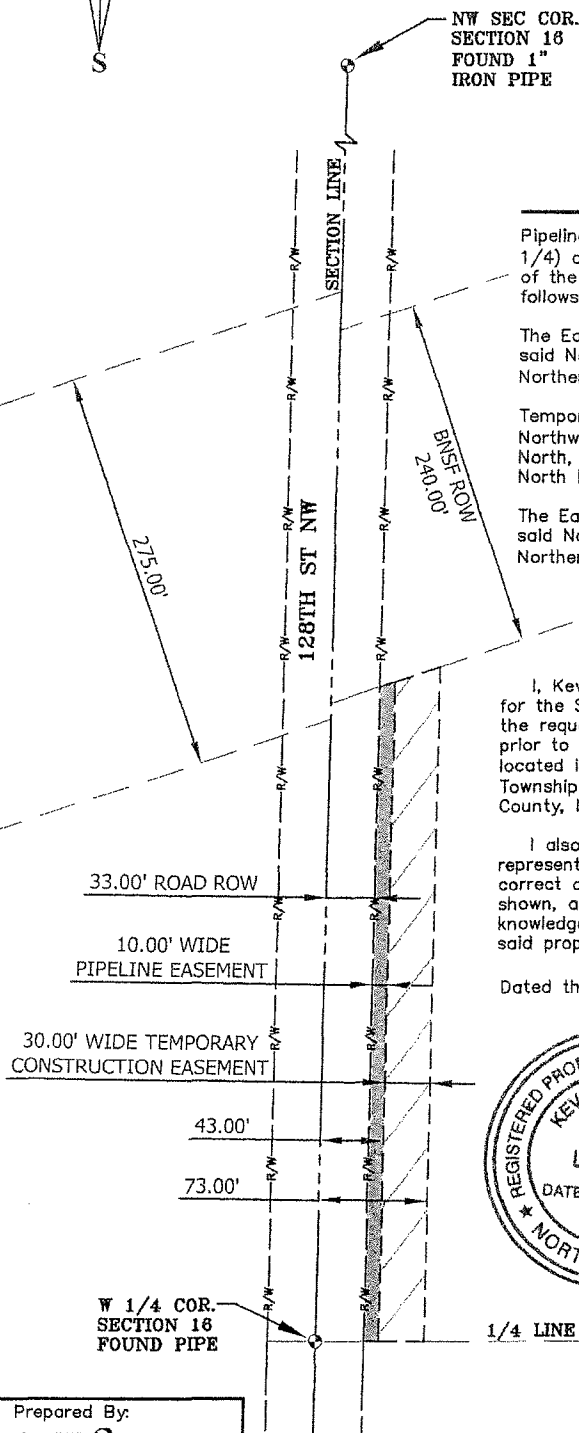
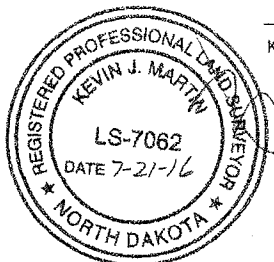
SURVEYOR'S CERTIFICATE

I, Kevin J. Martin, a Professional Land Surveyor in and for the State of North Dakota, do hereby certify that at the request of Montana-Dakota Utilities Co., did on or prior to July 6th, 2016, survey the Pipeline Easement located in the Northwest Quarter (NW 1/4) of Section 16, Township 155 North, Range 84 West of the 5th P.M., Ward County, North Dakota.

I also hereby certify that this Easement is a correct representation of the survey, that all distances are correct and monuments are placed in the ground as shown, and that this Easement is to the best of my knowledge and belief, in all respects, a true description of said property.

Dated this 21<sup>st</sup> day of July, 2016.

Kevin J. Martin, LS-7062



Prepared By:  
**BARTLETT & WEST**

3456 E. Century Ave.  
Bismarck, North Dakota 58503  
701-258-1110  
FAX 701-258-1111  
www.bartwest.com

**MONTANA-DAKOTA**  
UTILITIES CO.  
A Division of MDU Resources Group, Inc.  
In the Community to Serve®

EXHIBIT

**A**

tabbies

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**APPENDIX Q**

---

**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT**

**Civil No. 51-2016-CV-01678**

**[Filed: January 7, 2020]**

---

Montana-Dakota Utilities Co., a	)
Subsidiary of MDU Resources	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Lavern Behm,	)
	)
Defendant.	)

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**ORDER**

[¶1] The parties hereby stipulated to the terms of and valuation for the easement, and the amount of and award of attorney's fees to be determined by the Court at a later date;

[¶2] IT IS HEREBY ORDERED That trial of the issue of valuation of the easement has been resolved by Stipulation.

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[¶3] Dated this 7<sup>th</sup> day of January, 2020.

/s/ \_\_\_\_\_  
District Judge

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**APPENDIX R**

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**STATE OF NORTH DAKOTA  
COUNTY OF WARD  
IN DISTRICT COURT  
NORTH CENTRAL JUDICIAL DISTRICT**

**Ward County Civil No. 51 2016 CV 1678**

**[Filed: February 7, 2020]**

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Montana-Dakota Utilities Co.,	)
	)
a Division of MDU Resources	)
	)
Group, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
Lavern Behm,	)
	)
Defendant.	)

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**ORDER**

[1] The above action is one for eminent domain.

[2] The matter of the taking, and the amount of damages paid for the taking have been resolved. The only remaining issue is that of attorney's fees and costs.

[3] For the reasons stated below, the Court awards attorney's fees and costs to Laverne Behm in the amount of \$17,443.00.

#### PROCEDURAL HISTORY

[4] The plaintiff, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., hereafter MDU, sought an easement across and beneath real property owned by the defendant, Lavern Behm. The sole purpose of the easement was to place a natural gas pipeline from a main MDU pipeline to service a single user, Burlington Northern Santa Fe Railroad. Burlington Northern maintains a railroad switch near Lavern Behm's land. The switch must be heated in the winter months so that it will remain free of snow and ice. The natural gas would be used to supply the heaters for this switch.

[5] Lavern Belun objected to the pipeline and refused to grant an easement. This action for eminent domain was then commenced by MDU.

[6] This Court bifurcated the proceedings. A first trial was held on April 17, 2018, to determine whether MDU had established a need for the taking. The Court determined it had not. The Court issued its Order denying the taking on May 29, 2018.

[7] Lavern Behm then made a motion for his attorney's fees and costs pursuant to Section 32-15-32, NDCC. Both parties submitted arguments to the Court by brief, and neither party requested oral argument on the issue of fees and costs. On July 14, 2018, the Court issued its Order regarding attorney's fees, awarding Lavern Behm attorney's fees of \$22,100.00, plus costs

of \$50.00. Attorney's fees were awarded at the rate of \$325.00 per hour. A judgment was subsequently entered.

[8] MDU timely appealed the decision and judgment regarding the issue of necessity of the taking to the North Dakota Supreme Court. MDU did not contest this Court's order regarding the award of attorney's fees, or the hourly rate awarded to Lavern Behm's counsel. MDU tendered payment to Lavern Behm for all fees associated with the initial phase of the trial.

[9] Lavern Behm cross-appealed. In the 10 issues identified by counsel for Lavern Behm, no issue regarding this Court's earlier ruling on the award of attorney's fees was raised. Specifically, Lavern Behm did not appeal from any of this Court's earlier rulings of July 14, 2018, disallowing a number of claimed hours, nor the hourly rate allowed by the Court.

[10] The North Dakota Supreme Court reversed this Court's decision on May 16, 2019. See, MDU v. Behm, 2019 ND 139, 927 NW2d 865. The North Dakota Supreme Court reversed and remanded for trial on the amount of eminent domain damages which would be awarded to Lavern Behm. The North Dakota Supreme Court also awarded MDU its costs on appeal pursuant to Rule 39, NDRAppPro.

[11] Lavern Behm then advised this Court of his intention to seek review of the North Dakota Supreme Court decision by the United States Supreme Court. The Court deferred all further actions until that process ran its course.

[12] Lavern Behm filed his Petition for Writ of Certiorari with the United States Supreme Court on August 12, 2019.

[13] On November 21, 2019, the United States Supreme Court denied certiorari.

[14] After that denial, the case move back to this Court for trial on the issue of damages only, as per the North Dakota Supreme Court Court's decision, and in accordance with the rule of remand. Law v. Whittet, 2015 ND 16, 858 NW2d 636.

[15] The matter was set for a jury trial to commence January 8, 2020. The Court was notified on January 7, 2020, that the issue of compensation for the taking had been resolved. Lavern Behm thereafter submitted his billing for attorney's fees incurred subsequent to the initial trial and the earlier award of attorney's fees. The statement included attorney's fees incurred in the appeal before the North Dakota Supreme Court, as well as for the petition for Writ of Certiorari to the United States Supreme Court. The billings further included steps taken to finally resolve the issues of damages before the scheduled jury trial. Lavern Behm sought attorney's fees and costs of \$49,561.78. MDU objected to paying Lavern Behm's counsel's hourly rate (\$325 per hour), and all fees and costs incurred in the failed attempt to obtain review of the North Dakota Supreme Court decision by the United States Supreme Court. MDU also objected to a number of specific individual costs and fees MDU asserts are not related to the actual litigation.

## ANALYSIS

[16] Section 32-15-32, NDCC, provides in part:

The court may in its discretion award the defendant reasonable actual or statutory costs or both, which may include.... reasonable attorney's fees for all judicial proceedings.

Lavern Behm, as the defendant in this action, is entitled to the recovery of his reasonable attorney's fees, and costs associated with all judicial proceedings pursuant to this Section.

[17] The factors which the Court must consider when making an award of attorney's fees in an eminent domain proceeding are found in City of Bismarck v. Thom, 261 NW2d 640 (ND 1977), and North Dakota Department of Transportation v. Rosie Glow, LLC., 2018 ND 123, 911 NW2d 334. Both cases make clear that the predominant factors for determining reasonable attorney's fees are the number of hours spent, and the hourly rate charged for those fees. The hourly rate may be adjusted upwards or downwards based upon an objective evaluation of the complexity and novelty of the litigation, the degree of skill displayed by the lawyer, customary fees charged in the area, as well as other factors. All factors must be considered, and no single factor is determinative.

### Time Spent

[18] Attorney Lynn Boughey, counsel for Lavern Behm, has submitted three statements for his fees and costs incurred in this proceeding. These statements are broken down by date, followed by a brief description of



the work performed, and lastly the amount of time spent on each task. The statements are reasonably detailed and provide the Court with a fairly clear picture of the services rendered, and the time spent. While MDU has made a detailed list of objections, the Court will do its own, independent review of the statements to determine if they appear to be reasonable for these judicial proceedings.

### Strangers

[19] In its earlier order regarding the payment of attorney's fees following the first trial the Court disallowed a number of entries for contacts by Lavern Behm's attorney with persons or entities who the Court deemed were strangers to the proceedings. Without explanation of how similar individuals could now advance Lavern Behm's cause in these judicial proceedings as allowed by Section 32-15-32, NDCC, counsel again includes a large number of entries in which he had contact with individuals or entities who are, in the Court's eyes, total strangers to this litigation. Contact with these individuals or entities are not recoverable costs or attorney's fees for these judicial proceedings.

[20] The first billing statement is dated from June 23, 2018, through June 26, 2019.

[21] The very first entry, June 23, 2018, lists a lengthy email from attorney Boughey to Robert Hale, and other attorneys throughout the nation who deal with property rights issues. There is no doubt that this is the same Robert Hale who the Court previously noted was a complete stranger to the preceding. Robert Hale

has no known ownership or other interest in the Behm property. He was not a witness to any event. While he is a licensed attorney in North Dakota Hale filed no documents and made no appearance in the case. The Court is actually more than a little surprised to see his name once again listed in counsel's billing statement as someone of any significance or stature to this lawsuit. Robert Hale is a non-entity in this proceeding. Further, counsel's bruiting the case to other attorneys across the nation likewise advances nothing. This first entry is disallowed. July 3, lists another contact with Robert Hale. This entry is likewise disallowed.

[22] As noted above, counsel for Lavern Behm had numerous contacts with attorneys "throughout the nation" regarding this case He also initiated a number of contacts with the press, and other entities. None of these contacts had anything to do with any judicial proceeding. Nor do these contacts constitute reasonable attorney's fees. These entries include notations such as "email to various press," "email to various attorneys," "email from Federalist Society attorney," "email from AP reporter," to note just a few of the examples. The following entries of this ilk are excluded. They are: 8-12-18, 8-27-18, 8-31-18, 9-4-18, 9-6-18, 9-8-18, 10-10-18, 2-2-19, 2-3-19, 2-4-19, 5-23-19, 6-14-19, and 6-22-19. The total of all entries is 7.2 hours. Those hours are disallowed.

#### Staff and Overhead

[23] Attorney's fees are not recoverable for clerical or secretarial activities such as file review, file maintenance, scheduling, or other routine matters. Youngblood v. Youngblood, 91 So.3d 190 (Ct. of App.,

2d Dist., Fla. 2012). Work by support staff must be substantive. Copying and other secretarial tasks are not recoverable as attorney's fees. Taylor v. the Chubb Group of Insurance Companies, 1994 OK 47, 874 P2d 806. Routine office work is deemed part of an attorney's overhead and should be reflected in a lawyer's hourly rate. Hawaii Ventures v. Otaka, Inc., 116 Hawaii 465, 173 P3d 1122 (2007).

[24] Communications between a lawyer in his office staff regarding billing matters, payment of retainers and fees, and other financial matters are mere office functions and should be part of counsel's routine overhead. These activities do not constitute legal work and should not be passed on to opposing parties under Section 32-15-32, NDCC. These activities do not constitute attorney's fees, let alone reasonable attorney's fees for judicial proceedings.

[25] Examining again the first billing statement the Court notes entries such as "email from MDU staff regarding payment of attorney's fees," "complete W-9, forward same to MDU," "receive letter from MDU with check for attorney's fees." There are further entries noting other routine contacts with staff for matters such as scheduling, assembling documents, receipt of routine correspondence, and emailing.

[26] After examining the first billing statement, the Court disallows the following: 7-16-18, 7-16-18, 7-26-18, 8-18-18, 8-9-18, 8-13-18, 9-17-18, 9-21-18, 10-24-18, 11-2-18, 11-26-18, 12-5-18, 12-27-18, 12-28-18, 1-17-19, 1-18-19, 1-22-19, and 2-1-19. The total time noted on these entries is 4.1 hours.

North Dakota Supreme Court Appeal

[27] The case was appealed by MDU to the North Dakota Supreme Court. The work done by counsel on this appeal appears on the first billing invoice. The billing starts with work done by counsel to make his first request for payment of attorney's fees as allowed by the Court. The first entry is June 25, 2018. The billing then details work on preparing the motion for fees. The statement continues with numerous entries regarding the receipt of MDU's appeal and briefs, the drafting of Lavern Behm's own brief to the North Dakota Supreme Court, argument in the North Dakota Supreme Court and ultimately the receipt of the North Dakota Supreme Court opinion. All this work constitutes reasonable work and time expended by counsel in pursuit of this litigation.

[28] Except for those entries noted above regarding strangers and staff overhead, the Court will allow all entries from June 25, 2018, through May 16, 2019, incurred in connection with the appeal to the North Dakota Supreme Court. The total of these entries is 36.5 hours.

[29] The Court will additionally allow the entry for May 20, 2019. This entry notes settlement discussions between counsel for Lavern Behm and MDU. The time noted is 1.8 hours.

[30] The total number of hours allowed from the first billing statement is 36.5 hours.

United States Supreme Court

[31] The second billing statement focuses entirely upon Lavern Behm's efforts to obtain review of the North Dakota Supreme Court decision by the United States Supreme Court. MDU objects to paying any compensation to Lavern Behm's attorney for these efforts.

[32] Section 32-15-32, NDCC, allows for the actual costs and reasonable attorney's fees for all judicial proceedings. The phrase "all judicial proceedings" is not otherwise defined. The Court concludes, however, that the term does not include a side trip to a federal court.

[33] MDU cites to the case of United Power Association v. Moxness, 267 NW2d 814 (ND 1978). In that case landowners appeared before the North Dakota Public Service Commission. They contested the issuance of a certificate of site compatibility for the construction of a power transmission line across their property. They argued that the procedures before the PSC were part of, or a substitution for a judicial determination of necessity in the subsequent eminent domain proceeding. Consequently, they should be entitled to their attorney's fees and costs for appearing before the PSC pursuant to Section 32-15-32, NDCC. The District Court agreed. United Power appealed.

[34] The North Dakota Supreme Court reversed the award of fees for appearances before the PSC. The North Dakota Supreme Court reasoned that the proceedings before the PSC were governed by Chapter 49-22, NDCC, and not by Chapter 32-15, NDCC. The proceedings before the PSC were unrelated to the issue

of eminent domain. The North Dakota Supreme Court held that no language in Section 32-15-32, or Section 32-15-35, NDCC, in any way indicated an intention by the legislature to extend those provisions to any proceeding outside of Chapter 32-15, NDCC.

[35] In Arenson v. City of Fargo, 331 NW2d 30 (ND 1983), a landowner sued the City of Fargo and Cass County Drain Board in connection with the construction and maintenance of a dam on the Sheyenne River. The dam caused water to back onto the landowner's farm. The landowner commenced an action for damages alleging negligence by the defendants. The trial court dismissed the action on a motion for summary judgment due to the failure of the plaintiff to timely file a proper notice of claim. The landowner appealed.

[36] The North Dakota Supreme Court affirmed the dismissal of the negligence action, but reversed the decision holding that the Complaint stated a cause of action for inverse condemnation.

[37] A jury trial was held on the issue of inverse condemnation. Arneson prevailed. He then submitted his request for attorney's fees and costs, including attorney's fees associated with the original negligence claim, and the appeal from the grant of summary judgment. The attorney's fees request was \$47,000.00. The District Court slashed the fee to \$9,750.00. The District Court held that the first proceeding the claim of negligence was properly dismissed due to a lack of proper notice. The primary focus of Arneson's appeal was the grant of summary judgment on the issues of negligence and notice, and not inverse condemnation.

It would have therefore been improper, the District Court noted, to include any award of fees for those services under Section 32-15-32, NDCC. The North Dakota Supreme Court agreed, holding that it was not an abuse of discretion to disallow fees for the negligence action. The action in negligence was not contemplated by Chapter 32-15, NDCC.

[38] In Gissel v. Kenmare Township, 512 NW2d 470 (ND 1994), the District Court awarded a landowner costs and attorney's fees of \$28,076.00 in connection with a claim of inverse condemnation. The landowner appealed arguing that the District Court should have awarded \$49,970.00. The District Court reasoned that the reduction was justified because, among other reasons, the landowner had previously embarked upon improvident appeals. The prior appeals were noted in footnote 2 of the North Dakota Supreme Court opinion.

[39] The North Dakota Supreme Court affirmed the District Court's award of fees.

[40] From these cases this Court reasons that 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. A petition to

the United States Supreme Court is an improvident act. 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. The Court therefore disallows all fees incurred in connection with the pursuit of the petition for certiorari.

[41] On the first billing statement these fees encompass all entries from June 24, 2019, through June 26, 2019. These fees are disallowed.

[42] Lavern Behm submitted a second billing statement for June 27, 2019, through August 12, 2019. All of the entries on this statement are related to the drafting and printing of the petition for Writ of Certiorari to the United States Supreme Court. For the reasons stated above, all of these fees are denied. No fees are awarded for the second billing statement.

[43] Lavern Behm submitted a third billing statement for fees incurred from August 13, 2019, until January 8, 2020.

[44] All entries between August 13, 2019, and November 21, 2019, are related to the United States Supreme Court process. For the reasons stated above, these fees are denied.

[45] However, all entries from December 4, 2019, through January 8, 2020, appear to be related to the final trial preparations on the issue of damages, settlement discussions, and the ultimate and final resolution of this eminent domain case. The total



number of hours allowed on the third billing statement amount to 16.9 hours.

[46] The Court therefore allows 55.2 hours for counsel's time. (38.3+16.9).

#### Hourly Rate

[47] Lavern Behm's attorney billed his time in these statements at \$325 per hour. MDU objects to this amount, and argues that counsel's original per hour billing rate to his client, \$250 per hour, is justified.

[48] In the initial billing for the April 2018 proceeding this Court approved Lavern Behm's attorney's fees at the rate of \$325 per hour. In doing so, the Court analyzed the factors set out in the City of Bismarck v. Thom, 261 NW2d 640 (ND 1977), and North Dakota Department of Transportation v. Rosie Glow, LLC., 2018 ND 123, 911 NW2d 334. The Court gave credit to counsel for his high degree of professionalism and skill. The Court noted that the results obtained for Lavern Behm were substantial. The Court further considered attorney's fees awards in recent eminent domain cases in the North Central Judicial District. Relying upon all of these factors the Court concluded that Lavern Behm's counsel was entitled to his hourly rate, \$250 per hour, plus a "Lodestar" increase of \$75 per hour to an hourly fee of \$325 per hour.

[49] MDU paid Lavern Behm's attorney's fees incurred in the first proceeding as assessed by the Court at the rate of \$325 per hour.

[50] MDU then appealed the decision of this Court. MDU limited that appeal to the decision regarding

necessity for the taking only. MDU did not appeal from this Court's ruling regarding the award of attorney's fees, or the hourly rate for those fees.

[51] The law of the case doctrine provides that if an appellate court has passed on a legal issue and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined in a subsequent appeal in the same case. Further, this limitation encompasses not only those issues decided in the first appeal, but also those issues decided by the trial court prior to the first appeal, and which were not presented for review in the first appeal. Beuchler Construction v. City of Williston, 413 NW2d 336 (ND 1987).

[52] By failing to raise the issue of counsel's hourly rate in the first appeal, MDU has waived the issue and is now foreclosed from raising it. The hourly rate for Lavern Behm's attorney was established by the first round of litigation.

[53] The Court will allow Lavern Behm's lawyer's hourly rate to remain at \$325 per hour.

[54] The Court thus allows attorney's fees of \$17,940 (55.2 hours times \$325 per hour).

#### Costs

##### A. Lavern Behm

[55] Lavern Behm has made a request for cost of \$55.25, billing statement number one, \$3,218.42, billing statement number two, and \$950.00, billing

statement number three. The total amount claimed is \$4,223.67. The Court allows \$48.00 of costs.

[56] The lion's share of costs, appearing on statements two and three, are all costs incurred for printing briefs in support of the petition for certiorari to the United States Supreme Court. The same reasons which were stated above when denying the request for attorney's fees would likewise disallow the cost of printing briefs for presentation to the federal high court.

[57] With regard to the costs stated in the first billing statement, the first item is \$7.25 postage. The postage was for the mailing of MDU's North Dakota Supreme Court brief to the client, Lavern Behm. Costs are creatures of statute and are allowed only as by law. Thorvaldson-Johnson Co. v. Cochran, 64 ND 367, 252 NW 268 (1934). Costs are provided for by Chapter 28-26, NDCC. Nowhere in that Chapter are costs for attorney's postage expenses included. Costs and expenses incurred merely for the convenience of counsel are generally not recoverable. United Development Corporation v. State Highway Department, 133 NW2d 439 (ND 1965). Further, much like clerical time, the cost of an attorney's desk, chair, telephone, paper, law library, office rent, and the like, postage costs may well be deemed part of an attorney's overhead. The expense of doing business goes into the setting of counsel's hourly rate. The cost for postage is denied.

[58] The second two items of costs are surcharges for expenses and fees charged by the North Dakota Supreme Court. Although Lavern Behm did not prevail in the North Dakota Supreme Court, these costs were

made necessary by the North Dakota Supreme Court rules regarding electronic filings. They appear therefore to be legitimate costs incurred in this condemnation proceeding. The Court would further note that it was MDU's appeal which forced these costs onto Lavern Behm. MDU should not be heard to complain about these costs, any more than it can complain about Lavern Behm's attorney's time spent writing briefs and appearing before the North Dakota Supreme Court responding to MDU's appeal. \$48.00 are allowed as costs.

B. MDU

[59] MDU lists appellate costs of \$545.00: filing fee for Notice of Appeal, \$125.00, plus preparation of the transcript on appeal, \$420.00. An award of costs was ordered by the North Dakota Supreme Court in its Judgment issued on May 16, 2019. The North Dakota Supreme Court ordered that MDU have and recover from Lavern Behm costs and disbursements on appeal under Rule 39, NDRAppPro, to be taxed and allowed in the Court below-that is, this District Court.

[60] Rule 39, NDRAppPro, allows the prevailing party on appeal to recover costs for: (1) the preparation of transcript, and (4) the filing fee. MDU's submission for costs is in line with the recovery allowed by Rule 39.

[61] This District Court is somewhat perplexed by the North Dakota Supreme Court's order for costs. In the case of Lenertz v. City of Minot, 2019 ND 53, 923 NW2d 479, this very District Court dismissed a landowner's action for inverse condemnation against the City of Minot. As part of the Order and Judgment,

this Court ordered costs be paid to the City as the prevailing party. The landowner appealed. The North Dakota Supreme Court affirmed the dismissal, but reversed the award of costs. The North Dakota Supreme Court reasoned that general cost shifting provisions found in the Rules of Civil Procedure and other statutes did not apply to eminent domain proceedings brought pursuant to Chapter 32-15, NDCC. Section 32-15-32, NDCC, precluded an award of costs against the landowner in an inverse condemnation proceeding. This Court can think of no good reason why this holding, and the limitations on cost shifting found in Chapter 32-15, NDCC, would not have equal application to this eminent domain proceeding brought pursuant to Chapter 32-15, NDCC. Interestingly, in the Judgment of the North Dakota Supreme Court which accompanied the Lenertz opinion, the North Dakota Supreme Court did not award any appellate costs to the City of Minot as the prevailing party, at least in part, on the appeal.

[62] Yet, in this case, decided only a couple of months later, the North Dakota Supreme Court orders an award of appellate costs to MDU. As King Mongkut says: “It’s a puzzlement.”

[63] Notwithstanding the seeming contradictions the Court will award MDU its appellate costs. It does so for two reasons.

[64] First, the rule of remand requires the trial court follow the pronouncements of the appellate court on legal issues, and carry out the appellate court’s mandate according to its terms. Law v. Whittet, 2015 ND 16, 858 NW2d 636. The North Dakota Supreme

Court's Judgment is clear. This Court has been ordered to award costs to MDU. This Court will follow the North Dakota Supreme Court mandate.

[65] Second, the MDU v. Behm decision is later in time than the Lenertz v. City of Minot decision. The opinion and Judgment in the Lenertz case were issued on February 21, 2019. The opinion and Judgment in the Behm case were issued May 16, 2019. This Court must assume that the North Dakota Supreme Court was aware of its earlier decision in Lenertz, and saw reason to distinguish the two cases. The Court will follow the Judgment that is later in time.

[66] MDU is awarded its appeals costs of \$545.00.

[67] IT IS THEREFORE ORDERED:

[68] Lavern Behm is awarded attorney's fees for all proceedings in connection with Chapter 32-15, NDCC, in the amount of \$17,940.00.

[69] Lavern Behm is awarded costs for all proceedings in connection with Chapter 32-15, NDCC, in the amount of \$48.00.

[70] MDU is awarded its appellate costs, as ordered by the North Dakota Supreme Court in its Judgment of May 16, 2019, in the amount of \$545.00. This amount is to be offset against the costs and fees awarded to Lavern Behm, and noted above.

[71] Costs and fees are therefore awarded to Lavern Behm in the total sum of \$17,443.00 (\$17,940.00 plus \$48.00 minus \$545.00).

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[72] Counsel for MDU shall prepare the necessary final Judgment for entry.

[73] February 7, 2020

/s/ Gary H. Lee

[74] Gary H. Lee, District Judge