

**IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA**  
Appeal Number: 28174

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MONTANA-DAKOTA UTILITIES CO., and OTTER TAIL POWER COMPANY,  
Plaintiffs and Appellees

v.

PARKSHILL FARMS, LLC, VERA R. PARKS, REUBEN PARKS, AND ORDEAN  
PARKS, Defendants and Appellants

and

WEB WATER DEVELOPMENT ASSOCIATION, INC., KERMIT PARKS, and  
ORION EUGENE PARKS,  
Additional Defendants

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APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, DAY  
COUNTY, SOUTH DAKOTA

THE HON. TONY PORTRA, PRESIDING

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APPELLANTS' BRIEF

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Attorney for the Appellants:

N. Bob Pesall  
PESALL LAW FIRM  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274

Attorneys for the Appellees:

Thomas Welk, and Jason Sutton  
BOYCE LAW FIRM  
P.O. Box 5015  
Sioux Falls, SD 57117  
(605) 633-2424

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## PRELIMINARY STATEMENT

References to the clerk’s certified record will be designated “CR” followed by the appropriate page number. References herein to the Circuit Court’s April 5, 2016 hearing on the Plaintiffs’ right to take will be designated “RTT” and references to the January 25 and 26, 2017 jury trial to value just compensation for the taking be designated “VT,”

each followed by the appropriate transcript or exhibit page number. Appellants in this matter will generally be referred to as “the Parks.” Appellees will generally be referred to as “the Utilities.”

### **JURISDICTIONAL STATEMENT**

This is an appeal from the Circuit Court’s Order Regarding Hearing on Plaintiffs’ Right to Take, and final Judgment(s) for Condemnation regarding four easements to be taken by right of eminent domain in Day County, South Dakota. The final judgments were entered by the Court on February 10, 2017. The Plaintiffs served Notice of Entry of these judgments on February 22, 2017. The Parks timely filed and served a Notice of Appeal on March 10, 2017. This appeal is brought as a matter of right pursuant to S.D.C.L. 15-26A-3 and 21-35-20.

### **STATEMENT OF LEGAL ISSUES**

I. In South Dakota eminent domain can only be exercised if the public has a right of actual use in the property taken. In this case the Utilities seek easements for which the public can be denied use. Can the Utilities take these easements by right of eminent domain?

The Circuit Court held that eminent domain could be used to take the easements.

- *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913)
- *In re One-Time Special Assessment by Northern States Power Co. in Sioux Falls*, 2001 S.D. 63, 628 N.W.2d 332
- *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131
- S.D.Const Art. 6 Sec. 13

II. In South Dakota eminent domain can only be exercised if the public has a right of actual use in the property taken. In this case the Utilities seek easements for which the public can be denied use. If the Utilities can take these easements by right of eminent domain, must the duration of the easements be limited to the duration of the public's right of use?

The Circuit Court held that the duration of the easement need not be limited to the duration of the public's right of use.

- *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913)
- *Basin Electric Power Co-op v. Payne*, 298 N.W.2d 385 (S.D. 1980)
- *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131
- S.D. Const. Art. 6 Sec. 13
- S.D.C.L. 21-35-10.1

III. In South Dakota delegated eminent powers can only be exercised by a utility company to the extent necessary for the public purpose intended. In this case, some easements taken for the project are limited to 99 years, while the easements sought from the Parks are perpetual. If the Utilities can take these easements by eminent domain, must they be subject to the same 99 year limit?

The Circuit Court held that the duration of the easements need not be limited to the duration of other similar easements in the same project.

- *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913)
- *Basin Electric Power Co-op v. Payne*, 298 N.W.2d 385 (S.D. 1980)
- *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131
- S.D. Const. Art. 6 Sec. 13
- S.D.C.L. 21-35-10.1

IV. When an issue is supported by the evidence and an instruction correctly setting forth the law is requested, the court should so instruct the jury. In this case, the Parks requested an instruction for the jury to consider the "most injurious use of the property reasonably possible under the easement." Should the Circuit Court have instructed the jury to consider the most injurious use reasonably possible?

The Circuit Court refused to instruct the jury to consider the most injurious use of the property reasonably possible under the easement.

- *State v. Miller and Walsh*, 2016 S.D. 88, 889 N.W.2d 141
- *Kuper v. Lincoln-Union Electric Company*, 557 N.W.2d 748 (S.D. 1996)
- *Barney v. Burlington Northern Railroad Company, Inc.*, 490 N.W.2d 726 (S.D. 1992)
- *County of San Diego v. Bressi*, 184 Cal.App.3d 112 (Cal.App. 1986)

## **STATEMENT OF THE CASE AND FACTS**

### **I. Statement of the Case**

This is an appeal from proceedings in Day County Circuit Court, in the Fifth Judicial Circuit, before the Hon. Tony Portra. In late 2015, the Utilities commenced this action to take four easements on land owned by the Parks for the construction of an electric transmission line by right of eminent domain. (CR. 3-39.) The Parks contested the Utilities' right to take, the scope the taking, and the value of the easements. (CR. 53-55, 87-88.)

The Court conducted a hearing on the right to take and the scope of the taking on April 5, 2016. The Court issued a Memorandum Decision authorizing the taking as requested by the Utilities, without modifying its scope, and adopted the Utilities' proposed Findings of Fact and Conclusions of Law on June 6, 2016, and an Order authorizing the taking on August 5, 2016. (CR. 235, 247, 611).

The Court conducted a jury trial to determine just compensation for the easements on January 25 and 26, 2017. At that trial, the jury determined just compensation for each of the four easements to be taken. (CR. 1147.) On February 10, 2017 the Court issued four separate judgments for condemnation, one for each easement taken, incorporating the values determined by the jury. (CR. 1328-1355.) The Utilities served Notice of Entry for the judgments on February 22, 2017. (CR. 1356). The Parks timely filed and served their Notice of Appeal on March 10, 2017. (CR. 1438).

### **II. Statement of the Facts**

The Utilities in this case seek to take easements across land owned by the Parkses for the purpose of constructing an electric transmission line. (CR. 3.) This line is commonly referred to as the Big Stone South to Ellendale or BSSE project. (CR. 3). The idea to construct the line came from the Midwest Independent Service Operator (MISO). (RTT Transc. p. 23.) MISO is an regional transmission organization of which the Utilities in this case are members. (RTT Transcript p. 100, 102) MISO was formed as a result of Federal Energy Regulatory Commission (FERC) Orders 888 and 889. (RTT Transcript pp. 100, 163, 168.) Because the Circuit Court based some of its decisions on the legal relationship between the Utilities, MISO, and FERC Orders 888 and 889, it is necessary to explain that relationship before discussing the easements sought, the BSSE line, and facts surrounding the takings in this case.

**a. The Utilities, MISO, and FERC**

FERC Orders 888 and 889 require certain utility companies to provide “open access” to their transmission facilities. (RTT Transcript pp. 167-168.) Prior to FERC Orders 888 and 889, those utility companies could be vertically integrated, meaning power could be produced, transmitted, and delivered to the customer by the same company, and other generators and consumers could not demand to use those transmission lines. (RTT Transcript pp. 163, 167.)

Through FERC Orders 888 and 889, the FERC ordered a de-integration of the electric utility companies under its jurisdiction to provide “open access” to their transmission networks for multiple generation sources (RTT Transcript pp. 119, 163).

MISO was formed as a result of these FERC orders. (RTT Transcript pp. 100, 168.) MISO's purpose is to manage the "open access" transmission system owned by its members, and provide an "energy market" for the sale of energy from generation to load centers. (RTT Transcript p. 101-102). In the case of MISO, "open access" does not mean automatic or identical access, because each proposed interconnection is evaluated on a case-by-case basis by MISO. (RTT Transcript p. 141-142.) Each connection is governed by a separate agreement, and each agreement is specific to each project. (RTT Transcript pp. 119 and 142.) Renewable generation sources are treated differently from other generation sources. (RTT Transcript p. 162.)

The relationship between the Utilities and MISO is governed by certain Terms of Agreement (TOA) which are incorporated into the larger MISO governing instrument, the MISO Tariff. (RTT Exhibits 34 and 38; CR. 266-610.) The MISO Tariff, as a whole, governs MISO activities, its operation as an energy marketplace, and its relationship with its members. (RTT Transcript pp. 117-118; RTT Exhibit 38.) The MISO Tariff must be filed with, and is subject to approval by the FERC. (RTT Transcript p. 117.)

By its terms the TOA expire after thirty years, subject to ongoing five-year renewal provisions which can be exercised at the discretion of MISO's members. (RTT Exhibit 34, p. 141; CR. 443.) The Utilities may withdraw from MISO upon providing appropriate notice to MISO, and for certain members, by obtaining approval by the FERC. (RTT Exhibit 34, pp. 189-190; CR. 272-273.)

The MISO Tariff requires MISO members to offer transmission service to all "Eligible Customers" on a non-discriminatory basis. (RTT Exhibit 34, p. 151; CR. 453.)

MISO maintains functional control over the transmission lines of its members. (RTT Transcript p. 133; RTT Exhibit 34, p. 81; CR. 146.) MISO also engages in expansion planning for the transmission line network it oversees. (RTT Transcript p. 126; RTT Exhibit 101.)

**b. The BSSE Transmission Line**

The BSSE Transmission Line is one of several expansion proposals developed by MISO through its transmission expansion planning process. (RTT Exhibit 101.) The BSSE line would be owned by the Utilities, and would run from a substation near Ellendale, North Dakota, to a substation near Big Stone City, South Dakota. (RTT Exhibit 101, p. 30.) The Utilities intend to construct the line as a series of steel monopole towers, spaced 700 to 1,200 feet apart, along which three bundled conductor lines would run, together two smaller shielding and fiber optic wires. (RTT Transcript pp. 46-49, RTT Exhibit 1B, pp. 89-90.)

The BSSE Transmission Line would be a bulk transmission facility. (RTT Transcript p. 13.) Bulk transmission lines are high voltage lines that do not directly serve customers. (RTT Transcript pp. 13-14.) Rather, they are designed to move large amounts of electrical energy from generation facilities in remote areas to consumers in load centers at other locations. (RTT Transcript pp. 156-157; RTT Exhibit 108 p. 1.)

The purpose of the BSSE Transmission Line is to move “mandated renewable energy from the Dakotas to major 345kV transmission hubs and load centers,” (RTT Exhibit 101, p. 30.) and “add capacity to the overall [MISO] system.” (RTT Transcript

pp. 115-116.) While energy can flow in either direction on a bulk transmission line, the general flow of energy for the BSSE Transmission line will be from northwest to southeast, or from North Dakota towards Minnesota. (RTT Transcript pp. 97-98; RTT Exhibit 1B p. 731.)

### **c. The Takings Case**

In late 2015, the Utilities executed resolutions of necessity and commenced the current action to take easements across land owned by the Parkses by right of eminent domain. (CR. 3-7; 11-16.) The easements taken by the Utilities would be perpetual easements, held in fee simple. (RTT Exhibits 28-31.<sup>1</sup>) The Utilities would be free to sell the easements to third parties, whether or not those parties were members of MISO or agreed to provide public access. (RTT Transcript pp. 78-79.)

The easements would be 150 feet wide, “for the purpose of constructing, operating, [and] maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across” the Parkses’ property. (RTT Exhibits. 28-31, p. 2) The rights taken under the easements would not be specific to the BSSE facility as proposed by the utilities, but would include the rights to “construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures and equipment relating to such electric line facility ... through, over, under and across” the Parkses’ land. (Id.)

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1 RTT Exhibits 28-31 are identical to the final Judgment(s) for Condemnation issued by the Circuit Court. To avoid repetition, only copies of the Judgments have been included in the appendix.

Approximately ten miles of the BSSE line would lie in North Dakota. (RTT Transcript p. 77.) Easements taken in North Dakota are limited to a term of 99 years by state statute. (Id.) The Utilities did not determine whether the project could be built if 99 year easements were also taken in South Dakota. (RTT Transcript p. 78.)

Vera, Ordean, and Reuben Parks are family farmers who, through Parkshill Farms, LLC, have owned the parcels at issue since the late 1950s. (RTT Transcript pp. 182-183, 189.) These parcels are part of a larger family farming operation in Day County that covers approximately 3,713 acres. (VT Transcript Volume I p.53; VT Exhibit 1.)

In their Answer, the Parksese contested the taking (CR. 53-54). The Parksese also sought to limit the scope of any easements taken “to a term of 99 years or for so long as the [easement] remains in continuous public use” as a 345kV transmission line. (CR. 87.)

The Circuit Court conducted a hearing on the right to take and the scope of the taking on April 5, 2016. After the hearing, the parties submitted proposed findings, conclusions, and objections. (CR. 176-204; 215-216; 217-218.) On June 6, 2016, the Circuit Court adopted the Findings of Fact and Conclusions of Law proposed by the Utilities, and affirmed the Utilities’ claimed right to take by eminent domain. (CR. 235-246.) On the issue of public use, the Court concluded that the public had a right to access and use the easements because the Utilities were members of MISO, and the MISO tariff provided for “open access” subject to regulatory oversight by MISO.<sup>2</sup> (CR. 240, 243.)

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2 The Circuit Court categorized its conclusion that a public right of use existed as a finding of fact, but it is more properly designated as a conclusion of law.

On the issues of the scope and public necessity of the easement, the Court concluded that the Utilities had made determinations of necessity which were subject to substantial deference absent an abuse of discretion, fraud or bad faith, and that the easements taken should include all terms and conditions proposed by the Utilities. In so doing, the Court denied the Parks'es' motion to limit the duration of the easements either to the time of public use or the 99 years applied in North Dakota. (CR. 243-245.)

A jury trial was conducted to determine just compensation for the taking on January 25-26, 2017. At trial, the Parks'es presented testimony from themselves, a local sprayer pilot named Doug Hansen, and real estate appraiser Otto Spence. Together they testified at length about the impact the easements and the proposed line would have on their farming practices, the rights that would be taken, risks which would be created and the impact these would have on the value of their farm if those rights were exercised by the Utilities or their successors. (VT Transcript pp. 75-101, 118-120, 131-137, 153-189). Mr. Spence appraised the total value of all four easements at \$840,000. (CR. 1312; VT Transcript Volume I pp. 104, 188.)

For their case in chief, the Utilities presented testimony from Al Koekeritz, their project manager, Dr. Daniel Humburg, an agricultural engineering professor from SDSU, and Brad Johnson, another real estate appraiser. Mr. Koekeritz and Dr. Humburg gave extensive testimony regarding the line as they expected it to be constructed by the Utilities, and the limited impact they felt it would have on farming practices. (VT Transcript Volume II pp. 8-11, 15-18, 21-40, 61-84.) Mr. Koekeritz generally described the facility as a series of steel monopole structures with concrete foundations. (VT

Transcript Volume II pp. 10-11.) Mr. Koekeritz did not claim that any of the “structures, poles ... crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures and equipment” described in the easement would actually be constructed. He specifically stated “there will not be any [guy wires]” (VT Transcript Volume II, p. 21.) He further testified that he did not expect the Utilities to exercise their right to sell, remove, or rebuild the line. (VT Transcript Volume II, p.47-48.) Dr. Humburg presented a series of detailed slides depicting how specific farm implements could be used around the facility as the Utilities intended to construct it. (CR. 1192-1226.) Brad Johnson appraised the total value of the easements taken at \$73,097. (CR. 1191.)

On cross examination, Mr. Koeckeritz acknowledged that the easements to be taken included provisions for guy wires, support buildings, and other fixtures which were a not part of the project as the Utilities planned to construct it. (VT Volume II pp. 45-46). Mr. Koeckeritz also acknowledged that any subsequent owners of the easements would have the opportunity to remove the original facility and install different fixtures. (VT Transcript Volume II, pp. 45-46).

During the settlement of instructions, the Court considered the Parkses’ Proposed Final Jury Instruction No. 6. (CR. 1110.) This proposed instruction, in relevant part, instructed the jury to “consider the most injurious use of the property reasonably possible under the easement.” The Court rejected the instruction. (VT Transcript Volume II, pp. 169-170.)

Later, during closing argument, the Utilities relied on their witnesses’ testimony regarding the limited impact the line would have as they specifically intended to build

and maintain it. (VT Transcript Volume II, pp. 182-183) The Utilities minimized the loss of rights, likening the towers to a rock pile or “just one more thing to work around.” (VT Transcript Volume II, p. 184.) They contended that “you can farm under [the line] and there’s not a big risk.” (VT Transcript Volume II, p. 183.) They contended that the odds against the rights to remove and reconstruct the line ever being exercised were “a million to one.” (VT Transcript Volume II p. 183.)

The Jury ultimately awarded \$95,046.10 in total as just compensation for the taking of all four easements. (CR. 1147)

## **ARGUMENT**

South Dakota applies an “actual public use” standard for takings by right of eminent domain under S.D.Const. Art. 6 Sec. 13. *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913). At the time our state constitution was drafted, the drafters were openly suspicious of the delegation of eminent domain powers to corporations. Mr. Moody, a delegate to the convention of 1885, even went so far as to assert “railroad corporations are, I believe, about the only corporations upon which the Legislature can confer the right which exists in the state, the right to exercise eminent domain.” 1 Dakota Constitutional Convention (1885), 294 (Doane Robinson ed., Huronite Prtg. Co.1907). This would be due in part to the fact that the public’s right to use the railroads, and the railroads’ right to construct their lines, were enshrined in the constitution itself. S.D.Const. Art. 18 Sec. 15-17. As far as the undersigned counsel can determine, our “actual public use” standard has never been

applied to determine whether an electric utility can take easements for the purpose of constructing a bulk transmission line.

Against that background, the Parksés appeal four errors by the Circuit Court. First, the Circuit Court erred by allowing the Utilities to take the requested easements by right of eminent domain. Second, the Circuit Court erred by failing to limit the duration of any easements taken to the duration of actual public use. Third, the Circuit Court erred by failing to limit the duration of any easements taken to 99 years. Fourth, and finally, the Circuit Court erred by denying the Parksés' Requested Final Jury Instruction No. 6. regarding the "most injurious use."

**I. The Utilities cannot take the easements by right of eminent domain.**

**a. The standard of review**

This is an eminent domain case. The power of eminent domain is an inherent right of the state, subject to the protections afforded by S.D.Const. Art. 6 Sec. 13. *Darnall v. State*, 108 N.W.2d 201, 203 (S.D. 1961.) The State has delegated the limited use of that right to certain utility companies through S.D.C.L. 49-34-4 and 49-34-8. The question of whether the easements desired by the Utilities in this case may be lawfully taken by right of eminent domain is therefore one of statutory construction and constitutional right. Issues involving statutory interpretation and the application of constitutional rights are questions of law for which no deference is given to the Circuit Court. *Benson v. State*, 2006 SD 8, ¶39, 710 N.W.2d 131.

**b. The taking**

S.D. Const. Art. 6 Sec. 13 limits the taking of private property through eminent domain proceedings. It provides in relevant part, “Private property shall not be taken for public use, or damaged, without just compensation.” This section prohibits a private company from using eminent domain powers delegated to it by the legislature unless it can first satisfy a five-part test:

“... it devolves upon a party seeking, through delegated power, to exercise the right of eminent domain to show (1) That such party is within the class to whom the power has been delegated. (2) That all conditions precedent have been complied with. (3) That the purpose for which the property is taken is one of the purposes enumerated in the statute. (4) That the property is to be taken for a public use. (5) That the property sought to be taken is necessary to the accomplishment of the public purpose intended.”

*Illinois Central*, 144 N.W. at 726, (internal quotations omitted).

These five points provide the outline by which the taking in this case should be examined. The Parks’ arguments regarding public use and the duration of the easement all fall within the context of this five point test.

The taking in this case appears to satisfy parts one through three of the *Illinois Central* Test. The legislature delegated limited eminent domain rights to electric utility companies such as the Utilities in this case through S.D.C.L. 49-34-4 and 49-34-8. The Utilities and the Circuit Court complied with the laws and rules of practice governing eminent domain proceedings set out in S.D.C.L. Chapter 21-35, so all conditions precedent appear to have been met. And, the purpose of the taking appears to be one of the purposes authorized by S.D.C.L. 49-34-4.

However, the taking in this case fails to meet the fourth and fifth elements of the *Illinois Central* test. The Fourth element addresses “public use.” There is a critical

distinction here between the “public purpose” approach applied under the federal Fifth Amendment, and the uniquely narrow definition of “public use” we apply under S.D.Const. Art. 6 Sec. 13.

Under the federal Fifth Amendment, a taking under eminent domain must be for a general “public purpose.” “[This] Court long ago rejected any literal requirement that condemned property be put into use for the ... public ... Rather, it has embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Kelo v. City of New London*, 545 U.S. 469, 479 (2005).

South Dakota does not follow the general public purpose rule. Instead, under S.D.Const. Art. 6 Sec. 13, we employ an actual public use requirement. “Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question.” *Illinois Central*, 114 N.W. at 728, (expressly distinguishing its decision from jurisdictions which required only “public benefit, utility, or advantage” to meet the public use requirement). “Thus we find that the matter that is controlling with the courts is not the necessity of the use, or even the fact of use, but the right of use [by the public].” More specifically,

“The controlling and decisive question is, have the public the right to its use upon the same terms as the person at whose instance the way was established? If they have, it is a public use; if they have not, it is a private one. If the owner can exercise the same kind of dominion over it as he does over other property owned by him, if he can close it up, if he can prohibit all or any part of the public from its use, then it is clear that its establishment would be private, and not public, and the right of eminent domain could not be invoked in its creation.”

*Id.*, at 729. Finally, “If [the thing built] may be used by the public generally, upon equal terms, not merely by permission but as a right, and if the [thing built] is subject to governmental control, under general laws ... then the use is a public one.” *Id.*

South Dakota reaffirmed its actual public use standard, and rejected again the public purpose standard articulated by the Supreme Court of the United States in *Kelo v. City of New London*, as recently as 2006:

“The issue of what constitutes a ‘public use’ has been a subject of frequent litigation. Recently in *Kelo v. City of New London* ... the United States Supreme Court concluded that a taking from one private party that will ultimately go to another private party complies with this standard as long as it ‘embraced ... the broader and more natural interpretation of public use as public purpose.’ However, the Court recognized that states were free ‘to impose public use requirements that are stricter than the federal baseline.’ South Dakota has consistently done so. In its interpretation of Article VI, section 13, this Court adopted the ‘use by the public test.’ This definition requires that there be a ‘use or right of use on the part of the public or in some limited portion of it.’”

*Benson*, 2006 SD 8, ¶42. (Internal citations and quotations omitted.)

The easements sought to be taken in this case do not meet the requirements South Dakota’s public use rule. The public does not have the right to use the easements, or the transmission line, on the same terms as the Utilities who would establish it. Functional control of the line is assigned entirely to MISO, and MISO can assess all requests for use on a case-by-case basis according to its own standards.

Notwithstanding MISO’s functional control, the Utilities still have ultimate control and can exercise the same dominion over the easement as they could any other property owned by them, because they would take the easements in fee simple. They could, if they desired, close it up and prohibit all or any part of the public from its use. They would be free to sell the easements to third parties who could do the same.

Easements belonging to railroad companies like Illinois Central Railroad Co. were open for public use as a matter of right under S.D.Const. Art. 18 Sec. 15. Our constitution attaches no similar right of public use to the transmission line easements sought in this case, or to the utility companies that would own them. The taking in this case does not, therefore, meet the public use requirement of S.D.Const. Art. 6 Sec. 13.

The Utilities may urge this Court to adopt the reasoning of the Circuit Court, which reached the opposite conclusion. But the Circuit Court erred in applying the public use rule. It concluded that members of the public will actually use the line, that a public right of use exists based upon the “open access” tariff which governs MISO, and that because the MISO Tariff is subject to FERC approval, it has the full force and effect of law. (Findings of Fact and Conclusions of Law, pp.6 and 9, citing *In re One-Time Special Assessment by Northern States Power Co. in Sioux Falls*, 2001 S.D. 63, ¶8, 628 N.W. 332.)

This conclusion is flawed for a variety of reasons. First, it assumes that the MISO “open access” Tariff, as required by FERC orders 888 and 889, and subsequently approved by the FERC creates a public right of use in the easements. This is incorrect because the FERC rules, and the MISO Tariff requirements which implement the rules, attach to the Utilities themselves, not to the easements which would be taken. FERC orders 888 and 889 were issued under the authority of the Federal Power Act sections 205 and 206 (16 U.S.C. 824 (d-e)) and require “public utilities” under its jurisdiction to provide “open access” service. *Transmission Access Policy Study v. Fed Energy*

*Comm'n.*, 225 F.3d 667, 682 (D.C.Cir. 2000), *aff'd. New York et al. v. Federal Energy Regulatory Commission et al.*, 535 U.S. 1 (2002).

But to qualify as an actual public use, the public's right must attach to the easement, not the utility company. "The test whether a use is public or not may be determined by the fact that, where the use is public, a trust attaches to the subject condemned for the benefit of the public." *Illinois Central*, at 729, quoting *Zircle v. Southern Ry. Co.*, 45 S.E. 802.

Nor can it be said that the "open access" rule would apply to all owners. The FERC does not have jurisdiction over all potential owners of the easements. Its reach is limited to those utilities transmitting electricity in interstate commerce. *Transmission Access Policy Study*, 225 F.3d at 691; 16 U.S.C. 824(b)(1). The Utilities may be subject to FERC jurisdiction, but nothing in the easements themselves binds them to use in interstate commerce. Because of this jurisdictional limitation, the Utilities could, if they choose, avoid FERC Orders 888 and 889 by withdrawing from MISO and re-structuring their affairs to avoid transmitting electricity in interstate commerce. Or, since the Utilities would own the easements in fee simple, they could sell them to other parties who might do the same. Or, the agreements establishing MISO could be allowed to expire. In short, either the current owners or future owners would be free to close off the easements to the public in a variety of ways if they elect to do so. If the owner of the easement "can close it up, if he can prohibit all or any part of the public from its use, then it is clear that its establishment would be private, and not public and the right of eminent domain could not be invoked in its creation." *Illinois Central*, 144 N.W. at 729.

Finally, any public use purported to be guaranteed by FERC Orders 888 and 889 would be unenforceable and thus illusory. Members of the public are prohibited from bringing actions in court to enforce rights under FERC order 888 and 889 if they feel they are being treated unfairly. 16 U.S.C. 824v(b). And, from a more practical perspective, the interconnections to and from lines like the BSSE Transmission line cannot even be disclosed to the general public. 18 C.F.R. 388.113.

In addition to failing to provide a right of actual public use, the taking in this case also fails to meet the fifth element of the *Illinois Central* test. Under this final element, the Court is empowered to determine, from a constitutional perspective, whether “the particular property sought to be taken is necessary to the accomplishment of the public purpose intended.” *Illinois Central*, 144 N.W. at 726. While the Court in *Illinois Central* deferred to the legislature on the question of “public necessity” in the context of whether the public had practical need of the project, it did not reach the question of whether the taking as proposed exceeded what was “necessary to the accomplishment of the public purpose;” that is, whether the scope of the taking exceeded that which was necessary to ensure the public’s right of use. *Id.*, at 728. In this case, the Utilities seek perpetual easements when the public’s right of use is not perpetual. And within those easements, they seek the rights to install fixtures they do not intend to construct, and a right to remove and replace those fixtures which they do not intend to exercise. If the Utilities have no intention of exercising these rights, they cannot be said to be “necessary for the public purpose intended.”

The Utilities may argue, and the Circuit Court held, that the Utilities are entitled to substantial deference on the “necessity” element articulated in part five of the *Illinois Central* test, because S.D.C.L. 21-35-10.1 states that “a finding of necessity by the plaintiff, unless based upon fraud, bad faith, or abuse of discretion, shall be binding on all persons.” This contention is flawed, and the Circuit Court erred for several reasons.

First, such an interpretation would deprive the fifth element of the *Illinois Central* test of any practical meaning. Second, it equates “a finding of necessity” under S.D.C.L. 21-35-10.1 with the determination of what is “necessary to the accomplishment of the public purpose intended” under part five of the *Illinois Central* test. The two are not the same.

The cases which have applied the deferential standard have done so when considering whether the public actually needs the project, or when the physical dimensions of the taking are challenged. Under those circumstances,

“[a] broad discretion is necessarily vested in those to whom the power of eminent domain is delegated, in determining what property is necessary for the public purpose, with respect to the particular route, line or location of the proposed work or improvement, and the general rule is that the courts will not disturb their action in the absence of fraud, bad faith, or gross abuse of discretion.”

*Basin Electric Power Cooperative v. Payne*, 298 N.W.2d 385, 386 (S.D. 1980).

This case is different because it does not deal with public need for the project, or the practical needs that support the physical dimensions of the taking. At issue in this case is the duration of the taking, and whether it is necessary to take a perpetual easement when the public’s right of use is not perpetual. Lewis’ treatise on eminent domain, relied on by the Court in *Illinois Central*, recognized this distinction, noting that while actual

public need was not generally determined by the Court, “[s]ome courts have held that, in order to uphold an exercise of eminent domain, a necessity must exist for its exercise, in order to accomplish the purpose sought, and that this question of necessity is in some way an element in determining whether the taking is for a public use.” John Lewis, *A Treatise on the Law of Eminent Domain in the United States*, §255 (3<sup>rd</sup> Ed., Chicago Callaghan & Co. 1909).

The legislature, in creating S.D.C.L. 21-35-10.1, did not refute Lewis’ treatise, did not deprive the Court of its authority to consider necessity for the public purpose intended in this context, and did not deprive property owners of the protections part five of the *Illinois Central* test affords. It could not. “The legislature is not authorized to restrict the language or take from the citizen the protection the constitution has thrown around him and his property.” *Hurley v. State*, 143 N.W.2d 722, 729 (1966). But read in context with other statutes, S.D.C.L. 21-35-10.1 plainly relates to those more practical findings of physical scope and public need for which the legislature is best suited.

S.D.C.L. 21-35-1 applies to a variety of potential condemnors, most of whom would obtain their specific authority to condemn property from other sections of the code. Those individual condemnors, however, are still responsible for complying with the conditions imposed by the specific statutes under which they are invested with the privilege of taking property.

In the context of a utility company, that privilege is invested through S.D.C.L. 49-34-4, to the extent “necessary for the construction and operation of its business,

including ... power lines ... and other conveniences reasonably necessary to accomplish the objects of its incorporation.”

It is the determination of necessity “to accomplish the objects of its incorporation” under S.D.C.L. 49-34-4 which is afforded deference by S.D.C.L. 21-35-10.1, not necessity “to accomplish the public purpose intended” under S.D.Const. Art. 6 Sec. 13. To interpret the statute differently would deprive the public of the constitutional protections articulated under part five of the *Illinois Central* test. “If a statute can be construed so as not to violate the constitution, that construction must be adopted.” *Benson*, 2006 SD 8 at ¶40.

Even if the necessity under part five of the *Illinois Central* test did turn on abuse of discretion, fraud or bad faith, abuse of discretion is present in this case. “A choice to condemn must grossly violate fact and logic or be wholly arbitrary to support a finding of abuse of discretion.” *City of Rapid City v. Finn*, 2003 SD 97, 19, 668 N.W.2d 324. The Utilities seek to take a variety of rights they have no intention of using. The description of the project given by the Utilities, both at the hearing on the right to take and at trial, included only a set of steel monopoles on concrete foundations, connected by three conductors and some smaller communication and shielding lines. The Utilities claim no intent to construct, and there is no evidence in the record to suggest a need to install the guy wires, crossarms, cables, supports, counterpoises or other fixtures described by the easement. The same is true with the right to rebuild, relocate or remove the equipment installed. The Utilities contend the likelihood this right would be exercised is “a million

to one.” Claiming that it is necessary to take rights that will not be exercised is grossly violative of fact and logic.

Because the taking of a perpetual easement, with all of the rights requested by the Utilities fails to meet both the fourth and fifth elements of the *Illinois Central* test, the Circuit Court should have concluded that they cannot exercise a right to take those easements by eminent domain in this case.

**II. If the Utilities can take the easements by right of eminent domain, the duration of the easements must be limited to the duration of the public’s right of use.**

**a. The standard of review**

The Parks also appeal the Circuit Court’s denial of their request to limit the duration of any easements taken to that period of time for which the public has a right of use. This request was based on the constitutional limitations on takings provided by S.D. Const. Art. 6 Sec. 13, particularly as they are set out in parts four and five of the *Illinois Central* test. This too is a question regarding the application of a constitutional right under S.D.Const. Art. 6 Sec. 13, for which the standard of review is de novo. *Benson*, 2006 SD 8 at ¶39.

**b. The taking must be limited to the duration of the public use**

S.D.Const. Art. 6 Sec. 13 provides constitutional limits to takings by right of eminent domain. It does not specify how exactly the Courts must approach the enforcement of its limitations. However, “it is generally held that a constitutional prohibition against taking or damaging private property for public use without just

compensation therefor is self-executing, even though the method of ascertaining such compensation is left for legislative determination.” *Hurley*, 143 N.W.2d at 729. The Court has the inherent power to bring these constitutional protections into effect. *Id.*

Where an easement would be taken by right of eminent domain, the Court must apply the provisions of the *Illinois Central* test, set out at length above, to determine the constitutionality of that taking. Of particular importance for this issue are, again, parts four and five of that test.

In the context of a railroad easement, like the one taken in the *Illinois Central* case, the public’s right of use is protected in perpetuity by S.D.Const. Art. 18 Sec. 15. In this case the public’s right of use, if one exists at all, is not perpetually and constitutionally protected. It exists only so long as the owner of the easement is a member of MISO or subject to the FERC “open access” rule. The sale of the easement to a nonmember, or unregulated third party, or a change in the MISO Tariff, or a change in the governing FERC rules would all cause that right to evaporate.

If an easement taken by eminent domain must be subject to a right of use by the public, and limited to the extent necessary for its public purpose, it follows that if the public’s right of use is not perpetual, the easement cannot be perpetual either.

Assuming, for the purpose of argument, that a public right of use exists at all, the Circuit Court should therefore have determined that the duration of the easements taken must be limited in time to to the duration of the public’s right of use.

Here again the Utilities may argue, and the Circuit Court held that the utilities are entitled to substantial deference on the “necessity” element, and that a perpetual easement

should be allowed. The reasons why this contention fails, and the Circuit Court erred, are set out at length under Issue I, above. In short, constitutional necessity for a public purpose under S.D.Const. Art. 6 Sec. 13 and the *Illinois Central* test is different than “necessity to accomplish the objects of its incorporation” under S.D.C.L. 49-34-4 and 21-35-1. And, deference in this context would render part five of the *Illinois Central* test without meaning.

Even if necessity turned on the presence or absence of an abuse of discretion by the utilities, the result would be the same. The taking of a perpetual easement in South Dakota for a public use, when the public’s right of use is not perpetual, is grossly violative of facts and logic and constitutes abuse of discretion. *Finn*, 2003 SD 97 at ¶19.

**III. If the Utilities can take the easements by eminent domain, the duration of the easements must be limited to 99 years.**

**a. The standard of review**

The Parksés also appeal the Circuit Court’s denial of their request to limit the duration of the easements taken to a term of 99 years, because this was sufficient duration for other, similar easements taken for the same project in North Dakota. This request was again based on the constitutional limitations on takings provided for by S.D. Const. Art. 6 Sec. 13, specifically in part five of the *Illinois Central* test. Since this is also a question regarding the application of a constitutional right under S.D.Const. Art. 6 Sec. 13, the standard of review remains de novo. *Benson*, 2006 SD 8 at ¶39.

**b. The easements taken must be limited to 99 years**

S.D.Const. Art. 6 Sec. 13 and part five of the *Illinois Central* test direct the Court to consider whether “the particular property sought to be taken is necessary to the accomplishment of the public purpose intended.” It follows that property which is not necessary to the accomplishment of the public purpose intended cannot be taken.

In this case, the Utilities have obtained easements similar to the ones sought from the Parkses along the roughly 163 mile route of the BSSE Transmission Line. These include easements along the roughly 10 miles of the line which would extend into North Dakota. North Dakota, by statute, limits the duration of the Utility Company easements to a term of 99 years.

The BSSE Transmission line is intended to connect substations near Ellendale, North Dakota and Big Stone City, South Dakota. After 99 years, the easements in North Dakota will terminate. Without easements in North Dakota, the purpose of the line cannot be accomplished. It follows, therefore that if the line serves a public purpose, it could not do so after 99 years.

Assuming again, for the purpose of argument, that a taking is permissible at all, the Circuit Court should have determined that the duration of the easement taken must be limited to the amount of time necessary to accomplish the line’s purpose. Since the purpose of the line is to connect a substation in North Dakota with a substation in South Dakota, and since the line’s easements terminate after 99 years in North Dakota, the Court should have determined that the period for which the easements are necessary in South Dakota likewise terminates after 99 years.

Once again the Utilities may argue, and the Circuit Court held, that the Utilities are entitled to substantial deference on the “necessity” element, and that since the anticipated duration of the line is longer than 99 years, the easement should be allowed to extend beyond 99 years. And once again such a contention must fail for the reasons set out under issues I and II, above. The public purpose is to interconnect with a substation in North Dakota. The projects ability to fulfill that purpose terminates with the North Dakota easements after 99 years.

Even if necessity turned on the presence or absence of an abuse of discretion by the Utilities, the result would be the same. The taking of an easement in South Dakota in perpetuity to support a project that is limited to 99 years in North Dakota is grossly violative of facts and logic and constitutes abuse of discretion. *Finn*, 2003 SD 97 at ¶19.

**IV. The Circuit Court should have instructed the jury to consider the most injurious use of the easements which is reasonably possible.**

**a. The standard of review**

This issue relates to a request for a jury instruction which was denied by the Circuit Court. The general standard of review for trial court decisions on whether to grant or deny a requested instruction is abuse of discretion. *State v. Zephier*, 2012 SD 16, ¶9, 810 N.W.2d 770. However, “[o]n issues supported by competent evidence in the record, the trial court should instruct the jury. . . . Failure to give a requested instruction that correctly sets forth the law is prejudicial error.” *Kuper v. Lincoln-Union Electric Company*, 1996 SD 145, ¶32, 557

N.W.2d 748. The instructions are reviewed as a whole, and the burden is on the challenging party to demonstrate prejudice. *Id.*

**b. An instruction on the “most injurious use” should have been given**

During the jury trial in this case, there was a marked difference between the rights which were to be taken under the easements and the rights which the Utilities claimed they would exercise in constructing and maintaining the BSSE Transmission line on the Parkses land. The easements, as described in exhibits 4 through 7, included a long list of rights to be taken, including the rights to:

“construct, operate, maintain, use, upgrade, build, rebuild, relocate, or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility ... through, over, under and across [the Parkses’ property].”

The easements would also take rights of ingress and egress, the removal of tress and limitations on the construction of new buildings.

During the trial, however, the Utilities’ case relied on testimony from Mr. Koeckeritz and Dr. Humburg to the effect that these rights would not be exercised, or would not be exercised in ways that significantly intruded upon the Parkses’ farming operation. They testified that the Utilities would only construct steel monopole towers on concrete foundations, connected by three large conductors, and some small shield and fiber-optic lines. Even though the easement included the right to install them, there would not be any guy wires, crossarms, cables, supports, counterpoises or other fixtures. Even though the easement included the right of entry on the property, physical intrusions onto the Parkses’ land would be kept to a minimum by the use of aircraft. Even though

the easement included the right to remove the proposed facility and install a completely different facility, this would not be done. Counsel for the Utilities argued in closing that the chances that chances of this happening were “a million to one” against it.

To address the distinction between the project as described, and the actual rights which would be taken under the easements, the Parks submitted Requested Jury Instruction No. 6. It provided as follows:

“The Landowners’ damages in this case include damages for all rights taken under the easement, not just those arising from the project proposed by the Plaintiffs. In considering damages for the rights taken under the easement, you must consider all damages, present and prospective, that will accrue reasonably from the taking of the easement, and in so doing must consider the most injurious use of the property reasonably possible under the easement.”

This language relating to the “most injurious use” is used in California. *County of San Diego v. Bressi*, 184 Cal.App.3d, 112, 123 (Cal.App. 1986); *Metropolitan Water Dist. of South California v. Campus Crusade for Christ*, 37 Cal.Rptr.3d 598 (Cal.App. 2005). Rhode Island has embraced a similar standard, “if compensation is to be just it must be measured by what the condemnor can do and not by what he intends to do, it being the rule that the damages are to be assessed on the most injurious method of construction that is reasonably possible.” *Hickey v. Town of Burrillville*, 713 A.2d 781 (R.I. 1998) citing *North Carolina State Highway etc. Comm'n v. Black*, 79 S.E.2d 778 (N.C. 1954) and Lewis, *Eminent Domain* (3d ed.) § 713. Oregon has done likewise, affirming a jury instruction that just compensation should be, “adequate to compensate the owners for all time to come for the most injurious use of the land taken reasonably probable.” *State By and Through State Highway Commission v. Hurliman*, 368 P.2d 724, 733 (Or. 1962). A similar rule has been applied in Idaho. *Powell v. McKelvey*, 56 Idaho

291, 53 P.2d 626, 632 (Idaho 1935) citing *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60 (Idaho 1911).

While the “most injurious use” language has not been expressly adopted in South Dakota, the principle that the trier of fact valuing a partial taking should consider the rights taken rather than the project proposed, is established. See eg. *State v. Miller and Walsh*, 2016 S.D. 88, 34, 889 N.W.2d 141, (holding that the trial court abused its discretion by instructing the jury to consider the diminution in value caused by the “project” rather than the “taking.”)

In the context of an easement taking, the consideration of the “most injurious use” is particularly important because the use of an easement will change over time. “It has long been held that the holder of an easement is not limited to the particular method in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible.” *Barney v. Burlington Northern*, 490 N.W.2d 726, 733 (S.D. 1992) quoting *Wash. Wildlife*, 329 N.W.2d 546 (Minn. 1983), overruled in part on other grounds, *Brown v. Northern Hills Regional R.R. Authority*, 2007 SD 49, ¶20, 732 N.W.2d 732.

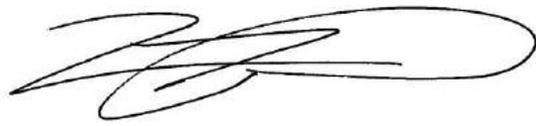
At the trial, the Utilities encouraged the jury to consider the project as planned, and to minimize consideration of the rights actually being taken. The jury’s final determination on just compensation leaned strongly in favor of the Utilities, suggesting that they embraced the Utilities’ argument, and valued the taking based on the project as it was proposed rather than according to the rights actually taken.

Ultimately, the “most injurious use” instruction was an accurate statement of the law, and supported by evidence at trial regarding the divergence between the Utilities planned facility and the rights taken. It was, therefore, prejudicial to refuse to provide that instruction.

The Utilities may argue, and the Circuit Court stated on the record, that the other instructions adequately addressed the issue. This contention fails in light of the instructions as they were actually given. While the Court, in Final Instruction No. 5, used the word “taking” rather than “project,” avoiding the error in *State v. Miller*, the confusion between the rights taken and the project as planned was reintroduced through Final Instruction No. 11. This instruction directed the Jury to consider “the land actually occupied by the electrical transmission facility.” In the absence of an instruction directing the jury to consider uses of the easement which would differ from the one planned by the Utilities, Instruction 11 effectively told the jury that they must base their valuation on the project as proposed. Standing alone, this would lead the jury to incorrectly apply the law, as no other instruction told the jury to also consider different potential uses in the future.

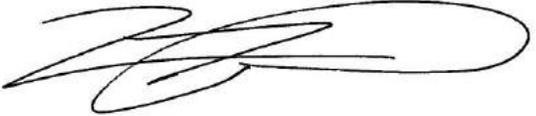
### CONCLUSION

Because the public will not have a right of use, the Circuit Court should be reversed, and the Utilities should be instructed on the public right of use.



If any such right of use did exist, because that right is not perpetual, the Circuit Court should be reversed and instructed on remand to limit the duration of the taking

either to the duration of the public's right of use, or to the 99 year limit imposed upon related easements in North Dakota. Thereafter a new trial to value just compensation should be conducted.

Finally, because just compensation must be based on the rights taken, not the project proposed, if a taking is allowed  and instructed on remand to conduct a new trial on the issue of just compensation, and to instruct the jury to consider the most injurious use reasonably possible of the rights taken.

**REQUEST FOR ORAL ARGUMENT**

The Parksres respectfully request the opportunity to present oral argument.

Respectfully submitted this 24<sup>th</sup> day of May, 2017

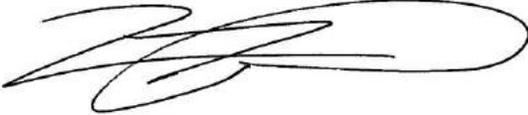
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N. Bob Pesall  
Attorney for the Defendants/Appellants  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274

**CERTIFICATE OF COMPLIANCE**

Pursuant to S.D.C.L. 15-26A-66(b), the undersigned attorney certifies that the foregoing brief complies with the statutory font, character, and volume limitations, containing 8,137 words and 40,870 characters.

Dated this 24<sup>th</sup> day of May, 2017.



**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing **Appellants' Brief** was served upon the following individuals by electronic mail this 24<sup>th</sup> day of May, 2017:

Thomas Welk, Attorney for the Utilities  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
TJWelk@boycelaw.com

And that two true and correct copies of the same were further served upon the following individuals by first class mail on the 24<sup>th</sup> day of May, 2017:

Jeff Schiley  
14944 428A Ave.  
Bristol, SD 57219

WEB Water Development Association. Inc.  
38456 W. US Hwy. 12  
P.O. Box 51  
Aberdeen, SD 57402

Kermit Parks  
42783 146<sup>th</sup> St.  
Webster, SD 57274

Estate of Orion Parks  
Suree Parks, Personal Representative  
42765 147<sup>th</sup> St.  
Bristol, SD 57219

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N. Bob Pesall, Attorney

# APPENDIX

## MDU et al. v. Parkshill Farms, LLC et al. Appeal Number 28174

1. Verified Petition for Condemnation	AP.1
2. Answer to Petition, Request for Hearing	AP.9
3. Motion to Limit Scope of Easement	AP.12
4. April 5, 2016 Hearing on “Right to Take” Transcript (Relevant Portions)	AP.14
5. “Right to Take” Exhibit 1B (Relevant Portions)	AP.49
6. “Right to Take” Exhibit 34 (Relevant Portions)	AP.53
7. “Right to Take” Exhibit 101 (Relevant Portions)	AP.57
8. “Right to Take” Exhibit 108 (Relevant Portion)	AP.59
9. Memorandum Decision on Plaintiff’s Right to Take	AP.60
10. Findings of Fact and Conclusions of Law (Regarding Right to Take)	AP.70
11. Order Regarding Hearing on Plaintiffs’ Right to Take	AP.82
12. Jury Trial Volume I Transcript (Valuation Trial, Relevant Portions)	AP.84
13. Jury Trial Volume II Transcript (Valuation Trial, Relevant Portions)	AP.161
14. Valuation Trial Exhibit 1	AP.223
15. Defendants’ Requested Final Jury Instruction No. 6	AP.224
16. Verdict Form (Valuation Trial)	AP.225
17. Judgment for Condemnation of Parcel 1	AP.227
18. Judgment for Condemnation of Parcel 2	AP.234
19. Judgment for Condemnation of Parcel 3	AP.241
20. Judgment for Condemnation of Parcel 4	AP.248

STATE OF SOUTH DAKOTA     )  
  :SS  
COUNTY OF DAY             )

IN CIRCUIT COURT  
  
FIFTH JUDICIAL CIRCUIT

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

Civ. 15 - **67**

Plaintiffs,

VERIFIED PETITION FOR  
CONDEMNATION

vs.

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS; ORDEAN  
PARKS; JEFF SCHILEY,

Defendants.

Montana-Dakota Utilities Co. and Otter Tail Power Company for their Verified Petition pursuant to SDCL Ch. 21-35, state and allege as follows:

1. Petitioners Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., a Delaware corporation, and Otter Tail Power Company, a Minnesota corporation, (collectively "Plaintiffs"), propose to construct a 345-kilovolt (kV) transmission line through North Dakota and South Dakota and a 345-kV Substation located near Ellendale, North Dakota. The transmission line will run to the Big Stone South Substation in Grant County, South Dakota near Big Stone City, South Dakota.

2. Plaintiffs have filed an application with the South Dakota Public Utilities Commission for the project, which is known as Big Stone South to Ellendale Project, on August 23, 2013. A construction permit was issued for the project on August 22, 2014.

3. The transmission line will enter South Dakota at the South Dakota-North Dakota border in Brown County. It will extend in a south and then easterly direction through portions of Brown, Day and Grant counties.

4. Plaintiffs have the right of eminent domain pursuant to SDCL 49-34-4.

5. Defendants Parkhill Farms, LLC, Ordean R. Parks, Reuben G. Parks, Kermit R. Parks and Vera R. Parks are the owners of record of real property located in Day County, South Dakota, which is legally described as follows. Defendants Ordean R. Parks and Reuben G. Parks are the owners of record of the abandoned railroad right-of-way located in the West Half of the Southeast Quarter of this parcel. Defendants Kermit R. Parks and Vera R. Parks are the owners of record of the abandoned railroad right-of-way located in the Northeast Quarter of the Southwest Quarter of this parcel.

Parcel 121-57-32-B ("Parcel 1")

The South Half (S1/2) of Section 32, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota;

6. Defendant Parkhill Farms, LLC, is the owner of record of real property located in Day County, South Dakota, which is legally described as follows:

Parcel 121-57-33-B ("Parcel 2")

The Southeast Quarter (SE1/4) of Section 33, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota;

Parcel 121-57-35-C ("Parcel 3")

The Southwest Quarter (SW1/4) of Section 35, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota;

Parcel 120-57-01-D ("Parcel 4")

Government Lots 2, 3 and 4, and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) of Section 1, Township 120 North, Range 57 West of the 5th P.M., Day County, South Dakota.

7. The following are believed to have a property interest in the above properties:  
Parkhill Farms, LLC; WEB Water Development Association, Inc.; Kermit Parks;  
Reuben Parks; Vera Parks; Estate of Orion E. Parks; Ordean Parks; Jeff Schiley.

8. Plaintiffs know of no other persons claiming an interest in or having a lien on the property described above.

9. Plaintiffs have each determined by a condemnation designation and a resolution of necessity, copies of which are attached as Exhibits A-1 and A-2, that it is necessary to acquire permanent and temporary easements over the Defendants' real property for the construction and operation of the transmission line.

10. Plaintiffs have been unable to acquire the necessary easements by agreement with Defendants, and therefore seek by this Verified Petition to exercise its right of eminent domain.

11. The permanent and temporary easements sought to be acquired by Plaintiffs are described in:

Parcel 121-57-32-B ("Parcel 1") (Parkhill 526-531)  
Parcel 121-57-33-B ("Parcel 2") (Parkhill 336-339)  
Parcel 121-57-35-C ("Parcel 3") (Parkhill 342-345)  
Parcel 120-57-01-D ("Parcel 4") (Parkhill 348-351)

copies of which are attached as Exhibit B, C, D and E. Petitioners seek an easement for a single transmission line, as described in Exhibits B, C, D and E. These documents have been presented to the respective Defendants, but they have refused to sign them.

12. The easement sought to be acquired over Defendant Parkhill Farms, LLC, Ordean R. Parks, and Reuben G. Parks is depicted in Exhibit F and described as follows:

Parcel 121-57-32-B: ("Parcel 1")

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the South

Half of Section 32, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 32; thence North 00 degrees 50 minutes 43 seconds West, along the west line of said Southwest Quarter, a distance of 171.70 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.45 feet to the west line of the Southeast Quarter of said Section 32; thence continuing North 89 degrees 16 minutes 50 seconds East, a distance of 2639.46 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west line of the Southwest Quarter of Section 32 and said east line of the Southeast Quarter of Section 32.

13. The easement sought to be acquired over Defendant Parkshill Farms, LLC are depicted in Exhibits G, H, and I and are described as follows:

Parcel 121-57-33-B ("Parcel 2")

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southeast Quarter of Section 33, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 33; thence North 00 degrees 50 minutes 55 seconds West, along the west line of said Southwest Quarter, a distance of 165.82 feet; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.43 feet to the west line of said Southeast Quarter and to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.44 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southeast Quarter of Section 33.

Parcel 121-57-35-C ("Parcel 3")

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of Section 35, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of said Southwest Quarter of Section 35; thence North 01 degrees 02 minutes 05 seconds West, along the west line of said Southwest Quarter, a distance of 186.98 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2637.38 feet to the east line of said Southwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southwest Quarter of Section 35.

Parcel 120-57-01-D ("Parcel 4")

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of the Northwest Quarter and Government Lots 2, 3 and 4 of Section 1, Township 120 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet to the left and 75.00 feet to the right of the following described line:

Commencing at the northwest corner of said Government Lot 4 of Section 1; thence North 89 degrees 13 minutes 16 seconds East, along the north line of said Government Lot 4, a distance of 183.01 feet to the Point of Beginning of the line to be described; thence South 01 degrees 16 minutes 28 seconds East, a distance of 2995.76 feet to the south line of said Southwest Quarter of the Northwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said north line of Government Lot 4 and said south line of the Southwest Quarter of the Northwest Quarter of Section 1.

14. Pursuant to SDCL 21-35-11, Plaintiffs hereby offer to deposit with the Clerk of this Court the sum stated in its offer pursuant to SDCL 21-35-11, a copy of which is attached as Exhibit J, with costs to be paid to Defendants, as compensation for all of the property to be taken or damaged.

15. Plaintiffs hereby agree to pay separately for all damages to crops, roads, driveways, fences, and livestock caused by the construction or maintenance of the transmission line in the area of the permanent easement either during or after construction, as indicated in Exhibits B, C, D and E.

Wherefore, Plaintiffs pray for judgment as follows:

- (1) That judgment be entered against Defendants granting and appropriating the easement rights described above to Plaintiffs;
- (2) That a jury be empaneled under SDCL 21-35-1 for the purpose of determining the just compensation and damages that the respective Defendant is entitled to receive because of the taking and appropriation;
- (3) That judgment be entered pursuant to SDCL 21-35-19; and
- (4) For any other relief that the Court deems just and equitable.



**OTTER TAIL POWER COMPANY**

By: *Al Koeckeritz*  
Al Koeckeritz  
Its: Manager, Project Management

**VERIFICATION**

STATE OF MINNESOTA        )  
  :SS  
COUNTY OF OTTER TAIL    )

On this 2<sup>nd</sup> day of November, 2015, before me, the undersigned, a Notary Public in and for the State of Minnesota, personally appeared Al Koeckeritz, a person authorized to execute this Verified Petition by Otter Tail Power Company, a Plaintiff in the above-entitled proceeding; that affiant states that he has read the above and foregoing Verified Petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; and that his signature to the foregoing instrument and action is in good faith for the uses and purposes specified in this Verified Petition.

*Al Koeckeritz*  
Al Koeckeritz

Subscribed and sworn to before me  
this 2<sup>nd</sup> day of November, 2015.  
*Carol J. Kocher*  
Notary Public, Minnesota  
My Commission Expires: Jan. 31, 2020



STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

MONTANA-DAKOTA UTILITIES CO, AND  
 OTTER TAIL POWER COMPANY,  
 Plaintiffs,

vs.

PARKSHILL FARMS, LLC; WEB WATER  
 DEVELOPMENT ASSOCIATION, INC;  
 KERMIT PARKS; REUBEN PARKS; VERA  
 PARKS; ESTATE OF ORION E. PARKS;  
 ORDEAN PARKS; JEFF SCHILEY,  
 Defendants

**ANSWER TO PETITION, REQUEST FOR  
 HEARING BY PARKS HILL FARMS, LLC,  
 REUBEEN PARKS, VERA PARKS, AND  
 ORDEAN PARKS**

18 CIV 15-67

COME NOW PARKS HILL FARMS, LLC, REUBEN PARKS, VERA PARKS, AND ORDEAN PARKS, (The Parkses,) three of the above-named defendants, and in response to the Plaintiffs' Verified Petition for Condemnation allege and state as follows:

1. The Parkses deny each and every allegation set out in the Petitioners' Petition except as hereinafter admitted, denied, or qualified.
2. The Parkses are without adequate information to confirm or deny the allegations set out in paragraphs 1 through 3 of the Petition and therefore deny the same.
3. The Parkses deny that Petitioners have the right of eminent domain pursuant to S.D.C.L. 49-41-4 as set out in paragraph 4 of the Petition, and pursuant to S.D.C.L. 21-35-10.1 demand a hearing in Circuit Court on the petitioner's right to take.
4. The Parkses admit the allegations in paragraphs 5-7 of the Petition.
5. The Parkses are without adequate information to confirm or deny the allegations set out in paragraph 8 of the Petition and therefore deny the same.

6. To the extent that a response is applicable to paragraphs 9 through 15 of the Petition, the Parkses deny the same. Further, the Parkses specifically deny necessity exists as identified therein.

7. The Parkses further allege and state that the terms of the easement described in the Petition exceed those which would be reasonably necessary for the proposed transmission line.

8. The Parkses further allege and state that the proposed transmission line would not be a public use as required by S.D.Const. Art. 6 Sec. 13.

WHEREFORE, the Parkses pray for the following relief:

1. That pursuant to S.D.C.L. 21-35-10.1 discovery be permitted and a hearing be conducted on the petitioners' right to take, that the Court determine that the Petitioners lack such right, and that the matter be dismissed.
2. That, in the event that a taking is permitted herein, pursuant to S.D.Const. Art. 6 Sec. 13, and S.D.C.L. Chapter 21-35 a jury be empaneled for the purpose of determining just compensation and damages which the Parkses are entitled to receive.
3. That the Parkses be awarded all fees, costs, and attorney fees incurred herein as provided by law.
4. That the Court award the Parkses any other relief it deems just and equitable.

Dated this 17<sup>th</sup> day of December, 2015



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N. Bob Pesall, Attorney  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274  
bob@pesall.com

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing **ANSWER TO PETITION, REQUEST FOR HEARING BY PARKS HILL FARMS, LLC, REUBEN PARKS, VERA PARKS, AND ORDEAN PARKS** was served upon the following individual(s) by Odyssey Electronic Service this 17<sup>th</sup> day of December, 2015:

Jeffrey T. Sveen  
400 Capital Building  
415 South Main St.  
Aberdeen, SD 57401  
jsveen@sbslaw.net

Thomas Welk  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
TJWelk@boycelaw.com



---

N. Bob Pesall, Attorney

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

MONTANA-DAKOTA UTILITIES CO, AND  
OTTER TAIL POWER COMPANY,  
Plaintiffs,

**MOTION TO LIMIT SCOPE OF  
EASEMENT**

18 CIV 15-67

vs.

PARKSHILL FARMS, LLC; WEB WATER  
DEVELOPMENT ASSOCIATION, INC;  
KERMIT PARKS; REUBEN PARKS; VERA  
PARKS; ESTATE OF ORION E. PARKS;  
ORDEAN PARKS; JEFF SCHILEY,

Defendants

COME NOW PARKS HILL FARMS, LLC, REUBEN PARKS, ORDEAN PARKS, AND VERA PARKS, the above-named defendants, and pursuant to S.D.C.L. 49-34-4 move the Court to limit the scope of the proposed easement at issue in the above action to a term of 99 years or for so long as the same remains in continuous public use as a 345kKv transmission line. This motion is based upon the grounds that easements underlying other portions of the proposed line are limited to 99 years, and that no finding or resolution of necessity has been issued by either Plaintiff indicating that a term longer than 99 years is necessary for the project or at any time after the easement property ceases to be used for a 345Kv transmission line, as set out in the supporting affidavit of counsel, filed herewith.

Dated this 29<sup>th</sup> Day of February, 2016



N. Bob Pesall, Attorney  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274  
bob@pesall.com

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a true and correct copy of the foregoing **MOTION TO LIMIT SCOPE OF EASEMENT** was served upon the following individual(s) by Odyssey Electronic Service this 29<sup>th</sup> day of February, 2016:

Jeffrey T. Sveen  
400 Capital Building  
415 South Main St.  
Aberdeen, SD 57401  
jsveen@sbslaw.net

Thomas Welk  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
TJWelk@boycelaw.com



---

N. Bob Pesall, Attorney

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

Montana Dakota Utilities,  
Otter Tail Power Company,

18CIV15-50

18CIV15-77

18CIV15-67

Plaintiff,

Court Trial

vs.

Parks Hill Farm, LLC, Web Water  
Development Ass. Inc., Kermit Parks,  
Reuben Parks, Vera R. Parks, Estate  
of Orion E. Parks, Ordean Parks,  
Jeff Schiley,

Defendants.

Date & Time: April 5, 2016  
9:00 a.m.

Before: THE HONORABLE TONY L. PORTRA  
Circuit Court Judge  
P.O. Box 1087, Aberdeen  
South Dakota

Location: Day County Courthouse  
Webster, SD 57274

APPEARANCES

For the Plaintiffs: Thomas J. Welk  
Jason R. Sutton  
BOYCE LAW FIRM  
300 S. Main Ave.  
PO Box 5015  
Sioux Falls, SD 57117-5015

For the Defendants: N. Bob Pesall  
PESALL LAW FIRM  
809 W. Pipestone Ave., Ste. 11  
PO Box 23  
Flandreau, SD 57028

1 A. Correct.

2 Q. Generally speaking what is the project?

3 A. Well, generally the project is a 345,000 volt line  
4 intended to connect a new substation to be built at  
5 Ellendale, North Dakota, to a new substation under  
6 construction at, close to Big Stone City, South Dakota. We  
7 call that the Big Stone South 345-kV substation. It's  
8 approximately 163 miles long.

9 Q. And it is an electrical line transmission facility?

10 A. Yes, electrical transmission facility.

11 Q. Why don't you give the Court a little bit of a  
12 comparison as to what a 345-kV line compared to lines we  
13 might see in the country or in town. How does this line  
14 compare to the lines that we see in the ditch, in the  
15 country, or those that might go to a farmhouse or home in one  
16 of the towns of Webster or Aberdeen?

17 A. Okay. So we look at this -- generally the higher  
18 the voltage the more power you intend for that line to  
19 transmit. So a 345,000 volt line is a relatively large  
20 transmission facility. We would call it a bulk transmission  
21 facility. So a line generally intended to transmit bulk  
22 transmission, typically from that level of voltage you would  
23 connect to other facilities like at Big Stone will have a  
24 230,000 volt line that comes in there and steps down in there  
25 to other voltages, but it's a bulk transmission facility.

1 And usually, as you mentioned, how do we get to a home, for  
2 example? We would leave that facility perhaps going, as  
3 mentioned, the Big Stone 345 substation, from there a lower  
4 voltage transmission like a distribution substation at  
5 Webster or Aberdeen, wherever it might be, at that point in  
6 time we would then step down the voltage again from 230,000  
7 to 115,000 volts coming into that substation down to say  
8 20,000 volts or 24,000 volts into potentially a rural  
9 distribution system. And then from that distribution system  
10 we would come down the streets or all over the cities or  
11 through the rural area of a county and eventually land at a  
12 retail customer, a home or a business. And when we get to  
13 that retail customer then we would transform the voltage down  
14 to 122 or 240 voltage kind of network like a road network. A  
15 345-kV system would be like the interstate, lots of bulk  
16 transmissions would be like up and down the interstate. You  
17 get to an intersection of the interstate like Highway 12,  
18 that's like a low voltage transmission system, turn off onto  
19 Highway 12 would be like a lower voltage transmission  
20 facility, travel down the road to get to Webster or other  
21 communities. And at that point in time you're talking about,  
22 like, Webster being the distribution substation. So you  
23 would get to the distribution substation, and then from there  
24 you're basically talking about going down a county road. So  
25 just like a road network, the transmission system in the

1 has with another utility, and it recognizes both utilities as  
2 being utilities.

3 Q. In Exhibit 13 that is another certificate of  
4 authorization of a foreign corporation for MDU Resources  
5 Group issued by the Secretary of State of South Dakota  
6 indicating that MDU Resources Group, Inc., has been  
7 authorized to transact business in the state since June 27th,  
8 1935; is that correct?

9 A. Correct, that's the document.

10 Q. To your knowledge are Otter Tail Power and MDU  
11 Resources authorized as public utilities, to your knowledge,  
12 authorized to condemn real estate for the purposes of  
13 constructing electric transmission lines?

14 A. To my knowledge they are.

15 Q. Let's just give the Court a little bit of  
16 background of how the project was conceived. I know we're  
17 going to have another witness, but where did the idea come  
18 from to construct the project?

19 A. The idea came from the Midcontinent Independent  
20 System Operator, which we know as MISO, abbreviated as MISO.

21 Q. Again as you mentioned, Jason, will testify to the  
22 study side of it?

23 A. Essentially over a period of time MISO conducted  
24 some transmission planning studies leading up to their  
25 transmission expansion plan published in December of 2011,

1 Q. For our terms of monopoles and structures, are they  
2 same?

3 A. For our terms because the structures are going to  
4 be a monopole or single pole in most cases, we refer to them  
5 as the same on these specific parcels or intended to be a  
6 single pole structure.

7 Q. Let's turn back to Exhibit 1, the application, and  
8 to appendix H.

9 A. Okay.

10 Q. To give the Court some background as to the  
11 structures or poles themselves.

12 A. All right, I'm at appendix H.

13 MR. WELK: We'll wait until the court gets back to  
14 the appendix.

15 THE COURT: Okay.

16 Q. (BY MR. WELK) there's a structure on each one,  
17 what's that structure euphemistically called?

18 A. That structure in H-1 we call than an A frame  
19 structure. As mentioned, we have perhaps an application or  
20 two where we may use this but that's not the general intent  
21 of the line at this point in time.

22 Q. Are those type of structures used to create angles?

23 A. The H-1 structure, this structure itself would be a  
24 normal, what we would call an in-line tangent structure, just  
25 a straight structure ongoing use for straight line

1 installations.

2 Q. We see these in the country out here now but that's  
3 not going to be the predominant structure on this line?

4 A. Correct.

5 Q. What will be the predominant pole on this line?

6 A. In the next page, H-2 and H-3, those pages are  
7 generally the structure that will be along the line. Page  
8 H-1 is an in-line tangent structure. So if the line is  
9 straight we'll use the line, use the structure similar to  
10 this. And this was developed in 2013. And we're finalizing  
11 our design related to it. But that's the general theory or  
12 concept design. And then on H-3, that's generally a 90  
13 degree corner, where if you were coming from your right, the  
14 line would come from the right to the insulators that are  
15 sticking out to the right of the pole, and then it would turn  
16 the corner, it would come straight out of the page at you.  
17 So that would be a 90 degree corner structure.

18 Q. So how tall, what is the anticipated height of  
19 these structures or poles?

20 A. Again, we're finishing our design by 125 feet to  
21 approximately 155 feet.

22 Q. What do you call the things that are hanging on the  
23 poles?

24 A. So if you look at the structure on page, the H-2  
25 structure, you can see there's five what we call arms.

1 There's two on the top sticking out from the structure and  
2 then there's three as you move down the structure at  
3 different heights. And so the three arms that come down  
4 they're on the structure itself that have a string of  
5 insulators hanging off the end.

6 Q. That's the glass things we see?

7 A. Yes.

8 Q. So tell us about the lines again on the poles.

9 A. So the lines on the poles on the bottom three, on  
10 the end of the glass insulators, that's the conductor, the  
11 wire that transports the electricity itself. On top of the  
12 structure, the two arms on the top of the structure, they'll  
13 hold a shield wire. One of the shield wires will be steel.  
14 The other shield wire will be what we call an optical guide  
15 wire. So steel on the outside with fiber optic on the inside  
16 so we can communicate from the Ellendale substation to the  
17 Big Stone substation for relaying and line protection.

18 Q. What do you call the line where the electricity is  
19 going to be conducted? That's called a conductor?

20 A. Yes.

21 Q. What's the approximate circumference of the  
22 conductor lines?

23 A. Well, in our case on a higher voltage line you  
24 typically will do a bundle conductor, so two wires. So at  
25 the bottom of these string of insulators there would be, will

1 be a wire above and a second bundle or second wire below  
2 that. Specific wires are going to be twisted together so  
3 that even though you'll have two sets of wires for each phase  
4 with the three phases, the phases would be what hangs at the  
5 end of the insulator. The top set will be a set of twisted  
6 wires. And the bottom set will be a set of twisted wires.  
7 And they're going to be approximately, let's say each single  
8 wire will be about three quarters of an inch, and so maybe  
9 it's an inch and a half.

10 Q. What will the span be from structure to structure,  
11 or pole to pole?

12 A. The span is going to be about 700 feet to, I think  
13 maybe the longest might be 1100 or 1200 feet.

14 Q. So approximately how many structure per mile?

15 A. Five to six structures per mile depending on how  
16 the structure lays out with the terrain.

17 Q. Tell the Court how you will actually construct the  
18 pole. What is the physical construction process?

19 A. So the whole structure or just the pole itself?

20 Q. Well, the pole itself. Let's talk on a piece of  
21 land and how is this pole going to get on the land?

22 A. So assuming we really want to start with the  
23 foundation in this case. If we look at page H-2 or H-3,  
24 either one, you can see the surface of the ground. At the  
25 bottom of the structure there's a larger cylinder looking

1 the words preference in describing the desire the project had  
2 to have a permanent easement; is that right?

3 A. I haven't got my notes back from that, it could be.  
4 It could have been what I said.

5 Q. Now the project is, in fact, building ten miles of  
6 this line inside North Dakota; is that right?

7 A. That is correct.

8 Q. On each one of the parcels in North Dakota, that  
9 easement is limited to 99 years?

10 A. It is.

11 Q. It's still possible to build a project under those  
12 circumstances?

13 A. Our assessment with the project was going into all  
14 the requirements by the different states, and what we are  
15 allowed to do in the different states. So when we did an  
16 assessment of the project, South Dakota allowed us to have  
17 perpetual easements. And in North Dakota the law required us  
18 to have a 99 year easement. So when we assessed overall  
19 liability, we'll live with that for that ten mile section  
20 knowing we have perpetual easements in the state of South  
21 Dakota.

22 Q. Was there any specific aspect of the project that  
23 could not be constructed if an easement in South Dakota were  
24 limited to 99 years?

25 A. I don't understand that question. Could you

1 rephrase that?

2 Q. Is there any reason specific to this project, that  
3 the project could not be built if South Dakota easements were  
4 limited to 99 years?

5 A. I think the utilities would have to go back and  
6 reassess whether or not we'd be willing to build a line under  
7 that condition. It wasn't a condition that we went into the  
8 project having before us. We don't go and do all these what  
9 if's, there has to be a reason to decide we're going a head  
10 with the project.

11 Q. So you don't know?

12 A. I can't speak to that.

13 Q. The easements that you have been obtaining with  
14 respect to the other landowners, those that have signed those  
15 are going to be jointly owned by Montana Dakota Utility and  
16 Otter Tail Power?

17 A. Yes.

18 Q. As you mentioned, Exhibit No. 19, it spells out the  
19 easement is with Otter Tail Power, Montana Dakota Utilities,  
20 and the landowners that we're seeking the easement from. The  
21 easement, itself, would be owned in fee simple between those  
22 two?

23 A. Correct.

24 Q. Those two entities would then be able to sell the  
25 easements or the entire project to a different entity at a

1 future time?

2 A. At a future time, that's the way the easement is  
3 written.

4 Q. You would agree there's nothing in the easements or  
5 the proposed judgments that would require any future owner of  
6 that easement to maintain a membership in MISO?

7 A. The easement itself does not speak to any  
8 membership of MISO.

9 Q. And there's nothing in the easements or the  
10 proposed judgments that would require any third party owner  
11 to provide public access to the transmission line if it's  
12 constructed?

13 A. That is correct. The easement does not speak to  
14 that. The easement is for the line as it is.

15 Q. I'm going to direct your attention to Exhibit 39 or  
16 40. I have to see which one because I'm going to use  
17 plaintiff's version of the exhibit rather than my own in  
18 order to keep the record a bit smaller. If I could direct you  
19 to Exhibit 39, page eight.

20 A. Okay, I'm on page eight of Exhibit 39.

21 Q. Looking at the answer that you've given to  
22 interrogatory number 11, it begins with an objection,  
23 indicating that plaintiffs' object to the disclosure of  
24 information that is critical energy infrastructure  
25 information which is subject to restricted access by

1 talking about the flow of electricity. Is that the flow of  
2 electrons?

3 A. Yes.

4 Q. Is there anyway we can pick an electron that's at  
5 the Ellendale substation and identify exactly where that  
6 electron goes into as it results in someone's lights,  
7 lighting up this courtroom for instance?

8 A. No, that's not possible.

9 Q. Why not?

10 A. The electrical grid is comprised of so many  
11 generators and so many loads with numerous interconnections  
12 throughout the transmission and distribution system, that  
13 it's impossible to follow an electron from the point it is  
14 generated to the point where it's ultimately consumed.

15 Q. If an additional future substation is built that  
16 connects with this project, where could the electricity flow  
17 as a result of that substation?

18 A. That would depend on if the new substation is being  
19 built for a generator or loading.

20 Q. Let's talk generators first. What do you mean by  
21 generator substation?

22 A. If a generator wants to interconnect to the project  
23 and build a substation to connect the generator, it would  
24 inject additional power into this project. And what I would  
25 expect, again based on my experience with the studies, that

1 the flow from the new substation to Big Stone South may  
2 increase even given that the predominant direction of flow is  
3 from northwest to southeast.

4 Q. Can you provide the Court some examples of types of  
5 generators that could directly connect with this line?

6 A. Sure. Any type could interconnect to this line as  
7 long as it meets the requirements of the tariff requirements  
8 under the MISO requirements. And I think MISO is the  
9 Midcontinent Independent System Operator, as I mentioned  
10 earlier. The generators could be wind, gas, solar. It could  
11 be coal. It just depends on which generator the developer  
12 has interest in developing in this region.

13 Q. Now you also mentioned a load substation. What's  
14 the difference between a load substation and a generator  
15 substation?

16 A. As I mentioned earlier, the generator produces  
17 power, produces electrons needed to supply the customers. A  
18 load substation would be interconnected to serve the  
19 customers or consume energy at that location.

20 Q. Regarding the project, who has regulatory authority  
21 over access and use of the transmission line?

22 A. MISO.

23 Q. Who is responsible or what government agency is  
24 responsible for regulating MISO?

25 A. The Federal Energy Regulatory Commission or FERC.

1 Q. Before we get into the details of MISO, what role  
2 does the South Dakota Public Utilities Commission have as it  
3 relates to regulation of this line?

4 A. The South Dakota Public Utilities Commission is  
5 able to grant a facility permit to the construction of this  
6 project. And they also have the authority over the rates in  
7 which public utilities have in place for recovery of the  
8 costs from rate payers.

9 Q. Are those rate payers limited to the rate payers in  
10 South Dakota?

11 A. Are you speaking specifically through the South  
12 Dakota PUC?

13 Q. Correct.

14 A. Yes.

15 Q. So in layman's terms, when we all get our  
16 electricity bill, there's a bill that we have to pay, does  
17 the South Dakota PUC set the rates that affect what we all  
18 pay in our billings?

19 A. No. South Dakota customers, yes.

20 Q. And as part of that calculation through the various  
21 tariffs, is there a recovery of the cost of this project and  
22 other projects for South Dakota rate payers?

23 A. Yes, there is.

24 Q. Let's get in MISO in much more detail now. Explain  
25 to the Court generally your personal experience with MISO.

1           A.    MISO was formed back in 2001.  They are a nonprofit  
2 organization recognized by FERC as a regional transmission  
3 organization.  My experience directly with MISO has been  
4 working directly with their transmission planning personnel  
5 in the evaluation of studies, in the identification of future  
6 transmission projects on the system.

7           Q.    You said FERC, who is FERC?

8           A.    FERC is the Federal Energy Regulatory Commission.

9           Q.    You also said regional transmission organization,  
10 what is that?

11          A.    The regional transmission organization is, in this  
12 case is MISO.  That's a term that has a certain set of  
13 requirements that MISO has successfully met and has been  
14 approved by FERC.

15          Q.    Have you worked with MISO regarding it's planning  
16 activities?

17          A.    Yes, I have.

18          Q.    How long have you worked with MISO regarding  
19 transmission planning activities?

20          A.    Otter Tail joined MISO in 2002.  Since I've been  
21 working with Otter Tail since 2000, really the entire  
22 duration of my employment with Otter Tail it had been  
23 involved in planning with MISO.

24          Q.    What is MISO as an organization?

25          A.    Sure.  MISO is a regional transmission

1 organization, nonprofit organization that has several  
2 different functions. It's functions which come to mind for  
3 me is ensuring that the transmission system meets the current  
4 and future needs of the transmission system in a reliable  
5 fashion, and also operates an energy market to dispatch  
6 generation to load.

7 Q. How was MISO created?

8 A. It was created as a result of a FERC order.

9 Q. Who are the member of MISO generally?

10 A. Membership in MISO is really unlimited as long as  
11 you abide by the application requirements of the ongoing  
12 membership requirements of MISO. At this time I'm aware of  
13 transmission owners that are part of MISO. Generation  
14 developers, co-operatives, municipalities, as well as state  
15 regulatory agencies.

16 Q. What is the role of MISO regarding transmission  
17 planning and management?

18 A. As I mentioned, one of the functions of MISO is to  
19 continually evaluate the needs on the transmission system  
20 both currently and in the future. As they evaluate the need  
21 of a system they perform transmission planning studies to  
22 identify the need for future projects.

23 Q. What's the geographic footprint generally of MISO?

24 A. MISO encompasses 15 states from Minnesota and the  
25 Dakotas all the way down to Louisiana and the midwest part of

1 the United States.

2 Q. So when you discussed the role of transmission  
3 planning and reliability, is MISO looking at that geographic  
4 footprint or is that across broader transmission systems?

5 A. Generally MISO studies, their focus is on the  
6 geographic area of MISO but they do take into account the  
7 various interconnections that occur along the seams of the  
8 MISO footprint.

9 Q. You also indicated that MISO has a role in the  
10 market for electricity. Explain that role to the Court,  
11 please.

12 A. In 2005 MISO started the energy market within its  
13 region. As part of the energy market what MISO does is they  
14 dispatch generation in the region to meet customer demand  
15 within the region. And while they dispatch regional load,  
16 they are continually monitoring the transmission system to  
17 make sure reliability is not jeopardized.

18 Q. Are Otter Tail Power Company and Montana Dakota  
19 Utilities Company members of MISO?

20 A. Yes, we are. We are currently transmission owning  
21 members of MISO.

22 Q. Did MISO have any role in the development of this  
23 project?

24 A. Yes.

25 Q. Explain that role to the Court.

1           A.    This project could be interconnected by any  
2 interested party.  And in addition to that, the energy or the  
3 power that flows on this line can and will be consumed by  
4 customers within South Dakota.

5           Q.    Let's break these up a bit.  We've got the ability  
6 to connect and then the actual transmission of the  
7 electricity.  I want to deal with them separately.  Let's  
8 start with the transmission as it exists up and down this  
9 bilateral line that we've talked about.  How will the project  
10 be used by generation users in the public or generation  
11 producers, excuse me?

12          A.    Any generation producer who is interested in  
13 connecting to the line will be allowed to interconnect to  
14 this line subject to the rules within the MISO tariff.

15          Q.    How does the interconnected nature of the  
16 transmission network allow generation users to transmit  
17 electrons on the line even if they don't interconnect?

18          A.    Can you repeat that again?

19          Q.    Sure.  You're testifying that anyone could connect?

20          A.    Correct.

21          Q.    Let's back up.  Even if they don't ask to directly  
22 connect, how does the interconnected nature of the line allow  
23 electrons from members of the public who are generating  
24 electricity to be carried on the line?

25          A.    This new project will add transmission capacity to

1 the overall system. And as a backbone facility of a higher  
2 voltage of lower voltage facilities, it will be unloaded.  
3 And some of that flow that used to flow on the lower voltage  
4 facilities will now flow on the new project. And because of  
5 the transfer of that flow from the lower voltage system to  
6 the higher voltage system, there will now be additional  
7 capacity to be used by the public.

8 Q. So we would expect electrons to travel on the line  
9 from generation producers, even if they don't directly  
10 connect?

11 A. That's correct.

12 Q. Let's talk about load users, retail customers.  
13 Would we expect that electrons travel on this specific line  
14 to load customers in South Dakota, even if they don't  
15 directly connect to the line?

16 A. Yes, I would.

17 Q. Why is that?

18 A. There are substations at both Big Stone South and  
19 at Ellendale. And at those substations there are different  
20 transmission paths that ultimately provide deliveries that  
21 would serve customers within South Dakota.

22 Q. Are those customers limited to customers of Otter  
23 Tail and Montana Dakota Utilities?

24 A. No.

25 Q. Limited to customers of utilities who are members

1 of MISO?

2 A. No.

3 Q. So we've now talked about the transmission of  
4 electrons if they don't directly connect. Let's talk about  
5 if they directly do connect or plug into the line. Who can  
6 connect directly with the project?

7 A. Anyone can connect with the project as long as they  
8 follow the requirements, the regulatory requirements of MISO.

9 Q. Let's talk a bit about those regulatory  
10 requirements. Jason, do you know what a tariff is?

11 A. Yes, I do.

12 Q. Generally explain to the Court what a tariff is.

13 A. It's a publicly filed document that governs  
14 operation of public utilities and regional transmission  
15 organizations.

16 Q. The regional transmission organization here is  
17 MISO; is that right?

18 A. Correct.

19 Q. Does MISO have a publicly filed tariff that governs  
20 it?

21 A. Yes.

22 Q. Who was responsible for approving the tariff  
23 governing MISO?

24 A. The Federal Energy Regulatory Commission or FERC.

25 Q. Is the MISO tariff filed with FERC?

1           A.    Yes, it's filed with FERC and also publicly  
2 available on the MISO website.

3           Q.    Are there also tariffs that are filed at state  
4 regulatory levels?

5           A.    Yes, there are.

6           Q.    And you testified earlier about rate recovery.  If  
7 all of us South Dakotans paying electric bills, is that based  
8 on the tariff filed with the South Dakota PUC?

9           A.    Yes, it is.

10          Q.    From a public utilities or regional transmission  
11 organization's perspective, what is the significance of a  
12 publicly filed tariff?

13          A.    The publicly filed tariff really outlines the  
14 recovery aspect of the utility from the jurisdictional rate  
15 payers.

16          Q.    The tariff also governs both the utility or the  
17 RTO; is that correct?

18          A.    That's correct.

19          Q.    The MISO tariff in this case -- will you please  
20 turn to Exhibit 38.  Exhibit 38 is a CD.  Have you had an  
21 opportunity to, before your testimony today, to review  
22 Exhibit 38, Jason?

23          A.    Yes, I have reviewed portions of this CD.

24          Q.    Does Exhibit 38 contain a copy of the publicly  
25 filed tariff at FERC which governs MISO?

1 A. Yes.

2 Q. That tariff is 6,000 plus pages so we're not going  
3 to go through it in detail. But you've had a chance to look  
4 at it and review portions; is that right?

5 A. Yes, I have.

6 Q. Does the MISO tariff provide for open access to  
7 this transmission facility?

8 A. Yes, it does.

9 Q. Explain what that means to the Court.

10 A. Open access is a term that is required by FERC and  
11 outlined in the MISO tariff as being a process where anyone  
12 can interconnect to the system on a nondiscriminatory basis  
13 as long as they follow the requirements of the MISO tariff.

14 Q. Exhibit 34, which is the free standing document --  
15 and, your Honor, to save you, I'm just going to identify  
16 these. I'm not going to go through them at this point.  
17 Exhibit 35, 36, 37, have you reviewed those documents and at  
18 least a portion of Exhibit 34, Jason?

19 A. Yes, I have.

20 Q. Are those excerpts from the MISO tariff?

21 A. Yes, they are.

22 Q. Based upon your review of those documents and your  
23 knowledge of MISO, what do those documents indicate? Who can  
24 access or connect with this project?

25 A. Based on my review of this material anyone can

1 Q. Could you take a moment to review that?

2 A. Sure. Okay.

3 Q. Does that appear to be an accurate copy of the 2012  
4 MISO MVP Portfolio study?

5 A. This is an accurate copy of the Multi Value Project  
6 Portfolio study that was dated January 10, 2012, and it was  
7 included as part of the South Dakota PUC application.

8 Q. So that particular document there should actually  
9 also be in the record as an attachment to the PUC application  
10 already submitted?

11 A. That's correct. In Exhibit 1-B, I believe.

12 Q. I'm going to let you hold on to that one for just a  
13 moment. Let's go on with that one now actually. Can you  
14 explain to us, first of all, exactly what an MTEP is?

15 A. MTEP is an acronym for MISO Transmission Expansion  
16 Plan.

17 Q. And these were done as part of the development of  
18 these Multi Value Projects?

19 A. The MTEP is actually an annual planning process  
20 performed by MISO.

21 Q. There was an MTEP in 2005 looked into, something  
22 called Northwest Study. Are you familiar already with that?

23 A. I believe it's called the Northwest Exploratory  
24 Study.

25 Q. Bringing attention to Exhibit 101, page 13, if my

1           A.    Yes.

2           Q.    And you would agree that MISO is a Delaware  
3 nonstock corporation?

4           A.    Based on what I'm reading here, yes.

5           Q.    Turning your attention to page 81 of Exhibit 34.  
6 The first sentence of that page indicates that the chief  
7 executive has the right to exercise functional control over  
8 the operation of the transmission system. Do you agree that  
9 that's the intent in the way that the agreement is being  
10 carried out by the parties?

11          A.    I can testify that the functional control of Otter  
12 Tail and MDU facilities, transmission facilities, has been  
13 turned over to MISO.

14          Q.    But you're not aware of whether the chief, you're  
15 not personally aware of whether the chief executive officer  
16 is actually exercising that authority?

17          A.    I would have to read the definition of what chief  
18 executive officer refers to.

19          Q.    I won't force you to do that, I'll write that into  
20 a brief. We'll keep you moving along. Turning your attention  
21 to page 146 of Exhibit 34 --

22          A.    Did you say 146?

23          Q.    146. The first sentence of that page indicates by  
24 this agreement each of the owners authorizes MISO to exercise  
25 functional control over the operation of transmission lines.

1           A.     Sure.  The MISO tariff outlines the requirements  
2 for a potential developer to interconnect to the transmission  
3 system.  As part of that process the interconnection customer  
4 would make an application to MISO, and then MISO would  
5 evaluate the project on the system to determine if the system  
6 can accommodate that interconnection reliably.  Through the  
7 course of studies, system reliability will be determined.  If  
8 there are concerns, we identify upgrades to make sure we can  
9 safely interconnect that project.  At the end of the process  
10 there's a generation interconnection agreement that is signed  
11 between the customer, the transmission owner, and MISO that  
12 bind all three parties to the terms and conditions of the  
13 interconnection which ultimately is approved by FERC.

14           Q.     Is it fair to say that different interconnections  
15 at different points may have different technical  
16 requirements?

17           A.     From an aspect of interconnection or from an aspect  
18 of study?

19           Q.     Interconnection.

20           A.     From interconnection, any project that wants to  
21 interconnect will have to come into a substation of some  
22 sort, whether it be a substation that steps voltage down to  
23 lower voltage or higher, or a voltage breaker station that  
24 doesn't have a transformer.

25           Q.     And any such proposed interconnection would be

1 evaluated on a case by case basis by MISO?

2 A. Each individual project is handled on a case by  
3 case basis. But like we talked about in the MVP studies, in  
4 a group of generators to proceed through the study, MISO  
5 lumps those generators into one study to look for any  
6 reliability concerns.

7 Q. So if there was a group of generators that would be  
8 handled differently than an individual generator?

9 A. The MISO queue process is what they call a first  
10 ready first serve, so to the extent that there's projects  
11 within a certain geographic area that are ready to proceed  
12 with studies, they would study all of those in a common  
13 group. Each connection agreement is specific to each  
14 project.

15 Q. You mentioned the MISO queue, and I'd like to ask  
16 you a little bit about that. If I could direct your  
17 attention to Exhibit 7. Turning your attention to the two  
18 yellow highlighted projects listed at the center of that  
19 table on Exhibit 7. Am I correct, your testimony was that  
20 those are wind energy projects?

21 A. That is correct.

22 Q. And those wind energy projects have asked about  
23 interconnecting with the Big Stone to South Ellendale line?

24 A. They are requesting direct interconnection to the  
25 Big Stone South Ellendale line, yes.

1 Q. In conjunction with that was it necessary for you  
2 to develop some tools in order to explain how modern power  
3 grids work?

4 A. Yes, it was.

5 Q. And at my request did you actually assemble a  
6 selection of slides from that presentation?

7 A. Yes, I did.

8 Q. I will go ahead and hand you a copy of what's been  
9 marked as Exhibit 108. Does Exhibit 108 appear to be a true  
10 and correct copy of the slide that you used in order to  
11 explain modern power grids during defense of your doctoral  
12 research?

13 A. Yes, it does.

14 Q. Beginning then with the first of the slides there,  
15 can you tell us exactly what these depict?

16 A. Yes. So on slide 4, Exhibit 108, is the basic  
17 operation of the electric power system as it appears today.

18 Q. Just to clarify, Doctor, are you using the page  
19 number on the slide and not the number as they occur in the  
20 exhibit?

21 A. Correct. So there's three main pieces to the  
22 electric power system. There's the generation where the  
23 power is produced. There is the distribution system where  
24 the power ends up being consumed. And because the generation  
25 usually takes place far away from where the load is consumed,

1 you have the transmission system as well to deliver power  
2 from the generation to where it is consumed on the  
3 distribution network.

4 Q. Going forward then through the next slide.

5 A. Okay. So on the slide number five I have just  
6 highlighted the same figure where I put a circle around  
7 generation. This is talking about those bulk power plants  
8 that are usually located far away from where the load is  
9 consumed, and this is where the power is produced.

10 Q. Okay, going on.

11 A. Okay. On slide six I've highlighted the  
12 transmission network where power is produced. It is stepped  
13 up in voltage to where it will be transmitted to where it's  
14 consumed. Stepped up in voltage to reduce losses from  
15 transmission. So these transmission lines operate at a very  
16 high voltage level. And they are usually very long lines  
17 that are interconnected to deliver the power from where it is  
18 consumed to where it will eventually be consumed.

19 Q. Having a pause just for a moment on that one, in  
20 preparation for your testimony today have you familiarized  
21 yourself with the Big Stone South to Ellendale Project?

22 A. Yes.

23 Q. How did you go about doing that?

24 A. I have taken what was provided to me by Bob Pesall,  
25 I reviewed documents through the MISO website.

1 large coal plants minus some regulation on how clean they  
2 have to be, is usually very cheap as well. Right now the  
3 price of natural gas is low, so large natural gas generators  
4 as well will be those cheaper types of generators.

5 Q. Where in the scale of cheap generation do wind and  
6 solar fall?

7 A. Operational cost is usually very close to zero,  
8 free minus some maintenance cost, but their output really  
9 depends on how available their renewable resource is at each  
10 point in time.

11 Q. Is it fair to say that it's difficult to predict  
12 how much energy a wind tower or solar panel produces on any  
13 given day in any different area?

14 A. Correct, that is an ongoing area of research.

15 Q. How does the system handle that currently?

16 A. So what happens is unlike a large generator which  
17 can exactly bid how much power they will be producing at each  
18 point in time, wind and solar are what is known as  
19 intermittent resources so they have to bid in differently.  
20 They have to bid in their forecast. And if their forecast is  
21 incorrect, then the load that they were not able to produce  
22 has to be picked up by some of these other generating units.

23 Q. So within the market those renewable sources are  
24 treated differently?

25 A. Yes.

1 Q. Finally then, can you describe for us how this  
2 integrated market system differs from what may have been in  
3 place 20 years ago?

4 A. Yes. So prior to FERC orders 888 and 889, power  
5 could be produced, transmitted, and delivered to the customer  
6 by the same company. And if other entities wanted to build  
7 generation on a given company's transmission line, they may  
8 not be able to do so. It's up to the discretion of the  
9 company who owns the transmission network. So after FERC  
10 orders 888 and 889, the U.S. Government de-integrated the  
11 companies and now everyone has open access to the  
12 transmission network.

13 Q. So if we come across a term like vertically  
14 integrated, what does that mean?

15 A. It means that the same company owns everything from  
16 where the power was produced to where it was consumed.

17 MR. PESALL: I have no further questions, Doctor.  
18 Thank you.

19 THE COURT: Mr. Sutton or Mr. Welk?

20 MR. SUTTON: Thank you, your Honor.

21 CROSS-EXAMINATION

22 Q. (BY MR. SUTTON) Good afternoon, Dr. Hansen.

23 A. Good afternoon.

24 Q. Now you've been engaged as an expert for landowners  
25 in this right to take hearing; is that right?

1 Q. Just a meet and greet, right? Generally when you  
2 met him?

3 A. Yes, and he presented his work with high voltage DC  
4 electricity for wind power.

5 Q. The extent of your interaction was you were  
6 introduced to him, correct?

7 A. Yup.

8 Q. You discussed possibly getting a letter of support  
9 for grant writing by Mr. Osbourne; is that correct?

10 A. Yes.

11 Q. That was the extent of your conversation with Mr.  
12 Osbourne?

13 A. Correct.

14 Q. And your only experience with MISO directly?

15 A. Yes.

16 Q. This project is subject to the MISO tariff, you  
17 understand that?

18 A. Yes.

19 Q. MISO is regulated by the Federal Energy Regulatory  
20 Commission, correct?

21 A. That is correct.

22 Q. FERC or the Federal Energy Regulatory Commission  
23 has entered orders requiring open access to the transmission  
24 system, hasn't it?

25 A. Yes.

1 Q. You mentioned on direct examination FERC order 888,  
2 889, and 2000; do you recall that testimony?

3 A. The 2000 was in my deposition, but yes.

4 Q. In any event, FERC 888 and 889, those are the  
5 orders that are implemented by the MISO tariff, aren't they?

6 MR. PESALL: I'm going to object. That calls for a  
7 legal conclusion.

8 THE COURT: Sustained.

9 Q. (BY MR. SUTTON) Do you know, Dr. Hansen, whether  
10 the MISO tariff has been adopted pursuant to FERC order 888  
11 and 889?

12 A. The FERC orders would have to be included by MISO  
13 in any of their regulatory statements, including the tariff  
14 document.

15 Q. And you understand as an expert that those FERC  
16 orders govern MISO, correct?

17 A. Correct.

18 Q. Those FERC orders require open access to the  
19 transmission system, don't they?

20 A. Yes.

21 Q. And consistent with those FERC orders the MISO  
22 tariff in this case requires open access, doesn't it?

23 A. Correct.

24 MR. PESALL: Objection. The witness wouldn't have  
25 that information. There's no foundation that he's familiar

1 Q. (BY MR. PESALL) To your recollection prior to the  
2 lawsuit in this case being filed, did any of the  
3 representatives from BSS and E who spoke to you ever tell you  
4 to go look at the Public Utilities Commission website and  
5 find out what protections you have?

6 A. No.

7 Q. How long have you owned this land?

8 A. Since 2007.

9 MR. PESALL: No further questions, your Honor.

10 MR. SUTTON: Nothing further, your Honor.

11 THE COURT: You may step down, thank you.

12 You may call your next witness.

13 MR. PESALL: Thank you, your Honor. We'd call  
14 Reuben Parks.

15 REUBEN PARKS,

16 called as a witness, having been first duly  
17 sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 Q. (BY MR. PESALL) Mr. Parks, I'm going to walk you  
20 through the same sorts of information that Mr. Mages just  
21 testified to. Can you state your full name?

22 A. Reuben Gregory Parks.

23 Q. How old are you?

24 A. I'm sixty-five.

25 Q. What do you do for a living?

1 A. I've farmed since I was about 21 years old.

2 Q. Do you and members of your family control some land  
3 that is at issue in this case?

4 A. We do.

5 Q. How do you manage that land?

6 A. We manage it through an LLC which we are members  
7 of.

8 Q. And that would be Parkhill Farm, LLC?

9 A. That's correct.

10 Q. What other family members are members of that LLC?

11 A. I have a brother Dean and my mother Vera.

12 Q. Can you describe the land that's at issue in this  
13 case?

14 A. In general it's five quarters of land which amount  
15 to approximately 160 acres a piece. One of them is a 200  
16 acre plat, but they all cover about two and a half miles of  
17 agriculture land.

18 Q. Is this good, farmable land?

19 A. Most of it is, yes.

20 Q. And is it your intention in these proceedings to  
21 oppose the issue of eminent domain?

22 A. It is.

23 Q. Prior to this lawsuit being filed were you  
24 personally contacted by representatives of the Big Stone  
25 South to Ellendale Project?

1 A. I never said that.

2 Q. Did you ever request a reroute around your land?

3 A. No, we did not.

4 MR. SUTTON: Nothing further, your Honor.

5 THE COURT: Any further direct?

6 REDIRECT EXAMINATION

7 Q. (BY MR. PESALL) How long did you say your family  
8 has owned the property in question?

9 A. Over the course of those five quarters, anywhere  
10 from 40 to 80 years.

11 Q. So we're looking at late 1950's?

12 A. Yeah.

13 MR. PESALL: No further questions, your Honor.

14 MR. SUTTON: Nothing further, your Honor.

15 THE COURT: You may step down, thank you.

16 MR. PESALL: I would call Gerald Pesall, your Honor.

17 THE COURT: Do you anticipate this to be your last  
18 witness?

19 MR. PESALL: I do, your Honor.

20 GERALD PESALL,

21 called as a witness, having been first duly  
22 sworn, was examined and testified as follows:

23 DIRECT EXAMINATION

24 Q. (BY MR. PESALL) Mr. Pesall, I'm going to go through  
25 the same sorts of information with you that I did with Mr.



Application to the Public Utilities Commission of the State of South Dakota for a Facility Permit

MONTANA-DAKOTA UTILITIES CO. & OTTER TAIL POWER COMPANY

Big Stone South to Ellendale Project

AUGUST 14, 2013



## 23.0 Information Concerning Transmission Facilities (ARSD 20:10:22:35)

A high-voltage transmission line (HVTL) consists of three phases, each at the end of a separate insulator string, all physically supported by structures. Each phase consists of one or more conductors. When more than one conductor is used to make up a phase, the term “bundled” conductors is used. Conductors are metal cables consisting of multiple strands of steel and aluminum wire wound together. There are also two shield wires strung above the electrical phases to prevent damage from lightning strikes that may also include a fiber optic communication cable. The conductors will be approximately one to two inches in diameter. Transmission lines are constructed on a ROW, the width of which is primarily dependent on structure design, span length, and electrical safety requirements associated with the transmission line’s voltage. The South Dakota Facility ROW typically will be 150 feet wide.

### 23.1 Configuration of Towers

The Applicants propose to use single pole steel single-circuit structures for the South Dakota Facility, unless engineering or environmental conditions require the use of steel H-frame or guyed mono-pole structures. Public input was a consideration in the selection of the structure type. Single steel pole structures are typically placed on concrete foundations measuring about 6 to 11 feet in diameter. Specialty structures, including dead-end structures, H-frame structures, or guyed mono-pole structures, may be used in certain circumstances.

Typically, H-frame structures consist of two steel poles with cross bracing. A guyed mono-pole structure is a mono-pole with guy wires that extend diagonally out to the ground. Concrete pier foundations may be used for angle structures or if soil conditions are poor. As engineering continues, it will be determined if and where specialty structures may be used. Table 21 shows a summary of the configuration of the structures that are under consideration for the South Dakota Facility.

The South Dakota Facility will be designed to meet or surpass all relevant local and state codes, National Electric Safety Code (NESC) requirements and APLIC and Applicant standards. Appropriate standards will be met for construction and installation and all applicable safety procedures will be followed during and after installation.

Table 21. Structure Design/Configuration Summary

Structure Type	Structure Material	ROW Width (feet)	Approx. Structure Height (feet)	Approx. Structure Base Diameter (feet)	Approx. Foundation Diameter (feet)	Average Span Between Structure (feet)	Pole to Pole Span on Single H-Frame Structure (feet)
Single Pole Davit Arm (majority of route)	Steel	150	125-155	3-4 (tangent structures) 4-6 (angle structures)	6-11	1,000 (range of 700 - 1200)	N/A

Structure Type	Structure Material	ROW Width (feet)	Approx. Structure Height (feet)	Approx. Structure Base Diameter (feet)	Approx. Foundation Diameter (feet)	Average Span Between Structure (feet)	Pole to Pole Span on Single H-Frame Structure (feet)
Guyed Mono-Pole	Steel	150	125-155	3-4 (tangent structures) 4-6 (angle structures)	3-5	1,000 (range of 700 - 1200)	N/A
H-Frame (if necessary)	Steel	150	100-130	3-4 (tangent structures)	3-5	1,000 (range of 700 - 1200)	30

### 23.2 Conductor Configuration

It is anticipated that each phase will consist of two conductor bundled (2x), TP (twisted pair) 477 kcmil (thousand circular mils), 26/7, Hawk, aluminum conductor steel reinforced (ACSR) or conductors of comparable capacity.

### 23.3 Proposed Transmission Site and Major Alternatives

The site of the South Dakota Facility is described in Sections 2.1 and 7.0, Appendix A, and shown on Exhibit 2. Section 8.0 outlines the route identification and selection process.

### 23.4 Reliability and Safety

#### 23.4.1 Transmission Line Reliability

In general, transmission infrastructure is built to withstand weather extremes that can be encountered within this region. With the exception of severe weather conditions such as tornadoes and extreme ice, transmission lines usually only fail when they are subjected to conditions beyond the design parameters.

Transmission lines are automatically taken out of service by the operation of protective relaying equipment when a fault is detected on the system. Such interruptions are usually only momentary. Scheduled maintenance outages are also infrequent on high voltage transmission lines. As a result, the average annual availability of transmission infrastructure is very high, in excess of 99 percent.

#### 23.4.2 Safety

The South Dakota Facility will be designed to meet the local, state, NESC and the Applicants' standards regarding clearance to ground, clearance to crossing utilities, clearance to buildings, strength of materials, and ROW widths. Construction crews will comply with local, state, NESC and the Applicants' standards regarding installation of facilities and standard construction practices. The Applicants' and industry safety procedures will be followed during and after installation of the transmission line.

A brief summary of these new plans is documented below:

### Ellendale to Big Stone to Brookings

A new line planned from North Dakota into Minnesota provides an outlet to North Dakota wind by directly transferring wind energy at 345 kV, thus offloading the existing 230 kV circuits.

### Brookings to Twin Cities

In addition to transferring wind from North Dakota, this new 345 kV line helps transfer additional southwestern Minnesota wind into Minneapolis-St. Paul. Through various transformations throughout the path, this circuit provides on and off ramps for power transfer.

### North LaCrosse to North Madison to Cardinal

This new transmission, a continuation of the northern 345 kV path, connects the North Lacrosse station at the Minnesota-Wisconsin border into the Madison load center.

### Pleasant Prairie to Zion Energy Center

Creating a new tie line between American Transmission Company (ATC) and Commonwealth Edison (ComEd), this new 345 kV circuit provides an outlet for southeast Wisconsin generation noted in the near term assessment, in addition to allowing wind energy transfer from the Dakotas and Minnesota.

### Lakefield to Winnebago to Winco-Burt, Lime Creek to Emery to Blackhawk to Hazleton, Sheldon to Burt to Webster 345kV

These lines facilitate transfer of wind from MISO's West Region closer to large load centers in Illinois and Wisconsin by connecting existing wind heavy areas around Lakefield and Sheldon, and further accessing wind in central Iowa from the Lime Creek area to Hazleton. It provides on and off ramps for power transfer through intermediate transformations.

### Dubuque County to Spring Green to Cardinal and Oak Grove to Galesburg to Fargo

Both projects, one connecting to Madison, Wisconsin; and the other to the northern Illinois station at Fargo, provide an outlet for the Western Region wind and connections to load centers. The two projects also help offload transmission constraints out of the Quad Cities Station.

### Ottumwa to Adair to Palmyra Tap

This new line provides an outlet for a wind zone in Missouri, and offloads transmission constraints driven through transfers between Iowa and Illinois.

MISO  
MISO RATE SCHEDULES

Section I  
Withdrawal Notice.  
30.0.0

A Member who is not an Owner may, upon submission of a written notice of withdrawal to the Chief Executive Officer (or if the Board chooses not to elect the Chief Executive Officer, the President), withdraw from membership in MISO at any time which withdrawal shall be effective thirty (30) days after the receipt of such notice by the Chief Executive Officer (or if the Board chooses not to elect the Chief Executive Officer, the President). A Member who is also an Owner may, upon submission of a written notice of withdrawal to the Chief Executive Officer (or if the Board chooses not to elect the Chief Executive Officer, the President), commence a process of withdrawal of its facilities from the Transmission System. Such withdrawal shall not be effective until December 31 of the calendar year following the calendar year in which notice is given, nor shall any such notice of withdrawal become effective any earlier than five (5) years following the date that the Owner signed this Agreement except as provided for in Article Seven of this Agreement. Notwithstanding this limitation on withdrawals during the first five years, in the event of a merger, consolidation, reorganization, sale, spin-off, or foreclosure, as a result of which substantially all of an Owner's transmission facilities which are part of the Transmission System are acquired by another entity, that entity shall have the right to withdraw its facilities from MISO upon providing one (1) year's notice to MISO. Such withdrawal, however, may become effective only if FERC approves the withdrawal. If any withdrawal creates a situation where an Owner's or Owners' transmission system is not physically interconnected with the Transmission System, MISO shall determine if such withdrawal affects the ability of such Owner(s) to continue as an Owner(s). With regard to these withdrawal rights, the Owner shall remain a Member with all rights and obligations of a Member who is an Owner until such time as the FERC approves the withdrawal, as appropriate. However, no further FERC approval of the withdrawal is required for withdrawals pursuant to Article Seven of this Agreement, or for

Effective On: November 19, 2013

MISO000189

AP.53

MISO  
MISO RATE SCHEDULES

Section I  
Withdrawal Notice.  
30.0.0

withdrawals by an Owner who is not subject to the jurisdiction of the FERC at the time it executes this Agreement.

Effective On: November 19, 2013

MISO000190

**AP.54**

MISO  
MISO RATE SCHEDULESA.  
Period.  
30.0.0

Except with respect to Governmental Entities, as defined in Article Seven, Section C, this Agreement shall continue for a period of thirty (30) years from the earliest Effective Date for any signatory to this Agreement. Thereafter, it shall be renewed for successive five-year (5-year) terms unless, no later than two years prior to the end of any term, a majority of the Owners vote not to renew this Agreement. Notwithstanding any other provisions of this Agreement, the appendices thereto or the Tariff, as to Governmental Entities, who become signatories to this Agreement, the initial term of the Agreement shall begin as of the Effective Date applicable to the Governmental Entity, as provided in Article One, Section I, through and including December 31 of the calendar year of execution. Thereafter, as to such Governmental Entities, this Agreement shall have a term of one (1) year and shall be automatically renewed for successive one (1) year terms; provided, however, that either MISO or such Governmental Entity may cancel this Agreement at the end of each one (1) year term, including the initial term, without cause upon prior written notice to the other party at least thirty (30) days prior to the expiration of the then current term.

Effective On: November 19, 2013

MISO000141

AP.55

MISO  
MISO RATE SCHEDULES

A.  
Type of Service.  
30.0.0

MISO shall offer transmission service over the entire Transmission System and over Non-transferred Transmission Facilities to all "Eligible Customers," as defined in the Tariff, including the Owners, on a non-discriminatory basis, pursuant to the Tariff and Agency Agreement attached hereto as Appendix G. The Tariff shall offer both network and point-to-point

transmission service, as presently described in the FERC's *pro forma* tariff adopted pursuant to FERC Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), and FERC Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), order on reh'g, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), order on reh'g, Order No. 890-B, 123 FERC ¶ 61,299 (2008), order on reh'g, Order No. 890-C, 126 FERC ¶ 61,228 (2009), or other forms of service pursuant to any superseding tariff. MISO shall administer the Tariff.

Effective On: November 19, 2013

MISO000151

AP.56

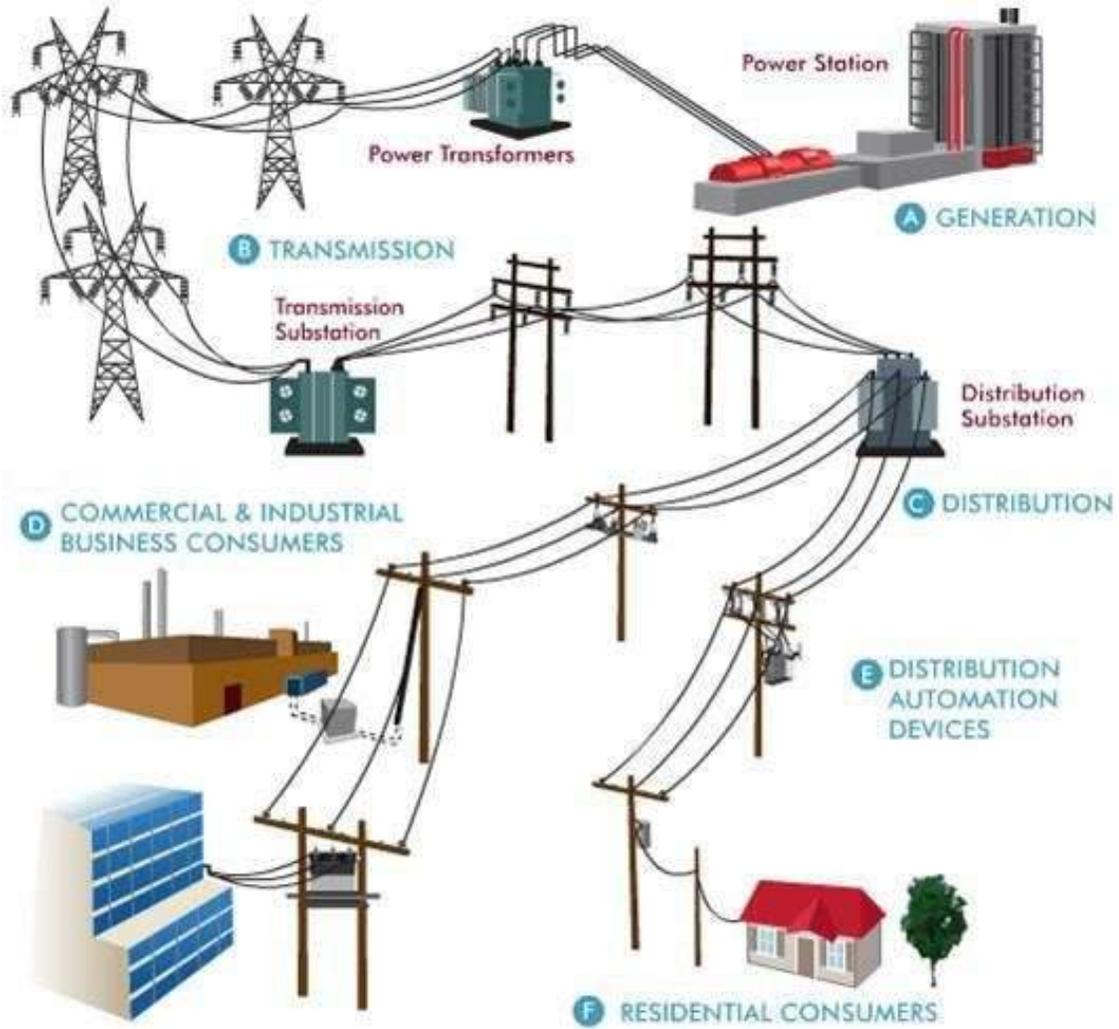
# Multi-Value Project Portfolio

Results and Analyses

January 10, 2012



# Traditional Bulk Power System



**FILED**

**JUN -7 2016**

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

IN CIRCUIT COURT

STATE OF SOUTH DAKOTA

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

MONTANA-DAKOTA UTILITIES CO. AND  
OTTER TAIL POWER COMPANY,

Plaintiff,

v.

LARRY A. MAGES; MARGARET MAGES;  
ESTATE OF LOUIS PESALL; AGSTAR  
FINANCIAL SERVICES, FCLA; ATWOOD  
H. HELSA; MAURINE H. HELSA,

and,

PARKSHILL FARMS, LLC; WEB WATER  
DEVELOPMENT ASSOCIATION, INC.;  
KERMIT PARKS; REUBEN PARKS; VERA  
PARKS; ESTATE OF ORION E. PARKS;  
ORDEAN PARKS; JEFF SCHILEY,

and,

GERALD W. PESALL; GERALDINE M.  
PESALL; DACOTAH BANK, F/K/A  
SECURITY BANK AND TRUST CO.;  
DAVID M. GOLLNICK; LOUIS PESALL,

Defendants.

**MEMORANDUM DECISION ON  
PLAINTIFFS' RIGHT TO TAKE**

**CIV. 15-50**

**CIV. 15-67**

**CIV. 15-77**

Montana-Dakota Utilities Company and Otter Tail Power Company (collectively "Plaintiffs") initiated condemnation proceeding against Larry A. Mages, Gerald W. Pesall, and Parkshill Farms, LLC (collectively "Defendants") in the above entitled matters. Plaintiffs seek to condemn certain portions of land owned by Defendants's for a perpetual easement as part of the Big Stone South to Ellendale Project ("BSSE"). A right to take hearing, pursuant to SDCL 21-

35-10.1, was held on April 5, 2016.<sup>1</sup> Both sides presented evidence supporting their respective positions. At the end of the hearing, the Court reserved ruling, allowing counsel to file post-hearing briefs and findings of fact and conclusions of law. This Memorandum Decision constitutes the Court's ruling on Plaintiffs' right to take.

### **STATEMENT OF FACTS**

Plaintiffs are public utilities companies authorized to conduct business in South Dakota. HT at 17-23. As such, Plaintiffs provide electricity to customers in South Dakota and the surrounding areas. *Id.* at 8, 21. Together Plaintiffs seek to build BSSE—a high voltage transmission line from a substation near Ellendale, North Dakota, to a substation south of Big Stone City, South Dakota. *Id.* at 13. BSSE is approximately one-hundred-sixty-three miles in length, with ten miles in North Dakota and the remaining one-hundred-fifty-three miles in South Dakota. *Id.* at 13, 77. This project was conceived by Midcontinent Independent System Operator Inc. (“MISO”), a nonprofit organization recognized by the Federal Energy Regulatory Commission (“FERC”) as a regional transmission organization. *Id.* at 23, 100.

MISO's function is to regulate the planning, construction, and management of transmission systems in its geographic market, which covers most of the Midwestern United States, including South Dakota. *Id.* at 100-01. MISO continually evaluates the needs of its transmission systems, focusing on present and future needs. *Id.* at 101. Transmission planning studies are then done to identify the need for future projects. *Id.* BSSE is one of seventeen such projects identified by MISO that need to be built. *Id.* at 104. After approval by the MISO board of directors, Plaintiffs, as transmission owners in MISO, were obligated to construct BSSE. *Id.* at 102, 104.

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<sup>1</sup> References to the hearing transcript will be noted as “HT.” followed by the appropriate page number. Exhibits will be noted “Ex.” with its designated number.

Plaintiffs began the construction process in the fall of 2012 by selecting a route. *Id.* at 28-30. BSSE's impact on landowners, governmental interests, and tribal interests were considered as a part of this process. *Id.* In particular, Plaintiffs engaged landowners in a variety of ways, including holding multiple open house meetings, sending out letters to potentially affected landowners, and setting up a website. *Id.* at 37-39. Additionally, numerous issues were studied. *Id.* at 28-30. For example, Plaintiffs investigated the cost and length of BSSE, cultural impacts, environmental impacts, avoidance of population centers, and landowner concerns. *Id.* BSSE's initial route was finally selected after fifteen months of studying all these interests and factors.<sup>2</sup> *Id.*

After selecting an initial route, Plaintiffs received and considered approximately sixty requests for route changes. *Id.* at 61-65. The project team was tasked with analyzing the proposed route changes.<sup>3</sup> In its analysis, the team initially determined whether there was an impact on the environment, engineering, and other landowners, as well as any attendant cultural impact. *Id.* at 62-63. The team then determined the proposed route's efficacy, considering a number of factors: (1) viability; (2) significance of the deviation; (3) agreeability of other landowners; (4) cost savings; (5) cultural impact; (6) engineering impact; and (7) environmental impact. *Id.*

Plaintiffs next engaged in negotiations for voluntary easements along the proposed route with landowners, including Defendants. *Id.* at 39, 170, 183, 190. Although Plaintiffs were successful in obtaining voluntary easements on ninety-one percent of the parcels sought for

<sup>2</sup> In August 2013, Plaintiffs filed an application for a facility permit with the South Dakota Public Utilities Commission ("PUC"). HT at 30. Gerald Pesall opposed Plaintiffs's permit application. *Id.* at 32. An evidentiary hearing was held, and the PUC granted the facility permit on August 22, 2014. *Id.*; Ex. 2. Pesall appealed the PUC's decision to the Day County Circuit Court. HT at 33. The Honorable Scott P. Myren affirmed the PUC's ruling. Ex. 3. Pesall then appealed to the South Dakota Supreme Court. HT at 34. The Court affirmed the issuance of the facility permit. Ex. 4.

<sup>3</sup> The project team included Plaintiffs's land rights group, environmental group, engineering group, and project management personnel. HT at 62.

BSSE, they were unable to secure voluntary easements from Defendants. *Id.* at 42-43. As a result, Plaintiffs determined that filing a condemnation action was necessary, prompting this action. *Id.* at 43-44. Plaintiffs seek to condemn a perpetual, one-hundred-fifty foot easement for the construction, maintenance, and long-term operation of BSSE. *Id.* at 45, 54.

### ANALYSIS AND DECISION

Article 6, Section 13 of the South Dakota Constitution contains our state's taking clause. It provides, in relevant part, that "[p]rivate property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article." S.D. Const. Art. 6, § 13.

In 1913, the South Dakota Supreme Court announced a five-prong test to determine when an entity is granted the right to use eminent domain—a governmental power. *Illinois Cent. R.R. Co. v. E. Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913). An entity must establish: first, that it "is *within the class* to whom the power has been delegated"; second, that entity must then prove "that all *conditions precedent* have been complied with"; third, the reason for the taking must be "one of the purposes *enumerated in the statute*"; fourth, the taking must be "for a *public use*"; and fifth, "the particular property sought to be taken is *necessary* to the accomplishment of the public purpose intended." *Id.* at 726 (emphasis in original).

The parties agree that this is the applicable test. Plaintiffs' Post-Hearing Brief on Right to Take Hearing at 2; Landowners' Response to Plaintiffs' Post-Hearing Brief on Right to Take Hearing at 2. Defendants concede that Plaintiffs satisfy the first and third prongs of the test.<sup>4</sup>

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<sup>4</sup> Plaintiffs are public utility companies organized under the laws of sister states that have registered with the South Dakota Secretary of State's Office, allowing them to conduct business in South Dakota. HT at 17-23. Consequently, SDCL 49-34-8 enables them to "exercise and enjoy all the rights, powers, privileges, and franchises possessed by such corporations organized under the laws of this state." SDCL 49-33-10 allows corporations, like Plaintiffs, the power "to take so much land as may be necessary for the construction, operation, and safety of its road, electric light or powerline[.]" SDCL 49-34-4 dictates that the laws and rules and practices of procedure be followed before an entity is allowed to proceed with condemnation.

Landowners's Response to Plaintiffs's Post-Hearing Brief on Right to Take Hearing at 2-3. As such, the Court will focus its analysis on the three remaining prongs at issue.

**I. Whether Plaintiffs have met the conditions precedent necessary to exercise eminent domain over Defendants' property.**

SDCL 49-34-4 mandates that any time a corporation exercises the right of eminent domain, it must be done in accordance with the "law[s] and the rules of practice and procedure pertaining to condemnation proceedings." Condemnation proceedings are governed by SDCL Chapter 21-35. Thus, the requirements of that chapter must be met in order to satisfy the conditions precedent necessary to exercise eminent domain. Plaintiffs assert they have met the requirements of SDCL 21-35-1, -2, -4, -5, and -9, and it appears from the record that Plaintiffs have indeed complied with these requirements.<sup>5</sup>

Instead, Defendants argue that BSSE is a trans-state transmission line, necessitating an application of SDCL 21-35-1.1. Under that statute, a utility company constructing a transmission line cannot exercise eminent domain before first acquiring a permit pursuant to SDCL Chapter 49-41B and legislative approval. SDCL 21-35-1.1. A trans-state transmission facility is "an electric transmission line and its associated facilities which originates outside the State of South Dakota, crosses this state *and* terminates outside the State of South Dakota[.]" SDCL 49-41B-2(11) (emphasis added).

There is no evidence to conclude that BSSE does not terminate in South Dakota. In fact, Defendants admit in their brief that the line terminates in South Dakota. However, they argue that MISO's purpose in building the line is to connect wind farms in North Dakota to energy

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<sup>5</sup> Plaintiffs filed a condemnation petition for each case in Day County Circuit Court. SDCL 21-35-1. This petition was verified and contained a statement of good faith. SDCL 21-35-4. It further satisfied the three requirements of SDCL 21-35-2 as it: (1) correctly listed the parties; (2) properly described the property to be taken; and (3) clearly stated the purpose for taking the property. The petition was accompanied by resolution from Plaintiffs' respective boards of directors. SDCL 21-35-5. Finally, Plaintiffs mailed a summons, along with a copy of the verified petition, to each Defendant. SDCL 21-35-9.

consumers in Minnesota. However, the Court declines Defendants' invitation to read words into the statute. Under the plain language of the statute, BSSE is not a trans-state transmission facility, and SDCL 21-35-1.1 does not apply. Plaintiffs have met the conditions precedent to exercise eminent domain.

## II. Whether Plaintiffs' taking of Defendants' land is for a public use.

"[O]ur state constitution provides its landowners more protection against a taking than the United States Constitution." *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146. This greater protection from eminent domain flows from the South Dakota Supreme Court's adoption of the "use by the public test." *Id.* (citing *Illinois Central R.R. Co.*, 144 N.W. at 128). That test "requires that there be a 'use or right of use on the part of the public or some limited portion of it[.]'" *Id.* (alteration in original) (emphasis added) (quoting *Illinois Central R.R. Co.*, 144 N.W. at 128). "[I]t is not material that but few persons enjoy it, or that it also serves a private use[.]" *Illinois Central R.R. Co.*, 144 N.W. at 129 (quoting *Kansas City, S. & G. Ry. Co. v. Louisiana W. R. Co.*, 40 So. 627, 629 (La. 1905)).

Plaintiffs here have established BSSE satisfies a public use under either prong of the "use by public test." First, South Dakotans will actually use the electricity transmitted from BSSE, even if those residents are not directly connected to the line. HT at 114-17. The substations at Ellendale, North Dakota, and Big Stone South, South Dakota, provide different transmission paths that serve customers in South Dakota. *Id.* at 116. Those customers do not have to be customers of Plaintiffs or a utility company affiliated with MISO. *Id.* at 116-17. These facts are not disputed so the first prong of the "use by public test" is met.

Second, it is possible for anyone to directly connect into BSSE provided the regulatory requirements established by MISO are followed. *Id.* at 117. These regulatory requirements,

contained in a tariff, were approved by FERC and are publically available. *Id.* Tariffs, like this one, have the force of law. *In re One-time Special Underground Assessment by N. States Power Co. in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. This tariff requires open access to BSSE—a requirement for transmission systems pursuant to FERC Order 888 and 889. HT at 119, 167-68; *see also Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff'd sub nom. New York v. F.E.R.C.*, 535 U.S. 1 (2002) (noting “open access is the essence of Orders 888 and 889.”). Open access means that anyone can interconnect to the system on a nondiscriminatory basis as long as the regulatory requirements are met. HT at 119-20. For example, a landowner could build a substation to connect into BSSE. *Id.* at 120-21. This is enough to establish the public has a right to use BSSE under the second prong of the “use by public test.”

**III. Whether it is necessary for Plaintiffs to take a perpetual easement on Defendants' land to accomplish their public purpose.**

“[M]uch 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.” *City of Rapid City v. Finn*, 2003 S.D. 97, ¶ 19, 668 N.W.2d 324, 329 (quoting *Basin Elec. Power Co-op v. Payne*, 298 N.W.2d 385, 388 (S.D. 1980) (quoting *Otter Tail Power Co. v. Malme*, 92 N.W.2d 514, 521 (N.D. 1958))). This same latitude also applies to a corporation’s selection and location of the route for its power transmission line.” *Basin Elec. Power Co-op*, 298 N.W.2d at 388 (quoting *Otter Tail Power Co.*, 92 N.W.2d at 521). A “landowner 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.” *Id.* (quoting *Otter Tail Power Co.*, 92 N.W.2d at 521). A finding of necessity is binding on all persons, unless it is “based upon fraud, bad faith, or an abuse of discretion.” SDCL 21-35-10.1. Landowners “shoulder the burden of proving abuse or

bad faith and overcoming the strong presumption that the condemnor acted lawfully.” *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 10, 630 N.W.2d 699, 703 (citations omitted).

The same logic that allows a condemnor to determine how much property is necessary and where the route will be placed applies to situations like this one where the extent of the property interest sought is at issue. *See City of Rapid City*, 2003 S.D. 97, ¶ 19, 668 N.W.2d at 329; *Basin Elec. Power Co-op*, 298 N.W.2d at 388; *Otter Tail Power Co.*, 92 N.W.2d at 521; *see also City of Charlotte v. Cook*, 498 S.E.2d 605, 608-09 (N.C. 1998) (the decision to condemn a piece of property in fee simple absolute or as an easement is subject to deferential review based on necessity).<sup>6</sup> This logic is consistent with other areas of the code involving eminent domain conducted in accordance with SDCL Chapter 21-35. *See, e.g.*, SDCL 9-41A-51 (a municipal power agency may acquire fee simple absolute or a lesser interest through use of eminent domain); SDCL 11-8-50 (same but the power is vested in a municipality); and SDCL 49-17A-18 (same but the power is vested in regional railroad authorities). Plaintiffs are therefore entitled wide latitude in their determination that this perpetual easement is necessary.

**a. Whether Plaintiffs abused their discretion in determining a perpetual easement is necessary.**

For an abuse of discretion to occur “[a] choice to condemn must grossly violate fact and logic or be wholly arbitrary[.]” *City of Rapid City*, 2003 S.D. 97, ¶ 19, 668 N.W.2d at 329. Here, the evidence does not rise to the level necessary to find an abuse of discretion. Plaintiffs expect BSSE to serve customers, including South Dakotans, in perpetuity. HT at 60. As a result, Plaintiffs’s boards of directors determined acquiring “Property Interests” from landowners was

<sup>6</sup> *See also City of Willmar v. Kvam*, 769 N.W.2d 775, 779 (Minn. Ct. App. 2009) (analyzing the city’s determination to condemn in fee simple absolute versus an easement in terms of necessity); *Miller v. Florida Inland Navigation Dist.*, 130 So.2d 615, 623 (Fla. Dist. Ct. App. 1961) (recognizing the trial court is not entitled to invade the discretion of the condemning authority in regard to the extent of the easement’s use or time during which it may be enjoyed, unless there is a clear showing of oppression, actual fraud, or bad faith)

necessary to accomplish that public purpose. Ex. 10. The property interest sought was a perpetual easement. HT at 60. These facts do not violate fact and logic. Nor are they wholly arbitrary. This conclusion is only strengthened by the fact that Plaintiffs' took a perpetual easement—a lesser property interest than ownership in fee simple. *See City of Charlotte*, 498 S.E.2d at 608-09.

**b. Whether Plaintiffs engaged in bad faith negotiations with Defendants.**

Bad faith in condemnation proceedings has been defined as “conscious wrongdoing motivated by improper interest, ill will, or dishonest intent.” *City of Freeman*, 2001 S.D. 84, ¶ 11, 630 N.W.2d at 703. However, there is no requirement in South Dakota to attempt negotiations for a voluntary agreement before proceeding with condemnation. *Id.* ¶ 15, 630 N.W.2d at 703-04. “A hallmark of bad faith in condemnation proceedings is the use of the power of eminent domain for an improper purpose.” *Id.* ¶ 16, 630 N.W.2d at 704.

After a review of the evidence, it is evident that Plaintiffs did not engage in bad faith negotiations with Defendants. Indeed, it appears just the opposite is true: Plaintiffs engaged in good faith negotiations with all landowners. Five facts support this conclusion. First, the purpose underlying these easements is proper. *See* Section II. Second, Plaintiffs engaged all landowners by holding open house meetings, sending out letters, and setting up a website. HT at 37-39. Third, Plaintiffs were successful in voluntarily obtaining ninety-one percent of the parcels necessary for BSSE. *Id.* at 42-43. As part of that process, Plaintiffs modified the terms of the proposed easements for some landowners. *Id.* at 73. Additionally, Plaintiffs considered approximately sixty route changes proposed by landowners and, after analyzing their merits, granted thirty of them. *Id.* at 61-65. Fourth, Plaintiffs contacted each Defendant in an effort to negotiate before the last final offer but were stymied by Defendants's unwillingness to

meaningfully participate. *Id.* at 68-69. And fifth, Plaintiffs offered Defendants *more* money for the easement as part of the last final offer. Ex. 16-18. This was an attempt to avoid condemnation.<sup>7</sup> *Id.* Consequently, the steps taken by Plaintiffs here evidence a good faith attempt to negotiate.

**CONCLUSION**

Plaintiffs have satisfied all five prongs of the *Illinois Central* test needed to establish they have been granted the power of eminent domain. *See Illinois Cent. R.R. Co.*, 144 N.W. at 726. Accordingly, Plaintiffs have the right to take a one-hundred-fifty foot, perpetual easement on Defendants' land as sought.

Dated this 6<sup>th</sup> day of June, 2016.

BY THE COURT:



Tony L. Portra  
Circuit Judge

ATTEST:

Claudeite Opitz, Clerk of Courts

By: Deputy Clerk

<sup>7</sup> The fact that the last final offer mentions condemnation before identifying the price does not establish bad faith. Plaintiffs actively sought to negotiate with Defendants but were stymied. HT at 68-69. Moreover, there is no requirement in South Dakota to attempt negotiations before proceeding with condemnation. *See City of Freeman*, 2001 S.D. 84, ¶ 15, 630 N.W.2d at 703-04.

STATE OF SOUTH DAKOTA

COUNTY OF DAY

**FILED**

IN CIRCUIT COURT

**JUN - 7 2016**

FIFTH JUDICIAL CIRCUIT

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

MONTANA-DAKOTA UTILITIES CO. AND  
OTTER TAIL POWER COMPANY,

Plaintiffs,

vs.

LARRY A. MAGES, ET AL.,  
PARKSHILL FARMS, LLC, ET AL.,  
GERALD W. PESALL, ET AL.,

Defendants

18 CIV 15-50  
18 CIV 15-67  
CIV. 15-77

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Montana-Dakota Utilities Co. and Otter Tail Power Company (collectively, "Plaintiffs"), have filed Verified Petitions for Condemnation in the above-captioned matters. Defendants Larry and Margaret Mages, Gerald and Geraldine Pesall, and Parkshill Farms, LLC (collectively "Landowner Defendants") have all objected to Plaintiffs' right to exercise the power of eminent domain and requested a hearing pursuant to SDCL 21-35-10.1. Based upon the agreement of the parties, the hearing pursuant to SDCL 21-35-10.1 has been consolidated in each of these actions, which consolidation was ordered in the Consolidation and Scheduling Order dated January 19, 2016, entered in each of the above-captioned matters. Consistent with the Consolidation and Scheduling Order, the hearing pursuant to SDCL 21-35-10.1 came before the Circuit Court, Honorable Tony Portra presiding, for hearing on April 5, 2016. Plaintiffs appeared through their attorneys, Thomas J. Welk and Jason R. Sutton, along with corporate representatives Al Koeckeritz and Jason Weiers. The Landowner Defendants appeared personally and through their attorney N. Bob Pesall. Based upon the evidence presented at the hearing, the Court's review of

the file and record as a whole, and the oral and written arguments of counsel, the Court enters the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. Plaintiffs are both public utilities who are authorized to transact business in South Dakota.
2. As public utilities, both Plaintiffs provide electric service to customers in, among other places, South Dakota.
3. Plaintiffs are the owners who are seeking to build a high voltage transmission line known as the Big Stone South to Ellendale Project (“the Project”).
4. The Project is approximately 163 miles of 345kV transmission line that will run from a new substation near Ellendale, ND to a substation south of Big Stone City, SD.
5. Transmission planning completed by the Midcontinent Independent System Operator, Inc. (“MISO”) identified the Project as one that needed to be built. The Project is one of a portfolio of 17 transmission projects approved by the MISO Board of Directors in December, 2011.
6. MISO is an organization created to, among other things, regulate the planning, construction, and management of transmission in MISO’s territory, which includes much of the upper Midwest including South Dakota.
7. MISO is subject to the regulation and control by the Federal Energy Regulatory Commission, and the terms and conditions of the MISO tariff provide anyone can access any MISO transmission project.
8. Plaintiffs are transmission owners in MISO, and Plaintiffs are obligated to build the Project.

9. Access to and use of the the Project is controlled by and pursuant to the authority of MISO.

10. In order to construct the Project, Plaintiffs were required to file an Application for a facility permit with the Public Utilities Commission of the State of South Dakota ("PUC").

11. Defendant Gerald Pesall intervened in the PUC facility permit proceeding and opposed the issuance of the facility permit.

12. Following an evidentiary hearing, the PUC granted the requested facility permit to Plaintiffs in a Final Decision and Order: Notice of Entry dated August 22, 2014.

13. Defendant Gerald Pesall appealed the PUC's decision granting the facility permit to the South Dakota Circuit Court in the matter captioned *Gerald Pesall v. Montana-Dakota Utilities Co.*, Civ. 14-53, South Dakota Circuit Court for the Fifth Judicial Circuit, Day County, SD ("Circuit Court Appeal"). The Circuit Court, Honorable Scott P. Myren presiding, issued a judgment filed December 24, 2014, affirming the decision by the PUC granting the facility permit.

14. Gerald Pesall appealed to the South Dakota Supreme Court, who entered an opinion captioned *Gerald Pesall v. Montana-Dakota Utilities Co., et al.*, 2015 S.D. 81 ("Supreme Court Decision"), affirming the issuance of the facility permit.

15. The Project has acquired almost all of the permits it needs to proceed with the construction of the Project along the entirety of the route. The permits that have not yet been obtained are expected to be received.

16. Prior to and as part of the Application for the facility permit, the Project engaged in an extensive route selection process. The route selection process took almost a year and it considered the interests of various stakeholders, such as landowners, government interests, as

well as the Plaintiffs. The route selection process took into account a variety of significant issues, including cost and length of the transmission line, cultural impacts, environmental impacts, minimizing impacts to human settlements, and consideration of landowner comments. Based upon these criteria, after considering the comments of the various stakeholders, the route for the Project was selected. The selection of the route for the Project was done in good faith.

17. Following the selection of the initial route, the Project also considered requests by various landowners for route changes and adjustments. Approximately one-half of the route change requests were granted while others were denied. The Project engaged in a reasonable review of the requests for route changes. The consideration and granting of some of these requests is further evidence of good faith in the selection of the specific route for the Project.

18. The route of the Project crosses real property owned by Landowner Defendants.

19. Plaintiffs engaged in good faith in selecting the route for the Project, including the placement of the Project route on Landowner Defendants' real property.

20. Plaintiffs attempted to negotiate voluntary easement acquisitions with each of the Landowner Defendants, who have all each refused to grant Plaintiffs an easement for the Project.

21. Plaintiffs have negotiated voluntary easements across approximately 91% of the parcels of property needed to build the entire Project.

22. The terms and conditions of the easements are necessary for the construction, maintenance, and long-term operations of the Project, and Plaintiffs have engaged in good faith in requesting those terms and conditions in the easement document. There is no credible evidence indicating that Plaintiffs have engaged in any fraud, bad faith or abuse discretion initiating these condemnation actions.

23. The Plaintiffs are condemning a perpetual, 150-foot easement for the construction, maintenance, and long-term operation of the Project. The Plaintiffs reasonably and in good faith determined the amount of land necessary for the construction, operations, and maintenance of the Project.

24. Based upon the need to build the Project, and based upon Landowner Defendants' refusal to voluntarily grant an easement, each of the Plaintiffs have made determinations that it is necessary to proceed with condemnation in this matter.

25. The Plaintiffs' finding that it is necessary to proceed with condemnation and to seek to condemn an easement with the same terms and conditions of the easement document rejected by the Landowner Defendants is not fraudulent, in bad faith, or an abuse of discretion.

26. Other than the duration of the easement, the Landowner Defendants have not challenged any of the other terms and conditions of the proposed easement.

27. Landowner Defendants' objection to the duration of the easement does not warrant modifying the terms and conditions of the proposed condemned easement. Plaintiffs seek a perpetual easement, and the existence of a perpetual easement is necessary in order to provide the needed electrical benefits of the Project to the region.

28. In North Dakota, the easements for the Project are limited to 99 years based upon North Dakota law rather than the anticipated duration of the use of the Project by the public. The evidence indicates that the Project is expected to last longer than 99 years, and as a result, the Plaintiffs did not engage in fraud, bad faith or abuse of discretion conduct in seeking to condemn an easement with a perpetual duration.

29. The Project, which is a bulk transmission project, will be used by members of the public, including utility customers in South Dakota.

30. Construction of the Project is needed to facilitate future generation in South Dakota, including renewable energy such as wind.

31. Construction of the Project will also increase the reliability of the electrical service in South Dakota, including reliability for South Dakota residents by unloading the burden on the current electrical system.

32. Construction of the Project will also create an economic benefit of reduced transmission congestion and increased available generation, increased property taxes, increased construction jobs, and ancillary economic benefit of the construction such as monies spent locally on restaurants, hotel rooms, fuel, and other supplies.

33. Due to the network and interconnected nature of the electrical transmission grid, electricity transmitted on the Project will may be used to provide power to electrical customers located in South Dakota.

34. The public has the right to access and use the Project. Specifically, based upon the open access tariff applicable to MISO, members of the public such as potential generation providers as well as electrical transmission customers can connect with the Project if they satisfy the regulatory requirements of MISO and provide the necessary equipment to connect.

35. Because members of the public will use the Project, and because the members of the public have a right to connect to the Project subject to regulatory requirements by MISO, the Court finds that the Project will serve a public use.

36. If any of the foregoing findings of fact are better considered questions of law, they shall be deemed as such.

#### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction over the matter and the parties.

2. Plaintiffs have commenced this condemnation action pursuant to SDCL 21-35-1 by serving a verified petition for condemnation.

3. Each of the Landowner Defendants has requested a hearing on Plaintiffs' right to take pursuant to SDCL 21-35-10.1 within 30 days of service of the verified petition for condemnation.

4. In exercising the power of eminent domain, Plaintiffs bear the burden of proving by a preponderance of the evidence each of the following: (1) That Plaintiffs are within the class to whom the power of eminent domain has been delegated; (2) That all conditions precedent for the exercise of that power have been complied with; (3) That the purpose for which the property is to be taken as one of the purposes enumerated in the statute; (4) That the property is being taken for a public use; and (5) That the particular property sought to be taken is necessary to accomplishment of the public purpose intended. *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724, 726 (S.D. 1913).

5. The Plaintiffs have proven each of these requirements by a preponderance of the evidence.

6. Regarding the first element, as a public utility authorized to transact business in South Dakota, both Plaintiffs have the power of eminent domain pursuant to SDCL 49-33-10, 49-34-4 and 49-34-8.

7. Regarding the second element, all conditions precedent has been satisfied for the exercise of eminent domain. Pursuant to SDCL 49-34-4, the procedure for condemnation shall be as provided in SDCL Chapter 21-35. The Court concludes that the Plaintiffs have satisfied the procedures required by Chapter 21-35.

8. Regarding the third element, the right-of-ways sought to be condemned in this case are to be used for the purpose for which the property can be taken under the applicable statutes. SDCL 49-33-10, 49-34-4 and 49-34-8 authorize the utilities to take a right-of-way for purposes of constructing a power line. Plaintiffs are taking the property in this case to construct a power line which is within the enumerated purposes provided by the statutes.

9. Regarding the fourth element, Plaintiffs must prove that the property is being taken for a public use. South Dakota Constitution Article 6, Section 13 provides, in relevant part, that, “[p]rivate property shall not be taken for public use, or damage, without just compensation, which will be determined according to the legal procedure established by the Legislature and according to Section 6 of this article.” According to the South Dakota Supreme Court, public use requires “use or right of use on the part of the public or some limited portion of it.” *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146 (quoting *Illinois Central Railroad Co.*, 144 N.W. at 728). The existence of a public benefit of the construction of the infrastructure, without a public use, does not give a right to condemn the property. *See Id.*

10. The South Dakota Supreme Court in *Illinois Central Railroad Co. v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913) articulated the test for public use. According to the Court, a public use exists if members of the public will actually use the infrastructure, or if members of the public have the same right to access the infrastructure as the person requesting the construction of the infrastructure. *Id.* at 728-29. It does not matter that the infrastructure will in fact be used by few, if any, member of the public. *Id.* Instead, as long as the members of the public have the right to access the infrastructure subject to the general laws and regulation of the government, then the Project will serve a public use. *See Id.*

11. The Court concludes that the Project in this case will serve a public use. Plaintiffs are proposing to construct a transmission line that will in fact be used by members of the public. The transmission line will transmit electricity both generated by and used by members of the public, including members of the public in South Dakota.

12. In addition, the Plaintiffs have proven that the members of the public have a right to access the Project. The Project is subject to the MISO tariff. This MISO tariff has the full force and effect of law. *In re One-Time Special Assessment by Norther States Power Co. in Sioux Falls*, 2001 SD 63, ¶ 8, 628 N.W.2d 332, 334. The terms of the MISO tariff provide that it is an open access project which can be accessed by any person subject to the general regulatory requirements imposed by MISO. This right to access the Project establishes a public use.

13. The last element required to be proven by Plaintiffs is that the particular property sought to be taken is necessary to the accomplishment of the public purpose intended. This is an issue of necessity.

14. Plaintiffs here have determined it is necessary to proceed with condemnation of the right-of-ways for construction of the Project. The Plaintiffs' determination of necessity is subject to substantial deference. Specifically, SDCL 21-35-10.1 states that a "finding of necessity by the plaintiff, unless based upon fraud, bad faith, or an abuse of discretion, shall be binding on all persons." As a result, Plaintiffs have broad discretion in determining what property is necessary to be taken for the construction of the transmission line. *See Basin Electric Power Co-op v. Payne*, 298 N.W. 2d 385, 386 (S.D. 1980).

15. The Landowner Defendants bear the burden of proving abuse of discretion, fraud, or bad faith needed to overcome strong presumption that Plaintiffs acted lawfully in making the determination of necessity. *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 10, 630 N.W.2d 699, 703.

16. The Court concludes that Plaintiffs' decision that it is necessary take the easement requested by Plaintiffs, including all the terms and conditions contained in the proposed judgments offered at Exhibits 28 to 33, are necessary. Plaintiffs' determination of necessity is not based upon fraud, bad faith or abuse of discretion.

17. Regarding fraud, there is no credible evidence indicating that a fraud occurred in the determination of necessity by the Plaintiffs.

18. Regarding alleged bad faith, the South Dakota Supreme Court has stated, "[a] hallmark of bad faith and condemnation proceedings is the use of the power of eminent domain for an improper purpose." *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 16, 630 N.W.2d 699, 704. Additionally, there is an abuse of discretion in making the finding of necessity only when "the result [is] so palpably and grossly in violative of fact and logic that it evidence is not the exercise of will but pervasivity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather a passion or bias." *Payne*, 298 N.W.2d at 387.

19. The Landowner Defendants have failed to bear their burden of proving Plaintiffs have abused their discretion or engaged in bad faith. The Project engaged in reasonable siting efforts, worked to voluntarily acquire the easements in this case, and ultimately concluded that they needed to proceed with condemnation in order to construct the Project. This determination was not fraudulent, an abuse of discretion or in bad faith.

20. Landowner Defendants have objected to the duration of the term of the easement. Landowner Defendants indicates that it is not necessary to condemn an easement longer in duration than 99 years. The Court finds that the perpetual duration of the easement is not fraudulent, in bad faith or an abuse of discretion. The evidence indicates that the existence of 99 year easements in North Dakota was based upon North Dakota law rather than the anticipated

duration of the Project. The evidence further indicates that the perpetual duration of the Project is reasonable because the Plaintiffs expect that the Project will remain in commission beyond 99 years.

21. Landowner Defendants claim that the Plaintiffs' negotiation indicates bad faith in proceeding with condemnation. This argument is not supported by the evidence. The Project has obtained approximately 91 percent of the easements needed to construct the whole project through voluntary negotiation. This success rate establishes the Project's good faith efforts to negotiate with landowners.

22. Regarding the specific Landowner Defendants here, the evidence does not establish bad faith by the Plaintiffs. The Landowner Defendants never stated what changes they wanted regarding the terms of the easement. Instead, they were against the Project generally. The Project only proceeded with condemnation after the Landowner Defendants refused to negotiate with the Landowner Defendants. Proceeding with condemnation under these circumstances is not bad faith. See *City of Freeman*, at ¶ 15, 630 N.W.1d at 703-04 (recognizing that unlike some states, South Dakota law does not require an attempt to negotiate a voluntary agreement before proceeding with condemnation, and thus, it was not bad faith to terminate negotiations and proceed with condemnation).

23. The Court concludes that the Plaintiffs have the right to take and condemn a right-of-way for construction of the Project that contains all of the terms and conditions in the judgment provided as Exhibits 23 to 33.

24. All the terms and conditions of the proposed easement in the judgment provided as Exhibits 23 to 33 are hereby approved for taking by Plaintiffs.

25. If any of these foregoing conclusions of law are better deemed findings of fact, they shall be deemed as such.

26. The Court's Memorandum Decision On Plaintiff's Right To Take is incorporated herein by reference.

Dated this 6<sup>th</sup> day of June, 2016.

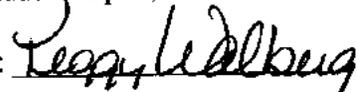
BY THE COURT:



  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

ATTEST:

Claudette Opitz, Clerk of Courts

By:  Deputy Clerk

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

MONTANA-DAKOTA UTILITIES CO. AND  
OTTER TAIL POWER COMPANY,

Plaintiffs,

vs.

LARRY A. MAGES, ET AL.,  
PARKSHILL FARMS, LLC, ET AL.,  
GERALD W. PESALL, ET AL.,

Defendants

18 CIV 15-50  
18 CIV 15-67  
18 CIV. 15-77

**ORDER REGARDING HEARING ON  
PLAINTIFFS' RIGHT TO TAKE**

Montana-Dakota Utilities Co. and Otter Tail Power Company (collectively, "Plaintiffs"), have filed Verified Petitions for Condemnation in the above-captioned matters. Defendants Larry and Margaret Mages, Gerald and Geraldine Pesall, and Parkshill Farms, LLC (collectively "Landowner Defendants") have requested a hearing pursuant to SDCL 21-35-10.1. Based upon the agreement of the parties, the hearing pursuant to SDCL 21-35-10.1 ("Right to Take Hearing") has been consolidated in each of these actions, which consolidation was ordered in the Consolidation and Scheduling Order dated January 19, 2016, entered in each of the above-captioned matters. Consistent with the Consolidation and Scheduling Order, the hearing pursuant to SDCL 21-35-10.1 came before the Circuit Court, Honorable Tony Portra presiding, for hearing on April 5, 2016. Plaintiffs appeared through their attorneys, Thomas J. Welk and Jason R. Sutton, along with corporate representatives Al Koeckeritz and Jason Weiers. The Landowner Defendants appeared personally and through their attorney N. Bob Pesall. Based upon the evidence presented at the Right to Take Hearing, the Court's review of the file and record as a whole, and the oral and written arguments of counsel, the Court issued a

Memorandum Decision filed June 6, 2016, and Findings of Fact and Conclusions of Law filed June 6, 2016, granting the Plaintiffs the right to take an easement with the same terms and conditions as contained in Exhibits 22 to 33.

Based on the foregoing, it is hereby

ORDERED that Plaintiffs have the right to exercise the power of eminent domain and to condemn a right of way for construction of the Big Stone South to Ellendale project that contains all the terms and conditions of the perpetual easement contained in paragraphs 1 through 20 of the proposed judgment documents identified and admitted as Exhibits 28 through 33, inclusive, at the Right to Take Hearing for the reasons stated in the Findings of Fact and Conclusions of Law filed June 7, 2016, and the Court's Memorandum Decision on Plaintiffs' Right to Take, filed June 7, 2016, both of which are hereby incorporated by reference as if fully stated herein. It is further hereby

ORDERED that following a jury trial determining just compensation, the Plaintiffs are entitled to entry of the judgments in the form of the judgments identified and admitted as Exhibits 28 through 33, inclusive at the Right to Take Hearing.

BY THE COURT:

Attest:  
Claudette Opitz  
Clerk/Deputy



Signed: 8/5/2016 3:08:51 PM

  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

1 STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

2 COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

3  
4  
5 Montana-Dakota Utilities  
And Otter Tail Power Company,

6 Plaintiffs,

7 Vs.

Case No. 18CIV15-067  
JURY TRIAL  
Volume I

8 Parkshill Farm, LLC, Web  
9 Water Development Association,  
10 Inc., Kermit Parks, Reuben Parks,  
Vera Parks, Estate of Orion E.  
Parks, Ordean Parks, Jeff Schiley,

11 Defendants.

12  
13 Date & Time:

January 25, 2017  
9:00 a.m.

14 Before:

15 THE HONORABLE TONY L. PORTRA  
16 Circuit Court Judge  
P.O. Box 1087  
Aberdeen, South Dakota

17 Location:

Day County Courthouse  
Webster, SD 57274

18  
19 APPEARANCES

20 For the Plaintiffs:

Reed A. Rasmussen  
SIEGEL, BARNETT & SCHULTS  
P.O. Box 490  
Aberdeen, SD 57402

21  
22 For the Defendants:

N. Bob Pesall  
PESALL LAW FIRM  
P.O. Box 23  
Flandreau, SD 57028

1 Q. Would you take a look at what I think is the first page in  
2 that exhibit book in front of you there?

3 A. Yup.

4 Q. You see something marked Exhibit 1?

5 A. Yes.

6 Q. Is that a map of your farm?

7 A. That is.

8 Q. All right. I'd like to talk to you a little bit about that  
9 map. So the jury can see what's going on I'm going to publish  
10 the large printout copy. Can you see the large printout copy from  
11 your location?

12 A. Yes.

13 Q. Okay. So this is a map of your farm; is that right?

14 A. That's correct.

15 Q. How many acres do you farm in total?

16 A. We cultivate about 2700 acres.

17 Q. Okay.

18 A. The remainder, some of it, the last few years we've had  
19 the areas that are indicated as wet have expanded and contracted,  
20 so it depends on how much water.

21 Q. How many acres in total?

22 A. 3,713.

23 Q. And can you describe for the jury whereabouts the home  
24 place is? And I'll actually give you a laser pointer here if you  
25 would hold that button and point out on the map there where is

1 Q. So you're about in the middle; is that a fair statement?

2 A. Yes.

3 Q. If you would turn to page three. Mr. Parks, you've read  
4 this whole book; is that fair?

5 A. Yes.

6 Q. The book is largely a set of safety issues and  
7 considerations the landowners needs to keep track of; is that a  
8 fair statement?

9 A. Yes.

10 Q. Okay, let's take a look at some of these. If you will  
11 look at the top left of page number three. This first sentence  
12 right in there, can you tell me what that says?

13 A. "We will remove trees." Is that the one?

14 Q. That's the one.

15 A. "And buildings, we will remove trees and buildings within  
16 150 foot wide right of way to ensure safety. We also will trim  
17 or remove danger trees or trees outside of the right of way that  
18 lean toward the right of way, or are tall enough to pose danger  
19 to the line to reduce potential damage."

20 Q. You can stop there.

21 A. Okay.

22 Q. I won't make you read the whole thing. I just want to  
23 cover a few concerns that might be of issue to you. That safety  
24 concern, that indication that they will remove trees and  
25 buildings, does that create any concerns for you when you think

1 about the value of your farm?

2 A. Yes, it precludes our adding any bins or any fixtures  
3 within those areas.

4 Q. You don't currently have any bins there, do you?

5 A. No.

6 Q. Is there a reason why you might want to put bins in the  
7 area along where the line is on your farm?

8 A. Well, there's access on some of the properties. We used  
9 to have a bin there by number two. We used to maintain bins  
10 there.

11 Q. If you would turn to page, I apologize, the technology is  
12 getting the better of me again, page four. The jury will have a  
13 copy they can look at. If you would look at the top of page four.  
14 This first indication right here, can you read that first  
15 sentence for me?

16 A. We will not permit installation of structures, planting of  
17 tall growing vegetation, and stockpiling of crops under the  
18 transmission line.

19 Q. Does that limitation give you some concerns about how this  
20 will impact the value of your farm?

21 A. Yes, it does.

22 Q. Why so?

23 A. Well, if we ever need to use that, I mean, we'll be, it  
24 won't be allowed.

25 Q. If you would read this last sentence right down here, it

1 starts out, "we will inspect."

2 A. "We will inspect the line by air with occasional visits by  
3 ground crews as needed."

4 Q. Does the idea of having aerial and ground inspections  
5 going on above your property give you any concerns?

6 A. Well, yes, it does.

7 Q. Okay, why so?

8 A. Well, about the only way to enforce any trespass is for  
9 ourselves to either do it or report it to the proper authorities.  
10 And so unless we have prior notice for any of the visits I can  
11 imagine it's going to cost more time.

12 Q. That's time that you're already short of?

13 A. Yes.

14 Q. If you would look down a little bit further. Let's go  
15 ahead and jump to this section here where it talks about physical  
16 contact. Do you see where I'm pointing?

17 A. No, I don't.

18 Q. Right here.

19 A. Okay.

20 Q. Could you read that sentence that starts out "physical  
21 contact."

22 A. "Physical contact, including equipment with a transmission  
23 line, can be hazardous and may cause a lethal shock."

24 Q. Does that give you any concern?

25 A. Yes, it does.

1 Q. Tell me why?

2 A. Lethal means dead.

3 Q. Fair enough. If you would go down to this one right here  
4 and read that sentence to us.

5 A. To help prevent arc flash or electric shock keep  
6 equipment, antennas, and people at least 15 feet away from any  
7 energized transmission line.

8 Q. And you, I believe, testified that you have some equipment  
9 that's more than 15 feet tall?

10 A. Yes.

11 Q. Do you ever have to stand on top of your equipment?

12 A. Yes.

13 Q. Do you ever do any field or crop work staging in the area  
14 where the easement would go?

15 A. We have in the past.

16 Q. If you would go down a little bit to where, right here  
17 where it says, "keep a minimum." If you would read me that  
18 sentence right here.

19 A. "Keep a minimum distance of 100 feet from the line for  
20 refueling."

21 Q. Okay, does that raise any concerns for you?

22 A. Well yes, it does. I mean, their advice is probably good  
23 so you can't fuel anything within 100 feet.

24 Q. Will that make it more difficult to stage planning or crop  
25 work operations in those easement areas?

1           A. Yes, it will. We'll have to change what we have been  
2 doing.

3           Q. If you change what you've been doing, is it going to cost  
4 you more time?

5           A. It wouldn't be as efficient. Yes, it would cost more  
6 time.

7           Q. Take a look at the next section down here. This is about  
8 GPS information. The sentence that starts, "transmission  
9 structures", could you read that for me?

10          A. Transmission structures near satellite based GPS farm  
11 equipment may block or reflect GPS signals like a building, but  
12 the presence of multiple satellites usually prevents this from  
13 being a significant issue.

14          Q. Do you use GPS in any of your farming operations?

15          A. Yes, we do. And we're, as we upgrade our machinery we're  
16 using it more and more.

17          Q. Do you use GPS to actually guide your equipment across  
18 fields yet?

19          A. Yes.

20          Q. Do you have any concerns if there was small  
21 inconsistencies in your GPS signalling that might effect your  
22 ability to guide your equipment?

23          A. Yes, I've seen pictures where people have relied on that  
24 and it's pretty disastrous.

25          Q. You think other farmers in the market area would have the

1 same concerns?

2 A. Yes.

3 Q. Let's go over where they talk about fencing a little bit.

4 If you would go ahead and read this sentence, "nonelectric."

5 A. "Nonelectric fencing made of barbwire or similar material  
6 directly attached to steel posts are adequately grounded and will  
7 not collect an electric charge. Nonelectric metallic fencing  
8 installed on insulating posts, such a wooden poles, could have  
9 induced voltage if the fence is parallel to the transmission  
10 line."

11 Q. Let's talk about that nonelectric fencing statement. Is  
12 that a barbwire fence?

13 A. Yes.

14 Q. Do you have barbwire fences on your farm?

15 A. The proposed line will go over six of them.

16 Q. And what kind of posts do you use with those?

17 A. It depends on the areas. It's mostly steel but where it's  
18 real moist soil we go to wood posts.

19 Q. Do you necessarily agree that a steel fence post is going  
20 to provide a ground?

21 A. It depends on the time of the year.

22 Q. Why is that?

23 A. I know IEEE codes recommends --

24 Q. We don't want to get into IEEE codes. Is there something  
25 practical that gives you a concern?

1 A. Yeah, you need to get below the frost line.

2 Q. If you were to go down to, say, a tractor supply company  
3 and buy fence posts, are they bare steel or are they coated?

4 A. No, they're coated. And they talk about non-coated poles  
5 versus coated poles.

6 Q. Is that part of the reason you have some concern about  
7 this?

8 A. That is, yes. I take their word for it.

9 Q. If you would go ahead and take a look at this sentence  
10 here, "if you own a fence"?

11 A. "If you own a fence that is within 100 feet of the right  
12 of way, contact one of the transmission line owners shown on the  
13 inside cover to address possible mitigation of induced voltage."

14 Q. How many fences did you say you have within that 100 foot  
15 range?

16 A. Six. There's also electric lines, temporary fences.

17 Q. You have temporary fences along there as well?

18 A. Yes.

19 Q. Describe those for me.

20 A. They're just, excuse me, it's a solar powered generator  
21 and they're around some of the areas where the cattle frequent  
22 water.

23 Q. And are those connected to a metal connection to the  
24 ground?

25 A. Not presently.

1 Q. Would an electric fence work if you had it grounded out  
2 like that?

3 A. There's ways around it.

4 Q. Ordinarily?

5 A. Yeah. Well, yeah.

6 Q. If you take a look at this page five then, you see the  
7 diagram on the bottom there?

8 A. Yes.

9 Q. This picture right here?

10 A. Yeah.

11 Q. Depicts a couple of poles and the wires between them.  
12 Does that fairly represent what you understand would be  
13 constructed across your land?

14 A. That's what this brochure says. There was a fellow, Henry  
15 Ford, in Aberdeen, he said that --

16 MR. RASMUSSEN: Objection. Hearsay, your Honor.

17 THE COURT: Sustained.

18 MR. PESALL: That would be hearsay.

19 Q. (BY MR. PESALL) Is that fairly accurate as far as what  
20 you anticipated?

21 A. Yes, that's within a foot.

22 Q. Okay. You see here, what's the minimum ground clearance  
23 that they say these lines will have?

24 A. Thirty foot is what the brochure says.

25 Q. You have some concerns about the height of your equipment

1 coming within 15 feet if the lines hang as low as 30?

2 A. That's only going to leave 15 foot. Yeah, that's a  
3 concern.

4 Q. You would actually be coming within 15 feet based on some  
5 of your equipment?

6 A. Yeah, and that's for a point, if you expand the area  
7 there's going to be a definite increase in the effect.

8 Q. What do you mean if they expand the area?

9 A. Like the top of a combine would probably be, this is a  
10 guess, but fifty square foot and that's going to change the  
11 equation.

12 Q. As far as the risk factor of getting too close to the  
13 line?

14 A. That's correct.

15 Q. Let's take to you page six. I'm looking at the left-hand  
16 side right here where it talks about "transmission lines are only  
17 one." Can you read that sentence there?

18 A. "Transmission lines are only one of the number of sources  
19 of electromagnetic interference that could interfere with a  
20 pacemaker."

21 Q. Do you know of anybody with a pacemaker?

22 A. I have.

23 Q. Do you have concerns about them being out on your farm if  
24 they have a pacemaker?

25 A. Yes, I would.

1 Q. Take a look up over here where we talk about hunting a  
2 little bit. Can you read the sentence that starts out, "yes, but  
3 be aware"?

4 A. "Yes, but be aware of the transmission line before aiming  
5 or firing a gun. Intentionally shooting a transmission line is  
6 illegal. Shooting insulators or conductors can break a wire and  
7 cause hazards such as an electrical discharge or arc flash."

8 Q. Do people hunt on your property?

9 A. Yes.

10 Q. Do you hunt on your property?

11 A. Yes, I do.

12 Q. Do you let other people hunt on your property?

13 A. Yes.

14 Q. Would you have any concerns about letting people hunt in  
15 the areas near this transmission line?

16 A. Yes, I would.

17 Q. Would you be inclined to let people hunt there?

18 A. No.

19 Q. Fair enough. If you would take a look at the next sentence  
20 down here talking about fires. Can you read the sentence that  
21 start out "no"?

22 A. "Never start a fire under the transmission line or within  
23 the right of way, smoke and hot gases from fires can create a  
24 conductive path for electricity. Fire could damage the poles or  
25 wires and result in an outage. It's possible that the

1 transmission line could flash to the ground through the hot air  
2 and smoke."

3 Q. Do you do any burning on your property?

4 A. Yeah, we -- yes.

5 Q. What kind of burning do you do?

6 A. Any time that we're trying to reconstitute the grasses,  
7 fire is very much a part of it. There's a couple of properties  
8 there that --

9 Q. I'll give you the laser pointer if you want to indicate on  
10 the map.

11 A. People call them slews but we used them, there's one right  
12 here, one here, one over here, and there's one here, that we have  
13 used for harvesting cow feed and fire is very much a part,  
14 especially like now, when we're coming out of a wet period you  
15 have to, burning is the fastest, easiest way to get them back  
16 into production once the water goes down to where you can work  
17 them.

18 Q. If you would take a look at this section right here where  
19 we talk about snowmobiles? Starts out as a "landowner." Can you  
20 read that for us?

21 A. "As a landowner you have the right to allow and restrict  
22 access to your land for snowmobiles. We don't recommend that the  
23 transmission line right of way be used for snowmobiles and  
24 encourage snowmobilers to watch for utility poles, guide wires,  
25 fencing, and underground cable junction boxes. Remember that

1 these dangers aren't easily seen from a speeding snowmobile  
2 especially in the dark."

3 Q. During the winter do you sometimes have people snowmobile  
4 on your farm?

5 A. We have.

6 Q. Would you be inclined to let them snowmobile anywhere near  
7 the transmission line?

8 THE COURT: May I have counsels approach for just a  
9 moment?

10 MR. PESALL: Sure.

11 (Sidebar.)

12 Q. (BY MR. PESALL) Let's go ahead and look at page seven.  
13 There's some text there about irrigation. Do you currently do  
14 any irrigating?

15 A. No, we don't.

16 Q. Do you have folks in the area, other farmers that do  
17 irrigating?

18 A. Within four or five miles there is irrigation.

19 Q. Do you see in this section of the page a series of  
20 warnings about operating irrigation near the transmission line?

21 A. Yes.

22 Q. Could you briefly read those off for us?

23 A. "Never let a solid stream of water contact the  
24 transmission line. Make sure your irrigation system is well  
25 grounded. When unloading pipes stay at least 50 feet from the

1 transmission line to avoid placing them too close to the wires.  
2 Install long lengths of metal pipes at right angles to the  
3 transmission line to reduce risk of the pipes building up induced  
4 voltage. Take extra precautions when using fertilizer and  
5 pesticide because they increase water conductivity."

6 Q. Do you use any liquid fertilizers or pesticides?

7 A. Yes, we do.

8 Q. Do you think those restrictions on the use of irrigation  
9 would impact the value of your farm?

10 A. Potentially, yes.

11 Q. Physically then how tall do you understand these towers  
12 will typically be?

13 A. Up to 155 foot.

14 Q. And the line can come within 30 feet of the ground?

15 A. Yes.

16 MR. PESALL: Your Honor, I'm done with this exhibit.

17 THE COURT: Okay, this will be a good time to break for  
18 lunch then. We'll come back at 1:10. Remember as I've  
19 instructed you previously, do not discuss this case with anyone  
20 or let them discuss it with you. Do not make up your mind at  
21 this time until it has been submitted to you. Do not express or  
22 form any opinion about the case until it has been submitted to  
23 you for your decision. When you come back to the courthouse  
24 we'll try to get started promptly at ten after one. When you  
25 come back go into the jury room so the bailiff knows you're

1 present and ready to come back into court. Alright, we'll be in  
2 recess.

3 Mr. Pesall, anything before we break for lunch?

4 MR. PESALL: I don't think so.

5 THE COURT: Mr. Rasmussen?

6 MR. RASMUSSEN: No, your Honor.

7 THE COURT: Alright, 1:10.

8 (Whereupon, the lunch recess was taken.)

9 THE COURT: We're on the record out of the presence of  
10 the jury. Mr. Pesall, anything else we should address before we  
11 bring the jury back in?

12 MR. PESALL: I don't have anything, your Honor.

13 THE COURT: Mr. Rasmussen?

14 MR. RASMUSSEN: No, your Honor.

15 (Whereupon, the proceedings resumed in the presence of  
16 the jury.)

17 THE COURT: Mr. Pesall, are you satisfied the jury is  
18 present and accounted for?

19 MR. PESALL: I am, your Honor.

20 THE COURT: Mr. Rasmussen?

21 MR. RASMUSSEN: Yes, your Honor.

22 THE COURT: Alright, are you going to continue  
23 questioning Mr. Parks?

24 MR. PESALL: Yes.

25 THE COURT: If you would come forward, please. You're

1 still under oath. You may take the stand.

2 Q. (BY MR. PESALL) Now Ordean, this isn't the first time that  
3 you've been in the courtroom to talk about this particular case;  
4 is that right?

5 A. We were not deposed.

6 Q. Are you feeling okay?

7 A. Yeah. We came in and did with Mr. Rasmussen, answered  
8 questions.

9 Q. Do you recall having some hearings on exactly what the  
10 scope of the taking was going to be in this case?

11 A. Yes, that's right. There were some motions.

12 Q. And do you recall the Court issuing some form judgments  
13 that we --

14 A. Yes.

15 Q. Would you take a look at what's in the binder you've got  
16 there as Exhibits 4, 5, 6, and 7, just briefly. That's going to  
17 start on page 34.

18 A. Oh exhibits, yeah. Yes.

19 Q. Do you understand those four exhibits to be the judgments  
20 that would be issued in this case once we figure out the dollar  
21 amounts?

22 A. Yes.

23 Q. Have you read all of those?

24 A. I've read one of them. And I know that the others are  
25 duplications.

1 Q. Would you briefly take a look at Exhibit 4? This is on  
2 page 34 of your binder there.

3 A. Yeah.

4 Q. If you would look at the second page of that exhibit. Do  
5 you see about half way down where there is a legal description  
6 that starts, "the South Half"?

7 A. Yes.

8 Q. Could you read that legal description for me?

9 A. "The South Half of Section 32, Township 121 North, Range  
10 57 West 5th P.M., Day County, South Dakota."

11 Q. The South Half of Section 32, if you could take a look  
12 over here, is that this whole piece right here?

13 A. That's correct.

14 Q. It's just the south half, not the whole section?

15 A. Right.

16 Q. So it's your understanding that that judgement for parcel  
17 one would be the south half of that section that's on the big  
18 map?

19 A. Yeah.

20 Q. Okay. If you would jump ahead to Exhibit 5, which is  
21 going to be page 40.

22 A. Yup.

23 Q. On the second page of that about half way down, do you see  
24 a legal description?

25 A. Yes.

1 Q. Could you read that off for me?

2 A. "The Southeast Quarter Section of Section 33, Township  
3 121, Range 57 West."

4 Q. As you understand it then, would that be this portion of  
5 this section right here?

6 A. That's correct.

7 Q. Okay. So we'll call that one parcel two. If you would jump  
8 ahead to Exhibit 6.

9 A. Do you want me to read it?

10 Q. Yes, tell the jury what the legal description is for  
11 Exhibit 6.

12 A. "Southwest Quarter of Section 35, Township 121 North,  
13 Range 57 West."

14 Q. That's designated as the judgment for parcel three?

15 A. That's correct.

16 Q. So would that then be this green quarter right here?

17 A. Right.

18 Q. All right. Then if you would jump ahead to what is  
19 designated Exhibit 7, the Judgement of Condemnation for parcel  
20 four. Do you have that one?

21 A. Yup.

22 Q. Could you tell me what the legal description is for that  
23 one?

24 A. "The Southwest Quarter of the Northwest Quarter and  
25 Government Lots 1, 2, 3, 4 and Section 1, Township 120 North 57

1 West."

2 Q. That would be right in here; is that right?

3 A. That's correct.

4 Q. Okay. So it's your understanding then that those judgment  
5 exhibits detail all of the rights that would be taken in this  
6 case and for which you should get paid; is that your  
7 understanding?

8 A. Well --

9 Q. Is that not your understanding?

10 A. Yeah.

11 Q. Okay. If you would go ahead and turn to the beginning of  
12 Exhibit 4 for me.

13 A. Okay.

14 Q. I'd like you to describe for the jury a couple provisions  
15 of this judgment that you're looking at there, and tell me some  
16 of your thoughts about it. Since it's a little hard for the jury  
17 to read, could you go ahead and read the last couple sentences  
18 down here that start with number one?

19 A. "Plaintiffs have the power to exercise eminent domain  
20 pursuant to South Dakota Chapters 21, 35, and plaintiffs have  
21 exercised that power and taken a perpetual easement for  
22 construction, operation, and maintenance of an electric  
23 transmission line."

24 Q. The words "perpetual easement", what does that mean to  
25 you?

1 A. Forever.

2 Q. Let's take a look at the next page then that gives us more  
3 detail as to what we're talking about. Would you go ahead and  
4 read this first paragraph here for the jury?

5 A. "Plaintiffs as tenants in common and their successors and  
6 assigned are hereby granted an irrevocable easement to construct,  
7 operate, maintain, use, upgrade, rebuild, relocate, or remove  
8 electric line facility with one or more circuits with all tower  
9 structures, poles, foundation, crossarms, cables, wires, anchors,  
10 guide, support column posts, fixtures, and equipment related to  
11 said electrical line facility together with communication  
12 equipment relating to the operation of such electric line  
13 facility through, over, under, and across certain lands situated  
14 in the County of Day."

15 Q. You can stop there. Ordean, what are your feelings about  
16 granting those kinds of rights to a company?

17 A. That's pretty much, that pretty much includes all of the  
18 rights that are of interest.

19 Q. So you feel that they're essentially taking all of the  
20 rights that would have any value?

21 A. I'm certainly not going to be the landowner with free and  
22 clear title any more.

23 Q. Let's talk about exactly what the easement is supposed to  
24 look like. If you could read the first sentence of this  
25 description down here. Right in there where it starts out 150?

1           A. "A 150 foot easement for the purpose of constructing,  
2 operating, maintaining an overhead electric transmission line up  
3 to but not exceeding 345 kV" --

4           Q. Okay, I'll stop you there. A 150 foot wide, is that your  
5 understanding of what would be going through your land?

6           A. That's what the easement says.

7           Q. And do you see down in here where it explains about how  
8 long it would be just inside parcel four? Or in parcel one, I'm  
9 sorry.

10          A. The distance measurement?

11          Q. Yes, the length of that 10 foot easement?

12          A. 2639.46 feet.

13          Q. Is that just in the Southwest quarter?

14          A. That's a half mile that's in the section.

15          Q. So that first, I think you said 2639.46 feet?

16          A. That's a half mile.

17          Q. So did you understand it would be right through here in  
18 the Southeast corner of Section 32?

19          A. Yes.

20          Q. Is there another section or description that includes  
21 another 2639 feet?

22          A. Yeah, there's one above that.

23          Q. How long is that one?

24          A. 2639.45.

25          Q. Added together would that then create an easement all the

1 way across that entire section?

2 A. Correct. One mile, yes.

3 Q. So that piece alone is one mile long and 150 feet wide; is  
4 that what you understand that to be?

5 A. Yup.

6 Q. How long is 150 feet? Can you give us a frame of  
7 reference?

8 A. Half a football field.

9 Q. Okay. Now in this easement judgment there's a couple of  
10 different terms. If you look at your document, do you see where  
11 it describes something as the premises? Do you see that right  
12 there?

13 A. On the same page?

14 Q. Let me move the map a little bit, does that help you?

15 A. Yup.

16 Q. So on page two of that easement judgment number one, do  
17 you see where it describes the premises?

18 A. Premises also referred to as parcel one.

19 Q. Is the premises then the entire south half of Section 32?

20 A. Yes.

21 Q. We've also got something described as the easement area,  
22 do you see that?

23 A. Yup.

24 Q. As you understand it, is the easement area then the strip  
25 that would go across Section 32?

1 A. That's the entire quarter, the entire property.

2 Q. The easement area?

3 A. Yeah, 150 foot it runs full length so --

4 Q. Okay, so we've got two different things here, premises and  
5 an easement area. Would you turn to page three of that judgment  
6 that you're looking at there? Take a look at numbered item  
7 number four right about here. Can you read that for the jury?

8 A. Yeah, "plaintiffs may enter upon the premises to survey  
9 and locate the electric line."

10 Q. That says premises, right?

11 A. Right.

12 Q. So as you understand it, would that be the entire south  
13 half of Section 30?

14 A. Yes.

15 THE COURT: Mr. Parks, please make sure that you wait for  
16 him to finish the entire question before you answer, okay? I  
17 know that in conversation we anticipate the question and we  
18 answer, but it makes it really hard for the court reporter. So  
19 we need complete questions and answers.

20 MR. PESALL: Thank you.

21 Q. (BY MR. PESALL) Ordean, would you read the first sentence  
22 of number five for the jury?

23 A. "Plaintiffs shall have the right to ingress and egress  
24 over and across the premises to the easement area by means of  
25 existing roads, lanes, if any, otherwise by the use of the most

1 reasonable and feasible route selected by the plaintiffs in their  
2 reasonable discretion."

3 Q. What do you understand that as giving the utilities  
4 company the right to do?

5 A. They pretty much have the right to go anywhere on the  
6 property, on those two quarters.

7 Q. Let's have you turn to what would be page four in that  
8 judgment document that you're looking at. And I'm going to  
9 direct your attention down to number 13.

10 A. Okay.

11 Q. Can you read the first sentence there?

12 A. "Plaintiff shall indemnify, defend, and hold harmless the  
13 landowners from and against any third party claims for loss or  
14 damage to property, or for any injury or death of any person  
15 occurring as a result of the plaintiffs negligent installation,  
16 maintenance, operation, or removal of the transmission line and  
17 facilities upon the easement area except to the extent such  
18 claims are caused by the negligence or otherwise wrongful act or  
19 omission of the landowners or their agents or employees."

20 Q. Alright, as you read that what do you understand the  
21 utility companies as being responsible for in the event of an  
22 accident?

23 A. Of the liability if an accident occurs within the easement  
24 area.

25 Q. What if you cause the accident, do they cover that?

1 A. I'm not sure if it's this section or another one where  
2 they absolve themselves of all liability.

3 Q. Is it your understanding that if you were to have an  
4 equipment collision with some part of this line, that you would  
5 be responsible for paying for it?

6 A. Yes.

7 Q. Is it your understanding if there was some equipment  
8 malfunction as a result of the maintenance crew running this  
9 line, that the utility company would pay for it?

10 A. I understand that it's during the construction phase they  
11 would be responsible.

12 Q. I'm going to turn your attention to number 16, which is on  
13 the next page. Number 16 is right about here. Can you read that  
14 to the jury?

15 A. "Plaintiffs may assign all or any portion of this  
16 judgement, the easement, or the electric line on either an  
17 exclusive or nonexclusive basis to one or more entities.

18 Q. What do you understand that allows the utilities companies  
19 to do?

20 A. They can sell it to whoever they want at any time they  
21 want.

22 Q. So you might eventually be dealing with completely  
23 different companies?

24 A. Yeah.

25 Q. Let's talk a little bit about how the various fields you

1 have, and particularly these four parcels, work together. I mean,  
2 just as an overview relative to your farm, do those four pieces  
3 of land where the power line would come through, form an integral  
4 part of your entire farm?

5 A. Yes.

6 Q. What would happen to your farming operation if you were to  
7 cut those pieces out?

8 A. It would be a lesser, the whole thing would be lesser.

9 Q. How so?

10 A. It would change the way we rotate. I mean, it would  
11 change our flexibility in the rotation. It would entail, if we  
12 wanted to maintain the same size I would imagine we'd have to go  
13 buy more land.

14 Q. Is your farm as a business operation able to generate more  
15 income with those pieces included in the whole?

16 A. More efficiently, we can generate more income more  
17 efficiently.

18 Q. Do you feel that what you're doing with it right now is  
19 the highest and best use that you could have for this property?

20 A. We think so, yes.

21 Q. Do you know of any family farms in the area that operate  
22 entirely on just one quarter of land?

23 A. Not any more, no.

24 Q. To your mind is a modern farmer, is it economically  
25 feasible to operate on just one quarter?

1 A. No, there's economy of scale.

2 Q. Let's talk about how you're going to approach this thing  
3 once the line is built. Do you intend to farm inside of the  
4 easement areas, the narrow yellow bands if the line is built?

5 A. I was discussing this with my brother the other day and we  
6 pretty much have decided that it would be best for us to just  
7 abandon those areas.

8 Q. Are there economic factors that play in your decision?

9 A. Yeah, it wouldn't be timely to spray. There's a hazard, a  
10 definite added risk.

11 Q. When you say risk, what are you concerned about?

12 A. The physical power line and the fields they generate.  
13 Using modern machinery, your bigger machinery, there's going to  
14 be problems.

15 Q. How long has your farm been in operation?

16 A. A hundred and seven years, parts of it.

17 Q. Do you plan on keeping it going as a family farm for the  
18 foreseeable future?

19 A. Yes.

20 Q. Over the next 107 years do you think accidents will be  
21 likely?

22 A. They're probable.

23 Q. Now when you're actually farming there are obstacles in  
24 fields now that you have to work around, aren't there?

25 A. Yes.

1 Q. Rock piles, for example?

2 A. Yes.

3 Q. Is there a difference in your mind between working around  
4 a rock pile and working around a transmission line?

5 A. Yes, there is a lot of rocks you can go over if you run  
6 into a problem steering, or if you get so upset with them you can  
7 just bury them.

8 Q. Do you have any rock piles that you work around?

9 A. Yes.

10 Q. Have you buried or removed rock piles?

11 A. We do when we have any spare time.

12 Q. Are any of your rock piles connected with a 345,000 volt  
13 electric line?

14 A. No.

15 Q. You don't anticipate that you'd be free to move these  
16 towers if they were in your way, would you?

17 A. No.

18 Q. Do you consider yourself pretty typical as a farmer in  
19 this part of South Dakota?

20 A. Yes.

21 Q. The concerns that you've expressed about working around a  
22 transmission line like this, do you think those other farmers  
23 would have the same concerns?

24 MR. RASMUSSEN: Objection. Irrelevant, your Honor.

25 THE COURT: Sustained.

1 each one takes up?

2 A. Yes.

3 Q. If you had the choice would you rather get paid nothing  
4 and not have to deal with the line?

5 A. In fact, at the first meeting when they started talking  
6 dollars I offered to give them an amount --

7 MR. RASMUSSEN: Objection, your Honor.

8 MR. PESALL: We can't get into that area.

9 Q. (BY MR. PESALL) Would you prefer to not have the line  
10 than get any money?

11 A. Yes.

12 MR. RASMUSSEN: Objection. That's irrelevant, your Honor.

13 THE COURT: He's already answered that I believe.

14 MR. PESALL: Alright, Ordean, I don't think I have any  
15 more questions for you. Thank you.

16 THE COURT: Cross-examination.

17 CROSS-EXAMINATION

18 Q. (BY MR. RASMUSSEN) Good afternoon, Mr. Parks.

19 A. Good afternoon.

20 Q. You testified previously that of your 3714 or so acres  
21 about 2500 are tillable?

22 A. Yes.

23 Q. How much then of that is pasture ground?

24 A. There's some of it that's flooded. Some of the remainder  
25 is flooded and then some is pasture.

1 A. No.

2 MR. RASMUSSEN: I have no further questions, thank you.

3 THE COURT: Any further direct?

4 MR. PESALL: Very briefly, your Honor. Thank you.

5 REDIRECT EXAMINATION

6 Q. (BY MR. PESALL) Ordean, I'm going to have you open up  
7 Exhibit 4 again if you would.

8 A. Okay.

9 Q. I'm going to turn your attention to paragraph, page two of  
10 that exhibit, paragraph number two. Do you see that there?

11 A. Yes.

12 Q. Does paragraph number two list all of the things that the  
13 utility company that owns this easement would be free to put on  
14 your property?

15 A. I think they can add additional power lines.

16 Q. Read paragraph two to yourself and let me know when you're  
17 finished.

18 A. Okay.

19 Q. Based on what you've read in paragraph two there, and  
20 let's make sure you're looking at the same paragraph I am. Are  
21 you looking at this one?

22 A. I think so.

23 Q. Does that look about right?

24 A. Plaintiff's tenants in common.

25 Q. Okay, so based on your reading of that then they would

1 actually be taking the right to put in all the towers that they  
2 want, right?

3 A. That's correct.

4 Q. All the structures that they want, right?

5 A. Yes.

6 Q. All the poles that they want, right?

7 A. Yes.

8 Q. All the foundations that they want?

9 A. Yes.

10 Q. Crossarms that they want?

11 A. Yes.

12 Q. Cables?

13 A. Yes.

14 Q. Wires?

15 A. Yes.

16 Q. Anchors?

17 A. Yes.

18 Q. Guides?

19 A. Yes.

20 Q. You understand that to be guide wires?

21 A. Yes.

22 Q. So even though you haven't called the utility company to  
23 ask if they're going to be installing guide wires, what they're  
24 taking from you is the right to install guide wires, correct?

25 A. That's correct.

1 Q. Other supports?

2 A. I don't know what a counter poles is.

3 Q. Fair enough. Fixtures, any fixtures that they want?

4 A. Yes. It says rebuild, move.

5 Q. And they can sell this easement to another power company,  
6 couldn't they?

7 A. Yes.

8 Q. As you read that, are they free to install or remove  
9 whatever they want as far as the equipment that would run a  
10 345,000 volt line?

11 A. Yes.

12 Q. You were asked on cross-examination about whether you  
13 could just call in and try and get permission to build structures  
14 on the transmission line route. Do you recall that question?

15 A. Yeah.

16 Q. I'm going to turn you to Exhibit 3, page four, page number  
17 22 in your book there. Can you look at this particular location  
18 right here, the top right where it says "we will not" and read  
19 that for me?

20 A. "We will not permit installation of structures, planting  
21 of tall growing vegetation, and stockpiling of crops under the  
22 transmission line."

23 Q. It says clearly they will not permit it, why would you  
24 call and ask for permission?

25 A. That's a good question.

1 A. Yes.

2 Q. Can you tell me just generally what impact on your ability  
3 to spray a farm like the Parks' this line would have?

4 A. Well, any time there's a power line you need to keep a  
5 safe distance from it. And everyone's opinion of safe is, you  
6 know, individual. But it's my understanding this particular one,  
7 the path in the direction that it's going in areas, there's also  
8 another smaller transmission line there and it's going to run  
9 parallel with it. So there's going to be an area in there that  
10 you just won't be able to do, get in there with an aerial  
11 application, the distance between the two. Earlier they were  
12 asking about flying under the wires and, yes, aerial applicators  
13 in some instances these very, very big steel tower transmission  
14 lines is actually safer to go under them than to try to climb up  
15 and over them each and every time. And also the distance where  
16 you're coming back into the field is so far out there by the time  
17 you get down to where it's applicable to turn the booms on so.  
18 But here if you got two of them and one of them is a short  
19 distance from the other, there's a part of it that you just will  
20 not be able to spray by air. At least I will not.

21 Q. Now when you mentioned the ones coming from Oahe, those  
22 aren't a steel monopole tower are they?

23 A. No, they are not.

24 Q. Those are the ones one could be more safe flying  
25 underneath?

1 A. Yes, in most instances. Not always.

2 Q. As a general rule do you consider it safe for a sprayer  
3 pilot to fly underneath a line that's only got a 30 foot  
4 clearance?

5 A. No.

6 Q. Have you ever done it?

7 A. Yes.

8 Q. Would you recommend it to any other pilot that they do it?

9 A. I need to clarify something, back when I first started  
10 spraying in 1979, the aircraft we used were smaller piston  
11 powered aircraft. Physical size very, very small. The cost of  
12 these airplanes were 20, 30, \$40,000 airplanes. Today we're  
13 flying physically very high powered turbine powered aircraft.  
14 Turbine powered aircraft is basically a jet engine with a gear  
15 box up to it and a prop up to the gear box. A lot of these  
16 airplanes are in excess of a million dollars. Plus the physical  
17 size of them. The speed is much, almost twice as much in some  
18 instances. Personally, I would never risk doing that with these  
19 bigger high powered, very more expensive aircraft.

20 Q. You said faster with the modern aircraft that you were  
21 using at the time that you retired, how fast are you flying one  
22 of those over a field?

23 A. My fastest one basically going across a field 160 to 170  
24 miles an hour ground speed.

25 Q. As far as safety is concerned do you know of pilots that

1 have collided with lines like this?

2 A. Yes, I have.

3 Q. Do you know pilots that have died from hitting lines like  
4 this?

5 A. Yes, I have.

6 Q. Now it is possible though to spray around areas near those  
7 transmission lines like this, isn't it?

8 A. Yes, it is.

9 Q. Does the presence of that line effect your ability to  
10 spray near by?

11 A. You're always aware of that presence of that power line,  
12 yes. It's not a good feeling.

13 Q. Let's take a look, for example, at section 32 on the Parks  
14 family map?

15 A. Yes.

16 Q. Are there spraying patterns that that particular line  
17 would prevent you from following?

18 A. Possible, yes.

19 Q. Is it typically preferred to go north to south when  
20 spraying a field, or east to west?

21 A. One of the main reasons if you do it's better to go north  
22 and south is because of the sunrise and the sunset. You're not  
23 looking directly into the sun in the mornings or in the evenings.  
24 Spray planes, they get a lot of chemical, engine debris, a lot of  
25 bugs on the windshield, and you start looking into the sun and

1 that becomes incredibly dangerous because you cannot see. So  
2 it's much safer in that respect to fly north and south.

3 Q. Given the location of line relative to the Parks' farm,  
4 would that line make it more difficult for you to spray north and  
5 south?

6 A. Yes, it would.

7 Q. Let's talk about time. If you were to try and spray one  
8 of those fields, does the line's presence effect how long it  
9 takes?

10 A. Doing a herbicide application, which is a weed killer, and  
11 it can show up in off target drift is what we're very much  
12 concerned about. You have to shut off way earlier because the  
13 last thing you want to do is start pulling up with an airplane  
14 with the booms running, so you shut off. So you need a way, way  
15 bigger headland. So at the end you need to go and try to make as  
16 many clean up passes that you can that parallels the power lines.  
17 My two turbine aircraft, my smallest one and my bigger one, my  
18 smaller one I figure I need to gross \$1100, \$1200 an acre gross  
19 to make it work. My bigger one you needed \$1400 an acre gross.  
20 Sometimes depending on the situation you get into, certain  
21 situations where you may use an additional 15 minutes up to an  
22 hour because of obstacles, not only power lines but other things,  
23 it's just another obstacle you have to deal with and it takes  
24 longer so the airplane is less, the productivity goes way down in  
25 that airplane.

1 Q. Does the productivity that you can get in the time  
2 required factor into how much you charge a particular farmer to  
3 do a particular field?

4 A. We used to, we could line up, well, even a mile or  
5 especially if you get a mile and a half, two miles, we'd offer a  
6 discount, yes, because it's so much quicker and we have to turn  
7 around less.

8 Q. So if a farmer owned a larger piece of land, they actually  
9 get a lower price for their spraying services per acre?

10 A. It's possible, yes.

11 Q. In your experience in having worked around various sizes  
12 of transmission lines, are there wildlife factors that you would  
13 consider?

14 A. Yes.

15 Q. Can you explain those?

16 A. A hawk sitting on the transmission lines.

17 Q. Is that common?

18 A. Yes.

19 Q. What happens if there's hawks sitting on the transmission  
20 line?

21 A. They usually wait until you get about to them and they'll  
22 come out, and I've had them come through the windshield. They'll  
23 come down and take the pump off or the blades off the pump,  
24 physical damage to the airplane.

25 Q. One part of the project as it would go through the Parks'

1 farm has a couple of right angled bends in it. Do those right  
2 angled bends have an impact on your ability to run an aerial  
3 sprayer?

4 A. Yes.

5 Q. How so?

6 A. Well, normally they do have guide wires there. I haven't  
7 seen this. They're saying that there will not be, but any time  
8 there's a bend it most generally in the past they do have big  
9 anchors out there.

10 Q. If for example, you were asked to do some weed spraying  
11 work down here in section 1, and this is identified as parcel 4  
12 for any jurors that are taking notes, are you going to have any  
13 special difficulties inside of corner of this right angle?

14 A. Yes.

15 Q. How so?

16 A. Well, on a herbicide application our biggest concern is  
17 having any of that herbicide escape within the boundaries of the  
18 field that you're spraying. There could be a sensitive crops  
19 possibly on the other side, not always. Even if it's a similar  
20 crop to what you're spraying, in that case it could be pasture.  
21 But neighbors that don't get along or people that don't like  
22 airplanes or aerial spraying, they can make trouble. They call  
23 the Department of Agriculture and they come out there and they  
24 take samples. And if they find any of that residue outside that  
25 box that you're supposed to be spraying in, and then you're

1 subject to fines and lawsuits.

2 Q. Is that something that you would figure in when you're  
3 pricing a spraying job?

4 A. You try and get as much information as you can, and who's  
5 going to be around when you're going to be spraying, yes.

6 Q. Have you actually gone out and looked at the Parks' farm  
7 where this line is slated to go?

8 A. Yes, I have.

9 Q. Is there anything special about section 1 that made you  
10 have some concerns about being able to spray --

11 MR. RASMUSSEN: Your Honor, may we approach on this?

12 THE COURT: Sure.

13 The objection will be sustained.

14 Q. (BY MR. PESALL) Long story short, in the spectrum of  
15 providing aerial spraying work for a farm like the Parks', will  
16 there be times when an aerial spraying company like yours would  
17 insist on charging more to do work around a power line?

18 A. It's possible. I sold my business so I will not be making  
19 those decisions, but I do know people in the state that do that.

20 Q. Is it also possible you'll run into situations where the  
21 environment makes it impossible to spray in the time window you  
22 have available?

23 A. Yes.

24 MR. PESALL: I don't have any more questions, your Honor.  
25 Thank you.

1 that showed a change that had occurred through this process, the  
2 movement or the positioning of the easement and various other  
3 issues that came to light that I did not know before. I saw a  
4 change in those values.

5 Q. The final appraisal report then that you did, when did you  
6 do the final appraisal report?

7 A. I did the final appraisal report and that was the date  
8 whenever it was signed, and that was December 14th, 2016.

9 Q. As of that date did your appraisal report include all of  
10 the information you had?

11 A. Yes.

12 Q. Well, let's walk through then the analysis that you did.  
13 Start by explaining the larger parcel process.

14 A. The larger parcel process is sort of a jargon term that is  
15 unique to the eminent domain, or the appraisal process whenever  
16 you're doing an eminent domain. If you don't get the larger  
17 parcel correct, the rest of the appraisal is incorrect because  
18 your theory, your analysis is based upon understanding that  
19 larger parcel. In this case you're dealing with 28 different  
20 assessed tracks and 50 improvements that make up what we're  
21 looking at as far as the chart over here to your very left, and  
22 then you're looking at the chart over to your extreme right. The  
23 literature, or the written section, is describing the legal  
24 indications on the two in the middle where it's telling you that  
25 there was 3,713.84 acres that was owned by the Parkshill Farm

1 that we had to start the appraisal process with. And that was  
2 obtained by, when we sit down and talk to the Parkshill Farm  
3 people, they said we have this amount of acreage, we have these  
4 improvements. And that was on the start of the appraisal  
5 process, and that was basically May 28th, 2016. And so it took me  
6 a week of my time to go out and walk those indicated, those  
7 yellow and orange spots that are marked on the map to the far  
8 left, it took me a week to walk those and measure the  
9 improvements on that. So as far as for each individual  
10 improvement I put the tape measure on and walked around whatever  
11 the land components were. I had maps of those. So as far as I  
12 walked those properties and took photos of those properties.

13 Q. So then the map on the far right, is that a map that you  
14 prepared as a part of your report?

15 A. That is correct.

16 Q. And it's your understanding that that represents the  
17 entirety of the Parks' farm as you appraised it?

18 A. That's correct.

19 Q. Now as far as doing an appraisal for the purposes of  
20 determining the value in an eminent domain case, what role does  
21 determining that larger parcel play? What do you do with that  
22 information?

23 A. That's what your entire appraisal or your entire value is  
24 based upon. It's where you need to go and look. And this is a  
25 farming unit, or what we call an interrelated economic unit.

1 Because what establishes a larger parcel are three issues. And  
2 one is that they have common ownership. And that's the strongest  
3 one of all, is that all those properties, those 3,713.84 acres  
4 are owned by the same entity. That's the first requirement. The  
5 second requirement is that you have unity. And as far as, in  
6 other words, there is a continuity where everything sort of fits  
7 together, or it joins together either in physical or economic  
8 issues. Twenty of those 28 properties are adjoining each other.  
9 And because they use the parent property, which is what the  
10 others are served by -- when we say served by, it's where you  
11 have storage of equipment, is on one of those main properties.  
12 That's a parent property. It's where the Parks' brothers live.  
13 That services the rest of those properties. And it's important  
14 that they are within a distance and all of those properties. The  
15 biggest separation from those properties is a mile and a half,  
16 okay. And then the third one is it's continued use. In other  
17 words, all of those properties are used for the same type of use.  
18 And because it's a farm, it's an economic unit. Their highest  
19 and best use is that they are used for farm purposes. So it  
20 meets those three criterias. So all 28 properties would compose  
21 what we would call the larger parcel.

22 Q. So then do you value the larger parcel as sort of the  
23 first step?

24 A. That's correct. You're valuing the larger parcel as that  
25 one unit. And that's what would be selling as a comprised unit.

1 Q. Did you then, well, let me back up. What role do the  
2 improvements play when doing an appraisal of the large parcel?

3 A. The improvements, you're looking for those improvements to  
4 be able to support what the land is being used for. In other  
5 words, the 50 improvements that we're looking at that were built  
6 on this land, they are either a housing unit for the people to  
7 live there, or if they don't live there they typically use that  
8 to house workers that they may hire to come in and work. So  
9 you've got living accommodations. Then you've got the storage  
10 buildings, equipment storage, sheds. And that's to store, what?  
11 The rapidly depreciating items such as tractors and equipment  
12 that runs, it's important for them to be in an enclosed area even  
13 though in the winter time if you're storing that, it has to be  
14 supportive of that. Then you deal with the grain bins because,  
15 what? Once you have a crop in the field and whenever you harvest  
16 it, you have to have a place to store that product.

17 Q. Would you take a look at Exhibit No. 9 and see if there is  
18 a page that would help you explain those 50 improvements that  
19 you've described?

20 A. On it would be, those 50 improvements are what we're  
21 talking about. They're not on this page but they are described,  
22 as you know, one residential, single unit, housing unit, two  
23 concrete pads. And the two concrete pads are supportable of  
24 fertilizer tanks. Because the fertilizer tanks are attached to  
25 the concrete pad so, therefore, they are personal equipment and

1 that should register those. Then you have 17 vertical commercial  
2 farm improvements. And those 17 commercial farm improvements are  
3 where they store equipment, tractors, combines, those types of  
4 things. Then you have two wood, they call cabinetry or storage  
5 areas that are wood, that store grain. And then you have 28  
6 cylinder grain storage facilities. And then you have two  
7 barnyards where you have the areas that you come in and you have  
8 the equipment that may set, it's gravel and it's set up for that  
9 storage. Open storage, in other words.

10 Q. Would you turn to pages, I think, 92 and 93 in the  
11 evidence binder?

12 A. 92?

13 Q. I think so, yeah.

14 A. Okay, yes.

15 Q. Is that the complete list of improvements that you were  
16 identifying on the larger parcel?

17 A. Yes. That's the listing of the improvements, yes.

18 Q. I'm going to go ahead and pull those out here.

19 A. Okay.

20 Q. The placards that I put up, do those appear to represent,  
21 accurately represent the improvements that you identified to the  
22 property?

23 A. Yes.

24 Q. So did you then calculate a value for the improvements in  
25 addition to the property itself?

1 A. Yes.

2 Q. Let's start by valuing the property, the larger parcel  
3 without anything, by itself as though vacant. Can you tell me  
4 how you go about doing that?

5 A. The first component that we're looking at is the land  
6 value. And as far as, do we want to put that --

7 Q. Sure, if there's a particular page in the exhibit that you  
8 would like to refer to I can bring those up for you.

9 A. Okay. It would be Exhibit 9.

10 Q. Exhibit 9, page?

11 A. Ninety.

12 Q. Oh, page 90?

13 A. Yes.

14 Q. Is this the one you're looking for?

15 A. Yes.

16 Q. So what are we looking at there?

17 A. This is the result, or it's a vacant land grid that has 50  
18 examples of what I consider are vacant land comparables. In other  
19 words, the other biggest component of this property is the  
20 3,713.84 acres. So that's where the majority of the value would  
21 sit and it's being used for farming. Because what we're saying  
22 the highest and best use of that land to be used is for a farming  
23 unit. So we went out and looked and pulled comparable sales from  
24 Marshall County, from Roberts County, from Grant County, from  
25 Deuel County, from Clark County, from Day County, from Spink,

1 from Codrington, Hamlin, Brown, all of those counties. We looked  
2 at basically back to 2009, and we pulled sales that showed the  
3 transactions from 2009 to 2016. We went out and we looked at  
4 those, and we had everywhere from a sale of \$500 an acre to  
5 \$12,000 an acre in this market. And we looked, and looked at  
6 soil quality. We looked at the frontage, the access, the time it  
7 sold, what it was being used as, why the buyer paid what they  
8 paid for it. And we looked at those, and we looked at that, and  
9 we felt that these 50 was a good composite reflection of about  
10 300 sales that we looked at. And based upon what I saw as far as  
11 walking and inspecting and looking at the Parks' property, after  
12 looking at all these we felt like the land would be worth \$7,000  
13 per acre.

14 Q. Let's breakdown the approach that we're going through.  
15 Are there different approaches that an appraiser typically takes  
16 when they're doing an appraisal, even in a before situation like  
17 this?

18 A. Yes, you're looking at really three approaches. And  
19 you're looking at the cost approach. And that's what we're  
20 looking at here. And you may say what does the cost approach  
21 have in an overall appraisal? But you put yourself in that,  
22 you're evaluating it to go out and buy a piece of property.  
23 Don't you first think, what can I buy that property for in a  
24 land? And what can I build those improvements, or build it to  
25 the way that I want to use it? So that's the support of the cost

1 approach. We're looking at the components, the land, the  
2 improvements or the buildings, to see if we can assemble that  
3 for, what? Less than what we can buy it for in the market in  
4 existence. And if we can buy it for cheaper than what it's  
5 selling for, then what are we gonna do? We're gonna buy the  
6 land, build the improvements, and keep that rest that is compared  
7 to what it sells for in the market as our equity that we put in,  
8 or sweat equity. So the reason we're doing the cost approach is  
9 to see if we can build it, or we can assemble it for cheaper than  
10 what the market standards are in there to sell it for, okay.

11 Q. What are the other approaches that a typical appraiser  
12 would take?

13 A. You look at the sales comparison approach. That's sort of  
14 what everybody feels more comfortable with because you're looking  
15 at what it can sell for out there in the market. And then you're  
16 looking for the income approach. And a lot of farmers in this  
17 area are getting older. And when you look at Day County, Day  
18 County has 40 percent of its land, according to the Director of  
19 Equalization here in Day County, 40 percent of the land is leased  
20 to someone else. And they pay a monthly, annual, biyearly rent  
21 for the use of that property. And another county south of here  
22 that adjoins at Clark, you're seeing that 60 percent of the land  
23 that is agricultural land is being leased. So you're seeing an  
24 aging population that would use an income approach to be able to  
25 get their value from it. So you've got three approaches; the

1 cost approach, the sales comparison approach, and the income  
2 approach.

3 Q. Let's go back to the cost approach that we're walking  
4 through here then. Once you have gone through and identified all  
5 50 vacant land comparable sales under the cost approach, what do  
6 you do with those numbers?

7 A. Well, you know, I looked at these in analysis. And I  
8 looked, and you can either take and go by what you're seeing is  
9 selling as individual components, and you look at these. And  
10 when we look at this we saw, we did some analysis as far as on  
11 the average and on the means. And it showed that, you know, if  
12 you had, if you looked at these 50 sales and you were to say that  
13 the property was average, then you would have a mean of about  
14 \$6,221.77. Again, the mean is just the average of those 50 of  
15 this type of property, okay. Then the median is sort of the  
16 middle place in here, you have \$6,562.50. And then the one that  
17 was the most occurring in this was a mote, and it was like that  
18 bottom one, about \$5,000 an acre.

19 Q. What did you come up with as far as a value under the cost  
20 approach for the Parks' farm?

21 A. I came up with \$7,000 an acre for the Parks property.

22 Q. That's a little higher than the average, is there a reason  
23 for that?

24 A. Because I was looking at the overall unit. What the  
25 property had, excellent usage of water. It had excellent usage

1 of farm land. It was just a good unit of comparison that fit  
2 what I saw a lot of those sales for. There was one sale in this  
3 group that supported a value of about \$6,800 and \$6,850. And  
4 when I talked to the property owner, and I called him a number of  
5 times, but most people are not willing to return my phone call.  
6 So the way that I have to do that is I have to go out there and  
7 knock on the door and beg to get in. So when I knocked on the  
8 door, and a lot of these people on the front door and said, I'm a  
9 real estate appraiser. And they said, you've got a funny accent.  
10 I said, okay. And I said, okay, I'm looking to verify this sale  
11 because, what? I already have the sales price so I'm not looking  
12 for something that they feel like they have to give up to me  
13 because I already say that I see that you paid \$6,250 per acre  
14 for this. Did you have to do any improvements to it? Did you  
15 have to put any tiles into it? Were there any concessions of  
16 sales? And so I would ask those questions. Sometimes I got the  
17 answer of, I didn't return your phone call so get lost. Some  
18 people took me in and sort of talked to me about those things.  
19 So I, whenever I'm looking at those sales in those upper 6,000  
20 and lower sevens, it's where they have had the land taken care of  
21 and it fits the unit. So I felt very comfortable at that \$7,000  
22 an acre.

23 Q. And that's for the entire farm and everything on it?

24 A. No, that's just for the land.

25 Q. Okay, would you then go in a cost approach and add into a

1 final appraisal of the improvements, or how do those factor in?

2 A. Yes. As far as when we look here at this chart, we see  
3 that, you know, the value on that issue -- I mean, it ended up  
4 that the land in the larger parcel was valued at \$25,996,980.00.  
5 And then to that which is we're showing here, the chart, and  
6 we're looking at the chart where it's the second one in from your  
7 right, okay. If you look at the cost, the number column to your  
8 left, that shows \$2,457,754.91. That's what it would cost to  
9 build that, just the materials and labor. And we know that as  
10 far as materials and labor. And then you have a third component  
11 and that is the skill to build that property. And that's  
12 typically what a person will charge to oversee the project and  
13 have it built.

14 So the second column says that our cost new is a total of  
15 \$2,949,360.41; okay? And then when we look at the third column,  
16 what? These are not new improvements but what? They've aged.  
17 So, you know, whenever they are aging we're saying that the  
18 depreciated value of those improvements at this time is  
19 \$2,256,690.00. So we have the land value, we have the component  
20 values. And then we have to add in what are the site values such  
21 as a septic system or a driveway. Those type of things, okay.

22 Q. So once you identified all of those things and added them  
23 together, do you have a single consolidated cost approach value  
24 for the entire Parks farm without the power line on it?

25 A. Yes. If we, if we're telling them that based upon that

1 cost approach that their property is worth \$28,290,600.00; that's  
2 what it would take to take the land, the improvements, the site  
3 improvements, and to put it into one unit, a built, complete  
4 project. That's the value that we would put this as.

5 Q. So that's the first of the three different approaches that  
6 you can take in an appraisal then, right?

7 A. Right.

8 Q. Let's go on to the sales approach. Can you describe the  
9 general process for the sales approach?

10 A. The sales comparison approach is when we go out and we  
11 look at what are competing properties. What are properties that  
12 have sold in the market. And what values do they relate that has  
13 occurred when you have buyers and sellers that have interacted in  
14 the market place.

15 Q. If you take a look at page 94 of the exhibit binder in  
16 front of you, would that particular page be helpful as we walk  
17 through this?

18 A. Yes. This is a comparison of two properties that we were  
19 able to confirm. We looked, we talked to local realtors, we  
20 talked to the appraiser at Farm Credit, and we talked to anybody  
21 that had sold large properties such as the subject property.  
22 When we look at the subject property, and that's called the  
23 larger parcel, which is the second column in from the outside  
24 left.

25 Q. Right here?

1           A. Yes. And what we're doing with column one and column two  
2 is we are adjusting what we know in the market for columns one  
3 and two to be equal and have a replica of what is in the column  
4 called the larger parcel. So we are adjusting what we call  
5 elements of comparison. That's typically sales price, property  
6 rights, conditions of sale, market conditions, expenditures. Did  
7 we have to do any tiling? Did we have to do any upgrades? Then  
8 we do location, physical characteristics, economic  
9 characteristics. Then we look at zoning use. And are there any  
10 other special things that are built into this? So we had direct  
11 access to the appraiser that had the appraisal here for Farm  
12 Credit in column one. We went out and looked at comparable one,  
13 talked to the person that was in charge and asked them questions,  
14 and had photos of what was transacting in that sale for 20  
15 million dollars. Then we went to sale two, which is a part of a  
16 property that was an auction. And it sold in individual  
17 components. And we went back and brought those individual  
18 components back into one value as a sale, okay. And we had eight  
19 others that we're still trying to confirm. We started out with a  
20 total of ten, but we could not get enough confirmed on the other  
21 eight that we could use those as an examples but they're sort of  
22 leaning into the same value as shown by this process.

23           Q. So as you do the comparison between the larger parcel of  
24 the Parks farm and these two other large land sales, were you  
25 able to come to a specific value for the Parks farm?

1           A. We came to a value at the end of our comparison of  
2           \$28,290,600.

3           Q. That would be for the entirety of the larger parcel before  
4           the power line goes through?

5           A. That's correct, yes.

6           Q. Then did you also apply the income approach to determine a  
7           value for the Parks farm?

8           A. That's correct. We went out and we looked at what  
9           properties were selling for, or what were renting for on their  
10          individual components. Can we look at exhibit --

11          Q. How about 95 and 96?

12          A. Ninety-five.

13          Q. Is this what you're looking for?

14          A. Yes.

15          Q. So then in the income approach, what have we got going on  
16          here?

17          A. We have what is the components, the rental components of  
18          the larger parcel. And I want to make sure that we look at where  
19          it says 3,313.84 acres. And that is this line here. And we're  
20          saying that each one of those acres will rent for \$250 a year.  
21          In other words, if somebody would lease that for agricultural  
22          purposes, or whatever the use, the overall rental rate per acre  
23          on that larger parcel is \$250 per acre. Now I want to make sure  
24          that you see that we subtracted 400 acres off of that. And the  
25          reason that we've taken 400 acres off of that is because of an

1 influence of water on the Parks property. Now keep in mind that  
2 if I'm taking that out, that land, that water can be, what?  
3 Leased for hunting purposes and other issues. But as far as I am  
4 trying to get to a more solid number and I'm using that \$250 of a  
5 year lease for the overall agricultural use and we know, what?  
6 That fish and wildlife will pay a certain amount of money, \$40 an  
7 acre per year on that. So I am looking at that income stream and  
8 making it more tighter and changing out that. We looked, and we  
9 went and surveyed farmers in this whole market and we got rents  
10 from anywhere from \$165 per acre per year to \$350, okay. I saw  
11 where people were renting that at \$185 if they had rented it for  
12 a number of years and they had a good relationship with the  
13 property owners. But that was not market. Market we talked to  
14 the Silky Group that rents properties all the way from Texas into  
15 Canada. And as far as they are paying in this market in Day  
16 County, \$250 for a similar rental unit. So we looked at this and  
17 determined that this acreage would support \$250 a year for that.  
18 And that's how we looked at the major component. Then we had the  
19 rental property which was the house. Then we had the equipment  
20 storage facilities. You had the bins, the farming buildings, the  
21 storage sheds, the livestock sheds. And then you had 195,589  
22 bushels of grain storage in the bins. And we went and checked to  
23 see what that was being leased at. And that was at 15 cents,  
24 okay. Fifteen cents for storage. And we ended up with a, which  
25 is at the bottom of this category where it says potential gross

1 income for the larger parcel as \$899,198.35. So we're saying that  
2 this property has the potential to generate the \$899,198.35 in a  
3 year's term, okay.

4 Q. Now a few questions about that. When you say generate, is  
5 that gross income?

6 A. That's gross income.

7 Q. So any expenses they had for maintaining the property or  
8 insurance would come off of that?

9 A. That's correct.

10 Q. You're not saying today that they're making \$899,000 a  
11 year off of this?

12 A. No, but we're looking at crude management. What somebody  
13 would come in and operate that farm on.

14 Q. With respect to the number of acres of potential cropland,  
15 you've been out to the Parks farm, right?

16 A. Yes.

17 Q. I think Ordean testified they're actually farming a little  
18 less than 3,000 right now, you're aware of that?

19 A. That's fine, yes.

20 Q. Based on your analysis though, that's the number of acres  
21 that could be, potentially be farmed?

22 A. Yes.

23 Q. There was also some testimony earlier today about a \$35 an  
24 acre rental rate. Based on your analysis is that market?

25 A. No.

1 Q. So then with the income approach, how do you take that  
2 potential income number and turn it into a number for the value  
3 for property?

4 A. You take that potential gross income and you take off the  
5 expenses to generate that amount of income. And that would be  
6 the next exhibit.

7 Q. Page 96?

8 A. Page 96, yes.

9 Q. Is this what you're looking for?

10 A. Yes.

11 Q. So what have we got going on as far as calculating a value  
12 based on the income approach on page 96?

13 A. The first line there is potential gross income, that's  
14 what we just talked about. And we're saying that this property  
15 has the potential to be able to generate \$899,198.35; that is our  
16 start. Credit loss and vacancy and collection loss of zero  
17 percent. When you're doing a farm, what? It's always producing  
18 something; grass, whatever. If you just let it go it is going to  
19 produce something. It will produce something. So in the theory  
20 of appraising farms you do not take off anything for credit loss  
21 or vacancy. It's a zero allocation. That's just the way the  
22 industry does it. Then we look at effective gross income. And  
23 in this case our effective gross income is the same as our  
24 potential gross income, \$889,195.35, okay. Then we look at the  
25 expenses to maintain, the expenses to maintain that effective

1 gross income. The taxes on this property is \$28,587.43. And  
2 when you say that's for the past fiscal year, it is increasing.  
3 So that amount is always gross but that's in your analysis.  
4 You're seeing that grow. Then you have the insurance, which is  
5 \$5,000. Now they're actively paying \$2,000, I think, a month for  
6 insurance. And I had that discussion with them that I feel like  
7 that they are underinsured by how it sits today before the line  
8 even is involved. But we've quoted the \$5,000 and that's sort of  
9 what we looked at other farms of this size on what their  
10 percentage of gross income is allocated to insurance. So we've  
11 increased that and went with our own numbers that we feel are  
12 based more upon market. They probably would disagree and say we  
13 can do it for \$2,000. Which when their expenses go, what? Their  
14 expenses go down, liability goes up, and property value goes up.  
15 Then we look at utility expenses such as electric, water, sewer,  
16 and repairs and maintenance. Now typically when somebody is  
17 leasing a property they take care of those expenses. Those are  
18 not a cost to the typical property owner. Then we look at  
19 management fee. A lot of people in this market do not charge  
20 management fees against themselves because they go, well, we  
21 manage it as a family, or we do it as an independent entity. But  
22 I'm putting that in there because prudent management would charge  
23 something for managing that \$899,000. In other words, nobody  
24 maintains a bank account for free. You're going to charge  
25 somebody something, and that's 250. I mean, I'm sorry, that is

1 based upon the acreage by \$2.50. We saw anywhere from a \$1.50 to  
2 \$3.00, \$3.50 so we chose in the middle. Then you have the  
3 accounting and legal fees. If you're renting this out you have,  
4 what? You have an accountant and you have -- and they'll at  
5 least charge you a \$1,000 to file your taxes and do your books to  
6 keep you moving in that area. And we're talking about  
7 advertising, that's another \$1,000. And that's advertising this  
8 farm in Landowners Magazine or doing some type of analysis. If  
9 you're signing a lease, then it's as far as, this is not  
10 commission fees. Typically they are added on or they are  
11 increased in another way. We see that our total expenses are  
12 about 4.879 percent of the overall effective gross income. And  
13 the expenses to maintain that \$899,198.35 income stream, to  
14 manage that and make sure that's worth is \$43,872.03, okay. When  
15 we did deduct that off of your effective gross income you have  
16 NOI, net operating income, that is \$855,362.32. That's what we're  
17 saying will come to the pocket before taxes, okay? Then we have  
18 to turn that NOI into a present value. And the market right now  
19 is showing that the capitalization rate for this type of property  
20 is 2.5 percent. So you would take your \$855,326.32 and you would  
21 divide that by .025, and that is your return rate on your  
22 investment, okay. And that .025 is a low rate. If we did not have  
23 improvements, this market is showing a cap rate of less than one  
24 percent at about .075 up to a 1.5 percent if it was just land.  
25 But because we've added a depreciating asset into an appreciating

1 asset, 2.5 is what we've seen it. We've extracted that out of  
2 sales where we've seen properties that have been renting and we  
3 see that as the return, okay.

4 Q. Now there were a couple of numbers in here that you had  
5 mentioned are not quite the same as what the Parks' may have.  
6 For example, you had an insurance number higher than what they're  
7 spending now?

8 A. That's right, about \$3,000 higher than what they're  
9 allocating on it on their income tax and schedule.

10 Q. And there are probably some farms out there that don't  
11 spend \$1,000 a year on legal fees and advertising?

12 A. That's correct.

13 Q. But by using these numbers are you being extra cautious in  
14 your appraisal?

15 A. I'm structuring this in a manner about which we're  
16 comparing a rental farm in how it would be looked at as an income  
17 investment, yes.

18 Q. So if you had lower numbers up here your actual value for  
19 the farm would go up?

20 A. Yes.

21 Q. By the income approach?

22 A. Yes. And you know when we're doing this we're coming up  
23 with a value of \$34,213,052.00. That's what we're saying the  
24 investment, the market value based upon the investment of this  
25 property would be worth.

1 Q. Were you able to then reconcile the figures you got from  
2 the cost approach, the sales approach, and the income approach?

3 A. Yes. We had a cost approach and the sales comparison  
4 approach that were actually equal. They were at \$28,209,600.  
5 Then we have the income approach here at \$34,213,100. And we  
6 ended up that we decided that --

7 Q. Mr. Spence, would it be helpful to put up page 85?

8 A. Eighty-five. Let me look at that real quick, yes.

9 Q. Would this be the one you're looking for?

10 A. Yes.

11 Q. So back to my question then. As far as reconciling the  
12 results of these different approaches, how did you go about that?  
13 What did you come up with?

14 A. I'd like to draw your attention to where it says the  
15 before acquisition. And in that situation I am saying that the  
16 value of this property is worth on a scale between \$28,290,600  
17 and \$34,213,100. That is if you're looking at a value scale,  
18 that's where it would be in. But because of the purpose of this  
19 appraisal I have to come to a single point value. And that  
20 single point value is what I came up with as \$28,300,000.

21 Q. And that's this \$28,300,000 right here?

22 A. Yes.

23 Q. All right. So that's ultimately then what you determined  
24 to be your fully appraised value for the entire Parks farm; is  
25 that right?

1 A. That's correct. If they were going to sell this property  
2 as of May 28, 2016, that's what I would say that this property  
3 would sell for in the market.

4 Q. Let's turn our attention then to the after acquisition  
5 that you have noted here. Did you do a cost approach again to  
6 determine the value of the entire larger parcel after the  
7 acquisition?

8 A. Yes, I did.

9 Q. Would it be helpful to put up some pages here?

10 A. Yes, it would be. Page 97 for the land value. And then  
11 we would be looking at the same exhibits of 92 and 93 as before.

12 Q. Is this what you're looking for, Mr. Spence?

13 A. Yes.

14 Q. So what have we got going on here?

15 A. What we have going on here is that you notice that we have  
16 a number of 3,595.29 and that is a change from 3,713.84. And the  
17 influence of the power line in this strip, it's positioning being  
18 out in the field and how it effects the overall use of this land.  
19 We determined by the market that it will reduce the operations of  
20 this farm by 118.55 acres. That that will reduce that value. It  
21 will separate that off from the main body of the larger parcel.  
22 And this property would suffer a loss of the utility and a bundle  
23 of rights of 118.55 acres.

24 Q. Mr. Spence, why don't we go through and kind of explain to  
25 the jury how you came up to that 118 acre figure. Take a look at

1 pages 75 through 84. Are there some of those that would help you  
2 explain that?

3 A. Yes.

4 Q. What would you like to look at?

5 A. I would like to look at Exhibit 75, 76, 77 and 78.

6 Q. And that would be the site diagrams?

7 A. Uh-huh.

8 Q. Are these the ones you're looking for?

9 A. Yup.

10 Q. All right. Would you like all four of those at once?

11 A. Let's do one at a time.

12 Q. Okay. This should be Exhibit 9, page 75, that we're  
13 looking at here. What have we got going on there?

14 A. If you draw your attention over here to the first diagram,  
15 this sort of does an excellent job of explaining what's happening  
16 in the individual component parts. If you look at this map where  
17 you see the red and yellow line that is going across where you  
18 see the little four at the first one at your far left, that's  
19 considered parcel 1. And that is running across that section of  
20 the larger parcel. And that yellow area, that yellow area is  
21 representing 18.8 acres that are being influenced by the  
22 existence of the placement, of the existence of the power line.  
23 And that's what's showed in this diagram here where Mr. Pesall is  
24 pointing at. That is that line that is going here that's shown  
25 on that map, okay. And then if we can look at the next one.

1 We're seeing in the previous diagram what's on the left-hand side  
2 as extending onto that. So what we saw on that previous exhibit  
3 plus that little spot there on the left, that is extending one  
4 mile, 5,280 linear feet by 150 linear feet in width, okay. And  
5 that's 18.18 acres, okay.

6 Q. Next one?

7 A. Yes. Now if we take and we look -- Bob, can we have that  
8 one sit on the next one? What we're seeing here on the right  
9 side of this previous diagram is where we're seeing over here on  
10 the green, that yellow space and where it says three okay, right  
11 here where it says three, we're describing this, where it is  
12 extending across here. And that's call parcel 2, okay. And  
13 parcel 2 is taking up 9.09 by the placement of that yellow strip  
14 that's coming across, okay. And that's moving east, okay.

15 Q. Here work for you?

16 A. Yup. Now this is looking at the parcel that is labelled  
17 2. And this is really parcel number 3, okay. It is extending  
18 across that half an acre, a little bit over a half acre and along  
19 the frontage of that at a width of 150 linear feet in width,  
20 okay. So you see that over here on that, the upper part of that  
21 yellow, okay, right here. Okay, now you're seeing where this line  
22 would turn. It will turn south and we're looking at where that,  
23 where you see the yellow one, okay. And it comes down in a  
24 southern direction on the western portion of that parcel. And  
25 that is taking up 10.32 acres. And it is extending along in 150

1 foot width there. And to the south of the property it is turning  
2 back east, okay. In that direction right there, okay.

3 Q. Now the acreage amount that you've given, that's just the  
4 acres that are directly under the transmission line easement?

5 A. That is within the easement. That's being determined as  
6 46, it's a combined 46.67 acres is what is within the boundary of  
7 what we are showing as yellow across here.

8 Q. Just so we're clear as to what we are talking about,  
9 there's been previous testimony about the easement area and  
10 access rights that the project would take covering whole quarter  
11 sections. You're not including that in the acreage that you're  
12 talking about right now, are you?

13 A. No.

14 Q. Now is there effect near these easement areas, direct  
15 effect to the usefulness of the land that's not reflected in  
16 these rather rough diagrams?

17 A. Right. What is sort of not seen by the eye in this case  
18 is that where you see that yellow mark across here, those are  
19 setting, the center of that mark is setting from 171 linear feet  
20 to 186 linear feet into the property, okay. So they have, and I  
21 made that mistake, and that's what Mr. Pesall referred to at the  
22 beginning where I thought that this line was coming down. I had  
23 read the lis pendens and I thought there was no gap between the  
24 road and the existence of this easement. But in each one of  
25 these cases, this line and this belt is setting back into the

1 property from a jagged distance of 172 linear feet to 186 feet.  
2 And it creates an area that is on the frontage -- think about  
3 that, on the frontage of this property that now will be separated  
4 from the main body of this parcel.

5 Q. Have you prepared some hand drawn diagrams in this exhibit  
6 that might help us explain that better to the jury?

7 A. Yes.

8 Q. Pages 81 through 84?

9 A. That's correct.

10 Q. I'm sorry, 83?

11 A. Yeah, 80, 81, 82, 83. Yes, 84.

12 Q. How would you like to orient that? This way or that way?

13 A. Let's do it that way. The last one would also be down  
14 this way.

15 Q. This way?

16 A. No, the other way. It would be turned the other way.

17 Q. Oh, I'm sorry.

18 A. And then this one over here would be showing it going  
19 down.

20 Q. I see. Would you rather have it over there then?

21 A. Yes, and turn it up on its side. Okay. Now if you want to  
22 criticize the artist on this, the artist is me, okay. If we look  
23 at the one, that second one in here, this is what I'm talking  
24 about. You'll see that the easement, the center line of that  
25 easement, which is the yellow area and the middle line across,

1 that's what is described in the documents and the table. So  
2 you're going into the property 171.70 linear feet. And that is  
3 where that line through the middle of the yellow is where the  
4 towers are going to be located. And that's the centering of  
5 influence for that. That easement that is being imposed on this  
6 property extends 75 linear feet south, 75 linear feet north,  
7 okay. And you'll see that from the ownership rights where we have  
8 the road, I call abandoned when it's not maintained and it's not  
9 used, from the center of that to the bottom most southern point  
10 of that 150 foot easement is 96.7 linear feet. That and that  
11 blank space between the bottom area that is being separated off  
12 from the main body that is north of this property. In other  
13 words, to use this you're going to have to pass underneath that  
14 electric line, and its use and its influence, to get to this area  
15 underneath. And that area underneath that's in the white is  
16 11.72 acres. That's in parcel one, okay.

17 Q. With respect to parcel 2 then is there additional acreage  
18 that you've got concern with there?

19 A. Right. Here the document says that center line that you  
20 extend from the southern ownership boundary line into the  
21 property 165.82 feet, 165.82 feet into the body of the property  
22 and it creates the situation where now it is 90.82 feet of a gap  
23 between the southernmost boundary of the owners of the easement  
24 down to the southernmost boundary of the property. And you're  
25 creating that area in there of an economic remnant of about 5.5

1 acres. So right inside this area here, which is labeled section  
2 33, you're seeing a dead space of 5.5 acres, okay.

3 Q. Mr. Spence, I can see that the jury is getting tired so  
4 I'll rush us along through some of the other stuff here. Same  
5 issue with the uneconomic remnant here in parcel number 3?

6 A. Right, this is the placement of that easement and this is  
7 the evaluation because, what? You would think if that easement  
8 was sitting on that southern property line we would not be having  
9 this discussion. But it's the placement of that easement that's  
10 creating a second divide or a second portion of that parcel,  
11 okay.

12 Q. Do you have a figure for the total amount of land consumed  
13 by that uneconomic remnant?

14 A. For the uneconomic remnant that takes up 31.43 acres. That  
15 takes out 31.43 acres that will be on the south side or the west  
16 side of that easement.

17 Q. Now are there other property limitations that you've also  
18 included in your 118 acre figure?

19 A. Right, when we're looking at each one of these, when you  
20 look at parcel 1, parcel 2, parcel 3, there will be an extended  
21 restricted use area that will influence the northern side of this  
22 easement of 205 linear feet. It will influence the use of that  
23 property north on the top three drawings 205 linear feet. When  
24 we look at parcel 4, the one here down on the bottom where it's  
25 running north and south, the restrictions that you see that are

1 put on the use of that property, it will extend 205 linear feet  
2 to the east on that particular property.

3 Q. And so when you say 118 effected acres, that's including  
4 all of the different effects that this easement would have as it  
5 crosses not just the yellow line parts that are the easement  
6 itself?

7 A. Right.

8 Q. What are those effects that are primarily of a concern to  
9 you?

10 A. The primary effects -- and these were given to the  
11 property owner in the booklets whenever they went to the meeting  
12 that talked about the installation of this pipeline, of this high  
13 tension power line, okay. And there were 21 that was dealing with  
14 just the documentation. There's a number of others that go in  
15 such as unregulated visits. Whenever they can come into a  
16 property whenever they would like, okay. But as far as there's  
17 listed in those brochures of at least 21.

18 Q. If you could take a look at what's Exhibit 3 in the white  
19 binder in front of you, it would be about page 17.

20 A. Yes.

21 Q. That's the booklet you're talking about?

22 A. Yes.

23 Q. So what are those limitations then that you had identified  
24 from that booklet? I think you said there was 20 or 21?

25 A. Yes.

1 Q. What are they?

2 A. We're going through all 21?

3 Q. If you can do it quickly.

4 A. All right. Number one, it says all trees and buildings  
5 within 150 foot right of way will be removed, including those  
6 that lean into the vertical space. So you're not only  
7 responsible for what's in that right of way but anything adjacent  
8 to that right of way. Number two, because of weather conditions  
9 the 345 kV transition line will stretch and sag. In other words,  
10 they're saying that the clearance on this line is 30 feet, so it  
11 will stretch and it will sag. Number three, metal constructed  
12 structures and building near the 345 kV transmission line may  
13 need to be grounded. Four, structures cannot be built beneath the  
14 345 kV transmission line. Five, Otter Tail Power Company and  
15 Montana Dakota Utilities Company will allow landowners to  
16 continue any agricultural activity not impacting the operation of  
17 the transmission line and specifically prohibited in the  
18 easement. Most agricultural uses will have no impact. Six, there  
19 shall be no installation of structures, planting of tall growing  
20 vegetation and stock piling of crops underneath the transmission  
21 line. Seven, the line will be inspected by air and occasionally  
22 visits ground crews as needed. Eight, when using farm machinery  
23 and equipment always be aware of the transmission line wires and  
24 guide wires. And although transmission line clearance is  
25 designed to accommodate most farm equipment and equipment, always

1 remember physical contact, including equipment, with a  
2 transmission line can be hazardous and may cause a lethal shock.  
3 B, don't lift, elevate, build, or pass under a transmission line  
4 any object, tool, or vehicle which may contact wires. C, to help  
5 prevent arc flash or electric shock, keep equipment, antennas,  
6 and people at least 15 feet away from the energized transmission  
7 line. Nine, keep a minimum distance of 100 linear feet from the  
8 line for refueling. If you want to fuel, if you must fuel a  
9 vehicle under a transmission line, as with any situation in which  
10 a portable fuel tank is used, use a fuel tank with a flame  
11 assister.

12 Q. Mr. Spence?

13 A. Yes.

14 Q. It occurs to me I actually made one of the previous  
15 witnesses this morning go through most of these. So in the  
16 interest of getting folks out of here in a reasonable hour, can  
17 you tell me which ones of those you included in your diagrams  
18 here and why?

19 A. Okay. All right. All of these have been influenced in a  
20 diagram that's what I'm looking at. But keep in mind that that  
21 economic remnant that we talked about before that was separated  
22 at the bottom, where do most farmers park their vehicles when  
23 they have refueling equipment? They park right on the front of  
24 that property. They're parking within this area that we're  
25 talking about, will be restricted from that use. And if any

1 damage occurs then, you know, these rules exist. So it would be  
2 the property owner's fault if they did anything within this area  
3 after the acknowledgment and acceptance of this indication. The  
4 one main thing here that's not talked about in this, is where I  
5 have considered the influence of spraying. You know, if you see  
6 a lot of farms, they will have their crops sprayed or seeded or  
7 worked from the air. In this case I've been told that they will  
8 not fly within 200 linear feet of those lines. So that is an  
9 additional issue that I have considered in this process.

10 Q. So taking all of those areas of influence into account, is  
11 that how you reach the 118 plus acre figure?

12 A. Yes, I took into consideration the yellow plotted area of  
13 the actual easement, the creation of the remnant that will be on  
14 the south or the west side that will be boxed in from the road to  
15 the outer most boundary of the easement, and that area is also  
16 influenced by these regulations. Then I looked at the other side  
17 and acknowledged these issues, okay.

18 Q. And then did you consequently do the appraisal after  
19 accounting for those 118 acres with all three methods?

20 A. Yes.

21 Q. What is -- from an appraiser's perspective what does a  
22 potential buyer do with acres, burdened acres like that when  
23 they're considering the purchase price for a farm like this?

24 A. They will typically disregard this as an area that they're  
25 going to pay money for. They will look at this in, a good real

1 estate agent will do their due diligence and will say the  
2 frontage of this site is influenced by these power lines, or  
3 whatever it may be, and they will take off that area and say we  
4 will bid on the rest of the component, not the area that's  
5 burdened by these impacts.

6 Q. Is that true even though they would wind up taking title  
7 to the area burdened by the transmission line?

8 A. Yes, because you're not going to pay for something that  
9 you do not have the full bundle of rights to have here. In other  
10 words, when somebody, the seller, the Parkhill properties will  
11 be selling in the future an encumbered and burdened property by  
12 the influence on the frontage of these properties.

13 Q. Walk us through then, how did you do the cost approach in  
14 the after analysis hypothetically assuming that the property was  
15 burdened by these easements and areas of restriction?

16 A. In the process of doing the appraisal I looked at the  
17 loss, or the area of burden of being 118.55 acres. And I viewed  
18 and I looked at the market. And I talked to people that have  
19 given me opinions in this market about how they view that land  
20 afterwards. They have said that they would disregard that amount  
21 of acres in the overall valuing of the property. So in this  
22 process I went back and I valued the remainder which is what is  
23 given back to the property owners, which is the same title as the  
24 larger parcel except you're taking away the influence of the  
25 power line in all adverse conditions to be able to determine that

1 value.

2 Q. So when you re-evaluated it in the absence of all of that,  
3 did you then produce the figures that we have here in page 85 and  
4 the after acquisition?

5 A. Yes.

6 Q. Can you walk the jury through the figures that you've got  
7 there on page 85 then?

8 A. On page 85 when I looked at the cost approach, the  
9 improvements on this site, they are still building bins. So  
10 taking away 118.55 acres does not put a burden on their  
11 improvements because, what? They're still able to handle and  
12 store and do the farm operations. If this was where they had a  
13 larger bin operation, where they had a greater storage of grain,  
14 and you took off that 118.55 acres and it caused them to have a  
15 shortage and their bins were not fully used, then it would  
16 create, what? A functional obsolescence. The issue here is the  
17 direct damage to the land. So what I -- in this analysis we took  
18 off 118.55 acres off of the 3,713.84 and we valued that at \$7,000  
19 an acre. And I think that grid is underneath that, no, the  
20 second middle, yup, yes, okay.

21 Q. This one?

22 A. Yes. And so the 3,595.29 is the amount of the remainder  
23 after we've taken away that component of that 118.55 acres, okay.  
24 And then as far as the improvements remain the same, the site  
25 improvements remain the same and we added those back together,

1       okay. And then in this case we ended up with what's shown on  
2       here on the second example of \$27,460,720.

3           Q. Okay. What about the sales approach then?

4           A. Sales comparison approach. We went through and we looked  
5       at the grid. When we had the acreage in the remainder parcel it  
6       was reduced by that 118.55 acres and we adjusted those  
7       comparables back to make a replica of the subject in its current  
8       state. And that's where we ended up with the \$27,460,750; okay.

9           Q. And then finally with the income approach in the after  
10       acquisition situation, how did you come up with that number?

11          A. We went and took those 118.55 acres off of what could  
12       generate, that \$250 a year income. We took that out of the  
13       analysis, okay. And so that reduced the potential gross income by  
14       that amount of money. We did not -- and we have heard comments  
15       from the ownership of this property that as far as now that their  
16       insurance rates have doubled but we kept that insurance rate  
17       still at the \$5,000 to be conservative and just say that that  
18       main issue in that change is the utility and the property rights  
19       that are being taken away from the property based upon that  
20       amount. And then we did the same process and we came up with  
21       \$33,039,400; okay. And that was, and so that established our  
22       before.

23          Q. So then you've got some different calculations here. Can  
24       you walk us through how each one of those comes into being?

25          A. Like we talked about before, each one of those value

1 methods has a little different component. And we have, just like  
2 we have a range at the top, we have a range of damages from  
3 \$829,880 to \$1,173,700. That is our scale that our three  
4 approaches indicates that the loss of the 118.55 acres would  
5 result in a damage between this scale.

6 Q. How then did you reconcile the differences there to come  
7 up with the final \$840,000 figure?

8 A. We went back to what we were talking about on this step  
9 after acquisition, and we reconciled, and we said we're looking  
10 at given that influence of the sales comparison approach and the  
11 cost approach still, and we determined that the after value would  
12 be \$27,460,000. And then from that we took what's up in the red,  
13 we took the \$28,300,000, the value that we said they could sell  
14 it for in the before, and we subtracted that from the value we  
15 said they would be able to sell it after the influence of that  
16 easement at \$27,460,000, that's the difference between those two  
17 is the before and after analysis result, the difference of  
18 \$840,000.

19 Q. Now that \$840,000 again represents the damage to the  
20 entire farm by all of these little areas that are burdened; is  
21 that right?

22 A. That's correct.

23 Q. Relative to the value of the whole farm, how much loss in  
24 value are we looking at with \$840,000. What percentage is that?

25 A. That's probably less than three percent.

1 Q. Are you able to prorate out the \$840,000 on a linear basis  
2 among the various pieces? Parcel 1, parcel 2, parcel 3, and  
3 parcel 4?

4 A. Yes, if I'm asked to but the before and after sort of puts  
5 it into where it's not separated out, but yes.

6 Q. If you were to do that, do you have some figures with you  
7 that you think would be appropriate?

8 MR. RASMUSSEN: Your Honor, may we approach?

9 THE COURT: You may.

10 The objection will be sustained.

11 MR. PESALL: Mr. Spence, I've got your figures. That's  
12 all we really needed from you today. I'm done with the witness,  
13 your Honor.

14 THE COURT: Cross-exam.

15 MR. RASMUSSEN: If the figures are all we needed we would  
16 have done this quicker.

17 CROSS-EXAMINATION

18 Q. (BY MR. RASMUSSEN) Mr. Spence, you've never lived in South  
19 Dakota, have you?

20 A. No. I probably spend more time here in South Dakota than I  
21 do in Kentucky though.

22 Q. You first got involved in South Dakota in '08 with the  
23 TransCanada pipeline. You did appraisals for that project,  
24 right?

25 A. Yes, sir.

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

Montana-Dakota Utilities Co.  
And Otter Tail Power Company,

Plaintiffs,

Vs.

Case No. 18CIV15-067  
JURY TRIAL  
Volume II

Parkshill Farm, LLC, Web  
Water Development Association,  
Inc., Kermit Parks, Reuben Parks,  
Vera Parks, Estate of Orion E.  
Parks, Ordean Parks, Jeff Schiley,

Defendants.

Date & Time: January 26, 2017  
9:00 a.m.

Before: THE HONORABLE TONY L. PORTRA  
Circuit Court Judge  
P.O. Box 1087  
Aberdeen, South Dakota

Location: Day County Courthouse  
Webster, SD 57274

APPEARANCES

For the Plaintiffs: Reed A. Rasmussen  
SIEGEL, BARNETT & SCHULTZ  
P.O. Box 490  
Aberdeen, SD 57402

For the Defendants: N. Bob Pesall  
PESALL LAW FIRM  
P.O. Box 23  
Flandreau, SD 57028

1           A. Well, Otter Tail and MDU are paying up front but the  
2 project was developed through the MidContinent Independent System  
3 Operator. They did a number of studies and determined that this  
4 would be one of 17 projects that should get built. And so  
5 because of that, because of the fact that they consider it a  
6 multi-value project, all the owners within the midwest, I'm  
7 sorry, MidContinent Independent System Operator will pay for the  
8 project.

9           Q. Is there any federal funding for this project?

10          A. There is not.

11          Q. This line is 345,000 volts upwards or 345 kV line; is that  
12 right?

13          A. That's correct.

14          Q. It's called a transmission line?

15          A. Correct.

16          Q. How does that distinguish from distribution lines that  
17 would bring power to an individual's residence or business, that  
18 sort of thing?

19          A. We often use an analogy kind of similar to a highway  
20 system, I think that's pretty good and easy to comprehend. We  
21 look at a 345,000 volt line as what we would call bulk  
22 transmission. If you think of that, that to me is kind of like  
23 an interstate. It's meant to move bulk traffic. In our case  
24 bulk electricity. Then if you think of that, so that's kind of  
25 the back bone of the system in the grid of a bulk transmission

1 line. From then you typically will step down that bulk level,  
2 that higher voltage level to more of a lower voltage transmission  
3 system. And similar to an interstate you're going to have very  
4 specific entrance and access points. So for our line or our  
5 entrance and access points are Big Stone and Ellendale. That's  
6 where energy can either enter the line or leave the line. If  
7 you're thinking of something like Highway 29 or I-29, I would see  
8 I-29 as similar to our line we're building. And Highway 12  
9 coming from I-29, say, over to Webster as a lower voltage  
10 transmission line, say, 115,000 volts or so. So you come over to  
11 Webster, if you would, with a lower voltage line, and when you  
12 get to a town like Webster, if you wanted to leave the lower  
13 level vehicle traffic or the road, Highway 12, you may turn off  
14 on 25.

15 And that would be like the intersection of 12 and 25  
16 would be like where we would call another distribution type of  
17 substation where we would step down the voltage from 115,000  
18 volts to 7,000; 12,000; 24,000 volts, it depends on each  
19 distribution system. So then you would have your distribution  
20 system which would serve, say, the city of Webster, or in the  
21 rural areas, the rural residences and that would be kind of like  
22 I said Highway 25 kind of system. And then as you were to travel  
23 down the road further, if when you get to your own driveway, for  
24 example, that would be a point where we would consider hanging a  
25 distribution transformer. And then at that point in time the

1 driveway itself would be like the service wire that comes to your  
2 home. So that's how you can see electricity from a bulk  
3 transmission system down to distribution, and then eventually the  
4 service to your residence or business, whatever that might be.

5 Q. Now has construction of the line commenced?

6 A. It has.

7 Q. How much progress has been made at this point?

8 A. At this point we're doing two activities. We're placing  
9 foundations and we're setting the structures. We started placing  
10 foundations, or installing foundations if you will, in June of  
11 2016. We're about 40 percent, or a little over 40 percent  
12 complete with the foundations. We started in the Big Stone area  
13 and have come this direction. And now we've generally finished  
14 south of Webster and we're continuing to work west towards the  
15 Andover area. So that's where we're at with foundations. On the  
16 structure setting side, we also started at the Big Stone end, and  
17 we have approximately 40 of the structures set right now and  
18 we're continuing to move this direction.

19 Q. When you say a structure, does that mean the pole?

20 A. Yes, the pole. It's a single, we call it a monopole  
21 design. So it's a single pole. That single pole is made  
22 typically of three different sections, because it's hard to get a  
23 120 foot piece of steel to travel down the road, so we make them  
24 in three different sections. Some might be four. But there will  
25 be three different sections slipped together typically, and then

1 placed on a concrete foundation.

2 Q. Why did you decide to use the monopoles as opposed to the  
3 lattice type structures that we see in a lot of places?

4 A. Sure. When we had our public open houses that occurred in  
5 the fall of 2012, in the spring of 2013 we gathered information  
6 from the people that attended, and even information from our web  
7 site or other opportunities that people had to provide comments,  
8 and the majority of the people were interested in the monopole  
9 design. Generally the belief is that they're easier to work  
10 around. They're a single foundation rather than potentially a  
11 lattice structure, or H frame, which would have two poles side by  
12 side 20 feet apart. So it was landowner feedback.

13 Q. Have you reached the area where the Parks' property is?

14 A. We have with the foundations.

15 Q. But you haven't put any foundations on their property yet?

16 A. We have not, no.

17 Q. Have you gone around that property for now?

18 A. Yes.

19 Q. So you'll have to come back to that property after this  
20 proceeding?

21 A. Yes, we will have to come back to that property.

22 Q. Just tell the jury a little bit about Otter Tail Power and  
23 MDU. They're, obviously we know they're utilities. What areas  
24 do they service, that sort of thing.

25 A. Sure. Otter Tail Power, we're an electric utility. Only

1 red hatching, or a black hatching, but there's a hatch piece  
2 there that is black and then a red kind of a dash line that would  
3 represent the center of the easement area.

4 Q. I think we've heard testimony previously that the easement  
5 is a 150 feet wide?

6 A. Correct.

7 Q. Obviously 75 feet on each side of the midpoint where the  
8 poles would be?

9 A. Generally that's where we would expect them to be.  
10 Sometimes it doesn't happen exactly that way but in general  
11 terms.

12 Q. What's the reason for it being 150 feet wide?

13 A. When we look at an easement, what we look at is, there's a  
14 few things we work together. One, how many structures is  
15 reasonable to put on somebody's property, or what they would  
16 agree to. And then when you start to look at that. Then you  
17 have to start to look at heights and such and maintain  
18 clearances. But then that also dictates how wide you want your  
19 easement to be. We look at a situation where if the wind blew  
20 approximately 100 miles per hour, how far would that blow a wire  
21 away from the center of the structure. And so when we look at  
22 that we intend to keep, have an easement wide enough it would  
23 contain a situation that would blow the wire out. And so when we  
24 acquire a wider easement, it's because we're going to have a  
25 longer span. The longer span the more the wires will blowout.

1 So if you shorten your span enough you can have a more narrow  
2 easement.

3 Q. What is the general distance or the span between the  
4 poles?

5 A. In our documentation I think we've typically said spans  
6 would be about 700 to 1200 feet apart. In this specific area no  
7 span is less than 1100 feet. And some of the spans, or the  
8 majority of the spans, are up in the 1200 feet. So almost a  
9 quarter mile, 1320 feet.

10 Q. So nearly a quarter mile between the poles?

11 A. Correct.

12 Q. The easement on this property, and I think it's true on  
13 the other ones, the other parcels we're going to talk about, is  
14 placed some distance to the north. Or on the one parcel to the  
15 east of the property line. Why is that? Why don't you put it on  
16 the property line?

17 A. Well, a couple things. One, of course, you're probably  
18 referring to why don't we put it on the edge of the road right of  
19 way? Because the property line would be in the middle of the  
20 road, so we wouldn't look to put it there.

21 Q. That's what I meant.

22 A. Right. So when we looked at this we thought about what  
23 are the different things that would effect where we would place a  
24 transmission line. And as we looked at it we thought, okay, some  
25 people like to put lines up, you know, on the edge of the road

1 right of way. Our structure is designed to be 120 to 155 feet  
2 tall on the structure at this location. At the top of the  
3 structure there will be some arms that will hang straight out  
4 kind of like a T and those will be about 20 feet or so long off  
5 the edge of the pole. And so if you were to place a structure  
6 right up against a road right of way, you would overhang that  
7 road right of way, which is typically 33 feet, in some places  
8 it's 50 feet, but you would overhang that road right of way by 20  
9 feet. Typically that can put you in the middle of the driving  
10 surface, or on the edge of the driving surface. So when we  
11 looked at it we didn't feel that was a good place we wanted to  
12 be, Montana Dakota Utilities and Otter Tail Power Company as we  
13 worked through this. Then we looked at what are the other  
14 opportunities? What should we consider? And in our open houses  
15 we talked with different landowners about farming operations.

16 What would be reasonable distances to be away from the  
17 edge of the road right of way to allow farming between a  
18 structure and a road right of way? Because we felt if we were to  
19 set the edge of our easement up against the edge of the road  
20 right of way, that's 75 feet. We've heard testimony that lots of  
21 equipment are becoming 90 feet and bigger. So we felt it  
22 practical to move further out into the field. And so we  
23 established generally to be 150 feet out from the road right of  
24 way. Now you will see in some of these documents we aren't quite  
25 150 feet out because of the curvature of the earth and the desire

1 to maintain a straight line. They have to interact with each  
2 other so there becomes some variability with what that distance  
3 actually is. So in the end it was really a consideration for  
4 farming between the structures and the road right of way.

5 Q. On Exhibit 100 it indicates that in this particular  
6 portion of the line on this land, there's 18.18 crop acres; is  
7 that right?

8 A. Yes, that's right.

9 Q. Let's turn to Exhibit 101 then. This is a similar map or  
10 diagram, or I guess, aerial photograph of Section 33, which is  
11 the, what's referred to as Parcel 2; is that right?

12 A. Correct.

13 Q. And in this Section 33, the southwest quarter is owned by  
14 someone else?

15 A. That's correct.

16 Q. And the Parkshill Farm owns the southeast quarter where  
17 the line runs across; is that right?

18 A. Correct.

19 Q. This one is outlined again the same way the other one was.  
20 And it's true, with the black and then the red line showing the  
21 midpoint; is that right?

22 A. Yes, that's right.

23 Q. This one indicates how many crop acres are in this  
24 particular easement area?

25 A. In this easement area what we've estimated is crop acres

1 A. Two.

2 Q. And then Exhibit 107. Parcel 4, how many poles there?

3 A. Two.

4 Q. Are there going to be any guidewires with these  
5 structures?

6 A. There will not be any guidewires.

7 Q. Now we've heard testimony about the fact that the easement  
8 allows the project to access the easement area?

9 A. Correct.

10 Q. Obviously, you have to access it for construction  
11 purposes?

12 A. Yes.

13 Q. After the construction is completed, the foundations are  
14 put in, and the poles are put up, well, I suppose you have to  
15 have access when the wires are strung then too?

16 A. Yes.

17 Q. How is that done, by the way?

18 A. How do we string wire?

19 Q. Yeah.

20 A. It's actually a pretty interesting operation. I'd  
21 encourage anybody to take a look at that from a distance, of  
22 course, for safety considerations, but when we get to the point,  
23 meaning our contractor gets to the point of stringing wire, they  
24 will use a helicopter to pull in a rope. And it's kind of a  
25 three step process. You pull in a rope and then you pull in a

1 wire, because the ropes not strong enough to pull in the size of  
2 wire we need to pull in. So you pull the rope in. And they'll  
3 do that about every, set up about every two miles. They're still  
4 working to the complete the plan. And they get the rope pulled  
5 in. And they hook the rope to a wire and pull a wire in. And  
6 then that wire will be used to pull in the static wires as well  
7 as the conductor. So the helicopter won't be able to pull the  
8 wire itself, just the rope. And that allows them to pull it with  
9 what we call a tension string trailer. So they'll pull that rope  
10 in, pull the wire in, and pull the conductor up.

11 And it's probably worth noting the conductor, itself,  
12 will be a bundle conductor. It will hang in a vertical position.  
13 So there will be two sets of wires per insulator string that's  
14 hung up there. And it will be twisted wire. And so that twisted  
15 wire helps prevent galloping and ionizing and such. It's  
16 supposed to rock back and forth and shed ions as it builds up  
17 over time. So they'll pull that up with, they'll get that pulled  
18 up and come back and use the helicopter again to clip it in, or  
19 to tie it to the structure. They'll typically do that on the top  
20 phase, the static phase. On the arms themselves it depends upon  
21 the terrain. They'll use a helicopter or use a bucket to reach  
22 the structure and tie in or clip in, attach the conductor to the  
23 end of the insulator.

24 Q. You used a couple of terms there. When you say the static  
25 phase, is on the top is what are you referring to?

1           A. There will be two wires that go over the top of the line.  
2           So there will be two arms -- I don't recall exact length of those  
3           arms, I think they're about 15 feet. But they're there to  
4           protect the line from lightening strikes and such. And one of  
5           the wires will have fiber optic capability, so we call that an  
6           optical guidewire. That allows us to communicate between the Big  
7           Stone Substation and the Ellendale Substation. So if there is a  
8           problem with the line, there's communication there to talk back  
9           and forth.

10                  Also, when we get information from the system from  
11           metering and other kinds of things that would be going on.

12           Q. Then the other wires are called conductors?

13           A. Right.

14           Q. And those would be down lower?

15           A. They'll be lower. That's what the electricity will  
16           actually travel on, would be those conductors.

17           Q. So after all that is done, the structures are put up and  
18           the wires are strung, what further access will the project need  
19           to the property?

20           A. Right now as we look at maintenance and ongoing  
21           inspections for the project, MDU is proposed to be the  
22           maintenance provider. At this point in time, although the full  
23           plan hasn't been determined, the expectation is that they'll look  
24           at every structure physically, go to every structure once a year.  
25           And then they will fly the lines and look for any defects in the

1 line. So now when they go to look at the structure there's  
2 flexibility. It doesn't have to be at any specific time the  
3 year. And so it doesn't have to be in the middle of a crop  
4 season or anything like that. Access can be coordinated with  
5 landowners generally.

6 Q. Has the project prepared some diagrams indicating  
7 generally how it intends to access these, each of the poles on  
8 the easements we're talking about?

9 A. We have, yes.

10 Q. Would you take a look at Exhibit 108, please? That's a  
11 little difficult to see on the screen but the exhibit itself,  
12 what can you see on the exhibit itself? We can kind of see the  
13 line there at the bottom.

14 A. Right.

15 Q. But is there something else on the exhibit you have in  
16 front of you that you can see better?

17 A. Yeah, I'll point that out. It's hard for the jury to see  
18 this for sure, but there are the black dots across here. Those  
19 are the structure locations. This would be Section 32, Parcel  
20 Number 1 that we talked about. We currently, when we put the  
21 exhibit together we expected to basically come in, this is a  
22 roadway not heavily used but it is a roadway, and we intended to  
23 come basically straight from the roadway up to these structures.  
24 The structure on the far right, when we published this exhibit we  
25 thought we would come down a roadway here. We've since then are

1 actually looking at coming from in from the south as well. So  
2 straight off the township road up to the structure. We haven't  
3 been on the property, so this is a proposed plan until we can  
4 actually get out there and look more closely.

5 Q. If a landowner has a particular issue with the way you're  
6 proposing to access the property, will you work with them on  
7 that?

8 A. Yes, we'll certainly talk to them about it and see if we  
9 can figure out a plan together. Lots of times landowners will  
10 have better knowledge of the property than we've seen, and they  
11 can tell us what the situation might be out there specifically on  
12 the ground. Sometimes they're interested in a permanent access.  
13 We'll be willing to put a permanent access in in some cases if  
14 there is a reasonable long-term need for us and a long-term need  
15 for them. And so we generally will have an open dialog and try  
16 to work together.

17 Q. You want to put up 109, please. Is this a similar diagram  
18 for Parcel 2?

19 A. It is.

20 Q. And is there some yellow lines on that one?

21 A. Correct, it generally shows coming off a township roadway.

22 Q. The roadway is on here you can see it comes and curves and  
23 goes south. Is there a roadway across this area here?

24 A. My knowledge is this is as the Parks testified, this water  
25 level goes up and down so I don't believe you can get through

1 there right now, but there still is a road that isn't abandoned  
2 or vacated there. And you can come from the other direction from  
3 the east of town in this area to access that structure, at least  
4 that's our plan.

5 Q. Let's look at Exhibit 110.

6 A. I'm sorry, if we could back up one. I have a correction  
7 to that.

8 Q. That's okay.

9 A. I think we actually are going to have to come from a  
10 different direction from that last structure I spoke of.

11 Q. Okay, we got 109 back up.

12 A. Correct. This is hard to see with that shading but I  
13 believe we're actually planning to come across this way because  
14 of this body of water. Again, it's preliminary planning.

15 Q. That's some other landowner's property?

16 A. Correct, and we've been working with that landowner.

17 Q. Okay. Put 110 back up, please.

18 A. And this is similar. There's two structures on this  
19 property and we would come off from this roadway up to the  
20 structures here, and this structure right here.

21 Q. Did you do some work on a roadway on one of these parcels?

22 A. Not on the parcels, no, but we did some work on this  
23 roadway leading up to this area here. There's some very  
24 difficult terrain through there and some culvert issues, so we  
25 spoke with the township and worked with the landowners that were

1 adjoining the landowners to the south that we were able to  
2 contact adjoining that roadway.

3 Q. So the project, they made some improvements to the  
4 roadway?

5 A. We did.

6 Q. And 110 is Parcel 3; is that right?

7 A. It is.

8 Q. 111, this is Parcel 4. Is that right?

9 A. Correct.

10 Q. How were you going to access that one?

11 A. This is a little bit difficult to see, but generally we  
12 plan to come up the township road that's through there. Right  
13 here we are showing coming down the right of way, but I think  
14 we've adjusted that and are planning to go down the township road  
15 itself. I would offer as part of the planning process we did put  
16 together a road use plan that was provided to the counties and  
17 the townships, and they were all aware of the road use that we  
18 intend to have.

19 Q. Let's, why don't you take a look at Exhibit 3. You don't  
20 need to bring it up. That's the landowner, I'm sorry, that would  
21 be in the other book. That's the landowner information brochure.

22 A. All right.

23 Q. And I'm not going to put that up on the screen, but you've  
24 heard the testimony yesterday about some of the questions and  
25 answers in this document, correct?

1 A. I did, yes.

2 Q. I want to ask you about some of those things. If you look  
3 at exhibit, page four of that exhibit.

4 A. Okay.

5 Q. There was discussion about GPS. What's your understanding  
6 of the impact the transmission line would have on a GPS system?

7 A. I'm not a GPS expert but --

8 MR. PESALL: Your Honor, I guess I would object to the  
9 testimony if he's not claiming to be a GPS expert.

10 THE COURT: Let's pursue the qualifications a little bit  
11 further.

12 Q. (BY MR. RASMUSSEN) Although you're not a GPS expert, do  
13 you have some knowledge of the impact of the power line on a GPS  
14 system?

15 A. I have some knowledge of that, yes.

16 MR. PESALL: Your Honor, I'm going to maintain the  
17 objection.

18 THE COURT: Counsel approach, please.

19 (Sidebar.)

20 Q. (BY MR. RASMUSSEN) What's the basis of your knowledge  
21 about GPS? First of all, what sort of knowledge do you have  
22 regarding transmission lines, 345 kilovolt transmission lines?

23 A. Well, I know a reasonable amount about 345 kV transmission  
24 lines. Do you have anything specific you'd like to know about  
25 that?

1 Q. Just your background, how do you have that knowledge?

2 A. Well, my knowledge, I work with our design engineers. I  
3 listen to their information that they provide and the documents  
4 we file, sit in our engineering meetings, hear the concerns,  
5 speak through about the different items relating to how the  
6 design should be. You know, what's the physical parameters the  
7 line needs to maintain and withstand. What impact the line may  
8 have on different types of equipment and those kinds of things.

9 Q. And you have a background in electrical engineering?

10 A. I do.

11 Q. You said you had some knowledge of GPS. What is the basis  
12 of that knowledge?

13 A. Just general knowledge about how the signal may get  
14 blocked and that kind of thing. I don't use a GPS for the most  
15 part, myself, but I have understanding from others that have used  
16 GPS systems.

17 Q. And are you familiar with the impact the power lines,  
18 other power lines might have had on GPS systems and what the  
19 company has been told about that?

20 A. I'm familiar with what our company has been told about  
21 impacts on other power lines.

22 MR. RASMUSSEN: May we proceed then?

23 MR. PESALL: Your Honor, I'll stick with the objection at  
24 this point.

25 THE COURT: Objection is overruled, he may testify.

1 Q. (BY MR. RASMUSSEN) What's your understanding of the impact  
2 that the power line might have on a GPS system?

3 A. My understanding is it's a direct line of sight impact,  
4 just like a tree or any other kind of thing you might be under  
5 that could potentially impact a GPS system.

6 Q. In the brochure on page four there's the question, who  
7 should I contact if I experience interference to radio,  
8 television, communication or GPS equipment near the transmission  
9 line? The answer is, contact one of the transmission line owners  
10 shown on the inside cover to discuss the situation and receive  
11 guidance. Is that generally true with most of these things we've  
12 talked about, as far as the restrictions that are set forth in  
13 this brochure?

14 A. It is. We will work with people that bring concerns to  
15 us, that's why we put this document together. We have a  
16 requirement to work with the landowners. Even if we didn't have  
17 a requirement, we would anyway. So if there is a potential  
18 concern that a GPS system is blocked, or agricultural use system  
19 is not working as it was before the transmission line was built,  
20 we would be working with a landowner to solve that issue. Even  
21 radio, television signals and all that. When we look at  
22 buildings and fences and all that we have, specifically have a  
23 requirement to make sure that those situations are mitigated. We  
24 would study it. We would test it and place the mitigation  
25 measure for the landowner.

1 Q. When you say you have a requirement, who's placed a  
2 requirement on you?

3 A. The South Dakota Public Utility Commission.

4 Q. So that's part of the deal here, you have to work with  
5 landowners if you experience problems?

6 A. Correct. I think it's fair to say we would anyway. For  
7 example, we have a pole on a different project that was just  
8 noisy. We finally figured out it's the wind blowing across the  
9 insulator. We worked with the landowner that wasn't even on the  
10 project but just adjacent to the project. It took us over a year  
11 to figure out to replace the insulators because we didn't know if  
12 it was the metal or the pole or the insulator, or what it was.  
13 But that's just a demonstration of what we'll do to help people  
14 out.

15 Q. So you encourage landowners to contact you if you have  
16 issues?

17 A. We do.

18 Q. The brochure talks about fueling of machinery near the  
19 transmission line. What's the requirement there? What's the  
20 suggestion there?

21 A. Our suggestion recommendation is to, as it says, keep a  
22 minimum distance of 100 feet from the line. But if you must  
23 fuel, or decide to fuel near the line as with any situation with  
24 a portable fuel tank, use a fuel container with a flame resistor.  
25 I think of this as, perhaps, an impact, perhaps, something we

1 should all be considering when we're fueling our vehicles even at  
2 the gas station, you know, static electricity builds up in a back  
3 of a truck with a bed liner. How many times do we remember to  
4 take our fuel can out of the back of a truck with a bed liner?  
5 So there's a practical application, you can ground it. It won't  
6 take too much to ground a piece of equipment temporarily to  
7 undergo that operation.

8 Q. The easement doesn't prohibit someone from fueling a  
9 vehicle under the line?

10 A. It does not.

11 Q. It's just a safety suggestion?

12 A. This is a safety suggestion.

13 Q. Is that true for a number of things in this brochure?

14 A. Yes, I think it's true or good to know that, you know,  
15 many things in here are safety suggestions for people and  
16 situations that already occur across the United States, and  
17 probably across the world when it come to these types of  
18 situations.

19 Q. Are the issues addressed here solely limited to a 345 kV  
20 line?

21 A. They're not solely limited to that. Some of the issues  
22 occur naturally as it spells out in the landowner document, the  
23 earth's magnetic field and some of those things. Some of the  
24 issues are related. If you can just look at power lines and, you  
25 know, distribution lines in town, some of them are related to

1 your direct appliances in your home. There's a lot of issues  
2 that aren't just directly related to 345 transmission line.

3 Q. The brochure talks about sag. And sag is what? That's on  
4 page five.

5 A. Sag is the difference between what the wires elevation is  
6 where it attaches to the structure, and at the lowest point that  
7 the wire hangs down between the spans.

8 Q. And is there a minimum required for that?

9 A. Well, there's not a minimum sag but there's a minimum  
10 clearance requirement. And the National Electric Safety Code  
11 says the minimum clearance requirement is 28 feet. We are using  
12 30 feet as our minimum distance.

13 Q. So that doesn't mean every line is 30 feet above the  
14 ground?

15 A. Correct.

16 Q. That's just the minimum?

17 A. That's just the minimum, right. So at the attachment  
18 point it will be much higher.

19 Q. On page six of the brochure there's a reference to stray  
20 voltage?

21 A. Yes.

22 Q. Does a 345 kV line create stray voltage?

23 A. It does not. A stray voltage is a situation that's  
24 between a neutral and a ground. And a 345 kV line does not have  
25 a neutral on it, so it can't contribute directly to stray

1 voltage.

2 Q. Let's look at Exhibit 112-1. I think you've got a better  
3 copy of that in front of you. What is this document?

4 A. This is what we call our plan and profile. It's what our  
5 design engineers put together.

6 Q. And 112-1, 112-2, 112-3, 112-4, and 112-5 show the line  
7 with regard to all of the poles to the Parkshill property; is  
8 that right?

9 A. Correct.

10 Q. We'll just look at this one again. This is a little tough  
11 to see on the screen. We've got -- well, first of all, let's  
12 start from the bottom. What does this bottom line represent?

13 A. That's the earth.

14 Q. And then what does this next line that I'm focusing on  
15 represent?

16 A. That would be the clearance requirement that we've placed  
17 on the line.

18 Q. And then we have a red line, what is that?

19 A. Each of those, are you talking about the line that sags  
20 across?

21 Q. Yes.

22 A. So that would be lowest conductor, the lowest wire on the  
23 system that transmits electricity.

24 Q. So that line should either touch or be above this second  
25 line here?

1 A. Correct.

2 Q. And the line is along the entire line. It's designed so  
3 as to do that; is that right?

4 A. That's correct.

5 Q. You would have a similar drawing like this for every pole  
6 on the project?

7 A. Yes, the whole length of the project.

8 Q. The other lines that are above that bottom of the sagging  
9 lines are additional lines that would be on the poles?

10 A. Correct, so these three lines right here are the three  
11 that will conduct electricity, and they're all at different  
12 heights.

13 Q. And then the top one would be what you called the static  
14 line before?

15 A. Correct. It's hard to tell from that picture right there,  
16 but there are two wires. And they are slightly different because  
17 they're different in physical characteristics. As I mentioned,  
18 one is a steel wire, a three inch steel wire. And the other one  
19 will be an optical guidewire, so they have a different sag on the  
20 structure.

21 Q. Will you pull up 124, please. What is Exhibit 124?

22 A. This exhibit shows a completed foundation.

23 Q. And is, I'm assuming there will be on the project  
24 foundations of somewhat varying sizes?

25 A. Yes, across the whole project there will be various sizes.

1 Q. Do you know as far as the Parkshill property is concerned,  
2 what the size of the foundations will be?

3 A. The size of the foundations, most of them will be seven  
4 feet across. We don't know the complete depth yet because we  
5 haven't been on the property to obtain a soil boring. What we do  
6 for the structural design is bore each location to understand  
7 what the soil conditions are, but generally we would expect it to  
8 be probably in the 30 foot depth range. And as shown here, that  
9 should be a two feet, what we call a reveal. So the concrete  
10 would be two feet higher than the adjoining terrain. So on the  
11 Parks' property, the foundations are preliminary designed, when  
12 we finish the soil boring they're expected to be about seven  
13 feet. I think one is expected to be six and a half feet. One is  
14 expected to be seven and a half feet. But the rest of them,  
15 seven feet in diameter.

16 Q. Why haven't you completed the soil boring yet?

17 A. We don't have access to the property.

18 Q. They refused to allow you to do that?

19 A. Correct.

20 Q. This foundation goes down, you said, 30 feet?

21 A. Yes, most of the structures are generally in the 30 foot  
22 range. Most of the foundations to the structure I should say.

23 Q. So you gotta dig a pretty deep hole to pour the cement  
24 into, right?

25 A. Yes, it's a deep hole.

1 Q. What happens to the topsoil and the subsoil that comes out  
2 of these holes?

3 A. Well, our contractor, Tri State Drilling, they really have  
4 a pretty smooth operation. They will take the topsoil and they  
5 will set it aside. They typically will put it on the back of a  
6 truck so they can keep the topsoil separated from the subsoil.  
7 They take that and set that topsoil aside. And they have what  
8 they call a drill, and it's just a big auger, and they keep  
9 augering down. Some of the foundations will require cases. And  
10 so they're like a form to keep the soil from collapsing,  
11 depending on the soil conditions. Some will have a temporary  
12 case where they'll put the casing down the hole and as you go up,  
13 they'll pull the casing out. But as they dig the hole they'll  
14 set the subsoil off to the side, and they'll pick that up and  
15 transport that subsoil.

16 And if it's on an individual landowner's property, if  
17 they want the soil we'll put it, I think we set a distance of  
18 three miles, we would transport it up to about three miles to  
19 place it at a location they would want it at. If they don't want  
20 it then we would find another property owner in the area and we  
21 would get the subsoil to them. So the subsoil basically gets  
22 hauled off unless they would tell us, what we would call wasted  
23 on site, which would be to spread it out in the area there.

24 Q. The bolts on top of the foundation here, I'm assuming  
25 that's what's used to attach the structure to the foundation; is

1 that right?

2 A. Correct. We call that an anchor bolt assembly. The  
3 anchor bolt assembly has a nut on the bottom and a nut on the  
4 top. This ring just is a form basically, and the structure plate  
5 will go in between the two nuts, and that way they can get it  
6 plum. So they can adjust the bottom to get it plum and tighten  
7 the top down to the bottom.

8 Q. 125, please. This is just a closer view of the same  
9 foundation, or at least a similar one?

10 A. It's at least a similar one. It does appear to be the  
11 same foundation but I didn't take the picture.

12 Q. So what's the wire that comes out of the middle there?

13 A. That's a ground wire. And so we make sure that there's a  
14 lot of steel that goes into the concrete foundation and the rebar  
15 and the anchor bolt both, so we make sure we get those attached  
16 to this ground wire. And we bring the ground wire out and then  
17 we'll attach that, we'll install a ground rod and that will get  
18 grounded to the earth along with the structure.

19 Q. Pull up 126. Exhibit 126 is another photograph. What does  
20 this one show?

21 A. This one shows an access similar to what we are, at least  
22 in distance similar to what we're proposing on most of the Parks'  
23 property. This specific area was a soy bean field. It's  
24 probably kind of hard to tell without the picture in front of  
25 you, but this is soy beans around this. At this point in time it

1 must have been somewhat wet. And in efforts to not tear up the  
2 field we placed these, what we call composite matts. Sometimes  
3 they're called plastic matts, but it's a matt. And you can see  
4 from here to here, and then across here is the size of the matt.  
5 And they pin, these specific kinds of matts will pin together.  
6 And so we put those matts out there to prevent rutting and damage  
7 to the property when we did work on this structure.

8 Q. You don't put the matts on every structure?

9 A. We do not. If it's rained and it warrants matting. We're  
10 not going to cause substantial damage to the property. We won't  
11 matt it at that time, specifically if one is frozen as well.

12 Q. Back here there was something white, something covered  
13 with something white it appears. What's that?

14 A. We put a plastic top on the concrete once it's poured,  
15 just to contain the heat and the moisture until it cures. I  
16 think it's about a week and then we pick it up.

17 Q. So underneath that is the foundation?

18 A. Yes, that's the foundation.

19 Q. When this particular construction was done there was some  
20 damage to the soy bean field?

21 A. Correct.

22 Q. What is the, does the project do anything to compensate  
23 landowners for damage to crops?

24 A. Yes. I believe it was, you can spell it out in Exhibit 3  
25 here. We will go out and contact the landowner. We'll ask them

1 if they'd like to meet with us. Typically it's one of our land  
2 agents, Vicki Severson has been doing the majority of this up  
3 until this point in time. So if it was Vicki, she would make a  
4 contact and ask the landowner if they would like to meet with her  
5 and measure the damaged area to the crop. And then once that  
6 area is measured, she'll figure out what that area is. We'll get  
7 crop information from the landowner, figure out what their crop  
8 loss would be, kind of the average crop information that they  
9 have. And then there will be somewhat of a negotiation, you  
10 know, with the landowner to what is the amount that's damaged.  
11 How much is their typical crop? And then we multiply that by the  
12 price of the crop at the time and we make that payment. And we  
13 typically would pay for damage at that time. And assuming there  
14 was impact to the ground as well, we would also pay crop damage.  
15 Basically it's 200 percent to accommodate for potential  
16 compaction of the soil that may can have occurred.

17 Q. Is that spelled out on page 14 of Exhibit 3?

18 A. Correct, that's on page 14 of Exhibit 3.

19 Q. We heard prior testimony that the project hired Brad  
20 Johnson to do the appraisals in Day County for this project?

21 A. We did.

22 Q. And does the project believe the amounts determined by Mr.  
23 Johnson are appropriate?

24 A. We do feel that they are appropriate.

25 MR. RASMUSSEN: Thank you, sir. I have no further

1 Q. Same thing with an aircraft?

2 A. Sure.

3 Q. Now the easements that MDU and Otter Tail Power are going  
4 to be taking in these cases, those are transferable, aren't they?

5 A. Correct.

6 Q. There is potential that MDU and Otter Tail Power would  
7 actually sell these easements to some other company?

8 A. There's always a potential but it's highly unlikely.

9 Q. If it was sold to some other company, that company might  
10 not be bound by the same promise to work with the landowners that  
11 you've expressed on behalf of MDU and Otter Tail, would they?

12 A. I don't know if that's true. I would have to ask the  
13 Public Utility Commission that question. It would certainly be  
14 bound by the easement that was transferred to them.

15 Q. So they would be free to maintain and install a  
16 transmission line on site?

17 A. The transmission line exists as it is. I'm not sure what  
18 you're asking there. They exist as it is when they purchase the  
19 project from us.

20 Q. Mr. Koeckeritz, would you take a look in the white binder,  
21 Exhibit 4?

22 A. Okay.

23 Q. I'm looking at page two. There's a paragraph in there on  
24 the top of page two. This will be indicated as Parkshill exhibit  
25 page 35.

1 A. Yes, I have that page.

2 Q. That indicates that the utilities would be taking a  
3 perpetual and irrevocable easement to construct, operate,  
4 maintain, use, rebuild, relocate, remove an electric line  
5 facility with one or more circuits and all towers, structures,  
6 poles, foundations, cross arms, cables, wires, anchors, guides,  
7 supports, it goes on. What your testimony today is that the  
8 utility companies in this case could sell that right to some  
9 other company?

10 A. Yes, we would sell the line and everything that would go  
11 with it, which would be the easements as well.

12 Q. So that new company would have the right to construct,  
13 operate, maintain, rebuild, etcetera, a completely different line  
14 if they were inclined to do so?

15 A. Once they met all the requirements for permitting and such  
16 they would be, they would have that opportunity.

17 Q. Thank you. You testified briefly about some of the safety  
18 recommendations, or safety advisements that are set out in  
19 Exhibit 3?

20 A. Yes.

21 Q. Now Exhibit 3 was something that's published by the  
22 project; is that right?

23 A. That's correct.

24 Q. And if the risks and advisements that are in there are not  
25 legitimate they wouldn't have published it, would they?

1 A. Right, we won't publish something that's foolish.

2 Q. Now let's start with GPS, for example. You indicate that  
3 if a landowner had GPS issues, they could contact the utilities  
4 company and you will work with them to try and correct that?

5 A. Yes, I did.

6 Q. Is that the same, would that also be true with all of the  
7 other risks and issues identified in Exhibit 3?

8 A. I would say the majority of them, yes.

9 Q. I'm curious if a landowner refuels within 100 feet and  
10 starts a fire, how is the utility company going to work with  
11 them?

12 A. That is a recommendation that we have for them. That is  
13 one that we can't control. We can't mitigate them. We advise  
14 them on options but --

15 Q. If the landowner were to experience a lethal shock, the  
16 same problem would arise?

17 A. Correct.

18 Q. There's no real way to go back and fix that after it's  
19 happened?

20 A. That's correct.

21 MR. PESALL: No further questions. Thank you.

22 THE COURT: Redirect.

23 REDIRECT EXAMINATION

24 Q. (BY MR. RASMUSSEN) You were asked about the prospect of  
25 Otter Tail and MDU selling the line and the easement, and then

1 you were asked about whether they could come in and build a whole  
2 new line?

3 A. Right.

4 Q. What are the chances that somebody would buy an existing  
5 line, tear it down, and build a whole new line?

6 MR. PESALL: Objection. Calls for speculation.

7 THE COURT: Overruled.

8 MR. KOECKERITZ: We wouldn't expect that. If you look at  
9 the lines, especially the high voltage transmission lines that  
10 are across our country, most of them are there forever. There's  
11 very few that ever get taken down and rebuilt. In some congested  
12 areas it could happen, but there's a significant investment here.  
13 The likelihood of Otter Tail and MDU selling that is not very  
14 high.

15 Q. (BY MR. RASMUSSEN) Even if something like that did  
16 happen, you said they were to comply with the permitting process.  
17 Would that be going back to PUC and doing that whole thing?

18 A. Correct.

19 MR. RASMUSSEN: Nothing further.

20 THE COURT: Further cross.

21 MR. PESALL: No recross on that, your Honor.

22 THE COURT: You may step down.

23 Mr. Rasmussen, you may call your next witness.

24 MR. RASMUSSEN: We call Reuben Parks.

25 Reuben Parks,

1 structure is very similar to that.

2 Q. Do the presence of power poles on a piece of ground create  
3 challenges for farming?

4 A. Yes, to the extent that you have to go around it. And  
5 nobody wants to have an obstacle to work around if you can avoid  
6 it. So they're a challenge but it's something that farmers adapt  
7 to very quickly. We figure out how to go around them.

8 Q. In your experience are farmers generally successful  
9 farming around high voltage transmission lines and poles?

10 A. All of my experience suggests that farmers are very  
11 resourceful when it comes to getting the most out of the land  
12 they are paying for, so they will farm as close to the structures  
13 as practical.

14 Q. Are you familiar with the Parks' property?

15 A. I have driven past on the roads. I visited the property.  
16 I haven't been on the property but I observed them so I could  
17 legitimately evaluate them.

18 Q. Have you also looked at Google Earth maps?

19 A. Yes, I also looked at -- the most recent Google Earth  
20 images are very detailed and clear and so you can see those  
21 relatively easily. There are also satellite images in some of  
22 the documentation from the utility that's proposing the line  
23 here. And I looked at those as well as the most recent satellite  
24 images of the fields.

25 Q. Are you familiar with the equipment used by Parkshill

1 Farms?

2 A. Not necessarily brands but I was provided with a list of  
3 the types of equipment, or the widths of equipment that they  
4 would use. And I understand the types of equipment that they  
5 would use in their operation.

6 Q. Have you prepared a power point that demonstrates how you  
7 feel the property that's involved in this case could be farmed  
8 with the placement of poles?

9 A. Yes, I have.

10 Q. And I believe the actual slides for that are in evidence  
11 as Exhibit 122. And the first page of that is up on the screen;  
12 is that right?

13 A. That's correct.

14 Q. Do you want to take the jury through this Power Point and  
15 explain what it shows?

16 A. I certainly can. We'll start with the image that's up  
17 there. As you heard earlier, there are four separate tracts, or  
18 at least referred to as four different parcels involved in the  
19 Parks potentially impacted by easements. I'm only illustrating  
20 three of the four of those, because the fourth one is the one  
21 that is all pasture or all graze land, and the machine issues for  
22 graze land are pretty minimal.

23 You might spray if they control weeds, but since they're  
24 not running planting equipment or harvesting equipment on that  
25 land, I didn't try to illustrate any particular machine path on

1 that one. So we'll go to this one. This I believe would have  
2 been the third tract that Al talked about. This one is half  
3 pasture land and half cropland. And I zoomed in here on the  
4 Google Earth image to the eastern half of it, which is the  
5 portion used as cropland. It's very roughly a north-south 80 at  
6 this point. Well, I can't say that it's 80 acres, it's the  
7 eastern part of that tract of land. If you look at the lower  
8 portion of the image you see two yellow dots. One in the lower  
9 left. And one in about the lower center part of the image.  
10 Those are as near as I can place them in this image, the proposed  
11 locations of the two structures on this quarter section.

12 Q. Between there and there?

13 A. That's correct. And the one on the right with the arrow  
14 to it is the one structure in this tract that lands on the crop  
15 part of this parcel. I also drew some yellow lines, just more  
16 for my own understanding and to highlight the tracts so that it's  
17 easier for you to see. The vertical, yellow line is the eastern  
18 boundary of the tract right there. That's correct. And then  
19 there are some natural obstacles in the field already. There's  
20 some wet areas that are circled that the producers are currently  
21 farming around.

22 I understand that's very common here and they may shrink  
23 or swell given what the moisture conditions are. A little above  
24 that looks like an rock pile in the field, which is not unusual,  
25 but there's another obstacle to work around. And those are

1 things that they are currently navigating around in the field.  
2 And then the structure proposed in the lower portion of the  
3 field. The exhibits from the utility company for the proposed  
4 easement give exact dimensions of where that easement is proposed  
5 for relative to the boundary of the property. And they overlay  
6 that on a satellite image of the property. I chose to use these  
7 Google Earth images because they're more recent and they're very  
8 detailed. And I can zoom in to see things better where the pdf  
9 file that was a part of the documentation, I couldn't zoom. I  
10 could zoom in, but my resolution was limited. This was a little  
11 bit better so I'm using these images to illustrate how you might  
12 farm around there.

13 One of the other things I didn't necessarily understand  
14 completely when I started the process, was the roadway that  
15 represents the south boundary of this tract. It looks like it's  
16 been vacated but, in fact, it's not vacated, it's just not being  
17 utilized because of access, water issues essentially. They can't  
18 get past all of it. So it's still a road there, but it's not  
19 currently actively used as a road. The producer may use it to  
20 access the field, but it doesn't look like it's used by the  
21 public right now. What's not always clear in the image is where  
22 there's the boundary that's the township boundary, and then  
23 there's a boundary that is currently being farmed to. Where is  
24 the actual edge of the field? And then where is the actual limit  
25 of the tract, or the property boundary? So I tried to illustrate

1 two things. One, was if you farm to where they're currently  
2 farming, how would it work out to go around the pole? And then I  
3 also said if you were to farm all the way to the property  
4 boundary, for instance, if that roadway were vacated, where would  
5 they farm to and how would that work go out? So I kind of got  
6 two illustrations in some of these cases and it gets a little  
7 long, but you need to know that's why I did it twice. I also then  
8 illustrated to understand that kind of schematically without the  
9 image. So if we start with this, this would be the road right of  
10 way or the property south of the actual farm tract. Here's the  
11 section line. That would be the property line to which the Parks  
12 brothers own. And then this would be the location of the  
13 proposed easement. That yellowish area with the dotted line down  
14 the center would be the easement. That's 150 feet wide is the  
15 easement width.

16 And I've drawn, in this case I drew two because I didn't  
17 know the exact diameter of this foundation. I drew a seven foot  
18 one and an 11 foot one, just to kind of bracket what could show  
19 up there, but those circles are drawn to scale. So that's 150  
20 foot easement. That's approximately a seven foot and an 11 foot  
21 diameter foundation. And the distance to the property line is  
22 also to scale. And then it appears --

23 Q. Let me ask, you said the seven and 11. Is the seven on  
24 the inside and then that black would make it eleven?

25 A. I'm sorry, yes. The gray center is a seven foot diameter

1 circle. And the 11 foot would be largest foundation that they  
2 will probably encounter, or very close to that. And it's about  
3 125 feet in the image from the center of the easement line to the  
4 edge of the area that they're currently farming. Now that's not  
5 something that the utility company measures and puts it there. I  
6 had to kind of determine that from the scale there, so you're  
7 getting my approximation not an absolute measurement. It's about  
8 185 feet. And that is from the utility company documentation  
9 from the easement center line to the property boundary. They go  
10 to the nearest hundredth of a foot. I just rounded to the  
11 nearest foot. We'll go from this slide. I have to click through  
12 that again. So we start the illustration. What I intended to  
13 illustrate was the passes the producer might make. I'm not  
14 saying he has to make this set, but it's probably the way I would  
15 start, or the first attempt I would make with an eight row  
16 planter.

17 Their current planter is an eight row planter. They use  
18 a 38 inch row, so that gives me about a 25 foot four inch width  
19 on the actual planter pass. And so we said, okay, if that's the  
20 easement and there's the area that they're going to farm from,  
21 there's the poles, structure in the southeast area of the field,  
22 that would be what I would do is planter passes. And now you  
23 made one, two, three, four passes with the planter and he still  
24 isn't up to the structure line yet. But the next pass he's going  
25 to have to do something if he doesn't want to run into the pole.

1 And he's certainly not going to try to do that. So he's going to  
2 have to deviate. In this case he deviated south and went around  
3 the structure to the south. The next pass coming back he'll have  
4 to go a little bit to the north. And then after that, we're off  
5 to the races the way we normally plant and just keep going.

6 Q. There would be a little bit of an overlap both on the  
7 north and the south side; is that right?

8 A. That's correct.

9 Q. Is that an issue?

10 A. Well, it can be a little bit of an issue in that if he  
11 deviates this way, in the case of planting, he would have two or  
12 three rows at the widest point where he's double planting. He's  
13 overlapping something he's already planted. And that little lens  
14 shaped area is going, where he's double planted is going to have  
15 less, a little lower yield in there because he's got too high a  
16 plant population and twice as many seeds as he would like to  
17 have, but it's a relatively small area. And so I don't know what  
18 his yield reduction would be if he normally grew 150 bushels an  
19 acre on that small area. It might only grow 120 bushels an acre  
20 that year. It doesn't kill the crop. It just probably doesn't  
21 produce at it's maximum in that location. So there's a small  
22 area implicated by that. In this case the planter isn't an  
23 exceptionally wide planter so that area is very small. We also  
24 illustrate here if the road right of way would be vacated, how  
25 might they farm it then? And the same process would be used,

1 he'll go back and forth. In this case he's going to come to the  
2 structure in pretty much in the middle of a pass now and he has  
3 to deviate. In this case he's only going to make the deviation  
4 in one pass. In the next pass there will be a little bit of  
5 overlap, so there would be a small impact in a very localized  
6 area around the structure to his yield.

7 Q. This area would be where there would be no planting?

8 A. That's correct. There would be an actual absence of crop  
9 in the area where they would have to go around the structure. I  
10 have illustrated here a close pass around there with an eight row  
11 planter. You can hug the structure fairly closely if you wish  
12 to. Some of my other illustrations show a bigger area involved  
13 there and I didn't try to stay as close to the structure, but you  
14 can't go around it without leaving a little bit of area that's  
15 not planted. The Parks' also use a 45 foot drill, solid seeding  
16 drill for either wheat or soy beans or both, but small grains.  
17 And so they had several different sized drills, but I used a 45  
18 foot drill to illustrate a wider implement and how they would do  
19 that. But it's the same kind of process as we did before, it's  
20 just a wider swath. So on the third pass they need to deviate to  
21 go around the structure and then the next one clears it. So this  
22 is probably the way I would approach it, but I wouldn't preclude  
23 a farmer from finding a better way to do it. They know their  
24 equipment and how to utilize it well. Again, if you farm to the  
25 property line instead of up to the current boundary of the farmed

1 area, you know, that was able to do that with very little lost  
2 area to the structure itself.

3 Now we move to a spraying operation for weed control.  
4 They have several different sized sprayers. One of them was a 90  
5 foot sprayer. That's not an uncommon size to use now. If the  
6 producer themselves have a sprayer it could be 90 feet. If you  
7 hire the work done from a co-operative that sprayer could be 90  
8 feet, it could be 120 feet. I illustrate both of those just to  
9 cover the bases. So in this case you have to make a decision.  
10 Here we started at the currently farmed boundary. And then the  
11 second pass across the field, now they encounter the structure in  
12 the middle. You could just loop up around it and it would leave  
13 a substantial area where you aren't controlling the weeds  
14 necessarily. You could also choose to stop, back up, swing off  
15 to the side and spray to the side there, and go around the other  
16 side and spray, and then come back up to the structure and take  
17 off again.

18 That's a fair amount of rigmarole. It would take an  
19 extra five minutes to do all that for that pass across the field.  
20 You could also, if they chose to, make a loop around the  
21 structure and spray it from, in a circular pattern and stay close  
22 to it. Then you'll have a little bit of overlap when you come  
23 into that circular area, and leave that circular area on the  
24 other side. This is the same 90 foot sprayer but farms to the  
25 center of the road right of way. It works out a little bit

1 friendlier in this particular case, but that's a 90 foot sprayer  
2 pass. They also indicated sometimes they use 120 foot sprayer or  
3 higher, I've done it with a 120 foot sprayer. So I've  
4 illustrated that one as well. And that one doesn't work out too  
5 badly for this particular one either. If they farm on the center  
6 of the road right of way instead, now they encounter another one  
7 that's a little more awkward. And again, they can choose what  
8 the best way for them to get around that structure is. Whether  
9 to loop around it or to do this kind of patchwork coverage. Or  
10 if you chose not to, you could leave that vertical strip and just  
11 go around the pole and back up to it and take off. But you would  
12 leave 120 foot wide strip that was maybe 12 feet wide that you  
13 weren't controlling the weeds in, and most producers aren't going  
14 to want to do that. That was the first tract. We go onto the  
15 second tract, or to me the second tract.

16 Q. This is Parcel 2?

17 A. Parcel 2 is the way it's referred to. This is a quarter  
18 section, 160 acres. It's a little different. It has a road that  
19 comes up from the center of the bottom and makes that left turn.  
20 It has several structures or obstacles in it. That white  
21 surrounded area is a wet area that has to be farmed around. Both  
22 of those are wet areas that are currently farmed around. There's  
23 quite a bit of terrain on this one too that's not quite as  
24 obvious. There's an older farmstead in the center of the picture  
25 with the trees, they're going around that one. And it looks like

1 either a wet area or a rock pile. It's probably a wet area in  
2 the northwest part of the field as well. There are three  
3 structures in the proposed power transmission line that would  
4 land on this quarter section. They're illustrated as the three  
5 yellow dots along the bottom. The one in the lower right is  
6 circled. That's the first one that I'll treat when we look at  
7 farming. There's the one on the far left, which we'll also look  
8 at. And then there's the one in the center. And that one  
9 currently is sited right on the edge of this area that's wetland.  
10 And so there's, like, grass and weeds on one side. And then the  
11 power pole, or the structure there. And cropland on the other  
12 side of it. So I didn't, the only illustration I made for that  
13 one is to put a wide line in it. I don't know that that line  
14 necessarily matches the width of their planter at this scale but  
15 it's pretty close. And they would farm around that. That shows  
16 they're following the edge of the field. And there's a little  
17 dip made to go around that structure and pin it against the wet  
18 area.

19 And that's probably their only real option there is to do  
20 that. That results in a very small area that's not planted. But  
21 we'll look at this, the illustration for this one. And I have to  
22 do these two separately because this one has an active road right  
23 of way, and I thought this one might have been abandoned.  
24 Apparently, it's not vacated yet but not utilized as a road  
25 because of this wet area here that cuts it off. Again, we'll

1 kind of do the sizing of things. So we have the field to the  
2 south, which actually may be a road right of way yet. We have  
3 the 150 foot easement. There's the old road right of way. I'm  
4 sorry, I illustrated these separately. The easement width, it's  
5 about 90 feet. And again, this is from my using the scale and  
6 the Google Earth image to determine where they're actually  
7 farming to, from where that is. But about 90 feet from the  
8 center of the right of way to the edge of the area that they're  
9 currently farming. And it's about 159 feet from the property  
10 line to the edge of their property, to the center of the  
11 easement. That's more carved in stone, but that's a more  
12 accurate number. Mine is a little bit more of an approximation  
13 up here.

14 So again, we look at how would we manage that with an  
15 eight row planter? Starting at the area that they're currently  
16 farming we would probably go around the pole, something like  
17 that. If they were farming down to the section line, which they  
18 might do if the township ever vacates that road right of way  
19 completely, they would pick up a little bit of farmland and come  
20 up to the structure and just barely pass it there. They would  
21 have to go around it on the north side. Again, if they used a 45  
22 foot solid seeding implement starting where they currently farm,  
23 the second pass and the third pass, they would have to zip around  
24 it. And I stayed quite a ways away from it there but they can  
25 come closer if they wish to.

1           Again, if they farm all the way down to the edge of their  
2 property into the middle of the road right of way, it would work  
3 out more like that. A little bit bigger area there that's not  
4 planted. That should have been my heading to start with I think.  
5 Then in terms of chemical application, if they were using a 90  
6 foot sprayer it works out something like that. Again, they could  
7 come a little closer to the structure if they wanted to. But  
8 with a 90 foot boom, I spent a summer spraying for a local  
9 applicator, I would give it more berth because I banged the tip  
10 of the spray boom into a fence post or a telephone pole more than  
11 once. So you can go around it this way without a lot of  
12 difficulty.

13           One of the benefits of the current technology used on  
14 sprayers though is that we tend to have control over sections of  
15 those booms. And so if there's an overlap into an adjacent area  
16 that he's already sprayed, you usually can say, well, I want this  
17 part of the sprayer and this part of the sprayer to be active,  
18 and the outside of the boom I don't need to use right now. So  
19 you don't necessarily have to do all the double spray where you  
20 would have overlap. Again, with a 90 foot boom down to the  
21 section line, this is one way to do it. Not necessarily the only  
22 way, but one way to do it. And with 120 foot sprayer they could  
23 piece it in like that if they wished to, or you could loop down  
24 around that structure as well if you wish to, or go all the way  
25 around it. Some of the very newest technology that our sprayers

1 are using, and I wouldn't necessarily expect a producer to own  
2 this now but co-ops are buying the equipment. Some of the newest  
3 stuff that Raven Industries is putting out will actually keep  
4 track of a map and it controls each individual spray nozzle on  
5 the boom. And it will know if that boom is over an area that  
6 you've already sprayed or not. And it says I don't need to spray  
7 that, you've already sprayed that, and I'll turn off that nozzle  
8 and you can do it with individual nozzles. That's really the  
9 Cadillac right now. But the co-ops that are spraying are using  
10 that kind of stuff, and that's one of the ways they compensate  
11 for things like this, and water, and rock piles, and waterways,  
12 and everything else. So if they farmed all the way down to the  
13 property line, again this one, they would have to do some piece  
14 work to fill in.

15 So that was this structure down here that we were talking  
16 about. This one I'm not going to talk about because it's pinned  
17 up against the wet area and there's really only one option, is  
18 probably to loop around it there. The third one is this  
19 structure in the western part of the field. There is an active  
20 road there. And so this is a township road that would be  
21 normally 66 feet wide within the total right of way and their  
22 property line. I would expect to go to the center of that.  
23 However, in everything that I looked at it looked like the  
24 section line is actually on the south side of the road slightly.  
25 I don't know necessarily why it is that way and if I'm correct in

1 that regard, but it looks like the section line is on the south  
2 edge of the road. And the easement area, it's about 75 feet from  
3 the boundary of the farmed area to the structure center line. So  
4 it looks like the structure, I may have an error here, but it  
5 looks like the structure, or the easement, comes up close to the  
6 road area about 162 feet from the property boundary to the  
7 structure center line. So then the question is how do we plant,  
8 again, with an eight row planter operating from where they  
9 currently farm from the images where the rows begin? It would be  
10 the third and fourth passes across the field where they would  
11 encounter that pole or that structure. If we used a 45 foot,  
12 they're planting wheat or with a grain drill, a 45 foot one, it  
13 would encounter the structure on the second pass across the  
14 field. And after, they can go all the way around it. You can do  
15 that swing around or dip south of it like this. With a 90 foot  
16 sprayer it looks something like that.

17           With 120 foot sprayer, now I did a little bit different  
18 pattern here and I'll tell you why. First of all, I'm not  
19 showing down to the property line because that's actually on the  
20 other side of the road. This is an active road so I'm not  
21 expecting they're going to farm down to the property line. In  
22 this case there may be existing power poles along the edge of the  
23 road right of way. So rather than swing the sprayer over the  
24 ditch area, they could move along that edge and then pivot the  
25 tractor and the sprayer, or if it's a self propelled sprayer,

1 swing the sprayer itself around the south side of the pole to  
2 catch that sliver and then back up, and go around the pole and  
3 back up to the pole again and then move on. There's no question  
4 it's extra rigmarole to farm it there but it will take a few  
5 extra minutes to accomplish spraying that one. This is tract one,  
6 or parcel one in the previous testimony. This is the southwest  
7 and southeast quarters and whatever section number this is, I  
8 don't remember what section it is.

9 Q. Thirty-two.

10 A. Thirty-two, thank you. And I use this image for my own  
11 understanding to see how does this field lay out. And again,  
12 this would be the north boundary of it, I think, right here. And  
13 there's a road right of way here, 148th Street, and then the  
14 blacktop road out of south of Butler is here. And so if I look  
15 at this field, you can see a number of features in the field  
16 where we might generously call them features. Some are  
17 obstacles. There's an old railroad right of way right here.  
18 There are wet areas here and here. And a wet area there. And  
19 more wet areas. And there's a rock pile down here somewhere.  
20 And then there's the actual road right of way. So there are a  
21 number of things that have to be worked around in this field  
22 right now.

23 I looked in the lower, left-hand corner of it, this is  
24 along 148th Street here. And that road is not vacated but it is  
25 not actively used by the public, or appears to not be. It looks

1 to be grass with several tracks here. However, there is an  
2 existing set of power poles. These would be a lower voltage  
3 transmission line. It's not as large as the one being proposed.  
4 But you can actually see the pole there, and here, and here, and  
5 here. And so those would be on, typically on the edge of the  
6 road right of way. And you can see that they're farming, they're  
7 swinging their planting equipment between those poles, and up  
8 around the poles, and down into what is probably the road right  
9 of way. But as no one is using it, they're farming it like most  
10 farmers probably would. But we're going around the poles and so  
11 there's, and these poles are much, much, much closer together  
12 than the proposed ones are.

13 Q. So they're going around the poles and under the line to do  
14 the farming here?

15 A. Ostensively, yeah. If this is an active line there's  
16 wires on that one. So we're going underneath there to utilize  
17 part of that road right of way and get the most out of the tract  
18 that they can. And I just backed out from that and traced the  
19 edge of that with a yellow line so I could see this clearly, and  
20 that's that southwest corner of the southeast quarter. And then  
21 go up around this wet area, and that's the boundary of where  
22 they're currently farming. This dot, that yellow dot is the  
23 western most land structure for the large power line. And again,  
24 this one happens to land right on the edge of this wet area so I  
25 won't spend a lot more time trying to teach you how I would farm

1 around that. You know what? Well, some of you do, but you'd  
2 probably swing around that and pin that pole against the wet area  
3 and stay as close to it as you can. That's the southwest corner.  
4 This is the southeast area of the field. Again, the road right  
5 of way is illustrated right here. And there's one, two, three  
6 more structures that occur in this mile of farmland. I've traced  
7 around some of the other obstacles in the field so I knew where  
8 they were and demonstrate them for you. This is a rock pile out  
9 in the field, and they're farming around that one. There's some  
10 of that scalloped edge where they're going around those power  
11 poles that exist on that right of way. And then for some reason  
12 at the east end it's straightened out and doesn't go between any  
13 more poles there. But that's the layout of it.

14 Now we go to my schematic representation. So here's the  
15 grass of the road right of way that's not currently being used  
16 for traffic so much. The section line appears to be kind of near  
17 the south edge of that road right of way. There's the location  
18 of the 150 foot easement for the power company, or the utility  
19 company, and the proposed line. I only illustrate one pole even  
20 though there's three. I wanted to show one at scale rather than  
21 to try to back out and not be able to show it at the right scale,  
22 so I'm only showing one. And I'm using the average distances  
23 from the property line and the farmed area up to that pole. They  
24 vary a little bit a couple feet. Each one is a couple feet  
25 different than the other ones, but I'm using the average of

1 those. So it's about 100 feet from where they're currently  
2 farming up to the center of the proposed easement, and about 170  
3 feet to the section line. So we go back to the same planting  
4 equipment. Again, it's an eight row planter. And it would be  
5 the fourth pass across the field that we encounter the pole, and  
6 a fifth pass a little bit. And then we're past the obstacle. And  
7 if they were farming that using wheat this time and a 45 foot  
8 grain drill or solid seeder, it would be the third pass across  
9 the field where they'd have to go around the structure. If for  
10 weed control purposes, if they're going to spray with a 90 foot  
11 sprayer, it would look probably something like that. Again, they  
12 could choose to do it differently than that but this is one way  
13 to do it. And with 120 foot sprayer, which is the largest  
14 implement they indicated would be used on this currently, I  
15 wouldn't guarantee that implements don't get larger but 120 feet  
16 is pretty wide.

17 I would, again, probably use a maneuver something like  
18 that because there may be power poles along this right of way and  
19 you may not want to swing south into that, but if you pivot  
20 around the pole at this point you can cover that strip and go  
21 around and back up to the pole and start again. So that's one  
22 way to do it with a wide implement. I think that's the end of  
23 illustrations about how it would be done. I'm not saying that's  
24 the only way they could do that, but it illustrates one way to  
25 get around those structures.

1 Q. Have you seen farmers do things like this?

2 A. Just about every power pole I've ever seen in an  
3 agricultural field had some method of getting the crop close to  
4 it.

5 Q. You had indicated before you've done work before with GPS?

6 A. Yes, we started a class at the university. We follow GPS  
7 very closely because that's a research area that's new  
8 technology. We like that stuff. And you're always trying to  
9 figure out how to utilize it. We started using GPS in the early  
10 1990's before the satellite constellation was even complete. We  
11 were using it for research projects and trying to understand it.  
12 So when we developed a course one of the things we would teach  
13 students is how does a GPS system work? And what are the things  
14 that can cause errors in your location with that system? So we  
15 have a long list of the things that can cause errors in the GPS  
16 position accuracy. And we would do, I've never done tests with a  
17 high voltage transmission line, we would do tests, small tests to  
18 illustrate for students accuracy so they would understand it. We  
19 would park a receiver on the roof of the building and collect  
20 data for 24 hours and have the students plot that data and see  
21 how far did that receiver appear to wander even though it was  
22 still on the roof. Then they got a sense of, it says it's in one  
23 location but it's actually one location give or take a little bit  
24 because it appears to be wandering around here when it's not. So  
25 we would do tests like that, but we also had to understand the

1 other sources of potential error in order to be able to teach the  
2 students that. The one source that is spoken of specifically in  
3 the documentation from the utility --

4 MR. PESALL: Your Honor, can I approach for a second?

5 THE COURT: Yes.

6 (Sidebar.)

7 MR. RASMUSSEN: Continue.

8 MR. HUMBURG: Okay. One of the sources of error, and  
9 again, there are a number of things that can cause problems.  
10 Many of them are very, very technical things that are difficult  
11 to explain, at least so my students would probably tell you. But  
12 one of them that you can understand that is one of the ones that  
13 they speak of in the documentation that's provided to the  
14 landowners is what's call multipath error. The GPS system  
15 figures out where you are by measuring the distance from your  
16 receiver. If you have one on your cell phone it's doing it all  
17 the time, measuring the distance from that receiver to a series  
18 of satellites, each one individual distance. If it knows the  
19 distance to, it actually takes four, if it knows the distance to  
20 four different satellites it can figure out exactly where you  
21 are, but it needs to know that distance very accurately. One of  
22 the things that can happen is that the signal can bounce off of a  
23 structure like a tall tree, a Cottonwood tree. If you're in  
24 Minneapolis it can bounce off a building and hit you at a  
25 different angle. So instead of your signal coming in a straight

1 line, the receiver can be confused as to the distance because  
2 it's got one distance here, and maybe another distance there.  
3 But if it only gets this one, it would make it the wrong distance  
4 because it was two paths that it took instead of a single  
5 straight line thing. That's one of the things they point out is  
6 that the power pole structure can act like that. As you go past  
7 it, you could get a bounced off signal from it so it can cause an  
8 error. But it's likely to cause that error only to one  
9 satellite, and most receivers are now tracking twelve satellites  
10 at a time. One of them isn't likely to make that much difference  
11 in the actual computed position. Also in your driving past it,  
12 that obstacle is only going to be there for a second or two as  
13 you pass by, and the system isn't likely to cause an error that  
14 fast. Most of our tractors that are using, or the GPS receiver  
15 and the system that John Deere or Case would use, actually have an  
16 inertial system built in, a little electronic system that says  
17 I'm going in this direction.

18 If I lose the GPS signal all together for a while, I'll  
19 just keep, I'll figure out where you are based on what you were  
20 doing. And so if you lose something for a second or two it  
21 doesn't cause, I wouldn't say it doesn't ever cause an error but  
22 it doesn't cause a big error. So there are many potential  
23 sources of error that can be there. Most of them not effected by  
24 the power poles or the structures that are there. The signal that  
25 the GPS receiver is using to do measurement from the satellites

1 is a very different signal in terms of it's frequency than the  
2 electrical magnetic field that's produced by the power  
3 transmission. That's 60 cycles per second that that's occurring  
4 at. That's 60 oscillations in one second. The GPS system  
5 frequency is one, there are actually two frequencies and they're  
6 close to each other, about 1.4 billion cycles per second. So  
7 they're so different from each other that it's difficult for  
8 anything from the power line to actually be confused with the GPS  
9 signal. The one area where I would say we need, a farmer would  
10 need to pay close attention, is if they're using high accuracy  
11 GPS. We call it RTK for real time kinematic. Doesn't matter why  
12 it's called that, but that's the most accurate.

13           And if a farmer is using that to plant his crop and  
14 absolutely straight lines and guide his equipment from that, that  
15 requires a second piece of information in addition to the basic  
16 GPS information. It requires a base station to be transmitting  
17 some information. That tends to come from the local implement  
18 dealership, as many of them have set up to be able to supply that  
19 information at some cost to the farmer. And you can buy it from  
20 some other commercial sources. If you're in Minnesota, the  
21 Minnesota Department of Transportation has set up a network  
22 system to provide that to anybody. Doesn't cost you there,  
23 except that you have to get it on a cell phone. It comes as a  
24 subscription on a cell phone link that talks to your GPS  
25 receiver, and between the two of them they get this really fine

1 accuracy. Whatever system you're using to get that secondary  
2 piece of information, cell phone, a radio receiver from your  
3 implement dealership, or some farmers put their own receiver up  
4 on a grain leg or a tower and broadcast their own signal to their  
5 equipment. Whatever you're using for that broadcast has to be  
6 able to deal with any electrical signal or corona, whatever, from  
7 the power line. I don't have any reason to believe that that  
8 doesn't work, but that's separate from the actual GPS process. So  
9 if I was concerned about something as a producer, that's the part  
10 I would want to make sure my system for that is not vulnerable to  
11 the signals from the power line itself.

12 Other than that, every bit of research I've been able to  
13 do, I've not done tests on high voltage transmission lines, but  
14 every bit of research that I've done to see who has done work on  
15 this, they all indicate they find little or no effect on GPS  
16 accuracy from the transmission line.

17 MR. RASMUSSEN: Thank you. I have no further questions.

18 THE COURT: Cross-examination.

19 MR. PESALL: Thank you, Judge.

20 CROSS-EXAMINATION

21 Q. (BY MR. PESALL) Again, just to clarify Dr. Humburg, you're  
22 intent with the majority of your testimony here today is to  
23 demonstrate ways it's physically possible to farm under or around  
24 the transmission line as proposed; is that a fair statement?

25 A. I think that's fair.

1 There has been differing opinions whether or not to consider the  
2 larger parcel, or only the four specific effected parcels, but  
3 nobody has drawn a line as far as contiguous or not contiguous.  
4 So I think it interjects an issue where none has been raised at  
5 this point. All right then, we'll move to defendants requested  
6 number five. That talks about the best and most profitable use.  
7 Again, this is a pattern instruction. The Court has indicated an  
8 inclination to give that instruction because it is a pattern and  
9 a correct statement of the law.

10 Mr. Pesall, anything further you would say on that?

11 MR. PESALL: No, your Honor. That's our instruction. We  
12 would agree with the Court.

13 THE COURT: Mr. Rasmussen?

14 MR. RASMUSSEN: Since both appraisers agreed the greatest  
15 and best use of land being agricultural, I don't think this  
16 particular instruction is necessary in this case. I object to it  
17 for that reason.

18 THE COURT: And then we have defendants proposed six,  
19 which is an instruction regarding damages for all rights taken  
20 under the easement. The Court has indicated an inclination not  
21 to use this instruction because it's not a pattern instruction  
22 and I feel it's already been adequately addressed by the pattern  
23 instruction as far as damage.

24 Mr. Pesall, further record you would make on that?

25 MR. PESALL: Just briefly, your Honor. We believe that

1 it's an inaccurate statement that when you've got the taking of  
2 an easement, that you're talking about the rights taken and not  
3 necessarily the project to be built. The injury you should  
4 consider most injurious is the injury sited in Miller and Walsh.

5 THE COURT: Mr. Rasmussen?

6 MR. RASMUSSEN: I believe the other instructions that have  
7 been agreed upon adequately addressed the issue of damages in  
8 this instruction is unnecessary and possibly confusing to the  
9 jury.

10 THE COURT: All right. The Court is going to then not  
11 give defendants proposed six. As far as plaintiffs proposed  
12 three, I believe Mr. Pesall, that after reviewing that again you  
13 are in agreement that that is a pretty standard instruction and  
14 could be given?

15 MR. PESALL: Yes, your Honor.

16 THE COURT: That will be given. All right. And then  
17 finally as to the verdict form, the Court has indicated again an  
18 inclination to use the verdict form of the plaintiffs. The  
19 difference, as it was explained to the Court, is that the  
20 defendants proposed verdict form had an aggregate amount and then  
21 a separate amount for each parcel. And the plaintiffs simply had  
22 a separate amount for each parcel. Mr. Pesall, further record  
23 you would make on that?

24 MR. PESALL: The only difference on our proposed verdict  
25 form, your Honor, is that we would include an aggregate. We

1 value of \$336,000. Parcel 2 has a reasonable value of \$168,000.  
2 Parcel 3 is \$168,000. Parcel 4 is \$168,000. I apologize if my  
3 math is wrong but it's gotten late in the day. I think that's  
4 pretty close on accurate. Ladies and gentlemen, thank you for  
5 serving here today. I will turn you over to Mr. Rasmussen for  
6 his clients concerns about the case, and I trust you're going to  
7 do an excellent job in getting a just verdict.

8 CLOSING STATEMENT

9 MR. RASMUSSEN: To hear Mr. Pesall talk and the  
10 plaintiffs, you would expect if you drive around the country side  
11 you'd find dead bodies underneath all the power lines. This is a  
12 power line, yes. It carries a lot of voltage, no question. But  
13 they're all over the place. There are a lot of farms. People  
14 farm around them and they deal with them on a daily basis. This  
15 is not some huge deal that is threatening the lives of these  
16 landowners. They talk about all these restrictions, and Mr.  
17 Spence has a list of 21 things that are taken from, primarily  
18 from the booklet that Otter Tail and MDU published, and some from  
19 the easement itself. And they come in here and talk about how  
20 these are so terrible. You can't have buildings or trees under  
21 the power line.

22 Well, there aren't any buildings or trees under the power  
23 lines. They're not tearing anything down there. They talk about  
24 that first day, or when Mr. Ordean testified, he talked about  
25 snowmobiles but then later on they learned they don't let anyone

1 use snowmobiles on their property anyway. Talking about  
2 pacemakers, none of these guys have pacemakers. Talking about  
3 refueling, there's nothing in the easement that says you can't  
4 refuel under the power line. If you want to do it, go ahead.  
5 But the utilities suggest, you know, go 100 feet away. Is that a  
6 big deal? I drove my car over from Aberdeen this morning and I  
7 didn't think I had enough gas to get here so I filled up before I  
8 left. I didn't just drive it until I ran out. And that's what  
9 you do when you're working on the farm, you refuel. You can  
10 refuel 100 feet from the power line. That's not a big deal.

11 And that's true with virtually all of these restrictions,  
12 or this bundle of rights. And they talk about, well, they can go  
13 back in, they can tear this down, they can build a new power  
14 line. Well, you heard Mr. Koeckeritz testify, the chances of  
15 anything like that happening are a million to one. The fact that

16 the Parks tried to come in here and tell you that they're not  
17 going to farm this land anymore, they farmed around the other  
18 power poles. There's other power lines, and Dr. Humburg showed  
19 you how they went around those. They went under the line. You  
20 go out there next year they'll be farming under these power  
21 lines, and we all know that. But they come in here and tell you  
22 that they're not going to do it. Even if they don't, that  
23 doesn't change the value of the land. What we're looking at is  
24 if these guys wanted to sell, what they could sell this land for  
25 now? Or after the power line is there compared to what they

1 could have sold it for before? That's the issue in the case. And  
2 if they decide not to farm it, I guess that's fine. But that  
3 doesn't have anything to do with the damages that would be  
4 awarded in this case. And clearly Dr. Humburg showed you, and I  
5 guess they're not really disputing it, you can farm under here  
6 and there's not a big risk. He talked about GPS. He talked  
7 about electromagnetic field and all this stuff. And is it a  
8 nuisance? Yes, it's a nuisance. You've got to go around the  
9 poles. But they've got all kinds of obstacles and nuisances on  
10 their land. They've got rock piles, they've got a lot of water,  
11 they've got ditches, they've got railroad right of ways, all  
12 kinds of stuff that they have to deal with, and that's not  
13 unusual for farmers to have to deal with that. It's just one more  
14 thing that they have to work around.

15 But when you really come down to the crux of this case,  
16 and I think I mentioned this in the opening statement, is the  
17 appraisers. And I fully agree with Mr. Pesall that you've got to  
18 judge the credibility. You've got to judge the credibility of  
19 somebody coming in here being paid \$350 an hour after already  
20 being paid \$15,000, who comes in here and tells you that land  
21 values in South Dakota have not dropped recently. That's what he  
22 said on the stand. Does anybody really believe that? He comes in  
23 here and tells you that every piece of property that the Parks  
24 own is worth \$7,000 an acre even when it's, some of it is covered  
25 by water. And he did say, talked about \$7600 an acre for land

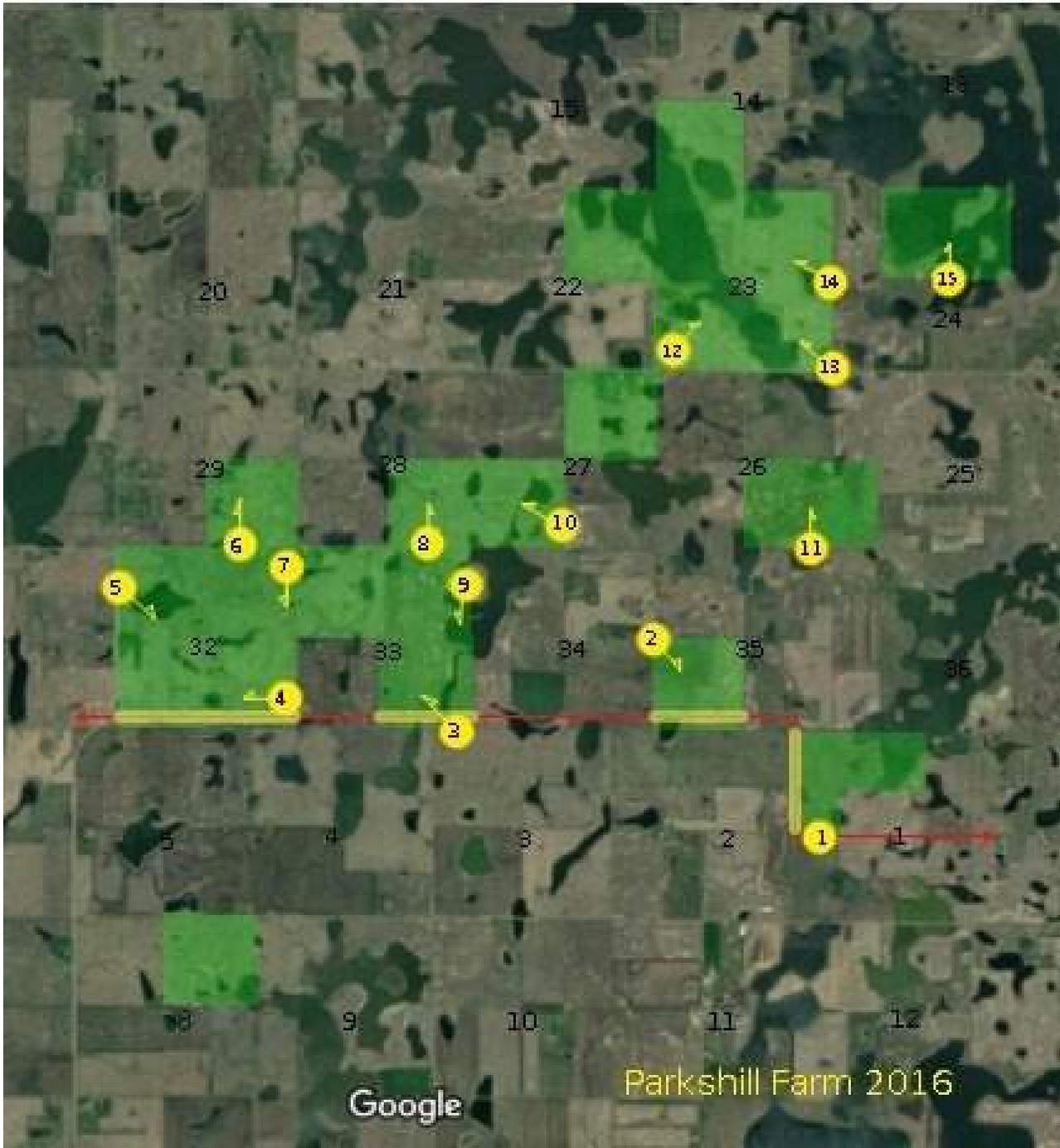


EXHIBIT  
**1**

DEFENDANTS' REQUESTED FINAL JURY INSTRUCTION No. 6

The Landowners' damages in this case include damages for all rights taken under the easement, not just those arising from the project proposed by the Plaintiffs. In considering damages for the rights taken under the easement, you must consider all damages, present and prospective, that will accrue reasonably from the taking of the easement, and in doing so must consider the most injurious use of the property reasonably possible under the easement.

SOURCE: *County of San Diego v. Bressi*, 184 Cal.App.3d 112, 123 (Cal.App. 1986)

*State v. Miller and Walsh*, 216 S.D. 88, ¶34.

**FILED**

**JAN 27 2017**

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO. \* 18CIV15-000067  
and OTTER TAIL POWER COMPANY,

Plaintiffs,

vs.

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS,

VERDICT FORM

Defendants.

\* \* \* \* \*

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, award Landowners damages as follows:

1. The sum of \$ 44,217.20 is just compensation due for the easement taken by the utilities on Parcel 1, which is legally described as follows:

The South Half (S½) of Section 32, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota.

2. The sum of \$ 20,837.70 is just compensation due for the easement taken by the Utilities on Parcel 2, which is legally described as follows:

The Southeast Quarter (SE¼) of Section 33, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota.

3. The sum of \$ 20,822.10 is just compensation due for the easement taken by the Utilities on Parcel 3, which is legally described as follows:

The Southwest Quarter (SW¼) of Section 35, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota.

4. The sum of \$ 9,109.10 is just compensation due for the easement taken by the Utilities on Parcel 4, which is legally described as follows:

Government Lots 2, 3 and 4, and the Southwest Quarter of the Northwest Quarter (SW¼NW¼) of Section 1, Township 120 North, Range 57 West of the 5th P.M., Day County, South Dakota.

Dated this 26<sup>th</sup> day of January, 2017.

  
\_\_\_\_\_  
Foreperson

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 1**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC (“Landowners”) appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the “Easement”) to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the “Electric Line”) through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The South Half (S1/2) of Section 32, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the “Premises”), also referred to as Parcel 1 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the “Easement Area”), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the South Half of Section 32, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 32; thence North 00 degrees 50 minutes 43 seconds West, along the west line of said Southwest Quarter, a distance of 171.70 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.45 feet to the west line of the Southeast Quarter of said Section 32; thence continuing North 89 degrees 16 minutes 50 seconds East, a distance of 2639.46 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west line of the Southwest Quarter of Section 32 and said east line of the Southeast Quarter of Section 32.

Said easement is shown as the hatched area on Exhibit A and contains 18.18 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.

5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.

6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.

7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.

8. Landowners shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.

9. Landowners shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.

10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.

11. Landowners retain the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowners shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities (“Improvements”), any portion of said Easement Area not occupied by the structures supporting Plaintiffs’ electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs’ ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowners, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowners, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs’ negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowners or their agents or employees.

14. Plaintiffs shall promptly pay all of Landowners’ reasonable damages to Landowners’ unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs’ construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowners' assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Forty-Four Thousand Two Hundred and Seventeen Dollars and Twenty Cents (\$44,217.20), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowners shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

Signed: 2/10/2017 10:19:55 AM

  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge



STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 2**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC (“**Landowners**”) appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the “**Easement**”) to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the “**Electric Line**”) through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The Southeast Quarter (SE1/4) of Section 33, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the “**Premises**”), also referred to as Parcel 2 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the “**Easement Area**”), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southeast Quarter of Section 33, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 33; thence North 00 degrees 50 minutes 55 seconds West, along the west line of said Southwest Quarter, a distance of 165.82 feet; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.43 feet to the west line of said Southeast Quarter and to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.44 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southeast Quarter of Section 33.

Said easement is shown as the hatched area on attached aerial exhibit A and contains 9.09 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities (“Improvements”), any portion of said Easement Area not occupied by the structures supporting Plaintiffs’ electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs’ ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs’ negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner’s reasonable damages to Landowner’s unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs’ construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Twenty Thousand Eight Hundred Thirty-Seven Dollars and Seventy Cents (\$20,837.70), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkshill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkshill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

Signed: 2/10/2017 10:19:26 AM

A handwritten signature in black ink, appearing to read "Tony L. Portra", written over a horizontal line.

Tony L. Portra  
Circuit Court Judge



STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 3**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC (“**Landowners**”) appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the “**Easement**”) to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the “**Electric Line**”) through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The Southwest Quarter (SW/14) of Section 35, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota

(hereinafter referred to as the “**Premises**”), also referred to as Parcel 3 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the “**Easement Area**”), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of Section 35, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of said Southwest Quarter of Section 35; thence North 01 degrees 02 minutes 05 seconds West, along the west line of said Southwest Quarter, a distance of 186.98 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2637.38 feet to the east line of said Southwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southwest Quarter of Section 35.

Said easement is shown as the hatched area on attached aerial exhibit A and contains 9.08 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.

5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.

6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.

7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.

8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.

9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.

10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.

11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and

underground utilities (“**Improvements**”), any portion of said Easement Area not occupied by the structures supporting Plaintiffs’ electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs’ ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs’ negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner’s reasonable damages to Landowner’s unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs’ construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Twenty Thousand Eight Hundred Twenty-Two Dollars and Ten Cents (\$20,822.10), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkhill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkhill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy

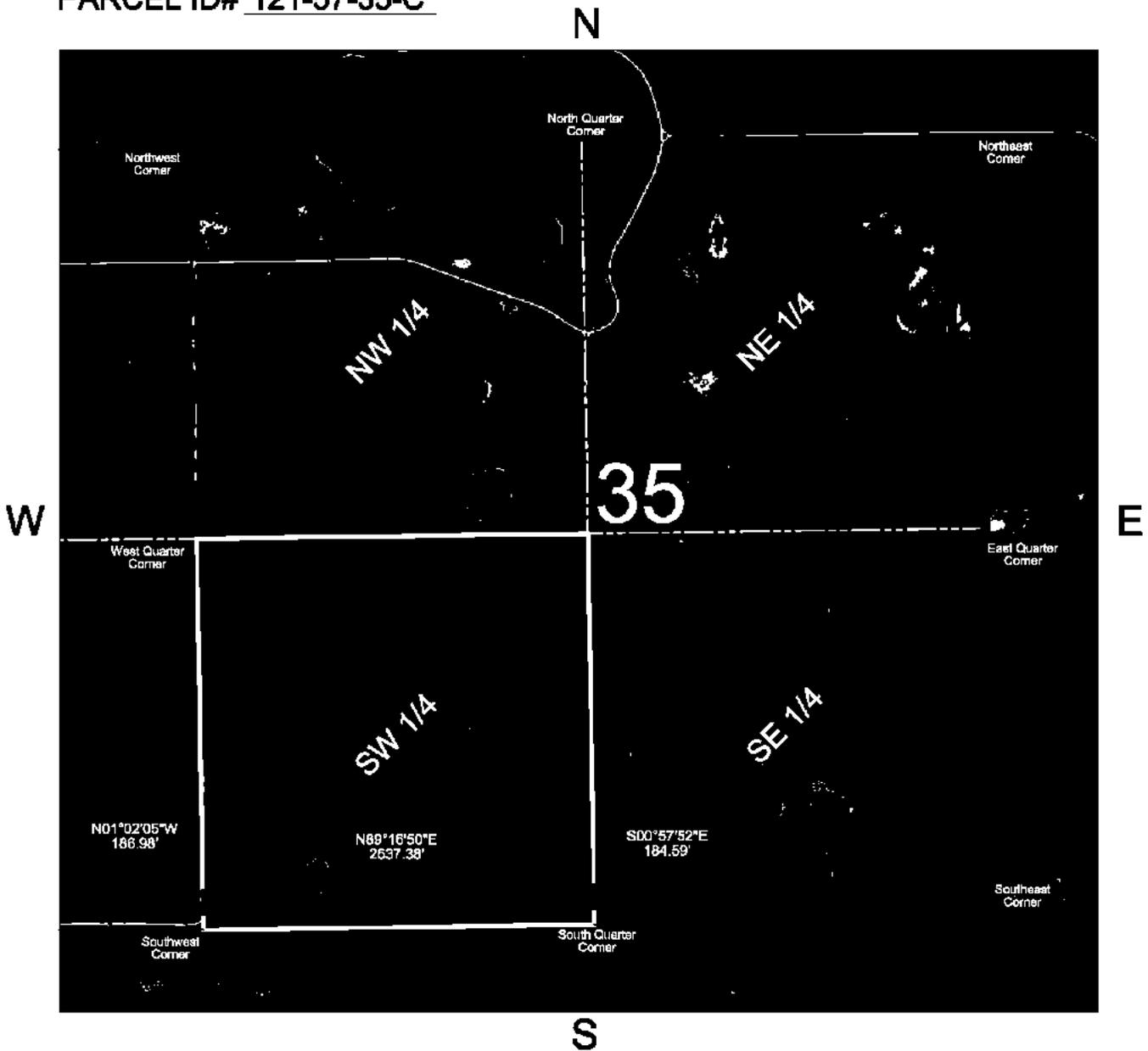


BY THE COURT:

Signed: 2/10/2017 10:18:55 AM

\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

**EASEMENT AREA  
EXHIBIT A  
PARCEL ID# 121-57-35-C**



**LEGEND**

- = PROPOSED TRANSMISSION EASEMENT AREA
- = LANDOWNER PARCEL AFFECTED BY EASEMENT AREA
- = SECTION LINE
- = QUARTER LINE
- = SIXTEENTH LINE
- = PROPOSED TRANSMISSION CENTER LINE
- = PROPOSED TRANSMISSION 150' RIGHT OF WAY LIMIT

PROPERTY DESCRIPTION: SW4 SEC: 35 TWN: 121 N RGE: 57 W

COUNTY: DAY STATE: SOUTH DAKOTA MERIDIAN: 5TH

OWNER: PARKSHILL FARMS, LLC ADDRESS: 42783 146TH ST, WEBSTER, SD 57274

TRANSMISSION FACILITY: 345KV BIG STONE SOUTH TO ELLENDALE

CROP ACRES: 5.12 EASEMENT: 2637.38' 150' 9.08  
LENGTH WIDTH TOTAL ACRES

PASTURE ACRES: 3.96

EXHIBIT DATE: 7/22/2015

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 4**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC (“Landowners”) appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the “**Easement**”) to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the “**Electric Line**”) through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

Government Lots 2, 3, 4, and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) of Section 1, Township 120 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the “**Premises**”), also referred to as Parcel 4 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the “**Easement Area**”), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of the Northwest Quarter and Government Lots 2, 3 and 4 of Section 1, Township 120 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet to the left and 75.00 feet to the right of the following described line:

Commencing at the northwest corner of said Government Lot 4 of Section 1; thence North 89 degrees 13 minutes 16 seconds East, along the north line of said Government Lot 4, a distance of 183.01 feet to the Point of Beginning of the line to be described; thence South 01 degrees 16 minutes 28 seconds East, a distance of 2995.76 feet to the south line of said Southwest Quarter of the Northwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said north line of Government Lot 4 and said south line of the Southwest Quarter of the Northwest Quarter of Section 1.

Said easement is shown as the hatched area on attached aerial exhibit A and contains 10.32 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities (“Improvements”), any portion of said Easement Area not occupied by the structures supporting Plaintiffs’ electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs’ ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs’ negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner’s reasonable damages to Landowner’s unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs’ construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Nine Thousand One Hundred Nine Dollars and Ten Cents (\$9,109.10), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkshill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkshill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

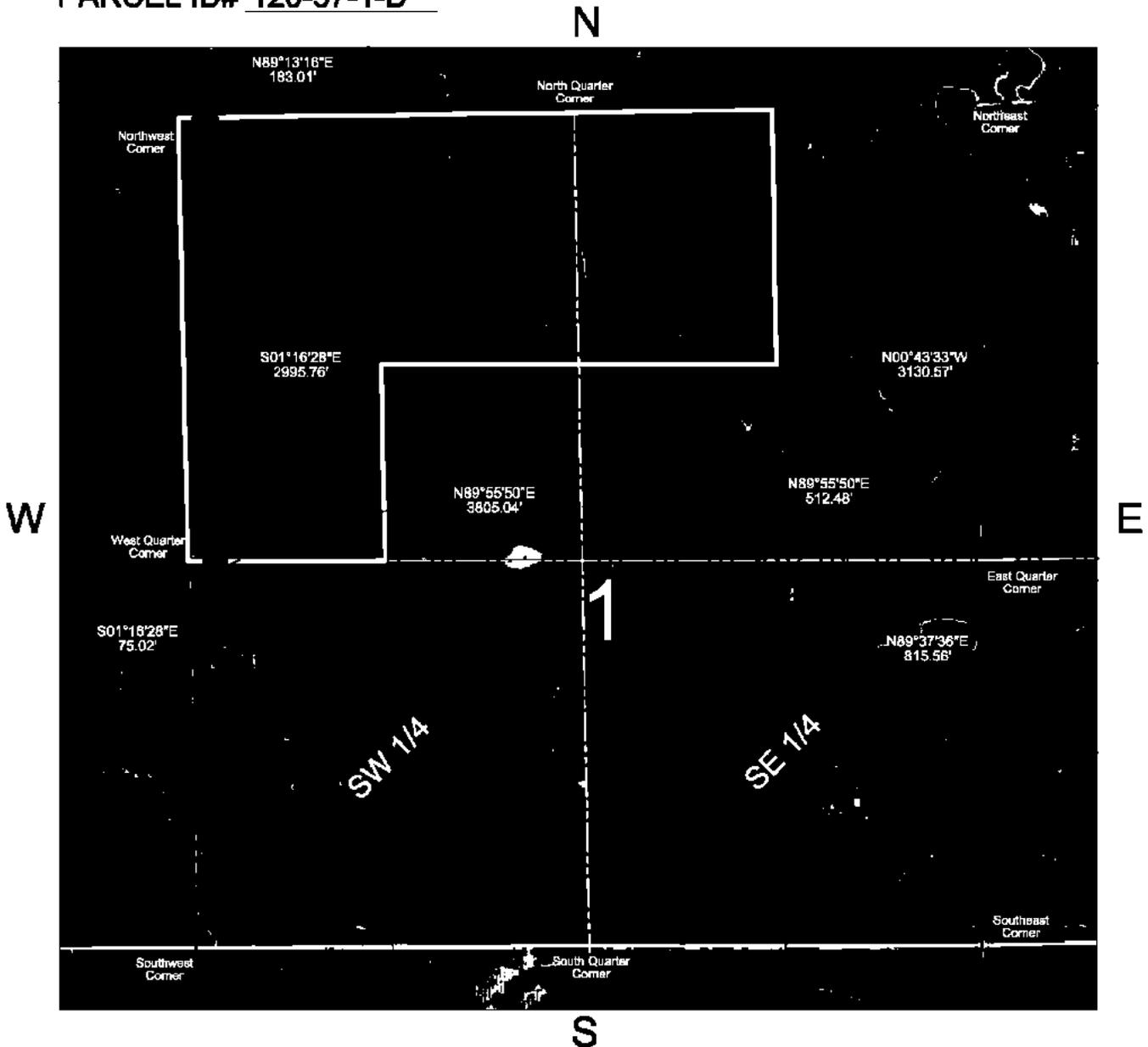
Signed: 2/10/2017 10:17:40 AM

A handwritten signature in black ink, appearing to read "Tony L. Portra".

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Tony L. Portra  
Circuit Court Judge

**EASEMENT AREA**  
**EXHIBIT A**  
 PARCEL ID# 120-57-1-D



**LEGEND**

- PROPOSED TRANSMISSION EASEMENT AREA
- LANDOWNER PARCEL AFFECTED BY EASEMENT AREA
- SECTION LINE
- QUARTER LINE
- SIXTEENTH LINE
- PROPOSED TRANSMISSION CENTER LINE
- PROPOSED TRANSMISSION 160' RIGHT-OF-WAY LIMIT

PROPERTY DESCRIPTION: GOVT LOTS 2, 3 & 4 & SW4NW4 SEC: 1 TWN: 120 N RGE: 57 W

COUNTY: DAY STATE: SOUTH DAKOTA MERIDIAN: 5TH

OWNER: PARKSHILL FARMS, LLC ADDRESS: 42783 146TH ST, WEBSTER, SD 57274

TRANSMISSION FACILITY: 345KV BIG STONE SOUTH TO ELLENDALE

CROP ACRES: 0.00 EASEMENT: 2995.76' 150' 10.32  
LENGTH WIDTH TOTAL ACRES

PASTURE ACRES: 10.32

EXHIBIT DATE: 7/7/2015

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

---

APPEAL NO. 28174

---

MONTANA-DAKOTA UTILITIES CO., AND OTTER TAIL POWER  
COMPANY,

Plaintiffs and Appellees,

v.

PARKSHILL FARMS, LLC, VERA R. PARKS, REUBEN PARKS AND  
ORDEAN PARKS,

Defendants and Appellants,

and

WEB WATER DEVELOPMENT ASSOCIATION, INC., KERMIT  
PARKS and ORION EUGENE PARKS,

Defendants.

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Appeal from the Circuit Court, Fifth Judicial Circuit  
Day County, South Dakota

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The Honorable Tony Portra, Presiding  
Circuit Court Judge

---

APPELLEES' BRIEF

---

Thomas J. Welk  
Jason R. Sutton  
Boyce Law Firm, L.L.P.  
300 South Main Avenue  
P.O. Box 5015  
Sioux Falls, SD 57117-5015

N. Bob Pesall  
Pesall Law Firm  
P.O. Box 23  
Flandreau, SD 57028  
Attorney for Appellant

Reed Rasmussen  
Siegel, Barnett & Schutz  
415 S. Main Street, 400 Capitol Building  
PO Box 490  
Aberdeen, SD 57402-0490

Attorneys for Appellees

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NOTICE OF APPEAL FILED MARCH 10, 2017

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## JURISDICTIONAL STATEMENT

Montana-Dakota Utilities Co. and Otter Tail Power Company (“collectively the Utilities”)<sup>1</sup> agree with the Defendants Parkshill Farms, LLC, Reuben Parks, Ordean Parks, and Vera Parks (collectively “the Parks”) jurisdictional statement. (Appellants’ Brief (“Parkses’ Brief”) at p.iv).

### STATEMENT OF ISSUES

- 1. Did the Circuit Court Clearly Err in Finding the Project Will Serve a Public Use for Two Separate, Alternative Basis: (1) the Project Will Be Used by the Public; and (2) the Public Has a Right to Access the Project.**

The Circuit Court found as a matter of fact that the taking will serve a public use.

S.D. Const. Article 6, § 13

*Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131

*Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913)

*Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 681 (D.C. Cir. 2000)

- II. When the Utilities Determined It was Necessary to Condemn a Perpetual Easement with the Terms and Conditions Contained in the Judgments, Did the Circuit Court Clearly Err in Finding That Parkses Failed Their Burden of Proving the Utilities’ Necessity Decision Was Fraudulent, An Abuse of Discretion, or In Bad Faith.**

The Circuit Court found as a matter of fact that the Utilities’ decision to condemn the easement sought, including all terms and conditions of that easement, was not fraudulent, an abuse of discretion, or done in bad faith.

SDCL 21-35-10.1

*Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913)

*City of Freeman v. Salis*, 2001 SD 84, 630 N.W.2d 699

*Basin Electric Power Co-op v. Payne*, 298 N.W.2d 385 (S.D. 1980)

*City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950)

---

<sup>1</sup> For clarity, the same definitions of the parties used by the Parkses are used in this brief.

**III. Did the Circuit Court’s Instructions Properly Instruct the Jury How to Determine Just Compensation for the Taking of the Easement in this Powerline Easement Case When the Circuit Court Rejected Parks’ Proposed Instruction No. 6?**

The Circuit Court rejected Parks’ proposed instruction no. 6.

S.D. Const. Art. 6 § 13

*Nebraska Electric Generation & Transmission Co-op. v. Tinant*, 241 N.W.2d 134 (S.D. 1976)

*State ex rel. Department of Transportation v. Miller*, 2016 SD 88, 889 N.W.2d 141

*State ex rel. State Highway Commission v. Hurliman*, 368 P.2d 724 (Or. 1962)

**STATEMENT OF CASE**

This is an appeal of a condemnation action from Day County Circuit Court, the Honorable Tony Portra presiding. The Utilities commenced a condemnation action against the Parks by filing a verified petition for condemnation on November 18, 2015. (CR 3-39).<sup>2</sup> The Utilities sought to condemn a perpetual easement on the Parks property for the Big Stone South to Ellendale electric transmission line project (“the Project”). (*Id.*). The Parks answered the complaint, contested the Utilities’ right-to-take, and demanded a hearing pursuant to SDCL 21-35-10.1. (CR 53-55).

On April 5, 2016, the Circuit Court held an evidentiary hearing on the right to take the easements. Following the evidentiary hearing, the Circuit Court issued a memorandum decision and findings of fact and conclusions of law ruling the Utilities could condemn the easements sought. (Pl-App. 1-12).<sup>3</sup>

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<sup>2</sup> The Certified Record is cited “CR” with citation to the appropriate page. The transcript for the right-to-take hearing occurring on April 5, 2016, is cited “RTT” with citation to the appropriate page. The transcript for the jury trial occurring on January 25 and 26, 2016, is cited “JTT” with citation to the appropriate volume and page.

<sup>3</sup> For clarity sake, the citations to Utilities’ appendix are designated “Pl-App.” The citations to Parks’ appendix is designated “App.”

Following the Circuit Court’s right-to-take ruling, the parties proceeded with the just compensation phase of the litigation. The Circuit Court held a jury trial on January 25 and 26, 2017, to determine the just compensation. (Pl-App. 26). The jury returned a verdict determining the just compensation to be paid for the taking of each of the four easements from the Parks. (CR 1147). The Circuit Court then entered four separate judgments granting the Utilities the condemned easements in exchange for the payment of just compensation. The Parks appeal both the Circuit Court’s decision that the Utilities have the right-to-take the easements and the denial of one of Parks’ proposed jury instructions.

### STATEMENT OF FACTS

Utilities are the owners of the Project. Otter Tail Power Company is a public utility providing electrical service to over 130,000 customers in South Dakota, North Dakota, and Minnesota. (RTT pp.17-17). Montana-Dakota Utilities Co. is a public utility providing electrical service to approximately 135,000 customers in South Dakota, North Dakota, Wyoming, and Montana. (RTT pp.20-21). Under South Dakota law, the Utilities must provide service to all customers in their service territory. *See* SDCL 49-34A-2.1; 49-34A-42; 49-34A-58.

The Project runs approximately 163 miles from a new substation near Ellendale, North Dakota, to a substation south of Big Stone City, South Dakota. (FOF 4).<sup>4</sup> This Court previously affirmed the issuance of the facility permit for the Project. *Gerald Pesall v. Montana-Dakota Utilities Co., et al.*, 2015 SD 81, 871 N.W.2d 649.

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<sup>4</sup> Citations to “FOF” and “COL” refer to the appropriate finding of fact or conclusion of law entered by the Circuit Court on June 6, 2016. The Circuit Court’s Findings of Fact and Conclusions of Law are found at Pl-App.1-12.

**A. Background of the Project**

The Project is a 345-kV “bulk” electric transmission line. (FOF 29). The need for the project was identified by Midcontinent Independent System Operator, Inc (“MISO”). (RTT pp.102-03, 105-06). MISO is an organization created to, among other things, regulate the planning, construction, and management of electrical transmission in MISO’s territory. (FOF 6). MISO’s territory includes much of the upper Midwest, including South Dakota. (*Id.*). MISO is subject to regulation and control by the Federal Energy Regulatory Commission (“FERC”). (FOF 7). Plaintiffs are members of MISO, and they are required to construct the Project. (FOF 8).

The Project is needed to facilitate future electric generation in South Dakota, including wind generation. (FOF 30). Construction of the Project also will increase the reliability of electric service in the region, including South Dakota. (FOF 31).

In determining the route for the Project, the Utilities engaged in an extensive route selection process. (FOF 16). Following the selection of the initial route, the Project considered requests by landowners to change the route. (FOF 17). Approximately one-half of the landowners’ route change requests were adopted. (*Id.*).

The Project executed voluntary easements with 91 percent of the landowners on the Project. (COL 91). Not all landowners executed voluntary easements, and the Utilities needed to condemn property from thirteen landowners. (RTT p.42).

The Project crosses four parcels of agricultural property owned by the Parks. (CR 3-39). The Parks refused the Utilities’ requests for a voluntary easement. (RTT p.43). As a result, the Utilities determined it was necessary to condemn easements on the Parks’ four properties. (*Id.*).

**B. Condemnation Action Against the Parks**

The Utilities commenced a condemnation action against the Parks through a verified petition for condemnation filed November 18, 2015. (CR 3-39). The Utilities sought to take a perpetual, 150-foot-wide easement over the Parks' property. (FOF 23). The Utilities sought to condemn an easement with the same terms and conditions as the easement the Utilities requested the Parks to voluntarily negotiate. (Right to Take Hearing Exs. 28-31; RTT p.58).

The Parks answered the condemnation complaint, objected to the Utilities' exercise of the power of eminent domain, and requested a hearing pursuant to SDCL 21-35-10.1. (CR 53-55). The right-to-take hearing was bifurcated from the "just compensation" phase. (CR 62-64).

**C. Right-to-Take Hearing**

The Circuit Court held an evidentiary hearing on April 5, 2016, on the right-to-take issues. At the right-to-take hearing, the Utilities presented the testimony of, among others, Project Manager Al Koeckeritz. Mr. Koeckeritz testified that the terms and conditions of the easement sought to be condemned were necessary for the construction and maintenance of the Project. (RTT p.61). Mr. Koeckeritz also testified that the Project sought to condemn a perpetual easement because the Project expected the transmission line to be used perpetually to transmit electricity to customers. (RTT p.67). Mr. Koeckeritz's testimony regarding the expected duration for the use of the Project was un rebutted at the evidentiary hearing.

The Utilities also presented expert testimony by Jason Weiers, an electrical engineer and transmission planner. Mr. Weiers testified that due to the interconnected

nature of electrical grid, the Project would be used by members of the public in South Dakota. (RTT pp.114-17, 119-20). The Project will carry electricity for use by both consumers of energy (load) and those which produce energy (generators) (RTT pp.114-17).

As a matter of physics, electricity follows the path of least resistance from generation to load. (RTT p.95). The Project will carry electricity both directions depending on load needs. (RTT pp.95-96). The transmission network works like a “grid,” and at each of Ellendale and Big Stone South substations, there are other electrical lines connecting to the substation that may transmit the electricity from the Project to customers within the state of South Dakota. (RTT pp.90-91, 115-16). Thus, the Project is akin to the interstate highway system with the substations acting like “exits” connecting the interstate to smaller highways. (RTT pp.14-15, 93).

Mr. Weiers also testified that the Project is subject to MISO’s “open access” tariff approved by FERC. (RTT pp.117-20; Right to Take Hearing Exs. 35-37). “Open access” prohibits discrimination when evaluating requests to connect to the Project. (RTT p.117). Under the requirements of “open access,” any person can directly connect to the Project provided they satisfy regulatory requirements imposed by MISO and provide the necessary equipment to interconnect. (RTT pp.119-20). A landowner could build a substation and directly connect to the Project. (RTT p.120). Similarly, electrical generators—such as wind farms or natural gas power plants—have the right to connect to the Project. (*Id.*). Separate from and in addition to MISO’s “open access” tariff, FERC Orders 888 and 889 mandate open access to the transmission system. (RTT pp.168-69).

Mr. Weiers' testimony on both the use of the Project and right to access the Project were un rebutted. Indeed, rather than challenging Mr. Weiers' testimony about access, the Parkses' expert Dr. Hansen confirmed the "open access" requirements imposed by the MISO tariff. (RTT 167-68).

Following the evidentiary hearing, the parties submitted post-hearing briefs and proposed findings of fact and conclusions of law. (RTT p.198). As relevant to this appeal, the Parkses asserted two arguments challenging the Utilities right-to-take. First, the Parkses argued that the Utilities lacked the power of eminent domain because the Project did not serve a public use. (CR 175-204). Second, the Parkses challenged the Project's ability to condemn a perpetual easement, which the Parkses characterized as an issue of "necessity" rather than "public use." (*Id.*). The duration of the easement was the only term and condition challenged. (FOF 16).

On June 6, 2016, the Circuit Court issued a memorandum decision ("Memorandum Decision") along with findings of fact and conclusions of law overruling the Parkses' challenges to the Utilities' exercise of eminent domain. (Pl-App 1-22).<sup>5</sup> The Circuit Court ruled that the Project served a public use for two separate, independent reasons: (1) because the Project will in fact be used by the public; and (2) because the public has a right to access the Project based upon MISO's open access tariff and FERC Order 888 and 889. (Memorandum Decision at pp.6-7; FOF 33, 35; COL 9-12).

Regarding the duration of the easement, the Circuit Court ruled that this is an issue of "necessity" subject to deferential review by the court under SDCL 21-35-10.1. (Memorandum Decision at pp.7-9; COL 14, 20). Under SDCL 21-35-10.1, the "finding

of necessity by the [Utilities], unless based upon fraud, bad faith, or an abuse of discretion, shall be binding on all persons.” The Circuit Court ruled that taking of a perpetual easement was not fraudulent, in bad faith, or an abuse of discretion because the Project expected to be in existence and serve customers into perpetuity. (Memorandum Decision at pp.8-9; FOF 27-28; COL 20). The Circuit Court thus ruled that the Utilities had properly exercised the power of eminent domain to take easements and affirmed the form of the judgments marked as right-to-take hearing Exhibits 28 through 31 (“the Judgments”).

**D. Just Compensation Jury Trial**

Following the Circuit Court’s ruling on the right-to-take issues, the parties proceeded to the just compensation phase. The Circuit Court held a jury trial on January 25 and 26, 2017.

At the just compensation trial, the Utilities indicated they will take a 150-foot easement on the Parks’ property. In total, the four easements taken contained 46.67 acres. (Jury Trial Exs. 100-103). The easements, including all terms and conditions, were presented to the jury. (Jury Trial Exs. 4-7). The right-of-way taken will contain steel monopoles with approximately 7-foot wide foundations. (JTT v.II, pp.10-11, 36). The minimum ground clearance for the transmission line will be 30 feet. (JTT v.II, p.33). The Parks will be able to continue farming around the structures within the easement area. (JTT v.II, p.17-18, 60-65, Jury Trial Ex. 122).

Both the Utilities and the Parks presented expert appraiser testimony. The Utilities’ appraiser Brad Johnson opined that the total just compensation of \$73,457

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<sup>5</sup> The Memorandum Decision is incorporated by reference into the Findings of Fact and

should be paid for the easements taken. (JTT v.II, pp.125-26). In forming his opinion, appraiser Johnson appraised each of the four parcels before the taking of the easement. (JTT v.II, pp.105-06, 117-18). Appraiser Johnson then appraised each of the four parcels after the taking of the easement. (JTT v.II, pp.125-26). The difference between the “before” valuation and the “after” valuation, along with the fair market value of the land occupied by the powerline poles, is the amount of just compensation. (*Id.*).

The Parksés presented testimony by an appraiser named Otto Spence. (JTT v.I, p.146). Like Mr. Johnson, Spence appraised the Parksés’ property both “before” and “after” the taking of the easement. (JTT v.I, pp.173-74, 188). The difference between the “before” and “after” appraisals is the amount of just compensation. (JTT v.I, p.188). Spence opined that that the total just compensation is \$840,000. (JTT v.I, pp.188-89). In forming his opinions, Spence identified 21 limitations arising from the Project that purportedly impacted the landowner, and in turn, decreased the value of the real property. (JTT v.I, at pp.182-86). Spence testified that the alleged impacts are itemized in jury trial Exhibit 3. (*Id.*).

Following the completion of the evidence, the parties settled the jury instructions. In the final jury instructions, the Circuit Court instructed the jury regarding the applicable law to assist the jury in determining the amount of just compensation. Pertinent to this appeal are Final Instructions No. 5 and 11 defining how the jury determines just compensation: Instruction No. 5 states:

Montana-Dakota Utilities Company and Otter Tail Power Company are taking only a part of Parkshill Farms’ property. The residue of the tract of land remains in Parkshill Farms’ ownership.

South Dakota uses the “before” and “after” formula to determine the just compensation to which the owner is entitled in a partial-taking case. Where only a portion of the property is condemned, the measure of just compensation includes both the land actually taken and the value by which the residue, or remaining parcel, has been diminished, if any, as a consequence of the partial taking.

To determine just compensation, first you must determine the “before value,” which is the fair market value of the entire property *before and unaffected by, the taking*. Then you must determine the “after value,” which is the fair market value of the residue, or remaining parcel, *after, and as affected by, the taking*. The difference between the “before value” and “after value” will be the just compensation to which the defendant property owner is entitled and will also be the amount of your verdict.

(Pl-App. 24) (emphasis added). Instruction No. 11 states:

The estate or interest being taken by the Utilities in this proceeding is a permanent easement to enter upon the land belonging to the Landowners as shown *and described in the maps and easement documents* which have been received into evidence for the construction, operation, use, maintenance, repair and replacement of an electric transmission line facility, including the line, poles, and *other related structures necessary for this purpose*.

When an easement is established across a particular tract of land by condemnation proceedings, just compensation is due to the landowner in the amount reasonably intended to compensate the owner for payment of the fair market value of the specific land actually occupied by the electrical transmission line facility, plus the reduction in value of the balance of the right-of-way taken, and the depreciation in value of the remaining tract of land. In considering the depreciation in value of the remaining tract, the elements of damage must not be remote, speculative or uncertain.

(Pl-App. 25) (emphasis added). Final Instruction No. 11 is one of the Parks'es' proposed instructions, namely Defendants' Requested Final Jury Instruction No. 2. (CR 1106).

The Parks'es did not object to Final Instructions No. 11. (JTT v.II, p.166).

The Circuit Court rejected Parks'es' proposed instruction number 6, which states:

The Landowners' damages in this case include damages for all rights taken under the easement, not just those arising from the project proposed by the Plaintiffs. In considering damages for the rights taken under the easement, you must consider all damages, present and prospective, that will accrue reasonably from the taking of the easement, and in doing so,

you must consider the most injurious use of the property reasonably possible under the easement.

(App. 224). The Court rejected the proposed instruction number 6 because it determined the other instructions adequately addressed the issues of how to determine just compensation. (JTT v.II, p.169).

The jury returned a verdict determining the amount of just compensation for taking of the easements in the Judgments. The total just compensation awarded by the jury was \$94,986.10 for the taking of the easement across all four parcels. The Parksés appeal.

## **ARGUMENT**

There are two separate phases in a condemnation proceeding. First, the trial court determines whether the condemning authority—here the Utilities—have properly exercised the power of eminent domain. Second, if the Utilities have properly exercised the power of eminent domain, then a jury determines the amount of just compensation.

In this appeal, the Parksés challenge both phases of the condemnation action. They argue that the Circuit Court erred in finding that the Utilities properly exercised the power of eminent domain for two separate reasons. At the just compensation phase, the Parksés argue that the Court erred in failing to give one of the Parksés' proposed jury instruction number 6. Both of these arguments fail.

**I. The Circuit Court, After a Full Evidentiary Hearing, Correctly Found as a Matter of Fact that the Utilities Have Properly Exercised the Power of Eminent Domain.**

**A. The Parksés' Appeal of the Circuit Court's Right-to-Take Decision is Really A Challenge to the Circuit Court's Findings of Fact, Which Are Subject to the Clearly Erroneous Standard of Review.**

The Parkses argue that the five-element test from *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.* determines whether the Utilities have the power of eminent domain. (Parkses' Brief at pp.13-14). The applicable five-part test requires the condemning authority to prove: (1) That Plaintiffs are within the class to whom the power of eminent domain has been delegated; (2) that all conditions precedent for the exercise of that power have been complied with; (3) that the purpose for which the property is to be taken is one of the purposes enumerated in the statute; (4) that the property is being taken for a public use; and (5) that the particular property sought to be taken is necessary to accomplish the public purpose intended. *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724, 726 (S.D. 1913).

The Utilities agree that this is the correct legal test. Moreover, the Circuit Court applied this test. (COL 4). As a result, there is no dispute that the Circuit Court applied the proper law when ruling the Utilities have the power of eminent domain.

Instead, the Parkses argue that the Circuit Court erred in finding that the Utilities proved the fourth and fifth elements of the *Illinois Central* test. (Parkses' Brief at p.14).<sup>6</sup> Although characterized as issues of law, the Parkses are really challenging the Court's underling factual findings on elements 4 and 5.

Factual findings refer to the court's factual determinations. *See Johnson v. Petroleum Carriers, Inc.*, 240 N.W.2d 114, 115 (S.D. 1976) ("This court has held that a fact found by the court although expressed as a conclusion of law will be treated on appeal as a finding of fact.") The court's determination is a finding of fact rather than a conclusion of law when its is based upon "natural reasoning" rather than applying "fixed

rules of law.” *Id*; see also *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292, 296 (S.D. 1982).

This Court reviews the Circuit Court’s findings of fact based upon the clearly erroneous standard of review. *Coffey v. Coffey*, 2016 SD 96, ¶ 7, 888 N.W.2d 805, 809. “The question is not whether this Court would have made the same findings the [circuit] court did, but whether on the entire evidence [this Court is] left with a definite and firm conviction that a mistake has been committed.” *Kaberna v. Brown*, 2015 S.D. 34, ¶ 14, 864 N.W.2d 497, 501 (internal quotation omitted). “Doubts about whether the evidence supports the court’s findings of fact are to be resolved in favor of the successful party’s ‘version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court’s action.’” *Estate of Card v. Card*, 2016 S.D. 4, ¶ 12, 874 N.W.2d 86, 91.

The Parkses do not directly attack the Circuit Court’s findings of fact regarding elements 4 and 5 of the *Illinois Central Railroad Co.* In fact, in their appellate brief, the Parkses do not mention the Court’s findings of fact. Instead, trying to dodge the “clearly erroneous” standard of review, the Parkses argue that the *de novo* standard applies because the issues on appeal involve statutory construction and the application of constitutional rights presenting questions of law. (Parkses’ Brief at pp.13, 25, 28). Because the Parkses are in actuality challenging the Circuit Court’s factual findings, the clearly erroneous standard applies.

**B. The Circuit Court Properly Found that Utilities Proved the Taking Is For a “Public Use.”**

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<sup>6</sup> The Parkses concede the first three elements of the *Illinois Central R. Co.* test are satisfied. (Parkses’ Brief at p.14).

The Parkses argue that the taking will not serve a public use. (Parkses’ Brief at pp.14-20). Article 6, Section 13, of the S.D. Constitution<sup>7</sup> authorizes the taking of property for a “public use.” This Court defined what constitutes a public use in *Illinois Central Railroad Co v. East Sioux Falls Quarry Co*, 144 N.W. 724 (S.D. 1913). In *Illinois Central Railroad Co.*, the railroad condemned a right-of-way for a spur serving a single, industrial client. *Id.* at 726. Even though this railroad spur was being built primarily to serve a single private customer, the Court concluded its was a “public use” because the public had the right to access and use the spur. *Id.* at 728-29. If a portion of the public either will use **or** has the right to access and use the infrastructure to be built on the property taken, then there is a public use. *See Illinois Central Railroad Co.*, 144 N.W. at 728. *See also Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146 (stating public use requires “use or right of use on the part of the public or some limited portion of it.” (internal quotation omitted)).

The Utilities can prove a “public use” one of two separate ways—**either** actual use by the public **or** a right to use by the public. (Memorandum Decision at p.6). *See also Benson*, at ¶ 42, 710 N.W.2d at 146. Although not necessary, the Circuit Court expressly found that the Utilities proved **both** alternative methods of establishing public use. (FOF 33-35). Thus, compared to *Illinois Central Railroad Co.*, the taking in this

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<sup>7</sup> Article 6, § 13 states: “Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.”

case presents a better case for public use because both methods of proving public use exist.

*1. The Project Will In Fact Be Used by The Public*

Starting with the “actual use,” the Circuit Court expressly found that the Project will be used to transmit electricity used by members of the public in South Dakota. (FOF 33, 35). This finding is supported by extensive evidence.

The Project will be connected to the electrical grid at both the Ellendale and Big Stone South substations. (RTT pp.95-96). Additional electrical lines interconnect to the Project at both substations. (RTT pp. 90-91, 115-16). Electricity transmitted on the Project can transfer to these other lines and be transmitted for use by customers in South Dakota. (RTT 95-96, 114-17, 148-49). Additionally, there are electrical generators that will generate electricity transmitted on the Project. (RTT pp.110-13). In fact, there are two generators who are seeking the ability to connect directly to the Project. (RTT pp.110-11, 142). Thus, Project will carry electricity for use by both consumers and producers of electricity, including those in South Dakota. (RTT pp.114-17).

Incredibly, the Parkses completely ignore the Circuit Court’s finding that the Project will **actually be used** by the public. Nowhere in the Parkses’ opening brief is “actual use” even addressed. Instead, the Parkses entire argument is based upon the second method of proving “public use,” namely the public’s right to access the Project. (Parkses’ Brief at pp.14-20). This Court does not even need to address the Parkses “public use” arguments because of the uncontested, alternative method of proving public use exists—actual use by the public.

*2. The Taking is a Public Use Because the Public Has a Right to Access the Project*

Separately, and in addition, the Circuit Court found the Utilities also established a public use by proving that beyond its actual use, the public also has the right to access the Project:

The public has the right to access and use the Project. Specifically, based upon the open access tariff applicable to MISO, members of the public such as potential generation providers as well as electrical transmission customers can connect with the Project if they satisfy the regulatory requirements of MISO and provide the necessary equipment to connect.

(FOF 34).

This factual finding is supported by substantial evidence. The Project is governed by the MISO tariff. (RTT 167). Both the Utilities' expert Jason Weiers and the Parks' expert Dr. Hansen testified that the MISO tariff required open access to the transmission line. (RTT 118-20; 167-69). FERC Orders 888 and 889 also require open access. (RTT pp.168-69). Open access means that any person can directly connect with the Project if they satisfy the requirements of MISO. (RTT 119). Open access also mandates a non-discriminatory ability for anyone to access to the Project. (TR 119-21). This includes both members of the public who are generating electricity and who are consuming the electricity. (RTT 119-20).

The Parks' argue that the "open access" requirements imposed by the MISO tariff and FERC Orders 888 and 889 do not create a "public use" because the tariff only applies to Utilities **and not** the easement itself. (Parks' Brief at p.18). This is a red-herring argument.

Under the terms of the easement, the Utilities are granted an easement for a limited, specific purpose—“the purpose of constructing, operating, maintaining an overhead transmission line up to and not exceeding 345kv . . . .” (Pl-App. 27 at ¶3; 34 at ¶3; 41 at ¶3; 48 at ¶3). Thus, the property interest taken is an easement for the construction of a transmission line. And, as a transmission line, the applicable MISO tariff approved by FERC requires “open access.” (RTT pp.117-20; Right to Take Hearing Exs. 35-37). Tariffs have the full force and effect of law. *See In re One-Time Special Assessment by Norther States Power Co. in Sioux Falls*, 2001 SD 63, ¶ 8, 628 N.W.2d 332, 334. Moreover, separate from MISO’s tariff, FERC Orders 888 and 889 require open access to the transmission system. (TR 167-68). *See also Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff’d sub nom. New York v. F.E.R.C.*, 535 U.S. 1, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002) (stating that non-discriminatory, open access is required by Orders 888 and 889). Thus, anyone can access the Project.

The Parkses also argue that the “open access” tariff does not grant a right to access the Project because the Plaintiffs could transfer the Project to another utility that is not subject to FERC’s regulatory jurisdiction. (Parkses’ Brief at p.19). There is no evidence to support this argument. Instead, the undisputed evidence, including the testimony of Parkses own expert witness Dr. Hansen, establishes that the Project is subject to FERC’s regulatory authority and the open access tariff. (RTT pp.167-69).

To support their “FERC jurisdiction” argument, Parkses cite *Transmission Access Policy Study*, 225 F.3d 667, 691 (D.C. Cir. 2000) and 16 U.S.C. § 824(b)(1).<sup>8</sup> These authorities actually confirm that FERC has jurisdiction over the Project. 16 U.S.C. § 824(b)(1) grants FERC jurisdiction over “the transmission of electric energy in interstate commerce.” Section 824(c) defines what constitutes transmission of electricity in interstate commerce: “For purposes of this subchapter, electric energy shall be held to transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof, but only insofar as such transmission takes place in the United States.” Thus, if any of the energy transmitted on the Project’s transmission line may be consumed outside of South Dakota, then FERC has jurisdiction over the Project irrespective of the Project’s owner. The undisputed evidence establishes that some of the power transmitted on the Project’s transmission line will be consumed outside of South Dakota. (RTT p.94).

The Parkses argue that there is no “public use” because MISO has the regulatory authority to determine whether someone can connect with the Project on a case-by-case basis. (Parkses’ Brief at pp.16-17). The South Dakota Supreme Court has recognized, however, that there can be regulatory control over access to a “public use” project. For

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<sup>8</sup> 16 U.S.C. § 824(b)(1) states: “The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”

instance, in *Illinois Cent. R. Co.*, the access to the railroad line was regulated by the railroad commission. 144 N.W. at 729-30. The Supreme Court nevertheless found the condemnation of the railroad spur was a public use. Similar to the regulation of railroads, there are regulatory limits as to who can build a direct connection with a South Dakota highway. ARSD 70:09:01:02. Just like railroads and highways, MISO regulates who can directly connect with a transmission line.<sup>9</sup> This regulation does not, however, prevent a public use from existing because FERC's open access requirement mandate non-discriminatory access by any person to the Project provided they satisfy the appropriate regulatory requirements.

Finally, the Parkses argue that there is no public use because no private right of action exists to enforce the "open access" requirements, and because technical data regarding the specific connections with the Project cannot be publicly disclosed under federal law. (Parkses' Brief at p.20). There is no requirement that there be a statutory private right of action for a "public use" to exist. Nor does the protection of confidential information regarding the transmission line to prevent a terrorist attack pursuant to 18 C.F.R. 388.113 mean there is no "public use." (HT 150-51). The applicable tariff, which has the full force of law, provides anyone can connect to the transmission line. MISO has adopted a process and regulations implementing this open access by providing a process to connect to the Project. (RTT 140-41). This open access requirement establishes a public use.

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<sup>9</sup> MISO cannot regulate whose electricity is actually transmitted on the Project. The interconnected nature of the transmission system results in electricity traveling the path of least resistance from generation to load. (RTT 95). This is matter of physics rather than regulation.

In sum, the Circuit Court properly found that the Utilities proved the taking would create a public use through two separate, independent methods: actual use of the Project by the public **and** the right to use the Project by the public. Either of these findings alone would support the Circuit Court's conclusion that the Utilities proved a public use. Because the Circuit Court's findings of fact are not clearly erroneous, the Circuit Court properly concluded the taking will create a public use.

C. The Easements Taken By Utilities Are "Necessary" to Accomplishment of the Public Purpose Intended

The Parkses also argue that the Utilities failed to prove the fifth element of the *Illinois Central R. Co.* test, which inquires whether "the particular property sought to be taken is necessary to accomplish the public purpose intended." (Parkses' Brief at pp.20, 27, 29). Once again, the Circuit Court found that the Utilities proved this element. (FOF 24-28). And, once again, the Parkses completely ignore these factual findings.

In this appeal, the Parkses assert two different challenges to the "necessity" of the easement taken by the Utilities: (1) that it is not necessary to take a "perpetual" easement; and (2) that the easement taken impermissibly gives the Utilities authority to place structures that the Utilities do not need, such as guy-wires.

1. *The Utilities Decision That It is Necessary to Condemn a Perpetual Easement Was Not Fraudulent, In Bad Faith, or an Abuse of Discretion*

The Utilities determined it was necessary to condemn a perpetual easement with all the terms and conditions reflected in the Judgments. The Parkses challenged the duration. (FOF 26). Applying the deferential standard imposed by SDCL 21-35-10.1, the Circuit Court ruled Utilities could take a perpetual easement because their decision to do so was not fraudulent, in bad faith, or an abuse of discretion. (Memorandum Decision

at pp.7-9; COL 14-20). The Parksers contend the Circuit Court erred in ruling SDCL 21-35-10.1 applies to the duration of the easement.

- a. The Utilities’ Decision to Condemn a Perpetual Easement is an Issue of “Necessity” Subject to Deferential Review Under SDCL 21-35-10.1.

As a general matter, the condemning authority—like Utilities here—has substantial discretion in determining what property must be condemned to serve the public purpose. *See Basin Elec. Power Co-op v. Payne*, 298 N.W.2d 385, 386 (S.D. 1980); *see also City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950). In fact, the Legislature codified the deference given to the condemning authority’s necessity determination: “The finding of necessity by the plaintiff, unless based upon fraud, bad faith, or an abuse of discretion, shall be binding on all persons.” SDCL 21-35-10.1. The Parkses bear the burden of proving abuse of discretion, fraud, or bad faith and of overcoming the strong presumption that Plaintiffs acted lawfully in making the determination it is necessary to proceed with condemnation. *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 10, 630 N.W.2d 699, 703.

The Parkses argue SDCL 21-35-10.1 does not apply to the Utilities’ decision to condemn a perpetual easement. (Parkses’ Brief at pp.21-24). As a threshold matter, the Parkses did not preserve this argument because they never asserted it to the Circuit Court. *Hall v. State ex rel. Dep’t of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26 (“We have repeatedly stated that we will not address for the first time on appeal issues not raised below.”). Even if preserved, however, this argument is meritless.

The *Illinois Central* test represents this Court’s articulation of the limits imposed as to when a condemning authority can exercise the power of eminent domain. Of the five requirements for condemnation imposed by *Illinois Central*, only one of the requirements is constitutionally mandated—public use. The operative South Dakota

Constitution provision is Article 6, § 13, which states: “Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to the legal procedure established by the Legislature and according to § 6 of this article.” Nowhere does the constitution mention “necessity.” Instead, the only constitutional mandates are “public use” and “just compensation.”

Rather than a constitutional issue, the other four requirements of the *Illinois Central* test all relate to whether the Legislature has authorized condemnation under the facts and circumstances. See *Illinois Central*, 144 N.W. at 726. These elements are statutory rather than constitutional issues. By arguing that “necessity” is an extension of “public use,” the Parks’ argument would prohibit the Legislature from statutorily deciding (or delegating the authority to decide) issues of necessity. The S.D. Constitution states, however, that the **Legislature** determines the procedure for condemning property. S.D. Const. Article 6, § 13. The Legislature exercised that power and adopted SDCL 21-35-10.1.

Without citing any supportive authority, the Parks contend that “necessity” for purposes of SDCL 21-35-10.1 is somehow different than the common law “necessity” requirement imposed by the fifth element of the *Illinois Central* test. (Parks’ Brief at pp.21-23). Rather than representing a different limit on the power of eminent domain, however, 21-35-10.1 merely codified the deference provided under the applicable common law to the condemning authority on issues of necessity. See generally *City of Rapid City v. Finn*, 2003 SD 97, ¶¶ 26-40, 668 N.W.2d 324, 330-31 (J. Srstka, concurring) (detailing the historical development of condemnation law throughout the United States and in South Dakota).

In 1950, this Court recognized the condemning authority determines the “necessity” of the taking:

The question of existence of the necessity for exercising the right of eminent domain, where it is first shown that the use is public, is not open to judicial investigation and determination, but that the body having power to exercise the right of eminent domain is also invested with power to determine the existence of necessity.

*City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950). Absent “fraud, bad faith, or abuse of discretion,” the condemning authority’s decision regarding necessity is conclusive. *Id.*

Tellingly, this is the exact standard imposed by SDCL 21-35-10.1. That statute was not adopted, however, until 1976. Relying on SDCL 21-35-10.1, this Court has stated that “[n]ecessity is not a judicial question: a city’s decision to condemn is binding absent fraud, bad faith, or an abuse of discretion.” *City of Freeman v. Salis*, 2001 SD 84, ¶ 10, 630 N.W.2d 699, 702. SDCL 21-35-10.1 thus did not change the deference afforded condemning authorities on issues of “necessity.” *Finn*, 2003 SD at 36, 668 N.W.2d at 331.

If the Parks are correct that “necessity” under the *Illinois Central* test is constitutionally mandated as an extension of “public use,” then the courts would seem to have plenary power to review issues of “necessity.” Indeed, the Parks here seek *de novo* review of whether it was necessary to condemn a perpetual easement. This would represent a monumental shift in condemnation law because, as this Court has recognized, issues of necessity are decided by the condemning authority rather than the courts. *Salis*, at ¶ 10, 630 N.W.2d at 702.

Finally, the Parkses argue that the statutory deference granted by SDCL 21-35-10.1 does not apply because the issue is “duration” of the easement rather than “physical dimensions” of the taking. (Parkses’ Brief at p.22). This distinction is illusory. In both instances, the condemning authority is deciding what property rights (or bundle of sticks) should be taken. There is no analytical basis for treating the decision to condemn a perpetual easement versus a 99-year easement any different than the decision to condemn 10 acres versus 5 acres differently. Both are issues of “necessity.”

In making its determination of “necessity,” the condemning authority must decide **what** property to condemn. For instance, the plaintiff needs to decide how much property to condemn. *See City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950) (affirming finding of necessity because, among other reasons, there was no allegation the plaintiff condemned more property than was needed); *Board of County Comm’rs of Creek County v. Casteel*, 522 P.2d 608, 610 (Okla. 1974); *Pfeifer v. City of Little Rock*, 57 S.W.3d 714, 720 (Ark. 2001). Similarly, the specific location of the property condemned is an issue of “necessity” subject to deferential review. *See Basin Elec. Power Co-op v. Payne*, 298 N.W.2d 385, 386 (S.D. 1980); *Lake County Parks & Recreation Bd. v. Indiana-American Water Co., Inc.*, 812 N.E.2d 1118, 1125-26 (Ind. Ct. App. 2004).

Like determinations of “how much” and “where” to condemn the property, the condemning authority has considerable deference in deciding what property interest should be taken because it is an issue of “necessity.” For instance, the condemning authority must decide whether it is “necessary” to condemn fee simple title to the

property to serve the public use, or whether a lesser encumbrance can be taken. *See City of Willmar v. Kvam*, 769 N.W.2d 775, 779 (Minn. 2009).

In *City of Willmar*, the city condemned property to build an underground sewer line. The city decided to condemn the property and obtain fee simple title to the property. The landowner argued that the city should have condemned an easement rather than fee simple title to the property. On appeal, after concluding the city had the statutory authority to condemn the property in fee simple, the Minnesota Court of Appeals analyzed the decision to condemn fee simple title versus an easement as an issue of “necessity.” *Id.* at 779. Because the decision to condemn fee simple title was an issue of “necessity,” the city’s decision was entitled to substantial deference. *Id.* *See also City of Charlotte v. Cook*, 498 S.E.2d 605, 608-09 (N.C. 1998) (describing issue of whether fee simple or an easement should be condemned as one of necessity subject to a deferential review by the court).

Like in *City of Willmar*, the Utilities in this case needed to make a decision regarding whether to condemn fee simple title or an easement for the construction and maintenance of the transmission line. Ultimately, Utilities chose to condemn less than fee simple--an easement with the terms and conditions provided for in the Judgments.

Logically, if the decision of whether to condemn fee simple title versus an easement is an issue of “necessity,” then terms and conditions of that easement are also an issue of necessity because each term and condition represents a lesser encumbrance than condemning fee simple title. This would include the duration of the easement. *See Miller v. Florida Inland Nav. Dist.*, 130 So.2d 615, 623 (Fla. Dist. Ct. App. 1961) (“in the absence of a clear showing of oppression, actual fraud, or bad faith, the trial court is not

entitled to invade the discretion of the condemning authority with respect *to the extent of the use or the time during which it may be enjoyed.*” (emphasis added)); *see also Staplin v. Canal Authority*, 208 So.2d 853, 856 (Fla. Dist. Ct. App. 1968) (“It is equally well recognized, however that an acquiring authority will not be permitted to take a *greater quantity of property, or a greater interest or estate therein*, than is necessary to serve the particular public use.” (emphasis added)). As a result, the duration of the easement is an issue of “necessity,” and the Utilities decision to condemn a perpetual easement is entitled to substantial deference pursuant to SDCL 21-25-10.1.

b. The Parkses Failed to Prove Fraud, An Abuse of Discretion, or Bad Faith by the Utilities’ Condemnation of a Perpetual Easement.

The Utilities determined it necessary to condemn a perpetual easement. The Parkses bear the heavy burden of showing this decision is fraudulent, an abuse of discretion, or in bad faith. *See Salis*, 2001 S.D. at ¶ 16, 630 N.W.2d at 704. The Circuit Court found the decision to condemn a perpetual easement was not fraudulent, an abuse of discretion, or in bad faith. (Memorandum Decision pp.7-9, FOF 35, 27-28).

Ignoring the Circuit Court’s findings of fact, the Parkses argue that the Utilities abused their discretion in condemning a perpetual easement. An abuse of discretion occurs in making the finding of necessity only when “the result [is] so palpably and grossly in violative of fact and logic that it evidences not the exercise of will but pervasivity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather a passion or bias.” *Payne*, 298 N.W.2d at 387.

The Parkses argue that the Utilities abused their discretion in taking a perpetual easement because the Court should have limited the duration of the easement to the

duration of the “public use” of the Project. (Parkses’ Brief at pp.25-26). As noted above, this argument wrongfully conflates the issues of “public use” and “necessity.” In any event, the evidence indicates the use will be perpetual, and there is sound reason for condemning a perpetual easement. Project Manager Al Koeckeritz specifically testified that the Project will be used perpetually. (RTT 60). Mr. Koeckeritz’s testimony on this issue is unrebutted. Based upon this testimony, it cannot be said that the Utilities decision to condemn a perpetual easement is an abuse of discretion. Indeed, if a condemning authority can condemn fee simple title (which never terminates) for construction of a sewer line, Utilities here properly exercised their discretion in condemning a lesser property interest—a perpetual easement. *See City of Charlotte*, 498 S.E.2d at 609.

The Parksес also argue that the Utilities abused their discretion in taking a perpetual easement because the easements in North Dakota are limited in duration to 99 years. (Parksес’ Brief at pp.28-30). The Circuit Court found that the duration of easements in North Dakota was based upon North Dakota law rather than the expected life span of the Project. (FOF 28). There is ample evidence to support this finding. (RTT pp.66-67). *See also* N.D. Stat. Ann.§ 47-05-02.1 As a result, the Circuit Court’s findings are not clearly erroneous.

2. *The Parksес Failed to Preserve their Challenges to the Other Terms and Conditions of the Easement, and Even if Properly Preserved, Their Challenges Are Meritless*

The Parksес argue that the easement taken is not “necessary” because it enables the Utilities to install “guy wires, crossarms, cables, supports, counterpoises, or other fixtures described in the easement,” that the Project will not use. (Parksес’ Brief at p.24).

The Parkses thus argue that the Utilities abused their discretion in the taking the easements. (*Id.*).

As an initial matter, the Parkses have not preserved this argument because they failed to challenge the “necessity” of any of these terms before the Circuit Court. The Parkses’ proposed findings of fact and conclusions of law do not contain this argument. Instead, as expressly found by the Circuit Court, duration was the only term of the easement challenged by the Parkses. (FOF 26). By failing to raise objections to the necessity of these terms at the Circuit Court level, the Parkses have failed to preserve this issue for appeal. *Hall*, at ¶ 12, 712 N.W.2d at 26.

Even if preserved, the Parkses’ argument would still fail. As noted above, challenges to the terms and conditions of the easement are an issue of “necessity.” The Circuit Court found that the Utilities decision to condemn an easement with the terms and conditions in the Judgments was not an abuse of discretion. (FOF 25, COL 16). This finding is supported by the testimony of Project Manager Al Koeckeritz who testified that the terms of the easement are necessary for construction of the Project. (RTT 58). Tellingly, this evidence was un rebutted at the right-to-take hearing.<sup>10</sup> As a result, the Circuit Court’s findings of fact are not clearly erroneous.

## **II. The Circuit Court Properly Instructed the Jury Regarding the Determination of Just Compensation for the Taking of the Easements**

The Parkses contend that the Circuit Court erred in refusing their Requested Jury Instruction No. 6. (Parkses’ Brief at pp.32-35). The Court reviews the “jury instructions

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<sup>10</sup> In their brief, when discussing Al Koeckeritz’s testimony that the Project will not have any guy wires on the Parkses’ property, the Parkses cite testimony from the **just compensation jury trial**, not the right-to-take hearing. (Parkses’ Brief at p.10). The Parkses never raised these objections at the right-to-take hearing.

as a whole to learn if they provided a full and correct statement of the law.” *State ex rel. Dep. of Transp. v. Miller*, 2016 S.D. 88, ¶ 32, 889 N.W.2d 141, 151. “If, as a whole, the instructions misled, conflicted, or confused, then reversible error occurred.” *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 37, 698 N.W.2d 555, 570. “The party charging that an instruction was given in error has the dual burden of showing that the instruction was erroneous and prejudicial.” *Id.* “The appellant must show the jury might, and probably would, have returned a different verdict if the proposed instruction had been given.” *Sommervold v. Grevlos*, 518 N.W.2d 733, 739 (S.D. 1994). “It is not error to refuse proposed instructions that are already covered in the court's instructions.” *Id.* at 742.

The Parks argue that the Court should have provided their proposed instruction number 6, which relates to the proper method for determining just compensation. (Parkses’ Brief at pp.31-35). Article 6, § 13 of the South Dakota Constitution requires the Utilities to pay the Parks landowners “just compensation” for taking of the Parkses’ property. The Utilities took an easement, which is a “partial taking.” *Basin Elec. Power Co-op., Inc. v. Poindexter*, 305 N.W.2d 46, 47 (S.D. 1981); *see also Miller*, at ¶ 34, 889 N.W.2d at 152. “[T]he proper measure of damages in condemnation cases involving a partial taking or damaging of property is the difference between fair market value of the unit before the taking and the fair market value of what remains after the taking.” *Rupert v. City of Rapid City*, 2013 SD 13, ¶ 20, 827 N.W.2d 55, 64 (internal quotation omitted); *Basin Elec. Power Co-op., Inc. v. Cutler*, 217 N.W.2d 798, 801 (S.D. 1974). This is the “before” and “after” test.

For powerlines, this Court has slightly refined the “before” and “after” test. *See Nebraska Elec. Generation & Transmission Co-op., Inc. v. Tinant*, 241 N.W.2d 134, 137-

38 (S.D. 1976). In a powerline condemnation case, the just compensation for an easement is calculated as “the payment of the fair market value of the land actually occupied by the poles or towers, plus the diminution in value to the balance of the right of way taken, together with the depreciation in value of the remainder of the tract.” *Id.*

Here, the Circuit Court properly instructed the jury on how to determine just compensation. The key instructions are Final Instruction No. 5 and Final Instruction No.

11. Final Instruction No. 5 states:

Montana-Dakota Utilities Company and Otter Tail Power Company are taking only a part of Parkshill Farms’ property. The residue of the tract of land remains in Parkshill Farms’ ownership.

South Dakota uses the “before” and “after” formula to determine the just compensation to which the owner is entitled in a partial-taking case. Where only a portion of the property is condemned, the measure of just compensation includes both the land actually taken and the value by which the residue, or remaining parcel, has been diminished, if any, as a consequence of the partial taking.

To determine just compensation, first you must determine the “before value,” which is the fair market value of the entire property before and unaffected by, the taking. Then you must determine the “after value,” which is the fair market value of the residue, or remaining parcel, after, and as affected by, the taking. The difference between the “before value” and “after value” will be the just compensation to which the defendant property owner is entitled and will also be the amount of your verdict.

(Pl-App. 24) (emphasis added). Instruction No. 5 thus instructed the jury to use the “before” and “after” test.

Final Instruction No. 11 instructed the jury on the *Tinant* test for just compensation in powerline cases:

The estate or interest being taken by the Utilities in this proceeding is a permanent easement to enter upon the land belonging to the Landowners as shown and described in the maps and easement documents which have been received into evidence for the construction, operation, use, maintenance, repair and replacement of an electric transmission line facility, including the line, poles, and other related structures necessary for this purpose.

When an easement is established across a particular tract of land by condemnation proceedings, just compensation is due to the landowner in the amount reasonably intended to compensate the owner for payment of the fair market value of the specific land actually occupied by the electrical transmission line facility, plus the reduction in value of the balance of the right-of-way taken, and the depreciation in value of the remaining tract of land. In considering the depreciation in value of the remaining tract, the elements of damage must not be remote, speculative or uncertain.

(Pl-App. 25). As a result, the Circuit Court’s instructions, taken as a whole, properly stated the law for just compensation, and the Parks’ challenges to the instructions fails. *See Miller*, at ¶ 32, 889 N.W.2d at 151.

The Parks argue that the Circuit Court erred in refusing Instruction No. 6, which the Parks contend was necessary to instruct the jury on the “most injurious use” rule. (Parks’ Brief at pp.32-36). The Parks conceded that “most injurious rule” has never been adopted by the Courts’ in South Dakota. (Parks’ Brief at p.33). The Parks nevertheless rely on various decisions from other jurisdictions to argue that the Circuit Court improperly instructed on just compensation. But, as noted above, the Circuit Court’s instructions properly stated the applicable **South Dakota** law for just compensation in a powerline easement case.

Furthermore, as drafted, Parks proposed instruction number 6 incorrectly states the law. Among other things, proposed instruction number 6 instructed the jury that it must award damages for “the most injurious use of the property reasonably possible under the easement.” (App. 224). By basing compensation on a “possible” use, proposed instruction number 6 invites the jury to impermissibly speculate. Just compensation cannot be based upon remote or speculative damages. *See Tinant*, 241 N.W.2d at 138 (stating that severance damages cannot be “remote, speculative or uncertain, they must be

direct and proximate, and not such as are **merely possible**” (emphasis added)); *Basin Elec. Power Co-op., Inc. v. Cutler*, 254 N.W.2d 143, 146 (S.D. 1977) (stating that when determining impact of taking on future uses of the land, the alternative use of the property “must not be remote, speculative or uncertain”).

At a minimum, even assuming for argument sake only that this Court would adopt the most injurious rule test, a proper instruction would determine damages based upon a “probable” use rather than a “possible” use. *See State ex rel. State Highway Comm’n v. Hurliman*, 368 P.2d 724, 733 (Or. 1962) (affirming a jury instruction involving the “most injury use of the land taken reasonably probable”). Because Parks’ proposed instruction number 6 does not accurately state the law, the Circuit Court properly refused it. *See Carlson v. Constr. Co.*, 2009 SD 6, ¶ 13, 761 N.W.2d 595, 599.

The Circuit Court also properly rejected Parks’ proposed instruction number 6 because the other instructions already addressed the Parks’ concerns. The Parks argue that proposed instruction number 6 was required to ensure the jury awarded just compensation for the “easement” taken rather than the Project as planned. The instructions already addressed this issue. Final Instruction No. 5 instructed the jury to determine the “before” value by determining the fair market value of the property as unaffected **by the taking**, and to determine the “after” value by determining the fair market value of the property as affected **by the taking**. Thus, the jury was properly instructed that the impact of the taking, not the Project, determines just compensation. *See Miller*, at ¶¶ 20-21, 889 N.W.2d at 148-49.

This Court’s recent decision in *Department of Transportation v. Miller*, 2016 SD 88, 889 N.W.2d 141, confirms the appropriateness of Final Instruction No. 5. In *Miller*,

the Circuit Court instructed on the “before” and “after” test. *Miller*, at ¶ 21, 889 N.W.2d at 148-49. The Landowners argued just compensation should be determined based upon the fair market value of the land unaffected by the **Project** in the “before,” and the fair market value of the land as affected by the **Project** in the “after” valuation. *Id.* at ¶¶ 20-21, 889 N.W.2d at 148-49. In the pattern jury instruction, it is the impact of the “taking” rather than the “project” which determines the amount of just compensation. *Id.* at ¶ 20, 889 N.W.2d at 148. *See also* S.D. Civ. Pattern Jury Instr. No. 50-90-20. In the *Miller* case the landowners asked for, and the Circuit Court agreed, to change the word “taking” in the pattern instruction to “Project.”

On appeal, this Court reversed the Circuit Court’s decision to deviate from the pattern jury instruction:

the use of the term *project* instead of *taking* . . . is an incorrect statement of the law. The former encompasses a wider range of conduct than the latter.

*Miller*, at ¶ 34, 889 N.W.2d at 152. The *Miller* Court stated that the “measure of damages in condemnation cases involving a partial taking is the difference between the market value of the unit before the *taking* and the fair market value of what remains after the *taking*.” *Id.* (emphasis in original and quotation omitted). Final Instruction No. 5 properly follows *Miller* and instructed the jury to determine just compensation based upon the impact of the taking.

Recognizing Final Instruction No. 5 properly states that the “law,” the Parkses argue that Final Instruction No. 11 creates confusion because it references the “land actually occupied by the electrical transmission facility.” The Parkses ignore, however, that they proposed the instruction that became Final Instruction No. 11. Nor did the

Parkses object to this instruction. (JTT v.II, p.166). The Parkses thus waived any argument that Final Instruction No. 11 created confusion. See *Huether v. Mihm Transp. Co.*, 2014 SD 93, ¶¶ 22, 857 N.W.2d 854, 862 (“The complaining party must have properly objected to the instruction in order to preserve the issue on appeal, or the improper instruction becomes the law of the case.” (internal quotation omitted)).

Even if the Parkses’ objection was preserved, Final Instruction No. 11 does not create confusion. The instruction says that the interest taken by the Utilities is described in, among other things, the “easement documents,” which again reminded the jury to award just compensation based upon what was taken. The reference to the “land actually occupied by the transmission facility” refers to the land occupied by the power poles. Under the *Tinant* test, the Utilities must pay the entire value of this land because it is akin to a complete, rather than partial, taking of that property. At the same time, in Final Instruction No. 11, the Circuit Court instructed the jury that it could award two other categories of potential damages: (1) for reduction in value of the remaining right-of-way; and (2) for depreciation of the value of the remaining tract. The Parkses’ arguments regarding the “most injurious rule” are addressed in these other two categories of damages, and Final Instruction No. 11 is not confusing. The Court thus properly refused Parkses’ proposed instruction no. 6.

### **CONCLUSION**

Based on the foregoing, Plaintiffs’ respectfully request that the Court affirm the Judgments in their entirety.

Dated this 26<sup>th</sup> day of June, 2017.

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Thomas J. Welk  
Jason R. Sutton  
BOYCE LAW FIRM, L.L.P.  
300 S. Main Avenue  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
(605) 336-2424

Reed Rasmussen  
Siegel, Barnett & Schutz  
415 S. Main Street, 400 Capitol Building  
PO Box 490  
Aberdeen, SD 57402-0490

Attorneys for Appellees

**CERTIFICATE OF COMPLIANCE**

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 9,988 words as counted by Microsoft Word.

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Jason R. Sutton

**CERTIFICATE OF SERVICE**

I, Jason R. Sutton, hereby certify that I am a member of the law firm of Boyce Law Firm, L.L.P., and that on the 26<sup>th</sup> day of June 2017, Appellees' Brief and this Certificate of Service were electronically served upon the following individuals:

Mr. N. Bob Pesall  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274  
bob@pesall.com

and two true and correct copies of the same were further served upon the following individuals by first-class mail on the 26<sup>th</sup> day of June 2017:

Jeff Schiley  
14944 428A Avenue  
Bristol, SD 57219

WEB Water Development Association,  
Inc.  
38456 W. US Hwy. 12  
P.O. Box 51  
Aberdeen, SD 57402

Kermit Parks  
42783 146<sup>th</sup> Street  
Webster, SD 57274

Estate of Orion Parks  
Suree Parks, Personal Representative  
42765 147<sup>th</sup> Street  
Bristol, SD 57219

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Jason R. Sutton

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STATE OF SOUTH DAKOTA

COUNTY OF DAY

**FILED**

IN CIRCUIT COURT

JUN - 7 2018

FIFTH JUDICIAL CIRCUIT

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

MONTANA-DAKOTA UTILITIES CO. AND  
OTTER TAIL POWER COMPANY,

Plaintiffs,

vs.

LARRY A. MAGES, ET AL.,  
PARKSHILL FARMS, LLC, ET AL.,  
GERALD W. PESALL, ET AL.,

Defendants

18 CIV 15-50

18 CIV 15-67

CIV. 15-77

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Montana-Dakota Utilities Co. and Otter Tail Power Company (collectively, "Plaintiffs"), have filed Verified Petitions for Condemnation in the above-captioned matters. Defendants Larry and Margaret Mages, Gerald and Geraldine Pesall, and Parkshill Farms, LLC (collectively "Landowner Defendants") have all objected to Plaintiffs' right to exercise the power of eminent domain and requested a hearing pursuant to SDCL 21-35-10.1. Based upon the agreement of the parties, the hearing pursuant to SDCL 21-35-10.1 has been consolidated in each of these actions, which consolidation was ordered in the Consolidation and Scheduling Order dated January 19, 2016, entered in each of the above-captioned matters. Consistent with the Consolidation and Scheduling Order, the hearing pursuant to SDCL 21-35-10.1 came before the Circuit Court, Honorable Tony Portra presiding, for hearing on April 5, 2016. Plaintiffs appeared through their attorneys, Thomas J. Welk and Jason R. Sutton, along with corporate representatives Al Koeckeritz and Jason Weiers. The Landowner Defendants appeared personally and through their attorney N. Bob Pesall. Based upon the evidence presented at the hearing, the Court's review of

the file and record as a whole, and the oral and written arguments of counsel, the Court enters the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Plaintiffs are both public utilities who are authorized to transact business in South Dakota.
2. As public utilities, both Plaintiffs provide electric service to customers in, among other places, South Dakota.
3. Plaintiffs are the owners who are seeking to build a high voltage transmission line known as the Big Stone South to Ellendale Project ("the Project").
4. The Project is approximately 163 miles of 345kV transmission line that will run from a new substation near Ellendale, ND to a substation south of Big Stone City, SD.
5. Transmission planning completed by the Midcontinent Independent System Operator, Inc. ("MISO") identified the Project as one that needed to be built. The Project is one of a portfolio of 17 transmission projects approved by the MISO Board of Directors in December, 2011.
6. MISO is an organization created to, among other things, regulate the planning, construction, and management of transmission in MISO's territory, which includes much of the upper Midwest including South Dakota.
7. MISO is subject to the regulation and control by the Federal Energy Regulatory Commission, and the terms and conditions of the MISO tariff provide anyone can access any MISO transmission project.
8. Plaintiffs are transmission owners in MISO, and Plaintiffs are obligated to build the Project.

9. Access to and use of the the Project is controlled by and pursuant to the authority of MISO.

10. In order to construct the Project, Plaintiffs were required to file an Application for a facility permit with the Public Utilities Commission of the State of South Dakota ("PUC").

11. Defendant Gerald Pesall intervened in the PUC facility permit proceeding and opposed the issuance of the facility permit.

12. Following an evidentiary hearing, the PUC granted the requested facility permit to Plaintiffs in a Final Decision and Order: Notice of Entry dated August 22, 2014.

13. Defendant Gerald Pesall appealed the PUC's decision granting the facility permit to the South Dakota Circuit Court in the matter captioned *Gerald Pesall v. Montana-Dakota Utilities Co.*, Civ. 14-53, South Dakota Circuit Court for the Fifth Judicial Circuit, Day County, SD ("Circuit Court Appeal"). The Circuit Court, Honorable Scott P. Myren presiding, issued a judgment filed December 24, 2014, affirming the decision by the PUC granting the facility permit.

14. Gerald Pesall appealed to the South Dakota Supreme Court, who entered an opinion captioned *Gerald Pesall v. Montana-Dakota Utilities Co., et al.*, 2015 S.D. 81 ("Supreme Court Decision"), affirming the issuance of the facility permit.

15. The Project has acquired almost all of the permits it needs to proceed with the construction of the Project along the entirety of the route. The permits that have not yet been obtained are expected to be received.

16. Prior to and as part of the Application for the facility permit, the Project engaged in an extensive route selection process. The route selection process took almost a year and it considered the interests of various stakeholders, such as landowners, government interests, as

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well as the Plaintiffs. The route selection process took into account a variety of significant issues, including cost and length of the transmission line, cultural impacts, environmental impacts, minimizing impacts to human settlements, and consideration of landowner comments. Based upon these criteria, after considering the comments of the various stakeholders, the route for the Project was selected. The selection of the route for the Project was done in good faith.

17. Following the selection of the initial route, the Project also considered requests by various landowners for route changes and adjustments. Approximately one-half of the route change requests were granted while others were denied. The Project engaged in a reasonable review of the requests for route changes. The consideration and granting of some of these requests is further evidence of good faith in the selection of the specific route for the Project.

18. The route of the Project crosses real property owned by Landowner Defendants.

19. Plaintiffs engaged in good faith in selecting the route for the Project, including the placement of the Project route on Landowner Defendants' real property.

20. Plaintiffs attempted to negotiate voluntary easement acquisitions with each of the Landowner Defendants, who have all each refused to grant Plaintiffs an easement for the Project.

21. Plaintiffs have negotiated voluntary easements across approximately 91% of the parcels of property needed to build the entire Project.

22. The terms and conditions of the easements are necessary for the construction, maintenance, and long-term operations of the Project, and Plaintiffs have engaged in good faith in requesting those terms and conditions in the easement document. There is no credible evidence indicating that Plaintiffs have engaged in any fraud, bad faith or abuse discretion initiating these condemnation actions.

23. The Plaintiffs are condemning a perpetual, 150-foot easement for the construction, maintenance, and long-term operation of the Project. The Plaintiffs reasonably and in good faith determined the amount of land necessary for the construction, operations, and maintenance of the Project.

24. Based upon the need to build the Project, and based upon Landowner Defendants' refusal to voluntarily grant an easement, each of the Plaintiffs has made determinations that it is necessary to proceed with condemnation in this matter.

25. The Plaintiffs' finding that it is necessary to proceed with condemnation and to seek to condemn an easement with the same terms and conditions of the easement document rejected by the Landowner Defendants is not fraudulent, in bad faith, or an abuse of discretion.

26. Other than the duration of the easement, the Landowner Defendants have not challenged any of the other terms and conditions of the proposed easement.

27. Landowner Defendants' objection to the duration of the easement does not warrant modifying the terms and conditions of the proposed condemned easement. Plaintiffs seek a perpetual easement, and the existence of a perpetual easement is necessary in order to provide the needed electrical benefits of the Project to the region.

28. In North Dakota, the easements for the Project are limited to 99 years based upon North Dakota law rather than the anticipated duration of the use of the Project by the public. The evidence indicates that the Project is expected to last longer than 99 years, and as a result, the Plaintiffs did not engage in fraud, bad faith or abuse of discretion conduct in seeking to condemn an easement with a perpetual duration.

29. The Project, which is a bulk transmission project, will be used by members of the public, including utility customers in South Dakota.

30. Construction of the Project is needed to facilitate future generation in South Dakota, including renewable energy such as wind.

31. Construction of the Project will also increase the reliability of the electrical service in South Dakota, including reliability for South Dakota residents by unloading the burden on the current electrical system.

32. Construction of the Project will also create an economic benefit of reduced transmission congestion and increased available generation, increased property taxes, increased construction jobs, and ancillary economic benefit of the construction such as monies spent locally on restaurants, hotel rooms, fuel, and other supplies.

33. Due to the network and interconnected nature of the electrical transmission grid, electricity transmitted on the Project will may be used to provide power to electrical customers located in South Dakota.

34. The public has the right to access and use the Project. Specifically, based upon the open access tariff applicable to MISO, members of the public such as potential generation providers as well as electrical transmission customers can connect with the Project if they satisfy the regulatory requirements of MISO and provide the necessary equipment to connect.

35. Because members of the public will use the Project, and because the members of the public have a right to connect to the Project subject to regulatory requirements by MISO, the Court finds that the Project will serve a public use.

36. If any of the foregoing findings of fact are better considered questions of law, they shall be deemed as such.

#### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction over the matter and the parties.

2. Plaintiffs have commenced this condemnation action pursuant to SDCL 21-35-1 by serving a verified petition for condemnation.

3. Each of the Landowner Defendants has requested a hearing on Plaintiffs' right to take pursuant to SDCL 21-35-10.1 within 30 days of service of the verified petition for condemnation.

4. In exercising the power of eminent domain, Plaintiffs bear the burden of proving by a preponderance of the evidence each of the following: (1) That Plaintiffs are within the class to whom the power of eminent domain has been delegated; (2) That all conditions precedent for the exercise of that power have been complied with; (3) That the purpose for which the property is to be taken as one of the purposes enumerated in the statute; (4) That the property is being taken for a public use; and (5) That the particular property sought to be taken is necessary to accomplishment of the public purpose intended. *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724, 726 (S.D. 1913).

5. The Plaintiffs have proven each of these requirements by a preponderance of the evidence.

6. Regarding the first element, as a public utility authorized to transact business in South Dakota, both Plaintiffs have the power of eminent domain pursuant to SDCL 49-33-10, 49-34-4 and 49-34-8.

7. Regarding the second element, all conditions precedent has been satisfied for the exercise of eminent domain. Pursuant to SDCL 49-34-4, the procedure for condemnation shall be as provided in SDCL Chapter 21-35. The Court concludes that the Plaintiffs have satisfied the procedures required by Chapter 21-35.

8. Regarding the third element, the right-of-ways sought to be condemned in this case are to be used for the purpose for which the property can be taken under the applicable statutes. SDCL 49-33-10, 49-34-4 and 49-34-8 authorize the utilities to take a right-of-way for purposes of constructing a power line. Plaintiffs are taking the property in this case to construct a power line which is within the enumerated purposes provided by the statutes.

9. Regarding the fourth element, Plaintiffs must prove that the property is being taken for a public use. South Dakota Constitution Article 6, Section 13 provides, in relevant part, that, “[p]rivate property shall not be taken for public use, or damage, without just compensation, which will be determined according to the legal procedure established by the Legislature and according to Section 6 of this article.” According to the South Dakota Supreme Court, public use requires “use or right of use on the part of the public or some limited portion of it.” *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146 (quoting *Illinois Central Railroad Co.*, 144 N.W. at 728). The existence of a public benefit of the construction of the infrastructure, without a public use, does not give a right to condemn the property. *See Id.*

10. The South Dakota Supreme Court in *Illinois Central Railroad Co. v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913) articulated the test for public use. According to the Court, a public use exists if members of the public will actually use the infrastructure, or if members of the public have the same right to access the infrastructure as the person requesting the construction of the infrastructure. *Id.* at 728-29. It does not matter that the infrastructure will in fact be used by few, if any, member of the public. *Id.* Instead, as long as the members of the public have the right to access the infrastructure subject to the general laws and regulation of the government, then the Project will serve a public use. *See Id.*

11. The Court concludes that the Project in this case will serve a public use. Plaintiffs are proposing to construct a transmission line that will in fact be used by members of the public. The transmission line will transmit electricity both generated by and used by members of the public, including members of the public in South Dakota.

12. In addition, the Plaintiffs have proven that the members of the public have a right to access the Project. The Project is subject to the MISO tariff. This MISO tariff has the full force and effect of law. *In re One-Time Special Assessment by Norther States Power Co. in Sioux Falls*, 2001 SD 63, ¶ 8, 628 N.W.2d 332, 334. The terms of the MISO tariff provide that it is an open access project which can be accessed by any person subject to the general regulatory requirements imposed by MISO. This right to access the Project establishes a public use.

13. The last element required to be proven by Plaintiffs is that the particular property sought to be taken is necessary to the accomplishment of the public purpose intended. This is an issue of necessity.

14. Plaintiffs here have determined it is necessary to proceed with condemnation of the right-of-ways for construction of the Project. The Plaintiffs' determination of necessity is subject to substantial deference. Specifically, SDCL 21-35-10.1 states that a "finding of necessity by the plaintiff, unless based upon fraud, bad faith, or an abuse of discretion, shall be binding on all persons." As a result, Plaintiffs have broad discretion in determining what property is necessary to be taken for the construction of the transmission line. *See Basin Electric Power Co-op v. Payne*, 298 N.W. 2d 385, 386 (S.D. 1980).

15. The Landowner Defendants bear the burden of proving abuse of discretion, fraud, or bad faith needed to overcome strong presumption that Plaintiffs acted lawfully in making the determination of necessity. *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 10, 630 N.W.2d 699, 703.

16. The Court concludes that Plaintiffs' decision that it is necessary take the easement requested by Plaintiffs, including all the terms and conditions contained in the proposed judgments offered at Exhibits 28 to 33, are necessary. Plaintiffs' determination of necessity is not based upon fraud, bad faith or abuse of discretion.

17. Regarding fraud, there is no credible evidence indicating that a fraud occurred in the determination of necessity by the Plaintiffs.

18. Regarding alleged bad faith, the South Dakota Supreme Court has stated, "[a] hallmark of bad faith and condemnation proceedings is the use of the power of eminent domain for an improper purpose." *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 16, 630 N.W.2d 699, 704. Additionally, there is an abuse of discretion in making the finding of necessity only when "the result [is] so palpably and grossly in violative of fact and logic that it evidence is not the exercise of will but pervasivity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather a passion or bias." *Payne*, 298 N.W.2d at 387.

19. The Landowner Defendants have failed to bear their burden of proving Plaintiffs have abused their discretion or engaged in bad faith. The Project engaged in reasonable siting efforts, worked to voluntarily acquire the easements in this case, and ultimately concluded that they needed to proceed with condemnation in order to construct the Project. This determination was not fraudulent, an abuse of discretion or in bad faith.

20. Landowner Defendants have objected to the duration of the term of the easement. Landowner Defendants indicates that it is not necessary to condemn an easement longer in duration than 99 years. The Court finds that the perpetual duration of the easement is not fraudulent, in bad faith or an abuse of discretion. The evidence indicates that the existence of 99 year easements in North Dakota was based upon North Dakota law rather than the anticipated

duration of the Project. The evidence further indicates that the perpetual duration of the Project is reasonable because the Plaintiffs expect that the Project will remain in commission beyond 99 years.

21. Landowner Defendants claim that the Plaintiffs' negotiation indicates bad faith in proceeding with condemnation. This argument is not supported by the evidence. The Project has obtained approximately 91 percent of the easements needed to construct the whole project through voluntary negotiation. This success rate establishes the Project's good faith efforts to negotiate with landowners.

22. Regarding the specific Landowner Defendants here, the evidence does not establish bad faith by the Plaintiffs. The Landowner Defendants never stated what changes they wanted regarding the terms of the easement. Instead, they were against the Project generally. The Project only proceeded with condemnation after the Landowner Defendants refused to negotiate with the Landowner Defendants. Proceeding with condemnation under these circumstances is not bad faith. *See City of Freeman*, at ¶ 15, 630 N.W.1d at 703-04 (recognizing that unlike some states, South Dakota law does not require an attempt to negotiate a voluntary agreement before proceeding with condemnation, and thus, it was not bad faith to terminate negotiations and proceed with condemnation).

23. The Court concludes that the Plaintiffs have the right to take and condemn a right-of-way for construction of the Project that contains all of the terms and conditions in the judgment provided as Exhibits 23 to 33.

24. All the terms and conditions of the proposed easement in the judgment provided as Exhibits 23 to 33 are hereby approved for taking by Plaintiffs.

25. If any of these foregoing conclusions of law are better deemed findings of fact, they shall be deemed as such.

26. The Court's Memorandum Decision On Plaintiff's Right To Take is incorporated herein by reference.

Dated this 6<sup>th</sup> day of June, 2016.

BY THE COURT:



A handwritten signature in black ink, appearing to read "Tony L. Porta".

Tony L. Porta  
Circuit Court Judge

ATTEST:  
Claudette Opitz, Clerk of Courts

By: Leah L. Alberg Deputy Clerk

**FILED**

**JUN - 7 2015**

**CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS**

**IN CIRCUIT COURT**

**STATE OF SOUTH DAKOTA**

**COUNTY OF DAY**

**FIFTH JUDICIAL CIRCUIT**

**MONTANA-DAKOTA UTILITIES CO. AND  
OTTER TAIL POWER COMPANY,**

**Plaintiff,**

**v.**

**LARRY A. MAGES; MARGARET MAGES;  
ESTATE OF LOUIS PESALL; AGSTAR  
FINANCIAL SERVICES, FCLA; ATWOOD  
H. HELSA; MAURINE H. HELSA,**

**and,**

**PARKSHILL FARMS, LLC; WEB WATER  
DEVELOPMENT ASSOCIATION, INC.;  
KERMIT PARKS; REUBEN PARKS; VERA  
PARKS; ESTATE OF ORION B. PARKS;  
ORDEAN PARKS; JEFF SCHILEY,**

**and,**

**GERALD W. PESALL; GERALDINE M.  
PESALL; DACOTAH BANK, F/K/A  
SECURITY BANK AND TRUST CO.;  
DAVID M. GOLLNICK; LOUIS PESALL,**

**Defendants.**

**MEMORANDUM DECISION ON  
PLAINTIFFS' RIGHT TO TAKE**

**CIV. 15-50**

**CIV. 15-67**

**CIV. 15-77**

Montana-Dakota Utilities Company and Otter Tail Power Company (collectively "Plaintiffs") initiated condemnation proceeding against Larry A. Mages, Gerald W. Pesall, and Parkshill Farms, LLC (collectively "Defendants") in the above entitled matters. Plaintiffs seek to condemn certain portions of land owned by Defendants's for a perpetual easement as part of the Big Stone South to Ellendale Project ("BSSE"). A right to take hearing, pursuant to SDCL 21-

35-10.1, was held on April 5, 2016.<sup>1</sup> Both sides presented evidence supporting their respective positions. At the end of the hearing, the Court reserved ruling, allowing counsel to file post-hearing briefs and findings of fact and conclusions of law. This Memorandum Decision constitutes the Court's ruling on Plaintiffs' right to take.

#### **STATEMENT OF FACTS**

Plaintiffs are public utilities companies authorized to conduct business in South Dakota. HT at 17-23. As such, Plaintiffs provide electricity to customers in South Dakota and the surrounding areas. *Id.* at 8, 21. Together Plaintiffs seek to build BSSE—a high voltage transmission line from a substation near Ellendale, North Dakota, to a substation south of Big Stone City, South Dakota. *Id.* at 13. BSSE is approximately one-hundred-sixty-three miles in length, with ten miles in North Dakota and the remaining one-hundred-fifty-three miles in South Dakota. *Id.* at 13, 77. This project was conceived by Midcontinent Independent System Operator Inc. ("MISO"), a nonprofit organization recognized by the Federal Energy Regulatory Commission ("FERC") as a regional transmission organization. *Id.* at 23, 100.

MISO's function is to regulate the planning, construction, and management of transmission systems in its geographic market, which covers most of the Midwestern United States, including South Dakota. *Id.* at 100-01. MISO continually evaluates the needs of its transmission systems, focusing on present and future needs. *Id.* at 101. Transmission planning studies are then done to identify the need for future projects. *Id.* BSSE is one of seventeen such projects identified by MISO that need to be built. *Id.* at 104. After approval by the MISO board of directors, Plaintiffs, as transmission owners in MISO, were obligated to construct BSSE. *Id.* at 102, 104.

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<sup>1</sup> References to the hearing transcript will be noted as "HT," followed by the appropriate page number. Exhibits will be noted "Ex." with its designated number.

Plaintiffs began the construction process in the fall of 2012 by selecting a route. *Id.* at 28-30. BSSE's impact on landowners, governmental interests, and tribal interests were considered as a part of this process. *Id.* In particular, Plaintiffs engaged landowners in a variety of ways, including holding multiple open house meetings, sending out letters to potentially affected landowners, and setting up a website. *Id.* at 37-39. Additionally, numerous issues were studied. *Id.* at 28-30. For example, Plaintiffs investigated the cost and length of BSSE, cultural impacts, environmental impacts, avoidance of population centers, and landowner concerns. *Id.* BSSE's initial route was finally selected after fifteen months of studying all these interests and factors.<sup>2</sup> *Id.*

After selecting an initial route, Plaintiffs received and considered approximately sixty requests for route changes. *Id.* at 61-65. The project team was tasked with analyzing the proposed route changes.<sup>3</sup> In its analysis, the team initially determined whether there was an impact on the environment, engineering, and other landowners, as well as any attendant cultural impact. *Id.* at 62-63. The team then determined the proposed route's efficacy, considering a number of factors: (1) viability; (2) significance of the deviation; (3) agreeability of other landowners; (4) cost savings; (5) cultural impact; (6) engineering impact; and (7) environmental impact. *Id.*

Plaintiffs next engaged in negotiations for voluntary easements along the proposed route with landowners, including Defendants. *Id.* at 39, 170, 183, 190. Although Plaintiffs were successful in obtaining voluntary easements on ninety-one percent of the parcels sought for

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<sup>2</sup> In August 2013, Plaintiffs filed an application for a facility permit with the South Dakota Public Utilities Commission ("PUC"). HT at 30. Gerald Pesall opposed Plaintiffs's permit application. *Id.* at 32. An evidentiary hearing was held, and the PUC granted the facility permit on August 22, 2014. *Id.*; Ex. 2. Pesall appealed the PUC's decision to the Day County Circuit Court. HT at 33. The Honorable Scott P. Myren affirmed the PUC's ruling. Ex. 3. Pesall then appealed to the South Dakota Supreme Court. HT at 34. The Court affirmed the issuance of the facility permit. Ex. 4.

<sup>3</sup> The project team included Plaintiffs's land rights group, environmental group, engineering group, and project management personnel. HT at 62.

BSSE, they were unable to secure voluntary easements from Defendants. *Id.* at 42-43. As a result, Plaintiffs determined that filing a condemnation action was necessary, prompting this action. *Id.* at 43-44. Plaintiffs seek to condemn a perpetual, one-hundred-fifty foot easement for the construction, maintenance, and long-term operation of BSSE. *Id.* at 45, 54.

### ANALYSIS AND DECISION

Article 6, Section 13 of the South Dakota Constitution contains our state's taking clause. It provides, in relevant part, that "[p]rivate property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article." S.D. Const. Art. 6, § 13.

In 1913, the South Dakota Supreme Court announced a five-prong test to determine when an entity is granted the right to use eminent domain—a governmental power. *Illinois Cent. R.R. Co. v. E. Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913). An entity must establish: first, that it "is *within the class* to whom the power has been delegated"; second, that entity must then prove "that all *conditions precedent* have been complied with"; third, the reason for the taking must be "one of the purposes *enumerated in the statute*"; fourth, the taking must be "for a *public use*"; and fifth, "the particular property sought to be taken is *necessary* to the accomplishment of the public purpose intended." *Id.* at 726 (emphasis in original).

The parties agree that this is the applicable test. Plaintiffs' Post-Hearing Brief on Right to Take Hearing at 2; Landowners' Response to Plaintiffs' Post-Hearing Brief on Right to Take Hearing at 2. Defendants concede that Plaintiffs satisfy the first and third prongs of the test.<sup>4</sup>

<sup>4</sup> Plaintiffs are public utility companies organized under the laws of sister states that have registered with the South Dakota Secretary of State's Office, allowing them to conduct business in South Dakota. HT at 17-23. Consequently, SDCL 49-34-8 enables them to "exercise and enjoy all the rights, powers, privileges, and franchises possessed by such corporations organized under the laws of this state." SDCL 49-33-10 allows corporations, like Plaintiffs, the power "to take so much land as may be necessary for the construction, operation, and safety of its road, electric light or powerline[.]" SDCL 49-34-4 dictates that the laws and rules and practices of procedure be followed before an entity is allowed to proceed with condemnation.

Landowners's Response to Plaintiffs's Post-Hearing Brief on Right to Take Hearing at 2-3. As such, the Court will focus its analysis on the three remaining prongs at issue.

**I. Whether Plaintiffs have met the conditions precedent necessary to exercise eminent domain over Defendants' property.**

SDCL 49-34-4 mandates that any time a corporation exercises the right of eminent domain, it must be done in accordance with the "law[s] and the rules of practice and procedure pertaining to condemnation proceedings." Condemnation proceedings are governed by SDCL Chapter 21-35. Thus, the requirements of that chapter must be met in order to satisfy the conditions precedent necessary to exercise eminent domain. Plaintiffs assert they have met the requirements of SDCL 21-35-1, -2, -4, -5, and -9, and it appears from the record that Plaintiffs have indeed complied with these requirements.<sup>5</sup>

Instead, Defendants argue that BSSE is a trans-state transmission line, necessitating an application of SDCL 21-35-1.1. Under that statute, a utility company constructing a transmission line cannot exercise eminent domain before first acquiring a permit pursuant to SDCL Chapter 49-41B and legislative approval. SDCL 21-35-1.1. A trans-state transmission facility is "an electric transmission line and its associated facilities which originates outside the State of South Dakota, crosses this state *and* terminates outside the State of South Dakota[.]" SDCL 49-41B-2(11) (emphasis added).

There is no evidence to conclude that BSSE does not terminate in South Dakota. In fact, Defendants admit in their brief that the line terminates in South Dakota. However, they argue that MISO's purpose in building the line is to connect wind farms in North Dakota to energy

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<sup>5</sup> Plaintiffs filed a condemnation petition for each case in Day County Circuit Court. SDCL 21-35-1. This petition was verified and contained a statement of good faith. SDCL 21-35-4. It further satisfied the three requirements of SDCL 21-35-2 as it: (1) correctly listed the parties; (2) properly described the property to be taken; and (3) clearly stated the purpose for taking the property. The petition was accompanied by resolution from Plaintiffs' respective boards of directors. SDCL 21-35-5. Finally, Plaintiffs mailed a summons, along with a copy of the verified petition, to each Defendant. SDCL 21-35-9.

consumers in Minnesota. However, the Court declines Defendants' invitation to read words into the statute. Under the plain language of the statute, BSSE is not a trans-state transmission facility, and SDCL 21-35-1.1 does not apply. Plaintiffs have met the conditions precedent to exercise eminent domain.

**II. Whether Plaintiffs' taking of Defendants' land is for a public use.**

"[O]ur state constitution provides its landowners more protection against a taking than the United States Constitution." *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146. This greater protection from eminent domain flows from the South Dakota Supreme Court's adoption of the "use by the public test." *Id.* (citing *Illinois Central R.R. Co.*, 144 N.W. at 128). That test "requires that there be a 'use or right of use on the part of the public or some limited portion of it[.]'" *Id.* (alteration in original) (emphasis added) (quoting *Illinois Central R.R. Co.*, 144 N.W. at 128). "[I]t is not material that but few persons enjoy it, or that it also serves a private use[.]" *Illinois Central R.R. Co.*, 144 N.W. at 129 (quoting *Kansas City, S. & G. Ry. Co. v. Louisiana W. R. Co.*, 40 So. 627, 629 (La. 1905)).

Plaintiffs here have established BSSE satisfies a public use under either prong of the "use by public test." First, South Dakotans will actually use the electricity transmitted from BSSE, even if those residents are not directly connected to the line. HT at 114-17. The substations at Ellendale, North Dakota, and Big Stone South, South Dakota, provide different transmission paths that serve customers in South Dakota. *Id.* at 116. Those customers do not have to be customers of Plaintiffs or a utility company affiliated with MISO. *Id.* at 116-17. These facts are not disputed so the first prong of the "use by public test" is met.

Second, it is possible for anyone to directly connect into BSSE provided the regulatory requirements established by MISO are followed. *Id.* at 117. These regulatory requirements,

contained in a tariff, were approved by FERC and are publically available. *Id.* Tariffs, like this one, have the force of law. *In re One-time Special Underground Assessment by N. States Power Co. in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. This tariff requires open access to BSSE—a requirement for transmission systems pursuant to FERC Order 888 and 889. HT at 119, 167-68; *see also Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff'd sub nom. New York v. F.E.R.C.*, 535 U.S. 1 (2002) (noting “open access is the essence of Orders 888 and 889.”). Open access means that anyone can interconnect to the system on a nondiscriminatory basis as long as the regulatory requirements are met. HT at 119-20. For example, a landowner could build a substation to connect into BSSE. *Id.* at 120-21. This is enough to establish the public has a right to use BSSE under the second prong of the “use by public test.”

**III. Whether it is necessary for Plaintiffs to take a perpetual easement on Defendants' land to accomplish their public purpose.**

“[M]uch 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.” *City of Rapid City v. Finn*, 2003 S.D. 97, ¶ 19, 668 N.W.2d 324, 329 (quoting *Basin Elec. Power Co-op v. Payne*, 298 N.W.2d 385, 388 (S.D. 1980) (quoting *Otter Tail Power Co. v. Malme*, 92 N.W.2d 514, 521 (N.D. 1958))). This same latitude also applies to a corporation’s selection and location of the route for its power transmission line.” *Basin Elec. Power Co-op*, 298 N.W.2d at 388 (quoting *Otter Tail Power Co.*, 92 N.W.2d at 521). A “landowner 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.” *Id.* (quoting *Otter Tail Power Co.*, 92 N.W.2d at 521). A finding of necessity is binding on all persons, unless it is “based upon fraud, bad faith, or an abuse of discretion.” SDCL 21-35-10.1. Landowners “shoulder the burden of proving abuse or

bad faith and overcoming the strong presumption that the condemnor acted lawfully.” *City of Freeman v. Salis*, 2001 S.D. 84, ¶ 10, 630 N.W.2d 699, 703 (citations omitted).

The same logic that allows a condemnor to determine how much property is necessary and where the route will be placed applies to situations like this one where the extent of the property interest sought is at issue. *See City of Rapid City*, 2003 S.D. 97, ¶ 19, 668 N.W.2d at 329; *Basin Elec. Power Co-op*, 298 N.W.2d at 388; *Otter Tail Power Co.*, 92 N.W.2d at 521; *see also City of Charlotte v. Cook*, 498 S.E.2d 605, 608-09 (N.C. 1998) (the decision to condemn a piece of property in fee simple absolute or as an easement is subject to deferential review based on necessity).<sup>6</sup> This logic is consistent with other areas of the code involving eminent domain conducted in accordance with SDCL Chapter 21-35. *See, e.g.*, SDCL 9-41A-51 (a municipal power agency may acquire fee simple absolute or a lesser interest through use of eminent domain); SDCL 11-8-50 (same but the power is vested in a municipality); and SDCL 49-17A-18 (same but the power is vested in regional railroad authorities). Plaintiffs are therefore entitled wide latitude in their determination that this perpetual easement is necessary.

**a. Whether Plaintiffs abused their discretion in determining a perpetual easement is necessary.**

For an abuse of discretion to occur “[a] choice to condemn must grossly violate fact and logic or be wholly arbitrary[.]” *City of Rapid City*, 2003 S.D. 97, ¶ 19, 668 N.W.2d at 329. Here, the evidence does not rise to the level necessary to find an abuse of discretion. Plaintiffs expect BSSE to serve customers, including South Dakotans, in perpetuity. HT at 60. As a result, Plaintiffs’s boards of directors determined acquiring “Property Interests” from landowners was

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<sup>6</sup> *See also City of Wilmor v. Kvam*, 769 N.W.2d 775, 779 (Minn. Ct. App. 2009) (analyzing the city’s determination to condemn in fee simple absolute versus an easement in terms of necessity); *Miller v. Florida Inland Navigation Dist.*, 130 So.2d 613, 623 (Fla. Dist. Ct. App. 1961) (recognizing the trial court is not entitled to invade the discretion of the condemning authority in regard to the extent of the easement’s use or time during which it may be enjoyed, unless there is a clear showing of oppression, actual fraud, or bad faith)

necessary to accomplish that public purpose. Ex. 10. The property interest sought was a perpetual easement. HT at 60. These facts do not violate fact and logic. Nor are they wholly arbitrary. This conclusion is only strengthened by the fact that Plaintiffs' took a perpetual easement—a lesser property interest than ownership in fee simple. *See City of Charlotte*, 498 S.E.2d at 608-09.

**b. Whether Plaintiffs engaged in bad faith negotiations with Defendants.**

Bad faith in condemnation proceedings has been defined as “conscious wrongdoing motivated by improper interest, ill will, or dishonest intent.” *City of Freeman*, 2001 S.D. 84, ¶ 11, 630 N.W.2d at 703. However, there is no requirement in South Dakota to attempt negotiations for a voluntary agreement before proceeding with condemnation. *Id.* ¶ 15, 630 N.W.2d at 703-04. “A hallmark of bad faith in condemnation proceedings is the use of the power of eminent domain for an improper purpose.” *Id.* ¶ 16, 630 N.W.2d at 704.

After a review of the evidence, it is evident that Plaintiffs did not engage in bad faith negotiations with Defendants. Indeed, it appears just the opposite is true: Plaintiffs engaged in good faith negotiations with all landowners. Five facts support this conclusion. First, the purpose underlying these easements is proper. *See* Section II. Second, Plaintiffs engaged all landowners by holding open house meetings, sending out letters, and setting up a website. HT at 37-39. Third, Plaintiffs were successful in voluntarily obtaining ninety-one percent of the parcels necessary for BSSE. *Id.* at 42-43. As part of that process, Plaintiffs modified the terms of the proposed easements for some landowners. *Id.* at 73. Additionally, Plaintiffs considered approximately sixty route changes proposed by landowners and, after analyzing their merits, granted thirty of them. *Id.* at 61-65. Fourth, Plaintiffs contacted each Defendant in an effort to negotiate before the last final offer but were stymied by Defendants' unwillingness to

meaningfully participate. *Id.* at 68-69. And fifth, Plaintiffs offered Defendants *more* money for the easement as part of the last final offer. Ex. 16-18. This was an attempt to avoid condemnation.<sup>7</sup> *Id.* Consequently, the steps taken by Plaintiffs here evidence a good faith attempt to negotiate.

### CONCLUSION

Plaintiffs have satisfied all five prongs of the *Illinois Central* test needed to establish they have been granted the power of eminent domain. *See Illinois Cent. R.R. Co.*, 144 N.W. at 726. Accordingly, Plaintiffs have the right to take a one-hundred-fifty foot, perpetual easement on Defendants' land as sought.

Dated this 6<sup>th</sup> day of June, 2016.



BY THE COURT:

  
\_\_\_\_\_  
Tony L. Portra  
Circuit Judge

ATTEST:

Claudette Opitz, Clerk of Courts

By:  Deputy Clerk

<sup>7</sup> The fact that the last final offer mentions condemnation before identifying the price does not establish bad faith. Plaintiffs actively sought to negotiate with Defendants but were stymied. *Id.* at 68-69. Moreover, there is no requirement in South Dakota to attempt negotiations before proceeding with condemnation. *See City of Freeman*, 2001 S.D. 84, ¶ 15, 630 N.W.2d at 703-04.

**FILED**

**JAN 27 2017**

**CLAUDETTE OFITZ  
DAY CO. CLERK OF COURTS**

INSTRUCTION NO. 1

Both sides having rested, it is now the duty of the Court to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions and the preliminary instructions previously given, and it is your duty to follow them. You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance.

By the language of these instructions, the Court does not intend to imply what any of the disputed facts in this case are, or what your verdict in this case should be.

Each of you must faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on the evidence and not upon speculation, guess, or conjecture.

INSTRUCTION NO. 5

Montana-Dakota Utilities Company and Otter Tail Power Company are taking only a part of Parkshill Farms' property. The residue of the tract of land remains in Parkshill Farms' ownership.

South Dakota uses the "before and after" formula to determine the just compensation to which the owner is entitled in a partial-taking case. Where only a portion of a property is condemned, the measure of just compensation includes both the value of the land actually taken and the value by which the residue, or remaining parcel, has been diminished, if any, as a consequence of the partial taking.

To determine just compensation, first you must determine the "before value," which is the fair market value of the entire property before, and unaffected by, the taking. Then you must determine the "after value," which is the fair market value of the residue, or remaining parcel, after, and as affected by, the taking. The difference between the "before value" and "after value" will be the just compensation to which the defendant property owner is entitled and will also be the amount of your verdict.

JURY INSTRUCTION 11

The estate or interest being taken by the Utilities in this proceeding is a permanent easement to enter upon the land belonging to the Landowners as shown and described in the maps and easement documents which have been received in evidence for the construction, operation, use, maintenance, repair and replacement of an electric transmission line facility, including the line, poles, and other related structures necessary for this purpose.

When an easement is established across a particular tract of land by condemnation proceedings, just compensation is due to the landowner in that amount reasonably intended to compensate the owner for payment of the fair market value of the specific land actually occupied by the electrical transmission line facility, plus the reduction in value of the balance of the right-of-way taken, and the depreciation in value of the remaining tract of land. In considering the depreciation in value of the remaining tract of land, the elements of damage must not be remote, speculative or uncertain.

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 1**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC ("Landowners") appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

**ORDERED, ADJUDGED, AND DECREED:**

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the "Easement") to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the "Electric Line") through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The South Half (S1/2) of Section 32, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the "Premises"), also referred to as Parcel 1 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the "Easement Area"), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the South Half of Section 32, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 32; thence North 00 degrees 50 minutes 43 seconds West, along the west line of said Southwest Quarter, a distance of 171.70 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.45 feet to the west line of the Southeast Quarter of said Section 32; thence continuing North 89 degrees 16 minutes 50 seconds East, a distance of 2639.46 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west line of the Southwest Quarter of Section 32 and said east line of the Southeast Quarter of Section 32.

Said easement is shown as the hatched area on Exhibit A and contains 18.18 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowners shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowners shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowners retain the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowners shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities ("Improvements"), any portion of said Easement Area not occupied by the structures supporting Plaintiffs' electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs' ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowners, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowners, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs' negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowners or their agents or employees.

14. Plaintiffs shall promptly pay all of Landowners' reasonable damages to Landowners' unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs' construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowners' assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Forty-Four Thousand Two Hundred and Seventeen Dollars and Twenty Cents (\$44,217.20), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowners shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendants, Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

Signed: 2/10/2017 10:19:55 AM

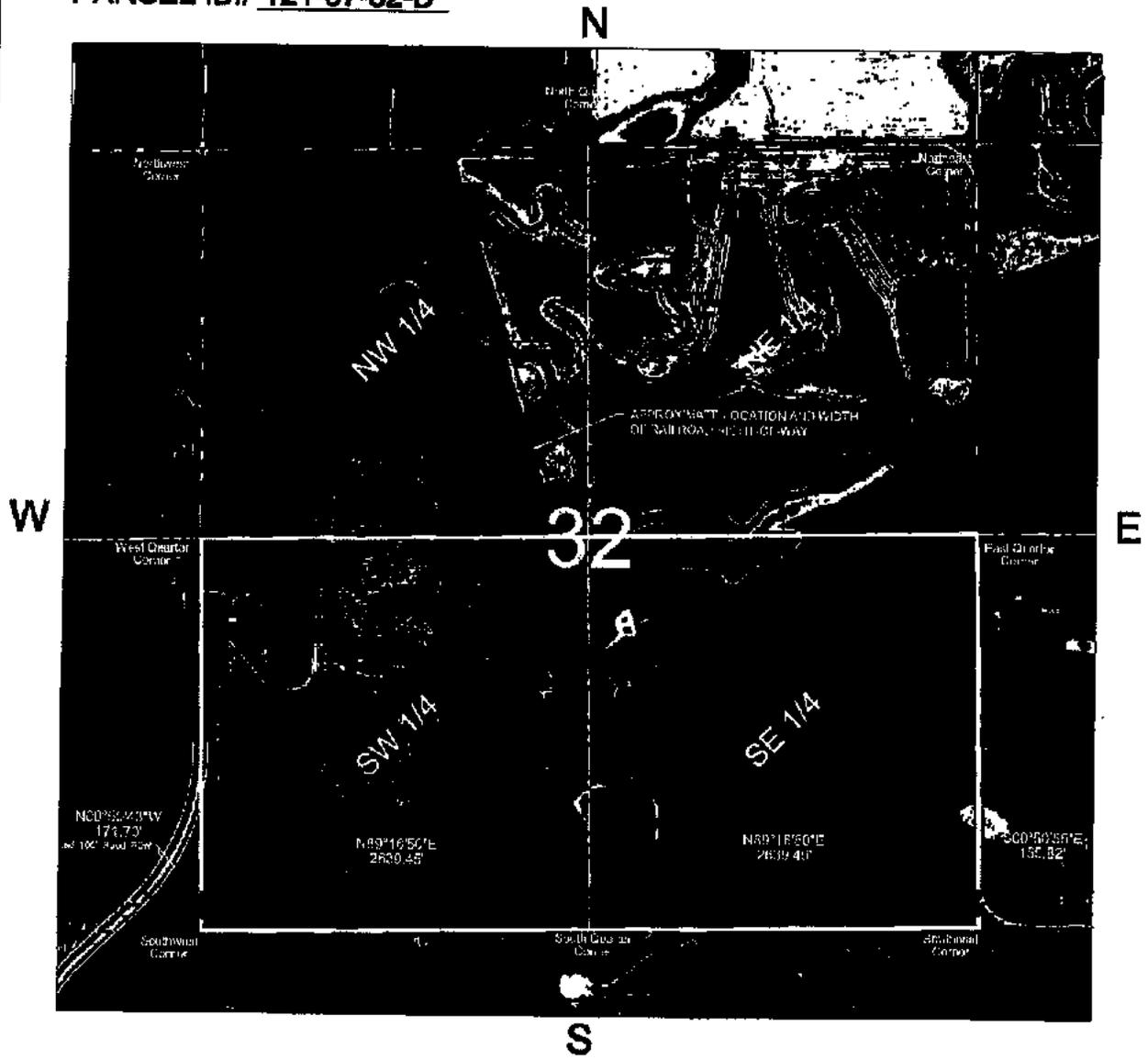
  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

# EASEMENT AREA EXHIBIT A

PARCEL ID# 121-57-32-B



**BSS+E**  
Big Stone South to Ellendale



**LEGEND**

- PROPOSED TRANSMISSION EASEMENT AREA
- LAND OWNER CORNER AS APPEARED BY EASEMENT AREA
- SECTION LINE
- QUARTER LINE
- SECTION CORNER
- PROPOSED TRANSMISSION CENTERLINE
- PROPOSED TRANSMISSION RIGHT-OF-WAY

PROPERTY DESCRIPTION: S2 SEC: 32 TWN: 121 N RGE: 57 W  
 COUNTY: DAY STATE: SOUTH DAKOTA MERIDIAN: 5TH  
 OWNER: PARKSHILL FARMS, LLC ADDRESS: 42783 146TH ST, WEBSTER, SD 57274  
 OWNER: ORDEAN R. PARKS ADDRESS: 42783 146TH ST, WEBSTER, SD 57274  
 OWNER: REUBEN G. PARKS ADDRESS: 42783 146TH ST, WEBSTER, SD 57274  
 TRANSMISSION FACILITY: 345KV BIG STONE SOUTH TO ELLENDALE  
 CROP ACRES: 18.18 EASEMENT: 5278.91' 150' 18.18  
Linear Width VERT  
 PASTURE ACRES: 0.00

EXHIBIT DATE: 10/26/2015

CYP FORM 534 - REV. 7/14

Parkshill - 120-57-32-B Rev 10-28-532

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 2**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC ("Landowners") appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

**ORDERED, ADJUDGED, AND DECREED:**

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the "Easement") to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the "Electric Line") through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The Southeast Quarter (SE1/4) of Section 33, Township 121 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the "Premises"), also referred to as Parcel 2 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the "Easement Area"), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southeast Quarter of Section 33, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of the Southwest Quarter of said Section 33; thence North 00 degrees 50 minutes 55 seconds West, along the west line of said Southwest Quarter, a distance of 165.82 feet; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.43 feet to the west line of said Southeast Quarter and to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2639.44 feet to the east line of said Southeast Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southeast Quarter of Section 33.

Said easement is shown as the hatched area on attached aerial exhibit A and contains 9.09 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities ("Improvements"), any portion of said Easement Area not occupied by the structures supporting Plaintiffs' electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs' ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs' negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner's reasonable damages to Landowner's unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs' construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Twenty Thousand Eight Hundred Thirty-Seven Dollars and Seventy Cents (\$20,837.70), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkhill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkhill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkhill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

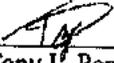
25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

Signed: 2/10/2017 10:19:26 AM

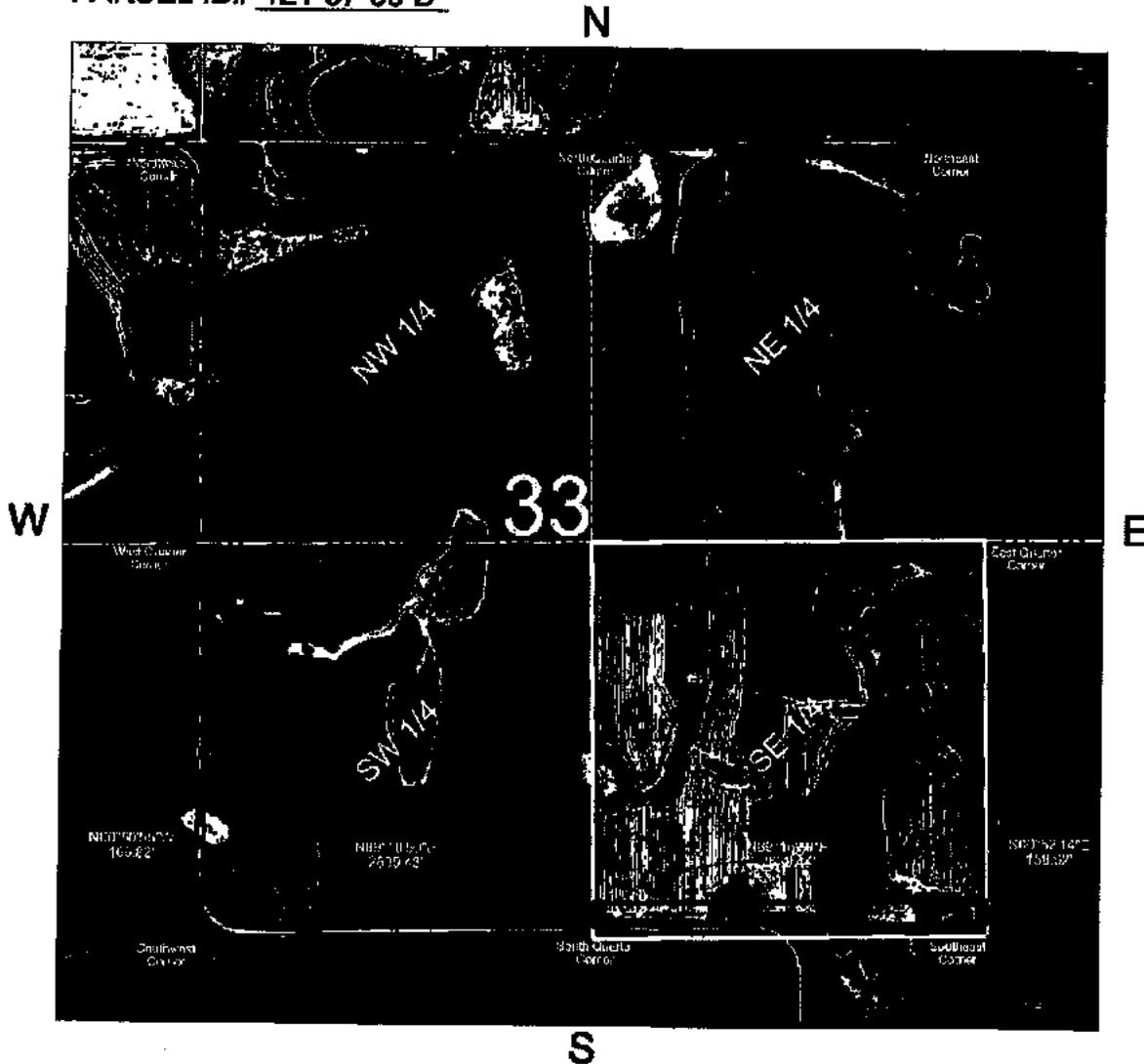
  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

# EASEMENT AREA EXHIBIT A



**BSS+E**  
Big Stone South to Ellendale

PARCEL ID# 121-57-33-B



**LEGEND**

- PROPOSED TRANSMISSION EMBANKMENT
- LAMBORN OR PASTURE ACRES BY EASEMENT
- SECTION LINE
- QUARTER LINE
- EASEMENT LINE
- PROPOSED TRANSMISSION OCCUPYING
- PROPOSED TRANSMISSION OCCUPYING

PROPERTY DESCRIPTION: SE4 SEC: 33 TWN: 121 N RGE: 57 W  
 COUNTY: DAY STATE: SOUTH DAKOTA MERIDIAN: 5TH  
 OWNER: PARKSHILL FARMS, LLC ADDRESS: 42763 146TH ST, WEBSTER, SD 57274  
 TRANSMISSION FACILITY: 345KV BIG STONE SOUTH TO ELLENDALE  
 CROP ACRES: 8.95 EASEMENT: 2639.44' 150' 9.09  
 PASTURE ACRES: 2.14 ACRES FEET TOTAL ACRES  
 EXHIBIT DATE: 7/22/2015

DTP FORM 686 - REV. 7/15

Parkshill - 121-57-33B - REV000340

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 3**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\* \* \* \* \*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC ("Landowners") appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

**ORDERED, ADJUDGED, AND DECREED:**

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the "Easement") to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the "Electric Line") through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

The Southwest Quarter (SW/14) of Section 35, Township 121 North, Range 57  
West of the 5th P.M., Day County, South Dakota

(hereinafter referred to as the "Premises"), also referred to as Parcel 3 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the "Easement Area"), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of Section 35, Township 121 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet either side of the following described line:

Commencing at the southwest corner of said Southwest Quarter of Section 35; thence North 01 degrees 02 minutes 05 seconds West, along the west line of said Southwest Quarter, a distance of 186.98 feet to the Point of Beginning of the line to be described; thence North 89 degrees 16 minutes 50 seconds East, a distance of 2637.38 feet to the east line of said Southwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said west and east lines of the Southwest Quarter of Section 35.

Said easement is shown as the hatched area on attached aerial exhibit A and contains 9.08 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.
12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and

underground utilities ("Improvements"), any portion of said Easement Area not occupied by the structures supporting Plaintiffs' electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs' ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs' negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner's reasonable damages to Landowner's unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs' construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Twenty Thousand Eight Hundred Twenty-Two Dollars and Ten Cents (\$20,822.10), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkhill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkhill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:

Signed: 2/10/2017 10:18:55 AM

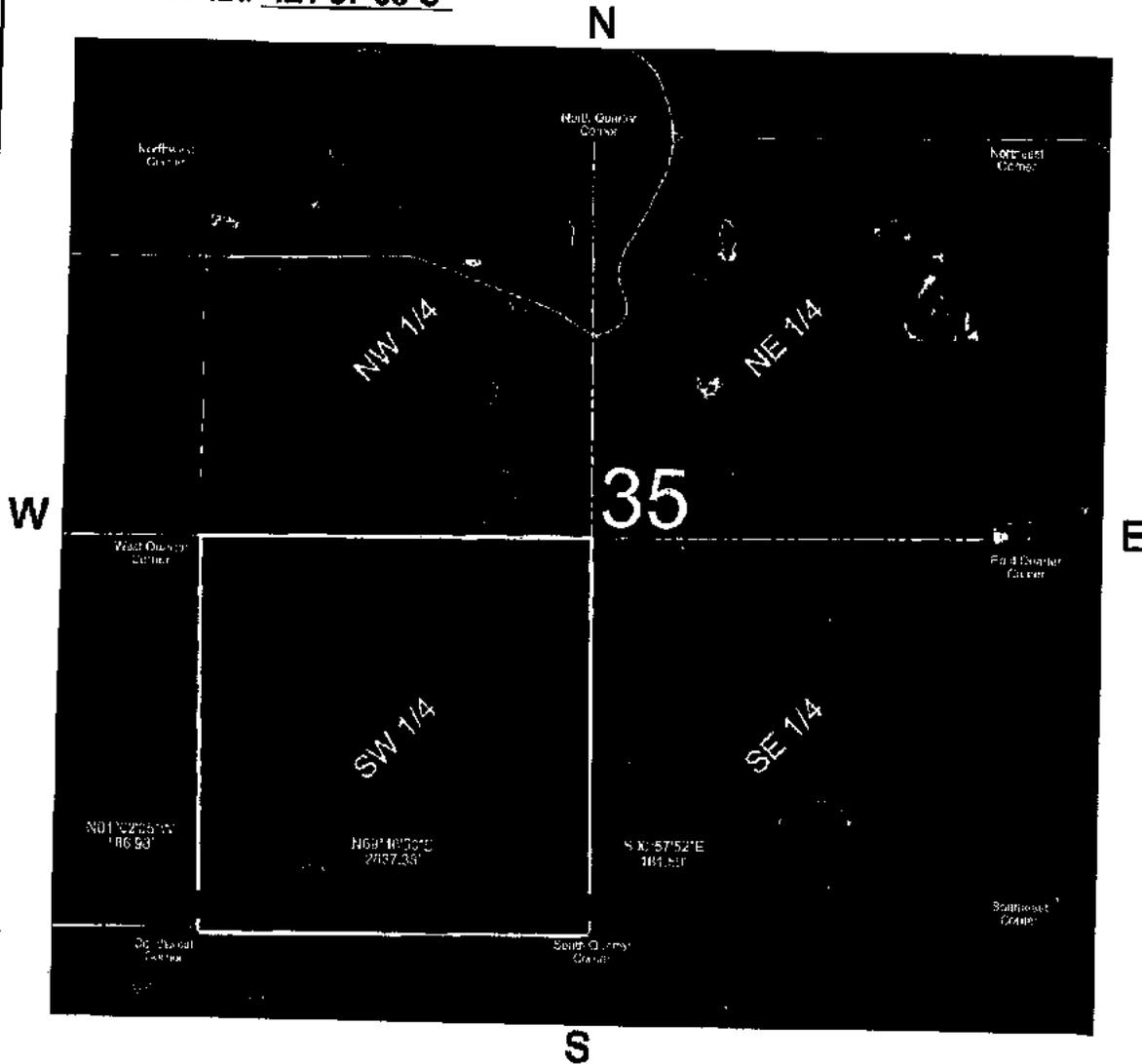
A handwritten signature in black ink, appearing to read "Tony L. Portra".

\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

**EASEMENT AREA  
EXHIBIT A**  
PARCEL ID# 121-57-35-C



**BSS+E**  
Big Stone South to Ellendale



**LEGEND**

- 345KV TRANSMISSION EASEMENT AREA
- 150' TRANSMISSION EASEMENT BUFFER
- SECTION LINE
- QUARTER LINE
- BACKSTOP LINE
- 150' TRANSMISSION EASEMENT BUFFER
- 150' TRANSMISSION EASEMENT BUFFER

PROPERTY DESCRIPTION: SW4 SEC: 35 TWN: 121 N RGE: 57 W  
 COUNTY: DAY STATE: SOUTH DAKOTA MERIDIAN: 6TH  
 OWNER: PARKSHILL FARMS, LLC ADDRESS: 42783 149TH ST, WEBSTER, SD 57274  
 TRANSMISSION FACILITY: 345KV BIG STONE SOUTH TO ELLENDALE  
 CROP ACRES: 6.12 EASEMENT: 2637.38' 150' 6.08  
 PASTURE ACRES: 3.98 (TOTAL) (TOTAL)  
 EXHIBIT DATE: 7/22/2015

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

\*\*\*\*\*

MONTANA-DAKOTA UTILITIES CO.  
and OTTER TAIL POWER COMPANY,

18 CIV 15-67

Plaintiffs,

vs.

**JUDGMENT  
FOR CONDEMNATION  
OF PARCEL 4**

PARKSHILL FARMS, LLC; WEB  
WATER DEVELOPMENT  
ASSOCIATION, INC.; KERMIT PARKS;  
REUBEN PARKS; VERA PARKS;  
ESTATE OF ORION E. PARKS;  
ORDEAN PARKS;

Defendants.

\*\*\*\*\*

The above captioned matter came before the Circuit Court, Honorable Tony L. Portra presiding, for a jury trial on January 25 through 26, 2017. Plaintiffs Montana-Dakota Utilities Co. and Otter Tail Power Company appeared through their representative Al Koeckeritz and their attorney Reed Rasmussen. Defendants Rueben Parks, Ordean Parks, Vera Parks, and Parkshill Farms, LLC ("Landowners") appeared personally and through their attorney N. Bob Pesall. No other named party appeared. The issues in this matter were duly tried, and the jury rendered its verdict on January 26, 2016. Based thereon, it is hereby

ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have the power to exercise eminent domain pursuant to SDCL Ch. 21-35, and Plaintiffs have in fact exercised that power and taken a perpetual easement for construction, operation, and maintenance of an electrical transmission line.

2. Plaintiffs, as tenants in common, and their successors and assigns, are hereby granted a perpetual and irrevocable easement (the "Easement") to construct, operate, maintain, use, upgrade, rebuild, relocate or remove an electric line facility with one or more circuits, with all towers, structures, poles, foundations, crossarms, cables, wires, anchors, guys, supports, counterpoises, fixtures, and equipment related to said electric line facility, together with communication equipment relating to the operation of such electric line facility (collectively, the "Electric Line") through, over, under and across the certain lands situated in the County of Day, State of South Dakota, legally described as:

Government Lots 2, 3, 4, and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) of Section 1, Township 120 North, Range 57 West of the 5th P.M., Day County, South Dakota,

(hereinafter referred to as the "Premises"), also referred to as Parcel 4 in the Verified Petition for Condemnation and the caption of this Judgment.

3. The Easement on the Premises shall be limited to that certain part of the Premises (the "Easement Area"), which is legally described as:

A 150.00 foot easement for the purpose of constructing, operating, maintaining an overhead electric transmission line up to but not exceeding 345kV over, under and across the Southwest Quarter of the Northwest Quarter and Government Lots 2, 3 and 4 of Section 1, Township 120 North, Range 57 West of the Fifth Principal Meridian in Day County, South Dakota.

Said easement being 75.00 feet to the left and 75.00 feet to the right of the following described line:

Commencing at the northwest corner of said Government Lot 4 of Section 1; thence North 89 degrees 13 minutes 16 seconds East, along the north line of said Government Lot 4, a distance of 183.01 feet to the Point of Beginning of the line to be described; thence South 01 degrees 16 minutes 28 seconds East, a distance of 2995.76 feet to the south line of said Southwest Quarter of the Northwest Quarter and said line there terminating.

The sidelines of said easement are to be prolonged or shortened to terminate on said north line of Government Lot 4 and said south line of the Southwest Quarter of the Northwest Quarter of Section 1.

Said easement is shown as the hatched area on attached acrial exhibit A and contains 10.32 acres, more or less, and is subject to right-of-ways, easements and other restrictions of record, if any.

4. Plaintiffs may enter upon the Premises to survey for and locate the Electric Line.
5. Plaintiffs shall have the right of ingress and egress over and across the Premises to the Easement Area, by means of existing field roads and lanes, if any, otherwise, by the use of the most reasonable and feasible route selected by Plaintiffs in their reasonable discretion.
6. Plaintiffs are granted a temporary easement for use by Plaintiffs of the Premises adjacent to the Easement Area from time to time during construction, repair, replacement or upgrade of the Electric Line.
7. The Electric Line installed and placed by or on behalf of Plaintiffs in the Easement Area shall remain the property of Plaintiffs.
8. Landowner shall not place any buildings, structures or other objects, permanent or temporary, upon the Easement Area without prior express written approval from Plaintiffs.
9. Landowner shall not plant any trees, shrubs or other vegetation ("Trees") that interferes with the operation or maintenance of the Electric Line within the Easement Area without the prior express written approval from Plaintiffs, nor perform any act which will interfere with or endanger the Electric Line.
10. Plaintiffs have the right to trim and remove any Trees, located within the Easement Area, and the right to trim or remove any Trees that are located adjacent to the Easement Area which may interfere with or otherwise endanger the Electric Line by falling thereon or by otherwise striking the Electric Line.
11. Landowner retains the right to cultivate, use and occupy the Easement Area in a manner that is not inconsistent with Plaintiffs' rights granted herein.

12. Landowner shall have the right to dedicate and have or permit to be improved, maintained, and used for the purposes of streets, curbs and gutters, sewers, water and underground utilities ("Improvements"), any portion of said Easement Area not occupied by the structures supporting Plaintiffs' electric system, provided that said Improvements do not in the opinion of Plaintiffs impair the structural or electrical integrity of the Electric Line, or Plaintiffs' ability to maintain the Electric Line or materially alter the existing ground elevations; and provided further that all such Improvements shall not result in a ground or other clearance of less than the minimum requirements specified by the National Electrical Safety Code and any other applicable laws or regulations or other codes in effect from time to time. Landowner, their agents, successors, transferees or assigns must submit plans of improvements or other installations within the Easement Area for review, compliance and written approval by the Plaintiffs.

13. Plaintiffs shall indemnify, defend and hold harmless the Landowner, from and against any third party claims for loss or damage to property or for any injury or death of any person occurring as a result of the Plaintiffs' negligent installation, maintenance, operation, or removal of the transmission lines and facilities upon the Easement Area, except to the extent such claims are caused by the negligent or otherwise wrongful act or omission of Landowner or its agents or employees.

14. Plaintiffs shall promptly pay all of Landowner's reasonable damages to Landowner's unharvested crops, fences, livestock, roads and/or fields caused by Plaintiffs' construction, placement and/or maintenance of the Electric Line except for damages to Trees removed by Plaintiffs under this Easement.

15. The term of this Judgment, the Easement, and the covenants and rights granted or contained in this Judgment are perpetual.

16. Plaintiffs may assign all or any portion of this Judgment, the Easement, or the Electric Line on either an exclusive or nonexclusive basis to one or more entities. In the event of an assignment in this paragraph, then the assignee shall be responsible for payment of any and all monies for the damages required to be paid pursuant to paragraph 14 of this Judgment if the damages are incurred after the date of the assignment.

17. The Easement and the covenants and rights granted or contained in this Judgment shall run with and against the Premises.

18. The Easement and the covenants and rights granted or contained in this Judgment are binding on Landowner's assignees, legal representatives, legatees, and devisees.

19. This Judgment, the Easement, and the covenants and rights granted or contained in this Judgment shall be governed by the laws of the state in which the Premises is located.

20. This Judgment may be recorded with the Register of Deeds, of the county wherein the Premises lies, without further notice or hearing.

21. Plaintiffs shall deposit with the Clerk of Courts on or before \_\_\_\_\_, 2017, the sum of Nine Thousand One Hundred Nine Dollars and Ten Cents (\$9,109.10), which is the amount of the just compensation determined by the jury for the perpetual Easement taken by the Plaintiffs.

22. Any person making a claim to such funds other than the Landowner shall file such claim within thirty (30) days of entry of this Judgment.

23. If any party, other than the defendant, Parkshill Farms, LLC, makes claim against the deposited funds the Court shall determine the proper disbursement of these monies.

24. If no party other than the defendant, Parkhill Farms, LLC, makes a claim against the deposited funds, the Clerk of Court shall disburse such deposited funds to the defendant, Parkhill Farms, LLC, thirty-three (33) days after notice of entry of this Judgment.

25. Each party shall bear its own costs and disbursements, including attorneys' fees, incurred in this matter.

Attest:  
Jessica Saltler  
Clerk/Deputy

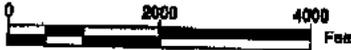


BY THE COURT:

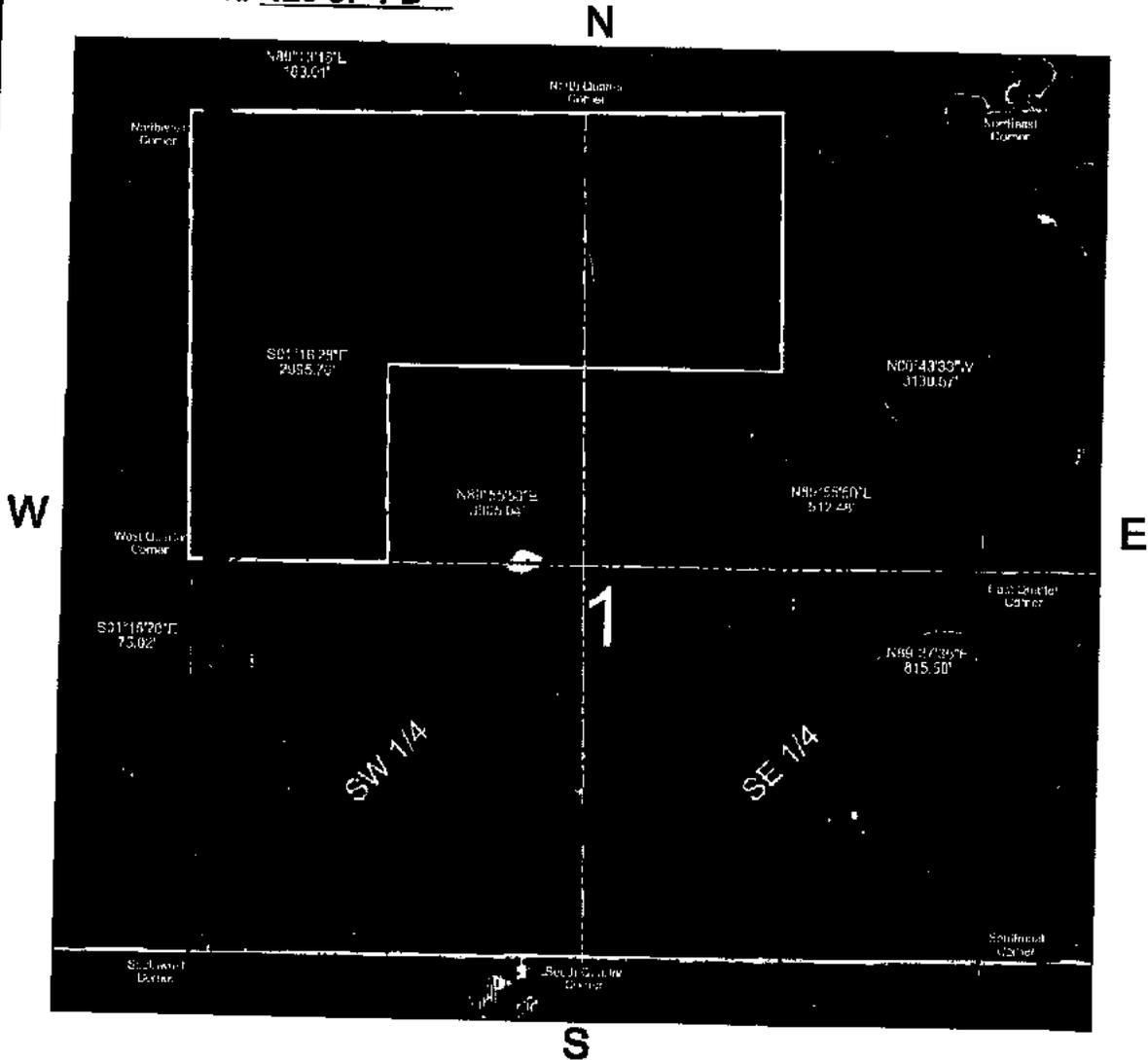
Signed: 2/10/2017 10:17:40 AM

  
\_\_\_\_\_  
Tony L. Portra  
Circuit Court Judge

**EASEMENT AREA  
EXHIBIT A**  
PARCEL ID# 120-57-1-D



**BSS+E**  
Big Stone South to Ellendale



**LEGEND**

- 1. 345KV TRANSMISSION FACILITY
- 2. SECTION LINE
- 3. QUARTER LINE
- 4. SURVEY LINE
- 5. PROPERTY LINE
- 6. UNDEVELOPED TRANSMISSION FACILITY

**PROPERTY DESCRIPTION:** GOVT LOTS 2, 3 & 4 & SW4NW4 **SEC:** 1 **TWN:** 120 N **RGE:** 57 W  
**COUNTY:** DAY **STATE:** SOUTH DAKOTA **MERIDIAN:** 6TH  
**OWNER:** PARKSHILL FARMS, LLC **ADDRESS:** 42783 146TH ST, WEBSTER, SD 57274  
**TRANSMISSION FACILITY:** 345KV BIG STONE SOUTH TO ELLENDALE  
**CROP ACRES:** 0.00 **EASEMENT:** 2005.75' 150' 10.32  
(18.00) (2.25) (TOTAL ACRES)  
**PASTURE ACRES:** 10.32  
**EXHIBIT DATE:** 7/7/2015

**IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA**  
Appeal Number: 28174

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MONTANA-DAKOTA UTILITIES CO., and OTTER TAIL POWER COMPANY,  
Plaintiffs and Appellees

v.

PARKSHILL FARMS, LLC, VERA R. PARKS, REUBEN PARKS, AND ORDEAN  
PARKS, Defendants and Appellants

and

WEB WATER DEVELOPMENT ASSOCIATION, INC., KERMIT PARKS, and  
ORION EUGENE PARKS,  
Additional Defendants

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APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, DAY  
COUNTY, SOUTH DAKOTA

THE HON. TONY PORTRA, PRESIDING

---

APPELLANTS' REPLY BRIEF

---

Attorney for the Appellants:

N. Bob Pesall  
PESALL LAW FIRM  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274

Attorneys for the Appellees:

Thomas Welk, and Jason Sutton  
BOYCE LAW FIRM  
P.O. Box 5015  
Sioux Falls, SD 57117  
(605) 633-2424

Notice of Appeal Filed March 10, 2017



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## PRELIMINARY STATEMENT

To avoid repetition, the following Reply Brief will focus on those arguments raised or addressed by the Appellees which require correction or clarification. As in the original brief, references to the clerk’s certified record will be designated “CR” followed by the appropriate page number. References herein to the Circuit Court’s April 5, 2016 hearing on the Plaintiffs’ right to take will be designated “RTT” and references to the January 25 and 26, 2017 jury trial to value just compensation for the taking will be

designated “VT,” each followed by the appropriate transcript or exhibit page number. References to the Appellee Utilities’ Brief will be designated “UB” followed by the appropriate page number. Appellants in this matter will generally be referred to as “the Parkses.” Appellees will generally be referred to as “the Utilities.”

### **JURISDICTIONAL STATEMENT AND STATEMENT OF LEGAL ISSUES**

The Parkses rely on the Jurisdictional Statement and Statement of Legal Issues set out in their original Appellants’ Brief dated May 24, 2017.

## STATEMENT OF THE CASE AND FACTS

The Parkses rely on their statements of the case and statement of the facts as set out in their original brief, with the exception of one correction to the facts as articulated in the Utilities' brief. Utilities assert in their statement of fact that "Under South Dakota law, the Utilities must provide service to all customers in their service territory. See SDCL 49-34A-2.1; 49-34A-42; 49-34A-58." (UB p. 3.) This assertion appears to be more of a legal argument than a factual assertion. Whether legal or factual, it is not supported by any citation to the record, and does not appear to have been raised by the Utilities before the Trial Court. Finally, although S.D.C.L. 49-34A-2.1 comes close, the statutes cited do not iversally require the Utilities to provide service to all customers.

## ARGUMENT

South Dakota applies unique limits to takings under its own laws and constitution. S.D.Const. Art. 6 Sec. 13; *Illinois Central Railroad Company v. East Sioux Falls Quarry Co.*, 144 N.W. 724 (S.D. 1913). A taking by a utility company through a power delegated to it by the legislature must satisfy a five part test. For purposes of this reply brief, the essential parts of that test are parts four "[t]hat the property is to be taken for a public use" and part five, "[t]hat the property sought to be taken is necessary to the accomplishment of the public purpose intended." *Id.*, at 726, (internal quotations omitted).

### **I. The Utilities cannot take the easements by right of eminent domain.**

The Utilities, through their brief, contest both the standard of review and the application of parts four and five of the *Illinois Central* test.

**a. The standard of review**

In this case the Utilities seek to take property by right of eminent domain, through a statutorily delegated power. Their ability to do so is limited both by the State Constitution, S.D.Const. Art. 6 Sec. 13, and by the delegating statutes, S.D.C.L. 49-34-4 and 49-34-8. Our constitution guarantees the public a right of actual use in the property taken. The governing statutes specify when and how a delegated power to take by right of eminent domain may be exercised. Issues involving statutory interpretation and the application of constitutional rights are questions of law for which no deference is given to the Circuit Court. *Benson v. State*, 2006 SD 8, ¶39, 710 N.W.2d 131.

The Utilities contend that a right of use determination is factual, being based on “natural reasoning” rather than “fixed rules of law.” (UB p. 12.) They further contend that this court must, on review, apply a clearly erroneous standard of review. This is incorrect. Particularly in the context of an eminent domain case, “a court owes no deference to a legislature’s judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property.” *Kelo v. City of New London*, 545 U.S. 469, 517 (2005) (Thomas, J. dissenting.) If the question of whether the public has a right to use the property is “quintessentially legal,” it is a legal question. Questions of law are subject to review de novo. *Benson*, 2006 SD 8, ¶39.

**b. The Right of Use**

The taking in this case is prohibited by S.D. Const. Art. 6 Sec. 13, as explained by the court in part four of its test in *Illinois Central*, because the Utilities would take broad easements, in fee simple, in which the public would not have a right of use. In this case the Utilities seek to take easements for the construction of a transmission line. The easements themselves allow the construction and maintenance of a line of any voltage up to 345 thousand volts, in a variety of structural configurations. Lines constructed under the easement need not be constructed as planned by the Utilities. And the easements permit the Utilities to sell or transfer each individual easement to any third party who might desire it.

This means that even if MISO or FERC required these Utilities to provide access to the public, that right does not attach to the property taken, nor to future owners of that property.

The Utilities contend that the taking is still permissible because constitutional “public use” can be established either by a right of use, or by actual use, and the trial Court found actual public use would take place. The Utilities base this assertion on language from *Benson*, 2006 SD 8, 42, that there must be “use or right of use on the part of the public” quoting *Illinois Central*, 144 N.W. 724 at 728. (UB p. 14-15.)

The Utilities read this quote in *Benson* separately from the *Illinois Central* case from which it is drawn, to support the broad claim that there are two ways to satisfy the public use standard. However a careful reading of both *Benson* and *Illinois Central* shows this to be in error. The Court in *Illinois Central* made it clear that what matters is not whether the public will actually use the property taken, but whether it has the right to

use it. “Thus we find that the matter that is controlling with the Courts is not the necessity of the use, not even the fact of use, but the right of use.” *Illinois Central*, 144 N.W. 724 at 729. This court in *Benson* did not overrule or limit *Illinois Central*, but rather reaffirmed it.

The Utilities further contend that since the easement is for the construction of a transmission line, it automatically falls under the authority of MISO and FERC, and that these bodies assure a right of public use. (UB p. 17.) In addition to the reasons set out in the Parks’ original brief as to why oversight by these bodies does not create a right of public use, one additional point illustrates why the Utilities’ argument fails. It incorrectly equates the project as planned with the easement as taken. These are not the same thing.

Currently, the Utilities are members of MISO, subject to regulation by FERC, and intend to use the easements taken to construct a transmission line from Ellendale, North Dakota to Big Stone, South Dakota. But there is nothing in the easements themselves, or the law governing the easements which binds those easements to that purpose. Because they are owned in fee simple, those easements can be bought and sold to third parties. Neither the Utilities nor future owners of the easement are bound to remain members of MISO. They are not bound to engage in the activities which put them under the jurisdiction of FERC. And they are not bound to use the easements to support “the Project” as it is envisioned by the Utilities at this time. “It has long been held that the holder of an easement is not limited to the particular method in vogue when the easement was acquired.” *Barney v. Burlington Northern*, 490 N.W.2d 726, 733 (S.D. 1992) quoting *Wash. Wildlife*, 329 N.W.2d 546 (Minn. 1983), overruled in part on other

grounds, *Brown v. Northern Hills Regional R.R. Authority*, 2007 SD 49, ¶20, 732 N.W.2d 732.

**c. Necessity**

The Utilities also cannot take the easements sought in this case because the scope of those easements exceeds that which is “necessary to the accomplishment of the public purpose” as required under part five of the *Illinois Central* test. The easements would be perpetual, while the public’s ability to use them is not. And, the easements provide for structures which the Utilities do not intend to construct. Thus both the duration and the scope of the easement plainly exceed what is necessary for the purpose of constructing a transmission line for public use.

The Utilities initially contend that the question of whether the Court should limit its review of necessity only to abuse of discretion, fraud, or bad faith was not preserved for appeal. (UB p. 21, 28.) This is incorrect. The Utilities urged the trial Court to apply the abuse of discretion, fraud or bad faith standard in their proposed findings and conclusions after the hearing on the right to take. Parks timely objected to the same. (CR. 215-216.) The trial court ultimately adopted the Utilities’ proposal, but the objection preserved the issue for appeal.

The Utilities go on to contend that it is not for the Court to make any necessity determination, and that their own determination of necessity should be upheld in all respects, absent abuse of discretion, fraud or bad faith. (UB p. 20.) The reasons why this contention is incorrect are set out at length in the Parks’ original brief. (PB. 20-24.) In sum, the Utilities’ argument must fail because it incorrectly equates statutory “[necessity]

for the construction and operation of its business” under S.D.C.L. 21-35-10.1 and 49-34-4 with constitutional “[necessity] for the public purpose intended” under *Illinois Railroad*. If the two were intended to have the same meaning, the legislature would have used the same words. *Gloe v. Iowa Mut. Ins. Co.*, 2005 SD 29, ¶38, 694 N.W.2d 238 (Meierhenry, J. dissenting).

The distinct nature of this constitutional necessity, as it relates to public use, is neither a new concept nor “monumental shift in condemnation law” (UB p. 23.) It has been recognized as far back as Lewis’ *Treatise on the Law of Eminent Domain in the United States*, the 3<sup>rd</sup> edition of which was relied on heavily by this Court in *Illinois Railroad*, and which was published in 1909.

Finally, citing a series of cases from other jurisdictions, the Utilities contend that their attempt to take easement rights that they do not intend to use, or which last longer than the public’s right of use, are still permissible because it is ultimately the utility which must decide what property to condemn. And, they claim, the Utilities in this case could have taken the property in fee simple rather than merely taking an easement. (UB p. 24-26.)

This contention contains two errors. First, the question of whether the Utilities might take outright ownership rather than an easement was not before the trial court, and is not before this court. Second, the Utilities incorrectly equate the physical dimensions of a taking with the duration of the public’s right of use. Utility determinations as to the physical dimensions of a taking may be entitled to deference in a case like this, because a Utility company is better equipped than the Court to determine the physical aspects of

project to be built, and thus the physical aspects of the property to be taken. *Basin Electric Power Cooperative v. Payne*, 298 N.W.2d 385, 386 (S.D. 1980). But the issue here is one tied to public use, specifically, whether the easement needs to be perpetual if the public's right of use is not perpetual. Where a question of necessity is tied to public use, the issue is one suitable for judicial review. John Lewis, *A Treatise on the Law of Eminent Domain in the United States*, §255 (3<sup>rd</sup> Ed., Chicago Callaghan & Co. 1909)

If the rule were otherwise, a taking utility would be able to take property for a bona fide public use at first, but then close it up to the public as soon as it no longer made economic sense to keep it open.

Lastly, the Utilities note that one of the citations to the record in the Parks' original brief, relating to the presence of guy wires, is not appropriate for consideration on the question of whether the terms of the easement exceed the project as planned, and thus constitute abuse of discretion. While the Utilities are correct that the admission that there would be no guy-wires was made at the valuation trial, the overall description of the project as planned did not change significantly from the right-to-take hearing until the valuation trial. The Utilities have never contended that they would install guy wires, counterpoises, or other fixtures, even though they claim a necessity for the same in the easements they would take.

**II. If the Utilities can take the easements by right of eminent domain, the duration of the easements must be limited to the duration of the public's right of use.**

The Utilities do not separately address this issue in their brief, but appear to rely on the same arguments they made regarding the public right of use, and necessity for the public purpose intended which are addressed above. As such, the Utilities' contentions need only be briefly addressed as they relate specifically to the Parks' motion to limit the duration of the easements to the duration of the public right of use, raised as Issue II in this appeal.

In short, if the public must have a right of use in the thing taken, or some portion of it, under S.D.Const. Art. 6 Sec. 13, and under the *Illinois Railroad* standard. An easement which lasts longer than the public's right of use cannot therefore be constitutionally taken by right of eminent domain.

In this case, if the public has a right of use in the easement at all, that right exists only so long as the owner remains a member of MISO, and remains subject to FERC jurisdiction, and only for so long as FERC preserves its open access rules under FERC Orders 888 and 889. The owner is free to sell the easement to a third party (the Parks' neighbor for example.) The owner may withdraw from MISO, may cease to be subject to FERC jurisdiction, or FERC may change the rule. As soon as any of these events take place, any public right of use terminates. There is nothing in the easement itself which binds it to this specific project, this particular owner, MISO, or FERC.

Under these facts, if a taking is allowed at all, the public must rely on the Court to protect its right of use both now and in the future. Fortunately, their constitutional right of use is self-executing. "[I]t is generally held that a constitutional prohibition against taking or damaging private property for public use without just compensation therefor is

self-executing” *Hurley v. State*, 143 N.W.2d 722, 729 (S.D. 1966) quoting 16 C.J.S. Const.Law §49 p. 149. Therefore it falls to the Court to impose a limit on the taking commensurate with the public’s right of use.

The Utilities contend that they have determined that a perpetual easement is necessary, and that they are subject to deference in that regard absent abuse of discretion, fraud, or bad faith. This contention is incorrect under South Dakota law, both because it equates statutory necessity with constitutional necessity, and because such a rule would render the language of the fifth element of the Illinois Railroad test meaningless.

Even if abuse of discretion were the appropriate standard, the contention that a perpetual taking is necessary to support a public purpose, when the public may ultimately be excluded from any right of use, is prohibited because it would “grossly violate fact and logic.” *City of Rapid*

*City v. Finn*, 2003 SD 97, 19, 668 N.W.2d 324 quoting *Basin Electric Power Cooperative*, 298 N.W.2d 388.

**III. If the Utilities can take the easements by eminent domain, the duration of the easements must be limited to 99 years.**

The Utilities also declined to separately address this issue in their brief, but again appear to rely on their general arguments equating constitutional necessity and statutory necessity. Again, since these are addressed at length above, they need only be briefly addressed here with specific respect to the Parks’ motion to limit the duration of the easements to 99 years, raised as Issue III in this appeal.

In short, the Utilities admit that the easements they chose to take inside of North Dakota are intended for the same transmission like as those taken in South Dakota in this case. Under North Dakota law, the duration of those easements is limited to 99 years. The Utilities determined that a 99 year easement was sufficient, and moved forward with the project anyway. If a 99 year easement is all that is necessary for construction of the proposed transmission line at one point, it does not follow that a perpetual easement would be necessary at other, virtually identical points on the same line.

S.D.Const. Art 6 Sec. 13 and part five of the *Illinois Central* test require the Court to consider whether “the particular property sought to be taken is necessary to the accomplishment of the public purpose intended.” The plain language of the test indicates that the Court must consider necessity. However, even if the standard were abuse of discretion, the Utilities claim that a 99 year easement is sufficient at one point, while a perpetual easement is necessary at another point on the same transmission line is again “grossly violative of fact and logic.” It is thus prohibited under either the constitutional standard in *Illinois Central*, and under the abuse of discretion standard urged by the Utilities.

**IV. The Circuit Court should have instructed the jury to consider the most injurious use of the easements which is reasonably possible.**

With respect to the jury instructions given at the valuation trial, the Parks' Requested Instruction No. 6 was an instruction that the jury consider not only the current project as planned by the Utilities, but also “the most injurious use of the property

reasonably possible under the easement.” This “most injurious use” principle has been embraced by courts in a number of other jurisdictions. *County of San Diego v. Bressi*, 184 Cal.App.3d, 112, 123 (Cal.App. 1986); *Metropolitan Water Dist. of South California v. Campus Crusade for Christ*, 37 Cal.Rptr.3d 598 (Cal.App. 2005); *Hickey v. Town of Burrillville*, 713 A.2d 781 (R.I. 1998); *North Carolina State Highway etc. Comm'n v. Black*, 79 S.E.2d 778 (N.C. 1954); *State By and Through State Highway Commission v. Hurliman*, 368 P.2d 724, 733 (Or. 1962); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626, 632 (Idaho 1935); *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60 (Idaho 1911).

These jurisdictions also apply the same “before and after” standard for determining damages as that used in South Dakota. *Nebraska Elec. Generation & Transmission Co-op., Inc. v Tinant*, 241 N.W.2d 134, 137 (S.D. 1976); *Bressi*, 184 Cal.App.3d at 123; *Hickey*, 713 A.2d 781, 784; *Black*, 79 S.E.2d 781-782, *Lobdell v. State ex rel. Board of Highway Directors*, 407 P.2d 135, 137 (Idaho 1965).

The “most injurious use” instruction is appropriate in cases like this because the law assumes that the use of an easement will change over time, *Barney*, 490 N.W.2d at 733. The easement in this case is perpetual, and the easement allows for the installation of a variety of fixtures not initially planned by the Utilities such as guy wires and counterpoises. Where an instruction correctly sets for the law and is supported by the evidence, it should be given.

On appeal, instructions are reviewed as a whole to determine if the jury was correctly instructed. *Kuper v. Lincoln-Union Electric Company*, 1996 SD 145, ¶32, 557

N.W.2d 748. The Utilities’ argument against the requested instruction is difficult to follow. They do not appear to argue that the “most injurious use” standard is incorrect. Rather, they appear to contend that Instructions 5 and 11, as given by the Court, provided adequate instruction to the jury on future damages. Then, they assert, if instruction 11 created confusion standing alone, in the absence of an instruction to consider the “most injurious use,” the Parksers cannot raise the issue because they did not first object to instruction 11. This a problematic argument where, as here, both instruction 11 and the “most injurious use” instruction are required to fully state the law for the jury.

Instructions 5 and 11 correctly state the law, so the Parksers would not have cause to object. But they are not a complete statement of the law. Since the use of an easement may change, and the easement taken includes rights not intended to be exercised by the Utilities under their initial construction plan, the Jury must be instructed to consider what uses are reasonably possible in the future and give weight to them when determining value. Neither instruction 5 nor instruction 11 directs them to do this.

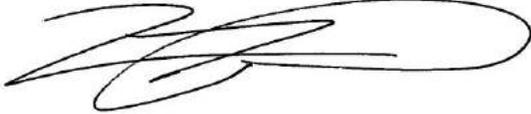
Because the future exercise of any of the rights to install guy wires, or counterpoises, or anything else that would physically occupy land beyond those towers and foundations initially described to the jury would probably reduce the value of the remainder parcel, the Jury’s failure to do so very probably produced an incorrect valuation for the taking.

## **CONCLUSION**

The contentions made by the Utilities in their brief do not directly address the issues raised on appeal. To the extent that they do, they fail to demonstrate that, as a

matter of law, a right of public use exists in the property they would take, and fail to demonstrate constitutional necessity for a perpetual easement when the public's right of use is not perpetual.

Too, those arguments fail to demonstrate why taking rights which the Utilities do not actually intend to exercise is not an abuse of discretion, nor why the easements taken must be perpetual rather than limited to either 99 years, or to the duration of the public's right to use it.

Because of this, the Court should and vacate the judgments of the trial court 

If any such right of use does exist, the duration of the taking should be limited to the duration of the public use.

In addition, since necessity permits the use of a 99 year easement at some points along the proposed line, the Court should limit the duration of any easement taken elsewhere for substantially the same use to the same 99 years.

Finally, because just compensation must be based on the rights taken, not the project proposed, if any taking is permitted a new trial should be ordered at which the jury is instructed to consider the most injurious use reasonably possible for the rights taken.

Respectfully submitted this 10<sup>th</sup> day of



N. Bob Pesall  
Attorney for the Defendants/Appellants  
P.O. Box 23  
Flandreau, SD 57028  
(605) 573-0274

CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. 15-26A-66(b), the undersigned attorney certifies that the foregoing brief complies with the statutory font, character, and volume limitations, containing 3,678 words and 17,956 characters.

Dated this 10<sup>th</sup> day of July, 2017.

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N. Bob Pesall, Attorney

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing **Appellants' Reply Brief** v [REDACTED] electronic mail this 10<sup>th</sup> day of July, 2017.



Thomas Welk, Attorney for the Utili  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
TJWelk@boycelaw.com

And that two true and correct copies of the same were further served upon the following individuals by first class mail on the 10<sup>th</sup> day of July, 2017:

Jeff Schiley  
14944 428A Ave.  
Bristol, SD 57219

WEB Water Development Association. Inc.  
38456 W. US Hwy. 12  
P.O. Box 51  
Aberdeen, SD 57402

Kermit Parks  
42783 146<sup>th</sup> St.  
Webster, SD 57274

Estate of Orion Parks  
Suree Parks, Personal Representative  
42765 147<sup>th</sup> St.

Bristol, SD 57219

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N. Bob Pesall, Attorney