IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

App. No. 30317 and 30338

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PATRICIA K. DEEG TRUST,
Plaintiff and Appellant,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR,
Plaintiff's and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Filed: 8/28/2023 4:38 PM CST Supreme Court, State of South Dakota #30317

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appeal from the Third Judicial Circuit, Beadle and Lake County
Honorable Patrick Pardy
and Fifth Judicial Circuit, Brown, Edmunds, McPherson, and Spink County
Honorable Richard A. Sommers
Notice of Appeal filed April 28, 2023

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JURISDICTIONAL STATEMENT

This is a consolidation of two appeals, Appeal # 30317 and # 30338. These are appeals of seven circuit court cases that were consolidated into two, one in the Third Judicial Circuit (Appeal 30317) and one in the Fifth Judicial Circuit (Appeal 30338). Pleadings amongst the various counties were identical within each Circuit. For the convenience of the Court, references to the settled record in the Third Circuit will be to 39CIV22-000064 (Lake County) and references to the settled record in the Fifth Circuit will be to 22CIV22-000020 (Edmunds County). All references to the Third Circuit settled record will be referenced herein as (SR3_____) and references to the Fifth Circuit settled record will be referenced herein as (SR5____).

Appeal # 30317 is an appeal of a Memorandum Decision dated December 28, 2023 (SR3 1274), a Memorandum Decision dated March 8, 2023 (SR3 2251) and a final Order dated March 15, 2023 (SR3 2261). Notice of Entry of Order was given on March 16, 2023 (SR3 2263). Appeal was taken pursuant to SDCL § 15-26A-3(1) on April 14, 2023 (SR3 2316).

Appeal # 30338 is an appeal of an Order granting partial summary judgment dated March 28, 2023 (SR5 2290), a Letter Decision dated April 19, 2023 (SR5 2345) and a final Order dated April 21, 2023. (SR5 2347). Notice of Entry of Order was given on April 21, 2023. (SR5 2355). Appeal was taken pursuant to SDCL § 15-26A-3(1) on April 28, 2023.

STATEMENT OF THE ISSUES PRESENTED

A. Did the trial courts err in finding that SDCL § 21-35-31 is not a taking of private property that violates the state and federal constitutions?

The trial courts granted SCS's Motion for Summary Judgment finding SDCL § 21-35-31 is not a taking of private property in violation of the state and federal constitutions.

- S.D. CONST. art. VI, § 13
- S.D. CONST. art. XVII, § 18
- U.S. CONST. amend. V
- *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)
- *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982)

B. Did the trial courts err in finding SDCL § 21-35-31 affords Landowners adequate due process of law?

The trial courts granted SCS's Motion for Summary Judgment finding SDCL § 21-35-31 does not violate Landowners' procedural due process rights.

- S.D. CONST. art. VI, § 2
- U.S. CONST. amend. XIV
- *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905
- *Hollander v. Douglas Co.*, 2000 SD 159, 620 N.W.2d 181

C. Did the trial courts err in granting summary judgment on Landowner's claim that SCS is not a common carrier vested with the power of eminent domain?

The trial courts granted SCS's Motion for Summary Judgment finding SCS was a common carrier under SDCL § 49-7-11.

- SDCL § 49-7-11
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913)
- *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)
- *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012)

D. Did the Third Circuit err by making certain factual findings related to SCS's status as a common carrier sua sponte which were adopted by the Fifth Circuit?

The Third Circuit ruled sua sponte that SCS met the definition of a common carrier under South Dakota law and that the CO2 SCS intends to transfer is a commodity within the meaning of SDCL § 49-7-11. The Fifth Circuit adopted that ruling within its decision granting summary judgment in favor of SCS.

- SDCL § 49-7-11
- *Brown v. Hanson*, 2007 SD 134, 743 N.W.2d 677
- *Leonhardt v. Leonhardt*, 2012 SD 71, 822 N.W.2d 714

E. Did the trial courts err in finding SCS complied with all requirements of SDCL § 21-35-31(2)?

The trial courts granted SCS's Motion for Summary Judgment finding that SCS complied with the statutory requirements contained in SDCL § 21-35-31.

- SDCL § 21-35-31(2)
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, (1913)
- *Lewis & Clark Rural Water Systems, Inc. v. Seeba*, 2006 SD 7, 709 N.W.2d 824

F. Did the trial courts err by failing to require SCS to establish that its bond was sufficient to account for any and all damages caused to Landowners' properties as a result of the demanded examinations and surveys.

The lower courts did not require SCS to provide any evidence regarding the sufficiency of its alleged bond required by SDCL § 21-35-31(3).

- SDCL § 21-35-31(3)
- S.D. CONST. art. XVII, § 18
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, (1913)

G. Did the trial courts err in denying Landowners' motion to continue summary judgment proceedings for discovery purposed pursuant to SDCL § 15-6-56(f)?

The lower courts denied Landowners' Motion to continue summary judgment proceedings for discovery purposes.

- SDCL § 15-6-56(f)
- *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, 848 N.W.2d 273
- *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39, 766 N.W.2d 510

H. Did the trial courts err in finding SDCL § 21-35-31 authorizes the scope of survey and examination sought by SCS?

The lower courts granted SCS's Motion for Summary Judgment on SCS's request for injunctive relief authorizing subsurface survey and examination activities.

- SDCL § 21-35-31
- S.D. CONST. art. VI, § 13
- *State v. Bowers*, 2018 SD 50, 915 N.W.2d 161
- *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 322 S.E.2d 887 (1984)

STATEMENT OF THE CASE AND FACTS

This is a consolidation of two appeals. Appeal #30317 contains two consolidated cases in the Third Judicial Circuit, the Honorable Patrick Pardy presiding. Appeal #30338 contains five consolidated cases in the Fifth Judicial Circuit, the Honorable Richard Sommers presiding. All cases involved the same facts, legal analysis, and discovery disputes. SCS Carbon Transport, LLC ("SCS") was on one side of each case and various South Dakota landowners ("Landowners") were on the other.

Beginning in early June 2022, Landowners received letters from SCS claiming authority to enter their land without consent pursuant to SDCL § 21-35-31. (SR3 25) (SR5 29). SCS stated it would enter Landowner's property on the dates shown in the letters, with or without Landowners' consent. *Id.* Landowners did not consent and sought judicial relief. (SR3 3) (SR5 2).

SCS' proposed pipeline is supposed

SCS offered Landowners no compensation for the entry onto Landowner's property (SR3 25) (SR5 29) and SDCL § 21-35-31 does not afford Landowner's their Constitutional right to have their compensation determined by jury prior to the taking.

In October 2022, SCS filed a motion for protective order (SR3 122) (SR5 146) and Landowners filed a motion to compel discovery. (SR3 206) (SR5 270). On December 28, 2022, the Third Circuit Court issued a Memorandum Decision based only on briefs, granting SCS motion for protective order. (SR3 1274). The Court ruled sua sponte that

SCS is shipping a commodity for a fee and stated the

Id. SCS moved for summary judgment in both circuits shortly thereafter. (SR3 1310) (SR5 1377). The Fifth Circuit eventually also granted SCS' motion for protective order (1875), but did not do so until March 3, 2023, days after Landowners Brief in Response to SCS' Motion for Summary Judgment was due on February 28, 2023. (SR5 1843).

SCS requested the following summary judgment relief: (1) a declaration that it has the right to access Landowners' property to conduct examinations and surveys without Landowners' consent, pursuant to SDCL § 21-35-31; and (2) an injunction preventing Landowners from denying SCS such access. (SR3 1310) (SR5 1377). Both Courts granted SCS' motions. (SR3 2251, 2261) (SR5 2290, 2345, 2347). Landowners appeal on constitutional and procedural grounds. Landowners also appeal the Courts' ruling that the undisputed facts permitted summary judgment regarding SCS' status as a common carrier and whether SCS complied with SDCL § 21-35-31.

SCS has not provided any evidence it is transporting a commodity for hire, as required of a common carrier.

Even if SCS is a common carrier, the trial Courts did not require SCS to show it complied with SDCL § 21-35-31. SCS never sent notice to Landowner's tenants or included its PUC filing in any letters to Landowners as required (SR3 25) (SR5 29) and the trial Courts failed to address Landowners' argument that SCS' 45-day window to perform its work does not comply with SDCL § 21-35-31. (SR3 2251, 2261) (SR5 2290, 2345, 2347).

ARGUMENT

I. The trial courts erred by finding SDCL § 21-35-31 is not a taking within the meaning of the Fifth Amendment to the United States Constitution and the South Dakota Constitution, art. VI, § 13.

a. Standard of review

Summary judgment decisions are reviewed under a de novo standard of review. *Smith Angus Ranch, Inc. v. Hurst*, 2021 SD 40, ¶ 13, 962 N.W.2d 626, 629. "Further, an alleged violation of a constitutional right is 'an issue of law to be reviewed under the de novo standard of review.'" *Rupert v. City of Rapid City*, 2013 SD 13, ¶ 8, 827 N.W.2d 55, 60 (citing *Benson v. State*, 2006 SD 10, ¶ 12, 710 N.W.2d 131, 145).

There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it clearly, palpably, and plainly appears that the statute violates a provision of the Constitution. *Oien v. City of Sioux Falls*, 393 N.W.2d 286, 289 (S.D. 1986). Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision. *Id.* at 69. *Sedlacek v. S. Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989).

b. SDCL § 21-35-31 effects a per se physical taking of the right to exclude.

This case concerns the seizure of one of the most treasured sticks in the bundle of rights that comprise private property ownership: the right to enjoy property to the exclusion of all others. The trial courts in both the Third and Fifth Circuits erred as a matter of law by granting Appellee's Motion for Summary Judgment and concluding SDCL § 21-35-31 is not a taking or damaging of private property rights.

The Fifth Amendment to the United States Constitution ends with the Takings Clause: "nor shall private property be taken for public use without just compensation." South Dakota's Takings Clause, found in S.D. CONST. art. VI, § 13, directs that "[p]rivate property shall not be taken for public use, or damaged, without just compensation…"

The Takings Clause is obviously implicated when a government expressly exercises its eminent domain powers and condemns private property. However, the Takings Clause has also been interpreted to require just compensation when a government action affects a private property interest to a degree that an *implicit taking* has occurred. "Where a state or an agency thereof acting in a sovereign capacity takes or damages private property for public use without exercising the power of eminent domain, it cannot evade the constitutional provision which guarantees the right to compensation but will be obligated to pay the same as if it had proceeded under that power." *Darnall v. State*, 79 S.D. 59, 65, 108 N.W.2d 201, 204 (1961).

There are four recognized types of implicit takings, 1) a per se physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982), 2) a per se total regulatory taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), 3) a regulatory taking under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978), and 4) a land-use exaction violating the standards as set forth in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).

For the purposes of this appeal, the Court must determine whether SDCL § 21-35-31 is per se physical taking of Landowners' right to exclude under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). A per se physical taking occurs when the government or its designee occupies or invades a private property right and thus takes a landowner's fundamental right to exclude. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). "These sorts of physical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021).

In *Loretto*, a New York City landlord sued a cable television company. He claimed that installation of cable facilities upon the landlord's property pursuant to New York law requiring a landlord to permit installation of such facilities on rental properties amount to a constitutionally compensable taking. *Id.* Prior to *Loretto*, whether a law or regulation rose to a taking within the meaning of the Fifth Amendment was determined using the "essentially ad hoc factual inquiry" described in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 8 S. Ct. 2646, 57 L.Ed.2d 631 (1978). Under *Penn Central*, a law alleged as a taking is scrutinized for its economic impact on property rights, especially the degree of interference with investment-backed expectations. The character of the government action is relevant, and a taking may more readily be found when the interference with property can be characterized as a physical invasion. *Id.*, at 124, 98 S. Ct. at 2659.

Loretto established a new per se rule: "when the character of the government action is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419–20, 102 S. Ct. 3164, 3167–68, 73 L. Ed. 2d 868 (1982). "Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property" *Id.*

In 2021, the Supreme Court broadened *Loretto's* per se physical takings rule to include government invasion of private property that are only temporary or intermittent. *Cedar Point,* 141 S. Ct. 2063. The *Cedar Point* Court held that a 40-year-old California regulation that gave union organizers limited access to agricultural worksites (three hours a day, 120 days a year) amounted to a taking. 141 S. Ct. at 2069. The Court held that "[t]he regulation appropriates a right to physically invade the growers' property- to literally 'take access,'…it is therefore a *per se* taking under our precedents." 141 S. Ct. at 2074.

Following *Cedar Point,* per se physical takings were no longer limited to permanent physical occupations. "The duration of an appropriation—just like the size of an appropriation, bears only on the amount of compensation." *Cedar Point Nursery,* 141 S. Ct. at 2074 (citing *United States v. Dow*, 357 U.S. 17, 26, 78 S. Ct. 1039, 2 L.Ed.2d 1109 (1958), and *Loretto*, 458 U.S. at 436–437, 102 S. Ct. 3164). Frequency of the invasion is also irrelevant to the takings analysis. "Physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2075. "The fact that a right

to take access is exercised only from time to time does not make it any less a physical taking." *Id.*

The *Cedar Point* decision centered on the appropriation of an owner's right to exclude. As the Court stated, "[w]e cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings…" *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2077 (internal citations omitted).

SDCL § 21-35-31 is a per se physical taking of Landowners' right to exclude. The statute clearly appropriates a landowner's fundamental right to exclude all others and redistributes that right to "person[s] vested with authority to take private property for public use." SDCL § 21-35-31. With that stick from the bundle of rights in hand, "[t]he person or the person's agents and officers may enter the private property for the purpose of the examination and survey" where permission has been denied. *Id.* Under the clear precedent established by the United States Supreme Court, namely under *Loretto* and *Cedar Point*, SDCL § 21-35-31 constitutes a taking of private property within the meaning of the Fifth Amendment and the South Dakota Constitution, art. VI, § 13.

c. SDCL § 21-35-31 is unconstitutional for its failure to require just compensation and failure to require just compensation be determined by a jury.

The State and Federal Takings Clauses prohibit the government and those who have been conferred with the power of eminent domain from taking private property without just compensation. U.S. CONST., amend. V, and S.D. CONST., art. VI, § 13. But that is precisely what the plain language of SDCL § 21-35-31 authorizes. SDCL § 21-35-31 requires only that a prospective condemnor acting pursuant to the statute "[m]ake a

payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry." SDCL § 21-35-31 contains no provision requiring compensation for the entry of private property against the owner's will. The Legislature's failure to require just compensation for the right to enter, survey, and examine renders the statute unconstitutional on its face, and the statute should be invalidated.

The absence of just compensation for the right to invade private property is not SDCL § 21-35-31's only constitutional deficiency. A landowner has an absolute right to have the amount of just compensation determined by a jury and to be paid that amount prior to the acquisition of any rights. S.D. CONST. art. XVII, § 18 protects the citizen from a condemning authority naming its own price for the land it is taking. The Constitutional provision reads:

> Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

The legislature is expressly prohibited from depriving a landowner whose property is being taken of his or her right to a jury trial. Pursuant to this constitutional right, compensation must be determined and then paid or secured prior to entry by the condemnor. The South Dakota Supreme Court has repeatedly affirmed these

fundamental protections. *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 SD 7, ¶ 58, 709 N.W.2d 824, 839, *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 SD 14, ¶ 2, 675 N.W.2d 739, 740. These are basic tenets of South Dakota takings law, yet they are omitted from SDCL § 21-35-31.

By failing to provide just compensation for the right to enter, survey, and examine private property and an opportunity to have the amount of just compensation for those rights determined by a jury prior to entry, the Legislature has authorized a taking of private property which clearly, plainly, and palpably violates the South Dakota and United States Constitutions.

d. SDCL § 21-35-31 does not satisfy any exception to the per se physical takings rule.

Cedar Point Nursery v. Hassid recognized three narrow exceptions by which a government could avoid takings liability for a physical invasion of private property.

First, the Court differentiates between authorized actions, such as a statute authorizing an invasion, and unauthorized actions, such as a trespass. *Cedar Point Nursery*, 141 S. Ct. at 2078. An occasional invasion absent any authority is considered a trespass, not a taking. *Id.* A Landowner does not have a Fifth Amendment takings claim if a representative of the government mistakenly enters upon their property. Second, entry pursuant to longstanding background principles upon property including pre-existing limitations upon the owner's title or common law privileges to enter private property would not be considered takings. *Id.* And finally, the Court conceded that reasonable entry for purposes of a health and safety inspection as a condition to a permit, license, or registration would not constitute a taking. *Id.*

At issue is whether pre-condemnation survey for common carrier pipelines is a longstanding background restriction upon Landowners' properties. Pre-condemnation survey is not a background restriction upon property because it is neither a pre-existing limitation on Landowner's title nor is it a common law privilege to enter recognized within South Dakota.

i. Not a pre-existing limitation on title

Longstanding background principles are not defined within *Cedar Point;* however, earlier U.S. Supreme Court cases explain that background principles are derived from state law. "[T]he question [of whether a property law concept is a background principle] must turn, in accord with this Court's 'takings' jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 1004, 112 S. Ct. 2886, 2888, 120 L. Ed. 2d 798 (1992). A background principle upon private property must be consistent "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas,* 112 S. Ct. at 2900. For a privilege of entry to be a limitation on an owner's title, the privilege must be "of those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo v. Rhode Island,* 533 U.S. 606, 630, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001).

Pre-condemnation survey is not a part of South Dakota's legal tradition for several reasons. First, the statute in question, SDCL § 21-35-31, was only adopted in 2016. While there are earlier South Dakota statutes authorizing pre-condemnation survey, none of them apply to common carrier pipelines, which have only been recognized

entities in South Dakota since 1980. The passage of a statute alone is insufficient to create a background restriction upon property. "A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo*, 121 S. Ct. at 2464. Thus, the earlier pre-condemnation survey authorizations alone do not qualify pre-condemnation survey as a background restriction upon private property in South Dakota.

Additionally, there is not a single opinion from this Court declaring pre-condemnation survey to be a background restriction upon South Dakota land, let alone a body of jurisprudence that would put a reasonable landowner on notice that they take title subject to that encumbrance. There is no indication that a prospective condemnor has ever invoked a statutory privilege to perform a pre-condemnation survey in South Dakota.

Finally, pre-condemnation survey access does not fall within a citizens' historic understanding regarding the State's power over the 'bundle of rights' that an owner acquires when they take title to property. *Lucas*, 112 S. Ct. at 2087-2088. No South Dakota landowner expects that they took their property servient to a condemnor's right to enter their land against their will for survey and examination activities.

There are South Dakota examples of longstanding third-party privileges to enter private property. Examples include access to retrieve a down bird while road hunting, (*see* SDCL § 41-9-1.1, and *Benson v. State*, 2006 SD 8, 710 N.W.2d 131) or the ability of recreationalists to access waters of the state below the high-water mark (*see* SDCL § 41-23-5, and *Duerre v. Helper*, 2017 SD 8, 892 N.W.2d 209). Those rights of access have been reviewed by this Court and found to be consistent with South Dakota's legal traditions and not takings.

Limited entry for game retrieval and recreation below the high-water mark are of those common, shared understandings of permissible limitations derived from South Dakota's legal tradition. Entry for those purposes generally comports with landowner's reasonable understanding "of the State's power over the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). The same cannot be said for pre-condemnation entry, survey, and examination by a private corporation.

SDCL § 21-35-31 clearly is not a part of South Dakota's property law tradition and therefore is not a background restriction absolving takings liability under *Lucas* and its progeny.

ii. No common law privilege to enter

No common law privilege to pre-condemnation survey exists in South Dakota. "'The common law' is not a borderless body of legal principles, articulable by a court in any jurisdiction; rather each jurisdiction has its own common law. Thus, the common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state." 15A Am. Jur. 2d Common Law § 3 (citing *Purdue Pharma L.P. v. Bos. Globe Life Scis. Media, LLC*, No. 2016-CA-000710-MR, 2018 WL 6580507, at *3 (Ky. Ct. App. Dec. 14, 2018), and *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012)).

The state specific application of common law rings especially true in the context of property rights, which are inherently creatures of state law. South Dakota has no published case law considering pre-condemnation survey or examination against the will of the owner, much less a case defining such activity as a part of our common law.

While *Cedar Point* does not define background principles, it does provide an explicit, yet non exhaustive, list of examples of certain common law rights of entry including 1) the event of public and private necessity; 2) the abatement of nuisances; and 3) enforcement of criminal law in certain circumstances. *Cedar Point,* 141 S. Ct. at 2079. These examples are all centered around public necessity and prevention of public harm. They are also reasons for which a reasonable landowner could expect the government to invade their property under certain circumstances. Consistent with a "citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 1004, 112 S. Ct. 2886, 2888, 120 L. Ed. 2d 798 (1992)).

Notably absent from *Cedar Point's* list is any common law privilege of entry that even remotely resembles a private company's right of entry for pre-condemnation planning purposes. *Id.* The entry authorized by SDCL § 21-35-31 is far closer to the union organizers' right of entry declared a taking in *Cedar Point,* which had been the law of California since 1976. Cal. Code Regs. tit. 8, § 20900. Both California's union access law and SDCL § 21-35-31 appropriate a right that would be in the possession of the landowner but for the regulation, the owner's fundamental right to exclude.

SDCL § 21-35-31 effects a per se physical taking of an owner's right to exclude without just compensation and without the right to a jury trial on just compensation. Entry upon private property for the purposes enumerated in the statute are not background restrictions upon title or common law privileges to enter under South Dakota law. The statute violates the State and Federal constitutions and should be declared invalid by this Court.

II. The trial courts erred as a matter of law by concluding SDCL § 21-35-31 provided adequate procedural due process.

SDCL § 21-35-31 deprives landowners of their right to exclude without due process of law. Under the Fourteenth Amendment to the United States Constitution, as well as Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law."

Landowners have a protected property interest in the right to use their property to the exclusion of others. That right is derived from state statute. SDCL § 43-2-1. To establish a procedural due process violation, a plaintiff must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law. *Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp.*, 2014 SD 98, 857 N.W.2d 865.

For purposes of procedural due process, property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905. Due process guarantees that notice and the right to be heard are granted in a "meaningful time and in a meaningful manner." *Hollander v. Douglas Co.*, 2000 SD 159, ¶ 17, 620 N.W.2d 181, 186 (citations omitted). Such guarantees are fundamental. *City of Pierre v. Blackwell*, 2001 SD 127, ¶ 13, 635 N.W.2d 581, 585.

Determining what process is due in a particular case requires consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the

government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905.

The property right that will be affected by the action is one of the most important rights a citizen has, the right to use private property to the exclusion of others. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435–36. The right to own and protect property is an inherent right bestowed upon all citizens in our State's Bill of Rights. Article VI, § 1 of the South Dakota Constitution, which enumerates "all men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness."

The risk of an erroneous deprivation of private property rights through the procedures authorized in SDCL §21-35-31 is significant. SDCL § 21-35-31 requires only 30 days written notice of the entry. The statute provides no mechanism for challenging the permit applicant's right to enter under the statute. An example of adequate procedures for the seizure of private property is already enumerated in SDCL Chapter 21-35. Chapter 21-35 requires a condemnor to file and serve a Condemnation Petition (SDCL § 21-35-2), serve a summons (SDCL § 21-35-9), permit a condemnee to demand a hearing on Petitioner's right to take (SDCL § 21-35-10.1), and directs that just compensation for the taking and damages be determined by a jury trial (SDCL § 21-35-15). These procedural safeguards exist to ensure due process when a property right is being taken. There is no

compelling reason to demand anything less for entry, survey, and examination prior to commencement of formal condemnation proceedings.

Finally, the court must consider the permit applicant's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. A survey and examination are not required to obtain a permit from the South Dakota Public Utilities Commission. Pre-condemnation survey is merely a convenience for prospective condemnors. The statute expressly "does not apply to the state or its political subdivisions" who are still required to formally condemn temporary access easements prior to entry. SDCL § 21-35-31. The state and its political subdivisions have been able to successfully condemn right-of-way without a statutorily enumerated right to pre-condemnation survey, as did common carrier pipelines prior to 2016. Further procedural safeguards would not impact SCS's interest in any meaningful way.

For all of the reasons set forth above, SDCL § 21-35-31 violates the due process clause of the State and Federal Constitutions and should be declared invalid by this Court.

III. The trial courts erred by entering summary judgment concluding SCS was a common carrier vested with the power of eminent domain.

On appeal, the circuit court's entry of summary judgment is viewed under a de novo standard with no deference to the circuit court's decision. *Smith Angus Ranch, Inc. v. Hurst*, 2021 SD 40, ¶ 13, 962 N.W.2d 626, 629. The Court's "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Id.*

The trial courts committed reversible error by applying incorrect legal standards and by entering summary judgment concluding that SCS is a common carrier pursuant to SDCL § 49-7-11 vested with the power of eminent domain because material facts were in dispute.

a. Strict compliance with the elements of common carriage was required.

These cases concern SCS' authority to enter, survey, and examine Landowners' properties against their will pursuant to SDCL § 21-35-31. A prerequisite for a person or corporation claiming authority under SDCL § 21-35-31 is the "authority to take private property for public use…" SDCL § 21-35-31. SCS alleges its eminent domain authority is derived from SDCL § 49-7-13, which grants eminent domain power to common carrier pipelines, and SDCL § 49-2-12, which grants eminent domain power to common carriers generally. Landowner's challenge whether SCS meets the requisite conditions to possess eminent domain authority.

The Legislature may impose conditions when delegating the State's eminent domain power to private corporations. "The power of eminent domain being a power which is possessed by [a corporation] solely by being delegated to such corporation by the sovereign power of the state, its existence depends upon a strict compliance with each and every condition prescribed by such sovereign power." *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913). "[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. "The intent of a statute is determined from what the Legislature said, rather than

what we think it should have said." *Engesser v. Young*, 2014 SD 81, ¶ 22 n.1, 856 N.W.2d 471, 478 n.1.

A condition of eminent domain authority for common carrier pipelines is compliance with the enacted definition of such entity. SDCL § 49-7-11 defines a common carrier pipeline as "all pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire." The trial courts failed to require strict compliance with the directives of the Legislature, namely the requirements that SCS transport a "commodity" and do so "for hire."

b. SCS is not providing transportation services to the public "for hire".

The trial courts erred by declaring SCS a common carrier without considering whether they were providing transportation services to the public "for hire," a *sine qua non* of common carrier status and authority to condemn private property in South Dakota. The Legislature's mandate that transportation services be offered to the public for hire is clear and purposeful.

"For hire" is not defined in SDCL § 49-7-11; however, "hire" is not an ambiguous term. "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 SD 50, ¶ 16, 915 N.W.2d 161, 166. "Hire" as a verb is defined as "to purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation" *Hire*, Black's Law Dictionary (11th ed. 2019). By any definition, carrying for the public for hire is a condition that SCS must satisfy to be deemed a common carrier vested with the power of eminent domain.

"[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. The purpose of the Legislature's directive can be discerned by examining the relationship between common carriers and the public. Because common carriers are cloaked with the immense power of taking private property for public use, they have certain obligations to the public generally. Common carriers have a "duty to devote itself to public service without discrimination" (*Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)) and to carry "persons or goods belonging to others for hire." *Ciaccio v. New Orleans Public Belt R. R.*, 285 F. Supp. 373 (E.D. LA 1968). "Because a common carrier undertakes to carry for all people indifferently it may be regarded, in some respects, as a public servant or as having a quasi-public character. Hence, one performing transportation service for only oneself is not a common carrier." 13 Am. Jur. 2d Carriers § 5 (citing *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)("Harms' dedication of his equipment to first serve his own needs and those of his customers is in contravention of a common carrier's duty to devote itself to public service without discrimination.")).

The statutory condition that a common carrier pipeline provide transportation services to the public "for hire" implies that the carrier transport a commodity for a third party who retains ownership of that commodity. The third party must *hire* the company to provide transportation services which ensures the pipeline is merely a transportation conduit rather than the point where title is transferred. This is true for a traditional common carrier like a railroad, which may be *hired* by any member of the public to transport persons or freight.

The lower courts did not demand strict compliance with the "for hire" condition, and instead broadly considered whether SCS benefited by transporting and disposing of CO2.

On December 28, 2022, the Third Circuit ruled sua sponte that "SCS is shipping carbon dioxide, belonging to the ethanol plans [sic], for a fee" and "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists" (SR3 1276-1277). This holding is wholly inconsistent with the requirement that SCS offer the public transportation services for hire. Under the plain definition of "hire," the transfer of value from the hirer to the hired are certainly relevant and determinative of whether a hiring has occurred.

In addition, SDCL § 49-7-11 does not require a common carrier offer transportation service to the public *for a fee*; it requires the purported common carrier to engage in the business of transporting "for hire." This is not an issue of semantics. The erroneous application of the statute led the lower courts to review the business relationship between SCS and the ethanol plants to permit a much broader exchange of value than the statute requires. Where a fee is a noun that could possibly be construed as an ancillary benefit like a federal tax credit, the only reasonable interpretation of "for

hire" is payment from the customer to the carrier. The Fifth Circuit committed a similar error by "adopt[ing] the reasoning of Judge Pardy" and held "[t]hat SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value." (SR5 2346).

SDCL § 49-7-11 does not define a common carrier pipeline as one who transports commodities for a federal tax credit or an exchange of value. The Legislature expressly and purposefully required that common carrier pipelines ship "for hire". Neither trial court made a finding on that critical element. By applying the incorrect legal standard, the trial courts supplanted their own definition of common carrier with the definition enacted by the Legislature and circumvented the legislatively prescribed condition required for SCS to possess eminent domain authority. These erroneous applications of the law require reversal.

c. There were disputed facts material to the "for hire" question.

In addition to applying the incorrect legal standard in their common carrier analysis, the trial courts erred by granting summary judgment when material facts were clearly in dispute. "It is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity." *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996). Whether SCS is engaged in the business of carrying for hire was squarely in dispute at summary judgment. The available evidence at summary judgment presented a glaring contradiction between SCS' alleged business enterprise and its actual business enterprise.

In the Third Circuit, SCS did not submit any Statement of Undisputed Material Fact or any evidence on the "for hire" prong. SCS relied entirely upon the trial court's earlier sua sponte findings in its Brief in Support of its Motion for Summary Judgment. (SR3 1322). In the Fifth Circuit, SCS submitted proposed Undisputed Material Fact 5: "SCS is offering its CO2-transportation services to or for the public for hire." (SR5 1385). The totality of SCS's evidence in support of this material fact were six statements submitted in the Affidavit of James Pirolli. (SR5 1463). These statements are devoid of reference to any compensation, value, or remuneration of any kind from any of its affiliate CO2 emitters for the shipment of CO2.

In contrast to SCS's silence in the Third Circuit and the unsupported affidavit statements put forth in the Fifth Circuit, Landowners submitted four redacted Carbon Dioxide Offtake Agreements and two Letters of Intent between SCS and its alleged shipping customers. (SR3 1693-1942) (SR5 2026-2275). The Offtake Agreements and Letters of Intent were provided in discovery and were represented as the entire body of agreements between SCS and its alleged customers in South Dakota.

"The nature of a carrier is determined by its method of operation rather than by what it represents it does." 13 Am. Jur. 2d Carriers § 5 (citing *McDonald v. Irby*, 74 Wash 2d 431, 445 P.2d 192 (1968), and *Kvalheim v. Horace Mann*

Life Ins. Co., 219 N.W.2d 533 (Iowa 1974)).

Transporting for the public "for hire" also requires shipping for all indiscriminately. Landowners argued at Summary Judgment that SCS's relentless pursuit to keep its contractual information private, including its rates and terms of shipment, directly contradicts its purported common carrier status. Crude oil and natural gas pipelines are generally considered common carriers vested with the power of eminent domain. They are regulated by the Federal Energy Regulatory Commission ("FERC") through either the Interstate Commerce Act (crude oil pipelines) or the Natural Gas Act (gas pipelines). CFR Title 18. Oil pipelines and gas pipelines are required to file their proposed rate schedules, proposed tariffs (terms of transportation), and service agreements with FERC for approval. 18 C.F.R. §§ 154.102 and 341.1. This information is readily available to the public on the FERC website, etariff.ferc.gov. Railroads experience a similar disclosure and rate setting process through the Surface Transportation Board. 49 C.F.R. Chapter X, Subchapter D. Retail distribution power and natural gas companies are subject to the same requirements through the South Dakota Public Utilities Commission. SDCL Chapter 49-34A. Information pertaining to state regulated utilities is available publicly on the PUC's website.

A common thread connecting utilities and common carriers vested with the power of eminent domain is their obligation to disclose certain financial information in support

of their rates and tariffs. However, SCS argued for the power of the sovereign without responsibility to the public.

SCS maintained, and the lower courts agreed, that its contracts, rates, and terms of shipment should be sealed from public inspection and that within the limited disclosures it made at the trial court level it should be able to redact information pertaining

It is seeking status as a common carrier and the authority to condemn South Dakota land. The fact that SCS's contracts, rates, and terms of shipment are not open to the public is evidence that genuinely disputes whether SCS is offering transportation services for hire.

The trial courts erred by granting summary judgment when there were genuine issues of material fact as to whether SCS intends to provide transportation services for hire. This case should be reversed and remanded for further proceedings on SCS's status as a common carrier.

d. SCS is not shipping a "commodity".

An additional condition placed upon common carrier pipelines vested with the power of eminent domain is the transportation of a "commodity". SDCL § 49-7-11. The trial courts erred by finding "carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value." (SR3 1276-1277) (SR5 2346).

The term "commodity" is not defined in South Dakota law, thus the plain and ordinary meaning must be applied. The trial courts properly reasoned "[a]ccording to Black's Law Dictionary, a commodity is defined as 'an article of trade or commerce' or 'an economic good, esp. a raw material or an agricultural product.' *Commodity*, Black's Law Dictionary (11th ed. 2019)." *Id.* The trial courts utilized Black's Law Dictionary to create an ascertainable standard for qualifying as a commodity, an article of trade or commerce or economic good. The trial courts then abandoned that standard and found CO2 to be a commodity "regardless of the form of compensation, terms of payment, or transfer of value." (SR3 1276-1277).

Following the trial courts' decision to its logical conclusion, any substance that could be placed in a pipeline qualifies as a commodity for purposes of SDCL § 49-7-11. This application violates the Legislature's express directive that common carrier status is reserved for those pipelines transporting commodities. The Legislature did not use a generic term like product or substance, which would encompass anything capable of being moved by pipeline, including waste. The Legislature expressly used the term "commodity," implying there must be a commercial value or application of the product being transported.

The trial courts erred by broadening the definition of "commodity" to include waste. Landowners do not dispute that there are circumstances in which CO2 can be a commodity. However, the undisputed facts presented at summary judgment establish that SCS's pipeline is being built exclusively for the purpose of "permanently" sequestering at least 12 million metric tons of CO2 per year in North Dakota. (SR3 1390) (SR5 1493). Pursuant to 26 U.S.C. § 45Q, the federal law authorizing the $85 per metric ton

government subsidy in the form of tax credits, SCS only qualifies for the credit if the product is being "disposed" of permanently. 26 U.S.C. § 45Q(a)(1)(b). There is no definition of commodity that includes a substance destined for permanent disposal. While aluminum cans may be an article of commerce if recycled, they are not a commodity if loaded on a garbage truck destined for a landfill.

The trial courts failed to apply the plain language of SDCL § 49-7-11 and failed to require strict compliance with the condition imposed by the Legislature that common carrier pipelines transport a "commodity". This error requires reversal.

e. The Third Circuit erred by sua sponte entering summary judgment on the questions of whether SCS was transporting a commodity for hire.

"Sua sponte orders of summary judgment will be upheld only when the party against whom judgment will be entered was given sufficient notice and an adequate opportunity to demonstrate why summary judgment should not be granted." *Brown v. Hanson*, 2007 SD 134, ¶ 19, 743 N.W.2d 677, 682. "Providing the parties with adequate notice of the issues ensures that the parties have a meaningful opportunity to develop the record and present all relevant evidence to the court." *Leonhardt v. Leonhardt*, 2012 SD 71, ¶ 12, 822 N.W.2d 714, 717

On December 28, 2022, the Third Circuit issued a Memorandum Decision "on Defendant SCS Carbon Transport LLC's ("SCS") Motion for Entry of Protective Order following a Motion to Compel Discovery brought by Plaintiff Landowners ("Landowners")." (SR3 1274). The Court granted SCS' Motion for Entry of Protective Order but did not rule on Landowners noticed depositions or their other written discovery requests. (SR3 1274-1277). The trial court concluded its decision with two paragraphs that would drastically change the dynamic of the case. Sua sponte, the court disposed of

one of the primary and closely contested issues of the case, whether SCS is a common carrier under South Dakota law. (SR3 1322).

On January 13, 2023, SCS moved for summary judgment on all Landowner claims arguing in part "[t]his Court has already held that CO2 is a commodity and that SCS is transporting CO2 for hire." (SR3 1351). SCS submitted no additional evidence or argument on these issues. Landowners requested that the Court consider evidence and argument on the "commodity" and "for hire" questions in its response to SCS's Motion for Summary Judgment.

> With deference to this Court, Landowners contend that these statements were outside the scope of the question before the Court of whether to protect certain business information from the discovery process pursuant to 15-6-26(c)(7). Further, said comments were made without the benefit of landowner evidence… Landowners were not provided the opportunity to present full briefing or argument on whether the CO2 SCS intends to ship is a commodity or whether that shipment was "for hire." Landowners request that the Court consider the legal and factual arguments herein and permit reasonable discovery prior to making a formal finding on those questions. (SR3 1628).

The trial court declined Landowners' request to consider evidence and argument on those topics and relied on its prior findings when it granted summary judgment in favor of SCS on March 8, 2023. (SR3 2253). The Court affirmed its "prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31." *Id.* The Fifth Circuit did not make specific findings on the "commodity" or "for hire" questions other than to "adopt the reasoning of Judge Pardy." (SR5 2346, 2455).

Prejudice from the ruling was severe. Landowners' inability to brief and argue the issues prior to the Memorandum Decision led to an erroneous application of law. In its rush to judgment, the trial court replaced the "for hire" element of common carrier with "for a fee." The impact of this error is explained above.

SCS used the Memorandum Decision as a battering ram, moving for summary judgment just days after the decision was issued. (SR3 1310). SCS argued its status as a common carrier had been ruled upon. (SR3 1322). SCS reneged on its offer to make corporate representatives available for deposition on the "commodity" and "for hire" questions, which it had previously agreed to subject to a protective order. Based upon the findings in the Memorandum Decision, SCS rescinded the agreement despite the entry of a protective order. (SR3 2162).

Prejudice from the decision extended beyond the Third Circuit. SCS filed the Memorandum Decision as Supplemental Authority in all other circuits where disputes were pending, including the Fifth Circuit. (SR5 1070). The Memorandum Decision served as the primary support for its requested Protective Order in the Fifth Circuit (SR5 1361). SCS moved for Summary Judgment in the Fifth Circuit on February 10, 2023, before the court had ruled on the Motion for Protective Order and before the Offtake Agreements had been disclosed in that Circuit. SCS briefing relied heavily upon the Third Circuit's Memorandum Decision, which was adopted in the Fifth Circuit's decision to grant summary judgment in favor of SCS. (SR5 1414, 2346).

The Third Circuit's sua sponte entry of summary judgment on disputed material issues in this case was error. The erroneous decision was adopted by the Fifth Circuit in

error. The severe prejudice that resulted from the premature and unfair findings requires reversal.

f. A test for common carrier.

The Supreme Court of Texas has considered a case remarkably similar to the present matter in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012). In March 2008, purported common carrier pipeline company Denbury Green sued Texas Rice Land Partners, Ltd. for an injunction allowing access to land Texas Rice owned along a proposed carbon dioxide pipeline route to obtain access for pre-condemnation survey. Texas Rice resisted the surveys, arguing the pipeline was not a common carrier because it intended to ship only its own CO2. The trial court entered Summary Judgment in favor of Denbury Green and permanently enjoined Texas Rice from interfering with the pipeline's survey. *Id.* Texas's intermediate appellate court affirmed, holding a pipeline owner can conclusively acquire the right to condemn private property by declaring itself a common carrier. *Texas Rice*, 363 S.W.3d 192, 195 (Tex. 2012).

On appeal to the Texas Supreme Court, Denbury Green argued that "merely making the pipeline available for public use [was] sufficient to confer common carrier status." *Texas Rice*, 363 S.W.3d at 201. The Court disagreed and held that simply offering its services to the public without a reasonable probability that such service will be provided does not satisfy the "to or for the public for hire" element of common carriage. *Id.* Tex. Nat. Res. Code Ann. § 111.002 (West).

For purposes of determining whether a CO2 pipeline was a common carrier, the Court established the following test:

> "For a person intending to build a CO2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." 363 S.W.3d at 202.
>
> For purposes of this test, "a reasonable probability is one that is more likely than not." *Id.* at 202 n. 29. Additionally, once a landowner challenges a common-carrier status, "the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain." *Id.* at 202.

The common carrier test established in *Texas Rice* is both intuitive and consistent with South Dakota law. Like Texas, South Dakota's Constitution also restricts exercises of eminent domain to taking and damaging for a public use. S.D. CONST. art. VI, § 13 and Art. XVII, § 18. Both States judge public use on the public's right to use the improvement rather than the extent to which the public actually exercises that right. *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 729 (1913); *Hous. Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 166–67, 143 S.W.2d 79, 84 (1940). But the public's right to use must be demonstrated in some concrete way beyond mere fiat. Requiring a pipeline claiming privileges as a common carrier to establish a "reasonable probability" that the project will serve the public is not an unreasonable burden. This commonsense approach appropriately balances the constitutional rights of South Dakota landowners with the reasonable expectations of private business.

Finally, the *Texas Rice* test is consistent with the requirements of SDCL § 49-7-11, namely the requirement that the pipeline provide transportation services to the public "for hire". "A common carrier transporting gas for hire implies a customer other than the pipeline owner itself." *Texas Rice,* 363 S.W.3d at 194. The proposed test requires

evidence of an actual hiring rather than a broad claim of mutual benefit.

The *Texas Rice* common carrier test honors the clear intent of the legislature, the South Dakota Constitution, and the common law, while providing a framework for considering challenges to common carrier status. Establishing a test for common carrier status consistent with the laws of South Dakota is within the Court's purview and would provide clarity and consistency moving forward. The Court should reverse and remand for the application of this reasonable and intuitive test.

IV. The trial courts erred by finding SCS complied with the requirements of SDCL § 21-35-31.

The trial courts failed to correctly apply SDCL § 21-35-31 by finding SCS met the notice requirements for entry, survey, and examination under the statute. SCS failed to meet the plain language of SDCL § 21-35-31(2) by failing to provide notice of specific dates of entry, failing to include a copy of its permit application to the South Dakota Public Utilities Commission with its alleged notice, and failing to provide notice to tenants in possession of the subject properties. The trial courts also erred by failing to require SCS to establish the adequacy of its bond for actual damage to Landowners properties.

a. SCS failed to meet the notice requirements of SDCL § 21-35-31(2)

"The power of eminent domain being a power which is possessed by [a corporation] solely by being delegated to such corporation by the sovereign power of the state, its existence depends upon a strict compliance with each and every condition prescribed by such sovereign power." *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913).

"[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. "The intent of a statute is determined from what the Legislature said, rather than what we think it should have said." *Engesser v. Young*, 2014 SD 81, ¶ 22 n.1, 856 N.W.2d 471, 478 n.1. "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 SD 50, ¶ 16, 915 N.W.2d 161, 166.

Landowners assert that SDCL § 21-35-31 is a constitutional taking of private property. Even if this Court were to hold otherwise, the statute is in the eminent domain chapter of South Dakota Code and there are inherent constitutional underpinnings to the unwarranted entry upon private land. Strict compliance with the conditions prescribed by the Legislature is required.

SDCL § 21-35-31(2) requires a party seeking to act pursuant to the statute to "[g]ive thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property…" On June 4, 2022, Jenni Sherrill, Right of Way Supervisor in service to Summit Carbon Solutions mailed letters to Landowners intended to be written notice pursuant to SDCL § 21-35-31(2). (SR3 1504, 1507-1511) (SR5 1620-1753). SCS's June 2022 letters fail to specifically contain the expected dates of entry as required by statute. The letters initially set out a four-day window when Landowners can expect to see representatives of the company, trucks, and drilling equipment on their land. (SR3 1507) (SR5 1620). Landowner's more strenuous objection was with the additional statement that work may take place over a stretch of

"45-days following the 30-day written notice period that is initiated by the receipt of this letter." *Id.*

The trial courts found "SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated." (SR3 2259) (SR5 2346). Landowners did not argue for perfect precision or a single date of entry. However, a 45-day window for unpermitted entry onto private property is unreasonable and clearly does not comply with the purpose of the statute, which is to provide written notice to Landowners of when they could expect strangers on their land. Landowners who would understandably want to be present during the survey and examination activities cannot be expected to standby for 45 days. The trial courts erred in determining SCS satisfied the notice requirements imposed by the Legislature.

Additionally, SCS's June 2022 letter fails to "include[e] the filing" as required by SDCL § 21-35-31(2). The letters instead rely upon on the written hyperlink to the PUC docket. The trial courts found the hyperlink to be "enough under SDCL § 21-35-31 to place Landowners on notice of the filing." (SR3 2259). The statutory burden is not upon landowner to look up the docket and find the application. The statutory burden is on the entity seeking to enter the landowner's property without permission to provide a copy of the documents. That was the Legislature's express intent and only strict compliance with that directive will suffice. The trial courts erred in finding SCS complied with this requirement.

Finally, SCS did not provide 30-day notice letters to any "tenant in possession of the property" as required by SDCL § 21-35-31(2). SDCL § 21-35-31 does not give SCS

an option to serve the owner *or* the tenant. The statute expressly requires service upon both. The trial courts erred in finding SCS complied with SDCL § 21-35-31 when SCS did not provide the requisite notice to tenants in possession of the property. SCS's error was presented to both trial courts at the respective summary judgment hearings. (SR3 2278-2279) (SR5 2433, 2532). However, the error was not mentioned in the written decisions from either circuit.

Strict compliance with the conditions prescribed in SDCL § 21-35-31 is required, but the trial courts did not "read such rigidity into the statute." (SR3 2354). The trial courts erred by permitting only substantial compliance with SDCL § 21-35-31.

b. SCS failed to establish it had obtained adequate security for actual damage caused as required by SDCL § 21-35-31(3).

SDCL § 21-35-31(3) requires a party claiming authorization under the statute to "[m]ake payment to the owner, or provide sufficient security for the payment, for any actual damage done by the entry." Landowners challenged whether the $1 million dollar bond referenced in SCS's June 22 letters was adequate to account for all potential property damage. Landowners concerns over a foreign limited liability company's ability to compensate them for damage were legitimate, and challenging the adequacy of the bond is appropriate under SDCL § 21-35-31.

The June 2022 letters contained no information regarding how many properties and how many states were covered by the bond, nor was any evidence available on how SCS arrived at the $1 million figure. (SR3 1507) (SR5 1620). Landowners sought that information in discovery, but answers or depositions were never provided. At some point during litigation, SCS increased its bond amount to $5 million; however, Landowners questions remained unanswered.

At summary judgment, Landowners asserted again that the bond was insufficient and that further discovery was needed to determine the bond's sufficiency. (SR3 1641) (SR5 1793). SCS did not provide evidence that the bond was adequate to cover damages caused by its proposed exploratory activities. Despite SCS providing no evidence to support the bond's sufficiency, the trial court found SCS's letters stating they had obtained sufficient security to be adequate. (SR3 2259).

SDCL § 21-35-31(3) requires sufficient security for actual damage. Landowners properly called the particulars of the bond into question. The trial courts erred in determining the bond represented sufficient security for actual property damage without supporting evidence.

V. The trial courts erred by denying Landowners Motion to Continue Summary Judgment for discovery purposes.

A circuit court's refusal to grant additional discovery prior to awarding summary judgment is reviewed for abuse of discretion. *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, ¶ 24, 848 N.W.2d 273, 281. "SDCL 15–6–56(f) ... provides that a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion. Under that rule, the facts sought through discovery must be 'essential' to opposing summary judgment...." *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39, ¶ 6, 766 N.W.2d 510, 512.

In advance of the hearing on SCS's Motion for Summary Judgment, Landowners filed a Motion to continue the summary judgment proceedings pursuant to SDCL § 15-6-56(f). (SR3 1557) (SR5 1769). The Motions were accompanied by the Affidavit of Counsel which precisely identified the probable facts not available, what steps have been

taken to obtain those facts, and why those facts are essential to oppose summary judgment. (SR3 1561) (SR5 1771).

Landowners sought to depose SCS corporate designees pursuant to SDCL § 15-6-30(b)(6). (SR3 1561-1565) (SR5 1773-1775). These depositions were initially requested in September of 2022. (SR3 1562). The affidavits of counsel detail the efforts Landowners had taken to secure the requested depositions over the preceding four months, all of which were rebuffed. (SR3 1561-1565) (SR5 1773-1775). Depositions on the noticed topics were particularly relevant given the Offtake Agreements had only recently been disclosed and the substance of the agreements was directly relevant to SCS' status as a common carrier. (SR3 1561-1565) (SR5 1773-1775). Landowners also sought the testimony of the CEOs of SCS's affiliate ethanol plants. (SR3 1947-1963) (SR5 1773-1775) The requested depositions would have provided facts directly relevant to SCS' status as a common carrier, its compliance with SDCL § 21-35-31, and its financial ability to compensate Landowners for actual damage resulting from exploratory work on the property, which were all genuinely in dispute.

Granting Landowners request for additional discovery prior to summary judgment would have led to a more developed record for the lower courts to consider and avoided the foreseeable errors that accompanied their rushed decisions. Denial of Landowners' request was an abuse of discretion. This case should be remanded for further consideration of SCS's status as a common carrier with instruction to permit reasonable discovery on that topic.

VI. The trial courts erred by finding SDCL § 21-35-31 authorized subsurface exploratory activities.

The trial courts erred by finding SCS's proposed examination activities were within the scope of activity authorized by SDCL § 21-35-31. SCS' written notices to Landowners include survey and examination activities that drastically exceed the scope of SDCL § 21-35-31. The statute authorizes a prospective condemnor to enter private property for "examination and survey." Nowhere in the statute are soil disturbances authorized, let alone the destructive measures SCS proposed.

The notices indicate that surveys for "civil construction, biological, and cultural reasons" will occur. (SR3 1504, 1507-1511) (SR5 1620-1753). The notices state that the intended surveys typically require "hand tools (e.g., spades, shovels, augurs)" and may result in small soil disturbances at discrete locations depending on encountered conditions. *Id.* SCS sought to perform geotechnical work on certain properties which is defined by SCS as follows:

> This process utilizes a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks.
>
> During the drilling activities, the soil and rock materials will be observed, logged, and visually classified…various types of drilling bits and methods may need to be used based upon conditions, such as continuous flight augers, hollow stem augers, wet rotary drills, or rock coring drills. Other vehicles will also be on site, including the drilling support truck and trailer. Samples will be collected and taken to a laboratory for additional testing.
>
> The hole will be backfilled with the drill cuttings or with a cement/bentonite grout mixture. (SR5 1627, 1630, 1704, 1725) (SR3 1508).

SCS sought to perform "deep testing" on certain properties which is defined by SCS as follows:

> The use of a backhoe to dig trenches typically 7 to 10 feet in length, 2 to 3 feet in width, and 6 to 10 feet deep. This will allow archeologists and cultural resource specialists the ability to determine whether cultural materials are present. (SR5 1621, 1624).

Surveys do not require hand tools for digging, track mounted drilling rigs, continuous flight augers, hollow stem augers, wet rotary drills, rock coring drills, or backhoes. The plain meaning of a survey is "to ascertain corners, boundaries, and divisions, with distances and directions…" *Survey*, Black's Law Dictionary (11th ed. 2019). "Civil construction, biological, and cultural" surveys are beyond the scope of SDCL § 21-35-31. Similarly, underground examinations prior to formal condemnation of an easement are not appropriate. "Permissible entry 'cannot amount to other than such innocuous entry and ... examination as would suffice for the making of surveys or maps." *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

According to North America's preeminent condemnation treatise, *Nichols on Eminent Domain*:

> Courts have typically defined a survey as the measurement of land. Invasive activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement. A statutory right to enter on land for the purpose of making an examination or survey does not include the right to engage in a course of destruction. For example, the right to make an examination or survey does not include the right to conduct archaeological digs. Nor does the right to make examinations, surveys, and maps permit installation of permanent survey monuments. Consequently, entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing. *Nichols*, § G32.06 (2021).

SCS's proposed activities grossly overstep the authority granted by SDCL § 21-35-31. There is no legal support for the trial courts' approval of these activities, and the leading treatise on the topic expressly prohibits soil disturbance under the precise language contained in South Dakota's statute. If the Court affirms the lower courts on other issues within this appeal, it should remand with instruction to limit surveys to above ground activities.

CONCLUSION

Landowners respectfully request the Court reverse the trial court and invalidate SDCL § 21-35-31 because it effects a taking without just compensation in violation of the Fifth Amendment to the United States Constitution and Article VI, § 13 of the South Dakota Constitution and deprives Landowners of due process of law pursuant to the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution. If the Court affirms the trial courts on the constitutionality of SDCL § 21-35-31, Landowners alternatively request the Court reverse the lower courts' decisions to grant summary judgment on SCS' status as a common carrier pursuant to SDCL § 49-7-11 and its compliance with the requirements of SDCL § 21-35-31 and remand for trial on those claims.

Appellants hereby request oral argument before this Honorable Court.

Dated this 28th day of August, 2023.

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CERTIFICATE OF SERVICE

This is to verify that on the 28th day of August 2023, I filed via Odyssey, a true and correct copy of the foregoing ***BRIEF OF APPELLANT LANDOWNERS*** and served via email the following attorneys:

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IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, **Plaintiffs and Appellants,** **vs.** **SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,** **Defendant and Appellee.**	App. No. 30317 and 30338 **APPENDIX OF APPELLANT LANDOWNERS**
PATRICIA K. DEEG TRUST, **Plaintiff and Appellant,** **vs.** **SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,** **Defendant and Appellee.**	
PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR,	

Filed: 8/28/2023 4:38 PM CST Supreme Court, State of South Dakota #30317

Plaintiff's and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP,

FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appellant Landowners submit this Appendix in support of its brief.

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Dated this 28th day of August, 2023.

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STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

PROTECTIVE ORDER

This matter comes before the Court on SCS Carbon Transport LLC's motion for entry of a protective order. For good cause shown and in accordance with SDCL § 15-6-26(c), **IT IS HEREBY ORDERED** that confidential information be disclosed only in designated ways:

DEFINITIONS

1. As used in the Protective Order, the terms listed below are defined as follows:

a. **"Action"** refers to the above-captioned consolidated action: (a) *Patricia K. Deeg Trust v. SCS Carbon Transport LLC*, Beadle County no. 02CIV22-000129; and (b) *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC*, Lake County no. 39CIV22-000064 (together, "Action").

b. **"Confidential Discovery Material"** is Discovery Material designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of this Protective Order.

c. **"Confidential"** documents are documents designated under Paragraph 4.a.

d. **"Highly Confidential – Attorneys' Eyes Only"** documents are documents that are either: (i) designated under Paragraph 4.b; or (ii) designated as "Highly Confidential" in the Other South Dakota Cases, as defined below.

e. **"Documents"** (whether capitalized or not) are all materials within the scope of SDCL § 15-6-34(a).

f. **"Other South Dakota Cases"** are: See Exhibit A.

g. **"Outside Attorneys"** means outside counsel of record for any Party.

h. **"Outside Vendors"** means messenger, copy, coding, and other clerical-services vendors not employed by a Party or its Outside Attorneys.

i. **"Written Assurance"** means an executed document in the form attached as Exhibit B.

SCOPE

2. This Protective Order applies to all information, documents, and things exchanged in or subject to discovery that are produced or otherwise provided in the Action, either by a Party or Non-Party (each a "Producing Person"), to any other Party or Non-Party, in response to or in connection with any discovery requests, including, but not limited to, deposition testimony

(whether based on oral examination or written questions), interrogatories, answers to interrogatories, requests for admission, responses to requests for admissions, document requests, documents, information, and other things produced, as well as any and all copies, abstracts, digests, notes, summaries, and excerpts thereof ("Discovery Material").

3. No action taken in accordance with the Protective Order will be construed as a waiver of any claim or defense in the Action or of any position as to discoverability or admissibility of evidence.

DESIGNATIONS

4. A Producing Person may designate a document "Confidential" or "Highly Confidential – Attorneys' Eyes Only" to protect information within the scope of SDCL § 15-6-26(c) (the "Designating Party"), in accordance with the following provisions:

a. "Confidential" will mean sensitive, confidential, proprietary information, or non-public personal information (e.g., social security numbers) that has not been made public by the Designating Party and that the Designating Party reasonably and in good faith believes contains or comprises: (i) material that is confidential pursuant to applicable law, including trade secrets, and any other materials that the Designating Party believes in good faith to be entitled to protection under SDCL § 15-6-26(c)(7); (ii) proprietary or otherwise sensitive non-public business information; or (iii) information implicating an individual's legitimate expectation of privacy, such as personal financial information, personal identifying information, or other personally or competitively sensitive information. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good faith assessment of whether the passage of time has eliminated the need to mark the material as "Confidential."

b. "Highly Confidential – Attorneys' Eyes Only" will mean Confidential Discovery Material that the Designating Party reasonably and in good faith believes is so highly sensitive and is of such a nature that disclosure to persons other than those listed in Paragraph 10 would create a substantial risk of economic injury that could not be avoided by less restrictive means. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good-faith assessment of whether the passage of time has eliminated the need to mark the material as "Highly Confidential – Attorneys' Eyes Only."

c. As for electronic or hard copy documents designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," each will be clearly marked or stamped as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as applicable, using means sufficient to ensure that every page of such document, when printed, contains the appropriate mark or stamp, where practicable, and will not interfere with legibility or audibility. But electronically stored information ("ESI") produced in native format need not be produced using a means sufficient to ensure that every page of such document contains the appropriate mark or stamp so long as: (i) a TIFF placeholder image corresponding to the ESI produced in native format is produced that includes the "Confidential" or "Highly Confidential – Attorneys' Eyes Only" mark; (ii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears in the file name of the natively-produced ESI; or (iii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears on the label of the media or in the transmittal email containing natively-produced ESI.

5. Third parties whose documents are produced in this Action may also designate documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" subject to the same

protections and constraints as the Parties to this Action. A copy of this Protective Order shall be served along with any subpoena served in connection with the Action.

LIMITATIONS ON USE OF CONFIDENTIAL DISCOVERY MATERIAL

6. All Confidential Discovery Material produced in this Action may be used solely for purposes of this Action.

7. Any person subject to this Protective Order who receives Confidential Discovery Material pursuant to the terms of this Protective Order may not disclose such Confidential Discovery Material to anyone else except as expressly permitted hereunder.

8. Nothing in this Order precludes a Party from: (a) using its own documents or information; or (b) using documents or information that are public or that are obtained from a source other than a Producing Party.

ACCESS TO CONFIDENTIAL DISCOVERY MATERIAL

9. Access to Confidential documents will be limited to:

a. The Court and its staff;

b. In-house counsel, representatives, and current employees of the Parties responsible for overseeing and assisting with the Action to whom disclosure is reasonably necessary, and Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

e. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) it is shown

through testimony or other evidentiary proof that the witness prepared, received, or reviewed the information or otherwise to have personal knowledge regarding its contents; or (2) (a) the counsel who discloses the information to the witness determines, in good faith, that such disclosure is reasonably necessary and appropriate to assist in the conduct of this Action; and (b) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

f. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B; Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B; and

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other disputes, and their necessary personnel.

10. Access to "Highly Confidential – Attorneys' Eyes Only" documents will be limited to:

a. The Court and its staff;

b. Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action retained to transcribe testimony;

e. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

f. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) the witness is shown through testimony or other evidentiary proof to have prepared, received or reviewed the Highly Confidential Information or otherwise to have personal knowledge regarding its contents; and (2) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically

retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other dispute, and their necessary personnel; and

j. Designated in-house counsel for SCS Carbon Transport LLC, only during, or in preparation for, the hearings of any dispositive motions (including any hearing on class certification). The following individuals will be the designated in-house counsel for SCS Carbon Solutions, LLC: Jess Vilsack, General Counsel, Summit Carbon Solutions, LLC.

11. Each person appropriately designated under Paragraph 9.f or 9.g to receive "Confidential" information and in Paragraph 10.f or 10.g to receive "Highly Confidential – Attorneys' Eyes Only" documents will execute a "Written Assurance" in the form attached as Exhibit B. Outside Attorneys who provided access to Discovery Material to persons in accordance with this Paragraph will maintain a collection of each executed Exhibit B.

USE OF CONFIDENTIAL DISCOVERY MATERIAL

12. **A confidential document may be filed only in accordance with SDCL Chapter 15-15A and any other applicable state law. Any Party seeking to file with the Court documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under seal shall do so in accordance with SDCL Chapter 15-15A and any other applicable state law and local court procedures.**

Except as otherwise provided in SDCL Chapter 15-15A and any other applicable state law, a Party intending to present another Party's or a Non-Party's Confidential Discovery Material

at a hearing or trial must promptly, and no less than three days before the hearing or trial, notify all counsel of record for the Designating Party and for all other Parties so that they may seek relief from the court.

13. All depositions or portions of depositions taken in the Action that contain confidential information may be designated by a Party or its counsel as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and thereby obtain the protections accorded other "Confidential" or "Highly Confidential – Attorneys' Eyes Only" documents. Confidentiality designations for depositions will be made either: (a) orally on the record and requesting that the relevant portion(s) of testimony be so designated; or (b) by written notice to the Parties and those who were present at the deposition. Unless otherwise agreed, depositions will be treated as "Highly Confidential – Attorneys' Eyes Only" during the 30-day period following receipt of the transcript. The deposition of any witness (or any portion of such deposition) that encompasses "Confidential or Highly Confidential – Attorneys' Eyes Only" documents and information will be taken only in the presence of persons who are qualified to have access to such information. Nothing in this Paragraph will apply to or affect the confidentiality designations on Discovery Material entered as an exhibit at depositions. Nor will anything in this Paragraph preclude the witness from reviewing his or her deposition transcript.

14. If testimony is designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," the court reporter, who will first have agreed to abide by the terms of this Paragraph, will be instructed to include on the cover page of each such transcript the legend: "This transcript portion contains information subject to a Protective Order and will be used only in accordance therewith," and each page of the transcript will include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate. If the deposition is videotaped, the videotape

will also be subject to the same level of confidentiality as the transcript and include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate, if any portion of the transcript itself is so designated.

15. Any document produced (or material containing information from a document produced), any deposition transcripts or exhibits, any expert reports, any filings, and other materials from the Other South Dakota Cases involving any of the Parties in this Action that were designated therein as "Confidential" or "Highly Confidential, Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of the operative Protective Orders in those cases shall be given the corresponding confidentiality designation in this case, unless the original source of the document agrees to waive confidentiality, the document has since become public, or the Court orders otherwise.

16. If a Party or any other person or entity that has agreed to be bound by this Protective Order by executing Exhibit B (a "Subpoena Recipient") is served with a subpoena or a court order issued in other litigation or a request from a legislative or other administrative body with authority to compel disclosure requesting information or items designated in the action as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," they must promptly notify in writing the Designating Party. Such notification will include a copy of the subpoena or order. The Subpoena Recipient will promptly notify in writing the party who caused the subpoena or order to issue in the other litigation or proceedings that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification will include a copy of this Protective Order. The Subpoena Recipient must cooperate with the Designating Party with respect to all reasonable procedures sought by the Designating Party whose material may be affected. If the Designating Party timely seeks a protective order, the Party served with the subpoena will not produce any information designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" before a determination by a court

in accordance with SDCL § 16-5-45(a)-(g), unless the Subpoena Recipient has obtained the Designating Party's permission. The Designating Party will bear the burden and expense of seeking protection in that court of its confidential material. Nothing contained in this provision will be construed as authorizing or encouraging a Subpoena Recipient in this action to disobey a lawful directive from another court.

CHANGES TO DESIGNATIONS

17. If at any time before the trial of this Action, a Producing Person realizes that some portion of Discovery Material previously produced should be designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only,"they may so designate it by apprising all prior recipients of the Discovery Material in writing, and thereafter such designated portion of the Discovery Material will be deemed to be and treated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the terms of this Protective Order. Notwithstanding this provision, a Party may challenge the asserted confidentiality designation as provided for herein.

18. Any Party who inadvertently fails to identify documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will provide written notice and substitute appropriately-designated documents. Any Party receiving such improperly designated documents will retrieve such documents from persons not entitled to receive those documents and, upon receipt of the substitute documents, will return or destroy the improperly designated documents.

19. Any Party may request a change in the designation of any information designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only." Any such document will be treated as designated until the change is completed. If the requested change in designation is not agreed to by the Parties, the Party seeking the change may move the Court for appropriate relief, providing notice to any Party or third party whose designation of produced documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" in the Action may be affected. The Party asserting

that the material is "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will have the burden of proving that the information in question is within the scope of protection afforded by SDCL § 15-6-26(c). If the motion affects a document produced by a Non-Party then, with respect to the motion, that Non-Party is entitled to the same notice and opportunity to be heard as a Party.

DISPOSITION OF CONFIDENTIAL DISCOVERY MATERIAL

20. Within 60 days of the termination of the Action, including any appeal, each Party to the Action will either destroy or return to the other Parties all documents produced by the other Parties that were designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies of such documents, and will destroy all extracts and data taken from such documents. Each Party will provide a certification as to such return or destruction within the 60-day period. But attorneys will be entitled to retain a set of all documents filed with the Court and all correspondence generated in connection with the Action as well as materials that contain, reflect, incorporate, attach, or reference attorney work product, so long as the terms of this Protective Order will continue to govern any such retained materials. Additionally, with respect to ESI, the Parties need not destroy backup media so long as the Party has a data destruction policy for the backup media that will result in the overwriting or destruction of that data. Similarly, in-house counsel, external counsel, experts or consultants retained to assist with the Action, and their respective employees or staff, will not be required to destroy "Confidential" or "Highly Confidential – Attorneys' Eyes Only" or material contained in their email accounts or document management systems, so long as they otherwise comply with this Protective Order with respect to such retained material. Nothing in this Paragraph shall obligate any Party to destroy its own Confidential Information at the close of this Action or at any other time.

PRIVILEGED AND PROTECTED MATERIALS

21. To the greatest extent permitted by law, the production or disclosure of privileged or protected materials, whether inadvertent or otherwise, does not waive any applicable privilege or protection in this Action or any other proceeding. The Parties intend for this Paragraph to be interpreted to provide the maximum protection allowed by law.

22. Any Party who inadvertently produces or discloses privileged materials will, promptly upon discovery of such inadvertent production or disclosure, notify the receiving Party/ies in writing and request that the documents be returned. When a receiving Party receives notice of such inadvertent production or disclosure it must sequester, return, or destroy the inadvertently produced or disclosed privileged materials and confirm that any persons or entities to whom it has provided such privileged materials have sequestered, returned, or destroyed the privileged materials. The privileged materials may not be used or disclosed for any purpose—including to challenge the assertion of privilege over those materials—unless and until the assertion of privilege is withdrawn or overruled. The privileged materials will be deleted or otherwise permanently removed from any systems used to house documents, including document review databases, e-rooms, and any other locations that store the privileged materials. Any extracts, notes or summaries referring or relating to any such inadvertently produced or disclosed privileged materials must likewise be returned or destroyed. Within seven days of providing notice of inadvertent production or disclosure, a Party or Producing Person claiming privilege for inadvertently produced or disclosed privileged materials must state the basis for the privilege assertion. Nothing herein will prevent a receiving Party from challenging the propriety of a privilege assertion by submitting a challenge to the Court consistent with applicable law, although the privileged materials themselves cannot be used or disclosed as part of such a challenge. The Party asserting privilege bears the burden of establishing the privileged nature of any inadvertently

produced or disclosed privileged materials. If a receiving Party becomes aware that it is in receipt of information or materials that it knows or reasonably should know is privileged, protected, or immune, counsel for the receiving Party will immediately take steps to: (i) stop reading such information or materials; (ii) notify counsel for the Producing Party of such information or materials; (iii) collect all copies of such information or materials; (iv) sequester, destroy, or return such information or materials to the Producing Party; and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

EXPERT WITNESS DISCLOSURE

23. Disclosure of Certain Information Regarding Expert Witnesses.

a. No subpoenas (for depositions or documents) need be served on any SDCL § 15-6-26(b)(4) expert in this case. Instead, the Party or Parties retaining such expert will make him or her available for deposition, at a time mutually agreed to by the Parties. If an expert is required to submit a report, the deposition of such expert will be conducted after the report is served at a time mutually agreed by the Parties. If such an expert has already been deposed as a fact witness, he or she may be deposed again in his or her expert capacity.

b. Within three business days of service of a report, the Party submitting such report shall produce: (i) any data, facts or other information relied upon by the expert in forming the expert witness's opinions and not previously produced in this action, as well as a list identifying by bates range or other appropriate identifiers any produced data, facts, or other information relied upon by the expert in forming the expert witness's opinions; (ii) any exhibits that will be used to summarize or support the expert witness's opinions; (iii) the expert witness's qualifications, including a list of all publications authored in the previous ten years; (iv) a list of all other cases, during the previous four years, where the expert witness has testified as an expert at trial or by deposition; and (v) a statement of the compensation to be paid for the study and testimony in this case. To the extent such disclosures

include charts, tables, exhibits, information or data processed or modeled by computer at the direction of a disclosed testifying expert in the course of forming the expert's opinions, machine-readable copies of the exhibits, information, or data (including all linked data files, input and output files, formulas contained within spreadsheet cells and similar electronic information necessary to understand the charts, tables, exhibits, information, or data) sufficient to allow the replication of all analysis contained in the report, where applicable, along with appropriate computer programs and instructions necessary to access and use the data (unless such computer programs are reasonably and readily commercially available) shall also be provided with such disclosures. Information gleaned from non-public sources shall also be provided with such disclosures.

24. Non-Disclosure of Certain Information Regarding Expert Witnesses.

a. The below-listed categories of documents, recording media, and communications need not be disclosed by any Party and an expert may not be examined at deposition, hearing, or trial on the contents of the below-listed categories of documents, recording media, and communications (subject to the exceptions at the end of this Paragraph):

i. any notes or other writings taken or prepared by or for an expert witness in connection with this matter (aside from the final written expert report(s) and notes generated while testifying), including:

1. written correspondence or memoranda to or from, and notes of conversations between and among the expert witness and the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs); and/or

2. copies of materials produced by any Party in this Action bearing the notes, markings, or comments of the expert, the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs);

ii. any draft reports, draft studies, draft work papers, draft declarations, or other draft materials prepared by, for, or at the direction of an expert witness, regardless of the form in which the draft is recorded; and

iii. any oral or written communication between and among expert witnesses and their assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs), regardless of the form of the communications. For avoidance of doubt, this includes oral or written communication between any of the individuals listed above, including but not limited to (a) one expert and/or their staff and assistants and (b) another expert and/or their staff and assistants.

b. The foregoing exclusions from disclosure set forth in subparagraphs (a)(i)–(iii) do not apply to any communications, documents, data sets, or analyses upon which an expert relies as a basis for his or her ultimate opinion. In addition, examination shall be permitted on alternative analyses, methodologies, or approaches to issues on which the expert is testifying, regardless of whether the expert considered them in forming the expert's opinion, including but not limited to analyses that the expert performed but ultimately did not rely upon.

c. Communications between and among experts, their staffs, and attorneys shall not be discoverable unless relied upon as a basis for any expert's ultimate opinion(s). Although communications relating to compensation for the expert's work or testimony shall not be required to be produced or exchanged, the Parties may examine witnesses at deposition or trial as to the amount they charge.

25. Except as provided under SDCL § 15-6-26(b)(4)(D), no Party may take discovery of an expert who has been retained or specially employed by another Party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, without the express written consent and authorization of the Party employing such expert.

DUTY TO NOTIFY

26. If any Party learns of a potential breach of this Protective Order or of the confidentiality of any document designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under this Protective Order, that Party will promptly inform all other Parties in writing of the breach.

MODIFICATION AND DURATION OF THIS PROTECTIVE ORDER

27. Any Party may apply to the Court for a modification of the Protective Order, and nothing in this Protective Order will be construed to prevent a Party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

28. The obligations imposed by the Protective Order will survive the termination of the Action.

PRIOR ORDERS

29. **All prior consistent orders remain in full force and effect.**

REMEDIES

30. **Failure to comply with any provision of this protective order or any other prior consistent order shall subject the non-complying party, non-complying counsel and/or the party such counsel represents to any and all appropriate remedies, sanctions and the like, including without limitation: assessment of costs, fines and attorneys' fees and disbursements; waiver of rights to object; exclusion or limitation of witnesses, testimony, exhibits, and other evidence; striking of pleadings; complete or partial dismissal with prejudice; entry of whole or partial default judgment; and/or any other relief that this Court may from time to time deem appropriate.**

BY THE COURT:

1/3/2023 7:37:02 AM

Circuit Court Judge

Attest:
Dykstra, Amber
Clerk/Deputy

EXHIBIT A

Other South Dakota Cases:

- *Helfenstein et al. v. SCS Carbon Transport LLC*, McPherson County no. 45CIV22-000014
- *SCS Carbon Transport LLC v. Jordre et al.*, McPherson County no. 45CIV22-000018
- *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC*, Spink County no. 71CIV22-000047
- *Bossly et al. v. SCS Carbon Transport LLC*, Brown County no. 06CIV22-000253
- *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC*, Edmunds County no. 22CIV22-000020
- *Geide et al. v. SCS Carbon Transport LLC*, Minnehaha County no. 49CIV22-001694
- *Bell-Murphy Family Trust et al. v. SCS Carbon Transport LLC*, Lincoln County no. 41CIV22-000365
- *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC*, Lake County no. 39CIV22-000064
- *Patricia K. Deeg Trust v. SCS Carbon Transport LLC*, Beadle County no. 02CIV22-000129
- *SCS Carbon Transport LLC v. Mathern et al.*, Brown County no. 06CIV22-000335
- *SCS Carbon Transport LLC v. Skelton et al.*, Codington County no. 14 CIV22-000274
- *SCS Carbon Transport LLC v. Wieseler et al.*, Hand County no. 29CIV22-000021
- *SCS Carbon Transport LLC v. Benson et al.*, Lake County no. 39CIV22-000083
- *SCS Carbon Transport LLC v. Job et al.*, McPherson County no. 45CIV22-000024
- *SCS Carbon Transport LLC v. Thorson et al.*, Spink County no. 71CIV22-000057

- *SCS Carbon Transport LLC v. Fossum et al.*,
  Lincoln County no. 41CIV22-000476

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

EXHIBIT B

NON-DISCLOSURE WRITTEN ASSURANCE

I, _____, acknowledge that I have read and understand the Protective Order in this Action dated _____, filed in the above-captioned case pending in the Third Judicial Circuit Court of South Dakota. I agree to comply with and be bound

by the provisions of the Protective Order. I understand that any violation of the Protective Order may subject me to sanctions by the Court.

Consistent with the terms of this Protective Order, I will not divulge any documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" obtained under such Protective Order, or the contents of such documents, to any person other than those specifically authorized by the Protective Order. I will not copy or use such documents except for under the terms of the Protective Order.

As soon as practical, but no later than 30 days after final termination of this Action, I will return to the attorney from whom I have received them any documents in my possession designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies, excerpts, summaries, notes, and other materials containing or discussing some or all of the contents of such documents.

I submit myself to the jurisdiction of the Third Judicial Circuit Court of South Dakota for the purpose of enforcing or otherwise providing relief relating to the Protective Order.

Executed on _____ _____
(Date) (Signature)

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned cases:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 1,900 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.*

5. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

6. The Patricia K. Deeg Trust and the Betty Jean Strom Trust ("Landowners") own or are in possession of real property that will be crossed by SCS's pipeline:

* *See also In the Matter of the Application by SCS Carbon Transport LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, Docket No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

Filed: 1/13/2023 3:07 PM CST Beadle County, South Dakota 02CIV22-000125

Landowner	County	APN	Legal Description
Patricia K. Deeg Trust	Beadle	5004	SEC 35-T112N-R61W: NW4
	Beadle	4965	SEC 26-T112N-R61W: SE4 EX 11 AC E OF ROAD
	Beadle	4959	SEC 25-T112N-R61W: SW4
Betty Jean Strom Trust	Lake	090001055336210	SEC 36-T105N-R53W: N1/2NW4
	Lake	090001055325310	SEC 25-T105N-R53W: SW1/4 EXC BONNEMA TRACT

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

7. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

8. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–9; Schovanec Aff. Exhibits 1, 2.

9. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibit 1 at p. 1, Exhibit 2 at p. 1.

10. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibit 1 at pp. 1–2, Exhibit 2 at pp. 1–2.

11. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2. For both Landowners, SCS seeks a "typical survey," and for the Patricia K. Deeg Trust, SCS also seeks a "geotech survey." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

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12. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

13. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." Schovanec Aff. Exhibit 1 at p. 2.

14. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 11; Schovanec Aff. Exhibit 3.

15. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

16. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 10.

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APP026

Dated this 13th day of January, 2023.

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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 13th day of January, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian Jorde
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/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.		02CIV22-000129 **LANDOWNERS STATMENT OF DISPUTED MATERIAL FACTS IN RESISTENCE TO SCS MOTION FOR SUMMARY JUDGMENT**
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.		39CIV22-000064

Comes now, Landowners by and through their attorneys of records, and submits the following Landowners Statement of Disputed Material Facts.

1. Deny. As stated defendants act as if there idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that land owners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *See Supplemental Affidavit of Nicholas G. Moser in Support of Landowner's Resistance to Summary Judgment*, ¶ 5.

2. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 6.

3. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 7.

4. Admit something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.* at ¶ 8.

5. Deny. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 9.

6. Deny that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 10.

7. Deny. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop

competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 11.

8. Deny, nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 12.

9. Admit that the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 13.

10. Deny as to what the letters inform Landowners of and object as to foundation. Deny the "link" which is text on a page informs anyone of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 14.

11. Admit as to the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 15.

12. Deny as to "typical" this is without definition or limit under the unconstitutionally challenged law. Admit SCS witness describes way "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 16.

13. Admit what is stated are the words in the letter. Deny the authenticity of the underlying statement and deny the truth of the matter asserted. Deny that there would be "no impact" to the land. Object as to vague and ambiguous as to what is "normal land". Object insofar as SCS has failed to prove that Landowners land is in fact "normal land." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 17.

14. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 18.

15. Admit this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 19.

16. Admit that Landowners do not believe the desired and unnecessary access and unfetter run of the land is lawful constitutional. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 20.

Dated this 14th day of February, 2022.

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CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 14th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

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/s/ Nicholas Moser
Nicholas Moser

02CIV22-000129

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

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March 8, 2023

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RE: *Patricia K. Deeg Trust v. SCS Carbon Transport LLC & Betty Jean Strom Trust, Rita Brown, Craig & Lisa Basler Family Trust v. SCS Carbon Transport LLC*; 02CIV22-129 & 39CIV22-64 Consolidated—Motion to Compel Discovery; Motion for Continuance; and Motion for Summary Judgment

INTRODUCTION

Defendant SCS Carbon Transport LLC ("SCS") filed a Motion for Summary Judgment seeking dismissal of Plaintiff Landowners ("Landowners") Amended Complaint with prejudice

and granting of SCS's Counterclaims. Landowners resist summary judgment, believing the motion to be premature, and filed a Motion to Compel Discovery and a Motion for Continuance. A hearing was held in Lake County, South Dakota, on February 28, 2023, where this Court took the matter under advisement. For the reasons set forth below, Landowners' Motion to Compel Discovery and Motion for Continuance are denied, and SCS's Motion for Summary Judgment is granted.

BACKGROUND

SCS and its parent Summit Carbon Solutions, LLC ("Summit") have intentions of developing an interstate pipeline that would receive, transport, and deliver carbon dioxide through a network of approximately 2,000 miles of underground pipelines. The route of the proposed pipeline travels through eighteen counties in South Dakota and four other states before reaching a sequestration site in North Dakota for storing of the carbon dioxide.

Prior to any pipeline construction, SCS must enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations, including core or water sampling activities. The purpose of said surveys and investigations is to identify and describe the property needed to construct the pipeline and appraise the property to acquire any requisite easements.

Pursuant to and in accordance with SDCL § 21-35-31, SCS needed to obtain a siting permit before entering on Landowners private property to conduct the surveys. SCS sent letters to Landowners dated June 4, 2022, seeking consent for SCS to enter their property for the surveys. Landowners did not consent; rather, they instituted these lawsuits with complaints filed July 19, 2022. The complaints were consolidated in October 2022. From their Amended Complaint filed October 27, 2022, Landowners assert six claims against SCS: 1) that SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation; 2) that SDCL § 21-35-31

amounts to an unconstitutional taking as applied; 3) that SDCL § 21-35-31 violates the Due Process Clause of the State and Federal Constitutions; 4) that SCS is not of the class of corporations authorized to act under SDCL § 21-35-31; 5) that SCS's notice letters to Landowners are insufficient under SDCL § 21-35-31; and 6) that the survey access SCS seeks is not authorized under SDCL § 21-35-31. SCS counterclaimed, seeking declaratory and injunctive relief authorizing it to survey despite objection from Landowners.

On December 28, 2022, this Court issued a Memorandum Decision granting SCS's Motion for Entry of Protective Order, and in doing so, made the following findings: 1) that carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value; and 2) that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee. This Memorandum Decision was introduced as a handout to the Senate Commerce and Energy Committee when it considered House Bill 1133 at the current legislative session. While not binding authority, the Committee effectively affirmed this Court's findings when it denied the bill, which was pushed by Landowners and sought to amend the definition of a commodity for the purpose of qualifying as a common carrier under SDCL § 49-7-11.

These prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31. Landowners also withdrew their as applied constitutional challenge of SDCL § 21-35-31 in their brief resisting summary judgment. As such, the remaining issues before the court are: 1) the facial constitutionality of SDCL § 21-35-31; 2) if SDCL § 21-35-31 violates state and federal procedural due process; 3) the sufficiency of SCS's notice letter to Landowners under SDCL § 21-35-31; and 4) if SDCL § 21-35-31 authorizes SCS's surveys. Because these remaining issues are questions of

law, a decision on summary judgment is ripe, and each issue will be discussed in turn. Therefore, Landowners' motion to compel discovery and for a continuance are moot.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765. In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings but, rather, must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). "Where no genuine issues of material fact exist and the trial court resolves the questions of law in a party's favor, summary judgment is appropriate." *Weber v. First Fed. Bank*, 523 N.W.2d 720, 721 (S.D. 1994) (citing *King v. John Hancock Mut. Life. Ins.*, 500 N.W.2d 619 (S.D. 1993)).

APPLICABLE LAW & ANALYSIS

1. Whether SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation

"Challenges to the constitutionality of a statute meet formidable restrictions." *State v. Allison*, 2000 S.D. 21, ¶ 5, 607 N.W.2d 1, 2 (internal quotation omitted). "Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until

the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 10, 851 N.W.2d 208, 213. The burden of proving the unconstitutionality of a statute is on the challenger. *Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 8, 578 N.W.2d 134, 134. "[T]he South Dakota Supreme Court construes South Dakota laws in accordance with the doctrine of constitutional avoidance, which requires adopting a construction of a law that avoids questions about its constitutionality if such a construction is 'fairly possible[.]'" *Sisney v. Kaemingk*, 15 F.4th 1181, 1198 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022) (quoting *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985)). A statute's words are to be defined according to their ordinary meaning to effect its purpose. *Hofer v. Redstone Feeders, LLC*, 2015 S.D. 75, ¶ 15, 870 N.W.2d 659, 662. Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶ 15, 727 N.W.2d 808, 812.

Landowners challenge the constitutionality of SDCL § 21-35-31's pre-condemnation surveys, arguing they violate Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. These constitutional provisions prohibit the taking of private property for public use without just compensation. S.D. Const. art. VI, § 13; U.S. Const. amend. V. The narrow issue then is whether the pre-condemnation surveys authorized in SDCL § 21-35-31 amount to a taking without the constitutional requirement of just compensation.

In 2016, the South Dakota Legislature adopted SDCL § 21-35-31 which states as follows:

> The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:
> (1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and
(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

SDCL § 21-35-31.

Landowners specifically challenge the constitutionality of the statute considering the United States Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). That case concerned a California regulation that gave agricultural employees the right to self-organize on the premises of an agricultural employer for up to four 30-day periods in one calendar year. *Id.* at 2069. Prior to doing so, a labor organization needed to file a written notice with the Agricultural Labor Relations Board and serve a copy on the employer. *Id.* The Court held that the access regulation appropriated a right to invade the growers' property and therefore constituted an uncompensated *per se* physical taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 2074.

This Court declines to extend *Cedar Point* and hold that SDCL § 21-35-31 and its permitted surveys suffer from the same constitutional infirmities. The government does not take a property interest when it merely asserts a pre-existing limitation upon the landowner's title. *Id.* at 2079 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). In terms of eminent domain, other courts have held that there is an ancillary right to survey land prior to condemnation. As cited by then Judge, now Justice, Salter in litigation concerning the Dakota Access pipeline, the Missouri Supreme Court in *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981) stated the following:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Other jurisdictions, both with and without specific statutes granting the right of entry, have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1985); *State by Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982); *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176 (Ohio App. 5d 2016); *In re Application for Permit to Enter Land for Surys. & Examination Associated with a Proposed N. Dakota Diversion & Associated Structures*, 883 N.W.2d 844 (N.D. 2016). In light of the above-cited authorities and the strong presumption in favor of constitutionality, Landowners have failed to prove beyond a reasonable doubt that SDCL § 21-35-31 unconstitutionally authorizes a taking without just compensation in violation of Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. Rather, this Court finds in favor of SDCL § 21-35-31's constitutionality and that its related surveys are merely a right ancillary to condemnation not amounting to a governmental taking. Summary judgment is granted on this issue.

2. Whether SDCL § 21-35-31 violates state and federal procedural due process

Under the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law." "Due process requires adequate notice and an opportunity for meaningful participation." *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 386 (citing *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160). "A procedural due process claim focuses not on the merits of a deprivation, but on whether the State

circumscribed the deprivation with constitutionally adequate procedures." *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

The plain language of SDCL § 21-35-31 provides adequate notice and an opportunity for meaningful participation. It first allows owners of private property the opportunity to consent to an examination and survey. If consent is not given, the statute mandates the person vested with authority to take private property to both file a siting permit application with the Public Utilities Commission and provide private property owners with thirty days written notice of this filing and expected dates of entry. Because of these mandates, owners of private property are effectively under adequate notice of anticipated examination and surveying and may meaningfully participate by consenting or denying permission to do the same. Furthermore, as seen in this specific case, the procedures set forth in SDCL § 21-35-31 give owners sufficient opportunity to be heard through the judicial process before entry for examination and surveying occurs. Therefore, SDCL § 21-35-31 does not violate state or federal procedural due process, and summary judgment is also granted on this issue.

3. Whether SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31

Giving SDCL § 21-35-31's language a plain meaning to effect its purpose, the Court is satisfied as to the sufficiency of SCS's notice letters under the statute. Landowners take issue with SCS's notice letters in that they did not specify the expected dates of entry, they only contained the hyperlink to the Public Utilities Commission docket rather than the entire siting permit application, and they failed to set out measurement of and submission for damages to private property from the surveys. However, the Court does not read such rigidity into the statute. All that SDCL § 21-35-31 requires is: 1) written notice, including the Public Utilities Commission filing; 2) expected dates of entry; and 3) provide sufficient security for the payment of any actual damages

done to the property by the entry. Within SCS's notice letters to Landowners, it is undisputed a hyperlink to the filing of the siting permit application was included. This is enough under SDCL § 21-35-31 to place Landowners on notice of the filing. Secondly, SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated. Lastly, SCS's letters note that it has secured a bond, now in the amount of $5 million, intended to cover any damage to Landowners' properties. This statement acts as sufficient security to Landowners for the payment of any actual damages sustained on their property. Because SCS's notice letters comport with the plain and ordinary meaning of the words within SDCL § 21-35-31, summary judgment is granted on this issue.

4. Whether the survey access SCS seeks is authorized under SDCL § 21-35-31

SDCL § 21-35-31 authorizes persons with vested authority to first cause an examination and survey to be made as necessary before taking private property for public use. "Examine" means "to test the condition of." *Examine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/examine (last visited Mar. 8, 2023). "Survey" means "to examine as to condition, situation, or value." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Mar. 8, 2023). In interpreting its survey access law[1], the Supreme Court of North Dakota stated that "[t]he definition of 'examination' is not strictly limited to a visual examination" but also includes instances of soil borings that penetrate the ground's surface and are minimally invasive. *In re 2015 Application*, 883 N.W.2d at 848-49.

Considering the ordinary definitions of "examination" and "survey" and the Supreme Court of North Dakota's statutory interpretation, this Court finds that SDCL § 21-35-31 authorizes

[1] N.D. Cent. Code Ann. § 32-15-06 provides in relevant part: "Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof..."

minimally invasive soil disturbances such as those SCS seeks to perform on Landowners' properties. The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones but contemplates the minimally invasive typical and geotech surveys proposed by SCS. Summary judgment is granted on this final issue.

CONCLUSION

Based upon the foregoing analysis, SCS's Motion for Summary Judgment is GRANTED, and Landowner's Amended Complaint is dismissed with prejudice.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

Attest:
McHenry, Marilyn
Clerk/Deputy

Filed on: 03/08/2023 Beadle County, South Dakota 02CIV22-000129

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22—000064
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment and Denying Landowners Motion to Compel Discovery and Motion for Continuance rendered in the above-entitled action on the 15th day of March, 2023, a copy of which is attached hereto and by reference incorporated herein, was reduced to

writing, signed by the Court, attested by the Clerk, and filed in the Beadle County Clerk's office on the 15th day of March, 2023.

Dated this 16th day of March, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: */s/ Justin L. Bell*

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CERTIFICATE OF SERVICE

Justin L. Bell, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 16th day of March, 2023, he electronically filed and served a true and correct copy of the foregoing via the Odyssey File & Serve system, which will notify the following attorneys of record:

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Brian E. Jorde
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/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064
PATRICIA K. DEEG TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

This matter came be heard on the 28th day of February 2023 before the Honorable Patrick T. Pardy on Defendant SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, and Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023. Said Motion having been argued by all parties appearing at said hearing, Defendant SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP and Brian D. Boone and Matthew Hooker of Alston & Bird LLP, and Plaintiffs having been represented by Nicholas G. Moser of Marlow, Woodward & Huff, Prof. LLC, and Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present

arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, which is further explained in the Court's Memorandum Decision dated March 8, 2023, which is fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, is hereby **GRANTED** and all of Plaintiffs' claims are **DISMISSED** with prejudice.

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023 is hereby **DENIED** as moot;

ORDERED, ADJUDGED AND DECREED that, pursuant to SDCL 21-35-31, SCS Carbon Transport LLC, is granted a declaratory judgment authorizing access for the purpose of conducting civil, environmental and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings and archaeological/cultural resource surveys and examinations, for the property described as follows:

Landowner	Legal Description
Patricia K. Deeg Trust	Township 112 North, Range 61 West, Section 25: SW1/4 Section 26: SW1/4 EX 11 AC E OF ROAD Section 35: NW1/4
Betty Jean Strom Trust	Township 105 North, Range 53 West Section 25: SW1/4 EXC BONNEMA TRACT Section 36: N1/2NW1/4

and,

ORDERED, ADJUDGED AND DECREED that Defendants Patricia K. Deeg Trust and Betty Jean Strom Trust shall be enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said property, including conducting preliminary civil, environmental and archaeological surveys and examinations and environmental or archeological investigations, including any necessary core or water sampling activities subject to any conditions.

BY THE COURT:
3/15/2023 12:31:31 PM

The Honorable Patrick T. Pardy
Circuit Court Judge

Attest:
Dykstra, Amber
Clerk/Deputy

Filed on: 03/15/2023 Beadle County, South Dakota 02CIV22-000129 APP048
Filed: 3/15/2023 4:40 PM CST Beadle County, South Dakota 02CIV22-000129

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**PROTECTIVE ORDER** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

PROTECTIVE ORDER

This matter comes before the Court on SCS Carbon Transport LLC's motion for entry of a protective order. For good cause shown and in accordance with SDCL § 15-6-26(c), **IT IS HEREBY ORDERED** that confidential information be disclosed only in designated ways:

DEFINITIONS

1. As used in the Protective Order, the terms listed below are defined as follows:

a. "**Action**" refers to the above-captioned consolidated action: (a) *Helfenstein et al. v. SCS Carbon Transport LLC*, McPherson County no. 45CIV22-000014; (b) *SCS Carbon*

Transport LLC v. Jorde et al., McPherson County no. 45CIV22-000018; (c) *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC*, Spink County no. 71CIV22-000047; (d) *Bassly et al. v. SCS Carbon Transport LLC*, Brown County no. 06CIV22-000253; and (e) *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC*, Edmunds County no. 22CIV22-000020 (together, "Action").

b. **"Confidential Discovery Material"** is Discovery Material designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of this Protective Order.

c. **"Confidential"** documents are documents designated under Paragraph 4.a.

d. **"Highly Confidential – Attorneys' Eyes Only"** documents are documents that are either: (i) designated under Paragraph 4.b; or (ii) designated as "Highly Confidential" in the Other South Dakota Cases, as defined below.

e. **"Documents"** (whether capitalized or not) are all materials within the scope of SDCL § 15-6-34(a).

f. **"Other South Dakota Cases"** are: See Exhibit A.

g. **"Outside Attorneys"** means outside counsel of record for any Party.

h. **"Outside Vendors"** means messenger, copy, coding, and other clerical-services vendors not employed by a Party or its Outside Attorneys.

i. **"Written Assurance"** means an executed document in the form attached as Exhibit B.

SCOPE

2. This Protective Order applies to all information, documents, and things exchanged in or subject to discovery that are produced or otherwise provided in the Action, either by a Party or Non-Party (each a "Producing Person"), to any other Party or Non-Party, in response to or in

connection with any discovery requests, including, but not limited to, deposition testimony (whether based on oral examination or written questions), interrogatories, answers to interrogatories, requests for admission, responses to requests for admissions, document requests, documents, information, and other things produced, as well as any and all copies, abstracts, digests, notes, summaries, and excerpts thereof ("Discovery Material").

3. No action taken in accordance with the Protective Order will be construed as a waiver of any claim or defense in the Action or of any position as to discoverability or admissibility of evidence.

DESIGNATIONS

4. A Producing Person may designate a document "Confidential" or "Highly Confidential – Attorneys' Eyes Only" to protect information within the scope of SDCL § 15-6-26(c) (the "Designating Party"), in accordance with the following provisions:

a. "Confidential" will mean sensitive, confidential, proprietary information, or non-public personal information (e.g., social security numbers) that has not been made public by the Designating Party and that the Designating Party reasonably and in good faith believes contains or comprises: (i) material that is confidential pursuant to applicable law, including trade secrets, and any other materials that the Designating Party believes in good faith to be entitled to protection under SDCL § 15-6-26(c)(7); (ii) proprietary or otherwise sensitive non-public business information; or (iii) information implicating an individual's legitimate expectation of privacy, such as personal financial information, personal identifying information, or other personally or competitively sensitive information. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good faith assessment of whether the passage of time has eliminated the need to mark the material as "Confidential."

b. "Highly Confidential – Attorneys' Eyes Only" will mean Confidential Discovery Material that the Designating Party reasonably and in good faith believes is so highly sensitive and is of such a nature that disclosure to persons other than those listed in Paragraph 10 would create a substantial risk of economic injury that could not be avoided by less restrictive means. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good-faith assessment of whether the passage of time has eliminated the need to mark the material as "Highly Confidential – Attorneys' Eyes Only."

c. As for electronic or hard copy documents designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," each will be clearly marked or stamped as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as applicable, using means sufficient to ensure that every page of such document, when printed, contains the appropriate mark or stamp, where practicable, and will not interfere with legibility or audibility. But electronically stored information ("ESI") produced in native format need not be produced using a means sufficient to ensure that every page of such document contains the appropriate mark or stamp so long as: (i) a TIFF placeholder image corresponding to the ESI produced in native format is produced that includes the "Confidential" or "Highly Confidential – Attorneys' Eyes Only" mark; (ii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears in the file name of the natively-produced ESI; or (iii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears on the label of the media or in the transmittal email containing natively-produced ESI.

5. Third parties whose documents are produced in this Action may also designate documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" subject to the same

protections and constraints as the Parties to this Action. A copy of this Protective Order shall be served along with any subpoena served in connection with the Action.

LIMITATIONS ON USE OF CONFIDENTIAL DISCOVERY MATERIAL

6. All Confidential Discovery Material produced in this Action may be used solely for purposes of this Action.

7. Any person subject to this Protective Order who receives Confidential Discovery Material pursuant to the terms of this Protective Order may not disclose such Confidential Discovery Material to anyone else except as expressly permitted hereunder.

8. Nothing in this Order precludes a Party from: (a) using its own documents or information; or (b) using documents or information that are public or that are obtained from a source other than a Producing Party.

ACCESS TO CONFIDENTIAL DISCOVERY MATERIAL

9. Access to Confidential documents will be limited to:

a. The Court and its staff;

b. In-house counsel, representatives, and current employees of the Parties responsible for overseeing and assisting with the Action to whom disclosure is reasonably necessary, and Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

e. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) it is shown

through testimony or other evidentiary proof that the witness prepared, received, or reviewed the information or otherwise to have personal knowledge regarding its contents; or (2) (a) the counsel who discloses the information to the witness determines, in good faith, that such disclosure is reasonably necessary and appropriate to assist in the conduct of this Action; and (b) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

f. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B; Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B; and

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other disputes, and their necessary personnel.

10. Access to "Highly Confidential – Attorneys' Eyes Only" documents will be limited to:

a. The Court and its staff;

b. Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action retained to transcribe testimony;

e. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

f. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) the witness is shown through testimony or other evidentiary proof to have prepared, received or reviewed the Highly Confidential Information or otherwise to have personal knowledge regarding its contents; and (2) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically

retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other dispute, and their necessary personnel; and

j. Designated in-house counsel for SCS Carbon Transport LLC, only during, or in preparation for, the hearings of any dispositive motions (including any hearing on class certification). The following individuals will be the designated in-house counsel for SCS Carbon Solutions, LLC: Jess Vilsack, General Counsel, Summit Carbon Solutions, LLC.

11. Each person appropriately designated under Paragraph 9.f or 9.g to receive "Confidential" information and in Paragraph 10.f or 10.g to receive "Highly Confidential – Attorneys' Eyes Only" documents will execute a "Written Assurance" in the form attached as Exhibit B. Outside Attorneys who provided access to Discovery Material to persons in accordance with this Paragraph will maintain a collection of each executed Exhibit B.

USE OF CONFIDENTIAL DISCOVERY MATERIAL

12. **A confidential document may be filed only in accordance with SDCL Chapter 15-15A and any other applicable state law. Any Party seeking to file with the Court documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under seal shall do so in accordance with SDCL Chapter 15-15A and any other applicable state law and local court procedures.**

Except as otherwise provided in SDCL Chapter 15-15A and any other applicable state law, a Party intending to present another Party's or a Non-Party's Confidential Discovery Material

at a hearing or trial must promptly, and no less than three days before the hearing or trial, notify all counsel of record for the Designating Party and for all other Parties so that they may seek relief from the court.

13. All depositions or portions of depositions taken in the Action that contain confidential information may be designated by a Party or its counsel as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and thereby obtain the protections accorded other "Confidential" or "Highly Confidential – Attorneys' Eyes Only" documents. Confidentiality designations for depositions will be made either: (a) orally on the record and requesting that the relevant portion(s) of testimony be so designated; or (b) by written notice to the Parties and those who were present at the deposition. Unless otherwise agreed, depositions will be treated as "Highly Confidential – Attorneys' Eyes Only" during the 30-day period following receipt of the transcript. The deposition of any witness (or any portion of such deposition) that encompasses "Confidential or Highly Confidential – Attorneys' Eyes Only" documents and information will be taken only in the presence of persons who are qualified to have access to such information. Nothing in this Paragraph will apply to or affect the confidentiality designations on Discovery Material entered as an exhibit at depositions. Nor will anything in this Paragraph preclude the witness from reviewing his or her deposition transcript.

14. If testimony is designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," the court reporter, who will first have agreed to abide by the terms of this Paragraph, will be instructed to include on the cover page of each such transcript the legend: "This transcript portion contains information subject to a Protective Order and will be used only in accordance therewith," and each page of the transcript will include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate. If the deposition is videotaped, the videotape

will also be subject to the same level of confidentiality as the transcript and include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate, if any portion of the transcript itself is so designated.

15. Any document produced (or material containing information from a document produced), any deposition transcripts or exhibits, any expert reports, any filings, and other materials from the Other South Dakota Cases involving any of the Parties in this Action that were designated therein as "Confidential" or "Highly Confidential, Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of the operative Protective Orders in those cases shall be given the corresponding confidentiality designation in this case, unless the original source of the document agrees to waive confidentiality, the document has since become public, or the Court orders otherwise.

16. If a Party or any other person or entity that has agreed to be bound by this Protective Order by executing Exhibit B (a "Subpoena Recipient") is served with a subpoena or a court order issued in other litigation or a request from a legislative or other administrative body with authority to compel disclosure requesting information or items designated in the action as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," they must promptly notify in writing the Designating Party. Such notification will include a copy of the subpoena or order. The Subpoena Recipient will promptly notify in writing the party who caused the subpoena or order to issue in the other litigation or proceedings that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification will include a copy of this Protective Order. The Subpoena Recipient must cooperate with the Designating Party with respect to all reasonable procedures sought by the Designating Party whose material may be affected. If the Designating Party timely seeks a protective order, the Party served with the subpoena will not produce any information designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" before a determination by a court

in accordance with SDCL § 16-5-45(a)–(g), unless the Subpoena Recipient has obtained the Designating Party's permission. The Designating Party will bear the burden and expense of seeking protection in that court of its confidential material. Nothing contained in this provision will be construed as authorizing or encouraging a Subpoena Recipient in this action to disobey a lawful directive from another court.

CHANGES TO DESIGNATIONS

17. If at any time before the trial of this Action, a Producing Person realizes that some portion of Discovery Material previously produced should be designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only,"they may so designate it by apprising all prior recipients of the Discovery Material in writing, and thereafter such designated portion of the Discovery Material will be deemed to be and treated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the terms of this Protective Order. Notwithstanding this provision, a Party may challenge the asserted confidentiality designation as provided for herein.

18. Any Party who inadvertently fails to identify documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will provide written notice and substitute appropriately-designated documents. Any Party receiving such improperly designated documents will retrieve such documents from persons not entitled to receive those documents and, upon receipt of the substitute documents, will return or destroy the improperly designated documents.

19. Any Party may request a change in the designation of any information designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only." Any such document will be treated as designated until the change is completed. If the requested change in designation is not agreed to by the Parties, the Party seeking the change may move the Court for appropriate relief, providing notice to any Party or third party whose designation of produced documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" in the Action may be affected. The Party asserting

that the material is "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will have the burden of proving that the information in question is within the scope of protection afforded by SDCL § 15-6-26(c). If the motion affects a document produced by a Non-Party then, with respect to the motion, that Non-Party is entitled to the same notice and opportunity to be heard as a Party.

DISPOSITION OF CONFIDENTIAL DISCOVERY MATERIAL

20. Within 60 days of the termination of the Action, including any appeal, each Party to the Action will either destroy or return to the other Parties all documents produced by the other Parties that were designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies of such documents, and will destroy all extracts and data taken from such documents. Each Party will provide a certification as to such return or destruction within the 60-day period. But attorneys will be entitled to retain a set of all documents filed with the Court and all correspondence generated in connection with the Action as well as materials that contain, reflect, incorporate, attach, or reference attorney work product, so long as the terms of this Protective Order will continue to govern any such retained materials. Additionally, with respect to ESI, the Parties need not destroy backup media so long as the Party has a data destruction policy for the backup media that will result in the overwriting or destruction of that data. Similarly, in-house counsel, external counsel, experts or consultants retained to assist with the Action, and their respective employees or staff, will not be required to destroy "Confidential" or "Highly Confidential – Attorneys' Eyes Only" or material contained in their email accounts or document management systems, so long as they otherwise comply with this Protective Order with respect to such retained material. Nothing in this Paragraph shall obligate any Party to destroy its own Confidential Information at the close of this Action or at any other time.

PRIVILEGED AND PROTECTED MATERIALS

21. To the greatest extent permitted by law, the production or disclosure of privileged or protected materials, whether inadvertent or otherwise, does not waive any applicable privilege or protection in this Action or any other proceeding. The Parties intend for this Paragraph to be interpreted to provide the maximum protection allowed by law.

22. Any Party who inadvertently produces or discloses privileged materials will, promptly upon discovery of such inadvertent production or disclosure, notify the receiving Party/ies in writing and request that the documents be returned. When a receiving Party receives notice of such inadvertent production or disclosure it must sequester, return, or destroy the inadvertently produced or disclosed privileged materials and confirm that any persons or entities to whom it has provided such privileged materials have sequestered, returned, or destroyed the privileged materials. The privileged materials may not be used or disclosed for any purpose—including to challenge the assertion of privilege over those materials—unless and until the assertion of privilege is withdrawn or overruled. The privileged materials will be deleted or otherwise permanently removed from any systems used to house documents, including document review databases, e-rooms, and any other locations that store the privileged materials. Any extracts, notes or summaries referring or relating to any such inadvertently produced or disclosed privileged materials must likewise be returned or destroyed. Within seven days of providing notice of inadvertent production or disclosure, a Party or Producing Person claiming privilege for inadvertently produced or disclosed privileged materials must state the basis for the privilege assertion. Nothing herein will prevent a receiving Party from challenging the propriety of a privilege assertion by submitting a challenge to the Court consistent with applicable law, although the privileged materials themselves cannot be used or disclosed as part of such a challenge. The Party asserting privilege bears the burden of establishing the privileged nature of any inadvertently

produced or disclosed privileged materials. If a receiving Party becomes aware that it is in receipt of information or materials that it knows or reasonably should know is privileged, protected, or immune, counsel for the receiving Party will immediately take steps to: (i) stop reading such information or materials; (ii) notify counsel for the Producing Party of such information or materials; (iii) collect all copies of such information or materials; (iv) sequester, destroy, or return such information or materials to the Producing Party; and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

EXPERT WITNESS DISCLOSURE

23. Disclosure of Certain Information Regarding Expert Witnesses.

a. No subpoenas (for depositions or documents) need be served on any SDCL § 15-6-26(b)(4) expert in this case. Instead, the Party or Parties retaining such expert will make him or her available for deposition, at a time mutually agreed to by the Parties. If an expert is required to submit a report, the deposition of such expert will be conducted after the report is served at a time mutually agreed by the Parties. If such an expert has already been deposed as a fact witness, he or she may be deposed again in his or her expert capacity.

b. Within three business days of service of a report, the Party submitting such report shall produce: (i) any data, facts or other information relied upon by the expert in forming the expert witness's opinions and not previously produced in this action, as well as a list identifying by bates range or other appropriate identifiers any produced data, facts, or other information relied upon by the expert in forming the expert witness's opinions; (ii) any exhibits that will be used to summarize or support the expert witness's opinions; (iii) the expert witness's qualifications, including a list of all publications authored in the previous ten years; (iv) a list of all other cases, during the previous four years, where the expert witness has testified as an expert at trial or by deposition; and (v) a statement of the compensation to be paid for the study and testimony in this case. To the extent such disclosures

include charts, tables, exhibits, information or data processed or modeled by computer at the direction of a disclosed testifying expert in the course of forming the expert's opinions, machine-readable copies of the exhibits, information, or data (including all linked data files, input and output files, formulas contained within spreadsheet cells and similar electronic information necessary to understand the charts, tables, exhibits, information, or data) sufficient to allow the replication of all analysis contained in the report, where applicable, along with appropriate computer programs and instructions necessary to access and use the data (unless such computer programs are reasonably and readily commercially available) shall also be provided with such disclosures. Information gleaned from non-public sources shall also be provided with such disclosures.

24. Non-Disclosure of Certain Information Regarding Expert Witnesses.

a. The below-listed categories of documents, recording media, and communications need not be disclosed by any Party and an expert may not be examined at deposition, hearing, or trial on the contents of the below-listed categories of documents, recording media, and communications (subject to the exceptions at the end of this Paragraph):

i. any notes or other writings taken or prepared by or for an expert witness in connection with this matter (aside from the final written expert report(s) and notes generated while testifying), including:

1. written correspondence or memoranda to or from, and notes of conversations between and among the expert witness and the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs); and/or

2. copies of materials produced by any Party in this Action bearing the notes, markings, or comments of the expert, the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs);

ii. any draft reports, draft studies, draft work papers, draft declarations, or other draft materials prepared by, for, or at the direction of an expert witness, regardless of the form in which the draft is recorded; and

iii. any oral or written communication between and among expert witnesses and their assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs), regardless of the form of the communications. For avoidance of doubt, this includes oral or written communication between any of the individuals listed above, including but not limited to (a) one expert and/or their staff and assistants and (b) another expert and/or their staff and assistants.

b. The foregoing exclusions from disclosure set forth in subparagraphs (a)(i)–(iii) do not apply to any communications, documents, data sets, or analyses upon which an expert relies as a basis for his or her ultimate opinion. In addition, examination shall be permitted on alternative analyses, methodologies, or approaches to issues on which the expert is testifying, regardless of whether the expert considered them in forming the expert's opinion, including but not limited to analyses that the expert performed but ultimately did not rely upon.

c. Communications between and among experts, their staffs, and attorneys shall not be discoverable unless relied upon as a basis for any expert's ultimate opinion(s). Although communications relating to compensation for the expert's work or testimony shall not be required to be produced or exchanged, the Parties may examine witnesses at deposition or trial as to the amount they charge.

25. Except as provided under SDCL § 15-6-26(b)(4)(D), no Party may take discovery of an expert who has been retained or specially employed by another Party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, without the express written consent and authorization of the Party employing such expert.

DUTY TO NOTIFY

26. If any Party learns of a potential breach of this Protective Order or of the confidentiality of any document designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under this Protective Order, that Party will promptly inform all other Parties in writing of the breach.

MODIFICATION AND DURATION OF THIS PROTECTIVE ORDER

27. Any Party may apply to the Court for a modification of the Protective Order, and nothing in this Protective Order will be construed to prevent a Party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

28. The obligations imposed by the Protective Order will survive the termination of the Action.

PRIOR ORDERS

29. **All prior consistent orders remain in full force and effect.**

REMEDIES

30. Failure to comply with any provision of this protective order or any other prior consistent order shall subject the non-complying party, non-complying counsel and/or the party such counsel represents to any and all appropriate remedies, sanctions and the like, including without limitation: assessment of costs, fines and attorneys' fees and disbursements; waiver of rights to object; exclusion or limitation of witnesses, testimony, exhibits, and other evidence; striking of pleadings; complete or partial dismissal with prejudice; entry of whole or partial default judgment; and/or any other relief that this Court may from time to time deem appropriate.

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BY THE COURT:

Circuit Court Judge

Attest:
Payne, Megan
Clerk/Deputy

EXHIBIT A

Other South Dakota Cases:

- *Helfenstein et al. v. SCS Carbon Transport LLC,*
  McPherson County no. 45CIV22-000014
- *SCS Carbon Transport LLC v. Jordre et al.,*
  McPherson County no. 45CIV22-000018
- *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC,*
  Spink County no. 71CIV22-000047
- *Bossly et al. v. SCS Carbon Transport LLC,*
  Brown County no. 06CIV22-000253
- *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC,*
  Edmunds County no. 22CIV22-000020
- *Geide et al. v. SCS Carbon Transport LLC,*
  Minnehaha County no. 49CIV22-001694
- *Bell-Murphy Family Trust et al. v. SCS Carbon Transport LLC,*
  Lincoln County no. 41CIV22-000365
- *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC,*
  Lake County no. 39CIV22-000064
- *Patricia K. Deeg Trust v. SCS Carbon Transport LLC,*
  Beadle County no. 02CIV22-000129
- *SCS Carbon Transport LLC v. Mathern et al.,*
  Brown County no. 06CIV22-000335
- *SCS Carbon Transport LLC v. Skelton et al.,*
  Codington County no. 14 CIV22-000274
- *SCS Carbon Transport LLC v. Wieseler et al.,*
  Hand County no. 29CIV22-000021
- *SCS Carbon Transport LLC v. Benson et al.,*
  Lake County no. 39CIV22-000083
- *SCS Carbon Transport LLC v. Job et al.,*
  McPherson County no. 45CIV22-000024
- *SCS Carbon Transport LLC v. Thorson et al.,*
  Spink County no. 71CIV22-000057

- *SCS Carbon Transport LLC v. Fossum et al.*,
  Lincoln County no. 41CIV22-000476

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA	06CIV22-000253

ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned actions:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of James Pirolli (Pirolli Aff.) ¶¶ 3–4; Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

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2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 2,000 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Pirolli Aff. ¶ 4; Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Pirolli Aff. ¶ 5; Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.[1]

5. SCS is offering its CO_2-transporation services to or for the public for hire. Pirolli Aff. ¶¶ 4, 6–10.

6. SCS and Summit Carbon Solutions have advertised and continue to actively advertise SCS's CO_2-transportation service for hire to the public on Summit Carbon Solutions' website. They also have engaged and continue to actively engage in direct outreach to potential customers to offer SCS's interstate CO_2-transportation services. Pirolli Aff. ¶ 6.

7. SCS will hold an open season to publicly solicit binding commitments for interstate CO_2-transportation services from interested customers along the pipeline's path. Pirolli Aff. ¶ 7.

8. SCS is reserving a portion of the capacity of its pipeline for future shippers that may desire to receive interstate CO_2-transportation services after the pipeline has begun operations. Pirolli Aff. ¶ 8.

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[1] *See also In re Application by SCS Carbon Transp. LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

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9. Summit Carbon Solutions has contracted with or signed letters of intent with more than 34 unaffiliated facilities to transport by pipeline CO_2 produced at those facilities. Pirolli Aff. ¶ 9.

10. On June 24, 2022, SCS filed its acceptance of the provisions of N.D. Cent. Code Chapter 49-19 with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO_2 for others . . . in accordance with the definition of a common carrier." Pirolli Aff. Exhibit 1; Pirolli Aff. ¶ 10.[2]

11. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

12. Peter Helfenstein, Jr., Rott Farms, Inc., Ketterling Farm, LLC, Vilhauer Land Limited Partnership, Brian Hoffman, the David and Valerie Rath Living Trust dated December 02, 2013, Colin and Mary Beth Hoffman, Jerome G. Hoffman, Michael and Nancy Klipfel, Alden and Wilma Flakoll, Shantel C. Schumack, Leroy and Joan Weiszhaar, Wade and Judy Weiszhaar, Dennis Wolff, Quinton Wolff, R & C Feickert Land LLC, Rebecca D. Michaelsohn, David Melland, Rott Ranch Limited Partnership, the Gary and Shirley Wolff Living Trust, Willard Goeshel, Ken Stugelmayer, Marsha M. Vossler, the Mark M. Vossler and Marsha M. Vossler Revocable Trust, Marilyn D. Nelson, Mark Thompson, the Estate of Albert Eugene Erdmann, the Braun Family Trust 2020, the Margaret Ellett Living Trust, the Ken Olson Trust 2010, the Olson Family Trust 2019, Francoli Family Limited Partnership, Armadale Limited Partnership, the Myron O. Hammer Credit Shelter Testamentary Trust, Jared Bossly, Bossly Real Estate Limited

[2] *See also In re SCS Carbon Transp. LLC Acceptance of Provisions of N.D.C.C. § 49-19-12*, No. PU-22-260 (N.D. Pub. Serv. Comm'n June 24, 2022), https://www.psc.nd.gov/database/documents/22-0260/001-010.pdf.

Partnership, the Estate of Donald A. Schaunaman, Craig D. Schaunaman, Kirk Schaunaman, Todd and Donna Rozell, Scott Rozell, Seth Klipfel, the Delores Schumacher Revocable Trust, and John and Stephanie Jung ("Landowners") own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4

Landowner	County	APN	Legal Description
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE

Landowner	County	APN	Legal Description
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

13. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

14. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–50; Schovanec Aff. Exhibits 1–43.

15. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibits 1–43 at p. 1.

16. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibits 1–43 at pp. 1–2.

17. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibits 1–43 at p. 2. In this consolidated action, SCS seeks survey access from 44 Landowners in total. For the vast majority—37—SCS seeks only typical surveys. Schovanec Aff. Exhibits 1–43 at p. 2. For the others, in addition to typical surveys,

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SCS seeks geotech surveys for five (Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2) and deep-dig surveys for two (Schovanec Aff. Exhibits 1, 2 at p. 2).

18. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibits 1–43 at p. 2.

19. A typical survey takes on average 1–2 days to complete (3–4 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 13.

20. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2. That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." *Id.*

21. A geotech survey, as described in the 30-day notice letters, takes on average 1 day to complete (2 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 14.

22. Deep-dig surveys are required when a landowners' property "is located within a floodplain." Schovanec Aff. Exhibits 1, 2 at p. 2. That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." *Id.* For that reason, deep-dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine whether cultural materials are present." *Id.*

Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." *Id.*

23. A deep dig survey, as described in the 30-day notice letters, takes on average 1–2 days to complete, although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 15.

24. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 52; Schovanec Aff. Exhibit 44.

25. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibits 1–43 at p. 2.

26. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 51.

Dated this 10th day of February, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell

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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 10th day of February, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

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nick@mwhlawyers.com

Brian E. Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

Filed: 2/10/2023 4:32 PM CST Brown County, South Dakota 06CIV22-000253
- Page 1628 -
APP082

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK BROWN, AND EDMUNDS)	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY, AND JOAN WEISZHAAR Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 **LANDOWNERS' STATEMENT OF DISPUTED MATERIAL FACTS IN RESISTANCE TO SCS' MOTION FOR SUMMARY JUDGMENT**
SCS CARBON TRANSPORT, LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK	45CIV22-000018

Filed: 2/28/2023 6:04 PM CST Brown County, South Dakota 06CIV22-000253

M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, AND SIEH FARMS, LLC, Defendants.	71CIV22-000047
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES and ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-000253
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL and NANCY KLIPFEL,	

Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020
DELORES SCHUMACHER REVOCABLE TRUST, AND JOHN AND STEPHANIE JUNG Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	

Landowners hereby submit this Landowners's Statement of Disputed Material Facts in Response to SCS motion for summary judgment.

1. Landowners deny SCS's idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. *See* Affidavit of Nicholas G. Moser in Support of Landowners' Resistance to SCS Motion for Summary Judgment, ¶¶ 2 – 11. *Id.*

2. As stated, Defendant acts as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred. *Id.*

3. As stated defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred.. *Id.*

4. Landowners acknowledge something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.*

5. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

6. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

7. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

8. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

9. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition.

SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

10. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. Additionally, SCS has not made any contracts available to Landowners in this action because there has not yet been a protective order entered in this action. *Id.*

11. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

12. There is no evidence that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

13. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

14. Nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

15. Landowners acknowledge the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

16. Landowners deny the letters inform them of anything that SCS believes it is bound to comply with. Landowners disagree the "link" which is text on a page informs anyone

of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

17. Landowners acknowledge the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

18. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

19. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

20. There is no evidence as what Geotech survey is as it is purported to be used by SCS in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

21. Landowners acknowledge that what is stated are the words in the letter, which do not state such surveys would take 1-2 days. Landowners deny the authenticity of the underlying statement and deny the truth of the matter asserted. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

22. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

23. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the

deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

24. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

25. Landowners acknowledge this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

26. Admit.

Dated this 28th[th] day of February, 2022.

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Filed: 2/28/2023 6:04 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2034 -

CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 28th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
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Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

STATE OF SOUTH DAKOTA

FIFTH JUDICIAL CIRCUIT

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Gregg C. Magera
CIRCUIT JUDGES
Tony L. Porta
Richard A. Sommers
Marshall Lovrien
MAGISTRATE JUDGE
Cullen McNeece

RICHARD A. SOMMERS
Circuit Court Judge

Sara Zahn, RPR
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April 19, 2023

VIA EMAIL

45CIV22-000014

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Re: *Peter Helfenstein, Jr. et al. v. SCS Carbon Transport, LLC; SCS Carbon Transport, LLC v. Geraldine H. Saylor Jordre, et al.; Braun Family Trust 2020, et al. v. SCS Carbon Transport, LLC; Jared Bossly, et al. v. SCS Carbon Transport, LLC; Delores Schumacher Revocable Trust and John and Stephanie Jung v. SCS Carbon Transport, LLC;* 45CIV22-14, 45CIV22-18, 71CIV22-47, 06CIV22-253, 22CIV22-20 Consolidated Cases

Dear Counsel:

This Court has had the opportunity to review the supplemental briefs filed by the parties in the above-entitled matter. Viewing the undisputed facts as a whole, I find that SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value. This Court will adopt the reasoning of Judge Pardy and Judge Pekas on companion cases from other Circuits on this issue.

Counsel for SCS should prepare the order and submit it for signature.

Sincerely,

Richard A. Sommers
Circuit Court Judge

cc: Brown County Clerk of Courts
Edmunds County Clerk of Courts
Spink County Clerk of Courts
McPherson Clerk of Courts

STATE OF SOUTH DAKOTA)SS COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND	45CIV22-000018

SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD	06CIV22-000253

A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment in Part and Taking Remaining Issue Under Advisement rendered in the above-entitled action on the 28th day of March, 2023, a copy of which is attached

hereto and by reference incorporated herein, was reduced to writing, signed by the Court, attested by the Clerk, and filed in the Brown County Clerk's office on the 28th day of March, 2023.

Dated this 31st day of March, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 31st day of March, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

and the same by First Class Mail, to-wit:

Brian E. Jorde
Domina Law Group
2425 S 144th Street
Omaha, NE 68144

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	))SS))	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

This matter came be heard on the 14th day of March, 2023 before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023. Said Motion having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners[1] having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, it is therefore:

[1] The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC (SCS)'s Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED** as to the following issues:

1. SDCL § 21-35-31 is constitutional;
2. Carbon dioxide is a commodity under SDCL § 49-7-11;
3. SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31; and
4. The surveys and examinations SCS seeks to conduct are authorized by SDCL § 21-35-31.

It is further **ORDERED, ADJUDGED AND DECREED** that SCS's Motion for Summary Judgment, filed February 10, 2023, is hereby **TAKEN UNDER ADVISEMENT** as to the sole remaining following issue:

1. Whether SCS is entitled to summary judgment on the question of whether, in accordance with SDCL § 49-7-11, SCS is holding itself out to the general public as engaged in the business of transporting carbon dioxide for hire by pipeline.

It is further **ORDERED, ADJUDGED AND DECREED** that the parties will submit further briefing and any supplemental materials related to the issue taken under advisement according to the following schedule:

1. SCS will submit its further briefing and any supplemental materials within 14 days of the entry of this order.
2. Landowners will submit their further briefing and any supplemental materials within 14 days of the filing of SCS's brief.

3/28/2023 1:24:54 PM

BY THE COURT:

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

STATE OF SOUTH DAKOTA)SS COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment and Denying Landowners' Motion to Continue rendered in the above-entitled action on the 21st day of April, 2023, a copy of which is attached hereto and by reference incorporated herein, was reduced to writing, signed by the Court, attested by the Clerk, and filed in the Brown County Clerk's office on the 21st day of April, 2023.

Dated this 21st day of April, 2023.

Filed: 4/21/2023 3:57 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2588 -

MAY, ADAM, GERDES & THOMPSON LLP

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Attorneys for SCS Carbon Transport LLC

Filed: 4/21/2023 3:57 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2589 -

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 21st day of April, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian E. Jorde
bjorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA))SS COUNTIES OF MCPHERSON, SPINK,) BROWN, AND EDMUNDS)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING
SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

This matter came to be heard on the 14th day of March, 2023, before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed on February 10, 2023, and on Landowners'* Motion to Continue, filed on February 28, 2023. Said motions having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments; and on the basis of the hearing on said motions, the arguments of counsel and the records and files of this action, including supplemental briefing and materials related to the issue taken under advisement by this Court; and good cause appearing, which is

* The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

further explained in the Court's March 28, 2023 Order and April 19, 2023 Letter Decision, which are fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED, AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED**. Landowner Plaintiffs' Amended Complaint (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on October 27, 2022, and Landowner Defendants' Counterclaim (case no. 45CIV22-000018), filed on August 29, 2022, are **DISMISSED** with prejudice;

ORDERED, ADJUDGED, AND DECREED that Landowners' Motion to Continue, filed February 14, 2023, is **DENIED**;

ORDERED, ADJUDGED, AND DECREED that, pursuant to SDCL § 21-35-31, SCS Carbon Transport LLC is granted the declaratory judgment and the injunctive relief it seeks in its Restated Counterclaim (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on November 7, 2022, and in its Complaint (case no. 45CIV22-000018), filed on July 20, 2022, including authorizing access for the purpose of conducting civil, environmental, and archaeological/cultural, surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions, for the properties described as follows:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4

Landowner	County	APN	Legal Description
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4

Landowner	County	APN	Legal Description
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

and,

ORDERED, ADJUDGED, AND DECREED that the above Landowners, their agents and representatives, and anyone acting in concert with them, are enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said properties, including conducting civil, environmental, and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions.

[SIGNATURE PAGE FOLLOWS]

4/21/2023 11:10:17 AM

BY THE COURT:

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-35. Condemnation Under Power of Eminent Domain (Refs & Annos)

SDCL § 21-35-31

21-35-31. Entry on private property for examination and survey of project requiring siting permit from Public Utilities Commission

Currentness

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Credits
Source: SL 2016, ch 118, § 1.

S D C L § 21-35-31, SD ST § 21-35-31
Current through the 2023 Regular Session and Supreme Court Rule 23-16

End of Document

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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-2. Carriers' Powers and Duties in General (Refs & Annos)

SDCL § 49-2-12

49-2-12. Eminent domain powers

Currentness

A common carrier may exercise the right of eminent domain in acquiring right of way as prescribed by statute.

Credits
Source: SDC 1939, § 8.0801.

Notes of Decisions (3)

S D C L § 49-2-12, SD ST § 49-2-12
Current through the 2023 Regular Session and Supreme Court Rule 23-16

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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-11

49-7-11. Pipelines that are common carriers--Exemption

Currentness

All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B.

Credits

Source: SL 1980, ch 321, § 1; SL 1980, ch 328, § 3; SL 1981, ch 341.

S D C L § 49-7-11, SD ST § 49-7-11
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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-13

49-7-13. Condemnation of pipeline right-of-way--Width across school and public lands

Currentness

Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry.

Credits
Source: SL 1980, ch 321, § 3.

S D C L § 49-7-13, SD ST § 49-7-13
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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 2

§ 2. Due process--Right to work

Currentness

No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

Credits

History: Amendment proposed by SL 1945, ch 315, approved Nov., 1946.

Notes of Decisions (550)

Const. Art. 6, § 2, SD CONST Art. 6, § 2
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 13

§ 13. Private property not taken without just compensation--Benefit to owner--Fee in highways

Currentness

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.

Credits

History: Amendment proposed by SL 1961, ch 297, approved Nov. 6, 1962. Amendment proposed by SL 1989, ch 3, rejected November 6, 1990.

Notes of Decisions (299)

Const. Art. 6, § 13, SD CONST Art. 6, § 13
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article XVII. Corporations (Refs & Annos)

Const. Art. 17, § 18

§ 18. Compensation for private property taken for public use--Assessment of damages

Currentness

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

Credits

History: Repeal proposed by SL 1975, ch 3, rejected Nov. 2, 1976.

Notes of Decisions (3)

Const. Art. 17, § 18, SD CONST Art. 17, § 18
Current through the 2023 Regular Session

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United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

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<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30317

BETTY JEAN STROM TRUST et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Third Judicial Circuit,
Nos. 39CIV22-000064 (Beadle County) and 02CIV22-000129 (Lake County).
The Hon. Patrick T. Pardy, Judge presiding.
Notices of appeal filed April 14, 2023.

No. 30338

PETER HELFENSTEIN, JR. et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Fifth Judicial Circuit,
Nos. 45CIV22-000014 (McPherson County), 45CIV22-000018 (McPherson County), 71CIV22-000047 (Spink County), 06CIV22-000253 (Brown County), and 22CIV22-000020 (Edmunds County).
The Hon. Richard A. Sommers, Judge presiding.
Notice of appeal filed April 28, 2023 in No. 45CIV22-000014.
No notice of appeal filed in Nos. 45CIV22-000018, 71CIV22-000047, 06CIV22-000253, or 22CIV22-000020.

APPELLEE SCS CARBON TRANSPORT LLC'S BRIEF
(Public Redacted Copy)

Filed: 12/1/2023 2:06 PM CST Supreme Court, State of South Dakota #30317

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JURISDICTIONAL STATEMENT

In a June 16, 2023 order, this Court consolidated Appeal Nos. 30317 and 30338 for briefing and submission.

Appeal No. 30317 is an appeal from two consolidated cases in the Third Judicial Circuit before the Honorable Patrick T. Pardy: 39CIV22-000064 (*Strom*) and 02CIV22-000129 (*Deeg*). On March 15, 2023, the court entered final orders in each case. Notices of entry of the final orders were filed and served in each case on March 16, 2023. Notices of appeal were filed in each case on April 14, 2023. We will cite to the *Strom* record as "30317/064R" and the *Deeg* record as "30317/129R." If the two records are substantively the same for this appeal, we will cite to only the *Strom* record.

Appeal No. 30338 is a purported appeal from five consolidated cases in the Fifth Judicial Circuit before the Honorable Richard A. Sommers: 45CIV22-000014 (*Helfenstein*), 45CIV22-000018 (*Jordre*), 71CIV22-000047 (*Braun*), 06CIV22-000253 (*Bossly*), and 22CIV22-000020 (*Schumacher*). Final judgments were entered and notices of entry were filed and served in *Helfenstein*, *Jordre*, and *Bossly* on April 21, 2023; in *Schumacher* on April 25, 2023; and in *Braun* on April 26, 2023. A notice of appeal was filed in *Helfenstein* on April 28, 2023. No notice of appeal was filed in *Jordre*, *Braun*, *Bossly*, or *Schumacher*. The arguments in this brief do not waive the issues raised in SCS Carbon Transport LLC's Motion to Dismiss Appeal No. 30338. We will cite to the *Helfenstein* record as "30338/014R," the *Jordre* record as "30338/018R," the *Braun* record as "30338/047R," the *Bossly* record as

"30338/253R," and the *Schumacher* record as "30338/020R." If these five records are substantively the same for this appeal, we will cite to only the *Helfenstein* record.

STATEMENT OF THE CASE

In the Third Circuit cases (*Strom* and *Deeg*), Landowners[1] sued Appellee SCS Carbon Transport LLC in July 2022, seeking declaratory and injunctive relief prohibiting SCS from completing surveys on their property under SDCL 21-35-31. Their original complaints challenged SDCL 21-35-31 as facially unconstitutional under the federal and state takings and procedural due process clauses. (30317/064R 7–15; 30317/129R 7–18.) After Judge Pardy consolidated the cases (30317/064R 204–05), Landowners amended their complaint to seek declaratory and injunctive relief on six bases:

(1) SDCL 21-35-31 is facially unconstitutional under the federal and state takings clauses;

(2) SDCL 21-35-31 amounts to an unconstitutional taking as applied;

(3) SDCL 21-35-31 is facially unconstitutional under the federal and state procedural due process clauses;

(4) SCS does not have eminent-domain power;

(5) SCS's notice letters do not satisfy SDCL 21-35-31; and

(6) SCS's survey types are not authorized by SDCL 21-35-31.

[1] We will refer to the Appellants collectively as "Landowners."

(*Id.* 336–55.)[2] SCS counterclaimed for declaratory and injunctive relief confirming its right to survey Landowners' property. (*Id.* 432–37.)

In the Fifth Circuit, Landowners sued SCS in June and July 2022 in four cases (*Helfenstein*, *Braun*, *Bossly*, and *Schumacher*), seeking the same relief and bringing the same two constitutional challenges as in the original Third Circuit complaints. (30338/014R 15–24; 30338/047R 10–18; 30338/253R 9–17; 30338/020R 6–17.) In the fifth case (*Jordre*), SCS sued Landowners in July 2022 for declaratory and injunctive relief to complete its surveys. (30338/018R 3–9.) Those Landowners counterclaimed with the same two constitutional challenges. (*Id.* 35–46.) After Judge Sommers consolidated the five cases (30338/014R 145–47), Landowners-Plaintiffs (in *Helfenstein*, *Braun*, *Bossly*, and *Schumacher*) filed a consolidated amended complaint that is essentially identical to the Third Circuit amended complaint. (*Id.* 482–503.) SCS counterclaimed for survey access.[3] (*Id.* 589–94.) Landowners-Defendants (in *Jordre*) never sought to amend their counterclaim to align with the consolidated amended complaint.

In January 2023, SCS moved for summary judgment in the Third Circuit cases on all claims and counterclaims. (30317/064R 1310–1517.)

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[2] Landowners filed identical amended complaints in each case under separate captions.

[3] In both the Third and Fifth Circuits, SCS did not seek relief against some of the landowners who had sued it. So SCS did not counterclaim against those landowners when it filed its restated counterclaims to the amended complaints. (30317/064R 432–33; 30338/014R 589–90.)

Landowners resisted SCS's motion and filed their own motion to continue the summary judgment hearing and to compel additional discovery. (*Id.* 1557–1946.) After a hearing in February and taking the matters under advisement, Judge Pardy granted SCS's motion in full and entered a final order accordingly. (*Id.* 2251–67.)

In February 2023, SCS moved for summary judgment in the Fifth Circuit cases on all claims and counterclaims. (30338/014R 1697–2081.) Landowners again resisted SCS's summary judgment motion and filed a motion to continue the summary judgment hearing. (*Id.* 2115–2220, 2304–2561, 2572–97.) After a hearing in mid-March, Judge Sommers granted SCS's motion on all issues except one—SCS's common-carrier status. He took that issue under advisement and ordered supplemental briefing. (*Id.* 2608–11, 2639–47.) After the additional briefing (*id.* 2612–31, 2648–64), Judge Sommers granted summary judgment in SCS's favor on that final issue and entered a final order. (*Id.* 2665–87.)

STATEMENT OF THE FACTS

SCS and its parent Summit Carbon Solutions, LLC are developing an interstate pipeline in South Dakota and four other states to transport carbon dioxide (CO_2). (30317/064R 1373, 1503, 655; 30338/014R 1785, 1795, 1930.) Summit Carbon Solutions has contracted with or signed letters of intent with at least 34 third-party facilities to transport CO_2 from those facilities through SCS's pipeline. (30317/064R 655, 1693–1942; 30338/014R 1785, 2308–2557.) SCS will also hold an open season to publicly solicit additional binding

commitments for CO_2 shipment from interested customers and is reserving a portion of its pipeline capacity for future uncommitted shippers. (30317/064R 655; 30338/014R 1785.) In February 2022, SCS applied for a siting permit under SDCL Chapter 49-41B with the South Dakota Public Utilities Commission (PUC). (30317/064R 1374, 1377–1501; 30338/014R 1795–96, 1802–1926.)

To determine the pipeline route and to appraise properties, SCS must enter and examine the property along the pipeline's route and complete preliminary civil, environmental, and cultural surveys and investigations. (30317/064R 1374–75; 30338/014R 1796–1800.) By statute, an entity with eminent-domain power, in connection with a project regulated by Chapter 49-41B, "may cause an examination and survey to be made as necessary for its proposed facilities."[4] SDCL 21-35-31. In accordance with the statute, SCS gave written notice to South Dakota landowners along the pipeline's proposed route of its plans to perform surveys. (30317/064R 1504, 1506–11, 1943–46; 30338/014R 1931–39, 1941–2075.) These lawsuits followed.

ARGUMENT

Summary judgment is proper when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). On appeal, this Court "decide[s] only whether genuine

[4] We will use the terms "survey" and "survey access" as shorthand for all of the access authorized by SDCL 21-35-31, whether denominated as "examinations," "surveys," or otherwise.

issues of material fact exist and whether the law was correctly applied." *Bordeaux v. Shannon Cnty. Schs.*, 2005 SD 117, ¶ 11, 707 N.W.2d 123, 126 (citation and quotation marks omitted). "'Summary judgment will be affirmed if there exists *any* basis which would support the trial court's ruling.'" *Holzer v. Dakota Speedway, Inc.*, 2000 SD 65, ¶ 8, 610 N.W.2d 787, 792 (citation omitted).

There are no disputed issues of material fact in these cases, so summary judgment was appropriate. SDCL 21-35-31 is constitutional, and the trial courts correctly concluded that SCS met all statutory requirements to complete surveys. This Court should affirm the judgments below.

I. SDCL 21-35-31 IS CONSTITUTIONAL.

"The constitutionality of a statute is a question of law reviewed de novo." *State v. One 1969 Blue Pontiac Firebird*, 2007 SD 63, ¶ 5, 737 N.W.2d 271, 272. There is a "strong presumption that a statute is constitutional." *Beals v. Pickerel Lake Sanitary Dist.*, 1998 SD 42, ¶ 8, 578 N.W.2d 134, 135. "That presumption is not overcome until it is clearly and unmistakably shown beyond a reasonable doubt that the act violates constitutional principles." *Id.* ¶ 18, 578 N.W.2d at 137. The burden of overcoming that strong presumption rests on the challenging party. *Id.* ¶ 8, 578 N.W.2d at 135. "'If a statute can be construed so as not to violate the constitution, that construction must be adopted.'" *State v. Allison*, 2000 SD 21, ¶ 5, 607 N.W.2d 1, 2 (citation omitted); *see also In re Expungement of Oliver*, 2012 SD 9, ¶ 17, 810 N.W.2d 350, 354.

On a facial challenge, "the challenger must establish that no set of circumstances exists under which the [challenged statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also State v. Andrews*, 2007 SD 29, ¶ 6, 730 N.W.2d 416, 419 ("A 'facial' challenge, in this context, means a claim that the law is invalid *in toto* - and therefore incapable of any valid application." (citation and quotation marks omitted)). A facial challenge is "the most difficult challenge to mount successfully," and challengers have a "heavy burden to demonstrate that [a statute] is 'facially' unconstitutional." *Salerno*, 481 U.S. at 745.

A. SDCL 21-35-31 does not authorize a taking.

Landowners challenge SDCL 21-35-31 as authorizing an unconstitutional taking.[5] (Br. at 6–16.) Citing the U.S. Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), they contend that SDCL 21-35-31 violates the Fifth Amendment to the U.S. Constitution and Article VI, § 13 and Article XVII, § 18 of the South Dakota Constitution because it authorizes survey access that amounts to a taking without requiring just compensation. But *Cedar Point*, which addressed a California union regulation, not a survey statute, makes clear that longstanding restrictions on property rights—like the right to survey access—are not takings.

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[5] This is a facial challenge. Landowners abandoned their as-applied challenge at summary judgment. (30317/064R 1608; 30338/014R 2198; 3d Cir. Tr. 14:12–17, 18:5–10; 5th Cir. Tr. 4:23–5:3.)

1. *Cedar Point* reaffirms that longstanding restrictions on property rights are not takings.

Cedar Point was not about survey access. It was about a California regulation requiring all agricultural employers to "allow union organizers onto their property for up to three hours per day, 120 days per year" without compensation for the intrusion. 141 S. Ct. at 2069. The Court held that the regulation authorized a per se physical taking without compensation because it "appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year." *Id.* at 2074. The Court did not mention survey laws, let alone hold that survey-access statutes suffer from the same constitutional infirmities as the California union regulation.

Far from it. Even as the Court invalidated the California regulation, it affirmed that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Id.* at 2079. The Court explained that "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the landowner's title.'" *Id.* at 2079 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)). That principle did not apply in *Cedar Point* because "no traditional background principle of property law requires the growers to admit union organizers onto their premises." *Id.* at 2080. In doing so, the Court rejected the theory that Landowners peddle

here—that every physical invasion of property is a per se taking. *See also id.* at 2078–79 (discussing how not all government-induced flooding is a taking).[6]

2. Survey access is a longstanding background restriction on property rights.

Unlike the California union regulation in *Cedar Point*, survey access incidental to the power of eminent domain is a "traditional background principle of property law." 141 S. Ct. at 2080. Survey statutes "merely assert[] a 'pre-existing limitation upon the landowners' title.'" *Id.* at 2079 (citation omitted). SDCL 21-35-31—like South Dakota's other survey statutes—reflects a longstanding background restriction on property rights that has existed in this State (and across the Nation) for more than a century. SDCL 21-35-31 does not authorize a taking because Landowners never enjoyed the right to exclude prospective condemnors from surveying their land in the first place. *See Lucas*, 505 U.S. at 1030 ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."); *Palmer v. Atl. Coast Pipeline, LLC*, 801

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[6] Many courts have declined to extend *Cedar Point* beyond its union-regulation context. *E.g.*, *Hardy v. United States*, 156 Fed. Cl. 340, 344–45 (2021); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1380, 1383 (8th Cir. 2022); *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 491–92 (Fla. Dist. Ct. App.), *review denied*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022), *cert. denied*, 143 S. Ct. 980 (2023); *Gonzales v. Inslee*, 535 P.3d 864, 872–73 (Wash. 2023); *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 551–53 (2d Cir.), *cert. denied*, No. 22-1095, 2023 WL 6379013 (U.S. Oct. 2, 2023); *United States v. Andrews*, No. 3:20-cv-1300, 2022 WL 1443998, at *3 n.3 (D. Conn. May 6, 2022); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 980–81 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 1085 (2023); *Munzel v. Hillsborough County*, No. 8:21-cv-2185, 2022 WL 671578, at *4 (M.D. Fla. Mar. 7, 2022).

S.E.2d 414, 418 (Va. 2017) ("[T]he common law has long recognized that the right to exclude is not absolute.").

A longstanding background restriction is one that is consistent "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1028. In assessing "historical practice," courts look "primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions." *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020). In *Cedar Point*, the Court relied on *Nichols on Eminent Domain* to explain the distinction between trespass and takings. 141 S. Ct. at 2078 (citing 1 *P. Nichols, The Law of Eminent Domain* § 112, p. 311 (1917)). *Nichols* explains that "[e]ntry by a governmental agency for purposes of conducting a survey generally does not constitute a taking, under either the common law or under applicable statutory guidelines." 2A *Nichols on Eminent Domain* § 6.01(16)(b) (2022). "Inspections for the purposes of surveys and examinations have been allowed," *Nichols* continues, "even in the absence of statutory authority." 6 *Nichols* § 26C.01(1).

Cedar Point also relied on the Restatement of Torts for examples of common-law privileges. 141 S. Ct. at 2079 ("These background limitations also encompass traditional common law privileges to access private property." (citing Restatement (Second) of Torts § 196 (1964))); *see also Chem-Age Indus., Inc. v. Glover*, 2002 SD 122, ¶ 33 & n.8, 652 N.W.2d 756, 770 & n.8

(recognizing the Restatements as "persuasive in many instances").[7] Like *Nichols*, the Restatement of Torts recognizes the common-law survey privilege. Restatement (Second) of Torts § 211 cmt. c ("The privilege of entry for the purpose of performance or exercise of such duty or authority may be specifically given, as where an employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain. Such a privilege of entry may also arise by implication.").

The Model Code on Eminent Domain reflects the same background limitations on property rights: "The owner shall not obstruct a condemnor from entering upon his land prior to filing a declaration of taking for the purpose of surveying the land or making a specified inspection of same, provided that, the condemnor shall compensate the owner for any virtual damages that may result from his entrance upon the land . . . ." 10 *Nichols* Appendix D-2 § 308.

Those sources reflect the long-established and (as far as we can tell) unanimous position of appellate courts across the Country. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015) ("Indeed, it appears that no court has declared a statute expressly giving a

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[7] This Court has cited the Restatement of Torts with approval on several occasions. *E.g.*, *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶ 52, 599 N.W.2d 384, 398; *Petersen v. Dacy*, 1996 SD 72, ¶ 7, 550 N.W.2d 91, 93; *Kjerstad v. Ravellette Publ'ns, Inc.*, 517 N.W.2d 419, 429 (S.D. 1994); *Petersen v. Sioux Valley Hosp. Ass'n*, 491 N.W.2d 467, 468 (S.D. 1992).

utility the right to enter private property for survey purposes before exercising eminent domain authority facially unconstitutional.").[8] American courts have long recognized—even in the absence of statutory authorization—that an entity with eminent-domain power has a right to enter private land to undertake preliminary surveys or similar investigations. *See Fox v. W. Pac. R.R. Co.*, 31 Cal. 538, 543–44 (1867); *Young v. McKenzie*, 3 Ga. 31, 45 (1847); *Chambers v. Cincinnati & Ga. R.R.*, 69 Ga. 320, 322 (1882); *Thomas v. City of Horse Cave*, 61 S.W.2d 601, 604 (Ky. 1933); *Winslow v. Gifford*, 60 Mass. 327, 329–30 (1850); *Brigham v. Edmands*, 73 Mass. 359, 363 (1856); *Orr v. Quimby*, 54 N.H. 590, 596–97 (1874); *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538, 544 (1877); *Kincaid v. United States*, 35 F.2d 235, 247 (W.D. La. 1929), *aff'd*, 49 F.2d 768 (5th Cir. 1931), *rev'd on other grounds sub nom.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *see also Klemic*, 138 F. Supp. 3d at 690–91 ("[I]t is clear that the common law recognizes, and state and federal courts have consistently upheld, the

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[8] One Iowa trial court recently held that an Iowa survey-access statute is unconstitutional. *Navigator Heartland Greenway, LLC v. Koenig*, No. EQCV034863 (Iowa Dist. Ct. May 3, 2023), *appeal voluntarily dismissed*, No. 23-0739 (Iowa Nov. 27, 2023). That court misapplied both *Cedar Point* and the legal standard for a facial constitutional challenge. Yet even in its error, that court recognized "that survey access may be a traditional privilege that allows access to private property." *Id.* at 11. Since the *Koenig* decision, two Iowa courts have upheld the same statute's constitutionality. *Summit Carbon Sols., LLC v. Kasischke*, No. CVCV101911, order at 3–13 (Iowa Dist. Ct. May 10, 2023), *appeal filed*, No. 23-1186 (Iowa July 28, 2023); *Navigator Heartland Greenway, LLC v. Hulse*, No. EQCV204557, order at 3–12 (Iowa Dist. Ct. May 30, 2023), *appeal filed*, No. 23-1026 (Iowa June 28, 2023).

privilege to enter private property for survey purposes before exercising eminent domain authority . . . . [A] landowner has no constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes.").

Take, for instance, *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1984). There, the Georgia Supreme Court—citing *Nichols*—upheld the common-law right to enter property to survey, inspect, and appraise it. *Id.* at 889. *Oglethorpe* explained that "it would be illogical to require the prospective condemnor to institute condemnation proceedings and pay compensation" before a preliminary entry. *Id.* at 890. The court held that "a prospective condemnor is not required to adhere to condemnation procedures and constitutional provisions for compensation before making a preliminary entry" and, surveying the legal landscape, observed that "courts in a vast majority of jurisdictions agree." *Id.*

That includes South Dakota. SDCL 21-35-31 went into effect in 2016 and is the latest codification of a longstanding common-law and statutory right to survey access in this State. *See* 2016 S.D. Sess. Laws 295, 295 (ch. 118, § 1). In fact, at least as far back as 1916, this Court recognized that "prior to or pending the condemnation proceedings," a prospective condemnor has the right to make "surveys of the land" and dig "test holes," and that "such acts certainly did not amount to taking possession of the tract." *Fairmont & Veblen Ry. Co. v. Bethke*, 37 S.D. 446, 449–50, 159 N.W. 56, 58

(1916). More recently, then-Judge (now Justice) Salter reaffirmed the common-law survey right and its constitutionality. *Dakota Access, LLC v. Schumaker*, No. 49CIV15-000941, mem. op. at 14 (S.D. Cir. Ct. Mar. 24, 2016) ("Here, the court concludes that a pre-condemnation survey is not, itself, a taking and that Dakota Access is not required to seek relief by commencing a condemnation proceeding.").

Another survey statute—SDCL 49-33-6—has been in effect since 1903. *See* 1903 S.D. Sess. Laws 115, 118 (ch. 107, § 8(1)). And those are just some examples of how survey access is deeply rooted in property law in South Dakota. *See also Dakota Access*, mem. op. at 16–22 (discussing the history of survey access and citing three other statutes—SDCL §§ 50-6A-19, 46A-6-5, and 46-8-2.1); Off. Op. No. 83-32, 1983 S.D. Op. Atty Gen. 70, 1983 WL 180613, at *1–2 (citing SDCL §§ 1-1-10, 49-33-6 and observing that the legislature had authorized survey access in several contexts).

For 120 years, then, South Dakota has statutorily authorized pre-condemnation survey access. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (noting that "the regulatory regime in place at the time the claimant acquires the property at issue" shapes the reasonableness of expectations and informs the background principles analysis for takings). Those South Dakota authorities—along with authorities like *Klemic*, *Palmer*, *Nichols on Eminent Domain*, the Restatement of Torts, and the Model Code on Eminent Domain—illustrate

that survey-access laws are a longstanding part of American law that "merely assert[] a 'pre-existing limitation upon the landowner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028–29). They "are consistent with longstanding background restrictions on property rights" and do not constitute a taking. *Id.*; *see also Benson* v. *State*, 2006 SD 8, ¶ 84, 710 N.W.2d 131, 162 ("The Constitution was written and adopted in the light of the conditions and well known laws as they then existed.'" (citation omitted)).

Again, South Dakota is not an outlier. "Today, every state has codified the common law privilege of a body exercising eminent domain authority to enter private property to conduct preliminary surveys without trespass liability." *Palmer*, 801 S.E.2d at 418 & n.2. In fact, there are more than 490 survey-access statutes currently codified across the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *See* App'x at 1–24 (Addendum: Nationwide Survey-Access Laws). At least 29 States (plus D.C. and Puerto Rico) have had statutes in effect for more than a hundred years. *Id.* That of course says nothing of common-law survey rights that predate codification efforts.

The bottom line: Landowners took title to their property subject to a longstanding background restriction authorizing survey access. That makes this case unlike *Cedar Point*.

3. Landowners' attempts to distinguish SDCL 21-35-31 ignore the law.

Conceding that South Dakota has long recognized survey access, Landowners fall back on an attempt to distinguish the *type* of condemnor as relevant to the inquiry. (Br. at 13–14 ("While there are earlier South Dakota statutes authorizing pre-condemnation survey, none of them apply to common carrier pipelines . . . .").) That is the wrong analysis. The inquiry does not focus on whether a particular type of condemnor is seeking survey access but rather on whether pre-condemnation survey access itself is a longstanding background restriction. SDCL 21-35-31 represents the latest iteration of the South Dakota legislature's practice of adapting and expanding eminent-domain and survey-access laws to accommodate emerging technologies and infrastructures. Reviewing the history of the codification of survey access in the State, Justice Salter rejected a similar argument:

> These instances of legislative action do not reflect a single, simultaneous effort to allow pre-condemnation surveys for some entities and purposefully deny that authority to pipeline companies who are common carriers. . . .
>
> Under the circumstances, the court cannot accept the *expressio unius* argument and find that pre-condemnation surveys [for pipeline common carriers] are categorically prohibited.

Dakota Access, mem. op. at 20.

Landowners' attempt to limited background restrictions to *Cedar Point*'s three examples likewise fails. The Court held that "many" longstanding background restrictions on property rights are not takings,

explained that those longstanding background restrictions include (but are not limited to) "traditional common law privileges to access private property," and then provided a few examples of those common-law privileges (which are only a subset of the broader universe of "longstanding background restrictions" that are not takings). 141 S. Ct. at 2079. The Court did not limit background restrictions to only those examples. They were examples, not an exhaustive list. *Id.* at 2079 ("One such privilege allowed . . . ."). In any event, *Cedar Point*'s examples included government-authorized invasions for both public and private interests (*id.* at 2078–79), and a condemnor's survey authority is consistent with those examples.

Nor is survey access the only background restriction outside of *Cedar Point*'s explicit examples. Landowners point to two "South Dakota examples of longstanding third-party privileges to enter private property" that do not fall within *Cedar Point*'s examples. (Br. at 14–15.) Those dealt with rights to private property for private convenience, undercutting Landowners' attempt to cabin background restrictions to only those "centered around public necessity and prevention of public harm." (Br. at 16.) In *Benson*, for instance, this Court held that SDCL 41-9-1.1(2) did not authorize a taking when it allowed the shooting at or taking of small game flying over private land. 2006 SD 8, ¶ 89, 710 N.W.2d at 163. The Court looked to the history of South Dakota law: "If the passage of SDCL 41-9-1.1(2) constitutes a compensable taking, then the same legal situation existed from 1889 and for many years

thereafter. . . . Yet, one can search all the Constitutional Debates and our case law prior thereto and after 1889 and there is no hint or suggestion a taking was the state of the law." *Id.* ¶ 84, 710 N.W.2d at 162.

4. SDCL 21-35-31 requires payment for property damage.

Landowners also suggest that SDCL 21-35-31 violates the South Dakota Constitution's right to have damages determined by a jury and paid before entry. (Br. at 10–12 (citing S.D. Const. art. XVII, § 18).) But because entry for survey access is not a taking, there is no just compensation due for the entry in the first place. In any event, SDCL 21-35-31(3) requires the surveying entity to "[m]ake a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry."[9] Landowners have a statutory right to payment for actual property damage caused by the survey—a right that they may enforce if payment is wrongfully refused. *E.g.*, *Rupert v. City of Rapid City*, 2013 SD 13, ¶¶ 9–10, 827 N.W.2d 55, 60–61 (contemplating the possibility of a post-damage lawsuit); *Hamen v. Hamlin County*, 2021 SD 7, ¶¶ 17–19, 55 N.W.2d 336, 344–45 (same).

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[9] Landowners' argument also defies logic: How could a surveyor pay for "actual damage" before completing the surveys? There is no damage before the surveys happen, and there is no guarantee that a survey will cause damage.

There is no hint in *Cedar Point* that the U.S. Supreme Court upended centuries of nationwide survey-access laws when it invalidated a California union regulation with no analog elsewhere in the Nation. Landowners' contrary position would threaten longstanding laws in all 50 States even though *Cedar Point* did not mention, let alone cast doubt on, those laws.

If adopted, Landowners' position would invalidate more than 490 statutes across the Nation. It would also force all prospective condemnors (including the State of South Dakota) to condemn property before surveying it, causing condemnation proceedings to proliferate and increasing the burden on property owners, condemnors, the public, and the courts. Fortunately, longstanding principles of South Dakota property law—reflecting the consensus across the country—defeat Landowners' theory.

B. SDCL 21-35-31 satisfies procedural due process.

Landowners also fail to meet their heavy burden to prove SDCL 21-35-31's facial unconstitutionality under the procedural due process clauses. (Br. at 17–19.) No court in the country has ever invalidated a survey statute on procedural-due-process grounds. Landowners nevertheless identify two alleged deficiencies: the statute (1) "requires only 30 days written notice of the entry" and (2) "provides no mechanism for challenging the permit applicant's right to enter." (Br. at 18.) They misapprehend what procedural due process requires.

First, because survey access is a "traditional background principle of property law" (*Cedar Point*, 141 S. Ct. at 2080), there is no deprivation

requiring procedural due process in the first place. *See Morris Fam. LLC v. S.D. Dep't of Transp.*, 2014 SD 97, ¶ 28, 857 N.W.2d 865, 873–74 ("[A] property or liberty interest [is] needed to support a procedural due process claim."); *Vruno v. Schwarzwalder*, 600 F.2d 124, 129 (8th Cir. 1979).

Second, procedural due process requires only "reasonable notice" and an "opportunity to be heard." *Schrank v. Pennington Cnty. Bd. of Comm'rs*, 1998 SD 108, ¶ 13, 584 N.W.2d 680, 682 (citation and quotation marks omitted); *see also Achtien v. City of Deadwood*, 814 F. Supp. 808, 813 (D.S.D. 1993) ("Procedural due process is commonly understood to require notice of the deprivation and an opportunity to be heard, though the opportunity to be heard need not always precede the deprivation."). Landowners cannot in good faith contend that SDCL 21-35-31 deprives them (or others) of notice or the opportunity to be heard. How could they? This litigation, which started before any survey happened, confirms that the statute provides both. Landowners challenged SCS's right to enter at the trial courts below before any surveys took place, and they are now pressing their appeals in this Court.[10]

SDCL 21-35-31 provides notice and an opportunity to be heard. Prospective condemnors must give 30 days' notice before entering a landowner's property, and the statute does not abrogate a landowner's right

[10] Landowners claim that 30 days' notice is not enough, but they do not explain why or how. And the statute that they point to as an example of "adequate procedures" (Br. at 18) also contains a 30-day notice period. *See* SDCL 21-35-10.1.

to seek a judicial remedy for any property damage or improper entry. That is all that procedural due process requires.

II. SCS IS A COMMON CARRIER WITH EMINENT-DOMAIN POWER.

The trial courts properly granted summary judgment confirming SCS's status as a common carrier. SDCL 21-35-31 grants survey rights to entities with eminent-domain power. Any pipeline company that is a common carrier under SDCL 49-7-11 "may exercise the right of eminent domain." SDCL 49-7-13. Pipeline companies are common carriers when they "hold[] themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline." SDCL 49-7-11.

Landowners contend that (1) SCS is not holding itself out to the general public as engaged in the business of transporting CO_2 for hire and (2) CO_2 is not a commodity. (Br. at 19–30, 33–35.) They also take issue with how Judge Pardy resolved these issues in the Third Circuit. (Br. at 30–33.) Landowners are wrong on all counts. First, the undisputed record evidence shows that SCS is holding its transportation services out to the public for hire. Second, CO_2 is by any definition a commodity. And third, Landowners suffered no prejudice from how Judge Pardy ruled on those issues.

A. SCS is a common carrier under SDCL 49-7-11's plain language.

1. SCS is holding itself out to the general public as engaged in the business of transporting CO_2 for hire.

Because the term "for hire" is not defined in SDCL 49-7-11, its "ordinary" and "plain" meaning controls. *Hofer v. Redstone Feeders, LLC*, 2015 SD 75, ¶ 15, 870 N.W.2d 659, 662. The ordinary and plain meaning of "for hire" is to provide goods or services in exchange for some value—particular characteristics of the value are irrelevant. *E.g.*, *Hire*, Black's Law Dictionary (11th ed. 2019); *Hire*, Merriam-Webster, https://www.merriam-webster.com/dictionary/for%20hire (last visited Nov. 29, 2023); *see also* SDCL 49-16A-1(3) (defining "for hire" in a different common-carrier context as "the condition of receiving remuneration *of any kind*, paid or promised, *either directly or indirectly*, for the transportation" (emphasis added)). In addition, the term "public" "'does not mean everybody all the time.'" *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 733 (E.D.N.C. 2008) (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)). At common law, the "crucial criteria is that the common carrier makes its services available to any 'who may choose to employ him.'" *Id.* (quoting *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927)). "It does not matter that the service offered will be used by a limited subset of the population." *Id.*

The undisputed evidence shows that SCS is holding out its transportation services to the public for hire.

First, SCS has advertised its transportation services for hire to the public on Summit Carbon Solutions' website and has reached out directly to potential customers. (30317/064R 655; 30338/014R 1785, 2617.) Through those outreach efforts, SCS has opened its transportation services to the general public.

Second, SCS will hold an open season during which it will publicly solicit binding commitments for interstate CO_2-transportation services from interested customers. (30317/064R 655; 30338/014R 1785.) An open season is a standard method for common carriers to hold out their services. *E.g.*, *White Cliffs Pipeline, L.L.C.*, 148 FERC P 61,037, 61,156 (2014) (explaining that an open season functions to "widely advertise[] and afford[] all potentially interested shippers a fair and equal opportunity to become committed shippers").

Third, SCS is reserving pipeline capacity for uncommitted future shippers that may want to receive CO_2-transportation services after the pipeline has begun operations. (30317/064R 655; 30338/014R 1785.) Reservation of pipeline capacity is another feature of a common carrier. *E.g.*, *Medallion Pipeline Co.*, 155 FERC P 61,268, 62,731 (2016) (noting that reserving "capacity to remain available for walk-up shippers . . . provides reasonable access . . . for shippers that did not enter into committed firm agreements" during the open season). By both holding an open season and reserving capacity for walk-up shippers, SCS is holding its transportation

services open to the general public—to both committed and uncommitted shippers—for hire.

Fourth, SCS's actions in other states, like North Dakota, confirm that SCS is a common carrier. In June 2022, SCS filed its acceptance of N.D. Cent. Code Chapter 49-19's provisions with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO2 for others . . . in accordance with the definition of a common carrier." (30317/064R 655, 658–60; 30338/014R 1785–86, 1789–91.)

Each of those facts, alone, demonstrates that SCS is a common carrier. Landowners address none of those facts in their brief and instead fixate on a handful of contracts. But those contracts and signed letters of intent with at least 34 third-party facilities for CO_2-transportation services also demonstrate that SCS is in the business of transporting CO_2 for hire. (30317/064R 655, 1693–1942; 30338/014R 1785, 2308–2557.) They show that SCS is providing CO_2-transportation services in exchange for value. The facilities, and indeed anyone reading the contracts, would understand that SCS's business is transporting CO_2 for *others* for *hire*.

Landowners argue that there is no record evidence that the facilities are paying for the CO_2-transportation services under the contracts. (Br. at 25.) That is false. The signed letters of intent, for example, contemplate that the facilities will pay [redacted] (30317/064R 1934, 1941; 30338/014R 2549, 2556.) And each of the executed contracts with

ethanol plants contain price terms. (30317/064R 1709–10, 1772–73, 1835, 1883–84; 30338/014R 2324–25, 2387–88, 2450, 2498–99.) The specific price terms were redacted because, as the trial courts correctly held, they constitute "highly confidential information" that is not relevant to the legal question of whether a transfer of value *exists*.[11] (30317/064R 1276–77; 30338/014R 2087–88.)

That the transportation and sequestration of CO_2 may generate federal tax and carbon-offset credits has no bearing on SCS's common-carrier status. Landowners seem to think that because the project may generate revenue for both SCS and the facilities through these credits, SCS cannot be transporting the CO_2 for hire. That makes no sense. SCS is still providing transportation services for an exchange of value, which is just another way of saying that SCS is transporting CO_2 for hire.

Those facts are undisputed and establish that SCS is holding itself out to the public as engaged in the business of transporting CO_2 for hire. Similar facts were sufficient for Justice Salter to conclude that Dakota Access was a common carrier under the same statute. *Dakota Access*, mem. op. at 16 (holding that Dakota Access was a common carrier because it had "contracted with third parties to ship their crude oil" and "plan[ned] to make 10% of its pipeline capacity available to the public").

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[11] Landowners have not appealed the trial courts' approval of the redactions.

2. Landowners' focus on payment terms and title is a diversion.

That statutory language defeats Landowners' arguments, so they try to move away from the statutory language by arguing that SCS is not a common carrier under SDCL 49-7-11 because (1) particular characteristics of the value exchange are relevant, so Judge Pardy erred in ruling that "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists" (Br. at 23); and (2) under a handful of contracts, [redacted] (Br. at 23–28.) Those arguments are frivolous.

Landowners point to no South Dakota authority for either argument, and nothing in SDCL 49-7-11's text supports either argument. The statute says nothing about specific payment terms. *Cf.* SDCL 49-16A-1(3) (defining "for hire" in a different common-carrier context as "the condition of receiving remuneration *of any kind*, paid or promised, *either directly or indirectly*, for the transportation" (emphasis added)). It also does not require a pipeline company to take title to the commodity to qualify as a common carrier, nor does it prohibit taking title.

Landowners' position finds no support in SDCL 49-7-11's language, so to avoid the statute's plain meaning, Landowners point the Court to inapplicable federal law for guidance. (Br. at 27–28.) Of course, whether SCS is a common carrier is a question of South Dakota law, not federal law. Moreover, Landowners' emphasis on payment terms and title are

inconsistent with the statutory scheme, which carves common-carrier pipelines out from many regulations rather than imposing additional requirements. *See* SDCL 49-7-11 (common-carrier pipelines "are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B").[12]

In any case, Landowners' argument that SCS cannot be a common carrier if [redacted] is unsupported by the broader body of law on common carriers. "[T]he concept of 'common carrier' must be flexible enough to accommodate reasonable commercial practice." *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 251 (3d Cir. 2007). For that reason, it is not uncommon for an affiliated entity—like a marketing affiliate or shipping aggregator—to take title to at least some of the commodity from the originating third party before transport. *E.g.*, *Magellan Midstream Partners, L.P.*, 161 FERC P 61,219, 62,253 (2017) ("Marketing Affiliates of oil pipelines have become commonplace in the industry" and "a Marketing Affiliate may ship on an affiliated/parent pipeline" consistent with the pipeline's common-carrier status); *N.Y. Susquehanna*, 500 F.3d at 242, 250–51 (rejecting argument that

[12] Inasmuch as Landowners take issue with Judge Pardy's use of "for a fee" instead of "for hire," they ignore that they were the ones to first use that terminology when they argued that "'[f]or hire' means SCS must ship the commodity of another *for a fee*." (30317/064R 1025; 30338/014R 1383 (emphasis added).) It's also a red herring—"for hire" means an exchange of any value (including a fee), so Judge Pardy used proper terminology.

a rail carrier was not a common carrier because it "sold most of its shipping capacity to . . . primary customer[s]" that "acted as middlemen between the generators of waste and the railroad" and "took title to C&D waste from the operators of the sites that generated it"). Historically, even the common carrier itself could take title to the commodity without jeopardizing its status as a common carrier. *E.g.*, *Valvoline Oil Co. v. United States*, 308 U.S. 141, 143–46 (1939) (rejecting argument that a pipeline was not a common carrier because it acquired the oil and then transported the oil to its own refineries; what mattered was the pipeline's "purchase [of the oil] from many sources and subsequent carriage"); *Hunt Refin. Co.*, 70 FERC P 61,035, 61,112 (1995) (holding that pipeline was a common carrier because it transported oil from third-party facilities and explaining that "the fact that the oil transported belongs to the owner of the pipeline does not mean that the pipeline is not" a common carrier).

Landowners fail to explain how [redacted] under some contracts undermines SCS's status as a common carrier. Under those agreements, SCS is still transporting CO_2 originating from third parties for an exchange of value. That is all the statute requires. *See also Am. Orient Express Ry. Co.*, No. 34502, 2005 WL 3552968, at *3 (S.T.B. Dec. 27, 2005) ("In determining whether there has been a holding out, 'one must look to the character of the service of the party in relation to the public.'" (citation omitted)).

Landowners' reliance on *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury I*), 363 S.W.3d 192 (Tex. 2012), is misplaced. (Br. at 33–35.) First, *Denbury I* involved the application of Texas, not South Dakota, law. Second, Landowners conveniently fail to disclose to this Court that the Texas Supreme Court ultimately concluded that the pipeline company at issue *was* a common carrier even though it took title to some of the CO_2 being transported. *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.* (*Denbury II*), 510 S.W.3d 909, 915–17 (Tex. 2017). Under *Denbury I* and *II*, taking title to some of the commodity does not defeat common-carrier status.

The *Denbury* cases are also factually distinct. The company there provided no evidence that its pipeline would be available to the public. *Denbury I*, 363 S.W.3d at 201–04; *Denbury II*, 510 S.W.3d at 915; *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC*, 296 S.W.3d 877, 881 (Tex. App. 2009). Here, by contrast, SCS provided undisputed evidence of far more than a "reasonable probability" that its pipeline will serve the public. *Denbury II*, 510 S.W.3d at 913. SCS has committed to holding an open season, is reserving pipeline capacity for uncommitted shippers, and will ship CO_2 for at least 34 third-party facilities. *See also Denbury I*, 363 S.W.3d at 200 n.23 ("'allow[ing] the dedication of [pipeline] capacity to the public or anyone other than' the . . . owners of the pipeline" is evidence of common-carrier status (citation omitted)); *Tex. Cent. R.R. & Infrastructure, Inc. v.*

Miles, 635 S.W.3d 684, 692 (Tex. App. 2020) ("*Texas Rice* [*Denbury*] *II* did not require that Denbury show that it was currently operating in such a way to serve the public, only that there was a reasonable probability that in the future, it would."), *aff'd*, 647 S.W.3d 613 (Tex. 2022).

The bottom line: Landowners ignore the record. The record shows that SCS is a common carrier not only because of the contracts with third-party facilities but also because it is offering its services more broadly to the public, will hold an open season, and is reserving pipeline capacity for future uncommitted shippers.

B. Carbon dioxide is a commodity.

"Commodity" is not defined in SDCL 49-7-11, so the word's "ordinary" and "plain" meaning controls. *Hofer*, 2015 SD 75, ¶ 15, 870 N.W.2d at 662. A "commodity" is "something useful or valued" or "an economic good." *Commodity*, Merriam-Webster, https://www.merriam-webster.com/dictionary/commodity (last visited Nov. 29, 2023). That includes but is not limited to "a product of agriculture or mining," an "article of commerce especially when delivered for shipment," or any "mass-produced unspecialized product." *Id.*; *see also Commodity*, Black's Law Dictionary (11th ed. 2019) ("[a]n article of trade or commerce" or "[a]n economic good, esp. a raw material or an agricultural product"); *Commodity*, Oxford English Dictionary (3d ed. 2018, last updated Sept. 2023) ("[a] natural resource, material, etc., which is of use or value to humankind; a useful product" or "[a] thing produced for use or sale; a piece of merchandise; an article of commerce . . . a raw material,

primary product, or other basic good which is traded in bulk and the units of which are interchangeable for the purposes of trading"), https://doi.org/10.1093/OED/3226605775. None of those definitions turns on how a particular person intends to use the item; gold, for instance, is a commodity whether it is traded by the ounce on an exchange or made into a wedding band.

By any definition, CO_2 is a commodity. *First*, the federal government and several other States expressly recognize CO_2's status as a commodity. *E.g.*, 49 C.F.R. § 1039.11(a) (the federal Surface Transportation Board lists carbon dioxide as a commodity); La. Rev. Stat. § 30:1102(A)(2) ("Carbon dioxide is a valuable commodity to the citizens of the state."); Okla. Stat. tit. 27A, § 3-5-101(B)(1) ("Carbon dioxide is a valuable commodity to the citizens of the state . . . ."); Miss. Code Ann. § 53-11-3(1)(b) ("Carbon dioxide is a valuable commodity to the citizens of the state."); N.D. Cent. Code § 38-22-01 (referring to CO_2 as "a potentially valuable commodity"); Neb. Rev. Stat. § 57-1602 (same).

Second, the myriad uses for CO_2 and its recognized value confirm its status as a commodity. Companies around the world buy, sell, and use CO_2 in commercial, industrial, and other contexts—to the tune of approximately 230 million tons every year. (30317/064R 831; 30338/014R 1152.) Manufacturers use it to create proteins, fertilizers, polymers, foams, building blocks, plastics, concrete, furniture, shatterproof glass, and fuel. (30317/064R 937, 949;

30338/014R 1258, 1270; *see also* 30317/064R 916–17; 30338/014R 1237–38.) By some estimates, CO_2-based products could be worth between $800 billion and $1 trillion by 2030. (30317/064R 916; 30338/014R 1237; *see also* 30317/064R 926–29, 931, 953; 30338/014R 1247–50, 1252, 1274.)

Even CO_2 that is not "used" in the traditional sense carries immense value through carbon-offset markets and government incentives. Many companies purchase carbon offsets—buying carbon credits to fund activities that remove carbon from the air—to "close the gap between [the] company's current emissions and their climate targets." (30317/064R 985; 30338/014R 1306; *see also* 30317/064R 955–75; 30338/014R 1276–96.) And the federal government places significant value on CO_2 through the Section 45Q tax credit, which promotes investment in carbon capture and sequestration. (30317/064R 995–96, 999–1009, 1012–16; 30338/014R 1316–17, 1320–30, 1333–37.)

Despite that, Landowners argue that CO_2 is not a commodity because it is "waste" that will be permanently sequestered. (Br. at 29.) They claim that CO_2's status as a commodity depends on how a particular party intends to use it. That argument makes no sense. A commodity is a commodity no matter how a particular party intends to use it, and it retains that status regardless of *who* owns the item, *how* it is transported or stored, or *what* the intended or ultimate use is. Under Landowners' theory, metal on a train or oil in a pipeline might be a commodity in one instance but not in another

based on how the customer intends to use it. That tortured definition would lead to absurd results. *See Nelson v. S.D. State Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D. 1991) ("When a statute or rule does not define a term, it should be construed according to its accepted usage and a strained, unpractical, or absurd result should be avoided."). Nothing in SDCL 49-7-11 cabins "commodity" to specific purposes or end uses.

In fact, earlier this year the South Dakota Legislature rejected an amendment to SDCL 49-7-11 that would do just that. H.B. 1133 proposed to redefine "commodity" to be "a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing" but excluding "a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q." H.B. 1133, 2023 Leg., 98th Sess. (S.D. 2023) (as engrossed by H. State Affairs Comm., Feb. 6, 2023). The bill failed.[13] That failed effort to redefine "commodity" confirms that CO_2 is a commodity. In fact, one of H.B. 1133's proponents was Mr. Jorde, Landowners' counsel here.[14] Having failed to convince the Legislature, opposing counsel now asks this Court to override the Legislature

[13] Minutes of S. Com. & Energy Comm. at 1, 2023 Leg., 98th Sess. (Feb. 16, 2023), https://mylrc.sdlegislature.gov/api/Documents/249452.pdf.

[14] Minutes of H. State Affairs Comm. at 1, 2023 Leg., 98th Sess.(Feb. 6, 2023), https://mylrc.sdlegislature.gov/api/Documents/248237.pdf.

and adopt a definition contrary to the statute's plain language. This Court should reject that effort.

Landowners' definition is also inconsistent with the requirement that pipeline common carriers must "hold[] themselves out to the general public" to provide transportation "for hire." SDCL 49-7-11. Under Landowners' theory, SCS would be forced to scrutinize every potential CO_2 shipper to determine where the CO_2 came from, why it is being transported, and all potential destinations and uses of that particular CO_2 in the future. That contradicts SDCL 49-7-11 and common sense.

C. Judge Pardy's analysis on the commodity and common carrier issues was correct and did not prejudice Landowners.

Landowners take issue with how Judge Pardy ruled on the commodity and common-carrier issues. And they suggest that Judge Sommers's summary judgment ruling on the same issues was tainted because he adopted Judge Pardy's reasoning. (Br. at 30–33.) Judge Pardy's analysis was proper. But regardless, it was not prejudicial to Landowners, and Landowners didn't preserve the issue for review.

First, this issue is not properly before the Court. Landowners challenge Judge Pardy's analysis in his December 28 memorandum decision. That decision was not identified in Landowners' notice of appeal; the only order identified in the notice is the final order granting SCS's summary judgment

motion and denying Landowners' motions to compel and continue.[15] (30317/064R 2316.) *See* SDCL 15-26A-4(1) ("The notice [of appeal] . . . shall designate the judgment, order, or part thereof appealed from . . . ."). Although the Court "may review any order . . . involving the merits and necessarily affecting the judgment and appearing upon the record" (SDCL 15-26A-7), Judge Pardy's ruling was not a final merits decision because he did not enter judgment on any issue until after full briefing and a hearing on SCS's summary judgment motion. And because their notice specified only one order being appealed (the final summary judgment order), Landowners excluded any other decisions from their appeal. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002) ("[A] notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice."); *Gustafson v. Bi-State Dev. Agency*, 29 F.4th 406, 413 (8th Cir. 2022) (same).

In any event, Landowners cannot protest a ruling that they invited. After SCS moved for entry of a protective order to govern the disclosure of confidential information, including contracts with ethanol plants, Landowners suggested that Judge Pardy and Judge Sommers review the

[15] Landowners also did not include the memorandum decision in their appendix. *See* SDCL 15-26A-60(8)(a) ("The appendix shall include . . . [t]he judgment, order or decision in question and any relevant written findings of fact and conclusions of law and memorandum decision . . . .").

contracts *in camera* to determine the appropriateness of a protective order, the documents' designation as "Attorneys' Eyes Only," and SCS's proposed redactions. (30317/064R 1028, 1032–33; 30338/014R 1386, 1413–16.) Landowners argued that the contracts were "probative to [CO_2's] status as a commodity" and "to SCS's common carrier status." (30317/064R 1025–26; 30338/014R 1383.) When Judge Pardy granted SCS's motion and approved the redactions and designation, he addressed Landowners' arguments. He explained that, as a matter of law, CO_2 is a commodity, so the contracts have no bearing on that issue. And addressing SCS's proposed redactions of highly sensitive commercial terms (something Landowners don't challenge on appeal), he explained that even with the redactions, the agreements "establish that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee." (30317/064R 1276–77.)

Landowners now complain that Judge Pardy's analysis was tantamount to an improper *sua sponte* summary judgment ruling. They are wrong. Judge Pardy resolved only the discrete issues necessary to address Landowners' own arguments. Regardless, it was *Landowners* who asked the Court to review the contracts *in camera* to assess their relevance and resolve the parties' discovery disputes. And it was *Landowners* who put the commodity and common-carrier issues before the court.

Landowners cannot now complain because they do not like the outcome. "[T]he cases almost universally hold that one who invites error in a

lower court is estopped to assert that error in the appellate court." *In re Estate of Hofer*, 90 S.D. 140, 144, 238 N.W.2d 496, 498 (1976) (holding party was estopped from challenging the validity of an order that she had requested); *see also State v. Johnson*, 272 N.W.2d 304, 306 (S.D. 1978) ("It has long been the holding of this court, however, that a [party] cannot take advantage of error which he has invited."); *Taylor Realty Co. v. Haberling*, 365 N.W.2d 870, 873 (S.D. 1985) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." (citation omitted)).

Nor were Landowners prejudiced by Judge Pardy's analysis. They still pressed all their arguments on those issues in resistance to SCS's summary judgment motion, and they offered SCS's contracts and letters of intent as evidence. (30317/064R 1628–31, 1693–1942.) At the hearing, Judge Pardy gave Landowners the opportunity to explain any errors in his analysis and to show what facts, if any, would change the analysis. (3d Cir. Tr. 7:1–4.) Landowners had a full and fair opportunity to address the issues at summary judgment, and they did. Ultimately, Judge Pardy did not enter summary judgment on *any* issue until after briefing and a hearing. There was no *sua sponte* entry of summary judgment.[16] And even if there was, it was not

[16] Similarly, there was no error with Judge Sommers's ruling on those issues. Judge Sommers did not enter summary judgment on any issue until full briefing and a hearing. (30338/014R 2608–11.) And he did not enter summary

erroneous because "sua sponte orders are appropriate where"—as here—"'the court's ruling on issues properly raised forecloses as a matter of law the claim on which the court wishes to grant summary judgment sua sponte.'" *Brown v. Hanson*, 2007 SD 134, ¶ 19, 743 N.W.2d 677, 682 (citation omitted).

Finally, "'[s]ummary judgment will be affirmed if there exists *any* basis which would support the trial court's ruling.'" *Holzer*, 2000 SD 65, ¶ 8, 610 N.W.2d at 792 (citation omitted); *see also Wolff v. Secretary of S.D. Game, Fish & Parks Dep't*, 1996 SD 23, ¶ 32, 544 N.W.2d 531, 537 ("[W]here a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons."). Both parties fully argued and briefed these issues on summary judgment and now again before this Court. CO_2 is a commodity as a matter of law, and the undisputed evidence shows that SCS is a common carrier.

III. SCS COMPLIED WITH SDCL 21-35-31'S SURVEY-ACCESS CONDITIONS.

A common-carrier pipeline may survey under SDCL 21-35-31 once it has (1) "filed a siting permit application with the public utilities commission pursuant to § 49-41B-11;" (2) "[g]ive[n] thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property;" and (3) "ma[d]e a payment to the owner, or provide[d] sufficient security for the payment, for any actual damage done

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judgment on the common-carrier issue until after supplemental briefing. (*Id.* 2665–74.)

to the property by the entry." Landowners challenge the second and third requirements. (Br. at 35–39.) By providing expected entry dates and a link to SCS's PUC application, SCS's notice letters satisfy SDCL 21-35-31(2). And Landowners waived the issues of the sufficiency of SCS's bond and notice to tenants, which SCS complied with in any event.

A. SCS's notice letters provide notice of its expected entry dates and the filing of its PUC application.

To obtain survey access under SDCL 21-35-31, a condemnor must "[g]ive thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property." SDCL 21-35-31(2). SCS's notice letters satisfy those requirements.

SCS sent notice letters at least 30 days before its planned surveys.[17] (30317/064R 1504, 1506–11; 30338/014R 1931–39, 1941–2075.) Each letter provides the expected dates of entry (*e.g.*, 30317/064R 1507 ("Our expected dates of entry would be from 7/26/2022 to 7/30/2022.")) and notice of the filing of SCS's PUC application (*e.g.*, *id.* 1508 ("The [PUC] application filing was made February 7, 2022 and can be found at your county auditor's office and can also be accessed on line here: https://puc.sd.gov/Dockets/HydrocarbonPipeline/2022/HP22-001.aspx[.]")).

[17] Landowners challenge only the letters' contents; they do not dispute the actual "giving" and timing of the notices. (Br. at 4 ("Beginning in early June 2022, Landowners received letters from SCS . . . ."); 30317/064R 1601, 1631; 30338/014R 2193, 2212–13.)

In the pleadings, Landowners claimed that providing a date range (like a four-day window) is improper and that the letters must "more specifically define dates of entry." (30317/064R 346; 30338/014R 494.) Providing a date range satisfies the statute because it requires notice of only the *expected* entry dates (plural); it does not require prophetic precision.

Landowners also take issue with the letters' statement that SCS seeks "to complete the survey work within 45-days following the 30-day written notice period that is initiated by the receipt of this letter." (Br. at 36–37; *e.g.*, 30317/064R 1507.) This sentence does not establish "a 45-day window for unpermitted entry" (Br. at 37) because Landowners read the sentence out of context. The 45-day reference follows the definitive set of entry dates along with SCS's explanation that "[i]f you have a more convenient series of dates, we'd be glad to work with you on it." (*E.g.*, 30317/064R 1507.) Each letter identifies a discrete, expected entry window while reiterating SCS's commitment to working with Landowners to find alternative dates if needed.

Each letter also gives notice of the filing of SCS's PUC permit application by providing a link to the application on the PUC's docket. (*E.g.*, 30317/064R 1507–08.) *See* SDCL 21-35-31(2) (the notice must "includ[e] the filing" of the application). Landowners argue that SCS's letter did not "includ[e] the filing" because it provided a hyperlink instead of enclosing the full 124-page application. (Br. at 37.) But the statute requires only that SCS "[g]ive thirty days written notice, including the filing." SDCL 21-35-31(2).

SCS's letters gave notice of the filing by explaining that SCS had applied for a permit and by providing a link to the application and docket.

B. Landowners waived the issue of notice to tenants, and in any event, SCS provided undisputed evidence that it gave notice to all identified owners and tenants.

Notice must be given to "the owner and any tenant in possession of the private property." SDCL 21-35-31(2). Landowners did not question notice to tenants in their summary judgment filings; the word "tenant" appears just once in their resistance brief (quoting the statute). Instead, they waited until the hearings to argue—for the first time—that SCS did not give notice to "tenant[s] in possession" of the at-issue properties. They now press that issue on appeal. (Br. at 37–38.)

By waiting until the hearings, Landowners failed to preserve the issue for appeal. Failure to sufficiently raise an issue before the trial court waives the issue on appeal. *E.g.*, *State v. Willingham*, 2019 SD 55, ¶ 25, 933 N.W.2d 619, 625; *Hass v. Wentzlaff*, 2012 SD 50, ¶ 40, 816 N.W.2d 96, 108; *Alvine Fam. L.P. v. Hagemann*, 2010 SD 28, ¶ 21, 780 N.W.2d 507, 514. This Court—and others—have recognized that an issue is not sufficiently presented when, as here, it is "raised for the first time at oral argument and thus has not been briefed." *Tjeerdsma v. Glob. Steel Bldgs., Inc.*, 466 N.W.2d 643, 644 n.2 (S.D. 1991); *see also Entrust Datacard Corp. v. Atl. Zeiser GMBH*, Civ. No. 15-4260, 2016 WL 10952822, at *5 (D. Minn. Aug. 4, 2016) (collecting cases and refusing to "consider plaintiff's arguments raised for the first time at the motion hearing"); *Schwendimann v. Arkwright Advanced*

Coating, Inc., Civ. No. 11-820, 2016 WL 6916838, at *3 n.2 (D. Minn. Jan. 8, 2016) (same); SDCL 15-6-56(c) (establishing specific process for presenting evidence and briefing issues on summary judgment).

In any event, Landowners' argument is meritless. SCS provided evidence that (1) identified the individuals who "own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline" and (2) confirmed 30 days' written notice to them. (30317/064R 1373, 1504, 1506–11; 30338/014R 1796, 1930–39, 1941–2075.) With that, SCS established its compliance with SDCL 21-35-31(2).

Landowners do not assert on appeal that there are any tenants who were not given notice. And there is no evidence in the record that any tenant was not given notice. *See* SDCL 15-6-56(c)(2) (requiring a party opposing summary judgment to specifically identify, with "appropriate citations to the record" any genuine factual issues). Because Landowners did not introduce any evidence to controvert SCS's evidence of sufficient notice, that fact is deemed admitted.[18] *See* SDCL 15-6-56(c)(3) ("All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party."); SDCL 15-6-56(e) (a party opposing a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial"

[18] Judge Pardy asked whether Landowners had controverted this fact in their statement of disputed facts. Opposing counsel's response was, "I don't know." (3d Cir. Tr. 11:2–21.)

and "[i]f he does not so respond, summary judgment, if appropriate, shall be entered against him").

Landowners cannot avoid summary judgment by sandbagging SCS at the hearings and gesturing to hypothetical tenants without any evidence. *See Himrich v. Carpenter*, 1997 SD 116, ¶ 18, 569 N.W.2d 568, 573 ("When challenging a summary judgment [motion], the nonmoving party must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy." (citation and quotation marks omitted)). The notion that SCS must prove beyond a shadow of a doubt that there are absolutely no other owners or tenants requiring notice is untenable and not what the statute requires. SCS gave notice to all individuals that it could identify, and Landowners offered evidence of no one else. Judge Sommers recognized the problems with Landowners' argument:

> If there is no written lease agreement filed at the courthouse, how would they have actual notice or even any kind of notice that there were tenants?
>
> . . .
>
> [T]he way they find out who the owners are is that they go out and do a title search. That's constructive notice. There is no constructive notice if it's an oral lease agreement, [and] there is no realistic way for them to give notice to someone that they don't know exists.

(5th Cir. Tr. 35:2–5, 16–21.)

C. Landowners waived any challenge to the sufficiency of SCS's bond, and in any event, SCS's bond is sufficient.

For the first time on appeal, Landowners challenge the sufficiency of SCS's $5 million bond. *See* SDCL 21-35-31(3) (requiring the company "[m]ake a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry"). But again, "[i]ssues not raised before the circuit court cannot ordinarily be raised for the first time on appeal." *Willingham*, 2019 SD 55, ¶ 25, 933 N.W.2d at 625. Landowners did not raise this issue before the trial courts in their briefs or at the hearings. Accordingly, "[b]y failing to bring this claim before the trial court, [Landowners] failed to preserve the argument for [this Court's] review. *Id.*, 933 N.W.2d at 625; *see also Alvine*, 2010 SD 28, ¶ 21, 780 N.W.2d at 514 ("We have consistently held that this Court may not review theories argued for the first time on appeal."); *Hass*, 2012 SD 50, ¶ 40, 816 N.W.2d at 108 (declining to address an argument that was never argued to the trial court).

Regardless, the undisputed evidence establishes the sufficiency of SCS's bond. SCS secured a $5 million bond to cover the payment of any actual damage done to Landowners' property by SCS's surveys. (30317/064R 1504, 1512–17; 30338/014R 1939, 2076–81.) On its face, a $5 million bond is more than sufficient. And as the notice letters explain, SCS's surveys are unlikely to cause damage, but in the unlikely event of disturbance or damage, SCS will restore property to near-existing conditions. (30317/064R 1506–11; 30338/014R 1941–2075.) Given that only minimal—if any—damage may

occur, $5 million is far more than ample security. *See also Dakota Access*, mem. op. at 23 (requiring $1,000-per-parcel bond).

IV. SDCL 21-35-31 AUTHORIZES SCS'S SURVEYS.

Landowners also challenge the types of surveys and examinations that SCS sought to complete, claiming that SDCL 21-35-31 does not permit soil disturbances or other subsurface examinations. (Br. at 40–43.) SDCL 21-35-31's plain text authorizes all three types of SCS's surveys.

Because the statute does not define the terms "examination" and "survey," this Court will give them "their ordinary meaning." *Hofer*, 2015 SD 75, ¶ 15, 870 N.W.2d at 662. The North Dakota Supreme Court, interpreting an analogous statute, explained that an "examination" means an "inspection" or an "inquiry" and "is not strictly limited to a visual examination." *In re 2015 Application for Permit to Enter Land*, 883 N.W.2d 844, 849 (N.D. 2016) (quoting Webster's New World Dictionary (2d coll. ed. 1980)); *see also Examination*, Oxford English Dictionary (3d ed. 2016, last updated Sept. 2023) ("Investigation of the nature or condition of something by means of visual or physical inspection"), https://doi.org/10.1093/OED/6549293389. "Survey" means "to examine as to condition, situation, or value" of something or "to determine and delineate the form, extent, and position of (such as a tract of land)." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Nov. 29, 2023); *see also Survey*, Oxford English Dictionary (3d ed. 2016, last updated July 2023) ("To determine the form, extent, and situation of the parts of (a tract of ground, or any portion of the

earth's surface)"), https://doi.org/10.1093/OED/1056188665; *Survey*, Black's Law Dictionary (11th ed. 2019) ("The measuring of a tract of land and its boundaries and contents").

SCS's surveys fit comfortably within the plain meaning of "examination" and "survey." Depending on the property, SCS planned to complete one or a combination of three survey types: typical surveys, geotech surveys, and deep dig surveys. The notice letters describe which types are expected for a particular Landowner's property. (30317/064R 1341, 1375, 1506–11; 30338/014R 1745–46, 1800, 1941–2075.)

Typical surveys

Typical surveys—the only survey planned for the vast majority of Landowners—are minimally invasive, non-destructive examinations. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." (*E.g.*, 30338/014R 1955.) Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." (*Id.*) SDCL 21-35-31 authorizes those type of surveys. *See In re 2015 Application*, 883 N.W.2d at 849 (holding that "examination" under North Dakota's survey-access statute permits "minimally invasive" evaluations including ground penetration and removal of soil for testing).

Geotech surveys

SDCL 21-35-31 likewise authorizes SCS's geotech surveys (planned for just six Landowners). Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." (*E.g.*, 30338/014R 1949.) That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and there is "no impact to normal land use" afterward. (*Id.*) Like typical surveys, geotech surveys are non-destructive, minimally invasive surveys for the purpose of ascertaining the "form, extent, and position" of the land relevant to SCS's pipeline. *Survey*, Merriam-Webster; *see also In re 2015 Application*, 883 N.W.2d at 848–49 (permitting geotechnical examinations involving "penetration test borings" by "drill[ing] with truck or track mounted core auger drills, equipped with hollow-stem augers").

Deep dig surveys

Finally, SDCL 21-35-31 authorizes SCS's deep dig surveys (planned for only two Landowners). "[B]ased on aerial and topographic map review," SCS identified some properties as "located within a floodplain." (*E.g.*, 30338/014R 1943.) That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." (*Id.*) For that reason, deep dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine

whether cultural materials are present." (*Id.*) Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." (*Id.*) This survey is permitted because SDCL 21-35-31 provides for surveys and examinations that are "necessary for [SCS's] proposed facilities." SDCL 21-35-31. SCS planned deep dig surveys for only two Landowners' properties based on the properties' unique location. The surveys are limited to what is "necessary" and nothing more.

* * *

Landowners do not explain why SDCL 21-35-31 should be interpreted otherwise. For good reason: The statute confirms that it "is in addition to and not in derogation of other existing law" (SDCL 21-35-31), so in addition to the authority granted under the statute, the common law also continues to authorize survey access. *E.g.*, *Dakota Access*, mem. op. at 16–22; *Fairmont*, 37 SD at 449–50, 159 N.W. at 58. And inasmuch as Landowners rely on *Nichols on Eminent Domain* to argue that "invasive acts" are not authorized (9 *Nichols* § G32.06), *In re 2015 Application* confirms that SCS's surveys are not invasive. 883 N.W.2d at 848–49.

Landowners suggest that only above-surface maps and measurements are allowed under the statute (Br. at 42 (quoting *Oglethorpe*, 322 S.E.2d at 890)), but SDCL 21-35-31 certainly does not say that and neither do the authorities that Landowners cite. *Oglethorpe*, for instance, was not interpreting statutory language, never mind interpreting a South Dakota statute. Landowners also omit key language from *Oglethorpe*: The court held

that surveys and examinations were limited to "such innocuous entry and . . . examination as would suffice for the making of surveys or maps [or other similar purposes]." 322 S.E.2d at 890 (brackets in original) (citation and quotation marks omitted). SCS's surveys are for the similar purpose of preparing for construction of an *underground* pipeline. (30317/064R 1373–74; 30338/014R 1795, 1800.) As Judge Pardy recognized:

> The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones . . . .

(30317/064R 2260.)

The plain meanings of "surveys" and "examinations" in SDCL 21-35-31 encompass SCS's typical, geotech, and deep dig surveys.

V. THE TRIAL COURTS DID NOT ABUSE THEIR DISCRETION IN DENYING LANDOWNERS' MOTIONS TO CONTINUE IN BOTH CASES AND MOTION TO COMPEL IN THE THIRD CIRCUIT.

Landowners moved to continue the summary judgment hearings in both cases (and moved to compel in the Third Circuit), claiming that they needed a 30(b)(6) deposition of SCS (and depositions of third parties in the Third Circuit). Yet Landowners failed to articulate how the discovery they sought was essential to opposing SCS's summary judgment motions, instead persisting in seeking irrelevant, overbroad, unnecessary, and burdensome discovery. The trial courts properly denied the motions.

This Court reviews both the denial of a motion to continue and the denial of a motion to compel for an abuse of discretion. *Gores v. Miller*, 2016 SD 9, ¶ 14, 875 N.W.2d 34, 39; *Lien v. Lien*, 2004 SD 8, ¶ 33, 674 N.W.2d 816, 827. SDCL 15-6-56(f) allows "a court to order a continuance to permit a party opposing summary judgment to conduct discovery when necessary to oppose the motion." *Gores*, 2016 SD 9, ¶ 14, 875 N.W.2d at 39. But the facts sought through discovery must be "essential to justify" the party's opposition to summary judgment. SDCL 15-6-56(f); *see also* SDCL 15-11-4 (a motion for continuance may be granted only for "good cause shown").

Discovery must be relevant, reasonable, and proportionate to the litigation's needs. *E.g.*, SDCL 15-6-26(b)(1)(A)(i). Landowners' approach to discovery in these cases was none of that. As thoroughly documented in the trial courts, throughout the entire litigation Landowners pressed overbroad and burdensome discovery requests, most of which had nothing to do with the actual issues. (30317/064R 1034–1273, 1965–2214; 30338/014R 1417–1679, 2233–44) And even when SCS tried to work with Landowners to agree to a 30(b)(6) deposition, Landowners refused to schedule the deposition, stipulate to a standard protective order, or agree to reasonable 30(b)(6) topics. Landowners never sought proportionate discovery targeted at obtaining

relevant evidence.[19] The trial courts were well within their discretion to put an end to Landowners' haphazard and reckless tactics.

Landowners' motions to continue and supporting affidavits were delay tactics. To prevail on a motion to continue under SDCL 15-6-56(f), Landowners had to articulate specific facts and evidence that was "essential" to their opposition to SCS's summary judgment motion. Landowners fell far short of that standard. They gestured vaguely to needing a 30(b)(6) deposition or to depose SCS's summary judgment affiants but never actually explained—in their motions or at the hearing—what *evidence* they were seeking, what *facts* additional discovery would uncover, or how that additional discovery was *relevant* to any disputed issue.[20] Landowners' motions and supporting affidavits are exactly the kind that this Court has consistently held do not satisfy Rule 56(f):

> Although [plaintiff's] Rule 56(f) affidavit explained what steps had been taken to obtain discovery and

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[19] In the Third Circuit, Landowners waited until more than a month *after* SCS moved for summary judgment to suggest that they wanted to depose six third parties. (30317/064R 1947–64.) One of those individuals had passed away 13 months earlier (*id.* 1967), further demonstrating how little investigation Landowners did into what relevant information those individuals might have and what possible need there was to depose them.

[20] In related survey litigation in the Second Circuit with a similar procedural history, the trial court granted a motion to continue, postponing summary judgment to give those landowners (represented by the same counsel as Landowners here) time to take depositions. More than three months passed, and opposing counsel did *nothing*. They did not serve any deposition notices or reach out to SCS to schedule any depositions. They also never responded to SCS's own discovery requests. That case was later dismissed for unrelated reasons, but it confirms that these lawsuits were meant for delay and nothing more.

> the short time to review that discovery, it did not include identification of any specific facts further discovery might uncover. It also failed to state with specificity how additional discovery would rebut summary judgment. Rather, it only made a non-particularized statement that additional discovery . . . would 'shed further light' on [plaintiff's claim].
>
> This general statement seeking further discovery . . . was insufficient to satisfy the showing necessary under SDCL 15-6-56(f). . . . We acknowledge [plaintiff's] argument that it did not know what precise facts it would find until it conducted discovery. But even at oral argument [plaintiff] did not articulate *probable* facts relevant to [the issue] that could have been developed with additional discovery. 'Mere speculation that there is some relevant evidence not yet discovered will never suffice.'

Stern Oil Co. v. Border States Paving, Inc., 2014 SD 28, ¶¶ 27–28, 848 N.W.2d 273, 282 (citations omitted); *see also Davies v. GPHC, LLC*, 2022 SD 55, ¶ 54, 980 N.W.2d 251, 265 ("These cursory, 'non-particularized' statements do not satisfy the standard for granting a continuance under Rule 56(f). [Plaintiff] identifies no facts to be discovered, what prior steps had been taken to seek them, or how additional time to take the depositions of Black and Wilson would have allowed him to contest the undisputed material facts contained in [defendant's] motion for summary judgment.").

As the North Dakota Supreme Court has recognized, a proceeding for a court order authorizing survey access is "'preliminary to the condemnation action itself' and is not a condemnation proceeding." *All. Pipeline L.P. v. Smith*, 833 N.W.2d 464, 470 (N.D. 2013) (citation omitted). The scope of

discovery must fit the purpose of the case. *See also Square Butte Elec. Coop. v. Dohn*, 219 N.W.2d 877, 883 (N.D. 1974) ("For the purposes of entering the land for survey and limited testing, it is our view that [plaintiff] is required to show only that it was in the category of persons entitled to seek eminent domain, and that it was not required to prove that at that stage of the proceedings eminent domain was proper, justified, and necessary."). Landowners' efforts to take expansive discovery were grossly disproportionate to these cases about preliminary, pre-condemnation survey access. That is not what SDCL 21-35-31 or the discovery rules contemplate—and certainly not what they require. The trial courts did not abuse their discretion in denying Landowners' motions.

CONCLUSION

SDCL 21-35-31 is constitutional, and SCS established its compliance with the statute and its right to complete surveys on Landowners' property. The Court should affirm the judgments below.

ORAL ARGUMENT REQUESTED

SCS respectfully requests oral argument on this appeal.

[Signature page follows.]

Respectfully submitted this 1st day of December, 2023.

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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of December, 2023, he electronically filed and served a true and correct copy of the foregoing in the above-captioned action via the Odyssey File & Serve system, which will notify the following counsel of record at their last known address:

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Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies under SDCL 15-26A-66(b)(4) that the foregoing brief complies with SDCL 15-26A-66(b)(2)'s type volume limitation as expanded by the Court's July 28, 2023 order, which provided that Appellee's responsive brief may not exceed 42 pages or the greater of 13,000 words or 65,000 characters. The foregoing brief—excluding the table of contents, the table of authorities, the jurisdictional statement, any addendum materials, and any certificates of counsel—is 12,844 words as calculated by the word-processing system used to prepare the brief.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30317

BETTY JEAN STROM TRUST et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Third Judicial Circuit,
Nos. 39CIV22-000064 (Beadle County) and 02CIV22-000129 (Lake County).
The Hon. Patrick T. Pardy, Judge presiding.
Notices of appeal filed April 14, 2023.

No. 30338

PETER HELFENSTEIN, JR. et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Fifth Judicial Circuit,
Nos. 45CIV22-000014 (McPherson County), 45CIV22-000018 (McPherson County), 71CIV22-000047 (Spink County), 06CIV22-000253 (Brown County), and 22CIV22-000020 (Edmunds County).
The Hon. Richard A. Sommers, Judge presiding.
Notice of appeal filed April 28, 2023 in No. 45CIV22-000014.
No notice of appeal filed in Nos. 45CIV22-000018, 71CIV22-000047, 06CIV22-000253, or 22CIV22-000020.

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Ala. Code § 23-1-44	1939	1939 Ala. Laws 363 (Act No. 210)
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Ariz. Rev. Stat. § 40-809(A)(1)	1901	Ariz. Rev. Stat. § 859 (1901) (earliest codification located)
Ariz. Rev. Stat. § 12-1142(B)	1935	1935 Ariz. Sess. Laws 415, 418 (ch. 102, § 4)

* This table is a non-exhaustive list of survey-access laws that are currently codified in the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. For each statute in the left column, the middle and right columns provide the year and citation of the earliest act or session law that the current survey-law codification can be traced back to (using the Lexis, Westlaw, and HeinOnline databases). Due to recodification efforts, some statutes may have been enacted even earlier than reflected.

Ariz. Rev. Stat. § 48-2341(A)	1985	1985 Ariz. Sess. Laws 462, 475 (ch. 190, § 18)
Ariz. Rev. Stat. § 48-2988	1985	1985 Ariz. Sess. Laws 462, 476 (ch. 190, § 20)
Ariz. Rev. Stat. § 48-2664(B)	1985	1985 Ariz. Sess. Laws 462, 475 (ch. 190, § 19)
Ariz. Rev. Stat. § 48-3097(B)	1985	1985 Ariz. Sess. Laws 462, 476 (ch. 190, § 20)
Ariz. Rev. Stat. § 33-104	1985	1985 Ariz. Sess. Laws 657, 658–59 (ch. 197, § 4)
Ariz. Rev. Stat. § 48-1552(A)	1985	1985 Ariz. Sess. Laws 462, 473 (ch. 190, § 12)
Ariz. Rev. Stat. § 48-4856(D)	1990	1990 Ariz. Sess. Laws 592, 601 (ch. 181, §1)
Ariz. Rev. Stat. § 45-1946(D)	1993	1993 Ariz. Sess. Laws 500, 507 (ch. 121, § 1)
Ariz. Rev. Stat. § 36-1403(A)(9)	1999	1999 Ariz. Sess. Laws 952, 954 (ch. 212, § 3)
Arkansas		
Ark. Code Ann. § 23-11-209(1)	1868	1868 Ark. Acts 290, 300 (Act No. 71, § 22)
Ark. Code Ann. § 18-15-603	1895	1895 Ark. Acts 183, 184–85 (Act No. 126, § 4)
Ark. Code Ann. § 18-15-1601(a)(2)	1901	1901 Ark. Acts 155, 156 (Act No. 90, § 3)
Ark. Code Ann. § 18-15-1302(a)	1905	1905 Ark. Acts 577, 578–79 (Act No. 228, § 3)
Ark. Code Ann. § 18-15-1302	1905	1905 Ark. Acts 577, 578–79 (Act No. 228, § 3)
Ark. Code Ann. § 18-15-503(c)	1907	1907 Ark. Acts 303, 305 (Act No. 120, § 3)
Ark. Code Ann. § 18-15-1102(b)	1909	1909 Ark. Acts 234, 235–36 (Act No. 87, § 4)
Ark. Code Ann. § 23-18-407(b); Ark. Code Ann. § 18-15-510(b)	1929	1929 Ark. Acts 1110 (Act No. 246, § 1)
Ark. Code Ann. § 27-69-104(3), (5), (13)	1939	1939 Ark. Acts 86, 94–96 (Act No. 45, § 11)
Ark. Code Ann. § 14-234-215(b)	1955	1955 Ark. Acts 702, 703 (Act No. 321, § 1)
Ark. Code Ann. § 18-15-402	1957	1957 Ark. Acts 816, 817 (Act No. 269, § 3)

Ark. Code Ann. § 25-20-309(b)	2001	2001 Ark. Acts 3662, 3672–73 (Act No. 982, § 1)
Ark. Code Ann. § 27-76-502	2007	2007 Ark. Act 1985, 2009–10 (Act No. 389, ¶ 1)
Ark. Code Ann. § 14-144-205(b)	2007	2007 Ark. Act 5422, 5435 (Act No. 1045, § 1)
Ark. Code Ann. § 25-20-509(b)	2009	2009 Ark. Acts 6619, 6630 (Act No. 1371, § 1)
California		
Cal. Pub. Util. Code § 7526(a)	1951	1951 Cal. Stat. 2025, 2177 (ch. 764, § 7526)
Cal. Civ. Proc. Code § 1245.010	1975	1975 Cal. Stat. 3409, 3421 (ch. 1275, § 2)
Colorado		
Colo. Rev. Stat. § 38-2-102	1876	1876 Colo. Sess. Laws 143, 183 (ch. 19, § 115)
Colo. Rev. Stat. § 37-41-114	1905	1905 Colo. Sess. Laws 246, 254 (ch. 113, § 12)
Colo. Rev. Stat. § 36-4-108	1913	1913 Colo. Sess. Laws 588, 589 (ch. 150, § 5)
Colo. Rev. Stat. § 37-3-113	1921	1921 Colo. Sess. Laws 517, 552–53 (ch. 160, § 36)
Colo. Rev. Stat. § 29-4-104(1)(e)	1935	1935 Colo. Sess. Laws 498, 503 (ch. 131, § 4)
Colo. Rev. Stat. § 29-4-209(1)(j)	1935	1935 Colo. Sess. Laws 523, 534 (ch. 132, § 9)
Colo. Rev. Stat. § 37-46-107(1)(c), (f)	1937	1937 Colo. Sess. Laws 997, 1000–01 (ch. 220, § 5)
Colo. Rev. Stat. § 37-47-107(1)(c), (f)	1941	1941 Colo. Sess. Laws 866, 868–69 (ch. 231, § 5)
Colo. Rev. Stat. 31-25-105(1)(e)	1975	1975 Colo. Sess. Laws 1004, 1164 (ch. 275, § 1)
Colo. Rev. Stat. § 37-48-105(1)(d), (g)	1967	1967 Colo. Sess. Laws 664, 666 (ch. 329, § 1)
Colo. Rev. Stat. § 37-50-107(1)(e), (h), (i)	2004	2004 Colo. Sess. Laws 1905, 1909 (ch. 390, § 1)
Connecticut		
Conn. Gen. Stat. § 48-13	1955	1955 Conn. Acts 399, 399 (Pub. Act No. 378)
Conn. Gen. Stat. § 13a-38	1963	1963 Conn. Acts 294, 310–11 (Pub. Act No. 226, § 39)

Conn. Gen. Stat. § 13a-60	1965	1965 Conn. Acts 693 (Spec. Sess. Feb. 1965) (Pub. Act No. 520, § 1)
Conn. Gen. Stat. § 7-329e	1967	1967 Conn. Acts 1546, 1548 (Reg. Sess.) (Pub. Act No. 900, § 5)
Conn. Gen. Stat. § 7-273bb(a)(25)	1981	1981 Conn. Acts 283, 288 (Reg. Sess.) (Act No. 81-231, § 4)
Conn. Gen. Stat. § 7-148(c)(6)(A)(iii)	1981	1981 Conn. Acts 304, 308 (Pub. Act 81-219)
Conn. Gen. Stat. § 32-658(h)	1999	1999 Conn. Acts 987, 1027–28 (Reg. Sess.) (Pub. Act No. 99-241, § 35)
Conn. Gen. Stat. § 22a-501(a)(24)	1995	1995 Conn. Acts 1541, 1549 (Reg. Sess.) (Pub. Act. 95-329, § 11)
Conn. Gen. Stat. § 22a-498a	2013	2013 Conn. Acts 1078 (Reg. Sess.) (Pub. Act No. 13-222, §1)
Delaware		
Del. Code Ann. tit. 9, § 1525(a)	1931	1931 Del. Laws 400, 400 (ch. 113, § 1)
Del. Code Ann. tit. 2, § 906(c)	1945	1945 Del. Laws 1088, 1090 (ch. 300, § 2
Del. Code Ann. tit. 2 § 704(e)	1945	1945 Del. Laws 1088, 1092–93 (ch. 300, §
Del. Code Ann. tit. 17, § 132(c)(13)	1959	52 Del. Laws 657, 657–58 (1959) (ch. 295, § 1)
Del. Code Ann. tit. 9, § 4119(a)	1968	1968 Del. Laws 394, 395 (ch. 103, § 4)
Florida		
Fla. Stat. § 180.12	1935	1935 Fla. Laws 797, 802 (ch. 17118, § 6)
Fla. Stat. § 332.02	1945	1945 Fla. Laws 795, 796 (ch. 22846, § 2)
Fla. Stat. § 361.05	1951	1951 Fla. Laws 1026 (ch. 26893, § 1)
Fla. Stat. § 161.36(5)	1965	1965 Fla. Laws 1435, 1446 (ch. 65-408, § 1)
Fla. Stat. § 163.370(2)(e)(1)	1969	1969 Fla. Laws 1075, 1086 (ch. 69-305, § 9)
Fla. Stat. § 361.025	1982	1982 Fla. Laws 2115, 218 (ch. 82-90, § 5)
Fla. Stat. § 337.274	1984	1984 Fla. Laws 1743, 1746 (ch. 84-319, § 2)
Fla. Stat. § 331.310(1)(a)	1989	1989 Fla. Laws 1899, 1909 (ch. 89-300, § 10)

Fla. Stat. § 348.0311(2)	2019	2019 Fla. Laws 2289, 2318 (ch. 2019-169, § 14)
Georgia		
Ga. Code Ann. § 22-3-121	1847	Cobb's 1851 Digest, p. 155 (earliest codification located)
Ga. Code Ann. § 46-8-100(1)	1892	1892: 1892 Ga. Laws 37, 42 (No. 68, § 9)
Ga. Code Ann. § 32-2-2(a)(9); Ga. Code Ann. § 32-4-42(4)	1973	1973 Ga. Laws 947, 978 (No. 679, § 1)
Ga. Code Ann. § 22-3-86(c), (d)	1995	1995 Ga. Laws 161, 163–64 (No. 158, § 2), repealed, 2017 Ga. Laws 744 (Act No. 263)
Hawaii		
Haw. Rev. Stat. § 101-8	1896	1896 Haw. Sess. Laws 104, 105–06 (Act No. 45, § 7)
Idaho		
Idaho Code § 7-705	1880	1880 Idaho Sess. Laws 192 (§ 855)
Idaho Code § 62-104(1)	1887	Idaho Rev. Stat. § 2666 (1887) (earliest codification located)
Idaho Code § 42-5224(19)	1995	1995 Idaho Sess. Laws 982, 995 (ch. 290, § 1)
Idaho Code § 40-1310(1)	1985	1985 Idaho Sess. Laws 586, 650 (ch. 253, § 2)
Idaho Code § 21-807(13)	1967	1967 Idaho Sess. Laws 776, 783 (ch. 277, § 7)
Illinois		
220 Ill. Comp. Stat. 55/2	1874	Ill. Rev. Stat. ch. 134, § 2 (1874)
605 Ill. Comp. Stat. 5/10-702(7)	1982	1982 Ill. Laws 220, 862 (Pub. Act 82-783, § 22)
610 Ill. Comp. Stat. 5/19(1)	1984	1984 Ill. Laws 3647, 3756 (Pub. Act. 84-551)
70 Ill. Comp. Stat. 5/22.3(a)(viii)	2007	2007 Ill. Laws 8538, 8549 (Pub. Act 95-0641, § 5)
20 Ill. Comp. Stat. 3855/1-20(b)(18)	2007	2007 Ill. Laws 6821, 6829 (Pub. Act 95-0481)
Indiana		
Ind. Code § 8-4-1-16(a)	1850	1850 Ind. Acts 256, 265 (ch. 134)
Ind. Code § 8-10-5-8(a)(10)	1959	1959 Ind. Acts 912, 919 (ch. 343, § 8)
Ind. Code § 8-4-10-1(a)	1869	1869 Ind. Acts (Spec. Sess.) 97, 97–98 (ch. 46, § 1)

Ind. Code § 5-2-2-6	1971	1971 Ind Acts 234, 236–37 (Pub. Law 43, § 1)
Ind. Code § 36-9-27-33	1981	1981 Ind. Acts 2409, 2908–09 (Pub. Law 309, § 101)
Ind. Code § 36-7-15.1-7(a)(8)	1982	1982 Ind. Acts 616, 679 (Pub. Law 77, § 8)
Ind. Code § 36-9-31-3(13)	1982	1982 Ind. Acts 616, 750 (Pub. Law 77, § 27)
Ind. Code § 36-7-14-12.2(a)(9)	1990	1990 Ind. Acts 1, 231 (Pub. Law 1, § 363)
Ind. Code § 32-24-1-3(b)(1)	2002	2002 Ind. Acts 187, 298 (Pub. Law 2-2002)
Ind. Code § 36-7.6-3-2(a)(15)	2007	2007 Ind. Acts 4206, 4227 (Pub. Law 232, § 7)
Iowa		
Iowa Code § 314.9	1925	1925 Iowa Acts 98, 98–99 (ch. 108, § 1)
Iowa Code § 478.15(2)–(3)	1957	1957 Iowa Acts 297, 297–98 (ch. 240, § 1)
Iowa Code § 403.6(3)	1957	1957 Iowa Acts 247, 250 (ch. 197, § 6)
Iowa Code § 403A.3(8)	1961	1961 Iowa Acts 221, 225 (ch. 215, § 3)
Iowa Code § 161A.51	1971	1971 Iowa Acts 448, 471–72 (ch. 227, § 24)
Iowa Code § 479.30	1979	1979 Iowa Acts 368, 369 (ch. 118, § 2)
Iowa Code § 355.13	1990	1990 Iowa Acts 457, 462–63 (ch. 1236, § 14)
Iowa Code § 479B.15	1995	1995 Iowa Acts 472, 484 (ch. 192, § 42)
Iowa Code § 28J.9(12)	2005	2005 Iowa Acts 497, 532 (ch. 150, § 97)
Iowa Code § 354.4A	2009	2009 Iowa Acts 652 (ch. 157, § 1)
Kansas		
Kan. Stat. Ann. § 66-501	1868	1868 Kan. Sess. Laws 190, 202 (ch. 23, § 47)
Kan. Stat. Ann. § 17-4748(c)	1955	1955 Kan. Sess. Laws 192, 196 (ch. 86, § 7)
Kan. Stat. Ann. § 26-512	1963	1963 Kan. Sess. Laws 400, 404 (ch. 234, § 12)

Kan. Stat. Ann. § 17-1903	1963	1963 Kan. Sess. Laws 400, 415 (ch. 234, § 39)
Kan. Stat. Ann. § 42-120	1963	1963 Kan. Sess. Laws 400, 431 (ch. 234, § 76)
Kan. Stat. Ann. § 12-3406(i)	1969	1969 Kan. Sess. Laws 231, 235 (ch. 89, § 6)
Kentucky		
Ky. Rev. Stat. Ann. § 76.080(11)	1946	1946 Ky. Acts 250, 256 (ch. 104, § 6)
Ky. Rev. Stat. Ann. § 96.175(9)	1946	1946 Ky. Acts 588, 593 (ch. 212, § 7)
Ky. Rev. Stat. Ann. § 416.130	1956	1956 Ky. Acts 74 (ch. 52)
Ky. Rev. Stat. Ann. § 262.745(2)	1960	1960 Ky. Acts 381 (ch. 96, § 1)
Ky. Rev. Stat. Ann. § 416.560(4)	1976	1976 Ky. Acts 297, 297–98 (ch. 140, § 4)
Ky. Rev. Stat. Ann. § 277.060(1)(a)	1976	1976 Ky. Acts 297, 327 (ch. 140, § 111)
Ky. Rev. Stat. Ann. § 175B.050(4)	2009	2009 Ky. Acts (1st Ex. Sess.) 1, 88 (ch. 1, § 84)
Louisiana		
La. Rev. Stat. Ann. § 48:1256(D)	1954	1954 La. Acts 480, 487 (Act No. 232, § 6)
La. Rev. Stat. Ann. § 48:217(B)	1955	1955 La. Acts 247, 248 (Act No. 130, § 1)
La. Rev. Stat. Ann. § 38:301(D)	1992	1992 La. Acts 605 (Act No. 182, § 1)
La. Rev. Stat. Ann. § 48:2029(12)	1997	1997 La. Acts 1727, 1735 (Act No. 1017, § 1)
La. Rev. Stat. Ann. § 48:2077(13)	2001	2001 La. Acts 2708, 2714 (Act No. 1209, § 2)
La. Rev. Stat. Ann. § 48:2097(13)	2003	2003 La. Acts 2837, 2842 (Act No. 893, § 1)
La. Rev. Stat. Ann. § 48:2137(13)	2007	2007 La. Acts 1923, 1929 (Act No. 329, § 1)
La. Rev. Stat. Ann. § 48:2157(13)	2009	2009 La. Acts 3310, 3315 (Act No. 518, § 1)
La. Rev. Stat. Ann. § 49:214.6.9	2009	2009 La. Acts 3379, 3426 (Act No. 523, § 3)
La. Rev. Stat. Ann. § 48:2180(12)	2010	2010 La. Acts 2830, 2838 (Act No. 838, §2)
La. Rev. Stat. Ann. § 30:2456(E)(2)	2012	2012 La. Acts 3376, 3377 (Act No. 832, § 1)

Maine		
Me. Rev. Stat. Ann. tit. 38, § 1153	1965	1965 Me. Laws 397, 404 (ch. 310)
Me. Rev. Stat. Ann. tit. 4, § 180	1976	1976 Me. Laws 3430 (ch. 753)
Me. Rev. Stat. Ann. tit. 23, § 1967(3)	1981	1981 Me. Laws 327, 332 (ch. 492, part D, § 1)
Me. Rev. Stat. Ann. tit. 38, § 1734	1983	1983 Me. Laws (2d Reg. Sess.) 3730, 3750–51 (ch. 820, § 2)
Me. Rev. Stat. Ann. tit. 30, § 5403(9)	1987	1987 Me. Laws 1362, 1562 (ch. 737)
Me. Rev. Stat. Ann. tit. 23, § 153-B	1993	1993 Me. Laws 1140, 1441 (ch. 536, § 2)
Me. Rev. Stat. Ann. tit. 30-A, § 1904	2003	2003 Me. Laws 501, 506 (ch. 228, § 1)
Me. Rev. Stat. Ann. tit. 6, § 177(3)(A)	2007	2007 Me. Laws (1st Spec. Sess.) 1922, 1926 (ch. 563, § 7)
Me. Rev. Stat. Ann. tit. 32, § 18231	2013	2013 Me. Laws 207, 210 (ch. 180, § 5)
Maryland		
Md. Code Ann., Real Prop. § 12-111	1916	1916 Md. Laws 1332 (ch. 649)
Md. Code Ann., Nat. Res. § 3-104(p)	1970	1970 Md. Laws 519, 527 (ch. 240, § 1)
Md. Code Ann., Transp. § 6-306	1977	1977 Md. Laws 21, 278 (ch. 13, § 2)
Md. Code Ann., Bus. Occ. & Prof. § 1-301	1977	1977 Md. Laws 601, 623 (ch. 31, § 1)
Md. Code Ann., Nat. Res. § 3-305(f)	1984	1984 Md. Laws 3070 (ch. 601)
Md. Code Ann., State Fin. & Proc. § 5-203(i)	1985	1985 Md. Laws 729, 850 (ch. 11, § 2)
Md. Code Ann., Pub. Util. § 5-406(a)(3)	1998	1998 Md. Laws 70, 180 (ch. 8, § 2)
Md. Code Ann., Land Use § 2-105(a)(3)	2012	2012 Md. Laws 2157, 2206 (ch. 426, § 2)
Md. Code Ann., Local Gov't § 1-801(c)(6)	2013	2013 Md. Laws 572, 628 (ch. 119, § 2)
Md. Code Ann., Local Gov't § 26-4019c)	2013	2013 Md. Laws 1921, 1938 (ch. 119, § 2)
Md. Code Ann., Transp. § 10-208(31)(b)	2017	2017 Md. Laws 38, 61 (ch. 3, § 1)
Massachusetts		
Mass. Gen. Laws ch. 84, § 10	1868	1868 Mass. Acts 189 (ch. 264)

Mass. Gen. Laws ch. 160, §§ 75, 76	1881, 1878	1881 Mass. Acts 427, 427 (ch. 111, § 1); 1878 Mass. Acts 155, 155 (ch. 512, § 1
Mass. Gen. Laws ch. 164 § 72A	1927	1927 Mass. Acts 54 (ch. 66)
Mass. Gen. Laws ch. 90, § 51G	1946	1946 Mass. Acts 726, 727 (ch. 613, § 1
Mass. Gen. Laws ch. 41, § 81CC	1953	1953 Mass. Acts 709, 723 (ch. 674, § 7)
Mass. Spec. Laws ch. S73, § 4 / Mass. Gen. Laws ch. 91 App., § 1-4	1956	1956 Mass. Acts 322, 332 (ch. 465, § 4)
Mass. Gen. Laws ch. 81, § 7F	1958	1958 Mass. Acts 423 (ch. 582)
Mass. Spec. Laws ch. S71, § 6	1958	1958 Mass. Acts 479, 485 (ch. 606, § 6)
Mass. Gen. Laws ch. 82, § 11A	1962	1962 Mass. Acts 368 (ch. 589
Mass. Gen. Laws ch. 21, § 9A	1970	1970 Mass. Acts 63, 633 (ch. 767, § 1)
Mass. Spec. Laws ch. S17, § 6(g)	1977	1977 Mass. Acts 576, 587–88 (ch. 436, § 6)
Mass. Gen. Laws ch. 40N, § 8(g)	1992	1992 Mass. Acts 955, 964–65 (ch. 343, § 2)
Mass. Spec. Laws ch. S22, § 9 / Mass. Gen. Laws ch. 23A App., § 3-9	1995	1995 Mass. Acts 81, 84 (ch. 22, § 9)
Mass. Gen. Laws ch. 6C, § 3(24)	2009	2009 Mass. Acts 103, 113 (ch. 25, § 8)
Michigan		
Mich. Comp. Laws § 486.307	1869	1869 Mich. Pub. Acts 188, 192 (Act No. 113, § 7)
Mich. Comp. Laws § 485.8	1875	1875 Mich. Pub. Acts 287, 289–90 (Act No. 233, § 8
Mich. Comp. Laws § 123.181	1882	1882 Mich. Pub. Acts (Ex. Sess.) 54, 54 (Act No. 23, § 1)
Mich. Comp. Laws § 259.104	1945	1945 Mich. Pub. Acts 578, 588 (Act No. 327, § 104)
Mich. Comp. Laws § 254.314	1952	1952 Mich. Pub. Acts 34, 345 (Act No. 214, § 4)
Mich. Comp. Laws § 254.235	1954	1954 Mich. Pub. Acts 116, 122 (Act No. 99, § 15)
Mich. Comp. Laws § 54.122	1976	1976 Mich. Pub. Acts 228, 229 (Act No. 115, § 2)

Mich. Comp. Laws § 120.126	1978	1978 Mich. Pub. Acts 2412, 2423 (Act No. 639, § 26)
Mich. Comp. Laws § 213.54(3)	1980	1980 Mich. Pub. Acts 234, 235 (Act No. 87, § 4)
Mich. Comp. Laws § 462.223(a)	1993	1993 Mich. Pub. Acts 2341, 2351 (Act No. 354)
Mich. Comp. Laws § 324.60502	1995	1995 Mich. Pub. Acts 182, 370 (Act. No. 57)
Mich. Comp. Laws § 324.60307	1995	1995 Mich. Pub. Acts 182, 369 (Act No. 57)
Mich. Comp. Laws § 483.2a(2)	1997	1997 Mich. Pub. Acts 853, 853 (Act No. 125)
Mich. Comp. Laws § 259.116(1)(e)	2002	2002 Mich. Pub. Acts 232, 244 (Act No. 90)
Mich. Comp. Laws § 254.324a(3)	2018	2018 Mich. Pub. Acts 1599, 1601 (Act No. 359, § 14a)
Minnesota		
Minn. Stat. § 360.032(1), (2)	1945	1945 Minn. Laws 534, 555 (ch. 303, § 11)
Minn. Stat. § 360.021(1), (4)	1945	1945 Minn. Laws 534, 55253 (ch. 303)
Minn. Stat. § 458A.06(9)	1969	1969 Minn. Laws 2368, 2381 (ch. 1134, § 6)
Minn. Stat. § 117.041	1971	1971 Minn. Laws 1102, 1103 (ch. 595, § 5)
Minn. Stat. § 115A.69(4)	1980	1980 Minn. Laws 786, 823 (ch. 564)
Minn. Stat. § 103D.335(14)	1990	1990 Minn. Laws 354, 470 (ch. 193)
Minn. Stat. § 164.07(13)	2000	2000 Minn. Laws 285, 285 (ch. 334, § 1)
Mississippi		
Miss. Code Ann. § 11-27-39	1926	1926 Miss. Laws 367 (ch. 256)
Miss. Code Ann. § 77-5-23(e)	1936	1936 Miss. Laws 334, 337 (ch. 183, § 12)
Miss. Code Ann. § 77-5-405(h)	1936	1936 Miss. Laws 354, 357 (ch. 185, § 3)
Miss. Code Ann. § 61-5-7	1958	1958 Miss. Laws 851, 853 (ch. 513, § 3)
Miss. Code Ann. § 61-3-17	1958	1958 Miss. Laws 384, 389 (ch. 230, § 8)
Miss. Code Ann. § 43-35-15(c)	1958	1958 Miss. Laws 867, 872 (ch. 518, § 7)

Miss. Code Ann. § 19-29-19	1980	1980 Miss. Laws 1321, 1327–28 (ch. 544, § 10)
Miss. Code Ann. § 57-67-11(g)	1987	1987 Miss. Laws (Ex. Sess.) 22, 24 (ch. 24, § 6)
Miss. Code Ann. § 17-17-317(p)	1991	1991 Miss. Laws 1042, 1052 (ch. 581, § 9)
Miss. Code Ann. § 65-1-335	1997	1997 Miss. Laws 509, 515 (ch. 439, § 18)
Miss. Code Ann. § 51-39-25(*l*)	2000	2000 Miss. Laws 1105, 1115 (ch. 597, § 13)
Miss. Code Ann. § 49-17-743(t)	2006	2006 Miss. Laws 1435, 1450 (ch. 546, § 22)
Missouri		
Mo. Rev. Stat. § 388.210(1)	1852	1852 Mo. Laws (2d Sess.) 121, 134
Mo. Rev. Stat. § 227.120(1)(13)	1929	1929 Mo. Laws 366, 367
Mo. Rev. Stat § 226.420(4)	1939	1939 Mo. Laws 667, 673
Mo. Rev. Stat. § 99.420(10)	1951	1951 Mo. Laws 300, 310
Mo. Rev. Stat § 100.390(7)	1967	1967 Mo. Laws 172, 178
Mo. Rev. Stat. § 204.340(1)	1983	1983 Mo. Laws 488, 492
Montana		
Mont. Code Ann. § 70-30-110(1)	1877	1877 Mont. Laws 40, 191
Mont. Code Ann. § 69-3-108(5)	1913	1913 Mont. Laws 88, 92–93 (ch. 52, § 10)
Mont. Code Ann. § 85-1-204(2)	1933	1933 Mont. Laws (Ex. Sess.) 92, 108 (ch. 35, § 21)
Nebraska		
Neb. Rev. Stat. § 46-125	1895	1895 Neb. Laws 269, 277 (ch. 70, § 10
Nev. Rev. Stat. § 46-156(2)	1911	1911 Neb. Laws 535, 536 (ch. 162, § 1)
Nev. Rev. Stat. § 76-702	1951	1951 Neb. Laws 451, 452 (ch. 101, § 2)
Neb. Rev. Stat. § 3-504(16)	1957	1957 Neb. Laws 110, 118 (ch. 9, § 4)
Neb. Rev. Stat. § 15-229	1961	1961 Neb. Laws 160, 161 (ch. 36, § 1)
Nevada		
Nev. Rev. Stat. § 536.070(1)	1866	1866 Nev. Stat. 202, 203 (ch. 100, § 2)
Nev. Rev. Stat. § 37.050	1907	1907 Nev. Stat. 279, 281 (ch. 128, § 5)
Nev. Rev. Stat. § 340.040(3)	1935	1935 Nev. Stat. 286, 288 (ch. 135, § 4)

Nev. Rev. Stat. § 496.070(2)	1947	1947 Nev. Stat. 713, 715 (ch. 215, § 6)
Nev. Rev. Stat. § 244A.521(1)	1973	1973 Nev. Stat. 1726, 1734 (ch. 790, § 27)
New Hampshire		
N.H. Rev. Stat. Ann. § 371:15(V)	1941	1941 N.H. Laws 307, 309–10 (ch. 197)
N.H. Rev. Stat. Ann. § 371:2-a	1965	1965 N.H. Laws 79 (ch. 90)
N.H. Rev. Stat. Ann. § 498-A:10	1971	1971 N.H. Laws 731, 735 (ch. 526)
New Jersey		
N.J. Stat. Ann. § 32:3-6	1931	1931 N.J. Laws 1219, 1226 (ch. 391, § 1)
N.J. Stat. Ann. § 32:1-141.2	1945	1945 N.J. Laws 677, 682 (ch. 197, § 4)
N.J. Stat. Ann. § 27:19-27	1946	1946 N.J. Laws 1031, 1032–33 (ch. 318, § 2)
N.J. Stat. Ann. § 48:5-18(b)	1947	1947 N.J. Laws 1264, 1264 (ch. 401, § 1)
N.J. Stat. Ann. § 32:1-35.15(b)	1947	1947 N.J. Laws 117, 129 (ch. 43, § 15)
N.J. Stat. Ann. § 58:16A-9(4)	1948	1948 N.J. Laws 1409, 1414 (ch. 351, § 9)
N.J. Stat. Ann. § 58:22-12(d)	1958	1958 N.J. Laws 94, 106 (ch. 34, § 12)
N.J. Stat. Ann. § 48:5-7(V)	1966	1966 N.J. Laws 984, 985 (ch. 197, § 1)
N.J. Stat. Ann. § 40:68-41	1967	1967 N.J. Laws 717, 720–21 (ch. 184, § 15)
N.J. Stat. Ann. § 13:17-6(f)	1968	1968 N.J. Laws 1313, 1326 (ch. 404, § 6)
N.J. Stat. Ann. § 20:3-16	1971	1971 N.J. Laws 1713, 1720–21 (ch. 361, § 16)
N.J. Stat. Ann. § 40:55B-10	1977	1977 N.J. Laws 830, 831 (ch. 195, § 1)
N.J. Stat. § 13:1L-7(a)	1983	1983 N.J. Laws 1377, 1379 (ch. 324, § 7)
N.J. Stat. Ann. § 5:12-182(e)	1984	1984 N.J. Laws 1126, 1170 (ch. 218, § 34)
N.J. Stat. Ann. § 40A:12A-8(h)	1992	1992 N.J. Laws 784, 796 (ch. 79, § 8)
N.J. Stat. Ann. § 52:27I-26(*l*)	2010	2010 N.J. Laws 846, 858 (ch. 51, § 9)
New Mexico		
N.M. Stat. Ann. § 72-1-5	1907	1907 N.M. Laws 71, 74 (ch. 49, § 3)

N.M. Stat. Ann. § 72-4-1	1909	1909 N.M. Laws 372, 373 (ch. 129, § 1)
N.M. Stat. Ann. § 62-1-4	1909	1909 N.M. Laws 409, 410 (ch. 141, § 4)
N.M. Stat. Ann. § 73-5-9	1909	1909 N.M. Laws 210, 212–13 (ch. 76, § 9)
N.M. Stat. Ann. § 73-8-20	1917	1917 N.M. Laws 83, 91 (ch. 22, § 20)
N.M. Stat. Ann. § 70-3-5	1953	1953 N.M. Laws 66, 68–69 (ch. 42, § 8)
N.M. Stat. Ann. § 3-45-4(A)(4)	1965	1965 N.M. Laws 1008, 1282 (ch. 300)
N.M. Stat. Ann. § 3-29-6(A)	1969	1969 N.M. Laws 686, 690–91 (ch. 192, § 3)
N.M. Stat. Ann. § 42A-1-8	1980	1980 N.M. Laws 53, 57–58 (ch. 20, § 8)
N.M. Stat. Ann. § 72-12A-12(A)	1980	1980 N.M. Laws 599, 606 (ch. 148, § 12)
N.M. Stat. Ann. § 11-3A-7(A)(3)	1994	1994 N.M. Laws 1161, 1169 (ch. 132, § 7)
New York		
N.Y. Pub. Auth. Law § 1007(8)	1939	1939 N.Y. Laws 2245, 2381–82 (ch. 870)
N.Y. Pub. Hous. Law § 37(1)(*l*)	1939	1939 N.Y. Laws 1978, 1989 (ch. 808)
N.Y. Unconsol, Law ch. 217, § 2(13) (Consol.) / N.Y. Unconsol. Law § 7702(13) (McKinney)	1942	1942 N.Y. Laws 1034, 1038 (ch. 423, § 2)
N.Y. Unconsol, Law, ch. 187, § 3 (Consol.) / N.Y. Unconsol. Law § 6732 (McKinney)	1945	1945 N.Y. Laws 543, 545 (ch. 163, § 3)
N.Y Unconsol, Law, ch 185, § 5 (Consol.) / N.Y. Unconsol. Law § 6705 (McKinney)	1946	1946 N.Y. Laws 1055, 1058 (ch. 443)
N.Y. Educ. Law § 227(3)	1947	1947 N.Y. Laws 1542, 1587–88 (ch. 820)
N.Y. Pub. Auth. Law § 1096(13)	1950	1950 N.Y. Laws 2224, 2229 (ch. 805, § 1)
N.Y. High. Law § 170	1951	1951 N.Y. Laws 2032, 2032 (ch. 826, § 2)
N.Y. High. Law § 118(5)	1951	1951 N.Y. Laws 2032 (ch. 826)
N.Y. Unconsol. Law ch. 152, § 15 (Consol.) / N.Y. Unconsol. Law § 6615 (McKinney)	1962	1962 N.Y. Laws 980, 998 (ch. 209, § 15)

N.Y. Transp. Law § 43(1)(j)	1970	1970 N.Y. Laws 2901, 2905 (ch. 948, § 1)
N.Y. Env't Conserv. Law § 15-1909(1)	1972	1972 N.Y. Laws 2242, 2531 (ch. 664, § 2)
N.Y. Env't Conserv. Law § 15-1983(3)	1972	1972 N.Y. Laws 2242, 2553 (ch. 664)
N.Y. Env't Conserv. Law § 21-1701, art. IV, § 1(i)	1972	1972 N.Y. Laws 2242, 2793 (ch. 664)
N.Y. Env't Conserv. Law § 15-2109(2)	1972	1972 N.Y. Laws 2242, 2563 (ch. 664)
N.Y. Env't Conserv. Law § 15-2303(5)	1972	1972 N.Y. Laws 2242, 2586 (ch. 664, § 2)
N.Y. Em. Dom. Proc. Law § 404	1977	1977 N.Y. Laws ch. 839, § 1 (p. 10)
N.Y. High. Law § 30(17)	1977	1977 N.Y. Laws ch. 840, § 40 (p. 60)
N.Y. Transp. Law § 228(15)	1977	1977 N.Y. Laws ch. 840, § 95 (p. 118)
N.Y. High. Law § 29(15)	1977	1977 N.Y. Laws ch. 840, § 39 (p. 53)
N.Y. Canal Law § 40(16)	1977	1977 N.Y. Laws ch. 840, § 3 (p. 11)
N.Y. Mil. Law § 177(2)	1977	1977 N.Y. Laws ch. 840, § 63 (p. 83)
N.Y. High. Law § 347(18)	1977	1977 N.Y. Laws ch. 840, § 57 (p. 76)
N.Y. Env't Conserv. Law § 16-0107(16)	1977	1977 N.Y. Laws ch. 840 (p. 31)
N.Y. Pub. Auth. Law § 2045-e(12)	1981	1981 N.Y. Laws 2369, 2374 (ch. 932)
N.Y. Pub. Auth. Law § 2047-e(13)	1982	1982 N.Y. Laws 2565, 2569 (ch. 675, § 1)
N.Y. Pub. Auth. Law § 2046-f(13)	1982	1982 N.Y. Laws 2501, 2505 (ch. 632, § 2)
N.Y. Pub. Auth. Law § 1196-d(14)	1984	1984 N.Y. Laws 2709, 2714 (ch. 510, § 1)
N.Y. Pub. Auth. Law § 2049-d(12)	1984	1984 N.Y. Laws 2928, 2932 (ch. 638, § 1)
N.Y. Pub. Auth. Law § 1197-e(15)	1985	1985 N.Y. Laws 3136, 3144 (ch. 795, § 2)
N.Y. Pub. Auth. Law § 1199-d(14)	1986	1986 N.Y. Laws 2956, 2961 (ch. 723, § 1)
N.Y. Pub. Auth. Law § 1020-h(7)	1986	1986 N.Y. Laws 2518, 2530 (ch. 517, § 1)
N.Y. Pub. Auth. Law § 1115-f(18)	1986	1986 N.Y. Laws 3285, 3294 (ch. 868, § 2)
N.Y. Pub. Auth. Law § 1020-f(v)	1986	1986 N.Y. Laws 2518, 2524 (ch. 517, § 1)

N.Y. Pub. Auth. Law § 1115-c(12)	1986	1986 N.Y. Laws 3285, 3291 (ch. 868, § 2)
N.Y. Pub. Auth. Law § 1020-d(6)	1986	1986 N.Y. Laws 3091, 3094 (ch. 807, § 1)
N.Y. Pub. Auth. Law § 2050-e(13)	1986	1986 N.Y. Laws 3539, 3544 (ch. 936, § 1)
N.Y. Pub. Auth. Law § 1199-ee(17) (Wayne County Water and Sewer Authority	1987	1987 N.Y. Laws 2773, 2778 (ch. 685, § 1)
N.Y. Pub. Auth. Law § 1199-ee(12) (Orange County Water Authority)	1987	1987 N.Y. Laws 2818, 2822 (ch. 709, § 1)
N.Y. Pub. Auth. Law § 2041-d(13)	1987	1987 N.Y. Laws 2864, 2869 (ch. 747, § 1)
N.Y. Pub. Auth. Law § 2049-ee(12)	1988	1988 N.Y. Laws 2969, 2975 (ch. 627, § 2)
N.Y. Pub. Auth. Law § 2051-e(13)	1988	1988 N.Y. Laws 3060, 3065 (ch. 665, § 1)
N.Y. Pub. Auth. Law § 2050-ee(12)	1989	1989 N.Y. Laws 3205, 3211 (ch. 726, § 1)
N.Y. Pub. Auth. Law § 2756(15)	1989	1989 N.Y. Laws 3066, 3072 (ch. 663, § 1)
N.Y. Pub. Auth. Law § 1199-eee(16)	1990	1990 N.Y. Laws 3422, 3428 (ch. 678, § 1)
N.Y. Pub. Auth. Law § 1120-d(14)	1990	1990 N.Y. Laws 3478, 3483 (ch. 724, § 1)
N.Y. Pub. Auth. Law § 1198-f(15)	1990	1990 N.Y. Laws 3729, 3738 (ch. 868, § 1)
N.Y. Pub. Auth. Law § 1124(12)	1991	1991 N.Y. Laws 3533, 3539 (ch. 592, § 1)
N.Y. Pub. Auth. Law § 1174-f(15)	1991	1991 N.Y. Laws 3415, 3422 (ch. 491, § 1)
N.Y. Pub. Auth. Law § 1125(15)	1991	1991 N.Y. Laws 3550, 3555 (ch. 595, § 1)
N.Y. Pub. Auth. Law § 2782(15)	1993	1993 N.Y. Laws 3891, 3898 (ch. 686, § 1)
N.Y. Pub. Auth. Law § 2053-e(13)	1993	1993 N.Y. Laws 3290, 3295 (ch. 434, § 1)
N.Y. Pub. Auth. Law § 1226-f(17)	1994	1994 N.Y. Laws 3452, 3461 (ch. 647)
N.Y. Pub. Auth. Law § 1226-d(11)	1994	1994 N.Y. Laws 3452, 3457 (ch. 325, § 1)

N.Y. Pub. Auth. Law § 1199-dddd(17)	1995	1995 N.Y. Laws 3203, 3209 (ch. 411, § 1)
N.Y. Pub. Auth. Law § 1199-eeee(17)	1995	1995 N.Y. Laws 2881, 2886 (ch. 195, § 1)
N.Y. Pub. Auth. Law § 1147-e(22)	1995	1995 N.Y. Laws 3658, 3666 (ch. 691, § 1)
N.Y. Pub. Auth. Law § 1943(10)	1996	1996 N.Y. Laws 2074, 2078 (ch. 130, § 1)
N.Y. Pub. Auth. Law § 3305(16)	1997	1997 N.Y. Laws 62, 69 (ch. 11, § 1)
N.Y. Pub. Auth. Law § 3404(16)	1997	1997 N.Y. Laws 45, 52 (ch. 9, § 1)
N.Y. Pub. Auth. Law § 903(17)	1999	1999 N.Y. Laws 3296, 3300 (ch. 605, § 1)
N.Y. Pub. Auth. Law § 3605(16)	1999	1999 N.Y. Laws 3131, 3137 (ch. 507, § 1)
N.Y. Pub. Auth. Law § 2579(16)	2000	2000 N.Y. Laws 3299, 3302 (ch. 545, § 1)
N.Y. Pub. Auth. Law § 1230-f(17)	2002	2002 N.Y. Laws 3075, 3084 (ch. 275)
N.Y. Pub. Auth. Law § 1230-d(11)	2002	2002 N.Y. Laws 3075, 3080 (ch. 275, § 1)
N.Y. Pub. Auth. Law § 3630(25)	2003	2003 N.Y. Laws 2738, 2747 (ch. 143, § 1)
N.Y. Pub. Auth. Law § 1021-d(9)	2010	2010 N.Y. Laws 1393, 1397 (ch. 533, § 1)
N.Y. Pub. Auth. Law § 2799-ggg(15)	2011	2011 N.Y. Laws 1318, 1325 (ch. 463, § 1)
N.Y. Pub. Auth. Law § 1114-e(15)	2021	2021 N.Y. Laws 1472, 1480 (ch. 575, §1)
North Carolina		
N.C. Gen. Stat. § 136-190(1)	1872	1871–72 N.C. Sess. Laws 186, 201 (ch. 138, § 29)
N.C. Gen. Stat. § 157-9(a)	1935	1935 N.C. Sess. Laws 771, 779 (ch. 456, § 9)
N.C. Gen. Stat. § 63-49(a), (b)	1945	1945 N.C. Sess. Laws 675, 678–79 (ch. 490, § 2)
N.C. Gen. Stat. § 160A-512(10)	1951	1951 N.C. Sess. Laws 1112, 1118 (ch. 1095, § 9)
N.C. Gen. Stat. § 159-83(a)(13)	1971	1971 N.C. Sess. Laws 946, 974 (ch. 780, § 1)
N.C. Gen. Stat. § 40A-11	1981	1981 N.C. Sess. Laws 1382, 1387 (ch. 919, § 1)

North Dakota		
N.D. Cent. Code § 32-15-06	1895	N.D. Rev. Code § 5960 (1895) (earliest codification located)
N.D. Cent. Code, § 61-07-16(2)	1917	1917 N.D. Laws 125, 146 (ch. 115, § 31)
N.D. Cent. Code § 24-05-09	1935	1935 N.D. Laws 154, 155 (ch. 121, § 1)
N.D. Cent. Code § 61-07-03(6)	1939	1939 N.D. Laws 433, 443 (ch. 253, § 10)
N.D. Cent. Code § 2-06-08	1959	1959 N.D. Laws 96, 101 (ch. 91, § 8)
Ohio		
Ohio Rev. Code Ann. § 4961.13	1894	1894 Ohio Laws 294, 294–95
Ohio Rev. Code Ann. § 743.39	1927	1927 Ohio Laws 143, 143–44
Ohio Rev. Code Ann. § 4582.31(A)(12)	1957	1957 Ohio Laws 249, 253
Ohio Rev. Code Ann. § 303.37(C)	1959	1959 Ohio Laws 1254, 1260
Ohio Rev. Code Ann. § 308.06(P)	1961	1961 Ohio Laws 1282, 1285
Ohio Rev. Code Ann. § 4933.151	1963	1963 Ohio Laws 5, 1165
Ohio Rev. Code Ann. § 163.03	1965	1965 Ohio Laws 5, 180
Ohio Rev. Code Ann. § 4933.15	1965	1965 Ohio Laws 5, 1199
Ohio Rev. Code Ann. § 306.35(V)	1965	1965 Ohio Laws 5, 194
Ohio Rev. Code Ann. § 4582.06(A)(11)	1971	1971 Ohio Laws 199, 204–05
Oklahoma		
Okla. Stat. tit. 66, § 51	1893	Okla. Stat. § 1026 (1893) (earliest codification located)
Okla. Stat. tit. 3, § 65.3	1947	1947 Okla. Sess. Laws 15, 17 (tit. 3, ch. 1)
Okla. Stat. tit. 82, § 1106(10)	1959	1959 Okla. Sess. Laws 390, 393 (tit. 82, ch. 16)
Okla. Stat. tit. 82, § 277.6(C)(12)(b)	1973	1973 Okla. Sess. Laws 263, 266 (ch. 1279, § 6)
Okla. Stat. tit. 11, § 22-114	1977	1977 Okla. Sess. Laws 695, 751 (ch. 256)
Okla. Stat. tit. 11, § 38-108(A)(3)	1977	1977 Okla. Sess. Laws 695, 849 (ch. 256)
Okla. Stat. tit. 82, § 1272(18)	1985	1985 Okla. Sess. Laws 1617, 1622 (ch. 353, § 4)

Oregon		
Or. Rev. Stat. § 272.010	1876	1876 Or. Laws 33, 33–34
Or. Rev. Stat. § 545.239(1)	1895	1895 Or. Laws 13, 19
Or. Rev. Stat. § 772.210(1)(a)	1903	1903 Or. Laws 111, 111
Or. Rev. Stat. § 772.010	1909	1901 Or. Laws 132, 133 (ch. 75, § 2)
Or. Rev. Stat. § 772.410(2)	1953	1953 Or. Laws 1073, 1073 (ch. 559, § 1)
Or. Rev. Stat. § 459.053(4)	1979	1979 Or. Laws 1028, 1029
Or. Rev. Stat. § 35.220	2003	2003 Or. Laws 1720, 1720–21 (ch. 477, § 2)
Pennsylvania		
36 Pa. Cons. Stat. § 3503, Art. V	1931	1931 Pa. Laws 575, 581 (Act No. 200)
36 Pa. Cons. Stat. § 3401, Art. III	1931	1931 Pa. Laws 1352, 1356 (Act No. 332)
16 Pa. Cons. Stat. §§ 12601(p), 12661	1933	1933 Pa. Laws (Ex. Sess.) 114, 117, 120 (Act No. 30)
35 Pa. Cons. Stat. § 1550(*l*)	1937	1937 Pa. Laws 955, 962 (Act No. 265, § 10
35 Pa. Cons. Stat. § 1709(g)	1945	1945 Pa. Laws 991, 996 (Act No. 385, § 9)
35 Pa. Cons. Stat. § 1590.9(n)	1947	1947 Pa. Laws 1414, 1417 (Act No. 549, § 9
16 Pa. Cons. Stat. § 5603	1953	1953 Pa. Laws 723, 876–77 (Act No. 230)
26 Pa. Cons. Stat. § 309	2006	2006 Pa. Laws 112, 121–22 (Act No. 2006-34, § 1)
Rhode Island		
R.I. Gen. Laws § 39-6-6	1881	1881 R.I. Acts & Resolves 2, 2 (ch. 891, § 1)
R.I. Gen. Laws § 45-29-29	1935	1935 R.I. Acts & Resolves 192, 200–01 (ch. 2256, § 6)
R.I. Gen. Laws Ann. § 24-12-9(a)(19)	1954	1954 R.I. Acts & Resolves 541, 554–55 (ch. 3390, § 5)
R.I. Gen. Laws § 45-32-5(a)(7)	1956	1956 R.I. Acts & Resolves 86, 102–02 (ch. 3654, § 40)
R.I. Gen. Laws § 46-25-24.1	1997	1997 R.I. Pub. Laws 857, 857 (ch. 219, § 1)
R.I. Gen. Laws § 45-48.1-5(7)	2003	2003 R.I. Pub. Laws 866, 868 (ch. 270, § 1)

R.I. Gen. Laws § 45-63-2(b)	2006	2006 R.I. Pub. Laws 538, 539 (ch. 121, § 1)
South Carolina		
S.C. Code Ann. § 28-2-70(c)	1987	1987 S.C. Acts 2074, 2081 (Act No. 173, § 1)
South Dakota		
S.D. Codified Laws § 49-33-6	1903	1903 S.D. Sess. Laws 115, 118 (ch. 107, § 8)
S.D. Codified Laws § 1-1-10	1903	1903 S.D. Sess. Laws 155, 155 (ch. 137, § 1)
S.D. Codified Laws § 46A-6-5	1925	1925 S.D. Sess. Laws 228, 228 (ch. 212, §1)
S.D. Codified Laws § 11-8-23	1966	1966 S.D. Sess. Laws 443, 449 (ch. 149, § 8)
S.D. Codified Laws § 50-6A-19	1976	1976 S.D. Sess. Laws 479, 484 (ch. 303, § 11)
S.D. Codified Laws § 46-8-2.1	1983	1983 S.D. Sess. Laws 533, 551 (ch. 314, § 133A)
S.D. Codified Laws § 21-35-31	2016	2016 S.D. Sess. Laws 295, 295 (ch. 118, § 1)
Tennessee		
Tenn. Code Ann. § 29-16-121	1858	Tenn. Code § 1345 (1857–58) (earliest codification located)
Tenn. Code Ann. § 29-17-601	1877	1877 Tenn. Acts 38, 38 (ch. 24, § 1)
Tenn. Code Ann. § 65-21-205	1885	1885 Tenn. Acts 120, 120–21 (ch. 66, § 3)
Tenn. Code Ann. § 13-20-104(a)(15)	1935	1935 Tenn. Pub. Acts (Ex. Sess.) 209, 221 (ch. 20, § 9)
Tenn. Code Ann. § 42-5-108(a)	1957	1957 Tenn. Pub. Acts 1303, 1307 (ch. 375, § 3)
Tenn. Code Ann. § 42-3-109	1957	1958 Tenn. Pub. Acts 1326, 1337–38 (ch. 376, § 8)
Tenn. Code Ann. § 42-2-204(d)(2)	1957	1957 Tenn. Pub. Acts 1259, 1274 (ch. 374, § 7)
Tenn. Code Ann. § 7-37-104(8)	1968	1968 Tenn. Pub. Acts 570, 571 (ch. 581, § 2)
Tenn. Code Ann. § 42-4-107(13)	1969	1969 Tenn. Pub. Acts 482, 190 (ch. 174, § 7)
Tenn. Code Ann. § 7-5-107(12)	1979	1979 Tenn. Pub. Acts 154, 166 (ch. 95, § 7)
Tenn. Code Ann. § 68-211-906(a)(15)	1991	1991 Tenn. Pub. Acts 731, 751 (ch. 451, § 63)

Tenn. Code Ann. § 9-21-107(11)	1986	1986 Tenn. Pub. Acts 678, 685 (ch. 770, § 7)
Tenn. Code Ann. § 64-10-106(c)(11)	2011	2011 Tenn. Pub. Acts ch. 419, § 4 (p. 3
Tenn. Code Ann. § 7-36-107(a)(17)	2016	2016 Tenn. Pub. Acts ch. 995, § 1 (p. 6)
Texas		
Tex. Nat. Res. Code § 152.012	1977	1977 Tex. Gen. Laws 2345, 2648 (ch. 871
Tex. Rev. Civ. Stat. art. 4477-7j, § 4.14	1991	1991 Tex. Gen. Laws 2436, 2444 (ch. 670, § 1)
Tex. Transp. Code § 451.062	1995	1995 Tex. Gen. Laws 1025, 1364–65 (ch. 165, § 1)
Tex. Water Code § 49.221	1995	1995 Tex. Gen. Laws 3755, 3773–74 (ch. 715, § 2)
Tex. Transp. Code § 203.068	1995	1995 Tex. Gen. Laws 1025, 1281 (ch. 165, § 1)
Tex. Transp. Code § 283.101(a)	1995	1995 Tex. Gen. Laws 1025, 1199 (ch. 165, § 1)
Tex. Transp. Code § 284.061(a)	1995	1995 Tex. Gen. Laws 1025, 1207 (ch. 165, § 1)
Tex. Transp. Code § 366.164	1997	1997 Tex. Gen. Laws 4427, 4477 (ch. 1171, § 7.24)
Tex. Util. Code § 181.083(1)	1997	1997 Tex. Gen. Laws 713, 987 (ch. 166, § 1)
Tex. Transp. Code § 203.0521(e)	1997	1997 Tex. Gen. Laws 1137, 1137 (ch. 224, § 1)
Tex. Water Code § 36.123	1999	1999 Tex. Gen. Laws 4589, 4590 (ch. 1354, § 3)
Tex. Transp. Code § 91.093	2003	2003 Tex. Gen. Laws 4884, 4933 (ch. 1325, § 4.01)
Tex. Spec. Dists. Code § 21.211	2007	2007 Tex. Gen. Laws 2320, 2329 (ch. 920, § 1.01)
Tex. Transp. Code § 112.051	2009	2009 Tex. Gen. Laws 153, 160 (ch. 85, § 2.03)
Tex. Spec. Dist. Code § 8246.151(11)	2009	2009 Tex. Gen. Laws 3155, 3406 (ch. 1139, § 1.04)
Tex. Transp. Code § 131.013(b)(2)	2009	2009 Tex. Gen. Laws 153, 167 (ch. 85, § 2.03
Tex. Spec. Dists. Code § 11003.161	2013	2013 Tex. Gen. Laws 226, 474 (ch. 112, § 1.07)

Tex. Spec. Dists. Code § 11006.160	2015	2015 Tex. Gen. Laws 2736, 2877 (ch. 855, § 1.07)
Tex. Spec. Dists. Code § 11005.161	2015	2015 Tex. Gen. Laws 2736, 2866 (ch. 855, § 1.07)
Tex. Nat. Res. Code § 111.019(d)	2021	2021 Tex. Gen. Laws 2743, 2743–44 (ch. 1039, § 1)
Tex. Prop. Code § 21.0101	2021	2021 Tex. Gen. Laws 2023, 2025 (ch. 826, § 5)
Utah		
Utah Code Ann. § 78B-6-506	1951	1951 Utah Laws 1150, 218 (ch. 58, § 1)
Utah Code Ann. § 17B-2a-205(1)	2007	2007 Utah Laws 1723, 1870 (ch. 329, § 281)
Vermont		
Vt. Stat. Ann. tit. 5, § 3518	1849	1849 Vt. Acts & Resolves 30, 36–37 (Act No. 41, § 25)
Vt. Stat. Ann. tit. 24, § 3209(3)	1957	1957 Vt. Acts & Resolves 259, 263 (Act No. 264, § 7)
Vt. Stat. Ann. tit. 24A, § 405-5(26)	1989	1989 Vt. Acts & Resolves 375, 429 (Act No. M-12, § 2)
Vt. Stat. Ann. tit. 30, § 111a(c)	2008	2008 Vt. Acts & Resolves 134, 138 (Act No. 131, § 4)
Virginia		
Va. Code Ann. § 25.1-203	1904	1902–04 Va. Acts 957, 957–58 (ch. 608, § 3)
Va. Code Ann. § 25.1-246	1904	1902–04 Va. Acts 957, 967–68 (ch. 608, § 26)
Va. Code Ann. § 56-49	1944	1944 Va. Acts 523, 539 (ch. 367, § 1)
Va. Code Ann. § 21-248(8)	1946	1946 Va. Acts 346, 352 (ch. 206, § 5)
Va. Code Ann. § 15.2-2604(9)	1956	1956 Va. Acts 948, 950 (ch. 640, § 2)
Va. Code Ann. § 33.2-1011	1959	1959 Va. Acts 763, 763 (ch. 491, § 1)
Va. Code Ann. § 5.1-2.5	1980	1980 Va. Acts 1176, 1177–78 (ch. 750, § 1)
Va. Code Ann. § 56-49.01	2004	2004 Va. Acts 1276, 1276–77 (ch. 829, § 1)
Va. Code Ann. § 33.2-2902(13)	2009	2009 Va. Acts 731, 734 (ch. 471, § 1)
Washington		
Wash. Rev. Code § 87.03.140	1889	1889 Wash. Sess. Laws 671, 678 (§ 12)
Wash. Rev. Code § 90.16.040	1901	1901 Wash. Sess. Laws 299, 299–300 (ch. 143, § 2)

Wash. Rev. Code § 22.16.020	1919	1919 Wash. Sess. Laws 233, 234 (ch. 98, § 2)
Wash. Rev. Code § 47.01-170	1945	1945 Wash. Sess. Laws 501, 501 (ch. 176, § 1)
Wash. Rev. Code § 35.81.070(6)	1957	1957 Wash. Sess. Laws 134, 144 (ch. 42, § 7)
Wash. Rev. Code § 35.81.150(2)(k)	1957	1957 Wash. Sess. Laws 134, 156 (ch. 42, § 15)
West Virginia		
W. Va. Code § 54-1-3	1870	W. Va. Code app'x 747 (1870)
W. Va. Code § 16-15-7(a)(9)	1933	1933 W. Va. Acts (2d Ex. Sess.) 236, 241 (ch. 93, § 7)
W. Va. Code § 5-6-4(a)(15)	1939	1939 W. Va. Acts 241, 244 (ch. 43, § 3)
W. Va. Code § 17-2A-8(4)	1957	1957 W. Va. Acts 668, 678 (ch. 143)
W. Va. Code § 54-1-3a	1963	1963 W. Va. Acts 380, 380–81 (ch. 65)
W. Va. Code § 31-2-13(a)	1873	187273 W. Va. Acts 213, 223 (ch. 88, § 20)
W. Va. Code § 5D-1-5(29)	1985	1985 W. Va. Acts 170, 277–78 (ch. 41)
W. Va. Code § 18-9D-3(a)(14)	1988	1988 W. Va. Acts (3d Ex. Sess.) 1126, 1225 (ch. 7)
Wisconsin		
Wis. Stat. § 83.01(7)(e)	1922	1922 Wis. Sess. Laws 107, 135 (ch. 108, § 124
Wis. Stat. § 190.02(1)	1929	1929 Wis. Sess. Laws 686, 870 (ch. 504, § 12)
Wis. Stat. § 87.12(5)	1931	1931 Wis. Sess. Laws 839, 850 (ch. 481, § 1)
Wis. Stat. § 30.18(7)	1935	1935 Wis. Sess. Laws 426, 428 (ch. 287, § 1)
Wis. Stat. § 87.12(5)	1937	1937 Wis. Sess. Laws 697, 698 (ch. 425, § 1)
Wis. Stat. § 62.23(4)	1941	1941 Wis. Sess. Laws 252, 24 (ch. 203, § 5)
Wis. Stat. § 182.38	1953	1953 Wis. Sess. Laws 174, 179 (ch. 186, § 3)
Wis. Stat. § 59.84(2)(i)	1957	1957 Wis. Sess. Laws 478, 481–82 (ch. 329, § 4)
Wis. Stat. § 66.1333(5)(a)(3)	1959	1959 Wis. Sess. Laws 630, 633 (ch. 515, § 3)

Wis. Stat. § 84.01(10)	1969	1969 Wis. Sess. Laws 1500, 1501 (ch. 500, § 7)
Wis. Stat. § 200.11(3)	1971	1971 Wis. Sess. Laws 1047, 1053 (ch. 276, § 5)
Wis. Stat. § 36.25(6)	1973	1973 Wis. Sess. Laws 1092, 1103 (ch. 335, § 7)
Wis. Stat. § 1.06	1977	1977 Wis. Sess. Laws 1994, 1995 (ch. 449, § 1)
Wis. Stat. § 200.35(11)	1981	1981 Wis. Sess. Laws 1138, 1152 (ch. 282, § 20)
Wis. Stat. § 92.07(14)	1981	1981 Wis. Sess. Laws 1425, 1434 (ch. 346, § 34)
Wis. Stat. § 229.44(10)	1993	1993 Wis. Sess. Laws 1059, 1068 (Act No. 263, § 47)
Wis. Stat. § 59.70(2)(d)	1995	1995 Wis. Sess. Laws 1377, 1410 (Act No. 201, § 216)
Wyoming		
Wyo. Stat. Ann. § 41-10-113(a)(xiv)	1959	1959 Wyo. Sess. Laws 257, 269 (ch. 188, § 13)
Wyo. Stat. Ann. § 15-9-113(a)(v)	1965	1965 Wyo. Sess. Laws 376, 383–84 (ch. 140, § 14)
Wyo. Stat. Ann. § 1-26-506	1981	1981 Wyo. Sess. Laws 305, 306–07 (ch. 174, § 1)
Wyo. Stat. Ann. § 30-5-402	2005	2005 Wyo. Sess. Laws 169, 170–71 (ch. 81, § 1)
District of Columbia		
D.C. Code § 9-103.04	1893	27 Stat. 532, 534 (ch. 197, § 4) (1893)
D.C. Code § 9-1115.03(25)(a)	1995	42 D.C. Reg. 7185, 7197 (Dec. 29, 1995) (D.C. Act 11-179, § 4)
Puerto Rico		
P.R. Laws Ann. tit. 22, § 255	1909	1909 P.R. Laws 152, 158–59
P.R. Laws Ann. tit. 22, § 304	1919	1919 P.R. Laws 348, 352–55 (Act No. 63, § 10)
P.R. Laws Ann. tit. 22, § 196(s)	1941	1941 P.R. Laws 684, 696–97 (Act No. 83, § 6)
P.R. Laws Ann. tit. 28, § 261(o)	1941	1941 P.R. Laws 388, 406–07 (Act No. 26, § 8)
P.R. Laws Ann. tit. 23, § 336(r)	1942	1942 P.R. Laws 710, 720–21 (Act No. 125, § 6)
P.R. Laws Ann. tit. 22, § 144(*l*)	1949	1949 P.R. Laws 430, 440–41 (Act No. 163, § 1)

P.R. Laws Ann. tit. 22, § 906(a)(14)	1958	1958 P.R. Laws 120, 123 (Act No. 56, § 5
P.R. Laws Ann. tit. 23, § 525(r)	1958	1958 P.R. Laws 202, 207 (Act No. 93, § 4)
P.R. Laws Ann. tit. 23, § 606(r)	1959	1959 P.R. Laws 17, 22 (Act No. 5, § 6)
P.R. Laws Ann. tit. 23, § 555(r)	1959	1959 P.R. Laws 46, 50 (Act No. 10, § 4)
P.R. Laws Ann. tit. 23, § 311f(r)	1962	1962 P.R. Laws 11, 18 (Act No. 13, § 7)
P.R. Laws Ann. tit. 9, § 2004(p)	1965	1965 P.R. Laws 158, 162 (Act No. 74, § 4)
P.R. Laws Ann. tit. 23, § 3055(r)	1974	1974 P.R. Laws 239, 245 (Act No. 62, § 5)
P.R. Laws Ann. tit. 23, § 11164(a)(15)	2014	2014 P.R. Laws 506, 524 (Act No. 123, § 5)
U.S. Virgin Islands		
V.I. Code Ann. tit. 29, § 35(26)	1958	1958 V.I. Sess. Laws 42, 52 (No. 316, § 1)
V.I. Code Ann. tit. 30, § 415	1960	1960 V.I. Sess. Laws 155, 155 (No. 629, § 1)
V.I. Code Ann. tit. 29, § 85(26)	1962	1962 V.I. Sess. Laws 193, 201–02 (No. 903, § 5)
V.I. Code Ann. tit. 29, §§ 191d(a)(7), 191o	1963	1963 V.I. Sess. Laws 205, 209, 215 (No. 991, § 1)
V.I. Code Ann. tit. 30, § 105(17)	1964	1964 V.I. Sess. Laws 378, 386 (No. 1248, § 1)
V.I. Code Ann. tit. 29, § 496(p)	2003	2003 V.I. Sess. Laws 205, 217 (No. 6638, § 1)

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

DAN FELDHAUS
Court Reporter
200 E. Center Street
Madison, SD 57042
605-256-5285
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March 8, 2023

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RE: *Patricia K. Deeg Trust v. SCS Carbon Transport LLC & Betty Jean Strom Trust, Rita Brown, Craig & Lisa Basler Family Trust v. SCS Carbon Transport LLC*; 02CIV22-129 & 39CIV22-64 Consolidated—Motion to Compel Discovery; Motion for Continuance; and Motion for Summary Judgment

INTRODUCTION

Defendant SCS Carbon Transport LLC ("SCS") filed a Motion for Summary Judgment seeking dismissal of Plaintiff Landowners ("Landowners") Amended Complaint with prejudice

and granting of SCS's Counterclaims. Landowners resist summary judgment, believing the motion to be premature, and filed a Motion to Compel Discovery and a Motion for Continuance. A hearing was held in Lake County, South Dakota, on February 28, 2023, where this Court took the matter under advisement. For the reasons set forth below, Landowners' Motion to Compel Discovery and Motion for Continuance are denied, and SCS's Motion for Summary Judgment is granted.

BACKGROUND

SCS and its parent Summit Carbon Solutions, LLC ("Summit") have intentions of developing an interstate pipeline that would receive, transport, and deliver carbon dioxide through a network of approximately 2,000 miles of underground pipelines. The route of the proposed pipeline travels through eighteen counties in South Dakota and four other states before reaching a sequestration site in North Dakota for storing of the carbon dioxide.

Prior to any pipeline construction, SCS must enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations, including core or water sampling activities. The purpose of said surveys and investigations is to identify and describe the property needed to construct the pipeline and appraise the property to acquire any requisite easements.

Pursuant to and in accordance with SDCL § 21-35-31, SCS needed to obtain a siting permit before entering on Landowners private property to conduct the surveys. SCS sent letters to Landowners dated June 4, 2022, seeking consent for SCS to enter their property for the surveys. Landowners did not consent; rather, they instituted these lawsuits with complaints filed July 19, 2022. The complaints were consolidated in October 2022. From their Amended Complaint filed October 27, 2022, Landowners assert six claims against SCS: 1) that SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation; 2) that SDCL § 21-35-31

amounts to an unconstitutional taking as applied; 3) that SDCL § 21-35-31 violates the Due Process Clause of the State and Federal Constitutions; 4) that SCS is not of the class of corporations authorized to act under SDCL § 21-35-31; 5) that SCS's notice letters to Landowners are insufficient under SDCL § 21-35-31; and 6) that the survey access SCS seeks is not authorized under SDCL § 21-35-31. SCS counterclaimed, seeking declaratory and injunctive relief authorizing it to survey despite objection from Landowners.

On December 28, 2022, this Court issued a Memorandum Decision granting SCS's Motion for Entry of Protective Order, and in doing so, made the following findings: 1) that carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value; and 2) that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee. This Memorandum Decision was introduced as a handout to the Senate Commerce and Energy Committee when it considered House Bill 1133 at the current legislative session. While not binding authority, the Committee effectively affirmed this Court's findings when it denied the bill, which was pushed by Landowners and sought to amend the definition of a commodity for the purpose of qualifying as a common carrier under SDCL § 49-7-11.

These prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31. Landowners also withdrew their as applied constitutional challenge of SDCL § 21-35-31 in their brief resisting summary judgment. As such, the remaining issues before the court are: 1) the facial constitutionality of SDCL § 21-35-31; 2) if SDCL § 21-35-31 violates state and federal procedural due process; 3) the sufficiency of SCS's notice letter to Landowners under SDCL § 21-35-31; and 4) if SDCL § 21-35-31 authorizes SCS's surveys. Because these remaining issues are questions of

law, a decision on summary judgment is ripe, and each issue will be discussed in turn. Therefore, Landowners' motion to compel discovery and for a continuance are moot.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765. In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings but, rather, must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). "Where no genuine issues of material fact exist and the trial court resolves the questions of law in a party's favor, summary judgment is appropriate." *Weber v. First Fed. Bank*, 523 N.W.2d 720, 721 (S.D. 1994) (citing *King v. John Hancock Mut. Life. Ins.*, 500 N.W.2d 619 (S.D. 1993)).

APPLICABLE LAW & ANALYSIS

1. Whether SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation

"Challenges to the constitutionality of a statute meet formidable restrictions." *State v. Allison*, 2000 S.D. 21, ¶ 5, 607 N.W.2d 1, 2 (internal quotation omitted). "Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until

the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 10, 851 N.W.2d 208, 213. The burden of proving the unconstitutionality of a statute is on the challenger. *Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 8, 578 N.W.2d 134, 134. "[T]he South Dakota Supreme Court construes South Dakota laws in accordance with the doctrine of constitutional avoidance, which requires adopting a construction of a law that avoids questions about its constitutionality if such a construction is 'fairly possible[.]'" *Sisney v. Kaemingk*, 15 F.4th 1181, 1198 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022) (quoting *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985)). A statute's words are to be defined according to their ordinary meaning to effect its purpose. *Hofer v. Redstone Feeders, LLC*, 2015 S.D. 75, ¶ 15, 870 N.W.2d 659, 662. Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶ 15, 727 N.W.2d 808, 812.

Landowners challenge the constitutionality of SDCL § 21-35-31's pre-condemnation surveys, arguing they violate Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. These constitutional provisions prohibit the taking of private property for public use without just compensation. S.D. Const. art. VI, § 13; U.S. Const. amend. V. The narrow issue then is whether the pre-condemnation surveys authorized in SDCL § 21-35-31 amount to a taking without the constitutional requirement of just compensation.

In 2016, the South Dakota Legislature adopted SDCL § 21-35-31 which states as follows:

> The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:
> (1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and
(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

SDCL § 21-35-31.

Landowners specifically challenge the constitutionality of the statute considering the United States Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). That case concerned a California regulation that gave agricultural employees the right to self-organize on the premises of an agricultural employer for up to four 30-day periods in one calendar year. *Id.* at 2069. Prior to doing so, a labor organization needed to file a written notice with the Agricultural Labor Relations Board and serve a copy on the employer. *Id.* The Court held that the access regulation appropriated a right to invade the growers' property and therefore constituted an uncompensated *per se* physical taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 2074.

This Court declines to extend *Cedar Point* and hold that SDCL § 21-35-31 and its permitted surveys suffer from the same constitutional infirmities. The government does not take a property interest when it merely asserts a pre-existing limitation upon the landowner's title. *Id.* at 2079 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). In terms of eminent domain, other courts have held that there is an ancillary right to survey land prior to condemnation. As cited by then Judge, now Justice, Salter in litigation concerning the Dakota Access pipeline, the Missouri Supreme Court in *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981) stated the following:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Other jurisdictions, both with and without specific statutes granting the right of entry, have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1985); *State by Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982); *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176 (Ohio App. 5d 2016); *In re Application for Permit to Enter Land for Surys. & Examination Associated with a Proposed N. Dakota Diversion & Associated Structures*, 883 N.W.2d 844 (N.D. 2016). In light of the above-cited authorities and the strong presumption in favor of constitutionality, Landowners have failed to prove beyond a reasonable doubt that SDCL § 21-35-31 unconstitutionally authorizes a taking without just compensation in violation of Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. Rather, this Court finds in favor of SDCL § 21-35-31's constitutionality and that its related surveys are merely a right ancillary to condemnation not amounting to a governmental taking. Summary judgment is granted on this issue.

2. Whether SDCL § 21-35-31 violates state and federal procedural due process

Under the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law." "Due process requires adequate notice and an opportunity for meaningful participation." *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 386 (citing *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160). "A procedural due process claim focuses not on the merits of a deprivation, but on whether the State

circumscribed the deprivation with constitutionally adequate procedures." *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

The plain language of SDCL § 21-35-31 provides adequate notice and an opportunity for meaningful participation. It first allows owners of private property the opportunity to consent to an examination and survey. If consent is not given, the statute mandates the person vested with authority to take private property to both file a siting permit application with the Public Utilities Commission and provide private property owners with thirty days written notice of this filing and expected dates of entry. Because of these mandates, owners of private property are effectively under adequate notice of anticipated examination and surveying and may meaningfully participate by consenting or denying permission to do the same. Furthermore, as seen in this specific case, the procedures set forth in SDCL § 21-35-31 give owners sufficient opportunity to be heard through the judicial process before entry for examination and surveying occurs. Therefore, SDCL § 21-35-31 does not violate state or federal procedural due process, and summary judgment is also granted on this issue.

3. Whether SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31

Giving SDCL § 21-35-31's language a plain meaning to effect its purpose, the Court is satisfied as to the sufficiency of SCS's notice letters under the statute. Landowners take issue with SCS's notice letters in that they did not specify the expected dates of entry, they only contained the hyperlink to the Public Utilities Commission docket rather than the entire siting permit application, and they failed to set out measurement of and submission for damages to private property from the surveys. However, the Court does not read such rigidity into the statute. All that SDCL § 21-35-31 requires is: 1) written notice, including the Public Utilities Commission filing; 2) expected dates of entry; and 3) provide sufficient security for the payment of any actual damages

done to the property by the entry. Within SCS's notice letters to Landowners, it is undisputed a hyperlink to the filing of the siting permit application was included. This is enough under SDCL § 21-35-31 to place Landowners on notice of the filing. Secondly, SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated. Lastly, SCS's letters note that it has secured a bond, now in the amount of $5 million, intended to cover any damage to Landowners' properties. This statement acts as sufficient security to Landowners for the payment of any actual damages sustained on their property. Because SCS's notice letters comport with the plain and ordinary meaning of the words within SDCL § 21-35-31, summary judgment is granted on this issue.

4. Whether the survey access SCS seeks is authorized under SDCL § 21-35-31

SDCL § 21-35-31 authorizes persons with vested authority to first cause an examination and survey to be made as necessary before taking private property for public use. "Examine" means "to test the condition of." *Examine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/examine (last visited Mar. 8, 2023). "Survey" means "to examine as to condition, situation, or value." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Mar. 8, 2023). In interpreting its survey access law[1], the Supreme Court of North Dakota stated that "[t]he definition of 'examination' is not strictly limited to a visual examination" but also includes instances of soil borings that penetrate the ground's surface and are minimally invasive. *In re 2015 Application*, 883 N.W.2d at 848-49.

Considering the ordinary definitions of "examination" and "survey" and the Supreme Court of North Dakota's statutory interpretation, this Court finds that SDCL § 21-35-31 authorizes

[1] N.D. Cent. Code Ann. § 32-15-06 provides in relevant part: "Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof..."

minimally invasive soil disturbances such as those SCS seeks to perform on Landowners' properties. The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones but contemplates the minimally invasive typical and geotech surveys proposed by SCS. Summary judgment is granted on this final issue.

CONCLUSION

Based upon the foregoing analysis, SCS's Motion for Summary Judgment is GRANTED, and Landowner's Amended Complaint is dismissed with prejudice.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

FILED

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

SCS Appendix 34

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064
PATRICIA K. DEEG TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

This matter came be heard on the 28th day of February 2023 before the Honorable Patrick T. Pardy on Defendant SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, and Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023. Said Motion having been argued by all parties appearing at said hearing, Defendant SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP and Brian D. Boone and Matthew Hooker of Alston & Bird LLP, and Plaintiffs having been represented by Nicholas G. Moser of Marlow, Woodward & Huff, Prof. LLC, and Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present

arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, which is further explained in the Court's Memorandum Decision dated March 8, 2023, which is fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, is hereby **GRANTED** and all of Plaintiffs' claims are **DISMISSED** with prejudice.

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023 is hereby **DENIED** as moot;

ORDERED, ADJUDGED AND DECREED that, pursuant to SDCL 21-35-31, SCS Carbon Transport LLC, is granted a declaratory judgment authorizing access for the purpose of conducting civil, environmental and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings and archaeological/cultural resource surveys and examinations, for the property described as follows:

Landowner	Legal Description
Patricia K. Deeg Trust	Township 112 North, Range 61 West, Section 25: SW1/4 Section 26: SW1/4 EX 11 AC E OF ROAD Section 35: NW1/4
Betty Jean Strom Trust	Township 105 North, Range 53 West Section 25: SW1/4 EXC BONNEMA TRACT Section 36: N1/2NW1/4

and,

ORDERED, ADJUDGED AND DECREED that Defendants Patricia K. Deeg Trust and Betty Jean Strom Trust shall be enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said property, including conducting preliminary civil, environmental and archaeological surveys and examinations and environmental or archeological investigations, including any necessary core or water sampling activities subject to any conditions.

BY THE COURT:

3/15/2023 12:31:19 PM

Attest:
Klosterman, Linda
Clerk/Deputy

The Honorable Patrick T. Pardy
Circuit Court Judge

Filed on: 03-15-2023 Lake County, South Dakota 39CIV22-000064

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&I. FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

This matter came be heard on the 14th day of March, 2023 before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023. Said Motion having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners[1] having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, it is therefore:

[1] The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC (SCS)'s Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED** as to the following issues:

1. SDCL § 21-35-31 is constitutional;
2. Carbon dioxide is a commodity under SDCL § 49-7-11;
3. SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31; and
4. The surveys and examinations SCS seeks to conduct are authorized by SDCL § 21-35-31.

It is further **ORDERED, ADJUDGED AND DECREED** that SCS's Motion for Summary Judgment, filed February 10, 2023, is hereby **TAKEN UNDER ADVISEMENT** as to the sole remaining following issue:

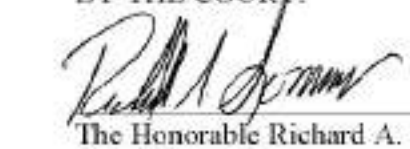
1. Whether SCS is entitled to summary judgment on the question of whether, in accordance with SDCL § 49-7-11, SCS is holding itself out to the general public as engaged in the business of transporting carbon dioxide for hire by pipeline.

It is further **ORDERED, ADJUDGED AND DECREED** that the parties will submit further briefing and any supplemental materials related to the issue taken under advisement according to the following schedule:

1. SCS will submit its further briefing and any supplemental materials within 14 days of the entry of this order.
2. Landowners will submit their further briefing and any supplemental materials within 14 days of the filing of SCS's brief.

3/28/2023 1:25:12 PM

BY THE COURT:



The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Moser, Katie
Clerk/Deputy

Filed on:04-20-2023 McPherson County, South Dakota 45CIV22-000014

STATE OF SOUTH DAKOTA

FIFTH JUDICIAL CIRCUIT

PRESIDING JUDGE
Gregg C. Magera
CIRCUIT JUDGES
Tony L. Portra
Richard A. Sommers
Marshall Levrien
MAGISTRATE JUDGE
Cullen McNeece

RICHARD A. SOMMERS
Circuit Court Judge

Sara Zahn, RPR
Official Court Reporter

101 SE 1ST Ave, Ste 300
PO Box 1087
Aberdeen, SD 57402-1087
Phone: 605-626-2450
Fax: 605-626-2491
Email: 5thcircuit@ujs.state.sd.us

April 19, 2023

VIA EMAIL

45CIV22-000014

Nicholas Moser
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200 West Third Street
Yankton, SD 57078

Brian Jorde (*pro hac vice*)
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Brian Boone (*pro hac vice*)
Michael Hoernlein (*pro hac vice*)
Matthew Hooker (*pro hac vice*)
Alston & Bird, LLP
101 S. Tyron St., STE 4000
Charlotte, NC 28280

Re: *Peter Helfenstein, Jr. et al. v. SCS Carbon Transport, LLC; SCS Carbon Transport, LLC v. Geraldine H. Saylor Jordre, et al.; Braun Family Trust 2020, et al. v. SCS Carbon Transport, LLC; Jared Bossly, et al. v. SCS Carbon Transport, LLC; Delores Schumacher Revocable Trust and John and Stephanie Jung v. SCS Carbon Transport, LLC;* 45CIV22-14, 45CIV22-18, 71CIV22-47, 06CIV22-253, 22CIV22-20 Consolidated Cases

Filed on: 04-20-2023 McPherson County, South Dakota 45CIV22-000014

Dear Counsel:

This Court has had the opportunity to review the supplemental briefs filed by the parties in the above-entitled matter. Viewing the undisputed facts as a whole, I find that SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value. This Court will adopt the reasoning of Judge Pardy and Judge Pekas on companion cases from other Circuits on this issue.

Counsel for SCS should prepare the order and submit it for signature.

Sincerely,

Richard A. Sommers
Circuit Court Judge

cc: Brown County Clerk of Courts
Edmunds County Clerk of Courts
Spink County Clerk of Courts
McPherson Clerk of Courts

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

Filed on: 04/21/23 McPherson County, South Dakota 45CIV22-000014

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&I. FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING
SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

This matter came to be heard on the 14th day of March, 2023, before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed on February 10, 2023, and on Landowners'* Motion to Continue, filed on February 28, 2023. Said motions having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments; and on the basis of the hearing on said motions, the arguments of counsel and the records and files of this action, including supplemental briefing and materials related to the issue taken under advisement by this Court; and good cause appearing, which is

* The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

further explained in the Court's March 28, 2023 Order and April 19, 2023 Letter Decision, which are fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED, AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED**. Landowner Plaintiffs' Amended Complaint (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on October 27, 2022, and Landowner Defendants' Counterclaim (case no. 45CIV22-000018), filed on August 29, 2022, are **DISMISSED** with prejudice;

ORDERED, ADJUDGED, AND DECREED that Landowners' Motion to Continue, filed February 14, 2023, is **DENIED**;

ORDERED, ADJUDGED, AND DECREED that, pursuant to SDCL § 21-35-31, SCS Carbon Transport LLC is granted the declaratory judgment and the injunctive relief it seeks in its Restated Counterclaim (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on November 7, 2022, and in its Complaint (case no. 45CIV22-000018), filed on July 20, 2022, including authorizing access for the purpose of conducting civil, environmental, and archaeological/cultural, surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions, for the properties described as follows:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4

Landowner	County	APN	Legal Description
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4

Landowner	County	APN	Legal Description
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

and,

ORDERED, ADJUDGED, AND DECREED that the above Landowners, their agents and representatives, and anyone acting in concert with them, are enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said properties, including conducting civil, environmental, and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions.

[SIGNATURE PAGE FOLLOWS]

BY THE COURT:

4/21/2023 11:10:38 AM

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Moser, Katie
Clerk/Deputy

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned cases:

Filed: 1/13/2023 3:12 PM CST Lake County, South Dakota 39CIV22-000064

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3 4.

2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 1,900 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.*

5. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

6. The Patricia K. Deeg Trust and the Betty Jean Strom Trust ("Landowners") own or are in possession of real property that will be crossed by SCS's pipeline:

* *See also In the Matter of the Application by SCS Carbon Transport LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, Docket No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

Filed: 1/13/2023 3:12 PM CST Lake County, South Dakota 39CIV22-000064
- Page 1316 -

Landowner	County	APN	Legal Description
Patricia K. Deeg Trust	Beadle	5004	SEC 35-T112N-R61W: NW4
	Beadle	4965	SEC 26-T112N-R61W: SE4 EX 11 AC E OF ROAD
	Beadle	4959	SEC 25-T112N-R61W: SW4
Betty Jean Strom Trust	Lake	090001055336210	SEC 36-T105N-R53W: N1/2NW4
	Lake	090001055325310	SEC 25-T105N-R53W: SW1/4 EXC BONNEMA TRACT

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

7. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

8. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–9; Schovanec Aff. Exhibits 1, 2.

9. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibit 1 at p. 1, Exhibit 2 at p. 1.

10. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibit 1 at pp. 1–2, Exhibit 2 at pp. 1–2.

11. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2. For both Landowners, SCS seeks a "typical survey," and for the Patricia K. Deeg Trust, SCS also seeks a "geotech survey." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

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12. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

13. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." Schovanec Aff. Exhibit 1 at p. 2.

14. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 11; Schovanec Aff. Exhibit 3.

15. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

16. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 10.

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Dated this 13th day of January, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 13th day of January, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
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Brian Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF BEADLE AND LAKE	)	THIRD JUDICIAL CIRCUIT

PATRICIA K. DEEG TRUST, Plaintiff, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.	02CIV22-000129 **LANDOWNERS STATMENT OF DISPUTED MATERIAL FACTS IN RESISTENCE TO SCS MOTION FOR SUMMARY JUDGMENT**
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.	39CIV22-000064

Comes now, Landowners by and through their attorneys of records, and submits the following Landowners Statement of Disputed Material Facts.

1. Deny. As stated defendants act as if there idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that land owners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *See Supplemental Affidavit of Nicholas G. Moser in Support of Landowner's Resistance to Summary Judgment,* ¶ 5.

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2. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 6.

3. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 7.

4. Admit something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.* at ¶ 8.

5. Deny. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 9.

6. Deny that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 10.

7. Deny. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop

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competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 11.

8. Deny, nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 12.

9. Admit that the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 13.

10. Deny as to what the letters inform Landowners of and object as to foundation. Deny the "link" which is text on a page informs anyone of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 14.

11. Admit as to the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 15.

12. Deny as to "typical" this is without definition or limit under the unconstitutionally challenged law. Admit SCS witness describes way "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 16.

13. Admit what is stated are the words in the letter. Deny the authenticity of the underlying statement and deny the truth of the matter asserted. Deny that there would be "no impact" to the land. Object as to vague and ambiguous as to what is "normal land". Object insofar as SCS has failed to prove that Landowners land is in fact "normal land." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 17.

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14. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 18.

15. Admit this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 19.

16. Admit that Landowners do not believe the desired and unnecessary access and unfetter run of the land is lawful constitutional. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 20.

Dated this 14th day of February, 2022.

By: /s/ Brian E. Jorde
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Plaintiff's Lawyers

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CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 14th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
Cash Anderson (cea@mayadam.net)
Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

Filed: 2/10/2023 4:12 PM CST McPherson County, South Dakota 45CIV22-000014

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA	06CIV22-000253

Filed: 2/10/2023 4:12 PM CST McPherson County, South Dakota 45CIV22-000014

ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned actions:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of James Pirolli (Pirolli Aff.) ¶¶ 3 4; Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

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2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 2,000 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Pirolli Aff. ¶ 4; Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Pirolli Aff. ¶ 5; Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.[1]

5. SCS is offering its CO_2-transporation services to or for the public for hire. Pirolli Aff. ¶¶ 4, 6–10.

6. SCS and Summit Carbon Solutions have advertised and continue to actively advertise SCS's CO_2-transportation service for hire to the public on Summit Carbon Solutions' website. They also have engaged and continue to actively engage in direct outreach to potential customers to offer SCS's interstate CO_2-transportation services. Pirolli Aff. ¶ 6.

7. SCS will hold an open season to publicly solicit binding commitments for interstate CO_2-transportation services from interested customers along the pipeline's path. Pirolli Aff. ¶ 7.

8. SCS is reserving a portion of the capacity of its pipeline for future shippers that may desire to receive interstate CO_2-transportation services after the pipeline has begun operations. Pirolli Aff. ¶ 8.

[1] *See also In re Application by SCS Carbon Transp. LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

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9. Summit Carbon Solutions has contracted with or signed letters of intent with more than 34 unaffiliated facilities to transport by pipeline CO_2 produced at those facilities. Pirolli Aff. ¶ 9.

10. On June 24, 2022, SCS filed its acceptance of the provisions of N.D. Cent. Code Chapter 49-19 with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO_2 for others . . . in accordance with the definition of a common carrier." Pirolli Aff. Exhibit 1; Pirolli Aff. ¶ 10.[2]

11. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

12. Peter Helfenstein, Jr., Rott Farms, Inc., Ketterling Farm, LLC, Vilhauer Land Limited Partnership, Brian Hoffman, the David and Valerie Rath Living Trust dated December 02, 2013, Colin and Mary Beth Hoffman, Jerome G. Hoffman, Michael and Nancy Klipfel, Alden and Wilma Flakoll, Shantel C. Schumack, Leroy and Joan Weiszhaar, Wade and Judy Weiszhaar, Dennis Wolff, Quinton Wolff, R & C Feickert Land LLC, Rebecca D. Michaelsohn, David Melland, Rott Ranch Limited Partnership, the Gary and Shirley Wolff Living Trust, Willard Goeshel, Ken Stugelmayer, Marsha M. Vossler, the Mark M. Vossler and Marsha M. Vossler Revocable Trust, Marilyn D. Nelson, Mark Thompson, the Estate of Albert Eugene Erdmann, the Braun Family Trust 2020, the Margaret Ellett Living Trust, the Ken Olson Trust 2010, the Olson Family Trust 2019, Francoli Family Limited Partnership, Armadale Limited Partnership, the Myron O. Hammer Credit Shelter Testamentary Trust, Jared Bossly, Bossly Real Estate Limited

[2] *See also In re SCS Carbon Transp. LLC Acceptance of Provisions of N.D.C.C. § 49-19-12*, No. PU-22-260 (N.D. Pub. Serv. Comm'n June 24, 2022), https://www.psc.nd.gov/database/documents/22-0260/001-010.pdf.

Partnership, the Estate of Donald A. Schaunaman, Craig D. Schaumaman, Kirk Schaumaman, Todd and Donna Rozell, Scott Rozell, Seth Klipfel, the Delores Schumacher Revocable Trust, and John and Stephanie Jung ("Landowners") own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4

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Landowner	County	APN	Legal Description
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE

Landowner	County	APN	Legal Description
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

13. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

14. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–50; Schovanec Aff. Exhibits 1–43.

15. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibits 1–43 at p. 1.

16. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibits 1–43 at pp. 1–2.

17. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibits 1–43 at p. 2. In this consolidated action, SCS seeks survey access from 44 Landowners in total. For the vast majority—37—SCS seeks only typical surveys. Schovanec Aff. Exhibits 1–43 at p. 2. For the others, in addition to typical surveys,

Filed: 2/10/2023 4:12 PM CST McPherson County, South Dakota 45CIV22-000014
- Page 1712 -

SCS seeks geotech surveys for five (Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2) and deep-dig surveys for two (Schovanec Aff. Exhibits 1, 2 at p. 2).

18. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibits 1–43 at p. 2.

19. A typical survey takes on average 1–2 days to complete (3–4 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 13.

20. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2. That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." *Id.*

21. A geotech survey, as described in the 30-day notice letters, takes on average 1 day to complete (2 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 14.

22. Deep-dig surveys are required when a landowners' property "is located within a floodplain." Schovanec Aff. Exhibits 1, 2 at p. 2. That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." *Id.* For that reason, deep-dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine whether cultural materials are present." *Id.*

Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." *Id.*

23. A deep dig survey, as described in the 30-day notice letters, takes on average 1–2 days to complete, although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 15.

24. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 52; Schovanec Aff. Exhibit 44.

25. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibits 1–43 at p. 2.

26. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 51.

Dated this 10th day of February, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell

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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 10th day of February, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian E. Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK BROWN, AND EDMUNDS)	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY, AND JOAN WEISZHAAR Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 **LANDOWNERS' STATEMENT OF DISPUTED MATERIAL FACTS IN RESISTANCE TO SCS' MOTION FOR SUMMARY JUDGMENT**
SCS CARBON TRANSPORT, LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK	45CIV22-000018

Filed: 2/28/2023 5:45 PM CST McPherson County, South Dakota 45CIV22-000014

M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, AND SIEH FARMS, LLC, Defendants.	71CIV22-000047
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES and ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-000253
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL and NANCY KLIPFEL,	

Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020
DELORES SCHUMACHER REVOCABLE TRUST, AND JOHN AND STEPHANIE JUNG Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	

Landowners hereby submit this Landowners's Statement of Disputed Material Facts in Response to SCS motion for summary judgment.

1. Landowners deny SCS's idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. *See* Affidavit of Nicholas G. Moser in Support of Landowners' Resistance to SCS Motion for Summary Judgment, ¶¶ 2 – 11. *Id.*

2. As stated, Defendant acts as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred. *Id.*

3. As stated defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred.. *Id.*

4. Landowners acknowledge something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.*

5. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

6. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

7. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

8. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

9. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition.

SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

10. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. Additionally, SCS has not made any contracts available to Landowners in this action because there has not yet been a protective order entered in this action. *Id.*

11. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires not legal requirements or facts. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

12. There is no evidence that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

13. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

14. Nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

15. Landowners acknowledge the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

16. Landowners deny the letters inform them of anything that SCS believes it is bound to comply with. Landowners disagree the "link" which is text on a page informs anyone

of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

17. Landowners acknowledge the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

18. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

19. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

20. There is no evidence as what Geotech survey is as it is purported to be used by SCS in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

21. Landowners acknowledge that what is stated are the words in the letter, which do not state such surveys would take 1-2 days. Landowners deny the authenticity of the underlying statement and deny the truth of the matter asserted. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

22. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

23. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the

deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

24. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

25. Landowners acknowledge this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

26. Admit.

Dated this 28th[th] day of February, 2022.

By: /s/ Brian E. Jorde
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CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 28th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
Cash Anderson (cca@mayadam.net)
Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

STATE OF SOUTH DAKOTA)ss COUNTIES OF BEADLE AND LAKE	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	CASE NO. 02CIV22-000129 MOTIONS HEARING
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	CASE NO. 39CIV22-000064

Before

The Honorable Patrick T. Pardy
Circuit Court Judge

Lake County Courthouse
Madison, South Dakota

Tuesday, February 28, 2023

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APPEARANCES:

FOR PLAINTIFFS PATRICIA K. DEEG TRUST, BETTY JEAN STROM TRUST, RITA BROWN, CRAIG & LISA BASLER FAMILY TRUST:	BRIAN E. JORDE, ESQ. Domina Law Group, PC, LLO 2425 South 144th Street Omaha, NE 68144 402.858.9212
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FOR DEFENDANT SCS CARBON TRANSPORT, LLC, A DELAWARE LIMITED LIABILITY COMPANY, A/K/A SUMMIT CARBON SOLUTIONS:	BRIAN D. BOONE, ESQ. Alston & Bird One South at The Plaza 101 South Tryon St., Suite 4000 Charlotte, NC 28280-4000 704.444.1000
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Objections:

Plaintiffs: (None)

Defendant: (None)

--o0o--

Stipulations:

(None)

--o0o--

INDEX OF EXHIBITS MARKED FOR IDENTIFICATION

Exhibits	Description	Marked	Offered	Rec'd

(No exhibits were offered.)

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SCS Appendix 84

30(b)(6), and then the motion to continue.

And so the issue here, Your Honor, is that so far, the record is unilateral, one-way data from Summit only, despite approximately six months of our requests for a deposition and multiple meet and confers, multiple attempts to get a deposition taken.

We initially had approximately 13 topics. We then -- they had said that those weren't specific enough, so we made 80 topics, which really were basically an outline of
13:18 specific questions. I couldn't have gotten more specific. And that was too specific. And so now we've narrowed it down to ten topics.

And we believe we need to have that deposition in order to fully develop the summary-judgment record. Because what's before you right now is, the Court, on a protective order, received affidavits from Summit, where we were not able to put forth any affidavits because, of course, they control at that time the off-take agreement, which we had never seen before. So, obviously, we can't
13:19 argue to you about a confidential document that we've never had.

And so following your protective order, you then put forth an order entering a protective order; but in there, that made the comments related to "for-hire" and "commodity." Summit has now --

THE COURT: Let me ask this question.
MR. JORDE: Yes.
THE COURT: What fact would -- give me an example of a fact from that, that would change how it applies.
MR. JORDE: A fact --
THE COURT: So is it the tax credit? If it is a tax credit, then it's not for hire? Or what is your exact --
MR. JORDE: Okay, and I appreciate that.

So, for instance, the off-take agreement related to, 13:20 for instance, Glacial Lakes and Summit. We don't believe that this is for hire. And we believe that even though there was, you know, an affidavit of Mr. Pirolli for the protective order that said a conclusory statement, "This is for hire," we don't believe that it's for hire on the face of the contract itself.

THE COURT: So your argument is, if it's not a cash payment, it's not for hire; is that --
MR. JORDE: Well, I guess I'll just -- I mean, I'll just get right to the heart of it. [redacted]

under South Dakota law.

But even if it didn't fail, they have other problems because under the survey statute, it requires that they give notice to owners and any tenant in possession; and their summary-judgment evidence is only that they gave notice to landowners. And each of these landowners have tenants; and they have the burden of proof, not us. So they fail there because they haven't proven that they've notified any tenants on the property, so they lose there.

13:25 And then even if they could get over all those hurdles --

THE COURT: Let me stop you on that one.

In your Statement of Facts, disputed facts, is that listed, that there's tenants? I might have missed it, but I want to make sure.

MR. JORDE: You know, that is -- I don't know if it is or --

THE COURT: Because I'm bound to that document; correct?

MR. JORDE: What's that?

13:25 THE COURT: I'm bound to their alleged Statement of -- both parties' statements of material facts?

MR. JORDE: Sure. But they don't have a fact that they did it; and they have the burden.

We don't have the burden to prove the negative.

THE COURT: All right.

MR. BOONE: I am, Your Honor.

THE COURT: Okay, go ahead.

MR. BOONE: So all that Mr. Jorde just argued, he could have argued in his summary-judgment opposition. He did not. None of that appears in the statement of disputed facts, so he has waived all of those arguments on summary judgment.

We're here to argue summary judgment. The Court has already said that the only remaining questions are constitutional questions. Those are questions of law. They don't turn on evidence, they don't turn on discovery. And, in fact, since the Court's earlier ruling, the landowners have abandoned their as-applied challenge. I call it an "as-applied challenge." I'm not sure it's an as-applied challenge; but whatever it was, they've abandoned it. So, really, the only issue left is their facial challenge to a survey statute. And on that, they bear a very heavy burden. It is their burden to prove beyond a reasonable doubt that the statute is unconstitutional in all circumstances. Not in some circumstances, not in many circumstances, but in all circumstances.

They haven't even tried to do that here. They rest their whole argument on *Cedar Point*, but they misread *Cedar Point*. In *Cedar Point*, the Supreme Court made clear

you can figure it out." The statute is unconstitutional on its face. The background restrictions are limited --

THE COURT: I want you to address something before your time is up.

Have you abandoned the as-applied argument? And if not, explain it to me.

MR. JORDE: We have abandoned "as applied." It's a facial challenge only, Your Honor.

THE COURT: All right.

13:33 MR. JORDE: Yes.

And I guess I should -- well, I mean, the background restrictions, again, I think I've covered that. The *Cedar Point* carves out only those types of examples that I gave you, and that's right within the *Cedar Point* case. And so for their interpretation, again, it would have to be that South Dakota landowners, when you buy your land, you buy it, believing that any third party that you don't know, that's not connected to you, that may or may not have a business, that may have an LLC in a dream, like Summit

13:33 does -- doesn't own a pipeline anywhere -- can come onto your land, without your permission, day or night, for every day, for a hundred days, you know, for the next three years, there's no limitations -- and physically disturb and tear up your land, and you can't do anything about it. And that is not a background restriction. That

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAKE)

--oOo--

CERTIFICATE OF REPORTER

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person;

That my shorthand notes were transcribed into typewriting by computer-aided technology; and

That this transcript contains a true and correct record of the foregoing proceedings.

In witness whereof, I have hereunto set my hand on May 31, 2023.

/s/ Daniel P. Feldhaus

Daniel P. Feldhaus
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Certified Shorthand Reporter

STATE OF SOUTH DAKOTA))SS	IN CIRCUIT COURT
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS)	FIFTH JUDICIAL CIRCUIT

* *

PETER HELFENSTEIN JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, Plaintiffs, - vs - SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 MOTIONS HEARING

* *

SCS CARBON TRANSPORT, LLC, Plaintiff, - vs - GERALDINE SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA MICHAELSOHN, DAVID MELAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA MEIER, KEN STUGELMAYER, MARSHA VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, SIEH FARMS LLC, Defendants.	45CIV22-000018 MOTIONS HEARING

* *

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, JAMES AND ALTA SMITH, Plaintiffs, -vs- SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-47 MOTIONS HEARING

* *

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, MICHAEL AND NANCY KLIPFEL, Plaintiffs, -vs- SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-253 MOTIONS HEARING

* *

DELORES SCHUMACHER REVOCABLE TRUST, JOHN AND STEPHANIE JUNG,
Plaintiffs,
-vs-
SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant.

22CIV22-000020

MOTIONS HEARING

* *

DATE & TIME: March 14, 2023
9:00 a.m.

BEFORE: THE HONORABLE RICHARD SOMMERS
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota 57401

LOCATION: Brown County Circuit Courtroom
Brown County Courthouse
Aberdeen, South Dakota 57401

APPEARANCES: **FOR PLAINTIFFS:**

BRIAN E. JORDE, ESQ.
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144

NICHOLAS G. MOSER, ESQ. (Via telephone)
Marlow, Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078

FOR DEFENDANT:

JUSTIN BELL, ESQ.
May, Adam, Gerdes & Thompson, LLP
PO Box 160
Pierre, SD 57501

BRIAN D. BOONE, ESQ. (Via telephone)
Alston & Bird
1120 S. Tryon St., Suite 300
Charlotte, NC 28203-6818

THE COURT: All right. This is the time set for hearings in a number of cases concerning various landowners and Summit Carbon Transport -- Summit Carbon Solutions Transport, LLC.

Counsel, note your appearance.

MR. BELL: Your Honor, Justin Bell on behalf of SCS Carbon Transport, LLC, a/k/a Summit Carbon Solutions.

MR. JORDE: Good morning, Your Honor. Brian Jorde on behalf of all the landowners.

MR. BELL: And I would note there is counsel online -- or on the phone as well who might want to make an appearance, Your Honor.

THE COURT: And I believe that they are just going to monitor today. Is that correct?

MR. BELL: That is correct, Your Honor.

THE COURT: All right. And, Mr. Bell, you had earlier indicated that you were just simply going to rely on your briefs. I'm certainly not going to hold you to that. If you wish to make some arguments, you may proceed.

MR. BELL: Your Honor, I'll be very brief. And then, you know, if Mr. Jorde has certain arguments he wants to make, if the Court would allow us to rebut those.

But before the Court is a brief in support of a motion for summary judgment as it relates in this matter. Mr. Jorde and his clients have raised originally a facial and as-applied challenge to the survey statute at issue. In the briefing,

Mr. Jorde and his clients have abandoned their as-applied challenge, so now we're just talking about a facial challenge to the survey statute.

I would note to this Court that no court has accepted Mr. Jorde's argument and note that since the briefing was concluded, Judge Pardy in the Second Circuit has adopted our arguments, has granted summary judgment explicitly rejecting those arguments. Similarly, an Iowa court has recently rejected those arguments. And that's for a good reason, and that's because a facial challenge is the most difficult type of constitutional challenge to win.

As the Court is well aware, there is a strong presumption that the state statute is constitutional, and the landowners' burden is to prove beyond a reasonable doubt that the statute is unconstitutional. It also means that, in a facial challenge that the plaintiffs' burden means that they have to prove the statute is unconstitutional in every possible circumstance. That's the burden that the landowners have.

The landowners haven't made that showing and, quite frankly, haven't attempted to make that showing in this case. Really, their argument turns on the *Cedar Point* U.S. Supreme Court case. The argument that essentially every government-authorized entrance onto property is a taking, and that's not the holding of *Cedar Point*. *Cedar Point* explicitly states and holds the longstanding background restrictions,

even claim that they did that.

THE COURT: Let's, let's talk about that, though. If there is no written lease agreement filed at the courthouse, how would they have actual notice or even any kind of notice that there were tenants?

MR. JORDE: Well, the answer is the statute that they're relying on doesn't require it. The statute puts it firmly on them to send notice to the, "to the owner and any tenant in possession." That's their problem. And we don't have to disprove it. They have to come to you and prove that they followed all these steps to get summary judgment. And they don't have a single allegation or fact that says they served the tenant. That's their problem. They could have asked us in discovery "Who are the tenants?" so they could have checked the box and sent the letter. They didn't do it. They failed.

THE COURT: But, Mr. Jorde, that's the way they find out who the owners are is that they go out and do a title search. That's constructive notice. There is no constructive notice if it's an oral lease agreement, if there is no realistic way for them to give notice to someone that they don't know exists.

MR. JORDE: Then that's another good reason to strike this down because the plain language says they have to give notice to the tenant in possession. That's their job to figure it out. And they can --

STATE OF SOUTH DAKOTA)
)SS CERTIFICATE
COUNTY OF BROWN)

THIS IS TO CERTIFY that I, Kristi A. Brandt, RPR, Official Court Reporter for the Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota, took the proceedings of the foregoing case, and the foregoing pages, 1-39 inclusive, are a true and correct transcript of my stenotype notes.

Dated at Aberdeen, South Dakota, this 24th day of May, 2023.

/s/ Kristi A. Brandt
Kristi A. Brandt, RPR
Official Court Reporter
My Commission Expires:
February 21, 2025

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-35. Condemnation Under Power of Eminent Domain (Refs & Annos)

SDCL § 21-35-31

21-35-31. Entry on private property for examination and survey of project requiring siting permit from Public Utilities Commission

Currentness

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Credits
Source: SL 2016, ch 118, § 1.

S D C L § 21-35-31, SD ST § 21-35-31
Current through the 2023 Regular Session and Supreme Court Rule 23-17

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2016 SESSION LAWS
OF THE
STATE OF SOUTH DAKOTA

PASSED BY THE NINETY-FIRST SESSION OF THE LEGISLATIVE ASSEMBLY, BEGUN AND HELD IN PIERRE ON JANUARY 12, 2016, AND CONCLUDED ON MARCH 29, 2016.

OFFICIAL EDITION

AUTHENTICATION

STATE OF SOUTH DAKOTA,)
) SS
HUGHES COUNTY)

I, Doug Decker, Code Counsel of the State of South Dakota, do hereby certify that the laws contained in this volume are, with the exception of clerical errors, true and correct copies with overstrikes and underscores added to show the effects of amendments of the proposed constitutional amendments and of the enacted Bills and Joint Resolutions passed by the Legislature of the State of South Dakota at the Ninety-first Session, which have been filed in my office.

Signed this first day of May, 2016.

Doug Decker
South Dakota Code Counsel

CHAPTER 118

(HB 1134)

Access to property for the purpose of making surveys.

ENTITLED, An Act to provide for access to certain property for the purpose of making surveys.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 21-35 be amended by adding a NEW SECTION to read:

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the public utilities commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Signed March 15, 2016

CHAPTER 119

(HB 1062)

An order to change the name of a minor child without prior publication.

ENTITLED, An Act to permit an order changing the name of a minor child without prior publication in certain instances.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 21-37 be amended by adding a NEW SECTION to read:

The court may grant an order changing the name of a minor child without publication of notice or a hearing in open court if all of the following conditions are met:

(1) It appears from the pleadings that the minor child has been a resident of the county in

ENABLING ACT AND CONSTITUTION

AND

THE LAWS

PASSED AT THE

EIGHTH SESSION

OF THE

LEGISLATURE

OF THE

STATE OF SOUTH DAKOTA.

Begun and Held at Pierre, the Capital of Said State, on Tuesday, the Sixth Day of January, 1903, and Concluded March 6th, A. D. 1903.

OFFICIAL EDITION.

1903
STATE PUBLISHING CO.
PIERRE, S. D.

SCS Appendix 102

their trustees, regularly called, in such particulars as such trustees may deem necessary for the better accomplishment of the objects for which said corporations were created, and may also increase or decrease their number of trustees: *provided*, that such amendments shall not in any way impair the obligation of existing contracts and may be made at any meeting of the board of trustees of such religious, educational or benevolent corporation, upon notice to each member of such board of trustees of the proposed amendment and the time when said amendment will be considered.

§ 4. DUTIES OF PRESIDENT AND SECRETARY.] The president or [and] secretary of the corporation shall prepare in duplicate a certificate, properly setting forth the amendment or amendments when adopted in the manner provided in this act and said certificate shall also state the number of votes cast for said amendment and the total number of shares of capital stock subscribed and outstanding also that legal notice as provided herein had been given, and file one of said certificates with the secretary of state and the other with the secretary of said corporation.

§ 5. SIGNATURES MUST BE ACKNOWLEDGED.] The signatures of the said president and secretary to such certificate must be acknowledged before some officer authorized to take acknowledgments, who knows that the parties signing the same to be the president and secretary of such corporation.

§ 6. DUTY OF SECRETARY OF STATE.] When such certificate is filed with the Secretary of State, he shall issue a certificate of amendment setting forth that the provisions of this act have been complied with and such certificate shall state in what particular the original articles of incorporation have been amended by said corporation.

§ 7. No amendment shall take effect or be in force until all the requirements of this act have been complied with.

§ 8. REPEAL.] All acts or parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 5, 1903.

CHAPTER 107.

ELECTRIC LIGHT, STREET RAILWAY AND POWER COMPANIES.

(H. B. 163.)

AN ACT to authorize the incorporation of electric light, street railways, and power companies in this state and the acquisition of property thereby by eminent domain.

Be it Enacted by the Legislature of the State of South Dakota:

§ 1. CORPORATION CAN BE FORMED.] Any number of persons, not less than three, may form a corporation for the purpose of constructing,

scribed by its by-laws, but no shares shall be transferable until all previous calls and assessments thereon shall have been fully paid. No person holding stock in any such corporation as executor, administrator, guardian or trustee and no person holding such stock as collateral security shall be liable as stockholders of said corporation for any calls or installments on any partially paid up stock thereof; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such personal representatives, guardians or trustees shall be liable to the same extent as the decedent, ward, or other person interested would have been if living or competent to act and held stock in his own name.

§ 7. CAPITAL MAY BE INCREASED.] The capital stock of said corporation may be increased to such an amount as may by its stockholders be deemed necessary for the construction or operation of its railways or in the increase of its lighting capacity or power, by the vote of the owners of sixty per cent or sixtenths of its capital stock at any annual meeting or at any special meeting called for that purpose. In case of a special meeting written notice shall be given to each stockholder, either by serving the same personally or by depositing the same in the postoffice, postage prepaid, directed to such stockholder at his usual postoffice address not less than twenty days prior to such meeting; such notice shall state the time and place of such meeting, its object and the amount it is proposed to increase said capital stock. Such notice shall not be necessary if all of the stockholders of said corporation shall waive notice thereof in writing and the amount of such capital stock may be increased without such meeting, if the owners of three-fourths of the capital stock of any such corporation shall, in writing to be filed and recorded in the records of such corporation, consent thereto.

§ 8. FURTHER POWERS.] Every corporation organized under this act shall in addition to the powers conferred upon corporations under the laws of this state, have power:

(1) To cause such examinations and surveys to be made as may be necessary to the selection of the most advantageous route for its proposed street railroad and for such purpose to enter, by its agents, officers and servants upon the lands or waters of any person subject, however, to responsibility for all damages done to said property by such entry.

(2) To erect and maintain such buildings, power houses, plants, poles, wires, trolleys and appliances as may be necessary for the transmission of electric power and use the same to operate its street railway and to contract with any person or corporation for the furnishing to such person or corporation of electric lights or power for the operation of farm or other machinery: to contract with any city, town, village or county for the lighting of its streets, highways and public buildings, and to contract with any municipal corporation for the furnishing of its inhabitants with electric light and power.

(3) To take and hold such voluntary grants of real estate and other property as may be made to it to aid in the construction, maintenance and

South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-11

49-7-11. Pipelines that are common carriers--Exemption

Currentness

All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B.

Credits

Source: SL 1980, ch 321, § 1; SL 1980, ch 328, § 3; SL 1981, ch 341.

S D C L § 49-7-11, SD ST § 49-7-11
Current through the 2023 Regular Session and Supreme Court Rule 23-17

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2023 South Dakota Legislature

House Bill 1133

HOUSE STATE AFFAIRS ENGROSSED

Introduced by: ***Representative*** *Lems*

An Act to define a commodity for the purpose of qualifying as a common carrier.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 49-7-11 be AMENDED:

49-7-11. All ~~pipelines~~ companies holding themselves out to the general public as being engaged in the business of transporting commodities for hire, by pipeline, are common carriers and are not subject to ~~the provisions of Title 49~~ this title, except as provided by this chapter and chapter 49-41B.

For purposes of this section, the term, commodity, means a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing, within or outside of this state. The term does not include a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q.

Underscored indicate new language. ~~Overstrike~~ indicate deleted language.

Committee: House State Affairs Monday, February 06, 2023 7:45 AM

Roll Call
Present: Rep. Bartels, Rep. Blare, Rep. Cammack, Rep. Chaffee, Rep. Chase, Rep. Drury, Rep. Hansen, Rep. Healy, Rep. Lesmeister, Rep. Reimer, Rep. Wangsness, Rep. Rehfeldt, and Rep. Mortenson

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Representative Mortenson

MOTION: TO APPROVE THE MINUTES OF FRIDAY, FEBRUARY 03RD

Moved by: Rehfeldt
Second by: Bartels
Action: Prevailed by voice vote

HB 1133 : provide that a company transporting carbon dioxide by pipeline is not a common carrier.

Presented by: Representative Karla Lems
Proponents: Brian E Jorde, Landowners for Eminent Domain Reform, Omaha (Handout(s) #1)
Craig Schaunaman, self, Aberdeen
Joy Hohn, self, Sioux Falls
Dennis Feickert, self, Aberdeen
Wendy Schulz, self, Watertown (Handout(s) #2.3.4)
Mark Lapka, self, Leola
Ed Fischbach, self, Mellette
Representative John Sjaarda
Sid Fischbach, self, Long Lake
Opponents: Jake Ketzner, Summit Carbon Solutions, Ames, IA
Elizabeth Burns-Thompson, Navigator Heartland Greenway LLC, OMAHA (Handout(s) #5)
Jim Seurer, Glacial Lakes Energy, LLC, Watertown
Eric Baukol, Redfield Energy LLC, Redfield
Kent Hartwig, Gevo, Englewood, CO
Steve Willard, South Dakota Electric Utility Companies, Pierre
David Owen, South Dakota Chamber of Commerce & Industry, Pierre
William M. Van Camp, NextEra Energy Resources, Juno Beach, FL

MOTION: AMEND HB 1133

1133A

On page 1, line 8, of the Introduced bill, delete "Notwithstanding the provisions of this section, a company transporting carbon dioxide, by pipeline, is not a common carrier." and insert "

For purposes of this section, the term, commodity, means a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing, within or outside of this state. The term does not include a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q."

Moved by: Drury
Second by: Bartels
Action: Prevailed by voice vote

MOTION: DO PASS HB 1133 AS AMENDED

Moved by: Wangsness
Second by: Hansen
Action: Prevailed by Majority Members Elect (8-5-0-0)

Voting Yes: Blare, Hansen, Healy, Lesmeister, Reimer, Wangsness, Rehfeldt, and Mortenson

Voting No: Bartels, Cammack, Chaffee, Chase, and Drury

HB 1188 : provide for property owner inclusion in the pipeline siting application and condemnation process.

Presented by: Representative Karla Lems
Proponents: Brian E Jorde, Landowners for Eminent Domain Reform, Omaha
Monica Meyer, self, Aberdeen
Rick Bonander, self, Valley Springs
Linda Schauer, self, Leola
Karen Jones, self, Sioux Falls
Ed Fischbach, self, Mellette
Opponents: Brett Koenecke, Summit Carbon Solutions, Ames, IA (Handout(s) #6)
Darla Pollman Rogers, South Dakota Rural Electric Association, Pierre
Steve Willard, South Dakota Electric Utility Companies, Pierre

MOTION: AMEND HB 1188

1188A

On page 1, line 4, of the Introduced bill, after "Dakota:" delete "Section 1. That § 21-35-2 be AMENDED:
"
On page 1, line 5, of the Introduced bill, after "AMENDED:" delete "21-35-2. A petition filed pursuant to § 21-35-1 shall name must:
(1) Name the person, group, or corporation desiring to take or damage private property as plaintiff, and all persons having interest in or liens upon the property affected by the proceeding as defendants, so far as they shall be are known at the time of the filing the same. It shall contain;
(2) Contain a description of the property to be taken or damaged. The;
(3) Set forth the purpose for which the property is to be taken or damaged shall be clearly set forth in the petition; and
(4) Be accompanied by a verification of consent, if required by section 4 of this Act.
It shall is not be necessary to specify the interests or claims of the several defendants in the land or property affected by the proceeding."
On page 2, line 22, of the Introduced bill, after "carry." delete "Section 4. That chapter 49-7 be amended with a NEW SECTION:
"
On page 2, line 23, of the Introduced bill, after "SECTION:" delete "A company seeking to exercise the right of eminent domain under this chapter shall demonstrate that it has received sufficient consent to proceed with the condemnation from the owners of property that the proposed pipeline will cross.

Committee: Senate Commerce and Energy Thursday, February 16, 2023 10:00 AM

Roll Call
Present: Sen. Crabtree, Sen. Brent "B.R." Hoffman, Sen. Steve Kolbeck, Sen. Nesiba, Sen. Schoenbeck, Sen. Stalzer, Sen. Zikmund, Sen. Beal, and Sen. Wheeler

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Senator Wheeler

MOTION: TO APPROVE THE MINUTES OF TUESDAY, FEBRUARY 14TH

Moved by: Beal
Second by: Schoenbeck
Action: Prevailed by voice vote

HB 1133 : define a commodity for the purpose of qualifying as a common carrier.

Presented by: Senator Bryan J. Breitling (Handout(s) #1)
Representative Karla Lems
Proponents: Craig Schaunaman, self, Aberdeen
Joy Hohn, self, Sioux Falls
Dennis Feickert, self, Aberdeen
Wendy Schulz, self, Watertown
Ed Fischbach, self, Mellette
Mark Lapka, self, Leola
Rick Bonander, self, Valley Springs
Opponents: Brett Koenecke, Summit Carbon Solutions, Ames, IA (Handout(s) #2. #3, #4)
Elizabeth Burns-Thompson, Navigator Heartland Greenway, Altoona, IA
Walt Wendland, Ringneck Energy & Feed LLC, Onida
Kirk Yackley, self, Onida
Jim Seuer, Glacial Lakes, Watertown
Kent Hartwig, Gevo, Lake Preston
Others: Jake Ketzner, Summit Carbon Solutions, Ames, IA

MOTION: DEFER HB 1133 TO THE 41ST LEGISLATIVE DAY

Moved by: Crabtree
Second by: Stalzer
Action: Prevailed by Majority Members Elect (9-0-0-0)

Voting Yes: Crabtree, Brent "B.R." Hoffman, Steve Kolbeck, Nesiba, Schoenbeck, Stalzer, Zikmund, Beal, and Wheeler

HB 1230 : clarify references to the court in a condemnation action.

Presented by: Senator Erin Tobin
Representative Will Mortenson
Proponents: Steve Siegel, Landowners for Eminent Domain Reform, Omaha, NE
Tony Ventura, self, Hudson

South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-13

49-7-13. Condemnation of pipeline right-of-way--Width across school and public lands

Currentness

Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry.

Credits
Source: SL 1980, ch 321, § 3.

S D C L § 49-7-13, SD ST § 49-7-13
Current through the 2023 Regular Session and Supreme Court Rule 23-17

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United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

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<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 2

§ 2. Due process--Right to work

Currentness

No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

Credits
History: Amendment proposed by SL 1945, ch 315, approved Nov., 1946.

Const. Art. 6, § 2, SD CONST Art. 6, § 2
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 13

§ 13. Private property not taken without just compensation--Benefit to owner--Fee in highways

Currentness

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.

Credits

History: Amendment proposed by SL 1961, ch 297, approved Nov. 6, 1962. Amendment proposed by SL 1989, ch 3, rejected November 6, 1990.

Const. Art. 6, § 13, SD CONST Art. 6, § 13
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article XVII. Corporations (Refs & Annos)

Const. Art. 17, § 18

§ 18. Compensation for private property taken for public use--Assessment of damages

Currentness

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

Credits

History: Repeal proposed by SL 1975, ch 3, rejected Nov. 2, 1976.

Const. Art. 17, § 18, SD CONST Art. 17, § 18
Current through the 2023 Regular Session

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STATE OF SOUTH DAKOTA) :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

Dakota Access, LLC,

Plaintiff,

vs.

THOMAS L. SHUMAKER; LINDA L. SHUMAKER; THOMAS E. STOFFERAHN; RONALD H. STOFFERAHN; RUBY KRAMER, AS TRUSTEE OF HER SUCCESSORS IN TRUST, UNDER THE RUB KRAMER LIVING TRUST, DATED OCTOBER 23, 2008 AND ANY AMENDMENTS THERETO; LONNIE KRAMER; CATHERINE E. KRAMER; PEGGY A. HOOGESTRAAT, TRUSTEE OF THE PEGGY A. HOOGESTRAAT REVOCABLE TRUST, DATED FEBRUARY 2, 2006; MATTHEW L. ANDERSON; KRISTI R. ANDERSON; ORRIN E. GEIDE; RODNEY L. HOHN; JOY A. HOHN; KYLE NICHOLAS GRACE; NADINE ELAINA GRACE; MERLE W. GRAVE AND MARLENE M. GRAVE, AS TRUSTEES OF THE MERLE W. GRAVE AND MARLENE M. GRAVE REVOCABLE TRUST AGREEMENT DATED FEBRUARY 01, 2013; WAYNE A. PROSTROLLO; LAUREL J. PROSTROLLO; RUTH E. ARENDS; ALLAN C. ARENDS; LORRIE L. ARENDS; AND SHERRIE K. FINES,

Defendants.

Civ. 15-941

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MEMORANDUM OPINION AND ORDER

This matter is before the court upon the petition by Dakota Access, LLC, ("Dakota Access") seeking a preliminary injunction and default judgment as to certain Defendants. The court conducted a hearing on July 7, 2015. Dakota Access appeared through its attorneys, Brett Koenecke and Justin L. Bell of May, Adam, Gerdes and Thompson, LLP, and Glenn J. Boomsma of Breit Law Office, P.C., represented Peggy A. Hoogestraat, Trustee of the Peggy A. Hoogestraat Revocable Trust Dated February 2, 2006, Orrin E Geide, Rodney L. Hohn, Joy A. Hohn, Thomas L. Shumaker, Linda L. Shumaker, Thomas E. Stofferahn, Ronald H Stofferahn, Matthew L. Anderson, Kristi R. Anderson, Ruth E. Arends, Allan C. Arends, Lorrie L. Arends, and Sherri K Fines ("the Landowners").

At the conclusion of the hearing, the court orally granted the petition for a preliminary injunction as well as the motion for default judgment as to some Defendants who had not appeared. Following the hearing, the court considered further the substantive and procedural issues associated with the case. In an October 2, 2105, order, the court provided notice that it was considering evaluating Dakota Access' request for injunctive relief as a petition for a permanent – not a preliminary – injunction. The court invited additional briefs. Dakota Access submitted a brief, and the Landowners submitted orders from two Lincoln County parallel actions decided adversely to Dakota Access by the Honorable Bradley G. Zell.

After continuing to carefully consider the issues expressly raised by the parties and those implicated by their arguments along with the relevant authority

and the information contained in the record, the court affirms its determination that Dakota Access possesses a right to conduct a pre-condemnation survey of the Landowners' property. However, for reasons explained below, the court cannot determine whether Dakota Access' proposed subsurface inspection and testing of the Landowners' property constitutes a taking under the existing record. Therefore, the court's earlier oral determination is modified, and the court grants a Dakota Access' petition in part. A permanent injunction shall be issued allowing Dakota Access the ability to conduct a brief survey of the surface of the Landowner's property involving foot traffic only.

Findings of Fact and Background[1]

Dakota Access is a Delaware limited liability company with its principal offices in Dallas, Texas. The membership interest of Dakota Access is owned 75 percent by Dakota Access Holdings, LLC and 25 percent by Phillips 66 DAPL Holdings LLC.

Dakota Access is in the application process for construction of the Dakota Access Pipeline Project ("the Project" or "the Dakota Access Pipeline"). The overall Project is an approximately 1,134-mile-long, 12-inch to 30-inch diameter pipeline that will connect the rapidly expanding Bakken and Three Forks production areas

[1] The factual information is taken from the affidavits of Damon Daniels and Micah T. Rorie. The use of affidavits to establish facts is generally disfavored. *See Bloom v. Bloom*, 498 N.W.2d 213 (S.D. 1993). Affidavits can lack context and overstate or distort facts, all without being subject to cross examination. *See id.* Ultimately, though, a trial court has discretion to consider them, and here the court is considering these affidavits for the purpose of establishing certain factual information about Dakota Access and its Project, none of which appears to be controverted. Indeed, the Landowners have not offered any evidence to rebut the information found in the affidavits.

in North Dakota to existing crude oil transportation infrastructure in Illinois. The Project originates in the northwest portion of North Dakota and traverses southeast through South Dakota, Iowa, and Illinois and terminates at the existing Patoka, Illinois hub.

The Project enters South Dakota in Campbell County approximately 17 miles east of the Missouri River, and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln counties. The Project crosses the Big Sioux River approximately 14 miles south of Sioux Falls, and continues in a southeast direction through Iowa.

Dakota Access successfully conducted two binding open seasons in 2014 to solicit shipper commitments for the Dakota Access Pipeline. As a result of those open seasons, multiple third parties have contracted with Dakota Access for transportation service on the Dakota Access Pipeline. Dakota Access is also reserving 10% of the capacity on the Dakota Access Pipeline for allocation to walk up shipments, in accordance with FERC's rules and regulations for common carrier crude oil pipelines under the ICA. Dakota Access is available to the public to ship crude oil for a fee on the Dakota Access Pipeline. On December 24, 2014, FERC issued an order granting Dakota Access's petition for declaratory order for approval of the rate elements for committed transportation service on the Dakota Access Pipeline.

Certain affiliates of the owners of Dakota Access do have contracts to ship oil on the Dakota Access Pipeline; however, most of the volume is not subscribed by affiliated entities of either Energy Transfer Partners or Phillips 66.

Dakota Access will not take title to or ownership in the crude oil received for transportation from its third-party shippers on the Dakota Access Pipeline. Once the crude oil arrives at the crude oil terminating hub in Patoka, Illinois, the third-party shippers transporting crude oil through the Dakota Access Pipeline will be able to access and distribute their crude oil to multiple markets, including Midwest and Gulf Coast markets via existing and proposed pipeline infrastructure.

Dakota Access has developed its route based upon the many codes, standards, specifications, regulatory policies and guidance originating from the various local, state and Federal rules and regulations that govern pipelines. During this evaluation, Dakota Access utilized a geographic information system ("GIS") that contains multiple tools to quantify and qualify various land features and other information pertinent to selecting a pipeline route.

In this regard, Dakota Access initially gathered and evaluated the various publicly available environmental and demographic data, soil and topographic conditions, location of public utilities, public properties or lands. It also evaluated environmental considerations such as wetlands, streams and rivers, threatened and endangered species, cultural resources, agricultural lands, drainage features and unique land uses or land features just to name a few.

Dakota Access also collected its own data by evaluating the various regions' resources along the pipeline route to determine the feasibility and constructability of the pipeline. Dakota Access then consolidated the information into the GIS routing tool that, at a "macro" level, provided the shortest route with the least amount of impacts to the various constraints based upon a weighted-basis of importance (e.g. impacts to environmental features such as wetlands or threatened or endangered species were weighted with higher routing importance than impacts to roads).

From the computer-based route, Dakota Access then moved into what is called the "micro" routing phase which is based upon driving, walking, surveying and flying the route to shift or adjust the route to avoid as many physical land features and constraints as possible. These adjustments to the route were based upon things like the location of residences in proximity to the pipeline, crossing streams and public roads, minimizing and avoiding impacts to wetlands and other sensitive environmental features, considering and routing around future land use for commercial and residential development. Dakota Access also relied upon other siting criteria established by industry guidelines, standards, specifications and codes, the various state and federal regulations that govern pipelines and criteria specific to crude oil pipelines as part of the hazard analysis for sensitive environmental and water resources.

The last and current step of routing the pipeline is to conduct a detailed civil and environmental survey of the entire route to further avoid and minimize impacts

to sensitive land features and environmental resources. Some of the survey work is required by the National Environmental Policy Act and the National Historic Preservations Action. Other survey work may be required pursuant to requirements of the United States Army Corps of Engineers and the United States Fish and Wildlife Service. In addition, the survey results are utilized during the proceedings filed with the South Dakota Public Utilities Commission for evaluation of the factors found in SDCL 49-41B and ARSD ch. 20:10:22.[2]

The requested surveys are required to allow Dakota Access and public policy makers to properly analyze the project and to ensure that the route selected has the least impact to as many stakeholders and environmental, demographic and social features as possible while still connecting the pipeline from the supply area to the terminus and market.

Dakota Access has completed the vast majority of the civil and environmental surveys along the proposed route. The remaining Landowners own or are in possession of real property in Minnehaha County through which Dakota Access proposes to locate its pipeline. They include:

Landowner	Legal Description
Thomas L. Shumaker and Linda L. Shumaker	The E1/2 of the SE1/4 of Section 11, Township 102 North Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated March 4, 2005 from Thomas L. Shumaker and Linda L. Shumaker to Thomas L. Shumaker and Linda L. Shumaker, record at Deed Book 498,

[2] Some or all of this process may have been completed during the pendency of this case.

	Page 923, Official Public Records, Minnehaha County, South Dakota, Less and except and conveyances heretofore made.
Thomas E. Stofferahn and Ronald H. Stofferahn	The NW1/4 of Section 13, Township 102 North, Range 52 West of the 5th P.M., Minnehaha County, South Dakota, Except the West 1208 Feet of the North 373 Feet thereof; Except that portion thereof lying South of the Right-Of-Way of Chicago , St. Paul, Minneapolis & Omaha Railway Company; Except the Right-Of-Way of said railway company: and Except the Lots H-1 and H-2 of said NW1/4, described in Warranty Deed dated September 02, 1975 from Evelyn L. Carlson,(formerly Evelyn L. Ranschau) and Wayne K. Carlson, her husband to Thomas E. Stofferahn and Ronald H. Stofferhan, as tenants in common, recorded in Book 307, Page 197, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Ruby Kramer, as Trustee of her successors in trust, under the Rub Kramer Living Trust, dated October 23, 2008, and any amendments thereto	The SW1/4 of the SW1/4, except the West 302.28 feet of the South 547.8 feet of Section 12, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated October 23, 2008 from Ruby Kramer a/k/a Ruby M. Kramer to Ruby Kramer, as Trustee of her successors in trust, Deed Book 523, Page 953, Deed Records, Minnehaha County, South Dakota, less and except and conveyances heretofore made. -and- The E1/2, lying North of the RR Right of Way and Highway No. 38, except the East 493' of the South 472' of the North 1588.10', of Section 13, Township 102

	North Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated October 23, 2008 from Ruby Kramer a/k/a Ruby M. Kramer to Ruby Kramer, as trustee of her successors in trust, under the Ruby Kramer Living Trust, dated October 23, 2008, recorded at Deed Book 523, Page 953, Deed records, Minnehaha County, South Dakota , less and except any conveyances heretofore made.
Lonnie Kramer and Catherine E. Kramer	The E1/2 of the SW1/4 of Section 12, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 22, 1975 from Margaret O. Wagner and Mabel V. Lane, to Lonnie Kramer and Catherine E. Kramer, recorded at Deed Book 304, Page 229, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Peggy A. Hoogestraat, Trustee of the Peggy A. Hoogestraat Revocable Trust, dated February 2, 2006	The SE1/4, South of Hwy 38, Section 13, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 2, 2006 from Peggy A. Hoogestraat and Craig L. Hoogestraat, Trustee of the Peggy A. Hoogestratt Revocable Trust, dated February 2, 2006 recorded at Deed Book 505, Page 608, Official Public Records, Minnehaha County, South Dakota, Less and Except any conveyances heretofore made. -and- The NE1/4 of Section 24, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 2, 2006 from Peggy A. Hoogestraat and Craig L. Hoogestraat, Trustee of the Peggy A.

	Hoogestraat Revocable Trust, dated February 2, 2006 recorded at Deed Book 505, Page 608, Official Public Records, Minnehaha County South Dakota, less and except any conveyances heretofore made
Matthew L. Anderson and Kristi R. Anderson	That certain tract of land situated in the E1/2SE1/4, of Section 19, Township 102 North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated January 8, 2014 from Peggy A. Hoogestraat, as Trustee of the Peggy A. Hoogestraat Revocable Trust dated February 2, 2006, to a Matthew L. Anderson and Kristi R. Anderson, recorded at Deed Book 553, Page 946, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Orrin E. Geide	The NW1/4 of Section 5, Township 101 North, Range 51 West, Minnehaha County, South Dakota, describe in Quit Claim Deed dated March 16, 2000 from Earle R. Geide and Cornelia Rose Geide to Orrin E. Geide, recorded at Deed Book 465, Page 54, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made. -and- The SW1/4 of Section 5, Township 101 North Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated January 25, 1994 from Earle Geide and Cornelia Rose Geide to Orrin Earle Geide, recorded at Deed Book 428, Page 199, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Rodney L. Hohn and Joy A. Hohn	A parcel located in the W1/2 of the SE1/4 of Section 5, Township 101

	North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated May 26, 2010 from Orrin E. Geide to Rodney L. Hohn and Joy A. Hohn, recorded at Deed Book 532, Page 729, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Wayne A. Prostrollo and Laurel J. Prostollo	The SE1/4, Section 28, Township 101 North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated July 19, 1993 from Evangeline Pearl Haak to Wayne A. and Laurel J. Prostrollo, recorded at Deed Book 424, Page 874, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Ruth E. Arends, Life Estate Allan C. Arends, Lorrie L. Arends and Sherrie K. Fines, Remaindermen	The N1/2 of the NW1/4 of Section 34, Township 101 North, Range 51West, EXCEPT: H-1 and R-1, Minnehaha County, South Dakota, described in Warranty Deed dated July 17, 1990 from Arnold E. Arends and Ruth E. Arends to Allan C. Arends, Lorrie L. Arends, and Sherrie K. Fines, recorded at Deed Book 406, Page 39, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.

The court entered a judgment of default against Defendants Wayne Prostrollo, Laurel Prostrollo, Ruby Kramer, Lonnie Kramer, and Catherine Kramer on July 7, 2015.

Agents for Dakota Access have contacted the Landowners, asking for permission to enter the property for survey purposes. The Landowners have refused to grant Dakota Access to enter their land to conduct a survey.

In this action, Dakota Access argues that it is a common carrier authorized to exercise a statutory right of eminent domain. In its view, that right carries with it the ancillary or inherent authority to conduct a pre-condemnation survey of the Landowners' property. The Landowners resist this effort, claiming the absence of legislative authority to conduct a pre-condemnation survey is fatal to Dakota Access' argument and further that Dakota Access' authority to enter the land can only come through a condemnation proceeding.

Additional findings of fact may be added in the court's analysis.

CONCLUSIONS OF LAW AND AUTHORITIES AND ANALYSIS[3]

The central arguments of the parties begin at divergent points. Implicit in the arguments, but not addressed in the parties' briefs, is the question of whether a pre-condemnation survey is a taking within the meaning of the Fifth Amendment of the United States Constitution and Article VI, §13 of the South Dakota Constitution.

Even if Dakota Access possesses an ancillary right to conduct a survey, resolving the takings inquiry is necessary to determine the efficacy of the procedure it has selected here. If the survey Dakota Access proposes is a taking, it should have sought court approval through a condemnation proceeding under SDCL Chapter 21-35, including a determination of just compensation. However, if the survey is not a taking, the injunction procedure is appropriate, though the nature of

[3] This Court has both subject matter jurisdiction and personal jurisdiction over the subject matter and parties to this action. Venue is proper pursuant to SDCL § 15-5-1.

the relief more closely approximates a permanent – not a preliminary – injunction and should be analyzed accordingly.

A. A surface pre-condemnation survey by Dakota Access is not a taking.

The standard for determining the existence of a taking is difficult to discern. In the context of regulatory takings cases, our Supreme Court has summarized the holdings of the United States Supreme Court in the following terms:

> Serious discussion of the equities in takings cases must begin with Justice Holmes's maxim that, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326 (1922). The problem, of course, is to know what is "too far" in any given case. Generally, the U.S. Supreme Court has avoided a formulaic answer to this question, opting instead for "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

SDDS, Inc. v. State of South Dakota, 2002 SD 90, ¶24, 650 N.W.2d 1, 9-10.

Although the Landowners have not identified a particular type of taking, a per se taking occurs when a condemnor "compel[s] a property owner to suffer a physical 'invasion' of the property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015; *see also Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419. Though this type of intrusion can be compensable "no matter how minute [it is], and no matter how weighty the public purpose behind it," its application is confined to permanent invasions. *See Lucas*, 505 U.S. at 1015.

Our Supreme Court has also recognized that these per se takings are limited to permanent occupations of land or air space:

> [T]here is a constitutional distinction between a permanent physical occupation and a temporary physical invasion. The first effects a compensable taking within the meaning of the Fifth Amendment, but the second does not. A physical occupation that is less than permanent, and amounts to no more than a temporary physical invasion does not constitute a classic per se regulatory physical taking within the meaning of *Loretto*.

Benson v. State of South Dakota, 2006 SD 8, ¶ 48, 710 N.W.2d 131, 150 (internal quotation and embedded citations omitted).

Here, the court concludes that a pre-condemnation survey is not, itself, a taking and that Dakota Access is not required to seek relief by commencing a condemnation proceeding. This conclusion, however, applies only to what the court is considering to be a survey, or an examination of the surface of real property.[4] A desire to conduct a subsurface examination gives the court pause because it contemplates a more invasive impact on individual property rights. *See Missouri Highway & Transportation Comm'n v. Eilers*, 729 S.W.2d 471, 472-474 (Mo.App. 1987).

In this regard, the question of whether an intrusion goes "too far" is a fact bound determination, and here the record about the details of Dakota Access' proposed subsurface examination is not well-developed. The affidavits of Damon Daniels and Micah Rorie do not address these details, with the exception of an

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[4] Dakota Access, of course, remains liable for any damage it might cause, and the $1,000 bond it suggested, in the absence of different view, provides some assurance that the Landowners could, if necessary, make a claim upon a surety for damage. This bond is different from the undertaking required by Rule 65(c) which is restricted to damages from an improvidently granted preliminary injunction. SDCL 15-6-65(c). The bonds the court is requiring here are not actually mandated by rule or statute and exist solely to address damage claims prompted by the pre-condemnation survey.

attachment to Mr. Rorie's affidavit which is the proposed "Property Examination Permit" Dakota Access used in connection with obtaining pre-condemnation entry by consent. In it, Dakota Access identifies its purpose as "making an examination of said property, including conducting environmental and archaeological surveys and environmental or archeological investigations, including any necessary core or water sampling activities[.]" Rorie Aff. at Ex. A; *see also* Complaint at ¶ 6.

Beyond that, there is only the description by Dakota Access's counsel describing the subsurface work as minimal. *See e.g.* Reply Brief at 3. These statements, however, are not, themselves, evidence and lack the necessary detail to allow the court to assess the degree of intrusion and determine whether the work effects a taking.[5]

These details and the resulting analysis are particularly important here. As discussed further below, Dakota Access' request to enter upon the Landowner's property is not based upon controlling authority such as a rule, statute or binding caselaw. Instead, the request raises a novel and unsettled question that is entirely dependent upon its assertion that it has an inherent right of access that is ancillary to its authority to exercise eminent domain power. Under these circumstances, the court believes a circumspect view of the entirety of Dakota Access' proposed action is required.

[5] Dakota Access acknowledges a split of authority involving certain types of subsurface examinations and sampling. *See* Reply Brief at 3.

B. Dakota Access possesses the authority to conduct a pre-condemnation survey.

Pipeline companies are common carriers when they "hold[] themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline[.]" SDCL §49-7-11. These pipeline companies "may exercise the power of eminent domain in acquiring right-of-way as prescribed by statute." SDCL § 49-7-13; *see also* S.D. Const. Art. VI, § 13 ("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[.]").

Here, the only evidence contained in the record establishes that Dakota Access is a pipeline company and a common carrier, possessed of the right to exercise the power of eminent domain. It has contracted with third parties to ship their crude oil for a fee. *See* Affidavit of Damon Daniels at ¶¶ 7-9. Dakota Access also plans to make 10% of its pipeline capacity available to the public to ship oil for a fee, in accordance with federal regulations. *Id.* at ¶ 8; Rorie Aff. at ¶ 3. The Landowners have not submitted any evidence challenging Dakota Access' claim to be a pipeline company or common carrier.

The principal area of disagreement among the parties relates to Dakota Access' claim that it has a right, ancillary to its power of eminent domain, to survey land prior to condemnation. This issue presents a question which is not dispositively addressed by either a statute or binding decisional law. However, other courts have considered the question and held that the right to exercise

eminent domain carries with it the concomitant right to survey land before it is condemned.

In *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981), the Missouri Supreme Court held that the absence of specific statutory authority allowing a pre-condemnation inspection did not prevent pre-condemnation surveys:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Citing reasons that seem as practical as they are legal, the court in *Crouch* noted the utility of the pre-condemnation surveys as an essential component of the exercise of eminent domain:

> [I]t is necessary that the exact location, amount, and description of the property sought to be condemned, be definitely ascertained, and in such circumstances, if these preliminary steps be denied, it would be at least difficult, if not impossible, to successfully carry out condemnation proceedings.

Id. (quoting *Thomas v. City Horse Cave*, 249 Ky. 713, 61 S.W.2d 601,604 (1033)).

Other jurisdictions have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1985) ("Either by express statutory grant or, as here, by implication, a condemning body . . . has the right, incidental to its power of eminent domain, to enter private property in order to survey, inspect, and appraise the property . . . it would be illogical to require the prospective condemnor to institute condemnation proceedings and pay compensation "before making a

preliminary minimally intrusive entry."); *Ware v. Henry County Water & Sewerage Auth.*, 575 S.E.2d 654, 659 (Ga. Ct. App. 2002) ("the law in Georgia is clear that a prospective condemning body has the right, incidental to its power of eminent domain, to enter private property in order to survey, inspect, and appraise the property"); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990) ("'It would make little sense that the legislature would grant the power of eminent domain to an entity and at the same time deny the entity the means required to use the grant.'" (*Crouch*, 621 S.W.2d 47, 48 (Mo. 1981))); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982) (affirming order enjoining landowners from interfering with survey work because "[a]ncillary to [the power of eminent domain] was the authority to enter upon the land to make a preliminary survey").

The Landowners have not cited any reported decisions that suggest pre-condemnation surveys are precluded in the absence of specific statutory authority. Instead, their principal argument rests upon the fact that the Legislature has provided for pre-condemnation inspections in other contexts, but not for pipeline companies. From this, the Landowners contend that the Legislature has, therefore, proscribed pre-condemnation inspections by purposefully omitting express statutory authority. This argument, in the court's view, is not sustainable.

Known historically as the canon of *expressio unius est exclusio alterius*, or simply *expressio unius*, this method of divining legislative intent by negative implication has limited utility, particularly under circumstances such as those presented here. The force of any negative implication that a legislative body

intentionally enacted "disparate provisions [is] strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *see also Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects[.]"). The United States Supreme Court has further held that "the *expressio unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it[.]'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003)).

Our Supreme Court has also urged caution when applying the expressio unius cannon:

> The general rule that the express mention of one thing in a statute implies the exclusion of another 'is merely an auxiliary rule of statutory construction, to be applied with great caution; it is not a rule of substantive law, or a constitutional command. The maxim is not of universal application, or conclusive as to the meaning of a statute; and it does not constitute a formula for construction to be arbitrarily applied.'

Tracfone Wireless, Inc. v. South Dakota Dept. of Revenue, 2010 SD 6, ¶ 14, 778 N.W.2d 130, 135 (quoting *Argo Oil Corp. v. Lathrop*, 76 S.D. 70, 74, 72 N.W.2d 431, 434 (1955)).

Here, a close examination of the statutory authority allowing pre-condemnation inspections for certain, other entities does not reflect a deliberate

legislative effort to deprive common carrier pipelines of the same ability. Indeed, the various statutes were enacted at different times, employ different procedures and reflect little congruence even among themselves. For example, SDCL § 50-6A-19, authorizing pre-condemnation inspections by airport authorities, was enacted in 1976 and simply provides that "it shall be lawful for the authority to enter upon the land, doing no unnecessary damage[]" to "make surveys and examinations[.]" SDCL § 50-6A-19. However, the legislative authority of an irrigation district to enter upon a landowner's real property was enacted in 1939 and exists among a broader range of water management powers, including the ability to levy special assessments, provide funds to drain land, enter upon the lands for making surveys, exercise power of eminent domain and contract for the construction of ditches. SDCL § 46A-6-5. Finally, the right of an entity proposing a water project dates from 1983 and is not self-executing, requiring the entity to first seek permission from a circuit court. SDCL § 46-8-2.1.

These instances of legislative action do not reflect a single, simultaneous effort to allow pre-condemnation surveys for some entities and purposefully deny that authority to pipeline companies who are common carriers. Indeed, the main statutes addressing pipelines as common carriers with the power of eminent domain, SDCL §§ 49-7-11 and 49-7-13, were enacted in 1980 during a different legislative session from those described above.

Under the circumstances, the court cannot accept the *expressio unius* argument and find that pre-condemnation surveys are categorically prohibited.

Instead, the weight of the authority from other jurisdictions provides the better rule and the one the court will apply here.

C. The court's injunctive power may be used to allow Dakota Access the ability to conduct pre-condemnation surveys on the Landowner's property.

Having determined that Dakota Access possesses the ability to conduct a pre-condemnation survey, the court authorizes the issuance of an injunction to allow the surveys. These surveys are limited to one instance, though the survey may extend beyond one day. They are further limited to a surface examination of the landowner's property in the absence of greater evidentiary detail concerning Dakota Access' proposed subsurface examination.

As indicated in its October 2, 2015, order, the court does not view this application by Dakota Access as implicating preliminary injunction principles or procedure. The relief it seeks is not preliminary – it is final. Once the pre-condemnation survey is completed, nothing remains to adjudicate.

A permanent injunction may be granted, among other instances, where "pecuniary compensation would not afford adequate relief" or where "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief[.]" SDCL § 21-8-14. Our Supreme Court has provided several considerations to guide trial courts in determining the question of injunctive relief:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by

> the enjoined party ... disproportionate to the ... benefit to be gained by the injured party?

Knodel v. Kassel Twp., 1998 S.D. 73, ¶ 9, 581 N.W.2d 504, 507.

The Landowners here have certainly not acted to cause damage or in bad faith. They are simply asserting their rights as property owners. This is a sincere and understandable sentiment. Still, the stark reality remains that the power of eminent domain, as it exists in this state and elsewhere, contemplates that individual property rights can be impacted for a more broadly-determined public use. As the court balances the equities here, the limited interference by Dakota Access, at least at this point, suggests to the court that the degree of hardship for the Landowners is not disproportionate to the benefit Dakota Access would gain. Further, it would be extremely difficult, if it could be done at all, to calculate adequate monetary relief for denying Dakota Access the opportunity to "walk" its proposed pipeline route. There is, in this regard, no adequate remedy at law to otherwise address this right. Though the Landowners have argued the commencement of a condemnation action is the appropriate legal remedy, this remedy would be efficacious only where the proposed action was a taking. Here, the survey, as it is authorized, is not.

ORDER

Based upon the foregoing, it is hereby ordered:

1) that Dakota Access' application for injunctive relief is granted in part. Dakota Access is authorized to enter upon the Landowners' real property for the purpose of conducting a pre-condemnation survey, limited to a survey of the surface and surface features of the real property and as otherwise provided in the Memorandum Opinion and Order;

2) that Dakota Access must furnish a bond in the amount of $1,000 per parcel prior to undertaking a pre-condemnation survey;

3) that Dakota Access may seek to supplement the record and reconsideration relating to the extent of the injunctive relief ordered; and

4) that the clerk will provide a copy of this Memorandum Opinion and Order to the parties' counsel electronically or by U.S. Mail.

Dated this 25th day of March, 2016.

BY THE COURT:

Mark Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____ Deputy

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
MAR 24 2016
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs and Appellants, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	**App. No. 30317 and 30338**
PATRICIA K. DEEG TRUST, Plaintiff and Appellant, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	
PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiff's and Appellants, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appeal from the Third Judicial Circuit, Beadle and Lake County
Honorable Patrick Pardy
and Fifth Judicial Circuit, Brown, Edmunds, McPherson, and Spink County
Honorable Richard A. Sommers
Notice of Appeal filed April 28, 2023

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INTRODUCTION

During South Dakota's Constiutional convention framers vigiously debated condemnation. The debate centered almost exclusively on railroad corporations. Many farmers were sent as Convention Delegates. These farmers at the convention knew then that railroads were vital to South Dakota's future. Without railroads to transport their grain, cattle, or other commodities to market their transport required horse-drawn wagons, cattle drives, or a river barge.

Despite embracing railroads, those farmers and many others knew private lands would be impacted and they fought vigorously for their property rights. That fight included (1) adding "or damaged" in the Takings Clause, (2) consideration of benefit to the landowner in calculating just compensation, and (3) the right to demand a jury determination of just compensation. Delegate Moody of Lawrence County proposed an amendment to limit these protections. *See* 1 Dakota Constitutional Convention 291 (Doane Robinson ed., Huronite Prtg. Co.1907).

The Convention engaged in vigorous debate over the tension between industrial development and protecting property owners. One Delegate stated:

> Upon reflection, I think I am opposed to the measure. I remember I heard said by a railroad attorney. He said the profession can take care of themselves. The Convention will take care of the people and the railroads will take care of themselves. That is very nice. Gentlemen, how do corporations and individuals get along together? Peaceably, like a lion and a lamb. They can get along peaceably because the lamb is eaten up.

Id. at 293.

After considerable discussion, Delegate Moody effectively withdrew his support for the amendment. He went on to state:

> I recognize the fact that a corporation is capable of a concentration of energy that would be simply impossible under other circumstances, therefore, we should with the utmost care guard the rights of the people against the encroachments from such as are capable of using the state and the public in aid of their enterprises.

Id. at 296.

The Convention determined that they would not cede private property protections to corporate expedience or financial gain. S.D. CONST. art. VI, § 13 requires just compensation for property taken "or damaged," a clause that has been interpreted as providing even greater protection of private property than the Fifth Amendment to the United States Constitution. *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146. Article VI, § 13 also prohibits consideration of benefits which may accrue to the landowner as a result of the improvement in determining just compensation. The right to have just compensation determined by a jury was adopted in S.D. CONST. art. XVII, § 18.

Article XVII, § 18 also expressly prohibits the Legislature from depriving any landowner of his or her right to appeal a preliminary assessment of damages to a jury. Landowners' Counsel is unable to identify another State constitution with such an explicit limitation on the Legislature's authority to restrict a jury trial in condemnation cases.

South Dakota's tradition of protecting private property rights from the encroachment of private interests is ensconced in our Constitution and has been guaranteed by this Court for over 130 years. These fundamental protections have not prevented railroads, power lines, gas and oil pipelines, and roads from being constructed here. Landowners respectfully request this Court intercede and "guard the rights of the people against the encroachments from such [corporate interests] as are capable of using

the state and the public in aid of their enterprises." 1 Dakota Constitutional Convention 296 (Doane Robinson ed., Huronite Prtg. Co. 1907).

Landowners understand deference is given to the constitutionality of a legislative enactment; however, the guiding principles of our Constitution and the recent United States Supreme Court holding in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) require that SDCL § 21-35-31 be found unconstitutional.

ARGUMENT

I. SDCL § 21-35-31 constitutes a *per se* physical taking of Landowners' right to exclude without just compensation or the right to trial by jury.

a. *Cedar Point* expanded the *per se* physical takings rule to include temporary invasions like those authorized by SDCL § 21-35-31.

Landowners agree *Cedar Point* was not about survey access. *Appellee Br. p. 8.* It was about much more – a landowners' right to use and enjoy their property to the exclusion of others. *Cedar Point* is broader than SCS acknowledges. It affirms the right to exclude as fundamental and directs that legislative or regulatory infringements upon that right, regardless of frequency or duration, are *per se* physical takings.

The Court's discussion and holding in *Cedar Point* address the paradox of analyzing temporary physical invasions as regulatory takings rather than physical ones. "We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right' that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*[.]" *Cedar Point*, 141 S. Ct. at 2077 (internal citation omitted).

Despite SCS' best attempts to mininze the holding in *Cedar Point*, it controls here. For context, the union organizer access regulation struck down as unconstitional in *Cedar Point* was far more limited in scope than § 21-35-31:

	Cedar Point **Unconstitutional Regulation**	**§ 21-35-31**
Limits as to the **frequency** of invasion & occupation?	YES	NO
Limits as to **duration** of invasion & occupation?	YES	NO
Limits as to **type of property** that can be invaded & occupied	YES; only commercial production agricultural land	NO
Limits as to **business disruption / inconvenience?**	YES; 1 hour before work; 1 hour during lunch; 1 hour after work	NO
Long-time Regulation/Statute?	40 years	NO; 2016

b. Background restrictions are derived from a State's legal tradition.

Among the narrow exceptions to the *per se* rule are "longstanding background restrictions on property rights" which include "common law privileges to access private property." *Id.* at 2066 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). The limited exceptions provided in *Cedar Point* (nuisance abatement, public or private necessity, and certain law enforcement) are drastically different than what SCS claims here. Determining which rights of entry constitute background restrictions requires an ad hoc inquiry into South Dakota's "constitutional culture" and "legal tradition." *Lucas*, 505 U.S. 1003, 112 S. Ct.

2886, 120 L. Ed. 2d 798 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606, 630, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001).

The essence of the background restriction exception is "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*,112 S. Ct. at 2900). The restriction must "inhere in the title itself." *Lucas*, 112 S. Ct. 112 at 2900. To do so, the restriction must comport with "citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property . . .." *Lucas*, 112 S.Ct. at 2888.

Pre-condemnation survey cannot meet these standards. SCS claims prospective condemnors have a common law right to enter private property for invasive survey and examination anywhere, at any time, for any duration, without notice. While SDCL § 21-35-31 imposes certain formalities like notice, the purported right of entry is derived from common law, not the statute. According to SCS, this right of entry is so engrained within our State's legal tradition that it is consistent "with citizen's historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Id.*

This narrow exception is as intuitive as the rule itself. When a citizen takes title to property, there is a common understanding that the bundle of sticks they have acquired does not allow them to exclude the government when entry upon private property is necessary to avert an imminent public disaster or avert serious harm to a person, land, or chattels. *Cedar Point*, 141 S. Ct. Similarly, landowners know they are not entitled to maintain a nuisance. But, no landowner expects that pre-condemnation surveys are a part

of South Dakota's legal tradition. The very notion of entry for pre-condemnation surveys without just compensation defies South Dakota's "constitutional culture."

c. South Dakota has no tradition of pre-condemnation survey.

SCS' reliance on cases and statutes from other jurisdictions cannot save its background principal theory. Background restrictions are derived from the "State's law of property" and "legal tradition." *Lucas,* 112 S.Ct. at 2900; *Palazzolo,* 121 S. Ct. at 2464. Each state has its own common law. "'The common law' is not a borderless body of legal principles, articulable by a court in any jurisdiction; rather each jurisdiction has its own common law." *15A Am. Jur. 2d Common Law § 3.* No South Dakota case even mentions pre-condemnation survey as a background principle.

A statutory right to pre-condemnation survey in South Dakota did not exist until 2016. Prior to that, there were a few statutes granting the right to various condemnors; however, "[a] law does not become a background principle for subsequent owners by enactment itself." *Palazzolo,* 121 S.Ct. at 2464. The earlier survey statutes have never been cited by this Court and there is no evidence they have ever been utilized.

SCS cites a single South Dakota appellate decision, *Fairmont & V. Ry. Co. v. Bethke*, 37 S.D. 446, 159 N.W. 56, 57 (1916), but that case does not apply. *Fairmont* concerned a railroad's attempt to abandon a taking after the jury had rendered a verdict on just compensation. The decision simply points out that the railroad surveyed the proposed land to be taken and dug test holes and that activity did not amount to a taking of the entire 31-acre tract. *Fairmont,* 159 N.W. at 58. There is no indication in the decision that any survey work by the railroad was conducted against the will of the owner

and there is no discussion of statutory or common law right to survey for pre-condemnation planning. *Fairmont* has no applicability here.

SCS references and the circuit courts relied heavily on the *Dakota Access* case. The *Dakota Access* opinion does not support SCS' arguments because it was issued prior to *Cedar Point*. Moreover, as Judge (now Justice) Salter stated, whether pre-condemnation surveys are ancillary to the power of eminent domain "raises a novel and unsettled question. . ." "which is not dispositively addressed by either a statute or binding decisional law." *Dakota Access, p. 15-16, SCS APPX 131-132.*

In the absence of binding South Dakota law or the instructions from *Cedar Point*, the court relied upon "the weight of authority from other jurisdictions" to find "that a pre-condemnation survey is not, itself, a taking." *Dakota Access, Pages 21 and 14.* Following *Cedar Point's* directive, we now know unauthorized invasion of private property is a *per se* physical taking, regardless of duration and degree of invasiveness.

Three unscrutinized and unused statutes are insufficient to establish a legal tradition. SCS' entry for pre-condemnation survey is a *per se* physical taking within the meaning of the Fifth Amendment. SDCL § 21-35-31 authorizes that taking without just compensation and without the right to a jury trial in direct violation of our state and federal constitutions. For those reasons, the statute must be invalidated.

II. SCS concedes subsurface examinations are not background restrictions.

There is inherent conflict between the privilege SCS is claiming, entry for surface survey, and what current law allows and what SCS proposes to do, embark on a course of destruction. SCS argues SDCL § 21-35-31 is "the latest codification of a longstanding common-law and statutory right to survey access in this State." *SCS Br. p. 13.* SCS cites

to a number of non-binding pre-*Cedar Point* sources in support of that proposition. But SCS is careful to extend its background restriction and common law argument only as far as above surface survey access, and it makes no assertion there is a background restriction or common law privilege to engage in the invasive and injurious activities it proposes.

There is no authority in this jurisdiction or elsewhere to support such a claim. Many of the nonauthoritative sources SCS relies upon say the opposite, and conclude subsurface activity including boring, digging, and trenching, are takings. ("Permissible entry 'cannot amount to other than such innocuous entry and ... examination as would suffice for the making of surveys or maps [or other similar purpose]." *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

Nichols on Eminent Domain specifically addresses the two activities enumerated in SDCL § 21-35-31, survey and examination. "Courts have typically defined a survey as the measurement of land. Invasive activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement.... [T]he right to make an examination or survey does not include the right to conduct archaeological digs... entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing." *Nichols*, § G32.06 (2021).

In *Dakota Access*, the court found survey and surface examination, akin to "walking" the land, were ancillary to the power of eminent domain, but it expressly declined to make the same determination for subsurface activity which "[gave] the court

pause because it contemplates a more invasive impact on individual property rights." *Dakota Access Dec.* at p. 14. Landowners acknowledge there is authority from other jurisdictions declaring a surface survey is ancillary to eminent domain power within those states; however, SCS cites no authoirity that treats subsurface activity that same way.

SCS scarcely even attepts to argue that its background principle theory applies to subsurface activity. That alone suggests that SCS exceeded the statutory limitations imposed by SDCL § 21-35-31. If this Court were to find that SDCL § 21-35-31 authorizes the subsurface activity SCS proposes, then the statute must be deemed facially unconstitutional for lack of any applicable exception to *per se* takings liability under *Cedar Point*.

SCS cannot have it both ways. Either SDCL § 21-35-31 is unconstitutional based upon its appropriation of the right to exclude or its authorization must be limited to minimally invasive above-ground survey and examination. Either outcome requires reversal of the trial courts.

III. SDCL § 21-35-31 violates S.D. CONST. art. XVII, § 18.

SCS does not address Landowners' claim that SDCL § 21-35-31 plainly and palpably violates S.D. CONST. art. XVII, § 18. Article XVII, § 18 is a unique constitutional provision with directives that extend beyond Art. VI, § 13 and the Fifth Amendment. The straightforward section requires corporations vested with the power of eminent domain to "make just compensation for property taken, injured, or destroyed, by construction or enlargement of their works, highways or improvements…" which shall be paid or secured in advance. S.D. CONST. art XVII, § 18. Importantly, the section states that "[t]he Legislature is hereby prohibited from depriving any person of an appeal from

any preliminary assessment of damages against any such corporation… and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases" *Id.*

The Legislature violated this express prohibition. SDCL § 21-35-31 authorizes corporations vested with the power of eminent domain to enter and examine private property in furtherance of their works or improvements. The statute permits the corporation to unilaterally fix the amount of payment it will either make or secure for "any actual damage done to the property by the entry." SDCL § 21-35-31(3). Notably absent from the statute are the requirements that a preliminary assessment of damages be made and that landowners be granted the opportunity to appeal that assessment to a jury.

SDCL § 21-35-31's constitutional deficiencies were also raised in the lower court proceedings when Landowners challenged SCS' bond. Landowners alleged SCS' bond was insufficient and requested discovery on that topic. No such discovery was provided. In the rush to summary judgment, the Courts deprived Landowners their constitutional right to question the amount. Despite SCS providing no evidence to support the bond's sufficiency, the trial court found SCS' letters stating they had obtained sufficient security to be adequate. (SR3 2259). The lower courts' premature dismissal of Landowners' attempt to challenge the preliminary assessment of compensation is just one, clear example of the SDCL 21-35-31's constitutional failure.

SCS appears to argue that damages cannot be assessed before completing surveys. *SCS br. p.18, fn. 9.* But temporary access and construction easements are valued as a matter of course in condemnation cases. If SCS is unsure, then it should make its best assessment and let the landowner appeal that to a jury, as S.D. CONST. art. XVII, § 18 requires.

Article XVII, § 18 is expressly designed to guard against corporate encroachments into private property rights. The Legislature's failure to abide by the section's precise language renders SDCL § 21-35-31 unconstitutional.

IV. SCS did not establish as a matter of law that it was a common carrier when material facts were clearly in dispute.

a. Under the Offtake Agreements, SCS will not operate its proposed pipeline as a "for hire" carrier.

Because eminent domain power accompanies common carrier status, a thorough review of the purported common carrier's proposed activities must be taken to ensure strict compliance with each element of common carriage. The trial courts' review fell well short of a thorough review, resulting in a premature entry of judgment with material facts in dispute.

The Offtake Agreements in the record demonstrate that SCS does not intend to transport a commodity for hire. Under SCS' Offtake Agreements, it would (a)

of the carbon dioxide acquired; (b) transport this carbon dioxide through its own pipeline to disposal sites in furtherance of its carbon management business that includes carbon capture, transportation, and storage; and (c) obtain a federal tax credit for the permanent disposal of CO2. (SR3 1693-1942)(SR5 2026-2275).

SCS is not transporting the carbon dioxide it acquires through the Offtake Agreements on a "for hire" basis,

While transporting carbon dioxide is a necessary element of its overall carbon disposal business, under the Offtake Agreements, SCS' primary business is

Further, no third party is for transporting carbon dioxide. Under SCS' and the trial courts' loose reading of the statute, ("SCS is shipping carbon dioxide, belonging to the ethanol plans [sic], for a fee" and "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists." (SR3 1276-1277), it's hard to imagine a pipeline that wouldn't qualify as a common carrier. But a closer look at the statute and case law shows SDCL § 49-7-11 is designed to ensure that common carrier pipelines are merely transportation conduits designed to serve the public indiscriminately, not private facilities built to primarily benefit the pipeline's owner.

SCS' crafty business model does not entitle the company to common carrier status under South Dakota law because SCS does not have a

"[O]ne performing transportation service for only oneself is not a common carrier." *13 Am. Jur. 2d Carriers § 5* (citing *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)) (Harms' dedication of his equipment to first serve his own needs and those of his customers is in contravention of a common carrier's duty to devote itself to public service without discrimination.).

b. SCS' unenforceable promises are insufficient to confer common carrier status.

Despite the Offtake Agreements demonstrating SCS has no intention of transporting anything for hire, the lower courts relied upon SCS' unenforceable affidavit statements of speculative future activity to grant common carrier status. Granting summary judgment with clearly disputed material facts was reversible error.

i. Open Season

SCS argues that its intent to "hold an open season during which it will publicly solicit binding commitments for interstate CO2 transportation services from interested customers," supports the proposition that it is a common carrier. *SCS br. p. 23.* Even if this self-serving and completely unsupported promise were true, more contracts by which at a CO2 emitting facility and transports product through a pipeline does not make it a common carrier. It would just make SCS a larger private carrier.

SCS argues that the *Dakota Access* decision supports its open season theory. But in *Dakota Access* the court found that Dakota Access had already held two binding open seasons in 2014 to solicit shipper commitments for the pipeline. *Dakota Access Decision, p. 4, SCS APPX 120.* SCS has not held an open season, and once they are granted permission to condemn private property as a common carrier, they will be under no state or federal regulatory obligation to hold an open season.

ii. Reserved Capacity

SCS' unenforceable promise to reserve capacity is another smoke and mirrors attempt at looking like a common carrier. SCS avers that it "is reserving pipeline capacity for uncommitted future shippers that may want to receive CO2 transportation services after the pipeline has begun operations." *SCS br. p. 23.* Landowners agree with SCS that "[r]eservation of pipeline capacity is another feature of a common carrier." *Id.*

What SCS leaves out of its argument is that reservation of capacity is also required by the Federal Energy Regulatory Commission (FERC) for common carriers. Actual common carriers (crude oil, natural gas, etc.) do not promise to reserve capacity, they are required by law to do so and there is an enforcement mechanism for non-

compliance. That protection doesn't exist against CO2 pipelines. Again, in *Dakota Access*, the court considered that "Dakota Access is also reserving 10% of the capacity of the Dakota Access Pipeline for allocation to walk-up shipments, in accordance with FERC's rules and regulations for common carrier crude oil pipelines." *Dakota Access Decision, p. 4, SCS APPX 120.* Without the regulatory backstop of FERC, only binding contractual obligations can demonstrate compliance with the reservation of capacity element of common carriage.

iii. Shipping for Others

Here, SCS goes beyond a promise to meet its obligation to ship commodities owned by third-parties, and suggests it has evidence outside the record to prove that it already is. SCS derides Landowners for "fixat[ing] on a handful of contracts" (*SCS br. p. 24*), but those are the only contracts SCS produced, despite discovery requests for any and all contracts or agreements related to the shipment of CO2. (SR3 1103)(SR5 1340). The "handful" provided are the only contracts in this appellate record. SCS now references these "34 third-party contracts" as if they are a part of the record ("Landowners fail to explain how an affiliate's taking of title to *some* of the CO2 that SCS is transporting under *some* contracts undermines SCS status as a common carrier.") (emphasis added) *SCS br. p. 28.* SCS has no evidence to back up its newly crafted strawman argument.

SCS understands that CO2 it will ship would be fatal to its common carrier status. That is why it represents to the Court there are other contracts that read differently but refused to provide them. Shipping product owned by third parties is essential for providing shipment services "to the public…" "for hire"

rather than providing merely private transportation services. SDCL § 49-7-11. SCS did not establish that it meets this statutory burden.

If SCS has contracts it claims support its common carrier status, then it would have submitted them to the record. SCS' reliance on purported contracts outside of the record to support its claim is precisely why summary judgment should be reversed and the case remanded for a meaningful discovery and analysis of SCS' alleged common carrier status.

c. There is no substantial evidence in the record to support that SCS' proposed pipeline would operate common carrier service.

SCS can state anything it wants on its website or in an affidavit, but once it achieves common carrier status in South Dakota, it has no state or federal regulatory burdens to comply with. For that reason alone, the trial courts should have provided a meaningful analysis of SCS' proposed carriage plans and consider the following factors before granting summary judgment.

First, the lack of federal or state commercial regulation of SCS' proposed pipeline system means that the trial courts could not rely on a legally enforceable common carrier status under federal or state law. Second, the Offtake Agreement structure is it is nothing like a fee-for-service transportation services agreement structure, much less a tariff. Third, under the Offtake Agreements, SCS would carbon transported, which makes a pipeline owner a private carrier. Fourth, in regards to SCS' purported intent to enter into conventional transportation service agreements third-party shippers, SCS has not executed any contracts with any potential shippers, making such commercial arrangements entirely speculative.

In these circumstances, there is a substantial likelihood that the proposed pipeline, if built, would serve only SCS, for its entire commercial life, and it would do so without any commercial regulation by any federal or state agency that could impress on it and enforce an obligation to operate as a common carrier.

The Offtake Agreements themselves undermine SCS as a common carrier. SCS' allegedly planned but unestablished services for hypothetical third-party shippers do not provide evidence confirming that the proposed pipeline would operate in common carrier service. The lower courts erred by conferring common carrier status, including the power of eminent domain, when facts were clearly in dispute. This case must be reversed for meaningful consideration of the common carrier question.

V. SCS' Motion to Dismiss should be dismissed because it provides no relevant authority to support its Motion.

SCS' claim that Landowners "chose" to disobey statute is completely meritless. *See SCS reply to its motion to dismiss p. 4.* SCS admits this court has jurisdiction over the *Helfenstein* case. SCS claims allowing the other consolidated Landowners into the appeal prejudices SCS by "significantly expand[ing] the scope of the appeal", but does not explain how. SCS has never experienced prejudice in this litigation. There was a timely filed appeal in the Fifth Circuit consolidated case. Landowner's Docketing Statement listed each of the consolidated cases. SCS' counsel was served with Landowners' Notice of Appeal and Docketing Statement. This Court has jurisdiction over the consolidated case.

SCS claims Landowners failed to address that its appeal did not designate the order appealed from. Plaintiff's appeal was entitled "Plaintiff's Petition for Appeal of

Summary Judgement". How much clearer can that be? Additionally, the "Relief Sought" makes it clear what is being appealed.

The Legislature could require electronic filing in each individual case that makes up a consolidated or jointly appealed case, but it has not. SCS cites no direct language in the statute and no authority supporting its claim that an appeal from a consolidated case or a joint appeal must be electronically filed *in each individual consolidated or jointly appealed case.*

SCS' motion is moot. The Court's ruling on the merits will apply equally to all landowners – present and future – not just the individual appellants in this case. Since SCS is not moving to dismiss the Third Circuit, the case will be heard on the merits. Therefore, SCS' motion is moot because its outcome "will have no practical legal effect upon an existing controversy." *Netter v. Netter*, 2019 S.D. 60, ¶ 9, 935 N.W.2d 789, 791 (quoting *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 14, 922 N.W.2d 784, 788).

CONCLUSION

Landowners respectfully request the Court find SCS is not a common carrier per SDCL § 49-7-11, reverse the trial courts, and invalidate SDCL § 21-35-31 because it effects a taking without just compensation in violation of the Fifth Amendment to the United States Constitution and Article VI, § 13 of the South Dakota Constitution and deprives Landowners of due process of law pursuant to the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution.

Appellants hereby request oral argument before this Honorable Court.

Dated this 23rd day of January, 2024.

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CERTIFICATE OF SERVICE

This is to verify that on the 23rd day of January 2024, I filed via Odyssey, a true and correct copy of the foregoing ***REPLY BRIEF OF APPELLANT LANDOWNERS*** and served via email the following attorneys:

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IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

App. No. 30317 and 30338

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PATRICIA K. DEEG TRUST,
Plaintiff and Appellant,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR,
Plaintiff's and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Filed: 8/28/2023 4:44 PM CST Supreme Court, State of South Dakota #30338

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appeal from the Third Judicial Circuit, Beadle and Lake County
Honorable Patrick Pardy
and Fifth Judicial Circuit, Brown, Edmunds, McPherson, and Spink County
Honorable Richard A. Sommers
Notice of Appeal filed April 28, 2023

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JURISDICTIONAL STATEMENT

This is a consolidation of two appeals, Appeal # 30317 and # 30338. These are appeals of seven circuit court cases that were consolidated into two, one in the Third Judicial Circuit (Appeal 30317) and one in the Fifth Judicial Circuit (Appeal 30338). Pleadings amongst the various counties were identical within each Circuit. For the convenience of the Court, references to the settled record in the Third Circuit will be to 39CIV22-000064 (Lake County) and references to the settled record in the Fifth Circuit will be to 22CIV22-000020 (Edmunds County). All references to the Third Circuit settled record will be referenced herein as (SR3_____) and references to the Fifth Circuit settled record will be referenced herein as (SR5____).

Appeal # 30317 is an appeal of a Memorandum Decision dated December 28, 2023 (SR3 1274), a Memorandum Decision dated March 8, 2023 (SR3 2251) and a final Order dated March 15, 2023 (SR3 2261). Notice of Entry of Order was given on March 16, 2023 (SR3 2263). Appeal was taken pursuant to SDCL § 15-26A-3(1) on April 14, 2023 (SR3 2316).

Appeal # 30338 is an appeal of an Order granting partial summary judgment dated March 28, 2023 (SR5 2290), a Letter Decision dated April 19, 2023 (SR5 2345) and a final Order dated April 21, 2023. (SR5 2347). Notice of Entry of Order was given on April 21, 2023. (SR5 2355). Appeal was taken pursuant to SDCL § 15-26A-3(1) on April 28, 2023.

STATEMENT OF THE ISSUES PRESENTED

A. Did the trial courts err in finding that SDCL § 21-35-31 is not a taking of private property that violates the state and federal constitutions?

The trial courts granted SCS's Motion for Summary Judgment finding SDCL § 21-35-31 is not a taking of private property in violation of the state and federal constitutions.

- S.D. CONST. art. VI, § 13
- S.D. CONST. art. XVII, § 18
- U.S. CONST. amend. V
- *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)
- *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982)

B. Did the trial courts err in finding SDCL § 21-35-31 affords Landowners adequate due process of law?

The trial courts granted SCS's Motion for Summary Judgment finding SDCL § 21-35-31 does not violate Landowners' procedural due process rights.

- S.D. CONST. art. VI, § 2
- U.S. CONST. amend. XIV
- *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905
- *Hollander v. Douglas Co.*, 2000 SD 159, 620 N.W.2d 181

C. Did the trial courts err in granting summary judgment on Landowner's claim that SCS is not a common carrier vested with the power of eminent domain?

The trial courts granted SCS's Motion for Summary Judgment finding SCS was a common carrier under SDCL § 49-7-11.

- SDCL § 49-7-11
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913)
- *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)
- *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012)

D. Did the Third Circuit err by making certain factual findings related to SCS's status as a common carrier sua sponte which were adopted by the Fifth Circuit?

The Third Circuit ruled sua sponte that SCS met the definition of a common carrier under South Dakota law and that the CO2 SCS intends to transfer is a commodity within the meaning of SDCL § 49-7-11. The Fifth Circuit adopted that ruling within its decision granting summary judgment in favor of SCS.

- SDCL § 49-7-11
- *Brown v. Hanson*, 2007 SD 134, 743 N.W.2d 677
- *Leonhardt v. Leonhardt*, 2012 SD 71, 822 N.W.2d 714

E. Did the trial courts err in finding SCS complied with all requirements of SDCL § 21-35-31(2)?

The trial courts granted SCS's Motion for Summary Judgment finding that SCS complied with the statutory requirements contained in SDCL § 21-35-31.

- SDCL § 21-35-31(2)
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, (1913)
- *Lewis & Clark Rural Water Systems, Inc. v. Seeba*, 2006 SD 7, 709 N.W.2d 824

F. Did the trial courts err by failing to require SCS to establish that its bond was sufficient to account for any and all damages caused to Landowners' properties as a result of the demanded examinations and surveys.

The lower courts did not require SCS to provide any evidence regarding the sufficiency of its alleged bond required by SDCL § 21-35-31(3).

- SDCL § 21-35-31(3)
- S.D. CONST. art. XVII, § 18
- *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, (1913)

G. Did the trial courts err in denying Landowners' motion to continue summary judgment proceedings for discovery purposed pursuant to SDCL § 15-6-56(f)?

The lower courts denied Landowners' Motion to continue summary judgment proceedings for discovery purposes.

- SDCL § 15-6-56(f)
- *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, 848 N.W.2d 273
- *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39, 766 N.W.2d 510

H. Did the trial courts err in finding SDCL § 21-35-31 authorizes the scope of survey and examination sought by SCS?

The lower courts granted SCS's Motion for Summary Judgment on SCS's request for injunctive relief authorizing subsurface survey and examination activities.

- SDCL § 21-35-31
- S.D. CONST. art. VI, § 13
- *State v. Bowers*, 2018 SD 50, 915 N.W.2d 161
- *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 322 S.E.2d 887 (1984)

STATEMENT OF THE CASE AND FACTS

This is a consolidation of two appeals. Appeal #30317 contains two consolidated cases in the Third Judicial Circuit, the Honorable Patrick Pardy presiding. Appeal #30338 contains five consolidated cases in the Fifth Judicial Circuit, the Honorable Richard Sommers presiding. All cases involved the same facts, legal analysis, and discovery disputes. SCS Carbon Transport, LLC ("SCS") was on one side of each case and various South Dakota landowners ("Landowners") were on the other.

Beginning in early June 2022, Landowners received letters from SCS claiming authority to enter their land without consent pursuant to SDCL § 21-35-31. (SR3 25) (SR5 29). SCS stated it would enter Landowner's property on the dates shown in the letters, with or without Landowners' consent. *Id.* Landowners did not consent and sought judicial relief. (SR3 3) (SR5 2).

SCS' proposed pipeline is supposed

SCS offered Landowners no compensation for the entry onto Landowner's property (SR3 25) (SR5 29) and SDCL § 21-35-31 does not afford Landowner's their Constitutional right to have their compensation determined by jury prior to the taking.

In October 2022, SCS filed a motion for protective order (SR3 122) (SR5 146) and Landowners filed a motion to compel discovery. (SR3 206) (SR5 270). On December 28, 2022, the Third Circuit Court issued a Memorandum Decision based only on briefs, granting SCS motion for protective order. (SR3 1274). The Court ruled sua sponte that

SCS is shipping a commodity for a fee and stated the

Id. SCS moved for summary judgment in both circuits shortly thereafter. (SR3 1310) (SR5 1377). The Fifth Circuit eventually also granted SCS' motion for protective order (1875), but did not do so until March 3, 2023, days after Landowners Brief in Response to SCS' Motion for Summary Judgment was due on February 28, 2023. (SR5 1843).

SCS requested the following summary judgment relief: (1) a declaration that it has the right to access Landowners' property to conduct examinations and surveys without Landowners' consent, pursuant to SDCL § 21-35-31; and (2) an injunction preventing Landowners from denying SCS such access. (SR3 1310) (SR5 1377). Both Courts granted SCS' motions. (SR3 2251, 2261) (SR5 2290, 2345, 2347). Landowners appeal on constitutional and procedural grounds. Landowners also appeal the Courts' ruling that the undisputed facts permitted summary judgment regarding SCS' status as a common carrier and whether SCS complied with SDCL § 21-35-31.

SCS has not provided any evidence it is transporting a commodity for hire, as required of a common carrier.

Even if SCS is a common carrier, the trial Courts did not require SCS to show it complied with SDCL § 21-35-31. SCS never sent notice to Landowner's tenants or included its PUC filing in any letters to Landowners as required (SR3 25) (SR5 29) and the trial Courts failed to address Landowners' argument that SCS' 45-day window to perform its work does not comply with SDCL § 21-35-31. (SR3 2251, 2261) (SR5 2290, 2345, 2347).

ARGUMENT

I. The trial courts erred by finding SDCL § 21-35-31 is not a taking within the meaning of the Fifth Amendment to the United States Constitution and the South Dakota Constitution, art. VI, § 13.

a. Standard of review

Summary judgment decisions are reviewed under a de novo standard of review. *Smith Angus Ranch, Inc. v. Hurst*, 2021 SD 40, ¶ 13, 962 N.W.2d 626, 629. "Further, an alleged violation of a constitutional right is 'an issue of law to be reviewed under the de novo standard of review.'" *Rupert v. City of Rapid City*, 2013 SD 13, ¶ 8, 827 N.W.2d 55, 60 (citing *Benson v. State*, 2006 SD 10, ¶ 12, 710 N.W.2d 131, 145).

There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it clearly, palpably, and plainly appears that the statute violates a provision of the Constitution. *Oien v. City of Sioux Falls*, 393 N.W.2d 286, 289 (S.D. 1986). Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision. *Id.* at 69. *Sedlacek v. S. Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989).

b. SDCL § 21-35-31 effects a per se physical taking of the right to exclude.

This case concerns the seizure of one of the most treasured sticks in the bundle of rights that comprise private property ownership: the right to enjoy property to the exclusion of all others. The trial courts in both the Third and Fifth Circuits erred as a matter of law by granting Appellee's Motion for Summary Judgment and concluding SDCL § 21-35-31 is not a taking or damaging of private property rights.

The Fifth Amendment to the United States Constitution ends with the Takings Clause: "nor shall private property be taken for public use without just compensation." South Dakota's Takings Clause, found in S.D. CONST. art. VI, § 13, directs that "[p]rivate property shall not be taken for public use, or damaged, without just compensation…"

The Takings Clause is obviously implicated when a government expressly exercises its eminent domain powers and condemns private property. However, the Takings Clause has also been interpreted to require just compensation when a government action affects a private property interest to a degree that an *implicit taking* has occurred. "Where a state or an agency thereof acting in a sovereign capacity takes or damages private property for public use without exercising the power of eminent domain, it cannot evade the constitutional provision which guarantees the right to compensation but will be obligated to pay the same as if it had proceeded under that power." *Darnall v. State*, 79 S.D. 59, 65, 108 N.W.2d 201, 204 (1961).

There are four recognized types of implicit takings, 1) a per se physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982), 2) a per se total regulatory taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), 3) a regulatory taking under *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978), and 4) a land-use exaction violating the standards as set forth in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).

For the purposes of this appeal, the Court must determine whether SDCL § 21-35-31 is per se physical taking of Landowners' right to exclude under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). A per se physical taking occurs when the government or its designee occupies or invades a private property right and thus takes a landowner's fundamental right to exclude. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). "These sorts of physical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021).

In *Loretto*, a New York City landlord sued a cable television company. He claimed that installation of cable facilities upon the landlord's property pursuant to New York law requiring a landlord to permit installation of such facilities on rental properties amount to a constitutionally compensable taking. *Id.* Prior to *Loretto*, whether a law or regulation rose to a taking within the meaning of the Fifth Amendment was determined using the "essentially ad hoc factual inquiry" described in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 8 S. Ct. 2646, 57 L.Ed.2d 631 (1978). Under *Penn Central*, a law alleged as a taking is scrutinized for its economic impact on property rights, especially the degree of interference with investment-backed expectations. The character of the government action is relevant, and a taking may more readily be found when the interference with property can be characterized as a physical invasion. *Id.*, at 124, 98 S. Ct. at 2659.

Loretto established a new per se rule: "when the character of the government action is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419–20, 102 S. Ct. 3164, 3167–68, 73 L. Ed. 2d 868 (1982). "Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property" *Id.*

In 2021, the Supreme Court broadened *Loretto's* per se physical takings rule to include government invasion of private property that are only temporary or intermittent. *Cedar Point,* 141 S. Ct. 2063. The *Cedar Point* Court held that a 40-year-old California regulation that gave union organizers limited access to agricultural worksites (three hours a day, 120 days a year) amounted to a taking. 141 S. Ct. at 2069. The Court held that "[t]he regulation appropriates a right to physically invade the growers' property- to literally 'take access,'…it is therefore a *per se* taking under our precedents." 141 S. Ct. at 2074.

Following *Cedar Point,* per se physical takings were no longer limited to permanent physical occupations. "The duration of an appropriation—just like the size of an appropriation, bears only on the amount of compensation." *Cedar Point Nursery,* 141 S. Ct. at 2074 (citing *United States v. Dow*, 357 U.S. 17, 26, 78 S. Ct. 1039, 2 L.Ed.2d 1109 (1958), and *Loretto*, 458 U.S. at 436–437, 102 S. Ct. 3164). Frequency of the invasion is also irrelevant to the takings analysis. "Physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2075. "The fact that a right

to take access is exercised only from time to time does not make it any less a physical taking." *Id.*

The *Cedar Point* decision centered on the appropriation of an owner's right to exclude. As the Court stated, "[w]e cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings…" *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2077 (internal citations omitted).

SDCL § 21-35-31 is a per se physical taking of Landowners' right to exclude. The statute clearly appropriates a landowner's fundamental right to exclude all others and redistributes that right to "person[s] vested with authority to take private property for public use." SDCL § 21-35-31. With that stick from the bundle of rights in hand, "[t]he person or the person's agents and officers may enter the private property for the purpose of the examination and survey" where permission has been denied. *Id.* Under the clear precedent established by the United States Supreme Court, namely under *Loretto* and *Cedar Point*, SDCL § 21-35-31 constitutes a taking of private property within the meaning of the Fifth Amendment and the South Dakota Constitution, art. VI, § 13.

c. SDCL § 21-35-31 is unconstitutional for its failure to require just compensation and failure to require just compensation be determined by a jury.

The State and Federal Takings Clauses prohibit the government and those who have been conferred with the power of eminent domain from taking private property without just compensation. U.S. CONST., amend. V, and S.D. CONST., art. VI, § 13. But that is precisely what the plain language of SDCL § 21-35-31 authorizes. SDCL § 21-35-31 requires only that a prospective condemnor acting pursuant to the statute "[m]ake a

payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry." SDCL § 21-35-31 contains no provision requiring compensation for the entry of private property against the owner's will. The Legislature's failure to require just compensation for the right to enter, survey, and examine renders the statute unconstitutional on its face, and the statute should be invalidated.

The absence of just compensation for the right to invade private property is not SDCL § 21-35-31's only constitutional deficiency. A landowner has an absolute right to have the amount of just compensation determined by a jury and to be paid that amount prior to the acquisition of any rights. S.D. CONST. art. XVII, § 18 protects the citizen from a condemning authority naming its own price for the land it is taking. The Constitutional provision reads:

> Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

The legislature is expressly prohibited from depriving a landowner whose property is being taken of his or her right to a jury trial. Pursuant to this constitutional right, compensation must be determined and then paid or secured prior to entry by the condemnor. The South Dakota Supreme Court has repeatedly affirmed these

fundamental protections. *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 SD 7, ¶ 58, 709 N.W.2d 824, 839, *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 SD 14, ¶ 2, 675 N.W.2d 739, 740. These are basic tenets of South Dakota takings law, yet they are omitted from SDCL § 21-35-31.

By failing to provide just compensation for the right to enter, survey, and examine private property and an opportunity to have the amount of just compensation for those rights determined by a jury prior to entry, the Legislature has authorized a taking of private property which clearly, plainly, and palpably violates the South Dakota and United States Constitutions.

d. SDCL § 21-35-31 does not satisfy any exception to the per se physical takings rule.

Cedar Point Nursery v. Hassid recognized three narrow exceptions by which a government could avoid takings liability for a physical invasion of private property.

First, the Court differentiates between authorized actions, such as a statute authorizing an invasion, and unauthorized actions, such as a trespass. *Cedar Point Nursery*, 141 S. Ct. at 2078. An occasional invasion absent any authority is considered a trespass, not a taking. *Id.* A Landowner does not have a Fifth Amendment takings claim if a representative of the government mistakenly enters upon their property. Second, entry pursuant to longstanding background principles upon property including pre-existing limitations upon the owner's title or common law privileges to enter private property would not be considered takings. *Id.* And finally, the Court conceded that reasonable entry for purposes of a health and safety inspection as a condition to a permit, license, or registration would not constitute a taking. *Id.*

At issue is whether pre-condemnation survey for common carrier pipelines is a longstanding background restriction upon Landowners' properties. Pre-condemnation survey is not a background restriction upon property because it is neither a pre-existing limitation on Landowner's title nor is it a common law privilege to enter recognized within South Dakota.

i. Not a pre-existing limitation on title

Longstanding background principles are not defined within *Cedar Point;* however, earlier U.S. Supreme Court cases explain that background principles are derived from state law. "[T]he question [of whether a property law concept is a background principle] must turn, in accord with this Court's 'takings' jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 1004, 112 S. Ct. 2886, 2888, 120 L. Ed. 2d 798 (1992). A background principle upon private property must be consistent "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas,* 112 S. Ct. at 2900. For a privilege of entry to be a limitation on an owner's title, the privilege must be "of those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo v. Rhode Island,* 533 U.S. 606, 630, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001).

Pre-condemnation survey is not a part of South Dakota's legal tradition for several reasons. First, the statute in question, SDCL § 21-35-31, was only adopted in 2016. While there are earlier South Dakota statutes authorizing pre-condemnation survey, none of them apply to common carrier pipelines, which have only been recognized

entities in South Dakota since 1980. The passage of a statute alone is insufficient to create a background restriction upon property. "A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo*, 121 S. Ct. at 2464. Thus, the earlier pre-condemnation survey authorizations alone do not qualify pre-condemnation survey as a background restriction upon private property in South Dakota.

Additionally, there is not a single opinion from this Court declaring pre-condemnation survey to be a background restriction upon South Dakota land, let alone a body of jurisprudence that would put a reasonable landowner on notice that they take title subject to that encumbrance. There is no indication that a prospective condemnor has ever invoked a statutory privilege to perform a pre-condemnation survey in South Dakota.

Finally, pre-condemnation survey access does not fall within a citizens' historic understanding regarding the State's power over the 'bundle of rights' that an owner acquires when they take title to property. *Lucas*, 112 S. Ct. at 2087-2088. No South Dakota landowner expects that they took their property servient to a condemnor's right to enter their land against their will for survey and examination activities.

There are South Dakota examples of longstanding third-party privileges to enter private property. Examples include access to retrieve a down bird while road hunting, (*see* SDCL § 41-9-1.1, and *Benson v. State*, 2006 SD 8, 710 N.W.2d 131) or the ability of recreationalists to access waters of the state below the high-water mark (*see* SDCL § 41-23-5, and *Duerre v. Helper*, 2017 SD 8, 892 N.W.2d 209). Those rights of access have been reviewed by this Court and found to be consistent with South Dakota's legal traditions and not takings.

Limited entry for game retrieval and recreation below the high-water mark are of those common, shared understandings of permissible limitations derived from South Dakota's legal tradition. Entry for those purposes generally comports with landowner's reasonable understanding "of the State's power over the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). The same cannot be said for pre-condemnation entry, survey, and examination by a private corporation.

SDCL § 21-35-31 clearly is not a part of South Dakota's property law tradition and therefore is not a background restriction absolving takings liability under *Lucas* and its progeny.

ii. No common law privilege to enter

No common law privilege to pre-condemnation survey exists in South Dakota. "'The common law' is not a borderless body of legal principles, articulable by a court in any jurisdiction; rather each jurisdiction has its own common law. Thus, the common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state." 15A Am. Jur. 2d Common Law § 3 (citing *Purdue Pharma L.P. v. Bos. Globe Life Scis. Media, LLC*, No. 2016-CA-000710-MR, 2018 WL 6580507, at *3 (Ky. Ct. App. Dec. 14, 2018), and *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012)).

The state specific application of common law rings especially true in the context of property rights, which are inherently creatures of state law. South Dakota has no published case law considering pre-condemnation survey or examination against the will of the owner, much less a case defining such activity as a part of our common law.

While *Cedar Point* does not define background principles, it does provide an explicit, yet non exhaustive, list of examples of certain common law rights of entry including 1) the event of public and private necessity; 2) the abatement of nuisances; and 3) enforcement of criminal law in certain circumstances. *Cedar Point,* 141 S. Ct. at 2079. These examples are all centered around public necessity and prevention of public harm. They are also reasons for which a reasonable landowner could expect the government to invade their property under certain circumstances. Consistent with a "citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 1004, 112 S. Ct. 2886, 2888, 120 L. Ed. 2d 798 (1992)).

Notably absent from *Cedar Point's* list is any common law privilege of entry that even remotely resembles a private company's right of entry for pre-condemnation planning purposes. *Id.* The entry authorized by SDCL § 21-35-31 is far closer to the union organizers' right of entry declared a taking in *Cedar Point,* which had been the law of California since 1976. Cal. Code Regs. tit. 8, § 20900. Both California's union access law and SDCL § 21-35-31 appropriate a right that would be in the possession of the landowner but for the regulation, the owner's fundamental right to exclude.

SDCL § 21-35-31 effects a per se physical taking of an owner's right to exclude without just compensation and without the right to a jury trial on just compensation. Entry upon private property for the purposes enumerated in the statute are not background restrictions upon title or common law privileges to enter under South Dakota law. The statute violates the State and Federal constitutions and should be declared invalid by this Court.

II. The trial courts erred as a matter of law by concluding SDCL § 21-35-31 provided adequate procedural due process.

SDCL § 21-35-31 deprives landowners of their right to exclude without due process of law. Under the Fourteenth Amendment to the United States Constitution, as well as Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law."

Landowners have a protected property interest in the right to use their property to the exclusion of others. That right is derived from state statute. SDCL § 43-2-1. To establish a procedural due process violation, a plaintiff must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law. *Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp.*, 2014 SD 98, 857 N.W.2d 865.

For purposes of procedural due process, property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905. Due process guarantees that notice and the right to be heard are granted in a "meaningful time and in a meaningful manner." *Hollander v. Douglas Co.*, 2000 SD 159, ¶ 17, 620 N.W.2d 181, 186 (citations omitted). Such guarantees are fundamental. *City of Pierre v. Blackwell*, 2001 SD 127, ¶ 13, 635 N.W.2d 581, 585.

Determining what process is due in a particular case requires consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the

government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Daily v. City of Sioux Falls*, 2011 SD 48, 802 N.W.2d 905.

The property right that will be affected by the action is one of the most important rights a citizen has, the right to use private property to the exclusion of others. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435–36. The right to own and protect property is an inherent right bestowed upon all citizens in our State's Bill of Rights. Article VI, § 1 of the South Dakota Constitution, which enumerates "all men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness."

The risk of an erroneous deprivation of private property rights through the procedures authorized in SDCL §21-35-31 is significant. SDCL § 21-35-31 requires only 30 days written notice of the entry. The statute provides no mechanism for challenging the permit applicant's right to enter under the statute. An example of adequate procedures for the seizure of private property is already enumerated in SDCL Chapter 21-35. Chapter 21-35 requires a condemnor to file and serve a Condemnation Petition (SDCL § 21-35-2), serve a summons (SDCL § 21-35-9), permit a condemnee to demand a hearing on Petitioner's right to take (SDCL § 21-35-10.1), and directs that just compensation for the taking and damages be determined by a jury trial (SDCL § 21-35-15). These procedural safeguards exist to ensure due process when a property right is being taken. There is no

compelling reason to demand anything less for entry, survey, and examination prior to commencement of formal condemnation proceedings.

Finally, the court must consider the permit applicant's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. A survey and examination are not required to obtain a permit from the South Dakota Public Utilities Commission. Pre-condemnation survey is merely a convenience for prospective condemnors. The statute expressly "does not apply to the state or its political subdivisions" who are still required to formally condemn temporary access easements prior to entry. SDCL § 21-35-31. The state and its political subdivisions have been able to successfully condemn right-of-way without a statutorily enumerated right to pre-condemnation survey, as did common carrier pipelines prior to 2016. Further procedural safeguards would not impact SCS's interest in any meaningful way.

For all of the reasons set forth above, SDCL § 21-35-31 violates the due process clause of the State and Federal Constitutions and should be declared invalid by this Court.

III. The trial courts erred by entering summary judgment concluding SCS was a common carrier vested with the power of eminent domain.

On appeal, the circuit court's entry of summary judgment is viewed under a de novo standard with no deference to the circuit court's decision. *Smith Angus Ranch, Inc. v. Hurst*, 2021 SD 40, ¶ 13, 962 N.W.2d 626, 629. The Court's "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Id.*

The trial courts committed reversible error by applying incorrect legal standards and by entering summary judgment concluding that SCS is a common carrier pursuant to SDCL § 49-7-11 vested with the power of eminent domain because material facts were in dispute.

a. Strict compliance with the elements of common carriage was required.

These cases concern SCS' authority to enter, survey, and examine Landowners' properties against their will pursuant to SDCL § 21-35-31. A prerequisite for a person or corporation claiming authority under SDCL § 21-35-31 is the "authority to take private property for public use…" SDCL § 21-35-31. SCS alleges its eminent domain authority is derived from SDCL § 49-7-13, which grants eminent domain power to common carrier pipelines, and SDCL § 49-2-12, which grants eminent domain power to common carriers generally. Landowner's challenge whether SCS meets the requisite conditions to possess eminent domain authority.

The Legislature may impose conditions when delegating the State's eminent domain power to private corporations. "The power of eminent domain being a power which is possessed by [a corporation] solely by being delegated to such corporation by the sovereign power of the state, its existence depends upon a strict compliance with each and every condition prescribed by such sovereign power." *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913). "[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. "The intent of a statute is determined from what the Legislature said, rather than

what we think it should have said." *Engesser v. Young*, 2014 SD 81, ¶ 22 n.1, 856 N.W.2d 471, 478 n.1.

A condition of eminent domain authority for common carrier pipelines is compliance with the enacted definition of such entity. SDCL § 49-7-11 defines a common carrier pipeline as "all pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire." The trial courts failed to require strict compliance with the directives of the Legislature, namely the requirements that SCS transport a "commodity" and do so "for hire."

b. SCS is not providing transportation services to the public "for hire".

The trial courts erred by declaring SCS a common carrier without considering whether they were providing transportation services to the public "for hire," a *sine qua non* of common carrier status and authority to condemn private property in South Dakota. The Legislature's mandate that transportation services be offered to the public for hire is clear and purposeful.

"For hire" is not defined in SDCL § 49-7-11; however, "hire" is not an ambiguous term. "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 SD 50, ¶ 16, 915 N.W.2d 161, 166. "Hire" as a verb is defined as "to purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation" *Hire*, Black's Law Dictionary (11th ed. 2019). By any definition, carrying for the public for hire is a condition that SCS must satisfy to be deemed a common carrier vested with the power of eminent domain.

"[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. The purpose of the Legislature's directive can be discerned by examining the relationship between common carriers and the public. Because common carriers are cloaked with the immense power of taking private property for public use, they have certain obligations to the public generally. Common carriers have a "duty to devote itself to public service without discrimination" (*Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)) and to carry "persons or goods belonging to others for hire." *Ciaccio v. New Orleans Public Belt R. R.*, 285 F. Supp. 373 (E.D. LA 1968). "Because a common carrier undertakes to carry for all people indifferently it may be regarded, in some respects, as a public servant or as having a quasi-public character. Hence, one performing transportation service for only oneself is not a common carrier." 13 Am. Jur. 2d Carriers § 5 (citing *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)("Harms' dedication of his equipment to first serve his own needs and those of his customers is in contravention of a common carrier's duty to devote itself to public service without discrimination.")).

The statutory condition that a common carrier pipeline provide transportation services to the public "for hire" implies that the carrier transport a commodity for a third party who retains ownership of that commodity. The third party must *hire* the company to provide transportation services which ensures the pipeline is merely a transportation conduit rather than the point where title is transferred. This is true for a traditional common carrier like a railroad, which may be *hired* by any member of the public to transport persons or freight.

The lower courts did not demand strict compliance with the "for hire" condition, and instead broadly considered whether SCS benefited by transporting and disposing of CO2.

On December 28, 2022, the Third Circuit ruled sua sponte that "SCS is shipping carbon dioxide, belonging to the ethanol plans [sic], for a fee" and "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists" (SR3 1276-1277). This holding is wholly inconsistent with the requirement that SCS offer the public transportation services for hire. Under the plain definition of "hire," the transfer of value from the hirer to the hired are certainly relevant and determinative of whether a hiring has occurred.

In addition, SDCL § 49-7-11 does not require a common carrier offer transportation service to the public *for a fee*; it requires the purported common carrier to engage in the business of transporting "for hire." This is not an issue of semantics. The erroneous application of the statute led the lower courts to review the business relationship between SCS and the ethanol plants to permit a much broader exchange of value than the statute requires. Where a fee is a noun that could possibly be construed as an ancillary benefit like a federal tax credit, the only reasonable interpretation of "for

hire" is payment from the customer to the carrier. The Fifth Circuit committed a similar error by "adopt[ing] the reasoning of Judge Pardy" and held "[t]hat SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value." (SR5 2346).

SDCL § 49-7-11 does not define a common carrier pipeline as one who transports commodities for a federal tax credit or an exchange of value. The Legislature expressly and purposefully required that common carrier pipelines ship "for hire". Neither trial court made a finding on that critical element. By applying the incorrect legal standard, the trial courts supplanted their own definition of common carrier with the definition enacted by the Legislature and circumvented the legislatively prescribed condition required for SCS to possess eminent domain authority. These erroneous applications of the law require reversal.

c. There were disputed facts material to the "for hire" question.

In addition to applying the incorrect legal standard in their common carrier analysis, the trial courts erred by granting summary judgment when material facts were clearly in dispute. "It is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity." *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996). Whether SCS is engaged in the business of carrying for hire was squarely in dispute at summary judgment. The available evidence at summary judgment presented a glaring contradiction between SCS' alleged business enterprise and its actual business enterprise.

In the Third Circuit, SCS did not submit any Statement of Undisputed Material Fact or any evidence on the "for hire" prong. SCS relied entirely upon the trial court's earlier sua sponte findings in its Brief in Support of its Motion for Summary Judgment. (SR3 1322). In the Fifth Circuit, SCS submitted proposed Undisputed Material Fact 5: "SCS is offering its CO2-transportation services to or for the public for hire." (SR5 1385). The totality of SCS's evidence in support of this material fact were six statements submitted in the Affidavit of James Pirolli. (SR5 1463). These statements are devoid of reference to any compensation, value, or remuneration of any kind from any of its affiliate CO2 emitters for the shipment of CO2.

In contrast to SCS's silence in the Third Circuit and the unsupported affidavit statements put forth in the Fifth Circuit, Landowners submitted four redacted Carbon Dioxide Offtake Agreements and two Letters of Intent between SCS and its alleged shipping customers. (SR3 1693-1942) (SR5 2026-2275). The Offtake Agreements and Letters of Intent were provided in discovery and were represented as the entire body of agreements between SCS and its alleged customers in South Dakota.

"The nature of a carrier is determined by its method of operation rather than by what it represents it does." 13 Am. Jur. 2d Carriers § 5 (citing *McDonald v. Irby*, 74 Wash 2d 431, 445 P.2d 192 (1968), and *Kvalheim v. Horace Mann*

Life Ins. Co., 219 N.W.2d 533 (Iowa 1974)).

Transporting for the public "for hire" also requires shipping for all indiscriminately. Landowners argued at Summary Judgment that SCS's relentless pursuit to keep its contractual information private, including its rates and terms of shipment, directly contradicts its purported common carrier status. Crude oil and natural gas pipelines are generally considered common carriers vested with the power of eminent domain. They are regulated by the Federal Energy Regulatory Commission ("FERC") through either the Interstate Commerce Act (crude oil pipelines) or the Natural Gas Act (gas pipelines). CFR Title 18. Oil pipelines and gas pipelines are required to file their proposed rate schedules, proposed tariffs (terms of transportation), and service agreements with FERC for approval. 18 C.F.R. §§ 154.102 and 341.1. This information is readily available to the public on the FERC website, etariff.ferc.gov. Railroads experience a similar disclosure and rate setting process through the Surface Transportation Board. 49 C.F.R. Chapter X, Subchapter D. Retail distribution power and natural gas companies are subject to the same requirements through the South Dakota Public Utilities Commission. SDCL Chapter 49-34A. Information pertaining to state regulated utilities is available publicly on the PUC's website.

A common thread connecting utilities and common carriers vested with the power of eminent domain is their obligation to disclose certain financial information in support

of their rates and tariffs. However, SCS argued for the power of the sovereign without responsibility to the public.

SCS maintained, and the lower courts agreed, that its contracts, rates, and terms of shipment should be sealed from public inspection and that within the limited disclosures it made at the trial court level it should be able to redact information pertaining

It is seeking status as a common carrier and the authority to condemn South Dakota land. The fact that SCS's contracts, rates, and terms of shipment are not open to the public is evidence that genuinely disputes whether SCS is offering transportation services for hire.

The trial courts erred by granting summary judgment when there were genuine issues of material fact as to whether SCS intends to provide transportation services for hire. This case should be reversed and remanded for further proceedings on SCS's status as a common carrier.

d. SCS is not shipping a "commodity".

An additional condition placed upon common carrier pipelines vested with the power of eminent domain is the transportation of a "commodity". SDCL § 49-7-11. The trial courts erred by finding "carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value." (SR3 1276-1277) (SR5 2346).

The term "commodity" is not defined in South Dakota law, thus the plain and ordinary meaning must be applied. The trial courts properly reasoned "[a]ccording to Black's Law Dictionary, a commodity is defined as 'an article of trade or commerce' or 'an economic good, esp. a raw material or an agricultural product.' *Commodity*, Black's Law Dictionary (11th ed. 2019)." *Id.* The trial courts utilized Black's Law Dictionary to create an ascertainable standard for qualifying as a commodity, an article of trade or commerce or economic good. The trial courts then abandoned that standard and found CO2 to be a commodity "regardless of the form of compensation, terms of payment, or transfer of value." (SR3 1276-1277).

Following the trial courts' decision to its logical conclusion, any substance that could be placed in a pipeline qualifies as a commodity for purposes of SDCL § 49-7-11. This application violates the Legislature's express directive that common carrier status is reserved for those pipelines transporting commodities. The Legislature did not use a generic term like product or substance, which would encompass anything capable of being moved by pipeline, including waste. The Legislature expressly used the term "commodity," implying there must be a commercial value or application of the product being transported.

The trial courts erred by broadening the definition of "commodity" to include waste. Landowners do not dispute that there are circumstances in which CO2 can be a commodity. However, the undisputed facts presented at summary judgment establish that SCS's pipeline is being built exclusively for the purpose of "permanently" sequestering at least 12 million metric tons of CO2 per year in North Dakota. (SR3 1390) (SR5 1493). Pursuant to 26 U.S.C. § 45Q, the federal law authorizing the $85 per metric ton

government subsidy in the form of tax credits, SCS only qualifies for the credit if the product is being "disposed" of permanently. 26 U.S.C. § 45Q(a)(1)(b). There is no definition of commodity that includes a substance destined for permanent disposal. While aluminum cans may be an article of commerce if recycled, they are not a commodity if loaded on a garbage truck destined for a landfill.

The trial courts failed to apply the plain language of SDCL § 49-7-11 and failed to require strict compliance with the condition imposed by the Legislature that common carrier pipelines transport a "commodity". This error requires reversal.

e. The Third Circuit erred by sua sponte entering summary judgment on the questions of whether SCS was transporting a commodity for hire.

"Sua sponte orders of summary judgment will be upheld only when the party against whom judgment will be entered was given sufficient notice and an adequate opportunity to demonstrate why summary judgment should not be granted." *Brown v. Hanson*, 2007 SD 134, ¶ 19, 743 N.W.2d 677, 682. "Providing the parties with adequate notice of the issues ensures that the parties have a meaningful opportunity to develop the record and present all relevant evidence to the court." *Leonhardt v. Leonhardt*, 2012 SD 71, ¶ 12, 822 N.W.2d 714, 717

On December 28, 2022, the Third Circuit issued a Memorandum Decision "on Defendant SCS Carbon Transport LLC's ("SCS") Motion for Entry of Protective Order following a Motion to Compel Discovery brought by Plaintiff Landowners ("Landowners")." (SR3 1274). The Court granted SCS' Motion for Entry of Protective Order but did not rule on Landowners noticed depositions or their other written discovery requests. (SR3 1274-1277). The trial court concluded its decision with two paragraphs that would drastically change the dynamic of the case. Sua sponte, the court disposed of

one of the primary and closely contested issues of the case, whether SCS is a common carrier under South Dakota law. (SR3 1322).

On January 13, 2023, SCS moved for summary judgment on all Landowner claims arguing in part "[t]his Court has already held that CO2 is a commodity and that SCS is transporting CO2 for hire." (SR3 1351). SCS submitted no additional evidence or argument on these issues. Landowners requested that the Court consider evidence and argument on the "commodity" and "for hire" questions in its response to SCS's Motion for Summary Judgment.

> With deference to this Court, Landowners contend that these statements were outside the scope of the question before the Court of whether to protect certain business information from the discovery process pursuant to 15-6-26(c)(7). Further, said comments were made without the benefit of landowner evidence… Landowners were not provided the opportunity to present full briefing or argument on whether the CO2 SCS intends to ship is a commodity or whether that shipment was "for hire." Landowners request that the Court consider the legal and factual arguments herein and permit reasonable discovery prior to making a formal finding on those questions. (SR3 1628).

The trial court declined Landowners' request to consider evidence and argument on those topics and relied on its prior findings when it granted summary judgment in favor of SCS on March 8, 2023. (SR3 2253). The Court affirmed its "prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31." *Id.* The Fifth Circuit did not make specific findings on the "commodity" or "for hire" questions other than to "adopt the reasoning of Judge Pardy." (SR5 2346, 2455).

Prejudice from the ruling was severe. Landowners' inability to brief and argue the issues prior to the Memorandum Decision led to an erroneous application of law. In its rush to judgment, the trial court replaced the "for hire" element of common carrier with "for a fee." The impact of this error is explained above.

SCS used the Memorandum Decision as a battering ram, moving for summary judgment just days after the decision was issued. (SR3 1310). SCS argued its status as a common carrier had been ruled upon. (SR3 1322). SCS reneged on its offer to make corporate representatives available for deposition on the "commodity" and "for hire" questions, which it had previously agreed to subject to a protective order. Based upon the findings in the Memorandum Decision, SCS rescinded the agreement despite the entry of a protective order. (SR3 2162).

Prejudice from the decision extended beyond the Third Circuit. SCS filed the Memorandum Decision as Supplemental Authority in all other circuits where disputes were pending, including the Fifth Circuit. (SR5 1070). The Memorandum Decision served as the primary support for its requested Protective Order in the Fifth Circuit (SR5 1361). SCS moved for Summary Judgment in the Fifth Circuit on February 10, 2023, before the court had ruled on the Motion for Protective Order and before the Offtake Agreements had been disclosed in that Circuit. SCS briefing relied heavily upon the Third Circuit's Memorandum Decision, which was adopted in the Fifth Circuit's decision to grant summary judgment in favor of SCS. (SR5 1414, 2346).

The Third Circuit's sua sponte entry of summary judgment on disputed material issues in this case was error. The erroneous decision was adopted by the Fifth Circuit in

error. The severe prejudice that resulted from the premature and unfair findings requires reversal.

f. A test for common carrier.

The Supreme Court of Texas has considered a case remarkably similar to the present matter in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012). In March 2008, purported common carrier pipeline company Denbury Green sued Texas Rice Land Partners, Ltd. for an injunction allowing access to land Texas Rice owned along a proposed carbon dioxide pipeline route to obtain access for pre-condemnation survey. Texas Rice resisted the surveys, arguing the pipeline was not a common carrier because it intended to ship only its own CO2. The trial court entered Summary Judgment in favor of Denbury Green and permanently enjoined Texas Rice from interfering with the pipeline's survey. *Id.* Texas's intermediate appellate court affirmed, holding a pipeline owner can conclusively acquire the right to condemn private property by declaring itself a common carrier. *Texas Rice*, 363 S.W.3d 192, 195 (Tex. 2012).

On appeal to the Texas Supreme Court, Denbury Green argued that "merely making the pipeline available for public use [was] sufficient to confer common carrier status." *Texas Rice*, 363 S.W.3d at 201. The Court disagreed and held that simply offering its services to the public without a reasonable probability that such service will be provided does not satisfy the "to or for the public for hire" element of common carriage. *Id.* Tex. Nat. Res. Code Ann. § 111.002 (West).

For purposes of determining whether a CO2 pipeline was a common carrier, the Court established the following test:

> "For a person intending to build a CO2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." 363 S.W.3d at 202.
>
> For purposes of this test, "a reasonable probability is one that is more likely than not." *Id.* at 202 n. 29. Additionally, once a landowner challenges a common-carrier status, "the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain." *Id.* at 202.

The common carrier test established in *Texas Rice* is both intuitive and consistent with South Dakota law. Like Texas, South Dakota's Constitution also restricts exercises of eminent domain to taking and damaging for a public use. S.D. CONST. art. VI, § 13 and Art. XVII, § 18. Both States judge public use on the public's right to use the improvement rather than the extent to which the public actually exercises that right. *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 729 (1913); *Hous. Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 166–67, 143 S.W.2d 79, 84 (1940). But the public's right to use must be demonstrated in some concrete way beyond mere fiat. Requiring a pipeline claiming privileges as a common carrier to establish a "reasonable probability" that the project will serve the public is not an unreasonable burden. This commonsense approach appropriately balances the constitutional rights of South Dakota landowners with the reasonable expectations of private business.

Finally, the *Texas Rice* test is consistent with the requirements of SDCL § 49-7-11, namely the requirement that the pipeline provide transportation services to the public "for hire". "A common carrier transporting gas for hire implies a customer other than the pipeline owner itself." *Texas Rice,* 363 S.W.3d at 194. The proposed test requires

evidence of an actual hiring rather than a broad claim of mutual benefit.

The *Texas Rice* common carrier test honors the clear intent of the legislature, the South Dakota Constitution, and the common law, while providing a framework for considering challenges to common carrier status. Establishing a test for common carrier status consistent with the laws of South Dakota is within the Court's purview and would provide clarity and consistency moving forward. The Court should reverse and remand for the application of this reasonable and intuitive test.

IV. The trial courts erred by finding SCS complied with the requirements of SDCL § 21-35-31.

The trial courts failed to correctly apply SDCL § 21-35-31 by finding SCS met the notice requirements for entry, survey, and examination under the statute. SCS failed to meet the plain language of SDCL § 21-35-31(2) by failing to provide notice of specific dates of entry, failing to include a copy of its permit application to the South Dakota Public Utilities Commission with its alleged notice, and failing to provide notice to tenants in possession of the subject properties. The trial courts also erred by failing to require SCS to establish the adequacy of its bond for actual damage to Landowners properties.

a. SCS failed to meet the notice requirements of SDCL § 21-35-31(2)

"The power of eminent domain being a power which is possessed by [a corporation] solely by being delegated to such corporation by the sovereign power of the state, its existence depends upon a strict compliance with each and every condition prescribed by such sovereign power." *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724, 726 (1913).

"[I]n determining whether a statutory condition has been satisfied, we look to the purpose of the statute." *Lewis & Clark Rural Water Systems, Inc. v. Seeba.*, 2006 SD 7, ¶ 50, 709 N.W.2d 824, 838. "The intent of a statute is determined from what the Legislature said, rather than what we think it should have said." *Engesser v. Young*, 2014 SD 81, ¶ 22 n.1, 856 N.W.2d 471, 478 n.1. "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 SD 50, ¶ 16, 915 N.W.2d 161, 166.

Landowners assert that SDCL § 21-35-31 is a constitutional taking of private property. Even if this Court were to hold otherwise, the statute is in the eminent domain chapter of South Dakota Code and there are inherent constitutional underpinnings to the unwarranted entry upon private land. Strict compliance with the conditions prescribed by the Legislature is required.

SDCL § 21-35-31(2) requires a party seeking to act pursuant to the statute to "[g]ive thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property…" On June 4, 2022, Jenni Sherrill, Right of Way Supervisor in service to Summit Carbon Solutions mailed letters to Landowners intended to be written notice pursuant to SDCL § 21-35-31(2). (SR3 1504, 1507-1511) (SR5 1620-1753). SCS's June 2022 letters fail to specifically contain the expected dates of entry as required by statute. The letters initially set out a four-day window when Landowners can expect to see representatives of the company, trucks, and drilling equipment on their land. (SR3 1507) (SR5 1620). Landowner's more strenuous objection was with the additional statement that work may take place over a stretch of

"45-days following the 30-day written notice period that is initiated by the receipt of this letter." *Id.*

The trial courts found "SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated." (SR3 2259) (SR5 2346). Landowners did not argue for perfect precision or a single date of entry. However, a 45-day window for unpermitted entry onto private property is unreasonable and clearly does not comply with the purpose of the statute, which is to provide written notice to Landowners of when they could expect strangers on their land. Landowners who would understandably want to be present during the survey and examination activities cannot be expected to standby for 45 days. The trial courts erred in determining SCS satisfied the notice requirements imposed by the Legislature.

Additionally, SCS's June 2022 letter fails to "include[e] the filing" as required by SDCL § 21-35-31(2). The letters instead rely upon on the written hyperlink to the PUC docket. The trial courts found the hyperlink to be "enough under SDCL § 21-35-31 to place Landowners on notice of the filing." (SR3 2259). The statutory burden is not upon landowner to look up the docket and find the application. The statutory burden is on the entity seeking to enter the landowner's property without permission to provide a copy of the documents. That was the Legislature's express intent and only strict compliance with that directive will suffice. The trial courts erred in finding SCS complied with this requirement.

Finally, SCS did not provide 30-day notice letters to any "tenant in possession of the property" as required by SDCL § 21-35-31(2). SDCL § 21-35-31 does not give SCS

an option to serve the owner *or* the tenant. The statute expressly requires service upon both. The trial courts erred in finding SCS complied with SDCL § 21-35-31 when SCS did not provide the requisite notice to tenants in possession of the property. SCS's error was presented to both trial courts at the respective summary judgment hearings. (SR3 2278-2279) (SR5 2433, 2532). However, the error was not mentioned in the written decisions from either circuit.

Strict compliance with the conditions prescribed in SDCL § 21-35-31 is required, but the trial courts did not "read such rigidity into the statute." (SR3 2354). The trial courts erred by permitting only substantial compliance with SDCL § 21-35-31.

b. SCS failed to establish it had obtained adequate security for actual damage caused as required by SDCL § 21-35-31(3).

SDCL § 21-35-31(3) requires a party claiming authorization under the statute to "[m]ake payment to the owner, or provide sufficient security for the payment, for any actual damage done by the entry." Landowners challenged whether the $1 million dollar bond referenced in SCS's June 22 letters was adequate to account for all potential property damage. Landowners concerns over a foreign limited liability company's ability to compensate them for damage were legitimate, and challenging the adequacy of the bond is appropriate under SDCL § 21-35-31.

The June 2022 letters contained no information regarding how many properties and how many states were covered by the bond, nor was any evidence available on how SCS arrived at the $1 million figure. (SR3 1507) (SR5 1620). Landowners sought that information in discovery, but answers or depositions were never provided. At some point during litigation, SCS increased its bond amount to $5 million; however, Landowners questions remained unanswered.

At summary judgment, Landowners asserted again that the bond was insufficient and that further discovery was needed to determine the bond's sufficiency. (SR3 1641) (SR5 1793). SCS did not provide evidence that the bond was adequate to cover damages caused by its proposed exploratory activities. Despite SCS providing no evidence to support the bond's sufficiency, the trial court found SCS's letters stating they had obtained sufficient security to be adequate. (SR3 2259).

SDCL § 21-35-31(3) requires sufficient security for actual damage. Landowners properly called the particulars of the bond into question. The trial courts erred in determining the bond represented sufficient security for actual property damage without supporting evidence.

V. The trial courts erred by denying Landowners Motion to Continue Summary Judgment for discovery purposes.

A circuit court's refusal to grant additional discovery prior to awarding summary judgment is reviewed for abuse of discretion. *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, ¶ 24, 848 N.W.2d 273, 281. "SDCL 15–6–56(f) ... provides that a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion. Under that rule, the facts sought through discovery must be 'essential' to opposing summary judgment...." *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39, ¶ 6, 766 N.W.2d 510, 512.

In advance of the hearing on SCS's Motion for Summary Judgment, Landowners filed a Motion to continue the summary judgment proceedings pursuant to SDCL § 15-6-56(f). (SR3 1557) (SR5 1769). The Motions were accompanied by the Affidavit of Counsel which precisely identified the probable facts not available, what steps have been

taken to obtain those facts, and why those facts are essential to oppose summary judgment. (SR3 1561) (SR5 1771).

Landowners sought to depose SCS corporate designees pursuant to SDCL § 15-6-30(b)(6). (SR3 1561-1565) (SR5 1773-1775). These depositions were initially requested in September of 2022. (SR3 1562). The affidavits of counsel detail the efforts Landowners had taken to secure the requested depositions over the preceding four months, all of which were rebuffed. (SR3 1561-1565) (SR5 1773-1775). Depositions on the noticed topics were particularly relevant given the Offtake Agreements had only recently been disclosed and the substance of the agreements was directly relevant to SCS' status as a common carrier. (SR3 1561-1565) (SR5 1773-1775). Landowners also sought the testimony of the CEOs of SCS's affiliate ethanol plants. (SR3 1947-1963) (SR5 1773-1775) The requested depositions would have provided facts directly relevant to SCS' status as a common carrier, its compliance with SDCL § 21-35-31, and its financial ability to compensate Landowners for actual damage resulting from exploratory work on the property, which were all genuinely in dispute.

Granting Landowners request for additional discovery prior to summary judgment would have led to a more developed record for the lower courts to consider and avoided the foreseeable errors that accompanied their rushed decisions. Denial of Landowners' request was an abuse of discretion. This case should be remanded for further consideration of SCS's status as a common carrier with instruction to permit reasonable discovery on that topic.

VI. The trial courts erred by finding SDCL § 21-35-31 authorized subsurface exploratory activities.

The trial courts erred by finding SCS's proposed examination activities were within the scope of activity authorized by SDCL § 21-35-31. SCS' written notices to Landowners include survey and examination activities that drastically exceed the scope of SDCL § 21-35-31. The statute authorizes a prospective condemnor to enter private property for "examination and survey." Nowhere in the statute are soil disturbances authorized, let alone the destructive measures SCS proposed.

The notices indicate that surveys for "civil construction, biological, and cultural reasons" will occur. (SR3 1504, 1507-1511) (SR5 1620-1753). The notices state that the intended surveys typically require "hand tools (e.g., spades, shovels, augurs)" and may result in small soil disturbances at discrete locations depending on encountered conditions. *Id.* SCS sought to perform geotechnical work on certain properties which is defined by SCS as follows:

> This process utilizes a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks.
>
> During the drilling activities, the soil and rock materials will be observed, logged, and visually classified…various types of drilling bits and methods may need to be used based upon conditions, such as continuous flight augers, hollow stem augers, wet rotary drills, or rock coring drills. Other vehicles will also be on site, including the drilling support truck and trailer. Samples will be collected and taken to a laboratory for additional testing.
>
> The hole will be backfilled with the drill cuttings or with a cement/bentonite grout mixture. (SR5 1627, 1630, 1704, 1725) (SR3 1508).

SCS sought to perform "deep testing" on certain properties which is defined by SCS as follows:

> The use of a backhoe to dig trenches typically 7 to 10 feet in length, 2 to 3 feet in width, and 6 to 10 feet deep. This will allow archeologists and cultural resource specialists the ability to determine whether cultural materials are present. (SR5 1621, 1624).

Surveys do not require hand tools for digging, track mounted drilling rigs, continuous flight augers, hollow stem augers, wet rotary drills, rock coring drills, or backhoes. The plain meaning of a survey is "to ascertain corners, boundaries, and divisions, with distances and directions…" *Survey*, Black's Law Dictionary (11th ed. 2019). "Civil construction, biological, and cultural" surveys are beyond the scope of SDCL § 21-35-31. Similarly, underground examinations prior to formal condemnation of an easement are not appropriate. "Permissible entry 'cannot amount to other than such innocuous entry and ... examination as would suffice for the making of surveys or maps." *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

According to North America's preeminent condemnation treatise, *Nichols on Eminent Domain*:

> Courts have typically defined a survey as the measurement of land. Invasive activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement. A statutory right to enter on land for the purpose of making an examination or survey does not include the right to engage in a course of destruction. For example, the right to make an examination or survey does not include the right to conduct archaeological digs. Nor does the right to make examinations, surveys, and maps permit installation of permanent survey monuments. Consequently, entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing. *Nichols*, § G32.06 (2021).

SCS's proposed activities grossly overstep the authority granted by SDCL § 21-35-31. There is no legal support for the trial courts' approval of these activities, and the leading treatise on the topic expressly prohibits soil disturbance under the precise language contained in South Dakota's statute. If the Court affirms the lower courts on other issues within this appeal, it should remand with instruction to limit surveys to above ground activities.

CONCLUSION

Landowners respectfully request the Court reverse the trial court and invalidate SDCL § 21-35-31 because it effects a taking without just compensation in violation of the Fifth Amendment to the United States Constitution and Article VI, § 13 of the South Dakota Constitution and deprives Landowners of due process of law pursuant to the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution. If the Court affirms the trial courts on the constitutionality of SDCL § 21-35-31, Landowners alternatively request the Court reverse the lower courts' decisions to grant summary judgment on SCS' status as a common carrier pursuant to SDCL § 49-7-11 and its compliance with the requirements of SDCL § 21-35-31 and remand for trial on those claims.

Appellants hereby request oral argument before this Honorable Court.

Dated this 28th day of August, 2023.

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CERTIFICATE OF SERVICE

This is to verify that on the 28th day of August 2023, I filed via Odyssey, a true and correct copy of the foregoing ***BRIEF OF APPELLANT LANDOWNERS*** and served via email the following attorneys:

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/s/ Nicholas G. Moser
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IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PATRICIA K. DEEG TRUST,
Plaintiff and Appellant,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR,

App. No. 30317 and 30338

APPENDIX OF APPELLANT LANDOWNERS

Filed: 8/28/2023 4:44 PM CST Supreme Court, State of South Dakota #30338

Plaintiff's and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP,

FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appellant Landowners submit this Appendix in support of its brief.

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Dated this 28th day of August, 2023.

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STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

PROTECTIVE ORDER

This matter comes before the Court on SCS Carbon Transport LLC's motion for entry of a protective order. For good cause shown and in accordance with SDCL § 15-6-26(c), **IT IS HEREBY ORDERED** that confidential information be disclosed only in designated ways:

DEFINITIONS

1. As used in the Protective Order, the terms listed below are defined as follows:

a. **"Action"** refers to the above-captioned consolidated action: (a) *Patricia K. Deeg Trust v. SCS Carbon Transport LLC*, Beadle County no. 02CIV22-000129; and (b) *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC*, Lake County no. 39CIV22-000064 (together, "Action").

b. **"Confidential Discovery Material"** is Discovery Material designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of this Protective Order.

c. **"Confidential"** documents are documents designated under Paragraph 4.a.

d. **"Highly Confidential – Attorneys' Eyes Only"** documents are documents that are either: (i) designated under Paragraph 4.b; or (ii) designated as "Highly Confidential" in the Other South Dakota Cases, as defined below.

e. **"Documents"** (whether capitalized or not) are all materials within the scope of SDCL § 15-6-34(a).

f. **"Other South Dakota Cases"** are: See Exhibit A.

g. **"Outside Attorneys"** means outside counsel of record for any Party.

h. **"Outside Vendors"** means messenger, copy, coding, and other clerical-services vendors not employed by a Party or its Outside Attorneys.

i. **"Written Assurance"** means an executed document in the form attached as Exhibit B.

SCOPE

2. This Protective Order applies to all information, documents, and things exchanged in or subject to discovery that are produced or otherwise provided in the Action, either by a Party or Non-Party (each a "Producing Person"), to any other Party or Non-Party, in response to or in connection with any discovery requests, including, but not limited to, deposition testimony

(whether based on oral examination or written questions), interrogatories, answers to interrogatories, requests for admission, responses to requests for admissions, document requests, documents, information, and other things produced, as well as any and all copies, abstracts, digests, notes, summaries, and excerpts thereof ("Discovery Material").

3. No action taken in accordance with the Protective Order will be construed as a waiver of any claim or defense in the Action or of any position as to discoverability or admissibility of evidence.

DESIGNATIONS

4. A Producing Person may designate a document "Confidential" or "Highly Confidential – Attorneys' Eyes Only" to protect information within the scope of SDCL § 15-6-26(c) (the "Designating Party"), in accordance with the following provisions:

a. "Confidential" will mean sensitive, confidential, proprietary information, or non-public personal information (e.g., social security numbers) that has not been made public by the Designating Party and that the Designating Party reasonably and in good faith believes contains or comprises: (i) material that is confidential pursuant to applicable law, including trade secrets, and any other materials that the Designating Party believes in good faith to be entitled to protection under SDCL § 15-6-26(c)(7); (ii) proprietary or otherwise sensitive non-public business information; or (iii) information implicating an individual's legitimate expectation of privacy, such as personal financial information, personal identifying information, or other personally or competitively sensitive information. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good faith assessment of whether the passage of time has eliminated the need to mark the material as "Confidential."

b. "Highly Confidential – Attorneys' Eyes Only" will mean Confidential Discovery Material that the Designating Party reasonably and in good faith believes is so highly sensitive and is of such a nature that disclosure to persons other than those listed in Paragraph 10 would create a substantial risk of economic injury that could not be avoided by less restrictive means. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good-faith assessment of whether the passage of time has eliminated the need to mark the material as "Highly Confidential – Attorneys' Eyes Only."

c. As for electronic or hard copy documents designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," each will be clearly marked or stamped as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as applicable, using means sufficient to ensure that every page of such document, when printed, contains the appropriate mark or stamp, where practicable, and will not interfere with legibility or audibility. But electronically stored information ("ESI") produced in native format need not be produced using a means sufficient to ensure that every page of such document contains the appropriate mark or stamp so long as: (i) a TIFF placeholder image corresponding to the ESI produced in native format is produced that includes the "Confidential" or "Highly Confidential – Attorneys' Eyes Only" mark; (ii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears in the file name of the natively-produced ESI; or (iii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears on the label of the media or in the transmittal email containing natively-produced ESI.

5. Third parties whose documents are produced in this Action may also designate documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" subject to the same

protections and constraints as the Parties to this Action. A copy of this Protective Order shall be served along with any subpoena served in connection with the Action.

LIMITATIONS ON USE OF CONFIDENTIAL DISCOVERY MATERIAL

6. All Confidential Discovery Material produced in this Action may be used solely for purposes of this Action.

7. Any person subject to this Protective Order who receives Confidential Discovery Material pursuant to the terms of this Protective Order may not disclose such Confidential Discovery Material to anyone else except as expressly permitted hereunder.

8. Nothing in this Order precludes a Party from: (a) using its own documents or information; or (b) using documents or information that are public or that are obtained from a source other than a Producing Party.

ACCESS TO CONFIDENTIAL DISCOVERY MATERIAL

9. Access to Confidential documents will be limited to:

a. The Court and its staff;

b. In-house counsel, representatives, and current employees of the Parties responsible for overseeing and assisting with the Action to whom disclosure is reasonably necessary, and Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

e. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) it is shown

through testimony or other evidentiary proof that the witness prepared, received, or reviewed the information or otherwise to have personal knowledge regarding its contents; or (2) (a) the counsel who discloses the information to the witness determines, in good faith, that such disclosure is reasonably necessary and appropriate to assist in the conduct of this Action; and (b) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

f. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B; Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B; and

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other disputes, and their necessary personnel.

10. Access to "Highly Confidential – Attorneys' Eyes Only" documents will be limited to:

a. The Court and its staff;

b. Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action retained to transcribe testimony;

e. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

f. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) the witness is shown through testimony or other evidentiary proof to have prepared, received or reviewed the Highly Confidential Information or otherwise to have personal knowledge regarding its contents; and (2) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically

retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other dispute, and their necessary personnel; and

j. Designated in-house counsel for SCS Carbon Transport LLC, only during, or in preparation for, the hearings of any dispositive motions (including any hearing on class certification). The following individuals will be the designated in-house counsel for SCS Carbon Solutions, LLC: Jess Vilsack, General Counsel, Summit Carbon Solutions, LLC.

11. Each person appropriately designated under Paragraph 9.f or 9.g to receive "Confidential" information and in Paragraph 10.f or 10.g to receive "Highly Confidential – Attorneys' Eyes Only" documents will execute a "Written Assurance" in the form attached as Exhibit B. Outside Attorneys who provided access to Discovery Material to persons in accordance with this Paragraph will maintain a collection of each executed Exhibit B.

USE OF CONFIDENTIAL DISCOVERY MATERIAL

12. **A confidential document may be filed only in accordance with SDCL Chapter 15-15A and any other applicable state law. Any Party seeking to file with the Court documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under seal shall do so in accordance with SDCL Chapter 15-15A and any other applicable state law and local court procedures.**

Except as otherwise provided in SDCL Chapter 15-15A and any other applicable state law, a Party intending to present another Party's or a Non-Party's Confidential Discovery Material

at a hearing or trial must promptly, and no less than three days before the hearing or trial, notify all counsel of record for the Designating Party and for all other Parties so that they may seek relief from the court.

13. All depositions or portions of depositions taken in the Action that contain confidential information may be designated by a Party or its counsel as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and thereby obtain the protections accorded other "Confidential" or "Highly Confidential – Attorneys' Eyes Only" documents. Confidentiality designations for depositions will be made either: (a) orally on the record and requesting that the relevant portion(s) of testimony be so designated; or (b) by written notice to the Parties and those who were present at the deposition. Unless otherwise agreed, depositions will be treated as "Highly Confidential – Attorneys' Eyes Only" during the 30-day period following receipt of the transcript. The deposition of any witness (or any portion of such deposition) that encompasses "Confidential or Highly Confidential – Attorneys' Eyes Only" documents and information will be taken only in the presence of persons who are qualified to have access to such information. Nothing in this Paragraph will apply to or affect the confidentiality designations on Discovery Material entered as an exhibit at depositions. Nor will anything in this Paragraph preclude the witness from reviewing his or her deposition transcript.

14. If testimony is designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," the court reporter, who will first have agreed to abide by the terms of this Paragraph, will be instructed to include on the cover page of each such transcript the legend: "This transcript portion contains information subject to a Protective Order and will be used only in accordance therewith," and each page of the transcript will include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate. If the deposition is videotaped, the videotape

will also be subject to the same level of confidentiality as the transcript and include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate, if any portion of the transcript itself is so designated.

15. Any document produced (or material containing information from a document produced), any deposition transcripts or exhibits, any expert reports, any filings, and other materials from the Other South Dakota Cases involving any of the Parties in this Action that were designated therein as "Confidential" or "Highly Confidential, Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of the operative Protective Orders in those cases shall be given the corresponding confidentiality designation in this case, unless the original source of the document agrees to waive confidentiality, the document has since become public, or the Court orders otherwise.

16. If a Party or any other person or entity that has agreed to be bound by this Protective Order by executing Exhibit B (a "Subpoena Recipient") is served with a subpoena or a court order issued in other litigation or a request from a legislative or other administrative body with authority to compel disclosure requesting information or items designated in the action as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," they must promptly notify in writing the Designating Party. Such notification will include a copy of the subpoena or order. The Subpoena Recipient will promptly notify in writing the party who caused the subpoena or order to issue in the other litigation or proceedings that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification will include a copy of this Protective Order. The Subpoena Recipient must cooperate with the Designating Party with respect to all reasonable procedures sought by the Designating Party whose material may be affected. If the Designating Party timely seeks a protective order, the Party served with the subpoena will not produce any information designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" before a determination by a court

in accordance with SDCL § 16-5-45(a)-(g), unless the Subpoena Recipient has obtained the Designating Party's permission. The Designating Party will bear the burden and expense of seeking protection in that court of its confidential material. Nothing contained in this provision will be construed as authorizing or encouraging a Subpoena Recipient in this action to disobey a lawful directive from another court.

CHANGES TO DESIGNATIONS

17. If at any time before the trial of this Action, a Producing Person realizes that some portion of Discovery Material previously produced should be designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only,"they may so designate it by apprising all prior recipients of the Discovery Material in writing, and thereafter such designated portion of the Discovery Material will be deemed to be and treated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the terms of this Protective Order. Notwithstanding this provision, a Party may challenge the asserted confidentiality designation as provided for herein.

18. Any Party who inadvertently fails to identify documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will provide written notice and substitute appropriately-designated documents. Any Party receiving such improperly designated documents will retrieve such documents from persons not entitled to receive those documents and, upon receipt of the substitute documents, will return or destroy the improperly designated documents.

19. Any Party may request a change in the designation of any information designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only." Any such document will be treated as designated until the change is completed. If the requested change in designation is not agreed to by the Parties, the Party seeking the change may move the Court for appropriate relief, providing notice to any Party or third party whose designation of produced documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" in the Action may be affected. The Party asserting

that the material is "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will have the burden of proving that the information in question is within the scope of protection afforded by SDCL § 15-6-26(c). If the motion affects a document produced by a Non-Party then, with respect to the motion, that Non-Party is entitled to the same notice and opportunity to be heard as a Party.

DISPOSITION OF CONFIDENTIAL DISCOVERY MATERIAL

20. Within 60 days of the termination of the Action, including any appeal, each Party to the Action will either destroy or return to the other Parties all documents produced by the other Parties that were designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies of such documents, and will destroy all extracts and data taken from such documents. Each Party will provide a certification as to such return or destruction within the 60-day period. But attorneys will be entitled to retain a set of all documents filed with the Court and all correspondence generated in connection with the Action as well as materials that contain, reflect, incorporate, attach, or reference attorney work product, so long as the terms of this Protective Order will continue to govern any such retained materials. Additionally, with respect to ESI, the Parties need not destroy backup media so long as the Party has a data destruction policy for the backup media that will result in the overwriting or destruction of that data. Similarly, in-house counsel, external counsel, experts or consultants retained to assist with the Action, and their respective employees or staff, will not be required to destroy "Confidential" or "Highly Confidential – Attorneys' Eyes Only" or material contained in their email accounts or document management systems, so long as they otherwise comply with this Protective Order with respect to such retained material. Nothing in this Paragraph shall obligate any Party to destroy its own Confidential Information at the close of this Action or at any other time.

PRIVILEGED AND PROTECTED MATERIALS

21. To the greatest extent permitted by law, the production or disclosure of privileged or protected materials, whether inadvertent or otherwise, does not waive any applicable privilege or protection in this Action or any other proceeding. The Parties intend for this Paragraph to be interpreted to provide the maximum protection allowed by law.

22. Any Party who inadvertently produces or discloses privileged materials will, promptly upon discovery of such inadvertent production or disclosure, notify the receiving Party/ies in writing and request that the documents be returned. When a receiving Party receives notice of such inadvertent production or disclosure it must sequester, return, or destroy the inadvertently produced or disclosed privileged materials and confirm that any persons or entities to whom it has provided such privileged materials have sequestered, returned, or destroyed the privileged materials. The privileged materials may not be used or disclosed for any purpose—including to challenge the assertion of privilege over those materials—unless and until the assertion of privilege is withdrawn or overruled. The privileged materials will be deleted or otherwise permanently removed from any systems used to house documents, including document review databases, e-rooms, and any other locations that store the privileged materials. Any extracts, notes or summaries referring or relating to any such inadvertently produced or disclosed privileged materials must likewise be returned or destroyed. Within seven days of providing notice of inadvertent production or disclosure, a Party or Producing Person claiming privilege for inadvertently produced or disclosed privileged materials must state the basis for the privilege assertion. Nothing herein will prevent a receiving Party from challenging the propriety of a privilege assertion by submitting a challenge to the Court consistent with applicable law, although the privileged materials themselves cannot be used or disclosed as part of such a challenge. The Party asserting privilege bears the burden of establishing the privileged nature of any inadvertently

produced or disclosed privileged materials. If a receiving Party becomes aware that it is in receipt of information or materials that it knows or reasonably should know is privileged, protected, or immune, counsel for the receiving Party will immediately take steps to: (i) stop reading such information or materials; (ii) notify counsel for the Producing Party of such information or materials; (iii) collect all copies of such information or materials; (iv) sequester, destroy, or return such information or materials to the Producing Party; and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

EXPERT WITNESS DISCLOSURE

23. Disclosure of Certain Information Regarding Expert Witnesses.

a. No subpoenas (for depositions or documents) need be served on any SDCL § 15-6-26(b)(4) expert in this case. Instead, the Party or Parties retaining such expert will make him or her available for deposition, at a time mutually agreed to by the Parties. If an expert is required to submit a report, the deposition of such expert will be conducted after the report is served at a time mutually agreed by the Parties. If such an expert has already been deposed as a fact witness, he or she may be deposed again in his or her expert capacity.

b. Within three business days of service of a report, the Party submitting such report shall produce: (i) any data, facts or other information relied upon by the expert in forming the expert witness's opinions and not previously produced in this action, as well as a list identifying by bates range or other appropriate identifiers any produced data, facts, or other information relied upon by the expert in forming the expert witness's opinions; (ii) any exhibits that will be used to summarize or support the expert witness's opinions; (iii) the expert witness's qualifications, including a list of all publications authored in the previous ten years; (iv) a list of all other cases, during the previous four years, where the expert witness has testified as an expert at trial or by deposition; and (v) a statement of the compensation to be paid for the study and testimony in this case. To the extent such disclosures

include charts, tables, exhibits, information or data processed or modeled by computer at the direction of a disclosed testifying expert in the course of forming the expert's opinions, machine-readable copies of the exhibits, information, or data (including all linked data files, input and output files, formulas contained within spreadsheet cells and similar electronic information necessary to understand the charts, tables, exhibits, information, or data) sufficient to allow the replication of all analysis contained in the report, where applicable, along with appropriate computer programs and instructions necessary to access and use the data (unless such computer programs are reasonably and readily commercially available) shall also be provided with such disclosures. Information gleaned from non-public sources shall also be provided with such disclosures.

24. Non-Disclosure of Certain Information Regarding Expert Witnesses.

a. The below-listed categories of documents, recording media, and communications need not be disclosed by any Party and an expert may not be examined at deposition, hearing, or trial on the contents of the below-listed categories of documents, recording media, and communications (subject to the exceptions at the end of this Paragraph):

i. any notes or other writings taken or prepared by or for an expert witness in connection with this matter (aside from the final written expert report(s) and notes generated while testifying), including:

1. written correspondence or memoranda to or from, and notes of conversations between and among the expert witness and the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs); and/or

2. copies of materials produced by any Party in this Action bearing the notes, markings, or comments of the expert, the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs);

ii. any draft reports, draft studies, draft work papers, draft declarations, or other draft materials prepared by, for, or at the direction of an expert witness, regardless of the form in which the draft is recorded; and

iii. any oral or written communication between and among expert witnesses and their assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs), regardless of the form of the communications. For avoidance of doubt, this includes oral or written communication between any of the individuals listed above, including but not limited to (a) one expert and/or their staff and assistants and (b) another expert and/or their staff and assistants.

b. The foregoing exclusions from disclosure set forth in subparagraphs (a)(i)–(iii) do not apply to any communications, documents, data sets, or analyses upon which an expert relies as a basis for his or her ultimate opinion. In addition, examination shall be permitted on alternative analyses, methodologies, or approaches to issues on which the expert is testifying, regardless of whether the expert considered them in forming the expert's opinion, including but not limited to analyses that the expert performed but ultimately did not rely upon.

c. Communications between and among experts, their staffs, and attorneys shall not be discoverable unless relied upon as a basis for any expert's ultimate opinion(s). Although communications relating to compensation for the expert's work or testimony shall not be required to be produced or exchanged, the Parties may examine witnesses at deposition or trial as to the amount they charge.

25. Except as provided under SDCL § 15-6-26(b)(4)(D), no Party may take discovery of an expert who has been retained or specially employed by another Party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, without the express written consent and authorization of the Party employing such expert.

DUTY TO NOTIFY

26. If any Party learns of a potential breach of this Protective Order or of the confidentiality of any document designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under this Protective Order, that Party will promptly inform all other Parties in writing of the breach.

MODIFICATION AND DURATION OF THIS PROTECTIVE ORDER

27. Any Party may apply to the Court for a modification of the Protective Order, and nothing in this Protective Order will be construed to prevent a Party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

28. The obligations imposed by the Protective Order will survive the termination of the Action.

PRIOR ORDERS

29. **All prior consistent orders remain in full force and effect.**

REMEDIES

30. **Failure to comply with any provision of this protective order or any other prior consistent order shall subject the non-complying party, non-complying counsel and/or the party such counsel represents to any and all appropriate remedies, sanctions and the like, including without limitation: assessment of costs, fines and attorneys' fees and disbursements; waiver of rights to object; exclusion or limitation of witnesses, testimony, exhibits, and other evidence; striking of pleadings; complete or partial dismissal with prejudice; entry of whole or partial default judgment; and/or any other relief that this Court may from time to time deem appropriate.**

BY THE COURT:

1/3/2023 7:37:02 AM

Circuit Court Judge

Attest:
Dykstra, Amber
Clerk/Deputy

EXHIBIT A

Other South Dakota Cases:

- *Helfenstein et al. v. SCS Carbon Transport LLC*, McPherson County no. 45CIV22-000014
- *SCS Carbon Transport LLC v. Jordre et al.*, McPherson County no. 45CIV22-000018
- *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC*, Spink County no. 71CIV22-000047
- *Bossly et al. v. SCS Carbon Transport LLC*, Brown County no. 06CIV22-000253
- *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC*, Edmunds County no. 22CIV22-000020
- *Geide et al. v. SCS Carbon Transport LLC*, Minnehaha County no. 49CIV22-001694
- *Bell-Murphy Family Trust et al. v. SCS Carbon Transport LLC*, Lincoln County no. 41CIV22-000365
- *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC*, Lake County no. 39CIV22-000064
- *Patricia K. Deeg Trust v. SCS Carbon Transport LLC*, Beadle County no. 02CIV22-000129
- *SCS Carbon Transport LLC v. Mathern et al.*, Brown County no. 06CIV22-000335
- *SCS Carbon Transport LLC v. Skelton et al.*, Codington County no. 14 CIV22-000274
- *SCS Carbon Transport LLC v. Wieseler et al.*, Hand County no. 29CIV22-000021
- *SCS Carbon Transport LLC v. Benson et al.*, Lake County no. 39CIV22-000083
- *SCS Carbon Transport LLC v. Job et al.*, McPherson County no. 45CIV22-000024
- *SCS Carbon Transport LLC v. Thorson et al.*, Spink County no. 71CIV22-000057

- *SCS Carbon Transport LLC v. Fossum et al.*,
  Lincoln County no. 41CIV22-000476

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

EXHIBIT B

NON-DISCLOSURE WRITTEN ASSURANCE

I, _____, acknowledge that I have read and understand the Protective Order in this Action dated _____, filed in the above-captioned case pending in the Third Judicial Circuit Court of South Dakota. I agree to comply with and be bound

by the provisions of the Protective Order. I understand that any violation of the Protective Order may subject me to sanctions by the Court.

Consistent with the terms of this Protective Order, I will not divulge any documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" obtained under such Protective Order, or the contents of such documents, to any person other than those specifically authorized by the Protective Order. I will not copy or use such documents except for under the terms of the Protective Order.

As soon as practical, but no later than 30 days after final termination of this Action, I will return to the attorney from whom I have received them any documents in my possession designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies, excerpts, summaries, notes, and other materials containing or discussing some or all of the contents of such documents.

I submit myself to the jurisdiction of the Third Judicial Circuit Court of South Dakota for the purpose of enforcing or otherwise providing relief relating to the Protective Order.

Executed on _____ _____
(Date) (Signature)

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned cases:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 1,900 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.*

5. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

6. The Patricia K. Deeg Trust and the Betty Jean Strom Trust ("Landowners") own or are in possession of real property that will be crossed by SCS's pipeline:

* *See also In the Matter of the Application by SCS Carbon Transport LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, Docket No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

Filed: 1/13/2023 3:07 PM CST Beadle County, South Dakota 02CIV22-000125

Landowner	County	APN	Legal Description
Patricia K. Deeg Trust	Beadle	5004	SEC 35-T112N-R61W: NW4
	Beadle	4965	SEC 26-T112N-R61W: SE4 EX 11 AC E OF ROAD
	Beadle	4959	SEC 25-T112N-R61W: SW4
Betty Jean Strom Trust	Lake	090001055336210	SEC 36-T105N-R53W: N1/2NW4
	Lake	090001055325310	SEC 25-T105N-R53W: SW1/4 EXC BONNEMA TRACT

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

7. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

8. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–9; Schovanec Aff. Exhibits 1, 2.

9. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibit 1 at p. 1, Exhibit 2 at p. 1.

10. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibit 1 at pp. 1–2, Exhibit 2 at pp. 1–2.

11. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2. For both Landowners, SCS seeks a "typical survey," and for the Patricia K. Deeg Trust, SCS also seeks a "geotech survey." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

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- Page 1346 -

12. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

13. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." Schovanec Aff. Exhibit 1 at p. 2.

14. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 11; Schovanec Aff. Exhibit 3.

15. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

16. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 10.

Filed: 1/13/2023 3:07 PM CST Beadle County, South Dakota 02CIV22-000129
- Page 1347 -
APP026

Dated this 13th day of January, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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Attorneys for SCS Carbon Transport LLC

Filed: 1/13/2023 3:07 PM CST Beadle County, South Dakota 02CIV22-000125

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 13th day of January, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.		02CIV22-000129 **LANDOWNERS STATMENT OF DISPUTED MATERIAL FACTS IN RESISTENCE TO SCS MOTION FOR SUMMARY JUDGMENT**
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.		39CIV22-000064

Comes now, Landowners by and through their attorneys of records, and submits the following Landowners Statement of Disputed Material Facts.

1. Deny. As stated defendants act as if there idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that land owners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *See Supplemental Affidavit of Nicholas G. Moser in Support of Landowner's Resistance to Summary Judgment*, ¶ 5.

2. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 6.

3. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 7.

4. Admit something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.* at ¶ 8.

5. Deny. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 9.

6. Deny that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 10.

7. Deny. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop

competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 11.

8. Deny, nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 12.

9. Admit that the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 13.

10. Deny as to what the letters inform Landowners of and object as to foundation. Deny the "link" which is text on a page informs anyone of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 14.

11. Admit as to the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 15.

12. Deny as to "typical" this is without definition or limit under the unconstitutionally challenged law. Admit SCS witness describes way "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 16.

13. Admit what is stated are the words in the letter. Deny the authenticity of the underlying statement and deny the truth of the matter asserted. Deny that there would be "no impact" to the land. Object as to vague and ambiguous as to what is "normal land". Object insofar as SCS has failed to prove that Landowners land is in fact "normal land." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 17.

14. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 18.

15. Admit this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 19.

16. Admit that Landowners do not believe the desired and unnecessary access and unfetter run of the land is lawful constitutional. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 20.

Dated this 14th day of February, 2022.

By: /s/ Brian E. Jorde
Brian E. Jorde,
Pro Hac Vice
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By: /s/ Nicholas G. Moser
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Plaintiff's Lawyers

CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 14th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
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Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

02CIV22-000129

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

DAN FELDHAUS
Court Reporter
200 E. Center Street
Madison, SD 57042
605-256-5285
605-256-5012

March 8, 2023

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101 S. Tryon St., STE 4000
Charlotte, NC 28280

RE: *Patricia K. Deeg Trust v. SCS Carbon Transport LLC & Betty Jean Strom Trust, Rita Brown, Craig & Lisa Basler Family Trust v. SCS Carbon Transport LLC*; 02CIV22-129 & 39CIV22-64 Consolidated—Motion to Compel Discovery; Motion for Continuance; and Motion for Summary Judgment

INTRODUCTION

Defendant SCS Carbon Transport LLC ("SCS") filed a Motion for Summary Judgment seeking dismissal of Plaintiff Landowners ("Landowners") Amended Complaint with prejudice

and granting of SCS's Counterclaims. Landowners resist summary judgment, believing the motion to be premature, and filed a Motion to Compel Discovery and a Motion for Continuance. A hearing was held in Lake County, South Dakota, on February 28, 2023, where this Court took the matter under advisement. For the reasons set forth below, Landowners' Motion to Compel Discovery and Motion for Continuance are denied, and SCS's Motion for Summary Judgment is granted.

BACKGROUND

SCS and its parent Summit Carbon Solutions, LLC ("Summit") have intentions of developing an interstate pipeline that would receive, transport, and deliver carbon dioxide through a network of approximately 2,000 miles of underground pipelines. The route of the proposed pipeline travels through eighteen counties in South Dakota and four other states before reaching a sequestration site in North Dakota for storing of the carbon dioxide.

Prior to any pipeline construction, SCS must enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations, including core or water sampling activities. The purpose of said surveys and investigations is to identify and describe the property needed to construct the pipeline and appraise the property to acquire any requisite easements.

Pursuant to and in accordance with SDCL § 21-35-31, SCS needed to obtain a siting permit before entering on Landowners private property to conduct the surveys. SCS sent letters to Landowners dated June 4, 2022, seeking consent for SCS to enter their property for the surveys. Landowners did not consent; rather, they instituted these lawsuits with complaints filed July 19, 2022. The complaints were consolidated in October 2022. From their Amended Complaint filed October 27, 2022, Landowners assert six claims against SCS: 1) that SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation; 2) that SDCL § 21-35-31

amounts to an unconstitutional taking as applied; 3) that SDCL § 21-35-31 violates the Due Process Clause of the State and Federal Constitutions; 4) that SCS is not of the class of corporations authorized to act under SDCL § 21-35-31; 5) that SCS's notice letters to Landowners are insufficient under SDCL § 21-35-31; and 6) that the survey access SCS seeks is not authorized under SDCL § 21-35-31. SCS counterclaimed, seeking declaratory and injunctive relief authorizing it to survey despite objection from Landowners.

On December 28, 2022, this Court issued a Memorandum Decision granting SCS's Motion for Entry of Protective Order, and in doing so, made the following findings: 1) that carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value; and 2) that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee. This Memorandum Decision was introduced as a handout to the Senate Commerce and Energy Committee when it considered House Bill 1133 at the current legislative session. While not binding authority, the Committee effectively affirmed this Court's findings when it denied the bill, which was pushed by Landowners and sought to amend the definition of a commodity for the purpose of qualifying as a common carrier under SDCL § 49-7-11.

These prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31. Landowners also withdrew their as applied constitutional challenge of SDCL § 21-35-31 in their brief resisting summary judgment. As such, the remaining issues before the court are: 1) the facial constitutionality of SDCL § 21-35-31; 2) if SDCL § 21-35-31 violates state and federal procedural due process; 3) the sufficiency of SCS's notice letter to Landowners under SDCL § 21-35-31; and 4) if SDCL § 21-35-31 authorizes SCS's surveys. Because these remaining issues are questions of

law, a decision on summary judgment is ripe, and each issue will be discussed in turn. Therefore, Landowners' motion to compel discovery and for a continuance are moot.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765. In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings but, rather, must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). "Where no genuine issues of material fact exist and the trial court resolves the questions of law in a party's favor, summary judgment is appropriate." *Weber v. First Fed. Bank*, 523 N.W.2d 720, 721 (S.D. 1994) (citing *King v. John Hancock Mut. Life. Ins.*, 500 N.W.2d 619 (S.D. 1993)).

APPLICABLE LAW & ANALYSIS

1. Whether SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation

"Challenges to the constitutionality of a statute meet formidable restrictions." *State v. Allison*, 2000 S.D. 21, ¶ 5, 607 N.W.2d 1, 2 (internal quotation omitted). "Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until

the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 10, 851 N.W.2d 208, 213. The burden of proving the unconstitutionality of a statute is on the challenger. *Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 8, 578 N.W.2d 134, 134. "[T]he South Dakota Supreme Court construes South Dakota laws in accordance with the doctrine of constitutional avoidance, which requires adopting a construction of a law that avoids questions about its constitutionality if such a construction is 'fairly possible[.]'" *Sisney v. Kaemingk*, 15 F.4th 1181, 1198 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022) (quoting *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985)). A statute's words are to be defined according to their ordinary meaning to effect its purpose. *Hofer v. Redstone Feeders, LLC*, 2015 S.D. 75, ¶ 15, 870 N.W.2d 659, 662. Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶ 15, 727 N.W.2d 808, 812.

Landowners challenge the constitutionality of SDCL § 21-35-31's pre-condemnation surveys, arguing they violate Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. These constitutional provisions prohibit the taking of private property for public use without just compensation. S.D. Const. art. VI, § 13; U.S. Const. amend. V. The narrow issue then is whether the pre-condemnation surveys authorized in SDCL § 21-35-31 amount to a taking without the constitutional requirement of just compensation.

In 2016, the South Dakota Legislature adopted SDCL § 21-35-31 which states as follows:

> The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:
> (1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and
(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

SDCL § 21-35-31.

Landowners specifically challenge the constitutionality of the statute considering the United States Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). That case concerned a California regulation that gave agricultural employees the right to self-organize on the premises of an agricultural employer for up to four 30-day periods in one calendar year. *Id.* at 2069. Prior to doing so, a labor organization needed to file a written notice with the Agricultural Labor Relations Board and serve a copy on the employer. *Id.* The Court held that the access regulation appropriated a right to invade the growers' property and therefore constituted an uncompensated *per se* physical taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 2074.

This Court declines to extend *Cedar Point* and hold that SDCL § 21-35-31 and its permitted surveys suffer from the same constitutional infirmities. The government does not take a property interest when it merely asserts a pre-existing limitation upon the landowner's title. *Id.* at 2079 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). In terms of eminent domain, other courts have held that there is an ancillary right to survey land prior to condemnation. As cited by then Judge, now Justice, Salter in litigation concerning the Dakota Access pipeline, the Missouri Supreme Court in *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981) stated the following:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Other jurisdictions, both with and without specific statutes granting the right of entry, have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1985); *State by Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982); *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176 (Ohio App. 5d 2016); *In re Application for Permit to Enter Land for Surys. & Examination Associated with a Proposed N. Dakota Diversion & Associated Structures*, 883 N.W.2d 844 (N.D. 2016). In light of the above-cited authorities and the strong presumption in favor of constitutionality, Landowners have failed to prove beyond a reasonable doubt that SDCL § 21-35-31 unconstitutionally authorizes a taking without just compensation in violation of Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. Rather, this Court finds in favor of SDCL § 21-35-31's constitutionality and that its related surveys are merely a right ancillary to condemnation not amounting to a governmental taking. Summary judgment is granted on this issue.

2. Whether SDCL § 21-35-31 violates state and federal procedural due process

Under the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law." "Due process requires adequate notice and an opportunity for meaningful participation." *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 386 (citing *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160). "A procedural due process claim focuses not on the merits of a deprivation, but on whether the State

circumscribed the deprivation with constitutionally adequate procedures." *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

The plain language of SDCL § 21-35-31 provides adequate notice and an opportunity for meaningful participation. It first allows owners of private property the opportunity to consent to an examination and survey. If consent is not given, the statute mandates the person vested with authority to take private property to both file a siting permit application with the Public Utilities Commission and provide private property owners with thirty days written notice of this filing and expected dates of entry. Because of these mandates, owners of private property are effectively under adequate notice of anticipated examination and surveying and may meaningfully participate by consenting or denying permission to do the same. Furthermore, as seen in this specific case, the procedures set forth in SDCL § 21-35-31 give owners sufficient opportunity to be heard through the judicial process before entry for examination and surveying occurs. Therefore, SDCL § 21-35-31 does not violate state or federal procedural due process, and summary judgment is also granted on this issue.

3. Whether SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31

Giving SDCL § 21-35-31's language a plain meaning to effect its purpose, the Court is satisfied as to the sufficiency of SCS's notice letters under the statute. Landowners take issue with SCS's notice letters in that they did not specify the expected dates of entry, they only contained the hyperlink to the Public Utilities Commission docket rather than the entire siting permit application, and they failed to set out measurement of and submission for damages to private property from the surveys. However, the Court does not read such rigidity into the statute. All that SDCL § 21-35-31 requires is: 1) written notice, including the Public Utilities Commission filing; 2) expected dates of entry; and 3) provide sufficient security for the payment of any actual damages

done to the property by the entry. Within SCS's notice letters to Landowners, it is undisputed a hyperlink to the filing of the siting permit application was included. This is enough under SDCL § 21-35-31 to place Landowners on notice of the filing. Secondly, SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated. Lastly, SCS's letters note that it has secured a bond, now in the amount of $5 million, intended to cover any damage to Landowners' properties. This statement acts as sufficient security to Landowners for the payment of any actual damages sustained on their property. Because SCS's notice letters comport with the plain and ordinary meaning of the words within SDCL § 21-35-31, summary judgment is granted on this issue.

4. Whether the survey access SCS seeks is authorized under SDCL § 21-35-31

SDCL § 21-35-31 authorizes persons with vested authority to first cause an examination and survey to be made as necessary before taking private property for public use. "Examine" means "to test the condition of." *Examine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/examine (last visited Mar. 8, 2023). "Survey" means "to examine as to condition, situation, or value." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Mar. 8, 2023). In interpreting its survey access law[1], the Supreme Court of North Dakota stated that "[t]he definition of 'examination' is not strictly limited to a visual examination" but also includes instances of soil borings that penetrate the ground's surface and are minimally invasive. *In re 2015 Application*, 883 N.W.2d at 848-49.

Considering the ordinary definitions of "examination" and "survey" and the Supreme Court of North Dakota's statutory interpretation, this Court finds that SDCL § 21-35-31 authorizes

[1] N.D. Cent. Code Ann. § 32-15-06 provides in relevant part: "Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof..."

minimally invasive soil disturbances such as those SCS seeks to perform on Landowners' properties. The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones but contemplates the minimally invasive typical and geotech surveys proposed by SCS. Summary judgment is granted on this final issue.

CONCLUSION

Based upon the foregoing analysis, SCS's Motion for Summary Judgment is GRANTED, and Landowner's Amended Complaint is dismissed with prejudice.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

Attest:
McHenry, Marilyn
Clerk/Deputy

Filed on: 03/08/2023 Beadle County, South Dakota 02CIV22-000129

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22—000064
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment and Denying Landowners Motion to Compel Discovery and Motion for Continuance rendered in the above-entitled action on the 15th day of March, 2023, a copy of which is attached hereto and by reference incorporated herein, was reduced to

writing, signed by the Court, attested by the Clerk, and filed in the Beadle County Clerk's office on the 15th day of March, 2023.

Dated this 16th day of March, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: */s/ Justin L. Bell*

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CERTIFICATE OF SERVICE

Justin L. Bell, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 16th day of March, 2023, he electronically filed and served a true and correct copy of the foregoing via the Odyssey File & Serve system, which will notify the following attorneys of record:

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/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064
PATRICIA K. DEEG TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

This matter came be heard on the 28th day of February 2023 before the Honorable Patrick T. Pardy on Defendant SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, and Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023. Said Motion having been argued by all parties appearing at said hearing, Defendant SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP and Brian D. Boone and Matthew Hooker of Alston & Bird LLP, and Plaintiffs having been represented by Nicholas G. Moser of Marlow, Woodward & Huff, Prof. LLC, and Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present

arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, which is further explained in the Court's Memorandum Decision dated March 8, 2023, which is fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, is hereby **GRANTED** and all of Plaintiffs' claims are **DISMISSED** with prejudice.

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023 is hereby **DENIED** as moot;

ORDERED, ADJUDGED AND DECREED that, pursuant to SDCL 21-35-31, SCS Carbon Transport LLC, is granted a declaratory judgment authorizing access for the purpose of conducting civil, environmental and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings and archaeological/cultural resource surveys and examinations, for the property described as follows:

Landowner	Legal Description
Patricia K. Deeg Trust	Township 112 North, Range 61 West, Section 25: SW1/4 Section 26: SW1/4 EX 11 AC E OF ROAD Section 35: NW1/4
Betty Jean Strom Trust	Township 105 North, Range 53 West Section 25: SW1/4 EXC BONNEMA TRACT Section 36: N1/2NW1/4

and,

ORDERED, ADJUDGED AND DECREED that Defendants Patricia K. Deeg Trust and Betty Jean Strom Trust shall be enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said property, including conducting preliminary civil, environmental and archaeological surveys and examinations and environmental or archeological investigations, including any necessary core or water sampling activities subject to any conditions.

BY THE COURT:
3/15/2023 12:31:31 PM

The Honorable Patrick T. Pardy
Circuit Court Judge

Attest:
Dykstra, Amber
Clerk/Deputy

Filed on: 03/15/2023 Beadle County, South Dakota 02CIV22-000129 APP048
Filed: 3/15/2023 4:40 PM CST Beadle County, South Dakota 02CIV22-000129

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**PROTECTIVE ORDER** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

PROTECTIVE ORDER

This matter comes before the Court on SCS Carbon Transport LLC's motion for entry of a protective order. For good cause shown and in accordance with SDCL § 15-6-26(c), **IT IS HEREBY ORDERED** that confidential information be disclosed only in designated ways:

DEFINITIONS

1. As used in the Protective Order, the terms listed below are defined as follows:

a. "**Action**" refers to the above-captioned consolidated action: (a) *Helfenstein et al. v. SCS Carbon Transport LLC*, McPherson County no. 45CIV22-000014; (b) *SCS Carbon*

Transport LLC v. Jorde et al., McPherson County no. 45CIV22-000018; (c) *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC*, Spink County no. 71CIV22-000047; (d) *Bassly et al. v. SCS Carbon Transport LLC*, Brown County no. 06CIV22-000253; and (e) *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC*, Edmunds County no. 22CIV22-000020 (together, "Action").

b. **"Confidential Discovery Material"** is Discovery Material designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of this Protective Order.

c. **"Confidential"** documents are documents designated under Paragraph 4.a.

d. **"Highly Confidential – Attorneys' Eyes Only"** documents are documents that are either: (i) designated under Paragraph 4.b; or (ii) designated as "Highly Confidential" in the Other South Dakota Cases, as defined below.

e. **"Documents"** (whether capitalized or not) are all materials within the scope of SDCL § 15-6-34(a).

f. **"Other South Dakota Cases"** are: See Exhibit A.

g. **"Outside Attorneys"** means outside counsel of record for any Party.

h. **"Outside Vendors"** means messenger, copy, coding, and other clerical-services vendors not employed by a Party or its Outside Attorneys.

i. **"Written Assurance"** means an executed document in the form attached as Exhibit B.

SCOPE

2. This Protective Order applies to all information, documents, and things exchanged in or subject to discovery that are produced or otherwise provided in the Action, either by a Party or Non-Party (each a "Producing Person"), to any other Party or Non-Party, in response to or in

connection with any discovery requests, including, but not limited to, deposition testimony (whether based on oral examination or written questions), interrogatories, answers to interrogatories, requests for admission, responses to requests for admissions, document requests, documents, information, and other things produced, as well as any and all copies, abstracts, digests, notes, summaries, and excerpts thereof ("Discovery Material").

3. No action taken in accordance with the Protective Order will be construed as a waiver of any claim or defense in the Action or of any position as to discoverability or admissibility of evidence.

DESIGNATIONS

4. A Producing Person may designate a document "Confidential" or "Highly Confidential – Attorneys' Eyes Only" to protect information within the scope of SDCL § 15-6-26(c) (the "Designating Party"), in accordance with the following provisions:

a. "Confidential" will mean sensitive, confidential, proprietary information, or non-public personal information (e.g., social security numbers) that has not been made public by the Designating Party and that the Designating Party reasonably and in good faith believes contains or comprises: (i) material that is confidential pursuant to applicable law, including trade secrets, and any other materials that the Designating Party believes in good faith to be entitled to protection under SDCL § 15-6-26(c)(7); (ii) proprietary or otherwise sensitive non-public business information; or (iii) information implicating an individual's legitimate expectation of privacy, such as personal financial information, personal identifying information, or other personally or competitively sensitive information. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good faith assessment of whether the passage of time has eliminated the need to mark the material as "Confidential."

b. "Highly Confidential – Attorneys' Eyes Only" will mean Confidential Discovery Material that the Designating Party reasonably and in good faith believes is so highly sensitive and is of such a nature that disclosure to persons other than those listed in Paragraph 10 would create a substantial risk of economic injury that could not be avoided by less restrictive means. The Producing Person shall, when producing materials not previously produced in another litigation and when filing material with the Court in this Litigation pursuant to Paragraph 12, make a good-faith assessment of whether the passage of time has eliminated the need to mark the material as "Highly Confidential – Attorneys' Eyes Only."

c. As for electronic or hard copy documents designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," each will be clearly marked or stamped as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as applicable, using means sufficient to ensure that every page of such document, when printed, contains the appropriate mark or stamp, where practicable, and will not interfere with legibility or audibility. But electronically stored information ("ESI") produced in native format need not be produced using a means sufficient to ensure that every page of such document contains the appropriate mark or stamp so long as: (i) a TIFF placeholder image corresponding to the ESI produced in native format is produced that includes the "Confidential" or "Highly Confidential – Attorneys' Eyes Only" mark; (ii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears in the file name of the natively-produced ESI; or (iii) "Confidential" or "Highly Confidential – Attorneys' Eyes Only" appears on the label of the media or in the transmittal email containing natively-produced ESI.

5. Third parties whose documents are produced in this Action may also designate documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" subject to the same

protections and constraints as the Parties to this Action. A copy of this Protective Order shall be served along with any subpoena served in connection with the Action.

LIMITATIONS ON USE OF CONFIDENTIAL DISCOVERY MATERIAL

6. All Confidential Discovery Material produced in this Action may be used solely for purposes of this Action.

7. Any person subject to this Protective Order who receives Confidential Discovery Material pursuant to the terms of this Protective Order may not disclose such Confidential Discovery Material to anyone else except as expressly permitted hereunder.

8. Nothing in this Order precludes a Party from: (a) using its own documents or information; or (b) using documents or information that are public or that are obtained from a source other than a Producing Party.

ACCESS TO CONFIDENTIAL DISCOVERY MATERIAL

9. Access to Confidential documents will be limited to:

a. The Court and its staff;

b. In-house counsel, representatives, and current employees of the Parties responsible for overseeing and assisting with the Action to whom disclosure is reasonably necessary, and Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

e. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) it is shown

through testimony or other evidentiary proof that the witness prepared, received, or reviewed the information or otherwise to have personal knowledge regarding its contents; or (2) (a) the counsel who discloses the information to the witness determines, in good faith, that such disclosure is reasonably necessary and appropriate to assist in the conduct of this Action; and (b) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

f. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B; Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B; and

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other disputes, and their necessary personnel.

10. Access to "Highly Confidential – Attorneys' Eyes Only" documents will be limited to:

a. The Court and its staff;

b. Outside Attorneys, their law firms, and their Outside Vendors;

c. Persons shown on the face or metadata of the document to have authored or received it, or from whose files the document was produced;

d. Court reporters, stenographers, or videographers who record deposition or other testimony in connection with this Action retained to transcribe testimony;

e. Any current employee or director of the Producing Person, or any witness designated to testify as an SDCL § 15-6-30(b)(6) witness on behalf of the Producing Person;

f. During a deposition or court proceeding, any fact witness who is a former employee or former agent of a Producing Person, and who was employed by or an agent of the Producing Person at the time the Discovery Material was created, provided that: (1) the witness is shown through testimony or other evidentiary proof to have prepared, received or reviewed the Highly Confidential Information or otherwise to have personal knowledge regarding its contents; and (2) the witness has executed the "Written Assurance" in the form attached as Exhibit B.

Should any Party notify a Producing Person that the Party anticipates requiring a former employee or former agent to execute a "Written Assurance" before or during a deposition or court proceeding, the Producing Person shall, without waiving any rights, make a good-faith effort to ensure that the former employee or former agent execute the "Written Assurance" so as to minimize the need for Court intervention;

g. Outside industry advisors, outside financial advisors, outside accounting advisors, outside experts, and outside consultants (and their respective staff) that are specifically

retained by the signatories to this Protective Order as consultants or experts in this Action, and who have signed a "Written Assurance" in the form provided as Exhibit B;

h. Any persons to whom the Parties agree in writing and who have executed the "Written Assurance" in the form attached as Exhibit B;

i. Discovery masters, special masters, mediators, or other third parties who are appointed by the Court or retained by the Parties for settlement purposes or resolution of discovery or other dispute, and their necessary personnel; and

j. Designated in-house counsel for SCS Carbon Transport LLC, only during, or in preparation for, the hearings of any dispositive motions (including any hearing on class certification). The following individuals will be the designated in-house counsel for SCS Carbon Solutions, LLC: Jess Vilsack, General Counsel, Summit Carbon Solutions, LLC.

11. Each person appropriately designated under Paragraph 9.f or 9.g to receive "Confidential" information and in Paragraph 10.f or 10.g to receive "Highly Confidential – Attorneys' Eyes Only" documents will execute a "Written Assurance" in the form attached as Exhibit B. Outside Attorneys who provided access to Discovery Material to persons in accordance with this Paragraph will maintain a collection of each executed Exhibit B.

USE OF CONFIDENTIAL DISCOVERY MATERIAL

12. **A confidential document may be filed only in accordance with SDCL Chapter 15-15A and any other applicable state law. Any Party seeking to file with the Court documents designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under seal shall do so in accordance with SDCL Chapter 15-15A and any other applicable state law and local court procedures.**

Except as otherwise provided in SDCL Chapter 15-15A and any other applicable state law, a Party intending to present another Party's or a Non-Party's Confidential Discovery Material

at a hearing or trial must promptly, and no less than three days before the hearing or trial, notify all counsel of record for the Designating Party and for all other Parties so that they may seek relief from the court.

13. All depositions or portions of depositions taken in the Action that contain confidential information may be designated by a Party or its counsel as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and thereby obtain the protections accorded other "Confidential" or "Highly Confidential – Attorneys' Eyes Only" documents. Confidentiality designations for depositions will be made either: (a) orally on the record and requesting that the relevant portion(s) of testimony be so designated; or (b) by written notice to the Parties and those who were present at the deposition. Unless otherwise agreed, depositions will be treated as "Highly Confidential – Attorneys' Eyes Only" during the 30-day period following receipt of the transcript. The deposition of any witness (or any portion of such deposition) that encompasses "Confidential or Highly Confidential – Attorneys' Eyes Only" documents and information will be taken only in the presence of persons who are qualified to have access to such information. Nothing in this Paragraph will apply to or affect the confidentiality designations on Discovery Material entered as an exhibit at depositions. Nor will anything in this Paragraph preclude the witness from reviewing his or her deposition transcript.

14. If testimony is designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," the court reporter, who will first have agreed to abide by the terms of this Paragraph, will be instructed to include on the cover page of each such transcript the legend: "This transcript portion contains information subject to a Protective Order and will be used only in accordance therewith," and each page of the transcript will include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate. If the deposition is videotaped, the videotape

will also be subject to the same level of confidentiality as the transcript and include the legend "Confidential" or "Highly Confidential – Attorneys' Eyes Only" as appropriate, if any portion of the transcript itself is so designated.

15. Any document produced (or material containing information from a document produced), any deposition transcripts or exhibits, any expert reports, any filings, and other materials from the Other South Dakota Cases involving any of the Parties in this Action that were designated therein as "Confidential" or "Highly Confidential, Highly Confidential – Attorneys' Eyes Only" pursuant to the terms of the operative Protective Orders in those cases shall be given the corresponding confidentiality designation in this case, unless the original source of the document agrees to waive confidentiality, the document has since become public, or the Court orders otherwise.

16. If a Party or any other person or entity that has agreed to be bound by this Protective Order by executing Exhibit B (a "Subpoena Recipient") is served with a subpoena or a court order issued in other litigation or a request from a legislative or other administrative body with authority to compel disclosure requesting information or items designated in the action as "Confidential" or "Highly Confidential – Attorneys' Eyes Only," they must promptly notify in writing the Designating Party. Such notification will include a copy of the subpoena or order. The Subpoena Recipient will promptly notify in writing the party who caused the subpoena or order to issue in the other litigation or proceedings that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification will include a copy of this Protective Order. The Subpoena Recipient must cooperate with the Designating Party with respect to all reasonable procedures sought by the Designating Party whose material may be affected. If the Designating Party timely seeks a protective order, the Party served with the subpoena will not produce any information designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" before a determination by a court

in accordance with SDCL § 16-5-45(a)–(g), unless the Subpoena Recipient has obtained the Designating Party's permission. The Designating Party will bear the burden and expense of seeking protection in that court of its confidential material. Nothing contained in this provision will be construed as authorizing or encouraging a Subpoena Recipient in this action to disobey a lawful directive from another court.

CHANGES TO DESIGNATIONS

17. If at any time before the trial of this Action, a Producing Person realizes that some portion of Discovery Material previously produced should be designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only,"they may so designate it by apprising all prior recipients of the Discovery Material in writing, and thereafter such designated portion of the Discovery Material will be deemed to be and treated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under the terms of this Protective Order. Notwithstanding this provision, a Party may challenge the asserted confidentiality designation as provided for herein.

18. Any Party who inadvertently fails to identify documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will provide written notice and substitute appropriately-designated documents. Any Party receiving such improperly designated documents will retrieve such documents from persons not entitled to receive those documents and, upon receipt of the substitute documents, will return or destroy the improperly designated documents.

19. Any Party may request a change in the designation of any information designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only." Any such document will be treated as designated until the change is completed. If the requested change in designation is not agreed to by the Parties, the Party seeking the change may move the Court for appropriate relief, providing notice to any Party or third party whose designation of produced documents as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" in the Action may be affected. The Party asserting

that the material is "Confidential" or "Highly Confidential – Attorneys' Eyes Only" will have the burden of proving that the information in question is within the scope of protection afforded by SDCL § 15-6-26(c). If the motion affects a document produced by a Non-Party then, with respect to the motion, that Non-Party is entitled to the same notice and opportunity to be heard as a Party.

DISPOSITION OF CONFIDENTIAL DISCOVERY MATERIAL

20. Within 60 days of the termination of the Action, including any appeal, each Party to the Action will either destroy or return to the other Parties all documents produced by the other Parties that were designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" and all copies of such documents, and will destroy all extracts and data taken from such documents. Each Party will provide a certification as to such return or destruction within the 60-day period. But attorneys will be entitled to retain a set of all documents filed with the Court and all correspondence generated in connection with the Action as well as materials that contain, reflect, incorporate, attach, or reference attorney work product, so long as the terms of this Protective Order will continue to govern any such retained materials. Additionally, with respect to ESI, the Parties need not destroy backup media so long as the Party has a data destruction policy for the backup media that will result in the overwriting or destruction of that data. Similarly, in-house counsel, external counsel, experts or consultants retained to assist with the Action, and their respective employees or staff, will not be required to destroy "Confidential" or "Highly Confidential – Attorneys' Eyes Only" or material contained in their email accounts or document management systems, so long as they otherwise comply with this Protective Order with respect to such retained material. Nothing in this Paragraph shall obligate any Party to destroy its own Confidential Information at the close of this Action or at any other time.

PRIVILEGED AND PROTECTED MATERIALS

21. To the greatest extent permitted by law, the production or disclosure of privileged or protected materials, whether inadvertent or otherwise, does not waive any applicable privilege or protection in this Action or any other proceeding. The Parties intend for this Paragraph to be interpreted to provide the maximum protection allowed by law.

22. Any Party who inadvertently produces or discloses privileged materials will, promptly upon discovery of such inadvertent production or disclosure, notify the receiving Party/ies in writing and request that the documents be returned. When a receiving Party receives notice of such inadvertent production or disclosure it must sequester, return, or destroy the inadvertently produced or disclosed privileged materials and confirm that any persons or entities to whom it has provided such privileged materials have sequestered, returned, or destroyed the privileged materials. The privileged materials may not be used or disclosed for any purpose—including to challenge the assertion of privilege over those materials—unless and until the assertion of privilege is withdrawn or overruled. The privileged materials will be deleted or otherwise permanently removed from any systems used to house documents, including document review databases, e-rooms, and any other locations that store the privileged materials. Any extracts, notes or summaries referring or relating to any such inadvertently produced or disclosed privileged materials must likewise be returned or destroyed. Within seven days of providing notice of inadvertent production or disclosure, a Party or Producing Person claiming privilege for inadvertently produced or disclosed privileged materials must state the basis for the privilege assertion. Nothing herein will prevent a receiving Party from challenging the propriety of a privilege assertion by submitting a challenge to the Court consistent with applicable law, although the privileged materials themselves cannot be used or disclosed as part of such a challenge. The Party asserting privilege bears the burden of establishing the privileged nature of any inadvertently

produced or disclosed privileged materials. If a receiving Party becomes aware that it is in receipt of information or materials that it knows or reasonably should know is privileged, protected, or immune, counsel for the receiving Party will immediately take steps to: (i) stop reading such information or materials; (ii) notify counsel for the Producing Party of such information or materials; (iii) collect all copies of such information or materials; (iv) sequester, destroy, or return such information or materials to the Producing Party; and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

EXPERT WITNESS DISCLOSURE

23. Disclosure of Certain Information Regarding Expert Witnesses.

a. No subpoenas (for depositions or documents) need be served on any SDCL § 15-6-26(b)(4) expert in this case. Instead, the Party or Parties retaining such expert will make him or her available for deposition, at a time mutually agreed to by the Parties. If an expert is required to submit a report, the deposition of such expert will be conducted after the report is served at a time mutually agreed by the Parties. If such an expert has already been deposed as a fact witness, he or she may be deposed again in his or her expert capacity.

b. Within three business days of service of a report, the Party submitting such report shall produce: (i) any data, facts or other information relied upon by the expert in forming the expert witness's opinions and not previously produced in this action, as well as a list identifying by bates range or other appropriate identifiers any produced data, facts, or other information relied upon by the expert in forming the expert witness's opinions; (ii) any exhibits that will be used to summarize or support the expert witness's opinions; (iii) the expert witness's qualifications, including a list of all publications authored in the previous ten years; (iv) a list of all other cases, during the previous four years, where the expert witness has testified as an expert at trial or by deposition; and (v) a statement of the compensation to be paid for the study and testimony in this case. To the extent such disclosures

include charts, tables, exhibits, information or data processed or modeled by computer at the direction of a disclosed testifying expert in the course of forming the expert's opinions, machine-readable copies of the exhibits, information, or data (including all linked data files, input and output files, formulas contained within spreadsheet cells and similar electronic information necessary to understand the charts, tables, exhibits, information, or data) sufficient to allow the replication of all analysis contained in the report, where applicable, along with appropriate computer programs and instructions necessary to access and use the data (unless such computer programs are reasonably and readily commercially available) shall also be provided with such disclosures. Information gleaned from non-public sources shall also be provided with such disclosures.

24. Non-Disclosure of Certain Information Regarding Expert Witnesses.

a. The below-listed categories of documents, recording media, and communications need not be disclosed by any Party and an expert may not be examined at deposition, hearing, or trial on the contents of the below-listed categories of documents, recording media, and communications (subject to the exceptions at the end of this Paragraph):

i. any notes or other writings taken or prepared by or for an expert witness in connection with this matter (aside from the final written expert report(s) and notes generated while testifying), including:

1. written correspondence or memoranda to or from, and notes of conversations between and among the expert witness and the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs); and/or

2. copies of materials produced by any Party in this Action bearing the notes, markings, or comments of the expert, the expert's assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs);

ii. any draft reports, draft studies, draft work papers, draft declarations, or other draft materials prepared by, for, or at the direction of an expert witness, regardless of the form in which the draft is recorded; and

iii. any oral or written communication between and among expert witnesses and their assistants and/or support staff, non-testifying consultants (including their staffs), or attorneys for the Party or Parties (including their staffs), regardless of the form of the communications. For avoidance of doubt, this includes oral or written communication between any of the individuals listed above, including but not limited to (a) one expert and/or their staff and assistants and (b) another expert and/or their staff and assistants.

b. The foregoing exclusions from disclosure set forth in subparagraphs (a)(i)–(iii) do not apply to any communications, documents, data sets, or analyses upon which an expert relies as a basis for his or her ultimate opinion. In addition, examination shall be permitted on alternative analyses, methodologies, or approaches to issues on which the expert is testifying, regardless of whether the expert considered them in forming the expert's opinion, including but not limited to analyses that the expert performed but ultimately did not rely upon.

c. Communications between and among experts, their staffs, and attorneys shall not be discoverable unless relied upon as a basis for any expert's ultimate opinion(s). Although communications relating to compensation for the expert's work or testimony shall not be required to be produced or exchanged, the Parties may examine witnesses at deposition or trial as to the amount they charge.

25. Except as provided under SDCL § 15-6-26(b)(4)(D), no Party may take discovery of an expert who has been retained or specially employed by another Party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, without the express written consent and authorization of the Party employing such expert.

DUTY TO NOTIFY

26. If any Party learns of a potential breach of this Protective Order or of the confidentiality of any document designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" under this Protective Order, that Party will promptly inform all other Parties in writing of the breach.

MODIFICATION AND DURATION OF THIS PROTECTIVE ORDER

27. Any Party may apply to the Court for a modification of the Protective Order, and nothing in this Protective Order will be construed to prevent a Party from seeking such further provisions enhancing or limiting confidentiality as may be appropriate.

28. The obligations imposed by the Protective Order will survive the termination of the Action.

PRIOR ORDERS

29. **All prior consistent orders remain in full force and effect.**

REMEDIES

30. Failure to comply with any provision of this protective order or any other prior consistent order shall subject the non-complying party, non-complying counsel and/or the party such counsel represents to any and all appropriate remedies, sanctions and the like, including without limitation: assessment of costs, fines and attorneys' fees and disbursements; waiver of rights to object; exclusion or limitation of witnesses, testimony, exhibits, and other evidence; striking of pleadings; complete or partial dismissal with prejudice; entry of whole or partial default judgment; and/or any other relief that this Court may from time to time deem appropriate.

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BY THE COURT:

Circuit Court Judge

Attest:
Payne, Megan
Clerk/Deputy

EXHIBIT A

Other South Dakota Cases:

- *Helfenstein et al. v. SCS Carbon Transport LLC,*
  McPherson County no. 45CIV22-000014
- *SCS Carbon Transport LLC v. Jordre et al.,*
  McPherson County no. 45CIV22-000018
- *Braun Family Trust 2020 et al. v. SCS Carbon Transport LLC,*
  Spink County no. 71CIV22-000047
- *Bossly et al. v. SCS Carbon Transport LLC,*
  Brown County no. 06CIV22-000253
- *Delores Schumacher Revocable Trust et al. v. SCS Carbon Transport LLC,*
  Edmunds County no. 22CIV22-000020
- *Geide et al. v. SCS Carbon Transport LLC,*
  Minnehaha County no. 49CIV22-001694
- *Bell-Murphy Family Trust et al. v. SCS Carbon Transport LLC,*
  Lincoln County no. 41CIV22-000365
- *Betty Jean Strom Trust et al. v. SCS Carbon Transport LLC,*
  Lake County no. 39CIV22-000064
- *Patricia K. Deeg Trust v. SCS Carbon Transport LLC,*
  Beadle County no. 02CIV22-000129
- *SCS Carbon Transport LLC v. Mathern et al.,*
  Brown County no. 06CIV22-000335
- *SCS Carbon Transport LLC v. Skelton et al.,*
  Codington County no. 14 CIV22-000274
- *SCS Carbon Transport LLC v. Wieseler et al.,*
  Hand County no. 29CIV22-000021
- *SCS Carbon Transport LLC v. Benson et al.,*
  Lake County no. 39CIV22-000083
- *SCS Carbon Transport LLC v. Job et al.,*
  McPherson County no. 45CIV22-000024
- *SCS Carbon Transport LLC v. Thorson et al.,*
  Spink County no. 71CIV22-000057

- *SCS Carbon Transport LLC v. Fossum et al.*,
  Lincoln County no. 41CIV22-000476

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA	06CIV22-000253

ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned actions:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of James Pirolli (Pirolli Aff.) ¶¶ 3–4; Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

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- Page 1619 -

2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 2,000 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Pirolli Aff. ¶ 4; Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Pirolli Aff. ¶ 5; Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.[1]

5. SCS is offering its CO_2-transporation services to or for the public for hire. Pirolli Aff. ¶¶ 4, 6–10.

6. SCS and Summit Carbon Solutions have advertised and continue to actively advertise SCS's CO_2-transportation service for hire to the public on Summit Carbon Solutions' website. They also have engaged and continue to actively engage in direct outreach to potential customers to offer SCS's interstate CO_2-transportation services. Pirolli Aff. ¶ 6.

7. SCS will hold an open season to publicly solicit binding commitments for interstate CO_2-transportation services from interested customers along the pipeline's path. Pirolli Aff. ¶ 7.

8. SCS is reserving a portion of the capacity of its pipeline for future shippers that may desire to receive interstate CO_2-transportation services after the pipeline has begun operations. Pirolli Aff. ¶ 8.

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[1] *See also In re Application by SCS Carbon Transp. LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

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9. Summit Carbon Solutions has contracted with or signed letters of intent with more than 34 unaffiliated facilities to transport by pipeline CO_2 produced at those facilities. Pirolli Aff. ¶ 9.

10. On June 24, 2022, SCS filed its acceptance of the provisions of N.D. Cent. Code Chapter 49-19 with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO_2 for others . . . in accordance with the definition of a common carrier." Pirolli Aff. Exhibit 1; Pirolli Aff. ¶ 10.[2]

11. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

12. Peter Helfenstein, Jr., Rott Farms, Inc., Ketterling Farm, LLC, Vilhauer Land Limited Partnership, Brian Hoffman, the David and Valerie Rath Living Trust dated December 02, 2013, Colin and Mary Beth Hoffman, Jerome G. Hoffman, Michael and Nancy Klipfel, Alden and Wilma Flakoll, Shantel C. Schumack, Leroy and Joan Weiszhaar, Wade and Judy Weiszhaar, Dennis Wolff, Quinton Wolff, R & C Feickert Land LLC, Rebecca D. Michaelsohn, David Melland, Rott Ranch Limited Partnership, the Gary and Shirley Wolff Living Trust, Willard Goeshel, Ken Stugelmayer, Marsha M. Vossler, the Mark M. Vossler and Marsha M. Vossler Revocable Trust, Marilyn D. Nelson, Mark Thompson, the Estate of Albert Eugene Erdmann, the Braun Family Trust 2020, the Margaret Ellett Living Trust, the Ken Olson Trust 2010, the Olson Family Trust 2019, Francoli Family Limited Partnership, Armadale Limited Partnership, the Myron O. Hammer Credit Shelter Testamentary Trust, Jared Bossly, Bossly Real Estate Limited

[2] *See also In re SCS Carbon Transp. LLC Acceptance of Provisions of N.D.C.C. § 49-19-12*, No. PU-22-260 (N.D. Pub. Serv. Comm'n June 24, 2022), https://www.psc.nd.gov/database/documents/22-0260/001-010.pdf.

Partnership, the Estate of Donald A. Schaunaman, Craig D. Schaunaman, Kirk Schaunaman, Todd and Donna Rozell, Scott Rozell, Seth Klipfel, the Delores Schumacher Revocable Trust, and John and Stephanie Jung ("Landowners") own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4

Landowner	County	APN	Legal Description
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE

Landowner	County	APN	Legal Description
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

13. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

14. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–50; Schovanec Aff. Exhibits 1–43.

15. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibits 1–43 at p. 1.

16. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibits 1–43 at pp. 1–2.

17. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibits 1–43 at p. 2. In this consolidated action, SCS seeks survey access from 44 Landowners in total. For the vast majority—37—SCS seeks only typical surveys. Schovanec Aff. Exhibits 1–43 at p. 2. For the others, in addition to typical surveys,

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SCS seeks geotech surveys for five (Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2) and deep-dig surveys for two (Schovanec Aff. Exhibits 1, 2 at p. 2).

18. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibits 1–43 at p. 2.

19. A typical survey takes on average 1–2 days to complete (3–4 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 13.

20. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2. That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." *Id.*

21. A geotech survey, as described in the 30-day notice letters, takes on average 1 day to complete (2 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 14.

22. Deep-dig surveys are required when a landowners' property "is located within a floodplain." Schovanec Aff. Exhibits 1, 2 at p. 2. That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." *Id.* For that reason, deep-dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine whether cultural materials are present." *Id.*

Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." *Id.*

23. A deep dig survey, as described in the 30-day notice letters, takes on average 1–2 days to complete, although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 15.

24. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 52; Schovanec Aff. Exhibit 44.

25. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibits 1–43 at p. 2.

26. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 51.

Dated this 10th day of February, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell

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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 10th day of February, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

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/s/ Justin L. Bell
JUSTIN L. BELL

Filed: 2/10/2023 4:32 PM CST Brown County, South Dakota 06CIV22-000253
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APP082

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK BROWN, AND EDMUNDS)	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY, AND JOAN WEISZHAAR Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 **LANDOWNERS' STATEMENT OF DISPUTED MATERIAL FACTS IN RESISTANCE TO SCS' MOTION FOR SUMMARY JUDGMENT**
SCS CARBON TRANSPORT, LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK	45CIV22-000018

Filed: 2/28/2023 6:04 PM CST Brown County, South Dakota 06CIV22-000253

M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, AND SIEH FARMS, LLC, Defendants.	71CIV22-000047
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES and ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-000253
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL and NANCY KLIPFEL,	

Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020
DELORES SCHUMACHER REVOCABLE TRUST, AND JOHN AND STEPHANIE JUNG Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	

Landowners hereby submit this Landowners's Statement of Disputed Material Facts in Response to SCS motion for summary judgment.

1. Landowners deny SCS's idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. *See* Affidavit of Nicholas G. Moser in Support of Landowners' Resistance to SCS Motion for Summary Judgment, ¶¶ 2 – 11. *Id.*

2. As stated, Defendant acts as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred. *Id.*

3. As stated defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred.. *Id.*

4. Landowners acknowledge something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.*

5. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

6. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

7. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

8. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

9. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition.

SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

10. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. Additionally, SCS has not made any contracts available to Landowners in this action because there has not yet been a protective order entered in this action. *Id.*

11. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

12. There is no evidence that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

13. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

14. Nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

15. Landowners acknowledge the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

16. Landowners deny the letters inform them of anything that SCS believes it is bound to comply with. Landowners disagree the "link" which is text on a page informs anyone

of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

17. Landowners acknowledge the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

18. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

19. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

20. There is no evidence as what Geotech survey is as it is purported to be used by SCS in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

21. Landowners acknowledge that what is stated are the words in the letter, which do not state such surveys would take 1-2 days. Landowners deny the authenticity of the underlying statement and deny the truth of the matter asserted. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

22. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

23. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the

deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

24. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

25. Landowners acknowledge this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

26. Admit.

Dated this 28th[th] day of February, 2022.

By: /s/ Brian E. Jorde
Brian E. Jorde,
Pro Hac Vice
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
402-493-4100 (p)
bjorde@dominalaw.com

By: /s/ Nicholas G. Moser
Nicholas G. Moser, SDSB #4650
Marlow, Woodward &
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PO Box 667 - 200 W.3d St
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nick@mwhlawyers.com
Plaintiff's Lawyers

Filed: 2/28/2023 6:04 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2034 -

CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 28th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
Cash Anderson (cea@mayadam.net)
Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

STATE OF SOUTH DAKOTA

FIFTH JUDICIAL CIRCUIT

PRESIDING JUDGE
Gregg C. Magera
CIRCUIT JUDGES
Tony L. Porta
Richard A. Sommers
Marshall Lovrien
MAGISTRATE JUDGE
Cullen McNeece

RICHARD A. SOMMERS
Circuit Court Judge

Sara Zahn, RPR
Official Court Reporter

101 SE 1ST Ave, Ste 300
PO Box 1087
Aberdeen, SD 57402-1087
Phone: 605-626-2450
Fax: 605-626-2491
Email: 5thcircuit@ujs.state.sd.us

April 19, 2023

VIA EMAIL

45CIV22-000014

Nicholas Moser
Marlow, Woodward & Huff, Prof. LLC
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Yankton, SD 57078

Brian Jorde (*pro hac vice*)
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144

Justin Bell
Cody Honeywell
Cash Anderson
May, Adam, Gerdes & Thompson, LLP
P.O. Box 160
Pierre, SD 57501-0160

Brian Boone (*pro hac vice*)
Michael Hoernlein (*pro hac vice*)
Matthew Hooker (*pro hac vice*)
Alston & Bird, LLP
101 S. Tyron St., STE 4000
Charlotte, NC 28280

Re: *Peter Helfenstein, Jr. et al. v. SCS Carbon Transport, LLC; SCS Carbon Transport, LLC v. Geraldine H. Saylor Jordre, et al.; Braun Family Trust 2020, et al. v. SCS Carbon Transport, LLC; Jared Bossly, et al. v. SCS Carbon Transport, LLC; Delores Schumacher Revocable Trust and John and Stephanie Jung v. SCS Carbon Transport, LLC;* 45CIV22-14, 45CIV22-18, 71CIV22-47, 06CIV22-253, 22CIV22-20 Consolidated Cases

Dear Counsel:

This Court has had the opportunity to review the supplemental briefs filed by the parties in the above-entitled matter. Viewing the undisputed facts as a whole, I find that SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value. This Court will adopt the reasoning of Judge Pardy and Judge Pekas on companion cases from other Circuits on this issue.

Counsel for SCS should prepare the order and submit it for signature.

Sincerely,

Richard A. Sommers
Circuit Court Judge

cc: Brown County Clerk of Courts
Edmunds County Clerk of Courts
Spink County Clerk of Courts
McPherson Clerk of Courts

STATE OF SOUTH DAKOTA)SS COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND	45CIV22-000018

SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD	06CIV22-000253

A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment in Part and Taking Remaining Issue Under Advisement rendered in the above-entitled action on the 28th day of March, 2023, a copy of which is attached

hereto and by reference incorporated herein, was reduced to writing, signed by the Court, attested by the Clerk, and filed in the Brown County Clerk's office on the 28th day of March, 2023.

Dated this 31st day of March, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 31st day of March, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

and the same by First Class Mail, to-wit:

Brian E. Jorde
Domina Law Group
2425 S 144th Street
Omaha, NE 68144

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	))SS))	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

This matter came be heard on the 14th day of March, 2023 before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023. Said Motion having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners[1] having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, it is therefore:

[1] The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC (SCS)'s Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED** as to the following issues:

1. SDCL § 21-35-31 is constitutional;
2. Carbon dioxide is a commodity under SDCL § 49-7-11;
3. SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31; and
4. The surveys and examinations SCS seeks to conduct are authorized by SDCL § 21-35-31.

It is further **ORDERED, ADJUDGED AND DECREED** that SCS's Motion for Summary Judgment, filed February 10, 2023, is hereby **TAKEN UNDER ADVISEMENT** as to the sole remaining following issue:

1. Whether SCS is entitled to summary judgment on the question of whether, in accordance with SDCL § 49-7-11, SCS is holding itself out to the general public as engaged in the business of transporting carbon dioxide for hire by pipeline.

It is further **ORDERED, ADJUDGED AND DECREED** that the parties will submit further briefing and any supplemental materials related to the issue taken under advisement according to the following schedule:

1. SCS will submit its further briefing and any supplemental materials within 14 days of the entry of this order.
2. Landowners will submit their further briefing and any supplemental materials within 14 days of the filing of SCS's brief.

3/28/2023 1:24:54 PM

BY THE COURT:

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

STATE OF SOUTH DAKOTA)SS COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

NOTICE OF ENTRY OF ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

YOU WILL PLEASE TAKE NOTICE that the Order Granting SCS Carbon Transport LLC's Motion for Summary Judgment and Denying Landowners' Motion to Continue rendered in the above-entitled action on the 21st day of April, 2023, a copy of which is attached hereto and by reference incorporated herein, was reduced to writing, signed by the Court, attested by the Clerk, and filed in the Brown County Clerk's office on the 21st day of April, 2023.

Dated this 21st day of April, 2023.

Filed: 4/21/2023 3:57 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2588 -

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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Attorneys for SCS Carbon Transport LLC

Filed: 4/21/2023 3:57 PM CST Brown County, South Dakota 06CIV22-000253
- Page 2589 -

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 21st day of April, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian E. Jorde
bjorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA))SS COUNTIES OF MCPHERSON, SPINK,) BROWN, AND EDMUNDS)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING
SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

This matter came to be heard on the 14th day of March, 2023, before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed on February 10, 2023, and on Landowners'* Motion to Continue, filed on February 28, 2023. Said motions having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments; and on the basis of the hearing on said motions, the arguments of counsel and the records and files of this action, including supplemental briefing and materials related to the issue taken under advisement by this Court; and good cause appearing, which is

* The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

further explained in the Court's March 28, 2023 Order and April 19, 2023 Letter Decision, which are fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED, AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED**. Landowner Plaintiffs' Amended Complaint (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on October 27, 2022, and Landowner Defendants' Counterclaim (case no. 45CIV22-000018), filed on August 29, 2022, are **DISMISSED** with prejudice;

ORDERED, ADJUDGED, AND DECREED that Landowners' Motion to Continue, filed February 14, 2023, is **DENIED**;

ORDERED, ADJUDGED, AND DECREED that, pursuant to SDCL § 21-35-31, SCS Carbon Transport LLC is granted the declaratory judgment and the injunctive relief it seeks in its Restated Counterclaim (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on November 7, 2022, and in its Complaint (case no. 45CIV22-000018), filed on July 20, 2022, including authorizing access for the purpose of conducting civil, environmental, and archaeological/cultural, surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions, for the properties described as follows:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4

Landowner	County	APN	Legal Description
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4

Landowner	County	APN	Legal Description
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

and,

ORDERED, ADJUDGED, AND DECREED that the above Landowners, their agents and representatives, and anyone acting in concert with them, are enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said properties, including conducting civil, environmental, and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions.

[SIGNATURE PAGE FOLLOWS]

4/21/2023 11:10:17 AM

BY THE COURT:

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-35. Condemnation Under Power of Eminent Domain (Refs & Annos)

SDCL § 21-35-31

21-35-31. Entry on private property for examination and survey of project requiring siting permit from Public Utilities Commission

Currentness

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Credits
Source: SL 2016, ch 118, § 1.

S D C L § 21-35-31, SD ST § 21-35-31
Current through the 2023 Regular Session and Supreme Court Rule 23-16

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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-2. Carriers' Powers and Duties in General (Refs & Annos)

SDCL § 49-2-12

49-2-12. Eminent domain powers

Currentness

A common carrier may exercise the right of eminent domain in acquiring right of way as prescribed by statute.

Credits
Source: SDC 1939, § 8.0801.

Notes of Decisions (3)

S D C L § 49-2-12, SD ST § 49-2-12
Current through the 2023 Regular Session and Supreme Court Rule 23-16

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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-11

49-7-11. Pipelines that are common carriers--Exemption

Currentness

All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B.

Credits

Source: SL 1980, ch 321, § 1; SL 1980, ch 328, § 3; SL 1981, ch 341.

S D C L § 49-7-11, SD ST § 49-7-11
Current through the 2023 Regular Session and Supreme Court Rule 23-16

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South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-13

49-7-13. Condemnation of pipeline right-of-way--Width across school and public lands

Currentness

Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry.

Credits
Source: SL 1980, ch 321, § 3.

S D C L § 49-7-13, SD ST § 49-7-13
Current through the 2023 Regular Session and Supreme Court Rule 23-16

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 2

§ 2. Due process--Right to work

Currentness

No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

Credits

History: Amendment proposed by SL 1945, ch 315, approved Nov., 1946.

Notes of Decisions (550)

Const. Art. 6, § 2, SD CONST Art. 6, § 2
Current through the 2023 Regular Session

End of Document

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 13

§ 13. Private property not taken without just compensation--Benefit to owner--Fee in highways

Currentness

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.

Credits

History: Amendment proposed by SL 1961, ch 297, approved Nov. 6, 1962. Amendment proposed by SL 1989, ch 3, rejected November 6, 1990.

Notes of Decisions (299)

Const. Art. 6, § 13, SD CONST Art. 6, § 13
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article XVII. Corporations (Refs & Annos)

Const. Art. 17, § 18

§ 18. Compensation for private property taken for public use--Assessment of damages

Currentness

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

Credits

History: Repeal proposed by SL 1975, ch 3, rejected Nov. 2, 1976.

Notes of Decisions (3)

Const. Art. 17, § 18, SD CONST Art. 17, § 18
Current through the 2023 Regular Session

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United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

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<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30317

BETTY JEAN STROM TRUST et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Third Judicial Circuit,
Nos. 39CIV22-000064 (Beadle County) and 02CIV22-000129 (Lake County).
The Hon. Patrick T. Pardy, Judge presiding.
Notices of appeal filed April 14, 2023.

No. 30338

PETER HELFENSTEIN, JR. et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Fifth Judicial Circuit,
Nos. 45CIV22-000014 (McPherson County), 45CIV22-000018 (McPherson County), 71CIV22-000047 (Spink County), 06CIV22-000253 (Brown County), and 22CIV22-000020 (Edmunds County).
The Hon. Richard A. Sommers, Judge presiding.
Notice of appeal filed April 28, 2023 in No. 45CIV22-000014.
No notice of appeal filed in Nos. 45CIV22-000018, 71CIV22-000047, 06CIV22-000253, or 22CIV22-000020.

APPELLEE SCS CARBON TRANSPORT LLC'S BRIEF
(Public Redacted Copy)

Filed: 12/1/2023 2:05 PM CST Supreme Court, State of South Dakota #30338

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JURISDICTIONAL STATEMENT

In a June 16, 2023 order, this Court consolidated Appeal Nos. 30317 and 30338 for briefing and submission.

Appeal No. 30317 is an appeal from two consolidated cases in the Third Judicial Circuit before the Honorable Patrick T. Pardy: 39CIV22-000064 (*Strom*) and 02CIV22-000129 (*Deeg*). On March 15, 2023, the court entered final orders in each case. Notices of entry of the final orders were filed and served in each case on March 16, 2023. Notices of appeal were filed in each case on April 14, 2023. We will cite to the *Strom* record as "30317/064R" and the *Deeg* record as "30317/129R." If the two records are substantively the same for this appeal, we will cite to only the *Strom* record.

Appeal No. 30338 is a purported appeal from five consolidated cases in the Fifth Judicial Circuit before the Honorable Richard A. Sommers: 45CIV22-000014 (*Helfenstein*), 45CIV22-000018 (*Jordre*), 71CIV22-000047 (*Braun*), 06CIV22-000253 (*Bossly*), and 22CIV22-000020 (*Schumacher*). Final judgments were entered and notices of entry were filed and served in *Helfenstein*, *Jordre*, and *Bossly* on April 21, 2023; in *Schumacher* on April 25, 2023; and in *Braun* on April 26, 2023. A notice of appeal was filed in *Helfenstein* on April 28, 2023. No notice of appeal was filed in *Jordre*, *Braun*, *Bossly*, or *Schumacher*. The arguments in this brief do not waive the issues raised in SCS Carbon Transport LLC's Motion to Dismiss Appeal No. 30338. We will cite to the *Helfenstein* record as "30338/014R," the *Jordre* record as "30338/018R," the *Braun* record as "30338/047R," the *Bossly* record as

"30338/253R," and the *Schumacher* record as "30338/020R." If these five records are substantively the same for this appeal, we will cite to only the *Helfenstein* record.

STATEMENT OF THE CASE

In the Third Circuit cases (*Strom* and *Deeg*), Landowners[1] sued Appellee SCS Carbon Transport LLC in July 2022, seeking declaratory and injunctive relief prohibiting SCS from completing surveys on their property under SDCL 21-35-31. Their original complaints challenged SDCL 21-35-31 as facially unconstitutional under the federal and state takings and procedural due process clauses. (30317/064R 7–15; 30317/129R 7–18.) After Judge Pardy consolidated the cases (30317/064R 204–05), Landowners amended their complaint to seek declaratory and injunctive relief on six bases:

(1) SDCL 21-35-31 is facially unconstitutional under the federal and state takings clauses;

(2) SDCL 21-35-31 amounts to an unconstitutional taking as applied;

(3) SDCL 21-35-31 is facially unconstitutional under the federal and state procedural due process clauses;

(4) SCS does not have eminent-domain power;

(5) SCS's notice letters do not satisfy SDCL 21-35-31; and

(6) SCS's survey types are not authorized by SDCL 21-35-31.

[1] We will refer to the Appellants collectively as "Landowners."

(*Id.* 336–55.)[2] SCS counterclaimed for declaratory and injunctive relief confirming its right to survey Landowners' property. (*Id.* 432–37.)

In the Fifth Circuit, Landowners sued SCS in June and July 2022 in four cases (*Helfenstein*, *Braun*, *Bossly*, and *Schumacher*), seeking the same relief and bringing the same two constitutional challenges as in the original Third Circuit complaints. (30338/014R 15–24; 30338/047R 10–18; 30338/253R 9–17; 30338/020R 6–17.) In the fifth case (*Jordre*), SCS sued Landowners in July 2022 for declaratory and injunctive relief to complete its surveys. (30338/018R 3–9.) Those Landowners counterclaimed with the same two constitutional challenges. (*Id.* 35–46.) After Judge Sommers consolidated the five cases (30338/014R 145–47), Landowners-Plaintiffs (in *Helfenstein*, *Braun*, *Bossly*, and *Schumacher*) filed a consolidated amended complaint that is essentially identical to the Third Circuit amended complaint. (*Id.* 482–503.) SCS counterclaimed for survey access.[3] (*Id.* 589–94.) Landowners-Defendants (in *Jordre*) never sought to amend their counterclaim to align with the consolidated amended complaint.

In January 2023, SCS moved for summary judgment in the Third Circuit cases on all claims and counterclaims. (30317/064R 1310–1517.)

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[2] Landowners filed identical amended complaints in each case under separate captions.

[3] In both the Third and Fifth Circuits, SCS did not seek relief against some of the landowners who had sued it. So SCS did not counterclaim against those landowners when it filed its restated counterclaims to the amended complaints. (30317/064R 432–33; 30338/014R 589–90.)

Landowners resisted SCS's motion and filed their own motion to continue the summary judgment hearing and to compel additional discovery. (*Id.* 1557–1946.) After a hearing in February and taking the matters under advisement, Judge Pardy granted SCS's motion in full and entered a final order accordingly. (*Id.* 2251–67.)

In February 2023, SCS moved for summary judgment in the Fifth Circuit cases on all claims and counterclaims. (30338/014R 1697–2081.) Landowners again resisted SCS's summary judgment motion and filed a motion to continue the summary judgment hearing. (*Id.* 2115–2220, 2304–2561, 2572–97.) After a hearing in mid-March, Judge Sommers granted SCS's motion on all issues except one—SCS's common-carrier status. He took that issue under advisement and ordered supplemental briefing. (*Id.* 2608–11, 2639–47.) After the additional briefing (*id.* 2612–31, 2648–64), Judge Sommers granted summary judgment in SCS's favor on that final issue and entered a final order. (*Id.* 2665–87.)

STATEMENT OF THE FACTS

SCS and its parent Summit Carbon Solutions, LLC are developing an interstate pipeline in South Dakota and four other states to transport carbon dioxide (CO_2). (30317/064R 1373, 1503, 655; 30338/014R 1785, 1795, 1930.) Summit Carbon Solutions has contracted with or signed letters of intent with at least 34 third-party facilities to transport CO_2 from those facilities through SCS's pipeline. (30317/064R 655, 1693–1942; 30338/014R 1785, 2308–2557.) SCS will also hold an open season to publicly solicit additional binding

commitments for CO_2 shipment from interested customers and is reserving a portion of its pipeline capacity for future uncommitted shippers. (30317/064R 655; 30338/014R 1785.) In February 2022, SCS applied for a siting permit under SDCL Chapter 49-41B with the South Dakota Public Utilities Commission (PUC). (30317/064R 1374, 1377–1501; 30338/014R 1795–96, 1802–1926.)

To determine the pipeline route and to appraise properties, SCS must enter and examine the property along the pipeline's route and complete preliminary civil, environmental, and cultural surveys and investigations. (30317/064R 1374–75; 30338/014R 1796–1800.) By statute, an entity with eminent-domain power, in connection with a project regulated by Chapter 49-41B, "may cause an examination and survey to be made as necessary for its proposed facilities."[4] SDCL 21-35-31. In accordance with the statute, SCS gave written notice to South Dakota landowners along the pipeline's proposed route of its plans to perform surveys. (30317/064R 1504, 1506–11, 1943–46; 30338/014R 1931–39, 1941–2075.) These lawsuits followed.

ARGUMENT

Summary judgment is proper when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). On appeal, this Court "decide[s] only whether genuine

[4] We will use the terms "survey" and "survey access" as shorthand for all of the access authorized by SDCL 21-35-31, whether denominated as "examinations," "surveys," or otherwise.

issues of material fact exist and whether the law was correctly applied." *Bordeaux v. Shannon Cnty. Schs.*, 2005 SD 117, ¶ 11, 707 N.W.2d 123, 126 (citation and quotation marks omitted). "'Summary judgment will be affirmed if there exists *any* basis which would support the trial court's ruling.'" *Holzer v. Dakota Speedway, Inc.*, 2000 SD 65, ¶ 8, 610 N.W.2d 787, 792 (citation omitted).

There are no disputed issues of material fact in these cases, so summary judgment was appropriate. SDCL 21-35-31 is constitutional, and the trial courts correctly concluded that SCS met all statutory requirements to complete surveys. This Court should affirm the judgments below.

I. SDCL 21-35-31 IS CONSTITUTIONAL.

"The constitutionality of a statute is a question of law reviewed de novo." *State v. One 1969 Blue Pontiac Firebird*, 2007 SD 63, ¶ 5, 737 N.W.2d 271, 272. There is a "strong presumption that a statute is constitutional." *Beals v. Pickerel Lake Sanitary Dist.*, 1998 SD 42, ¶ 8, 578 N.W.2d 134, 135. "That presumption is not overcome until it is clearly and unmistakably shown beyond a reasonable doubt that the act violates constitutional principles." *Id.* ¶ 18, 578 N.W.2d at 137. The burden of overcoming that strong presumption rests on the challenging party. *Id.* ¶ 8, 578 N.W.2d at 135. "'If a statute can be construed so as not to violate the constitution, that construction must be adopted.'" *State v. Allison*, 2000 SD 21, ¶ 5, 607 N.W.2d 1, 2 (citation omitted); *see also In re Expungement of Oliver*, 2012 SD 9, ¶ 17, 810 N.W.2d 350, 354.

On a facial challenge, "the challenger must establish that no set of circumstances exists under which the [challenged statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also State v. Andrews*, 2007 SD 29, ¶ 6, 730 N.W.2d 416, 419 ("A 'facial' challenge, in this context, means a claim that the law is invalid *in toto* - and therefore incapable of any valid application." (citation and quotation marks omitted)). A facial challenge is "the most difficult challenge to mount successfully," and challengers have a "heavy burden to demonstrate that [a statute] is 'facially' unconstitutional." *Salerno*, 481 U.S. at 745.

A. SDCL 21-35-31 does not authorize a taking.

Landowners challenge SDCL 21-35-31 as authorizing an unconstitutional taking.[5] (Br. at 6–16.) Citing the U.S. Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), they contend that SDCL 21-35-31 violates the Fifth Amendment to the U.S. Constitution and Article VI, § 13 and Article XVII, § 18 of the South Dakota Constitution because it authorizes survey access that amounts to a taking without requiring just compensation. But *Cedar Point*, which addressed a California union regulation, not a survey statute, makes clear that longstanding restrictions on property rights—like the right to survey access—are not takings.

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[5] This is a facial challenge. Landowners abandoned their as-applied challenge at summary judgment. (30317/064R 1608; 30338/014R 2198; 3d Cir. Tr. 14:12–17, 18:5–10; 5th Cir. Tr. 4:23–5:3.)

1. *Cedar Point* reaffirms that longstanding restrictions on property rights are not takings.

Cedar Point was not about survey access. It was about a California regulation requiring all agricultural employers to "allow union organizers onto their property for up to three hours per day, 120 days per year" without compensation for the intrusion. 141 S. Ct. at 2069. The Court held that the regulation authorized a per se physical taking without compensation because it "appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year." *Id.* at 2074. The Court did not mention survey laws, let alone hold that survey-access statutes suffer from the same constitutional infirmities as the California union regulation.

Far from it. Even as the Court invalidated the California regulation, it affirmed that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Id.* at 2079. The Court explained that "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the landowner's title.'" *Id.* at 2079 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)). That principle did not apply in *Cedar Point* because "no traditional background principle of property law requires the growers to admit union organizers onto their premises." *Id.* at 2080. In doing so, the Court rejected the theory that Landowners peddle

here—that every physical invasion of property is a per se taking. *See also id.* at 2078–79 (discussing how not all government-induced flooding is a taking).[6]

2. Survey access is a longstanding background restriction on property rights.

Unlike the California union regulation in *Cedar Point*, survey access incidental to the power of eminent domain is a "traditional background principle of property law." 141 S. Ct. at 2080. Survey statutes "merely assert[] a 'pre-existing limitation upon the landowners' title.'" *Id.* at 2079 (citation omitted). SDCL 21-35-31—like South Dakota's other survey statutes—reflects a longstanding background restriction on property rights that has existed in this State (and across the Nation) for more than a century. SDCL 21-35-31 does not authorize a taking because Landowners never enjoyed the right to exclude prospective condemnors from surveying their land in the first place. *See Lucas*, 505 U.S. at 1030 ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."); *Palmer v. Atl. Coast Pipeline, LLC*, 801

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[6] Many courts have declined to extend *Cedar Point* beyond its union-regulation context. *E.g.*, *Hardy v. United States*, 156 Fed. Cl. 340, 344–45 (2021); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1380, 1383 (8th Cir. 2022); *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 491–92 (Fla. Dist. Ct. App.), *review denied*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022), *cert. denied*, 143 S. Ct. 980 (2023); *Gonzales v. Inslee*, 535 P.3d 864, 872–73 (Wash. 2023); *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 551–53 (2d Cir.), *cert. denied*, No. 22-1095, 2023 WL 6379013 (U.S. Oct. 2, 2023); *United States v. Andrews*, No. 3:20-cv-1300, 2022 WL 1443998, at *3 n.3 (D. Conn. May 6, 2022); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 980–81 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 1085 (2023); *Munzel v. Hillsborough County*, No. 8:21-cv-2185, 2022 WL 671578, at *4 (M.D. Fla. Mar. 7, 2022).

S.E.2d 414, 418 (Va. 2017) ("[T]he common law has long recognized that the right to exclude is not absolute.").

A longstanding background restriction is one that is consistent "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1028. In assessing "historical practice," courts look "primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions." *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020). In *Cedar Point*, the Court relied on *Nichols on Eminent Domain* to explain the distinction between trespass and takings. 141 S. Ct. at 2078 (citing 1 *P. Nichols, The Law of Eminent Domain* § 112, p. 311 (1917)). *Nichols* explains that "[e]ntry by a governmental agency for purposes of conducting a survey generally does not constitute a taking, under either the common law or under applicable statutory guidelines." 2A *Nichols on Eminent Domain* § 6.01(16)(b) (2022). "Inspections for the purposes of surveys and examinations have been allowed," *Nichols* continues, "even in the absence of statutory authority." 6 *Nichols* § 26C.01(1).

Cedar Point also relied on the Restatement of Torts for examples of common-law privileges. 141 S. Ct. at 2079 ("These background limitations also encompass traditional common law privileges to access private property." (citing Restatement (Second) of Torts § 196 (1964))); *see also Chem-Age Indus., Inc. v. Glover*, 2002 SD 122, ¶ 33 & n.8, 652 N.W.2d 756, 770 & n.8

(recognizing the Restatements as "persuasive in many instances").[7] Like *Nichols*, the Restatement of Torts recognizes the common-law survey privilege. Restatement (Second) of Torts § 211 cmt. c ("The privilege of entry for the purpose of performance or exercise of such duty or authority may be specifically given, as where an employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain. Such a privilege of entry may also arise by implication.").

The Model Code on Eminent Domain reflects the same background limitations on property rights: "The owner shall not obstruct a condemnor from entering upon his land prior to filing a declaration of taking for the purpose of surveying the land or making a specified inspection of same, provided that, the condemnor shall compensate the owner for any virtual damages that may result from his entrance upon the land . . . ." 10 *Nichols* Appendix D-2 § 308.

Those sources reflect the long-established and (as far as we can tell) unanimous position of appellate courts across the Country. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015) ("Indeed, it appears that no court has declared a statute expressly giving a

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[7] This Court has cited the Restatement of Torts with approval on several occasions. *E.g.*, *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶ 52, 599 N.W.2d 384, 398; *Petersen v. Dacy*, 1996 SD 72, ¶ 7, 550 N.W.2d 91, 93; *Kjerstad v. Ravellette Publ'ns, Inc.*, 517 N.W.2d 419, 429 (S.D. 1994); *Petersen v. Sioux Valley Hosp. Ass'n*, 491 N.W.2d 467, 468 (S.D. 1992).

utility the right to enter private property for survey purposes before exercising eminent domain authority facially unconstitutional.").[8] American courts have long recognized—even in the absence of statutory authorization—that an entity with eminent-domain power has a right to enter private land to undertake preliminary surveys or similar investigations. *See Fox v. W. Pac. R.R. Co.*, 31 Cal. 538, 543–44 (1867); *Young v. McKenzie*, 3 Ga. 31, 45 (1847); *Chambers v. Cincinnati & Ga. R.R.*, 69 Ga. 320, 322 (1882); *Thomas v. City of Horse Cave*, 61 S.W.2d 601, 604 (Ky. 1933); *Winslow v. Gifford*, 60 Mass. 327, 329–30 (1850); *Brigham v. Edmands*, 73 Mass. 359, 363 (1856); *Orr v. Quimby*, 54 N.H. 590, 596–97 (1874); *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538, 544 (1877); *Kincaid v. United States*, 35 F.2d 235, 247 (W.D. La. 1929), *aff'd*, 49 F.2d 768 (5th Cir. 1931), *rev'd on other grounds sub nom.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *see also Klemic*, 138 F. Supp. 3d at 690–91 ("[I]t is clear that the common law recognizes, and state and federal courts have consistently upheld, the

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[8] One Iowa trial court recently held that an Iowa survey-access statute is unconstitutional. *Navigator Heartland Greenway, LLC v. Koenig*, No. EQCV034863 (Iowa Dist. Ct. May 3, 2023), *appeal voluntarily dismissed*, No. 23-0739 (Iowa Nov. 27, 2023). That court misapplied both *Cedar Point* and the legal standard for a facial constitutional challenge. Yet even in its error, that court recognized "that survey access may be a traditional privilege that allows access to private property." *Id.* at 11. Since the *Koenig* decision, two Iowa courts have upheld the same statute's constitutionality. *Summit Carbon Sols., LLC v. Kasischke*, No. CVCV101911, order at 3–13 (Iowa Dist. Ct. May 10, 2023), *appeal filed*, No. 23-1186 (Iowa July 28, 2023); *Navigator Heartland Greenway, LLC v. Hulse*, No. EQCV204557, order at 3–12 (Iowa Dist. Ct. May 30, 2023), *appeal filed*, No. 23-1026 (Iowa June 28, 2023).

privilege to enter private property for survey purposes before exercising eminent domain authority . . . . [A] landowner has no constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes.").

Take, for instance, *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1984). There, the Georgia Supreme Court—citing *Nichols*—upheld the common-law right to enter property to survey, inspect, and appraise it. *Id.* at 889. *Oglethorpe* explained that "it would be illogical to require the prospective condemnor to institute condemnation proceedings and pay compensation" before a preliminary entry. *Id.* at 890. The court held that "a prospective condemnor is not required to adhere to condemnation procedures and constitutional provisions for compensation before making a preliminary entry" and, surveying the legal landscape, observed that "courts in a vast majority of jurisdictions agree." *Id.*

That includes South Dakota. SDCL 21-35-31 went into effect in 2016 and is the latest codification of a longstanding common-law and statutory right to survey access in this State. *See* 2016 S.D. Sess. Laws 295, 295 (ch. 118, § 1). In fact, at least as far back as 1916, this Court recognized that "prior to or pending the condemnation proceedings," a prospective condemnor has the right to make "surveys of the land" and dig "test holes," and that "such acts certainly did not amount to taking possession of the tract." *Fairmont & Veblen Ry. Co. v. Bethke*, 37 S.D. 446, 449–50, 159 N.W. 56, 58

(1916). More recently, then-Judge (now Justice) Salter reaffirmed the common-law survey right and its constitutionality. *Dakota Access, LLC v. Schumaker*, No. 49CIV15-000941, mem. op. at 14 (S.D. Cir. Ct. Mar. 24, 2016) ("Here, the court concludes that a pre-condemnation survey is not, itself, a taking and that Dakota Access is not required to seek relief by commencing a condemnation proceeding.").

Another survey statute—SDCL 49-33-6—has been in effect since 1903. *See* 1903 S.D. Sess. Laws 115, 118 (ch. 107, § 8(1)). And those are just some examples of how survey access is deeply rooted in property law in South Dakota. *See also Dakota Access*, mem. op. at 16–22 (discussing the history of survey access and citing three other statutes—SDCL §§ 50-6A-19, 46A-6-5, and 46-8-2.1); Off. Op. No. 83-32, 1983 S.D. Op. Atty Gen. 70, 1983 WL 180613, at *1–2 (citing SDCL §§ 1-1-10, 49-33-6 and observing that the legislature had authorized survey access in several contexts).

For 120 years, then, South Dakota has statutorily authorized pre-condemnation survey access. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (noting that "the regulatory regime in place at the time the claimant acquires the property at issue" shapes the reasonableness of expectations and informs the background principles analysis for takings). Those South Dakota authorities—along with authorities like *Klemic*, *Palmer*, *Nichols on Eminent Domain*, the Restatement of Torts, and the Model Code on Eminent Domain—illustrate

that survey-access laws are a longstanding part of American law that "merely assert[] a 'pre-existing limitation upon the landowner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028–29). They "are consistent with longstanding background restrictions on property rights" and do not constitute a taking. *Id.*; *see also Benson* v. *State*, 2006 SD 8, ¶ 84, 710 N.W.2d 131, 162 ("The Constitution was written and adopted in the light of the conditions and well known laws as they then existed.'" (citation omitted)).

Again, South Dakota is not an outlier. "Today, every state has codified the common law privilege of a body exercising eminent domain authority to enter private property to conduct preliminary surveys without trespass liability." *Palmer*, 801 S.E.2d at 418 & n.2. In fact, there are more than 490 survey-access statutes currently codified across the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *See* App'x at 1–24 (Addendum: Nationwide Survey-Access Laws). At least 29 States (plus D.C. and Puerto Rico) have had statutes in effect for more than a hundred years. *Id.* That of course says nothing of common-law survey rights that predate codification efforts.

The bottom line: Landowners took title to their property subject to a longstanding background restriction authorizing survey access. That makes this case unlike *Cedar Point*.

3. Landowners' attempts to distinguish SDCL 21-35-31 ignore the law.

Conceding that South Dakota has long recognized survey access, Landowners fall back on an attempt to distinguish the *type* of condemnor as relevant to the inquiry. (Br. at 13–14 ("While there are earlier South Dakota statutes authorizing pre-condemnation survey, none of them apply to common carrier pipelines . . . .").) That is the wrong analysis. The inquiry does not focus on whether a particular type of condemnor is seeking survey access but rather on whether pre-condemnation survey access itself is a longstanding background restriction. SDCL 21-35-31 represents the latest iteration of the South Dakota legislature's practice of adapting and expanding eminent-domain and survey-access laws to accommodate emerging technologies and infrastructures. Reviewing the history of the codification of survey access in the State, Justice Salter rejected a similar argument:

> These instances of legislative action do not reflect a single, simultaneous effort to allow pre-condemnation surveys for some entities and purposefully deny that authority to pipeline companies who are common carriers. . . .
>
> Under the circumstances, the court cannot accept the *expressio unius* argument and find that pre-condemnation surveys [for pipeline common carriers] are categorically prohibited.

Dakota Access, mem. op. at 20.

Landowners' attempt to limited background restrictions to *Cedar Point*'s three examples likewise fails. The Court held that "many" longstanding background restrictions on property rights are not takings,

explained that those longstanding background restrictions include (but are not limited to) "traditional common law privileges to access private property," and then provided a few examples of those common-law privileges (which are only a subset of the broader universe of "longstanding background restrictions" that are not takings). 141 S. Ct. at 2079. The Court did not limit background restrictions to only those examples. They were examples, not an exhaustive list. *Id.* at 2079 ("One such privilege allowed . . . ."). In any event, *Cedar Point*'s examples included government-authorized invasions for both public and private interests (*id.* at 2078–79), and a condemnor's survey authority is consistent with those examples.

Nor is survey access the only background restriction outside of *Cedar Point*'s explicit examples. Landowners point to two "South Dakota examples of longstanding third-party privileges to enter private property" that do not fall within *Cedar Point*'s examples. (Br. at 14–15.) Those dealt with rights to private property for private convenience, undercutting Landowners' attempt to cabin background restrictions to only those "centered around public necessity and prevention of public harm." (Br. at 16.) In *Benson*, for instance, this Court held that SDCL 41-9-1.1(2) did not authorize a taking when it allowed the shooting at or taking of small game flying over private land. 2006 SD 8, ¶ 89, 710 N.W.2d at 163. The Court looked to the history of South Dakota law: "If the passage of SDCL 41-9-1.1(2) constitutes a compensable taking, then the same legal situation existed from 1889 and for many years

thereafter. . . . Yet, one can search all the Constitutional Debates and our case law prior thereto and after 1889 and there is no hint or suggestion a taking was the state of the law." *Id.* ¶ 84, 710 N.W.2d at 162.

4. SDCL 21-35-31 requires payment for property damage.

Landowners also suggest that SDCL 21-35-31 violates the South Dakota Constitution's right to have damages determined by a jury and paid before entry. (Br. at 10–12 (citing S.D. Const. art. XVII, § 18).) But because entry for survey access is not a taking, there is no just compensation due for the entry in the first place. In any event, SDCL 21-35-31(3) requires the surveying entity to "[m]ake a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry."[9] Landowners have a statutory right to payment for actual property damage caused by the survey—a right that they may enforce if payment is wrongfully refused. *E.g.*, *Rupert v. City of Rapid City*, 2013 SD 13, ¶¶ 9–10, 827 N.W.2d 55, 60–61 (contemplating the possibility of a post-damage lawsuit); *Hamen v. Hamlin County*, 2021 SD 7, ¶¶ 17–19, 55 N.W.2d 336, 344–45 (same).

* * *

[9] Landowners' argument also defies logic: How could a surveyor pay for "actual damage" before completing the surveys? There is no damage before the surveys happen, and there is no guarantee that a survey will cause damage.

There is no hint in *Cedar Point* that the U.S. Supreme Court upended centuries of nationwide survey-access laws when it invalidated a California union regulation with no analog elsewhere in the Nation. Landowners' contrary position would threaten longstanding laws in all 50 States even though *Cedar Point* did not mention, let alone cast doubt on, those laws.

If adopted, Landowners' position would invalidate more than 490 statutes across the Nation. It would also force all prospective condemnors (including the State of South Dakota) to condemn property before surveying it, causing condemnation proceedings to proliferate and increasing the burden on property owners, condemnors, the public, and the courts. Fortunately, longstanding principles of South Dakota property law—reflecting the consensus across the country—defeat Landowners' theory.

B. SDCL 21-35-31 satisfies procedural due process.

Landowners also fail to meet their heavy burden to prove SDCL 21-35-31's facial unconstitutionality under the procedural due process clauses. (Br. at 17–19.) No court in the country has ever invalidated a survey statute on procedural-due-process grounds. Landowners nevertheless identify two alleged deficiencies: the statute (1) "requires only 30 days written notice of the entry" and (2) "provides no mechanism for challenging the permit applicant's right to enter." (Br. at 18.) They misapprehend what procedural due process requires.

First, because survey access is a "traditional background principle of property law" (*Cedar Point*, 141 S. Ct. at 2080), there is no deprivation

requiring procedural due process in the first place. *See Morris Fam. LLC v. S.D. Dep't of Transp.*, 2014 SD 97, ¶ 28, 857 N.W.2d 865, 873–74 ("[A] property or liberty interest [is] needed to support a procedural due process claim."); *Vruno v. Schwarzwalder*, 600 F.2d 124, 129 (8th Cir. 1979).

Second, procedural due process requires only "reasonable notice" and an "opportunity to be heard." *Schrank v. Pennington Cnty. Bd. of Comm'rs*, 1998 SD 108, ¶ 13, 584 N.W.2d 680, 682 (citation and quotation marks omitted); *see also Achtien v. City of Deadwood*, 814 F. Supp. 808, 813 (D.S.D. 1993) ("Procedural due process is commonly understood to require notice of the deprivation and an opportunity to be heard, though the opportunity to be heard need not always precede the deprivation."). Landowners cannot in good faith contend that SDCL 21-35-31 deprives them (or others) of notice or the opportunity to be heard. How could they? This litigation, which started before any survey happened, confirms that the statute provides both. Landowners challenged SCS's right to enter at the trial courts below before any surveys took place, and they are now pressing their appeals in this Court.[10]

SDCL 21-35-31 provides notice and an opportunity to be heard. Prospective condemnors must give 30 days' notice before entering a landowner's property, and the statute does not abrogate a landowner's right

[10] Landowners claim that 30 days' notice is not enough, but they do not explain why or how. And the statute that they point to as an example of "adequate procedures" (Br. at 18) also contains a 30-day notice period. *See* SDCL 21-35-10.1.

to seek a judicial remedy for any property damage or improper entry. That is all that procedural due process requires.

II. SCS IS A COMMON CARRIER WITH EMINENT-DOMAIN POWER.

The trial courts properly granted summary judgment confirming SCS's status as a common carrier. SDCL 21-35-31 grants survey rights to entities with eminent-domain power. Any pipeline company that is a common carrier under SDCL 49-7-11 "may exercise the right of eminent domain." SDCL 49-7-13. Pipeline companies are common carriers when they "hold[] themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline." SDCL 49-7-11.

Landowners contend that (1) SCS is not holding itself out to the general public as engaged in the business of transporting CO_2 for hire and (2) CO_2 is not a commodity. (Br. at 19–30, 33–35.) They also take issue with how Judge Pardy resolved these issues in the Third Circuit. (Br. at 30–33.) Landowners are wrong on all counts. First, the undisputed record evidence shows that SCS is holding its transportation services out to the public for hire. Second, CO_2 is by any definition a commodity. And third, Landowners suffered no prejudice from how Judge Pardy ruled on those issues.

A. SCS is a common carrier under SDCL 49-7-11's plain language.

1. SCS is holding itself out to the general public as engaged in the business of transporting CO_2 for hire.

Because the term "for hire" is not defined in SDCL 49-7-11, its "ordinary" and "plain" meaning controls. *Hofer v. Redstone Feeders, LLC*, 2015 SD 75, ¶ 15, 870 N.W.2d 659, 662. The ordinary and plain meaning of "for hire" is to provide goods or services in exchange for some value—particular characteristics of the value are irrelevant. *E.g.*, *Hire*, Black's Law Dictionary (11th ed. 2019); *Hire*, Merriam-Webster, https://www.merriam-webster.com/dictionary/for%20hire (last visited Nov. 29, 2023); *see also* SDCL 49-16A-1(3) (defining "for hire" in a different common-carrier context as "the condition of receiving remuneration *of any kind*, paid or promised, *either directly or indirectly*, for the transportation" (emphasis added)). In addition, the term "public" "'does not mean everybody all the time.'" *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 733 (E.D.N.C. 2008) (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)). At common law, the "crucial criteria is that the common carrier makes its services available to any 'who may choose to employ him.'" *Id.* (quoting *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927)). "It does not matter that the service offered will be used by a limited subset of the population." *Id.*

The undisputed evidence shows that SCS is holding out its transportation services to the public for hire.

First, SCS has advertised its transportation services for hire to the public on Summit Carbon Solutions' website and has reached out directly to potential customers. (30317/064R 655; 30338/014R 1785, 2617.) Through those outreach efforts, SCS has opened its transportation services to the general public.

Second, SCS will hold an open season during which it will publicly solicit binding commitments for interstate CO_2-transportation services from interested customers. (30317/064R 655; 30338/014R 1785.) An open season is a standard method for common carriers to hold out their services. *E.g.*, *White Cliffs Pipeline, L.L.C.*, 148 FERC P 61,037, 61,156 (2014) (explaining that an open season functions to "widely advertise[] and afford[] all potentially interested shippers a fair and equal opportunity to become committed shippers").

Third, SCS is reserving pipeline capacity for uncommitted future shippers that may want to receive CO_2-transportation services after the pipeline has begun operations. (30317/064R 655; 30338/014R 1785.) Reservation of pipeline capacity is another feature of a common carrier. *E.g.*, *Medallion Pipeline Co.*, 155 FERC P 61,268, 62,731 (2016) (noting that reserving "capacity to remain available for walk-up shippers . . . provides reasonable access . . . for shippers that did not enter into committed firm agreements" during the open season). By both holding an open season and reserving capacity for walk-up shippers, SCS is holding its transportation

services open to the general public—to both committed and uncommitted shippers—for hire.

Fourth, SCS's actions in other states, like North Dakota, confirm that SCS is a common carrier. In June 2022, SCS filed its acceptance of N.D. Cent. Code Chapter 49-19's provisions with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO2 for others . . . in accordance with the definition of a common carrier." (30317/064R 655, 658–60; 30338/014R 1785–86, 1789–91.)

Each of those facts, alone, demonstrates that SCS is a common carrier. Landowners address none of those facts in their brief and instead fixate on a handful of contracts. But those contracts and signed letters of intent with at least 34 third-party facilities for CO_2-transportation services also demonstrate that SCS is in the business of transporting CO_2 for hire. (30317/064R 655, 1693–1942; 30338/014R 1785, 2308–2557.) They show that SCS is providing CO_2-transportation services in exchange for value. The facilities, and indeed anyone reading the contracts, would understand that SCS's business is transporting CO_2 for *others* for *hire*.

Landowners argue that there is no record evidence that the facilities are paying for the CO_2-transportation services under the contracts. (Br. at 25.) That is false. The signed letters of intent, for example, contemplate that the facilities will pay [redacted] (30317/064R 1934, 1941; 30338/014R 2549, 2556.) And each of the executed contracts with

ethanol plants contain price terms. (30317/064R 1709–10, 1772–73, 1835, 1883–84; 30338/014R 2324–25, 2387–88, 2450, 2498–99.) The specific price terms were redacted because, as the trial courts correctly held, they constitute "highly confidential information" that is not relevant to the legal question of whether a transfer of value *exists*.[11] (30317/064R 1276–77; 30338/014R 2087–88.)

That the transportation and sequestration of CO_2 may generate federal tax and carbon-offset credits has no bearing on SCS's common-carrier status. Landowners seem to think that because the project may generate revenue for both SCS and the facilities through these credits, SCS cannot be transporting the CO_2 for hire. That makes no sense. SCS is still providing transportation services for an exchange of value, which is just another way of saying that SCS is transporting CO_2 for hire.

Those facts are undisputed and establish that SCS is holding itself out to the public as engaged in the business of transporting CO_2 for hire. Similar facts were sufficient for Justice Salter to conclude that Dakota Access was a common carrier under the same statute. *Dakota Access*, mem. op. at 16 (holding that Dakota Access was a common carrier because it had "contracted with third parties to ship their crude oil" and "plan[ned] to make 10% of its pipeline capacity available to the public").

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[11] Landowners have not appealed the trial courts' approval of the redactions.

2. Landowners' focus on payment terms and title is a diversion.

That statutory language defeats Landowners' arguments, so they try to move away from the statutory language by arguing that SCS is not a common carrier under SDCL 49-7-11 because (1) particular characteristics of the value exchange are relevant, so Judge Pardy erred in ruling that "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists" (Br. at 23); and (2) under a handful of contracts, [redacted] (Br. at 23–28.) Those arguments are frivolous.

Landowners point to no South Dakota authority for either argument, and nothing in SDCL 49-7-11's text supports either argument. The statute says nothing about specific payment terms. *Cf.* SDCL 49-16A-1(3) (defining "for hire" in a different common-carrier context as "the condition of receiving remuneration *of any kind*, paid or promised, *either directly or indirectly*, for the transportation" (emphasis added)). It also does not require a pipeline company to take title to the commodity to qualify as a common carrier, nor does it prohibit taking title.

Landowners' position finds no support in SDCL 49-7-11's language, so to avoid the statute's plain meaning, Landowners point the Court to inapplicable federal law for guidance. (Br. at 27–28.) Of course, whether SCS is a common carrier is a question of South Dakota law, not federal law. Moreover, Landowners' emphasis on payment terms and title are

inconsistent with the statutory scheme, which carves common-carrier pipelines out from many regulations rather than imposing additional requirements. *See* SDCL 49-7-11 (common-carrier pipelines "are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B").[12]

In any case, Landowners' argument that SCS cannot be a common carrier if [redacted] is unsupported by the broader body of law on common carriers. "[T]he concept of 'common carrier' must be flexible enough to accommodate reasonable commercial practice." *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 251 (3d Cir. 2007). For that reason, it is not uncommon for an affiliated entity—like a marketing affiliate or shipping aggregator—to take title to at least some of the commodity from the originating third party before transport. *E.g.*, *Magellan Midstream Partners, L.P.*, 161 FERC P 61,219, 62,253 (2017) ("Marketing Affiliates of oil pipelines have become commonplace in the industry" and "a Marketing Affiliate may ship on an affiliated/parent pipeline" consistent with the pipeline's common-carrier status); *N.Y. Susquehanna*, 500 F.3d at 242, 250–51 (rejecting argument that

[12] Inasmuch as Landowners take issue with Judge Pardy's use of "for a fee" instead of "for hire," they ignore that they were the ones to first use that terminology when they argued that "'[f]or hire' means SCS must ship the commodity of another *for a fee*." (30317/064R 1025; 30338/014R 1383 (emphasis added).) It's also a red herring—"for hire" means an exchange of any value (including a fee), so Judge Pardy used proper terminology.

a rail carrier was not a common carrier because it "sold most of its shipping capacity to . . . primary customer[s]" that "acted as middlemen between the generators of waste and the railroad" and "took title to C&D waste from the operators of the sites that generated it"). Historically, even the common carrier itself could take title to the commodity without jeopardizing its status as a common carrier. *E.g.*, *Valvoline Oil Co. v. United States*, 308 U.S. 141, 143–46 (1939) (rejecting argument that a pipeline was not a common carrier because it acquired the oil and then transported the oil to its own refineries; what mattered was the pipeline's "purchase [of the oil] from many sources and subsequent carriage"); *Hunt Refin. Co.*, 70 FERC P 61,035, 61,112 (1995) (holding that pipeline was a common carrier because it transported oil from third-party facilities and explaining that "the fact that the oil transported belongs to the owner of the pipeline does not mean that the pipeline is not" a common carrier).

Landowners fail to explain how [redacted] under some contracts undermines SCS's status as a common carrier. Under those agreements, SCS is still transporting CO_2 originating from third parties for an exchange of value. That is all the statute requires. *See also Am. Orient Express Ry. Co.*, No. 34502, 2005 WL 3552968, at *3 (S.T.B. Dec. 27, 2005) ("In determining whether there has been a holding out, 'one must look to the character of the service of the party in relation to the public.'" (citation omitted)).

Landowners' reliance on *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* (*Denbury I*), 363 S.W.3d 192 (Tex. 2012), is misplaced. (Br. at 33–35.) First, *Denbury I* involved the application of Texas, not South Dakota, law. Second, Landowners conveniently fail to disclose to this Court that the Texas Supreme Court ultimately concluded that the pipeline company at issue *was* a common carrier even though it took title to some of the CO_2 being transported. *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.* (*Denbury II*), 510 S.W.3d 909, 915–17 (Tex. 2017). Under *Denbury I* and *II*, taking title to some of the commodity does not defeat common-carrier status.

The *Denbury* cases are also factually distinct. The company there provided no evidence that its pipeline would be available to the public. *Denbury I*, 363 S.W.3d at 201–04; *Denbury II*, 510 S.W.3d at 915; *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex. LLC*, 296 S.W.3d 877, 881 (Tex. App. 2009). Here, by contrast, SCS provided undisputed evidence of far more than a "reasonable probability" that its pipeline will serve the public. *Denbury II*, 510 S.W.3d at 913. SCS has committed to holding an open season, is reserving pipeline capacity for uncommitted shippers, and will ship CO_2 for at least 34 third-party facilities. *See also Denbury I*, 363 S.W.3d at 200 n.23 ("'allow[ing] the dedication of [pipeline] capacity to the public or anyone other than' the . . . owners of the pipeline" is evidence of common-carrier status (citation omitted)); *Tex. Cent. R.R. & Infrastructure, Inc. v.*

Miles, 635 S.W.3d 684, 692 (Tex. App. 2020) ("*Texas Rice* [*Denbury*] *II* did not require that Denbury show that it was currently operating in such a way to serve the public, only that there was a reasonable probability that in the future, it would."), *aff'd*, 647 S.W.3d 613 (Tex. 2022).

The bottom line: Landowners ignore the record. The record shows that SCS is a common carrier not only because of the contracts with third-party facilities but also because it is offering its services more broadly to the public, will hold an open season, and is reserving pipeline capacity for future uncommitted shippers.

B. Carbon dioxide is a commodity.

"Commodity" is not defined in SDCL 49-7-11, so the word's "ordinary" and "plain" meaning controls. *Hofer*, 2015 SD 75, ¶ 15, 870 N.W.2d at 662. A "commodity" is "something useful or valued" or "an economic good." *Commodity*, Merriam-Webster, https://www.merriam-webster.com/dictionary/commodity (last visited Nov. 29, 2023). That includes but is not limited to "a product of agriculture or mining," an "article of commerce especially when delivered for shipment," or any "mass-produced unspecialized product." *Id.*; *see also Commodity*, Black's Law Dictionary (11th ed. 2019) ("[a]n article of trade or commerce" or "[a]n economic good, esp. a raw material or an agricultural product"); *Commodity*, Oxford English Dictionary (3d ed. 2018, last updated Sept. 2023) ("[a] natural resource, material, etc., which is of use or value to humankind; a useful product" or "[a] thing produced for use or sale; a piece of merchandise; an article of commerce . . . a raw material,

primary product, or other basic good which is traded in bulk and the units of which are interchangeable for the purposes of trading"), https://doi.org/10.1093/OED/3226605775. None of those definitions turns on how a particular person intends to use the item; gold, for instance, is a commodity whether it is traded by the ounce on an exchange or made into a wedding band.

By any definition, CO_2 is a commodity. *First*, the federal government and several other States expressly recognize CO_2's status as a commodity. *E.g.*, 49 C.F.R. § 1039.11(a) (the federal Surface Transportation Board lists carbon dioxide as a commodity); La. Rev. Stat. § 30:1102(A)(2) ("Carbon dioxide is a valuable commodity to the citizens of the state."); Okla. Stat. tit. 27A, § 3-5-101(B)(1) ("Carbon dioxide is a valuable commodity to the citizens of the state . . . ."); Miss. Code Ann. § 53-11-3(1)(b) ("Carbon dioxide is a valuable commodity to the citizens of the state."); N.D. Cent. Code § 38-22-01 (referring to CO_2 as "a potentially valuable commodity"); Neb. Rev. Stat. § 57-1602 (same).

Second, the myriad uses for CO_2 and its recognized value confirm its status as a commodity. Companies around the world buy, sell, and use CO_2 in commercial, industrial, and other contexts—to the tune of approximately 230 million tons every year. (30317/064R 831; 30338/014R 1152.) Manufacturers use it to create proteins, fertilizers, polymers, foams, building blocks, plastics, concrete, furniture, shatterproof glass, and fuel. (30317/064R 937, 949;

30338/014R 1258, 1270; *see also* 30317/064R 916–17; 30338/014R 1237–38.) By some estimates, CO_2-based products could be worth between $800 billion and $1 trillion by 2030. (30317/064R 916; 30338/014R 1237; *see also* 30317/064R 926–29, 931, 953; 30338/014R 1247–50, 1252, 1274.)

Even CO_2 that is not "used" in the traditional sense carries immense value through carbon-offset markets and government incentives. Many companies purchase carbon offsets—buying carbon credits to fund activities that remove carbon from the air—to "close the gap between [the] company's current emissions and their climate targets." (30317/064R 985; 30338/014R 1306; *see also* 30317/064R 955–75; 30338/014R 1276–96.) And the federal government places significant value on CO_2 through the Section 45Q tax credit, which promotes investment in carbon capture and sequestration. (30317/064R 995–96, 999–1009, 1012–16; 30338/014R 1316–17, 1320–30, 1333–37.)

Despite that, Landowners argue that CO_2 is not a commodity because it is "waste" that will be permanently sequestered. (Br. at 29.) They claim that CO_2's status as a commodity depends on how a particular party intends to use it. That argument makes no sense. A commodity is a commodity no matter how a particular party intends to use it, and it retains that status regardless of *who* owns the item, *how* it is transported or stored, or *what* the intended or ultimate use is. Under Landowners' theory, metal on a train or oil in a pipeline might be a commodity in one instance but not in another

based on how the customer intends to use it. That tortured definition would lead to absurd results. *See Nelson v. S.D. State Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D. 1991) ("When a statute or rule does not define a term, it should be construed according to its accepted usage and a strained, unpractical, or absurd result should be avoided."). Nothing in SDCL 49-7-11 cabins "commodity" to specific purposes or end uses.

In fact, earlier this year the South Dakota Legislature rejected an amendment to SDCL 49-7-11 that would do just that. H.B. 1133 proposed to redefine "commodity" to be "a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing" but excluding "a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q." H.B. 1133, 2023 Leg., 98th Sess. (S.D. 2023) (as engrossed by H. State Affairs Comm., Feb. 6, 2023). The bill failed.[13] That failed effort to redefine "commodity" confirms that CO_2 is a commodity. In fact, one of H.B. 1133's proponents was Mr. Jorde, Landowners' counsel here.[14] Having failed to convince the Legislature, opposing counsel now asks this Court to override the Legislature

[13] Minutes of S. Com. & Energy Comm. at 1, 2023 Leg., 98th Sess. (Feb. 16, 2023), https://mylrc.sdlegislature.gov/api/Documents/249452.pdf.

[14] Minutes of H. State Affairs Comm. at 1, 2023 Leg., 98th Sess.(Feb. 6, 2023), https://mylrc.sdlegislature.gov/api/Documents/248237.pdf.

and adopt a definition contrary to the statute's plain language. This Court should reject that effort.

Landowners' definition is also inconsistent with the requirement that pipeline common carriers must "hold[] themselves out to the general public" to provide transportation "for hire." SDCL 49-7-11. Under Landowners' theory, SCS would be forced to scrutinize every potential CO_2 shipper to determine where the CO_2 came from, why it is being transported, and all potential destinations and uses of that particular CO_2 in the future. That contradicts SDCL 49-7-11 and common sense.

C. Judge Pardy's analysis on the commodity and common carrier issues was correct and did not prejudice Landowners.

Landowners take issue with how Judge Pardy ruled on the commodity and common-carrier issues. And they suggest that Judge Sommers's summary judgment ruling on the same issues was tainted because he adopted Judge Pardy's reasoning. (Br. at 30–33.) Judge Pardy's analysis was proper. But regardless, it was not prejudicial to Landowners, and Landowners didn't preserve the issue for review.

First, this issue is not properly before the Court. Landowners challenge Judge Pardy's analysis in his December 28 memorandum decision. That decision was not identified in Landowners' notice of appeal; the only order identified in the notice is the final order granting SCS's summary judgment

motion and denying Landowners' motions to compel and continue.[15] (30317/064R 2316.) *See* SDCL 15-26A-4(1) ("The notice [of appeal] . . . shall designate the judgment, order, or part thereof appealed from . . . ."). Although the Court "may review any order . . . involving the merits and necessarily affecting the judgment and appearing upon the record" (SDCL 15-26A-7), Judge Pardy's ruling was not a final merits decision because he did not enter judgment on any issue until after full briefing and a hearing on SCS's summary judgment motion. And because their notice specified only one order being appealed (the final summary judgment order), Landowners excluded any other decisions from their appeal. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002) ("[A] notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice."); *Gustafson v. Bi-State Dev. Agency*, 29 F.4th 406, 413 (8th Cir. 2022) (same).

In any event, Landowners cannot protest a ruling that they invited. After SCS moved for entry of a protective order to govern the disclosure of confidential information, including contracts with ethanol plants, Landowners suggested that Judge Pardy and Judge Sommers review the

[15] Landowners also did not include the memorandum decision in their appendix. *See* SDCL 15-26A-60(8)(a) ("The appendix shall include . . . [t]he judgment, order or decision in question and any relevant written findings of fact and conclusions of law and memorandum decision . . . .").

contracts *in camera* to determine the appropriateness of a protective order, the documents' designation as "Attorneys' Eyes Only," and SCS's proposed redactions. (30317/064R 1028, 1032–33; 30338/014R 1386, 1413–16.) Landowners argued that the contracts were "probative to [CO_2's] status as a commodity" and "to SCS's common carrier status." (30317/064R 1025–26; 30338/014R 1383.) When Judge Pardy granted SCS's motion and approved the redactions and designation, he addressed Landowners' arguments. He explained that, as a matter of law, CO_2 is a commodity, so the contracts have no bearing on that issue. And addressing SCS's proposed redactions of highly sensitive commercial terms (something Landowners don't challenge on appeal), he explained that even with the redactions, the agreements "establish that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee." (30317/064R 1276–77.)

Landowners now complain that Judge Pardy's analysis was tantamount to an improper *sua sponte* summary judgment ruling. They are wrong. Judge Pardy resolved only the discrete issues necessary to address Landowners' own arguments. Regardless, it was *Landowners* who asked the Court to review the contracts *in camera* to assess their relevance and resolve the parties' discovery disputes. And it was *Landowners* who put the commodity and common-carrier issues before the court.

Landowners cannot now complain because they do not like the outcome. "[T]he cases almost universally hold that one who invites error in a

lower court is estopped to assert that error in the appellate court." *In re Estate of Hofer*, 90 S.D. 140, 144, 238 N.W.2d 496, 498 (1976) (holding party was estopped from challenging the validity of an order that she had requested); *see also State v. Johnson*, 272 N.W.2d 304, 306 (S.D. 1978) ("It has long been the holding of this court, however, that a [party] cannot take advantage of error which he has invited."); *Taylor Realty Co. v. Haberling*, 365 N.W.2d 870, 873 (S.D. 1985) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." (citation omitted)).

Nor were Landowners prejudiced by Judge Pardy's analysis. They still pressed all their arguments on those issues in resistance to SCS's summary judgment motion, and they offered SCS's contracts and letters of intent as evidence. (30317/064R 1628–31, 1693–1942.) At the hearing, Judge Pardy gave Landowners the opportunity to explain any errors in his analysis and to show what facts, if any, would change the analysis. (3d Cir. Tr. 7:1–4.) Landowners had a full and fair opportunity to address the issues at summary judgment, and they did. Ultimately, Judge Pardy did not enter summary judgment on *any* issue until after briefing and a hearing. There was no *sua sponte* entry of summary judgment.[16] And even if there was, it was not

[16] Similarly, there was no error with Judge Sommers's ruling on those issues. Judge Sommers did not enter summary judgment on any issue until full briefing and a hearing. (30338/014R 2608–11.) And he did not enter summary

erroneous because "sua sponte orders are appropriate where"—as here—"'the court's ruling on issues properly raised forecloses as a matter of law the claim on which the court wishes to grant summary judgment sua sponte.'" *Brown v. Hanson*, 2007 SD 134, ¶ 19, 743 N.W.2d 677, 682 (citation omitted).

Finally, "'[s]ummary judgment will be affirmed if there exists *any* basis which would support the trial court's ruling.'" *Holzer*, 2000 SD 65, ¶ 8, 610 N.W.2d at 792 (citation omitted); *see also Wolff v. Secretary of S.D. Game, Fish & Parks Dep't*, 1996 SD 23, ¶ 32, 544 N.W.2d 531, 537 ("[W]here a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons."). Both parties fully argued and briefed these issues on summary judgment and now again before this Court. CO_2 is a commodity as a matter of law, and the undisputed evidence shows that SCS is a common carrier.

III. SCS COMPLIED WITH SDCL 21-35-31'S SURVEY-ACCESS CONDITIONS.

A common-carrier pipeline may survey under SDCL 21-35-31 once it has (1) "filed a siting permit application with the public utilities commission pursuant to § 49-41B-11;" (2) "[g]ive[n] thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property;" and (3) "ma[d]e a payment to the owner, or provide[d] sufficient security for the payment, for any actual damage done

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judgment on the common-carrier issue until after supplemental briefing. (*Id.* 2665–74.)

to the property by the entry." Landowners challenge the second and third requirements. (Br. at 35–39.) By providing expected entry dates and a link to SCS's PUC application, SCS's notice letters satisfy SDCL 21-35-31(2). And Landowners waived the issues of the sufficiency of SCS's bond and notice to tenants, which SCS complied with in any event.

A. SCS's notice letters provide notice of its expected entry dates and the filing of its PUC application.

To obtain survey access under SDCL 21-35-31, a condemnor must "[g]ive thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property." SDCL 21-35-31(2). SCS's notice letters satisfy those requirements.

SCS sent notice letters at least 30 days before its planned surveys.[17] (30317/064R 1504, 1506–11; 30338/014R 1931–39, 1941–2075.) Each letter provides the expected dates of entry (*e.g.*, 30317/064R 1507 ("Our expected dates of entry would be from 7/26/2022 to 7/30/2022.")) and notice of the filing of SCS's PUC application (*e.g.*, *id.* 1508 ("The [PUC] application filing was made February 7, 2022 and can be found at your county auditor's office and can also be accessed on line here: https://puc.sd.gov/Dockets/HydrocarbonPipeline/2022/HP22-001.aspx[.]")).

[17] Landowners challenge only the letters' contents; they do not dispute the actual "giving" and timing of the notices. (Br. at 4 ("Beginning in early June 2022, Landowners received letters from SCS . . . ."); 30317/064R 1601, 1631; 30338/014R 2193, 2212–13.)

In the pleadings, Landowners claimed that providing a date range (like a four-day window) is improper and that the letters must "more specifically define dates of entry." (30317/064R 346; 30338/014R 494.) Providing a date range satisfies the statute because it requires notice of only the *expected* entry dates (plural); it does not require prophetic precision.

Landowners also take issue with the letters' statement that SCS seeks "to complete the survey work within 45-days following the 30-day written notice period that is initiated by the receipt of this letter." (Br. at 36–37; *e.g.*, 30317/064R 1507.) This sentence does not establish "a 45-day window for unpermitted entry" (Br. at 37) because Landowners read the sentence out of context. The 45-day reference follows the definitive set of entry dates along with SCS's explanation that "[i]f you have a more convenient series of dates, we'd be glad to work with you on it." (*E.g.*, 30317/064R 1507.) Each letter identifies a discrete, expected entry window while reiterating SCS's commitment to working with Landowners to find alternative dates if needed.

Each letter also gives notice of the filing of SCS's PUC permit application by providing a link to the application on the PUC's docket. (*E.g.*, 30317/064R 1507–08.) *See* SDCL 21-35-31(2) (the notice must "includ[e] the filing" of the application). Landowners argue that SCS's letter did not "includ[e] the filing" because it provided a hyperlink instead of enclosing the full 124-page application. (Br. at 37.) But the statute requires only that SCS "[g]ive thirty days written notice, including the filing." SDCL 21-35-31(2).

SCS's letters gave notice of the filing by explaining that SCS had applied for a permit and by providing a link to the application and docket.

B. Landowners waived the issue of notice to tenants, and in any event, SCS provided undisputed evidence that it gave notice to all identified owners and tenants.

Notice must be given to "the owner and any tenant in possession of the private property." SDCL 21-35-31(2). Landowners did not question notice to tenants in their summary judgment filings; the word "tenant" appears just once in their resistance brief (quoting the statute). Instead, they waited until the hearings to argue—for the first time—that SCS did not give notice to "tenant[s] in possession" of the at-issue properties. They now press that issue on appeal. (Br. at 37–38.)

By waiting until the hearings, Landowners failed to preserve the issue for appeal. Failure to sufficiently raise an issue before the trial court waives the issue on appeal. *E.g.*, *State v. Willingham*, 2019 SD 55, ¶ 25, 933 N.W.2d 619, 625; *Hass v. Wentzlaff*, 2012 SD 50, ¶ 40, 816 N.W.2d 96, 108; *Alvine Fam. L.P. v. Hagemann*, 2010 SD 28, ¶ 21, 780 N.W.2d 507, 514. This Court—and others—have recognized that an issue is not sufficiently presented when, as here, it is "raised for the first time at oral argument and thus has not been briefed." *Tjeerdsma v. Glob. Steel Bldgs., Inc.*, 466 N.W.2d 643, 644 n.2 (S.D. 1991); *see also Entrust Datacard Corp. v. Atl. Zeiser GMBH*, Civ. No. 15-4260, 2016 WL 10952822, at *5 (D. Minn. Aug. 4, 2016) (collecting cases and refusing to "consider plaintiff's arguments raised for the first time at the motion hearing"); *Schwendimann v. Arkwright Advanced*

Coating, Inc., Civ. No. 11-820, 2016 WL 6916838, at *3 n.2 (D. Minn. Jan. 8, 2016) (same); SDCL 15-6-56(c) (establishing specific process for presenting evidence and briefing issues on summary judgment).

In any event, Landowners' argument is meritless. SCS provided evidence that (1) identified the individuals who "own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline" and (2) confirmed 30 days' written notice to them. (30317/064R 1373, 1504, 1506–11; 30338/014R 1796, 1930–39, 1941–2075.) With that, SCS established its compliance with SDCL 21-35-31(2).

Landowners do not assert on appeal that there are any tenants who were not given notice. And there is no evidence in the record that any tenant was not given notice. *See* SDCL 15-6-56(c)(2) (requiring a party opposing summary judgment to specifically identify, with "appropriate citations to the record" any genuine factual issues). Because Landowners did not introduce any evidence to controvert SCS's evidence of sufficient notice, that fact is deemed admitted.[18] *See* SDCL 15-6-56(c)(3) ("All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party."); SDCL 15-6-56(e) (a party opposing a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial"

[18] Judge Pardy asked whether Landowners had controverted this fact in their statement of disputed facts. Opposing counsel's response was, "I don't know." (3d Cir. Tr. 11:2–21.)

and "[i]f he does not so respond, summary judgment, if appropriate, shall be entered against him").

Landowners cannot avoid summary judgment by sandbagging SCS at the hearings and gesturing to hypothetical tenants without any evidence. *See Himrich v. Carpenter*, 1997 SD 116, ¶ 18, 569 N.W.2d 568, 573 ("When challenging a summary judgment [motion], the nonmoving party must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy." (citation and quotation marks omitted)). The notion that SCS must prove beyond a shadow of a doubt that there are absolutely no other owners or tenants requiring notice is untenable and not what the statute requires. SCS gave notice to all individuals that it could identify, and Landowners offered evidence of no one else. Judge Sommers recognized the problems with Landowners' argument:

> If there is no written lease agreement filed at the courthouse, how would they have actual notice or even any kind of notice that there were tenants?
>
> . . .
>
> [T]he way they find out who the owners are is that they go out and do a title search. That's constructive notice. There is no constructive notice if it's an oral lease agreement, [and] there is no realistic way for them to give notice to someone that they don't know exists.

(5th Cir. Tr. 35:2–5, 16–21.)

C. Landowners waived any challenge to the sufficiency of SCS's bond, and in any event, SCS's bond is sufficient.

For the first time on appeal, Landowners challenge the sufficiency of SCS's $5 million bond. *See* SDCL 21-35-31(3) (requiring the company "[m]ake a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry"). But again, "[i]ssues not raised before the circuit court cannot ordinarily be raised for the first time on appeal." *Willingham*, 2019 SD 55, ¶ 25, 933 N.W.2d at 625. Landowners did not raise this issue before the trial courts in their briefs or at the hearings. Accordingly, "[b]y failing to bring this claim before the trial court, [Landowners] failed to preserve the argument for [this Court's] review. *Id.*, 933 N.W.2d at 625; *see also Alvine*, 2010 SD 28, ¶ 21, 780 N.W.2d at 514 ("We have consistently held that this Court may not review theories argued for the first time on appeal."); *Hass*, 2012 SD 50, ¶ 40, 816 N.W.2d at 108 (declining to address an argument that was never argued to the trial court).

Regardless, the undisputed evidence establishes the sufficiency of SCS's bond. SCS secured a $5 million bond to cover the payment of any actual damage done to Landowners' property by SCS's surveys. (30317/064R 1504, 1512–17; 30338/014R 1939, 2076–81.) On its face, a $5 million bond is more than sufficient. And as the notice letters explain, SCS's surveys are unlikely to cause damage, but in the unlikely event of disturbance or damage, SCS will restore property to near-existing conditions. (30317/064R 1506–11; 30338/014R 1941–2075.) Given that only minimal—if any—damage may

occur, $5 million is far more than ample security. *See also Dakota Access*, mem. op. at 23 (requiring $1,000-per-parcel bond).

IV. SDCL 21-35-31 AUTHORIZES SCS'S SURVEYS.

Landowners also challenge the types of surveys and examinations that SCS sought to complete, claiming that SDCL 21-35-31 does not permit soil disturbances or other subsurface examinations. (Br. at 40–43.) SDCL 21-35-31's plain text authorizes all three types of SCS's surveys.

Because the statute does not define the terms "examination" and "survey," this Court will give them "their ordinary meaning." *Hofer*, 2015 SD 75, ¶ 15, 870 N.W.2d at 662. The North Dakota Supreme Court, interpreting an analogous statute, explained that an "examination" means an "inspection" or an "inquiry" and "is not strictly limited to a visual examination." *In re 2015 Application for Permit to Enter Land*, 883 N.W.2d 844, 849 (N.D. 2016) (quoting Webster's New World Dictionary (2d coll. ed. 1980)); *see also Examination*, Oxford English Dictionary (3d ed. 2016, last updated Sept. 2023) ("Investigation of the nature or condition of something by means of visual or physical inspection"), https://doi.org/10.1093/OED/6549293389. "Survey" means "to examine as to condition, situation, or value" of something or "to determine and delineate the form, extent, and position of (such as a tract of land)." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Nov. 29, 2023); *see also Survey*, Oxford English Dictionary (3d ed. 2016, last updated July 2023) ("To determine the form, extent, and situation of the parts of (a tract of ground, or any portion of the

earth's surface)"), https://doi.org/10.1093/OED/1056188665; *Survey*, Black's Law Dictionary (11th ed. 2019) ("The measuring of a tract of land and its boundaries and contents").

SCS's surveys fit comfortably within the plain meaning of "examination" and "survey." Depending on the property, SCS planned to complete one or a combination of three survey types: typical surveys, geotech surveys, and deep dig surveys. The notice letters describe which types are expected for a particular Landowner's property. (30317/064R 1341, 1375, 1506–11; 30338/014R 1745–46, 1800, 1941–2075.)

Typical surveys

Typical surveys—the only survey planned for the vast majority of Landowners—are minimally invasive, non-destructive examinations. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." (*E.g.*, 30338/014R 1955.) Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." (*Id.*) SDCL 21-35-31 authorizes those type of surveys. *See In re 2015 Application*, 883 N.W.2d at 849 (holding that "examination" under North Dakota's survey-access statute permits "minimally invasive" evaluations including ground penetration and removal of soil for testing).

Geotech surveys

SDCL 21-35-31 likewise authorizes SCS's geotech surveys (planned for just six Landowners). Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." (*E.g.*, 30338/014R 1949.) That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and there is "no impact to normal land use" afterward. (*Id.*) Like typical surveys, geotech surveys are non-destructive, minimally invasive surveys for the purpose of ascertaining the "form, extent, and position" of the land relevant to SCS's pipeline. *Survey*, Merriam-Webster; *see also In re 2015 Application*, 883 N.W.2d at 848–49 (permitting geotechnical examinations involving "penetration test borings" by "drill[ing] with truck or track mounted core auger drills, equipped with hollow-stem augers").

Deep dig surveys

Finally, SDCL 21-35-31 authorizes SCS's deep dig surveys (planned for only two Landowners). "[B]ased on aerial and topographic map review," SCS identified some properties as "located within a floodplain." (*E.g.*, 30338/014R 1943.) That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." (*Id.*) For that reason, deep dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine

whether cultural materials are present." (*Id.*) Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." (*Id.*) This survey is permitted because SDCL 21-35-31 provides for surveys and examinations that are "necessary for [SCS's] proposed facilities." SDCL 21-35-31. SCS planned deep dig surveys for only two Landowners' properties based on the properties' unique location. The surveys are limited to what is "necessary" and nothing more.

* * *

Landowners do not explain why SDCL 21-35-31 should be interpreted otherwise. For good reason: The statute confirms that it "is in addition to and not in derogation of other existing law" (SDCL 21-35-31), so in addition to the authority granted under the statute, the common law also continues to authorize survey access. *E.g.*, *Dakota Access*, mem. op. at 16–22; *Fairmont*, 37 SD at 449–50, 159 N.W. at 58. And inasmuch as Landowners rely on *Nichols on Eminent Domain* to argue that "invasive acts" are not authorized (9 *Nichols* § G32.06), *In re 2015 Application* confirms that SCS's surveys are not invasive. 883 N.W.2d at 848–49.

Landowners suggest that only above-surface maps and measurements are allowed under the statute (Br. at 42 (quoting *Oglethorpe*, 322 S.E.2d at 890)), but SDCL 21-35-31 certainly does not say that and neither do the authorities that Landowners cite. *Oglethorpe*, for instance, was not interpreting statutory language, never mind interpreting a South Dakota statute. Landowners also omit key language from *Oglethorpe*: The court held

that surveys and examinations were limited to "such innocuous entry and . . . examination as would suffice for the making of surveys or maps [or other similar purposes]." 322 S.E.2d at 890 (brackets in original) (citation and quotation marks omitted). SCS's surveys are for the similar purpose of preparing for construction of an *underground* pipeline. (30317/064R 1373–74; 30338/014R 1795, 1800.) As Judge Pardy recognized:

> The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones . . . .

(30317/064R 2260.)

The plain meanings of "surveys" and "examinations" in SDCL 21-35-31 encompass SCS's typical, geotech, and deep dig surveys.

V. THE TRIAL COURTS DID NOT ABUSE THEIR DISCRETION IN DENYING LANDOWNERS' MOTIONS TO CONTINUE IN BOTH CASES AND MOTION TO COMPEL IN THE THIRD CIRCUIT.

Landowners moved to continue the summary judgment hearings in both cases (and moved to compel in the Third Circuit), claiming that they needed a 30(b)(6) deposition of SCS (and depositions of third parties in the Third Circuit). Yet Landowners failed to articulate how the discovery they sought was essential to opposing SCS's summary judgment motions, instead persisting in seeking irrelevant, overbroad, unnecessary, and burdensome discovery. The trial courts properly denied the motions.

This Court reviews both the denial of a motion to continue and the denial of a motion to compel for an abuse of discretion. *Gores v. Miller*, 2016 SD 9, ¶ 14, 875 N.W.2d 34, 39; *Lien v. Lien*, 2004 SD 8, ¶ 33, 674 N.W.2d 816, 827. SDCL 15-6-56(f) allows "a court to order a continuance to permit a party opposing summary judgment to conduct discovery when necessary to oppose the motion." *Gores*, 2016 SD 9, ¶ 14, 875 N.W.2d at 39. But the facts sought through discovery must be "essential to justify" the party's opposition to summary judgment. SDCL 15-6-56(f); *see also* SDCL 15-11-4 (a motion for continuance may be granted only for "good cause shown").

Discovery must be relevant, reasonable, and proportionate to the litigation's needs. *E.g.*, SDCL 15-6-26(b)(1)(A)(i). Landowners' approach to discovery in these cases was none of that. As thoroughly documented in the trial courts, throughout the entire litigation Landowners pressed overbroad and burdensome discovery requests, most of which had nothing to do with the actual issues. (30317/064R 1034–1273, 1965–2214; 30338/014R 1417–1679, 2233–44) And even when SCS tried to work with Landowners to agree to a 30(b)(6) deposition, Landowners refused to schedule the deposition, stipulate to a standard protective order, or agree to reasonable 30(b)(6) topics. Landowners never sought proportionate discovery targeted at obtaining

relevant evidence.[19] The trial courts were well within their discretion to put an end to Landowners' haphazard and reckless tactics.

Landowners' motions to continue and supporting affidavits were delay tactics. To prevail on a motion to continue under SDCL 15-6-56(f), Landowners had to articulate specific facts and evidence that was "essential" to their opposition to SCS's summary judgment motion. Landowners fell far short of that standard. They gestured vaguely to needing a 30(b)(6) deposition or to depose SCS's summary judgment affiants but never actually explained—in their motions or at the hearing—what *evidence* they were seeking, what *facts* additional discovery would uncover, or how that additional discovery was *relevant* to any disputed issue.[20] Landowners' motions and supporting affidavits are exactly the kind that this Court has consistently held do not satisfy Rule 56(f):

> Although [plaintiff's] Rule 56(f) affidavit explained what steps had been taken to obtain discovery and

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[19] In the Third Circuit, Landowners waited until more than a month *after* SCS moved for summary judgment to suggest that they wanted to depose six third parties. (30317/064R 1947–64.) One of those individuals had passed away 13 months earlier (*id.* 1967), further demonstrating how little investigation Landowners did into what relevant information those individuals might have and what possible need there was to depose them.

[20] In related survey litigation in the Second Circuit with a similar procedural history, the trial court granted a motion to continue, postponing summary judgment to give those landowners (represented by the same counsel as Landowners here) time to take depositions. More than three months passed, and opposing counsel did *nothing*. They did not serve any deposition notices or reach out to SCS to schedule any depositions. They also never responded to SCS's own discovery requests. That case was later dismissed for unrelated reasons, but it confirms that these lawsuits were meant for delay and nothing more.

> the short time to review that discovery, it did not include identification of any specific facts further discovery might uncover. It also failed to state with specificity how additional discovery would rebut summary judgment. Rather, it only made a non-particularized statement that additional discovery . . . would 'shed further light' on [plaintiff's claim].
>
> This general statement seeking further discovery . . . was insufficient to satisfy the showing necessary under SDCL 15-6-56(f). . . . We acknowledge [plaintiff's] argument that it did not know what precise facts it would find until it conducted discovery. But even at oral argument [plaintiff] did not articulate *probable* facts relevant to [the issue] that could have been developed with additional discovery. 'Mere speculation that there is some relevant evidence not yet discovered will never suffice.'

Stern Oil Co. v. Border States Paving, Inc., 2014 SD 28, ¶¶ 27–28, 848 N.W.2d 273, 282 (citations omitted); *see also Davies v. GPHC, LLC*, 2022 SD 55, ¶ 54, 980 N.W.2d 251, 265 ("These cursory, 'non-particularized' statements do not satisfy the standard for granting a continuance under Rule 56(f). [Plaintiff] identifies no facts to be discovered, what prior steps had been taken to seek them, or how additional time to take the depositions of Black and Wilson would have allowed him to contest the undisputed material facts contained in [defendant's] motion for summary judgment.").

As the North Dakota Supreme Court has recognized, a proceeding for a court order authorizing survey access is "'preliminary to the condemnation action itself' and is not a condemnation proceeding." *All. Pipeline L.P. v. Smith*, 833 N.W.2d 464, 470 (N.D. 2013) (citation omitted). The scope of

discovery must fit the purpose of the case. *See also Square Butte Elec. Coop. v. Dohn*, 219 N.W.2d 877, 883 (N.D. 1974) ("For the purposes of entering the land for survey and limited testing, it is our view that [plaintiff] is required to show only that it was in the category of persons entitled to seek eminent domain, and that it was not required to prove that at that stage of the proceedings eminent domain was proper, justified, and necessary."). Landowners' efforts to take expansive discovery were grossly disproportionate to these cases about preliminary, pre-condemnation survey access. That is not what SDCL 21-35-31 or the discovery rules contemplate—and certainly not what they require. The trial courts did not abuse their discretion in denying Landowners' motions.

CONCLUSION

SDCL 21-35-31 is constitutional, and SCS established its compliance with the statute and its right to complete surveys on Landowners' property. The Court should affirm the judgments below.

ORAL ARGUMENT REQUESTED

SCS respectfully requests oral argument on this appeal.

[Signature page follows.]

Respectfully submitted this 1st day of December, 2023.

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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of December, 2023, he electronically filed and served a true and correct copy of the foregoing in the above-captioned action via the Odyssey File & Serve system, which will notify the following counsel of record at their last known address:

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CERTIFICATE OF COMPLIANCE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies under SDCL 15-26A-66(b)(4) that the foregoing brief complies with SDCL 15-26A-66(b)(2)'s type volume limitation as expanded by the Court's July 28, 2023 order, which provided that Appellee's responsive brief may not exceed 42 pages or the greater of 13,000 words or 65,000 characters. The foregoing brief—excluding the table of contents, the table of authorities, the jurisdictional statement, any addendum materials, and any certificates of counsel—is 12,844 words as calculated by the word-processing system used to prepare the brief.

/s/ Justin L. Bell
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30317

BETTY JEAN STROM TRUST et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Third Judicial Circuit,
Nos. 39CIV22-000064 (Beadle County) and 02CIV22-000129 (Lake County).
The Hon. Patrick T. Pardy, Judge presiding.
Notices of appeal filed April 14, 2023.

No. 30338

PETER HELFENSTEIN, JR. et al., *Appellants*,

v.

SCS CARBON TRANSPORT LLC, *Appellee*.

Appeal from the Circuit Court, Fifth Judicial Circuit,
Nos. 45CIV22-000014 (McPherson County), 45CIV22-000018 (McPherson County), 71CIV22-000047 (Spink County), 06CIV22-000253 (Brown County), and 22CIV22-000020 (Edmunds County).
The Hon. Richard A. Sommers, Judge presiding.
Notice of appeal filed April 28, 2023 in No. 45CIV22-000014.
No notice of appeal filed in Nos. 45CIV22-000018, 71CIV22-000047, 06CIV22-000253, or 22CIV22-000020.

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Alabama		
Ala. Code § 10A-21-2.09(1)	1907	Ala. Code § 3493 (1907) (earliest codification located)
Ala. Code § 39-7-22(a)(11)	1935	1935 Ala. Laws 72, 80 (Act No. 40, § 26)
Ala. Code § 24-1-27(a)(11)	1935	1935 Ala. Laws 126, 133 (Act No. 56, § 9)
Ala. Code § 23-1-44	1939	1939 Ala. Laws 363 (Act No. 210)
Ala. Code § 24-1-66(a)(11)	1935	1935 Ala. Laws 126, 133 (Act No. 56, § 9)
Ala. Code § 22-21-53(a)(8)	1945	1945 Ala. Laws 330, 335 (Act No. 211, §12)
Ala. Code § 22-51-11(a)(7)	1967	1967 Ala. Laws 853, 858 (Act No. 310, § 10)
Ala. Code § 35-2-32	1971	1971 Ala. Laws 3608, 3612 (Act No. 2248, § 12)
Ala. Code § 18-1A-50	1985	1985 Ala. Laws 802, 808 (Act No. 85-548, § 301)
Ala. Code § 23-1-380	2000	2000 Ala. Laws 328, 347 (Act No. 2000-220, § 33)
Alaska		
Alaska Stat. § 09.55.280	1962	1962 Alaska Sess. Laws ch. 101, § 13.05
Alaska Stat. § 18.57.040(14)	1975	1975 Alaska Sess. Laws ch. 142, § 1
Alaska Stat. § 34.65.020	1985	1985 Alaska Sess. Laws ch. 32, § 1
Arizona		
Ariz. Rev. Stat. § 12-1115	1887	1887 Ariz. Sess. Laws 312, 315 (ch. 17, § 5)
Ariz. Rev. Stat. § 40-809(A)(1)	1901	Ariz. Rev. Stat. § 859 (1901) (earliest codification located)
Ariz. Rev. Stat. § 12-1142(B)	1935	1935 Ariz. Sess. Laws 415, 418 (ch. 102, § 4)

* This table is a non-exhaustive list of survey-access laws that are currently codified in the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. For each statute in the left column, the middle and right columns provide the year and citation of the earliest act or session law that the current survey-law codification can be traced back to (using the Lexis, Westlaw, and HeinOnline databases). Due to recodification efforts, some statutes may have been enacted even earlier than reflected.

Ariz. Rev. Stat. § 48-2341(A)	1985	1985 Ariz. Sess. Laws 462, 475 (ch. 190, § 18)
Ariz. Rev. Stat. § 48-2988	1985	1985 Ariz. Sess. Laws 462, 476 (ch. 190, § 20)
Ariz. Rev. Stat. § 48-2664(B)	1985	1985 Ariz. Sess. Laws 462, 475 (ch. 190, § 19)
Ariz. Rev. Stat. § 48-3097(B)	1985	1985 Ariz. Sess. Laws 462, 476 (ch. 190, § 20)
Ariz. Rev. Stat. § 33-104	1985	1985 Ariz. Sess. Laws 657, 658–59 (ch. 197, § 4)
Ariz. Rev. Stat. § 48-1552(A)	1985	1985 Ariz. Sess. Laws 462, 473 (ch. 190, § 12)
Ariz. Rev. Stat. § 48-4856(D)	1990	1990 Ariz. Sess. Laws 592, 601 (ch. 181, §1)
Ariz. Rev. Stat. § 45-1946(D)	1993	1993 Ariz. Sess. Laws 500, 507 (ch. 121, § 1)
Ariz. Rev. Stat. § 36-1403(A)(9)	1999	1999 Ariz. Sess. Laws 952, 954 (ch. 212, § 3)
Arkansas		
Ark. Code Ann. § 23-11-209(1)	1868	1868 Ark. Acts 290, 300 (Act No. 71, § 22)
Ark. Code Ann. § 18-15-603	1895	1895 Ark. Acts 183, 184–85 (Act No. 126, § 4)
Ark. Code Ann. § 18-15-1601(a)(2)	1901	1901 Ark. Acts 155, 156 (Act No. 90, § 3)
Ark. Code Ann. § 18-15-1302(a)	1905	1905 Ark. Acts 577, 578–79 (Act No. 228, § 3)
Ark. Code Ann. § 18-15-1302	1905	1905 Ark. Acts 577, 578–79 (Act No. 228, § 3)
Ark. Code Ann. § 18-15-503(c)	1907	1907 Ark. Acts 303, 305 (Act No. 120, § 3)
Ark. Code Ann. § 18-15-1102(b)	1909	1909 Ark. Acts 234, 235–36 (Act No. 87, § 4)
Ark. Code Ann. § 23-18-407(b); Ark. Code Ann. § 18-15-510(b)	1929	1929 Ark. Acts 1110 (Act No. 246, § 1)
Ark. Code Ann. § 27-69-104(3), (5), (13)	1939	1939 Ark. Acts 86, 94–96 (Act No. 45, § 11)
Ark. Code Ann. § 14-234-215(b)	1955	1955 Ark. Acts 702, 703 (Act No. 321, § 1)
Ark. Code Ann. § 18-15-402	1957	1957 Ark. Acts 816, 817 (Act No. 269, § 3)

Ark. Code Ann. § 25-20-309(b)	2001	2001 Ark. Acts 3662, 3672–73 (Act No. 982, § 1)
Ark. Code Ann. § 27-76-502	2007	2007 Ark. Act 1985, 2009–10 (Act No. 389, ¶ 1)
Ark. Code Ann. § 14-144-205(b)	2007	2007 Ark. Act 5422, 5435 (Act No. 1045, § 1)
Ark. Code Ann. § 25-20-509(b)	2009	2009 Ark. Acts 6619, 6630 (Act No. 1371, § 1)
California		
Cal. Pub. Util. Code § 7526(a)	1951	1951 Cal. Stat. 2025, 2177 (ch. 764, § 7526)
Cal. Civ. Proc. Code § 1245.010	1975	1975 Cal. Stat. 3409, 3421 (ch. 1275, § 2)
Colorado		
Colo. Rev. Stat. § 38-2-102	1876	1876 Colo. Sess. Laws 143, 183 (ch. 19, § 115)
Colo. Rev. Stat. § 37-41-114	1905	1905 Colo. Sess. Laws 246, 254 (ch. 113, § 12)
Colo. Rev. Stat. § 36-4-108	1913	1913 Colo. Sess. Laws 588, 589 (ch. 150, § 5)
Colo. Rev. Stat. § 37-3-113	1921	1921 Colo. Sess. Laws 517, 552–53 (ch. 160, § 36)
Colo. Rev. Stat. § 29-4-104(1)(e)	1935	1935 Colo. Sess. Laws 498, 503 (ch. 131, § 4)
Colo. Rev. Stat. § 29-4-209(1)(j)	1935	1935 Colo. Sess. Laws 523, 534 (ch. 132, § 9)
Colo. Rev. Stat. § 37-46-107(1)(c), (f)	1937	1937 Colo. Sess. Laws 997, 1000–01 (ch. 220, § 5)
Colo. Rev. Stat. § 37-47-107(1)(c), (f)	1941	1941 Colo. Sess. Laws 866, 868–69 (ch. 231, § 5)
Colo. Rev. Stat. 31-25-105(1)(e)	1975	1975 Colo. Sess. Laws 1004, 1164 (ch. 275, § 1)
Colo. Rev. Stat. § 37-48-105(1)(d), (g)	1967	1967 Colo. Sess. Laws 664, 666 (ch. 329, § 1)
Colo. Rev. Stat. § 37-50-107(1)(e), (h), (i)	2004	2004 Colo. Sess. Laws 1905, 1909 (ch. 390, § 1)
Connecticut		
Conn. Gen. Stat. § 48-13	1955	1955 Conn. Acts 399, 399 (Pub. Act No. 378)
Conn. Gen. Stat. § 13a-38	1963	1963 Conn. Acts 294, 310–11 (Pub. Act No. 226, § 39)

Conn. Gen. Stat. § 13a-60	1965	1965 Conn. Acts 693 (Spec. Sess. Feb. 1965) (Pub. Act No. 520, § 1)
Conn. Gen. Stat. § 7-329e	1967	1967 Conn. Acts 1546, 1548 (Reg. Sess.) (Pub. Act No. 900, § 5)
Conn. Gen. Stat. § 7-273bb(a)(25)	1981	1981 Conn. Acts 283, 288 (Reg. Sess.) (Act No. 81-231, § 4)
Conn. Gen. Stat. § 7-148(c)(6)(A)(iii)	1981	1981 Conn. Acts 304, 308 (Pub. Act 81-219)
Conn. Gen. Stat. § 32-658(h)	1999	1999 Conn. Acts 987, 1027–28 (Reg. Sess.) (Pub. Act No. 99-241, § 35)
Conn. Gen. Stat. § 22a-501(a)(24)	1995	1995 Conn. Acts 1541, 1549 (Reg. Sess.) (Pub. Act. 95-329, § 11)
Conn. Gen. Stat. § 22a-498a	2013	2013 Conn. Acts 1078 (Reg. Sess.) (Pub. Act No. 13-222, §1)
Delaware		
Del. Code Ann. tit. 9, § 1525(a)	1931	1931 Del. Laws 400, 400 (ch. 113, § 1)
Del. Code Ann. tit. 2, § 906(c)	1945	1945 Del. Laws 1088, 1090 (ch. 300, § 2
Del. Code Ann. tit. 2 § 704(e)	1945	1945 Del. Laws 1088, 1092–93 (ch. 300, §
Del. Code Ann. tit. 17, § 132(c)(13)	1959	52 Del. Laws 657, 657–58 (1959) (ch. 295, § 1)
Del. Code Ann. tit. 9, § 4119(a)	1968	1968 Del. Laws 394, 395 (ch. 103, § 4)
Florida		
Fla. Stat. § 180.12	1935	1935 Fla. Laws 797, 802 (ch. 17118, § 6)
Fla. Stat. § 332.02	1945	1945 Fla. Laws 795, 796 (ch. 22846, § 2)
Fla. Stat. § 361.05	1951	1951 Fla. Laws 1026 (ch. 26893, § 1)
Fla. Stat. § 161.36(5)	1965	1965 Fla. Laws 1435, 1446 (ch. 65-408, § 1)
Fla. Stat. § 163.370(2)(e)(1)	1969	1969 Fla. Laws 1075, 1086 (ch. 69-305, § 9)
Fla. Stat. § 361.025	1982	1982 Fla. Laws 2115, 218 (ch. 82-90, § 5)
Fla. Stat. § 337.274	1984	1984 Fla. Laws 1743, 1746 (ch. 84-319, § 2)
Fla. Stat. § 331.310(1)(a)	1989	1989 Fla. Laws 1899, 1909 (ch. 89-300, § 10)

Fla. Stat. § 348.0311(2)	2019	2019 Fla. Laws 2289, 2318 (ch. 2019-169, § 14)
Georgia		
Ga. Code Ann. § 22-3-121	1847	Cobb's 1851 Digest, p. 155 (earliest codification located)
Ga. Code Ann. § 46-8-100(1)	1892	1892: 1892 Ga. Laws 37, 42 (No. 68, § 9)
Ga. Code Ann. § 32-2-2(a)(9); Ga. Code Ann. § 32-4-42(4)	1973	1973 Ga. Laws 947, 978 (No. 679, § 1)
Ga. Code Ann. § 22-3-86(c), (d)	1995	1995 Ga. Laws 161, 163–64 (No. 158, § 2), repealed, 2017 Ga. Laws 744 (Act No. 263)
Hawaii		
Haw. Rev. Stat. § 101-8	1896	1896 Haw. Sess. Laws 104, 105–06 (Act No. 45, § 7)
Idaho		
Idaho Code § 7-705	1880	1880 Idaho Sess. Laws 192 (§ 855)
Idaho Code § 62-104(1)	1887	Idaho Rev. Stat. § 2666 (1887) (earliest codification located)
Idaho Code § 42-5224(19)	1995	1995 Idaho Sess. Laws 982, 995 (ch. 290, § 1)
Idaho Code § 40-1310(1)	1985	1985 Idaho Sess. Laws 586, 650 (ch. 253, § 2)
Idaho Code § 21-807(13)	1967	1967 Idaho Sess. Laws 776, 783 (ch. 277, § 7)
Illinois		
220 Ill. Comp. Stat. 55/2	1874	Ill. Rev. Stat. ch. 134, § 2 (1874)
605 Ill. Comp. Stat. 5/10-702(7)	1982	1982 Ill. Laws 220, 862 (Pub. Act 82-783, § 22)
610 Ill. Comp. Stat. 5/19(1)	1984	1984 Ill. Laws 3647, 3756 (Pub. Act. 84-551)
70 Ill. Comp. Stat. 5/22.3(a)(viii)	2007	2007 Ill. Laws 8538, 8549 (Pub. Act 95-0641, § 5)
20 Ill. Comp. Stat. 3855/1-20(b)(18)	2007	2007 Ill. Laws 6821, 6829 (Pub. Act 95-0481)
Indiana		
Ind. Code § 8-4-1-16(a)	1850	1850 Ind. Acts 256, 265 (ch. 134)
Ind. Code § 8-10-5-8(a)(10)	1959	1959 Ind. Acts 912, 919 (ch. 343, § 8)
Ind. Code § 8-4-10-1(a)	1869	1869 Ind. Acts (Spec. Sess.) 97, 97–98 (ch. 46, § 1)

Ind. Code § 5-2-2-6	1971	1971 Ind Acts 234, 236–37 (Pub. Law 43, § 1)
Ind. Code § 36-9-27-33	1981	1981 Ind. Acts 2409, 2908–09 (Pub. Law 309, § 101)
Ind. Code § 36-7-15.1-7(a)(8)	1982	1982 Ind. Acts 616, 679 (Pub. Law 77, § 8)
Ind. Code § 36-9-31-3(13)	1982	1982 Ind. Acts 616, 750 (Pub. Law 77, § 27)
Ind. Code § 36-7-14-12.2(a)(9)	1990	1990 Ind. Acts 1, 231 (Pub. Law 1, § 363)
Ind. Code § 32-24-1-3(b)(1)	2002	2002 Ind. Acts 187, 298 (Pub. Law 2-2002)
Ind. Code § 36-7.6-3-2(a)(15)	2007	2007 Ind. Acts 4206, 4227 (Pub. Law 232, § 7)
Iowa		
Iowa Code § 314.9	1925	1925 Iowa Acts 98, 98–99 (ch. 108, § 1)
Iowa Code § 478.15(2)–(3)	1957	1957 Iowa Acts 297, 297–98 (ch. 240, § 1)
Iowa Code § 403.6(3)	1957	1957 Iowa Acts 247, 250 (ch. 197, § 6)
Iowa Code § 403A.3(8)	1961	1961 Iowa Acts 221, 225 (ch. 215, § 3)
Iowa Code § 161A.51	1971	1971 Iowa Acts 448, 471–72 (ch. 227, § 24)
Iowa Code § 479.30	1979	1979 Iowa Acts 368, 369 (ch. 118, § 2)
Iowa Code § 355.13	1990	1990 Iowa Acts 457, 462–63 (ch. 1236, § 14)
Iowa Code § 479B.15	1995	1995 Iowa Acts 472, 484 (ch. 192, § 42)
Iowa Code § 28J.9(12)	2005	2005 Iowa Acts 497, 532 (ch. 150, § 97)
Iowa Code § 354.4A	2009	2009 Iowa Acts 652 (ch. 157, § 1)
Kansas		
Kan. Stat. Ann. § 66-501	1868	1868 Kan. Sess. Laws 190, 202 (ch. 23, § 47)
Kan. Stat. Ann. § 17-4748(c)	1955	1955 Kan. Sess. Laws 192, 196 (ch. 86, § 7)
Kan. Stat. Ann. § 26-512	1963	1963 Kan. Sess. Laws 400, 404 (ch. 234, § 12)

Kan. Stat. Ann. § 17-1903	1963	1963 Kan. Sess. Laws 400, 415 (ch. 234, § 39)
Kan. Stat. Ann. § 42-120	1963	1963 Kan. Sess. Laws 400, 431 (ch. 234, § 76)
Kan. Stat. Ann. § 12-3406(i)	1969	1969 Kan. Sess. Laws 231, 235 (ch. 89, § 6)
Kentucky		
Ky. Rev. Stat. Ann. § 76.080(11)	1946	1946 Ky. Acts 250, 256 (ch. 104, § 6)
Ky. Rev. Stat. Ann. § 96.175(9)	1946	1946 Ky. Acts 588, 593 (ch. 212, § 7)
Ky. Rev. Stat. Ann. § 416.130	1956	1956 Ky. Acts 74 (ch. 52)
Ky. Rev. Stat. Ann. § 262.745(2)	1960	1960 Ky. Acts 381 (ch. 96, § 1)
Ky. Rev. Stat. Ann. § 416.560(4)	1976	1976 Ky. Acts 297, 297–98 (ch. 140, § 4)
Ky. Rev. Stat. Ann. § 277.060(1)(a)	1976	1976 Ky. Acts 297, 327 (ch. 140, § 111)
Ky. Rev. Stat. Ann. § 175B.050(4)	2009	2009 Ky. Acts (1st Ex. Sess.) 1, 88 (ch. 1, § 84)
Louisiana		
La. Rev. Stat. Ann. § 48:1256(D)	1954	1954 La. Acts 480, 487 (Act No. 232, § 6)
La. Rev. Stat. Ann. § 48:217(B)	1955	1955 La. Acts 247, 248 (Act No. 130, § 1)
La. Rev. Stat. Ann. § 38:301(D)	1992	1992 La. Acts 605 (Act No. 182, § 1)
La. Rev. Stat. Ann. § 48:2029(12)	1997	1997 La. Acts 1727, 1735 (Act No. 1017, § 1)
La. Rev. Stat. Ann. § 48:2077(13)	2001	2001 La. Acts 2708, 2714 (Act No. 1209, § 2)
La. Rev. Stat. Ann. § 48:2097(13)	2003	2003 La. Acts 2837, 2842 (Act No. 893, § 1)
La. Rev. Stat. Ann. § 48:2137(13)	2007	2007 La. Acts 1923, 1929 (Act No. 329, § 1)
La. Rev. Stat. Ann. § 48:2157(13)	2009	2009 La. Acts 3310, 3315 (Act No. 518, § 1)
La. Rev. Stat. Ann. § 49:214.6.9	2009	2009 La. Acts 3379, 3426 (Act No. 523, § 3)
La. Rev. Stat. Ann. § 48:2180(12)	2010	2010 La. Acts 2830, 2838 (Act No. 838, §2)
La. Rev. Stat. Ann. § 30:2456(E)(2)	2012	2012 La. Acts 3376, 3377 (Act No. 832, § 1)

Maine		
Me. Rev. Stat. Ann. tit. 38, § 1153	1965	1965 Me. Laws 397, 404 (ch. 310)
Me. Rev. Stat. Ann. tit. 4, § 180	1976	1976 Me. Laws 3430 (ch. 753)
Me. Rev. Stat. Ann. tit. 23, § 1967(3)	1981	1981 Me. Laws 327, 332 (ch. 492, part D, § 1)
Me. Rev. Stat. Ann. tit. 38, § 1734	1983	1983 Me. Laws (2d Reg. Sess.) 3730, 3750–51 (ch. 820, § 2)
Me. Rev. Stat. Ann. tit. 30, § 5403(9)	1987	1987 Me. Laws 1362, 1562 (ch. 737)
Me. Rev. Stat. Ann. tit. 23, § 153-B	1993	1993 Me. Laws 1140, 1441 (ch. 536, § 2)
Me. Rev. Stat. Ann. tit. 30-A, § 1904	2003	2003 Me. Laws 501, 506 (ch. 228, § 1)
Me. Rev. Stat. Ann. tit. 6, § 177(3)(A)	2007	2007 Me. Laws (1st Spec. Sess.) 1922, 1926 (ch. 563, § 7)
Me. Rev. Stat. Ann. tit. 32, § 18231	2013	2013 Me. Laws 207, 210 (ch. 180, § 5)
Maryland		
Md. Code Ann., Real Prop. § 12-111	1916	1916 Md. Laws 1332 (ch. 649)
Md. Code Ann., Nat. Res. § 3-104(p)	1970	1970 Md. Laws 519, 527 (ch. 240, § 1)
Md. Code Ann., Transp. § 6-306	1977	1977 Md. Laws 21, 278 (ch. 13, § 2)
Md. Code Ann., Bus. Occ. & Prof. § 1-301	1977	1977 Md. Laws 601, 623 (ch. 31, § 1)
Md. Code Ann., Nat. Res. § 3-305(f)	1984	1984 Md. Laws 3070 (ch. 601)
Md. Code Ann., State Fin. & Proc. § 5-203(i)	1985	1985 Md. Laws 729, 850 (ch. 11, § 2)
Md. Code Ann., Pub. Util. § 5-406(a)(3)	1998	1998 Md. Laws 70, 180 (ch. 8, § 2)
Md. Code Ann., Land Use § 2-105(a)(3)	2012	2012 Md. Laws 2157, 2206 (ch. 426, § 2)
Md. Code Ann., Local Gov't § 1-801(c)(6)	2013	2013 Md. Laws 572, 628 (ch. 119, § 2)
Md. Code Ann., Local Gov't § 26-4019c)	2013	2013 Md. Laws 1921, 1938 (ch. 119, § 2)
Md. Code Ann., Transp. § 10-208(31)(b)	2017	2017 Md. Laws 38, 61 (ch. 3, § 1)
Massachusetts		
Mass. Gen. Laws ch. 84, § 10	1868	1868 Mass. Acts 189 (ch. 264)

Mass. Gen. Laws ch. 160, §§ 75, 76	1881, 1878	1881 Mass. Acts 427, 427 (ch. 111, § 1); 1878 Mass. Acts 155, 155 (ch. 512, § 1
Mass. Gen. Laws ch. 164 § 72A	1927	1927 Mass. Acts 54 (ch. 66)
Mass. Gen. Laws ch. 90, § 51G	1946	1946 Mass. Acts 726, 727 (ch. 613, § 1
Mass. Gen. Laws ch. 41, § 81CC	1953	1953 Mass. Acts 709, 723 (ch. 674, § 7)
Mass. Spec. Laws ch. S73, § 4 / Mass. Gen. Laws ch. 91 App., § 1-4	1956	1956 Mass. Acts 322, 332 (ch. 465, § 4)
Mass. Gen. Laws ch. 81, § 7F	1958	1958 Mass. Acts 423 (ch. 582)
Mass. Spec. Laws ch. S71, § 6	1958	1958 Mass. Acts 479, 485 (ch. 606, § 6)
Mass. Gen. Laws ch. 82, § 11A	1962	1962 Mass. Acts 368 (ch. 589
Mass. Gen. Laws ch. 21, § 9A	1970	1970 Mass. Acts 63, 633 (ch. 767, § 1)
Mass. Spec. Laws ch. S17, § 6(g)	1977	1977 Mass. Acts 576, 587–88 (ch. 436, § 6)
Mass. Gen. Laws ch. 40N, § 8(g)	1992	1992 Mass. Acts 955, 964–65 (ch. 343, § 2)
Mass. Spec. Laws ch. S22, § 9 / Mass. Gen. Laws ch. 23A App., § 3-9	1995	1995 Mass. Acts 81, 84 (ch. 22, § 9)
Mass. Gen. Laws ch. 6C, § 3(24)	2009	2009 Mass. Acts 103, 113 (ch. 25, § 8)
Michigan		
Mich. Comp. Laws § 486.307	1869	1869 Mich. Pub. Acts 188, 192 (Act No. 113, § 7)
Mich. Comp. Laws § 485.8	1875	1875 Mich. Pub. Acts 287, 289–90 (Act No. 233, § 8
Mich. Comp. Laws § 123.181	1882	1882 Mich. Pub. Acts (Ex. Sess.) 54, 54 (Act No. 23, § 1)
Mich. Comp. Laws § 259.104	1945	1945 Mich. Pub. Acts 578, 588 (Act No. 327, § 104)
Mich. Comp. Laws § 254.314	1952	1952 Mich. Pub. Acts 34, 345 (Act No. 214, § 4)
Mich. Comp. Laws § 254.235	1954	1954 Mich. Pub. Acts 116, 122 (Act No. 99, § 15)
Mich. Comp. Laws § 54.122	1976	1976 Mich. Pub. Acts 228, 229 (Act No. 115, § 2)

Mich. Comp. Laws § 120.126	1978	1978 Mich. Pub. Acts 2412, 2423 (Act No. 639, § 26)
Mich. Comp. Laws § 213.54(3)	1980	1980 Mich. Pub. Acts 234, 235 (Act No. 87, § 4)
Mich. Comp. Laws § 462.223(a)	1993	1993 Mich. Pub. Acts 2341, 2351 (Act No. 354)
Mich. Comp. Laws § 324.60502	1995	1995 Mich. Pub. Acts 182, 370 (Act. No. 57)
Mich. Comp. Laws § 324.60307	1995	1995 Mich. Pub. Acts 182, 369 (Act No. 57)
Mich. Comp. Laws § 483.2a(2)	1997	1997 Mich. Pub. Acts 853, 853 (Act No. 125)
Mich. Comp. Laws § 259.116(1)(e)	2002	2002 Mich. Pub. Acts 232, 244 (Act No. 90)
Mich. Comp. Laws § 254.324a(3)	2018	2018 Mich. Pub. Acts 1599, 1601 (Act No. 359, § 14a)
Minnesota		
Minn. Stat. § 360.032(1), (2)	1945	1945 Minn. Laws 534, 555 (ch. 303, § 11)
Minn. Stat. § 360.021(1), (4)	1945	1945 Minn. Laws 534, 55253 (ch. 303)
Minn. Stat. § 458A.06(9)	1969	1969 Minn. Laws 2368, 2381 (ch. 1134, § 6)
Minn. Stat. § 117.041	1971	1971 Minn. Laws 1102, 1103 (ch. 595, § 5)
Minn. Stat. § 115A.69(4)	1980	1980 Minn. Laws 786, 823 (ch. 564)
Minn. Stat. § 103D.335(14)	1990	1990 Minn. Laws 354, 470 (ch. 193)
Minn. Stat. § 164.07(13)	2000	2000 Minn. Laws 285, 285 (ch. 334, § 1)
Mississippi		
Miss. Code Ann. § 11-27-39	1926	1926 Miss. Laws 367 (ch. 256)
Miss. Code Ann. § 77-5-23(e)	1936	1936 Miss. Laws 334, 337 (ch. 183, § 12)
Miss. Code Ann. § 77-5-405(h)	1936	1936 Miss. Laws 354, 357 (ch. 185, § 3)
Miss. Code Ann. § 61-5-7	1958	1958 Miss. Laws 851, 853 (ch. 513, § 3)
Miss. Code Ann. § 61-3-17	1958	1958 Miss. Laws 384, 389 (ch. 230, § 8)
Miss. Code Ann. § 43-35-15(c)	1958	1958 Miss. Laws 867, 872 (ch. 518, § 7)

Miss. Code Ann. § 19-29-19	1980	1980 Miss. Laws 1321, 1327–28 (ch. 544, § 10)
Miss. Code Ann. § 57-67-11(g)	1987	1987 Miss. Laws (Ex. Sess.) 22, 24 (ch. 24, § 6)
Miss. Code Ann. § 17-17-317(p)	1991	1991 Miss. Laws 1042, 1052 (ch. 581, § 9)
Miss. Code Ann. § 65-1-335	1997	1997 Miss. Laws 509, 515 (ch. 439, § 18)
Miss. Code Ann. § 51-39-25(*l*)	2000	2000 Miss. Laws 1105, 1115 (ch. 597, § 13)
Miss. Code Ann. § 49-17-743(t)	2006	2006 Miss. Laws 1435, 1450 (ch. 546, § 22)
Missouri		
Mo. Rev. Stat. § 388.210(1)	1852	1852 Mo. Laws (2d Sess.) 121, 134
Mo. Rev. Stat. § 227.120(1)(13)	1929	1929 Mo. Laws 366, 367
Mo. Rev. Stat § 226.420(4)	1939	1939 Mo. Laws 667, 673
Mo. Rev. Stat. § 99.420(10)	1951	1951 Mo. Laws 300, 310
Mo. Rev. Stat § 100.390(7)	1967	1967 Mo. Laws 172, 178
Mo. Rev. Stat. § 204.340(1)	1983	1983 Mo. Laws 488, 492
Montana		
Mont. Code Ann. § 70-30-110(1)	1877	1877 Mont. Laws 40, 191
Mont. Code Ann. § 69-3-108(5)	1913	1913 Mont. Laws 88, 92–93 (ch. 52, § 10)
Mont. Code Ann. § 85-1-204(2)	1933	1933 Mont. Laws (Ex. Sess.) 92, 108 (ch. 35, § 21)
Nebraska		
Neb. Rev. Stat. § 46-125	1895	1895 Neb. Laws 269, 277 (ch. 70, § 10
Nev. Rev. Stat. § 46-156(2)	1911	1911 Neb. Laws 535, 536 (ch. 162, § 1)
Nev. Rev. Stat. § 76-702	1951	1951 Neb. Laws 451, 452 (ch. 101, § 2)
Neb. Rev. Stat. § 3-504(16)	1957	1957 Neb. Laws 110, 118 (ch. 9, § 4)
Neb. Rev. Stat. § 15-229	1961	1961 Neb. Laws 160, 161 (ch. 36, § 1)
Nevada		
Nev. Rev. Stat. § 536.070(1)	1866	1866 Nev. Stat. 202, 203 (ch. 100, § 2)
Nev. Rev. Stat. § 37.050	1907	1907 Nev. Stat. 279, 281 (ch. 128, § 5)
Nev. Rev. Stat. § 340.040(3)	1935	1935 Nev. Stat. 286, 288 (ch. 135, § 4)

Nev. Rev. Stat. § 496.070(2)	1947	1947 Nev. Stat. 713, 715 (ch. 215, § 6)
Nev. Rev. Stat. § 244A.521(1)	1973	1973 Nev. Stat. 1726, 1734 (ch. 790, § 27)
New Hampshire		
N.H. Rev. Stat. Ann. § 371:15(V)	1941	1941 N.H. Laws 307, 309–10 (ch. 197)
N.H. Rev. Stat. Ann. § 371:2-a	1965	1965 N.H. Laws 79 (ch. 90)
N.H. Rev. Stat. Ann. § 498-A:10	1971	1971 N.H. Laws 731, 735 (ch. 526)
New Jersey		
N.J. Stat. Ann. § 32:3-6	1931	1931 N.J. Laws 1219, 1226 (ch. 391, § 1)
N.J. Stat. Ann. § 32:1-141.2	1945	1945 N.J. Laws 677, 682 (ch. 197, § 4)
N.J. Stat. Ann. § 27:19-27	1946	1946 N.J. Laws 1031, 1032–33 (ch. 318, § 2)
N.J. Stat. Ann. § 48:5-18(b)	1947	1947 N.J. Laws 1264, 1264 (ch. 401, § 1)
N.J. Stat. Ann. § 32:1-35.15(b)	1947	1947 N.J. Laws 117, 129 (ch. 43, § 15)
N.J. Stat. Ann. § 58:16A-9(4)	1948	1948 N.J. Laws 1409, 1414 (ch. 351, § 9)
N.J. Stat. Ann. § 58:22-12(d)	1958	1958 N.J. Laws 94, 106 (ch. 34, § 12)
N.J. Stat. Ann. § 48:5-7(V)	1966	1966 N.J. Laws 984, 985 (ch. 197, § 1)
N.J. Stat. Ann. § 40:68-41	1967	1967 N.J. Laws 717, 720–21 (ch. 184, § 15)
N.J. Stat. Ann. § 13:17-6(f)	1968	1968 N.J. Laws 1313, 1326 (ch. 404, § 6)
N.J. Stat. Ann. § 20:3-16	1971	1971 N.J. Laws 1713, 1720–21 (ch. 361, § 16)
N.J. Stat. Ann. § 40:55B-10	1977	1977 N.J. Laws 830, 831 (ch. 195, § 1)
N.J. Stat. § 13:1L-7(a)	1983	1983 N.J. Laws 1377, 1379 (ch. 324, § 7)
N.J. Stat. Ann. § 5:12-182(e)	1984	1984 N.J. Laws 1126, 1170 (ch. 218, § 34)
N.J. Stat. Ann. § 40A:12A-8(h)	1992	1992 N.J. Laws 784, 796 (ch. 79, § 8)
N.J. Stat. Ann. § 52:27I-26(*l*)	2010	2010 N.J. Laws 846, 858 (ch. 51, § 9)
New Mexico		
N.M. Stat. Ann. § 72-1-5	1907	1907 N.M. Laws 71, 74 (ch. 49, § 3)

N.M. Stat. Ann. § 72-4-1	1909	1909 N.M. Laws 372, 373 (ch. 129, § 1)
N.M. Stat. Ann. § 62-1-4	1909	1909 N.M. Laws 409, 410 (ch. 141, § 4)
N.M. Stat. Ann. § 73-5-9	1909	1909 N.M. Laws 210, 212–13 (ch. 76, § 9)
N.M. Stat. Ann. § 73-8-20	1917	1917 N.M. Laws 83, 91 (ch. 22, § 20)
N.M. Stat. Ann. § 70-3-5	1953	1953 N.M. Laws 66, 68–69 (ch. 42, § 8)
N.M. Stat. Ann. § 3-45-4(A)(4)	1965	1965 N.M. Laws 1008, 1282 (ch. 300)
N.M. Stat. Ann. § 3-29-6(A)	1969	1969 N.M. Laws 686, 690–91 (ch. 192, § 3)
N.M. Stat. Ann. § 42A-1-8	1980	1980 N.M. Laws 53, 57–58 (ch. 20, § 8)
N.M. Stat. Ann. § 72-12A-12(A)	1980	1980 N.M. Laws 599, 606 (ch. 148, § 12)
N.M. Stat. Ann. § 11-3A-7(A)(3)	1994	1994 N.M. Laws 1161, 1169 (ch. 132, § 7)
New York		
N.Y. Pub. Auth. Law § 1007(8)	1939	1939 N.Y. Laws 2245, 2381–82 (ch. 870)
N.Y. Pub. Hous. Law § 37(1)(*l*)	1939	1939 N.Y. Laws 1978, 1989 (ch. 808)
N.Y. Unconsol, Law ch. 217, § 2(13) (Consol.) / N.Y. Unconsol. Law § 7702(13) (McKinney)	1942	1942 N.Y. Laws 1034, 1038 (ch. 423, § 2)
N.Y. Unconsol, Law, ch. 187, § 3 (Consol.) / N.Y. Unconsol. Law § 6732 (McKinney)	1945	1945 N.Y. Laws 543, 545 (ch. 163, § 3)
N.Y Unconsol, Law, ch 185, § 5 (Consol.) / N.Y. Unconsol. Law § 6705 (McKinney)	1946	1946 N.Y. Laws 1055, 1058 (ch. 443)
N.Y. Educ. Law § 227(3)	1947	1947 N.Y. Laws 1542, 1587–88 (ch. 820)
N.Y. Pub. Auth. Law § 1096(13)	1950	1950 N.Y. Laws 2224, 2229 (ch. 805, § 1)
N.Y. High. Law § 170	1951	1951 N.Y. Laws 2032, 2032 (ch. 826, § 2)
N.Y. High. Law § 118(5)	1951	1951 N.Y. Laws 2032 (ch. 826)
N.Y. Unconsol. Law ch. 152, § 15 (Consol.) / N.Y. Unconsol. Law § 6615 (McKinney)	1962	1962 N.Y. Laws 980, 998 (ch. 209, § 15)

N.Y. Transp. Law § 43(1)(j)	1970	1970 N.Y. Laws 2901, 2905 (ch. 948, § 1)
N.Y. Env't Conserv. Law § 15-1909(1)	1972	1972 N.Y. Laws 2242, 2531 (ch. 664, § 2)
N.Y. Env't Conserv. Law § 15-1983(3)	1972	1972 N.Y. Laws 2242, 2553 (ch. 664)
N.Y. Env't Conserv. Law § 21-1701, art. IV, § 1(i)	1972	1972 N.Y. Laws 2242, 2793 (ch. 664)
N.Y. Env't Conserv. Law § 15-2109(2)	1972	1972 N.Y. Laws 2242, 2563 (ch. 664)
N.Y. Env't Conserv. Law § 15-2303(5)	1972	1972 N.Y. Laws 2242, 2586 (ch. 664, § 2)
N.Y. Em. Dom. Proc. Law § 404	1977	1977 N.Y. Laws ch. 839, § 1 (p. 10)
N.Y. High. Law § 30(17)	1977	1977 N.Y. Laws ch. 840, § 40 (p. 60)
N.Y. Transp. Law § 228(15)	1977	1977 N.Y. Laws ch. 840, § 95 (p. 118)
N.Y. High. Law § 29(15)	1977	1977 N.Y. Laws ch. 840, § 39 (p. 53)
N.Y. Canal Law § 40(16)	1977	1977 N.Y. Laws ch. 840, § 3 (p. 11)
N.Y. Mil. Law § 177(2)	1977	1977 N.Y. Laws ch. 840, § 63 (p. 83)
N.Y. High. Law § 347(18)	1977	1977 N.Y. Laws ch. 840, § 57 (p. 76)
N.Y. Env't Conserv. Law § 16-0107(16)	1977	1977 N.Y. Laws ch. 840 (p. 31)
N.Y. Pub. Auth. Law § 2045-e(12)	1981	1981 N.Y. Laws 2369, 2374 (ch. 932)
N.Y. Pub. Auth. Law § 2047-e(13)	1982	1982 N.Y. Laws 2565, 2569 (ch. 675, § 1)
N.Y. Pub. Auth. Law § 2046-f(13)	1982	1982 N.Y. Laws 2501, 2505 (ch. 632, § 2)
N.Y. Pub. Auth. Law § 1196-d(14)	1984	1984 N.Y. Laws 2709, 2714 (ch. 510, § 1)
N.Y. Pub. Auth. Law § 2049-d(12)	1984	1984 N.Y. Laws 2928, 2932 (ch. 638, § 1)
N.Y. Pub. Auth. Law § 1197-e(15)	1985	1985 N.Y. Laws 3136, 3144 (ch. 795, § 2)
N.Y. Pub. Auth. Law § 1199-d(14)	1986	1986 N.Y. Laws 2956, 2961 (ch. 723, § 1)
N.Y. Pub. Auth. Law § 1020-h(7)	1986	1986 N.Y. Laws 2518, 2530 (ch. 517, § 1)
N.Y. Pub. Auth. Law § 1115-f(18)	1986	1986 N.Y. Laws 3285, 3294 (ch. 868, § 2)
N.Y. Pub. Auth. Law § 1020-f(v)	1986	1986 N.Y. Laws 2518, 2524 (ch. 517, § 1)

N.Y. Pub. Auth. Law § 1115-c(12)	1986	1986 N.Y. Laws 3285, 3291 (ch. 868, § 2)
N.Y. Pub. Auth. Law § 1020-d(6)	1986	1986 N.Y. Laws 3091, 3094 (ch. 807, § 1)
N.Y. Pub. Auth. Law § 2050-e(13)	1986	1986 N.Y. Laws 3539, 3544 (ch. 936, § 1)
N.Y. Pub. Auth. Law § 1199-ee(17) (Wayne County Water and Sewer Authority	1987	1987 N.Y. Laws 2773, 2778 (ch. 685, § 1)
N.Y. Pub. Auth. Law § 1199-ee(12) (Orange County Water Authority)	1987	1987 N.Y. Laws 2818, 2822 (ch. 709, § 1)
N.Y. Pub. Auth. Law § 2041-d(13)	1987	1987 N.Y. Laws 2864, 2869 (ch. 747, § 1)
N.Y. Pub. Auth. Law § 2049-ee(12)	1988	1988 N.Y. Laws 2969, 2975 (ch. 627, § 2)
N.Y. Pub. Auth. Law § 2051-e(13)	1988	1988 N.Y. Laws 3060, 3065 (ch. 665, § 1)
N.Y. Pub. Auth. Law § 2050-ee(12)	1989	1989 N.Y. Laws 3205, 3211 (ch. 726, § 1)
N.Y. Pub. Auth. Law § 2756(15)	1989	1989 N.Y. Laws 3066, 3072 (ch. 663, § 1)
N.Y. Pub. Auth. Law § 1199-eee(16)	1990	1990 N.Y. Laws 3422, 3428 (ch. 678, § 1)
N.Y. Pub. Auth. Law § 1120-d(14)	1990	1990 N.Y. Laws 3478, 3483 (ch. 724, § 1)
N.Y. Pub. Auth. Law § 1198-f(15)	1990	1990 N.Y. Laws 3729, 3738 (ch. 868, § 1)
N.Y. Pub. Auth. Law § 1124(12)	1991	1991 N.Y. Laws 3533, 3539 (ch. 592, § 1)
N.Y. Pub. Auth. Law § 1174-f(15)	1991	1991 N.Y. Laws 3415, 3422 (ch. 491, § 1)
N.Y. Pub. Auth. Law § 1125(15)	1991	1991 N.Y. Laws 3550, 3555 (ch. 595, § 1)
N.Y. Pub. Auth. Law § 2782(15)	1993	1993 N.Y. Laws 3891, 3898 (ch. 686, § 1)
N.Y. Pub. Auth. Law § 2053-e(13)	1993	1993 N.Y. Laws 3290, 3295 (ch. 434, § 1)
N.Y. Pub. Auth. Law § 1226-f(17)	1994	1994 N.Y. Laws 3452, 3461 (ch. 647)
N.Y. Pub. Auth. Law § 1226-d(11)	1994	1994 N.Y. Laws 3452, 3457 (ch. 325, § 1)

N.Y. Pub. Auth. Law § 1199-dddd(17)	1995	1995 N.Y. Laws 3203, 3209 (ch. 411, § 1)
N.Y. Pub. Auth. Law § 1199-eeee(17)	1995	1995 N.Y. Laws 2881, 2886 (ch. 195, § 1)
N.Y. Pub. Auth. Law § 1147-e(22)	1995	1995 N.Y. Laws 3658, 3666 (ch. 691, § 1)
N.Y. Pub. Auth. Law § 1943(10)	1996	1996 N.Y. Laws 2074, 2078 (ch. 130, § 1)
N.Y. Pub. Auth. Law § 3305(16)	1997	1997 N.Y. Laws 62, 69 (ch. 11, § 1)
N.Y. Pub. Auth. Law § 3404(16)	1997	1997 N.Y. Laws 45, 52 (ch. 9, § 1)
N.Y. Pub. Auth. Law § 903(17)	1999	1999 N.Y. Laws 3296, 3300 (ch. 605, § 1)
N.Y. Pub. Auth. Law § 3605(16)	1999	1999 N.Y. Laws 3131, 3137 (ch. 507, § 1)
N.Y. Pub. Auth. Law § 2579(16)	2000	2000 N.Y. Laws 3299, 3302 (ch. 545, § 1)
N.Y. Pub. Auth. Law § 1230-f(17)	2002	2002 N.Y. Laws 3075, 3084 (ch. 275)
N.Y. Pub. Auth. Law § 1230-d(11)	2002	2002 N.Y. Laws 3075, 3080 (ch. 275, § 1)
N.Y. Pub. Auth. Law § 3630(25)	2003	2003 N.Y. Laws 2738, 2747 (ch. 143, § 1)
N.Y. Pub. Auth. Law § 1021-d(9)	2010	2010 N.Y. Laws 1393, 1397 (ch. 533, § 1)
N.Y. Pub. Auth. Law § 2799-ggg(15)	2011	2011 N.Y. Laws 1318, 1325 (ch. 463, § 1)
N.Y. Pub. Auth. Law § 1114-e(15)	2021	2021 N.Y. Laws 1472, 1480 (ch. 575, §1)
North Carolina		
N.C. Gen. Stat. § 136-190(1)	1872	1871–72 N.C. Sess. Laws 186, 201 (ch. 138, § 29)
N.C. Gen. Stat. § 157-9(a)	1935	1935 N.C. Sess. Laws 771, 779 (ch. 456, § 9)
N.C. Gen. Stat. § 63-49(a), (b)	1945	1945 N.C. Sess. Laws 675, 678–79 (ch. 490, § 2)
N.C. Gen. Stat. § 160A-512(10)	1951	1951 N.C. Sess. Laws 1112, 1118 (ch. 1095, § 9)
N.C. Gen. Stat. § 159-83(a)(13)	1971	1971 N.C. Sess. Laws 946, 974 (ch. 780, § 1)
N.C. Gen. Stat. § 40A-11	1981	1981 N.C. Sess. Laws 1382, 1387 (ch. 919, § 1)

North Dakota		
N.D. Cent. Code § 32-15-06	1895	N.D. Rev. Code § 5960 (1895) (earliest codification located)
N.D. Cent. Code, § 61-07-16(2)	1917	1917 N.D. Laws 125, 146 (ch. 115, § 31)
N.D. Cent. Code § 24-05-09	1935	1935 N.D. Laws 154, 155 (ch. 121, § 1)
N.D. Cent. Code § 61-07-03(6)	1939	1939 N.D. Laws 433, 443 (ch. 253, § 10)
N.D. Cent. Code § 2-06-08	1959	1959 N.D. Laws 96, 101 (ch. 91, § 8)
Ohio		
Ohio Rev. Code Ann. § 4961.13	1894	1894 Ohio Laws 294, 294–95
Ohio Rev. Code Ann. § 743.39	1927	1927 Ohio Laws 143, 143–44
Ohio Rev. Code Ann. § 4582.31(A)(12)	1957	1957 Ohio Laws 249, 253
Ohio Rev. Code Ann. § 303.37(C)	1959	1959 Ohio Laws 1254, 1260
Ohio Rev. Code Ann. § 308.06(P)	1961	1961 Ohio Laws 1282, 1285
Ohio Rev. Code Ann. § 4933.151	1963	1963 Ohio Laws 5, 1165
Ohio Rev. Code Ann. § 163.03	1965	1965 Ohio Laws 5, 180
Ohio Rev. Code Ann. § 4933.15	1965	1965 Ohio Laws 5, 1199
Ohio Rev. Code Ann. § 306.35(V)	1965	1965 Ohio Laws 5, 194
Ohio Rev. Code Ann. § 4582.06(A)(11)	1971	1971 Ohio Laws 199, 204–05
Oklahoma		
Okla. Stat. tit. 66, § 51	1893	Okla. Stat. § 1026 (1893) (earliest codification located)
Okla. Stat. tit. 3, § 65.3	1947	1947 Okla. Sess. Laws 15, 17 (tit. 3, ch. 1)
Okla. Stat. tit. 82, § 1106(10)	1959	1959 Okla. Sess. Laws 390, 393 (tit. 82, ch. 16)
Okla. Stat. tit. 82, § 277.6(C)(12)(b)	1973	1973 Okla. Sess. Laws 263, 266 (ch. 1279, § 6)
Okla. Stat. tit. 11, § 22-114	1977	1977 Okla. Sess. Laws 695, 751 (ch. 256)
Okla. Stat. tit. 11, § 38-108(A)(3)	1977	1977 Okla. Sess. Laws 695, 849 (ch. 256)
Okla. Stat. tit. 82, § 1272(18)	1985	1985 Okla. Sess. Laws 1617, 1622 (ch. 353, § 4)

Oregon		
Or. Rev. Stat. § 272.010	1876	1876 Or. Laws 33, 33–34
Or. Rev. Stat. § 545.239(1)	1895	1895 Or. Laws 13, 19
Or. Rev. Stat. § 772.210(1)(a)	1903	1903 Or. Laws 111, 111
Or. Rev. Stat. § 772.010	1909	1901 Or. Laws 132, 133 (ch. 75, § 2)
Or. Rev. Stat. § 772.410(2)	1953	1953 Or. Laws 1073, 1073 (ch. 559, § 1)
Or. Rev. Stat. § 459.053(4)	1979	1979 Or. Laws 1028, 1029
Or. Rev. Stat. § 35.220	2003	2003 Or. Laws 1720, 1720–21 (ch. 477, § 2)
Pennsylvania		
36 Pa. Cons. Stat. § 3503, Art. V	1931	1931 Pa. Laws 575, 581 (Act No. 200)
36 Pa. Cons. Stat. § 3401, Art. III	1931	1931 Pa. Laws 1352, 1356 (Act No. 332)
16 Pa. Cons. Stat. §§ 12601(p), 12661	1933	1933 Pa. Laws (Ex. Sess.) 114, 117, 120 (Act No. 30)
35 Pa. Cons. Stat. § 1550(*l*)	1937	1937 Pa. Laws 955, 962 (Act No. 265, § 10
35 Pa. Cons. Stat. § 1709(g)	1945	1945 Pa. Laws 991, 996 (Act No. 385, § 9)
35 Pa. Cons. Stat. § 1590.9(n)	1947	1947 Pa. Laws 1414, 1417 (Act No. 549, § 9
16 Pa. Cons. Stat. § 5603	1953	1953 Pa. Laws 723, 876–77 (Act No. 230)
26 Pa. Cons. Stat. § 309	2006	2006 Pa. Laws 112, 121–22 (Act No. 2006-34, § 1)
Rhode Island		
R.I. Gen. Laws § 39-6-6	1881	1881 R.I. Acts & Resolves 2, 2 (ch. 891, § 1)
R.I. Gen. Laws § 45-29-29	1935	1935 R.I. Acts & Resolves 192, 200–01 (ch. 2256, § 6)
R.I. Gen. Laws Ann. § 24-12-9(a)(19)	1954	1954 R.I. Acts & Resolves 541, 554–55 (ch. 3390, § 5)
R.I. Gen. Laws § 45-32-5(a)(7)	1956	1956 R.I. Acts & Resolves 86, 102–02 (ch. 3654, § 40)
R.I. Gen. Laws § 46-25-24.1	1997	1997 R.I. Pub. Laws 857, 857 (ch. 219, § 1)
R.I. Gen. Laws § 45-48.1-5(7)	2003	2003 R.I. Pub. Laws 866, 868 (ch. 270, § 1)

R.I. Gen. Laws § 45-63-2(b)	2006	2006 R.I. Pub. Laws 538, 539 (ch. 121, § 1)
South Carolina		
S.C. Code Ann. § 28-2-70(c)	1987	1987 S.C. Acts 2074, 2081 (Act No. 173, § 1)
South Dakota		
S.D. Codified Laws § 49-33-6	1903	1903 S.D. Sess. Laws 115, 118 (ch. 107, § 8)
S.D. Codified Laws § 1-1-10	1903	1903 S.D. Sess. Laws 155, 155 (ch. 137, § 1)
S.D. Codified Laws § 46A-6-5	1925	1925 S.D. Sess. Laws 228, 228 (ch. 212, §1)
S.D. Codified Laws § 11-8-23	1966	1966 S.D. Sess. Laws 443, 449 (ch. 149, § 8)
S.D. Codified Laws § 50-6A-19	1976	1976 S.D. Sess. Laws 479, 484 (ch. 303, § 11)
S.D. Codified Laws § 46-8-2.1	1983	1983 S.D. Sess. Laws 533, 551 (ch. 314, § 133A)
S.D. Codified Laws § 21-35-31	2016	2016 S.D. Sess. Laws 295, 295 (ch. 118, § 1)
Tennessee		
Tenn. Code Ann. § 29-16-121	1858	Tenn. Code § 1345 (1857–58) (earliest codification located)
Tenn. Code Ann. § 29-17-601	1877	1877 Tenn. Acts 38, 38 (ch. 24, § 1)
Tenn. Code Ann. § 65-21-205	1885	1885 Tenn. Acts 120, 120–21 (ch. 66, § 3)
Tenn. Code Ann. § 13-20-104(a)(15)	1935	1935 Tenn. Pub. Acts (Ex. Sess.) 209, 221 (ch. 20, § 9)
Tenn. Code Ann. § 42-5-108(a)	1957	1957 Tenn. Pub. Acts 1303, 1307 (ch. 375, § 3)
Tenn. Code Ann. § 42-3-109	1957	1958 Tenn. Pub. Acts 1326, 1337–38 (ch. 376, § 8)
Tenn. Code Ann. § 42-2-204(d)(2)	1957	1957 Tenn. Pub. Acts 1259, 1274 (ch. 374, § 7)
Tenn. Code Ann. § 7-37-104(8)	1968	1968 Tenn. Pub. Acts 570, 571 (ch. 581, § 2)
Tenn. Code Ann. § 42-4-107(13)	1969	1969 Tenn. Pub. Acts 482, 190 (ch. 174, § 7)
Tenn. Code Ann. § 7-5-107(12)	1979	1979 Tenn. Pub. Acts 154, 166 (ch. 95, § 7)
Tenn. Code Ann. § 68-211-906(a)(15)	1991	1991 Tenn. Pub. Acts 731, 751 (ch. 451, § 63)

Tenn. Code Ann. § 9-21-107(11)	1986	1986 Tenn. Pub. Acts 678, 685 (ch. 770, § 7)
Tenn. Code Ann. § 64-10-106(c)(11)	2011	2011 Tenn. Pub. Acts ch. 419, § 4 (p. 3
Tenn. Code Ann. § 7-36-107(a)(17)	2016	2016 Tenn. Pub. Acts ch. 995, § 1 (p. 6)
Texas		
Tex. Nat. Res. Code § 152.012	1977	1977 Tex. Gen. Laws 2345, 2648 (ch. 871
Tex. Rev. Civ. Stat. art. 4477-7j, § 4.14	1991	1991 Tex. Gen. Laws 2436, 2444 (ch. 670, § 1)
Tex. Transp. Code § 451.062	1995	1995 Tex. Gen. Laws 1025, 1364–65 (ch. 165, § 1)
Tex. Water Code § 49.221	1995	1995 Tex. Gen. Laws 3755, 3773–74 (ch. 715, § 2)
Tex. Transp. Code § 203.068	1995	1995 Tex. Gen. Laws 1025, 1281 (ch. 165, § 1)
Tex. Transp. Code § 283.101(a)	1995	1995 Tex. Gen. Laws 1025, 1199 (ch. 165, § 1)
Tex. Transp. Code § 284.061(a)	1995	1995 Tex. Gen. Laws 1025, 1207 (ch. 165, § 1)
Tex. Transp. Code § 366.164	1997	1997 Tex. Gen. Laws 4427, 4477 (ch. 1171, § 7.24)
Tex. Util. Code § 181.083(1)	1997	1997 Tex. Gen. Laws 713, 987 (ch. 166, § 1)
Tex. Transp. Code § 203.0521(e)	1997	1997 Tex. Gen. Laws 1137, 1137 (ch. 224, § 1)
Tex. Water Code § 36.123	1999	1999 Tex. Gen. Laws 4589, 4590 (ch. 1354, § 3)
Tex. Transp. Code § 91.093	2003	2003 Tex. Gen. Laws 4884, 4933 (ch. 1325, § 4.01)
Tex. Spec. Dists. Code § 21.211	2007	2007 Tex. Gen. Laws 2320, 2329 (ch. 920, § 1.01)
Tex. Transp. Code § 112.051	2009	2009 Tex. Gen. Laws 153, 160 (ch. 85, § 2.03)
Tex. Spec. Dist. Code § 8246.151(11)	2009	2009 Tex. Gen. Laws 3155, 3406 (ch. 1139, § 1.04)
Tex. Transp. Code § 131.013(b)(2)	2009	2009 Tex. Gen. Laws 153, 167 (ch. 85, § 2.03
Tex. Spec. Dists. Code § 11003.161	2013	2013 Tex. Gen. Laws 226, 474 (ch. 112, § 1.07)

Tex. Spec. Dists. Code § 11006.160	2015	2015 Tex. Gen. Laws 2736, 2877 (ch. 855, § 1.07)
Tex. Spec. Dists. Code § 11005.161	2015	2015 Tex. Gen. Laws 2736, 2866 (ch. 855, § 1.07)
Tex. Nat. Res. Code § 111.019(d)	2021	2021 Tex. Gen. Laws 2743, 2743–44 (ch. 1039, § 1)
Tex. Prop. Code § 21.0101	2021	2021 Tex. Gen. Laws 2023, 2025 (ch. 826, § 5)
Utah		
Utah Code Ann. § 78B-6-506	1951	1951 Utah Laws 1150, 218 (ch. 58, § 1)
Utah Code Ann. § 17B-2a-205(1)	2007	2007 Utah Laws 1723, 1870 (ch. 329, § 281)
Vermont		
Vt. Stat. Ann. tit. 5, § 3518	1849	1849 Vt. Acts & Resolves 30, 36–37 (Act No. 41, § 25)
Vt. Stat. Ann. tit. 24, § 3209(3)	1957	1957 Vt. Acts & Resolves 259, 263 (Act No. 264, § 7)
Vt. Stat. Ann. tit. 24A, § 405-5(26)	1989	1989 Vt. Acts & Resolves 375, 429 (Act No. M-12, § 2)
Vt. Stat. Ann. tit. 30, § 111a(c)	2008	2008 Vt. Acts & Resolves 134, 138 (Act No. 131, § 4)
Virginia		
Va. Code Ann. § 25.1-203	1904	1902–04 Va. Acts 957, 957–58 (ch. 608, § 3)
Va. Code Ann. § 25.1-246	1904	1902–04 Va. Acts 957, 967–68 (ch. 608, § 26)
Va. Code Ann. § 56-49	1944	1944 Va. Acts 523, 539 (ch. 367, § 1)
Va. Code Ann. § 21-248(8)	1946	1946 Va. Acts 346, 352 (ch. 206, § 5)
Va. Code Ann. § 15.2-2604(9)	1956	1956 Va. Acts 948, 950 (ch. 640, § 2)
Va. Code Ann. § 33.2-1011	1959	1959 Va. Acts 763, 763 (ch. 491, § 1)
Va. Code Ann. § 5.1-2.5	1980	1980 Va. Acts 1176, 1177–78 (ch. 750, § 1)
Va. Code Ann. § 56-49.01	2004	2004 Va. Acts 1276, 1276–77 (ch. 829, § 1)
Va. Code Ann. § 33.2-2902(13)	2009	2009 Va. Acts 731, 734 (ch. 471, § 1)
Washington		
Wash. Rev. Code § 87.03.140	1889	1889 Wash. Sess. Laws 671, 678 (§ 12)
Wash. Rev. Code § 90.16.040	1901	1901 Wash. Sess. Laws 299, 299–300 (ch. 143, § 2)

Wash. Rev. Code § 22.16.020	1919	1919 Wash. Sess. Laws 233, 234 (ch. 98, § 2)
Wash. Rev. Code § 47.01-170	1945	1945 Wash. Sess. Laws 501, 501 (ch. 176, § 1)
Wash. Rev. Code § 35.81.070(6)	1957	1957 Wash. Sess. Laws 134, 144 (ch. 42, § 7)
Wash. Rev. Code § 35.81.150(2)(k)	1957	1957 Wash. Sess. Laws 134, 156 (ch. 42, § 15)
West Virginia		
W. Va. Code § 54-1-3	1870	W. Va. Code app'x 747 (1870)
W. Va. Code § 16-15-7(a)(9)	1933	1933 W. Va. Acts (2d Ex. Sess.) 236, 241 (ch. 93, § 7)
W. Va. Code § 5-6-4(a)(15)	1939	1939 W. Va. Acts 241, 244 (ch. 43, § 3)
W. Va. Code § 17-2A-8(4)	1957	1957 W. Va. Acts 668, 678 (ch. 143)
W. Va. Code § 54-1-3a	1963	1963 W. Va. Acts 380, 380–81 (ch. 65)
W. Va. Code § 31-2-13(a)	1873	187273 W. Va. Acts 213, 223 (ch. 88, § 20)
W. Va. Code § 5D-1-5(29)	1985	1985 W. Va. Acts 170, 277–78 (ch. 41)
W. Va. Code § 18-9D-3(a)(14)	1988	1988 W. Va. Acts (3d Ex. Sess.) 1126, 1225 (ch. 7)
Wisconsin		
Wis. Stat. § 83.01(7)(e)	1922	1922 Wis. Sess. Laws 107, 135 (ch. 108, § 124
Wis. Stat. § 190.02(1)	1929	1929 Wis. Sess. Laws 686, 870 (ch. 504, § 12)
Wis. Stat. § 87.12(5)	1931	1931 Wis. Sess. Laws 839, 850 (ch. 481, § 1)
Wis. Stat. § 30.18(7)	1935	1935 Wis. Sess. Laws 426, 428 (ch. 287, § 1)
Wis. Stat. § 87.12(5)	1937	1937 Wis. Sess. Laws 697, 698 (ch. 425, § 1)
Wis. Stat. § 62.23(4)	1941	1941 Wis. Sess. Laws 252, 24 (ch. 203, § 5)
Wis. Stat. § 182.38	1953	1953 Wis. Sess. Laws 174, 179 (ch. 186, § 3)
Wis. Stat. § 59.84(2)(i)	1957	1957 Wis. Sess. Laws 478, 481–82 (ch. 329, § 4)
Wis. Stat. § 66.1333(5)(a)(3)	1959	1959 Wis. Sess. Laws 630, 633 (ch. 515, § 3)

Wis. Stat. § 84.01(10)	1969	1969 Wis. Sess. Laws 1500, 1501 (ch. 500, § 7)
Wis. Stat. § 200.11(3)	1971	1971 Wis. Sess. Laws 1047, 1053 (ch. 276, § 5)
Wis. Stat. § 36.25(6)	1973	1973 Wis. Sess. Laws 1092, 1103 (ch. 335, § 7)
Wis. Stat. § 1.06	1977	1977 Wis. Sess. Laws 1994, 1995 (ch. 449, § 1)
Wis. Stat. § 200.35(11)	1981	1981 Wis. Sess. Laws 1138, 1152 (ch. 282, § 20)
Wis. Stat. § 92.07(14)	1981	1981 Wis. Sess. Laws 1425, 1434 (ch. 346, § 34)
Wis. Stat. § 229.44(10)	1993	1993 Wis. Sess. Laws 1059, 1068 (Act No. 263, § 47)
Wis. Stat. § 59.70(2)(d)	1995	1995 Wis. Sess. Laws 1377, 1410 (Act No. 201, § 216)
Wyoming		
Wyo. Stat. Ann. § 41-10-113(a)(xiv)	1959	1959 Wyo. Sess. Laws 257, 269 (ch. 188, § 13)
Wyo. Stat. Ann. § 15-9-113(a)(v)	1965	1965 Wyo. Sess. Laws 376, 383–84 (ch. 140, § 14)
Wyo. Stat. Ann. § 1-26-506	1981	1981 Wyo. Sess. Laws 305, 306–07 (ch. 174, § 1)
Wyo. Stat. Ann. § 30-5-402	2005	2005 Wyo. Sess. Laws 169, 170–71 (ch. 81, § 1)
District of Columbia		
D.C. Code § 9-103.04	1893	27 Stat. 532, 534 (ch. 197, § 4) (1893)
D.C. Code § 9-1115.03(25)(a)	1995	42 D.C. Reg. 7185, 7197 (Dec. 29, 1995) (D.C. Act 11-179, § 4)
Puerto Rico		
P.R. Laws Ann. tit. 22, § 255	1909	1909 P.R. Laws 152, 158–59
P.R. Laws Ann. tit. 22, § 304	1919	1919 P.R. Laws 348, 352–55 (Act No. 63, § 10)
P.R. Laws Ann. tit. 22, § 196(s)	1941	1941 P.R. Laws 684, 696–97 (Act No. 83, § 6)
P.R. Laws Ann. tit. 28, § 261(o)	1941	1941 P.R. Laws 388, 406–07 (Act No. 26, § 8)
P.R. Laws Ann. tit. 23, § 336(r)	1942	1942 P.R. Laws 710, 720–21 (Act No. 125, § 6)
P.R. Laws Ann. tit. 22, § 144(*l*)	1949	1949 P.R. Laws 430, 440–41 (Act No. 163, § 1)

P.R. Laws Ann. tit. 22, § 906(a)(14)	1958	1958 P.R. Laws 120, 123 (Act No. 56, § 5
P.R. Laws Ann. tit. 23, § 525(r)	1958	1958 P.R. Laws 202, 207 (Act No. 93, § 4)
P.R. Laws Ann. tit. 23, § 606(r)	1959	1959 P.R. Laws 17, 22 (Act No. 5, § 6)
P.R. Laws Ann. tit. 23, § 555(r)	1959	1959 P.R. Laws 46, 50 (Act No. 10, § 4)
P.R. Laws Ann. tit. 23, § 311f(r)	1962	1962 P.R. Laws 11, 18 (Act No. 13, § 7)
P.R. Laws Ann. tit. 9, § 2004(p)	1965	1965 P.R. Laws 158, 162 (Act No. 74, § 4)
P.R. Laws Ann. tit. 23, § 3055(r)	1974	1974 P.R. Laws 239, 245 (Act No. 62, § 5)
P.R. Laws Ann. tit. 23, § 11164(a)(15)	2014	2014 P.R. Laws 506, 524 (Act No. 123, § 5)
U.S. Virgin Islands		
V.I. Code Ann. tit. 29, § 35(26)	1958	1958 V.I. Sess. Laws 42, 52 (No. 316, § 1)
V.I. Code Ann. tit. 30, § 415	1960	1960 V.I. Sess. Laws 155, 155 (No. 629, § 1)
V.I. Code Ann. tit. 29, § 85(26)	1962	1962 V.I. Sess. Laws 193, 201–02 (No. 903, § 5)
V.I. Code Ann. tit. 29, §§ 191d(a)(7), 191o	1963	1963 V.I. Sess. Laws 205, 209, 215 (No. 991, § 1)
V.I. Code Ann. tit. 30, § 105(17)	1964	1964 V.I. Sess. Laws 378, 386 (No. 1248, § 1)
V.I. Code Ann. tit. 29, § 496(p)	2003	2003 V.I. Sess. Laws 205, 217 (No. 6638, § 1)

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

PATRICK T. PARDY
Circuit Judge
200 E. Center Street
Madison, SD 57042
605-256-5035
605-256-5012

COUNTIES
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

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200 E. Center Street
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March 8, 2023

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RE: *Patricia K. Deeg Trust v. SCS Carbon Transport LLC & Betty Jean Strom Trust, Rita Brown, Craig & Lisa Basler Family Trust v. SCS Carbon Transport LLC*; 02CIV22-129 & 39CIV22-64 Consolidated—Motion to Compel Discovery; Motion for Continuance; and Motion for Summary Judgment

INTRODUCTION

Defendant SCS Carbon Transport LLC ("SCS") filed a Motion for Summary Judgment seeking dismissal of Plaintiff Landowners ("Landowners") Amended Complaint with prejudice

and granting of SCS's Counterclaims. Landowners resist summary judgment, believing the motion to be premature, and filed a Motion to Compel Discovery and a Motion for Continuance. A hearing was held in Lake County, South Dakota, on February 28, 2023, where this Court took the matter under advisement. For the reasons set forth below, Landowners' Motion to Compel Discovery and Motion for Continuance are denied, and SCS's Motion for Summary Judgment is granted.

BACKGROUND

SCS and its parent Summit Carbon Solutions, LLC ("Summit") have intentions of developing an interstate pipeline that would receive, transport, and deliver carbon dioxide through a network of approximately 2,000 miles of underground pipelines. The route of the proposed pipeline travels through eighteen counties in South Dakota and four other states before reaching a sequestration site in North Dakota for storing of the carbon dioxide.

Prior to any pipeline construction, SCS must enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations, including core or water sampling activities. The purpose of said surveys and investigations is to identify and describe the property needed to construct the pipeline and appraise the property to acquire any requisite easements.

Pursuant to and in accordance with SDCL § 21-35-31, SCS needed to obtain a siting permit before entering on Landowners private property to conduct the surveys. SCS sent letters to Landowners dated June 4, 2022, seeking consent for SCS to enter their property for the surveys. Landowners did not consent; rather, they instituted these lawsuits with complaints filed July 19, 2022. The complaints were consolidated in October 2022. From their Amended Complaint filed October 27, 2022, Landowners assert six claims against SCS: 1) that SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation; 2) that SDCL § 21-35-31

amounts to an unconstitutional taking as applied; 3) that SDCL § 21-35-31 violates the Due Process Clause of the State and Federal Constitutions; 4) that SCS is not of the class of corporations authorized to act under SDCL § 21-35-31; 5) that SCS's notice letters to Landowners are insufficient under SDCL § 21-35-31; and 6) that the survey access SCS seeks is not authorized under SDCL § 21-35-31. SCS counterclaimed, seeking declaratory and injunctive relief authorizing it to survey despite objection from Landowners.

On December 28, 2022, this Court issued a Memorandum Decision granting SCS's Motion for Entry of Protective Order, and in doing so, made the following findings: 1) that carbon dioxide is a commodity regardless of the form of compensation, terms of payment, or transfer of value; and 2) that SCS is shipping carbon dioxide, belonging to the ethanol plants, for a fee. This Memorandum Decision was introduced as a handout to the Senate Commerce and Energy Committee when it considered House Bill 1133 at the current legislative session. While not binding authority, the Committee effectively affirmed this Court's findings when it denied the bill, which was pushed by Landowners and sought to amend the definition of a commodity for the purpose of qualifying as a common carrier under SDCL § 49-7-11.

These prior findings dispose of one of the current issues on summary judgment; namely, if SCS is of the class of corporations authorized pursuant to SDCL § 21-35-31. Landowners also withdrew their as applied constitutional challenge of SDCL § 21-35-31 in their brief resisting summary judgment. As such, the remaining issues before the court are: 1) the facial constitutionality of SDCL § 21-35-31; 2) if SDCL § 21-35-31 violates state and federal procedural due process; 3) the sufficiency of SCS's notice letter to Landowners under SDCL § 21-35-31; and 4) if SDCL § 21-35-31 authorizes SCS's surveys. Because these remaining issues are questions of

law, a decision on summary judgment is ripe, and each issue will be discussed in turn. Therefore, Landowners' motion to compel discovery and for a continuance are moot.

STANDARD OF REVIEW

SDCL § 15-6-56(c) states that summary judgment shall be granted when the moving party proves that "no genuine issue as to any material fact [exists] and that the moving party is entitled to judgment as a matter of law." *See also Anderson v. Production Credit Ass'n*, 482 N.W.2d 642, 644 (S.D. 1992). Summary judgment is authorized where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (2006) (citing SDCL § 15-6-56(c)). "All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party." *Id.* (citing *Northstream Invs., Inc. v. 1804 Country Store Co.*, 2005 S.D. 61, ¶ 11, 697 N.W.2d 762, 765. In order to defeat summary judgment, the nonmoving party may not rest on mere allegations or his pleadings but, rather, must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D. 1996). "Where no genuine issues of material fact exist and the trial court resolves the questions of law in a party's favor, summary judgment is appropriate." *Weber v. First Fed. Bank*, 523 N.W.2d 720, 721 (S.D. 1994) (citing *King v. John Hancock Mut. Life. Ins.*, 500 N.W.2d 619 (S.D. 1993)).

APPLICABLE LAW & ANALYSIS

1. Whether SDCL § 21-35-31 is facially unconstitutional by authorizing a taking without just compensation

"Challenges to the constitutionality of a statute meet formidable restrictions." *State v. Allison*, 2000 S.D. 21, ¶ 5, 607 N.W.2d 1, 2 (internal quotation omitted). "Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until

the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Tibbs v. Moody County Bd. Of Com'rs*, 2014 S.D. 44, ¶ 10, 851 N.W.2d 208, 213. The burden of proving the unconstitutionality of a statute is on the challenger. *Beals v. Pickerel Lake Sanitary Dist.*, 1998 S.D. 42, ¶ 8, 578 N.W.2d 134, 134. "[T]he South Dakota Supreme Court construes South Dakota laws in accordance with the doctrine of constitutional avoidance, which requires adopting a construction of a law that avoids questions about its constitutionality if such a construction is 'fairly possible[.]'" *Sisney v. Kaemingk*, 15 F.4th 1181, 1198 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022) (quoting *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985)). A statute's words are to be defined according to their ordinary meaning to effect its purpose. *Hofer v. Redstone Feeders, LLC*, 2015 S.D. 75, ¶ 15, 870 N.W.2d 659, 662. Issues of statutory and constitutional interpretation are questions of law. *Gray v. Gienapp*, 2007 S.D. 12, ¶ 15, 727 N.W.2d 808, 812.

Landowners challenge the constitutionality of SDCL § 21-35-31's pre-condemnation surveys, arguing they violate Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. These constitutional provisions prohibit the taking of private property for public use without just compensation. S.D. Const. art. VI, § 13; U.S. Const. amend. V. The narrow issue then is whether the pre-condemnation surveys authorized in SDCL § 21-35-31 amount to a taking without the constitutional requirement of just compensation.

In 2016, the South Dakota Legislature adopted SDCL § 21-35-31 which states as follows:

> The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:
> (1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and
(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

SDCL § 21-35-31.

Landowners specifically challenge the constitutionality of the statute considering the United States Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). That case concerned a California regulation that gave agricultural employees the right to self-organize on the premises of an agricultural employer for up to four 30-day periods in one calendar year. *Id.* at 2069. Prior to doing so, a labor organization needed to file a written notice with the Agricultural Labor Relations Board and serve a copy on the employer. *Id.* The Court held that the access regulation appropriated a right to invade the growers' property and therefore constituted an uncompensated *per se* physical taking in violation of the Fifth and Fourteenth Amendments. *Id.* at 2074.

This Court declines to extend *Cedar Point* and hold that SDCL § 21-35-31 and its permitted surveys suffer from the same constitutional infirmities. The government does not take a property interest when it merely asserts a pre-existing limitation upon the landowner's title. *Id.* at 2079 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). In terms of eminent domain, other courts have held that there is an ancillary right to survey land prior to condemnation. As cited by then Judge, now Justice, Salter in litigation concerning the Dakota Access pipeline, the Missouri Supreme Court in *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981) stated the following:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Other jurisdictions, both with and without specific statutes granting the right of entry, have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1985); *State by Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982); *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176 (Ohio App. 5d 2016); *In re Application for Permit to Enter Land for Surys. & Examination Associated with a Proposed N. Dakota Diversion & Associated Structures*, 883 N.W.2d 844 (N.D. 2016). In light of the above-cited authorities and the strong presumption in favor of constitutionality, Landowners have failed to prove beyond a reasonable doubt that SDCL § 21-35-31 unconstitutionally authorizes a taking without just compensation in violation of Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution. Rather, this Court finds in favor of SDCL § 21-35-31's constitutionality and that its related surveys are merely a right ancillary to condemnation not amounting to a governmental taking. Summary judgment is granted on this issue.

2. Whether SDCL § 21-35-31 violates state and federal procedural due process

Under the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law." "Due process requires adequate notice and an opportunity for meaningful participation." *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 386 (citing *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160). "A procedural due process claim focuses not on the merits of a deprivation, but on whether the State

circumscribed the deprivation with constitutionally adequate procedures." *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

The plain language of SDCL § 21-35-31 provides adequate notice and an opportunity for meaningful participation. It first allows owners of private property the opportunity to consent to an examination and survey. If consent is not given, the statute mandates the person vested with authority to take private property to both file a siting permit application with the Public Utilities Commission and provide private property owners with thirty days written notice of this filing and expected dates of entry. Because of these mandates, owners of private property are effectively under adequate notice of anticipated examination and surveying and may meaningfully participate by consenting or denying permission to do the same. Furthermore, as seen in this specific case, the procedures set forth in SDCL § 21-35-31 give owners sufficient opportunity to be heard through the judicial process before entry for examination and surveying occurs. Therefore, SDCL § 21-35-31 does not violate state or federal procedural due process, and summary judgment is also granted on this issue.

3. Whether SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31

Giving SDCL § 21-35-31's language a plain meaning to effect its purpose, the Court is satisfied as to the sufficiency of SCS's notice letters under the statute. Landowners take issue with SCS's notice letters in that they did not specify the expected dates of entry, they only contained the hyperlink to the Public Utilities Commission docket rather than the entire siting permit application, and they failed to set out measurement of and submission for damages to private property from the surveys. However, the Court does not read such rigidity into the statute. All that SDCL § 21-35-31 requires is: 1) written notice, including the Public Utilities Commission filing; 2) expected dates of entry; and 3) provide sufficient security for the payment of any actual damages

done to the property by the entry. Within SCS's notice letters to Landowners, it is undisputed a hyperlink to the filing of the siting permit application was included. This is enough under SDCL § 21-35-31 to place Landowners on notice of the filing. Secondly, SCS's letters included a four-day range of expected dates of entry. SDCL § 21-35-31 does not require perfect precision and contemplates providing a private landowner with more than one date that entry is anticipated. Lastly, SCS's letters note that it has secured a bond, now in the amount of $5 million, intended to cover any damage to Landowners' properties. This statement acts as sufficient security to Landowners for the payment of any actual damages sustained on their property. Because SCS's notice letters comport with the plain and ordinary meaning of the words within SDCL § 21-35-31, summary judgment is granted on this issue.

4. Whether the survey access SCS seeks is authorized under SDCL § 21-35-31

SDCL § 21-35-31 authorizes persons with vested authority to first cause an examination and survey to be made as necessary before taking private property for public use. "Examine" means "to test the condition of." *Examine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/examine (last visited Mar. 8, 2023). "Survey" means "to examine as to condition, situation, or value." *Survey*, Merriam-Webster, https://www.merriam-webster.com/dictionary/survey (last visited Mar. 8, 2023). In interpreting its survey access law[1], the Supreme Court of North Dakota stated that "[t]he definition of 'examination' is not strictly limited to a visual examination" but also includes instances of soil borings that penetrate the ground's surface and are minimally invasive. *In re 2015 Application*, 883 N.W.2d at 848-49.

Considering the ordinary definitions of "examination" and "survey" and the Supreme Court of North Dakota's statutory interpretation, this Court finds that SDCL § 21-35-31 authorizes

[1] N.D. Cent. Code Ann. § 32-15-06 provides in relevant part: "Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof..."

minimally invasive soil disturbances such as those SCS seeks to perform on Landowners' properties. The plain language of SDCL § 21-35-31 permits examinations and surveys to be made as necessary depending on the proposed facilities. Here, the proposed facilities are underground pipelines. It follows that SDCL § 21-35-31's discretionary language does not restrict examinations and surveys to only visual ones but contemplates the minimally invasive typical and geotech surveys proposed by SCS. Summary judgment is granted on this final issue.

CONCLUSION

Based upon the foregoing analysis, SCS's Motion for Summary Judgment is GRANTED, and Landowner's Amended Complaint is dismissed with prejudice.

Hon. Patrick T. Pardy
Circuit Court Judge
Third Judicial Circuit

FILED

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

SCS Appendix 34

STATE OF SOUTH DAKOTA)SS COUNTY OF LAKE AND BEADLE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064
PATRICIA K. DEEG TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS MOTION TO COMPEL DISCOVERY AND MOTION FOR CONTINUANCE

This matter came be heard on the 28th day of February 2023 before the Honorable Patrick T. Pardy on Defendant SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, and Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023. Said Motion having been argued by all parties appearing at said hearing, Defendant SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP and Brian D. Boone and Matthew Hooker of Alston & Bird LLP, and Plaintiffs having been represented by Nicholas G. Moser of Marlow, Woodward & Huff, Prof. LLC, and Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present

arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, which is further explained in the Court's Memorandum Decision dated March 8, 2023, which is fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed January 13, 2023, is hereby **GRANTED** and all of Plaintiffs' claims are **DISMISSED** with prejudice.

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Compel Discovery and Motion for Continuance filed February 14, 2023 is hereby **DENIED** as moot;

ORDERED, ADJUDGED AND DECREED that, pursuant to SDCL 21-35-31, SCS Carbon Transport LLC, is granted a declaratory judgment authorizing access for the purpose of conducting civil, environmental and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings and archaeological/cultural resource surveys and examinations, for the property described as follows:

Landowner	Legal Description
Patricia K. Deeg Trust	Township 112 North, Range 61 West, Section 25: SW1/4 Section 26: SW1/4 EX 11 AC E OF ROAD Section 35: NW1/4
Betty Jean Strom Trust	Township 105 North, Range 53 West Section 25: SW1/4 EXC BONNEMA TRACT Section 36: N1/2NW1/4

and,

ORDERED, ADJUDGED AND DECREED that Defendants Patricia K. Deeg Trust and Betty Jean Strom Trust shall be enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said property, including conducting preliminary civil, environmental and archaeological surveys and examinations and environmental or archeological investigations, including any necessary core or water sampling activities subject to any conditions.

BY THE COURT:

3/15/2023 12:31:19 PM

Attest:
Klosterman, Linda
Clerk/Deputy

The Honorable Patrick T. Pardy
Circuit Court Judge

Filed on: 03-15-2023 Lake County, South Dakota 39CIV22-000064

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&I. FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT IN PART AND TAKING REMAINING ISSUE UNDER ADVISEMENT

This matter came be heard on the 14th day of March, 2023 before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023. Said Motion having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners[1] having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments, and on the basis of the hearing on said Motion, the arguments of counsel and the records and files of this action, and good causing appearing, it is therefore:

[1] The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

ORDERED, ADJUDGED AND DECREED that SCS Carbon Transport LLC (SCS)'s Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED** as to the following issues:

1. SDCL § 21-35-31 is constitutional;
2. Carbon dioxide is a commodity under SDCL § 49-7-11;
3. SCS's notice letters to Landowners are sufficient under SDCL § 21-35-31; and
4. The surveys and examinations SCS seeks to conduct are authorized by SDCL § 21-35-31.

It is further **ORDERED, ADJUDGED AND DECREED** that SCS's Motion for Summary Judgment, filed February 10, 2023, is hereby **TAKEN UNDER ADVISEMENT** as to the sole remaining following issue:

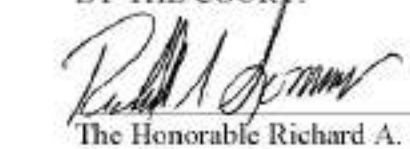
1. Whether SCS is entitled to summary judgment on the question of whether, in accordance with SDCL § 49-7-11, SCS is holding itself out to the general public as engaged in the business of transporting carbon dioxide for hire by pipeline.

It is further **ORDERED, ADJUDGED AND DECREED** that the parties will submit further briefing and any supplemental materials related to the issue taken under advisement according to the following schedule:

1. SCS will submit its further briefing and any supplemental materials within 14 days of the entry of this order.
2. Landowners will submit their further briefing and any supplemental materials within 14 days of the filing of SCS's brief.

3/28/2023 1:25:12 PM

BY THE COURT:



The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Moser, Katie
Clerk/Deputy

Filed on:04-20-2023 McPherson County, South Dakota 45CIV22-000014

STATE OF SOUTH DAKOTA

FIFTH JUDICIAL CIRCUIT

PRESIDING JUDGE
Gregg C. Magera
CIRCUIT JUDGES
Tony L. Portra
Richard A. Sommers
Marshall Levrien
MAGISTRATE JUDGE
Cullen McNeece

RICHARD A. SOMMERS
Circuit Court Judge

Sara Zahn, RPR
Official Court Reporter

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Aberdeen, SD 57402-1087
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Fax: 605-626-2491
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April 19, 2023

VIA EMAIL

45CIV22-000014

Nicholas Moser
Marlow, Woodward & Huff, Prof. LLC
200 West Third Street
Yankton, SD 57078

Brian Jorde (*pro hac vice*)
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144

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Cash Anderson
May, Adam, Gerdes & Thompson, LLP
P.O. Box 160
Pierre, SD 57501-0160

Brian Boone (*pro hac vice*)
Michael Hoernlein (*pro hac vice*)
Matthew Hooker (*pro hac vice*)
Alston & Bird, LLP
101 S. Tyron St., STE 4000
Charlotte, NC 28280

Re: *Peter Helfenstein, Jr. et al. v. SCS Carbon Transport, LLC; SCS Carbon Transport, LLC v. Geraldine H. Saylor Jordre, et al.; Braun Family Trust 2020, et al. v. SCS Carbon Transport, LLC; Jared Bossly, et al. v. SCS Carbon Transport, LLC; Delores Schumacher Revocable Trust and John and Stephanie Jung v. SCS Carbon Transport, LLC;* 45CIV22-14, 45CIV22-18, 71CIV22-47, 06CIV22-253, 22CIV22-20 Consolidated Cases

Filed on: 04-20-2023 McPherson County, South Dakota 45CIV22-000014

Dear Counsel:

This Court has had the opportunity to review the supplemental briefs filed by the parties in the above-entitled matter. Viewing the undisputed facts as a whole, I find that SCS is a common carrier. SCS is transporting CO2 originating from third parties for an exchange of value. This Court will adopt the reasoning of Judge Pardy and Judge Pekas on companion cases from other Circuits on this issue.

Counsel for SCS should prepare the order and submit it for signature.

Sincerely,

Richard A. Sommers
Circuit Court Judge

cc: Brown County Clerk of Courts
Edmunds County Clerk of Courts
Spink County Clerk of Courts
McPherson Clerk of Courts

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**ORDER GRANTING SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

Filed on: 04/21/23 McPherson County, South Dakota 45CIV22-000014

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&I. FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and	06CIV22-000253

JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

ORDER GRANTING
SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT AND DENYING LANDOWNERS' MOTION TO CONTINUE

This matter came to be heard on the 14th day of March, 2023, before the Honorable Richard A. Sommers on SCS Carbon Transport LLC's Motion for Summary Judgment, filed on February 10, 2023, and on Landowners'* Motion to Continue, filed on February 28, 2023. Said motions having been argued by all parties appearing at said hearing, SCS Carbon Transport LLC having been represented by Justin L. Bell of May, Adam, Gerdes & Thompson LLP, and Landowners having been represented by Brian E. Jorde of Domina Law Group; all parties having had an opportunity to present arguments; and on the basis of the hearing on said motions, the arguments of counsel and the records and files of this action, including supplemental briefing and materials related to the issue taken under advisement by this Court; and good cause appearing, which is

* The term "Landowners" refers collectively to the Plaintiffs in nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020 and the Defendants in no. 45CIV22-000018.

further explained in the Court's March 28, 2023 Order and April 19, 2023 Letter Decision, which are fully incorporated herein by reference, it is therefore:

ORDERED, ADJUDGED, AND DECREED that SCS Carbon Transport LLC's Motion for Summary Judgment, filed February 10, 2023, is hereby **GRANTED**. Landowner Plaintiffs' Amended Complaint (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on October 27, 2022, and Landowner Defendants' Counterclaim (case no. 45CIV22-000018), filed on August 29, 2022, are **DISMISSED** with prejudice;

ORDERED, ADJUDGED, AND DECREED that Landowners' Motion to Continue, filed February 14, 2023, is **DENIED**;

ORDERED, ADJUDGED, AND DECREED that, pursuant to SDCL § 21-35-31, SCS Carbon Transport LLC is granted the declaratory judgment and the injunctive relief it seeks in its Restated Counterclaim (case nos. 45CIV22-000014, 71CIV22-000047, 06CIV22-000253, and 22CIV22-000020), filed on November 7, 2022, and in its Complaint (case no. 45CIV22-000018), filed on July 20, 2022, including authorizing access for the purpose of conducting civil, environmental, and archaeological/cultural, surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions, for the properties described as follows:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4

Landowner	County	APN	Legal Description
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4

Landowner	County	APN	Legal Description
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

and,

ORDERED, ADJUDGED, AND DECREED that the above Landowners, their agents and representatives, and anyone acting in concert with them, are enjoined from interfering with SCS Carbon Transport, LLC's access for the purpose of surveying and examining said properties, including conducting civil, environmental, and archaeological/cultural surveys and examinations, including any necessary geotechnical/soil borings, archaeological/cultural resource surveys and examinations, and deep dig surveys and examinations, and including any necessary core or water sampling activities subject to any conditions.

[SIGNATURE PAGE FOLLOWS]

BY THE COURT:

4/21/2023 11:10:38 AM

The Honorable Richard A. Sommers
Circuit Court Judge

Attest:
Moser, Katie
Clerk/Deputy

STATE OF SOUTH DAKOTA)SS COUNTIES OF BEADLE AND LAKE	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		02CIV22-000129
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.		39CIV22-000064

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned cases:

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1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3 4.

2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 1,900 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.*

5. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

6. The Patricia K. Deeg Trust and the Betty Jean Strom Trust ("Landowners") own or are in possession of real property that will be crossed by SCS's pipeline:

* *See also In the Matter of the Application by SCS Carbon Transport LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, Docket No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

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- Page 1316 -

Landowner	County	APN	Legal Description
Patricia K. Deeg Trust	Beadle	5004	SEC 35-T112N-R61W: NW4
	Beadle	4965	SEC 26-T112N-R61W: SE4 EX 11 AC E OF ROAD
	Beadle	4959	SEC 25-T112N-R61W: SW4
Betty Jean Strom Trust	Lake	090001055336210	SEC 36-T105N-R53W: N1/2NW4
	Lake	090001055325310	SEC 25-T105N-R53W: SW1/4 EXC BONNEMA TRACT

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

7. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

8. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–9; Schovanec Aff. Exhibits 1, 2.

9. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibit 1 at p. 1, Exhibit 2 at p. 1.

10. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibit 1 at pp. 1–2, Exhibit 2 at pp. 1–2.

11. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2. For both Landowners, SCS seeks a "typical survey," and for the Patricia K. Deeg Trust, SCS also seeks a "geotech survey." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

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12. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

13. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." Schovanec Aff. Exhibit 1 at p. 2.

14. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 11; Schovanec Aff. Exhibit 3.

15. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibit 1 at p. 2, Exhibit 2 at p. 2.

16. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 10.

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Dated this 13th day of January, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 13th day of January, 2023, he gave notice by electronically filing and serving a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF BEADLE AND LAKE	)	THIRD JUDICIAL CIRCUIT

PATRICIA K. DEEG TRUST, Plaintiff, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.	02CIV22-000129 **LANDOWNERS STATMENT OF DISPUTED MATERIAL FACTS IN RESISTENCE TO SCS MOTION FOR SUMMARY JUDGMENT**
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, v. **SCS CARBON TRANSPORT LLC**, a Delaware Limited Liability Company, a/k/a **SUMMIT CARBON SOLUTIONS,** Defendant.	39CIV22-000064

Comes now, Landowners by and through their attorneys of records, and submits the following Landowners Statement of Disputed Material Facts.

1. Deny. As stated defendants act as if there idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that land owners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *See Supplemental Affidavit of Nicholas G. Moser in Support of Landowner's Resistance to Summary Judgment,* ¶ 5.

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2. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 6.

3. Deny. As stated, defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is of course not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 7.

4. Admit something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.* at ¶ 8.

5. Deny. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 9.

6. Deny that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 10.

7. Deny. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires – not legal requirements or facts. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop

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competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 11.

8. Deny, nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 12.

9. Admit that the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 13.

10. Deny as to what the letters inform Landowners of and object as to foundation. Deny the "link" which is text on a page informs anyone of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 14.

11. Admit as to the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 15.

12. Deny as to "typical" this is without definition or limit under the unconstitutionally challenged law. Admit SCS witness describes way "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 16.

13. Admit what is stated are the words in the letter. Deny the authenticity of the underlying statement and deny the truth of the matter asserted. Deny that there would be "no impact" to the land. Object as to vague and ambiguous as to what is "normal land". Object insofar as SCS has failed to prove that Landowners land is in fact "normal land." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 17.

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14. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 18.

15. Admit this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 19.

16. Admit that Landowners do not believe the desired and unnecessary access and unfetter run of the land is lawful constitutional. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.* at ¶ 20.

Dated this 14th day of February, 2022.

By: /s/ Brian E. Jorde
Brian E. Jorde,
Pro Hac Vice
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2425 S. 144th St.
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By: /s/ Nicholas G. Moser
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Plaintiff's Lawyers

Filed: 2/14/2023 5:16 PM CST Lake County, South Dakota 39CIV22-000064

CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 14th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
Cash Anderson (cea@mayadam.net)
Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS	)	FIFTH JUDICIAL CIRCUIT
	)	

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT** 45CIV22-000014
SCS CARBON TRANSPORT LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W	45CIV22-000018

Filed: 2/10/2023 4:12 PM CST McPherson County, South Dakota 45CIV22-000014

MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC, Defendants.	
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-000047
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA	06CIV22-000253

Filed: 2/10/2023 4:12 PM CST McPherson County, South Dakota 45CIV22-000014

ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL AND NANCY KLIPFEL, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	
DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG, Plaintiffs, vs. SCS CARBON TRANSPORT LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF SCS CARBON TRANSPORT LLC'S MOTION FOR SUMMARY JUDGMENT

SCS Carbon Transport LLC ("SCS"), through undersigned counsel and under SDCL § 15-6-56(c), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment in the above-captioned actions:

1. SCS and its parent Summit Carbon Solutions, LLC are developing and will own, operate, and manage an interstate pipeline within South Dakota for the transportation of carbon dioxide (CO_2). Affidavit of James Pirolli (Pirolli Aff.) ¶¶ 3 4; Affidavit of Jason Zoller (Zoller Aff.) ¶¶ 3–4; Affidavit of Erik Schovanec (Schovanec Aff.) ¶¶ 3–4.

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2. SCS's pipeline will receive, transport, and deliver CO_2 through a network of more than 2,000 miles of underground pipelines across five states: South Dakota, North Dakota, Iowa, Minnesota, and Nebraska. Pirolli Aff. ¶ 4; Zoller Aff. ¶ 4; Schovanec Aff. ¶ 4.

3. SCS's pipeline will travel through 18 counties in South Dakota: Beadle, Brown, Clark, Codington, Edmunds, Hamlin, Hand, Hyde, Kingsbury, Lake, Lincoln, McCook, McPherson, Miner, Minnehaha, Spink, Sully, and Turner. Pirolli Aff. ¶ 5; Zoller Aff. ¶ 5; Schovanec Aff. ¶ 5.

4. On February 7, 2022, SCS filed an application with the South Dakota Public Utilities Commission (PUC) for a siting permit under the South Dakota Energy Conversion and Transmission Facilities Act for its pipeline. Zoller Aff. ¶ 7; Zoller Aff. Exhibit 1.[1]

5. SCS is offering its CO_2-transporation services to or for the public for hire. Pirolli Aff. ¶¶ 4, 6–10.

6. SCS and Summit Carbon Solutions have advertised and continue to actively advertise SCS's CO_2-transportation service for hire to the public on Summit Carbon Solutions' website. They also have engaged and continue to actively engage in direct outreach to potential customers to offer SCS's interstate CO_2-transportation services. Pirolli Aff. ¶ 6.

7. SCS will hold an open season to publicly solicit binding commitments for interstate CO_2-transportation services from interested customers along the pipeline's path. Pirolli Aff. ¶ 7.

8. SCS is reserving a portion of the capacity of its pipeline for future shippers that may desire to receive interstate CO_2-transportation services after the pipeline has begun operations. Pirolli Aff. ¶ 8.

[1] *See also In re Application by SCS Carbon Transp. LLC for a Permit to Construct a Carbon Dioxide Transmission Pipeline*, No. HP22-001 (S.D. Pub. Utils. Comm'n Feb. 7, 2022), https://puc.sd.gov/dockets/HydrocarbonPipeline/2022/HP22-001.aspx.

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9. Summit Carbon Solutions has contracted with or signed letters of intent with more than 34 unaffiliated facilities to transport by pipeline CO_2 produced at those facilities. Pirolli Aff. ¶ 9.

10. On June 24, 2022, SCS filed its acceptance of the provisions of N.D. Cent. Code Chapter 49-19 with the North Dakota Public Service Commission, explaining that it is a pipeline company and will "transport[] CO_2 for others . . . in accordance with the definition of a common carrier." Pirolli Aff. Exhibit 1; Pirolli Aff. ¶ 10.[2]

11. To prepare for construction of the pipeline, SCS must first enter and examine the property along the proposed route to complete preliminary civil, environmental, and cultural surveys and investigations. Zoller Aff. ¶ 8.

12. Peter Helfenstein, Jr., Rott Farms, Inc., Ketterling Farm, LLC, Vilhauer Land Limited Partnership, Brian Hoffman, the David and Valerie Rath Living Trust dated December 02, 2013, Colin and Mary Beth Hoffman, Jerome G. Hoffman, Michael and Nancy Klipfel, Alden and Wilma Flakoll, Shantel C. Schumack, Leroy and Joan Weiszhaar, Wade and Judy Weiszhaar, Dennis Wolff, Quinton Wolff, R & C Feickert Land LLC, Rebecca D. Michaelsohn, David Melland, Rott Ranch Limited Partnership, the Gary and Shirley Wolff Living Trust, Willard Goeshel, Ken Stugelmayer, Marsha M. Vossler, the Mark M. Vossler and Marsha M. Vossler Revocable Trust, Marilyn D. Nelson, Mark Thompson, the Estate of Albert Eugene Erdmann, the Braun Family Trust 2020, the Margaret Ellett Living Trust, the Ken Olson Trust 2010, the Olson Family Trust 2019, Francoli Family Limited Partnership, Armadale Limited Partnership, the Myron O. Hammer Credit Shelter Testamentary Trust, Jared Bossly, Bossly Real Estate Limited

[2] *See also In re SCS Carbon Transp. LLC Acceptance of Provisions of N.D.C.C. § 49-19-12*, No. PU-22-260 (N.D. Pub. Serv. Comm'n June 24, 2022), https://www.psc.nd.gov/database/documents/22-0260/001-010.pdf.

Partnership, the Estate of Donald A. Schaunaman, Craig D. Schaumaman, Kirk Schaumaman, Todd and Donna Rozell, Scott Rozell, Seth Klipfel, the Delores Schumacher Revocable Trust, and John and Stephanie Jung ("Landowners") own or are in possession of real property in South Dakota that will be crossed by SCS's pipeline:

Landowner	County	APN	Legal Description
Peter Helfenstein, Jr.	McPherson	3764	SEC 19-T128N-R70W: NW1/4
	McPherson	4719	SEC 24-T128N-R71W: N1/2NE1/4
	McPherson	4721	SEC 24-T128N-R71W: N1/2NW1/4
	McPherson	4636	SEC 13-T128N-R71W: NE1/4SW1/4
	McPherson	4652	SEC 14-T128N-R71W: NW1/4SE1/4
	McPherson	4642	SEC 14-T128N-R71W: SW1/4NE1/4
	McPherson	4647	SEC 14-T128N-R71W: SE1/4NW1/4
	McPherson	4616	SEC 10-T128N-R71W: SE1/4SE1/4
Rott Farms, Inc.	McPherson	1369	SEC 18-T125N-R67W: SW1/4
	McPherson	1368	SEC 18-T125N-R67W: NW1/4
	McPherson	1005	SEC 18-T127N-R67W: S1/2NE1/4
	McPherson	1014	SEC 19-T127N-R67W: LOTS 3, 4, 5, 6, 11 & 12
	McPherson	350	SEC 36-T127N-R68W: E1/2SW1/4
Ketterling Farm, LLC	McPherson	1186	SEC 16-T126N-R68W: SW1/4
Vilhauer Land Limited Partnership	McPherson	2758	SEC 35-T127N-R69W: NW1/4
	McPherson	2751	SEC 34-T127N-R69W: SE1/4NE1/4; N1/2NE1/4
	McPherson	2707	SEC 27-T127N-R69W: S1/2SE1/4
	McPherson	2702	SEC 27-T127N-R69W: S1/2NE1/4; NW1/4NE1/4
	McPherson	2703	SEC 27-T127N-R69W: NW1/4
	McPherson	2673	SEC 22-T127N-R69W: SW1/4
	McPherson	2708	SEC 28-T127N-R69W: NE1/4
	McPherson	2670	SEC 21-T127N-R69W: SE1/4
	McPherson	2668	SEC 21-T127N-R69W: E1/2SW1/4
	McPherson	2665	SEC 20-T127N-R69W: SE1/4
Brian Hoffman	McPherson	1128	SEC 6-T126N-R68W: LOT 6
	McPherson	2761	SEC 35-T127N-R69W: SW1/4SE1/4
The David and Valerie Rath Living Trust dated December 02, 2013	McPherson	1377	SEC 20-T12N5-R67W: SW1/4
	McPherson	1371	SEC 19-T125N-R67W: NE1/4

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Landowner	County	APN	Legal Description
Colin and Mary Beth Hoffman	McPherson	1184	SEC 16-T126N-R68W: N1/2NW1/4
	McPherson	1144	SEC 8-T126N-R68W: S1/2SE1/4
	McPherson	1141	SEC 6-T126N-R68W: NE1/4SW1/4; S1/2SW1/4
	McPherson	1131	SEC 7-T126N-R68W: NE1/4NE1/4
	McPherson	1149	SEC 9-T126N-R68W: SW1/4SE1/4
	McPherson	1148	SEC 9-T126N-R68W: SW1/4
Jerome G. Hoffman	McPherson	1185	SEC 16-T126N-R68W: S1/2NW1/4
Michael and Nancy Klipfel	McPherson	454	SEC 23-T128N-R66W: NW1/4
Alden and Wilma Flakoll	McPherson	474	SEC 28-T128N-R66W: NE1/4
	McPherson	477	SEC 28-T128N-R66W: SE1/4
Shantel C. Schumack	McPherson	975	SEC 12-T127N-R67W: NW1/4
Leroy and Joan Weiszhaar	McPherson	1248	SEC 27-T126N-R68W: NW1/4
Wade and Judy Weiszhaar	McPherson	1214	SEC 21-T126N-R68W: NW1/4
	McPherson	1212	SEC 21-T126N-R68W: N1/2NE1/4
Dennis Wolff	McPherson	3862	SEC 35-T128N-R70W: NW1/4SW1/4
Quinton Wolff	McPherson	3850	SEC 34-T128N-R70W: N1/2NE1/4
	McPherson	3851	SEC 34-T128-R70: S1/2NE1/4
	McPherson	3852	SEC 34-T128N-R70W: N1/2NW1/4
	McPherson	3853	SEC 34-T128-R70: S1/2NW1/4
R & C Feickert Land LLC	McPherson	3815	SEC 27-T128N-R70W: SW1/4
	McPherson	3822	SEC 28-T128N-R70W: SE1/4
	McPherson	3819	SEC 28-T128N-R70W: NE1/4
Rebecca D. Michaelsohn	McPherson	4644	SEC 14-T128N-R71W: NE1/4NW1/4
David Melland	McPherson	925	SEC 1-T127N-R67W: SE1/4
Rott Ranch Limited Partnership	McPherson	1665	SEC 12-T125N-R68W: NE1/4
Gary and Shirley Wolff Living Trust	McPherson	2643	SEC 17-T127N-R69W: S1/2SW1/4
	McPherson	8959	SEC 20-T127N-R69W: NW1/4 EXCEPT WOLF SUBDIVISION IN THE NW1/4 & NE1/4
Willard Goeshel	McPherson	2646	SEC 18-T127N-R69W: NE1/4
	McPherson	2651	SEC 18-T127N-R69W: E1/2SE1/4
	McPherson	2652	SEC 18-T127N-R69W: W1/2SE1/4
Ken Stugelmayer	McPherson	3779	SEC 21-T128N-R70W: N1/2SW1/4; SE1/4SW1/4
Marsha M. Vossler	McPherson	4654	SEC 14-T128N-R71W: SE1/4SE1/4
The Mark M. Vossler and Marsha M. Vossler Revocable Trust	McPherson	4651	SEC 14-T128N-R71W: NE1/4SE1/4
Marilyn D. Nelson	McPherson	496	SEC 33-T128N-R66W: NW1/4
Mark Thompson	McPherson	961	SEC 8-T127N-R67W: SE1/4

Landowner	County	APN	Legal Description
The Estate of Albert Eugene Erdmann	McPherson	1007	SEC 18-T127N-R67W: LOTS 2, 7, & 10
Braun Family Trust 2020	Spink	005294	SEC 34-T120N-R63W: ALL W OF RIV IN NE1/4
	Spink	005224	SEC 27-T120N-R63W: ALL W OF RIV IN SE1/4
Margaret Ellett Living Trust	Spink	003054	SEC 14-T117N-R63W: SE1/4
Ken Olson Trust 2010	Spink	001629	SEC 7-T118N-R62W: SE1/4
	Spink	001627	SEC 7-T118N-R62W: NE1/4
	Spink	001628	SEC 7-T118N-R62W: NW1/4
Olson Family Trust 2019	Spink	001701	SEC 20-T118N-R62W: NE1/4
	Spink	001634	SEC 8-T118N-R62W: SW1/4
Francoli Family Limited Partnership	Spink	005234	SEC 28-T120N-R63W: NE1/4
Armadale Limited Partnership	Spink	005225	SEC 27-T120N-R63W: SW1/4
	Spink	005223	SEC 27-T120N-R63W: NW1/4 LESS NW1/4 OF NW1/4
Myron O. Hammer Credit Shelter Testamentary Trust	Spink	007314	SEC 23-T119N-R63W: N1/2 OF N1/2 OF SE1/4
	Spink	007312	SEC 23-T119N-R63W: S 60A OF NE1/4
	Spink	007211	SEC 11-T119N-R63W: NW1/4
	Spink	007142	SEC 2-T119N-R63W: SW1/4 OF SW1/4
	Spink	007141	SEC 2-T119N-R63W: NW1/4 OF SW1/4
	Spink	007148	SEC 3-T119N-R63W: NE1/4 EX LOT H-1
	Spink	004511	SEC 34-T120N-R63W: ALL E OF RIV IN SE1/4
Jared Bossly	Brown	6495	SEC 20-T121N-R64W: SE
Bossly Real Estate Limited Partnership	Brown	6510	SEC 21-T121N-R64W: SW
	Brown	6476	SEC 19-T121N-R64W: SE
Estate Of Donald A. Schaunaman	Brown	5786	SEC 25-T123N-R65W: NE
Craig D. Schaunaman	Brown	5509	SEC 28-T123N-R64W: NW
	Brown	5524	SEC 29-T123N-R64W: NE
	Brown	5793	SEC 25-T123N-R65W: N2 SW
	Brown	5787	SEC 25-T123N-R65W: S2 NW
Kirk Schaunaman aka Kirk J. Schaunaman	Brown	5540	SEC 30-T123N-R64W: SE
	Brown	5541	SEC 30-T123N-R64W: SW
Todd and Donna Rozell	Brown	5923	SEC 12-T121N-R65W: W2 SE

Landowner	County	APN	Legal Description
Scott Rozell aka Scott A. Rozell	Brown	5927	SEC 13-T121N-R65W: W2 NE
	Brown	20091	SEC 33-T122N-R65W: SE
Seth Klipfel	Brown	7938	SEC 7-T128N-R65W: NE
Delores Schumacher Revocable Trust	Edmunds	1723	SEC 9-T124N-R67W: SW4
John and Stephanie Jung	Edmunds	2795	SEC 8-T123N-R66W: NW4

Zoller Aff. ¶ 9; Schovanec Aff. ¶ 7.

13. To determine the appropriate route for its pipeline and related facilities and to appraise properties, SCS must survey and examine Landowners' property. The surveys and examinations are necessary to identify and describe the property needed to construct the pipeline. They may also be necessary for purposes of appraising Landowners' property to acquire the requisite easements. Zoller Aff. ¶¶ 10–11.

14. SCS sent notice letters to Landowners under SDCL § 21-35-31(2) at least 30 days before its planned surveys and examinations. Schovanec Aff. ¶¶ 8–50; Schovanec Aff. Exhibits 1–43.

15. The notice letters identify SCS's expected dates of entry onto Landowners' property. Schovanec Aff. Exhibits 1–43 at p. 1.

16. The letters inform Landowners of the filing of SCS's permit application and provide a link to the application on the PUC's public docket. Schovanec Aff. Exhibits 1–43 at pp. 1–2.

17. The letters describe the types of surveys and examinations that SCS seeks to perform. Zoller Aff. ¶ 12; Schovanec Aff. Exhibits 1–43 at p. 2. In this consolidated action, SCS seeks survey access from 44 Landowners in total. For the vast majority—37—SCS seeks only typical surveys. Schovanec Aff. Exhibits 1–43 at p. 2. For the others, in addition to typical surveys,

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SCS seeks geotech surveys for five (Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2) and deep-dig surveys for two (Schovanec Aff. Exhibits 1, 2 at p. 2).

18. Typical surveys are minimally invasive, non-destructive inquiries to assess the land. They may involve the use of "hand tools (e.g., spades, shovels, augers)" and may result in "small soil disturbances at discrete locations." Although typical surveys are unlikely to result in disturbance or damage, SCS will return any "disturbed site . . . to near existing conditions." Schovanec Aff. Exhibits 1–43 at p. 2.

19. A typical survey takes on average 1–2 days to complete (3–4 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 13.

20. Geotech surveys collect geotechnical samples to assess underlying soil and rock conditions and "utilize[] a track mounted drilling rig to create a small diameter hole into the soil to collect samples of subsurface soils and rocks." Schovanec Aff. Exhibits 3, 4, 28, 35 at p. 2. That small hole will "be backfilled with the drill cuttings or with a cement/bentonite grout mixture," and "[t]here will be no impact to normal land use after drilling is complete and the hole is backfilled." *Id.*

21. A geotech survey, as described in the 30-day notice letters, takes on average 1 day to complete (2 days at a maximum), although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 14.

22. Deep-dig surveys are required when a landowners' property "is located within a floodplain." Schovanec Aff. Exhibits 1, 2 at p. 2. That means that SCS must inspect for the possibility of "prehistoric occupation sites" that might be "found deeply buried below the modern ground surface." *Id.* For that reason, deep-dig testing is necessary to "allow archaeologists and cultural resource specialists the ability to determine whether cultural materials are present." *Id.*

Once the testing is completed, "any trenches will be backfilled and the ground will be graded to near existing conditions." *Id.*

23. A deep dig survey, as described in the 30-day notice letters, takes on average 1–2 days to complete, although the exact amount of time may depend on the size of the property. Zoller Aff. ¶ 15.

24. SCS has obtained a $5 million performance bond for the payment of any actual damage done to Landowners' property by SCS's surveys and examinations. SCS initially had a $1 million bond, which it later increased to $5 million. Schovanec Aff. ¶ 52; Schovanec Aff. Exhibit 44.

25. The 30-day notice letters to Landowners state that SCS has secured a bond to cover any property damage and invite Landowners to contact SCS with any questions. Schovanec Aff. Exhibits 1–43 at p. 2.

26. Landowners have refused to grant SCS access for survey and examination of their property. Schovanec Aff. ¶ 51.

Dated this 10th day of February, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell

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Attorneys for SCS Carbon Transport LLC

CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 10th day of February, 2023, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Nicholas G. Moser
nick@mwhlawyers.com

Brian E. Jorde
BJorde@dominalaw.com

/s/ Justin L. Bell
JUSTIN L. BELL

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTIES OF MCPHERSON, SPINK BROWN, AND EDMUNDS)	)	FIFTH JUDICIAL CIRCUIT

PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY, AND JOAN WEISZHAAR Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 **LANDOWNERS' STATEMENT OF DISPUTED MATERIAL FACTS IN RESISTANCE TO SCS' MOTION FOR SUMMARY JUDGMENT**
SCS CARBON TRANSPORT, LLC, Plaintiff, vs. GERALDINE H. SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R & C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK	45CIV22-000018

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M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, AND SIEH FARMS, LLC, Defendants.	71CIV22-000047
BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED and JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES and ALTA SMITH, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-000253
JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH and DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD and DONNA ROZELL, SCOTT ROZELL, DENNIS and JEAN HASELHORST, MILTON and RHONDA HASELHORST, SETH KLIPFEL, and MICHAEL and NANCY KLIPFEL,	

Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	22CIV22-000020
DELORES SCHUMACHER REVOCABLE TRUST, AND JOHN AND STEPHANIE JUNG Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	

Landowners hereby submit this Landowners's Statement of Disputed Material Facts in Response to SCS motion for summary judgment.

1. Landowners deny SCS's idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. *See* Affidavit of Nicholas G. Moser in Support of Landowners' Resistance to SCS Motion for Summary Judgment, ¶¶ 2 – 11. *Id.*

2. As stated, Defendant acts as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred. *Id.*

3. As stated defendants act as if their idea and desired hazardous pipeline project is a foregone conclusion and something that will in fact occur. This is not backed by any fact whatsoever. Landowners admit that defendant has a dream to do certain things and that is all. Further deny on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either or any other representatives for a deposition until a protective order is entered in this case, which has not yet occurred.. *Id.*

4. Landowners acknowledge something entitled an Application was filed with the PUC on February 7, 2022. Deny the Application was complete and deny that Defendant complied with all other prerequisites or requirements of law related to that filing and docket. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition until a protective order is entered in this case, which has not yet occurred. Further object as to hearsay, hearsay within hearsay, foundation, and relevance as to the contents of said Application insofar as it is attached to Mr. Zoller's Affidavit. *Id.*

5. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

6. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

7. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

8. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

9. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition.

SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

10. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. Additionally, SCS has not made any contracts available to Landowners in this action because there has not yet been a protective order entered in this action. *Id.*

11. There is no PUC rule or law requiring that SCS "must first enter and examine the property…". Again, as stated this alleged fact is not undisputed and is in fact false. Defendant describes its dreams, wishes, and desires not legal requirements or facts. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

12. There is no evidence that anything owned by Landowners "will be" crossed by SCS's desired hazardous pipeline. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

13. There is no PUC rule or law requiring that SCS "must survey and examine Landowners' property…" for any purpose. Again, as stated this alleged fact is not undisputed and is in fact false. Landowners deny this fact and object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. SCS has stated it will not agree to permit any depositions or other discovery to occur until a protective order has been entered, which has not yet occurred in these consolidated cases. *Id.*

14. Nothing about the letters as provided in evidence support the date on which they were purportedly "sent". Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

15. Landowners acknowledge the two letters referenced described a roving window of potential entry. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

16. Landowners deny the letters inform them of anything that SCS believes it is bound to comply with. Landowners disagree the "link" which is text on a page informs anyone

of anything. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

17. Landowners acknowledge the letters describe various intrusive and invasive methods of property disturbance. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

18. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. Deny that SCS can or will return the land to "near existing conditions." Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

19. There is no evidence as to what is "typical" without definition or limit under the unconstitutionally challenged law. Landowners acknowledge the letters state what "may" occur but deny that there is any limitation upon what SCS might actually do upon the property. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

20. There is no evidence as what Geotech survey is as it is purported to be used by SCS in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

21. Landowners acknowledge that what is stated are the words in the letter, which do not state such surveys would take 1-2 days. Landowners deny the authenticity of the underlying statement and deny the truth of the matter asserted. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

22. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

23. There is no evidence as what a deep dig survey is as it is purported to be used by SCS in this case or that it is needed in this case. SCS letters to landowners state the survey could last up to forty- five days. Further object on the basis that landowners have requested both the

deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

24. The document speaks for itself. Deny said bond is sufficient. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

25. Landowners acknowledge this statement was generally made but deny the truth of the matter asserted and no evidence exists that proves this point. Further object on the basis that landowners have requested both the deposition of Mr. Zoller and Mr. Schovanec to further discover and develop competing evidence on this alleged fact and defendant has failed to agree to produce either for a deposition. *Id.*

26. Admit.

Dated this 28th[th] day of February, 2022.

By: /s/ Brian E. Jorde
Brian E. Jorde,
Pro Hac Vice
Domina Law Group
2425 S. 144th St.
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402-493-4100 (p)
bjorde@dominalaw.com

By: /s/ Nicholas G. Moser
Nicholas G. Moser, SDSB #4650
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nick@mwhlawyers.com
Plaintiff's Lawyers

CERTIFICATE OF SERVICE

Nicholas Moser certifies that on the 28th day of February, 2023, he served electronically served through electronic mail a true and correct copy of the foregoing ***Landowners Statement of Disputed Material Facts in Resistance to SCS's Motion for Summary Judgement*** in the above-captioned matter to the following at their last known e-mail address:

SCS CARBON TRANSPORT LLC:
Justin Bell (jlb@mayadam.net)
Brett Koenecke (brett@mayadam.net)
Cody Honeywell (cody@mayadam.net)
Cash Anderson (cca@mayadam.net)
Matthew Hooker (Matthew.Hooker@alston.com)
Michael Hoernlein (Michael.Hoernlein@alston.com)
Brian Boone (Brian.Boone@alston.com)

/s/ Nicholas Moser
Nicholas Moser

STATE OF SOUTH DAKOTA)ss COUNTIES OF BEADLE AND LAKE	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PATRICIA K. DEEG TRUST, Plaintiff, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	CASE NO. 02CIV22-000129 MOTIONS HEARING
BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	CASE NO. 39CIV22-000064

Before

The Honorable Patrick T. Pardy
Circuit Court Judge

Lake County Courthouse
Madison, South Dakota

Tuesday, February 28, 2023

--o0o--

APPEARANCES:

FOR PLAINTIFFS PATRICIA K. DEEG TRUST, BETTY JEAN STROM TRUST, RITA BROWN, CRAIG & LISA BASLER FAMILY TRUST:	BRIAN E. JORDE, ESQ. Domina Law Group, PC, LLO 2425 South 144th Street Omaha, NE 68144 402.858.9212
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FOR DEFENDANT SCS CARBON TRANSPORT, LLC, A DELAWARE LIMITED LIABILITY COMPANY, A/K/A SUMMIT CARBON SOLUTIONS:	BRIAN D. BOONE, ESQ. Alston & Bird One South at The Plaza 101 South Tryon St., Suite 4000 Charlotte, NC 28280-4000 704.444.1000
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--oOo--

INDEX OF PROCEEDINGS

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--o0o--

Objections:

Plaintiffs: (None)

Defendant: (None)

--o0o--

Stipulations:

(None)

--o0o--

INDEX OF EXHIBITS MARKED FOR IDENTIFICATION

Exhibits	Description	Marked	Offered	Rec'd

(No exhibits were offered.)

--o0o--

SCS Appendix 84

30(b)(6), and then the motion to continue.

And so the issue here, Your Honor, is that so far, the record is unilateral, one-way data from Summit only, despite approximately six months of our requests for a deposition and multiple meet and confers, multiple attempts to get a deposition taken.

We initially had approximately 13 topics. We then -- they had said that those weren't specific enough, so we made 80 topics, which really were basically an outline of
13:18 specific questions. I couldn't have gotten more specific. And that was too specific. And so now we've narrowed it down to ten topics.

And we believe we need to have that deposition in order to fully develop the summary-judgment record. Because what's before you right now is, the Court, on a protective order, received affidavits from Summit, where we were not able to put forth any affidavits because, of course, they control at that time the off-take agreement, which we had never seen before. So, obviously, we can't
13:19 argue to you about a confidential document that we've never had.

And so following your protective order, you then put forth an order entering a protective order; but in there, that made the comments related to "for-hire" and "commodity." Summit has now --

THE COURT: Let me ask this question.
MR. JORDE: Yes.
THE COURT: What fact would -- give me an example of a fact from that, that would change how it applies.
MR. JORDE: A fact --
THE COURT: So is it the tax credit? If it is a tax credit, then it's not for hire? Or what is your exact --
MR. JORDE: Okay, and I appreciate that.

So, for instance, the off-take agreement related to, 13:20 for instance, Glacial Lakes and Summit. We don't believe that this is for hire. And we believe that even though there was, you know, an affidavit of Mr. Pirolli for the protective order that said a conclusory statement, "This is for hire," we don't believe that it's for hire on the face of the contract itself.

THE COURT: So your argument is, if it's not a cash payment, it's not for hire; is that --
MR. JORDE: Well, I guess I'll just -- I mean, I'll just get right to the heart of it. [redacted]

under South Dakota law.

But even if it didn't fail, they have other problems because under the survey statute, it requires that they give notice to owners and any tenant in possession; and their summary-judgment evidence is only that they gave notice to landowners. And each of these landowners have tenants; and they have the burden of proof, not us. So they fail there because they haven't proven that they've notified any tenants on the property, so they lose there.

13:25 And then even if they could get over all those hurdles --

THE COURT: Let me stop you on that one.

In your Statement of Facts, disputed facts, is that listed, that there's tenants? I might have missed it, but I want to make sure.

MR. JORDE: You know, that is -- I don't know if it is or --

THE COURT: Because I'm bound to that document; correct?

MR. JORDE: What's that?

13:25 THE COURT: I'm bound to their alleged Statement of -- both parties' statements of material facts?

MR. JORDE: Sure. But they don't have a fact that they did it; and they have the burden.

We don't have the burden to prove the negative.

THE COURT: All right.

MR. BOONE: I am, Your Honor.

THE COURT: Okay, go ahead.

MR. BOONE: So all that Mr. Jorde just argued, he could have argued in his summary-judgment opposition. He did not. None of that appears in the statement of disputed facts, so he has waived all of those arguments on summary judgment.

We're here to argue summary judgment. The Court has already said that the only remaining questions are constitutional questions. Those are questions of law. They don't turn on evidence, they don't turn on discovery. And, in fact, since the Court's earlier ruling, the landowners have abandoned their as-applied challenge. I call it an "as-applied challenge." I'm not sure it's an as-applied challenge; but whatever it was, they've abandoned it. So, really, the only issue left is their facial challenge to a survey statute. And on that, they bear a very heavy burden. It is their burden to prove beyond a reasonable doubt that the statute is unconstitutional in all circumstances. Not in some circumstances, not in many circumstances, but in all circumstances.

They haven't even tried to do that here. They rest their whole argument on *Cedar Point*, but they misread *Cedar Point*. In *Cedar Point*, the Supreme Court made clear

you can figure it out." The statute is unconstitutional on its face. The background restrictions are limited --

THE COURT: I want you to address something before your time is up.

Have you abandoned the as-applied argument? And if not, explain it to me.

MR. JORDE: We have abandoned "as applied." It's a facial challenge only, Your Honor.

THE COURT: All right.

13:33 MR. JORDE: Yes.

And I guess I should -- well, I mean, the background restrictions, again, I think I've covered that. The *Cedar Point* carves out only those types of examples that I gave you, and that's right within the *Cedar Point* case. And so for their interpretation, again, it would have to be that South Dakota landowners, when you buy your land, you buy it, believing that any third party that you don't know, that's not connected to you, that may or may not have a business, that may have an LLC in a dream, like Summit

13:33 does -- doesn't own a pipeline anywhere -- can come onto your land, without your permission, day or night, for every day, for a hundred days, you know, for the next three years, there's no limitations -- and physically disturb and tear up your land, and you can't do anything about it. And that is not a background restriction. That

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAKE)

--oOo--

CERTIFICATE OF REPORTER

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person;

That my shorthand notes were transcribed into typewriting by computer-aided technology; and

That this transcript contains a true and correct record of the foregoing proceedings.

In witness whereof, I have hereunto set my hand on May 31, 2023.

/s/ Daniel P. Feldhaus

Daniel P. Feldhaus
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Certified Shorthand Reporter

STATE OF SOUTH DAKOTA))SS	IN CIRCUIT COURT
COUNTIES OF MCPHERSON, SPINK, BROWN, AND EDMUNDS)	FIFTH JUDICIAL CIRCUIT

* *

PETER HELFENSTEIN JR., ROTT FARMS, INC., KETTERLING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, Plaintiffs, - vs - SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	45CIV22-000014 MOTIONS HEARING

* *

SCS CARBON TRANSPORT, LLC, Plaintiff, - vs - GERALDINE SAYLER JORDRE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA MICHAELSOHN, DAVID MELAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA MEIER, KEN STUGELMAYER, MARSHA VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSSLER REVOCABLE TRUST, MARILYN NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, SIEH FARMS LLC, Defendants.	45CIV22-000018 MOTIONS HEARING

* *

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHBACH TRUST 2012 & DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, JAMES AND ALTA SMITH, Plaintiffs, -vs- SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	71CIV22-47 MOTIONS HEARING

* *

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, CRAIG SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, MICHAEL AND NANCY KLIPFEL, Plaintiffs, -vs- SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant.	06CIV22-253 MOTIONS HEARING

* *

DELORES SCHUMACHER REVOCABLE TRUST, JOHN AND STEPHANIE JUNG,
Plaintiffs,
-vs-
SCS CARBON TRANSPORT, LLC, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant.

22CIV22-000020

MOTIONS HEARING

* *

DATE & TIME: March 14, 2023
9:00 a.m.

BEFORE: THE HONORABLE RICHARD SOMMERS
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota 57401

LOCATION: Brown County Circuit Courtroom
Brown County Courthouse
Aberdeen, South Dakota 57401

APPEARANCES: **FOR PLAINTIFFS:**

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THE COURT: All right. This is the time set for hearings in a number of cases concerning various landowners and Summit Carbon Transport -- Summit Carbon Solutions Transport, LLC.

Counsel, note your appearance.

MR. BELL: Your Honor, Justin Bell on behalf of SCS Carbon Transport, LLC, a/k/a Summit Carbon Solutions.

MR. JORDE: Good morning, Your Honor. Brian Jorde on behalf of all the landowners.

MR. BELL: And I would note there is counsel online -- or on the phone as well who might want to make an appearance, Your Honor.

THE COURT: And I believe that they are just going to monitor today. Is that correct?

MR. BELL: That is correct, Your Honor.

THE COURT: All right. And, Mr. Bell, you had earlier indicated that you were just simply going to rely on your briefs. I'm certainly not going to hold you to that. If you wish to make some arguments, you may proceed.

MR. BELL: Your Honor, I'll be very brief. And then, you know, if Mr. Jorde has certain arguments he wants to make, if the Court would allow us to rebut those.

But before the Court is a brief in support of a motion for summary judgment as it relates in this matter. Mr. Jorde and his clients have raised originally a facial and as-applied challenge to the survey statute at issue. In the briefing,

Mr. Jorde and his clients have abandoned their as-applied challenge, so now we're just talking about a facial challenge to the survey statute.

I would note to this Court that no court has accepted Mr. Jorde's argument and note that since the briefing was concluded, Judge Pardy in the Second Circuit has adopted our arguments, has granted summary judgment explicitly rejecting those arguments. Similarly, an Iowa court has recently rejected those arguments. And that's for a good reason, and that's because a facial challenge is the most difficult type of constitutional challenge to win.

As the Court is well aware, there is a strong presumption that the state statute is constitutional, and the landowners' burden is to prove beyond a reasonable doubt that the statute is unconstitutional. It also means that, in a facial challenge that the plaintiffs' burden means that they have to prove the statute is unconstitutional in every possible circumstance. That's the burden that the landowners have.

The landowners haven't made that showing and, quite frankly, haven't attempted to make that showing in this case. Really, their argument turns on the *Cedar Point* U.S. Supreme Court case. The argument that essentially every government-authorized entrance onto property is a taking, and that's not the holding of *Cedar Point*. *Cedar Point* explicitly states and holds the longstanding background restrictions,

even claim that they did that.

THE COURT: Let's, let's talk about that, though. If there is no written lease agreement filed at the courthouse, how would they have actual notice or even any kind of notice that there were tenants?

MR. JORDE: Well, the answer is the statute that they're relying on doesn't require it. The statute puts it firmly on them to send notice to the, "to the owner and any tenant in possession." That's their problem. And we don't have to disprove it. They have to come to you and prove that they followed all these steps to get summary judgment. And they don't have a single allegation or fact that says they served the tenant. That's their problem. They could have asked us in discovery "Who are the tenants?" so they could have checked the box and sent the letter. They didn't do it. They failed.

THE COURT: But, Mr. Jorde, that's the way they find out who the owners are is that they go out and do a title search. That's constructive notice. There is no constructive notice if it's an oral lease agreement, if there is no realistic way for them to give notice to someone that they don't know exists.

MR. JORDE: Then that's another good reason to strike this down because the plain language says they have to give notice to the tenant in possession. That's their job to figure it out. And they can --

STATE OF SOUTH DAKOTA)
)SS CERTIFICATE
COUNTY OF BROWN)

THIS IS TO CERTIFY that I, Kristi A. Brandt, RPR, Official Court Reporter for the Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota, took the proceedings of the foregoing case, and the foregoing pages, 1-39 inclusive, are a true and correct transcript of my stenotype notes.

Dated at Aberdeen, South Dakota, this 24th day of May, 2023.

/s/ Kristi A. Brandt
Kristi A. Brandt, RPR
Official Court Reporter
My Commission Expires:
February 21, 2025

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-35. Condemnation Under Power of Eminent Domain (Refs & Annos)

SDCL § 21-35-31

21-35-31. Entry on private property for examination and survey of project requiring siting permit from Public Utilities Commission

Currentness

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the Public Utilities Commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Credits
Source: SL 2016, ch 118, § 1.

S D C L § 21-35-31, SD ST § 21-35-31
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

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2016 SESSION LAWS
OF THE
STATE OF SOUTH DAKOTA

PASSED BY THE NINETY-FIRST SESSION OF THE LEGISLATIVE ASSEMBLY, BEGUN AND HELD IN PIERRE ON JANUARY 12, 2016, AND CONCLUDED ON MARCH 29, 2016.

OFFICIAL EDITION

AUTHENTICATION

STATE OF SOUTH DAKOTA,)
) SS
HUGHES COUNTY)

I, Doug Decker, Code Counsel of the State of South Dakota, do hereby certify that the laws contained in this volume are, with the exception of clerical errors, true and correct copies with overstrikes and underscores added to show the effects of amendments of the proposed constitutional amendments and of the enacted Bills and Joint Resolutions passed by the Legislature of the State of South Dakota at the Ninety-first Session, which have been filed in my office.

Signed this first day of May, 2016.

Doug Decker
South Dakota Code Counsel

CHAPTER 118

(HB 1134)

Access to property for the purpose of making surveys.

ENTITLED, An Act to provide for access to certain property for the purpose of making surveys.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 21-35 be amended by adding a NEW SECTION to read:

The provisions of this section only apply to a project which requires a siting permit pursuant to chapter 49-41B. Each person vested with authority to take private property for public use may cause an examination and survey to be made as necessary for its proposed facilities. The person or the person's agents and officers may enter the private property for the purpose of the examination and survey. Any person seeking to cause an examination or survey, where permission for examination or survey has been denied, shall:

(1) Have filed a siting permit application with the public utilities commission pursuant to § 49-41B-11;

(2) Give thirty days written notice, including the filing and expected dates of entry, to the owner and any tenant in possession of the private property; and

(3) Make a payment to the owner, or provide sufficient security for the payment, for any actual damage done to the property by the entry.

This section does not apply to the state or its political subdivisions. This section is in addition to and not in derogation of other existing law.

Signed March 15, 2016

CHAPTER 119

(HB 1062)

An order to change the name of a minor child without prior publication.

ENTITLED, An Act to permit an order changing the name of a minor child without prior publication in certain instances.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 21-37 be amended by adding a NEW SECTION to read:

The court may grant an order changing the name of a minor child without publication of notice or a hearing in open court if all of the following conditions are met:

(1) It appears from the pleadings that the minor child has been a resident of the county in

ENABLING ACT AND CONSTITUTION

AND

THE LAWS

PASSED AT THE

EIGHTH SESSION

OF THE

LEGISLATURE

OF THE

STATE OF SOUTH DAKOTA.

Begun and Held at Pierre, the Capital of Said State, on Tuesday, the Sixth Day of January, 1903, and Concluded March 6th, A. D. 1903.

OFFICIAL EDITION.

1903
STATE PUBLISHING CO.
PIERRE, S. D.

SCS Appendix 102

their trustees, regularly called, in such particulars as such trustees may deem necessary for the better accomplishment of the objects for which said corporations were created, and may also increase or decrease their number of trustees: *provided*, that such amendments shall not in any way impair the obligation of existing contracts and may be made at any meeting of the board of trustees of such religious, educational or benevolent corporation, upon notice to each member of such board of trustees of the proposed amendment and the time when said amendment will be considered.

§ 4. DUTIES OF PRESIDENT AND SECRETARY.] The president or [and] secretary of the corporation shall prepare in duplicate a certificate, properly setting forth the amendment or amendments when adopted in the manner provided in this act and said certificate shall also state the number of votes cast for said amendment and the total number of shares of capital stock subscribed and outstanding also that legal notice as provided herein had been given, and file one of said certificates with the secretary of state and the other with the secretary of said corporation.

§ 5. SIGNATURES MUST BE ACKNOWLEDGED.] The signatures of the said president and secretary to such certificate must be acknowledged before some officer authorized to take acknowledgments, who knows that the parties signing the same to be the president and secretary of such corporation.

§ 6. DUTY OF SECRETARY OF STATE.] When such certificate is filed with the Secretary of State, he shall issue a certificate of amendment setting forth that the provisions of this act have been complied with and such certificate shall state in what particular the original articles of incorporation have been amended by said corporation.

§ 7. No amendment shall take effect or be in force until all the requirements of this act have been complied with.

§ 8. REPEAL.] All acts or parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 5, 1903.

CHAPTER 107.

ELECTRIC LIGHT, STREET RAILWAY AND POWER COMPANIES.

(H. B. 163.)

AN ACT to authorize the incorporation of electric light, street railways, and power companies in this state and the acquisition of property thereby by eminent domain.

Be it Enacted by the Legislature of the State of South Dakota:

§ 1. CORPORATION CAN BE FORMED.] Any number of persons, not less than three, may form a corporation for the purpose of constructing,

scribed by its by-laws, but no shares shall be transferable until all previous calls and assessments thereon shall have been fully paid. No person holding stock in any such corporation as executor, administrator, guardian or trustee and no person holding such stock as collateral security shall be liable as stockholders of said corporation for any calls or installments on any partially paid up stock thereof; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such personal representatives, guardians or trustees shall be liable to the same extent as the decedent, ward, or other person interested would have been if living or competent to act and held stock in his own name.

§ 7. CAPITAL MAY BE INCREASED.] The capital stock of said corporation may be increased to such an amount as may by its stockholders be deemed necessary for the construction or operation of its railways or in the increase of its lighting capacity or power, by the vote of the owners of sixty per cent or sixtenths of its capital stock at any annual meeting or at any special meeting called for that purpose. In case of a special meeting written notice shall be given to each stockholder, either by serving the same personally or by depositing the same in the postoffice, postage prepaid, directed to such stockholder at his usual postoffice address not less than twenty days prior to such meeting; such notice shall state the time and place of such meeting, its object and the amount it is proposed to increase said capital stock. Such notice shall not be necessary if all of the stockholders of said corporation shall waive notice thereof in writing and the amount of such capital stock may be increased without such meeting, if the owners of three-fourths of the capital stock of any such corporation shall, in writing to be filed and recorded in the records of such corporation, consent thereto.

§ 8. FURTHER POWERS.] Every corporation organized under this act shall in addition to the powers conferred upon corporations under the laws of this state, have power:

(1) To cause such examinations and surveys to be made as may be necessary to the selection of the most advantageous route for its proposed street railroad and for such purpose to enter, by its agents, officers and servants upon the lands or waters of any person subject, however, to responsibility for all damages done to said property by such entry.

(2) To erect and maintain such buildings, power houses, plants, poles, wires, trolleys and appliances as may be necessary for the transmission of electric power and use the same to operate its street railway and to contract with any person or corporation for the furnishing to such person or corporation of electric lights or power for the operation of farm or other machinery: to contract with any city, town, village or county for the lighting of its streets, highways and public buildings, and to contract with any municipal corporation for the furnishing of its inhabitants with electric light and power.

(3) To take and hold such voluntary grants of real estate and other property as may be made to it to aid in the construction, maintenance and

South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-11

49-7-11. Pipelines that are common carriers--Exemption

Currentness

All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B.

Credits

Source: SL 1980, ch 321, § 1; SL 1980, ch 328, § 3; SL 1981, ch 341.

S D C L § 49-7-11, SD ST § 49-7-11
Current through the 2023 Regular Session and Supreme Court Rule 23-17

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2023 South Dakota Legislature

House Bill 1133

HOUSE STATE AFFAIRS ENGROSSED

Introduced by: ***Representative*** *Lems*

An Act to define a commodity for the purpose of qualifying as a common carrier.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 49-7-11 be AMENDED:

49-7-11. All ~~pipelines~~ companies holding themselves out to the general public as being engaged in the business of transporting commodities for hire, by pipeline, are common carriers and are not subject to ~~the provisions of Title 49~~ this title, except as provided by this chapter and chapter 49-41B.

For purposes of this section, the term, commodity, means a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing, within or outside of this state. The term does not include a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q.

Underscored indicate new language. ~~Overstrike~~ indicate deleted language.

Committee: House State Affairs Monday, February 06, 2023 7:45 AM

Roll Call
Present: Rep. Bartels, Rep. Blare, Rep. Cammack, Rep. Chaffee, Rep. Chase, Rep. Drury, Rep. Hansen, Rep. Healy, Rep. Lesmeister, Rep. Reimer, Rep. Wangsness, Rep. Rehfeldt, and Rep. Mortenson

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Representative Mortenson

MOTION: TO APPROVE THE MINUTES OF FRIDAY, FEBRUARY 03RD

Moved by: Rehfeldt
Second by: Bartels
Action: Prevailed by voice vote

HB 1133 : provide that a company transporting carbon dioxide by pipeline is not a common carrier.

Presented by: Representative Karla Lems
Proponents: Brian E Jorde, Landowners for Eminent Domain Reform, Omaha (Handout(s) #1)
Craig Schaunaman, self, Aberdeen
Joy Hohn, self, Sioux Falls
Dennis Feickert, self, Aberdeen
Wendy Schulz, self, Watertown (Handout(s) #2.3.4)
Mark Lapka, self, Leola
Ed Fischbach, self, Mellette
Representative John Sjaarda
Sid Fischbach, self, Long Lake
Opponents: Jake Ketzner, Summit Carbon Solutions, Ames, IA
Elizabeth Burns-Thompson, Navigator Heartland Greenway LLC, OMAHA (Handout(s) #5)
Jim Seurer, Glacial Lakes Energy, LLC, Watertown
Eric Baukol, Redfield Energy LLC, Redfield
Kent Hartwig, Gevo, Englewood, CO
Steve Willard, South Dakota Electric Utility Companies, Pierre
David Owen, South Dakota Chamber of Commerce & Industry, Pierre
William M. Van Camp, NextEra Energy Resources, Juno Beach, FL

MOTION: AMEND HB 1133

1133A

On page 1, line 8, of the Introduced bill, delete "Notwithstanding the provisions of this section, a company transporting carbon dioxide, by pipeline, is not a common carrier." and insert "

For purposes of this section, the term, commodity, means a product that is intended for commerce and is being transported to a point of distribution, consumption, or processing, within or outside of this state. The term does not include a product that is disposed of in geological storage or used in a manner that allows its owner, shipper, or the shipper's customer to qualify for a tax credit or a direct payment, pursuant to 26 U.S.C. § 45Q."

Moved by: Drury
Second by: Bartels
Action: Prevailed by voice vote

MOTION: DO PASS HB 1133 AS AMENDED

Moved by: Wangsness
Second by: Hansen
Action: Prevailed by Majority Members Elect (8-5-0-0)

Voting Yes: Blare, Hansen, Healy, Lesmeister, Reimer, Wangsness, Rehfeldt, and Mortenson

Voting No: Bartels, Cammack, Chaffee, Chase, and Drury

HB 1188 : provide for property owner inclusion in the pipeline siting application and condemnation process.

Presented by: Representative Karla Lems
Proponents: Brian E Jorde, Landowners for Eminent Domain Reform, Omaha
Monica Meyer, self, Aberdeen
Rick Bonander, self, Valley Springs
Linda Schauer, self, Leola
Karen Jones, self, Sioux Falls
Ed Fischbach, self, Mellette
Opponents: Brett Koenecke, Summit Carbon Solutions, Ames, IA (Handout(s) #6)
Darla Pollman Rogers, South Dakota Rural Electric Association, Pierre
Steve Willard, South Dakota Electric Utility Companies, Pierre

MOTION: AMEND HB 1188

1188A

On page 1, line 4, of the Introduced bill, after "Dakota:" delete "Section 1. That § 21-35-2 be AMENDED:
"
On page 1, line 5, of the Introduced bill, after "AMENDED:" delete "21-35-2. A petition filed pursuant to § 21-35-1 shall name must:
(1) Name the person, group, or corporation desiring to take or damage private property as plaintiff, and all persons having interest in or liens upon the property affected by the proceeding as defendants, so far as they shall be are known at the time of the filing the same. It shall contain;
(2) Contain a description of the property to be taken or damaged. The;
(3) Set forth the purpose for which the property is to be taken or damaged shall be clearly set forth in the petition; and
(4) Be accompanied by a verification of consent, if required by section 4 of this Act.
It shall is not be necessary to specify the interests or claims of the several defendants in the land or property affected by the proceeding."
On page 2, line 22, of the Introduced bill, after "carry." delete "Section 4. That chapter 49-7 be amended with a NEW SECTION:
"
On page 2, line 23, of the Introduced bill, after "SECTION:" delete "A company seeking to exercise the right of eminent domain under this chapter shall demonstrate that it has received sufficient consent to proceed with the condemnation from the owners of property that the proposed pipeline will cross.

Committee: Senate Commerce and Energy Thursday, February 16, 2023 10:00 AM

Roll Call
Present: Sen. Crabtree, Sen. Brent "B.R." Hoffman, Sen. Steve Kolbeck, Sen. Nesiba, Sen. Schoenbeck, Sen. Stalzer, Sen. Zikmund, Sen. Beal, and Sen. Wheeler

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Senator Wheeler

MOTION: TO APPROVE THE MINUTES OF TUESDAY, FEBRUARY 14TH

Moved by: Beal
Second by: Schoenbeck
Action: Prevailed by voice vote

HB 1133 : define a commodity for the purpose of qualifying as a common carrier.

Presented by: Senator Bryan J. Breitling (Handout(s) #1)
Representative Karla Lems
Proponents: Craig Schaunaman, self, Aberdeen
Joy Hohn, self, Sioux Falls
Dennis Feickert, self, Aberdeen
Wendy Schulz, self, Watertown
Ed Fischbach, self, Mellette
Mark Lapka, self, Leola
Rick Bonander, self, Valley Springs
Opponents: Brett Koenecke, Summit Carbon Solutions, Ames, IA (Handout(s) #2. #3, #4)
Elizabeth Burns-Thompson, Navigator Heartland Greenway, Altoona, IA
Walt Wendland, Ringneck Energy & Feed LLC, Onida
Kirk Yackley, self, Onida
Jim Seuer, Glacial Lakes, Watertown
Kent Hartwig, Gevo, Lake Preston
Others: Jake Ketzner, Summit Carbon Solutions, Ames, IA

MOTION: DEFER HB 1133 TO THE 41ST LEGISLATIVE DAY

Moved by: Crabtree
Second by: Stalzer
Action: Prevailed by Majority Members Elect (9-0-0-0)

Voting Yes: Crabtree, Brent "B.R." Hoffman, Steve Kolbeck, Nesiba, Schoenbeck, Stalzer, Zikmund, Beal, and Wheeler

HB 1230 : clarify references to the court in a condemnation action.

Presented by: Senator Erin Tobin
Representative Will Mortenson
Proponents: Steve Siegel, Landowners for Eminent Domain Reform, Omaha, NE
Tony Ventura, self, Hudson

South Dakota Codified Laws
Title 49. Public Utilities and Carriers (Refs & Annos)
Chapter 49-7. Right-of-Way for Carrier Facilities (Refs & Annos)

SDCL § 49-7-13

49-7-13. Condemnation of pipeline right-of-way--Width across school and public lands

Currentness

Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry.

Credits
Source: SL 1980, ch 321, § 3.

S D C L § 49-7-13, SD ST § 49-7-13
Current through the 2023 Regular Session and Supreme Court Rule 23-17

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United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

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<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 2

§ 2. Due process--Right to work

Currentness

No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization.

Credits
History: Amendment proposed by SL 1945, ch 315, approved Nov., 1946.

Const. Art. 6, § 2, SD CONST Art. 6, § 2
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article VI. Bill of Rights (Refs & Annos)

Const. Art. 6, § 13

§ 13. Private property not taken without just compensation--Benefit to owner--Fee in highways

Currentness

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.

Credits

History: Amendment proposed by SL 1961, ch 297, approved Nov. 6, 1962. Amendment proposed by SL 1989, ch 3, rejected November 6, 1990.

Const. Art. 6, § 13, SD CONST Art. 6, § 13
Current through the 2023 Regular Session

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South Dakota Codified Laws
Constitution of South Dakota (Refs & Annos)
Article XVII. Corporations (Refs & Annos)

Const. Art. 17, § 18

§ 18. Compensation for private property taken for public use--Assessment of damages

Currentness

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

Credits

History: Repeal proposed by SL 1975, ch 3, rejected Nov. 2, 1976.

Const. Art. 17, § 18, SD CONST Art. 17, § 18
Current through the 2023 Regular Session

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STATE OF SOUTH DAKOTA) :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

Dakota Access, LLC,

Plaintiff,

vs.

THOMAS L. SHUMAKER; LINDA L. SHUMAKER; THOMAS E. STOFFERAHN; RONALD H. STOFFERAHN; RUBY KRAMER, AS TRUSTEE OF HER SUCCESSORS IN TRUST, UNDER THE RUB KRAMER LIVING TRUST, DATED OCTOBER 23, 2008 AND ANY AMENDMENTS THERETO; LONNIE KRAMER; CATHERINE E. KRAMER; PEGGY A. HOOGESTRAAT, TRUSTEE OF THE PEGGY A. HOOGESTRAAT REVOCABLE TRUST, DATED FEBRUARY 2, 2006; MATTHEW L. ANDERSON; KRISTI R. ANDERSON; ORRIN E. GEIDE; RODNEY L. HOHN; JOY A. HOHN; KYLE NICHOLAS GRACE; NADINE ELAINA GRACE; MERLE W. GRAVE AND MARLENE M. GRAVE, AS TRUSTEES OF THE MERLE W. GRAVE AND MARLENE M. GRAVE REVOCABLE TRUST AGREEMENT DATED FEBRUARY 01, 2013; WAYNE A. PROSTROLLO; LAUREL J. PROSTROLLO; RUTH E. ARENDS; ALLAN C. ARENDS; LORRIE L. ARENDS; AND SHERRIE K. FINES,

Defendants.

Civ. 15-941

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MEMORANDUM OPINION AND ORDER

This matter is before the court upon the petition by Dakota Access, LLC, ("Dakota Access") seeking a preliminary injunction and default judgment as to certain Defendants. The court conducted a hearing on July 7, 2015. Dakota Access appeared through its attorneys, Brett Koenecke and Justin L. Bell of May, Adam, Gerdes and Thompson, LLP, and Glenn J. Boomsma of Breit Law Office, P.C., represented Peggy A. Hoogestraat, Trustee of the Peggy A. Hoogestraat Revocable Trust Dated February 2, 2006, Orrin E Geide, Rodney L. Hohn, Joy A. Hohn, Thomas L. Shumaker, Linda L. Shumaker, Thomas E. Stofferahn, Ronald H Stofferahn, Matthew L. Anderson, Kristi R. Anderson, Ruth E. Arends, Allan C. Arends, Lorrie L. Arends, and Sherri K Fines ("the Landowners").

At the conclusion of the hearing, the court orally granted the petition for a preliminary injunction as well as the motion for default judgment as to some Defendants who had not appeared. Following the hearing, the court considered further the substantive and procedural issues associated with the case. In an October 2, 2105, order, the court provided notice that it was considering evaluating Dakota Access' request for injunctive relief as a petition for a permanent – not a preliminary – injunction. The court invited additional briefs. Dakota Access submitted a brief, and the Landowners submitted orders from two Lincoln County parallel actions decided adversely to Dakota Access by the Honorable Bradley G. Zell.

After continuing to carefully consider the issues expressly raised by the parties and those implicated by their arguments along with the relevant authority

and the information contained in the record, the court affirms its determination that Dakota Access possesses a right to conduct a pre-condemnation survey of the Landowners' property. However, for reasons explained below, the court cannot determine whether Dakota Access' proposed subsurface inspection and testing of the Landowners' property constitutes a taking under the existing record. Therefore, the court's earlier oral determination is modified, and the court grants a Dakota Access' petition in part. A permanent injunction shall be issued allowing Dakota Access the ability to conduct a brief survey of the surface of the Landowner's property involving foot traffic only.

Findings of Fact and Background[1]

Dakota Access is a Delaware limited liability company with its principal offices in Dallas, Texas. The membership interest of Dakota Access is owned 75 percent by Dakota Access Holdings, LLC and 25 percent by Phillips 66 DAPL Holdings LLC.

Dakota Access is in the application process for construction of the Dakota Access Pipeline Project ("the Project" or "the Dakota Access Pipeline"). The overall Project is an approximately 1,134-mile-long, 12-inch to 30-inch diameter pipeline that will connect the rapidly expanding Bakken and Three Forks production areas

[1] The factual information is taken from the affidavits of Damon Daniels and Micah T. Rorie. The use of affidavits to establish facts is generally disfavored. *See Bloom v. Bloom*, 498 N.W.2d 213 (S.D. 1993). Affidavits can lack context and overstate or distort facts, all without being subject to cross examination. *See id.* Ultimately, though, a trial court has discretion to consider them, and here the court is considering these affidavits for the purpose of establishing certain factual information about Dakota Access and its Project, none of which appears to be controverted. Indeed, the Landowners have not offered any evidence to rebut the information found in the affidavits.

in North Dakota to existing crude oil transportation infrastructure in Illinois. The Project originates in the northwest portion of North Dakota and traverses southeast through South Dakota, Iowa, and Illinois and terminates at the existing Patoka, Illinois hub.

The Project enters South Dakota in Campbell County approximately 17 miles east of the Missouri River, and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln counties. The Project crosses the Big Sioux River approximately 14 miles south of Sioux Falls, and continues in a southeast direction through Iowa.

Dakota Access successfully conducted two binding open seasons in 2014 to solicit shipper commitments for the Dakota Access Pipeline. As a result of those open seasons, multiple third parties have contracted with Dakota Access for transportation service on the Dakota Access Pipeline. Dakota Access is also reserving 10% of the capacity on the Dakota Access Pipeline for allocation to walk up shipments, in accordance with FERC's rules and regulations for common carrier crude oil pipelines under the ICA. Dakota Access is available to the public to ship crude oil for a fee on the Dakota Access Pipeline. On December 24, 2014, FERC issued an order granting Dakota Access's petition for declaratory order for approval of the rate elements for committed transportation service on the Dakota Access Pipeline.

Certain affiliates of the owners of Dakota Access do have contracts to ship oil on the Dakota Access Pipeline; however, most of the volume is not subscribed by affiliated entities of either Energy Transfer Partners or Phillips 66.

Dakota Access will not take title to or ownership in the crude oil received for transportation from its third-party shippers on the Dakota Access Pipeline. Once the crude oil arrives at the crude oil terminating hub in Patoka, Illinois, the third-party shippers transporting crude oil through the Dakota Access Pipeline will be able to access and distribute their crude oil to multiple markets, including Midwest and Gulf Coast markets via existing and proposed pipeline infrastructure.

Dakota Access has developed its route based upon the many codes, standards, specifications, regulatory policies and guidance originating from the various local, state and Federal rules and regulations that govern pipelines. During this evaluation, Dakota Access utilized a geographic information system ("GIS") that contains multiple tools to quantify and qualify various land features and other information pertinent to selecting a pipeline route.

In this regard, Dakota Access initially gathered and evaluated the various publicly available environmental and demographic data, soil and topographic conditions, location of public utilities, public properties or lands. It also evaluated environmental considerations such as wetlands, streams and rivers, threatened and endangered species, cultural resources, agricultural lands, drainage features and unique land uses or land features just to name a few.

Dakota Access also collected its own data by evaluating the various regions' resources along the pipeline route to determine the feasibility and constructability of the pipeline. Dakota Access then consolidated the information into the GIS routing tool that, at a "macro" level, provided the shortest route with the least amount of impacts to the various constraints based upon a weighted-basis of importance (e.g. impacts to environmental features such as wetlands or threatened or endangered species were weighted with higher routing importance than impacts to roads).

From the computer-based route, Dakota Access then moved into what is called the "micro" routing phase which is based upon driving, walking, surveying and flying the route to shift or adjust the route to avoid as many physical land features and constraints as possible. These adjustments to the route were based upon things like the location of residences in proximity to the pipeline, crossing streams and public roads, minimizing and avoiding impacts to wetlands and other sensitive environmental features, considering and routing around future land use for commercial and residential development. Dakota Access also relied upon other siting criteria established by industry guidelines, standards, specifications and codes, the various state and federal regulations that govern pipelines and criteria specific to crude oil pipelines as part of the hazard analysis for sensitive environmental and water resources.

The last and current step of routing the pipeline is to conduct a detailed civil and environmental survey of the entire route to further avoid and minimize impacts

to sensitive land features and environmental resources. Some of the survey work is required by the National Environmental Policy Act and the National Historic Preservations Action. Other survey work may be required pursuant to requirements of the United States Army Corps of Engineers and the United States Fish and Wildlife Service. In addition, the survey results are utilized during the proceedings filed with the South Dakota Public Utilities Commission for evaluation of the factors found in SDCL 49-41B and ARSD ch. 20:10:22.[2]

The requested surveys are required to allow Dakota Access and public policy makers to properly analyze the project and to ensure that the route selected has the least impact to as many stakeholders and environmental, demographic and social features as possible while still connecting the pipeline from the supply area to the terminus and market.

Dakota Access has completed the vast majority of the civil and environmental surveys along the proposed route. The remaining Landowners own or are in possession of real property in Minnehaha County through which Dakota Access proposes to locate its pipeline. They include:

Landowner	Legal Description
Thomas L. Shumaker and Linda L. Shumaker	The E1/2 of the SE1/4 of Section 11, Township 102 North Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated March 4, 2005 from Thomas L. Shumaker and Linda L. Shumaker to Thomas L. Shumaker and Linda L. Shumaker, record at Deed Book 498,

[2] Some or all of this process may have been completed during the pendency of this case.

	Page 923, Official Public Records, Minnehaha County, South Dakota, Less and except and conveyances heretofore made.
Thomas E. Stofferahn and Ronald H. Stofferahn	The NW1/4 of Section 13, Township 102 North, Range 52 West of the 5th P.M., Minnehaha County, South Dakota, Except the West 1208 Feet of the North 373 Feet thereof; Except that portion thereof lying South of the Right-Of-Way of Chicago , St. Paul, Minneapolis & Omaha Railway Company; Except the Right-Of-Way of said railway company: and Except the Lots H-1 and H-2 of said NW1/4, described in Warranty Deed dated September 02, 1975 from Evelyn L. Carlson,(formerly Evelyn L. Ranschau) and Wayne K. Carlson, her husband to Thomas E. Stofferahn and Ronald H. Stofferhan, as tenants in common, recorded in Book 307, Page 197, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Ruby Kramer, as Trustee of her successors in trust, under the Rub Kramer Living Trust, dated October 23, 2008, and any amendments thereto	The SW1/4 of the SW1/4, except the West 302.28 feet of the South 547.8 feet of Section 12, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated October 23, 2008 from Ruby Kramer a/k/a Ruby M. Kramer to Ruby Kramer, as Trustee of her successors in trust, Deed Book 523, Page 953, Deed Records, Minnehaha County, South Dakota, less and except and conveyances heretofore made. -and- The E1/2, lying North of the RR Right of Way and Highway No. 38, except the East 493' of the South 472' of the North 1588.10', of Section 13, Township 102

	North Range 52 West, Minnehaha County, South Dakota, described in Quit Claim Deed dated October 23, 2008 from Ruby Kramer a/k/a Ruby M. Kramer to Ruby Kramer, as trustee of her successors in trust, under the Ruby Kramer Living Trust, dated October 23, 2008, recorded at Deed Book 523, Page 953, Deed records, Minnehaha County, South Dakota , less and except any conveyances heretofore made.
Lonnie Kramer and Catherine E. Kramer	The E1/2 of the SW1/4 of Section 12, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 22, 1975 from Margaret O. Wagner and Mabel V. Lane, to Lonnie Kramer and Catherine E. Kramer, recorded at Deed Book 304, Page 229, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Peggy A. Hoogestraat, Trustee of the Peggy A. Hoogestraat Revocable Trust, dated February 2, 2006	The SE1/4, South of Hwy 38, Section 13, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 2, 2006 from Peggy A. Hoogestraat and Craig L. Hoogestraat, Trustee of the Peggy A. Hoogestratt Revocable Trust, dated February 2, 2006 recorded at Deed Book 505, Page 608, Official Public Records, Minnehaha County, South Dakota, Less and Except any conveyances heretofore made. -and- The NE1/4 of Section 24, Township 102 North, Range 52 West, Minnehaha County, South Dakota, described in Warranty Deed dated February 2, 2006 from Peggy A. Hoogestraat and Craig L. Hoogestraat, Trustee of the Peggy A.

	Hoogestraat Revocable Trust, dated February 2, 2006 recorded at Deed Book 505, Page 608, Official Public Records, Minnehaha County South Dakota, less and except any conveyances heretofore made
Matthew L. Anderson and Kristi R. Anderson	That certain tract of land situated in the E1/2SE1/4, of Section 19, Township 102 North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated January 8, 2014 from Peggy A. Hoogestraat, as Trustee of the Peggy A. Hoogestraat Revocable Trust dated February 2, 2006, to a Matthew L. Anderson and Kristi R. Anderson, recorded at Deed Book 553, Page 946, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Orrin E. Geide	The NW1/4 of Section 5, Township 101 North, Range 51 West, Minnehaha County, South Dakota, describe in Quit Claim Deed dated March 16, 2000 from Earle R. Geide and Cornelia Rose Geide to Orrin E. Geide, recorded at Deed Book 465, Page 54, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made. -and- The SW1/4 of Section 5, Township 101 North Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated January 25, 1994 from Earle Geide and Cornelia Rose Geide to Orrin Earle Geide, recorded at Deed Book 428, Page 199, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Rodney L. Hohn and Joy A. Hohn	A parcel located in the W1/2 of the SE1/4 of Section 5, Township 101

	North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated May 26, 2010 from Orrin E. Geide to Rodney L. Hohn and Joy A. Hohn, recorded at Deed Book 532, Page 729, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Wayne A. Prostrollo and Laurel J. Prostollo	The SE1/4, Section 28, Township 101 North, Range 51 West, Minnehaha County, South Dakota, described in Warranty Deed dated July 19, 1993 from Evangeline Pearl Haak to Wayne A. and Laurel J. Prostrollo, recorded at Deed Book 424, Page 874, Deed Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.
Ruth E. Arends, Life Estate Allan C. Arends, Lorrie L. Arends and Sherrie K. Fines, Remaindermen	The N1/2 of the NW1/4 of Section 34, Township 101 North, Range 51West, EXCEPT: H-1 and R-1, Minnehaha County, South Dakota, described in Warranty Deed dated July 17, 1990 from Arnold E. Arends and Ruth E. Arends to Allan C. Arends, Lorrie L. Arends, and Sherrie K. Fines, recorded at Deed Book 406, Page 39, Official Public Records, Minnehaha County, South Dakota, less and except any conveyances heretofore made.

The court entered a judgment of default against Defendants Wayne Prostrollo, Laurel Prostrollo, Ruby Kramer, Lonnie Kramer, and Catherine Kramer on July 7, 2015.

Agents for Dakota Access have contacted the Landowners, asking for permission to enter the property for survey purposes. The Landowners have refused to grant Dakota Access to enter their land to conduct a survey.

In this action, Dakota Access argues that it is a common carrier authorized to exercise a statutory right of eminent domain. In its view, that right carries with it the ancillary or inherent authority to conduct a pre-condemnation survey of the Landowners' property. The Landowners resist this effort, claiming the absence of legislative authority to conduct a pre-condemnation survey is fatal to Dakota Access' argument and further that Dakota Access' authority to enter the land can only come through a condemnation proceeding.

Additional findings of fact may be added in the court's analysis.

CONCLUSIONS OF LAW AND AUTHORITIES AND ANALYSIS[3]

The central arguments of the parties begin at divergent points. Implicit in the arguments, but not addressed in the parties' briefs, is the question of whether a pre-condemnation survey is a taking within the meaning of the Fifth Amendment of the United States Constitution and Article VI, §13 of the South Dakota Constitution.

Even if Dakota Access possesses an ancillary right to conduct a survey, resolving the takings inquiry is necessary to determine the efficacy of the procedure it has selected here. If the survey Dakota Access proposes is a taking, it should have sought court approval through a condemnation proceeding under SDCL Chapter 21-35, including a determination of just compensation. However, if the survey is not a taking, the injunction procedure is appropriate, though the nature of

[3] This Court has both subject matter jurisdiction and personal jurisdiction over the subject matter and parties to this action. Venue is proper pursuant to SDCL § 15-5-1.

the relief more closely approximates a permanent – not a preliminary – injunction and should be analyzed accordingly.

A. A surface pre-condemnation survey by Dakota Access is not a taking.

The standard for determining the existence of a taking is difficult to discern. In the context of regulatory takings cases, our Supreme Court has summarized the holdings of the United States Supreme Court in the following terms:

> Serious discussion of the equities in takings cases must begin with Justice Holmes's maxim that, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326 (1922). The problem, of course, is to know what is "too far" in any given case. Generally, the U.S. Supreme Court has avoided a formulaic answer to this question, opting instead for "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

SDDS, Inc. v. State of South Dakota, 2002 SD 90, ¶24, 650 N.W.2d 1, 9-10.

Although the Landowners have not identified a particular type of taking, a per se taking occurs when a condemnor "compel[s] a property owner to suffer a physical 'invasion' of the property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015; *see also Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419. Though this type of intrusion can be compensable "no matter how minute [it is], and no matter how weighty the public purpose behind it," its application is confined to permanent invasions. *See Lucas*, 505 U.S. at 1015.

Our Supreme Court has also recognized that these per se takings are limited to permanent occupations of land or air space:

> [T]here is a constitutional distinction between a permanent physical occupation and a temporary physical invasion. The first effects a compensable taking within the meaning of the Fifth Amendment, but the second does not. A physical occupation that is less than permanent, and amounts to no more than a temporary physical invasion does not constitute a classic per se regulatory physical taking within the meaning of *Loretto*.

Benson v. State of South Dakota, 2006 SD 8, ¶ 48, 710 N.W.2d 131, 150 (internal quotation and embedded citations omitted).

Here, the court concludes that a pre-condemnation survey is not, itself, a taking and that Dakota Access is not required to seek relief by commencing a condemnation proceeding. This conclusion, however, applies only to what the court is considering to be a survey, or an examination of the surface of real property.[4] A desire to conduct a subsurface examination gives the court pause because it contemplates a more invasive impact on individual property rights. *See Missouri Highway & Transportation Comm'n v. Eilers*, 729 S.W.2d 471, 472-474 (Mo.App. 1987).

In this regard, the question of whether an intrusion goes "too far" is a fact bound determination, and here the record about the details of Dakota Access' proposed subsurface examination is not well-developed. The affidavits of Damon Daniels and Micah Rorie do not address these details, with the exception of an

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[4] Dakota Access, of course, remains liable for any damage it might cause, and the $1,000 bond it suggested, in the absence of different view, provides some assurance that the Landowners could, if necessary, make a claim upon a surety for damage. This bond is different from the undertaking required by Rule 65(c) which is restricted to damages from an improvidently granted preliminary injunction. SDCL 15-6-65(c). The bonds the court is requiring here are not actually mandated by rule or statute and exist solely to address damage claims prompted by the pre-condemnation survey.

attachment to Mr. Rorie's affidavit which is the proposed "Property Examination Permit" Dakota Access used in connection with obtaining pre-condemnation entry by consent. In it, Dakota Access identifies its purpose as "making an examination of said property, including conducting environmental and archaeological surveys and environmental or archeological investigations, including any necessary core or water sampling activities[.]" Rorie Aff. at Ex. A; *see also* Complaint at ¶ 6.

Beyond that, there is only the description by Dakota Access's counsel describing the subsurface work as minimal. *See e.g.* Reply Brief at 3. These statements, however, are not, themselves, evidence and lack the necessary detail to allow the court to assess the degree of intrusion and determine whether the work effects a taking.[5]

These details and the resulting analysis are particularly important here. As discussed further below, Dakota Access' request to enter upon the Landowner's property is not based upon controlling authority such as a rule, statute or binding caselaw. Instead, the request raises a novel and unsettled question that is entirely dependent upon its assertion that it has an inherent right of access that is ancillary to its authority to exercise eminent domain power. Under these circumstances, the court believes a circumspect view of the entirety of Dakota Access' proposed action is required.

[5] Dakota Access acknowledges a split of authority involving certain types of subsurface examinations and sampling. *See* Reply Brief at 3.

B. Dakota Access possesses the authority to conduct a pre-condemnation survey.

Pipeline companies are common carriers when they "hold[] themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline[.]" SDCL §49-7-11. These pipeline companies "may exercise the power of eminent domain in acquiring right-of-way as prescribed by statute." SDCL § 49-7-13; *see also* S.D. Const. Art. VI, § 13 ("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[.]").

Here, the only evidence contained in the record establishes that Dakota Access is a pipeline company and a common carrier, possessed of the right to exercise the power of eminent domain. It has contracted with third parties to ship their crude oil for a fee. *See* Affidavit of Damon Daniels at ¶¶ 7-9. Dakota Access also plans to make 10% of its pipeline capacity available to the public to ship oil for a fee, in accordance with federal regulations. *Id.* at ¶ 8; Rorie Aff. at ¶ 3. The Landowners have not submitted any evidence challenging Dakota Access' claim to be a pipeline company or common carrier.

The principal area of disagreement among the parties relates to Dakota Access' claim that it has a right, ancillary to its power of eminent domain, to survey land prior to condemnation. This issue presents a question which is not dispositively addressed by either a statute or binding decisional law. However, other courts have considered the question and held that the right to exercise

eminent domain carries with it the concomitant right to survey land before it is condemned.

In *State v. Crouch*, 621 S.W.2d 47 (Mo. 1981), the Missouri Supreme Court held that the absence of specific statutory authority allowing a pre-condemnation inspection did not prevent pre-condemnation surveys:

> [P]re-condemnation surveying is not only necessary to the exercise of the right of eminent domain, it is a part of eminent domain. The right of eminent domain is virtually useless to an entity without the right to survey, and that right must be available before the beginning of condemnation proceedings.

Crouch, 621 S.W.2d at 48.

Citing reasons that seem as practical as they are legal, the court in *Crouch* noted the utility of the pre-condemnation surveys as an essential component of the exercise of eminent domain:

> [I]t is necessary that the exact location, amount, and description of the property sought to be condemned, be definitely ascertained, and in such circumstances, if these preliminary steps be denied, it would be at least difficult, if not impossible, to successfully carry out condemnation proceedings.

Id. (quoting *Thomas v. City Horse Cave*, 249 Ky. 713, 61 S.W.2d 601,604 (1033)).

Other jurisdictions have reached similar results. See e.g. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1985) ("Either by express statutory grant or, as here, by implication, a condemning body . . . has the right, incidental to its power of eminent domain, to enter private property in order to survey, inspect, and appraise the property . . . it would be illogical to require the prospective condemnor to institute condemnation proceedings and pay compensation "before making a

preliminary minimally intrusive entry."); *Ware v. Henry County Water & Sewerage Auth.*, 575 S.E.2d 654, 659 (Ga. Ct. App. 2002) ("the law in Georgia is clear that a prospective condemning body has the right, incidental to its power of eminent domain, to enter private property in order to survey, inspect, and appraise the property"); *Pogue v. Kamo Elec. Coop.*, 795 S.W.2d 566, 568 (Mo. Ct. App. 1990) ("'It would make little sense that the legislature would grant the power of eminent domain to an entity and at the same time deny the entity the means required to use the grant.'" (*Crouch*, 621 S.W.2d 47, 48 (Mo. 1981))); *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982) (affirming order enjoining landowners from interfering with survey work because "[a]ncillary to [the power of eminent domain] was the authority to enter upon the land to make a preliminary survey").

The Landowners have not cited any reported decisions that suggest pre-condemnation surveys are precluded in the absence of specific statutory authority. Instead, their principal argument rests upon the fact that the Legislature has provided for pre-condemnation inspections in other contexts, but not for pipeline companies. From this, the Landowners contend that the Legislature has, therefore, proscribed pre-condemnation inspections by purposefully omitting express statutory authority. This argument, in the court's view, is not sustainable.

Known historically as the canon of *expressio unius est exclusio alterius*, or simply *expressio unius*, this method of divining legislative intent by negative implication has limited utility, particularly under circumstances such as those presented here. The force of any negative implication that a legislative body

intentionally enacted "disparate provisions [is] strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *see also Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects[.]"). The United States Supreme Court has further held that "the *expressio unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it[.]'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003)).

Our Supreme Court has also urged caution when applying the expressio unius cannon:

> The general rule that the express mention of one thing in a statute implies the exclusion of another 'is merely an auxiliary rule of statutory construction, to be applied with great caution; it is not a rule of substantive law, or a constitutional command. The maxim is not of universal application, or conclusive as to the meaning of a statute; and it does not constitute a formula for construction to be arbitrarily applied.'

Tracfone Wireless, Inc. v. South Dakota Dept. of Revenue, 2010 SD 6, ¶ 14, 778 N.W.2d 130, 135 (quoting *Argo Oil Corp. v. Lathrop*, 76 S.D. 70, 74, 72 N.W.2d 431, 434 (1955)).

Here, a close examination of the statutory authority allowing pre-condemnation inspections for certain, other entities does not reflect a deliberate

legislative effort to deprive common carrier pipelines of the same ability. Indeed, the various statutes were enacted at different times, employ different procedures and reflect little congruence even among themselves. For example, SDCL § 50-6A-19, authorizing pre-condemnation inspections by airport authorities, was enacted in 1976 and simply provides that "it shall be lawful for the authority to enter upon the land, doing no unnecessary damage[]" to "make surveys and examinations[.]" SDCL § 50-6A-19. However, the legislative authority of an irrigation district to enter upon a landowner's real property was enacted in 1939 and exists among a broader range of water management powers, including the ability to levy special assessments, provide funds to drain land, enter upon the lands for making surveys, exercise power of eminent domain and contract for the construction of ditches. SDCL § 46A-6-5. Finally, the right of an entity proposing a water project dates from 1983 and is not self-executing, requiring the entity to first seek permission from a circuit court. SDCL § 46-8-2.1.

These instances of legislative action do not reflect a single, simultaneous effort to allow pre-condemnation surveys for some entities and purposefully deny that authority to pipeline companies who are common carriers. Indeed, the main statutes addressing pipelines as common carriers with the power of eminent domain, SDCL §§ 49-7-11 and 49-7-13, were enacted in 1980 during a different legislative session from those described above.

Under the circumstances, the court cannot accept the *expressio unius* argument and find that pre-condemnation surveys are categorically prohibited.

Instead, the weight of the authority from other jurisdictions provides the better rule and the one the court will apply here.

C. The court's injunctive power may be used to allow Dakota Access the ability to conduct pre-condemnation surveys on the Landowner's property.

Having determined that Dakota Access possesses the ability to conduct a pre-condemnation survey, the court authorizes the issuance of an injunction to allow the surveys. These surveys are limited to one instance, though the survey may extend beyond one day. They are further limited to a surface examination of the landowner's property in the absence of greater evidentiary detail concerning Dakota Access' proposed subsurface examination.

As indicated in its October 2, 2015, order, the court does not view this application by Dakota Access as implicating preliminary injunction principles or procedure. The relief it seeks is not preliminary – it is final. Once the pre-condemnation survey is completed, nothing remains to adjudicate.

A permanent injunction may be granted, among other instances, where "pecuniary compensation would not afford adequate relief" or where "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief[.]" SDCL § 21-8-14. Our Supreme Court has provided several considerations to guide trial courts in determining the question of injunctive relief:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by

> the enjoined party ... disproportionate to the ... benefit to be gained by the injured party?

Knodel v. Kassel Twp., 1998 S.D. 73, ¶ 9, 581 N.W.2d 504, 507.

The Landowners here have certainly not acted to cause damage or in bad faith. They are simply asserting their rights as property owners. This is a sincere and understandable sentiment. Still, the stark reality remains that the power of eminent domain, as it exists in this state and elsewhere, contemplates that individual property rights can be impacted for a more broadly-determined public use. As the court balances the equities here, the limited interference by Dakota Access, at least at this point, suggests to the court that the degree of hardship for the Landowners is not disproportionate to the benefit Dakota Access would gain. Further, it would be extremely difficult, if it could be done at all, to calculate adequate monetary relief for denying Dakota Access the opportunity to "walk" its proposed pipeline route. There is, in this regard, no adequate remedy at law to otherwise address this right. Though the Landowners have argued the commencement of a condemnation action is the appropriate legal remedy, this remedy would be efficacious only where the proposed action was a taking. Here, the survey, as it is authorized, is not.

ORDER

Based upon the foregoing, it is hereby ordered:

1) that Dakota Access' application for injunctive relief is granted in part. Dakota Access is authorized to enter upon the Landowners' real property for the purpose of conducting a pre-condemnation survey, limited to a survey of the surface and surface features of the real property and as otherwise provided in the Memorandum Opinion and Order;

2) that Dakota Access must furnish a bond in the amount of $1,000 per parcel prior to undertaking a pre-condemnation survey;

3) that Dakota Access may seek to supplement the record and reconsideration relating to the extent of the injunctive relief ordered; and

4) that the clerk will provide a copy of this Memorandum Opinion and Order to the parties' counsel electronically or by U.S. Mail.

Dated this 25th day of March, 2016.

BY THE COURT:

Mark Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____ Deputy

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
MAR 24 2016
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT OF
THE STATE OF SOUTH DAKOTA

BETTY JEAN STROM TRUST, RITA BROWN, and CRAIG AND LISA BASLER FAMILY TRUST, Plaintiffs and Appellants, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	**App. No. 30317 and 30338**
PATRICIA K. DEEG TRUST, Plaintiff and Appellant, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	
PETER HELFENSTEIN, JR., ROTT FARMS, INC., KETTLERING FARM, LLC, VILHAUER LAND LIMITED PARTNERSHIP, BRIAN HOFFMAN, THE DAVID AND VALERIE RATH LIVING TRUST, COLIN AND MARY BETH HOFFMAN, JEROME G. HOFFMAN, MICHAEL AND NANCY KLIPFEL, ALDEN AND WILMA FLAKOLL, SHANTEL C. SCHUMACK, LEROY AND JOAN WEISZHAAR, and WADE AND JUDY WEISZHAAR, Plaintiff's and Appellants, vs. SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS, Defendant and Appellee.	

Filed: 1/23/2024 2:38 PM CST Supreme Court, State of South Dakota #30338

SCS CARBON TRANSPORT LLC,
Plaintiff and Appellee,

vs.

GERALDINE H. SAYLER JORDE, DENNIS WOLFF, QUINTON WOLFF, R&C FEICKERT LAND LLC, REBECCA D. MICHAELSOHN, DAVID MELLAND, ROTT RANCH LIMITED PARTNERSHIP, THE ROGER E. MEYER AND ELIZABETH I. MEYER REVOCABLE LIVING TRUST, SUSIE K. TREFTZ, PAMALA KESSLER, GARY AND SHIRLEY WOLFF LIVING TRUST, WILLARD GOESHEL, LARVINA W. MEIER, KEN STUGELMAYER, MARSHA M. VOSSLER, THE MARK M. VOSSLER AND MARSHA M. VOSLER REVOCABLE TRUST, MARILYN D. NELSON, MARK THOMPSON, THE ESTATE OF ALBERT EUGENE ERDMANN, CHARLES E. SCHAUNAMAN, JEROME R. WAHL, THE VIRGINIA L. BREITAG LIVING TRUST, and SIEH FARMS, LLC
Defendants and Appellants.

BRAUN FAMILY TRUST 2020, B&L FISCHBACH FARMS, MARGARET ELLETT LIVING TRUST, KEN OLSON TRUST 2010, OLSON FAMILY TRUST 2019, FRANCOLI FAMILY LIMITED PARTNERSHIP, FISCHBACH REAL ESTATE LP, ED AND JOELL FISCHBACH, ARMADALE LIMITED PARTNERSHIP, PAUL FISCHABACH TRUST 2012 AND DAWN FISCHBACH TRUST 2012, J&S PARTNERSHIP, MYRON O. HAMMER CREDIT SHELTER TESTAMENTARY TRUST, and JAMES AND ALTA SMITH
Plaintiffs and Appellants.

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

JARED BOSSLY, BOSSLY REAL ESTATE LIMITED PARTNERSHIP, KENNETH AND DIANNA SHAFER, ESTATE OF DONALD A. SCHAUNAMAN, KIRK SCHAUNAMAN, JOYCE DAHME, TODD AND DONNA ROZELL, SCOTT ROZELL, DENNIS AND JEAN HASELHORST, MILTON AND RHONDA HASELHORST, SETH KLIPFEL, AND MICHAEL AND NANCY KLIPFEL,
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

DELORES SCHUMACHER REVOCABLE TRUST, and JOHN AND STEPHANIE JUNG
Plaintiffs and Appellants,

vs.

SCS CARBON TRANSPORT, LLC, a Delaware Limited Liability Company, a/k/a SUMMIT CARBON SOLUTIONS,
Defendant and Appellee.

Appeal from the Third Judicial Circuit, Beadle and Lake County
Honorable Patrick Pardy
and Fifth Judicial Circuit, Brown, Edmunds, McPherson, and Spink County
Honorable Richard A. Sommers
Notice of Appeal filed April 28, 2023

Reply Brief of Appellant Landowners

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INTRODUCTION

During South Dakota's Constiutional convention framers vigiously debated condemnation. The debate centered almost exclusively on railroad corporations. Many farmers were sent as Convention Delegates. These farmers at the convention knew then that railroads were vital to South Dakota's future. Without railroads to transport their grain, cattle, or other commodities to market their transport required horse-drawn wagons, cattle drives, or a river barge.

Despite embracing railroads, those farmers and many others knew private lands would be impacted and they fought vigorously for their property rights. That fight included (1) adding "or damaged" in the Takings Clause, (2) consideration of benefit to the landowner in calculating just compensation, and (3) the right to demand a jury determination of just compensation. Delegate Moody of Lawrence County proposed an amendment to limit these protections. *See* 1 Dakota Constitutional Convention 291 (Doane Robinson ed., Huronite Prtg. Co.1907).

The Convention engaged in vigorous debate over the tension between industrial development and protecting property owners. One Delegate stated:

> Upon reflection, I think I am opposed to the measure. I remember I heard said by a railroad attorney. He said the profession can take care of themselves. The Convention will take care of the people and the railroads will take care of themselves. That is very nice. Gentlemen, how do corporations and individuals get along together? Peaceably, like a lion and a lamb. They can get along peaceably because the lamb is eaten up.

Id. at 293.

After considerable discussion, Delegate Moody effectively withdrew his support for the amendment. He went on to state:

> I recognize the fact that a corporation is capable of a concentration of energy that would be simply impossible under other circumstances, therefore, we should with the utmost care guard the rights of the people against the encroachments from such as are capable of using the state and the public in aid of their enterprises.

Id. at 296.

The Convention determined that they would not cede private property protections to corporate expedience or financial gain. S.D. CONST. art. VI, § 13 requires just compensation for property taken "or damaged," a clause that has been interpreted as providing even greater protection of private property than the Fifth Amendment to the United States Constitution. *Benson v. State*, 2006 S.D. 8, ¶ 42, 710 N.W.2d 131, 146. Article VI, § 13 also prohibits consideration of benefits which may accrue to the landowner as a result of the improvement in determining just compensation. The right to have just compensation determined by a jury was adopted in S.D. CONST. art. XVII, § 18.

Article XVII, § 18 also expressly prohibits the Legislature from depriving any landowner of his or her right to appeal a preliminary assessment of damages to a jury. Landowners' Counsel is unable to identify another State constitution with such an explicit limitation on the Legislature's authority to restrict a jury trial in condemnation cases.

South Dakota's tradition of protecting private property rights from the encroachment of private interests is ensconced in our Constitution and has been guaranteed by this Court for over 130 years. These fundamental protections have not prevented railroads, power lines, gas and oil pipelines, and roads from being constructed here. Landowners respectfully request this Court intercede and "guard the rights of the people against the encroachments from such [corporate interests] as are capable of using

the state and the public in aid of their enterprises." 1 Dakota Constitutional Convention 296 (Doane Robinson ed., Huronite Prtg. Co. 1907).

Landowners understand deference is given to the constitutionality of a legislative enactment; however, the guiding principles of our Constitution and the recent United States Supreme Court holding in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) require that SDCL § 21-35-31 be found unconstitutional.

ARGUMENT

I. SDCL § 21-35-31 constitutes a *per se* physical taking of Landowners' right to exclude without just compensation or the right to trial by jury.

a. *Cedar Point* expanded the *per se* physical takings rule to include temporary invasions like those authorized by SDCL § 21-35-31.

Landowners agree *Cedar Point* was not about survey access. *Appellee Br. p. 8.* It was about much more – a landowners' right to use and enjoy their property to the exclusion of others. *Cedar Point* is broader than SCS acknowledges. It affirms the right to exclude as fundamental and directs that legislative or regulatory infringements upon that right, regardless of frequency or duration, are *per se* physical takings.

The Court's discussion and holding in *Cedar Point* address the paradox of analyzing temporary physical invasions as regulatory takings rather than physical ones. "We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right' that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*[.]" *Cedar Point*, 141 S. Ct. at 2077 (internal citation omitted).

Despite SCS' best attempts to mininze the holding in *Cedar Point*, it controls here. For context, the union organizer access regulation struck down as unconstitional in *Cedar Point* was far more limited in scope than § 21-35-31:

	Cedar Point **Unconstitutional Regulation**	**§ 21-35-31**
Limits as to the **frequency** of invasion & occupation?	YES	NO
Limits as to **duration** of invasion & occupation?	YES	NO
Limits as to **type of property** that can be invaded & occupied	YES; only commercial production agricultural land	NO
Limits as to **business disruption / inconvenience?**	YES; 1 hour before work; 1 hour during lunch; 1 hour after work	NO
Long-time Regulation/Statute?	40 years	NO; 2016

b. Background restrictions are derived from a State's legal tradition.

Among the narrow exceptions to the *per se* rule are "longstanding background restrictions on property rights" which include "common law privileges to access private property." *Id.* at 2066 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). The limited exceptions provided in *Cedar Point* (nuisance abatement, public or private necessity, and certain law enforcement) are drastically different than what SCS claims here. Determining which rights of entry constitute background restrictions requires an ad hoc inquiry into South Dakota's "constitutional culture" and "legal tradition." *Lucas*, 505 U.S. 1003, 112 S. Ct.

2886, 120 L. Ed. 2d 798 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606, 630, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001).

The essence of the background restriction exception is "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*,112 S. Ct. at 2900). The restriction must "inhere in the title itself." *Lucas*, 112 S. Ct. 112 at 2900. To do so, the restriction must comport with "citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property . . .." *Lucas*, 112 S.Ct. at 2888.

Pre-condemnation survey cannot meet these standards. SCS claims prospective condemnors have a common law right to enter private property for invasive survey and examination anywhere, at any time, for any duration, without notice. While SDCL § 21-35-31 imposes certain formalities like notice, the purported right of entry is derived from common law, not the statute. According to SCS, this right of entry is so engrained within our State's legal tradition that it is consistent "with citizen's historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Id.*

This narrow exception is as intuitive as the rule itself. When a citizen takes title to property, there is a common understanding that the bundle of sticks they have acquired does not allow them to exclude the government when entry upon private property is necessary to avert an imminent public disaster or avert serious harm to a person, land, or chattels. *Cedar Point*, 141 S. Ct. Similarly, landowners know they are not entitled to maintain a nuisance. But, no landowner expects that pre-condemnation surveys are a part

of South Dakota's legal tradition. The very notion of entry for pre-condemnation surveys without just compensation defies South Dakota's "constitutional culture."

c. South Dakota has no tradition of pre-condemnation survey.

SCS' reliance on cases and statutes from other jurisdictions cannot save its background principal theory. Background restrictions are derived from the "State's law of property" and "legal tradition." *Lucas,* 112 S.Ct. at 2900; *Palazzolo,* 121 S. Ct. at 2464. Each state has its own common law. "'The common law' is not a borderless body of legal principles, articulable by a court in any jurisdiction; rather each jurisdiction has its own common law." *15A Am. Jur. 2d Common Law § 3.* No South Dakota case even mentions pre-condemnation survey as a background principle.

A statutory right to pre-condemnation survey in South Dakota did not exist until 2016. Prior to that, there were a few statutes granting the right to various condemnors; however, "[a] law does not become a background principle for subsequent owners by enactment itself." *Palazzolo,* 121 S.Ct. at 2464. The earlier survey statutes have never been cited by this Court and there is no evidence they have ever been utilized.

SCS cites a single South Dakota appellate decision, *Fairmont & V. Ry. Co. v. Bethke*, 37 S.D. 446, 159 N.W. 56, 57 (1916), but that case does not apply. *Fairmont* concerned a railroad's attempt to abandon a taking after the jury had rendered a verdict on just compensation. The decision simply points out that the railroad surveyed the proposed land to be taken and dug test holes and that activity did not amount to a taking of the entire 31-acre tract. *Fairmont,* 159 N.W. at 58. There is no indication in the decision that any survey work by the railroad was conducted against the will of the owner

and there is no discussion of statutory or common law right to survey for pre-condemnation planning. *Fairmont* has no applicability here.

SCS references and the circuit courts relied heavily on the *Dakota Access* case. The *Dakota Access* opinion does not support SCS' arguments because it was issued prior to *Cedar Point*. Moreover, as Judge (now Justice) Salter stated, whether pre-condemnation surveys are ancillary to the power of eminent domain "raises a novel and unsettled question. . ." "which is not dispositively addressed by either a statute or binding decisional law." *Dakota Access, p. 15-16, SCS APPX 131-132.*

In the absence of binding South Dakota law or the instructions from *Cedar Point*, the court relied upon "the weight of authority from other jurisdictions" to find "that a pre-condemnation survey is not, itself, a taking." *Dakota Access, Pages 21 and 14.* Following *Cedar Point's* directive, we now know unauthorized invasion of private property is a *per se* physical taking, regardless of duration and degree of invasiveness.

Three unscrutinized and unused statutes are insufficient to establish a legal tradition. SCS' entry for pre-condemnation survey is a *per se* physical taking within the meaning of the Fifth Amendment. SDCL § 21-35-31 authorizes that taking without just compensation and without the right to a jury trial in direct violation of our state and federal constitutions. For those reasons, the statute must be invalidated.

II. SCS concedes subsurface examinations are not background restrictions.

There is inherent conflict between the privilege SCS is claiming, entry for surface survey, and what current law allows and what SCS proposes to do, embark on a course of destruction. SCS argues SDCL § 21-35-31 is "the latest codification of a longstanding common-law and statutory right to survey access in this State." *SCS Br. p. 13.* SCS cites

to a number of non-binding pre-*Cedar Point* sources in support of that proposition. But SCS is careful to extend its background restriction and common law argument only as far as above surface survey access, and it makes no assertion there is a background restriction or common law privilege to engage in the invasive and injurious activities it proposes.

There is no authority in this jurisdiction or elsewhere to support such a claim. Many of the nonauthoritative sources SCS relies upon say the opposite, and conclude subsurface activity including boring, digging, and trenching, are takings. ("Permissible entry 'cannot amount to other than such innocuous entry and ... examination as would suffice for the making of surveys or maps [or other similar purpose]." *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

Nichols on Eminent Domain specifically addresses the two activities enumerated in SDCL § 21-35-31, survey and examination. "Courts have typically defined a survey as the measurement of land. Invasive activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement.... [T]he right to make an examination or survey does not include the right to conduct archaeological digs... entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing." *Nichols*, § G32.06 (2021).

In *Dakota Access*, the court found survey and surface examination, akin to "walking" the land, were ancillary to the power of eminent domain, but it expressly declined to make the same determination for subsurface activity which "[gave] the court

pause because it contemplates a more invasive impact on individual property rights." *Dakota Access Dec.* at p. 14. Landowners acknowledge there is authority from other jurisdictions declaring a surface survey is ancillary to eminent domain power within those states; however, SCS cites no authoirity that treats subsurface activity that same way.

SCS scarcely even attepts to argue that its background principle theory applies to subsurface activity. That alone suggests that SCS exceeded the statutory limitations imposed by SDCL § 21-35-31. If this Court were to find that SDCL § 21-35-31 authorizes the subsurface activity SCS proposes, then the statute must be deemed facially unconstitutional for lack of any applicable exception to *per se* takings liability under *Cedar Point*.

SCS cannot have it both ways. Either SDCL § 21-35-31 is unconstitutional based upon its appropriation of the right to exclude or its authorization must be limited to minimally invasive above-ground survey and examination. Either outcome requires reversal of the trial courts.

III. SDCL § 21-35-31 violates S.D. CONST. art. XVII, § 18.

SCS does not address Landowners' claim that SDCL § 21-35-31 plainly and palpably violates S.D. CONST. art. XVII, § 18. Article XVII, § 18 is a unique constitutional provision with directives that extend beyond Art. VI, § 13 and the Fifth Amendment. The straightforward section requires corporations vested with the power of eminent domain to "make just compensation for property taken, injured, or destroyed, by construction or enlargement of their works, highways or improvements…" which shall be paid or secured in advance. S.D. CONST. art XVII, § 18. Importantly, the section states that "[t]he Legislature is hereby prohibited from depriving any person of an appeal from

any preliminary assessment of damages against any such corporation… and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases" *Id.*

The Legislature violated this express prohibition. SDCL § 21-35-31 authorizes corporations vested with the power of eminent domain to enter and examine private property in furtherance of their works or improvements. The statute permits the corporation to unilaterally fix the amount of payment it will either make or secure for "any actual damage done to the property by the entry." SDCL § 21-35-31(3). Notably absent from the statute are the requirements that a preliminary assessment of damages be made and that landowners be granted the opportunity to appeal that assessment to a jury.

SDCL § 21-35-31's constitutional deficiencies were also raised in the lower court proceedings when Landowners challenged SCS' bond. Landowners alleged SCS' bond was insufficient and requested discovery on that topic. No such discovery was provided. In the rush to summary judgment, the Courts deprived Landowners their constitutional right to question the amount. Despite SCS providing no evidence to support the bond's sufficiency, the trial court found SCS' letters stating they had obtained sufficient security to be adequate. (SR3 2259). The lower courts' premature dismissal of Landowners' attempt to challenge the preliminary assessment of compensation is just one, clear example of the SDCL 21-35-31's constitutional failure.

SCS appears to argue that damages cannot be assessed before completing surveys. *SCS br. p.18, fn. 9.* But temporary access and construction easements are valued as a matter of course in condemnation cases. If SCS is unsure, then it should make its best assessment and let the landowner appeal that to a jury, as S.D. CONST. art. XVII, § 18 requires.

Article XVII, § 18 is expressly designed to guard against corporate encroachments into private property rights. The Legislature's failure to abide by the section's precise language renders SDCL § 21-35-31 unconstitutional.

IV. SCS did not establish as a matter of law that it was a common carrier when material facts were clearly in dispute.

a. Under the Offtake Agreements, SCS will not operate its proposed pipeline as a "for hire" carrier.

Because eminent domain power accompanies common carrier status, a thorough review of the purported common carrier's proposed activities must be taken to ensure strict compliance with each element of common carriage. The trial courts' review fell well short of a thorough review, resulting in a premature entry of judgment with material facts in dispute.

The Offtake Agreements in the record demonstrate that SCS does not intend to transport a commodity for hire. Under SCS' Offtake Agreements, it would (a)

of the carbon dioxide acquired; (b) transport this carbon dioxide through its own pipeline to disposal sites in furtherance of its carbon management business that includes carbon capture, transportation, and storage; and (c) obtain a federal tax credit for the permanent disposal of CO2. (SR3 1693-1942)(SR5 2026-2275).

SCS is not transporting the carbon dioxide it acquires through the Offtake Agreements on a "for hire" basis,

While transporting carbon dioxide is a necessary element of its overall carbon disposal business, under the Offtake Agreements, SCS' primary business is

Further, no third party is for transporting carbon dioxide. Under SCS' and the trial courts' loose reading of the statute, ("SCS is shipping carbon dioxide, belonging to the ethanol plans [sic], for a fee" and "the nature of the payment or transfer of value is not relevant or determinative of the fact that a fee exists." (SR3 1276-1277), it's hard to imagine a pipeline that wouldn't qualify as a common carrier. But a closer look at the statute and case law shows SDCL § 49-7-11 is designed to ensure that common carrier pipelines are merely transportation conduits designed to serve the public indiscriminately, not private facilities built to primarily benefit the pipeline's owner.

SCS' crafty business model does not entitle the company to common carrier status under South Dakota law because SCS does not have a

"[O]ne performing transportation service for only oneself is not a common carrier." *13 Am. Jur. 2d Carriers § 5* (citing *Application of Harms*, 491 N.W.2d 760, 762 (S.D. 1992)) (Harms' dedication of his equipment to first serve his own needs and those of his customers is in contravention of a common carrier's duty to devote itself to public service without discrimination.).

b. SCS' unenforceable promises are insufficient to confer common carrier status.

Despite the Offtake Agreements demonstrating SCS has no intention of transporting anything for hire, the lower courts relied upon SCS' unenforceable affidavit statements of speculative future activity to grant common carrier status. Granting summary judgment with clearly disputed material facts was reversible error.

i. Open Season

SCS argues that its intent to "hold an open season during which it will publicly solicit binding commitments for interstate CO2 transportation services from interested customers," supports the proposition that it is a common carrier. *SCS br. p. 23.* Even if this self-serving and completely unsupported promise were true, more contracts by which at a CO2 emitting facility and transports product through a pipeline does not make it a common carrier. It would just make SCS a larger private carrier.

SCS argues that the *Dakota Access* decision supports its open season theory. But in *Dakota Access* the court found that Dakota Access had already held two binding open seasons in 2014 to solicit shipper commitments for the pipeline. *Dakota Access Decision, p. 4, SCS APPX 120.* SCS has not held an open season, and once they are granted permission to condemn private property as a common carrier, they will be under no state or federal regulatory obligation to hold an open season.

ii. Reserved Capacity

SCS' unenforceable promise to reserve capacity is another smoke and mirrors attempt at looking like a common carrier. SCS avers that it "is reserving pipeline capacity for uncommitted future shippers that may want to receive CO2 transportation services after the pipeline has begun operations." *SCS br. p. 23.* Landowners agree with SCS that "[r]eservation of pipeline capacity is another feature of a common carrier." *Id.*

What SCS leaves out of its argument is that reservation of capacity is also required by the Federal Energy Regulatory Commission (FERC) for common carriers. Actual common carriers (crude oil, natural gas, etc.) do not promise to reserve capacity, they are required by law to do so and there is an enforcement mechanism for non-

compliance. That protection doesn't exist against CO2 pipelines. Again, in *Dakota Access*, the court considered that "Dakota Access is also reserving 10% of the capacity of the Dakota Access Pipeline for allocation to walk-up shipments, in accordance with FERC's rules and regulations for common carrier crude oil pipelines." *Dakota Access Decision, p. 4, SCS APPX 120.* Without the regulatory backstop of FERC, only binding contractual obligations can demonstrate compliance with the reservation of capacity element of common carriage.

iii. Shipping for Others

Here, SCS goes beyond a promise to meet its obligation to ship commodities owned by third-parties, and suggests it has evidence outside the record to prove that it already is. SCS derides Landowners for "fixat[ing] on a handful of contracts" (*SCS br. p. 24*), but those are the only contracts SCS produced, despite discovery requests for any and all contracts or agreements related to the shipment of CO2. (SR3 1103)(SR5 1340). The "handful" provided are the only contracts in this appellate record. SCS now references these "34 third-party contracts" as if they are a part of the record ("Landowners fail to explain how an affiliate's taking of title to *some* of the CO2 that SCS is transporting under *some* contracts undermines SCS status as a common carrier.") (emphasis added) *SCS br. p. 28.* SCS has no evidence to back up its newly crafted strawman argument.

SCS understands that CO2 it will ship would be fatal to its common carrier status. That is why it represents to the Court there are other contracts that read differently but refused to provide them. Shipping product owned by third parties is essential for providing shipment services "to the public…" "for hire"

rather than providing merely private transportation services. SDCL § 49-7-11. SCS did not establish that it meets this statutory burden.

If SCS has contracts it claims support its common carrier status, then it would have submitted them to the record. SCS' reliance on purported contracts outside of the record to support its claim is precisely why summary judgment should be reversed and the case remanded for a meaningful discovery and analysis of SCS' alleged common carrier status.

c. There is no substantial evidence in the record to support that SCS' proposed pipeline would operate common carrier service.

SCS can state anything it wants on its website or in an affidavit, but once it achieves common carrier status in South Dakota, it has no state or federal regulatory burdens to comply with. For that reason alone, the trial courts should have provided a meaningful analysis of SCS' proposed carriage plans and consider the following factors before granting summary judgment.

First, the lack of federal or state commercial regulation of SCS' proposed pipeline system means that the trial courts could not rely on a legally enforceable common carrier status under federal or state law. Second, the Offtake Agreement structure is it is nothing like a fee-for-service transportation services agreement structure, much less a tariff. Third, under the Offtake Agreements, SCS would carbon transported, which makes a pipeline owner a private carrier. Fourth, in regards to SCS' purported intent to enter into conventional transportation service agreements third-party shippers, SCS has not executed any contracts with any potential shippers, making such commercial arrangements entirely speculative.

In these circumstances, there is a substantial likelihood that the proposed pipeline, if built, would serve only SCS, for its entire commercial life, and it would do so without any commercial regulation by any federal or state agency that could impress on it and enforce an obligation to operate as a common carrier.

The Offtake Agreements themselves undermine SCS as a common carrier. SCS' allegedly planned but unestablished services for hypothetical third-party shippers do not provide evidence confirming that the proposed pipeline would operate in common carrier service. The lower courts erred by conferring common carrier status, including the power of eminent domain, when facts were clearly in dispute. This case must be reversed for meaningful consideration of the common carrier question.

V. SCS' Motion to Dismiss should be dismissed because it provides no relevant authority to support its Motion.

SCS' claim that Landowners "chose" to disobey statute is completely meritless. *See SCS reply to its motion to dismiss p. 4.* SCS admits this court has jurisdiction over the *Helfenstein* case. SCS claims allowing the other consolidated Landowners into the appeal prejudices SCS by "significantly expand[ing] the scope of the appeal", but does not explain how. SCS has never experienced prejudice in this litigation. There was a timely filed appeal in the Fifth Circuit consolidated case. Landowner's Docketing Statement listed each of the consolidated cases. SCS' counsel was served with Landowners' Notice of Appeal and Docketing Statement. This Court has jurisdiction over the consolidated case.

SCS claims Landowners failed to address that its appeal did not designate the order appealed from. Plaintiff's appeal was entitled "Plaintiff's Petition for Appeal of

Summary Judgement". How much clearer can that be? Additionally, the "Relief Sought" makes it clear what is being appealed.

The Legislature could require electronic filing in each individual case that makes up a consolidated or jointly appealed case, but it has not. SCS cites no direct language in the statute and no authority supporting its claim that an appeal from a consolidated case or a joint appeal must be electronically filed *in each individual consolidated or jointly appealed case.*

SCS' motion is moot. The Court's ruling on the merits will apply equally to all landowners – present and future – not just the individual appellants in this case. Since SCS is not moving to dismiss the Third Circuit, the case will be heard on the merits. Therefore, SCS' motion is moot because its outcome "will have no practical legal effect upon an existing controversy." *Netter v. Netter*, 2019 S.D. 60, ¶ 9, 935 N.W.2d 789, 791 (quoting *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 14, 922 N.W.2d 784, 788).

CONCLUSION

Landowners respectfully request the Court find SCS is not a common carrier per SDCL § 49-7-11, reverse the trial courts, and invalidate SDCL § 21-35-31 because it effects a taking without just compensation in violation of the Fifth Amendment to the United States Constitution and Article VI, § 13 of the South Dakota Constitution and deprives Landowners of due process of law pursuant to the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution.

Appellants hereby request oral argument before this Honorable Court.

Dated this 23rd day of January, 2024.

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CERTIFICATE OF SERVICE

This is to verify that on the 23rd day of January 2024, I filed via Odyssey, a true and correct copy of the foregoing ***REPLY BRIEF OF APPELLANT LANDOWNERS*** and served via email the following attorneys:

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