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## This Land Is Not for Sale

Derrick Braaten

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## THIS LAND IS NOT FOR SALE

Derrick Braaten<sup>†</sup>

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## I. INTRODUCTION

In 2012, North Dakota surpassed every state except Texas in oil production.<sup>1</sup> It is common knowledge that the oil boom has flooded the state with money and allowed it to maintain impressive budget surpluses while other states in the nation saw distinct budget shortfalls.<sup>2</sup> There are, however, many negative impacts of the oil boom: farmers and ranchers dealing with the impacts of energy development are often frustrated by a distinct disparity between the talk of money flooding into the state, and what is perceived as a confusing parsimony when it comes to compensating landowners for land that is taken or damaged by the energy industry.<sup>3</sup>

This Article will provide background information regarding environmental damage caused by energy development,<sup>4</sup> and will consider the remedies available in North Dakota for landowners,

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1. Stephen J. Lee, *N.D. Becomes No. 2 Oil Producing State, Trailing Only Texas*, BAKKEN TODAY (May 16, 2012, 1:08 PM), <http://www.bakken.today.com/event/article/id/33956>.

2. See Dennis Cauchon, *North Dakota Economy Booms, Population Soars*, USA TODAY (Mar. 17, 2011, 5:59 PM), [http://usatoday30.usatoday.com/news/nation/census/2011-03-16-north-dakota-census\\_N.htm](http://usatoday30.usatoday.com/news/nation/census/2011-03-16-north-dakota-census_N.htm).

3. See, e.g., Deborah Sontag & Robert Gebeloff, *The Downside of the Boom*, N.Y. TIMES (Nov. 22, 2014), [http://www.nytimes.com/interactive/2014/11/23/us/north-dakota-oil-boom-downside.html?\\_r=0](http://www.nytimes.com/interactive/2014/11/23/us/north-dakota-oil-boom-downside.html?_r=0).

4. See *infra* Part II.

with comparisons to certain trends and remedies around the country.<sup>5</sup> Further, it will argue that the remedies generally available are in need of reconsideration, and that legal interpretations asserted by the energy industry are often erroneous, and more importantly, unnecessarily attempt to limit the recovery of landowners whose land has been taken or damaged for energy development.<sup>6</sup> The Article will focus on North Dakota law and cases, and the author's experience litigating on behalf of landowners in North Dakota.

## II. BACKGROUND

In 2014, the *New York Times* reported that “[f]or those who champion fossil fuels as the key to America’s energy independence, North Dakota is an unrivaled success.”<sup>7</sup> It also noted that “state leaders rarely mention the underside of the boom and do not release even summary statistics about environmental incidents and enforcement measures.”<sup>8</sup> Between April 1, 2010, and July 1, 2014, North Dakota’s population grew by 9.9 percent, three times the rate of the nation in general.<sup>9</sup> In recent years, North Dakota has had record budget surpluses while the rest of the nation has struggled.<sup>10</sup> The budget surplus in June of 2011 was \$996.8 million, which was the highest end-of-biennium balance in North Dakota’s history.<sup>11</sup>

But while North Dakota’s coffers have been full, not all North Dakotans have benefited equally from the oil boom. For the owners of the surface of the land, things do not always look as positive. According to one report, “more than 18.4 million gallons of oils and chemicals spilled, leaked or misted into the air, soil and waters of North Dakota from 2006 through early October 2014.”<sup>12</sup> Another more recent report in 2015 indicates that “the spill rate per well

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5. See *infra* Parts III–IV.

6. See *infra* Part V.

7. *Id.*

8. *Id.*

9. See *QuickFacts: North Dakota*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited May 12, 2016).

10. See N.D. OFFICE OF MGMT. & BUDGET, NORTH DAKOTA REV-E-NEWS (2011), <https://www.nd.gov/omb/sites/omb/files/documents/newsletters/201109news.pdf>.

11. *Id.*

12. Sontag & Gebeloff, *supra* note 3.

almost tripled between 2004 and 2013. On average, more than two gallons of this wastewater spill *per minute* in North Dakota.”<sup>13</sup> Kris Roberts, an inspector for the North Dakota Department of Health, told one reporter: “We have pipeline leaks, lightning strikes, leaks at oil well sites, we have illegal discharges by truckers who do not want to wait at saltwater disposal wells . . . . If there’s a way it can happen, it probably will.”<sup>14</sup> Dave Glatt is the head of the North Dakota Department of Health’s Environmental Health Section.<sup>15</sup> Mr. Glatt stated that wastewater spills are his “biggest worry.”<sup>16</sup> He said, “My concern is, if we don’t get a handle on this, if we don’t have appropriate remediation technologies, that we’ll have a landscape that is pockmarked with . . . dead zones.”<sup>17</sup>

North Dakota regulators have taken heat for their comfortable relationship with the oil industry and lack of enforcement.<sup>18</sup> Jeff Keller, a natural resource manager for the Army Corps of Engineers, when asked about enforcement by North Dakota state agencies, said “There’s no enforcement . . . . None.”<sup>19</sup>

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13. Emily Guerin, *In North Dakota, Oilfield Spill Problems Worsen*, INSIDE ENERGY (Jan. 28, 2015), <http://insideenergy.org/2015/01/28/in-north-dakota-oilfield-spill-problems-worsen>.

14. Emily Guerin, *Saltwater Spills Leave North Dakota Farmland Sterile for Years*, INSIDE ENERGY (Aug. 27, 2014), <http://insideenergy.org/2014/08/27/saltwater-spills-leave-north-dakota-farmland-sterile-for-years>.

15. *Department Overview: Environmental Health Section*, N.D. DEPT. HEALTH [hereinafter *Environmental Health Section*], <https://www.ndhealth.gov/DoH/Overview> (last visited May 12, 2016).

16. Guerin, *supra* note 13.

17. *Id.*

18. See Andrew Brown, *Landowners from the Oil Patch Believe State Is Bowing to Oil Companies, Threaten Litigation*, GRAND FORKS HERALD (Dec. 9, 2014), <http://www.grandforksherald.com/news-business/landowners-oil-patch-believe-state-bowing-oil-companies-threaten-litigation-3631135>; Emily Guerin, *State Officials Misrepresent North Dakota’s Spill Problem*, INSIDE ENERGY (Feb. 16, 2015), <http://insideenergy.org/2015/02/16/state-officials-misrepresent-north-dakotas-spill-problem>; Nicholas Kusnetz, *North Dakota’s Oil Boom Brings Damage Along with Prosperity*, PROPUBLICA (June 7, 2012, 9:47 AM), <http://www.propublica.org/article/the-other-fracking-north-dakotas-oil-boom-brings-damage-along-with-prosperity>; Deborah Sontag, *Where Oil and Politics Mix*, N.Y. TIMES (Nov. 23, 2014), <http://www.nytimes.com/interactive/2014/11/24/us/north-dakota-oil-boom-politics.html>; Tu-Uyen Tran, *North Dakota Gets D- in 2015 State Integrity Investigation*, WDAY6 (Nov. 11, 2015, 6:46 AM), <http://www.wday.com/news/3880422-north-dakota-gets-d-2015-state-integrity-investigation>.

19. Kusnetz, *supra* note 18.

Putting aside a lack of enforcement, landowners are often left in the lurch even if there is adequate enforcement of state regulations. Karl Rockeman is the Director of the North Dakota Department of Health's Division of Water Quality under the Environmental Health Section.<sup>20</sup> Mr. Rockeman responded to questions about whether the Department of Health's remediation standards protect landowners, and admitted under oath that "[t]he department recognizes that our standards are to protect water quality and that there may be subsequent damage, loss of productivity, [and] other damages to personal property that are outside of our scope of authority."<sup>21</sup> The Department of Health recently sent out notice of draft remediation guidelines that state explicitly: "In order to prevent loss of productivity on agricultural lands and subsequent private property damage, lower constituent levels may be needed. These levels should be negotiated between the landowner and responsible party and are not required by the [North Dakota Department of Health]."<sup>22</sup>

One of the most surprising aspects of the oil boom, however, is that so many of the negative impacts are borne by the owners of the surface lands, whose rights are trumped by those of the mineral owners.<sup>23</sup> From the use of eminent domain for oil pipelines to construction of well pads, there are several situations in which a surface owner has no right to say "no" to development, and is limited to the payment of damages.<sup>24</sup> As such, the way the legal system views and quantifies the types of damages due to the owners of the land's surface is crucial to developing oil and gas in a manner that is just and fair for those living on the land.<sup>25</sup>

It is the author's experience that too often damages to surface owners are limited by law, or at times, by the erroneous understandings and interpretations of the law advocated by the oil and gas industry.<sup>26</sup> For example, in some situations, North Dakota

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20. See *Environmental Health Section*, *supra* note 15.

21. Transcript of Rule 30(b)(6) Deposition of Karl Rockeman, *In re* Peterson v. Ballantyne Oil, No. 20130537 (N.D. Indus. Comm'n Jan. 20, 2015) (on file with author).

22. DIV. WATER QUALITY, N.D. DEP'T OF HEALTH, GUIDELINES FOR THE ASSESSMENT AND CLEANUP OF SALTWATER RELEASES (DRAFT) (2014) (on file with author).

23. See *infra* Parts III–IV.

24. See *infra* Parts III–IV.

25. See *infra* Part V.

26. See, e.g., 1-2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW

law caps damages to real estate at the fair market value of the land.<sup>27</sup> This leads to a certain mentality in the industry that destruction of land is acceptable, so long as market value is paid. Thus, an operator may spill saltwater on three acres of land, and if similar land previously sold for \$750 per acre, the operator simply offers \$2,250 and considers this fair. What the operator does not understand is that the land was not for sale, and worse, the land may be sterilized for decades, meaning the farmer will endure a loss of productive value that may exceed the fair market value of that land. The following sections of this Article will address some of the situations in which courts are tasked with determining the damages to surface owners, and it will discuss the positive and negative aspects of both current law and potential changes to current law.

### III. EMINENT DOMAIN: PROBLEMS AND SOLUTIONS RELATED TO JUST COMPENSATION

In eminent domain cases, it is always the situation that the landowner is having her land taken against her will. Traditional appraisal methodologies often result in a conclusion that there are no damages for certain purposes associated with energy development, such as electric transmission lines and oil and gas pipelines.<sup>28</sup> This creates an obvious conflict with the constitutional requirement that landowners receive “just compensation” for the taking of their land.<sup>29</sup>

The infrastructure necessary for oil and gas development was, to a great extent, underdeveloped in North Dakota when the boom got underway. Certain projects, such as Enbridge’s Sandpiper pipeline, Basin Electric Power Cooperative’s recent transmission line, and the proposed Dakota Access pipeline, are among the types of projects authorized by statute to take land by eminent domain under the power of the State.<sup>30</sup> While statutory authority

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§ 218 (2015).

27. See N.D. CENT. CODE ANN. § 32-03-09.1 (West, Westlaw through 2015 Reg. Sess. of the 64th Legis. Assemb.).

28. See, e.g., Thomas O. Jackson & Jennifer M. Pitts, *The Effects of Electric Transmission Lines on Property Values: A Literature Review*, 18 J. REAL EST. LITERATURE 239 (2010) (concluding that with use of paired sales analysis, transmission lines and pipelines often have little to no impact on market values).

29. See, e.g., N.D. CONST. art. I, § 16.

30. See N.D. CENT. CODE ANN. § 32-15-02 (Westlaw). For further description

exists for these projects to use eminent domain, that authority is not unassailable.<sup>31</sup> Landowners may challenge the use of eminent domain for these projects,<sup>32</sup> but most eminent domain cases will focus on the valuation of the property being taken.<sup>33</sup>

This valuation then becomes crucial to assuring that the landowner obtains an appropriate remedy for the taking.

A. *The Problem with Standard Appraisal Methodology*

North Dakota law requires that, “[a]s far as practicable, compensation must be assessed separately for property actually taken and for damages to that which is not taken.”<sup>34</sup> This analysis becomes difficult to apply in the situation of a partial taking for a

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of selected oil and gas development projects, see *Antelope Valley Station to Neset Transmission Project*, BASIN ELECTRIC POWER COOPERATIVE, <https://www.basinelectric.com/Projects/North-Dakota-Transmission/index.html> (last visited May 12, 2016); *Overview of the Dakota Access Pipeline*, ENERGY TRANSFER, <http://www.dapipelinefacts.com/about/overview.html> (last visited May 15, 2016); *Sandpiper Pipeline Project*, ENBRIDGE, <http://www.enbridge.com/SandpiperProject.aspx> (last visited May 15, 2016).

31. See, e.g., *Thompson v. Heineman*, 857 N.W.2d 731, 765 (N.D. 2015) (citing *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012)); *Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519, 523 (N.D. 1976) (“Where the existence or non-existence of public use is placed in issue, the determination, dependent as it is upon the facts and circumstances of the matter, is properly a judicial one.”); see also, e.g., *Cty. of Haw. v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615 (Haw. 2008); *Vinegar Bend Lumber Co. v. Oak Grove & G.R. Co.*, 43 So. 292, 294 (Miss. 1907) (“[W]henver an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.”); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331 (Pa. 2007); *Tex. Rice Land Partners*, 363 S.W.3d at 194–95 (remanding to trial court after holding that “[a] private enterprise cannot acquire unchallengeable condemnation power under [Texas law] merely by checking boxes on a one-page form and self-declaring its common-carrier status. Merely holding oneself out is insufficient under Texas law to thwart judicial review”).

32. See *supra* note 31.

33. See Paul W. Moomaw, *Fire Sale! The Admissibility of Evidence of Environmental Contamination to Determine Just Compensation in Washington Eminent Domain Proceedings*, 76 WASH. L. REV. 1221, 1225 (2001) (citing William B. Stoebuck, *Real Estate: Property Law*, in 17 WASHINGTON PRACTICE, § 9.1 (1995)) (“This portion of the proceeding tends to be the most hotly debated: the great majority of eminent domain cases focus upon the issue of the proper measure of just compensation.”).

34. N.D. CENT. CODE ANN. § 32-15-22(5) (Westlaw).

transmission line or pipeline. Responding to this potential confusion, the Supreme Court of North Dakota set forth a common valuation methodology in *Northern States Power Co. v. Effertz*:

[I]t would be simpler, less confusing, or in other words much more practicable to award compensation upon the basis of the damage done to [a] tract . . . to the remainder of the farm unit. The damage to the tract, whatever its size, would simply be the difference between its reasonable market value before the [damage] and its reasonable market value thereafter. Such an award would give the land owner full compensation without requiring the jury to make difficult, confusing and sometimes impossible computations.<sup>35</sup>

The determination of market value, however, is what creates the inadequacy with damages in these situations. The standard appraisal methodology, called the comparable sales approach, requires the appraiser to find sales of similar properties close in time to the subject property and assess the value based on those sales.<sup>36</sup> Combining this with the methodology described in the *Effertz* case, the methodology is to determine the loss in market value based on sales *without* a similar encumbrance and reduce it based on the market value of sales of similar land *with* a similar encumbrance.

The problem with this methodology becomes clear when real estate appraisers start offering opinions in eminent domain cases. The standard appraisal methodology often results in a landowner receiving little more than nominal compensation, if that.<sup>37</sup> Many appraisers come to the conclusion that there is no impact on the value of the land.<sup>38</sup> There are, however, other effective ways for landowners to present evidence regarding the just compensation they are due when their land is taken, such as offering testimony of compensation paid for easements similar to those being taken via eminent domain.<sup>39</sup>

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35. *N. States Power Co. v. Effertz*, 94 N.W.2d 288, 294 (N.D. 1958).

36. *See, e.g.*, 60 AM.JUR. *Trials* § 27 (1996).

37. *See, e.g.*, Jackson & Pitts, *supra* note 28, at 258 (concluding that, with use of paired sales analysis, transmission lines and pipelines often have little to no impact on market values).

38. *Id.*

39. *See infra* Part III.

Wyoming is one state that has addressed valuation issues explicitly through its eminent domain laws. Under Wyoming law:

- (i) The fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy;
- (ii) The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable;
- (iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:
  - (A) The value determined by appraisal of the property performed by a certified appraiser;
  - (B) *The price paid for other comparable easements or leases of comparable type, size and location on the same or similar property;*
  - (C) *Values paid for transactions of comparable type, size and location by other public or private entities in arms length transactions for comparable transactions on the same or similar property.*<sup>40</sup>

Commenting specifically on the provision that allows for evidence of comparable easements, the Supreme Court of Wyoming recognized:

[I]n some cases a partial taking may not reduce the value of the remaining property, at least according to some generally accepted appraisal techniques. By offering an alternative method for measuring just compensation when there is a partial taking which does not result in a reduction in value of the remaining property, the legislature assured a property owner would at least receive compensation for the value of the land taken.<sup>41</sup>

While North Dakota's eminent domain laws are not as specific as Wyoming's, they do allow for the same type of evidence.<sup>42</sup> North Dakota law states, *inter alia*, that

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40. WYO. STAT. ANN. § 1-26-704 (West, Westlaw through 2015 Gen. Sess.) (emphasis added).

41. *Barlow Ranch, Ltd. P'ship v. Greencore Pipeline Co.*, 301 P.3d 75, 84–85 (2013).

42. *Compare* WYO. STAT. ANN. § 1-26-704 (Westlaw), *with* N.D. CENT. CODE ANN. § 32-15-22 (West, Westlaw through 2015 Reg. Sess. of the 64th Legis. Assemb.).

[t]he jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess[] the value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein. If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.<sup>43</sup>

An easement can be construed as “the . . . property sought to be condemned” and can also be subsumed by the language referring to “each estate and interest therein.”<sup>44</sup> North Dakota’s pattern jury instruction for damage valuation in an eminent domain case provides additional support for this position. It states that “[j]ust compensation for the property actually taken is the fair market value of that property . . . .”<sup>45</sup> “‘Fair market value’ is the highest price for which the property can be sold in the open market by a willing seller to a willing purchaser, neither party acting under compulsion and both exercising reasonable judgment.”<sup>46</sup> Wyoming, for example, has recognized in its statutes that the fair market value of other similar easements is one of the best indicators of the fair market value of an easement being taken through eminent domain proceedings.<sup>47</sup> The pattern jury instruction from North Dakota also makes it clear that “[t]he determination of value in a condemnation proceeding is not a matter of a formula or artificial rules, but of sound judgment and discretion based upon [the juror’s] consideration of all the relevant facts in a particular case.”<sup>48</sup>

Despite the language in North Dakota’s law and that of the pattern jury instruction, the author’s experience is that operators will argue that other easements are not competent evidence.<sup>49</sup> While these arguments have not always prevailed,<sup>50</sup> it would be

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43. N.D. CENT. CODE ANN. § 32-15-22(1) (Westlaw).

44. *Id.*

45. STATE BAR ASS’N OF N.D., NORTH DAKOTA PATTERN JURY INSTRUCTIONS no. 75.05 (2014) [hereinafter N.D. JURY INSTRUCTIONS], <https://www.sband.org/UserFiles/files/pdfs/patternjuryinstruction/2014PatternJuryCivl.pdf>.

46. *Id.*

47. *See, e.g.*, WYO. STAT. ANN. § 1-26-704(a) (iii) (B) (Westlaw).

48. N.D. JURY INSTRUCTIONS, *supra* note 45, at no. 75.05.

49. *See infra* notes 56–59, 77–82 and accompanying text.

50. *See infra* Section III.B. In the *Basin Electric v. Wayne Hauge* proceedings,

beneficial for landowners if the North Dakota Legislative Assembly amended its eminent domain laws in the explicit manner that was accomplished in Wyoming. The Wyoming statute recognizes what many would consider common sense: If you want to know that market value of an easement being taken by eminent domain, the best evidence is consideration of other similar easements actually bought on the open market.

*B. Evidentiary Challenges to Eminent Domain Valuations: The Story of Botsford and Basin Electric Power Cooperative*

Specific examples of evidentiary challenges by condemners illuminate why it is helpful for eminent domain valuation laws to be as explicit as in Wyoming.

*1. North Dakota Pipeline Company v. James and Krista Botsford: Under North Dakota Law, Easement Offers from the Condemnor Should Be Admissible*

In a recent high-profile case in North Dakota, *North Dakota Pipeline Co., LLC v. Botsford*, the North Dakota Pipeline Company (NDPC) sought to condemn an easement over the Botsfords' property for an oil pipeline.<sup>51</sup> The dispute arose from the Botsfords' refusal to grant an easement over their land for NDPC's Sandpiper pipeline.<sup>52</sup>

According to one report, the Botsfords refused to grant the easement because they "did not want to participate in a private enterprise that would increase global warming and threaten the lives of [their] heirs. This was a moral imperative . . ."<sup>53</sup> After Mr. Botsford suggested to a company representative that they go around his property, he said that the representative responded,

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Judge Rustad allowed evidence of other easements to come into evidence. *See infra* notes 73–77 and accompanying text.

51. N.D. Pipeline Co. LLC v. Botsford et al., No. 18-2014-CV-01058 (N.D. Dist. Ct. Dec. 23, 2015), *cert. granted*, No. 20160017 (N.D. Jan. 1, 2016).

52. NDPC is a joint venture between Enbridge Energy Partners, L.P. and Williston Basin Pipe Line LLC, an indirect subsidiary of Marathon Petroleum Corporation. *See Sandpaper Pipeline Project*, ENBRIDGE, <http://www.enbridge.com/SandpaperProject.aspx> (last visited Apr. 26, 2016); *see also* Georgianne Nienaber, *Farmer Won't Sell Easement So Enbridge Oil Is Suing*, HUFFINGTON POST (Aug. 8, 2015, 8:27 PM), [http://www.huffingtonpost.com/georgianne-nienaber/farmer-wont-sell-family-f\\_b\\_7960084.html](http://www.huffingtonpost.com/georgianne-nienaber/farmer-wont-sell-family-f_b_7960084.html).

53. Nienaber, *supra* note 52.

“Enbridge [doesn’t] go around anything—they go through it.”<sup>54</sup> In the end, NDPC was granted the right to exercise eminent domain and a trial was held on the issue of just compensation.<sup>55</sup>

NDPC had made an offer to the Botsfords for the easement and the Botsfords sought to introduce the offer at trial.<sup>56</sup> NDPC argued that its offer for the easement should be excluded as evidence under rule 408 of the North Dakota Rules of Evidence,<sup>57</sup> which prohibits introduction of offers of compromise as evidence.<sup>58</sup> NDPC argued as follows:

Evidence of pre-condemnation offers is not admissible to prove just compensation at trial. North Dakota Rule of Evidence 408, subdivision (a)(1), bars evidence that a party offered “valuable consideration in . . . attempting to compromise” a claim, if the evidence is offered “to prove . . . the amount of a disputed claim.” Similarly, “conduct [and] statement[s] made during compromise negotiations” cannot be offered to prove or disprove the validity of an amount in controversy. “The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties.” It reflects a determination that “open and effective discussions of compromise” are only possible where “the parties know in advance that they will not jeopardize their case by fully

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54. *Id.*

55. *See Botsford*, No. 18-2014-CV-01058.

56. *Id.*

57. North Dakota Rule of Evidence 408 states:

(a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

N.D. R. EVID. 408.

58. *See Botsford*, No. 18-2014-CV-01058.

discussing all aspects of a claim.” NDPC’s pre-litigation offer was intended to obtain an easement in the Botsfords fee property without resorting to litigation. The declarations contained in the offer constitute “conduct” and “statements” made during compromise negotiations; they are, therefore, inadmissible. Furthermore, under North Dakota law, offers of compromise made before the filing of an action are still barred by Rule 408. Therefore, it is of no legal consequence that the offer predated initiation of the condemnation proceedings.<sup>59</sup>

The Botsfords responded, arguing that NDPC’s offer to the Botsfords is not an “offer to compromise” that is covered by Rule 408.<sup>60</sup> Although NDPC referred to its offer as an “offer to compromise,” it failed to address the specifics of the actual offer, as well as the specific legal context in which the offer was made, both of which show that it was not, indeed, an offer to compromise.

It is illuminating to examine the actual easement offer that NDPC sought to exclude. It stated: “NDPL hereby offers to you the amount of Thirty Eight Thousand Sixty Two dollars (\$38,062.00) as full monetary *compensation* for the easement and workspace *land value*.”<sup>61</sup> The offer also indicates that it is an “offer to *purchase an easement*.”<sup>62</sup> On the third page of the offer, it lists the documents enclosed, one of which is titled “Grand Forks County Market Analysis Summary.”<sup>63</sup> Below the listed item, it explains, “This Market Analysis Summary is enclosed *to support the valuation as it was applied to your property*, and is for your review.”<sup>64</sup>

NDPC cited to *McCormick on Evidence*, section 274, in support of its position, but in its argument it left out a much more important and pertinent part of the discussion from that treatise. As stated in that treatise:

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59. *Id.*; Plaintiff’s Motion in Limine to Exclude Evidence, *Botsford*, No. 18-2014-CV-01058, Doc No. 106 (on file with the author) (internal citations and quotations omitted); Brief in Support of Plaintiff’s Motion in Limine, *Botsford*, No. 18-2014-CV-01058, Doc No. 107 (on file with the author) (internal citations and quotations omitted).

60. *See* Defendant’s Response to Plaintiff’s Motion in Limine, *Botsford*, No. 18-2014-CV-01058, Doc No. 109 (on file with author).

61. *See* Exhibit A to Affidavit of Derrick Braaten, *Botsford*, No. 18-2014-CV-01058, Doc No. 111 [hereinafter Exhibit A] (on file with the author) (emphasis added).

62. *See id.* (emphasis added).

63. *Id.*

64. *Id.* (emphasis added).

To call into play the exclusionary rule, there must be an actual dispute, or at least an apparent difference of view between the parties as to the validity or amount of the claim. An offer to pay an admitted claim is not privileged. There is no policy of encouraging compromises of undisputed claims. They should be paid in full.<sup>65</sup>

There was no question that NDPC was required to pay just compensation to the Botsfords in the condemnation proceeding.<sup>66</sup> The fact that the Botsfords were attempting to submit NDPC's offer as evidence makes it clear that the Botsfords did not dispute that the amount offered was sufficient to evidence just compensation for the easement. Therefore, the claim was undisputed, and should have been paid in full as per NDPC's offer of just compensation, and the exclusionary rule cited by NDPC is inapplicable.

Further, the mandate of North Dakota Century Code section 32-15-06.1 cannot be ignored. This section first requires the following: "Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established."<sup>67</sup> Additionally, "[t]he condemnor shall provide the owner of the property with . . . a written statement and summary, showing the basis for the amount it established as just compensation for the property."<sup>68</sup> NDPC's offer indicated that it was intended to comply with this mandate.<sup>69</sup> After indicating the amount of the offer, NDPC explained that "[t]he enclosed Calculation Sheet and Statement of Value and Summary explain how this amount was determined."<sup>70</sup> Included with the offer was NDPC's "Grand Forks County Market Analysis Summary," which NDPC explained to the Botsfords was a "Market Analysis Summary . . . [which] support[s] the valuation as it was applied to your

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65. MCCORMICK ON EVIDENCE § 274 (2d ed. 1972); *accord* MCCORMICK ON EVIDENCE § 266 (7th ed. 2013).

66. *See* N.D. CONST. art. I, § 16 ("Private property shall not be taken or damaged for public use without just compensation having been first made to . . . the owner.").

67. N.D. CENT. CODE ANN. § 32-15-06.1(2) (West, Westlaw through 2015 Reg. Sess. of the 64th Legis. Assemb.).

68. *Id.* § 32-15-06.1(4).

69. *See* Exhibit A, *supra* note 61.

70. *Id.*

property . . . .”<sup>71</sup> As is required by section 32-15-06.1(2), NDPC established through its analysis what it believed to be “just compensation,” and then forwarded this offer to the Botsfords. Therefore, there was no better evidence of “[t]he value of the property sought to be condemned”<sup>72</sup>—in this case, an easement over the Botsford’s land.

The requirement that a condemnor determine what it believes to be “just compensation” should not be an idle act. If a condemnor follows the dictate of this law, then there is no question that its original offer based on its determination should be the floor for establishing just compensation for the taking.

2. Basin Electric Power Cooperative v. Wayne Hauge:  
*Easement Offers from Third Parties Should Be Admissible*

a. *Easement Offers Are Competent Evidence of Market Value*

Another challenge to traditional appraisal methodology in North Dakota recently came in *Basin Electric Power Cooperative v. Wayne Hauge*.<sup>73</sup> Basin Electric Power Cooperative (Basin) filed an action to condemn an easement for an electric transmission line across Mr. Hauge’s property.<sup>74</sup> Mr. Hauge’s resistance to the taking was based on the fact that the land over which Basin wanted an easement was his family’s homestead, and he had made a decision to never allow another easement on that land.<sup>75</sup> Nonetheless, Basin was allowed to take an easement via eminent domain authority, and Mr. Hauge found himself at a trial regarding just compensation for the taking.<sup>76</sup> One of the issues at the trial, however, was whether Mr. Hauge could offer testimony regarding other easements he had negotiated on his land.<sup>77</sup> As was argued, no one knows the land better than the landowner himself.<sup>78</sup>

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71. *Id.*

72. *See* N.D. CENT. CODE ANN. § 32-15-22(1) (Westlaw).

73. No. 53-2014-CV-00695 (N.D. Dist. Ct. Feb. 9, 2016) (on file with author).

74. *Id.*

75. *Id.*; *see also* Derrick Braaten, *AgVocate: Our Land Is Not for Sale*, AGWEEK (Dec. 9, 2015, 8:00 AM), <http://www.agweek.com/columns/derrick-braaten/3898104-agvocate-our-land-not-sale>.

76. *Hauge*, No. 53-2014-CV-00695.

77. *Id.*

78. *Id.*

Mr. Hauge intended to submit other easement offers as evidence of the market value for the easement Basin sought to take, and Basin objected that in the other transactions, the company buying the pipeline easement was not a “willing buyer.”<sup>79</sup> The court allowed Mr. Hauge to testify as to the value of the other easements, and Basin was allowed to cross-examine and produce its own evidence in rebuttal.<sup>80</sup> An appraiser hired by Basin testified that when a company is seeking an easement for a pipeline or transmission line route, the company is limited to a linear corridor and therefore is not a willing buyer.<sup>81</sup> On cross-examination, however, the appraiser admitted that the company was the one who chose the route, and was able to deviate from the route if it so chose.<sup>82</sup> In the end, the issue of whether a company in another transaction was or was not a willing buyer is a fact issue, the determination of which should be made by the fact-finder.

*b. Landowner Testimony Regarding Market Value Is Subject to Cross-Examination, But Should Not Be Excluded Based on Foundation*

Landowners are given significant latitude in North Dakota to testify on the issue of valuation of real property. “The general rule is that an owner of property may testify without qualification other than the fact of ownership as to its value.”<sup>83</sup> This rule holds true not only in North Dakota, but in numerous other jurisdictions.<sup>84</sup> This is an exception to the rule that lay witnesses typically may not offer opinion testimony.<sup>85</sup> While not controlling precedent in all jurisdictions, in response to the apparent concerns of condemners who might object to such lay opinion testimony, the Supreme

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79. *Id.* The proceedings were held on record in the chambers of Judge Joshua B. Rustad.

80. *Id.*

81. *Id.* (citing the testimony of Joe Ibach in open court).

82. *Id.*

83. *Pfliger v. Peavey Co.*, 310 N.W.2d 742, 747 (N.D. 1981).

84. *See, e.g.*, 3 FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 16:17 (3d ed. 2015) (detailing cases from numerous jurisdictions where such opinion testimony was allowed).

85. *See generally* J.E. Macy, Annotation, *Competency of a Witness to Give Expert Opinion Testimony as to Value of Real Property*, 159 A.L.R. 7 (1946); *see also* N.D. R. EVID. 701. Other jurisdictions’ Rule 701 also regulate opinion testimony by lay witnesses. *See, e.g.*, FED. R. CIV. P. 701; MINN. R. EVID. 701.

Court of Arkansas offered a helpful and concise explanation of the rule:

Of course, such opinion testimony, either by the landowner or his value witnesses, may be stricken on motion if there is no fair or logical basis for its support. Once the landowner or his qualified expert witness has expressed into evidence his opinion as to fair market values, the burden then shifts to the condemner to show by cross-examination that the landowner or the witnesses has no logical basis to support his opinion before such testimony is subject to being stricken from the record on motion. If on cross-examination, the condemner is unable to draw from the landowner or his expert witness more than a weak or questionable basis for his opinion, that fact has a bearing on the weight to be given the testimony by the jury,<sup>86</sup> and the testimony should not be stricken on motion.

The Supreme Court of North Dakota has stated that the “liberal rule that permits an owner to testify concerning the value of his property is based upon a presumed familiarity with the subject, acquired from having purchased it or from having gained a knowledge in some other way, sufficient to qualify him.”<sup>87</sup>

*C. Courts Should Continue Liberally Applying the Landowner Testimony Rule Based Upon the Landowner’s Presumed Familiarity with the Land and Its Value*

Although North Dakota and other jurisdictions have liberal rules that allow landowners to testify as to the value of their own property, there will always be condemners and other parties who will attempt to restrict that testimony as much as possible, as exemplified by the arguments made by NDPC and Basin. As the Wyoming Legislature explicitly recognized, however, there are times when the typical appraisal methodology of looking at the parcel of land before and after the hypothetical easement results in nominal or no compensation for the landowner.<sup>88</sup> Indeed, North

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86. Ark. State Highway Comm’n v. Jones, 505 S.W.2d 210, 211–12 (Ark. 1974) (citations omitted).

87. Alm Constr. Co. v. Vertin, 118 N.W.2d 737, 748 (N.D. 1962) (internal quotations omitted).

88. See N. States Power Co. v. Effertz, 94 N.W.2d 288, 294 (N.D. 1958); 60 AM. JUR. Trials, *supra* note 36.

Dakota's Constitution, like many other state constitutions, states that "[p]rivate property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner . . . ."<sup>89</sup> It is simply not possible for just compensation to be "first made to [the landowner] or paid into court" if the condemnor's appraiser is correct that there is no loss to the value of the land, and therefore no payment whatsoever to make to the landowner or deposit with the court. As such, the courts need to recognize a liberal rule allowing landowners to testify, especially considering that the landowners are typically being sued by large entities who can afford to hire expensive appraisers, which was the case in *Basin Electric*.

#### IV. DAMAGES TO REAL ESTATE: PROBLEMS AND SOLUTIONS RELATED TO ADEQUATE COMPENSATION FOR DAMAGES ARISING FROM OIL AND GAS DEVELOPMENT

There are also problems with valuation of damages to real estate outside of the eminent domain context, specifically because the concept of diminution in market value is still pertinent to these valuations. Although there is a separate body of case law and different laws that apply, the energy industry applies the same reasoning to the damage it causes outside of the context of eminent domain.

In North Dakota and in some other states, practitioners in the oil and gas industry typically distinguish between expected damages from construction of well pads and access roads, and other unanticipated damages from, for example, oil and saltwater spills.<sup>90</sup> As will be explained, oil and gas operators typically have certain rights to use of the surface, and that use only gives rise to damages when a statute creates the right for damages.<sup>91</sup> On the other hand, if the use of the land goes beyond the rights of the operator to use

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89. N.D. CONST. art. I, § 16.

90. See generally *Kartch v. EOG Res., Inc.*, No. 4:10-cv-014, 2010 WL 4260103, at \*1 (D.N.D. Oct. 22, 2010). The court in this case explained that prior to adoption of the compensation statute, surface owners did not have an accepted right to compensation for reasonable use of the surface. *Id.* at \*2. The implied conclusion as recognized by other courts is that a use beyond that which is reasonably necessary will give rise to an action for damages. See *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

91. *Kartch*, 2010 WL 4260103, at \*1.

the surface for production, such as with a spill, then common law actions are available.<sup>92</sup>

A. *The Split Estate and the Implied Easement*

To understand the interplay between these different categories of damages and corresponding rights, it is necessary to understand the nature of the split estate. A split estate refers to a situation in which the owner of the surface of land is different than the owner of the minerals.<sup>93</sup> The mineral estate is dominant over the surface estate, and the mineral estate affords its owner an implied servitude for access to and use of the surface estate.<sup>94</sup> Additionally, the granting of an oil and gas lease by a mineral owner gives the lessee under such a lease these same rights.<sup>95</sup>

Whether the express uses are set out or not, the mere granting of the lease creates and vests in the lessee the dominant estate in the surface of the land for the purposes of the lease; by implication it grants the lessee the use of the surface to the extent necessary to a full enjoyment of the grant.<sup>96</sup>

Landowners in North Dakota and their attorneys are faced with myriad issues when the fee simple absolute estate is severed, particularly with respect to minerals such as oil and gas. The fee simple estate can be split by a reservation of minerals in a deed or other conveyance, or by a grant of any or all of the minerals underlying the surface estate.<sup>97</sup> “Minerals in place are land, and may be conveyed as other lands are conveyed.”<sup>98</sup> “After severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance.”<sup>99</sup>

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92. *Id.*

93. For further explanation of the split estate, see *Split Estate*, BUREAU LAND MGMT., [http://www.blm.gov/wo/st/en/prog/energy/oil\\_and\\_gas/best\\_management\\_practices/split\\_estate.html](http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/split_estate.html) (last visited May 15, 2016).

94. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979) (“[T]he surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate.”); *see also* *Christina v. Emineth*, 212 N.W.2d 543, 550 (N.D. 1973) (describing the attendant rights of the owner of a surface estate and those of a mineral owner).

95. *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 834 (N.D. 1969).

96. *Id.*

97. *See* *Beulah Coal Mining Co. v. Heihn*, 180 N.W. 787, 789 (N.D. 1920).

98. *Id.*

99. *Bilby v. Wire*, 77 N.W.2d 882, 886 (N.D. 1956) (internal quotations

Different strata and different minerals may be severed separately.<sup>100</sup> The most common situation in the North Dakota oil patch is a split estate involving one person who owns the surface estate, and one or more others who own the mineral rights underlying that surface estate.<sup>101</sup> Landowners and their lawyers must understand the basic rights that belong to the owner of the surface estate and the owner of the mineral estate.

The rights granted to the dominant estate owner are limited: “[T]he rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are [r]easonably necessary to explore, develop, and transport the materials.”<sup>102</sup>

In *Getty Oil Co. v. Jones*, the seminal case regarding the rights of the mineral owner in a split estate situation, the Texas Supreme Court explained the concept of due regard, and adopted what has come to be known as the “accommodation doctrine.”<sup>103</sup> Essentially, the accommodation doctrine requires due regard for the surface

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omitted).

100. See, e.g., *Beulah Coal Mining*, 180 N.W. at 787.

101. See, e.g., *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979); *Beulah Coal Mining*, 180 N.W. at 787.

102. *Hunt Oil Co.*, 283 N.W.2d at 135; see also *Union Producing Co. v. Pittman*, 146 So.2d 553, 555 (Miss. 1962) (citation omitted) (“[A] grant or reservation of mines or minerals gives to the mineral owner the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.”). According to the *Union Producing* court:

[T]he question of what is a reasonable use of the premises is a question of fact, and although the drilling operator may use as much of the surface as may be reasonably necessary, he cannot be unreasonable in the use of such land, nor oppressive or capricious in its use. The owner of the minerals may do what is reasonably necessary to recover minerals, but the mineral owner or agent is not the final judge as to what is reasonably necessary. This is a question of fact for the determination of the jury.

*Union Producing Co.*, 146 So.2d at 555–56; see also *Hunt Oil Co.*, 283 N.W.2d at 137 (citations omitted) (“Whether or not the use of the surface estate by the mineral estate owner is reasonably necessary is a question of fact for the trier of facts.”). Further informing the determination of reasonable use of the surface is “the concept that the owner of the mineral estate must have due regard for the rights of the surface owner and is required to exercise that degree of care and use which is a just consideration for the rights of the surface owner.” *Hunt Oil Co.*, 283 N.W.2d at 135 (citations omitted).

103. 470 S.W.2d at 622–23; see also WILLIAMS & MEYERS, *supra* note 26.

owner and his use of the property.<sup>104</sup> While the mineral owner may have the right to do what is reasonably necessary to obtain production of the minerals, if there are alternatives available to the mineral developer, some of which harm the surface use, and some which do not, the mineral developer generally must utilize the alternative that does not disrupt the surface use.<sup>105</sup>

Jurisdictions vary in the degree to which they apply the concept of “due regard” or “reasonable accommodation,” more frequently known as the “accommodation doctrine.” Prior to the Texas Supreme Court’s decision in *Getty Oil*, Texas followed the unidimensional “reasonably necessary” test.<sup>106</sup> Many states, including North Dakota, have now adopted the accommodation doctrine.<sup>107</sup> A closer look at the language in *Hunt Oil* helps shed light on the position North Dakota has taken regarding the accommodation doctrine:

We agree a *pure* balancing test is not involved under the accommodation doctrine where no reasonable alternatives are available. *Where alternatives do exist*, however, the concepts of due regard and reasonable necessity *do require a weighing of the different alternatives against the inconveniences to the surface owner*. Therefore, once alternatives are shown to exist a balancing of the mineral and surface owner’s interest does occur.<sup>108</sup>

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104. 470 S.W.2d at 622.

105. *Id.* (internal citations omitted) (“The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. And there may be necessitous temporary use governed by the same principle. But under the circumstances indicated here (i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired) and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”).

106. See WILLIAMS & MEYERS, *supra* note 26 (“Excessive user has been found by reason of . . . occupation of more of the surface than was reasonably necessary for the full enjoyment of the minerals . . .” (citation omitted)).

107. *Id.*; see also *Hunt Oil Co.*, 283 N.W.2d 131 at 137 (applying the accommodation doctrine).

108. *Hunt Oil Co.*, 283 N.W.2d 131 at 137 (citing *Getty Oil Co.*, 470 S.W.2d at 623) (emphasis added). The court also noted:

It is important to note that the Texas Supreme Court in *Getty*

Thus, the North Dakota Supreme Court agreed with Texas insofar as it did not adopt a *pure* balancing test, but it went further than the *Getty Oil* court. Specifically, the court held by that, where alternatives exist, there *is* a balancing that takes place between the potential alternatives to the developer and the inconveniences to the surface owner.<sup>109</sup>

*B. Damages Arising from Well Site and Infrastructure Development*

*1. Compensation Statutes and North Dakota's Surface Damages Act*

Pursuant to the common law discussed above, there was also no legal requirement for a mineral developer to pay damages to the surface owner if its use of the surface fell within its rights under the implied easement. Prior to the adoption of certain statutes in many of the oil-producing states, “[t]he rights of the surface owner were perceived as being limited to seeking relief in tort if the mineral owners [sic] use of the surface was unreasonable or negligent.”<sup>110</sup>

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concluded the accommodation doctrine is not a balancing type test weighing the harm or inconvenience to the owner of one type of interest against the benefit to the other. Rather the court said the test is the availability of alternative non-conflicting uses of the two types of owners. Inconvenience to the surface owner is not the controlling element where no reasonable alternatives are available to the mineral owner or lessee. The surface owner must show that under the circumstances, the use of the surface under attack is not reasonably necessary.

*Id.*

109. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997).

The fact that neither the surface owner nor the severed mineral rights holder has any absolute right to exclude the other from the surface may create tension between competing surface uses. “The broad principle by which these tensions are to be resolved is that each owner must have due regard for the rights of the other in making use of the estate in question.” This “due regard” concept requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate.

*Id.* (citing *Grynberg v. City of Northglenn*, 739 P.2d 230, 234 (Colo. 1987))

110. Order Denying Motion to Strike Jury Demand, *Kartch v. EOG Res., Inc.*, No. 4:10-cv-014 (D.N.D. Oct. 22, 2010), 2010 WL 4260103 at \*2 (citing *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 554–56, 555 n.3 (8th Cir. 1984); *Hunt Oil Co.*, 283 N.W.2d at 135 n.4).

Due to the perceived inequities of this situation, many states have passed surface damage compensation acts requiring compensation even if the mineral owner has an implied easement or an express lease. North Dakota passed the Oil and Gas Production Damage Compensation Act (Surface Damage Act), which provided, *inter alia*, a requirement that mineral developers compensate surface estate owners for damage arising from construction of well pads and access roads.<sup>111</sup> The “purpose of [the Surface Damage Act] is to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals.”<sup>112</sup> The primary provisions of the Surface Damage Act provide various requirements for mineral developers to apprise surface owners of anticipated activities, and most importantly, to pay damages for damage to the surface estate arising from drilling and production operations.<sup>113</sup>

Although litigation in the state district courts is frequent, there are only a handful of reported decisions on the Surface Damage Act in North Dakota. One case brought pursuant to this statute, *Kartch v. EOG Resources, Inc.*, was the subject of a summary judgment decision in the U.S. District Court for the District of North Dakota.<sup>114</sup> The court ruled on several damage items in a manner inconsistent with the intent and purpose of the Surface Damage Act.

In *Kartch*, the court considered claims for “(1) excessive noise; (2) contamination of soil and water; (3) diminished air quality, use of flare, and excessive odors; (4) excessive litter; and (5) storage of unnecessary equipment.”<sup>115</sup>

With respect to the excessive noise, the surface owner testified:  
I can hear that generator running in my home with the windows closed. I can hear that generator running virtually—I can hear the generator running from every corner of any piece of property I own there. It appears to

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111. See N.D. CENT. CODE ANN. ch. 38-11.1 (West, Westlaw through 2015 Reg. Sess. of the 64th Legis. Assemb.).

112. *Id.* § 38-11.1-02.

113. See generally *id.* § 38-11.1-01 through -10.

114. Order Denying Motion to Strike Jury Demand, *supra* note 110.

115. *Kartch v. EOG Res., Inc.*, 845 F. Supp. 2d 995, 1009 (D.N.D. Feb. 29, 2012).

run consistently. It is very loud. And it prevents enjoyment of my property.

....

It disrupts my ability to sleep. It disrupts my ability to recreate or enjoy or work on my property. It constantly runs.<sup>116</sup>

The U.S. District Court addressed the surface owners' complaints, stating that

[w]hile the Kartches complain that the noise produced by the generator is excessive and hinders their ability to enjoy the property, they do not claim that the noise is inordinate or exceeds the normal level of noise created by generators on active oil wells in North Dakota. A certain amount of noise is inevitable in oil production.<sup>117</sup>

Similarly, with respect to the flare on the property, the court simply stated that such flaring is customary in the oil industry in North Dakota and is therefore not a nuisance.<sup>118</sup>

The court also found that “[t]he litter of which the Kartches complain does not appear to be a persistent problem, nor does it cause the unsanitary conditions that rise to the level of a nuisance,” and that “as a matter of law, that ‘run-of-the-mill litter’ at the well site d[id] not constitute a nuisance under North Dakota law.”<sup>119</sup> Finally, the court found that equipment stored at the well site also did not constitute a nuisance.<sup>120</sup> This conclusion fails to acknowledge the specific purpose of the Surface Damage Act.

While the court recognized that the Kartches' pleadings disclosed nuisance claims, it also recognized that these claims were made pursuant to and were subsumed under the Surface Damage Act.<sup>121</sup> The court noted that “[i]t is clear that mineral developers are responsible for damages ‘resulting from a nuisance caused by drilling operations.’”<sup>122</sup>

The district court's analysis is not entirely inconsistent with nuisance law in North Dakota, but its analysis fails to take into account the need for interpreting a nuisance through the lens of

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116. *Id.*

117. *Id.* at 1010.

118. *Id.* at 1011.

119. *Id.*

120. *Id.* at 1012.

121. *Id.* at 1008–09.

122. *Id.* at 1008 (citing N.D. CENT. CODE ANN. § 38-11.1-06) (Westlaw)).

the Surface Damage Act. In other words, a nuisance within the context of damages alleged pursuant to the Surface Damage Act should be analyzed differently than a nuisance claim unrelated to oil and gas drilling and production operations. The North Dakota Attorney General referred to testimony about the Surface Damage Act in a 2007 opinion:

[The oil and gas company] usually but not always . . . makes a one time offer to the surface owner for actual surface damage. In the event of a dry hole the compensation may be fair . . . but in the event of production, which may be for 20 or 30 years of [sic] more, the surface owner gets no consideration unless the producer volunteers or the surface owner has to sue in each instance and prove his claim . . . . We are reluctant to be operating under present practices where the surface owner has to sue in every instance where he feels he has been damaged, and must prove his claim . . . . The trouble with a one time settlement is that there is no way to determine years in advance what actual damage, let alone intangible damages might be. For instance, *odor in the air, management practices, working around oil equipment, danger to health of humans and livestock, loss of water wells and springs. Then too, salt and oil spills, corrosion on metal buildings, machinery and wire by hydrogen sulfide gas, loss of use of surface, cattle passes, roads, pipelines and traffic, flair [sic] outs, fires, pollution, trespassing and depreciated value of surface.*<sup>123</sup>

These were precisely the type of damages alleged by the surface owners in *Kartch*, and the Surface Damage Act should not be interpreted to have the same constraints as a common law nuisance claim.

The interpretation of the district court in *Kartch* fails to acknowledge that the Surface Damage Act was intended to compensate surface owners for precisely the types of damages the court disallowed. By ruling that the noise from EOG's generator was not a nuisance because the noise did not "exceed[] the normal level of noise created by generators on active oil wells in North Dakota,"<sup>124</sup> the court frustrated the intent of the North Dakota Legislative Assembly. The Assembly recognized that oil and gas

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123. Letter from Wayne Stenehjem, N.D. Att'y Gen., to Lynn D. Helms, Dir., Oil & Gas Div., N.D. Indus. Comm'n, 2007 WL 780365, at \*2 (Mar. 13, 2007) (emphasis added) (citation omitted) (statement of Rep. Murphy).

124. *Kartch*, 845 F. Supp. 2d at 1009.

production brings additional noise, gas flares can be loud and often emit a noxious smell, and that additional traffic servicing the oil field can be a nuisance to the people living in the oilfield, and it intended that they be compensated for these things.<sup>125</sup> To limit recovery because such nuisances are common in the oilfield misses the point. The only limits the Assembly intended to allow to the damages a surface owner can recover are constitutional limits.<sup>126</sup>

## 2. *Unforeseen Environmental Damages*

Although most claims related to oilfield damages are encompassed by North Dakota Century Code chapter 38-11.1, some of the extraordinary damages occasioned by pipeline ruptures and well blowouts can also be brought under different legal theories, such as trespass. There is a common restriction on damages to real estate, however, which typically limits damages for restoration of the property when those damages exceed the diminution in the fair market value of the property.<sup>127</sup> As previously discussed, this rule creates a warped perspective for operators in which the only ramification of destroying land is to pay its market value based on past agricultural sales, even when the land was not for sale.<sup>128</sup>

### a. *Some Jurisdictions Have Recognized the Problem with a Fair Market Value Cap and Adjusted Accordingly*

Some courts have changed their thinking on damages to real property arising from oil and gas production, doing away with a concrete restriction on restoration damages. For example, in *Ruffatto v. EOG Resources, Inc.*, a federal district court in Montana applied the diminution in value damage cap to a surface damage act substantially similar to North Dakota's.<sup>129</sup> The *Ruffatto* opinion,

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125. *Supra* note 123 and accompanying text.

126. N.D. CENT. CODE ANN. § 38-11.1-02 (Westlaw) (“It is the purpose of this chapter to provide the *maximum amount of constitutionally permissible protection* to surface owners and other persons from the undesirable effects of development of minerals. This chapter is to be interpreted in light of the legislative intent expressed herein.” (emphasis added)).

127. *See, e.g., id.* § 32-03-09.1.

128. *See supra* Part III. While there may be other ramifications related to the regulatory authorities, such ramifications are not necessarily focused on making the landowner whole.

129. *Ruffatto v. EOG Res., Inc.*, CV-06-32-BLG-RFC, at 4 (D. Mont. Dec. 7, 2007) (on file with author); *see also* MONT. CODE ANN. § 82-10 *et seq.* (West, Westlaw

however, invoked a now outdated interpretation of Montana law regarding damages for injury to real property. Montana's current interpretation allows for damages beyond simply the fair market value of the affected property.

In *Ruffatto*, the court referred to the "general rule in Montana . . . that the measure of damages for permanent injuries to real property is the difference between the value of the property before and after the injury."<sup>130</sup> But, after *Ruffatto*, Montana's view of this rule changed, in part because the courts recognized that a fair market value cap created a disincentive to restore land.<sup>131</sup> In a recent decision, the Montana Supreme Court explained:

Montana formerly followed the presumption that diminution in market value constituted the appropriate measure of damages for injury to property. The Court always had recognized, however, that no single measure of damages can serve in every case to compensate adequately an injured party. Our decision in *Sunburst* officially rejected any one-size-fits-all approach to property damages. A review of the circumstances giving rise to the decision in *Sunburst* to broaden the available remedies in property damages cases provides helpful guidance in resolving [the plaintiff's] claim.<sup>132</sup>

In the *Sunburst* decision, referred to above, the Montana Supreme Court acknowledged that fair market value often does not provide a complete picture of the scope of damages for injury to real property in all cases:

It is clear that the market value of land will not always correspond directly to a plaintiff's damages resulting from an injury to real property, thus rendering diminution in market value an inadequate measure of the property's worth to the owner. Other courts have acknowledged that "the loss in market value is a poor gauge of damage" when the property gains its principal value from personal use rather than for pecuniary gain."<sup>133</sup>

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through 2015 Reg. Sess.).

130. *Ruffatto*, CV-06-32-BLG-RFC, at 4 (citing *Burk Ranches, Inc. v. State*, 790 P.2d 443, 445–46 (Mont. 1990)), *abrogated by* *Lampi v. Speed*, 261 P.3d 1000 (Mont. 2011).

131. *Lampi*, 261 P.3d at 1004 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007)).

132. *Id.* (internal citations omitted).

133. *Sunburst*, 165 P.3d at 1088 (citations omitted).

The Montana Supreme Court elaborated on *Sunburst* in another case, *Lampi v. Speed*.<sup>134</sup> The *Lampi* court explained that in *Sunburst*, Texaco operated a gasoline refinery near Sunburst, Montana, and had a leak that contaminated the water and soil in a neighboring town.<sup>135</sup> Residents sought damages sufficient to restore their property, and Texaco argued that it should only have to pay the market value of the land it had contaminated.<sup>136</sup> The court instructed the jury to award damages sufficient to restore the property, noting that “[l]ittle incentive would exist for tortfeasors to prevent or remediate contamination, especially in parts of Montana where property values are relatively low, if restoration damages could not exceed a property’s market value.”<sup>137</sup> The court concluded that “statutory and common laws, such as environmental laws can compel repair or restoration costs in excess of the diminution in market value.”<sup>138</sup>

The detailed discussion of *Sunburst* in *Lampi* makes it clear that current Montana law supports the Restatement’s position that fair market value does not cap a landowner’s damages in every case.<sup>139</sup> The Montana Supreme Court in *Sunburst* joined “other jurisdictions in adopting the flexible guidelines of the Restatement (Second) of Torts § 929, and comment b, for the calculation of damages to real property to ensure that plaintiffs receive a proper remedy for their injuries.”<sup>140</sup>

Returning to *Kartch v. EOG Resources, Inc.*, which was brought under North Dakota’s Surface Damage Act, the U.S. District Court for the District of North Dakota agreed that damages were not capped by diminution in value for a claim brought under North Dakota Century Code chapter 38-11.1. The court relied on the text of the Surface Damages Act, however, and not the Restatement relied upon by the Supreme Court of Montana, finding “that compensable damages under North Dakota Century Code section 38-11.1-04 are not necessarily capped by the fair market value of the

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134. 261 P.3d 1000.

135. *Id.* at 1004.

136. *Id.*

137. *Id.*

138. *Id.* (internal citations omitted).

139. *See Lampi*, 261 P.3d at 1004 (“The [*Sunburst* c]ourt adopted the restoration damages rule from Restatement (Second) of Torts section 929.” (citing *Sunburst*, 165 P.3d at 1088)).

140. *Sunburst*, 165 P.3d at 1088.

surface estate.”<sup>141</sup> Although courts in other jurisdictions have begun to recognize the need for restoration damages in situations where oil and gas contamination occurs, this is not universal, and is not necessarily the case in North Dakota outside of chapter 38-11.1.<sup>142</sup> The underlying purpose of damages in our tort system should address both the need for compensation to injured parties as well as deterrence of situations giving rise to such damages.

*b. North Dakota Courts Are Substantially Limited Because the Fair Market Value Cap Is Statutory*

It is significant to note that Montana changed its view on scope of damages even though its oil and gas surface damage compensation law does not include the strong language of North Dakota’s law with regard to its intent and purpose.<sup>143</sup> North Dakota’s statute states clearly that “the purpose of this chapter [is] to provide the *maximum amount of constitutionally permissible protection* to surface owners and other persons from the undesirable effects of development of minerals.”<sup>144</sup> The Supreme Court of North Dakota has also cited favorably to section 929 of the Restatement (Second) of Torts, which was relied upon in part by the Supreme Court of Montana in refusing to limit damages based on market value or diminution in value.<sup>145</sup> The rule in North Dakota, however, has

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141. *Kartch v. EOG Res., Inc.*, 845 F. Supp. 2d 995, 1008 (D.N.D. 2012).

142. *See* N.D. CENT. CODE ANN. § 32-03-09.1 (West, Westlaw through 2015 Reg. Sess. of the 64th Legis. Assemb.). *But see id.* chs. 32–40 (Environmental Law Enforcement Act). Although there are no reported decisions on these chapters of the North Dakota Century Code, it is likely that a court would find that the fair market value cap does not apply to these chapters for the same reasons as it does not apply to North Dakota Century Code chapter 38-11.1. The very underpinnings of the shift in judicial thinking away from strict adherence to this cap on damages is even more compelling under a statutory scheme specifically set up to ensure compliance with environmental laws and protection of natural resources.

143. *Compare* MONT. CODE ANN. § 82-10-501 (West, Westlaw through 2015 Reg. Sess.) (“The purpose of this part is to provide for the protection of surface owners of land underlaid with oil and gas reserves while allowing for the necessary development of those reserves.”), *with* N.D. CENT. CODE ANN. § 38-11.1-02 (Westlaw) (“It is the purpose of this chapter to provide the *maximum amount of constitutionally permissible protection* to surface owners and other persons from the undesirable effects of development of minerals.” (emphasis added)).

144. N.D. CENT. CODE ANN. § 38-11.1-02 (Westlaw) (emphasis added).

145. *See* *Lang v. Wonnemberg*, 455 N.W.2d 832, 840 (N.D. 1990) (citing section 929 of the Restatement (Second) of Torts for the proposition that “it is generally recognized that damages for loss of use may be awarded in addition to

questionable application to different statutes as discussed, and an explicit amendment to section 32-03-09.1 of North Dakota Century Code specifically excluding real property from its application would make the law clear and it would be helpful in avoiding litigation over interpretive issues.

V. ALTHOUGH THE LEGAL SYSTEM HAS MADE PROGRESS IN ADDRESSING THE FAIRNESS OF REMEDIES FOR SURFACE OWNERS, MORE IS NEEDED.

The oil and gas industry has often argued for limitations on damages that are awarded to surface owners. There are an abundance of policy reasons to resist the pressure to do so. For example, with respect to North Dakota's Surface Damage Act, one mineral developer argued that the statute was unconstitutional because, *inter alia*, it did not require a surface owner to apply damage payments to land restoration, and therefore was not forwarding the public policy of protecting agricultural land.<sup>146</sup> The Eighth Circuit Court of Appeals disagreed, explaining as follows:

Nor does the absence of a requirement that compensated surface owners apply damage payments to restorative purposes render the statute incapable of advancing the public welfare. The requirement that mineral developers compensate surface owners for damage they cause may well serve as an incentive for developers not to drill, and thereby disrupt surface uses, where drilling is not likely to yield enough oil or gas to justify the loss to the economy from disruption of surface productivity. The compensation requirement might also create an incentive for developers not to cause unnecessary surface damage, and to remedy any damage—avoidable or unavoidable—they may cause without necessitating resort to the courts by surface owners suing under the terms of a lease or under the common law of negligence.<sup>147</sup>

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diminution in the value of the property"); *see also* *Lampi v. Speed*, 261 P.3d 1000, 1004 (Mont. 2011) (citing section 929 of the Restatement (Second) of Torts for the proposition that "an award of restoration damages in excess of the property's diminution in market value" is warranted in certain cases because "diminution in market value will not always correspond with a plaintiff's damages resulting from injury to real property").

146. *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 555 (8th Cir. 1984).

147. *Id.*

This is not the only time the industry has attempted to limit damages in such a way. One striking example comes from a Louisiana case and legislative amendments.<sup>148</sup> J. Michael Veron has written about a saga in Louisiana he handled, referred to as the “Corbello litigation.”<sup>149</sup> In that litigation, the defendant oil and gas operators argued that the landowner should not be entitled to restoration damages because it was not certain that the landowner would actually use the money to restore the land.<sup>150</sup> The landowners agreed to escrow a portion of their damages specifically to be used for cleanup.<sup>151</sup> Once a plan was agreed upon, the landowners discovered they needed what they believed was a standard permit from the Army Corps of Engineers.<sup>152</sup> As Mr. Veron has explained:

In a remarkable turn of events, the Corbello consultant was informed that the permit was not being issued. Instead, he was summoned to a meeting in Baton Rouge with [Army] Corps of Engineers representatives, as well as representatives from state agencies. When he arrived, he was surprised to find one of Shell’s attorneys from the trial at the meeting, as well as an attorney representing Exxon. No one explained to the landowners’ representative why oil company lawyers had been invited to the meeting or what right they had to discuss whether a wetlands permit should be issued to allow the landowners to begin cleaning up their property.

It soon became apparent that the attorneys were there to oppose the landowners’ plans. While they were excluded from the meeting at the landowners’ insistence, they were invited to meet with the regulators separately afterward. While the exact nature of the oil companies’ opposition was not disclosed to the landowners, it was unquestionably effective: Despite repeated efforts over the following year, the landowners were never able to obtain a permit.<sup>153</sup>

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148. J. Michael Veron, *Oilfield Contamination Litigation in Louisiana: Property Rights on Trial*, 25 TUL. ENVTL. L.J. 1, 10 (2011).

149. *Id.* at 8.

150. *Id.* at 13.

151. *Id.*

152. *Id.*

153. *Id.* at 13–14.

This outcome defies common sense, and is an alarming example of the need for a hard look at the influence of the oil and gas industry on landowner remedies.

Thus, there have been some improvements in the law, recognized by shifts in the thinking of Montana courts regarding the fair market value cap, and the explicit recognition in Wyoming that comparable easements are acceptable measures of fair market value. On the other hand, there remains significant pressure from the oil and gas industry to constrain the legal remedies available to landowners, as is appallingly exemplified by Mr. Veron's experience in Louisiana. North Dakota is similar in that it has made improvements, such as adopting North Dakota Century Code chapter 38-11.1 to address compensation for surface owners, and it also has an eminent domain statute that can be interpreted to allow the comparable easement testimony that is explicitly recognized in Wyoming. It is imperative, however, that all three branches of government in North Dakota recognize that there are still significant hindrances to providing complete justice to landowners faced with the negative impacts of the oil boom. Courts have interpreted chapter 38-11.1 to constrain damages beyond what was intended by the Legislative Assembly, something that both North Dakota courts and the legislative branch can, but have not, addressed. While courts have allowed landowner testimony regarding third party easements, other courts have refused to allow testimony about condemnor offers of just compensation. There is significant room for improvement, and so far it does not appear that any relief for landowners will be forthcoming from the executive branch. What is certain is that a myopic focus on past sales of agricultural land is not the way forward with respect to compensating landowners for the damages caused by oil and gas development.

The unique nature of real property is important to understanding the necessity of providing adequate remedies to landowners beyond nominal damages based on arbitrary views of market value. For example, the Restatement (Second) of Contracts recognizes that contracts for the sale of land have historically been given a "special place in the law of specific performance" because land is unique and therefore "impossible of duplication by the use of *any amount of money*."<sup>154</sup>

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154. RESTATEMENT (SECOND) OF CONTRACTS § 360 (AM. LAW INST. 1981)

Judge Loren Smith, Chief Judge of the U.S. Court of Claims, explained it as follows:

First, the law considers each parcel of land unique. Unlike money, or most personal property, it is not fungible. Its location can never be exactly duplicated, and each location has a unique value. Second, the owner of land rarely has the same degree of liquidity as the owner of personal property such as stocks, bonds, gold, or the like. If someone does something I object to near my land, I generally have to deal with that action, rather than shift my assets. Third, people have deep emotional attachments to land that they rarely have towards the other common types of wealth. Fourth, a piece of land is part of a community, always connected to other land, and existing in a matrix of roads, rivers, and the whole of civilized society.<sup>155</sup>

Mineral developers often look at past sales of agricultural land and assume that is the value they must pay for destroying it. This assumption is based on an incredibly misguided presumption: if a rancher is approached and asked to lease or sell a parcel of land to his neighbor so that his neighbor can grow wheat or run some cattle, the farmer will charge a certain price. If that neighbor approached the rancher and asked to buy the land to dump sterilizing wastewater or construct an industrial site on that land, the rancher would probably say no—but on the off chance the answer was yes, the price would be much greater.

So when mineral developers argue that they need only pay the same rates as past agricultural sales, they are saying to the landowner: “We’re paying you the market rate for those acres of agricultural land, or even more. You should be happy.” The landowner’s response: *This land was not for sale.*

## VI. CONCLUSION

The valuation of damages caused by energy development is exceptionally important because it is often the only remedy available to landowners faced with the negative impacts of such development. Surface owners typically view the energy developers as guests on their property, but unfortunately, developers more

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(emphasis added).

155. Loren A. Smith, *The Morality of Regulation*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 507, 518 (1998).

often view themselves as the dominant property owner in the situation. When surface owners lack the ability to control what is happening on their own property, whether due to eminent domain laws or a severed mineral estate, it is imperative that these landowners are at least compensated for the true damage caused to their land, and their quality of life.

The friction between developers attempting to minimize damage awards, and landowners demanding full and just compensation for the actual disruption energy development causes to their land and livelihoods has been played out in both the judicial and legislative forums. This friction will continue in both forums, and it is crucial for judges and lawmakers to recognize that this issue is not simply a matter of the price of an acre of land. It is a matter of creating policies and laws that protect the most important resources humanity has: our air, our water, and our land.