

District Court, Thomas County, Nebraska

Brush Creek Ranch, LLC,

Plaintiff,

v.

**Nebraska Public Power District,
A Political Subdivision**

Defendant.

Case No. _____

**Complaint, Jury Demand, and
Request for Survey Instructions**

**Constitutional Issues Presented
Notice given to
Nebraska Attorney General.**

Plaintiff alleges:

Overview

1. Brush Creek Ranch, LLC owns one of the most pristine ranches in the Nebraska Sandhills. No all-terrain vehicle is permitted on the Ranch at any time. Horses are used, and livestock is carefully regulated, grazed, and controlled. The Ranch consists of highly-sensitive, fragile native Sandhills' grasses growing over sand dunes that are archaeologically active.

2. The Ranch is home to flora and fauna on the endangered species and protected species active lists of the United States Environmental Protection Agency and administered by the United States Fish & Wildlife Service of the US Department of Interior, and other elements of federal authority. The home sites of these species are included in locations of the suspected path of a proposed electrical transmission line construction project proposed by Nebraska Public Power District ("NPPD"), Defendant.

3. The Ranch is also home, and resting site for migratory and unique species of birds including Whooping Cranes, Sandhills Cranes, Piping Plovers, Least Terns, and is from time to time to Burrowing Owls and perhaps Mountain Terns. The Ranch also provides resting space for migratory birds. It is also the home of the Blowout Penstemon

(*Penstamon haydenii*) and the American Burying Beetle (*Nicrophorus americanus*), both of which are endangered species.

4. This is an action to recover just compensation for entry by Defendant NPPD upon the real estate and damages to it. Attorney's fees are also requested. It also seeks a Judgment setting forth limitations on the manner in which any attempt can be made by NPPD to exercise rights to survey the real estate under *Neb Rev Stat* § 76-702, NPPD did not initiate condemnation proceedings against the Ranch. Yet, it entered on the real estate and threatens to do so again. It has committed a constitutionally compensable "taking" under *US Const Amend V* and *Neb Const Art I* § 21. NPPD has also caused compensable damages to Plaintiff's real estate within the meaning of *Neb Const Art I*, § 21.¹

5. The Ranch alleges a constitutional tort for the taking of private property rights and interests by a condemning authority for reasons purported to be matters of public purpose. *Neb Rev Stat* § 76-702 is a statute inferior to *US Const Amend V* and *Neb Const Art I* § 21. It is also inferior to *US Const Amend XIV* and *Neb Const Art I*, § 3, each of which guarantees, though differently in some respects, that "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." *Id.*

6. Defendant proposes to enter onto the real estate again to conduct surveying procedures or for other reasons. NPPD contends this action is authorized by *Neb Rev Stat* § 76-702. But, NPPD has not initiated a legal proceeding in County Court or District Court invoking this statute or authorizing its use, nor has Defendant initiated eminent domain proceedings against the Ranch. The Ranch is not accorded procedural or substantive due process of law or equal protection of the law by the action NPPD contends it is entitled to undertake under § 76-702. The statute, both facially and as applied, violates the Ranch's constitutional due process, equal protection, and just compensation rights.

¹ *Henderson v City of Columbus*, 285 Neb 482 (2013); *Dishman v NPPD*, 240 Neb 452 (1992).

Jurisdiction, Venue, Parties

7. The District Court has subject matter jurisdiction of this constitutional tort and action for a declaration of rights under *Neb Rev Stat* §24-302 and § 25-21,149 et seq. venue is proper in Thomas County, Nebraska because this action involves an injury to real estate in Thomas County.²

8. The Plaintiff Ranch is a Nebraska limited liability company with its principal place of business in Thomas County, Nebraska. Dan Welch is the Ranch's Managing Member. The Ranch alleges a constitutional tort for the taking of private real property rights and interests by a condemning authority for reasons purported to be matters of public purpose. It seeks just compensation for the taking and for damages to its property under *Neb Const* Art I, § 21 and *U.S. Const* Amend V & XIV. If it is found that § 76-702 is constitutional contrary to the Ranch's position, the Ranch also seeks reasonable limitations on the methods actions entry and use of the Ranch's property permitted to survey its real estate.

9. The Defendant, Nebraska Public Power District ("NPPD") is a political subdivision and public power district organized under Nebraska law, with the power and authority conferred upon it by the Legislature, and with no other powers.

10. NPPD has in the past, and proposes to again enter onto the real estate to conduct surveying procedures. It contends this action is authorized by *Neb Rev Stat* § 76-702. But, NPPD has not initiated a legal proceeding in County Court or District Court invoking this statute or authorizing its use. Nor has Defendant initiated eminent domain proceedings against the Ranch. The parties also disagree about whether defendant NPPD is authorized to act, in any manner or under any circumstances, under the authority of *Neb Rev Stat* §76-702. The Ranch contends that the Legislature of Nebraska is empowered to extend or withhold eminent domain authority to or from any political subdivision, including public power districts. In *Neb Rev Stat* §70-301, the Nebraska Legislature conferred a limited grant of eminent domain to public power districts,

² *Neb Rev Stat* §§25 – 401. The events giving rise to these claims also occurred in Thomas County. *Neb Rev Stat* §25 – 403.02.

including NPPD. By its terms, NPPD is constrained in that §70- 301 contains this limitation:

The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724. (*Emphasis added.*)

The statute does not empower NPPD or any power district to take any action otherwise purportedly authorized by §76-702. The Legislature intentionally withheld §76-702 authority from public power districts.

11. Even if the court determines that NPPD is authorized to use §76-702, the Ranch contends that it may not do so as it has already purportedly invoked the statute and is it threatens to continue to do so. The parties disagree about what NPPD is permitted to do, and what damages it must pay, under § 76-702. An actual case and controversy exists about the rights and duties of the parties under this statute, and about its constitutional validity. A declaration of rights pursuant to *Neb Rev Stat § 25-21.149 et seq.* is also sought by the Ranch.

12. Plaintiff, Brush Creek Ranch, LLC, is a Nebraska limited liability company. Bush Creek Ranch owns the following described real estate in Thomas County, Nebraska:

In Twp 22 N R 28, W:

All Secs 1, 2, and 3;

Pt Sec 4, including the E ½ NE ¼ and other land.

In Twp 23 N R 28 W

Pt Sec 19, pt Sec 20;

All Sec 21

Pt Sec 22 E of US Highway 183 ROW

Pt Sec 30

All Secs 26, 27, 28, 29

Pt Sec 31

Pt Sec 32

All Secs 33, 34, 35, 36.

13. Defendant, Nebraska Public Power District, is a Nebraska Political Subdivision, organized pursuant to law and under Ch. 70 of the Nebraska statutes. It is

governed by an elected Board and operates a publicly-owned electrical utility business serving parts of Nebraska. NPPD's principal place of business is at 1414 15th Street, PO Box 499, Columbus, NE 68602-0499. The person at NPPD authorized to receive service of process, pursuant to *Neb Rev Stat* § 25 – 510.02 is NPPD's Chief Executive Officer, Clerk, Secretary or other official whose duty it is to maintain the official records of Defendant. NPPD is authorized to acquire right-of-way and exercise the power of eminent domain but its authorization is limited.³

14. This Complaint challenges the right of NPPD to use, and the constitutional validity of, *Neb Rev Stat* 76-702. The Attorney General of Nebraska has been notified of the Ranch's contentions that the statute is unconstitutional and void.

Background Facts

15. NPPD is believed to have plans to construct a 345 kv power line using lattice towers, access roads, and heavy construction equipment, as well as maintenance equipment, helicopters, drones and dune buggies, on and across all or portion of the Ranch's real estate including, specifically, parts of Sections 3 & 4 in Twp 22 and Sections 26, 27, & 34 in Twp 23 N, all in R 28 W, Thomas County, Nebraska. The transmission line will require a permanent right-of-way, temporary construction right-of-way and easements, and related construction easements during construction and thereafter, if built. Construction of the line threatens to dramatically disturb, disrupt, and destroy the Ranch's Sandhills lands that are highly fragile. This includes Brush Creek's pristine lands. NPPD has entered on Plaintiff Brush Creek's land to survey and threatens to do so again. It used, and threatens to use, motor vehicles, motorized four-wheelers, and dune buggy type vehicles to enter onto, and to cross, the Ranch.

16. The Ranch has information that NPPD desires and intends to perform survey work across Plaintiff's real estate including some, or all, of the areas identified in the preceding paragraph. It entered onto some or all of this real estate on April 14, 2016, without permission and contrary to its express representations and assurances. NPPD,

³ *Neb Rev Stat* § 70-301, requiring a procedure and authorizing a power district to proceed "in the manner set forth in sections 76-704 to 76-724.

through its personnel, committed an overt falsehood—it lied—by surreptitiously entering onto the real estate on April 14 after promising not to do so the prior day.

17. The Ranch's land has been damaged and will be further damaged by NPPD's past and threatened entry onto its property with mechanical equipment and devices, including motorized vehicles. In addition to the Ranch's land, forage, and potential disturbance of livestock, entry disturbed, and threatens to disturb, Ranch's peaceable and quiet use and enjoyment of their property.

18. NPPD does not require access to the Ranch's property for surveys and does not require easements across the property for the purpose of building an electric transmission line. Superior routes exist. Those superior routes have been overtly identified and approved as superior by federal officials including U.S. Fish & Wildlife Service scientists, and the twenty-five (25)-year former Chief Executive Officer of NPPD.

19. No eminent domain proceedings have been initiated by NPPD concerning the Ranch's real estate. However, NPPD entered, and threatens to continue to enter, onto the real estate for the purpose of conducting survey activities. NPPD contends it is authorized to do so by *Neb Rev Stat* § 76-702, which provides in pertinent part:

After negotiations have failed, any condemner, or his representative, upon proper identification, and after informing the condemnee of the contemplated action is authorized to enter upon any land for the purpose of examining and surveying the same in contemplation of bringing or during the pendency of condemnation proceedings under §§ 76-701 to 76-724; *provided* when an inventory is made of the damage to personal property by reason of examining or surveying the land by the condemner, or his representative, a copy of the inventory shall be delivered to the condemnee.

20. As noted in ¶ 9 above, *Neb Rev Stat* §70-301 empowers public power districts, including NPPD, to exercise eminent domain, but does not authorize them to use §76-702. The Ranch contends NPPD has improperly reported to use and rely upon §76 – 702 and by doing so has Taken possession or partial possession of the Ranch real estate,

caused damages to it, and is liable for just compensation because NPPD has no right to exercise any authority under this statute.

21. The Ranch also contends § 76-702 does not permit NPPD to enter upon its real estate because NPPD has not initiated eminent domain proceedings, does not provide for procedural or substantive due process of law after notice and before making a categorical Taking of possessory rights by entering onto the real estate, and by purporting to abridge the damages to which the Ranch is entitled. The Ranch contends NPPD's prior entry onto the land was an unlawful Taking because it was performed under color of state law by NPPD.

22. On April 13, 2016, the Ranch's representatives and members, Mr. and Mrs. Dan Welch, accompanied by two (2) employees of Ranch, met with the Thomas County Sheriff and approximately ten (10) persons who purported to be employees of NPPD. The meeting occurred on or adjacent to Brush Creek Ranch real estate along US Highway 83 in Thomas County. Brush Creek respectfully refused to allow NPPD to enter upon the real estate. No violence or altercation occurred. Two (2) Nebraska State Patrol officials arrived. Conversations were calm, peaceful, and appropriate.

23. It was agreed that NPPD would not cause or permit its personnel to enter onto the Ranch's real estate without first proceeding to Court to seek and, if possible, secure appropriate orders. NPPD assured the Ranch it would use, and abide by, the legal process, but that judicial proceedings would be initiated. These commitments were made in the presence of law enforcement. Thereupon all persons departed from the scene.

24. On the morning of April 14, 2016, Brush Creek's personnel placed chains and locks on Ranch gates along US Highway 83 as a matter of protection to assure no entry, no failure to close and lock gates, and no wandering of livestock from appropriate locations. Later during the morning of April 14, the Ranch's principal was contacted by the Thomas County Attorney who informed The Ranch that NPPD personnel had entered onto Brush Creek's real estate during the early morning hours and was physically on the real estate at the time of the County Attorney's call. The NPPD personnel were locked onto the property because the Ranch had had placed locks on gates to keep people off the

property and did so not knowing the NPPD personnel had breached the company's commitments of the previous day, and acted unlawfully, when it caused or permitted its crews to enter onto the real estate owned by the Ranch.

First Claim. Declaration of Rights: NPPD May Not Act Under § 76-702

Second Claim: § 76-702 Is Unconstitutional

Third Claim: In the Alternative, Conditions on Use of § 76-702 Must Be Declared

25. All allegations above are renewed here. Plaintiff asserts three claims. If successful on the first, the second and third claims need not be decided, and if successful on the second but not the first, the third claim need not be decided. The claims arise in series, accordingly. They arise from common facts and our all, therefore, alleged collectively as the facts applied to them collectively, but the legal issues arise in the series in which the claims are listed sequentially.

26. The Ranch seeks a declaration of its rights. First, it asks the Court to declare that NPPD has no authority to invoke or use *Neb Rev Stat* §76-702 under any circumstances because it has not been empowered by the Legislature to do so. However, if the Court concludes otherwise, then, second, the Ranch asks the court to determine that §76-702 is unconstitutional and void for the reasons set forth below. And, third, in the event the Court decides that §76-702 is available to NPPD and is constitutionally valid, then the Ranch asks the court to declare and determine limitations upon the manner in which NPPD may enter upon Ranch real estate to conduct any survey or other assessment prior to eminent domain proceedings be initiated.

27. An actual case and controversy exists as to each of these three points of dispute and the court is asked to declare and adjudicate the rights of the parties with respect to each under *Neb Rev Stat* §25-21, 149 et seq.

28. The Ranch contends the Legislature has plenary authority over the power of eminent domain. It may withhold or confer this power on political subdivisions in its discretion. In the case of public power districts, the Legislature has granted a limited and conditional right to exercise eminent domain. This limited grant of eminent domain

authority to public power districts, including NPPD, appears at *Neb Rev Stat* §70-301 and does not extend to §76-702. Accordingly, the Ranch respectfully contends and asserts that NPPD has unlawfully proceeded in the past under §76-702 and may not do so in the future.

29. In the event the Court concludes, however, that NPPD may use §76-702 notwithstanding the Ranch position to the contrary, then the Ranch contends that § 76-702, by purporting to limit compensation to personal property, is unconstitutional and void. The constitutional infirmity arises because the statute violates *US Const Amend V*, and *Neb Const Art I*, § 21, by denying just compensation for a categorical physical taking of the Ranch's property for surveying purposes, and compensation for damages to the real estate as well.

30. Finally, in the event the court finds contrary to the Ranch positions set forth in ¶¶ 26 & 27, and elsewhere above in this Complaint, then the Ranch contends that under *Neb Rev Stat* § 76-702, it has a right to seek a declaration in this Court of the times and methods that may be used by NPPD, a condemning authority, for the purpose of conducting surveys and surveying operations on the Ranch's real estate. The Ranch contends the statute is vague for its failure to identify the terms, circumstances, and conditions under which surveying must be conducted, and purports to authorize a condemning authority, including Defendant, to use any means it chooses without an obligation to pay just compensation.

31. The Ranch seeks a declaration that *Neb Rev Stat* § 76-702 is unconditional and void. The Nebraska Attorney General has been notified of the Ranch's contention concerning the constitutional infirmity of § 76-702.

32. It is necessary that this Court declare the rights of the parties under and with respect to § 76-702, and Plaintiff requests the Court declare it unconstitutional and void. The statute is void because it:

32.1. Purports to limit compensation to personal property.

32.2. Purports to empower a condemning authority to enter onto real estate without providing an opportunity for the land owner to be

heard or a hearing procedure and, therefore, denies procedural due process of law, contrary to *US Const Amend XIV* and *Neb Const Art 1, § 3*.

32.3. Purports to limit compensation for the taking or damage of real property for certain surveying purposes, without a judicial method for determining the damages and, therefore, denies both procedural and substantive due process of law, contrary to *US Const Amend XIV* and *Neb Const Art 1, § 3*.

32.4. Purports to empower NPPD to exercise judicial decision-making by determining when, where, and how surveying is to occur, without affording the land owner an opportunity to be heard and provide input. By doing so, the statute purports to empower a political subdivision to make adjudicative decisions without an adjudicative process or procedure due process, including a disinterested decision maker, all contrary to *US Const Amend XIV* and *Neb Const Art I, § 3 & §13* guaranteeing due process of law and violating the requirement that Nebraska's courts shall always be open.

32.5. *Neb Rev Stat § 76-702* is unconstitutional because it contains an improper delegation or assignment of judicial decision-making authority and power to a political subdivision's administrative personnel and thereby invades the judicial power of the courts contrary to *Neb Const Art II, § 1* governing separation of powers, and *Neb Const Art I, § 13* governing openness and access to Nebraska's courts.

Fourth Claim. Inverse Condemnation

33. All allegations above are renewed here.

34. When NPPD personnel entered onto the Ranch's real estate on April 14, 2016, NPPD committed a categorical taking of property and property rights from the

Ranch. It did so by exercising rights and incidents of ownership, including possessory rights.

35. In addition, NPPD damaged the Ranch's real estate and improvements by driving upon it, crushing its vegetation, altering the surface configuration of its land, and causing tracks which will become ruts on the face of the land.

36. NPPD took these steps without initiating eminent domain proceedings. Its action constitutes both the taking of and damage to Plaintiff's real estate compensable under *US Const Amend V* and *XIV* and *Neb Const Art I, § 21*.

37. The damages to Plaintiff's real estate are substantial. Judgment is demanded for:

37.1. The taking committed by NPPD.

37.2. Damages caused to the real estate.

37.3. The entire Ranch's litigation expenses, including court costs, expert witness fees, attorney's fees, and related expenses.

Jury Demand

38. Plaintiff respectfully demands trial by jury on all issues so triable.

Requests for Relief

39. On the foregoing basis, Plaintiff, Brush Creek Ranch, LLC, seeks judgment for:

39.1. First Claim: a declaration of rights that NPPD is not empowered to take any action under *Neb Rev Stat § 76-702*.

39.2. Second Claim: in the event the First Claim does not result in a judgment for the Ranch, the Ranch seeks a declaration of rights, including a declaration that *Neb Rev Stat § 76-702* is unconstitutional and void for each and all of the reasons specified above.

39.3. Third Claim: in the event the First Claim for Second Claim do not result in a judgment for the Ranch, the Ranch seeks a declaration of

rights limiting the manner in which NPPD may conduct itself under the authority of §76-702 upon Ranch real estate.

- 39.4. Fourth Claim: Judgment for just compensation and damages for Taking and damages to the Ranch's property, including, but not limited to, Judgment for the value of the taking committed by NPPD to Plaintiff's property on April 14, 2016 when NPPD personnel entered onto the real estate contrary to their express assurances of the previous day that they would not do so.
- 39.5. On each and all claims, Judgment for Attorney's fees, expert witness fees, and other litigation expenses as permitted by law.
- 39.6. Taxable court costs.


Jury Demand

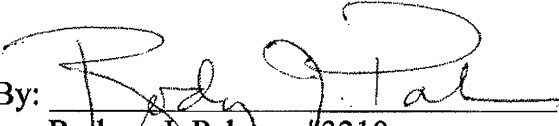
- 39.7. The Ranch demands trial by jury on all issues so triable.

April 19, 2016.

Brush Creek Ranch, LLC, Plaintiff,

And,

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