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Appellants' Opening Brief

by

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APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

This case concerns Article XVII, Sections 21-24 of the South Dakota Constitution. These provisions were adopted by initiated measure and became effective on November 16, 1998. These provisions have also been referred to as "Amendment E," a reference to their placement on the 1998 ballot. The amendments prohibit certain business structures from farming and owning farmland. S.D. Const. art. XVII, § 21.

Plaintiffs SD Farm Bureau, SD Sheep Growers, Haverhals Feedlot, Sjovall Feedyard, Brost, Tesch, Aeschlimann, Spear H. Ranch, and Holben filed their Complaint for Declaratory and Injunctive Relief on June 28, 1999. App. 12. Among the various claims, Plaintiffs asserted that Amendment E violated the dormant aspect of the federal commerce clause. App. 33-35. SD Farm Bureau also claimed that Amendment E was invalid under the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101, et seq. App. 39-40. In addition to the two named State Defendants involved in this appeal, the Complaint also named the State of South Dakota.

The State Defendants filed their Answer on July 28, 1999. On October 21, 1999, the State Defendants filed a Motion to Dismiss on the basis of sovereign immunity and the Eleventh Amendment. App. 43-45. In the alternative, Defendants sought to dismiss claims relating to the privileges and immunities clause and to the Americans With Disabilities Act. App. 44. Hearing was scheduled.

In the meantime, Dakota Rural Action and South Dakota Resources Coalition sought and received permission to intervene as Defendants. *South Dakota Farm Bureau, Inc., et al. v. Hazeltine, et al.*, 189 F.R.D. 560 (D.S.D. 1999).

Also, Plaintiffs filed their Motion Instanter to Join Parties and File First Amended Complaint. App. 83-87. Plaintiffs sought to add the Utilities as Plaintiffs. The proffered Amended Complaint did not add any new claims for relief, but added factual allegations pertaining to rules that Defendant Hazeltine promulgated in implementing the provisions of Amendment E.

Hearing on the various motions was held on January 18, 2000. The court orally (1) granted the Utilities' motion to join as Plaintiffs (MHT 51, 53), (2) dismissed the case as against the State of South Dakota (MHT 5), and (3) dismissed the ADA claim (MHT 6). He took other issues under advisement, including the request to dismiss State Defendants Barnett and Hazeltine. MHT 47, 54.

Subsequently, on February 8, 2000, Plaintiffs filed another Motion Instanter to File First Amended Complaint. App. 119-22. Among other things, the Plaintiffs amended their Complaint to delete the ADA claim and to add the Marston and Marian Holben Trust and the Utilities as Plaintiffs. App. 119-22.

On September 15, 2000, Judge Kornmann denied the remaining motion to dismiss and granted the Plaintiffs' motion to amend. App. 136-49. The

September 15 Order also dismissed the ADA claim. App. 140. The Amended Complaint and the Answer to Amended Complaint were both filed on September 27, 2000. App. 150-96.

Following an unsuccessful motion for partial summary judgment, trial was scheduled for December 4, 2001. Plaintiffs' trial brief set forth the various issues that it would try at hearing. App. 197-234. It included the commerce clause issue as well as other claimed issues, but included no reference to an ADA claim.

A court trial was held from December 3 through 7, 2001. At the close of trial, the court requested post-trial briefs.

The next week, on December 12, 2001, Judge Kornmann issued a memorandum indicating that he would again consider the ADA claim. App. 235. Defendants' post-trial briefs responded to this issue. Plaintiffs filed post-trial briefs, but did not address the ADA issue at all.

On May 17, 2002, Judge Kornmann filed his Memorandum Opinion. App. 236-76. He first held that cooperatives are not subject to Amendment E. App. 258-59. Second, he found that Amendment E is preempted by the ADA. App. 259-65. Third, he declared that Amendment E is unconstitutional under the dormant aspect of the federal commerce clause when considered in light of the claims made by Utilities. App. 265-76. The Judgment was also filed on May 17, 2002. App. 277.

On May 20, 2002, the State Defendants filed their notice of appeal.

STATEMENT OF FACTS

South Dakota has restricted corporate farming since 1974.[1] SDCL ch. 47-9A. The 1974 Family Farm Act generally bars corporate ownership of agricultural land. It recognizes "the importance of the family farm to the economic and moral stability of the state," and that the "existence of the family farm is threatened by conglomerates in farming." SDCL 47-9A-1. Family farms and "authorized small farm corporations"[2] are exempt.

The 1974 statutes concern cultivation of land. In 1988, these statutes were amended to address confined hog operations. SDCL 47-9A-13.1. This amendment applies only to corporations that bred, farrowed, and raised swine. SDCL 47-9A-13.1; Attorney General Memorandum Opinion 89-05. Swine operations that do not engage in breeding are exempt from the 1974 Act. SDCL 47-9A-13.1. Other types of corporate livestock feeding operations are not restricted by the Family Farm Act. SDCL 47-9A-11.

Since the 1970s, agricultural and livestock ventures have increasingly changed from traditional agricultural business structures (single proprietorship

1. This is not unique. Other corporate farming statutes include Iowa Code. Ann. § 172C.4; Kan. Stat. Ann. § 17-5904; Minn. Stat. Ann. § 500.24(1)(c); Mo. Ann. Stat. § 350.015; N.D. Cent. Code § 10-06-01; Wis. Stat. Ann. § 182.001(1)(a).

2. Corporations with less than ten shareholders and whose revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of their gross receipts. SDCL 47-9A-14.

and partnerships) to business structures such as limited liability corporations and other types of corporations. App. 8-11. Between 1978 and 1997, the number of farm corporations in South Dakota increased from 776 to 1298. App 9. While the number of corporations grew the number of farmers declined. The number of farm operators (by principal occupation) in South Dakota fell from around 36,821 in 1974 to approximately 22,704 in 1997. App. 11.

Although the 1974 Family Farm Act was designed to protect family farming, it did not stem the trend toward larger corporate farms and fewer family farms. As addressed later in this brief, corporate farming causes adverse sociological impacts on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

This problem was also of concern to the federal government. The USDA studied this issue in 1981 and issued a report known as A Time to Choose: Summary Report on the Structure of Agriculture. Exh. 311. A second study seventeen years later in 1998 reported:

When Secretary Bergland's report, A Time to Choose was published, it warned that ". . . unless present policies and programs are changed so that they counter, instead of reinforce or accelerate the trends toward ever-larger farming operations, the results will be a few large farms controlling production in only a few years."

Looking back now nearly two decades later, it is evident that this warning was not heeded, but instead, policy choices made since then perpetrated the structural bias toward greater concentration of assets and wealth in fewer and larger farms and fewer and larger agribusiness firms.

A Time to Act, Exh. 312 (also published at www.reeusda.gov/smallfarm/report.htm).

In the meantime, in 1982, the Nebraska Constitution was amended (by initiated measure) to include corporate farming restrictions designed to protect family farms. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33, *cert. denied*, 502 U.S. 814 (1991). This measure was "intended to address the social and economic evils perceived as related to corporate farming." *Id.*

Ultimately in 1998, Amendment E was placed on the ballot in South Dakota. Like the Nebraska measure, it was designed to amend the State Constitution. Like the Nebraska measure, it generally bars both corporate ownership of farmland, as well as corporate livestock feeding operations. Amendment E passed and became effective on November 16, 1998. It is now included in the South Dakota Constitution as Article XVII, Sections 21-24.

SUMMARY OF ARGUMENTS

The district court erred in finding that utility easements are an "interest" in "land used for farming" within the meaning of Amendment E. This is a matter of state law construction. Under South Dakota law, utility easements are limited

to the use for utility purposes and are not a general interest in land used for any other purpose. Transmission line easements are not within the purview of Amendment E.

The district court further erred in finding that Amendment E violates the commerce clause when considered in light of Utilities' interest in land at Big Stone, South Dakota ("Big Stone"). Part of the Big Stone property is "grandfathered" under Amendment E. The rest is exempt from Amendment E because the involved project is likely to be developed during the five-year "window" for construction allowed in Amendment E.

Moreover, any effect on the Big Stone property is outweighed by the beneficial effect of protecting family farming. Corporate farming causes adverse sociological effects on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have independent markets for their products.

The district court also erred in several ways in holding that Amendment E violates the American Disabilities Act. First, although one party (SD Farm Bureau) originally made an ADA claim, it abandoned the claim and did not renew it at trial. Indeed, SD Farm Bureau lacked standing. Yet, Judge Kornmann sua sponte revived the claim after trial. This is reversible error.

Further, Judge Kornmann expanded the ADA claim to include other parties (retired CPA Holben and retired lawyer Brost) who had presented minimal evidence on heart disease on other claims (equal protection and commerce clause). Brost and Holben have never, to this day, made an ADA claim. The claim has been waived or abandoned by all parties. Also, evidence that a retired CPA and a retired lawyer cannot perform strenuous ranching activities is not sufficient to show that they suffer substantial limitations on life activity and are "qualified individuals with a disability" within the meaning of the ADA. Further, these family-held corporations would be exempt from Amendment E if a family member resides on a ranch.

Finally, the district court erred in holding that Amendment E does not apply to cooperatives. Amendment E was designed to bar risk-shielding business structures from farming in South Dakota, and cooperatives are a form of a risk-shielding business structure. Further, Amendment E specifically applies to corporations. Cooperatives are a form of corporation and must be analyzed like any other corporation under Amendment E.

ARGUMENTS AND AUTHORITIES

I. ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION DOES NOT APPLY TO ELECTRIC TRANSMISSION LINE EASEMENTS.

Judge Kornmann held that Article XVII, Section 21 of the South Dakota Constitution (Amendment E) bars Utilities from purchasing new easements for

transmission lines.

A. Standard of Review.

This issue involves whether, under state property law, utility easements crossing agricultural land are "interests in land used for farming" within the meaning of the State Constitution.

This question involves neither a federal statute nor an issue of federal constitutional dimension. Rather it involves an interpretation of South Dakota property law pertaining to easements and the South Dakota Constitution. Because matters of state law are involved, the district court is to defer to the construction given by the highest court of the state. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Becker v. Lockhart*, 971 F.2d 172, 174 (8th Cir. 1992). Here, the state court has opined on the scope and extent of utility easements, and deference should be afforded in that regard. *Knight v. Madison*, 2001 S.D. 120, 634 N.W.2d 540, 542; *Musch v. H-D Electric Cooperative, Inc.*, 460 N.W.2d 149 (S.D. 1990).

The further question is whether such utility easements, as defined by South Dakota law, are "interests in land used for farming" within the meaning of the South Dakota Constitution. The state supreme court has not ruled on this precise question. The district court was therefore required to "predict" as best it could, how the state's highest court would rule. *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994).

The appellate standard of review is de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Brandenburg*, 23 F.3d at 1440.

B. Utility Easements Are Not Prohibited by the Corporate Farming Laws.

Article XVII, Section 21 bars corporations and syndicates from holding "an interest whether legal, beneficial, or otherwise, in any real estate *used for farming* in this state." (Emphasis added.) Section 21 is silent as to utility easements. There is good reason: the easements obtained by Utilities are not used for farming.

Under South Dakota property law, an easement is "an interest in the land in the possession of another which entitles the owner of such interest to a *limited use or enjoyment of the land* in which the interest exists." *Knight*, 2001 S.D. 120, ¶ 4, 634 N.W.2d at 542 (emphasis added). SDCL 43-13-5 provides that, "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Neither the physical size nor the purpose or use to which an easement may be used can be expanded or enlarged beyond the terms of the grant of the easement. *Knight*, 634 N.W.2d at 542.

The South Dakota Supreme Court specifically examined the scope of utility easements in *Musch*. The court recognized that the easement is limited to the use specified in the grant, and the remaining rights to use the land lie with the grantor. 460 N.W.2d at 154. Under *Musch*, utility easements are a legal interest limited to the use specified by their easement: the placement of utility poles and

wires.

The easements in question here are consistent in scope. Utilities submitted exhibits showing that the purpose of the easements are for electrical power cables (Exh. 90) and for overhead or underground electric lines (Exh. 88). App. 1-2, 5-6. In both cases, the *grantor* of the easements reserved the right to cultivate the land not providing support for the utility line. Article XVII, Section 21 does not bar corporations from acquiring utility easements, as Utilities do not have an interest in land used for farming. The corporate farming laws do not apply to them.

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTIONS 21-24 OF THE SOUTH DAKOTA CONSTITUTION IS UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

Judge Kornmann held that Amendment E is unconstitutional as applied to the Utilities. In large part, he was concerned with the transmission line easements. App. 252-53, 265-67. As set forth in Issue I, Amendment E does not apply to utility easements at all. The only other utility interest involved the Big Stone property. As described below, that situation does not merit a determination that Amendment E is unconstitutional.

A. The Big Stone Issue Does Not Require Constitutional Review.

There are two parcels of Big Stone property involved. First, Utilities own 552 acres adjacent to the Big Stone Power Plant in northeast South Dakota. It was leased to farmers previous to 1998 and continues to be leased to them. All parties acknowledge (and Judge Kornmann found) that this property is exempt under Section 22(4) of Amendment E. App. 265. This clause allows the Utilities (who own the land under a tenancy in common) to continue to own this land and lease it to farmers so long as the ownership interests of the tenancy in common are not altered. App. 252, 253.

The same tenancy in common also owns the nearby power plant. The Utilities may need to change the ownership percentages of the power plant in the future. T 286. Accordingly, the Utilities claim that if the percentages of ownership within the tenancy in common change, then "it would destroy the grandfather which Amendment E offers." T 286. State Defendants submit that even if the *industrial* plant is operated by a different configuration of tenants in common *in the future*, there is no requirement that such new group would be required to own the farmland or farm the *nearby land.* T 304. Indeed, Utilities acknowledge that they could continue to maintain the tenancy in common under its current configuration for the 552 acres of land regardless of any change in corporate structure for operating the nearby power plant.[3] T 304.

3. In *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 127 (1978), the Court held that the commerce clause does not protect "the particular structure of methods of operation" for businesses. Instead, it protects interstate firms from prohibitive or burdensome regulations. 437 U.S. at 127, 128. Moreover, the commerce clause does not immunize corporations from regulation. *Id.*

Even though this property is currently farmed (pursuant to the grandfather exemption), the Utilities are holding it for future development, for ash disposal, and for a buffer zone for the plant. T 299. These purposes would exist even if the land were not used for farming. Due to its proximity to a rail line and good water supply, various industrial projects have been proposed in the past at this location. These projects have included an ethanol plant and a processing plant called ProGold. T 299. Some land is currently leased to an ethanol plant. T 300. The land is well adapted for industrial use. There is little reason to expect this 552 acres would ever be sold as farm property and invoke the corporate farming laws. Hence, the constitutional question need not be addressed. *United States v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999) (if the issue is so premature that court would have to speculate as to real injury, the court should not address constitutional questions).

At trial, the Utilities raised a second Big Stone claim. They recently purchased additional farmland for a new plant near the existing plant. T 283. They intend to turn this land over to the new owners of Big Stone II, a group not yet formed. T 288, 289. They have also purchased an option on additional land for the cooling pond for this project. T 287, 306. None of this additional property would be grandfathered under Amendment E. For these lands, the Big Stone Partners must comply with Section 22(10), which permits a corporation purchasing agricultural land for development purposes to rent the land (to a family farmer) for no more than five years. The Utilities cannot use the land for agricultural production after the five years and would have to sell the land or let it lie idle pending development.

Construction of the existing plant took only five years. T 301. At trial, the plant manager estimated that construction of Big Stone II may be complete as early as 2007. T 304. Construction itself would take as many as four construction seasons and begin within the five-year period. T 304, 305. The actual land on which construction occurs cannot physically be farmed during construction. T 302. A constitutional requirement that the farmland must be taken out of production after five years would not be burdensome if the land is already taken out of production while the plant is being constructed.

The constitutionality of Amendment E need not be addressed with respect to this property that will soon be dedicated to industrial use. The Utilities have not shown that they will be harmed. To find otherwise would be to engage in speculation regarding regulatory approval and construction delay. The Court should refuse to engage in such premature debate. *Thomas*, 198 F.3d at 1065.

B. Standard of Review.[4]

Plaintiffs' burden on a constitutional claim is to demonstrate beyond a reasonable doubt that the challenged law is unconstitutional. *Equipment*

4. As seen, Utilities have not established that the facts regarding the Big Stone property merit constitutional review. However, assuming for the sake of argument that such review is merited, Amendment E survives constitutional scrutiny.

Manufacturers Institute, et al. v. Janklow, et al., No. 01-2062, slip op. at 28 (8th Cir. Aug. 6, 2002); *Knowles v. United States*, 829 F. Supp. 1147 (D.S.D. 1993), *aff'd in part*, 29 F.3d 1261 (8th Cir. 1994), *rev'd in part*, 91 F.3d 1147 (8th Cir. 1996).

The appellate standard for reviewing the district court's conclusions of law on this issue is "de novo." *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001).

C. Commerce Clause Framework.

The states retain authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *Maine v. Taylor*, 477 U.S. 131, 138 (1986). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 126 (1978). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (rejecting a claim of discrimination because the challenged statute "'regulates evenhandedly' . . . without regard to whether the [commerce came] from outside the State").

"For purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000); *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994).

Discrimination may take one of three forms. The law may be (a) discriminatory on its face, (b) may have a discriminatory purpose, or (c) may have a discriminatory effect. *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995); *U&I Sanitation*, 205 F.3d at 1067. If a state regulation is discriminatory in one of these ways, it will be subjected to one of two dormant commerce clause tests, depending on the discriminatory nature of the statute.

One test applies if a law regulates evenhandedly and has only incidental effects on, and does not overtly discriminate against, interstate commerce. *Hampton Feedlot*, 249 F.3d at 818. Under this test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

If the law overtly discriminates against interstate commerce, the second test applies: It will be struck down unless the state can demonstrate "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Hampton Feedlot*, 249 F.3d at 818; *U&I Sanitation*, 205 F.3d at 1067.

Under this strict scrutiny test, the State bears the burden of justifying the interstate discrimination or burden by showing that: (1) local benefits flow from the challenged law, and (2) nondiscriminatory alternatives, adequate to preserve

the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). It is considered a persuasive or overriding basis for validity when the state legitimately seeks to further a *police power objective* rather than when merely economic interests are at stake. *Carbone*, 511 U.S. at 405-6 (concurrence); *U&I Sanitation*, 205 F.3d at 1070.

D. Amendment E Is Not Facially Discriminatory and Does Not Discriminate Against Interstate Commerce in Purpose or Effect.

Section 21 of Article XVII (Amendment E) applies to all corporations and limited liability syndicates doing business in South Dakota; it prohibits all corporations and syndicates from owning real estate used for farming or from engaging in farming. It clearly applies both to in-state and out-of-state corporations and syndicates. On its face, Amendment E thus regulates evenhandedly.

Amendment E does not establish preferential treatment in favor of in-state businesses or discriminating against out-of-state entities. Neither Utilities nor any other Plaintiff presented evidence to this effect. Plaintiff Northwestern Public Service has its principal place of business in Sioux Falls, and its service area is in South Dakota. App. 4, Exh. 89. Otter Tail and Montana-Dakota Utilities are located in South Dakota and other states. Yet, all three Utilities claim to be affected in the same way.

The testimony of other plaintiffs is also telling. Plaintiff SD Farm Bureau's witness stated that Amendment E "actually hurts South Dakota farmers rather than protects them against out-of-state competition." T 38. Although Plaintiff Brost attempted to assert that Amendment E provides differential treatment, he admitted that he is "not claiming that Amendment E benefits South Dakota farmers to the detriment of out-of-state farmers" from a "profit-making perspective." T 100.

In-state economic hardship does not violate the commerce clause. In *Hampton Feedlot*, 249 F.3d at 820-21, the Court stated:

The Missouri Legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harm and benefits to all stakeholders in creating its price discrimination law. In the event that the implemented statute adversely affects Missouri farmers or consumers, appellees are free to petition the legislature to amend or repeal the statute. Appellees have asked us to strike Missouri's statute because it burdens interstate commerce, but they have failed to show how the measure has this unconstitutional effect. Economic hardship experienced by Missouri feedlots does not rise to the level of a dormant commerce clause violation.

Another facet of the discrimination determination is whether the purpose of Amendment E is to economically protect in-state businesses to the detriment of

out-of-state businesses. It clearly is not. Amendment E's purpose, as most clearly expressed in the "Pro-Con Statement" and as determined by a South Dakota circuit court, *see supra*, is to protect family farms and the environment and to maintain the rural way of life. It is thus not designed for economic protection of in-state businesses, neither helping in-state syndicates nor placing additional burdens on out-of-state syndicates.

At trial Plaintiffs argued that the drafters of Amendment E were motivated by economic protectionism or other discriminatory purpose, based upon Plaintiffs' characterization of the drafters' purpose and intent. Judge Kornmann properly rejected that argument, finding as a matter of fact that the drafters' motives were proper. *See also* Pro-Con Statement (Exh. 19), governmental documents (Exhs. 501, 502), and academic research (Exhs. 314, T 232-42, 802-63).

Amendment E is neither an economic protectionist measure nor was it enacted for other discriminatory purposes. Therefore, Amendment E regulates evenhandedly with only incidental effects on interstate commerce. The test to be applied is whether the local benefits of Amendment E are outweighed by its burdens on interstate commerce: the *Pike* test.

E. The Burden Imposed By Amendment E Upon Interstate Commerce Is Not Excessive in Relation to Its Local Benefits.

Under the Pike test, the law will be stricken only if the incidental effects it imposes upon interstate commerce are "clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

Judge Kornmann found that the burden on Utilities outweighed the local benefits. His analysis considered both the transmission line issue and the Big Stone issue together, although it appears to be premised largely on the transmission line issue. It is unclear whether Judge Kornmann would have found Amendment E constitutional or unconstitutional on the Big Stone issue alone.[5] App. 265-67. Judge Kornmann did find that the Big Stone property leased to local farmers generates income of fifteen to twenty thousand dollars annually. He did not separate which Big Stone lands are "grandfathered" and which lands are being held for development. App. 265.

Assuming, for sake of argument, that Judge Kornmann correctly found that the harm arising to the Utilities from Amendment E was fifteen to twenty thousand dollars, that sum is the "burden" that must be examined for commerce clause purposes.[6] That monetary burden would be weighed against the putative local benefits.

Legislation that promotes or protects South Dakota agriculture is a valid local benefit and a reasonable exercise of police power under South Dakota law.

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5. As described above, the transmission lines are not barred by Amendment E and should not factor into this analysis at all.

6. This sum is used for commerce clause argument only. State Defendants do not acknowledge that Utilities are damaged in this amount.

In re Request for an Advisory Opinion, 387 N.W.2d 239, 243 (S.D. 1986).

Measures to promote and protect a state's major industry are within a state's police powers. "[I]t cannot be reasonably contended that the protection and promotion of [South Dakota's agriculture economy] is not a matter of public concern or that the Legislature may not determine within reasonable bounds what is necessary for the protection and expedient for promotion of that industry."

Id. (citations omitted).

This finding is consistent with cases where corporate ownership of farmland has been considered. *Asbury Hospital v. Cass*, 326 U.S. 207 (1945) (barring all corporations (except cooperatives) from owning farmland is an appropriate legislative application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988) (protecting the welfare of citizens in the traditional farm community is a legitimate state interest); *MSM Farms*, 927 F.2d at 333 (retaining and promoting family farm operations and preventing unrestricted corporate ownership is a legitimate state interest).

Similarly, this Court recently upheld a Missouri livestock pricing statute against a commerce clause challenge recognizing that the statute was designed to "preserve the family farm and Missouri's rural economy." *Hampton Feedlot*, 249 F.3d at 820. As this Court recognized in *MSM Farms* and in *Hampton Feedlot*, the protection of the family farm and the rural way of life are legitimate local benefits.

At trial, expert sociologists testified regarding this issue. Drs. Lobao and Heffernan used different approaches and demonstrated that two major types of corporate farming (industrialized farming and production contracting) caused detrimental effects in farm communities over the long term.

Dr. Lobao reviewed thirty-eight studies that are representative of the major sociological work regarding industrialized farming[7] and its effect on communities. T 455, 474. Dr. Lobao looked at studies that used four generally accepted sociological methodologies: case study designs, macro-social accounting designs, regional economic impact models, and surveys. T 457-59. The studies included federally funded studies (T 463), as well as various private studies. Over seventy-five percent of the studies showed that industrialized farming caused some detrimental effects on communities. T 496; Exh. 314, Table 1. These detrimental socioeconomic effects include income inequality and corresponding social disruption, crime rates, lack of education attainment, lower total community employment, and higher unemployment rates. T 475. Detrimental effects on the social fabric of the community include the decline in quality of local governance, reduced enjoyment of property, lack of civic participation, and social disruption. Exh. 314, at 16-17. Sociologists have also found that industrialized farming causes detrimental health effects. Exh. 314, at

7. Industrialized farming refers to farming where different groups of people are engaged in management of the operation beyond just a household situation. T 451.

16-17.

Secondly, Dr. Lobao testified regarding her own research on socioeconomic wellbeing in various communities. T 464. She compared small family, larger family, and industrialized farming. T 454. Dr. Lobao found that the middle-sized family owned and operated, locally controlled farms tended to be related to a higher quality of life in terms of socioeconomic well being. T 464. Although there was not a clear-cut detrimental impact on an immediate basis, she found a detrimental impact occurring over time, such as a ten-year period. T 465.

Dr. Heffernan testified regarding production contracting, a type of industrialized farming that is largely prohibited by Amendment E as it is practiced primarily by corporations. Production contracting is becoming more commonly used in the hog business, but has been in use in the broiler industry for decades. T 802. The experience in the broiler industry is useful to analyze the possibilities in the hog industry (or other livestock industries using production contracts in the future).

Dr. Heffernan testified regarding his case study of sociological effects of production contracting in one Louisiana parish over thirty years. T 803. In 1969, the parish was impoverished, and contract production had been in place for about ten years. T 806, 810. Contracts were issued by four companies (integrators) for terms long enough for the grower to pay off his capital investment (building, waste management system, water supply). T 810.

In 1981, the number of integrators had dropped to two. T 813. Contracts were offered only for seven or eight weeks (the time to feed a batch of broilers) rather than a period of years. T 814. Growers had done well economically during the period from 1969 to 1981, but were still in debt for the broiler buildings. T 815-16.

By 1999, there was one integrator. T 818. The number of independent family farmers had decreased dramatically over the thirty years, and the number of contract growers had doubled. T 818. The contracts remained at a term of seven weeks, but there was an inconsistent supply of broilers for the growers to feed. T 820. Integrators were able to vary the supply of broilers to meet market needs; growers sat with buildings empty and a continuing debt load. T 820.

By 1999, this parish had the highest farm sales of any parish in the state, yet was still a persistent poverty county. T 824. Growers had made capital expenditures for the buildings, but were unable to build collateral. T 826. The integrators often required the growers to make additional improvements. T 826. The growers never built up equity in the stock. Yet, the growers still had to bear the cost of livestock death loss when contract payments were made. T 827.

Poultry growers now have no opportunity to become independent producers in Louisiana or anywhere else in the country. Due to the rise in production contracting, the large corporations own ninety-five to ninety-eight percent of the broilers at all stages of production and manufacturing. T 827. They do not buy broilers on the market, and there is no independent market for broilers. As

Dr. Heffernan stated, the "bird never sells." T 827.[8]

Poultry production in Louisiana is not an isolated example of the asymmetrical position between the growers and integrators in production contract situations. *See, e.g., Crowell v. Campbell Soup Company*, 264 F.3d 756 (8th Cir. 2001) (broilers in Minnesota) and *Seegers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998) (seed corn in Indiana).

Dr. Heffernan also testified regarding concentration among processors in the food system. T 831. Because of increasing concentration, farmers have fewer options to sell their product. T 832. It is undeniable that the corporate farming issue and continuing concentration is an area of intense concern. *See* USDA Reports "A Time to Act" And "A Time to Choose." Exhs. 311, 312.

Amendment E addresses these socioeconomic and market concentration issues by prohibiting corporate entities from farming unless they are closely tied (by residence or routine labor) to the farm itself. This ensures that farm owners are involved in the farm operation themselves, more like a traditional family farmer than a corporate CEO who, in the days of Enron, cannot be presumed to act to the benefit of the farm (or indeed, corporate stockholders). It prevents corporations from conducting farming by having their animals raised by others under production contracts. By controlling these problems, Amendment E protects the socioeconomic structure of rural life and traditional family-farm based agriculture.

Therefore, even if it is assumed that Amendment E has incidental effects on interstate commerce, Amendment E does not burden interstate commerce in excess in relation to its local benefits of protecting family farms. As such, under *Pike*, 397 U.S. 137, Amendment E does not violate the commerce clause.

F. *In the Alternative, Amendment E Also Satisfies the Second Commerce Clause Test.*

If the Court determines that Amendment E does discriminate against or burden interstate commerce, it still satisfies the "strict scrutiny" test. The legitimate local purpose served by Amendment E, described above, is the protection of the family farm and rural way of life.

Nondiscriminatory alternatives to Amendment E were attempted by the State; these failed to provide adequate protection for family farms. SDCL ch. 47-9A, which restricts corporate farming activities, has been in effect since 1974 and has not stemmed the trend toward larger corporate farms and fewer family farms. Other alternatives, such as restricting the size of farms, affect interstate commerce in the same manner as Amendment E; they would apply to both in-state and out-of-state corporations and syndicates just as does Amendment E. Legislation or constitutional amendments which prohibit vertical integration by corporations and syndicates would, in effect, act almost entirely

8. While there is an opportunity for direct neighborhood sales (such as the sales by Hutterite Colonies in South Dakota) or niche markets, those enterprises represent as little as two percent of the broiler market nationwide. The Hutterite Colonies, for example, process the broilers themselves and sell the broilers in local communities.

on out-of-state businesses, as in South Dakota it is out-of-state businesses that have the capital and power to vertically integrate. Such legislation would burden interstate commerce far more than does Amendment E, and may indeed be viewed as per se economic protectionism.

Another alternative would be an "excess land tax," whereby corporate farms would be required to pay more property tax than smaller farms. This alternative may make the cost of doing business higher for corporations, but would not address the problem of consolidation of farms, declining numbers of family farmers, and adverse changes in communities.

Thus, Defendants submit that no alternatives exist that would accomplish the goals involved here and that would have less of an impact on interstate commerce than does Amendment E. Even under the strict scrutiny test, Amendment E does not violate the commerce clause.

III. PLAINTIFFS HAVE NOT ESTABLISHED THAT ARTICLE XVII, SECTION 22(1) VIOLATES ARTICLE II OF THE AMERICANS WITH DISABILITIES ACT.

Judge Kornmann erred in ruling, sua sponte, that Amendment E violates the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

A. Standard of Review.

This issue addresses several errors pertaining to the ADA question. The standard of review will be referenced at the beginning of each of these areas.

B. Sua Sponte Consideration of Abandoned Claim.

The appropriate standard of review is "de novo" because it involves consideration of whether legal claims may be considered "sua sponte" on a post-trial basis.

The only ADA claim ever filed by a Plaintiff in this case was made by SD Farm Bureau. App. 39-40. The State Defendants moved to dismiss, asserting that SD Farm Bureau lacked standing to assert that claim, and that the Eleventh Amendment barred suit. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (ADA is not a valid abrogation of Eleventh Amendment immunity). At hearing on January 18, 2000, the court orally dismissed the ADA claim on the basis of *Alsbrook*. MHT 6.

In February 2000, Plaintiffs sought permission to file an Amended Complaint. App. 119-22. They sought to delete the ADA claim to "reflect the court's rulings on January 18, 2000." App. 121. The district court's written ruling on the subject was filed six months later in September 2000. App. 140, 141. Although the district court's oral ruling and its written opinion dismissed the claim, it did not require the claim to be stricken from the Complaint.

Plaintiffs filed a trial brief thirty days before trial and never mentioned the ADA claim. Likewise, no ADA issues whatsoever were raised at trial. When a

pretrial motion excludes evidence on a particular issue, the issue must be raised again at trial to preserve the record. *Keeper v. King*, 130 F.3d 1309, 1315 (8th Cir. 1997). The issue was abandoned in the Amended Complaint, was not tried, and was waived.

Yet, a week after trial the district court issued a *post-trial* Memorandum indicating that the court might reconsider its previous decision due to the recent decision in *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001).

The *Grey* decision had been filed on November 6, 2001. It held that ADA claims may be brought against state officers for prospective injunctive relief, notwithstanding the Eleventh Amendment. In so holding, *Grey* reiterated this Court's decision in *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001). *Randolph* was issued in July 2001. Had Plaintiffs brought the *Randolph* decision to the district court's attention in July 2001 (or even brought up the *Grey* decision in November 2001), there might still have been time for discovery before trial. As it was, Plaintiffs never brought the issue up at all. Indeed, Plaintiffs' post-trial brief (filed after the court's post-trial memorandum) did not address this issue at all.[9]

Although Judge Kornmann found that the issue was raised in an offer of proof during trial, Plaintiffs simply made no such offer. The rationale for an offer of proof is twofold. One reason is to provide the appellate court with a record. *Kline v. City of Kansas City*, 175 F.3d 660, 665 (8th Cir. 1999). The second reason is to apprise the judge *and opposing counsel* of the evidence involved. *Id.* ("the offer of proof is to inform the [trial] court and opposing counsel of the substance of the excluded evidence, enabling them to take appropriate action").

Although no Plaintiff ever indicated that an offer of proof was being made, two Plaintiffs (who had never raised ADA claims) testified generally on their physical well-being for purposes of their equal protection and commerce clause claims. Plaintiffs Holben and Brost testified that they have chosen not to reside on their respective ranches and that they cannot engage in strenuous ranching activities. T 76, 259. However, Holben and Brost had claimed in their Complaint that Amendment E impaired their rights under the equal protection and commerce clauses.[10] The evidence of physical hardship was admissible under those constitutional claims.

Where a party is making an offer of proof, that party must articulate that an offer of proof is being made and explain the various uses for the evidence. *New York v. Microsoft*, ___ F. Supp. 2d ___, 2002 WL 1311434 (D.D.C. May 29, 2002); *Clausen v. Sea-3*, 21 F.3d 1181, 1194 (1st Cir. 1994). Plaintiffs failed to do so. Because Holben and Brost had <u>never</u> raised the ADA issue, the State Defendants had no reason to object and did not cross-examine on ADA issues

9. Even if Plaintiffs had made the argument on a post-trial basis, the issue would have been waived. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722, 723 (10th Cir. 1993). The fact that the issue was raised sua sponte should not salvage the issue when it was never tried.

10. *To date, neither of these Plaintiffs have asked for relief under the ADA.*

such as the extent of the disability, and whether the disability was a "substantial impairment" within the meaning of the ADA. An offer of proof that is accepted and denies opposing counsel the ability to cross-examine is improper. *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm'n*, 665 F.2d 1210, 1216 (D.C. Cir. 1981). Indeed, had there been *any* indication that the Holben and Brost evidence would be used to support the ADA theory, the State Defendants would have objected. Since there was no indication that this unpled issue was being introduced at trial, the State Defendants certainly did not consent to bringing it up. Where evidence is not recognizable as an independent issue, failure to object cannot be construed as consent to try the issue. *Portis v. First National Bank of New Albany*, 34 F.3d 325, 331 (5th Cir. 1994). The issue was not tried and Judge Kornmann erred.

C. Standing.

The standard of review on this standing argument is "de novo." *Steger v. Franco*, 228 F.3d 889, 892 (8th Cir. 2000).

As stated, the only ADA claim ever filed in this case was made in the initial Complaint by SD Farm Bureau. The State Defendants raised the question of SD Farm Bureau's standing in a pretrial motion. App. 44. Judge Kornmann did not rule on the standing issue due to his Eleventh Amendment ruling. After the trial he held that the Eleventh Amendment did not bar suit, so he considered the ADA claim and the standing issue. He held that SD Farm Bureau had standing to raise the ADA claim:

There is no evidence in the record to support associational standing as to the ADA claims by Farm Bureau, perhaps because of the erroneous previous ruling by the court. Farm Bureau, however, like the Farmers Union broadly represents farmer members' interests before legislative and other bodies on a routine basis. The court takes judicial notice of this. Representing the claims of presently "disabled farmers" who are members of Farm Bureau and farmer members yet to be disabled may be something of a "stretch" but the court will allow associational standing.

App. 259, 260.

The State Defendants submit that allowing associational standing is more than a stretch, it is reversible error. App. 39-40.

As Judge Kornmann recognized, there was no evidence in the record to support associational standing. SD Farm Bureau, in the original Complaint, alleged that it is "an independent, non-governmental federation made up of 47 County Farm Bureaus," and "represents the interests of more than 10,000 voluntary member farm, ranch, and rural families in the State of South Dakota." Complaint, ¶ 32; T 19. SD Farm Bureau was "founded to protect, promote, and improve the political, social, economic, and personal status of South Dakota farm, ranch, and rural families." Complaint, ¶ 33. It meets the needs of its members through "the provision of beneficial services." Complaint, ¶ 34. According to the initial Complaint (but not in the Amended Complaint), SD

Farm Bureau includes members "who are or may become disabled." Complaint, ¶ 127.

At trial, SD Farm Bureau called its administrative director, Mike Held, as a witness. He testified generally about SD Farm Bureau's concerns with Amendment E, did not mention the ADA, or the protection of impaired persons in any manner. T 23-36. Judge Kornmann recognized the standing problem and tried to overcome it by taking judicial notice that SD Farm Bureau is a general farm advocate. The test is, however, much more restrictive. Organizations whose own legal rights and interests have not been injured have standing to seek redress on behalf of their members only under certain circumstances. *Kessler Inst. For Rehab. v. Essex Fells Mayor*, 876 F. Supp. 641 (D.N.J. 1995). The Supreme Court has set out the test for organizational or associational standing as:

an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343; *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 470 (8th Cir. 1985).

The first prong of the *Hunt* test mandates that the association's members have standing to sue in their own right. SD Farm Bureau has not alleged that any of its members are "qualified individuals with a disability" as required by the applicable ADA provision, 42 U.S.C. § 12132. App. 160-62. This definition

requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." Sec. 12102(2). *Thus whether a person has a disability under the ADA is an individualized inquiry.*

Sutton, et al. v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). Specific facts must be asserted in the complaint if a plaintiff is bringing a claim asserting that the defendants regard their disability as substantially limiting their ability to work. *Sutton*, 527 U.S. at 483.

Further, a limit on *one* type of job (such as farming, in the case here at issue) is not a "substantially limiting impairment" under the ADA. *Sutton*, 527 U.S. at 491. Moreover, ADA claims must demonstrate that the disabled claimants are injured by the challenged law, policy, or government act. *Steger*, 228 F.3d at 893 (blind persons not "among the injured" when they have never entered the building where non-compliant facilities exist).

Thus, more than a bare allegation of a disability that might exist (Complaint, ¶ 127 and no allegation at all in the Amended Complaint, App. 160-62) is necessary in order to state a claim for relief under the ADA. The judicial notice taken that SD Farm Bureau lobbies on behalf of all of its members does not cure the problem. In order to support an ADA claim, more fact-specific information is clearly required. Neither the Complaint nor any evidence at trial make the necessary allegations to demonstrate that SD Farm Bureau has standing

to sue under the ADA. The first prong of the *Hunt* test has not been met.

The third prong of *Hunt* generally provides that participation of individual members in the lawsuit is not necessary to maintain associational standing. However, a claim brought under the ADA necessarily requires participation by individual members because ADA claims are individualized. *Sutton*, 527 U.S. at 483. *See Kessler*, 876 F. Supp. at 653 (entity which *serves* the disabled is not *disabled* as contemplated by 42 U.S.C. § 12132 and, therefore, subchapter II of the ADA confers no substantive rights upon it to provide a basis for standing). The SD Farm Bureau does not have standing to bring this ADA claim.

Consequently, SD Farm Bureau cannot:

shoehorn an unknown number of supposed, but unknown, victims into their cause of action by the mechanism of associational standing. *See, e.g., Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 426 (8th Cir. 1985) ("[a]ssociational standing is properly denied where, as here, the need for 'individualized proof,' [citation to *Hunt* omitted], so pervades the claim that the furtherance of the members' interests required individual representation").

Concerned Parents to Save Dresher Park Center v. City of West Palm Beach, 884 F. Supp. 487, 489 (S.D. Fla. 1994) (action filed against city for alleged violations of Title II of the ADA). *See also Jeanine B. By Blondis v. Thompson*, 877 F. Supp. 1268, 1286 (E.D. Wis. 1995). ("The plaintiffs have failed to state claims under the ADA . . . because they have not sufficiently alleged that any of the individual plaintiffs are disabled as defined under those acts. The failure to so allege is fatal to the complaint's claims against the State defendants. . . .")

Judge Kornmann relied on *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). In that case, however, the court specifically noted that the city did not challenge the plaintiff's standing. *Innovative Health*, 117 F.3d at 46. Further, in *Innovative Health*, the plaintiff was a drug and alcohol rehabilitation center offering services to disabled persons. It involved the revocation of a building permit for a facility to serve disabled persons. That situation constituted a specific injury to the association itself because it actually ran the rehabilitation center. SD Farm Bureau never alleged that it provides disability-related services that are impacted by Amendment E.

D. The ADA Was Not Violated in Light of the Evidence in this Case.

The ADA has four titles, of which only Title II applies to state government. Title II states:

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such public entity.

42 U.S.C. § 12132. Thus, in order to raise a claim under 42 U.S.C. § 12132, the Plaintiffs must meet the definition of a "qualified individual with a disability." This definition appears at 42 U.S.C. § 12102(2) as:

(A)A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B)A record of such an impairment; or

(C)Being regarded as having such an impairment.

Judge Kornmann held that because Plaintiff Brost (a retired lawyer and government executive) and Plaintiff Holben (a retired CPA) suffer from heart disease, they are disabled. The evidence simply does not merit this result.

In some cases, heart disease does constitute a physical impairment under the ADA. *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1227 (11th Cir. 1999). Physical limitations due to heart conditions are not, however, a per se disability covered by the ADA. *Weber v. Strippit*, 186 F.3d 907, 914 (8th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 974 (2000). Moderate limitations on major life activities caused by some restrictions on physical labor do not constitute a "disability." *Id.* at 914.

Under the ADA, the physical impairment must substantially limit one or more of the individual's major life activities.[11] *Id.*; 42 U.S.C. 12102(2); 29 C.F.R. 1630.2(j); *Strippit*, 186 F.3d at 913. Major life activities include, for example, eating, breathing, walking, and working. A limit on one type of job is not a "substantially limiting impairment" on a "major life activity" as contemplated by the ADA. *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000). Instead, the claimant must demonstrate the inability to work in a broad range of jobs. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, ___ U.S. ___, 122 S.Ct. 681 (2002); *Sutton*, 527 U.S. 471; *Fjellstad v. Pizza Hut of America*, 188 F.3d 944, 949 (8th Cir. 1999).

Brost and Holben do not meet this criteria. There are several reasons. First, Plaintiff Brost participated in this lawsuit as an individual. His ranch was incorporated under Brost Land and Cattle, an entity not a party to this suit. T 62. Brost has standing only to pursue his own claims in this case. Because Brost Land and Cattle was not participating as a party in this suit, Brost lacks standing to advance claims on behalf of Brost Land and Cattle. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Any disability of Brost should not be imputed to the corporation in a lawsuit where the corporation is not even a party.

Further, Brost, as an individual, has not demonstrated that he has a substantially limiting impairment on the major life activity of working. He received a J.D. from the University of South Dakota School of Law in 1965 and practiced law until 2001. T 61, 68. He was a business, tax, and estate lawyer. T 72.

Brost still wishes to maintain this corporation and has a "desire to remain in the cattle business and the ranching business because I'm plum [sic] able to do that and participate at the level that I was before this event [heart surgery] occurred." T 66. He is on the ranch twice a week during the growing season. T 105. He is still capable of making financial investments, making decisions on

11. State Defendants were denied the opportunity to cross-examine on this issue since the ADA claim was not raised at trial.

crop planting, and livestock marketing. T 66. He has also been a state government executive. T 63. There is no indication that his heart disease has diminished his ability to use his communication skills, political contacts, or other executive skills. T 84, 85. According to his own direct testimony, Brost would be able to work in a range of jobs.

Brost did testify that he is unable to "do the daily and routine physical exertion" that would be required if his corporations were to qualify as family farm corporations within the meaning of Amendment E. T 76 (Article XVII, Section 22(1) requires that a family farm corporation must have a family member residing on the farm or engaged in day-to-day labor and management of the farm). Brost testified that the reason he cannot live on the ranch is that the hired men already occupy the homes. T 88. While he cannot engage in strenuous activity and is not in a position to live on the ranch, neither situation means that he is suffering from a substantial impairment within the meaning of the ADA.

Marston Holben is a CPA and worked in the accounting field starting in 1959. T 249. Holben is now retired. Spear H. Ranch, Inc. and Plaintiffs Holben and the Marston and Marion Holben Family Trust (through their operation of the Spear H. Ranch) are in compliance with Amendment E under the family farm exception in Section 22(1). Holben purchases steers for the corporation in the springtime, has them branded and vaccinated, and then pastures them on unimproved ranch property in western South Dakota. T 250-53. Once on the ranch, the cattle graze in the pasture for the summer. Day-to-day labor is not required. T 257. Holben oversees matters every week or two, sometimes two or three times a week. T 258. He rides herd and checks to make sure the steers are healthy. T 259. He and his wife completely manage the operation. T 258. To the extent heavy physical work is required, he hires the work done. T 259.

Amendment E does not require that a family member be present on a daily basis if the operation does not require that level of activity. The extent of labor and management required "depends in large part on the type of farm or ranch operation being conducted." *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420, 428 (2000) (interpreting Nebraska's similar requirement). It is undisputed that ranches like Holben's do not require daily chores. T 257. The activities of Marston Holben qualify Plaintiff Spear H. Ranch, Inc. under the family farm exception of Section 22(1).

In sum, Brost and Holben's evidence of heart disease was made in support of their equal protection and commerce clause claims. The ADA claim filed in the original Complaint was not made by these parties. Each testified generally that he had heart disease that limits (but does not bar) physical labor on ranches they own. T 58, 198, 255. However, neither Brost nor Holben established that the nature, duration, and long-term medical problems of their heart disease caused them to be substantially limited in a major life activity. Neither has claimed or demonstrated that he is within the class of disabled persons protected by the ADA.

For each of these reasons, the district court erred in holding that

Amendment E violated the ADA.

IV. ARTICLE XVII, SECTION 21 OF THE SOUTH DAKOTA CONSTITUTION APPLIES TO COOPERATIVES.

Judge Kornmann found that cooperatives are not subject to Amendment E.

A. Standard of Review.

Because this issue involves solely an interpretation of state law, the standard of review is "de novo." *See infra*, in Issue I.

B. Cooperatives Are Subject to Amendment E.

Although no cooperatives are parties in this suit, some of the Plaintiffs do business with cooperatives and claimed to be affected by the issue of whether cooperatives are barred by Amendment E. Judge Kornmann held that cooperatives are not included as one of the business enterprises included in Amendment E.

The issue of whether cooperatives are included in the Amendment E depends on state constitutional construction. South Dakota courts apply the general principles of statutory construction in interpreting constitutional sections. *Breck v. Janklow*, 2001 S.D. 28, 623 N.W.2d 449, 455; *In Re Request of Governor Janklow*, 2000 S.D. 106, ¶ 4, 615 N.W.2d 618, 620. State laws are to be "construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure." *Moore v. Michelin Tire Company, Inc.*, 1999 S.D. 152, 603 N.W.2d 513, 518.

Importantly, the language of Section 21 broadly prohibits "*any corporation* organized under the laws of any state of the United States or any country" and "*syndicates*, *including* any limited partnership, limited liability partnership, business trust, or limited liability company organized under the law of any state." (Emphasis added.) It is significant that the term "including" was used after the term "syndicates" and before a list of specific types of business entities. The word "including" in this type of situation is not a limiting or all-embracing definition, but is "an illustrative application of the general principle." *Argo Oil Corp. v. Lathrop*, 72 N.W.2d 431, 434 (S.D. 1955). Indeed,

Where a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which standing alone would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.

Id. By using the term "corporation" and then listing various business entities as illustrations of the interpretation of "syndicates," it is apparent that Section 21 applies to all types of business entities where liability has been limited by statute.

Judge Kornmann failed to analyze whether cooperatives were risk-shielding entities within the ambit of Amendment E. He held that cooperatives were not included because cooperatives are inherently a different kind of enterprise than the entities listed in Article XVII, Section 21. The State Defendants submit, however, that cooperatives are the same as the various entities listed in Article XVII, Section 21 insofar as the critical determinative aspect is concerned: risk protection. For each of the entities specifically listed in Article XVII, Section 21, the stockholders or partners are shielded from the liability of the corporation. Cooperative members enjoy the same protection. SDCL 47-16-30 provides:

Except for debts lawfully contracted between the member and the cooperative, no member or patron is liable for the debts of the cooperative to an amount exceeding the sum remaining unpaid on his subscription for shares of the cooperative, and the sum unpaid on such members membership fees, if such fee is required by the cooperative.

This liability risk shield for cooperative members has been in place since 1965. Consequently, every cooperative entity formed since 1965 has insulated investors from the liability of the cooperative or corporation. Since the cooperative risk shield law was solidly in place many years before Amendment E, it is presumed to have been considered by the drafters. Courts assume that the "the legislature, in enacting a provision, had in mind previously enacted statu[t]es relating to the same subject." *Moore*, 603 N.W.2d at 518, 519.

Because Article XVII, Section 21 was designed to bar entities that insulate investors from liability, the prohibition necessarily applies to cooperative corporations like other corporations.

Cooperatives not only shield risk, but they also are actually *corporations*. Although Judge Kornmann found that some cooperatives are not corporations, entities calling themselves cooperatives must be incorporated in South Dakota. SDCL 47-15-41. No separate cooperative "associations" and the like can be formed in South Dakota.

Further, Judge Kornmann's decision fails to give effect to Article XVII, Section 22(2) which exempts certain types of cooperatives.

Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;

A constitutional provision must be read giving full effect to all of its parts. *Breck*, 2001 S.D. 28, 623 N.W.2d at 454; *South Dakota Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984). "No wordage should be found to be surplus." *Kneip v. Herseth*, 87 S.D. 642, 659, 214 N.W.2d 93, 102 (1974). No provision can be left without meaning." *Id.*

If all cooperatives were generally exempt from Amendment E, as Judge Kornmann found, then the exemption for limited types of cooperatives would be mere surplusage. The State Defendants submit that this interpretation is erroneous because it is inconsistent with recognized constitutional construction.

In sum, cooperatives should be analyzed in the same way that other corporations or limited liability business enterprises would be analyzed. That fact that an entity is a cooperative is not an automatic "loophole" out of Amendment E.

CONCLUSION

Based on the foregoing arguments and authorities, the State Defendants respectfully request that the district court's Judgment be reversed.