

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**Brief of Appellees Montana-Dakota Utilities
Co., Northwestern Public Service, and
Otter Tail Power Company**

by

Neil Fulton and Dave Gerdes

Originally published in SOUTH DAKOTA LAW REVIEW
49 S. D. L. REV. 674 (2004)

www.NationalAgLawCenter.org

**BRIEF OF APPELLEES MONTANA-DAKOTA UTILITIES CO.,
NORTHWESTERN PUBLIC SERVICE, AND OTTER TAIL
POWER COMPANY**

NEIL FULTON
DAVE GERDES
May, Adam, Gerdes & Thompson LLP
P.O. Box 160
Pierre, South Dakota 57501-0160
Attorneys for Plaintiffs-Appellees
Montana-Dakota Utilities Co.,
Northwestern Public Service, and
Otter Tail Power Company

CORPORATE DISCLOSURE STATEMENT

Montana-Dakota Utilities CO. is a division of MDU Resources, Inc. Northwestern Public Service is a division of NorthWestern Corporation. On 9 April 2002 Otter Tail Power Company changed its corporate name to Otter Tail Corporation. No publicly traded company owns 10% or more of the stock of any of these entities.

SUMMARY OF THE CASE

Defendants appeal the judgment of the District Court for the District of South Dakota, The Honorable Charles B. Kornmann presiding, declaring that Article XVII, Sections 21 through 24 of the South Dakota Constitution (known as "Amendment E") violate the Commerce Clause of the United States Constitution. Following a bench trial the District Court held that Amendment E imposed an undue burden on interstate commerce in violation of the Commerce Clause, did not apply to cooperatives, and was preempted by the Americans With Disabilities Act. This appeal has been consolidated with cross-appeals of various named Plaintiffs. Appellees request oral argument of 30 minutes per side because this case involves the interpretation of both state and federal constitutional and statutory provisions and involves multiple parties participating in cross-appeals of various aspects of the District Court judgment.

STATEMENT OF THE ISSUES¹

1) DOES SOUTH DAKOTA'S CONSTITUTIONAL AMENDMENT E VIOLATE THE DORMANT ASPECT OF THE COMMERCE CLAUSE BY DIRECTLY DISCRIMINATING AGAINST OR IMPOSING AN UNDUE BURDEN ON INTERSTATE COMMERCE?

S.D. Const., Art. XVII, §§ 21-22

SDDS, Inc. v. State of South Dakota, 47 F.3d 263 (8th Cir. 1995)

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)

2) ARE UTILITY EASEMENTS INTERESTS IN "REAL ESTATE USED FOR FARMING" COVERED BY AMENDMENT E?

S.D. Const., Art. XVII, § 21

Kaberna v. School Board of Lead-Deadwood, 438 N.W.2d 542 (S.D. 1989)

Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992)

STATEMENT OF THE CASE

This appeal involves an action for declaratory and injunctive relief filed

1. Appellants' argument that Amendment E does not cover cooperatives is not addressed. Since the District Court's declaration that Amendment E is unconstitutional should be affirmed, the scope of its coverage need not be addressed.

against South Dakota's Secretary of State and Attorney General in their official capacities (collectively referred to as "the State"). The Plaintiffs sought a declaration that Article XVII, §§ 21 through 24 of the South Dakota Constitution (popularly known as "Amendment E") violated the Commerce Clause of the U.S. Constitution. After a week long court trial, the District Court, the Honorable Charles B. Kornmann, took the case under advisement. On 17 May 2002 the District Court entered judgment in favor of the Plaintiffs declaring that Article XVII, §§ 21 through 24 of the South Dakota Constitution violated the Commerce Clause and was unenforceable. The District Court denied the request for injunctive relief in the same judgment. The State filed this appeal.

STATEMENT OF THE FACTS

Through a 1998 popular initiative, South Dakota adopted "Amendment E" to its constitution as Article XVII, Sections 21 through 24. The heart of Amendment E is its provision that, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. Art. XVII, § 21. Addendum p. A-2. Amendment E provides certain exceptions, the largest being for any "family farm corporation or syndicate." S.D. Const. Art. XVII, § 22(1). That exception applies only if a majority of ownership in the "corporation or syndicate" is held by natural persons within the fourth degree of kinship and at least one owner "shall reside on or be actively engaged in the day to day labor and management of the farm," through "both daily or routine substantial physical exertion and administration." *Id.*

Livestock and real estate owned, leased, or contracted for prior to the approval date of Amendment E is exempt. S.D. Const., Art. XVII, § 22(4) & (5). Real estate must be held in "continuous ownership" to fit within this exception and no contract involving livestock may be extended beyond the termination date it had when Amendment E was approved. *Id.* Amendment E also exempts "agricultural land" acquired for non-agricultural development purposes if it is developed within five years of acquisition and not used for farming (unless by a "family farm") during that five year period. S.D. Const., Art. XVII, § 22(10).

An atmosphere of protectionism for South Dakota agriculture surrounded the passage of Amendment E. South Dakota Farmer's Union President Dennis Wiese was a primary supporter of Amendment E. He testified that Amendment E was intended to protect "family farms" by keeping corporate livestock producers like Murphy Farms and Tyson out of South Dakota. T. 123, 634, 646.² Wiese and Nancy Thompson, an attorney involved in drafting Amendment E, agreed that it was written to prevent out of state corporations from qualifying for its exceptions. T. 224, 226, 228, 649. The "family farm" exemption incorporated its requirement for daily residence or labor on the

2. Citations to the trial transcript are made by "T. ___" as in the State's brief.

property to achieve that purpose. T. 228. Despite discussion that Amendment E might violate the Commerce Clause, T. 377-78, it was put together quickly because some out of state corporations were rumored to be coming to South Dakota and supporters “wanted to get a law in place to stop them.” T. 224.

Amendment E has substantially disrupted interstate commerce with South Dakota in agriculture and other areas. Ron Wheeler, head of South Dakota’s Governor’s Office of Economic Development, testified that numerous business prospects declined to come to South Dakota because of inability to comply with Amendment E. T. 737, 739. South Dakota Farm Bureau President Mike Held testified that Amendment E has prevented neighbors who were not in the same family from jointly purchasing farm machinery or livestock and prevented farms from entering contracts to feed livestock for out of state companies. T. 23-24. Important sources of capital, particularly for beginning farmers, are frozen out of South Dakota by Amendment E. T. 24, 27.

Individual producers also testified that Amendment E severely disrupted their operations. Frank Brost owns land and cattle individually and with his children and a long time ranch employee through several business entities. T. 64-65. Heart surgery and a knee replacement prevent him from engaging in “routine substantial physical exertion” on the ranch. T. 62, 66, 75-77, 78, 80, 98. Since Brost cannot comply with Amendment E, he must liquidate or disband his existing business structures and destroy a sophisticated estate plan. T. 85-87, 88-89. The value of his ranch is diminished because Amendment E severely narrows the realm of possible purchasers. T. 91.

About 70 percent of the cattle John Haverhals feeds on a contract basis belong to entities that cannot do business in South Dakota under Amendment E. T. 163-65. Ivan Sjovall has lost almost two thirds of his feeding clients since Amendment E was enacted. T. 192-93. Both men take in so many cattle from out of state companies that they will be out of business if Amendment E remains in place. T. 173, 200. Plaintiff Donald Tesch has already lost his contract to feed hogs for Harvest States Cooperative because of Amendment E. T. 184.

Plaintiffs Montana-Dakota Utilities, Northwestern Public Service, and Otter Tail Power Company (collectively known as the “Big Stone Partners”) are also injured by Amendment E. The Big Stone Partners own farming real estate both for an existing power plant’s disposal needs and for planned construction of a new plant. T. 284-86. The Big Stone Partners will change their ownership percentages in the course of building the new plant, ending the continuous ownership needed to fit within an exception to Amendment E. T. 286-87. Acquiring new land for development and easements for transmission lines is also severely hampered by Amendment E. It may not be possible to complete development on farming property within Amendment E’s five year window, current ownership percentages cannot be altered without losing an existing exemption, and new easements cannot allow farming to take place on them because the Big Stone partners will have an interest in real estate used for farming. T. 286-289, 326, 330. Easements across pastures, for example, will now require acquisition in fee and fencing of the easement corridor to prevent

livestock grazing. T. 330.

The expert testimony at trial indicated that Amendment E provides little, if any benefit to family farms. Dr. Lisa Labao, a sociologist, testified that industrialized farming had no clear cut detrimental impact on the social fabric. T. 465. Dr. Labao's own research actually indicated that "industrialized farming" improves the economy while small farming corresponds to increased poverty. T. 503-04. Dr. Luther Tweeten, an economist, testified that prohibiting corporate ownership of agricultural real estate and livestock would hurt small farmers because it would prevent the introduction of outside capital and management expertise. T. 538, 552, 554. Additionally, it prevents South Dakota farmers from competing on an even footing with out of state producers because they are barred from achieving the efficiencies and economies of scale that "corporate farming" provides. T. 540, 544, 550, 555. Amendment E burdens interstate commerce by limiting trade with South Dakota. T. 613.

SUMMARY OF THE ARGUMENT

Amendment E prohibits ownership of livestock or agricultural real estate by any "corporation or syndicate" that does not meet an enumerated exception. It both directly discriminates against interstate commerce and places an undue burden upon it in violation of the "dormant" aspect of the Commerce Clause. U.S. Const., Art. I, §8. Amendment E's discriminatory purpose is apparent both from the testimony of its proponents that it was proposed to keep certain large agricultural corporations out of South Dakota and from the poor fit between its means and stated ends. The effective inability of out of state business entities to fit within its primary exceptions demonstrates its discrimination in practical effect. Amendment E also imposes an undue burden on interstate commerce that is clearly excessive in relation to its ostensible local benefit: it totally forecloses many avenues of interstate commerce while protecting small farms, the environment, and rural life little if at all.

Amendment E's prohibition on corporate ownership of agricultural real estate applies to easements in land. The language of Amendment E states that, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming. . . ." That prohibition applies to any interest in real estate used for farming, including easements. Easements are only excluded if the modifying phrase "used for farming" is improperly applied to "interest" rather than "real estate" in violation of the rules of statutory construction and common grammar.

ARGUMENT

This Court reviews the factual findings of the District Court for clear error. *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995). Legal conclusions are reviewed de novo. *Id.*

I) AMENDMENT E VIOLATES THE COMMERCE CLAUSE BOTH BY DIRECTLY DISCRIMINATING AGAINST AND BY PLACING AN UNDUE

BURDEN UPON INTERSTATE COMMERCE.

The power of Congress to regulate commerce among the states has long been held to include a concurrent restriction on the ability of individual states to do so. *See e.g., Hunt v. Washington Advertising Commission*, 432 U.S. 333, 350 (1977). State laws can violate this “dormant” aspect of the Commerce Clause in two ways.

First, state laws that discriminate against interstate commerce in their text, purpose, or effect are unconstitutional “virtually per se.” *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A directly discriminatory law must be struck down unless the state demonstrates that it is the only means to advance a legitimate local purpose. *Hunt*, 432 U.S. at 353.

Second, laws that do not directly discriminate against interstate commerce in their text, purpose, or effect, may not impose a burden on interstate commerce that is clearly excessive in relation to their putative local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The District Court determined that Amendment E violated only the second standard. The record demonstrates that it fails both tests, however, and this Court may affirm on any basis supported by the record. *Mead v. Intermec Technology Corp.*, 271 F.3d 715, 716 (8th Cir. 2002).

1) Amendment E directly discriminates against interstate commerce in both purpose and effect.

Amendment E directly discriminates against interstate commerce in its purpose and practical effect. As this Court recognized in striking down another protectionist popular initiative from South Dakota, discriminatory purpose can be identified by the intent and public statements supporting Amendment E. *SDDS, Inc., v. State of South Dakota*, 47 F.3d 263, 268-69 (8th Cir. 1995).

Amendment E was drafted quickly because out of state agricultural corporations, particularly Murphy Farms, were poised to enter South Dakota and Amendment E’s proponents “wanted to get a law in place to stop them.” T. 224, 397, 634, 646. That discriminatory purpose was communicated to the voters through the “Pro-Con” ballot statement regarding Amendment E. Addendum, p. A-1. The “Pro” statement demonstrates Amendment E’s protectionist intent to keep agricultural profits from being “skimmed out of local economies and into the pockets of distant corporations.” Addendum, p. A-1. Dennis Wiese, a drafter of the “Pro” statement, testified that Amendment E was intended to keep certain corporations out of South Dakota and to “provide local economies a very strong position,” at their expense. T. 123, 634, 646, 666. Amendment E’s drafters specifically tailored its language and the language of its exceptions to prevent out of state corporations from qualifying to do business in South Dakota. T. 224, 228, 649. As in *SDDS*, the atmosphere surrounding Amendment E was “brimming with protectionist rhetoric” that demonstrates its purpose of discriminating against interstate commerce.

Amendment E's discriminatory purpose can also be seen in the fact that the means used to achieve its ostensible purposes are relatively ineffective. *SDDS*, 47 F.3d at 268-69, citing *Hunt*, 432 U.S. at 352. The only legitimate purposes presented in Amendment E's "Pro" ballot statement are protecting South Dakota's rural and agricultural economy and environment. Addendum, p. A-1. Research by the State's own expert indicated that large scale farming improved the local economy while small farming was corresponded to higher poverty rates. T. 465, 505-04. Likewise, Dr. Luther Tweeten testified that Amendment E would hurt small farmers in South Dakota because it prevented access to capital and expertise that corporate farming enterprises could inject into South Dakota markets. T. 538, 552, 554. No evidence was introduced about environmental conditions or problems in South Dakota that Amendment E could address. The only thing that Amendment E did with precision is prevent out of state business entities from owning agricultural real estate and livestock. That further demonstrates its discriminatory purpose. *SDDS*, 47 F.3d at 268-69.

Amendment E also directly discriminates against interstate commerce in its practical effect. The language of Amendment E is clear, "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const., Art. XVII, § 21. To own livestock or agricultural property as an active producer, a "corporation or syndicate" must have a majority of ownership in the hands of individuals within the fourth degree of kinship with one family member who will ". . . reside on or be actively engaged in the day-to-day labor and management of the farm" through "both daily or routine substantial physical exertion and administration." S.D. Const., Art. XVII, § 22(1). This sweeping prohibition and narrowly limited exception has the practical effect of prohibiting almost all out of state business entities from engaging in production agriculture in South Dakota.

Almost by definition out of state businesses will not have an interest holder who meets the "residence" requirement of § 22(1). Likewise, it is far less likely that an out of state business entity will have an interest holder who can engage in "day to day labor and management of the farm" through physical work there. This makes it effectively impossible for most out of state business entities to farm or ranch legally in South Dakota—a fact recognized by several witnesses who testified that Amendment E had already driven out of state agricultural business from South Dakota. T. 102, 124, 126, 167, 184, 192-93.

Although some South Dakota business entities may not be able to comply with Amendment E's "sweat of the brow" requirement, out of state entities almost certainly cannot. Disproportionately burdening out of state businesses in this manner violates the Commerce Clause. *South Central Bell v. Alabama*, 526 U.S. 160, 169-70. *South Central Bell* held that allowing only in state corporations to chose to be taxed on the par value of their stock rather than actual capitalization violated the Commerce Clause because it disproportionately burdened out of state businesses. *Id.* Providing exceptions favoring in state trucking interests also violated the Commerce Clause. *Kassel v. Consolidated*

Freightways, Corp., 450 U.S. 662, 676 (1981). Likewise, Amendment E's requirement of daily residence or physical labor on the farm creates a burden that becomes increasingly severe the further one gets from the South Dakota border. As a result, it discriminates against interstate commerce in practical effect. *Id.*

Because Amendment E discriminates against interstate commerce in purpose and effect, the State must show that it advances a legitimate purpose which nondiscriminatory means cannot. *Hunt*, 432 U.S. at 353. The record demonstrates that the State has not met that burden.

The State identifies "protection of the family farm and rural way of life" as the ostensible legitimate purposes of Amendment E. Appellant's Brief, p. 26. Assuming the legitimacy of those purposes, other means to achieve them exist that do not discriminate against interstate commerce.

The State quickly identifies, but dismisses, three alternatives to Amendment E in its brief: those and other nondiscriminatory options do exist, however. South Dakota could limit the number of livestock or acres owned by any one person or corporation. If the concern of Amendment E is "large scale" farming, nothing would be more effective. South Dakota could more aggressively enforce its existing antitrust statutes (SDCL § 37-1-1, et seq.) or expand them to stop vertical integration and unfair use of market power by large agricultural production companies. South Dakota could impose a progressive tax on livestock and agricultural real estate as a disincentive to expansion beyond a certain level. Concerns about the environment and rural way of life can be addressed through existing or new laws on zoning and environmental contamination.

An additional problem with the State's argument is that the testimony at trial indicated that small farms correlate to increased poverty in rural communities. T. 465, 504-04. Ultimately, not only do nondiscriminatory options exist to achieve Amendment E's stated purpose, much more effective options exist. The State therefore fails to meet its burden to demonstrate that no alternatives that do not discriminate against interstate commerce exist to achieve Amendment E's ostensible purposes. The District Court's declaratory judgment that Amendment E violates the dormant aspect of the Commerce Clause should therefore be affirmed.

2) *Amendment E places an undue burden on interstate commerce that is clearly excessive in comparison to its purported local benefit.*

Amendment E imposes a burden on interstate commerce that is clearly excessive in comparison to any local benefit that it provides. The record shows that several forms of interstate commerce in South Dakota have been lost or severely hampered by Amendment E while little, if any, benefit is attributable to it. The District Court therefore properly determined that Amendment E violates the Commerce Clause. *Pike*, 397 U.S. at 142.

Plaintiffs Montana Dakota Utilities Company, Otter Tail Power Company, and Northwestern Public Service own land and power generating facilities

together as the Big Stone Partners. T. 284. The Big Stone Partners own an existing power generation plant and have a plan in place to construct another plant. T. 283. The plan is sufficiently concrete that the Big Stone Partners have bought some of the land they will need to build on and applied to South Dakota's Public Utilities Commission for a site permit. T. 283. To build the new plant, the Big Stone Partners will need to convey some of the property they owned prior to Amendment E to a new ownership group, destroying the ability of that land to fit within Amendment E's "grandparent" exception. T. 288. The new plant will also require acquisition of transmission easements across farm property. T. 289. The cost of those easements is expected to triple because Amendment E prevents the Big Stone Partners from having an easement interest in land used for farming; as a result, they would have to purchase the entire easement corridor in fee and prevent agricultural access. T. 326-28, 330. These problems would exist for any future easements or construction by the Big Stone Partners or other businesses.

The injury to the Big Stone Partners is, contrary to the State's argument, ripe for consideration. The Big Stone Partners have purchased agricultural real estate for development of a new power plant. While that land currently fits within Amendment E's exception for land obtained for development, if plant construction is not completed within five years, the Big Stone Partners must divest themselves of the land. S.D. Const., Art. XVII, § 22(10). If they do not divest, the State may bring an action to force divestment or escheat to the State. *Id.* at § 24. Additionally, the Big Stone Partners have previously readjusted their ownership percentages for agricultural real estate owned for future development and as a "buffer zone" for their plant. T. 284-85, 299, 301. Any future change of ownership would destroy the Big Stone Partners' qualification under the "grandparent" exception costing them rental income off the farm property and forcing them to divest within five years. T. 286, 325; S.D. Const., Art. XVII, § 24. Development and construction of a large power plant often takes more than five years, making Amendment E a substantial hurdle to new construction. T. 288-89. Additionally, the Big Stone Partners cannot buy land when the price is right unless it will be developed within five years. The Big Stone Partners thus have specific existing injuries from Amendment E: they cannot change ownership of existing real estate, are limited in their ability to acquire development real estate for future development, and face increased acquisition costs.

Although not heavily relied on by the District Court, the record demonstrates that Amendment E unduly burdens other areas of interstate commerce as well. Feedlot operators Ivan Sjovall and John Haverhals have both lost numerous out of state clients as a result of Amendment E. T. 165, 173, 192-93. Both men will be unable to continue their business if Amendment E remains in place. T. 173, 200. Donald Tesch lost a feeding contract with Harvest States Cooperative to feed hogs because of Amendment E. T. 184. Rancher Frank Brost and South Dakota Farm Bureau president Mike Held both testified that Amendment E severely limits the possible business forms for agricultural

enterprises, and by extension shuts off out of state sources for capital, marketing expertise, and business opportunities. T. 23-24, 27, 91, 102, 124-26.

Otter Tail Power has bypassed South Dakota as a location for wind energy generation due to uncertainty surrounding Amendment E. T. 313. Florida Power and Light likewise has a wind power generation project on hold due to Amendment E. Deposition of Bob Bergstrom, p. 13, 19. The Governor's Office of Economic Development had numerous business prospects reject South Dakota because of Amendment E. T. 737, 739.

On the other side of the ledger, however, Amendment E does little if anything to advance its ostensible purposes of protecting small farms and the rural way of life. Haverhals, Sjovall, and Tesch testified how Amendment E has already hurt them as small producers. Held and Brost also addressed how Amendment E limits the ability of South Dakota farmers and ranchers, particularly younger producers just starting out, to compete in today's markets. These harms spill over into small communities by decreased purchases of goods and services. T. 193-95.

Both sides of the case produced expert testimony demonstrating that Amendment E's benefit is substantially outweighed by its harm. Dr. Tweeten testified that Amendment E hurts South Dakota's small farmers by depriving them of capital and marketing expertise, economies of scale, and placing them at a competitive disadvantage in relation to producers in other states. T. 538, 540, 550, 552, 554. The State's expert, Dr. Labao, testified that the presence of "industrialized farming" was a much worse predictor of community health than things like quality and quantity of non-agricultural employment opportunities and community capital. T. 494. Her own research did not demonstrate a detrimental impact on communities from "industrialized farming." T. 497. In fact, in the central portion of the United States, the presence of industrialized farming correlated to better economic conditions. T. 503. Poverty and community decay varied little, if at all, in relation to the presence of small or industrialized farms. T. 503.

The balance of Amendment E's benefits and harms is clear. In its limited lifespan, Amendment E has terminated or impaired contract livestock feeding enterprises, cooperative agricultural machinery agreements between neighbors, farming and ranching enterprises operated by older or disabled farmers, utility construction and easement acquisition, and general economic development. In opposition to this checkered record, there is little, if any, evidence of benefits Amendment E has created for small farmers. Amendment E imposes an undue burden on interstate commerce and the District Court's declaratory judgment that its provision violates the dormant aspect of the Commerce Clause should be affirmed. *Pike*, 397 U.S. at 142.

II) AMENDMENT E APPLIES TO EASEMENTS.

Amendment E is clear: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming. . . ." S.D. Const., Art. XVII, § 21. There is no listed exception for easements. S.D. Const., Art. XVII, § 22. There is also no doubt

that an easement is “an interest in the land in the possession of another” under South Dakota law. See *Knight v. Madison*, 634 N.W.2d 540, 542 (S.D. 2001) (internal citation omitted). The State is not arguing that an easement is not an interest in land, but that the Court should rewrite Amendment E to make “used for farming” describe the “interest” obtained by easement rather than the “real estate” it is obtained in. That argument is wrong.

It is true that an easement is an interest in land that is limited to its terms and subservient to the owner’s remaining bundle of rights in the property. See e.g., *Knight*, 634 N.W.2d at 542-43 (right of way easement did not include right to exclude other users); *Musch v. H-D Elec. Co-op. Inc.*, 460 N.W.2d 149, 152-53 (S.D. 1990) (easement holder could not assert landowner defense of no duty to trespasser). The phrase “used for farming” in Amendment E does not limit its application to easements for certain uses, however, but describes the type of real estate in which a “corporation or syndicate” may not acquire “an interest, whether legal, beneficial, or otherwise.”

The plain meaning of Amendment E must be given effect. *Apa v. Butler*, 638 N.W.2d 57, 70 (S.D. 2000). The plain meaning of “an interest, whether, legal, beneficial or otherwise in any real estate used for farming” is that “used for farming” modifies “any real estate” rather than “an interest.” The rules of statutory construction and grammar dictate that a modifier be read to modify its last antecedent unless the context clearly dictates otherwise. *Kaberna v. School Board of Lead-Deadwood*, 438 N.W.2d 542, 543 (S.D. 1989); see also *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389-90 (1959); Strunk & White, *The Elements of Style*, (3d ed.) p. 30-31, Macmillian Publishing Co., Inc., 1979. Nothing in Amendment E indicates that “used for farming” refers to anything other than the immediately antecedent “any real estate.” Interpreting this portion of Amendment E as the State suggests would require an improper rewriting of the text of the South Dakota Constitution. *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992) citing *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 397 (1988). The District Court’s reading of Amendment E to prohibit the acquisition of easements by any “corporation or syndicate” should therefore be affirmed.

CONCLUSION

Amendment E discriminates against interstate commerce in its purpose and effect and imposes a burden on interstate commerce that is clearly excessive in relation to its local benefit. It applies to all interests in land used for farming, including utility easements. The declaratory judgment of the District Court that Amendment E violates the Commerce Clause of the U.S. Constitution should therefore be affirmed.