

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ENABLE OKLAHOMA INTRASTATE )  
TRANSMISSION, LLC, )  
) )  
Plaintiff, )  
) )  
v. )  
) )  
A 25 FOOT WIDE EASEMENT and right-of-way )  
for underground natural gas pipeline lying and )  
situated in the Southwest Quarter of the Southeast )  
Quarter and the West Half of the Southeast Quarter )  
of the Southeast Quarter in Section 28, Township 7 )  
North, Range 11 West of the I. B. & M., in Caddo )  
County, State of Oklahoma, et al., )  
) )  
Defendants. )  
) )

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Case No. 5:15-cv-01250

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR  
RECOVERY OF ATTORNEYS' FEES AND EXPENSES**

## **INTRODUCTION**

On November 11, 2015, Plaintiff Enable Oklahoma Intrastate Transmission, LLC (“Enable”), filed this action to condemn an easement across Allotment 84 under 25 U.S.C. § 357; 18 Okla. Stat. Ann. § 437.2; 27 Okla. Stat. Ann. § 7, 52 Okla Stat. Ann. §§ 22 and 27, and 66 Okla. Stat. Ann. §§ 50-60, inclusive. (Compl. [DE 1], ¶ 3.) Defendants Matthew Martin Ware, Betty Lou Ware, Benjamin Blackstar, Corey Ware, Patricia Ware, Jean Ann Carter Ware, Edmond L. Carter, Carri Gwen DuPont, Patricia Ann Carter, Marcia W. Davilla, Mayredean Mammedaty Palmer, Janice C. Mammedaty, Katina Dherie Smith Lipton, William Kendrix Ware, Wesley Ware, III, Angela Rae Ware Silverhorn, Samuel Martin Ware, Rena A. Ware (Killsfirst), and Thomas Blackstar, III (collectively “Defendants”) filed a Motion to Dismiss Enable’s condemnation action. (Mot. to Dismiss and Mem. in Supp. [DE 32].)

This Court granted that Motion to Dismiss on August 18, 2016, holding that “[b]ecause the Kiowa Tribe owns an undivided 1.1% interest in the tract that is held in trust, . . . the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357.” (Order [DE 55] at 5.) Defendants now file this brief in support of their Motion for Attorneys’ Fees, filed contemporaneously herewith.

## **STATUTORY BASIS FOR ATTORNEYS’ FEES**

“[T]he right to recover attorney fees in a condemnation proceeding must be provided by statute.” *Bd. of Cnty. Comm’rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639 (Okla. 2006). Attorneys’ fees in this case are authorized by 66 Okla. Stat. Ann. § 55(D) (“Section 55(D))”.

Section 55(D) provides that, where there is a final judgment that property cannot be acquired by condemnation, the owners of the property involved may recover their attorneys' fees in opposing the condemnation action:

Where the party instituting a condemnation proceeding abandons such proceeding, *or where the final judgment is that the real property cannot be acquired by condemnation . . .* then the owner of any right, title or interest in the property involved may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation proceeding. The sum awarded shall be paid by the party instituting the condemnation proceeding.

66 Okla. Stat. Ann. § 55(D)(emphasis added). Although Chapter 66 is titled "Railroads," it is applicable to this action, as explained below.

Enable relies in its complaint on 18 Okla. Stat. Ann. § 437.2, which governs the condemnation rights of cooperatives. (*See* Compl. [DE 1] ¶ 2.)<sup>1</sup> Section 437.2(o) provides cooperatives with the same condemnation rights as railroads are provided under Oklahoma law: "A cooperative shall have power . . . [t]o have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations under the laws of this State." 18 Okla. Stat. Ann. § 437.2(o). In other words, to determine the condemnation rights of Enable, one must look to the condemnation rights given to railroads, which are found in 66 Okla. Stat. § 51 *et seq.* Enable concedes this point in its Complaint, citing 66 Okla. Stat. Ann. §§ 50-60,

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<sup>1</sup> Enable also cites 25 U.S.C. § 357 as authority for its condemnation action. Section 357 provides for condemnation of lands allotted in severalty to Indians for a public purpose, so long as it is permitted under the laws of the State where the property is located. Thus, § 357 points the Court to the Oklahoma statutes, discussed *infra*.

inclusive as the basis for its condemnation authority. (Compl. [DE 1] ¶ 3); *see also Lowery*, 136 P.3d at 652-53.

In *Lowery*, for example, Muskogee County brought a condemnation action. Condemnation actions by counties are governed by 27 Okla. Stat. Ann. § 5. Title 27 Okla. Stat. § 5—like 18 Okla. Stat. Ann. § 437.2(o)—provides in relevant part that “[a]ny county . . . shall have power to condemn lands in like manner as railroad companies . . . .” *Id.* at 652. The Supreme Court of Oklahoma consequently held that it could award the prevailing landowners their attorneys’ fees pursuant to Section 55(D). *Id.* at 652-53; *see also Williams Nat. Gas Co. v. Perkins*, 952 P.2d 483, 490-91 (Okla. 1997) (citing Section 55(D) as allowing the award of attorneys’ fees in a condemnation action brought by a natural gas company).

Similarly, an electric cooperative (“Kamo”) instituted a condemnation action against private landowners pursuant to 18 Okla. Stat. Ann. § 437. *W.C. Root v. Kamo Elec. Coop., Inc.*, 699 P.2d 1083, 1085 (Okla. 1985). The Supreme Court of Oklahoma upheld the trial court’s award of attorneys’ fees to the private landowners pursuant to Section 55(D), albeit pursuant to the provision allowing attorneys’ fees when a jury award exceeds the commissioners’ award by at least ten percent. *Id.* at 1091-93.

Here, attorneys’ fees are appropriate because this Court has entered a “final judgment . . . that the real property cannot be acquired by condemnation.” 66 Okla. Stat. Ann. § 55(D); (Judgment [DE 56]; Order [DE 55]) (“Because the Kiowa Tribe owns an undivided 1.1% interest in the tract . . . the Court finds that the tract is tribal land *and*

*cannot be condemned*”) (emphasis added)). Therefore, attorneys’ fees in this action are authorized by 66 Okla. Stat. Ann. § 55(D).

**AMOUNT OF ATTORNEYS’ FEES AND EXPENSES**

Determination of a reasonable fee involves a two-step process. *Musket Corp. v. Star Fuel of Oklahoma, LLC*, Case No. Civ. 11-444-M, 2016 WL 1057800, at \* 5 (W.D. Okla. March 14, 2016). First, the Court must calculate the lodestar by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Id.* The Oklahoma Supreme Court has adopted “a strong presumption that the lodestar method, alone, will reflect a reasonable attorney fee.” *Parsons v. Volkswagen of Am., Inc.*, 341 P.3d 662, 671 (Okla. 2014). The Court must then consider whether to adjust the lodestar by the following factors::

- 1) the time and labor required;
- 2) the novelty and difficulty of the questions;
- 3) the skill required to perform the legal services properly;
- 4) the preclusion of other employment by the attorney due to accepting the case;
- 5) the customary fee;
- 6) whether the fee is fixed or contingent;
- 7) time limitations imposed by the client or the circumstances;
- 8) the amount involved and the results obtained;
- 9) the experience, reputation, and ability of the attorney;
- 10) the undesirability of the case;

- 11) the nature and length of the professional relationship with the client;
- and
- 12) awards made in similar cases.

*Musket Corp.*, 2016 WL 1057800, at \* 5.

As set forth in the Affidavit of David C. Smith (“Smith Aff.”) filed in conjunction herewith, the Kilpatrick Townsend law firm undertook this matter when the individual Defendants approached them as they were of limited financial means and unable to hire counsel. Kilpatrick has not charged for its services and has advanced expenses. (Smith Aff. ¶ 2). Kilpatrick has carefully reviewed the time records on this matter and has exercised billing judgment, removing those entries that could be considered excessive, duplicative or unnecessary. (*Id.* ¶¶ 8-9). The total hours incurred in defending this matter are 191.8.

Defendants have identified those timekeepers who worked on this matter, their backgrounds, and their hourly rates. (Smith Aff. ¶¶ 7, 12-22). The hourly rates charged are reasonable, being based on surveys of similar law firms in the regions in which they work. (*Id.* at ¶ 6). In applying those rates to the hours worked, the total fees claimed are \$91,744.50. The fees are particularly appropriate as Defendants were unable to find a law firm to handle their case, they had no means to compensate counsel for the work required, the legal work necessitated specific expertise in Federal Indian Law, counsel was required to coordinate communications with 38 individual clients at different locations, and they had to travel a significant distance to meet with them and to attend court hearings and mediations.

Defendants are further requesting reimbursement for expenses related to the defense of this litigation which includes computerized research necessary for supporting briefs and memoranda, copy charges including for communications with clients, and one-half of travel expenses related to client meetings, a mediation and a court appearance in Oklahoma. The expenses total \$10,456.86. (Smith Aff. ¶¶ 23-25).

**Conclusion**

Based on the foregoing, Defendants respectfully request recovery of Attorney's fees in the amount of \$91,744.50 and expenses of \$10,456.86 incurred in the defense of this matter.

Respectfully submitted this 1st day of September, 2016.

s/David C. Smith  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2016, I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR RECOVERY OF ATTORNEYS' FEES AND EXPENSES** with the Clerk of Court. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System.

s/David C. Smith  
David C. Smith