

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

ENABLE OKLAHOMA INTRASTATE )  
TRANSMISSION,LLC., a Delaware limited )  
liability company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
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. )

Case No. CIV-15-1250-M

**PLAINTIFF’S RESPONSE TO DEFENDANT LANDOWNERS’ MOTION FOR  
RECOVERY OF ATTORNEYS’ FEES AND EXPENSES AND BRIEF IN SUPPORT**

COMES NOW the Plaintiff, ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC (hereinafter “Enable”), and offers this Response to Defendant Landowners’ Motion for Recovery of Attorneys’ Fees and Expenses.

**INTRODUCTION**

1. On November 11, 2015, Plaintiff filed this condemnation action to obtain an easement across the land at issue, Kiowa Allotment 84, pursuant to 25 U.S.C. § 357 [Dkt #1]. This court dismissed this action on August 18, 2016, holding that the Kiowa Tribe could not be joined, and it was a necessary party in the proceeding.<sup>1</sup>

<sup>1</sup> Plaintiff's Motion for New Trial is pending [Doc. 59].

2. On September 1, 2016, the individual Defendant landowners in this case filed a Motion for Recovery of Attorneys' Fees and Expenses, along with a corresponding affidavit [Doc. 58].

3. The Defendant landowners' are not entitled to recover the amount of attorneys' fees and expenses claimed in their Motion, as many of the expenses are not recoverable under Oklahoma law. Accordingly, this Court should deny the Defendants' motion, in part.

### ARGUMENT & AUTHORITIES

#### **I. The bulk of the litigation expenses claimed by Defendants are not recoverable under Oklahoma law and, therefore, Defendants' expenses must be denied.**

Plaintiffs' Complaint is based on Oklahoma state law governing eminent domain. Likewise, Defendants' Motion is predicated on an Oklahoma statute codified at Okla. Stat. tit. 66, § 55 (D). *See Complaint, ¶ 2. See Defendants' Motion for Recovery of Attorneys' Fees and Expenses p. 1* [Dkt. # 58]. This Oklahoma statute defines what expenses are recoverable in a condemnation action based on Oklahoma law. In fact, Section 55 (D) explicitly provides as follows:

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." (emphasis added).

Attorney fee and expense shifting statutes like § 55(D) are substantive in nature and, therefore, are applicable to this case. *See e.g. Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 1001 (10<sup>th</sup> Cir. 2008); *see also Kimzey v. Flamingo Seismic Solutions, Inc.*, No. CIV-10-906-M, 2011 WL 4808163 at \*1 (W.D. Okla. October 11, 2011). "Oklahoma law governs whether defendant[s] [are] entitled to attorney's fees in this case." *Kimzey*, 2011 WL at \*1. Moreover, Federal Rule of

Civil Procedure 71.1 expressly provides that “this rule governs an action involving eminent domain under state law.” Fed.R.Civ.P. 71.1 (k).

In their affidavit supporting their Motion, Defendants list numerous expenses they seek to recover from Enable, but most of these expenses are not recoverable under Oklahoma law as litigation expenses. *See Affidavit of David C. Smith*, ¶¶ 23-25. Many of the claimed expenses consist of travel expenses like airfare and taxis, car rental and fuel, lodging expenses, parking, dining, and legal research expenses.<sup>2</sup> Section 55 (D), which substantively authorizes the Defendants’ Motion, does not allow for the recovery of \$10,456.86 in litigation expenses claimed by the Defendants. In fact, Section 55 (D) expressly limits reimbursement to reasonable attorney, appraisal, engineering, and expert witness fees. Okla. Stat. tit. 66, § 55 (D).

Oklahoma case law interpreting these specific Oklahoma eminent domain authorities also precludes the recovery of these claimed litigation expenses. Specifically, in *Oklahoma Turnpike Auth. v. New Life Pentecostal Church of Jenks*, the Oklahoma Supreme Court interpreted Section 55 (D) as excluding “components of a lawyer’s overhead”, such as “litigation expenses- i.e., copying, mileage, telephone and telefax expenses, and postage.” 870 P.2d 762, 764 (internal citations omitted); *See also Williams Natural Gas Co. v. Perkins*, 952 P.2d 483, 491 (Okla. 1997)(“Perkins was entitled to reasonable attorney, appraisal, engineering and expert witness fees.”).

These cases reaffirm earlier Oklahoma Supreme Court holdings, such as *Oklahoma Turnpike Auth. v. New*, which held that professional expenses, such as copying, mileage, long-distance telephone calls, telefax expenses and postage incurred by landowners’ attorneys,

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<sup>2</sup> *See Exhibit 1 attached hereto, which is a concise summary of the Defendants’ claimed litigation expenses.*

appraisers, engineer and expert witness were part of attorney overhead and are not recoverable as costs in condemnation action. 853 P.2d 765, 767 (Okla. 1993)(“overhead of the provider . . . are not recoverable as costs . . . in a condemnation action.”). In *New*, the Oklahoma Supreme Court reversed the district court judge’s ruling that overhead expenses are payable under Section 55 (D). A statutory basis must grant the right to recover fees and costs, and Section 55 (D) does not grant courts authority to award overhead costs. *See also Spears v. Shelter Mutual Ins. Co.*, 73 P.3d 865, 870 (Okla. 2003)(“These costs are treated as overhead and are not recoverable.”).

Finally, Okla. Stat. tit. 12, § 942, which defines costs that may be awarded under Oklahoma law, does not contemplate the recovery of legal research costs, Westlaw, Lexis, travel costs, airfare, rental cars, fuel, taxi fare, or meal expenses. Okla. Stat. tit. 12, § 942; *See e.g., New*, 853 P.2d 765, and *Gilbert v. Security Finance Corp. of Okla.*, 152 P.3d 165, 185 (precluding the recovery of costs of video deposition editing as not being a cost expressly authorized by statute). Only expenses which are expressly authorized by statute are taxable as litigation costs in Oklahoma. *See Ashby v. Harris*, 918 P.2d 744, 747 (Okla. 1996).

Accordingly, Enable respectfully requests this Court to deny, in part, the Defendant landowners’ Motion for Recover of Attorney’ Fees and Expenses. This Court should strike the claimed \$10,456.86 in litigation expenses as being non-recoverable expenses precluded by Oklahoma law.

**II. The attorney fee rates sought by Defendants' counsel are unreasonable in the Oklahoma marketplace.**

The attorney fee rates charged by Defendants’ counsel and sought in their Motion are unreasonable under local community standards and for this type of litigation. Specifically, there are two main reasons which render Defendants’ attorneys’ fees unreasonable: 1) the rates do not

properly reflect the time and labor required, the skill required, and the level of specialty needed in a case which has thus far been limited to subject matter jurisdiction, and 2) their hourly rates are not reasonable in relation to local community standards.

In this action, the land which is the subject of this condemnation lawsuit consists of .73 acres of vacant pasture land in Caddo County. *See Complaint* [doc. 1]. Enable has operated and maintained a buried natural gas pipeline under the subject property since the early 1980's, when it purchased a .73 acre easement from the Bureau of Indian Affairs for \$1,950. *See Plaintiff's Objection and Response to Motion to Dismiss, p. 2 [doc. 45]*. This litigation never touched upon the merits, such as the value of the land taken for renewal of the pre-existing natural gas pipeline easement. No discovery was undertaken in this case. No witnesses or experts were disclosed. The activities of the Defendant landowners were limited to filing four (4) substantive pleadings: (1) a motion to dismiss and brief in support with an appendix [doc.32-33], (2) a Joint Status Report [doc. 42], (3) a reply brief in support of their motion to dismiss [doc.48], and, (4) a brief in response to Plaintiffs' motion to consolidate this case with the trespass case [doc.49]. The parties did attend a settlement conference before Magistrate Purcell which involved this case and the trespass case, Case No. CIV-15-1250-M. Despite these limited activities, the time entries for travel by Defendants' Washington, D.C. counsel on February 21-22 and March 1, 2016, by themselves exceed the appraised fee simple value of the .73 acres, according to appraisals previously exchanged with the Bureau of Indian Affairs. *See doc. 58-2*. These attorney's fees for travel are unreasonable, especially when Defendants had local counsel from Oklahoma Indian Legal Services located in Oklahoma City.

Enable does not dispute that Oklahoma law provides for the recovery of attorney's fees in this action, but the amount of fees must be grounded on the touchstone of reasonableness. In fact, section 55 (D) provides for reimbursement of reasonable attorneys' fees. Okla. Stat. tit. 66, § 55 (D). Under Oklahoma law, the reasonableness of attorney's fees is determined under the *Burk* test. *See State of Oklahoma ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 661 (Okla. 1979); *see also Kimzey*, 2011 WL at \* 2. The factors are: 1) time and labor required, 2) novelty and difficulty of questions, 3) the skill required to perform effectively, 4) preclusion of other employment, 5) customary fee, 6) fixed or contingent fee, 7) time limitations imposed by client or circumstances, 8) amount involved and results obtained, 9) experience, reputation, and ability of the attorney, 10) undesirability of the case, 11) nature and length of professional relationship with client, and 12) awards in similar cases. *Id.*

Most notably, in *Burk* the Court held the "reasonable value of services should be predicated on the standards within the *local* legal community." *Id.* at 663 (emphasis added). This concept is a well-accepted legal standard. "Unless the subject of the litigation is 'so unusual or requires such special skills' that only an out-of-state attorney possesses, the 'fee rates of the local area should be applied even when the lawyers seeking fees are from another area.'" *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10<sup>th</sup> Cir. 2006) (internal citations omitted); *see also e.g., Little Rock School Dist. v. Arkansas*, 674 F.3d 990, 997 (8<sup>th</sup> Cir. 2012) (rates limited to "similar work in the community"); *Hadix v. Johnson*, 65 F.3d 532, 536 (6<sup>th</sup> Cir. 1995).

The attorney fee rates listed in the appendix accompanying the Defendants' Motion are excessive compared to the local community. For example, David Smith, the lead attorney for the individual Defendants', charged the rate of \$675 per hour in 2016; another partner, Catherine

Munson, charged \$555 per hour. Even though the law firm of Kilpatrick, Townsend, & Stockton LLP may customarily charge these rates for their work in Washington, D.C., “fee rates of the local area should be applied even when lawyers seeking fees are from another area.” *Lippoldt*, 468 F.3d at 1225. In their Motion, Defendants’ counsel alleges that the “fees charged are reasonable in accordance with the legal market *in which the attorney or other employee works.*” *See Affidavit of David C. Smith p. 3* [Dkt. # 59]. This is contrary to the *Burk* standard adopted in Oklahoma, which holds that standards of the local community are used to assess the reasonableness of attorney’s fees. *See Burk*, 598 P.2d at 663.

The rates listed in the affidavit supporting the Motion do not reflect those usually and customarily charged by attorneys in the Oklahoma legal community. Mr. Larry Ottaway, an experienced Oklahoma City trial attorney with the law firm of Foliart, Huff, Ottaway, & Bottom, attests that these rates are well beyond rates charged by Oklahoma attorneys involved in complex litigation. *See Affidavit of Larry Ottaway, attached hereto as Exhibit 2*. Mr. Ottaway is AV Rated by Martindale-Hubbell, and he has tried cases to jury verdict in Oklahoma. *See Exhibit 2*. His practice consists of litigating complex cases, such as products liability defense, business litigation, and medical malpractice and attorney malpractice defense. *Id.* He is a Fellow of the International Academy of Trial Lawyers, the American College of Trial Lawyers, the International Society of Barristers, and the Litigation Counsel of America. *Id.* Mr. Ottaway is a member of the Oklahoma and Oklahoma County Bar Associations. *Id.* He is also licensed to practice in the Cherokee and Chickasaw Nation Courts, as well as being licensed to practice in all federal district courts in Oklahoma. For his services, Mr. Ottaway’s attorney fee rates typically fall in the range of \$195 to \$295 per hour, and his billing rate for this matter is \$295. *Id.* In his professional opinion, the rates

claimed by Defendants' counsel in this case are excessive when compared with the prevailing rates in the Oklahoma legal community. *Id.* In Mr. Ottaway's experience, customary rates charged by Oklahoma attorneys in complex litigation generally fall in the range of \$125 to \$450 per hour. *Id.*

Defendants' counsel will argue their higher rate is palatable because knowledge of Indian law was necessary in this case. *See Affidavit of David C. Smith p. 5* [Dkt. # 59] (mentioning Mr. Smith teaches Federal Indian Law at the University of Notre Dame and Wake Forest University). While it is true that Indian law is a specialty area, Indian law is not specialized in the relevant legal community of Oklahoma. In fact, Oklahoma's legal landscape and the coursework taught at Oklahoma's three law schools reflect a high degree of familiarity with Indian law. Oklahoma practitioners who deal with real property, eminent domain, probate, personal injury, and oil and gas law must necessarily be familiar with Indian law, as they will regularly encounter restricted Indian land, Tribal Courts, and Tribal entities in their communities within the State of Oklahoma.

The University of Oklahoma College Of Law in Norman offers an advanced Master of Laws degree in Indigenous Peoples Law and a Master of Legal Studies in Indigenous Peoples Law.<sup>3</sup> The *American Indian Law Review* resides at the University of Oklahoma. The University of Tulsa College of Law also offers a Master of Laws degree in American Indian and Indigenous Peoples Law.<sup>4</sup> While Defendants were free to hire a law firm in Washington D.C. with offices nationally to represent them in this litigation, it would be incorrect to suggest there were not competent Oklahoma attorneys to litigate the claims in this case. Therefore, reasonableness of attorneys' fees should be predicated on local rates. Counsel for the Defendants should not be allowed to transfer Washington, D.C. rates to the Oklahoma legal marketplace. Accordingly, this

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<sup>3</sup> See <http://www.law.ou.edu/content/academics-1>.

<sup>4</sup> See <https://law.utulsa.edu/academics/degrees/masters-of-law-llm/llm-in-american-indian-indigenous-law/>



Court should adjust downwardly the Defendants' hourly attorney fee rates to reflect the prevailing rates charged in the Oklahoma legal marketplace.

### CONCLUSION

The Defendant landowners' Motion for Recovery of Attorneys' Fees and Expenses [Dkt # 58] should be denied, in part. Most of the claimed litigation expenses, such as lodging, Westlaw research services, rental cars, meals, etc., are overhead expenses which are not recoverable under Oklahoma law. The billing rates charged by Defendants' counsel also should be reduced to reflect reasonable, prevailing attorney fee rates in the Oklahoma marketplace.

Respectfully submitted,

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s/ STRATTON TAYLOR  
STRATTON TAYLOR, OBA # 10142  
[staylor@soonerlaw.com](mailto:staylor@soonerlaw.com)  
TONEY D. FOSTER, OBA # 16063  
[tfoster@soonerlaw.com](mailto:tfoster@soonerlaw.com)  
CLINT RUSSELL, OBA # 19209  
[crussell@soonerlaw.com](mailto:crussell@soonerlaw.com)  
KASSIE N. MCCOY, OBA # 31405  
[kmccoy@soonerlaw.com](mailto:kmccoy@soonerlaw.com)  
**TAYLOR, FOSTER, MALLETT, DOWNS  
RAMSEY & RUSSELL**  
400 West Fourth Street P.O. Box 309  
Claremore, OK 74018  
918-343-4100; 918-343-4900 fax  
**Attorneys for Plaintiff**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of September, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Tom Majors, OBA #5637  
Assistant U.S. Attorney  
210 Park Ave., Ste. 400  
Oklahoma City, OK 73102  
405-553-8814; 405-553-8885 fax  
[tom.majors@usdoj.gov](mailto:tom.majors@usdoj.gov)  
**Attorney for Defendant,  
United States of America**

C. Steven Hager, OBA # 12315  
Colline Keely, OBA # 12405  
Oklahoma Indian Legal Services  
4200 Perimeter Center Drive, Ste. 222  
Oklahoma City, OK 73112  
[keely@oilsonline.org](mailto:keely@oilsonline.org)

and

David Smith  
Kilpatrick Townsend & Stockton LLP  
607 14<sup>th</sup> Street, NW Ste 900  
Washington, DC 20005  
202-508-5865  
[dcsmith@kilpatricktownsend.com](mailto:dcsmith@kilpatricktownsend.com)  
**Attorneys for Defendants**

s/ STRATTON TAYLOR