Case No. 17-6188

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC,
a Delaware limited liability company,
Plaintiff/Appellant,

vs.

A 25 FOOT WIDE EASEMENT et al.,
Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE VICKI MILES-LAGRANGE, DISTRICT JUDGE
CIV-15-1250-M

APPELLANT'S OPENING BRIEF

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ATTORNEYS FOR APPELLANT

Dated: January 16, 2018

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellant Enable Oklahoma Intrastate Transmission, LLC, a limited liability company, is solely-owned by Enable Midstream Partners, LP.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF RELATED CASES

There have been no prior appeals in this action. Appeal No. 17-6088 is a related appeal.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this action pursuant to 25 U.S.C. §357, and thus 28 U.S.C. § 1331, because the action below asserted claims seeking condemnation of allotted lands held in trust by the federal government under that federal statute. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), because the appeal is from a final judgment entered below on August 18, 2016 (the "August 18, 2016 Judgment"). On that same date, the district court entered its order dismissing the case for lack of subject matter jurisdiction (the "August 18, 2016 Order"). On September 14, 2016, Plaintiff timely filed its Rule 59 motion for a new trial. On July 21, 2017, the district court denied Plaintiff's motion for a new trial (the "July 21, 2017 Order"). On August 9, 2017, the district court also entered an order awarding Defendants attorney fees pursuant to a motion they filed (the "August 9, 2017 Order"). On August 15, 2017, Plaintiff timely filed its notice of appeal within the time permitted by FRAP 4(a)(1)(A) from the district court's August 18, 2016 Judgment, the July 21, 2017 Order denying the timely-filed Rule 59 motion, and the August 9, 2017 Order awarding attorney fees.

STATEMENT OF ISSUES

1. Did the district court err in concluding Plaintiff's complaint should be dismissed for a purported lack of subject matter jurisdiction and for Plaintiff's

purported failure to join a necessary party to the action?

2. Did the district court err by granting Defendants' motion for an award of attorney fees in an unreasonable amount, by calculating the award based on hourly rates that were well above the local market rate in Oklahoma?

STATEMENT OF THE CASE

Plaintiff filed its Complaint in condemnation seeking *in rem* to condemn an easement for an existing natural gas pipeline across the subject property (known as Kiowa Allotment 84). App. 0004. The individual allotment owners filed a Motion to Dismiss on January 15, 2016. App. 0017. The United States of America, in its capacity as trustee, filed its Motion to Dismiss on March 7, 2016. App. 0101.

On August 18, 2016, the district court dismissed the action on the basis of an alleged lack of subject matter jurisdiction and for lack of an indispensable party under Federal Rules of Civil Procedure 19 and 12(b)(7). App. 0231. Judgment was entered on August 18, 2016. App. 0241.

Facts Relevant To Issues Presented For Review

A. The "Allotted Lands" at issue across which Plaintiff sought to condemn a Right-of Way Easement, after expiration of the original 20-Year easement granted in 1980

The land across which Plaintiff sought a 25-foot right-of-way in this condemnation action is grassland located in rural Caddo County, Oklahoma. The property was originally allotted by the United States to a Native American named Emaughobah or Millie Oheltoint. It is thus commonly referred to as "Emaugobah

Kiowa Allotment 84" or "Kiowa Allotment 84." App. 0010. Kiowa Allotment 84 is presently held in trust by the federal government for the benefit of individual beneficial owners, App. 006, except for a 1.1% beneficial interest held in trust by the federal government for the Kiowa Tribe. App. 0024 n.2.

On November 19, 1980, the United States granted an easement under 0.73 acres of the 136.25 acre Kiowa Allotment 84 tract on behalf of the beneficial owners of these allotted lands to Producer's Gas Company ("Producer's"). App. 0048. The easement was approved by the Bureau of Indian of Affairs (the "BIA") and it encumbered 0.536% of Kiowa Allotment 84 and allowed 77 rods (or approximately 1,300 feet) of pipeline to be run under the property for twenty (20) years. *Id*. In exchange for this twenty (20) year easement, Defendants' predecessor paid Plaintiffs (or their predecessors) $1,925, or $25 per rod. *Id*.

Before 2000, Plaintiff acquired Producer's successor-in-interest, the company that owned the natural gas pipeline that traverses these allotted lands. App. 0069. In connection with that acquisition, Plaintiff obtained the easement rights Producer's had procured on Kiowa Allotment 84. These 1,300 feet of pipe that traverse Kiowa Allotment 84 are part of an approximately 100 mile long pipeline that runs between Canute and Cox City, Oklahoma, and that pipeline is part of a broader natural gas pipeline system that traverses approximately 2,200 miles of Oklahoma.

B. Expiration of the 1980 Easement in Kiowa Allotment 84 and Plaintiff's application for a new easement

In 2000, shortly after the transaction with Producer's closed, the 20-year easements expired. Plaintiff first learned of the expiration of the easements over Kiowa Allotment 84 in 2002. Later that year, Plaintiff submitted Right-of-Way Applications for new 20 year easements over these tracts. App. 0050. In each application, Plaintiff offered individual landowners $40 per rod—a number derived from appraisals of the relevant properties. When Plaintiff made offers to the individual landowners, the Kiowa Tribe did not own an interest in the subject properties. The properties were thus clearly subject to 25 U.S.C. § 357, the federal statute which permits condemnation of right-of-way easements across allotted properties under state law.

Five of the beneficial owners of Kiowa Allotment 84 agreed to the $40 per rod price with regard to their property, but the other beneficial owners of Kiowa Allotment 84 did not give their consent and instead made inquiry to the BIA regarding Plaintiff's application. App. 0025. In response to the inquiry, the BIA explained that Plaintiff's offer of $40 per rod was based on an appraisal submitted to the BIA, and that this appraisal had been "forwarded to the Office of Special Trustee . . . for review and recommendation." The BIA further explained that the review "**supported [the] appraisal price of $3,080.00 ($40.00 per rod)**" and "**encourage[d] [the Defendants] to finalize negotiations with [Plaintiff] and**

provide [] written consent as soon as possible." (Emphasis in original).[1]

C. Defendants refuse to continue negotiating with Plaintiff

Following Plaintiff's payment of a so-called "trespass assessment" in September 2006, the beneficial owners of Kiowa Allotment 84 continued their dealings with the BIA but ceased communicating with Plaintiff. "On December 21, 2007, a meeting was held at the [BIA's local office] between landowners . . . . and Agency staff." "The landowners . . . stated they would not agree to the $40 per rod offer to renew." These landowners "were advised of [Plaintiff's] intentions to file condemnation proceedings and were given the opportunity, which they refused, to call [Plaintiff] regarding possible settlement." (Emphasis added).

D. BIA approves a new easement across Kiowa Allotment 84

By May 2008, no deal had been reached and Plaintiff's Right-of-Way Application had lapsed. Certain of the landowners continued demanding $63,000 for the easement, which exceeded the appraisal amount BIA could negotiate (and which Plaintiff would not agree to pay). At that point, Plaintiff was "in the process of forwarding the case for condemnation proceedings," but "subsequently stopped

[1] Notwithstanding the fact the beneficial owners of the allotted tracts adjacent to Kiowa Allotment 84 had accepted Plaintiff's offer of $40 per rod and the BIA had encouraged Defendants to do the same, certain Defendants insisted Plaintiff should pay approximately $63,000 (or approximately $818.18 per rod) for a new twenty (20) year easement. The $63,000 demand was the full market value for the entire 136.25 acre surface of Kiowa Allotment 84 as determined by the appraisal Plaintiff provided to BIA in support of its $40 per rod offer. Plaintiff was unwilling to pay the appraised price of the entire surface of the 135.25 acre parcel for a twenty-year 0.73 acre subsurface easement.

the condemnation action and resubmitted the ROW application for $40 per rod." App. 0025. On June 23, 2008, the acting Superintendent for the BIA local agency (Robin Phillips) approved Plaintiff's application. *Id*.; App. 0054.

In her approval, Superintendent Phillips again noted that "[t]he $40.00 per rod offer from Defendants [met] the appraisal for a new easement of an already existing buried pipelines." App. 0054. Superintendent Phillips went on to explain that pursuant to 25 C.F.R. § 169.3(c)(5), the BIA has the authority "to grant rights-of-way over and across individually owned lands without the consent of the Individual Indian owners when the owners interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also, **that the grant will cause no substantial injury to the land or any owner thereof**." *Id*. (emphasis in original). Superintendent Phillips found both of these criteria were satisfied and approved Plaintiff's offer.

E. The BIA Superintendent's approval is appealed

On July 22, 2008, one month after BIA approval of the new easement, certain of the beneficial owners of Kiowa Allotment 84 appealed this decision to the BIA's Regional Director. App. 0025; 0057. The landowners expressed concern about a 2008 approval of a $40 per rod offer that was premised on a 2002 appraisal but did not challenge Superintendent Phillips' conclusion that approval of Plaintiff's offer and the continued presence of the pipeline under Kiowa Allotment

84 would "cause no substantial injury to the land or any owner thereof." *Id*.

On May 23, 2010, the BIA's Regional Director granted the landowners' appeal and concluded that Plaintiff's offer of $40 per rod was, in his estimation, too low, and that "[a] review of recent transactions for th[e] area reveal[ed] a range of $60 to $80 per rod" (or $4,620 to $6,160 total for the easement), which was still much less than the $818.18 per rod (or $63,000) certain landowners were demanding. App. 0058; 0061. He then "remand[ed] [the case] for further negotiation," adding that if an agreement was not reached, Plaintiff "should be directed to move the pipeline off the subject property." *Id.* at 0061. No such removal order was ever issued.

F. Plaintiff elects to exercise its right of condemnation, resulting in the litigation below

Plaintiff had negotiated in good faith with the beneficial owners of Kiowa Allotment 84 and the BIA in its representative capacity for more than ten (10) years. However, after the BIA first approved Plaintiff's $40 per rod or $3,080 offer, but later revoked that approval after a two (2) year appeal, Plaintiff believed it should not have to pay full market value for the surface rights to the entire 136.25 acres of the Kiowa Allotment 84 to obtain a twenty (20) year underground easement on less than three quarters (3/4) of an acre. Nor did Plaintiff believe it should have to attempt to obtain a new easement or easements elsewhere and to reroute its pipe at the estimated expense of more than $500,000.

On November 11, 2015, Plaintiff filed this condemnation proceeding to acquire the 0.73 acre sub-surface easement on Kiowa Allotment 84 via the power of eminent domain. Plaintiff had always understood eminent domain was a procedure available to it (but one it had hoped to avoid using by reaching an amicable agreement with the beneficial landowners).

SUMMARY OF ARGUMENT

1. The district court erred when it concluded that Plaintiff's condemnation claim should be dismissed for an alleged lack of subject matter jurisdiction. It erroneously construed Section 357 as inapplicable to allotted lands where a Native American tribe owns any interest in those lands, even an infinitesimally small one, as is the case here. Section 357 authorizes condemnation of lands previously allotted in severalty to Indians. The Kiowa 84 allotment is such an allotment. Section 357 thus created subject matter jurisdiction in the district court and constituted a waiver of the Kiowa Tribe's sovereign immunity. Further, the district court failed to recognize the *in rem* nature of a condemnation claim. As a result of the *in rem* nature of the claim, the Kiowa Tribe is not a necessary party to the action. Its sovereign immunity is thus no barrier to Plaintiff's prosecution of the condemnation claim in the action below.

2. The district court erred by granting Defendants an award of $103,546.50 in attorney fees (the full amount sought by Defendants) based on

hourly rates that greatly exceed the local market rates charged in Oklahoma, including hourly rates for Defendant's lead attorney of either $645 or $675 per hour. The district court thus impermissibly awarded an unreasonable amount of attorney fees under the relevant state law. It created an exception to the Oklahoma rule requiring fees to be based on hourly rates charged in the local market, relying solely on inapplicable federal precedent. The district court was not authorized to create or modify Oklahoma law by making a new exception that had not been adopted by any Oklahoma court.

ARGUMENT

A. APPLICABLE STANDARDS OF REVIEW

The Court reviews a "district court's dismissal for lack of subject matter jurisdiction," and the legal questions presented thereby, "de novo." *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004). The Court reviews "an award of attorneys' fees for abuse of discretion" but "the district court's legal analysis underpinning the fee award is reviewed de novo." *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257 (10th Cir. 2005).

B. THE DISTRICT COURT'S ERRORS

1. The district court erred by granting the Defendants' motions to dismiss for an alleged lack of subject matter jurisdiction or for an alleged failure to join a necessary party.

The district court dismissed Plaintiff's complaint seeking condemnation of the Kiowa Allotment 84 in its August 18, 2016 Order. The district court concluded

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." Attachment 1 at 5; App. 0235. As a result, the district court found it did "not have subject matter jurisdiction over this action." *Id.* The district court further concluded that the Kiowa Tribe was a necessary party to the action that could not "be joined under Rule 19(a) or Rule 71.1 as a defendant in this case due to its sovereign immunity." Attachment 1 at 7; App. 0237. Both of the district court's conclusions are erroneous. This Court should reverse the August 18, 2016 Judgment and thus remand the case for further proceedings below.

At the outset, Plaintiff wants to make clear to the Court that it presents this error out of an abundance of caution, even though this Court rejected similar arguments in *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101 (10th Cir. 2017), in order to preserve these arguments for further review in two ways. The Supreme Court is considering a petition for writ of certiorari filed by the appellants in *Barboan. Petition for Certiorari Filed* (No. 17-756). Plaintiff may benefit from the Supreme Court's review of *Barboan* if that petition is granted. Second, although this Court rejected similar arguments in *Barboan*, Plaintiff continues to believe that the *Barboan* panel erroneously construed 25 U.S.C. § 357 for reasons set forth below. Plaintiff intends to seek rehearing *en banc* herein so that this Court may

correct the panel's error in *Barboan*.[2]

A. The district court had subject matter jurisdiction over this action under a proper construction of 25 U.S.C. § 357.

The district court erroneously dismissed Plaintiff's condemnation action because it concluded that 25 U.S.C. § 357 does not permit condemnation of allotted lands if a Native American tribe later obtains some interest in the allotted lands. It is undisputed that the Kiowa Allotment 84 lands are "allotted lands" in which the Kiowa Tribe now has a small interest, and that the federal government continues to hold Kiowa Allotment 84 in trust. Properly construed, Section 357 gives Plaintiff the right to exercise eminent domain powers to condemn a right-of-way easement over Kiowa Allotment 84 for its natural gas pipeline in these circumstances.

When concluding that the allotted lands at issue were not subject to state-law condemnation powers, the district court (and this Court in *Barboan*) engrafted an exception onto 25 U.S.C. § 357 that the *Barboan* Court acknowledged went "unmentioned" in the plain text of the statute. 857 F.3d at 1108 ("Tribal lands go unmentioned"). Construed properly, however, Section 357 gives Plaintiff the right to use state law eminent domain powers to condemn easements over the properties

[2] Unlike the utility in *Barboan*, Plaintiff's predecessor-in-interest had a clear right to condemn right-of-way easements in these allotted lands under 25 U.S.C. § 357 at the time it applied to the BIA for an easement and while it negotiated with the individual allottees because the Kiowa Tribe indisputably did not own an interest in these lands at that time.

at issue. On its face, Section 357 specifically allows condemnation of "lands," without exception or qualification, if they were previously allotted to individual owners: "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located . . . ." 25 U.S.C. § 357.

The district court's construction of Section 357, however, conflicts with the statute's plain language. Where a federal court can apply the statute's plain language, it must do so without resorting to other canons in aid of construction. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). By creating an exception for "lands allotted . . . to Indians" if a tribe ever reacquires any interest in those lands, as happened here, the district court improperly ignored its duty to apply the "plain language" of Section 357, as written.

The Supreme Court has consistently rejected this kind of judicial policy-making, done under the guise of statutory construction, to create exceptions to Congressionally-authorized powers. *See, e.g., E.P.A. v. EME Homer City Generation, L.P.*, ___ U.S. ___, 134 S. Ct. 1584, 1588 (2014) ("However sensible the [] Circuit's exception to this [statutory prescription] may be, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it'"; *citing Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493

U.S. 120, 126 (1989)); *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result'").

In *Barboan*, this Court acknowledged that Section 357 "permits condemnation of any land parcel previously allotted," albeit only so long as its "current beneficial owners" are "individual Indians." 857 F.3d at 1108. Yet, although acknowledging this statutory authority, the *Barboan* Court curiously ignored "statutory silence" regarding any transfers that may have occurred between "individual Indians" (whether by operation of an individual Indian's will or through the relevant laws of intestate succession).

In *Barboan*, as noted, this Court observed the phrase "[t]ribal lands" is "unmentioned" in Section 357. *Id*. at 1108. In other words, the statute's plain language cannot support an exception based on the land's (partial) status as "tribal lands." Notwithstanding this omission, the Court nevertheless concluded an exception for "tribal lands" should be implied. *Id*. To accomplish this, the *Barboan* Court compared Section 357 to 25 U.S.C. § 319, "the paragraph immediately preceding § 357." *Id*. The comparison, however, is uncalled for and unnecessary in light of the plain language of Section 357.

The Supreme Court has held that lower courts must assume Congress meant to use the language in one section but not in the other: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Sandoz Inc. v. Amgen Inc.*, __U.S. __, 137 S. Ct. 1664, 1677 (2017) (citing *Russello*). In determining the import of Congressional silence within another section of the same statutory scheme, the *Russello* Court further observed: "Had Congress intended to restrict [a section without the omitted language], it presumably would have done so expressly as it did in the" other section. *Id*. (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *United States v. Naftalin*, 441 U.S. 768, 773–74 (1979)).

The Supreme Court's observation in *Naftalin* is thus equally applicable with regard to the *Barboan* Court's efforts to engraft language from Section 319 into Section 357. "The short answer is that Congress did not write the statute that way for a reason so that Congress intended not to include such a limit in the latter by its omission." 441 U.S. at 773-74.

In an older line of cases, the Supreme Court also similarly warned federal courts against assuming that Congress implied limitations of a power that it

expressly authorized. Where Congress has enacted a statute expressly authorizing certain powers and duties, "it cannot be lightly assumed that restrictions on that authority are to be implied." *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940) (rejecting implied exceptions to FHA's power "to sue and be sued"). Instead, if authority "is to be delimited by implied exceptions," then it "must be clearly shown that" certain exercises of the authority "are not consistent with the statutory . . . scheme" among other possible exceptions not applicable here. *Id.*

The *Barboan* Court's decision was hardly necessary to avoid an inconsistency between Section 357 and the rest of the statutory scheme Congress adopted in 1901. Sections 319 and 357 are readily harmonized without employing the *Barboan* panel's machinations. These sections serve entirely different purposes and govern different methods for acquiring a property interest in lands held in trust by the United States. *See S. California Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982) (Section 357 provides "an alternative method for the acquisition of an easement across allotted Indian land"); *see also Nicodemus v. Washington Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959); *Yellowfish v. Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982).

Section 357 governs involuntary condemnation of an interest in allotted lands under state law. In sharp contrast, Section 319 governs voluntary grants of a

certain kind of property right (right-of-way easements) in lands held in trust by the United States (and whether they are beneficially owned by a tribe or by individual Native Americans) under federal law. That Section 319 establishes procedures for the Secretary of the Interior's voluntary grant of an easement in a broader category of properties in no way conflicts with Section 357's grant of condemnation authority over allotted lands.

Given that the sections can be read consistently, the district court (and this Court in *Barboan*) erred by engrafting an exception onto Section 357 based on Section 319. If such an exception for "tribal lands" were to be added to Section 357, Congress must do so – not the federal courts under the guise of statutory construction. This Court should thus reconsider its erroneous construction of Section 357 in *Barboan* and reverse the district court's August 18, 2016 Judgment and its August 18, 2016 Order dismissing the Plaintiff's complaint below.

B. The Kiowa Tribe was not a necessary party and the United States waived any sovereign immunity the Kiowa Tribe may have had for these purposes by enacting 25 U.S.C. §357.

The district court held that the case below should be dismissed because the Kiowa Tribe was a necessary party which could not be joined as a defendant based on its sovereign immunity. As set forth below, that conclusion is not a separate justification for the district court's dismissal because, properly construed, the United States waived the Kiowa Tribe's immunity as its dependent-sovereign

when it enacted Section 357. In any event, condemnation actions are *in rem* proceedings and the Kiowa Tribe was thus not a necessary party to the action below.

The district court's decision ignored the "*in rem*" nature of the condemnation action filed by Plaintiff. The Supreme Court established the "*in rem*" nature of condemnation claims in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Because the condemnation claim is an "*in rem*" action, section 357 applies without regard to who owns an interest in the "lands." As such, the Kiowa Tribe was not a necessary party to that claim and its sovereign immunity should not have acted as a barrier to Plaintiff's prosecution of its condemnation claim. *Id.* The district court thus erred in dismissing the action on this basis.

Furthermore, Native American tribes are *dependent* sovereigns so the United States Congress may waive their sovereign immunity. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263–64 (10th Cir. 1998) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Here, Congress waived any sovereign immunity the Kiowa Tribe might otherwise have enjoyed from the condemnation of these lands. It did so by its enactment of Section 357, which expressly authorizes condemnation of the allotted lands without qualification. If the Kiowa Tribe were a necessary party, it could thus be joined and dismissal on this basis

was therefore improper as well.

2. The district court erred by granting Defendants' motion for an award of attorney fees based on the hourly rates charged by law firms in the region where defense counsel practice, instead of the hourly rates charged in Oklahoma.

Oklahoma law governs the award of fees in this case, including the proper method for calculating an award. This Court recently held "[w]hen state law governs whether to award attorney fees, all agree that state law also governs how to calculate the amount." *Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII–A, L.P.*, 861 F.3d 1182, 1188 (10th Cir. 2017) (collecting authorities); *see also* 17A-124 *Moore's Federal Practice* § 124.07[3][b] ("When state law controls, state law governs not only the right to fees but also the method of calculating the fees") (cited favorably by *Chieftain Royalty*). "The calculation of attorney fees is considered substantive law because '[t]he method of calculating a fee is an inherent part of the substantive right to the fee itself and reflects substantive state policy.'" *Id*. (quoting *Moore's*).

Under Oklahoma law, the reasonableness of an attorney fees award must be determined under the test adopted by the Oklahoma Supreme Court in *State of Oklahoma ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 661 (Okla. 1979) ("*Burk*"); *see also Chieftain Royalty*, 861 F.3d at 1190-91 ("*Burk* continues to be good law"). In *Burk*, the Oklahoma Supreme Court adopted the "lodestar method" (i.e., the result of "multiplying the number of hours reasonably expended on the

litigation by a reasonable hourly rate") as the proper method by which a reasonable award must be determined. *Burk*, 598 P.2d at 661. The *Burk* Court specifically held that the "reasonable value of services should be *predicated on the standards within the local legal community*." *Id*. at 663 (emphasis added); *see also Morgan v. Galilean Health Enterprises, Inc.*, 977 P.2d 357, 364-65 (Okla. 1998) ("Lawyers must present to the trial court … evidence of the reasonable value of different types of legal work *based on local standards*") (emphasis added).[3]

The *Burk* Court also outlined twelve additional factors a trial court may consider in calculating an award where the facts in the record justify their consideration. *Id*. at 661. However, Defendants did not seek application of those factors below. Further, as this Court recognized in *Chieftain Royalty*, "the Oklahoma Supreme Court has limited the application of the enhancement factors." 861 F.3d at 1190. For example, in *Hess v. Volkswagen of Am., Inc.*, the Oklahoma Supreme Court held "[t]here is a strong presumption that the lodestar method, alone, will reflect a reasonable attorney fee." 341 P.3d 662, 671 (Okla. 2014) (*citing Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552–54 (2010)).

The district court erred by departing from this method. Specifically, the district court improperly concluded that "under the particular, unique

[3] Even though the burden was on Defendants to prove their attorney fees were reasonable "based on local standards," Plaintiff offered uncontradicted evidence below that established the hourly rates of Defendants' attorneys were well beyond reasonable under local standards. App. 0309-0310.

circumstances of the instant action," App. 0336, it could award fees at the hourly rates sought by Defendants which were far in excess of the hourly rates charged by Oklahoma attorneys. For example, it awarded fees based on work done by lead defense counsel at hourly rates of either $645 (2015) or $675 (2016) per hour. App. 0266.[4] In support of their counsel's hourly rates, Defendants contended below that the rates were "reasonable, being based on surveys of similar law firms in the regions in which [the defense lawyers] work." App. 0250.

Neither the district court nor Defendants cited any Oklahoma authority for the proposition that an award under Oklahoma law could be based on the hourly rates charged by law firms "similar" to defense counsel's law firms "in the regions" where they work. For its part, the district court cited only *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006), as apparent justification for its award based on hourly rates above those charged "within the local legal community." However, *Lippoldt* does not support the district court's award. First, *Lippoldt* did not apply Oklahoma law. Instead, it applied federal law in a case which arose under two federal civil rights statutes. 468 F.3d at 1210-11 ("plaintiffs filed suit … pursuant to 42 U.S.C. §§ 1983 and 1985, alleging violations of the First and Fourteenth Amendments"). Second, *Lippoldt* held generally that "the fee rates of the local area

[4] The district court awarded attorney fees in the total amount of $103,546.50. *See* Attachment 4 at 4; App. 0337. That amount is the total of the $91,744.50 in fees Defendants' motion sought (App. 0251; 0263) plus a supplemental amount of $11,802.00 sought in their reply. App. 0320; 0327.

should be applied even when the lawyers seeking fees are from another area." 468 F.3d at 1225. In federal civil rights cases, it concluded that an exception may apply where the "subject of the litigation is so unusual or requires such special skills that only an out-of-state attorney possesses." *Id*.

The Oklahoma Supreme Court, however, has not adopted that exception. But even if it had, Defendants did not even attempt to satisfy those requirements here. Instead, they contended that no Oklahoma attorney had agreed or would agree to undertake their representation on a pro bono basis. That hardly establishes that only a Washington, D.C. attorney had the requisite skills to challenge subject matter jurisdiction below.

In any event, Oklahoma courts have not adopted this exception to the *Burk* rule that an attorney fees award under Oklahoma law must be "predicated on the standards within the local legal community." In such circumstances, this Court should reject Defendants' efforts to expand their entitlement to a greater award based on Washington, D.C. hourly rates. *See Groesbeck v. Bumbo Int'l Tr.*, No. 15-4150, 2017 WL 5899766, at *12 (10th Cir. Nov. 29, 2017) ("[a]s a federal court, we are generally reticent to expand state law without clear guidance from its highest court"); *see also Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013)(same); *Pehle v. Farm Bureau Life Ins. Co.*, 397 F.3d 897, 901 (10th Cir. 2005)(same).

The district court erred by creating an exception to the *Burk* requirement that a fee award be calculated based on reasonable hourly rates charged in the local market. This Court should reverse that award.

CONCLUSION

The district court erred in dismissing the complaint below seeking condemnation of an easement across Defendants' property under Section 357 and Oklahoma state law. Further, the district court erroneously granted Defendants' request for an award of attorney fees calculated based on hourly rates that exceed the reasonable amount charged by local attorneys in Oklahoma. This Court should thus reverse the district court's rulings below.

RELIEF SOUGHT

Plaintiff asks the Court to reverse the district court's judgment and order dismissing the complaint and reverse the order awarding attorney fees to Defendants, and remand the case for further proceedings below.

STATEMENT REGARDING ORAL ARGUMENT

Appellant asks for oral argument because of the number and complexity of the issues in this appeal, as well as the substantial financial interests at stake herein.

Respectfully Submitted,

SPENCER FANE LLP

/s/ Andrew W. Lester

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ATTORNEYS FOR PLAINTIFF/APPELLANT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned certifies:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6423 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Barry L. Pickens
Attorney for Plainiff/Appellant

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.

2. If required to file additional hard copies, this ECF submission is an exact copy of those documents.

3. The digital submissions have been scanned for viruses with the most recent version of Windows Defender Virus Definition Version 1.259.1667.0 with Virus Definitions File updated on 1/16/2018 at 8:05 a.m., and, according to that program, are free of viruses.

/s/ Barry L. Pickens
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing **APPELLANTS' BRIEF** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

/s/ Andrew W. Lester
Andrew W. Lester

ATTACHMENTS

1. August 18, 2016 Order
2. August 18, 2016 Judgment
3. July 21, 2017 Order
4. August 9, 2017 Order

Attachment 1:
August 18, 2016 Order

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

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, 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 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

ORDER

Before the Court is 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's ("Individual Defendants") Motion to Dismiss, filed January 15, 2016. On March 7, 2016, plaintiff filed its response, and on March 14, 2016, Individual Defendants filed their reply. Also before the Court is defendant United States' Motion to Dismiss for Lack of Jurisdiction (Rule 12(b)(1)) and Failure to Join a Necessary Party (Rule 12(b)(7) and Rule 19), filed March 7, 2016. On March 28, 2016, plaintiff filed its response, and on April 4, 2016, defendant United States filed its reply. Based upon the parties' submissions, the Court makes its determination.

I. Background

This is a condemnation action to condemn a twenty-five (25) foot wide natural gas pipeline easement through an approximate 137 acre tract of land in Caddo County, Oklahoma, which had originally been an Indian allotment to Millie Oheltoint (Emaugobah), held in trust by the United States Department of Interior, Bureau of Indian Affairs ("BIA"). Thirty-eight (38) Indians and the Kiowa Indian Tribe of Oklahoma ("Kiowa Tribe") own undivided interests in the tract. The Kiowa Tribe obtained its approximately 1.1% undivided interest sometime after 2008, on the death of certain Indian owners and by operation of the American Indian Probate Reform Act.

On November 19, 1980, the BIA approved the grant of a .73 acre easement across the southern part of the tract in exchange for consideration of $1,925.00 for a twenty (20) year term right-of-way for plaintiff's predecessor in interest, Producer's Gas Company, to install, construct, operate, and maintain a natural gas transmission pipeline. The natural gas transmission pipeline has been in continuous operation since its installation in the early 1980's. The original right of way expired in November 2000.

On or about June 14, 2002, plaintiff's predecessor-in-interest, Enogex, Inc. ("Enogex"), submitted to the BIA a new application for a new 20-year term regarding the existing natural gas pipeline right-of-way. Defendant Marcia Davilla, among others, rejected Enogex's offer on or about August 8, 2004. Despite the landowners' rejection of Enogex's offer, on June 23, 2008, the Acting Superintendent of the BIA's Anadarko Agency approved Enogex's application for the easement. On July 22, 2008, thirteen owners of the tract again rejected Enogex's offer for an easement by consent. Twelve of those landowners separately wrote to the acting superintendent requesting that she withdraw her decision approving Enogex's renewal request.

On March 23, 2010, the BIA vacated the acting superintendent's decision and remanded the case for further negotiation and instructed that if approval of a right-of-way was not timely secured that Enogex should be directed to move the pipeline. A new right of way has not been granted, and plaintiff has continued to operate the natural gas pipeline.[1] On November 11, 2015, plaintiff filed the instant action to condemn the easement pursuant to 25 U.S.C. § 357.

II. Discussion

Defendant United States contends that the tract at issue is tribal land and, as a result, the Court has no subject matter jurisdiction to condemn the easement. Additionally, all defendants contend that the Kiowa Tribe is a required party to this action, that the Kiowa Tribe cannot be joined in this action because it has sovereign immunity from suit, and under the factors set forth in Federal Rule of Civil Procedure 19(b), equity and good conscience mandate that this action be dismissed.

A. Subject matter jurisdiction

Plaintiff asserts that this Court has subject matter jurisdiction over this condemnation action pursuant to 25 U.S.C. § 357. Section 357 provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357. Clearly, the Court would have subject matter jurisdiction over a condemnation action regarding lands that are allotted in severalty to Indians and, thus, would have jurisdiction in this case if the tract at issue was owned solely by Indians to whom the tract had been allotted in

[1]Individual Defendants have initiated a separate action for trespass against plaintiff for the period from November 2000 to the present.

severalty. However, in the case at bar, the Kiowa Tribe undisputedly has a 1.1% undivided interest in the tract.

Congressional legislation and Department of Interior regulations treat tribal land and allotted land differently. Regarding rights-of-ways, consent of the tribe has been required for tribal land, but consent of the individual Indians is not always required. For example, United States Code, Title 25, § 324 provides:

> No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials. Right-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

25 U.S.C. § 324. Further, 25 C.F.R. § 169.107 provides, in pertinent part:

> (a) For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right-of-way across tribal land. The consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant.
> (b) For a right-of-way across individually owned Indian land, the applicant must notify all individual Indian landowners and, except as provided in paragraph (b)(1) of this section, must obtain written consent from the owners of the majority interest in each tract affected by the grant of right-of-way.
>
> (1) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if all of the

following conditions are met: . . . .

25 C.F.R. § 169.107(a),(b). Additionally, "tribal land and allotted land have been treated differently by the courts." *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cty. of Thurston, Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983). In *Nebraska Public Power*, the Eighth Circuit held that tribal land, as opposed to allotted land, cannot be condemned pursuant to 25 U.S.C. § 357 and consent of the Secretary of the Interior and the proper tribal officials must be obtained pursuant to 25 U.S.C. § 324. *Id.*

The Court, thus, must determine whether the Kiowa Tribe's 1.1% undivided interest in the tract constitutes tribal land. Tribal land is defined in 25 C.F.R. § 169.2 as follows:

> Tribal land means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status. The term also includes the surface estate of lands held in trust for a tribe but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477).

25 C.F.R. § 169.2. Because the Kiowa Tribe owns an undivided 1.1% interest in the tract that is held in trust, the Court finds that the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357. The Court, therefore, finds that it does not have subject matter jurisdiction over this action.

B. Required party

Alternatively, defendants assert that the Kiowa Tribe is a required party under Federal Rules of Civil Procedure 19(a) and 71.1[2], that the Kiowa Tribe cannot be joined in this action, and that

[2]Rule 71.1 addresses condemning real or personal property.

this action should be dismissed pursuant to Rule 19(b).[3] Rule 19(a)(1) provides:

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1)** ***Required Party*****.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
>
> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Further, Rule 71.1(c)(3) provides:

> When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

Fed. R. Civ. P. 71.1(c)(3).

Having reviewed the parties' submissions, the Court finds that the Kiowa Tribe is a required party to this case. Specifically, the Court finds that because the Kiowa Tribe owns a 1.1% undivided interest in the tract at issue, Rule 71.1(c)(3) requires that the Kiowa Tribe be joined as a defendant in this case. Further, the Court finds that in the Kiowa Tribe's absence, this Court cannot accord

[3]Although the Court has found that it lacks subject matter jurisdiction, the Court will address defendants' alternative argument.

complete relief among the existing parties – plaintiff cannot access the tract without a right-of-way easement that is binding on all of the owners. Additionally, the Court finds that because the Kiowa Tribe owns a 1.1% undivided interest in the tract at issue, the Kiowa Tribe clearly claims an interest relating to the subject of this action and that disposing of this action in the Kiowa Tribe's absence would leave plaintiff subject to a substantial risk of incurring inconsistent obligations because of the Kiowa Tribe's interest – the Individual Defendants' interests in the tract would be condemned but the Kiowa Tribe would retain its interest in the tract and could exclude plaintiff from the tract and could pursue claims for trespass.

While the Kiowa Tribe is a required party, the Court finds that the Kiowa Tribe cannot be joined as a party in this action. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotations omitted). The Kiowa Tribe is a federally recognized tribe and has sovereign immunity from suit. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). Further, "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58 (internal quotations and citations omitted). Plaintiff does not assert, and the Court does not find, that the Kiowa Tribe has expressly waived its sovereign immunity. Accordingly, the Court finds that the Kiowa Tribe cannot be joined under Rule 19(a) or Rule 71.1 as a defendant in this case due to its sovereign immunity.

Because the Kiowa Tribe cannot be joined as a defendant in this case, the Court must determine whether Rule 19(b) requires dismissal of this action. Rule 19(b) provides:

> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to

> consider include:
>
> > **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> > **(2)** the extent to which any prejudice could be lessened or avoided by:
> >
> > > **(A)** protective provisions in the judgment;
> > > **(B)** shaping the relief; or
> > > **(C)** other measures;
> >
> > **(3)** whether a judgment rendered in the person's absence would be adequate; and
> > **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(b). Further, when "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (internal quotations and citations omitted).

Having reviewed the parties' submissions, the Court finds that equity and good conscience mandate that this action should be dismissed. Specifically, the Court finds that the Kiowa Tribe's sovereign immunity is an extremely compelling interest favoring dismissal of this case. Further, the Court finds that continuing this action without the Kiowa Tribe would irreparably prejudice the Kiowa Tribe and plaintiff. Granting plaintiff an easement across the tract without the Kiowa Tribe's presence in this case would materially prejudice the Kiowa Tribe's interest in the tract and, perhaps more importantly, would greatly prejudice the Kiowa Tribe's sovereign immunity rights. Further, it would prejudice plaintiff by potentially subjecting it to inconsistent obligations to the various owners of the tract. The Court also finds that there is no way to lessen the above prejudice. Providing the Kiowa Tribe compensation from a condemnation award only addresses the Kiowa

Tribe's property rights and does not address its sovereignty interests. There is no way to tailor any condemnation judgment to protect the Kiowa Tribe's sovereign immunity rights because it is the prosecution of this action itself that violates those rights.

Additionally, the Court finds that any judgment rendered in the Kiowa Tribe's absence would be inadequate because an incomplete condemnation judgment may be unenforceable. *See Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011) ("If the United States is not a party to the action, any judicial decision condemning the land has no binding effect, so the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto."). Because the Kiowa Tribe's interest cannot be condemned in its absence, any judgment rendered in the Kiowa Tribe's absence would be meaningless. Finally, the Court finds that plaintiff has an adequate remedy if this action is dismissed. Plaintiff can acquire a voluntary easement under 25 U.S.C. §§ 323-328, the statutory scheme and administrative procedure that acts as an alternative to § 357's condemnation of allotted land in federal court.

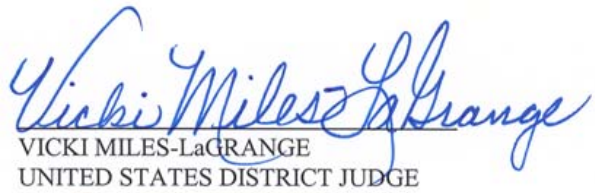
Accordingly, the Court finds that the Kiowa Tribe is a required party under Rule 19(a) and Rule 71.1, that in light of its sovereign immunity, the Kiowa Tribe cannot be joined; and that under Rule 19(b), the Court, in equity and good conscience, must dismiss this action.

III. Conclusion

For the reasons set forth above, the Court GRANTS the Individual Defendants' Motion to Dismiss [docket no. 32] and defendant United States' Motion to Dismiss for Lack of Jurisdiction

(Rule 12(b)(1)) and Failure to Join a Necessary Party (Rule 12(b)(7) and Rule 19) [docket no. 47] and DISMISSES this action.

IT IS SO ORDERED this 18th day of August, 2016.



VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

Attachment 2:

August 18, 2016

Judgment

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

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, 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 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

JUDGMENT

Pursuant to a separate order issued this same date, this action is hereby dismissed.

ENTERED at Oklahoma City, Oklahoma this 18th day of August, 2016.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

Attachment 3:

July 21, 2017 Order

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

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-15-1250-M
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.	)	

ORDER

Before the Court is plaintiff's Motion for New Trial, filed September 14, 2016. On September 28, 2016, the individual defendants filed their response, and on October 5, 2016, plaintiff filed its reply to the individual defendants' response. On November 2, 2016, defendant United States filed its response, and on November 16, 2016, plaintiff filed its reply to defendant United States' response. On March 9, 2017, plaintiff filed a notice of supplemental authority, and on March 13, 2017, the individual defendants filed a response to plaintiff's notice of supplemental authority. Finally, on May 26, 2017, the individual defendants filed a Notice of Subsequently Decided Authority.

On August 18, 2016, this Court granted defendants' motions to dismiss and dismissed this case. Plaintiff now moves, pursuant to Federal Rule of Civil Procedure 59, for a new trial. Specifically, plaintiff contends that this Court erred as a matter of law when it held that

fractionalized interests of allotted Indian land, which escheated from a deceased allottee to an Indian Tribe through operation of the Indian Land Consolidation Act, became cloaked with sovereign immunity, thus precluding condemnation of the land and the joinder of the Tribe.

The United States Court of Appeals for the Tenth Circuit recently addressed this specific issue in *Public Service Company of New Mexico v. Barboan*, 857 F.3d 1101 (10th Cir. 2017), and affirmed the district court's dismissal of a condemnation action for lack of subject matter jurisdiction as to two land parcels in which an Indian Tribe held an interest. The Tenth Circuit held "[w]hen all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes 'tribal land' not subject to condemnation under § 357." *Id.* at 1111 (internal quotations and citation omitted). The Tenth Circuit further held that "because the tribe owns an interest in the disputed parcels, § 357's '[l]ands allotted in severalty to Indians' prerequisite is inapplicable and so the law gives [plaintiff] no authority to condemn. And that deprives us of federal jurisdiction under 28 U.S.C. § 1331." *Id.* at 1112.

In light of the Tenth Circuit's opinion in *Public Service Company of New Mexico v. Barboan*, the Court finds that it did not err in dismissing this case. Accordingly, the Court DENIES plaintiff's Motion for New Trial [docket no. 59].

IT IS SO ORDERED this 21st day of July, 2017.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

Attachment 4:

August 9, 2017 Order

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

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, 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

ORDER

Before the Court is 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's (the "Individual Defendants") Motion for Recovery of Attorneys' Fees and Expenses, filed September 1, 2016. On September 21, 2016, plaintiff filed its response,[1] and on September 28, 2016, the Individual Defendants filed their reply. Based upon the parties' submissions, the Court makes its determination.

[1] The Court would note that plaintiff's response was untimely under Local Civil Rule 54.2, which provides that "[o]bjections to the allowance of attorney's fees must be filed within 14 days from the date the motion for attorney's fees is filed."

On November 11, 2015, plaintiff filed the instant action to condemn an easement. The Individual Defendants filed a motion to dismiss, and on August 18, 2016, this Court granted the motion to dismiss. The Individual Defendants now move this Court, pursuant to Okla. Stat. tit. 66, § 55(D), for an award of their reasonable attorneys' fees and expenses incurred in litigating this action. Plaintiff does not contest that the Individual Defendants are entitled to recover attorneys' fees and expenses in this case; however, plaintiff asserts that many of the litigation expenses claimed by the Individual Defendants are not recoverable under Oklahoma law and that the billing rates charged by the Individual Defendants' counsel should be reduced to reflect reasonable, prevailing attorney fee rates in the Oklahoma marketplace.

Section 55(D) provides, in pertinent part:

> 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.

Okla. Stat. tit. 66, § 55(D).

The Oklahoma Supreme Court has held that attorney, appraisal, engineering, and expert witness fees are recoverable in a condemnation action. *See Okla. Turnpike Auth. v. New Life Pentecostal Church of Jenks*, 870 P.2d 762, 764 (Okla. 1994). However, the Oklahoma Supreme Court has held that other litigation expenses, such as copying, mileage, telephone and telefax expenses, and postage, are not recoverable and simply constitute components of the lawyer's overhead. *See id.* Accordingly, the Court finds that the Individual Defendants are only entitled to recover their attorney, appraisal, engineering, and expert witness fees. Because all of the expenses

requested by the Individual Defendants are "other litigation expenses" and not appraisal, engineering, and expert witness fees, the Court finds that the expenses requested by the Individual Defendants are not recoverable.

Regarding an award of attorneys' fees, the amount of fees must be grounded on the touchstone of reasonableness. Under Oklahoma law, the reasonableness of attorneys' fees is determined using the following *Burk*[2] factors: (1) the time and labor required, (2) the novelty and difficulty of the questions presented, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of 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 attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.[3] *See Burk*, 598 P.2d at 661. The Oklahoma Supreme Court has further held that "[r]easonable value of services should be predicated on the standards within the local legal community." *Id.* at 663. Further, "[u]nless 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 (10th Cir. 2006) (internal quotations and citations omitted).

Having carefully reviewed the parties' submissions, and having considered all of the *Burk* factors, the Court finds that the Individual Defendants' requested award of attorneys' fees is

[2] *State ex rel. Burk v. City of Okla. City*, 598 P.2d 659 (Okla. 1979).
[3] In its untimely response, plaintiff primarily objects to the fee rates of the Individual Defendants' counsel. Plaintiff asserts that the attorney fee rates should be based on the rates in the local legal community, i.e., Oklahoma.

reasonable. Specifically, the Court finds that the hours expended by the Individual Defendants' counsel are reasonable and necessary. Further, the Court finds that under the particular, unique circumstances of the instant action, the requested hourly rates for the Individual Defendants' counsel are reasonable. Specifically, the Court finds the Individual Defendants could not afford to hire counsel and were unable to locate any counsel, let alone an attorney with expertise in Indian law, locally who would represent them. In her affidavit, Stephanie Hudson, Executive Director of Oklahoma Indian Legal Services ("OILS"), states that OILS determined there was no counsel in Oklahoma who would be able to represent the Individual Defendants. *See* Affidavit of Stephanie C. Hudson, attached as Exhibit 1 to the Reply in Support of the Individual Defendants' Motion for Recovery of Attorneys' Fees and Expenses, at ¶ 3. Further, Ms. Hudson states:

> There are a limited number of attorneys in Oklahoma who solely practice Federal Indian law. There are even fewer who represent Tribal members with Federal Indian law issues on a pro bono basis. An action of this complexity requires counsel who understands the unique relationship of individual Tribal members, the Bureau of Indian Affairs and Trust Indian land. It also requires counsel who has already built relationships with individual Tribal members.

Id. at ¶ 6. Ms. Hudson finally states that OILS does not have attorneys available or the financial resources to take on an action of this magnitude. *See id.* at ¶ 7.

Accordingly, the Court GRANTS the Individual Defendants' Motion for Recovery of Attorneys' Fees and Expenses [docket no. 57] and AWARDS the Individual Defendants attorneys' fees against plaintiff Enable Oklahoma Intrastate Transmission, LLC in the amount of $103,546.50.

IT IS SO ORDERED this 9th day of August, 2017.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE