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 REPLY BRIEF

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Dated: April 30, 2018

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SUMMARY OF ARGUMENT

As noted in Enable's Opening Brief ("Opening Br."), Enable contends that the district court erred by granting defendants' motions to dismiss solely to preserve these errors for further review by this Court if the Supreme Court should hand down an opinion (or opinions) announcing law that may be relevant, and to preserve its right to seek rehearing *en banc* from the full Court. As explained below, Appellant will not further address these errors in this reply.

The district court also erred by granting Defendants an award of attorney fees in the full amount sought by Defendants based on hourly rates up to $675 per hour. Those rates greatly exceed the local Oklahoma market rates the district court was required to use in making any award under Oklahoma law.

ARGUMENT

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.

Enable has set forth its arguments that the district court committed reversible error by dismissing its claims in this action in order to preserve the issues for further review. Enable will not further address in this reply the arguments made in Sections I and II of the Appellees' Brief (filed April 16, 2018) or any of the arguments made in the Answering Brief of the United States ("USA") (filed April 16, 2018).

As explained previously, if the Supreme Court accepts review of this Court's decision in *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101 (10th Cir. 2017) ("*Barboan*"), then there likely will be developments in the law relevant to the issues raised herein. There may also be relevant developments in the law that arise from the Supreme Court's review of the Washington Supreme Court's decision in *Upper Skagit Indian Tribe v. Lundgren*, 389 P.3d 569 (Wash. 2017), *cert. granted* 138 S.Ct. 543 (Dec. 8, 2017) (No. 17-387).[1]

The Supreme Court heard oral argument in *Upper Skagit Indian Tribe* on March 21, 2018. It has not yet determined whether to hear *Barboan*. Nevertheless, even if the Supreme Court declines review of this Court's decision in *Barboan*, Enable intends to seek review of these issues on rehearing *en banc* so that this Court may revisit its decision in *Barboan*.

Given the status of these Supreme Court cases, Appellant does not object to the USA's suggestion that this Court should defer oral argument in this case until after the Supreme Court decides whether to review the decision in *Barboan*, nor the suggestion that if the Supreme Court reviews *Barboan*, argument should be further deferred until after the Court issues a decision. Enable agrees that if the Supreme Court issues a decision in *Barboan* that clarifies the law, this Court

[1] *Upper Skagit Indian Tribe* presents the Supreme Court with the question: "Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?"

should "request briefing on the effect [of that decision] on this case." In addition, this Court's analysis may be impacted by the Supreme Court's decision regarding whether a Court's assertion of *in rem* jurisdiction may overcome a Native American tribe's sovereign immunity in *Upper Skagit Indian Tribe*, so that after that decision is handed down, this Court also should request further briefing on what impact that decision may have on this case.

2. The district court erred by granting Defendants' motion for an award of attorney fees in the full amount requested.

The parties agree that Oklahoma substantive law governs the propriety of the district court's order awarding fees in this case. The Oklahoma Supreme Court's decision in *State of Oklahoma ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659 ("*Burk*"), continues to govern fee awards authorized by Oklahoma law in every case. *See Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII–A, L.P.*, 861 F.3d 1182 (10th Cir. 2017).

The *Burk* test clearly requires that an award of fees be based on the reasonable value of the services and "should be predicated on the standards within the local legal community." *Id*. ¶ 20, 598 P.2d at 663. It is equally clear that the district court in this case did not predicate its award of attorney fees on the reasonable hourly rates that prevail within the Oklahoma legal community. Nevertheless, Defendants seek to defend the district court's award based on two arguments.

First, Defendants argue that Enable forfeited its claim of error through "invited error." In other words, they claim that Enable affirmatively asked the district court to make an exception to *Burk*. From that faulty premise, Defendants conclude Enable cannot base error on the district court's use of out-of-state rates. Defendants' argument is wrong at every turn.

Enable did not forfeit its argument that Oklahoma law required the district court to use Oklahoma hourly rates. To the contrary, Enable repeatedly argued below that the district court must use local rates. Enable also made the same alternative argument it makes on appeal, that even if the district court could apply the exception, Defendants failed to offer any evidence to justify the district court applying the federal rule regarding out-of-state hourly rates in these circumstances. Enable did not forfeit or waive these arguments below. It expressly preserved both.

Second, Defendants argue the *Burk* test did not automatically preclude use of out-of-state hourly rates in calculating the fee award. To make that argument, Defendants must ignore the relevant requirement of *Burk*, and instead focus on a separate rule. Defendants thus cite a case holding that "documentation requirements" discussed in *Burk* are merely "guidelines." That may be accurate, but it is beside the point.

Burk established *a mandatory rule* that fee awards authorized by Oklahoma law "should be predicated on" local community standards for value. And *Burk*

made clear this rule is required "in every case." *Burk*, ¶ 20, 598 P.2d at 663. The Oklahoma Supreme Court has never authorized out-of-state rates in any circumstances. And that Court has never adopted the exception relied upon by Defendants. The district erred by creating a new rule of Oklahoma law to use out-of-state rates rather than applying extant law.

A. The District Court's error in engrafting a "so unusual" exception onto the *Burk* test was not "invited error" by Enable.

Defendants' first argument to defend the fee award, that Enable invited the district court to use out-of-state rates in making the fee award, is based on a demonstrably-false premise. Enable did not affirmatively ask the district court to award any fees, and it certainly never invited the court to use out-of-state hourly rates in making an award.

In fact, Enable did the very opposite. It repeatedly urged that Oklahoma law, as established in *Burk* and its progeny, requires the court to use Oklahoma rates in calculating fees, such that the award Defendants sought was improper and inconsistent with *Burk*. *E.g.*, App. 325 (arguing Defendants' application was based on a rate "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"); *id*. at 323-24 (arguing one reason "Defendants' attorneys' fees [were] unreasonable" was "their hourly rates are not reasonable in relation to local

community standards") and 325 ("The attorney fee rates … are excessive compared to the local community").

Defendants did not and cannot point to a single sentence in Enable's briefing below where it invited the Court to use out-of-state rates. In fact, Enable never did so. Instead, Defendants' argument "Enable acknowledged that [the *Lippoldt* exception] *could* apply" (emphasis supplied) is based upon their selective recitation of Enable's brief and wishful thinking. In context, Enable's citation to *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006), was made for the proposition that *Burk* is based on "a well-accepted" rule. App. 325. Indeed, *Lippoldt* supports that point, noting "the fee rates of the local area should be applied even when the lawyers seeking fees are from another area."[2]

Enable should not be penalized where it clearly, consistently, and repeatedly argued to the district court that the district court "must" use local Oklahoma rates. Having cited *Lippoldt*, however, Enable also argued – ***in the alternative*** (just as it argues in the alternative in this appeal) – that even if Oklahoma law could be read to embrace the exception, Defendants still could not prove the facts required for its application, i.e., Defendants could not demonstrate this case's subject matter was so unusual or that the relevant law was so complex that only D.C. attorneys

[2] That argument was not strictly necessary to establish that Oklahoma law required use of local hourly rates. However, the argument that governing law is consistent with the established law in other venues is often made, sometimes in order to avoid raising potential conflicts of law.

possess the "special skills" needed. *Id*. at 1225. Enable did not "invite" the errors it challenges in this appeal. Enable specifically preserved both alternative arguments.

To be sure, language from Enable's alternative argument is the core of Defendants' focus in making its forfeiture argument. Yet, that language cannot bear the weight that Defendants ask. Nowhere did Enable invite the district court to rely on any exception to using local hourly rates. It merely preserved an alternative argument. This Court should thus reject Defendants' strained forfeiture argument. *Meredith v. Beech Aircraft Corp*., 18 F.3d 890, 895-96 (10th Cir. 1994) (rejecting invited-error claim where appellant cited legal precedent for separate purpose).

In any event, this Court can and should use its power to apply the proper legal test in this appeal. *E.g.*, *Ray v. Unum Life Ins. Co. of Am.*, 314 F.3d 482, 487 (10th Cir. 2002) (rejecting waiver and invited-error arguments on their merits, but also exercising court's "discretion to consider the [legal] issue on its merits"); *see also Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 837 (10th Cir. 2014) (this Court is "not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

B. Under Oklahoma law, application of the *Burk* test is mandatory.

Defendants stridently contend Oklahoma law "does not preclude the district court from using out-of-state rates to calculate an attorneys' fee award." Appellees'

Br. at 31. They also level a serious but erroneous accusation at Enable's counsel, contending they "mischaracterize[] *Burk* when" stating that an attorney fees award under Oklahoma law "*must* be predicated on the standards within the local legal community." *Id*. (emphasis in original). Defendants make such an accusation by employing a rhetorical sleight-of-hand that conflates two separate holdings from *Burk*, and also by brazenly ignoring a subsequent Oklahoma Supreme Court decision applying *Burk* (which Enable cited in its opening brief). The latter case expressly uses the word Defendants complain Enable has falsely added ("must"), holding parties seeking fee awards "*must* present to the trial court" evidence of the work's value "*based on local standards*." *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶ 16, 977 P.2d 357, 364-65 (emphasis supplied).

In *Burk*, the Oklahoma Supreme Court established two separate legal rules applicable to fee awards authorized by Oklahoma law. *Burk* first established a preferred rule regarding the method for attorneys seeking fees to document their work. *Burk*, ¶ 20, 598 P.2d at 663. *Burk* also held that a fee award "should be predicated on" local standards, and held that is required "in every case." *Id*.

In its later decision in *Conti v. Republic Underwriters Ins. Co.*, the Oklahoma Supreme Court clarified that the *Burk* "documentation guidelines" are not always mandatory (if there is otherwise adequate evidence in the record to satisfy the Oklahoma standards). 1989 OK 128, ¶¶ 21-23, 782 P.2d 1357, 1362–63

(rejecting argument that "failure of counsel to follow [the *Burk*] documentation guidelines prohibits an award of attorney fees"). However, Defendants can cite no case where the Oklahoma Supreme Court similarly clarified that the *Burk* requirement for "local community standards" of value was anything other than mandatory "in every case," nor is Enable aware of any such authority.

Accordingly, this Court need not be distracted by Defendants' quotation of *Conti*'s holding that the *Burk* documentation rules were merely "guidelines." Counsel seeking fees in that case was an Oklahoma attorney (Mr. Ransdell), and his rate was ***substantially*** below the (up-to) $675 per hour charged by defense counsel here. *Conti* affirmed his fee award calculated using a rate of $150 per hour. *Id*. Because he was local, that Court of course was not faced with the issue of whether an out-of-state attorney could charge $675 per hour, or whether *Burk*'s local value rule remains mandatory for awards to out-of-state counsel.

In more recent decisions from the Oklahoma Supreme Court, however, the Court made clear that its requirement that fees must be "predicated on the standards within the local legal community" remains a mandatory requirement. For example, in *In re Adoption of Baby Boy A*, the Oklahoma Supreme Court held that "[t]he *Burk* criteria are *the standard* by which our courts test the reasonableness of … attorney fee awards." 2010 OK 39, ¶ 27, 236 P.3d 116, 124–25 (emphasis supplied; citing, *inter alia*, *Morgan v. Galilean Health Enterprises, Inc.*, *supra*).

And as Enable quoted it in its opening brief, the Court in *Morgan* held that under Oklahoma law, "[l]awyers *must* present to the trial court … evidence of the reasonable value of different types of legal work *based on local standards*." *Morgan*, ¶ 16, 977 P.2d at 364-65 (emphasis supplied).

As Enable pointed out in its opening brief (without contradiction from Appellees), Oklahoma courts have not adopted any exception to the *Burk* rule that an attorney fees award under Oklahoma law must be "predicated on the standards within the local community." Opening Br. at 21. Moreover, the Oklahoma Supreme Court has not adopted the *Lippoldt* rule (or any similar exception to *Burk*).[3] Yet, Defendants completely ignore the rule that when applying state law, this Court is "reticent to expand state law without clear guidance from its highest court." *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) (citation omitted).

No "clear guidance" from the Oklahoma Supreme Court has ever existed for applying out-of-state hourly rates in calculating a fee award authorized by Oklahoma law. In fact, *Burk* and its progeny clearly held to the contrary. Based on the same reticence expressed in cases like *Schrock*, this Court should conclude the district court could not create law to award fees using Washington, D.C. hourly

[3] While *Burk*, in very limited circumstances, allows enhancement of the presumptively-correct fee award (based on the number of hours times the local hourly rate), the movant must provide evidence necessary to invoke the twelve factor analysis *Burk* requires. *Burk*, *id*. at 661; *see Chieftain Royalty*, 861 F.3d at 1190. Here, Appellees did not even attempt to satisfy the multi-factor test.

rates. This Court should thus reverse the district court's fee award.

C. The District Court record included no evidence to support application of an exception to the *Burk* rule based on the litigation being "so unusual" or requiring "such special skills that only an out-of-state attorney possesses."

The district court's reliance on *Lippoldt*, which allows use of out-of-state hourly rates for fee awards in certain kinds of federal civil rights cases, was unjustified. *Lippoldt* does not authorize using out-of-state rates where the movant merely tries to prove that attorneys who have the required skills would not have worked on this matter on a *pro bono* basis. Yet, that is the only evidence Defendants offered in support of using D.C. hourly rates. *E.g.*, App. 339 ("the Defendants could not afford to hire counsel. They were unable to locate any counsel who would represent them….")[4]

Stated more directly, there was no evidence in the record below that only a Washington, D.C. attorney possesses the "special skills" necessary to understand Native American law or to raise the subject matter jurisdiction challenges made by Defendants here. Nor could there have been any such evidence given that Oklahoma lawyers routinely litigate such issues. The district court erred as a matter of law, and abused its discretion, by applying *Lippoldt* to permit the use of D.C. rates to calculate fees based on the record offered by Defendants in their pleadings

[4] *See also id*. at 277 ("the individual defendants could not afford to retain counsel in this action") & 347 ("[t]here are [very few] attorneys in Oklahoma who solely practice Federal Indian law [and] who represent Tribal members with Federal Indian law issues on a *pro bono* basis").

filed below. This Court should thus reverse that fee 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 greatly exceed the reasonable amount charged by local attorneys in Oklahoma. This Court should reverse the district court's rulings below.

Respectfully Submitted,

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The undersigned certifies:

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/s/ Andrew W. Lester
Attorney for Plaintiff/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 1.267.552.0 with Virus Definitions File updated on April 30, 2018 at 8:08 a.m., and, according to that program, are free of viruses.

/s/ Andrew W. Lester
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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