

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-6188

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, a
Delaware limited liability company,

Plaintiff-Appellant,

v.

A 25 FOOT WIDE EASEMENT, et al.,

Defendants-Appellees

UNOPPOSED MOTION FOR ATTORNEYS' FEES

Appellees respectfully submit this motion pursuant to Fed. R. App. P. 27(a) for an order awarding Appellees all attorneys' fees incurred on appeal and remanding this matter to the district court for a determination of the amount of fees. Subject to their purported forthcoming motion for reconsideration, counsel for Appellant represented that it does not oppose this motion. Counsel for the United States represented that it takes no position on this motion.

Appellees are entitled to all fees incurred during this appeal. A federal court sitting in diversity is required to apply state substantive law governing the award of attorney fees. *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 460–61 (10th Cir. 2017) (stating that attorney fees awarded based on the outcome of litigation are substantive whereas attorney fees awarded punitively are procedural). Oklahoma law provides for the award of attorney fees to the owner of any right, title, or interest in real property that is the subject of a condemnation proceeding where the final judgment is that the real property cannot be acquired by condemnation. Okla. Stat. tit. 66 § 55(D); *see also id.* tit. 27 §§ 7, 11(1). This applies to fees incurred before both the trial court and an appellate court. The Supreme Court of Oklahoma has held that “[w]henver there is statutory authority to award attorney fees in the trial of a matter, the prevailing party may be awarded additional fees for services rendered on appeal.” *State ex rel. Dep’t of Transp. v. Cedars Grp., L.L.C.*, 393 P.3d 1095, 1101 (Okla. 2017); *see also Bd. of Cty. Comm’rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 652-53 (Okla. 2006) (granting prevailing landowners’ motion for appeal-related attorney fees pursuant to Okla.

Stat. tit. 66 § 55(d)). However, while the appellate court should award the prevailing party its fees, it should remand the matter to the trial court to hear evidence and determine the amount of those fees. Okla. Stat. tit. 12 § 696.4(C).

On November 15, 2018, this Court affirmed the District Court for the Western District of Oklahoma's dismissal of Appellant's condemnation proceeding because the real property at issue was not subject to condemnation. Appellees are therefore entitled to their fees pursuant to Okla. Stat. tit. 66 § 55(D). This Court should therefore enter an order that Appellees are entitled to all attorneys' fees incurred before this Court. The Court should then remand to the district court for a determination of the amount of fees owed.

Respectfully submitted,

s/ Dustin T. Greene
DUSTIN T. GREENE
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 607-7432
Fax: (336) 734-2612
dgreene@kilpatricktownsend.com

THURSTON H. WEBB

Kilpatrick Townsend & Stockton LLP
100 Peachtree Street, NE, Suite 2800
Atlanta, GA 30309
Telephone: (404) 815-6300
Fax: (404) 541-3128
twebb@kilpatricktownsend.com

Counsel for Appellees

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, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, Version 1.281.979.0, last updated 11/28/2018 at 9:11 AM and according to the program are free of viruses.

s/ Dustin T. Greene
DUSTIN T. GREENE

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, I electronically filed this **MOTION FOR ATTORNEYS' FEES** 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/ Dustin T. Greene
DUSTIN T. GREEN