

Testimony of Attorney Lynn Boughey regarding House Bill No. 1466

February 9, 2023

Mr. Chairman and members of the committee,

My name is Lynn Boughey and I am an attorney that specializes in litigation on behalf of farmers and ranchers and other landowners, and I have had many cases regarding eminent domain and inverse condemnation.

Recently I had a case in which I assisted a rancher near Glen Ullin (named Keith Kessler) to remove a wind tower which was illegally placed too close to a second residence on the property. The large Minnesota company tried to claim that the residence was abandoned, and therefore they had not violated the PSC order requiring the wind tower to be at least 1400 feet away from a residence.

Before we could sue the matter out as inverse condemnation for devaluing the land, we first had to present our complaint to the public service commission, which eventually ruled in our favor and ordered the large Minnesota company to take down the wind tower. We were required to do this because we had to exhaust administrative remedies before bringing the action for inverse condemnation, which as you know is the other half of eminent domain law.

We requested attorney fees for all the time we had to spend before the public service commission, the public service commission refused to award us attorney fees, and recently Judge Hovland in the eminent domain/inverse condemnation case that we brought also declined to award attorney fees for all the time we had to spend before the public service commission because section 32-15-32 allows attorney fees only for judicial proceedings.

We are therefore requesting that you add in the language "and adjudicative" proceedings so the landowners will get paid for the time required before any administrative agency prior to being able to sue out the matter under eminent domain law.

Although this will not help my client unless you make the law retroactive, which of course we would happy with, it will at least the next farmer, rancher, or landowner who has to go through the same thing my client had to go through.

One last point. There is a very good policy reason for allowing attorney fees when somebody takes your land through eminent domain: it's bad enough they're taking your land without your permission, but you should not add insult to injury by

forcing the landowner to pay for the privilege of demanding that the jury decide the real value of the property taken.

Many if not all of my clients would have most probably taken the low sum offered by the large corporation taking the land if the attorney fees were not allowed under this section.

As a matter of fact, I note that Judge Hovland, in the case I'm dealing with right now on behalf of the Kesslers, stated in a recent opinion applying Section 32-15-32 and denying attorney fees for the PSC portion of our case,

"While the court may even agree with some of the public policy considerations raised by the Kessler's, the case law in North Dakota does not permit recovery. . . . This court cannot expand the scope of Section 32-15-32 because the hearings were, instead, adjudicative proceedings.

I provided a copy of that decision to this committee, and the judge's quote is on page 7 of that decision.

I will now be pleased to stand for questions.