2025 SENATE JUDICIARY

SB 2321

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2321
2/12/2025

Relating to awarding costs and fees in eminent domain proceedings.

2:30 p.m. Chair Larson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Expert witness fees
- Eminent domain proceedings
- Landowner compensation
- Legal interpretation
- Negotiation processes
- Infrastructure development

2:31 p.m. Senator Magrum introduced the bill.

2:32 p.m. Senator Hogue testified in favor.

2:43 p.m. Troy Coons, Chairman of Northwest Landowners Association, testified in favor and submitted testimony #37161.

2:46 p.m. Derrick Braaten, Bismarck Attorney for Farmers and Ranchers, testified in favor.

3:00 p.m. Travis Zablotney testified in favor.

3:02 p.m. Jerol W. Gohrick, Chairman of District 2, testified in favor and submitted testimony #37326.

3:03 p.m. Gregory Demme testified in favor.

3:06 p.m. Delwin Bane testified in favor.

3:08 p.m. Stephanie Engebretson, Deputy Director and Attorney of NDLC, testified in opposition and submitted testimony #37324.

3:12 p.m. Andrea Pfennig, Vice President of GNDC, testified in opposition and submitted testimony #37353.

Additional written testimony:

Lanny D. Kenner submitted testimony in favor #37396.

Dennis Pathroff, Power Companies of North Dakota, submitted testimony in opposition #37132.

Jonathan Fortner, VP of Government Relations from Lignite Energy Council, submitted testimony in opposition #37377.

Todd Kranda, Lobbyist for ND Petroleum Council, submitted testimony in opposition #37333 and #37334.

3:21 p.m. Chair Larson adjourned.

Kendra McCann, Committee Clerk

Power Companies OF NORTH DAKOTA

Chairman Larson and members of the Senate Judiciary Committee,

The Power Companies of North Dakota ("PCND") urges a "Do Not Pass" recommendation on SB 2321.

PCND is a coalition of the state's leading shareholder-owned gas and electric utilities. Our members include MDU Resources Group, Xcel Energy, Otter Tail Power Company, and ALLETE. Together, PCND members serve over 427,000 North Dakota customers, employ over 1,200 North Dakotans, and manage significant power generation and transmission infrastructure across our state.

Senate Bill 2321 proposes amendments to sections of the North Dakota Century Code concerning eminent domain proceedings. Specifically, section 1 of SB 2321 adds defendant's costs for expert witness fees to the already substantial costs required to be borne by the condemning entity when proceedings are dismissed or withdrawn. While the bill aims to protect landowners, it ultimately imposes financial burdens on utility companies, which must ultimately be recovered from electric consumers in rates.

Section 2 of SB 2321 adds defendant's costs for expert witness fees to the list of costs for which a court may authorize recovery from the condemning entity. Again, these are costs that would ultimately be borne by electric consumers in rates.

Eminent domain is a necessary tool to ensure reliable and affordable electric service, particularly in the development of transmission infrastructure. The added costs mandated by SB 2321 could increase project expenses, delay infrastructure investments, and result in higher costs for North Dakota electric consumers.

Accordingly, PCND urges a "Do Not Pass" recommendation on SB 2321.

Thank you, Chairman Larson and committee members.

Testimony of Troy Coons on behalf of
Northwest Landowners Association
in favor of
SENATE BILL NO. 2321
Senate Judiciary Committee
February 12, 2025

Chairwoman Larson and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents hundreds of farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am not a paid lobbyist.

The Northwest Landowners Association supports SB 2321 because it is important to ensure property owners are made whole when the government takes their property. If the amount of their just compensation is reduced by the expense of expert witnesses and appraisals because those items are not reimbursed, then they are not truly receiving just compensation. Generally we understand that in North Dakota, landowners get their fees and expenses, including their appraiser's fees reimbursed at the end of eminent domain litigation.

But our legal counsel has advised that North Dakota law is being applied in federal courts, in other contexts, and also in the context of eminent domain lawsuits. One example is natural gas pipelines which use the Natural Gas Act, a federal law that gives the developers condemnation rights. I have attached one case provided by our legal counsel in which our federal court in North Dakota applied North Dakota law in a federal condemnation action on the specific issue of reimbursement of attorneys' fees.

We believe it should be clear in North Dakota law that it is part of our right to compensation that we are also able to get our expenses reimbursed, including the expenses for appraisers and other experts if needed. We understand there are times when the federal courts do not consider the expert witness expenses to be part of the recoverable costs, so we want it to be explicit that in North Dakota, we intend our laws to cover that, and we intend to make the landowner whole.

Thank you again for your time, and we urge a **do pass** on SB 2321.

Thank you,

Troy Coons
Northwest Landowners Association

Wbi Energy Transmission, Inc. v. Across

United States District Court for the District of North Dakota

November 1, 2022, Decided; November 1, 2022, Filed

Case No. 1:18-cv-078

Reporter
2022 U.S. Dist. LEXIS 250348 *; 2022 WL 22649232

WBI Energy Transmission, Inc., Plaintiff, vs. Easement and Right-of-Way Across, 189.9 rods, more or less, located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4, 227.8 rods, more or less, located in Township 140 North, Range 98 W Section 11: N1/2SW1/4, W1/2SE1/4, 242.0 rods, more or less, located in Township 149 North, Range 98 W Section 2: SW1/4SE1/4 Section11: NE1/4, 335.3 rods, more or less, located in Township 150 North, Range 98 W Section 35: W1/2E1/2, 223.8 rods, more or less, located in Township 149 North, Range 98 W Section 28: S1/2N1/2, 83.6 rods, more or less, located in Township 149 North, Range 98 W Section 14: NW1/4, McKenzie County, North Dakota, David L. Hoffmann; Denae M. Hoffmann; Leonard W. Hoffmann and Margaret A. Hoffmann, Trustees of the Hoffmann Living Trust dated March 8, 2002; Rocky & Jonilla Farms, LLP; Randall D. Stevenson; and all other unknown owners of the above lands, Defendants.

Counsel: **[*1]** For 83.6 rods more or less located in Township 149 North Range 98 W Section 14: NW1/4 McKenzie County North Dakota, An easement and right-of-way across, 242.0 rods more or less located in Township 149 North Range 98 W Section 2: SW1/4SE1/4 Section 11: NE1/4 McKenzie County North Dakota, An easement and right-of-way across, 189.9 rods more or less located in Township 149 North Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4 McKenzie County North Dakota, An easement and right-of-way across, 223.8 rods more or less located in Township 149 North Range 98 W Section 28: S1/2N1/2 McKenzie County North Dakota, An easement and right-of-way across, 227.8 rods more or less located in Township 149 North Range 98 W Section 11: N1/2SW1/4 W1/2SE1/4 McKenzie County North Dakota, An easement and right-of-way across, 335.3 rods more or less located in Township 150 North Range 98 W Section 35: W1/2E1/2 McKenzie County North Dakota, An easement and right-of-way across, Defendants: Derrick L. Braaten, Braaten Law Firm, Bismarck, ND.

For Rocky & Jonilla Farms LLP, Randall D. Stevenson, Leonard W. Hoffmann, Trustee of the Hoffmann Living Trust dated March 8 2002, David L. Hoffmann, Margaret A. Hoffmann, **[*2]** Trustee of the Hoffmann Living Trust dated March 8 2002, Denae M. Hoffmann, Defendants: Derrick L. Braaten, LEAD ATTORNEY, Braaten Law Firm, Bismarck, ND.

And all other unknown owners of the above lands, Defendant, Pro se.

For WBI Energy Transmission Inc., Plaintiff: Paul Jonathan Forster, LEAD ATTORNEY, Casey Ann Furey, Crowley Fleck PLLP (Bismarck), Bismarck, ND.

Judges: Daniel L. Hovland, United States District Judge.

Opinion by: Daniel L. Hovland

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND EXPENSES

Before the Court is the "Defendants' Motion for Attorney's Fees and Expenses" filed on August 12, 2021. See Doc. No. 118. The Plaintiff filed a response to the motion on September 9, 2021. See Doc. No. 120. The Defendants

then filed a reply brief on October 4, 2021. See Doc. No. 127. Subsequently, the Plaintiff filed a sur-reply on October 13, 2021. See Doc. No. 130.

For the reasons set forth below, the motion is granted.

I. BACKGROUND

The Plaintiff, WBI Energy Transmission, Inc. ("WBI Energy"), is a full-service interstate natural gas transmission, gathering, and storage company operating under the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). WBI Energy is also a holder of a **[*3]** certificate of public convenience and necessity authorizing WBI Energy to acquire and operate the interstate pipeline facilities previously owned and operated by Montana-Dakota Utilities, Co. ("MDU"). See Doc. No. 1, ¶ 7. As a holder of a certificate of public convenience and necessity, WBI Energy may acquire the necessary rights-of-way to construct, operate and maintain a pipeline for the transportation of natural gas "by the exercise of the right of eminent domain" when such easement cannot be acquired by contract. *15 U.S.C. § 717f(h)*.

WBI Energy brought a condemnation action pursuant to *Federal Rule of Civil Procedure 71.1* and the Natural Gas Act. See Doc. No. 1, ¶ 2. WBI Energy sought to "condemn permanent easements and temporary rights-of-way including workspace and access roads" across the Defendants' properties in McKenzie County, North Dakota ("Subject Easements"). Id.; see Doc. Nos. 1-2, 1-3, 1-4, 1-5, and 1-6. The purpose of the permanent easement was to construct, operate, and maintain approximately twelve (12) miles of 24-inch diameter pipeline from WBI Energy's existing Spring Creek Meter Station to the existing Cherry Creek Valve Setting. See Doc. No. 1, ¶ 2.

On May 7, 2018, the Court adopted a stipulation jointly filed by parties and ordered **[*4]** that WBI Energy shall have immediate use and possession of the Subject Easements for the purpose of constructing a natural gas pipeline transportation system.[1] See Doc. No. 19, p. 3. Accordingly, the only issue that remained for trial was the amount of compensation owed to the Defendants by WBI Energy for the Subject Easements.

The Court convened a bench trial on April 26, 2021. See Doc. No. 109. During the bench trial, the parties reached a settlement agreement. The Court later entered a condemnation judgment on July 13, 2021. See Doc. No. 115. Nonetheless, the Defendants reserved their right to file a motion to seek the recovery of attorney's fees and expenses, and WBI reserved the right to contest the motion. The parties stipulated that "[d]efendants' right to attorney's fees and expenses, if any, shall be the same as if the parties had proceeded to judgment on the amount of just compensation." See Doc. No. 114, p. 2. In accordance with that stipulation, the Defendants filed the pending motion and seek the "right to recover reasonable attorney's fees and related expenses" related to this case.

II. LEGAL DISCUSSION

Defendants contend they are entitled to an award of attorneys' fees pursuant **[*5]** to North Dakota Century Code § 32-12-32. In opposition, WBI Energy contends that the *Fifth Amendment's* "just compensation" measure controls because federal law supplies the exclusive measure of compensation in Natural Gas Act condemnation proceedings.

It is well-established that the federal government holds the power to exercise eminent domain. See *Kohl v. United States, 91 U.S. 367, 370, 23 L. Ed. 449 (1875)*. The federal government also has the authority to delegate its eminent domain power to private entities. *Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954)*. However, the precise issue before the Court is whether state law or federal law governs the measure of just compensation in condemnation proceedings brought by a *private entity* under the Natural Gas Act. While a handful

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[1] Pursuant to the parties' stipulation, the Court also dismissed WBI Energy's claim to condemn the temporary access road easement crossing the lands of Defendants David L. Hoffmann and Denae M. Hoffmann as depicted in Docket No. 1-3.

of circuits around the country have grappled with this issue, the Eighth Circuit Court of Appeals has not established concrete precedent. A private entity in the role as the condemner opens the Court to an analysis that is distinct, unique, and separate from circumstances in which the United States is filling the role of the condemner.

A. The Natural Gas Act

The Natural Gas Act permits gas companies to acquire private property by eminent domain to construct, maintain, and operate natural gas pipelines. *15 U.S.C. § 717f(h)*. As it relates to choice of law, *Section 717f(h)* reads, "[t]he practice and procedure in any action or proceeding for [condemnation under *§ 717f(h)*] shall **[*6]** conform as nearly as may be with practice and procedure in similar action or proceeding in the courts of the State where the property is situated..." Id. The statute's reference to state "practice and procedure," however, does not mean that it incorporates state law for the substantive determination of compensation. Id. "This language require[s] conformity in procedural matters only." *United States v. 93.970 Acres of Land, 360 U.S. 328, 333 n.7, 79 S. Ct. 1193, 3 L. Ed. 2d 1275 (1959)*. In any event, that language has been superseded by *Rule 71.1*, which establishes its own procedures applicable to condemnation cases in federal court. See *Fed. R. Civ. P. 71.1*, Advisory Committee Notes (1951). However, *Rule 71.1* does not resolve the issue. *Rule 71.1(l)* simply states that the proceedings it governs are not subject to any provisions for costs set forth in Rule 54(d). It does not mean that costs are not recoverable in condemnation actions under the Natural Gas Act. All that can be gathered from *Rule 71.1* is that this Court is not bound by Rule 54(d).

As a result, it is clear *Rule 71.1* and the Natural Gas Act are silent regarding the application of state law in condemnation proceedings under the statute. Further, it makes no mention of remedies available in condemnation proceedings, so the Court is left to determine the applicable law and remedies that accompany it. Suffice it to say the issue of whether **[*7]** compensation for a condemnation action brought pursuant to the Natural Gas Act should follow state law is a matter of first impression in this circuit. The Natural Gas Act is entirely silent as to the application of state law under the statute. The Court would note that the Natural Gas Act is also silent on the remedies available in the condemnation proceedings it allows. The Natural Gas Act does not even expressly require that just compensation be awarded.

WBI Energy contends no gap in the federal statutory scheme exists with respect to litigation expenses and, as such, federal law applies prohibiting an award of attorney's fees.[2] Moreover, it notes the United States Supreme Court has found attorney's fees to be outside the scope of just compensation required by the *Fifth Amendment*.[3] Alternatively, the Defendants argue federal law and rules provide no direction regarding an award of attorney's fees and, accordingly, state law should control compensation and cost awards in Natural Gas Act proceedings brought by private condemners. The Court concludes that a gap in federal statutory scheme certainly exists; therefore, resolution of this issue follows the analysis outlined in *United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979)* and its progeny.

B. Introduction of *Kimbell Foods*

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[2] WBI Energy's contention that *United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943)* controls is misguided. For the very reasons it outlined in its response to the motion, the Court is unwilling to parallel the instant action with it. WBI Energy is unable to provide any binding authority for the proposition that *Miller* applies beyond cases or circumstances where the federal government is the condemner - nothing in *Miller* or its progeny expands its reach to condemnations by private entities. In fact, courts have explicitly recognized this limitation, noting that *Miller* announced the standard for determining "only the amount of compensation due to an owner of land condemned by the United States." *Certain Parcels of Land in Phila., 144 F.2d 626, 629 (3rd Cir. 1944)*.

[3] In *United States v. Bodcaw Co., 440 U.S. 202, 99 S. Ct. 1066, 59 L. Ed. 2d 257 (1979)*, the United States brought a condemnation action to acquire a permanent easement, not a private party.

"When Congress has not spoken 'in **[*8]** an area comprising issues substantially related to an established program of government operation,'" *Kimbell Foods, 440 U.S. 715, 727, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979)* (quoting *United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973)*), the Supreme Court has "direct[ed] federal courts to fill the interstices of federal legislation 'according to their own standards,'" (quoting *Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S. Ct. 573, 87 L. Ed. 838 (1943)*). This type of law that is woven by federal courts is referred to as federal common law. However, in crafting such federal common law, courts need not "inevitably . . . resort to uniform federal rules." *Id. at 727-28* (citations omitted). Instead, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" *Id. at 728* (quoting *United States v. Standard Oil Co., 332 U.S. 301, 310, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947)*).

Kimbell Foods involved the priority of competing private and federal liens, some of which were rooted in federal loan programs, in the absence of a federal statutory law setting priorities. *Id. at 718*. The Supreme Court addressed whether the federal courts should sculpt a uniform federal common-law rule or adopt state law as the federal standard. *Id. at 728*. It held a federally uniform law was unnecessary, and that state law governed the priority **[*9]** of liens in the absence of federal law. *Id. at 740*. The Court enumerated three considerations guiding its analysis: (1) whether the federal program, by its very nature, required uniformity; (2) whether the application of state law would frustrate specific objectives of the federal program; and (3) whether the application of uniform federal law would disrupt existing commercial relationships predicated on state law. *Id. at 728-29*.

Where federal law governs a controversy, but there is no federal rule or decision on a particular matter, a federal court must fill the void through common lawmaking, either by fashioning a uniform, national rule or by incorporating state law as the federal standard. *Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019)*. Determining which course of action to take turns on the application of the *Kimbell Foods* factors outlined above.

C. Guiding Precedent

Before diving into a *Kimbell Foods* analysis, the Court looks to its sister circuits for guidance. *Georgia Power Co. v. 138.30 Acres of Land (Sanders), 617 F.2d 1112 (5th. Cir 1980)*, *Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992)*, and *Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019)* all provide some direction.

In *Georgia Power*, the Fifth Circuit sitting *en banc* addressed whether the issue of compensation in Federal Power Act condemnation cases "should be determined under federal law or under the law of the state where the condemned property is located when a licensee of the Federal Energy **[*10]** Regulation Commission (FERC) exercises the power of eminent domain in federal court..." *Id. at 1113*. The Federal Power Act has substantially similar language to that in the Natural Gas Act and allows private entities to use eminent domain to condemn private property in efforts to develop water ways. *Id. at 1114*. However, like the Natural Gas Act, no rule exists to dictate the appropriate compensation owed to condemnees. *Id. at 1115*. The Fifth Circuit held that "the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee [of the FERC] exercises the power of eminent domain pursuant to . . . the Federal Power Act." *Id. at 1124*. The Court highlighted that the project was undertaken by a private party - not by the federal government. *Id. at 1118*. Therefore, it did not significantly "implicate the interests of the United States..." Id. In addition, since FERC licensees have the choice to proceed in either state or federal court, the court concluded that integrating state law would not further frustrate the important interest in national uniformity. *Id. at 1122*. The Fifth Circuit emphasized "the state's interest in avoiding displacement of its laws in the area of property rights, traditionally an area of local **[*11]** concern." *Id. at 1123*. While the Fifth Circuit acknowledged that applying state law would arguably lead the condemner to pay higher costs to the property owner, that speculative possibility did not "amount[] to the kind of conflict which [would] preclude[] adoption of state law." *Id. at 1121* (citation omitted).

In 1985, the Fifth Circuit Court of Appeals summarily held that the statutory language of the Natural Gas Act at *15 U.S.C. § 717f(h)* required that state law be adopted as the federal rule. *Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662, 665 (5th Cir. 1985)*.

The Sixth Circuit Court of Appeals reached the same conclusion in a related case. In *Columbia Gas*, the Columbia Gas Transmission Corporation filed an eminent domain action under *15 U.S.C. § 717f(h) of the Natural Gas Act* against private landowners condemning an underground storage easement. The district court selected a committee to determine the compensation owed to the landowners. The district court upheld the committee's decision regarding the compensation. However, the Sixth Circuit Court of Appeals reversed. The Sixth Circuit relied on *Georgia Power* to hold that the Natural Gas Act "incorporates the law of the state in which the condemned property is located in determining the amount of compensation due." *Id. at 1199*. That holding was reaffirmed in the circuit. See *Rockies Express Pipeline LLC v. 4.895 Acres of Land, 734 F.3d 424, 429 (6th Cir. 2013)* ("While condemnation under the Natural Gas Act is a federal matter, courts conducting **[*12]** such proceedings must apply 'the law of the state in which the condemned property is located in determining the amount of compensation due.'" (quoting *Columbia Gas, 962 F.3d at 1199*). Given the Natural Gas Act's silence in prescribing the appropriate compensation, the Court turned to the *Kimbell Foods* analysis. In its analysis of the *Kimbell Foods* considerations, the court determined that "(1) it is unnecessary to fashion a nationally uniform rule of compensation for private parties condemning land under the Natural Gas Act, (2) incorporating state law as the federal standard would not frustrate the specific objectives of the Natural Gas Act, and (3) property rights have traditionally been defined by state law." *Id. at 1198-99*. Accordingly, the Sixth Circuit adopted state law as the federal standard to govern compensation determinations under the Natural Gas Act. *Id. at 1199*.

Finally, in 2019, the Third Circuit Court of Appeals decision in *Tennessee Gas* provides the most recent pronouncement on the issue. In *Tennessee Gas*, the Tennessee Gas Pipeline Company commenced a condemnation action under the Natural Gas Act seeking to acquire easements over a 975-acre tract of land on property owned by the appellants. *Tennessee Gas, 931 F.3d at 241*. On interlocutory appeal, a sole legal issue presented was whether state law or federal **[*13]** law governs the substantive determination of just compensation in condemnation actions brought by private entities under the Natural Gas Act.

The Third Circuit Court of Appeals said that the Natural Gas Act is completely silent as to the appropriate compensation owed to condemnees under the statute. As a result, the *Kimbell Foods* framework and analysis is appropriate. The Third Circuit held that Pennsylvania substantive law provided the federal standard for determining just compensation in a condemnation proceeding brought by a natural gas pipeline company acting under the authority of *15 U.S.C. § 717f(h)* because a gap clearly existed in the statutory scheme of the Natural Gas Act. *Id. at 255*. In its decision, the Third Circuit explained that fashioning a national uniform rule is unnecessary, incorporating state law does not frustrate the Natural Gas Act's objectives, and the application of a uniform federal rule would upset commercial relationships founded on state law. *Id. at 251*. In other words, the *Kimbell Foods* factors weigh in favor of incorporating state law as the federal rule in this context. The analysis ultimately led to the decision that state substantive law would control.

In summary, the Third Circuit in *Tennessee Gas* reached the following conclusion:

> In sum, we determine **[*14]** that, at the threshold, federal law is the interpretive basis to determine just compensation in condemnation proceedings arising out of the NGA. But, because neither *Miller* nor any other binding authority provides a federal rule of decision as to what constitutes just compensation precisely where a private entity condemns private property under the statute, we turn to *Kimbell Foods*. That case and its progeny reflect a presumption in favor of state law, one not rebutted here. Even without that presumption, however, the *Kimbell Foods* factors collectively weigh in favor of state law because, for the reasons explained previously, (1) fashioning a nationally uniform rule is unnecessary, (2) incorporating state law does not frustrate the NGA's objectives, and (3) application of a uniform federal rule would upset commercial relationships. In light of this analysis, we decide to incorporate state substantive law as the federal standard of measuring just compensation in condemnation proceedings by private entities acting under the authority of the NGA.

Id. at 255.

D. *Kimbell Foods* Analysis

Given the conclusion that a gap in statutory scheme exists, the Court turns to the factors outlined in *Kimbell* ***[*15]*** *Foods*. An analysis of these factors assists the Court in its determination and decision whether to fashion a uniform common law or incorporate state law as the applicable federal rule. The Court starts with the presumption that state law should be incorporated unless there is an expression of legislative intent to the contrary, or a showing that state law significantly conflicts with the federal interest present. See *Kimbell Foods, 440 U.S. at 739* (citations omitted); *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." (citing, *Kimbell Foods, 440 U.S. at 728-29, 739-40*). Here, there is neither. Accordingly, the Court presumes that state law should be incorporated in this case.

1. There is No Overriding Need for a Nationally Uniform Rule

In this case, fashioning a nationally uniform rule is unnecessary for a plethora of reasons, but most important is: (1) the case involves two private parties, not the United States government, and (2) property rights are an area of state concern, especially in North Dakota. Although federal rules have been applied **[*16]** to the determination of just compensation in federal condemnation cases where the United States is the party condemning and paying for the land, those decisions do not control because this case arises in the context of a proceeding by a licensee where the nature of the federal interests involved differs markedly from the nature of the federal interests involved where the United States is the condemner. *Georgia Power, 617 F.2d at 1119-20*. (citation omitted). When the condemner is no longer the United States, it does not significantly implicate the interests of the United States. As reasoned in *Kimbell Foods*, when the government is involved, it "generate[s] immediate interests" and therefore warrant[s] federal law and, on the other hand, cases "purely between private parties" that "do not touch the rights and duties of the United States" and are thus "far too speculative, far too remote . . . to justify the application of federal law to transactions essentially of local concern." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34, 77 S. Ct. 119, 1 L. Ed. 2d 93, (1956)*. WBI is in the role of the condemner and does not "generate the same immediate interests" as the government would in its exact same shoes.

Second, property rights are traditionally an area of state concern, especially in North Dakota. See 36 C.J.S. Federal Courts § 189(5) (1960) **[*17]** ("As a general rule, legal interests and rights in property are created and determined by state law. . . . [Thus,] the courts of the United States have applied state law in cases involving . . . the power of eminent domain and its exercise . . . ."), See also *Nat'l R. Passenger Corp. v. Two Parcels of Land, 822 F.2d 1261 (2d Cir. 1987)* (a state generally has an interest in avoiding displacement of its laws in the area of property rights; and that since state law usually governs the question of what constitutes property, the value of property rights is ordinarily best determined according to state law.) The federal interest in a nationally uniform rule is especially weak because of the strong correlation between the state and property rights. From farming to original homesteads, it is in the blood of North Dakota landowners to be protective of their real estate. From family ties to the need for farmers to grow crops, property ownership is near and dear to those who maintain it. Ultimately, creating a nationally uniform rule for compensation risks "muddying elaborate state property rules" and interests therein. In addition, the Natural Gas Act contemplates state participation in numerous ways which undermines the argument for a national, uniform rule of compensation. Notably, **[*18]** the statute allows licensees to bring condemnation actions under the Act in state court. See *15 U.S.C. § 717f(h)*. Accordingly, a uniform nation rule is inappropriate in this case.

2. Application of the North Dakota Century Code Does Not Frustrate the Objectives of the Natural Gas Act

The second factor under *Kimbell Foods* requires a probe into the objectives of the Natural Gas Act and an evaluation of the potential interests that would be frustrated by the injection of state law found within the North

Dakota Century Code. The Court believes incorporating North Dakota law as the federal standard will not frustrate the objectives of the Natural Gas Act. The Act declares its purpose as furthering the public interest "in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce." *15 U.S.C. § 717(a)*. The only imaginable result that adopting state law as the measure of just compensation might have on this purpose would be that condemners proceeding under the Act may be required to pay more or less than under an alternative federal common-law rule. *Georgia Power, 617 F.2d at 1121*. To the degree that compensation under state law may deviate from that under a federal rule, the Court holds this variance is entirely too speculative to warrant **[*19]** displacing state law.

3. Application of a Uniform Federal Rule Would Upset Commercial Relationships

The final prong to be evaluated under the *Kimbell Foods* analysis requires the Court to consider whether application of a uniform federal rule would upset commercial expectations found in state law. On the one hand, because there already exists "an established body of federal law on the issue of just compensation" in general, parties that conduct business in this industry are already on notice of the potential application of federal law. *Georgia Power, 617 F.2d at 1123 n.17* (citation omitted). On the other hand, "property rights have traditionally been, and to a large degree are still, defined in substantial part by state law." *Columbia Gas, 962 F.2d at 1198* (citation omitted). If a nationally uniform rule was indeed formed, the rule would "merely superimpose a layer of property right allocation onto the already well-developed state property regime." Id. Indeed, "when dealing with those powers left to the states, the courts should tread gingerly" in attempting to create a uniform common law. *Georgia Power, 617 F.2d at 1125* (Fay, J., concurring). The commercial relationships that have been established are long-standing and have been cemented into North Dakota's foundational practices **[*20]** and procedures in the area of property rights. The Court finds this factor weighs in favor of adopting state law due to the "risk of upsetting parties' commercial expectations" based upon 'the already well-developed state property regime. *Columbia Gas, 962 F.2d at 1198*.

E. North Dakota Substantive Law Permits an Award of Attorney's Fees

Based on this Court's finding that a gap in the federal statutory scheme exists, the Natural Gas Act does not answer the question at issue, and common-law has yet to be created in this domain. The Court was tasked with applying the *Kimbell Foods* factors to the present facts. An analysis of each *Kimbell Foods* factor reveals that adopting state substantive law as the federal standard of just compensation is warranted. As such, the Court "incorporates the law of the state in which the condemned property is located [to] determine[e] the amount of compensation due." *Columbia Gas, 962 F.3d at 1199*. All the condemned property is located in McKenzie County, North Dakota. The controlling, relevant law is *North Dakota Century Code Section 32-15-32*, which reads as follows:

> The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available **[*21]** for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings.

The Court concludes that, although condemnation under the Natural Gas Act is a matter of federal law, incorporating state substantive law as the federal standard of measuring just compensation proceedings by private entities is the appropriate standard for the reasons set forth in the *Kimbell Foods* analysis. Further, considerations of the historic underpinnings and ties to North Dakota property strengthens the reasoning of this Court and supports a finding that North Dakota law supplants the federal standard.

III. CONCLUSION

For the reasons set forth above, the "Defendants' Motion for Attorney's Fees and Expenses" (Doc. No. 118) is **GRANTED**. In accordance with the stipulation for a schedule on the motion for attorney's fees, phase two of briefing

may now commence to aid the Court in determining the reasonable amount of attorney's fees and related expenses to be awarded.

IT IS SO ORDERED.

Dated this 1st day of November, 2022.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge

United States District Court

End of Document

NORTH DAKOTA LEAGUE OF CITIES

February 12, 2025
Senate Judiciary Committee
SB 2321
Senator Diane Larson, Chair

For the record, I am Stephanie Dassinger Engebretson, appearing on behalf of the North Dakota League of Cities (NDLC). I am the deputy director and attorney for the NDLC. The NDLC appears in opposition to SB 2321.

Cities do not use eminent domain proceedings often and strive to work with landowners to find solutions that work for everyone. However, most recently, a few cities have needed to use eminent domain to acquire property for flood protection projects. HB 2321 would make those projects more expensive and less likely for cities and landowners to work out an agreement without litigation.

In Section 2 of the bill, on page 1, line 18, the language “in its discretion” is struck. This language provides the court with discretion for awarding costs and attorney fees when an eminent domain case is litigated. It is the NDLC’s understanding that in most cases, the court awards the defendant his or her attorney fees and costs. However, in some cases, if a defendant ends up receiving less than or equal to the amount offered in settlement negotiations, the court could decide not to award attorney fees and costs. Removing this language from the code removes any incentive a defendant has to work with a city to settle a case without a trial. The NDLC believes striking this language would significantly increase the number of eminent domain cases that go to trial, even when just and fair compensation has been offered.

In sections 1, 2, and 3 of the bill language stating, “the costs incurred for retaining an expert witness for use during the condemnation proceeding” is added to the costs that must be awarded in an eminent domain proceeding. This language does not allow for any judicial discretion related to reasonableness of those costs and would be an unregulated cost added to these proceedings. Additionally, expert witness fees are usually handled in any settlement agreements that are negotiated between the parties. As such, adding expert witness fees to the language in the code would just increase the cost of eminent domain proceedings.

The NDLC respectfully requests a Do Not Pass recommendation on SB 2321.

Committee Members,
I am here to testify in support of SB2321!!! If the state is going to allow theft of property by a non-common carrier status, or at least there is no reason that they have a common carrier status, then the least they can do is to pay for Lawyer Expenses, and just compensation for the land should be value of the land multiply it by $1000.00!!! These foreign countries that are in charge of this pipeline have Trillions of Dollars, and we the people are supposed to take pennies for our land?? This is insane we have to even have this conversation about a foreign adversary who has more rights than our Born And Raised Americans!! It is absurd that we are at this stage of the game to talk about suing landowners because they won't give up their land to a Foreign Adversary. Where did the conversation about why the pipeline is needed, because last I heard it was for Oil Recovery in the Bakken & this will never be part of Oil Recovery!!!! I urge a Do pass on SB2321!!

Respectfully yours,

Jerol Gohrick
District 2
Chairman

CHAPTER 28-26
COSTS AND DISBURSEMENTS

28-26-01. Attorney's fees by agreement - Exceptions - Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.
2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.

28-26-02. Amount of costs in specific cases.

Costs in the district courts and in the supreme court must be as follows:

1. To the plaintiff for all proceedings before trial, ten dollars, and for each additional defendant served with process not exceeding ten, one dollar.
2. To the defendant, for all proceedings before trial, five dollars.
3. For every trial of an issue of fact, five dollars.
4. Superseded by N.D.R.App.P., Rule 38.
5. To either party for every term not exceeding five, at which the cause is necessarily on the calendar of the district court and is not tried or is postponed by order of the court, three dollars, and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars. Term fees are not taxable as costs when a cause, properly on the calendar, is not reached for trial during the term, nor in case a continuance is had upon the application of, or stipulation with, the party in whose favor costs are to be taxed.

28-26-03. Costs on appeal from county justice.

Repealed by S.L. 1981, ch. 320, § 111.

28-26-04. Attorney's fee in instrument void.

Any provision contained in any note, bond, mortgage, security agreement, or other evidence of debt for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security agreement, is against public policy and void.

28-26-05. Costs on foreclosure of liens.

Repealed by S.L. 1975, ch. 106, § 673.

28-26-06. Disbursements taxed in judgment.

In all actions and special proceedings, the clerk of district court shall tax as a part of the judgment in favor of the prevailing party the following necessary disbursements:

1. The legal fees of witnesses; sheriffs; clerks of district court; the clerk of the supreme court, if ordered by the supreme court; process servers; and of referees and other officers;
2. The necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial;
3. The legal fees for publication, when publication is made pursuant to law;

4. The legal fees of the court reporter for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case; and
5. The fees of expert witnesses. The fees must be reasonable fees as determined by the court, plus actual expenses. The following are nevertheless in the sole discretion of the trial court:
   a. The number of expert witnesses who are allowed fees or expenses;
   b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and
   c. The amount of costs for actual expenses to be paid the allowed expert witnesses.

28-26-07. When costs allowed to plaintiff.

Costs must be allowed of course to the plaintiff upon a recovery in the following cases:

1. In an action for the recovery of real property or when a claim of title to real property arises on the pleadings or is certified by the court to have come in question at the trial.
2. In an action to recover the possession of personal property.

28-26-07.1. Notice of no personal claim.

In the case of a defendant in a civil action in a district court against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons a notice subscribed by the plaintiff or the plaintiff's attorney, setting forth the general object of the action and a brief description of the property affected by it, if it affects specific real or personal property, and stating that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, the defendant shall pay costs to the plaintiff.

28-26-08. Costs specially limited.

In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recovers less than fifty dollars damages, the plaintiff may recover no more costs and disbursements than damages. In an action to recover the possession of personal property, if the plaintiff recovers less than fifty dollars damages, the plaintiff may recover no more costs and disbursements than damages, unless the plaintiff recovers property also, the value of which with the damages amounts to fifty dollars, or the possession of property is adjudged to the plaintiff, the value of which with the damages amounts to fifty dollars. Such value must be determined by the jury, court, or referee by whom the action is tried. When several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same claim for relief against several parties who might have been joined as defendants in the same action, no costs other than disbursements may be allowed to the plaintiff in more than one of such actions, which must be at the plaintiff's election, if the party or parties proceeded against in such action or actions, at the time of the commencement of the previous action or actions, has been openly within this state and not secreted.

28-26-09. When costs allowed to defendant.

Costs must be allowed of course to the defendant in the actions mentioned in sections 28-26-07 and 28-26-08 unless the plaintiff is entitled to costs therein.

28-26-10. Costs in discretion of court.

In actions other than those specified in sections 28-26-07, 28-26-08, and 28-26-09, costs may be allowed for or against either party in the discretion of the court. In all actions, when there are several defendants not united in interest and making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor.

28-26-11. Costs of appeal - When discretionary.

In the following cases, the costs of an appeal are in the discretion of the court:

1. When a new trial is ordered; or

2. When a judgment is affirmed in part and reversed in part.

28-26-12. Costs on dismissal of action.

When an action is dismissed from any court for want of jurisdiction or because it has not been transferred regularly from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action.

28-26-13. Interest on verdict.

When the judgment is for the recovery of money, interest, from the time of the verdict or report of a referee until judgment finally is entered, must be computed by the clerk and added to the costs of the party entitled thereto.

28-26-14. Notice of taxing costs - Verification - Items.

Superseded by N.D.R.Civ.P., Rule 54.

28-26-15. Notice of retaxation - Procedure.

Superseded by N.D.R.Civ.P., Rule 54.

28-26-16. Taxation reviewed on motion.

A taxation or a retaxation of costs may be reviewed by the court upon motion. The order made upon such motion may allow or disallow any item objected to before the taxing officer, in which case it has the effect of a new taxation.

28-26-17. Costs of postponement.

When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed in the discretion of the court or referee as a condition of granting the same.

28-26-18. Costs on motion.

Upon a motion in an action or proceeding, costs may be awarded, not to exceed twenty-five dollars, either absolutely or to abide the event of the action, to any party, in the discretion of the court.

28-26-19. Taxing costs.

In all actions, motions, and proceedings in the supreme and district courts, the costs of the parties must be taxed and entered on record separately.

28-26-20. Payment of costs against infant plaintiff.

When costs are adjudged against a plaintiff who is an infant or a person of unsound mind, the guardian by whom the plaintiff appeared in the action must be responsible therefor and payment thereof may be enforced in the manner provided in section 28-26-30.

28-26-21. Payment of costs from trust funds.

In an action prosecuted or defended by a personal representative, trustee of an express trust, or a person expressly authorized by statute, costs must be recovered as in an action by and against a person prosecuting or defending in the person's own right, but such costs, by the judgment, must be chargeable only upon or collected of the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense.

28-26-22. Payment of costs against state - Exception.

In a civil action prosecuted in the name of the state by an officer duly authorized for that purpose, the state is liable for the costs in the same cases and to the same extent as a private party. If a private person is joined with the state as plaintiff, that person is liable in the first

instance for the defendant's costs, which may not be recovered of the state until after execution is issued therefor against such private party and returned unsatisfied.

28-26-23. Action in name of state - Costs charged against party in interest.

In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any corporation, limited liability company, or person, costs awarded against the party plaintiff must be charged against the party for whose benefit the action was prosecuted and not against the state.

28-26-24. Liability for costs on judgment against assignee.

In an action in which the claim for relief, by assignment after the commencement of the action or in any other manner, becomes the property of a person not a party to the action, such person is liable for the costs in the same manner as if the person were a party.

28-26-25. Nonresident must furnish surety.

Repealed by S.L. 1983, ch. 364, § 1.

28-26-26. Responsibility of surety.

The surety for costs is bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtains judgment or not.

28-26-27. Dismissal when surety not given.

An action in which surety for costs is required and has not been given must be dismissed on motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court such surety for costs is given.

28-26-28. Surety on becoming nonresident.

If the plaintiff in an action after its commencement becomes a nonresident of the state, the plaintiff shall give surety for costs in the same manner as is required of a nonresident in commencing an action.

28-26-29. When additional surety demanded.

In an action in which surety for costs has been given, the defendant at any time before judgment, after reasonable notice to the plaintiff, may move the court for additional surety on the part of the plaintiff, and if on such motion the court is satisfied that the surety has removed from this state or is not sufficient, the action may be dismissed, unless in a reasonable time to be fixed by the court sufficient surety is given by the plaintiff.

28-26-30. Judgment against surety.

After final judgment has been rendered in an action in which surety for costs has been given as required by this chapter, the court, on motion of the defendant, or any other person having a right to such costs or any part thereof, after ten days' notice of such motion, may enter judgment in the name of the defendant or the defendant's legal representatives against the surety for costs, or against the defendant's executors or administrators, for the amount of the costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases for the use and benefit of the person entitled to such costs.

28-26-31. Pleadings not made in good faith.

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

SENATE BILL 2321
Testimony of Todd D. Kranda
Senate Judiciary Committee

- February 12, 2025 -

Madam Chair Larson and members of the Senate Judiciary Committee, for the record, my name is Todd D. Kranda, I am an attorney with the law firm of Kelsch Ruff Kranda Nagle & Ludwig law firm in Mandan, ND. I am appearing before you as a lobbyist on behalf of the North Dakota Petroleum Council.

The North Dakota Petroleum Council represents more than 550 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline development, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, South Dakota, and the Rocky Mountain region.

The North Dakota Petroleum Council is opposed to SB 2321 which deals with an award of costs and fees, specifically expert witness fees which are incurred during a condemnation proceeding under Chapter 35-15 NDCC.

North Dakota already has existing laws that adequately address the award of costs, disbursements, and reasonable expert witness fees in litigation matters. North Dakota's existing statutes in Chapter 28-26 NDCC, Costs and Disbursements, already provides the opportunity for the award of the exact type of costs and disbursements, namely reasonable expert witness fees plus actual costs, and other expenses and fees, for all civil cases, including these types of situations involving a condemnation proceeding. The changes proposed in SB 2321 are unnecessary and could actually create uncertainty and legal confusion since North Dakota courts are already applying and awarding such costs and disbursements together with reasonable expert witness fees and expenses.

The North Dakota Petroleum Council opposes the passage of SB 2321 and urges this committee to give SB 2321 a **Do Not Pass Recommendation**. Thank you for the opportunity to provide this information. I would be happy to try to answer any questions.

GREATER NORTH DAKOTA CHAMBER
SB 2321
Senate Judiciary Committee
Chair Diane Larson
February 9, 2025

Mr. Chairman and members of the Committee, my name is Andrea Pfennig, and I am the Vice President of Government Affairs for the Greater North Dakota Chamber. GNDC is North Dakota's largest statewide business advocacy organization, with membership represented by small and large businesses, local chambers, and trade and industry associations across the state. We stand in **opposition** of Senate Bill 2321.

Our members support a business-friendly regulatory environment that is consistent, efficient, cost-effective and promotes investment in infrastructure.

While private negotiations with landowners are the preferred method for acquiring necessary easements or property rights for public projects, we recognize that mechanisms such as amalgamation and eminent domain, when used appropriately, are essential to ensure the continued development of North Dakota's infrastructure and economy.

By allowing the court to award expert witness costs in condemnation proceedings, regardless of the outcome, we risk increased costs that will ultimately be paid for by the public.

We believe the existing framework for eminent domain is already balanced, providing protections for landowners while allowing for necessary development. The proposed changes could disrupt that balance by shifting too much risk and cost onto the public entities responsible for providing essential infrastructure, services, and utilities. These changes could ultimately harm the very individuals and communities the bill intends to protect by reducing the ability to undertake critical development projects in a timely and cost-effective manner.

Smart approaches to infrastructure are vital to ensure that North Dakota has the infrastructure necessary to support and grow a thriving economy. We urge you to oppose SB 2321.

701.222.0929 ndchamber@ndchamber.com ndchamber.com PO Box 2639 • Bismarck, ND 58502

Lignite Energy Council
LEADING THROUGH ADVOCACY AND INNOVATION

February 12, 2025

Chairwoman Larson and members of the Senate Judiciary Committee,

Thank you for the opportunity to testify in opposition to Senate Bill 2321 on behalf of the Lignite Energy Council. Our organization represents North Dakota's lignite industry, which plays a crucial role in providing affordable and reliable energy. While we support fair and just eminent domain proceedings, SB 2321 introduces unnecessary financial burdens that will increase costs for utilities, infrastructure developers and North Dakota consumers.

By expanding the requirement for public entities and organizations with eminent domain authority to cover litigation costs, including attorney's fees and expert witness expenses, this bill will drive up expenses for critical infrastructure projects and discourage much-needed investment in energy development. These added costs will inevitably be passed down to consumers, leading to higher electricity rates and increased financial strain on ratepayers.

Furthermore, the bill undermines the balance in current eminent domain laws, which already ensure landowners are treated fairly while allowing projects in the public interest to proceed. By expanding the scope of financial liabilities for utilities and project developers, this bill increases the risk of litigation, delays essential projects and creates uncertainty in an industry that relies on long-term stability to make investment decisions.

For these reasons, the Lignite Energy Council urges the committee to oppose SB 2321 with a "Do Not Pass" recommendation.

Thank you for your consideration,

Jonathan Fortner
VP of Government Relations
Lignite Energy Council

1016 E. Owens Ave. | PO Box 2277 | Bismarck, ND 58502
701.258.7117 www.lignite.com LEC@lignite.com

Lanny Kenner
District 7

Chairman Larson and committee members.
I am urgently requesting a DO PASS on SB 2321.

Life liberty, and the pursuit of happiness." This essential equality means that

.

SB 2321 needs to be passed to help landowners when an injustice such as eminent domain that is used for private/ foreign companies are being forced upon them!

When a landowner or group of landowners have to bring in expert witnesses to testify against this Injustice it should NOT be at the expense of the landowner! The party forcing the landowner to hire such a person should be the one paying for such a person.

In the case of the world's largest proposed CO2 pipeline coming right around the city of Bismarck and many other populated areas we need to bring in expert witnesses. Expert witnesses are hired to let the public know about the very real dangers of this pipeline being built by a company who has never built a pipeline before.

If the North Dakota industrial Commission would have given $300,000 to educate the public on not just the pros but the cons of this CO2 pipeline the landowners wouldn't have to hire expert witnesses

I feel bad when I see how one-sided our North Dakota state government has become!

They need to start caring more about the rights of the citizens than the rights of a company partially owned by China!
Money seems to have replaced any common Sense these people used to have.

It's a sad thing when we have to look for common sense out of state like in South Dakota where the supreme Court decided CO2 pipelines are not a common carrier creating a precedent in the courts. Thank God for the people of SD!

I could say much more but just want to say please pass Senate bill 2321. Thank you!

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2321
2/17/2025

Relating to awarding costs and fees in eminent domain proceedings.

10:19 a.m. Chair Larson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Banking industry input
- SB 2383
- SB 2364

10:20 a.m. Committee discussion on upcoming schedule.

10:23 a.m. Chair Larson decided to wait before hearing Senator Cory's proposed amendments for Senate Bill 2383.

10:23 a.m. Senate Bill 2364 waiting on amendment from the banking industry.

10:23 a.m. Senator Paulson planned to speak with bill sponsor for Senate Bill 2321 to make adjustments.

10:25 a.m. Chair Larson closed the hearing.

Kendra McCann, Committee Clerk

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2321
2/18/2025

Relating to awarding costs and fees in eminent domain proceedings.

9:25 a.m. Chair Larson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Expert witness fees
- Negotiation parameters

9:28 a.m. Stephanie Engebretson, Deputy Director and Attorney of NDLC, testified as neutral and answered committee questions.

9:30 a.m. Chair Larson led committee in discussion on upcoming schedule.

9:31 a.m. Chair Larson closed the hearing.

Kendra McCann, Committee Clerk

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2321
2/18/2025

Relating to awarding costs and fees in eminent domain proceedings.

3:36 p.m. Chair Larson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Expert witness fees
- Reasonable reimbursements

3:36 Senator Paulson updated the committee on proposed amendment and submitted testimony #38011.

3:44 p.m. Chair Larson adjourned the meeting.

Kendra McCann, Committee Clerk

25.0662.01000

NDLC Proposed Amendment

Sixty-ninth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2321

Introduced by

Senators Magrum, Luick, Paulson

A BILL for an Act to amend and reenact sections 32-15-28, 32-15-32, and 32-15-35 of the North Dakota Century Code, relating to awarding costs and fees in eminent domain proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-28 of the North Dakota Century Code is amended and reenacted as follows:

32-15-28. Public corporation bound by judgment.

~~In the event that any~~If a property is being acquired by ~~any~~a public corporation through condemnation proceedings, ~~such~~the public corporation ~~shall be~~is bound by the judgment rendered ~~therein~~in the condemnation proceedings and within six months after the entry of ~~such a~~ judgment shall pay ~~into~~the court the full amount of the judgment on account of damages. If the public corporation ~~shall dismiss~~dismisses the action ~~prior to~~before the entry of judgment, without agreement of the defendant ~~thereon~~, the court shall award ~~to~~ the defendant reasonable actual or statutory costs and disbursements, as defined in chapter 28-26, or both, which ~~shall include~~includes reasonable attorney's fees ~~and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~.

SECTION 2. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

1. The court may in its discretion award to the defendant reasonable actual or statutory Costs and disbursements, as defined in chapter 28-26, or both, which ~~may include~~includes interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, ~~the costs incurred for retaining an expert witness for use during the condemnation proceeding,~~ and reasonable attorney's fees for all judicial proceedings.

2. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. ~~In all cases when~~If a new trial ~~has been~~is granted upon the application of the defendant and the defendant ~~has failed upon such trial~~fails to obtain greater compensation than was allowed ~~the defendant upon~~at the first trial, the costs of ~~such~~the new trial ~~shall~~must be taxed against the defendant.

SECTION 3. AMENDMENT. Section 32-15-35 of the North Dakota Century Code is amended and reenacted as follows:

32-15-35. Eminent domain proceedings - Costs of defendant to be paid ~~when~~if proceedings withdrawn or dismissed by party bringing the proceedings.

~~Whenever~~If the state ~~acting by and through its officers, departments, or agencies, or any municipality~~ or political subdivision of this state acting by and through its officers, departments, or agencies, ~~or~~ any public utility, ~~corporation, limited liability company, association,~~ or other ~~entity which has been granted~~organization with the power of eminent domain ~~by the state, shall commence~~commences eminent domain proceedings against any land within ~~this~~the state and ~~thereafter~~subsequently withdraws or ~~has such~~the proceedings are dismissed without agreement of the defendant, the ~~state, municipality, political subdivision, public utility, corporation, limited liability company, association, or entity~~party commencing ~~such eminent domain~~the proceedings ~~shall be~~is liable ~~for and pay to~~to pay the owner of ~~such~~the land all court costs and disbursements, as defined in chapter 28-26, expenses, and fees, including reasonable attorney's fees~~, and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~ as ~~shall be~~ determined by the court in which the proceedings were filed.

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2321
2/19/2025

Relating to awarding costs and fees in eminent domain proceedings.

10:50 a.m. Chair Larson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Committee action

10:51 a.m. Senator Paulson moved a Do Pass.

10:51 a.m. Senator Myrdal seconded the motion.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Ryan Braunberger	Y
Senator Jose L. Casteneda	Y
Senator Claire Cory	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion Passed 7-0-0.

10:53 a.m. Senator Cory will carry the bill.

10:53 a.m. Chair Larson closed the hearing.

Kendra McCann, Committee Clerk

REPORT OF STANDING COMMITTEE
SB 2321 (25.0662.01000)

Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT OR EXCUSED AND NOT VOTING). SB 2321 was placed on the Eleventh order on the calendar. This bill does not affect workforce development.

2025 HOUSE ENERGY AND NATURAL RESOURCES

SB 2321

2025 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2321
3/13/2025

Relating to awarding costs and fees in eminent domain proceedings.

3:48 p.m. Chairman Porter called the meeting to order.

Members Present: Chairman Porter, Vice Chairman Anderson, Vice Chair Novak, Representatives: Dockter, Hagert, Headland, Heinert, Johnson, Marschall, Olson, M. Ruby, Conmy, Foss

Discussion Topics:

- Condemnation proceeding court process
- Defendant's costs for expert witness fees
- ND electrical service

3:51 p.m. Troy Coons, Chairman of the Northwest Landowners Association, testified in favor and submitted testimony. #41375

3:54 p.m. Derrick Braaten, Owner, Braaten Law, testified in favor.

3:59 p.m. Ladd Erickson, McLean County States Attorney, testified in favor.

4:04 p.m. Senator David Hogue, testified in favor.

4:08 p.m. Lanny Kenner, ND Resident, testified in favor and submitted testimony. #41213

4:10 p.m. Rachel Gross, ND Farm Bureau, testified in favor.

4:12 p.m. Stephanie Engebretson, Deputy Director, ND League of Cities, NDLC, testified in opposition and submitted testimony. #41344

4:15 p.m. Dennis Pathroff, Lobbyist for Power Companies of ND, testified in opposition and submitted testimony. #41071

4:17 p.m. Andrea Pfennig, Vice President of Government Affairs for the Greater ND Chamber, testified in opposition and submitted testimony. #41154

Additional written testimony:

Sandra Rupp, ND Resident, submitted testimony in favor #40128

Steve Rupp, ND Resident, submitted testimony in favor #40514

Susan Long, ND Resident, submitted testimony in favor #40707

Josey Milbradt, ND Resident, submitted testimony in favor #41107

Gordon Greenstein, ND Resident, submitted testimony in favor #41158

Lucas Wald, ND Resident, submitted testimony in favor #41186

Jill Wald, ND Resident, submitted testimony in favor #41187

Debra Wald, ND Resident, submitted testimony in favor# 41207

Kurt Swenson, ND Resident, submitted testimony in favor #41295

Sabrina Hildenbrand, ND Resident, submitted testimony in favor #41321

Jonathan Fortner, VP of Government Relations for Lignite Energy Council, submitted testimony in opposition #41237

4:19 p.m. Chairman Porter closed the hearing.

Saydee Wahl for Leah Kuball, Committee Clerk

Dear Energy & Natural Resources Committee

Please pass SB2321.

This bill helps landowners recover fees, when it's necessary to bring in expert witness(s), during the eminent domain process.

More and more we see the push and threat of either Eminent Domain or Condemnation. In so many ways this is such an abuse to our "North Dakota Land Owners." Why should owners have the burden of added costs when trying to voice their concerns on the environmental impact or safety concerns when it comes to the land they manage?

Therefore, I urge a DO PASS recommendation on SB2321

Respectfully,

Sandra J Rupp
District 28
Edgeley, ND

SUPPORT SB2321

Thank you Chairwoman Larson and other members of the Senate Judiciary committee for taking my testimony on Senate Bill 2321. I am writing in favor of this bill. It speaks to securing the rights of the individual in their struggle against larger entities that are bringing Eminent Domain proceedings against them. At the end of the day, it at least reimburses them for the expenses of expert witlessness, and appraisals, and other associated expenses. Approval of this bill would at least make them whole by not costing them these expenses to defend themselves and their position in these matters.

Thank you for your consideration
Steve Rupp
District 28

Chair and Members of the Committee,

As a North Dakota landowner, I am writing in support of SB 2321, which strengthens protections for property owners in eminent domain proceedings by ensuring fair compensation for legal and expert costs when our land is subject to condemnation. SB 2321 is a meaningful step toward protecting ND citizens from unjust takings.

Property owners should not bear the financial burden of defending our rights when a government entity or private party seeks to take our land. SB 2321 rightly ensures that if a condemnation case is dismissed, withdrawn, or if the property owner prevails, they are entitled to reasonable attorney's fees, court expenses, etc. These are essential safeguards that promote fairness and discourage the misuse of eminent domain authority.

Eminent domain is a powerful tool, and its use should be accompanied by the highest standards of responsibility and respect for our private property rights.

Please protect landowner's rights. I urge a "Do Pass" recommendation on SB 2321.

I appreciate your time and consideration.

Susan R. Long

Berlin ND

Power Companies OF NORTH DAKOTA

Chairman Porter and members of the House Energy and Natural Resources Committee,

The Power Companies of North Dakota ("PCND") urges a "Do Not Pass" recommendation on SB 2321.

PCND is a coalition of the state's leading shareholder-owned gas and electric utilities. Our members include MDU Resources Group, Xcel Energy, Otter Tail Power Company, and ALLETE. Together, PCND members serve over 427,000 North Dakota customers, employ over 1,200 North Dakotans, and manage significant power generation and transmission infrastructure across our state.

Senate Bill 2321 proposes amendments to sections of the North Dakota Century Code concerning eminent domain proceedings. Specifically, section 1 of SB 2321 adds defendant's costs for expert witness fees to the already substantial costs required to be borne by the condemning entity when proceedings are dismissed or withdrawn. While the bill aims to protect landowners, it imposes financial burdens on utility companies, which must ultimately be recovered from electric consumers in rates.

Section 2 of SB 2321 adds defendant's costs for expert witness fees to the list of costs for which a court may authorize recovery from the condemning entity. Again, these are costs that would ultimately be borne by electric consumers in rates.

Eminent domain is a necessary tool to ensure reliable and affordable electric service, particularly in the development of transmission infrastructure. The added costs mandated by SB 2321 could increase project expenses, delay infrastructure investments, and result in higher costs for North Dakota electric consumers.

Accordingly, PCND urges a "Do Not Pass" recommendation on SB 2321.

Thank you, Chairman Porter and committee members.

Chairman Porter and Members of the House Energy and Natural Resources Committee

I am writing to express my strong support for SB 2321. This bill addresses a critical aspect of eminent domain proceedings by ensuring that property owners are fairly compensated for the costs and expenses incurred when their property is subject to condemnation. The proposed amendments provide a clear and equitable framework for awarding costs and fees, which is essential for protecting the rights of property owners and promoting fairness in the legal process.

I urge a DO PASS from the committee to help protect the rights of property owners in eminent domain proceedings.

Thank you for your consideration.

Respectfully,

Josey Milbradt

GREATER NORTH DAKOTA CHAMBER
SB 2321
House Energy & Natural Resources Committee
Chair Todd Porter
March 13, 2025

Mr. Chairman and members of the Committee, my name is Andrea Pfennig, and I am the Vice President of Government Affairs for the Greater North Dakota Chamber. GNDC is North Dakota's largest statewide business advocacy organization, with membership represented by small and large businesses, local chambers, and trade and industry associations across the state. We stand in **opposition** of Senate Bill 2321.

Our members support a business-friendly regulatory environment that is consistent, efficient, cost-effective and promotes investment in infrastructure.

While private negotiations with landowners are the preferred method for acquiring necessary easements or property rights for public projects, we recognize that mechanisms such as amalgamation and eminent domain, when used appropriately, are essential to ensure the continued development of North Dakota's infrastructure and economy.

By allowing the court to award expert witness costs in condemnation proceedings, regardless of the outcome, we risk increased costs that will ultimately be paid for by the public.

We believe the existing framework for eminent domain is already balanced, providing protections for landowners while allowing for necessary development. The proposed changes could disrupt that balance by shifting too much risk and cost onto the public entities responsible for providing essential infrastructure, services, and utilities. These changes could result in a reduced ability to undertake critical development projects in a timely and cost-effective manner.

Smart approaches to infrastructure are vital to ensure that North Dakota has the infrastructure necessary to support and grow a thriving economy. We urge you to oppose SB 2321.

701.222.0929 ndchamber@ndchamber.com ndchamber.com PO Box 2639 • Bismarck, ND 58502

SB 2321

House Energy and Natural Resources

Chairman Porter and Committee Members

I strongly urge a Do Pass on SB 2321 because this bill allows property owners to be reimbursed for reasonable attorney's fees and expert witness costs if a public entity (such as a state agency, municipality, or public utility) withdraws or dismisses condemnation proceedings without the defendant's agreement. The bill also provides that courts may award costs, including interest and attorney's fees, to defendants in condemnation cases.

Thank You, Gordon Greenstein

US Navy (Veteran)

US Army-NDNG (Retired)

Chairman and Members of the Committee,

As a North Dakota landowner, I am writing in support of SB 2321. This bill will protect property owners by ensuring fair compensation for legal costs incurred when defending against unjust takeovers through condemnation and eminent domain.

We should not be forced into financial hardship for defending our rights against private corporations or entities trying to use eminent domain or condemnation. Private corporations and entities should not be able to misuse these last-resort tools without accountability.

Respectfully,

Lucas Wald
Edgeley, ND
District 28

Chairman and members of the committee,

I am writing to express my support for Senate Bill 2321. This bill would ensure that landowners would be fairly compensated for the expenses incurred while trying to protect their land that is subject to condemnation.

I appreciate your time and consideration.

Respectfully,

Jill Wald
Edgeley, ND
District 28

Chairman and Committee Members,

I am writing to express my strong support for Senate Bill 2379. This bill is essential in protecting the rights of property owners by ensuring that no one can enter private land without the landowner's consent or a court order.

Property rights are fundamental, and landowners should have the legal assurance that their land cannot be accessed without proper authorization. SB 2379 reinforces this principle and provides necessary protections against unauthorized entry.

Respectfully,
Debra Wald
Edgeley ND
District 28

Lanny Kenner
District 7

Chairman Porter and committee members, I urge a DO PASS on SB2321.

“Life liberty and the pursuit of happiness”, This essential equality means that no one is born with a natural right to rule over others WITHOUT their consent!

SB 2321 needs to be passed when an injustice like eminent domain that is used for corporate gain is FORCED on landowners!

When a landowner or group of land
owners have to bring in expert witnesses to testify against this INJUSTICE it should NOT be at the expense of the landowner. The party forcing the landowner to hire expert witnesses should be the ones paying for them.

Expert witnesses needed to be hired to let the public know of the VERY REAL DANGERS associated with the CO2 pipeline the size of the one proposed. This pipeline would be the world's largest CO2 pipeline and would be built by a company who has never built a pipeline before!

If the North Dakota Industrial Commission would have given $300,000 to let the public know NOT just the pros but the cons of this pipeline, landowners wouldn't have to hire expert witnesses.

It's sad when we have to look for common sense outside of our state like in South Dakota with the South Dakota PUC, the South Dakota Supreme Court who said CO2 pipelines are not a common carrier and to the South Dakota legislature and Governor for passing laws protecting landowners!
Thank God for South Dakota!

There is still hope for North Dakota so please pass SB 2321.

Thank you, Lanny Kenner

Lignite Energy Council
LEADING THROUGH ADVOCACY AND INNOVATION

March 13, 2025

Chairman Porter and members of the House Energy and Natural Resources Committee,

Thank you for the opportunity to testify in opposition to Senate Bill 2321 on behalf of the Lignite Energy Council. Our organization represents North Dakota's lignite industry, which plays a crucial role in providing affordable and reliable energy. While we support fair and just eminent domain proceedings, SB 2321 introduces unnecessary financial burdens that will increase costs for utilities, infrastructure developers and North Dakota consumers.

By expanding the requirement for public entities and organizations with eminent domain authority to cover litigation costs, including attorney's fees and expert witness expenses, this bill will drive up expenses for critical infrastructure projects and discourage much-needed investment in energy development. These added costs will inevitably be passed down to consumers, leading to higher electricity rates and increased financial strain on ratepayers.

Furthermore, the bill undermines the balance in current eminent domain laws, which already ensure landowners are treated fairly while allowing projects in the public interest to proceed. By expanding the scope of financial liabilities for utilities and project developers, this bill increases the risk of litigation, delays essential projects and creates uncertainty in an industry that relies on long-term stability to make investment decisions.

For these reasons, the Lignite Energy Council urges the committee to oppose SB 2321 with a "Do Not Pass" recommendation.

Thank you for your consideration,

Jonathan Fortner
VP of Government Relations
Lignite Energy Council

House Energy and Natural Resources Committee

Testimony on SB 2321 (IN FAVOR)

Kurt Swenson, Beulah, ND District 33

Chairman Porter, Vice Chairman Anderson and members of the House Energy and Natural Resources Committee, my name is Kurt Swenson from Beulah.

I am submitting this testimony in favor of SB 2321.

When taking private property occurs, it should come at ZERO cost to the landowner to obtain their JUST COMPENSATION required by our constitutions.

While I haven't personally been affected by an eminent domain proceeding in North Dakota, I have been part of legal proceedings with governmental agencies and the cost of the expert witnesses can be equal or greater than direct attorney costs.

We **should not be burdening landowners** with significant cost simply to get what is guaranteed by our ND and US Constitutions – **JUST COMPENSATION**.

I respectfully ask you to vote DO PASS vote on SB 2321.

Sincerely,

Kurt Swenson

Chairman and Members of the Committee,

SB2321 is necessary to protect ND landowners from unfair costs created by defending ourselves from private corporations. Landowners should be able to protect our land without the financial hardship in doing so.

I respectfully urge a “Do Pass” on SB2321

Respectfully,

Sabrina Hildenbrand

Monango, ND

District 28

NORTH DAKOTA LEAGUE OF CITIES

March 13, 2025
House Energy and Natural Resources
SB 2321
Representative Todd Porter, Chair

For the record, I am Stephanie Dassinger Engebretson, appearing on behalf of the North Dakota League of Cities (NDLC). I am the deputy director and attorney for the NDLC. The NDLC appears in opposition to SB 2321.

Cities do not use eminent domain proceedings often and strive to work with landowners to find solutions that work for everyone. However, most recently, a few cities have needed to use eminent domain to acquire property for flood protection projects. SB 2321 would make those projects more expensive and less likely for cities and landowners to work out an agreement without litigation.

In Section 2 of the bill, on page 1, line 18, the language "in its discretion" is struck. This language provides the court with discretion for awarding costs and attorney fees when an eminent domain case is litigated. It is the NDLC's understanding that in most cases, the court awards the defendant his or her attorney fees and costs. However, in some cases, if a defendant ends up receiving less than or equal to the amount offered in settlement negotiations, the court could decide not to award attorney fees and costs. Removing this language from the code removes any incentive a defendant has to work with a city to settle a case without a trial. The NDLC believes striking this language would significantly increase the number of eminent domain cases that go to trial, even when just and fair compensation has been offered.

In sections 1, 2, and 3 of the bill language stating, "the costs incurred for retaining an expert witness for use during the condemnation proceeding" is added to the costs that must be awarded in an eminent domain proceeding. That language does not take into account ensuring the expert witness costs are reasonable. In state court proceedings, the court refers to NDCC ch. 28-26 for awarding costs and disbursements to a defendant in an eminent domain proceeding. That chapter addresses the court evaluating the reasonableness of expert witness fees.

The NDLC worked on some language to address these concerns but the language was not adopted in the Senate. That proposed language is attached to my testimony.

The NDLC respectfully requests the committee either adopt the amendments or give the bill a Do Not Pass recommendation on SB 2321.

NDLC Proposed Amendment

SENATE BILL NO. 2321

A BILL for an Act to amend and reenact sections 32-15-28, 32-15-32, and 32-15-35 of the North Dakota Century Code, relating to awarding costs and fees in eminent domain proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-28 of the North Dakota Century Code is amended and reenacted as follows:

32-15-28. Public corporation bound by judgment.

~~In the event that any~~If a property is being acquired by ~~any~~a public corporation through condemnation proceedings, ~~such~~the public corporation ~~shall be~~is bound by the judgment rendered ~~therein~~in the condemnation proceedings and within six months after the entry of ~~such~~ ~~a~~ judgment shall pay ~~into~~the court the full amount of the judgment on account of damages. If the public corporation ~~shall dismiss~~dismisses the action ~~prior to~~before the entry of judgment, without agreement of the defendant ~~thereon~~, the court shall award ~~to~~ the defendant reasonable actual or statutory costs and disbursements, as defined in chapter 28-26, or both, which ~~shall include~~includes reasonable attorney's fees ~~and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~.

SECTION 2. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

1. The court may in its discretion award to the defendant reasonable actual or statutory Costs and disbursements, as defined in chapter 28-26, or both, which ~~may include~~includes interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, ~~the costs incurred for retaining an expert witness for use during the condemnation proceeding,~~ and reasonable attorney's fees for all judicial proceedings.

2. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. ~~In all cases when~~If a new trial ~~has been~~is granted upon the application of the defendant and the defendant ~~has failed upon such trial~~fails to obtain greater compensation than was allowed ~~the defendant upon~~at the first trial, the costs of ~~such~~the new trial ~~shall~~must be taxed against the defendant.

SECTION 3. AMENDMENT. Section 32-15-35 of the North Dakota Century Code is amended and reenacted as follows:

32-15-35. Eminent domain proceedings - Costs of defendant to be paid ~~when~~if proceedings withdrawn or dismissed by party bringing the proceedings.

~~Whenever~~If the state ~~acting by and through its officers, departments, or agencies, or any municipality~~ or political subdivision of this state acting by and through its officers, departments, or agencies, ~~or~~ any public utility, ~~corporation, limited liability company, association,~~ or other ~~entity which has been granted~~organization with the power of eminent domain ~~by the state, shall commence~~commences eminent domain proceedings against any land within ~~this~~the state and ~~thereafter~~subsequently withdraws or ~~has such~~the proceedings are dismissed without agreement of the defendant, the ~~state, municipality, political subdivision, public utility, corporation, limited liability company, association, or entity~~party commencing ~~such eminent domain~~the proceedings ~~shall be~~is liable ~~for and pay to~~to pay the owner of ~~such~~the land all court costs and disbursements, as defined in chapter 28-26, expenses, and fees, including reasonable attorney's fees~~, and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~ as ~~shall be~~ determined by the court in which the proceedings were filed.

Testimony of Troy Coons on behalf of
Northwest Landowners Association
in favor of
SENATE BILL NO. 2321
House Energy and Natural Resources Committee
March 13, 2025

Chairman Porter and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents hundreds of farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am not a paid lobbyist.

The Northwest Landowners Association supports SB 2321 because it is important to ensure property owners are made whole when the government takes their property. If the amount of their just compensation is reduced by the expense of expert witnesses and appraisals because those items are not reimbursed, then they are not truly receiving just compensation. Generally we understand that in North Dakota, landowners get their fees and expenses, including their appraiser's fees reimbursed at the end of eminent domain litigation.

But our legal counsel has advised that North Dakota law is being applied in federal courts, in other contexts, and also in the context of eminent domain lawsuits. One example is natural gas pipelines which use the Natural Gas Act, a federal law that gives the developers condemnation rights. I have attached one case provided by our legal counsel in which our federal court in North Dakota applied North Dakota law in a federal condemnation action on the specific issue of reimbursement of attorneys' fees.

We believe it should be clear in North Dakota law that it is part of our right to compensation that we are also able to get our expenses reimbursed, including the expenses for appraisers and other experts if needed. We understand there are times when the federal courts do not consider the expert witness expenses to be part of the recoverable costs, so we want it to be explicit that in North Dakota, we intend our laws to cover that, and we intend to make the landowner whole.

Thank you again for your time, and we urge a **do pass** on SB 2321.

Thank you,

Troy Coons
Northwest Landowners Association

Wbi Energy Transmission, Inc. v. Across

United States District Court for the District of North Dakota

November 1, 2022, Decided; November 1, 2022, Filed

Case No. 1:18-cv-078

Reporter
2022 U.S. Dist. LEXIS 250348 *; 2022 WL 22649232

WBI Energy Transmission, Inc., Plaintiff, vs. Easement and Right-of-Way Across, 189.9 rods, more or less, located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4, 227.8 rods, more or less, located in Township 140 North, Range 98 W Section 11: N1/2SW1/4, W1/2SE1/4, 242.0 rods, more or less, located in Township 149 North, Range 98 W Section 2: SW1/4SE1/4 Section11: NE1/4, 335.3 rods, more or less, located in Township 150 North, Range 98 W Section 35: W1/2E1/2, 223.8 rods, more or less, located in Township 149 North, Range 98 W Section 28: S1/2N1/2, 83.6 rods, more or less, located in Township 149 North, Range 98 W Section 14: NW1/4, McKenzie County, North Dakota, David L. Hoffmann; Denae M. Hoffmann; Leonard W. Hoffmann and Margaret A. Hoffmann, Trustees of the Hoffmann Living Trust dated March 8, 2002; Rocky & Jonilla Farms, LLP; Randall D. Stevenson; and all other unknown owners of the above lands, Defendants.

Counsel: **[*1]** For 83.6 rods more or less located in Township 149 North Range 98 W Section 14: NW1/4 McKenzie County North Dakota, An easement and right-of-way across, 242.0 rods more or less located in Township 149 North Range 98 W Section 2: SW1/4SE1/4 Section 11: NE1/4 McKenzie County North Dakota, An easement and right-of-way across, 189.9 rods more or less located in Township 149 North Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4 McKenzie County North Dakota, An easement and right-of-way across, 223.8 rods more or less located in Township 149 North Range 98 W Section 28: S1/2N1/2 McKenzie County North Dakota, An easement and right-of-way across, 227.8 rods more or less located in Township 149 North Range 98 W Section 11: N1/2SW1/4 W1/2SE1/4 McKenzie County North Dakota, An easement and right-of-way across, 335.3 rods more or less located in Township 150 North Range 98 W Section 35: W1/2E1/2 McKenzie County North Dakota, An easement and right-of-way across, Defendants: Derrick L. Braaten, Braaten Law Firm, Bismarck, ND.

For Rocky & Jonilla Farms LLP, Randall D. Stevenson, Leonard W. Hoffmann, Trustee of the Hoffmann Living Trust dated March 8 2002, David L. Hoffmann, Margaret A. Hoffmann, **[*2]** Trustee of the Hoffmann Living Trust dated March 8 2002, Denae M. Hoffmann, Defendants: Derrick L. Braaten, LEAD ATTORNEY, Braaten Law Firm, Bismarck, ND.

And all other unknown owners of the above lands, Defendant, Pro se.

For WBI Energy Transmission Inc., Plaintiff: Paul Jonathan Forster, LEAD ATTORNEY, Casey Ann Furey, Crowley Fleck PLLP (Bismarck), Bismarck, ND.

Judges: Daniel L. Hovland, United States District Judge.

Opinion by: Daniel L. Hovland

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND EXPENSES

Before the Court is the "Defendants' Motion for Attorney's Fees and Expenses" filed on August 12, 2021. See Doc. No. 118. The Plaintiff filed a response to the motion on September 9, 2021. See Doc. No. 120. The Defendants

then filed a reply brief on October 4, 2021. See Doc. No. 127. Subsequently, the Plaintiff filed a sur-reply on October 13, 2021. See Doc. No. 130.

For the reasons set forth below, the motion is granted.

I. BACKGROUND

The Plaintiff, WBI Energy Transmission, Inc. ("WBI Energy"), is a full-service interstate natural gas transmission, gathering, and storage company operating under the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). WBI Energy is also a holder of a **[*3]** certificate of public convenience and necessity authorizing WBI Energy to acquire and operate the interstate pipeline facilities previously owned and operated by Montana-Dakota Utilities, Co. ("MDU"). See Doc. No. 1, ¶ 7. As a holder of a certificate of public convenience and necessity, WBI Energy may acquire the necessary rights-of-way to construct, operate and maintain a pipeline for the transportation of natural gas "by the exercise of the right of eminent domain" when such easement cannot be acquired by contract. *15 U.S.C. § 717f(h)*.

WBI Energy brought a condemnation action pursuant to *Federal Rule of Civil Procedure 71.1* and the Natural Gas Act. See Doc. No. 1, ¶ 2. WBI Energy sought to "condemn permanent easements and temporary rights-of-way including workspace and access roads" across the Defendants' properties in McKenzie County, North Dakota ("Subject Easements"). Id.; see Doc. Nos. 1-2, 1-3, 1-4, 1-5, and 1-6. The purpose of the permanent easement was to construct, operate, and maintain approximately twelve (12) miles of 24-inch diameter pipeline from WBI Energy's existing Spring Creek Meter Station to the existing Cherry Creek Valve Setting. See Doc. No. 1, ¶ 2.

On May 7, 2018, the Court adopted a stipulation jointly filed by parties and ordered **[*4]** that WBI Energy shall have immediate use and possession of the Subject Easements for the purpose of constructing a natural gas pipeline transportation system.[1] See Doc. No. 19, p. 3. Accordingly, the only issue that remained for trial was the amount of compensation owed to the Defendants by WBI Energy for the Subject Easements.

The Court convened a bench trial on April 26, 2021. See Doc. No. 109. During the bench trial, the parties reached a settlement agreement. The Court later entered a condemnation judgment on July 13, 2021. See Doc. No. 115. Nonetheless, the Defendants reserved their right to file a motion to seek the recovery of attorney's fees and expenses, and WBI reserved the right to contest the motion. The parties stipulated that "[d]efendants' right to attorney's fees and expenses, if any, shall be the same as if the parties had proceeded to judgment on the amount of just compensation." See Doc. No. 114, p. 2. In accordance with that stipulation, the Defendants filed the pending motion and seek the "right to recover reasonable attorney's fees and related expenses" related to this case.

II. LEGAL DISCUSSION

Defendants contend they are entitled to an award of attorneys' fees pursuant **[*5]** to North Dakota Century Code § 32-12-32. In opposition, WBI Energy contends that the *Fifth Amendment's* "just compensation" measure controls because federal law supplies the exclusive measure of compensation in Natural Gas Act condemnation proceedings.

It is well-established that the federal government holds the power to exercise eminent domain. See *Kohl v. United States, 91 U.S. 367, 370, 23 L. Ed. 449 (1875)*. The federal government also has the authority to delegate its eminent domain power to private entities. *Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954)*. However, the precise issue before the Court is whether state law or federal law governs the measure of just compensation in condemnation proceedings brought by a *private entity* under the Natural Gas Act. While a handful

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[1] Pursuant to the parties' stipulation, the Court also dismissed WBI Energy's claim to condemn the temporary access road easement crossing the lands of Defendants David L. Hoffmann and Denae M. Hoffmann as depicted in Docket No. 1-3.

of circuits around the country have grappled with this issue, the Eighth Circuit Court of Appeals has not established concrete precedent. A private entity in the role as the condemner opens the Court to an analysis that is distinct, unique, and separate from circumstances in which the United States is filling the role of the condemner.

A. The Natural Gas Act

The Natural Gas Act permits gas companies to acquire private property by eminent domain to construct, maintain, and operate natural gas pipelines. 15 U.S.C. § 717f(h). As it relates to choice of law, Section 717f(h) reads, "[t]he practice and procedure in any action or proceeding for [condemnation under § 717f(h)] shall **[*6]** conform as nearly as may be with practice and procedure in similar action or proceeding in the courts of the State where the property is situated..." Id. The statute's reference to state "practice and procedure," however, does not mean that it incorporates state law for the substantive determination of compensation. Id. "This language require[s] conformity in procedural matters only." United States v. 93.970 Acres of Land, 360 U.S. 328, 333 n.7, 79 S. Ct. 1193, 3 L. Ed. 2d 1275 (1959). In any event, that language has been superseded by Rule 71.1, which establishes its own procedures applicable to condemnation cases in federal court. See Fed. R. Civ. P. 71.1, Advisory Committee Notes (1951). However, Rule 71.1 does not resolve the issue. Rule 71.1(l) simply states that the proceedings it governs are not subject to any provisions for costs set forth in Rule 54(d). It does not mean that costs are not recoverable in condemnation actions under the Natural Gas Act. All that can be gathered from Rule 71.1 is that this Court is not bound by Rule 54(d).

As a result, it is clear Rule 71.1 and the Natural Gas Act are silent regarding the application of state law in condemnation proceedings under the statute. Further, it makes no mention of remedies available in condemnation proceedings, so the Court is left to determine the applicable law and remedies that accompany it. Suffice it to say the issue of whether **[*7]** compensation for a condemnation action brought pursuant to the Natural Gas Act should follow state law is a matter of first impression in this circuit. The Natural Gas Act is entirely silent as to the application of state law under the statute. The Court would note that the Natural Gas Act is also silent on the remedies available in the condemnation proceedings it allows. The Natural Gas Act does not even expressly require that just compensation be awarded.

WBI Energy contends no gap in the federal statutory scheme exists with respect to litigation expenses and, as such, federal law applies prohibiting an award of attorney's fees.[2] Moreover, it notes the United States Supreme Court has found attorney's fees to be outside the scope of just compensation required by the Fifth Amendment.[3] Alternatively, the Defendants argue federal law and rules provide no direction regarding an award of attorney's fees and, accordingly, state law should control compensation and cost awards in Natural Gas Act proceedings brought by private condemners. The Court concludes that a gap in federal statutory scheme certainly exists; therefore, resolution of this issue follows the analysis outlined in United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979) and its progeny.

B. Introduction of *Kimbell Foods*

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[2] WBI Energy's contention that United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943) controls is misguided. For the very reasons it outlined in its response to the motion, the Court is unwilling to parallel the instant action with it. WBI Energy is unable to provide any binding authority for the proposition that Miller applies beyond cases or circumstances where the federal government is the condemner - nothing in Miller or its progeny expands its reach to condemnations by private entities. In fact, courts have explicitly recognized this limitation, noting that Miller announced the standard for determining "only the amount of compensation due to an owner of land condemned by the United States." Certain Parcels of Land in Phila., 144 F.2d 626, 629 (3rd Cir. 1944).

[3] In United States v. Bodcaw Co., 440 U.S. 202, 99 S. Ct. 1066, 59 L. Ed. 2d 257 (1979), the United States brought a condemnation action to acquire a permanent easement, not a private party.

"When Congress has not spoken 'in **[*8]** an area comprising issues substantially related to an established program of government operation,'" Kimbell Foods, 440 U.S. 715, 727, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979) (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973)), the Supreme Court has "direct[ed] federal courts to fill the interstices of federal legislation 'according to their own standards,'" (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S. Ct. 573, 87 L. Ed. 838 (1943)). This type of law that is woven by federal courts is referred to as federal common law. However, in crafting such federal common law, courts need not "inevitably . . . resort to uniform federal rules." Id. at 727-28 (citations omitted). Instead, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" Id. at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947)).

Kimbell Foods involved the priority of competing private and federal liens, some of which were rooted in federal loan programs, in the absence of a federal statutory law setting priorities. Id. at 718. The Supreme Court addressed whether the federal courts should sculpt a uniform federal common-law rule or adopt state law as the federal standard. Id. at 728. It held a federally uniform law was unnecessary, and that state law governed the priority **[*9]** of liens in the absence of federal law. Id. at 740. The Court enumerated three considerations guiding its analysis: (1) whether the federal program, by its very nature, required uniformity; (2) whether the application of state law would frustrate specific objectives of the federal program; and (3) whether the application of uniform federal law would disrupt existing commercial relationships predicated on state law. Id. at 728-29.

Where federal law governs a controversy, but there is no federal rule or decision on a particular matter, a federal court must fill the void through common lawmaking, either by fashioning a uniform, national rule or by incorporating state law as the federal standard. Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019). Determining which course of action to take turns on the application of the *Kimbell Foods* factors outlined above.

C. Guiding Precedent

Before diving into a *Kimbell Foods* analysis, the Court looks to its sister circuits for guidance. Georgia Power Co. v. 138.30 Acres of Land (Sanders), 617 F.2d 1112 (5th. Cir 1980), Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992), and Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019) all provide some direction.

In Georgia Power, the Fifth Circuit sitting *en banc* addressed whether the issue of compensation in Federal Power Act condemnation cases "should be determined under federal law or under the law of the state where the condemned property is located when a licensee of the Federal Energy **[*10]** Regulation Commission (FERC) exercises the power of eminent domain in federal court..." Id. at 1113. The Federal Power Act has substantially similar language to that in the Natural Gas Act and allows private entities to use eminent domain to condemn private property in efforts to develop water ways. Id. at 1114. However, like the Natural Gas Act, no rule exists to dictate the appropriate compensation owed to condemnees. Id. at 1115. The Fifth Circuit held that "the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee [of the FERC] exercises the power of eminent domain pursuant to . . . the Federal Power Act." Id. at 1124. The Court highlighted that the project was undertaken by a private party - not by the federal government. Id. at 1118. Therefore, it did not significantly "implicate the interests of the United States..." Id. In addition, since FERC licensees have the choice to proceed in either state or federal court, the court concluded that integrating state law would not further frustrate the important interest in national uniformity. Id. at 1122. The Fifth Circuit emphasized "the state's interest in avoiding displacement of its laws in the area of property rights, traditionally an area of local **[*11]** concern." Id. at 1123. While the Fifth Circuit acknowledged that applying state law would arguably lead the condemner to pay higher costs to the property owner, that speculative possibility did not "amount[] to the kind of conflict which [would] preclude[] adoption of state law." Id. at 1121 (citation omitted).

In 1985, the Fifth Circuit Court of Appeals summarily held that the statutory language of the Natural Gas Act at 15 U.S.C. § 717f(h) required that state law be adopted as the federal rule. Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662, 665 (5th Cir. 1985).

The Sixth Circuit Court of Appeals reached the same conclusion in a related case. In Columbia Gas, the Columbia Gas Transmission Corporation filed an eminent domain action under 15 U.S.C. § 717f(h) of the Natural Gas Act against private landowners condemning an underground storage easement. The district court selected a committee to determine the compensation owed to the landowners. The district court upheld the committee's decision regarding the compensation. However, the Sixth Circuit Court of Appeals reversed. The Sixth Circuit relied on Georgia Power to hold that the Natural Gas Act "incorporates the law of the state in which the condemned property is located in determining the amount of compensation due." Id. at 1199. That holding was reaffirmed in the circuit. See Rockies Express Pipeline LLC v. 4.895 Acres of Land, 734 F.3d 424, 429 (6th Cir. 2013) ("While condemnation under the Natural Gas Act is a federal matter, courts conducting **[*12]** such proceedings must apply 'the law of the state in which the condemned property is located in determining the amount of compensation due.'" (quoting Columbia Gas, 962 F.3d at 1199). Given the Natural Gas Act's silence in prescribing the appropriate compensation, the Court turned to the *Kimbell Foods* analysis. In its analysis of the *Kimbell Foods* considerations, the court determined that "(1) it is unnecessary to fashion a nationally uniform rule of compensation for private parties condemning land under the Natural Gas Act, (2) incorporating state law as the federal standard would not frustrate the specific objectives of the Natural Gas Act, and (3) property rights have traditionally been defined by state law." Id. at 1198-99. Accordingly, the Sixth Circuit adopted state law as the federal standard to govern compensation determinations under the Natural Gas Act. Id. at 1199.

Finally, in 2019, the Third Circuit Court of Appeals decision in *Tennessee Gas* provides the most recent pronouncement on the issue. In *Tennessee Gas*, the Tennessee Gas Pipeline Company commenced a condemnation action under the Natural Gas Act seeking to acquire easements over a 975-acre tract of land on property owned by the appellants. Tennessee Gas, 931 F.3d at 241. On interlocutory appeal, a sole legal issue presented was whether state law or federal **[*13]** law governs the substantive determination of just compensation in condemnation actions brought by private entities under the Natural Gas Act.

The Third Circuit Court of Appeals said that the Natural Gas Act is completely silent as to the appropriate compensation owed to condemnees under the statute. As a result, the *Kimbell Foods* framework and analysis is appropriate. The Third Circuit held that Pennsylvania substantive law provided the federal standard for determining just compensation in a condemnation proceeding brought by a natural gas pipeline company acting under the authority of 15 U.S.C. § 717f(h) because a gap clearly existed in the statutory scheme of the Natural Gas Act. Id. at 255. In its decision, the Third Circuit explained that fashioning a national uniform rule is unnecessary, incorporating state law does not frustrate the Natural Gas Act's objectives, and the application of a uniform federal rule would upset commercial relationships founded on state law. Id. at 251. In other words, the *Kimbell Foods* factors weigh in favor of incorporating state law as the federal rule in this context. The analysis ultimately led to the decision that state substantive law would control.

In summary, the Third Circuit in *Tennessee Gas* reached the following conclusion:

> In sum, we determine **[*14]** that, at the threshold, federal law is the interpretive basis to determine just compensation in condemnation proceedings arising out of the NGA. But, because neither Miller nor any other binding authority provides a federal rule of decision as to what constitutes just compensation precisely where a private entity condemns private property under the statute, we turn to *Kimbell Foods*. That case and its progeny reflect a presumption in favor of state law, one not rebutted here. Even without that presumption, however, the *Kimbell Foods* factors collectively weigh in favor of state law because, for the reasons explained previously, (1) fashioning a nationally uniform rule is unnecessary, (2) incorporating state law does not frustrate the NGA's objectives, and (3) application of a uniform federal rule would upset commercial relationships. In light of this analysis, we decide to incorporate state substantive law as the federal standard of measuring just compensation in condemnation proceedings by private entities acting under the authority of the NGA.

Id. at 255.

D. *Kimbell Foods* Analysis

Given the conclusion that a gap in statutory scheme exists, the Court turns to the factors outlined in *Kimbell* ***[*15]*** *Foods*. An analysis of these factors assists the Court in its determination and decision whether to fashion a uniform common law or incorporate state law as the applicable federal rule. The Court starts with the presumption that state law should be incorporated unless there is an expression of legislative intent to the contrary, or a showing that state law significantly conflicts with the federal interest present. See *Kimbell Foods, 440 U.S. at 739* (citations omitted); *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." (citing, *Kimbell Foods, 440 U.S. at 728-29, 739-40*). Here, there is neither. Accordingly, the Court presumes that state law should be incorporated in this case.

1. There is No Overriding Need for a Nationally Uniform Rule

In this case, fashioning a nationally uniform rule is unnecessary for a plethora of reasons, but most important is: (1) the case involves two private parties, not the United States government, and (2) property rights are an area of state concern, especially in North Dakota. Although federal rules have been applied **[*16]** to the determination of just compensation in federal condemnation cases where the United States is the party condemning and paying for the land, those decisions do not control because this case arises in the context of a proceeding by a licensee where the nature of the federal interests involved differs markedly from the nature of the federal interests involved where the United States is the condemner. *Georgia Power, 617 F.2d at 1119-20*. (citation omitted). When the condemner is no longer the United States, it does not significantly implicate the interests of the United States. As reasoned in *Kimbell Foods*, when the government is involved, it "generate[s] immediate interests" and therefore warrant[s] federal law and, on the other hand, cases "purely between private parties" that "do not touch the rights and duties of the United States" and are thus "far too speculative, far too remote . . . to justify the application of federal law to transactions essentially of local concern." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34, 77 S. Ct. 119, 1 L. Ed. 2d 93, (1956)*. WBI is in the role of the condemner and does not "generate the same immediate interests" as the government would in its exact same shoes.

Second, property rights are traditionally an area of state concern, especially in North Dakota. See 36 C.J.S. Federal Courts § 189(5) (1960) **[*17]** ("As a general rule, legal interests and rights in property are created and determined by state law. . . . [Thus,] the courts of the United States have applied state law in cases involving . . . the power of eminent domain and its exercise . . . ."), See also *Nat'l R. Passenger Corp. v. Two Parcels of Land, 822 F.2d 1261 (2d Cir. 1987)* (a state generally has an interest in avoiding displacement of its laws in the area of property rights; and that since state law usually governs the question of what constitutes property, the value of property rights is ordinarily best determined according to state law.) The federal interest in a nationally uniform rule is especially weak because of the strong correlation between the state and property rights. From farming to original homesteads, it is in the blood of North Dakota landowners to be protective of their real estate. From family ties to the need for farmers to grow crops, property ownership is near and dear to those who maintain it. Ultimately, creating a nationally uniform rule for compensation risks "muddying elaborate state property rules" and interests therein. In addition, the Natural Gas Act contemplates state participation in numerous ways which undermines the argument for a national, uniform rule of compensation. Notably, **[*18]** the statute allows licensees to bring condemnation actions under the Act in state court. See *15 U.S.C. § 717f(h)*. Accordingly, a uniform nation rule is inappropriate in this case.

2. Application of the North Dakota Century Code Does Not Frustrate the Objectives of the Natural Gas Act

The second factor under *Kimbell Foods* requires a probe into the objectives of the Natural Gas Act and an evaluation of the potential interests that would be frustrated by the injection of state law found within the North

Dakota Century Code. The Court believes incorporating North Dakota law as the federal standard will not frustrate the objectives of the Natural Gas Act. The Act declares its purpose as furthering the public interest "in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce." *15 U.S.C. § 717(a)*. The only imaginable result that adopting state law as the measure of just compensation might have on this purpose would be that condemners proceeding under the Act may be required to pay more or less than under an alternative federal common-law rule. *Georgia Power, 617 F.2d at 1121*. To the degree that compensation under state law may deviate from that under a federal rule, the Court holds this variance is entirely too speculative to warrant **[*19]** displacing state law.

3. Application of a Uniform Federal Rule Would Upset Commercial Relationships

The final prong to be evaluated under the *Kimbell Foods* analysis requires the Court to consider whether application of a uniform federal rule would upset commercial expectations found in state law. On the one hand, because there already exists "an established body of federal law on the issue of just compensation" in general, parties that conduct business in this industry are already on notice of the potential application of federal law. *Georgia Power, 617 F.2d at 1123 n.17* (citation omitted). On the other hand, "property rights have traditionally been, and to a large degree are still, defined in substantial part by state law." *Columbia Gas, 962 F.2d at 1198* (citation omitted). If a nationally uniform rule was indeed formed, the rule would "merely superimpose a layer of property right allocation onto the already well-developed state property regime." Id. Indeed, "when dealing with those powers left to the states, the courts should tread gingerly" in attempting to create a uniform common law. *Georgia Power, 617 F.2d at 1125* (Fay, J., concurring). The commercial relationships that have been established are long-standing and have been cemented into North Dakota's foundational practices **[*20]** and procedures in the area of property rights. The Court finds this factor weighs in favor of adopting state law due to the "risk of upsetting parties' commercial expectations" based upon 'the already well-developed state property regime. *Columbia Gas, 962 F.2d at 1198*.

E. North Dakota Substantive Law Permits an Award of Attorney's Fees

Based on this Court's finding that a gap in the federal statutory scheme exists, the Natural Gas Act does not answer the question at issue, and common-law has yet to be created in this domain. The Court was tasked with applying the *Kimbell Foods* factors to the present facts. An analysis of each *Kimbell Foods* factor reveals that adopting state substantive law as the federal standard of just compensation is warranted. As such, the Court "incorporates the law of the state in which the condemned property is located [to] determine[e] the amount of compensation due." *Columbia Gas, 962 F.3d at 1199*. All the condemned property is located in McKenzie County, North Dakota. The controlling, relevant law is *North Dakota Century Code Section 32-15-32*, which reads as follows:

> The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available **[*21]** for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings.

The Court concludes that, although condemnation under the Natural Gas Act is a matter of federal law, incorporating state substantive law as the federal standard of measuring just compensation proceedings by private entities is the appropriate standard for the reasons set forth in the *Kimbell Foods* analysis. Further, considerations of the historic underpinnings and ties to North Dakota property strengthens the reasoning of this Court and supports a finding that North Dakota law supplants the federal standard.

III. CONCLUSION

For the reasons set forth above, the "Defendants' Motion for Attorney's Fees and Expenses" (Doc. No. 118) is **GRANTED**. In accordance with the stipulation for a schedule on the motion for attorney's fees, phase two of briefing

may now commence to aid the Court in determining the reasonable amount of attorney's fees and related expenses to be awarded.

IT IS SO ORDERED.

Dated this 1st day of November, 2022.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge

United States District Court

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2025 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2321
3/27/2025

Relating to awarding costs and fees in eminent domain proceedings.

9:30 a.m. Chairman Porter called the hearing to order.

Members Present: Chairman Porter, Vice Chairman Anderson, Vice Chair Novak, Representatives: Dockter, Hagert, Heinert, Johnson, Marschall, Olson, Conmy, Foss

Members Absent: Representative M. Ruby, Representative Headland

Discussion Topics:

- Committee Action

9:33 a.m. Representative Porter testified and submitted testimony #44297 and #44306.

9:37 a.m. Representative Heinert moved a Do Not Pass.

9:37 a.m. Representative J. Olson seconded the motion.

Representatives	Vote
Representative Todd Porter	Y
Representative Dick Anderson	Y
Representative Anna Novak	Y
Representative Liz Conmy	Y
Representative Jason Dockter	Y
Representative Austin Foss	Y
Representative Jared c. Hagert	Y
Representative Craig Headland	AB
Representative Pat D. Heinert	Y
Representative Jorin Johnson	N
Representative Andrew Marschall	Y
Representative Jeremy L. Olson	Y
Representative Matthew Ruby	AB

Motion Passed: 10-1-2

Bill Carrier: Representative Heinert

9:42 a.m. Chairman Porter adjourned the meeting.

Saydee Wahl for Leah Kuball, Committee Clerk

REPORT OF STANDING COMMITTEE
SB 2321 (25.0662.01000)

Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (10 YEAS, 1 NAY, 2 ABSENT OR EXCUSED AND NOT VOTING). SB 2321 was placed on the Fourteenth order on the calendar.

25.0662.01004
Title.

Prepared by the Legislative Council staff for Representative Porter
March 26, 2025

Sixty-ninth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENTS TO

SENATE BILL NO. 2321

Introduced by

Senators Magrum, Luick, Paulson

A BILL for an Act to amend and reenact sections 32-15-28, 32-15-32, and 32-15-35 of the North Dakota Century Code, relating to awarding costs and fees in eminent domain proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-28 of the North Dakota Century Code is amended and reenacted as follows:

32-15-28. Public corporation bound by judgment.

~~In the event that any~~If a property is being acquired by ~~any~~a public corporation through condemnation proceedings, ~~such~~the public corporation ~~shall be~~is bound by the judgment rendered ~~therein~~in the condemnation proceedings and within six months after the entry of ~~such a~~ judgment shall pay ~~into~~the court the full amount of the judgment on account of damages. If the public corporation ~~shall dismiss~~dismisses the action ~~prior to~~before the entry of judgment ~~thereon~~, without agreement of the defendant, the court shall award ~~to~~ the defendant reasonable actual or statutory costs and disbursements under chapter 28-26, or both, which ~~shall include~~includes reasonable attorney's fees ~~and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~.

SECTION 2. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

1. The court may in its discretion award to the defendant reasonable actual or statutory costs and disbursements under chapter 28-26, or both, which ~~may include~~includes

interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, ~~the costs incurred for retaining an expert witness for use during the condemnation proceeding,~~ and reasonable attorney's fees for all judicial proceedings.

2. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. ~~In all cases when~~If a new trial ~~has been~~is granted upon the application of the defendant and the defendant ~~has failed upon such trial~~fails to obtain greater compensation than was allowed ~~the defendant upon~~at the first trial, the costs of ~~such~~the new trial ~~shall~~must be taxed against the defendant.

SECTION 3. AMENDMENT. Section 32-15-35 of the North Dakota Century Code is amended and reenacted as follows:

32-15-35. Eminent domain proceedings - Costs of defendant to be paid ~~when~~if proceedings withdrawn or dismissed by party bringing the proceedings.

~~Whenever~~If the state ~~acting by and through its officers, departments, or agencies, or any municipality~~ or political subdivision of this state acting by and through its officers, departments, or agencies, ~~or~~ any public utility, ~~corporation, limited liability company, association,~~ or other ~~entity which has been granted~~organization with the power of eminent domain ~~by the state, shall commence~~commences eminent domain proceedings against any land within ~~this~~the state and ~~thereafter~~subsequently withdraws or ~~has such~~the proceedings are dismissed without agreement of the defendant, the ~~state, municipality, political subdivision, public utility, corporation, limited liability company, association, or entity~~party commencing ~~such eminent domain~~the proceedings ~~shall be~~is liable ~~for and pay~~ to pay the owner of ~~such~~the land all court costs and disbursements under chapter 28-26, expenses, and fees, including reasonable attorney's fees~~, and the costs incurred for retaining an expert witness for use during the condemnation proceeding~~ as ~~shall be~~ determined by the court in which the proceedings were filed.

United States Court of Appeals
For the Eighth Circuit

No. 24-1693

WBI Energy Transmission, Inc.

Plaintiff - Appellant

v.

189.9 rods, more or less, located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section 14: NW1/4NE1/4 McKenzie County, North Dakota, An easement and right-of-way across; 227.8 rods, more or less, located in Township 149 North, Range 98 W Section 11: N1/2SW1/4, W1/2SE1/4, McKenzie County, North Dakota, An easement and right-of-way across; 242.0 rods, more or less, located in Township 149 North, Range 98 W Section 2: SW1/4SE1/4 Section 11: NE1/4, McKenzie County, North Dakota, An easement and right-of-way across; 335.3 rods, more or less, located in Township 150 North, Range 98 W Section 35: W1/2E1/2 McKenzie County, North Dakota, An easement and right-of-way across; 223.8 rods, more or less, located in Township 149 North, Range 98 W Section 28: S1/2N1/2, McKenzie County, North Dakota, An easement and right-of-way across; 83.6 rods, more or less, located in Township 149 North, Range 98 W Section 14: NW1/4, McKenzie County, North Dakota, An easement and right-of-way across; Leonard W. Hoffmann, Trustee of the Hoffmann Living Trust dated March 8, 2002; David L. Hoffmann; Denae M. Hoffmann; Margaret A. Hoffmann, Trustee of the Hoffmann Living Trust dated March 8, 2002; Rocky & Jonilla Farms, LLP; Randall D. Stevenson; All other Unknown Owners, of the above lands

Defendants - Appellees

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: October 24, 2024
Filed: March 24, 2025

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Attorney fees are typically unavailable when the United States exercises its eminent-domain power. Nothing changes when the federal government delegates the power to a private party under the Natural Gas Act, so we vacate the award of fees in this case.

I.

WBI Energy Transmission, Inc., transports and stores natural gas. To build a pipeline, it needs a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission. Upon receiving one, WBI usually acquires the easements it needs through voluntary sales. But, for the strip of land needed to build a pipeline through McKenzie County, North Dakota, one family turned down its offers, so it filed a federal condemnation action under the Natural Gas Act instead. *See* 15 U.S.C. § 717f(h).

Following a winding procedural history and three years of negotiations, the parties settled on the amount of "just compensation" for the easement. U.S. Const. amend. V. One unresolved question was *who* had to pay the attorney fees that the family had accumulated. Based on North Dakota law, the district court decided it was WBI. *See Petersburg Sch. Dist. of Nelson Cnty. v. Peterson*, 103 N.W. 756, 759 (N.D. 1905).

II.

The availability of attorney fees depends on whether state or federal law determines the compensation that is due. Under North Dakota law, as the district court pointed out, attorney fees are available in condemnation proceedings. *See id.* (interpreting Article I of the North Dakota Constitution). WBI's view is that federal law applies because it was exercising the eminent-domain power of the United States, which would owe no attorney fees if it did the condemning. *See United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam). Our task, applying de novo review, is to determine which approach is right. *See Ideus v. Teva Pharms. USA, Inc.*, 986 F.3d 1098, 1101 (8th Cir. 2021).

A.

Start with the text of the Natural Gas Act, which lets certificate holders "exercise . . . the right of eminent domain" to secure any "necessary right-of-way to construct, operate, and maintain a pipe[]line or pipe[]lines for the transportation of natural gas." 15 U.S.C. § 717f(h). This "categorical" delegation allows private parties like WBI to exercise the federal eminent-domain power. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 498 (2021); *see Kohl v. United States*, 91 U.S. 367, 372 (1875) (recognizing that "the right of eminent domain exists in the Federal government"). By stepping into the federal government's shoes, WBI inherited all its rights and obligations. It could take both "state-owned [and private] property," *PennEast*, 594 U.S. at 488, but it would have to pay "just compensation" for what it took. U.S. Const. amend. V; *see United States v. Miller*, 317 U.S. 369, 373 (1943); *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake Cnty. Fla.*, 74 F.4th 1346, 1348 (11th Cir. 2023) (Grant, J., concurring).

"Just compensation" under the Fifth Amendment has a well-established legal meaning that usually equates to "market value," the "full monetary equivalent of the property taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973). But the focus is always on the value of the property itself, not

what the owner spends trying to keep it. *See Bodcaw*, 440 U.S. at 203 ("[J]ust compensation 'is for the property, and not to the owner.'" (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893))). Under the Fifth Amendment, property owners cannot recover for "indirect costs" like attorney fees and expenses. *Id.*

Only a statute can require more. And sometimes they do. Consider the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides for the reimbursement of "reasonable costs, disbursements, and expenses, including . . . attorney . . . fees." 42 U.S.C. § 4654(a) (granting them when "the final judgment is that the Federal agency cannot acquire the real property" or "the proceeding is abandoned");[1] *see also Bodcaw*, 440 U.S. at 204. Or the General Bridge Act, which requires compensation as "ascertained and paid according to the laws of [the] State" in which the condemnation occurs, including attorney fees where available. *See* 33 U.S.C. § 532. Another part of the Natural Gas Act even leaves it to a regulatory agency "to determine the maximum consideration permitted as just compensation," subject, of course, to the minimum constitutional requirements. 15 U.S.C. § 717y(b)(2). In each case, "legislative grace[,] rather than constitutional command," makes attorney fees possible. *Bodcaw*, 440 U.S. at 204.

The question is whether Congress did the same thing here, in the statute governing *this* taking. On that point, the Natural Gas Act says nothing about the measure of compensation due to a property owner. It does not even use the words "just compensation," let alone say that attorney fees are available or that an agency or state law can provide them. Without such an exercise of "legislative grace," the default rule applies: "just compensation" under the Fifth Amendment. *Bodcaw*, 440 U.S. at 204. Congress gives private parties like WBI just the power it has, including the rights and obligations that come with it. *See Sabal Trail Transmission*, 74 F.4th

[1]The term "Federal agency" includes a private party like WBI that "has the authority to acquire property by eminent domain under Federal law." 42 U.S.C. § 4601(1). What is missing here, however, is satisfaction of either one of the statutory conditions for attorney fees. *See id.* § 4654(a)(1)–(2).

at 1348 (Grant, J., concurring) ("[W]hen a federal statute authorizes 'the exercise of the right of eminent domain,' without saying more, the statute authorizes only the compensation required by the Fifth Amendment—regardless of whether the United States or a private licensee exercises that power."). Those obligations do not include paying attorney fees. *See Bodcaw*, 440 U.S. at 202 ("[A]ttorneys' fees and expenses are not embraced within just compensation." (citation omitted)).

B.

The district court had a different view. It saw a gap in the Natural Gas Act and awarded attorney fees based on its belief that state law could fill it. In support of importing state law, it relied on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).[2]

Kimbell Foods presented a choice-of-law dispute about lien priority in a federal statute. *See id.* at 726. Congress had not "specif[ied] the appropriate rule of decision," so the Court needed to decide "[w]hether to adopt state law or to fashion a nationwide federal rule." *Id.* at 727–28. It laid out a three-part test balancing the "need for a nationally uniform body of law," the risk of "frustrat[ing] specific objectives of the federal program[]" by relying on state law, and the potential for the "disrupt[ion] [of] commercial relationships." *Id.* at 728–29. We have applied

[2]And so have other courts when deciding whether attorney fees are available under the Natural Gas Act. *See Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres*, 931 F.3d 237, 250 (3d Cir. 2019); *Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy Cnty.*, 59 F.4th 1158, 1165–66 (11th Cir. 2023); *cf. Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1195 (6th Cir. 1992) (incorporating state law under the Natural Gas Act to determine the value of the property taken); *Ga. Power Co. v. Sanders*, 617 F.2d 1112, 1115 (5th Cir. 1980) (en banc) (same under the Federal Power Act). In our view, however, "first principles counsel otherwise." *Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918, 924 (8th Cir. 2023), *aff'd*, 604 U.S. 22 (2025).

Kimbell Foods to fill statutory "gaps" before. *See, e.g.*, *Guenther v. Griffin Constr. Co.*, 846 F.3d 979, 982 (8th Cir. 2017).

The problem is that, when it comes to eminent domain, congressional silence leaves no "gaps" to fill. *See United States v. Great Plains Gasification Assocs.*, 813 F.2d 193, 195 (8th Cir. 1987) (observing that when we have "sufficient direction . . . , *Kimbell Foods* is inapplicable"). It is true that nothing in the Natural Gas Act tells certificate holders what they must pay when taking property. But we already know that any gaps are filled by the Fifth Amendment itself, including the obligation to pay "just compensation." *Bodcaw*, 440 U.S. at 203; *see Miller*, 317 U.S. at 379–80 (applying the Fifth Amendment standard directly). The rules of the road do not change, in other words, when the federal government hands the keys over to a private party like WBI. *See PennEast*, 594 U.S. at 489 (observing that Congress delegated "the *federal* eminent domain power").

PennEast confirms our conclusion. At issue there was whether New Jersey could raise sovereign immunity as a defense to a gas company's decision "to exercise the federal eminent domain power" over "two parcels in which [it] assert[ed] a possessory interest." *Id.* at 491. The United States played no role in the condemnation, other than authorizing it through the Natural Gas Act. The Supreme Court nevertheless rejected New Jersey's sovereign-immunity defense. In its view, "the States [had] consented in the plan of the Convention to the exercise of *federal eminent domain power*." *Id.* at 501 (emphasis added). That is, through the Natural Gas Act, the gas company received what amounted to the *entire* federal eminent-domain power, not just some diluted form of it, which was enough to prevail in the face of a defense that ordinarily would have required dismissal. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000).

It may well be that different concerns are at stake when the United States is exercising its own power under the Fifth Amendment, as in *Miller* and *Bodcaw*. In those circumstances, the "powerful federal interest[s] at play" are arguably weightier than when a private company like WBI is acting on its own. *Tenn. Gas*, 931 F.3d at

248. Not to mention that saddling private parties with attorney fees and other indirect costs does not raise the same fiscal "concern[s] about the spending of federal dollars" that exist when the United States does the taking. *Id.* at 249.

But these are policy arguments better addressed to Congress, which can amend the Natural Gas Act if it wishes. *See Bodcaw*, 440 U.S. at 204. Indeed, when the statute was first enacted, it was silent on how companies were supposed to secure the necessary easements to build natural-gas pipelines, leaving them at the mercy of state law. *See PennEast*, 594 U.S. at 489. Congress responded by delegating "the *federal* eminent domain power," which had the effect of removing state-law roadblocks. *Id.* Another amendment could provide an express right to attorney fees or make their availability contingent on state law or agency action. For now, however, the bare delegation in the Natural Gas Act gives landowners no more than if the United States were acting. It is the same "right to [just] compensation" either way. *Tenn. Gas*, 931 F.3d at 258 (Chagares, J., dissenting).

The Fifth Amendment, not state law or federal common law, fills any "gaps" in the Natural Gas Act. And unfortunately for these landowners, it provides no right to attorney fees.

III.

We accordingly vacate the attorney-fee award.
