APPENDIX

TABLE OF APPENDICES

PAGE

Appendix A

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,

Appendix A

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 the 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,"

[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).

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 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 *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.*,

---

[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).

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.

Appendix B

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,

Appendix B

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 the U.S.District Court
for the District of North Dakota – Western
(1:18-cv-00078-DLH)

JUDGMENT

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the attorney-fee award is vacated in accordance with the opinion of this court.

March 24, 2025

Order Entered in Accordance
With Opinion:

Appendix B

Clerk, U.S. Court of Appeals,
Eighth Circuit

/s/ Susan E. Bindler

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

WBI Energy Transmission, Inc.,	)	
Plaintiff,	)	
vs.	)	
Easement and Right-of-Way Across,	)	Case No. 1:18-cv-078
189.9 rods, more or less, Located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section14: NW1/4NE1/4,	)	
227.8 rods, more or less, Located in Township 140 North, Range 98 W Section 11: W1/2SW1/4, W1/2SE1/4,	)	
242.0 rods, more or less, Located in Township 149 North, Range 98 W Section 2: SW1/4SE1/4 Section 11: NE1/4,	)	
335.3 rods, more or less,	)	

Appendix C

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. Hoffman; 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.	)

ORDER GRANTING ATTORNEY'S FEES AND EXPENSES

Appendix C

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 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 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.

Following the bench trial, the Defendants moved this Court for an award of attorney's fees. See Doc.

---

[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.

No. 118. The Court granted the motion. See Doc. No. 131. Subsequent briefing commenced to aid the Court in determining the reasonable amount of attorney's fees and related expenses to be awarded.

II. LEGAL DISCUSSION

The Defendants seek to recover attorney's fees and expenses in the amount of **$383,375.76**. WBI contends the request is unreasonable and claim the Defendants should only be permitted to recover attorney's fees and expenses in the amount of **$220,625.52**. The Defendants filed a brief in support of their request on December 6, 2022. See Doc. No. 133. In addition, the Defendants supplemented their brief with an affidavit of attorney Derrick Braaten, along with exhibits including a verified statement of costs and fees and invoices of the attorneys who worked on the case. See Doc. No. 134. WBI filed a brief in opposition to the request on January 4, 2023. See Doc. No. 137. Defendants filed a reply on January 23, 2023. See Doc. No. 141.

It is well-established that determining the amount of reasonable attorney's fees to award a prevailing plaintiff is within the sound discretion of the trial court. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The starting point for a determination of reasonable attorney's fees is a calculation of the "lodestar figure" which is the product of the number of hours reasonably expended times a reasonable hourly rate. Burlington v. Dague, 505 U.S. 557, 559 (1992); Blanchard v. Bergeron, 489 U.S. 87, 94 (1989).

Appendix C

In *Hensley*, the United States Supreme Court defined the role of the lodestar methodology: The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . . "Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (internal citations omitted) (emphasis in original).

In *Hensley*, the United States Supreme Court explained that a trial court may consider the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to adjust the lodestar amount. Id. at 434 n.9. The twelve *Johnson* factors include the following: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the

legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hensley, 461 U.S. at 430 n.3. Trial courts have been instructed to utilize their own knowledge relating to various aspects of the lodestar. "The trial judge should weigh the hours claimed against his knowledge, experience and expertise of the time required to complete similar activities." Gilbert v. City of Little Rock, 867 F.2d 1063, 1066 (8th Cir. 1989).

As a general rule, a reasonable hourly rate is the prevailing market rate, that is, "the ordinary rate for similar work in the community where the case has been litigated." Emery v. Hunt, 272 F.3d 1042, 1048 (8th Cir. 2001). The party seeking an award of attorney's fees bears the burden of producing sufficient evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). The district court is in the best position to understand what services are reasonable and what hourly rates are appropriate in the relevant market. Al-Birekdar v. Chrysler Group, LLC, 499 F. App'x 641, 648 (8th Cir. 2013) (holding the district court did

not abuse its discretion in reducing the requested hourly rates).

The lodestar originally being sought by the Defendants is the amount of $329,383.90, which is based upon a total of 1,295.4 hours, billed at hourly rates ranging from $115 to $350. The Defendants new request is the amount of $332,724.90 to include $3,341.00 for the reply brief filed. The billing summaries evidencing the time spent by each attorney, the general subject matter of the time expenditures, and the hourly rates being claimed by the Braaten law firm are attached to the declaration of Derrick Braaten (See Doc No. 134-5) and the hourly rates being claimed by the Tarlow, Stonecipher, Weamer, and Kelly law firm are attached to the declaration of Derrick Braaten (See Doc. No. 134-6).

Reasonable hourly rates to be used in the lodestar calculation are "calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." Blum v. Stenson, 465 U.S. 886, 895 (1984). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." See Norman v. Housing Authority of Montgomery, Ala., 836 F.2d 1292, 1299 (11th Cir. 1988). The relevant legacommunity to determine the prevailing market rate is generally the place where the case is filed. Id.

Based on the Court's 40+ years of experience in

North Dakota as an attorney in private practice and as a federal judge, hourly rates for associates in the $200-$300 range and hourly rates for partners in the range of $300-$425 are not unusual or unreasonable. The Court finds the hourly rates charged and total number of hours expended were reasonable.

The Plaintiffs also seek $50,650.86 in litigation expenses, as detailed in the verified statement of costs and fees. See Doc. No. 134-1. These expenses include payments for court fees, travel expenses, legal research, and expert witness fees. The Court recognizes that reasonable expenses must be incurred in condemnation litigation and does not find the expenses incurred to be excessive.

In sum, the total amount sought for the Plaintiffs' attorney's fees and litigation expenses is **$383,375.76**. This sum represents $332,724.90 in attorneys' fees and $50,650.86 in litigation expenses. In the broad exercise of its discretion, and based on the undersigned's experience in handling civil litigation over the past 40+ years as an attorney and federal judge, the Court finds that the total attorney's fees and costs incurred for services rendered in connection with this condemnation action are reasonable.

III. CONCLUSION

In the broad exercise of its discretion, the Court finds that the total attorney's fees for legal services rendered to be **$332,724.90**. The Court finds that the total for costs and expenses (including expert fees) to

be **$50,650.86**. The result is a total judgment of **$383,375.76**, to be taxed by the Clerk against WBI.

IT IS SO ORDERED.

Dated this 5th day of March, 2024.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

Appendix D

UNITED STATES DISTRICT COURT
District of North Dakota

WBI Energy Transmission, Inc.,

Plaintiff,

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, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 1:18-cv-78

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

✓ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

Appendix D

☐ **Stipulation**. This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal**. This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

An original Judgment was filed on July 13, 2021 at document number 115. This supplemental judgment grants attorney's fees and costs as follows: The Court finds that the total attorney's fees for legal services rendered to be $332,724.90. The Court finds that the total for costs and expenses (including expert fees) to be $50,650.86. The result is a total judgment of $383,375.76, to be taxed against WBI.

Date: March 5, 2024

KARI M. KNUDSON,
CLERK OF COURT

by: */s/ Janelle Brunner, Deputy Clerk*

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

WBI Energy Transmission, Inc.,	)	
Plaintiff,	)	
vs.	)	
Easement and Right-of-Way Across,	)	Case No. 1:18-cv-078
189.9 rods, more or less, Located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section14: 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, Section 11: NE1/4,	)	
335.3 rods, more or less,	)	

Appendix E

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. Hoffman; 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.	)

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

Appendix E

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 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 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

[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.

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 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 (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 (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 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 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 (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 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

[2] WBI Energy's contention that United States v. Miller, 317 U.S. 369 (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).

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 (1979) and its progeny.

B. Introduction of *Kimbell Foods*

"When Congress has not spoken 'in an area comprising issues substantially related to an established program of government operation,'" Kimbell Foods, 440 U.S. 715, 727 (1979) (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (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 (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

---

[3] In United States v. Bodcaw Co., 440 U.S. 202 (1979), the United States brought a condemnation action to acquire a permanent easement, not a private party.

(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 (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 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 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 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 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 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 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 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 (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.

Appendix E

1. <u>There is No Overriding Need for a Nationally Uniform Rule</u>

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 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. <u>Georgia Power</u>, 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." <u>Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell</u>, 352 U.S. 29, 33-34, (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) ("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, 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 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 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 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

Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

WBI Energy Transmission, Inc.,	)	
Plaintiff,	)	
vs.	)	
An Easement and Right-of-Way Across	)	Case No. 1:18-cv-078
189.9 rods, more or less, Located in Township 149 North, Range 98 W Section 11: W1/2SE1/4 Section14: NW1/4NE1/4	)	
227.8 rods, more or less, Located in Township 149 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 Section 11: NE1/4	)	
335.3 rods, more or less,	)	

Appendix F

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. Hoffman; 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.	)

JUDGMENT OF CONDEMNATION

Appendix F

Pursuant to its "Order Adopting Stipulation and Order for Entry of Judgment" filed on July 13, 2021, (Doc. No. 114) the Court **ORDERS** and **ADJUDGES** as follows:

1. Plaintiff WBI Energy Transmission, Inc. ("WBI Energy"), 1250 West Century Avenue, Bismarck, North Dakota 58503, brought this action under the Natural Gas Act, 15 U.S.C. § 717f(h), to condemn certain pipeline easements. This Judgment of Condemnation ("Judgment") vests WBI Energy with pipeline easements across the Defendants' lands described below, effective as of the Court's Order dated May 7, 2018 adopting the parties' stipulation for immediate use and possession (Doc. No. 19). This Judgment vests the easements on the "Pipeline Easement Terms" set forth below and on the alignments depicted in Exhibits 1, and 3–6 to the Condemnation Complaint (Doc. Nos. 1-2, 1-4, 1-5, 1-6, and 1-7) as incorporated below.

2. WBI Energy agreed not to condemn the temporary access road easement crossing the lands depicted in Exhibit 2 to the Condemnation Complaint (Doc. 1-3) and identified in the caption as:

> 227.8 rods, more or less, located in
> Township 149 North, Range 98 W
> Section 11: N1/2SW1/4, W1/2SE1/4

(the "Access Road Easement"). Accordingly, WBI Energy's claim to condemn the Access Road Easement for construction access is dismissed as moot pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), without compensation and without costs or fees to any party, as ordered in the Court's Order dated May 7, 2018 (Doc. No. 19).

3. Defendants' claims for just compensation as to the condemned pipeline easements are dismissed with prejudice, the amount of compensation having been resolved in a confidential settlement among the parties. Defendants have reserved their right to file a motion seeking recovery of attorney's fees and expenses, and Plaintiff has reserved its right to contest any such motion. Defendants' 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.

4. This Judgment shall be filed with the Recorder for McKenzie County, North Dakota.

5. The specific terms of the condemned easements are as follows:

PIPELINE EASEMENT TERMS

This Easement is made and entered into effective May 7, 2018, between WBI Energy Transmission, Inc., a Delaware corporation, 1250 West Century

Avenue, Bismarck, North Dakota 58503, its successors and assigns ("Grantee"), and the following named persons, herein, whether singular or plural, hereinafter ("Grantor") namely:

Defendants in this action, Civil No: 1:18-cv-00078-DLH-CRH.

WITNESSETH, that for valuable considerations received, Grantor does hereby grant unto Grantee, its successors and assigns, an easement fifty (50) feet in width, being twenty-five (25) feet left, and twenty-five (25) feet right of the center line as surveyed or as finally installed on the hereinafter described lands, together with the right to construct, operate, maintain, repair, increase the capacity of, remove, replace, and upon termination either abandon in place or remove, one natural gas pipeline not to exceed twenty-four (24) inches in diameter and any necessary equipment and facilities appurtenant to said pipeline, including marker posts which shall not be located in cultivated fields, through, over, under and across the following described real estate, situated in the County of McKenzie, State of North Dakota namely:

The lands described in the caption for this action, Civil No: 1:18-cv-00078-DLH-CRH,

As more particularly shown on Exhibits 1 and 3–6 to the Condemnation Complaint (See Doc. Nos. 1-2, 1-4, 1-5, 1-6, and 1-7) incorporated and made part hereof (the "Pipeline Easement").

Appendix F

Grantee shall have the right to temporarily utilize an additional fifty (50) feet of land outside the Pipeline Easement when constructing the pipeline. Grantee shall also be entitled to use such additional work space as may be reasonable and necessary at road crossings or other areas in which unusual construction problems may occur that require additional temporary work space.

Grantee shall have all the rights and benefits reasonably necessary for Grantee's exercise of the rights granted herein, including, but not limited to, the right of ingress and egress over and across the Pipeline Easement for the purpose of laying, constructing, maintaining, operating, repairing, replacing or removing the pipeline and for the purpose of doing all necessary work in connection therewith. Grantee shall also have the right to clear obstructions that, in Grantee's reasonable judgment, may injure, endanger, or interfere with the Pipeline Easement.

Grantor, its successors and assigns, agree not to build, create or construct or permit to be built, created, or constructed any obstruction, building, improvement, concrete, asphalt or any other structure or facility upon, over, or under the Pipeline Easement without the prior written consent of Grantee, such consent to be given or withheld by Grantee in Grantee's sole reasonable discretion. Notwithstanding the foregoing sentence, Grantor may convey other easements which permit the construction of certain improvements including pipelines and other utility lines, in, over, through, or across the Pipeline

Appendix F

Easement that do not endanger or interfere with Grantee's pipeline or Grantee's rights hereunder.

Grantee agrees to pay Grantor for any damage to crops, fences, buildings and improvements that are caused by the constructing, maintaining, repairing, operating, replacing or removing Grantee's pipeline, including payment for any cost set forth by the USDA office, if any, when crossing lands currently under CRP contract. The damages, if not mutually agreed upon, may be determined by three (3) disinterested persons, one (1) to be selected by Grantee and one(1) by Grantor; these two (2) shall select a third person. The award of these three (3) persons shall be final and conclusive.

Grantee agrees to install the pipeline in compliance with all applicable federal, state, and local statutes, laws, rules, regulations, and ordinances.

Grantee agrees to segregate up to twelve (12) inches of topsoil and replace the subsoil in the bottom of the trench first during backfill operations. Grantee shall bury the pipeline a minimum of forty-eight (48) inches below the surface in cultivated land.

Grantee agrees to restore the surface reasonably close to its original contour and to seed all non-cultivated areas disturbed by Grantee. In the event backfill subsequently settles below the level of adjacent land, Grantee agrees to restore the Pipeline Easement to the level of the adjacent land at Grantee's expense. All rock larger than four (4) inch which is excavated

from the pipeline trench and which cannot be placed back into the pipeline trench shall be removed and disposed of in an approved location(s).

In the event Grantee ceases to use the Pipeline Easement for the purpose stated herein for a period of five (5) consecutive years, Grantee shall, within a reasonable period of time, release the Pipeline Easement or file for abandonment with the appropriate regulatory body, as applicable. Grantee shall, within twelve (12) months from the release of the Pipeline Easement or receipt of regulatory abandonment approval, as applicable, either remove or abandon the pipeline in-place. Grantor shall also have the right to request, during the twelve (12) month period, that Grantee turn over full ownership of the pipeline to Grantor in which case Grantee shall have no further interest or liability therein.

Grantee agrees to defend, indemnify and hold harmless Grantor, its successors and assigns from and against all liability arising from claims, suits, actions, costs (including reimbursement for reasonable attorney's fees and costs of investigation), expenses, damages, losses, fines, interest, penalties, assessments, judgments, demands, causes of action and litigation/arbitration of any kind or character (individually, a "Claim" and collectively, "Claims") arising out of or are in any way connected with Grantee's (including Grantee's employees, agents, contractors, invitees, and others designated by Grantee) work on, about, or attendant to, the Pipeline Easement that may be imposed on, incurred by or asserted by a third party

against Grantor. Grantee shall have the sole authority to direct the defense or settle any Claim indemnified by Grantee; provided, that Grantor may monitor such matters through counsel of Grantor's choice and at Grantor's own cost; and provided, further, that Grantee may not settle any indemnified Claim unless such settlement includes a release of, and the consent of (not to be unreasonably withheld) Grantor.

With respect to Claims of negligence, (i) Grantee shall be responsible for that portion of any Claim represented by the percentage of Grantee's comparative negligence and those for which it is responsible, and (ii) if Grantor is determined to have been negligent, Grantee and Grantor shall be responsible solely for the amount represented by the percentage of their respective comparative negligence; provided, however, the foregoing shall not be deemed to relieve Grantee of Grantee's obligation to defend Grantor in any such Claim. Grantee agrees to pay all legal fees and associated fees arising from, in connection with or incident to the Claim, provided, however, that in the event there is a determination of comparative fault Grantor shall reimburse Grantee for the reasonable legal fees and associated fees in proportion to Grantor's allocated percentage of fault. No settlement of any such Claim against Grantor shall be made unless consented to in writing in advance by Grantor, which consent shall not be unreasonably withheld.

Grantee is hereby expressly granted the right to assign this Easement, or any part thereof, or interest therein.

Appendix F

This Easement may be executed in one or more counterparts each of which will be deemed an original, but all of which together shall constitute one and the same instrument.

If the Easement is located in the State of North Dakota, then it shall be limited to a term of 99 years.

IT IS SO ORDERED.

Dated this 13th day of July, 2021

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

Appendix G

NATURAL GAS ACT

15 U.S. Code § 717f(h)

Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.