

**2023 HOUSE ENERGY AND NATURAL RESOURCES**

**HB 1466**

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Energy and Natural Resources Committee Coteau AB Room, State Capitol

HB 1466  
2/9/2023

Relating to costs to landowners in eminent domain adjudicative proceedings.

3:38 PM

**Chairman Porter** opened the hearing. **Members present:** Chairman Porter, Vice Chairman D. Anderson, Representatives Bosch, Conmy, Dockter, Hagert, Heinert, Ista, Kasper, Marschall, Novak, Olson, Roers Jones, and Ruby.

### Discussion Topics:

- Inverse condemnation
- Eminent domain
- Section 32-15-32
- Adjudicative proceedings
- Attorney fees

**Representative Henderson, District 9B**, introduced bill in support (#20416).

**Lynn Boughey, Attorney for Landowner Litigation**, testified in support (#20351, 20385).

**Todd Kranda, Attorney with Kelsch Law Firm, representing North Dakota Petroleum Council**, testified in opposition (#20268).

3:51 PM **Chairman Porter** closed the hearing.

*Kathleen Davis, Committee Clerk*

*Minutes completed by Mary Brucker, Committee Clerk*

# 2023 HOUSE STANDING COMMITTEE MINUTES

## Energy and Natural Resources Committee Coteau AB Room, State Capitol

HB 1466  
2/10/2023

Relating to costs to landowners in eminent domain adjudicative proceedings.

10:43 AM

**Chairman Porter** opened the hearing. **Members present:** Chairman Porter, Vice Chairman D. Anderson, Representatives Bosch, Conmy, Dockter, Hagert, Heinert, Ista, Kasper, Marschall, Novak, Olson, and Roers Jones. **Members absent:** Representative Ruby.

### Discussion Topics:

- Committee vote

**Representative Heinert** moved a **Do Not Pass**.

**Representative Conmy** seconded the motion.

### Roll call vote:

Representatives	Vote
Representative Todd Porter	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Liz Conmy	Y
Representative Jason Dockter	Y
Representative Jared Hagert	Y
Representative Pat D. Heinert	Y
Representative Zachary Ista	Y
Representative Jim Kasper	N
Representative Andrew Marschall	N
Representative Anna S. Novak	Y
Representative Jeremy Olson	Y
Representative Shannon Roers Jones	Y
Representative Matthew Ruby	AB

**Motion carried 11-2-1**

**Representative Anderson** is the bill carrier.

**Chairman Porter** adjourned at 10:45AM.

*Kathleen Davis, Committee Clerk*

*Minutes completed by Mary Brucker, Committee Clerk*

**REPORT OF STANDING COMMITTEE**

**HB 1466: Energy and Natural Resources Committee (Rep. Porter, Chairman)**  
recommends **DO NOT PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING).  
HB 1466 was placed on the Eleventh order on the calendar.

**TESTIMONY**

**HB 1466**

**HOUSE BILL 1466**  
**Testimony of Todd D. Kranda**  
**House Energy and Natural Resources Committee**

- February 9, 2023 –

Chairman Porter and members of the House Energy and Natural Resources Committee, for the record, my name is Todd D. Kranda, I am an attorney with the law firm of Kelsch Ruff Kranda Nagle & Ludwig 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 600 companies in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in ND.

The North Dakota Petroleum Council is in opposition to HB 1466. This Bill attempts to modify the existing law relating to the availability of an award of attorney's fees and costs with an eminent domain proceeding. The modification proposed within HB 1466 by the inclusion of the term "adjudicative" within the eminent domain statute would now greatly expand and include a possible recovery of attorney's fees and costs in an agency's administrative proceeding.

However, the modification is confusing and completely inappropriate because there is no eminent domain legal process involved within any administrative agency process. The change proposed within HB 1466 attempts to greatly expand and start the clock for possible recovery of attorney's fees and costs well in advance of an eminent domain proceeding, if any, is actually commenced. The effort to establish an opportunity to receive an award of

attorney's fees and costs for an agency's administrative proceeding which occurs far in advance of any eminent domain legal process simply is not reasonable.

In fact, there may never be an eminent domain legal process pursued for a project and yet this Bill would attempt to start to tally and award attorney's fees and costs at the administrative agency proceeding which may discourage parties from reaching a reasonable resolution of a matter and encourage eminent domain litigation.

Therefore, the changes proposed under HB 1466 are inappropriate and completely unnecessary and could actually promote on-going disputes leading to eminent domain litigation rather than resolution of the matter. For these reasons, the North Dakota Petroleum Council strongly opposes HB 1466 and urges a **Do Not Pass Recommendation**.

Thank you for the opportunity to provide this information. I would be happy to answer any questions.

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

Keith and Deanna Kessler, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Minnesota Power, a Division of )  
 ALLETE, Inc. )  
 )  
 Defendant. )

**ORDER GRANTING DEFENDANT’S  
PARTIAL MOTION TO DISMISS  
ATTORNEY’S FEES CLAIM**

Case No. 1:22-cv-029

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Before the Court is a motion to dismiss Count 5 of the complaint, as it applies to attorney’s fees incurred before the North Dakota Public Service Commission, filed by Defendant Minnesota Power, a Division of ALLETE, Inc. (“Minnesota Power”) on February 15, 2022. See Doc. No. 7. Defendant Minnesota Power concurrently filed a Memorandum in Support of its Partial Motion to Dismiss on February 15, 2022. See Doc. No. 8. Plaintiffs Keith and Deanna Kessler (“Kesslers”) filed a response in opposition to the motion on March 8, 2022. See Doc. No. 17. Defendant Minnesota Power filed a reply brief on March 22, 2022. See Doc. No. 21. For the reasons set forth below, the Defendant’s motion is granted, as it applies to the attorney’s fees incurred during proceedings before the North Dakota Public Service Commission hearings.<sup>1</sup>

**I. BACKGROUND**

The Kesslers own property in Oliver County, North Dakota, namely: the Northwest Quarter of Section 15, Township 141 North, Range 87 West and a portion of the Southeast Quarter

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<sup>1</sup> If successful, reasonable attorney’s fees may still be recoverable by Plaintiffs in conjunction with the current action.



of Section 15, Township 141 North, Range 87 West, Oliver County, North Dakota. The Kesslers own numerous structures on the above-mentioned Northwest Quarter, including a structure that is allegedly used as a residence.

On May 3, 2013, Minnesota Power filed an Application with the North Dakota Public Service Commission (“PSC”) for a Certificate of Site Compatibility seeking authorization for construction of the Bison 4 Wind Project (“Bison 4”), consisting of up to 70 wind turbine generators and associated facilities in Oliver County, North Dakota. See Doc. No. 22-2, p. 1. On September 13, 2013, a jurisdictional and siting hearing was held regarding the Certificate of Site Compatibility Application before the PSC. Id. On September 25, 2013, the PSC issued Minnesota Power a Certificate of Site Compatibility (“Certificate”) for Bison 4. Id. at p. 9. Following the issuance of the Certificate, Minnesota Power moved forward with their wind project, including erecting Turbine 441 adjacent to the Kesslers’ property. See 1-1, p. 1. However, the Certificate issued by the PSC required that “no turbines will be placed within 1,400 feet of an occupied residence.” See Doc. No. 22-2, p. 7.

On July 25, 2019, following the completion of Turbine 441, the Kesslers filed an administrative complaint with the PSC alleging that the turbine was built too close to an occupied residence on the Kesslers’ property in violation of the Order Provisions incorporated in the Certificate. See 1-1, p. 2. Minnesota Power asserted that the structure on the Kesslers’ property was not an occupied residence, but never contacted the property owner to confirm its assertion. Id. On March 25, 2021, the PSC held a hearing concerning the Kesslers’ complaint and found: (1) Minnesota Power constructed Turbine 441 approximately 1,100 feet from the Kesslers’ structure, and (2) that the structure was occupied at the time of siting and, as such, violated the 1,400-foot

setback required by the Certificate issued by the PSC. Id. The PSC ordered Minnesota Power to remove Turbine 441 within six months. Id. at p. 3.

Having exhausted their administrative remedies with the PSC, on January 19, 2022, the Kesslers filed a civil action in Oliver County, North Dakota asserting claims for inverse condemnation, negligence, nuisance, loss of enjoyment of use of property, and attorney's fees. Minnesota Power removed the action to federal court on February 15, 2022. See Doc. 1. The Kesslers' claim for attorney's fees in their complaint seeks to recover attorney's fees incurred through the administrative action before the PSC as well as attorney's fees incurred in the current action. Id. at p. 7. In the present motion, Minnesota Power seeks to dismiss the claim for attorney's fees incurred in connection with the PSC proceedings. See Doc. 7. The motion has been fully briefed and is ready for disposition.

## **II. STANDARD OF REVIEW**

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint is sufficient if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The court must accept all factual allegations as true, except for legal conclusions or "formulaic recitation of the elements of a cause of action." Id. at 681. Detailed factual allegations are not necessary under the

Rule 8 pleading standard, rather a plaintiff must set forth grounds of its entitlement to relief which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not “suffice if it tenders a naked assertion devoid of further factual enhancement.” Ashcroft, 556 U.S. at 678 (2009). The determination of whether a complaint states a claim upon which relief can be granted is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 679. Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling plaintiff to relief. Ulrich v. Pop Cnty, 715 F.3d 1054, 1058 (8th Cir. 2013).

### **III. LEGAL DISCUSSION**

Count 5 of the complaint asserts a single claim for attorney’s fees, but the attorney’s fees sought in the complaint can be separated into two categories from which they originate: those in conjunction with the present inverse condemnation action and those incurred through administrative hearings before the PSC. The issue presented to the Court is whether the Kesslers’ claim for attorney’s fees incurred in conjunction with the PSC hearings fail to state a claim upon which relief can be granted. Minnesota Power contends that under North Dakota law, the Kesslers are not allowed to recover any attorney’s fees incurred in the PSC proceedings and the portion of Count five (5) of the complaint must be dismissed as a matter of law. The Kesslers oppose the motion and contend that they should be allowed to recover all attorney’s fees incurred in relation to the administrative complaint filed by the Kesslers in 2019. The Court agrees with Minnesota Power.

The well-settled “American rule” on the payment of attorneys' fees in federal litigation is that, in the absence of a statute or an enforceable contract, each party is responsible for his or her own fees. Actors' Equity Ass'n. v. Am. Dinner Theatre Inst., 802 F.2d 1038 (8th Cir. 1986) (internal quotations omitted). No contract exists here, so the court then turns to consider whether any statute permits the Kesslers to recover fees incurred during the PSC proceedings.

Section 32-15-32 of North Dakota Century Code provides in part: "The court may in its discretion award . . . reasonable actual or statutory costs or both . . . and reasonable attorney's fees for all judicial proceedings." United Power Ass'n v. Moxness, 267 N.W.2d 814, 817 (N.D. 1978). More specifically, the North Dakota Supreme Court has said that Section 32-15-32 authorizes the district court to award reasonable attorney's fees for all judicial proceedings in an eminent domain action. Mont.-Dakota Utils. Co. v. Behm, 2020 ND 234, 951 N.W.2d 208. However, the North Dakota Supreme Court has limited recovery of attorney's fees to litigation of claims asserting condemnation or inverse condemnation. Moxness, 267 N.W.2d at 817. The Kessler's action before the Court includes an inverse condemnation claim. Therefore, in order to determine whether the recovery of attorney's fees is permitted for the Kesslers, the Court must classify the administrative hearings before the PSC, determine the authority that governs those proceedings, and clarify the scope of “judicial proceedings,” as written in Section 32-15-32 of North Dakota Century Code.

The North Dakota Supreme Court in Moxness clearly stated that attorney's fees will not be awarded for siting and jurisdiction hearings before the PSC:

No language in §§ 32-15-32 or 32-15-35, NDCC, in any way indicates any intent on the part of the Legislature to extend the application of those provisions to proceedings provided for outside of Chapter 32-15. The Legislature, not this court, should make the decision of whether costs and attorney fees should be allowed to landowners who participate in PSC jurisdictional or siting hearings.

Id.

The Kesslers argue they should be permitted to recover attorney's fees incurred in conjunction with exhausting administrative remedies before the PSC because those were not siting and jurisdictional proceedings. The Kesslers self-labeled the subsequent proceedings following the filing of their administrative complaint in July of 2019 as "enforcement proceedings." The Kesslers claim the attorney's fees incurred in conjunction with the proceedings brought against Minnesota Power in 2019 should be awarded to them. To support their claim, the Kesslers argue that the later "enforcement proceedings" were necessary exhaustive remedies to obtain a ruling that Minnesota Power violated the original PSC order as a "precondition to this inverse condemnation action." See Doc. 17, p. 4-5. Further, the Kesslers attempt to distinguish established case law and highlight public policy considerations.

The Kessler's arguments made to distinguish the later PSC hearings from the siting and jurisdictional proceedings are noted, but the Court is not convinced. Rather, the self-labeled "enforcement proceedings" were additional, subsequent siting and jurisdictional proceedings. Regardless of how the Kesslers want to characterize these proceedings, they ultimately were before the PSC to enforce a 1,400-foot setback violation for the placement of Turbine 441. This is a siting and jurisdictional issue. On August 4, 2021, the PSC's preliminary statement even references the matter as "a complaint concerning the siting of ALLETE, Inc.'s (ALLETE's) Bison 4 Wind Project (the Project) Turbine 441." See Doc. No. 22-1. Accordingly, the subsequent proceedings the Kesslers participated in before the PSC are classified as an extension of the earlier siting and jurisdictional proceedings. Thus, Moxness controls and the attorney's fees incurred by the Kesslers before the PSC are unrecoverable.

Alternatively, if the subsequent proceedings before the PSC are not to be considered siting and jurisdictional proceedings, the Court must determine how the PSC proceedings should be

classified. This is a vital determination because, in the event that Moxness would not control, Section 32-15-32 authorizes the district court to award reasonable attorney's fees for all judicial proceedings in an eminent domain action. A definition for "judicial proceeding" is absent from any North Dakota statute. However, the Court finds that the hearings before the PSC are more akin to an "adjudicative proceeding." Section 28-32-01(1) provides in part:

"Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening.

N.D.C.C § 28-32-01(1)

"Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government. N.D.C.C § 28-32-01(2). The administrative hearings before the PSC fit squarely into North Dakota's definition of an adjudicative proceeding. Consequently, the hearings before the PSC cannot be considered "judicial proceedings" and the Kesslers are not entitled to attorney's fees that were incurred in conjunction with those administrative hearings.

While the Court may even agree with some of the public policy considerations raised by the Kesslers, the case law in North Dakota does not permit recovery. It is well-understood that the Plaintiffs seek to differentiate the "enforcement proceedings" from the siting and jurisdictional proceedings. However, the self-labeled "enforcement proceedings" were merely an extension of the jurisdictional and siting proceedings. This Court cannot expand the scope of Section 32-15-32 so far as to include the PSC proceedings under the umbrella of "judicial proceedings," as written in Section 32-15-32 because the hearings were, instead, "adjudicative proceedings."

In their claim for attorney's fees, the Kessler's seek fees in conjunction with this action and those incurred before the PSC. If the Kesslers are successful in demonstrating an inverse condemnation claim, they may still be able to recover attorney's fees incurred in this action. However, North Dakota law does not entitle the Kesslers to recover attorney's fees arising from the PSC proceedings.

**IV. CONCLUSION**

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, Minnesota Power's motion to dismiss the attorney's fees claim (Doc. No. 7) is **GRANTED**, as it relates to the fees incurred in conjunction with the PSC hearings.

**IT IS SO ORDERED**

Dated this 11th day of July, 2022.

*/s/ Daniel L. Hovland*

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Daniel L. Hovland, District Judge  
United States District Court

## **Testimony of Attorney Lynn Boughey regarding House Bill No. 1466**

**February 9, 2023**

Mr. Chairman and members of the committee,

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

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

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

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

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

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

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



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

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

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

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

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

I will now be pleased to stand for questions.

House Bill 1466

Chairman Porter and Committee,

For the record I am Representative Donna Henderson from District 9B in Northeastern North Dakota, serving the great people of parts of Cavalier, Towner and Rolette counties.

I am here to introduce House Bill 1466

This is a bill seeking to add only 2 words to current century code.

It would allow landowners in certain eminent domain cases, who are successful in the court, to be awarded attorneys fees for adjudicative proceedings as well as judicial proceedings.

I'm here to give this very basic introduction, and I have the attorney who handled this case here to explain it much better than I, and who is much better equipped to answer your questions about this bill.

Thank you, Chairman Porter and committee.

Representative Donna Henderson