

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

NORTHERN NATURAL GAS COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 80 ACRES OF LAND IN THURSTON)
 COUNTY, NEBRASKA; UNITED STATES)
 OF AMERICA; PATRICIA E.)
 ABATANGELO, aka PATRICIA PETTIT)
 SOLOMON; CORA N. SOLOMON;)
 MARIANNE SOLOMON WIGGANS;)
 CHRISTINE MARIE SOLOMON;)
 KATHERINE SOLOMON; WILBUR)
 SOLOMON; MICHAEL ANDREW)
 SOLOMON; NOLAN J. SOLOMON; AND)
 UNKNOWN OWNERS,)
)
 Defendant.

CASE NO. 8:17-CV-328

NORTHERN NATURAL GAS
COMPANY’S STATEMENT OF
FACTS AND BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

PLAINTIFF NORTHERN NATURAL GAS COMPANY’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Northern Natural Gas Company (“Northern”) respectfully submits this Brief in support of its Motion for Summary Judgment. The Court has previously entered partial summary judgment on Plaintiff’s right to condemn the rights of way at issue and set the matter for trial on the sole issue of establishing the value of the condemned interest. (Filing No. 49) Discovery has now concluded and Plaintiff filed the instant Motion for Summary Judgment because there is no dispute regarding the value of the condemned interest. The undisputed evidence establishes that the total value of the condemned interest is no more than \$3,718 (\$734 for parcel 742-4 and \$2,984 for parcel 742-2).

In support of its Motion, Plaintiff offers the appraisals of two experts. The first, David Baker, is a certified appraiser hired by Plaintiff with experience in appraising the value of existing utility easements such as the one at issue. The second is the appraisal of Pat McGlamery, Staff Appraiser for the Eastern Oklahoma Region of the United States Department of Interior's Bureau of Indian Affairs ("BIA"). Both of the expert appraisers use the preferred "before and after" appraisal method and both conclude that the value of the renewal of existing pipeline easements is \$0 because there is no appreciable impact to the land or its use. Baker, however, also renders an opinion using the "takings plus damages" approach and concludes that the value of the Northern ROW is \$3,718 (\$734 for parcel 742-4 and \$2,984 for parcel 742-2).

The only party to enter an appearance is Nolan Solomon, pro se. He provides no reliable methodology for determining value and did not retain or identify any expert witnesses. He does not disagree with the expert appraisals and admits that he has no opinion of the value of the renewal. No other party (other than the United States) has entered an appearance in any capacity. Therefore, there is no disputed issue of material fact and trial is unnecessary. The Court may enter a finding that the value of the rights of way at issue in the Amended Complaint is no more than \$3,718.

II. STATEMENT OF FACTS

1. Northern owns, operates, and maintains nearly 15,000 miles of pipelines, under certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission, from Texas to the upper peninsula of Michigan that provide natural gas transportation and storage services to customers throughout the Midwest. (Kruger Dec. ¶ 2)

2. Portions of three of Northern's pipelines (the Sioux City 16" Main Line, the Sioux City 18" Main Line, and the Sioux City 24" Main Line) (collectively "Northern Pipelines") cross

lands of the reservation of the Tribe. Included in these lands are Omaha tribal lands (“Tribal Lands”) and individually owned Indian lands (“Allotted Lands”). (Kruger Dec. ¶ 3)

3. An easement granting a right-of-way (“ROW”) for the operation, maintenance, and repair of the Northern Pipelines across the Tribal lands and the Allotted Lands was issued by the Secretary of the Interior (“Secretary”) through the Bureau of Indian Affairs (“BIA”) on March 14, 1996 (“Northern ROW”). (Kruger Dec. ¶5 and Ex. 1)

4. The Allotted Lands covered by the Northern ROW included, among others, the lands at issue in this condemnation action, which are legally described and referred to as follows:

a. SW1/4 SW1/4 Section 1, Township 25 North, Range 8 East of the 6th P.M., Thurston County Nebraska (“Allotment No. 742-2”).

b. NW1/4 SW1/4 Section 1, Township 25 North, Range 8 East of the 6th P.M., Thurston County Nebraska (“Allotment No. 742-4”).

c. Allotment Nos. 742-2 and 742-4 are collectively referred to herein as “the Allotments at Issue.” (Kruger Dec. ¶ 4)

5. Prior to the expiration of the Northern ROW, Northern provided its Notice of Intent to Renew to the BIA and initiated the application process with the BIA for the renewal of the rights-of-way easements pursuant to 25 U.S.C. 32-328. (Kruger Dec. ¶ 6)

6. The three easements Northern seeks to acquire across each of Parcel One and Parcel Two (as shown on the plats of the proposed easements which are attached to the Kruger Declaration as Exhibit “1”), are centered on and in the same location as the Northern existing installed gas pipelines and are for a period commencing February 8, 2016 and expiring February 9, 2046. The easements are for purposes of allowing Northern to construct, maintain, operate, inspect, repair, replace, protect, alter, and remove pipelines and below ground appurtenances, including cathodic protection apparatus, on, over, under, across, and through a strip of land one

hundred feet (100') in width, together with the right of ingress to and egress from said right-of-way across the adjacent property of the individual defendant claiming an interest (“Interest Holder”) for the purpose of surveying and clearing the right-of-way of brush, trees, and obstructions, and for constructing, maintaining, operating, inspecting, repairing, replacing, protecting, altering, or removing the pipelines and appurtenances of Northern located thereon, in whole or in part, at the will of the Northern. The easements are to be subject to the right of the Interest Holders to use the property for all purposes which will not interfere with the use of the right-of-way for Northern’s purposes; provided, however, that no building, structure, improvement, landscaping or obstruction, other than ordinary and usual agricultural fences, shall be placed within or upon the easement by Interest Holders and no alteration of the ground surface or grade of the right-of-way shall be made by the Interest Holders without the Northern’s express written consent and the Northern shall not be liable for damages caused on the right-of-way by keeping the right-of-way clear of such trees, brush, undergrowth, landscaping, buildings, structure, improvements, residential fences and other obstructions in the exercise of its rights. (Kruger Dec. ¶ 6, Ex. 1)

7. On September 8, 2017, Northern filed the present condemnation action under Neb. Rev. Stat. Sec. 57-1101 and 25 U.S.C. § 357 to obtain rights-of-way across the Allotments at Issue. (Filing No. 1) Northern requests the renewal of the requested easements pursuant to these statutory sections for public purposes under its certificates of public convenience and necessity. (Kruger Declaration ¶ 8)

8. On December 4, 2017, Northern and the Tribe entered into an agreement for the renewal of Northern’s ROW over the Tribe’s lands (“Tribal Agreement”). (Kruger Dec., Ex. 3)

9. On December 7, 2017, the Tribe’s Tribal Council passed Resolution No. 18-15 (“Tribal Resolution”). (Kruger Dec., Ex. 4).

10. On December 12, 2017, the BIA's Winnebago Agency ("Agency"), "for, and on behalf of and with the consent of the Tribe (the GRANTOR) and under the Act of February 5, 1948,"¹ issued to Northern a grant of right-of-way across described Tribal Lands ("New ROW Grant"). (Kruger Dec., Ex. 5)

11. The term of the New ROW Grant is February 8, 2016 to February 7, 2046. (Kruger Dec., Ex. 5, at ¶ 2)

12. The Court has previously entered an order for summary judgment in favor of Northern establishing Northern's rights to condemn the Northern ROW. (Filing No. 45)

13. There are no further objections to Northern's request for relief.

III. ARGUMENT

A. Standard of Review

"Summary judgment is proper only when if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Cosby v. Steak N Shake*, 804 F.3d 1242, 1245 (8th Cir. 2015); *Torgerson v. City of Rochester*, 643 F.3d 1031 F.3d 1031, 1042 (8th Cir. 2011) (en banc). The moving party bears the initial responsibility of asserting the basis for its motion. *See id.* However, "[o]nce the moving party makes a prima facie case by producing evidence that he or she is entitled to judgment as a matter of law, the burden of production shifts to the non-moving party to produce evidence establishing that there is a genuine issue of material fact." *Reznicek v. Michael's Stores, Inc.*, 2015 WL 10373583 (D. Neb. 2015) (citing *Fontenelle Equipment v. Pattlen Enterprises*,

¹ The referenced "Act of February 5, 1948," codified at 25 U.S.C. § 323 (Indian ROW Act), empowers the Secretary of the Interior to grant rights-of-way over and across Indian lands, subject to such conditions as the Secretary may prescribe. The BIA's regulations governing Indian ROW Act rights-of-way are found at 25 C.F.R. Part 169.

Inc., 262 Neb. 129, 133, 631 N.W.2d 534, 539 (2001). Once the burden has shifted, “[t]he nonmoving party ‘must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial.’” *Graham Constr., Inc. v. Markel Am. Ins., Co.*, 180 F. Supp. 3d 626, 632 (D. Neb. 2016)(quoting *Briscoe v. Cnty. of St. Louis*, 690 F.3d 1004, 1011 (8th Cir. 2012). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Graham Constr., Inc.*, 180 F. Supp. 3d at 632 (internal quotes omitted) (quoting *Quinn v. St. Louis Cty.*, 653 F.3d 745, 751 (8th Cir. 2011).

B. There Is No Issue of Material Fact Regarding Northern’s Right to Condemnation.

Northern’s right to condemnation was confirmed by the Court in the prior Order granting Partial Summary Judgment in favor of Northern. (Filing No. 49). Northern seeks condemnation of the easements for public purposes under its certificate of public convenience and necessity pursuant to 25 U.S.C. 327, which authorizes such condemnations. There is no issue of material fact precluding the grant of such easements and, for reasons otherwise determined in the prior order of partial summary judgment, Northern is entitled to the requested relief without further need for trial.

C. There is No Issue of Material Fact Regarding the Value of Northern’s ROW and the Only Evidence Establishes that the Value is no more than \$3,718.

To establish the value of an easement Nebraska state and federal courts use the “before and after” method to establish fair market value. In other words, the value is the difference between the value of the land before and after the taking. Because the Northern ROW is merely the renewal of a pipeline easement for existing utility lines, there is no change in the value before and after the extension.

Nebraska courts set forth general standards of easement value based upon fair market value. “The measure of damages for the taking of an easement is the difference between the reasonable market value of the property before and after the taking of the easement.” *Liberty Development Corp. v. Metropolitan Utilities Dist. Of Omaha*, 751 N.W.2d 608, 616 (Neb. 2008) (concerning MUD’s condemnation of property for permanent and temporary construction of water distribution system). The standard is set forth by the Nebraska Supreme Court in *Wolfe v. State, Dept. of Roads*, 127 N.W.2d 721, 723 (Neb. 1965):

The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. *Fulmer v. State Department of Roads*, 178 Neb. 664, 134 N.W.2d 798. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a method which separately values the easement or right that is taken.

In a particular case, the rule may result in a determination that the landowner is entitled to no compensation for the taking of an easement. *Fulmer v. State Department of Roads, supra*. There was evidence in this case that the value of the plaintiff’s property was the same after the taking as it was before the taking.

The same measure of damages for easements is also used in federal courts. “When land is taken by eminent domain, and the title acquired is not a fee but an easement, the proper measure of damages is the difference between the market value of the land free of the easement and the market value as burdened with the easement.” *U.S. v. 1,129.75 Acres of Land*, 473 F.2d 996, 998 (8th Cir. 1973) (concerning the taking of a flowage easement for a flood control project).

Here, the undisputed evidence shows that the before and after method yields a value of \$0. (Baker Dec. Ex. 1, 2; United States Responses to Requests for Admissions). This is the opinion of both Baker and McGlamery, the only experts to offer evidence on valuation.

Solomon offers no expert evidence and cannot offer any admissible evidence on value. This is not a situation where there is a taking and a landowner’s opinions may have some

evidentiary value. This is a specialized interest in the form of a continuation of an existing underground easement for a pipeline in place. It does not impact the use of the property in any way.

Solomon has no training in valuation of real property. (Solomon Dep. 15:24-16:1; 18:21-19:1; 24:3-11). He is not a licensed appraiser nor has he received any certifications regarding land values. (Solomon Dep. 19:2-12). He is unfamiliar with the process used by licensed appraisers to determine value. (Solomon Dep. 23:18-22)

In fact, he was employed as a Superintendent for the Bureau of Indian Affairs in both Sisseton, SD and Winnebago, Nebraska and in that capacity he relied on certified appraisers for valuations of easements. (Solomon Dep. 19:14-20:14). Mr. Solomon was actually working as a Superintendent for the Winnebago Tribe in 1996 when the pipeline easement at issue was approved by the BIA. (Solomon Dep. 21:2-22)

With respect to the Northern ROW, Solomon testified that he had no opinion about the value of the easements. (Solomon Dep. 38:1-6) Solomon testified that he had an amount he would like to be paid, but admitted that this was not based on the value of the land, rather the value he perceived based on the diameter of the pipelines themselves. (Solomon Dep. 37:17-25, Ex. 6) He was unable to cite to any industry standard or even source for his analysis of what he would accept as payment for the easement. (Solomon Dep. 41:3-42:24) Solomon concedes that the methodology used by McGlamery is correct and has no basis to dispute his conclusions. (Solomon Dep. 48:5-17). McGlamery's conclusion is that the value of the Northern ROW is \$0. (United States Responses to Requests for Admissions Nos. 1 and 2).

The updated appraisal by David Baker concludes that the value of the Northern ROW is no more than \$3,718 (\$734 for parcel 742-4 and \$2,984 for parcel 742-2). Though the traditional

and accepted before and after approach yields a value of \$0, Baker employs the “taking plus damages” and assigns a nominal value to the easements. (Baker Declaration, Exs. A and B).

In summary, Solomon does not have any skills or training that provide him with any foundation to offer any opinion about the value of the extension of an existing pipeline easement. Further, he admits that he does not have any opinion of the value of the easement and does not dispute the McGlamery appraisal. Therefore, a trial is unnecessary because there are no issues of material fact regarding the value of the Northern ROW. The only remaining question is whether the value is \$0 or \$3,718 and Northern will concede for the purposes of this Motion that the value for the Northern ROW on parcel 742-4 is \$734 and the value of the Northern ROW on parcel 742-2 is \$2,984.

IV. CONCLUSION

For all of the reasons set forth herein, Plaintiff Northern Natural Gas respectfully requests that its Motion for Summary Judgment be granted and that the Court enter the following orders:

1. Conditioned upon deposit with the Clerk of the amounts referenced below, Northern is entitled to a judgment establishing its right of way easement to wit:

Three easements across each of Parcel One and Parcel Two (as shown on the plats of the proposed easements attached to the Amended Complaint as Exhibit “B” and as legally described on Exhibit C thereto), for a period commencing February 8, 2016 and expiring February 9, 2046. The easements are for purposes of allowing Plaintiff to construct, maintain, operate, inspect, repair, replace, protect, alter, and remove pipelines and below ground appurtenances, including cathodic protection apparatus, on, over, under, across, and through a strip of land one hundred feet (100') in width, together with the right of ingress to and egress from said right-of-way across the adjacent property of the Interest Holder for the purpose of surveying and clearing the right-of-way of brush, trees, and obstructions, and for constructing, maintaining, operating, inspecting, repairing, replacing, protecting, altering, or removing the pipelines and appurtenances of Plaintiff located thereon, in whole or in part, at the will of the Plaintiff. The easements are to be subject to the right of the Interest Holders to use the property for all purposes which will not interfere with the use of the right-of-way for Plaintiff’s purposes; provided, however, that no building, structure, improvement, landscaping or obstruction, other than ordinary and usual agricultural fences, shall be placed within or upon the easement by Interest Holders and no alteration of the

ground surface or grade of the right-of-way shall be made by the Interest Holders without the Plaintiff's express written consent and the Plaintiff shall not be liable for damages caused on the right-of-way by keeping the right-of-way clear of such trees, brush, undergrowth, landscaping, buildings, structure, improvements, residential fences and other obstructions in the exercise of its rights.

2. That the value of the Northern ROW on Omaha Allotment 742-4 is \$734 and the value of the Northern ROW on Omaha Allotment 742-2 is \$2,984.

DATED this 31st day of August, 2018.

Attorneys for Plaintiff NORTHERN
NATURAL GAS COMPANY

By: s/Kristopher J. Covi

Kristopher J. Covi (21462)
McGrath North Mullin & Kratz, PC LLO
First National Tower, Suite 3700
1601 Dodge Street
Omaha, Nebraska 68102
(402) 341-3070
(402) 341-0216 fax
Kristopher J. Covi
kcovi@mcgrathnorth.com

CERTIFICATE OF SERVICE

I certify that on the 31st day of August, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record who participate in the CM/ECF system and by US Mail, postage prepaid to the following interested parties who do not participate in the CM/ECF system:

Nolan J. Solomon, Pro Se
630 Truman Circle
Bosque Farms, NM 87068

Katherine Solomon
Address Unknown

Michael Andrew Solomon
36468 Cougar Place
Murrieta, CA 92563

Marianne Solomon Wiggans
21741 Rushford Drive
Lake Forest, CA 92630

Patricia E. Abatangelo
2419 Richmond Way
Costa Mesa, CA 92626

Wilbur Solomon
1702 Barona Road
Lakeside, CA 92040

Christine Marie Solomon
146 Redwood Ave., Apt. B
Carlsbad, CA 92008

Cora Solomon
300 Maple Street
Winnebago, NE 68071

s/Kristopher J. Covi