IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27381

Mark and Marilynn Long, Arnie and Shirley Van Voorst, Tim and Sara Doyle, Timothy and Jane Griffith, and Michael and Karen Taylor,
Plaintiffs and Appellants,

v.

State of South Dakota,
Defendant and Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Patricia Riepel
Circuit Court Judge

APPELLANTS' BRIEF

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Notice of Appeal filed on the 3rd day of March, 2015

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JURISDICTIONAL STATEMENT

This is an appeal from a final order dated January 16, 2015. *See:* SDCL § 15-26A-3(4). Notice of the entry of the order was given on February 6, 2015 and the appeal perfected within thirty days on March 3, 2015.

STANDARD OF REVIEW

The construction of a statute and its application to a particular set of uncontested facts are reviewed de novo. *Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55 lists several South Dakota cases noting the de novo standard is to be used to determine the intent of the legislature in passing a statute.

LEGAL ISSUES

I. Did the Legislature intend to adopt the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) by reference with the passage of 1972 Session Laws, Chapter 136 which is codified as SDCL § 5-2-18?

The trial court made no conclusion of law.

South Dakota v. Dole, 483 US 203, 107 S. Ct. 2793, 2796, 97 L.Ed. 2d 171 (1987).

State v. Johnson, 84 S.D. 556, 557, 173 N.W.2d 894, 895 (1970).

Moss v. Guttormson, 1996 S.D. 76, § 10, 551 N.W.2d 14, 17.

II. Has South Dakota by legislation authorized trial courts to award the litigation expenses of successful inverse condemnation plaintiffs?

The trial court denied attorney fees and costs because of its interpretation of *Rupert v. City of Rapid City* 2013 S.D. 13, 827 N.W.2d 55.

Moss v. Guttormson, 1996 S.D. 76, § 10, 551 N.W.2d 14, 17.

West Virginia Dept. of Transp. Div. of Highways v. Dodson Mobile Homes Sales and Services, Inc. 624 S.E.2d 468 (W.Va. 2005).

Estate of Kirkpatrick v. The City of Olathe, 289 Kan. 554, 215 P.3d 561.

42 USC §§ 4653, 4654 and 4655 (2006).

49 C.F.R. § 24.107.

STATEMENT OF THE CASE

This case began with a flood of Appellants' property on July 30 and 31, 2010. The Trial Court found the cause of the flood and damage to property was the State's reconstruction of Highway 11 and therefore a constitutional taking or damaging had occurred. The reconstructed highway culverts caused drainage waters to be diverted upon Plaintiffs' property. A jury awarded damages to each Plaintiff. The State has filed an appeal in the underlying case. (Appeal No. 27368).

This appeal is from an order denying expert witness fees, disbursements, attorney fees and other costs to the successful Plaintiffs.

The Plaintiffs claim that because the State has made assurances to the federal government through its adoption by reference of the federal real property acquisition policies, it must pay the costs of successful inverse condemnation claimants. The assurance has been given with the passage of Chapter 136 of the 1972 Session Laws, codified as SDCL § 5-2-18. The statute was updated in 1988 upon passage by Congress of Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17). (Hereafter Act.) Secondly, the State and its

subdivisions sign statements of assurance required by 42 U.S.C. § 4655 as a condition to obtain federal funds on an ongoing basis.

FACTS OF THE CASE

The essential facts for the determination of this appeal are not in dispute.

The State of South Dakota repaired Highway 11 in Lincoln County in the spring of 2010. The Plaintiffs' real estate was flooded on July 30 and 31, 2010.

The trial court conducted a trial on Plaintiffs' inverse condemnation claim and found for the Plaintiffs. (See South Dakota Supreme Court Case No. 27368). A jury awarded each Plaintiff damages after a trial on the damages portion of the case.

The Plaintiffs made a motion under SDCL § 5-2-18 and the Act for attorney fees, expert witness fees, and other costs and disbursements. (S.R. 863). The Trial Court denied the request without opinion based upon reliance upon *Rupert v. City of Rapid City*, 2013 S.D. 13. (Appx. 1).

The facts are not in doubt that the State has authorized the branches of state government to give the necessary assurance of the compliance with the federal policies found in the Act in order for the State to obtain federal funds.

The facts are not in dispute that the State gives yearly assurances that DOT will comply with the Act. Otherwise, the State would not have obtained over $1.5 Billion Dollars in federal highway funds during the years since 2010 while this case was pending, the State adoption of the land acquisition policies found in the

federal act and regulations permit the continued flow of hundreds of millions of dollars for South Dakota highways.

ARGUMENT

I. The American Rule of Attorney Fees

South Dakota has codified the American Rule for attorney fees. SDCL § 15-17-38. Numerous South Dakota cases have so held.

"This Court has rigorously followed the rule that authority to assess attorney fees may not be implied but must rest upon a clear legislative grant of power." *In Re Estate of O'Keefe*, 1998 S.D. 92, § 17, 583 N.W.2d 138, 142. One of the two exceptions to the rigorously enforced American Rule is "attorney fees may be awarded if 'an award of attorney's fees is authorized by statute.'" *Rupert v. City of Rapid City*, 2013 S.D. 13, § 32, 827 N.W.2d 55.

II. Federal Funding of South Dakota Highways

South Dakota is dependent upon the federal government for highway and airport funding. The State relies on federal grants of money for approximately 65% of its highway construction and maintenance funds. (Appendix 4, Admissions). South Dakota has a history of complying with federal mandates in order to obtain federal cash.

"Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power to further broad objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." (citing cases) *South Dakota v. Dole*, 483 US 203, 107 S. Ct. 2793, 2796, 97 L.Ed. 2d 171 (1987).

Congress forced South Dakota to comply with a 21 year old drinking age or lose 5% of its federal highway funds. The South Dakota Legislature amended the law, accepted the federal policy and took the money. *See*: SDCL § 35-9-4.1 and 1987 Session Laws, Chapter 261.

This case involves a federal statute that requires the State to adopt federal policies of land acquisition as a condition to receive federal funds. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) requires the states to give assurances as a condition of federal assistance. Section 42 USC § 4655 states in part:

> (a) …the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that--
>
> (2) Property owners will be paid or reimbursed for necessary expenses as specified in section 4653 and 4654 of this title.

The legislative history makes clear that Congress understood the act to create a policy that required payment of inverse condemnation fees. The House report states:

> Section 304 would authorize the reimbursement of owner of any right…in real property for reasonable

> expenses of litigation… where…a property owner brings an action in the nature of inverse condemnation and obtains an award of compensation (Tucker Act).
>
> *See* H.R.No.91-1656, 91st Congress 2nd Sess., US Code Congressional and Administrative News 1970, p. 1574-1575.

The federal regulations created by authority of the Act are found at 49 Transportation, CFR § 24.

Section 49 C.F.R. § 24.107 requires the State to pay plaintiff's inverse condemnation expenses:

> 49 C.F.R. § 24.107 Certain Litigation Expenses: The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:
>
> (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding. Source: 70 FR 612, Jan. 4, 2005, unless otherwise noted.

The Comptroller General in a letter to Senator John Stennis and Representative G.V. Montgomery on May 23, 1979 explained of the act:

> Real Property – Acquisition – Condemnation Proceedings – Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970
>
> Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, 84 Stat. 1894, 42 U.S.C. 4601 et seq. (1976), sets forth uniform and equitable procedures for the taking of real property by federal government or by state agencies receiving federal financial assistance. Pursuant to Section

> 305, Provisions of Title III are Mandatory, to the extent practicable, upon states as condition to their receipt of federal financial assistance. Title III is applicable to acquisition of any interest in real property. Including easements, even where acquisition is funded solely by local funds, if underlying program or project is federally administered or assisted.

Page 1, 58 Comp. Gen 599, B-1.92863, 1979 WL 14974.

The federal statutes and regulations require payment of successful inverse condemnation claimant's litigation expenses.

III. What did the Legislature Intend to Accomplish by the Passage SDCL § 5-2-18?

"When the language in a statute is clear, certain and unambiguous, there is no reason for statutory construction, and the Court's function to declare the meaning of the statute as clearly expressed." *Moss v. Guttormson*, 1996 S.D. 76, § 10, 551 N.W.2d 14, 17.

"[T]he true intention of the law…is to be ascertained primarily from the language expressed in the statute." *State ex rel. Dept. of Transp. v. Clark*, 2011 S.D. 20, § 5, 798 N.W.2d 160, 162.

SDCL § 5-2-18 was initially enacted in 1972 Chapter 136 in order to continue to obtain federal highway funds. The statute was amended in 1988, SL, Chapter 48, § 1 as a result of the passage by Congress of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17). The updating of state statutes swept like a wave over the Country securing the continued flow of federal funds. (See example West Virginia Laws, Chapter 1, Acts of 1990 amending W.V. Code § 54-3-1 to 5).

The State statute, SDCL § 5-2-18, provides the assurance required by 42 U.S.C. § 4655 that the State of South Dakota will comply with federal acquisition policies.

The clear intent of the passage of the 1972 and 1988 Session Laws was to enable state officials to give the federal government the assurance the State would comply with the Act. The result of compliance was the State's desire to receive federal funds in the future. The plain meaning of the two session laws is to give assurance under 42 U.S.C. § 4655 that all programs in South Dakota would comply "with the acquisition policies contained in said federal act." SDCL § 5-2-18.

The title of an act may be considered in determining the Legislature's intent. The title to the 1972 Session Law is:

> Authorizing State and Political Subdivisions to Provide Relocation Assistance in Federally Assisted Projects
>
> An Act Entitled, an Act relating to the acquisition of land for federally assisted projects, and providing for relocation assistance to persons displaced as a result thereof and for acquisition practices in connection therewith.

The title's language directs the reader's attention to "acquisition practices." The law is then enacted as follows:

> *Be It Enacted by the Legislature of the State of South Dakota:*
>
> Notwithstanding any other law, the state of South Dakota, its departments, agencies, instrumentalities or any political subdivisions are authorized to provide relocation benefits and assistance to

> persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures in connection with federally-assisted projects to the same extent and for the same purposes as provided for in the uniform relocation assistance and real property acquisition 8 1970 (P.L. 91 646), and to comply with all the acquisition policies contained in said federal act.

The title's plain meaning is to adopt by statute the federal law and policy on inverse condemnation attorney fees and other federal policies. The words "to comply with all the acquisition policies" is a complete acceptance of the federal policies by force of statute.

This Court made clear by its decision in *Independent Community Bankers Ass'n of South Dakota, Inc. v. State by and Through Meierhenry*, 346 N.W.2d 737 (S.D. 1984) several points of law important to the review of SDCL § 5-2-18.

The Court made clear (1) "The South Dakota Legislature may enact statutes, including statutory definitions, which adopt by reference statutory definitions." ICBSD, *supra*, p. 745 (2) "Statutes adopting laws or regulations of … the federal government…effective at the time of adoption are valid…" *State v. Johnson*, 84 S.D. 556, 557, 173 N.W.2d 894, 895 (1970), quoted in *Comm. Bankers, supra*, p. 744, see also *Schryver v. Shrimer*, 171 N.W.2d 634 (S.D. 1969). In common language, the adoption of statues and regulations by reference by the Legislature intellectually reprints the whole of the federal writing into the pages of South Dakota's code books.

The result of the passage of SDCL § 5-2-18 permits the DOT to comply with federal eminent domain policy in order to fund 65% of its budget. Clearly,

the Legislature intended the executive branch to follow all portions of the federal acquisition policies in order to get federal cash.

SDCL § 5-2-18 is an example of a "specific reference" statute. *See Sutherland Statutory Construction*, 6th Edition, Vol. 2B, § 51.06-51.07. The South Dakota statute specifically adopts the whole of the federal act creating eminent domain policy for programs that accept federal funds. *See*: *Looking Glass Law*; *Legislation by Reference in the States*, 68 La.L.Rev. 1201, Louisiana Law Review, 2008.

The Legislative intent "is clear, certain and unambiguous" in its direction that:

> … to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17), and may comply with all the acquisition policies contained in said federal act.
>
> SDCL § 5-2-18.

The policy of the federal government is to pay the litigation costs of successful inverse condemnation plaintiffs and is now a statutory direction of the South Dakota Legislature.

IV. Why Rupert v. City of Rapid City is not controlling authority

The successful inverse condemnation plaintiffs made a request for attorney fees in *Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55. The Plaintiffs in *Rupert* filed their motion by referenced of SDCL § 21-35-23.

The Court held that SDCL § 21-35-23 is to be strictly construed and it does not authorize fees for inverse condemnation fees to successful plaintiffs.

The claim here is not made under SDCL § 21-35-23 nor do plaintiffs attack the American Rule on attorney fees. Thus *Rupert*, which discussed no issue raised here, can be of no support for the nonpayment of attorney fees required by the State's passage of SDCL § 5-2-18.

V. Other States' Supreme Courts have Considered the Attorney Fee Requirement

Most states had by statute approved inverse condemnation fees as well as fees for direct condemnation to various degrees prior to the Act's passage by Congress. (See Appendix 5). The assurances needed under the Act did not require new legislation in those states. Therefore, the reported cases are of states like South Dakota but for the requirement of the Act, had no independent statutory permission of inverse litigation reimbursement.

Kansas, Nevada, and West Virginia follow the American Rule of attorney fees unless a statute authorizes the award. *Snider v. Am. Fmaily Mut. Ins.*, 298 P.3d 1120 (KN 2013); *Thomas v. City of North Las Vegas*, 127 P.3d 1057 (NV 2006); *Sally-Mike Properties v. Yokum*, 365 S.E. 2nd 246 (W.V. 1986).

All three states, like South Dakota, passed statutes giving assurance that the State and its agencies would follow the policies found in the Act.

West Virginia construed its Legislature's intent by the adoption of the federal acquisition policies W.Va. Code § 54-3-1 to 5 (Repl. Vol. 2000). The

Supreme Court found that the adoption by reference of the federal act required the payment of inverse litigation costs. *West Virginia Dept. of Transp. Div. of Highways v. Dodson Mobile Homes Sales and Services, Inc.* 624 S.E.2d 468 (W.Va. 2005).

A unanimous Court found that when the West Virginia legislature adopted the Act by reference it unambiguously required "that pursuant to the provisions of the [Act], the event triggering the award of attorney fees in a proceeding involving inverse condemnation, as set forth in Title 49, Section 24.107 of the Code of Federal Regulations, is when "[t]he Court…renders a judgment in favor of the owner." *W.Va. v. Dodson*, supra p. 474.

The West Virginia Court found no need for statutory construction because the plain intent of the statute was to adopt the federal policies. The adoption by the referenced statute, W.Va. Code § 54-3-1 to 5, is a statutory exception to the American Rule of attorney fees.

Nevada found that the adoption of the Act by reference also requires litigation expenses to successful inverse plaintiffs. Nevada found the adopted federal policies were a statutory exception to Nevada's American Rule of attorney fees. *McCarren International Airport v. Sisolak,* 137 P3d 1110 (NV. 2006).

Nevada gave its assurance to follow the Act by the passage of Chapter 342, Nevada Code. Section NRS 342.105 which requires compliance with the federal act.

The Nevada Court noted that state law did not provide attorney fees in eminent domain cases. The Court, however, concluded that the Act adopted by the Legislature required the payment. It set forth its reasoning at page 1129 of the reported decision:

> The Relocation Act requires that a state government entity receiving federal funds institute formal condemnation proceedings to acquire any interest in real property by exercising the power of eminent domain. Further, the Relocation Act states that the court "shall" award "reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings" only when "the final judgment is that the … agency cannot acquire the real property by condemnation; or … the proceeding is abandoned." However, plaintiffs may recover attorney fees and costs if they succeed in an inverse condemnation claim against the government. As one federal court has recognized, "[i]t is inevitable that the successful plaintiff in the … inverse condemnation action will be forced to pay greater litigation expenses than would have been necessary if the [state or] federal agency had properly performed its function and condemned the property in question." *Therefore, this provision is an attempt by Congress "to rectify this situation … by allowing recovery of litigation expenses for a successful plaintiff in an inverse condemnation action.*
>
> The provisions of the Relocation Act apply to all Nevada political subdivisions and agencies.
>
> *McCarran*, *supra*, 137 P3d p. 1129 (emphasis added)

Finally, the Nevada Court found that there need be no "specific nexus" nor actual displacement of the plaintiff. Because the County received federal funding for numerous improvements," the County had made assurances that it would comply with the act. The Supreme Court found "the plain terms of the Relocation

Act allowed the district court to award reasonable attorney fees and costs." *McCarran, supra,* 137 P3d p. 1130.

The Kansas Supreme Court has written extensively in two cases about the Act. Kansas' assurance of compliance with the Act and its acceptance of federal highway funds required state and cities to pay a successful plaintiff's inverse costs and expenses. *Bonanza, Inc. v. Carlson*, 269 Kan. 705, 9 P.3d 541 (2000) and *Estate of Kirkpatrick v. The City of Olathe*, 289 Kan. 554, 215 P.3d 561.

Kansas, like South Dakota, passed statutes to comply with the Federal Act. The two states used different methods. South Dakota adopted the federal act and policies by reference. SDCL § 5-2-18. Kansas proceeded to enact similar statutes and adopt regulations by reference. *See:* K.S.A. 3502 and 3506.

The Court noted in *Estate of Kirkpatrick v. City of Olathe*, page 574:

> In 1973, the Kansas Legislature adopted the Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (Kansas Act), K.S.A. 58-3501 *et seq.,* for the specified purpose of "authorize[ing] compliance with" the Federal Act in order to receive "federal financial assistance … to pay all or part of the cost" of a public improvement program. K.S.A. 58-3502(4) requires the State and its agencies and political subdivisions involved in affected projects to "pay or reimburse property owners for necessary expenses as specified in" 42 USC §§ 4653 and 4654 (2006).

The Kansas Court described its *Bonanza, Inc.* decision in *Kirkpatrick*, at 215 P.3d 573:

> *Bonanza* involved a successful inverse condemnation action against the Kansas Department of Transportation (KDOT) stemming from a highway improvement project. This court interpreted the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Federal Act), 42 U.S.C. § 4601 (1994) *et seq.*, in

> conjunction with Kansas statutes and KDOT regulations, to require the payment of the landowners' attorney fees and expenses. In particular, *Bonanza* held that because KDOT had adopted regulations pursuant to the Federal Act specifically requiring the payment of attorney fees in condemnation actions, those regulations authorized the district court to award attorney fees to the landowners in that case. 269 Kan. At 720-21, 9 P.3d 541.

The *Bonanza, Inc.* decision found that the intent of the Kansas legislation was to comply with federal statutes to get federal funds. The Kansas Court in *Estate of Kirkpatrick v. City of Olathe* reached the same decision that inverse condemnation fees and costs had to be paid but for an additional reason.

The Court found, "Because the City had made previous assurances to the federal government that it would reimburse attorney fees and other litigation expenses in order to receive federal funding … it cannot claim surprise when a request for such reimbursement [is] made." *Estate of Kirkpatrick*, 215 P.3d at 576.

The Kansas Court noted in *Estate of Kirkpatrick*, 215 P.3d at 574:

> There is no question that the City received federal funding to complete the public improvement project at the heart of this case, including the construction of the roundabout adjacent to the Estate's property. The only way that the City could have received this funding under the Federal Act was to make "satisfactory assurances" that the affected property owners would be reimbursed their attorney fees and other litigation costs associated with successful claims for inverse condemnation. See 42 U.S.C. § 4654. The City had the authority to make these assurances to the federal government under the Kansas Act. See K.S.A. 58-3506.

The DOT explains in its 2011 Annual Report page 14, "The importance of federal funding to the State of South Dakota Highway System cannot be

overstated, because it makes up about 75 percent of the State's DOT annual construction budget." (DOT Website, Reports).

South Dakota, like Kansas and other states, enacted legislation to give assurance to the federal government to receive the federal money.

The Legislature of South Dakota like Kansas adopted as its own law 42 U.S.C. § 4655(a)(2). The Kansas Court in *Kirkpatrick v. City of Olathe*, 215 P.3d at 574 explained:

> The provision of the Federal Act that guided the district court's decision in this case is 42 U.S.C. § 4655(a)(2) (2006), which states in relevant part:
>
> (a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with…under which Federal financial assistance…available to pay all or part of the cost of…project which will result in the acquisition…unless he receives satisfactory assurances from such acquiring agency that---
>
> ….
>
> (2) property owners will be paid or reimbursed for necessary expenses as specified in section 4653 and 4654 of this title."
>
> Notable to our discussion, 42 U.S.C. § 4654(c) (2006) states that condemning authorities must "reimburse" successful plaintiffs in inverse condemnation actions for their "reasonable costs, disbursement, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

The enactment of SDCL § 5-2-18 permitted state and local officials the power to give the federal government the assurance needed to receive hundreds of millions of dollars in federal funding. Upon the State's assurance that it would

"comply with all the acquisition policies contained in said federal act," the federal government continues to fund South Dakota. SDCL § 5-2-18.

The legislature thus enacted SDCL § 5-2-18 which is a specific statute not only permitting but requiring payment of attorney fees to the plaintiffs in this case. The State's failure to pay is a violation of the Legislature's intent in the passage of SDCL § 5-2-18.

The DOT of West Virginia, like South Dakota's DOT, attempted to avoid the payment of inverse condemnation attorney fees and costs. The Court found that its "primary object in construing a statute is to ascertain and give effect to the intent of the … (legislating body). *West Virginia Dept. of Transp., Div. of Highways v. Dodson Mobile Homes Sales and Services, Inc.*, 624 S.E.2d 468, 473 (W.V. 2005).

The West Virginia Court noted the federal regulations incorporated the objectives in the Act. Upon reading the Act and CFR, the Court held the West Virginia adoption of the federal act by reference was unambiguous. The court wrote:

> "The regulations unambiguously direct that attorney fees are to be awarded when a landowner prevails in an inverse condemnation proceeding. 49 CFR § 24.107(c)" *W.V. DOT v. Dodson*, at page 473.

West Virginia continues to receive federal funds for its highway.

CONCLUSION

The State of South Dakota enacted and amended SDCL § 5-2-18 for the purpose of giving the required assurances under 42 U.S.C. § 4655 that its

programs and projects would adhere to the law and acquisition policy found in the Uniform Relocation and Real Property Acquisition Policies Act of 1970 (P.L. 91 646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17).

The federal policies, 42 U.S.C. § 4654(c) and 49 C.F.R. § 24.107 require the payment of "reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the proceeding, if (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding."

Therefore, Appellants request the court reverse the order denying attorney fees and costs. Further, the trial court be ordered to receive a submission of such costs and expenses and apply the standards set forth by this Court in *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (S.D. 1994), hold a hearing thereon and award sums as the trial court determines proper.

Respectfully submitted this 18th day of May, 2015.

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Certificate of Service

The undersigned hereby certifies that two true and correct copies of the foregoing Appellants' Brief and all appendices were mailed by first class mail, postage prepaid to:

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On this 18th day of May, 2015.

MEIERHENRY SARGENT LLP

By: */s/ Mark V. Meierhenry*

Certificate of Compliance

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,161 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 18th day of May, 2015.

MEIERHENRY SARGENT LLP

By: */s/ Mark V. Meierhenry*

Appendix

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27381

MARK AND MARILYN LONG,
ARNIE AND SHIRLEY VAN VOORST,
TIM AND SARA DOYLE, TIMOTHY
AND JANE GRIFFITH, AND MICHAEL
AND KAREN TAYLOR,

Plaintiffs/Appellants,

vs.

STATE OF SOUTH DAKOTA,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

HONORABLE PATRICIA C. RIEPEL

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Notice of Appeal was filed March 3, 2015

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PRELIMINARY STATEMENT

The State of South Dakota will be referred to as "the State." Mark and Marilynn Long, Arnie and Shirley Van Voorst, Tim and Sara Doyle, Timothy and Jane Griffith, and Michael and Karen Taylor will be referred to collectively as "the Appellants." Pages of the settled record will be cited as (SR __.)

JURISDICTIONAL STATEMENT

The Order Denying Motion for Attorney Fees and Expenses was filed on January 22, 2015. (SR 1428.) Notice of Entry was filed on February 6, 2015. (SR 1484.) The Appellants' Notice of Appeal was filed on March 3, 2015. (SR 1926.)

STATEMENT OF THE ISSUES

1. Whether a party who prevails on an inverse condemnation claim arising under S.D. Const. Art. VI., § 13, is entitled to recover attorney fees and litigation expenses under SDCL § 5-2-18.

   The circuit court concluded a prevailing party in an inverse condemnation action is not entitled to its attorney fees and litigation expenses.

   Rupert v. City of Rapid City, 2013 S.D. 13, 827 N.W.2d 55.
   Rapid City v. Baron, 227 N.W.2d 617 (S.D. 1975).
   City of Austin v. Travis County Landfill Co., 25 S.W.3d 191, 206 (Tex. App. 1999).
   Randolph v. Mo. Hwys. & Transp. Comm'n, 224 S.W.3d 615 (Mo. Ct. App. 2007).
   SDCL § 5-2-18.

STATEMENT OF THE CASE

This is an appeal of an order denying the Appellants' Motion for Attorney Fees and Expenses entered by the Honorable Patricia Riepel, Circuit Court Judge. This case is an inverse condemnation action that was bifurcated into two phases. The first phase was a bench trial held by Judge Riepel to determine whether a taking had occurred as a matter of law. The circuit court concluded the State was liable for damages on the Appellants' inverse condemnation claims. The second phase of this case was a jury trial to determine whether the taking was permanent or temporary and to determine damages. The jury found the taking was permanent and fixed the damages for each individual Appellant in separate verdict forms.

The State has separately appealed the circuit court's final judgment, which is the subject of Appeal No. 27368. This appeal is solely concerning whether the Appellants are entitled to attorney fees based on a successful inverse condemnation claim. As a matter of judicial economy, this Court may wish to defer considering this appeal pending the outcome of Appeal No. 27368.

STATEMENT OF THE FACTS

Although this is a complex case involving numerous factual disputes as to the merits of the Appellants' underlying claims, there are few facts necessary to be

understood for the purposes of this appeal.[1] The Appellants' property flooded on the night and morning of July 29-30, 2010. (SR 193.) The Appellants' respective properties sustained damages as a result of the flood. (SR 193.) The Appellants brought suit against the State and the City of Sioux Falls. (SR 193.) After settling with the City, the Appellants proceeded with their inverse condemnation claim solely against the State, and ultimately received a jury verdict awarding damages.

On August 2, 2014, the Appellants filed a Motion for Attorney Fees and Expenses. (SR 863.) The motion came on for hearing on December 1, 2014. (SR 1936.) On January 16, 2014, the circuit court signed its Order Denying Motion for Attorney Fees and Expenses. (SR 1428.)

ARGUMENT

I. The Appellants are not entitled to recover attorney fees or litigation expenses.

Neither this Court's precedent nor South Dakota's statutes authorize an award of attorney fees to a plaintiff prevailing on an inverse condemnation claim. Indeed, this Court rejected such an argument in *Rupert v. City of Rapid City*, where the

[1] While the most relevant facts are not in dispute for purposes of this appeal, the State does object to the Appellants' statement of the facts to the extent they allege facts regarding the amount of funds the State has received from the federal government without any citations to the record as required by SDCL § 15-26A-60(5). The State similarly objects to the Appellants' Appendix to the extent it contains documents not submitted to the circuit court.

plaintiffs argued that such an award should be read into SDCL § 21-35-23. 2013 S.D. 13, ¶ 31, 827 N.W.2d 55, 67. This Court rejected that argument, holding attorney fees may not be awarded pursuant to statute, unless the statute expressly authorizes the award. *Id.* at ¶ 32. Like the plaintiffs in *Rupert*, the Appellants are inviting this Court to hold that authorization for attorney fees is implied by SDCL § 5-2-18. For the reasons set forth below, this Court should decline the invitation.

1. South Dakota's attorney fee framework: the American Rule.

The starting point for this Court's analysis of the availability of attorney fees must be South Dakota law. For purposes of awarding attorney fees, South Dakota follows the "American Rule." *Rupert*, 2013 S.D. 13, ¶ 32, 827 N.W.2d at 67. "Under the 'American Rule,' each party in an action bears its own attorney fees." *Id.* There are two exceptions to this rule, neither of which are applicable in this case. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." *Id.* No such agreement exists in this case. Second, attorney fees may be awarded "if an award of attorney's fees is authorized by statute." *Id.*

Importantly, this Court has made it clear that "attorney fees may not be awarded pursuant to statute unless the statute *expressly authorizes* the award of attorney fees in

such circumstances." *Rupert*, 2013 S.D. 13, ¶ 38, 827 N.W.2d at 69 (emphasis added). In other words, the power to assess attorney fees may not be implied or read into a statute as the Appellants are attempting to do. "This Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *In re Estate of O'Keefe*, 1998 S.D. 92, ¶ 17, 583 N.W.2d 138, 142. Additionally, this Court noted that awarding attorney fees against the State implicates sovereign immunity.

Rupert, 2013 S.D. 13, ¶ 33, 827 N.W.2d at 68. "Abrogation of sovereign immunity by the Legislature must be express." *Id.*

2. SDCL § 5-2-18 does not expressly authorize attorney fees.

The Appellants argue that SDCL § 5-2-18 provides a basis for this Court to hold that they are entitled to attorney fees and costs. SDCL § 5-2-18 provides:

> The State of South Dakota, its departments, agencies, instrumentalities, or any political subdivisions *may* provide relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures *in connection with federally assisted projects* to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P. L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P. L. 100-17), and *may* comply with all the acquisition policies contained in said federal act.

(Emphasis added). Nothing in § 5-2-18 expressly authorizes attorney fees as required by the American Rule in South Dakota. Additionally, the statute includes the word "may" twice, which this Court has held is construed in the permissive sense. *Breck v. Janklow*, 2001 S.D. 28, ¶ 11, 623 N.W.2d 449, 455.

This Court should decline the Appellants' invitations to examine the legislative history of SDCL § 5-2-18. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *In re Estate of Ricard*, 2014

S.D. 54, ¶ 8, 851 N.W.2d 753, 756. "When the language is clear,

this Court does not review legislative history." *Heumiller v. Heumiller*, 2012 S.D. 68, ¶ 10, 821 N.W.2d 847, 850.

3. The Uniform Relocation Act does not provide authority to award attorney fees for state inverse condemnation actions in state court.

Recognizing that SDCL § 5-2-18 does not expressly authorize attorney fees, the Appellants instead argue that SDCL § 5-2-18 adopted the entirety of the Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970 ("URA"). Of course, there is no language in SDCL § 5-2-18 indicating any legislative intent to adopt the URA by reference. Instead, SDCL § 5-2-18 states that South Dakota and its departments and agencies "may" comply with all acquisition policies contained in the federal act. Even assuming the URA was applicable, the URA's terms do not provide any authority to award attorney fees to the Appellants.

A. The URA statutory framework.

The URA is codified at 42 U.S.C. 4601 *et seq.* A comprehensive reading of the URA reveals that the primary intent of the URA is to establish uniform policies and procedures to provide relocation benefits to a person displaced as a result of formal condemnation proceedings initiated by a federal agency. 42 U.S.C. § 4621(b). A "displaced person" is defined as "any person who moves from real property, or moves his personal property from real property" as a "direct result of a written notice of intent

to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance." 42 U.S.C. § 4601(6)(A). Such relocation benefits for a displaced person may include moving expenses (42 U.S.C. § 4622) and replacement housing (42 U.S.C. § 4623), among other benefits.

The most relevant provision of the URA for purposes of this appeal is 42 U.S.C. § 4654(c), which provides:

> The court rendering a judgment in a proceeding brought under § 1346(a)(2)[2] or 1491[3] of Title 28, awarding compensation for the taking of property by a Federal agency . . . shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such a proceeding.

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[2] 28 U.S.C. § 1346(a)(2) confers jurisdiction upon federal district courts for civil actions against the United States "founded upon the Constitution, or any Act of Congress[.]"

[3] 28 U.S.C. § 1491 confers jurisdiction upon the United States Court of Federal Claims upon "any claim against the United States founded either upon the Constitution, or any Act of Congress[.]"

A plain reading of section 4654(c) demonstrates that it only authorizes attorney fees in federal courts for federal inverse condemnation claims. "[S]ection 4654 provides authority for the award of attorney's fees and expenses in actions brought in either federal court or the Court of Federal Claims." *City of Austin v. Travis County Landfill Co.*, 25 S.W.3d 191, 206 (Tex. App. 1999) (rev'd on other grounds.) "The Uniform Act contains no express authority for a similar award for state causes of action filed in state court." *Id.* "[T]he provisions of 42 U.S.C. 4654, entitling successful plaintiffs to litigation expenses, apply only to takings by a federal agency, not to an inverse condemnation action by a city redevelopment authority, nor to an award under a state condemnation." 8A PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § G20.05[3] (3d ed. 2015).

B. The Code of Federal Regulations cannot provide authority for attorney fees in excess of what is provided by the URA.

The Appellants next contend that the federal regulations created under the authority of the URA provide a basis upon which to award attorney fees. (App. Br. at 6.) 49 C.F.R. § 24.107 provides that the owner of real property shall be reimbursed for reasonable expenses, including attorney, appraisal, and engineering fees actually incurred because of a condemnation proceeding if "[t]he court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the

Agency effects a settlement of such proceeding."

Of course, an enabling regulation cannot provide greater rights or remedies than authorized by its implementing statute. *See Ragsdale v. Wolverwine World Wide, Inc.*, 535 U.S. 81, 96 (2002). "At most, section 24.107 clarifies that section 4654 applies to governmental entities facing claims in federal court or the Court of Federal Claims." *City of Austin*, 25 S.W.3d at 207. "It does not provide statutory authority for state courts to award attorney's fees for successful inverse condemnation claims arising under state law." *Id.*

C. Other courts have rejected the Appellants' arguments.

Other courts facing arguments nearly identical to the Appellants' arguments have held that attorney fees are not recoverable under the URA for successful inverse condemnation claims arising under state law in state court. These courts generally reason that the URA does not expressly authorize attorney fees for state law claims and note the absence of any state statute authorizing such fees.

In *City of Austin*, the jury determined that the City took the plaintiff's airspace rights by overflights associated with an abutting municipal airport, and, therefore, awarded damages for an inverse condemnation claim. 25 S.W.3d at 196. The trial court denied the plaintiff's request for attorney fees as a prevailing party, finding there

was no statutory authority for such an award. *Id.* at 206. The Texas Court of Appeals agreed. In language similar to this Court's reasoning in *Rupert*, the court first noted, "[r]ecovery of attorney fees is adverse to the common law and penal in nature, and statutes providing for such recovery must be strictly construed." *City of Austin*, 25 S.W.3d at 206. Like South Dakota, "Texas law provides no statutory authority for awarding attorney's fees in inverse condemnation actions arising under Article I, section 17 of the Texas Constitution." *Id.* at 207.

The plaintiff did not dispute the general rule against attorney fees, but, like the Appellants in this case, argued that federal law provided the requisite statutory authority for attorney fees under the URA. *Id.* at 208. The court rightly rejected this argument, holding the URA provided no such authority for state courts to award attorney fees for successful inverse condemnation claims under state law. *Id.* Specifically, the court held that 42 U.S.C. § 4654 only provided authority to award attorney fees in actions brought in either federal court or the Court of Federal Claims, and the URA "contains no express authority for a similar award for state causes of action filed in state court." *Id.*

Like the Appellants here (App. Br. at 5), the plaintiffs also relied on 42 U.S.C. § 4655(a). *City of Austin*, 25 S.W.3d at 208. 42 U.S.C. § 4655(a) provides:

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

The court again rejected the plaintiff's argument, explaining that, by its terms, section 4655 prohibits a federal agency from approving a federally-funded project in which a political subdivision of a state acquires real property without assuring that the acquiring political subdivision will: (1) follow the land acquisition policies of the URA to the extent possible under State law, and (2) reimburse property owners for litigation expenses as required under section 4654. *Id.* "Thus, section 4655 governs the relationship between the City and the federal agency from which it seeks federal funds. *Id.* "It does not create a landowner's cause of action for attorney's fees in the event the City fails to comply with the land acquisition policies outlined in the statute." *Id.* (citing *City of Buffalo v. Clement*, 45 A.D.2d 620, 624 (N.Y. App. Div. 1974)). The court ultimately concluded that the plaintiff was not entitled to its attorney fees because there was no statutory authority for such an award. *Id.*

A similar result was reached in *Randolph v. Mo. Hwys. & Transp. Comm'n*, 224 S.W.3d 615 (Mo. Ct. App. 2007). There, the plaintiffs argued the trial court erred by denying their motion for attorney fees and costs after they prevailed on their inverse condemnation claim arising under Missouri law. *Id.* at 619. The plaintiffs argued that such fees were authorized by the URA. *Id.* The defendants argued that Missouri law did not authorize attorney fees for successful inverse

condemnation claims. *Id.* The Missouri Court of Appeals agreed with the defendant, and affirmed the trial court. *Id.*

The court explained that (like South Dakota) "Missouri follows the 'American Rule' which requires each party to bear the expense of their own attorney fees." *Id.* "Missouri courts are not allowed to award attorney fees unless provided for by statute, contract or when needed to balance benefits in a court of equity." *Id.* The plaintiffs contended that the URA provided the required statutory authorization of attorney fees. The court disagreed, holding that the URA would only be applied "where Missouri law does not expressly prohibit its application." *Id.* (citing *City of Columbia v. Baurichter*, 713 S.W.2d 263, 266 (Mo. 1986)). The court explained, "[i]t is well established that costs cannot be assessed against state agencies or state officials absent express statutory authority." *Id.*

The court concluded, "[i]n the face of such a strong prohibition against awarding attorney fees against a state agency, such as [the defendant], the roundabout way [the plaintiff] attempted to overcome this prohibition cannot succeed." *Randolph*, 224 S.W.3d at 620. The court found the URA's application "tenuous at best," and concluded that the trial court properly denied the plaintiff's motion for attorney fees. *Id.*

The facts and law applicable and *City of Austin* and *Randolph* are directly analogous to this case. Both cases involved plaintiffs who prevailed on inverse condemnation claims arising under state law in state courts. Both cases relied on the American Rule and the rule that attorney fees may not be imposed against the state or state agencies absent express statutory authorization. Both cases held that attorney fees simply are not authorized under the URA for state law claims in state courts. *See also Buffalo v. J.W. Clement Co.*, 45 A.D.2d 620, 624 (N.Y. App. Div. 1974) (holding URA does not provide authorization for attorney fees in inverse condemnation cases). This Court should follow the framework set forth in *Rupert*, *City of Austin*, and *Randolph* to conclude that the Appellants are not entitled to attorney fees.

D. The Appellants' cited authority is inapposite.

The Appellants rely on several decisions from other jurisdictions purporting to stand for the proposition that state agencies must pay attorney fees to a plaintiff who prevails on an inverse condemnation claim under the URA. However, a closer reading of these cases reveals that these courts were simply enforcing statutes that expressly and unambiguously required the state to pay such attorney fees. Additionally, several of these cases faced federal takings claims, not state law claims.

The Appellants rely heavily on *Bonanza, Inc. v. Carlson*, 9 P.3d 541 (Kan. 2000). (App. Br. at 14-16.) There, the plaintiffs appealed the trial court's denial of attorney fees after the plaintiffs prevailed on their inverse condemnation claim. *Id.* at 543. The Kansas Supreme Court reversed, holding the plaintiffs were entitled to their attorney fees, but not for the reasons proffered by the Appellants in this case. Instead, the court simply held that Kansas statutes and regulations expressly required such fees. "Here, the landowners are not arguing that § 4654 of the [URA] provides authority for Kansas to award litigation expenses in inverse condemnation proceedings against a state agency taking property for a federally assisted project." *Id.* at 546-47. Instead, the plaintiffs relied on Kan. Stat. 58-3501 *et seq* and Kan. Admin. Reg. 13-16-1 which expressly authorized attorney fees to prevailing plaintiffs in inverse condemnation cases. *Id.* at 547.

Unlike South Dakota, Kansas's statute provided that the State of Kansas, its agencies, and subdivisions, "shall" comply with the requirements of the URA. *Bonanza*, 9 P.3d at 544 (citing Kan. Stat. 58-3502). Additionally, also unlike South Dakota, Kansas expressly adopted the entirety of the federal regulations associated with the URA: "49 C.F.R. Part 24, as of March 2, 1989, and all amendments thereto, is adopted by reference." Kan. Admin. Reg. 36-16-1(a). Kansas's statutes and

regulations explicitly authorized attorney fees against the state in inverse condemnation claim cases. A similar analysis was employed by the Kansas Supreme Court in *Estate of Kirkpatrick v. City of Olathe*, 215 P.3d 561, 573 (Kan. 2009) (citing Kan. Stat. 58-3501). As such, the Kansas Supreme Court did not hold that the URA itself provided authority to award such fees. Instead, the court simply enforced Kansas's existing state statutes and regulations that expressly authorized the award – statutes and regulations that South Dakota does not have.

The other cases cited by the Appellants are distinguishable on similar grounds. For example, as noted by the Nevada Supreme Court in *Mcarran Int'l Airport v. Sisolak*, Nevada has expressly adopted the URA's provisions at the state level. 137 P.3d 1110, 1129 (Nev. 2006); *see* Nev. Rev. Stat. 342.015 *et seq.* Under Nevada state law, Nevada state agencies and departments that are subject to the URA "*shall* . . . perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements." Nev. Rev. Stat. 342.105(1).

Like Nevada, West Virginia also expressly adopted the URA provisions at the state level. *W. Va. DOT v. Dodson Mobile Homes Sales & Servs.*, 624 S.E.2d 468, 472 (W.Va. 2005) (citing W.Va. Code §§ 54-3-1 to 54-3-5). West Virginia law provides that state agencies are "required" to adopt rules and regulations to implement

the URA and make the URA's requirements applicable to such state agencies. W.Va. Code § 54-3-3.

Other states awarding attorney fees for inverse condemnation actions likewise expressly adopted the URA at the state level. Like Kansas, Utah adopted the URA "wholesale" in its administrative code. *Robinson v. State*, 20 P.3d 396, 398 (Utah 2001); *see* Utah Admin. Code 933-1-1. Similarly, Minnesota statute mandates attorney fees in inverse condemnation cases. Minn. Stat. § 117.045; *see DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610 (Minn. 2012).

What these cases have in common is conspicuously absent in South Dakota, namely, state statutes and regulations expressly authorizing attorney fees against the state and its agencies in inverse condemnation cases. What these cases do not say is nearly as important as what they do. The Appellants argue that these cases hold that the URA itself is sufficient authority for an attorney fee award against the State for a state law claim, but these cases make no such claim. They merely stand for the proposition that attorney fees are available when expressly authorized by state statute and regulation.

4. Attorney fees may not be implicitly authorized by a statute and the URA may not be read into South Dakota's existing laws.

This Court clearly articulated the standards for awarding attorney fees in

Rupert, an inverse condemnation case. Under the American Rule as set forth in *Rupert*, attorney fees are not available unless the parties enter into an agreement entitling the prevailing party to such fees or the award is authorized by statute. *Rupert*, 2013 S.D. 13, ¶ 32, 827 N.W.2d at 67. The statutory authority for such an award "may not be implied" under *Estate of O'Keefe*, but this is precisely what the Appellants are asking this Court to do. 1998 S.D. 92, ¶ 17, 583 N.W.2d at 142.

The Appellants are asking this Court to hold that an award of attorney fees in inverse condemnation action is implicit in the language of SDCL § 5-2-18. The statute mentions neither attorney fees nor inverse condemnation. The Appellants then ask this Court to hold that SDCL § 5-2-18 implicitly adopts the URA by reference. The statute does not say it is adopting the URA by reference and uses the permissive language "may." Finally, the Appellants are asking this Court to hold that the URA implicitly authorizes attorney fees for inverse condemnation claims arising from state law in state court. The URA only provides authority for the award of attorney fees in actions brought in either federal court or the Court of Federal Claims. *City of Austin*, 25 S.W.3d at 206 (citing 42 U.S.C. § 4654(c)).

As discussed above, the applicable caselaw demonstrates that the URA, in and of itself, does not create a private cause of action for attorney fees in state law inverse

condemnation cases. *See* 42 U.S.C. § 4602 ("Nothing in this chapter shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to January 2, 1971.").

Indeed, this Court has already indicated that the URA has no effect on South Dakota law. *Rapid City v. Baron*, 227 N.W.2d 617 (S.D. 1975). In *Baron*, Rapid City condemned approximately 1,200 parcels of property under the authority of SDCL § 5-2-18 and the URA. *Id.* at 618. Rapid City and Baron disputed the value of Baron's parcel and the case proceeded to trial. *Id.* Over Rapid City's objections, the trial court permitted evidence and included jury instructions on the prices Rapid City paid for other property as part of its urban renewal program, under the rationale that one of the policies of the URA was to "assure consistent treatment for owners in the many Federal programs." *Id.* at 618 (quoting 42 U.S.C. § 4651).

This Court reversed, explaining that the governing law on the exercise of the power of eminent domain was South Dakota's constitution. *Id.* at 620. This Court held, "We find no compelling reason to hold that the quoted phrase from § 4651, 42 U.S.C.A., even when read in conjunction with SDCL 5-2-18, in any manner modifies our Constitution, statutes or caselaw." *Id.* at 620. As such, in the one opportunity

this Court has previously had to discuss the relationship of the URA to South Dakota law, it concluded that the URA did not modify South Dakota's Constitution, statutes, or caselaw. A similar result should be reached in this case.

CONCLUSION

There is no South Dakota statute expressly authorizing the award of attorney fees against the State in this case. In *Rupert*, this Court held that statutory authority for attorney fees may not be implied, and, in *Baron*, this Court held that the URA did not modify South Dakota's Constitution, statutes, or caselaw. Therefore, the State respectfully requests this Court affirm the circuit court's Order Denying Plaintiff's Motion for Attorney Fees and Expenses.

Dated this 1st day of July, 2015.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X5, and contains 4,246 words excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2015, I served via email a true and correct copy of the foregoing Appellee's Brief to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27381

Mark and Marilynn Long, Arnie and Shirley Van Voorst, Tim and Sara Doyle, Timothy and Jane Griffith, and Michael and Karen Taylor,
Plaintiffs and Appellants,

v.

State of South Dakota,
Defendant and Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Patricia Riepel
Circuit Court Judge

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed on the 3rd day of March, 2015

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REPLY ARGUMENT

I. South Dakota Attorney's Fee framework authorizes payment to Appellants.

A. Context and subject matter prove required authorization exists.

SDCL § 5-2-18 is a clear grant of power to the State and its agencies to pay attorney's fees to successful inverse condemnation claimants. "This Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *In re Estate of O'Keefe,* 1998 S.D. 92, 583 N.W.2d 138, 142. The South Dakota legislature has expressly authorized the State to follow the policies of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (hereinafter "URA"). One such policy is the payment of attorney's fees to a successful inverse condemnation claimant.

The State urges the Court to construe the word "may" in SDCL 5-2-18 in the permissive sense based on an incomplete statement of the law plucked from *Breck v. Janklow,* 2011 S.D. 28, 623 N.W.2d 449. The statement from *Breck* does state that the Court shall construe "may" in the permissive sense, "unless the context and subject matter indicate a different intention." *Id.* That statement of the law cites *State v. Burgers,* 602 N.W.2d 277, 281 (S.D. 1999), which is even clearer on the subject. "With respect to legislative enactments, we have held the word "may" in a statute should be construed in a permissive sense unless the context and subject matter indicate a different legislative intent." *Id.*

Contrary to the States urging to ignore context and legislative intent, the plain language of *Burgers* instructs otherwise. Clearly the context is important in this case and requires further analysis. As discussed in Appellants' (hereinafter "Landowners") original brief, the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (P.L 91-646) was codified as 42 U.S.C.A. § 4655 on January 2, 1971. Sub-section (a) of that section stated then, as it does today:

> Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, *unless he receives satisfactory assurances from such acquiring agency that—*
>
> (1) In acquiring real property it will be guided , to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and
> (2) Property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title. *§ 4655 (a).* [emphasis supplied]

This new federal law made clear that federal funds would not be made available to any acquiring agency without "satisfactory assurances from such acquiring agency." *Id.* The section goes on to define acquiring agency as "a State agency…which has the authority to acquire property by eminent domain under State law…" *§4655(b)(1).*

One year and one month later, on February 9, 1972, the South Dakota Legislature met in Pierre and passed Senate Bill 238, an Act Authorizing State and Political Subdivisions to Provide Relocation Assistance in Federally Assisted

Projects. *1972 South Dakota Session Laws, Ch. 136.* The legislative enactment read:

> Notwithstanding any other law, the state of South Dakota, its departments, agencies, instrumentalities, or any political subdivisions are authorized to provide relocation benefits…*to the same extent and for the same purposes* as provided for in the uniform relocation assistance and real property acquisition policies act of 1970 (P.L. 91 646), *and to comply with all the acquisition policies contained in said federal act*. [emphasis supplied] *1972 South Dakota Session Laws, Ch. 136.*

The act was adopted as SDCL § 5-2-18 that same year. As Landowners pointed out in their original brief, one of the policies contained in the act is the payment of fees in inverse condemnation actions. 42 U.S.C.A. § 4654.

B. Competing interpretations.

Here, there are two interpretations of the legislative intent being argued. Landowners argue that the legislature clearly intended to adopt and agree to follow the policies of the URA in order to receive federal highway funds. The State argues that the legislative intent was to allow the State to pick and choose which policies they would follow and when it would follow them.

The State's interpretation of "may" elicits the conclusion that there is a choice to be made. 42 U.S.C.A. 4655 does not give the State the choice to decide whether or not to follow the federal policies, rather, the plain language of the supreme law of the land demands the policies are followed. Clearly our legislature would not have been willing to risk losing a significant portion of our State's highway budget in 1972, which is exactly what it would have done if its intention was to provide the State and its agencies such flexibility.

Assurances were demanded in exchange for the federal dollars, and the legislature gave those assurances. The context and subject matter make clear the Legislature's intent to authorize the State and its agencies to comply with all the policies contained in the federal act, one of which was payment of reasonable attorney's fees to successful inverse condemnation claimants.

C. State law requires adherence to the policies "to the same extent and for the same purposes as provided for" in the federal act.

The State admits that attorney's fees are authorized under the Act for federal inverse condemnation claims in federal courts, but argues it can escape this requirement for state claims. *Appellee's Brief, p. 7.* The State of South Dakota by and through its legislature has agreed to follow the federal policies "to the same extent and for the same purposes as provided for" in the Federal Act. This is the compliance demanded by 42 U.S.C.A. § 4655 (a). Again, the federal government did not leave the State the choice to decide which policies to follow and which to turn a blind eye.

The State cites a passage from Nichols on Eminent domain that discusses the application of the URA to state claims. Nichols points out that the plain language of the provisions does not require the states to award attorney's fees in inverse condemnation cases. *8A Nichols on Eminent Domain,* §G20.05[3].

42 U.S.C.A. 4564 requires the federal government to pay attorney's fees to successful claimants, but does not directly place the burden on the states to do the same. Instead South Dakota's compliance with this policy is self-imposed under § 5-2-18. Again, the State chose to follow the policies of the URA and receive

federal funds rather than establish its own relocation policies and decline the federal dollars. Once it agreed to accept the money and provide the necessary assurances it would follow the URA's policies, authorization for payment of fees was complete. This is exactly what the highest courts of Kansas, Nevada, and West Virginia found their states had agreed to do. *Bonanza, Inc. v. Carlson,* 9 P.3d 541 (Kan. 2000). *Estate of Kirkpatrick v. City of Olathe,* 215 P.3d 561 (Kan. 2009). *McCarran Intern. Airport v. Sisolak,* 137 P.3d 1110, 1129 (Nev. 2006). *W. Va. DOT v. Dodson Mobile Homes Sales and Servs.,* 624 S.E.2d 468, 473 (W. Va. 2005).

II. The national case law supports Landowners claim for Attorney's fees.

A. States cited by Landowners have statutes similar to the statutes in South Dakota.

On page 16 of its brief, the State summarizes its analysis of the cases that support Landowner's arguments as follows: "What these cases have in common is conspicuously absent in South Dakota, namely, state statutes and regulations expressly authorizing attorney fees against the state and its agencies in inverse condemnation cases." If this were true, none of the cases cited would have been appealed.

In each case cited by Landowners to support their claim, the venue state had adopted the policies of the URA with varying degrees of clarity. However, none of them had flatly stated attorney's fees are to be awarded to successful inverse condemnation claimants. Instead, as is the case in South Dakota, the

venue state had to some degree adopted the URA to comply with federal requirements in order to secure federal funding.

Nevada's method of adoption of the URA is strikingly similar to South Dakota's. Nevada Revised Statutes 342.105 states:

> Any department, agency, instrumentality or political subdivision of this State, or any other public or private entity, which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto, and which undertakes any project that results in the acquisition of real property or in a person being displaced from his or her home, business or farm, shall provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements.

Supreme Court of Nevada found, based on that Statute, "The provisions of the Relocation Act apply to all Nevada political subdivisions and agencies." *McCarran Intern. Airport v. Sisolak,* 137 P.3d 1110, 1129 (2006). The State contends that the Nevada Court's rationale is "inapposite" to present issue. However, N.R.S. 342.105 is outstandingly similar to SDCL § 5-2-18. The Nevada Court contemplated the same issue presently before this Court, and decided to hold the State to the promises it made when it accepted federal highway funds.

Contrary to the State's claim that Kansas law contains express statutory language authorizing attorney's fees in inverse condemnation cases, no such language exists. The Supreme Court of Kansas in *Bonanza, Inc. v. Carlson,* 9 P.3d 541 (Kan. 2000), recognizing its state follows the American rule, made the following findings.

> The Kansas Legislature enacted the Relocation Assistance For Persons Displaced by Acquisition of Real Property Act to authorize state agencies to promulgate regulations that place Kansas in compliance with the requirements of the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. *Id.* at 542.

And

> K.A.R. 36–16–1 by reference to 49 C.F.R. § 24.107 (1999) clearly provides for an award of litigation expenses in inverse condemnation proceedings regardless of whether the condemnee is displaced. *Id.*

In *Bonanza,* the landowners were not arguing that §4654 of the Federal Act provided authority for Kansas to award litigation expenses in inverse condemnation proceedings against a state agency when a federally assisted project was at issue. Rather, landowners were arguing "the authority for the award sought by the landowners are Kansas statutes and Kansas regulations enacted by the Kansas Legislature to comply with federal law." *Id* at 547.

The State of Kansas adopted the entirety of the URA by reference for the purpose of receiving the federal funds. The South Dakota Legislature authorized the State and its agencies to follow the policies of the act for the same purpose. Both actions denote the authorization for payment of attorney's fees.

West Virginia agreed to follow the federal policies in a similar manner. The Annotated Code of West Virginia § 54-3-3 provides:

> In order to accomplish the purposes set forth in section two of this article and to satisfy the requirements of adequately compensating displaced persons under such federal acts, each acquiring agency is hereby required and is hereby granted plenary power and authority to adopt rules and regulations, which shall have the force and effect of law, to implement the provisions of such federal acts and make applicable to such acquiring agency the policies and

> requirements of such federal acts which are pertinent to the mission and functions of such acquiring agency…

The Supreme Court of Appeals of West Virginia interpreted its state legislature's authorization to comply with the federal policies to require the payment of Attorney's fees to successful inverse condemnation claimants. *W. Va. DOT v. Dodson Mobile Homes Sales and Servs.,* 624 S.E.2d 468, 473 (W. Va. 2005).

The URA requires "assurances" that the policies of the act will be followed before federal highway funds are dispersed. The South Dakota, Nevada, Kansas, and West Virginia Legislatures have chosen slightly different means to achieve the same effect. SDCL § 5-2-18 authorizes the payment of attorney's fees to the same degree as these other State's enactments, which is why we continue to receive highway funds from the United States Government.

B. South Dakota's obligation to pay attorney's fees is self-imposed.

The State has misconstrued Landowners' argument for attorney's fees by arguing the URA does not apply to state inverse condemnation claims. Landowners agree that the federal law standing alone does not impose a duty on the states to do anything-- unless the state wants to receive federal highway funds. "Incident to the spending power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole,* 483 U.S. 203, 107 (1989).

In the *Dole* case, Congress used its spending authority to standardize drinking laws, a function traditionally left to the states. *Id.* In its decision, the Dole Court analyzed instances where Congress achieves ends outside the scope of its enumerated constitutional powers by use of the spending power. This type of

congressional behavior was authorized by the Supreme Court in *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 319 (1936). The Court found Congress achieve objectives not thought to be within Article I's "enumerated legislative fields," through the use of the spending power and the conditional grant of federal funds. *Id.* at 65.

One judicially created condition on this Congressional strategy is that the state's choice to participate is made freely. "We have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole* at 2796 citing *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, and n. 13, 101 S.Ct. 1531, 1540 (1981).

The South Dakota Legislature in 1972 chose to follow the policies of the URA. That decision was memorialized in § 5-2-18. The State may argue that the URA alone does not apply to claims against the State, nevertheless, it was the South Dakota Legislature's commitment to adhere to the URA that authorizes the payment of attorney's fees. SDCL §5-2-18 provides the express statutory authority required under the American rule.

C. Cases cited by the State find that the URA alone does not directly apply to the States.

The State cites two cases, one from Texas and the other Missouri, which stand for the unremarkable proposition that the URA on its own does not apply to State inverse condemnation claims. The State's reliance on *City of Austin v.*

Travis County Landfill Co, LLC, 25 S.W.3d 191 (Tx. Ct. App. 1999) is misguided. The decision comes from an intermediate appellate court in Texas and was overruled on other grounds by the Texas Supreme Court, 73 S.W.3d 234 (2002). The Court of Appeals held:

> [Landowner] does not dispute the general rule. It argues, however, that relevant federal law provides the statutory authority allowing it to recover attorney's fees under its state inverse condemnation claim, citing the Uniform Relocation Assistance and Real Property Act ("Uniform Act"), 42 U.S.C.A. §§ 4601–4655 (West 1995). The Uniform Act is a federal statute that provides for the recovery of litigation expenses, including attorney's fees, by plaintiffs who instigate inverse condemnation proceedings under section 1346(a)(2) or 1491 of Title 2816 of the United States Code. *Id*

It is abundantly clear from the Court's analysis that landowners relied exclusively on the language of the federal law, and not on any state statute. Again, it was the State of South Dakota's agreement to comply which creates its obligation, not the federal act itself.

Randolph v. Missouri Highways and Transp. Com'n 224 S.W.3d 615 (Mo. Ct. App. 2007) is another decision from an intermediate appellate court. The Missouri Court of Appeals considered whether the federal act required the State's to pay attorney's fees in inverse condemnation cases. Landowners argued that Missouri had, through case law, adopted the URA. *Id* at 619. The Court found no such case law existed. *Id.* No reference was made in the decision to any statutory agreement to abide by the policies of the federal act.

The two decisions relied upon by the State in its brief are factually and legally different than the present case. Unlike the cases cited by Landowners, neither *City of Austin* nor *Randolph* makes any reference to the state's statutory

agreement to follow the policies of the federal act. These cases should not be considered as relevant authority in this matter.

D. Rupert and Baron do not bear on the issues presently before the Court.

This is an issue of first impression in South Dakota, despite the State's reliance on *Rupert v. City of Rapid City,* 2013 S.D. 13, 827 N.W.2d 55. There is absolutely no indication anywhere in the *Rupert* decision that South Dakota's agreement to follow the policies of the URA was argued by landowners or considered by the Court. Landowners counsel pointed out at the motion hearing in this case that these matters were not raised by the Attorneys in the *Rupert* case and that this is a new issue. *Appellant's Brief, Appx. 21.*

The *Rupert* Court completed an analysis of SDCL § 21-35-23, which authorizes the payment of attorney's fees in direct condemnation cases where the landowner obtains a judgment that exceeds the condemning authorities final written offer by 20 percent. *Id.* at 68-69. The cases which have applied this statute have done so strictly in direct condemnation matters. The Legislature must expressly abrogate sovereign immunity to be responsible for attorney's fees. *Id* at 67. As pointed out above, a reading of § 5-2-18 in the context of Congress using its spending power proves an abrogation of sovereign immunity in exchange for the federal dollars.

Rapid City v. Baron 88 S.D. 693 (1975) considered the trial court's interpretation of one specific provision of the URA and found it to be blatantly incorrect. Landowners used one of the stated purposes of the federal act, "To

assure consistent treatment for owners in the many Federal programs," to argue for uniform compensation payments to the approximately 1300 property owners whose properties were condemned following the Rapid City Flood.

The Court overruled the trial court's interpretation, finding it contrary to the "just compensation" language of our state Constitution and the fair market value principles which had governed condemnation awards in South Dakota. The Court described the consistent treatment provision to be "a policy statement taken out of context from a federal act." *Id.* at 619. The Court held that specific provision had no effect on our Constitution, statutes or case law. *Id.* at 699. In contrast, the federal act clearly authorizes attorney's fees for a successful inverse condemnation claimant. The *Baron* Court was not charged with determining if South Dakota had agreed to follow the federal act, rather it was interpreting a provision of the act as it applied to state law.

Neither *Rupert* nor *Baron* support the State's argument that the Legislature did not authorize the payment of attorney's fees in inverse condemnation cases when it passed § 5-2-18.

CONCLUSION

One policy of the URA is the payment of attorney's fees in inverse condemnation cases. Whether South Dakota has agreed to adhere to that policy is an issue of first impression for South Dakota. The Court must decide what the legislature intended by passing SDCL §5-2-18. If its intention was to give required assurances in exchange for federal highway funds, then there is no doubt that compliance with the URA's policies is mandatory under our state code. The

State must adhere to the policies of the URA and honor its commitment to the federal government and the citizens of South Dakota.

Landowners urge the Court to overrule the trial court's decision and remand this matter to the court below for a hearing on reasonable attorney's fees.

Respectfully submitted this 4th day of August, 2015.

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Certificate of Service

The undersigned hereby certifies that two true and correct copies of the foregoing Appellants' Reply Brief and all appendices were mailed by first class mail, postage prepaid to:

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Certificate of Compliance

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 3,357 words from the Reply Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 4th day of August, 2015.

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