IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH), et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 03-CV-0846-CVE-PJC
BLUE TEE CORP., et al.,	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES

Five hours before filing it Response, the Tribe, for the sixth time, supplemented its Rule 26(a)(1) disclosures, this time to limit its natural resource damages claims to terrestrial plants. The Tribe then declares that the State of Oklahoma has no interest in these resources, thus rendering the Rule 19 motion moot. If not moot, the Tribe argues the Motion is untimely, because Defendants should have known that the Tribe's now-rejected agricultural model was a "proxy" for injuries to wildlife and other resources within the trusteeship of the State. According to the Tribe, Defendants were obligated to raise the State's absence during Phase I and have now waived their ability to insist that all required parties, including the State, be present in the case.

Contrary to the Tribe's arguments, the Motion to Dismiss is neither moot nor untimely. Even though the Tribe has now apparently given up on its claim for injuries to aquatic resources and wildlife,[1] its limited claim for damages to terrestrial plants still falls within the scope of

[1] Although the Tribe asserts that it is only seeking to recover for injured terrestrial plants, discovery propounded by the Tribe less than a week before it served its Response focuses much more broadly on "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and/or recreational resources." (*See, e.g.*, Notice to Take Deposition and Subpoena Duces Tecum, at Ex. A n.1, attached hereto as Exhibit A.). During a subsequent meet-and-confer, Plaintiffs have continued to insist on discovery on this whole array of natural resources, even though they claim here that only terrestrial plants are at issue.

interests claimed by the State. And despite the Tribe's post-hoc characterization of its agricultural leasing model as a "proxy" for injuries to all other resources, the history of the Tribe's disclosures amply demonstrates that the Tribe's NRD claims have been (and continue to be) a moving target. A fair reading of the Tribe's agricultural model would not have put anyone on notice that it was intended as a "proxy" for injuries to other natural resources. Even if it were, the sovereign interests of the absentee State cannot be compromised by the parties to this case.

A. The Tribe's Last-Minute Narrowing of its Claims Does not Moot or Otherwise Overcome the Issues Raised by Defendants' Motion.

Contrary to the Tribe's assertion, its habitat equivalency analysis ("HEA") does not focus exclusively on natural resources on Indian lands. The Tribe admits that the HEA calculations contained in its Fifth Supplemental Disclosures include damages for "non-Tribal Land acreage that was inadvertently referenced." (Resp. Br., Dkt. No. 728, at 6 n.5). The Tribe states that it intends to supplement its disclosures again at some unspecified time. But for now its damage computations include non-Tribal land over which the State undoubtedly asserts an interest.

Even if the Tribe's claim is limited to tribal lands, its bare assertion that it is the sole trustee of resources on those lands is not determinative. The Tribe argues that *Tyson Foods* is distinguishable because there the State was attempting to recover for damage to all natural resources within the Illinois River watershed, while here the Tribe is attempting to recover damages for resources over which it claims sole trusteeship. (Resp. Br., Dkt. No. 728, at 12-14). Although the Tribe does not appear to be seeking to recover for injury to all natural resources within the Tar Creek site, the analysis still focuses on whether the absent party – the Cherokee Nation in *Tyson Foods* and the State of Oklahoma here – claims a non-frivolous interest in the resources at stake.

Here, the State clearly claims an interest in the resources at issue in the litigation – namely the terrestrial plants encompassed within the Tribe's claim.[2] As set forth in the Motion to Dismiss, the State has consistently taken the position – through its Legislature, through litigation (specifically the *Tyson Foods* case), and through its activities on the Tar Creek Trustee Council – that it has trusteeship over all natural resources within the State, irrespective of the status of land as "Indian Country." (Mot. to Dismiss, Dkt. No. 697, at 10-15). The State specifically claims an interest in the habitat and supporting ecosystems used by Oklahoma wildlife within the geographic boundaries of the Tar Creek site. (*See, e.g.*, *id.*, Ex. E. at 5.2 ("The State of Oklahoma, through the Oklahoma Secretary of the Environment, acts as a natural resource Trustee on behalf of the public for natural resources, ***including their supporting ecosystems***, at the Tar Creek Site.") (emphasis added)). The Tribe does not dispute this. As the Tribe acknowledges, the Tar Creek Trustee Council (of which the State is a member) performed a HEA encompassing ***the very same terrestrial plant resources over which the Tribe claims sole trusteeship***. "Mr. Donlan's HEA addressed primary restoration and compensatory restoration of degraded terrestrial habitat existing throughout the Tar Creek Site."[3] (Resp. Br., Dkt. No. 728, at 7 n.6). As the Trustee Council states: "The Oklahoma Trustees developed and implemented a HEA for the 1,190 acres of terrestrial habitat to value the loss of ecological services from these terrestrial areas over time." (Mot. to Dismiss, Dkt. No. 697, at Ex. I, p. 60). The Trustee Council

[2] Defendants do not concede that any entity has standing to recover damages for the lack of plants on private property, especially a loss attributable to the landowner's permitted use of private land. And Defendants specifically dispute that the Tribe can meet its burden of showing it actually has trusteeship over terrestrial plants on land owned by members of the Tribe. (*See* Dkt. No. 678 at 25 n.10 ("[A] necessary part of the Tribe's claim for damages will be to show that it actually has trusteeship over the natural resources that it is claiming defendants have harmed.")). This issue will be presented to the Court at a later time.

[3] Plaintiffs incorrectly attribute the HEA to Michael Donlan, an expert in the Asarco bankruptcy. In fact, the HEA was performed by the Tar Creek Trustee Council and is attached as Exhibit I to the Motion to Dismiss. The HEA for terrestrial resources is discussed at pages 60-62.

did not carve out terrestrial plants on Indian land from its HEA; it self-evidently does not believe the Quapaw Tribe is the sole trustee over terrestrial plants on Indian lands.

Despite the fact that the State claims an interest in all natural resources at the Tar Creek Site, including wildlife and ecosystems/habitat supporting that wildlife, the Tribe argues that the State does not have a valid interest in any natural resources within Indian Country. But this argument misses the point of Rule 19. The relevant factor under Rule 19 is that the State *claims* a non-frivolous interest in the subject matter of the litigation. *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999). The scope of the State's governmental authority over Indian lands appears to be a live dispute, and binding decisions on this issue should not be made in the absence of one of the parties to that dispute, particularly one whose participation (as the Tribe does not dispute) cannot be compelled under the Eleventh Amendment.

B. Defendants' Motion to Dismiss the NRD Claims is Timely.

The Tribe spends significant effort arguing that the Motion to Dismiss is untimely and should therefore be denied. (*See* Resp. Br., Dkt. No. 728, at 2, 6, 20-21). Its claim of "inexcusable delay" in bringing this motion is based largely on statements of defense counsel at the July 31, 2007 status conference, in which counsel noted the potential interests of other trustees, including the State. Approximately three months later, on October 26, 2007, the Tribe served its First Supplemental 26(a)(1) Disclosures. (*See* Mot. to Dismiss, Ex. 1). Presumably mindful of the potential interests of the other trustees, including the State, the Tribe carefully constructed its damage calculations to focus on agricultural leasing and revenues from hunting and fishing leases. This damage model, by necessity, framed the case and became the focus of Phase I. But the State has never claimed any interest in private agricultural leasing rents or private hunting and fishing rents – those damages belong to the landowners and not to the

sovereign. (*See* Dkt. No. 678 at 24-25). Because the State claimed no interest in the damages at issue in the Tribe's now-rejected damage model, the State was not a required party in Phase I.

The Tribe next asserts that its agricultural leasing damage model was really a "*proxy* to measure the lost use of land, surface *water*, plants, *wildlife*, *fish*, and other biota on *Tribal* Lands." (Resp. Br., Dkt. No. 728, at 2 (emphasis in original)). The Tribe suggests Defendants should have interpreted the leasing model as infringing on the State's interests, and mandating an earlier motion under Rule 19. But not until March 25, 2009 (when it was faced with losing its NRD claim on summary judgment) did the Tribe, for the first time, characterize the agricultural leasing model as a "proxy" for anything. (Dkt. No. 652 at 42-43). The word "proxy" does not appear in the Tribe's First Supplemental Rule 26(a)(1) Disclosures, and a fair reading of these disclosures provides no indication that the model was intended as a proxy for other damages.

The Tribe further claims that Defendants somehow violated "the Court's directive" by failing to raise the State's status as a required party during Phase I, though it fails to articulate any particular directive it believes Defendants violated. (Resp. Br., Dkt. No. 728, at 21). The Court's August 1, 2007 scheduling orders specified that joinder motions would not be required in Phase I. The Phase II "Standard Scheduling Order Re: Liability and Damages as Between Plaintiffs and Defendants" set forth a specific deadline for "Motions for Joinder of Additional Parties &/or Amendment to the Pleading." (Dkt. No. 409, ¶ 2).[4] The Phase I Scheduling Order,

[4] In its Opinion and Order dismissing the Tribe's CERCLA claim, the Court vacated all pending scheduling orders and ordered the parties to submit an amended joint status report and agreed scheduling orders for both phases of the remaining claims. (Dkt. No. 560 at 37). Thereafter, the parties filed a joint motion requesting that the Court suspend Phase II scheduling until after the Court had ruled upon the Phase I dispositive motions. (Dkt. No. 564 at 3; *see also* Dkt. No. 565 at 3). The Court granted that motion. (Dkt. No. 566 at 1). On September 22, 2009, the Court entered a Phase II scheduling order after ruling on the Phase I dispositive motions. (Dkt. No. 691). That Scheduling Order did not include a deadline for joinder motions, but simply left the deadline for such motions blank. (*Id.*) The parties, however, had jointly requested a deadline for such motions of January 11, 2010. (Dkt. No. 679 at 2).

on the other hand, indicated that a deadline for joinder motions is "not applicable." (*See* Dkt. No. 408, ¶ 2). And as recognized by the Advisory Committee Notes to Rule 19:

> A person may be added as a party at any stage of the action on motion or on the court's initiative (*see* Rule 21) and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (*see* Rule 12(h)(2), as amended; *cf.* Rule 12(b)(7), as amended).

Though complaining bitterly, the Tribe fails to articulate any prejudice that has resulted from the filing of the Rule 19 motion at this time. At most, the Tribe claims that it has "dedicated significant resources to litigating both Phase I and Phase II issues in this case." (Resp. Br., Dkt. No. 728, at 21). Defendants have also dedicated significant resources to attempting to pin the Tribe down on exactly what resources and damages are at issue. As late as five hours before filing their Response Brief, the Tribe once again changed its position on this issue through service of its Sixth Supplemental Rule 26(a) Disclosures. The resources the Tribe has devoted to constantly changing its theories to avoid dismissal do not justify denial of the Motion. Moreover, Defendants filed the instant motion well before the deadline that the parties had *jointly* proposed for the filing of such motions. (Dkt. No. 679 at 2).

Finally, even if the Court were to find that Defendants should have filed this Motion earlier, the failure to do so does not warrant denial of the Motion. Rule 19, by its very nature, protects interests much broader than those of the litigants. The interests implicated by the Tribe's NRD claim belong to the State, a sovereign that cannot be compelled to litigate these claims in this forum. The conduct of the parties should not be allowed to act as a waiver of the State's sovereign interests. As the Supreme Court has unequivocally stated, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, *dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign*."

Republic of the Philippines v. Pimentel, 128 S.Ct. 2180, 2191 (2008) (emphasis added). Here, the State asserts a non-frivolous interest in the "habitat" and "supporting ecosystems" at issue in the Tribe's latest iteration of its claims and enjoys sovereign immunity. The action should therefore be dismissed, regardless of when the Rule 19 Motion was filed.

C. The Trusteeship Approach From the *Coeur D'Alene* Litigation does not Provide an Alternative to Joining the State.

Citing to *United States v. Asarco*, 471 F. Supp. 2d 1063 (D. Idaho 2005) ("*Asarco*"), the Tribe claims that, even if the State is a co-trustee, the Tribe itself may still recover 100% of natural resource damages. (Resp. Br., Dkt. No. 728, at 16-17). This argument is based on an incomplete reading of *Asarco* and that court's earlier decision in *Coeur D'Alene Tribe v. Asarco*, 280 F. Supp. 2d 1094 (D. Idaho 2003)("*Coeur D'Alene*"). In *Coeur D'Alene*, the district court ruled that the plaintiffs – the Coeur D'Alene Tribe and the United States[5] – would be required at trial to demonstrate their management and control over natural resources to establish the percentage of trusteeship over specific natural resources. *Id.* at 1115-17. The court revisited this ruling in the *Asarco* decision, and found that the Coeur D'Alene Tribe and the United States were co-trustees over federal and tribal lands, as well as migratory resources such as wildlife, water, and groundwater. 471 F. Supp. 2d at 1068-69. However, the court's rationale for revising its prior ruling was that it believed the alternative approach was mandated by federal law:

> Upon further reflection and research, this Court finds that its reliance on traditional tort concepts in allocating trusteeship was misplaced and that this type of case is distinguishable from other tort actions. Under CERCLA the recovery, if any, is not for the benefit of any given party, but goes to the trustee as the fiduciary to accomplish the stated goals.

[5] The State of Idaho was not a party to the litigation because it previously settled its natural resource damage claims with the defendants. *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1115.

Id. at 1068. The court went on to say that "[i]t is unfortunate that the Court did not pick up on and distinguish the uniqueness of this statute from the traditional notions of tort law early on, but the Court is confident that this has to be the intent of Congress."[6] *Id.* Here, the CERCLA claim has been dismissed, and all that remains are common law tort claims. (*See* Dkt. No. 560 (dismissing the Tribe's CERCLA claims as premature)). As such, the "traditional notions of tort law" considered by the court in *Coeur D'Alene* – not the congressional intent behind CERCLA considered by the court in *Asarco* – will be determinative, and the Tribe is not entitled to recover the full amount of natural resource damages irrespective of the interests of the other trustees.[7]

D. The Co-Owners of Real Property at Issue are Required Parties.

In their Response, the Individual Plaintiffs do not dispute the basic legal principle that all co-owners must be joined in an action to recover for damage to real property. Instead, they argue that they are only seeking a proportionate share of damages to the properties at issue and, in any event, that Defendants' motion is untimely. Neither of these rationales justifies denial of the motion in light of the clear legal requirement that all co-owners be present.

The Individual Plaintiffs state that they are seeking "**only** to recover their proportionate share of any property damages." (Resp. Br., Dkt. No. 728, at 22 (emphasis in original)). Plaintiffs acknowledge that they own only fractional portions of the properties, and assert that Defendants therefore should have known from the start that the Individual Plaintiffs are seeking

[6] It is also noteworthy that all trustees were either before the court (the Coeur D'Alene Tribe and the U.S.) or had already settled the NRD claim (the State of Idaho). This, along with the Coeur D'Alene Tribe's agreement that the United States would represent its interests in the litigation, eliminated any potential disagreements among the trustees. *Asarco*, 471 F. Supp. 2d at 1068.

[7] Quoting the *Asarco* decision, the Tribe also asserts that any disagreement between the State and the Tribe over entitlement to damages recovered by the Tribe could be resolved in subsequent litigation. (Resp. Br., Dkt. No. 728, at 16). However such litigation would presumably require the Tribe to waive its sovereign immunity, which the Tribe has not stated it is willing to do. This approach is also contrary to the "public stake in settling disputes in wholes, whenever possible." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968).

only their proportionate share of damages. (*Id.*). But the Fifth Amended Complaint explicitly states that Plaintiffs' claims are for ***all*** damages, not just their proportionate share of damages:

> ¶ 153: "Plaintiffs seek ***all*** damages caused as a result of the Non-Federal Defendants' wrongful trespass;"
>
> ¶ 163: "Plaintiffs seek ***all*** damages caused by the Non-Federal Defendants' conduct;"
>
> ¶ 170: Plaintiffs seek ***all*** actual damages caused by the Non-Federal Defendants' negligent and grossly negligent conduct."

(Dkt. No. 570 (emphasis added)). The Individual Plaintiffs have not provided damage computations as required by Rule 26(a)(1)(A)(iii), and a fair reading of the Rule 26(a)(1) disclosures regarding damages does not put Defendants on notice that these Plaintiffs are seeking only their proportionate share of damages. (*See* Resp. Br., Dkt. No. 728, at Ex. 2, pp. 7, 13).

But even if Plaintiffs are now only seeking a proportionate share of damages, Plaintiffs provide no support for the notion that this solves the required party issue under Rule 19. *Ramsey v. Bomin Testing Inc.*, 68 F.R.D. 335 (W.D. Okla. 1975), cited in Defendants' Motion to Dismiss (*see* Dkt. No. 697 at 24) but ignored by Plaintiffs, confirms that Plaintiffs' claims still may not proceed without the absent co-owners. There, certain owners of fractional working interests in a gas and oil lease brought a claim to recover their proportionate share of the value of personal property removed from the leasehold. 68 F.R.D. at 336. On the principle that the defendants were entitled to have all claims against them arising from the transaction adjudicated in one trial, as well as the public interest in having the claims adjudicated only once, the court found that the absent co-owners were necessary parties and the claims were dismissed because joinder would destroy diversity jurisdiction. *Id.* at 337-38. Similarly, even if the Individual Plaintiffs here seek

only their proportionate share of damages, Defendants and the public are entitled to have the claims of all owners decided in one action.[8]

Plaintiffs' argument that this aspect of the Motion is untimely is equally unavailing. As discussed above, the Phase I scheduling order did not contain a deadline for joinder of parties. (*See* Dkt. No. 408, ¶ 2). Instead, it was contemplated that the deadline for joinder of parties and amendment of pleadings would occur in Phase II. (*See* Dkt. No. 409, ¶ 2). Plaintiffs themselves were obligated under Rule 19 to identify in their pleading all absent required parties and to state the reason for non-joinder. FED. R. CIV. P. 19(c). Plaintiffs failed to do so here, and cannot now complain that they have been prejudiced because Defendants waited too long to raise the issue.

There is no real prejudice resulting from the timing of the filing of the instant motion on December 1, 2009, almost one year before the date on which trial is now scheduled to begin, and just over two months after the Court issued a Phase II scheduling order on September 22, 2009. The "extensive discovery" regarding the Individual Plaintiffs' claims amounts to nothing more than producing five individuals for deposition and answering written discovery. The Individual Plaintiffs have not produced expert reports, have not provided required damage computations, and have not taken any depositions. And the depositions and written discovery of the Individual Plaintiffs that have already been accomplished can be used in subsequent litigation after joinder of all required parties (if their co-owners in fact were to sue).

For the foregoing reasons Defendants respectfully request that the Court grant Defendants' Motion to Dismiss for Failure to Join Required Parties.

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[8] Plaintiffs suggest that the Individual Plaintiffs' claims for inconvenience, annoyance, and discomfort should be allowed to proceed in the absence of their property damage claims and state that Defendants presumably agree with this position. This is incorrect – Defendants believe that all of the individual claims should be dismissed due to the absence of the co-owners. Defendants and the public share an interest in having all claims arising from the same factual allegations adjudicated in a single trial. *See Ramsey*, 68 F.R.D. at 337.

Dated: February 3, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 3rd day of February, 2010, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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