Case No. 09-5134

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. OKLAHOMA SECRETARY OF THE ENVIRONMENT J.D. STRONG in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiff-Appellee,

v.

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC.,

Defendants-Appellees.

CHEROKEE NATION,

Movant-Appellant.

BRIEF OF MOVANT-APPELLANT CHEROKEE NATION REGARDING QUESTION OF MOOTNESS

On Appeal from the United States District Court
For the Northern District of Oklahoma
The Honorable Judge Gregory K. Frizzell
Case 4:05-cv-00329-GKF-SAJ

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INTRODUCTION

The Court has asked the parties to brief whether or not this appeal, brought by the putative intervenor, Movant/Appellant Cherokee Nation ("Cherokee Nation" or "Nation"), has been mooted by the conclusion of the bench trial between the Plaintiff/Appellee State of Oklahoma ("State") and Defendants/Appellees. As of the date of this brief, the District Court has not yet rendered a decision in the underlying litigation of the State's claims that the land-application of poultry waste generated by Defendants/Appellees' birds has resulted in pollution of the waters of the Illinois River Watershed ("IRW"). The trial involved *only* the State's *equitable* claims seeking injunctive relief. The State's legal claims seeking damages have not been tried because those claims were dismissed in their entirety as part of the District Court's July 22, 2009 Order. Specifically, the District Court concluded that:

> ***The Cherokee Nation is a required party under Rule 19*** *with respect to the State's claims for damages. Joinder of the Cherokee Nation is not feasible based on the Nation's status as a dependent sovereign.* ***The Cherokee Nation is an indispensable party and, pursuant to Rule 19(b),*** *plaintiff's claims for damages should not, in equity and good conscience, be allowed to proceed among the existing parties.*

(Aplt. App. at 568) (emphasis added).

Following the District Court's finding that the Cherokee Nation was a necessary party, the Nation promptly attempted to revive the legal claims so that the Illinois River Watershed ("IRW"), an important natural and cultural resource for the Cherokee people, could be protected from the continuing pollution being caused by the Defendants/Appellees. Indeed, the Nation has done everything in its power to

prevent costly and disruptive delays in this litigation. As the Nation argued before the District Court in its Motion to Intervene below:

> The Nation itself attempted to permit the State to represent its interests in this matter and pursue the Nation's claims to avoid the possible delay that its intervention as a party might create . . .

(Aplt. App. at 603). That attempt, of course, was the mutual agreement between the Attorneys General of the State and the Nation regarding prosecution of the pollution claims against the Defendants/Appellees. And, after the Order of July 22nd , the Nation used its newly-enhanced position in the matter to engineer a last-ditch attempt at settlement with the parties before a settlement judge, a settlement discussion in which the Nation participated and agreed to be bound if an agreement could be reached. When those attempts failed, the Nation filed its Motion to Intervene with accompanying Complaint. That Motion was denied on September 19, 2009 and the bench trail on the State's injunctive claims went ahead. Although that trial concluded in February of 2010, no opinion or judgment has been issued by the District Court.

I. STANDARD OF REVIEW

When determining whether an appeal has become moot, "[t]he crucial question is whether granting a present determination of the issues offered will have some effect in the real world." Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1182 (10th Cir.2000). An appeal may become moot at any time, and because mootness is a jurisdictional question, the "the case and controversy must be extant at all stages of review, not merely at the time the complaint is filed." Schutz v. Thorne, 415 F.3d 1128, 1138 (10th Cir.2005). This Court has previously determined that

"[t]he crucial question is whether "granting a present determination of the issues offered ... will have some effect in the real world." Citizens at 1182. (citing Kennecott Utah Copper Corp. v. Becker, 186 F.3d 1261, 1266 (10th Cir.1999)).

II. THE CHEROKEE NATION IMMEDIATELY AND PROPERLY APPEALED THE DENIAL OF ITS INTERVENTION OF RIGHT WITHOUT A REQUEST FOR A STAY.

The Nation's appeal on the denial of its intervention is not moot; indeed the Nation had no option but to immediately appeal that denial. As the Supreme Court iterated in a 1947 opinion on the issue:

> [W]here a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instances. ***And since he cannot appeal from any subsequent order or judgment*** in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom.

Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co, 331 U.S. 519, 67 S.Ct. 1387, 1390, 91 L.Ed. 1646 (1947)(emphasis added). The Nation had to appeal when it did; it had no option to wait until after judgment to raise its claims. The Supreme Court discussed the holding of *Brotherhood of Railroad Trainmen* forty years later in *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987), and expounded that "[i]n that case the party seeking to intervene had no recourse other than pretrial review, since the trial court's order terminated that party's participation in the litigation." 107 S.Ct. at 1183. Undoubtedly

Defendants/Appellees will claim that the Nation should somehow be estopped from prosecuting this appeal because it did not seek a stay of the trial. As stated in the brief on appeal, the Nation chose not to pursue an appeal "because of the importance of getting injunctive relief to prevent further damage to the Illinois River Watershed." Brief of Appellant, p. 20.

This important public policy consideration was determinative in the decision making process. Further, the Nation knows of no case law that holds that the failure to request a stay will abrogate the merits to a mandatory appeal, timely made. During the District Court's consideration of the Cherokee Nation's Motion to Intervene, no one argued that the extent of the Nation's interest in this litigation: it was only argued that the Nation's motion was untimely. Consequently, if the Court determines that the Nation's motion was timely, the Nation should be permitted to protect that interest, regardless of whether the District Court has concluded the bench trial on the equitable claims.

III. THE CHEROKEE NATION'S COMPLAINT ALLEGES DAMAGE CLAIMS THAT MUST BE TRIED TO A JURY IF THE NATION IS PERMITTED TO INTERVENE

The District Court dismissed the State of Oklahoma's damage claims due to the State's failure to join the Cherokee Nation as a party. When the Cherokee Nation filed its motion to intervene, it also filed a complaint which requested damages identical to those requested by the State. Regardless of what has occurred in the case prior to the Cherokee Nation's involvement, if allowed to intervene the Nation would be entitled to a jury trial as to its claims. "Under well settled principles, when a

plaintiff brings both legal and equitable claims in the same action, the Seventh Amendment right to jury trial on the legal claims must be preserved by trying those claims first (or at least simultaneously with the equitable claims), and *the jury's findings on any common questions of fact must be applied when the court decides the equitable claims.*" *Colo. Visionary Acad. v. Medtronic, Inc.*, 397 F.3d 867, 875 (10th Cir. 2005) (emphasis added). Accordingly, when legal claims are revived after a bench trial on a party's equitable claims, issues common to both must be re-litigated before a jury. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990).

A series of court cases establishes the rules that federal courts may hear suits both at law and at equity. The liberal pleading rules allow multiple claims to be joined together and tried to a jury, together or in parts as necessary to provide the maximum access to a jury trial as required by the Seventh amendment. As such, the fact that the District Court has already heard the State's equitable claims for relief in a bench trial does not prohibit either the Nation or the State from pursuing its legal claims before a jury.

> In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.

Scott v. Neely, 140 U.S. 106, 109-110, 11 S. Ct. 712, 714, 35 L. Ed. 358 (1891).

Further case law specifies that the District Court should exercise its discretion in such a way as to maximize the plaintiff's access to a jury trial. In Beacon Theaters, Inc. v. Westover, the district court decided that the claims presented were

essentially equitable and that it was not entitled to a jury trial. The Supreme Court held that the Court should have exercised its discretion in such a way as to maximize Beacon's access to a jury.

> If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.

Beacon, 359 U.S. 500, 510, 79 S. Ct. 948, 956, 3 L. Ed. 2d 988 (1959).

If permitted to intervene, the Cherokee Nation would be entitled to a jury trial on its damage claims. For this reason alone, the present appeal is not moot as a matter of law. There is no reason why the District Court would not be well equipped to provide that trial, regardless of the outcome of the injunctive bench trial previously held by the Court.

IV. THE CHEROKEE NATION'S CLAIMS ARE NOT MOOT IF THE COURT COULD FASHION A REMEDY THAT PROVIDES EVEN PARTIAL RELIEF.

Although the trial on the State's injunctive claims is complete, if the Cherokee Nation is not a party to this case it will not be able to appeal any decisions made by the Court. As the Cherokee Nation is entitled to intervention as of right, it has a substantial interest in the outcome of the case and should be permitted to intervene as

a party to protect its rights. However, the question of mootness is jurisdictional, and the suggestion of mootness upon the record must be decided by the Court.

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 133, 40 L. Ed. 293 (U.S.S.C. 1895) There is no requirement that this Court find some way to fashion relief that would allow the Cherokee Nation to intervene as if the trial below had not occurred. If there is any way to provide relief to the Cherokee Nation should it prevail upon appeal, then the appeal is not moot.

During a dispute between the Church of Scientology and the Internal Revenue Service over a series of tapes the IRS had subpoenaed during its investigation of the tax returns of L. Ron Hubbardm, the question of mootness came before the Ninth Circuit. Church of Scientology of California v. United States, 506 U.S. 9, 13, 113 S. Ct. 447, 450, 121 L. Ed. 2d 313 (1992). The tapes in question had been turned over to the IRS while the Church's appeal of the District Court order was pending and the Church was unsuccessful in its attempt to secure a stay of the District Court's order. Because the IRS already had access to the tapes by the time the appeal was heard before the Ninth Circuit, the Court ultimately determined that the matter was moot. The Supreme Court granted a writ of certiorari to decide the narrow question of whether the appeal was moot.

In determining that the Church's appeal was not moot, the Supreme Court acknowledged that there was no way any Court could undo what had already been done and that the information the IRS had garnered from the tapes could not be unlearned. But that fact, in and of itself, did make the Church's appeal moot.

> While a court may not be able to return the parties to the *status quo ante*-there is nothing a court can do to withdraw all knowledge or information that IRS agents may have acquired by examination of the tapes-a court can fashion *some* form of meaningful relief in circumstances such as these.

Church of Scientology of California v. United States, 506 U.S. 9, 12-13, 113 S. Ct. 447, 450, 121 L. Ed. 2d 313 (1992)

In the current case, this Court's hands are not nearly so tied as the Ninth Circuit's were in fashioning relief, should the Cherokee Nation prevail in its appeal. The District Court has not, as of the writing of this brief, issued any order in the trial on the State's equitable claims. This Court could issue an order on remand that required the District Court to allow the Cherokee Nation to intervene and require re-trial of the entire matter. The Court could allow the District Court to rule on the injunctive claims, and allow the Cherokee Nation to intervene at this point in the litigation so that it may participate as the case moves ahead.

V. THE CHEROKEE NATION'S INTERVENTION AT THIS POINT IN THE LITIGATION WOULD ALLOW THE NATION TO APPEAL THE ORDERS OF THE DISTRICT COURT.

During the course of the litigation, the District Court made a number of decisions that have potentially profound consequences for the Cherokee Nation – it

ruled that the Nation could not independently bring CERCLA claims for damages done to its natural resources, and it ruled that the Cherokee Nation had a substantial, non-frivolous claim to the water in Northeast Oklahoma under the Five Tribes theory. Some or all of these decisions may be appealed by either the State or Defendants/Appellees. As these appeals may affect the nature and extent of the Cherokee Nation's asserted interests, the Nation should be allowed to intervene in the case regardless of whether the trial on the merits of the injunctive claims has concluded. As a practical matter, the end of the trial on injunctive relief in no way signals the end of this litigation.

It is well settled law that only a party can appeal an adverse ruling. In a *per curiam* opinion of the Supreme Court established that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." Marino v. Ortiz, 484 U.S. 301, 304, 108 S. Ct. 586, 587, 98 L. Ed. 2d 629 (1988). While later rulings of the Court have carved out an exception to this rule, that exception is not applicable to the circumstances the Nation is currently in. See Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002).

No party disputed, nor did the District Court hold, that the Cherokee Nation was not entitled to intervene as a matter of right for any reason other than timeliness. While the Nation disputes that its Motion to Intervene was untimely, the fact that the Nation is otherwise entitled to intervene as a matter of right is of independent importance for this Court to consider. The Defendants/Appellees thrust the Nation into this litigation with their Motion to Dismiss for failure to join an indispensible

party. When the Nation realized it could not avoid entanglement in this litigation, it sought to intervene in the case so that it might protect its interests and affect the outcome of the litigation in a way that would be most beneficial for its citizens.

With these facts, there would be great practical value in allowing the Nation to intervene in this case and appeal the decisions of the District Court. Considering how vociferously the current parties have litigated this matter and the likelihood that this case will continue to evolve both in the District Court and on appeal, overturning the District Court's decision and allowing the Cherokee Nation to participate as a party would be beneficial even after the trial on injunctive relief is complete.

CONCLUSION

As was stated by this Court, the crucial question to answer is whether granting a review of the issue on appeal can have some effect in the real world. There should be no question that whatever decision this Court makes on the Nation's appeal it will have real world impacts upon the Cherokee Nation and its citizens. If this Court grants the Nation's appeal, the Nation will be able to bring its damage claims against the Defendants and appeal the decisions, or participate in the appeals of the decisions that the District Court makes. If this Court denies the Nation motion, then it will leave the Cherokee Nation a bystander in a case where, regardless of the outcome, one of the Nation's most precious natural resources will be forever affected. A more real world impact is difficult to conceive.

Respectfully submitted this 15th day of April, 2010.

APPELLANT-INTERVENOR

CHEROKEE NATION

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of the Court's March 30, 2010 Order because this brief is limited to 15 pages in length in a 13 point font.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using a 13- point Times New Roman font.

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CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that:

1. All required privacy redactions have been made;

2. The ECF submission is an exact copy of the hard copy submissions; and

3. The digital submissions have been scanned for viruses with version 8.5.0.781 of MacAfee Virus Scan, updated February 15, 2010, and, according to the program, are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2010, I electronically filed the foregoing Brief of Plaintiff-Appellee with the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electric Filing to the following ECF registrants:

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