IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-5134

STATE OF OKLAHOMA, et al.

v.

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

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

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES REGARDING MOOTNESS

April 15, 2010

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants-Appellees Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's Inc., George's Farms, Inc., Peterson Farms, Inc., and Simmons Foods, Inc. (the "Poultry Companies") hereby submit supplemental briefing pursuant to the Court's March 30, 2010 Order requesting that the parties address whether this appeal has been mooted by the completion of the trial in this case.

The motion to intervene filed by Intervenor-Appellant the Cherokee Nation (the "Nation") is moot. After the trial court denied that motion, the Nation failed to seek a stay from the trial court or this Court and failed to move to expedite its appeal. As a result, a trial of 53 days commenced and concluded before the Nation's appeal from the denial of its motion to intervene could be heard. Under this Court's cases, an unsuccessful intervenor must move to stay trial proceedings pending appeal in order "to preserve the status quo … so that the appellant may reap the benefit of a potentially meritorious appeal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1265 (10th Cir. 2004) (internal quotation omitted); *see Plain v. Murphy Family Farms*, 296 F.3d 975, 981 (10th Cir. 2002) (same). A putative intervenor's failure to follow this mandatory procedure results in the dismissal of the intervention appeal as moot. *See*, *e.g.*, *id.*

("[T]o the extent it requests a new trial in which [proposed intervenors will] be permitted to participate, [the appeal] seeks 'review lost' by their failure to follow proper procedure the first time."); *Dominion*, 356 F.3d at 1265 (holding that "[a]s a result of Daystar's failure to seek a stay in our court, we are not in a position to provide Daystar with the relief it is seeking: the ability to intervene in the preliminary injunction action," and thus "Daystar's appeal of the denial of its motion to intervene is moot"). Here, it is unquestioned that the Nation failed to satisfy this Court's prerequisites to keeping its appeal alive.

Indeed, the Nation's strategic maneuvering here illustrates why this Court has developed the requirements set forth in *Plain* and *Dominion*. While the Nation failed to pursue its intervention diligently by seeking a stay, its attorneys attended the five-month trial and observed the development of the facts and the trial court's legal rulings. The Nation thus has had the opportunity to prepare for a retrial without any risk that it will be bound by the result of the now completed trial. The Nation is not permitted to lay back and obtain the advantage of a preview of its opponent's witnesses and trial strategy and the trial court's response to the evidence in the hope that this Court will reverse the denial of intervention and require a new trial. Instead, under this Court's case law, the trial's conclusion renders the Nation's intervention motion moot.

This Court has established the proper procedure for appealing the denial of a motion to intervene. And, in accordance with this Court's decisions, the Nation's appeal should be dismissed as moot.

II. SUPPLEMENTAL STATEMENT OF THE CASE

A. Course of Proceedings – Supplemental Statement

The District Court denied the Nation's motion to intervene on September 15, 2009. The Nation filed its notice of appeal two days later, *see* Nation Appendix ("Nation App.") 930, but the Nation elected not to file a motion to stay the proceedings pending appeal with the District Court. Moreover, the Nation did not petition this Court for a stay under Federal Rule of Appellate Procedure 8(a)(2). Finally, the Nation did not take advantage of this Court's rules authorizing the filing of a motion seeking expedited consideration of this appeal. *See* Fed. R. App. Pro. 2 (providing for expedited appellate proceedings); 10th Cir. R. 27.3(A)(7) (same). Accordingly, the proceedings in the District Court and in this Court continued on their normal schedule.

Over the course of the trial proceedings, the District Court resolved a number of legal issues based on the legal arguments and the evidence presented by the parties. As set forth in our opening brief, prior to trial, the District Court dismissed the State's claims under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq*., and all of the State's

claims for damages under state and federal common law. *See* Nation Addendum to Brief ("Nation Br. Addendum"), I 22-23. The District Court noted that these claims (which were not tried) were addressed in numerous motions, including summary judgment motions and *Daubert* motions, but held that the issues addressed in these motions were rendered moot when the underlying claims were dismissed. *See, e.g.*, Nation App. 273-274 (Orders, Dkt. Nos. 2363-2372). Indeed, in denying the motion to intervene, the District Court noted that allowing the Nation to participate would require reconsideration of many of these rulings and that the Nation's joinder would require at least 120 days of additional discovery. The District Court found that the Nation's proposed intervention:

> would trigger more than a 120 day delay. It would require the reinsertion of three causes of action that were previously dismissed, the consequent resuscitation of numerous motions pertaining to those causes of action, both motions for summary judgment and motions in limine. Perhaps more significantly, it would trigger the necessity of a new round of discovery pertaining to at least the statute of limitations issues, a new round of motions for summary judgment and likely a new round of motions in limine, in addition to those 41 that have already been filed.

Nation Br. Addendum, II 65.

The trial began on September 21, 2009 and continued until February 18, 2010. In total, the District Court heard 53 days of evidence and argument over the course of almost five months, including testimony from 63 different witnesses. As

noted above, counsel for the Cherokee Nation attended and observed throughout the trial proceedings.

At trial and after the State rested, the Poultry Companies brought a number of motions for partial judgment under Federal Rule of Civil Procedure 52(c). The District Court heard extensive argument on these motions over the course of several days. On December 14, 2009, the District Court granted in part the Poultry Companies' Rule 52(c) motion with regard to the State's claims of nuisance *per se*. *See* Transcript from Nonjury Trial Proceedings ("Tr.") at 8352:2-8353:5 (Dec. 14, 2009) (Addendum I). The District Court also granted the Companies' motion for judgment on the State's claims based on allegations of risks from bacteria. *See* Tr. at 8301:11-8306:23, 8353:24-8357:7 (Dec. 14, 2009) (Addendum I). On December 15, 2009, the District Court granted the Companies' Rule 52(c) motion concerning the State's claim under the Resource Conservation and Recovery Act ("RCRA"), concluding that the State had failed to establish that land application of poultry litter in the IRW constitutes the discard of a RCRA "solid waste." *See* Tr. at 8410:17-8413:5 (Dec. 15, 2009) (Addendum II). The District Court subsequently issued written findings of fact and conclusions of law to supplement its oral findings and conclusions on the Rule 52(c) motions. *See Findings of Fact and Conclusions of Law on Defendants' Motions for Partial Judgment Pursuant to Rule 52(c)*, Dkt. No. 2878 (Feb. 17, 2010) (Addendum III).

Following the close of evidence, the parties filed comprehensive proposed findings of fact and conclusions of law with respect to the remaining claims.[1] These proposed findings and conclusions totaled nearly 600 pages in length. All post-trial briefing and submissions were completed on March 1, 2010, and the parties are awaiting a final ruling from the District Court.

B. Nature of the Relief Requested

In its briefs to this Court, the Nation has clarified that it is asking this Court not only to grant its motion to intervene but also to send this case back to be either partially or completely retried. The Nation seeks to present additional evidence and argument on the claims that have been adjudicated in the trial. In addition, the Nation apparently seeks to have a trial (or have dispositive motions practice) on the claims that the District Court had already dismissed pursuant to the mid-trial Rule 52(c) motions discussed above. Finally, the Nation also seeks to revive those claims that the District Court severed from this case before trial began, and to try (or have dispositive motions practice) on these issues. *See Intervenor-Appellant's*

[1] After the District Court's pre-trial, mid-trial and post-trial orders, the remaining claims of the State were submitted for the District Court's decision:

(a) state law public nuisance claim for injunctive relief;

(b) federal common law nuisance claim for injunctive relief;

(c) trespass claim for injunctive relief; and

(d) claim alleging violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1, for injunctive relief and civil penalties.

Reply to Brief in Opposition of Defendants-Appellees, at 13 (Jan. 14, 2010) ("Nation Reply"); *see Brief of Appellant*, at 23 (Nov. 23, 2009) ("Nation Br."). The State of Oklahoma joins the Nation's request. *See Brief of Plaintiff-Appellee State of Oklahoma*, at 34 (Dec. 28, 2009) ("State Br.").

In their joint motion to extend oral argument, the Nation and State acknowledged that this appeal raises "unusual questions regarding the proper scope of a remand" because the bench trial has concluded. *See State of Oklahoma and Cherokee Nation's Joint Motion for Additional Time for Oral Argument*, at 3 (Apr. 5, 2010). Yet neither the Nation nor the State has explained the precise nature of the requested remand proceedings or addressed the effect of the trial's completion on the Nation's intervention motion. It is clear, however, that the Nation does not seek to intervene only to participate in post-trial proceedings and the appeal, if any. Rather, the Nation requests that its intervention result in a do-over, requiring not only a new trial on the claims that the parties have already tried, but also new discovery, the resuscitation of claims that were dismissed and the presentation of additional evidence and argument not addressed in the original trial. *See id.*; Nation Br. at 20-23; State Br. at 30-34.[2] The Nation may even be requesting that this Court order the District Court to seat a jury and conduct a jury trial, despite the

[2] The Nation has noted that theoretically it might seek intervention solely for purposes of an appeal arising from the District Court's final judgment in the completed trial. *See* Nation Br. at 21. However, it did not request this relief which, in any event, is not ripe for review.

fact that the State affirmatively waived its right to a jury on the claims that were tried,[3] and thus the case has already been completed as a bench trial.

III. ARGUMENT

A. The Cherokee Nation's Appeal Is Moot Because the Nation Failed to Seek a Stay or an Expedited Appeal

This Court has repeatedly held that a party which appeals the denial of a motion to intervene must seek a stay of the proceedings in which it seeks to intervene, lest those proceedings move past the point where the party's involvement is feasible without significant prejudice to the other parties and the federal courts. The Nation did not seek a stay from the District Court or this Court, and it did not seek to expedite the instant appeal. The parties have now completed the trial in which the Nation sought to intervene. The trial court's denial of the motion to intervene as untimely was correct; but even if it had not been, it is now too late for the Nation to ask this Court to address that motion because the Nation failed to protect its interests. This Court cannot turn back time and allow the Nation to participate in a trial that is now complete.

This Court has held on multiple occasions that a proposed intervenor's failure to move to stay district court proceedings pending appeal requires dismissal of the appeal as moot where the proceedings at issue have been completed. In its

[3] *See* Transcript of Proceedings at 11:10-16, 42:20-43:2 (Sept. 16, 2009) (Addendum IV).

seminal case on this issue, the Court dismissed an appeal from the denial of a motion to intervene in *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002). In *Plain*, this Court noted that:

> When the district court refused to stay the trial pending appeal, the proper procedure, as outlined in Fed. R. App. P. 8(a)(2), entailed moving this Court to stay the trial. Such a motion would have provided us with a timely opportunity to review the merits of the children's claim and decide whether a stay was warranted pending final resolution of their appeal. We do not believe we can review now what we could have reviewed then. The children's current appeal, to the extent its requests a new trial in which they be permitted to participate, seeks "review lost" by their failure to follow proper procedure the first time.

Id. at 981 (internal citations omitted).

Most recently, the Court reaffirmed that principle in *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004). In that case, the proposed intervenor, Daystar Television Network (Daystar), sought intervention under Rule 24 in preliminary injunction proceedings. *Id.* at 1256, 1265. The district court denied Daystar's motion to intervene, after which Daystar filed a motion with the district court to reconsider or in the alternative stay the preliminary injunction proceedings pending appeal. *Id.* at 1265. The district court denied the motions, and proceeded to conduct the preliminary injunction hearing and enter judgment in favor of defendant. *Id.*

In addressing Daystar's appeal of the intervention denial, this Court held that "Daystar's appeal must be dismissed as moot" because "Daystar failed to protect

its position as an alleged interested party in the preliminary injunction action by seeking a stay of the injunction proceedings with this court" pursuant to Federal Rule of Appellate Procedure 8(a)(2). *Id.* (citing *Plain*, 296 F.3d at 981). The Court further explained that "'[t]he sole purpose of such a stay is to preserve the status quo pending appeal so that the appellant may reap the benefit of a potentially meritorious appeal," *Dominion*, 356 F.3d at 1265 (quoting 30 Am. Jur. 2d, *Executions and Enforcement of Judgments* § 34 (2003), currently 30 Am. Jur. 2d, *Executions and Enforcement of Judgments* § 36 (2010)), and noted that Daystar's failure to seek a stay deprived the Court of a "'timely opportunity to review the merits of [Daystar's] claim and decide whether a stay was warranted pending final resolution of [its] appeal.'" *Dominion*, 356 F.3d at 1265 (quoting *Plain*, 296 F.3d at 981). As a result, this Court concluded that "we are not in a position to provide Daystar with the relief it is seeking: the ability to intervene in the preliminary injunction action," and it dismissed the intervention appeal as moot. *Dominion*, 356 F.3d at 1265.

This Court's requirement that a putative intervenor seek a stay of the trial (or to expedite the appeal) is not mere procedural nicety. The Nation's motion to intervene asked the District Court to allow the Nation to join the trial as a full party, able to raise claims and defenses, present evidence, cross-examine witnesses, submit legal argument, and obtain requested injunctive and monetary

relief. *See* Nation App. 600-39. An appeal from a motion to intervene at trial seeks the same relief—the opportunity to be a party and to participate fully in pre-trial, trial and post-trial proceedings. But with the five-month trial in this matter concluded and the post-trial briefing submitted, the Nation now necessarily seeks something different. The Nation asks this Court not only to set aside all or part of the District Court's work over the last six months, but also to reinstate claims that have been adjudicated and dismissed, and order a full or partial retrial. This Court has made clear that such a request will not be entertained where, as here, the putative intervenor failed to utilize the tools that the courts' rules provide to protect its interests by "preserv[ing] the status quo pending appeal" and ensuring that the appeal is not rendered moot by further district court proceedings. *Dominion*, 356 F.3d at 1265.[4]

Moreover, this Court's requirement that putative intervenors seek a stay pending appeal conserves scarce resources and avoids the risk of improper

[4] The Nation may point out that the Nation filed its notice of appeal before the start of the trial in this case, while the proposed intervenors in *Dominion* and *Plain* appealed only after the district court entered final judgment. This distinction is irrelevant because this Court requires that an appellant-intervenor move to stay the district court proceedings *at the time of denial* to preserve the status quo pending appeal. Absent a stay, the trial will proceed and, as here, may be completed before an appeal of the intervention decision can be resolved. Indeed, the fact that the Nation filed its notice of appeal and then allowed the trial to proceed for almost five months while attending and observing the proceedings makes this case even less appropriate for retrial than cases in which the putative intervenor filed a notice of appeal after the trial had concluded.

sandbagging. As explained in *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008), an intervention appeal that seeks to re-open a completed trial is untimely because it allows the "proposed intervenor [to] simply 'wait and see if the trial's outcome leaves intervention desirable with its attendant risk of undoing what the trial court has already done.'" *Id.* at 970 (quoting *Plain*, 296 F.3d at 980-81) (internal footnotes omitted).

This principle has special application in this case, where the District Court and the parties undertook, and have now completed, a complicated and an extraordinarily long trial that conclusively resolved a number of legal claims. A retrial of the matters already litigated would result in a substantial waste of time and money. It would also burden the numerous independent farmers and other witnesses whom the State called to testify and who would be required to testify again. And, as to those matters which were never tried, the District Court has already found that adding those claims to this case would result in at least 120 days of additional pre-trial delay to permit discovery related to the Nation's putative claims. *See* Nation Br. Addendum, II 65. After that discovery period, the District Court would then need to address the formerly-pending summary judgment and *Daubert* motions relating to those claims before the parties could proceed to trial. *See, e.g.*, Nation App. 273-274 (Orders, Dkt. Nos. 2363-2372) (dismissing motions as moot where underlying claims were dismissed). The time for discovery and

such motions is before trial, not after the trial has ended, particularly where, as here, there was no impediment to the Nation's participation at that time and the Nation has subsequently failed to act diligently to protect its alleged interests.

Significantly, the Nation has informed this Court that it was aware it could seek a stay of the proceedings, but consciously elected not to do so. *See* Nation Br. at 20. It stated that it "did not seek to stay because of the importance of getting injunctive relief to prevent further damage to the Illinois River Watershed." *Id*. But, of course, if the State of Oklahoma or the Nation had possessed proof that the Poultry Companies were in violation of law and were thereby creating an imminent risk of harm, the Federal Rules of Civil Procedure provided them with mechanisms for seeking a temporary restraining order or preliminary injunction. *See* Fed. R. Civ. P. 65. Indeed, the State sought an injunction which the District Court denied—a denial that this Court affirmed. *See Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009). Moreover, the Nation's stated reason for failing to seek a stay—its desire to see the trial come to a quick judgment—is inconsistent with its request here for a partial or complete re-opening of the completed trial.

The Cherokee Nation made a strategic decision not to move to stay the trial during the pendency of its appeal. Instead, the Nation elected "to wait and see if the trial's outcome leaves intervention desirable," *Plain*, 296 F.3d at 980-81, in

light of the evidence and rulings at trial. Under this Court's precedents, that strategic judgment mooted this appeal once the trial was concluded.

Finally, the Cherokee Nation is not prejudiced by the rejection of its appeal on mootness (or other) grounds. The parties' trial in this matter is over and, by order of the District Court, was structured so as not to address claims that might impair or impede the Cherokee Nation's rights or interests.[5] *See* Nation Br. Addendum, I 22-23. Accordingly, because the Nation is not a party to the case and its claims are not at issue, the Nation cannot assert that it is legally prejudiced by the inability to participate in these proceedings. As a non-party, the Nation is not bound by the District Court's rulings. Yet, at the same time, the Nation can seek to participate as am *amicus* on appeal if it wishes to express opinions on the topics at issue.

In all relevant respects, the Nation's intervention appeal is analogous to those dismissed by this Court in *Dominion* and *Plain*. The Nation's failure to seek a stay of the District Court's proceedings has deprived this Court of an opportunity to timely review the merits of the Nation's motion to intervene in the trial. Accordingly, the Nation's appeal should be dismissed as moot.

The Poultry Companies showed in their opening brief that the Nation's motion was untimely filed. The Nation's failure to seek a stay or to expedite its

[5] The State of Oklahoma's ability to bring claims against Defendant Poultry Companies will necessarily be constrained by any final judgment in this case.

appeal constitutes part of that same pattern of delay, designed to obtain a strategic advantage. But, the Nation should not be rewarded for this conduct with intervention, and in no circumstance should it be permitted to force the parties to engage in a retrial or any reconsideration of other decisions made below.

IV. CONCLUSION

For the foregoing reasons, the Poultry Companies respectfully request that the Court dismiss the Nation's appeal as moot.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

(1) There are no privacy redactions made to this Brief;

(2) The hard copy and electronic copy of this Brief are identical; and

(3) The electronic copy of this Brief has been checked for viruses using McAfee VirusScan Enterprise ver. 8.5i (updated Nov. 9, 2009), and is free of viruses according to that program.

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CERTIFICATE OF COMPLIANCE

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. This Brief also 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).

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of April, 2010, I electronically transmitted the attached document to the court's electronic filing system and electronically transmitted the attached document via email to the following ECF registrants and counsel of record.

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