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,

and

CHEROKEE NATION,

Intervenor-Appellant.

On appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Judge Gregory K. Frizzell
Case No. 4:05-CV-00329-GKF-PJC

BRIEF OF PLAINTIFF-APPELLEE STATE OF OKLAHOMA REGARDING QUESTION OF MOOTNESS

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INTRODUCTION

Pursuant to the Court's Order dated March 30, 2010, Plaintiff-Appellee, the State of Oklahoma ("the State"), hereby submits this brief addressing whether the underlying trial in this case has mooted the instant appeal and what relief could be afforded the Movant-Appellant, the Cherokee Nation ("the Nation"), if the Court determines that the District Court erred in denying intervention. As discussed below, the Nation's appeal from the denial of its intervention as of right is not moot.

Because the question presented in the instant appeal is not (and has never been) whether the Nation was a required party for the adjudication of the State's injunctive claims, the fact that those claims have now been tried is largely irrelevant to the current prosecution of the Nation's appeal and in no way renders the appeal moot. By determining that the District Court erred in denying the Nation's intervention, this Court can grant relief that will have "some effect in the real world." That relief includes: the opportunity for the Nation and the State to pursue their damages claims against Defendants; the protection of meaningful appellate rights on the part of the Nation resulting from its intervenor status; and the removal of any feared risk claimed by Defendants that they would incur multiple and inconsistent obligations resulting from separate lawsuits with the State and the Nation. Accordingly, because such effective relief remains possible, the Nation's appeal has not been rendered moot by the underlying trial. The District Court's denial of the Nation's Motion to Intervene should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

A. Legal Standard

In determining whether an appeal is moot, "[t]he crucial question is whether granting a present determination of the issues offered . . . will have some effect in the real world." *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009) (internal quotation marks omitted). An appeal is moot "[w]hen it becomes impossible for a court to grant effective relief . . . ." *Id.*; *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (appeal is moot "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever" (internal quotation marks omitted)).

B. Dismissal of the State's Damages Claims and the Trial of the State's Injunctive Claims

A brief review of (1) the District Court's July 22, 2009 Order dismissing the State's damages claims, which precipitated the Nation's Motion to Intervene and (2) the State's injunctive claims that have been tried to date in this case is warranted.

On July 22, 2009 -- two months before trial -- the District Court concluded that "[t]he Cherokee Nation is a required party under [Fed. R. Civ. P.] 19 with respect to the State's claims for damages." (Aplt. App. at 568.) The District Court reasoned that "[a]djudication of this action in the Cherokee Nation's absence would impair or impede the Nation's sovereign and stated interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction." (Aplt. App. at 559.) As a result, the District Court dismissed the State's damages claims in their

entirety, including its natural resource damages claim under CERCLA, its claim for recovery of its CERCLA response costs, as well as its claims for common law damages, punitive damages and unjust enrichment ("July 22 Order"). (*See* Aplt. App. at 569.)

Thereafter, those claims of the State that were not the subject of the District Court's July 22 Order were tried. Specifically, a bench trial took place from September 24, 2009 to February 18, 2010 limited to the State's claims, *insofar as they sought injunctive relief and civil penalties*, under Counts III (RCRA), IV (state law nuisance), V (federal common law nuisance), VI (trespass), and VII (27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1) of the State's Second Amended Complaint. The parties submitted their proposed findings of fact and conclusions of law on February 5, 2010. At the time of the instant filing, the District Court has not rendered its decision.

C. Inapplicability of Rule 19 Dismissal on State's Injunctive Claims

Against that procedural posture, it is necessary to understand that the Nation's proposed intervention as a matter of right under Fed. R. Civ. P. 24 was specifically intended to correct or undo the factual predicate for the District Court's July 22 Order dismissing the State's damages claims under Fed. R. Civ. P. 19, namely, the Nation's absence in the litigation. For example, in its Motion to Intervene, the Nation stated:

> Due to this Court's ruling on July 22, 2009 that the Cherokee Nation is an indispensible party, the State's natural resource damages claim under CERCLA and other damage claims were dismissed from the case. *Unless the Cherokee Nation is allowed to intervene, there will not be a complete remedy for the pollution of the IRW in this case. The damages claims will not be addressed by the Court[;] thus there will be no restoration of the natural resources injured by Defendants['] waste disposal practices, even if the State should prevail on all of its remaining claims.*

(Aplt. App at 602-603 (emphasis added).) Relatedly, the Nation stated: "It was not until July 22, 2009 when the Court[] ruled on the Defendants[']s motion that the Nation was aware that it was necessary for it to seek intervention." (Aplt. App. at 604.) In short, it is beyond dispute that the Nation sought intervention as of right under Rule 24 as a direct result of the District Court's surprising and unprecedented conclusion that the Nation was a required party under Rule 19 for the prosecution of the State's *damages* claims.

It was within this framework that the parties and the District Court repeatedly took the view that the Court's Rule 19 dismissal of the State's damages claims due to the Nation's absence did not prevent the adjudication of the State's injunctive claims. First, Defendants did not seek the dismissal of the State's injunctive claims on Rule 19 grounds. At the hearing on Defendants' Rule 19 Motion, the following exchange took place between the District Court and defense counsel (arguing for all Defendants):

> THE COURT: [T]he defendants are not seeking to dismiss any of the injunctive relief claims; is that correct?
>
> MR. GREEN: Yes, sir.

(July 2, 2009 Tr. at 62:14-18, attached hereto as Exhibit A[1]; *see also* Aplt. App. at 568-69 ("Movants do not seek dismissal of plaintiff's claims for injunctive relief.").)

Second, the District Court expressly held that its July 22 Rule 19 Order was directed to the State's damages claims and did not include the State's injunctive claims.

[1] Given that this portion of the underlying record is relevant only with respect to the Court's order for supplemental briefing on the issue of mootness, it was not included in the Appendix and is attached as an exhibit. If, however, the Court would prefer that the State supplement the Appendix to include this portion of the transcript, the State would be pleased to file an appropriate motion in that regard.

(Aplt. App. at 548 ("Count 3 (a claim for injunctive relief and civil penalties under SWDA), the State's claims for injunctive relief under Counts 4, 5 and 6, and the State's claims for state civil penalties and injunctive relief under Counts 7 and 8 are not at issue"); *id.* (citing Defendants' representation at July 2, 2009 hearing that they did not seek dismissal of the State's claims for injunctive relief).)

Accordingly, the fact that the State's *injunctive* claims proceeded to trial does nothing to render moot the Nation's appeal from the denial of its Motion to Intervene as of right, which if left undisturbed without any review will continue to deprive the State and the Nation, under the law of the case,[2] of a complete remedy to address the pollution caused by Defendants' poultry waste disposal practices in the Illinois River Watershed.

D. This Court's Determination That the District Court Erred in Denying the Cherokee Nation's Intervention Would Afford Meaningful, Effective Relief

Because an order by this Court reversing the District Court's denial of the Nation's Motion to Intervene would afford "some effect in the real world," *Stout*, 562 F.3d at 1246 (internal quotation marks omitted), the instant appeal is not moot. The "real world effect" that such an order by this Court would have is multi-layered.

1. *The Opportunity for Full Redress for Defendants' Conduct*

First, a reversal of the denial of the Nation's intervention would mean on remand that the damages claims of both sovereigns, the State and the Nation, may proceed. In its

[2] The State continues to assert that the District Court's July 22 Order granting the Rule 19 Motion is erroneous because the Nation was never a required party to this litigation. The State reserves all of its rights to appeal any and all aspects of the July 22 Order when such an appeal is ripe. Nevertheless, because the July 22 Order is currently the law of the case, the State supports the Nation's efforts to intervene in the case at bar.

July 22 Order, the District Court ruled that the presence of *both* sovereigns is necessary for the damages claims to proceed. (*See* Aplt. App. at 560-61; *see also* Aplt. App. at 877 ("MS. HAMMONS: We could bring a new CERCLA lawsuit, Your Honor. The problem, we believe that we would have to join the State of Oklahoma pursuant to Your Honor's finding. . . . THE COURT: Well, you're right, the State would have to be brought in to the extent that this issue of who owns what in the IRW has to be resolved. . . ."). Thus, based on the law of the case, the Nation is being prejudiced by not being permitted to proceed in the same action as the State. Similarly, under the current law of the case, the State is prejudiced by not being permitted to proceed in this action with the Nation. When the Court denied the Nation's Motion to Intervene, it effectively denied both the Nation and the State the right to pursue damages against the Defendants. Those claims were not tried and cannot be rendered moot by the trial.

A reversal by this Court would mean on remand that the Nation could proceed under its intervention complaint. A reversal would further mean on remand that the District Court would necessarily have to revive the State's damages claims, which were dismissed *solely* on the ground that the Nation was a required, but absent, party unable to be joined due to its status as a domestic dependent nation. (*See* Aplt. App. at 568-69.) With the Nation's intervention, the basis for the Court's dismissal of the State's damages claims would disappear, and the State and the Nation could work together toward assuring the restoration of the Illinois River Watershed.

In that vein, the bench trial on the State's equitable claims cannot preclude the right of the Nation and the State to have their claims heard by a jury. "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 relitigated before a jury. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990).

Lytle was an employment discrimination case in which -- as in the present case -- the plaintiff brought both legal and equitable causes of action. *Id*. at 548. Likewise, as here, the trial court in *Lytle* dismissed the plaintiff's legal claims and held a bench trial on his equitable ones. *Id*. at 548-49. On appeal, the Fourth Circuit concluded that the district court had erred in dismissing the legal claims, but declined to remand the case on the ground that the district court's bench findings on the plaintiff's equitable claims collaterally estopped the plaintiff from litigating his legal claims, the elements of which were identical. *Id*. at 549. The United States Supreme Court reversed. *Id*. at 555-56.

Although "an equitable determination can have collateral-estoppel effect in a *subsequent* legal action," *id.* at 550 (emphasis in original) (internal quotation marks omitted), it does not operate on remand in a "suit in which the plaintiff properly joined his legal and equitable claims," *see id*. at 553. Put another way, a district may not deprive a litigant of its right to a jury trial "by erroneously dismissing the legal claim." *Id*. at 552. Accordingly, the Supreme Court vacated both the judgment of the Fourth

Circuit and the decision of the district court with respect to the party's *equitable* claims. *Id*. at 555-56. The Court reasoned that, if the plaintiff's legal claims had not been dismissed, then "the jury's determination of legal and factual issues could not have been disregarded when the District Court considered his equitable claims." *Id*. at 556 n.4.

The Supreme Court explained:

> Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's *Seventh Amendment* rights. The relitigation of factual issues before a jury is no more 'needless' in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal . . . or that resolution of an equitable claim can precede resolution of a legal claim . . . . ***In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy . . . remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial.***

Id. at 553-54 (emphasis added) (citations omitted).[3] Thus, under these binding principles, there is no balancing of a litigant's right to a jury trial vis-à-vis concern about judicial economy arising from a bench trial that has already occurred. The former trumps the latter as a matter of law.[4]

Although the present appeal does not itself address the merits of the July 22 Order

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[3] Any judicial inefficiency is of Defendants' own making. For example, while *Defendants* moved for a continuance of the trial on June 30, 2009 (Dkt. #2296), they vigorously objected to the State's Motion for Continuance of Trial (for a 120-day period) (Dkt. #2573), which was intended to remove any obstacles to the granting of the Cherokee Nation's Motion to Intervene. Thus, on June 30, 2009, Defendants sought a continuance of the trial, but only several weeks later claimed they would be prejudiced by any continuance. (Dkt. #2599.)

[4] Findings that the District Court might enter as the result of the recently concluded bench trial might be used to support preliminary relief, but as *Lytle* instructs, they could not preclude a jury from resolving all common questions of fact at a subsequent full trial on the merits of the damage claims.

dismissing the State's legal claims, permitting the Cherokee Nation to intervene would both undermine the factual predicate for that Order -- namely, the absence of the Nation from the litigation -- and permit the Nation to join the State in challenging that Order by motion and/or on appeal from the final judgment. The underlying bench trial in this action has not undermined the real world effect of such relief because, by introducing the Nation's legal claims and reviving the State's legal claims, a reversal of the July 22 Order would -- in light of *Lytle* -- necessitate the relitigation of all claims, both legal and equitable. *See, e.g.*, *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. 2002) ("when legal and equitable issues to be decided in the same case depend on common determinations of fact, such questions of fact are submitted to the jury, and the court in resolving the equitable issues is then bound by the jury's findings on them").

2. *The Possibility of the Cherokee Nation's Participation in an Appeal from Any Final Judgment*

Second, a reversal of the District Court's intervention order, which would give the Nation party status in this litigation, would enable the Nation to participate in any appeal from the District Court's final judgment.

For example, in *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997), a snowmobiling association and individual snowmobiling enthusiasts sued the Secretary of the Interior and other governmental defendants seeking to enjoin the enforcement of restrictions on snowmobiling in a national park and challenging the closure of certain areas within the park to snowmobiling. *Id.* at 663. The Voyageurs Region National Park Association ("Association"), which sought to defend the closures, moved to intervene, which motion

was denied by the district court. *Id.* at 665. The Association appealed from the denial of its motion to intervene, and the Eighth Circuit reversed. *See id.*

While the Association's appeal on intervention was pending, the District Court issued its decision on the merits of the snowmobilers' claims, granted summary judgment to the snowmobilers, and enjoined enforcement of the park closure regulations. *Id.* Because the Association's intervention appeal was still pending at the time notices of appeal from the district court's decision on the merits were due, the Association filed a protective notice of appeal. *Id.* at 665-66. The governmental defendants eventually dismissed their appeal. *Id.* at 666. Having ultimately been granted the right to intervene, the Association pursued an appeal from the district court's judgment on the merits, even in the absence of the original parties on whose side intervention was sought. *Id.*

In this regard, the Eighth Circuit held that the Association, as a potential intervenor whose appeal from the intervention denial order was pending, was entitled to file a notice of appeal from the judgment on the merits. *Id.* "'If final judgment is entered with or after the denial of intervention, . . . the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed.'" *Id*. (quoting 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3902.1, at 113 (2d ed. 1991)). The Eighth Circuit added:

> A contrary rule would prevent a prospective intervenor who successfully appeals the district court's denial of his intervention motion from securing the ultimate object of such motion – party status to argue the merits of the litigation – if, as was the case here, the appellate court does not resolve the intervention issue prior to the district court's final decision on the merits.

Mausolf, 125 F.3d at 666. "The rule 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 (1988) (emphasis added).

In addition, in *Karsner v. Lothian*, 532 F.3d 876 (D.C. Cir. 2008), the district court denied a motion to intervene as of right filed by the Maryland Securities Commissioner and two days later, granted a petition to confirm a stipulated arbitration award between a securities broker-dealer and a customer. *Id.* at 881. The commissioner timely appealed from the denial of her motion to intervene, but did not file a notice of appeal from the judgment confirming the award. *Id.* The D.C. Circuit Court of Appeals held that the commissioner's intervention-related appeal was not moot as a result of her failure to file an appeal from the judgment on the merits. *Id*. at 885. The Court reasoned that upon a reversal of the intervention denial, the commissioner would be entitled to challenge the district court's confirmation order.[5] *Id.* at 886-87.

Relatedly, this Court stated in *Hutchinson v. Pfeil*, 211 F.3d 515 (10th Cir. 2000):

> An order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to an action. This is because denial of intervention precludes the proposed intervenor's ability to appeal the later judgment (and at that time to challenge the earlier denial of intervention). Thus, an appeal from the denial of intervention cannot be kept in reserve; it must be taken within thirty days of the entry of the order, or not at all.

Id. at 518.

Applying these principles to the instant appeal, conferring intervenor status on the Cherokee Nation will afford the Nation meaningful appellate rights in this case -- i.e., an

[5] The commissioner stated her intent to move under Fed. R. Civ. P. 60(b)(4) to void the district court's confirmation order. *Id.* at 886.

opportunity to pursue an appeal from the District Court's final judgment on the merits. To deny the Nation *any* review of the District Court's order denying intervention would strip the Nation of meaningful appellate rights that they would otherwise enjoy by virtue of this Court's reversal of the intervention order.

3. *The Avoidance of Multiple Litigation and Inconsistent Obligations*

Third, a reversal of the District Court's order denying the Nation's Motion to Intervene would afford the relief Defendants ostensibly sought in their Rule 19 Motion: a single proceeding where the State's and the Nation's claims were adjudicated by wholes, thereby avoiding any purported risk of double, multiple or inconsistent obligations. In this regard, in their Rule 19 Motion, Defendants claimed that "any resolution of this lawsuit in the Nation's absence would subject Defendants to 'a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest.'" (Aplt. App. at 378 (quoting Fed. R. Civ. P. 19).) Of course, Defendants used their purported fear of multiple litigation as a sword in the context of Rule 19, only to invite multiple litigation as a shield in the context of Rule 24. (Aplt. App. at 664 ("the Cherokee Nation can bring those claims in its own lawsuit if it wishes").

By reversing the denial of the Nation's intervention, this Court would afford a single proceeding wherein the State's and the Nation's claims could be adjudicated, eliminating Defendants' feared risk of multiple or otherwise inconsistent obligations.

E. The Absence of a Stay of the Trial Does Not Render the Appeal Moot.

Defendant-Appellees will likely argue that the Nation's appeal is moot because the

Nation did not move for an order staying the trial during the pendency of this appeal. That argument is unavailing.

Defendants may rely on *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004), in which this Court held that a putative intervenor's (Daystar's) appeal from the denial of its motion to intervene in preliminary injunction proceedings was moot because, as a result of Daystar's failure to seek a stay of those proceedings pursuant to Fed. R. App. P. 8(a)(2), the Court was "not in a position to provide Daystar with the relief [was] is seeking: the ability to intervene in the preliminary injunction action." *Id.* at 1265 (relying on *dicta* in *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002)). *Dominion Video* is readily distinguishable from the instant appeal because in that case, the intervenor's purpose was strictly limited to participation in the preliminary injunction proceedings. *See id.* More fundamentally, the Court found that -- consistent with traditional concepts of mootness -- the remedy sought by the intervenor had in fact been achieved: "The preliminary injunction hearing is over, the district court has issued a ruling, and we have determined on appeal that the district court ruling was erroneous – a result, coincidentally, for which Daystar would have advocated had it been permitted to intervene below." *Id.*

Here, the Nation did not seek intervention in such a limited manner, and its claims have not and will not be rendered moot by a decision of the District Court. As discussed in Section C, *supra*, the Nation sought intervention under Fed. R. Civ. P. 24 to address the District Court's conclusion under Fed. R. Civ. P. 19 that it was a required, but absent party, unable to be joined due to its status as a domestic dependent nation, which was the

sole predicate for the District Court's dismissal of the State's *damages* claims. This unique procedural posture distinguishes this appeal from *Dominion Video*.

Defendants may also rely on this Court's decision in *Plain*, 296 F.3d 975, a wrongful death action brought by a decedent's widow. *Id*. at 977-78. Seven months before trial, the decedent's children moved to intervene as of right; such motion was denied less than three weeks later. *Id.* at 978. Three months prior to trial, the children filed a second motion to intervene, which was denied the next day. *Id.* Having failed to file an appeal from the denial of their first motion to intervene, the children filed an appeal from the denial of their second motion to intervene. *Id.* When the district court refused to stay the trial, however, the children voluntarily dismissed their appeal because, *the children believed*, "the trial 'will render the issues moot.'" *Id.* After the jury verdict, but before an order dividing the award, the children filed a motion for a new trial, which was denied. *Id.* Following entry of final judgment, the children filed a second motion for a new trial, which was also denied. *Id.* at 979. The children appealed from this order.

Although this Court noted in *dicta* that the children did not seek a stay from this Court upon the district court's refusal to stay the trial pending appeal, the Court held that it would not entertain the children's appeal from the denial of its second motion for a new trial because they failed to timely appeal the denial of their first motion to intervene. Specifically, the Court stated: "Because the children were not parties to the wrongful death suit *and because they failed to pursue a timely appeal of the district court's pretrial order denying them the right to intervene*, they, as nonparties, may not now attack the judgment by seeking to appeal the district court's denial of their motion for a new trial."

Id. at 981; *see also id*. (citing *Hutchinson*, 211 F.3d at 519 (noting that movant's request to intervene in appeal "is, in effect, an attempt to obtain appellate review lost by her failure to timely appeal the denial of her motion to intervene in district court") and *B.H. By Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993) (rejecting movant's "improper attempt, by filing a virtually identical intervention motion, to circumvent his failure to appeal the first motion's denial within the required time")). Here, of course, the Cherokee Nation did file a timely notice of appeal from the District Court's decision.

Finally, because the denial of a motion to intervene is immediately appealable, and such appeal must be filed within thirty days of an order denying intervention, this is the only time for the District Court's denial of the Nation's Motion to Intervene to be reviewed. *See In re Grand Jury Subpoenas v. United States*, 40 F.3d 1096, 1099 (10th Cir. 1994) (denial of motion to intervene is final, appealable order).

In sum, because this Court's reversal of the District Court's denial of the Nation's intervention would leave open any or all of the foregoing possible scenarios, the Nation's appeal is not moot.

CONCLUSION

For the foregoing reasons, the Cherokee Nation's appeal has not been rendered moot in light of the trial that has taken place in this case. The District Court's order should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted this 15th day of April, 2010.

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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 requirements of the Court's March 30, 2010 Order because this brief is limited to 15 pages in length in a 13 point font.

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Dated: April 15, 2010

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 8.0 Service Pack 1 of TREND MICRO™ OfficeScan™, updated April 7, 2010 (Spyware Pattern) and April 13, 2010 (Virus Pattern), and, according to the program, are free of viruses.

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Dated: April 15, 2010

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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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al.	)	
Plaintiffs,	)	
V.	)	No. 05-CV-329-GKF-PJC
TYSON FOODS, INC., et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON JULY 2, 2009

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

For the Plaintiffs: Mr. Drew Edmondson
Attorney General
Ms. Kelly Hunter Burch
Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

EXHIBIT A

Honor.

THE COURT: You believe I can.

MR. GREEN: Can.

THE COURT: Okay.

MR. GREEN: Yes, sir.

THE COURT: Yes, this is Chad Smith who signed these letters. Mr. Nance, on that evidentiary point, can the Court consider these letters from the then principal chief?

MR. NANCE: Your Honor, we don't dispute that you can consider them. We might like to be heard on what they're worth and what they actually say.

THE COURT: Please. And Mr. Green, are you finished?

MR. GREEN: Unless Your Honor has further questions.

THE COURT: No, sir. I'm sorry, one more question, Mr. Green. Mr. Nance, I believe, has stated here on the record that the defendants are not seeking to dismiss any of the injunctive relief claims; is that correct?

MR. GREEN: Yes, sir.

THE COURT: All right. Mr. Nance.

MR. NANCE: Briefly, Your Honor, Chief Smith's letters, and I believe there are two of them here.

THE COURT: Yes.

MR. NANCE: Assert that the Nation has water rights, I'm looking for the exact language, and has had them since before statehood or something to that effect. That does not --