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

BRIEF IN OPPOSITION OF DEFENDANTS-APPELLEES

December 28, 2009

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I. STATEMENT OF PRIOR OR RELATED APPEALS

Appellees (hereafter "Poultry Companies") are aware of one related appeal, arising from this same case. *See Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009) (affirming the District Court's denial of a preliminary injunction to the plaintiffs in this case).

II. STATEMENT OF JURISDICTION

The Poultry Companies accept the Cherokee Nation's Statement of Jurisdiction, except that they note that the District Court has dismissed from this case the plaintiffs' claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq., and all of their claims for damages under state and federal common law. *See* Nation Addendum to Brief ("Nation Addendum"), I 22-23; *infra* at 16. In addition, the Cherokee Nation omitted the dates that establish the timeliness of the appeal as required by Fed. R. App. P. 28(a)(4)(c). The District Court denied the Nation's motion to intervene on September 15, 2009; the Nation filed its notice of appeal on September 17, 2009. *See* Nation Appendix ("Nation App.") 930.

III. STATEMENT OF THE ISSUE

Whether the District Court abused its discretion by denying the Cherokee Nation's motion to intervene, filed on the eve of trial, when the Nation had been aware that its interests were at issue for more than four years, when granting the

motion would substantially delay this case and prejudice the parties, and when the District Court had dismissed the claims whose resolution could have prejudiced the Nation's interests? (Nation Addendum, II 65-66.)

IV. STATEMENT OF THE CASE

A. Nature of the Case

The Illinois River Watershed ("IRW") "encompasses approximately one million acres of land across Arkansas and Oklahoma" and "is home to hundreds of large-scale poultry famers with which [the defendants in this case] contract[] to obtain poultry for processing and marketing." *Attorney Gen. v. Tyson Foods*, 565 F.3d at 773-74. The initial plaintiffs in this case – W.A. Drew Edmondson, Attorney General of the State of Oklahoma, and J.D. Strong, Secretary of the Environment – are officials of the State of Oklahoma (hereafter collectively, the "State Officials"). These State Officials[1] brought various state and federal environmental claims against the defendant Poultry Companies.

Less than three weeks before the beginning of a lengthy and complex trial in a case that had been litigated for more than four years, the Cherokee Nation sought

[1] While these State Officials purport to represent the State of Oklahoma, their views differ from those of other officials in Oklahoma state government with respect to the premises of this lawsuit. These plaintiffs assert that poultry litter is a threat to public health, while other Oklahoma officials and Oklahoma law promote the use of poultry litter as a fertilizer and oversee and regulate its application. Thus, this brief refers to the named litigants not as the State, but as "State Officials."

to intervene. The Nation had known that its interests were at stake in this case as early as 2005, yet it waited until the eve of trial to file its motion and proposed complaint. That complaint sought to re-insert into the case three claims for damages that the trial court had dismissed months before on the ground that the absent Nation was an indispensable party to their resolution. The District Court found that the Nation's motion was untimely in light of its lengthy, knowing delay in seeking intervention. It held that allowing the Nation's intervention would substantially delay the long-scheduled trial date, because it could fundamentally alter the nature of the case to be tried and would potentially require discovery about, and the resolution of, numerous issues not then at issue in the case. This would cause significant prejudice to the defendants, the court found. Moreover, the court concluded, denial of the motion would not prejudice the Nation because the court had protectively excised the relevant damages claims from this case, and the Nation was free to bring its own action asserting those claims for damages against the Poultry Companies. *See* Nation Addendum, II 65-66. In this appeal, the Nation asks this Court to find that the trial court's denial of the intervention motion in these circumstances was an abuse of discretion. In the meantime, trial of the plaintiffs' remaining claims proceeded.

B. Course of Proceedings

The original complaint in this action was filed on June 13, 2005. *See* Nation App.1 (Dkt. No. 2). The State Officials filed amended complaints on August 19, 2005, and July 16, 2007. *Id.* at 2, 142-43 (Dkt. Nos. 18, 1215). They sought:

- response costs and natural resource damages under CERCLA (Counts 1 and 2);
- injunctive relief and civil penalties under the Solid Waste Disposal Act ("SWDA" or "RCRA") (Count 3);
- damages and injunctive relief under Oklahoma's law of nuisance (Count 4);
- damages and injunctive relief under the federal common law of nuisance (Count 5);
- damages and injunctive relief under Oklahoma's common law of trespass (Count 6);
- civil penalties and injunctive relief for violation of Oklahoma environmental and agricultural statutes (Counts 7 and 8); and
- restitution and disgorgement of profits under Oklahoma's common law of unjust enrichment (Count 10).[2]

Nation App. 323-37 (Second Am. Compl. ¶¶ 69-146).

The defendant Poultry Companies answered these complaints in 2005 and in 2007. The Companies asserted, *inter alia*, that the claims were barred by the State Officials' failure to join indispensable parties, including the Cherokee Nation. *See*,

[2] The District Court dismissed Count 9 on the State's motion on May 12, 2009. *See* Nation Addendum, I 2 n.1.

e.g. Poultry Companies' Supplemental Appendix ("Supp. App.") 27 (Answer at 27 (Dkt. No. 73) (Oct. 3, 2005) ("The Complaint is barred by Plaintiffs' failure to join indispensable parties.")); Answer ¶ 5 (Dkt. No. 78) (Oct 3, 2005) (denying the State Officials "ha[ve] an interest in the waters and natural resources located within the IRW, which stands in derogation of the sovereign rights of certain Indian Nations including, but not limited to, the Cherokee Nation"); Supp. App. 41 (Answer ¶ 5 (Dkt. No. 1236) (Aug. 15, 2007) (same)); Supp. App. 103 (Answer at 23 (Dkt. No. 1238) (Aug. 15, 2007) ("The Complaint is barred by Plaintiffs' failure to join indispensable parties").

The parties engaged in substantial discovery and motions practice. On November 15, 2007, the District Court set the trial in this case for September 2009. *See* Order (Dkt. No. 1376). The court confirmed that trial date on January 15, 2008. *See* Order at 2 (Dkt. No. 1459) ("Modifications to the scheduling order, which has been relied upon by counsel since its entry on November 15, 2007, should not be made without clear benefit to all parties.").

In November 2007, after two and a half years of litigation, the State Officials filed a motion for a preliminary injunction, seeking to enjoin any use of poultry litter by anyone, anywhere in the million-acre IRW. *See* Supp. App. 116 (Mot. for Prelim. Inj. (Dkt. No. 1373)). The motion alleged that the Poultry Companies' actions were creating a substantial, imminent endangerment to human life and the

environment. *Id*. The District Court granted the request for an expedited schedule to hear the motion. *See* Order (Docket No. 1382). After reviewing thousands of documents and hearing evidence for eight days, the District Court denied the motion for a preliminary injunction on September 29, 2008. Order (Dkt. No. 1765). (That decision was affirmed by this Court on May 13, 2009. *See* Statement of Related Cases, *supra*.)

On October 31, 2008, the Poultry Companies filed a motion under Federal Rule of Civil Procedure 19, asking the District Court to dismiss the State Officials' claims seeking damages on the ground that the Cherokee Nation is an indispensable party to the resolution of any such claims.[3] Nation App. 354-84.

The State Officials opposed the motion. *Id.* at 394-424. And, on May 20, 2009, they filed with the District Court a purported agreement between the Attorney General of Oklahoma and the Cherokee Nation, attempting to assign the Nation's interests in this case to the State Officials in exchange for the Attorney General's recognition that the Nation had substantial interests in the IRW's natural resources. *Id.* at 532-34.

The parties then briefed the question of the agreement's validity under Oklahoma law, which sets specific requirements governing the State's entry into

[3] The Poultry Companies' initial motion sought dismissal of all claims, but was modified to seek dismissal only of the claims for damages. *See* Nation Addendum, I 2.

an agreement with an Indian tribe. *See* Nation App. 532, 535. The trial court heard oral argument on that issue and on the Poultry Companies' Rule 19 motion. The District Court granted that the Poultry Companies' motion on July 22, 2009, and dismissed Counts 1 and 2 (CERCLA damages), and the claims for damages in Counts 4, 5, 6, and 10 (state common law of nuisance, federal common law of nuisance, state common law of trespass, state common law of unjust enrichment). Nation Addendum, I 22-23. The State Officials' claims for injunctive relief under Counts 2, 4, 5, and 6, and for civil penalties and injunctive relief under Counts 7 and 8 were unaffected by the ruling. *Id.* This ruling defined the issues for the trial scheduled to begin in September.

The court's dismissal of the State Officials' damages claims mooted a number of pending motions for summary judgment, as well as *Daubert* motions. The court thus denied those motions without ruling on their merits. *See* Orders, Dkt. Nos. 2363-2372 (Nation App. 273-274).

On August 3, 2009, the State Officials filed a motion to reconsider the court's decision to grant the Rule 19 motion for dismissal. Nation App. 570-92. After full briefing, the court heard oral argument. That motion was denied on August 14, 2009. *Id.* at 599.

Two weeks later, on September 2, 2009, the Nation filed its motion to intervene in a trial scheduled to begin September 21, 2009. Nation App. 600-06.

The next day, the State filed a motion for continuance of the trial date. *See* Dkt. No. 2573. The Nation's motion was argued on September 15, 2009, three business days before the trial was set to begin. The District Court denied the motion that day and issued an oral ruling. Nation Addendum, II 65-66. The Nation filed its notice of appeal on September 17, 2009. Nation App. 930.

The trial in this case began on September 21, 2009. As of the date of the filing of this brief, the trial has proceeded for 41 days over 13 weeks from September through December. The parties anticipate that the trial will conclude in January 2009, before this appeal can be heard.

C. Disposition Below

In an oral ruling, the District Court denied the Nation's motion to intervene. The court first observed that "[t]his case was filed over four years and three months ago, and trial is scheduled to begin less than a week from today." Nation Addendum, II 65. The court found that if intervention were permitted, it "would trigger more than a 120 day delay" of the trial. *Id.* Specifically, the Nation's intervention "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." *Id.* Even more significantly, the court explained, "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." *Id.*

The court further found that this delay and expense "would severely prejudice the parties who have been actively proceeding toward trial these past four-plus years." *Id.* And, the court found, that the "Nation knew of its interest in this case from the outset of the litigation, but chose not to intervene." *Id.* at 66. Finally, the court concluded that the Nation "will not be prejudiced" by denial of the motion because it can "bring its claims in a separate lawsuit if it wishes." *Id.* Had the motion been timely, the court concluded, it would have been granted; but "it is not." *Id.*

V. STATEMENT OF FACTS

Well before this case was filed, the State Officials and the Cherokee Nation were fully aware that the Nation asserted ownership of the natural resources in the IRW and that the Nation's interests would be at stake in any case seeking monetary remedies for alleged pollution of the IRW.

The conflict between the State of Oklahoma and the Cherokee Nation over ownership of natural resources in the IRW is of historic standing. In 2004, Chad Smith, the Chief of the Cherokee Nation, wrote to federal and Oklahoma officials asserting that the Cherokee Nation owns the waters in the IRW and has *since*

before Oklahoma statehood. *See* Nation App. 680 (Ex. A to Defs.' Joint Resp. in Opp'n to Mot. to Intervene by Cherokee Nation & State's Mot. for Continuance of Trial ("Defs.' Opp. To Mot. to Intervene")).

More specifically, the Nation and the State Officials were aware that the Nation's claim to the IRW's waters gave it a stake in this litigation over alleged injuries to those waters. On March 14, 2005, the Chief of the Cherokee Nation wrote to Attorney General Edmonson about the State Officials' proposed lawsuit regarding the use of poultry litter in the IRW. *Id.* at 688 (Ex. B to Defs.' Opp. To Mot. to Intervene). The Chief noted that he had met with a number of poultry growers about the State's anticipated lawsuit. *Id.* The Chief offered to host discussions that might forestall litigation. *Id.*

As noted above, this case was filed on June 13, 2005. In its initial complaint and in the first and second amended complaints, filed August 19, 2005 and July 16, 2007, respectively, the State Officials alleged that the State of Oklahoma is the exclusive owner and trustee of the natural resources of the IRW and asserted claims for damages and injunctive relief based on CERCLA, RCRA, and federal and state common law. *See*, *e.g.*, *id*. at 307-08 (Second Am. Compl. ¶ 5 ("the state of Oklahoma holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public"); *id.* at 324-25 (¶¶ 78-79) (asserting claims for CERCLA

cost recovery and natural resource damages); *id.* at 330-32 (¶¶ 109-117) (asserting federal common law claim).

In answering the initial complaint and the amended complaint filed in 2007, the Poultry Companies asserted that the State Officials' claims were barred by their failure to join an indispensable party and indicated that Indian Nations, including the Cherokee Nation, had claimed ownership of the IRW resources alleged to be suffering damage in this case. *See supra* at 4-5 (citations to Answers).

In late 2005, shortly after the initial complaint in this matter was filed, counsel for the Tyson defendants traveled to the Cherokee Nation's capitol at Tahlequah to meet with the Nation's Chief and the Nation's Attorney General. In those meetings, the Poultry Companies pointed out that the Nation's ownership interests in the IRW conflicted with the claimed ownership of the State. The State Officials had a similar meeting. *See* Nation Addendum, II 7-11, 15-18, 29-30, 41-42. The Cherokee Nation, however, declined to assert its interests in the case; it asked the Poultry Companies not to put the validity of the Nation's claims before the trial court.

On February 19, 2008, at a hearing on the State Officials' motion for a preliminary injunction, the State Officials acknowledged under oath that the Cherokee Nation had claimed a competing interest in the natural resources of the IRW. Specifically, plaintiff Miles Tolbert testified that "there are some members

of the Cherokee Nation who think they have a claim to the water." Nation App. 694 (Ex. C, Defs.' Opp. To Mot. to Intervene (Testimony of M. Tolbert, Prelim. Inj. Hr'g Tr. 153:17-23)).

On June 26, 2008, one of the Poultry Companies, Tyson Foods, Inc., served discovery requests on the State Officials, seeking materials related to the Cherokee Nation's claim to natural resources in the IRW. The State Officials responded on August 11, 2008, providing several documents that demonstrated the existence of a longstanding dispute between the Nation and the State of Oklahoma over these natural resources. *See id*. at 697-738 (Ex. D, Defs.' Opp. To Mot. to Intervene).

On October 27, 2008, counsel for the Tyson defendants again met with Chief Smith and Diane Hammons, Attorney General of the Cherokee Nation, to inform them that the Poultry Companies had researched the Cherokee Nation's asserted interests in the IRW and the effect of those interests on the State Officials' claims against the Companies. The Companies informed Chief Smith and General Hammons that defendants would be filing a Rule 19 motion, and provided General Hammons with a copy of the anticipated motion and sought her comments prior to filing. *See id*. at 740 (Ex. E, Defs.' Opp. To Mot. to Intervene).

On October 31, 2008 (more than ten months before the Nation filed its motion to intervene), the Poultry Companies filed their Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, In the Alternative,

Motion for Judgment as a Matter of Law Based on Lack of Standing, Dkt. No. 1788. *See id*. at 354-84. The Companies asked the court to dismiss the State Officials' claims for failure to join the Cherokee Nation as a required party to this litigation.

In response, on November 3, 2008, the Cherokee Nation issued a press release. It stated that "[t]he water rights of the Cherokee Nation came into existence long before the State of Oklahoma or the United States. From the time the Nation exchanged with the federal government all its land in the east with the land in northeastern Oklahoma, water rights have remained intact." *See id*. at 743 (Ex. F, Defs.' Opp. To Mot. to Intervene). General Hammon provided the Poultry Companies with a copy of the statement, accompanied by a note thanking them for keeping the Nation informed about the Rule 19 motion. *Id.*

On November 7, 2008, the State Officials sought an extension of time to respond to the Rule 19 motion, which the trial court granted. *See* Dkt. Nos. 1795, 1800. The State Officials filed two responsive briefs on December 15, 2008. *See* Dkt. Nos. 1810, 1811. Those briefs continued to assert that the State is the exclusive sovereign owner and trustee of the IRW's natural resources. *Id.* The Poultry Companies provided the Nation with copies of these responses on December 16, 2008, to keep the Nation informed of the State Officials' continuing

assertion of rights that conflicted with the Nation's claims. *See* Nation App. 746 (Ex. G, Defs.' Opp. To Mot. to Intervene).

The District Court struck the State Officials' two briefs, but granted them additional time to file a single consolidated response. *See* Order (Dkt. No. 1817). That response was filed on January 8, 2009. *See* Nation App. 394 (Dkt. No. 1822). In this brief, too, the State Officials vigorously disputed the Cherokee Nation's interests in the resources of the IRW. *See, e.g.*, *id.* at 401-09 (denying Cherokee ownership or sovereignty over waters, lands, river beds or biota in the IRW).

On May 20, 2009, five months after the filing of the Rule 19 motion, the State Officials filed a notice with the court attaching a purported agreement between the Attorney General for the Cherokee Nation and the Oklahoma Attorney General. This agreement attempted retroactively to assign the Nation's claims in this case to the State Officials. *See id*. at 532-34 (Dkt. No. 2108-2, Ex. A (May 20, 2009)). The State Officials argued that this agreement meant that the Poultry Companies' Rule 19 motion should be denied.

The Poultry Companies filed a notice addressing the legal invalidity of the purported agreement and sought leave to file a brief. *See id*. at 535-39 (Dkt. No. 2110 (May 21, 2009)). Despite its decision to enter into the agreement purporting to assign its claims to the State Officials, the Cherokee Nation assisted the Poultry Companies in preparations for oral argument on the Rule 19 motion, providing

memoranda and an analysis detailing the nature of the Nation's interests in the IRW's natural resources to help defeat the State's claim to exclusive sovereignty and ownership. *See id*. at 748-76 (Ex. H, Defs.' Opp. To Mot. to Intervene).

On July 2, 2008, the District Court heard oral argument on the Rule 19 motion, with counsel for the Cherokee Nation present. On July 22, 2009, the District Court granted the Poultry Companies' Rule 19 motion in part, holding that the Cherokee Nation is a required and indispensable party to certain of the State Officials' claims. *See* Nation Addendum, I 22-23. The court held that the State Officials' "claims for money damages absent the Cherokee Nation ignores the Nation's sovereign right to manage [its] natural resources . . . and seek redress for pollution thereto." *Id.* at 13. It concluded that "[i]n light of [these] factors . . ., as well as the State's and the Nation's disparate views relating to jurisdiction and ownership of lands and natural resources in Northeastern Oklahoma, the court is unpersuaded that the State can adequately protect the absent tribe's interest." *Id.* at 14.

The court carefully crafted its dismissal order to avoid prejudice to either the State Officials or the Cherokee Nation. The court dismissed the portions of the State Officials' case that the court concluded would have an impact on the Cherokee Nation's competing interests, but it allowed the State Officials to

continue to pursue claims that they could potentially prosecute without prejudice to the Nation's interests. The court explained:

> 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. The Cherokee Nation is not a required party to the State's claims for violation of state environmental and agricultural regulations. Movants [the Poultry Companies] do not seek dismissal of plaintiff's claims for injunctive relief. Therefore, defendants' Motion to Dismiss is granted with respect to Counts 1, 2 and 10 and the claims for damages asserted in Counts 4, 5 and 6. The motion is denied with respect to Counts 3, 7, and 8 and claims for injunctive relief asserted in Counts 4, 5 and 6. [*Id.* at 22-23 (citation omitted).]

The court also rejected the State Officials' argument that their agreement with the Cherokee Nation (in which the Nation purported to assigned its claims to the State of Oklahoma) allowed the court to dispense with the presence of the Nation in this case. The court instead invalidated that agreement due to a myriad of legal flaws, including Oklahoma law's bar on the assignment of such claims and the signatories' failure to comply with mandatory requirements for the execution of such an agreement under federal, state and tribal law. *See id*. at 4-7. (The Cherokee Nation does not challenge that ruling in this appeal from the denial of intervention.)

On August 3, 2009, the State Officials sought reconsideration, and the trial court heard oral argument on that motion. The court denied that motion on August 14, 2009. Nation App. 599.

Finally, on September 2, 2009, the Nation filed its motion to intervene in this case. *Id.* at 600-06. As noted, the trial was scheduled to begin September 21, 2009. *See supra* at 8. On September 3, 2009, the State Officials – who had previously insisted on preservation of the trial date and who had sought a preliminary injunction to prevent an alleged imminent, substantial endangerment of public health – moved for continuance of the trial date. *See* Dkt. No. 2573. The Nation's motion was argued on September 15, 2009, three business days before the trial was set to begin. Nation Addendum, II 55.

At oral argument, the Nation made clear that it had understood that any claims seeking remedies for pollution in the IRW directly implicated the Nation's ownership interests. *See id*. at 8 (Cherokee Nation Counsel Hammons: "to the extent that remedial damages for pollution to the Illinois River Watershed are being sought, and we think that those are necessary to correct what's been done, then, yes, our interest is at stake"). The Nation also acknowledged that it had been aware of this lawsuit and its claims since 2005. *Id.* at 7-8; *see also supra* at 10-11. The Nation nonetheless asserted that its motion was timely.

The District Court denied the motion that day, issuing the ruling described *supra* at 8-9. The Nation noted its appeal on September 17, 2009. Nation App. 930. The Nation decided not to request expedition. Thus, as described *supra* at 8, the lengthy trial in this matter will be over by the time this Court hears the Nation's appeal.

VI. SUMMARY OF ARGUMENT

The District Court did not abuse its discretion by denying the Cherokee Nation's motion to intervene as untimely. The motion was filed in September 2009, after the case had been pending for four-and-a-half years and only weeks before trial, even though the Nation had been aware since 2005 that its interests were at issue. The trial court concluded that granting the motion – which sought to re-introduce into the case complex issues that had been dismissed – would have substantially delayed the case and prejudiced the parties. Far from an abuse of discretion, the trial court's judgment – based on his management of this case, including the run-up to trial – was correct and should be affirmed.

In this Court, four considerations are pertinent to the timeliness determination, and each one militated against granting the Nation's motion in this case. First, the trial court considered "the length of time since the applicant knew of his interest in the case," *SEC v. Broadbent*, 296 F. App'x 637, 639 (10th Cir. 2008), and concluded that the Cherokee Nation had been aware of this litigation

and its implications for the Nation's interests since 2005, and yet had allowed the litigation to proceed for four and a half years, through discovery, motions practice, and trial preparation, without seeking to intervene. Second, the trial court found that granting the motion would severely prejudice the parties by substantially delaying the imminent trial date and by injecting previously-resolved issues back into the case.

Next the court determined that any prejudice to the Nation from denial of the motion had been minimized by the court's dismissal of the State Officials' claims for money damages from the Poultry Companies. Thus, the trial would address only whether the Poultry Companies were engaged in violations of state and federal law and should be subject to penalties or injunctive relief. Indeed, any remaining prejudice to the Nation was substantially outweighed by the significant prejudice that allowing intervention would have inflicted on the parties because the Nation's exclusion was the result of its strategic choices and delay. Finally, the only extraordinary circumstances relevant to the Nation's motion were the immediacy of the trial date, the extraordinary harm to the parties from postponement, and the Nation's knowing decision not to act sooner. In these circumstances, the trial court's decision to deny the motion to intervene plainly was not an abuse of discretion.

VII. ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD THAT THE CHEROKEE NATION'S MOTION TO INTERVENE WAS UNTIMELY.

A. Introduction and Standard of Review

Under Federal Rule of Civil Procedure 24(a)

> "an applicant may intervene as a matter of right if (1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties."

SEC v. Broadbent, 296 F. App'x 637, 638 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1323 (2009); *Ute Distrib. Corp. v. Norton*, 43 F. App'x 272, 275 (10th Cir. 2002); *see* Fed. R. Civ. P. 24(a).[4] A putative intervenor must fulfill all of Rule 24(a)'s requirements; it is insufficient to show that some of these conditions are met. *See Broadbent*, 296 F. App'x at 639; *Ute Distrib.*, 43 F. App'x at 275; *United States v. Blaine County, Mont.*, 37 F. App'x 276, 278 (9th Cir. 2002) (mem.).

"'[T]imeliness is the threshold requirement for intervention as of right.'" *See Blaine County*, 37 F. App'x at 278. If the application for intervention was

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[4] In full, Rule 24(a) states:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

untimely, the court "need not address the other elements of Fed. R. Civ. P. 24(a)(2)." *Id.* In this Circuit,

> "[t]he timeliness of a motion to intervene is assessed in light of all the circumstances, including [1] the length of time since the applicant knew of his interest in the case, [2] prejudice to the existing parties, [3] prejudice to the applicant, and [4] the existence of any unusual circumstances."

Broadbent, 296 F. App'x at 639; *Ute Distrib. Corp.*, 43 F. App'x at 276.

After considering each of these factors, the District Court correctly determined that the Cherokee Nation's motion was untimely. Although this Court generally reviews denials of intervention of right de novo, *see Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 90 (10th Cir. 1993), it reviews a district court's determination that a motion to intervene was untimely only for abuse of discretion. *See Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of Interior*, 100 F.3d 837, 840 (10th Cir. 1996). The latter standard applies to this appeal.

Far from abusing its discretion, the District Court here correctly concluded that all relevant factors militated strongly against the Nation's intervention. This case is on all fours with *Ute Distrib. Corp. v. Norton*, 43 Fed. App. 272 (10th Cir. 2002). There, this Court affirmed the denial of an untimely motion to intervene as of right by the Timpanogos Tribe which, like the Cherokee Nation here, asserted interests as the holder of "aboriginal title to the water rights at issue in the

underlying litigation." *Id.* at 273. In rejecting the motion to intervene, this Court affirmed the district court's finding that the Tribe's motion was untimely because the Tribe had known of its interests (and the Ute Tribe's conflicting claims) for years and done nothing to previously assert those interests, and delayed in filing a motion to intervene for "approximately five years into the lawsuit." *Id.* at 273. This Court further found that the Timpanogos Tribe's intervention "would prejudice the existing parties by inserting new, substantial issues into the case." *Id.* at 277. The Court expressly concluded that the fact "that the motion for intervention was not timely is dispositive of the . . . appeal." *Id.* at 275 n.14. This same analysis and conclusion should apply here.

B. The Cherokee Nation Knew That Its Interests Would Be Implicated In This Litigation Even Before It was Filed And Chose Not To Intervene Until The Eve of Trial.

From the inception of this litigation, the Nation's counsel has acknowledged that the Nation "undoubtedly was aware of the litigation and knew that it had an interest in the IRW." Nation App. 604 (Mot. to Intervene by the Cherokee Nation (Sept. 2, 2009)). The State Officials have premised their federal and state claims in this case on their exclusive ownership and trusteeship of the natural resources of the IRW – resources also claimed by the Cherokee Nation. *See supra* at 4-5, 9-12. Thus, the State Officials' claim of exclusive ownership and trusteeship of the IRW has at all relevant times directly contradicted the Cherokee Nation's claim.

Moreover, the State Officials' allegation that, as owners and trustees of the IRW, they would be entitled to receive damages based on the Poultry Companies' asserted pollution of those resources necessarily conflicts with the Nation's potential claim that it, as owner and trustee, is entitled to such damages. The Nation's 2005 awareness of this lawsuit thus put it on notice that its interests were at stake.

> As the Cherokee Nation candidly acknowledges in its brief, it
>
> has continuously maintained its interest in the water located within the 14 county traditional treaty boundary of the Nation [which includes the IRW] since it was issued a fee patent from the United States in 1838, and the State of Oklahoma has asserted ownership and authority over that same water since 1906. [Nation Br. 8 n.1.]

In addition, as the recitation in the Statement of Facts makes clear, the Nation was aware of this litigation and of that fact that its interests were implicated even before the first complaint was filed in 2005. *See supra* at 11. Chief Smith wrote to General Edmondson about the soon-to-be-filed case in 2005, demonstrating his concrete awareness of the claims at issue and their potential impact on the Cherokee. And, the Poultry Companies both urged the Nation to assert its interests and ensured that the Nation was kept apprised of all developments in the case, most particularly the State Officials' assertion of rights inconsistent with the Nation's claimed rights. Nation App. 740 (Ex. E, Defs.' Opp. To Mot. To Intervene). Indeed, the Companies provided the Nation with copies of the parties'

briefing on the Rule 19 motion. *Id.* at 746 (Ex. G, Defs.' Opp. To Mot. Intervene). In turn, the Cherokee Nation provided input to the Companies on the arguments to present in support of the latter's Rule 19 motion (while simultaneously negotiating an agreement with the State to assign the Nation's rights in this litigation). *Id.* at 748-76 (Ex. H, Defs.' Opp to Mot. to Intervene).

Despite its awareness of the litigation and the fact that its interests in the IRW were at stake, the Nation chose not to intervene when the case was filed in 2005, through discovery, and even when the Poultry Companies filed their Rule 19 motion arguing that the Cherokee Nation was an essential party to litigation. It simply waited on the sidelines. It was not until September 2, 2009 that the Nation filed its motion, less than three weeks before the scheduled trial date of September 21 – a trial whose preparation had been ongoing for more than four years. Accordingly, the trial court found as a matter of fact that "the Cherokee Nation knew of its interest in this case from the outset of the litigation, but chose not to intervene for a number of reasons." Nation Addendum, II 65-66.[5]

[5] The Cherokee Nation's decision to stay out of this case provided it with an opportunity to take advantage of any favorable ruling on the Poultry Companies' Rule 19 motion, which finally brought to judgment the Cherokee Nation's longstanding claim to the waters of the IRW, while avoiding the *res judicata* effect that a negative ruling would have on parties to the litigation. But the consequence of the judgment not to intervene for more than four years is nonetheless that the motion was untimely.

As one preeminent treatise explains, "[w]hen the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention." 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1916, at 539-450 (3d ed. 2007). The courts in this Circuit share that reluctance. Most directly on point is *Ute Distrib. Corp.*, described above. There, this Court affirmed the denial of an untimely motion to intervene as of right by the Timpanogos Tribe because the Tribe had known of its interests (and the Ute Tribe's conflicting claims) for years and failed to assert those interests during nearly five years of litigation. *See* 43 F. App'x at 275-77.

Numerous other cases conduct the same analysis. For example, in *United States v. Blaine County Mont.*, 37 F. App'x 276, 278 (9th Cir. 2002), the court upheld the denial of an untimely motion to intervene of right filed by representatives of the Belknap Indian Reservation, where those representatives "had knowledge of the suit" and "knew they could have met the standard [for intervention] at the time the complaint was filed," and "fail[ed] to offer sufficient explanation for their delay in filing their motion to intervene." *See also Broadbent*, 296 F. App'x at 639-40 (rejecting motion as untimely where movant did not seek to intervene until nearly a year after receiving notice that his interests were at issue); *Canadian St. Regis Band of Mohawk Indians v. New York*, 2005 U.S. Dist. LEXIS 44673, at *9-25 (N.D.N.Y Oct. 11, 2005) (affirming denial of the Mohawk

Council of Kahnawaike's motion to intervene as of right in a land claim action where the Council had actual knowledge of its interest in the litigation, yet improperly delayed in filing the motion to intervene); *Cherokee Nation v. United States*, 54 Fed. Cl. 116 (2002) (denying intervention to a tribe on the eve of settlement when tribe was aware that the litigation had been pending for many years).

In its brief, the Cherokee Nation implies that it first received "notice that [its] interests were at issue in this case" on October 31, 2008, when the Poultry Companies filed their Rule 19 motion. Nation Br. 3. The undisputed facts set forth in the Statement of Facts make clear that this is wrong. It is incredible that the Nation would claim that it "had no way of knowing that its interests would be implicated in this lawsuit until October 31, 2008 when the [Poultry Companies] raised for the first time the issue of whether the Cherokee Nation and the State of Oklahoma had to jointly prosecute the claims the State had brought three years earlier." *Id*. at 12-13. The Nation was aware of this litigation and the nature of its claims in 2005 before the case was filed and kept apprised of developments in the case thereafter.

The Nation also argues that the litigation "which dealt with alleged damage to the [IRW] by the pollution of the [Poultry Companies] did not directly implicate the Nation's interests" because it "dealt with water quality and who was

responsible for the excess nutrients detected in the [IRW], not who owned the water." *Id*. at 8. This argument is incorrect on its face. If the Nation is the owner and trustee of these resources as it claims, then it, and not the State, would be entitled to seek damages for alleged harm caused by pollution from excess nutrients. If the State is not the owner of these resources, it is not entitled to damages for harm caused to them. The Nation's assertion that it owns the water but that its interests are not implicated by a suit seeking damages for harm to the quality of that water makes no sense.

The Nation's claim that it was the Poultry Companies' Rule 19 motion that put it on notice that its "interests were going to be at issue in the environmental damages case" is similarly without merit. *Id*. The motion did not alter or otherwise affect either the State Officials' claims which had been stated in their complaint in 2005 – a complaint of which the Nation was fully aware – or the Cherokee Nation's claimed interests which had been in existence since the 19th century.

The Cherokee Nation also attempts to excuse its delay in filing from October 31, 2008 (when the Poultry Companies filed their Rule 19 motion) to September 3, 2009 (when the Nation filed its motion to intervene). It recites the procedural steps that occurred during that period – argument on the motion, the Nation's attempt to assign its rights to the State, the court's decision on the motions, followed by

reconsideration proceedings, the Nation's encouragement of a settlement conference, *see id.* at 8-10 – and implies that September 3, 2009 was the first time it could have moved to intervene.

This implicit contention is plainly wrong and misapprehends the law governing timely intervention. To satisfy Rule 24's timeliness requirement, an intervenor must file a motion to intervene at the time "'the applicant knew of his interest in the case.'" *Broadbent*, 296 F. App'x at 639; *Ute Distrib. Corp.*, 43 F. App'x at 275. An intervenor may not sit on his rights until the proceedings in the case either validate or threaten its rights. *See Creusere v. Board of Educ.*, 88 F. App'x 813, 825 (6th Cir. 2003) ("[T]he [intervenor] should have known of its interest from the beginning of the litigation, and although its interest is heightened because of [a recent ruling in the case], its interest was not new. Therefore, the [intervenor] could have intervened as soon as this case was filed, but as it did not, its motion was too late.").

The Nation clearly understood that it had interests at stake in this litigation in 2005. The Poultry Companies' Rule 19 motion simply made clear that *a court decision* that would directly affect those interests was imminent, because the motion would require the District Court to determine whether the Nation truly had interests in the IRW resources, and the State Officials were denying that the Nation

had any such interests. *See supra* at 13. The Poultry Companies' Rule 19 motion was not the event that alerted the Cherokee Nation to its interests in this litigation.[6]

Equally to the point, the trial court's July 22, 2009 Order, granting in part the Poultry Companies' Rule 19 motion, did not alter the lawsuit or the Cherokee Nation's interests in it. It merely affirmed a fact that that Nation had long known – that its interests were at stake in this case and were not protected by the State Officials, who assert conflicting claims of exclusive ownership and trusteeship in the IRW.[7]

Finally, the cases that the Nation cites to justify its delay are inapt. In *Sanguine, Ltd. v. U.S. Department of the Interior*, 736 F.2d 1416 (10th Cir. 1984), tribal members whose land was affected by a new federal policy filed a motion to intervene after judgment was rendered. The district court found that the motion was timely because the defendant, a federal agency, failed to release the names of those affected by the suit until two weeks after the judgment had been rendered.

[6] Nor can the Nation claim that it must be entitled to intervene because the trial court found that it was an indispensable party. This Court has held that a party who is indispensable under Rule 19 must nevertheless satisfy Rule 24's four elements in order to intervene, including the timeliness requirement. *See Ute Distrib. Corp*, 43 F. App'x at 280 ("Even if a Rule 19 analysis may be applied to a motion for intervention of right, the Timpanogos Tribe must still demonstrate that it meets the four elements of Rule 24(a)(2).").

[7] Even if the Nation's claim of "new" issues raised by the Rule 19 order were true (it is not), the Nation's intervention would still be late. The Nation waited an *additional* six weeks after the court's ruling before filing the motion to intervene with the trial date approaching and the parties engaged in intensive preparation. On this basis alone, the motion was untimely.

Id. at 1419. Here, the putative intervenor was aware of the lawsuit and its interests before the lawsuit was even filed and during more than four years of litigation.

Likewise in *Cherokee Nation v. United States*, 69 Fed. Cl. 148 (2005), and *American Renovation & Construction Co. v. United States*, 65 Fed. Cl. 254 (2005), the applicants plainly did not know of the litigation's substantial impact on their interests substantially in advance of their intervention motions. *See*, *e.g.*, *Cherokee Nation*, 69 Fed. Cl. at 153-41 (movant "had no reason to seek intervention prior to the Secretary's decision" and filed its motion to intervene six days later); *American Renovation*, 65 Fed. Cl. at 258 (movant filed motion 37 days after it obtained a judgment making it a judgment creditor of a party).

The opposite is true here. The Cherokee Nation has long been aware of this litigation, which included claims for damage to the resources of the IRW. These are resources that the Nation claims as its own. It failed to move to intervene for four and a half years. As the trial court found, the Cherokee Nation's prior knowledge of this litigation and its impact on the Nation's interests justified denial of the Nation's motion to intervene, filed only days before trial and seeking to change the entire scope of the case.

C. The Parties and the Court Would Have Been Severely Prejudiced By the Cherokee Nation's Delay Had The Motion Been Granted.

As the trial court also correctly found, the existing parties and the Court would have suffered severe prejudice if the Cherokee Nation's untimely motion to

intervene had been granted. The court found that the intervention would trigger a delay of more than 120 days, Nation Addendum, II 65, because it would result in "the reinsertion of three causes of action that were previously dismissed, the consequent resuscitation of numerous motions pertaining to those causes of action," "a new round of discovery . . . [and] a new round of motions." *Id.* This, in turn, would have imposed significant expense on the parties and delayed the start of a trial for which parties, counsel and witnesses were prepared. *Id.* Thus, the court found, allowing intervention "would severely prejudice the parties who have been actively proceeding toward trial these past four-plus years." *Id.* This prejudice by itself warranted denial of the motion to intervene as untimely, and surely makes clear that the trial court did not abuse its discretion in so finding.

A motion to intervene is plainly untimely, where, as here, a party knows or should have known of its interest in the subject matter of a lawsuit, and waits to seek intervention until the case is several years old, discovery is closed, the deadline for dispositive motions has passed, and the trial is approaching. *See, e.g.*, *Creusere*, 88 F. App'x at 825 (denying intervention where case was over three years old and trial was scheduled in about a month); *Caterino v. Barry*, 922 F.2d 37, 39-43 (1st Cir. 1990) (affirming denial of intervention sought "just over three months before the scheduled trial date, and months after the close of discovery"); *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235 (D.C. Cir.

2006) (denying motion to intervene filed on the eve of trial and hindering a complicated trial); *EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 950 (7th Cir. 1975) (denying motion to intervene filed after the final pretrial conference had been held and where the addition of movants would have made it difficult if not impossible to try the case at the time set); *Jones v. Richter*, 2001 U.S. Dist. LEXIS 4228, *4-12 (W.D.N.Y. Apr. 3, 2001) (denying motion to intervene filed after "[d]iscovery had closed in this case and it had already been scheduled for trial").

As noted above, the motion was filed September 2, and argued September 15, three business days before the long established September 21, 2009 trial date. Both the court and the parties had expended enormous amounts of time and resources in pre-trial preparations, deposition designations, exhibit selection and objections, summary judgment motions, *Daubert* motions, motions in limine, and pretrial hearings. The Nation's current position that "the record does not reflect that a lengthy delay would be necessary," Nation Br. 22, is contrary to an express finding by the trial court (Nation Addendum, II 65), which is plainly entitled to deference on this point. Moreover, the Nation's intervention would have delayed this matter for months, if not a full year. It would have required the reevaluation and revision of all of the preparatory work for the trial. Because the trial involved complex issues, its preparation time and costs were substantial and constituted sunk costs by September 2, 2009.

The Nation's untimely motion also would have prejudiced the parties and the court by introducing numerous additional, complex issues of law and fact at a late juncture. *See, e.g.*, *Canadian St. Regis Band of Mohawk Indians*, 2005 U.S. Dist. LEXIS, at *25-31 (interjecting "complex" collateral matters, such as the Mohawk Council's "'right to the lands at issue under the Treaty of 1796'" would "prejudice the existing parties by expanding the scope of this litigation to include [such] collateral issues"). Although the "prejudice prong of the timeliness inquiry 'measures prejudice caused by the interveners' *delay* – not by the intervention itself," *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (emphasis added), the Cherokee Nation's delay in asserting its claims would have required the Poultry Companies to re-open discovery and litigate numerous issues that have already been resolved or removed from the case.

For example, extensive discovery would have been required to ascertain the scope of the Cherokee Nation's asserted interests, after which the parties would have needed to re-litigate the issue of standing to determine the extent of the Cherokee Nation's interests *vis-à-vis* not only the State, but also the United Keetoowah Band of Cherokee Indian, which asserts that it – not the Cherokee Nation – is the legally authorized recipient of the treaty promises made to the

historic Cherokee Nation.[8]

Additional discovery into the Nation's own contribution to the phosphorus and bacteria content of the waters of the IRW would have been required, both to refute the Nation's nuisance claim, *see Walters v. Prairie Oil & Gas Co.*, 204 P. 906, 908 (Okla. 1922) (holding that where a plaintiff asserting a nuisance claim also contributes to the nuisance, even indirectly, that plaintiff cannot recover without evidence sufficient to permit allocation), and in connection with any cross-claims or counterclaims the Poultry Companies might assert against the Nation. And, of course, the Nation had made no initial disclosures and has served no witness or exhibit lists, all of which would require additional discovery once they were served.

In addition to the new issues that would have been created by adding a new plaintiff who has had no part in the case from its inception to trial, allowing the

[8] This is a significant issue that the Poultry Companies identified after the Rule 19 motion was filed. Briefly, the Cherokee Nation of Oklahoma and the United Keetoowah Band of Cherokee Indian ("UKB") both claim to be the successor-in-interest to the historical Cherokee Nation. *See United Keetoowah Band of Cherokee Indian v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs* (U.S. Dept. of Interior June 24, 2009). *See* Nation App. 680-81 (Ex. A to Defs.' Opp. to Mot. to Intervene). To resolve the Nation's proposed damages claims, the parties would have had to determine whether the modern Cherokee Nation or the UKB is the tribal government with authority over the IRW's natural resources. This is a substantial issue involving complex facts and law spanning many decades. In addition, the trial court would have had to decide whether the UKB, a separate tribal government, is also an indispensable party to any damages claims in light of the analysis in its July 22, 2009 Order.

Cherokee Nation to intervene would have re-introduced into the case a large number of complex, unresolved legal issues that the court had determined were moot. *See Federal Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492-93 (10th Cir. 1987) (the introduction of new issues reduces efficiency and undermines the argument for intervention). For example, when the District Court dismissed the State Officials' CERCLA claims, that decision made it unnecessary for the court to decide (i) whether EPA was correct in stating that phosphates such as those found in animal manures are not "hazardous substances" under CERCLA, (ii) whether an entire million-acre watershed can be a single CERCLA facility, and (iii) whether federal preemption under *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006) applies to bar any of the claims in this case. *See, e.g.*, Supp. App. 151 (Defs.' Joint Mot. for Summ. J. on Counts 1 And 2 Of The Second Am. Compl., Dkt. No. 1872); *id.* at 203 (Defs.' Mot. for Partial Summ. J. on Pl.'s Damages Claims Preempted or Displaced by CERCLA, Dkt. No. 2031). In addition, in light of its dismissal order, the District Court no longer was required to decide numerous *Daubert* motions, motions *in limine* and other matters related to the dismissed claims, all of which would need to be addressed if the Motion to Intervene were granted and those damages claims were reintroduced into the litigation. Citations to those motions are set out in the note appended to this sentence.[9]

[9] *See, e.g.*, Supp. App. 191 (Mot. to Strike Supplemental Report of David R.

The Nation argues that the court should not have considered the delay resulting from the Nation's re-insertion of the damages claims into the case because that delay is "due to the mere existence of the Nation as a party," and not "prejudice caused by the timing of the Nation's motion to intervene." Nation Br. 22 (emphasis omitted). This argument is clearly wrong. The Nation's failure to move to intervene in this case from 2005 through 2008 resulted in the filing of the Poultry Companies' Rule 19 motion and the dismissal of the State Officials' damages claims. It is precisely the delay in the Nation's motion to intervene that causes the prejudice to the parties with respect to the damages issues. Had the Nation timely moved to intervene, the parties would not have litigated the Rule 19 motion and the case would not have been prepared for trial on the assumption that no damages claims remained. The Nation's delay is the direct cause of the prejudice that would have resulted if the damages claims had been reinserted into this case.

Payne, Dkt. No. 1992); *id.* at 240 (Mot. in Limine to Exclude Defs.' Expert Report Entitled "Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Value Study Illinois River Watershed," Dkt. No. 2242); *id.* at 277 (Mot. in Limine to Exclude Portions of Defs.' "Expert Report of William H. Desvousges and Gordon C. Rausser," Dkt. No. 2270); *id.* at 314 (Mot. to Exclude Test. of the Stratus Consulting Experts, Dkt. No. 2272); *id.* at 359 (Mot. to Strike Untimely Supplemental Report and Considered Materials of Defs.' Damages Experts William H. Desvousges and Gordon C. Rausser, Dkt. No. 2354); *id.* at 348 (Mot. to Strike Doc(s)., Dkt. No. 2339).

Finally, it is noteworthy that throughout this case, the State Officials have claimed that the Poultry Companies' actions have created imminent and substantial endangerment to the public that requires immediate action by the District Court. *See, e.g.*, Supp. App. 116 (Mot. for Prelim. Inj., Dkt. No. 1373 (filed Nov. 14, 2007)). The Poultry Companies disagree, as did the trial court which denied the State Officials' motion for a preliminary injunction, a decision affirmed by this Court. *See supra* at 1. The State Officials, however, continue to seek an injunction and claim that the public interest is at stake in this litigation. Thus, whatever the State Officials' current position on the Nation's intervention,[10] their claim that the subject matter of this litigation involves endangerment to the public militated strongly against allowing an intervention sure to result in substantial delay of the trial in this matter. Indeed, the Nation itself states that it did not seek to stay the trial in light of the "importance of getting injunctive relief." Nation Br. 20. This point thus provides significant support for the denial of the Nation's motion to intervene which would have substantially delayed the trial.

Courts simply do not permit intervention in the circumstances presented here. *See* Wright, Miller & Kane, *supra* § 1916, at 558 n.17 (citing cases). Indeed, had the trial court not authorized expedited treatment, the briefing of the Motion to

[10] The State Officials supported the Nation's intervention below, even filing a motion for a continuance of the trial, *see supra* at 7-8, a position plainly in substantial tension with their claims that the Poultry Companies' actions created an emergent situation.

Intervene would not even have been complete before the trial began. The trial court did not abuse its discretion in finding that this delay with its accompanying prejudice should not be excused.

D. The Cherokee Nation Was Not Prejudiced by Denial of its Motion to Intervene.

In contrast, as the trial court found, the Cherokee Nation would not be prejudiced if its untimely attempt to intervene were denied. Nation Addendum, II 66. At the time the Nation moved to intervene, the District Court had already dismissed the claims in this litigation that might impair or impede the Cherokee Nation's ability to protect its interests in the IRW. *See* Nation Addendum, I 22-23. The Nation may still bring such claims in its own lawsuit if it wishes to do so. The State Officials can join the Cherokee Nation in that litigation if they choose to do so. Indeed, the District Court specifically recognized that the State Officials and Cherokee Nation retained this option. *See* Nation Addendum, II 66. An applicant's ability to file a separate lawsuit to assert his or her interests cuts strongly against allowing intervention of right. *See Lucero ex rel. Chavez v. City of Albuquerque*, 140 F.R.D. 455, 459 (D.N.M. 1992) (intervention of right denied where applicant can vindicate its right in a separate action).

In response, the Nation argues that requiring it to file a separate lawsuit stating these claims will result in piecemeal litigation and that the Nation would benefit from litigating its claims for money damages with the assistance of the

State Officials. *See e.g.*, Nation Br. 11 (arguing that the delay should be excused because the Nation was seeking "to take advantage of the State's considerable legal expertise in the case"). The Poultry Companies recognize that there would have been some efficiencies in litigating the Nation's putative claims with the claims currently being tried. But, as set forth above, adding the damages claims back into this case in September 2009 would have required costly and complex additional proceedings, delayed the trial of the claims ready for trial, and prejudiced the parties and the court. The Nation made the strategic judgment *not* to intervene for many years while the State Officials pursued their claims. Any loss of efficiency is the result of a strategic choice of the Nation.[11]

In any event, courts have repeatedly recognized that "'the fact that [the Movant] . . . will face many significant obstacles if [it] file[s] [its] own lawsuit does not as a matter of law require intervention.' This is especially so considering, as the record shows, that in many respects any barriers which there may be to

[11] The Nation cites *Cherokee Nation*, 69 Fed. Cl. at 155, for the proposition that intervention should be permitted when it will avoid multiple lawsuits. That is a relevant but not dispositive consideration, particularly here where so many factors weigh heavily against intervention. In *Cherokee Nation*, the court granted an attorney's motion for intervention so that his right to additional fees from the attorneys' fees escrow account could be resolved before the Secretary completed disbursements from that account and so that the Cherokee could raise any challenge to the attorney's recovery of fees from that account. There was no question of undue delay or prejudice to the other parties resulting from the intervention. In fact, the court was concerned that failure to consider the intervenor's claim could delay entry of the parties' consent decree. *Id.*

separate litigation by the Movant have been created by the Movant itself." *Canadian St. Regis Band of Mohawk Indians*, 2005 U.S. Dist. LEXIS 44673, at *33 (alterations and omissions in original) (citation omitted) (quoting *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000)). Had the Nation sought intervention sooner, it would not have faced the need to file separate litigation. Its knowing failure to intervene militated strongly against granting its eleventh-hour motion.

The Nation has had no prior involvement in this case, and has invested no time and resources in preparing for trial. In contrast, the parties and the trial court had worked for years to prepare for trial on claims that were narrowed through discovery and motions. The District Court was fully aware of the enormous investment of time and resources that the court and the parties had made in the months and weeks leading up to trial, including the commitments in time and future scheduling made by parties, their attorneys, and witnesses. Because of the scope of this trial, those burdens were substantial. "[T]he purpose of the basic requirement that the application to intervene be timely is to prevent last minute disruption of painstaking work by the parties and the court." *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980). The prejudice resulting from the granting of the

Cherokee Nation's motion to intervene far outweighed any prejudice to the Nation in requiring it to bring a separate lawsuit.[12]

The Nation argues that it is an owner and trustee of the lands at issue and that it will be severely prejudiced if "issues revolving around ownership of the water within the traditional treaty boundaries of the Cherokee Nation" are considered without its participation in this case. Nation Br. 16. *See id.* at 20. The Poultry Companies recognize, as did the trial court, that the Nation asserts ownership interests in the IRW resources. That is why the court excised from this case the damages claims that would have required the court to address whether the Nation or the State is the owner or trustee of those resources. *See supra* at 15-16. What remains in the case are the State Officials' claims for injunctive relief and potentially civil penalties for the violation of environmental laws – claims that can likely be resolved without adjudication of the Nation's and the State's respective rights in the IRW.

The cases cited by the Nation illustrate the deficiency in its argument. In *Karuk Tribe v. United States*, 28 Fed. Cl. 694 (1993), the court allowed the Hoopa Valley Tribe to intervene in a case where the Karuk sought money damages from

[12] The Nation claims that the Poultry Companies would benefit from its intervention because it would "avoid[] the possibility of inconsistent or multiple obligations by the Defendants and avoid[] putting the Defendants 'in the center of a two-century old conflict over who owns the lands, water and biota in the IRW.'" Nation Br. 23. But, the trial court has already largely forestalled this prejudice by excising the damages claims from this case.

the United States for a taking of property awarded to it in an Act of Congress that settled an intertribal dispute by dividing a reservation and disputed funds between the two tribes. The Hoopa Valley Tribe was permitted to intervene because the court's resolution of the Karuk's ownership would directly affect the Hoopa's claimed property rights under the Settlement Act. *Id.* at 696. (Notably, moreover, the Hoopa faced no claim of inordinate delay in the face of knowledge of its interests nor caused delay of an impending trial date.) Here, the Nation's property interests in the IRW are not at issue and will not be decided.

Likewise in *Arizona v. California*, 460 U.S. 605 (1983), the Indian tribes indisputably had water rights that were to be determined in the litigation. *Id.* at 614. There was no claim that the tribal intervention would delay the litigation because the tribes were taking the same position already being urged by the United States. *Id.* at 613-15. Here, in contrast, the Nation's and the State's claims vis-à-vis ownership of the IRW are in conflict, and the court removed from the case all claims that would have required it to resolve that conflict. Thus, the trial court made clear that it is sensitive to the Nation's concern, and that it will not resolve the question of the Nation's ownership or trusteeship of the IRW resources precisely because the Nation is not a party.[13]

[13] The Nation also cites *American Renovation & Construction Co.*, 65 Fed. Cl. at 259, in arguing that the prejudice of duplication of effort that its intervention would cause the parties is outweighed by its interests. *See* Nation Br. 20-21. In

The Nation asserts that if it is not permitted to intervene and the State Officials lose their claim for injunctive relief, the Nation may find its damages claims under CERCLA and federal and state law barred by the doctrine of *res judicata*. Nation Br. 21. However, even assuming that the Nation's claims might be affected, the Nation stated in the trial court that its resources would not allow it separately to develop its claims and that it was willing to rely on the State Officials' factual and legal case. *See id*. at 23 ("The Cherokee Nation was willing to proceed based upon the strength of the State of Oklahoma's evidence and did not request any additional discovery."). The Nation cannot have it both ways. It should not be permitted to argue that its motion to intervene should be granted because it intends to rely solely on the State Officials' extant case *and* because otherwise it will be bound by the State Officials' presentation. Finally, the Nation did not ask the trial court for permission to participate as *amicus curiae*, but the interests the Nation describes in the outcome of current trial could be fully protected by a motion to participate as an *amicus* without the prejudice and delay that would result from the Nation's intervention.

In light of all the circumstances, the trial court's determination that the Nation's delay was unwarranted and that the prejudice to the parties substantially

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that case, the putative intervenor showed that the plaintiffs' claim was its only remaining asset that therefore that it had no hope of recovery from the plaintiff absent intervention. *Id.* at 21. Here, as we have shown, the opposite is true. The Nation may file a separate action and raise its claims.

outweighed any purported benefit of intervention was more than reasonable and certainly not an abuse of discretion.

E. Unusual Circumstances – Specifically The Nation's Filing Of A Motion to Intervene Two Weeks Before Trial – Strongly Supported Denial of that Motion.

There are no unusual circumstances that would excuse the Cherokee Nation's conscious failure to intervene during the past four-and-a-half years of this litigation. Indeed, that knowing "delay is an unusual circumstance[] that weighs *against* a finding of timeliness." *Canadian St. Regis Band of Mohawk Indians*, 2005 U.S. Dist. LEXIS 44673, at *35. Further, the prejudice that the parties and the District Court would have suffered as a result of the significant delay is both extreme and unusual.

The Nation claims that an unusual circumstance supporting intervention is the fact that under CERCLA, all trustees of land at issue must be joined in a single suit before any cost recovery or natural resources damages claim may be litigated. Nation Br. 15. In fact, however, the District Court dismissed the CERCLA claims from this suit precisely because the Nation was deemed a necessary party. Thus, the Nation's argument simply highlights the fact that allowing its intervention would have added long-dismissed claims to the suit, delaying the trial and prejudicing the parties and the court.

VIII. CONCLUSION

For the reasons set forth above, the District Court's denial of the Cherokee Nation's motion to intervene should be affirmed.

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ORAL ARGUMENT STATEMENT

The Poultry Companies respectfully submit that this Court could simply affirm the trial court's decision denying intervention based on the briefs in this matter. Of course, the Companies stand ready to present oral argument if the Court would find it helpful in its resolution of this matter.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

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Pursuant to Fed. R. Appellate Procedure 32(7)(C), I hereby certify that this brief complies with the type volume limitation of Rule 23(a)7)(B)(i) because the brief contains 11,311 words which is less than the 14,000 word limit.

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