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

ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, Plaintiff, v. A 25 FOOT WIDE EASEMENT and right-of-way for underground natural gas pipeline lying and situated in the Southwest Quarter of the Southeast Quarter and the West Half of the Southeast Quarter of the Southeast Quarter in Section 28, Township 7 North, Range 11 West of the I. B. & M., in Caddo County, State of Oklahoma, et al., Defendants.	)	Case No. 5:15-cv-01250

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12(b)(6), (7), 19, and 71.1, Defendants Matthew Martin Ware, Betty Lou Ware, Benjamin Blackstar, Corey Ware, Patricia Ware, Jean Ann Carter Ware, Edmond L. Carter, Carri Gwen DuPont, Patricia Ann Carter, Marcia W. Davilla, Mayredean Mammedaty Palmer, Janice C. Mammedaty, Katina Dherie Smith Lipton, William Kendrix Ware, Wesley Ware, III, Angela Rae Ware Silverhorn, Samuel Martin Ware, Rena A. Ware (Killsfirst), and Thomas Blackstar, III (collectively "Defendants") move to dismiss this action because the Kiowa Tribe of Oklahoma (the "Kiowa Tribe" or "Tribe") is a beneficial owner of the property Plaintiff Enable Oklahoma Intrastate Transmission, LLC ("Enable" or "Plaintiff") seeks to condemn, is a required party and cannot be joined. Moreover, 25 U.S.C. § 357, the sole authority under which Plaintiff brings this condemnation action, does not apply to land in which the Tribe holds a beneficial interest. In support thereof, they respectfully show the Court as follows:

Dissatisfied with an earlier decision of the Bureau of Indian Affairs ("BIA") denying its application for an easement to run a natural gas pipeline across Indian land, Plaintiff, now seeks to obtain that easement by condemnation through this action, without the consent of the property's beneficial owners – the Kiowa Tribe and numerous individual Indian allottees, members of the Kiowa, Comanche, Caddo, Apache, and Cherokee Tribes – and over the express objection of the great majority of those beneficial owners. In an ill-conceived attempt to avoid the law precluding its condemnation claim,

Plaintiff's Complaint fails to identify the Tribe as an owner of the property, even though the Tribe's ownership is apparent from the BIA title search for the property. In fact, the Tribe is the ***first owner listed*** on the BIA title search report. Plaintiff cannot ride roughshod over the property owners in this manner, and cannot avoid its obligation to fairly negotiate with them for an easement.

Plaintiff's condemnation claim should be dismissed under Federal Rules of Civil Procedure 12(b)(6), (7), 19, and 71.1 for the following reasons:

- The Tribe is a required party to this action because it owns an undivided interest in the property across which Plaintiff seeks to condemn an easement, and Federal Rule of Civil Procedure 71.1 requires that ***all*** of the property owners be parties to this action.
- Numerous decisions, including several binding opinions from the Tenth Circuit, establish beyond question that the Tribe cannot be joined in this action because it has sovereign immunity from suit, and because 25 U.S.C. § 357, the sole authority under which Plaintiff seeks to condemn this easement, does not apply to land beneficially owned by the Tribe.
- Under the factors set forth in Federal Rule of Civil Procedure 19(b), equity and good conscience mandate that this action be dismissed. Continuing this action would, in-fact, be fruitless because any judgment granting Plaintiff an easement by condemnation would not be binding on the Tribe, would not prevent the Tribe from excluding Plaintiff from the property or prosecuting Plaintiff for trespass, and would also result in inconsistent obligations for Plaintiff to the various owners

of the property at issue. Moreover, Plaintiff has another remedy after this action is dismissed for nonjoinder because Plaintiff is able to continue to negotiate for an easement by consent with the Tribe's officials and individual Indian owners, as it was previously ordered by BIA to do.

Accordingly, this action should be dismissed.

PROPER METHODS FOR OBTAINING EASEMENTS ACROSS INDIAN LAND

Before addressing the specifics of this Motion, background on the legal framework for obtaining an easement across Indian land may be helpful to this Court. Indian lands are governed by federal law. *See Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cty. of Thurston*, 719 F.2d 956, 961 (8th Cir. 1983) (hereafter "*NPPD*"). An easement across Indian land may be obtained by two methods.

First, under 25 U.S.C. §§ 323-328 the Secretary of the Interior may grant an easement, with the consent of the owners, across any Indian land – whether held in trust by the United States for the benefit of a federally recognized tribe or for the benefit of individual members of that tribe. These easements shall not be made "without the consent of the proper tribal officials," and, as to land allotted to individual Indians, easements can only be granted under this method if "the owners or owner of a majority of the interests therein consent to the grant …." 25 U.S.C. § 324 (2015).[1]

Alternatively, under 25 U.S.C. § 357, an easement may be taken by condemnation

[1] The statute provides exceptions allowing easements to be granted without majority consent, for example, when the whereabouts of the land owner(s) are unknown. None of the exceptions apply to this case.

across certain allotted land, in accordance with the law of the state where the Indian land is located. Significantly, as discussed in more detail in Section II(B), *infra*, § 357 does not apply to all types of Indian land covered by §§ 323-328. It is limited by its terms to "[l]ands allotted in severalty to Indians" and does not apply to land owned in whole or in part by tribes and held in trust by the United States. 25 U.S.C. § 357 (2015).

STATEMENT OF FACTS

This case involves a tract of land called Emaugobah Kiowa Allotment 84, also known as Section 28, Township 7 North, Range 11 West, Caddo County, Oklahoma ("Allotment 84" or "the Property"). One of the beneficial owners of Allotment 84 is the federally recognized Kiowa Indian Tribe of Oklahoma (*see* 80 Fed. Reg. 1942-02, at *1944 (Jan. 14, 2015) (listing the Tribe as one of 566 federally recognized tribes)). The other beneficial owners are a number of individual members of the Kiowa, Apache, Caddo, and Comanche Tribes and include some of the listed Defendants.[2] Ex. 1 (BIA Title Status Report (requested Dec. 9, 2015)).[3] Allotment 84 is held in trust by the United

[2] The owners of Allotment 84 all hold undivided fractional interests in the Property, varying from 28.6% down to less than 9/10ths of a percent. The Tribe owns a 1.1% undivided interest in the Property. As reflected on Exhibit 1, Plaintiff has not only failed to identify the Kiowa Tribe as a beneficial owner of the property, it has also failed to identify a number of individual Indian allottees identified on the BIA Title Status Report. In addition, at least three named Defendants, Ernie Clay Keahbone, Mac Travis McCarthy, Silas Mc Carthy and Mark Wallace Keahbone, are not identified in the Title Report and, upon information and belief, are deceased.

[3] When deciding a motion under Rule 19, the Court may consider evidence outside the pleadings. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960); *Behrens v. Donnelly*, 236 F.R.D. 509, 512 (D. Haw. 2006) (citing Charles A. Wright, *et al*., Federal Practice and Procedure § 1359 (3d ed. 2004)).

States for the benefit of all of the owners. *See id*.

On November 19, 1980, the United States granted Plaintiff's predecessor, Producer's Gas Company, a 20-year easement to construct and operate a natural gas pipeline across a portion of Allotment 84. Ex. 2 (Nov. 19, 1980 BIA Grant of Easement for Right-of-Way). The easement expired on November 18, 2000. On June 14, 2002, Enogex, Inc., successor in interest to Producer's Gas, wrote to the BIA applying for a new twenty-year easement. Ex. 3 (June 14, 2002 letter from Brian W. Green, Enogex Inc., to Steve Sullaway, BIA Anadarko Agency). Enogex, was unable, however, to obtain the landowners' consent. Ms. Marcie Davilla, one of the majority landowners, rejected Enogex's offer by returning the Landowner Consent to Grant of Right-of-Way document with "Voided" written across it, dated August 4, 2004. Ex. 4 (BIA Landowners' Consent form with "Voided" notation).

Despite the landowners' rejection of Enogex's offer, on June 23, 2008, Robin Phillips, the Acting Superintendent of the BIA's Anadarko Agency, approved Enogex's application for the easement. Ex. 5 (June 23, 2008 BIA Anadarko Agency Decision Approving Enogex's Application for Right-of-Way). On July 22, 2008, thirteen owners of Allotment 84 again rejected Enogex's offer for an easement by consent. Ex. 6 (July 22, 2008 letter from owners of Emaugobah, Kiowa 84 to Daniel Deerinwater, BIA). Twelve of those landowners separately wrote to Ms. Phillips requesting that she withdraw her decision approving Enogex's renewal request. *See, e.g.*, Ex. 7 (July 22, 2008 letter from Marcie Lee Ware Davilla to Robin Phillips, Acting Superintendent, BIA).

On March 23, 2010, the BIA vacated Ms. Phillips's June 23, 2008 decision, finding that the Anadarko Agency improperly approved the easement without the landowners' consent, and that the compensation Enogex offered the landowners to obtain the easement was likely inadequate. Ex. 8 (Mar. 23, 2010 letter from Dan Deerinwater, BIA Regional Director, at 4). The BIA remanded the case for "further negotiation" and instructed that "[i]f valid approval of a right of way for this tract is not timely secured, Enogex should be directed to move the pipeline off the subject property." (*Id.*) Rather than continuing negotiations with the landowners or offering them additional compensation to obtain an easement by consent, as directed by the BIA, on November 11, 2015, Enogex's most recent successor, Enable, upon receiving notice of the landowners' claim for trespass, filed this action to condemn the easement across Allotment 84 under 25 U.S.C. § 357. (Compl. [DE 1], ¶ 1(C), Ex A[4].)

ARGUMENT

Although § 357 allows condemnation of allotted lands under the laws of the state where the land is located, the Court must follow federal procedural law in condemnation actions brought under § 357. *See Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less*, 746 F.3d 362, 367 (8th Cir. 2014). Under the Federal Rules of Civil Procedure, this action should be dismissed because the Tribe is a required party, but it cannot be joined in this action.

[4] Exhibit 1 to the Complaint identifies the easement Plaintiff seeks to take by condemnation. The proposed easement runs across the property identified in the attached BIA Title Search (Ex. 1 to this brief), specifically "Sec. 28, T7N-R11W" or "Section 28, Township 7 North, Range 11 West."

I. The Tribe Is a Required Party Under Rules 19(a) and 71.1.

A. The Tribe's Undivided Ownership Interest in the Property Makes It a Required Party to This Action.

The Tribe's status as a required party to this action is dictated by Federal Rules of Civil Procedure 19(a) and 71.1. Under Rule 19(a):

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among the existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). Rule 71.1 further *requires* the plaintiff in a condemnation action to join as defendants "those persons who have … an interest in the property and whose names are then known," either when the action is filed or before a hearing on compensation.[5] Fed. R. Civ. P. 71.1(c)(3).

The recent decision, *Pub. Serv. Co. of N.M. v. Approximately 15.49 Acres of Land in McKinley Cty.*, No. 15-cv-501 JAP/CG, 2015 WL 9598913 (D.N.M. Dec. 1, 2015), is

[5] Rule 19(c) also required Plaintiff to identify the Tribe as a party required to be joined and to state the reasons for not joining the Tribe. Fed. R. Civ. P. 19(c). Considering that the Tribe appears as the first listed owner on the BIA Title Search, Plaintiff's failure to identify the Tribe as an owner in the Complaint is inexplicable.

directly on point. In that case, the court held that the Navajo Nation was a required party in an action to condemn an easement across two allotments under 25 U.S.C. § 357 because the Nation owned undivided fractional interests in those allotments. *Id*. at *1, 12-15. The court correctly noted that Rule 71.1 made joinder of the Nation mandatory. *Id*. at *14 ("Rule 71.1 requires joinder of both the holders of beneficial title and the holders of legal title to property."). Additionally, the court found that under Rule 19(a), if the action continued without the Nation, the Nation's "interest in not having its property involuntarily taken by eminent domain would certainly be 'impaired or impeded.'" *Id*. at *13 (citing Fed. R. Civ. P. 19(a)(1)(B)(ii)). Numerous decisions from the Tenth Circuit and other district courts likewise hold that tribes are required parties in cases affecting similar interests. *See Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-40 (10th Cir. 1987) (tribe was a required party to claims brought by lessee to enforce oil and gas lease rights on tribal land); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (Eastern Shoshone Tribe was a required party to an action regarding the imposition of vehicle and excise taxes on tribal members who resided on the reservation); *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225-27 (D. Colo. 2012) (Navajo Nation was a required party to action challenging issuance of mining permit on land owned by the tribe).

In this case, the Kiowa Tribe's ownership interest in the Property makes it a required party. *See Pub. Serv. Co.*, 2015 WL 9598913 at *12-14. In addition to the reasons set forth in *Public Service Company*, the Tribe is a required party under Rule 19(a)(1)(A) because complete relief cannot be afforded in the Tribe's absence—Plaintiff

cannot access the property without an easement that is binding on *all* of the owners. Further, under Rule 19(a)(1)(B)(ii), Plaintiff would be subject to inconsistent obligations if the individual owners' rights were condemned but the Tribe retained the right to exclude Plaintiff from the Property and to pursue claims for trespass. The Tribe is, therefore, a required party on all possible grounds under Rule 19(a).

B. The United States Cannot Adequately Protect the Tribe's Interests.

Plaintiff may argue that the Tribe need not be joined because the United States, as trustee of the Property, is a named defendant and can protect the Tribe's interests in this case. The Tribe's interest, however, is not only protecting its ownership rights in the Property. It is well-established that in these situations tribes have an overriding interest in protecting their sovereign right not to have their ownership rights determined by a court without their consent.[6] *See Enter. Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (holding that the tribe's interest was not just protecting its rights under the lease at issue, but also "its sovereign right not to have its legal duties judicially determined without consent"). The Tenth Circuit has held that the Tribe's sovereign immunity interest "is an interest which the United States' presence … cannot protect." *Id*.; *see also Pub. Serv. Co.*, 2015 WL 9598913 at *14 ("the United States cannot protect the Nation's primary interest in maintaining its immunity from suit"). Accordingly, the United States' presence in this case does not alter the conclusion that the Tribe is a required party.

[6] The Tribe's sovereign immunity is discussed further in Section II(A), *infra*.

II. The Tribe Cannot Be Joined.

Because the Tribe is a required party, the Court must next determine if it is feasible to join the Tribe in this action. *See N. Arapaho*, 697 F.3d at 1278-79. Joinder of the Tribe is not feasible, and in-fact not possible, because the Tribe has sovereign immunity from suit for condemnation of its property, and because § 357, the sole statute on which Plaintiff's condemnation claim rests, does not apply to land owned by the Tribe.

A. The Tribe Is Immune from Suit.

The most obvious reason the Tribe cannot be joined is that it is a sovereign entity with immunity from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted). Not only is the Kiowa Tribe federally recognized, 80 Fed. Reg. 1942-02, at *1944 (Jan. 14, 2015), but the United States Supreme Court has specifically held that this Tribe has sovereign immunity from suit. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998). The Tribe has also never waived its immunity. *See Santa Clara*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal quotation marks omitted)). Thus, the Tribe's sovereign immunity precludes its joinder. *See N. Arapaho*, 697 F.3d at 1281-82 (Eastern Shoshone Tribe could not be joined under Rule 19 due to sovereign immunity); *Enter. Mgmt.*, 883 F.2d at 892 (tribe could not be joined due to sovereign immunity); *Jicarilla*, 821 F.2d at 539-40 (same).

B. Plaintiff Cannot Condemn Land Owned by the Tribe Under 25 U.S.C. § 357.

Even if the Tribe's sovereign immunity were not dispositive (which it is), the Tribe could still not be joined, nor can this Property be condemned, because Plaintiff cannot condemn an easement across land in which a tribe has a beneficial interest under 25 U.S.C. § 357. Section 357 is the sole legal basis for Plaintiff's condemnation claim. (*See* Compl. [DE 1], ¶ 2.) That Section states:

> Lands allotted *in severalty to Indians* may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allotee.

25 U.S.C. § 357 (2015) (emphasis added).[7] It is well-established that Congress' use of the language "'[l]ands allotted *in severalty to Indians* may be condemned' illustrates a singular Congressional focus on allotted land owned by *individual tribal members*." *Pub. Serv. Co.*, 2015 WL 9598913 at *7 (first emphasis and alteration in original). Thus, as explained in *Public Service Company*, "under its plain language, § 357 only allows condemnation of allotted lands owned by individual tribal members, and § 357 does not expressly apply to allotted lands acquired by Indian tribes." *Id*. (holding that § 357 did not authorize condemnation of easements across land in which the Navajo Nation owned an interest); *see also NPPD*, 719 F.2d at 961-62 (holding that under § 357 a public utility could not condemn allotted land in which individual allottees had a life estate but the tribe held a reversionary interest); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28

[7] The Oklahoma statutes listed in the Complaint are dependent on the federal authority granted under 25 U.S.C. § 357 to condemn Indian land.

F.3d 1544, 1552 (9th Cir. 1994) (noting that § 357 "does not apply to land held in trust for the Tribe"); *Bear v. United States*, 611 F. Supp. 589, 599 (D. Neb. 1985) (holding that tribal land cannot be condemned under § 357 and collecting cases). Accordingly, even if the Tribe was somehow determined not to be immune from suit (which it is), Plaintiff's claim for condemnation under § 357 must be summarily dismissed for failure to state a claim on which relief may be granted under Rule 12(b)(6).

III. Rule 19(b) Requires Dismissal of this Action.

Because the Tribe is a required party but cannot be joined, this action must be dismissed. Rule 19(b) provides that "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). In making this determination the Court considers:

1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

2) the extent to which any prejudice could be lessened or avoided by:

   (A) protective provisions in the judgment;

   (B) shaping the relief; or

   (C) other measures;

3) whether a judgment rendered in the person's absence would be adequate; and

4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Id.

Although the Court must consider these factors, the Tenth Circuit has held that when, as here, "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors … because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt.*, 883 F.2d at 894 (internal quotation marks and citation omitted).[8] Thus, courts, including the Tenth Circuit, consistently hold that the suit should be dismissed when a tribe is a required party and cannot be joined because of immunity. *See id.* at 894 (dismissing contractor's claims for review of management contracts because the Citizen Band Potawatomi of Oklahoma was a required party and could not be joined because of its sovereign immunity); *N. Arapaho*, 697 F.3d at 1281-84 (affirming dismissal of suit because the Eastern Shoshone Tribe was a required party and was immune from suit); *Jicarilla*, 821 F.2d at 539-40 (affirming dismissal "because the Tribe was an essential party to the litigation but was immune from suit"); *Pub. Serv. Co.*, 2015 WL 9598913 at *14-15 (dismissing condemnation claims because the Navajo Nation owned interests in the property and was immune from suit); *Ctr. for Biological Diversity*, 858 F. Supp. 2d at 1228-30 (dismissing action because the Navajo Nation was a required party and was immune from suit). The result is the same in this case, and does not change even under a factor-by-factor analysis.

[8] Since *Enterprise Management* was decided, the terminology of Rule 19 has been changed to refer to "required parties" rather than "necessary parties." These terms are still sometimes used interchangeably by the courts and this terminology change does not alter the analysis under Rule 19.

A. Continuing This Action Without the Tribe Would Irreparably Prejudice the Tribe and Plaintiff.

The first two factors under Rule 19(b) concern the prejudice to the Tribe and existing parties if the case proceeds, and the extent, if any, to which such prejudice can be lessened or avoided. Where, as here, sovereign immunity is involved, "prejudice to the absent sovereign's interests is nearly a foregone conclusion...." *Ctr. for Biological Diversity*, 858 F. Supp. 2d at 1228. In fact, the Supreme Court has stated that "dismissal of the action ***must*** be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of the Phil. v. Pimentel*, 553 U.S. 851, 867 (2008) (emphasis added). As discussed in Section I, *supra*, granting Plaintiff an easement across the Property without the Tribe present in this action would materially prejudice the Tribe's interest in the Property and its sovereign immunity rights. It would also prejudice Plaintiff by potentially subjecting it to inconsistent obligations to the various owners.

There is also no way to lessen that prejudice. For example, providing the Tribe compensation from a condemnation award would only address the Tribe's property rights. It would not address the Tribe's sovereignty interests. There is no way to tailor a condemnation judgment to protect the Tribe's sovereign immunity rights because it is the prosecution of the suit itself that violates those rights. *See Pub. Serv. Co.*, 2015 WL 9598913 at *14. The first two Rule 19(b) factors, therefore, weigh heavily in favor of dismissal.

B. A Judgment Rendered in the Tribe's Absence Would Be Meaningless.

The third factor considers whether a judgment in the Tribe's absence would be adequate. Fed. R. Civ. P. 19(b)(3). This factor is not concerned with the Tribe's interest, "but that of the courts and the public in complete, consistent, and efficient settlement of controversies, that is, the public stake in settling disputes by wholes, whenever possible." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (internal quotation marks and citations omitted). This factor also weighs in favor of dismissal because the Tribe's ownership interest cannot be condemned in its absence. Fed. R. Civ. P. 71.1 (requiring that all property owners be made parties to any federal condemnation action); *see also Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) (noting that as a general rule, judgments do not bind non-parties); *N. Arapaho*, 697 F.3d at 1283 (finding that this factor weighed in favor of dismissal because absent tribe would not be bound by condemnation judgment, and the state would be required to relitigate with the tribe); *Pub. Serv. Co.*, 2015 WL 9598913 at *15 (this factor weighed in favor of dismissal because tribe's property interest could not be condemned in its absence).

C. Plaintiff Has an Adequate Alternative Remedy Because It Can Still Obtain an Easement by Consent, and Dismissal Would Be Appropriate In Any Event.

The final factor – the availability to Plaintiff of an alternative remedy – also weighs in favor of dismissal because Plaintiff can still negotiate a voluntary easement under 25 U.S.C. §§ 323-328. *See Pub. Serv. Co.*, 2015 WL 9598913 at *15 (holding that this factor weighed in favor of dismissing condemnation action because the plaintiff could obtain a voluntary easement under 25 U.S.C. §§ 323-328).

Regardless, dismissal would be appropriate even if it left Plaintiff with no alternate remedy. Absence of an alternate remedy "does not preclude dismissal, particularly when viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors." *N. Arapaho*, 697 F.3d at 1283 (affirming dismissal even though there was no alternate remedy) (alteration omitted). Dismissals under Rule 19(b) that preclude relief for plaintiffs are, in fact, "the not infrequent result of honoring sovereign immunity." *Ctr. for Biological Diversity*, 858 F. Supp. 2d at 1229-30 (holding that Rule 19 dismissal that left the plaintiff without a remedy was required to give "sufficient weight" to the tribe's sovereign immunity); *see also Pimentel*, 553 U.S. at 872 (dismissals under Rule 19 that leave plaintiffs without a remedy are "contemplated under the doctrine of foreign sovereign immunity").

Thus, ***all*** of the Rule 19(b) factors favor dismissal. Accordingly, Defendants' Motion to Dismiss should be granted.

CONCLUSION

Plaintiff has been unlawfully using Kiowa Allotment 84 for the past 15 years, despite being ordered not to do so by BIA. Rather than negotiate with the landowners or remove its natural gas lines, upon learning that the individual allottees were bringing an action to enforce their rights, Plaintiff quickly instituted this action for condemnation. In taking this action it ignored the federal statutes and regulations that prevented it from doing so. Plaintiff's Complaint for condemnation of Kiowa Allotment 84 should be dismissed.

Respectfully submitted this 15th day of January, 2016.

s/ C. Steven Hager
C. STEVEN HAGER
Oklahoma Bar. No. 12315
COLLINE WAHKINNEY-KEELY
Oklahoma Bar. No. 12405
Attorneys for Plaintiffs
Oklahoma Indian Legal Services
4200 Perimeter Center Dr. Suite 222
Oklahoma City, OK 73112
Telephone: (405) 943-6457
Fax: (405) 917-7060
keely@oilsonline.org
hager@oilsonline.org

DAVID C. SMITH
D.C. Bar No. 998932
Application for admission pending
CATHERINE F. MUNSON
D.C. Bar No. 985717
Application for admission pending
Attorneys for Plaintiffs
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: (202) 508-5800
Fax: (202) 508-5858
dcsmith@kilpatricktownsend.com
cmunson@kilpatricktownsend.com

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, I electronically filed the foregoing **MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** with the Clerk of Court. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System.

s/ C. Steven Hager
C. STEVEN HAGER