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 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.	)	**CIV-15-1250-M**

UNITED STATES' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Defendant United States hereby submits its Reply to Plaintiff's Response to the United States' Motion to Dismiss. The United States offers the following brief.

ARGUMENT AND AUTHORITY

At the outset, Plaintiff has stipulated the Kiowa Tribe of Oklahoma has an interest in the land in question. [Dkt. 42, p. 4]. Plaintiff further has acknowledged that "Since the original easement term, there has arisen an interest in favor of the Kiowa Indian Tribe of Oklahoma which, if proven, would undermine the jurisdiction of the condemnation claim based on the sovereign immunity of the Tribe, which has not been joined." [Dkt. 42, p. 2]. Plaintiff's about-face assertion the Court *does* have jurisdiction is curious to say the least.

Plaintiff's Argument the United States is the Only Indispensable Party is Without Merit

Plaintiff tells this Court that the "United States is the only indispensable party when a tract of Indian land held in trust for the beneficial owners is condemned…" despite naming all individual beneficial owners in this very action. [Dkt. 50 at 13 (clerk's numeration)]. Plaintiff's disingenuous argument does not cite or even attempt to explain away Rule 71.1 which unequivocally requires joinder of "those persons who have…an interest in the property and whose names are then known…" Fed. R. Civ. P. 71.1(c)(3). Plaintiff already conceded the Tribe has "an interest in the property," as do the rest of the named individual defendants. Instead, Plaintiff cites *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251 (1992) and *Cheyenne River Sioux Tribe of Indians v. United States,* 338 F.2d 906 (8th Cir. 1964). *County of Yakima* is wholly inapposite as it had nothing to do with condemnation of Tribal land (or any land for that matter). *Cheyenne River* is likewise inapposite, at least with respect to Plaintiff's argument, and its holding actually weighs in favor of dismissal here.

Cheyenne River involved the United States' contractual acquisition of Reservation land for the construction of a dam and reservoir. The Tribe conveyed all tribal, allotted, assigned, and inherited land within the Reservation in exchange for a sum of over $5,000,000. The Tribe was required to distribute over $2,000,000 of the fund to individual Indian owners in accordance with appraisals of the individual properties. A portion of the agreement allowed the individual members to reject the appraisal although

it was agreed the land was subject to condemnation by the United States if a rejection occurred. The underlying case in *Cheyenne River* was a condemnation action by the United States against an individual Indian, naming the individual Indian interest owner as a defendant, because he rejected the appraisal. The non-party Tribe argued, unsuccessfully, it was an indispensable party to the action despite it having *zero* interest in the subject property because the compensation to the individual Indian would come from the $2,000,000 fund. The Court held that the Tribe contractually "agreed that the Government was capable of representing [the Tribe's] interest derived from the fund out of which any excess or deficiency judgment is to be satisfied" *Cheyenne River* at 910 (emphasis added). In other words, the "interest" of the Tribe, to which Plaintiff refers, was the contractual funds, not an ownership interest in the land. In this case, Plaintiff concedes the Kiowa Tribe of Oklahoma has an ownership interest in the subject property. Thus, *Cheyenne River's* holding is irrelevant to the facts of this case. Of note, however, was the Court's analysis of Rule 71A[1]:

> Neither do we find any provision of Rule 71A, Fed. R. Civ. P., requiring the Government to name the Tribe as a party defendant or requiring the Court to permit the Tribe, upon application, to intervene as a party. This Rule, which appellant concedes was properly invoked when the action instituted against Hiat, provides that the Government shall join as defendants only the persons having or claiming an interest in the land. There is no duty, express or implied, on the Government to join as a party defendant one who is under a contractual obligation to satisfy the judgment. In other words, an interest in the fund that may be

[1] Fed. R. Civ. P. 71A is the predecessor of Fed. R. Civ. P. 71.1 as cited herein. Although it had similar language, Rule 71A was replaced with Rule 71.1 in 2008. Furthermore, Rule 71A was enacted in 1951, and it was the first Federal Rule of Civil Procedure dealing with condemnation actions. Thus, any case which Plaintiff cites prior to 1951 (and there are several) should be read in that context.

> affected may not be equated with an interest in the land that has been taken in determining who is entitled to participate in the litigation.

Cheyenne River at 910 (emphasis added). Thus, Plaintiff's citation of *Cheyenne River* is self-defeating.

Plaintiff also cites a North Dakota state court decision to bolster its argument. *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Township,* 643 N.W.2d 685 (N.D. 2002). The question the state court answered, based on North Dakota state condemnation law, was "May a state condemn land within its territorial boundaries which has been purchased in fee by an Indian tribe, but which is not reservation land, aboriginal land, allotted land, or trust land?" *Id.* at 688. In this case, the Kiowa Tribe did *not* purchase the land in fee. It acquired its interest by operation of federal law. Moreover, it *is* trust land with the United States being the trustee. Accordingly, *Cass County*, too, is easily dispatched as irrelevant to the question at hand. Despite Plaintiff's insistence this condemnation is *in rem,* it cites no authority for that proposition with respect to condemning Indian trust land. In fact, that proposition was squarely rejected in *Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley County, New Mexico,* 2016 WL 877951 (D.N.M. 2016) (attached to Defendant's Motion to Dismiss). The *Public Service* court noted "the Court recognizes that a condemnation action generally is considered an *in rem* proceeding against the property. However, the United States Supreme Court held that in §357 condemnation proceedings against allotted Indian trust land, the United States is an indispensable party." *Public Service* at 10 (citing *Minnesota v. United States,* 305 U.S. 382, 386

(1939)). "Consequently, a federal condemnation proceeding under §357 is not purely an *in rem* proceeding in which there are no indispensable parties." *Id.* *Public Service* distinguished *Cass County* on that basis as well because *Cass County* was interpreting state condemnation law based on a fee owner's rights.

ICLA Has Nothing to do With Condemning Tribal Land

Plaintiff delves into ICLA and cites statutes, which have nothing to do with condemnation, for the proposition that Tribal land may be condemned. Plaintiff cites 25 U.S.C. §2213 which is entitled "Tribe not treated as party to lease; no effect of tribal sovereignty, immunity." Section 2213 takes the unremarkable position that if a Tribe acquires an interest in property via ICLA which was subject to a pre-existing lease, the Tribe is entitled to payment under the lease despite not agreeing to it originally. It further states that said pre-existing lease does not affect the sovereignty of the Tribe. Section 2213 is of no consequence because this case has nothing to do with a lease.

Furthermore, not only is §2213 unhelpful to Plaintiff's position, this argument, too, is self-defeating. Plaintiff argues, essentially, that because the land in question was originally allotted, its status remains unchanged and Tribal land acquired through ICLA is still "allotted land" subject to condemnation. Not only is this a tortured interpretation of §357, discussed *infra*, it defies logic. Why would Congress expressly state that a Tribe can acquire land though ICLA which subject to a pre-existing lease without waiving immunity, but allow land acquired through the same statute be *condemned* when the Tribe without question must be a defendant? The obvious answer is Congress would not,

and did not, waive Tribal immunity for condemnation through ICLA statutes which do not touch the subject of condemnation.

The Plain Language of the Condemnation Statute Prevails

A great majority of Plaintiff's Response is dedicated to going around the relevant statutes and regulations instead of a straight-forward reading of them. Plaintiff did not cite 25 U.S.C. § 324 once. It states: "No grant of a right-of-way over and across any lands belonging to a tribe…shall be made without the consent of proper tribal officials." (emphasis added). Plaintiff also did not cite 25 C.F.R. § 169.3(a) once. It states, similarly: "No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe." (emphasis added). "Tribal land" is defined as "the surface estate of land or any interest therein held by the United States in trust for a tribe." 25 C.F.R. 169.1(d) (emphasis added). The whole of the land is "Tribal land" not subject to condemnation via 25 U.S.C. §357 or otherwise because the tribes have the rights and powers to "prevent the sale, disposition, lease, or encumbrance of tribal land, interest in lands, or other tribal assets without the consent of the tribe…" 25 U.S.C. §476 (emphasis added). Condemning land is, by any reasonable interpretation, a "disposition" and an "encumbrance" on the land. The tribe has a right to prevent it under federal law, yet Plaintiff has failed to name the Tribe as a Defendant and it would be immune from suit in any event.

Lastly, Plaintiff made no attempt to distinguish *Nebraska Pub. Power Dist. v. 100.95 Ares of Land in County of Thurston, Hiram Grant*, 719 F.2d 956 (8th Cir. 1983) or

Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley County, New Mexico, 2016 WL 877951 (D.N.M. 2016). Both cases squarely rejected Plaintiff's arguments made in its Response, and Plaintiff cited no relevant case law with an opposing view. And, to the extent there is *any* ambiguity regarding Plaintiff's ability to condemn the land in question (which is strongly denied), such ambiguities must be resolved "in favor of Indians" and "is to be given the 'broadest possible scope'" in favor of Indians. *N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1186, 1194-95 (10th Cir. 2002) (citing *DeCoteau v. Dist County Court,* 420 U.S. 425, 447 (1975). Plaintiff's Complaint must be dismissed in its entirety.

Respectfully submitted,

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/s/ Daniel J. Card

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CERTIFICATE OF SERVICE

X I hereby certify that on April 4, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a notice of Electronic Filing to the following ECF registrants:

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__ I hereby certify that on, I served the attached document by U.S. Mail on the following, who are not registered participants on the ECF System:

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