UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARCIA W. DAVILLA, et al.	)	
	)	
Plaintiffs and Counterclaim Defendants,	)	
	)	
v.	)	Civ. No. 5:15-cv-01262-M
	)	
ENABLE MIDSTREAM PARTNERS, L.P, et al.	)	
	)	
Defendants and Counterclaim Plaintiffs.	)	
	)	

PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS COUNTERCLAIM AND BRIEF IN SUPPORT

Pursuant to Rule 19 of the Federal Rules of Civil Procedure ("FRCP"), Plaintiffs and Counterclaim Defendants move to dismiss Defendants' Counterclaim. 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, Counterclaim-Plaintiffs Enable Midstream Partners, L.P., Enable G.P., LLC, and Enable Oklahoma Intrastate Transmission, LLC (collectively, "Enable") now assert a Counterclaim to obtain that easement by condemnation, without the consent of the property's beneficial owners—the Kiowa Indian Tribe of Oklahoma ("Tribe") and a number of individual Indian allottees, who are 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, Enable's Counterclaim fails to identify the Tribe as an owner of the property, even though the Tribe's ownership interest is apparent from the BIA title search for the property. In fact,

the Tribe is the *first owner listed* on the Bureau of Indian Affairs Title search report. Enable cannot ride roughshod over the property owners in this manner, and cannot avoid its obligation to fairly negotiate with them for an easement.

Enable's counterclaim for condemnation should be dismissed under Federal Rule of Civil Procedure 19 because:

- The Tribe is a required party to this action because it owns an undivided interest in all of the property across which Enable seeks to condemn an easement, and Federal Rule of Civil Procedure 71.1 requires that *all* of the property's 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 because it has sovereign immunity from suit, and because 25 U.S.C. § 357, the sole authority under which Enable seeks to condemn this easement, does not apply to land owned by the Tribe.
- Under the factors in Federal Rule of Civil Procedure 19(b), equity and good conscience dictate that this action should not continue without the Tribe as a party. In fact, continuing this action would be fruitless because any judgment granting Enable the requested easement by condemnation would not be binding on the Tribe, would not prevent the Tribe from excluding Enable from the property or prosecuting Enable for trespass, and would likely result in inconsistent obligations for Enable to the various owners of the property at issue.

The Counterclaim should, accordingly, be dismissed under Rule 19.

Additionally, Enable's Counterclaim fails because an action to condemn a right-of-way over an Indian allotment held in trust by the United States cannot proceed without the United States as a named defendant. Because Enable has failed to name the federal government in its counterclaim for condemnation, the Counterclaim should be dismissed. Enable is, however, able to continue to negotiate for an easement with Tribal officials and individual Indian owners, as it was previously ordered by BIA to do.

METHODS OF OBTAINING EASEMENTS ACROSS INDIAN LAND

Before addressing specific issues involved in this motion, some background on the legal framework for obtaining an easement across Indian land may be helpful to the Court. Indian lands are governed by federal law. *See Neb. Pub. Power Dist. v. 100.95 Acres of Land in Thurston Cnty., Hiram Grant*, 719 F.2d 956, 961 (8th Cir. 1983) (hereafter "*NPPD*"). There are two methods by which an easement across Indian land may be obtained. First, an easement may be granted by the Secretary of the Interior, 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 individual member of that tribe – under 25 U.S.C. §§ 323-328, and implementing regulations. These easements "shall [not] be made without the consent of the proper tribal officials," and, as to land owned by individual Indians, easements can only be granted if "the owners or owner of a majority of the interests therein consent to the grant …." 25 U.S.C. § 324 (2015).[1]

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

Alternatively, an easement may be taken by condemnation across certain allotted land, in accordance with the law of the state where the Indian land is located, under 25 U.S.C. § 357. As discussed in more detail in Section II(B), *infra*, however, § 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 Emaugobah Kiowa Allotment 84, which is also known as Section 28, Township 7 North, Range 11 West, Caddo County, Oklahoma ("Allotment 84" or "the Property"). Significantly, one of the beneficial owners of Allotment 84 is the federally recognized Kiowa Indian Tribe of Oklahoma (*see* 80 Fed. Reg. 1942-02, at *6 (Jan. 14, 2015) (listing all 566 federally recognized tribes)), as well as individual allottees.[2] (Ex. 1 (U.S. Dep't of the Interior, Bureau of Indian Affairs, Title Status Report (requested Dec. 9, 2015)).)[3] The United States holds Allotment 84 in trust for the benefit of all of the owners. *See id.*

On November 19, 1980, the United States granted Enable's predecessor, Producer's Gas Company, a 20-year easement across a portion of Allotment 84 to construct and operate a natural gas pipeline. (Ex. 2 (U.S. Dep't of the Interior, Bureau of

[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.

[3] When deciding a motion under Rule 19 for failure to join a necessary party, 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 5C Charles A. Wright, *et al*., Federal Practice and Procedure § 1359 (3d ed. 2004)).

Indian Affairs, Grant of Easement for Right-of-Way (Nov. 19, 1980)).) This easement expired on November 18, 2000. (*Id*.) On June 14, 2002, Enogex, Inc., successor in interest to Producer's Gas, wrote to the BIA applying for a new 20-year easement by consent. (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 requisite 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 this rejection, 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 (13) owners of Allotment 84 again rejected Enogex's offer for an easement. 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 by consent 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, Enable filed a counterclaim in this action to condemn the allotment.[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 for failure to join the Tribe as a required party and alternatively, for failure to name the United States as a counter-defendant.

I. 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 and 71.1 because the Tribe has an interest in the allotment and if this action was to continue, the Tribe's interest in not having its property involuntarily taken by eminent domain would certainly be impaired. In addition, complete relief regarding the easement cannot be afforded without the Tribe because Enable must obtain the Tribe's consent for an easement. Under Rule 19(a):

[4] Enable filed CIV-15-1250-L to condemn an easement across Allotment 84 under 25 U.S.C. § 357. (Compl. [DE 1], ¶ 1(C), Ex A[4].)

> 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 matter 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) (2015). 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 in *Pub. Serv. Co. of N.M v. Approximately 15.49 Acres of Land in McKinley County*, No. 15 CV 01 JAP/CG, 2015 WL 9598913 (D.N.M. Dec. 1, 2015), is directly on point. In that case, the court held that the Navajo Nation was a necessary party to an action to condemn an easement across two allotments under 25 U.S.C. § 357 when the Nation owned undivided fractional interests in those allotments. *Id*. at *3, 26-29. The court correctly noted that Rule 71.1 made joinder of the Nation

[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.

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 was to continue 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 *1. (citing Fed. R. Civ. P. 19(a)(1)(b)(ii)). The court's conclusions are supported by numerous decisions from the Tenth Circuit and other district courts holding that tribes are necessary parties in cases affecting similar interests. *See Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-40 (10th Cir. 1987) (tribe was a necessary party to claims brought by lessee to enforce oil and gas lease rights on tribal land); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (Eastern Shoshone Tribe was a required party to action regarding the imposition of vehicle and excise taxes on tribal members who resided on the reservation); *Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225-28 (D. Colo. 2012) (Navajo Nation was a required party to action challenging issuance of mining permit on land owned by the tribe).

The Kiowa Tribe's ownership interest in the Property makes it a required party to this case. *See Pub. Serv. Co.*, 2015 WL 9598913, at*14. In addition to the reasons set-forth in *Public Service Company*, the Tribe is a required party under Rule 19(a)(a)(A) because in the Tribe's absence complete relief cannot be afforded as Enable cannot access the property without an easement that is binding on all of the owners. Further, under Rule 19(a)(1)(B)(ii) Enable would be subject to inconsistent obligations if the individual owners' rights were condemned in this action, but the Tribe retained the right

to exclude Enable from the Property and pursue actions for trespass. Thus, the Tribe is a required party on all possible grounds under Rule 19(a).

II. Joinder of the Tribe is not feasible.

Since the Tribe is a required party the Court must next determine if it is feasible to join the Tribe in this action. *See Northern Arapaho Tribe v. Harnsberger*, 697 F.3d, 1272, 1281 (10th Cir. 2012). It is not.

A. The Tribe cannot be joined because it is immune from suit.

The most obvious reason the Tribe cannot be joined is that it has sovereign 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 a federally recognized tribe, 80 Fed. Reg. 1942-02, at *6 (Jan. 14, 2015), but the United States Supreme Court has specifically held that the Tribe has sovereign immunity from suit. *Kiowa Tribe of Okla. v. Mfg. Techs., 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.") (citation omitted). It is well settled that the Tribe's sovereign immunity precludes its joinder in this case. *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 892-94 (tribe could not be joined due to sovereign immunity); *Jicarilla*, 821 F.2d at 539-40 (same).

B. The Tribe cannot be joined because Enable cannot condemn land beneficially 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 because Enable cannot condemn an easement across the Tribe's land under 25 U.S.C. § 357. Section 357 is the sole legal basis for Enable's condemnation claim and yet it is well established that it does not apply to tribal interests. (*See* Compl. [DE 1], ¶ 2.)[6] 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 it is located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357 (2015) (emphasis added). 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 (emphasis in original). Thus, "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*. at *7 (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 962 (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 revisionary interest); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) (noting that § 357 "does not apply to land held in trust

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

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 were joined in this action and was determined not to be immune from suit (which it is), Enable's counterclaim for condemnation under § 357 would 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 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 nonjoinder.

Id.

Although the Court must consider these factors, 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. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (internal quotation marks and citation omitted). 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 895 (dismissing contractor's claims for review of management contracts under Rule 19(b) because the Citizen Band Potawatomi of Oklahoma was a necessary 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 necessary 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.*, No. 15 CV 501, at *25-32 (dismissing claims for condemnation of two allotments in which the Navajo Nation owned interests because the Nation was immune from suit); *Ctr. for Biological Diversity*, 858 F. Supp. 2d at 1228-30 (dismissing action because the Navajo Nation was a necessary 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.

A. Continuing this action without the Tribe would irreparably prejudice the Tribe and Enable.

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 Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (emphasis added). As discussed in Section I, *supra*, granting Enable 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 Enable by potentially subjecting it to inconsistent obligations to the various owners.

There is also no way to lessen that prejudice. For example, providing a proportionate distribution of compensation from a condemnation award to the Tribe would only address its property rights. It would not address the Tribe's sovereignty interests. There is no way to tailor a condemnation judgment that protects the Tribe's sovereign immunity rights because it is the prosecution of the suit itself that violates those rights. *See Pub. Serv. Co.*, at *30. 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 Martin v. Wilkes*, 490 U.S. 755, 761-62 (1989) (noting that as a general rule, judgments do not bind non-parties); *N. Arapaho*, 697 F.3d at 1283 (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.*, at * 31 (this factor weighed in favor of dismissal because tribe's property interest could not be condemned in its absence).

C. Enable has an adequate alternative remedy because it can obtain an easement by consent, and dismissal would be appropriate in any event.

The final factor – the availability of an alternative remedy – also weighs in favor of dismissal because Enable, can still negotiate a voluntary easement as required by 25 U.S.C. §§ 323-328. *See Pub. Serv. Co.*, 15-cv-501, at *31-32 (holding that the final Rule 19(b) 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 Enable 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 Tribe*, 697 F.3d at 1283 (alteration omitted) (affirming dismissal even though there was no alternate remedy). In fact, dismissals under Rule 19(b) that preclude relief for plaintiffs are "the not infrequent result of honoring sovereign immunity." *Ctr. for*

Biological Diversity, 858 F. Supp. 2d at 1229-30 (holding that dismissal under 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 (dismissal under Rule 19(b) leaving the plaintiff without an alternate remedy "is contemplated under the doctrine of foreign sovereign immunity").

IV. This Action is improper because the United States is a necessary party to a condemnation proceeding.

The Counterclaim for condemnation also fails because Enable failed to name the United States as a counter-defendant. Condemnation of property requires a formal condemnation proceeding. *United States v. Clarke*, 445 U.S. 253, 254 (1980). Further, the Supreme Court has held that an action for the condemnation of a right-of-way over an Indian allotment held in trust by the United States cannot proceed without the United States as a party. *Minnesota v. United States*, 305 U.S. 382, 386-88 (1939). Enable seeks to condemn a right-of-way over Allotment 84, which is held in trust by the United States. Thus, the only proper avenue to assert a counterclaim for condemnation in this instance is to name the federal government as an additional party defendant. *See, e.g. Houle v. Cent. Power Elec. Coop, Inc.*, No. 4:90-cv-021, 2011 WL 1464918, *6 (D.N.D. 2011); *Hammond v. Cnty. of Madera*, 974 F.2d 1342 (9th Cir. 1992). Here, Enable failed to name the United States as a counter-defendant in its counterclaim for condemnation, and its counterclaim should be dismissed.

Respectfully submitted this 8th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, I filed the foregoing PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS COUNTERCLAIM AND BRIEF 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