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

MARCIA W. DAVILLA, et al. Plaintiffs and Counterclaim Defendants, v. ENABLE MIDSTREAM PARTNERS, L.P, et al. Defendants and Counterclaim Plaintiffs.	)	CASE NO. CIV-15-01262-M

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' CONDEMNATION COUNTERCLAIM

It has been expressed that "[t]he moral test of government" is how it treats those citizens who are its weakest.[1] Enable characterizes this case as one in which the oil and gas industry is hampered in its use of private lands by the monetary demands of individual and tribal beneficial owners of federal trust lands. It is not. Enable has been using federal trust land beneficially held by 38 individual Indians, among the poorest people in this state, and the Kiowa Tribe, for its own economic benefit without compensation for over 15 years. It remained on the property despite being told to negotiate or remove its pipeline by the federal government five years ago. It has now brought an illegal condemnation claim, characterizing it as simply seeking "renewal of the easement." [Dkt. 22 ("Joint Status Report"), Defs.' Preliminary Stmt.] Whatever the

[1]Remarks at the dedication of the Hubert H. Humphrey Building, November 1, 1977, *Congressional Record*, November 4, 1977, vol. 123, p. 37287; *see also Lovejoy v. Elmore Cnty.*, No. 2:12–CV–91–WKW, 2012 WL 5382305, at * 2 (M.D. Ala. Nov. 1, 2012).

motivation is for defendants' counterclaim, it has no legal basis and should be dismissed.

The most perplexing aspect of Enable's Response is that it has previously conceded it has no basis to proceed with its condemnation claim. In response to an order of this Court [Dkt. No. 12], Enable stipulated that "[t]he Kiowa Tribe of Oklahoma, a federally recognized tribe, has a beneficial interest in Allotment 84 held in trust by the federal government." [Joint Status Report, Stipulated Fact 9.] Enable has also stipulated in a parallel action to condemn the same property, that if the Kiowa Tribe owns an interest in Allotment 84, it "would **undermine the jurisdiction of the condemnation claim based on the sovereign immunity of the Tribe, which has not been joined**" in either action. Ex. A (Enable's Preliminary Statement in Case No. 15-01250 (W.D. Okla)) (emphasis added). Yet, in both actions Enable seeks to diminish the Tribe's interest through a series of arguments that run afoul of § 357's plain language and have been rejected by every court to consider them. Plaintiffs' Motion to Dismiss should be granted.

ARGUMENT

I. Condemnation of the Tribe's Interest Is Contrary to § 357's Plain Language and all Existing Precedent.

A. Section 357 Does Not Allow Condemnation of Tribal Interests in Allotments.

The language of § 357 is dispositive. Contrary to Enable's characterization, § 357 does not generically address "allotted land." Defs.' Resp. at 19. Rather, § 357 allows condemnation only of "[l]ands allotted in severalty *to Indians*…." 25 U.S.C. § 357 (emphasis added). That condemnation of a *Tribe's* interest in trust land is impermissible is reinforced by the well accepted maxim that '"[p]lain meaning controls statutory

interpretation."' *Mize v. Liberty Mut. Ins. Co.*, 393 F. Supp. 2d 1223, 1227 (W.D. Okla. 2005) (quoting *United States v. Williams*, 376 F.3d 1048, 1052 (10th Cir. 2004)).[2] In referring to "Indians," Congress made clear it was referring to individual Indians and not Tribes. *See, e.g.*, 25 U.S.C. § 350 (referring to the "land on the reservation to which such Indian belongs"); 25 U.S.C § 352a (referring to the "heirs" of the Indian); *see also* 25 U.S.C. § 337 (referring separately to "Indian" and "Tribe"). A contrary reading would contradict the express language of 25 U.S.C. § 324, providing that "[n]o grant of a right-of-way over and across any lands belonging to a tribe … shall be made without the consent of the proper tribal officials." While in § 357 Congress authorized the condemnation of allotted lands held in trust for individual Indians under state law, in light of the sovereign interests of tribes it has never similarly authorized the condemnation of lands held in trust for a tribe by a state or private authority.

Enable's construction of § 357, purporting to allow condemnation of lands beneficially held in trust for a Tribe, is inconsistent with this Circuit's precedent that in passing § 357 "Congress distinguished between tribal and allotted lands and did not intend to permit condemnation of tribal or communally owned land…." *Yellowfish v. City of Stillwater*, 691 F.2d 926, 929 (10th Cir. 1982); *see also United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 353 (10th Cir. 1942). Moreover, it is inconsistent with the

[2] While Enable suggests that this clear statutory scheme is undesirable, Defs.' Resp. at 1, it is Congress' role to create laws balancing tribal sovereignty and the energy industry's profitability. *See, e.g., Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989) (a court's task "is to apply the text, not to improve upon it").

decision of every court that has examined this issue. *See Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cnty. of Thurston*, 719 F.2d 956, 961 (8th Cir. 1983) (holding that § 357 did not allow utility company to condemn Tribe's interests in allotted trust land that had been deeded to the Tribe by individual Indians); *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty.*, No. 15-cv-501 JAP/CG, 2015 WL 9598913, at *13-14 (D.N.M. Dec. 1, 2015) (hereafter "*Public Service Co. I*") (utility could not join the Tribe as a party, and could not condemn the Tribe's interests in two allotments under § 357); *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty.*, No. 15-cv-501 JAP/CG, 2016 WL 877951 (D.N.M. Mar. 2, 2016) (hereafter "*Public Service Co. II*"[3]) (denying motion to reconsider ruling that § 357 did not allow condemnation of Tribe's interests in allotted land, and alternatively that the Tribe was a required party that could not be joined because of sovereign immunity).[4]

The problems with Enable's principal argument – that once interests in Allotment 84 were allotted to individual Indians those interests remained subject to condemnation under § 357 regardless of a subsequent change in ownership (Defs.' Resp. at 11-22) – are legion. First, it disregards the plain language of § 357. Nothing in § 357 suggests that Congress intended for the condemnation proceeding to be predicated on the nature of the

[3] *Public Service Co. II* was decided after Plaintiffs' Motion to Dismiss was filed, but before Enable filed its Response. It reiterates and expands on the same rationales set forth in *Public Service Co. I* for dismissing condemnation claims identical to the one asserted by Enable, which are discussed in Plaintiffs' Opening Brief.

[4] Enable cites solely to cases in which *the United States* condemned land owned by Tribes under 25 U.S.C. § 341 and the plenary authority of Congress over Indian affairs. Defs.' Resp. at 6.

ownership at the time of allotment rather than the time of condemnation. The statute does not say "land *originally* allotted in severalty to Indians may be condemned." *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981) ("a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency"); *and cf. Carcieri v. Salazar*, 555 U.S. 379, 382-83 (2009) (interpreting 25 U.S.C. § 479 to apply at the time of enactment because Congress additionally used the word "now"). Second, it disregards well accepted canons relating to construction of statutes affecting the interests of Indians and Tribes – that to the extent there is any ambiguity, which there is not, such ambiguity must be construed in favor of the individual Indians and the Tribe, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), and that statutes purporting to terminate Indian rights must be interpreted narrowly. *Shoshone Indian Tribe v. Seaton*, 248 F.2d 154, 155 (D.C. Cir. 1957). Third, it ignores that statutes authorizing the condemnation of private lands, generally, *Sw. Nat. Gas Co. v. Brewer*, 87 P.2d 954, 956 (Okla. 1938); 3 Sutherland Statutory Construction § 64:6 (7th ed. 2015), and § 357, specifically, *United States v. City of Tacoma*, 332 F.3d 574, 579 (9th Cir. 2003); *Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. 2d 908, 930 (E.D. Wis. 2008), must be strictly construed in favor of the owner. Accordingly, the power to condemn may be exercised "only when explicitly authorized by statute," *United States v. Fisk Bldg.*, 99 F. Supp. 592, 594 (S.D.N.Y. 1951), an element clearly absent here. Fourth, as Enable concedes, allowing it to condemn tribal interests in allotments would constitute an implied waiver of the Kiowa Tribe's sovereign immunity. However, waivers of sovereign immunity are strictly construed, *Dry Creek Lodge, Inc. v*

United States, 515 F.2d 926, 930 (10th Cir. 1975), and there may be no Congressional abrogation of a Tribe's sovereign immunity unless it has "unequivocally express[ed] that purpose." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031 (2014); *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). Congress has expressed no intent to waive the Tribe's sovereign immunity here.[5]

B. Section 357 is Consistent With the Indian Land Consolidation Act.

The assimilationist policies of the federal government toward Indians initiated in the late 19th century, including the allotment of tribal land, "proved disastrous," *Hodel v. Irving*, 481 U.S. 704, 707 (1987), resulting in, among other things, the fractionation of Indian lands. *See Pub. Serv. Co. II*, 2016 WL 877951, at *5. To ameliorate the effects of this policy, Congress passed the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97–459, 96 Stat. 2515 (codified as amended in 25 U.S.C. §§ 2201 *et seq*.). ILCA allows the Secretary to acquire fractional interests in land previously allotted to individual Indians and to hold them in trust for the Tribe. 25 U.S.C. § 2212(a)(3). The purpose of ILCA was to consolidate the fractionated interests at the tribal level, and thereby "restore Indian economic life through expanding tribal land bases." *New York v. Salazar*, No. 6:08–CV–644 (LEK/GJD), 2009 WL 3165591, at *14 (N.D.N.Y Sept. 29, 2009).

Once fractionated interests are acquired by the Tribe under ILCA they are no longer "allotted in severalty to individual Indians" and are no longer subject to

[5] Merely because the federal government may have waived its sovereign immunity in enacting § 357 does not mean the Tribe's sovereign immunity was also waived. *Wagoner Co. Rural Water Dist. No. 2 v. United States*, No. 07-CV-0642-CVE-PJC, 2008 WL 559437, at *2 (N.D. Okla. Feb. 28, 2008).

condemnation under § 357. *Pub. Serv. Co. II*, 2016 WL 877951, at *6. Contrary to Enable's arguments, the change in the legal ownership of the land does not constitute an amendment of § 357. Section 357 operates as it always has – it allows condemnation of land "allotted in severalty to Indians" – but it does not reach interests in those lands held in trust for the Tribe. Thus, Congress' increase of Tribal land ownership through ILCA may reduce the land subject to condemnation, but it does not change § 357's operation.

Enable cites *Town of Okemah v. United States*, 140 F.2d 963, 965 (10th Cir. 1944), for the proposition that "[w]here there are two statutes upon the same subject, the earlier being special and the later general … the presumption is that the special is intended to remain in force as an exception to the general." However, unlike the statutes in *Town of Okemah*, § 357 and ILCA do not involve the same subject. Section 357 involves condemnation of allotted lands, while ILCA involves consolidation of fractionated lands. Enable's argument also assumes that § 357 authorizes the condemnation of lands held in trust for a Tribe, which it does not. *Pub. Serv. Co. I*, 2015 WL 9598913, at *10.

Enable's tortuous argument that ILCA actually authorizes condemnation of lands held in trust for Tribes lacks any merit. ILCA never mentions the condemnation of tribal or allotted lands. Its definition of allotted lands is identical to that applied in § 357 – "land held in trust or restricted status by the Secretary on behalf of one or more Indians." 25 U.S.C. § 2218(a)(3). It recognizes that lands conveyed under ILCA no longer fall under that definition as they are "immediately" held in trust for the Tribe. 25 U.S.C. § 2212(a)(3). It also acknowledges tribal sovereign immunity. 25 U.S.C. § 2218(d)(2)(B).

Enable identifies only two provisions of ILCA that it argues support its position. It refers to § 2213(c), providing that where a Tribe receives an interest in an allotment subject to ILCA on which there is an existing lease it is entitled to payment regardless of the fact that it neither consented to nor is a party to the lease. Defs.' Resp. at 18-20. However, this argument is illogical for nothing in Congress' decision to not require Tribe's to be parties to such leases suggests that Congress intended to open the door to condemnation of tribal lands. Nor does § 2218(g), providing that ILCA shall not be "construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land," support Enable. Defs.' Resp. at 21. Section 357 never allowed the condemnation of trust land owned by Tribes prior to ILCA's enactment. ILCA didn't change that.

Moreover, Enable ignores that ILCA is a remedial measure designed to further Native American interests. *Anderson & Middleton Co. v. Salazar,* No. 3:09–cv–05033–RBL, 2009 WL 2424446, at *8 (W.D. Wash. Aug. 4, 2009). As such, it must be construed broadly to effectuate its purpose in consolidating Indian lands at the tribal level to promote tribal economic development. *Id.* The position advocated by Enable – that a state or private entity may condemn the very lands Congress sought to provide to the Tribe to aid its economic development – is hardly consistent with that purpose.

II. The Tribe and the Individual Indian Allottees Are Required Parties.

Finally, Enable argues that neither the individual allottees nor the Tribe are required parties as a condemnation action is a proceeding *in rem.* Defs.' Resp. at 6-11.

However, Enable fails to cite Rule 71.1 requiring 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). This plain language requires joinder of the Tribe, which has "an interest in the property" to be condemned.[6] *See Pub. Serv. Co. I*, 2015 WL 9598913 at *12-14.

Consequently, a condemnation of land allotted for Indians under § 357 may not be fairly characterized as purely an action *in rem*. In addition to the requirements of Rule 71.1, the Supreme Court has rejected the argument made here that a condemnor may proceed directly against the land under § 357, explaining that the United States is an indispensable party given its interest in the land. *Minnesota v. United States*, 305 U.S. 382, 386-388 (1939); *see also Pub. Serv. Co. II*, 2016 WL 877951 at *10 (under *Minnesota*, "a federal condemnation proceeding under § 357 is not purely an *in rem* proceeding in which there are no indispensable parties"). Moreover, Enable is attempting to take through this proceeding the property of a separate sovereign, the Kiowa Tribe. The sovereign interests of the Tribe may not be litigated in its absence. *Enter. Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).[7]

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[6] As Enable did not respond to Plaintiffs' argument that its claim should be dismissed for failure to join the United States as a required party it has conceded that point. *Rosales v. Bd. of Regents of the Univ. of Okla.*, No. CIV-15-560-R, 2015 WL 4644832, at *1, n.2 (W.D. Okla. Aug. 4, 2015).

[7] *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685 (N.D. 2002), also relied on by Enable, is inapplicable as it was a state court action to condemn non-trust land, which the Tribe had purchased on the open market. The *Cass County* opinion specifically acknowledges that the question in that case was "whether tribal sovereign immunity bars a purely in rem action against land held by the Tribe in fee *and which is not reservation land, allotted land, aboriginal land, or trust land*." *Id*. at 691 (emphasis added).

Enable's reliance on *Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), for the proposition that the United States, as trustee, may represent the Tribe's interests, and is the only required party to an action to condemn Indian land held in trust, Defs.' Resp. at 7-8, is likewise misplaced. In *Cheyenne River* the Tribe sold its interest to the United States prior to the condemnation proceedings. *Id*. at 907-08. The Tribe's claim did not relate to the taking of its land but to the distribution of the funds from that sale to individual allotment owners. Thus, *Cheyenne River* is consistent with the Eighth Circuit's later holding in *Nebraska Public Power*, 719 F.2d at 961-62, that the Tribe's interest in allotted land cannot be taken without its consent.

Cheyenne River also did not address the Tribe's interest in maintaining its sovereign immunity. The United States cannot represent the Tribe's interest in maintaining its immunity from suit. *Enter. Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Pub. Serv. Co. I*, 2015 WL 9598913 at *14.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' Opening Brief, Defendants' condemnation counterclaim should be dismissed.[8]

Respectfully submitted this 14th day of March, 2016.

s/ David C. Smith

[8] Enable's Response contains a section on Plaintiffs' standing to pursue trespass claims on behalf of the Kiowa Tribe. Defs.' Resp. at 24-25. This argument is irrelevant because the present motion addresses Enable's condemnation counterclaim, not Plaintiffs' rights to pursue trespass claims. Regardless, Plaintiffs have addressed Enable's standing argument in their Motion to Strike and Supporting Brief [Dkt. 13]. To the extent it is necessary, Plaintiffs incorporate those arguments herein pursuant to Fed. R. Civ. P. 10(c).

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, I electronically filed the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' CONDEMNATION COUNTERCLAIM** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following registered users:

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