UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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

PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY FOR THEIR TRESPASS CLAIM AND FOR A PERMANENT INJUNCTION WITH BRIEF IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Regulations

Statutes

Pursuant to Rules 56 and 65 of the Federal Rules of Civil Procedure ("FRCP"), and LCvR56.1, Plaintiffs and Counterclaim Defendants (hereafter "Plaintiffs") move the Court to enter summary judgment in their favor on their trespass claim against Defendants, and to enter a permanent injunction requiring Defendants to remove the pipeline that they have illegally operated across Plaintiffs' property for the past 15 years.

INTRODUCTION

The "right to exclude others" from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property …." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Yet, for a decade and a half the Defendants have knowingly operated a natural gas pipeline across Plaintiffs' land, in open disregard for Plaintiffs' fundamental property rights, and in direct contradiction to directives from the Bureau of Indian Affairs ("BIA"). Defendants have continued to do so even after this action was filed. Plaintiffs now ask this Court to order Defendants to do what they will not otherwise—cease trespassing and remove their pipeline from the property on which Defendants have no legal right to be.

Significantly, the critical facts in this case are stipulated to by the parties or are otherwise undisputed. These facts establish that:

1. Defendants' easement to operate their pipeline, originally issued in 1980, expired in 2000;

2. Plaintiffs have never granted consent for a new easement, and are not required to do so;

3. Defendants have continued, and still continue, to operate their pipeline illegally, without any easement or other consent;

4. Defendants were informed in 2010 by the BIA that if they did not obtain Plaintiffs' consent for a new easement, they "should be directed to move the pipeline off the subject property," but have not done so.

Defendants' only justification for continuing to trespass on Plaintiffs' property is that they claim the right to take an easement by condemnation, and have filed a counterclaim in this case and a parallel condemnation action for that purpose. However, as explained in Plaintiffs' Motion to Dismiss Defendants' Counterclaim [Dkt. No. 14], and as stipulated by Defendants, the Kiowa Tribe of Oklahoma (the "Kiowa Tribe") holds an undivided ownership interest in the property at issue. The Kiowa Tribe's interest precludes Defendants' condemnation claim as a matter of law. Thus, once the Court resolves the pending Motion to Dismiss, and other pending motions regarding Plaintiffs' standing to pursue its trespass claim, summary judgment should be entered on liability for Defendants' trespass, and a permanent injunction should issue requiring them to cease that trespass and to remove their pipeline.

STATEMENT OF FACTS

Pursuant to LCvR56.1(b) and (d), Plaintiffs provide the following numbered paragraphs setting forth the material facts of this case.

1. This case involves Emaugobah Kiowa Allotment 84, which is also known as Tract 802 S 84-D, located in Caddo County, Oklahoma ("Allotment 84" or "the

Property"). (Joint Status Report[1] [Dkt. 22], Stipulated Fact #1.)

2. The beneficial owners of Allotment 84 are the federally recognized Kiowa Tribe and the individual allottees, which include Plaintiffs. 80 Fed. Reg. 1942-02, at *6 (Jan. 14, 2015) (listing all federally recognized tribes); (Joint Status Report [Dkt. 22], Stipulated Facts #1, #9); Ex. A (U.S. Dep't of the Interior, Bureau of Indian Affairs, Title Status Report (requested Dec. 9, 2015).

3. 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. *See* Ex. A.

4. The United States holds Allotment 84 in trust for the benefit of all of the owners, including the Kiowa Tribe. (Joint Status Report [Dkt. 22], Stipulated Facts #1, #9.)

5. On November 19, 1980, the United States granted Defendants' predecessor, Producer's Gas Company, a 20-year easement across a portion of Allotment 84 to construct and operate a 20-inch natural gas pipeline, a copy of which is attached as Exhibit B to this Motion. (Joint Status Report [Dkt. 22], Stipulated Fact #2.)

6. Defendants' easement expired on November 18, 2000. (*Id*.)

7. In 2002, Enogex, Inc., successor in interest to Producer's Gas, submitted a right-of-way offer to BIA and made an offer to Plaintiffs for a new 20-year easement, which was rejected by a majority of the landowners. (*Id*., Stipulated Fact #3.)

[1] The parties' stipulations in the February 23, 2016 Joint Status Report constitute "judicial admission[s]." *Tellez v. Okla. City Univ.*, No. CIV-04-1400-F, 2005 WL 1657040, at *2 (W.D. Okla. July 5, 2005).

8. Despite this rejection, in 2008 the Interim Superintendent for the local BIA agency approved a renewal of the right-of-way easement for twenty years. (*Id*., Stipulated Fact #5.)

9. The BIA did not obtain the consent of Plaintiffs for this 2008 renewal. (*Id*.)

10. Plaintiffs appealed the Interim Superintendent's decision, and in 2010, the BIA vacated that decision because it determined that it did not have authority to approve the right-of-way without the consent of Plaintiffs or their predecessors in interest and that the price offered by Defendants was unreasonable. (*Id*., Stipulated Facts #5, #6; Defs.' Answer [Dkt. 6] ¶ 2.)

11. 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." Ex. C (Mar. 23, 2010 letter from Dan Deerinwater, BIA Regional Director) at 4.

12. Since the BIA's decision in 2010, Defendants have never obtained Plaintiffs' consent for a right-of-way. (Joint Status Report [Dkt. 22], Stipulated Fact #8.)

13. Despite not obtaining Plaintiffs' consent, and despite BIA's 2010 directive that the pipeline should be removed if that consent is not obtained, six years later Defendants continue to illegally operate their pipeline across Allotment 84. (*Id*., Stipulated Facts #7, #8; Answer [Dkt. 6] ¶ 4 ("Defendants admit that their pipeline remains in place in the Easement.").)

PROCEDURAL HISTORY

Plaintiffs filed this action to halt Defendants' ongoing trespass on November 16, 2015. [Dkt. 1]. Rather than renewing negotiations with the landowners or offering them additional compensation to obtain an easement by consent, Enable filed a counterclaim to condemn an easement across the allotment [Dkt. 7], and instituted a parallel stand-alone condemnation action.[2]

Plaintiffs have since filed motions to address the following legal issues: Enable's ability to condemn an easement across property in which the Kiowa Tribe holds an undivided interest (Pls.' Mot. to Dismiss Defs.' Countercl. [Dkt. 14][3]); Plaintiffs' standing to bring claims for trespass; and Plaintiffs' ability to pursue trespass claims in their own right without the participation of the United States as the trustee for the Property. (Pls.' Mot. to Strike Defs.' Affirmative Defenses [Dkt.13].) Enable responded to Plaintiffs' Motions on March 7, 2016 [Dkt. 25, 26], and Plaintiffs filed reply briefs on March 14, 2016 [Dkt. 28, 29]. All pending motions are fully briefed and awaiting the Court's decision.

---

[2] Defendants filed CIV-15-1250-L to condemn an easement across Allotment 84 under 25 U.S.C. § 357. (*See* Compl. in CIV-15-1250-L [Dkt. 1].) The Court may take judicial notice of the filings in that action for purposes of this Motion. *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Co.*, 605 F.2d 1169, 1171-72 (10th Cir. 1979) (the court may "take judicial notice, whether requested or not, of its own records and files, and facts which are part of its public records … The proposition that a court may take judicial notice of its records and files has frequently proved useful in summary judgment proceedings.").

[3] A similar motion has been filed in CIV-15-1250-L. *See* CIV-15-1250-L, Dkt. 32. The United States, which is named as a defendant in that action, has also moved to dismiss that condemnation claim. *See* CIV-15-1250-L, Dkt. 47.

Following a status conference on March 1, 2016, the Court directed Defendants to file a motion to determine the appropriate measure of damages for their trespass, and directed Plaintiffs to file their motion for injunctive relief, both by April 1, 2016. [Dkt. 24]. This motion and brief are submitted in compliance with the Court's Order.

ARGUMENT

Defendants do not dispute the key facts of this case. They have stipulated that: (1) they have operated a pipeline across Plaintiffs' Property since 2000; (2) without an easement; and (3) that the Kiowa Tribe has a beneficial interest in that Property. (Joint Status Report [Dkt. 22], Stipulated Facts #2, #7, #8, #9.) Thus, if the Court determines that Plaintiffs have standing to pursue their trespass claim, that the United States is not a required co-plaintiff for that claim, and that the Tribe's interest in the Property prevents Defendants from taking an easement by condemnation—questions that have already been fully briefed—then there is no impediment to immediate entry of summary judgment for Plaintiffs on liability, and no reason to delay issuing a permanent injunction against Defendants. After liability is determined, and Defendants' trespass is enjoined, the only remaining issue will be damages for Defendants' past trespasses.

I. Plaintiffs Are Entitled to Summary Judgment on Liability for Defendants' Trespass.

Federal Rule of Civil Procedure 56 provides that "[a] party may move for summary judgment, identifying each claim or defense—*or the part of each claim or defense*—on which summary judgment is sought. Fed. R. Civ. P. 56(a) (2015) (emphasis added). The Court "*shall grant* summary judgment if the movant shows that there is no

genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." [4] *Id*. (emphasis added); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden then shifts to the non-movant to produce specific facts upon which a reasonable jury could find that there is a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 248. While the facts and all reasonable inferences are to be viewed in the light most favorable to the nonmovant, the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48 (emphasis in original).

A. Defendants' Trespass is Undisputed and the Parties Have Already Briefed All of the Legal Issues Relevant to Entry of Summary Judgment on Liability.

There is no genuine issue of material fact in this case. Defendants admits that they are operating a natural gas pipeline across Plaintiffs' property without an easement or any other consent to be on that property. Defendants' right, if any, to keep their pipeline on Plaintiffs' property depends solely on this Court's resolution of the legal issues surrounding Plaintiffs' trespass claim—primarily whether Defendants may take an easement by condemnation now that the Kiowa Tribe holds an undivided ownership interest in the Property. Plaintiffs have already fully briefed why Defendants lack this

[4] A motion for partial summary judgment is resolved under the same standard as a motion for summary judgment. *Franklin v. Thompson*, 981 F.2d 1168, 1169 (10th Cir. 1992).

power. (*See* Dkt. 14, 28.) Accordingly, once the Court rules on Plaintiffs' pending Motion to Dismiss and Motion to Strike, it may, and should, simultaneously enter partial summary judgment for Plaintiffs on Defendants' liability for trespass.

B. Defendants' Other Affirmative Defenses Do Not Prevent Entry of Summary Judgment.

In addition to their arguments regarding Plaintiffs' standing and the required parties/real parties in interest to Plaintiffs' trespass claim, Defendants have also pled the statute of limitations and "estoppel, waiver and/or laches" as affirmative defenses.[5] (Defs.' Answer [Dkt. 6], Third and Seventh Affirmative Defenses.) These defenses also do not prevent entry of summary judgment.

1. The Statute of Limitations Is No Defense to Liability for Trespass.

"There is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 240 (1985). Although a state limitations period may be borrowed and applied to a federal claim in some instances, this may not be done where application of the state statute would be inconsistent with underlying federal policies. *Id*. Congress has repeatedly reaffirmed, and the Supreme Court has recognized, that there is a strong federal policy "against the application of state statutes of limitations in the context of

[5] Defendants' other affirmative defenses relate to the measure of damages, and Plaintiffs' claim for punitive damages. Although Defendants have also stated that "Plaintiffs have failed to state a claim upon which relief can be granted in whole or part" they have not pursued a Rule 12(b)(6) motion to dismiss, or otherwise explained how Plaintiffs' trespass claim is deficient. (Defs.' Answer [Dkt. 6], Fourth Affirmative Defense.) Considering Defendants' subsequent stipulation to the facts establishing their trespass, this affirmative defense can be disregarded.

Indian land claims." *Id*. at 241, 242–44; s*ee also Washoe Tribe of Nev. v. Sw. Gas Corp.*, No. CV-N-99-153-ECRVPC, 2000 WL 665605, at *1–3 (D. Nev. Jan. 12, 2000) (holding that under *Oneida*, there is no statute of limitations for federal common law trespass claims to Indian land). Defendants' statute of limitations defense is, therefore, no bar to summary judgment for Plaintiffs.[6]

2. Defendants' Boilerplate Laches, Estoppel, and Waiver Defenses Are Not Barriers to Summary Judgment on Liability.

Defendants' laches/estoppel/waiver defenses fare no better. As an initial matter, Defendants have failed to properly plead their equitable defenses. In this district, when pleading an affirmative defense, a defendant must satisfy the Supreme Court's heightened pleading standards by providing sufficient factual information to demonstrate the defense is plausibly viable on its face or must provide sufficient factual matter from which a court can infer potential viability. *See Suarez-Martinez v. Wells Fargo Bank, N.A.*, No. CIV-14-1322-M, 2015 WL 1040420, *3 (W.D. Okla. Mar. 10, 2015) (striking laches, waiver, and estoppel defenses when "defendant set forth absolutely no factual basis for the defenses" in its Answer); *see also Bell Atlantic Corp v. Twombly*, 500 U.S. 544 (2007). Defendants have provided absolutely no factual basis for their laches, estoppel, or waiver defenses in violation of the requirements of this Court.

[6] Regardless of whether the statute of limitations for recovering trespass damages has expired, a court still may require a continuing trespass, such as the one in this case, to be removed. *See Russell v. Williams*, 964 P.2d 231, 235 (Okla. Ct. App. 1998); *Fairlawn Cemetery Ass'n v. First Presbyterian Church, U.S.A. of Okla. City*, 496 P.2d 1185, 1187 (Okla. 1972).

Nevertheless, as with the borrowing of state statutes of limitation, the application of laches or other similar equitable defenses to Plaintiffs' trespass claim is inconsistent with established federal policy. *See Oneida*, 470 U.S. at 244, n.16. Therefore, "Courts analyzing Indian land claim actions have consistently rejected the use of delay-based defenses." *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 123-24 (N.D.N.Y. 2002) (granting motion to strike laches defense); *see also Schaghticoke Tribe of Indians v. Kent Sch. Corp.*, 423 F. Supp. 780, 784 (D. Conn. 1976) ("The cases make plain that limitations, adverse possession, laches, and estoppel cannot bar recovery of Indian lands in a suit to recover protected territory." (citing *Ewert v. Bluejacket*, 259 U.S. 129 (1922)). This is because the extinguishment of Indian land rights "requires a sovereign act[,]" and cannot be accomplished by the mere passage of time. *Oneida*, 470 U.S. at 244, n.16; *see also Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y.*, 414 U.S. 661, 670 (1974).

Moreover, equitable defenses such as laches and estoppel may not be asserted in a case like the present where title to the land is in the name of the United States, even in its capacity as trustee, as federal property interests are not subject to a laches defense. *See United States v. City of Tacoma.*, 332 F.3d 574, 581-82 (9th Cir. 2003) ("there can be no argument that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense"); *United States v. Ahtanum Irrigation Dist*., 236 F.2d 321, 334 (9th Cir. 1956) ("No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses"); *see also Board of Cnty.*

Comm'rs v. United States, 308 U.S. 343, 350–51(1939) ("state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise"); *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (reaffirming that the defenses of laches and estoppel are not available to defeat Indian treaty rights); *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) (noting "the well-established rule that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses"). Because "individual Indians have no assurance that their claims will be pursued with sufficient speed and efficiency by the government because of the immense administrative burden involved," individual Indians may pursue land claims independent of the United States, and, when they do so, under the same federal policy "laches … waiver and estoppel can no more bar recovery on the part of [Indian] plaintiffs … than they might if the United States were a party plaintiff." *Schaghticoke Tribe*, 423 F. Supp. at 785 (citing *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 470-71 (9th Cir. 1975)).

Thus, it is well settled that Defendants cannot accomplish the taking of Plaintiffs' property, or extinguish their right to exclusive possession thereof, through equitable defenses such as laches, estoppel, or waiver. Accordingly, none of Defendants' affirmative defenses counter the entry of partial summary judgment for Plaintiffs.

II. A Permanent Injunction Should Issue to Require Defendants to Remove the Pipeline That They Are Illegally Operating Across Plaintiffs' Property.

Upon entry of partial summary judgment, Plaintiffs are entitled to a permanent injunction requiring Defendants to remove the pipeline from Allotment 84, as BIA

directed Defendants to do in 2010. "When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented … prudence dictates that [the Court] answer that question with dispatch." *OFC Comm. Baseball v. Markell*, 579 F.3d 293, 297 (3d Cir. 2009). Accordingly, Federal Rule of Civil Procedure 65(a)(2) allows the Court to consolidate a hearing on a motion for preliminary injunction with a trial on the merits. Fed. R. Civ. P. 65(a)(2) (2015). When there are no genuine issues of material fact, such that a trial on liability is not necessary, the Court may issue a permanent injunction concurrently with a grant of summary judgment in the plaintiff's favor. *See O'Connor v. Smith*, 427 F. App'x 359, 367–68 (5th Cir. 2011) (affirming concurrent entry of summary judgment for plaintiff and issuance of a permanent injunction to prevent defendant from trespassing and damaging a sunken 19th century Spanish treasure ship); *see also Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 497 (D.N.J. 2014) (finding that it is appropriate to consolidate rulings on summary judgment and injunctive relief when "the Court is presented with purely a legal question"); *Esso Standard Oil Co. v. Freytes*, 467 F. Supp. 2d 156, 169 (D.P.R. 2006) (granting plaintiff's motions for summary judgment and for a permanent injunction); *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397, n.4 (9th Cir. 1990) (noting that a district court may convert a preliminary injunction ruling into a final disposition of the merits by granting summary judgment, provided that the notice and hearing requirements of Rule 56 are met).

The standard for entry of a permanent injunction is the same as the standard for a preliminary injunction with the exception that a permanent injunction must be premised

on a finding of actual success on the merits, not a likelihood of success. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). Thus, Plaintiffs are entitled to a permanent injunction once they demonstrate: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) that the injury being suffered outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *See Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003).

A. Plaintiffs Are Automatically Entitled to a Permanent Injunction Upon a Finding of Liability Against Defendants for Continuing Trespass.

It is well established that a landowner is entitled to a permanent injunction to prevent a continuing trespass against his or her property. The Supreme Court of Oklahoma has stated, "where a trespasser persists in trespassing upon (the land) of another, and threatens to continue his wrongful invasion of the premises, equity will restrain such trespass." *Fairlawn Cemetery Ass'n v. First Presbyterian Church, U.S.A. of Okla. City*, 496 P.2d 1185, 1187 (Okla. 1972) (parenthetical in original) (quoting *Bradley v. Renfrow*, 84 P.2d 430 (Okla. 1938)); *see also Okaw Drainage Dist. of Champaign & Douglas Cnty., Ill. v. Nat'l Distillers & Chem. Corp.*, 882 F.2d 1241, 1246 (7th Cir. 1989) (absent a statutory exception, a landowner "has the exclusive right to the use of the property and an *automatic right* to an injunction against a trespasser" (emphasis added)).

For example, in *Fairlawn Cemetery*, the Oklahoma Supreme Court held that an injunction should be entered against the trespassing party—a church—requiring it to

remove encroaching fill dirt it deposited on the plaintiff's property, and preventing it from depositing more dirt there. *Id*. at 1187–88. In so holding the Court noted:

> [The] Church's encroachment upon the property of the Cemetery has continued for several years and it appears the church will continue its unauthorized use unless enjoined. In such case the conduct of the church creates a continuing trespass which a court of equity will enjoin.

Id. at 1187.

Similar injunctions have been entered against pipeline companies, requiring them to remove pipelines that they had no legal authority to operate, or to otherwise cease trespassing on a landowner's property. In *Angier v. Matthews Exploration Corp.*, 905 P.2d 826 (Okla. 1995), the Oklahoma Supreme Court held that the trial court abused its discretion by "reforming" an easement agreement instead of entering a permanent injunction to stop a continuing trespass similar to that of Defendants. In that case, the defendant pipeline company and the plaintiff landowner entered into a right-of-way agreement for an access road across the plaintiff's land. *Id*. at 829. The defendant constructed the entry for the road across the wrong portion of plaintiff's land, and used that entry continually, despite not having an easement for it. *Id*. The trial court denied the plaintiff's motion for a permanent injunction, deciding instead that the right-of-way agreement should be "reformed so as to increase the monthly payments" to compensate the plaintiff for defendant's use of the additional portion of the property. *Id*. at 830.

On appeal, the Oklahoma Supreme Court held that the "trial court could not 'reform' a contract with terms that neither party agreed to." *Id*. Rather, the Court found that the defendant's unauthorized use of the entry, outside of its agreed-upon right-of-

way, constituted a trespass, and held that "the trial court erred in refusing to permanently enjoin [defendant] from using this portion of the road." *Id*. at 831.

Although the injunction in *Angier* was directed to the defendant's use of an access road instead of a pipeline, other courts have applied the same rationale to permanently enjoin companies from operating pipelines across a plaintiff's land, and have required them to remove those pipelines. *See Wells v. Air Prods. & Chemicals, Inc.*, 383 F. Supp. 146, 150 (N.D. W. Va. 1974) (granting plaintiffs' motion for a permanent injunction "restraining defendant from continuing to use [gas] transmission lines" across plaintiffs' property, and finding that plaintiffs "are further entitled to immediate removal of said lines from their said property"); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1007 (D. Kan. 1984) (entering permanent injunction ordering the defendants to "cease using the offending pipelines and to remove them from [plaintiff's] land"); *see also Belusko v. Phillips Petroleum Co.*, 198 F. Supp. 140, 146 (S.D. Ill. 1961) (granting motion for an injunction to prevent defendant's unauthorized entry onto plaintiff's land for purposes of laying a pipeline).

In this case, Defendants have trespassed on Plaintiffs' land since 2000 by operating their pipeline across that land without an easement, and by refusing to remove it. It is evident that Defendants—whose resources vastly outmatch those of Plaintiffs—will not cease using the pipeline and will not remove it without an Order from this Court. Given that Defendants have no legal right to be on Plaintiffs' property, their use of the pipeline should be permanently enjoined, and they should be ordered to remove that pipeline immediately.

B. An Individual Analysis of the Injunction Factors Also Supports Permanently Enjoining Defendants' Trespass.

Because a permanent injunction is necessarily warranted once a continuing trespass is established, the cases above do not conduct a separate analysis of the four permanent injunction factors. However, a factor-by-factor analysis also supports entering Plaintiffs' requested injunction.

1. Entry of Summary Judgment Establishes Actual Success on the Merits.

As discussed *supra* in Section I, if the Court resolves the pending Motions to Dismiss Defendants' Counterclaim and Motion to Strike in Plaintiffs' favor, Plaintiffs are entitled to summary judgment on liability. This satisfies the first injunction factor—actual success on the merits.

2. Defendants' Continuing Violation of Plaintiffs' Property Rights Constitutes Irreparable Harm.

Irreparable harm is an injury that "cannot be adequately atoned for in money" or one which "the district court cannot remedy … following a final determination on the merits." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (internal citations and alterations omitted). The Oklahoma Court of Appeals' discussion of the irreparable nature of the harm that results from a continuing trespass in *Angier* is especially salient on this point.

> [Plaintiff] insists money damages cannot compensate her for the continuing trespass: [Defendant's] unauthorized use of the road. We agree. It is her interest in the exclusive possession of her land which has been invaded by [Defendant's] use of the wrongfully-placed portion of the road. The trial court erred in denying [Plaintiff's] request for a permanent injunction

> against [Defendant] which prohibits [Defendant] from using [this portion] of the road.

Angier, 905 F.2d at 830.

The same harm—which cannot be compensated by money damages—is present in this case. Defendants' continued use of Plaintiffs' land for their own profit, without consent or authorization, has deprived, and continues to deprive, Plaintiffs of "the most fundamental of all property interests"—their "right to exclude others from entering and using [their] property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Such harm is irreparable *per se*, and mandates issuance of a permanent injunction.

3. The Deprivation of Plaintiffs' Fundamental Property Rights Outweighs Any Potential Harm to Defendants.

The third factor—whether the injury Plaintiffs are currently suffering outweighs the harm that the injunction may cause Defendants—also weighs in favor of issuing the injunction. As discussed above, Plaintiffs are currently experiencing a deprivation of a fundamental property right. In contrast, issuing the injunction will not harm Defendants because Defendants do not have *any right* to maintain their pipeline across the Property, and have not had any right to do so for many years. Defendants are not harmed if this Court orders them to cease doing what they have no legal right to do in the first instance.

Defendants may argue that they will be harmed by the injunction because removing the pipeline will be expensive, and will disrupt their business. However, these costs do not constitute an injury because Defendants "ha[ve] no right to benefit from [their] illegal trespass." *Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F. Supp.

295, 302 (E.D. Pa. 1994) (injunction entered against competing bus line, which had no right to send "hawkers" onto competitor's property to solicit business).

Even if the economic costs to Defendants to remove their pipeline are considered, Defendants are solely to blame for them. Defendants have known since 2000 that they did not have an easement across Plaintiffs' property; they knew that the landowners had no obligation to consent to a new easement; they were informed in the subsequent years that the landowners in-fact did not consent to grant Defendants a new easement; and Defendants were informed in 2010 by the BIA that if they did not obtain an easement by consent that they "should be directed to move the pipeline off the subject property." Ex. C. After more than a decade and a half, Defendants have had more than enough time to make alternate arrangements. They have only themselves to blame for any economic impact the issuance of a permanent injunction may have at this late date. They have benefitted substantially from the wrongful use of Plaintiffs' property for 15 years. It is time for that to stop.

4. Plaintiffs' Requested Injunction Will Advance the Public Interest In Protecting Individual Property Rights and Tribal Sovereignty.

The fourth injunction factor is whether the injunction, if issued, will adversely affect the public interest. This factor also weighs in favor of issuing the injunction.

First, enjoining Defendants' trespass advances the public interest in protecting Plaintiffs' "fundamental" right to have exclusive use of their property. *Lingle*, 544 U.S. at 539.

Second, as Defendants have stipulated, the Kiowa Tribe holds an interest in the Property. (Joint Status Report [Dkt. 22], Stipulated Fact #9.) Plaintiffs' requested injunction advances the public interest—repeatedly established by Congress—in protecting the Tribe's sovereign immunity. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Congress is committed to a policy of supporting tribal self-government and self-determination."). For example, the public policy of protecting tribal sovereign immunity is evident from the fact that Congress did *not* authorize condemnation of tribal land in 25 U.S.C. § 357—the condemnation statute at issue in this case.[7] (*See* Pls.' Mot. to Dismiss Counterclaim [Dkt. 14] at 10–11.) That Plaintiffs' requested injunction will not adversely affect the public interest, but will instead advance two paramount public interests, additionally weighs in favor of granting Plaintiffs' Motion for a Permanent Injunction.

While Defendants may argue that this Court should consider their need to supply customers with natural gas, Defendants have had 15 years to figure out a different route so that supply can continue unimpeded. Instead Defendants did nothing, taking advantage of some of the poorest people in this country whose land they were wrongfully using. Allowing that kind of conduct to continue is not in the public's interest.

[7] The Tribe's sovereign immunity is discussed in more detail in Plaintiffs' Motion to Dismiss Defendants' Counterclaim and Brief in Support [Dkt. 14]. In the interest of brevity, Plaintiffs will not reiterate the full explanation of the Tribe's sovereignty here. However, the Tribe's status as an independent sovereign and Congress' recognition of tribal sovereignty as the public policy of the United States are beyond dispute.

CONCLUSION

Defendants have no legal right to be on Plaintiffs' land, and have benefited from their illegal trespass for far too long already. However, Defendants will not willingly remove their pipeline from Plaintiffs' Property, or acknowledge Plaintiffs' right to exclusive use and enjoyment of their land. Thus, this Court must protect Plaintiffs' rights. Plaintiffs' Motion for Partial Summary Judgment on Liability for Trespass should be granted, and a permanent injunction should issue forthwith requiring Defendants to cease using their pipeline, and to immediately remove that pipeline from Plaintiffs' land.

Respectfully submitted this 1st day of April, 2016.

s/ David C. Smith
DAVID C. SMITH
D.C. Bar No. 998932
CATHERINE F. MUNSON
D.C. Bar No. 985717
Application for admission submitted
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@kilpatricktowsend.com

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

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I electronically filed the foregoing PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY FOR THEIR TRESPASS CLAIM AND FOR A PERMANENT INJUNCTION WITH BRIEF IN SUPPORT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following registered users:

Stratton Taylor
Toney D. Foster
Clint Russell
C. Eric Pfanstiel
Kassie N. McCoy
Taylor, Foster, Mallett, Downs, Ramsey & Russell
400 West Fourth Street
P.O. box 309
Claremore, OK 74018
(T) (918) 343-4100
(F) (918) 343-4900
Attorneys for Defendants

and I hereby certify that I have also mailed the foregoing document to the following recipients:

None

Respectfully submitted, this the 1st day of April, 2016.

s/ David C. Smith
DAVID C. SMITH
D.C. Bar No. 998932
Attorney 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