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.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR TRESPASS AND FOR A PERMANENT INJUNCTION

Defendants approach this case as a garden variety, state law trespass action because under the applicable legal standards they have no defense to summary judgment on liability or to Plaintiffs' request for a permanent injunction. This action relates to Indian trust land, thus federal law, not Oklahoma common law, governs. Yet, Defendants seek to apply state law to accomplish what they plainly cannot under the controlling federal statutes – to take an easement across Plaintiffs' property without complying with 25 U.S.C. § 324, which requires: (1) "the consent of the proper tribal officials," (2) that "the owners or owner of a majority of the interests therein consent," and (3) that the Secretary of the Interior ("Secretary") approve any right of way. Defendants have not satisfied any of these requirements.

Instead, Defendants argue that summary judgment should not be entered because at one time they had the consent of five of 37 allottees, (who collectively own less than a 10% interest in the Property). Defendants' arguments lack merit. *First*, their efforts to

invoke state law are barred by multiple federal statutes and regulations. *Second*, Defendants' consent argument is contrary to their stipulations, and is incorrect given that the common law rule regarding consent by one tenant-in-common does not apply to allottee ownership, which is a creation of federal statutes. *Third*, the consent of 5 allottees with a collective 9.67% ownership does not satisfy § 324. *Fourth*, those consents were conditioned on BIA's approval, which was declined in 2010, and those consents were further revoked when suit was filed. Defendants' argument about accrual of the trespass claim is also misguided. Defendants are trespassing currently; summary judgment on liability and a *prospective* injunction requiring removal of the pipeline are appropriate.

Defendants' arguments against the permanent injunction are also incorrect. Plaintiffs will succeed on the merits, Defendants have submitted no evidence of harm to themselves or the public from the injunction, and the Court may not grant Defendants a *de facto* easement that is expressly barred by the controlling federal statutes.

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

In an effort to manufacture issues of fact where there are none, Defendants ignore their own stipulations of fact entered at the inception of this case. *See* Joint Status Report [Dkt. No. 22]. The key stipulations for purposes of the motion are:

1. Defendants' "easement expired on November 18, 2000." Stipulation No. 2.
2. It was not until 2002 that Defendants submitted an application to the BIA to renew the right-of-way, "which was rejected by a majority of the owners." Stipulation No. 3.
3. "In 2006 the BIA canceled the right-of-way application for failure to obtain consent of the owners." Stipulation No. 4.

4. While in 2008 an interim Superintendent inexplicably approved a right-of-way application without "obtain[ing] the consent of Plaintiffs," that decision was vacated in 2010 because BIA determined that it did not have authority to approve the right-of-way "without the consent of the Plaintiffs or their predecessors in interest," and because "the price offered by Defendant Enable Oklahoma for the easement was unreasonable." Stipulation Nos. 5 and 6.

5. "A new right-of-way easement has not been approved by the Plaintiffs or the BIA." Stipulation No. 8.

These stipulations constitute judicial admissions. *See Tellez v. v. Okla. City Univ.*, No. CIV-04-1400-F, 2005 WL 1657040, at *2 (W.D. Okla. Jul. 5, 2005). "Judicial admissions are formal admissions ... which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993) (quotation marks omitted), *abrogated on other grounds by* 39 F.3d 1078 (1994) (*en banc*). Defendants cannot create issues of fact by attempting to disavow their own judicial admissions. *Grynberg v. Bar S Serv., Inc.*, 527 F. App'x 736, 739 (10th Cir. 2013).

ARGUMENT

I. Defendants' Summary Judgment Arguments Are Meritless.

A. Federal law governs Plaintiffs' trespass claims.

Defendants' insistence that state law governs Plaintiffs' claims is misplaced. As is more fully explained in Plaintiffs' Response to Defendants' Motion to Determine Damages [Dkt. 37 at 4-8], federal law, not state law, governs Plaintiffs' trespass claims. Indeed, it is well-settled that Congress has *exclusive* and *plenary* authority to regulate matters involving Indians and Indian lands pursuant to the Indian Commerce Clause. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central

function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"). Congress' plenary power over Indian lands and assets "has been termed 'one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs.'" *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977) (citation omitted). Therefore, in *Sperry Oil & Gas Co. v. Chisholm*, 264 U.S. 488 (1924), the Supreme Court specifically held that Oklahoma law had no effect on the validity of an oil lease concerning allotted lands. As the Court explained, Congress had "authority over the Indians, their lands and property," that authority was "plenary," and "in all matters relating to the restrictions upon their allotted lands resort must be had to the Acts of Congress and to those Acts alone." *Id.* at 493-94; *see also Baldridge v. Caulk*, 237 P. 453, 456 (Okla. 1924) (citing *Sperry* for the principle that Oklahoma law, including statutes of limitation, is not applicable to Indian lands "unless it is clearly indicated that it is the intent of Congress to make such state statute applicable").

Congress has exercised that authority by legislating that easements across Indian trust lands must be approved by the Secretary (25 U.S.C. § 323), and cannot be granted "without the consent of the proper tribal officials," and, as to land allotted to 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; *see also* 25 C.F.R. § 169.3(a) (requiring "prior written consent of the tribe," "prior written consent" of "the owner or

owners of a majority of the interests" in trust lands, and "approval of the Secretary").[1]

Nahno-Lopez v. Houser, 625 F.3d 1279 (10th Cir. 2010), provides no support to Defendants' position. (Defs.' Br. at 12, 14-15.) That case involved a trespass claim asserted against a tribe by individual allottees. *Id*. at 1280-81. The Tenth Circuit affirmed the grant of summary judgment for defendants because the plaintiffs never refuted defendants' statement of undisputed fact that "Plaintiffs gave express consent to the Tribe to make use of the property."[2] *Id*. at 1281, 1284. While § 324 was not discussed in the opinion, consent was a defense because it had been given by all those having an interest in the land. In this case the opposite is true. Defendants have stipulated that "[a] new right-of-way easement *has not been approved by the Plaintiffs* or the BIA." [Dkt. 22 (Stipulation 8) (emphasis added)]. Thus, the requirements of § 324 are not met, and Defendants offer no justification for disregarding this controlling federal statute.

B. Defendants' *post hoc* consent argument is a baseless.

Defendants' primary argument is that they may continue to operate their pipeline indefinitely because they obtained consent in 2004 from five Plaintiffs with the following ownership interests in this Property – Thomas Blackstar (1.02%), Benjamin Blackstar (1.02%), Gilbert Clayton ("Ernie Clay") Keahbone (2.6%), Edmond Carter (6.35%), and Rene Ware (1.02%).[3] (Defs.' Br. at 6; Dkt. 32-1.) This argument fails.

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[1] Renumbered 25 C.F.R. § 169.107, effective 4/21/16, without substantive modification.
[2] The resolution of *Nahno-Lopez* turned on the plaintiffs' failure to comply with this Court's local rules regarding responses to itemized statements of undisputed facts under Local Rule 56.1, not a determination that state law controls over federal law with respect to claims for trespass to Indian trust land. *See id*. at 1284.
[3] These consents are not mentioned in Plaintiffs' Motion because they cannot form the

First, Defendants' legal premise – that under Oklahoma common law consent by one tenant-in-common is a defense against trespass claims – is inapplicable. Allottee ownership is a construct of federal statutory law – including, the General Allotment Act (25 U.S.C. § 331, *et seq*.), the Right of Way Act (25 U.S.C. § 321, *et seq*.), the ILCA, and other federal statutes and regulations – not Oklahoma common law. *See Begay v. Albers*, 721 F.2d 1274, 1280 (10th Cir. 1983) ("Questions of ownership of fee title to an Indian allotment involves the application of federal law."); *Haeker v. United States*, No. CV-14-20-BLG-SPW-CSO, 2014 WL 4073199, at *7 (D. Mont. Aug. 14, 2014) (common law "definitions of 'tenants in common' do not describe the trust interest held by the United States" in Indian land). Accordingly, "[s]tate laws are not applicable to allotted Indian lands except to the extent that Congress has so authorized." *Chemah v. Fodder*, 259 F. Supp. 910, 913 (W.D. Okla. 1966) (citing *Minnesota v. United States*, 305 U.S. 382, 387 (1939)). Congress has never authorized application of common law trespass rules to Indian trust land, particularly where, as here, doing so would nullify a federal statute. Under Defendants' argument a pipeline company could operate across trust land indefinitely without the consent of a majority of the owners, the tribe, or approval from the Secretary so long as an owner with a 0.000001% interest consented. This result would be contrary to Congress' intent, as expressed in 25 U.S.C. § 324.

Defendants also materially misrepresent the effect of 25 U.S.C. § 2213(a) in arguing that under this section "each interest owner 'may, as a tenant in common with the other owners … consent to the granting of rights of way …." (Defs.' Br. at 19.) Section

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basis for any good faith defense to Plaintiffs' trespass claims.

2213(a) actually states that "*an Indian tribe* … may, as a tenant in common with the other owners … consent to the granting of rights-of-way …." 25 U.S.C. § 2213(a) (emphasis added). This statute is part of the ILCA, and merely puts tribes that acquire interests in allotments thereunder on equal footing with individual allottees. It does not negate the requirement of majority consent in § 324, and there is nothing in § 2213(a) authorizing individual allottees to grant consent that is binding on all other allottees or a tribe.

Second, the consents Defendants obtained in 2004 represent less than 10% of the ownership interest in the Property. [Dkt. 36-4 (consent forms); Dkt. 32-1 (Title Status Report)]. This is well short of the "majority" required by § 324 and does not account for the required tribal approval, which Defendants also do not have.

Third, those consents were conditioned on the Secretary approving the offered consideration, which was expressly rejected as "unreasonable" in 2010. [Dkt. 22 (Stipulation 6); Dkt. 36-4]. To the extent they had any effect, those consents ceased to be effective at that time. Further, the BIA Regional Director's statement in his March 23, 2010 letter that the trespass had been "resolved" (Defs.' Br. at 3), referred to an August 24, 2006, letter from BIA to Defendants' predecessor in which a trespass assessment had been made, and purportedly paid, for the November 2000 to August 2006 period. [Dkt. 32-3 at 3]. Had BIA believed the trespass to be forever resolved, Defendants would not have been directed to "move the pipeline off the subject property" if a "valid approval of a right of way for this tract is not timely secured." *Id.* at 5.

Fourth, any question about Plaintiffs' consent was removed when *all Plaintiffs filed suit for trespass* based on Defendants' "illegal and unauthorized use of Plaintiffs'

land" and requested an injunction requiring removal of the pipeline. (Compl. ¶¶ 1, 56-57.) Defendants acknowledged that they did not have consent to be on Plaintiffs' land when they stipulated that "[a] new right-of-way easement has *not been approved by the Plaintiffs*…." [Dkt. 22 (Stipulation 8) (emphasis added)]. Defendants' *post hoc* rationalizations cannot overcome this stipulation. *See Grynberg*, 527 F. App'x at 739.

C. When the trespass claims first accrued goes to damages, not liability.

Defendants also question the date on which Plaintiffs' trespass claims accrued. (Defs.' Br. at 21.) However, the date of accrual is immaterial. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (issues of fact are only "material" if they are "essential to the proper disposition of the claim"). Defendants have stipulated that "[a] new right-of-way easement has not been approved by the Plaintiffs or the BIA" and that they continue to "maintain[] the pipeline across Kiowa Allotment 84." [4] [Dkt. 22 (Stipulations 7, 8)]. Thus, while the date of accrual might affect damages, it does not affect liability for Defendants' ongoing trespass.

II. Defendants' Permanent Injunction Arguments Are Baseless.

A permanent injunction is mandated in this case because Defendants submit no evidence to support their harm arguments, and allowing Defendants to keep their pipeline on trust land would amount to a *de facto* easement that is prohibited by 25 U.S.C. § 324.

A. Defendants fail to support their arguments with any evidence.

As a threshold matter, Defendants have not submitted any evidence to support the

[4] Defendants also fail to rebut the authority holding that there is no statute of limitations for Plaintiffs' trespass claims. (Pls.' Mot. at 8-11.)

argument that they (or the public) will be harmed by Plaintiffs' requested injunction. Defendants operate numerous pipelines, and have not shown that moving this pipeline will materially affect their business, much less the public's receipt of natural gas. Defendants' failure to present any evidence on this issue is grounds to grant the injunction. *See Navajo Health Found.-Sage Mem. Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122, 1189-90 (D.N.M. 2015) (granting injunction, based in part on "Defendant's failure to provide evidence of any meaningful injury that it will suffer").

B. Defendants' arguments against entry of a permanent injunction are barred by the controlling federal statutes and regulations.

Defendants argue that they may pay prospective monetary damages to keep their pipeline on Plaintiffs' land, without obtaining consent from Plaintiffs, the Kiowa Tribe, or approval from the Secretary. (Defs.' Br. at 23-28.) But this would amount to a *de facto*, indefinite easement in direct contravention of 25 U.S.C. § 324, and 25 C.F.R. §§ 169.3(a), 169.19, & 169.25(b)[5] (oil and gas pipeline easements "shall not extend beyond a term of 20 years"). Defendants cite no authority allowing them to make this end-run around the applicable federal statutes and regulations. Notably, Defendants cite cases in which the trespasser had the power to take the property by condemnation, which reduced the plaintiffs' relief to the compensation available had that power been exercised. *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716 (Okla. 1983) (utility company constructed pipeline across non-Indian land); *Mid-America Pipeline Co. v. Lario Enters., Inc*. ("*Mid-*

[5] As of April 21, 2016, these regulations were renumbered as 25 C.F.R. §§ 169.107, 169.202, and 169.201, respectively. When the easement expired, the regulations limited its duration to 20 years. 25 C.F.R. § 169.25(b). The revised regulations permit longer oil and gas pipeline easements in the Secretary's discretion. 25 C.F.R. § 169.201(c).

America I"), No. 88-4205-S, 1989 WL 38693, at *1 (D. Kan. Apr. 13, 1989) (City of Topeka built improvements across plaintiff's easement).[6] As explained in Plaintiffs' Motion to Dismiss Defendants' Counterclaim [Dkt. 14], Defendants cannot condemn an easement across this Property. *Kasner v. Reynolds*, 268 P.2d 864 (Okla. 1954), (Defs.' Br. at 27-28), is also inapplicable. Plaintiffs did not consent to Defendants' construction of a permanent improvement. Defendants knew that they had a 20 year easement, with no guarantee of renewal.[7] It is hardly inequitable to require a sophisticated pipeline company to comply with lease terms of which it was fully aware when it built its pipeline. To do otherwise would make any temporary pipeline easement permanent.

CONCLUSION

For the foregoing reasons, there are no issues of material fact, and there is no authority that would allow Defendants to remain on Plaintiffs' property in direct violation of the controlling federal statutes and regulations. Summary Judgment on liability should be entered and Plaintiffs' request for a permanent injunction should be granted.

Respectfully submitted this 10th day of May, 2016.

s/ David C. Smith
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[6] Defendants fail to inform the Court that Judge Rogers amended his order in *Mid-America I* to clarify that the injunction was denied because the plaintiff could pursue damages against the city based on claims for inverse condemnation. *See Mid-America Pipeline Co. v. Lario Enterprises, Inc.*, No. 88-4205, 1989 WL 88071, at *3 ("*Mid-America II*") (D. Kan. Aug. 3, 1989).

[7] Notably, Defendants could have utilized the procedures then in effect under 25 C.F.R. § 169.19 to file a renewal application "[o]n or before the expiration date of any right-of-way heretofore or hereafter granted for a limited term of years," but elected instead to wait until two years after their right of way expired to seek renewal.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2016, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR TRESPASS AND FOR A PERMANENT INJUNCTION with the Clerk of Court. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System.

s/ David C. Smith
DAVID C. SMITH