

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

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|-----------------------------------|---|------------------------|
| MARCIA W. DAVILLA, et al.         | ) |                        |
|                                   | ) |                        |
| Plaintiffs,                       | ) |                        |
|                                   | ) |                        |
| vs.                               | ) | Case No. CIV-15-1262-M |
|                                   | ) |                        |
| ENABLE MIDSTREAM PARTNERS, LP, et | ) |                        |
| al.                               | ) |                        |
|                                   | ) |                        |
| Defendants.                       | ) |                        |

**DEFENDANTS’ REPLY TO PLAINTIFFS’ OBJECTION AND RESPONSE  
[doc. 37] TO DEFENDANTS’ MOTION TO DETERMINE PROPER MEASURE  
OF DAMAGES AND RULES FOR DECISION WITH BRIEF IN SUPPORT**

COME NOW the Defendants, ENABLE MIDSTREAM PARTNERS, LP, ENABLE GP, LLC, and ENABLE OKLAHOMA INTRASATE TRANSMISSION, LLC (hereinafter “ENABLE”), and offer their Brief in Reply to the Plaintiffs’ Objection and Response to Defendants’ Motion to Determine the Proper Measure of Damages and Rules for Decision [doc.37]. In support hereof, Enable alleges and states the following:

**Introduction**

Plaintiffs’ Response Brief [doc.37] expends a great deal of words citing selected portions of cases but invests precious little time discussing the actual substance of those cases and why the various courts reach their conclusions about important points of law. A thoroughgoing review of the various cases though, many of which are cited by both Plaintiffs and Defendants, shows that federal case law embraces the legal positions taken by Enable in this case regarding the adoption of analogous Oklahoma state law to govern federal common

law trespass claims and their applicable statutes of limitations. In fact, as discussed at length by Enable in its opening brief on this issue [doc. 31], the 10<sup>th</sup> Circuit's published decision in *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10<sup>th</sup> Cir. 2010) is the template for this Court's decision in this case.

**I. *Nahno-Lopez v. Houser* and federal common law.**

Plaintiffs' discussion of the 10<sup>th</sup> Circuit's ruling in *Nahno-Lopez v. Houser* is superficial in nature to the extent that Plaintiffs overlook the substantive portion of the holding. 625 F.3d at 1282. The Plaintiffs' myopic viewpoint only sees that the 10<sup>th</sup> Circuit characterized the allotment owners trespass claims in *Nahno-Lopez* as arising under "federal common law". 625 F.3d at 1282. This part of Plaintiffs' analysis is entirely correct, as "federal common law" has traditionally been the vehicle upon which claims for trespass or damage to Indian allotment lands have obtained *jurisdiction* in federal court. The 10<sup>th</sup> Circuit's discussion in *Nahno-Lopez* concisely points this out, to wit:

Plaintiffs' two claims, however, can be fairly construed to articulate a viable claim over which we have jurisdiction. *They contend that § 345 was "violated" in the sense that Defendants' presence on their property constituted trespass and was thus "unlawful" within the meaning of § 345.* They combine this with a claim for common-law trespass. *We construe the complaint as stating a federal common-law trespass claim, for which § 345 provides jurisdiction.* (internal record cites omitted)(emphasis added).

625 F.3d at 1282.

Like the case of *Nahno-Lopez*, in this case the body of federal common law plus 25 U.S.C. § 345 and 28 U.S.C. § 1331 provide the jurisdictional basis for proceeding before this federal court with the Plaintiffs' continuing trespass claim. *See Complaint*, [doc.1], ¶46. But, it is at this point where the Plaintiffs' legal analysis falls short of the mark in interpreting *Nahno-*

*Lopez*. 625 F.3d at 1282. Plaintiffs failed to capture the 10<sup>th</sup> Circuit’s second and most important component of the analysis in *Nahno-Lopez*, which is deciding the “rule of decision” for the Plaintiffs’ federal common law claim for continuing trespass. Black’s Law Dictionary, 7<sup>th</sup> ed., defines a “rule of decision” as “[a] rule, statute, body of law, or prior decision that provides the basis for deciding or adjudicating a case. In *Nahno-Lopez*, the 10<sup>th</sup> Circuit concluded that “Oklahoma trespass law provides the rule of decision for this federal claim.” (emphasis added). 625 F.3d at 1282. Enable submits this is the substantive conclusion of the 10<sup>th</sup> Circuit in the *Nahno-Lopez* opinion, one which is firmly grounded in established Supreme Court jurisprudence, and that should be applied in this action to govern Plaintiffs’ trespass claim.<sup>1</sup>

For example, in *Nahno-Lopez* the 10<sup>th</sup> Circuit explicitly relies upon the Supreme Court of the United States in *California ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 283, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982)(hereinafter “*California*”). 625 F.3d at 1282. In *California*, the Supreme Court heard a quiet title lawsuit by the State of California against the federal government to determine the ownership of oceanfront property. 457 U.S. at 273. Although the Court observed that a dispute over property involving the rights of the federal

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<sup>1</sup> See e.g., 19 *Fed. Prac. & Proc. Juris.* § 4514 (2d ed.), footnotes 19-21, observing that “the Supreme Court for the past several years has expressed a strong preference for the law of the forum state as its choice of the appropriate rule. Accordingly, the determination of the content of the federal common law may be thought of as primarily the question of whether or not to displace the law of the forum state. The recent cases suggest a strong presumption in favor of non-displacement....”; See also *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 84 (1994)(observing that knowing whether federal common law applies does not much advance the ball, as the real issue is whether the state substantive law rule of decision is to be applied or displaced to decide the claim).

government was to be determined by federal law, the Court held that state substantive law may be borrowed for deciding the “substantive legal issue”, to wit:

Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, *state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.*

457 U.S. at 283.

This is precisely what the 10<sup>th</sup> Circuit did in *Nahno-Lopez* – borrow and apply Oklahoma substantive law to a federal common law trespass claim. 625 F.3d at 1282. The 10<sup>th</sup> Circuit’s holding in *Nahno-Lopez* is also consistent with its later holding in the 2012 case of *Gilmore v. Weatherford*, where Indian Tribal members with restricted, undivided interests in mine tailings, also known as “chat”, sued Oklahoma gravel companies for conversion and accounting in the United States District Court for the Northern District of Oklahoma. 694 F.3d 1160, 1164 (10<sup>th</sup> Cir. 2012). In *Gilmore*, the 10<sup>th</sup> Circuit ruled that the tribal members’ claims for conversion of their property gave the Northern District jurisdiction to hear the claim, but noted the claim itself was grounded in Oklahoma state law, stating as follows, with regard to the rule of decision and the allegations of the underlying Complaint:

Under Oklahoma law, “[c]onversion is any act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein.” *Steenbergen v. First Federal Savings and Loan of Chickasha*, 753 P.2d 1330, 1332 (Okla.1987).

In their complaint, plaintiffs allege:

Contrary to federal law, Bingham has removed nearly all of the trust chat from the Ottawa Pile without approval by the Secretary or the BIA and without any compensation to the Restricted Owners. *Bingham has therefore converted Indian trust property for Bingham's own use and profit.*

692 F.3d at 1172 (emphasis added).

Like in *Nahno-Lopez* and *Gilmore*, in this case the plaintiffs' federal common law claims for continuing trespass are governed by the substantive law of the forum state, which is Oklahoma. Finally, as argued by Enable in its Response and Objection to Plaintiffs' Motion for Partial Summary Judgment on Liability for their Trespass claim and for a permanent injunction [doc. 36], the 10<sup>th</sup> Circuit's application of Oklahoma law in *Nahno-Lopez* went even farther than defining the plaintiffs' trespass claim, as the Circuit also applied Oklahoma law to define the defendants' defenses, observing that "[u]nder Oklahoma law, *consent forms a complete defense to trespass.*" 625 F.3d at 1284 (emphasis added). Once again, this is yet another example of the 10<sup>th</sup> Circuit in *Nahno-Lopez* applying the substantive law of the State of Oklahoma to a federal common law claim for trespass. *Id.* For sake of brevity, Enable herein incorporates by reference the arguments and authorities relied upon by Enable in its Response and Objection, document 36, filed on May 3, 2016.

Accordingly, Enable respectfully requests this Court to issue an Order declaring that Oklahoma state law governing trespass provides the rule of decision for this claim, the applicable defenses, and the damages sought thereunder.

## **II. Oklahoma State Substantive Law Provides the Rule of Decision Governing the Statute of Limitations on Plaintiffs' Trespass Claim.**

The Plaintiffs' arguments about the rule of decision governing the statute of limitations for

continuing trespass are also unavailing in this case. Plaintiffs deftly point out that *Oneida II* holds there is no federal statute of limitations governing federal common law claims. But, Plaintiffs fail to see that this notable gap in the federal common law is generally filled with the state law limitations period for the analogous state law claim of the forum state. In this case, Enable again contends the substantive law of the forum State of Oklahoma provides the applicable rule of decision for the statute of limitations governing Plaintiffs' federal common law continuing trespass claim.

Specifically, in the case of *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240, the Supreme Court observed the traditional rule that [i]n the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim...."). In *Oneida County*, the Court did not apply the general rule though, but rather made an exception to the rule finding it would be inconsistent with federal policy "in these circumstances" to apply the analogous New York state law limitations period when the Oneida Tribe had been on a fifteen (15) year legal quest to acquit property rights which had been the subject of much dispute since 1795.<sup>2</sup> (The Court discussed at length the Oneida's long fight over their homeland).

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<sup>2</sup> See 470 U.S. at 1250 ("[i]n the summer of 1795 [the State of New York] entered into an agreement with the Oneidas whereby they conveyed virtually all of their remaining land to the State for annual cash payments. It is this transaction that is the basis of the Oneidas' complaint in this case." Further, in referencing the long period of discord between the Oneida Tribe and the State of New York, on page 1255 of *Oneida County* the Supreme Court observed that Congress had specifically set out to protect the Oneida Tribe from the New York statute of limitations back in 1950 when it adopted 25 U.S.C. § 233. Thus, the Plaintiffs' noticeable reliance on cases from New York federal courts. None of these facts or exceptional factors from *Oneida* are present in this case, where the issue is the renewal of a

Adopting Oklahoma's analogous state law limitations period governing continuing trespass claims is also consistent with the Ninth Circuit's holding in *Skokomish Indian Tribe v. United States*, where an Indian tribe brought claims alleging that a hydroelectric power plant violated treaty rights, as well as claims for trespass and conversion, among others. 410 F.3d 506, 515-16. The Ninth Circuit held the Indian Tribe's claims were barred by the Washington State statute of limitations and fixed an accrual date from the evidence in the pleadings, observing that:

[A]ll of the Tribe's state-law claims are barred by the applicable statutes of limitations. Under Washington law, the statute of limitations for inverse condemnation is ten years. The statutes of limitations for trespass, negligence, conversion, tortious interference, nuisance and actions under Washington Revised Code section 4.24.630 are three years.

Regarding the accrual of the state law statute of limitations, the 9<sup>th</sup> Circuit stated that:

[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. Stated more succinctly, the law does not require a smoking gun in order for the statute of limitations to commence.

410 F.3d at 516, 518.

Enable contends that Oklahoma's analogous two-year statute of limitations period governing Plaintiffs' continuing trespass should be applied to Plaintiffs' federal common law claims.<sup>3</sup> For sake of brevity, Enable hereby incorporates by reference the arguments and

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term pipeline easement across land that is undisputedly owned in fee by the descendants of Emaugobah, near Anadarko, Oklahoma subject to the trusteeship of the United States.

<sup>3</sup> Plaintiffs reliance on *Hoery v. United States*, 324 F.3d 1220, 1224 (10<sup>th</sup> Cir. 2003) is also misplaced, as the 10<sup>th</sup> Circuit ruled that "[f]or continuing torts, however, the claim continues to accrue as long as tortious conduct continues, *although the plaintiff's recovery is limited by*

authorities relied upon by Enable in its Response and Objection, document 36, filed on May 3, 2016, regarding the accrual of Plaintiffs' cause of action for continuing trespass.

### **III. Oklahoma State Law Provides the Proper Measure of Damages for Plaintiffs' Continuing Trespass Claim.**

Enable seeks a declaratory ruling from this Court holding that Oklahoma state law provides the measure of damages for Plaintiffs' federal common law claim for continuing trespass. Plaintiffs sharply disagree with Enable's position in their Response brief, but noticeably fail to cite any controlling legal authorities showing that Oklahoma's state law measure of damages does not govern their continuing trespass claim. For example, the first case cited by Plaintiffs is an unreported decision from the United States District Court of Colorado, where the district court applied the analogous Colorado state law measure of damages to the Plaintiffs' trespass claim. *See A-W Land Co., LLC v. Anadarko ESP Onshore, LLC*, 2014 WL 7051161 \* 3 (D.Colo. 2014). This case directly supports Enable's argument that analogous state law is frequently applied as the measure of damages.

Likewise, the 10<sup>th</sup> Circuit's ruling in *Beck v. Northern Natural Gas Co.*, 170 F.3d 1018, 1024 (10th Cir.1999), supports Enable's position that state law supplies the proper measure of damages for a trespass to land claim. In *Beck*, Kansas landowners sued Northern Natural Gas Company for trespass and unjust enrichment when it allowed gas to escape its underground gas storage facility and migrate to another underground formation where the gas company did not possess any storage rights. 170 F.3d at 1021. The landowners sought as

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*the statute of limitations to the two-year period dating back from when the plaintiff's complaint was filed.*" (emphasis added). This is precisely the point asserted by Enable.

their measure of damages the profits which Northern had allegedly earned as a result of the unlawful use of the plaintiffs' underground formation. *Id.* at 1024. The 10<sup>th</sup> Circuit disagreed, holding that "[t]he benefit that Northern received from the landowners was the use of the Simpson formation without payment of rent, for which the proper measure of damages was, as the district court found, fair rental value." *Id.* *Beck* supports Enable's position that the measure of damages for the unlawful use of another's property is generally recognized as the fair rental value of the property.

Like *Beck*, one of the recognized measures of damages under Oklahoma law for a trespass claim is the fair rental value of the subject property. *See Gergens v. McCollum*, 1909 OK 214, 111 P.208. Or, in more recent cases, Oklahoma's state and federal courts have held the "measure of damages for trespass is the difference in the value of the land before the trespass and the value after the trespass." *See Tulsa Foods, Inc. v. Wal-Mart Stores, Inc.*, 2007 WL 649347 \* 5 (N.D. Okla.)(unpublished)(citing *Gipson v. Sprint Comm. Co.*, 2003 OK CIV APP 89, 81 P.3d 65, 73)("Sprint correctly points out that the measure of damages for trespass is the difference in the value of the land before the trespass and the value after the trespass."). In this case, Enable respectfully request an Order from this Court declaring that under Oklahoma law the "measure of damages for trespass is the difference in the value of the land before the trespass and the value after the trespass."

Finally, Plaintiffs suggestion that a constructive trust should be imposed on the profits earned by Enable during the period of alleged trespass is misplaced and contrary to Oklahoma law, for the reasons stated above, *supra*. Plaintiffs' citation to the 10<sup>th</sup> Circuit case of *In re Seneca Oil* does not advance their cause. 906 F.2d 1445, 1450 (10<sup>th</sup> Cir. 1990). In *Seneca Oil*, the United States Department of Energy filed a proof of claim in Seneca Oil Company's pending bankruptcy case seeking to recover overcharges applied by Seneca Oil to the oil sale transactions of its customers in violation of federal law. 906 F.2d at 1451. The proof of claim was based on allegations that Seneca Oil had defrauded landowners and violated fiduciary duties owed to them. The 10<sup>th</sup> Circuit ruled that Oklahoma law provided for the imposition of a constructive trust in cases of fraud or the breach of a fiduciary duty. *Id.* Accordingly, *Seneca Oil* has no useful application to this case involving a dispute over a term easement across .73 acres of land.

Finally, Plaintiffs' reliance on Louisiana law is also misplaced. The damages awarded in the case of *Corbello v. Iowa Prods.*, 2003 WL 536727157 \* 2-4, 806 So.2d 32, 40 (La. Ct. App. 3rd Cir. 2001) did not arise from common trespass, but rather from physical injury to an aquifer caused by the unlawful discharge of salt water on the landowner's property and the costs of restoration of the land to its original condition as specified by a lease. These facts are not present in this case, where Plaintiffs have agreed their property has not been physically damaged by the presence of Enable's pipeline within the confines of the original easement granted in 1980. Accordingly, Louisiana law trespass law has no bearing on this action.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of May, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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