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

MARCIA W. DAVILLA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-15-01262-M
	)	
ENABLE MIDSTREAM PARTNERS, LP, et al.	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO STAY PERMANENT INJUNCTION AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Regulations

Other Authorities

MOTION

On March 28, 2017, the Court entered an Order granting partial summary judgment to Plaintiffs on their claims of trespass. As part of its Order, the Court enjoined Defendants Enable Midstream Partners, LP, *et al.* (collectively hereinafter "Enable") from continuing to use approximately 1,300 feet of natural gas pipeline that runs under approximately 0.73 acres of land in which Plaintiffs own beneficial interests. Docket No. 56 (the "Injunction Order"). The Court's Injunction Order further requires Enable excavate and remove the 1,300 feet of pipeline from the land within six (6) months; *i.e.*, on or before September 28, 2017. The docket call for the trial of this dispute is set for January 2018.

On April 25, 2017, Enable appealed the Court's Injunction Order to the Tenth Circuit. Docket No. 60. If necessary, Enable may file additional appeals following trial that may also raise issues concerning the Injunction Order. Pursuant to Fed. R. Civ. P. 62(c), Enable respectfully moves the Court to stay enforcement of its Injunction Order until all appellate issues regarding the Injunction Order are decided. Enable further requests that if its appellate efforts are ultimately unsuccessful, Enable be granted a brief, three (3) month period to comply with the Court's Injunction Order following exhaustion of its appellate rights. In support of its Motion, Enable submits the following brief.

BRIEF IN SUPPORT

SUMMARY OF THE ARGUMENT

"[T]he Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court

take a fresh look at the decision of the trial court before it becomes irrevocable." *Providence Journal v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). In accordance with this mandate, stays of injunctions pending appeal are routinely granted where, following a successful appeal, it would be impossible or financially impracticable to restore the *status quo*. *See, e.g.*, *Becker v. United States*, 451 U.S. 1306, 1311 (1981) (holding the "balance of equities" in considering a stay tipped heavily in applicants' favor where, absent a stay, their appeal would likely become moot); *Providence*, 595 F.2d at 890 (staying an injunction order compelling disclosure of confidential documents because "Appellants' right of appeal [would] become moot unless the stay is continued pending determination of the appeals. . . . [given that o]nce the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time [and t]he *status quo* could never be restored") (emphasis added); *Isaly Co. v. Kraft, Inc.*, 622 F. Supp. 62, 63 (M.D. Fla. 1985) (granting defendant's motion for stay of injunction pending appeal because denial would force defendant to "incur substantial costs" changing its packaging design and advertising, after which defendant "would find little or no value" reverting to original package design even if it prevailed on appeal, thus mooting appeal "for all practical and economic purposes").

In its current and post-trial appeals, Enable will ask the Tenth Circuit to conclude the company should not be required to remove its pipe from the subject property for a variety of reasons, including that Enable should be allowed to remain on the property

pursuant to an easement that can be acquired by eminent domain.[1] If a stay of the Court's Injunction Order is not granted, Enable's right to appellate review will be meaningless because the company will have already been forced to remove its pipe from the property before the Tenth Circuit determines whether removal is ultimately required under the law and all appeals are final. Once Enable incurs the costs of removing its pipe, the company will have no financial incentive to replace the pipe, even if the Tenth Circuit says it should never have been required to be removed in the first place. In short, absent the issuance of a stay, Enable will lose the right to seek meaningful appellate review of this Court's Injunction Order.

Accordingly, pursuant to Fed. R. Civ. P. 62(c), Enable respectfully moves the Court to stay enforcement of its Injunction Order until all appellate issues regarding the Injunction Order are decided, including Enable's post-trial appeal, and, if necessary, for a brief three (3) month period after final resolution. Without a stay, Enable's appeal rights will be rendered meaningless and it will suffer irreparable harm. Conversely, Plaintiffs will not be harmed by the requested stay as the pipeline has been on the property nearly 40 years, does not substantially encumber or diminish Plaintiffs' enjoyment of their

[1] On April 25, 2017, Enable appealed the Court's Injunction Order to the Tenth Circuit. Docket No. 60. Plaintiffs object to Enable's appeal as premature and/or argue that the Tenth Circuit should not exercise pendent jurisdiction to consider issues related to this Court's Injunction Order. 17-6088, Docket No. 01019807519. While Enable believes the Tenth Circuit can and should exercise pendent jurisdiction to consider such issues, the Court of Appeals may determine they can only be raised post trial. Further, there are certain issues not covered under pendent jurisdiction – such as Enable's assertion of certain defenses including statute of limitation and laches – that cannot be raised until post trial. Thus, both the current appeal and any post-trial appeal stand to affect the enforceability of the Injunction Order.

property, and any damages suffered by Plaintiffs are monetary in nature and are therefore not irreparable. And, as set forth in the Background and Procedural History, Enable worked in good faith to secure a new 20 year easement and attempt to avoid condemnation, even if that effort ultimately failed.

I. BACKGROUND AND PROCEDURAL HISTORY

The Kiowa 84 Allotment

Plaintiffs own beneficial interests in 136.25 acres of grassland located in Caddo County, Oklahoma. (Ex. "1") (Davilla_00052-63). This property was originally allotted by the United States to a Native American named Emaughobah or Millie Oheltoint and is known as "Kiowa Allotment 84." *See* Deed (Docket No. 36-1); JSR (Docket No. 22) at 2 (Stipulated Fact No. 1). Kiowa Allotment 84 is presently held in trust by the United States for the benefit of Plaintiffs. *See* JSR (Docket No. 22) at 2 (Stipulated Fact No. 1).

Pipeline at Issue

At issue in this lawsuit is approximately 1,300 feet of natural gas pipeline that traverse Kiowa Allotment 84. These 1,300 feet of pipe are part of an approximately 100 mile long pipeline that runs between Canute and Cox City, Oklahoma, which is referred to as "Line 25." Line 25 is part of a broader natural gas pipeline system that traverses approximately 2,200 miles of Oklahoma.

The Initial 20 Year Easement

On November 19, 1980, the United States, on behalf of Plaintiffs (or their predecessors), granted an easement under 0.73 of the 136.25 acre Kiowa Allotment 84 tract to Producer's Gas Company ("Producer's"). (Ex. "2") (Davilla0001-2). This

easement, which was approved by the Bureau of Indian of Affairs (the "BIA"), encumbered 0.536% of Kiowa Allotment 84 and allowed 77 rods (or approximately 1,300 feet) of Line 25 to be run under the property for twenty (20) years. *Id.* In exchange for this twenty (20) year easement, Enable's predecessor paid Plaintiffs (or their predecessors) $1,925, or $25 per rod. *Id.*

In connection with its operation of Line 25, in and around 1980 Producer's also acquired 20-year easements over other properties, including tracts of allotted Indian land adjacent to Kiowa Allotment 84. *See*, e.g., Ex. "3" (1980 Keehbone Easement). As with the initial easement over Kiowa Allotment 84, the easements over adjoining allotted properties were also approved by the BIA in 1980. *See id.* Kiowa Allotment 84, as well as the adjoining properties upon which Producer's also obtained easements, are depicted in Fig. A, below.

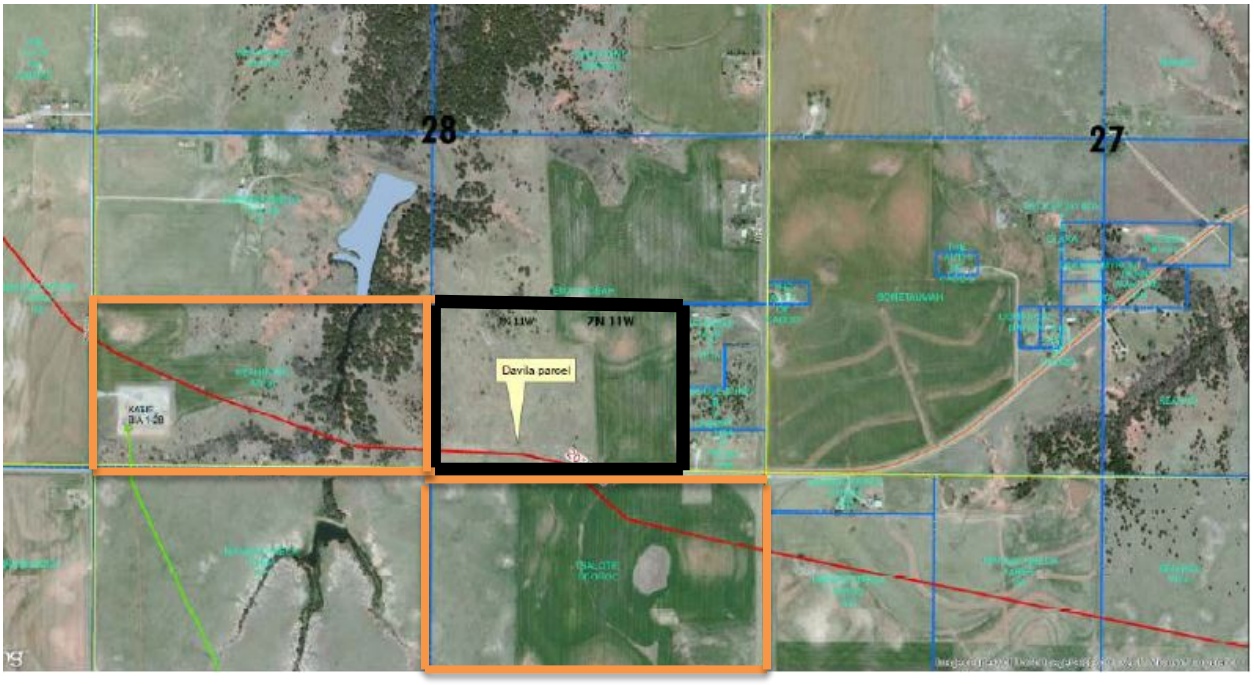

Fig. A. (Aerial photo of subject pipeline running under Kiowa Allotment 84 outlined in black). (Adjacent tracts upon which Producer's also obtained easements outlined in orange).

Enable Acquires Line 25, Obtains New Easements (Approved by BIA) on Adjacent Allotted Tracts, and Attempts to Obtain a New Easement on Kiowa Allotment 84

In and around 1999, Enable acquired Transok, Inc., the company which owned Line 25 at that time. *See* Declaration of Brian Green (Ex. "4") at ¶ 4-8. In connection with this transaction, Enable obtained the easement rights Producer's had procured on Kiowa Allotment 84 and adjacent allotted tracts. *See id.* In 2000, shortly after this transaction closed, these 20 year easements expired. *See* Exs. 2 and 3 (the Easements).

The expiration of the easements over Kiowa Allotment 84 and the adjacent allotted tracts did not come to the attention of Enable until early 2002.[2] Later that year, Enable submitted Right-of-Way Applications for new 20 year easements over these tracts. In each application, Enable offered the landowners $40 per rod—a number derived from appraisals of the relevant properties.[3] *See* [Ex. "5"].[4] At that time, $40 per rod was a rate commonly paid to obtain *perpetual* easements from private landowners in

[2] In a transaction such as Enable's purchase of Transok, Inc., the purchaser is typically unable to complete all diligence related to the myriad easements acquired form the seller prior to closing. *See* Declaration of Brian Green (Ex. 4) at ¶ 9. As a result, it is not unusual for the buyer to learn of expired easements after closing. *See id.*

[3] A "rod" is a unit of length equal to 5½ yards or 16½ feet.

[4] Kiowa 84 easement: Enable's June 14, 2002 letter to the BIA states that "[Enable] hereby submits an offer of settlement in the amount of $3,080.00 or $40.00 per rod." Keehbone easement: Landowner Consent to Grant of Right-of-way and subsequent checks to landowners indicate landowners accepted Enable's offer of $6,809 for 170.22 rods ($40 per rod). Tsalote easement: Right-of-Way Application and subsequent Grant of Easement for Right-of-Way Renewal indicate landowners accepted of Enable's offer of $3,920 for 98 rods ($40 per rod).

the area. *See* Declaration of Brian Green (Ex. "4") at ¶ 11. Enable was, however, willing to pay this same rate for 20 year term easements over Kiowa Allotment 84 and the adjoining allotted tracts. With respect Kiowa Allotment 84, the $40 per rod offer constituted an increased price of $3,080 (or $40 per rod) for the years 2000 to 2020, up from $1,925 (or $25 per rod) for the years 1980 to 2000.

The beneficial owners of the allotted tracts adjacent to Kiowa Allotment 84 agreed to Enable's $40-per-rod offers, and these new 20-year easements were approved by the BIA at that price. *See* Exs. "6" and "7" (New Easements). Several of the beneficial owners of Kiowa Allotment 84 also agreed to the price with regard to their property. *See* Docket Nos. 32-3 at 3 (noting that Enable secured approval from 17.5% of the ownership interests in the subject property); *see also* Docket No. 36-4 (signed approvals). Other beneficial owners of Kiowa Allotment 84 would not, however, give their consent and made inquiry to the BIA regarding Enable's application. (Ex. "8") (Davilla0007-8).

In response to the inquiry, the BIA explained that Enable's offer of $40 per rod was based on an appraisal submitted to the BIA, and that this appraisal had been "forwarded to the Office of Special Trustee . . . for review and recommendation." *Id.* The BIA further explained that the review "**supported [the] appraisal price of $3,080.00 ($40.00 per rod)**" and "**encourage[d] [the Plaintiffs] to finalize negotiations with [Enable] and provide [] written consent as soon as possible**." *Id.* (Emphasis in original).

Notwithstanding the fact the beneficial owners of the allotted tracts adjacent to Kiowa Allotment 84 had accepted Enable's offer of $40 per rod and the BIA had

encouraged Plaintiffs to do the same, certain Plaintiffs insisted Enable pay approximately $63,000 (or approximately $818.18 per rod) for a new twenty (20) year easement. (Ex. "9") (Davilla_0009-10). The $63,000 demand was the full market value for the entire 136.25 acre surface of Kiowa Allotment 84 as determined by the appraisal Enable provided to BIA in support of the company's $40 per rod offer. (Ex. "10") (Davilla001380-1425). Enable was unwilling to pay the appraised purchase price of the entire surface of the 135.25 acre parcel for a twenty-year 0.73 acre subsurface easement.

Continued Negotiations Regarding Kiowa Allotment 84

Although Enable was unwilling to pay the $63,000 demanded, Enable's Right-of-Way Application remained pending with the BIA, and Enable continued to meet and negotiate with the beneficial owners of Kiowa Allotment 84 and the BIA in hopes a deal could be reached. After one such meeting in April 2006, the BIA corresponded with the beneficial owners and reiterated that "Enable's offer of $3,080.00 ($40.00 per rod) met or exceeded the appraisal completed by the Office of Special Trustee's Office of Appraisal Services." (Ex. 9) (Davilla0009-10). In the letter, the BIA also addressed the aforementioned $63,000 demand by certain of the beneficial owners. The BIA explained the "Agency d[id] not have the authority to negotiate for a value exceeding the appraised value on the owner's behalf." *Id.*

Enable Makes a Partial Payment in 2006

By spring 2006, the parties had still not reached a deal. At this point, the BIA determined it appropriate to levy a "trespass assessment" on Enable. *Id.* "The trespass period was determined to be from November 18, 2000 . . . to . . . August 2006," and the

BIA calculated that trespass damages for the period to be $1,098.35. Docket Nos. 32-3, at 3. The BIA based its calculation on the $40 per rod offer the BIA had found "met or exceeded the appraisal completed by the Office of Special Trustee's Office of Appraisal Services." *Id.* Enable paid the $1,098.35 on September 13, 2006, which was disbursed to the Individual Indian Monies accounts of the beneficial owners of Kiowa Allotment 84 at the time. *Id.*

In later discussing this trespass payment, the BIA made two (2) key observations. First, the BIA noted that by virtue of Enable's payment of the trespass assessment, "[t]he trespass [w]as resolved" as reflected in a "certified letter to [Enable], dated August 24, 2006." *Id.* at 5. The BIA also noted that while it believed Enable began trespassing when the initial easement expired in 2000, Enable's 2002 renewal application tolled any trespass during its pendency. *See id.* As a result, the BIA observed that by paying a trespass assessment for its occupancy on Kiowa Allotment 84 from the time of its 2002 renewal application to the time of the 2006 assessment, Enable "paid four extra years of trespass fees." *Id.* The correct assessment would have only covered the two (2) years from 2000 to the submission of the 2002 renewal application, not the full six (6) years from 2000 to the time of the 2006 assessment.

Plaintiffs Refuse to Continue Negotiating with Enable

Following Enable's payment in September 2006, the beneficial owners of Kiowa Allotment 84 continued their dealings with the BIA but ceased communicating with Enable. "On December 21, 2007, a meeting was held at the [BIA's local office] between landowners . . . . and Agency staff." *Id.* at 3. "The landowners . . . stated they would not

agree to the $40 per rod offer to renew." *Id.* These landowners "were advised of Enable's intentions to file condemnation proceedings and were given the opportunity, which they refused, to call Enable regarding possible settlement." *Id.* (Emphasis added).

BIA Approves a New Easement Over Kiowa Allotment 84

By May of 2008, no deal had been reached and Enable's Right-of-Way Application had lapsed. Certain of the landowners continued demanding $63,000 for the easement, which exceeded the appraisal amount BIA could negotiate (and Enable would not agree to pay). *Id.* At that point, Enable "was in the process of forwarding the case for condemnation proceedings," but "subsequently stopped the condemnation action and resubmitted the ROW application for $40 per rod." *Id.* On June 23, 2008, the Acting Superintendent of the BIA's local Anadarko Agency, Robin Phillips, approved the Enable's application. (Ex. "11") (Davilla00011).[5]

[5] Pursuant to 25 U.S.C. § 357, "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located . . . ." The Tenth Circuit has made clear that this statute permits condemnation of allotted lands such as the Kiowa Allotment 84 even after such lands have passed to individual heirs of the original allottee. *See Transok Pipeline v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977). The Tenth Circuit recently held, however, that if an Indian tribe, rather an individual heir, comes to own a portion of an allotted tract, that tract can no longer be condemned pursuant to § 357. *See Pub. Serv. Co. of N.M. v. Barboan*, No. 16-202, slip op of May 26, 2017.

In 1983, Congress passed a law that allows tribes to purchase or, in certain instances, obtain by escheatment, fractional interests in allotted tracts. *See* Indian Land Consolidation Act (the "ILCA"), Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §§ 2201-2221). Prior to the BIA's June 2008 approval of Enable's ROW Application, no portion of the Kiowa Allotment 84 had, however, been acquired by a tribe pursuant to the ILCA. Rather, this occurred for the first time in November 2008, when Eugenia Allison Keahbone, one of Emaugobah's heirs, died intestate and a very small beneficial interest in the Kiowa Allotment 84 she owned escheated to the Kiowa Tribe. *See* Docket No. 36-3.

In her approval, Superintendent Phillips again noted that "[t]he $40.00 per rod offer from Enable [met] the appraisal for a new easement of an already existing buried pipelines." *Id.* Superintendent Phillips went on to explain that pursuant to 25 C.F.R. § 169.3(c)(5), the BIA has the authority "to grant rights-of-way over and across individually owned lands without the consent of the Individual Indian owners when the owners interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also, **that the grant will cause no substantial injury to the land or any owner thereof**." *Id.* (Emphasis in original). Superintendent Phillips found both of these criteria were satisfied and approved Enable's offer.

Superintendent Phillips' Approval is Appealed

On July 24, 2008, one month after BIA approval of new easement, certain of the beneficial owners of Kiowa Allotment 84 appealed this decision to the BIA's Regional Director. (Ex. "12") (Davilla00014-15). In the Statement of Reasons these landowners filed in support of their appeal, they expressed concern about a 2008 approval of a $40 per rod offer that was premised on a 2002 appraisal. (Ex. "13") (Davilla00018-43). The landowners did not, however, challenge Superintendent Phillips' conclusion that approval of Enable's offer and the continued presence of the pipeline under Kiowa Allotment 84 would "cause no substantial injury to the land or any owner thereof." *See id.*

Because no tribe had obtained an interest in Kiowa Allotment 84 at the time, Enable had the absolute right to condemn an easement over the property at any time prior to the BIA's June 2008 approval of the company's Right-of-Way Renewal Application. This is so regardless of the Tenth Circuit's ruling in *Barboan*. A ruling which is, in any event, currently subject to a Petition for Rehearing *En Banc*.

In a decision issued May 23, 2010, the BIA's Regional Director Dan Deerinwater granted the landowners' appeal. Docket Nos. 32-3. Director Deerinwater concluded that Enable's offer of $40 per rod was, in his estimation, too low, and that "[a] review of recent transactions for th[e] area reveal[ed] a range of $60 to $80 per rod" (or $4,620 to $6,160 total for the easement), which was still much less than the $818.18 per rod (or $63,000) certain landowners were demanding. *Id.* at 5. Director Deerinwater "remand[ed] [the case] for further negotiation," adding that if an agreement was not reached, Enable "should be directed to move the pipeline off the subject property." *Id.* No such removal order was ever issued.

Enable Finally Resorts to its Right of Condemnation

Enable had negotiated in good faith with the beneficial owners of Kiowa Allotment 84 and the BIA in its representative capacity for more than ten (10) years. Enable had paid an assessment fee for holding over in an amount determined by the BIA. Subsequently, the BIA had approved Enable's $40/rod or $3,080 offer, but later revoked that approval after a two (2) year appeal. Enable did not believe it should have to pay full market value for the surface rights to the entire 136.25 acres of the Kiowa Allotment 84 in order to obtain a twenty (20) year underground easement on less than three quarters (3/4) of an acre. Nor did Enable feel it should have to attempt to obtain a new easement or easements elsewhere and reroute its pipe at the estimated expense of more than $500,000. *See* Declaration of Brian Green (Ex. "4") at ¶ 17 and Preston Soell (Ex. "14") at ¶ 5.

Enable commenced a condemnation proceeding on November 11, 2015 to acquire a 0.73 acre sub-surface easement on Kiowa Allotment 84 via the power of eminent domain, which Enable believed was the procedure available to it but that it hoped to avoid by reaching an amicable agreement. The eminent domain procedure would result in a judicially determined fair market value that Enable believed would be in an amount consistent with its appraisal, which amount was accepted by the adjoining land owners and was far less than the fair market value of the surface of the entire 136.25 acre tract being demanded. *See Enable Oklahoma Intrastate Transmission, LLC v. A 25 foot wide easement et al.*, CIV-15-1250-M (the "Condemnation Case") (This case was filed five days later by the Plaintiffs). The defendants in the Condemnation Case, including nineteen of the 38 beneficial owners of Kiowa Allotment 84 and the United States, filed motions to dismiss, challenging Enable's ability to condemn the land in light of the Kiowa Tribe's 1.1% undivided interest in the tract. *See* Condemnation Case, Docket Nos. 32, 47.

Status of Enable's Condemnation Lawsuit
(Awaiting Ruling on Motion for New Trial)

In an August 18, 2016 Order, this Court dismissed Enable's Condemnation Case for lack of subject-matter jurisdiction and inability to join a necessary party. Condemnation Case, Docket No. 55. The Court ruled that because of the Kiowa Tribe's interest in the tract, the tract was cloaked in sovereign immunity and could not be condemned under 25 U.S.C. § 357. The Court further found that the Kiowa Tribe was a necessary party to the action but could not be joined because of its sovereign immunity.

Id. On September 14, 2016, Enable filed a Motion for New Trial pursuant to Fed. R. Civ. P. 59, Condemnation Case, Docket No. 59, and subsequently filed a Notice of Supplemental Authority in support of its Motion. Condemnation Case, Docket No. 77. This Motion remains pending before the Court.

Plaintiffs' Trespass Action and Enable's Condemnation Counterclaim

Five days after Enable filed the Condemnation Case – and more than five (5) years after Director Deerinwater determined Enable's $40 per rod offer should not be approved by the BIA[6] – the 38 beneficial owners of Kiowa Allotment 84 filed this parallel action, seeking money damages and a permanent injunction requiring Enable to remove its 77 rods (or 1,300 feet) of pipe from the property. Enable asserted a condemnation counterclaim in this case. Docket No. 7. On August 18, 2016, the Court dismissed Enable's counterclaim on the same grounds relied on in its order of the same date in the Condemnation Case. Docket No. 41. On March 28, 2017, this Court granted Plaintiffs' Motion for Partial Summary Judgment as to its trespass claim and issued the Injunction

[6] Plaintiffs seek to disgorge years of profits they say Enable was able to wrongfully realize while trespassing over the Kiowa Allotment 84. Enable, for its part, disputes there has been a trespass, particularly given that the BIA has acknowledged that in light of the 2006 payment from Enable, any "trespass has been resolved." *See* Docket No. 32-3 at 5. Moreover, Enable contends that even if there has been a trespass, the facts of this case, under whatever law is finally determined to be applicable, do not warrant the disgorgement sought by Plaintiffs. This is particularly so given that Plaintiffs waited years to sue Enable. If Plaintiffs were awarded the disgorgement they seek, this "would effectively compensate the plaintiffs for delaying the filing of this action." *Hammond v. County of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) *abrogated on other grounds, L.W. v. Grubbs*, 92 F.3d 984 (9th Cir. 1996)). Plaintiffs should not be "encourage[d] . . . to intentionally refrain from filing suit until such time as defendants ha[ve] amassed huge profits flowing from alleged misconduct. Such delay and unjust enrichment cannot be rewarded." *Id.*

Order requiring that Enable remove the Pipeline within six months (by September 28, 2017). Docket No. 56. On April 25, 2017 Enable appealed the Court's Injunction Order. Docket No. 60.

II. ARGUMENT & AUTHORITIES

A. The Court Should Stay its Injunction Order to Preserve the *Status Quo* Pending the Outcome of Any Appeals Filed by Enable

Pursuant to Fed. R. Civ. P. 62(c) this Court has the power to stay its Injunction Order and maintain the *status quo* pending the outcome of Enable's appellate rights to the Tenth Circuit regarding the Injunction Order. "An application under Rule 62(c) is committed to the Court's discretion informed by the balancing of [four] factors . . . .: (1) the threat of irreparable harm to the [moving party] absent a stay; (2) the harm to the [non-moving party] from the issuance of the stay; (3) the harm to the public interest; and (4) the likelihood that the [moving party] will succeed or prevail on appeal." *NXT, INC. v. Republic of KOREA*, No. CIV-10-561-W, 2013 WL 12090245, at *3 (W.D. Okla. Apr. 24, 2013) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Securities Investor Protection Corp. v. Blinder, Robinson & Co. Inc.*, 962 F.2d 960, 968 (10th Cir. 1992)).

Enable respectfully submits that, as discussed below, upon appropriate consideration of the four (4) factors to be balanced, the Court should, pursuant to Fed. R. Civ. P. 62(c), enter a stay of its Injunction Order pending the resolution of any appeals Enable files with the Tenth Circuit and, if necessary, for a short, three (3) month period of time following the final resolution of Enable's appellate rights.

1. As a Practical Matter, Enable's Appellate Rights Will Be Rendered Meaningless, and Enable Will Suffer Irreparable Harm, if a Stay is Not Entered

Enable will suffer irreparable harm if a stay is not entered and Enable is required to remove its pipe from Kiowa Allotment 84 before all appellate issues regarding the Injunction Order are decided, including but not limited to whether Enable can obtain an easement via the power of eminent domain. If a stay is not entered to preserve the *status quo* and the appellate court concludes Enable has the power of eminent domain or otherwise reverses the Injunction Order, Enable would have been forced to remove and relocate its pipe at great expense of time and money, only to later to have it determined this was unnecessary.

To comply with the Court's Injunction Order, Enable would incur not only the costs of excavation and remediation, but also the costs of acquiring new easements and rerouting portions of Line 25. These costs may exceed $500,000. *See* Declaration of Brian Green (Ex. "4") at ¶ 17 and Preston Soell (Ex. "14") at ¶ 5.

By contrast, if Enable is ultimately able to obtain an easement on Kiowa Allotment 84 or the Court's Injunction Order is reversed on some other basis, the company will incur none of these expenses. Further, during the course of Enable's attempts to negotiate a new twenty (20) year easement on Kiowa Allotment 84 from 2000 to 2020, Enable offered a price of $40 per rod for the seventy-seven (77) rods that run under the property. *See* Docket Nos. 32-3 at 1. This offer, based on a valid appraisal, would have led to a total payment by Enable of $3,080. *See id.* At most, even taking the BIA Regional Director Dan Deerinwater's determination in his May 23, 2010 ruling,

Docket Nos. 32-3, that "[a] review of recent transactions for th[e] area reveal[ed] a range of $60 to $80 per rod," yields a payment in the price range of $4,620 to $6,160 for renewal of the easement from 2000 to 2020.

Requiring Enable to remove and relocate the pipe before Enable exhausts all available appellate remedies regarding the Injunction Order would, for all practical and economic purposes, render Enable's appellate rights meaningless. In such circumstances, stays are granted to preserve the *status quo* during appellate review, where restoring the *status quo* after a successful appeal would be impossible or financially impracticable. *See Becker v. United States*, 451 U.S. 1306, 1311 (1981) (holding the "balance of equities" tipped heavily in stay applicants' favor where absent a stay, their appeal would likely become moot).

For example, if a favorable ruling by the appellate court on Enable's condemnation claim comes after Enable has already removed and rerouted its pipe, Enable would have the right to condemn an easement under Kiowa Allotment 84 to allow the pipeline to remain. However, Enable would have no reason to do so at that point given that its pipe would already be removed and relocated at great expense. This underscores how meaningless, in a practical and economic sense, Enable's appellate rights would become if a stay is not issued. *See Isaly Co. v. Kraft, Inc.*, 622 F. Supp. 62, 63 (M.D. Fla. 1985) (granting defendant's motion for stay of injunction pending appeal because denial would force defendant to "incur substantial costs" changing its packaging design and advertising, after which defendant "would find little or no value" reverting to original package design even if it prevailed on appeal, thus mooting appeal "for all

practical and economic purposes"); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (defining irreparable harm, in part, as an inability to restore the prior *status quo*); *Providence*, 595 F.2d at 890 (granting a stay of district court injunction order compelling disclosure of confidential documents) (finding that "Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The *status quo* could never be restored.").

Of further note regarding irreparable harm, Plaintiffs are individuals with fractional undivided interests in Kiowa Allotment 84. As a result, it is highly unlikely (if not impossible) they could post a bond to compensate Enable for the costs of excavating and relocating the pipeline if a stay is not entered and Enable prevails on appeal. And, while "economic loss is usually insufficient to constitute irreparable harm," imposing "money damages that cannot later be recovered . . . constitutes irreparable injury." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (holding absent preliminary injunction, law firm would be unable to recoup monies from Indian tribe because of sovereign immunity and would therefore be irreparably harmed); *Ligon v. City of N.Y.*, No. 08 CIV. 1034 SAS, 2013 WL 227654, at *3 (S.D.N.Y. Jan. 22, 2013) (finding denial of stay would impose "unnecessary administrative costs" on New York Police Department that were "in some sense irreversible," thereby constituting irreparable harm).

Beyond all this, in the event its appellate efforts are unsuccessful, Enable will need a brief period of time after the Tenth Circuit rules to remove its pipe from Kiowa

Allotment 84 in a commercially reasonable manner. The Court's Injunction Order directs Enable to remove the 1,300 or so feet of pipe from under the property. These 1,300 feet of pipe are, however, part of the longer 100 mile long Line 25. In order to remove the 1,300 feet of pipe from the property in a commercially reasonable manner, Enable will need to acquire new easements and lay additional pipe that will allow Line 25 to be run around Kiowa Allotment 84.

In light of Plaintiffs' request for injunctive relief, Enable began the process of evaluating and potentially acquiring the new easements that will be necessary to run Line 25 around Kiowa Allotment 84 in January 2017. *See* Declaration of Brian Green. (Ex. 4) at ¶ 12. Enable has, since that time, persisted in these efforts and plans to continue to do so while this case progresses both before this Court and the Tenth Circuit. Based on its experience – and in particular its prior dealings with the BIA – Enable believes this work can be completed and the necessary easements obtained approximately one (1) year from now. *See id.* at ¶ 15. Enable respectfully suggests that the company will not be able to exhaust its appellate rights during this time period.

Enable is willing to do the work and incur the costs required to obtain new easements and have the project to reroute of Line 25 "shovel ready" in the event the company is unsuccessful in its appellate efforts. It would not, however, make economic sense for Enable to be required to lay pipe in these easements and be prepared to immediately transition off Kiowa Allotment 84 following unsuccessful appellate efforts. Given the costs associated with laying these new pipes, once Enable takes this action the company will have no economic incentive to continue to press its appellate rights. If,

however, Enable has a brief, three (3) month period following any unsuccessful exhaustion of its appellate rights to lay these new pipes, remove the existing 1,300 feet of pipe from Kiowa Allotment 84, and complete its "wire around," Enable's appellate rights will not be mooted. *See* Declaration of Preston Soell (Ex. 14) at ¶ 4.

As the foregoing demonstrates, in the absence of a stay Enable will suffer irreparable harm, and an injunction is warranted to preserve the *status quo* and so that Enable's appeal rights are not rendered, for all practical and economic purposes, meaningless.

2. Plaintiffs Will Not Be Harmed by the Issuance of Stay

Plaintiffs will not be harmed by a stay of the Injunction Order. To be clear, the relief Enable is requesting will not delay the proceedings in this case, which are the continued litigation of Plaintiffs' claims for damages as a result of Enable's alleged trespass.[7] Enable merely asks the Court to preserve the *status quo* with respect to the operation and location of the pipe. Plaintiffs will not be substantially burdened if the pipe – which has been in continuous operation in its present location for more than 35 years – remains in place for a short time longer pending the outcome of Enable's appeal.

There is no evidence that a stay of the Injunction Order will substantially encumber or diminish Plaintiffs' enjoyment of the subject property. Aerial photos of the

[7] Because Enable is not requesting a stay of all proceedings but merely a stay of the Injunction Order, the additional requirements that the stay movant "make a strong showing of necessity" or "make out a clear case of hardship or inequity" do not apply here. *See Apache Tribe of Oklahoma v. Brown*, No. CIV-10-646-D, 2011 WL 710486, at *2 (W.D. Okla. Feb. 22, 2011) (citing *Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir.1983).

tract show it is undeveloped grassland suitable for grazing. *See* Fig. A, *supra.* Enable's pipe operates below approximately 0.5% of this grassland, and Plaintiffs have expressed neither the means nor desire to develop the sub-surface in a manner that would be impeded by Enable's 1,300 feet of pipe. Thus, if the Court grants a stay of the Injunction Order, Plaintiffs' injury would, at most, be from Enable's continued trespass under approximately 0.5% of their land for the duration of the stay. Considerations such as these were the basis for the BIA's determination that granting Enable a right-of-way on the tract would "cause no substantial injury to the land or any owner thereof." Ex. 11 (Davilla00011).

Further, any ultimately determined damages Plaintiffs may be found to have suffered would be "compensable in money damages" and, therefore, not irreparable—unlike the harm Enable will suffer absent a stay, as discussed above. *See Walker v. Kingfisher Wind, LLC*, No. CIV-14-914-D, 2016 WL 5947307, at *7 (W.D. Okla. Oct. 13, 2016) (denying landowners permanent injunction requiring defendant-wind company to move wind turbines, in part because injunctive relief sought would impose "enormous cost and delay" on defendant); *Sampson v. Murray*, 415 U.S. 61, 90 ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."). This, too, counsels for the granting of a stay.

3. Public Interests Favor the Issuance of a Stay

The public interest also supports issuance of a stay of the Injunction Order. There is a strong public policy in favor of appeal rights. As has been said, "the Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal.

Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable." *Providence*, 595 F.2d at 890.

Beyond a public interest in meaningful appeal rights, as discussed, *supra*, the 1,300 feet of pipe running under approximately 0.5% of Kiowa Allotment 84 is part of a longer, 100 mile long pipe known as Line 25, which is part of a 2,200-mile-long system that provides natural gas to a large number of customers.

If the Court does not issue a stay (and in particular a stay for a period of time after the resolution of Enable's appellate rights), Enable may be forced to remove its pipe from Kiowa Allotment 84 before it can construct a replacement, and this could cause Enable's pipeline to operate in a sub-optimal manner. This is particularly troublesome given that a major customer not far from the subject tract is a power plant operated by Public Service Company of Oklahoma, which services a large number of southwest Oklahoma homes and businesses. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 357–58 (10th Cir. 1986) (holding that for purposes of a preliminary injunction involving a public utility, "the interest of purchasers of electric power" is the "public interest"); *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 139 (D.D.C. 2006) (same). Given the strong public interest in favor of meaningful appeal rights, and not forcing customers to deal with sub-optimal service, a stay of the Injunction Order is proper.

4. The Likelihood Enable Will Prevail on Appeal

As noted *supra*, "where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat

relaxed." *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001)). Under this relaxed standard, Enable can demonstrate probability of success by raising "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.*

Enable has detailed its position concerning the question of whether the company has the power to obtain an easement on Kiowa Allotment 84 via eminent domain in a Motion for New Trial pending before the Court in the parties' parallel lawsuit. *See* Condemnation Case, Docket No. 55. Enable submits its currently pending appeal, which is premised on the same arguments as its pending motion for new trial, will raise question serious questions that deserve a final decision by the Court of Appeals. To avoid rehashing the substance of these issues, Enable incorporates the analysis set forth in its pending motion for new trial.

In addition to the issues raised in Enable's current appeal, it is likely there may be additional appeals filed which also raise issues concerning the Court's Injunction Order. These issues would also be serious, substantial, and difficult. In short, Enable has and will raise serious appellate questions that deserve a final decision by the court of appeals. Therefore, a stay of the Injunction Order is warranted.[8]

[8] As noted, *supra* n. 5, while Enable acknowledges the Tenth Circuit's recent decision in *Barbaon*, a petition for rehearing *en banc* has been filed. Further, the case will potentially be the subject of a petition for *certiorari* to the Supreme Court regardless of any *en banc* ruling, and the case raises the type of legal issue where *certiorari* may very well be granted. Enable further believes there are potential distinctions between the New Mexico case and the present case, including statute of limitation arguments. *See*

B. Enable Should Not Be Required to Post a Bond

Rule 62(c) states that if a stay is entered, the Court's Order should be "on terms for bond or other terms that secure the [non-moving] party's rights." The purpose of requiring security from the moving party is to ensure that the non-moving party will be able to be made whole by the moving party in the event of an unsuccessful appeal. In this case, this means the security from Enable would be designed to ensure that Plaintiffs can recover any trespass damages it is determined they might suffer during the pendency of a stay.

Although Rule 62(c) specifically references a bond, the rule does not require this particular form of security. Rather, "[i]t is within a district court's discretion to stay execution of a judgment pending appeal without requiring a bond." *Harrell ex rel. N.L.R.B. v. Big Ridge, Inc.*, No. CIV. 12-40-GPM, 2012 WL 1601166, at *2 (S.D. Ill. May 7, 2012) (citing *Lightfoot v. Walker*, 797 F.2d 505, 506 (7th Cir. 1986)). "When making this decision, a court should consider the following criteria: (1) 'the complexity of the collection process'; (2) 'the amount of time required to obtain a judgment after it is affirmed on appeal'; (3) 'the degree of confidence that the district court has in the availability of funds to pay the judgment'; (4) whether the defendant's ability to pay the judgment is so obvious that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial state that 'the requirement to post

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also United States v. Allen, 895 F.3d 1577, 1580-81 n.1 (10th Cir. 1990) (noting opinion was circulated among all judges on the court in regular active service because panel opinion overrules prior panel precedent). All of this supports Enable's position that it has raised serious questions that deserve a final decision by the court of appeals.

a bond would place other creditors of the defendant in an insecure position.'" *Id.* (quoting *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988)).

These are, for all intents and purposes, the same factors a Court must examine in determining whether to stay enforcement of a money judgment pending appeal pursuant to Fed. R. Civ. P. 62(d). In those circumstances, "courts have held that the . . . bond requirement may be waived if the appellant demonstrates a present financial ability to respond to the judgment that is likely to continue . . . ." *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2003 WL 25265871, at *8 (D. Colo. Apr. 21, 2003) (collecting cases). In the end, the analysis is the same: can the appellant satisfy the Court that a bond is not necessary because the appellant has the financial wherewithal to pay any damages that might accrue during the pendency of a stay. Enable has the required financial ability, as reflected in its most recent financial statement. *See* Enable 10-K filed on February 21, 2017, available at https://www.sec.gov/Archives/edgar/data/1591763/000159176317000010/enbl201610-k.htm.

C. The Court Also Has the Inherent Power to Grant a Stay

In addition to the power granted to it by Fed. R. Civ. P. 62(c), the Court also has the inherent power to modify its Injunction Order, which remains interlocutory. *See, e.g.*, *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 118 F. App'x 942, 946-47 (6th Cir. 2004) (holding district court had inherent power to modify interlocutory order of injunction *sua sponte*, irrespective of Rule 59). To the extent the Court does not wish to enter a stay pursuant to Rule 62(c), Enable respectfully requests that a stay be entered

pursuant to the Court's inherent powers. And in connection with such a stay, Enable again requests that no bond be required for the reasons discussed above.

CONCLUSION

For the reasons set forth above, Enable respectfully requests the Court exercise its power under Fed. R. Civ. P. 62(c) and stay its Injunction Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrants:

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