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

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN THE CHEROKEE NATION OR FOR LACK OF STANDING

Plaintiffs' opposition ("Opposition") to Defendants' Rule 19 motion to dismiss ("Motion") for failure to join the Cherokee Nation makes two points clear. First, Plaintiffs' response to the Motion (and their assertion of standing in this lawsuit) is based on the argument that the Cherokee Nation's exclusive rights in the natural resources of the Illinois River Watershed have been diminished or abrogated over time. Opp. at 4-5, 8, 13-14. This puts the Cherokee Nation's rights squarely at issue, and thus requires the Cherokee Nation's presence in the lawsuit. Under Rule 19, the Court should not determine an issue of such importance to the Cherokee Nation in the Nation's absence. Second, while denying any risk of double recovery, Plaintiffs repeatedly assert that the State and the Cherokee Nation are both determined to "stop Defendants' pollution." *Id*. at 16. Plaintiffs thereby acknowledge the Nation's ability to file a similar suit, *see also id*. at 18-20, exposing Defendants to the risk of multiple or inconsistent judgments if this case proceeds without the Nation.

I. The Cherokee Nation Has An Interest In The Subject Of This Suit

As Defendants' Motion demonstrated, the treaties of 1833 and 1835 gave the Nation sovereign ownership of the waters, streambeds, lands, and biota of the IRW. Plaintiffs' quibbles about whether those interests persist, Opp. at 3-9, are irrelevant to the present motion as Rule 19 looks not to the *merits* of the absent party's claims but only to their *existence* and *non-frivolity*. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001); *Davis v. U.S.*, 192 F.3d 951, 958 (10th Cir. 1999).[1]

Moreover, as the treaties and caselaw cited in the Motion make clear, the Cherokee Nation owns the IRW's waters, sediments, and other natural resources regardless of whether the

[1] Contrary to Plaintiffs' repeated assertion, Defendants do not argue that the Nation has rights to the *entire* IRW. Opp. at 3. The Nation certainly has an argument that it owns many of the categories of natural resources in their entirety. Mot. at 3-14. But, for purposes of Rule 19, because Plaintiffs have made the entire IRW within Oklahoma the subject of their suit, it is sufficient that the Nation lays claim to *any* part of those resources.

Nation has recently asserted that claim. Plaintiffs' historical recitation to the contrary is flawed.

Plaintiffs argue first that the treaties of 1833 and 1835 transferred only land.[2] Opp. at 4-5, 8. But the treaties' geographical descriptions set the metes and bounds of the territory transferred to the new nation, not restrict it to dry land. *Choctaw Nation*, 397 U.S. at 628; 7 Stat. 414; 7 Stat. 478. The Supreme Court rejected Plaintiffs' argument in *Winters v. United States*, where the Court found it implausible that tribes exchanged their existing lands and rights for land alone. 207 U.S. 564, 575-77 (1908). Nor does *Winters* limit the Nation's rights, as Plaintiffs claim. Opp. at 4-5. To the contrary, *Winters* held that Indian tribes are entitled to enjoy their historically-granted water rights free of interference. *Id.* at 565, 567, 576.

A host of authorities contradict Plaintiffs' argument. A federal land reservation includes the water necessary to its purpose. *Cappaert v. U.S.*, 426 U.S. 128, 139-40 (1976). The purpose of the 1833 and 1835 treaties, as with the reservation in *Winters*, was the relocation of a sovereign tribal nation to a new, independent homeland, which entails full sovereign rights. 202 U.S. at 576. In fact, the treaties with the Cherokee are unusual among Indian treaties in the extent to which they "promise [the Nation] virtually complete sovereignty over their new lands." *Choctaw Nation*, 397 U.S. at 635; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§ 1.03[1],[4]; 4.07[1][a] (2005 ed.). Indian treaties are to be construed as the Indians would have understood them, with every ambiguity interpreted in favor of the tribe. Mot. at 6-7 n.2; COHEN'S § 2.02 (collecting cases). Plaintiffs are wrong in asserting that the treaties gave the Nation only the dust of the ground without water or the other natural resources associated with a sovereign nation.

Nor was the Nation subsequently divested of its rights. Opp. at 5-7. First, the Tenth Circuit has rejected Plaintiffs' argument as it relates to riverbeds. *Cherokee Nation v. Oklahoma*,

[2] The State's argument on this point is contrary to the position taken by the State in *United States v. Grand River Dam Authority*, 363 U.S. 229, 233-34 (1960), where a state agency claimed water rights by virtue of the federal grant of water rights to the Nation.

461 F.2d 674, 677-78 (10th Cir. 1972) (holding that *Choctaw Nation* settled the Nation's current ownership of sediment rights). Plaintiffs are wrong that Congress impliedly eliminated the Cherokee Nation's rights in various enactments. Oklahoma identifies no instance where Congress explicitly stated an intent to break the treaties granting the IRW's natural resources to the Cherokee Nation. *See* Opp. at 5-8. Congress is required to make such a plain, unambiguous statement of any intent to diminish the rights granted to an Indian tribe. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976). This is more than just a requirement that Congress state its goals or intentions on how particular natural resources will be managed. Before tribal rights may be diminished, Congress must provide "clear evidence that [it] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (quoting *U.S. v. Dion*, 476 U.S. 734, 739-40 (1986)).[3] Plaintiffs cite the Organic Act of 1890, but the Organic Act did not undertake such an express recognition and abrogation of the treaties with the Cherokee.[4] While the Organic Act implemented Arkansas common law as the

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[3] *See also Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 412 (1968); *U.S. ex rel. Hualapi Indians v. Santa Fe. Pac. R.R.*, 314 U.S. 339, 346, 353 (1941); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1995-96 (10th Cir. 2002) ("We … do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear").

[4] Plaintiffs' reliance on *Mills Lac Band* is misplaced, Opp. at 6 n.7, 8, as that decision held that a treaty-granted usufructory right to use state land may coexist with state regulation. 526 U.S. at 204-05. Here, however, the Nation's treaty-granted rights in the IRW are not usufructory but sovereign, and are therefore exclusive of state regulation. *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."). Moreover, Plaintiffs' argument about whether Oklahoma's regulations apply to the natural resources within the IRW raises an entirely separate reason why this case cannot be decided in the absence of the Nation. Defendants' Motion is based on the fact that the Nation is the owner and trustee of the natural resources at issue. By arguing that Oklahoma has authority to act as the government whose regulations apply in the IRW, Plaintiffs have raised a separate issue. As this Court knows, whether tribal or state governments have regulatory authority is a complex question. This complexity persists regardless of whether the lands are still

rule of decision between private riparian landholders, the Nation held its water rights not as a mere landowner but as a sovereign. The Organic Act says nothing to undo that. 26 Stat. 81, § 31. Nor, as Plaintiffs admit, did allotment strip the Nation of its rights. Opp. at 5-6.[5]

In sum, as federal courts have held, Congress gave the Nation exclusive and sovereign rights to the natural resources in an area that included the IRW, and those rights persist to this day. *Choctaw Nation*, 397 U.S. 620;[6] *U.S. v. Grand River Dam Auth.*, 363 U.S. 229 (1960).

In light of the foregoing authorities, the Court should reject Plaintiffs' arguments that the Nation has failed to assert its rights or that those rights are too insubstantial for the State and the Court to notice. The Nation plainly asserts an interest in the subject of this suit. Mot. at 15-19. Plaintiffs' assertion that the Nation does not, Opp. at 14-15, should be rejected out of hand. The Nation has pressed its claims previously, *Choctaw Nation*, 397 U.S. 620, and has asserted them

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a reservation or, like the IRW, are now partially held by non-Indians. COHEN'S, § 3.04; 6.01. "[A]bsent a controlling congressional statute, jurisdiction over person, property, and events in Indian country is retained by the tribes." *Id*. Over time, Congress has granted states authority to regulate some matters in Indian country and then withdrawn some of that authority. Not all of the complex effects of these changes have been adjudicated. *Id.* §§ 1.06 – 1.07; 6.01 – 6.05.

[5] Plaintiffs' admission that the Nation retained some rights following allotment, Opp. at 5-7, renders the balance of their discussion irrelevant for Rule 19 purposes. Nevertheless, Plaintiffs overlook that allotment under the Act of July 1, 1902, 32 Stat. 716, was conducted by the Dawes Commission implementing the Curtis Act, which directed the Commission "to allot the exclusive use and occupancy of the *surface of all the lands* of said nation or tribe susceptible of allotment among the citizens thereof." 30 Stat. 495, § 11 (1898) (italics added); *see also Heckman v. U.S.*, 224 U.S. 413, 435 (1912) (Curtis Act was "a comprehensive statute embracing provisions as to … the allotment of … the surface of all the lands [by which] the United States practically assumed the full control over the Cherokee [Nation]"). Indeed, the Curtis Act precluded allotment of any natural resources such as the "oil, coal, asphalt, or mineral deposits" beneath the surface. *Id.*; *accord* Wellington L. Merwine, 2 The Trial of Title to Land in Oklahoma § 1632 (1913). Land allotted under the 1902 Act was therefore valued without reference to natural resources. 32 Stat. 716, § 9.

[6] Plaintiffs' effort to distinguish *Choctaw Nation* on the basis of navigability, Opp. at 7, is rebutted by *Choctaw Nation* itself: "[I]t seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. Rather, *the question is whether the United States intended to convey title to the river bed to petitioners*." 397 U.S. at 633 (italics added). The decision did not turn on navigability; rather the Court determined that the treaty had conveyed river beds. *Id.* at 633-35.

recently, Mot. Ex. 7. Plaintiffs have acknowledged the Nation's claims outside of this lawsuit, *see* Mot. Ex. 1; and the Nation has reaffirmed those claims since the Motion was filed. *See* Ex. 1 (quoting Chief Chad Smith: "From the time the Nation exchanged with the federal government all its lands in the east with the land on Northeast Oklahoma, water rights have remained intact").

The Nation's claimed interests in the natural resources that are the subject of this suit, whether ultimately vindicated or not, clearly bring the Nation within the scope of Rule 19. The Tenth Circuit has rejected a narrow interpretation of a non-party's "interest," *Davis ex rel Davis v. U.S.*, 343 F.3d. 1282, 1291 (10th Cir. 2003) (*Davis II*), and ownership of the allegedly injured property certainly qualifies. Plaintiffs urge the Court to follow *United Keetoowah Band of Cherokee Indians (UKB) v. United States*, 480 F.3d 1318 (Fed. Cir. 2007), but *UKB* supports Defendants' position. Mot. at 17. In *UKB*, the Federal Circuit concluded that the Nation was not a necessary party because the UKB was pursuing a cause of action that Congress created specifically for that case, which was not available to the Nation, and which sought compensation for the statutory extinguishment of UKB's legal claims, which the Nation had no right to redress. *UKB*, 480 F.3d at 1323-26. Here, by contrast, the Nation claims ownership and trusteeship of the very resources that are the subject of this suit. The Nation therefore may have the right to press the very claims Plaintiffs are asserting. That this action is not to quiet title or resolve property rights, Opp. at 12, 14, is beside the point. The Nation has an interest directly in the subject of the lawsuit.

II. Resolution Of This Suit May Impair The Nation's Interests

Rule 19 requires only that proceeding with the suit "*may* impair or impede" the absent party's interests. Fed. R. Civ. P. 19(a)(1)(B)(i) (emphasis added). Plaintiffs assert that their interests and the Nation's are congruent, Opp. at 15-16, but that assertion is an unfounded assumption. Indeed, discretion whether to sue and how to proceed is inherent in the Nation's

sovereignty. Mot. at 18-19. Many Cherokee engage in farming, ranching, or poultry growing, and thus have interests adverse to Plaintiffs' attempt to define animal manure as a hazardous waste. *See, e.g.*, Ex. 2. Nor will Plaintiffs' recovery necessarily benefit the Nation, particularly given Plaintiffs' pledge to give up to half of any recovery to their private counsel as a contingency fee.

The identity of the plaintiff impacts every aspect of this case, from what claims are asserted to how alleged damages are calculated. For example, Plaintiffs recently produced damage reports seeking roughly $600 million for aesthetic injuries to the IRW. Plaintiffs arrived at this number by taking a State-wide public opinion survey where they: (1) repeated their allegations that the IRW is polluted; (2) asked households how much they would be willing to pay to make the IRW more aesthetically pleasing and then (3) multiplied that number by the number households in Oklahoma (with small exclusions). *See* Ex. 3; Ex. 4. Regardless of whether it is appropriate to determine the damages in this case through polling, this calculation demonstrates the important of the plaintiff's identity as the damage claim increases simply by adding more households to the plaintiff's jurisdiction. Moreover, while Plaintiffs assert that injunctive and remedial relief will benefit the Nation, they remain silent about the fact that the damages they seek will be spent according to their priorities. Ultimately, pursuing another's lawsuit or recouping damages for another's property plainly impairs that person's interests.

III. This Suit Creates A Risk Of Multiple Or Inconsistent Recoveries

Rule 19 requires only a substantial possibility of inconsistent or multiple recoveries, not a guarantee that more litigation will follow. Rule 19(a)(1)(B)(ii). The risk need only be non-speculative. *Davis II*, 343 F.3d at 1292; *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993). Here, as in *Davis II*, continuing the suit exposes Defendants to such a risk. Mot. at 19-20. Plaintiffs admit as much as they tout the Nation's parallel interests,

Opp. at 16-18, 20, and its potential status as a "co-trustee under CERCLA," *id*. at 19.

Although Plaintiffs dismiss the risk to Defendants as speculative, Opp. at 16-17, their doubts that the Nation will elect to bring suit are legally insufficient. First, it is far from clear that the Nation will agree that "the State will remedy the pollution at issue," Opp. at 17, particularly given Plaintiffs' contingent fee obligations. Second, although the Nation has not appeared, *id.*, it has made clear that Defendants "would be mistaken to assume tribal support of an unconditional dismissal" or to anticipate that the Nation's enforcement would be "any less rigorous than [Plaintiffs']." Ex. 1. Third, having previously argued to the Court to the contrary, Plaintiffs now acknowledge that CERCLA limits recovery under their state law claims. Opp. at 17.[7] But, given the Court's prior rejection (subject to renewal) of Defendants' motion to that effect, this does not currently forestall the possibility of multiple recoveries. Given the Nation's representations, the possibility of multiple recoveries is distinctly not speculative.

IV. Dismissal Is Appropriate Under Rule 19

Finally, "equity and good conscience" favor dismissal. Mot. at 20-24. Plaintiffs cannot dispute that the Tenth Circuit strongly favors dismissal where, as here, sovereign immunity is involved. Proceeding with the suit in the absence of such a sovereign undercuts the whole point of immunity. *Enter. Mgmt. Consultants, Inc. v. U.S,*, 883 F.2d 890, 894 (10th Cir. 1989) ("When … a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.") (internal quotations omitted); *Citizen Potawatomi Nation*, 248 F.3d at 1001 ("We have noted the 'strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity.'") (quoting *Davis*, 192 F.3d at 960)). Indeed, principles of sovereign

[7] *See Plaintiffs Response to Defendants' Motion for Judgment On The Pleadings In Light Of New Mexico v. General Electric*, Dkt. No. 1021 (Jan. 16, 2007).

immunity are "much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection." *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2189-92 (2008).

Moreover, Defendants' Motion was timely. Opp. at 17-18. The Tenth Circuit has ruled repeatedly that Rule 19 cannot be waived and may be raised at any time. *Symes v. Harris*, 472 F.3d 754, 760 (10th Cir. 2006); *Mescalero Apache Tribe v. NM*, 131 F.3d 1379, 1383 (10th Cir. 1997). Because Rule 19 protects litigants and absent parties, it may even be raised for the first time on appeal. *Id.* Indeed, district and appellate courts have "an independent duty to raise [Rule 19] *sua sponte*." *Thunder Basin Coal Co. v. S.W. Pub. Serv. Co.*, 104 F.3d 1205, 1121 (10th Cir. 1997*); see also Symes*, 472 F.3d at 760; *Enter. Mgmt. Consultants*, 883 F.2d at 892-93; *Wyandotte Nation v. Unified Gv't of Wyandotte County*, 222 F.R.D. 490, 500 (D. Kan. 2004).

Nor did Defendants delay to the eleventh hour, as Plaintiffs claim. Opp. at 18. As the Court knows, Plaintiffs vigorously resisted Defendants' efforts to clarify what specific lands and resources Plaintiffs' claim to own and allege were injured.[8] After Defendants received the little clarification that Plaintiffs would provide, and after the Court itself raised the issue during oral argument on Defendants standing motion, *see* Transcript of Hearing at 145 (June 15, 2007), Defendants researched the Rule 19 issue promptly and filed their Motion a year before trial.

Finally, the Rule 19(b) factors overwhelmingly support dismissal. For many of the foregoing reasons, continuing without the Nation will result in an inadequate judgment that will prejudice both Defendants' and the Nation's interests. *Davis II*, 343 F.3d at 1292. If Defendants prevail, they face the risk of a second suit. At the same time, any recovery in this matter should be paid to the right plaintiff. For that and other reasons discussed herein, this suit will

[8] *See, e.g.*, Defendants' Motion for a More Definite Statement, Dkt. No. 71 (Oct. 3, 2005), opposed by Plaintiffs, Dkt. No. 131 (Nov. 18, 2005); Defendants' Motion to Dismiss for Lack of Standing, Dkt. No. 1076 (Mar. 12, 2007), opposed by Plaintiffs, Dkt. No. 1111 (Mar. 30, 2007).

necessarily put the Nation's rights at issue. Moreover, Plaintiffs retain an adequate remedy for the properties that do not belong to a different sovereign. A Rule 19 dismissal is without prejudice but only as to a properly pleaded suit. Fed. R. Civ. P 41(b). If this suit is dismissed based on the absence of the Nation, Plaintiffs may refile a suit that is limited to those allegedly injured lands the State actually owns or hold in trust, excluding the waters, soils, sediments and biota that belong to the Nation. Beyond that, Plaintiffs cannot complain of having an inadequate remedy to pursue injuries to someone else's property. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

V. DISMISSAL FOR LACK OF STANDING IS APPROPRIATE

Defendants' alternative motion made a simple and largely uncontested point: in order to recover, Plaintiffs bear the burden of demonstrating constitutional standing, *Lujan*, 504 U.S. 555, which includes demonstrating that each of their claims seeks to recover for an injury to their own legally protected interests and not the interests of another. *Id.* Plaintiffs lack standing to assert injury to property they neither own nor hold in trust. *See, e.g.*, *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006); *Wash. Legal Fdn. v. Legal Fdn. of Wash.*, 271 F.3d 835, 848 (9th Cir. 2001).

Plaintiffs attempt to circumvent this requirement by asserting a "quasi-sovereign" interest, which stands behind all private rights, alleviating any need to prove specific ownership or trusteeship. Opp. at 22-23. But, Plaintiffs overlook that here the federal government granted the Cherokee Nation sovereign rights over the land, water, and biota in the IRW well before the State of Oklahoma even existed. Mot. at 2-13. And, when Oklahoma entered the Union it disclaimed any ascension to any rights held by the Nation. Act of June 16, 1906, 34 Stat. 270 §§ 3-4. Thus, it is the Nation, not the State of Oklahoma, which "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). If sovereignty means anything, it means that Oklahoma has no quasi-sovereign right standing behind lands and natural resources that belong to the Cherokee Nation. Mot. at 17-19.

Therefore, as to the properties and natural resources in the IRW, Plaintiffs will have to prove particularized standing. Yet, because they have refused to do so and insist on claiming damages for the IRW as an undivided whole, the appropriate remedy is dismissal for lack of standing.

Plaintiffs' alternative arguments lack merit. Defendants' motion is properly made pursuant to Rule 12(c), Opp. at 21, a motion which may be filed at any time so long as it does not "delay trial." Fed. R. Civ. P. 12(c).[9] Nor are Defendants estopped from contesting Plaintiffs' ownership of waters in the IRW. Opp. at 24-25. Judicial estoppel applies only where the two positions are clearly inconsistent and the non-moving party prevailed on the position in the prior litigation. *Zedner v. United States*, 547 U.S. 489, 504 (2006); *Georgacarakos v. Wiley*, 2008 WL 4216265, at *6 (D. Colo. Sep. 12, 2008). Here, there is no inconsistency with Defendants' positions in the *City of Tulsa* case and Defendants did not "prevail" in the *City of Tulsa* litigation. The Court should also reject Plaintiffs' contention that Oklahoma and Arkansas stripped the Nation of its water rights through the Arkansas River Basin Compact. Opp. at 24. The Compact says nothing about what specific water rights either State enjoys, but rather simply recognizes mutually binding entitlements to water use. 82 Okla. Stat. 1421 art. IV. The Cherokee Nation was not a party to that agreement and is unaffected by it regardless of congressional approval. As noted above, Congress may divest Indian treaty rights only with a plain statement recognizing the right and stating the intent to abrogate it. The Compact makes no such statement.

Plaintiffs must demonstrate standing as to whatever particular land or resource they contend has been injured. Because they have refused to do so, and claim damages arising from interests that belong to the Nation, dismissal for lack of standing is appropriate.

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[9] Defendants' previously moved under Rule 12(c) for judgment on the pleadings for lack of standing as to Counts 2, 4, 6, and 10. Dkt. No. 1076-1. In response, Plaintiffs asserted that Oklahoma owns or holds in trust certain resources within the IRW. Dkt. No. 1111 at 10-11, 16, 17-18. Defendants noted in reply that they would examine the State's claims and "file additional motions on this issue as appropriate." Dkt. No. 1128 at 10 n.4.

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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