CASE NO. 09-5134

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J.D. STRONG in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiff-Appellee,

v.

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAIN FOODS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC.,

Defendants-Appellees,

and

CHEROKEE NATION

Intervenor-Appellant.

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

On Appeal from the United States District Court
For the Northern District of Oklahoma
The Honorable Judge Gregory K. Frizzell
Case 4:05-cv-00329-GKF-SAJ

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I. STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Tenth Circuit Rule 28(a) prior appeal to the Tenth Circuit Court of Appeals was filed by the State of Oklahoma in this matter, case number 08-05154.

II. STATEMENT OF JURISDICTION

Jurisdiction of the District Court: The State of Oklahoma asserts claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq. and the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6972. The State of Oklahoma also asserts claims under the federal common law of nuisance. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 9613(b) and 42 U.S.C. § 6972(a). The Court has supplemental jurisdiction over the state law claims asserted pursuant to 28 U.S.C. § 1367.

Jurisdiction of the Circuit Court: The Circuit Court has jurisdiction over this matter through 28 U.S.C. § 1291 which gives the Court jurisdiction over "appeals from all final decisions of the district courts of the United States". "[A]n order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to the action." WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 994 (10th Cir. 2009).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Cherokee Nation's Motion to Intervene (Dkt. #2564) was timely under Federal Rule of Civil Procedure 24(a).

IV. STATEMENT OF THE CASE

The State of Oklahoma under the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA") brought this case against Tyson Foods Inc, Tyson Poultry Inc, Tyson Chicken Inc., Aviagen Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's Inc, George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. seeking (1) all past monetary damages suffered by, and all costs and expenses incurred by, the State of Oklahoma as a result of, and in connection with, the Poultry Integrator Defendants' past wrongful conduct; (2) a declaration that the Poultry Integrator Defendants are liable for all future monetary damages suffered by, and all costs and expenses incurred by, the State of Oklahoma as a result of and in connection with the continuing effects of the Poultry Integrator Defendants' past wrongful conduct; (3) a permanent injunction requiring each and all of the Poultry Integrator Defendants to immediately abate their pollution-causing conduct in the IRW, to remediate the IRW, including the lands, waters and sediments therein, to take all such actions as may be necessary to abate the imminent and substantial endangerment to health and the environment, and to pay all costs associated with assessing and quantifying the amount of

remediation and natural resource damages as well as the amount of natural resource damages itself; (4) restitution in an amount sufficient to make the State of Oklahoma whole for the losses and damages it has suffered on account of the Poultry Integrator Defendants' improper poultry waste disposal practices and pollution of the IRW, including the lands, waters and sediments therein, as well as disgorgement of all gains the Poultry Integrator Defendants realized in consequence of their wrongdoings; (5) punitive and exemplary damages, to the maximum extent allowable under the law; (6) statutory penalties, to the maximum extent allowable under the law; and (7) prejudgment interest and all attorneys fees and cost of suit (including but not limited to court costs, expert and consultant costs, and litigation and investigative expenses).

On October 31, 2008 Poultry Integrator Defendants filed a motion to dismiss certain portions of the State's case alleging that the Cherokee Nation owned the waters within the Illinois River Watershed and was an indispensible party to the litigation. Upon notice that the Cherokee Nation's interests were at issue in this case, the Attorney General of the Cherokee Nation sought to enter into an Agreement with the Attorney General of the State of Oklahoma so that the Nation's interests in the case might be litigated on its behalf by the attorneys representing the State of Oklahoma. On July 22, 2009, the District Court found the Agreement between the Nation and the State was not valid because the Agreement

represented a cooperative agreement between the State and the Nation under Oklahoma law and the Agreement was not executed in accordance with that law. The Court further held that the Cherokee Nation was an indispensible party and dismissed all of the State's claims for damages.

The State of Oklahoma filed a motion to reconsider on August 3, 2009 which was heard on August 14, 2009 and denied. On September 2, 2009, the Cherokee Nation filed a motion to intervene.

The District Court denied the motion to intervene on September 15, 2009 based upon a finding that the Cherokee Nation's motion to intervene was untimely. The Court stated that the filing of an intervenor's complaint, including a federal common law nuisance claim, would trigger more than a 120 day delay.

Cherokee Nation timely filed a Notice of Appeal of the portion of the District Court's Order which ruled that the Motion to Intervene filed by the Cherokee Nation was untimely.

V. STATEMENT OF THE FACTS

1. On the 16th day of July, 2007, the State of Oklahoma filed its 2nd Amended Complaint seeking, among other things, punitive and exemplary damages, to the maximum extent allowable under the law; statutory penalties, to the maximum extent allowable under the law; prejudgment interest and all

attorneys fees and cost of suit (including but not limited to court costs, expert and consultant costs, and litigation and investigative expenses). Aplt. App. p. 305.

2. On October 31, 2008, Poultry Integrator Defendants filed a motion to dismiss certain portions of the State's case alleging that the Cherokee Nation owned the waters within the Illinois River Watershed and was an indispensible party to the litigation. Aplt. App. p.354.

3. The Cherokee Nation sought to enter into an Agreement with the Attorney General of the State of Oklahoma so that the Nation's interests in the case might be litigated on it's behalf by the attorneys representing the State of Oklahoma. Aplt. App. p.532.

4. On July 22, 2009, the District Court found the Agreement between the Nation and the State was not valid because the Agreement represented a cooperative agreement between the State and the Nation under Oklahoma law and the Agreement was not executed in accordance with that law. Additionally, the Court held that the Cherokee Nation was an indispensable party and further clarified that the Cherokee Nation and the State of Oklahoma, as two sovereigns with significant but undetermined interests in the IRW, must both be part of the same suit if CERCLA and common law damage claims were to be brought against the Defendants, and thus, dismissed all the States claims for damages. Aplt. App.p.547.

5. On September 2, 2009, the Cherokee Nation filed a motion to intervene based on the Courts ruling that Cherokee Nation was an indispensable party. Aplt. App.p.600.

6. On September 15, 2009, The District Court ruled against the Cherokee Nation's motion to intervene based upon a finding that the Cherokee Nation's motion to intervene was untimely. Aplt. App.p 863.

VI. SUMMARY OF THE ARGUMENT

A) The litigation in *State of Oklahoma v. Tyson* did not implicate the interests of the Cherokee Nation such that it should have been required to exercise its right to intervene prior to the decision of the District Court that the Nation was an indispensible party to the litigation under Rule 19.

B) After the Court's decision that the Cherokee Nation was an indispensible party to this suit, the Nation reasonably relied upon the State to prosecute the Nation's claims through an Agreement signed by the respective Attorneys General for the Cherokee Nation and the State of Oklahoma.

C) Upon the Court's decision that the Agreement between the respective Attorneys General of the Cherokee Nation and the State of Oklahoma was not valid, the Nation immediately initiated settlement discussions between the parties in an attempt to settle the issues without further litigation.

D) The Nation moved to intervene in this suit pursuant to Fed. R. Civ. P. 24(a) when those settlement talks ended without an agreement. There was no dispute that the Cherokee Nation had satisfied all of the requirements to intervene if the Nation's motion to intervene was timely. Based upon the circumstances described the Nation's motion to intervene was timely and should have been granted by the District Court. The District Court's decision that the Cherokee Nation's motion to intervene was not timely represented an abuse of discretion.

E) Prejudice to the existing parties that may be created by allowing the Nation to intervene as a party is outweighed by the prejudice to the Nation if it is not allowed to intervene.

VII. ARGUMENT

a. STANDARD OF REVIEW

The timeliness requirement of F.R.C.P. 24(a) is assessed under an abuse of discretion standard. *Sanguine, Ltd. v. Dept. of the Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984). This Circuit has consistently ruled that the review of a motion to intervene of right is otherwise reviewed *de novo* by this Court. *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc); *Wildearth Guardians v. U.S. Forest Service*, 573 F.3d 992, 995 (10th Cir. 2009).

b. ARGUMENT AND AUTHORITIES

I. <u>The Cherokee Nation Moved to Intervene Expeditiously After Its Interests Became At Issue In This Litigation.</u>

The conclusion that the Cherokee Nation's motion for leave to intervene under Rule 24(a) was timely submitted should be beyond dispute. Although the initial Complaint was filed on June 13, 2005 (Docket No. 2), neither the Plaintiff nor Defendant made any motion to add the Nation as a party to the litigation. The litigation itself, which dealt with alleged damage to the Illinois River Watershed by the pollution of the Defendant Poultry Integrators, did not directly implicate the Nation's interests. It dealt with water quality and who was responsible for the excess nutrients detected in the Illinois River Watershed; not who owned the water.

On October 31, 2009 the Defendant Poultry Integrators filed a Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party (Docket No. 1788) and only after that filing did the Cherokee Nation become seriously concerned, with good cause,[i] that the Nation's interests were going to be at issue in the environmental damage case being litigated between the parties. Initially, the Nation sought to enter into an Agreement with the Attorney General of the State of Oklahoma so that the Nation's interests in the case might be litigated on its behalf by the attorneys representing the State of Oklahoma. (Docket No. 2108).

[i] The Cherokee Nation has continuously maintained its interest in the water located within the 14 county traditional treaty boundary of the Nation since it was issued a fee patent from the United States in 1838, and the State of Oklahoma has asserted ownership and authority over that same water since 1906. Despite these issues, the State of Oklahoma's claims against the poultry industry for environmental damage did not appear to prejudice the Nation or impede its ability to bring any claims it might have against the Defendant Poultry Integrators.

This Agreement between the Attorneys General of the State of Oklahoma and the Cherokee Nation was memorialized and a copy filed with the District Court. In its July 22, 2009, order the District Court found the Agreement between the Nation and the State was not valid because the Agreement represented a cooperative agreement between the State and the Nation under Oklahoma law and the Agreement was not executed in accordance with that law. (Order at 5.)

Having found the Agreement to be invalid, the Court considered the Defendant's motion to dismiss for failure to join the Cherokee Nation as a required party. The Court found that the Cherokee Nation did claim an interest in the subject of the litigation sufficient that it was a required party under F.R.C.P. 19(a)(1). The Court also held that allowing the case to go forward in the Nation's absence would impair the Nation's interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction. Order at 13. Further, the Court expressed concern that allowing the damages claims to proceed would introduce a risk to the Defendants of subsequent litigation or double recovery of monetary damages on state law grounds. *Id*. at 16. Based upon these findings, the District Court determined that although the Cherokee Nation was an indispensible party under Rule 19, "joinder of the Cherokee Nation is not feasible based on the Nation's status as a dependent

sovereign" and that the Plaintiff's CERCLA and natural resource damage claims could not be allowed to proceed among the existing parties. (*Id*. at 22.)

With the Plaintiff's CERCLA and natural resource damages claims dismissed, the Nation pushed for an additional settlement conference which concluded without resolution in the last days of August, 2009. On September 2, 2009 the Cherokee Nation filed the instant motion to intervene with attached Complaint. (Docket No. 2564). In the Complaint, the Nation alleged CERCLA natural resource damage and cost recovery claims, as well as federal common law nuisance and trespass claims. These claims were virtually identical to claims brought by the State of Oklahoma in its Second Amended Complaint. (Docket No. 1215).

After a hearing on September 15, 2009, the District Court ultimately denied the Cherokee Nation's motion to intervene. The reasoning for this was set out at the hearing, and then later noted in a minute order issued September 16, 2009. (Docket No. 2617).

The question of timeliness of a motion for intervention "is to be determined from all the circumstances." *NAACP v. New York,* 413 U.S. 345, 366 (1973). The Tenth Circuit, in turn, has described the timeliness issue as requiring consideration of four factors:

"(1) the length of time the applicant knew of his interest in the case;

(2) prejudice to the existing parties;
(3) prejudice to the applicant;
(4) existence of any unusual circumstances."

Sanguine Limited v. U.S. Dept. of the Interior, 736 F.2d 1416, 1418 (10th Cir 1984) (quoting *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 143 (1st Cir. 1982). S*ee also Stallworth v. Monsanto Co*., 558 F.2d 257, 264-66 (5th Cir. 1977).

As the above-described history of this litigation demonstrates, the Nation's motion fully satisfies the Tenth Circuit's first factor to consider: the short period between when the Nation actually knew its rights were in jeopardy and when this motion seeking intervention was filed. See *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316 (7th Cir. 1995) (intervention motion (under Rule 24(a)) timely when filed soon after applicants learned their interests were no longer represented by defendant). As noted above, the Nation took immediate action when faced with the threat to its interests posed by the Defendant Poultry Integrators Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party. It is true that the Nation initially attempted to protect its interests without resorting to involvement in a complex and litigious lawsuit that had been going on for several years.

However, based upon the circumstances of this particular case, the Nation's attempts to take advantage of the State's considerable legal expertise in the case and it's attempt to negotiate a settlement between the parties was reasonable and

handled as expeditiously as possible by the Nation considering the complexity of the issues involved.

The Court has addressed the issue of timeliness of motions to intervene prompted by developing factual situations. In *Sanguine Ltd. v. U.S. Dept. of the Interior*, 736 F.2d 1416 (1984), nine members of the Wichita and Affiliated Tribes of Oklahoma, owners of restricted Indian lands in western Oklahoma, sought to intervene in an action filed by Sanguine Ltd. against the Department of the Interior over a change in the communitization agreements commonly used by the BIA on oil-producing Indian lands. *Id*. at 1418. Thirty days after entry of judgment in the case the owners of the restricted lands, citizens of the Wichita and Affiliated Tribes of Oklahoma, moved to intervene in the case.

In affirming the District Court's decision that the restricted land owners motion to intervene was timely, the Court cited as significant that the restricted land owners did not learn of their interest until two weeks after entry of judgment because the Defendant did not release the property owners names until a month after the information had been requested. *Id*.

As *Sanguine* demonstrates, even if a motion to intervene is filed after judgment is entered it can still be timely depending upon the circumstances. As referenced in the recitation of facts above, the Nation had no way of knowing that it's interests would be implicated in this lawsuit until October 31, 2008 when the

Defendant Poultry Integrators raised the for the first time the issue of whether the Cherokee Nation and the State of Oklahoma had to jointly prosecute the claims the State had brought three years earlier. It was not until the District Court's order of July 22, 2009 that the Nation was on notice that the State of Oklahoma would not be allowed to represent the Nation's interests in that litigation. Given these facts, the Nation's motion to intervene is timely.

Other Circuits have addressed the issue of timeliness of motions to intervene in the overall context of litigation. In *Cherokee Nation v. United States*, 69 Fed. Cl. 148 (Fed. Cl. 2005), the Court held that a motion to intervene filed by the plaintiff's former attorneys was timely when made three years after the case was settled, but shortly before a distribution of settlement funds. The Court rejected the Government's assertion that the attorneys should have advanced their claim for fees sooner (at the time settlement was approved), reasoning that the attorneys at that time believed they had an enforceable right to recover their fees that would be unaffected by the settlement, i*d.* at 153, and that once the attorneys became aware that the Secretary was considering the distribution of attorneys fees, the attorneys exercised due diligence to protect their interest. *Id.* at 153-54. Similarly, in *Am. Renovation and Constr. Co.*, 65 Fed. Cl. 254, 258 (Fed. Cl. 2005), a motion to intervene filed one year after commencement of the suit was found timely because

the applicant's interest in the case did not ripen until the conclusion of proceedings in another court.

Rather than draw arbitrary lines, the courts have adopted a flexible and common sense approach to assessing the timeliness of a motion to intervene. A party cannot intervene before it realizes that its interests may be affected by the outcome of a case. While no party should be permitted to sit upon its rights while a case proceeds and attempt to intervene and disrupt a case at a late stage in the litigation, the fact the Nation was brought into this case at a late stage had nothing to do with the action of the Nation, but with the actions of the Defendant Poultry Integrators who waited until the long scheduled trial appeared imminent to bring the Nation's interests before the District Court.

This is a different circumstance than the one observed in *Cherokee Nation v. United States*, 54 Fed. Cl. 116 (Fed. Cl. 2002), where the Court of Federal Claims denied as untimely UKB's motion to intervene, where intervention was sought on the eve of settlement of a case that had been pending for 13 years and which was a part of overall litigation that had been pending for more than 30 years. The fact that the applicant for intervention allegedly did not have financial resources to seek intervention sooner did not excuse delay. *See also Te-Moak Bands of Western Shoshone Indians v. United States*, 18 Cl.Ct. 82 (Cl.Ct. 1989) (motion to intervene not timely when made thirty-six years after complaint was filed, twenty-one years

after the parties stipulated to certain key facts, fifteen years after issues on value were determined, and eight years after final award was entered).

The second and third factors for this Court to consider, as set forth in *Sanguine ltd. v. U.S. Dept. of the Interior* –prejudice to the existing parties and to the applicant– is discussed under Point II and III, *infra*. As for the fourth factor, there are no "unusual circumstances" that militate against a finding the motion is timely. Indeed, in terms of special circumstances, the Defendant Poultry Integrators argument (and the District Court's subsequent order to that effect) that that all Trustees under CERCLA must be join one suit before any cost recovery or natural resource damages claims may be brought (*see* Point III *infra*) is a unique circumstance that strongly supports allowing the Nation to intervene.

In short, based upon the facts of this case, and well within the parameters of past precedent, the Cherokee Nation's motion for intervention of right is timely.

II. The Cherokee Nation's Intervention In This Case is Critical If the Nation Is To Protect Water Quality And Defend Its Interest In the Illinois River Watershed.

Although the nature and extent of the Nation's interest in this case has not been disputed by either party[i], a closer examination of the Nation's interest will

[i] The defendant poultry producers have asserted that, "the Cherokee Nation continues to own and to assert its authority over the lands and other natural resources granted by the treaties with the United States, including the natural resources of the IRW." Defendants Motion to Dismiss, p. 14. The State of Oklahoma, in its Agreement with the Nation, acknowledged that "the Cherokee

help the Court assess the true nature of the prejudice that the Nation may suffer if it is not allowed to intervene in this matter. The Defendant Poultry Integrators have successfully raised the water rights of the Cherokee Nation as a shield to protect themselves from liability. Whether the Nation should then be barred from intervening in the case so that it may protect the water quality of the Illinois River Watershed or its interest in the water raises both legal and public policy concerns that are a proper consideration for this Court.

The Nation's interest relating to the property was acknowledged and further defined in the District Court's Opinion and Order from July 22, 2009. In that opinion, the District Court recognized that "[w]hen the federal government set land apart in trust, it arguably reserved or recognized sufficient "reserved water rights" to fulfill the purposes of the land validly set apart in trust," and also found that the Nation has "an arguable, non-frivolous claim it owns much of the surplus water within its historic boundaries." Opinion and Order, July 22, 2009 10-11.

The issues revolving around ownership of the water within the traditional treaty boundaries of the Cherokee Nation are far from decided, and it is both unjust and impractical to bar the Nation as party when these issues are being considered.

Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated[.]" Supplemental Filing, Agreement at p. 1.

Other Courts that have weighed the interests of tribes in similar contexts have allowed the intervention.

While not expressly stating whether intervention was granted under Rule 24(a) or 24(b) (although apparently applying the criteria of Rule 24(a)), The Federal Court of Claims granted the Hoopa Valley Tribe's motion to intervene as a defendant in a suit brought by the Karuk Tribe where the Karuk Tribe sought damages from the United States for a taking of its property arising from an Act of Congress that settled an intertribal dispute by dividing a reservation between two tribes. *Karuk Tribe v. United States*, 28 Fed. Cl. 694 (Fed. Cl. 1993). The Hoopa Valley Tribe moved to intervene, both as of right and permissively, to maintain its rights under the Settlement Act. Granting intervention, the Court noted that the Karuk Tribe did not challenge the constitutionality of the act but, merely sought money damages from the United States based on its view that the Settlement Act took the Tribe's property. *Id.* at 696. Significantly, the Court there considered important, as the Cherokee Nation also here asserts, that its decision might affect future property interests in the land at issue. *Id.* at 696-97.

The Supreme Court itself has applied principles of permissive intervention under Rule 24(b) to uphold intervention of Indian tribes in water rights litigation notwithstanding that the United States already was a party to the case and

representing the tribes' interests. *Arizona v. California*, 460 U.S. 605 (1983). As the Supreme Court explained:

> [i]t is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. *Heckman v. United States*, 224 U.S. 413, 444-45, 32 S.Ct. 424, 434, 56 L.Ed. 820 (1912). Moreover, the Indians are entitled "to take their place as independent qualified members of the modern body politic." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968), *quoting Board of County Commissioners v. Seber*, 318 U.S. 705, 715, 63 S.Ct. 920, 925, 87 L.Ed. 1094 (1943). ***Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.***

Id. at 614-15 (emphasis added).

It is clear from these cases that Tribes have a stake in cases where tribal lands or assets are at issue, and that Tribal participation in litigation should be encouraged as beneficial to the Courts and consonant with the public policy of self-determination for Indian people.

III. The Cherokee Nation Will Suffer Prejudice If Not Allowed to Intervene.

In deciding whether the Cherokee Nation's Motion to Intervene was timely, the District Court was required to consider to what extent the Nation's interests may be impaired or impeded by the case at bar. "The central concern in deciding whether intervention is proper is the practical effect of the litigation on the

applicant for intervention." *San Juan County v. United States*, 503 F.3d 1163, 1193 (10th Cir. 2007).

The absence of an adequate alternative remedy is an important factor to consider in weighing as a matter of discretion whether intervention would cause undue delay or prejudice for the original parties. *Cherokee Nation v. United States,* 69 Fed. Cl. 148 (Fed. Cl. 2005). Specifically, in *Cherokee Nation,* a case arising under the Settlement Act, the Federal Court of Claims allowed intervention by a law firm under Rule 24(a) in material part upon a finding that adjudication of the intervenor's attorneys' fee claims would avoid potential multiple lawsuits. The Court there stated:

> [T]he question then arises whether this claim should be adjudicated in this action or in a separate action that PB [the applicant for intervention] may file. There are at least two reasons weighing in favor of allowing PB to intervene in this case. First, if PB's motion to intervene is denied, the Secretary may feel more justified in disbursing the funds to the Cherokee Nation out of the attorney fee escrow account. This may pose a significant problem for PB if the reviewing court in its separate action determines that any additional fees owed to PB may only come out of the attorney fee escrow account. Under these circumstances, PB would not have a fund from which to recover. Second, the possibility exists that the Cherokee Nation may want to contest PB's claim for additional fees if the Secretary does not pay out the balance of the attorney fee escrow account upon this court's denial of PB's motion. As a result of the Cherokee Nation's interest, it would then have to move to intervene in PB's separate action against the government. These unusual circumstances persuade the court that now is the time to deal with the issue of PB's entitlement to attorney's fees.

69 Fed. Cl. at 155.

As a general rule in intervention cases, of course, courts must weigh the potential prejudice to the original parties against the benefit of allowing participation by a third party. *See Sanguine, Ltd.*, 736 F.2d at 1419. As the Fifth Circuit observed, "Federal courts should allow intervention 'where no one would be hurt and greater justice could be attained.'" *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (quoting *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)).

This case is currently in trial, a trial that the Cherokee Nation did not seek to stay because of the importance of getting injunctive relief to prevent further damage to the Illinois River Watershed. Due to the order of the District Court the parties have now gone to considerable expense, and considerable public resources have been expended to try an injunctive case that would more properly have been tried as a whole with the damages case and all necessary parties. Though the original parties, therefore, will suffer some discomfort if intervention is granted – but even now the prejudice that the parties may face is far outweighed by the prejudice to the Cherokee Nation of denying it the opportunity to defend its rights and interests to a resource that has tremendous monetary, historical and cultural value to the Cherokee Nation and it's citizens. As the Court of Federal Claims acknowledged in *Am. Renovation & Constr. Co. v. United States,*:

> While the Court agrees with Defendant that allowing intervention could require the existing parties to duplicate previous settlement

> efforts, or might even derail settlement completely, the Court must weigh this potential prejudice against the prejudice that would be suffered by Intervenor-Applicant if intervention were denied. As pointed out in Intervenor-Applicant's brief, the claim asserted in this case is Plaintiff's only remaining asset. Thus, Intervenor-Applicant's best chance at recovering the money that it is allegedly owed would be as an intervenor in this action. * * * On balance, therefore, the potential for prejudice to Intervenor-Applicant is more significant than the prejudice on the parties of duplicative time and effort.

65 Fed. Cl. 254, 259 (Fed. Cl. 2005).

Practically, the Cherokee Nation may have no adequate alternative if the intervention is denied. If this case continues the Cherokee Nation, while it may not be legally bound as a party, may find itself unable to prosecute its claims against the Defendant Poultry Integrators. Since both the State and the Nation must bring their claims for damages collectively against the Defendant Poultry Integrators, the Nation's claims may well be practically barred by res judicata if the State of Oklahoma is unsuccessful in its case for injunctive relief currently pending before the District Court and barred from re-alleging its claims based upon the same facts. In addition, a loss by the State of Oklahoma at the District Court could well lead to appeals regarding multiple issues, including the issue of whether the Cherokee Nation has any rights to the waters of the Illinois River Watershed. By function of the District Court's denial of the Cherokee Nation's motion to intervene, the Nation would have no input into how this Court decided those issues, except perhaps as an amicus.

III. Any Prejudice To The Defendants Is Minimal Or A Product Of Their Own Delay.

Much of the prejudice the Defendant's claimed existed at the hearing before the District Court were unrelated to any delay by the Nation in filing the motion to intervene. When the District Court dismissed the Plaintiff's damage claims for failing to join the Cherokee Nation as required party, numerous summary judgment motions, Daubert motions, motions in limine and other issues were rendered moot. It is true that these issues may again be before the Court if the Nation's motion to intervene is granted, and that is a function of the Nation's participation in the case as a party.

However, the only prejudice the District Court could properly consider is prejudice caused by the ***timing*** of the Nation's motion to intervene, not prejudice that may arise due to the mere existence of the Nation as a party in the case. The Tenth Circuit in Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1251 (10th Cir. 2001) specifically held that, "[t]he prejudice prong of the timeliness inquiry measures prejudice caused by intervenors' delay – not by the intervention itself." As such, those considerations should be not be considered by the Court.

The delay and expense that the District Court expressed as reasoning behind its decision to deny the Cherokee Nation's Motion to Intervene was based primarily upon these same improper considerations. To the extent that delay was the concern, the record does not reflect that a lengthy delay would be necessary.

The Cherokee Nation was willing to proceed based upon the strength of the State of Oklahoma's evidence and did not request any additional discovery. It is clear from the record and the facts that a lengthy delay was not necessary and would not have unduly prejudiced either the Defendant Poultry Integrators or the Plaintiffs. Accordingly, the District Court abused it's discretion in denying the Cherokee Nation Motion to Intervene.

In addition, allowing the Cherokee Nation to intervene would be beneficial to the Defendants for many of the same reasons they originally raised in their Motion to Dismiss for Failure to Join a Required Party. The addition of the Nation as a party avoids the possibility of inconsistent or multiple obligations by the Defendants and avoids putting the Defendants "in the center of a two-century old conflict over who owns the lands, waters and biota in the IRW…" *Defendants Motion to Dismiss*, Pg. 2. Although the Defendants have and undoubtedly will continue to disclaim the prejudice that might result if the Nation is not allowed to intervene, such prejudice exists.

Finally, although not necessarily part of the relative prejudice equation, the Cherokee Nation submits that the District Court will be in a better position correctly to decide the merits of this case if the Nation is a party.

VIII. CONCLUSION

For the foregoing reasons, the Cherokee Nation's Motion to Intervene under Rule 24(a) should be granted.

IX. REQUEST FOR ORAL ARGUMENT

Oral argument is requested due to the complexity of the litigation and the importance of protecting water quality in the Illinois River Watershed, as well as to answer any questions the panel may have after the briefs and responses have been reviewed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, A. Diane Hammons hereby certify that on the 23rd day of November, 2009, I served a copy of the foregoing **Brief of Appellant,** to: All Interested Parties (See Attached List) at their last known address/email addresses, by mail and/or email.

/s/ A. Diane Hammons
Signature

November 23, 2009
Date

CERTIFICATE OF SERVICE

I certify that on the 23rd day of November, 2009, 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 ECF registrants:

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RULE 32(a)(7)
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(7)(C), I hereby certify that the brief complies with the type-volume limitation under Rule 32(a)(7)(B)(i) because the brief contains 5589 words which is less than the 14, 000 word limit.

/s/ A. Diane Hammons
A. Diane Hammons
Attorney General
Cherokee Nation

INDEX TO ADDENDUM

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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 05-cv-329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

Before the court is defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or in the Alternative, Motion for Judgment on the Pleadings. For the reasons set forth below, defendants' Motion to Dismiss is granted in part and denied in part and defendants' alternative Motion for Judgment on the Pleadings Based on Lack of Standing is granted in part and denied in part.

I. Claims/Procedural Status

Plaintiff State of Oklahoma seeks monetary damages and injunctive relief against the Poultry Integrator Defendants for injury caused to the Illinois River Watershed ("IRW") by defendants' practice of storing and disposing of hundreds of thousands of tons of poultry waste on lands within the IRW. *See* Second Amended Complaint, ¶ 1. Specifically, the State seeks recovery of response costs and natural resource damages pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq*. (Counts 1 and 2); injunctive relief and civil penalties under the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §6972 *et seq*. (Count 3); damages and injunctive relief under Oklahoma's law of nuisance (Count 4); damages and injunctive relief under federal common law of nuisance (Count 5); damages and injunctive relief under state common law of trespass (Count 6); civil penalties and injunctive relief for violation of

state environmental and agricultural statutes and regulations (Counts 7 and 8); and claims for restitution and disgorgement of profits under state common law of unjust enrichment (Count 10). [Second Amended Complaint, Doc. No. 1215, ¶¶69-146].[1]

Defendants move for dismissal pursuant to Fed.R.Civ.P. 19 because the State has failed to join the Cherokee Nation as a required party. Defendants contend the Cherokee Nation possesses significant, legally protected interests in lands, waters, and other natural resources in the IRW that will be impaired or impeded by its absence. Alternatively, defendants seek judgment as a matter of law, alleging the State lacks standing to assert claims of injury over properties it does not own or hold in trust.

Defendants argue in their motion that Rule 19 requires dismissal of *all* claims for damages and injunctive relief. However, at the hearing on the motion held July 2, 2009, defendants stated they do not seek dismissal of the State's claims for injunctive relief. Therefore, Counts 1 and 2, and claims for damages under Counts 4, 5, 6 and 10 are at issue in the motion to dismiss. Count 3 (a claim for injunctive relief and civil penalties[2] under SWDA), the State's claims for injunctive relief under Counts 4, 5 and 6, and the State's claims for state civil penalties and injunctive relief under Counts 7 and 8 are not at issue.

[1]On May 12, 2009, the court dismissed Count 9 on the State's motion.

[2]The parties do not address whether Rule 19 issues impact the claim for civil penalites under SWDA.

II. Rule 19

Rule 19 of the Federal Rules of Civil Procedure sets forth a three-step process for determining whether an action should be dismissed for failure to join a purportedly indispensable party. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001). First, the court must determine whether the absent party is "required." A person is "required" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed.R.Civ.P. 19(a)(1).

Second, if the absent party is required, the court must determine if joinder is "feasible." *Citizen Potawatomi Nation*, 248 F.3d at 997. In this case, if the Cherokee Nation is a required party, joinder is not feasible because the Cherokee Nation, as a domestic dependent nation, is immune from suit absent waiver by the tribe or abrogation by Congress. *Id.*

Third, if joinder of the absent party is not feasible, the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed.R.Civ.P. 19(b). The factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed

for nonjoinder.

Id. Because Rule 19(b) does not state the weight to be given each factor, the court in its discretion must determine the importance of each factor in the context of the particular case. *Thunder Basin Coal Co. v. SW Pub. Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir. 1997). The standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied in a practical and pragmatic but equitable manner. *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996). The moving party has the burden of persuasion in arguing for dismissal. *Id.*

III. The State's Supplemental Filing

On May 20, 2009, the State filed a "Notice of Filing of Document Related to Defendants' Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing" [Doc. No. 2108]. Attached to the Notice is a purportedly binding agreement between the State of Oklahoma and the Cherokee Nation. In that Agreement, the State agrees "the Cherokee Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated." [Doc. No. 2108-2, p. 1]. The Agreement, signed May 19, 2009, also provides:

> WHEREAS the Cherokee Nation is assigning to the State of Oklahoma the right to prosecute any of the Nation's claims relating to the causes of action brought by the State in *State of Oklahoma v. Tyson Foods, Inc., et al.*, 05-cv-329, N.D.Okla. and upon signing of this Agreement the Nation agrees that the continued prosecution of this action by the State of Oklahoma would not impair or impede the Nation's interests such that it is a necessary party under Rule 19(a);
>
> * * * *
>
> 1. The Cherokee Nation, to the extent of its interests in lands, water and other natural resources in the Illinois River (including any regulatory authority

> incident thereto), delegates and assigns to the State of Oklahoma any and all claims it has or may have against Defendants named in *State of Oklahoma v. Tyson Foods., Inc., et al.,* 05-cv-329, N.D. Okla., for their alleged pollution of the lands, water and other natural resources of the Illinois River Watershed resulting from poultry waste.
>
> * * * *
>
> 8. The effective date of this Agreement shall be deemed June 13, 2005.

[*Id.,* pp. 1-2]. The document is signed on behalf of the Nation and the State by their respective Attorneys General. Upon review, the court concludes the State's supplemental filing does not moot the need to address the Rule 19 issues raised in the pending motion for the following reasons:

First, Oklahoma law explicitly sets forth the requirements the State must follow when entering into cooperative agreements with Indian Tribes:

> C. 1. The Governor, or named designee, is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian Tribal Governments within this state to address issues of mutual interest. Except as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations.
>
> 2. If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.
>
> 3. Any cooperative agreement specified and authorized by paragraph 1 of this subsection involving the surface water and/or groundwater resources of this state or which in whole or in part apportions surface and/or groundwater ownership shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement.

74 Okla. Stat. §1221. The State has not shown that the Governor designated the Attorney General to negotiate and enter the cooperative agreement on behalf of the State, that the Joint Committee on State-Tribal Relations has approved the Agreement, that approval by the Secretary of the Interior has been sought and obtained with respect to Cherokee lands held in trust, or that the Oklahoma Legislature has consented to the cooperative agreement to the extent the agreement "involv[es] the

surface water and/or groundwater resources of this state."

Second, the State provides no authority for the proposition that the Attorney General of the Cherokee Nation may execute binding cooperative agreements on behalf of the Nation.[3] A review of the Cherokee Nation Environmental Quality Code Amendments Act of 2004 reveals that cooperative agreements with state authorities on matters dealing with environmental management or environmental enforcement require approval of the Principal Chief and/or the Council of the Cherokee Nation. 63 Cherokee Nation Code § 101 (D)(2) & (D)(5).

Third, Oklahoma law prohibits assignment of state law claims not arising out of contract. 12 Okla. Stat. §2017(D). The Cherokee Nation's rights to prosecute the trespass and nuisance causes of action arise under Oklahoma common law and may not be assigned to the State.

Fourth, the Agreement attempts to make its effective date retroactive to June 13, 2005, the date this action was filed. Section 1221 expressly prohibits retroactive effect, stating that cooperative agreements between the State and Indian Tribes "shall become effective upon approval" of the Joint Committee on State-Tribal Relations, except for cooperative agreements involving surface water and groundwater resources, which "shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement." Standing is a jurisdictional requirement, *see Keyes v. School Dist. No. 1*, 119 F.3d 1437, 1445 (10th Cir. 1997), and jurisdiction ordinarily depends on the facts as they exist at the time a complaint is filed. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). Because events occurring after the filing of a complaint

[3] At the hearing held July 2, 2009, counsel for the State argued that Cherokee statutory law confers authority on the Cherokee Nation's Attorney General to bind the tribe. The statute read to the Court at the hearing merely authorizes the Attorney General to initiate, defend and represent the Nation in civil and criminal legal proceedings–not to execute binding agreements on its behalf. *See* 51 Cherokee Nation Code § 104 (B)(2).

cannot retroactively create jurisdiction, and because Section 1221 does not permit retroactive effect, the State may not retroactively acquire standing to prosecute the Cherokee Nation's claims relating to the Nation's admitted "substantial interests in lands, water and other natural resources located within the [IRW]."

Accordingly, the court concludes the purported agreement is invalid and does not resolve or moot the Rule 19 issues raised in defendants' motion.

IV. Rule 19 Analysis

A. Is the Cherokee Nation a Required Party?

As mentioned above, the first step in evaluating whether the Cherokee Nation is an indispensable party is determining whether it is "required." Under Rule 19(a)(1), the court must determine whether the Cherokee Nation claims an interest relating to the subject of the action and is so situated that disposing of the action in the Cherokee Nation's absence may impair or impede its ability to protect the interest or leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations.

1. Does the Cherokee Nation Claim an Interest Relating to the Subject of the Action?

To determine whether an absent party has an "interest" in an action, a court "must begin by correctly characterizing the pending action between those already parties to the action." *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1326 (Fed Cir. 2007). As previously discussed, the State brings this action under federal and state statutory and common law and seeks money damages, injunctive relief and civil penalties for defendants' alleged "injury and damage to the IRW (including the biota, lands, waters and sediments therein) . . .". *See* Second

Amended Complaint, ¶ 1.[4]

"Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'" *Citizen Potawatomi Nation*, 248 F.3d at 998, *modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) (*quoting Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999) ("*Davis I*") (emphasis in original and quoting Fed.R.Civ.P. 19(a)(l)(B)). The Agreement signed by the respective Attorneys General of the State and Cherokee Nation acknowledges "the Cherokee Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated[.]" Insofar as this action is one for damage to those lands, water and other natural resources, the agreement by Oklahoma's Attorney General, one of two Oklahoma officials who brought this action, operates as an admission of the Cherokee Nation's interest in this action. If for some reason the admission is insufficient, there are other, independent, factors showing the Cherokee Nation's claimed interest:

First, one of the explicit goals set forth in the Cherokee Nation's Environmental Quality Code is to "prohibit the improper storage, transport, generation, burial or disposal of any solid, liquid or gaseous waste, . . . within the jurisdiction of the Cherokee Nation, or that could affect lands, air, water, natural resources or people of the Cherokee Nation." 63 Cherokee Nation Code § 302 (B)(8).

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[4]The State alleges that as a sovereign state of the United States, it, "without limitation, has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams" and "holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust and on behalf of and for the benefit of the public." [Second Amended Complaint, ¶5]. However, the subject matter of the State's action is not the nature and extent of the State's interests in the lands, water and natural resources of the IRW. Rather, the subject matter of this action are claims for relief against the Poultry Integrator Defendants for pollution of the lands, water and other natural resources in the IRW.

The Environmental Quality Code makes it "unlawful for any person to cause pollution of any air, water, land or resources of the Nation, or to place or cause to be places any wastes or pollutants in a location where they are likely to cause pollution of any air, water, land or resources of the Nation. Any such action is hereby declared to be a public nuisance." 63 Cherokee Nation Code §1004 (A). "Lands of the Cherokee Nation" are defined as

> tribal lands and those lands under the jurisdiction of the Cherokee Nation, including but not limited to the territory legally described in the treaties of 1828, 1835 and 1838 and the Cherokee Nation patent issued in 1846, [and] other such lands acquired by the Cherokee Nation since 1838. For purposes of this Chapter, the term "lands" shall include the earth, air and waters associated with such lands.

63 Cherokee Nation Code § 201. "Waters of the Nation" are broadly defined as

> all streams, lakes, ponds, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon the Cherokee Nation or any portion thereof, and shall include under all circumstances waters which are contained within the boundaries of, flow through or border upon this Nation or any portion thereof.

Id. Thus, the Cherokee Nation claims in its written Code an interest in protecting the Illinois River and in vindicating its claimed rights for any pollution of the watershed.

Second, the Cherokee Nation claims an interest in recovering for itself civil remedies – including monetary damages – for the injuries to the IRW claimed in this action. Its stated policy, again set forth in its Environmental Quality Code, is to "provide civil and criminal remedies and santions in favor of Cherokee Nation against any persons who violates [sic] this chapter or any regulations adopted hereunder and, to maximum extent possible, enforce these remedies and sanctions against such persons." 63 Cherokee Nation Code §302 (B)(7). The policy states the

Nation's intent to obtain such civil remedies in its own favor. In that light, the Nation has an interest in deciding for itself whether to pay half the monetary damages that may be recovered for damages to the tribe's natural resources to the State's private counsel under the State's contingency fee agreement.

Third, the Cherokee Nation claims an interest in "provid[ing] for regulation and taxation of interests, actions and omissions that adversely affect the environment of the Cherokee Nation." 63 Cherokee Nation Code § 302 (B)(9). The Cherokee Nation may, as a domestic dependent sovereign, seek to forego claims for money damages and, instead, regulate and tax the application of poultry waste to lands within its jurisdiction.

Fourth, the Cherokee Nation claims water rights in the Illinois River established under federal laws and treaties which are unaffected by statehood. *See* Correspondence dated April 20, 2004, from Principal Chief Chad Smith to Colonel Robert L. Suthard, Jr. of the U.S. Army Corps of Engineers, Tulsa District asserting its claim to Illinois River water impounded in Lake Tenkiller [Doc. No. 1788-8, pp. 5-7]. One of the State officials who brought this action admitted at the Preliminary Injunction Hearing that "there are some members of the Cherokee Nation who think they have a claim to the water." Testimony of Miles Tolbert, Oklahoma Secretary of the Environment [Doc. No. 1788-2, p. 5].

The claimed interests of the Cherokee Nation in the water rights portion of the subject matter of this action are substantial and are neither fabricated nor frivolous. *See Davis I*, 192 F.3d at 959. The State admits that, as of 1986, 92,405.97 acres were held in trust by the United States for the Cherokee Nation. *See Indian Reservations: A State and Federal Handbook*, McFarland & Company, Inc., 1986, p. 215. When the federal government set land apart in trust, it arguably reserved or

recognized sufficient "reserved water rights" to fulfill the purposes of the land validly set apart in trust. All formal Indian reservations have reserved water rights, also known as *Winters* rights, established in *Winters v. United States*, 207 U.S. 564 (1908). "If the land held by or for Indian tribes in Oklahoma is equivalent to formal reservations, then that land also has reserved water rights." Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 Tulsa L.J. 979, 993 (1998). No reported case has involved the application of reserved rights in a riparian jurisdiction. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2005 Edition, §19.01[2]; 4 Waters and Water Rights § 37.01(c)(2). However, in 2007, a Virginia state judge is said to have recognized the applicability of *Winters* rights in a riparian jurisdiction. *Id.* The *Winters* basis for Indian water rights in riparian and dual-system states continues to attract academic attention as a viable legal claim. *See* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 Wm. & Mary Envtl. L. & Policy Rev. 169 (2000); Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 Cornell L. Rev. 1203 (2005).

In addition to *Winters* rights, the Cherokee Nation appears to have an arguable, non-frivolous claim it owns much of the surplus water within its historic boundaries. When the Indian Territory was set aside for the Five Civilized Tribes, the United States promised that the lands set aside would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee, art. 5, 7 Stat. 478, 481. The Cherokee Nation owned all the lands (approximately 7 million acres) in fee simple, including lands underlying the navigable portion of parts of the Arkansas River. *Choctaw Nation v. Oklahoma*,

397 U.S. 620 (1970).[5] If the Nation owned all the land and water for its absolute and exclusive use, the question to be asked

> is not, How much water was reserved to the tribes? but how much water has been taken away? The shift in the nature of the question transfers the burden of establishing a right to water from the tribes to the state. The shift also creates a presumption that surplus water is the property of the tribes rather than the state.

Helton, 33 Tulsa L.J. at 995. Under this approach, known as the "Five Tribes Water Doctrine," the state is entitled only to water appurtenant to land which it holds. *Id.* "In such a case, the court would have to determine what fraction of the land is owned by the state and attach that same fraction of the region's water." *Id.* Suffice it to say that, because the IRW is a "checkerboard" area of both tribal and non-tribal lands, the Cherokee Nation continues to claim a real and substantial interest in some as-yet undetermined portion of the waters of the Illinois River.

Fifth and finally, CERCLA permits tribal claims for pollution to natural resources belonging to or held in trust for the benefit of the tribe:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State *and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation.*

42 U.S.C. §9607(f)(1) (emphasis added). Based upon the above and foregoing, the Court concludes

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[5]In *Choctaw Nation*, the Supreme Court rejected Oklahoma's argument that the United States had retained title to lands underlying the navigable portion of the Arkansas River and had passed title to the State upon its admission to the Union in 1906. In this case, the State initially alleged it "has an interest in the beds of navigable rivers to their high water mark," [Second Amended Complaint, ¶ 5] but now admits in its response that the Illinois River is non-navigable.

the Cherokee Nation claims an interest relating to the subject of this action for Rule 19 purposes.

2. Rule 19(a)(1)(B) Factors

The court must next determine whether, under Rule 19(a)(1)(B), disposing of the action in the Cherokee Nation's absence may, as a practical matter impair or impede the Cherokee Nation's ability to protect its interest, or leave defendants subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Rule 19(a)(1)(B)(i) and (ii)**.**

a. Impairment of or Impediment to the Ability to Protect the Interest

Adjudication of this action in the Cherokee Nation's absence would impair or impede the Nation's sovereign and stated interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction. The State seeks damages for pollution to the IRW as a whole; it does not attempt to differentiate, segregate and/or exclude damages to tribal lands and water rights. The State's pursuit of such claims for money damages absent the Cherokee Nation ignores the Nation's sovereign right to manage the natural resources within its jurisdiction and seek redress for pollution thereto.

The State seeks an award of monetary damages for the lost value of natural resources of the IRW, and for remediation of the injury to natural resources in the IRW. The State's most recent damages reports identify natural resources damages to the IRW totaling $611,529,987.00. In the absence of the Cherokee Nation as a party to this action, the State may distribute any award of monetary damages (for damage to both tribal and non-tribal resources) as the State alone sees fit. A large portion of the damages awarded for injury to tribal lands and natural resources would not benefit the Nation, as the State has contracted to give private counsel up to half of all monetary recovery as a contingency fee. In the Cherokee Nation's absence, the State officials bringing this

action are the only persons determining whether the contingency fee arrangement is appropriate, and the Cherokee Nation's ability to decide for itself how to prosecute its claims for natural resources damages is impaired.

The State contends that "the State and the Cherokee Nation share a desire for natural resources that are not polluted," and that an award of damages to the State would not impair or impede the Cherokee Nation's ability to protect its interests. In some cases, "the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected." *Davis II*, 343 F.3d at 1291-92. This type of representation is permissible only so long as no conflict exists between the representative party and the nonparty beneficiaries. *Citizen Potawatomi Nation*, 248 F.3d at 999. In light of the factors outlined above, as well as the State's and the Nation's disparate views relating to jurisdiction and ownership of lands and natural resources in Northeastern Oklahoma, this court is unpersuaded that the State can adequately protect the absent tribe's interest.

Finally, although the State says the Cherokee Nation is a "potential co-trustee under CERCLA," and although CERCLA prohibits "double recovery under this chapter [CERCLA] for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource," *see* 42 U.S.C. § 9607 (f)(1), the State makes no attempt to differentiate the natural resources "belonging to, managed by, controlled by, or appertaining to the State" and the natural resources "belonging to, managed by, controlled by, or appertaining to the tribe." As recognized in *Coeur D'Alene Tribe v. Asarco Incorporated*, 280 F.Supp.2d 1094 (D. Idaho 2003), "the only feasible way to compensate the co-trustees and avoid a double recovery or unjust enrichment to one trustee at the expense of another is to award damages

in the ratio or percentage of actual management and control that is exercised by each of the various co-trustees." In this case, the State has made no attempt to determine the relative ratios or percentages attributable to itself and the Nation. Furthermore, this Court can make no determination of the ratio or percentage of actual management and control exercised by the Cherokee Nation in the Nation's absence. One trustee – the State – is therefore likely to be unjustly enriched at the expense of the Nation, thereby impairing the Cherokee Nation's ability to protect its interests.

This Court concludes that, with respect to the claims for money damages, disposing of the case in the Cherokee Nation's absence may impair or impede the Cherokee Nation's ability to protect its interests.

b. Risk to Defendants of Double, Multiple or Inconsistent Obligations

Permitting this case to go forward on the State's claims for money damages in the Cherokee Nation's absence would leave defendants subject to a substantial risk of double or otherwise inconsistent obligations. The possibility of being subject to an additional lawsuit brought by the Cherokee Nation is real; it is not unsubstantiated or speculative. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (quoting 7 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE §1604 at 62). Not only has the Attorney General of the Cherokee Nation attempted to enter into a cooperative agreement to allow the State to prosecute claims on the Nation's behalf, the tribe's Principal Chief has recently issued a public statement that "The Cherokee Nation, like the State of Oklahoma, has to protect the water quality interests within our jurisdiction." [Doc. No. 1825-2]. In response to the motion, the State asserts "even if the CN were to sue Defendants, there is no reason to believe that the injunctive relief that it would seek would be more stringent than that which the State is seeking." The response avoids the real concern here – double recovery of

monetary damages. And although CERCLA prohibits double recovery of monetary damages "under this chapter [CERCLA]," it does not prevent double recovery of monetary damages sought under other state law claims. Nor does CERCLA prohibit subsequent litigation of a new CERCLA claim when the parties in the second action are not the same as, or in privity with, the parties in the prior action. *Coeur D'Alene*, 280 F.Supp.2d at 1118. Insofar as the Cherokee Nation is the steward of a separate and distinct subset of the natural resources in the IRW, it is not in privity with the State of Oklahoma.

The court concludes that proceeding with this litigation in the absence of the Cherokee Nation will subject defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations with respect to the claims for monetary damages.

B. Under Rule 19(b), Should the Action Proceed?

Having concluded the Cherokee Nation is a required party, and the parties having agreed that joinder of the Cherokee Nation is not feasible because of tribal sovereign immunity, this court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed.R.Civ.P. 19(b). The factors for the court to consider in making the determination include: 1) the extent to which a judgment rendered in the Cherokee Nation's absence might prejudice the Cherokee Nation or defendants; 2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief or other measures; 3) whether a judgment rendered in the Cherokee Nation's absence would be adequate; and 4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. This list of factors is not exclusive, but are guides to the overarching equity and good conscience determination. *Davis II*, 343 F.3d at 1289. The Rule 19(b) factors represent four distinct interests:

> (1) "the interest of the outsider whom it would have been desirable to join," (2) the interest of the defendant in avoiding "multiple litigation, ... inconsistent relief, or sole responsibility for a liability he shares with another," (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies[,] ... settling disputes by wholes, whenever possible ..." and (4) the plaintiff's interest in having a forum in which to present the claims.

Id. at 1290 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968).

1. Prejudice to the Cherokee Nation and/or Defendants

The court has noted the Cherokee Nation's interest, as a sovereign, in governing and regulating resources within its jurisdiction, in recovering monetary damages in its favor for pollution to natural resources belonging to, managed by, controlled by, or appertaining to the tribe, and in avoiding unjust enrichment of another CERCLA trustee at its expense. The Nation would likely suffer prejudice to its sovereign interests should a money judgment be rendered in its absence. The Tenth Circuit has noted the "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity." *Citizen Potawatomi Nation*, 248 F.3d at 1001 (quoting *Davis I*, 192 F.3d at 960); and *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989).

As for prejudice to the defendants, the court has noted that defendants face a substantial risk of double or inconsistent obligations arising from the claims for money damages. If the State prevails on its damages claims, nothing will prevent the Cherokee Nation from pressing similar claims against defendants. And in the event the State's claims fail, defendants will remain at risk of facing claims from the Cherokee Nation for damages related to alleged pollution of lands, water and natural resources within the Nation's jurisdiction in the IRW.

In an analysis of Rule 19(b) factors involving an absent tribe that was a required party, the

Tenth Circuit addressed the prejudice resulting from multiple or inconsistent obligations due to the tribe's absence:

> More important, however, is that the Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants if the BIA withheld funds. Thus, Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe.

Davis v. United States, 343 F.3d 1282,1292 (10th Cir. 2003) ("*Davis II*"). This case is similar. As previously mentioned, the Nation's Principal Chief has recently stated that the Cherokee Nation will protect the water quality interests within the Nation's jurisdiction. The Nation's Attorney General has attempted, albeit invalidly, to assign the Nation's rights in this action to the State. And, given the increasing importance of water rights in this country, the fact that the Cherokee Nation has not yet brought suit does not warrant a conclusion it will not do so in the future.

The court concludes that the first Rule 19(b) factor – prejudice to the Cherokee Nation or defendants – weighs in favor of dismissal.

2. Avoidance/Minimization of Prejudice

The State has not suggested, and this court has not discovered, a way by which prejudice to the Cherokee Nation and/or defendants could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures. Without a legally binding assignment of the Cherokee Nation's rights and interests in the IRW, a damage award to the State either abridges the right of the Cherokee Nation to pursue its own claim for money damages or, to the extent the Cherokee Nation is not barred by issue or claim preclusion, conversely exposes defendants to the risk of multiple, inconsistent judgments. And as previously noted, if the State loses its claim for damages, defendants face a real and substantial risk the Cherokee Nation, unfettered by issue and claim

preclusion, would pursue damage claims on its own.

3. Adequacy of a Judgment Rendered in the Cherokee Nation's Absence

The State argues that "[s]hould the State prevail at trial, liability for the pollution will be affixed and the judgment will award injunctive relief and damages aimed at resolving the problems caused by Defendants' poultry waste disposal practices. Inasmuch as the State and the Cherokee Nation both desire an IRW that is not polluted, the judgment will be plainly adequate." However, "[t]he United States Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view." *Davis II*, 343 F.3d at 1292-93 (citing *Provident Tradesmens Bank*, 390 U.S. at 111). "Rather, the factor is intended to address the adequacy of the dispute's resolution." *Id.* "The concern underlying this factor is not the plaintiff's interest 'but that of the courts and the public in complete, consistent, and efficient settlement of controversies,' that is, the 'public stake in settling disputes by wholes, whenever possible.'" *Id.*

In this case, a judgment awarding damages in favor of the State alone would fail to address and resolve the concerns outlined in *Davis II* and *Provident Tradesmens*. Because the State's claims involve allegations of harm to natural resources in which the Cherokee Nation claims an interest, a judgment for damages in this case would either impinge on the Cherokee Nation's sovereign and statutory rights or leave defendants exposed to subsequent suit by the Cherokee Nation, or both. The public interest in "complete, consistent, and efficient settlement of controversies" would be violated, and the "public stake in settling disputes by wholes" would be ignored.

The court finds that the third Rule 19(b) factor favors dismissal of the claims for monetary damages.

4. Whether the State Would Have an Adequate Remedy if the Claims Were Dismissed

The fourth Rule 19(b) factor is whether, if the monetary claims were dismissed for nonjoinder, the State would have an adequate remedy. The State is not without an alternative means to obtain monetary relief. The State could dismiss and refile the action after the State and Cherokee Nation have entered into a legally binding agreement whereby the State may obtain standing to assert the Nation's CERCLA, and possibly other, damage claims. The dispute could then be resolved "by wholes." Alternatively, the State can proceed to trial on its claims for injunctive relief. This factor also favors dismissal.

5. Timing of the Rule 19 Motion

In addition to the four traditional factors, the court considers as an additional factor the timing of defendants' Rule 19 motion. *See Illan-Gat Eng'rs., Ltd. v. Antigua Int'l Bank,* 659 F.2d 234, 242 (D.C. Cir. 1981) (a court should, in equity and good conscience, consider the timing of the motion, and the reasons for the delay). "The issue of dispensability, generally, is not waivable, and is one which courts have an independent duty to raise *sua sponte.*" *Symes v. Harris*, 472 F.3d 754, 760 (10th Cir. 2006); *Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1383 (10th Cir. 1997) ("the issue of indispensability can be raised at any time"); *Thunder Basin Coal Co.*, 104 F.3d at 1211; *Enterprise Mgmt. Consultants,* 883 F.2d at 892; *Wyandotte Nation v. Unified Gov't of Wyandotte County*, 222 F.R.D. 490, 500 (D. Kans. 2004).

The Advisory Committee on the Federal Rules of Civil Procedure notes, however, that undue delay in filing a Rule 19 motion can properly be counted against a party seeking dismissal "when the

moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision(a)(2)(i))." *See* Advisory Committee Notes to the Amended Rule. Defendants here are not seeking dismissal in order to protect themselves against a later suit by or on behalf of the Cherokee Nation. Rather, they argue that only a later suit can fully resolve this dispute, a later suit in which the State has standing to assert the interests of the Cherokee Nation. In addition, defendants assert the interests of the Cherokee Nation, as well as their own, against a prejudicial judgment in which the State is the only plaintiff in interest. Moreover, the State resisted for over two years the defendants' efforts to clarify what specific lands and resources the State claims to own and alleges were injured.

The court finds defendants did not unduly delay filing their motion to dismiss, and further finds the other four factors – prejudice to the absent party and to the defendants, the court's inability to lessen the prejudice without the Cherokee Nation's joinder, the inadequacy of a judgment rendered in the Cherokee Nation's absence, and the availability of an adequate remedy – outweigh prejudice to the State resulting from the timing of defendants' motion. Having weighed these factors, the court concludes, in equity and good conscience, the State's claims for monetary damages should not proceed among the existing parties. Accordingly, the court finds the Cherokee Nation to be an indispensable party, and grants defendants' motion to dismiss plaintiff's claims for monetary damages.

V. Standing

As set forth in Section III, above, the State does not have standing to prosecute monetary damage claims for injury to the Cherokee Nation's substantial interests in lands, water and other

natural resources located in the IRW. A plaintiff does not have standing to assert a claim of injury to property it does not own or hold in trust. *See Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006); *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 848 (9th Cir. 2001). Although the State has standing to assert its claims relative to its own rights in the IRW, it has no standing as a "quasi-sovereign" to seek damages for injury to lands and natural resources in the IRW that fall within the Cherokee Nation's sovereign interests.

The State contends it has standing under the Arkansas River Basin Compact of 1970 to assert claims relative to all water rights. In that Compact, the States of Arkansas and Oklahoma equitably apportioned the waters of the Arkansas River Basin. 82 Okla. Stat. §§ 1421. Congress consented to the Compact in 1973. The Cherokee Nation was not a party to the Compact. The Nation's pre-existing water rights are unaffected absent clear evidence that Congress actually considered the alleged conflict between the Compact's 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, 202-03 (1999). The State has provided no such clear evidence of intent to abrogate Cherokee water rights acquired by treaty.

VI. Conclusion

The Cherokee Nation is a required party under Rule 19 with respect to the State's claims for damages. Joinder of the Cherokee Nation is not feasible based on the Nation's status as a dependent sovereign. The Cherokee Nation is an indispensable party and, pursuant to Rule 19(b), plaintiff's claims for damages should not, in equity and good conscience, be allowed to proceed among the existing parties. The Cherokee Nation is not a required party to the State's claims for violation of state environmental and agricultural regulations. Movants do not seek dismissal of plaintiff's claims

for injunctive relief. Therefore, defendants' Motion to Dismiss [Doc. No. 1788] is granted with respect to Counts 1, 2 and 10 and the claims for damages asserted in Counts 4, 5 and 6. The motion is denied with respect to Counts 3, 7, and 8 and claims for injunctive relief asserted in Counts 4, 5 and 6.

Defendants' alternative Motion for Judgment on the Pleadings Based on Lack of Standing [Doc. No. 1790] is granted insofar as the State attempts to retroactively obtain standing to prosecute the Cherokee Nation's interests with respect to Counts 1, 2 and 10. The Motion for Judgment on the Pleadings is denied with regard to the remaining counts.

IT IS SO ORDERED this 22nd day of July 2009.

Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al.	)	
Plaintiff,	)	
V.	)	No. 05-CV-329-GKF-PJC
TYSON FOODS, INC., et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON SEPTEMBER 15, 2009

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

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PROCEEDINGS

September 15, 2009

THE COURT: Be seated, please.

THE CLERK: We're here in the matter of State of Oklahoma, et al. vs. Tyson Foods, Inc., et al. Case Number 05-CV-329-GKF. Will the parties please enter their appearance.

MR. BULLOCK: Louis Bullock for the State of Oklahoma.

THE COURT: Good morning.
MR. GARREN: Richard Garren for the State of Oklahoma.
MR. BAKER: Good morning, Your Honor, Fred Baker for the State.
MR. NANCE: Your Honor, Bob Nance for the State.
MS. FOSTER: Kelly Foster for the State.
MS. HAMMONS: Diane Hammons, motion to intervene on behalf of Cherokee Nation, Your Honor.
MR. PAGE: Your Honor, David Page for the State of Oklahoma.
MR. RIGGS: David Riggs for the State of Oklahoma.
MR. BLAKEMORE: Bob Blakemore for the State of Oklahoma.
MS. XIDIS: Claire Xidis for the State of Oklahoma.
MS MOLL: Ingrid Moll for the State of Oklahoma.
MS. SARA HILL: Sara Hill for the Cherokee Nation.
MS. GENTRY: Sharon Gentry for the State.
MR. SANDERS: Bob Sanders for Cal-Maine Foods.
MS. BRONSON: Vicki Bronson for Simmons Foods.
MR. MCDANIEL: Good morning, Your Honor, Scott McDaniel for Peterson Farms. Also appearing Philip Hixon, Nicole Longwell and Craig Mirkes.
MR. BASSETT: Your Honor, Woody Bassett for George's. Also here today is James Graves and Vince Chadick for George's.
MR. GREEN: Good morning, Your Honor, Tom Green for

Tyson Foods.

MR. GEORGE: Good morning, Your Honor, Robert George also for Tyson Foods.

MR. JORGENSEN: Good morning, Your Honor, Jay Jorgensen for Tyson Foods.

THE COURT: The Court would be remiss if it did not recognize here the chief, Principal Chief of the Cherokee Nation, who is also a member of the bar. Welcome, Chief Smith.

MR. SMITH: Thank you, Your Honor. With the Court's permission, I need to leave in about an hour, if that is okay with the Court.

THE COURT: Yes, sir. Thank you. Pleased to have you here, sir.

MR. GREEN: Your Honor, if it please the Court, also Gordon Todd is here on behalf of the Tyson defendants.

MR. TODD: Gordon Todd for Tyson.

MR. REDEMANN: Robert Redemann for Cal-Maine Foods.

MR. TUCKER: Your Honor, John Tucker, Del Ehrich and Theresa Hill for Cargill.

THE COURT: Mr. Jorgensen.

MR. JORGENSEN: May I handle a brief housekeeping matter, Your Honor?

THE COURT: Yes, sir.

MR. JORGENSEN: We, the defendants may have misinterpreted, and if so it's my fault, I made a mistake.

When we looked at the transcript of the Court's comments, we saw that the voir dire was due yesterday and both parties filed it, and the trial briefs due tomorrow and we're ready to file, but it seemed the jury instructions had been put off indefinitely. So we were going to see how the motions came out today, since they might impact the jury instructions and then file. The State filed jury instructions yesterday which gave me a heart palpitation that maybe you were expecting ours and we don't have them ready.

THE COURT: It doesn't cause great consternation. Believe me, I've got enough reading material here.

MR. JORGENSEN: Okay, good.

THE COURT: We do need to have a deadline. Mr. Bullock, your thoughts.

MR. BULLOCK: We don't have an objection if they can get them promptly filed, Judge. Our issue is finding out what the Court is actually -- what they see the Court is actually trying, so we're awfully close.

THE COURT: No, I think that's very important even on Count 7. And frankly, I thought the plaintiff's filings were very, very helpful in outlining the directions the plaintiff wished to take on Count 7 and it helps frame the issues for us so I think that's right. When can you get those filed, Mr. Jorgensen?

MR. JORGENSEN: Is Thursday too late, Your Honor?

THE COURT: No, sir, that's fine.

MR. JORGENSEN: Thank you. Thank you, sir.

THE COURT: All right. Let's take up the motion to intervene. Ms. Hammons.

MS. HAMMONS: Thank you, Your Honor. May it please the Court, the Cherokee Nation comes on and attempts to intervene in this lawsuit, a case that we never wished to be a party to, Your Honor. We tried very diligently not to become a party to this lawsuit. We never wished to have our ownership in the Illinois River Watershed an issue in this case. It was brought before this Court and made an issue not at our instigation and against our wishes, Your Honor. We had asked the defendants not to assert our interest in the watershed because we have always believed that this case was properly about water quality and not about water rights. There's no dispute as to when we knew that we had an ownership in the Illinois River Watershed. We knew it at the cessation of the Trail of Tears, Your Honor.

THE COURT: But you understand, and it was very interesting to get the legal material appended to the plaintiff's response relative to your position as to water rights and, of course, that's why in terms of intervention it's helpful to have the party whose interest is implicated in the case because, frankly, the Nation's position is quite different than that envisioned by the Court. But, even if it is about

water quality, the problem here is that we have money involved that necessarily implicates your rights; correct? I mean, to the extent that money is being sought to rectify water quality. I mean, that's the thrust of the Court's order; correct?

MS. HAMMONS: I believe so, Your Honor. I mean, to the extent that remedial damages for pollution to the Illinois River Watershed are being sought, and we think that those are necessary to correct what's been done, then, yes, our interest is at stake. I mean, we always believed, and in fact still believe, that the State of Oklahoma was correct and just in pursuing the claims for pollution to the Illinois River Watershed. We knew it was going on. That's why we remained out of it. We didn't want to further complicate this lawsuit, Your Honor.

THE COURT: One of the things that we haven't decided, insofar as CERCLA damages are being sought by the plaintiff, and I understand the position of the State, they're saying that they can take the position as trustee because these waters are within the state, but, of course, you understand the position that the Court has taken that even though it's within the exterior boundaries of the state, these waters aren't necessarily within the state. They very well may be, even though within the exterior boundaries of the State, not within the State of Oklahoma, but within the Cherokee Nation only; correct?

MS. HAMMONS: Correct, Your Honor.

THE COURT: And so there we have a real difference between your client and the State of Oklahoma. To the extent that the plaintiffs have an attorney fee agreement, whereby half of the monies would go to private attorneys, those monies wouldn't go to remediate the waters, arguably, only within the Cherokee Nation, would they?

MS. HAMMONS: No.

THE COURT: And there, there very well may be a fundamental difference between the Cherokee Nation's interests and the State of Oklahoma; correct?

MS. HAMMONS: There is a difference, Your Honor. It's one that we believe we can work out, if we get to that point, and hopefully we will, as to how damages are to be proportioned. Certainly, you know, we do not have the financial liability that the State of Oklahoma has and --

THE COURT: That is the obligation to their private attorneys.

MS. HAMMONS: Absolutely. And the cost associated with all of the scientific data that's been gathered in this case and we would be riding on their coattails. That is one of the primary reasons, one of the primary issues that went into us deciding to do what we're attempting to do, Your Honor, because we simply do not have the resources to bring this sort of lawsuit tableau rosa, on our own.

THE COURT: But I suspect that you were somewhat reluctant to bring the issue of the nature of your rights to federal court because you simply weren't prepared to address what would be a case of first impression and you're a little afraid of what the response might be from the Court, I take it; correct?

MS. HAMMONS: We were. We were, Your Honor, and we were very pleased with the response from the Court in the July 22nd order. We believed that that issue has now been settled and need not be further addressed. If both the --

THE COURT: I don't know that it's settled insofar as the Rule 19 determination was really rather narrow. It simply says the Cherokee Nation may have an interest here that would be implicated in the lawsuit. I don't know that it's a final adjudication, but it's simply, it recognizes that the Cherokee Nation has serious interests in the water, in the watershed of the Illinois River.

MS. HAMMONS: And that's why we seek to join, Your Honor, so that both the Nation and the State will be operating as plaintiffs in this case and trying to -- I'm not an environmental lawyer, Your Honor. I'm probably the only one that's not an environmental lawyer on this side of the bar. I'm just a tribal government lawyer. The case to me, Your Honor, is about cleaning up the Illinois River Watershed and trying to fix the damage that's been done. I have an

obligation to the people of the Cherokee Nation to do that and we have tried to do it in every way that we knew how after October 2008, when the defendants, against our will, brought our interests into this lawsuit. We tried to reach an agreement for the right to prosecute the claims, not an assignment of the -- Your Honor understood that.

THE COURT: You attempted to get everybody to sit down and work this thing out, apparently.

MS. HAMMONS: We very much did. We tried to do it back in 2005 as the exhibit that the defendants have attached from Chief Smith made clear. And then, Your Honor, we have not been sitting on our rights since the July 22nd order. The motion to reconsider was argued on August 14th. Pursuant to our initiation, there was a final settlement conference held. Both sides agreed that we could participate, we'd be bound by confidentiality, of course. We did participate in that and the final settlement responses to Judge Eagan happened on August 26th, Your Honor. On September 2nd, we filed a motion to intervene having, we believed, exhausted all of our other options to try to protect the resource in this case.

THE COURT: You admit that quote, "there is a possibility for delay here," and insofar as we're sitting less than a week away from the trial date set back in November 2007, wouldn't the filing of your intervenors' complaint necessarily trigger a new round of motions to dismiss, the reinsertion of

three causes of action previously dismissed, the consequent resuscitation of numerous motions pertaining to those causes of action, a new round of expert witness reports, a new round of discovery, expert discovery, a new round of fact discovery, a new round of motions for summary judgment, a new round of Daubert motions and a new round of motions in limine?

MS. HAMMONS: I don't believe so, Your Honor. I believe that maybe some of those, but I think very limited amount. Your Honor, this case is -- should the nation be allowed to intervene, one of the causes in determining timeliness and delay, as Your Honor knows from the briefs that have been submitted, is the prejudice to the other side. Well, the prejudice to the defendants in this case is to put them back to July 21st, 2009. In fact, they will still be better off or facing fewer claims of action than they were on July 21st, 2009, Your Honor, because we did not attempt to and we will not attempt to raise any more claims than we've presented in the three that we attached to the complaint, that we filed with our motion to intervene. We tried to be very judicious in what we were trying to resuscitate and bring back to the lawsuit and we tried to do that with the claims that we felt best went to what we desired and that is cleaning up the Illinois River Watershed.

Your Honor, if I could talk a little bit more about the prejudice to the Nation that will result if we're not

allowed to intervene. And we're cognizant, Your Honor, of course, of the upcoming trial date and it was not something that we did lightly. We did exercise, we believed, every option up to intervention and then we believed that we had no other choice.

If we are not allowed to intervene in this lawsuit, we will have to, at some point, file a new lawsuit. We will have to try to join the State of Oklahoma who also has immunity. Whether or not politically they can do it at that time is an issue. Whether or not we can afford to do it is a very real issue. It makes all sorts of sense and is a reasonable, practical approach to allow us to intervene in this lawsuit with all of the discovery that's gone on, with all of the experts that have been deposed, with all of the fact-finding that's been done and bring this case back to where it was, or at least partially to where it was on July 21st, 2009.

The prejudice to the defendants is not, as we've pointed out, our intervention, but our delay in intervening. Well, I submit to Your Honor that the delay is at the most two months. Should we have done it before? Your Honor, we tried everything we could not to.

THE COURT: Once again, the CERCLA issue, which very well may need to be resolved at the Tenth Circuit because you'll acknowledge that the application of CERCLA in the State of Oklahoma is arguably different than the application of

CERCLA in other states of the union. Insofar as the State is right, that one trustee can bring the action, then if you were to file a subsequent action, you would not need to bring the State in; correct?

MS. HAMMONS: That is correct, Your Honor. And that is why, in looking at the line of cases, it's not when the defendant knew, but there are a line of cases that say that when the defendant knew that the existing parties could no longer protect their interest. The United Airlines case that we cited, Your Honor, goes exactly to that. One of the flight attendants who had been discriminated against was not a party to the original action. She believed that her rights were protected by the class. The class failed and she actually moved to intervene post judgment. It was when the character of the lawsuit changed and the existing parties could no longer protect her interest, that's when the crucial time period start. When the State of Oklahoma could no longer protect our interest in asserting a CERCLA claim on July 22nd, 2009, that's when the character of this lawsuit changed.

THE COURT: But there's a procedural difference, here, is there not? In that case the claim would have been lost because she was a member of the class; correct? In this case, you would still have the opportunity to raise your interests in a subsequent lawsuit because you've not been prejudiced given the severance of the money damage claims here.

MS. HAMMONS: We could bring a new CERCLA lawsuit, Your Honor. The problem, we believe that we would have to join the State of Oklahoma pursuant to Your Honor's finding. They have immunity. We would have to do all of these things that have already been done in this lawsuit and also, Your Honor, depending on what happens here, we might very well face the real issues of res judicata or issue preclusion. Depending upon what happens to the State's case in this lawsuit it could very well affect any later lawsuit.

THE COURT: Well, you're right, the State would have to be brought in to the extent that this issue of who owns what in the IRW has to be resolved, if under CERCLA, that has to be resolved; correct?

MS. HAMMONS: Yes.

THE COURT: All right.

MS. HAMMONS: Your Honor, I just wanted to close and talk a little bit about -- first, I need to say, of course, that the State doesn't oppose our motion to intervene. The defendants do only on one ground, the timeliness, which Your Honor and I have explored. I think we've addressed in our conversation the subparts of the timeliness test, prejudice to the other parties, when we knew. There's no question about when we knew. It was when the character of the litigation changed that I believe the time starts to run. Did we sit on

our rights, or how did we behave, and Your Honor knows that.

Your Honor, the Illinois River Watershed is very important to the Cherokee Nation and Your Honor has recognized that. It's the biggest watershed in our territory, it has a number of tributaries. To the Cherokees and to a number of native people, I'm sure, running water is very crucial to our existence.

Many, many native people speak of water as the holy water of life. I don't think any of us would dispute that. To the Cherokees we have a very integral part of our culture and beliefs that involves going to water every morning, Your Honor. It's a cleansing ritual. Many traditional Cherokees still engage that. To go to water as part of that cleansing ritual to face the new day. You need running water, you need running clean water. That's all we're about, Your Honor, that's all we've ever wanted in this lawsuit. We tried to stay out of it because we didn't want to complicate it.

In final closing, I would like to quote an advocate for the Illinois River who, addressing this, a nonlawyer said after all, the question is not who owns the water, the question is who owns the pollution. And on that, the State of Oklahoma and the Cherokee Nation are very much in agreement.

THE COURT: In your reply brief, you cite this case law for the proposition that the relevant circumstance for determining timeliness is when the intervenor became aware that

it's interest would no longer be protected adequately by the parties. Now, this is a rather unique case. I take it that you continue to take the position that your interest is adequately protected by the State.

MS. HAMMONS: We believed so up until July 22nd, Your Honor, that our interest in addressing the pollution was adequately protected by the State. We believed that. Now that we've been --

THE COURT: Well, but which is it? Do you agree now with the Court's determination that you are an indispensable party? It's an either/or proposition, isn't it, that either you are an indispensable party here or, in the alternative, that your interests as a nation are adequately protected by the State?

MS. HAMMONS: I don't know that it's an either/or. We did not believe that we were an indispensable party to this lawsuit, Your Honor, because it deals with water quality and not water rights.

THE COURT: All right. So you continued --

MS. HAMMONS: The State of Oklahoma certainly made assertions that we didn't agree with, that wasn't surprise to us. We weren't bound by it because we weren't a party. We believed that the State of Oklahoma, certainly under CERCLA, could address those claims and we did not think that we were an indispensable party.

THE COURT: But if you believed that before July 22nd, do you not continue to believe that now or do you now agree with the Court that you are an indispensable party?

MS. HAMMONS: We agree with the Court. The Court's found we are an indispensable party and as an indispensable party we want to be part of this litigation so that it can proceed.

THE COURT: All right.

MS. HAMMONS: Thank you, Your Honor.

THE COURT: How ought we break this up?

MR. BULLOCK: Why don't the State follow, that way they can answer to all of us since we're aligned on this.

THE COURT: I think that makes sense.

MR. BULLOCK: Mr. Nance is -- we're going to split the argument, with the Court's permission. Mr. Nance will begin.

THE COURT: Mr. Nance.

MR. NANCE: Thank you, Your Honor. Bob Nance for the State of Oklahoma. I will address the Nation's interest and I think it's pretty clear based on the court's order on the Rule 19 motion that the Cherokee Nation, at this point, has the necessary interest to intervene of right. The defendants really have not contested that and we have briefed it. The burden on the Nation in this case is minimal to show that they have a substantial legal interest, but the Court has found that, in its Rule 19 order, found that they do. And based upon

that order, I mean just to tic them off, quickly, you said that they have an interest in the waters of the Illinois River Watershed.

THE COURT: We don't need to go into that.

MR. NANCE: Okay.

THE COURT: I think that's very clear. The issues here seem to be timeliness, prejudice. And frankly, and how do you respond to the defendants' argument that you're seeking to take procedural advantage here by opening it up again to reinsert three previously dismissed claims, and if I'm reading this correctly, you want to insert, through the Cherokee Nation, expert witnesses here at a late date.

MR. NANCE: We are not seeking to insert any expert witnesses that weren't already in the case. If damages come back into the case, we have a panel of damage experts, they have challenged them with Daubert motions and the Court would have to deal with that, but we're not trying to bring anything new that wasn't already here. And I don't understand the Cherokee Nation to be saying that they want to bring anything new, and General Hammons can address it if the Court wants her to, but it's my understanding the Nation is not intending to do much, if any, discovery on its own, but is willing to submit, I think, to narrowly drawn discovery from defendants which I think would be appropriate on one of their counts. They have brought three counts, if they're allowed to bring them, they'll

bring three counts.

THE COURT: The nuisance count, I take it.

MR. NANCE: Well, there's a federal common law of nuisance and then there is a CERCLA national resource damages and then there is CERCLA response costs.

THE COURT: I understand that, but which of the three do you admit the defendants would be entitled to some discovery from the Nation?

MR. NANCE: I think they would be entitled to discovery on the response cost claim because that would be -- that is separate from the State's response cost. The national resource damages, I believe the Nation would be satisfied to rely on our case as well as the federal common law of nuisance. But to the extent that the Cherokee Nation has response cost independent of the State's, I think the defendants are entitled to determine what those are. And I don't want to prejudge or get over into the continuance motion, but that's why we posited approximately a 60 day period for them to do that.

THE COURT: The defendants contend that with reference to the nuisance claims that they would be entitled to discovery from the Nation under the defense that he who contributes to the nuisance cannot seek nuisance damages or something to that effect.

MR. NANCE: Or something like that. For an intentional tort I don't think that's the law. I just don't

think that's the law. And you raised some legitimate questions about how we would proceed from here on out, but with the three claims that the Nation is bringing, all of those have withstood an onslaught of motions and that's why we have been here and I believe that the Nation kind of takes the record as it finds it at this point, and your decisions, and for the defendants to say that they all of a sudden want to brief motions to dismiss on the tribe's CERCLA ability, it's kind of frivolous. I mean it would be a waste of time. The law is clear the tribe can bring a CERCLA claim. I think the tribe can bring a federal common law of nuisance claim. To say that you have to go through all of that, at least in the intensity that the State has gone through all of that, I think is fallacious.

You raised the issue of the contingency fee contract and whether or not anything that went on that contract would go to remediate the Nation's resources. To the extent we're talking about CERCLA, I think the law is pretty clear that it wouldn't. Under New Mexico vs. GE and I think the plain language of CERCLA, a CERCLA recovery's got to go to restore, replace or acquire new resources. New Mexico vs. GE said in, from our point of view, unfortunately clear terms, that that can't be used for an attorney fee award. So that's not an issue. Whatever is recovered under CERCLA will be used for CERCLA purposes.

Should we be allowed to restore the state common law

damage issues, I think the law would be different and there's an issue there of to what extent that may or may not be preempted, but we that could be dealt with during the fall and a trial could be had early after the first of the year.

On CERCLA, Your Honor, no one disputes even to this minute -- I think General Hammons would say that maybe the State of Oklahoma should not be managing the water resources, the water resources of the watershed, but no one disputes that we are. And that's one of the headings under CERCLA that would entitle us to some sort of action. And, I mean, we ask you to reconsider your ruling. I mean, you didn't, we understand that, on the CERCLA issue. But if we are right about that and even if you are right about that, having the two sovereigns together in the same time in the same suit makes that issue go away and so nobody has to appeal that, nobody has to come back. Presumably, if the defendants think that there's something wrong happened, they can file the appeal and frankly, we would much rather give them that opportunity, but we can get it wrapped up in one proceeding.

The state of the law, at least as it is now, is that I think if the Cherokee Nation had to go and start over on the state of the law as it is now, they would have to face a Rule 19 challenge or, depending on what court you're in, a comparable challenge that says well, no, because we know the State of Oklahoma out there claims some interest in this water,

you've got to join them. Which means as it is right now, there is an extremely elegant catch-22 operating. That is neither sovereign can prosecute an environmental case without the other. And so if someone right now were dumping a tanker truckload of toxic waste in the Illinois River and the State of Oklahoma wanted to sue them for it and did not get the Nation to join us, we couldn't act under, at least under CERCLA, maybe under any of these theories.

The same thing, if they did it in waters that are claimed by the Cherokee Nation as their waters, sacred to their people, they couldn't redress it unless the State of Oklahoma joined. And whether the theoretical aspect of that is right or wrong, we can, as a practical matter deal with it in this court in a very short order and get it right, I think, as everyone would agree. The defendants fairly pled that the Cherokee Nation be allowed to be in this case, they had to be in this case. Well, here they are standing at the door wanting to come in and the defendants can't claim that they are prejudiced by that. And I think General Hammons is right, the case won't get -- other than their response costs, the case won't get any bigger than the case the State originally pled. And there just won't need to be what could be a thorny appeal on the CERCLA issue if they're allowed to intervene and we get these matters wound up in a reasonable amount of time and try the case.

I think CERCLA's the same in Oklahoma as it is

anywhere else, but we may disagree with you about that. It just, I think it is, I think it's the same law everywhere.

THE COURT: Well, but even if that's true, the question still remains can a state prosecute CERCLA claims on behalf of resources that are clearly tribal property, tribal resources?

MR. NANCE: And I won't reprise my whole argument about that, but I think clearly, under the management heading, we clearly can, but I don't want to renew that argument. But once we're all here together, it doesn't matter.

THE COURT: Right.

MR. NANCE: They clearly, on the interest prong or the interest portion of the case, they have, the Cherokee Nation has the adequate interest. I think we've agreed on that.

As a practical matter, General Hammons said something important and that is that they may not have the resources to do this again, even if they didn't have to join us. To say the least, this has been a hard and expensive slog and the Cherokee Nation, even if they had an unlimited, unrestricted free shot to file any lawsuit they wanted to, without the State's involvement, it would be prejudicial to them, you know, not to get the benefit of the case that we have worked up. And so I'm the interest prong of the argument. I think that they have the interest and they should be allowed to intervene. I think it will make this a much cleaner case to go forward on. And I was

about to turn it over to Mr. Bullock, but if you have a question I'll address it.

THE COURT: Well, your statement begs the question. I've not seen any cases that stand for the proposition that an intervenor may be prejudiced because of the cost of subsequent litigation, which is not precluded. Any cases for that proposition?

MR. NANCE: I do not. It's just, I think, an obvious practical consideration and you can take that sort of thing into consideration. It would certainly inure to the benefit of the defendants if we told the Cherokee Nation no, go file your own lawsuit knowing they can't afford to do it, and since we're here and we have afforded to do it, I think it's a compelling argument to allow them to intervene in the case.

Do you have any other interest related questions? If not, I'll turn it over to Mr. Bullock on timeliness.

THE COURT: No, sir. Mr. Bullock.

MR. NANCE: Thank you, sir.

MR. BULLOCK: Thank you, Your Honor. In addressing the issue of timeliness, I do think that it's important to appreciate that we find ourselves on one of the great fault lines of American history and particularly a fault line within the history of this particular, peculiar state.

It is in this fault line that corporate America has found the ability to exploit the resources of the native

peoples and escape full responsibility. They did it to these nations, to the five tribes. We saw the railroads do it. The railroads used to come into southeastern Oklahoma, grab the timber of the Choctaws and Chickasaws and take it to build the great national railroads and escape liability because the tribes couldn't stop them and the federal government was conflicted and didn't want to stop them.

The coal lands is another story. Oil and gas is another story. And today we stand on the verge of adding poultry to that long list of corporations who have found that fault line between one government and another and have exploited that fault line to their own advantage.

The issue is then, when was it timely for the Cherokee Nation to come forward and say we should be in this case. We must be in this case. Our interest is at risk. Now, it's not a matter of when you knew of the case. The Federal Rules do not require and federal courts don't require or expect that as soon as a party knows that their interest is at risk in a case, that they intervene in a case. It's only at the point where they have reason to recognize that that interest is no longer adequately represented.

The Cherokee Nation has told this Court with great clarity that the interest of their concern was that the pollution be stopped and the polluters be made to pay. And so far as the record in this case was that it was quite clear up

until July 22nd of 2009, that the State of Oklahoma was doing that. And there was reason to believe that the Congress had breached that fault line, had filled it in with CERCLA, that no longer could polluters say the State of Oklahoma and the Cherokee Nation must fight to the death defining their individual interest before one of them can stand up and make the polluters pay.

THE COURT: Well, but the State and the Cherokee Nation need not have fought to the death. The Cherokee Nation could have intervened and had an agreement which only arose four years into the lawsuit in May of 2009, after the case was filed in 2005. I mean, to the extent that you are legally correct that the Cherokee Nation's interests were adequately protected before July 22nd, I anticipate that your position is you're still right on that. So it's really a question of law, if they were adequately protected before, they're still adequately protected. Your argument really is one of practicality to the extent that the Court determined, in July of this year, that they were a necessary and indispensable party, you're saying even though the Cherokee Nation's rights are not precluded, in other words, they could bring the CERCLA claim on their own, you're saying as a practical matter, Judge, let them in so we can try this all together.

MR. BULLOCK: No. No. I don't think that that is the position that we stand in. That is, yes, we think the Court

erred on the 22nd, that CERCLA, because the State manages the resource, CERCLA says the State, as a trustee, can prosecute the polluters and collect natural resource damages. We believe that was the law before, we believe that it is now. But the Court has otherwise defined the law.

But the question before the 22nd is not whether that was right or wrong. The question before the 22nd is whether or not it was reasonable for the Cherokee Nation to believe that the State of Oklahoma, under CERCLA, was managing the resource, that's uncontested, and as the manager of the resource, could assert, independently assert a CERCLA claim. Was it reasonable for them to believe that? And if it was reasonable, then the things that you posit that they could have done, and right, they could have done any of those things, but the law does not say that they had to do them or they forfeited their right to intervene in the case when that belief was punctured by this Court on the 22nd.

But your task now is really sort of a difficult one for judges, that is not to merely say what the law is, but to examine whether a disagreement with your position was a reasonable one. Because if it was reasonable, if they could reasonably believe that the issue of CERCLA trustee did not require in this case either their presence or a litigation over who owns this resource, then they are staying out of the case. They had a reasonable belief their interest was represented.

Now, if you say that was unreasonable, that no one could believe that the manager of this resource could bring a CERCLA claim, then they are untimely.

But if you credit them with having taken a reasonable position on the law, credited them with believing that Congress had covered over that fault line by making these interlocking, overlapping trusteeships so that if they had stood up and said we're going to protect the Illinois River on our own, that they could have done it on their own, or that Oklahoma could do it on their own. If that was reasonable before the 22nd, then this motion is timely and that's really the issue.

Defendants have, at a late date, interjected this issue into this matter. It is true the defendants looked at this issue early. We pointed out where on September 19th, 2005 defendants had a meeting with a testifying expert to discuss this very matter. In their brief, defendants say and they are not precise as to time and I suspect it's because of just the limitations of recollection and the burden of pulling out a calendar that is so old, but they recall in the fall of '05, a meeting with Chief Smith and of discussing this issue of ownership and his, we don't want to get into litigating ownership, that's not our interest. We're going to stay out of that. And at the same time, in fact a few months before, Chief Smith, though, had told Attorney General Edmondson that they support, that the Cherokee Nation supported the State of

Oklahoma bringing this action and would provide what support that was needed for that cause. But the defendants, in the fall of '05, they don't act on this.

Now, what they say in their brief is we were left to discovery as to what the Cherokees might own. That is one of the most shallow suggestions I've heard in a case which seems to have a number of them. You can -- and he left, but, Chief Smith -- so now I can have a little more freedom. Chief Smith, you just pull the string and he'll tell you, you don't have to do discovery. You may have trouble getting out of the office, but he will be fulsome in his claim. So they didn't have to do discovery. They knew exactly in the fall of 2005.

Remember they then filed, though, their 12(b)(6)s and your order reflects, and I didn't think this was the case, but your July 22nd order reflects that it was a couple of years before we defined what we owned. My recollection of that was that they filed the 12(b)(6) that essentially said they haven't said whether it is all of the water or all of the groundwater or the water in the -- so they need to define what water they claim to own for the trespass. You sustained that. We quickly amended, and -- but the only issue was is it all the groundwater or is it the water in the defined stream. You recall that. The defendants are sitting there, while we're talking about all of that. They are sitting there in the fall, in fact, this is now the spring of 2006, knowing, having in

their pocket, this motion which has so disrupted the final part of this case. 2007 goes past, they keep it in their pocket. Halloween, October 31st, 2008, they decide that it's time to pull out their motion. It's late in the case, incredible resources have been spent, the plaintiff has submitted their expert reports, they have got us locked down. They think that if they can pull this off, they can create chaos in the case. I suppose they did. But for some reason it wasn't until then that they did it.

This Court, understanding your burden, but it wasn't until July 22nd that we found out for the first time what we still consider to be shocking, that the State of Oklahoma cannot on its own bring a CERCLA claim. The implications of that are shocking. And I want to go back to the State's history. The Court is right this is unique, but what you have done with CERCLA is to take --

THE COURT: I don't know that we're served to go back.

MR. BULLOCK: Okay.

THE COURT: We've had the motions, we've had motions to reconsider, I mean, with all due respect I've got --

MR. BULLOCK: Okay, Judge. I will move forward.

THE COURT: -- I've got nearly 30 more motions to decide. We're set for trial on Monday.

MR. BULLOCK: No, sir. I'm moving. I'm moving.

THE COURT: So we need to move along.

MR. BULLOCK: I am.

THE COURT: I mean, we're rehashing. You told me in a brief filed yesterday that you're going to file yet another motion to reconsider. We need to move forward. You know, the truth is you're criticizing the Court for not deciding the --

MR. BULLOCK: No.

THE COURT: -- the motion to dismiss. I've read it in many briefs, Mr. Bullock.

MR. BULLOCK: Judge, we're not criticizing.

THE COURT: The difficulty here is that as you know, I get 325 pending motions handed to me when I take this office. Some of which were four years old. Not in this case, but it is a big burden.

MR. BULLOCK: Judge.

THE COURT: Now, and as you know, there have been scores of motions in this case, scores of motions. Every inch of ground here has been fought over and that is as it should be. But there's one of me and there are many of you. So let's try to decide these cases. You're bringing cases of first impression, we're doing the best we can. But let's not rehash issues that we've decided and then re-decided on motions to reconsider. You know, that's why we have court of appeals.

These are difficult issues and as I said the last time, there are numerous issues here that have never been addressed by a court. They may well need to be resolved, as I

said earlier today, by a court of appeals. You know, I'm the umpire trying to call fastballs coming in at 95 miles an hour. If you want an instant replay, you go to the court of appeals. They can slow it down on stop frame. These things are coming fast. I've got a stack here of motions that I've got to decide today. I've got to decide at least 13 of these today because I've got 12 more tomorrow. So let's move on.

MR. BULLOCK: Well, Judge, the concept that the Cherokees have sat on this claim, have not acted in a timely manner to protect a resource which they hold so dear is contrary to the reality which we all know. Since the Trail of Tears, when they landed on those shores, on the shores of the Illinois. There they built their capital, they have cleaned their newborn young with its waters, they have drunk the waters, they have buried their dead in that river valley. This is since Van Buren was president, Abraham Lincoln was 28 years old. The concept that they would be slow to protect that, unless they believed that it was otherwise being adequately protected, is -- defies the reality and I suggest to the Court that the Court find that the motion is timely. And that without the Cherokees, this difficult and expensive and time consuming for the Court -- and truly, I appreciate the burden that the Court has faced here, I wouldn't trade places with the Court on this. My job is in many ways much easier than sorting out these complicated issues. But, on this one, the brief

recess that is required will truly make use of the time that we have all spent trying to get here and avoid unnecessary problems in the future. Do you have any questions?

THE COURT: No new experts?

MR. BULLOCK: No new experts.

THE COURT: No new discovery?

MR. BULLOCK: No new discovery, only, so far as I can think there are only two witnesses that will need to be added to the witness list. That would be a witness on the Cherokee Nation's response cost and a witness as to the Cherokee Nation's interest so that judgment can be added -- can be awarded against the poultry defendants on behalf of both of the plaintiffs in this matter.

THE COURT: Thank you very much. Mr. Jorgensen.

MR. GREEN: Mr. Green.

THE COURT: Mr. Green.

MR. GREEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. GREEN: Your Honor, I have looked at the authority that we cited for you in our moving papers and nowhere do I find reference to a test of reasonableness that is articulated by Mr. Nance and Mr. Bullock. And I think we have worked very hard to set forth the controlling principles in what we have filed. Now, I will say just briefly here, it's hard for me to look into the minds of the chief and other officials of the

Cherokee Nation or, for that matter, to look into the minds of counsel who are representing the State and ascertain why they did what they did at the time they did it.

When this case was filed, there was no attempt by the State to bring the Cherokee Nation into this case and, as a matter of fact, the Cherokee Nation wanted to stay out of the case. The plaintiffs, if truth be told, I believe, wanted the Cherokee Nation out of the case. I could postulate reasons, but I think they are irrelevant. Nothing really happened to change the terrain in this case. The Cherokee Nation was always on notice that its rights were implicated in this litigation. It was on notice from the earliest possible moment from before the case was even filed in 2005, and then at other points in 2005, the Court was making clear it's concern about ownership issues to the land and the biota and the waters of the Illinois River Watershed. And you will remember there was litigation over the initial complaints that were filed and finally in 2007, the plaintiffs filed their second amended complaint asserting that they were still the owners of all the water in the watershed, which implicated, again, the Cherokee Nation's rights.

Meanwhile, the Cherokee Nation was on notice of what was happening and that's the posture of the case when we went to work, because we were concerned that any damage claim produced a vulnerability for either inconsistent adjudications

or multiple adjudications and we did not want to be exposed to that, the State having defined itself as the owner of all the water resources. So we then went to work through discovery and other means and research, prodigious research, to be able to address the indispensability of the Cherokee Nation to this lawsuit and we filed that over a year ago. And that's really where we are. Now --

THE COURT: I think it was October of last year; right?

MR. GREEN: October of last year. Now, the analysis, as I understand it, and it's on the screen here, from the SEC v. Broadband and also the Ute Distribution Corp. V. Norton is that timeliness is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case. Now, the Cherokee Nation by their own admission and by admission of counsel for the State were thoroughly versed in understanding their interest in the case very, very early on. And it would be unprecedented now, six days before trial, to allow the Nation to intervene. They have not been prejudiced. And Your Honor made an observation that you, I believe, said that you did not see in any of the caselaw or decisional law anything addressing as a decisional component the cost that would be incurred by the Cherokee Nation in bringing their own litigation were that to happen.

THE COURT: Well, I just asked Mr. Nance whether he

had any caselaw for that proposition.

MR. GREEN: Well, I don't think there is any. You protected their interest when you carved out from this case the damage claims and they can -- and the caselaw makes it clear, they have a perfect right to pursue any claim that they want. Now, at this point if they come into this case it complicates this case, it doesn't just send this case back to July of last year. It, in many respects, sends this case back to square one. And whatever they say about how they believe the case will be either made more complex or less complex, the fact of the matter is if damage claims come back into this case, there has to be an adjudication of who owns what, and we're going to struggle, we are going to struggle with that. Certainly, I believe we're going to struggle with that over nuisance and we're going to struggle with that over CERCLA because I don't think -- I think each party can only claim damages for land and resources that they own.

THE COURT: Now, is that necessarily true? I mean, if there is an agreement between the State and the Cherokee Nation that the Court need not decide that, and that they will resolve that between themselves, I don't need to decide that.

MR. GREEN: I don't think that there can be an extrajudicial adjudication of the defendants' vulnerability for damages to two distinct parties in this litigation. I believe that that has to be adjudicated in this courtroom. And just

putting that aside for a minute, we have all these issues that relate to the contributions by the Cherokee Nation to the watershed from bacterial sources, bacterial contamination and phosphorus, we're going to get into all of that. We're going to have to look at --

THE COURT: I'm curious, what do you contend is the source of the Cherokee Nation's contributions to additional phosphorus in the water.

MR. GREEN: Well, they have their own operations, they have their own poultry operations, agricultural operations.

THE COURT: All right, that's what I suspected.

MR. GREEN: So to say that this is just a --

THE COURT: How extensive are those poultry operations, to your knowledge?

MR. GREEN: I can't tell you for sure, Your Honor. And actually, my colleague has reminded me, but I hoped I would have remembered as well, that we've got statute -- as far as the Cherokee Nation, we've got statute of limitations issues. So there's a mix of issues that have to come before the Court. And if we stop this trial today, six days ahead of our start date, there is enormous prejudice to the defendants and I hardly, I think, need to tic that off. All of the -- all of the legal work and the resources that have been devoted to this case, not to mention the clearing of time by I don't know how many attorneys here, really for both sides I should say, to be

able to come to Tulsa to try this case. Counsel seems to suggest that all you had to do is add another 60 or 120 days on the docket. My guess is that probably the majority or the vast number of the lawyers that are assembled in this courtroom would not even be available to try a two months trial in 60 or 120 days. I know I would not because I have trial commitments in the first quarter of next year.

So, you know, for those reasons, Your Honor, I think this is clearly untimely and the Cherokee Nation's interests are fully protected and I think they understand that, too. And why they have suddenly decided to file this motion, I think, has more to do with private discussions between the attorney general and the leadership of the Cherokee Nation. I can't say more about that, but I believe there is some -- there was some stimulation to their coming into this case and on one level it looks as if possibly it is as an effort to restore certain damage claims, but that's certainly not the analysis that the caselaw says should be brought to bear on this.

THE COURT: How do we address the caselaw cited to the Court, the Ninth Circuit consideration here? I don't see it reiterated in the Tenth Circuit, that the relevant circumstance here for determining timeliness is when the intervenor became aware that its interest would no longer be protected adequately by the parties? Now, I understand your initial response would be well, its interest still exists. They can bring their own

lawsuit. But the plaintiffs take the position well, in this lawsuit, in practicality, Judge, you need to allow the Cherokee Nation to intervene so that this decision can be decided by wholes.

I guess, first of all, as a matter of law, I need to ask both parties, when the plaintiffs rise again and the Cherokee Nation rises again, is there any caselaw in the Tenth Circuit that borrows this Ninth Circuit language.

MR. GREEN: Not that I'm aware -- I'm sorry.

THE COURT: But what of that? The thrust is that the intervenor did not know until July 22nd of the Court's decision that they were a necessary and indispensable party.

MR. GREEN: Your Honor, they, again, because I was not privy to the conversation, but I think it defies credulity, conversations between the State and the tribe commenced in 2005. There were some conversations between representatives of some of the defendants and the tribe in 2005. I can speak for the tone and tenor of our conversations which was to the effect that Cherokee Nation, your rights could well be impaired here, you should understand that. It is -- it is nonsensical to stand here and say that they did not understand the risks that attached to their strategy right from the beginning. And their strategy, again, if I may say so, was simply to avoid an adjudication of who really owned the various resources in the watershed. So for that reason I think that again, these

criteria have not been satisfied.

MR. JORGENSEN: Your Honor, I apologize. Can I say one thing.

THE COURT: Yeah, sure.

MR. JORGENSEN: I wanted to answer your question. We have not been able to locate any caselaw in the Tenth Circuit that adopts that Ninth Circuit standard. This is most recent one. You will see it's from a 2008 case, the length of time since the applicant knew of his interest in the case. But as Mr. Green was just saying, from the very first the State's claims have been contrary to the Cherokee's claims, which is why I've stood at this podium so often. The complaint says we own it and the others don't. And the nature of a trespass claim is that the plaintiff has exclusive possession and control and the right to bar others. In the materials we attached you see even before the case is filed, Chief Smith sending letters to the state and to the federal government, the Corps of Engineers, saying we own this, we are trying to wrestle it away from the State. And so that's why we went to meet with the State -- I mean with the Cherokee was to say we want your help with this in bringing this to the Court's attention because what the State is saying in its complaint is a direct attack on you, on what you say are your interests.

And then we've battled over that throughout. And if I can just briefly respond, because I think it was a little bit

directed at me on whether we sandbagged this motion. We didn't. It took hundreds of hours to research because we had no help. We had Secretary Tolbert, you recall, sat on this stand on February 19th, 2008, and said we, the State, own these waters and some Cherokee think they own them, but they don't. That was his testimony and it's cited there. So then that got us really rolling. And I'll admit, I've got hundreds of hours of research into finding the right treaties, making sure they're the right treaties, because we had to do it on our own. We did not sandbag this. But the point is, the inherent nature of the complaint is we own it, they don't, and which is why the State has stood here at this podium for many hours and said to you we own it, they don't.

THE COURT: Thank you. Mr. Green, anything further?

MR. GREEN: Unless you have another question, Your Honor.

THE COURT: I don't believe so. Thank you. Ms. Hammons.

MS. HAMMONS: Thank you, Your Honor. Very briefly, Your Honor. The quote for determining timeliness is when the intervenor became aware that it's interest would no longer be protected adequately by the parties was the precise issue decided in United Airlines. That's a United States Supreme Court case, on page, I think it's one, two, three, four of our reply, footnote one, we cite a Tenth Circuit case that has

adopted that reasoning.

We don't dispute the analysis, the timeliness of a motion to intervene as assessed in light of all the circumstances, including the length of time since the applicant knew of its interest in the case. We know what that means based on the United States Supreme Court interpretation. That's the time that our interests were no longer protected adequately by the existing parties.

Prejudice to the existing parties. Your Honor, we brought nothing new to this case, we're seeking nothing new that wasn't there as of July 21st, 2009.

Prejudice to the applicant we've talked about, it's not just money, it's also the time, the issue preclusion, res judicata, bringing in another sovereign, starting all over, the existence of any unusual circumstances. I don't think anybody with a straight face, Your Honor, could say the facts of this case are not unusual.

Your Honor, I seriously thought in our reply of saying something about pot, kettle, black, but I knew that wasn't the level of federal jurisprudence I needed to exercise in this case. But we truly did not seek to have our interest brought to this Court. The defendants did that. They did it against our wishes. We have tried to stay out of this case. When the case changed on July 22nd, 2009, we've done what we could. We tried to not force but facilitate settlement with our inclusion

and that didn't happen. It was only after that that we approached Your Honor, deferentially, respectfully, knowing full well everything that is involved in this case and everything that Your Honor has to face and that trial deadline. We have to be a part of this case, Your Honor, in order for this crucial issue, for the truth to be decided, did the defendants pollute the Illinois River Watershed and if that's yes, then what does that mean, the second question. What happens? And we can decide that. We can decide injunctive relief. What does that mean? What do damages mean? Where do they go? I hope that we get there. That's the second question. Are they responsible for polluting the Illinois River Watershed. The State and the Nation have to come to the table together to get that issue resolved, and that's a truth that needs to be resolved. We're here now.

Your Honor, the prejudice to the existing parties, it seems to me that the prejudice, if this case is not combined and decided in one fell swoop here in this existing case, it's going to be prejudice to the defendants as much as to anyone else. They said in their Rule 19 motion that they didn't want to have to litigate this again, that they faced subsequent litigation and we should all be here together and here we are. So, you know, cognizant of everything that's gone on, Your Honor, we would respectfully again request to intervene.

THE COURT: Before we finish, the Cherokee Nation's

reply brief was filed yesterday and I appreciate the attorney general's reference to the Elliot Industries case. I'm going to take a short recess, read that case as well as United Airlines and we'll be back.

MS. HAMMONS: Thank you, Your Honor.

(Recess).

THE COURT: Be seated. The Court has read both the Elliot Industries Limited Partnership, found at 407 F.3d 1091, a 10th Circuit 2005 case. A case involving ownership of royalties and oil and gas units, leases and wells. It is a case where the plaintiff brought the action on its own behalf and as a representative of a putative class and the issue there was whether intervention on appeal should be permitted. The Tenth Circuit reiterated the rule that intervention on appeal will be permitted only in an exceptional case for imperative reasons. The imperative reason in that case was that the party seeking to intervene took the position that there was no subject matter jurisdiction over the class and, therefore, any adverse judgment in the case would not be binding on the class. At that time in the litigation, neither existing party had an interest in contesting subject matter jurisdiction, so the proposed intervenor's interest would have been harmed if the intervenor had not been permitted to intervene on appeal. And essentially that's the rule as I understand it. In footnote 15 of United Airlines vs. McDonald, a U.S. Supreme Court case from

1977.

The practical argument that the plaintiff makes is perhaps the most attractive. Any reply?

Mr. Bullock, do you care to make any statement before I go to the defendants.

MR. BULLOCK: Judge, just one point. Another line in Elliot is where the -- let me go to the podium --

THE COURT: Please.

MR. BULLOCK: -- but I'll still be brief even though. In Elliot, and it's on page 1103, the Tenth Circuit concluded prior to the district court's entry of final judgment it was reasonable for the state litigants to rely ON appellees to argue the issue of subject matter jurisdiction. And so when Mr. Green says the issue of reasonableness that we advanced is not in the cases, I think it clearly is here. The other issue that I'd suggest is Coeur d'Alene 2 does say as the Court seemed to be suggesting during Mr. Green's argument, that you don't have to allocate between two cotrustees who are both before the Court. And so we can get one judgment to both of us and that could be worked out.

THE COURT: Of course, Mr. Bullock, you suggest that there's only one reasonable reason for the Cherokee Nation not to have sought to intervene. The other reasonable reason which has not been stated here today is, of course, that they didn't need to intervene because, of course, they could always bring

their own action.

MR. BULLOCK: Certainly on July 22nd that issue also changed, because at that point the Court said, and if the Court is correct it would be the law applied in any subsequent action, that until this very complex, the checkerboard is straightened out and clearly defined as to who, what and why, neither of these sovereigns -- we're in a three legged race going after any polluter, particularly for damages from thenceforth, at least according to the Court's theory in this case.

THE COURT: Of course, you picked as A good advocate would, the best cause argument for your argument, CERCLA. Now, but in the case of trespass, nuisance, clearly that's less attractive of an argument for you in the context of the Rule 19 issue.

MR. BULLOCK: Well, I think that you're right in terms of trespass, albeit we now have them together. The issue of nuisance, I still believe, is the fact that all the Cherokees who live in this watershed are also citizens of Oklahoma. When we talk about these issues of dual sovereignty and how there is the tribal land, that still those tribal citizens who are on that land are citizens of Oklahoma. And people who come to visit the Cherokee Nation are also visiting Oklahoma just by virtue of the checkerboard. And so in terms of being able to assert a public nuisance, it appears to me that we should be on

firm ground and were when we brought this to protect the people of Oklahoma, the citizens of Oklahoma and their guests. That one is different --

THE COURT: Well, but the problem there, of course, is being subject to multiple obligations.

MR. BULLOCK: Correct.

THE COURT: Because, if the Cherokee Nation wasn't brought in in the context of nuisance, then it would expose the defendants possibly to another nuisance action. You have a better argument with regard to CERCLA, to the extent that there can only be one recovery under CERCLA and that recovery can't go to pay attorney fees. I mean, that's your better argument.

MR. BULLOCK: Well, it is our better argument. I think that's the rock of the case and the rock on which the intervention should be decided. I mean, we could start going back and parsing the way this has developed.

THE COURT: Well, but we have to parse because it's a multiple cause of action lawsuit.

MR. BULLOCK: Well, I'm not disagreeing with that. But the first question of intervention is that -- is the CERCLA question. Now, the second is interesting. That is okay, the issues of nuisance and trespass. The Court has opened the possibility that those, provided you sort out these ownership issues, the Cherokee Nation might be able to bring on its own.

Well, we know that Oklahoma wasn't successful in doing

that on its own. But even allowing that hypothetical, then you get into defendants said that the Cherokee Nation was a necessary party and the Court held, because if they aren't in this lawsuit, defendants will be subjected to multiple litigation. And now they are taking that shield, protect us, Judge, from multiple litigation, and they are saying Judge, there can be multiple litigation. Allow us to have multiple suits against ourselves. Somewhere there has to be some consistency. Are we trying to avoid multiple suits or are we trying to multiply suits? I would like for them to say.

THE COURT: Mr. Jorgensen.

MR. JORGENSEN: Thank you, Your Honor, we got a little bit confused on the practicality point whether you were addressing us, but may I just address it?

THE COURT: The practical argument obviously being generally the deciding a case by wholes.

MR. JORGENSEN: Right.

THE COURT: Yes.

MR. JORGENSEN: So on that point, Your Honor, let me just say that I think the practicality cuts the other way because let me just focus for just a moment on the statute of limitations argument that Mr. Green made. On nuisance and trespass, the State has said we are not subject to a statute of limitations defense because we're the State. Well, that would not be true as to the Cherokee Nation.

So, Mr. Bullock has pointed out that the IRW is a checkerboard and I think his quote was we would need to sort out these ownership issues is what I wrote down. And indeed you would because the IRW, as the Court knows, is a million acres, a lot of different creeks. Imagine that the evidence comes in that one creek is damaged and another's not. One property is injured or another is not. We would have a statute of limitations defense, as just one example, if the Cherokee were the owner of that water or that property. And you'll recall in response to our Rule 19 motion, the State said well, the ownership of water is fractionalized in this state by riparian rights, so we would need to discover that. But let's say that we discovered that one of the creeks that were injured or one of the properties that was injured belonged to the Cherokee.

THE COURT: Of course, you understand, and you made the statement you are familiar with Indian law, obviously having grown up on the Ute Reservation; correct?

MR. JORGENSEN: Yes, Your Honor.

THE COURT: I mean, in the materials that you submitted was very interesting, I didn't get a chance to study them closely, but the Cherokee take the position, apparently, that Winters doctrine doesn't apply in Oklahoma.

MR. JORGENSEN: They take the position that the Winters doctrine does not apply.

THE COURT: Correct.

MR. JORGENSEN: I think that's incorrect, although I'll defer to them. I think they take the position that they are entitled to the water under the Winters doctrine, and that the limitations which have been imposed on that subsequently do not apply to them, but that all the surface water and groundwater still belongs to them. I could be wrong.

THE COURT: Okay. You understand that their position is at least that water which would be -- they would be entitled to under the Winters doctrine is theirs.

MR. JORGENSEN: Exactly.

THE COURT: But, of course, they are taking the position that all of it is theirs.

MR. JORGENSEN: Is theirs, exactly. So that would have to be litigated. And then we would have to go property by property and say who owns this, and what riparian water goes with this and who owns that, all as a predecessor. We would need to depose the Cherokee, get each of their claims and the reasons for them.

THE COURT: As to the trespass cause of action.

MR. JORGENSEN: Exactly. And to nuisance as well.

THE COURT: And to nuisance.

MR. JORGENSEN: Yes, Your Honor. That's right.

THE COURT: All right. What of Mr. Bullock's argument with regard to public nuisance? That that's not necessary in

the context of a nuisance claim?

MR. JORGENSEN: No, there is a statute of limitations for nuisance. And it runs, as the State says, based on whether or not you are the State or not. And so you would need -- we would need to adjudicate all of that and know. And then also, let's forget about statute of limitations. Totally aside from the statute of limitations, we're operating under the assumption in this argument that the IRW is one great whole and it's either injured or it's not injured, it's owned or it's not owned. And that's, of course, simply not true. It is as Mr. Bullock said a moment ago, a checkerboard. And as the evidence comes in we believe the evidence will show that it's not injured. But if it is injured, at a minimum, I don't think plaintiffs are asserting that every parcel has been injured. So who owns the various parcels will be important.

And I'll defer to Mr. Tucker, but I believe his firm has spent three years litigating with the Quapaw Tribe in a CERCLA case over what do they own, what do they not own, what do they have an interest to assert, what do they not have an interest to assert, and that's just CERCLA. So it isn't as simple as saying the entire IRW, it's either injured or it's not, it's either owned or it's not. You have to break out, break those things.

Now, if I can go to the -- do you have a question, Your Honor?

THE COURT: Well, but you would agree with Mr. Bullock and the Court in connection with our CERCLA discussion. It's an easier argument for the State on CERCLA. I mean, especially if they are right on the law that the state can bring a CERCLA claim for injury to all natural resources within its boundaries.

MR. JORGENSEN: If they're right on that, although I believe the Court has ruled against them on that, and I believe you are right on that.

THE COURT: Well, of course, well, but that's not -- still hasn't been decided by a court of appeals.

MR. JORGENSEN: No, that's right, Your Honor. And I respectfully suggest that practically that's the best way to let it play out, to let the Court issue its ruling, let it go up to the court of appeals. The Cherokee are not bound, they're not parties to the case, it's not res judicata against them. I think, I could be wrong, but I think Mr. Bullock suggested that until the Court issued its Rule 19 ruling that the Cherokee had no opportunity to come in or could not have come in and, of course, that's not true; or could not have filed their own which, of course, that's not true. They could have as well.

THE COURT: Mr. Jorgensen, having clerked on an appellate court, that begs the question, and nobody has raised it here, why not allow or certify an interlocutory appeal with

regard to this CERCLA issue given that it appears that it very well may be the heart of this lawsuit?

MR. JORGENSEN: Well, I don't think it's necessary, Your Honor, because the State -- rather the Cherokee do not assert just the CERCLA. They also assert, as you know, nuisance and trespass, so that's together in a package. And then the cases that we've cited to you in our response were cases where tribes tried to join a lawsuit, the court said, no, you're too late. The trial was had and then on appeal, you'll notice in some on the footnotes, the court says -- so the trial has wrapped while this has been on appeal because, of course, the denial of a motion for intervention is immediately appealable. But that's not unusual. What I'm pointing out is that's not a particularly prejudicial or unusual case for the trial to proceed and wrap up while the case is on appeal. That's actually what happened in those cases.

THE COURT: Well, but here, although a difficult issue, the motion to intervene is not the easiest issue in this case, the real heart here is the CERCLA issue, which really needs to be decided by a court of appeals. And even though a denial of a motion to intervene is immediately appealable, that doesn't get to the central issue. The real issue here is the CERCLA issue.

MR. JORGENSEN: And on that issue, Your Honor, you have carefully carved it out so it will not be prejudiced by

the ongoing trial. You could do both. I'm not urging it on you, but you could certify CERCLA for interlocutory appeal and go forward with the trial, because the point is you have taken CERCLA and you've set it aside. And so the ongoing trial is not about CERCLA claims and would not hurt anything. And Mr. Bullock, I think, has made the point that we said oh, we don't want to have multiple litigation. And it's true, we generally don't. But that's not what we said and not what Rule 19 focuses on. What we didn't want was to be sued by the State and then pay the State and then have somebody else come and say guess what, you have to pay me because you paid the wrong person. That's what Rule 19 is driving at. Not at the cost of doing a trial. And if I can focus on that, the cost of doing the trial.

THE COURT: Right.

MR. JORGENSEN: We have already incurred it. Dozens of witnesses have cleared their schedules and some of them are here, ready to go. We have moved to Tulsa, set up war rooms, prepared all of our trials. Mr. Green has told Judge McKinney in Indiana you can't have a trial in the end of 2008 because I've got a trial with Judge Frizzell and so now that one is set for the spring.

The point being, I'm doing a poor job of articulating it, but there's a million factors when you are -- are we three or four business days before trial? And the cases that deny

intervention talk about discovery has closed and we're still a year out. That's too close to trial. Those are the cases that are cited to you. None of them are three business or four business days before trial. Just really, it's really remarkable.

I hope I did a decent job of addressing practicality. I think if the Cherokee come in, Your Honor, it would be a multi-month fight over who owns each individual parcel. And if that fight is going to come, it's going to come, but it shouldn't delay this trial, given all the time and expense and inconvenience to all of the parties, all of the witnesses, both paid and unpaid, some of the unpaid ones.

THE COURT: If this was only a CERCLA issue against you, it's a much easier issue.

MR. JORGENSEN: Yes. Because then you could just send it up and wait, but there are all these other claims, which you've carefully separated.

THE COURT: Well, but the motion to intervene is easier.

MR. JORGENSEN: That's right, Your Honor. That's right.

THE COURT: All right.

MR. JORGENSEN: Thank you, sir.

THE COURT: Anything else?

MR. BULLOCK: Well, I guess he opened up a couple of

things.

THE COURT: Yeah, I think we've gotten more or less to the heart here. Go ahead.

MR. BULLOCK: First of all, we're not talking about parcels, we're talking about water and so that central issue. But the trial which the --

THE COURT: But aren't we also talking about phosphorus deposition on the property as well?

MR. BULLOCK: Well, we're talking about where it started, but that's not an issue of ownership, that's a question of control of the litter.

THE COURT: Okay. But we're also talking about not where it started out, but we're not only talking about pollution to the water, we're talking about biota.

MR. BULLOCK: Those things we are, the water and the biota in the water.

THE COURT: Oh. Only in the water?

MR. BULLOCK: Yes.

THE COURT: Is that clear?

MR. BULLOCK: Yes. Tell me that I'm wrong. Yes, that's true.

MR. PAGE: Yes, Your Honor.

THE COURT: Is that what the defendants understood, that we're only talking about that which is in the water?

MR. JORGENSEN: We did not understand that, Your

Honor, but we would be willing right now to narrow the case to just the water and the biota.

MR. BULLOCK: Yes, that's been --

MR. PAGE: Your Honor, the expert reports are very clear, that they deal with the fish, algae and the macro-invertebrates and the bugs, all in the water.

THE COURT: I thought we were talking about sediment, et cetera.

MR. BULLOCK: No. We dropped sediment during the fight over the issue of the 12(b)(6). Our claim for damages is the water and biota. That is the damages that we have claimed.

THE COURT: All right. Mr. Jorgensen.

MR. JORGENSEN: Does that, is the State, by this concession, limiting itself then to surface water and not the groundwater under individual parcels of property?

THE COURT: I don't believe that's the case.

MR. JORGENSEN: Well, would not the groundwater then be tied to individual parcels of property?

MR. BULLOCK: Well, we believe that in terms of the sovereigns' interests, and now we've got them both, that they have a right to and some might even argue a duty to protect the health of the people who are drinking that groundwater. The question of the assessment of damages for it is a different matter. We have claimed that the title that goes to that within a defined stream within the groundwater, not the

standing groundwater which comes out of the well. So it's a little bit --

THE COURT: But isn't Mr. Jorgensen right, and it appears to me that Ms. Burch is trying to keep you from --

MR. BULLOCK: Well, she will --

THE COURT: Well, no, I'm asking you the question, here.

MR. BULLOCK: Okay. Well, that's --

THE COURT: It seems that Ms. Burch is trying to keep you from stipulating away a portion of the lawsuit, here. But to the extent that we're talking about groundwater, that's defined by ownership of property.

MR. BULLOCK: As to the groundwater, unless it flows in a defined stream. Groundwater flowing in a defined stream is not the possession of the individual any more than what the stream water that flows across your land is owned.

THE COURT: Now, you're talking to a guy who took about three years of geology. You know, there are very few defined streams underground. We're talking about porosity in sandstone, porosity in limestone. That is defined, those groundwater rights, as I understand it, are defined by your rights as a landowner in fee simple, et cetera; correct?

MR. BULLOCK: Right.

MR. JORGENSEN: That being said, Your Honor, we would be willing to accept the narrowing of the case right here to

defined streams of groundwater.

THE COURT: I mean, Ms. Burch, is the State willing to give away any rights that are defined by fee simple ownership or otherwise in real property?

MS. FOSTER: May I answer?

MR. BULLOCK: Yeah, please. He said --

MS. FOSTER: I don't think that -- I'm not sure that the State is willing to give any rights of real property and fee ownership. The State's claim for damages in this case, the claim that we have made for damages, the expert report on damages, is limited to surface water flowing in streams and biota. Now we have separate claims for remediation which are still alive in the case under our injunctive theories, but our damage claim is for surface water and biota, not groundwater.

THE COURT: Now, as I recall, we talked about the State's parks, as I recall three parks; correct? This has been a long time ago when we talked about them in the motion to dismiss. You're not making any claims with respect to that property that the State owns; is that correct?

MS. FOSTER: Damage to the surface of the property, the lands, is that question, or the groundwater?

THE COURT: Sediments, you know, pollution by virtue of phosphorus deposition on the land, whatever. In other words, no -- you're not asserting any rights that are defined by the State's ownership of real property?

MS. FOSTER: I want to be really careful how I answer the question because I want to be really clear.

THE COURT: Right. That's why I'm asking, because I understood that there were some interests being asserted, that were being asserted by virtue of the State's ownership of parcels of property.

MS. FOSTER: I think that there was a lot of discussion about that. If I remember correctly, and I could be wrong -- I hope somebody corrects me -- I think a lot of that discussion was related to our standing to make certain claims. And so I'm trying to be as clear as possible that our claim for damages, our claim for natural resource damages under CERCLA are claim for damages under common law and -- common law are aimed at the surface water and the biota.

THE COURT: I know CERCLA, but how about trespass, nuisance, those other claims?

MS. FOSTER: Those are also -- the damage claims associated with those are limited to the surface water and biota. Now there are sediments in the surface water which are interconnected and relate to our damage claim, but we're not making a separate claim for land or groundwater underlying land or anything like that or wildlife on the land as a result of --

THE COURT: You're not making claim for damage to groundwater underlying land?

MS. FOSTER: That is correct.

THE COURT: All right.

MS. FOSTER: And I hope I'm clear, but we are making a claim for remedial activities with regard to a broader category of interest, but just for our specific damage claims, money damage claims, those are limited. Is that clear, am I being clear about that? So we have might ask for abatement as a remedy with regard to groundwater, but we wouldn't be asking for natural resource damages to groundwater.

THE COURT: Under CERCLA.

MS. FOSTER: Under CERCLA or common law.

THE COURT: All right. So we're talking about money, but money in the context of the injunctive action?

MS. FOSTER: That's correct.

THE COURT: All right.

MR. BULLOCK: Let's see if I had anything else on this truly short list. Without question, the trial that we're coming up on has multiple common issues that presumably will be decided in that and so the idea that you can do this the piecemeal way that the defendants suggest, that we try this case and let us suppose that we get a judgment against us. The Cherokees then turn around and say -- well, the Cherokees get into the case. The case, it seems to me, that you have run into all sorts of issues with issue preclusion.

It is my view that -- I mean, we believe strongly that absolutely the Court should grant this. It really, for all the

handwringing, is not much. We certainly aren't interested in an appeal and certainly not a certified question, at least in terms of an appeal of the collateral source like this or collateral order like this. Those, as the Court knows, are handled with added expedition at the circuit. We're interested in trying the case, Judge, but we really think we need to try the whole case.

THE COURT: Mr. Jorgensen.

MR. JORGENSEN: I don't know if we're testing your patience, Your Honor, but isn't this an example of the kinds of issues and the days we would spend together if these issues got opened, not to mention the discovery. I mean, this is very complex. On water rights, I believe the State has asserted that they are -- and I'm pleased to see the case narrowed here, but on water rights alone, I believe the State has asserted in its briefs that they are fraction -- the ownership of them is fractionalized based on ownership of land and riparian rights. I have to admit I don't know tons about that because it hasn't been part of this case, but that would need to be researched, discovery on it and then litigated. I mean, the idea that we're just going to add these and we're going to add two new witnesses and off we go, it's just not true.

I'm sorry, Your Honor, do you have a question?

THE COURT: Well, in terms of the trespass claim for money damages, to the extent that it's now the position of the

plaintiff, State of Oklahoma, that they are not claiming any trespass to property rights delineated by metes and bounds, but rather with respect to trespass to water, it would seem to me that we have to determine the relative rights of the Cherokee Nation versus the State of Oklahoma. Your thoughts there?

MR. JORGENSEN: I think that's right, it would have to be determined. And on that point, Your Honor, yes that would have to be fought out, we haven't spent much time arguing about one of the key prongs that's still upon the screen, the prejudice. What Mr. Bullock has said, you know, what -- he's very concerned about the prejudice to the defendants if we had to do a second suit. But what is the prejudice to the Cherokee Nation to being allowed to bring their claims if they want to and go forward? There really isn't any, because the Court has so carefully carved out and set aside their claims so that they are preserved. And that goes perhaps to the issue that Mr. Bullock raised about issue preclusion. On this one, I'm confident. Issue preclusion does not run against a nonparty, so that's just a complete red herring. I believe the idea was that if the Court were to hold a trial and at some future point, either in their own litigation or somehow in this litigation, the Cherokee were to assert claims, the fact that the State had lost would somehow hurt the Cherokee and, of course, that's not how that works.

THE COURT: We'll take a recess and we'll be back.

MR. JORGENSEN: Thank you, Your Honor.

(Recess).

THE COURT: Be seated, please. Mr. Bullock is right. This is not a particularly easy issue and there is no perfect resolution to this issue. This case was filed over four years and three months ago, and trial is scheduled to begin less than a week from today. As previously stated, the Nation admits quote "there's a possibility for delay" end quote, in the event this Court were to permit intervention. The Nation attaches to its motion a proposed intervenor's complaint with three causes of action. The filing of an intervenor's complaint, including a federal common law nuisance claim would trigger more than a 120 day delay. It would require the reinsertion of three causes of action that were previously dismissed, the consequent resuscitation of numerous motions pertaining to those causes of action, both motions for summary judgment and motions in limine. Perhaps more significantly, it would trigger the necessity of a new round of discovery pertaining to at least the statute of limitations issues, a new round of motions for summary judgment and likely a new round of motions in limine, in addition to those 41 that have already been filed.

Such an approach would result in delay and expense, which would severely prejudice the parties who have been actively proceeding toward trial these past four-plus years. The defendants have adequately demonstrated that the Cherokee

Nation knew of its interest in this case from the outset of the litigation, but chose not to intervene for a number of reasons and the Court will not second-guess those reasons.

The Nation will not be prejudiced in the sense that its claims will not be impaired by the denial of its motion to intervene. The Cherokee Nation may bring its claims in a separate lawsuit if it wishes. This Court would be -- would have been pleased to grant the Nation's motion to intervene if it had been timely. Unfortunately it is not. For these reasons, as well as the other reasons set forth in the defendants brief, the motion to intervene found at docket number 2564 is denied.

The next motion is the motion for continuance of trial. Mr. Bullock.

MS. HAMMONS: Your Honor, may we be excused then?

THE COURT: You may.

MS. HAMMONS: Thank you, Your Honor.

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