

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

THE QUAPAW TRIBE OF OKLAHOMA)
(O-GAH-PAH), et al.,)
)
Plaintiffs,)
)
v.)
)
BLUE TEE CORP., et al.,)
)
Defendants.)

Case No. 03-CV-0846-CVE-PJC

**MOTION TO DISMISS FOR FAILURE TO JOIN
REQUIRED PARTIES AND BRIEF IN SUPPORT THEREOF**

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Pursuant to FED. R. CIV. P. 19 and 12(b)(7) and (i), Defendants Blue Tee Corp., The Doe Run Resources Corporation, Gold Fields Mining, LLC, and NL Industries, Inc. (collectively, the “Mining Defendants”) seek pretrial determination of their pleaded defenses of failure to join required parties under Rule 19 and dismissal of the natural resource damage claims asserted by the Quapaw Tribe (the “Tribe”) because of the absence of such parties. This motion results from the Tribe’s recent disclosure that it will no longer seek natural resource damages solely for its members’ alleged past lost use of certain Indian lands for agricultural and other economic purposes, but will now seek to recover damages for injuries to surface water and other natural resources over which the State of Oklahoma (the “State”) and other trustees affirmatively claim to have an interest. In addition, the six individual plaintiffs, each of whom seeks to recover property damages, are not the sole owners of the land at issue in the lawsuit. Given their interests in the subject matter of this litigation, the State and the absent landowners are required parties under Rule 19. The State cannot be joined because it is immune to suit under the Eleventh Amendment. With respect to the landowners, Plaintiffs should be required to identify and join these parties; if they are unwilling or unable to do so, the claims with absent required parties should be dismissed.

I. BACKGROUND

The Tribe and six individuals (the “Individual Plaintiffs”)¹ filed this action on December 10, 2003. As originally conceived, the Tribe sought natural resource damages and the Individual Plaintiffs sought to represent a class of “former and current owners, and possessors of real

¹ There were originally seven Individual Plaintiffs – Colleen Wilson Austin, Edwina Faye Busby, Reberta Hallam Kyser, Florence Mathews, Ardina Revard Moore, Jean Ann Lambert, and Edward Rodgers. (Compl., Dkt. No. 1, at ¶¶ 90-96). Mr. Rodgers has been dropped from the suit and Jennifer Lunsford now seeks to assert claims individually and as the personal representative of Ms. Kyser. (See 5th Am. Compl., Dkt. No. 570, at ¶¶ 47-52). Of the six Individual Plaintiffs, all but Ms. Lunsford assert that they are members of the Tribe. (*Id.*).

property located within the [former] Quapaw Reservation” with respect to property damage claims arising from past mining at the site. (Compl., Dkt. No. 1, at ¶¶ 250, 270, 280). On June 7, 2007, in conjunction with their Third Amended Complaint, Plaintiffs dropped their class allegations and request for class certification. (Dkt. No. 367). Plaintiffs filed their operative pleading – the Fifth Amended Complaint – on October 3, 2008. (Dkt. No. 570). In the Fifth Amended Complaint, the Tribe seeks (i) natural resource damages; (ii) compensatory damages sufficient to abate the risk of subsidence or, in the alternative, an injunction requiring abatement; and (iii) property damages. (*See id.* at 37-41). The Individual Plaintiffs seek property damages. (*See id.* at 39-41). The Mining Defendants each asserted failure to join an indispensable party as an affirmative defense. (*See* Dkt. Nos. 574 at 28; 575 at 28; 576 at 10; 580 at 9).

On October 26, 2007, Plaintiffs served their First Supplemental Rule 26(a) Disclosures (attached as Ex. A). As required by FED. R. CIV. P. 26(a)(1)(C), the Tribe provided a computation of the natural resource and abatement damages claimed by the Tribe. (*See id.* at 6-10 and attached exhibits). The computation of damages for its natural resource damage claims was based on lost agricultural and recreational rents for the use of terrestrial resources (i.e., the land, including riparian areas alongside streams, but not the streams themselves). The Tribe did not compute damages for injuries to surface water, aquatic and terrestrial habitat, or any use of natural resources that was not tied directly to its members’ alleged past inability to use their land for agricultural and recreational leasing purposes.

On January 15, 2009, the Mining Defendants filed their Phase I Motion for Summary Judgment arguing, *inter alia*, that the Tribe could not recover natural resource damages for lost agricultural and recreational rents because such claims, if any, belonged to individual landowners, not the Tribe. (*See* Dkt. No. 618 at 34-39). The Court agreed and granted summary

judgment to the extent the Tribe sought recovery of agricultural and recreational rents. (Dkt. No. 678 at 24-25). However, the Court granted the Tribe permission to “expeditiously supplement its initial disclosures as to damages” and stated that “the Tribe may not rely on a loss of use model to calculate its damages, and it must provide a reasonable calculation of damages based on actual harm to natural resources over which the Tribe may act as a natural resources trustee.” (*Id.* at 25 and n.9).

On October 9, 2009, over two months after the Court ordered the Tribe to “expeditiously” supplement its damage calculations, Plaintiffs served their Second Supplemental Rule 26 (a) Disclosures (attached as Ex. B). Plaintiffs served their Third Supplemental Rule 26 (a) Disclosures on October 30, 2009 (attached as Ex. C) and their Fourth Supplemental Rule 26 (a) Disclosures on November 25, 2009 (attached as Ex. D). Although none of these disclosures contains the required computation of damages, Plaintiffs do disclose the general methodology they intend to use to calculate their natural resource damages. (*See* 3rd Supp. Rule 26(a) Discl., Ex. C, at 7-13). The Tribe now indicates that it intends to employ a “habitat equivalency analysis,” or “HEA,” for “aquatic and terrestrial habitat (and biota dependent on those habitats) injured by the unpermitted release of hazardous contaminants from mining activities.” (*Id.* at 8). The Tribe also states that it might perform a “resource equivalency analysis,” or “REA,” for certain unidentified natural resources.² (*Id.* at 8 n.2).

² The Third Supplemental 26(a) Disclosures also provide more detail regarding the Individual Plaintiffs’ damages. (*Id.* at 13). Although the Individual Plaintiffs, like the Tribe, fail to provide an actual computation of their damages as required by the rule, it is clear that they are seeking property damages and that they intend to measure their damages either based on a temporary injury to the land, or by diminution in value to the property. (*Id.*). In either case, it appears that each Individual Plaintiff is seeking to recover for the entire damage to each property in which she holds an interest, even where it is only a fractional interest.

This modification in damage theories represents a dramatic expansion of the resources actually at issue in this litigation. While the Tribe's complaints and discovery responses have been worded broadly to include the possibility that the Tribe might seek to recover for a potentially limitless number of specific "natural resources," the Tribe never provided a computation for natural resources other than those identified in the damage computation in its First Supplemental Rule 26(a) Disclosures. That computation appeared to have been fashioned in a manner that carefully avoided seeking damages for injury to resources over which the State of Oklahoma asserts trusteeship; that is for injury to any resource other than land owned by or on behalf of the Tribe and its members. Now that the Court has rejected this damage model, the Tribe has modified its damage model and seeks damages based on injuries to terrestrial "plants, birds, mammals and other biota," as well as aquatic resources, including biota such as "macroinvertebrates, mussels, clams, crayfish and fish." (*Id.*). These aquatic resources stretch beyond lands owned by the Tribe and its members and "may include all streams on the historic reservation" including "the entire stretches of Tar Creek, Lytle Creek, Beaver Creek, Rock Creek and Quapaw Creek." (*Id.* at 11). By expanding its claims to include aquatic resources, fish, and wildlife, the Tribe invades the interest that the State of Oklahoma asserts in these very same resources. Because the State is now a required party to this action and its joinder is infeasible, the Tribe's natural resource damage claims should be dismissed. In addition, co-owners of land for which the Individual Plaintiffs seek damages are required parties who should be identified and joined by Plaintiffs. If they are unable or unwilling to do so, these claims should be dismissed.

II. LEGAL STANDARDS.

Rule 19 establishes a three-step process for determining whether an action should be dismissed for failure to join a required party.³ *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001), *modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001). First, the Court determines whether the absentee is a required party, applying the factors articulated in Rule 19(a)(1), i.e., whether the court can accord complete relief among the parties without the absentee or whether the absentee claims an interest in the subject matter of that litigation that would be impeded or that would subject a party to the risk of incurring multiple obligations. *Id.* 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.” *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999) (emphasis in original) (quoting FED. R. CIV. P. 19(a)(2)). This standard excludes only those claimed interests that are “patently frivolous.” *Id.* at 959 (citing *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

If an absentee is a required party, the Court next determines whether joinder of the absentee is “feasible.” *Citizen Potawatomi Nation*, 248 F.3d at 997. Joinder may not be feasible where the joinder would destroy the Court’s subject matter jurisdiction, or where the absent party enjoys sovereign immunity from suit. *See id.* (noting agreement of the parties that joinder of absent tribes was not feasible because the tribes enjoy sovereign immunity); *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 474 (N.D. Okla. 2009) (noting that joinder of the Cherokee Nation is not feasible absent waiver of sovereign immunity by the tribe or abrogation by Congress).

³ Rule 19 was revised in 2007, to reference “required” parties rather than “necessary” parties, and to delete the reference to “indispensable” parties. These changes were stylistic only, and the substance and operation of Rule 19 remains unchanged. *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2184-85 (2008). Therefore, pre-2007 cases remain good law.

Finally, if joinder is not feasible, the Court must determine “whether in ‘equity and good conscience’ the action can continue” in the absence of the required party. *Citizen Potawatomi Nation*, 248 F.3d at 997.

In making this determination, the court must weigh the extent to which a judgment rendered in the person’s absence might be prejudicial to the person or those already parties; the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; whether a judgment rendered in the person’s absence will be adequate; and whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder.

Id. at 1000. This determination focuses on 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.

Davis v. United States, 343 F.3d 1282, 1290 (10th Cir. 2003) (alterations in original) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968)).

The party raising the defense of absence of a required party has the burden of persuasion on the issue. *Tyson Foods*, 258 F.R.D. at 475. To meet this burden, even when the issue is raised by motion, “the moving party may present, and the court may consider, evidence outside the pleadings.” *Raytheon Co. v. Continental Cas. Co.*, 123 F. Supp. 2d 22, 32 (D. Mass 2000); see also *Microsoft Corp. v. Cietdirect.com LLC*, Case No. 08-60668, 2008 U.S. Dist. LEXIS 61956, at *16 (S.D. Fla. Aug. 5, 2008) (“A determination on a motion to dismiss for failure to join a [required] party requires the court to accept the allegations of the complaint as true, and the Court may go outside the pleadings and look at extrinsic evidence.”) (citing *Rotec Indus., Inc. v. Aecon Group, Inc.*, 436 F. Supp. 2d 931 (N.D. Ill. 2006) and *Davis Co. v. Emerald Casino, Inc.*,

268 F.3d 477, 479-80 n.2, 4 (7th Cir. 2001)). The defense may be presented to the Court by pre-answer motion under Rule 12(b)(7), by pleading in the Defendants' answer, or even at trial. FED. R. CIV. P. 12 (h)(2). Regardless of how raised, on motion of a party the Court must determine the merit of the defense prior to trial, unless it defers the issue until trial. FED. R. CIV. P. 12(i).

III. LEGAL ARGUMENTS

A. The State of Oklahoma is a required party to the Tribe's natural resource damage claims, and the infeasibility of joining the State requires dismissal.

The necessity under Rule 19 of joining all potential natural resource trustees was recently analyzed by Judge Frizzell in the context of the State of Oklahoma's statutory and common law claims for natural resource damages arising from application of chicken litter in the Illinois River watershed. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472 (N.D. Okla. 2009) ("Tyson Foods"). In *Tyson Foods*, the State of Oklahoma sought injunctive relief and damages for injuries to natural resources. The State claimed that it "without limitation, has an interest in the beds and navigable 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 the benefit of the public." *Id.* at 477 n.4 (internal quotations omitted). The defendants, poultry companies alleged to be responsible for polluting the watershed, moved to dismiss the damage claims under Rule 19 for failure to join the Cherokee Nation as a required party. *Id.* at 473.

Judge Frizzell agreed that the Cherokee Nation was a required party whose joinder was not feasible, and that the State's damage claims must be dismissed. *Id.* at 484. The court initially concluded that the Cherokee Nation claimed an interest in the natural resources at issue in the case, which was expressed in multiple ways. First, the Nation "claims in its written Code an interest in protecting the Illinois River and in vindicating its claimed rights for any pollution in the watershed." *Id.* at 477. Second, the Nation "claims an interest in recovering for itself civil

remedies – including monetary damages – for injuries to the IRW claimed in this action” and “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.” *Id.* at 477-78. Third, the Nation claimed an interest in regulating and taxing actions that adversely impact the environment of the Nation. *Id.* at 478. Fourth, the Nation claimed water rights within the watershed through its treaties with the United States. *Id.* And finally, the Nation claimed an interest in seeking natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 96-7(f)(1). *Id.* at 479.

The court next determined, under Rule 19(a)(1)(B), that disposing of the case without joining the Cherokee Nation would impair or impede the Nation’s ability to protect its interests. The court noted that the State’s claim did not differentiate between natural resources of the State and those managed by the Tribe, and that in the Tribe’s absence, the State could use a damage award in any way it wished, including payment of up to half of the award to its private attorneys. *Id.* at 479-80. Without the Nation being joined in the case, the court would be unable to make a determination as to the ratio of natural resources managed by the State and Nation, resulting in the likelihood that the State would be “unjustly enriched at the expense of the Nation, thereby impairing the Cherokee Nation’s ability to protect its interests.” *Id.* at 480. And without joinder of the Cherokee Nation, the defendants would be at substantial risk of multiple inconsistent obligations. Given the Cherokee Nation’s previous, though invalid, attempt to assign its claims to the State, as well as public statements by the Nation’s Principal Chief, it was clear that the risk of litigation by the Nation was real, with a potential for double recovery of damages. *Id.* Based on these factors, the court determined that the Tribe was a required party. *Id.* at 481.

Stating that the parties agreed that joinder was not feasible under principles of tribal sovereign immunity, the court next turned to the issue of whether the action should be allowed to proceed. *Id.* Judge Frizzell found that both the Cherokee Nation and the defendants would suffer prejudice in the Nation's absence – the Nation because of the likelihood that the State would recover damages belonging to the Nation; and the defendants due to the risk that they would be subject to separate litigation by the Nation. *Id.* at 481-82. The court was unable to find any way to avoid or minimize the prejudice to the defendants or the Nation. *Id.* at 482. Further, judgment rendered in the absence of the Nation would not be adequate.

[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.

Id. (quoting *Davis*, 343 F.3d at 1292-93). Finally, the court concluded that, even if the action were dismissed, the State would have an adequate remedy because it could file a later suit after entering into an agreement with the Cherokee Nation, and could also continue to pursue its claims for injunctive relief. *Id.* Given that each of these factors weighed in favor of dismissal, Judge Frizzell dismissed the State's damage claims for failure to join the Cherokee Nation as a required party under Rule 19. *Id.* at 484.

The Quapaw Tribe's claims present the same situation as that which Judge Frizzell faced in *Tyson Foods*, except the posture of the Tribe and the State is reversed. Here, the Tribe is pursuing its natural resource damage claims to the exclusion of the State of Oklahoma, which asserts an interest in the same resources for which the Tribe now seeks damages. As was true of the Cherokee Nation in *Tyson Foods*, joinder of the State is not feasible here, though for a

different reason, i.e., Eleventh Amendment immunity. And as in *Tyson Foods*, the equities here weigh in favor of dismissal.

1. The State claims an interest in the natural resources at issue.

As noted above, the specific natural resources at issue in the Tribe's recent partial damages disclosures are very different than those at issue under the Tribe's previous damage model. Although the Tribe's Complaint speaks of its interest in natural resources in broad general terms, i.e., "[g]roundwater, surface water, sediments, wetlands, land, vegetation and wildlife" (*see* Dkt. No. 570 at ¶ 131), until recently, the Tribe had limited the computation of its natural resource damage claims to its members' past lost beneficial use of land for agricultural and recreational leasing purposes. (1st Supp. Rule 26 (a) Discl., Ex. A, at 6-9). With its Third Supplemental Rule 26 (a)(1) Disclosures, the Tribe has expanded the resources for which it is seeking damages far beyond the terrestrial resource (i.e., land) owned by its members. The Tribe now seeks damages for injuries to "all streams on the historic reservation," as well as damages for injuries to organisms relying on terrestrial and aquatic resources for habitat. (3rd Supp. Rule 26(a) Discl., Ex. C, at 11). This expansion of the Tribe's claim directly implicates the interests claimed by the State of Oklahoma in wildlife and waters within the State of Oklahoma.⁴

The State asserts its interest in the waters and wildlife of the State in a number of ways. First, the Oklahoma Legislature has declared the State's interest in these resources. For example, the State claims an interest in all unappropriated surface water within the State:

Water running in a definite stream, formed by nature over or under the surface, may be used by the owner of the land riparian to the

⁴ In addition to the State, six other Indian tribes, along with the Department of the Interior, are members of the Tar Creek Trustees Council and claim some trusteeship over natural resources in the area. Because the Tribe has not identified the specific resources for which it will seek damages, it is not possible to determine whether these resources overlap with the resources over which the six other Tribes assert trusteeship. It is possible, however, that these other Tribes will also be required parties and that infeasibility of their joinder will also require dismissal.

stream for domestic uses as defined in Section 105.1 of Title 82105.1 of the Oklahoma Statutes, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as *such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law*

OKLA. STAT. ANN., tit. 60, § 60 (emphasis added); *see also Oklahoma Water Res. Bd. v. Central Okla. Master Conservancy Dist.*, 464 P.2d 748, 753 (Okla. 1968) (“Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes.”); *Hanes v. State*, 973 P.2d 330, 337 (Okla. Crim. App. 1998) (holding that bed of Grand (or Neosho) River fell outside definition of Indian Country when upland was allotted by Cherokee Nation and passed out of restricted Indian ownership, and finding that the State had police power to regulate the time and manner of fishing). Likewise, the State asserts an interest in wildlife within the State: “All wildlife found in this state is the property of the state.” OKLA. STAT. ANN., tit. 29, § 7-204. And the Legislature has granted the Department of Wildlife Conservation jurisdiction to investigate wildlife kills and assert “wildlife damage claims.” OKLA. STAT. ANN., tit. 27A, § 1-3-101(H)(1)-(2). Finally, the Legislature has appointed the Secretary of the Environment to:

Act on behalf of the public as trustee for natural resources under the federal Oil Pollution Act of 1990, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the federal Water Pollution Control Act and any other federal laws providing that a trustee for the natural resources is to be designated.”

OKLA. STAT. ANN., tit. 27A, § 1-2-101.

The State of Oklahoma, as a member of the Tar Creek Trustee Council, has expressed its interest in the natural resources at the Tar Creek Site through natural resource damage assessment (“NRDA”) activities. As part of these NRDA activities, the State asserts that:

The State of Oklahoma, through the Oklahoma Secretary of Environment, acts as a natural resource Trustee on behalf of the public for natural resources, including their supporting ecosystems, at the Tar Creek Site within the boundary of the State or which belong to, are controlled by, are managed by, or appertain to the State.”

(Preassessment Screen for the Tar Creek Superfund Site, Ex. E, at 5.2). The Final Assessment Plan prepared by the Trustee Council identifies Lytle Creek, Tar Creek, Elm Creek, and the Spring River and its tributaries (including Beaver, Ontario, Quapaw, and Hockerville Creeks) as waterbodies over which the members of the Trustee Council assert trusteeship and for which the Council will be performing NRDA activities. (Final Report: Assessment Plan for Tar Creek, Ottawa County, Oklahoma, Ex. F, at 2-2 to 2-5). The Trustee Council also states that it may perform a habitat equivalency analysis and/or a resource equivalency analysis to value injured resources within the Tar Creek Site. (*Id.* at 4-18 to 4-20).

The State of Oklahoma has also asserted its interest in natural resources within the Tar Creek Site by pursuing a claim for natural resource damages in the Asarco bankruptcy proceeding, *In re Asarco LLC*, Case No. 05-21207 (S.D. Tex. 2005). On July 31, 2006, the State filed a proof of claim for over \$2 billion relating to its natural resource damage claim. (*See Ex. G*). In its supporting claim summary, the State noted that the Oklahoma Secretary of the Environment “acts on behalf of the public as trustee for natural resources, including their supporting ecosystems, within the boundary of the State or belonging to, managed by, or controlled by or appertaining to the State.” (*Id.*). The State indicated that it was seeking damages relating to approximately 4,400 acres of contaminated land, as well as 253.56 miles of streams and 11,434 acres of riparian habitat. (*Id.*). The State’s claim, which was developed jointly with the Department of the Interior and six Indian tribes (the Cherokee Nation, the Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, the Wyandotte

Nation, the Peoria Tribe of Indians of Oklahoma, and the Ottawa Tribe of Oklahoma) does not exclude any areas or resources over which the Quapaw Tribe may be asserting trusteeship.

The State reaffirmed its broad view of the scope of its interests in natural resources in its Initial Submissions in the Asarco Bankruptcy. There, the State noted that, although it had limited its claims by not seeking to hold Asarco jointly and severally liable:

The State, upon further development of the evidence and claim, and given the opportunity to present its claims outside the strictures of this estimation process, will assert a claim for site wide joint and several liability against other responsible parties. The State reserves all rights to bring a full claim against other responsible parties for the full amount of natural resource damages suffered at Tar Creek.

(Notice of Initial Submissions for Tar Creek Superfund Site Estimation Hearing by the State of Oklahoma, Ex. H, at 2). The State's Initial Submission also incorporated the Expert Report of Michael C. Donlan⁵, as well as an "NRD Assessment and Restoration Cost Estimate" prepared by the Department of the Interior, the States of Oklahoma, Kansas, and Missouri, and the six participating Indian Tribes (the "NRD Cost Estimate"). In the NRD Cost Estimate, the State of Oklahoma states that:

[T]he State of Oklahoma asserts trusteeship over natural resources, including their supporting ecosystems, within the boundary of the State or belonging to, managed by or appertaining to the State. Natural resources within the State of Oklahoma's trusteeship include, without limitation, surface water, groundwater, sediments, soil, habitat, air, fish, wildlife and biota.

(Ex. I, at 12). In estimating the natural resource damages for the Asarco bankruptcy proceeding, the Tar Creek trustees, including the State of Oklahoma, utilized a HEA to account for 1,190

⁵ Notably, the Tribe's Third and Fourth Supplemental Rule 26(a) Disclosures indicate that the Tribe's HEA analysis will rely on the analysis in the Donlan Report and the reports on which he relied. The Tribe has further stated that: "Mr. Donlan's HEA – a significant portion of which focuses on Tar Creek – will serve as the basis for the Tribe's HEA in this matter." (Dkt. No. 696 at 6). This further demonstrates the State's interest in the natural resources at issue in this case.

acres of injured terrestrial habitat. (*Id.* at 60-62). This area includes the entire Tar Creek Site, and does not exclude areas over which the Quapaw Tribe might assert trusteeship. Indeed, as the Tribe itself acknowledges in referring to the NRD Cost Estimate: “The Tribe anticipates that the spatial extent of the injury in its HEA analysis will overlap with some of these areas.” (3rd Supp. Rule 26(a) Discl., Ex. C, at 11). The NRD Cost Estimate also looked at damages for injuries to Elm Creek, Tar Creek, Lytle Creek, the Spring River, Beaver Creek, and Quapaw Creek. (Ex. I, at 12). The Tribe identifies these same streams (excluding the Spring River and Elm Creek) as areas for which it is seeking damages: “Specific waterbodies injured include the entire stretches of Tar Creek, Lytle Creek, Beaver Creek, Rock Creek, and Quapaw Creek within the Quapaw historic Reservation. The Tribe anticipates that the spatial extent of the injury encompasses these areas.” (3rd Supp. Rule 26(a) Disclosures, Ex. I, at 11).

Finally, the State’s position in *Tyson Foods* also demonstrates that the State of Oklahoma asserts a broad interest in natural resources, even those in Indian country. In its Second Amended Complaint, the State alleged as follows:

The State of Oklahoma is a sovereign state of the United States. The State of Oklahoma, 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. Additionally, the State of Oklahoma holds all natural resources, including the biota, land, air, and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public.

Dkt. No. 1215, at ¶ 5, in *State of Oklahoma v. Tyson Foods, Inc.*, Case No. 05-cv-329-GKF-SAJ. In *Tyson Foods*, an issue remained as to whether, in fact, the State’s interest is as broad as alleged. But as to the relevant inquiry under Rule 19, it is clear that it is the State’s position that it has broad interests in all natural resources within the State.

In short, the State has, in numerous instances, asserted broad interests in all natural resources within the State of Oklahoma, including resources the Tribe has now placed at issue in

this litigation. The State and the Tribe both claim trusteeship over terrestrial, aquatic, and biotic resources at the Tar Creek Site, and the State's interests in the subject matter of this litigation "are substantial and are neither fabricated nor frivolous." *Tyson Foods*, 258 F.R.D. at 478.

2. Proceeding without the State would impair the State's ability to protect its interests and would leave the Mining Defendants subject to a substantial risk of incurring multiple inconsistent liabilities.

The State, along with the other trustees on the Tar Creek Trustees Counsel, is in the process of preparing an NRDA pursuant to DOI regulations, with the intent of eventually bringing a claim for natural resource damages against the potentially responsible parties. (*See* Ex. F, at 3-4). Adjudication of this action in the absence of the State "would impair or impede [its] sovereign and stated interest in recovering for itself civil remedies for pollution of lands, waters and other natural resources within its . . . jurisdiction." *Tyson Foods*, 258 F.R.D. at 479. The State has already expressed an intent to pursue natural resource damage claims after performing an NRDA as required by the DOI regulations, and the Tribe's claim "ignores [the State's] sovereign right to manage the natural resources within its jurisdiction and seek redress for pollution thereto." *Id.* In addition, the Tribe is not bound to use any of the damages recovered to benefit the State. As in *Tyson Foods*, a large portion of the damages that could be awarded would not benefit the State, since the Tribe intends to pay part of any such award to private counsel in the form of a contingency fee. *See id.* at 479-80; *see also* Dkt. No. 570 at 38-39 (providing that damages recovered for pre-December 10, 1980 will be available for restoration, replacement, or acquisition of equivalent resources, but only after payment of attorneys' fees and litigation costs). In fact, the Tribe has already used part of its natural resource damage recovery from the Asarco bankruptcy to pay private counsel, rather than to restore, replace, or acquire the equivalent of the injured natural resources. (Mercer Dep., Ex. J, at 99:8-101:7). In the State's absence, the Quapaw Tribe is free to decide to again pay a large

portion of its recovery to private lawyers, rather than using such funds to restore or replace the resources in which the State claims an interest.

In addition, resolution of this case will require the Court to determine the extent to which the Tribe has trusteeship over the resources for which the State also claims trusteeship. A determination that the Tribe is trustee to the exclusion of the State would obviously be detrimental to the interests of the State. Even if the Court finds that the State and Tribe are co-trustees over the resources, in the State's absence the Court will have no ability to determine the ratio of actual management and control of resources between the State and the Tribe, potentially resulting in the unjust enrichment of the Tribe at the State's expense. *See Tyson Foods*, 258 F.R.D. at 480 (noting dangers of proceeding in absence of one co-trustee when compensation of co-trustees is based on percentage of actual management and control exercised by each trustee (citing *Coeur D'Alene Tribe v. Asarco, Inc.* 280 F. Supp. 2d 1094 (D. Idaho 2003))).

Allowing the case to proceed without the State also subjects the Mining Defendants to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." FED. R. CIV. P. 19(a)(1)(B)(ii). The possibility of being subjected to a lawsuit by the State for natural resource damage claims "is real; it is not unsubstantiated or speculative." *Tyson Foods*, 258 F.R.D. at 480. The State has already indicated that it intends to seek to hold potentially responsible parties liable for all natural resource damages at the Tar Creek Site. (*See* Ex. F, at 3-4). The State has, in fact, already asserted and received an allowed claim for natural resource damages at Tar Creek in the Asarco bankruptcy. (*See* Order Approving Settlement Agreement After Public Comment for the Tri-State Mining District Sites, Ex. K, at ¶¶ 4-5). And as discussed above, the State's claim was, in part, for injuries to the very resources the Tribe has placed in issue in its new damages model.

Given the impairment of the State's interests, as well as the likelihood that Defendants will be subjected to multiple, inconsistent obligations in the State's absence, the State is a required party to the Tribe's natural resource damage claims.

3. The State cannot be joined due to its sovereign immunity under the Eleventh Amendment.

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The Eleventh Amendment stands

for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact, that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the “plan of the convention.”

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (citations omitted). Although the Amendment on its face appears to apply to individual citizens, the Supreme Court has held that the Eleventh Amendment also bars suits against a state by an Indian tribe. *Id.* at 780-82. When a State is a required party, its Eleventh Amendment immunity renders joinder infeasible for purposes of Rule 19. *See, e.g., Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1495-96 (D.C. Cir. 1995) (joinder of State of Kansas in lawsuit by Indian tribe is not feasible because “Kansas enjoys immunity under the Eleventh Amendment of the United States Constitution that extends to suits commenced by Indian tribes.”); *see also Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505-06 (8th Cir. 1995) (finding that Eleventh Amendment bars involuntary joinder under Rule 19(a) of Missouri Department of Natural Resources in lawsuit by private individuals for environmental remediation costs and noting that “disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment

was intended to avoid”). Due to its immunity to suit under the Eleventh Amendment, joinder of the State is not feasible.

4. The Tribe’s natural resource damage claims should be dismissed.

Given that the State is a required party and that its joinder is not feasible, equity and good conscience dictate that the Tribe’s natural resource damage claims should be dismissed under the factors articulated in FED. R. CIV. P. 19(b). The fact that the State cannot be joined due to its sovereign immunity from suit may, in itself, compel dismissal of the Tribe’s natural resource damage claims. As the Supreme Court has noted:

A case may not proceed when a required-entity sovereign is not amenable to suit. . . . [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

Republic of the Philippines v. Pimentel, 128 S. Ct. 2180, 2191 (2008) (dismissing case for failure to join foreign sovereign where the Court of Appeals gave insufficient weight to the sovereign status of the absent party); *see also Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989) (“When, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests ‘compelling by themselves.’” (internal quotations omitted)). Since the State possesses non-frivolous claims for natural resource damages, but cannot be joined due to its sovereign immunity, the Court should dismiss the Tribe’s natural resource damage claims.

Balancing the four factors set forth in FED. R. CIV. P. 19(b) confirms that the natural resource damage claims should be dismissed.

(a) Prejudice. The first factor under Rule 19(b) – the prejudice to the required party and other parties if a judgment is rendered in the absence of the required party – weighs in favor of

dismissal. This factor is essentially the same as the inquiry as to the impairment of the absentee's ability to protect its interests under Rule 19(a)(2)(i). *Enterprise Mgmt. Consultants*, 883 F.2d at 894 n.4. The State has an interest in governing and regulating resources within its jurisdiction, in recovering monetary damages for injury to natural resources within its trusteeship, and avoiding unjust enrichment of other natural resource trustees. And the State would likely suffer prejudice to its interests if a judgment is rendered on the Tribe's natural resource damage claims. *See Tyson Foods*, 258 F.R.D. at 481. The Mining Defendants also face prejudice in that, as discussed above, allowing the Tribe to proceed alone will subject them to a substantial risk of multiple, inconsistent obligations. This is particularly true given that the State has already said that it intends to pursue NRD claims after completion of its NRDA activities. And if the Mining Defendants prevail on the Tribe's claims, the State would argue that it is not bound by that litigation, resulting in duplicative litigation with potentially inconsistent adjudications. *See id.* at 481-82. As in *Tyson Foods*, this factor favors dismissal of the claims.

(b) Avoidance/Minimization of Prejudice. There is no apparent way to avoid or minimize the prejudice faced by the State and the Mining Defendants. "[A] damage award to the [Tribe] either abridges the right of the [State] to pursue its own claim for money damages or, to the extent the [State] is not barred by issue or claim preclusion, conversely exposes defendants to the risk of multiple inconsistent judgments." *Id.* at 482. Because there is no feasible way to lessen the prejudice to the State or the Mining Defendants, this factor favors dismissal.

(c) Adequacy of Judgment Rendered in Absence of the State. The "adequacy" prong of the inquiry focuses not on adequacy from the plaintiff's perspective, but instead refers to the "public stake in settling disputes by wholes, whenever possible." *Provident Tradesmens*, 390 U.S. at 111. A judgment rendered in the absence of the State clearly would not be adequate

when viewed from this perspective. The State likely would not be bound by the judgment in this case, and it has already asserted that it intends to pursue a separate natural resource damage claim after completion of the Tar Creek Trustees' NRDA activities. *See Tyson Foods*, 258 F.R.D. at 482 (finding that, in resolving NRD claims with one trustee absent, "[t]he 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 adequacy of judgment factor therefore weighs in favor of dismissal of the Tribe's natural resource damage claim.

(d) Adequacy of Alternative Remedy. Finally, the availability of an adequate remedy also weighs in favor of dismissal of the Tribe's natural resource damage claim. The Tribe could rejoin the Tar Creek Trustee Council and pursue its natural resource damage claim jointly with the State, as the Department of the Interior and the other Tribes have done. Alternatively, the Tribe could seek to intervene if and when the other trustees, including the State, seek to pursue their NRD claims after completion of the NRDA activities.⁶

5. Conclusion

The State of Oklahoma has asserted an interest in the very resources for which the Quapaw Tribe now seeks to recover damages, and is a required party to this litigation due to its inability to protect its interests and because the State's absence puts the Mining Defendants at substantial risk of multiple, inconsistent liabilities. Joinder of the State is infeasible under the Eleventh Amendment, and equity and good conscience dictate that the Tribe's natural resource damage claims should be dismissed.

⁶ It is noteworthy that the Tribe's current common law NRD claim is but one component of the Tribe's potential NRD claims. The Court has already dismissed the Tribe's CERCLA NRD claims, without prejudice to later filing after EPA has completed its work at the Site. (Dkt. No. 560). In addition, the Tribe has stated that it has reserved its residual NRD claims (i.e., claims for restoration, replacement, or acquisition of equivalent resources) for a later proceeding. (*See* Tr. of July 31, 2007 Hr'g, Ex. L, at 13:7-16).

B. The co-owners of property are required parties to the claims for property damage.

In addition to the State, co-owners of land at issue are required parties who have not been joined by the Individual Plaintiffs. Unlike the State, joinder of these co-owners may be feasible, in which case Plaintiffs should be required to identify and join all such co-owners. If Plaintiffs are unable or unwilling to do so, their property damage claims should be dismissed.

As part of the claims in this lawsuit, the Tribe and the Individual Plaintiffs seek “compensatory damages for Defendants’ wrongful acts and omissions as complained of herein.” (5th Am. Compl., Dkt. No. 570, at 47). The six Individual Plaintiffs (other than Ms. Lunsford) assert that they are members of the Tribe, and each claims to be “the owner of interests in land and other assets” within the former Quapaw Reservation. (*Id.* at ¶¶ 47-52). Although they do not provide the required computation of damages in their Rule 26(a)(1) disclosures, they do make it clear that they are seeking property damages:

Property damages sought by the Individual Plaintiffs

It is the contention of the individual Plaintiffs that the injuries to their lands are temporary, i.e. “abatable either by an expenditure of labor or money.” However, to the extent the Court concludes that the proper measure of damages is diminution in value, then this measure of damages will be calculated as the difference between the value of the properties without contamination as compared to the value of the properties with such contamination. . . .

(3rd Supp. Rule 26(a) Discl., Ex. C, at 13).

As suggested in the Fifth Amended Complaint, the Individual Plaintiffs are not the sole owners of the properties for which they are seeking damages, but rather they own only fractional interests in most of those properties. For example, Ms. Busby claims a 5% fractional undivided interest in the Francis Quapaw Goodeagle allotment, and 8.33% fractional undivided interests in the Wat-tah-noh-zhe Goodeagle and Meh-het-tah Spada allotments. (Busby Objections and

Answers to Dft. Blue Tee Corp.'s Interrogs., Ex. M, at 5-6). Ms. Busby also claims to own a 1/20th of 51.65% (or approximately 2.5%) restricted undivided interest in the Pioneer chat pile. (*Id.* at 9).

Similarly, Ms. Moore claims a 0.625% interest in the Ruth Goodeagle allotment; a 1.25% interest in the Slim Jim allotment; between a 1.25% and a 5% interest in different parts of the Hah-win-nah-she Stanley allotment; 2.5% interests in the Sin-tah-hah-hah and Robert Thompson allotments; a 3.3% interest in the Oh-sta-wet-tah allotment; 5% interests in the Francis Quapaw Goodeagle, Fannie Crawfish, Mary Crawfish, and Joseph Greenback allotments; a 5.5% interest in the Netta Track allotment; between a 5% and 86.6% interest in different parts of the Anna Slagle allotment; and a 20% interest in the Minnie Track allotment. (Moore Objections and Answers to Dft. Blue Tee Corp.'s Interrogs., Ex. N, at 6-9). She also claims a fractional undivided interest in the Howe, St. Joe, Ottawa, and St. Louis No. 6 chat piles. (*Id.* at 12). Other individual Plaintiffs also own fractional interests in land. (*See* Ex. O, at 5-6 (Austin); Ex. P, at 7-8 (Lambert); (Ex. Q, at 5-6 (Lunsford); and Ex. R, at 5-6 (Mathews)).

Under Oklahoma and federal law *all* co-owners of real property must join in a suit to recover for damages to the property. In *Haught v. Continental Oil Co.*, a case involving allegations of contamination from oil and gas operations, the Oklahoma Supreme Court stated:

The rule is well established in this jurisdiction that where two parties have a joint interest in property, they must join in an action for injuries to such property. . . . It is the general rule that a joinder of cotenants is required in actions "for trespasses upon the common land." A defendant has the right to have a cause of action prosecuted against him by all of the real parties in interest. It thus seems clear that the damages involved herein are recoverable only in a single joint action in which both joint owners of the real property are necessary parties.

136 P.2d 691, 693 (Okla. 1943) (citations omitted) (quoting 14 AM. JUR., COTENANTS, § 98, p. 163); *see also* *Cole v. Asarco, Inc.*, 256 F.R.D. 690, 698 (N.D. Okla. 2009) ("Under Oklahoma

law, all parties having an interest in real property must join in an action for damage to the property.”). The same rule applies under Rule 19 of the Federal Rules of Civil Procedure. “[I]n order to sue for damages for injury to the land . . . all co-tenants must be before the court in order that each may claim his share. Otherwise a multiplicity of suits or inconsistent determinations may result.” 7 Charles A. Wright, et al., FED. PRAC. & PROC. CIV. § 1621 at 326-27 (3rd ed. 2001); *see also id.* at 336-37 (“Although the natural resources on particular land often are owned by several persons holding fractional interests, a suit for an accounting of royalties or rents may be instituted by any owner of that right without joining the others. *In contrast, all owners or tenants in common have been required to be joined in a suit for injury to the land.*” (emphasis added)); *Guth v. Texas Co.*, 155 F.2d 563, 566 (7th Cir. 1946) (holding that all lessors having an interest in a gas and oil lease must join in negligence claim against lessee for destruction of gas and oil on the leasehold).

The factors set forth in Rule 19 confirm that the co-owners of property are required parties here. The co-owners, by virtue of their ownership interest, clearly claim an interest related to the subject matter of the litigation. In the absence of the co-owners, their ability to protect their interests is impaired, and the Mining Defendants are at substantial risk of incurring multiple inconsistent obligations. Based on Plaintiffs’ most recent 26(a)(1) disclosures, it appears that the Individual Plaintiffs are seeking to recover for the entire amount of alleged damage to the property. (*See* 3rd Supp. Rule 26(A) Discl., Ex. C, at 13). If they obtain a judgment, they would be under no obligation to share the award with their co-owners, even though in many instances the named Individual Plaintiffs have far less than a 10% interest in the properties at issues. If, on the other hand, judgment is rendered in favor of Mining Defendants, then the co-owners would arguably be bound by principles of *res judicata*, given that the co-

owners and Individual Plaintiffs are in privity by virtue of claiming under the same title. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1175 (10th Cir. 1979). If the Individual Plaintiffs assert that they are only attempting to recover their proportionate share of any damages, the Mining Defendants will then be at substantial risk of incurring multiple obligations through successive lawsuits by the absent co-owners. *See Ramsey v. Bomin Testing, Inc.* 68 F.R.D. 335 (W.D. Okla. 1975) (holding that all owners of an undivided working interest in gas and oil lease were indispensable parties to a claim for value of personal property removed from leasehold, even where plaintiffs sought only their proportionate share and not that of the missing co-owners).

Given the highly fractionalized ownership of most of the land at issue, and the obligation of Plaintiffs to join required parties, Plaintiffs should be required to identify and, if feasible, join all absent co-owners of the properties for which they seek to recover property damages.⁷ If they are unwilling or unable to join all such parties, or if joinder of any parties would be infeasible, then the property damage claims for such property should be dismissed.

CONCLUSION

The Tribe has now modified its natural resource damage claim such that it substantially overlaps with interests claimed by the State of Oklahoma. Joinder of the State is infeasible due to its immunity under the Eleventh Amendment, and considerations of equity and good conscience favor dismissal of the Tribe's natural resource damage claim. Further, the co-owners of property for which property damage claims are asserted are required parties to this litigation

⁷ Under Rule 19(c), Plaintiffs are obligated to identify any absent required party and state the reason that party has not been joined. Plaintiffs have failed to do so. They also failed to provide the names of the co-owners of their properties as requested in written discovery. (*See Exs. M - R, at Resp. to Interrog. 4*).

and should be joined if feasible. If Plaintiffs are unable or unwilling to join these parties, then the claims for property damage should be dismissed.

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Respectfully submitted,

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