

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

THE QUAPAW TRIBE OF OKLAHOMA)	
(O-GAH-PAH) by and through its Business)	
Committee, and its Chairman JOHN L.)	
BERREY et al.)	Civil Action No. 03-CV-846-CVE-PJC
)	
)	
Plaintiffs,)	
)	
v.)	
)	
BLUE TEE CORP., et al.)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES**

TABLE OF CONTENTS

	<u>PAGE</u>
I. Introduction	1
II. Relevant Background	3
III. Argument and Authorities	7
A. The State is Neither a Required Nor Indispensable Party	7
1. Defendants’ Motion is Moot	7
2. The State Must Be Both Required and Indispensable	8
3. The State is Not a Required Party	10
a. The State Claims No Interest in Tribal Lands	10
b. This Lawsuit Will Neither Impair Oklahoma’s Interest Nor Subject Defendants to Multiple, Inconsistent Liabilities	15
B. Equity and Good Conscience Require the Tribe’s Claims to Go Forward	18
1. There Will be No Prejudice to Oklahoma or Defendants	18
2. Any Prejudice Could Be Minimized	18
3. The Judgment Would Adequately Resolve the Tribe’s Claims	18
4. The Tribe Would Have No Adequate Remedy to Recover Its Common Law Natural Resource Damages Absent this Suit	19
5. Defendants’ Delay in Bringing this Motion Weighs in Favor of Allowing the Tribe’s Claims To Go Forward	20
C. The Court Should Not Compel Joinder of the Co-Owners of the Properties Owned by the Individual Plaintiffs	22
1. Plaintiffs Seek Only Their Own Damages and Not Those of Absent Co-Owners	22

2.	Defendants’ Failure to Timely Seek Joinder Further Requires that their Motion Be Denied	22
IV.	Conclusion	24

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<i>Bowen v. Amoco Pipeline Co.</i> , 254 F.3d 925 (10th Cir. 2001)	16
<i>Brendale v. Confederated Yakima Indian Nation</i> , 492 U.S. 408 (1989)	11
<i>Coeur d'Alene Tribe v. Asarco, Inc.</i> , 280 F. Supp. 2d 1094 (D. Idaho 2003)	12, 16, 17
<i>Davis v. United States</i> , 192 F.3d 951 (10th Cir.1999)	9
<i>Davis Co. v. Emerald Casino, Inc.</i> , 268 F.3d 477 (7th Cir. 2001)	15, 17
<i>Davis ex. rel Davis v. United States</i> , 343 F.3d 1282 (10th Cir. 2003)	10
<i>Griffith v. Choctaw Casino of Pocola</i> , —P.3d—, No. 104887, 2009 WL 1877899, at *1 (Okla. June 30, 2009)	11
<i>Houck v. Hold Oil Co.</i> , 867 P.2d 451 (Okla. 1993)	16
<i>Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank</i> , 659 F.2d 234, 242 (D.C. Cir. 1981)	23, 24
<i>Indian Country U.S.A. v. Okla. Tax Comm'n</i> , 829 F.2d 967 (10th Cir. 1987)	11
<i>Kescoli v. Babbitt</i> , 101 F.3d 1304 (9th Cir. 1996)	19
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	11

Montana v. United States,
 450 U.S. 544 (1981) 11

Navajo Tribe of Indians v. New Mexico,
 809 F.2d 1455 (10th Cir. 1987) 12

Okla. Tax Comm’n v. Sac & Fox Nation,
 508 U.S. 114(1993) 11

Oklahoma v. Tyson Foods, Inc.,
 258 F.R.D. 472 (N.D. Okla. 2009) *passim*

Provident Tradesmens Bank & Trust Co. v. Patterson,
 390 U.S. 102 (1968) 10

Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr.,
 94 F.3d 1407 (10th Cir. 1996) 8, 9, 10, 19

Republic of Phil. v. Pimentel,
 128 S.Ct. 2180 (2008) 9, 10

Sac & Fox Nation of Mo. v. Norton,
 240 F.3d 1250 (10th Cir. 2001) 9, 18

Thunder Basin Coal Co. v. Sw. Public Service Co.,
 104 F.3d 1205 (10th Cir. 1997) 10

Truelock v. City of Del City,
 967 P.2d 1183, 1187 (Okla. 1998) 23

United Keetoowah Band of Cherokee Indians of Okla. v. United States,
 480 F.3d 1318 (Fed. Cir. 2007) 10

United States v. Asarco,
 471 F. Supp. 2d 1063 (D. Idaho 2005) 16, 17

United States v. Sabine Shell, Inc.,
 674 F.2d 480 (5th Cir. 1982) 14

Williams v. Lee,
 358 U.S. 217 (1959) 11

RULES

FED. R. CIV. P. 19 *passim*

Plaintiff, the Quapaw Tribe of Oklahoma (O-GAH-PAH) by and through its Business Committee and its Chairman JOHN L. BERREY (the “Tribe”), and Plaintiffs Colleen Wilson Austin, Edwina Faye Busby, Jennifer Lunsford, individually and as Successor of Reberta Hallam Kyser, Florence Mathews, Ardina Revard Moore, and Jean Ann Lambert (the “Individual Plaintiffs”), file this Response to Defendants Blue Tee Corp., Gold Fields Mining, LLC, NL Industries, Inc., and The Doe Run Resources Corporation’s (collectively “Defendants”) Motion to Dismiss for Failure to Join Required Parties and Brief in Support Thereof (the “Motion”).

I. Introduction

Having failed to secure their desired result in Phase I of this proceeding,¹ Defendants belatedly resurrect Phase I issues here, arguing that the State of Oklahoma is a necessary and indispensable party which cannot be joined due to sovereign immunity, and that dismissal must result. Defendants claim that “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.” (*See* Dkt. No. 697 at 4.) The Tribe’s Rule 26 disclosures confirm, however, that the Tribe’s damage claim is narrowly tailored to seek recovery of *terrestrial injury* to the *Tribal Lands* identified in the Fifth Amended Complaint—in other words, injury to resources over which *only* the Tribe has trusteeship. So there is no misunderstanding, the Tribe *does not seek* to recover for the aquatic resources, fish, and wildlife that apparently triggered Defendants’ Motion, and the Motion is therefore moot.

This conclusion is only confirmed under Rule 19. Indeed, a review of the Tribe’s claimed damages makes clear that the State of Oklahoma does not (and cannot) assert co-trusteeship over the

¹ As the Court will recall, this matter was bifurcated into two phases, the first dealing with CERCLA preemption and the Tribe’s trustee status, and the second, liability and damages. (*See* Dkt. No. 408, Standard Scheduling Order Re: Natural Resources at Issue and Tribe’s Trustee Status.)

terrestrial injury to Tribal Lands at issue in this lawsuit, and that the State is therefore not a required party. Because the State has no interest in Tribal Lands, there can be no comparison to recent authority in which the State of Oklahoma sought to recover for injury to *aquatic* resources in which the Cherokee nation had an *undisputed* interest. Likewise, because there is no overlap between the Tribe's common-law natural resource damages and theoretical future damages the State may (or may not) seek, there is no risk that Defendants will be subject to multiple, inconsistent obligations. Even if the State were a "required" party under Rule 19(a), equity and good conscience would still require the Tribe's claims to go forward. Given the Tribe's limited damage claim, Defendants can articulate no prejudice to themselves or the State. The Tribe, moreover, is itself a sovereign with the right to determine when its own claims should be pursued, and should not be required to wait until the State either chooses to file an action related to its own natural resources or definitively states it will not be doing so. Absent the current lawsuit—to which the Tribe has devoted considerable resources and is already preparing for trial—the Tribe simply has no other effective remedy.

In addition, Defendants' undue delay in bringing this Motion weighs strongly against dismissal. Defendants raised the State's interest in this matter at the July 31, 2007 status conference that resulted in bifurcation, yet the Defendants never addressed the joinder of Oklahoma as a necessary party during Phase I. Moreover, the Tribe's previous agricultural damage model was always designed to serve as a *proxy* to measure the lost use of land, surface *water*, plants, *wildlife*, *fish*, and other biota on *Tribal* Lands, and, under the Defendants' reasoning, actually implicated the State's interests. Ironically, therefore, the Tribe's current damage model, which seeks to recover natural resource damages only for *terrestrial* plants, is more limited in scope than ever before and cannot be construed to implicate the State's interests. Regardless, Defendants' failure to raise the

issue in Phase I should preclude their last-ditch effort to avoid facing liability in the approaching trial.

Finally, the Court should not compel joinder of the co-owners of the properties owned by the Individual Plaintiffs because: (1) the Individual Plaintiffs are not seeking damages belonging to the absent co-owners, and (2) Defendants have failed to timely seek such joinder. Defendants concede that the Third Amended Complaint eliminated the Individual Plaintiffs' class allegations and request for class certification. Contrary to Defendants' assertions, from that point forward, the Individual Plaintiffs have sought only to recover *their* proportionate share of any property damages. Because the individual Plaintiffs are not seeking damages belonging to the absent co-owners, the absent co-owners will not be prejudiced by this action. Moreover, Defendants have always known that the properties at issue were subject to fractionalized ownership and, in fact, some of the Defendants have sued co-owners in other Tar Creek litigation. Under these circumstances, and given that the Defendants have waited *over two-and-a-half years* to raise this issue, the Court should also deny Defendants' Rule 19 Motion as to the Individual Plaintiffs.

Without question, Defendants' Motion is neither meritorious nor timely, and should be denied in its entirety.

II. Relevant Background

The Tribe initiated CERCLA² and state common law claims in December 2003 arising out of the environmental devastation that decades of zinc and lead mining wrought upon Quapaw Tribal Lands located within the Tar Creek Superfund Site in Ottawa County, Oklahoma. The Tribe's claims

² Comprehensive, Environmental Response, Compensation, and Liability Act. 42 U.S.C. § 9601, *et. seq.* The original petition did not plead a CERCLA claim, but indicated the Tribe's intention to make such a claim following the appropriate statutory notice. (*See* Dkt. No. 1 ¶ 2.) The CERCLA claim was subsequently added (*see* Dkt. No. 146), but was later dismissed (*see* Dkt. No. 560).

for natural resource damages in this lawsuit are specifically limited to the categories of Tribal Land detailed in the Tribe's Fifth Amended Complaint: (1) restricted lands of the members of the Tribe ("Tribal restricted lands"); (2) lands held in trust for the Tribe ("Tribal trust lands"); and (3) lands owned in fee simple by the Tribe ("Tribal fee lands") (together referred to as "Tribal Lands"). (Dkt. No. 570, Fifth Am. Compl. 2.)

Less than a year after the lawsuit was filed, the Court stayed the proceeding pending the Tribe's appeal of orders denying its sovereign immunity defense to certain counterclaims. (*See* Dkt. Nos. 165, 185, and 253.) The Tenth Circuit ultimately affirmed the Court's sovereign immunity holding in February 2006, but the Parties jointly requested that the litigation remain stayed for nearly a year while settlement negotiations—which included the State of Oklahoma—and informal discovery continued. (*See id.*; *see also* Dkt. Nos. 306, 308.) In the meantime, Defendant ASARCO LLC sought bankruptcy protection in the Southern District of Texas,³ and environmental claims relating to ASARCO's involvement at the Tar Creek Site were ultimately litigated in that proceeding. (*See* Dkt. Nos. 297, 332.) Both the State of Oklahoma and the Tribe were claimants in the ASARCO bankruptcy proceeding.

The Court lifted the stay on the instant litigation in April 2007 after settlement negotiations ultimately proved unsuccessful. (*See* Dkt. No. 333.) Shortly thereafter, on July 31 2007, the Court held a status and scheduling conference (hereinafter the "July 31 Status Conference"). During the conference, the central two-part issue repeatedly raised by Defendants' Counsel was (1) what natural resources are at issue in this case, and (2) whether the Tribe has trusteeship over those natural

³ *In re: ASARCO LLC Bankruptcy*, No. 05-21207, S.D. Tex.

resources.⁴ Particularly germane to the issue framed in Defendants' Motion, Defendants *repeatedly* emphasized their view that the State of Oklahoma may be a necessary party to the case, and requested a "judicial determination of which resources are in issue and *which trustees have the rights to pursue those issues.*" (See Ex. 1, July 31, 2007 Hr'g Tr. at 34:3-5.) In response to Defendants' urging, the Court ultimately bifurcated the case so that the Defendants could focus discovery and briefing on these threshold issues. In the first Phase of the case, the Court encouraged the Parties to conduct discovery and file dispositive motions on CERCLA preemption and the Tribe's standing as a trustee to proceed with its claims for natural resource damages. (See Dkt. No. 408, Standard Scheduling Order Re: Natural Resources at Issue and Tribe's Trustee Status.) If the Court found the Tribe had standing to proceed, the second Phase, *now well underway*, was slated to address Defendants' liability and the Tribe's damages. (See Dkt. No. 409.)

At the time of the Court's scheduling order regarding Phase I briefing, the Tribe had already developed a preliminary damage calculation for measuring the lost use of natural resources on Tribal Lands in conjunction with the Tribe's proof of claim in the ASARCO bankruptcy proceeding. In the preliminary damage calculation, the Tribe used an agricultural model as a broad, objective *proxy* to measure the lost use of land, surface water, plants, wildlife, fish, and other biota on Tribal Lands. Although the Tribe's damages in this litigation were not scheduled to be resolved until Phase II, on October 26, 2007, the Tribe nonetheless disclosed the preliminary model to the Defendants in the Plaintiffs' First Supplemental Rule 26(a) Disclosures. (See Ex. 2, Plaintiffs' First Supplemental Rule

⁴ See Ex. 1, July 31, 2007 Hr'g Tr. at 14:20-22 ("In fact, one of the things we don't know at all is what natural resources are really at issue in the case."); *id.* at 31:4-6 ("Now, there is a question here about what natural resources are we looking at and does this [T]ribe have trustee status over them?"); *id.* at 34:3-5 ("What needs to happen in some way is that there needs to be a judicial determination of which resources are in issue and which trustees have the rights to pursue those issues").

26(a) Disclosures.⁵) Contrary to the Defendants' suggestion, Plaintiffs' First Supplemental Disclosures made clear that Plaintiffs were seeking natural resource damages for, among other things, damages to wildlife and fish, resources over which the Defendants' now claim Oklahoma has asserted trusteeship. (*See id.* at 6 (“loss of use of natural resources relating to wildlife and fisheries was quantified by recognizing the value of hunting and fishing leases”).)

Despite their purported concern with Oklahoma's potential trusteeship in the natural resources at issue in this litigation, Defendants opted not to brief the issue in their 73-page Phase I summary judgment motion, instead arguing that the Tribe's claims should be entirely dismissed for lack of *parens patriae* standing. (*See* Dkt. No. 618.) On September 2, 2009, the Court held that the Tribe had standing to pursue its claims under state common law, thereby moving the litigation into Phase II. (*See* Dkt. No. 678 (“the September 2 Order”).) The Court also held in the September 2 Order that the Tribe could not use its preliminary agricultural model to measure its damages, and indicated that the Tribe should 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 n.9). The Tribe subsequently supplemented its initial disclosures to inform Defendants that the Tribe intended to use a Habitat Equivalency Analysis (“HEA”) to measure its natural resource damages. (*See* Ex. 2, Plaintiffs' Fourth Supplemental Rule 26(a) Disclosures at 14.) The Tribe also disclosed that the Tribe's HEA would be informed by the HEA that Michael Donlan, an expert for the United States

⁵ All of Plaintiffs' Rule 26(a) Disclosures cited herein are contained in one document, entitled Plaintiffs' Sixth Supplemental Rule 26(a) Disclosures, and attached as Exhibit 2. The Tribe intends to further supplement its disclosures in the near future in order to eliminate non-Tribal Land acreage that was inadvertently referenced in its Fifth Supplemental Rule 26(a) Disclosures, which detailed the Tribe's preliminary HEA calculations.

in the ASARCO bankruptcy proceeding, prepared in that matter. (*Id.*)⁶

Having continued to develop its damage model, the Tribe supplemented its disclosures a fifth time on December 18, 2009. (*See* Ex. 2, Plaintiffs' Fifth Supplemental Rule 26(a) Disclosures.) These disclosures provided the Tribe's preliminary assessment of compensatory restoration damages for the terrestrial HEA the Tribe intends to use in this matter. (*See id.* at 16.) The Fifth Supplemental Disclosures make clear that the Tribe does not intend to seek damages for injury to aquatic resources, and that the Floristic Quality Assessment (FQA) the Tribe relies upon focuses on *plant* species. (*Id.*) Elaborating on this concept, the Tribe served its Sixth Supplemental Disclosures on January 20, 2010, which clarify that the Tribe's HEA does not identify, describe, or include any wildlife, be it terrestrial or aquatic. (Ex. 2, Plaintiffs' Sixth Supplemental Rule 26(a) Disclosures.) The HEA employs measures of habitat quality using FQA's, which serve as a standardized tool used to estimate the overall ecological quality of a site based on the presence of vascular *plants* there. (*Id.*) More specifically, the Tribe's FQA analysis does not rely on, or measure, the presence of wildlife on the site, but rather the presence of plants on the site and the attributes of those plants. (*Id.*)

III. Argument and Authorities

A. The State is Neither a Required Nor Indispensable Party

1. Defendants' Motion is Moot

As an initial matter, Defendants' motion is moot. The Tribe's most recent disclosures clarify that the Tribe is *not* seeking damages for injury to aquatic or wildlife resources. (*See* Ex. 2, Plaintiffs' Sixth Supplemental Rule 26(a) Disclosures.) Defendants claim they brought the instant motion

⁶ Mr. Donlan's HEA addressed primary restoration and compensatory restoration of degraded terrestrial habitat existing throughout the Tar Creek Site. Mr. Donlan's HEA also addressed primary restoration of degraded aquatic habitat within the Tar Creek Site, which is not included in the Tribe's HEA.

because the HEA detailed in the Tribe's Third Supplemental disclosures resulted in a "dramatic expansion of the resources actually at issue in this litigation" and that "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." (Dkt. No. 697 at 4.) Defendants incorrectly assert that the Tribe's previous damage calculation was "fashioned in a matter that carefully avoided seeking damages for injury to any resource 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.*" (Dkt. No. 697 at 4.) (emphasis added.) As is clear from Plaintiffs' First Supplemental Disclosures, and as was specifically addressed during the briefing of the Defendants' Phase I Motions for Summary Judgments, the Tribe's previous agricultural damage model was intended to serve as a *proxy* to measure the lost use of all damaged natural resources on Tribal Lands, and, under Defendants' reasoning, would implicate resources over which the State of Oklahoma asserts trusteeship. On the other hand, by now limiting its HEA to terrestrial resources on Tribal Lands, the Tribe has, by Defendants' own admission, eliminated any request for damages over which the State of Oklahoma could validly assert trusteeship. While a detailed analysis of the Rule 19 factors is unnecessary to this conclusion, such an analysis only further confirms that the Tribe's most recent damage model plainly moots any concern that the State is a required and indispensable party to this case.

2. The State Must Be Both Required and Indispensable

In order to procure dismissal of the Tribe's claims, Defendants must prove that Oklahoma is *both* a required and indispensable party. *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d

1407, 1411 (10th Cir. 1996).⁷ Federal Rule of Civil Procedure 19 governs the two-step analysis. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) (citing *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999)); *Rishell*, 94 F.3d at 1411. Pursuant to Rule 19(a), Oklahoma is a required party if: (1) in Oklahoma's absence complete relief cannot be accorded among the current parties, or (2) Oklahoma claims an interest relating to the subject of the action and is so situated that disposition in Oklahoma's absence may (i) as a practical matter impair or impede Oklahoma's ability to protect that interest or (ii) leave any of the current parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. FED. R. CIV. P. 19(a).

If Oklahoma is a required party, and Oklahoma's joinder is not feasible, the Court must next consider whether Oklahoma is also indispensable. *Sac & Fox Nation*, 240 F.3d at 1259. A required party is indispensable only if, "in equity and good conscience," a court should not allow the action to proceed in the party's absence. *Id.* (quoting FED. R. CIV. P. 19(b)). Rule 19(b) sets forth four factors to guide this determination, including: (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. FED. R. CIV. P. 19(b). In addition to the four traditional factors, the timing of a

⁷ Defendants correctly point out that Rule 19 was revised in 2007 to change "necessary" parties to "required" parties and to eliminate the term indispensable. (*See* Dkt. No. 697 n.3.) As Defendants observe, these changes were stylistic only, and made no change to Rule 19's application. (*See id.* (citing *Republic of Phil. v. Pimentel*, 128 S.Ct. 2180, 2189 (2008)).)

defendant's Rule 19 Motion may be considered. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 483 (N.D. Okla. 2009).

The Rule 19(b) standards are to be applied "in a practical and pragmatic but equitable manner." *Rishell*, 94 F.3d at 1411. Moreover, because Rule 19(b) does not state the weight to be accorded each factor, the district court must determine, in its discretion, the importance of each 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 decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 (1968). Thus, the list of factors in Rule 19(b) does not create a rigid test comprised of exclusive factors. *Pimentel*, 128 S.Ct. at 2188; *Davis ex. rel Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003). A court must assess and balance the unique combination of concerns in a particular case. *See Pimentel*, 128 S.Ct. at 2188.

3. The State is Not a Required Party

a. The State Claims No Interest in Tribal Lands

"To determine whether an absent party has an 'interest' in an action, a court must begin with correctly characterizing the pending action between those already parties to the action." *Tyson Foods*, 258 F.R.D. at 478 (quoting *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1326 (Fed. Cir. 2007).) Here, the subject of the suit is narrowly focused on terrestrial injury to Tribal Lands; in other words, natural resources over which the Tribe exerts *sole trusteeship*. As such, the State of Oklahoma has no interest in the subject of the suit.

The Tribe's sole trusteeship in Tribal Lands stems from their well-established legal status as

“Indian Country,” which includes “formal” and “informal” reservations, dependent Indian communities, and Indian allotments, whether tribal or individual restricted land or land held in trust by the United States for the benefit of a tribe. *See* 18 U.S.C. § 1151 (defining Indian Country); *see also Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993).⁸ Here, the Quapaw Reservation was set aside for the Tribe pursuant to the Treaty of May 13, 1833, 7 Stat. 424 (Kappler, 1904, vol. 12, p. 395), in which the Tribe received assurances of federal protection “against all interruption or disturbance from any other tribe or nation or from any other person or persons whatever.”⁹ This language incorporates the fundamental principle that the Tribe, as a sovereign, is under the perpetual superintendence of *only* the United States government.¹⁰

Acknowledging the Tribe’s sovereignty, both the Oklahoma Enabling Act and the Oklahoma Constitution disclaim any interest in Indian Country located within the State. *See* Act of June 16, 1906, 34 Stat. 267; *see also Griffith v. Choctaw Casino of Pocola*, —P.3d—, No. 104887, 2009 WL 1877899, at *15 (Okla. June 30, 2009) (acknowledging that Art. 1, § 3 of the Oklahoma Constitution

⁸ Indian Country status *does not* require a formal reservation. *Indian Country U.S.A. v. Okla. Tax Comm’n*, 829 F.2d 967 (10th Cir. 1987).

⁹ The Quapaw Tribe entered into six treaties and agreements with the United States in the 19th century, including (i) the Treaty of August 24, 1818 (Kappler, 1904, vol. 2, p. 160, 7 Stat. 176), (ii) the Treaty of November 15, 1824 (Kappler, 1904, vol. 2, p. 210, 7 Stat. 232), (iii) the Treaty of May 13, 1833 (Kappler, 1904, vol. 2, p. 395, 7 Stat. 424), (iv) the Treaty of August 24, 1835 (Kappler, 1904, vol. 2, p. 425, 7 Stat. 474), (v) the unratified Agreement of September 13, 1865 (Kappler, 1904, vol. 2, p. 1050), and (vi) the Treaty of February 23, 1867 (Kappler, 1904, vol. 2, p. 961, 515 Stat. 513).

¹⁰ The Supreme Court’s decision in *Williams v. Lee*, 358 U.S. 217, 220 (1959), provides the modern standard for Indian sovereignty: “absent governing Acts of Congress, the question has always been whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.” Specifically, the Supreme Court has recognized that Indian tribes are “invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (emphasis added). The United States Supreme Court has likewise acknowledged a tribe’s jurisdiction to control terrestrial natural resources for tribal lands. *See Montana v. United States*, 450 U.S. 544, 557 (1981) (hunting and fishing licenses); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989) (tribal zoning of tribal land).

provides that Tribal lands are considered within the jurisdiction of the United States). The Oklahoma Enabling Act also makes clear that Oklahoma has *no* control over Indian Country, stating “that nothing contained in the said [Oklahoma] Constitution shall be construed to limit or impair rights of persons or property pertaining to the Indians . . . or limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands or other rights by treaties, agreement, law or otherwise” Okla. Enabling Act, 34 Stat. 267.

Moreover, in the only case to date to determine what natural resources within Indian Country are within an Indian tribe’s trusteeship, the District Court of Idaho expressly held that the Coeur d’Alene Tribe is trustee of 100% of the land within the boundaries of its Indian Country. *Coeur d’Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1117 (D. Idaho 2003). The *Coeur d’Alene* case was brought by the federal government, the state of Idaho, and the Tribe to recover for damages to natural resources (largely aquatic) throughout the Coeur d’Alene Basin. *Id.* at 1104. The Basin covers approximately 3840 square miles in northern Idaho, and is co-extensive with the aboriginal territory of the Coeur d’Alene Tribe.¹¹ The court was faced with the task of determining the co-trusteeship interests of the Coeur d’Alene Tribe and the state and federal governments. *Id.* at 1114-15. In so doing, the court held that the Coeur d’Alene Tribe was unquestionably the *sole trustee* over the land within reservation boundaries. *Id.* at 1117.

Defendants strategically ignore the crucial first step of characterizing the subject of the lawsuit in an effort to liken the instant case to *Tyson Foods*, 259 F.R.D. 472. There, the State of Oklahoma brought CERCLA and state-common-law claims against poultry producers seeking, among other

¹¹ See Coeur d’Alene Basin Final Interim Restoration Plan and Environmental Assessment, at 32-33 (Apr. 2007) (available at www.fws.gov/easternwashington/documents/CdA_INT%20RES%FINAL.pdf).

things, damages to the natural resources of the Illinois River Watershed (“IRW”). *Id.* at 473-74. Defendants moved to dismiss, arguing that the Cherokee Nation (the “Nation”) was a required party because of its interest in the IRW. *Id.* at 474. Following the motion to dismiss, Oklahoma and the Nation entered into a purportedly binding agreement in which they acknowledged the Nation’s interests in the IRW and attempted to assign to Oklahoma the Nation’s right to prosecute the Nation’s claims relating to the case. *Id.* at 475. Accordingly, Oklahoma sought damages for pollution to the IRW as a whole, and made no attempt to exclude damages for tribal lands and water rights. *Id.* at 479.

Finding the agreement invalid for reasons irrelevant here, the court agreed that the Nation had an interest relating to the “*subject of the action*”—there, damage to the IRW as a whole. *Id.* at 477. Key to this finding was the agreement between the parties, which plainly acknowledged the Nation’s “substantial interest in the lands, water and other natural resources located within the Illinois River Watershed. . . .” *Id.* The court also noted several additional factors supporting the Nation’s interest in the IRW. First, the court observed that the Nation’s written code articulated an interest in “protecting the Illinois River and in vindicating its claimed rights for any pollution of the watershed.” *Id.* Second, the Nation’s environmental quality code expressed the Nation’s interest in recovering civil remedies for injuries to the IRW claimed in the case. *Id.* at 477-78. Third, the Nation claimed an interest in regulating and taxing actions affecting the Nation’s environment. *Id.* at 478. Fourth, the Nation claimed water rights in the Illinois River pursuant to federal laws and treaties. *Id.* Fifth and finally, CERCLA permits tribal claims for pollution to natural resources belonging to or held in trust for the tribe’s benefit. *Id.* at 479.

As the foregoing discussion makes clear, there is a significant, outcome-determinative

distinction between this case and *Tyson Foods: the subject of the action*. In *Tyson Foods*, there was no dispute that Oklahoma was seeking to recover for *all* damages to the IRW—the State made no effort to segregate or exclude damages to tribal lands or water rights. *Id.* at 479-80. To the contrary, the parties actively sought to have Oklahoma prosecute claims relating to the Nation’s interest in the IRW, thereby eliminating any doubt regarding the Nation’s claimed interest in the subject of the suit. While Defendants spend several pages articulating Oklahoma’s interest in the Tar Creek cite as a whole, they fail to acknowledge that the Tribe, unlike Oklahoma in *Tyson Foods*, is not seeking to recover natural resource damages to the Tar Creek cite as a whole, but rather is narrowly seeking terrestrial natural resource damages *only* to Quapaw Tribal Lands.

Given that the Tribe has made it clear that it will not seek to recover for injury to aquatic or wildlife resources, Oklahoma’s claimed interest in unappropriated surface water and other water rights within the State (*see* Dkt. No. 697 at 10-11) is entirely irrelevant. Likewise, even assuming Oklahoma has an interest in wildlife on Tribal Lands—which, as a matter of law, it does not—the Tribe is not seeking damages for loss of wildlife due to Defendants’ activities. As such, Oklahoma has no valid claim for NRD relating to the natural resources now at issue in this litigation.

Finally, the fact that the State is aware of this litigation and has chosen not to intervene indicates that the State itself does not believe it has an interest in the disposition of this suit. *See United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) (observing that non-parties’ failure to intervene despite their patent awareness of the litigation indicated that the non-parties did not believe that lawsuit’s outcome would impair or impede their interests).¹² Defense Counsel

¹² The Tribe is aware that the State’s failure to intervene does not legally counter any prejudice to the State if the State is actually found to be a required party. *See Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1472 n. 25 (10th Cir. 1987) (noting that a required party that is not joined would always satisfy the requirements for

indicated to the Court at the July 31 Status Conference that the State was “at least contemplating as some point watching the case and interven[ing] if [it] believ[ed] that [its] interests were being compromised.” (See Ex. 1, July 31, 2007 Hr’g Tr. at 34-9:12.) Tellingly, the State has taken no such action. Regarding Oklahoma’s involvement in the ASARCO bankruptcy, Defendants necessarily must concede that Oklahoma resolved its claims separately from the Tribe, plainly establishing that Oklahoma does not perceive any prejudice from the Tribe recovering for natural resource damages over which it has trusteeship. Oklahoma does not (and cannot) assert any interest in terrestrial natural resources on Tribal Lands, and only damages to those natural resources are at issue here.

b. This Lawsuit Will Neither Impair Oklahoma’s Interest Nor Subject Defendants to Multiple, Inconsistent Liabilities

Because the Tribe is seeking to recover only for damage to terrestrial (in particular, plant) resources on Tribal Lands, Defendants’ concern regarding the State’s future ability to recover for damage to natural resources on State lands is unfounded. See *Davis Co. v. Emerald Casino, Inc.*, 268 F.3d 477, 484 (7th Cir. 2001) (concluding that when a party has no interest in the subject of the particular lawsuit, his ability to bring a future suit to protect individual claims will not be impaired). Again relying on *Tyson Foods*, Defendants argue that, 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 Dkt. No. 679 at 10.) *Tyson Foods* is again distinguishable. In discussing its inability to determine percentages of co-trusteeship, the *Tyson Foods* court reemphasized that the State in that case “made

intervention as of right; to say that the availability of intervention mitigates prejudice would mean that a court could never find a required party to be indispensable). But given the State’s knowledge of this matter and participation in earlier global settlement negotiations (when the Tribe was asserting trusteeship over aquatic and wildlife resources as well), the State’s decision not to intervene does indicate that the State does not view itself as a required party having an interest in this matter.

no attempt to determine the relative ratios or percentages attributable to itself and the Nation.” *Tyson Foods*, 258 F.R.D. at 480. Here, the Tribe eliminates any need to apportion trusteeship by expressly limiting its claim to the natural resources on Tribal Lands in which it has sole trusteeship. *Tyson Foods* involved water rights in the Illinois River, and therefore required a co-trusteeship finding. No such finding is required here because Oklahoma could not reasonably assert a claim of trusteeship over the natural resources in this litigation.

Yet, even if the Court were to conclude that Oklahoma may assert co-trusteeship over the natural resources at issue here, and that such a claim would not be frivolous, the Tribe, as co-trustee, could still pursue the full amount of damages. In *United States v. Asarco*, 471 F. Supp. 2d 1063 (D. Idaho 2005), the district court modified its ruling in *Coeur D’Alene Tribe*, 280 F. Supp. 2d 1094, concerning the issue of co-trusteeship over natural resources. 471 F. Supp. 2d at 1068. More specifically, the *Asarco* court recanted its initial finding that “a given trustee cannot recover more than what its stewardship [percentage] is determined to be,” and explained that it **did not** have to determine the extent of each trustee’s interest nor did it have to apportion damages based on these percentages because CERCLA prohibits double recovery. *Id.* at 1067-68. Consequently, the district court in *Asarco* determined that a co-trustee, acting individually, could pursue an action for natural resources damages and recover the **full amount** of damages from the responsible parties. *Id.* Any disagreement between co-trustees would have to “be resolved by successive litigation between the parties, but it could in no way affect the liability of the responsible party.” *Id.*

Here, Oklahoma law, like CERCLA, prohibits double recovery for the same damage. *See Houck v. Hold Oil Co.*, 867 P.2d 451, 461 (Okla. 1993) (stating no double recovery in tort action for injury to land); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 938 (10th Cir. 2001) (noting that under

Oklahoma law, “double recovery for the same damage is not allowed”). Under *Asarco*, therefore, the Tribe is entitled to recover the full amount of natural resource damages. In suggesting otherwise, Defendants rely solely upon *Tyson Foods*, 258 F.R.D. 472. (See Dkt. No. 697 at 16.) The district court in *Tyson Foods*, 258 F.R.D. at 480, however, relied solely upon *Coeur D’Alene Tribe*, 280 F. Supp. 2d 1094, which, as to this issue, was later overruled by the *Coeur D’Alene Tribe* court itself. *Asarco*, 280 F. Supp. 2d at 1067. Thus, under *Asarco*, if Oklahoma were to later claim that the Tribe has been somehow unjustly enriched, Oklahoma would be free to resolve this issue in later litigation. Defendants’ argument that this possibility mandates dismissal is simply incorrect. Indeed, Defendants’ approach would significantly lessen the likelihood that defendants would be held responsible for natural resource damages because it would necessarily preclude any claims by co-trustees unless all sovereigns agreed to pursue their claims *at the same time*, which, as this case has established, is not always feasible. As such, even if Oklahoma did have a non-frivolous interest in the subject of this suit, this Court should follow the later *Asarco* opinion and allow this claim to proceed without Oklahoma.

Moreover, because the Tribe’s claims are limited to damage to Tribal Lands, there is no risk that Defendants will be subject to double, multiple, or inconsistent obligations. Defendants complain that the State has already articulated its intent to bring a natural resource damage claim for damages the State has suffered at the Tar Creek Site. But the test is whether Defendants will face multiple *conflicting obligations*, not multiple *lawsuits* concerning different obligations. See *Davis Co.*, 268 F.3d at 484 (holding that the fact that a defendant might be liable to a third party in a future action did not create the substantial risk of multiple, inconsistent obligations when there is no overlap in damages). That the Tribe may seek to recover its natural resource damages now while the State may

seek to recover its own natural resources in the future in no way subjects Defendants to multiple, conflicting obligations. *See id.*

B. Equity and Good Conscience Require the Tribe's Claims to Go Forward

Even if the State were somehow a required party to this action, which it cannot be given that the Tribe is not seeking natural resource damages for lost aquatic or wildlife resources, dismissal is still only appropriate if, in equity and good conscience, the Court should not allow the action to proceed in the party's absence. *Sac & Fox Nation*, 240 F.3d at 1259. For the reasons detailed below, equity and good conscience favor moving forward with the Tribe's claims here.

1. There Will be No Prejudice to Oklahoma or Defendants

As demonstrated above, there will be no prejudice to either Oklahoma or Defendants if the Tribe recovers for natural resource damages to Tribal Lands alone. The State will be free to recover its own natural resource damages when it chooses, and Defendants will not be subject to multiple, conflicting obligations because the damage claims of the Tribe and the State do not overlap. As such, the first Rule 19(b) factor plainly favors moving forward with the Tribe's claims here.

2. Any Prejudice Could Be Minimized

To the extent that there were any conceivable prejudice stemming from the Tribe's claims here, it could be removed by shaping a judgment limiting the Tribe's relief to those natural resources over which the Tribe has sole trusteeship. The Tribe has already set the stage for such a judgment by limiting its claim to natural resources damage to Tribal Lands.

3. The Judgment Would Adequately Resolve the Tribe's Claims

The concern underlying this factor is the interest "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.” *Tyson Foods*, 258 F.R.D. 472. Citing *Tyson Foods*, Defendants argue that a judgment here would impinge on the State’s sovereign or statutory rights. (*See* Dkt. No. 697 at 20.) Once again, this case vastly differs from *Tyson Foods* because (unlike the State in that case) the Tribe here has limited the damages it seeks to recover. This factor too weighs against dismissal.

4. The Tribe Would Have No Adequate Remedy to Recover Its Common Law Natural Resource Damages Absent this Suit

Absent the present suit, the Tribe would likely have no adequate remedy to recover its natural resource damages. To the contrary—as Defendants essentially concede—the Tribe could *only* seek a remedy if and when the State chooses to do so. This factor weighs strongly, if not conclusively, in favor of proceeding with the current action. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (noting that a court should be “extra cautious” before dismissing an action pursuant to Rule 19(b) if no alternative forum exists); *Rishell*, 94 F.3d at 1413 (noting that “[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal”).

Defendants attempt to gloss over this factor by suggesting that the Tribe could simply rejoin the Tar Creek Trustee Council and proceed jointly with the State, or seek to intervene in any future lawsuit the State brings. But the Trustee Council’s significant funding issues and failure to move forward with any natural resource damages claim in a timely manner is precisely why the Tribe has initiated this lawsuit. An alternative remedy that *possibly* exists—at best—far in the future is inadequate. Moreover, Defendants’ suggestion that the Tribe either proceed with the State or seek to intervene in any speculative future lawsuit the State may bring ignores the *Tribe’s* right as a sovereign to make its *own* determination regarding when and whether to pursue its own natural resource damages.

Beyond this, that the Tribe and the State may view differently the timing of any action related to Tar Creek is yet another distinction between this case and *Tyson Foods*, in which the State and the Nation had already attempted to execute an agreement allowing the State to prosecute the Tribe's claim, and in which it was clear that the State could refile its suit once the two sovereigns remedied the procedural defects in their agreement. *Id.* at 482. No such alternative remedy exists here.

5. Defendants' Delay in Bringing this Motion Weighs in Favor of Allowing the Tribe's Claims To Go Forward

Finally, Defendants' inexcusable delay in bringing this Motion weighs uniquely and heavily against dismissal given the procedural posture of this matter. *See Tyson Foods*, 258 F.R.D. at 483. This case was filed in 2003, and the Defendants asserted the failure to join indispensable parties in their original answers filed in early 2004. (*See* Dkt. Nos. 44, 58.) Moreover, the Defendants' assertion that the State was interested in the subject of this action was a *major* focus of the July 31 Status Conference wherein the Court bifurcated this matter into two phases, the first of which was expressly intended to address the very subject of the instant motion.¹³ In particular, Defendants expressed concern regarding the State and other potential co-trustees:

MR. DAVIS: [W]e don't know when because they aren't telling us, but at some point, the trustees, the other trustees who claim hegemony over the same natural resources that are at issue here, are going to either sue us or seek to intervene in this case. *There's no question about it.*

See Ex. 1, July 31, 2007 Hr'g Tr. at 28:21-25 (emphasis added).¹⁴

¹³ *See* Ex. 1, July 31, 2007 Hr'g Tr. at 38:15-39:24. ("THE COURT: That's issue one. And issue two, the State is the other elephant not in the room.")

¹⁴ *See also*, Ex. 1, July 31, 2007 Hr'g Tr. at 29:24-30:6 ("The State of Oklahoma takes the position that whatever the natural resources are that this tribe is claiming trustee status over, whether that's in the capacity as a natural resource damages trustee or under their common-law *parens patriae*, do not belong to them. It belongs to the State of Oklahoma or to some other trustee. All of those competing trustees are out there in this room, but not in this room."); 34:9-15 ("I think it may be taken by the State at some point. I think one of my colleagues has been told that they are at

Despite the Court's directive and the Defendants' purported concerns, Phase I of this proceeding came and went without Defendants raising the Rule 19 issue. Only now, with their attack on the Tribe's *parens patriae* standing having failed and trial quickly approaching, do Defendants make a last-ditch effort to avoid trial by raising this issue with the Court. In the meantime, both the Tribe and the Court have dedicated significant resources to litigating both Phase I and Phase II issues in this case. Mindful that the delay undermines their current purported need to join the State, Defendants attempt to excuse their conduct by suggesting that the Tribe somehow changed its position regarding trusteeship. But as both the Court and Defendants acknowledged at the July 31 Status Conference, the Tribe has all along claimed trusteeship over ground water, surface water, sediments, wetlands, surface land, vegetation, and wildlife. *Id.* at 30:23-25. The Tribe's agricultural damage model, which was a *proxy to measure* those resources, did not limit the Tribe's claim of trusteeship in any way. As such, nothing in the Tribe's initial disclosures ever limited the resources over which it asserts trusteeship, and nothing in the initial disclosures can excuse Defendants' delay here. Defendants had ample opportunity to brief this issue during Phase I of this matter, and they should not be able to resurrect it here. In any event, the Tribe has now limited its natural resource damages claims to eliminate this issue altogether.

least contemplating at some point watching the case and intervene if they believe that their interests are being compromised. I assume that would come if the Court would rule that the Tribe has trustee status over certain natural resources such as ground water, which they really think is theirs, that they believe should be theirs, not the Tribe.”)

C. The Court Should Not Compel Joinder of the Co-Owners of the Properties Owned by the Individual Plaintiffs

1. Plaintiffs Seek Only Their Own Damages and Not Those of Absent Co-Owners

Similar to the Tribe's claims vis-a-vis Oklahoma, allowing the Individual Plaintiffs to proceed cannot prejudice the absent co-owners. As Defendants are well aware, on June 7, 2007, in conjunction with their Third Amended Complaint, the Individual Plaintiffs eliminated their class allegations and request for class certification. (*See* Dkt. No. 367.) Since then, and contrary to Defendants' assertions, the Individual Plaintiffs have sought *only* to recover their proportionate share of any property damages. (*See* Dkt. No. 367 at ¶ 153, 159 ("Plaintiffs own undivided interests in allotted properties on the Quapaw Reservation"; "Plaintiffs have suffered grave economic injury to *their* Properties' value") (emphasis supplied).) Accordingly, because the Individual Plaintiffs are not seeking damages belonging to the absent co-owners, the absent co-owners are not required parties and cannot be prejudiced in this action.

2. Defendants' Failure to Timely Seek Joinder Further Requires that their Motion Be Denied

Defendants have also failed to timely seek joinder of the co-owners of the properties owned by the Individual Plaintiffs. Not only have Defendants always known that the properties at issue were subject to fractionalized ownership, but some of the Defendants have actually sued co-owners in other Tar Creek litigation. (*See, e.g.*, Dkt. No. 37 in *Holder v. Blue Tee Corp.*, Case No. 04-CV564HC, Third Party Complaint of Blue Tee Corp. and Gold Fields Mining Corp.) In *Tyson Foods*, the court recognized that the Advisory Committee on the Federal Rules has indicated "that undue delay in filing a Rule 19 motion can be properly 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)).” *Tyson Foods, Inc.*, 258 F.R.D. at 483. Defendants argue that the Court should order joinder because otherwise Defendants “will then be at substantial risk of incurring multiple obligations through successive lawsuits.” (Dkt. No. 697 at 24.) However, when there is undue delay in bringing a Rule 19 Motion, the Court should also consider the prejudice to the Plaintiffs if joinder is ordered, which in this case would be substantial. *See Ilan-Gat Eng’rs, Ltd. v. Antigua Int’l Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981).

Here, the parties have engaged in extensive discovery regarding the Individual Plaintiffs’ claims, including the exchange of written discovery, the production of thousands of pages of documents, and the taking of the Individual Plaintiffs’ depositions. Fact discovery is scheduled to conclude on March 31, 2010, with trial scheduled to commence on November 15, 2010. There are dozens, if not hundreds, of fractionalized co-owners of these properties. If the Court requires joinder of the absent co-owners, this case will doubtlessly be delayed by months, if not years, while the parties conduct discovery regarding the absent co-owners’ claims.

Alternatively, the Individual Plaintiffs will be forced to choose between dismissing their case entirely, or proceeding only on their claims for inconvenience, annoyance, and discomfort, and then later filing a separate claim for property damage along with the absent co-owners. *See Truelock v. City of Del City*, 967 P.2d 1183, 1187 (Okla. 1998) (holding that a cause of action for inconvenience, annoyance, and discomfort arising out of nuisance is one for personal injury and is separate and distinct from the cause of action for property damage).¹⁵ Any of these alternatives will result in

¹⁵ Defendants apparently are aware of this distinction since they have confined their Motion to the “abatement/property damages sought by the Individual Plaintiffs” and have not addressed the “annoyance and aggravation damages sought by the Individual Plaintiffs.” (See Dkt. No. 697 at 21 and Exhibit C thereto at 13 (Plaintiffs

substantial litigation costs that will be have to be incurred by the Individual Plaintiffs. While perhaps it might have been reasonable for the Defendants to force these choices early in this litigation, it is wholly unreasonable and inexcusable to do so now, especially when the Defendants offer no valid reason for their two-and-a-half year delay requesting the joinder of these absent co-owners. *See Ilan-Gat Eng'rs, Ltd.*, 659 F.2d at 242 (observing that courts should consider the timing of the motion and the reasons for the delay in weighing prejudice to the moving party and finding that it was error for a magistrate to consider only the prejudice of duplicate litigation to the moving party). Accordingly, the Court should allow the Individual Plaintiffs to proceed without the joinder of the absent co-owners.

IV. Conclusion

For the reasons set forth above, Defendants' Motion to Dismiss should be denied in its entirety.

Respectfully submitted,

By: s/ Cynthia B. Chapman
Michael A. Caddell, TBN: 03576700
Cynthia B. Chapman, TBN: 00796339
George Y. Niño, TBN: 00786456
CADDELL & CHAPMAN
1331 Lamar, Suite 1070
Houston TX 77010
(713) 751-0400 (Telephone)
(713) 751-0906 (Facsimile)

First Supplemental Rule 26(A) Disclosures, sub-parts (d) and (e).)

Bill Robins III
Heard, Robins, Cloud & Lubel, L.L.P.
300 Paseo de Peralta, Suite 200
Santa Fe NM 87501
(505) 986-0600 (Telephone)
(505) 986-0632 (Facsimile)

Andrew Sher
The Sher Law Firm
3800 Buffalo Speedway, Suite 550
Houston TX 77098
(713) 626-2100 (Telephone)
(713) 626-2101 (Facsimile)

Stephen R. Ward, Okla. Bar No. 13610
Conner & Winters, LLP
4000 One Williams Center
Tulsa OK 74172-0148
(918) 586-8978 (Telephone)
(918) 586-8547 (Facsimile)

Hank Bates
Carney Williams Bates Bozeman
& Pulliam, PLLC
11311 Arcade Drive, Suite 200
Little Rock AR72212
(501) 312-8500 (Telephone)
(501) 312-8505 (Facsimile)

***ATTORNEYS FOR PLAINTIFFS,
QUAPAW TRIBE OF OKLAHOMA
(O-GAH-PAH), JOHN L. BERREY,
COLLEEN WILSON AUSTIN,
EDWINA FAYE BUSBY, JENNIFER
LUNSFORD, Individually and as Successor
of REBERTA HALLAM KYSER, JEAN
ANN LAMBERT, FLORENCE
WHITECROW MATHEWS, and ARDINA
REVARD MOORE***

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of January, 2010 a full, true, and correct copy of the above and foregoing was electronically transmitted through the ECF System, and a copy of same also deposited in the United States mail with proper first-class postage fully prepaid thereon, to the following non-registrants of the ECF System:

Ms. Judy Garner Vanderflute, Pro Se
5 Quanna Drive
Fairland OK 74343-1000

/s/ Cynthia B. Chapman
Cynthia B. Chapman