Case No. 17-6088

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCIA W. DAVILLA, *ET AL.*,
Plaintiffs-Appellees,

v.

ENABLE MIDSTREAM PARTNERS, L.P., *ET AL.*,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN OF OKLAHOMA
HONORABLE VICKI MILES-LAGRANGE, DISTRICT JUDGE
CIV-15-1262-M

APPELLANTS' BRIEF

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ATTORNEYS FOR APPELLANTS

Dated: August 4, 2017

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellant Enable G.P., LLC is the general partner of Enable Midstream Partners, L.P and no publicly-held corporations own 10% or more of its stock. Appellant Enable Midstream Partners, L.P. is the parent and sole owner of Enable Oklahoma Intrastate Transmission, LLC and no publicly-held corporations own 10% or more of Appellant Enable Midstream Partners, L.P.

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STATEMENT OF RELATED CASES

There have been no prior or related appeals in this action. There is a related action pending in the Western District of Oklahoma, *Enable Oklahoma Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, Case No. CIV-15-1250-M.[1]

[1] On August 18, 2016, the district court granted a motion to dismiss. Then, on July 21, 2017, the district court denied the plaintiff's timely filed motion for new trial. The plaintiff, Enable Oklahoma Intrastate Transmission, LLC, intends to appeal from that judgment.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the action below asserts claims arising under federal common law. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), because the appeal is from an order granting an injunction and the Court may review that order and other rulings on which that injunction was based. This Court may also elect to exercise pendent jurisdiction over other issues if it believes they are "necessary for meaningful review" in the context of this appeal.[2]

The district court entered the order granting the injunction on March 28, 2017 (the "March 28 Order"). Defendants timely filed their notice of appeal from the March 28 Order on April 25, 2017, within the time permitted by Fed. R. App. P. 4(a)(1)(A).

[2] Jurisdictional questions were more fully briefed in Appellants' Response to Motion to Dismiss Appeal, filed in this Court on May 23, 2017.

STATEMENT OF ISSUES

1. The Supreme Court and this Court have consistently held movants are not entitled to summary judgment where their motion fails to establish they are entitled to judgment as a matter of law, in part by establishing there is no dispute with respect to each required element of the claim. Did the district court err by granting summary judgment on liability for these Plaintiffs where their motion did not even address a *prima facie* element of their continuing trespass claim in these circumstances? *See* Aplt. App. 158-159 (raising the issue that plaintiffs must be entitled to judgment as a matter of law); Aplt. App 260, *et seq*. (ruling on the issue by granting summary judgment).

2. Over plaintiffs' objections in *Nahno-Lopez v. Houser*, this Court specifically held that Oklahoma law will govern the effectiveness of consent with respect to a claim alleging trespass of Indian allottee property. Did the district court err by concluding there was no genuine dispute of fact about the consents given to Defendants by five of the Plaintiffs for continued use of the pipeline where Oklahoma law permits such co-owners to give effective consent, especially where Plaintiffs did not even address these consents in their summary judgment motion? *See* Aplt. App. 158-167 (raising the issue); Aplt. App. 260. *et seq*. (ruling on the issue).

3. Did the district court err in concluding Plaintiffs were automatically

entitled to a permanent injunction by establishing the merits of their trespass claim without ever considering the other three factors in the four-factor analysis a district court must consider in the exercise of its equitable discretion? *See* Aplt. App. 167-176 (raising the issue); Aplt. App. 268-270 (ruling on the issue and granting permanent injunction).

4. To permit meaningful appellate review of orders entered without a jury trial, Fed. R. Civ. P. 52(a)(1) requires a district court to make specific findings of fact and separate conclusions of law. Did the district court err in failing to make specific findings of fact and separate conclusions of law when it entered its order granting Plaintiffs a permanent injunction? *See* Aplt. App. 158-176 (raising factual and legal issues that required district court compliance with Fed. R. Civ. P. 52); Aplt. App. 260, *et seq*. (failing to make findings and conclusions).

STATEMENT OF THE CASE

Plaintiffs filed this action seeking a permanent injunction. They allege a continuing trespass by Defendants based on their continued use of a pipeline. Defendants' predecessor in interest first laid the underground pipeline pursuant to a validly obtained easement close to 20 years before Defendants acquired it.

Plaintiffs moved for partial summary judgment on liability. In the same motion, they also sought entry of a permanent injunction requiring Defendants to remove the pipeline allegedly constituting a trespass. The district court granted partial summary judgment to Plaintiffs, holding Defendants' pipeline constituted a continuing trespass of Plaintiffs' property under federal common law, in part based on rulings first made in the district court's November 28, 2016 Order. The district court also ruled that Plaintiffs were automatically entitled to a permanent injunction based on their prevailing on the merits of their continuing trespass claim and rejected consideration of the traditional equitable factors or otherwise exercise its discretion. Defendants timely filed this appeal.

Facts Relevant To Issues Presented For Review

A. Plaintiffs and the Kiowa 84 Allotment.

Plaintiffs Marcia W. Davilla, *et al.*, are the present beneficial owners of allotted land within the original territorial boundaries of the Kiowa Indian Tribe of Oklahoma. Specifically, the land at issue is 136.25 acres of grassland located in

Caddo County, Oklahoma. (Aplt. App. 29, ¶ 1 & 35, ¶ 48). The easement at issue involves less than one of those acres. The property was originally allotted by the United States to a Native American named Emaughobah or Millie Oheltoint and is thus commonly referred to as "Emaugobah Kiowa Allotment 84" or "Kiowa Allotment 84." (*Id.*) Kiowa Allotment 84 is presently held in trust by the federal government for the benefit of Plaintiffs (except for a .011 beneficial interest held in trust for the Kiowa Tribe). (*Id.*)

B. <u>The Pipeline at Issue and the Initial 20-Year Easement.</u>

This lawsuit arises from Defendants' use of approximately 1,300 feet of natural gas pipeline that traverse Kiowa Allotment 84. These 1,300 feet of pipe are part of an approximately 100 mile long pipeline that runs between Canute and Cox City, Oklahoma. That pipeline is part of a broader natural gas pipeline system that traverses approximately 2,200 miles of Oklahoma.

On November 19, 1980, the United States, on behalf of Plaintiffs (or their predecessors), granted an easement under 0.73 of the 136.25 acre Kiowa Allotment 84 tract to Producer's Gas Company. (Aplt. App. 69, Stipulated Fact, ¶ 2). This easement was approved by the Bureau of Indian of Affairs (the "BIA") and it encumbered 0.536% of Kiowa Allotment 84 and allowed 77 rods (or approximately 1,300 feet) of this pipeline to be run under the property for 20 years. (Aplt. App. 69).

C. Defendants Acquire the Pipeline, Obtain New Easements (Approved by BIA) on Adjacent Allotted Tracts, and Attempt to Obtain a New Easement.

Before 2000, Defendants acquired the company that owned the pipeline. (Aplt. App. 69, Stipulated Fact, ¶ 2). In connection with that acquisition, Defendants obtained the easement rights Producer's had procured on Kiowa Allotment 84 and adjacent allotted tracts. (*Id.*) In 2000, shortly after the transaction closed, these 20 year easements expired. (*Id.*)

The expiration of the easements over Kiowa Allotment 84 and the adjacent allotted tracts did not come to the attention of Defendants until early 2002 and later that year, they submitted Right-of-Way Applications for new 20 year easements over these tracts. In each application, Defendants offered the landowners $40 per rod[3] (Aplt. App. 136, 151), which was a rate derived from appraisals of the relevant properties and also a rate commonly paid to obtain *perpetual* easements from private landowners in the area. Defendants were willing to pay this same rate for 20 year term easements over Kiowa Allotment 84 and the adjoining allotted tracts.

Five of the beneficial owners of Kiowa Allotment 84 agreed to Enable's $40 per rod offers (Aplt. App. 138, 191), as had the beneficial owners of the allotted tracts adjacent to Kiowa Allotment 84 and the BIA approved those new 20 year

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

easements at that price.

Other beneficial owners of Kiowa Allotment 84 would not, however, give their consent to Defendants' application and made inquiry to the BIA regarding that application. In response to the inquiry, the BIA explained that Defendants' offer of $40 per rod was based on an appraisal submitted to the BIA, and that this appraisal had been "forwarded to the Office of Special Trustee ... for review and recommendation." The BIA further explained that the review "**supported [the] appraisal price of $3,080.00 ($40.00 per rod)**" and "**encourage[d] [the Plaintiffs] to finalize negotiations with [Defendants] and provide [] written consent as soon as possible**."

Notwithstanding the fact the beneficial owners of the allotted tracts adjacent to Kiowa Allotment 84 had accepted Defendants' offer of $40 per rod and the BIA had encouraged Plaintiffs to do the same, certain Plaintiffs insisted Defendants pay approximately $63,000 (or approximately $818.18 per rod) for a new 20 year easement (Aplt. App. 137, 196), despite the fact that amount was the *full market value for the entire 136.25 acre surface of Kiowa Allotment 84* as determined by the appraisal Defendants provided to BIA in support of the company's $40 per rod offer. Defendants were unwilling to pay the appraised price of the entire surface of the 135.25 acre parcel for a 20 year, 0.73 acre subsurface easement.

D. Continued Negotiations Regarding Kiowa Allotment 84.

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

E. Defendants Make a Partial Payment in 2006.

The parties had been unable to reach a deal by 2006. At this point, the BIA determined it appropriate to levy a "trespass assessment" on Defendants. (Aplt. App. 36, ¶ 51). "The trespass period was determined to be from November 18, 2000 ... to ... August 2006," and the BIA calculated that trespass damages for the period to be $1,098.35. (Aplt. App. 137). The BIA based its calculation on the $40 per rod offer the BIA had found "met or exceeded the appraisal completed by the Office of Special Trustee's Office of Appraisal Services." *(Id.*) Defendants paid the

$1,098.35 on September 13, 2006, which was disbursed to the Individual Indian Monies accounts of the beneficial owners of Kiowa Allotment 84. *(Id.*)

In later discussing this trespass payment, the BIA made two key observations. First, the BIA noted that by virtue of Defendants' payment of the trespass assessment, "[t]he trespass [w]as resolved" as reflected in a "certified letter to [Defendants], dated August 24, 2006." (Aplt. App. 139). The BIA also noted that while it believed Defendants began trespassing when the initial easement expired in 2000, Defendants' 2002 renewal application tolled any trespass during its pendency. (*Id.*) As a result, the BIA observed that by paying a trespass assessment for its occupancy on Kiowa Allotment 84 from the time of its 2002 renewal application to the time of the 2006 assessment, Defendants "paid four extra years of trespass fees." (*Id.*) The correct assessment would have only covered the two (2) years from 2000 to the submission of the 2002 renewal application, not the full six (6) years from 2000 to the time of the 2006 assessment.

F. <u>Plaintiffs Refuse to Continue Negotiating with Defendants.</u>

Following Defendants' payment in September 2006, the beneficial owners of Kiowa Allotment 84 continued their dealings with the BIA but ceased communicating with Defendants. "On December 21, 2007, a meeting was held at the [BIA's local office] between landowners ... and Agency staff." (Aplt. App. 137). "The landowners ... stated they would not agree to the $40 per rod offer to

renew." (*Id.*) These landowners "were advised of Defendants' intentions to file condemnation proceedings and were given the opportunity, *which they refused*, to call Defendants regarding possible settlement." (*Id.*) (emphasis added).

G. BIA Approves a New Easement Over Kiowa Allotment 84.

By May of 2008, no deal had been reached and Defendants' Right-of-Way Application had lapsed. Certain of the landowners continued demanding $63,000 for the easement. (Aplt. App. 137). At that point, Defendants were "in the process of forwarding the case for condemnation proceedings," but "subsequently stopped the condemnation action and resubmitted the ROW application for $40 per rod." (Aplt. App. 36, ¶ 52). On June 23, 2008, the acting Superintendent for the BIA local agency, Robin Phillips, approved Defendants' application. (*Id.*)

In her approval, Superintendent Phillips again noted that "[t]he $40.00 per rod offer from Defendants [met] the appraisal for a new easement of an already existing buried pipelines." Superintendent Phillips went on to explain that pursuant to 25 C.F.R. § 169.3(c)(5), the BIA has the authority "to grant rights-of-way over and across individually owned lands without the consent of the Individual Indian owners when the owners interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also, **that the grant will cause no substantial injury to the land or any owner thereof**."). Superintendent Phillips found both of these criteria were satisfied and approved

Defendants' offer. (Aplt. App. 36, ¶ 52).

H. The BIA Superintendent's Approval is Appealed.

On July 24, 2008, one month after BIA approval of the new easement, certain of the beneficial owners of Kiowa Allotment 84 appealed the decision to the BIA's Regional Director. (Aplt. App. 36, ¶ 52). The landowners expressed concern about a 2008 approval of a $40 per rod offer that was premised on a 2002 appraisal but did not challenge Superintendent Phillips' conclusion that approval of Defendants' offer and the continued presence of the pipeline under Kiowa Allotment 84 would "cause no substantial injury to the land or any owner thereof."

On May 23, 2010, the BIA's Regional Director granted the landowners' appeal and concluded that Defendants' offer of $40 per rod was, in his estimation, too low, and that "[a] review of recent transactions for th[e] area reveal[ed] a range of $60 to $80 per rod" (or $4,620 to $6,160 total for the easement), which was still much less than the $818.18 per rod (or $63,000) certain landowners were demanding. (Aplt. App. 36, ¶ 53).

I. Defendants Elect to Exercise their Right of Condemnation, Resulting in the Litigation Below.

Defendants had negotiated in good faith with the beneficial owners of Kiowa Allotment 84 and the BIA in its representative capacity for many years. But after the BIA first approved Defendants' $40 per rod or $3,080 offer, then later revoked that approval after a two year appeal, Defendants believed they should not have to

pay full market value for the surface rights to the entire 136.25 acres of the Kiowa Allotment 84 simply to obtain a 20 year underground easement on less than three quarters of an acre. Nor did they believe they should have to attempt to obtain a new easement or easements elsewhere and reroute its pipeline at the estimated expense of more than $500,000.

On November 11, 2015, Defendants filed a condemnation proceeding to acquire a 0.73 acre sub-surface easement on Kiowa Allotment 84 via the power of eminent domain, which they believed was the procedure available to them (one they had hoped to avoid using by reaching an amicable agreement with the landowners). *See Enable Oklahoma Intrastate Transmission, LLC v. A 25 foot wide easement et al.*, CIV-15-1250-M (the "Condemnation Case").[4] Five days later, Plaintiffs filed this case. Both cases were assigned to the same district judge, the Honorable Vicki Miles-LaGrange.

On March 28, 2017, the district court granted partial summary judgment in favor of Plaintiffs on liability for trespass. The district court also granted Plaintiffs' motion for a permanent injunction and directed Defendants to remove the pipeline within six months. (Aplt. App. 260).

SUMMARY OF ARGUMENT

1. Plaintiffs' motion for partial summary judgment was defective

[4] *See* note 1, *supra*, at 1.

because it did not address a required, *prima facie* element of their trespass claim when trespass is asserted in these kinds of circumstances – namely, that plaintiffs' must make a demand for a transferee owner to remove an allegedly encroaching structure and authorize entry to remove it. Because Plaintiffs' motion failed to demonstrate their entitlement to judgment as a matter of law, the district court erred by granting partial summary judgment on liability.

2. Plaintiffs' motion for partial summary judgment was also defective because it did not address the fact that five of the Plaintiffs had consented to Defendants' continued use of the pipeline. In *Nahno-Lopez v. Houser*, those plaintiffs argued (as the Plaintiffs argue here) that consent by co-owners was not effective under a similar federal statute. But this Court specifically held Oklahoma law governs the effectiveness of such co-owner consent. It also concluded that Oklahoma law permits co-owners to consent to an alleged trespass of Indian allottee property. The district court thus erred below by concluding there was no genuine dispute of fact about the consents given by five Plaintiffs for continued use of the pipeline. This is especially true here because Plaintiffs failed even to address these consents in their defective summary judgment motion.

3. At Plaintiffs' invitation, the district court concluded it did not need to consider the traditional four-factor test a district court must apply in exercising equitable discretion to order an injunction. Instead, the district court ruled,

Plaintiffs were automatically entitled to a permanent injunction once they prevailed on the merits of a continuing trespass claim. The district court's adoption of a category of claims automatically entitled to injunctive relief is inconsistent with Supreme Court and Tenth Circuit precedent. The district court erred by failing to exercise its discretion and by failing to apply the four-factor test.

4. Fed. R. Civ. P. 52(a)(1) requires a district court to make specific findings of fact and separate conclusions of law to permit meaningful appellate review of orders entered without a jury trial. This rule specifically applies to orders granting permanent injunctions. The district court thus erred by failing to make the findings and conclusions Rule 52(a)(1) mandates.

ARGUMENT

A. APPLICABLE STANDARDS OF REVIEW

The Court reviews the grant "of a permanent injunction for abuse of discretion," but it reviews all underlying questions of law *de novo*. *Crandall v. City & County of Denver*, 594 F.3d 1231, 1235-36 (10th Cir. 2010). This Court reviews decisions on motions for summary judgment *de novo*, applying the same standard as the district court. *E.g.*, *Tarrant Reg. Water Dist. v. Herrmann*, 656 F.3d 1222, 1232 (10th Cir. 2011). The Court should reverse an order granting summary judgment unless "the movant show[ed] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* at

1232–33.

B. THE DISTRICT COURT'S ERRORS

1. The district court erred by granting partial summary judgment on liability in favor of Plaintiffs where their motion did not address a *prima facie* element of their claim for trespass, let alone demonstrate entitlement to judgment as a matter of law.

In their Motion for Partial Summary Judgment (Aplt. App. 098-140), Plaintiffs set out twelve facts and addressed their entitlement to summary judgment on their affirmative claim for trespass across less than two pages. Nowhere in the motion, however, did Plaintiffs even attempt to identify the *prima facie* elements of a federal common law claim for continuing trespass in the circumstances at issue here, *i.e.*, where the alleged trespass was based solely on the presence of a pre-existing pipeline for which Defendants' predecessor had obtained a valid 20-year easement. Because they did not address all the *prima facie* elements of a federal trespass claim, Plaintiffs' summary judgment motion was defective and the district court erred by granting partial summary judgment in their favor.

a. Plaintiffs' summary judgment motion failed to address a required element of their claim – their demand for Defendants to remove the previously authorized structure.

1. Where an encroaching structure is alleged as the trespass, plaintiff must first demand that a transferee of the structure remove it.

This Court has not previously considered a federal common law trespass claim in the same or similar circumstances as those presented here. However,

another federal circuit has. In *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), the Ninth Circuit considered the required elements for such a claim.[5]

In *Milner*, the Court recognized that the continued presence of a previously built structure can constitute a trespass. *Id*. at 1190-91 (citing Restatement (Second) of Torts § 161; 75 Am. Jur. 2d *Trespass* § 19 (2009)).[6] However, the Court also recognized that, to establish the defendant's duty, a plaintiff must show that he or she requested the defendant to remove the encroaching structure (and also authorized defendant's entry to remove it). *Id*. *Milner* also quoted approvingly a federal district court decision, *Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983), which held:

> In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made.

561 F. Supp. at 974.

The authors of Section 161 of the Restatement (the section approved by *Milner* for federal common law claims) had also specifically noted that a transferee-owner's duty to remove the encroaching structure depends on notice from the plaintiff demanding removal of the structure. The Restatement drafters

[5] This Court cited *Milner* with approval in *Nahno-Lopez v. Houser*, on the related point that federal common law must govern such claims. 625 F.3d at 1282.

[6] In *Angier v. Mathews Expl. Corp.*, a decision cited by the district court in its March 28 Order, the Oklahoma Court of Appeals concluded that Section 161 correctly states Oklahoma trespass law. 1995 OK CIV APP 109, ¶ 6, 905 P.2d 826, 830.

noted:

> The rule of continuing trespass is significant where the ownership of the thing tortiously placed on the land is transferred, since … such transferee upon knowledge that the thing is wrongfully on the land comes under a duty to the possessor to remove the thing….

Restatement (Second) of Torts § 161, comment f; *see also id.*, comment c ("the liability of one who has tortiously placed a thing on another's land is more stringent than the liability of his transferee …. [T]he [transferee's] responsibility is merely for a violation of a duty of removal and, if the circumstances are such as to make it impossible for him to perform such duty, he is excused from liability for its non-performance").

In other words, without Plaintiffs first making a demand and giving authorization for removal of the pipeline from Plaintiffs' land, Defendants have no duty to remove it because they could not legally remove the allegedly encroaching pipeline. Without Plaintiffs' demand, re-entry on Plaintiffs' property itself would have constituted a trespass. This demand requirement is thus an element of a federal common law trespass claim in these circumstances, and was not proved here.

2. Plaintiffs' motion for summary judgment failed to address this *prima facie* element.

In their motion for partial summary judgment, Plaintiffs failed to address this *prima facie* element of notice and demand. (Aplt. App. 98-140). Their motion

did not include any statement of undisputed fact suggesting Plaintiffs ever demanded that Defendants remove the pipeline from their property. As *Milner* held, a plaintiff cannot establish a trespass in such circumstances unless he or she shows when a demand was made on a defendant to remove the encroaching structure. Plaintiffs failed to demonstrate they made a demand and Defendants had no duty to remove the pipeline.

Defendants are excused from liability for the alleged trespass until such a demand has been made. *Milner*, 583 F.3d at 1190-91; *Energy Research*, 561 F. Supp. at 974. Having failed even to address this intent/demand element, Plaintiffs were not entitled to judgment as a matter of law and the district court erred by granting partial summary judgment for them.

b. The district court was required to deny Plaintiffs' defective summary judgment motion.

This defect in Plaintiffs' summary judgment motion is fatal. It should have caused the district court to deny Plaintiffs' motion. Indeed, the Supreme Court and this Court have even held non-movants have no duty to point out such failings in a defective summary judgment motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (if the party moving for summary judgment does not discharge his "burden to show that he is entitled to judgment under established principles … then he is not entitled to judgment. No defense to an insufficient showing is required."); *Neal v. Lewis*, 414 F.3d 1244, 1248 (10th Cir. 2005) (ruling that a "failure to

timely respond to [a] motion for summary judgment does not, by itself, make summary judgment proper"; the "burden to respond arises only if" movants "met their initial burden"). As this Court held in *Reed v. Bennett*:

> A party's failure to file a response to a summary judgment motion is not, by itself, a sufficient basis on which to enter judgment against the party. The district court must make the additional determination that judgment for the moving party is "appropriate"…. Summary judgment is appropriate only if the moving party demonstrates that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.… [O]nly if those facts [in the moving party's motion] entitle the moving party to judgment as a matter of law should the court grant summary judgment.

312 F.3d 1190, 1195 (10th Cir. 2002).

The district court committed reversible error by granting Plaintiffs' defective summary judgment motion. Plaintiffs did not even address the requirement they make a demand for Defendants to remove the pipeline, let alone establish that they were entitled to judgment as a matter of law. This Court should reverse the entry of partial summary judgment.

2. <u>The district court erred by concluding Plaintiffs established the undisputed facts preclude Defendants' defense of consent. The consents of five co-owners at least raised a genuine dispute of fact.</u>

a. In *Nahno-Lopez,* the Court held Oklahoma trespass law governs the issue of consent by co-owners of Indian allotments.

For purposes of a federal common law claim of continuing trespass against a beneficial owner of an Indian allotment, Oklahoma state law provides "the rule of

decision" for the defense of consent. Collecting relevant precedent, this Court specifically so held in *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010):

> Oklahoma trespass law provides the rule of decision for this federal [trespass] claim. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982) ("Controversies governed by federal law do not inevitably require resort to uniform federal rules. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.") (citations omitted); [*United States v.]Milner*, 583 F.3d [1174,] 1182 n.6 [(9th Cir. 2009)] (adopting Washington trespass law to govern a federal common-law trespass claim brought by Indians) (citations omitted); Felix S. Cohen, *Handbook of Federal Indian Law* § 16.03(3)(c) (5th ed. 2005) ("Although state courts have no jurisdiction over allotment ownership disputes, federal law adopts state law as the rule of decision in many circumstances, either explicitly or implicitly").

625 F.3d at 1282-83. *Cf. Gilmore v. Weatherford*, 694 F.3d 1160, 1164 (10th Cir. 2012) (applying Oklahoma law as the rule of decision for conversion claim brought by Native American property owners).[7]

As this Court also held in *Nahno-Lopez*, "consent forms a complete defense to trespass" under Oklahoma law. *Id.* at 1284 (citing *Antonio v. Gen. Outdoor Adver. Co.*, 1966 OK 81, ¶ 14, 414 P.2d 289, 291; *Vertex Holdings, LLC v.*

[7] *See also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 84 (1994) (concluding the real issue under federal common law is whether a state substantive law "rule of decision" should be applied or displaced); 19 *Wright, Miller et al., Fed. Prac. & Proc. Juris.* § 4514 (2d ed.), at nn. 19-21 ("the Supreme Court for the past several years has expressed a strong preference for the law of the forum state as its choice of the appropriate rule. Accordingly, the determination of the content of the federal common law may be thought of as primarily the question of whether or not to displace the law of the forum state. The recent cases suggest a strong presumption in favor of non-displacement…").

Cranke, 2009 OK CIV APP 10, ¶ 15, 217 P.3d 120, 123). Under Oklahoma trespass law, "permission or consent" to do the acts complained of may be either express or "implied by the circumstances." *Antonio*, ¶ 13, 414 P.2d at 291. Consent is thus generally a classic "fact issue" under Oklahoma law. A single owner of a tenancy in common may enter into a lease for the entire co-tenancy property without any other's consent. *Anderson v. Dyco Petroleum Corp.*, 1989 OK 132, ¶ 7, 782 P.2d 1367, 1371-72 & n. 8; *see also United States v. Craft*, 535 U.S. 274, 280 (2002) ("Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares").

In *Nahno-Lopez*, the plaintiffs argued their purported consents (there, to a lease) were unauthorized and invalid under a federal statute that governs Indian allotted lands. Those plaintiffs relied on 25 U.S.C. § 348 to argue approval by the BIA was required (instead of 25 U.S.C. § 324, the statute on which Plaintiffs here rest their arguments). The *Nahno-Lopez* Court noted, "Plaintiffs maintain that the Secretary of the Interior never approved the lease, as is required by 25 U.S.C. § 348." *Id.* at 1280.

In other words, the *Nahno-Lopez* plaintiffs made the same argument Appellees made here. They argued even if there were otherwise valid consents under state law to the lease that would defeat the trespass claim, federal law (in that case, 25 U.S.C. § 348) invalidated the consent. This Court, however, held

otherwise. By concluding that the only material facts for this issue were either those that established effective consent by plaintiffs under Oklahoma state law or those that might have created a genuine dispute about that issue, this Court conclusively rejected the argument Appellees proffer here and affirmed summary judgment in favor of the defendants on the trespass claim. *Nahno-Lopez*, 625 F.3d at 1284.

b. Plaintiffs' Motion for Summary Judgment did not even address the validity of the five consents received from Co-Owners of the allotments.

Plaintiffs' Motion for Summary Judgment filed below (Aplt. App. 098-140) included only a sparse Statement of Undisputed Facts purportedly based on facts that were stipulated. In their Motion, Plaintiffs focused exclusively on whether an effective right-of-way easement had been reached under federal law, without addressing any other possible form of consent that might create a valid defense. In fact, Defendants first brought these consents to the attention of the district court by attaching five consents to their response to Plaintiffs' motion, including consents from co-owners Thomas Blackstar (1.02%), Benjamin Blackstar (1.02%), Gilbert Clayton ("Ernie Clay") Keahbone (2.6%), Edmond Carter (6.35%), and Rene Ware (1.02%). (Aplt. App.191-195)

In their Reply below (Aplt. App. 228-240), Plaintiffs addressed the import of those consents for the first time. However, a movant may not wait to correct a

defective summary judgment motion in its reply. Both the Supreme Court and this Court have held that a defective summary judgment motion must be denied regardless of the non-movant's response. *Adickes*, 398 U.S. at 161 ("No defense to an insufficient showing is required."); *Neal v. Lewis*, 414 F.3d at 1248. It is manifestly unfair to the non-moving party, here the Defendants, to deprive them of their right to respond to evidence and arguments to which, by virtue of first being included in a reply, Defendants have no right to respond. Accordingly, Plaintiffs' arguments in their Reply were too late to entitle them to summary judgment. Moreover, those arguments also failed to establish that Plaintiffs' were entitled to judgment as a matter of law on the undisputed facts.

In its March 28 Order, the district court should not have ignored the import of the five co-owners' consents. It should not have granted summary judgment in favor of Plaintiffs based on the motion's failure to address these consents. However, even if this Court were to reach these new issues for the first time on appeal, none of Plaintiffs' arguments was sufficient. Three of the five arguments assume that this Court's decision in *Nahno-Lopez* was wrong and that the federal statute on which they rely must govern the question of consent. Plaintiffs' other two arguments depend on facts that were not in the summary judgment record.

Undisputed facts did not exist in the summary judgment record to establish whether purported conditions on these five consents were ever satisfied (or waived

by one or more of the five). Undisputed facts did not exist establishing whether all five Plaintiffs effectively revoked their consents. In short, the district court should not have concluded that arguments first raised in Plaintiffs' Reply entitled them to judgment as a matter of law. The district court erred when it granted Plaintiffs partial summary judgment on this point.

3. The district court erred by concluding that Plaintiffs were automatically entitled to a permanent injunction by establishing the merits of their claim, which is only one of the four equitable factors a district court *must consider* in the exercise of its discretion.

The district court erred as a matter of law by failing to exercise its discretion based on the equitable four-factor test that a district court must apply to claims for permanent injunctive relief. Plaintiffs' claims below are expressly based on the Defendants' alleged "continuing trespass upon Plaintiffs' land in violation of federal common law." (Aplt. App. 037, ¶ 59). When Plaintiffs moved for partial summary judgment and for a permanent injunction based on the alleged trespass, Plaintiffs expressly sought such relief pursuant to Fed. R. Civ. Proc. 65, (Aplt. App. 098) and went to great lengths in their motion papers to emphasize that their claims arise under the federal common law.

Under the federal rules, a party seeking a permanent injunction must prove the district court should exercise discretion to enter an injunction based on a well established, four factor test. "A party requesting a permanent injunction bears the

burden of showing: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003); *see also Crandall v. City & County of Denver*, 594 F.3d 1231, 1235-36 (10th Cir. 2010); *Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). Even if a movant satisfies its burden to prove these factors favor an injunction, a district court has discretion whether to grant relief. This Court reviews grants "of a permanent injunction for abuse of discretion." *Crandall*, 594 F.3d at 1236 (citing *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993)).

Plaintiffs invited district court error by asking it to conclude they were "automatically" entitled to a permanent injunction if they succeeded on their federal continuing trespass claim, primarily citing Oklahoma precedent. *E.g.*, Aplt. App. 110 ("Plaintiffs Are Automatically Entitled to a Permanent Injunction Upon a Finding of Liability Against Defendants for Continuing Trespass") and Aplt. App. 112 ("a permanent injunction is necessarily warranted once a continuing trespass is established"). While Plaintiffs argued (without ever offering any evidence) that an injunction was proper even under the four-factor test, the district court nevertheless ruled it did not need to conduct that four-factor inquiry.

Instead, the district court concluded that "Courts that have addressed whether a permanent injunction should be entered in relation to a continuing trespass do not conduct a separate analysis of the four factors a court typically considers when determining whether a permanent injunction should be entered." (Aplt. App. 268). As a result of the erroneous conclusion that Plaintiffs were automatically entitled to a permanent injunction, the district court never exercised its discretion and never conducted the required four-factor analysis. The district court's failure to conduct that inquiry and exercise its discretion is reversible error. *Wyoming v. Dep't of Agric.*, 661 F.3d at 1272.

Moreover, the Supreme Court has consistently held that a district court must apply the equitable factors and may not instead adopt categorical rules that would entitle a movant to a permanent injunction simply by prevailing on a certain category of claim. For example, the Supreme Court held it was error to apply such a "general rule" in patent cases in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Specifically, the Supreme Court emphasized that "invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that [a right] has been infringed" must be "consistently rejected." *Id.* at 392-93; *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) ("An injunction should issue **only if the traditional four-factor test is satisfied**") (emphasis added); *Winter v. Natural*

Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) (holding a showing of a likelihood of irreparable harm is **required in all cases**).

> Even before those more recent cases, the Supreme Court had held that:
>
> In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987). It further held that applying a presumption of irreparable harm in the context of an injunction "is contrary to traditional equitable principles." *Id.* at 545.

The failure to apply the four-factor test cannot be cured on appeal. That is true in part because Rule 52 required the district court to make and enter specific findings of fact and conclusions of law, as set forth in Section 4, *infra*. Moreover, Plaintiffs failed to offer any evidence in support of their cursory arguments under the four-factor test, even though they had the burden to prove each factor. (Aplt. App. 120-123.) Even if Plaintiff had offered sufficient proof, the district court had to exercise its equitable discretion to decide whether to enter the injunction. It failed, however, to exercise its discretion at all. Its erroneous conclusion that Plaintiffs were automatically entitled to the injunction if they prevailed on their trespass claim requires this Court to reverse the district court's injunction.

4. <u>The district court erred by failing to comply with Rule 52(a)(1).</u>

Under Rule 52(a)(1), a district court must make sufficient findings of fact

and separately state its conclusions of law in all civil actions tried on the facts without a jury. *See* Fed. R. Civ. P. 52(a)(1) ("In an action tried on the facts without a jury …, the court must find the facts specially and state its conclusions of law separately"). "No request for findings by the parties is required to trigger the court's compliance." 9-52 Moore's Federal Practice - Civil § 52.10 ("Rule 52 extends to all actions tried upon the facts without a jury and therefore extends to actions seeking permanent injunctions"). *See also S.E.C. v. Management Dynamics, Inc.*, 515 F.2d 801, 814 (2d Cir. 1975); *United States v. Rohm & Haas Co.*, 500 F.2d 167, 176 (5th Cir. 1974); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 556 (9th Cir. 1990). Further, the district court's obligations "cannot be waived by the parties." *Id.; see also Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 890 n. 3 (10th Cir. 2013).

In its March 28 Order, the district court neither specially made findings of fact nor separately stated its conclusions of law. (Aplt. App. 268-269). Instead, it set out a cursory discussion of the case law by which it concluded Plaintiffs were automatically entitled to a permanent injunction if they prevailed on their trespass claim. *Id.* The portion of the district court's March 28 Order addressing the motion for a permanent injunction does not set out any findings of fact nor any conclusions of law with respect to at least three factors of the four-factor test required for a permanent injunction. In fact, it simply does not address these three

factors that Plaintiffs nevertheless must prove for entry of a permanent injunction.

The Supreme Court has held that it "is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); *see Sampson v. Murray*, 415 U.S. 61, 62 (1974) (quoting *Mayo*). This requirement ensures the Court is able to provide meaningful appellate review of an order granting an injunction because when the district court has failed to enter sufficient findings of fact and conclusions of law, this Court's "meaningful review is well-nigh impossible." *Sampson*, 415 U.S. at 62.

It is impossible to determine here whether the district court properly would have granted this injunction if it had properly exercised its discretion and balanced the four factors (based on sufficient evidence presented by Plaintiffs, or the lack thereof, with respect to the three factors). Where a district court failed to consider adequately the last three of the injunction factors, this Court has concluded it must vacate an injunction order and remand the case to apply the proper test in compliance with Rule 52. In *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006), this Court specifically concluded the district court "abused its discretion" based on its failure to "adequately analyze the last three" injunction factors. *Id*. at 1121.

CONCLUSION

The district court erroneously granted partial summary judgment in favor of Plaintiffs on liability for their trespass claim. Plaintiffs' defective summary judgment motion failed even to address a *prima facie* element of their claim in the circumstances presented in this case (a demand for Defendants to remove the pipeline) and failed to address consents that five of the Plaintiffs provided for Defendants' continued use of the pipeline.

The district court also erred by granting Plaintiffs' motion for a permanent injunction. It failed to exercise its equitable discretion and failed to apply the four-factor test required for entry of a permanent injunction. It erroneously concluded Plaintiffs were automatically entitled to a permanent injunction if they prevailed on their trespass claim.

Further, the district court failed to make specific findings of fact and separate conclusions of law as required by Rule 52(a)(1). That failure prevents this Court from providing meaningful review of the district court's exercise of its discretion (assuming arguendo it exercised that discretion here) and thus requires this Court to vacate the portion of the order granting a permanent injunction.

RELIEF SOUGHT

Defendants ask the Court to reverse the district court's entry of partial summary judgment and entry of a permanent injunction.

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument because of the number and complexity of the issues in this appeal, as well as the substantial financial burdens imposed on them by the district court's injunction.

Respectfully Submitted,

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ATTORNEYS FOR DEFENDANTS/APPELLANTS

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned certifies:

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 7,169 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Andrew W. Lester
Attorney for Defendants/Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.

2. If required to file additional hard copies, this ECF submission is an exact copy of those documents.

3. The digital submissions have been scanned for viruses with the most recent version of Windows Defender Virus Definition Version 1.243.948.0 with Virus Definitions File updated on 8/4/2017 at 10:09 a.m., and, according to that program, are free of viruses.

/s/ Andrew W. Lester
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I electronically filed the foregoing **APPELLANTS' BRIEF** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

/s/ Andrew W. Lester
Andrew W. Lester

ATTACHMENTS

1. November 28, 2016 Order
2. March 28, 2017 Order

Attachment 1:
November 28 Order Granting in part, denying in part, Def Motion to Determine Measure of Damages

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

MARCIA W. DAVILLA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-15-1262-M
	)	
ENABLE MIDSTREAM PARTNERS, L.P., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

Before the Court is defendants' Motion to Determine Proper Measure of Damages and Rules for Decision, filed March 31, 2016. On May 3, 2016, plaintiffs filed their response, and on May 10, 2016, defendants filed their reply. Based upon the parties' submissions, the Court makes its determination.

I. Background

Defendants are the owner and operator of a network of natural gas transmission pipelines across Oklahoma. Defendants' transmission pipeline crosses an approximate 137 acre tract of land in Caddo County, Oklahoma, which had originally been an Indian allotment to Millie Oheltoint (Emaugobah), held in trust by the United States Department of the Interior, Bureau of Indian Affairs ("BIA"). Thirty-eight (38) Indians and the Kiowa Indian Tribe of Oklahoma ("Kiowa Tribe") own undivided interests in the tract. The Kiowa Tribe obtained its approximately 1.1% undivided interest sometime after 2008, on the death of certain Indian owners and by operation of the American Indian Probate Reform Act.

On November 19, 1980, the BIA approved the grant of a .73 acre easement across the southern part of the tract in exchange for consideration of $1,925.00 for a twenty (20) year term

right-of-way for defendants' predecessor in interest, Producer's Gas Company, to install, construct, operate, and maintain a natural gas transmission pipeline. The natural gas transmission pipeline has been in continuous operation since its installation in the early 1980's. The original right of way expired on November 20, 2000.

On or about June 14, 2002, defendants' predecessor-in-interest, Enogex, Inc. ("Enogex"), submitted to the BIA an application for a new 20-year term regarding the existing natural gas pipeline right-of-way. On June 23, 2008, the Interim Superintendent of the BIA's Anadarko Agency approved Enogex's application for the easement. On March 23, 2010, the BIA vacated the interim superintendent's decision and remanded the case for further negotiation and instructed that if approval of a right-of-way was not timely secured, Enogex should be directed to move the pipeline. A new right of way has not been granted, and defendants have continued to operate the natural gas pipeline. On November 16, 2015, plaintiffs filed the instant action for continuing trespass in violation of federal common law and for preliminary and permanent injunctive relief against defendants.

II. Discussion

Defendants now move this Court to determine the following issues: (1) the rule of decision governing plaintiffs' claim for continuing trespass in violation of federal common law; (2) the rule of decision on the statute of limitations governing plaintiffs' claim for continuing trespass in violation of federal common law; (3) whether the Oklahoma substantive law provides a two-year statute of limitations on plaintiffs' trespass claim; (4) when plaintiffs' cause of action for trespass accrued; (5) what the proper measure of compensatory damages for continuing trespass is in this

case; and (6) whether plaintiffs' maximum recovery for compensatory damages for trespass is the total diminution of the value of the land affected by the trespass.

A. Rule of decision governing plaintiffs' trespass claim

Defendants assert that Oklahoma substantive law provides the rule of decision governing plaintiffs' federal common law claim for continuing trespass. Plaintiffs, however, contend that their trespass claim is governed by federal common law.

"Indian rights to a Congressional allotment are governed by federal – not state – law." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 (10th Cir. 2010). *See also United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) ("Federal common law governs an action for trespass on Indian lands." (citations omitted)). However, state law is sometimes borrowed and applied to federal common law claims as long as the application of the state law would not be inconsistent with federal law or underlying federal policies. *See Cty. of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240-41 (1985); *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982); *Nahno-Lopez*, 625 F.3d at 1282-83.

The Court, therefore, finds that federal common law governs plaintiffs' claim for continuing trespass but that Oklahoma trespass law may provide the rule of decision for certain aspects of plaintiffs' claim, as long as the application of Oklahoma law would not be inconsistent with federal law or underlying federal policies.

B. Statute of limitations

Defendants assert that Oklahoma substantive law provides the rule of decision governing the statute of limitations on plaintiffs' trespass claim and that Oklahoma law provides a two-year statute of limitations for plaintiffs' trespass claim. Plaintiffs, on the other hand, contend that under

controlling Supreme Court precedent, there is no statute of limitations for plaintiffs' federal common law claim for trespass.

The United States Supreme Court has held:

> [t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights. In the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies. We think the borrowing of a state limitations period in these cases would be inconsistent with federal policy. Indeed, on a number of occasions Congress has made this clear with respect to Indian land claims.
>
> * * *
>
> It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances.

Oneida, 470 U.S. at 240-41, 244 (internal citations omitted).

In light of the Supreme Court's ruling in *Oneida*, the Court finds that the two-year statute of limitations under Oklahoma law should not be borrowed and applied to plaintiffs' trespass claim – a federal common law claim by Indians to enforce their property rights. Further, the Court finds that plaintiffs' federal common law claim for trespass is not subject to any statute of limitations.[1] *See Oneida*, 470 U.S. at 244.

C. Proper measure of damages

Defendants assert that Oklahoma law provides the proper measure of compensatory damages for plaintiffs' trespass claim and that plaintiffs' maximum recovery for trespass is the total

[1]Because this Court has found that plaintiffs' federal common law claim for trespass is not subject to any statute of limitations, the Court need not determine at this time when plaintiffs' cause of action for trespass accrued.

diminution of the value of the land affected by the trespass. Plaintiffs, on the other hand, assert that under federal common law, they are entitled to an accounting of defendants' profits from the operation of their pipeline and recovery of the pro-rata share of those profits that is attributable to the portion of the pipeline that has been located on their property.

As set forth above, federal common law governs plaintiffs' trespass claim. Additionally, there is clear case law setting forth what remedies are available under federal common law for trespass on Indian land.[2] The Court, therefore, finds that it would be inappropriate to borrow Oklahoma law on damages for trespass in the instant action and that plaintiffs will be able to pursue those damages that are available under federal common law.

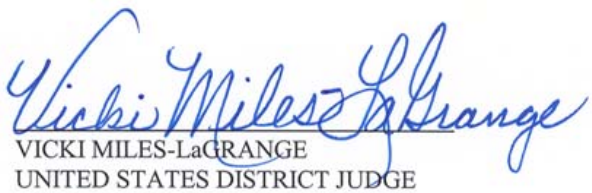
III. Conclusion

Accordingly, the Court GRANTS IN PART and DENIES IN PART defendants' Motion to Determine Proper Measure of Damages and Rules for Decision [docket no. 31] as follows:

(A) The Court GRANTS the motion by determining the proper damages and rules of decision in this case as set forth above, and

(B) The Court DENIES the motion as to the determinations defendants request this Court to make.

IT IS SO ORDERED this 28th day of November, 2016.



VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

[2]Remedies for trespass on Indian land under federal common law include: ejectment and damages, *Marsh v. Brooks*, 49 U.S. 223, 232 (1850); accounting, *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 359 (1941), and damages, *Oneida*, 470 U.S. at 233-34.

Attachment 2:
March 28, 2017 Order Granting Plaintiff Motion Partial Summary Judgment

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

MARCIA W. DAVILLA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-15-1262-M
	)	
ENABLE MIDSTREAM PARTNERS, L.P., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

Before the Court is plaintiffs' Motion for Partial Summary Judgment on Liability for Their Trespass Claim and for a Permanent Injunction, filed April 1, 2016. On May 3, 2016, defendants filed their response, and on May 10, 2016, plaintiffs filed their reply. Based upon the parties' submissions, the Court makes its determination.

I. Background

Defendants are the owner and operator of a network of natural gas transmission pipelines across Oklahoma. Defendants' transmission pipeline crosses an approximate 137 acre tract of land in Caddo County, Oklahoma, which had originally been an Indian allotment to Millie Oheltoint (Emaugobah), held in trust by the United States Department of the Interior, Bureau of Indian Affairs ("BIA"). Thirty-eight (38) Indians and the Kiowa Indian Tribe of Oklahoma ("Kiowa Tribe") own undivided interests in the tract, varying from 28.6% down to less than 9/10ths of a percent. The Kiowa Tribe obtained its approximately 1.1% undivided interest sometime after 2008, on the death of certain Indian owners and by operation of the American Indian Probate Reform Act.

On November 19, 1980, the BIA approved the grant of a .73 acre easement across the southern part of the tract in exchange for consideration of $1,925.00 for a twenty (20) year term right-of-way for defendants' predecessor in interest, Producer's Gas Company, to install, construct, operate, and maintain a natural gas transmission pipeline. The natural gas transmission pipeline has been in continuous operation since its installation in the early 1980's. The original right of way expired on November 20, 2000.

On or about June 14, 2002, defendants' predecessor-in-interest, Enogex, Inc. ("Enogex"), submitted a right-of-way offer to the BIA and made an offer to plaintiffs for a new twenty year easement, which was rejected by a majority of the landowners.[1] Prior to submitting its application for renewal of the easement, Enogex obtained the written consent of tenant-in-common landowners Thomas Blackstar, Benjamin Blackstar, Ernie Clay Keahbone, Edmond Carter, and Rene Ware, and these written consents were submitted to the BIA with the Enogex application.[2] Further, on September 13, 2006, Enogex paid the BIA $1,098.35, inclusive of interest and assessments, for use of the .73 acre easement from the date of the expiration of the previous easement, November 18, 2000, until the date Enogex submitted its renewal application on June 14, 2002.

Despite the rejection by a majority of the landowners, on June 23, 2008, the Interim Superintendent of the BIA's Anadarko Agency approved Enogex's application for the renewal of the right-of-way easement for twenty years. Plaintiffs appealed the Interim Superintendent's

[1]Enogex offered to pay $3,080 for the easement.

[2]These tenant-in-common landowners collectively own less than a 10% interest in the tract.

decision, and on March 23, 2010, the BIA vacated the interim superintendent's decision.[3] The BIA determined that it did not have authority to approve the right-of-way without the consent of plaintiffs or their predecessors in interest and that the price offered by defendants was unreasonable. The BIA remanded the case for further negotiation and instructed that if approval of a right-of-way was not timely secured that Enogex should be directed to move the pipeline. A new right-of-way has not been granted, and defendants have continued to operate the natural gas pipeline. On November 16, 2015, plaintiffs filed the instant action for continuing trespass in violation of federal common law and for preliminary and permanent injunctive relief against defendants.

II. Discussion

Plaintiffs move this Court to enter summary judgment in their favor on their trespass claim and to find defendants liable for trespass. Plaintiffs further move this Court to enter a permanent injunction requiring defendants to remove the pipeline across plaintiffs' property.

[3]In the March 23, 2010 letter, the BIA states:

> The trespass has been resolved based on the certified letter to Enogex, dated August 24, 2006. In fact, Enogex paid four extra years of trespass fees when considering Enogex's application tolled the ROW grant from June 14, 2002. This effectively makes the trespass rental value at about $120 per rod.

March 23, 2010 Letter from Dan Deerinwater, Regional Director of the BIA, attached as Exhibit C to plaintiffs' Motion for Partial Summary Judgment on Liability for Their Trespass Claim and for a Permanent Injunction with Brief in Support at 4.

A. Trespass claim

1. Summary judgment standard

"Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party is entitled to summary judgment where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. When applying this standard, [the Court] examines the record and reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1071-72 (10th Cir. 1998) (internal citations and quotations omitted).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Furthermore, the non-movant has a burden of doing more than simply showing there is some metaphysical doubt as to the material facts. Rather, the relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Neustrom v. Union Pac. R.R. Co.*, 156 F.3d 1057, 1066 (10th Cir. 1998) (internal citations and quotations omitted).

2. Merits

Plaintiffs assert they are entitled to summary judgment on the issue of liability on their trespass claim against defendants. Specifically, plaintiffs contend that defendants' trespass on their property is undisputed; defendants have admitted that they are operating a natural gas pipeline across plaintiffs' property without an easement. Plaintiffs further assert defendants' affirmative defenses do not prevent entry of summary judgment.

Defendants, however, contend that whether they are liable for trespass remains a disputed issue. Specifically, defendants contend that the five written consents to renewal of the easement that they received from the tenant-in-common landowners preclude the entry of summary judgment. Additionally, defendants contend Oklahoma's two-year statute of limitations applies in this case and that since plaintiffs have not proven when, or if, their trespass claim accrued, summary judgment should be denied.

On November 28, 2016, the Court entered an order in this case setting forth certain rules for decision in this case. Specifically, the Court found "that federal common law governs plaintiffs' claim for continuing trespass but that Oklahoma trespass law may provide the rule of decision for certain aspects of plaintiffs' claim, as long as the application of Oklahoma law would not be inconsistent with federal law or underlying federal policies." November 28, 2016 Order [docket no. 51] at 3. The Court further found "that the two-year statute of limitations under Oklahoma law should not be borrowed and applied to plaintiffs' trespass claim" and "that plaintiffs' federal common law claim for trespass is not subject to any statute of limitations." *Id.* at 4.

While defendants do not dispute that they are operating a natural gas pipeline across plaintiffs' property without an easement, defendants assert that there is no trespass in this case because under Oklahoma law consent forms a complete defense to trespass and they obtained five written consents to the renewal of the easement. While consent does form a complete defense under Oklahoma law, *see Nahno-Lopez v. Houser*, 625 F.3d 1279, 1284 (10th Cir. 2010), as set forth above, before applying this law, this Court must determine whether the application of this Oklahoma law would be inconsistent with federal law or underlying federal policies. As set forth

below, the Court finds that application of this Oklahoma law would be inconsistent with federal statutes and, thus, the Oklahoma law providing that consent is a complete defense to trespass is not applicable in this case.

The United States Congress has promulgated specific statutes regarding easements across Indian trust lands. Specifically, 25 U.S.C. § 323 provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired, or set aside for the use and benefit of the Indians.

25 U.S.C. § 323. Additionally, 25 U.S.C. § 324 provides:

> No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

25 U.S.C. § 324.

In the case at bar, it is undisputed that the tenant-in-common landowners who gave defendants written consent to the renewal of the easement collectively own less than a 10% interest in the tract and, thus, do not own a majority of the interests in the tract. Because the owners of a majority of the interests in the tract did not consent to the renewal of the easement, the Court finds that the requirements of § 324 have not been met[4] and any easement based upon those consents would not be valid under § 324. The Court, therefore, finds that relying on those consents as a complete defense to plaintiffs' trespass claim in this case would be completely counter to federal law and would be improper. The Court, thus, finds that the Oklahoma law providing that consent is a complete defense to trespass is not applicable in this case.[5]

Defendants further assert that Oklahoma's two-year statute of limitations applies in this case. As set forth above, this Court has previously found that plaintiffs' federal common law claim for trespass is not subject to any statute of limitations. Accordingly, the Court finds that Oklahoma's two-year statute of limitations does not preclude summary judgment on plaintiffs' trespass claim. The Court further finds when plaintiffs' trespass claim accrued is not relevant for purposes of determining defendants' liability but is only relevant for purposes of determining plaintiffs' damages.[6]

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4 The Court would also note that § 324's requirement for tribal approval was also not met in this case.

5 Defendants also rely upon 25 U.S.C. § 2213(a) to support their argument that these consents are valid and preclude the entry of summary judgment. Section 2213(a), however, only relates to an Indian tribe receiving a fractional interest under 25 U.S.C. § 2212 and does not address individual Indian owners.

6 The Court would note that based upon the evidence submitted, the latest that plaintiffs' trespass claim accrued was on or about March 24, 2010.

The Court, therefore, finds that plaintiffs are entitled to summary judgment as to the issue of liability on their trespass claim against defendants.

B. Permanent injunction

Upon entry of partial summary judgment, plaintiffs contend they are entitled to a permanent injunction requiring defendants to remove the pipeline from the tract at issue. Courts that have addressed whether a permanent injunction should be entered in relation to a continuing trespass do not conduct a separate analysis of the four factors a court typically considers when determining whether a permanent injunction should be entered. Instead, the courts typically enter a permanent injunction when there is a continuing trespass. "[W]here a trespasser persists in trespassing upon (the land) of another, and threatens to continue his wrongful invasion of the premises, equity will restrain such trespass." *Fairlawn Cemetery Ass'n v. First Presbyterian Church, U.S.A. of Okla. City*, 496 P.2d 1185, 1187 (Okla. 1972) (internal quotations and citation omitted). Further, "[t]his is so even . . . though the trespasser is able to respond financially in damages for in such cases the party in possession has no adequate remedy at law." *Angier v. Mathews Expl. Corp.*, 905 P.2d 826, 830 (Okla. Civ. App. 1995) (internal quotations and citation omitted). *See also Okaw Drainage Dist. of Champaign and Douglas Cty., Ill. v. Nat'l Distillers and Chem. Corp.*, 882 F.2d 1241, 1246 (7th Cir. 1989) ("the owner of property has the exclusive right to the use of the property and an automatic right to an injunction against a trespasser."); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1007 (D. Kan. 1984) (finding that continuing trespass by defendants' pipelines on property should be enjoined and ordering that defendant cease using pipelines and remove them from land); *Belusko v. Phillips Petroleum Co.*, 198 F. Supp. 140,146 (S.D. Ill. 1961) (finding injunction was appropriate remedy for company's unauthorized entry onto

land and laying of pipeline). However, some courts have declined to enter an injunction when the trespass was unintentional and when the landowner stands by and makes no objection until the greater part of the work has been completed. *See Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 720 (Okla. 1983); *Kasner v. Reynolds*, 268 P.2d 864, 864, 867 (Okla. 1954).

Having carefully reviewed the parties' submissions, and in light of the facts and circumstances in this case, the Court finds that a permanent injunction should be entered in this case. Specifically, it is plaintiffs' interests in the exclusive possession of their land which has been invaded by the presence of the pipeline and defendants' continued use of the pipeline. Further, defendants have continued to use the pipeline and although they were advised by the BIA on March 23, 2010, more than five and a half years before the instant action was filed, that "[i]f valid approval of a right of way for this tract is not timely secured, Enogex should be directed to move the pipeline off the subject property", March 23, 2010 Letter from Dan Deerinwater, Regional Director of the BIA, attached as Exhibit C to plaintiffs' Motion for Partial Summary Judgment on Liability for Their Trespass Claim and for a Permanent Injunction with Brief in Support at 4, defendants have done nothing to move the pipeline off the tract when negotiations with plaintiffs regarding the renewal of the easement failed. The Court finds defendants' continuing trespass on plaintiffs' property is clearly not unintentional. Additionally, plaintiffs have objected to the renewal of the easement and defendants' continued use of the pipeline from the time defendants first sought the renewal of the easement. Accordingly, the Court finds that in light of their continuing trespass, defendants should be permanently enjoined from using the pipeline under the tract at issue and should be required to move the pipeline within six (6) months of the date of this Order.

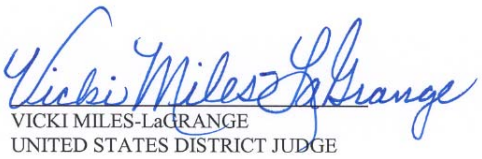
III. Conclusion

For the reasons set forth above, the Court GRANTS plaintiffs' Motion for Partial Summary Judgment on Liability for Their Trespass Claim and for a Permanent Injunction [docket no. 32] as follows:

(A) Plaintiffs are granted summary judgment as to the issue of liability on their trespass claim against defendants, and

(B) Defendants are hereby permanently enjoined from using the pipeline under the tract at issue in this case and are hereby required to move said pipeline within six (6) months of the date of this Order.

IT IS SO ORDERED this 28th day of March, 2017.



VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE