

No. 17-6088

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

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

Appeal from the United States District Court
for the Western District of Oklahoma
CIV-15-1262-M

The Honorable Vicki Miles-LaGrange, District Judge

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RULE 26.1 DISCLOSURE STATEMENT

The Appellees are individuals. There are no entities that have an interest in the outcome of this appeal that are required to be disclosed.

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STATEMENT OF PRIOR OR RELATED APPEALS

On August 15, 2017, a notice of appeal was filed in an 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, and was docketed as Appellate Case No. 17-6188 in this Court. That action is an appeal from the district court's dismissal of a claim to condemn an easement across the same parcel of land that is at issue for Plaintiffs' claim for trespass and a permanent injunction in this case.

INTRODUCTION

The “right to exclude others” from private property is “one of the most essential sticks in the bundle of rights that are commonly characterized as property” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). But in the district court, the defendants Enable Midstream Partners, L.P., Enable G.P. LLC and Enable Oklahoma Intrastate Transmission, LLC (collectively, “Enable”), stipulated that for more than a decade and a half they have operated a natural gas pipeline across land held in trust by the United States for 38 individual allottees—members of the Kiowa, Comanche, and Apache Tribes of Oklahoma—known as Kiowa Allotment 84 (“Plaintiffs’ Property”). Enable has not, and cannot, dispute that its operation of the pipeline is in direct contradiction of the terms of the original easement, the governing regulations incorporated into the easement grant, and directives from the Bureau of Indian Affairs (“BIA”). Indeed, Enable persisted in its trespass even after Plaintiffs filed suit demanding its discontinuance.

After considering a set of facts that were stipulated to by the parties and documentary evidence including the terms of the original easement, the district court granted partial summary judgment in Plaintiffs’ favor on their claim for federal common law trespass. The court then entered a permanent injunction to enforce that ruling. That injunction required Enable to cease using its pipeline and gave Enable six months to remove that pipeline from Plaintiffs’ land.

The district court's order should be affirmed in all respects. On appeal, Enable has abandoned most of the arguments it made in the district court in favor of arguments that were not raised below, and that were, therefore, waived. Enable's arguments also cannot overcome the common sense proposition that Enable should remove its pipeline from land on which it has no legal right to be. This principle is a cornerstone of American property rights, and is enforced with particular vigor in the context of Indian land considering the United States' trust responsibilities to the Plaintiffs in this case. This case should be no different.

STATEMENT OF JURISDICTION

Plaintiffs concur with Enable's Statement of Jurisdiction, except to the extent set-forth in Plaintiffs' Motion to Dismiss Appeal, filed May 9, 2017.

STATEMENT OF ISSUES

1. Did the district court correctly grant partial summary judgment in Plaintiffs' favor on liability when Enable stipulated that it had operated its pipeline on Plaintiffs' property for more than sixteen years without an easement?
2. Did the district court correctly reject Enable's arguments regarding the consent of allottees holding a minority interest in the property when controlling federal statutes require a majority of the beneficial interest holders to consent to grant an easement across allotted land?

3. Did the district court correctly hold that Plaintiffs were entitled to an injunction requiring Enable to cease using the pipeline and to remove it from Plaintiffs' property once summary judgment on liability for Enable's continuing trespass was entered?

4. Did the district court commit reversible error by not making itemized findings of fact and conclusions of law when its permanent injunction order was entered at the summary judgment stage, the parties stipulated to the facts supporting entry of the injunction, and the district court wrote a detailed opinion explaining its summary judgment and permanent injunction rulings?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Although glossed over in Enable's Brief, the summary judgment proceedings in the district court were conducted entirely based on a set of stipulated facts and documentary evidence. No deposition testimony or affidavits were submitted. The below facts are based on the record before the district court.¹

¹ In several instances, Enable fails to cite to the record when it recites the facts of this case, including direct quotes that Enable attributes to the parties or the BIA. (*See, e.g.*, Enable Br. 8-9.) This is because much of what Enable includes in its supposed facts are simply not part of the record. For example, Enable argues extensively about the alleged value of the easement and the intent behind its remaining on Plaintiffs' Property years after the easement expired—facts that were not before the district court. This Court should not rely on any of Enable's supposed facts or statements that are outside the record. *See N.M. Dep't. of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1240 n.1 (10th Cir.

A. The original easement.

“Plaintiffs are individual beneficial owners of Emaugobah Kiowa Allotment 84, described as Tract 802 S 84–D. Kiowa Allotment 84 consists of approximately 136.250 total acres within the exterior boundaries of Caddo County, Oklahoma. Kiowa Allotment 84 is held in trust by the United States for the benefit of Plaintiffs.” (App. 71 (Stipulation 1).)

“On November 19, 1980, the Department of Interior approved an easement for installation by Producer’s Gas Co. of a single 20” natural gas pipeline across Kiowa Allotment 84. The easement was to be no greater than 25’ in width and was for a term of 20 years. The rights to that easement were subsequently acquired by Enogex, LLC, now by way of name change Enable Intrastate Transmission, LLC (“Enable Oklahoma”). The easement expired on November 18, 2000.” (*Id.* (Stipulation 2).)

Enable’s original easement was granted by the BIA “pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17, 25 U.S.C. § 323-328, and Part 161, Title 25 Code of Federal Regulations ...).” (App. 133.) 25 C.F.R.

2017) (collecting cases holding that this Court’s review is limited to the record before the district court); 16A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3956.1 (4th ed. 2016) (“[A]s a general matter, the court of appeals will not consider matter that is not part of the record on appeal.”). Had Enable wanted the Court to consider additional materials, it should have moved to supplement the record under Fed. R. App. P. 10(e).

§ 169.25(b), as it existed at the time,² mandated that oil and gas pipeline easements “shall not extend beyond a term of 20 years.” 25 C.F.R. § 169.5³ required that to obtain a right-of-way across Indian trust land, the applicant was required to stipulate that “upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.” 25 C.F.R. § 169.5(i) (2000). Further, 25 C.F.R. § 169.19 required that Enable submit any application to renew its easement before it expired by its own terms. 25 C.F.R. § 169.19 (2000) (“On or before the expiration date of any right-of-way heretofore or hereafter granted for a limited term of years, an application may be submitted for a renewal of the grant.”).

B. Enable failed to apply to renew the easement or to remove the pipeline from Plaintiffs’ Property.

Despite the easement’s express twenty-year term and the governing regulations, Enable neither submitted an application to renew the easement nor returned Plaintiffs’ Property to its original condition—*i.e.*, by removing its pipeline—by the date the easement expired. Instead, two years after the easement

² Renumbered 25 U.S.C. § 169.201 as of April 21, 2016. The revised regulations permit longer oil and gas pipeline easements in the Secretary’s discretion. 25 C.F.R. § 169.201(c).

³ Renumbered 25 C.F.R. § 169.125. The re-designated regulation includes certain style amendments, but retains the relevant requirement that the easement holder “[r]estore the land to its original condition ... upon cancellation or termination of the right-of-way” 25 C.F.R. § 169.125(c)(5)(ix).

expired, “[i]n 2002, Enable’s predecessor-in-interest Enogex submitted a right-of-way application to the BIA and made an offer to Plaintiffs or their predecessors in interest for a twenty-year easement which was rejected by a majority of the owners.” (App. 71 (Stipulation 3).)

In 2004, Enable obtained conditional consents from five individuals that held interests in Kiowa Allotment 84—Ernie Clay Keahbone, Benjamin Blackstar, Thomas Blackstar, Rene Ware, and Edmond L. Carter. (App. 191-195.) These consents were expressly conditioned on the review and approval by the Secretary of the Interior of the consideration offered by Enable for the new easement. (*See id.* (“Consideration herein offered is subject to review and approval by the Secretary of the Interior”).) At the time these consents were obtained, they represented 17.5% of the ownership interest in Kiowa Allotment 84.⁴ (App. 135 (“Enable was only able to secure 17.5% ownership approval”).) No additional consents were obtained from any of the other owners, and “[i]n 2006, the BIA canceled the right-of-way application for failure to obtain consent of the owners.” (App. 72 (Stipulation 4).)

On September 13, 2006, Enogex paid a \$1,098.35 “trespass assessment” to the BIA, covering the period November 19, 2000 (the date its easement expired)

⁴ By the time suit was filed, these owners held less than 10% of the interest in the tract at issue. (*See* App. 129-30, 233.)

through August 2006. (App. 137.) There is no evidence in the record showing that Enogex disputed the BIA's determination that it was in trespass as of November 19, 2000. There is also no record evidence showing that any of the Plaintiffs released their trespass claims in exchange for this payment, which was assessed solely by the BIA. In fact, at a meeting on December 21, 2007, "[t]he landowners expressed their dissatisfaction with the amount of the trespass money collected and stated that they would not agree to the \$40 per rod offer to renew," which was the basis used by the BIA to calculate the trespass assessment. (App. 137.)

However, for reasons that are not clear, "[i]n 2008, the interim Superintendent for the local BIA agency approved a renewal of the right-of-way easement for twenty years at the same amount that had previously been rejected. The BIA did not obtain the consent of the Plaintiffs. Plaintiffs appealed this decision." (App. 72 (Stipulation 5).) "In 2010, the BIA vacated the 2008 decision because it determined that it did not have the authority to approve the 2008 right-of-way without the consent of the Plaintiffs or their predecessors in interest and that the price offered by Defendant Enable Oklahoma for the easement was unreasonable." (*Id.* (Stipulation 6).) In overturning the 2008 right-of-way approval, the BIA Regional Director further found that Enable never made the \$3,080 payment required by the interim Superintendent as a condition of the 2008 approval, which additionally "render[ed] the right of way null and void." (App.

137, 139.) The Regional Director also found that Enable's \$40 per rod offer was inadequate, making the conditional consents obtained in 2004 void, to the extent they still had any effect. (App. 139.) The Regional Director ordered 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." (*Id.*)

Enogex did not appeal the Regional Director's decision to the Interior Board of Indian Appeals. (*See id.* (giving notice of the right to appeal and deadlines and procedures for doing so).)

C. Enable continues operating its pipeline on Plaintiffs' Property.

More than five years after the Regional Director's decision was issued, Enable had still not obtained an easement by consent, nor had it removed its pipeline. On November 11, 2015, Enable filed the Condemnation Action to take by eminent domain the easement that Plaintiffs had repeatedly refused to convey by consent. Five days later, Plaintiffs filed this case. Both cases were assigned to the same district court judge.

After this case was filed, Enable stipulated that "Defendant Enable Oklahoma Intrastate Transmission LLC maintains the pipeline across Kiowa Allotment 84." (App. 72 (Stipulation 7).) Enable further stipulated that, "[a] new right-of-way easement has not been approved by the Plaintiffs or the BIA." (*Id.* (Stipulation 8).) Finally, Enable stipulated that "[t]he Kiowa Tribe of Oklahoma, a

federally recognized tribe, has a beneficial interest in Allotment 84 held in trust by the federal government.” (*Id.* (Stipulation 9).)

II. PROCEDURAL HISTORY

Plaintiffs’ Complaint was filed on November 16, 2015, asserting a single claim for continuing trespass under federal common law, and seeking an injunction to prohibit Enable from continuing its ongoing trespass. (App. 28-39 (¶¶ 1, 55-61).) After Enable filed its Answer, the parties filed a Joint Status Report and Discovery Plan, which contained the stipulated facts recited above, which were intended to narrow the scope of the issues for litigation. (App. 71-72.)

Plaintiffs moved for partial summary judgment on liability and for a permanent injunction on April 1, 2016. (App. 99-140.) In its response, Enable did not contend that essential facts regarding Plaintiffs’ trespass claim were unavailable, and it did not request leave to take additional discovery to respond to Plaintiffs’ motion under Federal Rule of Civil Procedure 56(d). (*See* App. 142-176 (Enable’s Opposition to Plaintiffs’ Summary Judgment Motion).) Rather, Enable made its summary judgment arguments based on the same stipulated facts and records presented by Plaintiffs, plus additional documents, including the written consents from the five minority beneficial interest holders that had been signed in 2004. No arguments were raised about the authenticity or admissibility of any evidence submitted at summary judgment.

On March 28, 2017, the district court granted partial summary judgment in Plaintiffs' favor on liability for trespass. (App. 261-268, 270.) The district court also granted Plaintiffs' motion for a permanent injunction and directed Enable to immediately cease using the pipeline and to remove it from Plaintiffs' Property within six months. (App. 268-270.) In its order, the district court recited the undisputed facts regarding the ownership of the Property, including the Kiowa Tribe's interest therein, the expiration of the easement, and Enable's continued use of its pipeline. (*See* App. 261-263.) The court then turned to the issues that were disputed by the parties—the legal effect of those facts.

First, the district court addressed Enable's argument that Oklahoma law should apply, and that under Oklahoma law it was not in trespass based on the five minority interest owner consents. (App. 265-267.) The district court rejected this argument, holding that applying Oklahoma law would contradict controlling federal statutes, including 25 U.S.C. § 323 and § 324, which require consent from the Kiowa Tribe and the holders of a majority interest in an allotment to grant a valid easement. (App. 266-267.)

Second, the district court rejected Enable's arguments that Plaintiffs' trespass claim was barred by Oklahoma's two year statute of limitations. The Court held that "plaintiffs' federal common law claim for trespass is not subject to any statute of limitations." (App. 267.) Enable has not challenged this holding on

appeal. The Court then found that the specific date that Plaintiffs' trespass claim accrued was "not relevant for purposes of determining defendants' liability but is only relevant for purposes of determining plaintiffs' damages." (*Id.*) Because Plaintiffs moved for summary judgment on liability only, the district court did not examine the date of accrual further, but left that issue for the damages phase of the case, which is currently proceeding in the district court and is not the subject of this appeal.

Based on the above holdings, the district court found that Plaintiffs were entitled to summary judgment on liability for their trespass claim. (App. 268.)

Next, the district court turned to Plaintiffs' request for a permanent injunction. The court examined the extensive case law, from both federal courts and Oklahoma state courts, holding that in the absence of extenuating circumstances equity will restrain a continuing trespass. (App. 268-269.) The court noted that an injunction may be denied "when the trespass was unintentional and when the landowner stands by and makes no objection until the greater part of the work is completed." (App. 269.) The court then applied these principles to the facts of this case. First, the court found that the interest at issue in this case 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." (*Id.*) Second, the court found that "defendants' continuing trespass on plaintiffs'

property is clearly not unintentional,” citing, *inter alia*, the fact that five and a half years before Plaintiffs’ Complaint was filed the BIA ordered that Enable’s predecessor “should be directed to move the pipeline off the subject property.” (*Id.* (quoting the March 23, 2010 letter from BIA Regional Director Dan Deerinwater).) Accordingly, because there were no equitable considerations presented that would weigh against enjoining Enable’s continuing trespass, the district court held that “Defendants are hereby permanently enjoined from using the pipeline under the tract at issue in this case and are hereby ordered to move said pipeline within six (6) months of the date of this Order.” (App. 270.) This appeal followed.

SUMMARY OF THE ARGUMENT

The district court’s partial summary judgment and permanent injunction order should be affirmed.

First, Enable’s argument that summary judgment was not warranted because Plaintiffs failed to present evidence of a pre-suit demand to remove the pipeline is baseless. Enable waived this argument by failing to raise it below. And even if this Court considers this argument for the first time on appeal, precedent from this Court and other authorities establish that pre-suit demand for removal is not an element of a federal common law trespass claim when the trespasser holds-over after the expiration of a lease or easement with an express termination date.

Second, Enable's argument that the trial court erred because Enable obtained conditional consents from five allottees that collectively held a minority interest in the Property is contrary to controlling law. Federal law, not state law, governs this issue. And federal statutes require the consent of a majority of the interest holders and the Kiowa Tribe to grant a new easement. Because this did not occur, the conditional consents presented by Enable are irrelevant. Those consents were also expressly conditioned on approval of the consideration offered in exchange for them. Thus, they were voided in 2010 when the BIA determined that consideration was inadequate.

Third, the district court did not err by entering a permanent injunction to restrain Enable's continuing trespass. Enable presented no equitable considerations that weighed against entry of the injunction after Enable's liability was determined as a matter of law. And an injunction is likewise warranted under the traditional factors for granting an injunction.

Finally, the district court also did not commit reversible error by not making itemized findings of fact and conclusions of law to support its injunction order. The district court's order was entered based solely on stipulated facts and documentary evidence, and the district court thoroughly explained its legal reasoning in a detailed opinion. No further discussion was warranted or required.

STANDARD OF REVIEW

This Court reviews the district court’s grant of partial summary judgment on liability *de novo*, “viewing the record in the light most favorable to the party opposing summary judgment.” *Neal v. Lewis*, 414 F.3d 1244, 1247 (10th Cir. 2005). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a). Entry of partial summary judgment on a “part of each claim or defense” is authorized under Rule 56(a).

The district court’s decision to grant Plaintiffs’ motion for a permanent injunction is reviewed for abuse of discretion. *See Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009). “The district court’s discretion in this context is necessarily broad and a strong showing of abuse must be made to reverse it.” *Id.* (citation omitted).

ARGUMENT

In the district court, Enable raised a host of arguments in opposition to Plaintiffs’ motion for partial summary judgment, many of which it has abandoned on appeal. Conversely, many of Enable’s arguments to this Court were never advanced in the district court, and are therefore waived. Regardless, the district court correctly entered summary judgment on liability for Plaintiffs’ trespass claim

and properly enjoined Enable from continuing to illegally operate its pipeline on Plaintiffs' Property. Those rulings should be affirmed.

I. PLAINTIFFS ESTABLISHED ALL ELEMENTS OF FEDERAL COMMON LAW TRESPASS.

In the district court, Enable agreed to proceed at summary judgment based on the parties' stipulated facts and documentary evidence. Those stipulations constitute judicial admissions. *See Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993) ("Judicial admissions are formal admissions ... which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.") (quotation marks omitted), *abrogated on other grounds* by 39 F.3d 1078 (1994) (*en banc*); *Grynberg v. Bar S Serv., Inc.*, 527 F. App'x 736, 739 (10th Cir. 2013) (parties cannot create issues of fact by attempting to disavow their own judicial admissions).

Enable also did not contend that Plaintiffs failed to establish trespass, other than arguing that under Oklahoma law the 2004 consents from the five minority interest holders formed a defense and that Oklahoma's two year statute of limitations barred Plaintiffs' trespass claim. (App. 160-166.) Having lost those arguments, Enable now attempts to change horses on appeal and raise new arguments under federal common law. This is not permitted. But even if it was, Enable's arguments fail because Plaintiffs established all the elements of their federal common law trespass claim in the district court.

A. Enable waived its argument that plaintiffs are not entitled to summary judgment because they allegedly failed to make a demand that the pipeline be removed from their property.

Making a strategic turn away from its arguments in the district court about applying state law, Enable now concedes that federal common law applies to Plaintiffs' trespass claim. Enable's new-found theory is that summary judgment was improper because Plaintiffs failed to show that they made an express demand for removal of the pipeline, which Enable contends is an essential element of Plaintiffs' claim under federal law. (Enable Br. 16-20.) But because Enable did not make this argument to the district court, it is waived. *Kannady v. City of Kiowa*, 590 F.3d 1161, 1174–75 (10th Cir. 2010). Indeed, the rule against raising arguments for the first time on appeal is only avoided “in the most unusual circumstances, which may include issues regarding jurisdiction and sovereign immunity, instances where public interest is implicated, or where manifest injustice would result.” *Id.* (quoting *Smith v. Rogers Galzanizing Co.*, 128 F.3d 1380, 1386 (10th Cir. 1997) (ellipses and internal quotation marks omitted)). These circumstances are not present here.

Enable's failure to raise this argument below is also not excused on the basis that Plaintiffs did not address this alleged “demand requirement” in the district court. Enable cites cases standing for the proposition that the party opposing summary judgment has no obligation to respond, at all, when the moving party

does not carry its burden to demonstrate that no genuine issue of material fact exists. (Enable Br. 19-20.) Those cases have no application here, where the parties extensively litigated in the district court about whether Enable had any legal right to remain on Plaintiffs' land after its easement expired. Plaintiffs presented extensive evidence and legal argument that no such right existed. In response, Enable elected to make three arguments: 1) Oklahoma law applied to Plaintiffs' trespass claim; 2) under Oklahoma law Plaintiffs' trespass claim was barred by the minority interest owners' consents it obtained in 2004; and 3) Oklahoma's statute of limitations for trespass claims had expired. (App. 160-167.) Because its legal theory was dependent on applying state law, Enable intentionally did not make any arguments under federal common law. It thus waived any such arguments. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011) (If a legal "theory was intentionally relinquished or abandoned in the district court, [the Tenth Circuit] usually deem[s] it waived and refuse[s] to consider it." (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)); *see also Lone Star Steel v. United Mine Workers of Am.*, 851 F.2d 1239, 1243 (10th Cir. 1988) ("Ordinarily, a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.")). This Court should thus disregard Enable's newly discovered "demand" argument.

B. Plaintiffs addressed all elements of their federal common law trespass claim.

Even if Enable's new argument is considered in this appeal, it fails.

First, this Court disposed of this argument in *Bledsoe v. United States*, 349 F.2d 605 (10th Cir. 1965). In *Bledsoe*, the United States brought an action in the Northern District of Oklahoma to eject a defendant that had leased restricted Indian land located in Oklahoma from an individual Indian. There was no dispute that the original lease was valid, but the defendant remained on the property for more than a year after that lease terminated. *Id.* at 606. The district court entered judgment in favor of the United States, and the defendant appealed. On appeal, the defendant contended that “the trial court erred in finding him a trespasser rather than a tenant at will, as defined by Oklahoma law.” *Id.* at 607. As a tenant at will, the defendant contended he was entitled to a notice to quit and 30 days to vacate the property. *Id.* This Court rejected that argument, holding that these requirements did not apply because “the leasing of restricted Indian lands, and the right to enter and remain thereon, is a matter regulated by federal law.” *Id.* This Court then went on to hold, in the alternative, that even under Oklahoma law a demand that the defendant vacate the property was not an element of the United States' trespass claim. Specifically, this Court held that “[t]he termination date of Bledsoe's lease was

clearly set-forth therein, making notice to quit unnecessary.” *Id.* 608.⁵ This Court, therefore, affirmed the district court’s holding that the defendant was in trespass and subject to being removed from the property, regardless of whether a pre-suit demand to quit the premises was made. *Bledsoe* directly controls this case. Enable’s post-hoc arguments about pre-suit demand for removal of the pipeline is thus contrary to law.

Second, the same result is dictated by trespass rules set forth in the Restatement (Second) of Torts, which Enable agrees this Court should follow. (Enable Br. 17-18); *see also United States v. Milner*, 583 F.3d 1174, 1182-83 (9th Cir. 2009) (“Federal common law ... generally comports with the Restatement of Torts”); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (adopting Restatement (Second) of Torts rules for federal trespass claims). Under the Restatement:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally ... *fails to remove from the land a thing which he is under a duty to remove.*

⁵ The Oklahoma statute that was the basis for this portion of the Court’s holding in *Bledsoe* is still in effect. It states, “[w]hen the time for the termination of a tenancy is specified in the contract, or where a tenant at will commits waste, or in the case of a tenant by sufferance, and in any case where the relation of landlord and tenant does not exist no notice to quit shall be necessary.” Okla. Stat. Ann. tit. 41, § 8.

Restatement (Second) of Torts § 158(c) (emphasis added); *see also United States v. Osterlund*, 505 F. Supp. 165, 167 (D. Colo. 1981) (adopting Restatement (Second) of Torts § 158 for federal common law trespass claims).

Subsequent sections of the Restatement make clear that failing to remove a structure from the owners' property after the easement or right-of-way permitting the presence of that structure expires constitutes trespass. Restatement Section 160 provides:

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or

(b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.

Restatement (Second) of Torts § 160. “[C]onsent given by a possessor of land to the actor’s presence on the land during a specified period of time does not create a privilege to enter or remain on the land at any other time.” Restatement (Second) of Torts § 170. Further, “the actor’s privilege to enter land created by consent of the possessor is terminated by ... the lapse of any specified period of time by which the consent is restricted.” Restatement (Second) of Torts § 171(a).

The evidence presented by Plaintiffs to the district court was that Enable’s pipeline was built on Plaintiffs’ Property by consent, but that consent was expressly limited to the 20-year term of the original easement. (App. 107 (citing the original easement, and the parties’ stipulation that the original easement expired on November 18, 2000).) Yet Enable continued to operate its pipeline on Plaintiffs’ Property. (*Id.*; App. 72 (Stipulations 7, 8); App. 47 (Enable’s Answer) ¶ 4 (“Defendants admit that their pipeline remains in place in the Easement.”).) Once the easement expired, Enable was under a duty to “restore the land to its original condition.” 25 C.F.R. § 169.5(i). This included removal of the pipeline. Because Enable failed to do so, it was in trespass the day after the original easement expired—November 19, 2000.

Enable relies on Restatement Section 161 and the Ninth Circuit’s decision in *Milner* to support its “demand” argument. (Enable Br. 16-18.) Those authorities do not support Enable. Section 161 of the Restatement deals with the “Failure to Remove Thing[s] Tortiously Placed on Land.” Restatement (Second) of Torts § 161 (emphasis added). In relevant part, it states that “[a] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.” *Id.* Section 161 does not impose, or even mention, Enable’s proposed “demand” requirement. It also does not address the situation, presented in

this case, where the trespassing structure was originally placed on the land with consent, which consent later expired by its own terms. This situation is addressed in Section 160 of the Restatement, which makes clear that failing to remove the structure “after the [owners’] consent has been effectively terminated” constitutes trespass. Restatement (Second) of Torts § 160(a).

Comment f to Section 161, which Enable also cites (Enable Br. 18), actually supports affirmance of the district court’s order. Comment f addresses the situation where ownership of the trespassing structure is transferred, and states that “such transferee *upon knowledge that the thing is wrongfully on the land comes under a duty to the possessor to remove the thing . . .*”⁶ Restatement (Second) of Torts § 161 cmt. f (emphasis added). The comment goes on to confirm that this duty to remove is “similar to the duty of one who has placed a thing on another’s land pursuant to a license from the other, *which license has now been terminated.*” *Id.* (emphasis added). Thus, Section 161 reinforces the common sense conclusion that once Enable’s easement expired, it was under a duty to remove the pipeline, and is liable for trespass for failing to do so. No further demand was required.

⁶ Enable did not raise any arguments in the district court about a transfer in ownership of the pipeline. Regardless, Enable’s predecessor, Enogex, was in possession of the pipeline when the easement expired in 2000. Enable, which was the successor to Enogex by way of a name change (App. 71 (Stipulation 2)), was continually on notice through its communications with the BIA and Plaintiffs that there was no easement allowing the pipeline to remain on Kiowa Allotment 84.

United States v. Milner also does not support Enable. *Milner* dealt with claims by the United States for trespass based on the presence of “shore defense” structures below the mean high water (“MHW”) line (defined as the average of all high tides over a period of 18.6 years), along the coast of Washington. *Milner*, 583 F.3d at 1180-81. After the structures were built the shoreline eroded significantly, so that by 2002 some structures that were originally constructed on private property were now below the MHW line, and thus on federal land. *Id.* at 1181, 1190. The homeowner-defendants argued that they could not be held liable for trespass under federal common law because they did not intend to trespass—*i.e.*, the presence of the structures on federal land was caused by the natural movement of the shoreline, not their actions. *Id.* at 1190. The district court rejected this argument, entering partial summary judgment on liability for the United States. *Id.* at 1181-82.

The Ninth Circuit affirmed, holding that the intent requirement for federal common law trespass was satisfied “because the government requested that the encroaching parts of the structures be removed, but the Homeowners failed to do so.” *Id.* at 1190-91. Due to the slow moving and natural change of the boundary line (which was determined by measuring and averaging high water marks over an 18.6 year period), a demand was required to give defendants notice they were in trespass. However, such a requirement would serve no purpose in cases like this

one, where Enable knew that its easement expired according to its own terms in 2000.

Enable's Brief and the *Milner* opinion also cite *New York State Energy Research & Development Authority v. Nuclear Fuel Service, Inc.*, 561 F. Supp. 954 (W.D.N.Y. 1983). However, *Nuclear Fuel Service* was decided under New York state law, not federal common law. And an express demand for removal of the spent nuclear waste at issue in that case was necessary to trigger trespass liability because the parties engaged in extensive negotiations for ongoing storage after the initial contract expired. *Id.* at 974. The court held that by engaging in those negotiations, the owner granted an implied license for continued storage, which required express notice to revoke. *Id.* This rule has no application here. Enable makes clear that "Plaintiffs Refuse[d] to Continue Negotiating" for a new easement by 2006, at the latest. (Enable Br. 10-11.) As discussed *infra*, Enable also cannot obtain an implied easement in this manner, in contravention of 25 U.S.C. § 324, which requires consent for an easement from the holders of a majority interest in allotted land.

Third, while the express expiration of the easement and the governing regulations make clear that Enable was in trespass as of November 19, 2000, the record is replete with additional evidence that Enable knew that it did not have consent to operate its pipeline on Plaintiffs' Property after that date. The 2002 offer

to Plaintiffs for a new twenty-year easement “*was rejected by a majority of the owners.*” (App. 72 (Stipulation 3) (emphasis added).) In 2006, Enable’s predecessor acknowledged its trespass by paying BIA a “trespass assessment”⁷ (App. 137), and then “the BIA canceled the right-of-way application *for failure to obtain consent of the owners.*” (App. 72 (Stipulation 4) (emphasis added).)

Although Enable’s easement application was inexplicably approved in 2008 without the owners’ consent, that decision was vacated in 2010, the approval was void because Enable’s predecessor never paid the required sum, and the Regional Director ordered 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.” (App. 72 (Stipulation 6); App. 137, 139.) To the extent any doubt remained, it was removed when Plaintiffs filed their Complaint seeking an injunction to require Enable to remove the pipeline. (App. 41, ¶¶ 1, 55-57.)

All of these facts were presented to the district court, which properly held that Plaintiffs met their burden to show that Enable was trespassing by maintaining

⁷ To the extent Enable suggests that the BIA making this trespass assessment or accepting this payment cured, forgave, or otherwise authorized its trespass, this argument is also misplaced. The BIA does not have any authority to authorize Enable to be on Plaintiffs’ Property except in accordance with 25 U.S.C. § 323 and § 324, discussed *infra*. And it is well established that intruders on federal land cannot “escape liability by asserting that officers of the United States gave them permission, so long as those officers lacked the necessary statutory authority.” *Edwardsen*, 369 F. Supp. at 1371 (citing *Cramer v. United States*, 261 U.S. 219, 234 (1923)).

their pipeline on Plaintiffs' Property without Plaintiffs' consent. This is all that is required to make out a claim for federal common law trespass.

In sum, Enable seeks to insert a demand requirement into Plaintiffs' claim that it did not raise in the district court, and which has never been adopted for cases dealing with expiration of rights of way with express end dates. Enable's arguments regarding this non-existent requirement should be rejected, and the district court's summary judgment ruling should be affirmed.

II. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS NO DISPUTE OF MATERIAL FACT REGARDING CONSENT.

In its order, the district court held that federal law, not Oklahoma law, governs Plaintiffs' trespass claim to the extent that the application of Oklahoma law is inconsistent with federal law. (App. 265-266.) The district court then rejected Enable's argument that the written consent of five land owners who held 17.5% of the interests in these tracts at the time their consent was given, and less than 10% of the interest in the tract by the time suit was filed, created a question of material fact regarding Plaintiffs' trespass claim because an easement based on those consents is not valid under federal law. (App. 267.)

In its brief, Enable argues that the district court erred because (1) Oklahoma trespass law, not federal law, governs Enable's consent defense, and (2) summary judgment is not proper because Plaintiffs' opening brief before the district court

failed to address Enable's consent defense. (Enable Br. 20-25.) Neither argument has merit.

A. Federal law governs plaintiffs' trespass claim.

According to Enable, even though it agrees that federal law governs Plaintiffs' trespass claim, *see supra* p. 16, it nonetheless argues that its defense of consent is governed by Oklahoma trespass law. (Enable Br. 20-23.) Enable is wrong.

It is well-settled that Congress has *exclusive* and *plenary* authority to regulate matters involving Indians and Indian lands pursuant to the Indian Commerce Clause. *See, e.g., United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”). Congress’ plenary power over Indian lands and assets “has been termed ‘one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs.’” *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977) (citation omitted). For example, in *Sperry Oil & Gas Co. v. Chisholm*, 264 U.S. 488 (1924), the Supreme Court specifically held that Oklahoma law had no effect

on the validity of an oil lease concerning allotted lands. As the Court explained, Congress had “authority over the Indians, their lands and property,” that authority was “plenary,” and “in all matters relating to the restrictions upon their allotted lands resort must be had to the Acts of Congress and to those Acts alone.” *Id.* at 493-94; *see also Baldridge v. Caulk*, 237 P. 453, 456 (Okla. 1924) (citing *Sperry* for the principle that Oklahoma law is not applicable to Indian lands “unless it is clearly indicated that it is the intent of Congress to make such state statute applicable”).

Indeed, allottee ownership is a construct of federal statutory law, established under the General Allotment Act, 25 U.S.C. § 331, *et seq.*, the Right of Way Act, 25 U.S.C. § 321, *et seq.*, and other federal statutes and regulations. *See Begay v. Albers*, 721 F.2d 1274, 1280 (10th Cir. 1983) (“Questions of ownership of fee title to an Indian allotment involves the application of federal law.”). Accordingly, “[s]tate laws are not applicable to allotted Indian lands except to the extent that Congress has so authorized.” *Chemah v. Fodder*, 259 F. Supp. 910, 913 (W.D. Okla. 1966) (citing *Minnesota v. United States*, 305 U.S. 382, 387 (1939)).

Pursuant to its plenary authority, Congress has legislated that easements across Indian trust lands *must* be approved by the Secretary under 25 U.S.C. § 323, and *cannot* be granted “without the consent of the proper tribal officials,” and, as to land allotted to individual Indians, easements *can only* be granted if “the owners

or owner of a majority of the interests therein consent to the grant” 25 U.S.C. § 324; *see also* 25 C.F.R. § 169.3(a) (requiring “prior written consent of the tribe,” “prior written consent” of “the owner or owners of a majority of the interests” in trust lands, and “approval of the Secretary”).⁸ Thus, an easement across Indian trust land is only valid if it complies with these statutory requirements.

In its brief, Enable ignores completely the above law. Instead, it relies almost exclusively on language in *Nahno-Lopez v. Houser*, 625 F.3d 1279 (10th Cir. 2010), and argues that in that case this Court established a rule that Oklahoma law *always* governs the decision of whether a party consented to a trespass. (Enable Br. 21.) But Enable misreads *Nahno-Lopez*.

In *Nahno-Lopez*, this Court considered a common-law trespass claim brought by individual tribal members against the Tribe. 625 F.3d at 1280-81. After acknowledging that federal law, not state law, governed the members’ trespass claim, the Court then stated that “Oklahoma trespass law provides the rule of decision for *this* federal claim.” *Id.* at 1282 (emphasis added). And in “this” claim, the individual tribal members had stipulated before the district court that they “gave express consent to the Tribe to make use of the property.” *Id.* at 1281, 1284. It was this stipulation that then led this Court to affirm summary judgment in favor

⁸ Renumbered 25 C.F.R. § 169.107, effective April 21, 2016, without substantive modification.

of the Tribe because there was no factual dispute about whether consent was given. In other words, every individual with an interest in the land gave consent to the tribe to use the land. The opposite is true here as Enable stipulated that “[a] new right-of-way easement *has not been approved by the Plaintiffs* or the BIA.” (App. 72 (Stipulation 8) (emphasis added).)

Indeed, Enable ignores that *Nahno-Lopez* did not address the primary issue present here—where federal law and Oklahoma law expressly conflict.⁹ And in fact the Supreme Court has already addressed this issue. In *California ex rel State Lands Comm’n v. United States*, 457 U.S. 273, 283-84 (1982)—the case relied upon by this Court in *Nahno-Lopez* for adopting Oklahoma law, 625 F.3d at 1282—the Supreme Court held that it would *not* borrow a state rule for a federal claim when a federal statute addressed the same issue. So too here, where § 324 already addresses the issue of consent.

In essence, Enable wants this Court to allow Oklahoma law to override § 324. But this is unquestionably improper given that Congress has expressly legislated in this area. *See supra* pp. 27-29. Indeed, Enable’s argument would mean that a pipeline company could operate across trust land indefinitely without the consent of a majority of the interest owners, the tribe, or approval from the

⁹ Enable contends that the plaintiffs in *Nahno-Lopez* argued that there was no valid consent under 28 U.S.C. § 348 because the Secretary never approved of the lease. (Enable Br. 22.) But the Court did not address this argument.

Secretary so long as an owner with a 0.000001% interest consented—a result contrary to Congress’ intent as expressed in § 323 and § 324. There is thus no basis to apply Oklahoma law.

Finally, under federal law, Enable’s consent argument fails as a matter of law. In fact, at no point does Enable even argue that it satisfied the federal standard for consent of an easement across Plaintiffs’ land. Nor could it, considering § 324 expressly only permits an easement with consent of the Secretary of the Interior, the tribal officials, *and* a majority of the land owners—none of which are present here.

B. There is no dispute of material fact with respect to consent.

In a somewhat confusing section, Enable appears to argue that because Plaintiffs did not address Enable’s defense of consent in its motion for summary judgment, and instead only addressed the issue in their reply in retort to Enable raising the issue, Enable is entitled to judgment as a matter of law. (Enable Br. 23-23.) But Enable’s argument is meritless for four reasons.

First, this argument depends on the application of Oklahoma law. As discussed *supra*, federal law governs the issue of consent here, and there is no dispute that § 324 is not satisfied.

Second, Enable is suggesting that it is entitled to judgment because Plaintiffs failed to address each of Enable’s possible *defenses* in their initial motion for

summary judgment. (Enable Br. 23-23.) This argument is trivial. Plaintiffs had every right to address in their reply an argument raised by Enable in its response. Plaintiffs thus did not raise a new issue in their reply; rather, they responded to the arguments Enable raised.

Indeed, even if Plaintiffs had raised new issues in their reply, this still would not require reversal. As this Court held in *Daneshvar v. Graphic Tech., Inc.*, 237 F. App'x 309, 318 (10th Cir. 2007), when a party moving for summary judgment raises new issues or introduces new evidence in a reply brief, the proper response by a nonmoving party is to request permission to respond to these new materials, a request the court “may not forbid.” So long as the district court does not forbid the nonmovant from responding to the new materials, there is no error. *Id.*; *see also Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998) (“Rule 56(c) simply requires that if the court relies on new materials or arguments in a reply brief, it may not forbid the nonmovant from responding to these new materials.”). Because Enable never requested leave to file a surreply, there is no error.

Third, Enable ignores that the consents it points to are no longer effective. Enable’s argument is based on consent forms executed in 2004 by five Plaintiffs, who held the following undivided interests in the Property when the Complaint was filed: Thomas Blackstar (1.02%); Benjamin Blackstar (1.02%); Gilbert Clayton (“Ernie Clay”) Keahbone (2.6%); Edmond Carter (6.35%); and Rene

Ware (1.02%). (App. 128-130, 233.) Together, these consents represented less than 10% of the current ownership interest in the Property at that time. (App. 191-195 (consent forms); App. 128-130 (Title Status Report).) Under 25 U.S.C. § 324, these consents were conditioned on the Secretary approving the offered consideration. (*See also* App. 191-195 (“Consideration herein offered is subject to review and approval by the Secretary of the Interior.”).) But the Secretary expressly rejected the consideration offered by Enable as “unreasonable” in 2010. (App. 72 (Stipulation 6).) To the extent they had any effect, those consents ceased to be effective at that time.

Finally, Enable ignores that each of these consents was unquestionably removed when *all Plaintiffs filed suit for trespass* based on Enable’s “illegal and unauthorized use of Plaintiffs’ land” and requested an injunction requiring removal of the pipeline. (App. 27-28, 37 (¶¶ 1, 56-57).) And Enable acknowledged that they did not have consent to be on Plaintiffs’ land when they stipulated that “[a] new right-of-way easement has *not been approved by the Plaintiffs....*” (App. 72 (Stipulation 8) (emphasis added).) Enable’s *post hoc* rationalizations cannot overcome this stipulation. *See Grynberg*, 527 F. App’x at 739.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING ENABLE TO CEASE ITS CONTINUING TRESPASS.

After finding Enable liable for its continuing trespass on Plaintiffs’ land, the district court entered a permanent injunction requiring Enable to remove its

pipeline from Plaintiffs' property. (App. 268-269.) The court found that an injunction was warranted because of "[P]laintiffs' interest in the exclusive possession of their land which has been invaded by" Enable, because Enable was aware it was trespassing and was previously told to move its pipeline, and the trespass "is clearly not unintentional" because Plaintiffs have objected to any renewal of an easement. (App. 269.)

Enable now contends that the district court abused its discretion because it did not apply the traditional four-factor test in holding that Enable must cease its continuing trespass. (Enable Br. 25-28.) But this argument is waived because Enable never raised it before the district court. Further, the circumstances of this case did not require application of the traditional four-factor test. And even if they had, the test is satisfied.

A. Enable waived this argument by failing to make it before the district court.

As discussed *supra* pp. 16-17, an appellant may not prevail on appeal on an argument that it failed to raise before the district court. Even if the waiver was unintentional, and is " 'purely legal' and does not require any additional fact-finding," this Court may only consider it if the appellant shows plain error—which it must do in its opening brief. *Richison*, 634 F.3d at 1127-28.

In their motion for summary judgment, Plaintiffs made two primary arguments, each with their own heading: (1) that Plaintiffs are automatically

entitled to a permanent injunction upon a finding of liability (App. 117-119); and (2) the traditional four-factors support a permanent injunction (App. 120-123) In response, Enable *solely* contested Plaintiffs' argument that the traditional four-factors supported a permanent injunction. (App. 167-175.) At no point did Enable ever address Plaintiffs' first argument that the law established that a landowner is entitled to a permanent injunction to prevent a continuing trespass against his or her property. Enable thus waived the legal theory that the law does not require application of the four-factor test for a permanent injunction when a continuing trespass is found.

B. Even if Enable did not waive this argument, the district court did not abuse its discretion by issuing a permanent injunction without expressly applying the traditional four-factor test.

As an initial matter, Enable misinterprets the district court's opinion by suggesting it held that "Plaintiffs were automatically entitled to a permanent injunction by establishing the merits of their claim." (Enable Br. 25.) The district court did no such thing. Rather, the court first noted that equity will normally restrain a continuing trespass where the defendant threatens to continue the trespass. (App. 268.) The court then held that "*in light of the facts and circumstances in this case*, the Court finds that a permanent injunction should be entered in this case." (App. 269 (emphasis added).) The court based this conclusion on its *findings* that Plaintiffs have an interest "in the exclusive possession of their

land” that Enable has invaded and continues to invade, that Enable was previously told to remove the pipeline but failed to do so, and that the “continuing trespass on plaintiffs’ property is clearly not unintentional.” (App. 269.) In other words, based on the facts and circumstances of this particular case, the district court exercised its discretion and held that it was equitable to permanently enjoin Enable from continuing to trespass on Plaintiffs’ property.

This was not an abuse of discretion by the district court. “Of course, in some situations the facts and the relevant law may indicate that an injunction clearly should be granted or denied.” 11A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2942 (3d ed. 2016). This is precisely such a case for several reasons.

First, courts routinely hold that landowners are entitled to a permanent injunction to prevent a continuing trespass against his or her property. *See, e.g.*, *Fairlawn Cemetery Ass’n v. First Presbyterian Church, U.S.A. of Okla. City*, 496 P.2d 1185, 1187 (Okla. 1972) (stating that “where 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”); *see also Okaw Drainage Dist. of Champaign & Douglas Cnty., Ill. v. Nat’l Distillers & Chem. Corp.*, 882 F.2d 1241, 1246 (7th Cir. 1989) (absent a statutory exception, a landowner “has the exclusive right to the use of the property and an *automatic*

right to an injunction against a trespasser” (emphasis added)); *Angier v. Matthews Exploration Corp.*, 905 P.2d 826 (Okla. 1995) (holding that a trial court abused its discretion by “reforming” an easement agreement instead of entering a permanent injunction to stop a continuing trespass).

Enable contends that these case are inapposite because federal law requires the application of the traditional four-factor test, citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). There, the Supreme Court held that a court is not permitted to create “a rule that an injunction automatically follows a determination that [a right] has been infringed.” *Id.* at 392-93. Rather, a court is required to consider the equities when determining whether to issue an injunction. *Id.* As explained *supra*, that is exactly what happened here.

This result is not unusual when a permanent injunction is issued at the summary judgment stage to restrain the illegal use of one party’s property. For example, in *Warner Bros. Entm't v. X One X Prods.*, 644 F.3d 584, 604 (8th Cir. 2011), the Eighth Circuit affirmed in part and reversed in part the district court’s entry of a permanent injunction restraining the use of certain copyrighted materials. In so doing, the Court did not examine whether the district court properly applied the four injunction factors. Instead, it based its holding regarding the suitability of the injunction on the propriety of the district court’s underlying summary judgment rulings. *Id.* at 590-91. As the court noted, “the propriety of the

permanent injunction depends upon the propriety of the underlying grant of summary judgment on the copyright infringement claim” *Id.*; *see also Vittoria N. Am., L.L.C. v. Euro-Asia Imports Inc.*, 278 F.3d 1076, 1080, 1086 (10th Cir. 2001) (affirming district court’s issuance of a permanent injunction to restrain trademark infringement upon holding that the district court properly entered summary judgment in plaintiff’s favor, without separately analyzing the four injunction factors).

Second, failure to issue an injunction would amount to a *de facto*, indefinite easement across Indian lands held in trust. This is in direct contravention of 25 U.S.C. § 177, 25 U.S.C. § 324, and 25 C.F.R. §§ 169.107, 169.202 and 169.201. Enable has not provided *any* support allowing it to make this end-run around the governing federal statutes and regulations.

In fact, in its brief, Enable fails to make *any* argument for why, if it is found liable for trespass, it is not required to remove the pipeline. This is because there is no justifiable reason that would allow Enable to continue to trespass on Plaintiffs’ land. The district court thus did not abuse its discretion in its decision that an injunction was warranted here.

C. The district court’s injunction should be affirmed applying the traditional four-factor test.

Under the traditional four-factor test, a plaintiff is entitled to a permanent injunction if it demonstrates “(1) that it has suffered an irreparable injury; (2) that

remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay*, 547 U.S. at 391. Even if the district court should have applied this test, because this test supports an injunction, the Court should affirm on this basis.

Enable, however, argues that the district court’s failure to apply the four-factor test “cannot be cured on appeal.” (Enable Br. 28.) This is wrong. “We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.” *Richison*, 634 F.3d at 1130. Here, the four factors support an injunction.

First, Enable’s continuing trespass constitutes an irreparable injury with no adequate remedy at law. “A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Relying on this same principle, the Oklahoma Court of Appeals has held that a continuing trespass always constitutes an irreparable injury. *See Angier v. Matthews Exploration Corp.*, 905 P.2d 826, 829-30 (Okla. Ct. App. 1995). Equity demands enjoining a

continuing trespass “even if the trespasser is able to respond financially in damages ‘for in such cases the party in possession has no adequate remedy at law’.” *Id.* at 930 (citation omitted). Applying this principle here, Plaintiffs are irreparably injured by Enable’s continued unauthorized use of Plaintiffs’ land for its own profit, and any damages paid by Enable are insufficient to fully remedy Plaintiffs’ injury.

Second, the balance of hardships supports a permanent injunction. Plaintiffs are currently experiencing a deprivation of a fundamental property right. In contrast, the injunction does not harm Enable because Enable does not have *any right* to maintain its pipeline across the property. Further, Enable failed to submit *any evidence* of harm that it would suffer as a result of the entry of the permanent injunction in the district court.

Although Enable argued below—without supporting evidence—that it would incur expense to remove the pipeline, this does not change the analysis. Enable “has no right to benefit from illegal trespass.” *Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F. Supp. 295, 302 (E.D. Pa. 1994). Indeed, any economic harm Enable suffers is solely its own fault. Enable has known since 2000 that it did not have an easement across Plaintiffs’ Property and that its failure to obtain an easement would require removal of the pipeline. Enable has only itself to blame for any economic hardship it must now incur.

Finally, the injunction serves the public interest. For one, it protects Plaintiff's "fundamental" right to have exclusive use of their property. *Lingle*, 544 U.S. at 539. Further, because the Kiowa Tribe holds an interest in the Property, the injunction advances the public interest in protecting the Tribe's sovereignty. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Congress is committed to a policy of supporting tribal self-government and self-determination.").

Enable might argue that there is a public interest in supplying customers with natural gas. However, Enable did not submit any evidence to the district court that any of its customers will lose access to natural gas if the pipeline is removed from Plaintiffs' Property. And Enable has had nearly 17 years to figure out a different route so that supply can continue unimpeded. Enable cannot now point to its own improper conduct as a reason to stop that same conduct.

IV. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR BY NOT ITEMIZING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Lastly, Enable argues that the district court committed another procedural error by not including "sufficient findings of fact" or "separately stat[ing] its conclusions of law" to support its permanent injunction ruling. (Enable Br. 28-30.) This argument also fails for multiple reasons.

First, Enable relies exclusively on Federal Rule of Civil Procedure 52(a)(1) to support this argument. But Enable ignores that the district court made its injunction ruling at the summary judgment stage, after determining that no genuine issues of material fact existed. Rule 52(a)(3) states that the district court is “not required to state findings or conclusions when ruling on a motion under Rule ... 56 ...” Fed. R. Civ. P. 52(a)(3); *see also Allen v. Muskogee, Okla.*, 119 F.3d 837, 840 (10th Cir. 1997) (“traditional ‘findings of fact’ are inappropriate in a summary judgment order”).

Second, even under Rule 52(a)(1), the requirement that the district court make findings of fact and conclusions of law is not jurisdictional. *Featherstone v. Barash*, 345 F.2d 246, 250 (10th Cir. 1965). The purpose of the rule is to “provide the appellate court with a clear understanding of the basis of the trial court’s decision and to aid the trial court in considering and adjudicating the facts.” *Colo. Flying Academy, Inc. v. United States*, 724 F.2d 871, 877 (10th Cir. 1984). In the absence of a request for more specific findings or conclusions, “[g]eneral findings which realistically meet and resolve the issues in dispute” are sufficient. *Featherstone*, 345 F.2d at 250; *see also Bell v. AT & T*, 946 F.2d 1507, 1510 (10th Cir. 1991) (“Findings of fact satisfy Rule 52(a) ... if they afford the reviewing court a clear understanding of the factual basis for the trial court’s decision.” (internal quotation marks omitted)).

The rule does not require the making of elaborate findings extending into minute and unnecessary detail on every feature of the case, but is met in full measure if the findings cover in clear, definite and concise language the contested issue or issues in the case Findings may be sufficient if they permit a clear understanding of the basis of decision of the trial court, irrespective of their mere form or arrangement.

Id.

Indeed, this Court has held that “a court of appeals can consider a district court’s failure to make adequate findings of fact as nonreversible error if it can ascertain from the record that one party or the other was clearly entitled to judgment in its favor.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001); *see also In re Young*, 91 F.3d 1367, 1373 (10th Cir. 1996) (holding that there was no need for remand where the trial court’s opinion provided sufficient basis for a *de novo* review of the legal issue presented); *see also* 9C Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2577 (3d ed. 2008) (remand is not required where “all of the evidence is documentary or if the facts are undisputed”).

Accordingly, this Court has affirmed injunction orders even when “the district court made no explicit factual findings or legal conclusions” *Prairie Band*, 253 F.3d at 1245-46 (affirming entry of a preliminary injunction because “the record on appeal indicates not only that the district court heard evidence on the matter but also that the evidence supported issuance of the preliminary injunction”); *Anthony v. Texaco, Inc.*, 803 F.2d 593, 600 (10th Cir. 1986)

(affirming injunction order even though the district court did not make specific findings of fact when there was “no danger of confusion about ... the basis of the decision” and “the record on appeal support[ed] the court's order and indicates the court heard evidence on each element” of injunctive relief); *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425, 1434 (10th Cir. 1983) (affirming injunction in the absence of specific findings because “[t]he parties, and [the appellate court], [were] fully informed as to the basis for the preliminary injunction entered by the district court”).

In this case, the facts submitted to the district court in connection with Plaintiffs’ injunction motion were stipulated to by all parties, or were based on documentary evidence. No affidavits, declarations, or other testimony was offered. Further, although Enable argued that issues of fact existed regarding when Plaintiffs’ trespass claim accrued (App. 159), the dispute Enable raised was purely legal—what effect was to be given to the five consents on which Enable relied to oppose summary judgment. None of the facts submitted to the district court were disputed by any of the parties, and Enable has not demonstrated any disputes of fact on appeal.¹⁰ The district court thus appropriately spent more than two pages of

¹⁰ Enable proffered additional facts in response to Plaintiffs’ summary judgment and permanent injunction motions, including offering the signed consents into evidence. Plaintiffs did not contest any of those facts, but rather showed that they had no legal effect that would preclude entry of summary judgment or a permanent injunction. (See App. 229-239.)

its Order reiterating the undisputed facts of the case, and then moved on to the crux of the matters before it—the parties’ legal arguments. (App. 261-263.) The district court dedicated another seven pages of its written opinion to the legal issues presented by the parties. (App. 263-269.) In doing so, the district court considered, and rejected, every argument raised by Enable in opposition to summary judgment and Plaintiffs’ permanent injunction request, including Enable’s arguments based on consent (App. 265-267), and other arguments that have been abandoned for purposes of this appeal, such as the statute of limitations (App. 267). This analysis, and the supporting record, provide a more than sufficient basis for this Court and Enable to understand the district court’s rulings. Remand for additional findings is not necessary or warranted under these circumstances. *See Prairie Band*, 253 F.3d at 1245-46.

Further, because the court held that Plaintiffs were entitled to judgment as a matter of law on liability for their continuing trespass claim, and Enable submitted no evidence regarding any harm it might suffer as a result of a permanent injunction, there were no further factual findings or conclusions of law to make to support the district court’s decision to grant Plaintiffs’ request for permanent injunctive relief.

Significantly, Enable fails to explain under what circumstances it could be allowed to continue operating its pipeline on federal trust land without an

easement, much less show that it presented evidence to the district court that could support that outcome. It also cites no cases reversing entry of a permanent injunction to enjoin a continuing trespass after liability is established as a matter of law. Accordingly, even if this Court finds that the district court committed a technical procedural error by not elucidating its factual findings or legal conclusions in greater detail, such error was harmless. Enable has no legal right to be on Plaintiffs' Property, and it cannot hide that basic truth behind *post hoc* procedural challenges to the district court's Order. The district court's summary judgment and permanent injunction rulings should be affirmed.

CONCLUSION

The Court should affirm the district court's judgment and permanent injunction.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument because this case involves substantial issues that affect Plaintiffs' fundamental property rights. Oral argument will assist the Court in reviewing and deciding these issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the applicable type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), the foregoing brief contains 11,113 words, as measured by the word count feature of Microsoft Word 2016.

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