



Appeals Court Decision Shines Light On Risks Of Land Deconstruction If Indian Allotment Owners' And Indian Tribes' Rights Are Not Respected

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In a recent decision, the U.S. Court of Appeals for the Tenth Circuit upheld a judgment of trespass against an oil and gas company based on the continued presence of a pipeline on tribal allotment lands in Oklahoma subsequent to the expiration of the easement upon which the pipeline sat. However, the Tenth Circuit reversed the district court's order requiring the oil and gas company, Enable Intrastate Transmission LLC, to remove the pipeline.

This decision underscores the need for uniform legal standards for easements and rights of way over land held in trust by the U.S. State law does not apply to land held in trust and there has been a split among federal circuit courts on how rights of way and easements on tribal land must be handled.

The U.S. has a long history with right of way on tribal lands. In the 1940s, Congress enacted a series of right of way statutes in order to support the construction of the infrastructure necessary for continued western settlement and development. Under the statutes, the secretary of the interior has the power to approve easements over lands "held in trust by the United States for individual Indians or Indian tribes." 25 U.S.C. 323. However to do so, the secretary needs "the consent of the proper tribal officials" if the land in trust is held for an Indian tribe, or the consent of owners of "a majority of the interests" if the land in trust is held for individual Indians. 25 U.S.C. § 324. In *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019), the secretary, in 1980 and with the consent of the majority owner of interest in the land, allowed the conveyance of a 25-foot pipeline easement over 160 acres of land held in trust for an individual Indian, known as an allotment. The easement allowed the oil and gas company to "install ... and thereafter, use, operate, inspect, repair, maintain, ... and remove a single buried natural gas

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pipeline” for a period of 20 years.

After the expiration of the easement in 2000, the oil and gas company did not remove the pipeline, nor did it immediately seek a new easement. Two years later, the oil and gas company applied for a new easement, but was unable to obtain the consent of a majority of the holders of equitable title in the allotment which then totaled close to 40 individual Indians. As a result, the secretary cancelled the oil and gas company’s application for an easement. The oil and gas company continued to operate the pipeline, despite lacking any easement that would allow it to do so over the individual Indian allotments.

Unlawful Operation of the Pipeline

In 2015, the individual Indian allotment owners sued the oil and gas company for trespass, saying that the company had unlawfully operated the pipeline for more than 15 years. In 2017, the district court granted summary judgment in favor of the individual Indian allotment owners on their trespass claims. Additionally, the district court permanently enjoined the oil and gas company from operating the pipeline and ordered the company to immediately remove the pipeline. The company appealed.

On appeal, the oil and gas company attempted to argue that the individual Indian allotment owners were equivalent to tenancies in common. As a result, because the oil and gas company received consent from five of the nearly 40 allotment owners, it could assert the complete defense of consent to the trespass claims. The Tenth Circuit reasoned that “[a]dopting [the oil and gas company]’s view would therefore frustrate federal Indian land policy, effectively robbing Indian allottees and the government of meaningful control over alienation.” Therefore, the Tenth Circuit upheld judgment on the trespass claim.

With regard to the injunctive relief, however, the Tenth Circuit found error in the issuance of the district court’s permanent injunction which, among other things, requiring the oil and gas company to remove the pipeline. In granting injunctive relief, the district court relied on Oklahoma law that equitable relief should be granted to restrain a continuing trespass. In doing so, the district court failed to consider federal rules of equity.

Need for Uniform Standard

In reversing the district court, the Tenth Circuit analyzed that while federal courts will generally adopt state law to avoid the creation of federal common law, the questions raised by *Davilla* demonstrate a distinct need for nationwide legal standards. Specifically, the Tenth Circuit stated:

Congress provided a way for the Secretary of the Interior to approve easements over and across any lands held in trust by the United States for individual Indians or Indian tribes. This right-of-way statute was to help ensure that necessities such as telegraph lines and roads could continue without encumbrance. While this does not rise to the level of creating a federal interest that federal common law should manage, the nationwide application of this right-of-way statute suggests a need for a uniform federal standard.

As such, the Tenth Circuit found that the district court should have applied the federal standard for permanently enjoining a continuing trespass over allotted

Indian lands; i.e., whether an injunction is required to prevent the allotment holders from suffering irreparable harm, whether the threatened injury outweighs the harm that could be caused by an injunction, and the injunctions effect on the public interest. Based on the information before it, the Tenth Circuit remanded the case for the district court to weigh such factors as it appeared that the equities would not weigh in favor of the allotment owners.

Regardless of which way the district court rules, it is likely this case will go through multiple rounds of appeal, as the consequences for both Indian country and utilities on and around Indian land are significant. This case illustrates the need for knowledge of the implications surrounding construction of both pipelines and other structures on and around tribal lands. A misunderstanding of the rights of individual Indians and Indian tribes on Indian land could result in years of prolonged litigation and unnecessary construction or deconstruction costs.