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# Oklahoma v. Tyson: Playing Chicken with Environmental Cleanup

## INTRODUCTION

In *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc. (Tyson Foods II)*, the Tenth Circuit upheld the district court's denial of the Cherokee Nation's motion to intervene in a suit between the State of Oklahoma and several large-scale poultry producers, including Tyson Foods, Inc.<sup>1</sup> Because the district court in *Oklahoma v. Tyson Foods, Inc. (Tyson Foods I)* found the Cherokee Nation a required party to the State's monetary claims against the producers,<sup>2</sup> the denial of intervention effectively dismissed those monetary claims.<sup>3</sup> This left the State with only the possibility of injunctive relief after four years of trial preparation.<sup>4</sup> Further, the court's rulings imply that tribal and state governments must both consent to such litigation when their interests coincide, complicating the process of seeking restoration damages in the future. However, Judge Deanell Reece Tacha's persuasive dissent in *Tyson Foods II* raises important questions about the accuracy of the majority's denial of intervention.<sup>5</sup>

### I. THE PATH TO LITIGATION: WASTE IN THE WATER

The original dispute stems from the producers' (collectively, "Tyson") "improper" poultry waste disposal practice of using waste as fertilizer for crops, and the resulting runoff pollution of the Illinois River Watershed (IRW).<sup>6</sup> The IRW covers approximately one million acres spanning the Arkansas-Oklahoma border, including land within the Cherokee Nation's (the

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1. *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc. (Tyson Foods II)*, 619 F.3d 1223, 1239 (10th Cir. 2010).

2. *Oklahoma v. Tyson Foods, Inc. (Tyson Foods I)*, 258 F.R.D. 472, 484 (N.D. Okla. 2009).

3. *Tyson Foods II*, 619 F.3d at 1229.

4. *Id.* at 1226.

5. *See id.* at 1239–43 (Tacha, J., dissenting).

6. *Id.* at 1225, 1227 (majority opinion); Press Release, Okla. Office of the Attorney Gen., AG Sues Poultry Industry for Polluting Oklahoma Waters (June 13, 2005), <http://www.oag.state.ok.us/oagweb.nsf/srch/7DB11B73010BFF99862572B4006F60FB?OpenDocument>.

Nation) boundaries, and serves as a “source of drinking water . . . in eastern Oklahoma.”<sup>7</sup>

Aware of the risks of pollution, one poultry producer issued an environmental handbook warning its farmers of the potentially high levels of nitrogen and phosphorous that could seep into the IRW as a result of using waste as a fertilizer.<sup>8</sup> Yet the producer admitted that it did nothing to ensure adherence to this handbook, and the amount of waste being spread on fields increased as big business took over poultry production.<sup>9</sup> Unsurprisingly, the IRW contained phosphorous “equivalent to the waste that would be generated by 10.7 million people, a population greater than the states of Arkansas, Kansas, and Oklahoma combined.”<sup>10</sup>

Citing the protection of Oklahoma’s lakes and streams, drinking water, and public health, the State sued Tyson in 2005 under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>11</sup> seeking both monetary relief and an injunction.<sup>12</sup> The Nation did not join the litigation, but consulted with both the State and Tyson regarding its interest.<sup>13</sup>

## II. REQUIRED BUT LATE: TYSON’S ESCAPE FROM LIABILITY

Although Tyson’s answer to the original complaint raised the defense of failure to join a required party under Federal Rule of Civil Procedure 19 (Rule 19), Tyson did not file a motion to dismiss until 2008, more than three years after the litigation began.<sup>14</sup> In *Tyson Foods I*, the district court granted the Rule 19 motion in part, determining that the Nation was a required party to the State’s monetary claims under Rule 19(a)(1) and dismissing those claims to protect the Nation’s interest and to avoid multiple, inconsistent rulings.<sup>15</sup>

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7. Press Release, Okla. Office of the Attorney Gen., *supra* note 6.

8. Justin Juozapavicius, *Poultry Exec: Didn’t Check If Rules Were Followed*, HUFFINGTON POST (Nov. 12, 2009), <http://www.huffingtonpost.com/huff-wires/20091112/us-poultry-trial-oklahoma>. The waste also contained arsenic, zinc, hormones, and microbial pathogens, such as *E. coli* and fecal coliform. Press Release, Okla. Office of the Attorney Gen., *supra* note 6.

9. Juozapavicius, *supra* note 8; Justin Juozapavicius, *River Heals as Lawsuit Against Big Poultry Looms*, U.S. NEWS & WORLD REPORT (Sept. 22, 2009), <http://www.usnews.com/science/articles/2009/09/22/river-heals-as-lawsuit-against-big-poultry-looms>.

10. Press Release, Okla. Office of the Attorney Gen., *supra* note 6.

11. 42 U.S.C. §§ 9601–9675 (2006).

12. Press Release, Okla. Office of the Attorney Gen., *supra* note 6.

13. Seemingly, the Nation wanted to avoid a ruling on the validity of its water rights in the IRW, which it feared would come before the court if it joined the litigation. *Tyson Foods II*, 619 F.3d 1223, 1227 (10th Cir. 2010).

14. *Id.* at 1228.

15. *Tyson Foods I*, 258 F.R.D. 472, 474, 484 (N.D. Okla. 2009). Specifically, in its three-step analysis the court determined that (1) the Nation was a required party because a ruling in its absence would “impair or impede” its ability to protect its interest in the suit, while also subjecting Tyson to risk of multiple, inconsistent suits; (2) the Nation could not be joined as it is immune to suit without its consent or abrogation by Congress; and (3) in “equity and good conscience” it should dismiss the monetary claims for fear of prejudice to Tyson and to protect the Nation’s interests. *Id.* at 474, 477, 480, 482.

Just six weeks after the district court ruled the Nation was a required party, and nineteen days before the trial date, the Nation filed a Federal Rule of Civil Procedure 24 (Rule 24) motion to intervene.<sup>16</sup> Hoping to resuscitate its monetary claims, the State supported the motion.<sup>17</sup> The Nation argued its motion was timely because it had reasonably believed the State protected its interest until the court declared the Nation a required party.<sup>18</sup> However, the court denied the Nation's motion as untimely because of the prejudice to Tyson in delaying trial, and because the Nation "knew of its interest . . . from the outset of the litigation, but chose not to intervene."<sup>19</sup>

On appeal, the *Tyson Foods II* majority upheld the denial of the Nation's motion under the abuse of discretion standard of review because the district court could properly have found the motion untimely.<sup>20</sup> In determining the timeliness of the motion, the majority considered (1) the length of time since the movant could no longer reasonably believe an existing party adequately represented its interest, (2) the prejudice to existing parties, (3) the prejudice to the Nation, and (4) the existence of any unusual circumstances.<sup>21</sup>

Both the Nation and the State maintained that the timeliness of the motion should be measured from when it became unreasonable for the Nation to believe its interest was protected by the State—when the court granted Tyson's Rule 19 motion to dismiss.<sup>22</sup> The majority agreed on how to measure timeliness, but stated that the Nation never had reason to believe its monetary interest was protected because its interest was wholly different from the State's.<sup>23</sup> For the State to protect the Nation's monetary interest, said the majority, the State must have sought damages in the Nation's name.<sup>24</sup> Thus, the majority measured timeliness from the outset of the litigation, making the Nation's delay in intervening over four years long.<sup>25</sup> Although this length ultimately corresponded with the district court's finding, the two used different legal standards of measurement to reach their conclusions.<sup>26</sup>

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16. *Tyson Foods II*, 619 F.3d at 1229–30.

17. *Id.* at 1230. The State also moved to continue the trial for 120 days to "remove any obstacles" in granting the motion. *Id.*

18. *Id.*

19. *Id.* at 1230–31.

20. *Id.* at 1226, 1231–32.

21. *Id.* at 1232. The majority found no compelling unusual circumstance, and thus made its ruling based only on the first three factors. *Id.* at 1238–39. For another case giving the timeliness factors, see *Sanguine, Ltd. v. U.S. Department of the Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984).

22. *Tyson Foods II*, 619 F.3d at 1232.

23. *Id.* at 1232–33. For example, in its motion the Nation sought recovery for "future necessary response costs incurred by the [Nation]," whereas the State had sought recovery for "future necessary response costs incurred by the State." *Id.* at 1233 (alteration in original) (first emphasis added). The majority also identified the Nation's injunctive interest, but deemed it irrelevant because it was protected by the State. *Id.* at 1234.

24. *See id.* at 1233–34.

25. *See id.* at 1235.

26. *See id.* at 1231–32.

Next, the majority found that the Nation's four-year delay in filing a motion for intervention would prejudice the existing parties.<sup>27</sup> Because the trial was so near—with calendars cleared and “war rooms” set up—the injection of several new issues would cause a substantial last-minute delay that would not have occurred with a timely motion.<sup>28</sup>

Finally, the Nation alleged it would suffer prejudice if the court denied the motion because, pursuant to *Tyson Foods I*, it must bring any damages claim with the State, which might face claim preclusion if it failed to gain an injunction.<sup>29</sup> In this event, neither party could bring monetary claims against Tyson.<sup>30</sup> While dismissing this argument because the Nation did not effectively present it to the district court, the majority did respond that a monetary claim would be unlikely to succeed if the State could not get an injunction.<sup>31</sup>

### III. A SECOND LOOK AT TIMELINESS

In her dissent, Judge Tacha forcefully argued against several of the majority's key points in denying intervention. First, she said the majority applied the wrong standard of review.<sup>32</sup> Although courts normally apply the abuse of discretion standard in timeliness determinations, *de novo* review applies when a district court relies on an improper legal standard.<sup>33</sup>

Here, the district court's timeliness test measured delay from when the Nation “knew of its interest,”<sup>34</sup> while the Tenth Circuit measured from the time the Nation could no longer reasonably believe its interest was protected.<sup>35</sup> Because the district court used an improper legal standard, Judge Tacha insisted the majority should have reviewed the decision *de novo*,<sup>36</sup> rather than apply the more deferential abuse of discretion standard.<sup>37</sup> In other words, the majority

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27. *Id.* at 1235–36.

28. *Id.* at 1236–37.

29. *Id.* at 1237.

30. *Id.*

31. *Id.* at 1237–38; *see also* *Tele-Comm'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997) (stating that “[g]enerally, an appellate court will not consider an issue raised for the first time on appeal”). Apparently, the Nation brought up preclusion issues only in passing, and failed to make it clear that its concern was in regard to the State, not itself. *Tyson Foods II*, 619 F.3d at 1237–38.

32. *Tyson Foods II*, 619 F.3d at 1239–40 (Tacha, J., dissenting).

33. *See* *Kretzinger v. First Bank of Waynoka (In re Kretzinger)*, 103 F.3d 943, 946 (10th Cir. 1996).

34. *Tyson Foods II*, 619 F.3d at 1239–40 (Tacha, J., dissenting).

35. *Id.* at 1232 (majority opinion).

36. *Id.* at 1240 (Tacha, J., dissenting). Although here both the proper and improper tests led to the same result, courts focus on the accuracy of the legal standard, not of the result, in determining the standard of review. *See, e.g., Kretzinger*, 103 F.3d at 946 (“[F]indings . . . premised on *improper legal standards* . . . are subject to *de novo* review.” (emphasis added)).

37. *See* *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (finding that, “[u]nder an abuse of discretion standard, a trial court's decision will not be disturbed unless [we have] a definite and firm conviction that the lower court has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances” (internal quotation marks omitted)).

incorrectly ruled on what the district court *could* have done, instead of ruling on what it *should* have done.

Next, Judge Tacha disagreed with the majority's ruling that the Nation could not reasonably believe the State protected its monetary interest unless the State sought damages in its name<sup>38</sup>—a ruling that led the majority to measure the Nation's delay from the outset of the litigation.<sup>39</sup> Judge Tacha argued the rule is much broader because a presumption of adequate representation arises when the movant's "ultimate objective" is the same as the existing party's.<sup>40</sup>

According to Judge Tacha, the Nation's ultimate objective was to seek "monetary damages from Tyson in order to compensate for and repair the damage it allegedly caused to the IRW."<sup>41</sup> By initially avoiding the litigation, the Nation confirmed that its primary interest was for Tyson to pay for restoration, not to simply receive damages for itself. Likewise, at the outset of litigation the State said it intended to "force [Tyson] to stop polluting and repair the damage [it has] already done."<sup>42</sup> The State's ultimate objective thus mirrored the Nation's: both wanted Tyson to pay for the cleanup and restoration of the IRW. Therefore, the Nation's belief that the State adequately represented its interest seems reasonable—at least until Tyson filed its Rule 19 motion.

But Judge Tacha went further by declaring the Nation could reasonably have believed its interest was protected even after Tyson filed its Rule 19 motion.<sup>43</sup> Previous case law suggested the State, as the Nation's co-trustee in the IRW, could pursue the monetary claims alone and share the damages with the Nation afterwards.<sup>44</sup> Instead, the district court ruled that to avoid "double recovery or unjust enrichment to one co-trustee at the expense of another," the actual management and control of the land by each co-trustee would have to be determined, which was not possible in the Nation's absence.<sup>45</sup>

In this ruling, the district court relied<sup>46</sup> on *Coeur D'Alene Tribe v. Asarco Inc. (Coeur D'Alene I)*,<sup>47</sup> which *United States v. Asarco Inc. (Coeur D'Alene II)* reversed.<sup>48</sup> *Coeur D'Alene II* held that a co-trustee could seek full compensation and later divide it among other co-trustees without affecting the

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38. *Tyson Foods II*, 619 F.3d at 1240 (Tacha, J., dissenting).

39. *See id.* at 1234–35 (majority opinion).

40. *Id.* at 1240 (Tacha, J., dissenting); *see Utah Ass'n of Cnty. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001).

41. *Tyson Foods II*, 619 F.3d at 1240 (Tacha, J., dissenting).

42. Press Release, Okla. Office of the Attorney Gen., *supra* note 6.

43. *Tyson Foods II*, 619 F.3d at 1240, 1241 (Tacha, J., dissenting).

44. *Id.*

45. *Tyson Foods I*, 258 F.R.D. 472, 480 (N.D. Okla. 2009) (internal quotation marks omitted).

46. *Id.*

47. *Coeur D'Alene Tribe v. Asarco Inc. (Coeur D'Alene I)*, 280 F. Supp. 2d 1094 (D. Idaho 2003), *modified*, 471 F. Supp. 2d 1063 (D. Idaho 2005).

48. *United States v. Asarco Inc. (Coeur D'Alene II)*, 471 F. Supp. 2d 1063 (D. Idaho 2005).

liability of the responsible party.<sup>49</sup> The Nation reasonably believed the district court would follow the most recent decision, *Coeur D'Alene II*, which would have allowed the State to adequately represent the Nation's interest.<sup>50</sup> Accordingly, Judge Tacha measured the Nation's delay from when the court granted Tyson's Rule 19 motion—only a six-week delay, instead of the majority's measurement of four years.<sup>51</sup>

Additionally, Judge Tacha stated any prejudice to Tyson was less severe than the majority proposed.<sup>52</sup> For example, Tyson itself asked for a continuance only two months before the Nation's motion, stating that a short delay "would not prejudice any party."<sup>53</sup> Further, Tyson waited three years to pursue a defense mentioned in its original answer, making it at least partly responsible for the last-minute delay.<sup>54</sup>

Finally, Judge Tacha provided an unusual circumstance for the timeliness test that the majority ignored: the significant loss the State would incur if the court excluded the Nation.<sup>55</sup> After years of expensive preparation, the State would be forced to start over in a joint suit with the Nation for damages, which both thought unlikely to happen.<sup>56</sup>

#### CONCLUSION: PRESENT AND FUTURE CONSEQUENCES

Judge Tacha's application of the timeliness test provides a powerful rebuttal to the majority's opinion. She indicated several errors that, when taken together, prove the court should have granted the Nation's Rule 24 motion to intervene. Regardless, the majority's decision stands and has broad implications for both this case and those to come.

In this case, Tyson has likely escaped paying damages.<sup>57</sup> Both the Nation and the State find the likelihood of joint litigation against Tyson slim, requiring coordination of political priorities, waiving of sovereignty, and gathering of financial resources.<sup>58</sup> The State's potential loss of time and public funds—in both the trial and cleanup of Tyson's pollution—makes rearrangement of Tyson's schedule seem inconsequential in comparison.<sup>59</sup>

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49. *Id.* at 1068. See generally William J. Jackson & William C. Petit, *The Authority of Co-Trustees under CERCLA's Natural Resource Damages Regime (Another Look at Coeur D'Alene and Tyson Foods)*, in 2010 ENVIRONMENTAL LITIGATION 6/10 (SR045) 1237, 1239–40 (ALI-ABA June 16–18, 2010), available at <http://westlaw.com> (citation: SR045 ALI-ABA 1237) (arguing that the *Coeur D'Alene II* approach furthers Congress's goals under CERCLA because it allows resolution of liability issues earlier so that restoration can be pursued).

50. See *Tyson Foods II*, 619 F.3d 1223, 1241 (10th Cir. 2010) (Tacha, J., dissenting).

51. See *id.*

52. See *id.* at 1241–42.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

More importantly, because the district court in *Tyson Foods I* ruled that the Nation was a necessary party and dismissed the State's monetary claims for fear of double recovery, the State might now need to seek tribal permission to protect its own interests whenever those interests are shared with a tribe.<sup>60</sup> The Nation would not have had to actually join in the suit, but it would need to allow the State to assert claims on its behalf through a legally binding agreement,<sup>61</sup> putting unprecedented power in tribal hands. A reversal of the situation would place that power with the State, requiring tribal nations to gain the State's consent to protect their own land. Only if the damaged natural resources were solely on either State or tribal land, without overlapping interests, would consent of the other be unneeded.<sup>62</sup> Imposing such a burden when interests coincide makes the vital recovery of natural resources damages unnecessarily difficult, and *Tyson Foods I* and *II* should be reexamined.<sup>63</sup>

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60. See Bill Bishop, *Oklahoma Depends on Cherokee for Poultry Pollution Suit*, DAILY YONDER (July 7, 2009), <http://www.dailyonder.com/oklahoma-depends-chokeee-poultry-pollution-suit/2009/07/27/2256> (quoting an Oklahoma environmental lawyer, Harlan Hentges, expressing this concern).

61. *Tyson Foods I*, 258 F.R.D. 472, 481–82 (N.D. Okla. 2009). In fact, the State and Nation attempted to enter into such a legally binding agreement, but the district court found it invalid under Oklahoma law because the State Attorney General, not the Governor, authorized it and attempted to apply it retroactively. *Id.* at 475–76.

62. See, e.g., *Quapaw Tribe of Okla. v. Blue Tee Corp.*, No. 03-CV-0846-CVE-PJC, 2010 WL 3368701, at \*4 (N.D. Okla. Aug. 20, 2010) (denying defendant's motion to dismiss for failure to join the State as a required party because the "natural resources at issue are located solely on Tribal lands").

63. Further, imposing this burden directly violates the purpose and spirit of CERCLA in providing quick and effective remedies to unexpected and imminent releases of hazardous waste. See ENVTL. PROT. AGENCY, RCRA ORIENTATION MANUAL VI-10 to -11 (2008), available at <http://www.epa.gov/osw/inforesources/pubs/orientat/rom.pdf>.

**We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**