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

JOHN A. "ROCKY" BARRETT, JR., and SHERYL S. BARRETT	)	
Plaintiffs,	)	
vs.	)	CIVIL NO.CIV-06-968-HE
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS JOHN A. BARRETT, JR., AND SHERYL S. BARRETT'S REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs John A. Barrett, Jr. ("Chairman Barrett"), and Sheryl S. Barrett (collectively, the "Barretts"), hereby reply to the Brief in Opposition To Plaintiffs' Motion for Summary Judgment filed by the defendant, United States of America. The Barretts will very briefly reply to certain statements by the Defendant in the order of the Defendant's response brief.

Legal Argument – Page 2 of Defendant's Brief.

The Defendant misunderstands the import and effect of the 1983 Notice, and implies it is simply some sort of regulatory rulemaking by the Secretary of the Interior. The 1983 Notice is no such thing; the 1983 Notice is notice of the terms of the Congressionally approved use and distribution plan for the Tribe pursuant to the Indian Tribal Judgment Funds Use or Distribution Act codified at 25 U.S.C. § 1401 *et seq.*

The Defendant also states that the plan outlined in the 1983 Notice "does not apply to any distributions after the expiration of the plan on or about 1995." However, Section 5(d)(iii) of the 1983 Notice specifically states that a reevaluation shall occur at the end of the ten year period and any changes to the use of the programming funds are subject to approval of the Secretary of the Interior. This is discussed further in "C" below.

Defendant also states that the "[1983] Notice does not preempt subsequent federal statutes providing that only per capita trust fund distributions are exempt from taxation." Conveniently, Defendant cites no statutes. The statute which Defendant cites later in its brief in support of the per capita argument is 25 U.S.C. § 1407, which was enacted in 1973, ten years prior to Congressional approval of the plan in the 1983 Notice.

A. The Statement of Material Facts – Page 3 of Defendant's Brief

Suffice it to say that Rule 56 of the Federal Rules of Civil Procedure expressly allows affidavits in support of motions for summary judgment. Because the Business Committee is the lawmaking body of the Tribe, and approved the payments to Chairman Barrett from the judgment funds held in trust, it is hardly a stretch to state that the Tribe made a conscious and intentional act of the Tribe is so approving. And, the Chairman, being a member of the Business Committee, certainly has first hand knowledge of the activities of the Business Committee.

B. The 1983 Notice – Page 5 of Defendant's Brief

Again, Defendant implies and argues that the plan in the 1983 Notice was merely rulemaking by the Secretary of the Interior. In doing so, Defendant ignores the

provisions of the Indian Tribal Judgment Funds Use or Distribution Act, which grants Congressional approval to the plan.

C. The 1983 Judgment Fund – Page 8 of Defendant's Brief

Defendant is simply wrong when it states in this part of the brief and other parts of its brief that the Congressionally approved plan set forth in the 1983 Notice provides for no expenditures beyond the ten-year plan. As noted above, Section 5(d)(iii) of the 1983 Notice specifically so provides. In addition, the Investment Management Policy, approved by the Secretary of the Interior pursuant to the Indian Trust Fund Management Program, 25 U.S.C. § 4021 *et seq.,* specifically states that "The purpose and use of the earnings from the Investment Accounts, will continue to be consistent with the original claims settlements..." (Page 2 of Investment Management Policy, Exhibit 5 to Stipulation of Facts) This is consistent with 25 U.S.C. § 4023(c)(1) which requires the Secretary of the Interior to ensure that the "purpose and use of the judgment funds identified in the ***previously approved judgment fund plan will continue*** to be followed by the Indian Tribe in the management of the judgment funds." (emphasis supplied) Thus, the plan under the 1983 Notice was intended to, and was contemplated both by statute and administrative ruling to, and did, continue beyond the original ten year plan.

Defendant is partially correct in stating the Tribe further defined what activities constitute acquisition, development, and maintenance actions under the plan. Defendant does not complete the story by stating that these guidelines were required under Section 5(d)(ii) of the plan as set forth in the 1983 Notice and were required to be, and were,

approved by the Secretary of the Interior. (Exhibit 3, Stipulation of Facts) Far from being unilateral definitions, the guidelines were required and approved by the federal government. The same Exhibit 3 also sets forth the budget for that year.

And, Defendant can not seriously challenge, at least with a straight face, that payment of the Chairman of the Tribe does not fit within those guidelines, i.e. "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally." (Section 1.4 of Exhibit 3 of Stipulation of Facts)

On page 10 of Defendant's brief, Defendant states that "all of the contemplated expenditures [under the Congressionally approved plan] are for investments in income-generating enterprises" citing Section 1.3 of the guidelines (Exhibit 3 of Stipulation of Facts). The guidelines apply that qualifier (i.e. investments in income-generating enterprises), however, only if the principal of the programming funds is invaded. In other words, the principal is only to be used as a last resort, and must be invested in income-generating enterprises. The same qualifier does not apply to the earnings on the principal, which are to be used in accordance with Section 1.4.

D. The Dictates of Policy – Page 12 of Defendant's Brief

Because the legal arguments have already been made, the Barretts would simply note the irony of Defendant's argument that the Internal Revenue Manual demonstrates clear Congressional intent after devoting more than a page in Defendant's motion for

summary judgment on the non-authoritative nature of the Internal Revenue Manual. And, to reiterate, the Internal Revenue Manual does recognize that excluded from the taxable income of individual tribal members is "income received from land claim settlements and judgments pursuant to 25 U.S.C. § 1401."

The Accuracy Penalty – Page 13 of Defendant's Brief

This issue has been fully briefed and merits no comment.

CONCLUSION

The compensation to Chairman Barrett by the Tribe from the judgment funds awarded the Tribe by the Indians Claims Commission and held in trust by the Secretary of the Interior is not subject to Federal income tax pursuant to the express terms of the Congressionally approved Ten-Year Tribal Acquisition, Development, and Maintenance Plan, as carried forward under the Investment Management Policy approved by the Secretary of the Interior at the time the Tribe took over management of the trust funds. Accordingly, the Barretts are entitled to a refund of all amounts (taxes, penalties and interest) paid on such trust funds, plus interest thereon. Assuming, *arguendo*, that these amounts are taxable to the Barretts, the Barretts had reasonable cause for the positions taken with respect to such compensation, and no penalty under 26 U.S.C. § 6662 is proper.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2007, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

Jacqueline Brown, Esq.
U.S. Department of Justice
P.O. Box 7238
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s/William H. Whitehill, Jr.
William H. Whitehill, Jr.

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