

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

David Houle and Becky Houle,)	
)	
Plaintiffs,)	Civil File No. 4:09-cv-00021
)	
-vs-)	
)	DEFENDANT CENTRAL POWER
Central Power Electric Cooperative,)	ELECTRIC COOPERATIVE, INC.’S
Inc., a North Dakota Electric)	REPLY BRIEF IN SUPPORT OF
Cooperative Corporation;)	MOTION TO DISMISS
)	AND REQUEST FOR ORAL
Defendant.)	ARGUMENT

CPEC incorporates by reference its initial “Brief In Support Of Motion To Dismiss” and the attachments to that brief. CPEC writes to reply to a Plaintiff’s assertions in their “Memorandum Resisting Defendant Central Power Electric Cooperative, Inc.’s Motion to Dismiss.”

In their brief, Plaintiffs attempt to paint a picture of a complete lack of justice for them in the Tribal Court. They then suggest this should allow them to bring this second proceeding in federal court. Much of Plaintiffs brief is leveled at CPEC’s attorney and ignores the real issue - Plaintiffs have failed to provide any admissible evidence to support the complaint. As such, dismissal in favor of CPEC should be granted.

I. THIS MOTION IS TIMELY.

Plaintiffs complain that pursuant to Federal Rule 12(b)(7) this motion is untimely because the motion needs to be brought prior to submitting the party’s answer.

(Plaintiff’s Memorandum, p. 10.) Federal Rule 12(b) states:

“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

. . .
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. . . No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”

Fed.R.Civ.Pro 12(b) (our emphasis). The rule does not require the motion to be made prior to the answer. Further CPEC asserted failure to join an indispensable party in its Answer. (Answer, Doc. No. 7, ¶ XXXI.) If a party moves for any dismissal based upon the 12(b)(7) defenses, “whether made in a pleading or by motion . . . [it] must be heard and decided before trial unless the court orders a deferral until trial.” Fed.R.Civ.Pro 12(i). As the Court can see, under the rules, this motion is timely and has not been waived.

II. PLAINTIFFS PRESENTED NO ADMISSIBLE EVIDENCE TO PREVENT DISMISSAL.

In order to succeed, the Plaintiffs need to rebut the facts with admissible evidence, not bare assertions. Fed. R. Civ. Pro. 56(e)(2); Local Rule 7.1(A)(3).¹ Plaintiffs make several allegations without the required factual support. These allegations, along with CPEC’s response, are as follows:

1. Plaintiffs allege that the BIA did not issue an easement over the Houle property. (Doc. No. 92, p. 3) This is true. CPEC’s Exhibits 1 and 2 were filed in response to Plaintiffs’ Prayer for Relief indicating that the easement from its inception was void. (Doc. No. 51, *Prayer for Relief*, ¶ b.) A review of the documents will find that CPEC has steadfastly maintained it has a valid Permit to Occupy Right of Way. (Doc. No. 7, ¶¶ XVI, XXVIII, XLV; Doc. No. 92-4, p. 2; Doc. No. 92-5, pp. 1, 6; Doc. No. 92-7.)

¹ When matters outside the pleadings are presented under Rule 12(b)(6) or 12(c) Motion to Dismiss, the motion is treated as a motion for summary judgment pursuant to Rule 56. Both parties have filed several documents, outside the pleadings of this lawsuit.

2. Plaintiffs allege that CPEC trespassed on the property. (Doc. No. 92, p. 3.) Plaintiffs provide no evidence of trespass, other than David Houle's deposition testimony. The Turtle Mountain Tribal Court, clearly ordered that the transmission line could be placed in the BIA Road Right of Way. (Doc. No. 81-7, p. 4.)
3. Plaintiffs allege that CPEC objected to the Turtle Mountain Tribal Court's jurisdiction. (Doc. No. 92, p. 3.) This is true. It is undisputed that the Turtle Mountain Tribal Court matter was not appealed. (David Houle Deposition, Doc. No. 81-10, p. 46, ll. 16-20.)
4. Plaintiffs allege that CPEC had knowledge that the Plaintiffs' Tribal Advocate and the Hon. Judge Marcellais were not graduates of an accredited law school, or admitted to practice law. (Doc. No. 92, p. 3) This is true. However, the Plaintiffs chose that forum knowing that this is common practice in the Turtle Mountain Tribal Court. The Turtle Mountain Band of Chippewa Indians allows for its members to be represented by Tribal Advocates. TMTC § 2.21401 (attached hereto as Exhibit 1 and incorporated by reference). The requirements for Judges are set by the Constitution and Bylaws of the Turtle Mountain Band of Chippewa Indians. Constitution and Bylaws of the Turtle Mountain Band of Chippewa Indians North Dakota, Article V, § 4 and Article XIV, § 4 (attached here as Exhibit 2 and incorporated herein by reference). As the Court can see, CPEC has no authority in determining who can practice law or is qualified to be judge in the Turtle Mountain Tribal Court. The Court should be aware that Plaintiffs' Tribal Advocate is now a Judge at the Turtle Mountain Tribal Court. Furthermore, Judge Marceillas is the Chief Judge of the Turtle Mountain Tribal Court and has presided over many cases. The Court should also be aware that Plaintiffs' Counsel has filed two nearly identical lawsuits in the Turtle Mountain Tribal Court to be heard in front of one of these two judges. (Doc. No. 69-1, 69-2.) This is strange, considering Plaintiffs claim that the "Tribal Court order which was issued in total derogation and regulatory scheme adopted by the United States". (Doc. No. 92, p. 19.) It is irreconcilable that Plaintiffs' counsel argues that the Tribal Court had no authority to issue the order in this matter while having nearly identical cases pending in Tribal Court for other tribal members.
5. Plaintiffs allege that CPEC wrongfully represented information to the Tribal Court. CPEC provided the Turtle Mountain Tribal Court with all the permits it had and understood that it needed. (Doc. No. 92-4, 92-5.) Mark Sherman testified that the BIA told CPEC that it could proceed. (Doc. No. 92-5, ¶ 7.) CPEC has always maintained it had a Permit to Occupy Right-of-Way. (Doc. No. 7, ¶¶ XVI, XXVIII, XLV; Doc. No. 92-4, p. 2; Doc. No. 92-5, pp. 1, 6; Doc. No. 92-7.)
6. Plaintiffs complain that even though CPEC objected to jurisdiction, it "raced to enforce the tribal court order." (Doc. No. 92, p. 5.) CPEC does not need to explain why it chose not to appeal this matter. In any event, once the

appeal time has run, the judgment becomes final. TMTC Chapter 2.13 (attached hereto as Exhibit 3 and incorporated herein by reference); N.D. R. App. Pro. 3, 4. A review of case law shows that jurisdictional questions are often at issue when a non-member is sued in Tribal Court. Plaintiffs appear to support a position that all orders regarding jurisdiction be appealed. However, the reality is that not all orders finding jurisdiction result in an appeal to the appellate court.

7. The Plaintiffs complain that CPEC had full knowledge that the Tribal Court lacked jurisdiction. (Doc. No. 92, p. 5.) The Court order clearly found that it had jurisdiction. (Doc. No. 81-7.) Plaintiffs had chosen this forum, not CPEC. Furthermore, Plaintiffs chose not to request reconsideration or a stay or to appeal the Tribal Court order, even though they were aware that those were options available to them. (David Houle Deposition, Doc. No. 81-10, pp. 46-47.) The Plaintiffs chose to accept the benefits and monetary awards from the order and now complain about an order issued by the Court they chose. CPEC only complied with the Court order.
8. Plaintiffs also assert that CPEC exploited the Tribal Court and its counsel intentionally evaded the purpose of the statute by not notifying the BIA. (Doc. No. 92, pp. 5-6.) The BIA was fully informed of the Tribal Court proceeding, its order, and payment to the Plaintiffs. (Ex. 4.)
9. Plaintiffs also assert that CPEC misrepresented that it had an easement, not a Permit to Occupy Right of Way. This is not true, CPEC has always asserted that it had a Permit to Occupy Right of Way. The transmission line, as built, is within the BIA Road Right-of-Way. (Doc. No. 93-1.)
10. Plaintiffs indicate that the Permit to Occupy does not include a legal description. (Doc. No. 92, n. 2.) The Permit to Occupy Right of Way, includes the description of the route of the right-of-way and a map. (Doc. No. 81-3.) Furthermore, the letter from the BIA Superintendent Patrick Hemmy indicates that a Grant of Easement from the Plaintiffs was received. (Id.)
11. Plaintiffs assert that the BIA had no authority to grant an easement to CPEC. (Doc. No. 92, p. 8.) This is the crux of CPEC's argument that the United States is an indispensable party.
12. Plaintiffs assert that the Tribal Court found that the BIA easement was only fifty feet and thus, there is a twenty five foot gap in the easement. (Doc. No. 92, p. 10.) Plaintiff overlooks the Court order granting CPEC the right to utilize the remaining 25 feet after payment to the Houles. (Doc. No. 81-7, ¶ 1.) Payments were made by CPEC and accepted by the Plaintiffs for use of the property. (Doc. No. 81-8.)

13. Plaintiffs assert that CPEC repeatedly represented that the transmission line would not be on their property. (Doc. No. 92, p. 9.) Plaintiffs presented no evidence for this contention.

Plaintiffs attached only pleadings filed with the Turtle Mountain Tribal Court.

Plaintiffs attach no affidavits to support its allegations as to what the BIA knew or did not know. Plaintiffs attach no documents showing misleading statements made by CPEC to them regarding placement of the transmission line. Plaintiffs attached no engineering drawings or affidavits to show where the transmission crosses its property, other than CPEC's drawing, which Plaintiffs claim is not a correct drawing of where the transmission line runs. (Doc. No. 92, p. 3, 18.) It is clear that Plaintiffs did not provide admissible evidence to overcome CPEC's Motion to Dismiss.

III. THE UNITED STATES IS AN INDISPENSIBLE PARTY.

Plaintiffs argue that they have no issues with the actions of the Bureau of Indian Affairs (United States). However, their complaint is replete with accusations that CPEC's actions exceeded that granted to it by the United States. (*see generally*, Amended Compl., Doc. No. 51.) The Plaintiffs entire complaint is an attempt to undo the United States' permission to place the transmission in the BIA Road Right-of-Way. (Amended Compl., Doc. No. 51, *Prayer for Relief*, b.) The United States is clearly critical to determining whether CPEC's actions were appropriate.

The United States is a necessary party under Rule 19(a)(1)(A) because the Court will not be able to accord complete relief among the existing parties in the United States' absence. Plaintiffs seek a declaration that the right-of-way easement obtained by CPEC was "obtained unlawfully and [is] in all things null and void from its inception." (Am. Compl., Doc. No. 51, *Prayer for Relief*, p. 46-47 ¶ b.) However, this Court cannot void the United States' conveyance of the subject right-of-way to CPEC unless the United

States is present because “[i]t is a fundamental principle of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court.” See Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1472 (10th Cir. 1987). Furthermore, the United States has a substantial interest relating to the subject of the action and its ability to protect those interests that would be impaired or impeded by allowing the action to proceed in its absence. The United States has an interest in preserving the validity and integrity of its right-of-way grants to third parties and of its agency determinations in general. The United States also has an interest in preserving the benefits provided by CPEC’s transmission line project to the Tribe, tribal members, and the general public.

IV. THE UNITED STATES CANNOT BE JOINED IN THIS ACTION.

Plaintiffs assert that the United States may be joined under the Administrative Practices Act or the 28 U.S.C. § 1346. (Doc. No. 92, p. 12.) The Administrative Practices Act requires that there be no other adequate remedy in court prior to allowing judicial review of an agency action. 28 U.S.C. §§ 704, 704. In this case, Plaintiffs conceivably had an option to have the agency action reviewed under the Federal Tort Act. The Court cannot take jurisdiction of this matter under 28 U.S.C. § 1346 because this matter would also fall under the Federal Tort Claim Act. 28 U.S.C. § 2680. A Federal Tort Claim proceeding requires that an administrative first be commenced. 28 U.S.C. § 2672, 2679. Plaintiffs have not commenced any administrative proceedings. (David Houle Deposition., Doc. No. 81-10, p. 59, ll. 7-23.)

Furthermore, any administrative actions taken in regards to easements or permits to occupy rights of way on the reservation lands, must be appealed to the agency making

the decision. 25 C.F.R. § 169.2, 2.9. In this case, that would be an appeal to the BIA. The plaintiffs have made no appeal of the BIA's decision. (David Houle Deposition., Doc. No. 81-10, p. 59, ll. 7-23.)

The United States is a sovereign entity. Neither the Administrative Practices Act nor the Federal Tort Claim Act waives that immunity.

V. THE HOULES HAVE ALREADY LITIGATED THEIR CLAIMS AND ACCEPTED PAYMENT FOR THOSE CLAIMS, WARRANTING DISMISSAL.

The claims brought by the Plaintiffs in this matter were, or should have been raised, in the Turtle Mountain Tribal Court action. The Turtle Mountain Tribal Court issued a judgment that the Plaintiffs chose not to appeal or ask for reconsideration. (Doc. No. 81-7; Doc. No. 81-10, pp. 46-47.) The Plaintiffs now bring this federal action. Res judicata prevents them from proceeding in this matter. Hager v. City of Devils Lake, 2009 ND 180, ¶ 13, 773 N.W.2d 420. Since Plaintiffs sued CPEC for its actions previously in tribal court, this action must be dismissed. Id., ¶ 20.

Furthermore, Plaintiffs accepted payment in satisfaction of the Turtle Mountain Tribal Court judgment for the trespass, easement, and advocate fees. (Doc. No. 81-8.) As a result, they cannot now come to federal court to receive additional payment for those issues. As such, Plaintiffs' claims should be dismissed with prejudice.

Finally, Plaintiffs claim that CPEC has unclean hands. Nothing is further than the truth. CPEC has followed all the Permits to Occupy Right-of-Way, directions by the BIA, and complied with all Court Orders. It is Plaintiffs own actions in failing to appeal the Tribal Court order that led to this proceeding, not the actions of CPEC.

CONCLUSION

Plaintiffs' action should be dismissed for failure to join the United States as an indispensable party under Fed. R. Civ. P. 19, res judicata, collateral estoppel, and accord and satisfaction.

REQUEST FOR ORAL ARGUMENT

CPEC hereby requests oral arguments on its Motion to Dismiss.

Respectfully submitted,

Dated: January 29, 2010

/s/ Debra L. Hoffarth
James E. Nostdahl, #3925
Debra L. Hoffarth, #05668
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
Telephone: (701) 852-0381

*Attorneys for Defendant
Central Power Electric Cooperative, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2010, Central Power Electric Cooperative, Inc.'s Reply Brief In Support Of Motion To Dismiss and Request for Oral Argument was filed electronically with the Clerk of Court through ECF, and the ECF will send a Notice of Electronic Filing (NEF) to the following:

Larry M. Baer

/s/ Debra L. Hoffarth
Debra L. Hoffarth