

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WYANDOTTE NATION,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 11-CV-02656-JAR-DJW
)	
KENNETH L. SALAZAR,)	
in his official capacity as Secretary)	
of the United States Department of)	
the Interior,)	
)	
Defendant,)	
)	
and)	
)	
STATE OF KANSAS,)	
)	
Defendant-Intervenor.)	

**INTERVENOR'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS**

COMES NOW Defendant-Intervenor, State of Kansas ("Kansas"), by and through its counsel, and in response to Plaintiff's Motion to Dismiss Counterclaims, states and responds as follows:

Introduction

Plaintiff moves to dismiss Kansas' counterclaims in this matter for two reasons. First, Plaintiff argues that it is immune from such counterclaims under the doctrine of tribal sovereign immunity. Second, Plaintiff alleges that Kansas' counterclaims—addressing the question of whether the land at issue (the “Park City Tract”) can be taken into trust under PL 602—are not ripe, and should be dismissed for that reason. Contrary to Plaintiff's argument, Plaintiff has waived its sovereign immunity as to the counterclaims asserted by Kansas, and the relief Plaintiff

seeks through its pleadings and other filings in this case precludes Plaintiff from arguing that Kansas' counterclaims are not ripe.¹

Arguments and Authorities

I. Plaintiff has waived its sovereign immunity to the extent of Kansas' counterclaims, because those counterclaims arise from the same transaction or occurrences as Plaintiff's suit, seek relief of the same kind or nature as Plaintiff seeks, and do not seek relief in excess of Plaintiff's claim.

Kansas certainly does not dispute the general legal principle of sovereign immunity, or that Plaintiff typically enjoys sovereign immunity. But Plaintiff's sovereign immunity is not unlimited and may be waived. One circumstance under which waiver can occur is where the Tribe seeks relief by filing a lawsuit in federal court. Under such circumstances, the Tribe "necessarily waives immunity for matters arising out of the same transaction or occurrence which is the subject matter of the suit, to the extent the counterclaims do not seek relief different in kind or nature or exceeding the amount of the relief sought by the state or tribe." Wyandotte Nation v. City of Kansas City, Kansas, 200 F.Supp. 2d 1279, 1285 (D. Kan. 2002) (internal quotations omitted).

In Wyandotte Nation, the Tribe filed an action in which it requested the court to issue a declaratory judgment quieting title in the Tribe's favor. Id. at 1282. One of the defendants filed a counterclaim for declaratory judgment, seeking essentially the opposite relief. Id. at 1282-83. The Tribe requested that the court dismiss the counterclaim, asserting sovereign immunity. Id. at 1283. The court denied the Tribe's request. Id. at 1285-86. In doing so, the court reasoned that it could not decide the issues raised in the Tribe's direct claim, without also considering the

¹ As is set forth in Section III below, Kansas agrees with the Secretary that the Court does not have jurisdiction to order the Secretary to take the Park City Tract into trust. Instead, the only issue in this case should be whether the Secretary has unreasonably delayed its decision on Plaintiff's application. The result of that determination should either be a dismissal of Plaintiff's claim, or an order that the Secretary make a decision on the merits. However, Plaintiff is requesting that this Court go beyond a determination of the timeliness of the

interests of the other potential claimants and who had better quality of title. Id. at 1285. The court further reasoned that considering the counterclaim would not subject the Tribe to liability or exposure greater than what the Tribe itself sought to adjudicate. Id. See also Oneida Tribe of Indians of Wisc. v. Village of Hobart, 500 F.Supp. 2d 1143 (E.D. Wis. 2007) ("by invoking the jurisdiction of the Court to determine the rights of the respective parties over the land in question, the Tribe has expressly waived its immunity from the Village's claim for a determination in its favor on the same issue. To hold otherwise would be anomalous and contrary to the Court's broad equitable powers.").

The Tenth Circuit reached a similar conclusion in Berrey v. Asarco, Inc., 439 F.3d 636, 640 (10th Cir. 2006). In Berrey, the Tribe filed a claim asserting that tenants under a mining lease caused environmental damage to the Tribe's land. Id. at 640. The defendant's counterclaimed for contribution and indemnity. Id. at 641. The Tribe argued that the counterclaim was barred by sovereign immunity. Id. The court denied the Tribe's motion to dismiss, finding that the Tribe had implicitly waived its sovereign immunity as to the counterclaims. Id. at 645. The court reaffirmed that when a Tribe files a lawsuit, it waives its sovereign immunity as to counterclaims that: (1) arise from the same transaction or occurrence in the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim. Id.

The same is true here. When Plaintiff filed its lawsuit, it waived its sovereign immunity with respect to counterclaims that: (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief for the same kind or nature of the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim. Kansas' counterclaims fit squarely within that rule.

Secretary's decision, and actually decide the merits of the question of whether the Secretary has an obligation to take the land into trust under PL 602. Plaintiff's counterclaims were filed to address Plaintiff's claims for such relief.

At its very core, Plaintiff's claim in this litigation is that the law and facts compel the conclusion that the Secretary was required to take the Park City Tract into trust pursuant to PL 602. Kansas, on the other hand, asserts that the facts and law demonstrate that the Secretary was not obligated to take the Park City Tract into trust and in fact does not have authority to do so under PL 602. By filing its lawsuit, Plaintiff has placed the issue of whether PL 602 requires the Secretary to take the land into trust under the facts of this case. It has thus waived its sovereign immunity as to Kansas' counterclaims, which arise from that same issue, seek the same kind or nature of relief (i.e. the determination of whether the Secretary is obligated to take the land into trust), and do not seek an amount in excess of Plaintiff's claim.

II. Even if Plaintiff has sovereign immunity as to Kansas' counterclaims, such counterclaims should be designated as defenses under Rule 8(c)(2) of the Federal Rules of Civil Procedure.

As is set forth above, Plaintiff has waived its sovereign immunity, and Kansas' assertions regarding the Secretary's lack of authority to take the Park City Tract into trust pursuant to PL 602 was properly raised as a counterclaim. However, to the extent that the Court determines that such matters cannot be raised as counterclaims in this case, they are, nevertheless defenses to Plaintiff's claim that the Secretary has the mandatory obligation to take the land into trust. It is a well accepted principle of law that when a party asserts a counterclaim that is more properly asserted as a defense, it should be treated as such under Rule 8(c)(2) of the Federal Rules of Civil Procedure. E.g. Reiter v. Cooper, 507 U.S. 258, 263 (1993); see also §1275 Mistaken Designation, 5 Fed. Prac. & Proc. Civ. §1275 (3rd Edition). Accordingly, in the event that the Court determines that Kansas' assertions regarding the Secretary's authority under PL 602 are not properly raised as counterclaims, those assertions may be set forth as defenses, and Kansas requests that the Court construe them as such pursuant to Rule 8(c)(2).

III. Kansas' claims are ripe because Plaintiff has put the Secretary's authority to take the land into trust at issue in this case.

The Secretary has previously argued that the Court's jurisdiction in this matter is limited to a determination of whether the Secretary has unreasonably delayed its decision on Plaintiff's application to have the land taken into trust. As such, the Secretary argues that the Court does not have jurisdiction to compel the Secretary to take the land into trust, as Plaintiff has requested. Instead, the Court's only remedy, if it finds in Plaintiff's favor, is to order that the Secretary make its determination on whether the land must be taken into trust under PL 602. Alternatively, if the Court determines that no unreasonable delay has occurred, the case can be dismissed to allow the Secretary to make its determination in due course.

Kansas does not disagree with the Secretary's position on this point. Kansas has never intended its counterclaims concerning Plaintiff's inability to have the land taken into trust under PL 602 to be a contention that the Court should reach the merits of the PL 602 issue. Instead, those counterclaims have been alleged prophylactically, in response to Plaintiff's request that the Secretary be ordered to take the land into trust. In other words, Kansas agrees that this case should be limited to the issue of whether the Secretary has acted timely on Plaintiff's application, and that the merits of PL 602 should not be reached. But because Plaintiff has injected the merits of PL 602 into this case, Kansas must ensure that its position on that issue is heard as well. It filed its counterclaims for that purpose.

Given the fact that Plaintiff is asking the Court to reach the merits of the PL 602 issue, its argument that Kansas' counterclaims are not ripe is disingenuous. Plaintiff is at once asking the Court to reach the merits of the PL 602 issue, and at the same time contending that Kansas' claims (which address that same issue) are not ripe and cannot be heard. But Plaintiff cannot have it both ways. Plaintiff either needs to acknowledge that the Court cannot reach the merits

of PL 602, or insist that the Court can reach that issue—thus making all claims relating to that issue (including Kansas') ripe for consideration.

Conclusion

For the foregoing reasons, Defendant-Intervenor, State of Kansas respectfully requests that the Court deny Plaintiff's motion to dismiss and afford such other and further relief as the Court deems just and proper.

Respectfully submitted,

PAYNE & JONES, CHARTERED

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ATTORNEYS FOR DEFENDANT-INTERVENOR

CERTIFICATE OF SERVICE

I certify that on May 29, 2012, I caused the above to be filed using the Court's Electronic Case Filing System, which will send notification of such filing to the following parties:

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