

NO. 13-5106, 13-5109

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEROKEE NATION, and CHEROKEE NATION ENTERTAINMENT, LLC,
APPELLEES/PLAINTIFFS,

v.

S.M.R. JEWELL, ET AL.,
APPELLEES/DEFENDANTS,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS OF OKLAHOMA,
APPELLANT/INTERVENOR DEFENDANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE GREGORY K. FRIZZELL
CASE NO. 12-cv-493 GKF TLW

APPELLANT UNITED KEETOOWAH BAND OF CHEROKEE
INDIANS IN OKLAHOMA'S REPLY IN SUPPORT OF ITS
EMERGENCY MOTION TO STAY ENFORCEMENT OF INJUNCTION

James C. McMillin, OBA No. 17206
211 North Robinson
Oklahoma City, Oklahoma 73102-7103
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
james.mcmillin@mcafeetaft.com

Christina M. Vaughn, OBA # 21390
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3104
christina.vaughn@mcafeetaft.com

Jessica John-Bowman, OBA No. 30388
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3146
jessica.johnbowman@mcafeetaft.com

*Attorney General, United Keetoowah
Band of Cherokee Indians in Oklahoma*

ATTORNEYS FOR APPELLANT UNITED KEETOOWAH BAND OF CHEROKEE
INDIANS IN OKLAHOMA

August 25, 2013

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COMES NOW, the Defendant-Appellant, United Keetoowah Band of Cherokee Indians in Oklahoma (“Tribe”), and pursuant to Fed. R. App. P. 27(a)(4) submits the following reply in support of its Emergency Motion to Stay Enforcement of Injunction (“Emergency Motion”).

I. INTRODUCTION

In their combined response to the Tribe’s and Federal Defendants’ motions for stay of the District Court’s injunction pending appeal, Plaintiffs incorrectly argue that the Tribe (and the Federal Defendants) failed to comply with Fed. R. App. P. 8(a)(1). [Plfs’ Resp. Br. pp. 8-10]. Plaintiff also make numerous misrepresentations. First, Plaintiffs misrepresent the nature of the emergency and the efforts of the Tribe to avoid the emergency. [Plfs’ Resp. Br. pp. 10-13]. Second, Plaintiffs self-servingly and without any personal knowledge of the facts alleged, significantly misrepresent the realities of the Eastern District Case and the Tribe’s agreements with the State therein. [Plfs’ Resp. Br. pp. 1-2]. Third, Plaintiffs, without citation, support, or personal knowledge misrepresent the validity of the sovereign immunity waiver of the Tribe’s Corporation. [Plfs’ Resp. Br. pp. 28-30]. Finally, many of Plaintiffs arguments rely upon an improper conflation of the CNO with the historic Cherokee Nation. [Plfs’ Resp. Br. pp. 4-6]. While the Tribe disagrees with each of Plaintiffs legal arguments, for the sake of brevity, the Tribe replies only to those listed above, and relies upon the argument

made in its opening brief in support of its motion and those made in the Federal Defendants' opening brief as to the remainder of Plaintiffs' arguments.

II. ARGUMENT AND AUTHORITY

A. THE TRIBE COMPLIED WITH FED. R. APP. P. 8(a).

Pursuant to Fed. R. App. P. 8(a)(1), a party seeking a stay of a district court order "must ordinarily move first in the district court" for such relief, and, pursuant to Fed. R. App. P. 8(a)(2), must show either that moving in the district court would be impractical, or that such motion was made and was denied by the district court. The Tribe plainly complied with both rules. As is ordinarily the case, the motion for stay pending appeal was made orally following the District Court's pronouncement of its decision. [Transcript p. 30]. Despite Plaintiffs suggestion otherwise, the rule does not require the use of particular words or argument, and the brief exchange between counsel and the Court made clear that the Court denied the request because there was no discernible way to proceed otherwise and retain the protection of the injunction, which the District Court believed was necessary. [Transcript p. 30-33]. Finally, it is unreasonable to suggest that after denying the Tribe's motion for stay, the United States is required to have asked for the same relief in order to satisfy the purpose of Fed. R. App. P. 8(a).

B. PLAINTIFFS MISREPRESENT THE NATURE OF THE EMERGENCY AND THE EFFORTS OF THE TRIBE TO OBTAIN A DECISION ON THE MERITS IN ADVANCE OF JULY 30, 2013.

Knowing that the Tribe was under a one-year deadline, Plaintiffs have purposefully sought to delay resolution of the District Court case. First, Plaintiffs delayed the filing of their Complaint until August 29, 2012, some thirty days after the Decision. [Dist. Ct. Doc. 2]. Later, when the Tribe sought to intervene, rather than consenting to a request that would obviously be granted, Plaintiffs objected, causing yet another delay. [Dist. Ct. Doc. 27] Plaintiffs have also raised objections regarding the administrative record, knowing that the case would not proceed apace until the record was settled. [Dist. Ct. Doc. 49]. Finally, Plaintiffs are aware that the Court acknowledged to the parties, off-the-record, at the hearing on the injunction that the administrative record and scheduling delays were the result of a staffing issue of the Court, which is certainly not anything the Tribe would have been able to control in order to obtain a prompt ruling and avoided the necessity of litigation over an injunction.

The Tribe, on the other hand, has done all it can to obtain a timely resolution. The Tribe was allowed to intervene on January 29, 2013. [Dist. Ct. Doc. 48]. Shortly thereafter, on February 12, 2013, in an effort to avert the harm that delay would cause, the Tribe moved to accelerate the hearing date, which was set prior to the Tribe's intervention, so that the Court could rule prior to July 30,

2013. [Dist. Ct. Doc. 50]. The Court denied the Tribe's request to accelerate the hearing schedule. [Dist. Ct. Doc. 51]. Moreover, as discussed in Section C, Plaintiffs and the Court were and are simply wrong regarding the ability of the Tribe to obtain an extension from the State or other contested relief in the Eastern District Case.

C. PLAINTIFFS MISREPRESENT THE REALITIES OF THE AGREED ORDERS; THE TRIBE WOULD PLAINLY HAVE MORE TIME IN THE EASTERN DISTRICT CASE WERE IT THE TRIBE'S DECISION ALONE.

Plaintiffs devote significant time to a discussion of the Eastern District Case and the Tribe's agreements with the State of Oklahoma. [Plfs' Resp. Br. pp. 1-2, 10-11]. However, as Plaintiffs note, they are not parties to the Eastern District Case. [Plfs' Resp. Br. p. 1], nor were they involved in the negotiations with the State which resulted in the agreements. Plaintiffs assumptions about what the Tribe did, should have done, or could have done in the Eastern District Case or in its agreements with the State are rank, self-serving speculation, which absolutely misrepresent the realities of the situation.

As previously discussed in the Tribe's Emergency Motion, the first Agreed Order [EDC Dkt. 151] came on the heels of demands by the State of Oklahoma for a finite and short period of time for the resolution of the land-into-trust issue. The Tribe argued to the State that a short and finite deadline was impractical due to the vagaries of the federal process in making a determination on trust applications, a

process the Tribe had absolutely no control over. The Tribe was unsuccessful in convincing the State. Despite Plaintiffs' insinuations otherwise, the Agreed Order contained the best terms on which the Tribe could obtain agreement from the State, including the one year period for the trust acquisition. The Tribe promptly advised the Agency of the Agreed Order, its terms, and the necessity to proceed with the trust acquisition of the Parcel with all dispatch.

Plaintiffs also completely mischaracterize, and successfully urged the District Court to accept their mischaracterization of the Tribe's ability to gain extensions of the State's deadlines through additional agreements with the State in the Eastern District Case. [Plfs' Resp. Br. pp. 1, 2, 10-11]. The harsh reality of the State's position is best illustrated by the Agency's well intended but failed efforts to obtain an extension from the State on behalf of the Tribe. [See correspondence from ASIA Washburn to Okla. Att. Gen., attached as Exhibit 1]. The Agency's efforts were forcefully rebuffed by the State. [See correspondence from Okla. Att. Gen. to ASIA Washburn, attached as attached as Exhibit 2]. Contrary to the urgings of Plaintiffs that the Tribe has a self-help remedy at the ready and the District Court's misplaced reliance upon Plaintiffs urgings, the Tribe's efforts at obtaining an extension resulted only in a meager and final extension of thirty days. [EDC Dkt. 153].

The District Court erred in concluding that the harm that will directly flow from the preliminary injunction to the Tribe can be avoided by other means. In short, there are no means to avert the harm to the Tribe absent suspension of the injunction, so that the Agency can act, pending appeal.

D. PLAINTIFFS MISREPRESENT THE NATURE AND EXTENT OF CNO'S SOVEREIGNTY.

Plaintiffs go to great lengths to misrepresent the status of the historic Cherokee Nation and its treaty rights as those of the CNO, a distinct Indian tribe that was federally recognized almost three decades after the Tribe. [Plfs' Resp. Br. pp. 5, 19, 21-22]. Plaintiffs argue that because the Tribe was not "federally recognized" until it obtained its Charter in 1950, it cannot have had treaties with the United States and therefore has no "former reservation." [Plfs' Resp. Br. pp. 5, 19, 21-22]. Plaintiffs simultaneously contend that the CNO (who was not "federally recognized" until 1976) does have treaties with the United States and a former reservation. [Plfs' Resp. Br. pp. 4-5, 27, 32]. The irony of Plaintiffs argument, while apparent, appears to be lost on Plaintiffs. What is true of one, must be true of the other. Accordingly, either the CNO and the Tribe have no treaties or former reservation, or, as explained by the Agency in its Decision, they both do by virtue of having originated with the historic Cherokee Nation.

CNO's bald assertion that it "once owned and exercised governmental authority over [the Parcel], along with the rest of its treaty territory, for decades" is

absurd. [Plfs' Resp. Br. p. 27]. The historic Cherokee Nation that once exercised jurisdiction over millions of acres of land no longer exists. [Tribe's Em. Mot. and Br. p. 10-11] The CNO is not the historic Cherokee Nation and cannot claim, honestly at least, that it has ever exercised jurisdiction over the Parcel. Thus, the argument fails to support a finding of irreparable harm to the Plaintiffs.

E. The Corporation's Sovereign Immunity has been Waived.

Plaintiffs incorrectly assert that "[t]he officers of the UKB Corporation are the only ones who can waive the sovereign immunity of the corporation." [Plfs' Resp. Br. p. 30]. Plaintiffs cite no authority in support of their bald assertion. Indeed, there is no such authority. Rather, the Tribe's Constitution plainly allows for delegation to boards, such as the Corporate Advisory Board, who issued the Resolution waiving the sovereign immunity of the Corporation pursuant to an express delegation of power. [See Const. Art. V, Sec. 5, attached as Ex. 9 to Tribe's opening brief]. The only point made by Plaintiffs on this issue that is correct is that the officers of the Tribe are also the officers of the Corporation. Those officers expressly ratified the Corporation's Resolution, and thereby the waiver of the Corporation's sovereign immunity. [See Tribe and Corporation Resolutions, attached respectively as Exs. 7 and 8 to Tribe's opening brief]. Plaintiffs' argument that the Corporation has not waived its sovereign immunity so as to allow the reversal of the trust acquisition, if necessary, is not supported by the law or facts.

WHEREFORE, the Defendant-Appellant, United Keetoowah Band of Cherokee Indians in Oklahoma respectfully requests an order suspending the preliminary injunction entered below pending appeal.

Respectfully submitted,

McAfee & Taft, A Professional Corporation

s/ James C. McMillin

James C. McMillin, OBA # 17206
Tenth Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102-7103
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
james.mcmillin@mcafeetaft.com

Jessica John-Bowman, OBA # 30388
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3104
jessica.johnbowman@mcafeetaft.com

and

Christina M. Vaughn, OBA # 21390
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3104
christina.vaughn@mcafeetaft.com

*Attorney General, United Keetoowah Band of
Cherokee Indians in Oklahoma*

CERTIFICATIONS OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

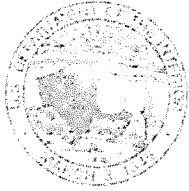
1. All required privacy redactions have been made per 10th Cir. R. 25.5;
2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, with McAfee VirusScan Enterprise 4.5.0.1270, and, according to the program, is free of viruses.
3. This digital submission was electronically transmitted on August 25, 2013 by a Notice of Electronic Filing to the following ECF registrants:

Katherine J. Barton, katherine.barton@usdoj.gov
Stephen Douglas Dodd, sddodd@dsda.com
William David McCullough, dmccullough@dsda.com
Jon E Brightmire, jbrightmire@dsda.com
Michael Todd Hembree, todd-hembree@cherokee.org
Amelia Ann Fogleman, afogleman@gablelaw.com
David E. Keglovits, dkeglovits@gablelaw.com
Barbara M. R Marvin, Barbara.marvin@usdoj.gov
Jody H. Schwarz, jody.schwarz@usdoj.gov
Christina M. Vaughn, christina.vaughn@mcafeetaft.com
Jessica I. John Bowman, jessica.johnbowman@mcafeetaft.com

s/James C. McMillin

James C. McMillin

EXHIBIT 1



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 20 2013

Mr. Scott Pruitt
Attorney General for the State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

Dear Attorney General Pruitt:

I am writing to urge you to consider extending the one-year grace period set forth in the settlement agreement between the United Keetoowah Band of Cherokee Indians (UKB) and the State of Oklahoma until the completion of the District Court litigation concerning the Department of the Interior's (Department) July 30, 2012, trust acquisition decision, or until such time as you find agreeable.

As you are aware, the UKB has been in the possession and operation of a gaming facility on a tract of land in the City of Tahlequah since 1986. The legal status of the Tahlequah parcel has been in dispute for much of this time, specifically whether the tract qualifies as "Indian land" for purposes of the Indian Gaming Regulatory Act and Federal regulatory jurisdiction. Pursuant to State court litigation concerning the UKB's legal authority to conduct gaming without State approval, the UKB and the State entered into a settlement agreement on June 8, 2012. The agreement provides that unless the Federal Government issued a decision to accept the Tahlequah parcel in trust on behalf of the UKB by July 30, 2012, the UKB would be required to cease all gaming activities at the Tahlequah casino as of that date. The settlement further provides that upon a decision to accept the land in trust, the UKB may conduct gaming operations unless the decision is withdrawn or reversed on appeal. In addition, the settlement provides a one-year grace period for the transfer of title to the United States. Therefore, if title has not been transferred on or before July 30, 2013, the UKB must cease gaming operations.

On July 30, 2012, the Department of the Interior issued a decision to acquire the Tahlequah parcel in trust for the UKB Corporation. The Department carefully considered its legal authority to make the acquisition, as well as the factual underpinnings of the application, primarily the critical role that the UKB casino serves in financing tribal government and providing employment for tribal members. Ultimately, the Department determined that the trust acquisition was necessary "[i]n order for the UKB to continue to sustain its programs and operations as a means to providing needed services and assistance to its members." This determination comports with the strong Federal policy behind the Indian Reorganization Act, incorporated by the Oklahoma Indian Welfare Act, of securing tribal homelands and advancing tribal self-determination.

On August 29, 2012, the Cherokee Nation of Oklahoma and its tribal corporation, Cherokee Nation Enterprises (collectively referred to as Cherokee Nation), filed a complaint in the United States District Court for the Northern District of Oklahoma challenging the Department's

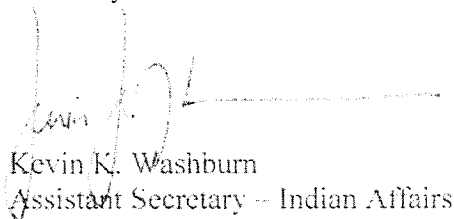
July 30, 2012, decision. The Complaint alleges that the decision violates the Indian Reorganization Act, the Administrative Procedure Act, the Indian Gaming Regulatory Act, the Cherokee Nation treaties with the United States, and the Department's land acquisition regulations at 25 C.F.R. Part 151. Following receipt of Cherokee Nation's Complaint, the Department, in accordance with its general practice at the time, voluntarily stayed the trust acquisition and agreed to provide the Cherokee Nation with 30 days written notice in advance of taking the land into trust during the pendency of the litigation.

The Department believes that the interests of the parties in this unique context should be fully resolved by the District Court before it acts to accept title to the Tahlequah parcel. The Department further believes that resolving this issue is urgent in light of the UKB's reliance on this gaming operation to provide over \$1,000,000 to tribal programs such as human services, emergency funds, housing rehabilitation, family services, education, clothing vouchers, and elder assistance. Accordingly, the Department has pursued this litigation with an underlying sense of urgency, particularly aware of the one-year grace period set forth in the settlement agreement with the State. The UKB, an intervening party, unsuccessfully filed an unopposed motion to expedite the summary judgment briefing schedule. Notwithstanding efforts to move the case forward, the District Court litigation will not be resolved until after the grace period expires on July 30, 2013.

The Department respectfully requests that the State of Oklahoma extend the grace period to allow for the conclusion of the District Court proceedings or until such time as the State finds appropriate. An extension would provide the necessary time to resolve the legal and factual issues associated with the Department's decision, while protecting the economic needs of the UKB tribal government and individual members. We welcome an opportunity to discuss this issue further and would be happy to organize a conference call with State officials, as well as the Department of Justice, and the UKB.

We appreciate your consideration of this request. If you have questions or would like to schedule a meeting to discuss the issue further, please contact Mr. Jonodev Chaudhuri, Senior Counselor to the Assistant Secretary, at (202) 208-7163.

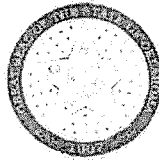
Sincerely,



Kevin K. Washburn
Assistant Secretary -- Indian Affairs

cc: Neal Leader, Senior Assistant Attorney General
George G. Wickliffe, Chief, United Keetoowah Band of Cherokee Indians

EXHIBIT 2



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

June 5, 2013

Kevin K. Washburn
Assistant Secretary - Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, DC 20240

Jonodev Chaudhuri, Senior Counselor to the Assistant Secretary
United States Department of the Interior
Office of the Secretary
Washington, DC 20240

Re: **Your request on behalf of the United Keetoowah Band of Cherokee Indians**

Dear Secretary Washburn and Senior Counselor Chaudhuri:

My senior staff and I have met to discuss your recent request. You ask that the State consider agreeing to extend the deadline established in the State's settlement with the United Keetoowah Band. As you know, this settlement was approved and adopted by the United States Federal Court for the Eastern District of Oklahoma.

To aid us as we determine whether it is in the State's interest to favorably respond to your request, my staff and I need some additional information, and I write to request that information. First, we need a more detailed explanation of the nature of the claims being litigated, and an overview of what has been filed to date, including any scheduling orders, together with your best judgment of when the matter will be resolved in the District Court. Second, we need an explanation of why the Department voluntarily stayed taking the land into trust and further agreed to provide the Appellant Tribe with thirty (30) days advance notice before taking the land into trust during the pendency of the litigation.



With this information, we will be in a better position to evaluate your request and determine whether it is in the best interest of the State to act in accordance with your request. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Pruitt", with a stylized flourish at the end.

E. SCOTT PRUITT
Oklahoma Attorney General

ESP/ab