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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS, Plaintiff, v. MICHAEL BLACK, et al. Defendants.	No. 06-2248 CM-DJW

BRIEF OF THE KICKAPOO TRIBE IN KANSAS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Kickapoo Tribe of the Kickapoo Reservation in Kansas ("Tribe"), believing that the material facts in this case justify the Court granting summary judgment in its favor, filed a Response and Cross-Motion for Summary Judgment (ECF No. 266-267) in response to the District's Motion for Summary Judgment (ECF No. 247). In its July 26, 2013 Order, (ECF No. 289), the Court dismissed the Tribe's Cross-Motion without prejudice and allowed the Tribe to re-file a Motion for Summary Judgment by Aug. 9, 2013. Pursuant to that Order, the Tribe respectfully submits this Motion for Summary Judgment and Brief in Support.

STATEMENT OF UNCONTROVERTED FACTS

Although the parties present opposite statements of facts in this case, that alone does not preclude summary judgment. 35B C.J.S. *Federal Civil Procedure* § 1165 (2013) (stating that "summary judgment does not become disfavored simply because a case is complex or even if there are some disputed facts..."). Courts make the final determination on the validity and/or existence of uncontroverted facts. *E.E.O.C. v. Lady Baltimore Foods, Inc.*, 643 F.Supp. 406, 407 (D.Kan. 1986). This Court may grant summary judgment for the Tribe as long as it believes there is no *genuine* issue of *material fact* and the Tribe is entitled to judgment as a matter of law. *Willard v. City of Kansas City*, 235 Kan. 655, 657, 681 P.2d 1067 (1984). (emphasis added.) Therefore, based upon its extensive review of the record, the Tribe respectfully offers the following summary of material and uncontroverted facts:

Tribal Water Development on the Kickapoo Reservation

1. The United States relocated the Kickapoo Tribe at least five times, a process which resulted in nine treaties with the Tribe. (Pl. Kickapoo Tribe of Kan. Sec. Am. Compl., ¶ 15, June 22, 2012, ECF No. 199 [*hereafter* "Sec. Am. Compl."] (*citing* 7 Stat. 117 (1809); 7 Stat.

130 (1815); 7 Stat. 145 (1816); 7 Stat 200 (1819); 7 Stat. 202 (1819); 7 Stat. 208 (1820); 7 Stat. 391 (1832); 10 Stat. 1078 (1854); 12 Stat. 1249 (1862).))

2. In 1832, the Kickapoo Reservation, then containing over 650,000 acres, was established in territory that is now Kansas. (*Id.* ¶ 15) (*citing* 1832 Treaty of Castor Hill, 12 Stat. 126 (1861)).)

3. After a treaty established the initial Reservation in what became Kansas, in 1832, the Tribe and the United States entered into two more treaties that first, reduced the size of the Reservation from larger than 75,000 acres to 19,200 acres, and second, opened the Reservation to allotment, and to a declaration of surplus lands and homesteading of non-allotted lands by non-Indians. (*Id.* ¶ 16 (*citing* Treaty of 1854, 10 Stat. 1078 (1854); Treaty of 1862, 12 Stat. 1249 (1862).))

4. Today, of the 19,200 acres within the Reservation boundaries, the Tribe owns 3,800 acres in trust; individual members of the Tribe own 3,100 acres in trust; and the Tribe owns 600 acres in fee. Non-Indians own the remaining 11,700 acres in fee. (*Compare id.* ¶ 17 *with* Def. Mem. Supp. Mot. Summ. J., ¶ 7 Jan. 13, 2013, ECF No. 248; *see also* Watershed Plan and Envtl. Impact Statement, Upper Delaware and Tributaries Watershed, Atchison, Brown, Jackson, and Nemaha Cntys., Kan., 11-12 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 30-31), Jan. 1994, ECF No. 248-6 [*hereinafter* "1994 Watershed Plan"].)

5. In the 1970s, the Kickapoo Tribe first began to develop its water supply. (Cadue Decl., ¶ 4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 4). Prior to that, the few tribal member homes on the Reservation depended on small, shallow wells. (*Id.*) The Tribe's early efforts led to construction of a small water intake, treatment and delivery system that is still in use today. (*Id.* ¶ 5.) This antiquated system continues to limit the Tribe's ability to

grow economically by adding commercial and industrial ventures, by supplying water to the on-reservation school, by adding housing, and by developing a more modern fire protection system. (*Id*. ¶¶ 52-57.)

6. Throughout the 1970s, 1980s and 1990s – the decades long planning effort that culminated in the 1994 Agreement to build the Plum Creek Project – the Tribe never asserted any regulatory or adjudicatory jurisdiction over the activities of non-Indians on Tribal fee lands within the Reservation boundaries because it never believed it has jurisdiction to do so. Supplemental Cadue Decl., ¶¶ 3-4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. A-1 at ¶¶ 3-4).

7. The Tribe believed, and continues to believe, that federal law deprives it of general authority to exercise its sovereignty over non-Indians on fee lands, a void which extends to any effort to condemn non-Indian fee lands both within and outside of the Kickapoo Reservation boundaries. (*Id*.)

8. In the 1970s, the engineering firm of Van Doren, Hazard and Stallings of Topeka, Kansas ("VHS") produced, and the Tribe published, a water engineering report which identified five possible sites on tributaries to the Delaware River on the Reservation for possible development as surface water storage sites. (*See* 1994 Watershed Plan, C-4.3 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 132), Jan. 1994, ECF No. 248-6.) The Plum Creek Site was chosen as the most viable site after exhaustive analysis. (*Id.* at 29-34 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 47-52), ECF No. 248-6.)

9. In the 1970s, the Tribe approached the BIA, seeking ways to secure federal financial and technical support to develop a water supply. (Cadue Decl., ¶ 4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 4).The BIA directed the Tribe to the USDA Soil

Conservation Service ("SCS") (the SCS changed its name to the Natural Resources Conservation Service in 1994 ("NRCS")). (*Id.*)

10. In the early 1980s, the Tribe began discussions with the SCS about developing the water supply on its Reservation. (Cadue Decl., ¶ 14 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 14).) As part of water supply development discussions, the Tribe inquired about its eligibility for the PL-566 Program but learned that Indian tribes could not serve as project sponsors under that version of the law, and in any event, there was already a Kansas watershed district that would have to be involved in any such project. (*Id.*)

11. After an amendment to PL-566 authorizing Indian tribes to sponsor watershed projects, *see* Watershed Protection and Flood Prevention Act, Watershed Protection and Flood Prevention Act of Dec. 22, 1981, Pub.L. 97–98, Tit. XV, § 1512, 95 Stat. 1332 (*codified at* 16 U.S.C. § 1002), the Tribe renewed its discussions with SCS, and SCS informed the Tribe that it could not serve as a sole sponsor of a PL-566 project because it did not have "control" over the entire watershed. (Letter from Joseph W. Haas, Deputy Chief for Natural Resource Projects, United States Department of Agriculture Soil Conservation Service, to John Thomas, Kickapoo Tribal Chairman (Def. Mem. Supp. Mot. Summ. J. Ex. 44), Jan. 13, 1983, ECF No. 248-10; Cadue Decl., ¶ 14 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 14).) SCS explained that sole sponsors of PL-566 projects must have the ability to secure all necessary land rights to install, operate and maintain works of improvement. (*Id.*)

12. The Tribe has always believed, and continues to believe, that federal law denies it condemnation power over fee lands owned by non-Indians. (Cadue Decl., ¶ 4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 4); Supplemental Cadue Decl., ¶¶ 3-4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. A-1 at ¶¶ 3-4).

Water Development by the Nemaha Brown Watershed Joint District Development No. 7

13. In 1958, the Nemaha Brown Watershed Joint District No. 7 (the "District") was established pursuant to the Kansas Watershed District Act. K.S.A. § 24-1201 *et seq*. (1959). The District's purposes include construction of works of improvement to conserve soil, prevent floods, and develop and use water for domestic, industrial, municipal, agricultural and recreational purposes. K.S.A. § 24-1209 (1959).

14. In 1958, the District first applied to participate in the PL-566 Small Watershed Program, but the SCS rejected their application because the District's boundaries did not conform to the hydrologic boundaries of the Delaware River watershed. (Gen. Plan Upper Del. and Tribut., Nemaha-Brown Watershed Joint Dist. No. 7, Kan., 4 (Def. Mem. Supp. Mot. Summ. J. Ex. 36 at 9), July 1978, ECF No. 248-10.)

15. In May 1975, after amending its jurisdictional boundaries to conform to the hydrologic boundaries of the Delaware River watershed, the District re-applied to participate in the PL-566 Small Watershed Program. (*Id*.) At that time, the District lacked a General Plan, and without such a plan, participation in the PL-566 Program was not possible because watershed districts in Kansas cannot participate in state cost share or federal cost share programs without a General Plan. (*Id.*, *see also* Cadue Decl., ¶ 12 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 12).

16. In 1978, the District developed and completed a General Plan under Kansas law with substantial support and input from the Tribe and tribal consultants from VHS. (Gen. Plan Upper Del. and Tribut., Nemaha-Brown Watershed Joint Dist. No. 7, Kan., 4 (Def. Mem. Supp. Mot. Summ. J. Ex. 36 at 78), July 1978, ECF No. 248-10; *see also* Cadue Decl., Ex. B-1 ¶¶ 12-13).

17. In early 1983, SCS informed the District that it could not serve as a sole sponsor of a PL-566 project, because of the presence of the Kickapoo Tribe and its Reservation in the watershed. (Memo. from Edgar H. Nelson, Director, Basin and Area Planning, United States Department of Agriculture Soil Conservation Service, to John W. Tippie, State Conservationist, United States Department of Agriculture Soil Conservation Service, 337 (Def. Mem. Supp. Mot. Summ. J. Ex. 45), Jan. 27, 1983, ECF No. 248-10.)

Joint Watershed Board Water Development

18. As neither the District nor the Tribe "controlled" the watershed exclusively, and neither working alone could commit to SCS that it had the ability to secure all necessary land rights for the Project, SCS encouraged the Tribe and the District to form a partnership for the purpose of securing sponsor status together. (*Id.*; *see also* Cadue Decl., Ex. B-1 ¶ 16).

19. In 1983, the parties formed the Joint Watershed Board, consisting of an equal number of Tribal and District representatives. (Co-Sponsorship Ag. on PL566 Structures, 48 (Def. Mem. Supp. Mot. Summ. J. Ex. 50 at 15), Mar. 28, 1983 (ECF No. 248-11); Cadue Decl., Ex. B-1 ¶ 17).

20. Over the course of the next eleven years, led by SCS and NRCS staff, the Tribe and the District worked together extensively to develop, negotiate, and finalize the parties' joint effort through regular meetings to select sites for smaller flood retention structures and appraisal level studies to determine the feasibility of constructing the multi-purpose project on Plum Creek. (Nemaha-Brown Watershed Joint Dist. #7 Annual Meeting, 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 57 at 46), Mar. 21, 1985, ECF No. 248-11.; Nemaha-Brown Watershed Joint Dist. #7 Progress Report Sept. 26. 1985 - Dec. 12. 1985, 1-2 (Def. Mem. Supp. Mot. Summ. J. Ex. 59 at 52-53), Dec. 12, 1985, ECF No. 248-11; Nemaha-Brown Watershed Joint Dist. #7 Quarterly

Meeting, 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 79 at 29), Dec. 6, 1990, ECF No. 248-13.; Nemaha-Brown Watershed Joint Dist. #7 Progress Report June 24. 1993 - Aug. 19. 1985, 1 (Def. Mem. Supp. Mot. Summ. J. Ex. 97 at 48), Aug. 19, 1993, ECF No. 248-14; *see also* 1994 Watershed Plan, 41-44 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 59-62), Jan. 1994, ECF No. 248-6.)

21. During the negotiations, both parties knew of the controlling Federal law, implementing regulations, and policy guidance documents. (*E.g.*, Letter from Gerald D. Signwill, Acting Deputy Chief for Natural Resource Projects, United States Department of Agriculture Soil Conservation Service, to John Thomas, Tribal Chairman, Kickapoo Tribe in Kansas, 1-2 (Def. Mem. Supp. Mot. Summ. J. Ex. 44 at 73-74) (Jan. 13, 1983), ECF No. 248-10. (citing Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566 *et seq.*, 68 Stat. 666 (1954) (*codified as amended at* 16 U.S.C. § 1001 *et seq.*); Water Resources Program Policy and Requirements, 40 Fed. Reg. 12,469, 12,476 (Mar. 19, 1975) (*to be codified at* 7 C.F.R. § 622.10); Watershed Projects Qualifications, 7 C.F.R. § 622.10 (1975); DEPARTMENT OF AGRICULTURE SOIL CONSERVATION SERVICE, 1992 NAT'L WATERSHED MANUAL, pt. 501, Sponsor Responsibilities § 501.20 (Dec. 1992), *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009610.pdf).)

22. The culminating 1994 Upper Delaware and Tributaries Watershed Plan contains the Watershed Agreement ("Agreement") between the Tribe, the Nemaha Brown Watershed District and other federal and state signatories, which incorporates an Environmental Impact Statement ("EIS"). (1994 Watershed Plan, 7, 41 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 27, 59), Jan. 1994, ECF No. 248-6.)

23. The Agreement (and incorporated EIS) lists the Tribe and the District as joint sponsors for the "Plum Creek Project," identified as project site 21-14. (*Id*. at iii-iv (Def. Mem. Supp. Mot. Summ. J. Ex.1 at iii, 59), *see also* Co-Sponsorship Ag. on PL566 Structures, 47-51 (Def. Mem. Supp. Mot. Summ. J. Ex. 50 at 14-18), Mar. 28, 1983 (ECF No. 248-11).)

24. The Agreement (and incorporated EIS) describes the larger multi-purpose project, 20 smaller flood retention structures, and land treatment and conservation practices as the array of projects under the Plan. (1994 Watershed Plan, at 1-2 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 21-22).) The smaller flood retention structures are connected functionally to the larger multi-purpose project; they perform soil erosion and flood control functions that benefit the larger project's life span. (*Id.*)

25. NRCS issued a Record of Decision in 1994, approving the project's compliance with the National Environmental Policy Act, and recommending authorization by the Office of Management and Budget and the Congress. (R. of Dec. Upper Del. and Trib. Watershed, Atchison, Brown, Jackson, and Nemaha Cntys., Kan., 11-16 (Def. Mem. Supp. Mot. Summ. J. Ex. 159 at 53-57), June 13, 1994, ECF No. 248-17.)

26. In the Agreement, the Tribe and the District self-identify as co-sponsors of the entire Upper Delaware and Tributaries Watershed PL-566 Project, each agreeing to use all available authorities to complete their obligations "as needed," including "the exercise of the right of eminent domain." (1994 Watershed Plan, 50 (Def. Mem. Supp. Mot. Summ. J. Ex. 1 at 68), Jan. 1994, ECF No. 248-6.)

27. Neither the Tribe nor the District is the sole sponsor or the sole beneficiary of the Plum Creek Project; the parties self-identify as co-sponsors. (Co-Sponsorship Ag. on PL566

Structures, 47-51 (Def. Mem. Supp. Mot. Summ. J. Ex. 50 at 14-18), Mar. 28, 1983 (ECF No. 248-11).)

28. The co-sponsors worked together on multiple aspects of both the entire Watershed Plan and the Plum Creek project, including the Tribe's securing of funds from the BIA to do the initial data research for the entire watershed, not just on Tribal lands or the Plum Creek project, (*See* Letter from James N. Habiger, State Conservationist, United States Department of Agriculture Soil Conservation Service, to John W. Peterson, Director, United States Department of Agriculture Soil Conservation Service, Re: PDM - Planning Authorization Request Upper Delaware and Tributaries Watershed, Kansas 457 (Def. Mem. Supp. Mot. Summ. J. Ex. 13 at 34) (May 1,1991), ECF No. 248-7), and the Watershed Board sending letters to state and federal legislators specifically in support of the Plum Creek Project. (Nemaha-Brown-Kickapoo Joint Watershed Meeting Minutes, 4 (Def. Mem. Supp. Mot. Summ. J. Ex. 72 at 28), Oct. 26, 1989, ECF No. 248-12.)

29. In their co-sponsorship agreement, both the Tribe and the District indicate that each will benefit from the construction of the multi-purpose project at Plum Creek. (Co-Sponsorship Ag. on PL566 Structures, 50 ¶ D(1) (Def. Mem. Supp. Mot. Summ. J. Ex. 50 at 17 ¶ D(1)), Mar. 28, 1983 (ECF No. 248-11).) Projected benefits include flood control, soil erosion control, water supply, recreation and water quality improvement. (1994 Watershed Plan, 65 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 83), Jan. 1994, ECF No. 248-6.)

30. In prior watershed projects, which did not come under the PL-566 Program, the District constructed water impoundments under both Federal and state cost share programs that required the District to secure an easement to the surface estate, but not the underlying fee title. (1994 Watershed Plan, C-4.4 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 133), Jan. 1994, ECF No.

248-6.). Similarly, for smaller flood retention dams (FRDs) or structures which come under the PL-566 Program, project sponsors need only acquire easements to the surface estate from private landowners. (*Id.*)

31. As the District's records reflect, the usual practice by the District was to seek only donated easements from landowners for such smaller projects. (Nemaha-Brown Watershed Joint Dist. #7 Annual Meeting, 4 (Def. Mem. Supp. Mot. Summ. J. Ex. 24 at 60), Mar. 24, 1983, ECF No. 248-8.) The District used this practice both to implement the Kansas Conservation Commission's cost share programs, and in planning FRDs for the Plum Creek Project. (*See id.* at 2, 4; *see also* Nemaha-Brown Watershed Joint Dist. #7 Annual Meeting, 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 57 at 37), Mar. 21, 1985, ECF No. 248-11.)

32. However, when a larger, multi-purpose structure is planned as part of a PL-566 project, the controlling statute, regulations and national manual dictate each sponsor's action. Watershed Protection and Flood Prevention Act, 68 Stat. 666 *et seq.*; Water Resources Program Policy and Requirements, 40 Fed. Reg. 12,476 (Mar. 17, 1975); 7 C.F.R. § 622.10; 1992 NAT'L WATERSHED MANUAL at § 501.20, *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009610.pdf. Those documents require that sponsors, when constructing a larger, multi-purpose structure, obtain more than an easement to the surface estate; they must acquire the underlying fee title or a perpetual easement. 1992 NAT'L WATERSHED MANUAL at § 501.22(d), *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009610.pdf.

33. In such instances, the controlling statute may require a sponsor of a multi-purpose project under the PL-566 Program to initiate a condemnation action, if it is necessary. 16 U.S.C. § 1002 (1956).

34. The record reflects that both the Tribe and the District as self-identified co-sponsors of the Plum Creek Project, preferred voluntary acquisitions of land in the project area, either by willing purchase or exchange. (*E.g.*, Gen. Plan Upper Del. and Tribut., Nemaha-Brown Watershed Joint Dist. No. 7, Kan., 1 (Def. Mem. Supp. Mot. Summ. J. Ex. 31 at 78), July 1978, ECF No. 248-10; Cadue Decl., ¶¶ 13 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶¶ 12-13).

35. Throughout 1991, none of the landowners in the project area opposed access when technical contractors sought landowners' permission to access their land for general survey work and to conduct subsurface geological testing to determine the stability of the subsurface at the alternate multi-purpose dam sites, including Plum Creek. (1994 Watershed Plan, 42 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 60), Jan. 1994, ECF No. 248-6.)

36. During the entire planning process leading up to the execution of the 1994 Agreement, none of the landowners in the Plum Creek Project area expressed opposition when the multi-purpose project expanded in size to include flood control and recreational benefits. (*Id.* at 19-20, 41-44 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 38-39, 59-62).)

37. During the entire planning process leading up to the execution of the 1994 Agreement, neither the District nor its Board expressed any opposition when the Plum Creek Project expanded in size to include flood control and recreational benefits. (*Id.* at 19-20, 41-44 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 38-39, 59-62).)

38. During the entire planning process leading up to the execution of the 1994 Agreement, none of the landowners in the project area ever raised objections to the Plum Creek Project, either in communications to the Tribe or to the SCS as part of the NEPA review and comment process. (*Id.* at 41-44 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 59-62).)

39. The Agreement (and incorporated EIS) expresses "assur[ance] of social acceptance" and a finding that "minimal" landowner opposition is expected. (*Id.* at 34 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 52).)

40. The Agreement (and incorporated EIS) acknowledges significant consultation and public outreach by SCS, the District and the Tribe in the form of individual interviews, presentations at public barbecues, and meetings providing a free meal that were advertised via local newspaper and radio releases. (*Id.* at 41-42 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 59-60).)

41. The Fact Sheet accompanying the Agreement (and incorporated EIS) further describes local citizens' mindset as "anxious to see the project in place." (Letter from James N. Habiger, State Conservationist, United States Department of Agriculture Soil Conservation Service, to Edward Riekert, Director, United States Department of Agriculture Soil Conservation Service, Re: PDM - Upper Delaware and Tributaries Watershed, Kansas Final Plan/Environmental Impact Statement 10 (Def. Mem. Supp. Mot. Summ. J. Ex. 148 at 56) (June 16, 1994), ECF No. 248-17.)

42. Between 1994 and 1998, none of the Plum Creek Project landowners opposed the project when Congress approved the Project's authorization for funding, and authorized NRCS to move the project into the next phases of planning, design and construction. (Letter from James N. Habiger, State Conservationist, United States Department of Agriculture Natural Resource Conservation Service, to David L. Pope, Chief Engineer, Kansas Dep't of Agriculture 205-08 (Def. Mem. Supp. Mot. Summ. J. Ex. 198 at 82-85) (Aug. 9, 2000), ECF No. 248-18.)

43. In 1998, Congressman Ryun testified in favor of the Project, stating that "[t]he project enjoys broad-based local and state support." *Land Between Watershed Projects:*

Regarding the Upper Delaware and Tributaries Watershed Project: Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation, 105th Cong. (1998) (statement of Rep. Jim Ryun).

44. Between 1983 and 2003, the entire 20 year planning process, the Tribe and the District believed that landowners favored the project and would willingly sell to the Tribe or exchange their land with other lands owned or acquired by the Tribe. (1994 Watershed Plan, at 19-20, 34, 41-44 (Def. Mem. Supp. Mot. Summ. J. Ex.1 at 38-39, 52, 59-62), Jan. 1994, ECF No. 248-6; Letter from James N. Habiger, Soil Conservation Service, to Edward Riekert, United States Department of Agriculture Soil Conservation Service, Re: PDM - Upper Delaware and Tributaries Watershed, Kansas Final Plan/Environmental Impact Statement 10 (Def. Mem. Supp. Mot. Summ. J. Ex. 148 at 56) (June 16, 1994), ECF No. 248-17; Letter from James N. Habiger, Natural Resource Conservation Service, to David L. Pope, Kansas Dep't of Agriculture 205-08 (Def. Mem. Supp. Mot. Summ. J. Ex. 198 at 82-85) (Aug. 9, 2000), ECF No. 248-18.)

45. In 2002, NRCS formally renewed its support for the Project, finding the project was still viable. (Letter from Harold Klaege, State Conservationist, United States Department of Agriculture Natural Resource Conservation Service, to Roger Bensey, Director, United States Department of Agriculture Natural Resource Conservation Service, Re: PDM - PL-566 - Upper Delaware and Tributaries Watershed Feasibility Update, 1 (Pl. Mem. Supp. Mot. Summ. J. Ex. H-1 at 63) (Apr. 22, 2002).)

46. In January 2003, Congressman Ryun visited the Kickapoo Reservation for a site visit and tour of the Plum Creek Project. (Jim Anderson, *Tribe, Ryun tour Plum Creek site*, HIAWATHA WORLD, Feb. 4, 2003, at A1 (Def. Mem. Supp. Mot. Summ. J. Ex. 207 at 103-04) (ECF No. 248-18).)

47. On that visit, Linda Lierz, the wife of District Board member Rodney Lierz and owner of property in the Plum Creek Project area, approached the Congressman with a letter of opposition to the Project. (*Id.*)

48. Ryun's visit to the Reservation was the first time that the Tribe learned of any landowner opposition. (*Id.*)

49. About the same time, Rodney Lierz was elected to the District Board, having run for the Board seat primarily in opposition to the Plum Creek Project. (*Id; see also* Linda Harvey, *Watershed board takes no action on Plum Creek*, SABETHA HERALD, Jan. 28, 2004, at A1, A10 (Pl. Mem. Supp. Mot. Summ. J. Ex. K-1 at 1-3).)

50. In response to the unexpected, sudden and unprecedented display of opposition, the Tribe requested a legal opinion from the Interior Department's Regional Solicitor's Office in Tulsa, Oklahoma, to confirm the Tribe's limited powers with respect to condemnation. (Memorandum from Field Solicitor, Tulsa, United States Department of the Interior Office of the Solicitor to Regional Director, Southern Plains Regional Office, Bureau of Indian Affairs, re: Tribal Power of Eminent Domain 1 (Mar. 10, 2003) (Def. Mem. Supp. Mot. Summ. J. Ex. 5 at 7) (ECF No. 248-7); *see also* Cadue Decl., ¶ 248 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. B-1 ¶ 248); Supplemental Cadue Decl., ¶¶ 26-27 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. A-1 at ¶¶ 26-27).)

51. In March 2003, the Regional Solicitor issued an opinion, stating that in the Regional Solicitor's opinion, the Tribe did not have the power to condemn fee lands owned by non-Indians. (Mem. from Field Solicitor, Department of the Interior to Regional Director, Southern Plains, Bureau of Indian Affairs, re: Tribal Power of Eminent Domain 3 (Mar. 10, 2003) (Def. Mem. Supp. Mot. Summ. J. Ex. 5 at 9) (ECF No. 248-7).)

52. In March 2003, at a Board meeting, the Tribe sought the approval of the District Board to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Nemaha-Brown Watershed Joint Dist. #7 Minutes Quarterly Meeting, 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 217 at 8), Mar. 23, 2003, ECF No. 248-19.)

53. At that meeting, the District "table[d] support…," in the process declining to bring the matter to a vote, and never denying its obligation to use eminent domain. (*Id.*)

54. In the Spring of 2003, in another attempt to obtain the land required for the Plum Creek Project, the Tribe opened a Land Office, and made its first formal offers to purchase Plum Creek Project lands. (Nellie Cadue Decl., ¶ 3 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1).)

55. During that time, the Director of the Tribe's Land Office, Nellie Cadue, sent a letter to all land owners in the project area soliciting negotiations and meetings to discuss land sales. (*Id.*., ¶¶ 1-4 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1); *see also id.* attach. 1 at 1-2 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, Ex. 1 at 7-9).) As part of the Tribe's effort to obtain the land, Land Office Director Cadue also sent numerous letters to individual land owners. (*E.g.*, *id.* attach. 8 at 1-22 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, Ex. 8 at 27-49); *id.* attach. 8 at 1-2 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, Ex. 7 at 24-26).) As further evidence of the Tribe's effort to obtain the land, Land Office Director Cadue met with land owners at least 21 times to discuss land transactions, conducted numerous calls, made public presentations, and attended land auctions. (*Id.* at 1-3 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, at 1-6).)

56. The Tribe was successful in acquiring one tract of land in the Plum Creek project area. (*Id.* at 3 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, at 5).)

57. In July 2003, for the **second** time, the Tribe sought the approval of the District Board at a Board meeting to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Nemaha-Brown Watershed Joint Dist. #7 Minutes Special Meeting, 1-2 (Def. Mem. Supp. Mot. Summ. J. Ex. 225 at 23-24), July 24, 2003, ECF No. 248-19.)

58. At that meeting, the District "motion[ed] not to proceed with condemnation at this time [and] to revisit the issue once the tribe has made an effort with negotiating with landowners," but never denying its obligation to use eminent domain. (*Id.* at 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 225 at 24).)

59. In October 2003, for the **third** time, the Tribe sought the approval of the District Board at a Board meeting to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Nemaha-Brown Watershed Joint Dist. #7 Minutes Special Meeting, 3 (Def. Mem. Supp. Mot. Summ. J. Ex. 232 at 44), Oct. 28, 2003, ECF No. 248-19.)

60. At that meeting, the District took no action on the tribe's request, declining to bring the matter to a vote, but never denying its obligation to use eminent domain. (*Id.)*

61. In late 2003, NRCS offered the Tribe a Project Agreement to commence next steps in the PL-566 process. (Letter from Grace N. McGrath, State Administrative Officer, United States Department of Agriculture, Natural Resource Conservation Service, to Steve

Cadue, Chairperson, Kickapoo Tribe of Kansas, re: Project Agreement 69-6215-3-03001, Multi-purpose Dam at Site 21-14, Upper Delaware and Tributaries 1016-17 (Def. Mem. Supp. Mot. Summ. J. Ex. 161 at 59-60) (ECF No. 248-17).)

62. Because the Tribe lacked condemnation powers over non-Indian landowners, as confirmed by the Regional Solicitor, and due to the Watershed Board's decision not to exercise condemnation authority, the Tribe could not sign the 2003 Project Agreement as a project co-sponsor possessing condemnation powers over all project lands, as the 2003 Project Agreement required. (*Id.)*

63. In January 2004, for the **fourth** time, the Tribe sought the approval of the District Board at a Board meeting to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Nemaha-Brown Watershed Joint Dist. #7 Minutes Annual Meeting, 2 (Def. Mem. Supp. Mot. Summ. J. Ex. 20 at 2), Oct. 28, 2003, ECF No. 248-8.)

64. At that meeting, the District stated that "no one was interested in making such a motion [to exercise eminent domain on behalf of the tribe because] [m]ore information was needed and more effort from the Kickapoos was required to convince the Board that the last resort of eminent domain had been reached," thus recognizing its obligation to use eminent domain. (*Id*.)

65. In May 2004, for the **fifth** time, the Tribe sought the approval of the District Board at a Board meeting to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Meeting Notes Nemaha-Brown Watershed Joint Dist. #7

Board and Kickapoo Tribal Council, 1-5 (Def. Mem. Supp. Mot. Summ. J. Ex. 236 at 61-65), May 20, 2004, ECF No. 248-19.)

66. At that meeting, the District was "not comfortable making a decision [on the use of eminent domain] before it had more information," in the process declining to bring the matter to a vote, and recognizing its obligation to use eminent domain. (*Id.* at 4 (Ex. 236 at 64).)

67. In June 2005, for the **sixth** time, the Tribe requested the approval of the District Board at a Board meeting to offer the Board's condemnation powers to assist the Tribe in negotiating with the Project area landowners, and to secure the land rights should actual condemnation actions need to be filed. (Nellie Cadue Decl., attach. 10 at 1 (Pl. Kickapoo Tribe of Kan. Mem. Supp. Mot. Summ. J. Ex. C-1, Ex. 10 at 53).)

68. There is no evidence in the record that the District considered the Tribe's sixth request at any District meeting.

STATEMENT OF QUESTIONS PRESENTED

1. Does the 1994 Watershed Agreement, when interpreted in context, in light of its purposes, and in accordance with federal law, unambiguously impose upon the Nemaha Brown Watershed District the obligation to exercise its eminent domain powers, "as needed", to acquire non-Indian land necessary to build the Plum Creek Project?

2. Whether commitments to enter into agreements in the future, and the use of "as needed," prevent the Agreement, signed by all of the parties, from being legally binding?

3. Assuming *arguendo* that the contract is ambiguous, does parole evidence establish that the Agreement imposes an obligation on the District to exercise eminent domain "as needed" to acquire non-Indian fee land necessary to build the Plum Creek Project?

4. Assuming *arguendo* the absence of a written obligation on the part of the District to exercise such eminent domain, is the obligation imposed by promissory estoppel?

5. Whether, in order to avoid an impairment of contract, the Tribe is entitled to specific performance of the District's obligation to exercise eminent domain "as needed"?

6. Assuming *arguendo* that specific performance is unavailable, is the Tribe entitled to an award of damages?

ARGUMENT

Summary of the Argument

The historical record in this case spans several decades, and for most of that time it was marked by a very cooperative and mutually beneficial relationship between the Tribe and the Nemaha Brown Watershed Joint District #7 ("District"). That relationship turned sour when control of the Board of Directors of the District changed hands in the early part of the 2000s, when members were elected to the Board who owned land or interests in land in the project area of the largest dam and water storage facility – the Plum Creek Project – to be built under a federally-authorized watershed project that the Tribe and the District had supported as "sponsors."

Under the Federal law controlling the construction of the Plum Creek Project, the Watershed and Flood Prevention Act of 1954, 16 U.S.C. § 1001, *et seq.*, the sponsors to a watershed plan have to be an agency or Indian tribe with authority "to carry out, maintain and operate the works of improvement"; and they must also possess the authority to "acquire, . . . by condemnation if necessary, . . . such land, easements, or rights-of-way as will be needed in

connection with works of improvement . . . ."[1] The statute's implementing regulations,[2] and national policy manual guidance,[3] all further define the roles and responsibilities of project sponsors.

The dispute in this case turns on a simple question. Did the District enter into a lengthy and complex watershed planning process with the Tribe under the Federal PL-566 Program with the obligation as a "sponsor" to use its condemnation power, *if needed*, to gain fee title to lands for the projects that would be developed under the program? The Tribe says the District did do so; District says it did not. A thorough review of the historical record in the case, in the context of the controlling federal statutory and regulatory framework, clearly supports the Tribe's interpretation and thus a ruling on summary judgment in its favor.

The Tribe and the District entered into the 1994 Agreement to secure benefits to both parties. This Agreement, when interpreted in context, in light of its purposes and controlling Federal law, unambiguously imposes on the District the obligation to exercise eminent domain

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[1] 16 U.S.C. § 1002 and §1004.

[2] The Small Watershed implementing regulation at 7 C.F.R. § 622.10, "Sponsors," requires that "(a) Watershed projects are sponsored by one or more local organizations qualifying as sponsors. All watershed plans shall be sponsored by entities legally organized under State law or by any Indian tribe or tribal organization having the authority to carry out, operate and maintain works of improvement. Those plans that incorporate the use of nonstructural or structural measures shall be sponsored by organizations that, individually or collectively, have: (1) **The power of eminent domain**, ..."

[3] NRCS National Watershed Program Manual, December (2009), § 500.11 "*Sponsor Responsibilities*: Watershed projects are sponsored by one or more local organizations. The STC [state conservationist] must require that at least one SLO of each project provide for the functions listed below: * * * **Power of Eminent Domain**—At least one SLO must have the power of eminent domain so that it may acquire real property, water, mineral, and other rights needed for the project (Pub. L. 83-566 Section 4(4)). This is not required for projects where all works of improvement are to be installed by land treatment long-term contracts. Nat'l Watershed Program Manual, 13 (December 2009), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_010704.pdf (accessed August 5, 2013)

"as needed" to acquire non-Indian fee land for the Plum Creek Project. The use of that authority is needed as the Tribe has been unable, despite its best efforts, to purchase all of the land. The District refuses to exercise that authority.

Assuming *arguendo* the Agreement is ambiguous as to the use of eminent domain, parole evidence establishes the obligation to exercise the power. Assuming *arguendo* the Agreement itself is not a contract, the District's actions created a contract under the doctrine of promissory estoppel. The Tribe is entitled to specific performance as damages are an inadequate remedy, and only specific performance will avoid an impairment of contract. Specific performance is available in the unique circumstances of this case where the land is needed for a water storage project at the only available location to make the Kickapoo Reservation a viable homeland for the Tribe and its members. Assuming *arguendo* that specific performance is unavailable, the Tribe is then entitled to an award of damages.

Summary Judgment Standard

A set of uncontroverted material facts can be gleaned from the extensive record in the case, as the Tribe set out at the beginning of the brief, above. Fed. R. Civ. P. 56, allows the Court to render summary judgment where the records and files of the case show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court instructs that summary judgment "is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *DP-TEK, Inc. v. AT & T Global Information Solutions Co*., 891 F. Supp. 1510, 1516 (D. Kan. 1995), *aff'd*, 100 F.3d 828 (10thCir. 1996) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

I. The 1994 Upper Delaware And Tributaries Watershed Plan Contains The Watershed Agreement ("Agreement"), Which Incorporates An Environmental Impact Statement, Between The Tribe And The Nemaha Brown Watershed District And Other Federal And State Signatories. That Agreement (And Incorporated EIS)

Is Unambiguous And Requires The District To Exercise Eminent Domain To Acquire Non-Indian Fee Land Needed For The Plum Creek Project.

A. The Agreement Must Be Interpreted In Context, In Light Of Federal Law And In Light Of Its Purposes.

In interpreting a contract, the court must consider the purpose for the contract and the context in which it was written. *Prenalta Corp. v. Colorado Interstate Gas Co.*, 944 F.2d 677, 688 (10th Cir. 1991) ("A contract, however, does not exist in a vacuum, its terms must be understood in light of the …**context** within which it was drawn. To determine the intent of the parties, the court must look to the instrument itself, its **purposes** and the **surrounding circumstances** of its execution and performance.")(emphasis added)*; Liberty Nat. Bank & Trust Co. v. Bank of America Nat. Trust & Savings Assoc.***,** 218 F.2d 831, 840 (10th Cir. 1955). The Restatement of Contracts provides that "words and other conduct are interpreted in the light of **all the circumstances,** and **if the principal purpose of the parties is ascertainable it is given great weight**." Restatement (Second) of Contracts § 202 (1981)(emphasis supplied). This rule does "not depend upon any determination that there is an ambiguity." *Id*. at comment a.

The parties arrived at the terms of the Agreement after a decades-long process of mutual planning to address the needs, interests and concerns of the District and the Kickapoo Tribe. Members of both the Watershed Board and the Tribe went to Washington, D.C. prior to the formation of the Joint Watershed Board in order to better understand their obligations under the PL-566 program. District Ex. 48. As an investment in the solution of both parties' water issues, the Tribe secured funding from the BIA to do the initial data research for the entire watershed, not just on Tribal lands or solely for the Plum Creek project. Fact ¶ 28. Demonstrative of its collaborative goal, the Watershed Board sent letters in support of the Plum Creek Project to Kansas federal and state legislators. Fact ¶ 28. Both parties took actions to further the Plum

Creek Project because it is a "multi-purpose" project, which would result in multiple benefits for both the Tribe and the District. Fact ¶¶ 27-29.

The Agreement was executed under the authority of PL-566, known as the Watershed Protection and Flood Prevention Act. 16 U.S.C. §§ 1001-1008. That Act authorized the Natural Resources Conservation Service (SCS or NRCS) of the United States Department of Agriculture to cooperate with States, local conservation and watershed districts and private landowners to carry out works of improvement for soil conversation and for other purposes, including flood prevention. The Agreement was officially ratified and authorized by Congress in 1998. The context of the Agreement, including applicable Federal law, makes clear that between the two sponsors there had to be adequate eminent domain authority.

First, the statute defines a "**local organization**" as "any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency **having authority under State law to carry out, maintain and operate the works of improvement**; or any irrigation or reservoir company, water users' association, or similar organization having such authority * * * ." 16 U.S.C. § 1002. (Emphasis added.) Second, 16 U.S.C. § 1004, "**Conditions for Federal assistance**," contains the following provision: "**The Secretary shall require as a condition to providing Federal assistance** for the installation of works of improvement that **local organizations shall--(1) acquire, or with respect to interests in land to be acquired by condemnation provide assurances satisfactory to the Secretary that they will acquire**, without cost to the Federal Government from funds appropriated for the purposes of this chapter, such land, easements, or rights-of-way as will be needed in connection with works of improvement installed with Federal assistance * * * ." (Emphasis added.)

The implementing regulations of the PL-566 Small Watersheds Program provide, at 7 CFR § 622.10, "Sponsors," that "(a) Watershed projects are sponsored by one or more local organizations qualifying as sponsors. **All watershed plans shall be sponsored by entities legally organized under State law or by any Indian tribe or tribal organization having the authority to carry out, operate and maintain works of improvement.** Those plans that incorporate the use of nonstructural or structural measures shall be sponsored by organizations that, individually or collectively, have: (1) **The power of eminent domain**, (2) The authority to levy taxes or use other adequate funding sources, including state, regional, or local appropriations, to finance their share of the project cost and all operation and maintenance costs. * * * (b) To receive Federal assistance for project installation, **sponsors must commit themselves to use their powers and authority to carry out and maintain the project as planned**. (Emphasis added.)

Provisions of the NRCS National Watershed Program Manual relating to the obligations of local sponsors also provide: "500.11 Sponsor Responsibilities: Watershed projects are sponsored by one or more local organizations. The STC must require that at least one SLO of each project provide for the functions listed below: Power of Eminent Domain—At least one SLO must have the power of eminent domain so that it may acquire real property, water, mineral, and other rights needed for the project (Pub. L. 83-566 Section 4(4))." Nat'l Watershed Program Manual, 13 (December 2009), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_010704.pdf (accessed August 5, 2013).

The need for a joint agreement with the District is dictated by PL-566 which requires sponsors with eminent domain authority to acquire the necessary lands for a project. Without such a local sponsor, NRCS will not enter into a project agreement and release planning funds to

begin the more detailed design and construction phases of the project. The Tribe does not have such authority over non-Indian fee lands. The Tribe's subject matter jurisdiction, and therefore its ability to exercise eminent domain, is defined by federal law. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, §7.02, 599 (2012 ed.). Well before the contract was signed, federal law clearly restricted tribal jurisdiction over non-Indians. *Montana v. United States*, 450 U.S. 544 (1981) (explicitly restricting tribal jurisdiction over non-Indians in regulatory matters); *Brendale v. Confederated Yakima Indian Nation*, 402 U.S. 408 (1989)*; Atkinson v. Shirley*, 532 U.S. 645 (2001) (restricting tribal jurisdiction over non-Indian fee-lands). *See also Cherokee v. Georgia*, 30 U.S. 1 (1831) (first espousing the principle that tribes lack authority over matters where it is inconsistent with their dependent status; the rationale for decisions such as *Montana*); *see also* Fact ¶ 51. If the Tribe had believed that it had eminent domain power over non-Indian land, it would not have needed a partner; the Tribe's knowledge of the foundational tenets of Federal Indian Law made it clear that the Tribe did not have that authority.

The 1981 Amendments to the Small Watersheds Program law, enacted as part of Pub. L. 97-98, the Agriculture and Food Act of 1981, expanded the definition of "local organization" in the PL-566 Program statute to include "any Indian tribe or tribal organization having authority under Federal, State, or Indian tribal law to carry out, maintain, and operate works of improvement." See Section 1512(a) of Pub. L. 97-98. Expanding the program to include Indian tribes as local sponsors did **not** mean that Congress expanded the condemnation authority of Indian tribes such as the Kickapoo Tribe over fee lands owned by non-Indians within its Reservation boundaries, however, or, for that matter, fee lands outside of Reservation boundaries owned by non-Indians. There is no such intent on the face of the amendment or in its legislative history.

The Agreement must be read to comply with federal law requiring at least one sponsor to have adequate eminent domain authority. *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751, 761 (2003) (court required to consider legislation in construing contracts having their source in legislation) (*citing Bennet v. Kentucky Dept. of Educ*., 470 U.S. 656, 669 (1985); *Barseback Kraft AB v. United States*, 121 F. 3d 1475, 1480-81(Fed. Cir. 1997) ("construing an agreement in the light of underlying legislation")). [4]

Further, the "parties are presumed to contract with knowledge of existing law," including all the aforementioned case law and statutes, *Ramah Navajo Chapter v. Salazar*, 644 F. 3d 1054, 1075 (10th Cir. 2011), especially since the PL-566 requirements have been functionally identical since the District applied for the program in 1975. The regulations passed in March 1975, two months before the District applied, state that "sponsors must severally or collectively have the power of eminent domain so they may acquire land …rights needed for the project." Water

[4] High level government officials issued contemporaneous interpretations of the law. *See e.g.*, January 13, 1983 letter from Joseph Haas of the Soil Conservation Service to John Thomas, Kickapoo Tribal Chairman, responding to the Tribe's letter to USDA Secretary Block that requested sole sponsorship status under the SCS' PL-566 Program to develop a watershed project. District Ex. 44. The letter states that "[t]he tribal [Reservation] land does not encompass the hydrologic watershed area, … [and] since the drainage area above the proposed structures would be from tribal and **other lands**, it would be necessary to include at least one other sponsor … ." *Id*. This is a clear statement that the Tribe lacks the requisite authority over "other lands" in the watershed to act as a sole sponsor in implementing the requirements of the PL-566 Program. Fact ¶ 11.

Copied on that letter was John Tippie, the SCS State Director in Kansas. See also the January 27, 1983 letter from Edgar Nelson, Director of Basin and Area Planning of the SCS Office in Washington, DC to John Tippie. District Ex. 45. That letter references the January 13, 1983 letter and indicates two things. First, that "since the **Tribe cannot exercise control over the contributing watershed** area" the SCS could not approve sole sponsorship of a watershed project. Second, "that any project that would involve or directly affect **Tribal lands of the Kickapoo Tribe of Kansas** would have to include the Tribe as a joint sponsor. It should be clear that any plan which would involve their lands would need to address their problems and concerns." *Id*. (Emphasis added.) Again, a very clear statement by key officials of the SCS Central Office in Washington, D.C. that the project needed eminent domain authority sufficient to acquire all lands needed for the project. Fact ¶ 17.

Resources Program Policy and Requirements, 40 Fed. Reg. 12,469, 12,476 (Mar. 19, 1975) (*codified at* 7 C.F.R. § 622.10).

Additionally, the NRCS Manual published in 1992, two years before the Agreement was signed, includes almost identical language to the 2009 Watershed Manual addressing the responsibilities of sponsoring organizations, under the regulations. 1992 NAT'L WATERSHED MANUAL at § 501.20, *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009610.pdf. Given this background the District should have understood, and by law is charged with understanding, its obligations at the time it applied for the program and when the Agreement was made.

The purposes of the Agreement also confirm the need for the use of eminent domain by the District. One of the principal purposes of the Agreement was to secure a long term, dependable water supply for the Kickapoo Tribe, in major part through the development of the Plum Creek project.[5] But that was not the only purpose. The proposed dam at Plum Creek is a multi-purpose dam that is to provide flood control, recreation, and soil conservation benefits to

[5] The Agreement and EIS reflect this mutual understanding. See, e.g.: Pages 1 and 2: Problem identification – "Lack of a dependable water supply causes economic losses on businesses and livestock producers during periods of drought. A lack of dependable water supply hampers the recruitment of businesses and industries with jobs to the [Kickapoo] [R]eservation. A lack of jobs causes tribal members to leave the reservation and their cultural ties to seek employment." Page 12: "In the 1970s the Tribe initiated comprehensive planning. * * * The studies indicate that the key to the Tribe's advancement is the development of industry to supply jobs; and the key to industrial development is a dependable water supply. Since 1975 the Tribe has developed several residential communities, a water treatment and development system, and has attracted several minor businesses. They also have established their own school system, kindergarten through high school. The Tribe's main goal now is the development of a dependable water supply for increased and sustainable industrial, domestic, and recreational uses." Page 18: Detailed explanation of the water needs of the Tribe – for economic development and employment, fire protection, drought relief, water quality, reliable potable water supply, etc. (1994 Watershed Plan, 1-2, 12, 18 (Def. Mem. Supp. Mot. Summ. J. Ex.1), Jan. 1994, ECF No. 248-6).

the entire watershed district and beyond.[6] The Agreement must be interpreted so as to meet these principal objectives.

Had the Tribe thought it could exercise eminent domain over the entire project area, it would not have needed to enter into an agreement with the Watershed District to exercise that same power. The only incentive for the Tribe to enter into the Agreement was its lack of "control" over the entire project area, as both NRCS and the Tribe recognized in 1983. Fact ¶ 18. The Tribe never had condemnation authority over non-Indian fee lands; if it had thought that it had such authority it would have simply initiated condemnation actions against the landowners in Tribal Court. *E.g.*, *Brendale*, 402 U.S. 408 (1989).

Only a tortured interpretation of the Agreement would produce the result that not only the Tribe but the District – which stands to gain significantly from the improvements in the Watershed – would be thwarted in their efforts and 20 years of planning because neither sponsor had the obligation to condemn Project lands.

B. The Agreement Unambiguously Requires The District To Exercise Eminent Domain To Acquire Non-Indian Fee Land Needed For The Plum Creek Project.

The Agreement was jointly signed, and legally adopted by all Federal, State, local and tribal parties in June of 1994.[7] It set forth an express plan to control erosion, provide drinking

[6] See Abstract of Agreement, p. I – environmental impacts include "reduced flood damage, reduced sedimentation, reduced flood plain scour, decreased terrestrial wildlife habitat, increased aquatic reservoir habitat, decreased stream aquatic habitat and improved water quality…." (1994 Watershed Plan, I (Def. Mem. Supp. Mot. Summ. J. Ex.1), Jan. 1994, ECF No. 248-6.) In addition, Kansas law provides that the existence and function of watershed districts is of benefit to all the area in the District. *Barten v. Turkey Creek Watershed Dist.*, 200 Kan. 489, 503 (1968).

[7] See page iii of the Agreement: "Whereas, there has been developed through the cooperative efforts of the sponsors and SCS a plan for resource management systems for the UDT Watershed, ... hereinafter referred to as the watershed plan/environmental impact statement, which plan is annexed to and made a part of this agreement….Now, therefore, in view of the

water and reduce flooding for the entire watershed, through the construction of 20 small flood retention dams (FRDs) and one large, multi-purpose water storage project, the Plum Creek dam and reservoir. Plum Creek is a 475 acre water surface area and 1200 acre land area, multi-use reservoir that will provide sufficient water to meet the present and future needs of the Kickapoo Reservation and its Indian and non-Indian residents and help meet the other purposes set forth in the Agreement. To accomplish these goals the Agreement had to provide for acquisition of land rights and the use of eminent domain authority over the non-Indian fee lands, and it did.

Paragraph 1 of the Agreement, at page iv, imposes a clear obligation on both parties that tracks the statute, implementing regulations and NRCS Watershed Manual requirements: the "[Nemaha Brown] Watershed District and the Tribe will acquire such land rights as will be needed in connection with the works of improvement." This obligation, and the responsibility for the costs of such land rights acquisition, are treated further on pages 49 – 53 of the EIS. On page 49 it states that the "Tribe will be responsible for the local cost of land rights for the multipurpose dam." Page 50 of the EIS defines the "land rights costs" as "direct and related costs for the right to install, operate, and maintain works of improvement. These costs include land purchases, easements, agreements, permits, and modifications of properties and utilities." The cost of land purchases is a direct cost to the Tribe. The cost of legal services in connection with eminent domain is addressed at Page 51 of the EIS, which states that "[t]he Watershed District will furnish legal services and obtain all land rights needed for installation of dams not on the reservation. The Tribe will furnish legal services and obtain all land rights needed for

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foregoing considerations, the Secretary of Agriculture, through SCS, and the sponsors hereby agree on this plan and that the works of improvement for this project will be installed, operated and maintained in accordance with the terms, conditions and stipulations provided for in this watershed plan, ..." (1994 Watershed Plan, iii (Def. Mem. Supp. Mot. Summ. J. Ex.1), Jan. 1994, ECF No. 248-6.)

installation of the dams on the reservation and the multi-purpose dam." The Tribe's obligations to pay the costs of land acquisition and to provide legal services in connection with the use of eminent domain do not imply power or responsibility to exercise eminent domain.

Responsibility for the exercise of eminent domain is covered at page 50 of the EIS which states that the "Nemaha Brown Watershed Joint District Number 7 and the Kickapoo Tribe of Kansas have the necessary authority to finance and install their portions of the planned project. This includes the . . . exercise [of] the right of eminent domain. ***They have agreed to use these powers as needed and will be responsible for excess investigation and design costs resulting from their delay or failure to do so.*"** (Emphasis added.) As noted, the benefits of the multi-purpose dam would redound to everyone in the District and it is everyone's project. The reference to both parties using eminent domain "as needed" reasonably refers to the land needed for the multipurpose dam. The 17 smaller FRDs in the project plan that are to be located and constructed off-reservation by the District typically only require easements. In the extensive planning of the project by SCS in consultation with the District, predating the Agreement, all of the 20 FRDs had preliminarily been located and the landowners had consented to the location of the FRDs on their property so that there would in all likelihood be no need to resort to eminent domain to obtain any of those easements. This language is all very clear and the parties' disagreement about the meaning of the eminent domain provision does not make it ambiguous. *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan.App.2d 932, 938, 159 P.3d 215, 220 (2007).

Eminent domain is necessary in order to acquire land needed for the Plum Creek Dam. The provision requires the exercise of eminent domain by the District in order to acquire non-Indian fee lands if they cannot be purchased. In addition, the language making the entity responsible for excess costs due to delay in exercising the powers of eminent domain has the

most plausible meaning and application in relation to the District's delay in exercising its powers of eminent domain. The 10th Circuit has held that '"contracts are to be interpreted in a way that does not render **any** provisions illusory or meaningless.'" *S & L Enterprises, Inc. v. Ecolab Inc.*, 247 Fed.Appx. 970, 974 (10th Cir. 2007) (applying Delaware law)(emphasis supplied); *North American Const. Corp. v. U.S.*, 56 Fed. Cl. 73, 82 (2003) (*citing Gould, Inc. v. Unites States.*, 935 F.2d 1271, 1274 (1991)) ("It is a well-established principle of contract interpretation that 'provisions of a contract must be so construed as to effectuate its spirit and purpose ... an interpretation which gives a reasonable meaning to **all of its parts** will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous or achieves a weird and whimsical result.'")(emphasis supplied); 17A Am. Jur. 2d Contracts § 377 ("The law of contract interpretation militates against interpreting a contract in a way that renders a provision superfluous. So far as reasonably possible, effect will be given to all the language, particularly where there is no irreconcilable conflict, and to every word, expression, phrase, and clause of the agreement.")

Both the Tribe and the District believed there was no significant landowner opposition to the project until 2003, when the membership of the Watershed Board changed and Linda Lierz first raised landowner objections. Fact ¶¶ 34-42. The Tribe had no reason to believe there would be resistance to purchasing land rights for the project. Fact ¶¶ 34-47. As the parties foresaw no opposition to the Plum Creek Project, and had no reason to believe the exercise of eminent domain power would be necessary they contracted to exercise their respective eminent domain powers "as needed".

The Agreement, when interpreted in light of the context in which it was negotiated, in the light of the authorizing legislation, taking into account the purposes to which it was directed, and

the need to give significant meaning to all its terms, unambiguously imposes an obligation on the District to exercise eminent domain as to non-Indian fee land both on and off the Reservation.

C. The Agreement Is Legally Binding.

All the essential terms of the contract were explicit and included in the 1994 Agreement. The parties expressly outlined any future documents as necessary to implement the project and perform the contract. *Idaho Timber Corp. of Kansas v. A.G. Spanos Constr., Inc.*, No. 93,270, 2005 WL 2665763 at *5 (Kan. App. Oct. 14, 2005) (stating that where "certain matters are expressly left to be agreed upon in the future, such an expectation will not prevent an agreement already made from being an enforceable contract").

Plus, the "as needed" language is sufficiently specific to form a contract. "… [I]t is not required that all terms of a contractual agreement be precisely specified, … . Rather, the agreement will be sustained if the meaning of the parties can be ascertained either from the express terms of the instrument or by fair implication." 17A Am. Jur. 2d Contracts § 190. This Court has held that "only reasonable certainty is required in a purported contract…." *Estate of Pingree v. Triple T Foods, Inc.*, 430 F. Supp. 2d 1226, 1236 (D. Kan. 2006). Language that is flexible, like the "as needed" language in the 1994 Agreement will not make a contract void or unenforceable, and in fact such language was specifically upheld in *Estate of Pingree*. *Id.* at 1236-37 (holding that "a reasonable jury could find mutual consent and reasonable definiteness as to the subject matter of the contract, *i.e.* that in exchange for life and health insurance benefits [etc.]…, Pingree would work **as needed** on accounting and investments.")(emphasis added); *see also Tsosie v. United States*, 452 F.3d 1161, 1164 (10th Cir. 2006). Likewise, that language "as needed" is enforceable here.

Kansas state courts are also reluctant to find that a contract is so vague as to be unenforceable:

> The courts will so construe an instrument as to carry the intentions of the parties into effect where possible. The law will favor upholding a contract against a claim of uncertainty where one of the parties has performed his part of the contract. A contract may contain imperfections or be lacking in detail but it will not be held void for uncertainty if the court, under the recognized rules of construction, can ascertain the terms and conditions by which the parties intended to be bound.

Hays v. Underwood, Administrator, 196 Kan. 265, 268, 411 P.2d 717, 721 (1966).

Furthermore, the parties' later actions can prove the existence of a particular agreement. *Price v. Grimes,* 234 Kan. 898, 904, 677 P.2d 969, 974-75 (1984) (*citing* Restatement of Contracts § 33 (1981)). Here, the District's five explicit demands that the Tribe meet new requirements before the District would exercise its eminent domain authority, without ever explicitly denying its obligation to exercise its eminent domain authority, is clear evidence that it knew it had such an obligation. Fact ¶¶ 52-65.

II. Assuming Arguendo That The Agreement Is Ambiguous, Parole Evidence Clarifies That The District Is Obligated To Exercise Eminent Domain.

A. Assuming Arguendo The Agreement Is Ambiguous As To The District's Obligation To Exercise Eminent Domain, Parole Evidence Can Be Introduced To Elucidate The Meaning Of The Provision Calling For The Exercise Of Eminent Domain "As Needed".

The parole evidence rule allows evidence outside the language of the contract to be used to help ascertain the meaning of an ambiguous contract. *Baum v. Great Western Cities, Inc.*, 703 F.2d 1197, 1205 (10th Cir. 1983). "To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning." *Brumley v. Lee,* 265 Kan.

810, 813, 963 P.2d 1224, 1226-27 (1998); *Allied Mutual Insurance Co., v. Moeder*, 30 Kan.App.2d 729, 732-33, 48 P.3d 1, 4 (2002). "Whether an instrument is ambiguous is a matter of law to be decided by the court." *Simon v. National Farmers Organization, Inc.*, 250 Kan. 676, 680, 829 P.2d 884, 888 (1992). In interpreting contracts, a court uses common sense and will not strain to create an ambiguity in a written instrument when one does not exist. *Eggleston v. State Farm Mut. Auto. Ins. Co.,* 21 Kan.App.2d 573, 574, 906 P.2d 661 (1995) ("We should not look for ambiguities or uncertainties where common sense tells us there are none").

If the parties reach and act upon a subsequent interpretation clarifying controversial portions of the original contract, this evidence is admissible to shed light upon the contract because the parties' actions carry substantial weight in interpreting the contract if the parties acted upon the ambiguous contract in a specific manner. *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 904, 220 P.3d 333, 341 (2009) ("Aside from the ambiguous language in Bergman's letter, the evidence establishes that part of the consideration for the referral was Oliver's continued participation); *Wichita Investors, L.L.C. v. Wichita Shopping Ctr. Assocs., L.P.*, 267 F. Supp. 2d 1049, 1054 (D. Kan. 2003).

B. The Parole Evidence In This Case Removes Any Arguable Doubt About The District's Obligation To Exercise Eminent Domain, And The District Either Knew, Or Should Have Known Of That Obligation.

Documentary evidence in the record in this case establishes that the use of eminent domain by the District to acquire land for the Plum Creek Project was required by federal law; that the Tribe lacked the necessary condemnation authority under federal law and knew that long before it entered into the 1994 Agreement; that the Tribe never communicated otherwise to the District; that the District possessed the condemnation power and that it understood that it had the obligation to exercise that power as needed. The federal requirements for the use of such

authority, and the lack of Tribal authority have been established earlier, see *supra* at § I.A., and will not be repeated here. The remaining relevant and material documentary evidence includes:

- The four affidavits submitted in support of the District's Motion for Summary Judgment by District Board President Dexter Davis, Board Members Leo Wessel and Glenn Hennigan, and former Board Member Wayne Heiniger, take the position: (1) that the Board had a longstanding policy against condemnation, (2) that they opposed the inclusion of language in the 1994 Agreement that required the use of condemnation by the Project sponsors, (3) that they asked the SCS representative Matt Sprick that the language be stricken from the Agreement and Sprick said was required in the Agreement; (4) but that Matt Sprick told them that despite the language in the Agreement the District would not be required to use condemnation if it chose not to do so; and (5) on that basis the Board approved the Agreement and signed it on May 12, 1994.

- These affidavits are in fact contradicted by actual minutes of the May 12, 1994 meeting of the District Board, which reference the visit by Matt Sprick but say nothing to corroborate the contentions in the Affidavits. The affidavits contain hearsay and are the subject of the Tribe's motion to strike filed previously (ECF No. 268).

- Matt Sprick is a long-time SCS/NRCS employee, but is not an attorney, never appeared in such a capacity when he represented the SCS/NRCS at meetings with the District Board, and as such could not be relied on for legal advice or legal interpretation by the Board in 1994 when it signed the Agreement, and cannot be relied on for legal advice or interpretation now.

- The Affidavits are also contradicted by the contemporaneous writings of Wayne Heiniger (see the next bullet) and by the statements of Dexter Davis at the meeting of the Board on May 20, 2004. *See* District Ex. 236. It is clear from the statements, writings and conduct of the Board that it never disavowed the obligation to use its condemnation authority. It is also clear that the Board repeatedly tabled the question of whether to authorize the use of the authority until the Tribe did more to attempt to negotiate with the Plum Creek landowners. *See* District Ex. 227, 232, 20, 236, [Minutes of District meetings dated 7/24/ 2003; 10/28/2003; 1/21/2004; 5/4/2004; 6/28/2005] and s Ex. 10 to Declaration of Nellie Cadue, Tribe Ex. C-1.

- The District's Exhibit 20 at p. 831 contains a **contradictory** signed statement by Mr. Heiniger made and executed shortly before the January 21, 2004 meeting of the District Board, in which he indicated that there he **would vote to use the District's condemnation authority** once the Tribe had made what he called "legitimate and premium offers to **all** landowners to purchase the required land."(Emphasis supplied);

- Mr. Heiniger also sent a letter to Board President Dexter Davis on May 26, 2004, specifying conditions under which he would vote for eminent domain. See Tribe Ex. G-1.

- The unanimous approval of the 1994 Watershed Plan and EIS by the Watershed District Board at its meeting for that purpose on May 12, 1994. See Minutes of the meeting at District Ex. 157 at 1535. The minutes reflect that Wayne Heiniger made the motion to approve the 1994 Plan and EIS, and Leo Wessel seconded the motion. NRCS representative Matt Sprick was at the meeting. The District's minutes reflect **absolutely no mention of or opposition** to the terms and language of the 1994 Plan and EIS relating to the sponsors' use of condemnation powers as needed to acquire the land rights to construct the projects works of improvement (Emphasis supplied);

- February 28, 1994 NRCS internal letter confirming that the District and the Tribe have reviewed the Draft 1994 Agreement, Plan and EIS and have no comments or corrections; Tribe Ex. I-1.

- April 18, 1994 NRCS internal letter confirming the approval of the 1994 Watershed Plan and EIS by the District, the Tribe and other Kansas and Federal partners to the project; Tribe Ex. J-1.

- The express language of the 1994 Watershed Plan and Environmental Impact Statement relating to the obligation of the project sponsors to use condemnation and other powers "as needed" to finance and secure the land rights for the Plum Creek Project. See District Ex. 1 at 50.

- January 13, 1983 letter from Joseph Haas of the Soil Conservation Service to John Thomas, Kickapoo Tribal Chairman, responding to the Tribe's letter to USDA Secretary Block that requested sole sponsorship status under the SCS' PL-566 Program to develop a watershed project. District Ex. 44. The letter states that "[t]he tribal [Reservation] land does not encompass the hydrologic watershed area, … [and] since the drainage area above the proposed structures would be from tribal and **other lands**, it would be necessary to include at least one other sponsor … ." (Emphasis supplied.) This is a clear statement that the Tribe lacks the requisite authority over "other lands" in the watershed to act as a sole sponsor in implementing the requirements of the PL-566 Program. Copied on that letter was John Tippie, the head of the SCS Office in Kansas. Fact ¶ 11.

- January 27, 1983 letter from Edgar Nelson, Director of Basin and Area Planning of the SCS Office in Washington, DC to John Tippie, SCS State Director in Kansas. See District Ex. 45. This letter references the January 13, 1983 letter on which Tippie was copied and indicates two things. First, that "since the **Tribe cannot exercise control over the contributing watershed** area" the SCS could not approve sole sponsorship of a watershed project. Second, "that any project that would involve or directly affect **Tribal lands of the Kickapoo Tribe of Kansas** would have to include the Tribe as a joint sponsor. (Emphasis supplied.) It should be clear that any plan which would involve their lands would need to address their problems and concerns." Again, a very clear statement by key officials of the SCS Central Office in Washington, D.C. that the project needed eminent domain authority sufficient to acquire all lands needed for the project. Fact ¶17.

- March 14, 2003 email from Matt Sprick of the NRCS Hiawatha, KS Field Office, to Kickapoo Chairman Steve Cadue and copied to NRCS-Salina employees Kenneth Hoffman and Jeffrey Gross. District Ex. 216. The email states in pertinent part: "We discussed potential land rights accession associated with the Plum Creek Reservoir. We discussed the Kickapoo Tribe's right of eminent domain within and outside of recognized reservation boundaries. ***The Watershed Board understands that the Kickapoo Tribe does not have the right of eminent domain for the Plum Creek Reservoir.*** **The Watershed Board discussed this subject as it relates to their right of eminent domain for the Plum Creek Reservoir.** ***The Watershed Board is aware that they have the right of eminent domain within their watershed boundaries (including the Plum Creek Reservoir).*** The Watershed Board discussed the pros and cons of eminent domain, but at this time were not ready to make a decision concerning potential exercising of their right of eminent domain." (Emphasis supplied.) This communication, as does the last, indicates the NRCS understanding and interpretation of the 1994 Agreement.

- May 28, 2003 letter from Harry Slawter, Acting Director of NRCS's Watershed and Wetlands Division, to Tribal Chairman Steve Cadue, responding to Cadue's May 2, 2003 letter to USDA Secretary Veneman. Tribe Ex E-1. Though this letter post-dates the 1994 Agreement, it clearly indicates the understanding of the NRCS [and SCS] in the years when the SCS and NRCS were involved in the PL-566 Program planning efforts with the Tribe and the Watershed District: **"It is our understanding that the Nemaha-Brown Watershed Joint District No. 7, Project Sponsor, *had the legal authority to acquire land rights with the power of eminent domain* when the plan was signed. We encourage you [the Tribe] to work with the Nemaha Brown Watershed District *in order to implement the Agreement as executed by you as the project sponsors*."** (Emphasis supplied.)

- August 22, 2003, email from Harold Klaege, Kansas State Director of the NRCS to Kickapoo Chairman Cadue, and copied to NRCS employees Matt Sprick, Jeff Gross and Ken Hoffman. The email states: "I am trying to have Jeff Gross meet with the watershed district to discuss their responsibilities to the project. We though[t] that they were going to decide to support the project at their last meeting, but just did not follow through. ***I am committed to the project and hope that we can convince the local district to follow up to their commitment.***" Tribe Ex. F-1. This communication, as does the last two, indicates the NRCS understanding and interpretation of the 1994 Agreement. (Emphasis supplied.)

- The Minutes from a mediation meeting sponsored by the Kansas Water Office on May 20, 2004. See District Ex. 236. The notes indicate that Kickapoo Chairman "Cadue stated that the ***district had agreed to use eminent domain***" as part of the original partnership between the District and the Tribe formed first in the 1980s. (Emphasis supplied.) District Ex. 236 at 1110.

- The January 21, 2004 Minutes of Annual Meeting of Nemaha Brown Watershed District Board. Chairman Cadue appeared before the Board and appealed to the Board to put up

its power of eminent domain behind the offers the Tribe had made to the non-Indian fee landowners in the Plum Creek Project area. Board member Rodney Lierz asked Chairman Cadue "how long Mr. Cadue and the tribe had known they did not possess the power of eminent domain. **Mr. Cadue stated about 20 years, but took for granted that the Watershed District would support their site.**" *See* District Ex. 20 at 2. (Emphasis supplied.)

- The actions of the Watershed District Board, circa 2003-2005, when asked by the Tribe to effectuate its condemnation authority to assist the Tribe in securing the land rights. When asked, the Board did not refuse to act on the basis that they had no such obligation under the 1994 Agreement, they repeatedly tabled the vote on the grounds that the Tribe had not made sufficient effort to acquire the project land by way of purchase or land exchange. These actions by the Board are evidence that they always interpreted the 1994 Agreement consistent with the Tribe's interpretation. See District Ex. 217, 227, 232, 20, 236, [Minutes of District meetings dated 3/21/2003; 7/24/ 2003; 10/28/2003; 1/21/2004; 5/4/2004; 6/28/2005] and see Ex. 10 to Declaration of Nellie Cadue, Tribe Ex. C-1.

- The minutes of an Annual Meeting of the Board on January 21, 2004: reflect that: "Dexter then asked again that discussion cease and stated that no one at this time was interested in making such a motion [to authorize the use of the District's condemnation power]: **More information was needed and more effort from the Kickapoo was required to convince the Board that the last resort of eminent domain had been reached.**" (Emphasis supplied.) District Exhibit 20 at 829.

- Also, at a meeting convened and hosted by the Kansas Water Office in 2004, Mr. Davis, appearing as a representative of the District Board, stated that "while he liked the idea of a lake, and he was sure he would use it, neither he nor the watershed district board felt comfortable making the decision to use eminent domain without more information." District Ex. 236 at 1110.

Contemporary facts and circumstances, and subsequent actions and statements by District Board members indicate that they did not object to using eminent domain at the time of the development of the Agreement and in fact afterwards made statements affirming their obligation to use eminent domain upon completion of efforts by the Tribe to purchase the land. The record corroborates that the Tribe was depending on the commitment made by the District throughout its long partnership with the Tribe as sponsors under the PL-566 Program. Thus, assuming *arguendo* that the Agreement is ambiguous as to the District's obligation to exercise eminent

domain, the contemporary evidence and subsequent actions of the District establish that the District has the obligation to exercise eminent domain.

III. Assuming Arguendo There Is No Written Agreement Requiring The District To Exercise Eminent Domain, Promissory Estoppel Imposes That Obligation On The District. [8]

Promissory estoppel can create contractual obligations when there is no written contract. Promissory estoppel is a doctrine by which courts view performance in reasonable reliance on a promise as sufficient to create a legally binding contract where a contract otherwise lacks consideration. *Decatur Cooperative Assn. v. Urban*, 219 Kan. 171, 179, 547 P.2d 323, 330 (1976). '"The vital principle of estoppel… is that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party.'" *Id*. (quoting 3 Williston on Contracts §533A (3d ed. Jaeger); *Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065, 1066-67 (10th Cir. 1980) ("promissory estoppel would be available under Kansas law to protect a plaintiff who has relied to his detriment.") *School-Link Tech. Inc. v. Applied Resources*, 471 F. Supp. 2d 1101, 1114 (D. Kan. 2007).

Under Kansas law, to establish a contract by promissory estoppel a plaintiff must prove a promise was made, and that: (1) the promisor reasonably expected the promisee to rely on the promise; (2) the promisee acted reasonably in reliance; and (3) refusal to enforce the promise would result in fraud or injustice. *Id.*; *Patrons Mutual Ins. Ass'n v. Union Gas System, Inc.*, 250

[8] A contract created by promissory estoppel is a contract for purposes of an action for impairment of contract. *Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740, 750 (Minn. 1983) ("We hold that the state constitution's impairment of contract clause, Minn. Const. art. I, § 11, applies to an implied-in-law obligation created by promissory estoppel.") The same rationale should apply to a cause of action under 42 U.S.C. § 1981. Under 42 U.S.C. § 1981, the ability to make and perform contracts is a protected activity. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308 (1994); *School-Link Tech. Inc.*, at 1114, *supra*.

Kan. 722, 726, 830 P.2d 35 (1992). The doctrine of promissory estoppel may also be used by a plaintiff to enforce a new provision of an existing contract that was never put in writing. *School-Link Tech. Inc.*, 471 F.Supp. 2d at 1114-15. Promissory estoppel should be available against the government and it can create an actionable contract. *Wheat Ridge Urban Renewal Authority v. The Cornerstone Group L.L.C.*, 176 P.3d 737, 744-46 (Colo. 2007) (even though specific performance could not be ordered, the renewal district's promise created a valid contract).

Here, the evidence shows that the Tribe has a valid promissory estoppel claim whether viewed as creating a separate claim or as a new provision under the existing contract. The Tribe met with the District on five different occasions over multiple years, and on each occasion the District sent the Tribe to collect more information, expend more effort, and spend more money attempting to purchase the land. Fact ¶¶ 52-65. On July 24, 2003, despite the Tribe's repeated attempts to purchase the land, the District passed a resolution not to proceed with condemnation, but to revisit the issue after the Tribe had further negotiated with the landowners. Fact ¶¶ 57-58. On January 21, 2004, the Nemaha Brown Board met and reaffirmed its understanding that it had a duty to use its eminent domain powers under the Agreement under appropriate circumstances. Fact ¶¶ 63-64. Minutes from that meeting reflect that it responded to the Tribe's request for exercise of the power of eminent domain with the statement that "more information was needed and more effort from the Tribe was required to convince the Board that the last resort of eminent domain had been reached." Fact ¶ 64.

The Board clearly indicated that if the Tribe made adequate attempts to purchase the needed land, but was unsuccessful, the Board would exercise eminent domain. Fact ¶¶ 52-68. This is a promise that the Board expected the Tribe to rely on and upon which the Tribe did reasonably rely to its detriment. The Tribe has expended time, money, and resources to more

than reasonably comply with its requirements to purchase the land. Fact ¶¶ 54-56. In April of 2003, the Tribe opened a Land Office for the sole purpose of purchasing land needed for the project. Fact ¶ 54. For two years the Tribe attempted to purchase all the land needed for the Plum Creek project offering a variety of incentives, including twice the market value of the land. Fact ¶ 55. The Tribe was only successful in purchasing one parcel of land through this project. Fact ¶ 56. On June 28, 2005, Tribal Chairman Steve Cadue sent a letter to the District requesting the District act on its obligations to enact eminent domain, and attached meticulous documentation of the efforts the Tribe had made to acquire the land by other means. Fact ¶67; Ex. 10 to Declaration of Nellie Cadue, Tribe Ex. C-1. The District never responded to that letter, and has still failed to address that request today. Fact ¶ 68. The District never, until the pleadings of this litigation, indicated to the Tribe that it did not believe it had the obligation to authorize eminent domain under the 1994 Agreement.

This is an extraordinary circumstance involving particular land necessary to provide water to the Kickapoo people, and it would work manifest injustice for the Tribe to be denied that promise. Thus, promissory estoppel requires the District to exercise eminent domain to acquire the land needed for Plum Creek.

IV. The District's Actions Constitute An Impairment Of Contract In Violation Of The Constitution, and 42 U.S.C. § 1983, Which Can Only Be Avoided By Granting Specific Performance.

A. The Tribe Is Entitled To Specific Performance Because Damages Are An Inadequate Remedy.

The Court has discretion to award specific performance where to do so would be reasonable, proper and equitable based upon the facts and circumstances of the particular case. *Dusenberry v. Jones*, 359 F. Supp. 712, 715 (D. Kan. 1972). Damages are inadequate, and specific performance reasonable here for two reasons.

First and foremost, where land is involved, damages are often inadequate. *Hochard v. Deiter*, 219 Kan. 738 (1976). Damages are an especially inadequate remedy when specific land is involved, because land is "impossible of duplication" by the award of any amount of money. Restatement (Second) of Contracts § 360, comment e (1981); *Henry v. Scurry*, 142 P.2d 717, 719-20 (Kan. 1943). In this case, the lands at issue provide the only viable location for a water storage project remaining in that portion of the watershed which drains the Kickapoo Reservation, in terms of geology, hydrology, subsurface geologic stability, and other technical factors necessary to site a reservoir of its size. Further, the 1994 Agreement, as well as the 1994 Record of Decision, concludes, after exhaustive analysis, that the Plum Creek site is the most viable water storage site on the Kickapoo Reservation. Dist. Ex. 1 and Dist. Ex. 159. Here, the Tribe has only one Reservation to make into its homeland – an area into which it was moved after losing its much larger aboriginal territory. There is one dam site which is appropriate for the purpose of ensuring the Tribe of a long term supply of water needed to make the Reservation a permanent homeland. *In Re General Adjudication of All Rights To Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 315-16, 35 P.3d 68, 76-77 (2001) (purpose of Reservation is as a homeland).

Second, in situations analogous to the situation here, where the Tribe claims damages on behalf of itself and its members which are difficult of calculation (loss of economic development, jobs, etc.), this Court has found an impairment of contract and ordered equitable relief.[9] *Mease v. City of Shawnee*, 266 F. Supp.2d 1270 (D. Kan. 2003) (equitable relief in the form of an injunction to prevent a contract impairment where money damages difficult of proof

[9] The damages suffered by the individual Tribal members stem in part from, and are related in part to, those suffered by the Tribe, but there are also individual damages suffered by Tribal members that are virtually impossible for an economist to quantify and calculate without an enormous amount of time and financial resources to accomplish the task.

or calculation and where a contract would otherwise be impaired). Under any or all of the theories, damages are an inadequate remedy and specific performance should be granted.

B. Specific Performance Is Available As A Remedy To The Tribe In The Interest Of Equity, Given The Unique Circumstances In This Case.

The Tenth Circuit has held that in a situation where the property owner acted in reliance upon actions and representations of a municipality/condemnor that made the complete loss of the owner's existing business appear virtually inevitable, the municipality was equitably estopped from terminating a pending condemnation action to avoid compensating the owner for the lost value of his property. *Piz v. Housing Auth. of the City & C'nty of Denver*, 132 Colo. 457, 471, 289 P.2d 905, 912-13 (1955). California has also required a municipality to complete eminent domain proceedings in the interest of equity. *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 334, 44 P.2d 547, 549, 559 (1935). *See also*, *Snip v. City of Lamar*, 239 Mo. App. 824, 833, 836-37, 201 S.W.2d 790, 796, 798-99 (1947) (ordering the city "to perform its contract according to the provisions thereof … [and] maintain the [river] crossing.").[10] There is law to the contrary when there is law to the contrary where no condemnation proceeding was pending. See, *Wheat Ridge, supra.*

There is no law on point in Kansas, but the Tribe maintains that the unique circumstances here call for the award of specific performance because the situation is even more extreme than in the *Piz* and *Times-Mirror* cases. In those cases the party seeking specific performance had the option of going elsewhere to operate its business. The Tribe has only one Reservation and no intentions of moving or ability to move elsewhere.

[10] When there is "continuing damage" that "seriously inconveniences" the non-breaching party, specific performance may be simpler and more appropriate remedy than damages at law. *Id*. at 837.

C. Assuming Arguendo That Specific Performance Is Unavailable, Then Damages Are Available.

Damages are available if specific performance is not available. The Tribe filed, pursuant to the Court's Order dated August 15, 2012 (Doc. 216) and Scheduling Order dated August 22, 2012 (Doc. 217), disclosures of expert witnesses and expert reports concerning the damages suffered by the Tribe as a result of the District's refusal to proceed to authorize the use of its eminent domain powers as necessary. The Tribe has established damages calculable against the District in the millions of dollars.

V. Conclusion.

For the foregoing reasons, the Court should grant the Tribe's Motion for Summary Judgment.

DATED this 9th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2013, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system that will send notice of electronic filing to the following:

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