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

(1) ALABAMA-QUASSARTE TRIBAL TOWN,	)	
Plaintiff,	)	
vs.	)	**Case No. 06-CV-558-RAW**
	)	**Judge Ronald A. White**
(1) UNITED STATES OF AMERICA, (2) SALLY JEWELL, Secretary of the United States Department of the Interior, (3) KEVIN K. WASHBURN, Associate Deputy of the Department of the Interior, (4) JACK LEW, Secretary of the Treasury, (5) MUSCOGEE (CREEK) NATION	)	
Defendants.	)	

REPLY OF DEFENDANT MUSCOGEE (CREEK) NATION
TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Defendant, the Muscogee (Creek) Nation previously filed its motion to dismiss the claims by the Alabama-Quassarte Tribal Town, concerning the beneficial ownership of more than eight hundred acres of land in Hughes County, Oklahoma. (Doc. Nos. 181, 182). The Nation presented a number of well reasoned and sound arguments in its motion. It argued that its was entitled to sovereign immunity and that such immunity had never been waived, that it was a necessary party which could not be joined, and that the Plaintiff's claims were untimely and were barred by any number of theories, including laches. (Doc. No. 182)

The Nation also showed that many of the issues raised in its motion to dismiss had previously been ruled on by this court. (Doc. No. 50). The Nation argued that the Plaintiff's latest complaint was merely an attempt to overturn the court's rulings in its previous order.

In response to the Nation's motion to dismiss, the Plaintiff has continued with arguments

which are both contradictory and confusing. It appears to rely on misstatements and exaggeration in its attempts to convince this court to overlook the fact that it did nothing for more than seventy years to have the beneficial title to this land transferred. Plaintiff continues to attack the prior rulings of this court and to argue that this court should overturn its previous rulings.

In its motion to amend to add the Muscogee (Creek) Nation, it claimed to have recently "discovered" the 1980 Tribal Resolution upon which it bases most of its claims to beneficial title. However, Plaintiff never explains how it did not know of a public document, filed of record with both the Nation and the United States, for more than thirty years. Although it claims that the 1980 Tribal Resolution is somehow a document of "title," it cites no authority for this assertion.

Perhaps most confusing is the Plaintiff's retreat from the reasons it espoused in its motion to amend to join the Nation. Plaintiff sought to amend its complaint to add the Muscogee (Creek) Nation as a party because it had an "interest" in the lands at issue. Apparently recognizing that its argument is the very essence of futility, the Plaintiff now claims that the Muscogee (Creek) Nation is not an indispensable party and its joinder is unnecessary. (Doc. No. 185, pp. 8-9). Although the Nation would disagree with the reasoning behind the Plaintiff's rather strained arguments, it does not disagree that its presence in this lawsuit is completely unwarranted.

THE NATION HAS NOT WAIVED ITS SOVEREIGN IMMUNITY

In response to its assertion of sovereign immunity, the Plaintiff continues to claim that the Nation "waived" that immunity by its participation in the administrative proceedings which grew out of this nearly ten year old litigation. Such an argument is without merit. The Nation cited well established law that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523

U.S. 751, 754 (1998). Clearly no such waiver appears in the Oklahoma Indian Welfare Act of 1936. *See,* 25 U.S.C. §503. The Act simply confirms the inherent right of Oklahoma Indian tribes to organize. *See Cheyenne–Arapaho Tribes v. Beard*, 554 F. Supp. 1, 3 (W.D. Okla. 1980).

Nor has Plaintiff shown any waiver of immunity by the Nation. Until the Plaintiff's latest complaint was filed, no lawyer had entered an appearance for the Muscogee (Creek) Nation in the nearly ten years that this case has been pending in this court. Although the Nation filed certain responses before the Office of Hearings and Appeals, *at the request of the government*, these actions alone cannot possibly be considered a waiver of its sovereign immunity.

The law of the Muscogee (Creek) Nation provides that any waiver of sovereign immunity *must be clear and express and in writing*. M(C)NCA Title 33, §1-101(a)(2007). The Nation's laws are in conformity with federal law. *See*, *United States v. Testan*, 424 U.S. 392, 399 (1976)(waiver must be "unequivocally expressed");*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

Plaintiff claims that the Muscogee (Creek) Nation has waived its sovereign immunity by seeking "affirmative relief" in this action. (Doc. No. 185 at p. 7). This purported "affirmative relief" is apparently found in a statement from the Nation in the administrative record that "respectfully requests the Interior Board of Indian Appeals to find and order the Surface Lease Income Trust is the beneficial property of the MCN and not the AQTT." (Doc. No. 185 at p. 7).

A request by the Nation that the Board of Indian Appeals merely continue with the status quo is hardly a request for "affirmative relief." Indeed, under its definitions of various forms of "relief," *Black's Law Dictionary* sets forth the definition of "affirmative relief" as "[t]he relief sought by a defendant by raising a counterclaim or crossclaim that could have been maintained independently

of the plaintiff's action." (10th ed. 2014). Such definition has been known in law since 1842. Contrary to the claims of Plaintiff, the Nation has never requested any "affirmative relief" in either this court or before the Board of Indian Appeals.

THE 1980 TRIBAL RESOLUTION DID NOT TRANSFER ANY TITLE

Plaintiff continues to rely on a Tribal Resolution from 1980 which stated that the beneficial interest "should" belong to the AQTT. Plaintiff continues to exaggerate the effect of this Resolution and continues to claim that the Resolution "transferred" title to the property. (Doc. No. 185 at pp. 8-9). Plaintiff presents no authority whatsoever to show that a Tribal Resolution has any effect whatsoever concerning the "title" to real property. Initially, the Resolution "requests" that the Secretary of the Interior "assign to the Muscogee (Creek) Nation all lands within the jurisdictional boundaries of the Muscogee (Creek) Nation which are held in trust by the United States, pursuant to the Oklahoma Indian Welfare Act." (Doc. No. 185-1). Thus, the first and foremost request was to assign the lands to the Nation. The very language of the 1980 Tribal Resolution shows that it merely "requests" that certain lands which are never identified in the document be placed in the names of the chartered towns. Nothing in the document identifies any land by a legal description, address or any other designation which would deem it to be a document of "title."

Once again, citing *Black's Law Dictionary*, a "document of title," is a "written description, identification, or declaration of goods authorizing the holder (usu. a bailee) to receive, hold, and dispose of the document and the goods it covers." (10th ed. 2014). Title is "evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." *Id.* A Tribal Resolution which does not identify even one square acre of land can hardly be deemed to fit the description of a document of "title."

Furthermore, Plaintiff conveniently omits any reference or argument concerning subsequent Tribal Resolutions which effectively repealed the 1980 Resolution and all others expressing an opinion that the beneficial interest "should" belong to the AQTT. *See*, Resolution TR 96-10 and TR 96-13. (Doc. No. 182-1, 182-2). Plaintiff cannot possibly claim that the 1980 Tribal Resolution is a document of title, and then argue that the 1996 Tribal Resolutions are not.

Plaintiff appears to argue that the Nation waited "too long" to rescind the 1980 Tribal Resolution by its passage of two separate resolutions in 1996. Plaintiff cites no authority whatsoever for this claim.

PLAINTIFF'S CLAIMS ARE BARRED BY THIS COURT'S PRIOR ORDERS

This court previously dismissed all of Plaintiff's claims for an assignment of the Wetumka Project lands. (Doc. No. 50). This court remanded the claims for an accounting to the United States defendants for further investigation and proceedings. (Doc. No. 135). The United States Department of Interior, Board of Indian Appeals issued its Final Reconsideration Decision in 2014. (Doc. No. 164-1). That decision rejected the claims of the AQTT.

In its latest pleading, the Plaintiff has basically requested that this court overturn the opinion of the Administrative Law judges, overturn its prior rulings, and enter an order requiring the Muscogee (Creek) Nation and the government to assign or transfer the beneficial title of the Wetumka Project lands to the Alabama-Quassarte Tribal Town. Indeed, the Plaintiff now claims that this court is not bound by its prior rulings. (Doc. No. 185 at pp. 11-12). However, the Plaintiff has failed to show how any error occurred in these prior rulings. Nor has the Plaintiff presented any newly discovered evidence which would warrant a reconsideration of those rulings nearly than seven years after the rulings were entered.

Plaintiff offers no explanation as to why it continues to seek an assignment of the beneficial interest when that claim was previously dismissed by this court. (Doc. No. 50). This court has already determined the Muscogee (Creek) Nation is a necessary party to litigation involving the Wetumka Project lands. (Doc. No. 50). This court already analyzed the factors under Rule 19 set out by the Tenth Circuit in *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999), and determined that the Muscogee (Creek) Nation is a necessary party which cannot be joined. (Doc. No. 50, at p. 13). Plaintiff cannot attack that ruling, nearly seven years later, by seeking to add the Muscogee (Creek) Nation as a defendant. Although Plaintiff now claims that the Nation is not a necessary party, this assertion is contradicted by the very language used by the Plaintiff that the "Muscogee (Creek) Nation may claim some right, title, or interest in and to the IIM monies or the Wetumka Project Lands." (Doc. No. 174 at p. 8, ¶19).

Finally, Plaintiff cannot over come the findings of this court that its claims are untimely. In its order of 2008, this court repeatedly held that Plaintiff's claims were time barred. (Doc. No. 50, at pp. 7-11). This court rightly held that any cause of action for the assignment of the beneficial title accrued when the lands were acquired. (Doc. No. 50, at p. 7).

Plaintiff now argues that the court's finding was incorrect because it did not "find" the 1980 Resolution until the document was produced in the administrative hearings. As the Nation noted in its motion to dismiss, this Tribal Resolution, like other Tribal Resolutions, *is a public document*. *See*, M(C)NCA Title 30, §§1-102 through 1-114 (2007). Plaintiff has never asserted that the document was somehow "hidden." Indeed, Plaintiff acknowledges that the document was "public knowledge" within the Nation. Plaintiff, as member of the Nation, can certainly be deemed to have knowledge of the Nation's laws and resolutions. *See, e.g.,Dayco Corp. v. Goodyear Tire & Rubber*

Co., 523 F.2d 389, 394 (6th Cir. 1975); *United Klans of America v. McGovern*, 621 F.2d 152, 155 (5th Cir. 1980) (plaintiffs are charged with knowledge of public records as a matter of law).

Furthermore, even if this document were somehow a "secret" and not "discovered" until recently, the Plaintiff has never offered any explanation whatsoever as to why it did nothing for more than seventy years concerning the beneficial title to the land. Since 1942 the land has been held in trust for the Muscogee (Creek) Nation. Plaintiff took no steps whatsoever in all those decades to have the Wetumka Project lands assigned to the AQTT.

CONCLUSION

This court has already determined that from 1942 until the present date, the beneficial title to the lands referred to as the Wetumka Project was never transferred to the Alabama-Quassarte Tribal Town. As it noted in its motion to dismiss, Defendant Muscogee (Creek) Nation has no answer as to why that was not done in 1942. Nonetheless, the beneficial title was never transferred and the Plaintiff cannot be heard to complain of it now.

WHEREFORE, the Defendant Muscogee (Creek) Nation requests an order of this court dismissing Plaintiff's claims in their entirety.

Respectfully submitted,

ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & FIASCO
A PROFESSIONAL CORPORATION

/s/ Keith B. Bartsch

Gregory D. Nellis, OBA # 6609
Keith B. Bartsch, OBA #22059
525 South Main Street, Suite 1500
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Attorneys for Defendant, Muscogee (Creek) Nation

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July 2015, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Eugene K. Bertman
McCormick & Bryan, PLLC
219 East Main Street
Norman, Oklahoma 73069
Attorneys for Plaintiff

John C. Cruden
Assistant Attorney General

Jody H. Schwarz
Anthony P. Hoang
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Attorneys for Defendants

/s/ Keith B. Bartsch

Keith B. Bartsch, OBA #22059

S:\Files\220\15\reply-resp-mtd-met.wpd