UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-62775-Middlebrooks/Brannon

SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

v.

LEON BIEGALSKI, as Executive Director
of the Florida Department of Revenue,

Defendant.
_____________________________________/

DEFENDANT'S REPLY MEMORANDUM IN
SUPPORT OF HIS MOTION TO DISMISS

Defendant moved to dismiss this case because claim preclusion (res judicata) prohibits the Tribe from re-litigating its claim that the Florida Utilities Tax cannot be collected from utility providers for payments they received outside the Tribe's reservations for electricity provided to the Tribe within its reservations. In the Motion, Defendant showed that the elements of claim preclusion/res judicata are present here and the case therefore should be dismissed with prejudice.

The Tribe responds by asserting that the cause of action here is not the same and therefore claim preclusion cannot apply. In its response memorandum, the Tribe's *own* characterization of the previous and current cases shows that argument is without merit. Describing the *previous* case, the Tribe admits that it alleged:

> that, if the legal incidence of the tax were determined to rest with the service provider, rather than the Tribe, **the Utilities Tax is preempted to the extent it is applied to utilities services that the Tribe uses to conduct activities that are exclusively and pervasively regulated by Federal law**.

Opposition memorandum at 5. (Emphasis added.) In characterizing the *present* case, the Tribe says:

> The Defendant imposes and collects the Utilities Tax on utilities services that the Tribe uses to conduct activities on Tribal Land that it contends to be exclusively and pervasively regulated by Federal law

Opposition Memorandum at 3. On their face, these words describe precisely the same claim in both the *previous* and the *present* cases.

The Tribe argues that claim preclusion does not apply because it has now alleged preemption based on a laundry list of statutes, rather than the three originally alleged. First, claim preclusion prohibits litigation of issues that *could* have been argued in the previous case. There is no valid reason why the Tribe would have been precluded from pleading the previous case to include all of these statutes. Indeed, the Tribe does not even try to suggest one. Because the Tribe chose to plead and argue the previous case the way it did, Judge Scola, on remand, dismissed the case rather than give the Tribe another bite at the apple by amending its pleadings and arguing exactly what it alleges in this case. The Tribe could have appealed that decision, but it did not. It is not entitled to still another bite in this case either.

Second, the Tribe claims to allege a new legal argument i.e. that the tax is preempted for uses that "constitute the exercise of its sovereign functions or the 'use' of its Tribal Land, all in violation of the Tribe's Federal rights." These arguments also could have been, should have been, and were required to have been made in the *previous* case. In fact, the Tribe argued that the tax was preempted as applied to electricity used for the provision of "essential government services" – just another way of expressing its sovereign functions; and by specific citation to the Indian Reorganization Act of 1934 in its summary judgment motion, the Tribe also made the "use of land" argument.

After engaging in the *Bracker* analysis, the 11th Circuit specifically held that this tax is not preempted. The inescapable conclusion here is that the Tribe is trying in this case to re-litigate the claims it lost in the previous case.[1] It is barred from doing so by claim preclusion.

In an effort to skew the legal analysis of the claim preclusion question in its favor, the Tribe states that questions of law are to be liberally decided in favor of the Tribe. This is a misstatement of what is known as the "pro-Indian canon." That canon applies to the interpretation of ambiguous statutes passed for the

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[1] Even if in tax *refund* cases each tax year is a separate cause of action, there is no refund claim here because it would be barred by the 11th Amendment. This case (and the previous case) are only suits for prospective declaratory relief. The same relief is sought in both cases – a declaration that the tax is preempted. The Tribe's reference to refund cases is inapposite.

benefit of the tribes. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)(statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.) The rules of claim preclusion, however, apply to the Tribe just like every other litigant, and they clearly apply here.

The Tribe's Complaint mischaracterizes the previous case and then argues that those are factual allegations that have to be accepted by this court on a motion to dismiss.[2] In the previous case, the Tribe did *not* seek a declaration that the legal incidence of the tax was on the Tribe but rather whether the tax is preempted – the legal incidence is only an element of that analysis. In other words, a tax is preempted if it is incident upon a Tribe on tribal lands. The Tribe argued *Bracker* in the alternative and the 11th Circuit ultimately ruled based on its own *Bracker* analysis, the same preemption analysis the Tribe seeks here.

The Tribe does not quarrel with the Eleventh Circuit's holding that the Utilities Tax is not preempted as a matter of law, as applied to all utilities services that the Tribe uses on Tribal Land, simply because some of those services are used to conduct Federally regulated activities. Those uses were broken down into three

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[2] Although it is true that factual allegations must be accepted as true for the purposes of a motion to dismiss, in this case Defendant asked the court to take judicial notice of the file in the previous case without objection from Plaintiff. As set forth in Defendant's Motion, the court can use documents judicially noticed in determining a motion to dismiss.

categories – essential government services, gaming, and land. But an inspection of the Tribe's allegations in this case shows that all of the statutes and uses are within those categories, and the Tribe even includes in the list the same three statutes it relied on in the previous case – ISDEAA, IGRA, and IRA.

Invocation of the Eleventh Circuit's holding in the previous case with respect to the rental tax is inapposite. There the court found that tax preempted based on specific language in the IRA and a prohibition of such a tax by Secretarial regulations. No such statutory or regulatory language is cited here.

In both the *previous* and *current* cases, the Tribe seeks a declaration that the Utilities Tax is preempted to the extent it is applied to utilities services that the Tribe uses to conduct activities that are exclusively and pervasively regulated by Federal law. Adding more specific citations to a laundry list of statutes that easily could have been pled previously rather than the three relied upon in the previous case and suggesting a new legal argument, do not prevent the application of the rules of claim preclusion. The issue is the same and the citations to the new statutes and the argument about tribal sovereignty could have been, should have been, and were required to be, pled in the previous case. Claim preclusion rules are designed to prevent the type of claim splitting and second or third bites of the apple the Tribe is attempting in this case.

Finally, the Tribe points to language in the 11th Circuit opinion and that of Judge Scola's order dismissing the case, as limiting the holding in some way. However, the previous case was not dismissed "without prejudice" and the 11th Circuit did not remand with instructions to engage in the *Bracker* analysis. The District Court commented in its dismissal order that footnote 22 in the appellate opinion is a **minor** limitation on the 11th Circuit's holding. Given this characterization, it cannot be construed as one that would allow the Tribe to avoid well established principles of claim preclusion and re-litigate the preemption issue.

In any event, this argument is a red herring. What matters is not the scope of the issues adjudicated in the in the previous litigation—an element of collateral estoppel, *not* res judicata—but rather whether this case arises from the same nucleus of operative facts—i.e., that the state taxes the gross receipts to the utilities from electricity that the Tribe consumes on tribal lands. The Tribe does not dispute, nor can it, that this practice was the focus of its previous lawsuit. The Tribe does not dispute, nor can it, that the only difference between this suit and the previous one is the addition of a bevy of new legal theories to challenge that same taxation. And the Tribe does not dispute, nor can it, that the Eleventh Circuit has previously applied res judicata to subsequent suits against a state official for the same ongoing conduct when the subsequent suit is essentially a do-over offering new legal theories. *See* NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (second

suit seeking injunctive and declaratory relief against flying confederate flag over state capitol on new legal theories barred by res judicata).[3] Indeed, Hunt shows that the Tribe's central premise in its response—that "[r]es judicata cannot apply to a request for only prospective declaratory relief," Opposition Memo. at 8—is incorrect.

The Tribe could have and should have raised its additional legal theories before. It argues that claim preclusion should not be applied here because it would be a "manifest injustice, but there is nothing unjust about applying settled res judicata principles to a sophisticated entity with experienced counsel that seeks to re-litigate its claim with different legal theories just months after losing its previous case. This case should be dismissed with prejudice.

Respectfully submitted this 3rd day of February, 2017.

PAMELA JO BONDI
ATTORNEY GENERAL

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[3] Although Hunt applied Alabama law, whereas federal res judicata principles apply here, both define the cause of action by reference to "the same nucleus of operative facts." Baloco v. Drummond Co., 767 F.3d 1229, 1246-47 (11th Cir. 2014); Hunt, 891 F.2d at 1560; see also Taylor v. Sturgell, 553 U.S. 880, 891 (2008) (providing that federal law supplies claim preclusion principles to prior federal court judgment on federal question).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on February 3, 2017 to:

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