ATTACHMENT

Ute Indian Tribe v. The United States of America

Case No. 1:18-cv-00357-RHH
Senior Judge Robert H. Hodges, Jr.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION *Plaintiff*, v. THE UNITED STATES OF AMERICA, *Defendant*.	Case No.: 1:18-cv-00357-RHH Senior Judge Robert H. Hodges, Jr.

[PROPOSED] PLAINTIFF'S SURREPLY IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS

Plaintiff, Ute Indian Tribe of the Uintah & Ouray Reservation ("Tribe"), presents this surreply to address three instances where Defendant raised new arguments for the first time in its reply (ECF No. 21).

INTRODUCTION

In its Response Brief in this matter, the Tribe defeated every argument that Defendant put forward for dismissal, and so Defendant has now come back with a reply brief in which it seeks to raise numerous new arguments. Its new arguments are no better than its old arguments.

The Executive Branch has sold or leased lands for which the United States is, by act of Congress, required to provide the proceeds from the sale or lease to the Tribe. The United States has no argument to the contrary, and so it has consistently sought to change re-write the Tribe's complaint and the Tribe's argument. To set up its straw-man argument, Defendant goes so far as to re-word quotes from the Tribe's response brief to fit the United States' mischaracterization of the claims. E.g. U.S. Reply at 16.

The Executive argument in its reply brief is analogous to a real estate broker telling a homeowner that, over the homeowner's objection, the broker is going to sell the homeowner's house but that the broker promises to give the homeowner the proceeds from the sale. Then, instead of selling the house the broker rents out the house to others. When the homeowner complains, not about being forced to sell but only about not being given the money from the sale, the broker says, "I told you a long time ago that I was going to sell your house, so you cannot complain." In this case, the homeowner is seeking the rent that the broker is receiving, and the Executive Branch's response that it told the Tribe a long time ago that it was going to sell the Uncompahgre and give the Tribe the proceeds does not defeat the Tribe's claim for the rent that the United States has been receiving.

The Executive Branch also asserts that because it sold a different house prior to 1945, and (only after being sued) it paid the Tribe the money for that house; or because it had also sold the Tribe's cars and (only after being sued) it paid the Tribe for those cars, the Tribe cannot bring a claim for the stolen rent money. It even asserts that because (only after being sued) it provided the Tribe with an accounting for the cars, it does not have to even provide an accounting for the rent it has been stealing.

And the above analogy then does not even take into account the Tribe's primary complaints that all of the Executive Department actions are in violation of federal statutes, and that in the 2012 settlement the Executive Branch promised that it would comply with the existing acts of Congress. In fact, the *quid pro quo* to the Tribe in the 2012 settlement included that the United States agreed it *would* comply with federal law on a forward-going basis, and the United States expressly acknowledged that the Tribe was *not* waiving any claims for Executive Branch violations after

2012. If Defendant wants to stop being sued for violating federal law, it should start complying with that law. It needs to provide the Tribe the compensation from the land.

I. ONLY CONGRESS CAN TAKE A TRIBE'S RIGHT TO COMPENSATION FROM LAND TO WHICH CONGRESS GAVE THE TRIBE RECOGNIZED TITLE.

In its reply brief, the Executive Branch seeks to raise a new argument, not presented in its opening brief, to attempt to evade the Tribe's legally correct analysis of the existing federal statutes. The Executive Branch now argues that even though, as relevant to this argument, the United States concedes that the Tribe has compensable title under existing federal statutes, the Executive Branch's own subsequent misinterpretation of the 1880, 1897, and 1934 Acts prevents the Tribe from recovering money that the United States has been taking from the Tribe's surplus lands. The Executive Branch's new argument is incorrect, because only Congress can take a Tribe's recognized title. Recognized title is compensable title, and creates the statutory right to the compensation from sales or uses of that land. Tribe's Resp. Br. at 8 (citing numerous cases). The United States concession regarding the correct interpretation of the existing acts of Congress is therefore fatal to its new argument.

The Executive Branch cites two cases for its new argument, but neither supports its argument. Defendant cites *Rosales v. United States, 89 Fed. Cl. 565* (2009) for its assertion that the Executive Branch took the Tribe's right to all sales and uses of the Tribe's surplus lands once the United States began misinterpreting the 1880, 1897, and 1984 Acts as removing the Tribe's beneficial interest in the unallotted Uncompahgre Reservation lands. *Rosales*, however, is easily distinguishable from the case at hand. Most importantly, in *Rosales* the land alleged taken was not recognized title, i.e. "tribal property that has been formally acknowledged by Congress through treaty or statute." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.04, at 1004 (Nell Jessup Newton ed., 2012). Instead, the parcel at issue was land that private landowners had simply deeded

to "[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood . . . ." *Rosales*, 89 Fed. Cl. at 574.

Defendant also cites *Ariadne Financial Services Party v. United States*, 133 F.3d 874 (Fed. Cir. 1998), but that case is similarly unavailing. In that case the plaintiff was seeking "compensation for a repudiation of a contract that promised continuing performance." Reply at 6 (quoting *Ariadne Financial Services Party*, 133 F.3d at 879-80) (emphasis added). While a party can repudiate its obligations set in a contract, a party cannot similarly repudiate its obligation to comply with federal law.

As the Tribe discussed in more detail in its response brief, the Executive Branch's dispositive error in its motion is that the Tribe has recognized title to the Uncompahgre Reservation, and "only Congress may divest an Indian tribe of its recognized title to Indian land."[1] Tribe's Resp. Br. at 8 (citing numerous cases). Defendant ignores this fundamental principle of Indian law. In fact, Defendant asserts that the actual congressional intent of the 1880, 1897, and 1984 Acts are irrelevant to its argument. Defendant now asserts, without any supporting case citation, that regardless of what those acts provided, the Tribe's right to the proceeds from sales of the land were taken by the Executive Branch after it at some point "*interpreted* the statutes as removing any beneficial interest for the Tribe." Reply, ECF 21 at 4. Defendant misconstrues the role of the Executive Branch. "After all, it is the prerogative of the judiciary 'to say what the law is.'" *Aqua Prods. v. Matal*, 872 F.3d 1290, 1324 (Fed. Cir. 2017). Only Congress, via the enaction of law, can take a tribe's recognized title. And only the judiciary can determine whether or not an applicable act served to actually take a tribe's recognized title.

[1] Although most cases concerning the abrogation of recognized title address treaty-recognized title, statutory-recognized title is treated the same. *United States v. Felter*, 546 F. Supp. 1002 (Dist. Utah 1982) ("the courts have treated recognition through treaty or statute as having equal force.").

The Defendant has an ongoing duty to comply with the 1880, 1894, and 1897 Acts, and the cases it cites simply do not support its new assertion that its misinterpretation of the act of Congress is outside the scope of this Court's jurisdiction. The Executive Branch could not take the Tribe's right to receipt of the proceeds from the sale or use of the Tribe's surplus land in violation of federal statute. The surplus Uncompahgre Reservation lands remain surplus lands unless and until disposed of in accordance with the applicable law.

II. THE 1965 SETTLEMENT AGREEMENT DID NOT WAIVE THE TRIBE'S TAKINGS CLAIM FOR ALL SURPLUS LANDS WITHIN THE UNCOMPAHGRE RESERVATION.

In its motion to dismiss, Defendant argued that the 1965 Settlement Agreement settled all of the Tribe's claims for just compensation for all surplus lands properly disposed of "after 1897, but before the 1946 ICC claim date." Opening Br. at 25. Those lands totaled approximately 400,000 acres out of the approximately 1,900,000 acres within the Uncompahgre Reservation. The Tribe succinctly responded to that limited argument regarding property disposed of before 1946, by noting it was a non-issue because the Tribe's own complaint excluded claims for compensation for those sales.

In its Reply Brief, Defendant seek to change to a different, much broader argument. It now asserts the 1965 Settlement Agreement waived the Tribe's takings claim for *all* 1,900,000 acres within the Uncompahgre Reservation. After it changes to that new argument in its reply brief, Defendant audaciously chastises the Tribe because the Tribe "gives no reason for" limiting its response brief to the 400,000 acres sold prior to 1946. Reply at 10. The Tribe did give a reason. The reason was that Defendant's argument in its opening brief was limited to the 400,000 acres. This Court could deny Defendant's new argument because it was simply not raised in the opening brief, but the Tribe's view is that the Court should consider it, and the argument below, and then

reject Defendant's new argument. Nothing in the 1965 Settlement Agreement settled such a broad claim.

Defendant's new argument is based upon its plain misstatement of the Tribe's 1951 complaint, which led to the settlement in 1965. The Tribe's 1951 complaint actually shows the exact opposite of what the Defendant now asserts—it shows that the Tribe understood that the United States had not taken most of the Uncompahgre Reservation, but that the United States had taken about 400,000 acres of the 1,900,000 acre Uncompahgre Reservation. Paragraphs 9 and 10 of the 1951 complaint defines the approximately 400,000 acres the United States had disposed of prior to 1946. In paragraph 12 of that complaint, the Tribe expressly sets out its takings claim, and in doing so it expressly states that the claim is for the approximately 400,000 acres, distinguishing those from the remaining lands (which the Tribe did not claim the United States had taken from the Tribe). 1951 Compl. ¶12. Defendant constructs its contrary argument by quoting paragraph 12 of the 1951 complaint and then improperly asserting or implying that the claim was for all 1,900,000 acres. The 1951 complaint is clearly contrary to the Defendant's new argument.

Additionally, the Tribe's 1951 complaint was filed under a statute that provided jurisdiction for claims by tribes that the United States had taken tribal land, and the sole remedy was monetary compensation for the taking. *E.g., Osage Nation of Indians v. United States*, 1 Ind. Cl. Comm. 54, 82, *rev'd on other grounds*, 97 F. Supp. 381 (Ct. Cl. 1951). The Tribe ultimately settled its 1951 claim for the federal taking of the portion of the Uncompahgre that is *not* at issue in this case, with the United States providing compensation for that taking. But by the same token, the Indian Claims Commission did not provide compensation for the larger part of the Uncompahgre that the United

States had not taken and could not take without congressional approval.[2] Claims regarding payment for surplus lands disposed of after 1946 were not settled by the 1965 Settlement Agreement.

The United States next argues that if the Tribe's takings claim was limited to the 400,000 acres (which it was, as discussed above), the Court should then reimagine the other claims in the Tribe's 1951 complaint for other wrongs as if they were claims for taking of the remaining 1,500,000 acres. This Court must reject that argument. Simply, the Tribe did not, as the United States now asserts, plead one takings claim with clarity and specificity, and then plead a second takings claim in some different roundabout way. The Tribe pled its takings claim as a takings claim. The claim was simply limited to 400,000 acres, and the fact that the United States now wants to keep all the money it has been receiving from the Tribe's surplus lands is not a sufficient basis to engage in convoluted interpretation of non-takings claims as if they were takings claims. For example, the Tribe's claim that the United States failed to provide an adequate reservation for the future support of the Uncompahgre Band simply referred to the inadequacy of the Uncompahgre Reservation, i.e. it was a desert wasteland, not a land on which one can live. The Uncompahgre Reservation was so "bare and unproductive" that Band members chose to relocate to the Uintah Valley Reservation. Ex. 4 to Mot. to Dismiss ¶ 11.[3] Similarly, the Tribe's claim that the United States failed or refused "to provide any reservation for said Indians in accord with the

[2] If Defendant's interpretation of the 1951 settlement were correct, some of the Tribe's claims in this case could be restated, through a motion to amend the complaint, as more legally complex claims based upon breaches of trust responsibilities or breaches of related federal obligations to the Tribe. The Tribe does not believe that will be needed, but if it were the Tribe would request leave to amend.

[3] The Uncompahgre remains virtually uninhabited. There is only one census area on the Uncompahgre Reservation, and in the most recent decennial census that census area, Bonanza, had a population of 1.

purposes of [the 1880 Act] as exemplified by the reservations granted other bands in that agreement" (emphasis added) does not broadly waive the Tribe's interest in the surplus lands. The express purpose and requirement of the 1880 Act was that as the quid pro quo for forcibly evicting the Tribe from its usable reservation lands in Colorado, the Act required the United States to relocate the Tribe to other arable lands, in Colorado if possible or in Utah. There was arable land available in Colorado and in Utah, but instead the United States moved the Tribe to a rocky desert in Utah. Thus, while the United States set aside a reservation in compliance with that provision of the 1880 Act, the Tribe had a strong claim that the United States had not acted fairly and honorably in accord with the purpose of that Act. Additionally, the Tribe's claim that the United States failed to maintain the Uncompahgre Reservation "as a reservation for said Uncompahgre Utes," is also not an oblique way of stating a takings claim for the other 1,500,000 acres. It is at most addresses the fact that the United States opened the Reservation, allowing non-Indians to enter and settle on land within the reservation.

In short, the 1965 Settlement Agreement did not settle the Tribe's claims to all surplus lands within the Uncompahgre Reservation, but only those that had been disposed of under the public land laws between 1897 and 1946.

III. THE TRIBE'S BREACH OF TRUST CLAIMS WERE EACH, AT LEAST IN SUBSTANTIAL PART TOLLED BY THE ITAS, AND THEREFORE DEFENDANTS' NEW ARGUMENT REGARDING THE ITAS IS NOT A BASIS FOR DISMISSAL OF ANY CLAIM.

Defendant newly argues that the Indian Trust Accounting Statute (the "ITAS") only covers claims regarding trust funds, not those involving trust assets, and that the Tribe's breach of trust claim involves assets that are not even held in trust. The Court need not consider that new argument in the current context because, even if it were correct (which it is not) it is not the basis for dismissal of any *claim*. A substantial portion of the Tribe's breach of trust claim involves trust funds and is plainly covered by the ITAS.

The ITAS tolls the statute of limitations for "any claim . . . concerning losses to or mismanagement of trust funds." Pub. L. 113-76, §1 Div.G, Title I, 128 Stat. 5, 305-306 (2014). While "mismanagement of trust funds' plainly covers a breach of fiduciary duty in the management of money already received in the trust," the phrase "losses to . . . trust funds," includes losses resulting from the Government's failure to deposit monies derived from trust assets into a tribe's interest-bearing trust accounts. *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348, 1350 (Fed. Cir. 2004).

A primary part of the Tribe's breach of trust claim is that Defendant failed to deposit monies derived from the surplus Uncompahgre Reservation lands into a trust fund account. A claim regarding the United States failure to deposit trust funds into a trust account is plainly included within the ITAS' tolling provision. Defendant incorrectly asserts that that because it did not place the funds from sales and uses of the land into trust accounts, the revenues at issue cannot be considered "trust funds" under the ITAS. This Court is free to deny such underdeveloped arguments that leave the Court and the Tribe to guess at the argument or develop the arguments for Defendant. *E.g., SmithKline Beecham Corp. v. Apotex Corp*., 439 F.3d 1312, 1320 (Fed. Cir. 2006). In any case, the argument is contrary to the plain language and intent of the ITAS.

Defendant also asserts that the Tribe's claim does not fall under the tolling provisions of the ITAS because the Tribe's challenge concerns Defendant's treatment of public lands and the Defendant's failure to pay the Tribe revenue generated from those lands is merely a harm stemming from that treatment. Once again, Defendant has an ongoing legal obligation pursuant to the 1880, 1894, and 1897 Acts to pay the Tribe whenever it disposes of land or resources from the Uncompahgre Reservation surplus lands. Each time Defendant fails to do so, it is breaching its trust responsibility to the Tribe.

Next, Defendant makes a new assertion that the funds derived from the surplus lands are not "trust funds," and thus are not covered by the ITAS because "the Tribe itself argues that the missing or delinquent payments do not constitute 'trust funds.'" Reply, ECF 21 at 14. Adding this type of openly fallacious argument in a reply brief is exactly why surreplies exist—the only slight hope that such an argument could work is if it can be made in a brief to which the opposing party does not get to respond. Defendant here is transparently equating apples and oranges--equating the phrase "trust fund" as used in the ITAS with the very different, very specific definition contained in the 2012 settlement. Independent from the above flaw, Defendant is plainly incorrectly arguing that the Tribe also equated apples and oranges. The Tribe's argument was a careful and detailed discussion of the trust fund accounts that were specifically identified in an attachment to the 2012 settlement. The Tribe has never argued that the funds derived from the surplus lands do not constitute "trust funds" under the ITAS. While the Tribe's response included an argument regarding the definition of "trust funds" as used in the 2012 Settlement Agreement, the Tribe never asserted that the definition of "trust fund" in the 2012 Settlement Agreement was the same as that used in the ITAS, and the Tribe's discussion of the 2012 settlement shows that the two are very different.

For the foregoing reasons, Defendant has still not asserted a valid argument for why the ITAS cannot apply to the Tribe's breach of trust claim.

IV. NEITHER PARAGRAPH 4(B)(3) OR 4(D) OF THE 2012 SETTLEMENT AGREEMENT WAIVED THE TRIBE'S BREACH OF TRUST CLAIMS REGARDING DEFENDANT'S MISAPPROPRIATION OF FUNDS.

In its motion to dismiss, Defendant pointed to several provisions in the 2012 Settlement Agreement which it argued waived the Tribe's breach of trust claims regarding Defendant's misappropriation of revenue derived from the surplus lands of the Uncompahgre Reservation. The Tribe responded detailing why those provisions did not waive the claims at issue in this case. In

making this argument, the Tribe provided a correct, and very detailed discussion of how the parties defined and expressly limited the term "trust funds" in the 2012 Settlement Agreement and in the 2006 complaint which initiated the proceeding and first defined the term for the purposes of that proceeding. In short, the Tribe showed that Defendant's argument was contrary to the clear text of the settlement. Notably, in its reply, Defendant does not set forth a different definition of trust funds, nor does it disagree with the Tribe's careful, lengthy discussion of how "trust funds" is defined in 2012 Settlement Agreement. Instead, Defendant appear to abandon the overbroad, defeated argument from its opening brief, and it now tries to shift to new arguments based upon two other provisions in the 2012 Settlement Agreement that it now claims waives the Tribe's breach of trust claims.

Unfortunately for Defendant, its new argument is no better than its old argument. Neither Paragraph 4(b)(3) nor 4(d) of the 2012 Settlement Agreement waive the Tribe's breach of trust claims related to Defendant's failure to pay the Tribe for monies derived from the surplus lands of the Uncompahgre Reservation. In its reply, Defendant never posited any theory for how these provisions waived the Tribe's breach of trust claims related to Defendant's failure to pay the Tribe for monies derived from the surplus lands of the Uncompahgre Reservation. Rather, Defendant simply quoted these provisions and then concluded that, *ipso facto* all of the Tribe's breach of trust claims were waived. This Court is free to deny such undeveloped arguments. *E.g., SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). If the Court were to consider Defendant's assertions, it would see from the plain language of these provisions that they do not waive the Tribe's pre-2012 breach of trust claims regarding Defendant's failure to deposit monies derived from the surplus lands.

Paragraph 4(b)(3) waives claims that "[t]he United States failed to *record or collect*, fully or timely, or at all, rents, fees, or royalties, or other payments for the transfer, sale, encumbrance, or use of Plaintiff's non-monetary trust assets or resources." While this provision waives pre-2012 claims that the Defendant failed to collect certain monies, those are not monies the Tribe is seeking in this case. Yet again Defendant is expansively interpreting the Tribe's claim and then making a motion to dismiss a *claim* based upon an argument that judgment cannot be issued on one part of a claim, based upon its own expansive interpretation. The prior settlement does not address claims that Defendant failed to *pay the Tribe* for monies it collected from the surplus lands. Part of the Tribe's breach of trust claim is that Defendant failed to deposit monies derived from the surplus Uncompahgre Reservation lands into a trust fund account. Paragraph 4(b)(3) does not waive this part of that claim.

Paragraph 4(d) similarly does not waive it. Paragraph 4(d) releases the United States of claims for "failure to perform trust duties related to the management of trust funds and non-monetary trust assets or resources . . . ." As explained in the Tribe's response, claims related to the management of trust funds clearly refer to the United States management of money already received in a trust fund account. *See* Response, ECF 20 at 23. Additionally, while this provision waives claims related to how the United States managed the surplus lands before 2012, it does not waive claims related to its failure to deposit monies derived from the management of these lands into a trust fund account.

Once again, Defendant has failed to show how any provision in the 2012 Settlement Agreement waives all of the Tribe's pre-2012 breach of trust claim.

CONCLUSION

Defendant raises several new arguments in its reply memorandum. As the above discussion shows, however, all new arguments are unavailing. The motion to dismiss must still be denied.

Respectfully submitted this ____ day of June, 2019.

FREDERICKS PEEBLES & PATTERSON LLP

By: */s/ Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen (Attorney of Record)
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

Of Counsel:
Jeremy J. Patterson
FREDERICKS PEEBLES & PATTERSON LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jpatterson@ndnlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2019, I electronically filed the **[PROPOSED] PLAINTIFF'S SURREPLY IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS** with the Clerk of the Court via the ECF filing system, which will send notification of such filing to all parties of record.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen