

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|---------------------------|---|-----------------------|
| COMANCHE NATION, |) | |
| OKLAHOMA, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| -vs- |) | Case No. CIV-05-328-F |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION BY FORT SILL APACHE TRIBE OF OKLAHOMA FOR
ENFORCEMENT OF AGREEMENT OF COMPROMISE AND SETTLEMENT

INTRODUCTION

Intervenor-Defendant Fort Sill Apache Tribe of Oklahoma (or “Tribe”) is compelled to invoke the continuing jurisdiction of this Court to enforce the terms of the Agreement of Compromise and Settlement (“Agreement”)¹ because one year after entry of this Court’s Order approving the Agreement, the United States Department of Interior has yet to fulfill the following promise:

The Fort Sill Apache has land in New Mexico held in trust status within the former aboriginal land and/or Indian title lands of the Chiricahua and/or Warm Springs Apache Tribes as defined by the Indian Claims Commission and United States Court of Claims. The United States agrees to **accept and timely process** an Fort Sill Apache Tribe application for a reservation proclamation for land currently held in trust for the Fort Sill Apache Tribe which is located in Luna County, New Mexico. (emphasis added).

¹The parties agreed the terms would be “incorporated ... in any Order dismissing the action ..., and that the Court shall have continuing jurisdiction to enforce the terms of this Agreement under the authority of Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381-82 (1994).” Agreement, ¶ 11.

Agreement, ¶ 7(1).

This promise from the United States was the fundamental reason for the Tribe's participation in the Agreement. The United States acknowledged that it "understands and agrees that the Comanche Nation and Fort Sill Apache Tribe assent and agree to terms ... in express reliance upon acknowledgment and agreement by the United States Department of Interior that the following representations [in ¶ 7] are true and correct" Id., ¶ 7.

Without the Government's agreement to a timely mechanism for formal reservation status in aboriginal homelands of the Chiricahua and Warm Springs Apache Tribes in the Southwest, the Fort Sill Apache Tribe would never have relinquished the right to additional trust acquisition in Oklahoma "within an original Comanche Allotment ... without prior written notice to and prior written consent from the governing body of the Comanche Nation" Agreement, ¶ 4.

The Tribe submitted its application for a reservation proclamation very soon after the Court approved and entered the Agreement, and the Tribe's Chairman attests to the ensuing course of inaction by the Department of Interior:

13. That the Tribe forwarded a request for a Reservation Proclamation pursuant to the direction of the [Bureau of Indian Affairs] on or about April 14, 2006. (Exhibit 3)

14. That the Tribe received a confirmation response relating to this request was dated May 6, 2006 from the BIA Mescalero Indian Agency relating to the Tribe's Reservation Proclamation request. (Exhibit 4)

15. That since May 6, 2006 until Tuesday, March 4, 2008, the Fort Sill Apache Tribe received no official correspondence from the United States or any of its agents or agencies relating to the status of or request for any additional information on the Tribe's request for a reservation proclamation.

Declaration of Jeff Houser.

Chairman Houser also attests to action on the part of the BIA taken well before the Agreement and relating to designated reservation status for the Tribe's trust lands in Luna County, New Mexico that should have made prompt issuance of a reservation proclamation here little more than a formality:

4. That on or about June 26, 2002, the United States of America issued a Warranty Deed taking land located in Luna County, New Mexico into trust for the Fort Sill Apache Tribe of Oklahoma. (Exhibit 1).

5. That on or about July 29, 2002, in response to the Tribe's request for Reservation Status on said property, the Bureau of Indian Affairs (BIA) assigned a Reservation Code for the Tribe's trust land in Luna County, New Mexico and has stamped that code on the official trust deed for this property. (Exhibit 2, and see Exhibit 1).

6. That the BIA has never provided the Tribe a copy of the BIA Land Office official land title report on the land in Luna County, New Mexico.

* * *

12. That neither the United States, the United States Department of the Interior nor the United States Bureau of Indian Affairs have any regulations that provide any clear definition as to what lands qualify as Reservation with regard to Native American Tribal lands.

Ibid.

In Sault Ste. Marie Tribe of Chippewa v. United States, Civil Action No. 06-cv-00276 (W.D. Mich., N.Div.) it was the very lack of "any regulations that provide any clear definition as to what lands qualify as Reservation" noted by Chairman Houser that helped prompt the Court recently to hold arbitrary and capricious and reject a finding by the National Indian Gaming Commission to the effect that lands taken into trust on behalf of the Sault Ste. Marie Tribe in 1983 did "not constitute a reservation for purposes of the IGRA [Indian Gaming Regulatory Act], and, therefore, gaming on ... [an adjoining] parcel [taken into trust in 2000, after the October 17, 1988 deadline for gaming on Indian lands prescribed by the IGRA] is not permitted by virtue of being on land contiguous to a reservation pursuant to 25 U.S.C. § 2719(a)(1)."

Report and Recommendation (July 27, 2007)² at 12.

The Court found that the Government “failed to provide a reasoned explanation for its conclusion that the 1983 parcel is not reservation land.... [C]ounsel representing [the Government] stated at oral argument, ‘The [decision] letter is clearly struggling with this definition of reservation. There is no question about it. The problem is that reservation is not defined in IGRA, so the Department went about trying to interpret what is a reservation by looking at, you know, where cases talk about it.’” Id. at 17.

As the Government acknowledged in Sault Ste. Marie Tribe, there is no clear and consistent definition of "Indian reservation" in law or regulation. Originally the phrase applied to land reserved for a Band of Indians or Tribe after the cession of a larger parcel of land to the Federal Government by treaty or direct conquest. During the 1850's, the modern definition began to emerge as land set aside for the residence of Tribal Indians.³ "Indian reservation" or "reservation" appear in a number of federal laws which give no definition.⁴

However, Congress has furnished several definitions, each expansive in scope. In 25 U.S.C. § 1901(10), for example, it defined “reservation” as:

²The Recommendation and Report of July 23, 2007 entered by the Magistrate Judge, and the Order of the District Court adopting it on August 28, 2007, are Attachments 7 and 8.

³ See F. Cohen, Handbook of Federal Indian Law, at 34, n. 2 (1982 ed.)

⁴ See, e.g., 16 U.S.C. §§ 796(2), 797(e); 25 U.S.C. §§ 33, 46, 155, 175, 176, 196, 200, 211, 231-233, 253, 262, 264, 279, 280, 283, 286, 291, 292, 304, 307, 309, 311, 312, 318a-321, 331, 333, 334, 336, 337, 339, 340, 342, 344, 348, 350-352, 380, 381, 393, 396a, 397-399, 400a, 402a, 407, 415, 461, 463, 463e, 465, 467, 468, 476-479, 488, 501, 631, 1083, 1311, 1466, 1495, 1521; 43 U.S.C. §§ 149, 150, 851, 856, 868, 1195-1196.

... Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

Congress expanded the definition further in 25 U.S.C. § 1452(d):

“Reservation” includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

The Department of Interior and its Bureau of Indian Affairs define reservation just as broadly:

“Reservation” means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

25 C.F.R. §20.100.

These make clear that Congress and the federal agencies with primary responsibility for administering Indian law and regulation have defined “reservation” broadly. It is just as clear that the courts have developed an “Indian canon of statutory construction ... providing that ambiguous statutes are to be construed in favor of Indians.” Sault Saint Marie Tribe, *supra* at 13. Thus we submit the Department of Interior, whose Bureau of Indian Affairs has already found Fort Sill Apache Tribe trust lands in New Mexico to warrant a Reservation Code, would be hard pressed in any judicial proceeding to justify a decision withholding a formal proclamation of reservation status, or to show that any such negative conclusion was other than arbitrary and capricious and an abuse of discretion.

CONCLUSION

The application and approval process with respect to trust lands in Luna County, New Mexico should have been no more than a formality, undertaken promptly. The Fort Sill Apache Tribe of Oklahoma respectfully requests that this Court exercise jurisdiction pursuant to ¶ 11 of the Agreement, declare the United States to be in fundamental breach of ¶ 7(1), and set the matter down for hearing to determine the remedies appropriate in the circumstances.

Respectfully submitted this 11th day of March, 2008,

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