

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

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UNITED STATES OF AMERICA,	:	CIVIL ACTION No. 07-C-316
	Plaintiff,:	
v.	:	
	:	MENOMINEE TRIBAL ENTERPRISES’
MENOMINEE TRIBAL ENTERPRISES,	:	REPLY MEMORANDUM OF LAW IN
the principal business arm	:	SUPPORT OF ITS MOTION TO
of the Menominee Indian Tribe of Wisconsin,	:	STRIKE THE DECLARATION OF
MARSHALL PECORE, and	:	MICHAEL CHATMON AND EXHIBITS
CONRAD WANIGER,	:	THERE TO
	:	
	Defendants.:	
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INTRODUCTION

Menominee Tribal Enterprises (“Menominee”) submits the following reply in support of its Motion to Strike the Declaration of Michael Chatmon and the Exhibits Thereto.

ARGUMENT

I. A Motion for Reconsideration Cannot “In Any Case” Be Employed As a Vehicle to Introduce New Evidence

Menominee demonstrated that the United States’ (“Government”) attempt to submit new evidence at this stage of the proceedings is procedurally improper under controlling Seventh Circuit precedent. The Government argues that because it is moving for reconsideration on the grounds of an alleged manifest error of law, rather than on grounds of alleged newly discovered evidence, that submission of the new materials (in the form of the Chatmon Declaration and exhibits thereto) is permissible.

This is erroneous. The Seventh Circuit has repeatedly and unequivocally held that a motion for reconsideration “cannot *in any case* be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion.”

Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (emphasis added) (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982)); accord *Pub. Resource, Inc. v. Walker-Davis Pub., Inc.*, 762 F.2d 557, 561 (7th Cir. 1985); *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996); see also *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999) (“The motion for reconsideration is not an opportunity for a party to correct its own procedural failures or introduce evidence that should have been brought to the attention of the court prior to judgment.”); *Morgan v. Harris Trust and Sav. Bank of Chicago*, 867 F.2d 1023, 1028 (7th Cir. 1988) (new evidence submitted in connection with motion for reconsideration could not be considered on appeal when there was no reason the evidence could not have been submitted at time of summary judgment motion); see also *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) (party declining to offer evidence during summary judgment should not be allowed to “slip it into the record through a motion for reconsideration.”); *Chirco v. Gateway Oaks, LLC*, No. 02-73188, 2006 WL 2056546, at *2 (E.D. Mich. July 21, 2006) (striking declaration and attached copies of legal authorities that were available at time of summary judgment motion). There is no exception to this rule under the “manifest error of law” standard. *Id.*

The Government next contends that its failure to submit these materials during summary judgment was not due to any “lack of diligence on the government’s part.” Instead, the Government contends that “space considerations prevented a more thorough and helpful treatment of the statute of limitations issue at the time the original motions were filed.” The Government also contends that the statute of limitations arguments were not fully developed.

On September 24, 2008, however, the Government filed a Rule 7.4 Expedited Motion for Permission to File a Consolidated Thirty-Page Reply Brief Supporting the Plaintiff’s Motion for

Summary Judgment (Docket No. 248.) In support of its request for additional pages, the Government specifically identified the “statute of limitations issue” as one of the reasons it needed additional space. (Docket No. 248, at ¶ 1.) Although the Government contended that it would “ordinarily be permitted to file two separate fifteen-page reply briefs,” it requested leave to file a thirty page consolidated reply on the following grounds: “The United States believes it can adequately respond to the defendants’ arguments in a total of thirty pages, but it may require in excess of fifteen pages to adequately respond to MTE’s contentions.” (Docket No. 248, ¶¶ 3, 4.) The Court granted the Government’s motion. (September 29, 2008 Margin Order.) The Government had knowledge that it needed more pages to address this issue and it set the number of pages at 30. It could have asked for more, but it did not do so. This Court should not relieve the Government from the page limits it imposed on itself and the Court approved.

Nevertheless, irrespective of any page limitations in its brief, there was nothing preventing the Government from filing the Chatmon Declaration and exhibits on reply. In fact, the Government submitted four affidavits and six exhibits in connection with its summary judgment reply. (Docket No. 252.) Simply put, it is reasonable for the Court to expect the Government to have considered and decided what it needed to respond to the statute of limitations issue. For one reason or another, Chatmon’s Declaration and exhibits were not among the materials upon which the Government chose to rely. This Court should not give the Government a second bite at the apple.

Nor is this a matter in which the arguments of the parties were not “fully developed.” Menominee pointed out the broad language of 25 U.S.C. § 450j-1(f), the reasons the Government’s claims are covered by the plain and unambiguous language of this provision, and the handful of undisputed facts that entitle Menominee to judgment. The analysis did not need to

go any further than that. Moreover, the Court fully considered the applicability of this statute and both parties' arguments, as reflected in the Court's five-page analysis of the issue in its January 16 Order. (Docket No. 257, pp. 27-31.)

The Government has advanced no legitimate excuse as to why it could not have timely submitted the Chatmon Declaration and exhibits, and these materials should, therefore, be stricken from the record.

II. The Chatmon Declaration Is Otherwise Improper and Must Be Stricken

Menominee demonstrated that the Chatmon Declaration and exhibits thereto must be stricken for the additional reason that it is the sole province of the Court to determine what the law is. The Government argues that Chatmon's Declaration is not submitted to usurp the Court's authority, and, to the extent that Chatmon's Declaration "expresses some legal conclusions, this Court may consider that opinion to the extent it finds his analysis helpful and within the scope of his expertise and experience." (Docket No. 276, at 5.) To this end, the Government states that "expert testimony reaching legal conclusions may be admissible" in some instances. (*Id.* at 6.)

Chatmon, however, was never disclosed as an expert witness (as the Government now contends him to be) in the Government's Rule 26(a)(2) disclosures. (Tchida Dec. ¶ 2.) Chatmon never prepared an expert report (as required by Fed. R. C. P. 26(a)(2)(B)), and Menominee never had the opportunity to test the assertions made by Chatmon through discovery. (*Id.* ¶ 3.) Chatmon's Declaration should, therefore, be stricken, to the extent the Government now proffers it as "expert testimony." *White v. United States*, 148 F.3d 787, 793 (7th Cir. 1998).

Chatmon's Declaration should also be stricken because it cannot be employed to alter the plain and unambiguous language of 25 U.S.C. § 450j-1(f). *Ioffe v. Skokie Motor Sales, Inc.*, 414 F.3d 708, 711 (7th Cir. 2005) (the Court's "inquiry must end if the statutory language is

unambiguous and ‘the statutory scheme is coherent and consistent.’”); accord *Albert J. Petrulis, D.D.S., S.C. v. Commissioner of Internal Revenue*, 938 F.2d 78, 80 (7th Cir. 1991) (when statutory language is unambiguous “our inquiry is at an end; the congressional intent embodied in that plain wording must be enforced.”) (quoting *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990)).

In addition, neither the OMB circular provision nor the BIA Manual provisions attached to the Chatmon Declaration have the force and effect of law, and those materials cannot, therefore, be employed to alter the plain and unambiguous language of 25 U.S.C. § 450j-1(f) any more than Chatmon’s own statements. *Prudential-Maryland Joint Venture Co. v. Lehman*, 590 F. Supp. 1390, 1403 (D.C. 1984) (OMB Circular has no force and effect of law); *U.S. Dep’t of Health and Human Services v. Federal Labor Relations Authority*, 844 F.2d 1087, 1094-96 (4th Cir. 1988) (same); *Morton v. Ruiz*, 415 U.S. 199, 234-35 (1974) (BIA Manual is nothing more than an “internal operations brochure”); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1331-32 (10th Cir. 1982) (“It is argued that an administrative interpretation of the regulation has been made by the Indian Affairs Manual and by the procedures used, to which deference should be given . . . particularly because of past reliance on them. We are convinced, however, that the plain, mandatory terms of the regulations do not leave room for deference to this interpretation, which does not serve the interest of the Indians.”) (internal citations omitted); *City of Santa Clara, CA v. Andrus*, 572 F.2d 660, 674 (9th Cir. 1978) (“the BIA cited a provision contained in its Indian Affairs Manual, an internal operations brochure . . .”).

Chatmon’s declaration and exhibits add nothing to the question of whether this Court committed a “manifest error of law” in holding that 25 U.S.C. § 450j-1(f) bars the Government’s common law claims. Indeed, the Interior Board of Contract Appeals has twice rejected the

argument that the Government is trying to support with Chatmon's Declaration and exhibits here, namely, that a disallowed cost must first be identified by the independent auditors in order for Section 450j-1(f) to apply. *Appeals of Cheyenne-Arapaho Tribes of Oklahoma, et al.*, IBCA No. 3995, 2002 WL 31055507, at 10-11 (I.B.C.A. July 15, 2002); *Appeals of Navajo Nation*, IBCA No. 4413-4419/2002, 2003 IBCA LEXIS 3, [*4]-[*8] (I.B.C.A. September 17, 2003). Far from constituting a "manifest error of law," these ICBA decisions show that the Court's decision is manifestly correct.

Chatmon's Declaration and the exhibits upon which he relies are an improper attempt to create a statutory ambiguity when none exists, and these materials have no place in this motion for reconsideration. Chatmon's Declaration and the exhibits thereto should thus be stricken.

CONCLUSION

For the foregoing reasons, Menominee respectfully requests that the Court strike the Declaration of Michael Chatmon and exhibits thereto from the record.

DATED: MARCH 19, 2009

/s/ Joshua Jay Kanassatega

Joshua J. Kanassatega (MN #211254)
jkanassatega@lawschool.gonzaga.edu
c/o Gonzaga University School of Law
721 N. Cincinnati St., P.O. Box 3528
Spokane, WA 99220-3528
Telephone: (509) 313-3723
Facsimile: (509) 313-5805

Bryant D. Tchida (MN #314298)
LEONARD, STREET AND DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500
Fax: (612) 335-1657

**ATTORNEYS FOR DEFENDANT
MENOMINEE TRIBAL ENTERPRISES**