

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 07-C-316

MENOMINEE TRIBAL ENTERPRISES,
the principal business arm of the Menominee Indian
Tribe of Wisconsin, MARSHALL PECORE, and
CONRAD WANIGER,

Defendants.

**UNITED STATES' RESPONSE TO MENOMINEE TRIBAL ENTERPRISES'
MOTION TO STRIKE THE DECLARATION OF MICHAEL CHATMON**

INTRODUCTION

The United States submits this memorandum in response to Menominee Tribal Enterprises' ("MTE") motion to strike the Declaration of Michael Chatmon and the Exhibits thereto.¹ MTE asserts that these materials should be stricken as "improper," and because "it is the province of the Court to determine what the law is, not an administrative employee's." (Doc. 268 at 1). MTE's argument for exclusion, however, is based primarily on its assertion that the government has not met

¹MTE's motion does not specify the rule under which its motion is made; therefore, pursuant to Civil L.R. 7.1(a), "the Court may deny the motion as a matter of course." Presumably the motion is brought under Fed. R. Civ. P. 12 (f), which provides in part that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." MTE does not appear to contend that the Chatmon affidavit is redundant, impertinent or scandalous. It therefore appears that the motion to strike is based on an alleged lack of materiality.

the “newly discovered evidence” prong for the test governing motions to reconsider. But the United States does not assert that newly discovered evidence supports its position; rather, the government’s reconsideration motion is premised on the “manifest error” standard, as discussed below.

For the reasons that follow, this Court may consider the Chatmon Declaration -- which describes the administrative process applicable to the BIA’s receipt and processing of Single Audit reports – to the extent the Court finds the summary helpful to its analysis of the legal and factual issues presented by the government’s motion to reconsider. In addition, it is entirely proper for this Court to consider the attached exhibits, which need not be independently authenticated and consist solely of regulatory material (including a publically available OMB Circular and two versions of a BIA Manual) relevant to the issues in this case.

ARGUMENT

In support of its motion to strike, MTE first asserts that the United States has submitted, by means of the Chatmon affidavit and its supporting exhibits, the kind of “new evidence” the Seventh Circuit found improper in *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 252 (7th Cir. 1987). However, the Court in *Rothwell* analyzed the newly discovered evidence standard governing motions to reconsider, not the “manifest error” standard at issue in this case. In addition, the circumstances surrounding the motion to reconsider in *Rothwell* are entirely different from those present here.

In *Rothwell*, the plaintiff in a contract dispute (Rothwell) moved to reconsider the district court’s entry of summary judgment against it on the ground that newly discovered evidence warranted a re-examination of the motion. *Id.* at 248. In support of its motion to reconsider, Rothwell submitted several categories of new material in three separate waves. First, in support of

its original motion to reconsider, Rothwell attached the deposition testimony of three witnesses (all of whose depositions had been taken at least a month before the district judge's decision), a memorandum from an employee of the defendant that had been produced at a deposition more than a month before the judge's decision, and two Commodity Futures Trading Commission decisions. *Id.* Next, in its reply brief, Rothwell attached more evidence which was either available to Rothwell before the original decision for summary judgment was issued, or was related to dealings between the parties that "were not relevant to the questions at issue in the suit." *Id.* Finally, in a third pleading, Rothwell submitted a supplemental reply brief to which it attached excerpts from a recently-taken deposition and some commodities trading rules published months before the action was commenced. *Id.* at 248-49. The district court ultimately denied Rothwell's motion to reconsider. *Id.* at 249.

On appeal, the Seventh Circuit examined whether Rothwell met the "newly discovered evidence" standard governing motions to reconsider, not the "manifest error" prong at issue in this case. *Id.* at 251. The Court cited with approval this statement of the law governing motions to reconsider:

Motions for reconsideration serve a limited function; to correct manifest errors of law or fact *or* to present newly discovered evidence. Such motions 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. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment.... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Id. at 251 (emphasis added)(quoting *Keene Corp. v. International Fidelity Insurance Co.*, 561 F.Supp. 656 (N.D. Ill. 1982)). Therefore, a motion to reconsider may be used to correct manifest legal errors, which the United States contends occurred here, or alternatively, to present newly

discovered evidence, which was the issue in *Rothwell*.

The Court in *Rothwell* held that under the newly discovered standard, Rothwell needed to establish that it could not, through the exercise of due diligence, have presented the new evidence to the district court before the decision on summary judgment was issued. *Id.* at 251. Applying that legal standard, the Court found that the district court did not abuse its discretion in denying Rothwell's motion to reconsider, because Rothwell failed to make a showing that it had exercised due diligence in attempting to produce the evidence or argument while the motion for summary judgment was pending. *Id.* at 251-52. The Court explained:

Most of the “newly discovered evidence” Rothwell submitted, along with three briefs filed in support of the motion to reconsider, was either case law or commodity rules that were in existence before the motion for summary judgment was even filed. Everything submitted with the opening brief on reconsideration was in existence before the original motion was decided, and Rothwell failed to give the trial court or this court any satisfactory explanation as to why the information could not have been produced earlier.

Id. at 252. Thus, the court ruled that “[a]bsent a showing that this resulted from reasons other than a lack of due diligence on the part of Rothwell, Rothwell may not relitigate a motion it already had a chance to contest, and lost.” *Id.*

The circumstances here are readily distinguishable. First, the United States does not contend, as Rothwell did, that the Court should re-examine its ruling due to “newly discovered evidence.” Rather, the government's claim is that the Court should correct a manifest error of law. Second, unlike *Rothwell*, the failure of the government to submit this additional material earlier was not due to a lack of diligence on the government's part. Instead, space considerations prevented a more thorough and helpful treatment of the statute of limitations issue at the time the original motions were filed. As set forth in the government's opening memorandum, MTE devoted less than three

pages to raising the statute of limitations issue. MTE, moreover, raised the issue for the first time in its response to the government's motion for summary judgement, a response which raised numerous other arguments (many of which were not fully developed). (See Doc. 239 at 2-4). Due to the page limitations applicable to reply briefs – typically fifteen pages – the United States responded with two pages of argument in its thirty-page consolidated reply brief, a brief which addressed dozens of contentions raised by all three defendants. (See Doc. 252 at 18-20). As a result, the statute of limitations issue was not fully developed by either party. And finally, although the court in *Rothwell* affirmed the denial of Rothwell's motion to reconsider on the ground that it failed to meet the newly discovered evidence standard, the court was not asked to strike, nor did it strike, the new material under Fed. R. Civ. P. 12(f). Accordingly, the holding in *Rothwell* does not control the outcome of MTE's present motion to strike.

MTE further maintains that the Chatmon Declaration “must be stricken for the additional reason that it is the Court's province to determine what the law is, not an administrative employee's.” (Doc. 268 at 2)(citing *Steele v. Depuy Orthopaedics, Inc.*, 295 F.Supp.2d 439, 445-46 (D.N.J. 2003)). Yet this overstates the import of Mr. Chatmon's Declaration, which simply summarizes the regulations and procedures that pertain to the BIA's review of Single Audit reports submitted by a tribal organization. Nowhere does Mr. Chatmon purport to usurp the Court's authority to determine the law that applies to this case.

Moreover, even to the extent Mr. Chatmon 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. It is generally true that the “interpretation of statutes normally is a question of law, which does not require expert testimony.” *American National Insurance Co. v. United States*, 690

F.2d 878, 888 (Ct.Cl. 1982). Nevertheless, expert testimony reaching legal conclusions may be admissible “where the testimony concerns state law or a technical provision peculiar to the ... industry.” *Principal Mutual Life Insurance Co. v. United States*, 26 Cl.Ct. 616, 625 (1992)(internal citations and quotations omitted). *See also Applegate v. United States*, 35 Fed. Cl. 406, 424-25 (1996)(denying a motion to strike the affidavit of the Deputy Secretary of the Florida Department of Environmental Protection summarizing the state’s regulatory processes, a matter within the affiant’s expertise); *Derksen v. Fond du Lac County*, 2007 WL 2325357 at *1, n. 1 (E.D. Wis. 2007)(denying a motion to strike an affidavit of a county employee because it allegedly recited his legal opinions; the Court ruled that this was not true because the affiant “simply states the contents of the laws and regulations relevant to this suit”).

There is no independent reason to strike the attached exhibits. Exhibit A, a copy of OMB Circular A-133, is a publically available document which has been provided to the Court and the parties as a courtesy. Exhibits B and C, although not generally available via the internet, are BIA policy manuals which help to explain the relatively complex regulatory procedure applicable to Single Audits. MTE has identified no substantive ground supporting the exclusion of these manuals.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny MTE’s motion to strike the Declaration of Michael Chatmon and the attached exhibits.

Dated at Milwaukee, Wisconsin, this 5th day of March, 2009.

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