

In the United States Court of Federal Claims

No. 99-550 L

(into which has been consolidated No. 00-169 L)

(E-Filed: August 10, 2011)

_____)
)
THE OSAGE TRIBE OF INDIANS)
OF OKLAHOMA,)
)
Plaintiff,)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)
_____)

CONFIDENTIALITY ORDER

Before the court is the Parties’ Joint Motion for Approval and Entry of Stipulation Regarding Confidentiality of Settlement Discussions and Communications as an Order of the Court, and [Proposed] Order (Joint Motion), Docket Number (Dkt. No.) 653, filed on August 1, 2011. The Joint Motion is GRANTED. Accordingly, the parties shall comply with the terms and conditions of the following Order, which may be referred to as the Confidentiality Order:

A. DEFINITIONS

For purposes of this Confidentiality Order and TAD Stipulation (as defined below in Paragraph B.7), filed just after this Confidentiality Order,

1. The term “Settlement Communications” means any communications made, exchanged, or provided by plaintiff; plaintiff’s attorneys, representatives, employees, agents, or consultants; defendant; or defendant’s attorneys, representatives, employees, agents, or consultants, in, or for purposes of, settling this case or any of the cases brought by the other members of the Settlement Consortium, regardless of whether the communications are oral, written, electronic, telephonic, or otherwise. “Settlement Communications” include but are not limited to those provided in or through meetings,

telephone calls, correspondence, or memoranda not filed with the court, reports, appraisals, or any other documents, and any part thereof.

2. The term “Settlement Consortium” means plaintiff and the other members of the group of 76 Tribes that are identified in Exhibit 1 hereto and that are engaged with defendant in a collective process to negotiate a settlement, if at all possible, of the trust accounting and trust mismanagement claims of plaintiff and the other members of the Settlement Consortium.

B. TERMS AND CONDITIONS

3. All Settlement Communications are for settlement purposes only and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence. All Settlement Communications shall be deemed confidential, and they shall not be disclosed to any person or entity who is not a party to this proceeding or a member of the Settlement Consortium or who is not a counsel, agent, officer, employee, representative, designee, expert, contractor, or consultant of plaintiff or of another member of the Settlement Consortium, except as provided in this Confidentiality Order. Settlement Communications shall not be disclosed to any person or entity seeking their disclosure by any means, including but not limited to requests submitted to the United States or its agencies under the Freedom of Information Act, 5 U.S.C. § 552, except as provided in this Confidentiality Order.

4. Facts and evidence that are not privileged and that are otherwise independently discoverable in this case from a party or a non-party or that are admissible evidence shall not lose that characteristic or be rendered immune from later discovery or inadmissible as a result of their use in the settlement discussion or because of their inclusion in Settlement Communications. The parties shall maintain as confidential any Tribal Account Database (TAD) that is produced as part of settlement discussions between the parties, subject to the right of either party to seek, under the procedures set out in Paragraphs 5 and 8 below, to use the TAD outside of settlement discussions.

5. A party may offer for admission or have admitted into evidence in this case or any subsequent proceedings (including but not limited to litigation, settlement or ADR proceedings other than those conducted pursuant to this Confidentiality Order and the associated Joint Stipulation, or administrative proceedings), or use in any other settings, a Settlement Communication or portion thereof that:

(a) the party has made, generated, produced, or obtained independently of the other party and these settlement proceedings, if the Settlement Communication or portion thereof does not attach, quote, paraphrase, or rely upon the contents or substance of any Settlement Communication or portion thereof provided by the other party, the disclosure

of which is otherwise precluded by this Confidentiality Order and the associated Joint Stipulation; or

(b) the party has received from the other party, only if the parties have conferred and agreed in writing, that the Settlement Communication or portion thereof may be offered for admission into evidence or used in the manner proposed.

6. Each party has used or will use consultants or contractors to assist in the settlement proceedings (Settlement Consultants or Contractors). In the event that this case proceeds to further litigation and a party offers any of its Settlement Consultants or Contractors as a testifying fact or expert witness, the parties shall meet and confer about which, if any, of the materials created or relied upon by the Settlement Consultant or Contractor in the course of the Settlement Consultant's or Contractor's engagement in the settlement proceedings shall be discoverable and admissible. Absent agreement of the parties or order of the court to the contrary, a party shall not seek in any way the testimony of the other party's Settlement Consultant or Contractor arising from (a) work conducted by that Settlement Consultant or Contractor for the purposes of the settlement proceedings, and (b) any Settlement Communication made by or to that Settlement Consultant or Contractor on any date.

7. Nothing in this Confidentiality Order and the Order incorporating the parties' joint stipulation (the TAD Stipulation), filed after this Confidentiality Order, addressing confidentiality of materials in certain TADs shall limit in any way communications between or among a party and its officers, attorneys, representatives, employees, designees, agents, experts, contractors, or consultants. A party or a party's counsel may disclose, without limitation, Settlement Communications, or the contents or substance of settlement proceedings, to that party's respective clients or client representatives, as necessary, so as to inform fully of the party's clients or client representatives about any proposed settlement resulting from these settlement proceedings and to discuss settlement authority with the party's clients or client representatives.

8. If one or the other of the parties has a dispute relating to Paragraphs 4, 5 or 6 of this Confidentiality Order and/or the TAD Stipulation, the disputing party shall notify the other party in writing stating the grounds for the dispute. Within 30 days of the other party's receipt of such written notification (or a longer period of time, if the parties so agree), the parties shall discuss and attempt to resolve the dispute. If the parties do not resolve the dispute within 30 days or an extension of time thereof, the disputing party may file a motion to seek a ruling from the court regarding the dispute.

9. Until further order of this court, this Confidentiality Order and TAD Stipulation shall remain in full force and effect after the dismissal of the case and regardless of whether the parties reach settlement.

The parties are urged to contact the court at any time when they believe the involvement of the court will help to secure the just, speedy and inexpensive determination of this action. See Rules of the United States Court of Federal Claims 1.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge

Exhibit 1
List of Tribal Members of the Settlement Consortium

1. Ak-Chin Indian Community
2. Alabama-Quassarte Tribal Town
3. Aleut Community of St. Paul Island
4. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
5. Bad River Band of Lake Superior Chippewa Indians
6. Blackfeet Tribe of the Blackfeet Indian Reservation
7. Bois Forte Band of Chippewa
8. Cachil Dehe Band of Wintun Indians of Colusa Rancheria
9. Cheyenne-Arapaho Tribe
10. Chippewa Cree Tribe of the Rocky Boy's Reservation
11. Coeur d'Alene Tribe
12. Confederated Salish & Kootenai Tribes
13. Confederated Tribes of Siletz Indians
14. Confederated Tribes of the Colville Reservation
15. Duckwater Shoshone Tribe
16. Gila River Indian Community
17. Grand Traverse Band of Ottawa & Chippewa Indians
18. Gros Ventre & Assiniboine Tribes of the Fort Belknap Reservation
19. Haudenosaunee
20. Hoopa Valley Tribe
21. Hualapai Tribe
22. Kaibab Band of Paiute Indians of Arizona
23. Kenaitze Indians Tribe
24. Kickapoo Tribe of Kansas
25. Klamath Tribes
26. Lac Courte Oreilles Band of Ojibwe
27. Lac Du Flambeau Band of Lake Superior Chippewa Indians
28. Leech Lake Band of Ojibwe
29. Little Shell Tribe of Chippewa Indians
30. Makah Indian Tribe of the Makah Indian Reservation
31. Mescalero Apache Tribe
32. Minnesota Chippewa Tribe
33. Native Village of Atka
34. Nez Perce Tribe
35. Nooksack Indian Tribe
36. Northern Cheyenne Tribe of Indians
37. Onondaga Nation
38. Osage Nation
39. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California

40. Passamaquoddy Tribe of Maine
41. Pawnee Nation of Oklahoma
42. Prairie Island Indian Community
43. Pueblo of Zia
44. Qawalangin Tribe
45. Quechan Tribe of the Fort Yuma Reservation
46. Rincon Luiseno Band of Indians
47. Round Valley Indian Tribes
48. Sac and Fox Nation
49. Salt River Pima-Maricopa Indian Community
50. Samish Indian Nation
51. San Luis Rey Indian Water Authority
52. Santee Sioux Tribe of Nebraska
53. Sault Ste. Marie Tribe of Chippewa Indians
54. Shoalwater Bay Indian Tribe
55. Shoshone-Bannock Tribes of the Fort Hall Reservation
56. Skokomish Tribal Nation
57. Soboba Band of Luiseno Indians
58. Spirit Lake Dakotah Nation
59. Spokane Tribe of Indians
60. Standing Rock Sioux Tribe
61. Summit Lake Paiute Tribe
62. Swinomish Indian Tribal Community
63. Te-Moak Tribe of Western Shoshone Indians
64. Timbisha Shoshone Tribe
65. Tlingit & Haida Tribes of Alaska
66. Tohono O'Odham Nation
67. Tulalip Tribes
68. Tule River Indian Tribe
69. Turtle Mountain Band of Chippewa Indians
70. Ute Indian Tribe of the Uintah & Ouray Reservation
71. Ute Mountain Ute Tribe
72. White Earth Band of Minnesota Chippewa Indians
73. Yakama Nation
74. Yankton Sioux Tribe
75. Yomba Shoshone Tribe
76. Yurok Tribe