

2002 DEC 12 A 9:49  
FEDERAL DISTRICT COURT  
IDAHO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

KIMBERLY ASSOCIATES, )  
an Idaho limited partnership, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CV 98-0083-S-LMB  
MEMORANDUM DECISION  
AND ORDER

Currently pending before the Court are Does' Motion to Intervene (Docket No. 49), Plaintiff's Motion for Judgment on the Pleadings (Docket No. 56), Does' Motion for Leave to File a Response to Plaintiff's Motion for Judgment on the Pleadings (Docket No. 66), and Plaintiff's Motion for Sanctions (Docket No. 70).

Having carefully reviewed the record, considered oral arguments, and otherwise being fully advised, the Court enters the following Memorandum Decision and Order.

I.

**FACTUAL BACKGROUND**

By way of brief overview, on January 30, 1981, Kimberly Associates ("Plaintiff") entered into a loan agreement with the Rural Housing Service ("RHS") wherein the RHS promised to loan Plaintiff the funds to build a multi-family, low-income housing project in Twin Falls, Idaho. Thereafter, on November 10, 1981, Plaintiff executed a promissory note for the loan which in part provided that "[p]repayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." *Verified Complaint Ex. B.*

Subsequent to entering into the agreement, Congress enacted the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA") which altered the ability of a borrower to prepay RHS loans. *See* 42 U.S.C. § 1472(c). Based upon the new prepayment provisions, the Secretary of Agriculture was not authorized to accept prepayment until after the borrower complied with the newly enacted procedures. Accordingly, in order to prepay a RHS loan under the requirements of the subsequently enacted ELIHPA, the government argued Plaintiff was required by the RHS to apply for and obtain permission from the RHS to prepay the Rural Housing Program loans. *See* 42 U.S.C. § 1472(c); *see also* 7 C.F.R. § 1965.201, *et seq.*

By the fall of 1997, the government had accepted prepayments from Plaintiff of nearly all of the loan principal without requiring Plaintiff to comply with the new regulatory procedures. On November 24, 1997, Plaintiff tendered the final and full prepayment of the outstanding loan. However, RHS repeatedly refused to accept the final payment, and sought to require Plaintiff to comply with the administrative procedures provided in 7 C.F.R. § 1965.224.

## II.

## PROCEDURAL BACKGROUND

Plaintiff filed the instant action on February 25, 1998. On April 27, 1998, the United States ("Defendant") filed a Motion to Dismiss (Docket No. 3) on the grounds the Court lacked jurisdiction over Plaintiff's claims and that Plaintiff had failed to state a claim upon which relief could be granted because the loan agreement was expressly subject to legislative and regulatory changes.

By Order dated January 25, 1999 (Docket No. 24), this Court concluded that it had jurisdiction over Plaintiff's claims and that Defendant had waived sovereign immunity. *Order*, pp. 5-11. Thus, the Court denied Defendant's Motion to Dismiss in this respect. However, the Court granted Defendant's Motion to Dismiss on the ground that the unmistakability doctrine<sup>1</sup> barred Plaintiff's claims because "Plaintiff is unable to allege or prove a set of facts which establishes that the loan agreement clearly and unmistakably contains a waiver of the government's sovereign power as contemplated by controlling law." *Id.* at p. 15 (citations omitted). Therefore, the Court concluded that the "equitable relief sought by Plaintiff declaring that the legislative and regulatory changes are not applicable to the Loan Agreement is not available to Plaintiff." *Id.*

On February 16, 1999, Plaintiff appealed to the Ninth Circuit Court of Appeals (Docket No. 26), and on August 17, 2001, the Ninth Circuit issued a decision which affirmed this Court's

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<sup>1</sup>As explained in the Court's January 25, 1999 Order, the unmistakability doctrine is that the "sovereign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* at p. 14 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

conclusion that Defendant waived sovereign immunity to this suit pursuant to 28 U.S.C. § 2410, but reversed and remanded with respect to the unmistakability doctrine. *Kimberly Assoc. v. United States*, 261 F.3d 864 (9th Cir. 2001).

The pending motions are now ripe and have been submitted to the Court for determination.

### III.

#### ANALYSIS

**A. Does' Motion to Intervene and to File a Response to Plaintiff's Motion for Judgment on the Pleadings (Docket Nos. 49 and 66)**

Applicant-Intervenors Ann Doe and Bonnie Doe, residents of Kimberly Sunset Manor, the apartment complex which is the subject of the instant action, seek to intervene in the instant action pursuant to Fed. R. Civ. P. 24(a). The Does argue that unless they are allowed to participate in the instant action to enforce ELIHPA, they will be deprived of their right to the statutory and regulatory benefits they possess and enjoy as residents of Kimberly Sunset Manor.

Fed. R. Civ. P. 24(a) allows for intervention of right and provides in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.

*See also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983).

As a preliminary matter, the Court recognizes that the prospective intervenors are not required to establish independent standing in order to intervene in the instant action. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1980) (declining to incorporate an

independent standing inquiry into the Ninth Circuit's intervention test). However, the court in *Hodel* continued by reasoning that "the standing requirement is at least implicitly addressed by our requirement that the applicant must 'assert[ ] an *interest relating to the property or transaction* which is the subject of the action.'" 866 F.2d at 308 n.1 (quoting *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)) (emphasis added).

After carefully reviewing the record and considering the legal memoranda and arguments of counsel, the Court concludes that the prospective intervenors do not have "an interest relating to the property or transaction which is the subject of the action." *Id.* Although the Court recognizes that the prospective intervenors are residents of Kimberly Sunset Manor, they have not suffered any harm, but only assert that such harm is likely if the provisions of ELIHPA are not enforced. There is no evidence in the record that the prospective intervenors have been deprived of any rights, and the Court is of the view that a threat of future harm is insufficient to establish an interest in the property or transaction which is the subject of this transaction. Accordingly, the Does' Motion to Intervene is denied. As a result, the Does' Motion to File a Response to Plaintiff's Motion for Judgment on the Pleadings is also denied.

## **B. Plaintiff's Motion for Judgment on the Pleadings (Docket No. 56)**

### **1. Standard for Judgment on the Pleadings**

When analyzing a motion to dismiss under Fed. R. Civ. P. 12(c), the Court must accept as true the material allegations contained in the allegations of the non-moving party and construe the pleadings in the light most favorable to that party.<sup>2</sup> *Doyle v. Raley's Inc.*, 158 F.3d 1012,

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<sup>2</sup>Fed. R. Civ. P. 12(c) provides in part that: "After all the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

1014 (9th Cir. 1998); *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). The Ninth Circuit has stated that "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to a judgment as a matter of law." *Hal Roach Studios*, 896 F.2d at 1550.

## **2. The Ninth Circuit's Decision**

### **a. Relief under 28 U.S.C. § 2410**

As the Ninth Circuit recognized, Kimberly seeks relief under 28 U.S.C. § 2410.<sup>3</sup> On appeal, Defendant argued that § 2410 is inapplicable because the basis of Plaintiff's claim "is contractual or injunctive and therefore not properly a suit to quiet title." *Kimberly*, 261 F.3d at 868. However, the Ninth Circuit rejected this argument and held that "the fact that the claim may be in part, contractually-based, is no bar to an action proceeding against the United States under § 2410." *Id.* Therefore, in light of clear and unambiguous guidance from the Ninth Circuit, this Court concludes the fact that Plaintiff's claim may be contractual is not a bar to it bringing an equitable action under § 2410. Thus, Plaintiff may properly assert a claim to quiet title under the circumstances.

### **b. Unmistakability Doctrine**

The Supreme Court of the United States has clearly held that Congress's power to exercise sovereign authority "will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v.*

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<sup>3</sup>28 U.S.C. § 2410(a) provides that "the United States may be named a party in any civil action or suit in any district court . . . (1) to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien."

*Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). Thus, if the government has not surrendered its sovereign authority in unmistakable terms, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* (quoting *Merrion*, 455 U.S. at 147).

In *Kimberly*, the Ninth Circuit recognized that the unmistakability doctrine "allows 'the Government to make agreements that bind future Congresses, but only if those contracts contain an unmistakable promise.'" 261 F.3d at 869 (quoting *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1578 (Fed. Cir. 1997)). The Ninth Circuit reasoned:

In cases where the unmistakability doctrine applies, it is demanding; it holds that for the United States to waive its sovereign rights when entering into a contract with a private citizen, it must do so in unmistakable terms. However, when the government is acting as a private contracting party, then the doctrine does not apply, and the government's rights and duties are governed by law applicable to private parties unaltered by the government's sovereign status.

*Id.*

The Ninth Circuit in *Kimberly* reasoned that "an unmistakability doctrine analysis requires examination of two questions: (1) in what capacity was the United States acting when it breached its contractual obligations? and (2) if the United States acted in its sovereign capacity, did the contract waive sovereign rights in unmistakable terms?" *Id.* at 869. The court in *Kimberly* concluded that "[i]n this instance, we need not reach the second question, because we conclude that the United States was not acting in a sovereign capacity when it altered its contract with Kimberly." *Id.*

The court in *Kimberly* reached its holding based on its finding that "[i]t is unquestionable that, when it altered the terms of its contract with Kimberly, the government was not acting in a

'public and general' capacity." *Id.* at 870. The court concluded:

The provisions of the 1992 amendments to ELIHPA applicable to Kimberly's situation constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered. As others have observed: "ELIHPA's prepayment restrictions were effectively a partial repudiation by Congress of its contractual obligation to perform or, in other words, to allow plaintiffs to prepay their mortgages . . ." To prevent enforcement of these private contracts between the third party trustee and the borrowers would be to "give the Government-as-contractor powers that private contracting parties lack." Such a result cannot be countenanced because the government in its private contracting capacity cannot exercise sovereign power "for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties."

*Id.* (citations omitted).

### **3. Applicability of ELIHPA**

Initially, the Court notes that the plain, clear and unambiguous language of the promissory note provides Plaintiff with an unconditional right to prepay the loan by tendering the full amount due at any time. *Verified Complaint* Ex. B. In addition, the clear language of the deed of trust provides that when payment is made in full, Plaintiff is to receive a deed of reconveyance of the property. *Verified Complaint* Ex. C. Plaintiff asserts it is entitled to have title quieted to the property in their favor.

In opposition, Defendant argues the Ninth Circuit in *Kimberly* did not conclude that Plaintiff is entitled to a clear title, free of any liens, encumbrances, or restrictions upon the tender of final payment. Rather, Defendant argues that regardless of whatever rights Plaintiff may have under the loan documents, ELIHPA prohibits the government from either accepting Plaintiff's

tender or executing and delivering a deed of reconveyance except in strict compliance with the statute.

The Ninth Circuit in *Kimberly* held that Defendant was acting in a private capacity when it altered the terms of the contract with Plaintiff and insisted that Plaintiff comply with the requirements of ELIHPA. 261 F.3d at 870. The Ninth Circuit characterized ELIHPA's prepayment restrictions as a "partial repudiation by Congress of its contractual obligation to perform."<sup>4</sup> *Id.* Thus, since Defendant was not acting in a sovereign capacity, the Ninth Circuit concluded that Defendant "cannot exercise sovereign power 'for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties.'" *Id.* (quoting *Yankee Atomic Elec.*, 112 F.3d at 1575). Therefore, as the Ninth Circuit concluded, Defendant's delay in the performance of the contract amounted to a "substantial breach of the contractual terms." *Id.*

After carefully reviewing the record, this Court concludes that ELIHPA is not applicable to the circumstances presented here because Defendant was not acting in a sovereign capacity when it altered the terms of the loan.<sup>5</sup> Therefore, the Court concludes Plaintiff is entitled to the benefit of the plain language of the promissory note which provides an unconditional right to prepay the loan by tendering the full amount due at any time.

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<sup>4</sup>Recently, the Supreme Court of the United States, in a case factually similar to the instant action, also characterized ELIHPA as a "repudiation" of loan contracts. *Fraconia Associates v. United States*, 122 S.Ct. 1993, 2002 (2002).

<sup>5</sup>See also *Atwood-Leisman, et. al v. United States of America*, CV 98-0416-S-BLW (Docket No. 71) (hereinafter "*Atwood-Leisman*") (concluding that ELIHPA was not applicable to retroactively change the terms of promissory notes and real estate security documents which gave the borrowers an unconditional right to prepay RHS loans).

Defendant urges the Court to adopt a rule that an unconditional tender of the full amount due does not operate to release the lien if the creditor establishes a justifiable and good faith reason for rejection of the tender. *See, e.g., Hohn v. Morrison*, 870 P.2d 513, 516-17 (Colo. App. 1993). However, it is a well-settled principal of law that “[a] party’s obligation to perform is not excused by conditions created by that party.” *Restatement (Second of Contracts*, § 261 (1981)).

In the instant action, Congress enacted ELIHPA. Therefore, the Court concludes that the government created its own condition to preclude performance, and further concludes that RHS does not have a justifiable and good faith reason for rejection of Kimberly’s tender of full payment.

Finally, the Court disagrees with Defendant’s argument that “unless the ELIHPA is first deemed unconstitutional, the Court cannot direct the government to either accept the tender, issue a deed of reconveyance, or release the property from the lien created by the Deed of Trust.” *Mem. in Opposition*, p. 10 (Docket No. 64). In the Court’s view, a ruling on constitutional issues is unnecessary because the Court concludes ELIHPA is not applicable to the circumstances presented here and the legislation enacted by Congress may not retroactively alter the terms and conditions of the parties’ promissory note and trust deed.

#### **4. Quiet Title**

As recognized by the Ninth Circuit in *Kimberly*, Idaho law applies in the instant action seeking to quiet title. 261 F.3d at 867. Specifically, the court in *Kimberly* cited the Idaho Supreme Court case *Kelly v. Clark*, 23 Idaho 1, 129 P. 921 (1913) which “allowed a quiet title action to proceed under the theory that the defendant wrongfully refused tender of payment.” *Id.*

In the instant action, Plaintiff has tendered the full amount owing on the loan, but

Defendant refused to accept Plaintiff's final payment on the loan and has refused to release the Deed of Trust lien. Therefore, the Court concludes that Plaintiff has demonstrated Defendant has "wrongfully refused tender of payment," *Kelly*, 129 P. 921, and is entitled to final judgment quieting title on the subject property. Accordingly, Plaintiff's Motion for Judgment on the Pleadings is granted and the Court will enter a separate final judgment and order quieting title.

**C. Plaintiff's Motion for Sanctions (Docket No. 70)**

Plaintiff argues that Defendant's response to Plaintiff's Motion for Judgment on the Pleadings disregards the law of this case and is not substantially justified. Therefore, Plaintiff seeks sanctions pursuant to the Equal Access to Justice Act ("EAJA") as codified at 28 U.S.C. § 2412(d)(1)(A).

The EAJA provides in part that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

In this regard, the Court notes that Plaintiff's motion is limited to fees "incurred in responding to the arguments set forth in the government's opposition to Kimberly's motion." *Plaintiff's Motion for Sanctions*, p. 2 (Docket No. 70). Rather than arguing that its position was "substantially justified," Defendant argues that Plaintiff's motion is premature because it has not yet established itself as the "prevailing party."<sup>6</sup> *See, e.g., U.S. v. Lewis County*, 175 F.3d 671, 679

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<sup>6</sup>Although Defendant does not substantively address Plaintiff's motion, the Court notes that Defendant "respectfully requests an opportunity to brief the 'merits' of the motion for EAJA fees until such time, if any, as the motion is renewed, ripe, properly supported, and placed before this Court for disposition." *Defendant's Mem. in Opposition*, p. 2 n.1 (Docket No. 74). The Court agrees that the procedure

(continued...)

(9th Cir. 1999). In response, Plaintiff does not disagree, but rather argues that it filed the motion "to expedite the process, and to avoid the Court having to revisit the merits of Kimberly's attorney fee claims via post judgment motions." *Plaintiff's Reply*, p. 2 (Docket No. 76).

After carefully reviewing the matter and the requirement of EAJA, the Court concludes that Plaintiff's motion is premature. Although Plaintiff is now the prevailing party given the Court's ruling on the quiet title issue, the EAJA provides that the entry of a *final judgment* governs timing of motions seeking an award of attorneys fees and costs in circumstances such as exist here. Pursuant to 28 U.S.C. § 2412(d)(1)(B), "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and costs." Judgment in Plaintiff's favor had not been entered at the time it filed its motion for sanctions and, further, it did not submit an application for an award of fees and costs at that time.

Accordingly, Plaintiff's Motion for Sanctions is denied without prejudice as being premature.

#### IV.

#### ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Does' Motion to Intervene (Docket No. 49) and Does' Motion for Leave to File a Response to Plaintiff's Motion for Judgment on the Pleadings (Docket No. 66) is DENIED.
2. Plaintiff's Motion for Judgment on the Pleadings (Docket No. 56) is GRANTED.

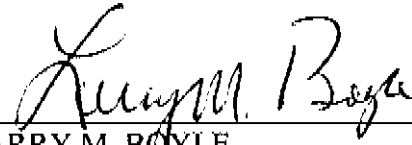
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<sup>6</sup>(...continued)

proposed by Defendant is the better manner in which to address the issue of an award of costs and fees to a prevailing party.

3. Plaintiff's Motion for Sanctions (Docket No. 70) is DENIED without prejudice.

SO ORDERED this 11<sup>th</sup> day of December, 2002.



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LARRY M. BOYLE  
CHIEF MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

United States District Court  
for the  
District of Idaho  
December 12, 2002

\* \* CLERK'S CERTIFICATE OF MAILING \* \*

Re: 1:98-cv-00083

I certify that a copy of the attached document was mailed or faxed to the following named persons:

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
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Cameron S. Burke, Clerk

Date: 12-12-02

BY:   
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