

UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	Case No. CIV 96-196 B
	)	
CITY OF STILWELL, OKLAHOMA,	)	
et al.,	)	
	)	
<i>Defendants.</i>	)	

**MOTION TO STRIKE NEW ESTOPPEL DEFENSE**

In the Pretrial Order, defendants for the first time raise an estoppel defense, stating that "plaintiff is estopped from asserting alleged violations subsequent to February 17, 1994, when defendant commenced acquisition of Ozarks' facilities." Pretrial Order ¶ I.D.7.<sup>1</sup> The United States hereby moves the Court to strike the defendants' estoppel defense on the grounds that (1) the defendants have failed to allege the affirmative misconduct that is necessary to support a claim of estoppel against the Government, and (2) defendants have waived the defense by failing to plead it in their answer .

**I. THE FACTS ALLEGED IN SUPPORT DEFENDANTS' ESTOPPEL DEFENSE ARE INSUFFICIENT AS A MATTER OF LAW**

The Supreme Court has held that "the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). Application of estoppel against the United States, particularly when it is acting in its sovereign law enforcement capacity, would "frustrate the

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<sup>1</sup> Defendants' theory of estoppel, though somewhat unclear, appears to be that because the United States was aware of and a party to the condemnation case against Ozarks, it is estopped from attacking implementation of the "all-or-none" policy after those proceedings began.

purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws." *Federal Deposit Insurance Corp. v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir, 1994). Therefore, although the Supreme Court has held open the possibility that there may be "extreme circumstances" in which the United States may be estopped, *Office of Personnel Management v. Richmond*, 496 U.S. 414, 434 (1990), it has reversed every finding of estoppel it has ever reviewed. *Id.* at 422.

The Tenth Circuit, noting that "[i]t is far from clear that the Supreme Court would ever allow an estoppel defense against the government under any set of circumstances," has held that the defense, if available at all, requires a showing of "affirmative misconduct." *Hulsey*, 22 F.3d at 1490. "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, or failure to follow agency guidelines does not constitute affirmative misconduct." *Board of County Commissioners v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994) (citations omitted); *see also In re DePaolo*, 45 F.3d 373, 376-77 (10th Cir. 1995).

Defendants have not alleged any action by the Government that even approaches affirmative misconduct. Accordingly, the estoppel defense asserted by defendants is insufficient as a matter of law and should be dismissed.<sup>2</sup>

## **II. DEFENDANTS HAVE WAIVED ANY ESTOPPEL DEFENSE**

Estoppel is also an affirmative defense, and must be set forth in the answer to the complaint. Fed. R. Civ. P. 8(c). The law is clear that affirmative defenses that are not timely pleaded are waived. *Bentley v. Cleveland County Board of*

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<sup>2</sup> Assuming Defendants prove all of the facts they list in the pretrial order, it is doubtful that there is a basis for estopping even a private party in this case. Because the Defendants have failed to allege the affirmative misconduct required to estop the United States, however, the Court need not decide this issue.

*Commissioners*, 41 F.3d 600, 604 (10th Cir. 1994); *Wolfenberger v. Williams*, 826 F.2d 930, 932 (10th Cir. 1987); *State Farm Mutual Auto. Ins. Co. v. Mid-Continent Casualty Co.*, 518 F.2d 292, 296 (10th Cir. 1975); *Cummings v. Moore*, 202 F.2d 145, 148 (10th Cir. 1953).

The purpose of requiring that affirmative defenses be raised in responsive pleadings is to prevent surprise and allow plaintiffs an opportunity for discovery. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971). Defendants have long known the facts upon which they rest their estoppel defense, and raising the defense only at this late date is highly prejudicial to the United States. Accordingly, the defense should be stricken.

### CONCLUSION

For the foregoing reasons, the United States moves the Court to strike Defendants' estoppel defense on the grounds that it is (1) insufficient as a matter of law for failure to allege affirmative misconduct by the United States, and (2) untimely raised and therefore waived.

Dated: February 5, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Strike Estoppel Defense was served by Federal Express on counsel of record for Defendants:

Lloyd E. Cole  
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this 5th day of February, 1998.

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Michael D. Billiel