IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAMONA TWO SHIELDS, et al.	)	
	)	
Plaintiffs,	)	No. 11-531L
	)	
v.	)	Hon. Lawrence J. Block
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs have two suits pending against the United States that both arise from substantially the same operative facts. In Plaintiffs' complaint in this court, the Court of Federal Claims ("CFC"), Plaintiffs, individual Indians with an interest in allotted or restricted trust land, allege that the United States has violated various fiduciary obligations and has mismanaged Plaintiffs' non-monetary trust assets, specifically oil and gas resources. Plaintiffs are also members of two certified classes in a case pending in the United States District Court for the District of Columbia, Cobell, et al. v. Salazar, et al., No. 96-cv-1285, and the United States Court of Appeals for the District of Columbia, Nos. 11-5205 and 11-5229 (collectively "District Court case"). In Plaintiffs' District Court case, Plaintiffs allege, among other things, that the United States, as trustee to individual Indians, breached its fiduciary duties to Plaintiff by mismanaging non-monetary trust assets, including oil and gas resources.

This Court is one of limited jurisdiction. One of those jurisdictional limits, 28 U.S.C. § 1500 ("Section 1500") provides the following:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

It is well-established that this Court lacks subject-matter jurisdiction to entertain a suit if the plaintiffs have a suit in another court based upon substantially the same operative facts. The Supreme Court recently held that, "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." United States v. Tohono O'Odham Nation, ___ U.S. ___, 131 S.

Ct. 1723, 1731 (2011).

This case is subject to Section 1500 because this case and Plaintiffs' District Court case are based on substantially the same operative facts. Through Section 1500, Congress explicitly has deprived this Court of jurisdiction to entertain this case, i.e., one containing claims that are "for or in respect to" claims which Plaintiffs have asserted in another pending case. Thus, this Court should dismiss this case.

II. QUESTION PRESENTED

Whether this Court lacks subject-matter jurisdiction over Plaintiff's complaint by operation of 28 U.S.C. § 1500 and whether Plaintiff's complaint should accordingly be dismissed.

III. STATEMENT OF THE CASE AND RELEVANT FACTUAL BACKGROUND.

A. Court of Federal Claims Lawsuit.

Plaintiffs are individual Indians who have an interest in Indian allotments on the Fort Berthold Indian Reservation. Complaint ("Compl."), ¶¶ 2-3. Plaintiffs seek to represent a class of all Indians who have an interest in restricted mineral interests within 42,500 acres of mineral estate on the Forth Berthold Indian Reservation. Compl., ¶ 59. Plaintiffs claim that between January 1, 2006, and November 1, 2010, the United States breached its fiduciary duties to Plaintiffs by imprudently leasing certain mineral interests on the Fort Berthold Indian Reservation. Compl., ¶¶ 37-52, 59. Based upon these alleged breaches of trust, Plaintiffs seek damages "in excess of $400 million" (individually and on behalf of the putative class), fees, costs, and other relief. Compl., Prayer.

More specifically, Plaintiffs claim they are owners of restricted trust-status Indian land.

Compl., ¶¶ 2-3. Plaintiffs allege that the United States, through the Department of the Interior's Bureau of Indian Affairs ("BIA"), "has the express fiduciary obligation under federal law to approve or disapprove the lease terms between a lessee oil and gas company and the lessor/allottee by applying a uniform 'best interest' standard for individual Indian mineral owners of trust lands. . . ." Compl., ¶ 10(c). Plaintiffs claim that BIA approved allegedly "below market" leases on allotted Indian lands, including their trust land. Compl., ¶ 12, 37. Plaintiffs appear to claim that the United States failed to obtain both reasonable bonus payments and to maximize royalty rates. Compl., ¶¶ 54-55. Plaintiff claims the United States owes them fiduciary obligations "set forth in specific statutes and regulations as well as in federal common law." Compl., ¶ 36. Plaintiffs claim the United States breached those duties by the aforementioned conduct as well as approving assignments of mineral leases on allotted Indian lands, including their trust land. Compl., ¶ 13.

B. District Court Lawsuit.

The Cobell complaint was filed on June 10, 1996. In the original Cobell complaint Plaintiffs alleged that officials of the United States violated their fiduciary duties as trustee to individual Indians and sought an accounting of their trust funds held in Individual Indian Money ("IIM") accounts. Cobell v. Salazar, 573 F.3d 808, 809 (D.C. Cir. 2009) ("Cobell XXII"). On February 4, 1997, the District Court certified Cobell as a class action under Fed. R. Civ. P. 23(b)(1)(A) and (b)(2). Cobell, Docket No. 27 at 2 [Appendix of Exhibits ("App. Ex.") at 2].[1/] The class that was certified consisted of "present and former beneficiaries of Individual Indian

[1/] Citations to the concurrently filed Appendix of Exhibits are to the sequentially numbered pages.

Money accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)." Id. at 2-3 [App. Ex. at 2-3].

With leave of court, and pursuant to the jurisdictional grant of the Claims Resolution Act of 2010 (Pub. L. 111-291; 124 Stat. 3064), Plaintiffs filed an amended complaint in Cobell on December 21, 2010. Cobell Docket No. 3671 [App. Ex. at 5-31] ("Cobell Amended Compl."). The Amended Complaint asserted three causes of action: (1) that the United States be compelled to provide a historical accounting to IIM beneficiaries; (2) that the class Plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of Plaintiffs' IIM trust funds; and (3) that the class Plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of Plaintiffs' trust lands and non-monetary trust assets. Cobell Amended Compl., ¶¶ 43-52 [App. Ex. at 28-29].

In their amended complaint in the District Court, Plaintiffs allege, in pertinent part, the following:

- Their damages claims arise from "gross breaches of trust by the United States. . . . with respect to the money, land, and other natural resource assets of more than 450,000 individual Indians." Cobell Amended Compl., ¶ 1 [App. Ex. at 5].
- The United States mismanaged Plaintiffs' funds, land, and resources. Cobell Amended Compl., ¶ 3 [App. Ex. at 6].
- The United States mismanaged Plaintiffs' "land and resources, including oil, natural gas, mineral, timber, grazing, and other resources." Cobell Amended Compl., ¶¶ 4(g), 28 [App. Ex. at 7-8, 17-18].
- That the United States owes certain fiduciary obligations to individual Indians with respect to their trust funds and lands including, but not limited to, the fiduciary obligations enumerated by Congress in the American Indian Trust Fund

Management Reform Act of 1994 ("1994 Act"), codified at 25 U.S.C. § 162a(d). Cobell Amended Compl., ¶¶ 19, 20, 22 [App. Ex. at 11-14].

With respect to the United States' management of Indian trust lands, Plaintiffs, in their District Court complaint, allege that the United States' fiduciary obligations included, among other things

- Leasing trust land and otherwise prudently contracting for the use of trust lands and the sale of subsurface rights and natural resources.
- Ensuring fair market value of leases, royalty agreements, easements, rights-of-way, other encumbrances and sales.
- Preventing loss, dissipation, waste, or ruin of trust land, subsurface rights, and other natural resources.
- Preventing misappropriation.

Cobell Amended Compl., ¶ 22 [App. Ex. at 14].

On December 21, 2010, the District Court certified two classes in Cobell. Cobell Docket No. 3670 [App. Ex. at 35-37]. The "Trust Administration Class" consists, in pertinent part, of individual Indians who had an IIM account at any time after approximately 1985 or, as of September 30, 2009, had a recorded or other demonstrable beneficial ownership interest in land held in trust or restricted status. Id. [App. Ex. at 36].

Plaintiffs are members of the "Trust Administration Class." Plaintiffs allege they own interests in allotments 651A and 868A on the Fort Berthold Indian Reservation. Compl., ¶¶ 2-3. Plaintiff Two Shields had an interest in restricted trust land in 2007 (among other times). Compl., ¶ 64(a). Plaintiff Defender Wilson had an interest in restricted trust land in 2008 (among other times). Compl., ¶ 64(b).

The Trust Administration Class is an opt-out class. Settlement Agreement, Terms of

Agreement, ¶ (C)(2)(b) [App. Ex. 55]. Plaintiffs did not opt-out of the Trust Administration Class. See, Cobell, Docket No. 3850, Exhibits A and B [App. Ex. at 171-210]. As members of the Trust Administration Class, Plaintiffs are entitled to a $500 "baseline" payment plus a prorated amount of the remaining available settlement funds as determined by the claims administrator. Settlement Agreement, Terms of Agreement, ¶ (E)(4)(b) [App. Ex. at 64-66]. Under the settlement agreement, participating Plaintiffs also have an opportunity to request reconsideration of their settlement award and appeal their initial award to the claims administrator. Settlement Agreement, Terms of Agreement, ¶ (E)(4)(e)(5) [App. Ex. at 69-70].

On July 27, 2011, the District Court entered its order granting final approval to the settlement. Cobell, Docket No. 3850 [App. Ex. at 158-210]. Therein, the District Court ordered that

> [t]he Settlement Agreement and this Order and Judgment are binding on all members of the Trust Administration Class who are not identified among the excluded class members in Exhibits A or B hereto. Such members of the Trust Administration Class and their heirs, administrators, successors or assigns shall be deemed to have released, waived and forever discharged the Resasees [including the United States] as set forth in Section I of the Settlement Agreement (except for those provisions in Section I relating solely to the Historical Accounting Class) and to have agreed to the stated balances in their IIM Accounts as provided for in Paragraph 1.8 of the Settlement Agreement.

Id., ¶ 10 [App. Ex. at 165]. Those released claims include "any and all claims and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed, on behalf of the Trust Administration Class, by reason of, or with respect to, or in connection with, or which arise out of, matters stated in the Amended Complaint for Funds Administration Claims or Land Administration Claims that the Mismanagement Releasors, or any of them, have against the Releasees, or any of them." Settlement Agreement, Terms of Agreement, ¶ (I)(2) [App. Ex.

at 80].

Notices of appeal of the District Court's final approval of the settlement were filed on August 6 and September 1, 2011. Cobell Docket Nos. 3863 and 3854. Those appeals have been docketed with the United States Court of Appeals for the District of Columbia.

IV. STANDARD OF REVIEW

The United States may assert by motion the defense of "lack of subject matter jurisdiction." Rules of the United States Court of Federal Claims ("RCFC") 12(b)(1). If the Court, at any time, determines that it lacks subject-matter jurisdiction, the action should be dismissed. RCFC 12(h)(3). 28 U.S.C. § 1500 is jurisdictional. Keene Corp. v. United States, 508 U.S. 200, 207-8 (1993).

When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. Crusan v. United States, 86 Fed. Cl. 415, 417-18 (2009). When a motion to dismiss challenges the Court's subject-matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir.1991). The determination of whether this Court has subject matter jurisdiction to hear Plaintiffs' claims is a question of law. Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379, 1381 (Fed. Cir. 2002).

Plaintiffs must prove subject-matter jurisdiction. Mars, Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1372 (Fed. Cir. 1994). If the pleadings and evidence establish that the Court lacks jurisdiction, the motion should be granted and the claims dismissed. RCFC 12(h)(3).

V. ARGUMENT

A. Section 1500.

Section 1500 provides that the CFC shall not have jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." The statute's "clear" purpose is to "save the Government from burdens of redundant litigation," Tohono, 131 S. Ct. at 1730, and it does so by "forc[ing] plaintiffs to choose between pursuing their claims in the [CFC] or in another court." UNR Indus. v. United States, 962 F.2d 1013, 1018, 1021 (Fed. Cir. 1992) (en banc).

Under Section 1500, the CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents. "Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." Tohono, 131 S. Ct. at 1731.

If Section 1500 applies, the CFC lacks jurisdiction, the complaint should be dismissed, and this Court lacks discretion to retain the action. Hill v. United States, 8 Cl. Ct. 382, 385-86 (1985).

B. Plaintiffs' Claims in Cobell Were Pending When this Action Was Filed.

As members of a certified class in the District Court at the time that this action was filed (and as current members of a certified class in the District Court and the Court of Appeals), Plaintiffs' District Court claims were pending when the instant suit was filed. Plaintiffs here are Plaintiffs in the currently pending Cobell action in the District Court. Plaintiffs are members of the certified Trust Administration Class because they have a recorded or other demonstrable

beneficial ownership interest in land held in trust or restricted status. Compl., ¶¶ 2-3, 64(a), 64(b). On August 25, 2011, when this case was filed, the Cobell amended complaint was on file in the District Court, the Cobell classes were certified, and the Cobell matter was pending. Thus, Section 1500 applies if both suits are based on substantially the same operative facts. See Tohono, 131 S. Ct. at 1730.[2/] Even though Cobell is currently on appeal, it remains "pending" for purposes of Section 1500. Vero Technical Support, Inc. v. United States, 94 Fed. Cl. 784, 795 (2010).

The fact that Plaintiffs are not named class representatives in Cobell is irrelevant to the Section 1500 analysis. "Class members cannot have it both ways, being non-parties (so that more cases can come to federal court) but still having a party's ability to litigate independently. Non-named class members, however, may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." Devlin v. Scardelletti, 536 U.S. 1, 9-10 (2002) (internal citations and quotation marks omitted). All class members in Cobell are entitled to the benefits of the settlement, and eventual judgment, in that action. RESTATEMENT (SECOND) OF JUDGMENTS, § 41 (1982); London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253 (11th Cir. 2003) (all members of the class are bound by the res judicata

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[2/] Because Plaintiffs' District Court complaint was filed before and was still pending when Plaintiffs filed their CFC complaint, this case does not present the question of whether the so-called order-of-filing rule articulated in Tecon Eng'rs, Inc. v. United States, 170 Ct. Cl. 389 (1965), remains good law after Tohono. See Tohono, 131 S. Ct. at 1729-30. In the United States' view, the order-of-filing rule in Tecon does not reflect good law. Hobbs v. United States, 168 Ct. Cl. 646, 647-48 (1964) (per curiam); see Maguire Indus., Inc. v. United States, 114 Ct. Cl. 687, 688, 690 (1949) (assuming that Tax Court action was an agency proceeding and treating appeal therefrom as a later-filed suit in another court precluding CFC jurisdiction), cert. denied, 340 U.S. 809 (1950); cf. Tohono, 131 S. Ct. at 1729-30.

effect of the judgment). Plaintiffs have received notice of the Cobell settlement, Plaintiffs will receive payment as members of the Trust Administration Class, Plaintiffs had an opportunity to actively participate in the Cobell fairness hearing, and Plaintiffs have the opportunity to accept or appeal to the claims administrator their preliminary award as members of the Trust Administration Class.

As observed by the United States Court of Appeals for the Fourth Circuit, "[i]t is the actual certification of the action as a class action under 23(c) and (a) which alone gives birth to the class as a jurisprudential entity, changes the action from a mere individual suit with class allegations into a true class action qualifying under 23(a), and provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action." Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978) (internal quotation marks and footnotes omitted). On December 21, 2010, when the two sub-classes were certified, Plaintiffs became part of the "jurisprudential entity," the Cobell classes, and Plaintiffs remain members of the Trust Administration Class to this date. "[C]lass members are parties to class actions." Local 194, Retail, Wholesale and Dept. Store Union v. Standard Brands, Inc., 540 F.2d 864, 867 (7th Cir. 1976).

Furthermore, "[t]wo of the primary purposes underlying Fed. R. Civ. P. 23 are avoidance of both duplicative litigation and inconsistent standards." Goff v. Menke, 672 F.2d 702, 704 (8th Cir. 1982). Here, those purposes are fully consistent with the objectives of Section 1500. See Tohono, 131 S. Ct. at 1730 (describing the statute's purpose as "the need to save the Government from burdens of redundant litigation"). Because Plaintiffs are members of the certified class-action in the District Court and/or Court of Appeals, Section 1500 applies to their

claims in this Court.

C. Plaintiffs' CFC Suit and Cobell are Based on Substantially the Same Operative Facts.

Plaintiffs' complaint in the CFC and Plaintiffs' complaint in the District Court are premised on allegations that the United States mismanaged individual Indians' mineral and non-monetary trust assets. "Two suits are for, or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." Tohono, 131 S. Ct. at 1731. It is not necessary that the factual allegations in both cases be identical for Section 1500 to apply, only that the suits are "based on substantially the same operative facts," even if the two suits are based on different legal theories. Keene Corp., 508 U.S. at 212. Here, it is clear that Plaintiffs' allegations in their CFC complaint and Plaintiffs' allegations in Cobell are based on substantially the same operative facts. In fact, the two complaints are based upon identical operative facts.

Here, Plaintiffs claim that the United States owes them certain fiduciary obligations as statutory Indian trustee, including obligations to maximize the bonuses paid on oil and gas leases (Compl., ¶ 54) and to maximize royalty rates on oil and gas leases (Compl., ¶ 55). In the District Court, Plaintiffs claim that the United States owes them certain fiduciary obligations as statutory Indian trustee, including obligations to lease "trust lands and otherwise prudently contracting for the use of trust lands and the sale of subsurface rights and natural resources" (Cobell Compl., ¶ 22(a)) and ensure "fair market value of leases, royalty agreements, easements, rights-if-way, other encumbrances and sales" (Cobell Compl., ¶ 22(b)). In their CFC Complaint, Plaintiffs allege that the United States, as statutory Indian trustee, is obligated to supervise oil and gas lease assignments and to obtain favorable lease terms for the Indians. Compl., ¶ 56-57. In the

District Court, Plaintiffs asset that the United States has an obligation to "prudently contract[]" oil and gas leases. Cobell Compl., ¶ 22(a). Here, Plaintiffs assert that the United States "has an absolute fiduciary duty obligation to 'maximize the economic interest' of the individual Indian mineral owner at each step." Compl., ¶ 35(d). In Plaintiffs' District Court complaint, they maintain that the United States is "obligated as fiduciar[y] to manage land and resources, including oil, natural gas, mineral, timber, grazing and other resources and subsurface rights solely for the benefit of individual Indians." Cobell Compl., ¶ 22.

In the District Court, Plaintiffs claim that "the United States, through Defendants, consistently and egregiously has failed to discharge prudently its fiduciary duties as trustee in its management and administration of [i]ndividual Indian [t]rust land and other natural resources. . . ." Cobell Compl., ¶ 22. Specifically, Plaintiffs assert that the United States failed to "prudently contract for the use of trust lands and subsurface rights and other natural resources;" to "obtain market value in its lease or sale of IIM [t]rust lands, subsurface rights, and other natural resources;" to "negotiate prudently leases, royalty and bonus agreements, easements, rights-of-way, similar encumbrances and sales contracts;" to "include in, or enforce terns of leases and other contracts that require conservation, maintenance, and restoration;" and to "manage oil, natural gas, or mineral resources for maximum production." Cobell Compl., ¶ 28. In this CFC case, Plaintiffs claim damages for the United States alleged failure to obtain market rates on oil and gas lease bonus payments (Compl., ¶¶ 54, 75); to prudently negotiate oil and gas leases so as to maximize royalty rates (Compl., ¶¶ 55, 76); and to include lease terms that would be favorable to the Indians to prevent waste, ensure productivity, and avoid assignment (Compl., ¶¶ 56-57, 77). The factual claims in both cases are substantially similar, if not identical.

In the District Court, Plaintiffs have released and waived all oil and gas mismanagement claims that "were, or should have been asserted in the Amended Complaint when it was filed," December 21, 2010. Settlement Agreement, ¶ (I)(2) [App. Ex. at 80]. In this case, Plaintiffs allege the United States breached its trust obligations as to oil and gas leasing on the Fort Berthold Indian Reservation "between January 1, 2006, and November 1, 2010." Compl., ¶ 59. Thus, the two complaints cover the same temporal scope.

The foregoing examples highlight the inevitable conclusion from a full review of Plaintiffs' CFC Complaint and the District Court amended complaint that Plaintiffs' claims in both courts are based on substantially the same (if not identical) operative facts. Therefore, Section 1500 applies to these claims and they should be dismissed. Tohono,131 S. Ct. at 1731.

VI. CONCLUSION

Plaintiffs claims here are based on substantially the same operative facts (if not identical facts) as those asserted in Cobell. Plaintiffs are members of the certified classes in Cobell and are therefore parties to that action. Cobell was filed before the instant action and is pending in the District Court and the Court of Appeal. All of the elements of Section 1500 are met, this Court lacks subject matter jurisdiction over Plaintiffs' Complaint, and Plaintiffs' Complaint should be dismissed.

Dated: October 20, 2011

Respectfully submitted,

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