IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAMONA TWO SHIELDS AND MARY LOUISE DEFENDER WILSON Individually, and On Behalf of Others Similarly Situated	§ § § §	Case1:11-cv-00531-LB Hon. Lawrence J. Block
v.	§	
THE UNITED STATES	§	

PLAINTIFFS' RESPONSE AND OPPOSITION TO MOTION TO DISMISS

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I. INTRODUCTION

The Government seeks to avoid taking responsibility for breaching its continuing fiduciary obligations relating to below-market oil and gas leases which it first approved and then has continued to improperly manage on behalf of Native American allottees with mineral interest rights located on the Fort Berthold Reservation in North Dakota.[1] It tries to do so by wrongly claiming that completely different class litigation (the *Cobell* action, now on appeal in the D.C. Circuit) includes and releases the Government from all of the wrongdoing alleged here in the *Two Shields* action.[2]

The named plaintiffs before this Court are unnamed class members in *Cobell*, which involved accounting issues over money flows in IIM accounts. The Government's motion to dismiss is a flawed overreach and a legal and factual house of cards, for the following reasons:

- The motion asks this Court to create new law, stretched far beyond the statutory language and case law:
    - Section 1500 is a post-Civil War statute that simply prohibits the same plaintiff filing a claim in the Court of Federal Claims from trying to file that same claim in a second court.
    - The only close application of that statute to the class action context is a single case in which, unlike *Two Shields*, the identical named plaintiffs filed the same claims in two courts.
    - The named plaintiffs in the present case were never named plaintiffs in any other case in which the same claims were brought.
- The motion also asks the Court, based solely on the pleadings, to take an improper leap of faith on factual issues:

[1] Citation to the Government's Memorandum of Points and Authorities will follow the convention "GM, at __." Citation to material in the Governments Appendix of Exhibits will follow the convention of "GA, Ex. __, at __."

[2] Action in the D.C. District Court was styled *Cobell v. Salazar*, No. 1:96CV01285(TFH). Appeal to the D.C. Circuit Court is styled *Craven v. Salazar*, No. 11-5205, and is set for oral argument on February 16, 2012. Reference to "*Cobell*" includes the entirety of the action. Reference to "*Two Shields*" is to the complaint and action now pending before the Court.

- The Government contends that the complex facts in this case are "identical" claims to facts pled in the separate *Cobell* class action.

- The Government ignores that not a single word of the factual allegations in the complaint before this Court are within the factual predicate for any claim in the *Cobell* amended complaint.

- Likewise, the Government ignores that a number of "continuing violation" allegations in this case on their face fall outside the class period in *Cobell*.

- Still further, the Government ignores flaws in the now-appealed *Cobell* litigation settlement—including a damage payment model that definitively shows it was not fashioned to address the facts and allegations here.

- Last, the Government ignores the obvious factual issues concerning whether the *Cobell* settlement might one day be an "affirmative defense" to claims here, including limitations in the language of the *Cobell* release itself.

The bottom line is simple: a "jurisdictional" dismissal is totally improper. Because these claims do not fall within the *Cobell* amended complaint, and because of the fact-specific nature of the Government's release theory, the Court should deny the motion to dismiss. The proper procedure to raise any issues relating to the now-appealed *Cobell* settlement will be in later proceedings, if necessary, as an affirmative defense to part of (but not all of) the claims here. Even a mere stay—while not at all necessary given the continuing violations alleged here—would be far more appropriate than a jurisdictional dismissal.

II. QUESTION PRESENTED

Whether 28 U.S.C. § 1500 applies in a procedural posture in which named plaintiffs in a class action properly before this Court are merely purported to be absent class members in a far different class action pending in Federal District Court, in which the named plaintiffs here have never appeared or intervened or in any way participated in that litigation?

III. STATEMENT OF THE CASE AND RELEVANT FACTUAL BACKGROUND

A. The *Two Shields* Action Involves a Unique Oil and Gas Swindle at the Fort Berthold Reservation That Is Continuing

The focal point of this class action is a billion-dollar purchase by Williams Companies of approximately 85,000 acres of mineral interests on the Fort Berthold Indian Reservation in western North Dakota, as announced by press release on December 21, 2010. The Fort Berthold Reservation is home to the Three Affiliated Tribes.

The focal point of the *Cobell* lawsuit, which even in its settlement ends relief to the *Cobell* class in September 2009, was nationwide accounting issues in Indian trust accounts. The *Cobell* action failed to mention a single factual predicate related to the Fort Berthold Reservation or the swindle with respect to the Bakken oil shale, as detailed below.

Thus, this case exposes a huge and unique level of bureaucratic incompetence and/or malfeasance committed by the Bureau of Indian Affairs ("BIA") in carrying out its fiduciary duties on behalf of Native Americans who own oil and gas interest allotments located on the Fort Berthold Indian Reservation. Misappropriation of land resources belonging to Native Americans is a very old story, but this is on a scale bigger than ever, given the incredible assets within the Bakken oil shale deposits in North Dakota, which were nowhere on the radar anywhere in the *Cobell* action.

1. The swindle became public after the close of the *Cobell* class period

The misappropriation in this case involves the estimated 20 billion barrels of oil recently discovered in the Bakken Formation, which spans the Williston Basin in North Dakota and surrounding area. To put the enormity of this oil find in perspective, the reserves in the Bakken Formation may be greater than all the oil reserves in the State of Texas. A key "sweet spot" in

the Bakken Formation falls directly below the lands of the Fort Berthold Reservation. Compl. ¶¶ 7-10.

On December 21, 2010, Williams Companies issued a press release effectively announcing to the world that the BIA, in disregard of its fiduciary obligations, had allowed allottees to be completely fleeced: Williams Companies had just paid $925 million for the 85,000 acres of mineral leases (including 185 million barrels of reserves) on the Fort Berthold Reservation, plus a small number of producing wells. This amounted to approximately $10,000 per acre. *Id.* ¶ 16. This transaction in 2010 came as a shock for a simple reason: the BIA had been approving the exact same leases that ultimately went to Williams Companies for a miniscule bonus as low as $35 per acre in the 2006 to 2010 period when they were initially sold by individual allottees owning Fort Berthold mineral interests as described below. *Id.*

By comparison, The *Cobell* amended complaint ceases to cover conduct after September 30, 2009. *See* GA, Ex. 4, at 49, 80 (definition of "Record Date" as used in release). Moreover, it touches only those claims in *Cobell* that "were, or should have been, asserted in the Amended Complaint when it was filed." GA, Ex. 4, at 80. As detailed below, the *Two Shields* claims could not have been asserted in the *Cobell* amended complaint because neither the *Cobell* named plaintiffs nor their class counsel knew or should have known about this swindle. Why not? Because the Williams announcement occurred eleven days after the settlement agreement and amended complaint were filed with the *Cobell* court.

2. The Government was clearly on notice that it had breached its fiduciary obligations at the Fort Berthold Reservation

Beginning in 2005 or 2006, a group of oil and gas companies, which included a company called "Dakota 3," obtained approximately 85,000 mineral acres of leases on the Fort Berthold Reservation, about half of which belong to individual Native Americans with what are called

"allotted" trust land mineral interests. The United States has historically allotted to individual Native Americans part of the land previously held in trust for the tribes. *Id.* ¶ 10(a). The reason for sophisticated energy companies to obtain leases of these allotted lands was obvious: the Bakken oil shale formation had proven commercially profitable for several years in the nearby Elm Coolee Field, and the geological information available to energy companies and the Government showed massive Bakken reserves in this area of North Dakota. *Id.* ¶¶ 38-42.

With reported unemployment rates on the Fort Berthold Reservation above 40%, many (if not most) of the individual Native American "allottees" are poor and have no experience negotiating oil and gas leases. Seizing on allottee ignorance, the oil and gas companies induced allottees to accept leases with bonus payments as low as $35 per acre—and/or as low as 16 2/3 percent royalty interest. *Id.* ¶ 10(b)(c).

To protect these allottees, federal law commands the BIA to undertake the express fiduciary obligation to approve or disapprove the lease terms between a lessee oil and gas company and the lessor/allottee by applying a "best interest" standard for individual Indian mineral owners of trust lands. In carrying out its duties, the BIA officially approves leases by using an actual rubberstamp with the following text: "This lease is in the best interest of the Indian mineral owner." *Id.* ¶ 10(e)(f).

As it turns out, the BIA was approving these cheap leases for allottee land located on the Fort Berthold Reservation at the same time the Government and non-Native Americans were securing leases in the same area for thousands of dollars more per acre. By 2008, the U.S. Bureau of Land Management was approving Bakken oil shale leases for the Theodore Roosevelt National Park in North Dakota (located about 100 miles away from the Fort Berthold Reservation) in the $3000 to $4000 per acre bonus rental range. At the same time, leases

immediately adjoining the Fort Berthold Reservation were going for as high as $3000 to $4000 per acre. Indeed, some government leases inside the Fort Berthold Reservation included bonuses as high as $3000 an acre. *Id.* ¶¶ 44-46.

Some members of the Three Affiliated Tribes complained to the BIA that the leasing prices being approved by the BIA were far too low. A March 26, 2008 letter from the Fort Berthold MHA Elders Association to the BIA stated:

> The BIA is allowing these lucrative agreements between oil companies and the BIA ... knowing that it was not fair market value.... The Bureau of Indian Affairs and the Office of Trust Services have failed in their fiduciary responsibilities to the enrolled members of the tribe.

Id. ¶ 11 (emphasis added).

The BIA never responded to this letter. Instead, it continued to systematically approve leases at rates and on terms below market, in breach of its fiduciary duties to the allottee mineral interest owners. All of this allowed the oil and gas speculators to complete their leasing effort to corner the market on allottee land located on the Fort Berthold Indian Reservation. *Id.* ¶ 12.

Without any apparent serious questioning, the BIA also systematically approved the subsequent flipping of these leases in the form of assignments from many of the original lessors. In doing so, the BIA used forms that did not require allottee approval, even though federal regulations allowed for it. Moreover, the Native American owners of the oil and gas leases received no benefit from the flipping. This is unusual. Customarily, Native American owners get more compensation from lessors and more control over the drilling if they have a voice in whether a new drilling company gets assigned an existing lease. *Id.* ¶ 13.

Recognizing how unfair this flipping process was to allottees, the governing body of the Three Affiliated Tribes urged the BIA to change its oil and gas lease form to require allottee consent, and to mandate that lessees share part of the consideration from the "flip" with allottees

prior to approving the assignment of any oil and gas lease on the Fort Berthold Reservation. On August 1, 2008, the Governing Body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation passed a Resolution that noted:

> *WHEREAS, the Three Affiliated Tribes has become aware of the possibility of the assignment or "flipping" of allottee mineral leases without the consent of the Allottee Mineral Owners and with little or no additional compensation to the Allottee Mineral Owners; and*
>
> *WHEREAS, the Three Affiliated Tribes has already installed a provision regarding the assignment of tribal trust leases and wishes to provide the same level of protection to the Fort Berthold Allottee; and*
>
> *NOW, THEREFORE BE IT RESOLVED, that the Three Affiliated Tribes Tribal Business Council through this resolution hereby request the Bureau of Indian Affairs – Fort Berthold Agency to amend the standard Oil and Gas Mining Lease for Fort Berthold to include the following provisions.*
>
> (h) *Assignment of lease. Except as provided herein*, Lessee agrees that it shall not assign any interest in this Lease except *(i)* with the written consent of the Lessor; *(ii) with the approval of the Secretary of Interior; and (iii) for any consideration received by the Lessee for any assignment of any interest contained under the Lease*, the Lessor shall be entitled to eighty percent (80%) of any additional consideration. . . . .

Id. ¶ 14.

The BIA ignored this request. As a result, Dakota 3 collected approximately 42,500 mineral interest acres through this leasing and flipping process. The allottees had no say and received none of the financial benefit earned by those companies flipping their leases. *Id.* ¶ 15.

This first round of flipping to Dakota 3 was not the end. The middlemen owning Dakota 3 then took the combined package to Williams Companies at the end of 2010. As previously noted, that was revealed in Williams Companies' press release in December 2010 regarding its $925 million acquisition of these and other leases previously flipped to Dakota 3. *Id.* ¶ 16. The Government did nothing at any point to stop or modify both phases of these lease transfers, and

gained no protections for individual Native American allottees in return for the right to flip the leases.

By systematically approving leases and assignments of approximately 42,500 mineral acres of the class members' individually allotted Indian trust land on the Fort Berthold Indian Reservation, which ultimately passed into the hands of Williams Companies at a market price far above what the individual allottees received, the Government failed to meet its fiduciary obligations by violating the BIA's "best interest" guidelines for leasing Indian mineral rights on "trust" lands. *Id.* ¶ 17.

3. The Government's breach of fiduciary duties includes continuing violations

Plaintiffs' class action complaint details a case of systematic breach of fiduciary duty with respect to allottees on the Fort Berthold Reservation. *Id.* ¶ 37-52. This includes continuing violations. For example, unitization, spacing, and other drilling activities are escalating in the area during the period of the five-year leases involved, and environmental problems are continuing as well. Plaintiffs' complaint emphasizes the BIA's control over every aspect of a lease, including creating the lease form language, finalizing the key terms, approving or disapproving any attempt to assign leases, approving all lease rights over spacing (where large spacing allows an oil company lessee to keep large amounts of lease acreage tied up with one well). Subsequent improper protection against abusive unitization, spacing, environmental and other aspects under the BIA's total control are pled in paragraphs 4, 12, 35, 36, 52, 57 and other paragraphs of the *Two Shields* complaint.

In a nutshell, the *Two Shields* complaint alleges that the Defendant has systematically failed to carry out its duty to manage, protect, and approve leases on the Fort Berthold Reservation both before the Williams transaction, at the time of the Williams transaction, and

continuing after the Williams transaction to the present and beyond. Damages will be in the hundreds of millions, if not billions, of dollars. *Id.* ¶ 54-57.

B. The *Cobell* Action Involves Different Issues Over the Accounting of Money Flows in IIM Accounts

For nearly fifteen years, the *Cobell* Class focused exclusively on accounting claims that had nothing to do with the BIA's improper approval of cheap oil and gas leases for any allottees, much less any on the Fort Berthold Reservation. *Cobell* had always dealt with the BIA's failure to properly account for money coming in and going out of individual IIM accounts nationwide. *See, e.g.*, GM, at 3; GA, Ex. 1 (1997 order initially certifying *Cobell* class). Consequently, an accounting was the sole relief sought in *Cobell* from the time the class action was first filed on June 10, 1996 through January 30, 2008 when the district court signed a Class Certification Order which provided that the *Cobell* class had a right to an accounting. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 98 (D.D.C. 2008). *Cobell*'s focus on an accounting continued through July 24, 2009, when the D.C. Circuit reaffirmed that "[t]he district court sitting in equity must do everything it can to ensure that [Government defendants] provide [plaintiffs] an equitable accounting." *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009).

Things changed on December 10, 2010. On that day, the *Cobell* class filed a settlement agreement seeking to resolve its 13-year litigation with the Government. Attached to the settlement agreement was an amended complaint that added—for the first time ever—an amorphous, ill-defined, and non-specific "Land Administration Claim" relating to a host of issues, including "[f]ailure to obtain fair market value for leases" and "[f]ailure to prudently negotiate leases." GA, Ex. 4, ¶ 21(b)-(c). No factual allegations in this regard were pleaded.

Neither the *Cobell* amended complaint nor the settlement agreement provide a factual predicate for the Land Administration Claim. Neither mention anything whatsoever about the

swindle of individual allottees on the Fort Berthold Reservation. Instead, the settlement agreement generically states that "Class Counsel conducted appropriate investigations and analyzed and evaluated the merits of the claims made ...." GA, Ex. 4, ¶ 16. None of the filings in *Cobell*, however, detail whether the "appropriate investigations" involved any investigation into the specific factual claims raised in *Two Shields*.

Given how the Government is now attempting to use the settlement release language to eliminate legitimate breach of fiduciary duty claims that the *Cobell* class had no reason to know about, it is critical to consider that release language. The settlement agreement makes clear in Section I(2) that the reach of the release language for the Trust Administration Class is limited to "all claims and causes of action that were, or should have been, asserted in the Amended Complaint when it was filed ...." GA, Ex. 4, at 80. Whether the *Cobell* named plaintiffs and class counsel knew or should have known about the *Two Shields* claims as of December 10, 2010, is of central importance.

Although the answer to that question might later be one of dispute in litigation, on the record presently before this Court the answer appears to be no. In the *Cobell* amended complaint, none of the five class representatives in *Cobell* identified themselves as allottees with oil and gas leases approved by BIA. None had the BIA approve below-market leases bonuses and royalty percentages on mineral interests located on the Fort Berthold Reservation. None had their leases flipped to Dakota-3 without compensation. None of their leases were acquired by Williams. In sum, none of the *Cobell* class representatives were affected by the BIA's decisions at the Fort Berthold Reservation. *See generally*, GA, Ex. 2 (amended complaint).

Indeed, it is completely undocumented whether, when the Land Administration Claims were created, the *Cobell* named plaintiffs or their class counsel knew anything about the illegal

activity happening on the Fort Berthold Reservation. Why not? Because the *Two Shields* claims, and the rip-off of allottees on the Fort Berthold Reservation, did not become front-page news until December 21, 2010—eleven days after the *Cobell* class filed the settlement agreement, which included the amended complaint as an attachment, on December 10, 2010. That's when Williams Company issued its press release announcing that it had closed on its $925 million purchase of cheap leases previously approved by the BIA with respect to rights held by the *Two Shields* class. Compl. ¶ 16. Only then did allottees realize that the $35 to $500 per acre lease bonuses the BIA had approved paled in comparison to the $10,000 per acre amount Williams had paid to acquire these same leases.

Based on this timing, the *Cobell* named plaintiffs and class counsel could not (and should not) have known that the *Two Shields* class had been cheated out of hundreds of millions of dollars at time the settlement agreement and amended complaint was filed with the federal district court. Nobody knew until nearly two weeks later. In short, the "appropriate investigations" conducted by *Cobell* class counsel could not have included the *Two Shields* claims.

IV. STANDARD OF REVIEW

The Government's citations pertinent to standard of review do not involve jurisdictional challenges under 28 U.S.C. § 1500, and most do not involve motions to dismiss under Fed. R. Civ. P. 12(b)(1). *See* GM, at 7. The properly stated standard is:

> In rendering a decision on motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), this court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. However, plaintiff bears the burden of establishing subject matter jurisdiction, and must do so by a preponderance of the evidence. If jurisdiction is found to be lacking, this court must dismiss the action.

Ramah Navajo School Board v. United States, 83 Fed. Cl. 786, 790 (2008) (citations omitted; emphasis added).

This Court's "task is necessarily a limited one, whereby the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Confederated Tribes v. United States*, 89 Fed. Cl. 589, 603 (2009). Whether the challenge to subject matter jurisdiction is a facial or factual one affects what may be considered by the court:

> When the movant challenges merely the facial sufficiency of the pleadings, the court will accept as true a plaintiff's undisputed allegations of fact ... and indulge all reasonable inferences in favor of the non-movant. Nevertheless, when the RCFC 12(b)(1) motion controverts the plaintiff's jurisdictional allegations and challenges the factual basis of the court's jurisdiction, the plaintiff must demonstrate facts sufficient to support jurisdiction. In assessing the plaintiff's proof, the court will not be limited to the allegations of the complaint, but instead "may consider other relevant evidence in order to resolve the factual dispute."

Id. (citation omitted).

Plainly, review is confined to the issue of subject matter jurisdiction, and not a ruling on the merits. *See Barrett v. United States*, 853 F.2d 124, 131 (2d Cir. 1988); Moore's Federal Prac. 3d Sec. 12.30[3].

V. ARGUMENT

Pursuant to the Indian Tucker Act, the Court of Federal Claims has jurisdiction over "any claim against the United States ... in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States ... whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." 28 U.S.C. § 1505. The *Two*

Shields class seek money damages for breach of fiduciary duty by the United States with respect to the Fort Berthold swindle, and as such, their claims belong before this Court, if anywhere. They simply cannot bring their claims before any other court.

The Government relies on 28 U.S.C. § 1500, not to assert that this Court could never be vested with subject-matter jurisdiction, but rather, to claim that it should be stripped of its rightful jurisdiction on a highly disputed factual contest. Your Honor has of course dealt with this statute before, applying it with fidelity to its terms and purpose, while seeking to avoid any ruling that "would merely solidify § 1500's status as a 'trap for the unwary.'" *Berry v. United States*, 86 Fed. Cl. 24, 29 (2009) (citation omitted) (Block, J.). The Court should construe the Government's arguments narrowly, and keep firmly in mind the question whether § 1500 was at all intended to strip jurisdiction when named plaintiffs in a class action properly before it are absent class members in an action pending elsewhere in which they have never appeared or participated, but which the Government merely alleges to have settled the claims here. It was not. From such perspective, it is clear that the Government seeks an untoward expansion of this jurisdiction-stripping provision.

A. Section 1500 Does Not Apply in this Class Action Scenario

1. Section 1500 on its face does not apply to the procedural posture here

The text of 28 U.S.C. § 1500 is straightforward, and starkly commands that it must be "the plaintiff or his assignee" that has brought action before the Court of Federal Claims and another court:

> 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.

28 U.S.C. § 1500 (emphasis added).

The named plaintiffs in this action—Ramona Two Shields and Mary Louise Defender—are not the named plaintiffs in the *Cobell* action. Two Shields and Defender did not file the *Cobell* action and have not litigated or directed the *Cobell* action in any way. Their complaint affirmatively pleads their ownership of the claims at issue, and nothing in the Government's pending motion or its attachments indicates that they have assigned their claims in this action to anyone, much less to anyone prosecuting the *Cobell* action. *See* Compl. ¶¶ 2-3, 64(a)(b). The Government neither makes any allegation nor presents any evidence contrary to any of the foregoing. On its face, then, § 1500 simply does not apply here.

Nor should it. As this Court has noted, "section 1500 divests this Court of subject matter jurisdiction when a plaintiff has elected to file the same claim in another court prior to filing suit in this Court." *Ramah Navajo School Board v. United States*, 83 Fed. Cl. 786, 791 (2008) (*quoting Cooke v. United States*, 77 Fed. Cl. 173, 176 (2007)) (emphasis added). Your plaintiffs here have not elected to file this same claim in another court; therefore, § 1500 cannot divest this Court of jurisdiction.

To avoid such an obvious result, the Government tortures the statutory language by suggesting that absent class members should be deemed "parties" in extant class actions, even though the term "parties" is not used in § 1500, and even where those bringing action in this Court deny that a class action elsewhere covers their claim here or could possibly settle it. Thus, without advising this Court it is doing so, the Government requests that this Court imply a jurisdiction-stripping extension far beyond the clear text of § 1500. That is improper.

The Supreme Court has already acknowledged that § 1500 is "anachronistic." *Keene Corp. v. United States*, 508 U.S. 200, 217-18 (1993). Your Honor has expressly "joined an ever

increasing chorus observing that the section constitutes a potential trap to litigants." *Lower Brule Sioux Tribe v. United States*, 2011 WL 6062269, *1 (Fed. Cl. Dec. 1, 2011) (Block, J.) (citations omitted). As shown below, neither the law pertaining to § 1500, nor the policy underlying it, support the extension requested by the Government. The "proper theater" to change the language of the statute is "the halls of Congress," for the courts are powerless to do so. *Keene*, 508 U.S. at 217-18 (citation omitted); *see also Berry*, 86 Fed. Cl. at 29 (Block, J., quoting *Keene* to same effect).

2. The Government cites no case establishing that jurisdiction of the Court of Federal Claims is divested where the plaintiff before the Court is an unnamed class member in another action

Defendant exerts the main force of its substantive argument by stitching together generic statements of class action principles, in a manner utterly out of context and without analogous application here. GM, at 8-10. Indeed, none of the class action cases cited by the Government in any way involved an action in the Court of Federal Claims, or in any way construed § 1500.[3] As such, the Government's argument and the cases it cites in no way advance consideration of the § 1500 issue.

To the contrary, no case has decided that § 1500 strips jurisdiction in the situation here, *viz.*, where a named plaintiff in this Court is definitively not a named plaintiff in a referenced class action in another court, but instead, is purported only to be an absent class member. We have searched for cases construing and applying § 1500 in the class action context, and believe the only decided action possibly on point is *Ramah Navajo School Board v. United States*, 83. Fed. Cl. 786 (2008). There, the court found § 1500 to require dismissal because the plaintiff in

[3] *See Devlin v. Scardelletti*, 536 U.S. 1 (2002 (retiree attempting to intervene in class action appeal involving private retirement plan); *Goff v. Menke*, 672 F.2d 702 (8th Cir. 1982) (pro se inmate against state penitentiary warden); *Local 194, Retail, Wholesale and Dept. Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976) (labor union against private employer); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003) (credit card applicant against credit card issuer and credit life insurer); *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) (racial discrimination action against private employer).

the Court of Federal Claims was also the named plaintiff in a class action pending in federal district court. The only other case that conceivably comes close is *Slattery v. United States*, 35 Fed. Cl. 180 (1996), where plaintiffs brought a shareholder derivative and class action in this Court, and the United States contended that an entirely different class action in federal district court arose out of the same operative facts. The court actually denied the motion, but only on the grounds that the two complaints sought different relief (a then-dispositive rule, since overturned by the Supreme Court), without in any way addressing the issue raised by the Government here. *Id.*, at 183.

As such, *Slattery* provides no guidance at all. And *Ramah Navajo* only answers the question of what to do when the same named plaintiff brings the same action before this Court and another simultaneously. That, of course, is not the case with Two Shields or Defender, as neither is a named plaintiff in *Cobell*. In short, no case answers the question with respect to completely different named plaintiffs bringing widely divergent class actions. Although we submit the answer to that question should be obvious, consideration of the policy and purposes underlying § 1500 confirm that jurisdiction should not be stripped.

3. The policy underlying Section 1500 would not be served by dismissal here

28 U.S.C. § 1500 dates back to the Civil War, and the intent of Congress to "curb duplicate lawsuits brought by residents of the Confederacy" with respect to claims seeking to recover cotton taken by the federal government. *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723, 1728 (2011). Specifically, these "cotton claimants" sued the United States for compensation in the Court of Claims pursuant to statute, and as a back-up (because their status as rebels jeopardized statutory recovery), such individuals filed separate suits elsewhere against federal officers under tort theories. *See Keene Corp. v. United States*, 508 U.S. 200, 206 (1993) .

Although § 1500 originated long ago, Congress has reenacted the provision several times, most recently in 1948.

The statute was not originated or ever reenacted with class action litigation in mind, and no statutory history indicates consideration of its application in a class action context. *See id.*, at 206-07. Instead, it was born out of concern that individual claimants not be permitted access to the Court of Federal Claims if that self-same claimant was pursuing the identical claim elsewhere.[4] *See UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1017-19 (Fed. Cir. 1992), *rev'd, Keene Corp. v. United States*, 508 U.S. 200 (1993) (detailed consideration of legislative history). That policy concern is not implicated in this case.

The policy underlying § 1500 is to "relieve[] the Government from defending the same case in two courts at the same time." *Branch v. United States*, 29 Fed. Cl. 606, 608 (1993). Far from being protected from litigation in two courts, the Government plainly desires never to litigate the specific claims brought by the *Two Shields* plaintiffs in any court. The fiduciary breaches at Fort Berthold are nowhere mentioned in the *Cobell* action. Indeed, *Cobell* was brought as an accounting action and prosecuted as such for more than fifteen years. Only after getting hammered on those accounting claims in the D.C. Circuit did the Government decide to settle, apparently hoping that it could sweep under the rug as much of its prior bad conduct as possible. And so, this Court has before it only the Government's bald assertion that the *Cobell* complaint was broadened in a way now purported to cover this action. Yet the Government makes no showing that any discovery was taken on the *Two Shields* claims, or that those claims were in any way litigated at all in *Cobell*. As such, no policy reason suggests extension of § 1500 to protect the Government this way.

[4] "Admittedly, this is a badly drafted statute. Viewed against a legal landscape that has changed dramatically since the days of the cotton claimants, it does not lend itself easily to sensible construction." *Keene Corp. v. United States*, 508 U.S. 200, 222 (1993) (Stevens, J., dissenting).

For its part, the Government makes the casual and conclusory assertion that absent class members are bound as "parties" in a certified class action, and thus makes the leap—without any supporting analysis—that absent class members should be construed as "the plaintiff or his assignee" as used in 28 U.S.C. § 1500. GM, at 9-10. The Government's leading decision is *Devlin v. Scardelletti*, 536 U.S. 1 (2002), but even the most cursory understanding of that case demonstrates why it is inapplicable. The Supreme Court was plainly wrestling with the fact that "[n]onnamed class members ... may be parties for some purposes and not for others." *Id.*, at 9-10. In the context of that case, it made sense that an absent class member could participate in the appeal of the very class action in which he would be bound. But even in so ruling, the Court noted that consideration of absent class members in a jurisdictional sense is far different:

> The rule that nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation. ... [C]onsidering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect.

Id., at 10.

That statement is of course in line with other familiar jurisdictional rules in the class context noting that only named plaintiffs or class representatives matter when assessing the court's jurisdiction. *See, e.g.*, 2 NEWBERG ON CLASS ACTIONS § 6:11 (4th ed. 2002) (named plaintiff damages in excess of diversity jurisdictional amount will not support jurisdiction over claims of absent class members with claims below that amount; collecting citations); *id.*, at 606 (only named plaintiff must have minimum contacts with forum for that forum to have personal jurisdiction sufficient to issue final judgment binding on all class members; collecting citations); *cf. id.* § 6:12, at 608 (unnecessary for all class members to reside in same district to establish

venue; collecting citations). Thus, when looking at a statute pertaining to jurisdiction (which § 1500 certainly is), it is far more proper not to count absent class members as "parties."

Beyond this, contrary to the Government's cursory conclusion, class members in most respects are not typically viewed as active "parties" to a class action claim. "Class members are not named adversary parties before the court. On the contrary, they are absent, unnamed parties who did not initiate the action but who will be bound by any class judgment . . . ." 1 NEWBERG ON CLASS ACTIONS § 1:3, at 19 (4th ed. 2002); *see, e.g., American Pipe & Construction Company v. Utah*, 414 U.S. 538, 552 (1974) (describing absent class members as "passive" parties who are entitled to do nothing other than await the results of the class litigation). It is nothing more than a truism to assert that absent class members might ultimately be bound by the results in a given class action. *See* GM, at 9-10. But that consideration will be a contested issue appropriate for resolution only upon a developed record, not as a matter of jurisdiction. In that context, the *Two Shields* plaintiffs do not agree that their claims are bound by *Cobell*, or that such action could possibly have purported to cover the wrongdoing here at issue.

As to direct consideration of § 1500 and its focus on the conduct of litigation, it must be remembered that absent class members "are not parties for purposes of filing or responding to briefs, or motions, or adversary discovery or participating directly in the class trial, except as witnesses." 1 NEWBERG ON CLASS ACTIONS § 1:4, at 22 (4th ed. 2002). The *Two Shields* plaintiffs plainly have no authority or ability to propound discovery or direct in any way the litigation on file in *Cobell*. The reverse is also true, for when it comes to defendants seeking to make absent class members subject to discovery, courts rarely impose such a burden. *See, e.g., Dellums v. Powell*, 566 F.2d 231, 236 (D.C. Cir. 1977) (because discovery against absent class members "can be a tactic to take undue advantage of the class members ... and further that

Rule 23 ... contemplates that absentee parties shall remain the passive beneficiaries of class suits, courts have found it necessary to restrict availability of discovery against absentees to those instances in which a need can be shown"). This again makes clear that the *Two Shields* plaintiffs are not properly deemed "plaintiffs" or "parties" to the *Cobell* action.

The named plaintiffs in *Two Shields* have done nothing to insert or involve themselves in the filing or prosecution of the *Cobell* action. They are true absent class members who cannot be considered as the party plaintiff, although they may be bound by any finalized settlement. But plaintiffs here dispute that the *Cobell* settlement, even if it becomes final, will release their claims in this action. Thus, even as to any finalization that might occur in *Cobell*, that is only a matter that should be tested on motion for summary judgment, as considered next.

B. This Action Does Not Duplicate the *Cobell* Action

1. It is not clear from the face of the pleadings that *Cobell* duplicates this action

The typical action in which 28 U.S.C. § 1500 comes into play involves literally the exact same plaintiff filing an identical or near-identical action in two courts. This is evident from the Government's own citations. In *Hill v. United States*, 8 Cl. Ct. 382, 383-84 (1985), a discharged female army reservist brought action arising out of her discharge by filing on the same day in the United States District Court and in the United States Claims Court, with "at least 24 paragraphs of its operative facts [being] virtually identical," together with relief "virtually identical in all material particulars." *See* GM, at 8. The recent Supreme Court decision in *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723 (2011), likewise dealt with a situation where a single Indian tribe itself "brought two actions based on the same alleged violations of fiduciary duty with respect to the Nation's lands and other assets," where "it appear[ed] that the Nation could

have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect." *Id.*, at 1726-27, 1731. *See* GM, at 9.

Applying *Tohono O'Odham*, Your Honor recently stated: "Legal theories and nomenclature aside, a court must ascertain whether the material facts—those 'upon which plaintiff's allegations of breaches ... are based'—are substantially the same in the two suits." *Lower Brule Sioux Tribe v. United States*, 2011 WL 6062269, *4 (Fed. Cl. Dec. 1, 2011) (Block, J.) (citations omitted). Here, there is not a single, specific allegation in the *Cobell* action that mentions, directly or indirectly, the breach of fiduciary duty arising from the Williams transaction. To state it charitably, *Cobell* speaks generically and generally. To put it more bluntly, *Cobell* speaks in meaningless boilerplate language unrelated to any substantive factual allegation in this regard.

In line with widespread authority, Your Honor has also observed "if the claims present distinctly different operative facts, § 1500 does not apply." *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225, 231 (2008). In *Yankton Sioux*, at 231, this Court cited and quoted propositions from two cases that have particular resonance here. First, from *D'Abrera v. United States*, 78 Fed. Cl. 51, 58 (2007), this Court noted that "if a material factual difference exists between two claims, they are not the same for purposes of Section 1500." Second, from *Heritage Minerals, Inc. v. United States*, 71 Fed. Cl. 710, 716 (2006), this Court noted that "while claims may be supported by some common operative facts, [s]ection 1500 is not implicated where the material facts supporting each claim are characterized as largely dissimilar." In short, and as summarized elsewhere, "[c]laims involving the same general factual circumstances, but distinct material facts can fail to trigger Section 1500." *Branch v. United States*, 29 Fed. Cl. 606, 609 (1993).

Not even by implication can the Government claim that the facts in the *Two Shields* action are necessarily subsumed by the facts pleaded in the *Cobell* action. Each and every paragraph of the *Two Shields* complaint details only specifics as to the Fort Berthold swindle. Not a single fact or allegation from that complaint appears in the *Cobell* amended complaint. Instead, *Cobell* discloses a particular focus on accounting for Individual Indian Money ("IIM") accounts, and specifically states that "[t]his action is limited to IIM Trust funds and other assets held in trust by the Federal Government and its agents for the benefit of individual Indians." *Cobell*, at ¶ 6. The Government points to what amount to snippets scattered throughout the *Cobell* amended complaint that it purports are broad and non-specific enough to swallow the *Two Shields* allegations. GM, at 11-12. But note what the Government is actually doing: it wants this Court to assume that the breadth and generality of the language was meant to cover an action such as this. It has not put "operative facts" from the *Cobell* action beside *Two Shields* allegations and demonstrated them to be one and the same. To the contrary, there are no "operative facts" from *Two Shields* that find their mirror in *Cobell*.

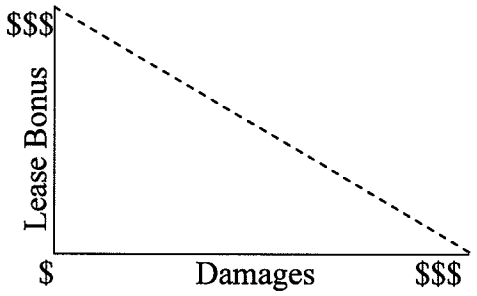
The terms of the *Cobell* settlement further dictate against drawing any conclusion that it resolved the *Two Shields* action. First, as noted in the Statement of the Case, the amended complaint and settlement agreement in *Cobell* pertain only to those "claims and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed." GA, Ex. 4, at 80. Yet the disclosure of the Fort Berthold swindle was not public until eleven days after the *Cobell* class filed their settlement agreement and proposed amended complaint. Compl. ¶ 16.

Second, beyond mere timing, the actual mechanics of the payment provisions contained in the *Cobell* settlement agreement buttress the conclusion that it did not consider the *Two*

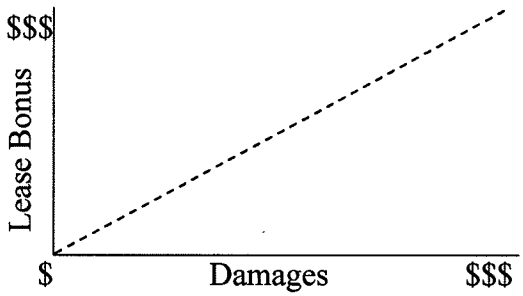
Shields claims as part of the settlement negotiations. The *Cobell* settlement provides two potential payments for Trust Administration Claims. The first is a $500 baseline payment. GA, Ex. 4, ¶ B(4)(b)(1). The second is a prorated payment based on the amount of money that has flowed through an IIM account. *Id.* ¶ B(4)(b)(2). Under the *Cobell* settlement, the more money that has flowed through the account during the relevant period, the more money the class member receives. Conversely, the less money that flows through a class members' IIM account, the less money that person will receive under the settlement agreement.

Why is it impossible for that prorated payment system to logically implicate the claims at issue in *Two Shields*? Because the damages in *Two Shields* will turn in part on the size of the lease bonus amounts and royalty rates approved by the BIA for class members. *Two Shields* alleges the lease bonuses and royalty rates were too low, far below market. Thus, the lower the lease bonus and royalty rates, the higher the damages in *Two Shields*. But under the *Cobell* settlement, *Two Shields* class members with lower lease bonuses and royalty rates (and correspondingly higher damages) will receive less than *Two Shields* class members whose lease bonus and royalty rates were higher (and therefore have lower damages) because less money flowed through those class members' IIM accounts. Because the *Cobell* settlement would turn any damages distribution in *Two Shields* on its head, this is persuasive evidence that the *Cobell* class did not consider the *Two Shields* claims to be part of the *Cobell* amended complaint and settlement agreement.

Two Shields Damages Increase As Lease Payment Amount Decreases



Cobell "Formula" Does the Opposite



Plaintiffs thus submit that they have met their burden here, because once all undisputed factual allegations are presumed to be true, and once all reasonable inferences are construed in their favor, the actions in *Two Shields* and *Cobell* are strikingly dissimilar. It is the Government that attempts to leverage *Cobell* with this Court, even though, as noted above, the named plaintiffs are entirely different, and no mention of Fort Berthold appears there.[5] If it hasn't already, the Court should be asking itself whether the Government has proffered any record evidence that the *Cobell* action actually considered (much less litigated) the *Two Shields* action. The answer is obvious. No evidence shows that any discovery in *Cobell* was ever taken regarding the Fort Berthold swindle, and worse, the Government is attempting to prevent those facts ever coming to light. Nothing shows fair investigation of those claims in an effort to resolve them as part of the *Cobell* action. If this *Two Shields* action were so intimately bound up in that *Cobell* action, wouldn't you expect to see documents and testimony explicitly establishing, in fact, that the *Two Shields*' claims were litigated there? Instead, silence.

[5] This is also why it is meaningless for the Government to suggest that Two Shields and Defender had an opportunity to opt out of the *Cobell* settlement and participate in its fairness hearing. GM, at 6, 10. That only impacts what in fact *Cobell* did settle. It does not answer the question whether the *Two Shields* action was itself subsumed therein.

Assume further that the Government fully intended to resolve the *Two Shields*' action as part of the *Cobell* settlement. The complaint in *Two Shields* makes it clear that individual Native Americans complained in writing to the United States by letter and by resolution, imploring it to observe its fiduciary duties. Compl. ¶¶ 11, 14. The Government was thus on notice of its potential liability. Because the United States acts as fiduciary to the *Two Shields* class, the Government had an absolute fiduciary duty to fully disclose to the *Cobell* class the potential liability associated with the BIA's oil and gas approval activity for allottees on the Fort Berthold Reservation, if it wished to resolve them in the *Cobell* litigation. The law is clear that a fiduciary must consider and completely disclose all meaningful information to the one to whom the duty is owed. *See, e.g., Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481-82 (6th Cir. 1990) (explaining, with quotation from Restatement of Contracts 2d, that for a release relating to matters within the scope of a fiduciary relationship to be valid under federal common law, the beneficiary must be put on an "equal footing" with the fiduciary with full understanding of his legal rights and of all relevant facts that the fiduciary knows or should know). Yet the Government submits no evidence that it disclosed these specific and concrete allegations to the *Cobell* attorneys. Absence of evidence in that respect strongly suggests that the parties in *Cobell* did not contemplate including the allegations in *Two Shields* as part of that settlement.

At base, the Government seeks a dismissal on the merits, not on jurisdictional grounds. For it truly asserts only that a defense might bar action, on some variant of *res judicata* or settlement and release. The Government is plainly entitled to test that theory, with which we strongly disagree. But such a defense, if it exists at all, ripens for consideration only if *Cobell* becomes final, and so is not properly before the Court on a motion to dismiss. *See In re Diet Drugs Products Liability Litig.*, 543 F.3d 179, 181 (3rd Cir. 2008) (certification of settlement

class and approval of settlement agreement after fairness hearing "became final upon exhaustion of all appeals"). Because any later motion would go to the merits, it would require discovery and the detailed factual record necessary to summary judgment motions. *See* RCFC 56.

2. The *Cobell* settlement does not purport on its face to settle the entirety of the action here

The Government obfuscates the dates involved in the *Cobell* settlement, leaving the impression that it would cover any and all claims through the date on which the *Cobell* amended complaint was filed in December 2010. GM, at 13. Such argument does not correspond with the settlement agreement in *Cobell*, which includes a paragraph regarding "Exclusions From Releases" that clearly states: "The releases provided in paragraphs 1 and 2 directly above neither release nor waive … (c) claims arising out of or relating to breaches of trust or alleged wrongs after the Record Date …." GA, Ex. 4, at 80. The "Record Date" is elsewhere defined to mean September 30, 2009. *Id.*, at 49.

The complaint at issue here asserts breaches of fiduciary duty through and including November 1, 2010. And so, more than one year of fiduciary breaches as to lease approvals cannot be avoided merely by pointing to the *Cobell* action. As such, at least part of this action incontestably remains within the jurisdiction of the Court.

Moreover, the *Two Shields* complaint also alleges that the breaches of fiduciary duty include "[b]uilding in no adequate environmental protections of the land against abuse by the lessee." Compl. ¶ 52(e). This is a continuing violation, one that "compounds the damages to Plaintiffs and the Class" on a continuous, ongoing, and escalating basis. *Id.* ¶ 57(e). Indeed, the complaint points out that the BIA has an exacting standard of management which includes development of leases in a manner that maximizes the best interests of individual Native American allottees and minimizes any adverse environmental impacts or cultural impacts

resulting from such development. *Id.* ¶ 70. In no event does *Cobell* cover any of the post-September 2009 aspects of the *Two Shields* complaint. *Id.* ¶ 52.

C. Even if the Court Believes *Cobell* Might Impact This Action, It Should Not Dismiss This Action, But Rather Stay It Until *Cobell* Is Resolved

This court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). As the Federal Circuit has noted, it is "within the sound discretion of the trial court" to best determine "[w]hen and how to stay proceedings." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). As detailed in *Cherokee Nation*, when determining whether to enter a stay, the court must "balance [the] interests favoring a stay against [the] interests frustrated by the action." *Cherokee Nation*, 124 F.3d at 1416. Entry of a "stay so extensive that it is 'immoderate or indefinite' may be an abuse of discretion." *Id.* (quoting *Landis*, 299 U.S. at 257). Thus, the court must find a "pressing need for the stay." *Id.*, at 1418.

This Court has the power to issue a stay in its consideration of challenges pursuant to 28 U.S.C. § 1500.[6] Indeed, Your Honor has done so recently. The procedural history of last month's decision in *Lower Brule Sioux Tribe v. United States*, 2011 WL 6062269, *2 (Fed. Cl. Dec. 1, 2011) (Block, J.), notes that this Court ordered briefing on a § 1500 issue there, and then stayed the case pending decision by the Supreme Court in the *Tohono O'Odham* case, which

[6] Note that the government cites the decision of *Goff v. Menke*, 672 F.2d 702,704 (8th Cir. 1982), for the unremarkable proposition that purposes underlying Fed. R. Civ. P. 23 include avoidance of duplicative litigation and inconsistent standards. *See* GM, at 10. *Goff* in no way addresses § 1500; indeed, it was not even an action involving the United States in the Court of Claims. Even so, when considering there an individual action that was purported to compete with a potentially similar class action, thus threatening potentially duplicative litigation or inconsistent standards, *Goff* notes that the court has power to "h[o]ld the damages action in abeyance pending resolution in" the class action. *Goff*, 672 F.2d at 704.

could prove controlling. In more directly analogous situations, in *Sohm v. United States*, 3 Cl. Ct. 74, 75-76 (1983), the court recounted in its history of the action that it had previously "entered an order, pursuant to 28 U.S.C. § 1500 (1970), suspending proceedings pending completion and final disposition of the district court proceedings." Likewise, in *Hossein v. United States*, 218 Ct. Cl. 727, 729 (1978), the court retained jurisdiction of a claim against the United States, but stayed its consideration "for reasons of comity and avoidance of piecemeal litigation," until a federal district court ruling issued.[7]

Even if this Court's authority to issue a stay were not clear in the face of a § 1500 challenge, it must be remembered that this Court plainly has jurisdiction over at least some part of the case here, as the *Cobell* release does not purport to release fiduciary breaches occurring after September 2009. *See* Part V.B. 2, above. Because jurisdiction exists, this Court's power to control its docket is in full force. Therefore, if doubt persists concerning the full extent of jurisdiction, the best course is to stay this action in deference to resolution in *Cobell*. Such a stay would plainly be of a limited duration awaiting a benchmark of bright-line definition.

Plaintiffs believe the *Cobell* settlement will fail on appeal, and if that occurs, this action proceeds apace in full. If the *Cobell* settlement is upheld and becomes final, then the time will be ripe for the Government to seek its actual requested relief here, *i.e.*, summary judgment on defenses of *res judicata* and/or settlement and release. On such motion, Plaintiffs would be entitled to take appropriate discovery so that a proper factual record exists for this Court to decide the ultimate issue: whether the release in *Cobell* would, in fact, cover the claims at issue

[7] The ruling in *Hossein* was called into question in *UNR Industries, Inc. v. United States*, 962 F.2d 1013,1022 n.3 (Fed Cir. 1992), but that decision in turn was reversed under the name *Keene Corp. v. United States*, 508 U.S. 200 (1993). Subsequent decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994), indicated that decisions nominally overruled in *UNR* are still valid precedent. See D. Stinson, The United States Court of Federal Claims, Handbook and Procedures Manual, at I-29 (2nd Edition 2003).

here. Taking note of that ultimate issue in this context confirms that the Government is seeking a dismissal on the merits—not on jurisdictional grounds as required by § 1500.

VI. CONCLUSION

For the foregoing reasons, the Government's Motion to Dismiss should be denied. The Government cites no case law to stretch § 1500 to cover unnamed class members—even if the *Cobell* facts were identical to the *Two Shields* lawsuit. In its effort to create a "trap for the unwary," the Government compounds this legal flaw by claiming that the *Cobell* case is identical, when there is absolutely no factual predicate in *Cobell* to establish this. Furthermore, the violations cited in *Two Shields* go well beyond the *Cobell* class period, and the damages paid in *Cobell* work systematically in the opposite direction than calculation of necessary damages in this action.

At most, the fact of the *Cobell* settlement may later become an affirmative defense in this case on some claims, which Plaintiffs will oppose. Even that is no basis for not proceeding with this lawsuit to discovery and class certification. At worst, and in the alternative, the Court should merely enter a stay of litigation until the *Cobell* appeal is resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Response to Motion to Dismiss filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies were sent to registered participants and non-registered participants by first-class mail, email, hand delivery or other proper service on January 9, 2012.

/s/ Charles R. Eskridge III
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