

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeal Number 11-2502

MAYNARD BERNARD AND FLORINE BERNARD

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; SECRETARY
OF THE DEPARTMENT OF INTERIOR; BOARD OF INDIAN HEARINGS
AND APPEALS; GREAT PLAINS REGIONAL DIRECTOR OF THE
BUREAU OF INDIAN AFFAIRS

Defendants - Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

The Honorable Charles B. Kornmann
United States District Judge

APPELLANTS' REPLY BRIEF

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Appellants, Maynard and Florine Bernard, submit the following reply to the government's brief filed in this appeal. Bernards address the government's arguments in the order set forth in government's brief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The government does not object to Bernards' recitation of the record and facts underlying the present action set forth at pages 3 through 15 of Bernards' brief.

ARGUMENT

1. STANDARD OF REVIEW.

The question in this case is whether the District Court should have transferred this case under 28 USC § 1631, a question of law decided de novo. As stated in Bernards' opening brief at 15-16, a court is required to transfer if the best interest standard is established. See Jerez v. Holder, 625 F.3d 1058, 1072 (8th Cir. 2010); Lopez v. Heinauer, 332 F.3d 507, 511 (8th Cir. 2003); and Gunn v. United States Dep't of Agric., 118 F.3d 1233, 1240 (8th Cir. 1997). The District Court found that a transfer would be in the best interest of Bernards, but refused to transfer for other impermissible reasons. The government's brief does not address the standard of review on a 1631 claim or take issue with the standard set forth by the Bernards.

Government analyzes the standard of review in this case by citation to cases decided under Civil Rule 60 (b) with one exception. Bernards moved to alter or amend the judgment to provide for a transfer to the Court of Federal Claims as authorized by Civil Rule 59 (e). They were not asking for any relief based on Civil Rule 60 (b) (1) through (5). The cases cited by the government involve overwhelmingly 60 (b) cases which do nothing to inform on the standard of review required under 28 USC § 1631. For example, Baxter Int'l v. Morris, 11 F.3d 90 (8th Cir. 1993), involved evidentiary matters and clear questions of fact; Arnold v. Wood, 238 F.3d 992 (8th Cir. 2001), dealt with review of previous arguments; Murphy v. Missouri Dept of Corr., 506 F.3d 1111 (8th Cir. 2007), pertained to questions of fraud; Sanders v. Clemco Indus., 862 F.2d 161 (8th Cir. 1988), was rehearing based on issues of law previously rejected; and Jones v. United States, 255 F.3d 507 (8th Cir. 2001), involved an attempt by a party to introduce additional facts for consideration by the court.

The one case cited by the government dealing with Civil Rule 59 (e), Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990), involved a reversal by this Court of the denial of a Rule 59 (e) motion when the District Court failed to set aside an injunction.

2. EXCEPTIONAL CIRCUMSTANCES NOT REQUIRED EVEN
THOUGH THEY EXIST.

The government under this part of their brief argues that Bernards were required to show exceptional circumstances under Civil Rule 60 (b) in order to obtain relief under 28 USC § 1631. The foundation of Bernards' claim is premised on a motion to transfer their case to the Court of Federal Claims under 28 USC § 1361 through the procedure of Civil Rule 59 (e). Under 1361, a transferring court is required to transfer and transfer is mandatory where jurisdiction over a claim is wanting and it would be in the interests of justice to transfer. There is no requirement for Bernards to show exceptional circumstances or any other preconditions argued by the government at pages 11 through 15 of its brief. Nevertheless, the facts of this case constitute exceptional circumstances. Unless the case is transferred, Bernards will be deprived of adequate redress, as the District Court found in this case, and they will be deprived of the opportunity to litigate their money damage claim against the United States.

The government argues that Bernards are seeking to justify intrusion into the final order entered in this case and should have brought their claim in the first instance in the Court of Federal Claims. The District Court had jurisdiction over the claims under the APA and against Renville, but not over any claims against the

United States for money damages. Once the claims under the former were resolved, the Bernards had the right and it was perfectly reasonable to have their claims for money damages transferred to the Court of Federal Claims. It is disingenuous for the government to argue that the Bernards were required to give up their rights under the APA and Renville by filing initially in the Court of Federal Claims for money damages or were required to give up their right to money damages from the government when they filed in the District Court for review under the APA and claims against Renville. They did not seek relief earlier in the Court of Federal Claims because they had meritorious claims under the APA and against Renville which were properly before the District Court. They were barred by statute from maintaining cases both in the District Court and Court of Federal Claims at the same time. Once the APA and claims against Renville were resolved, it was permissible to seek transfer of their money damage claims to the Court of Federal Claims. The Bernards were diligent in pursuing in the District Court claims over which the District Court had jurisdiction and upon conclusion to request as they have here the transfer of their claims for money damages to the Court of Federal Claims. And there is no question that if their claim for money damages is not transferred, the six year statute of limitation would bar the claim from being filed independently in the Court of Federal

Claims.

LaBlanc v. United States, 50 F.3d 1025 (Fed. Cir. 1995), hardly supports the government's argument under this section. In that case, LaBlanc moved to transfer a qui tam action from the Claims Court back to the District Court which had previously dismissed the case. In the present case, the Bernards have had no court adjudicate their claim for money damages against the United States.

The government dismisses, by imaginary distinctions, at footnote 5 overwhelming case law in support of transfer in this case.

3. THE REASONS CITED BY THE GOVERNMENT TO BAR TRANSFER ARE UNMERITORIOUS.

Gunn v. United States Dep't of Agric., 118 F.3d 1233 (8th Cir. 1997), supports the transfer in this case. "Section 1631 was enacted so that parties confused about which court has subject matter jurisdiction would not lose an opportunity to present the merits of a claim by filing in the wrong court and then, upon dismissal having the claim barred by a statute of limitations." 118 F3d 1240. The claim for money damages was initially brought in the District Court, which had no jurisdiction over such claim for damages, and now unless the case is transferred it will be barred by the statute of limitations.

a. Bernards Withdrew Their Tucker Act Claims Because The District Court Had No Jurisdiction Over Such Claims—It Did Not Abandon Such

Claims Or The Right To Seek Transfer Of Them To The Claims Courts.

Bernards amended their original complaint to delete the claim for money damages because the United States moved to dismiss the entire action. The District Court had no jurisdiction under the big Tucker Act and informed the parties of that fact. In reviewing a complaint on removal, “when a District Court orders a party to amend its complaint, or when the decision to amend is otherwise involuntary, the question of proper removal must be answered by examining the original complaint.” In re Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 929 (8th Cir. 2005); In re Atlas Van Lines, Inc., 209 F.3d 1064, 1067 (8th Cir. 2000)(“patently coercive predicament” in that the plaintiff could either amend their complaint or risk dismissal of their entire case). Indeed, in Humphrey v. Sequential, Inc., 58 F.3d 1238, 1241 (8th Cir. 1995), this Court held that an amendment of the complaint there was involuntary because, as here, plaintiff there faced the Hobson’s choice of amending his complaint or risking dismissal. A claim in the present case under the big Tucker Act was clearly alleged in the original complaint filed in the District Court which is sufficient to trigger jurisdiction in the Court of Federal Claims, a situation unlike that in Rogers v. United States, 26 Cl. Ct. 1023, 1028-1029 (1992), which involved a request to retransfer where no claim was made under the Federal Tort Claim Act either in the

transferring or receiving court. The District Court in this case erred in making its decision to deny transfer by focusing on the amended complaint and not on the original complaint where jurisdiction in the Court of Federal claims was clearly alleged.

Tootle v. Sec'y of the Navy, 446 F.3d 167 (D.C. Cir 2006), does not help the government in this case. First, the facts there bear no resemblance to the facts of the present case. It involved the situation where the plaintiff brought an action in the Claims Court which was dismissed for lack of jurisdiction. Plaintiff then brought an action in the District Court, which the District Court dismissed because the action was “in essence” one for money damages and should have been brought in the Court of Federal Claims. Second, it was not a case involving the right to or propriety of transfer under 28 USC § 1631. Third, it clearly did not involve a situation where the original complaint filed in the District Court stated a claim under the big Tucker Act. Johnson v. Woodcock, 444 F.3d 953 (8th Cir. 2006), involved a situation where the plaintiff on dismissal of its action in the District Court did not request transfer, unlike the Bernards in this case, and transfer was refused when the request was first made in briefs filed in this Court.

b. The Court of Federal Claims Has Jurisdiction Over Bernards' Claim For Money Damages.

The government seems to argue that the where District Court had jurisdiction over the APA claims, the Court of Federal Claims would dismiss any claims under the APA. Government's brief at 19-20. First, in making this argument government continues to argue that only the amended complaint can be reviewed in determining whether to transfer. That is not the case as pointed out previously above and in Bernards' opening brief at 20-21. Bernards amended their original complaint to delete the claim for money damages because otherwise the action would have been dismissed by the District Court. Second, the Bernards have not sought and did not seek to have the APA claims brought in the Court of Federal Claims. The Claims Court would not have jurisdiction over APA claims. Third, the only request for transfer involves the claims for money damages for breach of trust. Fourth, in the present posture of this case the Court of Federal Claims will have jurisdiction over the claims for money damages because at the time of transfer there will be no case pending in the District Court. The government's argument here is opaque to say the least.

c. Transfer Would Be In The Best Interest Of The Bernards.

As set out in Bernards' opening brief at 25-26, the best interests standard has been satisfied in their case. The District Court made damning findings in its June 1, 20011, opinion denying the motion to alter judgment to provide for

transfer concerning the bungling and incompetence of the Bureau of Indian Affairs in this matter. Add. 12-13, 15, 18. Indeed, the District Court found that it would be in the best interests to transfer the case to the Court of Federal Claims, but that transfer was prohibited by other reasons which upon review here do not prevent transfer. As stated by the District Court at 9 “I believe I would be in error to order any transfer, despite the fact that I understand that plaintiffs have perhaps not received total justice nor have they been made whole. Transferring the new claims would probably be in the ‘interest of justice’ but the other requirements of the statute are clearly not met.” Add 18.

i. Bernards’ Claim For Breach of Trust Responsibility And Money Damages Does Not Lack Merit.

The Bernards are only required to show that there is probable jurisdiction in the Court of Federal Claims. The showing does not have to be conclusive, nor is it binding on the Claims Court. Sodexo Marriott Mgmt. V. United States, 61 Fed. Cl. 229, 241 (2004). The Claims Court has an independent obligation to examine its own jurisdiction. Outlaw v. McHugh, 2011 U.S. Dist. LEXIS 46398 (page 21)(D. Hawaii 2011).

In United States v. Mitchell, 463 U.S. 206, 224 (1983), the Court examined the web of statutes and regulations giving the Secretary of Interior a pervasive role

in the management of timber resources and trust funds, which had not been before it in the earlier case, and concluded:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

While no statutory provision expressly required compensation for losses caused by mismanagement, the Court turned to private trust law principles to conclude that once a trust relationship is established, a beneficiary must be afforded money damages. The Court stated:

It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of Trusts §§ 205-212 (1959); G. Bogert, Law of Trusts and Trustees § 862 (2nd ed. 1965); 3 A. Scott, Law of Trusts § 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

Id. 226. In other words, once the Court concluded that the scheme created a trust relationship, obligating the United States to manage the property, it reasoned that the statutory scheme could fairly be read as mandating money damages. Id. 227.

When resources are subject to a federal regulatory scheme, particularly if

the scheme is comprehensive or pervasive, the scheme will be interpreted as creating a full fiduciary relationship that obligates the United States to meet both express and implied fiduciary duties. See, e.g., United States v. Mitchell, 463 U.S. 206 (1983) (elaborate statutory and regulatory framework for oil and gas leasing created trust); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)(trust duty to preserve and maintain trust property); Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996) (statutes authorizing active management of Indian long term leases, actual control of leasing, and regulations implementing Indian Long Term Leasing Act, 25 USC § 415, required Secretary to seek highest economic created trust responsibility; Oglala Sioux Tribe v. United States, 21 Cl. Ct. 176 (Ct. Cl. 1990)(statutes, regulations, and practice imposed on Bureau of Indian Affairs duty to manage tribal lands to maximize income; Navajo Nation v. United States, 501 F.3d 1327 (Fed. Cir. 2007) (on remand from United States v. Navajo Nation, 537 U.S. 488 (2003), holding that a network of statutes and regulations coupled with actual control over coal resource creates a money mandating claim).

The land owned by the Bernards in this case is held in trust by the United States. Legal title is in the United States and the Bernards are beneficiaries of the trust. Only with secretarial approval could the Bernards sell or transfer the land.

E.g., 25 USC § 379. The deed from the Bernards to themselves and Grady Renville as joint tenants had to be and was approved by the Bureau of Indian Affairs. See Thorstenson v. Norton, 440 F.3d 1059 (8th Cir. 2006). Any transfer without Bureau of Indian Affairs approval is void. 25 USC § 348. The statutes and regulations pertaining to the transfer of trust and administration of lands held in trust for individual Indians are pervasive. See, e.g., 25 USC § 2216 (b) (1) (A) (ii) (specific reference to trust responsibility in Land Consolidation Act); 25 USC § 3701 (purpose of Indian Agricultural Resources Management Act is to protect, conserve, utilize, and manage Indian lands); 25 USC § 348; 25 USC § 379; 25 USC § 405; and 25 USC § 404. The regulations for transfer of Indian lands are specific and all encompassing. See generally 25 C.F.R. 152.17 to 152.33 and specifically 25 C.F.R. 152.33 (any transfer must be in long range best interest of owners).

Clearly the United States had a trust responsibility over the land in which the Bernards were beneficiaries; had a trust responsibility to preserve and maintain the land; and could not commit a breach of trust responsibility in approving any conveyance of the land. Bernards' claim for breach of trust responsibility in the Court of Federal Claims is meritorious.

Both the Interior Board of Indian Appeals and the District Court declined to

address the issue of whether the Bureau of Indian Affairs breached its trust responsibility to the Bernards in this case.

ii. Bernards' Tucker Act Claim Is Not Prohibited By 28 USC § 1500.

Bernards addressed this argument, made by the District Court in denying transfer, at pages 25 to 26 of their opening brief. The Bernards requested transfer to the Claims Court of its claim for money damages based on breach of trust responsibility after the District Court dismissed its action. Upon transfer of the present action to the Claims Court, there will be no pending claims in any other court to trigger the bar under 25 USC § 1500. “Pendency” for purposes of applying 28 USC § 1500 is measured at the time of filing in or transfer of the claims to the Court of Federal Claims. Vaizburd v. United States, 46 Fed. Cl. 309 (2000).

iii. 28 USC § 2501 Does Not Bar Transfer To Court Of Federal Claims Because The Statute Was Tolloed.

This argument, also made by the District Court in denying transfer, was addressed by Bernards at pages 22-23 of their opening brief. If this case is not transferred, the statute of limitation will bar the Bernards from seeking redress of their breach of trust responsibility claim for money damages. The statute of limitation bar that would result without a transfer constitutes “interests of justice”

under 28 USC § 1631 justifying transfer. The statute of limitation is tolled when the action is filed in the court making the transfer, here the District Court. Thus, the action was timely filed in the District Court and can be transferred to the Court of Federal Claims without a statute of limitation bar.

CONCLUSION

For all the above reasons, the Bernards claim of breach of fiduciary duty and money damages should be transferred to the Court of Federal Claims pursuant to 28 USC § 1631.

Dated this 6th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies pursuant to Rule 32(a), that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 4032 words; and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect software in 14 pitch Time New Roman.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic file of this Reply Brief has been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

Dated this 6th day of December, 2011.

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