

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

WILLIAM S. FLETCHER, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
 et al.,)
)
 Federal Defendants.)

Case No. 02-CV-427-GKF-PJC

**FEDERAL DEFENDANTS' RESPONSE TO
PLAINTIFFS' FURTHER MOTION FOR CLASS CERTIFICATION**

Federal Defendants, the United States of America, the Department of the Interior, Kenneth Salazar (in his official capacity as Secretary of the Interior), the Bureau of Indian Affairs, and Larry EchoHawk (in his official capacity as Assistant Secretary – Indian Affairs, United States Department of the Interior), hereby respond to Plaintiffs' most recent Motion for Class Certification and Brief in Support [Docket No. 1148] ("Plaintiffs' Further Class Motion"). As set forth herein, Plaintiffs' Further Class Motion should be denied, and this case should be dismissed. In the alternative, if dismissal on subject matter jurisdiction grounds is not required, it appears that Plaintiffs' Further Class Motion may be granted, in the interests of finality, so long as the class claim is correspondingly limited by the proposed class, and this case may then be dismissed with prejudice.

ARGUMENT

Plaintiffs' Further Class Motion makes clear that they only seek to bring a claim for an accounting. See Plaintiffs' Further Class Motion at 8 (setting forth a single class claim). Despite repeated attempts to obtain clarification from Plaintiffs, a fundamental question remains -- just what is the basis for Plaintiffs' and their proposed class's accounting claim? Cf. Plaintiffs' Further Class Motion at 2-4 (purporting to state the "basis for Plaintiffs' claims against their trustee"). To be sure,

as Federal Defendants noted in their response to Plaintiffs' previous Motion for Class Certification and Brief in Support [Docket No. 984], see Docket No. 1001, Federal Defendants understand that class certification motions are not decided based on the merits, or lack thereof, of the underlying case. And, of course, as noted in the pending motion to dismiss [Docket No. 1126], Federal Defendants do not find any merit here. Nonetheless, this question of Plaintiffs' basis for their accounting claim is important because it is necessary to determine whether Plaintiffs have defined their proposed class properly. See, e.g., Shook v. El Paso County, 386 F.3d 963, 971 (10th Cir. 2004) (noting that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action . . .") (quoting General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982)).

Federal Defendants agree with Plaintiffs that the real purpose of class certification is to prevent multiple suits with possible conflicting or inconsistent results. Plaintiffs' Further Class Motion at 10-11. Accordingly, the proposed class could be proper only if it encompasses all who could bring the same class claim. This, in turn, is determined by the theory to be litigated. Thus, Plaintiffs' Further Class Motion should be granted only if this Court determines that the proposed class will encompass all who could bring the proposed class claim. Cf. Cherokee Nation of Okla. v. United States, 199 F.R.D. 357, 360 (E.D. Okla. 2001) ("Even if the court finds that all the requirements of Rule 23 are satisfied, the decision of whether to certify a class is firmly committed to the trial court's discretion") (citing Anderson v. City of Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982)).

At this point in the case, it may be too much to expect Plaintiffs to adequately answer these long-posed questions about the bases of their claim(s). But, if at all possible, both Federal

Defendants and this Court are entitled to move forward to a final conclusion of this case, including a determination on class certification. In order to do so, Plaintiffs' Further Class Motion could be granted, so long as their class claim is evaluated in light of the class (such that their class claim is interpreted as being consistent with the class being all of the persons or entities who could bring such a claim), and any lack of clarity or mismatch between Plaintiffs' class and their class claims has consequences in this regard. In other words, if the proposed class is certified, Plaintiffs should be deemed to have waived any claims or theories that are inconsistent with that class.

Before Federal Defendants and this Court can get to that point, however, this Court must address a more fundamental issue of subject matter jurisdiction. Federal Defendants thus turn to that issue first.

I. LACK OF SUBJECT MATTER JURISDICTION DUE TO THE FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Among the most basic requirements for class certification are the requirements of Rule 23(a) for numerosity, commonality, typicality, and the like. In evaluating these criteria, Federal Defendants have realized that these requirements have not been properly met here. That is because of the requirement for all of the plaintiffs to exhaust their administrative remedies before they may bring any action in this Court. This requirement to exhaust administrative remedies applies to the claim for an accounting at issue here. See *Gilmore v. Salazar*, 748 F. Supp. 2d 1299 (N.D. Okla. 2010). The failure to exhaust administrative remedies deprives this Court of subject matter jurisdiction, and thus requires dismissal.

To be sure, this lack of subject matter jurisdiction could have been raised in Federal Defendants' pending motion to dismiss [Docket No. 1126] as an additional basis for dismissal under Rule 12(b)(1). And, to the extent that this Court desires further briefing on this issue, Federal

Defendants stand ready to provide this Court with any supplemental briefing the Court may require. For present purposes, however, Federal Defendants simply note this issue, now that they are aware of it, and further note that “subject matter jurisdiction may be challenged at any time and objections to such jurisdiction cannot be waived.” New York Life Ins. Co. v. Ramco Holding Corp., 938 F.Supp. 754, 755 (N.D. Okla. 1996). Accordingly, this Court may also dismiss under Rule 12(h)(3).

“The plaintiffs must ‘allege . . . facts essential to show jurisdiction.’” Begay v. Public Service Co., 710 F. Supp. 2d 1161, 1185 (D.N.M. 2010) (quoting FW/PBS v. City of Dallas, 493 U.S. 215, 231 (1990)). Thus, “plaintiffs ‘must present affidavits or other evidence sufficient to establish the court’s subject matter jurisdiction by a preponderance of the evidence.’” Gilmore, 748 F. Supp. 2d at 1304 (quoting Southway v. Central Bank of Nigeria, 328 F.3d 1267, 1274 (10th Cir. 2003)). “Not only does a party’s failure to exhaust mandatory administrative remedies bar the court from hearing that party’s claim, but it also prevents the court from treating that party as a class member in a class action claim.” Begay, 710 F. Supp. 2d at 1191.

Here, none of the named Plaintiffs have established that they have exhausted their administrative remedies. Unless and until they can establish this, they will not be adequate representatives of the proposed class. Indeed, even if any of the named Plaintiffs can meet this jurisdictional requirement, this jurisdictional requirement will have to be met by each and every member of the proposed class. Unless and until all members of the proposed class can establish this, the lack of commonality and typicality will preclude certification of the proposed class.^{1/}

^{1/} There may be other obstacles to class certification. For example, as Federal Defendants noted the last time Plaintiffs sought class certification, an issue of commonality may exist, in that Plaintiffs have still yet to explain why or how Cora Jean Jech intends to withdraw from this litigation. See Docket No. 1001 at 9-10 n.5. In addition, depending on Plaintiffs’ theories, it is (continued...)

Although Federal Defendants believe that the requirement to exhaust administrative remedies applies to the claim for an accounting at issue here, and believe that Gilmore, 748 F. Supp. 2d 1299, establishes the same, Federal Defendants note that some language in Gilmore appears to leave open the possibility that this exhaustion requirement might not apply to a claim limited to an “accounting only.” See, e.g., id. at 1313 (citing cases from other jurisdictions, without deciding that such a situation would affect the exhaustion requirement). To the extent that Federal Defendants are incorrect that this Court must dismiss this case for the failure to exhaust administrative remedies, and that this Court need not deny Plaintiffs’ Further Class Motion for any of the reasons noted herein, then, in the interests of finality, Federal Defendants would not oppose Plaintiffs’ Further Class Motion, so long as the class claim is correspondingly limited by the proposed class, as discussed below.

II. GRANTING PLAINTIFFS’ FURTHER CLASS MOTION WOULD SERVE THE INTERESTS OF FINALITY SO LONG AS THE CLASS CLAIM IS CONSISTENT WITH THE CLASS

As noted above, if the proposed class is certified, Plaintiffs should be deemed to have waived any claims or theories that are inconsistent with that class.

^{1/} (...continued)

possible that issues of proper class representatives remain. Indeed, this very issue held up class certification the last time Plaintiffs sought it. See Transcript of Hearing on Dec. 10, 2010 [Docket No. 1112] at 65-68, 73. That, however, was when Plaintiffs sought to bring a claim for purported rights to headrights currently held by others. To the extent that Plaintiffs now bring only a claim for an accounting, outside of the issue of exhaustion of administrative remedies noted in text above, this class representative issue may no longer apply. Furthermore, Plaintiffs’ failure to even attempt to support an assertion that the Shield Law Group PLC and Amanda S. Proctor possess “the requisite experience and expertise” is, at the very least, curious. See Plaintiffs’ Further Class Motion at 16 and Ex. 2.

For example, Plaintiffs limit their class to certain “Indians.” Plaintiffs’ Further Class Motion at 10. One might wonder why all headright holders would not have the purported right to an accounting and/or, for example, for interest (common class allegation no. 2).^{2/} If the class does not include non-Indian headright holders, Plaintiffs must not be able to bring any claim for an accounting based on their status as headright holders.

One possible basis that only Indians could bring a claim is that only Indians have Individual Indian Money (“IIM”) accounts, which create certain alleged trust duties. But if Plaintiffs’ theory of trust obligation revolves around their IIM account holdings, they certainly state nothing of the sort in Plaintiffs’ Further Class Motion. Moreover, it is not even clear that all “Indians who . . . have received” headright payments have received them into IIM accounts at all times relevant in this case. In any event, to the extent that the proposed class claim is dependent upon the proposed class having received the headright payments now at issue into IIM accounts, there may be significant Cobell implications. Plaintiffs’ Further Class Motion understates these implications when it merely notes that a “similar, if larger, Indian Trust claim” is brought in that case. Plaintiffs’ Further Class Motion at 2; see also id. at 13, 17. The class claim here is not just similar to the class claims in Cobell, but is actually part of the class claims in that case. Although the settlement in Cobell may not have

^{2/} It is also noteworthy that at least this particular common class allegation appears to already be in litigation is the Osage Court of Federal Claims case, as that case involves claims for interest that go beyond the quarterly distribution dates with its “distribution lag” claim. Because this class motion and associated class allegations appeared only after the pending motion to dismiss was fully briefed, Plaintiffs may need to explain further their class allegations and theories and, depending on the explanation, further briefing may be required. For example, it is further noteworthy that the Court of Federal Claims has recently dismissed for lack of jurisdiction a “distribution lag” claim for interest in Jicarilla Apache Nation v. United States, No. 02-25L (Fed. Cl.) (Although the opinion issued Aug. 18, 2011, is filed under seal, no party has objected to its publication, and a public version is expected to be issued shortly).

released all possible claims by headright holders with IIM accounts, it does appear to release claims for an accounting for money in IIM accounts. See, e.g., Plaintiffs’ Further Class Motion, Ex. 1 at 15-16 (Cobell class counsel noting that “[e]ach member of the historical accounting class will be paid \$1,000 for giving up exactly the same thing, the receipt of an equitable accounting which the government has not and cannot provide”). In any event, to the extent that Plaintiffs base their class claim here on their IIM accounts, given the substantial overlap between class members in this case and Cobell, additional briefing on the effects of both the fact of their class membership in Cobell, and the settlement in that case, may be needed before the pending motion to dismiss [Docket No. 1126] can be decided. Alternatively, if the class does include non-IIM account holders, Plaintiffs must not be able to bring any claim for an accounting based on their status as IIM account holders.

Similarly, Plaintiffs limit their class to only those “Indians” with headrights (as recognized by Federal Defendants). Plaintiffs’ Further Class Motion at 10. Again, one might wonder how Plaintiffs could ever assert that some headright improperly went to one person, but should have properly gone instead to some other person. But, regardless, one might wonder why that other person must already be a headright holder (recognized by Federal Defendants) to be a member of the class. For example, could an Osage Indian without any headrights, who is related to whomever made a questioned transfer by will (for example), not make such a claim? Cf. Third Amended Complaint [Docket No. 985] at ¶ 65 (discussing “contested probates” and adoptions).³⁷ As noted above, however, neither the Federal Defendants nor the Court need struggle with such questions. Instead (assuming dismissal is not required for the reasons noted above), Plaintiffs’ Further Class

³⁷ Of course, to the extent that any issue in this case involves contested probates or adoptions, such fact specific issues or claims would be unique for each of the proposed class members such that commonality and typicality would be lacking.

Motion may be granted without any such answers so long as, as a consequence, Plaintiffs must not be able to bring any claim based on their status as relatives of prior headright holders. Likewise, Plaintiffs' class makes no distinction between Osage Indians and other Indians.^{4/} For whatever reason this is, a consequence of this is that Plaintiffs must not be able to bring any claim based on their Osage citizenry.

CONCLUSION

For the foregoing reasons, Plaintiffs' Further Class Motion should be denied, and this case should be dismissed. In the alternative, if dismissal on subject matter jurisdiction grounds is not required, then it appears that this Court may grant Plaintiffs' Further Class Motion, in the interests of finality, and then resolve this case in a manner consistent with this class.

RESPECTFULLY SUBMITTED this 26th day of August, 2011.

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^{4/} Plaintiffs have made several prior attempts to define a plaintiff class, see, e.g., Docket Nos. 984 at 13, 1024 at 2, 1030 at 1, each with a different proposed class, and this appears to be another departure from past attempts.

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CERTIFICATE OF SERVICE

I hereby certify on the 26th day of August, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/ Joseph H. Kim