

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WYANDOT NATION OF KANSAS,)	Civil Case No. : 1:06-cv-00919-LMB
)	
)	Judge Lawrence M. Baskir
Plaintiff,)	
)	[E-filed July 14, 2011]
vs.)	
)	
UNITED STATES OF AMERICA, et al.,)	
)	
Defendants.)	
)	
_____)	

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS
FOR LACK OF JURISDICTION

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WYANDOT NATION OF KANSAS

Plaintiff, Wyandot Nation of Kansas (hereinafter “Wyandot”), hereby submits the following opposition to the motion to dismiss of defendant, The United States of America (hereinafter “USA”), on the grounds that this Court does not have subject matter jurisdiction pursuant to 28 U.S.C. §1500.

INTRODUCTION

For over 150 years, Wyandot has been the beneficial owner of monies, land and other assets held in trust by the USA. In late 2005, Wyandot filed suit in the United States District Court in an effort to force the USA to provide the most basic of fiduciary obligations, to provide a accurate and complete historical accounting of trust activities. The relevant facts of that case involve the narrow issue of whether an accounting has been provided in accordance with the applicable law. The complaint was amended on June 30, 2006.

About a year later in late 2006, Wyandot filed a separate complaint in this Court (United States Court of Federal Claims) requesting monetary damages due it for the mismanagement of trust assets. These assets include trust funds held in the United States Treasury as well as the natural resources of the Tribe such as land leases, oil and gas royalties, timber, mineral rights, rights of way, grazing rights, etc. The relevant facts of this breach of fiduciary case involve the review of specific trust activities and the determination of whether the USA met the standards of care of a trustee. Since the end of 2006, these two cases have been pending concurrently.

For over four and a half (4.5) years, the USA has been silent on the issue of subject matter jurisdiction. During that time period the parties have exchanged data, shared expert information and have participated in extended mediation. It is only now, after the United States Supreme Court’s recent decision in *Tohono O’odham Nation*, 131 S.Ct. 1723 (U.S., 2011), that the USA raises the 28 U.S.C. §1500 issue as though the blindfold has been suddenly removed from its eyes. Although the

Supreme Court has modified the analysis under §1500, the ruling has no effect on the jurisdiction of this Court to hear Wyandot's claims. The CFC has jurisdiction to hear this matter where the companion case filed in the United States District Court does not present the same claim. The facts on which the United States District Court claim is based are not "substantially the same operative facts" as those at issue here.

1. The Tohono O'odham Ruling

On April 26, 2011, the United States Supreme Court decided the matter of *United States v. Tohono O'odham Nation*. *Nation*, 131 S.Ct. 1723 (U.S., 2011.) That decision addresses the jurisdictional limitations placed on the CFC by 28 U.S.C. §1500. Section 1500 limits the subject matter jurisdiction of the CFC by depriving the Court jurisdiction over "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. . . ." *Id.*

Since the *en banc* decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1548 (Fed. Cir. 1994) it was well-settled that the two actions do not present the same "claim" unless they ***both*** (1) arise from *the same operative facts* ***and*** (2) seek *the same relief*. See *Loveladies*, 27 F.3d at 1551 ("For the Court of Federal Claims to be precluded from hearing a claim under §1500, the claim pending in another court must arise from ***the same operative facts***, and must seek ***the same relief***" (emphases in original)); accord *Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004).

The Supreme Court's decision in *Tohono O'odham* departs from that precedent and holds that two pending lawsuits are "for or in respect to" the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in

each suit. *Tohono O'odham* 131 S.Ct. at 1727 - 1731.

Applying the new standard in the *Tohono O'odham* case, the Supreme Court compared the Tribe's complaints filed in the District Court and CFC and determined that there was substantial overlap in the operative facts sufficient to preclude jurisdiction in the CFC. *Id.* at 1731. In fact, the Supreme Court found that the two complaints were practically the same noting, "Indeed, it appears that the Nation could have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect." *Ibid.* This determination was in accord with the original CFC dismissal on §1500 grounds which was based, in part, on the finding that the Nation's two suits were, "for all practical purposes, identical." *Ibid.*

As discussed below, the two complaints filed by Wyandot are far from identical. The complaints do not contain the same factual allegations and are based on different operative facts.

2. The Two Wyandot Nation of Kansas Complaints

On December 28, 2006, Wyandot filed a complaint in the CFC alleging breach of fiduciary duty against the USA. The Tribe seeks monetary damages, with interest, due it resulting from the USA's past and present mismanagement of the Tribe's monetary and non-monetary trust assets. The CFC complaint delineates the duties owed by USA which include those duties set forth in 25 C.F.R. §§115.01 - 115, 1001 and 25 U.S.C. §177 to administer the trust assets with the greatest skill and care which includes the duty to ensure that the Tribe's trust property and funds are protected, preserved and managed as to produce the highest and best use and monetary return (CFC Comp. ¶¶ 8-19). In the CFC, Lower Brule seeks to analyze specific trust transactions to establish that the USA's management fell below the applicable standard of care for a prudent trustee. (A true and correct copy of Wyandot's CFC complaint is attached hereto as Exhibit "A".)

A year prior to the filing of the CFC complaint on December 30, 2005, Wyandot had filed a separate and different complaint in the District Court, Case No. 1:05-CV-2491-JR, alleging the government breached its narrowly defined duty to provide a historical accounting of trust activity. As stated above, a first amended complaint was filed June 30, 2006. At paragraph 21 of the amended District Court complaint, it is stated that by the Act of December 22, 1987, pub. L. No. 100-202, 101 Stat. 1329, Congress imposed two requirements on defendant: 1) that they audit and reconcile tribal trust funds, and 2) that they provide an accounting of such funds. See also paragraphs 20 and 22 which generally describe the duty of defendant to provide an accurate, complete and timely accounting of trust activity.

Paragraphs 20(A) - (H) and 25 detail the factual allegations that describe how the government breached its duty to provide an accounting. Thereafter, the First Claim for Relief demands a declaration that defendant has not provided the required trust accounting (Amended Complaint at ¶¶ 26 - 30.) The Second Claim for Relief seeks to compel the government to provide a proper accounting. (Amended Complaint at ¶¶ 31 - 33) Directly related to the accounting issue, the Third and Fourth Claims seek to compel the proper management of accounts and the preservation of claims until a proper accounting has been provided. (Amended Complaint at ¶¶ 34 - 38) (A true and correct copy of Wyandot's amended complaint filed in the District Court is attached hereto as Exhibit "B".)

The District Court complaint¹ fundamentally differs from the CFC complaint in that it is based upon substantially different operative facts in that separate trust duties are at issue.

¹ Further references to the District Court complaint will refer to the amended District Court complaint which is at issue before that court.

3. The Wyandot Nation of Kansas' Complaints are not Based on the Same Operative Facts.

As the *en banc* Court recognized in *Loveladies*, “operative facts” do not include every fact in a complaint, but instead require some link between the facts and the elements of the claim to be proved:

“Despite its lineage, it can be argued that there is a basic epistemological difficulty with the notion of legally operative facts independent of a legal theory. Insofar as a fact is ‘operative’ - i.e., relevant to a judicially imposed remedy - it is necessarily associated with an underlying legal theory, this is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence.”

27 F.3d at 1551 n. 17. Although the Court thus explained its general understanding of “operative facts” this issue was not critical to the decision in *Loveladies* and therefore the Court concluded it was unnecessary to “further refine” the term.

Consistent with *Loveladies*, the CFC in other cases has understood that the inquiry requires a comparison of those facts material to the proof of plaintiff’s claims and does not extend to “background facts.” The “fact that two claims share the same factual background is insufficient to divest [that] Court of jurisdiction when there is a material difference between the operative facts relevant to each claim.” *Cooke v. United States*, 77 Fed. Cl. 173, 178; *see also Fire-Trol Holdings, LLC v. United States*, 65 Fed Cl. 32, 34 (2005) (Facts that are “merely background” are “not operative facts directly giving rise to the claims pled.”); *Heritage Minerals, Inc. v. United States*, 71 Fed. Cl. 710, 716.

The two Wyandot complaints are based on distinct trust duties which are the operative facts of each case. As such, the link between the facts and the elements of the District Court claim to be

proved is whether the government has provided the accounting required by law. The operative facts concern the government's conduct in providing an accounting, as well as the nature, scope, accuracy and completeness of the accounting, assuming one has been performed. Conversely, the claims sought in the CFC complaint do not involve the evaluation of any accounting. Rather, the CFC case concerns the analysis of specific trust related transactions to determine whether the USA, as trustee, breached its fiduciary duty to Wyandot causing it monetary damages. The distinction between the duties is critical where the analysis of each duty naturally involves the analysis of different operative facts.

Here, the operative facts are different where the conduct related to distinct duties are at issue in the two complaints. Paragraph numbers 9-25 of the District Court complaint detail the specific allegations concerning the claim to be proved. These allegations concern the duty of government to maintain records of account, render a full, accurate and timely audit or accounting to plaintiff, provide a clear statement as to the origin or use of all of the funds, to provide a clear statement of why payments were being made, provide an effective system for regular or periodic accountings, etc. These are the operative facts in the District Court case.

The operative facts of the CFC complaint are contained in paragraph numbers 5-13 and 15-31 set forth the factual basis of the CFC claims. These paragraphs identify the source and nature of defendant's fiduciary obligations to manage tribal monetary and non-monetary trust assets. Specifically, paragraph 31 A - U identifies the conduct of the USA which breached the fiduciary duty it owed to Wyandot. These are the operative facts of the CFC claims. The CFC claims do not involve the evaluation of any accounting that may have been performed by the government. This issue is not part of the CFC case.

For the reasons set forth above, the distinct duties on which each case is based are independent of each other and the evaluation of each claim and the proof necessary to prevail in the two cases are entirely different. In fact, the evidence that would be presented during the trial of the two cases will look very different. The trial in the District Court will be dominated by accounting issues presented by forensic accounting and trust accounting experts. Wyandot will establish through admissible evidence that the government has failed to provide an accounting that comports with the standard required of a trustee.

The trial in the CFC will look entirely different and will be dominated by evidence relating to the handling of specific trust transactions and assets, *e.g.*, whether certain specific contracts for the sale of natural resources provided plaintiff with market value, whether certain land leases were collected and provided proper compensation, whether trust funds received the highest interest available, etc. The evidence presented will relate to specific contracts, leases, and similar agreements detailing how trust assets were handled and disposed of. Trust experts as well as experts familiar with the market value of timber, gravel, land leases, rights of way, etc. will offer testimony that the USA breached its fiduciary duties to Wyandot and will offer opinions as to the dollar amount of damages suffered. The trier of fact in the District Court and the CFC will not hear the same evidence nor will there be the same findings of law and fact.

4. Conclusion

Based on the foregoing, plaintiff respectfully asks the Court not to dismiss the present complaint for lack of jurisdiction pursuant to 28 U.S.C. §1500 where the claims at issue are not the same as those presented in the complaint pending before the United States District Court.

Dated the 14th day of July, 2011.

Respectfully submitted,

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WYANDOT NATION OF KANSAS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Opposition to Motion to Dismiss for Lack of Jurisdiction was electronically filed and served this date using the Court's ECF system and that the below-listed counsel are ECF users and will be served via the ECF System:

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This 14th day of July, 2011.

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