IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAMONA TWO SHIELDS and MARY LOUISE DEFENDER WILSON individually, and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 1:13-cv-00090-LB
v.	)	Hon. Lawrence J. Block
UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

Plaintiffs Ramona Two Shields and Mary Louise Defender Wilson respectfully submit this opposition to the Government's improper "request for judicial notice." Dkt. 17.

The Government's filing is simply its latest attempt to point to extrinsic hearsay evidence to support its case—all the while arguing that Plaintiffs should not have any opportunity to conduct discovery in return. This is wholly improper for at least three reasons:

- Its filing is not a request for judicial notice at all, but a blatant attempt to support its premature motion for summary judgment with new incomplete and misleading evidence after briefing has already ended.

- It is settled law that courts may take judicial notice only of the existence of court transcripts—not the truth of statements made therein. Yet the Government clearly wants this Court to accept the truth of its three cherry-picked statements:

    - That *Cobell* class counsel believed payments to some "members of the trust administration class will range from $800 to well over $100,000, and in a number of instances over $1 million." Dkt. 17 at 1.

    - That Judge Hogan believed "some Indians who . . . generate large amounts of revenue . . . could have funds generated in excess of $1 million." *Id.*

    - And that an objector to the *Cobell* settlement, Ms. Carol Good Bear, believed the named *Cobell* plaintiffs lacked standing to assert ***historical accounting***

claims on behalf of Fort Berthold allottees. *Id.*

- But even these cherry-picked statements do not support the Government's request.
    - The fact that some *Cobell* class members may be eligible for large payments says nothing about what *Two Shields* members may get and thus no bearing on Plaintiffs' actual point that *Cobell* does not reimburse *Two Shields* claims.
    - Nor does the Government mention that Ms. Carol Good Bear objected to the release of her ***historical accounting claims***—not the land administration claims that are the focus of the Government's defense. Thus, her statements at ***the June 2011*** hearing say nothing about the unique claims at issue here.

In short, the proper scope of the *Cobell* release is still the key question at issue. And the Government's desperate after-the–fact attempt to come up with ***any*** support for its inherently unfair interpretation only further demonstrates the reasonableness of Plaintiffs' interpretation or, at the very least, Plaintiffs' right to discovery. Plaintiffs respectfully ask the Court to deny the Government's motion.

I.

The Government's Request Should Be Denied as an Untimely Attempt to Introduce New Evidence and Argument in Support of Its Summary Judgment Motion.

Good cause does not exist for the Government's after-the-fact attempt to introduce new evidence and argument to support its summary judgment motion and its response to Plaintiffs' RCFC 56(d) motion for discovery. *Contra* Dkt. 17 at ¶¶ 3-5.

As the moving party, the Government had the ***initial*** burden of supporting its motion for summary judgment by "affirmatively produc[ing] evidence demonstrating that 'there is no genuine dispute as to any material fact.'" *Heger v. United States*, 103 Fed. Cl. 261, 267 (2012) (Lettow, J.). Yet the Government made a ***tactical choice*** not to cite or introduce the very evidence it now asks this Court to consider.

The Government could have cited the transcript in its motion (since it plainly quoted the

document). It ***chose*** not to.[1] Dkt. 6-1 at 28. The Government could have cited it in its reply. Again, it ***chose*** not to. Dkt. 14. And the Government could have cited it in its response to Plaintiffs' motion for discovery. Yet again, it ***chose*** not to. Dkt. 15. Instead, the Government ***chose*** to wait until all briefing had been completed to file what amounts to nothing more than a second reply that ambushes Plaintiffs with new evidence and argument in an attempt to deprive them of a chance to meaningfully respond.

The Government's actions are improper. "Summary judgment practice by ambush is no more to be favored than is trial by ambush." *Zagklara v. Sprague Energy Corp.*, No. 2:10-CV-445-GZS, 2012 WL 3679635, at *4 (D. Me. July 2, 2012). Thus, it is settled law that a "party is not entitled to turn the summary judgment process into an empty exercise by withholding evidence." *Id.* at *3 (barring the plaintiff from using her previously undisclosed evidence). It is also settled law that it is "entirely inappropriate" for the Government "to block the plaintiffs from discovery" and then attempt to "ambush" them by submitting previously "***undisclosed materials to the court***, leaving the plaintiffs unable to properly respond." *Smith v. Luther*, No. CIV. A. 4:96CV69-D-B, 1996 WL 671630, at *2 (N.D. Miss. Aug. 16, 1996) (emphasis added) (refusing to consider the defendants' motion for summary judgment until plaintiff got discovery because, absent discovery, the plaintiff could not adequately respond).

This is true even of requests for judicial notice. As other members of this Court have

[1] The Government undoubtedly ***chose*** not to cite the transcript in its original motion because it made its assertions about the value of Plaintiffs' claims and the compensation some *Cobell* class members may receive in support of its motion to dismiss, Dkt. 6-1 at 28—***a context in which extrinsic evidence of this kind is not permitted***. *Am. Contractors Indem. Co. v. United States*, 570 F.3d 1373, 1376 (Fed. Cir. 2009) ("On a motion to dismiss, the court generally may not consider materials outside the pleadings."); *see infra* pages 5-6 & n.2. Thus, the Government's unsupported assertions were in fact "specious (and improper)," Dkt. 11 at 44, as is its attempt to now justify those statements with "materials outside the pleadings." *Am. Contractors*, 570 F.3d at 1376.

explained, "[j]udicial notice is merely a way of introducing evidence without resort to the ordinary formalities; ***it does not circumvent the requirements of orderly judicial procedure*** . . . ." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974) (Davis, J.) (emphasis added) (refusing to let the Government introduce evidence via judicial notice on appeal that it could have "timely" introduced previously because even "[a]ssuming arguendo that it would be proper to take judicial notice of these documents, the Government's effort to inject them at this stage comes too late"). As a result, courts routinely refuse to grant after-the-fact requests for judicial notice like the Government attempts here.

In *J.W. ex rel. J.E.W. v. Fresno Unified School District*, for example, the court affirmed the denial of an "untimely" request for judicial notice of an official state document because the late request deprived the other party "of the opportunity to submit documents in response, to question witnesses about the [document], or to raise arguments regarding" it. 611 F. Supp. 2d 1097, 1108 (E.D. Cal. 2009). In *Shalaby v. Irwin Industry Toll Co.*, the court chastised the moving party for seeking to use a request for judicial notice as "nothing more than an untimely motion for summary judgment." No. 07CV2107-MMA BLM, 2009 WL 7452756, at *2 n.3 (S.D. Cal. July 28, 2009). And in *Ultratech, Inc. v. Tamarack Scientific Co.*, the court went so far as to deny as "untimely" a request for judicial notice of a dictionary definition because it came six days after the close of summary judgment briefing. No. C03-03235 CRB, 2004 WL 2304259, at *10 (N.D. Cal. Oct. 12, 2004); *see id.*, Docket Entries 266 & 273.

In sum, just as in *Turtle Mountain* and each of the cases cited above, regardless of the merit of the Government's request, its attempt "to inject them at this stage comes too late." *E.g.*, 490 F.2d at 945. By failing to timely submit its evidence and argument in its prior filings as it could have, the Government has deprived Plaintiffs of an opportunity to adequately respond.

J.W., 611 F. Supp. 2d at 1108; *infra* pages 6-9 (noting need for discovery). It should not be rewarded for this tactic. Rather, the Court should deny the Government's motion to make clear to the Government that the rules apply and must be followed. *E.g.*, *Ultratech*, 2004 WL 2304259, at *10; *see Zagklara*, 2012 WL 3679635, at *4.

II.

Even if the Government Had Timely Moved for Judicial Notice, Its Request Would Be Improper.

FEDERAL RULE OF EVIDENCE 201(b) permits this Court to "judicially notice a fact that is not subject to reasonable dispute because it":

> (1) is generally known within the trial court's territorial jurisdiction; or
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Thus, it is settled law that while "a court may take judicial notice of a document filed in another court," that notice is strictly limited to the factual "existence of the documents, not the accuracy of any legal or factual arguments made therein." *Mehle v. Am. Mgmt. Sys., Inc.*, No. 01-7197, 2002 WL 31778773, at *1 (D.C. Cir. Dec. 4, 2002) (per curiam). In other words, a "court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (internal quotation marks and citation omitted); *accord United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (noticing the existence of a court order but not the truth of any statements made therein); *United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993) (same).

As a result, the Government's reliance on *Biomedical Patent Management Corp. v. California, Department of Health Services* to support its request is misplaced. Dkt. 17-1 at ¶ 1. There, the court simply applied the general rule; it noticed prior court documents for the limited

purpose of establishing the fact of such litigation—not the truth of the statements made therein. 505 F.3d 1328, 1331 & n.1 (Fed. Cir. 2007) (noticing only the existence of prior litigation); *Biomedical Patent Mgmt. Corp. v. Calif., Dep't of Health Servs.*, No. C 06-00737 MHP, 2006 WL 1530177, at *1 (N.D. Cal. June 5, 2006) (same); *cf. Liberty Mut.*, 969 F.2d at 1388 (explaining that courts may notice only the fact of prior litigation).

But here, the Government plainly wants more. It wants the Court to notice not just the factual existence of the transcript and prior litigation, but also the truth of its cherry-picked statements. Dkt. 17 at ¶¶ 3-4. It wants the Court to accept as true that *Cobell* class members actually may receive as much as $1 million in *pro rata* payments. *Id.* at ¶ 3. It also wants the Court to accept as true Ms. Good Bear's statements and to rely on them as proof that "the parties to the *Cobell* Settlement and the District Court were []aware of the 'unique" situation of oil and gas lessees on the Fort Berthold Indian Reservation." *Id.* at ¶ 4. That is clearly not permitted.[2]

This serves as a second independent ground for denying the Government's motion.

III.

The Transcript Is Irrelevant and Reinforces Plaintiffs' Need for Discovery.

Finally, the Government request should be denied because nothing in the transcript refutes Plaintiffs' claims or their need for discovery.

Certainly, what payments the *Cobell* formula theoretically permits some unidentified *Cobell* class members has no bearing whatsoever on Plaintiffs' actual point—supported by the unrebutted testimony of its experts—that the *Cobell* formula does not take into account damages

[2] Notably, even assuming this Court could notice facts in prior court documents, the statements at issue do not qualify because each is "subject to reasonable dispute." FED. R. EVID. 201(b). As Plaintiffs explained in support of their request for discovery, even *Cobell* class counsel now represents that it does not know how much money individual *Cobell* class members may receive given the limited funds and unknown number of class members. Dkt. 16 at 18; *see* Dkt. 11-1 at 44 ¶ 21, 49 ¶ 39 (Parris Declaration); *id.* at 66-68 (May 23, 2013 settlement update).

suffered by *Two Shields* class members and that the Government's position therefore "boils down to the absurd assertion that Plaintiffs 'clearly' waived their valuable *Two Shields* claims for nothing." Dkt. 11 at 17; Dkt. 16 at 21; Dkt. 11-2 at 207 ¶¶ 42-43, 210 ¶ 46 (Zmijewski Affidavit) ("[T]he allocation of the Cobell Settlement ignores prospected proceeds of a Two Shields Plaintiffs' trust land, which, I understand could be most, and for some Two Shields Plaintiffs, all of the damages, and thus, would not compensate the Two Shields Plaintiffs for damages related to this litigation."). To the contrary, Judge Hogan's statement that only those Indians who "generate large amounts of revenue" could get large pro rata payments actually supports Plaintiffs' argument. *E.g.*, Dkt. 17 at 1. It serves as additional objective evidence that Plaintiffs' interpretation of the *Cobell* settlement agreement is reasonable and the Government's is not. Dkt. 16 at 15-16 (citing *Wyo. Sawmills, Inc. v. United States*, 90 Fed. Cl. 148, 158 (2009) (Block, J.) (explaining that a party "may show that its interpretation is reasonable . . . by showing that the Government's interpretation is inherently unfair")).

These same statements also have no bearing on the second basis for Plaintiffs' request for discovery related to the Government's knowledge of expected *Cobell* payments: the Government's unsupported assertion in its initial motion that "the Claims Resolution Act likely enhances the value of plaintiffs' property," Dkt. 6-l at 28. Dkt. 16 at 18. Having opened that door, the Government cannot now deny Plaintiffs an opportunity to discover the basis for the very assertions it uses to support its motion. *E.g.*, Dkt. 16 at 18.

And finally, the Government's attempt to spin Ms. Good Bear's testimony as somehow demonstrating that Plaintiffs' *Two Shields* claims (which concern only lease approval) were in fact released under *Cobell*, Dkt. 17 at ¶ 5, conveniently ignores two crucial facts. First, it ignores the fact that the Government argues only that Plaintiffs' claim were released as ***land***

administration claims and that the entirety of Ms. Good Bear's statement concerned ***historical accounting claims—not land administration claims***. *Compare, e.g.*, Dkt. 6-1 at 15 ("Plaintiffs now seek to litigate in this case Land Administration Claims . . . ."), *with* Dkt. 17-1 at 45-51. As she stated repeatedly:

- "I am objecting to the proposed settlement of the historical accounting class . . . ." *Id.* at 45 lns. 15-16.
- "I think that we should be permitted to opt out of the historical accounting. Not one of the plaintiffs is from my reservation, Your Honor. Not one of them has an oil lease from the same land, from the same geological formation, from the same reservoir, even the same geological province." *Id.* at 48 lns. 9-14.
- "The proposed settlement for the historical accounting class is simply not fair or reasonable." *Id.* at 49 lns. 7-8.

Accordingly, her statements are completely irrelevant to this case. *Cobell* released historical accounting claims regardless of whether they "could have been asserted through the Record Date." Dkt. 6-2 at 62 ¶ 15 (defining historical accounting claims to include all accounting claims without caveat). In contrast, *Cobell* defined land administration claims to include only those lease approval claims that "could have been asserted" by September 30, 2009. *Id.* at 63 ¶ 21(b)-(c), 65 ¶ 30. The two are as different as apples and oranges.

Second, the Government ignores the fact that Ms. Good Bear did not even make her statements about historical accounting claims ***until June 2011***—more than seven months after the Williams' transaction, Dkt. 1 at ¶ 113, and more than 21 months after the deadline for asserting a land administration claim, Dkt. 6-2 at 63 ¶ 21, 65 ¶ 30. Thus, the very fact that the Government cannot cite to anything prior to her statements to demonstrate any awareness of even Fort Berthold generally—let alone *Two Shields* claims specifically—only further proves Plaintiffs' point. Even the Government has no evidence that *Two Shields* claims had accrued until long after they could have been asserted under *Cobell*.

In sum, the Government's request is not only improper, but even taken at face value it does nothing to refute Plaintiffs' arguments or their need for discovery. To the contrary, the fact that the Government keeps trying to introduce new, previously undisclosed evidence simply underscores the need for full discovery to determine what other relevant information the Government knows or has but desperately does not wish to share.

CONCLUSION

Plaintiffs respectfully ask the Court strike the Government's motion in its entirety to protect Plaintiffs from being unfairly prejudiced by the Government's after-the-fact evidence and argument. *Zagklara*, 2012 WL 3679635, at *3-4.

Alternatively, if the Court is inclined to grant the Government's request, Plaintiffs respectfully request discovery related to that new evidence. *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 423 (5th Cir. 2013) ("Ordinarily, a party should be given notice that the court intends to judicially notice facts and, when appropriate, should be given an opportunity for discovery germane to [the] dispute implicated by the noticed facts."); *see* FED. R. EVID. 201(e). Plaintiffs need discovery "related to the *Cobell* payment methodology and any payments to be made to *Two Shields* class members under the *Cobell* settlement" and to "the value of the *Two Shields* mineral interests" to show that the Government's cherry-picked statements regarding *Cobell* payments are "subject to reasonable dispute." *E.g.*, Dkt. 11-1 at 5-6 ¶¶ 15-16. They also need discovery "related to the Government's awareness or knowledge prior to September 30, 2009, and December 10, 2010, of the *Two Shields* claims," especially as evidenced by disclosures to the *Cobell* class, to argue against noticing the statements of Ms. Good Bear. *E.g.*, *id.* at 5-6 ¶¶ 13-14, 17.

The Government has once again opened the door to this discovery by putting such facts at issue. As a result, prejudice to Plaintiffs can only be avoided by permitting Plaintiffs

discovery into those issues so that they can intelligently defend their case.

Respectfully submitted,

/s/ Kenneth E. McNeil

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Dated: July 12, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, I caused the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S REQUEST FOR JUDICIAL NOTICE** to be served on opposing counsel via the Court's CM/ECF system.

Dated: July 12, 2013.

/s/ Kenneth E. McNeil
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