IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 14-1405

HOMER FLUTE, ET AL.,

PLAINTIFFS-APPELLANTS,

V.

UNITED STATES, ET AL.,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (CASE NO. 13-CV-1836-PAB-CBS) HONORABLE PHILIP A. BRIMMER

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INTRODUCTION

For one-hundred fifty years the families that suffered at the Sand Creek massacre received lip-service from the United States for its admittedly "gross and wanton outrages" against them. *See* Treaty of Little Arkansas (1865) at Art. VI, 14 Stat. 703. Immediately after the massacre at Sand Creek, the United States entered into the Treaty of Little Arkansas wherein the United States condemned its own actions and made the unkept promise that underlies this action: the promise to make reparations—to pay money and provide land and goods—to the families that suffered at Sand Creek. *Id*.

The United States Congress, albeit partially, followed through on the promises by appropriating a small amount of money for the express purpose of "reimbursing members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek." 14 Stat. 255, 276 (July 26, 1866) (herein the "1866 Appropriations Act"). However, upon information and belief, the governmental entities—the same entities that are Defendants to this lawsuit—failed to comply with their duties under the Treaty of Little Arkansas and the 1866 Appropriations Act. It is believed that the Bureau of Indian Affairs (herein the "BIA") just took some of this money—this blood money—and used it for agency purposes. But no accounting has ever been provided by the BIA, so the fate of the reparations is ultimately unknown.

Fast-forward to today. Once again the families that suffered at the Sand Creek massacre are forced to hear the United States say one thing, but do another. In 1994, after over a century of mismanagement in fulfilling trust duties to Indian peoples, the United States Congress did the right thing; this time enacting statutes reiterating and clarifying the United States' historical duty to account for its trust management and reviving the ability for Indian beneficiaries to receive restitution for such trust mismanagement.

However, yet again, the federal agencies that are Defendants to this lawsuit are ignoring the responsibilities Congress placed upon them. In its brief, the United States initially puts forth an absurd administrative argument; that the United States can administratively steal from its own wards by simply closing their trust accounts, and in so doing gain immunity from the duty Congress imposed on it to account for the funds it had mismanaged *for centuries*.

Secondarily, the United States feigns support for the District Court's opinion by asserting that no trust duty exists regarding the funds that Congress appropriated. However, if the duty "to reimburse[e those] who suffered at Sand Creek" is not a trust duty, then there may never have been one. 14 Stat. 255, 276. While it is true the duty is not elaborate, it is a duty imposed by Congress on the United States for the benefit of Indians.

With that trust duty, comes the duty of the United States to account for the trust funds in question. Unsurprisingly, this has never been fulfilled by the United States. That right to an accounting is a powerful right, because Congress decided that until the United States actually accounts to Indians for trust funds then their cause of action "shall not begin to accrue." *See* Section III *infra*.

The District Court's inherent anathema to the revival of the Plaintiffs' claims should have no bearing on this Court's analysis. These claims are old, but *Congress* chose to revive them with a series of clauses it inserted in the defendant federal agencies' funding bills, each funding cycle, for 20 years. While it may appear inequitable to the District Court that the Plaintiffs' claims could be revived centuries later, the District Court and the BIA both lack the authority to overrule an act of Congress. Accordingly, the District Court's opinion must be reversed, and the Plaintiffs claims for an accounting must be reinstated.

Finally, the United States seeks to apply sharp edges to its interpretation of the duty to account, asserting that the duty dies when it administratively closes an account. Such sharp edges have no place in a case involving Indian trust duties, where instead the statutes need to be interpreted in a way that would benefit the Indians. Interpreting the accounting duty to apply only to accounts "then existing" as the United States now asserts only benefits the BIA, and conflicts with long-standing Indian canons of construction.

ARGUMENT

I. The Treaty of Little Arkansas and 1866 Appropriations Act Cleary Establish Enforceable Trust Duties.

A. United States Misstates and Misapplies Plaintiffs' Position.

The United States misstates the Plaintiffs' position regarding the Treaty and Appropriations Acts. Plaintiffs set forth several reasons that an enforceable trust duty was created—including the indisputable obligations on the Secretary of the Interior to distribute and manage appropriated funds and the manner in which to do it. Specifically, "the Treaty of Little Arkansas and 1866 Appropriations Act establish enforceable trust duties." *See* Aplt. Br. at 17-19. Under both the Treaty and 1866 Appropriations Act, the Secretary of the Interior is required to manage and control for the benefit of the surviving families, a point to which even the United States agreed with in the pleadings below. *See* Aplt. App. at 79-80. Not only was exclusive authority given to the Secretary, but *no* control over the appropriated funds was provided to the individual Indians.

In this case, even the United States agrees there were funds dedicated to the payment of the Plaintiffs. The Plaintiffs claim the money should still be there, and the United States asserts—without any factual or evidentiary support—that the "account" the funds were in was closed. The United States subsequent argument that, because it allegedly closed the account the Plaintiffs' money should be found in there is no responsibility to account for the "trust fund balances," finds no

support in the facts or the law. Simply put, there is no legal or rational basis for the United States' stunning assertion that it may steal trust funds by closing the "account" and not even be brought to account for the whereabouts of the money.

B. Plaintiffs' Appropriately and Timely Address the Application of Navajo and El Paso to the Facts of this Case.

The United States' waiver argument is, at best, novel. The United States suggests that Plaintiffs should have anticipated that the District Court would create a standard that had not been argued. In order to make its argument, the United States fabricates a simplistic, broad-brush position that Plaintiffs have never taken; that "cases involving claims for money damages are irrelevant to cases involving accounting claims." While the *Navajo* and *El Paso* cases set forth the principles applicable to determining when and how a trust is created – and Plaintiffs discuss those in their opening brief – they do not address when an *accounting* is required. *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Cl. Ct. 1980); *El Paso Natural Gas Co. v. United States*, 750 F.3d 863 (D.C. Cir. 2014). The opening brief states as much; the "cases have nothing to do with an accounting claim." Aplt. Br. at 15. Because the cases involved claims for damages, whether an accounting was required was not at issue in either *Navajo* or *El Paso*. And, consequently, the standard to be applied to determine when an accounting is required was not addressed.

To be sure, *Navajo* and *El Paso* do address the circumstances under which a trust is created. The United States says nothing, however, about whether they are appropriate precedent for determining *when an accounting is required* of funds held in trust by the United States. That is the exact point is made in the Plaintiffs' briefing. *See* Aplt. Br. at 15. Far from trying to "have it both ways," the Plaintiffs have appropriately applied the Supreme Court's reasoning on issues addressed in both cases (*e.g.,* the creation of an enforceable trust duty), and rejected its application to issues which were never addressed by the *Navajo* or *El Paso* courts (*e.g.,* the United States' duty to account). The United States' attempts to conflate these issues should be rejected.

C. El Paso Natural Gas Co. v. United States Fully Supports the Plaintiffs' Claims.

The United States lastly argues that the District Court appropriately relied on the Circuit Court's holdings in *El Paso*, concluding that the Treaty of Little Arkansas and the 1866 Appropriations Act did not create an "enforceable trust" in favor of the Plaintiffs. The District Court's holding was based on an incorrect reading of the facts of this case, finding that the United States did not have the right—under the Treaty or the Act—to use or control the funds held for survivors. As discussed above, and in the Plaintiffs' Opening Brief, this is quite clearly not the case. Additionally, the individuals to whom reparations are owed have never had any control whatsoever over the funds. Thus, to the extent that control,

management or use of the funds resides in any entity, it is completely and absolutely with the United States. Under the principles set forth in *El Paso*, this is enough to create and enforceable trust responsibility.

The United States also attempts to distinguish *El Paso* from the instant case, contending that no "express trust" was created by the Treaty and Appropriations Act. The United States makes this argument even though the *El Paso* court specifically held that, where "the Federal Government [is given] full responsibility to manage Indian resources," an enforceable, fiduciary relationship is created. *El Paso*, 750 F.3d at 893 (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("*Mitchell II*")). As noted previously, in this case the Federal Government was given all of the responsibility and authority over the reparations; the survivors were given none. It is as inequitable a situation as possible. And, as the Supreme Court has made clear, "[where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or a fiduciary connection." *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987) (emphasis added). Congress has *not* provided otherwise. Thus, there is no question at all that a trust was created.

II. The 1994 American Trust Fund Management Reform Act Does Not Limit The United States Accounting Duty To Only Those Trust Accounts "Then Existing."

The United States asserts this Court should uphold the dismissal of Plaintiffs' claim for an accounting on the premise that no duty to account to Plaintiffs exists. In broad terms, the BIA asserts alternatively that (a) the BIA has not waived its sovereign immunity, or (b) Plaintiffs have failed to state a claim upon which relief can be granted. More specifically, the BIA would rewrite the American Trust Fund Management Reform Act of 1994 (herein the "1994 Act") to provide itself with administrative efficiency, while depriving the Plaintiffs (and Congress) of the intent and benefit of the law. Defendants' argument on this single issue—whether the United States has a duty to account—fails for the reasons addressed below.

A. The United States' Duty to Account Pre-Existed the 1994 Act.

The United States "has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship." *See Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("*Cobell VI*"). The Plaintiffs' right to an accounting "inheres in the trust relationship itself." *Cobell VI*, at 240 F.3d at 1103 (relying on *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992) (citing G.T. BOGERT, TRUSTS § 141, at 494 (6th ed. 1987))); *see also* Restatement

(3d) Trusts, § 83(b) ("The right of any beneficiary to request information . . . includes a right to request and receive accounting or comparable reports" and allowing courts to compel such accountings). Once it is clear a trust exists, "[t]he district court sitting in equity ***must do everything it can to ensure that [the United States] provides [the Indians] an equitable accounting***," even if such an accounting seems impossible. *Cobell v. Salazar,* 573 F.3d 808, 813 (D.C.Cir. 2009) ("*Cobell XXII*").

There is a purpose for this duty to account. It is "to assure that [the BIA] exercises proper control and accountability for each trust fund and each account therein and to overcome the cumulative effects of" centuries of mismanagement of Indian trust funds by the BIA. *See* MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499 at 59-60 (1992). It would be ridiculous to assert that the resolution Congress intended was *partial* resolution when the purpose was to remedy the United States long-standing trust mismanagement.

B. The 1994 Act Only Clarified the United States' Duty to Account.

Of course, the 1994 Act is not the source of the United States' accounting duty. The duty to account is a fundamental trust duty that was merely "clarified" by the 1994 Act. *See Cobell VI*, 240 F.3d at 1100. The D.C. Circuit has explained:

> The Indian Trust Fund Management Reform Act *reaffirmed and clarified preexisting duties; it did not create them*. It further sought to

> remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of [the federal government's] obligations. . . Enactment of the Indian Trust Fund Management Reform Act in 1994 did not alter the nature or scope of the fiduciary duties owed by the government to [Indian] trust beneficiaries. Rather, by its very terms the 1994 Act identified a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out.

Cobell VI, 240 F.3d at 1100 (emphasis added); *see also Cobell XXII*, 573 F.3d at 813 (emphasis added) (holding that it is "the *scope* of the accounting [that] is derived from statutory law," not the duty to account").

Defendants wish to treat the 1994 Act as some sort of "reset button" on their trust responsibilities and forget any mismanagement that occurred before. This viewpoint is clearly erroneous because the 1994 Act was enacted in response to, and in an effort to cure, the United States' long history of trust mismanagement. The D.C. Circuit summarized the legislative history leading to the 1994 Act:

> Beginning in 1988, Congress held oversight hearings on Interior's management of the Indian trust accounts. These hearings led to a report, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499 (1992) [ ], which harshly criticized the Interior Department's mishandling of the trust accounts. Consistent with prior analyses, the report found, 'significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.' *Id.* at 2. Interior's persistent failure to meet its obligations led the congressional investigators to conclude that top officials "have utterly failed to grasp the human impact of its financial management of the Indian trust fund." *Id.* at 5.

Cobell VI, 240 F.3d at 1090. "Given the long history of the government's trust responsibilities to the tribes, and the difficulties in carrying out those duties, it defies reason to believe that Congress intended to direct that whatever balance was on the books at the time of passage of the 1994 Act was sufficient." *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 U.S. LEXIS 99548 at *6 (W.D. Okla. Dec. 10, 2008) (emphasis added).

The retroactive nature of the United States' duty to account is further illuminated by the Appropriations Acts.[1] The most recent Appropriations Act provides:

> [N]otwithstanding any other provision of law, *the statute of limitations shall not commence to run on any claim*, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 111-88, 123 Stat. 2904 (2009) (emphasis added). Since 1991, before the enactment of the 1994 Act, Congress has each year passed similar language protecting both tribal and individual Indian claims. The Appropriations Acts, by the United States' own admission, "alter[ ] the operations of the statute of

[1] The term "Appropriations Acts" refers to a series of acts passed by Congress waiving the United States' sovereign immunity and deferring accrual of potential claims until an Indian beneficiary receives an accounting. *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004).

limitations" so that "claims falling within its ambit [do] not accrue * * * until the claimant is provided with a meaningful accounting." *See* Defendants' Resp. Br. at 21 (quoting *Shoshone*, 364 F.3d at 1347).[2] The Accounting Acts even revive claims that would have expired before the passage of the Acts. *See Felter v. Salazar,* 679 F.Supp.2d 1, 6-8 (D.D.C. 2010) (holding that the 2003 iteration of the Tribal Trust Accounting Statute retroactively revived tribal trust accounting claims that would otherwise be barred by 28 U.S.C. § 2401).

If the United States' accounting duty was limited only to those accounts that existed after 1994 then the Accounting Acts that were passed prior to 1994 would lose all meaning. *See See* Pub. L. No. 102-154, 105 Stat. 990 (1991); Pub. L. 102-381, 106 Stat. 1374 (1992); Pub. L. No. 103-138, 107 Stat. 1379 (1993); Pub. L. No. 103-332, 108 Stat. 2499 (1994). Why would these acts mention an accounting if there was no duty to account? The only viable answer is that the accounting duty existed prior to the 1994 Act and is inherent in the trust itself.

[2] Federal Circuit in *Shoshone* determined that "[t]he introductory phrase 'notwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act[s] . . ." 364 F.3d at 1346. The Federal Circuit further reasoned that the phrase "'shall not commence to run,' unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered." *Id.* at 1347.

C. The United States Misconstrues Cobell XXII.

Despite the United States' assertion, in *Cobell XXII* the D.C. Circuit did not hold "that the 1994 Act does not require the government to provide trust beneficiaries with an accounting for accounts closed before 1994." *See* Defendants' Br. at 24. Instead, *Cobell XXII* simply provides guidance on molding the scope of an accounting to a finite amount of government resources to perform the accounting. *See Cobell XXII*, 573 F.3d at 813.

In *Cobell XXII*, the D.C. Circuit was faced with the situation where the United States simply could not afford a complete accounting of the Plaintiffs' more than three-hundred thousand trust accounts—limiting its holding to those circumstances. 573 F.3d at 813 ("The unique nature of this trust requires the district court to exercise equitable powers in resolving the paradox between classical accounting and limited government resources."); *see also Cobell v. Kempthorne*, 532 F.Supp. 2d 37, 39 (D.D.C. 2008) ("Plaintiffs are a certified class of present and former IIM account holders numbering in excess of 300,000.") ("*Cobell XX*"). For that reason, the D.C. Circuit offered "guidance" as to corners that the district court could cut to reduce the cost to account for Individual Indian Money (herein "IIM") accounts. *See Cobell XXII*, 573 F.3d at 813. The D.C. Circuit explained that, with the limited funds available, the United States should "concentrate on low-hanging fruit" and not to "allow the theoretically perfect

render impossible the achievable good." *Id.* at 815. As such, one area the D.C. Circuit indicated the United States could cut costs was IIM accounts that were closed before 1994. Thus, the D.C. Circuit found that accountings need not be performed for these IIM accounts because they had already received "a final determination" of the account through probate. *Id*. at 815.

This is not the situation in this case. Plaintiffs do not seek accountings for hundreds of thousands of IIM accounts. At most, Plaintiffs' accounting would only encompass funds that likely would have—or should have—been deposited into a limited number of IIM accounts. Here, there is but one account, not a myriad of accounts, that would require accounting for in this case. Moreover, unlike the closed IIM accounts in *Cobell XXII*, there has never been a probate of Plaintiffs' trust funds. Instead, upon information and belief, the United States merely stole the money before it distributed it pursuant to its trust obligations.

III. The United States Ignores The Express Language Of *Shoshone*.

The United States begins its argument with the statement that "the 2009 Appropriations Act is not a waiver of federal sovereign immunity, and *Shoshone* does not hold otherwise." Defendants' Resp. Br. at 19. However, the text of *Shoshone* directly contradicts this statement: "By the plain language of the [Appropriations] Act, ***Congress has expressly waived its sovereign immunity*** and deferred the accrual of the Tribes' cause of action until an accounting is provided."

Shoshone, 364 F.3d at 1346 (emphasis added). It is hard to contemplate how the Federal Circuit could have used clearer language and it is not surprising the United States wants to stick their head in the sand to avoid addressing it.

The Federal Circuit reached this conclusion after considering that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed" as the United States urges the Court consider. One way Congress expresses intent to allow suit against the Government is through "[s]tatutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government." *Shoshone*, 364 F.3d at 1346.

The United States should not be allowed to relitigate this issue here, since the Federal Circuit addressed the same authority the United States relies on here.

CONCLUSION

Despite the United States' misguided arguments to the contrary, Plaintiffs are clear trust beneficiaries that are owed an accounting. Moreover, jurisdiction exists over Plaintiffs' claims because the United States' has waived its sovereign immunity to pursue such an accounting claim. Accordingly, the District Court's Order dismissing Plaintiffs' claim for an accounting should be reversed.

Respectfully Submitted,

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Date: April 13, 2015

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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Date: April 13, 2015

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