IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on April 13, 2015)

GRACE M. GOODEAGLE, *et al.*,	)	
	)	
Plaintiffs,	)	No. 12-431L
	)	
v.	)	Hon. Thomas C. Wheeler
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PRE-OCTOBER 25, 1994, INDIVIDUAL INDIAN MONEY INVESTMENT MISMANAGEMENT CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Regulations

Other Authorities

I. INTRODUCTION

Prior to October 25, 1994, when the American Indian Trust Management Reform Act of 1994 was enacted, controlling law did not provide for the payment of interest on Individual Indian Money ("IIM") accounts. This was affirmed in 1978, when the United States Court of Appeals for the Federal Circuit's predecessor held that "no statute exists requiring interest to be paid" on IIM accounts. *United States v. Gila River Pima-Maricopa Indian Cmty.*, 586 F.2d 209, 216-17 (Ct. Cl. 1978) ("*Gila River II*"). Similarly, on two occasions prior to 1994, the Comptroller General opined that the United States is not liable for alleged investment losses on IIM accounts.

Because there was no obligation of the United States to invest or pay interest on IIM accounts prior to 1994, plaintiffs' claims that the United States failed to maximize income by prudent investment on their IIM accounts during the period prior to October 25, 1994, should fail. Judgment should be entered in favor of the United States on those claims as a matter of law.

II. QUESTION PRESENTED

Is the United States entitled to judgment as a matter of law on plaintiffs' IIM investment mismanagement claims for the period prior to October 25, 1994?[1/]

III. STANDARD OF REVIEW

The United States may move, at any time, for summary judgment on all or part of plaintiffs' claims. Rules of the United States Court of Federal Claims ("RCFC") 56(b). This Court may summarily adjudicate undisputed material facts, and determine liability on part of

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[1/] The United States does not, by this motion, seek judgment on plaintiffs' claims (if any) for unlawful debits from IIM accounts or deposit lag for credits to IIM accounts. Nor does the United States seek summary judgment on plaintiffs' claims, if any, for investment mismanagement of their IIM fund on, and after, October 25, 1994.

plaintiffs' claims, even if there remain other disputed issues for trial. RCFC 56(d). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see also Arko Exec. Servs., Inc. v. United States*, 553 F.3d 1375, 1378 (Fed. Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). By contrast, summary judgment is not appropriate where "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Thus, in reviewing a motion for summary judgment, the benefit of all factual inferences runs in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). "However, bald assertions and speculation do not create an evidentiary conflict sufficient to defeat a summary judgment motion." *Lathan Co., Inc. v. United States*, 20 Cl. Ct. 122, 125 (1990) (citing *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984)). The plain language of Rule 56(a) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

IV. STATEMENT OF UNDISPUTED FACTS, STATUTORY BACKGROUND, AND LEGAL BACKGROUND

In this case, plaintiffs claim that the United States has "failed to maximize trust income on plaintiffs' [IIM] accounts by prudent investment" and that the United States "has grossly mismanaged, and continues to mismanage, [p]laintiffs' IIM accounts." Appendix of Exhibits ("App.") Ex. 1 (Response to Interrogatory No. 10); *see also* Complaint ¶¶ 6-62, ECF No. 1. A portion of plaintiffs' IIM investment mismanagement claims pre-date October 25, 1994.

A. IIM and SDA Accounts.

An IIM account is "an interest bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary [of the Interior]. There are three types of IIM accounts: unrestricted, restricted, and estate accounts." 25 C.F.R. § 115.002. IIM accounts have their roots in the General Allotment Act, 24 Stat. 388 (1887), which allotted Indian land but restricted immediate alienation or encumbrance of that land by the Indian beneficiaries. *County of Yakima v. Confederated Tribes of the Yakama Indian Reservation*, 502 U.S. 251, 254 (1992). Since Indian allotments were held in trust by the United States, any revenues from those allotments were similarly held by the United States in trust, generally in IIM accounts. IIM accounts became a permanent fixture of the Indian law landscape with enactment of the Indian Reorganization Act of 1934 which ended the "allotment era" introduced by the General Allotment Act and imposed permanent restricted status on most Indian allotments.

The Department of the Interior also maintained Special Deposit Accounts ("SDA") in the IIM system prior to March 2000. A SDA is "a temporary account for the deposit of trust funds that cannot immediately be credited to the rightful account holders." 25 C.F.R. § 115.002. As an example, SDA accounts have been established to hold advance deposit payments for timber sales on allotted land. The awardee of a timber contract would deposit funds into a SDA account, and the Bureau of Indian Affairs ("BIA") would then transfer funds from the SDA account to IIM accounts for beneficial owners of the allotted land as timber is cut and reported by the timer contractor. These SDA accounts were maintained in the IIM system prior to approximately March 1, 2000, when the Department of the Interior switched accounting systems.

B. The Investment Statutes.

Two statutes are primarily implicated by plaintiffs' IIM investment mismanagement

claims. The first statute, 25 U.S.C. § 161a, was enacted in 1929, 45 Stat. 1164, and it mandated payment of interest on trust funds "carried on the books of the Treasury Department to the credit of an Indian tribe."[2/] The second statute, 25 U.S.C. § 162a, was enacted in 1938, 52 Stat. 1037, and it permitted the Secretary of the Interior "in his discretion" to withdraw Indian trust funds (both tribal and individual) from Treasury and invest them in securities authorized by statute. *See* 25 U.S.C. § 162a. Because 25 U.S.C. § 162a is discretionary, while 25 U.S.C. § 161a imposes a mandatory obligation on the Department of the Interior, the latter statute controls plaintiffs' claims for IIM investment mismanagement.

Prior to October 25, 1994, 25 U.S.C. § 161a made no provision for the payment of interest on IIM accounts. *See* Act of Oct. 4, 1984, Pub. L. No. 98-451, 98 Stat. 1729 (pre-1994 version of the statute that did not call for payment of interest on IIM funds). Before that date, the statute required only that the Secretary of the Interior invest funds "to the credit of Indian tribes," *id.*, it did not require the Secretary of the Interior to pay interest on IIM funds. Starting on October 25, 1994, Interior had the authority to pay interest on IIM funds held in the United States Treasury. 25 U.S.C. § 161a; Pub. L. No. 103-412 § 103, 108 Stat. 4239.[3/]

Beginning in 1966, the Department of the Interior invested IIM funds centrally from the BIA's Division of Finance in Albuquerque, New Mexico. *See* App. Ex. 2. IIM funds were

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[2/] From the time of its enactment to October 4, 1984, the statute mandated payment of 4% simple interest on all accounts with a balance over $500. *Id.* In 1984, the statute was amended to require all funds "carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes" to be invested in public debt securities. 98 Stat. 1729. The statute was not again amended until 1994.

[3/] While the Department of the Interior was not obligated to pay interest on IIM funds before October 25, 1994, it has long been allowed to invest IIM accounts in its discretion. *See, e.g.*, Department of the Interior Appropriations Act for 1909, Pub. L. No. 16-104, 35 Stat. 70, 73 (1908) (Secretary of the Interior "may deposit Indian moneys, individual or tribal, . . . in such national bank or banks as he may select. . . ."); *see also* 25 U.S.C. § 162a.

invested in "group securities." *See* App. Ex. 3 (describing group securities); App. Ex. 4 (IIM fund invested "on a Bureau-wide pool basis"). Until March 1989, BIA computed IIM interest semi-annually and distributed interest semi-annually. App. Ex. 5. Beginning in June 1989, BIA converted to a monthly distribution of interest on the basis of the average daily balance of each account. *Id.* This system remained in place through 1994.

C. Comptroller General Decisions.

In 1975, a probate proceeding before the Department of the Interior's Office of Hearings and Appeals identified "several mistakes" in that probate. *Matter of: Bureau of Indian Affairs Questions on Payments to Indians*, 65 Comp. Gen. 533, 534 (1986). These mistakes resulted in overpayments to some beneficiaries and underpayments to other beneficiaries of an Indian's estate. *Id.* In 1981, BIA sorted out the probate errors and sought recovery of overpayments from two heirs of the estate. *Id.* at 535. One of the beneficiaries from whom BIA sought recoupment had an open IIM account with a non-zero balance. *Id.* The other beneficiary had withdrawn the money and had a zero balance in her IIM account. *Id.* By 1985, BIA recovered the overpayment, with interest, from the beneficiary with an open, non-zero balance, IIM account, and offset the overpayment, with interest, against future credits of the other beneficiary who had a zero-balance IIM account. *Id.* BIA then questioned the legality of its recoupment efforts and sought an opinion from the Comptroller General as to the propriety of its recoupments. *Id.* The Comptroller General surveyed existing law, including Court of Claims decisions, and concluded that there was no statute that required interest to be paid on IIM funds. *Id.* at 540. Accordingly, the Comptroller General concluded that the "Government cannot be charged interest on monies it pays to the Indian notwithstanding [the fact that the] Government breached its trust responsibilities to the Indian." *Id.* at 533.

In 1991, the Acting Deputy Commissioner of Indian Affairs asked the Comptroller

General if Interior was liable to IIM account holders for "interest income that would have accrued to their accounts but did not because of the Bureau's management of those accounts." *Matter of: Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies*, No. B-243029, 1991 WL 197151 at *1 (Comp. Gen. March 25, 1991). In response, the Comptroller General opined that BIA "is not liable to IIM account owners for loss of interest, even that resulting from the Bureau's failure to manage IIM investments properly." *Id.*

D. The Bureau of Indian Affairs Manual.

In September 1994, BIA issued 85 BIAM ("Bureau of Indian Affairs Manual") Supplement 5, which established bureau-wide trust funds loss policy and procedures. App. Ex. 6. Therein, the agency stated that

> [o]nly the principal is reimbursable for losses to IIM accounts, except in those cases where the BIA has made investments which do not comply with 25 U.S.C. 162a, either as to type of investment or deposit, or as to the collateral or FDIC insurance threshold limitations. . . .

Id.. Thus, the BIA interpreted its liability for investment losses to IIM accountholders to be limited to circumstances where the government used IIM funds to purchase investment securities that were not authorized by 25 U.S.C. § 162a. The agency did not interpret the investment statutes to compel payment of "underinvestment" losses to IIM accountholders when it invested in securities permitted by statute but failed "to maximize the trust income by prudent investment." *See Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 289 (2013).

V. ARGUMENT

As the predecessor court to the United States Court of Appeals for the Federal Circuit, the Federal Circuit, this Court, and the Comptroller General have held, the United States owed no trust duty—money-mandating in breach or otherwise—to pay interest on IIM accounts prior to October 25, 1994. Thus, in this case, the portions of plaintiffs' IIM investment mismanagement

claims that pre-date October 25, 1994, lack merit and this Court should enter summary judgment on those claims in favor of the United States.

"[A] trustee is not an insurer of trust property" and the "proper procedure for [a trustee] is to conform his conduct to the instructions given him by the courts." *United States v. Mason*, 412 U.S. 391, 398-99 (1973). Further, "Congress may style its relations with the Indian a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *United States v. Jicarilla Apache Nation*, 564 U.S. ___, 131 S. Ct. 2313, 2323 (2011) (citing *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("*Mitchell II*")). Thus, in order for plaintiffs to state a valid claim for breach of trust against the United States, they have to allege that the United States "failed to comply with either a mandatory trust obligation specified in statute or in its own regulations, or with the fiduciary duties that spring from those obligations." *Jicarilla*, 112 Fed. Cl. at 288. Accordingly, plaintiffs' IIM mismanagement claims must also be grounded in statute or regulation.

Here, the predecessor court to the Federal Circuit has held in pre-1994 Act cases that Indians cannot state a claim for damages against the United States in this Court for lost investment interest stemming from the government's alleged management of IIM accounts. *Gila River II*, 586 F.2d at 216-17; *American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 1003 (Ct. Cl. 1981) *cert. denied* 456 U.S. 989 (1982) ("*Ak-Chin*"). In *Gila River*, a case originally brought before the Indian Claims Commission, the Gila River Pima-Maricopa Indian Community made various claims regarding funds disbursed from IIM accounts. *Gila River Pima-Maricopa Indian Community v. United States*, 38 Ind. Cl. Comm. 1,

17-18 (1976) (*Gila River I*"). The Commission addressed "whether refunds of payments made from Special Deposit and Individual Indian Moneys should be accompanied by an incremental payment for lost interest." *Id.* at 18. The Commission believed that the Court of Claims "seems to have spoken with two voices on the interest question." *Id.* Thus, the Commission reviewed the Court of Claims' decisions in *Cheyenne-Arapaho Tribes of Okla. v. United States*, 512 F.2d 1390 (Ct. Cl. 1975), and *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975). *Gila River I*, 38 Ind. Cl. Comm. at 18-20. The Commission attempted to reconcile the holdings of *Mescalero* and *Cheyenne-Arapaho* on the ground that "they deal with different periods and different funds." *Id.* at 18. As to the IIM accounts, the Commission concluded that *Cheyenne-Arapaho* applied to the IIM account funds, "that the Government cannot leave IIM funds in an interest-free account," and that "the Government [has] a duty to make them productive." *Id.* at 22. The Commission also found that "substantial balances were kept on hand [in IIM accounts] long enough between collection and expenditure to have made it feasible to deposit them in interest-bearing treasury or local savings accounts. . . ." *Id.*

On appeal, the Court of Claims reversed the Commission's holding as to the IIM accounts. *Gila River II*, 586 F.2d at 216-17. Despite the Commission's earnest effort to reconcile *Mescalero* with *Cheyenne Arapaho*, the Court of Claims held that "no statute exists requiring interest to be paid on 'Individual Indian Money' (IIM) accounts." *Id.* at 216.

In 1981, the Court of Claims again faced a general accounting claim by an Indian tribe regarding, *inter alia*, IIM accounts. *Ak Chin*, 667 F.2d at 983. The Court of Claims, on appeal from the trial division, adopted the trial commissioner's decision and held that "[n]o statute requires interest to be paid on IIM accounts." *Id.* at 1003 (citing favorably *Gila River II*, 586 F.2d at 216).

In *White Mountain Apache Tribe of Ariz. v. United States*, this Court (after transfer from the Indian Claims Commission) addressed tribal claims for "interest and lost investment yield." 20 Cl. Ct. 371, 377-78 (1990). In that case, the Court acknowledged that "[t]here is no . . . provision for [interest and lost investment yield] for IIM disbursements." *Id.* at 377. The Court's final judgment on the tribe's IIM disbursement claims were in nominal dollars and thus did not include damages for interest and lost investment yield. *White Mountain Apache Tribe of Ariz. v. United States*, 26 Cl. Ct. 446, 484 (1992).

In 1986, the Comptroller General relied upon the Court of Claims' decisions in determining that Interior could not "be charged interest on monies it pays to Indian notwithstanding Government breached its trust responsibilities to [the] Indian." *Matter of: Bureau of Indian Affairs Questions on Payments to Indians*, 65 Comp. Gen. at 533 (1986). Relevant here, the Comptroller General determined that BIA was not required to pay interest to an individual Indian beneficiary where BIA owed money to a beneficiary because of BIA error. *Id.* at 534. In reaching that conclusion, the Comptroller reviewed *Mescalero* and *Gila River II* and concluded that there was no statute that required interest to be paid on IIM funds. *Id.* at 540. In other words, the Comptroller General also concluded that BIA was not liable for interest on IIM accounts.

In 1987, this Court distinguished IIM accounts from tribal accounts when it assessed whether interest as a component of damages was recoverable in a Tucker Act (28 U.S.C. § 1491) claim by Yurok Indians who had been wrongfully excluded from per capita distributions of proceeds derived from the Hoopa Valley Reservation. *Short v. United States*, 12 Ct. Cl. 36, 42-44 (1987) ("*Short IV*"). The Court found that the timber income at issue in that case was from tribal land; the income would have been deposited into and disbursed from the tribe's tribal

proceeds of labor accounts; and that as a result plaintiffs were entitled to simple interest as a component of damages. *Id.* The Court distinguished that payment mechanism from "Individual Indian Money (IIM) accounts held for individual Indians, which are not necessarily required by statute to gather interest." *Id.* at 43.

On appeal the Federal Circuit confirmed that the plaintiffs were entitled to interest as a component of damages. *Short v. United States*, 50 F.3d 994, 998 (Fed. Cir. 1995). To reach that conclusion, the Federal Circuit repeatedly emphasized that the funds at issue were unlawfully disbursed from a tribal account, not an IIM account. *Id.* at 998 ("simple interest is paid on Indian Money, Proceeds of Labor ('IMPL') accounts") (footnote omitted), 999 ("part of the same IMPL accounts at issue in this case"), 1000 ("Where, as here, IMPL funds were at one time held in trust accounts . . . ."). The Federal Circuit in *Short* therefore had no opportunity to, and did not, overrule *Gila River II* or *Ak-Chin*.

In 1991, after an Inspector General report criticized the Interior's management of IIM accounts, the Department of the Interior again put the question of its liability for lost interest on IIM accounts to the Comptroller General. *Matter of: Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies*, No. B-243029, 1991 WL 197151. In responding to that query, the Comptroller General adopted the conclusion of the court in *White Mountain Apache*, finding that although the exercise of the authority granted to the Secretary of the Interior in 25 U.S.C. §162a "calls for the production of money," the statute does not expressly mandate the payment of interest on IIM accounts. *Matter of: Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies*, No. B-243029, 1991 WL 197151 at *4 (citing *White Mountain Apache*, 20 Cl. Ct. at 384). The Comptroller General found no basis to modify its 1986 opinion that the United States is not required to pay interest on IIM accounts. *Id.* at *5.

Decisions of the Comptroller General are binding on the executive. 31 U.S.C. §§ 3526(d) and 3529; *see also Petit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973). Comptroller General decisions are "authoritative and cannot be reversed by a court unless clearly contrary to law." *Greene County Planning Bd. v. Fed. Power Comm'n*, 559 F.2d 1227, 1235 (2d Cir. 1976). Thus, the General Accounting Office warns that "[u]ltimately, agency officials who act contrary to Comptroller General decisions may have to respond to congressional appropriations and program oversight committees." General Accounting Office, GAO-04-261SP, Principles of Federal Appropriations Law (3d Ed.) at 1-40 (2004).

In this case, plaintiffs seek damages for alleged investment mismanagement of their IIM accounts prior to October 25, 1994. App. Ex. 5; *see also* Complaint ¶¶ 6-62. As indicated by the above line of decisions, all courts that addressed the issue of investment losses on IIM account before the 1994 Act have held that the United States is not liable for those losses. "[I]t is unnecessary to penalize the United States' proper reliance on . . . past decision . . . ." *Mason*, 412 U.S. at 399. Because Courts have uniformly held that there can be no pre-1994 claim for interest or investment losses on IIM accounts, plaintiffs has failed to state a claim for those damages and they should be dismissed.

VI. CONCLUSION

Wherefore, for the reasons stated herein, the United States respectfully request that its motion be granted in full.

Respectfully submitted, April 13, 2015,

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