IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on June 1, 2015)

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

UNITED STATES' BRIEF IN REPLY TO PLAINTIFFS' OPPOSITION TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PRE-OCTOBER 25, 1994, INDIVIDUAL INDIAN MONEY INVESTMENT MISMANAGEMENT CLAIMS AND IN OPPOSITION TO PLAITNIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

No court has held the United States liable for lost investment interest[1/] due to Individual Indian Money ("IIM") accounts for the period prior to the amendment of 25 U.S.C. § 161a by Section 103 of the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), Pub. L. No. 103-412, § 103, 108 Stat. 4239, 4241. On the contrary, prior to 1994, several courts rejected claims by Indian tribes for damages for lost investment interest on IIM accounts. Accordingly, the United States should not be liable in this case for claims by individual Indians for lost interest due to their IIM accounts as a result of alleged investment mismanagement for the period prior to October 25, 1994.

Plaintiffs nonetheless argue that investment interest was required to be paid on their IIM accounts prior to 1994, *see generally* Opp'n and Cross-Mot. for Partial Summary Judgment, ECF No. 94 ("Opp'n and Cross-Mot."), but plaintiffs' arguments are flawed. First, Section 103 of the 1994 Act, which first required IIM funds to be invested, is not retroactive, it effectuated a change in the law. Second, several courts' conclusions that the United States has a money-mandating obligation to make tribal trust funds productive—specifically proceeds of labor and judgment award accounts—have no bearing on the United States' Tucker Act liability for alleged investment mismanagement of IIM accounts. IIM accounts are statutorily distinct from tribal trust fund accounts. Finally, courts and the Comptroller General held that the United States was not liable for lost investment interest resulting from mismanagement of IIM accounts despite the fact that when those decisions were rendered the United States could, and was, discretionarily

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1/ The Comptroller General describes these claims as "interest, even that resulting from the Bureau's failure to manage IIM investments properly." *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). Thus, the United States uses the phrase "interest" herein. "Interest" income and "investment" income are legally indistinguishable for purposes of these cross-motions. *See also* Note 2, *infra*.

investing IIM funds. The United States' motion for partial summary judgment should be granted and plaintiffs' cross-motion for partial summary judgment should be denied.

II. ARGUMENT

A. The 1994 Act Effectuated a Substantive Change in the Law Regarding the United States' Investment Obligations for IIM Accounts.

Prior to 1994, 25 U.S.C. § 161a did not require the investment of 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 the 1994 Act, the statute required only that the Secretary of the Interior invest funds held "to the credit of Indian tribes," *id.*, it did not require the Secretary of the Interior to invest IIM funds. As held by the United States Court of Appeals for the Federal Circuit's predecessor, "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*"). Plaintiffs' argument that the 1994 Act retroactively imposed an obligation to invest IIM funds, Opp'n and Cross-Mot. at 7-10, is inconsistent with the plain language of the 1994 Act, the legislative history of the 1994 Act, and the law.

1. The plain language of the 1994 Act refutes plaintiffs' retroactive application argument.

The 1994 Act effectuated a prospective change in the law, it did not "reaffirm[]" existing law. *Contra* Opp'n and Cross-Mot. at 8. The 1994 Act added subdivision (b) to 25 U.S.C. § 161a. 1994 Act, § 103, 108 Stat. at 4241. That subdivision requires the investment of funds held "to the credit of individual Indians." Subdivision (a) of 25 U.S.C. § 161a, by contrast, is limited to funds held "to the credit of Indian tribes." That subdivision was the entirety of the statute before it was amended by the 1994 Act. Thus, it was only after 25 U.S.C. § 161a was amended by the 1994 Act that the statute also applied to funds held "to the credit of individual Indians." 25 U.S.C. § 161a(b). The plain language of the 1994 Act is prospective, not retroactive, and it

changed the law with respect to the Department of the Interior's obligation to invest IIM funds.

It is well settled that statutes cannot be afforded retroactive effect "unless Congress clearly indicates its intention to do so." *Lowder v. Dep't of Homeland Sec.*, 504 F.3d 1378, 1384 (Fed. Cir. 2007). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (footnote omitted). Here, nothing in the text of Section 103 indicates that it is intended to apply retroactively. Pertinent here, the statute provides that "[a]ll funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury . . . ." The plain language of this provision is clear, it only requires the Department of the Interior to invest ("shall be invested," present tense) individual Indian funds currently held in trust ("carried in principal accounts on the books of the United States Treasury," again, present tense). There is nothing in the above language that can reasonably be interpreted to retroactively impose upon the Department of the Interior a statutory obligation to invest IIM funds prior to October 25, 1994.

This plain language understanding of the 1994 Act is bolstered by the very next provision, Section 104, codified at 25 U.S.C. § 4012. Section 104 is explicitly retroactive and it permits the Secretary of the Interior to "make payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual *before October 25, 1994*, retroactive to the date that the Secretary began investing individual Indian monies on a regular basis . . ." (emphasis added). This savings clause enabled the Secretary of the Interior, in her discretion, to settle historic non-investment IIM mismanagement claims, despite the fact that Section 103 only applied prospectively. In

Section 104, Congress specifically limited the Department of the Interior's pre-1994 IIM interest payment authority to those amounts "verified by the Secretary pursuant to the Department's policy for addressing accountholder losses." *Id.* At the time that the 1994 Act was passed, the Department of the Interior's loss policy provided 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.

Motion for Partial Summary Judgment, Appendix of Exhibits ("App.") Ex. 6 at 28, ECF No. 90-2. In other words, Congress excluded investment mismanagement claims from the Secretary's authority to pay back interest to IIM accountholders in settlement of appropriately documented claims for past wrongs.

When Congress passed the 1994 Act, it was well aware that the existing version of 25 U.S.C. § 161a, court decisions, and Comptroller General decisions did not require the United States to invest IIM funds. In Section 103, Congress prospectively changed the law so that in the future the Department of the Interior would be obligated to invest IIM funds. Congress was well aware that the Department of the Interior's loss policy excluded lost investment interest as reimbursable "losses" to IIM accountholders. Accordingly, when Congress passed Section 104—an explicitly retroactive section of the 1994 Act—it excluded investment losses from reimbursable IIM claims. Thus, the plain text of the 1994 Act refutes plaintiffs' argument that the duty to invest IIM funds was intended to be retroactive and supports the United States' entitlement to partial summary judgment on plaintiffs' pre-1994 IIM investment mismanagement claims.

2. The legislative history of the 1994 Act shows that Congress intended to change the law and did not recognize a prior duty to invest or pay interest on IIM accounts.

If there were any doubt that Section 103 of the 1994 Act did not "reaffirm[]" existing law, the legislative history of that section makes clear that Congress intended to prospectively change the law. As set forth in the House Report for the 1994 Act (and omitted by plaintiffs in their cross-motion), Congress understood that

> 25 U.S.C. 161a requires the Secretary to invest funds held by the Secretary in trust for tribes in public-debt securities. In order to achieve this requirement, 25 U.S.C. 162a authorizes the Secretary to withdraw tribal trust funds in order to deposit them for investment purposes. By borrowing language from both 25 U.S.C. 161a and 25 U.S.C. 162a, and amending both Acts, Section 103 of the Amendment to H.R. 4833 seeks to require uniformity in the Secretary's investment practices for both tribal trust funds and individual Indian trust funds. With the enactment of H.R. 4833, the Secretary will be authorized and required to both withdraw and deposit individual Indian trust funds in public-debt securities.

H.R. REP. No. 103-778 at 12 (1994). This provision makes clear that (a) Congress did not believe that investment interest was required for IIM accounts prior to the 1994 Act; and (b) that Congress decided to change 25 U.S.C. § 161a going forward. Congress therefore enacted Section 103 of the 1994 Act to, for the first time, "authorize[] *and* require[]" the Secretary of the Interior to "withdraw and deposit individual Indian trust funds in public-debt securities." *Id.* (emphasis added). Before the 1994 Act, the Secretary of the Interior was authorized but *not* required to invest IIM funds. In direct response to court decisions and Comptroller General decisions, Congress intended to prospectively change the United States' investment obligations for IIM funds with the 1994 Act.

Congress' understanding of the United States' pre-1994 Act investment obligations with respect to IIM funds is wholly consistent with the position advanced in the United States' motion for partial summary judgment. In the House Committee on Government Operation's seminal report, "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust

Fund," H.R. REP. No. 102-499 (1992), the House observed:

> The Comptroller General's decision turns on the wording of 25 U.S.C. 162a, which authorizes the Secretary to invest IIM moneys, but does not require him to do so. Clearly, the Bureau should be required to invest these funds and to make them as productive as possible for the beneficiaries. H.R. 1756 will do just that and it will require the Secretary of the Interior to pay lost interest resulting from past BIA failures to properly manage IIM investments. H.R. 1756 reinforces the Nation's moral and ethical obligations to individual Indian moneys accountholders. By its enactment, Congress will fill the gap in the authority of the Secretary of the Interior by requiring the Secretary to do what any fiduciary in the private sector would otherwise do; however, any expenditures under such authority will be subject to the annual appropriations process.

Id. at 63. Congress intended the 1994 Act to "fill the gap," not to "reaffirm[]" existing law. *Id.*

The legislative history of Section 103 of the 1994 Act refutes plaintiffs' argument that it simply "reaffirmed" an existing obligation to invest IIM funds. *Contra* Opp'n and Cross-Mot. at 8. The legislative history of Section 103, instead, affirms that the United States had no legal obligation to invest IIM funds prior to 1994 and supports granting the United States' motion for partial summary judgment.

3. *Cobell* decisions are inapplicable to Section 103.

Decisions from the United States Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia on the accounting duties at issue in the *Cobell* litigation have no application to plaintiffs' damages claims in this case. Plaintiffs' argument that the District of Columbia Circuit has already decided the issue and held that Section 103 applies retroactively, Opp'n and Cross-Mot. at 5-6, 8, is incorrect. First, in *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell XIII*"), the District of Columbia Circuit merely opined that Section 103 "*appears* in large part to codify Interior's prior *practice*, which involved complete control over the IIM funds." *Id.* at 471 (emphasis added). This is far from a definitive ruling that Congress implicitly reversed over fifteen years of court decisions and Comptroller General decisions and waived the United States' sovereign immunity as to historic IIM investment

mismanagement damages claims. Second, The District of Columbia Circuit's discussion of Section 103 was *dicta* because the Circuit Court reversed the district court's "Fixing the System" injunction on another legal basis: because it was an impermissible programmatic challenge and structural injunction outside the limited waiver of sovereign immunity contained in the Administrative Procedure Act. *Id*. at 472-78. The District of Columbia Circuit's discussion of Section 103 was neither necessary nor material to its ultimate mandate vacating, in part, the "Fixing the System" injunction.

This case, in contrast, involves the United States' waiver of sovereign immunity contained in the Tucker Act. The District of Columbia Circuit did not state that the 1994 Act amendments to 25 U.S.C. § 161a applied retroactively to damages claims. To the contrary, the District of Columbia Circuit later held that another provision of the 1994 Act, Section 102, codified at 25 U.S.C. § 4011, did not apply retroactively to closed IIM accounts. *Cobell v. Salazar*, 573 F.3d 808, 815 (D.C. Cir. 2009) ("*Cobell XXII*"). Thus, isolated statements from *Cobell* decisions regarding Section 103 of the 1994 Act have no application to this case for money damages under the Tucker Act. Plaintiffs' arguments that the 1994 Act amendments to 25 U.S.C. § 161a apply retroactively should be rejected and the United States' motion for partial summary judgment should be granted.

B. Control Alone is Insufficient to Confer Subject-Matter Jurisdiction and Prior Decisions Support the United States' Motion for Partial Summary Judgment.

The mere fact that the Department of the Interior gratuitously invested IIM funds prior to 1994, Opp'n and Cross-Mot. at 10-12 and 17-19, does not give rise to a claim for damages in this Court under the Tucker Act for alleged pre-1994 IIM investment mismanagement. As noted by the Federal Circuit's predecessor, the key distinguishing factor between tribal funds (which are subject to damages claims under the Tucker Act for alleged investment mismanagement) and

IIM funds (which were not) was 25 U.S.C. § 161a. *Am. 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*"); *Gila River II*, 586 F.2d at 216. In 1978 and 1981, when *Gila River II* and *Ak-Chin* were decided, 25 U.S.C. § 162a permitted the investment of IIM funds and the Department of the Interior was investing IIM funds. *See* Mot. App. Exs. 2 and 4. But the mere fact that the Department of Interior could and did invest IIM funds was irrelevant to the issue of whether the plaintiffs could recover damages for lost investment interest on IIM funds. *Gila River II*, 586 F.2d at 216-17 (precluding lost interest claims on IIM funds but permitting lost interest claims on proceeds of labor tribal funds).

Control of IIM funds alone is insufficient to support a claim for damages in this Court. Although the relationship between the United States and Indian tribes has been described as a trust, "Congress may style its relations with the Indians 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*")). Indians cannot simply rely upon "inherent" or common law duties imposed on a private trustee to state a claim against the United States; instead, plaintiffs must point to specific statues and regulations that "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.* at 2325 (quoting *Mitchell II*, 463 U.S. at 224). "When 'the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" *Id.* (quoting *United States v. Navajo Nation*,

556 U.S. 287, 302 (2009) ("*Navajo II*")). Thus, the United States' "control" over IIM funds and its voluntary (and discretionary) investment of IIM funds prior to 1994, *cf.* Opp'n and Cross-Mot. at 17-19, is irrelevant to resolving the United States' motion for partial summary judgment.

For this reason, tribal trust fund court decisions, *see* Opp'n at Cross-Mot. at 12-15, are distinguishable and not relevant to the issue of the United States' liability for its pre-1994 investments of IIM funds. In *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390 (Ct. Cl. 1975), the Court of Claims' jurisdictional analysis trained on 25 U.S.C. § 161a, which mandated the payment of interest on tribal funds and established a "floor rather than a ceiling" on interest income. *Id.* at 1393-94. Thus, crucial to the holdings in *Cheyenne-Arapaho* and the cases that followed it (including *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013) and *Osage Tribe of Indians of Oklahoma v. United States*, 72 Fed. Cl. 629 (2006)) were the facts that those cases involved tribal funds (not IIM funds) and that 25 U.S.C. § 161a mandated payment of interest on funds held "to the credit of Indian tribes." Neither of the foregoing holds true for IIM funds prior to 1994.

Plaintiffs would have this Court adopt the reasoning and holding in *Gila River Pima-Maricopa Indian Community v. United States*, 38 Ind. Cl. Comm. 1 (1976) ("*Gila River I*") that was rejected and reversed by the Court of Claims on appeal. In *Gila River I*, the Indian Claims Commission acknowledged that 25 U.S.C. § 161a permitted, but did not require, IIM funds to earn interest. *Id.* at 21 ("IIM funds may, but need not, be deposited in the Treasury of the United States"). The Commissions also observed that IIM funds could be invested under 25 U.S.C. § 162a. *Id.* It then held that *Cheyenne-Arapaho* mandated that "the Government cannot leave IIM funds in an interest-free account," and that "clearly the Government would have a duty to make them productive." *Id.* at 22. The Commission concluded that "[t]he improper payments from the

IIM funds, therefore, must be regarded as having diminished interest-bearing accounts." *Id.* *Gila River I*'s reasoning is indistinguishable from the arguments advanced in plaintiffs' opposition and cross-motion. *Cf.* Opp'n and Cross-Mot. at 10-15.

Of course, the IIM holding of *Gila I* was reversed by the Court of Claims on appeal. *Gila River II*, 586 F.2d at 216-17. Plaintiffs' identical argument should similarly be rejected here. Panel decisions of the Court of Claims are binding authority in the Federal Circuit and this Court. *South Corp. v. United States*, 690 F.2d 1368, 1369, 1370 (Fed. Cir. 1982) (en banc). This Court must apply "the rule that earlier decisions prevail unless overruled by the court *en banc*, or by other controlling authority such as intervening statutory change or Supreme Court decision." *Tex. Am. Oil Corp. v. U.S. Dep't of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc). This Court must follow *Gila River II*, should reject plaintiffs' argument that it adopt the holding and reasoning of *Gila River I*, and should grant the United States' motion for partial summary judgment.[2/]

III. CONCLUSION

The law is clear. "[N]o statute exist[ed] requiring interest to be paid" on IIM accounts, *Gila River II*, 586 F.2d at 216, prior to the amendment of 25 U.S.C. § 161a by the 1994 Act. Accordingly, there is no legal basis for plaintiffs' claims for lost interest or investment income on their IIM accounts for the period prior to October 25, 1994, the United States is entitled to summary judgment on those claims, and plaintiffs' cross-motion for partial summary judgment

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[2/] Plaintiffs' false distinction between "interest" and investment income, Opp'n at Cross-Mot. at 15-16, should also be rejected. Indian trust funds earn interest, *see* Act of June 13, 1930, Pub. L. No. 73-355, 46 Stat. 584 ("shall bear simple interest"). Prior to 1984, that interest was either statutory interest, *id.*, or interest earned from investments, 25 U.S.C. § 162a. After 1984, Congress eliminated statutory interest, Pub. L. No. 98-451, 98 Stat. 1729 (1984), and all interest on Indian trust funds was to be earned through investment. Interest and investment income are legally equivalent for purposes of these cross-motions.

should be denied.

Respectfully submitted, June 1, 2015,

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