UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle, et al.,	)	
Plaintiffs,	)	No. 12-431L
v.	)	Hon. Thomas C. Wheeler
United States,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON PRE-OCTOBER 25, 1994 IIM-ACCOUNT MISMANAGEMENT CLAIMS

The Government's motion for partial summary judgment rests on its mischaracterization of Goodeagle's claim regarding Individual Indian Money (IIM) accounts. The Government argues that Goodeagle is not entitled to recover pre-1994 interest on IIM accounts, and Goodeagle does not disagree. But the Government incorrectly extrapolates from that rule to contend that Goodeagle is also not entitled to recover lost profits from the Government's failure to prudently invest funds in the IIM accounts. Under *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*,[1] the Government has a duty to prudently invest all Indian funds to maximize income, and it is those lost profits that Goodeagle seeks to recover in this litigation.

[1] *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 206 Ct. Cl. 340 (1975).

1. Goodeagle is entitled to sue for the Government's failure to maximize IIM income through prudent investment—which is different from a claim for interest

Generally the owner of an Individual Indian Money account is not entitled to recover interest earned on those accounts prior to 1994, when Congress enacted legislation requiring that interest be paid to the account holder.[2] Goodeagle does not seek to recover pre-1994 interest in this case. Unlike the plaintiffs in the three cases the Government relies on in support of its motion for partial summary judgment, Goodeagle does not seek payment of interest on IIM accounts. The holdings in *United States v. Gila River Pima-Maricopa Indian Community* that "no statute exists requiring interest to be paid on 'Individual Indian Money' (IIM) accounts";[3] *White Mountain Apache Tribe of Arizona* that "[t]he statute does not expressly mandate . . . payment of interest";[4] and *American Indians Residing on Maricopa-Ak Chin Reservation v. United States* that "[n]o statute requires interest to be paid on IIM accounts";[5] are therefore irrelevant to this motion.

Also irrelevant here is the Comptroller General's opinion titled "Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies,"[6] concluding that "[b]ecause the law regarding the investment of Individual Indian Monies (IIM) does

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[2] *See* American Indian Trust Management Reform Act of 1994, Pub. L. 103-412, 108 Stat. 4239 (1994).
[3] *United States v. Gila River Pima-Maricopa Indian Cmty.*, 218 Ct. Cl. 74, 85 (1978).
[4] *White Mountain Apache Tribe of Ariz. v. United States*, 20 Cl. Ct. 371, 384 (1990).
[5] *Am. Indians Residing On Maricopa-Ak Chin Reservation v. United States*, 229 Ct. Cl. 167, 203 (1981).
[6] *Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies*, B-243029 (Comp. Gen.), 1991 WL 197151 (Mar. 25, 1991).

not require the payment of interest on IIM accounts, the Bureau of Indian Affairs (Bureau) is not liable to IIM account owners for loss of interest."[7] And, of course, "the Comptroller's opinions are not binding on this court . . . ."[8] As this Court has stated, although "we look to the opinions of the Comptroller General—which, after all, are legally only advisory . . . We reject those which we find illogical, unpersuasive, or just plain wrongheaded."[9]

A. Failure to maximize IIM income through prudent investment

In its motion for partial summary judgment the Government tries to stretch the no pre-1994 interest rule to incorrectly state that the Government is not liable for its failure to prudently invest Goodeagle's IIM funds. The Court of Claims in *Cheyenne-Arapaho Tribes*,[10] held that this argument incorrectly conflates two different claims: (1) the duty to pay interest (but not on IIM accounts) and (2) the duty to prudently invest trust funds to maximize income (which does apply to non-interest-bearing Indian trust funds).

In *Cheyenne-Arapaho Tribes*, the Government had paid the tribes the statutory 4% interest on funds on deposit with the Treasury Department, but placed the interest in separate accounts—which drew no interest.[11] The tribes asserted that

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[7] *Liability of Bureau of Indian Affairs for Interest on Individual Indian Monies*, 1991 WL 197151, at *1.
[8] *Ainslie v. United States*, 55 Fed. Cl. 103, 107 n.8 (2003) (citing *Yeskoo v. United States*, 34 Fed. Cl. 720, 738 (1996)).
[9] *Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 673 (2001).
[10] *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 206 Ct. Cl. 340 (1975).
[11] *Id.* at 346.

the Government should have invested all of these funds to maximize income (more than 4% on the interest-bearing accounts and also to earn income on the non-interest-bearing accounts).[12] The court first confirmed that Treasury was statutorily prohibited "from paying interest on the interest earned by funds on deposit," and that "[a]ccordingly, the various interest funds owned by plaintiffs, when held in the Treasury, are totally unproductive."[13] So because the Government had satisfied its statutory interest obligations, "if this were the limit of the Government's power [then] plaintiffs' claim, which does not attack the statutes, would have to fail."[14]

But the court further stated that "holding the money in the Treasury is only one of defendant's statutory alternatives,"[15] and that since 1918 the Secretary had the authority to invest that money for the best interest of the Indians:

> In 1918, Congress clarified and limited the Secretary's power to invest rather than hold Indian funds by providing that the Secretary could withdraw Indian funds from the Treasury and place them in banks where such banks paid a higher rate of interest than the Treasury was obligated to give, and he could also invest the funds "for the best interest of the Indians' in 'any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States" [under 25 U.S.C. § 162a.][16]

Finding that the Secretary had breached "[t]he fiduciary duty which the United States undertook with respect to these funds [which] includes the 'obligation

[12] *Cheyenne-Arapaho Tribes*, 206 Ct. Cl. at 345.
[13] *Id.* at 346–47.
[14] *Id.* at 347.
[15] *Id.*
[16] *Id.* at 347–48 (footnotes omitted) (quoting 25 U.S.C. § 162a (1970)).

to maximize the trust income by prudent investment,'"[17] the Court of Claims held that "[s]ince defendant had available at all relevant times outside investments which would have yielded some substantial return, we hold that the Government is liable for lost profits on those interest accounts."[18] These IIM accounts are no different from the non-interest-bearing accounts in *Cheyenne-Arapaho Tribes* and, although the Government had no duty to pay interest prior to 1994 on IIM accounts it retained in the Treasury, it did have the duty to make them productive by investing them elsewhere.

As the Court of Claims held in *Cheyenne-Arapahoe Tribes*,

> on those funds which defendant in effect borrowed from plaintiffs by retaining them in the Treasury, we hold defendant to a strict standard of fiduciary duty—if eligible investments were available at higher yields, defendant will be liable to plaintiffs for the difference between what interest defendant paid for the funds and the maximum the funds could have legally and practically earned if properly invested outside.[19]

White Mountain Apache held that this same fiduciary duty applies to IIM funds:

> The 1918 Act [25 U.S.C. § 162a] establishes and circumscribes the Secretary of the Interior's authority to invest funds. Exercise of that authority within the parameters established by the Act calls for the production of money. The 1918 Act constitutes a waiver of immunity insofar as it creates a substantive right enforceable against the United States for money damages. *See Mitchell*, 463 U.S. at 216, 103 S.Ct. at 2967–68.[20]

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[17] *Cheyenne-Arapaho Tribes*, 206 Ct. Cl. at 348.
[18] *Id.* at 352–53.
[19] *Id.* at 352.
[20] *White Mountain Apache Tribe*, 20 Cl. Ct. at 384.

B. Prudent investment distinguished from interest income

The Government's argument that in *Cheyenne-Arapaho Tribes* "the Court of Claims' jurisdictional analysis trained on 25 U.S.C. § 161a, which mandated the payment of interest on tribal funds," is just wrong. As the *Cheyenne-Arapaho Tribes* court stated, the Government's statutory 4% interest obligation under 25 U.S.C. § 161a was not at issue:

> Defendant has in fact paid four percent simple interest on plaintiffs' other funds, and if this were the limit of the Government's power plaintiffs' claim, which does not attack the statutes, would have to fail [because] holding the money in the Treasury is only one of defendant's statutory alternatives. . . . It is therefore legally possible, depending on the state of the market, for the Secretary, by investing rather than holding Indian funds, to provide the Indians with more than 4 percent simple interest.[21]

Instead, the Cheyenne-Arapaho Tribes' claim, like Goodeagle's, is based on the Secretary's authority to invest nonproductive funds prudently to maximize income—and the duty to do so.

Because here, as in *Cheyenne-Arapaho Tribes*, "[t]he essence of plaintiffs' assertions is that defendant failed to make their trust funds as productive as legally and practically possible,"[22] Goodeagle's motion should be granted and the Government's motion denied.

2. The Secretary is not entitled to keep the investment income generated by Goodeagle's IIM funds

The Government fails to respond to Goodeagle's argument that the Government actually invested Goodeagle's IIM funds and thereby generated some

[21] *Cheyenne-Arapaho Tribes*, 206 Ct. Cl. at 347–48 (footnote omitted).
[22] *Id.* at 349.

income.[23] "Beginning in 1938, the BIA initiated a policy in which all IIM funds would be invested and managed by BIA Agency level offices. . . . BIA investment policies developed such that since 1966, the BIA pooled all IIM accounts for investment purposes."[24] And having chosen to make certain investments, the Government is liable if those choices were not prudent:

> [W]here 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 fiduciary connection[25]

This fiduciary duty has existed since at least 1918:

> The 1918 Act [25 U.S.C. § 162a] establishes and circumscribes the Secretary of the Interior's authority to invest funds. Exercise of that authority within the parameters established by the Act calls for the production of money. The 1918 Act constitutes a waiver of immunity insofar as it creates a substantive right enforceable against the United States for money damages. *See Mitchell*, 463 U.S. at 216, 103 S.Ct. at 2967–68.[26]

There is no good reason why the Government should not be held liable for the investment choices it has made with respect to the Goodeagle IIM funds. This Court should hold that the Government is liable for failure to maximize income by prudent investment of Goodeagle's IIM funds as alleged in the Seventh Cause of Action.

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[23] Pls.' Opp. Br. & Cross-Motion at 4.
[24] H.R. Rep. No. 103-778, at 11–12 (1994).
[25] *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980).
[26] *White Mountain Apache Tribe*, 20 Cl. Ct. at 384.

3. The Government misunderstands the legislative history of the 1994 Reform Act

The Government's argument that "[t]he legislative history of Section 103, instead, affirms that the United States had no legal obligation to invest IIM funds prior to 1994"[27] betrays a lack of understanding. What Section 103 actually did was to change the type of investments the Secretary was required to make with IIM funds from pooled investments (BIA's practice since 1966) to public-debt securities (where tribal funds have been invested since 1984):

> BIA investment policies developed such that since 1966, the BIA pooled all IIM accounts for investment purposes, and since 1984 the Secretary has been required to invest tribal Indian trust funds in public-debt securities. Section 103 mirrors the language of 25 U.S.C. [§] 161a to also require the Secretary of the Interior to invest individual Indian trust funds in public-debt securities.
>
> 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.[28]

Conclusion

Although the Government did not have a duty to pay Goodeagle interest prior to 1994 on IIM funds it kept on deposit in the Treasury, the Government had a strict fiduciary duty to prudently invest those funds outside the Treasury to maximize income on the funds.

This Court should grant Goodeagle's cross-motion for summary judgment, determining that the Government had a fiduciary duty to maximize income on

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[27] Def.'s Resp. & Reply Br. at 6.
[28] H.R. Rep. No. 103-778, at 11–12 (1994).

Quapaw members' IIM accounts through prudent investment of those funds.

Respectfully submitted,

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