

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed January 14, 2016)

SUSAN FREDERICKS, <i>et al.</i> ,)
)
Plaintiffs,) No. 14-296L
)
v.) Hon. Charles F. Lettow
)
UNITED STATES OF AMERICA,)
)
Defendant.)
_____)

UNITED STATES' SUPPLEMENTAL BRIEFING

I. INTRODUCTION

The Court held a telephonic hearing and oral argument on the United States' Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. 25 ("Mot."), on Friday, January 8, 2016. During the argument, the Court inquired about *Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006), which was cited by neither the United States nor Plaintiffs in this litigation. The United States has subsequently reviewed *Wilkinson v. United States*, and hereby submits limited supplemental briefing on that case.

II. FACTUAL BACKGROUND

In *Wilkinson v. United States*, the plaintiffs were heirs of Ernest and Mollie Wilkinson, husband and wife, who owned descendable possessory interests in allotted Indian trust land on the Fort Berthold Reservation in North Dakota. *Id.* at 972. While living, Ernest and Mollie conducted farming operations on their trust land. *Id.* Ernest and Mollie borrowed against their trust land with mortgage loans from the Farm Service Administration ("FSA"), and assigned income from all their trust land on Fort Berthold Reservation to help repay the mortgage loans. *Id.* In the event of default, the mortgages gave the FSA the right to repossess, operate, or rent the

trust land, or to initiate foreclosure. *Id.*

Mollie Wilkinson died in 1991. *Id.* The Department of the Interior completed probate proceedings for Mollie's trust estate in 1993, and in a final probate order, "ordered the Superintendent of the Fort Berthold Reservation to distribute her real [trust] property in part to her husband Ernest and in part to two of her children, Harry and Virginia Wilkinson." *Id.* The plaintiffs alleged, and the United States did not contest, that the Bureau of Indian Affairs ("BIA") "failed to carry out the final probate order and that distribution under Mollie's [trust] estate never occurred." *Id.* Subsequently, three of the four heirs to Mollie's trust estate, Harry, Ernest, and Virginia died in 1994, 1997, and 1998, respectively. *Id.*

The FSA did not submit a creditor's claim during the probate of Mollie's trust estate. *Id.* at 973. By letter dated August 5, 1996, well after the probate of Mollie's trust estate, the FSA requested the BIA's assistance with collecting payments on Ernest and Mollie's mortgage loans. *Id.* Although the FSA letter to BIA "did not state that the Wilkinsons were in default on any mortgage nor demand that the BIA lease the mortgaged land to generate income," the BIA's Fort Berthold Superintendent advertised certain portions of Mollie's mortgaged trust land on February 19, 1997. *Id.* Before his death, Ernest Wilkinson appealed the BIA's decision to advertise and lease Mollie's trust land in satisfaction of the FSA loans. *Id.* On July 6, 1998, the Interior Board of Indian Appeals ("IBIA") granted Ernest's appeal and held that the BIA "had no legal authority to lease the Wilkinson's land." *Id.* On remand from the IBIA, the BIA Area Director "held that because the BIA lacked the authority to advertise and lease the lands, the BIA also lacked the authority to place a hold on Mollie's account and lacked the authority to pay the FSA from the proceeds of the unauthorized leases." *Id.* at 974. Despite the IBIA's holding and the Area Director's order to the contrary, the Fort Berthold Superintendent continued the hold on

Mollie's account, leased Mollie's trust lands, and paid the proceeds directly to the FSA. *Id.*

The plaintiffs filed suit in the federal district court for the district of North Dakota on January 3, 2003, after the Department of the Interior denied their administrative claim under the Federal Tort Claims Act. *Id.* at 974. The plaintiffs claimed, in part, that the Fort Berthold Superintendent's "negligent acts caused a constructive foreclosure of the family farm, and the loss of their home and homestead, land, and farm equipment." *Id.* The district court granted summary judgment for the United States on April 14, 2014. *Id.* The district court held that "the mortgage agreements permitted the FSA to lease the land and that the plaintiffs had never held an interest in the land superior to the FSA," and "the plaintiffs had no Article III standing because they held no property interest and could not prove an injury in fact." *Id.* at 974-75. The circuit court also noted that "the district court did not treat the [IBIA's July 6, 1998] decision as binding." *Id.* at 974.

III. QUESTION PRESENTED

The question presented in *Wilkinson v. United States* was whether the plaintiffs had Article III standing to bring a Federal Tort Claims Act suit against United States.

IV. ANALYSIS

The district court held that the plaintiffs lacked standing because they held no property interest and could not prove an injury in fact. *Id.* at 975. On appeal, the circuit court reexamined the district court's standing analysis. The circuit court reiterated the standard that "[f]or a plaintiff to have Article III standing, there must be: (1) an injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) a likelihood that a favorable decision by the court will redress the alleged injury." *Id.* at 977 (citing *Young Am. Corp. v. Affiliated Computer Servs., Inc.* 424 F.3d 840, 843 (8th Cir. 2005)).

Regarding the first two elements of Article III standing, the court held that “it is clear that certain persons were deprived of a *possessory interest* in real property,” *id.* at 977 (emphasis added), and that the deprivation of real property resulted from the challenged government actions. *Id.* The court explained that “[t]he first element is satisfied if the plaintiffs in this action were the persons deprived of an interest in real property or if they are entitled to represent persons deprived of an interest in real property.” *Id.*

As part of its standing analysis, the court held that “[t]o determine whether the plaintiffs were deprived of an interest in real property, we need only to trace ownership of the leased allotments to confirm that the plaintiffs received, or should have received, a possessory interests in those allotments.” *Id.* at 977. Importantly, the court focused on the fact that plaintiffs received, or should have received, possessory interests in the trust land at issue before the government leased their decedent’s trust land and paid the proceeds to the FSA. There, the plaintiffs should have received possessory interests in the trust land because the probate of Mollie’s estate was finalized, and the heirs to the decedent’s estate were determined¹, as of the final un-appealed probate order in 1993. However, the BIA’s failure to carry out the 1993 order probating Mollie’s trust estate “prevented these property rights from vesting in the heirs of Ernest and Virginia.” *Id.*

The court noted that “[d]elays in probate proceedings prevented these property rights from vesting in the heirs of [the decedents].” *Id.* at 977. However, the court was not referring to delays in the ordinary course of probate proceedings. Rather, the court was referring to the

¹ The IBIA determined that because the 1993 probate order in Mollie Wilkinson’s estate determined her heirs, the Secretary’s authority to lease allotted land on behalf of a deceased Indian landowner whose heirs are undetermined (see, 25 C.F.R. § 162.2(a)(3) (1998)) did not apply to the BIA’s leasing actions in this case. *Id.* at 974.

extraordinary delay caused by Fort Berthold BIA officials' failure to implement the final probate order of the decedent's trust estate. There, the BIA continued to lease the decedent's allotments without legal authority and paying the proceeds to the FSA despite a probate order that the allotments be distributed to the decedent's heirs as determined by the conclusion of probate. In light of such extraordinary delay, the court held that "[w]e refuse to allow the government to delay the disposition of estates and then rely on the consequences of those delays to claim that prospective heirs lack protectable interests." *Id.*

In this case, the Fredericks plaintiffs do not dispute that they hold remainder interests subject to Judy Fredericks' life estate, not present possessory interests. The life tenant holds the present possessory interest for her lifetime. As distinguished from *Wilkinson*, here there was no extraordinary delay by the BIA that deprived Plaintiffs of possessory interests in real trust property. Thus, in *Wilkinson* the plaintiffs should have obtained possessory interests in their decedent's trust estate as of the 1993 un-appealed final probate order, not as of the death of their decedent in 1991.

The court went on to explain that it has "previously held that prospective Indian heirs had Article III 'injury in fact' standing even though they suffered only injury to prospective possessory interests." *Id.* at 978 (citing *Irving v. Clark*, 758 F.2d 1260, 1267 n. 12 (8th Cir. 1985) ("the injury of loss of property (though not of a vested right to property) is sufficiently concrete since the ancestor through whom [the plaintiff] claims has died intestate and we know [the plaintiff] would have taken absent the operation of [the escheat provisions found in 25 U.S.C.] section 2206.")). The court quoted the Supreme Court's rationale as set forth in *Hodel v. Irving*, 481 U.S. 704, 711-12, 107 S.Ct. 2076 (1987), and determined the same rationale applied to the issue of the *Wilkinson* plaintiffs' standing. *Wilkinson*, 440 F.3d at 978.

We addressed the Supreme Court's *Hodel v. Irving* standing rationale in the United States' Reply in Support of its Motion to Dismiss. *See*, ECF No. 35 at 7; 12. In *Hodel*, the plaintiffs "[did] not assert their own property rights ha[d] been taken unconstitutionally, but rather that their decedent's right to pass the property at death ha[d] been taken." 481 U.S. at 711. The *Hodel* plaintiffs had standing to pursue their decedent's surviving claims as representatives because the escheat provision at issue "deprived [plaintiffs] of the fractional interests they otherwise would have inherited" by will or intestacy. *Id.* at 711-12. Similarly, the *Wilkinson* plaintiffs had standing to sue because the Fort Berthold Superintendent's failure to implement Mollie Wilkinson's 1993 probate order, the IBIA's July 6, 1998 decision, and the Area Director's remand order deprived the plaintiffs of their prospective possessory interests as heirs to their decedents' trust estates. Here, the Supreme Court's *Hodel* standing rationale is inapplicable because the *Fredericks* plaintiffs have not been deprived of any prospective possessory interests in their decedent's trust estate.

Further, the court in *Wilkinson* noted that the IBIA determined that BIA personnel acted without legal authority, and refused to execute a probate order "thereby depriving Ernest and Virginia and/or their heirs of possessory interests in the allotments or of rights provided as protection to debtors under North Dakota Law." *Id.* at 978. Here, the IBIA made no such finding of unlawful BIA action, and no government actions have deprived Plaintiffs of their future interests as remaindermen under the American Indian Probate Reform Act.

V. CONCLUSION

The United States respectfully submits that *Wilkinson* does not support standing in this case because, like the *Wilkinson* plaintiffs, the *Fredericks* plaintiffs did not receive vested property interests in their decedent's trust estate until the conclusion of probate of their

decedent's trust estate. Additionally, unlike the *Wilkinson* plaintiffs, the *Fredericks* plaintiffs have not suffered injury to prospective possessory interests in their decedent's trust estate.

Respectfully submitted, January 14, 2016,

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