IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAMONA TWO SHIELDS, et al. Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	No. 11-531L Hon. Lawrence J. Block

UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS [7] MOTION TO DISMISS

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I. INTRODUCTION

The United States moved to dismiss plaintiffs' complaint because plaintiffs are members of two certified classes in another case currently pending before the United States Court of Appeals for the District of Columbia, and plaintiffs have asserted claims in that other case that are based upon substantially the same operative facts as the claims advanced in their case before this Court. See generally Docket No. 7. In response to the United States' motion, plaintiffs do not dispute that they are members of the certified Trust Administration Class in Cobell, et al. v. Salazar, et al., D.D.C. No. 96-cv-1285. Docket No. 13 at 1 ("The named plaintiffs before this Court are unnamed class members in Cobell. . . ."). Instead, plaintiffs argue that 28 U.S.C. § 1500 ("Section 1500") should not apply to class actions; that plaintiffs' claims before this court are somehow distinct from the claims they are advancing in Cobell; that plaintiffs are entitled to discovery followed by a dismissal on the merits once the Cobell settlement becomes final; or that this Court should stay this litigation pending resolution of all appeals in Cobell. Id. at 1-2. As set forth herein, plaintiffs' arguments lack merit.

Section 1500 applies to unnamed class members of a certified class. The substantially similar operative facts test for Section 1500 is met here because plaintiffs' claims that the United States breached its fiduciary trust obligations by approving "below market" oil and gas leases for plaintiffs' allotted trust land is identical to claims advanced in the Cobell amended complaint and encompassed by the Cobell settlement agreement. Plaintiffs bear the burden of establishing this Court's subject-matter jurisdiction over their claims, and they cannot skirt jurisdictional issues in hopes of future discovery on different issues than those raised in the United States' motion (i.e., waiver, release, and claim preclusion). If this Court lacks subject-matter jurisdiction, it has no jurisdiction to stay this case, and a stay is unnecessary because a Section 1500 dismissal will be a dismissal without prejudice. Thus, Section 1500 applies to plaintiffs' case and it should be dismissed without prejudice.

II. ARGUMENT

A. Plaintiffs Have Failed to Meet Their Burden of Establishing Subject-Matter Jurisdiction.

The United States' motion to dismiss is directed at this Court's subject-matter jurisdiction to hear plaintiffs' claims. Thus, in response to the United States' motion, plaintiffs may not merely rely upon allegations in their complaint, they "must demonstrate facts sufficient to support jurisdiction." Docket No. 13 at 12 (citing Confederated Tribes and Bands of the Yakama Nation v. United States, 89 Fed. Cl. 589, 603 (2009)). The United States' motion controverts plaintiffs' jurisdictional allegations and is not premised merely on the facial sufficiency of the pleadings, especially since plaintiffs' complaint does not even mention the Cobell litigation, let alone acknowledge that plaintiffs are members of the Cobell Trust Administration Class. See Docket No. 1. As such, only uncontroverted factual allegations in the complaint should be accepted as true for purposes of this motion and the Court may review evidence extrinsic to the pleadings when assessing the predicate jurisdictional facts. Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993).

In light of the nature of the United States' motion, plaintiffs' arguments for "discovery" and a "detailed factual record" are misplaced. See Docket No. 13 at 26, 28. Also, it is plaintiffs that bear the burden of establishing subject-matter jurisdiction, it is not the United States' burden to disprove subject-matter jurisdiction, as argued by plaintiffs. See Docket No. 13 at 24 ("the Court should be asking itself whether the Government has proffered any record evidence. . . .")

(emphasis in original). The issue presented by the United States' motion is much less convoluted than plaintiffs' opposition brief suggests, and all information necessary for the Court to assess its subject-matter jurisdiction has been presented by the parties.

Parsing Section 1500, plaintiffs' complaint should be dismissed if "plaintiff or his assignee" has a case pending "in any other court" against the United States or any person who was "acting or professing to act, directly or indirectly under the authority of the United States" that is "based on substantially the same operative facts, regardless of the relief sought in each suit." 28 U.S.C. § 1500; United States v. Tohono O'Odham Nation, ___ U.S. ___, 131 S. Ct. 1723, 1731 (2011). As observed by the Supreme Court, Section 1500 "is more straightforward than its complex wording suggests" and precludes this Court's subject-matter jurisdiction "over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." Tohono, 131 S. Ct. at 1727. To avoid application of Section 1500, plaintiffs must present facts establishing this Court's subject-matter jurisdiction over their claims. Plaintiffs have failed to meet their burden of presenting such evidence, and their pleas for discovery on unrelated issues (e.g., waiver, release, claim preclusion, or the merits of their claims) should not be countenanced.

B. Section 1500 Applies to Class Actions and Class Plaintiffs.

Plaintiffs argue that Section 1500 should not apply here because plaintiffs are unnamed class members in Cobell. Docket No. 13 at 13-15. There is no sound legal basis for plaintiffs' position. By its terms, Section 1500 applies when the "plaintiff or his assignee" has a case pending before another court. Here, as members of two certified classes in Cobell, plaintiffs are litigants before the District of Columbia Circuit and Section 1500 applies by its terms to plaintiffs.

Plaintiffs admit that they are members of, inter alia, the Trust Administration Class in Cobell. Docket No. 13 at 1. As observed by the Cobell plaintiffs before the District of Columbia Circuit, "the plaintiffs in Two Shields are members of the Cobell Trust Administration Class who had the opportunity to opt out of the Cobell settlement and pursue their claims independently—but chose not to." Craven v. Salazar, et al., D.C. Cir. No. 11-5205, Docket No. 1347686 at 5. As also represented by the Cobell plaintiffs, "the Two Shields plaintiffs were aware of the terms of the settlement and their right to opt out or object to the terms of the Trust Administration Class. They also knew that the Cobell settlement resolved any trust mismanagement claims against the government that arose before September 30, 2009." Id. at 6.

Upon class certification, the class becomes the "jurisprudential entity" and class certification "provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action." Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978). "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984). Representative suits with preclusive effect on nonparties include properly conducted class actions. Taylor v. Sturgell, 553 U.S. 880, 894 (2008). "Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23." Smith v. Bayer Corp., ___ U.S. ___, 131 S. Ct. 2368, 2380 (2011). The aforementioned res judicata jurisprudence is pertinent to Section 1500 inquiries because "[t]he jurisdictional bar in § 1500 was enacted in part to address the problem that judgments in suits against officers were not preclusive in suits against the United States." Tohono, 131 S. Ct. at 1730; see also Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1164 (Fed. Cir. 2011) (the Court's Section 1500 analysis "should consider the principles of res judicata to which the Supreme Court pointed"). Thus, because the Trust Administration Class has been certified by the district court, and because plaintiffs are admittedly members of that certified class, plaintiffs (even as unnamed class members) are plaintiffs to the Cobell proceedings for Section 1500 purposes. It is, accordingly, irrelevant for purposes of Section 1500 that the named plaintiffs in this case "did not file the Cobell action and have not litigated or directed the Cobell action in any way." Docket No. 13 at 14.

The application of Section 1500 to unnamed members of a certified class is not without legal basis, as plaintiffs suggest. See Docket No. 13 at 15-16. In St. Bernard Parish Gov't v. United States, 99 Fed. Cl. 765 (2011), the court recognized, in dicta, that Section 1500 can be implicated where a class is certified in the district court and the Court of Federal Claims plaintiffs are unnamed class members of the certified class in the district court. Id. at 771 ("It is possible, however, that the court's jurisdiction could be compromised at some juncture, based on the outcome of the United States Court of Appeals for the Fifth Circuit's disposition on the merits in [the district court case], and the nature and scope of any class that the District Court may subsequently certify. If and when a class is certified in the District Court Action that includes the [Court of Federal Claims] Plaintiffs, they will have the option to decide whether to join any such class."). Additionally, the United States Court of Appeals for the Federal Circuit's predecessor has held that Section 1500 does not apply to unnamed class members if they unconditionally represented that "if they should receive notice that the [district court] case has been certified as a class action, they will request exclusion therefrom." Jaffe v. United States, 215 Ct. Cl. 906, 906 (1977). Here, a class has been certified in the district court and plaintiffs did not timely seek exclusion from that class. The contraposition to Jaffe's holding should apply here: plaintiffs who are members of a certified class pending before another court are subject to Section 1500 if they have not opted out of that certified class. Thus, by inaction, plaintiffs have allowed their claims to remain pending before the District of Columbia Circuit. Because plaintiffs are members of the certified Trust Administration Class, and have not opted-out of that class, they satisfy the Section 1500 requirement of "plaintiff or his assignee."

C. Plaintiff's Non-Monetary Trust Asset Mismanagement Claims Are Clearly Based upon Substantially the Same Operative Facts as the Cobell Trust Administration Class Claims.

Plaintiffs argue that their claims for non-monetary trust asset mismanagement are not encompassed by the Cobell Trust Administration Class's claims for non-monetary trust asset mismanagement. Docket No. 13 at 20-26. Plaintiffs assert that the claims in Cobell are based upon different operative facts than their claims in this case because the Cobell amended complaint does not specifically mention plaintiffs' claims in this case, because the word order of plaintiffs' complaint differs from the word order of the Cobell amended complaint, and because plaintiffs speculate that plaintiffs' non-monetary trust asset mismanagement claims were not "considered" by Cobell class counsel and the United States' counsel in Cobell. Id. Plaintiffs arguments are incorrect; plaintiffs' non-monetary trust asset mismanagement claims in this case are based on substantially the same (if not identical) operative facts as the Cobell Trust Administration Class's non-monetary trust asset mismanagement claims.

Preliminarily, plaintiffs' opposition brief appears to challenge the propriety of the Cobell settlement and final judgment. See id. at 28 ("Plaintiffs believe the Cobell settlement will fail on appeal. . . ."). Plaintiffs' collateral attacks in this Court on the Cobell settlement are wholly inappropriate and should not be entertained by this Court. If plaintiffs truly had issues with the Cobell settlement they had ample opportunity to opt-out of the Trust Administration Class, to object to the settlement, to participate at the fairness hearing, or to timely appeal the Cobell final judgment to the District of Columbia Circuit. Plaintiffs did none of the foregoing. Under basic principles of comity, as well as the federal rules (including, but not limited to, Fed. R. Civ. P. 60), any challenge to the Cobell settlement and final judgment have to be resolved by the District Court for the District of Columbia and the District of Columbia Circuit, not this Court. See RESTATEMENT (SECOND) OF JUDGMENTS, § 78 (1982).

Also, the legal merits of the proceedings in another court is not relevant for purposes of Section 1500. See Trusted Integration, 659 F.3d at 1166, n. 2 (irrelevant for Section 1500 purposes that district court dismissed some of the counts of the district court complaint after the complaint was filed before the Court of Federal Claims). The only relevant inquiry for purposes of Section 1500 is whether the claims pending in another court are based upon substantially the same operative facts (Tohono, 131 S. Ct. at 1731), regardless of the legal merits of the claims in either court.

Similarly, plaintiffs' speculation as to the "scienter" of the settling parties in Cobell and challenge to the "fairness" of the Cobell settlement as applied to plaintiffs' claims (Docket No. 13 at 10, 22-25) are inappropriately advanced before this Court and are irrelevant for purposes of Section 1500. It has long been acknowledged that a key purpose behind Section 1500 is to "protect the United States from having to defend two lawsuits over the same matter simultaneously." UNR Indus. v. United States, 962 F.2d 1013, 1019 (Fed. Cir. 1992) (en banc);

see also Harbuck v. United States, 378 F.3d 1324, 1328 (Fed. Cir. 2004) (purpose behind Section 1500 is to "prevent the United States from having to litigate and defend against the same claim in both courts."). As the Supreme Court observed, "[d]eveloping a factual record is responsible for much of the cost of litigation. Discovery is a conspicuous example, and the preparation and examination of witnesses at trial is another." Tohono, 131 S. Ct. at 1730. To force the United States to defend not only the merits of duplicative non-monetary trust asset mismanagement claims in two courts at the same time, but also to defend the propriety of the Cobell settlement agreement and final judgment before this Court and the District of Columbia Circuit at the same time, would be wholly inconsistent with the purpose of Section 1500.

As to the substance of plaintiffs' claims, plaintiffs' claims for mismanagement of their oil and gas trust assets fall squarely within the claims advanced by plaintiffs in Cobell as members of the Trust Administration Class. Identity of word order is not and never has been the test under Section 1500. The Supreme Court has rejected similar arguments in the past and held that Congress's use of the phrase "in respect to" in Section 1500 makes "clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity. . . ." Keene Corp. v. United States, 508 U.S. 200, 213 (1993); see also Tohono, 131 S. Ct. at 1731. Thus, plaintiffs' argument that the Cobell amended complaint does not specifically mention the Fort Berthold Indian Reservation or plaintiffs' specific leases is irrelevant. Docket No. 13 at 20-21.

Plaintiffs' attempt to distinguish the "focus" of Cobell prior to the filing of the amended complaint from the "focus" of plaintiffs' instant claims is equally unavailing. See id. at 3 (discussing "focal point" of complaints), 9 (describing how Cobell, prior to amendment, "focused exclusively on accounting claims"), 22 ("particular focus" of Cobell). The Supreme

Court has already rejected such arguments in Tohono. Before the Supreme Court, the tribe (respondent) in Tohono argued, "[a]lthough the complaints contain similar background descriptions of the Government's breaches of its fiduciary obligations to the Nation, they pursue distinct claims for relief for distinct injuries." S. Ct. No. 09-846 Respondent's Brief at 10. The tribe in Tohono also claimed, "[t]he gravamen of the district court complaint is its plea for the equitable remedy of an accounting. To obtain that remedy, the Nation need not demonstrate that the Government has mismanaged its trust assets." Id. The Supreme Court rejected the tribe's argument in Tohono and affirmed the Court of Federal Claims conclusion that the tribe's complaint should be dismissed by operation of Section 1500. Similarly here, the fact that the "focus" of Cobell prior to amendment was for an accounting is irrelevant because the operative facts at issue in the amended complaint in Cobell and plaintiffs' instant case are substantially similar (if not identical).

In the United States' opening brief, it outlined the substantially similar operative facts at issue in plaintiffs' case before this Court and those advanced by the Trust Administration Class in Cobell. Docket No. 7-1 at 11-13. Plaintiffs do not seriously contest in their opposition that the Trust Administration Class's claims encompass all non-monetary trust asset mismanagement claims, but instead fault the Cobell amended complaint for "speak[ing] generically and generally" and for containing allegedly "meaningless boilerplate language." Docket No. 13 at 21. Any dispute over the fact that all potential non-monetary trust asset claims of the Trust Administration Class are encompassed by the Cobell amended complaint is definitively resolved in the United States' favor by the terms of the Cobell settlement agreement.

The Trust Administration Class advanced, among other claims, "Land Administration

Claims" in Cobell. Those Land Administration Claims include "known and unknown claims that have been or could have been asserted through the Record Date for Interior Defendants' alleged breach of trust and fiduciary management of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights (the 'resources') situated on, in or under Land. . . ." Cobell Settlement Agreement, ¶ A.21 (Appendix of Exhibits ("App. Ex.") (Docket No. 7-2) at 47-48) (emphasis added). Specifically included in Land Administration Claims are claims for "[f]ailure to obtain fair market value for leases, easements, rights-of-way or sales;" claims for "[f]ailure to prudently negotiate leases, easements, rights-of-way, sales or other transactions;" claims for "[f]ailure to include or enforce [lease] terms requiring that Land be conserved, maintained, or improved;" and "[c]laims of like nature and kind arising out of allegations of Interior Defendants' breach of trust and/or mismanagement of Land. . . ." Id. It is beyond cavil that plaintiffs' instant claims that the United States allegedly failed to obtain "market rate" bonuses on leases of their oil and gas resources, that the United States allegedly imprudently leased plaintiffs' lands, and that the United States allegedly failed to include lease provisions to protect the environment on and adjacent to plaintiffs' allotted trust land, are included in the Cobell Land Administration Claims, are included in the Cobell settlement, and are based upon substantially the same (if not identical) operative facts as are at issue in Cobell. Thus, the substantially similar operative facts test of Section 1500 is met in this case and plaintiffs' complaint should be dismissed.

D. The Named Plaintiffs' Claims Are Encompassed by the Cobell Amended Complaint.

Plaintiffs argue that Section 1500 should not apply because the full putative class period claimed in this case is not covered by Cobell. Docket No. 13 at 26-27. Plaintiffs are correct that the Cobell settlement does not settle, resolve, or preclude, non-monetary trust asset mismanagement claims that arise out of conduct by the United States that post-dates September 30, 2009. See Cobell Settlement Agreement, ¶ I.3 (App. Ex. at 80). Nonetheless, the named plaintiffs' claims unquestionably accrued and existed prior to September 30, 2009, and are within the temporal scope of the Cobell claims. Because application of Section 1500 results in a dismissal without prejudice, other putative class members with claims that arose out of or relate to breaches of trust or alleged wrongs after September 30, 2009, are free to file their claims (subject to any other defenses that may be available to the United States) before the Court of Federal Claims.

A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988). This is no different for a claim for breach of trust brought by an individual Indian or an Indian tribe, band, or representative group, such a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("Shoshone II"). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. Jones v. United States, 801 F.2d 1334, 1336 (Fed. Cir. 1986).

As to the "knowledge of that repudiation" element of the accrual definition set forth in Shoshone II, it is defined further as "placing the beneficiary on notice that a breach [of trust] has occurred." Shoshone II, 364 F.3d at 1348. This "on notice" standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008). It is when the operative facts exist and are not inherently unknowable that dictates first accrual. Menominee Tribe v. United States, 639 F.2d 718, 720-22 (Fed. Cir. 1988). The rationale of this rule is that an Indian beneficiary, no less than anyone else, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered. See, e.g., Littlewolf v. Hodel, 681 F. Supp. 929, 942 (D.D.C. 1988).

Here, the lease of plaintiff Two Shields' allotment occurred on December 19, 2007. Complaint, ¶ 64(a) (Docket No. 1). The lease of plaintiff Defender Wilson's allotment occurred on April 8, 2008. Id., ¶ 64(b). Thus, the alleged wrongs that give rise to the named plaintiffs' claims occurred prior to September 30, 2009, and are part of the Cobell proceedings.

The named plaintiffs in this case claim that they did not receive adequate bonus payments when their leases were issued, that their leases did not contain non-assignment clauses when they were issued, that their leases did not "maximize" royalty rates when issued, that their leases did not contain adequate spacing or environmental protection provisions when they were issued, and that their leases did not contain provisions prohibiting assignment when issued. Complaint, ¶¶ 75 (failure to obtain "market rate" bonuses), 76 (failure to maximize royalty rates and to limit lease term to five years), 77 (failure to include provisions against assignment and spacing provisions). As such, all acts or omissions of the United States placed at issue by the named plaintiffs' claims occurred prior to September 30, 2009. The fact that plaintiffs may claim continuing damages stemming from these alleged breaches does not convert the named plaintiffs' claims to a "continuing claim." See Shoshone Indian Tribe of the Wind River

Reservation v. United States, ___ F.3d ___, 2012 WL 34382, *8 (Fed Cir. 2012) ("Shoshone IV") ("The failure to follow the notice, advertisement, and competitive bidding requirements of the 1938 Act when the conversions occurred was the harm suffered by the Tribes; the economic consequences of the new leases may define the scope of that harm, but they are not the event that triggers the statute of limitations."). Also, the Trust Administration Class's release in Cobell discharges "known and unknown" Land Administration Claims arising out of conduct by the United States that pre-dates September 30, 2009. Cobell Settlement Agreement, ¶¶ A.21, I.2 (App. Ex. at 47, 80).

The named plaintiffs had ample information available to place them on inquiry notice of their potential claims long before the time to opt-out of the Trust Administration Class expired. For example, in August 2008, plaintiffs' tribe passed a resolution requesting the Bureau of Indian Affairs to halt oil and gas lease assignments on the reservation. Docket No. 13 at 7. The named plaintiffs knew or should have known that "[b]y 2008, the U.S. Bureau of Land Management was approving Bakken oil shale leases for the Theodore Roosevelt National Park in North Dakota (located about 100 miles away from the Fort Berthold Reservation) in the $3000 to $4000 per acre bonus rental [sic] range." Id. at 5. The named plaintiffs knew or should have known that "by 2008 some government leases inside the Fort Berthold Reservation were going for as high as $3000 an acre." Complaint, ¶ 46. In March of 2008, the MHA Elders Association (of which plaintiff Two Shields was Secretary/Treasurer [Complaint, ¶ 64(a)]) complained to the Bureau of Indian Affairs that allottees were parties to leases that were "not fair market value." Complaint, ¶ 11. The named plaintiffs knew or should have known that the claims they are advancing in this case were Land Administration Claims in Cobell when they received notice of the settlement, prior to the close of the Trust Administration Class opt-out period, at the time of the fairness hearing, and long before they filed their complaint in this Court.

Plaintiffs' claims of ignorance of the alleged magnitude of their damages and argument that their potential claims "did not become front page news" until after September 30, 2009, are wholly irrelevant to resolving the United States' motion. See, e.g., Docket No. 13 at 11. The named plaintiffs' claims in this case arose out of conduct by the United States that pre-dates September 30, 2009. The named plaintiffs' non-monetary trust asset mismanagement claims were advanced by the Trust Administration Class. The named plaintiffs' non-monetary trust asset mismanagement claims were, or should have been, asserted in the Cobell amended complaint when it was filed. The named plaintiffs could have opted-out of the Cobell Trust Administration Class, but they did not opt-out. In sum, the named plaintiffs' claims are encompassed by Cobell, are currently pending before the District of Columbia Circuit, and Section 1500 divests this Court of subject-matter jurisdiction over plaintiffs' claims.

Should there be other Fort Berthold Indian Reservation allottees who had oil and gas leases issued after September 30, 2009, and who believe that the United States breached one or more fiduciary obligations in approving those leases, those individuals may advance Land Administration Claims before this Court, in another case, without running afoul of Section 1500 (yet subject to any other defenses that may be available to the United States). But, it is clear that the two named plaintiffs in this case (which has not been certified as a class action) are precluded from bringing their claims by operation of Section 1500 because they are plaintiffs in another court advancing claims based upon substantially the same operative facts.

E. A Stay of Litigation Is Not Warranted.

Plaintiffs request, in lieu of dismissal, that the Court stay this matter until final judgment in Cobell after all appeals have been exhausted. Docket No. 13 at 27-29. Plaintiffs' request for a stay has no basis if this Court lacks subject-matter jurisdiction. When presented with this precise issue, the Court of Claims held that if Section 1500 applies, the complaint should be dismissed for lack of subject-matter jurisdiction, and this Court lacks discretion to retain the action. Hill v. United States, 8 Cl. Ct. 382, 385-86 (1985). The rules afford the Court no discretion if it lacks subject-matter jurisdiction, providing that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Rules of the United States Court of Federal Claims 12(h)(3). As long ago held by the Supreme Court, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. 506, 514 (1869).

Also, there is no need for a stay, as a Section 1500 dismissal will be a dismissal without prejudice. Upon final judgment in Cobell, after resolution of all appeals and exhaustion of all deadlines to seek additional appellate relief, plaintiffs who believe they have a cognizable claim may re-file. That action will not be subject to Section 1500, but will be subject to other defenses available to the United States, including, but not limited to, waiver, release, claim preclusion, the statute of limitations, and lack of subject-matter jurisdiction under the Tucker Act and Indian Tucker Act. Thus, plaintiffs' alternative request for a stay of this litigation should be denied.

III. CONCLUSION

For the reasons stated in the United States' opening brief and herein, this Court lacks subject-matter jurisdiction over plaintiffs' claims because plaintiffs have claims based upon substantially the same operative facts pending before the District of Columbia Circuit, and Section 1500 deprives this Court of subject-matter jurisdiction. Thus, the United States respectfully requests that its motion be granted in full and plaintiffs' complaint be dismissed without prejudice.

Dated: January 26, 2012

Respectfully submitted,

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