

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Norton, et al.	: : :	Civil Action No. 02-0035 (JR)
Standing Rock Sioux Tribe v. Norton, et al.	: :	Civil Action No. 02-0040 (JR)
Three Affiliated Tribes of the Fort Berthold Reservation v. Norton, et al.	: : :	Civil Action No. 02-0253 (JR)
Shoshone-Bannock Tribes of The Fort Hall Reservation v. Norton, et al.	: : :	Civil Action No. 02-0254 (JR)
Chippewa Cree Tribe of the Rocky Boy's Reservation v. Norton, et al.	: : :	Civil Action No. 02-0276 (JR)
Yankton Sioux Tribe v. Norton, et al.	: :	Civil Action No. 03-1603 (JR)
Osage Tribe of Indians of Oklahoma v. USA, et al.	: :	Civil Action No. 04-0283 (JR)
Crow Creek Sioux Tribe v. Kempthorne, et al.	: :	Civil Action No. 04-0900 (JR)
Omaha Tribe of Nebraska v. Kempthorne, et al.	: :	Civil Action No. 04-0901 (JR)
Oglala Sioux Tribe v. Kempthorne, et al.	: :	Civil Action No. 04-1126 (JR)
The Confederated Tribes of the Colville Reservation v. Norton, et al.	: : :	Civil Action No. 05-2471 (JR)
Wyandot Nation of Kansas v. Kempthorne, et al.	: :	Civil Action No. 05-2491 (JR)
Rosebud Sioux Tribe v. Kempthorne, et al.	: :	Civil Action No. 05-2492 (JR)

Winnebago Tribe of Nebraska v. Kempthorne, et al.	:	Civil Action No. 05-2493 (JR)
Lower Brule Sioux Tribe v. Kempthorne, et al.	:	Civil Action No. 05-2495 (JR)
Prairie Band of Potawatomi Nation v. Kempthorne, et al.	:	Civil Action No. 05-2496 (JR)
Te-Moak Tribe of Western Shoshone Indians v. Norton, et al.	:	Civil Action No. 05-2500 (JR)
Cheyenne River Sioux Tribe v. Kempthorne, et al.	:	Civil Action No. 06-1897 (JR)
Stillaguamish Tribe of Indians v. Kempthorne, et al.	:	Civil Action No. 06-1898 (JR)
Iowa Tribe of Kansas and Nebraska v. Kempthorne, et al.	:	Civil Action No. 06-1899 (JR)
Confederated Tribes of the Goshute Reservation v. Kempthorne, et al.	:	Civil Action No. 06-1902 (JR)
Muskogee (Creek) Nation of Oklahoma v. Kempthorne, et al.	:	Civil Action No. 06-2161 (JR)
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Colorado River Indian Tribes v. Kempthorne, et al.	:	Civil Action No. 06-2212 (JR)

Tohono O’odham Nation v. Kempthorne, et al.	:	Civil Action No. 06-2236 (JR)
Nez Perce Tribe, et al. v. Kempthorne, et al.	:	Civil Action No. 06-2239 (JR)
Passamaquoddy Tribe of Maine v. Kempthorne, et al.	:	Civil Action No. 06-2240 (JR)
Salt River Pima-Maricopa Indian Community v. Kempthorne, et al.	:	Civil Action No. 06-2241 (JR)
Coer D’Alene Tribe v. Kempthorne, et al.	:	Civil Action No. 06-2242 (JR)
Ak-Chin Indian Community v. Kempthorne, et al.	:	Civil Action No. 06-2245 (JR)
Sokaogon Chippewa Community v. Kempthorne, et al.	:	Civil Action No. 06-2247 (JR)
Gila River Indian Community v. Kempthorne, et al.	:	Civil Action No. 06-2249 (JR)
Northern Cheyenne Tribe of Indians v. Kempthorne, et al.	:	Civil Action No. 06-2250 (JR)
Haudenosaunee: The Onondaga Nation v. Kempthorne, et al.	:	Civil Action No. 06-2254 (JR)

**THE AK-CHIN INDIAN COMMUNITY’S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO DEFENDANTS’
MOTION FOR REMAND AND STAY OF LITIGATION**

The Ak-Chin Indian Community (“Ak-Chin Community”) submits this Supplemental Memorandum because a remand and stay of this action would unnecessarily delay the Ak-Chin Community from obtaining relief from this Court enforcing the Ak-Chin Community’s right to receive information about its trust assets from Trustee-Delegates. This relief, which is wholly apart from the accounting and would not be addressed in remand, is of the utmost importance to

the Ak-Chin Community and a delay in obtaining such relief would cause the Ak-Chin Community irreparable harm.

The Ak-Chin Community is located in an area experiencing unprecedented growth and possessing accurate records regarding its reservation is absolutely critical. Without this information, the Ak-Chin Community is unable to protect its rights in connection with ongoing negotiations and other dealings with developers, local governments and the State regarding the expansion of roads and other issues affecting its reservation, including rights-of-way. Time is of the essence because the development is on-going. There is no just reason to postpone by six more months the Ak-Chin Community's access to its own trust records.

Moreover, delaying the Ak-Chin Community from obtaining this information while the action is stayed and remanded is particularly inequitable because it already has suffered through a protracted process -- similar to what Trustee-Delegates propose the Court adopt here -- in connection with an accounting action brought pursuant to the ICCA. After decades of proceedings, this case concluded only with the Court finding that the government had failed to provide the accounting required by law. As such, the relief the Ak-Chin Community seeks here is long overdue. For these independent reasons, Trustee-Delegates' Motion for Remand and Stay of Litigation should be denied.¹

¹ On October 1, 2007, Ak-Chin Community's counsel submitted Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Remand and Stay of Litigation on its behalf. The Ak-Chin Community thus adopts all of the arguments contained in that memorandum which specifically sets forth why the administrative doctrines invoked by Trustee-Delegates do not apply to this case. The Ninth Circuit Court of Appeals recently issued *Rhoades v. Avon Products*, No. 05-56047, 2007 WL 2983757 (9th Cir. Oct. 15, 2007), a decision which is fully consistent with the Plaintiff-Beneficiaries' position opposing Trustee-Delegates' request for remand and stay; in particular, that even if the doctrine of primary jurisdiction did apply, it does not support a remand here. In *Rhoades*, the Ninth Circuit Court of Appeals found that the District Court abused its discretion when it remanded a trademark action for declaratory relief to the Trademark Trial Appeal Board based upon the doctrine of primary jurisdiction. The Court reasoned that the

BACKGROUND

The Ak-Chin Community is located approximately 35 miles south of Phoenix, Arizona adjacent to the town of Maricopa, Arizona, one of the fastest growing suburbs of Phoenix. (Declaration of Delia Carlyle (“Carlyle Decl.”), at ¶3, attached hereto as Exhibit 1). The Ak-Chin Community, a small tribe with 767 enrolled members, once inhabited a small, rural farming village. (*Id.*) Today, like many Phoenix suburbs, the Ak-Chin Community is being significantly impacted by unprecedented hyper-growth in its area. (*Id.* at ¶4.) By way of example, in the year 2000, there were approximately 1,000 people in the adjacent town of Maricopa. (*Id.*) In 2004, the town had grown to over 5,000 people and one year later, the population swelled to approximately 18,000. (*Id.*) The town of Maricopa projects that in a just a few years its population will exceed 100,000 people – a 100 fold increase in less than a decade. (*Id.*) This explosive growth has brought “big-city” problems to the Ak-Chin Community, such as an increase in traffic, congestion and other effects of rapid urban expansion. (*Id.* at ¶5.) Because of the hyper-growth in the area, roadway infrastructure, in particular, is a major problem for the Ak-Chin Community and its neighbors. (*Id.*)

Trustee-Delegates hold all relevant information regarding roadways, rights-of-way and easements crossing the Ak-Chin Community’s reservation which has been directly impacted by hyper-growth. (*Id.* at ¶6.) The Ak-Chin Community has made many good faith attempts to retrieve documentation from Trustee-Delegates regarding certain rights-of-way and easements, but to no avail. (*Id.* at ¶7.) Trustee-Delegates’ failure to produce critical documents to the Ak-

“deciding factor should be efficiency; the district court should exercise jurisdiction ‘if this court is more efficient; otherwise, not.’” *Id.* at *10 (citing *PHC v. Pioneer Healthcare*, 75 F.3d 1074, 1081 (9th Cir. 2003)). Likewise, here, remand is not appropriate because it only would exacerbate the already unconscionable delay of Trustee-Delegates providing Plaintiff-Beneficiaries with a full and adequate accounting.

Chin Community makes it impossible for the Ak-Chin Community to effectively protect its rights or negotiate with local developers, and the State and local governments regarding road expansion and other developments affecting its reservation. (*Id.* at ¶8.) While Trustee-Delegates' failure to produce information to the Ak-Chin Community regarding its trust assets is not a new problem for the Ak-Chin Community – indeed, for decades, the Ak-Chin Community has had difficulty obtaining trust records from Trustee-Delegates – because of the recent hyper-growth in its area, obtaining this information is now a top priority. (*Id.* at ¶9.)

On December 29, 2006, the Ak-Chin Community initiated this action for an accounting of its trust funds and, importantly, to enforce the duty that Trustee-Delegates provide all information regarding the management and administration of the Ak-Chin Community's trust assets, such as rights-of-way and easements affecting the Ak-Chin Community's reservation. (*Id.* at ¶10.) During the first meeting of the parties' counsel in this action, Trustee-Delegates took the position that the Ak-Chin Community was not entitled to discovery in this case contending that the Ak-Chin Community's case involves nothing more than the Court's "review of an administrative record." *See* Fed. R. Civ. P. 26(a)(1)(E)(i) and Local Rule 16.3(b)(1); Joint Report Pursuant to Fed.R.Civ.P. 26(f) and Local Rule 16.3, at p. 3-5. Trustee-Delegates also withheld Initial Disclosures on those same grounds.²

However, because Trustee-Delegates agreed to produce some information to the Ak-Chin Community on an informal basis, on June 14, 2007, the Ak-Chin Community provided Trustee-Delegates' counsel with a listing of four roads and a pipeline and identified three narrow

² The United States served Initial Disclosures in the Ak-Chin Community's Court of Federal Claims action, but only provided very limited information and promised to produce documents at a later date, most of which has not yet been provided. The United States also moved to dismiss the Ak-Chin Community's Court of Federal Claims action pursuant to 28 U.S.C. § 1500. This motion is currently pending.

categories of supporting documentation that it required as a top-priority. (*Id.* at ¶11 and Ex. A.) On August 14, 2007, Trustee-Delegates provided the Ak-Chin Community with a redacted title status report and promised to provide documents relating to the June 14, 2007 request at a later date. (*Id.* at ¶12 and Ex. B.) The Ak-Chin Community still has not received this promised information from Trustee-Delegates. (*Id.* at ¶12.)

It is now more apparent than ever that the Ak-Chin Community will be able to obtain the information it is entitled to receive from Trustee-Delegates only as a result of an order of this Court. This relief is vital to the Ak-Chin Community and it should not be delayed by Trustee-Delegates' unfounded request for a remand and stay.

ARGUMENT

A. Remand Would Unnecessarily Delay Trustee-Delegates From Being Ordered To Comply With Their Duty To Turn Over Material Information Regarding the Management and Administration of the Ak-Chin Community's Trust Assets.

Because obtaining information from Trustee-Delegates regarding its reservation is crucial to the Ak-Chin Community, through this action, the Ak-Chin Community seeks to enforce the duty that Trustee-Delegates provide material information regarding the management and administration of their trust assets, "including but not limited to all relevant information regarding rights of way on the Community's trust land." (*See* Compl. Prayer ¶ 7).³ It is well-established that a trustee is "under a duty to the beneficiary to give him . . . complete and accurate information . . . as to the nature and amount of the trust property," and "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his

³ In this paragraph, "Plaintiff prays . . . [f]or a decree requiring the defendants to provide the Community all material information regarding the management and administration of the trust assets belonging to the Community and held in trust for its benefits by the defendants, including but not limited to all relevant information regarding rights of way on the Community's land."

rights under the trust or to prevent or redress a breach of trust.” *Restatement (Second) of Trusts*, § 173 (1959); *see also Clifford v. United States*, F.3d 144, 152 (D.C. Cir. 1998) (noting that a trust beneficiary is entitled to receive “all information necessary to protect his rights under the trust.”). Despite this clear obligation, Trustee-Delegates have failed to produce information in response to the Ak-Chin Community’s repeated requests for information essential to its ability to protect its interests in dealing with third parties. Stalling Ak-Chin from obtaining information through the relief it seeks in this Court is particularly inequitable because it has nothing to do with the wholly separate claim for an accounting. Indeed, the only obligation Trustee-Delegates purportedly would address during remand is the duty to account.

Trustee-Delegates have suggested that the Ak-Chin Community would be able to obtain the relief it seeks here through its action pending in the Court of Federal Claims. That action, however, is very different from this one. The Court of Federal Claims action involves Trustee-Delegates’ distinct breaches of trust in the management of the Ak-Chin Community’s trust funds and non-monetary trust assets. The mismanagement which is the subject of that case is not related to the information the Ak-Chin Community seeks here, for example, regarding certain rights-of-way on its reservation affected by development.

Moreover, the relief Ak-Chin seeks here is broader than the Ak-Chin Community’s right to obtain trust records pursuant to the rules governing discovery in the Court of Federal Claims action. The relief here encompasses *all* of the Ak-Chin Community’s trust assets, not just those involving the Ak-Chin Community’s claim for mismanagement pending in the Court of Federal Claims. *See William F. Fratcher*, 3 *Scott on Trusts* § 17.5, at 1196-97 (5th ed. 2007) (“The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it.”). This relief also is unique because it is equitable in nature and thus only can be granted by

this Court and not by the Court of Federal Claims. *See Klamath & Modoc Tribes & Yashookin Bank of Snake Indians v. United States*, 174 Ct. Cl. 483 (1966) (Court of Federal Claims’ “general jurisdiction under the Tucker Act does not include actions in equity”). In short, there is no justifiable reason for this Court to delay adjudicating the Ak-Chin Community’s claim to seek enforcement of the obligation Trustee-Delegates owe to furnish information, especially since the Ak-Chin Community only can obtain this relief in this Court.

B. The Relief the Ak-Chin Community Seeks Is Long Overdue.

Trustee-Delegates’ request for a remand and stay should be denied on the additional ground that the Ak-Chin Community should not be delayed any longer from obtaining the relief it seeks. The Ak-Chin Community knows all too well what the ramifications will be if this Court grants Trustee-Delegates’ request for a remand and stay to prepare a plan for an accounting. Granting Trustee-Delegates’ unfettered discretion to prepare an accounting without judicial guidance or pre-trial discovery only will result in protracted proceedings and unsatisfactory results.

The Ak-Chin Community suffered through a process much like the one Trustee-Delegates are attempting to impose upon this litigation when Ak-Chin brought a general accounting action against the United States in 1951. *Am. Indians Residing on Maricopa Ak-Chin Reservation v. United States*, 229 Ct. Cl. 167, 667 F.2d 980 (1981). In this earlier action governed by the ICCA, the burden first was on the United States to produce a proper accounting report. *See Blackfeet and Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65 (1973). If the Ak-Chin Community wished to contest the report, it then was required to file exceptions to the accounting. *See Sioux Tribe v. United States*, 12 Ind. Cl. Comm. 541, 547 (1963). In the event of a

dispute, the matter proceeded to a hearing on the disputed transaction, at which the Ak-Chin Community had the burden of proving a breach of trust. *Id.*

After initiating the above procedure, it took the United States twenty (20) years to prepare and file an “accounting report.” *Ak-Chin*, 667 F.2d at 984. The United States claimed that this report constituted a “general accounting” for the Ak-Chin Community for the period from March 3, 1883 to June 30, 1951 and yet, “the portion concerned with [the Ak-Chin Community’s] money and properties was contained in a scant eight pages.” *Id.* After the Ak-Chin Community made exceptions to the report and a hearing, the Court concluded, thirty (30) years after Ak-Chin initiated the action, that “the information that [the government] did provide is incomplete, inconsistent, and insufficient to enable the Indians to ascertain whether defendant’s obligations as a fiduciary have been faithfully discharged.” *Id.* at 1001. Moreover, rather than instructing Trustee-Delegates to comply with their fiduciary duties – with limited authority under the ICCA – the Court instead concluded that “[i]f needed records do not now exist, they will not be found in further rooting through the archives.” *Id.* at 1004.

The relief that Ak-Chin Community seeks is long overdue and it should not be made to suffer through an unnecessarily protracted proceeding again. The Court should deny Trustee-Delegates’ request for remand and stay and proceed to the merits of the Ak-Chin Community’s claims without further delay.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs’ Joint Memorandum in Opposition to Defendants’ Motion for Remand and Stay of Litigation, the Ak-Chin Community requests that the Court deny Trustee-Delegates’ Motion for Remand and Stay of the Litigation.

Respectfully submitted this the 22nd day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing The Ak-Chin Indian Community's Supplemental Memorandum in Opposition to Defendants' Motion for Remand and Stay of Litigation was electronically filed using the Court's ECF system and that the below-listed counsel are ECF users and will be served via the ECF System:

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