

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NEZ PERCE TRIBE, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 06-2239 (JR)
	:	
DIRK KEMPTHORNE, Secretary of	:	
the Interior, <i>et al.</i> ,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Thirty-seven suits by Indian tribes are on file in this court. They all seek more or less the same relief -- equitable accounting for tribal funds held in trust by the United States Government. All were filed in the wake of the seminal Individual Indian Money account case, *Cobell v. Norton*, No. 96-1285. Many of the tribal suits are mirrored by companion suits filed in the Court of Federal Claims. The instant case, filed by the Nez Perce Tribe for itself and for eleven other tribes, is one of a dozen that were filed in this court only days before the end of 2006, when, according to some theories, the statute of limitations would have run on the plaintiffs' claims.¹ Now pending is the motion of the Nez Perce plaintiffs that their suit be certified as a class action. The Nez Perce do not seek to represent tribes that have already filed their own cases, but only those tribes, some 250 of them, that have not done so.

¹ See note 2, infra.

I have concluded, for the reasons set forth in this memorandum, that certification of a plaintiff class in these tribal case is unnecessary, unwise, and unfair (if not impermissible) -- unnecessary, because any grant of the injunctive relief the Nez Perce seek would certainly extend to all Indian tribes anyway; unwise, because adding the trust records of some 250 individual Indian tribes to the litigation pot would be a terribly inefficient use of the litigation resources of the parties and the court; and unfair (even if permissible), because certifying a class of Indian tribes would create a "heads I win, tails you lose" situation for the tribes, which are sovereign nations that could enjoy a judgment favorable to them but may well not be bound by an unfavorable ruling.

Background

The Department of the Interior has the primary responsibility for the management of Indian affairs, 43 U.S.C. § 1457, and is charged with accounting for the Indian trust funds, 25 U.S.C. § 4011. According to the defendants, around \$2.9 billion presently sits in approximately 1,800 trust fund accounts for more than 250 tribes. Opp. at 4; U.S. Government Accountability Office (GAO), Testimony before the Committee on Natural Resources, House of Representatives: Department of the Interior: Major Management Challenges, GAO-07 - 502T , at 10 (Feb. 2007) (2007 DOI Report). About 70 percent of the funds in

these accounts is derived from payments required by treaty or in satisfaction of judgments against the United States. U.S. Department of the Interior, Office of the Inspector General (OIG), Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds Managed by the Office of Trust Funds 18 Management, Bureau of Indian Affairs, Audit Rep. No. 97-I-196, at 1 (Dec. 1996) (1996 DOI Report). The other 30 percent is income, royalties, and fees derived from land and resources held by the government in trust. *See generally, id.*

"The responsibility, or trusteeship, for the holding of funds by the United States for the benefit of individual Indians and Indian Tribes was first and most importantly established by treaties," some of which were made in the early years of the 19th century, if not earlier. U.S. Department of the Interior, Office of the Inspector General (OIG), Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds Managed by the Office of Trust Funds 18 Management, Bureau of Indian Affairs, Audit Rep. No. 97-I-196, at 1 (Dec. 1996) (1996 DOI Report). The sorry history of the government's performance as trustee for Indian tribes and individual Indians has been related elsewhere and need not be repeated here. *See, e.g.,* 1996 DOI Report, at 1; *Cobell v. Norton*, 283 F.Supp.2d 66 (D.D.C. 2003); 2007 DOI Report at 1; MCC at 11 (listing various reports).

In 1991, DOI contracted with the accounting firm Arthur Andersen to reconcile "all Tribal and Individual Indian money (IMM) trust fund accounts" as part of the BIA's "Tribal Reconciliation Project." Pl. MCC at 24-25. After a series of false starts and reality checks, the project was modified and re-modified until the parties ultimately agreed that it would encompass the following tasks: (1) basic reconciliation or verification of all the tribal trust transactions for the years 1972-1992; (2) investment yield analysis; (3) Treasury interest analysis to reconcile the interest on cash balances; (4) a reconciliation of the disparities in accounts reported by multiple recording systems; (5) a "fill the gap" procedure conducted for a limited number of trust accounts (not intended to be representative of the whole) that attempted to verify selected receipts to lease agreements and other money making contracts; (6) an analytical review to track any unusual fluctuations in receipts and disbursement in the fiscal years 1978 through 1992; (7) a "pro forma" procedure by which the tribes could be provided with a "purely hypothetical calculation" of their accounts that did "not requir[e] a correction/adjustment to the accounts;" and (8) the summarization of the "time between the apparent receipt date of collections to the deposit date posted in the tribes' trust accounts," again, to be used for purely informational purposes. Def. Opp. at 6-7; Chavarria Decl. at ¶¶ 7-15; Pl. MCC

at 26 (citing to various contracts between Arthur Andersen and the government attached to their motion as exhibits).

In 1994, the American Indian Trust Fund Management Reform Act of 1994, Pub.L. No. 103-412, 108 Stat. 4239 (as codified) (1995), was enacted. It required, among other things, that:

[t]he Secretary [of the Interior] shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe . . . which are deposited or invested[,] . . . [that] the Secretary shall provide a statement of performance to each Indian tribe . . . with respect to whom funds are deposited or invested pursuant . . . [which] shall identify - (1) the source, type, and status of the funds; (2) the beginning balance; (3) the gains and losses; (4) receipts and disbursements; and (5) the ending balance, [and that] [t]he Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe . . .

25 U.S.C. § 4011. Section 101 of the 1994 Act amended 25 U.S.C. § 162a to state that as part of his trust duties the Secretary must provide "adequate systems for accounting for and reporting trust fund balances," provide "periodic, timely reconciliations to assure the accuracy of accounts," and determine "accurate cash balances." 25 U.S.C. § 162a(d)(1). The Act also required the Secretary to:

transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995 . . .

[and] attestations by each account holder that . . . the Secretary has provided the account holder with as full and complete accounting as possible of the account holder's funds to the earliest possible date, and that the account holder accepts the balance as reconciled by the Secretary[] or [that] the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance.

25 U.S.C. § 4044.

In an attempt to comply with these Congressional mandates, in 1996 DOI began providing the tribes with the results of the Arthur Andersen study in the form of transaction-by-transaction account statements for the periods 1972 through 1992, a description of the procedures that were used to compile these reports, electronic images of certain source documents, and a BIA report that purported to reconcile tribal accounts for the period between 1993-1995 (TRP Reports). Def. Opp at 7; Pl. MCC at 29. Some of the tribes that received these reports sent back attestations of their accuracy, others disputed their balances, and still others did nothing at all. Opp at 34. Defendants assert that they have since sent tribes periodic and annual reports of their trust funds.

The complaint in this suit was filed on December 28, 2006, three days before a generic period of limitations for federal suits would run on a claim that accrued on December 31,

2000.² The complaint has three counts. The first is for a judgment declaring that the TRP Reports are not complete accountings of tribal trust funds and that the plaintiffs have not otherwise received such an accounting, and for setting forth standards for what would constitute a full and complete accounting. The second count is for a mandatory injunction, requiring the Secretary to provide a complete accounting and to correct account balances. The third count invokes the Administrative Procedure Act, alleging arbitrary and capricious agency action and the withholding or unreasonable delay of agency action.

²The statute of limitations ran out on something on December 31, 2006, but it is not clear what. Congress has fiddled with the subject on several occasions. In 2002, even though TRP reports began to be issued in 1996, Congress passed "An Act To encourage the negotiated settlement of tribal claims," decreeing, for statute of limitations purposes, that such reports would be deemed to have been received three years later, on December 31, 1999. Pl. No. 107-153, 116 Stat 79 (March 19, 2002). The provision was "solely intended to provide recipients of reconciliation reports with the opportunity to postpone the filing of claims, or to facilitate the voluntary dismissal of claims, to encourage settlement negotiations with the United States." *Id.* In 2005, Congress extended the "deemed received" date for another year, to December 31, 2000 (the date from which the parties are now reckoning). Pl. No. 109-158, 119 Stat 2954 (Dec. 30, 2005). Earlier in 2005, however, someone slipped into an appropriations bill for the Department of the Interior a provision, "notwithstanding any other provision of law, [that] the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." Pub. L. No. 109-54, 119 Stat. 499, at pg. 519 (Aug. 2, 2005).

Analysis

"To obtain class certification, a class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525 (D.C. Cir. 2006). "[T]he court may consider matters beyond the pleadings to ascertain whether the asserted claims or defenses are susceptible of resolution on a class-wide basis." *Does I through III v. District of Columbia*, 2006 WL 2864483 * 1 (D.D.C. 2006) (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n. 8 (D.C. Cir. 1984)). "A district court exercises broad discretion in deciding whether to permit a case to proceed as a class action, . . . [i]n light of the fact that trial courts have the primary responsibility of ensuring the orderly management of litigation and that the purpose of class actions lies in advanc[ing] the efficiency and economy of multi-party litigation" *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (internal citation and quotation omitted); see also *Int'l Union v. Clark*, 2006 WL 2687005 *5 (D.D.C. Sept.12, 2006) (citing *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1544 n. 8 (D.C. Cir. 1983)).

Plaintiffs would be happy to have their case certified under any one of Rule 23(b)'s subdivisions, but they assert that the best fit for their claims is under Rule 23(b)(2).

Recognizing the problem posed by the sovereignty of Indian tribes they also ask for Rule 23(d)(2) discretionary notice and opt-out procedures. Compl. at 20; MCC at 40. The defendants oppose class certification, arguing that the tribes' sovereign immunity makes class certification inappropriate, and, essentially, that the claims of the putative class members are too individualized to satisfy any of the Rule 23(a) factors or Rule 23(b) tests.

Sovereign Immunity

The centerpiece of the defendants' opposition is their argument that class certification would offend tribal sovereignty because it would purport to bind tribes as class members without an affirmative waiver of immunity.³ Inaction after the receipt an opt-out notice does not constitute such a waiver, Opp. at 16 (citing *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 40 (D.C. Cir. 2002)). Thus defendants argue, it would be meaningless to certify this case as a class action, because the tribes could take advantage of a favorable ruling that would bind the defendants, but ignore an adverse decision.

It is no answer to that argument to assert, as plaintiffs do, that a refusal to certify a class of sovereign nations would

³The defendants have standing to raise this issue because they have a direct interest in whether they may be bound to a judgment that none of the putative class members are bound to. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805-806 (1985).

strip them of their "right to make their own choices about their sovereignty in a particular lawsuit," Rpl. at 6, because the putative class members have been given notice of the pendency of this suit, and have been given what amounts to an engraved invitation to take the affirmative, sovereignty-waiving step of joining this suit as plaintiffs. See Dkt. 81. Nor is it accurate to state, as plaintiffs do, that tribal sovereignty "is not really impacted by . . . being named as part of a class action" because the tribes "are suing, not being sued." Rpl. at 5; Tr. at 63. A waiver of tribal immunity "cannot be implied but must be unequivocally expressed." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Thus, the filing of a suit by an Indian tribe does not waive tribal immunity from a compulsory counter claim. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-510 (1991). Even the active litigation of a case by a sovereign up to and after the entry of judgment by a district court will not waive an immunity defense raised for the first time on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

It is true that a plaintiff class of Indian tribes was certified in *Covelo Indian Community v. Watt*, 551 F.Supp. 366 (D.D.C. 1982), *vacated as moot*, No. 83- 2377 (D.C. Cir. Feb. 1, 1983). But it does not appear from the published opinion that

the sovereign immunity argument that defendants raise here - the heads-I-win-tails-you-lose argument - was raised in that case, or, indeed, that it has been raised in any other case. Voluntary joinder has been offered to the tribes that have not yet sued. Voluntary joinder clearly does waive sovereign immunity, see *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 510, and is the preferred procedure for presenting the claims of individual tribes.⁴

Rule 23(a)

At the threshold of the class certification process are four prerequisites: (1) the proposed class must be "so numerous that joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"; and (4) the "representative parties [must] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

These requirements are all easily met here. The plaintiffs are represented by the Native American Rights Fund, a highly respected and well established public interest law firm. Commonality and typicality are virtually self evident, at least

⁴ The docket entry for this order denying plaintiffs' motion for class certification also grants a motion to file a second amended complaint, adding 21 tribes as plaintiffs [Dkt. #83] and a motion to intervene, adding one more [Dkt. #82], so that there are now 34 plaintiffs in this suit.

for the less demanding screening process that is applied to Rule 23(a)'s threshold requirements. Numerosity is debatable - the voluntary joinder of as many as 250 separate parties is not unknown, or, with the help of electronic case filing, unmanageable - but there is no shortage of cases that have found 250 parties to be more than enough for class action treatment.

Rule 23(b) (1)

A class action may be certified under Rule 23(b) (1) if:

prosecuting separate actions by or against individual class members would create a risk of:
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

The plaintiffs here have made a pro forma argument for Rule 23(b) (1) certification based on the "shared interest [of all Indian tribes] in the existence, nature, and scope of Defendants's fiduciary accounting duties; whether those duties have been met; and whether and how Defendants must rectify their failure to meet those duties," MCC at 57, but such a shared interest is not enough to satisfy either subsection of the rule.

As for Rule 23(b) (1) (A), relating to the risk of incompatible or varying adjudications, four tribes have already asked not to participate in this action, at least 46 cases

similar to this one are pending in this and other federal district courts, and many more are in the Court of Federal Claims. There is plenty of risk already, and certification of a class like this one, even if the decision were binding on the plaintiffs, would not significantly reduce or alleviate it.

Rule 23(b)(1)(B) was created for "situations where the judgment in a nonclass action . . . while not technically concluding the" rights and interests of putative class members "might do so as a practical matter." Fed. R. Civ. Pro. 23 Advisory Comm. Notes. The archetypal Rule 23(b)(1)(B) class involves claims against a limited fund, see *Oritz v. Fibreboard Corp.*, 527 U.S. 815, 817 (1999)- which is not this case. Any tribe concerned about the possible "adverse practical effect on [its] interests," Fed. R. Civ. P. 23 Advisory Comm. Notes, of legal rulings that may emerge from this case has been given notice and opportunity to join the suit as a plaintiff.

Rule 23(b)(3)

Plaintiffs do not seriously contend that this case is appropriate for Rule 23(b)(3) certification, which is appropriate when:

the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

The sovereign immunity problem discussed earlier in this memorandum is enough without more to make a class action an inferior method of adjudicating the controversy presented in this suit: the prospect of trying to deal with the trust accounting of 250-plus tribes that have not affirmatively waived their sovereign immunity, only to have them walk away from a judgment they found unfavorable, is not a picture of either fairness or efficiency.

A more prosaic reason why Rule 23(b)(3) is a poor fit is that, in this case, issues "subject to generalized proof" do not "predominate over those issues that are subject only to individualized proof." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Plaintiffs have identified four issues that are common to each of the tribes: (1) "the existence, nature, and scope of the fiduciary accounting duty owed by Defendants to Plaintiffs"; (2) "whether Defendants have met that duty by the [TRP Reports] reports or otherwise"; (3) "what standards govern Defendants' fiduciary accounting or accounting-alternative duty"; and (4) "whether and how generally the trust fund accounts of Plaintiffs must be corrected." MCC at 50. The

first three of these may indeed be subject to "generalized proof," but they can be resolved just as well by proof that relates to the twelve named plaintiffs as with 250 class members. The fourth issue is the problem. Not only is it subject mostly to "individualized proof," but it would swallow the other three issues, and, as we learned in the *Cobell* case, render the suit nearly unmanageable.⁵

The plaintiffs will continue to maintain that this suit is about injunctive relief and not money damages (as they must if this court is to retain jurisdiction over claims that would otherwise belong in the Court of Federal Claims). They cannot deny, however, that the case will involve heavy lifting if and to the extent that discovery and trial preparation involves scrutinizing the trust records of individual tribes. As the undisputed affidavit of Richard P. Fielitz, Jr. shows, the tribal funds are not all alike. "[S]ome tribes have considerable

⁵Even the broader legal issues would be infused with facts specific to individualized beneficiaries. To name only a few examples, some tribes were recognized by the federal government after 1978, others were terminated, then restored, and some are unrecognized. Tr. at 83-84. At least one tribe has litigated trust issues before. Opp. at 29 (*citing Nez Perce of Idaho v. United States*, 228 Ct. Cl. 924 (1981)). Some tribes sent in attestations, some disputed their balances, other did nothing. Opp at 34. There are also some known disputes between class members over the distribution of funds that would require individualized resolution. See Opp. at 32 (describing the dispute between the Yurak Tribe and the Hoopa Valley Tribe over a settlement judgment and the dispute between tribes, some of which are putative class members, over the distribution of the Black Hills judgment fund).

assets, other very few . . . [and while] some tribes have only a single trust account, consisting of perhaps a judgment fund; others have multiple types of accounts, dating from different times and containing funds from different sources (such as timber or other natural resources revenues sources)." Fielitz Decl. at ¶3. Each fund differs in the "nature of the cash flows, balances held, and requirements that must be met per the governing trust document (e.g. public law, statutory restriction, judgment ruling, settlement agreement) . . . [and e]ach tribe has a unique combination of tribal accounts that require specific management decisions in order to properly receipt, invest and disburse funds." Fielitz Decl. at ¶4. Even among the named plaintiffs, trust land that generates fund revenues "ranges from 800 acres to almost 1 million acres," the numbers of transactions among accounts varies "from 722 to 24,199," and the amounts of each transaction ranges from "pennies to millions of dollars." Pl. MCC at 55 fn. 21. The accounts that contain proceeds from property "represent a wide variety of underlying resources, including oil and gas, timber, mining, gravel, and various surface leases," Pl. MCC at 55 fn. 21., and accounting for each of these resources can be vastly different, *see generally* Felitz Decl. and Chavarria Decl., and as a result the "accounting work for each type of trust account var[ies] widely," Fielitz Decl. at ¶ 4; *accord* Dutschuke Decl. at 2-3. Moreover, some tribes have

taken over management of their accounts. See Feilitz Decl. at ¶4; see, e.g., Dutschke Decl. at ¶¶2-3.

“Rule 23(b) (3) favors class actions where common questions of law or fact permit the court to ‘consolidate otherwise identical actions into a single efficient unit.’” *Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 12 (D.D.C. 2002) (quoting *Dellums v. Powell*, 566 F.2d 167, 189 (D.C. Cir. 1977)). This is not such a case. See *Does I through III v. District of Columbia*, 2006 WL 2864483 (D.D.C. 2006) (rejecting certification under Rule 23(b) (3) in part because when “computation of damages will require separate mini-trials, then the individualized damages determinations predominate over common issues and a class should not be certified.”) (internal quotation and citation omitted).

Rule 23(b) (2)

Class certification under Rule 23(b) (2) is appropriate when the plaintiff can show that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ P. 23(b) (2). This, the plaintiffs argue, is the best fit for their claims, because the defendants’ alleged general failure to provide complete accountings is a matter that affects the entire class, and because all of the issues raised by plaintiffs’ claims are “threshold” issues, or amenable to broad declaratory or injunctive relief, or both. The problem with this

argument is that, to the extent that the case really does seek only broad declaratory and injunctive relief, class certification is unnecessary: a declaration that the BIA has failed to fulfill its duties as trustee and an injunction mandating change would benefit all Indian tribes, whether or not they were members of a plaintiff class.

To the extent, however, that the focus of the case changes, as the focus of the *Cobell* case changed, from broad declaratory relief to monetary relief in the nature of restitution, the "assumptions of homogeneity and class cohesiveness that underlie (b) (2) certification" are called into question. *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997). "[T]he underlying premise of (b) (2) certification - that the class members suffer from a common injury that can be addressed by classwide relief - begins to break down when the class seeks to recover back pay or other forms of money damages to be allocated based on individual injuries." *Eubanks*, 110 F.3d at 95. Those concerns were triggered in *Eubanks*, even though that was a Title VII case, where "back pay is characterized as a form of equitable relief." *Id.* at 95 (quotations and citations omitted). Here, as in *Cobell*, the plaintiffs insist that they do not seek an award of damages - but they will not forswear monetary relief. And here, unlike in *Cobell*, the differences in the circumstances and the histories of the tribes that plaintiffs seek to represent make common fund, classwide relief unthinkable. See Moore's Federal

Practice § 23.43 ("A class action may not be certified under Rule 23(b) (2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant."); (citing *Heffner v. Blue Cross & Blue Shield of Ala.*, 443 F.3d 1330, 1344-1345 (11th Cir. 2006); *Caldwell v. Craighead*, 432 F.2d 213, 217 (6th Cir. 1970)).

Conclusion

For the reasons set forth above, it is **ORDERED** that the plaintiffs' motion for class certification [Dkt. #53] is **DENIED**.

JAMES ROBERTSON
United States District Judge