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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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ORANNA BUMGARNER FELTER, ET AL.:
:
Appellant, :
:
v. :
:
DIRK KEMPTHORNE, SECRETARY OF :
THE INTERIOR, ET AL., :
:
Appellee. :
:
-----X

No. 06-5092

Monday, December 11, 2006
Washington, D.C.

The above-entitled matter came on for oral argument,
pursuant to notice.

BEFORE:

CIRCUIT JUDGES TATEL AND KAVANAUGH AND SENIOR
CIRCUIT JUDGE WILLIAMS

APPEARANCES:

ON BEHALF OF APPELLANT:
DENNIS G. CHAPPABITTY, ESQ.
ON BEHALF OF APPELLEE:
JOHN E. ARBAB, ESQ.

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C O N T E N T S

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1 THE COURT: Can I ask you --

2 MR. CHAPPABITTY: And one of our counts in the
3 complaint dealing with cause of action number eight, sought to
4 request a remedy of an accounting to find out if there were
5 other valuable pieces of property --

6 THE COURT: Can I ask you one question, just to
7 interrupt you there?

8 MR. CHAPPABITTY: Yes, sir.

9 THE COURT: Paragraph six of your complaint stated
10 that for over 40 years plaintiff had repeated requested that
11 defendants comply with their legal and moral obligation and
12 redress the breaches of trust herein. And the question, of
13 course, in this case is whether you are out of time in
14 bringing the case, given that it's more than 40 years old.
15 Can you give us the explanation for why the suit was brought
16 at this time and why we can entertain it?

17 MR. CHAPPABITTY: Judge Kavanaugh, what we did is we
18 focused not on the implementation, correction, not on the
19 actual termination that I represent, but we looked at the
20 cases that have been filed, and I believe there are over 22
21 cases in those years. Now, those cases have looked at the
22 administration of the Ute Partition Act. They've looked at
23 various aspects of its implementation.

24 We sought to take a different approach, and after
25 months of researching and looking at those cases, we decided

1 that a case built around prior existing rights had never been
2 filed by any of the plaintiffs in this long line of cases.

3 Now, if we bring it up to date, we have the case of
4 Cobell that has come out of this Court. And that case, in
5 fact, entails an act of Congress that was passed in 2003. And
6 we believe that as far as cause of action for an accounting,
7 that that act of Congress covers the field very plainly and
8 simply by its language, and that at least cause H should
9 continue to exist and go forward.

10 Now, we've also done some research in furtherance of
11 your question, Judge, and we also found out that there had not
12 been an accounting, or we alleged that there had not been an
13 accounting ever done in the entire history of this entire
14 situation from 1954 on. The consistent approach of the United
15 States government has been, you lost your identity as an
16 Indian back then, so we owe you nothing. Well, we sat back
17 and said, well, what happens to that duty to account for prior
18 existing property and rights and various settlement claims
19 that my clients had vested before the implementation of the
20 Ute Partition Act.

21 Now, in plain terms, what they had before was taken
22 from them by virtue of their being stripped of their Indian
23 status. And U.S. government has used that very effectively to
24 stop any further inquiries into an accounting to determine
25 whether or not there should have been items that existed in

1 their ownership prior to 1954, to determine whether or not
2 those are wrongfully taken and have never been accounted, and
3 they lost that property.

4 THE COURT: The appropriations bill 108 that you are
5 referring to refers to losses to or mismanagement of trust,
6 mismanage of trust funds. So is it, I take it, it is your
7 theory then that the trust relationship survived the
8 termination?

9 MR. CHAPPABITTY: Judge, there is contention on that
10 point. I wouldn't concede that.

11 THE COURT: Wouldn't concede what?

12 MR. CHAPPABITTY: I wouldn't concede that the trust
13 relationship stopped or was terminated. The other causes of
14 action, the other seven causes of action we've laid out
15 various legal theories that allege that because of the faulty
16 implementation and the failure of the United States
17 government, the Secretary of Interior, to account for what's
18 preexisting Ute Partition Act properties, that indeed the
19 implementation causes the entire act to fail. That is
20 regarding the other seven causes of action. However it's --

21 THE COURT: Yes. I'm sorry.

22 MR. CHAPPABITTY: Yes.

23 THE COURT: There was language in your brief that
24 suggested that this is, among other things, a constitutional
25 challenge to the '54 act.

1 MR. CHAPPABITTY: No, Judge. That's a point that we
2 have not asserted. We are not looking at, targeting the exact
3 '54 act. We are looking at the corpus of the properties that
4 were owned by my clients, or allegedly owned by them prior to
5 the Ute Partition Act being implemented. We are not looking
6 at what Congress did or didn't do after 1954.

7 We're only saying that one second before August
8 27th, 1954, my clients had certain existing property rights as
9 Native Americans with a federally recognized status. At the
10 moment the clock struck midnight, the United States has been
11 very effective in saying, well, you no longer are Indian,
12 therefore, we are not going to account for you for potentially
13 millions and millions of dollars.

14 THE COURT: As you described that, it suggests that
15 in 1954 a duty to account for the closing of the trust arose.
16 Would that be right?

17 MR. CHAPPABITTY: That's correct, Judge.

18 THE COURT: How does that fit within the language of
19 108-108?

20 MR. CHAPPABITTY: Judge, we contend that the
21 language of 108-108 is very simple in its tone, and very
22 simple in the law. It just simply says that including any
23 claim and litigation pending on the date of the enactment of
24 this act.

25 THE COURT: Yes, but before that it says, the

1 statute of limitations shall not commence to run on any claim.
2 Now, at least if you and I, our minds are meeting, the cause
3 of action arose, I guess perhaps it would be a reasonable time
4 after the exact moment, midnight on a particular day in 1954,
5 when the duty to account arose and within a reasonable time
6 for Interior to fulfill that obligation. But at that point,
7 the cause of action for an accounting would arise, would it
8 not?

9 MR. CHAPPABITTY: Yes, it would. Under the
10 typical --

11 THE COURT: So the statute of limitations would have
12 commenced several, many decades before 108-108 was adopted.

13 MR. CHAPPABITTY: Judge, what we are looking at here
14 is the exception to the general rule. And I believe that is
15 the essence of the nominee case, that even though the
16 beneficiary hasn't filed an action for accounting within the
17 six-year time limit, that doesn't give any reason for them to
18 say, oh, I didn't know about it.

19 There is the ingredient of the federal trustee in
20 this situation, the trustee who consistently said, Ben, you're
21 not a Native American, therefore, I have no duty to owe you.
22 We believe that --

23 THE COURT: Well, that wouldn't respond. I mean,
24 that would be a lawless response to a claim by your clients
25 that they were entitled to an accounting at the termination of

1 the trust.

2 MR. CHAPPABITTY: Judge, I --

3 THE COURT: Purported trust, since you resist the
4 thought that the trust, purported termination.

5 MR. CHAPPABITTY: Yes, and I concede -- yes. I
6 concede that that rationale is very valid in certain
7 circumstances. We're looking at what has developed in the
8 long line of Cobell cases, those cases spawned by the Cobell
9 and decisions before this Circuit Court.

10 We're looking at Congress, not so much as looking at
11 this specifically in regards to the terminated Utes and
12 saying, oh, you lost back in '54. We're looking at those
13 terminated Utes as being members of a tribe and individual
14 Indians back in 1954, as well as other numerous groups of
15 tribes and Indians who have a similar problem with lack of an
16 accounting.

17 We believe that the act of Congress, public law 108-
18 108 simply leveled the field and brought within the scope a
19 broad range of general causes of action and accounting that
20 may or may not be filed.

21 THE COURT: Just to be clear what the scope of the
22 argument is, I take it that, suppose there was a particular
23 Indian, the beneficiary of a trust in 1890, and the trust was
24 terminated on the Indian's death with purported delivery of
25 assets to his heirs. I'm not sure whether the trust ever

1 worked that way. But let's suppose such a case. Then your
2 reading of 108-108 is that cause of action on behalf of those
3 heirs was revived by 108-108.

4 MR. CHAPPABITTY: Yes, that's what we would hold the
5 statute means. Very simply, the language is very clear, very
6 precise. It covers a broad area, and it could conceivably
7 bring within a claim that even went to the past injury 100
8 years ago. Thank you, Judge.

9 THE COURT: Thank you.

10 MR. CHAPPABITTY: I have two minutes for rebuttal.

11 THE COURT: Yes.

12 ORAL ARGUMENT OF JOHN E. ARBAB, ESQ.

13 ON BEHALF OF THE APPELLEE

14 MR. ARBAB: May it please the Court, John Arbab for
15 the Appellees. As I understand Mr. Chappabitty's presentation
16 this morning, he seems to concede that his clients' interest
17 in the \$32 million dollar judgment vested some three years
18 before the passage of the Ute Partition Act, that is in 1951.

19 If the trust was terminated at that time, or at
20 least if the cause of action vested at that time, it's
21 certainly well outside the six-year statute of limitation
22 period that's provided for it in section 2401(a).

23 THE COURT: Well, what about public law 108-108?

24 MR. ARBAB: Your Honor, I would suggest that that
25 statute goes -- well, first of all, I would maintain that the

1 argument based on that provision has been waived, because it
2 was not --

3 THE COURT: Well, assume it hasn't been waived.

4 THE COURT: Yes, assume it hasn't been waived for a
5 moment.

6 MR. ARBAB: If it hasn't been waived, I would --

7 THE COURT: It's not jurisdictional. Right?

8 MR. ARBAB: No, it's not.

9 THE COURT: Okay.

10 MR. ARBAB: That statute would address claims for,
11 as the statute provides, claims concerning the losses to or
12 mismanagement of trust funds. But here there is --

13 THE COURT: In some sense, perhaps a broad sense,
14 that is exactly the claim, that assets were held in trust and
15 sometime between 1951 and 1961, trust beneficiaries were
16 shortchanged.

17 MR. ARBAB: I think that is premised on the gravamen
18 of the complaint, which is that there was a wrongful
19 termination of Indian status.

20 THE COURT: Well, but I'm looking, the complaint is
21 broader than that. Paragraph 104, by reason of defendant's
22 breach of federal trust obligations and prematurely and
23 unlawfully distributing the assets, and purportedly
24 terminated. I mean, their allegations are that there was a
25 trust relationship that was inappropriately terminated or

1 maybe never terminated. Count eight, well, it's mainly count
2 seven. I mean, we have to assume the truth of the allegations
3 in the complaint.

4 MR. ARBAB: That's true, Your Honor.

5 THE COURT: And they talk about breeches of federal
6 trust obligations, prematurely and unlawfully distributing the
7 assets of these people. Right?

8 MR. ARBAB: Yes, Your Honor. I --

9 THE COURT: So doesn't that bring it under 108?

10 MR. ARBAB: I don't believe so.

11 THE COURT: Tell me why.

12 MR. ARBAB: The suit depends upon allegations of a
13 wrongful termination of Indian status.

14 THE COURT: That's what they've alleged.

15 MR. ARBAB: Right. And in this case, the latest
16 time at which that could have occurred, would have been 1961
17 with the --

18 THE COURT: No, but we're assuming that 108 applies.

19 MR. ARBAB: But 108-108 is not designed to revive
20 claims or to preserve claims, the gravamen of which is the
21 improper termination of federally recognized Indian status.

22 THE COURT: No, but they're alleging the unlawful
23 termination of the trust arrangement, also.

24 MR. ARBAB: Yes, but that depends on trust, the
25 trust, the termination of the trust and the termination of

1 Indian status were events that occurred together at the latest
2 in 1961 when the trust was terminated and the assets were
3 disbursed. And that is the gravamen of the complaint here,
4 that there was an improper termination of an Indian,
5 recognized Indian status.

6 THE COURT: Which --

7 MR. ARBAB: Which is not --

8 THE COURT: -- according to the complaint,
9 inappropriately terminated the trust relationship, which does
10 bring it under 108, doesn't it?

11 MR. ARBAB: I don't believe so.

12 THE COURT: I mean, whether it, I mean, 108 refers
13 to trust, concerning losses to or mismanagement of trust funds.
14 Now, the allegation of the complaint is that that's exactly
15 what's happened here. Your answer is, well, it occurred
16 because of the termination of their recognition, and that's
17 not covered by the statute. Right?

18 MR. ARBAB: Yes.

19 THE COURT: But the consequences of the termination,
20 according to the complaint, to produce, to put it in the terms
21 of 108-108, produce losses to or mismanagement of trust funds.

22 MR. ARBAB: Well, Your Honor, I would take the
23 position that the statute does cover claims concerning the
24 losses to or mismanagement of the trust funds. But --

25 THE COURT: And that's what, if you read the

1 portions of the complaint I quoted you, that's exactly what
2 they are alleging. Now, they may be wrong, I don't know, but
3 based on the complaint, which we have to accept as true at
4 this point, why doesn't it come under 108?

5 MR. ARBAB: The gravamen of the complaint here is,
6 it turns on or is based on the improper or a wrongful
7 termination of Indian status, recognized Indian status. That
8 is the springboard for the complaint in this case, and that is
9 not covered by the language of PL 108-108.

10 The trust was terminated at the latest in 1961 when
11 the Secretary of the Interior published the proclamation on
12 August 27th, I believe, 1961.

13 THE COURT: Look at paragraph 57. In enacting the
14 UPA, the U.S. Congress did not relieve the defendants from
15 expecting or otherwise complying with substantive preexisting
16 laws or statutes. Now, if, and that combined with the other
17 provisions of the complaint alleged that these are funds or
18 properties that were covered by the trust arrangement, the
19 trust relationship.

20 MR. ARBAB: Yes, Your Honor.

21 THE COURT: Yes. So just so I understand, your
22 position is, government's position is that this 108-108
23 doesn't apply because regardless of the language of the
24 complaint, the real focus is on the termination, and that's
25 what this case is about?

1 MR. ARBAB: Yes, Your Honor.

2 THE COURT: That's your argument?

3 MR. ARBAB: Yes, Your Honor. I believe that there
4 are plenty of allegations in the complaint that bear out that
5 construction of the suit.

6 THE COURT: And what do you think we should do with
7 these other allegations that refer to the trust arrangement?

8 MR. ARBAB: Well, I think that those are claims that
9 further demonstrate why the claim was untimely brought,
10 because they are all relating to --

11 THE COURT: No, no. We're assuming that 108
12 applies.

13 MR. ARBAB: I think you have to interpret, you have
14 to come to some interpretation of the complaint as a whole,
15 and the gravamen of the complaint is that the trust status,
16 that the federally recognized status of these particular group
17 of Indians was improperly terminated.

18 THE COURT: That they are all premised on improper
19 termination.

20 MR. ARBAB: Yes, Your Honor.

21 THE COURT: Your argument turns on a distinction
22 between unlawful termination and mismanagement. Is that
23 correct?

24 MR. ARBAB: I think that is a distinction that is
25 borne out by the way the complaint is drafted. Yes, Your

1 Honor.

2 THE COURT: Well, no, I'm talking about as a general
3 legal matter. Let's put aside the wording of the complaint.
4 And I guess suppose a state creates a cause of action for
5 mismanagement of a trust, and then the trustee simply
6 repudiates the trust and says, I'll take the assets. The
7 cause of action would, you think, clearly not, that claim
8 would not be encompassed by the hypothetical statute?

9 MR. ARBAB: I think it would depend on how the claim
10 is drafted. If the claim, as in this case, turns on some
11 improper termination of the status, then that would not be
12 covered by the statute.

13 THE COURT: Well, terminating the status of a
14 beneficiary as a beneficiary sounds like exactly that.

15 MR. ARBAB: Well, in a case such as you are
16 hypothesizing, the two situations may be not distinguishable.
17 But that isn't the situation that we have in this case.

18 THE COURT: You don't deny that there was a trust
19 relationship between the government and this tribe before the
20 termination, right?

21 MR. ARBAB: That's right.

22 THE COURT: And so if that act hadn't been passed,
23 then this, you would concede, then, that this would be covered
24 by 108?

25 MR. ARBAB: If there had not been the passage of a

1 statute.

2 THE COURT: Of the termination act, right. Right?

3 MR. ARBAB: I think the case probably would be
4 covered by 108-108 in that situation.

5 THE COURT: And since the ending of the trust
6 relationship was triggered by the termination act, your point
7 is that this is therefore a termination case, not a trust
8 case?

9 MR. ARBAB: Yes, Your Honor.

10 THE COURT: Thank you.

11 MR. ARBAB: Thank you.

12 THE COURT: Does counsel have any time left? No?
13 You can take two minutes.

14 MR. CHAPPABITTY: Thank you.

15 THE COURT: You used up your time, but you can have
16 two minutes.

17 REBUTTAL ARGUMENT OF DENNIS G. CHAPPABITTY, ESQ.

18 ON BEHALF OF THE APPELLANT

19 MR. CHAPPABITTY: Yes, I would like to provide a
20 very general comment in closing, and to borrow from a very
21 relevant analogy attributed to Felix Cohen, a very preeminent
22 federal Indian law expert in the forties and fifties. And my
23 originally terminated 490 Utes are the proverbial minor's
24 canaries. And what happened here, those minor's canaries were
25 not only humiliated and derogated in their human existence by

1 being stripped by an act of Congress, but they also had a
2 perfect theft committed against them. And that perfect theft
3 involved preexisting, pre-UPA property and shares, settlement
4 monies that were entrusted to them, and then in 1954 they lost
5 that.

6 THE COURT: Do you know where these -- do you have
7 any suspicions about where these funds and properties are now,
8 what they are worth?

9 MR. CHAPPABITTY: Judge, that is somewhat of a
10 chicken and the egg question which is --

11 THE COURT: I realize you haven't had the
12 accounting, but do you have any view?

13 MR. CHAPPABITTY: No, and we are seeking the
14 accounting to determine that, and to determine the extent of
15 what happened with those preexisting funds. And also I want
16 to emphasize to the Court that the United States has been very
17 effective in taking a very massive confusing historical
18 situation and using it to its advantage.

19 In this situation, we look at the simplicity of
20 public law 108-108 and look at what Congress intended to apply
21 in terms of the historical accountings that the Bureau of
22 Indian Affairs did or didn't do. And the Cobell case, very
23 preeminently pointed out that yes, there have been problems.
24 So Congress took this broad approach. And we contend that
25 this action comes within that, at least as to cause of action

1 number eight.

2 The other actions, we would urge the Court to look
3 at them not in terms of attacking the Ute Partition Act, as
4 much as looking at the historical recountment that we've laid
5 out in the allegations. And take those items as favorable as
6 the Court can to allow cause of action eight to continue.

7 THE COURT: Thank you.

8 MR. CHAPPABITTY: Thank you.

9 THE COURT: The case is submitted.

10 (Recess.)

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C E R T I F I C A T E

DEPOSITION SERVICES, INC., hereby certifies that the foregoing is a correct transcription of the electronic sound recording of the proceedings before the U.S. Court of Appeals in the matter of:

CASE NO. 06-5092

ORANNA BUMGARNER FELTER, ET AL.

V.

KIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

January 4, 2007

Teresa S. Hinds, Transcriber

