

[ORAL ARGUMENT SCHEDULED ON FEBRUARY 16, 2012]

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

ELOUISE PEPION COBELL, *et al.*,

Plaintiffs-Appellees,

KIMBERLY CRAVEN,

Objector-Appellant,

v.

KENNETH LEE SALAZAR, Secretary of the
Interior, *et al.*,

Defendants-Appellees.

No. 11-5205

**DEFENDANTS-APPELLEES' RESPONSE TO
OBJECTOR-APPELLANT'S 12/1/11 MOTION FOR JUDICIAL NOTICE**

Defendants-Appellees, Secretary of the Interior Ken Salazar, et al., hereby respond to Objector-Appellant Kimberly Craven's December 1, 2011 motion for judicial notice of the pleadings in *Two Shields v. United States* (Ct. Cl. Case No. 11-531L). *Two Shields* is a putative class action in the Court of Federal Claims, in which the Government has filed a motion to dismiss. The plaintiffs in that case, as in the Trust Administration Class in this case, allege that the Government breached fiduciary duties in the management of Indian trust assets.

Defendants take no position on Craven's judicial notice motion or whether its untimeliness should be excused. However, defendants wish to correct her erroneous description of the Government's position in its motion to dismiss in *Two Shields*.

Craven asserts that "the government contends [in the motion to dismiss] that the *Cobell* settlement eliminates the claims of the putative class member Indians in *Two Shields* who received \$80/acre or less for land leases worth \$10,000/acre." Mot. 2. That is inaccurate. The Government moved to dismiss the complaint in *Two Shields* under a jurisdictional bar to litigation in the Court of Federal Claims ("CFC"), 28 U.S.C. § 1500, *not* on the basis that the plaintiffs' claims had been "eliminate[d]" by the *Cobell* settlement. See Gov't *Two Shield* Mot. 8–13 (submitted by Craven as Doc. 7-1 in this case).

Section 1500 provides:

"The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

Thus, "[t]he CFC has no 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." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1727 (2011). In *Two Shields*,

the Government has explained that the plaintiffs are members of the Trust Administration Class in *Cobell*, and that their claims in the CFC are “for or in respect to” the same claims which that class has asserted in *Cobell*. Gov’t *Two Shields* Mot.

2. Because *Cobell* is currently “pending in” this Court, the Government has argued that Section 1500 — not the settlement agreement — precludes the *Two Shields* plaintiffs from bringing their claim in the CFC at this time. See Gov’t *Two Shields* Mot. 13 (“All of the elements of Section 1500 are met, this Court lacks subject matter jurisdiction over Plaintiffs’ Complaint, and Plaintiffs’ Complaint should be dismissed.”).

Only when all *Cobell* appeals have concluded and the settlement becomes final — or, if the settlement is not upheld, which would trigger the dissolution of the Trust Administration Class — would the Section 1500 bar be lifted. To be sure, the *Two Shields* plaintiffs may be precluded from bringing their claims in the CFC by the *Cobell* settlement upon final approval. But, if that is so, it will be because they declined to opt out of the Trust Administration Class, when they had an ample and meaningful opportunity to do so. Moreover, that the *Two Shields* claims may eventually be precluded cannot, standing alone, demonstrate any “intra-class equities of the settlement agreement” as Craven suggests (Mot. 3), because those claims, at this point, reflect nothing more than unproven allegations.

Finally, it is not clear that Craven even has standing to challenge the settlement on the basis that it is unfairly prejudicial to others' claims.

Respectfully submitted,

s/ Thomas M. Bondy
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DECEMBER 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2011, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will send notification of such filing to counsel of record.

s/ Thomas M. Bondy
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