In the United States Court of Federal Claims

No. 03-2772T
Filed February 18, 2005
NOT TO BE PUBLISHED

	*	Full Payment Rule;
BOB STARK, *pro se*,	*	Indian Claim;
	*	*Pro Se*;
Plaintiff,	*	Ruby Valley Treaty of 1863;
	*	Standing;
v.	*	Tax Refund;
	*	26 U.S.C. § 7422(a);
	*	28 U.S.C. § 1505;
THE UNITED STATES,	*	Treas. Reg. 301.6402-2(b)(1), (d);
	*	Treas. Reg. 301.6402-3(a)(2);
Defendant.	*	RCFC 9(h)(6);
	*	RCFC 12(b)(1).

Bob Stark, Spring Creek, Nevada, *pro se.*

David Douglas Gustafson, United States Department of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

BRADEN, *Judge*

RELEVANT FACTS AND PROCEDURAL BACKGROUND[1]

On December 3, 2003, *pro se* plaintiff Bob Stark ("plaintiff"), a tribal member of the Native Western Shoshone Ely Colony in the state of Nevada, filed a Complaint in the United States Court of Federal Claims, based on "Indian Claim under authority of 28 U.S.C. § 1505 arising under the Constitution, Laws, Executive Orders and Treaty obligations of the United States pursuant to ARTICLE 7 of the October 1, 1863 TREATY WITH THE WESTERN SHOSHONE, and PETITION FOR DECLARATORY JUDGMENT under authority of 26 U.S.C. § 7428 and 28 U.S.C. § 1507." Compl. at 1. The Complaint asserted seven causes of action, including that:

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[1]The relevant facts recited herein were derived from: Plaintiff's December 3, 2003 Complaint ("Compl."); May 28, 2004 Memorandum Opinion and Order; August 4, 2004 First Amended Complaint For Conversion, Breach Of Contract, Indian Claim For Refund Of Certain Income, Estate & Gift Taxes ("Pl. Amended Compl."); Defendant's August 16, 2004 Motion To Strike And To Dismiss ("Gov't Mot. to Strike and Dismiss"); Plaintiff's September 8, 2004 Response ("Pl. Response"); Defendant's September 13, 2004 Reply ("Gov't Reply"); and Plaintiff's Surreply ("Pl. Surreply").

(1) the United States breached its fiduciary duty by failing to convey a certain amount of land to plaintiff and/or make required payments under the Ruby Valley Treaty of 1863. *See* Compl. Section IV (First Cause of Action) at 4-5;

(2) the plaintiff was due a tax refund for the years 1993 to date based on his exempt status as a Native American. *See* Compl. Section V (Second Cause of Action) at 5-6 and Section VIII (Fifth Cause of Action) at 8; *see also* Compl. Exhibits 3, 7;

(3) Internal Revenue Service ("IRS") Commissioner "failed to make a reasonable inquiry as required by the IRS Restructuring and Reform Act of 1998 to investigate the unsigned and unsworn suspicious demand letters received by Bob Stark." Compl. Section VI (Third Cause of Action) at 7; *see also* Compl. Ex. 2;

(4) the Treasury Secretary and IRS Commissioner, along with other federal agents violated 26 U.S.C. § 7602(d) and 26 U.S.C. § 7214(a) in their tax collection efforts and conspired to extort money from plaintiff. *See* Compl. Section VII (Fourth Cause of Action) at 8;

(5) federal officials and agents violated the Fifth Amendment to the United States Constitution by attempting to collect taxes from plaintiff since he is a Native American. *See* Compl. Section VIII (Fifth Cause of Action) at 8;

(6) Senator Harry Reid, Senator John Ensign, and Congressman Jim Gibbons violated Articles I and VI of the United States Constitution when they allowed the United States to violate the Ruby Valley Treaty. *See* Compl. Section IX (Sixth Cause of Action) at 8-9; *see also* Compl. Exhibits 4-5;

(7) Senator Harry Reid, Senator John Ensign, and Congressman Jim Gibbons conspired to deprive the Western Shoshone Indians of money and land due under the Ruby Valley Treaty. See Compl. Section X (Seventh Cause of Action) at 9; *see also* Compl. Exhibits 4-5.

See Compl. Sections IV-X at 4-9.

On March 3, 2004, the defendant ("Government") moved to dismiss the Complaint for lack of subject matter jurisdiction. On March 30, 2004, plaintiff filed a Response in Opposition. On April 5, 2004, the Government filed a Reply. On May 4, 2004, plaintiff filed a Surreply. On May 28, 2004, the court issued a Memorandum Opinion and Order dismissing for lack of jurisdiction the claims set forth in the Complaint at Sections IV (First Cause of Action), V (Second Cause of Action), VI (Third Cause of Action), VII (Fourth Cause of Action) for the years 1993-1995 and 1998-2001, VIII (Fifth Cause of Action), IX (Sixth Cause of Action), and X (Seventh Cause of

Action). *See Bob Stark* v. *United States*, No. 03-2772T (Fed. Cl. May 28, 2004), at 2-4 (unpublished) ("*Bob Stark I*"). The court, however, did not dismiss the claims set forth in the Complaint at Section V (Second Cause of Action) for the years 1996-1997 and 2002-present to afford plaintiff an opportunity to amend the Complaint to establish that the jurisdictional requirements had been met for the tax refund claims set forth in Section V (Second Cause of Action) for the years 1996-1997 and 2002-present, *i.e.*, taxes were paid in those years and that a timely administrative claim for a refund had been filed with the IRS. *See Bob Stark I*, at 3-4.

On August 4, 2004, plaintiff filed a First Amended Complaint for Conversion, Breach of Contract, Indian Claims for Refund of Certain Income, Estate & Gift Taxes. *See* Pl. Amended Compl. Plaintiff states that the First Amended Complaint is filed on behalf of himself and deceased family members of the JOSEPH/STARK Lodge. *See* Pl. Amended Compl. at 2.[2] The First Amended Complaint also reasserted claims against the Secretary of Treasury, IRS Commissioner, and Secretary of the Interior. *See* Pl. Amended Compl. at ¶¶ 17-19, 34-35, 39, 41, 56.

The First Amended Complaint then proceeds to allege claims that: (1) the United States has unlawfully converted through fraud and deceit Western Shoshone Indian ancestral land rights and failed to make required payments (*see* Pl. Amended Compl. ¶ 29-30); (2) the IRS fraudulently has collected taxes from the Indians as well as state citizens in violation of the Constitution, since the Internal Revenue Code ("Code") has been repealed (*see* Pl. Amended Compl. ¶ 31-33, 36-38); (3) the Secretary of Treasury and IRS Commissioner knew that the Code does not apply to plaintiff or his ancestors (*see* Pl. Amended Compl. ¶ 34); (4) plaintiff is entitled to receive treaty land because of unlawful actions committed by agents of Secretary of Treasury and IRS Commissioner (*see* Pl. Amended Compl. ¶ 35, 39); and (5) plaintiff is entitled to a full accounting of his Great Grandfather's 560 acre farm (*see* Pl. Amended Compl. ¶ 40).

The First Amended Complaint also alleges that: (1) Secretary of Interior and Secretary of Treasury breached their fiduciary duties and trust obligations by failing to account for monies collected in the individual Indian money accounts (*see* Pl. Amended Compl. ¶ 41); (2) plaintiff has not been informed by the Bureau of Indian Affairs or Secretary of Interior about *Cobell* v. *Norton*, Civil Action No. 96-1285, pending in the United States District Court for the District of Columbia (seeking declaratory and injunctive relief for breach of statutory duty to provide an accounting under Indian Trust Fund Management Reform Act on behalf of beneficiaries of individual Indian money (IIM) trust accounts) (*see* Pl. Amended Compl. ¶ 42); (3) JOSEPH/STARK ancestors were tricked

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[2]Additional named plaintiffs include: Great Grandfather White River Jim McQueen (deceased); Great Grandmother Mary McQueen, full blood Western Shoshone (deceased); Grandmother Mary Jane McQueen, one-half Western Shoshone (deceased); Great Grandfather John Johannes Konrad/Conrad Stark, white man (deceased); Barbara Graff, white woman (deceased); John Jacob Stark, white man (deceased); Joe Joseph, full blood Western Shoshone (deceased); Mamie Swallow full blood Western Shoshone (deceased); Elmer Stark, one quarter Western Shoshone (deceased); and Lillian Joseph/Stark, full blood Western Shoshone (surviving spouse of Elmer Stark). *See* Pl. Amended Compl. at ¶¶ 6-16.

into making elections and that the word "label" on Form 1040 constitutes constructive fraud (*see* Pl. Amended Compl. ¶ 43-44); (4) plaintiff never agreed to pay on the public debt and his ancestors have been "duped" (*see* Pl. Amended Compl. ¶ 45-46); (5) the estates and other property belonging to JOSEPH/STARK LODGE have been altered (*see* Pl. Amended Compl. ¶ 47-48); (6) the JOSEPH/STARK Lodge has been deprived of legitimate voting rights and proper representation (*see* Pl. Amended Compl. ¶ 49); (7) taxes have been repealed and have no force or effect as taxes pertain to plaintiff or his interests in the JOSEPH/STARK Lodge, pursuant to 26 U.S.C. § 2603(c) (*see* Pl. Amended Compl. ¶ 50); (8) plaintiff's interests and rights under the Ruby Valley Treaty must be valued according to 26 U.S.C. § 2033 (*see* Pl. Amended Compl. ¶ 51); (9) plaintiff is entitled to an adjustment for certain gifts and a full accounting of his Great Grandfather White River Jim's farm and is entitled to all taxes collected in connection with such farm and from plaintiff individually (*see* Pl. Amended Compl. ¶ 52-54); (10) the land sold under the Ruby Valley Treaty was not sold for adequate and full consideration and the Western Shoshone Claims Distribution Act "is but another feeble attempt to steal our Western Shoshoni People's land" (*see* Pl. Amended Compl. ¶ 55); (11) plaintiff fears that he and the JOSEPH/STARK Lodge will become "subject victims of Secretary of Interior" (*see* Pl. Amended Compl. ¶ 56); and (12) plaintiff possesses powers transferred under 26 U.S.C. 2035(e) from a revocable trust upon the death of Elmer Stark (*see* Pl. Amended Compl. ¶ 57).

The First Amended Complaint requests as relief: (1) an accounting of White River James McQueen's farm; (2) a refund of all taxes assessed to or paid by plaintiff and any penalties and /or interest for the years previously requested; (3) a refund of taxes overpaid by some of plaintiff's ancestors and the JOSEPH/STARK Lodge for unspecified years; and (4) an order directing the Secretary of Interior to investigate whether Joseph and Mamie Swallow are included in the individual Indian money accounting system. *See* Pl. Amended Compl. Prayer for Relief at 23-24.

On August 16, 2004, the Government filed a Motion to Strike and to Dismiss. On September 8, 2004, plaintiff filed a Response. On September 13, 2004, the Government filed a Reply. On October 21, 2004, plaintiff filed a Surreply.

DISCUSSION

A. Jurisdiction.

The United States Court of Federal Claims is a court of limited jurisdiction. *See Terran ex rel. Terran* v. *Sec'y of Health & Human Services*, 195 F.3d 1302 (Fed. Cir. 1999). Under the Tucker Act, the court has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000). The Tucker Act itself, however, is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *Testan*, 424 U.S. 392, 398 (1976)). Therefore, in order to come within the jurisdictional reach of the Tucker Act, a plaintiff must identify and plead a constitutional provision,

federal statute, independent contractual relationship, and/or executive agency regulation that provides a substantive right to money damages. *See Todd* v. *United* States, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act."); *see also Roth* v. *United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004) ("Because the Tucker Act itself does not provide a substantive cause of action, . . . a plaintiff must find elsewhere a money-mandating source upon which to base a suit.").

The plaintiff properly alleges jurisdiction under 28 U.S.C. § 1505 and 28 U.S.C. § 1491. *See* Pl. Amended Compl. at ¶ 20-22.

B. *Pro Se* Plaintiff Pleading Requirements.

The pleadings of a *pro se* plaintiff traditionally have been held to a less stringent standard than those of a litigant represented by counsel. *See Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972)) (noting that *pro se* complaints "'however inartfully pleaded' are held "to less stringent standards than formal pleadings drafted by lawyers. . . ."). Indeed, it has long been the role of this court to examine the record "to see if [a *pro se*] plaintiff has a cause of action somewhere displayed." *Ruderer* v. *United States*, 188 Ct. Cl. 456, 468 (1969).

C. Standard Of Review.

Rule 12(b)(1) of the Rules of the United States Court of Federal Claims governs dismissal of a claim for lack of subject matter jurisdiction. *See* RCFC 12(b)(1); *see also Palmer* v. *United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999) (noting that the general power of a court to adjudicate in specific areas of substantive law is a question of a court's subject matter jurisdiction properly raised by a Rule 12(b)(1) motion). In deciding a RCFC 12(b)(1) motion to dismiss, the court is generally "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke* v. *United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 236-37 (1974)); *see also Catawba Indian Tribe of South Carolina* v. *United States*, 982 F.2d 1564, 1568-69 (Fed. Cir.1993) ("In reviewing the propriety of this dismissal, we take as true the facts alleged [in the complaint].") Plaintiff, as the non-moving party, however, bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds* v. *Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction was put in question it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

D. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Claims In This Case.

1. The First Amended Complaint Continues To Fail To Allege The Jurisdictional Prerequisites To Maintain Tax Refund Claims For Bob Stark, Individually, For The Tax Years 1996-1997 And 2002-2003.

The court previously dismissed plaintiff's tax refund claims for the periods 1993-1995 and 1998-2001, since plaintiff had outstanding tax liabilities for those tax years. *See Bob Stark I*, at 3. Plaintiff, however, was afforded an opportunity to evidence that the taxes for the periods 1996-1997 and 2002-2003 had been paid and that a timely administrative claim for refund had been filed.[3] *See Bob Stark I*, at 2-3 (citing *Flora* v. *United States*, 362 U.S. 145, 177 (1960) (holding that a valid refund claim "requires full payment of the assessment before an income tax refund suit can be maintained[.]"); 26 U.S.C. § 7422(a) (providing that a refund suit may not be maintained "until a claim for refund or credit has been duly filed with the Secretary [of Treasury]."); RCFC 9(h)(6) (special pleading requirements of tax refund suits, including the requirement that a "copy of the claim for refund shall be annexed to the complaint.")). Plaintiff's First Amended Complaint continues to fail to meet these jurisdictional requirements.

Specifically, the First Amended Complaint does not allege that plaintiff has paid any taxes for the periods 1996-1997 and 2002-2003, instead the court is advised that plaintiff "is without any means to learn exactly how much money has been taken from him[.]" *See* Pl. Amended Compl. ¶ 86; *see also* Pl. Amended Compl. Prayer at 23 ("Bob Stark prays this Court Order defendants provide Bob Stark with an assessment for the tax years previously requested and to refund all amounts in connection therewith and refund any such penalties and/or interest which may have accrued[.]"); Pl. Amended Compl. Exhibit 20 ("I am simply asking that you refund all sums taken from me.").

With respect to the requirement that a timely administrative claim for refund must be filed, the First Amended Complaint alleges only that plaintiff filed a claim for refund and that three documents evidence a claim for the refund, *i.e.*, a letter dated May 8, 2003 addressed to the Secretary of Treasury, IRS Commissioner, various offices of the IRS, United States Senator Harry Reid, and United States Senator John Ensign. *See* Pl. Amended Compl. ¶ 76; *see also* Pl. Amended Compl. Exhibit 17 ("Shoshoni Native Bob Stark's Notice and Demand for Abatement of Trading With the Enemy Act Taxes & Claim for Refund Due Indians Excluded; Article I, Section 2, Clause 3"). In addition, the First Amended Complaint alleges that Form 8857 Request for Innocent Spouse Relief, dated May 8, 2003, was a claim for refund. *See* Pl. Amended Compl. ¶ 87; *see also* Pl. Amended Compl. Exhibit 18 at 3. The First Amended Complaint also alleges that a June 26, 2003 letter to the Secretary of Treasury was a claim for refund. *See* Pl. Amended Compl. ¶ 80; *see also* Pl. Amended

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[3]The Government correctly notes that the period "2002-present" as set forth in *Bob Stark I* ends with the tax year 2003, as returns for 2004 are not due until April 15, 2005 and any such claims for 2004 or future years are not ripe for consideration by this court.

Compl. Exhibit 20 (stating, in part, "I request that you refund all sums taken from me for 'taxes.'").

The form of a tax refund, however, must comply with regulations established by the Secretary of the Treasury. *See* 26 U.S.C. § 7422(a) (providing that a claim for refund or credit must be duly filed "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.") In that regard, a refund claim must satisfy three requirements. First, "a separate claim shall be made for each type of tax for each taxable year or period." Treas. Reg. § 301.6402-2(d). Second, a refund claim "shall be made on Form 1040X." Treas. Reg. § 301.6402-3(a)(2). Third, a refund claim must include in detail the grounds for the credit or refund. *See* Treas. Reg. § 301.6402-2(b)(1) ("The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."). Plaintiff has failed to meet the requirements to claim a refund for the tax years 1996-1997 and 2002-2003.

Plaintiff should be aware that the court does not have authority to waive these requirements based on his status as a tribal member or lack of understanding about these requirements. Although under certain circumstances informal refund claims may be recognized, plaintiff's Exhibits 17, 18, and 20 fail to meet even the minimum notification requirement that a tax refund is sought and for specific years. *See United States* v. *Kales*, 314 U.S. 186, 194 (1941) ("This Court, applying the statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period."); *see also Arch Engineering Co., Inc.* v. *United States*, 783 F.2d 190, 192 (Fed. Cir. 1986) (quoting *American Radiator & Standard Sanitary Corp.* v. *United States*, 318 F.2d 915, 920 (Ct. Cl. 1963)) ("Proper informal claims have long been accepted. . . . There are no rigid guidelines except that an informal claim must have a written component and 'should adequately apprise the Internal Revenue Service that a refund is sought and for certain years.'").

Specifically, Exhibit 17 (May 8, 2003 letter to the Secretary of Treasury and others) although entitled, in part, "Claim for Refund Due," is a 68 page letter, but nowhere therein does it inform the IRS that a tax refund is sought or does it state the years for which a refund is claimed. Exhibit 17 is best described as a protest to the tax law generally. *See* Pl. Amended Compl. Exhibit 17 at 2 ("I have been subjected to a tax liability which I believe has been repealed"); *id*. at 22 ("[W]e have learned that the tax has been repealed and find our remedy under 26 U.S.C. § 1341 Claim of Right, Title, and Interest due to our vested and endowed estates held foreign.")

Exhibit 18 (Form 8857 Request for Innocent Spouse Relief) also does not advise the IRS that a tax refund is sought. Exhibit 18 requests only that plaintiff be relieved from tax liability. Moreover, Exhibit 18 expressly is limited to the tax year 1963 and does not apply to tax years 1996-1997 or 2002-2003. *See* Pl. Amended Compl. Exhibit 18 at 3, line 1.

Nor does Exhibit 20 (June 26, 2003 Letter to the Secretary of Treasury) apprise the IRS that a tax refund is sought for certain years. *See* Pl. Amended Compl. Exhibit 20 ("I request that you refund all sums taken from me for 'taxes.'").

Therefore, Exhibits 17, 18, and 20, individually or collectively, cannot be construed as a tax refund claim. *See Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293, 297-98 (1945) ("The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission.")

Accordingly, because plaintiff failed to allege that he has paid taxes for 1996-1997 and 2002-2003 and that a timely administrative claim for refund was filed, the court is compelled to dismiss the refund claims in the First Amended Complaint, as set forth in Cause of Action I (¶¶ 31-33, 36-38) and Cause of Action II (¶¶ 43-46, 50, 54).

2. The First Amended Complaint Also Fails To Allege The Jurisdictional Requirements To Allow Plaintiff's Ancestors To Assert Tax Refund Claims.

Plaintiff's First Amended Complaint, however, also added new claims for tax refunds. *See, e.g.*, Pl. Amended Compl. Cause of Action I (¶¶ 31-33, 36-38), Cause of Action II (¶¶ 43-46, 50, 54), Prayer at 23.[4]

For example, the First Amended Complaint includes refund claims for taxes overpaid for unspecified years by plaintiff's ancestors. *See* Pl. Amended Compl. ¶¶ 37-38, 43-44, 50; *see also* Pl. Amended Compl. Prayer at 24. Those claims, however, also are subject to the same jurisdictional prerequisites that governed the December 3, 2003 Complaint and the First Amended Complaint, *i.e.*, the taxpayer must allege that taxes were paid in specific years and that a timely administrative claim for a refund has been filed with the IRS. *See* 26 U.S.C. § 7422(a); *see also* RCFC 9(h)(6); *Flora*, 362 U.S. at 177. The First Amended Complaint does not meet these jurisdictional requirements either with respect to claims alleged on behalf of the JOSEPH/STARK Lodge or any of plaintiff's other ancestors. In addition, although ten of the eleven "new plaintiffs" are deceased, the First Amended Complaint fails to allege by what authority plaintiff has standing to sue on their behalf.

The statute of limitations for initiating a claim in the United States Court of Federal Claims is six years. *See* 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.") Hence, claims for refund on behalf of plaintiff's ancestors would have to be filed with the IRS within three years of the time plaintiff's ancestors' tax returns were filed or two years from the time the plaintiff's ancestors' taxes were paid and suit in the United States Court of Federal Claims would have to be filed within six years of the claim for refund being denied by the IRS. *See*

[4]Although the claims set forth in Cause of Action I (¶¶ 31-33, 36-38) and Cause of Action II (¶¶ 43-46, 50, 54) are not clear, the court has determined that they reasonably may be construed as the tax refund claims.

26 U.S.C. § 6511(a), (b)(1).[5] The First Amended Complaint does not allege that this jurisdictional requirement has been met with respect to plaintiff's ancestors' claims.

Therefore, for these reasons, the Government's Motion to Strike and to Dismiss claims as set forth in Cause of Action I (¶¶ 37-38) and Cause of Action II (¶¶ 43-44, 50) is granted.

3. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Tort Claims.

In *Bob Stark I*, plaintiff's tort claims for wrongful conduct by government officials in their official capacity was dismissed. *See Bob Stark I*, at 2. Nevertheless, the First Amended Complaint realleges in Cause of Action I (¶¶ 34-35, 39) and Cause of Action II (¶¶ 41, 56) wrongful conduct by governmental officials in their official capacity. These are tort claims over which the court does not have jurisdiction. *See Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 391-94 (1971); *Brown* v. *United States*, 105 F.3d 621, 624 (Fed. Cir. 1997). Therefore, the claims set forth in the First Amended Complaint Cause of Action I (¶¶ 34-35, 39) and Cause of Action II (¶¶ 41, 56) once again are dismissed for lack of subject matter jurisdiction.

4. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Claims Concerning The Ruby Valley Treaty.

In *Bob Stark I*, the court dismissed for lack of subject matter jurisdiction plaintiff's claims arising from the Ruby Valley Treaty set forth in Sections IV (First Cause of Action), IX (Sixth Cause of Action), and X (Seventh Cause of Action), because plaintiff, as an individual, did not have standing to seek relief for an alleged breach under 28 U.S.C. §1505 ("The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians[.]")

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[5]Section 6511(a) of the Code provides:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a). Section 6511(b)(1) provides: "No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. § 6511(b)(1).

Nevertheless, plaintiff again reasserted claims arising from the Ruby Valley Treaty together with other claims. *See* Pl. Amended Compl. Cause of Action I (¶¶ 29-30, 39-40); Cause of Action II (¶¶ 42, 46-49, 51-55, 57). Plaintiff's deceased JOSEPH/STARK Lodge family members are named as indispensable parties regarding those claims. *See* Pl. Amended Compl. at 2.

The claims related to the Ruby Valley Treaty, including those for an accounting, previously have been litigated at the Indian Claims Commission, Docket No. 326-K, and the United States Court of Federal Claims. *See Western Shoshone Legal Defense and Education Assoc.* v. *United States*, 531 F.2d 495 (Ct. Cl. 1976) (appeal from Indian Claims Commission); *see also Temoak Band of Western Shoshone Indians, Nevada* v. *United States*, 593 F.2d 994 (Ct. Cl. 1979) (appeal from Indian Claims Commission) ("The Temoak Band had been determined to be entitled to control the litigation on behalf of all Western Shoshone . . . ."); *Te-Moak Bands of Western Shoshone Indians of Nevada* v. *United States*, 948 F.2d 1258 (Fed. Cir. 1991) (appeal of general accounting claim) ("On August 10, 1951, the Western Bands of the Shoshone Nation, represented by the Te-Moak Bands, filed a claim before the Indian Claims Commission seeking relief for the alleged taking of Western Shoshone lands without just compensation and requesting an accounting of funds and proceeds held by the Government in trust accounts for the Western Shoshone, pursuant to trusts created as a result of the Treaty of Ruby Valley in 1863.").

On January 20, 2004, Congress passed the Western Shoshone Claims Distribution Act, Pub. L. 108-270, 118 Stat. 805, "to provide for the use and distribution of funds awarded to the Western Shoshone identifiable group" under judgments granted by the United States Court of Federal Claims and the Indian Claims Commission. *See* Western Shoshone Claims Distribution Act, Pub. L. 108-270, 118 Stat. 805. Plaintiff is identified as a member of the Native Western Shoshone Ely Colony Tribe and provided documentation that he is a member of such tribe. Plaintiff's claims relating to the Ruby Valley Treaty, however, previously were litigated, and therefore are barred by the doctrine of *res judicata*. *See Ammex, Inc.* v. *United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (quoting *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) and citing *Migra* v. *Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n.1 (1984)) ("Under the doctrine of *res judicata* (or claim preclusion), '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' . . . [T]he doctrine has come to incorporate common law concepts of merger and bar, and will thus also bar a second suit raising claims based on the same set of transactional facts.").

Therefore, for these additional reasons, the Government's Motion to Strike and to Dismiss the claims set forth in the First Amended Complaint as Cause of Action I (¶¶ 29-30, 39-40) and Cause of Action II (¶¶ 42, 46-49, 51-55, 57), as a matter of law, must be granted.

5. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate JOSEPH/STARK Lodge Indian Claims, JOSEPH/STARK Lodge Voting Rights' Claims, Or Plaintiff's Estate Claims.

To the extent that the First Amended Complaint attempts to allege claims on behalf of the JOSEPH/STARK Lodge, different from those previously asserted by the Western Shoshone related to the Ruby Valley Treaty, the court also does not have jurisdiction to adjudicate such claims.

The First Amended Complaint alleges that some of the claims are brought on behalf of the JOSEPH/STARK Lodge, as a "tribe, band or other identifiable group of American Indians," in response the court's earlier holding in *Bob Stark I* that plaintiff, as an individual, did not have standing to seek relief for these claims. The First Amended Complaint, however, has failed to allege or establish that the JOSEPH/STARK Lodge is a tribe, band, or identifiable group of American Indians as contemplated by 28 U.S.C. § 1505. *See Cherokee Nation of Okla.* v. *Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) (citing *United States* v. *Holliday*, 70 U.S. 407, 419 (1865) ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment."). The JOSEPH/STARK Lodge is not on the list of federally recognized Indian tribes published by the Department of Interior. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 68 FED. REG. 68,180 (Dec. 5, 2003).

The First Amended Complaint also does not allege that the JOSEPH/STARK Lodge has an official roll of tribal members or that the JOSEPH/STARK Lodge collectively owns any property interest. *See Menominee Tribe of Indians* v. *United States*, 388 F.2d 998, 1000-01 (Ct. Cl. 1967) (holding that Menominee Indians continue to constitute tribe notwithstanding the Menominee Termination Act, wherein membership was limited to persons on official roll of tribe, prepared in accordance with Termination Act, and where a tribe continues to hold beneficial and equitable interest in property conveyed by Secretary of Interior). The JOSEPH/STARK Lodge appears to be a group of plaintiff's ancestors or relatives and not a tribe, band, or identifiable group of American Indians as contemplated by 28 U.S.C. § 1505.[6]

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[6]Section 1505 of Title 28 of the United States Code provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treatises of the United States, or Executive orders of the President[.]

28 U.S.C. § 1505.

To the extent the plaintiff asserts a voting rights violation on behalf of the JOSEPH/STARK Lodge, *see* Pl. Amended Compl. ¶ 49, the court does not have jurisdiction since the remedy does not require the payment of money. *See* 28 U.S.C. § 1491.

For example, although unclear, to the extent that the First Amended Complaint ¶¶ 47-48, 52-53, 57 alleges an interest in an estate or to litigate a probate or estate claim, this court does not have jurisdiction over estate matters which are governed by state law. *See* 28 U.S.C. 1491 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department[.]").

Accordingly, for the foregoing reasons, the Government's Motion to Strike and to Dismiss the claims set forth in the First Amended Complaint as Cause of Action I (¶ 37) and Cause of Action II (¶¶ 44, 46-48, 49, 51, 52-53, 56, 57) is granted for lack of subject matter jurisdiction.

6. The United States Court Of Federal Claims Does Not Have Jurisdiction to Grant Equitable Relief In This Case.

As the court previously held, in light of the dismissal of plaintiff's other claims, the court has no independent jurisdiction to grant injunctive relief or declaratory judgment. *See Bob Stark I*, at 3 (citing *Brown* v. *United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) ("The Tucker Act does not provide independent jurisdiction over . . . claims for equitable relief.")). Accordingly, any claim for such relief in the First Amended Complaint must be dismissed.

CONCLUSION

The United States Court of Federal Claims has no jurisdiction to adjudicate the claims asserted in the August 4, 2004 First Amended Complaint, therefore, the Government's August 16, 2004 Motion to Strike and to Dismiss is granted.

The Clerk is ordered to dismiss the August 4, 2004 First Amended Complaint.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge