UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPO BAND OF MISSION INDIANS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No. 99-3375 (TFH)**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Pending before the Court are cross-motions for summary judgment on a claim of breach of trust by plaintiffs Campo Band of Mission Indians and Kumeyaay Tribal Coalition ("plaintiffs" or "tribes") and defendants the United States, the Department of Defense, Donald Rumsfeld, and Gale A. Norton ("defendants").[1] Upon careful consideration of plaintiffs' Motion, defendants' Cross Motion, and the entire record herein,[2] the Court will grant defendants' Cross-Motion for Summary Judgment.

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[1] Rumsfeld is a defendant in his official capacity as U.S. Secretary of Defense; Norton is a defendant in her official capacity as U.S. Secretary of the Interior. The United States, the Department of Defense, Rumsfeld, and Norton (and their predecessors, William S. Cohen and Bruce Babbitt) were the "federal defendants" in earlier stages of this case. The Court previously dismissed the claims against Casey Gwinn and the city of San Diego.

[2] The plaintiffs failed to file a response to the defendants' Motion; however, the period for filing has lapsed, and the Court will consider the case based on the filings to date. The parties have agreed to incorporate by reference the arguments presented in their filings concerning the plaintiffs' Motion for Preliminary Injunction, which the Court denied in its bench opinion of May 23, 2000, and its written Memorializing Opinion and Order of May 24, 2000.

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I. BACKGROUND

The U.S. Navy used about 540 acres on San Diego Bay as a Naval Training Center ("training center" or "NTC") until 1997. Joint Statement of Material Facts Not in Dispute ("Joint Facts") ¶ 2. In 1993, the Department of Defense ("DOD") notified the Department of the Interior ("DOI"), which includes the Bureau of Indian Affairs ("BIA"), that the training center property was available for transfer to other federal entities as "excess property."[3] Id. ¶ 5. In April 1994, the Southern California Coalition of Tribes expressed to BIA its desire to acquire portions of the training center. Id. ¶ 9. The Riverside, California, BIA office wrote to the Navy in July 1994 that it was its "intention to support the . . . tribes . . . in their quest to acquire this property" and that the tribes would work directly with the Navy. Id. ¶ 12. The Navy responded that so long as the property was classified as excess, only other federal agencies could submit requests. Id. ¶ 13.

The Riverside BIA sent the Navy a list of buildings that the tribes wished to acquire, but the Navy responded that it could not accept such a list as a firm proposal for the property. Id. ¶¶ 16, 17. The central BIA office then submitted to DOD a request for the transfer of property. Id. ¶ 20. The same day, the Riverside BIA also submitted a proposal. Id. ¶ 21. The central office never confirmed or modified the Riverside proposal, as requested by the Navy. Id. ¶ 22. In May 1995, the central BIA told the Navy that it would submit a revised request, but the Navy never received such a revision. Id. ¶ 25. In June 1995, the Navy declared the training center

[3] The "excess" designation indicates that the property will be available only to other federal agencies. 41 C.F.R. § 101-47.203

"surplus property."[4] Id. ¶ 24. It designated the city of San Diego as the local redevelopment authority ("LRA"), the entity that would review proposals and recommend to DOD how to dispose of the surplus property. Id. ¶ 26. In October 1998, the LRA adopted its final reuse plan, which would convey the property only to the city.

The tribes filed this suit December 17, 1999, alleging breach of trust violations against the United States and its agencies and officers. According to the plaintiffs, the tribes attempted to work with DOI and BIA to have their proposal—conveying the property to DOI to be held in trust for the tribes—submitted to DOD, but DOI and BIA failed to submit a proper proposal. On May 11, 2000, this Court granted plaintiffs' request for a temporary restraining order, halting the conveyance of the property. On May 23, 2000, this Court denied plaintiffs' motion for a preliminary injunction.

II. DISCUSSION

The parties agree that the sole issue before the Court is whether a fiduciary duty has attached that obligated DOI and BIA to submit a proposal so that the training center property could be transferred as excess and held in trust for the tribes. Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 4; Defs.' Cross-Mot. for Summ. J. ("Defs.' Mot.") at 1. In its Memorializing Opinion of May 24, 2000, the Court ruled that, at that stage of the litigation, the plaintiffs were not substantially likely to prevail on this question. 5/24/00 Memorializing Op. at 3-5. The parties agree that all material facts and relevant issues of law were fully presented when the Court considered the plaintiffs' Motion for Preliminary Injunction. Joint Status Report ¶ 2. The parties thus incorporate those matters for the consideration of the pending motions; additionally,

[4] The "surplus" designation indicates that the property will be available to entities outside the federal government. 41 C.F.R. § 101-47.301

plaintiffs ask the Court to reconsider its previous ruling in light of Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

A. Summary Judgment Standard

The Court will grant summary judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of identifying evidence that demonstrates that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party then must produce specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The Court will construe the evidence in favor of the nonmovant and draw all justifiable inferences in its favor. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). The parties agree that there are no disputed issues of material fact. See Joint Status Report ¶ 2; Pls.' Mot. at 2; Defs.' Mot. at 3.

B. Creation of Fiduciary Duty

As the defendants acknowledge, the federal government does have a trust relationship with federally recognized tribes such as the plaintiffs. Defs.' Mot. at 5. However, the question in this case is whether that relationship imposes on the government the stricter standards of a fiduciary. The Supreme Court refined the parameters of the federal government's trust responsibilities in 1983, looking beyond the express language of authorizing or underlying statutes. United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 225 (1983). For example, when the government assumes "elaborate control over forests and property belonging to Indians" or "supervision over tribal money or properties, the fiduciary relationship normally exists with respect to such money or properties." Id. Nevertheless, "the government's fiduciary

responsibilities necessarily depend on the substantive laws creating those obligations." Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995). The recent decision by the Court of Appeals for this Circuit in Cobell v. Norton, 240 F.3d 1081, does not substantially alter this analysis. The court merely reaffirmed that "[i]t is the nature of any instrument that establishes a trust relationship that many of the duties and powers are implied therein. They arise from the nature of the relationship established." Cobell, 240 F.3d at 1099.

The plaintiffs argue that the Court should find such a fiduciary relationship in BIA's handling of the tribes' desire to acquire the training center property. Pls.' Mot. at 6. However, as defendants argue, the facts of this case do not support a finding that the tribes' relationship with BIA created a fiduciary relationship, even assuming that Cobell sets a lower standard. In Cobell, the assets in question were Individual Indian Money trust accounts—Indian assets that the United States already held and managed in trust. By contrast, the property at issue here remained in the government's possession and control; the tribes had no right of ownership to this land but instead were merely requesting that the government hold it in trust for them. "[T]he Government, in its dealings with Indian tribal property, acts in a fiduciary capacity." Lincoln v. Vigil, 508 U.S. 182, 194 (1993). This tribal ownership element is critical, given "the Supreme Court's requirement in Mitchell II that a duty be based upon control of tribal monies or property." See White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614, 628 (1987), aff'd, 5 F.3d 1506 (Fed. Cir. 1993) (table).

Cobell does not change the nature of a fiduciary relationship. As the Supreme Court stated in Mitchell II, the "necessary elements of a common-law trust" are a trustee, a beneficiary, and a trust corpus (the assets of the trust). 463 U.S. at 225 (citing Restatement (Second) of Trusts § 2, comment h, at 10 (1959)). In this case, the land belongs to the federal government, so

there is no trust corpus, a fact that plaintiffs concede. Pls.' Mot. at 7. Plaintiffs ask the Court to look at the nature of the parties' relationship; doing so and considering Cobell, the Court finds that it falls short of the fiduciary obligations recognized in the caselaw relied upon by plaintiffs.

Plaintiffs also refer to Brown v. United States, 86 F.3d 1554, 1561 (Fed. Cir. 1996), as support for their argument in favor of finding a fiduciary obligation in this case. Pls.' Mot. for Prelim. Inj. at 14. However, Brown's facts differ significantly from the facts in the record now before the Court. In Brown, the court found a fiduciary relationship based on the government's control of a leasing program, but the leased property in question was land already allotted to the Indians. See Brown, 86 F.3d at 1554, 1561. The case before this Court concerns government-owned land. Accordingly, the Court finds that defendants are entitled to judgment as a matter of law with respect to the fiduciary duty claim.

In their filings concerning plaintiffs' motion for a preliminary injunction, the parties addressed several other bases for determining whether a fiduciary duty has attached. The pending motions for summary judgment present a different standard from the earlier motion for preliminary injunction. In its Memorializing Opinion, the Court ruled only that the plaintiffs were not substantially likely to prevail on the merits of their claims. The parties now have stipulated that there are no material facts in dispute and that the issues of law have been fully briefed. Accordingly, the only question before the Court on the remaining arguments is whether either party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

C. Executive Orders

Plaintiffs contend that certain executive orders impose obligations on the federal government in its dealings with Indian tribes. Pls.' Mot. for Prelim. Inj. at 23. However, the policies cited by plaintiffs require consultation with tribes for projects that affect "tribal trust

resources," "trust property," and "Indian lands." Id. at 23-24. As noted above, the property in question is not part of a tribal trust but instead is owned solely by the federal government. The executive orders on which these policies are based apply specifically to government activities that "significantly" or "uniquely" affect tribal interests. Exec. Order No. 12,898; Exec. Order No. 13,084. While the plaintiffs claimed an interest in the disposition of the training center property, they were not uniquely situated in the decisionmaking process. Furthermore, the executive orders expressly state that they do not create "any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person." Id. Therefore, the executive orders and accompanying agency policy statements do not provide a basis for finding that the government assumed a fiduciary obligation to plaintiffs in this case.

D. General Trust Relationship

Plaintiffs also argue that the existence of a general trust relationship obligated the government to act pursuant to the standards of a fiduciary trustee with respect to the tribes' request for the property at issue. Pls.' Mot. for Prelim. Inj. at 15. However, "in the absence of a specific assumption of comprehensive fiduciary duties, the Government should not be presumed to act in the same capacity as a private trustee." Wright v. United States, 32 Fed. Cl. 54, 57 (1994). Regarding transfers of excess federal property, Indian tribes do not have an automatic vested interest in the property. Skokomish Indian Tribe v. Gen. Servs. Admin., 587 F.2d 428, 432 (9th Cir. 1978). Indeed, a federal agency retains discretion for disposing of excess or surplus property, even if its ultimate decision is somehow "erroneous." Id. Moreover, on the theory of general trust relationships, "[a]ll of these cases have invoked or at least referred to the trust responsibility doctrine in a [context] of particular, recognizable Indian rights, which were being

interfered with or not sufficiently protected, e.g., actual land occupancy (Cramer [v. United States, 261 U.S. 219 (1923)]); existing allotment funds ([United States v.] Mason [412 U.S. 391 (1973)])." Donahue v. Butz, 363 F. Supp. 1316 (N.D. Cal. 1973). No statutory authority mandates that an agency acquire excess or surplus federal property to hold in trust for a tribe.[5] Therefore, the government's general trust relationship with the plaintiffs does not impose a fiduciary obligation in this case.

E. BIA's Initial Assistance

Finally, plaintiffs argue that once BIA filed an initial proposal on behalf of the tribes, it assumed a fiduciary duty to file a final proposal. Pls.' Mot. for Prelim. Inj. at 15. However, the government's voluntary provision of services does not, standing alone, create a duty to continue to provide those services. Navajo Tribe of Indians v. United States, 9 Cl. Ct. 336, 416 (1986). In the case before this Court, BIA prepared a proposal for the tribes, and DOD announced that it would entertain such proposals from BIA only. Joint Facts ¶¶ 10, 13. However, the "excess property" status means that only other federal agencies may request a transfer; after the property becomes "surplus," other entities may make proposals directly—and once the training center was designated surplus, that is exactly what DOD invited the plaintiffs to do. Id. ¶ 26 ("we are returning your proposal . . . for your use in submitting your reuse plan to the Local Reuse Authority . . . we suggest the [Tribes] continue to work with the LRA"). Therefore, BIA's handling of the plaintiffs' request was merely voluntary.

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[5] The only specific provision relating to the transfer of property to tribes, 40 U.S.C. § 483(a)(2), applies only to "excess real property located within the reservation of any group, band, or tribe of Indians." The training center property lies within the city of San Diego and not on any land owned by the plaintiffs. Joint Facts ¶ 2.

Such voluntary activity may lead to liability only if the government's actions are less than "fair and honorable." Navajo Tribe, 9 Cl. Ct. at 416. Even that basis, however, requires a "special relationship," which must consist of more than "mere affirmative actions." Gila River Pima-Maricopa Indian Cmty. v. United States, 427 F.2d 1194, 1199 (Ct. Cl. 1970), cert. denied, 400 U.S. 819 (1970). In this case, BIA was under no obligation to pursue the tribes' request to completion—indeed, the Bureau's regulations set forth the criteria by which it evaluates various tribes' requests for excess property. See Joint Facts ¶ 7. The presence of a "special relationship" depends on the "nature and scope of any responsibilities assumed by the United States." Gila River, 427 F.2d at 1199. BIA's actions do not rise to the level that would create a "special relationship" and thus an obligation to continue to act. Therefore, the Bureau's handling of plaintiffs' request here did not establish a fiduciary duty on the part of the federal defendants in this case.

In summary, none of the arguments advanced by plaintiffs supports a conclusion that the defendants assumed a fiduciary duty in their dealings with the tribes. Cobell cannot create such a relationship in the absence of any trust corpus, and in this case, the fact that the property in question belongs to the government rather than the plaintiffs bars such a finding. Similarly, the executive policies, general trust relationship, and voluntary assistance do not establish a fiduciary obligation here. Since the parties agree that this question is the sole issue remaining at this stage of the litigation and since the defendants are entitled to judgment as a matter of law with respect to this issue, the Court will grant defendants' Cross-Motion for Summary Judgment.

III. CONCLUSION

For the foregoing reasons, defendants' Cross-Motion for Summary Judgment is granted, and this case is dismissed with prejudice. An Order will accompany this Memorandum Opinion.

July 26th, 2001

Thomas F. Hogan
Chief Judge