ORAL ARGUMENT NOT YET SCHEDULED

No. 06-5092

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANNA BUMGARNER FELTER, ET AL.,

Plaintiffs/Appellants

V.

DIRK KEMPTHORNE, SECRETARY OF INTERIOR, ET AL.,

Defendants/Appellees.

On Appeal from the United States District Court for the
District of Columbia, No. CV-02-2156 RWR

APPELLANTS' REPLY BRIEF

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* Authorities upon which we chiefly reply are marked with astrisks.

SUMMARY OF ARGUMENT

The Brief of the Appellees presents a scenario where the Appellants "sat on their rights" and failed to file their complaint within six (6) years after the "Secretary of the Interior published the required termination proclamation in the Federal Register on August 26, 1961." *See* Appellees' Brief ("AB") at p. 8-10. This scenario *might* be worthy of consideration on appeal *if* the Appellees' Amended Complaint ("AC") leveled a "head on" attack on the enactment of the Ute Partition and Termination Act ("UPA"), 25 U.S.C. § 677 *et seq*. Appellants' Amended Complaint attacks the faulty implementation of the UPA that resulted in the loss of valuable property and monies accrued to their ownership before the UPA was enacted by the United States Congress in 1954. As presented below, one Appellee, Calvin C. Hackford, explains in an affidavit that major elements of the UPA involving water rights, tribal assets held in common and the transfer of unrestricted control to him of "all other property held in trust" for him by the United States have not ever been accomplished as mandated by the Act. *See* Appellants' Appendix ("App.") at 32-33; Appellees' Addendum at p. 7-8. In other words, the purported termination of Appellants and their descendants remains uncompleted and "continues" unresolved as of this date. Appellees have not rebutted these alleged omissions and failures to properly implement the UPA and have

only succeeded in misstating the record and mischaracterizing the Amended Complaint.

Further, the Appellees' contend that Appellants waived their accounting claim by failing to raise it in the district court. AB at p. 14-15. Pub. L. No. 108-108, 117 Stat. 1263 was enacted outside of and independent from those factual allegations and legal issues contained within the *Felter* Amended Complaint. Thus, this case warrants departure from the normal rule that legal theories not asserted at the district court level ordinarily will not be heard on appeal.

ARGUMENT

I. The Appellees have misconstrued the Amended Complaint.

Contrary to Appellees contention, it is not the passage of the UPA in 1954 and the subsequent execution of actions in compliance thereto in 1961 that are at issue in the Amended Complaint. It is obvious that the Defendants have taken a number of liberties in characterizing the factual allegations in the *Felter* Amended Complaint as proof that the claims were untimely filed. One of the most significant distortions is the assertion that the Appellants themselves admit that they lost any share of the $32 million Indian Claims judgment for which they seek an accounting due only to their "termination" by Act of Congress. AB at pp. 6, 9, 10. Specifically, Appellants state at *Id.*, p. 9-10:

> "By their own reckoning, the right of the "mixed-bloods" to share in the $32 million Indian Claims Commission judgement vested in 1951, and that vested right was allegedly improperly cut off by the enactment of the UPA in 1954 and the formal termination of the status of the "mixed-bloods" as federally recognized Indians in 1961."

The statement directly above may establish a date for the point of contention raised by the Defendants that any cause of action over the $32 million dollar judgment should have been filed, at the latest, in 1967. On the other hand, nowhere did the Appellants allege in their Amended Complaint that "termination" alone caused them to lose any share of monies from the Indian Claims Commission judgment. AB at p. 6. What they did allege was that a faulty implementation of the UPA by the Defendants *after its enactment* caused an unlawful taking that has never been the subject of an accounting by the fiduciary, the United States of America. *See* Appellants' Opening Brief ("Br.") at p. 15. They also firmly alleged that an Act of the United States Congress terminating their status as federally recognized Indians cannot deprive them of their share in the judgment when no language in the unfilled UPA provided for such a "taking". *Id.*, p. 14. Additionally, Defendants' reliance on the "bright line" date of August 26, 1961 to start the clock ticking for 28 U.S.C. § 2401(a) purposes is misplaced. Such a position ignores allegations in the Amended Complaint that defective execution of the UPA caused *pre*-UPA property and monies

to be commingled with properties and monies specifically defined and enumerated under the Act to their specific detriment and injury.

Defendants offer no discussion on the major impact of the faulty implementation of the UPA on the *Felter* Appellees ability to file suit to resolve the unjust taking of their *pre*-UPA property and monies. Even the District Court held that, as a result of the UPA, the mixed-bloods were no longer considered members of the Ute Tribe and they lose rights to the $32 million Indian Claims Commission judgment. *Id.* The District Court's conclusion was reached without a sufficiently developed record since there is absolutely no clear language in the UPA that anyone can point to that deprives Appellants of their right to the judgment. In fact, 25 U.S.C. § 677r, "Indian claims unaffected" states otherwise:

> Nothing in this subchapter shall affect any claim heretofore filed against the United States by the tribe, or the individual band comprising the tribe.

Appellees' Addendum at p. 8. This severance of rights on the basis of an Act of Congress lacking plain language to this effect adds to the misconstrued nature of the Amended Complaint. It is a very significant and "novel" legal issue when a group of United States Citizens are deprived of a right to an accounting because they have had their status as federally recognized Indians stripped from them. *Id.*, p. 18. Obviously,

both the District Court and Appellees view the UPA as severing these valuable judgment rights without any mention of 25 U.S.C. § 677r.

The "affidavit" of Calvin C. Hackford alleges facts supporting the defective implementation of the UPA. App. at 32-33. Hackford's sworn assertions support Appellant's allegations in the Amended Complaint that the UPA remains unfilled and, thus, has been breached by the Appellees: "Hackford's declaration speaks for the fact that he has experienced confusion over whether the UPA was actually executed as intended by Congress." Br. at p. 10. Hackford states that from 1961 to October 5, 2003 that no deed or record shows that the mixed-blood individuals received their interest as tenants in common as required by 677m of the UPA. App. at 32. He states that the UPA provided at § 677o for the conveyance "outright" of lands and interest held in trust by individuals prior to the enactment of the UPA and that the Secretary has filed to convey these assets as the Act required. *Id*. A reading of § 677o supports Hackford's sworn statements: ". . .the Secretary is authorized and directed to immediately transfer to him unrestricted control of *all other property held in trust for such mixed-blood member by the United States. . . .".* (Emphasis added.). Appellees' Addendum at p. 7. "All other property" can only mean rights to property held by Appellants vested before the enactment of the UPA.

Yet another violation of the plain terms of the UPA can be found in Hackford's statement. 25 U.S.C. § 677t, "Water rights" reads: "Nothing in this subchapter shall abrogate any water rights of the tribe or its members." *Id.*, p. 8. When viewed in the context of the *Felter* Appellants' unfulfilled UPA argument at District Court level, Hackford's reference to water rights (App. 32-33) gains enormous importance:

> 19. In 1961, when the Proclamation was issued, purportedly terminating the trust responsibility to the individual mixed-blood the Department refused to acknowledge the individuals right to use water on his land as was agreed to in the implementation of the Ute Partition Act.

If Hackford's statements at Paragraphs 16- 21 are correct, the Secretary of Interior's pervasive entanglement in the regulation of his user right to his water appurtenant to his own individual allotment proves continuing violations of the UPA. Not only this but it also proves that, as to him, the UPA remains to be implemented as intended by Congress. If the Secretary had implemented the Act in accordance with Congress' mandate, Hackford's land and water rights would not be burdened by Department of the Interior regulations while he pays taxes to Uintah County and the State of Utah *as though his water rights were free and clear from federal interference.* The Amended Complaint sets out other numerous violations of the UPA that haunt the daily lives of each *Felter* Appellant.

In their Brief, Appellees describe the gravamen of Felter's claim as the improper termination of the trust relationship between the "mixed-bloods" and the federal government that occurred long ago. AB at 12. This characterization of the Amended Complaint is incorrect. If Hackford's statements are taken as true, then they support numerous allegations in the *Felter* Amended Complaint that the UPA was incorrectly implemented and it must be declared null and void. Br. at 4. If Hackford's statements are taken as true, then the UPA "continues" to be unfilled in its implementation as of the date of the filing of the Complaint and the "continuing violations doctrine" applies.

Finally, this case can be distinguished from *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997). *Lightfoot* addressed the issue of whether a failure to offer an employee adequate compensation should be deemed a "continuing violation" because the employee continued to "feel" the effects of the lower pay up to the time he was terminated from his employment. *Id*., p. 907. The continuing violation issue in *Lightfoot* was analyzed within the context of a claim filed pursuant to federal Equal Employment Opportunity laws and regulations. In *Lightfoot*, the 2d Circuit Court of Appeals held that a continuing violation could not be established merely because an employee continues to feel the effects of a discriminatory act on the part of the employer. *Id.* The 2d Circuit Court of Appeals relied on *Malarkey v. Texaco*, 559 F.

Supp. 117 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 674 (2[d] Cir. 1983 (per curiam) (affirming on grounds of failure to state a claim). *Melarkey*, at 121, held that "[c]ompleted acts such as termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing nature." In contrast to *Lightfoot*, *Felter* is a case filed over the failure of the United States of America to implement an Act of Congress, the UPA, in accordance with its terms. Mr. Hackford is not just "feeling" the effects of a discriminatory act perpetuated against him by the Defendant United States. Hackford is alleging that the Defendants have failed to convey to him his land and water "assets" as required by the UPA. He and the other *Felter* Plaintiffs argue that it is the "unfulfilled" and faulty performance of mandatory acts defined in the "Jim Crow" like UPA by the Appellees that fall within the "continuing violations doctrine." This is clearly not a "touchy feely" situation that is ephemeral or transitory. Appellants are hit full in the face with a big fist each day the UPA remains unimplemented.

Appellants do not seek redress for harm suffered as a result of the termination of their federally recognized Indian status. They are seeking redress for continued violations of an Act of Congress that were not and have not been executed to this day in accordance with the UPA. Appellees have not placed into the record before the

District Court evidence proving full compliance with the provisions of the UPA that Hackford describes in his "affidavit."

II. Public Law 108-108 does apply here.

Appellees contend that Appellants waived her Pub. L. 108-108, 117 Stat. 1241 (Nov. 10, 2003) accounting argument because it was not raised before the District Court. AB at p. 14. The case of *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) is cited in support of this proposition.

First, *Felter* and *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. Dec. 10, 2004) involve actions for historical accountings. Br. at p. 11, 16. What distinguishes *Felter* from *District of Columbia v. Air Florida, Inc.*, is the added factor of a separate enactment of a law by Congress, Pub. L. No. 108-108, outside of and independent from those factual allegations and legal issues set out in the *Felter* Amended Complaint and argued below. Unlike *Air Florida, Inc.*, *Felter* does not implicate the advancement of a precisely "new" legal theory on appeal.[1] If Appellants had presented their argument on Pub. L. 108-108 to the District Court for resolution, it is very likely that the language of this Indian accounting law would have prevailed and the cause of action for an accounting would not have been dismissed.

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[1] Appellants argued that their case was similar to *Cobell* and its progeny because both sought historical accounting of individual Indian monies. Br. at 4-5.

Contrary to Appellees' assertion, Pub. L. No. 108-108 would apply to any losses or mismanagement of Appellants' trust funds arising from *pre*-UPA sources and held by the Department of Interior in any Individual Indian Money accounts held in their name. A request for an accounting of the properties and monies owned before the enactment of the UPA does not necessarily present complex issues to be determined by numerous questions of fact better handled in the tribal forum.

Finally, *Felter* stands for an exceptional circumstance where injustice might otherwise result if this Court of Appeals does not use its discretion to consider the application of Pub. L. 108-108 to the Appellants' request for an accounting. Thus, this case warrants departure from the normal rule that legal theories not asserted at the district court level ordinarily will not be heard on appeal.

CONCLUSION

For the foregoing reasons and those set forth in the Appellants' Opening Brief, this Court of Appeal should reverse the judgment below and remand the case to be addressed on its merits.

DATED: October 13, 2006

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I do certify that this Reply Brief complies with the type-volume limitation. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 2,481 words. This certificate was prepared in reliance on the word-count function of the word-processing system (WordPerfect 10.0) used to prepare this Opening Brief.

DATE: October 13, 2006

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Dennis G. Chappabitty

CERTIFICATE OF SERVICE

I, Dennis G. Chappabitty, certify that on this 13th day of October 2006, I served the foregoing Reply Brief of Appellants, by First Class Mail, postage prepaid to:

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