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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MAJOR MARGARET WITT,	)	Docket No. C06-5195RBL
	)	
Plaintiff-Appellee,	)	Tacoma, Washington
	)	
vs.	)	September 13, 2010
	)	
UNITED STATES DEPARTMENT OF THE	)	
AIR FORCE; ROBERT M. GATES,	)	
Secretary of Defense; MICHAEL B.	)	COA# 10-36079
DONLEY, Secretary of the	)	
Department of Air Force;	)	
and COLONEL JANETTE L.	)	
MOORE-HARBERT, Commander,	)	VOLUME 1
446th Aeromedical Evacuation	)	
Squadron, McChord AFB,	)	
	)	
Defendants-Appellants.	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RONALD B. LEIGHTON  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Court Reporter: Teri Hendrix  
Union Station Courthouse, Rm 3130  
1717 Pacific Avenue  
Tacoma, Washington 98402  
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**APPEARANCES- CONTINUED**

**For the Defendants:            PETER J. PHIPPS  
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   Tacoma, Washington 98402  
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**Proceedings recorded by mechanical stenography, transcript  
produced by Reporter on computer.**

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September 13, 2010

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1 MONDAY, SEPTEMBER 13, 2010 - 9:30 A.M.

2 \* \* \* \* \*

3 THE COURT: Please be seated. Good morning.

4 THE CLERK: This is in Cause No. C06-5195RBL, Major  
5 Margaret Witt versus Department of the Air Force, et al.  
6 Counsel, please make their appearances.

7 MR. LOBSENZ: Good morning, Your Honor. Jim Lobsenz  
8 for Major Witt. With me at counsel table, Sarah Dunne, Sher  
9 Kung and our legal assistant.

10 MR. PHIPPS: Good morning. Peter Phipps from the  
11 Department of Justice representing defendants. I am joined by  
12 Bryan Diederich and Mr. Steve Buckingham from the United  
13 States Department of Justice. Also with me at counsel table  
14 is Lieutenant Colonel Todi Carnes from the U.S. Air Force.

15 THE COURT: All right.

16 This matter comes on for trial. Before opening statements  
17 I was told there was a matter of clarification from the  
18 Court's earlier order regarding issues of back pay and  
19 retirement credit. Do you want to make a statement for the  
20 record?

21 MR. PHIPPS: Yes. I do thank you very much for the  
22 opportunity.

23 There is a point we need to make, and we think we need to  
24 make it before the trial commences because it is in some way  
25 jurisdictional. It relates, as you said, to the Court's order

1 of last week; specifically, with respect to jurisdiction.

2 Now, let me just back up and say, on Friday counsel for  
3 both sides had a very productive conversation on this issue;  
4 nonetheless I still feel the need to put this on the record  
5 before commencement of trial.

6 On pages 1 and 2 of the Court's order, the Court indicated  
7 that the parties agree that the Court has jurisdiction over  
8 this case. Respectfully, we take issue with that  
9 characterization. Again, this jurisdictional point is  
10 complicated, but just to clarify that, whether the Court has  
11 jurisdiction, depends on a statute under which plaintiff  
12 proceeds.

13 And there's a question given plaintiff's statements in her  
14 motion for summary judgment regarding the type of relief that  
15 she seeks, whether or not she's proceeding under the  
16 Administrative Procedures Act, the little Tucker Act, or  
17 sometimes called the big Tucker Act.

18 Our belief is this: As the Court suggests in its order  
19 that plaintiff could get relief from her claims in the Court  
20 of Federal Claims, at any point, even after this trial has  
21 concluded, then there's no jurisdiction over this case under  
22 the APA, because plaintiff would have an adequate remedy  
23 elsewhere.

24 It is true that -- and our position is that the plaintiff  
25 needs to elect her remedy. That's what we ask plaintiff to

1 do, just to clarify that, and to be certain. Our concern is,  
2 and I think both parties are going to agree, we don't want a  
3 jurisdictional cloud to hang over this case in any way.

4 The Court said in the pretrial conference it wanted an  
5 upward trajectory for this case and we concur with that, but  
6 just to be certain, each one of these -- the APA, the little  
7 Tucker Act, and the big Tucker Act -- has different  
8 consequences. If the plaintiff says she's proceeding only  
9 under the APA, waiver of sovereign immunity, and isn't seeking  
10 monetary relief or monetary damages, then the case is as it  
11 was in the complaint and we don't see a jurisdictional concern  
12 here.

13 Now, the second option, if plaintiff is proceeding under  
14 the little Tucker Act seeking damages under \$10,000, then we  
15 can proceed here today, but little Tucker Act claims must go  
16 directly to the federal circuit, not the Ninth Circuit, and  
17 that has a dramatic effect on the governing law of this case,  
18 is the government's position.

19 Lastly, if plaintiff attempts to make allegations or seek  
20 relief that would put her under the jurisdiction of the big  
21 Tucker Act, then our position is certainly the Court doesn't  
22 have jurisdiction; that's classic federal Court of Claims  
23 points.

24 So, essentially what we wanted to do was highlight that by  
25 way of clarification, make certain our position that if

1 plaintiff proceeds here, that's an election of remedies under  
2 the APA and there wouldn't be the opportunity to go take a  
3 second bite of the apple. So it's a clarification and we  
4 wanted to respond.

5 THE COURT: Thank you, Mr. Phipps. Do you want to  
6 respond, Mr. Lobsenz?

7 MR. LOBSENZ: If I could, briefly, I agree we had a  
8 pretty productive conversation on Friday. I think he has  
9 people that he has to seek authority from, back in Washington,  
10 D.C., but as soon as I have confirmation, I can confirm that  
11 we are withdrawing any claim for relief under the little  
12 Tucker Act or any claim for monetary relief, and proceeding  
13 under the APA. I just felt that we owed to it you to explain,  
14 Mr. Phipps has explained 28 U.S.C. Section 1491(A)(2) would  
15 indicate if we were to proceed under the little Tucker Act,  
16 then anything that happened here -- the appeal would go to  
17 federal circuit. Neither side wants that, so I am withdrawing  
18 any such claim for monetary relief.

19 THE COURT: Very well.

20 All right. Any other preliminary matters we need to take  
21 up at this time?

22 MS. DUNNE: Yes, we have exhibits that have been  
23 stipulated to, that we wanted to offer into the record. Would  
24 you like us to do that now or would you prefer that after  
25 opening statement?

1 Q. So on deployment, how were you treated by your fellow  
2 service members in Kuwait?

3 A. Very professionally. I really can't stress that enough,  
4 that the military is a very professional institution.

5 THE COURT: Okay, on that note we are going to break  
6 for the day.

7 THE WITNESS: Yes, sir.

8 THE COURT: We will be in recess until 9:30 tomorrow  
9 morning. I have got a sentencing tomorrow morning, but it  
10 shouldn't delay our start time. Just keep your stuff here.  
11 You have conference rooms that you've occupied, so you are  
12 set. Clear the tables -- counsel tables, so that counsel can  
13 make use of the courtroom when we have our sentencing  
14 tomorrow.

15 Anything we need to take up at this time before we recess?

16 MR. LOBSENZ: No, Your Honor.

17 MR. PHIPPS: No, Your Honor.

18 THE COURT: Court will be in recess.

19 (The Court recessed to Tuesday, September 14, 2010, at the  
20 hour of 9:00 a.m.)

21 \* \* \* \* \*  
22 C E R T I F I C A T E

23 I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

24 /S/ Teri Hendrix  
25 Teri Hendrix, Court Reporter

January 7, 2011  
Date