12 Cl.Ct. 36

v.

The UNITED STATES, Defendant,

and

The Hoopa Valley Tribe of Indians, Defendant-Intervenor.

Charlene ACKLEY, et al., Plaintiffs,

v.

The UNITED STATES, Defendant,

and

The Hoopa Valley Tribe of Indians, Defendant-Intervenor.

Nos. 102-63, 460-78.

United States Claims Court.

March 17, 1987.

37 William C. Wunsch, San Francisco, Cal., and Clifford L. Duke, Jr. and

William K. Shearer, San Diego, Cal., for plaintiffs in the Short case.

Francis B. Mathews, Eureka, Cal., for plaintiffs in the Ackley case.

James E. Brookshire, Edward J. Passarelli and Pamela S. West, Washington,

D.C., with whom was Asst. Atty. Gen. F. Henry Habicht II, for defendant.

Thomas P. Schlosser, Seattle, Wash., for The Hoopa Valley Tribe of Indians.

OPINION

MARGOLIS, Judge.

On December 5, 1985, this court ruled from the bench on the measure of damages

to be awarded in this case, reserving the right to supplement its ruling with a

written opinion. The court subsequently requested briefing on whether monies

distributed *38 to individual Hoopa Indians after 1974 should be included in

the damages determination, and now concludes that the post-1974 distributions

did injure plaintiffs. To the extent this written opinion adds to or differs

from the December 5, 1985 bench ruling, that ruling is hereby superseded and

modified.

BACKGROUND

This case, filed in the United States Court of Claims on March 27, 1963, has

outlasted some 400 now deceased plaintiffs, the original trial judge, several

deceased attorneys, and even the court in which it originally was filed.

Presently at issue is the nature and extent of the damage award. The liability

of the defendant United States is established. Jessie Short, et al., v.

United States, 202 Ct.Cl. 870, 884, 486 F.2d 561, 568 (1973), cert. denied,

416 U.S. 961, 94 S.Ct. 1981, 40 L.Ed.2d 313 (1974) (Short I). In 1981,

the court directed the trial judge to develop standards to determine which

plaintiffs were "Indians of the Reservation" entitled to recover. Jessie

Short, et al. v. United States, 228 Ct.Cl. 535, 550-51, 661 F.2d 150, 158-

59 (1981), cert. denied, 455 U.S. 1034, 102 S.Ct. 1738, 72 L.Ed.2d 153

(1982) (Short II). In 1983, those standards were affirmed, Jessie

Short, et al. v. United States, 719 F.2d 1133, 1143 (Fed.Cir.1983), cert.

denied, 467 U.S. 1256, 104 S.Ct. 3545, 82 L.Ed.2d 849 (1984) (Short

III), and the case-by-case qualification of the 3,800 individual plaintiffs,

under those standards, is currently underway.

In 1973, the Court of Claims determined that the Hoopa Valley Reservation

(Reservation) in northern California was a single unit and that income derived

from the unallotted lands on one portion of the Reservation known as the

"Square" could not be distributed only to Indians on the official roll of the

Hoopa Valley Tribe (Tribe). Fndgs. 188-89, Short I, 202 Ct.Cl. at 980-

81, 486 F.2d 561. The Hoopa Valley Tribe was organized as an entity in 1950

and its membership includes most of the ethnological Indian tribes and groups

who traditionally occupied the "Square." In Short I, the court held that

the plaintiffs, mostly Yurok Indians living on another portion of the

Reservation known as the "Extension" or "Addition," should have participated in

per capita distributions made by the Secretary of the Interior (Secretary).

All "Indians of the Reservation" were held entitled to receive payments, and

the discriminatory distributions of the proceeds of the timber sales (and other

Reservation income) constituted a breach of the government's fiduciary duties

with respect to the qualified plaintiffs. Short III, 719 F.2d at 1135.

Although this opinion deals primarily with the timber revenues, the principles

enunciated herein generally apply to the other Reservation income as well.

The Secretary first began to distribute proceeds derived from the unallotted

trust lands of the Square exclusively to Hoopa Valley Tribe members in 1955.

Monies, consisting of revenues and earned interest, were paid per capita to

individual Indians on the Tribe's official roll, and were also paid to the

Hoopa Valley Tribe (as a government) for the purpose of developing or

maintaining services for the Reservation. The plaintiffs did not receive any

per capita distributions, nor were any payments made to a Yurok tribal

government, as the Yuroks were not formally organized. To date, efforts to

organize a Yurok tribal government have been unsuccessful, largely because of

this case. See Short II, 228 Ct.Cl. at 540, 661 F.2d at 153.

Following the liability decision in Short I, the Bureau of Indian Affairs

restricted the distributions made to the Hoopa Valley Tribe to only thirty

percent (30%) of the unallotted Reservation income. The thirty percent figure

was selected because the number of Hoopa tribal members, when compared with the

number of Short plaintiffs in 1974, represented about 30% of the total

number of potential "Indians of the Reservation." Hoopa Valley Tribe v.

United States, 219 Ct.Cl. 492, 502-03, 596 F.2d 435, 440 (1979). However,

additional per capita payments were made to the plaintiffs' exclusion after

1974 when the Secretary released these funds to the Hoopa Valley Tribe.

*39 On six separate occasions commencing on August 6, 1974 and ending on

March 7, 1980, per capita payments amounting to some $5,293,975 were made to

individual Hoopa Indians on the official roll of the Hoopa Valley Tribe, with

the knowledge, acquiescence or cooperation of the Secretary. The remaining

seventy percent (70%) of the funds has been held in trust by the Secretary in

"Indian Monies, Proceeds of Labor" accounts (IMPL accounts), pending resolution

of this case. These accumulated monies, sometimes referred to as the Short

escrow fund, now total over $60,000,000 and remain in the United States

Treasury, accumulating interest pursuant to statute.

The plaintiffs seek a share of what the Hoopas received directly through per

capita payments and indirectly through monies paid to the Hoopa Valley Tribe as

a government. Under the plaintiffs' theory, the monies paid to the Tribe would

be prorated among the Tribe's membership, and each plaintiff would receive an

amount equal to one prorated share. Monies spent by the Tribe to preserve the

timber lands and other governmental services that benefited the entire

Reservation would be offset against the plaintiffs' award. The plaintiffs also

seek interest on the award and the balance of the escrow fund, arguing that

these accumulated monies represent their exclusive share of the Reservation

resources collected after 1974.

The defendant, United States, and the defendant-intervenor, Hoopa Valley Tribe

of Indians, insist that, as individuals, the plaintiffs have no rights to

monies distributed to the Tribe for communal purposes. Defendants argue that

the law of this case mandates that the award be based on what the plaintiffs

would have received had the Secretary not unfairly limited the class of

beneficiaries receiving per capita payments. Defendants further argue that

monies held by the Secretary in the escrow fund are communal or tribal in

nature, and this court lacks jurisdiction to award damages from this fund. The

government and the Tribe assert that plaintiffs, as individuals, have no rights

in communal revenues derived from unallotted lands until such revenues are

individualized through per capita payments.

In addition, the defendant argues that per capita distributions made after

1974 should not be included in the damage award. The government reasons that

since the Secretary retains control of the escrow fund and could decide to

distribute shares of the fund to the plaintiffs in the future, an award at this

time would be premature. With respect to interest, the defendant argues that

the government has not waived its sovereign immunity and that interest,

therefore, cannot be assessed. The defendant-intervenor disagrees with the

defendant in one respect. The Tribe argues that post-1974 per capita

distributions to its members did injure the plaintiffs, and they should now be

compensated for these post-1974 breaches of trust.

The court has considered the briefs filed by the parties regarding the post-

1974 distributions, reconsidered the extensive briefs filed on the issue of

damages generally, and reviewed the oral arguments presented.

DISCUSSION

[1] To the extent that prior opinions in this case specifically address the

issue of damages, those opinions emphasize the individual nature of the

plaintiffs' claims and indicate that recovery is limited to participation as

individuals in per capita distributions. As was stated by the U.S. Court of

Claims:

> [a]dopting the trial judge's opinion, ... [in 1973] we held that the Square and the Addition together constituted a single reservation, that all the Indians of that Reservation were entitled to share in all of its revenues that were distributed to individual Indians (including the timber revenues from the Square), and that the plaintiffs who were Indians of the

Reservation were entitled to recover the monies the government withheld from them.

Short II, 228 Ct.Cl. at 538, 661 F.2d at 152 (emphasis added). Elsewhere the court stated, "[i]t follows . . . that individuals whom the Secretary arbitrarily excluded from per capita distributions have the *40 right to recover." Id. at 543, 661 F.2d at 155.

The Federal Circuit's affirmation of the trial judge's 1982 opinion

establishing the eligibility standards, and the prior Short I and Short

II opinions, clearly characterized the plaintiffs' claim as one for breaches of

trust based upon discriminatory distributions of unallotted Reservation

revenues. This lawsuit is a claim for money damages, not one to partition or

individualize the unallotted common lands and resources of the Reservation.

Unallotted lands, by their very definition, are not individual in nature, but

rather are held in common for Indian tribes, nations, bands, or communities.

Similarly, the revenues from unallotted lands are communal or tribal in nature

until they are individualized. Breaking up or allotting communal or tribal

resources to individual Indians was once federal policy; however, that policy

is now disfavored. See 25 U.S.C. s 461 (1982); Felix S. Cohen's Handbook

of Federal Indian Law, 136-144, 170-75 (R. Strickland ed. 1982).

The unique situation on the Hoopa Valley Reservation, where the only formally

organized tribal government includes only a fraction of the Indians for whom

the Reservation was established, required the approach taken by the Court of

Claims in its 1973 ruling and subsequent decisions. Faced with the unusual

situation of no organized Yurok tribal government with an existing tribal roll

to determine which plaintiffs were unjustly excluded, the court adopted

approximations of the Hoopa Valley Tribe's enrollment standards to identify

the "Indians of the Reservation" who the Secretary should have included in the

per capita distributions.

In discussing the eligibility standards, Trial Judge Schwartz, who wrote the

1973 liability opinion, concluded that:

[i]n the present circumstances of per capita distributions already made to

fewer than those entitled, it is therefore sensible and equitable to define the

group improperly deprived of payments by the same definitions as identified

those who received payments, less the factors wrongfully used to exclude the

claimants from the distributions.

Short v. United States, No. 102-63, slip. op. at 28 (Ct.Cl. March 31,

1982). The law of the case therefore mandates that the individual qualified

"Indians of the Reservation" be included in any per capita distributions made

in the years until final judgment, and for the years to come while the

situation on the Reservation remains the same. Short III, 719 F.2d at 1143.

It should be clearly understood that this court is not determining which

individuals are members of a "Yurok Tribe" through the qualification process.

The decision regarding tribal citizenship or membership is an essential

attribute of Indian self-government and rests with the Indian tribe or nation

concerned, not this court. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72

n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978). Nor is this court

determining the extent of jurisdiction or the nature of rights that an

organized "Yurok Tribe" might have in the unallotted trust-status lands of the

Hoopa Valley Reservation. See Lillian Blake Puzz, et al. v. U.S. Department of

the Interior, No. C80-2908 TEH, slip op. at 14-15 (N.D.Cal. Oct. 2, 1984).

This action is one by individual Indians of the Hoopa Valley Reservation for a

breach of trust that will compensate them for monies they would have received

had the per capita distributions been made in a non-discriminatory manner.

As stated in the original liability opinion:

[s]uch of the plaintiffs as are found herein to be Indians of the reservation

will become entitled to share in the income from the entire reservation,

including the Square, equally with all other such Indians, including the

Indians of the Square.

Fndg. 189, Short I, 202 Ct.Cl. at 981, 486 F.2d 561. Therefore, a

qualified plaintiff holds individual rights as an Indian of the Reservation

equal to that of an enrolled Hoopa Valley Tribe member. Tribal or communal

assets that have not been individualized may not be awarded since plaintiffs

are suing as individuals under 28 U.S.C. s 1491 (1982).

*41 A. Per Capita Distributions Prior to 1974

Both the defendant and the defendant-intervenor concede that the qualified

Short plaintiffs are entitled to compensation for per capita distributions

made six years prior to the filing of suit on March 27, 1963. Qualified Ackley

plaintiffs may recover only for distributions made six years prior to the

filing of their suit on October 20, 1978. From March 27, 1957 to June 30,

1974, $23,811,963.75 in tribal or communal monies was distributed per capita to

the Tribe's individual members. However, the defendant and the defendant-

intervenor disagree with the plaintiffs on how that compensation should be

measured. The plaintiffs assert that they are entitled to receive what each

Hoopa Valley tribal member received through per capita payments on a dollar-

for-dollar basis. The defendants argue that the plaintiffs were damaged only

to the extent that they failed to receive the funds they would have received,

had the Secretary properly distributed the money.

The proper measure of damages to qualified plaintiffs will be the share they

would have received had the distributions been made in a non-discriminatory

manner. See Restatement (Second) of Trusts s 205 comment a (1959). Therefore,

each qualified plaintiff alive at a given date of distribution will receive a

share equal to the total amount of money distributed per capita (principal and

interest), divided by the total number of eligible "Indians of the Reservation"

who received, or should have received, a payment according to the formula as

shown:

total amount of money distributed per capita

Hoopas who received payments + qualified plaintiffs

The total money recovery for each qualified plaintiff will be the sum of the

amounts to which he or she is entitled for each per capita distribution, plus

interest from the date of distribution as discussed in section D of this

opinion.

B. Per Capita Distributions After 1974

[2] The defendant's argument that per capita distributions made after 1974 did

not injure plaintiffs is without merit. The mere possibility that the

Secretary could award funds at some future date, equal to what individual

Hoopas received and plaintiffs should have received, does not affect this

court's present ability to grant relief. As determined in 1973, plaintiffs

were entitled to participate in per capita distributions from Reservation

proceeds. Fndgs. 188-89, Short I, 202 Cl.Ct. at 980-81, 486 F.2d

561. Per capita distributions were made before and after 1974, but the

plaintiffs were denied participation. Hence, they are entitled to recover.

It is also without consequence that the monies were first distributed by the

Secretary to the Hoopa Valley Tribe for subsequent distribution to the Tribe's

individual members. Where the Secretary's action or failure to act permits a

violation of his fiduciary obligations to occur, the United States is liable

for the damages sustained. United States v. Mitchell, 463 U.S. 206, 226-28,

103 S.Ct. 2961, 2972-73, 77 L.Ed.2d 580 (1983) (Mitchell II). Per capita

distributions made after 1974 will be accounted for in the damage award in the

manner indicated above. The Secretary cannot avoid established trust

obligations to qualified plaintiffs by making discriminatory distributions to

individual Hoopas through the Hoopa Valley Tribe, when such distributions were

otherwise prohibited by the law of this case.

C. Distributions to the Tribe

The Secretary of the Interior, vested with certain discretionary powers over

the management of unallotted Indian resources, decides when and how

distributions of timber revenues from unallotted lands are to be made under

25 U.S.C. s 407 (1982). The Secretary's decision to provide necessary funds

from unallotted lands to a tribal government, rather than to individuals,

should be accorded some deference. These funds can be used to support tribal

sovereignty and permit organized and effective delivery of services to persons

living on reservation lands. There is nothing in the legislative and

administrative history of the Reservation to suggest that the Secretary lacks

the authority to support the development of tribal governments.

*42 The Reservation was established pursuant to the Act of April 8, 1864,

13 Stat. 39, which authorized the President to locate not more than four

Indian reservations in California, at least one of them to be in the northern

district of the state. Public notices were posted in 1864 and 1865 without

mention of any Indian tribe by name and without intimation of which tribes were

to occupy the Reservation. The same is true of President Grant's executive

order of 1876 that formally established the Reservation and its boundaries.

Short I, 202 Ct.Cl. at 876-78, 486 F.2d at 563. Since there were to be no

more than four reservations in the state, it was inevitable that each

reservation could and almost certainly would be occupied by more than one

ethnological tribal group.

The Addition or Hoopa Extension was added to the Reservation by order of

President Harrison in 1891. That executive order expanded the size of the

Hoopa Valley Reservation to include the "Old Klamath River Reservation" and the

connecting strip. Mattz v. Arnett, 412 U.S. 481, 493, 93 S.Ct. 2245, 2252,

37 L.Ed.2d 92 (1973); Fndg. 9, Short I, 202 Ct.Cl. at 887, 486 F.2d 561.

Plaintiffs argue that this joinder, which gave rise to the substantive rights

in the unallotted Reservation resources distributed per capita, also entitles

them to receive a share of monies appropriated to the Hoopa Valley Tribe.

[3, 4] Plaintiffs, like non-Indians within Indian country, do benefit from the

presence of an organized tribal government and also benefit from general

federal services administered by the Tribe that are not premised upon Hoopa

membership. See 18 U.S.C. s 1151 (1982) (definition of Indian country). To

be sure, plaintiffs arguably were not benefited by tribal services that they

were ineligible to receive because they were not enrolled Hoopas. However, an

individual Indian's rights in tribal or unallotted property arises only upon

individualization; individual Indians do not hold vested severable interests

in unallotted tribal lands and monies as tenants in common. See United

States v. Jim, 409 U.S. 80, 82-83, 93 S.Ct. 261, 263, 34 L.Ed.2d 282 (1972);

Gritts v. Fisher, 224 U.S. 640, 642, 32 S.Ct. 580, 581, 56 L.Ed. 928

(1912); Felix S. Cohen's Handbook of Federal Indian Law, supra, at 605-06.

Just as an enrolled Hoopa could not claim a "share" of monies used by the Hoopa

Valley Tribe as a government, plaintiffs may not recover a portion of monies

distributed to the Tribe. Thus, payments made to the Tribe will not be

credited to or deducted from the plaintiffs' award as individuals.

The Secretary may choose to make future distributions on a tribal basis, make

additional per capita payments to individuals, or both, but the distributions

must be made in a non-discriminatory manner. To mandate that the Secretary

distribute monies dollar-for-dollar between an organized tribal government and

a group of individual Indians could hinder the Secretary's implementation of

the Congress' and the Executive's policy of strengthening tribal governance and

self-determination. See Indian Self-Determination and Education Assistance

Act, Pub.L. No. 93-638, 88 Stat. 2203, codified at 25 U.S.C. ss 450, et

seq. (1982 & Supp. III 1985); President's Statement on Indian Policy, 19

Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983).

D. Interest on the Amounts Owed

[5, 6] In this case, as in Mitchell II, the timber statute in question,

25 U.S.C. s 407, has waived the government's sovereign immunity, permitting

recovery of damages sustained from a breach of trust. Short III, 719 F.2d

at 1134-35; see Mitchell II, 463 U.S. at 222-26, 103 S.Ct. at 2970-73.

Despite this waiver, as a general matter, interest is not assessable in claims

against the United States unless a Fifth Amendment taking has occurred, or

unless interest is provided for in an express contractual provision or by

statute. 28 U.S.C. s 2516(a) (1982); United States v. Alcea Band of

Tillamooks, 341 U.S. 48, 49, 71 S.Ct. 552, 95 L.Ed. 738 (1951); United

States v. Mescalero Apache Tribe, 207 Ct.Cl. 369, 380, 518 F.2d 1309, 1316

(1975), cert. denied, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976).

Nor can interest be awarded on the basis of policy, United States v. N.Y.

Rayon Importing Co., 329 *43 U.S. 654, 658-59, 67 S.Ct. 601, 603-04, 91

L.Ed. 577 (1947), or implied notions of just compensation, United States v.

Thayer-West Point Hotel Co., 329 U.S. 585, 588-90, 67 S.Ct. 398, 399-401, 91

L.Ed. 521 (1947). Recovery of interest in a judgment is also prohibited where

a statute otherwise provides for interest, but the monies at issue were never

held by the government in an interest-bearing account. Navajo Tribe v.

United States, 9 Cl.Ct. 227, 271 (1985); Mitchell v. United States, 229

Ct.Cl. 1, 16, 664 F.2d 265, 275 (1981), aff'd, 463 U.S. 206, 103 S.Ct.

2961, 77 L.Ed.2d 580 (1983).

[7] Plaintiffs argue, in addition to their claim that interest is authorized

by statute, that a Fifth Amendment taking has occurred. That issue need not be

addressed since 25 U.S.C. ss 161a, 161b, 162a provide for the payment of

interest for the type of funds in question. The defendant concedes that the

unallotted Reservation income was held in an "Indian Monies, Proceeds of

Labor" (IMPL) account, but argues that plaintiffs, as individuals, may not

claim interest on such accounts because such monies are held for "tribes,"

under 25 U.S.C. ss 161a, 161b, 162a. Further, the defendant argues, once

these monies were individualized and distributed to Hoopas, the monies lost

their interest-bearing nature as "tribal" funds, therefore barring the

plaintiffs' interest claim. This argument is not persuasive.

The accounts of revenues from unallotted lands are tribal or communal in

nature, as distinguished from Individual Indian Money (IIM) accounts held for

individual Indians, which are not necessarily required by statute to gather

interest. See American Indians Residing on the Maricopa--Ak Chin

Reservation v. United States, 229 Ct.Cl. 167, 203-04, 667 F.2d 980, 1003

(1981), cert. denied, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982).

Unlike the situation in Navajo Tribe, where the claimed monies were never

deposited in an interest-bearing account, it is clear that these IMPL funds

were held by the government in trust accounts and were accumulating interest

pursuant to express statutes.

The income from unallotted Reservation lands was held in U.S. Treasury Account

14X7236--"Proceeds of Labor, Hoopa Valley Indians," and the interest from these

proceeds was held in U.S. Treasury Account 14X7736. See Fndgs. 167-72,

Short I, 202 Ct.Cl. at 970-72, 486 F.2d 561. These types of funds

were required to accumulate simple interest at the rate of four percent per

annum, pursuant to the Act of June 13, 1930, 46 Stat. 584, codified at 25

U.S.C. ss 161a, 161b (1982). In 1984, this interest provision was amended

by the Act of Oct. 4, 1984, Pub.L. No. 98-451, 98 Stat. 1729, mandating that

the minimum interest collection rate be at rates as determined by the Secretary

of the Treasury, rather than the flat four percent. 25 U.S.C. s 161a (Supp.

III 1985). These funds could also have been invested, and the defendant

concedes were invested, under the provisions of 25 U.S.C. s 162a (1982) in

bank accounts for interest higher than the four percent of ss 161a, 161b.

[8, 9] But for the defendant's wrongful distribution, the plaintiffs' shares

of the unallotted income would have continued to accrue interest. In fact, the

accumulated escrow fund monies still held by the government continue to accrue

interest. While IMPL accounts are tribal or communal in nature, individual

Hoopas received portions of both accounts, including the accrued interest, in

their per capita payments. Thus, qualified plaintiffs should be treated

similarly. The government may not eliminate liability for interest mandated by

statute simply by wrongfully disposing of the principal to others. The

standard of duty the government owes as a trustee to Indians is not mere

reasonableness, but rather the highest fiduciary standard. American Indians

Residing on the Maricopa--Ak Chin Reservation, 229 Ct.Cl. at 182, 667 F.2d at

990. Where, as here, funds were bearing interest by statute in the U.S.

Treasury, and were disposed of wrongfully, the government is liable for

interest. United States v. Gila River Pima--Maricopa Indian Community, 218

Ct.Cl. 74, 85-86, 586 F.2d 209, 216-17 (1978); see Coast Indian

Community v. *44 United States, 213 Ct.Cl. 129, 157-58, 550 F.2d 639,

655 (1977).

[10] Compound interest, or interest on interest, may not be assessed against

the United States under s 161a. Menominee Tribe v. United States, 97 Ct.Cl.

158, 162-63 (1942) (interest requirements of 25 U.S.C. s 161a applicable

only to principal, not interest accounts). Therefore, plaintiffs' recovery of

interest pursuant to s 161a will be computed to include simple interest only on

the principal portion of the share that plaintiffs would have received from the

date of each distribution to the effective date of the amendment to s 161a.

For the period after the effective date of the amendment to s 161a, interest

will be paid pursuant to that amended section.

Plaintiffs argue that they should recover a "reasonable rate" of interest,

correctly stating that the statutory four percent interest rate on IMPL funds

is a floor rather than a ceiling. Mitchell, 229 Ct.Cl. at 15-16, 664 F.2d

at 274; Cheyenne-Arapaho Tribes v. United States, 206 Ct.Cl. 340, 348,

512 F.2d 1390, 1394 (1975). The award of an interest rate higher than that

provided by ss 161a, 161b is available for funds invested by the Secretary in

banks under s 162a. However, the recovery of a higher rate under s 162a is

premised upon a showing of higher investment opportunities available to the

government during the period in question. Cheyenne-Arapaho Tribes, 206

Ct.Cl. at 349-51, 512 F.2d at 1395-97. Provided such a showing is made, post-

distribution interest rates will be at a higher rate as provided by 25

U.S.C. s 162a, as amended on Nov. 4, 1983 by Pub.L. No. 98-146, 97 Stat.

929. 25 U.S.C. s 162a (Supp. III 1985). Even without a showing of higher

investment opportunity, the rate will be no less than the four percent required

under 25 U.S.C. ss 161a, 161b, and the rate determined by the Secretary

of the Treasury for the period after the effective date of the amendment of s

161a.

E. Monies Remaining in the Short Escrow Fund

[11] Plaintiffs seek to have this court award them the so-called Short

escrow fund in its entirety, arguing that the accumulated income and interest

represents their exclusive share of Reservation income collected since 1974.

However, under 28 U.S.C. s 1491, this court may award only "actual,

presently due money damages from the United States." United States v.

Testan, 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976) (quoting

United States v. King, 395 U.S. 1, 3, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52

(1969)). Plaintiffs have not been damaged with respect to these funds, still

held in the U.S. Treasury, and which remain subject to the Secretary's

discretion under 25 U.S.C. s 407. To date the Secretary's conduct with

regard to these monies remaining in the escrow fund, has not given rise to an

action for damages for injuries sustained.

This court cannot grant prospective relief for contemplated injury in the

future or issue a general declaratory judgment under its jurisdictional

constraints. The law of this case does require that if the Secretary decides

to make per capita distributions of unallotted Reservation income, all persons

who fall into the category of an Indian of the Hoopa Valley Reservation, alive

at the time of a given distribution, be included. However, until these monies

are individualized or otherwise handled contrary to law, plaintiffs have not

been injured with respect to these funds, and the requested relief will not be

granted.

The Hoopa Valley Tribe has expressed some concern that the defendant will

attempt to pay damages to the plaintiffs from the monies remaining in the

escrow fund. While the defendant-intervenor requests this court to direct the

disposition of the escrow funds for its benefit, this issue is not yet ripe for

decision, and there is serious doubt whether such authority is within the scope

of the court's powers absent a definitive action causing injury.

The Secretary is given authority to manage timber resources on Indian lands

under 25 U.S.C. s 407. This court will not substitute its judgment for that

of the Secretary, who is in a better position to determine the needs of the

Reservation and its *45 residents. Under s 407, Congress has stated that

the income from the sale of timber on unallotted lands "shall be used for the

benefit of the Indians who are members of the tribe or tribes concerned in such

manner as [the Secretary] may direct," allowing only for administrative expense

deductions. 25 U.S.C. s 407 (1982). While the Secretary does exercise

discretion over these funds, such discretion is not unlimited. The action must

be consistent with the government's overriding fiduciary obligation to Indian

tribes and individual Indians in the management of their resources, property,

and affairs. The violation of these duties under the statute would give rise to

an action for money damages. Mitchell II, 463 U.S. at 226, 103 S.Ct. at

2972; Short III, 719 F.2d at 1135; White Mountain Apache Tribe v.

United States, 11 Cl.Ct. 614, 669 (1987); Navajo Tribe, 9 Cl.Ct. at 232.

However, until such a violation occurs, this court is constrained from ruling

with regard to this issue.

CONCLUSION

Recovery of damages for those plaintiffs who qualify as Indians of the

Reservation will be calculated based upon their wrongful exclusion from prior

per capita distributions, which includes their shares as calculated above, plus

interest as provided by statute. The Short escrow funds remain subject to

the Secretary's discretion, and shall be expended as the Secretary determines,

for the benefit of the Indians of the Reservation as provided by statute, and

in a manner otherwise consistent with this opinion and previous court

decisions.