United States Court of Appeals for the Federal Circuit

WALTER McCOVEY, SR., ET AL.;

Appellants-Intervenors,

v.

CHEYENNE-ARAPAHO TRIBES OF INDIANS, ET AL., and THE UNITED STATES,

Appellees.

Appeal No. 83-767.

DECIDED: August 12, 1983

Before DAVIS, BALDWIN, and MILLER, Circuit Judges.

MILLER, Circuit Judge.

DECISION

The order of the United States Claims Court, denying appellants' motion to intervene as untimely, is affirmed.

OPINION

Appellants' right to intervene under United States Claims Court Rule 24(a) is conditioned upon their submission of a "timely application." The Claims Court correctly considered the three factors required by Sumitomo Metal Industries, Ltd. v.

Babcock & Wilcox Co., [illegible] weighed in making timeliness determinations under that rule.

We hold that an inordinate length of time elapsed from when appellants first knew, or reasonably should have known, of their right to intervene and when appellants actually moved to intervene. Although the accounts in which appellants claim an interest may not have been specifically identified by account number in the 1975 Cheyenne-Arapaho opinion, sufficient information was set forth ("proceeds of labor" and a correlative "interest" account with approximate balances at various dates) to place a reasonable asserted co-owner on notice that the precise identity of the accounts required investigation. Appellants had actual knowledge of the opinion in December 1975, relying on it to support an unsuccessful motion to compel the government to provide investment records in order to include a mismanagement of funds claim in Short v. United States, No. 102-63 (Ct. Cl. Oct. 6, 1982). Further, in Short v. United States, 486 F.2d 561, 202 Ct. Cl. 870 (1973), cert. denied, 416 U.S. 961 (1974), the Hoopa Valley Tribe intervened for the purpose of contesting appellants' right to share in certain all-reservation property. That issue having been raised in the Short litigation, we are satisfied that a prudent party would have been apprised that the Hoopa Valley Tribe believed that at least some reservation property belonged solely to the Tribe, and that title to other property claimed by the Tribe should be clarified so that any colorable claim for co-ownership could be asserted.

Further, we note that intervention would necessitate reopening of proceedings to determine, at a minimum, the extent of appellants' interest. The Hoopa Valley Tribe was willing to compromise some of its claims in exchange for prompt payment of a lesser amount of money. The resulting binding settlement agreement and judgment distribution plan (formulated by the Bureau of Indian Affairs, approved by Congress, and recently implemented) would be extremely difficult, if not impossible, to set aside.

Appellants' argument that there were "unusual circumstances" compelling a determination that the application for intervention was timely is not well-founded. The fact that a certain amount of secrecy surrounded the settlement negotiations between the Hoopa Valley Tribe and the government does not obviate the fact that appellants had actual notice in 1975 of a court opinion discussing certain accounts which would have led a reasonable asserted co-owner of similar accounts to determine whether the two sets of accounts were, in fact, one and the same, as stated above.

It is well established that all beneficiaries are normally deemed indispensable parties to an action affecting trust property (3 J. MOORE, W. TAGGERT, & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 19.18(1) (2d ed. 1982)), in order to avoid unfair repetition of actions against defendant trustees which could result from individual relitigation by each successive beneficiary. See Matthies v. Seymour Manufacturing Co., 270 F.2d

365, 370 (2d Cir. 1959). However, because the essential purpose of the rule is to protect the trustee from a multiplicity of suits, the requirement for joinder may be waived by him. See Britton v. Green, 325 F.2d 377, 390 (10th Cir. 1963) (Phillips, J., concurring). Here, the defendant trustee (the government) has impliedly waived its right to have appellants joined as indispensable parties by knowingly entering into a settlement agreement solely with the Hoopa Valley Tribe, leaving itself susceptible to suit by any other beneficiary of the trust who retains a direct, separable right of action if not joined. See Stevens v. Loomis, 334 F.2d 775, 778 (1st Cir. 1964). Further, courts have ruled that even indispensable parties do not always have a right to intervene. See Hoots v. Pennsylvania, 495 F.2d 1095, 1096 n.3 (3d Cir. 1974), cert. denied, sub nom. Churchill Area School District v. Hoots, 419 U.S. 884 (1974).

The Claims Court's denial of the motion to intervene was clearly not an abuse of discretion.