IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LILLIAN BLAKE PUZZ, et al.,

Plaintiffs,

v.

UNITED STATES DEP'T OF THE INTERIOR, et al.,

Defendants.

WILFRED K. COLEGROVE, et al.,

Cross/Counter Claimants.

NO. C80-2908 TEH

ORDER

For the last several years, this case has been the battleground of an acrimonious struggle over economic and political rights on what was known as the Hoopa Valley Reservation. On April 8, 1988, after extensive briefing by all concerned, this Court granted in part and denied in part motions for summary judgment brought by both sides, and awarded plaintiffs injunctive relief. Plaintiffs now seek to recover their attorneys' fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(a), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. Unfortunately, the instant fee dispute is proving no less contentious than the underlying litigation.

I. BACKGROUND

Created by Executive Order in 1876, the Hoopa Valley Reservation (or "Reservation") originally consisted of an area known as "The Square."[1] It was later expanded in 1891 to include a 20 mile area along the Klamath River known as "The Extension". A minority of the Indians[2] of the Reservation (approximately 30%) are members of the Hoopa Valley tribe and governed by the Hoopa Business Council ("HBC"). They live mostly on the timber-rich Square which is the source of millions of dollars in income. The remaining Indians of the Reservation trace their heritage to the Yurok tribe or other historic Indian groups. They live primarily on the impoverished Extension and have no tribal council or other governing body.

In 1980, several non-Hoopa Indians of the Reservation filed suit against the Bureau of Indian Affairs and various federal officials ("the government" or "federal defendants"), and members of the Hoopa Business Council. They alleged that the federal defendants, working closely with the HBC, were improperly administering the Reservation so as to deny the majority non-Hoopa Indians their share of Reservation

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[1] Congress had previously authorized four Indian reservations in California by Act of April 8, 1864 (13 Stat. 40).

[2] The Court has followed the parties' practice of referring to Native American persons and groups as Indians. This has been done merely as a matter of convenience and is not intended to convey a lack of respect for Native Americans.

resources and exclude them from participation in Reservation administration.

Eight years of litigation culminated in our Order of April 8, 1988, in which we granted in part plaintiffs' motion for summary judgment. That Order found that the 1864 Act authorizing the Reservation, and subsequent legislation, had created a reservation for multiple tribes, not just the Hoopa tribe in particular, and that the government had an overriding responsibility to administer the Reservation for the benefit of all Indians of the reservation, not just the Hoopa Indians. Order at 5, 14. We further concluded that the federal defendants could not continue to administer the Reservation in a manner that gave the Hoopas idiosyncratic rights or denied plaintiffs the use and benefit of the reservation and its resources. Order at 18-20.

While our April 8, 1988 Order did not embrace a number of plaintiffs' positions, it vindicated their basic claim that they had been unlawfully discriminated against in the management and operation of the reservation. Federal defendants were ordered to modify their procedures to ensure that non-Hoopas received a political voice in the operation of the Reservation and that Reservation resources were fairly allocated among all Indians of the Reservation.

Specifically, we ordered that 1) "federal defendants shall not dispense funds for any projects or services that do not benefit all Indians on the reservation in a non-

discriminatory manner," 2) federal defendants take steps to "ensure that all Indians receive the use and benefit of the reservation on an equal basis," 3) federal defendants submit a compliance plan that replaced their current "issue-by-issue" procedure of reservation governance with "a more effective means of ascertaining and responding to non-Hoopas' concerns," and 4) federal defendants not permit Reservation funds to be used to fund the Hoopas' legal expenses against the Yuroks. In addition, the Court invalidated prospectively a memorandum of understanding that allowed the Hoopa timber company to buy Reservation timber on a preferential basis.

Shortly thereafter, on October 31, 1988, while the April 8th Order was on appeal, Congress passed the Hoopa-Yurok Settlement Act, Pub. L. 100-580, 102 Stat. 2924. In essence, the Act partitioned the Hoopa Valley Reservation into two reservations, the Square for the Hoopas, and the Extension for the Yuroks. As a result, the issues raised by this action concerning the administration of the former Hoopa Valley Reservation were mooted. Accordingly, we dismissed this action as moot on December 21, 1988; the Ninth Circuit Court of Appeals similarly dismissed the pending appeal as moot on December 27, 1988.

II. EQUAL ACCESS TO JUSTICE ACT

A. Prevailing Party Status

Plaintiffs seek a fee award against the federal defendants pursuant to the Equal Access to Justice Act which provides in part that "a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

Thus, our initial inquiry is whether plaintiffs qualify as "prevailing parties." As the Supreme Court recently reiterated, plaintiffs are a prevailing party, for purposes of a fee award, if they succeed on "'any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing the suit.'" Texas Teachers Ass'n v. Garland School District, 109 S.Ct. 1486, 1493 (1989). "The touchstone of the prevailing party inquiry," the Court elaborated, "must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley [461 U.S. 424 (1983)], not the

availability of a fee award vel non." Id.

The April 8, 1988 Order amply established plaintiffs as prevailing parties under the "generous formulation," id., described above, and defendants do not seriously contend otherwise. Rather, they contend that the passage of the Hoopa-Yurok Settlement Act ("the Act"), in effect, rescinded plaintiffs' status as prevailing parties because, as a result, the case was mooted and plaintiffs failed to obtain a favorable practical outcome. While defendants' position is not without superficial appeal, careful consideration of the underlying policies at issue compel a contrary result.

First, it is important to remember that the mooting event --passage of the Act-- was not prompted by a determination that the Court's legal analysis was in error. Had that been the case, the Act could have been construed as a "reversal," akin to being reversed on appeal by a higher court. Cf. Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982). Significantly, however, the Senate Report stated that the Puzz case, "while perhaps correct on the peculiar facts and law, ha[s] had a very unhappy result."[3] Thus, plaintiffs' claims were mooted, not because Congress found fault with the Court's application of the law, but because Congress decided to legislate an entirely different approach to the Hoopa Valley Reservation by splitting the Reservation into two.

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[3] S. Rep. No. 100-564, 100th Cong., 2d Sess. at 12 (1988)(emph. added).

Nevertheless, the government argues that a fee award is barred because a ruling mooted for any reason should never "spawn legal consequences," United States v. Munsingwear, 340 U.S. 36, 41, 71 S.Ct. 104, 107 (1950) of any kind for the losing party, including liability for fees. This argument ignores the fact that courts have consistently approved statutorily authorized fee awards although the underlying case was mooted. See e.g., Nash v. Chandler, 859 F.2d 1210, 1211 (5th Cir. 1988)("Fees are allowable even though the injunction is dismissed as moot."); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981).[4] Thus, the mere fact that defendants are unable to test a ruling on appeal has not deterred courts from imposing liability for fees.

However, as the government also points out, the timing of the mooting event here also had the effect of preventing plaintiffs from actually realizing the practical benefits of their judicial victory. Thus, this case raises the more difficult question whether, in those circumstances, the plaintiff may still be deemed the prevailing party.

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[4] See also, Conservation Law Foundation of New England v. Secretary of Interior, 790 F.2d 965, 968 (1st Cir. 1986), where the court observed:

> The purpose of attorney's fees is to encourage actions to enforce the statute. It is proper that counsel must depend on success, but is it appropriate that they risk loss of all compensation when, though, on the record, demonstrably well on their way to final success, the rug is pulled out by happenstance mootness?

Where a case is mooted, voluntarily dismissed or settled before a ruling on the merits, plaintiffs are routinely required to demonstrate a favorable practical outcome causally connected to the lawsuit to justify an award of fees. Ramon v. Soto, 1989 D.A.R. 13714, 13717 (9th Cir. Nov. 15, 1989)("To be deemed prevailing, a party need not obtain formal relief. Instead, the party may simply have acted as a catalyst that prompted the opposing party to take action")(citations omitted); Clark v. City of Los Angeles, 803 F.2d 987, 989-990 (9th Cir. 1986)(absent "formal relief" plaintiffs must show causal relationship between lawsuit and practical outcome realized); American Constitutional Party v. Munro, 650 F.2d 184, 189 (9th Cir. 1981)(plaintiff need not obtain formal relief but must establish causal relationship between litigation and practical outcome realized). Such a showing serves as a substitute for the missing judicial determination usually required to support an award of fees.

Here, the mooting event occurred after the case had progressed through two rounds of summary judgment motions, over eight years, and plaintiffs had been awarded permanent injunctive relief. In this context, we do not agree that the ability to demonstrate a "practical" favorable outcome is essential.

The purpose of EAJA and section 1988 is to encourage citizens to challenge improper governmental conduct and vindicate their civil and other rights. Ramon v. Soto, 1989

D.A.R. 13714, 13717 (9th Cir. November 15, 1989)("EAJA's purpose [is to award] fees to those who help to ensure that government officials will act in accordance with their legal responsibilities.. . "); Martin v. Heckler, 773 F.2d 1145, 1150 (11th Cir. 1985)(primary purpose of § 1988 was to "encourage worthwhile litigation that is necessary to protect civil rights"); Lauritzen v. Lehman, 736 F.2d 550, 556-57 (9th Cir. 1984)("EAJA was designed to encourage individuals . . . to contest government actions by authorizing fee awards to a prevailing party"); S.Rep. No. 1011, 94th Cong. 2d Sess., at 3, reprinted in 1976 U.S.Code Cong & Ad. News at 5910. When plaintiffs' persistent efforts culminated in the permanent injunctive relief awarded April 8th, the purposes underlying EAJA's prevailing party requirement were clearly fulfilled. To impose the additional requirement that the district court's final determination also be fully implemented or practically realized would unfairly penalize plaintiffs for events outside their control and contribute little or nothing to furthering the goals of EAJA.

In summary, given that plaintiffs had already obtained a final determination in this Court on the merits of their claims and had obtained substantial, permanent injunctive relief, we conclude that passage of the Hoopa-Yurok Settlement Act did not deprive plaintiffs of their prevailing party status although it mooted the case and precluded final

implementation of the injunctive relief ordered.[5]

This conclusion is consistent with, although not dictated by, Williams v. Alioto, 625 F.2d 845 (9th Cir.), cert. denied, 450 U.S. 1012 (1982), where the Court allowed the plaintiffs to recover fees although the case was mooted while on appeal. In Williams, the district court issued a preliminary injunction prohibiting the San Francisco Police Department from using broad search tactics in their efforts to apprehend those responsible for the infamous "Zebra murders." The Court upheld a fee award in favor of plaintiffs although the case was mooted on appeal due to the arrest and conviction of the suspects.

Although the Williams plaintiffs received a practical favorable outcome (because the search tactics were halted by the preliminary injunction and never resumed), the Court did not hold that this was an essential condition of eligibility for fees. Rather, the Court simply stated that "our previous dismissal of the appeal as moot and vacation of the district court judgment does not affect the fact that for the pertinent time period appellees obtained the desired relief, upon findings by the district court that the original guidelines

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[5] Notably, an "interim plan" was being implemented at the time the case was mooted, which required the federal defendants to take a number of specific actions. See Order After Status Conference, filed September 2, 1989.

were unconstitutional." Id. at 845.[6] In addition, we note that in Williams the district court had only granted preliminary relief, whereas here plaintiffs had obtained final injunctive relief.

Accordingly, plaintiffs are prevailing parties for the purposes of a fee award, notwithstanding the passage of the Hoopa-Yurok Settlement Act.

B. Substantial Justification

EAJA "creates a presumption that fees will be awarded unless the government's position was substantially justified." United States v. 313.34 Acres of Land, 1989 D.A.R. 8157, 8158 (9th Cir. Nov. 8, 1989). The phrase "substantially justified" has been interpreted to mean that the government's position must have a "reasonable basis both in law and fact." Pierce v. Underwood, 108 S.Ct. 2541, 2550 (1988); United States v. One 1984 Ford Van, 873 F.2d 1281, 1281 (9th Cir. 1989); Thomas v. Peterson, 841 F.2d 332, 335 (9th Cir. 1988). In determining whether this test has been satisfied, "'we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation.'" Thomas, 841 F.2d at 334; Andrew v. Bowen, 837

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[6] We conclude that the "pertinent time period" referred to in Williams is the time between the judicial determination and the mooting event. Between April 8, 1988 and December 21, 1989, when this case was dismissed as moot, plaintiffs were receiving as much benefit from the relief granted as could reasonably be provided in that time frame. See n. 5, supra.

F.2d 875 (9th Cir. 1988)(reversing denial of fees where underlying conduct not substantially justified although litigation position was reasonable). The burden of establishing substantial justification lies with the government. Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988).

Plaintiffs do not argue that several of defendants' litigation positions (such as its position re justiciability of the dispute, plaintiffs' standing, and appropriate remedies) lacked a reasonable basis in law and fact. Rather they focus on the federal defendants' underlying conduct -- their role in administering the reservation. This underlying conduct, they assert, was without substantial justification and thus justifies an award of fees.

There is little dispute that, by 1952, the government had permitted the Hoopa tribe and Business Council to assume control of the Reservation and reap the benefits of the unallotted reservation resources generated by the timber-rich Square. S. Rept. No. 100-564 at 7. As time passed, the gap between the Hoopas and non-Hoopas widened. In 1977, three years before plaintiffs filed suit, the San Jose Mercury News reported that the Square boasted a new shopping center, a multi-million dollar community center, service stations, modern schools, paved roads, electricity, water service, telephones, hospitals, schools, parks, playground and rodeo grounds. In stark contrast, the majority of the Indians living on the Extension had no telephones, and no electricity.

The water and sanitation systems were inadequate and the roads unpaved. Reservation-funded programs and services were almost non-existent and some lived in condemned and substandard housing. See Appendix to Morris Decl., filed in support of plaintiffs' opposition to motion for stay pending appeal.

It was not reasonable, plaintiffs contend, for the government to persist with administrative policies that permitted and fostered these gross disparities. The Court agrees, in light of three additional factors.

First, it was "beyond reasonable dispute," that when Congress created the Hoopa Valley Reservation, it created it for tribes, and not exclusively for the Hoopa tribe. Neither the 1864 Act authorizing the establishment of Indian Reservations in California, nor subsequent Executive Orders specifically referred to the Hoopa tribe but rather to any tribes living there. Thus, no particular rights were ever conferred on the Hoopa tribe in particular. Also, Congress must have contemplated that each reservation could include more than one tribe since it limited the number of California reservations to four. See April 8, 1988 Order at 8.[7]

Similarly plain was the government's trust responsibility toward all Indians of the Reservation. United

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[7] See also Short v. United States, 486 F.2d 561, 565 (1973)("it is perfectly plain that from the outset in 1864 all involved understood that the reservation was intended for an undetermined number of tribes including the Hoopas and the [Yuroks], and that the authorities repeatedly acted on that assumption").

States v. Creek Nation, 295 U.S. 103, 110 (1935); Cramer v. United States, 261 U.S. 219, 232 (1923). As we stated in our April 8th order:

> In performing this duty, the government is held to the highest standards of fiduciary responsibility and trust. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). The government must administer reservations solely in the benefit of the beneficiaries. Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973). Its actions in carrying out this duty cannot be arbitrary or discriminatory. Short v. United States, 719 F.2d 1133, 1337 (Fed. Cir. 1983). (Order at 16).

Third, the Court of Claims held, seven years before this action was filed, that the Square and the Extension were one integrated reservation, and that the government had acted arbitrarily in recognizing only Hoopas as persons entitled to income from the unallotted trust-status lands on the Square [i.e. income from timber sales]. Short v. United States, 202 Ct. Cl. 870, 976-981 [findings 183, 188, 189], 486 F.2d at 561 (1973). cert. denied, 416 U.S. 961 (1974), rehearing denied, 417 U.S. 959 (1974). In so doing, it observed that there could only be "equal rights for all Indians of the Reservation." Id. 486 F.2d at 567.[8]

The government argues, however, that notwithstanding

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[8] In 1981, the Court of Claims described its 1973 decision as holding that the "the Square and the [Extension] 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) . . ." Short v. United States, 661 F.2d 150, 152 (Ct. Claims 1981), cert. denied, 455 U.S. 1034 (1982).

the above -- the glaring (and undisputed) disparities, the government's trust responsibilities, the fact that the Reservations was plainly intended for the use and benefit of all tribal members, and the teachings of the Short litigation -- its underlying conduct in the administration of the reservation was reasonable.

First, it points out that the Short litigation only actually and necessarily resolved the narrow issue of the distribution of unallotted reservation income, holding that the government could not exclude non-Hoopas, as it had been, in making per capita payments to individuals from the Reservation's lucrative timber revenues.[9] It did not adjudicate how other reservation resources should be distributed and managed, or issues concerning political participation in the process. Nevertheless, the clear import of the exhaustive Short litigation was that the members of the Hoopa tribe enjoyed no special vested rights, and that the Reservation's economic resources should inure to the benefit

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[9] Specifically, we found that Short had conclusively established the following four facts: 1) The Square and the Addition (or Extension) constitute one unified reservation for the purpose of distributing income for unallotted trust lands of the Reservation to "Indians of the Reservation"; 2) There are no tribes on the Hoopa Valley Reservation having vested rights to the income from unallotted trust lands on the Reservation; 3) the Indians of the Reservation hold equal rights to income from unallotted trust lands of the Reservation; and 4) the United States Department of Interior, Bureau of Indian Affairs, acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe as the persons entitled to the income from the unallotted trust lands on the Square. October 2, 1984 Order at 15-16 (emph. added).

of Hoopas and non-Hoopas alike.[10]

Second, it notes that the government did attempt to respond to the Short litigation by initiating the "Issue-by-Issue" process in 1982. This process was supposed to identify the views of Yurok Indians, and thus include them in the decision making process with respect to allocation of Reservation resources. This slight modification in procedure, however, appears to have had little to no effect on the distribution of Reservation resources. Also, it was instituted well after the underlying governmental conduct that prompted the initiation of this lawsuit.

Primarily, however, the government emphasizes that its decision to work with, and funnel resources to, the Hoopa Business Council was justified given the federal policy favoring development and support of tribal governments on reservations, and the fact that no other functioning tribal governing body existed on the Reservation.

We recognize that the government enjoys broad

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[10] As our August 8th order stated, "the four facts [established in Short, see n. 9 supra], seen in the context of the government's trust responsibilities to all Indians of the Reservation, establish that plaintiffs are entitled to relief insofar as they have been deprived of the use and benefit of reservation resources." Order at 15.

We also note that the principles underlying the original Short litigation were reaffirmed in Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979), and in Short v. United States (Short II), 661 F.2d 150, 228 Ct.Cl. 35 (1980), cert. denied, 455 U.S. 1034 (1982); Short v. United States (Short III), 719 F.2d 1133 (Fed. Cir. 1983), cert. denied, 467 U.S. 1256 (1984).

discretion over reservation administration, Donnelly v. United States, 228 U.S. 243, 256 (1913), and was entitled to pursue the above policies.[11] This discretion, however, is not a license to abdicate its overriding responsibility to protect the welfare of all Indians under its purview. It does not allow the government to pursue tribal support policies blindly or to the point where they continually leave the majority of a reservation's Indians impoverished while a minority flourish. Even putting aside the issue of impounding the non-Hoopa Indians' share of the timber income, the government's stubborn persistence in following a course that perpetuated, and made no serious effort to alleviate, such inequitable results, simply can not be characterized as reasonable conduct in light of all of the above.[12]

Finally, the government urges us to find its conduct reasonable given the "extremely complex task the Government faced in attempting to manage competing and often adverse

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[11] Our April 8, 1988 order specifically found that the government was entitled to provide the Hoopa Business Council with a role in reservation administration. Order at 12-13.

[12] As the Director of BIA operations in California, William Finale, candidly admitted to the San Jose Mercury in 1977, four years after the first Short case, "The Bureau hasn't done anything yet to bring its policy on this matter into conformity with [the Short] ruling . . . . ¶ Regardless of the [Short] case, the facts (are) that we recognize the Hoopa tribe and that it has been approved and its governing sovereignty recognized . . . even though that may have been illegal . . . Maybe that sounds contradictory . . . but that is the way it is. We have been doing it this way and I have not been given any new authority to change the way we have been doing it." San Jose Mercury News, June 9, 1977 at 2.

interests on the Hoopa Valley Reservation." (Fed. Defs' Oppo. at 10-11). This argument is unpersuasive. While we appreciate that administration of the Reservation was a difficult task, the situation was not so unyielding or intractable as to preclude the government from acting in a reasonable manner.[13]

In summary, we conclude that plaintiffs are prevailing parties and that the federal defendants have not met their burden of establishing that their position was substantially justified for purposes of a fee award under the Equal Access for Justice Act. Accordingly, plaintiffs are entitled to recover their reasonable attorneys' fees and costs from the federal defendants.[14]

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[13] It is true that the Yurok Indians rejected the government's attempt to organize them into a tribe. See Short v. United States, 661 F.2d 150, 153-54, 155 (Ct.Claims 1981). However that factor did not eliminate the government's overriding responsibilities with respect to the management of the Reservation. The government, itself, appeared to acknowledge this when it stated "If the Yurok Tribe does not form at least an interim governing committee, the Secretary of the Interior has no choice but to act for the Yurok Tribe in the management of the reservation assets." 44 Fed.Reg. 23537 (April 25, 1979). See also, 47 Fed.Reg. 49094 (October 29, 1982)("Developments since 1978 have taken place, including the failure of the Yurok Tribe to implement the principal feature of the 1978 plan, which was the organization of an interim Yurok tribal governing body. Those developments require the adoption of new management procedures for the Hoopa Valley Reservation").

[14] A court may deny fees to a prevailing party even where the government's position was not substantially justified if special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(a). This provision, however, should only be invoked with caution. J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985)(defendants' burden of showing that special circumstances warrant a denial of fees is

III. CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT

Plaintiffs also seek an award of fees, against the federal defendants and the Hoopa defendants, pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. This Act provides that "in any action . . . to enforce [42 U.S.C.] sections 1981, 1982, 1983, 1985 and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Fees are recoverable under section 1988, if the plaintiff prevails on a statutory "non-fee" claim that is factually related to an unadjudicated but substantial civil rights claim enumerated above. Maher v. Gagne, 448 U.S. 122, 132, and n.15, 100 S.Ct 2570, 2576 (1980); The Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 661 (9th Cir. 1989)("Section 1988 fees may be awarded to a prevailing party if that party presented a substantial unadjudicated claim within the scope of § 1983 that was not alleged solely to support the fee award"). Such a rule "'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding

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a "strong one"); Martin v. Heckler, 773 F.2d 1145, 1150 (11th Cir. 1985)(special circumstances exception should be narrowly construed). The government contends that the same arguments it proffered on the "prevailing party" issue support a finding that special circumstances are present here. We disagree for the same reasons we reject the government's argument that plaintiffs are not prevailing parties.

unnecessary decision of important constitutional issues.'" Id. 448 U.S. at 133, 100 S.Ct. at 2577. Plaintiffs contend that their unadjudicated § 1985 claim warrants an award of fees under § 1988.

Section 1985 creates no substantive rights; rather, it is only a mechanism for enforcement when some otherwise defined federal right has been breached. Great American Federal Savings and Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979); Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 504 (9th Cir. 1979). In order to prevail on a section 1985(3) claim,[15] the plaintiff must establish the following four elements:

1) a conspiracy,

2) for the purpose of depriving, directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws,

3) that the conspirators committed some act in furtherance of the conspiracy, and

4) that the plaintiff was injured in his person or property or was deprived of having and exercising a right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 103-04, 91 S.Ct. 1790 (1971).

As the Supreme Court explained, section 1985's language "requiring intent to deprive of equal protection, or equal

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[15] 42 U.S.C. § 1985(3) provides that a cause of action will lie "[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators action." Id. at 102 (emph. in original). Thus, the second element set forth above requires that the plaintiff show (a) a violation of a legally protected right, and (b) that an invidious discriminatory class-based animus motivated the violation. Life Insurance Co. of North America, 591 F.2d at 502-503, 505.

Although plaintiffs' section 1985 claim was never particularly well developed, the theory currently asserted is that the federal defendants and the Hoopa defendants conspired to deny plaintiffs their rights under the Act of 1864. For purposes of part (b) of the second element discussed above, plaintiffs characterized themselves as a "political class" in their April 21, 1981 motion for summary judgment: "[s]imply stated, plaintiffs suffer from political discrimination intentionally directed at them. . . political discrimination is within the ambit of § 1985(3))." Memorandum in Support of Motion at 30-31.[16]

While there was support for the proposition that political classes were protected under § 1985 when this action

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[16] Plaintiff's April 1981 motion for summary judgment was put on hold pending the resolution of the Short litigation. At the conclusion of that litigation, the parties filed supplemental papers. However, those papers did not discuss the section 1985 claim; nor was it addressed by the Court. See October 2, 1984 Order at 4-10 (summarizing procedural history).

was initiated, it appears that that support has since dissipated. In DeSantis v. Pacific Telephone and Telegraph Co., Inc., 608 F.2d 327 (9th Cir. 1979), the Court stated the following in rejecting a § 1985(3) claim involving discrimination against homosexuals:

> In contradistinction to southern blacks of 1871, the blacks of Griffin [403 U.S. 88], and the women of Reichardt [591 F.2d 499], it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals as "suspect" or "quasi-suspect" classification so as to require more exacting scrutiny of classification involving homosexuals . . . . ¶ We conclude that homosexuals are not a 'class' within the meaning of § 1985(3).

608 F.2d at 333.

The Ninth Circuit subsequently interpreted DeSantis to hold that a § 1985(3) claim may only be maintained if "the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or [if] Congress has indicated through legislation that the class required special protection." Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985). Applying this test, the Court upheld dismissal of a § 1985 claim involving a "political class" composed of a coalition of state representatives. See also, Watkins v. United States Army, 875 F.2d 699, 722 n.25 (9th Cir. 1989)(en banc)(Norris, J., Concurring Opin.)("Along with subsequent cases, DeSantis has established that there are only two ways of [coming within those groups requiring "special federal assistance" in protecting their civil rights

under § 1985(3)]: (1) proving that Congress has enacted statutes offering special protection to the class; or (2) proving that courts have offered special protection to the class by designating it a suspect or quasi-suspect class")(emph. in original).[17]

Plaintiffs, whether characterized as a class subjected to a "political conspiracy" or simply as "non-Hoopas of the Hoopa Valley Reservation," do not fall within the ambit of § 1985(3) under binding Ninth Circuit authority. They have not been designated by the courts as a suspect or quasi-suspect class (and plaintiffs do not argue to the contrary); nor has Congres enacted statutes offering them special protection. Accordingly, we decline to rest an award of attorney's fees upon this claim.[18]

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[17] We do not agree with plaintiffs that Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987) constitutes a retreat from DeSantis and Schultz. Gerritsen merely notes that this Circuit has previously held that to state a claim under § 1985, the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights, citing Schultz. But as Schultz (as well as the more recent Watson) make clear, only the categories of classes delineated above will be deemed to meet this description. We also note that the other two cases cited to pre-date United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983), discussed infra.

[18] The United States Supreme Court has not expressly ruled whether section 1985 extends to political classes; however, its strongly worded dicta on this point in United Brotherwhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 103 S.Ct. 3352 (1983) has not gone unobserved. This Circuit has noted that Scott "indicated that section 1985(3) probably did not extend to wholly political, non-racial conspiracies. 759 F.2d at 718, and other circuits have specifically ruled as such in light of Scott. See Wilhelm v. Continental Title Co.,

FURTHER PROCEEDINGS

In light of this Court's finding that the federal defendants are liable for fees under EAJA,, it is HEREBY ORDERED that:

1. Counsel for plaintiffs and federal defendants are referred to a mandatory settlement conference before Chief Magistrate Woelflen or such other Magistrate as may be assigned. The parties shall contact Magistrate Woelflen and arrange for a settlement conference to take place no later than 30 days from the date of this order or the earliest possible date thereafter if no Magistrate is available within this time period. This conference shall be for the purpose of informally resolving the amount of fees to be awarded. If such resolution proves impossible the parties should attempt to resolve subsidiary issues such as the appropriate hourly rate and to narrow the dispute as much as possible with

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720 F.2d 1173 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984); Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985); Harrison v. KVAT Food Management Co., 766 F.2d 155, 161 (4th Cir. 1985); see also, Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988), cert. denied, 109 S.Ct. 1339 (1989); Rodriguez v. Nazario, 719 F.Supp. 52 (D. Puerto Rico 1989). But see, Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987)(Following previous binding Sixth Circuit authority allowing § 1985 claims involving political classes given that Supreme Court had left issue open in Scott); Galloway v. State of Louisiana, 817 F.2d 1154, 1159 (5th Cir. 1987)(citing pre-Scott authority).

respect to the number of compensable hours.

2. In the event a complete settlement is not reached, plaintiffs shall file, no later than Monday, January 29, 1989, a regularly noticed motion for calculation of fees, and accompanying documentation.

IT IS SO ORDERED.

DATED 11/24/89

Judge Thelton E. Henderson,
United States District Court.