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).