

IN THE UNITED STATES CLAIMS COURT

JESSIE SHORT, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	No.: 102-63
)	
THE UNITED STATES,)	
)	
Defendant.)	

Courtroom 6, Room 507
United States Claims Court
717 Madison Place, N.W.,
Washington, D.C.

Wednesday,
June 10, 1992

The parties met, pursuant to the notice of the
Judge, at 3:08 p.m.

BEFORE: HON. LAWRENCE S. MARGOLIS
Judge

APPEARANCES:

For the Plaintiff:

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For the Defendant:

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For the Defendant - Intervenor:

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1 In page 18 of their brief, footnote, it says
2 that the decision was "premised upon the 1958 opinion of
3 the solicitor of the Department of the Interior," an
4 opinion which Mr. Schlosser and the government admits that
5 they didn't even try to defend; that was not only wrong,
6 but which had no substantial justification.

7 The decision which was resulted in this
8 litigation was "premised upon the 1958 opinion." So under
9 these circumstances, I would urge the Court to rule today
10 that the plaintiffs are entitled to EAJA fees at this
11 stage.

12 THE COURT: Do you want the last word?

13 MS. WEST: It will be very short. Your Honor, I
14 think the whole question comes down to the world of 1963
15 and the decision of 1973.. If we did not have that before
16 us, there would really be no question.

17 We believe that if the Congress had wanted a
18 different standard, it wouldn't have been substantially
19 justified. If the Supreme Court had enacted a different
20 standard, it wouldn't have been reasonableness. And we
21 believe we have demonstrated reasonableness. Thank you.

22 THE COURT: I am going to rule today. And my
23 decision is that the plaintiffs are entitled to interim
24 attorney's fees and expenses under the EAJA provision. I
25 find that the plaintiffs are a prevailing party. And I

1 find that the position of the United States was not
2 substantially justified.

3 I'll issue a written opinion later, giving my
4 reasons for this decision. Of course, the plaintiffs are
5 going to have to itemize, and document the attorney's fees
6 and costs, and supply that information to the defendant,
7 so that the parties hopefully can reach an agreement as to
8 the quantum.

9 And if the parties can't agree on the quantum,
10 the parties will probably have to brief that issue, and
11 I'll decide it.

12 MS. WEST: Excuse me, Your Honor, may I ask one
13 question?

14 THE COURT: Yes.

15 MS. WEST: What is the interaction between this
16 and any subsequent EAJA award? One concern we've had,
17 other than the fact that obviously we would like you to
18 rule the other way, is the fact that there are other
19 attorneys and we haven't gone to judgement yet.

20 How does this interim award, or perhaps the
21 Court could clarify in the order, how this interacts with
22 all of that. We don't want to sort of get through with
23 all this, and discover that that's a point at which Mr.
24 Matthews is going make a claim.

25 THE COURT: I'm just dealing with the plaintiffs

1 before me right now. I'm not dealing with the other
2 plaintiffs at this particular moment.

3 MS. WEST: Your Honor, then our question would
4 just be a question of timing. Interim fees would go to
5 the date of this order, we gather? And if any subsequent
6 fees would be beyond this? There are just some procedural
7 questions people keep asking me, and I can't answer.

8 THE COURT: Well, why don't you try to work it
9 out with the plaintiffs for the time being.

10 MS. WEST: Thank you, Your Honor.

11 MR. WARIN: Thank you very much, Your Honor.

12 MR. GREENBERG: Thank you, Your Honor.

13 MR. SCHLOSSER: Thank you.

14 MR. SHEARER: Thank you, Your Honor.

15 THE COURT: Let me just make one other comment.
16 I'd like to put some time periods on this as well. How
17 long do you think it will take for the plaintiffs to
18 supply this EAJA material to the government so we can
19 start working on a possible settlement? You only have to
20 put together 29 years of material.

21 MR. GREENBERG: Yes, Your Honor, this is Mr.
22 Greenberg. We will certainly start working on it as
23 quickly as we can. But I would not feel comfortable --
24 I'm talking with Mr. Wunsch here just now -- in setting a
25 date that was any less than 60 days from now, although we

1 obviously will present it earlier if we can.

2 It is an extraordinary amount of data, and it's
3 on a number of different computer systems, etc. that the
4 firm has used, and hard copies, all through these years.
5 So we would like to set it at 60 days, now, and start
6 working, and if it can be quicker, it sure will be.

7 MR. WUNSCH: Your Honor, Bill Wunsch. I would
8 prefer 90 days. Heller Erhman has a lot of their stuff on
9 computer. Of course in the years and years that Mr.
10 Faulkner and I worked on it alone, none of that is on a
11 computer. And it's going to be a major job. So I would
12 feel more comfortable talking in terms of 90 days.

13 THE COURT: All right, why don't we set 90 days.
14 Possibly you could come up with some approximations and
15 talk to the government in general terms at first.

16 MR. WARIN: Your Honor?

17 THE COURT: Yes?

18 MR. WARIN: I would -- and this is subject to
19 revision after I talk with my client's, and at the
20 pleasure of the Court and the government -- but it would
21 be our expectation that we would provide it to the
22 government within 90 days, but not necessarily burden the
23 court record at that time. And then have some period of
24 time to see if we can either eliminate some issues --

25 MR. GREENBERG: I can't hear Mr. Warin.

1 MR. WARIN: -- either eliminate some issues or
2 resolve some issues in conversations between us. And
3 then, if that were unsuccessful, then to file it with the
4 Court. But if the Court would like us to file
5 simultaneous with providing it to the government, we'll be
6 happy to.

7 THE COURT: I don't want any papers. I would
8 like the parties to try to resolve it among themselves, if
9 that's possible. Why don't we just set a 90 day time
10 limit in which to supply the material to the government.

11 MS. WEST: Your Honor, we'll just meet with
12 whoever is going to take the lead on this to arrange where
13 we're going to have it shipped and deal with those
14 details.

15 MR. WARIN: Thank you, Your Honor.

16 THE COURT: Let me make a comment about another
17 matter. I believe I have finally decided all the
18 entitlement motions in Ackley and Short and any other
19 plaintiffs. Is that true?

20 MS. WEST: We believe so, Your Honor.

21 MR. GREENBERG: The plaintiffs believe so, as
22 well.

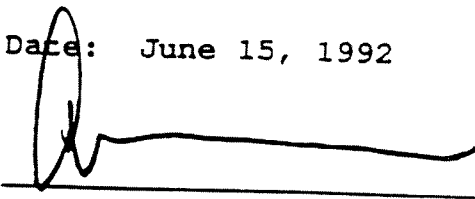
23 MR. SHEARER: Well, Your Honor, I have to --
24 this is Bill Shearer -- I have to say that, as to one
25 plaintiff whom I represent, I may be compelled to bring a

REPORTER'S CERTIFICATE

1
2
3 DOCKET NO.: 102-63
4 CASE TITLE: Jessie Short, et al.
5 HEARING DATE: June 10, 1992
6 LOCATION: Washington, D.C.

7 I hereby certify that the proceedings and evidence
8 are contained fully and accurately on the tapes and notes
9 reported by me at the hearing in the above case before the
10 United States Claims Court.

11
12 Date: June 15, 1992

13
14 A handwritten signature in black ink, consisting of a large, stylized initial 'H' followed by a long, horizontal, slightly wavy line extending to the right. The signature is positioned above a solid horizontal line.

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