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WILLIAM J. SWAKER
U.S. DISTRICT COURT
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ZIONTZ, HIRTLE, MORISSI
ERNSTOFF & CHESTNUT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALTER McCOVEY, SR.; JESSIE)
SHORT; ELLA HOSTLER JOHNSON;)
and LAWRENCE ORCUTT,)
)
) Plaintiffs,)
)
v.)
)
) UNITED STATES DEPARTMENT OF)
) THE INTERIOR and THE BUREAU)
) OF INDIAN AFFAIRS,)
)
) Defendants.)
)

NO. C 82-6196 TEH

ORDER DENYING TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

This matter came on for hearing on April 29, 1983 on plaintiffs' motion for a temporary restraining order and preliminary injunction. The Court having carefully considered the arguments of all counsel, for the reasons stated below,

IT IS HEREBY ORDERED that plaintiffs' motion for a temporary restraining order and preliminary injunction is denied.

FACTS

Plaintiffs filed their complaint and their first motion for a preliminary injunction on November 10, 1982. Plaintiffs allege that the defendants Department of the Interior and Bureau of Indian Affairs failed to properly follow the dictates of the Distribution of Judgment Funds Act, 25 U.S.C. § 1401-1407, and accompanying regulations in developing a distribution plan for

1 certain funds awarded the intervenor-defendant, Hoopa Valley Tribe
2 by the Court of Claims on February 10, 1982 in the case of
3 Cheyenne-Arapaho Tribes of Indians v. United States, Nos. 342-
4 70 and 343-70.

5 On November 24, 1982, based on plaintiffs' initial
6 showing that the statute and regulations may not have been re-
7 ligiously complied with; as well as the fact that plaintiffs at
8 the time had pending a motion to intervene in the Cheyenne-Arapaho
9 litigation, which, if granted, would have thrown the status of
10 the Judgment Distribution Plan into a state of some confusion;
11 and finally, based on the fact that the plan was about to be sub-
12 mitted to Congress, after which many of the violations alleged
13 by plaintiffs would be effectively unreviewable under the Adminis-
14 trative Procedure Act, this Court preliminarily enjoined the De-
15 partment of the Interior from submitting its plan to Congress
16 pending further proceedings in this Court.

17 On December 3, 1982 this Court's preliminary injunction
18 was stayed by the Ninth Circuit Court of Appeals on an emergency
19 motion by the Hoopa Valley Tribe. On the same day, the Secretary
20 of the Interior's judgment distribution plan was submitted to
21 Congress pursuant to 25 U.S.C. § 1402.

22 On April 11, 1983 the plan became effective after 60
23 days had elapsed in which Congress had taken no action to veto
24 the plan. 25 U.S.C. § 1405.

25 Plaintiffs have now brought the present motion for a
26 temporary restraining order and preliminary injunction, seeking
27 to prevent the Secretary from distributing the judgment funds
28 pursuant to the now effective plan.

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APPLICABLE LEGAL STANDARD

In the Ninth Circuit, a party seeking a preliminary injunction must demonstrate

either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor.
(emphasis in the original.)

Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982).

ANALYSIS

Factual Developments Since November 24, 1982

Two changes have occurred in the posture of the matter before us that convince us that plaintiffs are no longer entitled to the extraordinary relief requested.

(1) Plaintiffs' motion to intervene in the Cheyenne-Arapaho case has been denied, with a finding by Judge Lydon of the United States Claims Court that

movants [plaintiffs herein] should have intervened within a reasonable period of time after the Court of Claims held in its March 19, 1975, decision . . . that the Hoopa Valley Tribe, and other Indian tribes, were entitled to recover monies from the government for mismanagement of tribal funds. Movants and other Yurok Indians on whose behalf movants plead were aware of this decision and should have intervened in 1975 or 1976 since it was obvious then, or should have been, that the Hoopa Valley Tribe considered the tribal funds mismanaged to be their sole property.

3 USCCR No. 9 (January 12, 1983).

(2) The judgment distribution plan has been ratified by Congress by virtue of its failure to veto it within 60 days of its submission for approval.

//

1 Plaintiffs' Administrative Procedure Act Claim

2 When this Court granted plaintiffs' earlier request
3 for injunctive relief, we were desirous of adjudicating any chal-
4 lenges to the Secretary's administrative procedures before the
5 product of those procedures, the judgment distribution plan, was
6 submitted to Congress and finalized. At this juncture, exactly
7 that has happened, and, accordingly, we feel it incumbent on us
8 to stay our hand.

9 On April 11, 1983 the distribution plan at issue became
10 "effective" under the terms of 25 U.S.C. § 1405, as amended (Jan.
11 12, 1983), sixty days after its submission to Congress.^{1/}

12 The Court now considers the plan to have been effect-
13 ively ratified by Congress. That act of Congress, which allows
14 the distribution of the funds which plaintiffs seek to enjoin,
15 is subject to review by this Court only under the standard set
16 forth in Delaware Tribal Business Committee v. Weeks, 430 U.S.
17 73 (1977). Any such challenge holds little likelihood of success
18 on the merits, nor have plaintiffs raised a serious question in
19 this regard.

20
21 ^{1/} Section 1405 provides:

22 (a) Original plan
23 The plan prepared by the Secretary shall become effective,
24 and he shall take immediate action to implement the plan for the
25 use or distribution of such judgment funds, at the end of the
26 sixty-day period (excluding days on which either the House of Re-
27 presentatives or the Senate is not in session because of an ad-
28 journeyment of more than three calendar days to a day certain) be-
beginning on the day such plan is submitted to the Congress, unless
during such sixty-day period a joint resolution is enacted dis-
approving such plans.

27 //

28 //

1 Similarly, the Court finds it unlikely that plaintiffs
2 will ultimately prevail in their contention that the instant case
3 is like Gold v. The Confederated Tribes of the Warm Springs In-
4 dian Reservation, 478 F. Supp. 190, 197 (D. Ore. 1979), in which
5 the court held that the Secretary of the Interior's statements
6 to Congress in presenting a distribution plan for approval "were
7 so ambiguous and the procedural irregularities so numerous that
8 Congress' failure to veto [the] plan cannot be construed as a
9 legislative adoption." Plaintiffs have made no such showing here.

10 Nor have plaintiffs made a sufficient showing of the
11 possibility of irreparable injury. The Court is not convinced
12 that other avenues of relief do not remain open to plaintiffs
13 even if this judgment fund is distributed, including a suit
14 against the government alleging that this distribution constituted
15 a breach of trust, Moose v. United States, 674 F.2d 1277, 1282
16 (9th Cir. 1982); a motion to amend the damage claim in the pend-
17 ing case of Jessie Short v. United States, Ct. Cl. No. 102-63;
18 or a suit against the government for breach of trust alleging
19 exactly what was alleged by the Hoopa Valley Tribe in Cheyenne-
20 Arapaho.^{2/} In addition, plaintiffs may still pursue the pending
21

22 ^{2/}We note that to the extent such a claim is barred at this
23 point by the statute of limitations, Judge Lydon found that:

24 Movants could have and should have intervened in
25 these cases long before the parties engaged in any
26 settlement negotiations. Had they done so they
27 could easily have asserted their alleged interest
28 in the matter, and thus have avoided the present
state of affairs. Movants "waited comfortably in
the shade while another does battle for his rights."
[citation].

Cheyenne-Arapaho v. United States, 3 USCCR No. 9
(Jan. 12, 1983.
(Cont'd)

1 appeal of Judge Lydon's decision denying their motion to inter-
2 vene in Cheyenne-Arapaho.

3 Plaintiffs' Constitutional Challenge to the Distribution
4 of Judgment Funds Act

5 Neither is the Court persuaded that plaintiffs have demon-
6 strated a sufficient likelihood of success on the merits to war-
7 rant injunction of the distribution based on the statute's alleg-
8 ed constitutional infirmities. Plaintiffs cite Consumer's Union
9 of U. S., Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir. 1982), Consumer
10 Energy Council v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982), appeal
11 docketed, 51 U.S.L.W. 3099 (Aug. 2, 1982), and Chadha v. I.N.S.,
12 634 F.2d 408 (9th Cir. 1980), cert. granted. juris. postponed
13 sub nom. United States House of Representatives v. I.N.S., 454
14 U.S. 812 (1981), to support their contention that the legislative
15 veto provision of the Distribution of Judgment Funds Act is un-
16 constitutional.

17 Without delving too deeply into the merits of the plain-
18 tiffs' challenge, this Court notes the extensive discussions of
19 standing, ripeness, and other questions of justiciability in the
20 cases cited by plaintiffs, in support of our initial concern that
21 plaintiffs cannot challenge a veto procedure that was not exer-
22 cised with regard to this plan.

23 In addition, to the extent plaintiffs seek to challenge
24 the veto provisions of the Act prior to its amendment in
25

26 2/ cont'd.

27 This further persuades the Court that the balance of hard-
28 ships does not tip sharply in plaintiffs' favor, where any such
hardship is solely the fault of plaintiffs themselves.

1 January, 1983, such a challenge could well be mooted by such
2 amendments.^{3/}

3 Finally, to the extent plaintiffs might have standing to
4 challenge the new provisions of the Act as amended, it calls for
5 veto by Congressional "joint resolution." 25 U.S.C. § 1405. Such
6 resolutions "are sent to the President for approval and have the
7 full force of law." International Brotherhood of Electrical Work-
8 ers v. Washington Terminal Company, 473 F.2d 1156, 1163 (D.C.
9 Cir. 1972), cert. denied, 411 U.S. 906 (1973). As such, the veto
10 provision of this Act is clearly distinguishable from those held
11 unconstitutional in the cases cited by plaintiffs, which involved
12 either one-house vetoes or veto by concurrent resolution.

13 Nor have plaintiffs made any showing that they could not
14 obtain complete relief should they eventually prevail on the
15 merits of this claim, even if the fund is distributed.

16 Plaintiffs' Challenge Under Section 1402(b)

17 Finally, we are not persuaded by plaintiffs' argument
18 that under 25 U.S.C. § 1402(b), the government should be enjoined
19 from distributing this fund because the Secretary failed to com-
20 ply with that subsection's mandate to withdraw this plan from
21 Congress after January 13, 1983 and resubmit it.

22 _____
23 ^{3/} 25 U.S.C. § 1405 provided, prior to its amendment in 1983:

24 (a) The plan prepared by the Secretary shall become ef-
25 fective, and he shall take immediate action to implement the plan
26 for the use or distribution of such judgment funds, at the end
27 of the sixty-day period (excluding days on which either the House
28 of Representatives or the Senate is not in session because of an
adjournment of more than three calendar days to a day certain)
beginning on the day such plan is submitted to the Congress, un-
less during such sixty-day period either House adopts a resolu-
tion disapproving such plans.

1 Having read the legislative history of the amendments to
2 the Act as a whole, as well as that of the subsection in question,
3 the Court is unwilling to conclude that Congress intended to im-
4 pose a mandatory obligation on the Secretary even where it would
5 result in a nonsensical delay in proceedings, and would further
6 clog, rather than relieve the Secretary's backlog of pending dis-
7 tribution plans. ^{4/} In addition, the ratification of the plan
8 by Congress would seem to insulate the plan from attack on this
9 ground to the extent that Congress's ratification of the Secre-
10 tary's interpretation of this subsection is rational. Delaware
11 Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

12 Accordingly, for all of the reasons stated above, the
13 motion for temporary restraining order and preliminary injunction
14 is denied.

15 IT IS SO ORDERED.

16 DATED: May 13, 1983



17 THELTON E. HENDERSON
18 UNITED STATES DISTRICT JUDGE

19 ^{4/}12 U.S. Cong. News 1982, p. 4409:

20 [T]he purpose of H.R. 3731 is to amend the [prior]
21 Act . . . to allow the Secretary of the Interior
22 additional time to submit certain plans for the
23 distribution of judgment funds. . .

24 The section-by-section analysis contained in Senate Report
25 No. 97-658, 12 U.S. Cong. News 1982 at p. 4411 explains that sub-
26 section (b):

27 allows the Secretary of the Interior to submit plans
28 within one year after enactment of this legislation
 for distribution of judgment funds awarded and appro-
 priated before enactment of this act. There are pre-
 sently some 83 separate awards of judgments awaiting
 development of plans by the Department of Interior. . .
 This subsection will enable the Department of the In-
 terior to develop plans for the majority of these
 awards without necessity of seeking legislation.