IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 102-63

(Filed: July 25, 1980)

JESSIE SHORT et al.	)	
	)	Res judicata; Substitution of
v.	)	Parties; Estoppel, Hoopa Valley
	)	Reservation; Tribal and individual
THE UNITED STATES	)	rights; Yurok and Hoopa Indians
	)	

Harold C. Faulkner, attorney of record, for certain plaintiffs. Faulkner, McComish & Wunsch, of counsel.

Clifford L. Duke, Jr., attorney of record, for certain plaintiffs. Bryan R. Gerstel and William K. Shearer, Duke & Gerstel, of counsel.

Jerry C. Straus, attorney of record, for defendant-intervenor. Wilkinson, Cragun & Barker, Edward M. Fogarty, Alan I. Rubinstein, Jerry R. Goldstein, of counsel.

C. David Redmon, attorney of record, for defendant, with whom was Assistant Attorney General James W. Moorman. James E. Brookshire, of counsel.

OPINION*

SCHWARTZ, Trial Judge: In this suit, begun in March 1963, some 3800 persons who claim to be Yurok Indians of the Hoopa Valley Indian Reservation seek their aliquot shares of the timber profits of the reservation. Liability of the Government has been determined, and the claims of some of the plaintiffs sustained. Jessie Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied, 416 U.S. 961 (1974). Until the decision in Jessie Short, of which more below, the timber profits had been distributed entirely by the Government in per

* The within opinion is submitted pursuant to orders of reference of November 12, 1976 and November 16, 1979.

capita payments to the members of the Hoopa Valley Tribe; thereafter, payments were suspended to await the conclusion of the proceedings. In process of decision are the individual qualifications of most of the plaintiffs to be considered Indians of the reservation, and therefore equally with all others entitled to a share of the reservation profits.

The Government has now moved to substitute for the plaintiffs the Yurok Tribe, as the real party in interest. The motion seeks (a) the dismissal on the merits of the claims of the plaintiffs, on the ground that the property is tribal and owned not by the individual Indians of the reservation but by the Hoopa and Yurok Tribes, determined by the Department of the Interior to be the only two Indians of the reservation; and (b) the retroactive installation of the Yurok Tribe as the sole plaintiff.[1/] The motion is herein denied.

1/

"None of the individual plaintiffs who qualify as members of the Yurok Tribe has property interests in the resources of the reservation; * * *. The Indians of the Reservation consist of the Hoopa Tribe and the Yurok Tribe." (Government's Moving Brief, May 23, 1979, 1-2).

"Specifically, the Government is asking the Court to substitute the Yurok Tribe as the sole party plaintiff and [to] dismiss the claims of the individuals." Id. at 4.

In the instant motion the Government urges that the property is tribal, and prays for the substitution of the Yurok tribe for the individual plaintiffs. In an accompanying motion the defendant-intervenor, the Hoopa Valley Tribe, moves to dismiss under the political question doctrine, on the ground that the property interests involved are tribal and that decisions involving tribal assets are constitutionally committed to Congress.

The Government is thus moving for the acceptance of a contention which its co-defendant urges as reason for dismissal.

The primary reason for the denial lies in the repeated past rejection on the merits of the contention that the property interests involved are tribal. This contention was first raised at the institution of the case in 1963 by motion to dismiss:

> Plaintiffs ask this Court to award them a share in the tribal property on the Hoopa Valley Reservation. The administration of tribal property is subject to the plenary power of Congress and is not a judicial matter. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Sioux Indians v. United States, 277 U.S. 424, 436, 437 (1928), affirming Sisseton and Wahpeton Indians v. United States, 58 Ct.Cls. 302, 327 (1923); Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). * * * Determining membership in the tribe for the purpose of distribution of tribal assets comes within the plenary power of Congress over tribal property. Jurisdiction to determine membership in an Indian tribe or band for the purpose of determining who will share in the tribal property is in Congress or the tribe and not the courts. (Motion to Dismiss, July 8, 1963, 3-4).

The motion to dismiss was denied; the contention that the property is tribal was rejected. The ruling of the court was that the action is within the jurisdiction as a suit by individuals for money judgments for their pro rata shares of the reservation's timber income. Orders of April 24, 1964, and April 15, 1966. The contention of tribal property rights was raised again, in a motion for rehearing, denied in October 1964, in which the Government argued that the individual plaintiffs did not have standing to maintain an action affecting tribal property and that Congress "did not confer jurisdiction upon this Court to control the administration of tribal Indian

property." Motion for rehearing, May 25, 1964, 10. The Government continued, in its answer, to plead that the property involved was tribal, not individual: "The plaintiffs as individuals have no standing to maintain an action affecting tribal property." Eighth affirmative defense, answer filed January 15, 1965.

The action had been brought by 16 Yurok Indians, who alleged that many others were similarly situated. Once the complaint was sustained as an action for individual money shares, the Government requested that the complaint be amended to include as named plaintiffs the individuals meeting the standards of the class of Indians who would be entitled to recover if the court entered judgment in favor of plaintiffs. Counsel for plaintiffs agreed and after a time some 3300 additional persons, claiming to be Yurok Indians of the Reservation, were added as plaintiffs, by amendment to the petition dated March 6, 1967.

In 1973, following trial of the cases of 26 representative plaintiffs, the court again ruled on the contention of tribal or individual rights, with finality, in Jessie Short, supra, 202 Ct. Cl. at 881-82, 884-85, 980-81 (findings of fact 188, 189, pp. 980-81; finding 217 and the conclusion of law, pp. 987-88)(1973))[2/]. The court decided that the parts of the reservation known as the Square, the Addition and the Connecting Strip constitute a single, integrated reservation (this part of the decision, the Government now says, it "accepts");

2/ The report of the opinion in 486 F.2d 561 does not contain the findings.

and that all the Indians of the Hoopa Valley Reservation have equal rights in the reservation's timber profits. Accordingly, such of the plaintiffs as can show they are "Indians of the reservation" are entitled to an aliquot share of the timber profits from the reservation (202 Ct. Cl. at 986-87):

> 188. Nothing appearing to the contrary, and a great deal appearing in support, it is concluded that the effect of the executive order of 1891 was that all the Indians of the reservation as thereby extended--Addition and Square--got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of the Indians of the Square, the Hoopa Valley Tribe or any other Indians of the reservation.
>
> 189. It follows that defendant acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square. Such of the plaintiffs as are found herein to be Indians of the reservation will become entitled to share in the income from the entire reservation, including the Square, equally with all other such Indians, including the Indians of the Square.

Twenty-two of the 26 representative plaintiffs were in this decision awarded summary judgment "in amounts to be calculated after all the 3323 claims are tried and determined." 202 Ct. Cl. at 885; cf. 987-88, 873. Following the denial in 1974 of certiorari to review this decision, 515 additional applicant-plaintiffs were by the court sitting en banc held "entitled to intervene as a matter of right," with rights to income dating back to 1957, 6 years prior to the institution of the original suit. With their intervention the class was ordered closed. The ruling on intervention, in both the order of the majority

of the court and the expressed dissent, reaffirmed the individual nature of the claims of the plaintiffs. 209 Ct. Cl. 777, 777-78 (1976).

Meanwhile, the parties and the trial judge had turned to the large task of ascertaining the facts bearing on the personal qualifications, as Indians of the reservation, of the now some 3800 plaintiffs. Detailed questionnaires were drafted, agreed to by the parties, and were answered by 3200 plaintiffs. The details given--as to birth, ancestry, schooling, residence, tribal census and allotment status--were checked, confirmed and objected to by the Government, and the objections responded to by the plaintiffs. Between 2 and 3 years were spent on this work.

In a ruling in the course of this effort, the court held that the Government could not be required to assist the plaintiffs in processing the questionnaires, because the action was one by "a number of individuals" to recover from the Government moneys to which the claimants were entitled. 207 Ct. Cl. 964 (1975). The entitlement of the individual plaintiffs then became the subject of several cross-motions for summary judgment for and against some 3200 plaintiffs. Those motions are still pending, their progress toward decision having been interrupted first by efforts to mediate and later by the Government's

program to create a Yurok Tribe and by the present motion.[3/]

3/ The chronology of the motions for summary judgment and the present motion reflects the unhappy rate of progress of the case. The first motion for summary judgment was made in September 1976, and was referred to the trial judge the following month. Successive similar motions were made through May 1977. Briefs, supported by 30 boxes containing the questionnaires, of the some 3200 plaintiffs involved, and the responses and replies thereto, were completed in November 1977 and a conference of counsel was set for January 31, 1978. At this conference the trial judge emphasized the wastefulness and difficulties of the litigation, and the desirability of a settlement of the case, upon which the parties expressed a desire to mediate their differences.

Mediation occupied the period February-September 1978, and was wholly unsuccessful. On September 26, 1978, the trial judge ordered a reconvening of the status conference on the motions for summary judgment at the earliest practicable date, to be fixed by counsel. The Government responded on September 28, 1978, with a request for a delay of 120 days for the development of plans being formulated by a task force engaged in a reassessment of Interior Department policy with respect to the Hoopa Valley Reservation and the case. On the eve of a status conference set for December 5, 1978, the Interior Department on November 20, 1978, addressed a message to the Hoopas and Yuroks announcing plans to create a Yurok Tribe.

The conference of December 5 considered the Government's message and the enlistment of amici curiae on the motions for summary judgment; the Government asked for a substantial suspension of proceedings pending further development of policy and plans concerning the case. Another such request came on February 12, 1979. (Meantime various matters with respect to the case continued; for instance, the trial judge's docket of the case shows 10 entries in September 1978, 12 in October 1978, 16 in November 1979, 10 in December 1978, 10 in January 1979, 14 in February 1979 and so on; the docket presently fills 64 pages.)

In May and July 1979, the present motion, and the defendant-intervenor's companion motion to dismiss the case as nonjusticable, made their appearance. An unsuccessful effort to suspend the reference of dispositive motions to the trial judge occupied from May to November 1979, when the current motions were remanded to the trial judge. Briefing then followed and was concluded in February, 1980, upon which the Government sought oral argument. On March 14, 1980, oral argument was set for the first day convenient to all concerned, April 29, 1980. Hearing took place in San Francisco, for the convenience of Yuroks and Hoopas who wished to attend. Post-hearing briefs were filed on May 20, 1980.

These details of the highpoints of the proceedings are set out to give the many persons directly interested some inkling of the causes for the protracted delay in the final disposition of the case.

It thus appears that from 1963 to the present, the Government has steadily argued that the property rights involved in the case are tribal rights and that the plaintiffs' case should therefore be dismissed. The only change has been in the name of the alleged tribal owner. Formerly, the contention was that sole tribal ownership was in the Hoopa Tribe, and the prayer was that the court should dismiss for lack of jurisdiction over tribal rights. Now, the Government having accepted that the Hoopa Valley Reservation is one reservation, continues to argue that the property is tribal, changes the contention of exclusive Hoopa ownership to one of dual ownership by the Yurok and Hoopa tribes, and continues to seek a dismissal of plaintiffs' case, adding only a new prayer for the installation as sole plaintiff of a Yurok Tribe. The former and present contentions are the same, in urging the recognition of exclusively tribal rights and the dismissal of the claims of the plaintiffs.

The Government, it should be said, recognizes that the issue of tribal versus individual interest in the reservation has been raised before and that "essentially similar grounds are offered in support of the present motion to substitute." (Moving brief, 2-3). The difference between the situation then and now is in the moving brief claimed to be that the Executive Branch has in a fashion binding on the court recognized the to-be-created Yurok tribe as the owner of the property sued for by plaintiffs.

Were this position still material, it would be appropriate to recall that the Government is here the defendant; that a defendant does not make the rules of decision in pending cases; and that the Interior Department's recognition of the Yurok Tribe as the owner of the money claimed by plaintiffs is no more binding on the court than was the Interior Department's recognition in 1958 of the Hoopas as the owner of the timber profits. Since the motion was made it has appeared, however, that the Government's efforts to create a Yurok Tribe have been enjoined unless approved by vote of the Yurok people, a vote unlikely to be given. The Government accordingly has amended its position and now argues that because the property rights are tribal, the plaintiffs have no rights to the revenues of the reservation "as a matter of law, whether the United States recognizes one, two or no Indian tribes on the reservation."[4/] The change eliminates the last difference between the present contention and that repeatedly rejected by the court over the past years.

The question of tribal rights has not only been decided but as res judicata has resisted relitigation in another case. Only

---

4/ "Defendant's motions rest on an uncompromised principle of this country's Indian jurisprudence--that unallotted resources of the reservation are, as a matter of law, tribal assets. Individual Indians, whether they be members of organized tribes or unaffiliated, have no severable legal rights, title, or interests as individuals in the Hoopa Valley Indian Reservation. Consequently, the individual plaintiffs in Short and Ackley and the members of the Hoopa Valley Indian Tribe as individuals have no legal entitlement either to the reservation resources or to revenue derived from those resources. This is true as a matter of law, whether the United States recognizes one, two or no Indian tribes on the reservation." (emphasis in original); Government's post-hearing memorandum, May 20, 1980, 2.

last year the court dismissed a complaint by the Hoopa Valley Indian Tribe making a claim on various theories to the timber monies, which had been frozen by the Secretary of the Interior following the decision in Jessie Short. The claim was held to be res judicata by virtue of the decision in Jessie Short that "every Indian of the Reservation is equally entitled to a share of the profits from trust timberlands wherever located on the Reservation." Hoopa Valley Tribe v. United States, 219 Ct.Cl. _____, _____, 596 F.2d 435, 439 (1979). Further, "[i]n Short the court held that the rights in the timber revenues were the individual rights of the Indians of the Reservation; that all the revenues were to be divided by the number of the Indians of the Reservation and that the resulting shares were to be those of the individual Indians, respectively." Id. at ____, 596 F.2d at 447.

The question of tribal versus individual ownership has thus been decided, and the decision reaffirmed more than once. It is a settled matter and the Government will not be heard to reopen it.

Alternative grounds for the denial of the motion, were it now being presented for the first time, are these:

1. Equitable principles are a bar to the motion. Since 1974, when the Supreme Court denied the application for a writ of certiorari to review the decision in Jessie Short, the Government has participated in a years-long searching inquiry by all the parties--essentially a trial--into the personal qualifications of 3200 of the individual plaintiffs who seek to be adjudged Indians of the reservation and therefore entitled to a money judgment. This inquiry led, finally, to the cross-motions for

summary judgment already described. An enormous amount of work has been done by the plaintiffs and their counsel in the preparation and litigation of these motions. Large costs in time, effort and money have been incurred. The doctrine of res judicata aside, the Government's delay until now in making what is no more than another application for a rehearing of the claim that the property is tribal, constitutes laches, and an estoppel on the Government to make the motion.

2. The contention that the property is tribal is without merit, even were it open to reconsideration. The Hoopa Valley Reservation was created as a non-tribal reservation for such Indians as the President might settle thereon. The opinion and the findings in Jessie Short make it clear as can be that by the word "tribes," used throughout to describe the Indians settled there by the President and the Indians presently there, is meant Indian peoples. There were no tribes on the reservation in the sense of entities with a claim to property rights, until the Hoopa Valley Tribe was created by the Government in 1950 so that its roll of members could be used for the per capita distribution of the timber profits. There has never been a Yurok Tribe on the reservation.

3. Still another ground dispositive of the motion, understood as a motion to replace the plaintiffs with a Yurok Tribe, is that there is no Yurok Tribe in existence and it is highly unlikely that there will be one, at least in consequence

of the Government's present efforts. The creation of the tribe was enjoined in an action in the district court for the Northern District of California brought by 14 plaintiffs in the present case. The injunction has been dissolved as moot, on the undertaking of the Government that it would not again attempt to create such a tribe without first conducting a referendum on the issue whether a representative body should be created. Beaver v. Secretary of the Department of the Interior, No. Civil 79-2925-SW, D.C.N.D. Calif., order dated Feb. 11, 1980. Preparations for such a referendum are now in process; the referendum is expected to take place about August 15. Most or all of the voters will be the present plaintiffs, and they are not likely to vote to create a Yurok tribe, which they not unreasonably see as part of a Government plan to deprive them of their expectation of individual money judgments in this case. The Interior Department's efforts to create a Yurok tribe, the Government believes, will not be successful unless this court substitutes the to-be-formed Yurok tribe for the individual plaintiffs.

The hard fact is that if, as the Government asks, the individual plaintiffs are held to have no rights and their complaint is dismissed, the retroactive installation as plaintiff of a stranger to a case pending for 17 years, especially a non-existent stranger, is out of the question. If the plaintiffs have no rights, the case must come to an end. This consequence the Government is most unwilling to see. In its post-hearing

memorandum, the Government states that acceptance of its views leaves the court with two choices: dismissal of the plaintiffs' case or substitution of the Yurok tribe. Little reason is however offered for the choice of substitution other than the hardly legal reasons of sympathy for the "rightful owner of the claim" (i.e., the non-existent tribe), and protection of "the investment of the parties and the judiciary in a resolution of the case."

4. The Department of Interior regulations for the election which was to be the first step in the creation of a Yurok Tribe on their face undertook that the creation of the tribe should not prejudice the continued litigation of this case and the plaintiffs' expectation of recovery:

> For the reasons detailed below, it is made clear that the effort to provide the Yurok people an opportunity to organize a tribal government is separate from the interests at stake in the Short case. * * *
>
> The Court of Claims does not have before it any issue of tribal organization or form of tribal government. And, the Jessie Short case does not purport to affect the exercise of tribal government powers. * * *
>
> The organization of a tribal group and its exclusion of a qualified Indian plaintiff from membership in the tribe cannot usurp the authority of the Court of Claims to find that such plaintiff nevertheless is entitled to recovery in the Short case. * * *
>
> * * * all actions with respect to the reservation assets must take into account that, until the Short case is finally determined, it will not be known how income from the reservation assets should be distributed. Nevertheless, even though the question of who is entitled to share in the distribution of income from the reservation assets remains uncertain until the Short case is decided, the Hoopa Valley Indian Reservation assets must still be managed. * * * (44 Fed. Reg. 24536, 24537 (1979)).

By this statement the Yuroks were told that the organization of a tribal government and their "interests at stake in the Short case" are separate matters; that no issue of tribal organization or government is before the Court of Claims; that even if the tribe on its organization excluded a qualified Indian plaintiff from membership lists, that could not "usurp the authority of the court to find that such plaintiff nevertheless is entitled to recovery in the Short case." This is no less than a representation that the case will continue unaffected by an organization of a Yurok Tribe.

The plaintiff Yuroks have been told that the Government's program for Yurok tribal organization will not affect continuation and conclusion of the case to a distribution of reservation timber proceeds to the plaintiffs. The court is now engaged in identifying the plaintiffs entitled to shares in the timber proceeds. To deliver such a public message and simultaneously come to court with a proposal to replace the plaintiffs with the Tribe-to-be-created is squarely inconsistent and wholly unjustifiable.

The Government's promise and representation preface a "Final Rule" and are part of the "concise general statement of [the] basis and purpose" of a final rule within the meaning of § 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c). Neither promise nor representation, even if they do not have the force of law of the "Final Rule" itself, may be ignored by the Government. Yet neither can be squared with the present

motion, or with the "distinctive obligation of trust upon the Government in its dealings with these dependent and sometimes exploited peoples." Seminole Nation v. United States, 316 U.S. 286, 296 (1942), quoted with approval in Morton v. Ruiz, 415 U.S. 199, ___(1974). Accord, Navajo Tribe v. United States, Ct. Cl. Nos. 69, 299 and 353, May 28, 1980, slip. op. Part IV. A motion characterized by such inconsistency between official promise and conduct cannot commend itself.

For all these reasons, the Government's motion must be denied.

A TRUE COPY:

TEST:

Linda A. Fitch
Deputy CLERK
U. S. COURT OF CLAIMS