

In the United States Claims Court

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No. 102-63

(FILED JULY 25, 1989)

PIRTLE, MORISSET  
SCHLOSSER & AYER

JESSIE SHORT, ET AL., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 THE UNITED STATES, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 THE HOOPA VALLEY TRIBE OF INDIANS, )  
 )  
 Defendant-Intervenor.)

ORDER

DENIAL OF GROUP DAMAGES AWARD UNDER 28 U.S.C. § 1505

The plaintiffs filed a motion for an award of group damages under 28 U.S.C. § 1505. The defendant United States and the defendant-intervenor, Hoopa Valley Tribe oppose the motion. After careful consideration of the record, and after hearing oral argument, the court has determined that the measure of the plaintiffs' damages was previously decided. The law of the case conclusively establishes that the plaintiffs' recovery will be individual and not tribal or communal. In addition, 28 U.S.C. § 1505 is merely a jurisdictional statute which does not confer additional substantive rights on the plaintiffs. Because the substantive bases for the plaintiffs' recovery were fully before the court when liability and damages were decided, there exists no additional basis for the plaintiffs to recover. Accordingly, the plaintiffs' motion for an award of group damages under 28 U.S.C. § 1505 is denied.

## BACKGROUND

Plaintiffs represented by William C. Wunsch moved for an order awarding plaintiffs group damages under 28 U.S.C. § 1505, in response to a preliminary ruling in Puzz v. United States, No. C80 2908 TEH (N.D. Cal., April 8, 1988). On June 24, 1988, plaintiffs represented by Clifford Duke joined in the Wunsch plaintiffs' motion. The plaintiffs contend that they are an "identifiable group of American Indians" under 28 U.S.C. § 1505, and that as such they are entitled to an additional damage award based on alleged discriminatory distributions of communal revenues by the Bureau of Indian Affairs (BIA) to the Hoopa Valley tribal organization.

Also on June 24, 1988, the defendant United States responded in opposition to the plaintiffs' motion. The defendant contends that the plaintiffs' motion is in essence an untimely motion for reconsideration of the court's damages opinion, Short v. United States, 12 Cl. Ct. 36 (1987) (Short IV); that Puzz is not relevant to the issue of damages; and that if the court determines that a new issue exists, then it should be properly briefed in accordance with summary judgment procedures under Claims Court Rule 56. RUSCC 56.

The defendant-intervenor Hoopa Valley Tribe (Tribe) moved for a stay pending appeals of Puzz and because of legislation pending in Congress. On October 31, 1988, Congress enacted the Hoopa-Yurok Settlement Act, P.L. No. 100-580. The passage of the Hoopa-Yurok Settlement Act rendered the Puzz case moot, and the district court's order was vacated by the Ninth Circuit Court of Appeals and remanded with directions to dismiss the complaint. Puzz v. United States, Nos. 88-2834, 88-2836, 88-2837 (9th Cir., Dec. 27, 1988).

The Tribe filed a response in opposition to the plaintiffs' motion on January 13, 1989. The Tribe joined the government's argument that the plaintiffs had in essence submitted no more than an untimely motion for reconsideration of the court's 1987 damages opinion. The Tribe also argued that the plaintiffs were precluded from arguing that they possess a group or communal claim because of admissions and rulings of the court which establish that the plaintiffs possess individual claims only. Finally, the Tribe argues that the plaintiffs cannot rely on vacated and dismissed Puzz orders to support their new theory of damages.

## DISCUSSION

### I. Law of the Case

Few cases have a history so long and a record so large as this case. Short v. United States represents a body of law unto itself from which the court must occasionally draw for the only controlling precedent available. This court and its predecessor have issued numerous rulings. From this body of law, the court draws the same conclusion now that it did in 1987, when the court stated:

To the extent that prior opinions in this case specifically address the issue of damages, those opinions emphasize the individual nature of the plaintiffs' claims and indicate that recovery is limited to participation as individuals in per capita distributions. As was stated by the U.S. Court of Claims:

[a]dopting the trial judge's opinion, . . . [in 1973] we held that the Square and the Addition 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), and that the plaintiffs who were Indians of the Reservation were entitled to recover the monies the government withheld from them.

Short II, 228 Ct. Cl. at 538, 661 F.2d at 152 (emphasis added). Elsewhere the court stated, "[i]t follows . . . that individuals whom the Secretary arbitrarily excluded from per capita distributions have the right to recover." Id. at 543, 661 F.2d at 155.

\* \* \*

The law of the case therefore mandates that the individual qualified "Indians of the Reservation" be included in any per capita distributions made in the years until final judgment, and for the years

to come while the situation on the Reservation remains the same. Short III, 719 F.2d at 1143.

\* \* \*

Therefore, a qualified plaintiff holds individual rights as an Indian of the Reservation equal to that of an enrolled Hoopa Valley Tribe member. Tribal or communal assets that have not been individualized may not be awarded since plaintiffs are suing as individuals under 28 U.S.C. § 1491 (1982).

Short IV, 12 Cl. Ct. at 39-40.

Regarding distributions of revenues to the Hoopa Valley Tribe by the Secretary of the Interior, the court also squarely addressed this question in the 1987 damages opinion. The court stated:

The Secretary of the Interior, vested with certain discretionary powers over the management of unallotted Indian resources, decides when and how distributions of timber revenues from unallotted lands are to be made under 25 U.S.C. § 407 (1982). The Secretary's decision to provide necessary funds from unallotted lands to a tribal government, rather than to individuals, should be accorded some deference. These funds can be used to support tribal sovereignty and permit organized and effective delivery of services to persons living on reservation lands. There is nothing in the legislative and administrative history of the Reservation to suggest that the Secretary lacks the authority to support the development of tribal governments.

\* \* \*

Plaintiffs, like non-Indians within Indian country, do benefit from the presence of an organized tribal government and also benefit from general federal services administered by the Tribe that are not premised upon Hoopa membership. To be sure, plaintiffs arguably were not benefited by tribal services that they were ineligible to

receive because they were not enrolled Hoopas. However, an individual Indian's rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common. Just as an enrolled Hoopa could not claim a "share" of monies used by the Hoopa Valley Tribe as a government, plaintiffs may not recover a portion of monies distributed to the Tribe. Thus, payments made to the Tribe will not be credited or deducted from the plaintiffs' award as individuals.

The Secretary may chose to make future distributions on a tribal basis, make additional per capita payments to individuals, or both, but the distributions must be made in a non-discriminatory manner. To mandate that the Secretary distribute monies dollar-for-dollar between an organized tribal government and a group of individual Indians could hinder the Secretary's implementation of the Congress' and the Executive's policy of strengthening tribal governance and self-determination.

Id. at 41-42 (citations omitted).

Thus, the court concludes that the issue raised by the plaintiffs' motion has already been fully considered and decided. In addition to the discussion outlined above, the court in Short IV thoroughly reviewed earlier rulings in deciding the appropriate measure and basis of the plaintiffs' damages. The court set forth a formula for calculating the recovery of individual plaintiffs once the qualification phase is complete. The conclusion that the theory urged by the plaintiffs now was rejected in 1987 is underscored by the fact that an award of group damages would necessitate discarding the formula devised by the court in Short IV.

The principle that the government's liability for the breach of its trust obligations flows to plaintiffs as individual Indians is deeply rooted in the law of this case. In Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973) cert. denied, 416 U.S. 961 (1974) (Short I), Judge Schwartz specifically delineated the

nature of the government's liability. The court found that:

171. Beginning in 1955 and continuing to the present time, the Secretary of the Interior, upon requests made by resolutions of the Hoopa Valley Business Council, has each year disbursed, from the accumulated income in Account No. 14X7236 and its interest Account No. 7736 for the Hoopa Valley Indians (finding 167, supra), per capita payments to the Indians on the official roll of the Hoopa Valley Tribe. . . .

Id., 202 Ct. Cl. at 971. In finding number 172, Judge Schwartz set forth a table showing the dates of the disbursements, the amounts paid each individual, and totals of these amounts. Id. at 972. The court concluded that:

[D]efendant 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.

Id. at 980-81. The court thus concluded that the specific injury suffered by the plaintiffs was the defendant's arbitrary distribution of revenues only to individuals on the official Hoopa roll. The principle that damages be awarded on an individual basis is consonant with the fundamental theory of liability established in Short I.

This fundamental theory of liability and consequent measure of damages was reaffirmed by Judge Schwartz in Hoopa Valley Tribe v. United States, 219 Ct. Cl. 492, 596 F.2d 435 (1979), where the plaintiffs, inter alia, sought to raise the issue of the division of revenues between the Hoopas and Yuroks. Judge Schwartz stated that:

In Short this 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 Indians of the Reservation and that the resulting shares were to be those of the individual Indians, respectively.

Id., 219 Ct. Cl at 516, 596 F.2d at 477.

In Short v. United States, 228 Ct. Cl 535, 661 F.2d 150 (1981), cert. denied, 455 U.S. 1034 (1982) (Short II), the court once again emphasized the individualized nature of the plaintiffs' claims. In that proceeding, the government had sought to substitute as plaintiff an as yet unorganized Yurok tribal organization for the individual plaintiffs in the case. The Court of Claims stated, referring to Short I, that:

\* \* \*

Our ultimate finding was that the government "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." It follows from that conclusion that individuals whom the Secretary arbitrarily excluded from per capita distributions have the right to recover.

Thus, as the trial judge pointed out in his opinion on the political question issue, "this is a case in which claimants are seeking the vindication of individual Indian rights," not of tribal rights. Indeed, despite the existence of the Hoopa Valley tribal organization, the Secretary "disbursed" from the timber receipts "per capita payments to the Indians on the official roll of the Hoopa Valley Tribe. . . ." The Secretary thus recognized that payment of the timber revenues on an individual (rather than a tribal) basis was an appropriate method of distribution, and was not in conflict with any concept of tribal ownership of trust-status lands.

Unlike the Hoopa Valley Indians, who had a tribal organization, there was no functioning entity that could have acted for the non-Hoopa Indians of the Reservation either when the non-Hoopa Indians filed this suit in 1963, or when we ruled in 1973 that all the Reservation Indians had an interest in all the Reservation property. It was therefore not only appropriate, but necessary, that the present suit be brought by individual Indians.

Id. 228 Ct. Cl. at 543, 661 F.2d at 155 (citations omitted). This view was later reaffirmed by the newly formed Federal Circuit Court of Appeals, which stated in Short v. United States, 719 F.2d 1133, 1137 (1983), cert. denied, 467 U.S. 1256 (1984) (Short III), that "[t]his is a matter of individual entitlement not of tribal membership for other purposes."

It is, therefore, inescapably and conclusively the law of this case that the nature of the injury suffered by the plaintiffs is individual, that the government's liability flows to the plaintiffs as individuals, and that their entitlement to damages is strictly on an individual basis. Previous rulings in this case evidence no specifically delineated theory of liability to support an award of group damages. Only under exceptional circumstances is it appropriate for the court to re-examine the decided law of the case. As the Court of Claims stated in Northern Helex Co. v. United States, 225 Ct. Cl. 194, 201, 634 F.2d 557, 562 (1980):

The standard under this exception is a stringent one. As we stated in Turtle Mountain Band: "The purpose of the law-of-the-case principle is to provide finality to judicial decisions. A strong showing of clear error therefore is required before a court should reexamine its decision. . . ."

The court is ever mindful of the Federal Circuit's admonition that "this very old case will speedily be concluded." Short III, 719 F.2d at 1143. Accordingly, the purpose of the law-of-the-case doctrine, "to provide finality in judicial decisions," id., will be served in declining to re-examine the court's prior rulings on damages.

## II. The Indian Tucker Act

The plaintiffs rely on 28 U.S.C § 1505 as the basis for the court to award additional group damages.



Section 1505, also known as the "Indian Tucker Act," United States v. Mitchell, 463 U.S. 206, 214 (1983) (Mitchell II), like the Tucker Act, 28 U.S.C. § 1491, on which it is based, is jurisdictional only. The statute does not confer any substantive rights upon a plaintiff. In United States v. Mitchell, 445 U.S. 538, 540 (1983) (Mitchell I), the Supreme Court stated that:

Under 28 U.S.C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491, and the United States is entitled to the same defenses at law and in equity under both statutes. It follows that 28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491.

Regarding 28 U.S.C. § 1491, the Supreme Court held in Mitchell I that:

The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." The Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists."

Id. at 538 (citations omitted). Accordingly, there can be no question that the substantive rights of the plaintiffs are not enlarged by the existence of jurisdiction in this court under 28 U.S.C. § 1505.

The plaintiffs' substantive rights in this case are founded upon the trust obligations of the United States government. These obligations are derived from the Act of April 8, 1864, 13 Stat. 39, establishing Indian reservations in California, from Executive Orders, and from 25 U.S.C. § 407, which provides that proceeds of the sale of timber harvested from unallotted reservation lands be used for the benefit of the Indians. These substantive bases have been before the court from the beginning and were fully considered by the court throughout the disposition of this case. Section 1505 adds nothing. The assertion of an additional jurisdictional basis for an action does not carry with it any additional substantive rights. The plaintiffs' request for group damages does not assert any additional substantive basis for such an award, and as previously discussed, 28 U.S.C. 1505, like the Tucker Act, is jurisdictional only. Accordingly, the plaintiffs' motion must be denied.

CONCLUSION

The court has determined that the measure of the plaintiffs' damages has already been decided by the court. The law-of-the-case doctrine precludes any reconsideration at this time. The Indian Tucker Act, upon which the plaintiffs' motion is founded, does not confer any additional substantive rights that support an award of group damages. The substantive bases of the plaintiffs' entitlement to damages have been fully considered. Accordingly, the plaintiffs' motion is denied.

*Lawrence S. Margolis*  
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LAWRENCE S. MARGOLIS  
Judge, U.S. Claims Court