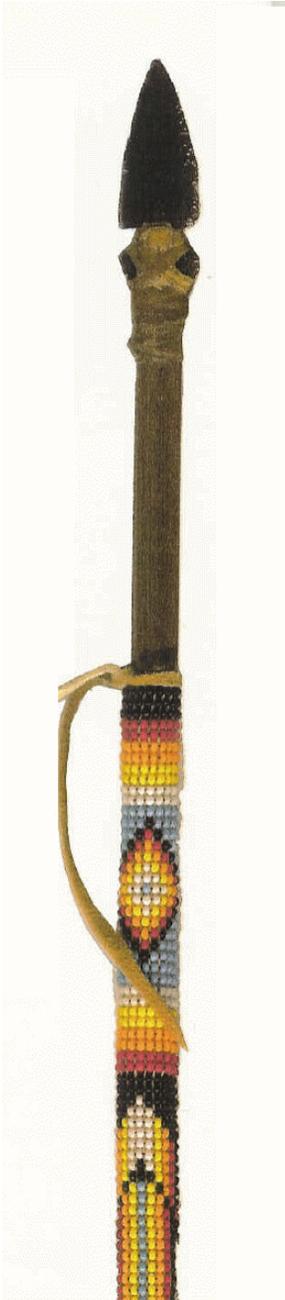


Counsel of Record Report # 3 June 20, 2003



On June 11 and 12, 2003, I worked intensively with Calvin Hackford and Oranna Felter in Roosevelt, Utah to discuss the defendants' motion to dismiss and to develop a legal strategy in opposition of their motion. In my last Report, I briefly described the basis for the defendants' motion to dismiss. I urge all of you who have access to the internet to thoroughly review the motion to dismiss *prior* to the June 28 plaintiffs' meeting in Heber City, Utah. Stated again, the defendants' motion to dismiss argues that the *Felter* complaint does not establish: 1) subject matter jurisdiction in the United States District Court; 2) the complaint does not identify where the United States government has waived its sovereign immunity; 3) the complaint is completely barred by the statute of limitations; and all the claims in the complaint are barred by the principles of res judicata and collateral estoppel.

After spending many hours with Cal and Oranna documenting the history of the Ute Partition Act ("UPA") *against the "actual" actions taken by the United States* in implementing the UPA, it is clear that, from the beginning, the original intent of the United States Congress in passing this "termination" legislation was derailed. That original intent was to terminate *all* the members of the Uinta, Whiteriver and Uncompaghre Band of Utes that were consolidated under the 1937 Indian Reorganization Act "Constitution and By-laws of the Ute Indian Tribe of the Uintah-Ouray Reservation, Utah". Of course this did not occur since the two (2) remaining Band went back to Congress and persuaded it to amend the UPA so they would not suffer "termination."

One of the key characteristics of the UPA was that certain "assets" were to be divided under the Act between the full-blood Utes and the mixed-blood members of the Uinta Band. History shows that in an around 1960, the Bureau of Indian Affairs ("BIA") circumvented the UPA to allow the "Ute Tribe" to acquire the mixed-bloods' land. See *"Termination's Legacy - The Discarded Indians of Utah, R. Warren Metcalf, Univ. of Nebraska Press, 2003, at page 200*. Although this is a historical fact and it can be proven that this manipulation of the UPA occurred, we must develop a sound legal strategy to place this fact in a position where it helps us overcome the defendants' motion to dismiss. Otherwise, it is only a historical fact of no use to us.

One way to accomplish this to defeat the motion to dismiss, is to *examine the current assets* held or not held by the original 490 mixed-bloods and determine why, in this modern day, those assets are held or not held by the original 490 and their lineal descendants. From Cal's detailed historical account of the manner in which the UPA was not correctly implemented, it is easy to see how the defendants employed the difficult to understand "technical" definitions of the UPA to encourage that the mixed-blood would be cheated out of their land, corporate share holdings and valuable rights to timber, water and oil and gas interest.

First, we must look to whether the cases cited by the defendants in the brief supporting the motion to dismiss specifically addressed the points of fact and law that might have been raised, argued and decided in those cases. For instance, if the UPA had been properly implemented by the Department of the Interior many years ago, then Cal would have had his water rights that are appurtenant to his allotted lands given to him outright. However, Cal, as the owner and beneficial user of certain water rights associated with his land, cannot do what any other "non-

Indian" owner can do with this valuable asset which is to sell, it convey it by will, or use the water right *without* federal involvement as he sees fit. To this day, Cal, as an original 490, cannot do like any other non-Indian can do with regard to their water rights but he must deal with the Secretary of the Interior who has the ultimate say-so over water rights that should have been given to him outright many years ago *had the UPA been correctly implemented*. Another point is that, if he owned the rights to his water like any other non-Indian, he could will his valuable rights to others. However, the defendants say that once he dies then the rights to his appurtenant water rights do not go down to anyone by intestacy or by a testamentary distribution by will. Another kicker in Cal's situation is that he is taxed on his water like any other non-Indian. Cal's situation shows that the federal government remains very much involved in a continuing failure to finally implement the UPA. If Cal was truly "terminated" under the UPA, he would have his water rights appurtenant to his land "free and clear" from Department of Interior involvement: if he is not so "terminated" as a mixed-blood member of the Uinta Band then the provisions of the UPA have not been successfully carried out even to this day.

Next, we must look at the manner in which the simple example described above can be used in this modern day to get around the statute of limitations argument asserted by the United States in its motion. Assuming that Cal did not get what the UPA said he would get, an independent right to use, sell or transfer his water rights like any other non-Indian, then this easily proven fact shows that the UPA has not been implemented and *that failure by the defendants' to correctly implement the UPA continues to injure his legal rights today*. There will be other similar examples in the facts of each plaintiff's situation that will come close to Cal's situation even if it does not deal with a water right. Remember, there were grazing rights that were issued as a result of the UPA and lost to the mixed-bloods and their heirs as a consequence of federal action that occurred over 40 years ago. As I noted in my prior Report, the defendants' motion seek to portray to Judge Lamberth that everything that the federal defendants had to do to correctly implement the UPA was done way back in the 1960's. From Cal's example, this not true. It is our job to argue this untruth to the Court in our opposition.

I also emphasized to Cal and Oranna while in Roosevelt, that we must develop a "theme" that we can use to present the historical background of the Uinta Band and how the UPA has been mishandled to a point, over time, where the UPA must be considered null and void. If properly framed, the "theme" will allow us to more effectively place each of those arguments and law cases noted by the defendants in their motion in the proper context of a continuing duty by the United States to correctly execute the UPA.

In California, "rancherias" were also terminated in the 1960's pursuant to the California Rancheria Act, Public Law 35-671, as amended effective August 13, 1965. In the late 1970's, the California Indian Legal Services Corporation filed a series of lawsuits challenging the implementation of the California Rancheria Act. After almost 20 years, these lawsuits successfully challenged the termination by the BIA of California Rancherias and restored most of their members back to federally-recognized status. As you see, there is some basis to argue that these cases stand for the fact that a lawsuit questioning whether the United States executed its duties under a "termination" law can be successfully brought even if brought over 40 years after the UPA was passed by Congress.

Finally, I must explain that I represent the legal interest of only those individual plaintiffs, who have paid their dues and signed on to be included in the *Felter* case. I understand that some out there believe that they can ride on the "coattails" of those who have shown their commitment by paying their contributions and formally signing on to be in the case. This is not a class action lawsuit but one filed by individuals. Should a court order, decision or decree be reached in our favor, the scope and extent of that court action can reach only so far as those individual plaintiffs named in the lawsuit. If you expect to ride on the "coattails" of those who are sincere about their role and participation in this lawsuit, I urge you to think about his and consider a formal entry in our lawsuit by paying your contributions.

I will see you in Heber City next week!

Dennis G. Chappabitty
Counsel of Record in *Felter, et al., v. Norton, et al.*