UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:02 CV 2156 (RWR)
GALE NORTON, Secretary of the Interior, et al.	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Defendants respectfully submit their reply to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss ("P. Opp.").

Plaintiffs' brief is often very unclear about the legal and factual arguments it is making. The brief, like their Amended Complaint ("A.C."), does not specify alleged wrongs defendants have committed or omitted with respect to the Ute Partition and Termination Act, enacted August 27, 1954, 25 U.S.C. §§ 677-677aa ("the UPA" or "the Act"). Plaintiffs' submission also is inconsistent in its positions and in the generalized claims it puts at issue.[1/]

Plaintiffs spend considerable time in colorful language to attack in the most general terms:

> [t]he culpability of the federal Defendants in using the UPA as a 'lethal weapon' in a campaign what [sic] can only be characterized as racism and cultural

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[1/]Plaintiffs Opposition makes a number of factual statements, which at the appropriate time, if necessary, defendants will present evidence to dispute. In the context of this motion to dismiss, however, but without conceding the accuracy of plaintiff's factual assertions, defendants do not attempt to refute them.

> genocide against a proud and spiritual Indigenous People, the Uinta Band of Ute Indians, the original inhabitants and grantees of the Uinta and Ouray Reservation in the present State of Utah.

P. Opp., 1. Plaintiffs attack at some points both Congress for enacting the UPA and the federal defendants for implementing it:

> Plaintiffs believe that the UPA was a proverbial small-pox infected blanket given to them by Congress and delivered to their Reservation by the Department of the Interior. . . . [T]he UPA had untold and perhaps incalculable deadly consequences.

Id., note 1.

Though plaintiffs consistently fail to specify any particular wrongs committed against them, they repeatedly state in their Amended Complaint that:

> they seek redress in the federal courts to obtain a determination which recognizes those *"prior existing ownership and rights in property"*, compensates them for loss of those *"pre-1961"* rights and property and acknowledges that the Act "plowed" under and handed them to undeserving parties all without accounting for various Treaties, Acts of Congress, the Constitution of the United States of America and Amendments thereto, the Indian Reorganization Act ('IRA') Constitution and By-laws of the Ute Indian Tribe "not specifically extinguished" by the UPA.

Id., 2. (Italicized emphasis in original.)

Thus stated, plaintiffs leave no doubt that they are seeking both restoration of and belated compensation for rights and ownership they claim were lost to them improperly by actions of the United States and federal officials – all before 1961. In fact, nowhere in either the Amended Complaint or their Opposition brief do plaintiffs allege any pertinent actions after 1961.

Plaintiffs' Claims Are All Barred by the Statute of Limitations

In so casting their Complaint and recasting it again in their Opposition, the plaintiffs have offered no factual basis for avoiding the bar of the statute of limitations, 25 U.S.C. 2401, to all of

their claims in this case. They make no effort in their legal argument on that issue to suggest the law somehow operates otherwise to save their case. Quite to the contrary, plaintiffs even reinforce defendants' contention throughout their Opposition by arguing defendants have misdirected the debate by couching it "in a *post-UPA* scenario." P. Opp. 25. (Italicized emphasis in original.) As defendants translate that remarkable statement, plaintiffs have conceded that all their rights and all the wrongs committed against them occurred before 1961 – some forty-one years before they filed their original Complaint herein.

Others of the 490 "mixed-bloods,"[2/] whose trust property was extinguished by implementation of the UPA, have previously but unsuccessfully sued to challenge the allegedly improper or illegal carrying out of the Congressional directives in the UPA by federal officials. In one case, not filed for many years after 1961, the Tenth Circuit dismissed, in part, because it held that those plaintiffs who had participated along with all 490 "mixed-bloods" in the formation of the Affiliated Ute Citizens ("AUC"), organized initially to manage their share of the indivisible tribal assets, could not complain 29 years later that those actions were illegal. Maldonado v. Hodel, 683 F.Supp. 1322, 1329 (D. Utah 1988), aff'd No. 89-4035 slip. op. (10th Cir. 1990). The plaintiffs in the instant case are either among those same 490 or are their descendants and are likewise legally barred from making the same kind of challenges even later in time than the Maldonado complaint.

Plaintiffs make no effort to refute that the UPA when implemented by 1961 constituted a clear termination of the trust relationship between the United States and plaintiffs. Their

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[2/]The term "mixed-bloods" is used within quotes in this brief. The expression is not only used by plaintiffs in their Amended Complaint and in their Opposition brief, it is used in the UPA and in most of the decisions discussed in defendants' two briefs.

ignoring of the matter is fatal because all of the claims they now appear to make accrued by 1961 – the effective termination of the trust corpus to which they had been beneficiaries. After that event, 28 U.S.C. § 2401 permitted them only six years to file any termination-related claims. See Jones v. United States, 801 F.2d 1334, 1335-36 (Fed. Cir. 1986), aff'g 9 Cl.Ct. 292, 295-96 (1985), cert. denied, 481 U.S. 1013 (1987).

The only effort plaintiffs advance to avoid that bar is generally to allege that they be given the later chance to attempt to show that "Defendants, as trustees, fraudulently conceal [sic] and obstructed them from information [sic] them." P. Opp. 25-26. The opposition on that basis is futile on the face of their own Amended Complaint. In the first place, everything affecting plaintiffs in this case emanates from an Act of Congress, the UPA, of which everyone is on legal notice. In the second place, it is evident that those of plaintiffs who were alive at the time of the UPA's enactment and implementation prior to 1961 were aware that events recited in the complaint were happening to them at that time.[3/] In the third place, there have been numerous lawsuits over the legal effect and implementation of the UPA[4/], suits of which plaintiffs were well aware because the organization they voted to create, the AUC, brought several of the most significant cases in a representative capacity on plaintiffs' behalf.[5/] Additionally, in another case

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[3/]A recital of significant, notorious events that directly affected plaintiffs and flowed from enactment and implementation of the UPA appears in the Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("D. Mem."), pp. 20-21. For even fuller discussion of the history of the enactment and implementation of the UPA, see Affiliated Ute Citizens v. United States, 406 U.S. 128, 133-39 (1972) ("AUC I") and Hackford v. Babbitt, 14 F.3d 1457, 1460-64 (10th Cir. 1994).

[4/]Many of these cases are discussed in Hackford v. Babbitt, 14 F.3d at 1463-64.

[5/]AUC I, 406 U.S. at 128; Affiliated Ute Citizens v. United States, 199 Ct. Cl. 1004 (1972; and Affiliated Ute Citizens v. United States, 566 F.2d 1191 (1977, cert. denied, 436 U.S. 983 (1978). These cases are discussed in D. Mem. 10-14, 17-18, and 19, respectively.

brought by the AUC, a "mixed-blood" and his son, who appear to be parties to the instant case, were also party plaintiffs.[6/] It is plain that under these circumstances plaintiffs could not establish, even after the exhaustive discovery they propose, that their claims were not known, much less not unknowable, under the standard set out in Menominee Tribe of Indians v. United States, 726 F.2d 718, 720 (Fed. Cir. 1984), cert. denied, 469 U.S. 826 (1985).

Plaintiffs' claims are clearly barred by limitations.

Plaintiffs' Claims Are Barred by Res Judicata or Collateral Estoppel

Defendants demonstrated in the opening memorandum on the motion to dismiss that several prior decisions of the Supreme Court and courts of appeals have already decided issues that bar some plaintiffs by res judicata, because they are in privity with the same party that is bound by other prior decisions D. Mem. 11-21.

Plaintiffs argue that they are not issue-precluded because the prior cases did not decide the same claims that plaintiffs now bring (P. Opp. 19-23) and because plaintiffs are not in privity with the prior litigants. Id. 23-25. Neither argument is correct.

Each of the cases defendants discussed in their opening memorandum presents decisions that bar this case. Id. at11-21.

The principal decision, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) ("AUC I"), as explained fully at D. Mem. 10-14, disposes of both of plaintiffs' arguments. There, the Supreme Court said that the AUC was organized as an unincorporated association in 1956 pursuant to section 6 of the UPA, 25 U.S.C. § 677e "to take any action that is required by

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[6/] Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992) was brought by the AUC and two "mixed-bloods," Glen (Mac) Murdock and Mac (Eugene) Murdock, Jr. The same names are listed as parties here. A.C. 20.

[the UPA] to be taken by the 'mixed-blood' members as a group." AUC I, 406 U.S. at 135-36. Although plaintiffs charge that today that critical meetings involving them were illegally held in implementing the UPA[7] (P. Opp. 10), the Court also found that these "mixed-bloods"[8] thereby empowered AUC's board of directors to delegate to corporations organized under the UPA "such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized." Id. (quoting from the AUC Constitution, Article V, § 1(b)). The AUC brought one of the two cases consolidated and decided in AUC I on its own behalf and as representative of all the 490 "mixed-bloods" identified by the UPA. Thus, the plaintiff AUC is in clear privity with all of the plaintiffs.

In AUC I, the Court found that the formation of the UDC was part of the plan formulated by the "mixed-bloods" for the distribution of assets to the individual members of their group. The AUC's board of directors with a quorum present and voting, approved the articles of UDC, which the Secretary of the Interior also approved. In January 1959 the AUC directors by a unanimous vote (5-0) irrevocably delegated authority to UDC [and two other related corporations of the "mixed-bloods"[9]] to accomplish the purposes for which the UDC was formed. Id. Each "mixed-blood" was given 10 shares of the UDC capital stock, alienable only under specified statutory conditions "for the purpose of distributing to the stockholders in the future their respective shares in the proceeds or income from all claims and assets in which the

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[7] See p. 3, supra, for discussion of Maldonado v. Hodel, 683 F.Supp. at 1329.

[8] The term is not only used by plaintiffs in their Amended Complaint and in their Opposition brief, it is used in the UPA and in the decisions discussed on the res judicata and collateral estoppel sections of defendants' two briefs.

[9] The Antelope-Sheep Range Company and the Rock Creek Cattle Range Company. See § 13 of the Act, 25 U.S.C. § 677l(3)

mixed-blood members . . . have or will have an interest under the provisions of [the UPA]." Id., at 136, 138; D. Mem. 10-11.

The AUC brought AUC I to obtain a pro-rata distribution of over 27% of the tribal assets that had been declared indivisible by 25 U.S.C. § 677i, principally the oil and gas, to the "mixed-bloods" and a declaration that the AUC rather than the UDC, was entitled to manage the indivisible tribal assets jointly with the Tribal Business Committee of the Ute Tribe. The Court observed that the original Tribe from which the "mixed-bloods" were terminated had sought the UPA, that those 490 so terminated had themselves formed the AUC, and that the AUC itself "created and breathed life and vigor into UDC." AUC I, 406 U.S. at 143-44. D. Mem. 12. The Supreme Court affirmed the lower court rulings and held (1) that the UDC, not the AUC, could jointly manage the tribal property with the Tribal Business Committee and (2) that no "mixed-bloods," including the instant plaintiffs, have any individual interest in distributions of those jointly managed assets. AUC I, 406 U.S. at 144. Finally, the Court upheld the constitutionality of the UPA.[10/] Id. Thus, not only are plaintiffs in privity with the AUC, they are bound by Supreme Court's decision which precluded them and other "mixed-bloods" from claiming individual rights to the jointly-managed property at issue here.

This result has been further confirmed in Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992), cert. denied, Murdock v. Ute Distribution Corp., 507 U.S. 1042 (1993). There, the Tenth Circuit held that all holdings of the consolidated AUC I are binding on all members of the AUC and their descendants. As discussed fully in D. Mem. 14-17, the Tenth Circuit in

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[10/]In cases cited at D. Mem. 14, n. 3, the Act's constitutionality has been upheld on other occasions against allegations of racial discrimination and lack of due process, e.g., United States v. Murdock, 132 F.3d 534, 541-42 (10th Cir. 1997).

Murdock held:

> Under these circumstances, the AUC cannot now complain that it did not have a full and fair opportunity to litigate the issue [in AUC I]. It raised the issue in its initial complaint in one of the [AUC I consolidated] cases. It asked the Supreme Court to decide the issue in its brief and it argued its position extensively. The Supreme Court did decide the issue. . . . We hold that the AUC had a full and fair opportunity to litigate its status as the 'mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets.

975 F.2d at 690. The Tenth Circuit also extended the res judicata effect of the Supreme Court's decision on one of the Murdock plaintiffs who was the son of a "mixed-blood":

> to the extent that he [Mac Eugene Murdock, son of a mixed-blood] would not benefit from a declaratory judgment that the AUC is the mixed-blood Ute's authorized representative for purposes of the indivisible tribal assets, he has no standing to argue the issue. To the extent that he would benefit from such a judgment, the same reasoning regarding privity that we apply to his father also applies to him.

975 F.2d at 689, n6. The ruling on the descendants of the original 490 "mixed-bloods" also demonstrates that plaintiffs' assertions here that the UPA did not terminate the rights of "newborns" must be rejected. Another descendant was similarly held to be bound by the actions of the AUC. United States v. Murdock, 132 F.3d 534, 540 (10th Cir. 1997).

All of plaintiffs' claims here are barred by the foregoing decisions, and the others discussed in D. Mem. 11-21, the parties with which plaintiffs are either in privity or identical.

Plaintiffs Have Still Failed to Identify Any Statute Conferring Jurisdiction of This Court That Waives the Sovereign Immunity of the United States for Such Actions

Defendants, as they best understand plaintiffs' opposition brief, do not find any meaningful refutation of the fully legally supported reasons set forth in D. Mem. 21-29 that no statute plaintiffs cited in their Amended Complaint waives the sovereign immunity of the United States with respect to the allegations here. Accordingly, defendants submit that no waiver has

been shown and, for that reason, too, the Amended Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed on all counts because the Court lacks jurisdiction over the subject matter of it, because the Amended Complaint is barred by the statute of limitations and by res judicata or collateral estoppel.

Dated this 26th day of November, 2003.

Respectfully submitted,

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