UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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CIV. NO. 99-4106

CASIMIR LEBEAU and VERNON ASHLEY, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant

DEFENDANT'S RESPONSE TO ORDER REQUIRING INTEREST CALCULATIONS

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The Defendant, by and through counsel, Assistant United States Attorney Jan L. Holmgren, submits the following interest calculation as ordered by the Court and accompanying brief.

The Court in its Order filed July 29, 2002, ordered the parties to provide a brief and any supporting materials proposing an interest calculation taking into account the rule that "Plaintiffs are not entitled to recover interest on any interest portion of the damage award." The Court ordered a damage award in the amount of $482.79 plus interest, which is based on the benchmark of 1983, the date of the proposed partial distribution to eligible lineals, established by the Plaintiffs and the Court.

The attached mathematical calculations were provided by the Office of Trust Funds Management within the Department of the Interior. They show, on Exhibit A, that the principal portion of the 1982 figure of $482.79 was $219.70. The interest portion of the 1982 figure of $482.79 was $263.09. The Office of Trust Funds Management (OTFM) cannot provide a daily accrual rate that can be used prospectively for the Court to calculate interest because the interest rate on the fund changes daily. OTFM can calculate to a date certain in the past if one is designated by the Court, or to the date on which the calculation is made, and will do so at the Court's direction. Once judgment is entered, the interest can be calculated to the date of judgment because the interest rates up to that date can be determined historically.

The accounting principal used to calculate the interest on the damages amount is: principal x interest rate x time. Based on the Court's memorandum decision, it appears the variable would be the last part of the equation, the time period in question. Based on the Court's decision, it appears there are several possible time frames that could be filled in:

1) From 1983 (date the Plaintiffs' claim for damages) to the date of judgment
2) From 1983 (date the Plaintiffs' claim for damages) to 1987 (the last year the Court found the Defendants liable for delay)
3) From 1983 to 1998 (Plaintiff's made no claim for breach from 1998 forward)
4) From 1998 (date of the loss as found by the Court, November 13, 1998, date of enactment of the 1998 Amendment) to the date of judgment;
5) From 1972[1] to 1987 (period the Court found the Defendant liable for delay)

For the purposes of preserving the issue on appeal, however, the United States

[1] As to the 1972 date, Defendants would argue that the Bureau of Indian Affairs should have been given some time to prepare the roll, and the 1972 Act, PL 92-555, was not passed until October 25, 1972.

reiterates that no interest should accrue, and that the case cited by the Court in its Memorandum Decision and Order, Short v. United States, 50 F.3d 994 (Fed. Cir. 1995), is factually distinct and does not support any interest award under the circumstances of the instant case. The decision in Short is founded on a combination of statutory and trust duty:

> These statutes [tribal fund investment statutes, 25 U.S.C. 161a et seq.], in conjunction with the government's fiduciary duty to Indian tribes, *see* United States v. Mitchell, 463 U.S. 206, 224-26... (1983) (Mitchell II) give the plaintiffs a substantive right to damages, including interest....

Short, 50 F.3d at 998.

Short is another case which involved a breach of trust due to mismanagement of the trust corpus (in Short, wrongful distribution of proceeds from Indian timber land). *See also*, United States v. Mitchell, 463 U.S. 206, 224 (1983) (Mitchell II) (alleged mismanagement of pervasively regulated timber lands). *See also*, Nevada v. United States, 463 U.S. 110, 141 (1983)(alleged failure to obtain additional water rights for tribe); Pawnee v. United States, 830 F.2d 187, 192 (Fed. Cir. 1987) (failure to collect gas and oil royalties); North Slope Borough v. Andrus, 642 F.2d 589, 593, 611-13 (D.C. Cir.1980) (lease sale of property with oil and gas potential); California v. Watt, 668 F.2d 1290, 1325 (D.C. Cir. 1981) (lease sale of property with oil and gas potential); Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) (assist with cost of cleanup of tribal property). Even the cases cited in Short deal with losses due to mismanagement of the trust assets themselves. *See*, Cheyenne Arapaho Tribes of Indians v. United States, 512 F.2d 1390, 1393 (Ct. Cl. 1975) (mismanagement of IMPL accounts); Peoria Tribe v.

United States, 390 U.S. 648 (1968 (disposal of tribal lands at private rather than public auction for a lower price violated treaty). There was no wrongful disbursement or mismanagement of the fund corpus in the instant case, but rather a failure to make any disbursement at all.

In Short, the court stated that the Plaintiffs were wrongfully deprived of interest from the date that money from the trust was wrongfully disbursed to others. In the context of the instant case, that would mean that the interest damages would accrue from the date the loss to the Mississippi Sioux Tribes Judgment Fund occurred, by the amendment on November 13, 1998. The Court in its Memorandum Decision and Order stated that the loss occurred when the 1998 Amendment was passed by Congress, reducing the lineals' share by providing an additional percentage of the undistributed funds to the three successor tribes.

Further, the statute cited by the Court as the basis for the award, 25 U.S.C. 161(a) requires that "all funds held in trust .... to the credit of Indian tribes shall be invested...." The money in the Mississippi Sioux Judgment Fund was invested based on the 1968 Appropriations Act, Pub. L. 90-352, (82 Stat. 239), which Congress passed to satisfy a judgment to the three tribes who successfully obtained an Indian Claims Commission Judgment for loss of tribal lands to the aboriginal Mississippi Sioux. It was the 1972 distribution act, PL 92-555, that provided an allocation to individuals out of the fund. A statute that requires interest to be paid to tribes should not be used to waive sovereign immunity to pay interest to individuals outside the fund.

Further, in the Restatement of Trusts cited by the Court, Restatement (Second of Trusts § 345 , cmt. f, it states:

> Where it is the duty of the trustee to convey trust property to the beneficiary in kind, and the property depreciates in value before the conveyance is made, the trust is liable for the amount of such depreciation, if, but only if, it occurred after the trustee had unreasonably delayed in making the payment.

There was no depreciation in the value of the trust property in the case at bar, but rather there was an independent action of Congress in exercising its lawful authority to allocate property that was awarded to the aboriginal tribe by the Indian Court of Claims.

Dated this the 13 day of September, 2002.

JAMES E. McMAHON
UNITED STATES ATTORNEY

Jan L. Holmgren

Jan L. Holmgren
Assistant United States Attorney
PO Box 5073
Sioux Falls, SD 57117-5073
605-330-4400