

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
3

4
5 CHEYENNE ARAPAHO TRIBES OF
6 OKLAHOMA,

7 Appellants,

No. 07-5399

8 v.

9 UNITED STATES OF AMERICA, ET
10 AL.,

11 Appellees.
12

Monday, January 5, 2009

Washington, D.C.

13
14 The above-entitled matter came on for oral
15 argument pursuant to notice.
16

17 BEFORE:

18 CHIEF JUDGE SENTELLE, AND CIRCUIT JUDGES ROGERS
19 AND GRIFFITH

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

22 RICHARD J. GRELLNER, ESQ.

23 ON BEHALF OF THE APPELLEES:

24 MARY GABRIELLE SPRAGUE, ESQ.
25

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Mary Gabrielle Sprague, Esq. On Behalf of the Appellees	11

1 double the Tribe's current land base, a land base that at one
2 time encompassed 51 million acres, or over half of the Great
3 Plains. We would ask the Court to take notice that this Tribe
4 filed this case at the very last moment. Several decades went
5 by, several bills were introduced in front of Congress, and we
6 believe that we had no choice but to file this case because,
7 contrary to the Government's previous actions of recognizing
8 the Tribe's continued beneficial rights through its actions
9 over the years, and these types of special use lands, the
10 Department of Agriculture in 1994 issued an opinion stating
11 otherwise, and so therefore we felt -- and soon thereafter --

12 JUDGE GRIFFITH: Counsel, you don't dispute that
13 there were times in which the Fort Reno land was used for
14 other than military purposes, right?

15 MR. GRELLNER: We don't dispute that at all, Your
16 Honor.

17 JUDGE GRIFFITH: But that puzzles me because what
18 that does to your case because in your brief at page two you
19 say the Tribes allege the existence of a reversionary interest
20 which would vest when the lands were no longer devoted
21 exclusively to military purposes. So, the moment the land is
22 not devoted exclusively to military purpose you're on notice
23 of an adverse claim, aren't you?

24 MR. GRELLNER: That's a great question, except for
25 the fact that the United States didn't see it that way,

1 because the United States continued to recognize the existence
2 of the, and the application of the Executive Order. And in
3 fact, in the 1954 set aside, which the United States points
4 out in its amendment to its brief that the new agreement was
5 entered into for any possible foreign aid use. That
6 agreement, which is part of the record, said that it was up to
7 the military to determine whether or not it was ever going to
8 use it.

9 So, our position is, is just because the USDA had
10 jurisdiction doesn't mean that this property wasn't set aside
11 continually for military use --

12 JUDGE GRIFFITH: But isn't the issue, according to
13 your records, whether it's exclusive military use or not?

14 MR. GRELLNER: The issue is exclusive with respect
15 to the beneficial title, which is what we ask for, okay? And
16 when the United States transferred jurisdiction to USDA in
17 1948 it did nothing to extinguish the Tribes of beneficial
18 title, it didn't include language of extinguishing all right,
19 title, and interest, or any of that. And our position is, is
20 that if the Executive Order continued to remain into effect
21 beyond 1963 up to and continuing today then at the end of the
22 day the claim may never accrued, it may have accrued during
23 that time, we don't know. So, the Rule 56 --

24 JUDGE GRIFFITH: But what you've primarily appealed
25 here is District Court's denial of discovery, the

1 jurisdictional discovery. What do you hope to find through
2 discovery?

3 MR. GRELLNER: What we hope to find through
4 discovery is how long this agreement between the United States
5 Department of Agriculture and the military, where the military
6 had an exclusive right to determine how long they needed this
7 property for the foreign aid program, how long that stayed
8 into effect. If we could have completed this record with
9 respect to that then we would have known whether or not this
10 case continued till today.

11 JUDGE GRIFFITH: So, I take it you think there's
12 some secret documents, or secret agreements out there?

13 MR. GRELLNER: They were classified, Your Honor.
14 They were classified --

15 JUDGE GRIFFITH: Although it was reported in the
16 press at the time, in 1954 you have press accounts of this.

17 MR. GRELLNER: That's exactly right. And it was
18 also reported in the press that that set aside invalidated the
19 Tribe's claim. So, the Tribe's notice was this set aside for
20 these military, possible future military uses invalidates your
21 claim.

22 JUDGE SENTELLE: So said a newspaper article. But
23 as far as your factual knowledge you knew that there was non-
24 military use going on at the time, right?

25 MR. GRELLNER: The Tribe knew --

1 JUDGE SENTELLE: Yes.

2 MR. GRELLNER: -- the Tribe obviously knew that the
3 USDA had jurisdiction over the property. But the issue with
4 respect to the beneficial title in this case was whether or
5 not that agreement stayed in place, and whether or not it just
6 continued perpetually. And so, we believe that it's important
7 for as complete a record as possible to find out whether or
8 not that terminated.

9 The second issue that we believe the court erred on,
10 aside from not granting the Rule 56 motion, is that the court
11 granted summary judgment and entered a footnote in the
12 alternative. We believe the Eighth Circuit case Spirit Lake
13 stands in stark contrast to that because that case says that
14 once the lower court judge decided on the Quiet Title Act it
15 had no jurisdiction to proceed to the summary judgment motion
16 on the issue of res judicata.

17 JUDGE SENTELLE: Suppose you win on that issue, but
18 only that issue, you haven't won anything, have you?

19 MR. GRELLNER: On which issue, Your Honor?

20 JUDGE SENTELLE: The issue that you're now proposing
21 that this footnote has erred. Suppose we scratch that
22 footnote, how are you any better off than you were when you
23 came here?

24 MR. GRELLNER: Much better off, Your Honor.

25 JUDGE SENTELLE: That's why I asked you how you were

1 better off. Don't tell me much, tell me how.

2 MR. GRELLNER: I was fixing to. In that case, in
3 the Eighth Circuit case the court said although we agree with
4 the District Court's ultimate resolution that the claims
5 against the Government on the Quiet Title Act, we are obliged
6 to vacate it in part to remand so that the court may properly
7 dismiss against the Government for lack of jurisdiction.
8 There is no solved matter between a dismissal or summary
9 judgment in this context. Under the terms, the Tribe's claim
10 has been litigated, the Government would own Devils Lake. By
11 instructing the court to dismiss the complaint for lack of
12 jurisdiction, the ownership remains open.

13 So, if this case gets dismissed for lack of jurisdiction
14 under the Block decision, the ownership still remains at
15 issue. So, therefore the Tribe is free to move forward, as it
16 has in previous decades, to pursue a remedy in Congress.
17 That's why it's significant, because a dismissal on the Quiet
18 Title Act does not quiet title.

19 Now, that case was cited below, but it was not argued on
20 that issue. And that came out, the case, that's the follow up
21 case to the Devils Lake case that was cited, that tribe's name
22 was changed to Spirit Lake, and that issue was decided in
23 2001.

24 JUDGE SENTELLE: So, if we strike that footnote in
25 this case, the footnote you're talking about, what happens

1 differently than if we leave the footnote in?

2 MR. GRELLNER: What happens differently than if you
3 leave the footnote in there is, is the Tribe is free to pursue
4 say a third party, ala Arizona comes in and tries to get the
5 benefit of the Tribe's beneficial rights, then the Tribe is
6 free to pursue that third party because it can't -- and at
7 that point in time the issue could be determined and the
8 United States could come forward and file its own case to
9 determine the proper, whether or not title is quieted in the
10 United States. So, that's what happens if you strike that
11 footnote, title is not quieted in the United States.

12 Now, with respect to res judicata, we also believe that
13 this case, and the Government has cited no case to show that
14 any claim beyond 1946 is properly, would have been properly
15 determined by the ICC. We also believe that res judicata
16 should not have been determined because of the acreage
17 discrepancy in the record of the ICC case.

18 With respect to the Rule 56 motion, I'm tracking backward
19 here, and the Quiet Title Act, we believe that the evidence
20 clearly showed that the Government's own actions early in the
21 twentieth century, back to 1908, clearly showed that they
22 recognized the Tribe's interest in these special use lands.
23 In fact, the first time the Government in 1912 made the on the
24 record statement that these lands had been ceded, the Tribe
25 stood up and said these lands, this character should have been

1 returned, and the Government then appropriated the money to
2 the sale of some of these lands to the benefit of the Tribe.
3 It was after the Tribe was recognized and as a result of the
4 Oklahoma Indian Welfare Act in 1936 that the Government then
5 returned the balance of these lands, began to return them to
6 the Tribe.

7 With respect to Fort Reno, it's the only piece of
8 property with one small exception of about 1,000 acres that
9 was not disposed of, and either returned to the Tribe or sold
10 out of the entire reservation that was in the category of
11 special use lands. So, we believe that the Government's own
12 actions recognized the Tribe's beneficial title on an
13 affirmative basis, all the way up to 1963. Okay. Regardless
14 of what the Government may have said at one point or another,
15 every time they said something the Tribe rebutted it, the
16 Government appropriated the monies.

17 From 1963 forward there was no mineral leasing on this
18 property, and as late as 1995 the Veteran's Administration
19 cited a quieted title when a proposed national cemetery there
20 was determined to be, was being considered. At this point in
21 time that's where we believe that the Government began to
22 affirmatively take the opposite position. So, any further
23 questions?

24 JUDGE SENTELLE: You can save the rest for rebuttal.

25 MR. GRELLNER: Thank you.

1 ORAL ARGUMENT OF MARY GABRIELLE SPRAGUE, ESQ.

2 ON BEHALF OF THE APPELLEES

3 MS. SPRAGUE: Good morning, Your Honors. Mary
4 Gabrielle Sprague for the United States, and trial counsel
5 with me is Mr. Upton (phonetic sp.), trial counsel.

6 The Quiet Title Act enacted in 1972 provides the only
7 vehicle for contesting the United States' claim to real
8 property, but Congress limited the Act's waiver of sovereign
9 immunity in order to prevent the assertion of old claims. An
10 adverse claimant must file suit within 12 years of, "the date
11 on which the Plaintiff or his predecessor in interest knew or
12 should have known of the claim of the United States." The
13 Supreme Court has applied this statute of limitations with
14 equal force to Indian plaintiffs, as is made clear in United
15 States v. Mottaz.

16 About 2,700 acres of the former Fort Reno has been used
17 by the Department of Justice for a prison beginning in 1937,
18 and 6,800 acres is presently being used by the Department of
19 Agriculture for the grazing lands research laboratory. And
20 this use for civilian agricultural research purposes commenced
21 60 years ago, in 1948. The Tribes filed suit in 2006, that
22 was simply too late.

23 Indeed, this is one of the claims that never could have
24 been filed under the Quiet Title Act at all because as of 1972
25 when the Act was passed, this claim was already too old. The

1 United States had made it clear well before 1960 that it
2 rejected any ongoing reversionary interest of the Tribe. They
3 made this clear, Congress made this clear in 1937 when it
4 transferred 1,000 acres to the jurisdiction of the Department
5 of Justice, it made it even clearer in 1948 when Congress
6 transferred jurisdiction over the remaining acreage to the
7 Department of Agriculture.

8 The Tribes are mistakenly focusing on their own
9 interpretation of their claim rather than on the claim of the
10 United States to the property. The claim of the United States
11 is that there has been no reversionary interest since 1890
12 when the Tribe ceded the property to the United States. The
13 Tribes are looking at their own claim and saying well --

14 JUDGE GRIFFITH: Do you think that the 1883
15 Executive Order creates a reversionary interest, though?

16 MS. SPRAGUE: Your Honor, the United States has
17 never conceded that it even --

18 JUDGE GRIFFITH: I see.

19 MS. SPRAGUE: -- created that interest. And the
20 District Court said assuming it created an interest, then it
21 was ceded. And at this point it's a question of historical
22 fact really without effect as to whether there was one that
23 was ceded, or whether there was never one at all.

24 The Tribes are looking at this case from the perspective
25 of their reversionary interest, and their theory seems to be

1 that their Quiet Title Act claim didn't accrue until their
2 reversionary interest ripens into a future possessory
3 interest, and that is leading them to then ask well, when did
4 military use end? That's when our reversionary interest
5 ripened. But none of that is relevant because the United
6 States has made it quite clear that it rejects any
7 reversionary interest at all.

8 Counsel for the Tribes refers to the series of bills and
9 enactments of the special use lands within the 1869 Executive
10 Order reservation, and in some cases Congress did give the
11 tribes money for some of those lands, and in another case it
12 actually gave the land back to the tribe. But it's clear in
13 the enactments and the legislative history of these enactments
14 that all of these were as matters of recognition of a moral
15 and equitable claim by the tribes, and not a recognition of
16 any legal claim. And in fact, as we point in our brief at
17 page 21, the 1960 Act couldn't have said more clearly in the
18 legislative history that the bill donates the land to the
19 tribes.

20 And so, the fact that the United States has seen fit when
21 other lands that have been reserved for school and agency
22 purposes were no longer needed by the United States that as a
23 moral and equitable matter Congress then gave the lands back
24 to the tribes, doesn't say anything about the fact that it
25 needs and wants the Fort Reno property, and does not recognize

1 any reversionary interest in the tribes.

2 But even if you accepted the Tribe's view of the case as
3 their reversionary interest ripening into a present possessory
4 interest upon the cessation of military use of Fort Reno, the
5 District Court should still be affirmed because under the
6 Tribe's theory they were put on notice in 1954 that there was
7 this stand-by request between the Department of the Army
8 Quartermaster Corp and the Department of Agriculture to use a
9 portion of Fort Reno if they needed to muster mules for the
10 Indochina crisis. Well, after 1954 at some point the Tribe
11 knew or should have known that that didn't happen, and at some
12 point they should have said to the Department of Agriculture
13 well, we notice you have not been mustering mules, that the
14 Quartermaster Corp has not been mustering mules on Fort Reno,
15 we believe our reversionary interest has ripened, we would
16 like our land back. And it is quite clear standing here that
17 had that request been made of the Department of Agriculture,
18 the Department would have said no, we're not going to give you
19 the land back because that is not relevant, you no longer have
20 a reversionary interest.

21 So, at this point in time the Tribe's only recourse is
22 through Congress. And whether or not the Tribes were paid for
23 Fort Reno in their 1965 Indian Claims Commission settlement,
24 and the United States believes that they were paid, and Judge
25 Freedman (phonetic sp.) agreed with that, even if they were

1 paid, Congress could still if it chose give them the property
2 as a donation in recognition of any moral or equitable right
3 that the Tribe wishes to assert.

4 So, at this point in time there's really nothing for this
5 Court to do about the Tribe's interest in this property, that
6 is strictly a matter for Congress.

7 JUDGE SENTELLE: Do you understand the significance
8 of footnote three in the District Court's opinion?

9 MS. SPRAGUE: Yes.

10 JUDGE SENTELLE: Okay. Would you explain your
11 view --

12 MS. SPRAGUE: Of why Judge Freedman wrote that
13 footnote?

14 JUDGE SENTELLE: Yes.

15 MS. SPRAGUE: I think Judge Freedman was saying if
16 this Court for some reason has a problem with the dismissal
17 for lack of jurisdiction under the Quiet Title Act, and if
18 this Court believes there was jurisdiction in the District
19 Court, I've already reviewed all of the historical record
20 that's relevant to deciding the res judicata defense, and I'm
21 going to let the Court know that under the United States --

22 JUDGE SENTELLE: So, at most that's --

23 MS. SPRAGUE: -- affirmative defense --

24 JUDGE SENTELLE: -- an exercise of judicial
25 efficiency, which is without effect should we affirm the

1 District Court on the primary ground, right?

2 MS. SPRAGUE: I believe it is correct dicta.

3 JUDGE SENTELLE: Right or wrong it's only dicta if
4 we affirm on the primary ground. It only becomes of legal
5 significance if we reverse on the primary ground, right?

6 MS. SPRAGUE: I believe that's correct, Your Honor.

7 JUDGE SENTELLE: Okay.

8 MS. SPRAGUE: I think the Tribes are concerned about
9 its effect on their moral arguments to Congress.

10 JUDGE SENTELLE: Okay. Thank you, Counsel.

11 MS. SPRAGUE: Are there any other questions?

12 JUDGE SENTELLE: No. How much time did Counsel have
13 left?

14 THE COURT: Counsel has five minutes remaining.

15 JUDGE SENTELLE: We'll hear you in rebuttal,
16 Counsel.

17 ORAL ARGUMENT OF RICHARD J. GRELLNER, ESQ.

18 ON BEHALF OF THE APPELLANTS

19 MR. GRELLNER: Thank you, Your Honor. I'd like to
20 respond to a few of the arguments that Ms. Sprague made.

21 Number one, the United States argues that they never
22 recognized the reversionary interest in this property. I
23 guess that is the issue. And their point is, is that if the
24 reversionary interest, if we had brought forth past 1954 and
25 brought, and said that you're not using that for military that

1 they would have said you never had a reversionary interest.
2 Our point is, is that if the agreement between the Agriculture
3 Department and the military continued then we were entitled to
4 see the limit and scope of whether or not the Executive Order
5 was -- or the 1883 Executive Order was still in place.

6 Keep in mind that as of 1963 the United States' own
7 general land office record recognized that the 1883 Executive
8 Order was still in effect with respect to these 6,900 acres.
9 So, therefore, we believe it makes all their notice arguments
10 irrelevant if the Executive Order of 1883 is still in effect.

11 And with respect to the footnote and everything she says
12 about -- well, let me finish on that line of thought. The
13 National Security Act forbade the Tribe from getting any of
14 these records up until 2005. As the record shows the exact
15 status of this property was classified, and even though we had
16 previously put in for a request we didn't get any of these
17 documents until well into this case.

18 With respect to the -- and that's basically it, Your
19 Honor.

20 JUDGE SENTELLE: Okay. Thank you, Counsel. Seeing
21 no further questions the case is submitted.

22 (Recess.)

23

24

25

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood
DEPOSITION SERVICES, INC.

February 1, 2009