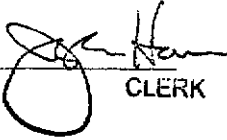


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**

OCT 24 2002

  
CLERK

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

VS

Civil No. 99-4106

UNITED STATES OF AMERICA,  
Defendant.

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**BRIEF IN SUPPORT OF MOTION FOR FEES and EXPENSES**

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**INTRODUCTION**

Plaintiffs respectfully move the Court for an award of fees and expenses in the above entitled matter under the Equal Access to Justice Act (EAJA), 28 U.S.C. Sec. 2412(d) (1988).

Judgment was entered on October 16, 2002. Plaintiffs lost the constitutional issue and they lost the issue questioning whether or not the enactment of the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998, itself, constituted a breach of trust. However, they prevailed on their breach of trust claim for delay in distribution of the funds appropriated and allocated by Pub. L. No. 90-352, 82 Stat. 239 and Pub. L. No. 92-555, 86 Stat. 1168 (codified at 25 U.S.C. Sec. 1300 *et seq.* (1983)).

Your applicant states that pursuant to 28 U.S.C. Sec. 2412(d)(2)(B) neither of the plaintiffs had a net worth exceeding \$2,000,000.00 at the time this action was filed.

**TIMING AND PROCEDURE FOR OBTAINING A FEE AWARD**

Local Rules of Practice for the United States District Court, District of South Dakota, LR 54.1(C) provides, in part:

In any case in which attorney's fees are recoverable under the law applicable to that case, a motion for attorney's fees shall be filed with the

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Clerk with proof of service within fourteen days after the entry of judgment...except as provided under the Equal Access to Justice Act when the motion shall be filed within thirty days.

The EAJA requires that a fee claimant file an application for fees "within thirty days of final judgment in the action." 28 U.S.C. Sec. 2412(d)(1)(B) (1988)

**THE GOVERNMENT'S POSITION ON THE BREACH OF TRUST CLAIM FOR DELAY IN DISTRIBUTION WAS NOT SUBSTANTIALLY JUSTIFIED**

The government's position, on the breach of trust claim for delay in distribution of the funds appropriated and allocated, was not substantially justified. The government claimed the breach of trust claim was without merit and was barred by the statute of limitations. The government could have distributed the funds in question to the plaintiffs twenty years ago, but failed to do so. Subsection (d) of the EAJA authorizes an award of attorney's fees against the government when the government's underlying position or litigation position is not substantially justified.

In **Pierce v. Underwood**, 487 U.S. 552 @ 565 (1988), the Supreme Court interpreted "substantially justified" to mean "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." This definition, concluded the Court, comports with the "reasonable basis both in law and fact" formulation adopted by the vast majority of circuit courts. In **Commissioner, Immigration & Naturalization Service v. Jean**, 110 S.Ct. 2316 @ 2322-23 (1990), the Supreme Court explained that the substantial justification inquiry focuses on the alleged governmental misconduct giving rise to the litigation, as well as on the government's litigation position. See also 28 U.S.C. Sec. 2412(d)(2)(D) (1988) (defining "position of the United States" as including both "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based").

This court found that the Aberdeen Area Office twice requested permission from Washington to make a partial distribution to the lineal descendants in 1982, but those

requests were not approved. Memorandum Opinion and Order of July 29, 2002 @ page 17. The court found that the BIA's lack of diligence in preparing the roll and distributing the Judgment Fund because of a lack of political pressure from any Tribe violated the defendant's duties to the lineal descendants as trustee of the fund. Id. @ 18. The court found that it was clear that 1,900 eligible beneficiaries, including the two plaintiffs, were entitled to receive \$1,700 each from the fund in 1982. Id. @ 20. The court found that the Department of Interior breached its duty to diligently administer the trust and wind up the trust and distribute the Judgment within a reasonable period of time. Id. @ 21.

This court held that the statute of limitations did not accrue until November 13, 1998, stating:

Enactment of the 1998 Act was the first time the lineal descendants' share of the Judgment Fund was depleted as a result of the Secretary's delay in preparing the roll and distributing the funds. Therefore, the plaintiffs first had a claim for money damages, as a result of the Secretary's breach of trust, on November 13, 1998. See 25 U.S.C. Sec. 1300d-21 *et seq.* (2001). Thus, the statute of limitations on plaintiffs' breach-of-trust claim for money damages giving this Court jurisdiction under the "Little" Tucker Act began to run on November 13, 1998, when all the events had occurred that fixed the alleged liability of the defendant and entitled the plaintiffs to institute an action, and plaintiffs knew or should have known that they had a claim for money damages against the defendant as trustee.

Id @ 16.

In summary, the government's position in defending the unconscionable twenty year delay in payment by claiming there was no breach of trust and that the statute of limitations barred plaintiffs' claim was not substantially justified.

Without this litigation, plaintiffs would have not received the \$905.33, each, in damages for breach of trust. More importantly, the other 1,898 lineal descendants approved in 1982, would not have received their share of the funds ( $\$905.33 \times 1,898 = \$1,718,316.34$ ). They should receive their share now, since a class action, based upon

the results of this litigation, has been instituted on their behalf. See **Barry Lebeau v. United States**, Civ. 02-4168.

### **PREVAILING PARTY STATUS**

The classic test of eligibility for an award under fee-shifting statutes is whether the plaintiff has "prevailed" in the case. To qualify as a "prevailing party," the party seeking fees must have attained "some relief on the merits of his claim." **Hanrahan v. Hampton**, 446 U.S. 754, 757 (1980) (per curiam). In **Texas State Teachers Ass'n v. Garland Independent School District**, 489 U.S. 782 @ 792 (1989), the Supreme Court rejected a test for prevailing party status that required a party to prevail on the "central issue" in the litigation and not merely upon significant secondary issues. The Court adopted a general rule that, to be a prevailing party under fee-shifting statutes, a litigant need only succeed on "any significant issue in [the] litigation which achieve[d] some of the benefit the parties sought in bringing the suit." *Id.* @ 789. Plaintiffs did prevail on a significant issue in this case which achieved a substantial portion of the benefit the plaintiffs were seeking under the two theories upon which they did not prevail.

The Supreme Court in **Farrar v. Hobby**, 113 S.Ct. 566 @ 573 (1992) held that even the mere attainment of nominal damages was not so minimal or technical in nature as to deprive a party of prevailing status. Although a verdict may be for a nominal sum, such as one dollar, the judgment nevertheless materially alters the legal relationship between the parties: A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay. *Id.* @ 574. In the present case the two plaintiffs each were awarded judgment in the amount of \$905.33. However, the extent of their success has ramifications far beyond this amount. Mr. Ashley and Mr. Lebeau have paved the way for their fellow 1,898 lineal descendants to also collect \$905.33 each. The remaining

lineal descendants stand to gain \$1,720,127.00 ( $\$905.33 \times 1,900 = \$1,720,127.00$ ) from this litigation, since a class action based on the results of this case has recently been filed with this Court. **Barry Lebeau**, supra. This litigation has produced significant benefit for the lineal descendants. The government's position in not paying these individual Indians the money awarded to them in 1972; and in asserting there was no breach of trust; and claiming the statute of limitations barred this equitable and just cause of action was unreasonable.

The plaintiffs did prevail.

#### **CALCULATION OF ATTORNEY FEES AND COSTS**

An itemized statement is attached. The amount claimed is \$64,350.00 which is calculated as follows: 429 Hrs. @ \$150.00 Hr. = \$64,350.00. The amount of out of pocket expenses claimed is \$1,502.24.

This case presented many complex procedural and substantive issues, which are reflected in the itemized billing statement, including: monitoring the **Loudner** litigation; Rule 19 issues; summary judgment issues; Fifth Amendment taking issues; class action issues; Rule 54(b) issues; breach of trust issues; limitations issues; interest issues and attorney fee issues. These issues involved research and brief writing, interrogatories, depositions and trial. Counsel for plaintiffs did the work at risk of no fees. With the amount of money and social issues involved counsel believes the fees should be given a lode star rating. Normal per hour fee of counsel is generally \$100.00 and sometimes \$125.00 an hour - and that is when payment is assured. Under the circumstance, counsel believes fees should be awarded at the rate of \$150.00 per hour.

It appears that lineal descendants stand to gain \$1,720,127.00 ( $\$905.33 \times 1,900 = \$1,720,127.00$ ) from this litigation. A one third contingent fee (33.3 %) would equal \$573,375.66. The amount claimed of \$65,852.34 (fees and expenses) equals less than 4 % of the amount the lineals descendants stand to gain as a result of this litigation.

This litigation commenced in 1999 and was completed in 2002. The amount requested, \$65,852.34, in fees and expenses, averages \$16,463.00 per year.

The plaintiffs prevailed on a breach of trust theory, one of two, but failed on the constitutional issue. However, it is believed that the case involved a common core of facts and closely related legal theories. This Court stated in **Christina A. v. Bloomberg**, CIV. 00-4036, (Sept. 28, 2001):


...the requested award will not be reduced on the claim that the Settlement Agreement did not represent a total success for the Plaintiffs. Because this case involved a common core of facts and closely related legal theories, the lawsuit cannot be viewed as series of discrete claims. *See Hensley*, 461 U.S. at 435, 103 S.Ct. 1933; *see also Jenkins v. State of Missouri*, 127 F.3d 709, 718 (8th Cir. 1997) ("If the plaintiff has won an excellent result, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he did not win.")

### CONCLUSION

Mr. Ashley and Mr. Lebeau are to be commended for taking on the government, when it totally ignored its duty to them and the other lineal descendants. This case fits squarely within the objective of the EAJA, which is to eliminate financial disincentives for those who would challenge unjustified government action or, as in this case, inaction. This is a worthy case for the application of the EAJA.

It is requested that the Court enter an order requiring defendant to pay plaintiffs attorney fees and expenses in the amount of \$65,852.34.

Dated October 23, 2002.

  
J.M. Grossenburg  
Attorney for Plaintiffs  
501 South Main Street  
Winner, SD 57580  
1-605-842-1676

**CERTIFICATE OF SERVICE**

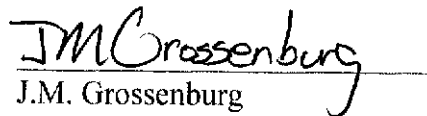
The undersigned hereby certifies that he served a copy of THE ABOVE DOCUMENT(S) upon the person(s) herein next designated, on the date below shown by depositing a copy thereof in the United States mail at Winner, South Dakota, postage prepaid, on an envelope addressed to each said addressee, to-wit:

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

**United States Clerk of Court            (original + 1)**  
**400 S. Phillips Ave., # 128**  
**Sioux Falls, SD 57104**

which address is the last address of each addressee known to the subscriber.

October 23, 2002

  
J.M. Grossenburg