Appeal Nos. 18-4151, 184160

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America,

Plaintiff-Cross Appellant,

v.

Uintah Valley Shoshone Tribe, et al.,

Defendants – Appellants.

Appeal from the United States District Court
For the District of Utah in Case No. 2:17-cv-1140
Judge Bruce S. Jenkins

Appellants' Response Brief

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RELATED CASES STATEMENT

No prior appeals have been taken in this action, or to this Court from any related action.

STATEMENT OF THE ISSUES

Issue No. 1: The UVST, who has maintained a cultural identity from time immemorial, and has hunted and fished on the lands of the Uintah and Ouray Reservation, maintains its rights to hunt and fish on its ancestral lands regardless of its recognition as a federally recognized Indian tribe. Did the district court err in determining that the UVST lacks authority to sell its own hunting and fishing permits?

Issue No. 2: Congress has authorized courts to enjoin schemes that use interstate wire communications to obtain money through false representations. While the UVST does not dispute that it did issue hunting and fishing permits with the help of interstate wire communications, did the district court correctly determine that the UVST did not make false representations while issuing hunting and fishing licenses?

STATEMENT OF THE CASE

In October 2017, the United States filed a complaint against the Appellants alleging that the Appellants had committed wire fraud, 18 U.S.C. § 1345, and sought to permanently enjoin the Appellants from selling and/or issuing hunting and fishing licenses, declare all hunting and fishing licenses that have been issued

by the Appellants null and void *ab initio*, and permanently enjoin the use of the UVST hunting and fishing licenses that have already been issued.

After the parties both filed Motions for Summary Judgment pursuant to Fed. R. Civ. P. 56, the district court held that based on the factual stipulations presented to the trial court, it was difficult to find that the Appellants engaged a scheme to obtain money by false representations and promises through the sale of hunting and fishing licenses. However, the district court held that Appellants nonetheless do not have the authority to issue hunting and fishing licenses as the rights of the UVST to issue hunting and fishing licenses were ceded from the UVST to the Ute Indian Tribe under the Indian Reorganization Act of 1934(IRA), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79). *See Hackford v. Babbit*, 14 F.3d 1457, 1461 (10th Cir. 1994).

The district court went on to further state that Article VI, § 4 of the Constitution Establishing the Ute Tribe made so the individual bands ceased to exist separately outside of the Ute Tribe. The rights that were formerly vested in the UVST were ceded to the Ute Tribe. *See United States v. Von Murdock*, 132 F.3d 534, 541 (10th Cir. 1997).

Finally, the district court ruled that the Ute Partition and Termination Act ("UPTA") of August 27, 1954, ch. 1009, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa). The UPTA established certain procedures for the division of

tribal assets between the Full-Blood members of the Ute Tribe and the Mixed-Bloods. Those divisible assets were to be divided among the two groups, while non-divisible assets such as hunting and fishing rights "were to remain in government trust and be jointly managed by [the Ute] Tribal Business Committee and the Mixed-Bloods' representative." *Hackford*, 14 F.3d at 1462 (quoting *Ute Distrib. Corp. v. United States*, 938 F.2d 1157, 1159 (10th Cir. 1991).

STATEMENT OF FACTS

In 1861, President Abraham Lincoln authorized the creation of the Uintah Valley Reservation in the Uintah Basin. *Hackford v. Babbit*, 14 F.3d 1457, 1459 (10th Cir. 1994). In 1882, President Chester A. Arthur authorized the creation of the Uncompahgre Reservation. *Id. at 1459.* Later, the Uintah Valley and Uncompahgre reservations became the Uintah and Ouray Reservation. *Id.* From 1882 to 1934, several bands of Utes, including the Uintah (the predecessors to the Uinta Valley Shoshone Tribe) lived and used the Uintah and Ouray Reservation. Under the Indian Reorganization Act of 1934 ("IRA") the Uintah, White River, and Uncompahgre Bands of the Ute Tribe reorganized to form the "Ute Tribe of the Uintah and Ouray Reservation". *Id. at 1461*.

In 1954, Congress enacted the Ute Partition and Termination Act ("UPTA"), in which it established a procedure to divide tribal assets between the Full-Blood members of the Ute Tribe and the Mixed-Bloods.1 Pub. L. No. 83-671, § 1; 68

Stat. 868. The UVST were deemed Mixed-Bloods pursuant to the UPTA. Under the UPTA, after the divisible assets were allocated between the two groups, the Secretary of the Interior would issue a proclamation terminating the Mixed-Bloods' status as "Indians" under federal law. *Hackford,* 14 F.3d at 1462. Although the UVST were deemed Mixed-Blood and thus had their relationship with the federal government terminated, the UVST continued to maintain its cultural identity, including selling hunting and fishing licenses members of the UVST for use on the Uintah and Ouray Reservation.

For the 2016 and 2017 hunting seasons, the UVST sold hunting permits to hunt dear and elk to its members for $25.00. The UVST also sold lifetime fishing permits to its member for $5.00. (J.A. 703). It should be noted that the UVST only issued hunting and permits to the tribal members of the UVST. (J.A. 796). The permits that were issued allowed UVST members to hunt and fish on the original lands set forth in 1861 and 1882. (J.A. 731).

ARGUMENT

I. APPELLANTS RETAIN THEIR RIGHT TO HUNT AND FISH ON TRIBAL LANDS

a. Mixed Blood Rights to Hunt and Fish on Tribal Lands were Not Ceded by the Ute Partition and Termination Act of 1954

Although the UPTA terminated the relationship between the federal government and the mixed-blood Ute Indians, the UPTA did not act to abrogate

those mixed-bloods' hunting or fishing rights. The courts are clear that termination by an act of Congress does not terminate the rights of a terminated tribe to hunt or fish on the reservation unless Congress explicitly terminates those rights.

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968), the Court states:

> We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-567) "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co.* v. *Cox Co.*, 291 U.S. 138, 160.See also *Squire* v. *Capoeman*, 351 U.S. 1.

The Termination Act in *Menominee* is the Menominee Termination Act of 1954, which provided that federal supervision of the Menominee Tribe of Wisconsin would end in 1961. *Menominee* at 407.

In *United States v. Felter*, 752 F.2d 1505 (10th Cir., 1985), in a case similar to the instant matter, Felter was issued a Federal misdemeanor citation for fishing without a tribal permit within the bounds of the Uintah and Ouray Reservation. *Id*. at 1507. Initially, a magistrate held that the UPTA caused mixed-bloods to lose their right to hunt or fish on Indian lands. *Id*. This decision was later reversed by the District Court, holding that *Menominee* was relevant, stating that "like the Supreme Court in *Menominee [Tribe]*, this Court will readily 'decline to construe the [1954]

Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." *United States v Felter*, 546 F. Supp 1002, 1023 (D. Utah 1982). The 10th Circuit states that the UPTA "does not contain provisions specifically treating the right to hunt and fish. We believe that proper construction of the 1954 Act compels the conclusion that the mixed-blood Ute Indians retained the right to hunt and fish on reservation land." *Felter* at 1509. It appears to be well settled that mixed-blood Utes are entitled to hunt and fish on tribal lands as those rights were retained even after the UPTA of 1954.

The district court erred in its application of *Felter* in that the UVST still retains its right to hunt and fish on the Uintah and Ouray Reservation. As a question of law, this is subject to *de novo* review. *Gardner v. Galetka*, 568 F.3d 862 (2009).

b. The Uinta Valley Shoshone Tribe Retain Rights to the Uintah and Ouray Reservation as Granted by Executive Order in 1861 and 1882, Regardless of their Federal Status as an Indian Tribe

The failure of the federal government to recognize a particular group of Indians as a tribe cannot deprive that group of vested treaty rights. *Timpanogos Tribe v. Conway*, 286 F. 3d 1195, 1203–04 (10th Cir. 2002). To enjoy treaty rights, however, the group must have maintained itself as a distinct community with some defining characteristic that permits it to be identified as the group named in the treaty. *United States v. Washington*, 641 F. 2d 1368 (9th Cir. 1981).

Since at least1956, the Uinta Valley Shoshone Tribe has maintained its own constitution and conducted business as its own tribal entity. The UVST traces its lineage back through the UPTA, the Indian Reorganization Act, the 1882 Executive Order creating the Uncompahgre Reservation, the 1861 Executive Order creating the Uinta Valley Reservation, all the way from time immemorial.

Therefore, the Uinta Valley Shoshone Tribe has maintained its separate and distinct community and has identified itself as a distinct group whose identities can be traced back to the 1861 treaty creating the Uinta Valley Reservation. Although the federal government no longer recognizes the UVST, and therefore no longer maintains a special relationship with the Tribe, the Uinta Valley Shoshone Tribe maintains its rights under the treaties if 1861 and 1882. *Timpanogos Tribe* at 1203-1204. Under the treaty, the tribe has the right to continue to use the land. One of those rights is the right to hunt and fish on the land. As the Tribe retains those rights under the treaty. The Supreme Court in *Menominee* held that the language of the 1854 Treaty of the Wolf River granted the Menominee tribe the right to hunt and fish on the land, even though the Treaty of the Wolf River did not explicitly include the right to hunt or fish on the land. The Treaty of the Wolf River merely states that the land is "to be held as Indian lands are held" and this language explicitly includes the right to hunt and fish. *Menominee* at 406.

Based on *Menominee* and *Timpanogos*, the UVST and therefore its members, retain the right to hunt and fish on their lands, despite their lack of recognition as a federal Indian tribe.

II. THE DISTRICT COURT DID NOT ERR IN FINDING APPELLANTS DID NOT MAKE FALSE REPRESENTATIONS WHILE ISSUING HUNTING AND FISHING LICENSES.

18 U.S.C. § 1343, the criminal wire fraud statute, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The district court found that the United States failed to show to that the UVST acted with by means of false or fraudulent pretenses. As the United States sought a permanent injunction pursuant to 18 U.S.C. 1345, the United States must prove "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (30 the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Prairie Band Potawatomi Nation v. Wagnun*, 476 F.3d 818, 822 (10th Cir. 2007) (quotations and citations omitted).

In order to succeed in permanently enjoining the UVST from selling hunting and fishing licenses, the United States must both prove that there was a violation of 18 U.S.C. 1343, (actual success on the merits), and then factors (2)-(4) of 18 U.S.C. 1435. As the district court held, the Untied States failed to show that the hunting and fishing licenses were sold by means of fraud or false pretenses.

The district court was correct in finding that there was not fraud or fraudulent pretenses used in selling hunting and fishing licenses to the members of the UVST. As argued above, the district court did not err in its finding that the United States failed to show that the UVST sold hunting and fishing licenses by means of fraud or by false pretenses.

CONCLUSION

This Court should vacate the judgment and remand with instructions for the district court to enter summary judgment in favor of the Uinta Valley Shoshone Tribe, Dora Van, Leo LeBarron and Ramona Harris.

Respectfully Submitted:
April 22, 2019

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CERTIFICATE OF COMPLIANCE

My brief was prepared in a proportionally spaced typeface and contains 2085. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, Michael J Rock has served all parties with APPELLANTS AMENDED PRINCIPLE BRIEF via this Courts CM/ECF System. This Certificate of Service has been electronically filed with the Clerk of Court using the ECF system which will send notice and copies of the document to all registered counsel in this case.

Dated: April 22, 2019

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per Rule 25.5;

2. If required to file additional hard copies, that the ECF submission is an exact copy of those documents;

3. The digital submissions have been scanned for viruses with Windows Defender version 1.285.1399.0 on April 22, 2019, and this submission is free of viruses.

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