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A COMMENT ON THE AINU TRUST ASSETS LITIGATION IN JAPAN

Mark Levin* and Teruki Tsunemoto**

The white world of abstract symbols became a nightmare for Indian people.

Vine DeLoria¹

Litigation regarding trust assets against the United States government on behalf of Native Americans has a counterpart in Japan. The Ainu Trust Assets litigation was filed in July 1999 in Sapporo District Court by Ainu activist Ryukichi Ogawa and twenty-three others against the Governor of Hokkaido, seeking a declaration of invalidity or avoidance of the Governor's determination of appropriate individual recipients for the return of approximately US\$200,000 of trust assets.²

The litigation pertains to a tension between the infamous 1899 Hokkaido Former Aboriginals Protection Act³ and its replacement, the Ainu Cultural Promotion Law of 1997.⁴ Under the old law, the Hokkaido Governor became the trustee for various assets of the Ainu people, including deposits from imperial grants, allocations for expropriation of group fishing rights, and receiverships for Ainu persons who had been deemed legally

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1. Vine DeLoria, Jr., *Custer Died for Your Sins* 9 (U. Okla. Press 1988). In preparing this brief comment, the authors recognize their inability to speak for or from the perspective of the Ainu people. We aim to use our privileged platforms as white and Wajin law professors to bring broader attention to these issues presently while hoping for and supporting the near-term emergence of legal scholarship pertaining to the Ainu people's relationship with Japan by Ainu writers with independent Ainu voices.

2. Pl.'s Compl., *Ogawa v. Hori*, Heisei 11 (Gyo U) No. 13 (Sapporo D. Ct. July 15, 1999) (Ainu Trust Assets suit) (copy on file with *Tulsa Law Review*). For more extensive analysis of legal issues relating to the Ainu people in Japan, see Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. Intl. L. & Pol. 419 (2001); Teruki Tsunemoto, Paper Presentation, *Constitutional and Legal Status of the Ainu in Japan: A National Report* (Intl. Assn. Comp. L., July 15, 2002) (available at <<http://courseweb.edtechd.uottawa.ca/IACLindigenousminorityrights/JapanTsunemoto.htm>>). Regarding the Ainu more generally, see Richard Siddle, *Race, Resistance and the Ainu of Japan* (Routledge 1996) and *Ainu: Spirit of a Northern People* (William W. Fitzhugh & Chisato O. Dubreuil eds., Natl. Museum Nat. History 1999).

3. *Hokkaido Former Protection Act*, Law No. 27 of 1899 (Japan) (reprinted in English in Siddle, *supra* n. 2, at app. 1, 194-96).

4. *Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Traditions*, Law No. 52 of 1997 (Japan) (trans. available at *Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Traditions: A Translation of the Ainu Shinpou*, 1 Asian-P. L. & Policy J. 11 (Masako Yoshida Hitchingham trans., Feb. 2000) <<http://www.hawaii.edu/aplpj/pdfs/11-masako.pdf>>). Richard Siddle's assessment of the Ainu Cultural Promotion Law provides a valuable update, finding a net detrimental impact for the Ainu people's movement. Richard Siddle, *An Epoch-Making Event? The 1997 Ainu Cultural Promotion Act and Its Impact*, 14 Japan Forum 405 (2002).

incompetent.⁵ One of the supplemental provisions of the Ainu Cultural Promotion Law instructed the Governor to return the assets to their “owners.”⁶ The law required a claims application within one year of an announcement by the Governor and provided that unclaimed assets would escheat to a foundation established under the same law.

The plaintiffs’ original complaint alleged the following claims:

- (1) The funds were improperly managed in violation of Article 29 of the Japanese Constitution.⁷ Since 1970, there appear to have been proper accounts kept, but no accounts were kept previously. Moreover, the value of the funds has remained entirely static since deposits were made in the 1930s and 1940s, causing substantial financial losses to the beneficiaries.
- (2) The statutory method for returning the funds represented an unconstitutional violation of due process. The one-year claims limitation was invalid in light of the fact that most beneficiaries were yet unaware of their entitlements. Under Japanese fiduciary law, the trustee should have the burden to find the proper beneficiaries. Thus, the statutory scheme violated Article 31 of the Constitution.⁸
- (3) All of the above circumstances represented violations of international standards for the Ainu as an ethnic minority under Article 27 of the International Covenant on Civil and Political Rights (ICCPR)⁹ and as an indigenous people.¹⁰

Trial proceedings and oral testimony continued from October 1999 through 2001, during which time the trust asset redistribution process was carried out.¹¹ Asset distribution was handled by a five-member panel designated by the Governor of Hokkaido, which included two Ainu persons, ostensibly representative of the Ainu community; one Wajin (non-Ainu Japanese) attorney; and two Wajin academics.

5. Altogether there were eighteen primary accounts with 1,293,098 yen total balance and eight other miscellaneous accounts, for a grand total of 1,468,338 yen. *Case Seeking Confirmation of the Invalidation of the Return of Former Hokkaido Indigenous Persons Trust Assets, Ogawa v. Hori*, Heisei 11 (Gyo U) No. 13 (Sapporo D. Ct. Mar. 7, 2002) (Shigeru Nakanishi, C.J., Yasuji Kawaguchi & Mayumi Tomura, JJ.) (copy on file with *Tulsa Law Review*).

6. *Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Traditions*, Supp. Provisions, art. 3(1).

7. Article 29 of the Constitution of Japan states, “The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefore.” Japan Const. ch. III, art. 29.

8. Article 31 states, “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.” *Id.* at ch. III, art. 31.

9. *International Covenant on Civil and Political Rights* pt. III, art. 27 (Dec. 19, 1966) 999 U.N.T.S. 171 (“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”).

10. With regards to the ICCPR and Ainu in Japan, see *Kayano v. Hokkaido Expropriation Comm.*, 1598 Hanrei Jiho 33 (Sapporo D. Ct. Mar. 27, 1997) (Japan), reprinted in 38 Intl. Leg. Materials 394 (Mark A. Levin trans., 1999) (available at <<http://www.hawaii.edu/law/faculty/publications/nibutani.pdf>>).

11. Injunctive relief to stop government action is rare in Japanese administrative law litigation. See Levin, *supra* note 2, at 453 n. 121.

On March 7, 2002, the three-judge panel handed down its decision in the case, rejecting the plaintiffs' claims entirely.¹² The Court first divided the plaintiffs into two separate classes: one class comprised of twenty-three claimants who received trust asset distributions from the Governor of Hokkaido under the law, and another class of three claimants whose applications for trust asset distributions had been denied. As to the first class of grantees, the Court dismissed their claims based on mootness or lack of standing. For the remaining three claimants, the Court recognized their standing to sue, but denied their claims on the merits.

As noted above, twenty-three of the plaintiffs were awarded distributions under the administrative scheme established by the Ainu Cultural Promotion Law during the trial proceedings. The Court ruled that these persons suffered no damages from the administrative process and had no standing to sue. Because they were granted administrative awards as they sought under the statute, the Court would not consider the constitutionality of the statute or the appropriateness of the process established by the statute. Moreover, the plaintiff's administrative law claims only pertained to the validity of the administrative decision in a yes/no manner; the claims offered no basis to address the alleged flaws of the trust assets system that may have worked to the enormous detriment of the trust beneficiaries causing financial and personal damages.

The remaining three claimants' claims were denied based upon a dance of paradoxical, but devastating, formalism.¹³ The Court acknowledged these plaintiffs' standing to sue to reverse the adverse decisions denying them trust asset awards, but rejected their attack on the constitutionality of the trust assets scheme established under the Ainu Cultural Promotion Law. The determinative premise was that the Court could only determine, in a yes/no fashion, if the administrative ruling should be reversed. Accordingly, if the Court reviewed the Ainu Cultural Promotion Law and found it to be unconstitutional, then the law itself would become null and void. This in turn would leave the plaintiffs with no legal basis to pursue claims to trust assets under the statute, and hence the Court would have no administrative ruling to review. In short, the Court could only address the validity of the administrative rulings by presuming the constitutional validity of the statute and, accordingly, the plaintiffs' objections to the validity of the statute (which constituted the crux of the litigation) were deemed irrelevant.

As to the legality of the administrative rulings *within* the context of the presumptively valid statutory scheme, the Court found that the administrative body acted in accordance with the law and that its conclusion would be accepted in deference to the fact-finding expertise of the administrative panel.

The plaintiffs promptly filed their appeal with the Sapporo High Court, and proceedings there are presently underway. It is anticipated that these proceedings will continue for one to two years more before a ruling can be expected from this middle tier

12. *Case Seeking Confirmation of the Invalidation of the Return of Former Hokkaido Indigenous Persons Trust Assets, Ogawa v. Hori*, Heisei 11 (Gyo U) No. 13 (Sapporo D. Ct. Mar. 7, 2002) (Shigeru Nakanishi, C.J., Yasuji Kawaguchi & Mayumi Tomura, JJ.).

13. *Cf. Chris K. Iijima, Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 Rutgers L. Rev. 91, 108-10 (2000) (discussing formalism in U.S. Supreme Court jurisprudence concerning Native Hawaiians).

of the Japanese judicial system. Given the nature of the case, an appeal to the Japanese Supreme Court will likely follow so that a final determination of the plaintiffs' claims cannot be expected for at least three to five years.

Finally, it should be noted that the case received only a modest degree of media attention when the decision was announced,¹⁴ and the opinion itself remains unpublished in both public and private law reporters. There has been a complete dearth of corresponding attention to the case in Japanese legal scholarship. This may be interpreted as a sad reflection that matters concerning the Ainu people in Japan are still seen by influential majority Wajin people as pertinent to Hokkaido only and relatively inconsequential for the nation as a whole.

14. See e.g. *Ainu People Lose Litigation*, Hokkaido Shimbun 1 (evening ed. Mar. 7, 2002); Japan Times Online, *Sapporo Court Rejects Ainu Lawsuit* <<http://www.japantimes.com/cgi-bin/getarticle.pl5?nn20020308a2.htm>> (Mar. 8, 2002); Mainichi Daily News, *News Archives, Ainu Lose Battle in Century-Old Feud* <<http://mdn.mainichi.co.jp/news/archive/200203/07/20020307p2a00m0dm013001c.html>> (Mar. 7, 2002). Despite the lack of local interest, the case was noted in the addendum to the 2003 report to the Commission on Human Rights filed by Rodolfo Stavenhagen. *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2002/65*, Addendum, U.N. Commission on Human Rights, 59th Sess., Provisional Agenda Item 15, at ¶ 36, U.N. Doc. E/CN.4/2003/90/Add.1 (2003) (available at <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2003.90.Add.1.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.90.Add.1.En)>).