IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HOOPA VALLEY TRIBE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S COMBINED MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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On July 22, 2008, Defendant, the United States of America ("Defendant") filed Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment in this matter. Defendant's Memorandum explained that Plaintiffs Hoopa Valley Tribe, et al.'s, ("Plaintiffs") claims should be rejected for multiple reasons. As Defendant set forth, Plaintiffs fail to meet the requirements of the Indian Tucker Act. Plaintiffs lack standing to pursue their claims. Furthermore, the 1988 Hoopa-Yurok Settlement Act ("1988 Act" or "Act"), Pub. L. No. 100-580 (codified as amended at 25 U.S.C. § 1300i *et seq*.), expressly precludes Plaintiffs' claims. In addition, Plaintiffs' arguments regarding the Yurok Interim Council, the sufficiency of the Yurok Tribe's 2007 waiver, and the *Short* litigation lack merit.

On September 10, 2008, Plaintiffs filed their Response in Opposition ("Response"). Plaintiffs' Response accuses Defendant of engaging in "word play" in justifying their distribution of a portion of the Hoopa-Yurok Settlement Fund ("Settlement Fund" or "Fund") to the Yurok Tribe. Pls.' Resp. at 30. Quite the contrary, any problems in legal reasoning lie squarely with Plaintiffs. Plaintiffs' Response ignores or omits key provisions from the 1988 Act that form the very foundation of Defendant's actions. It attempts to turn back the clock by invoking language from the *Short* litigation and previous statutory provisions made irrelevant by the 1988 Act. Plaintiffs' Response also offers strained reasoning in an attempt to establish that Plaintiff Hoopa Valley Tribe and individual Plaintiffs have standing.

As made clear in the Defendant's Memorandum and as further discussed below, Defendant's position in this matter can be summed up fairly easily: the 1988 Act controls. More specifically, the law and facts establish the following points:

- Congress set the parameters of the trust duty owed in the 1988 Act. Congress directed the equitable division of the Settlement Fund between the two Tribes with certain specified individual payments.

- Defendant already made the payments directed by Congress and met its trust duties to the Hoopa Valley Tribe and the specified individuals under the 1988 Act.

- The remaining funds involved those specifically intended for the benefit of the Yurok Tribe, as directed by Congress, and thus any trust duty runs only to the Yurok.

- Defendant distributed the remaining funds to the Yurok Tribe once it provided a waiver to Defendant consistent with the terms Congress set.

- Congress, not Defendant, authorized the Yurok Tribe to provide *per capita* payments to its members, and the Yurok Tribe chose to do so.

Accordingly, Plaintiffs' Complaint should be dismissed, or in the alternative Defendant's Motion for Summary Judgment should be granted.

I. The plain language of the 1988 Act specified the beneficiary of the funds at issue as only the Yurok Tribe and thus any trust duty owed does not run to Plaintiffs.

In Defendant's Memorandum, Defendant established that Plaintiffs fail to meet the requirements of the Indian Tucker Act. Def.'s Mem. at 18-24. Defendant explained that the 1988 Act does not contain specific fiduciary duties owed to Plaintiffs in regard to the portion of the Settlement Fund set aside for the Yurok Tribe. In addition, Defendant demonstrated that the 1864 Act creates only a general fiduciary duty to Plaintiffs. Defendant further explained that 25 U.S.C. § 407 no longer applies to the Settlement Fund.

A. <u>Plaintiffs ignore the plain language of the 1988 Act that specifically directed the establishment of a separate Yurok-only account by 1991.</u>

In response, Plaintiffs make much of the existence of a federal trust duty, including their continued assertion of a "fairly" inferred duty based on a network of statutes beyond the 1988 Act itself. Pls.' Resp. at 2-10. As Plaintiffs concede in passing, Defendant has already acknowledged that Congress established a money-mandating trust duty regarding the division,

investment, and distribution of the Fund in the 1988 Act. *Id.* at 7 n.5; Def.'s Mem. at 22-24.[1] Plaintiffs, however, fail to acknowledge that only the 1988 Act has any bearing on this issue and that the only remaining duty with respect to the funds at issue here runs specifically to the Yurok Tribe.

Plaintiffs place heavy reliance on 25 U.S.C. § 1300i-3(b), which provides that the Secretary "shall make distribution from the Settlement Fund" as provided in the Act and "shall invest and administer" the Fund "as Indian trust funds pursuant to" 25 U.S.C. § 162a. Pls.' Resp. at 3-4, 8 n.6, 19, 23-24, 29. Based on this language, Plaintiffs assert that they have a continuing interest in the funds at issue here. This provision, however, is not the Act's applicable provision.

Plaintiffs completely ignore the plain language of section 1300i-3(d). In that section of the 1988 Act, Congress expressly provided that the "Secretary *shall pay out* of the Settlement Fund into a trust account *for the benefit of the Yurok Tribe*" its share "[e]ffective with the publication of the option election date" as provided in the 1988 Act. 25 U.S.C. § 1300i-3(d) (emphasis added). Thus, contrary to Plaintiffs' position, Congress specifically directed the Secretary to place the Yurok's share of the Fund into a trust account solely for the Yurok's benefit seventeen years ago. Def.'s Mem. at 17 (citing Pls.' Mot. App. 148 (56 Fed. Reg. 22996 (May 17, 1991) (notice of option election date)), 23 (citing 25 U.S.C. § 1300i-3(d)); *see also id.* at 28.[2]

[1] Contrary to Plaintiffs' assertion, Pls.' Resp. at 4, 8 n.6, Defendant has not argued that the 1988 Act "ended any trust relationship." Instead, Defendant asserts that it has met its trust obligations to Plaintiffs already and that, by the express terms of the 1988 Act, any trust duty with respect to the funds at issue now runs only to the Yurok. Def.'s Mem. at 12-13, 16 n.6, 22-24.

[2] Likewise, Congress directed Defendant to hold in trust for the Yurok any Fund remainder after specified payments. Def.'s Mem. at 23 (citing 25 U.S.C. § 1300i-6(a)).

Plaintiffs briefly attempt to rebut this fact, calling Defendant's reliance on the section of the 1988 Act cited above "disingenuous." Pls.' Resp. at 15. Yet Congress specified the timing, amount, and beneficiary in section 1300i-3(d) and directed the Secretary to establish this separate trust account for the Yurok Tribe only. Contrary to Plaintiffs' suggestion, reading the waiver provision under section 1300i-1(c)(4) as a "condition precedent" on section 1300i-3(d), simply does not square with the 1988 Act's plain language. *See also* Part I.C (discussing *Short v. United States (Short VI)*, 28 Cl. Ct. 590 (1993)). As explained previously, the former provision only precluded the *release* of benefits (including the funds at issue here) to the Yurok pending a waiver required by the Act, not the establishment and distribution to a separate trust account for the Yurok under the latter provision. Def.'s Mem. at 7, 23-24, 27-28. Even under Plaintiffs' theory (*see* Pls.' Mem. at 29-34; Pls.' Resp. at 26-28), the waiver was not required until 1993, two years *after* Congress directed Defendant to establish this Yurok-only trust account.[3]

Accordingly, Plaintiffs' claims must fail because they are not the beneficiary of the remaining funds at issue here. Congress expressly limited the duty with respect to these funds by establishing a separate trust account for the Yurok Tribe only. Plaintiffs' attempt to insert themselves as beneficiaries of such funds based on the "Indian trust funds" language in a separate provision cannot withstand scrutiny. Consequently, Plaintiffs have not established a money mandating duty that would support this Court's jurisdiction.

B. Prior statutory provisions have no bearing on this issue.

[3] Plaintiffs argue that the decisions in *Short I*, 202 Ct. Cl. 870 (1973), and *Karuk Tribe v. United States*, 41 Fed. Cl. 468 (Fed. Cl. 1998), aff'd, 209 F.3d 1366 (Fed. Cir. 2000), also rebut Defendant's position. Pls.' Resp. at 16. Yet both decisions addressed whether vested rights or interests existed in the Joint Reservation and its resources *prior* to the 1988 Act, concluding in the negative. The 1988 Act, however, specifically changed this equation by partitioning the Joint Reservation, vesting the respective interests in each Tribe, and dividing the Fund between them. Accordingly, these decisions in no way help Plaintiffs' position.

Likewise, Plaintiffs' attempt to invoke statutes and caselaw that pre-date the 1988 Act also provide no support for their position. The 1864 Act cited by Plaintiffs (which established the Joint Reservation) created no specific fiduciary duty, only a general duty that does not support this Court's jurisdiction. Further, 25 U.S.C. § 407 does not apply because Congress expressly established a specific distribution scheme for the Settlement Fund (which included revenues from timber and other sources) under the 1988 Act. Def.'s Mem. at 19-22. Congress therefore intended the 1988 Act to take precedence over *Short*. *See infra* Part I.C & n.7. The statutes and cases cited by Plaintiffs simply no longer have any bearing on this issue.[4] *See* Pls.' Resp. at 5-10.

Further, as noted previously, Congress amended 25 U.S.C. § 407 in the 1988 Act and removed the very language relied upon by Plaintiffs and the prior *Short* litigation. In enacting the 1988 Act, Congress specifically legislated away the ability to secure individualized interests and specified that timber proceeds run to tribes. Def.'s Mem. at 21-22; *see also LeBeau v. United State*s, 474 F.3d 1334 (Fed. Cir. 2007). Because Plaintiff Hoopa already received its

[4] Plaintiffs argue that the proper standard for whether the elements of their asserted "network" are money-mandating statutes has changed from whether the statute can "fairly be interpreted" as mandating compensation to whether the statute is "reasonably amenable" to such a reading. Pls.' Resp. at 5-7 (citing *Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007) and *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005). The cases cited by Plaintiffs, however, are not so clear. In fact, *Fisher* declined to rule on the proper test: "Whether *White Mountain* alters the *Mitchell* test, as suggested by the dissent in *White Mountain*, and whether the new test is less stringent in some respects or is the same, as suggested by the concurrence, is less than clear. Future opinions by the Supreme Court may clarify all this." 402 F.3d at 1173-74. *Navajo VI* used two different tests in the same analysis and provided no clear rule. *Compare* 501 F.3d at 1341, 1344, 1348 ("fairly be interpreted") *with* 1335-36 ("reasonably amenable").

Accordingly, it appears that the standard may not have changed. On October 1, 2008, the Supreme Court granted a Writ of Certiorari in *Navajo* (No. 07-1410, docketed May 13, 2008), although this question was not specifically presented in the United States' Petition for Certiorari. In the only case where the Federal Circuit has engaged in an analysis of whether the Supreme Court changed the standard, the Federal Circuit decided that the standard had not been changed. *Contreras v. United States*, 64 Fed. Cl. 583, 588-91 (2005), *aff'd*, 168 Fed. Appx. 938 (Fed. Cir. 2006) (per curiam).

share of the Fund and conceded that it no longer holds an interest, this fact also defeats Plaintiffs' claims here. *See id.* at 13, 15 (citing Pls.' Mem. at 3 n.3).

C. Neither *Short VI* nor any other *Short* ruling supports Plaintiffs' position.

Plaintiffs further assert that the ruling in *Short VI* "rejects" Defendant's position because in that case the court held that the 1988 Act did not end the trust duties established in the *Short* litigation. Pls.' Resp. at 4-5 (citing *Short VI*, 28 Fed. Cl. at 595). To the contrary, Defendant has not so argued, and the *Short VI* ruling actually supports Defendant's position here.

Short VI involved the *Short* Plaintiffs' (non-Hoopa members of the Joint Reservation, primarily Yurok Indians) attempt to receive damages based on the *per capita* distribution that the 1988 Act authorized to Hoopa members. *Id.* at 590, 592; *see also* Def.'s Mem. at 3-4 (discussing genesis of *Short* litigation). The court rejected this claim based on the plain language of the 1988 Act. 28 Fed. Cl. at 594-95. In setting the background, the court then understood the effect of the 1988 Act as presented above:

> The Act required the Secretary to take the *Short* escrow fund, add other funds to it, and name the resulting fund the "Settlement Fund." *Pursuant to the Act, the Secretary then apportioned the Settlement Fund between the Hoopa Valley Tribe and the Yurok Tribe*, roughly in proportion to the number of Indians in each tribe.

Id. at 591-92 (emphasis added). Thus, the *Short VI* court understood that the Secretary had already divided the Fund between the two Tribes by 1993. Accordingly, *Short VI* offers nothing to counter Defendant's argument that the 1988 Act does not contain specific fiduciary duties owed to Plaintiffs in regard to the portion of the Settlement Fund set aside for the Yurok Tribe.

Moreover, Plaintiffs fail to cite other critical findings from the *Short VI* court, including that the plain language of the 1988 Act allowed this distribution, that such distribution did not interfere with any entitlements established by the *Short* cases (entitlements which ran to non-Hoopa Plaintiffs), and that Congress expressed an intent to supersede the *Short* case to the extent

a conflict existed between *Short* and the 1988 Act. *Id.* at 594-95. This Court should reject Plaintiffs' attempt to turn the *Short* decisions upside-down now for their benefit.

Similarly, the Court should reject Plaintiffs' argument regarding section 3 of the 1988 Act, which provides that the 1988 Act shall not affect "the entitlement established under decisions . . . or any final judgment" in the *Short* litigation. Pls.' Resp. at 8; 25 U.S.C. § 1300i-2. This provision preserved the ability of *non*-Hoopa Indians of the former Joint Reservation (primarily Yurok) to proceed to judgment over *their* entitlement under the *Short* litigation for the *per capita* distributions to Hoopa members that pre-dated the 1988 Act. The *Short* plaintiffs received damages for distributions made only to Hoopa members from 1955 to 1980 and also received interest as part of the ultimate damage award and judgment rendered in 1995. *See Short IV*, 12 Cl. Ct. 36, 39, 41 (1987)*; Short VII*, 50 F.3d 994, 999-1000 (Fed. Cir. 1995); *see also* Pls.' Mem. at 8. As discussed in Defendant's opening brief and above, nothing in the 1988 Act, including section 3, established a right or interest in Hoopa Plaintiffs here or an ability to invoke *Short* to alter the distributions of the Fund established by Congress in that Act.

Indeed, the *Short* courts have repeatedly noted that to the extent there is a conflict between the 1988 Act and the *Short* rulings, the Act controls. *See, e.g., Short VI*, 28 Fed. Cl. At 595 (citing S. Rep. 100-564 and *Short III*, 719 F.2d 1133, 1143 (Fed. Cir. 1983)). The *Short VI* court reiterated the holding from *Short III* "that the decision reached in this court ... will obtain only for the years until final judgment, and for the years to come *while the situation in the Reservation remains the same* subject of course to births and deaths," noting that the passage of the 1988 Act changed the situation on the Reservation. *Short III*, 719 F.2d at 1143 (emphasis supplied). Clearly, the situation on the Reservation changed with the passage of the 1988 Act. Plaintiffs' argument, therefore, that the *Short* rulings support the finding of a money-mandating

duty or remain unchanged after the passage of the 1988 Act is belied by the *Short* cases themselves.

Plaintiffs have not met the requirements of the Indian Tucker Act and neither *Short VI* nor any other *Short* ruling establishes otherwise.

II. Plaintiffs fail to show the requisite standing to bring these claims.

In a similar vein, Defendant's Memorandum explained that Plaintiffs have no standing to challenge Defendant's action at issue here because they can show no interest in the remainder of the Settlement Fund, let alone the necessary "injury in fact" to any interest. Def.'s Mem. at 11-14. In its Memorandum, Defendant further explained that Plaintiff Hoopa Valley Tribe fails to meet the requirements necessary to bring suit as *parens patriae*. *Id*. at 14. Plaintiffs' Response offers nothing to establish that Plaintiffs have standing to bring this suit.

As an initial matter, Plaintiff Hoopa Valley Tribe already conceded that it has no independent interest at issue here because Defendant has already provided the Tribe its share of the Fund as Congress directed in the 1988 Act. Pls.' Mem. at 3 n.3; *see also* Def.'s Mem. at 12-13, 15 (describing the equitable distribution scheme established by Congress and the Hoopa's receipt of its share). Instead, Plaintiff Hoopa Valley Tribe asserts representational standing of an *unspecified* number of Hoopa members, as *parens patriae*, based on a vague "interest in the settlement framework" as a named beneficiary and sovereign and a "reserved [] right to enforce the statute." Pls.' Resp. at 20-21.[5] These assertions fall flat.

Critical here, Plaintiffs fail to establish that *any* individual Hoopa member has an interest at issue. *See* Def.'s Mem. at 13-15. Congress established three sets of beneficiaries under the

[5] Defendant does not dispute Plaintiff Tribe's sovereignty. Rather, Defendant contends that neither the Hoopa Valley Tribe nor any of its members has any interest here, let alone an injury to an interest. *See* Def.'s Mem. at 14-15; *see also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607-08 (1982) (citing that three elements that must be present in order for a sovereign to proceed as *parens patriae*).

1988 Act: the Hoopa Valley Tribe, the Yurok Tribe, and certain individuals not at issue here. Plaintiffs do not challenge the distributions to the Hoopa Valley Tribe or to the specified individuals. Instead, Plaintiffs challenge the action related to the Yurok Tribe's interest, to which they cannot claim to be a beneficiary. *See, e.g.*, 25 U.S.C. § 1300i-1(a)(2) (Hoopa waiver and consent to payments to Yurok Tribe and individuals under the Act); *id.* § 1300i-5(b)(4) (Indians electing Hoopa membership have no right or interest in the Yurok Reservation, Yurok Tribe, or Settlement Fund).

Through strained interpretations, Plaintiffs' Response attempts to substitute language from separate provisions of the 1988 Act, other statutes, and the *Short* litigation to manufacture an interest held by individual Hoopa members.[6] As discussed above, Congress directed Defendant to divide the Fund between the two Tribes and to establish a separate account for the Yurok Tribe. The only individual entitlements recognized by Congress in the 1988 Act do *not* involve Plaintiffs. Def.'s Mem. at 13 (citing 25 U.S.C. § 1300i-5(d) (lump sum payment to opt out of either Tribe). Contrary to Plaintiffs' position here, Congress otherwise sought to preclude the "individualization of tribal communal assets . . . that conflict with the general federal policies and laws favoring recognition and protection of tribal property rights[.]" Pls.' Mot., Ex. 6, App. 79 (Senate Report, S. Rep. 100-564 (Sept. 30, 1988)). Plaintiffs' attempt to invent new individual beneficiaries out of whole-cloth defies both the plain language and intent of Congress in the 1988 Act and must be rejected.[7]

[6] Even Plaintiffs admit that it would take an act of Congress to have reapportioned the Fund. Pls.' Resp. at 30. Notwithstanding this acknowledgement, Plaintiffs make claims here that would require the Court to effectively rewrite the 1988 Act. The Federal Circuit has previously rejected a breach of trust claim that would run counter to the plain language and intent of Congress regarding specific tribal shares to a fund. *LeBeau v. United States*, 474 F.3d 1334, 1343 (Fed. Cir. 2007); *see also* Def.'s Mem. at 21.

[7] As noted above, Plaintiffs' invocation of the *Short* litigation in its favor here seems misplaced given those decisions established entitlements and parameters for injuries to *non*-Hoopa (primarily members of the Yurok Tribe)

III. Plaintiffs' claims are otherwise barred.

Defendant's Memorandum also contended that the 1988 Act expressly precludes Plaintiffs' claims. Def.'s Mem. at 15-18. Plaintiffs, to invoke this Court's jurisdiction, claim damages based on a purported interest and trust duty owed them that simply do not exist in the 1988 Act. Indeed, Plaintiffs' Response effectively asks this Court to rewrite the 1988 Act in their favor. Plaintiffs, however, cannot support such a request. Accordingly, the defenses set forth in Defendant's Memorandum apply here and bar Plaintiffs' claims.[8]

A. Plaintiff Hoopa Valley Tribe's claims are barred.

For Plaintiff Hoopa Valley Tribe, Plaintiffs make three arguments: their prior waiver in 1988 excluded "future" or unknown claims, the waiver did not cover "discriminatory individualization" of the Fund to the Yurok, and the waiver excluded actions "to enforce rights and obligations created by" the 1988 Act. Pls.' Resp. at 16-19. None has merit.

The first two arguments ignore the plain language of the 1988 Act, which specified the division of the Fund between the Tribes and authorized both Tribes to make *per capita* distributions of their respective shares. 25 U.S.C. §§ 1300i-3(c)-(d), 1300i-6(a)-(b). Plaintiffs' argument amounts to grammatical "word play" over verb tense. Pls.' Resp. at 16 (arguing that

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Indians of the Joint Reservation that preceded the 1988 Act. Indeed, to the extent any *Short* decision applies, this Court should follow *Short VI* and reject the claims brought by Plaintiffs asserting that *per capita* distributions authorized by the 1988 Act discriminated against individual Hoopa members.

[8] Contrary to Plaintiffs' view, Defendant does not concede that this Court could redress any purported injury or violation of the 1988 Act. Pls.' Resp. at 23. Even if the Court were to find that Defendant improperly accepted the Yurok's waiver in 2007, such a finding alone cannot establish any injury or trust duty owed to Plaintiffs. Congress directed Defendant to distribute the Fund in a specific manner to specific beneficiaries, including the separate trust account for and distribution to the Yurok Tribe. Nothing in the 1988 Act provided for a different distribution in the event of an untimely or even an invalid waiver, let alone established an entitlement in Plaintiffs. Conversely, Congress did not establish the express limits on the waiver that Plaintiffs seek to impose now. Def.'s Mem. at 24-28. Only Congress could have changed this arrangement, and it has not done so after all this time, notwithstanding attempts by Plaintiffs. *See, e.g.*, Pls.' Mot., Ex. 26, App. 348 (Proposed Amendments to the Hoopa-Yurok Settlement Act Developed in Formal Mediation (Dec. 3, 2003)); *id*., Ex. 27, App. 353 (S. 2878, 108th Cong., 2d Sess., A Bill to Amend the Hoopa-Yurok Settlement Act (Sept. 30, 2004)).

the 1988 Act "use[es] the present perfect tense ("have") in describing the waiver). This argument, however, cannot undo Plaintiffs' waiver of "any claim"-- existing or potential, known or unknown that Plaintiff "may have against the United States arising out of the provisions of the" the 1988 Act. 25 U.S.C. § 1300i-1(a)(2)(A)(1) (detailing the waiver the Hoopa Valley Tribe was required to adopt). Accordingly, these arguments fail.

Plaintiffs' last two arguments rely on purported "rights and obligations" based on the irrelevant or obsolete statutory provisions discussed and refuted above in Part I. Moreover, the Yurok waiver is not a "right or obligation" that runs to Plaintiffs. Instead, the 1988 Act required the Yurok Tribe to waive any claims against Defendant arising under the Act. *Id.* §§ 1300i-1(c)(4), 1300i-8(d)(2)(i). These arguments likewise fail.

Plaintiff Hoopa Valley Tribe received its full entitlement and waived its claims under the Act. *See* Def.'s Mem. at 16. It has no claim to assert, and the Act and its waiver bar any claim now.

B. Individual Plaintiffs' claims are also barred.

For individual Plaintiffs, Plaintiffs assert that the 1988 Act required no individual waiver from them, and thus they are not barred from asserting claims here. Pls.' Resp. at 13-14. Although Plaintiffs' assertion is accurate regarding individual waivers, Plaintiffs fail to acknowledge that neither the 1988 Act nor the *Short* litigation created any entitlement in Hoopa members either.

Instead, in enacting the 1988 Act, Congress sought to resolve the *Short* litigation (involving Indians of the Joint Reservation not recognized as Hoopa members) and to end the individualization of tribal assets, as discussed above. Accordingly, Congress only needed to address any interests of Hoopa members under the 1988 Act in three distinct ways: (1) the Tribe

had to submit a resolution waiving claims and affirming tribal consent to the use of Hoopa funds, by which the Tribe also confirmed its membership's consent to the 1988 Act (25 U.S.C. § 1300i-1(a)(2)(A); Pls.' Mot., Ex. 8, App. 133 (Notice Regarding Hoopa Valley Tribe Claim Waiver, 53 Fed. Reg. 49361 (Dec. 7, 1988); (2) individual Indians who met certain requirements and then elected Hoopa membership were similarly required to disclaim any right or interest in the Yurok Reservation, Yurok Tribe, and the Fund (§ 1300i-5(b)(4)); and (3) individuals, including Hoopa members who wanted to challenge any provision of the 1988 Act as effecting a taking or providing inadequate compensation, had to do so by September 1991 (§ 1300i-11(b)(1)). *See also* Def.'s Mem. at 16-18, 24.

Individual Plaintiffs are members of the Hoopa Valley Tribe. The 1988 Act does not provide a vehicle for them to distance themselves from the Hoopa Valley Tribe's waiver of claims. Moreover, it specifically provides that individual Plaintiffs "shall no longer have any right or interest" in the funds at issue. § 1300i-5(b)(4). Furthermore, any claims that Plaintiffs seek to bring as individuals exceed the strict statute of limitations included in the 1988 Act. § 1300i-11(b)(1). Consequently, individual Plaintiffs, like Plaintiff Hoopa Valley Tribe, are barred from asserting claims here.

IV. Defendant violated no duty to Plaintiffs by accepting the Yurok's waiver.

Finally, Defendant's Memorandum also asserted that Plaintiffs' arguments regarding the Yurok Interim Council and the sufficiency of the Yurok Tribe's 2007 waiver lack merit. Def.'s Mem. at 24-27. Furthermore, Defendant explained that after careful consideration, it concluded that the Yurok Tribal Council could provide a new waiver of claims that would meet the requirements of the 1988 Act. Accordingly, Defendant complied with the requirements of the

1988 Act concerning distribution of the remaining funds that had been specifically set aside for the Yurok Tribe.

Plaintiffs' Response continues to assert that Defendant breached fiduciary obligations to them by accepting the Yurok's "illusory" waiver in 2007 because the Interim Council no longer existed and the Yurok could not "cure" its waiver after it had litigated its takings claim. Pls.' Resp. at 26-30.[9] Defendant, however, has already refuted such arguments. Def.'s Mem. at 24-27.

In brief, Congress had to delineate the powers of the Yurok Interim Council specifically because Congress established this special entity as a prelude to the formal Yurok Council. Without a specific delineation by Congress, this special entity would have no powers, such as those inherent in a tribal sovereign. This delineation, however, in no way negated the inherent powers held by the sovereign Yurok Tribe once its members adopted a constitution and elected a formal Council. *See* Def.'s Mem. at 25-26.[10] Plaintiffs' Response, however, seeks to rewrite the

[9] Plaintiffs fault Defendant for citing a letter that Plaintiffs relied upon and included in their exhibits. Pls.' Resp. at 28 (discussing Defendant's reliance on Pls.' Mot., Ex. 23, App. 188 (Letter of Assistant Secretary – Indian Affairs to Susie L. Long (Mar. 14, 1995)). At bottom, Plaintiffs have submitted an exhibit that undercuts their assertion that Defendant has consistently taken the position that the Yurok Tribe could not submit a waiver after the *Karuk* litigation and after the Yurok Interim Council expired. Plaintiffs provide no authority to establish that Defendant cannot discuss such a document. The primary purpose of the letter at issue was to "reaffirm [the Department of the Interior's] decision of April 4, 1994." Pls.' Mot., Ex. 23, App. 187. To the extent that the letter is interpreted to be part of compromise negotiations, Defendant has not relied upon it to "to prove liability for, invalidity of, or amount of" the claims underlying the *Karuk* litigation. Fed. R. Evid. 408.

[10] Plaintiffs also continue to assert that the Yurok Council did not follow its own constitution in providing the waiver to Defendant. Pls.' Resp. at 27-28. Plaintiffs have no standing to make such a challenge. Plaintiffs are required to assert their own rights; they are not permitted to stake their claims for relief on "the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Moreover, there is nothing to suggest that Defendant is required to second guess the Yurok Tribe's waiver resolution. To the contrary, decisions from the Department of the Interior's Board of Indian Appeals have emphasized that the Department must give deference to an Indian tribe's reasonable interpretation of its own laws and governing documents. *See, e.g.*, *San Manuel Band of Mission Indians v. Sacramento Area Director*, 27 IBIA 204, 207 (1995) (Indian tribe's interpretation of its own governing documents entitled deference); *Rhatigan v. Muskogee Area Director*, 21 IBIA 258, 261-62 (1992) (same, noting deference grounded in doctrines of tribal sovereignty and self-determination). Furthermore, the Yurok membership effectively ratified the waiver by voting through tribal referendum to approve the *per capita* distribution that Plaintiffs challenge now. *See* http://www.yuroktribe.org/news&issues /news/documents/November07newsletter.pdf

1988 Act by asserting through inference a statute of limitations for the Yurok waiver based on the Act's reference to the Interim Council. To use part of Plaintiffs' argument, Congress knew how to include a time limitation when it wanted to do so, *see* 25 U.S.C. § 1300i-11, and Congress did not include one here.

Likewise, the universe of potential claims under the 1988 Act extended beyond the takings claim litigated by the Yurok. Congress broadly required the waiver of "any claim . . . against the United States arising out of the provisions" of the Act not just claims for a taking or unjust compensation. 25 U.S.C. § 1300i-1(c)(4). The 1988 Act addressed issues beyond just entitlement to land and money, including tribal membership criteria and the recognition and organization of the Yurok Tribe. Thus, even accepting Plaintiffs' argument regarding the extinguishment of the takings claim, Pls.' Resp. at 29, the waiver provided by the Yurok runs beyond just that matter. Accordingly, Defendant violated no duty to Plaintiffs by accepting the Yurok Tribe's waiver.

V. Conclusion

Simply put, the 1988 Act controls. In that Act, Congress established a specific distribution scheme, providing for the Fund to be divided between the two Tribes (with certain specified payments to individuals that are not at issue here). Plaintiff Hoopa Valley Tribe already received its share of the Fund and claims no breach of trust with respect to those funds.

Here, Plaintiffs, a few individual Hoopa members and the Tribe (solely on behalf of its members and advancing no right of its own), challenge the distribution of funds that Congress: (a) directed to be provided to the Yurok Tribe only and (b) authorized the Yurok (just as it had the Hoopa) to make *per capita* distributions to its members. Plaintiffs have no interest in the

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(discussing Yurok vote); http://www.yuroktribe.org/news&issues/news/documents/Marchnewsletter.pdf (discussing distribution to members). Plaintiffs' argument here has no merit.

account released by Defendant. Consequently, Defendant owes no trust duty to Plaintiffs regarding the funds distributed to the Yurok Tribe.

Instead, in making such a distribution, Defendant implemented the plain language and intent of Congress under the 1988 Act. Now, Plaintiffs effectively ask this Court to rewrite the 1988 Act to recognize an interest for them, invoke a trust duty to them, and insert a statute of limitations on the Yurok waiver. Only Congress can change the provisions it enacted, and it has not done so here. Plaintiffs' allegations have no merit, and this Court should reject their Complaint and rule in favor of Defendant's Motion to Dismiss, or in the alternative for Summary Judgment.

Dated: October 1, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2008, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties in this matter.

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