

**Lillian Blake PUZZ, et al., Plaintiffs,**

**v.**

**UNITED STATES, et al., Defendants.**

**No. C80-2908 TEH**

United States District Court,

N.D. California.

**April 8, 1988.**

**Vacated Dec. 21, 1988.**

Garry J.D. Hubert, Kincaid, Gianunzio, Caudle & Hubert, Oakland, Cal., Jack Tomlinson, Pual A. Erstein, San Francisco, Cal., for Hoopa defendants.

Duard R. Barnes, Asst. Sol., Dept. of the Interior, Edward Passarelli, Dept. of Justice, Team Leader and Indian Claims, Lands and Natural Resources Div., Washington, D.C., Patrick Ramirez S. Bupara, Asst. U.S. Atty., San Francisco, Cal., for defendants.

Jerry A. Jacobson, Jacobson, Jewett & Therolf, Madford, Or., for plaintiffs.

#### ORDER

THELTON E. HENDERSON, District Judge.

**\*1** The cross motions for summary judgment in this case raise novel and difficult questions of Indian law. [FN1] Plaintiffs are individual Indians of the Hoopa Valley Reservation ("reservation"), and defendants are the Bureau of Indian Affairs and various federal officials (collectively referred to as "the government" or "federal defendants") and the Hoopa Business Counsel ("HBC"), the governing body of the Hoopa Tribe. Plaintiffs' claim, in essence, is that defendants have violated their rights to participate in reservation administration and to benefit from the reservation's resources.

#### I. Factual Background

This Court will not attempt to set forth fully the tangled factual and legal history of this dispute. Briefly, this litigation originated because only one functioning tribal government

was formed, on a reservation occupied by members of several district tribes and groups.

The Hoopa tribe, whose members mostly live on the part of the reservation known as the Square, is represented by the Hoopa Business Council. Other Indians of the reservation, such as plaintiffs, are not eligible for membership in the Hoopa tribe and are not represented by the Hoopa Business Council. Most of these Indians live on the reservation's "Addition" or "Extension" along the Klamath river, or in other places distant from the Square, and many of them trace their origin to the Yurok tribe or other historic Indian groups. They have no council or governing body, do not view themselves as a separate tribe or tribes, and have resisted the government's efforts to have them organize themselves as a tribe. Plaintiffs are among these Indians of the reservation, but they sue as individuals, not on behalf of the class of all non-Hoopa Indians of the reservation.

Part of the origin of this dispute is geographical. The reservation as originally created by the Act of April 8, 1964 (13 Stat. 39 et seq.) contained only the area now called the Square. The Extension was added to the reservation by the Executive Order of October 16, 1891 (1 Kapp. 815). Most of the Hoopa tribe traditionally lived on the Square, and regarded it as their tribal homeland. It appears that until about 30 years ago the government informally treated the Square and the Extension as separate reservations, and tacitly regarded the Square as belonging to the Hoopas. Moreover, most of the timber from which reservation income is derived is on the Square. This history of non-unified reservation administration partly accounts for the strongly felt territorial and political divisions within what is legally a single, unified reservation. *Short v. United States*, 661 F.2d 150, 155 (Ct.Cl.1981).

Since less than one third of the Indians of the reservation belong to the Hoopa tribe, the interests of the majority of Indians are not represented by any tribal organization. Despite this, the government pursued its policy of strengthening tribal self-government by working closely with the Hoopa Business Council in administering the reservation. People not represented by the Hoopa Business Council came to believe that the government's administration of the reservation in conjunction with the HBC was unfair. They claimed that the government was allowing the Hoopa tribe to enrich itself, denying non-Hoopa Indians a fair share of income from reservation resources, administering social services in a discriminatory manner, and denying non-Hoopa Indians a voice in reservation government.

**\*2** The issue of distribution of reservation income has been litigated in a related action, *Short v. United States*, supra. The present action focuses on the political rights of

plaintiffs as non-Hoopa Indians of the reservation-- their right to participate in future decisions on budgeting, resource management, provision of services, etc.

This action, like *Short*, has been plagued by long delays, by a lack of clarity as to precisely what factual and legal questions are dispositive, and by the extremely hostile and inflexible positions taken by the parties. Nonetheless, this Court finds that this action essentially turns on purely legal questions appropriate for summary judgment.

Three summary judgment motions are now before this Court: (1) federal and Hoopa defendants' motion based on the tribal nature of the reservation and the nonjusticiability of executive and legislative dealings with tribes; (2) plaintiffs' motion based on the preclusive effect of the "four modified facts" this Court found to be established by *Short*; and (3) plaintiffs' motion based on the federal defendants' noncompliance with the Administrative Procedures Act in making crucial decisions concerning reservation administration. [FN2]

## II. The "Tribal Premise" and Justiciability

Defendants argue that the reservation is tribal; its resources are tribally owned, and plaintiffs as individuals have no property rights in the land nor political rights to have a voice in reservation government. They also claim that the government's actions in dealing with sovereign tribes are nonjusticiable, and that there are no judicially manageable standards to decide plaintiffs' claims.

However, this Court concludes that although Congress and the executive did intend to create the reservation for tribes, as opposed to granting individual entitlements for each Indian, they never intended one specific tribe, the Hoopas, to have exclusive property or political rights. Thus, we agree with defendants that reservation property is tribal or communal in nature, and that the courts cannot tell the government whether or not to recognize an Indian group as a tribe. But these facts do not bar us from ordering the government not to give some Indians idiosyncratic rights to manage and profit from resources held for the benefit of all.

Thus, defendants are not entitled to summary judgment on all of plaintiffs' claims on the grounds raised in this motion, but these grounds do set important constraints on the relief this Court can grant. This motion is therefore the proper starting place for discussion.

Defendants' basic premise is that governmental recognition of an Indian tribe as a sovereign entity is a political question not subject to judicial scrutiny. This Court agrees. We have no power to compel Congress or the executive branch to recognize or not to recognize an Indian group as a sovereign tribe. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *Baker v. Carr*, 369 U.S. 186, 215 (1962). Both the Hoopa and Yurok tribes are currently federally recognized. 50 Fed.Reg. 6055-6058 (Feb. 13, 1985); see *Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir.1981). This Court therefore cannot compel the government to stop treating the Hoopa tribe as a sovereign body.

**\*3** However, the question remains of just what "recognition" means. Recognition, or lack thereof, is not the sine qua non of Indians' rights in reservations. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 378 (1st Cir.1975). It is clear that a sovereign tribe has the right to define its membership standards and govern its members, that is, to "regulate their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 2 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 173 (1973).

Recognition does not necessarily entail the exclusive right to control territory and manage resources shared with non-members. Tribes have these further powers only when the government has conferred on them, by treaty or statute, a right of territorial management. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir.1983), cert. denied, 466 U.S. 926 (1984).

We must turn to the history of legislative and executive actions concerning the reservation, to determine whether federal recognition of the Hoopa tribe entails a right to control reservation land and resources. The text and legislative history of the Act of 1986 shows that it did not refer specifically to the Hoopa tribe, but concerned any and all tribes which were living there or could be induced to live there. *Short v. United States*, 486 F.2d 561, 565 (Ct.Cl., 1973). The Act conferred continuing executive discretion to locate any tribe or tribes thereon, and to change the boundaries of the reservation. See *Short v. United States*, 202 Ct.Cl. 870, 881-82 (Ct.Cl.1973); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04 (1949); *Donnelly v. United States*, 228 U.S. 243, 256-57 (1913).

Thus, although the reservation was created for tribes, not for individuals, the 1864 Act did not grant any territorial rights to the Hoopa tribe alone. *Short v. United States*, 486 F.2d at 564. Likewise, none of the later legislative enactments concerning the reservation conferred any rights on the Hoopa tribe per se.

Congress must have contemplated that each reservation could include more than one tribe. It limited the number of California reservations to four. *Short v. United States*, 12 Cl.Ct. 36, 42 (1987). Similarly, the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., shows that Congress realized that more than one tribe could live on and have rights in a reservation. Thus, Congress, intent to create the reservation for tribes, not exclusively for the Hoopa tribe, is beyond reasonable dispute.

This Court concludes that the government's recognition of the Hoopa tribe gave the tribe sovereignty over its membership standards and the internal relations of its members, neither of which are at issue in this action. Recognition did not, however, give the tribe sovereign control over reservation land and resources. Thus, the rule that recognition is a nonjusticiable political question does not bar this Court from adjudicating this dispute, since the dispute is not really about tribal recognition.

**\*4** However, defendants raise another threshold challenge, concerning plaintiffs' standing to bring this action. They correctly articulate the basic premise of tribal enjoyment of reservation land and resources. Indians as individuals have no vested ownership rights in the reservation; they have beneficial ownership only as members of tribes. Since plaintiffs sue as individual Indians of the reservation, not as members of a reservation tribe, defendants conclude that they have no rights in reservation land or resources, and hence no interest which gives them standing to bring this action.

This Court agrees with defendants that the reservation is tribal, in the sense that its land and resources are communally, not individually, owned. The premise of tribal enjoyment is fundamental, and reservations are deemed tribal unless their status is explicitly altered by statute or executive order. *Rice v. Rehner*, 463 U.S. 713, 726 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); see Cohen, *Handbook of Federal Indian Law* 605 (1982 ed.). Thus, unallotted reservation resources do not belong to individuals, but are held for the common benefit of all. *United States v. Jim*, 409 U.S. 80, 82-83 (1972); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912); *The Cherokee Trust Funds*, 117 U.S. 288, 308 (1886); Cohen, *supra*, at 606.

No intention appears in the language or history of the 1864 Act to alter this basic premise. Subsequent legislation shows that Congress continued to view the reservation, and reservations in general, as tribally enjoyed. See, e.g., Act of May 19, 1958 (72 Stat. 121); Act of June 25, 1910 (as amended, 25 U.S.C. § 407); Act of March 3, 1883 (as amended, 25 U.S.C. § 155). Likewise, executive administration of the reservation from the time of its creation forward is consistent with the tribal premise. For example, allotment and fishing rights depended on membership in some tribe of the reservation. Government agents consistently recognized the existence of various tribes on the reservation, including the Hoopas and Yuroks, and dealt with these and other groups as

tribes. See, e.g., *Thompson v. United States*, 44 Ct.Cl. 359, 366 (1909); *Elser v. Gill Net #1*, 54 Cal.Rptr. 568, 575 (1966).

However, defendants' reasoning from this solid promise to the conclusion that plaintiffs lack standing is unconvincing. Admittedly, plaintiffs' strident emphasis on their rights as individuals does little to assist them on this issue. However, plaintiffs are Indians of the reservation, which necessarily means that they trace their origins to one or another of the Indian tribes or groups for whose benefit the reservation was created.

It is as true today as in 1898 that the Indians of the reservation are made up of assorted tribes, bands, and groups, which have intermarried, merged and divided extensively over the history of the reservation, and that these groups have always "simply in fact existed, irrespective of recognition." *Dobbs v. United States*, 33 Ct.Cl. 308, 316 (1898). Thus, plaintiffs make a valid point that their claims depend not on their membership in a specific, formally organized tribe like the Hoopas, but rather on their connections with any of the various Indian groups, organized or not, for whom the reservation was created.

**\*5** This Court therefore finds that the reservation is indeed tribally enjoyed, and plaintiffs can make no claim for individual, severable shares of its land or resources. See *Short v. United States*, 12 Ct.Cl. 36, 42. However, it does not follow that plaintiffs, as Indians of the Reservation, have no standing to claim a right to share in the communal enjoyment of the reservation. In this action, plaintiffs make the latter, not the former, kind of claim.

Some clarification is required. In some parts of their argument, plaintiffs speak as if all Indians of the reservation are now one unified tribe for purposes of reservation administration. This is inaccurate. No legislative or executive act has ever consolidated the tribes on the reservation. Indeed, this could not be done without the consent of all tribes. *Dobbs v. United States*, 33 Ct.Cl. 308, 317 (1898); Act of May 17, 1882 (as amended, 25 U.S.C. § 63). Therefore, plaintiffs cannot predicate their standing on membership in some new, reservation-wide tribal community. But they need not have made this unhelpful and confusing argument. Their status as Indians of the reservation necessarily entails ties to one or another of the historic Indian groups for which the reservation was created, and these ties create the right to share in the benefits of the reservation. This is enough of an interest to confer standing.

Defendants also advance another version of the political question argument, that plaintiffs are essentially seeking political recognition and power, and their proper

remedy is not through litigation but through organizing as a separate tribe and dealing with the government through a tribal council. Defendants cite cases holding that the political rights in reservation government of non-members of tribes are nonjusticiable. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975).

Plaintiffs, for reasons that remain a mystery to this Court, have chosen not to pursue political rights through organizing into a non-Hoopa tribal council or councils. Defendants may be correct that some of the results they seek through this lawsuit are only attainable by this course of action. However, unlike the plaintiffs in *Martinez* and *Mazurie*, plaintiffs here do have justiciable claims as Indians of the reservation, as explained above. It is possible to respect the limitations imposed by cases like *Martinez* and *Mazurie* on adjudication of political rights, but still grant plaintiffs some relief. The possibility of a political remedy does not entirely preclude plaintiffs' claims.

Having addressed threshold issues of standing and political question, the next obstacle plaintiffs face is the federal policy favoring tribal self-determination. Since the Hoopa Business Council is the only organized, functioning tribal body on the reservation, defendants argue that the federal government is entitled to pursue this policy by involving the HBC in reservation administration.

**\*6** It is undeniable that current legislative and executive policy favors tribal self-government. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980); *Bryan v. Itasca County*, 426 U.S. 373, 389 n. 14 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). Therefore, this Court cannot enjoin the federal defendants from supporting the HBC, as far as is consistent with their other legal duties.

Federal defendants have broad administrative discretion over reservation administration and relations with tribes. *Donnelly v. United States*, 228 U.S. 243, 256 (1913). Since the HBC is the only functioning tribal body on the reservation, the government is not acting unlawfully in giving it a role in reservation administration. Federal defendants' discretion encompasses the use of the HBC as an advisory body both to aid in reservation administration and to carry out the policy of tribal self-determination. *Short v. United States*, 12 Cl.Ct. at 41-42.

This exercise of discretion does not offend equal protection principles because it is not unlawful to treat an organized tribal body differently than unorganized Indians of the reservation, "so long as that [disparate] treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business*

Committee v. Weeks, 430 U.S. 73, 84 (1977), quoting Morton v. Macari, 417 U.S. 535, 555 (1974).

Hence, the federal policy of encouraging tribal self-government, coupled with federal defendants' broad administrative discretion, supports a partial grant of defendants' summary judgment motion. This Court cannot enjoin federal defendants from involving the HBC in decisions concerning budgeting of reservation funds, resource management, and provision of services. Nor can this Court enjoin the HBC from conducting business as an advisory body participating in reservation government.

This conclusion severely restricts the scope of relief that plaintiffs may obtain. However, it does not defeat their claims entirely. The government has an overriding responsibility to administer the reservation for the use and benefit of all Indians of the reservation. Insofar as its and Hoopa defendants' actions violate that duty, plaintiffs may be entitled to injunctive relief. As detailed below, this Court concludes that some of the federal defendants' actions in conjunction with the HBC violate their duties to plaintiffs. Hence, defendants' summary judgment motion must be denied in part.

### III. The "Four Facts" and Federal Defendants' Trust Duties

In an Order of October 2, 1984, this Court found that four factual propositions were conclusively established by the related litigation in *Short v. United States*.

These facts are:

1. The Square and the Addition constitute one unified reservation for the purpose of distributing income from unallotted trust lands of the Reservation to "Indians of the Reservation";
2. There are no tribes on the Hoopa Valley Reservation having vested rights to the income from unallotted trust lands on the Reservation;
- \*7 3. The Indians of the Reservation hold equal rights to income from unallotted trust lands of the Reservation; and
4. The United States Department of Interior, Bureau of Indian Affairs, acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe as the persons entitled to the income from the unallotted trust lands on the Square.

Plaintiffs claim that the four facts have preclusive effect entitling them to a judgment in this action. Defendants, in response, point out the narrowness of the *Short* decision and the limits of the Court of Claims' jurisdiction.



The decision in *Short* did not resolve the present dispute, because *Short* only actually and necessarily decided that the government could not exclude non-Hoopas in making per capita payments of income from unallotted reservation resources. The decision in *Short* did not determine prospective issues, such as who has the right to decide how reservation income should be spent, to manage reservation resources, and to administer social services. However, this Court now concludes that the four facts, seen in the context of the government's trust responsibilities to all Indians of the Reservation, establish that plaintiffs are entitled to relief insofar as they have been deprived of the use and benefit of reservation resources.

The government has a trust responsibility to protect all Indians and their property. *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Cramer v. United States*, 261 U.S. 219, 232 (1923). In performing this duty, the government is held to the highest standards of fiduciary responsibility and trust. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The government must administer reservations solely in the benefit of the beneficiaries. *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238, 1245 (N.D.Ca.1973). Its actions in carrying out this duty cannot be arbitrary or discriminatory. *Short v. United States*, 719 F.2d 1133, 1137 (Fed.Cir.1983). Thus, this duty logically must extend to each Indian alike, not just to organized tribes. Hence, the government has a duty to allow all Indians of a reservation to benefit from reservation resources and to participate in self-government, on a non-discriminatory basis. See *Kerr- McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

Defendants respond that the doctrine of trust does not impose broad, sweeping duties on the government. To be enforceable, trust duties must be based on specific statutes, treaties or agreements which define and limit the relevant duties. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir.1975); see also *United States v. Mitchell*, 445 U.S. 535 (1980). Thus, they argue, there is no breach of trust in supporting the Hoopa tribe and giving it funds and political power, since there is no trust duty to confer governmental power equally on an organized tribal body and on a number of unorganized individual Indians. Nor is there a duty to refrain from supporting a tribal body unless it represents all Indians of reservation. Since such actions by defendants do not clearly contradict the terms of intent of the 1864 Act creating and defining the trust relationship, federal defendants argue that there are no applicable legal standards by which to adjudicate their conduct. They conclude that we must defer to their discretion in carrying out their trust duties. See *Strickland v. Morton*, 519 F.2d 467, 470 (9th Cir.1975).

**\*8** This court agrees that the government's trust duties do not prohibit it from supporting the Hoopa Business Council. Plaintiffs' equal protection argument fails

because an organized tribal body and unorganized individuals simply are not similarly situated. Moreover, equal protection doctrine must be interpreted in the special context of the government's duties toward Indians. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Moreover, as discussed above, the government's broad discretion gives it great latitude in dealing with tribes. Hence, the four facts and applicable law do not compel the conclusion that the federal defendants cannot fund and support the HBC, nor that Hoopa defendants cannot participate in reservation government.

However, the 1864 Act and subsequent legislative and executive actions do impose on federal defendants a duty to administer the reservation for the use and benefit of all Indians of the reservation. As stated above, the reservation was created for tribes, but not exclusively for the Hoopa tribe. Hence, the federal defendants cannot give any group within the reservation idiosyncratic rights. Cf. *Whitmire v. Cherokee Nation*, 30 Cl.Ct. 138, 158 (1895). Actions that deny plaintiffs the use and benefit of the reservation and its resources violate the government's trust duties.

On this basis, plaintiffs are entitled to part of the declaratory and injunctive relief that they seek.

The federal defendant may continue to support the HBC and involve it in reservation government, but only so far as this benefits all Indians of the reservation. The federal defendants may not disperse funds for any projects or services that do not benefit all Indians of the reservation in a nondiscriminatory manner. An extreme example of impermissible spending is that the federal defendants have allowed the use of reservation funds for the Hoopa defendants' litigation expenses in this action. It is an obvious violation of trust to allow the dissipation of reservation income to arm one faction of the Indians of the reservation against another.

Federal defendants must retain supervisory authority over all spending of reservation funds, to assure that they are used for purposes which benefit non-Hoopa as well as Hoopa Indians of the reservation. To fulfill the responsibility, federal defendants must develop and implement a process to receive and take account of the opinions of non-Hoopas on the proper use of reservation funds. This Court will therefore require defendants to propose a plan conforming to the requirements of this Order.

This Court acknowledges that the federal defendants have made some attempt to include non-Hoopas in decision making, through the issue-by-issue procedure. The issue-by-issue procedure is a process whereby the federal defendants reach a proposed decision on a matter of reservation administration with the participation of the HBC, and then publish the proposal in reservation newspapers. Comments by letter are solicited

from all Indians of the reservation. These comments are considered before a final decision is made.

**\*9** This process is not sufficient by itself to comply with the requirements of this Order. The federal defendants' compliance plan must replace this ad hoc process with an orderly system for determining the needs and views of non- Hoopa Indians of the reservation. Some possibilities the government should consider are: regular meetings open to all Indians of the reservation, held in areas largely populated by non-Hoopas; mail-in advisory ballots on issues of reservation-wide importance, distributed to all non-Hoopas; and appointment of federal officials specifically responsible for representing non-Hoopa interests in federal defendants' decision making processes.

This Court cannot compel the political reorganization of the reservation, nor infringe on federal defendants' discretion to govern it and cooperate with its single functioning tribal body. However, we can confine the exercise of that discretion within the boundaries of the trust relationship created by the 1864 Act. Federal defendants must run the reservation for the use and benefit of all, not for the benefit of some to the clear detriment of others. This Court therefore grants, in part, plaintiff's motion for summary judgment based on the four modified facts.

#### IV. The Administrative Procedures Act

Plaintiffs argue in this motion that several crucial decisions by the federal defendants violated the Administrative Procedures Act, 5 U.S.C. § 533, in that they are rules made without the required notice and comment procedure. Rules made without a prior notice and comment period are invalid. 5 U.S.C. § 706(2)(D); *Hotch v. United States*, 212 F.2d 280, 283 (9th Cir.1954). Specifically, the challenged decisions are: (1) the federal defendants' recognition and support of the Hoopa tribe's constitution and bylaws in 1972; (3) the 70/30 split whereby the federal defendants allocated 30% of reservation income to the Hoopas and held 70% in trust; and (4) the issue-by-issue procedure and two actions taken pursuant to it: allocating more than 30% of reservation income to the Hoopas in 1983, and issuing a Memorandum of Understanding allowing the Hoopa timber company to buy reservation timber on a professional basis.

Defendants oppose the motion on the grounds that some of plaintiffs' objections are moot or time-barred, that these administrative decisions are not "rules" within the meaning of the Administrative Procedures Act, and that plaintiffs have no standing to object to some of the decisions. This Court finds it unnecessary to reach the questions of standing and of whether the challenged decisions are rules, because plaintiffs' motion must be denied on other grounds.

First, defendants are correct that some of the issues are barred by the applicable six-year statute of limitations, 28 U.S.C. § 2401(a). Plaintiffs' challenge in this motion is not based on the substance or effects of the decisions, but on the fact that they were made without notice and comment. Thus, plaintiffs cannot invoke the continuing violation doctrine by arguing that the federal defendants continue to carry out the substantive policies embodied in those decision, and plaintiffs continue to feel the ill effects of those policies. The omissions of notice and comment periods were discrete historical events, and the statute of limitations began to run at the time each of the challenged decisions was made. Hence, plaintiffs' challenges to the federal defendants' decisions regarding the Hoopa tribe in the 1950's, and to the approval of the tribe's constitution and bylaws in 1972, are time- barred.

**\*10** Plaintiffs' challenge to the 70/30 split is moot, as plaintiffs concede in their reply brief. Likewise, the present Order renders their challenge to the issue-by-issue procedure moot, since federal defendants are required to replace or supplement that procedure with a more effective means of ascertaining and responding to non-Hoopas' concerns.

The motion is also moot with respect to the June 4, 1987 budget statement which succeeded the 70/30 split. This Order requires federal defendants hence forward to evaluate all spending decisions to ensure that they benefit all Indians of the reservation on a nondiscriminatory basis. Hence, the 1987 budget statement can have no prospective effect. This action's scope excludes challenges to past spending.

What remains is the timber Memorandum of Understanding. This Court concludes that the Memorandum can no longer be valid and binding, but for a more substantive reason than noncompliance with the Administrative Procedures Act. The Memorandum was adopted under an administrative system which this Court now orders the federal defendants to change, to respond adequately to non-Hoopas' concerns. Since it was not properly determined whether the Memorandum is in the interest of all Indians of the reservation, the Memorandum cannot have any prospective effect. Thus, this Court need not reach the questions of its compliance with the Administrative Procedures Act.

Plaintiffs' motion for summary judgment based on the Administrative Procedures Act must be denied, because it is time-barred in part and moot in part.

Good cause appearing, IT IS HEREBY ORDERED that:

Federal and Hoopa defendants' motion for summary judgment is granted in part and denied in part. The motion is granted in that federal defendants may lawfully allow the Hoopa Business Council to participate in reservation administration, and the Hoopa

Business Council may lawfully conduct business as a tribal body sovereign over its own members, and as an advisory body participating in reservation administration. The motion is denied in that plaintiffs are entitled to injunctive relief as follows.

2. Plaintiffs' motion for summary judgment based on the four modified facts is denied in part, as to the issues on which defendants' summary judgment motion is granted. Plaintiffs' motion is granted in part, in that the federal defendants shall not dispense funds for any projects or services that do not benefit all Indians of the reservation in a nondiscriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefit of the reservation on an equal basis. Specifically, federal defendants shall not permit any reservation funds to be used for litigation among any Indians or tribes of the reservation.

3. To fulfill the requirements of this Order, federal defendants must develop and implement a process to receive and respond to the needs and views of non-Hoopas as to the proper use of reservation resources and funds. Federal defendants shall submit a plan for compliance with this Order within sixty (60) days of the date of this Order.

\*11 4. Plaintiffs' motion for summary judgment based on the Administrative Procedures Act is denied because it is time-barred in part and moot in part.

5. Hoopa defendants' motion for summary judgment on their counterclaims is denied.

IT IS SO ORDERED.

ORDER OF DEC. 21, 1988

On November 15, 1988, this court ordered plaintiffs to show cause why this case should not be dismissed as moot in light of the passage of the Hoopa-Yurok Settlement Act (Public Law 100-580) (hereafter "Act"). In their response, filed November 30, 1988, plaintiffs asserted that the case had not yet become moot because mere passage of the Act did not automatically divide the existing reservation, and thus change the legal relations among the parties. Rather, partition of the reservation would only occur upon publication in the Federal Register of a resolution by the Hoopa Valley Tribe waiving any claim the Tribe may have against the United States arising out of the Act, and affirming Tribal consent to the distribution of escrowed timber sale proceeds.

As the federal defendants noted in their response, filed December 8, 1988, such a resolution has now been published in the Federal Register. 53 Fed. Reg. 49,361 (December 7, 1988). Accordingly, it appears that all parties would now agree, and this

court so finds, that this case has become moot. [FN1] *Bowen v. Kizer*, 108 S.Ct. 1200 (1988) (case mooted by subsequent legislation); *United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 105 S.Ct. 413 (1984) (issue mooted by subsequent legislation).

FN1. Plaintiffs have not filed any reply to the defendants' responses.

The Hoopa defendants also request that this court vacate its prior orders of April 8, 1988, June 20, 1988, and September 2, 1988. Under prevailing principles, and the circumstances of this case, we conclude that vacating the above orders is the appropriate course. *Bowen*, 108 S.Ct. at 1200-01; *Boston Chapter, NAACP v. Beecher*, 716 F.2d 931, 933 (1st Cir. 1983), vacated on other grounds, 468 U.S. 1206 (1984), on remand, 749 F.2d 102, cert. denied, 471 U.S. 1075 (1985) ("According to the established practice of federal courts, when a case is found moot, the district court's judgment will be vacated"); see also, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39- 40, 71 S.Ct. 104, 106-07 (1950). We also note that plaintiffs have filed no objection to defendants' request.

Accordingly, it is HEREBY ORDERED that

1. this court's orders of April 8, 1988, June 20, 1988, and September 2, 1988, are vacated and
2. this case is dismissed as moot. Each party to bear its own costs.

IT IS SO ORDERED.

FN1. Throughout this Order, the Court will follow the parties' practice in referring to Native American persons and groups as Indians. This is merely a matter of convenience, and is not intended to convey a lack of respect or sensitivity.

FN2. In addition, Hoopa defendants have moved for summary judgment on their counterclaim based on the contention that, if this Court grants the relief plaintiffs seek, the Hoopas' constitutional rights will be infringed. This motion is premature and improper. Hoopa defendants' proper remedy, if and when they believe that this Court's decision violates their

rights, is to appeal the decision. Therefore the present Order need not address the merits of this fourth motion. It must be denied as unripe.