

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ORANNA BUMGARNER FELTER,)	
et al.,)	
)	
Plaintiff,)	Civil Action No. 02-2156 (RWR)
)	
v.)	
)	
DIRK KEMPTHORNE, Secretary)	
of the Interior, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ REPLY IN SUPPORT OF DEFENDANTS’ RENEWED MOTION TO
DISMISS**

Extensive litigation has taken place regarding the Ute Partition and Termination Act (“UPA”), 25 U.S.C. § 677 *et seq.* In this case, Plaintiffs Oranna Bumgarner Felter, et al. (“Plaintiffs”) again bring claims “in connection with the purported termination of the Indian status of the indigenous people of the [Uintah] Band” pursuant to the UPA. The actions underlying Plaintiffs’ claims occurred over forty years ago. On August 31, 2007, Defendants Dirk Kempthorne, Secretary of the Interior, et al.’s (“Defendants”) filed a Renewed Motion to Dismiss Plaintiffs’ time-barred claims. In their Motion, Defendants explained that the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) (“P.L. 108-108”) does not revive Plaintiffs’ long expired claims. In addition, Defendants contended that P.L. 108-108 has no applicability to this case, because Plaintiffs were provided with an accounting. Furthermore, Defendants examined each of Plaintiffs’ eight claims and explained that such claims do not fall within the ambit of P.L. 108-108.

On September 27, 2007, Plaintiffs filed a Response to Defendants' Renewed Motion to Dismiss. Plaintiffs' Response appears to focus only on Plaintiffs' eighth cause of action (entitled "Action for Accounting"). Pls.' Resp. at 4-5; 19-20.^{1/} Plaintiffs' Response, however, fails to establish that P.L. 108-108 salvages this claim or any of Plaintiffs' other claims. Consequently, Plaintiffs' entire Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

I. P.L. 108-108 Does Not Revive Plaintiffs' Long Expired Claims.

In their Motion, Defendants explained that P.L. 108-108 fails to revive Plaintiffs' claims. Defendants also detailed that Plaintiffs' claims expired long ago. Defs.' Renewed Mot. at 7 (discussing rulings by this Court and the D.C. Circuit which concluded that "the alleged misapplication of the UPA and the resulting termination of trust status and asset distribution occurred in the 1950s and 1960s."). Indeed, thirty-five years ago in *Affiliated Ute Citizens v. United States*, the Court of Claims held that claims brought by the "mixed bloods" regarding the division and distribution of tangible and intangible tribal property were barred by the statute of limitations. 199 Ct. Cl. 1004 (1972).^{2/} In essence, Plaintiffs' Response argues that in enacting P.L. 108-108, Congress aimed to revive decades old claims and displace judgments entered

^{1/} Plaintiffs failure to oppose Defendants' Renewed Motion to Dismiss on their other counts should be treated as conceded. LCvR 7(b) (if opposing "memorandum is not filed within the prescribed time, the Court may treat the motion as conceded."); *Red Lake Band Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 11 n.2 (D.D.C. 1990) (citing Rules of the United States District Court for the District of Columbia, Rule 108 (if motion is not opposed, "the court may treat the motion as conceded"))).

^{2/} In addition, thirty years ago, the Court of Claims found that the plaintiffs' claims regarding water, hunting, fishing, future timber growth rights were also time-barred. *Affiliated Ute Citizens v. United States*, 215 Ct. Cl. 935 (1977).

many years ago. There is nothing, however, to establish that Congress intended such an extraordinary result.

An examination of the plain language of P.L. 108-108 shows that it does not contain the requisite clear statement of congressional intent to revive long expired claims. P.L. 108-108 is best construed as a tolling provision that preserves causes of action that were not yet time-barred as of the passage of the first Indian Trust Accounting provision. P.L. 108-108 prevents the statute of limitations from running during the specified period (*i.e.*, between the passage of the first of the Indian Trust Accounting provisions and the Department of the Interior's provision of an accounting), but it does not purport to revive a moribund claim and undo the effect of a plaintiff's prior failure to assert its rights within the time set forth in 28 U.S.C. § 2401. Moreover, P.L. 108-108 certainly does not propose to displace prior rulings by courts regarding time-barred claims.

In keeping with this analysis of the Indian Trust Accounting provision, the *Cobell v. Babbitt* court found that the statute did not provide for the "revival of potentially long stale claims." 30 F. Supp. 2d 24, 43-44 (D.D.C. 1998) (examining H.R.Rep. No. 103-158, 103rd Cong., 1st Sess. 57 (1993) and finding that "[n]othing in this statement of legislative intent supports an argument that the 'rights' being protected include stale causes of action"); *see also Cobell v. Norton*, 260 F. Supp. 2d 98, 103 (D.D.C. 2003).³⁷ Plaintiffs state that such rulings are

³⁷ As noted in Defendants' Motion, additional authority indicates that P.L. 108-108 does not revive Plaintiffs' long expired claims. Defs.' Renewed Mot. at 6-7 (citing *Resolution Trust Corp. v. Seale*, 13 F.3d 850, 853 (5th Cir. 1994) ("[s]ubsequent extensions of a limitations period will not revive barred claims in the absence of a clear expression of contrary legislative intent."); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997); *Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990)). As a condition of the United States' waiver of sovereign

from “*lower* court cases now held to be inconsistent with the governing law of the Federal Circuit.” Pls.’ Resp. at 3 (emphasis in original). Plaintiffs, however, fail to point to any authority from this Court or the D.C. Circuit rejecting the instant holdings from *Cobell*.

Plaintiffs state that “treaty and statutory obligations to tribal nations impose the ‘most exacting fiduciary standards’ in the United States’ relationship with its Indian beneficiaries.” Pls.’ Resp. at 14. Courts, however, have “routinely subjected Indians’ claims to statutes of limitations.” *Littlewolf v. Hodel*, 681 F. Supp. 929, 941-42 (D.D.C. 1988) (citing *United States v. Mottaz*, 476 U.S. 834 (1986); *Menominee Tribe v. United States*, 726 F.2d 718, 720 (Fed. Cir. 1988); *Hydaburg Cooperative Ass’n v. United States*, 667 F.2d 64 (Ct. Cl. 1981); *Andrade v. United States*, 485 F.2d 660, 664 (1973)). “Statutes of limitations apply regardless of the existence of an Indian trust.” *Littlewolf*, 681 F. Supp. at 942 (citing *Menominee Tribe*, 726 F.2d at 721-22; *Andrade*, 485 F.2d at 660-61)). Indeed, statutory waivers of Defendants’ sovereign immunity must be narrowly construed, and the Court’s jurisdiction must be limited to that which Congress clearly intended. *Spannaus v. United States Dep’t of Justice*, 643 F. Supp. 698, 700 (D.D.C. 1983), *aff’d*, 824 F.2d 52 (D.C. Cir. 1987), (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

In support of their argument, Plaintiffs also cite *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004). Pls.’ Resp. at 10. It is important to note, however, that *Shoshone* did not involve a situation in which a judgment had been previously entered finding claims barred by the statute of limitations. Accordingly, the

immunity, such legislation must be strictly construed in favor of the sovereign; and, even where susceptible to two interpretations, the construction limiting the waiver must be accepted. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

Shoshone court did not consider whether P.L. 108-108 contained a clear statement of congressional intent to displace judgments entered many years ago.

Moreover, Plaintiffs' Response makes clear the time-barred nature of their claims. Plaintiffs' Response focuses on their eighth cause of action (entitled "Action for Accounting"). Pls.' Resp. at 4-5; 19-20. In discussing this claim, Plaintiffs state that they "have long contended that when their status as federal recognized Indians was terminated in 1954 and 1961 the federal fiduciary took a position that it owed no legal obligation to account for any land, minerals and water that they owned separate and independent from the operation from the UPA." Pls.' Resp. at 20 (emphasis added). This alleged deficiency is certainly sufficient to accrue a claim for the failure to provide such an accounting. *Western Shoshone Natl. Council v. United States*, 73 Fed. Cl. 59, 70 (2006) (dismissing claim when it was "impossible to conclude that [p]laintiffs only became aware of the Government's position within the last six years.").

In addition, Plaintiffs claim they maintain vested rights in an Indian Claims Commission judgment award of June 13, 1960 to the Uintah Band. Pls.' Resp. at 2; Pls.' Ex. A. The June 1, 1950 Share and Share Alike Resolution, ratified, approved, and confirmed in 25 U.S.C. § 672, provided that such judgments would "become the tribal property of all Indians of the Ute Indian Tribe . . . without regard to band derivation. . . ." Such funds were then distributed in accordance with the UPA. *See* 25 U.S.C. § 677i (governing division of assets); Defs.' Ex. 1 (discussing division of June 13, 1960 judgment award). In any event, this allegation serves to underscore the fact that Plaintiffs are challenging actions that occurred forty years ago. Accordingly, any claims Plaintiffs potentially held against Defendants regarding these matters surely expired long ago

As noted above and set forth in greater detail in Defendants' Motion, Plaintiffs' claims

accrued many years ago. Upon consideration of Plaintiffs' claims, this Court and the D.C. Circuit concluded "the alleged misapplication of the UPA and the resulting termination of trust status and asset distribution occurred in the 1950s and 1960s." *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007); *see also* Ct.'s Order of January 27, 2006, 12. These findings are in keeping with the ruling made over three decades ago by the Court of Claims in *Affiliated Ute Citizens*, 199 Ct. Cl. 1004 (1972); *see also Affiliated Ute Citizens*, 215 Ct. Cl. 935 (1977). Plaintiffs' Response simply fails to establish that P.L. 108-108 salvages such time-barred claims. Consequently, Plaintiffs' claims must be dismissed.

II. P.L. 108-108 Does Not Apply, Because Plaintiffs Were Provided With An Accounting.

Defendants' Motion also noted the extensive litigation that has taken place regarding the UPA. Defs.' Renewed Mot. at 9 (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp.*, 507 U.S. 1042 (1993); *Affiliated Ute Citizens*, 199 Ct.Cl. 1004; *Affiliated Ute Citizens*, 215 Ct. Cl. 935 (1977); *United States v. Murdock*, 132 F.3d 534 (10th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *Ute Indian Tribe v. Probst*, 428 F.2d 491 (10th Cir. 1970) (on rehearing), *cert. denied*, 400 U.S. 926)). Defendants' Motion further explained that Plaintiffs were provided with an accounting regarding the division of judgment funds and the property of the Ute Indian Tribe of the Uintah and Reservation subject to equitable and practicable distribution pursuant to the UPA in connection with previous litigation. *Id.* at 9-10 (discussing Defs.' Ex. 1 (Affidavit of James J. Clear); Defs.' Ex. 2 (Affidavit of Stewart V. Thompson)). Accordingly, Defendants contended that because Plaintiffs have already received an accounting, P.L. 108-108 does not apply to Plaintiffs' claims. P.L. 108-108 (the statute of limitations shall

not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting . . .).

In response, Plaintiffs “agree that [Defendants’] Exhibit 1 *may* account for distributions of the monies to various Ute Tribes.” Pls.’ Resp. at 17 (emphasis in original). Plaintiffs proceed to argue, however, that this exhibit is not “an accounting to Plaintiffs as *individual* Indians with rights vested in the judgment monies *before* the enactment of the UPA.” *Id.* (emphasis in original). Plaintiffs’ argument is based upon a flawed premise. During the time period in question, Plaintiffs lacked vested individual rights to such funds. Thus, Plaintiffs’ statement that “before they were terminated Plaintiffs maintained legal and beneficial ownership of trust monies . . . ” is incorrect.

Indeed, Individual Indians do not possess interests to tribal assets held in common. Tribal property interests and governmental authority flow from reserved treaty rights and are secured to recognized Indian tribes as distinguished from individual Indians. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *see also Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). As set forth in *Short v. United States*:

An individual Indian’s rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

12 Cl. Ct. 36, 42 (Cl. Ct. 1987) (citing *United States v. Jim*, 409 U.S. 80, 82-83 (1972); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912)) (additional citations omitted). Likewise, in *Eastern Band of Cherokee Indians v. United States*, the Supreme Court ruled that certain funds invested for the

Cherokee Nation and “lands from sales of which proceeds were derived belonged to the Cherokee Nation as a political body, not to its individual members.” 117 U.S. 288, 308 (1886).

The Supreme Court explained that:

They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a pro rata proportion of the proceeds of sales made of any part of them.

Id.

Plaintiffs have been provided with an accounting regarding the division of judgment funds. Defs.’ Renewed Mot. at 9-10 (describing Exhibit 1 which provided information concerning the amounts of the various judgment funds awarded to the Ute Indian Tribe, attorneys fees, and offsets; detailed the division of such funds between the Southern Ute Tribe, Ute Mountain Tribe, and the Ute Indian Tribe of the Uintah and Ouray Reservation; showed the amounts received by the “full-blood” members and the “mixed-blood” members; and, tracked where such funds are deposited or paid); *id.* (noting that Exhibit 2 explained that the property subject to equitable and practicable distribution “was either distributed in kind to the Mixed-Blood and Full-Blood groups with appropriate cash adjustments to reflect any imbalance in value of the distributed property, or it was sold and the proceeds shared by the two groups” and further nothing that “[i]n each instance the partition percentage agreed to by the two groups was used.”). Plaintiffs have offered no authority to support the proposition that they are entitled to an accounting as individual Indians regarding a time period in which they lacked rights to tribal assets held in common. As detailed above, an accounting has been provided to Plaintiffs. Consequently, P.L. 108-108 has no application to this action.

III. Plaintiffs’ Claims Do Not Fall Within the Ambit of P.L. 108-108.

In their Motion, Defendants analyzed each of Plaintiffs' eight claims and explained that such claims do not fall within the ambit of P.L. 108-108. Defs.' Renewed Mot. at 11. In response, Plaintiffs concentrate solely on their eighth cause of action (entitled "Action for Accounting"). Pls.' Resp. at 4-5; 19-20. Because this claim does not fall within the purview of P.L. 108-108, it is also subject to dismissal. Consequently, none of Plaintiffs' claims are salvaged by P.L. 108-108 and they should be dismissed.

Defendants' Motion explained that the Indian Trust Accounting provision "covers claims concerning 'losses to . . . trust *funds*' rather than losses to . . . trust *assets*." *Shoshone Indian Tribe of Wind River Reservation*, 364 F.3d at 1351 (emphasis in original); *see also* Defs.' Renewed Mot. at 10 (citing *Wolfchild v. United States*, 62 Fed. Cl. 521, 548 (Fed. Cl. 2004); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (Fed. Cl. 2006); *Western Shoshone Nat. Council*, 73 Fed. Cl. at 70)).

In their Response, Plaintiffs state that they "seek an accounting of trust funds." Pls.' Resp. at 19. Upon further examination of Plaintiffs' statements, however, it appears that Plaintiffs seek an accounting connected with asset mismanagement. For example, Plaintiffs allege that certain monies were to be invested in land. *Id.* Plaintiffs then assert that they "have long contended that when their status as federal recognized Indians was terminated in 1954 and 1961 the federal fiduciary took a position that it owed no legal obligation to account for any land, minerals and water that they owned separate and independent from the operation from the UPA." Pls.' Resp. at 20. Plaintiffs further state that "[w]ith no final P.L. 108-108 accounting, there remains the question of who owns the user rights to water on allotted individual lands within the Uinta[h] and Ouray Reservation." *Id.* Plaintiffs also cite Exhibit E, a declaration by

Plaintiff Calvin Hackford, in support of their argument. Exhibit E appears to include allegations primarily of asset mismanagement. See Pl.’s Ex. E, ¶ 16 (alleging mismanagement of water rights); ¶ 19 (same).⁴

P.L. 108-108, however, plainly does not apply to asset mismanagement. *Shoshone Indian Tribe of Wind River Reservation*, 364 F.3d at 1351; *Wolfchild*, 62 Fed. Cl. at 548; *Simmons*, 71 Fed. Cl. at 193 (Fed. Cl. 2006); *Western Shoshone Nat. Council*, 73 Fed. Cl. at 70. Thus, Plaintiffs’ claims should be dismissed.

IV. Plaintiffs’ Suggestion Regarding Discovery Should be Disregarded.

In an attempt to keep their claims from dismissal, Plaintiffs suggest that “[c]ourt-ordered discovery would help to resolve any disputed jurisdictional facts and aid the Court in making a fair determination of the question on remand.” Pls.’ Resp. at 10. Discovery is, however, not necessary for the Court to decide the question of whether P.L. 108-108 applies to any of

⁴ In addition, Exhibit E appears to contain multiple errors and a failure to acknowledge legal precedent. For example, in contrast to the allegation contained in Paragraph 1 of Exhibit E, the Tenth Circuit ruled that the Uintah Band ceased to exist independently of the Ute Indian Tribe in *United States v. Perry Von Murdock*, 132 F.3d 534, 541 (10th Cir. 1997). Unlike the assertion made in Paragraph 4, no allotments were made to the Uintah Tribe. The General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, did not provide for allotments to be made to Indian Tribes; rather, allotments were made to members of the Tribe in accordance with the Act. In contrast to the allegation contained in Paragraph 5, no provision existed in the Ute Constitution allowing the three bands to reserve identity and rights. *Perry Von Murdock*, 132 F.3d at 541. In comparison to the statement made in Paragraph 6, no reference to the Ute Constitution is made in the June 1, 1950 Share and Share Alike Resolution, ratified in 25 U.S.C. § 672. Furthermore, the allegations contained in Paragraphs 19 and 20 are misleading. Mr. Hackford filed suit regarding his water rights claims; he lost this suit on substantive grounds. See *Hackford v. Babbitt*, 114 F.3d 1457 (10th Cir. 1994). In regard to Paragraph 22, Mr. Hackford incorrectly refers to the Uintah Indians as if they were not members of the Ute Indian Tribe. Finally, the allegation contained in Paragraph 24 is incorrect, because the “the [Ute] Constitution makes clear . . . that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe” *Perry Von Murdock*, 132 F.3d at 541.

Plaintiffs' claims. The central facts are undisputed. Namely, that the actions underlying Plaintiffs' claims occurred over forty years ago. Discovery is properly denied in connection with a motion to dismiss on jurisdictional grounds when the court "do[es] not see what facts additional discovery could produce that would affect [its] jurisdictional analysis." *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (quoting *Goodman Holdings v. Faridain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994)). No amount of discovery will assist Plaintiffs in establishing that this Court has jurisdiction over their long expired claims. Accordingly, the Court should exercise its discretion and disregard Plaintiffs' suggestion regarding jurisdictional discovery. *Mwani*, 417 F.3d at 17.

V. Conclusion.

Based on the aforementioned and the arguments contained in Defendants' Renewed Motion to Dismiss, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint.

Dated: November 2, 2007

Respectfully submitted,

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