UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2009-5084

HOOPA VALLEY TRIBE, on its own behalf, and in its capacity as parens patriae on behalf of its members; OSCAR BILLINGS; BENJAMIN BRANHAM, JR.; WILLIAM F. CARPENTER, JR.; MARGARET MATTZ DICKSON; FREEDOM JACKSON; WILLIAM J. JARNAGHAN, SR.; JOSEPH LEMIEUX; CLIFFORD LYLE MARSHALL; LEONARD MASTEN, JR.; DANIELLE VIGIL-MASTEN; LILA CARPENTER; and ELTON BALDY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant/Third Party Plaintiff-Appellee

v.

YUROK TRIBE,

Third Party Defendant.

Appeal from the United States Court of Federal Claims in 08-CV-072, Judge Thomas C. Wheeler

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APPELLANTS' COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTEREST

Counsel for the appellants certifies the following:

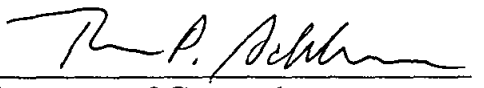
1. The full name of every party or amicus represented by me is: Elton Baldy; Oscar Billings; Benjamin Branham, Jr.; Lila Carpenter; William F. Carpenter, Jr.; Margaret Mattz Dickson; Freedom Jackson; William J. Jarnaghan, Sr.; Joseph LeMieux; Clifford Lyle Marshall; Leonard Masten, Jr.; Danielle Vigil-Masten; Hoopa Valley Tribe.

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by me is: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Law Firm: Morisset, Schlosser & Jozwiak; Attorneys: Thomas P. Schlosser (director); Thane Somerville (associate).

Date: April 22, 2010



Signature of Counsel

Thomas P. Schlosser

Printed Name of Counsel

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I. FEDERAL CIRCUIT RULE 35(b) STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Court: *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*); *Short v. United States*, 719 F.2d 1133 (Fed Cir. 1983) (*Short III*).

Thomas P. Schlosser, Counsel for Appellants

II. BASIS FOR REHEARING AND REHEARING EN BANC

1. This matter should be considered by the *en banc* court because the panel majority opinion, which held that Hoopa Plaintiffs lack standing to sue for breach of trust, directly conflicts with Supreme Court and Federal Circuit rulings in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*) and *Short v. United States*, 719 F.2d 1133 (1983) (*Short III*). The trust funds at issue here are derived from the harvesting of timber on the Hoopa Valley Reservation. A55-56. Both *Mitchell II* and *Short III* hold that Indians have standing to sue the United States for breach of trust resulting from the mismanagement of their reservation timber resources or the unlawful distribution of funds derived from such timber resources.

2. Rehearing or rehearing *en banc* is also appropriate because the panel majority opinion overlooked relevant statutory provisions and misapprehended the statutory source of Hoopa Plaintiffs' interest in the trust funds at issue. The panel majority: (a) failed to apprehend that Hoopa Plaintiffs' interest in the trust funds

and the United States' corresponding trust obligation was established by 25 U.S.C. § 407; (b) overlooked the fact that Congress did provide for individual Hoopa Plaintiffs to receive distributions of monies from the Hoopa-Yurok Settlement Act, 25 U.S.C. §1300i, *et seq.*, as confirmed by Sections 7(b) and 5(e) of the Settlement Act; and (c) overlooked language in the Settlement Act that required continued management of the trust funds by the Secretary of the Interior for the benefit of all Indians of the Hoopa Valley Reservation, including Hoopa Plaintiffs, pending final distribution of the funds in compliance with the terms of the Settlement Act. The Settlement Act did not terminate Hoopa Plaintiffs' interest in the trust funds under § 407, and Hoopa Plaintiffs, pursuant to *Mitchell II* and *Short III*, have standing to sue the United States for breach of trust duties relating to those trust funds.

3. Rehearing or rehearing *en banc* is also necessary because the panel majority erroneously inferred Congressional intent to terminate Hoopa Plaintiffs' rights in the trust funds upon enactment of the Settlement Act. This conflicts with Supreme Court cases that prohibit the termination of tribal property interests, or the federal trust relationship, except upon express evidence of Congressional intent in the relevant statutory language. Those cases include *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1967). No language in the Settlement Act expresses Congressional intent to

terminate Hoopa Plaintiffs' interest in the trust funds that were derived from timber harvesting on the Hoopa Reservation, or to lessen the Secretary's duties under § 407, pending lawful distribution of the trust funds in compliance with the Act.

III. ARGUMENT FOR PANEL REHEARING AND REHEARING EN BANC

A. The Panel Majority's Ruling That Hoopa Plaintiffs Lack Standing to Sue For Breach of Trust Damages Conflicts with *Mitchell* and *Short*.

The panel, by a 2 to 1 vote, ruled that Hoopa Plaintiffs (both the Tribe and individually named Hoopa tribal members) lack standing to sue the United States for breach of trust resulting from the unlawful distribution of trust funds derived from the harvesting of timber on the Hoopa Valley Reservation. Judge Friedman dissented from the majority ruling that the Tribe lacked standing, but voted to affirm Judge Wheeler's opinion on independent grounds not discussed by the panel majority.[1] The panel majority's ruling that Hoopa Plaintiffs lack standing conflicts with Supreme Court and Federal Circuit precedent in *United States v. Mitchell*, 463 U.S. 206 (1983) and *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983).

In *United States v. Mitchell*, 463 U.S. 206 (1983), individual Indians sued the United States for money damages for alleged breaches of trust relating to the

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[1] Judge Friedman's basis for decision -- that a Yurok Tribe claim waiver could be provided at any time -- presumes that Congress' careful language failed to require a waiver that would avert the very litigation brought by the Yurok Tribe and ignores the 2-year limitation on waiving claims by the Yurok Interim Council required by Sections 9 and 2(c)(4) of the Settlement Act. 25 U.S.C. § 1300i-8; 25 U.S.C. § 1300i-1(c)(4).

United States' management of tribal forest resources. The Supreme Court found that the timber management statutes contained in 25 U.S.C. § 406, 407, 466, and associated regulations established a comprehensive responsibility of the United States in managing tribal timber resources. *Id.* at 222. The timber management statutes and regulations confirmed fiduciary obligations of the United States and required the Secretary to manage timber resources to "generate proceeds for the Indians." *Id.* at 226-227. Based on the substantive management obligations created by statute, and the need for a mechanism of accountability, the Supreme Court affirmed the beneficiary Indians' right to sue the United States for breach of trust resulting from mismanagement of timber resources. *Id.* at 228.

In *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983), individual Indians sued the United States based on allegedly discriminatory distributions of timber proceeds derived from timber harvested on the Hoopa Valley Reservation. Ruling on a jurisdictional attack, this Court held that *Mitchell* governed, that 25 U.S.C. § 407 established a fiduciary relationship between the United States and Indians of the Hoopa Valley Reservation, and that those Indians had a cause of action based on alleged breach of trust flowing from the discriminatory distribution of timber-based revenues. *Id.* at 1135. Affirming jurisdiction, this Court stated that the United States "was under fiduciary obligations with respect to the comparable Indian forest lands involved here, and is liable for breach of fiduciary obligation in

failing to distribute the sale proceeds (and other income) to persons entitled to share in those proceeds." *Id.* "If the Secretary decides (as he has) to distribute proceeds under § 407, he must act non-discriminatorily and cannot exclude any of those Indians properly entitled to share in the proceeds." *Id.* at 1137.

The panel majority opinion in this case is irreconcilable with *Mitchell II* and *Short III*. The trust funds at issue in this case are derived from timber proceeds of the Indian plaintiffs' reservation (just like the funds/assets at issue in *Mitchell* and *Short*). The Hoopa Plaintiffs are Indians of the Hoopa Valley Reservation (just like the plaintiffs in *Short*). The comprehensive timber management regime and corresponding trust obligations contained in 25 U.S.C. § 407 applies to the trust funds at issue here, just like in *Mitchell* and *Short*.

The majority's ruling that Hoopa Plaintiffs lack adequate standing to sue for the misappropriation of funds that were derived from timber harvested on their reservation lands is a remarkable departure from precedent. The trust funds at issue are derived from assets harvested from the Hoopa Reservation and federal law, in 25 U.S.C. § 407, imposes fiduciary duties on the Secretary's management of those funds for the benefit of all Indians of the Hoopa Valley Reservation, including Hoopa Plaintiffs. Yet, the panel majority's ruling would prevent Hoopa Plaintiffs from invoking any judicial oversight over the Secretary's use of their trust funds, no matter how unlawful or outrageous. Under the majority's ruling

below, the Secretary could appropriate the monies in the Settlement Fund for his personal use, donate them to charity, or use them for any other purpose, lawful or unlawful, and Hoopa Plaintiffs would have no cause of action to enforce the Secretary's trust obligations under § 407 or the Settlement Act.[2]

Since *Mitchell II*, it is clear that the United States' management of Indian trust funds does not present a non-justiciable political question. The holdings in *Mitchell* and *Short* expressly permit judicial oversight of the United States' trust duties and confirm that Indian beneficiaries do have a cause of action where the United States is alleged to breach trust duties relating to management of timber-derived assets. In *Mitchell II*, the Court noted, at page 227:

> It would be anomalous to conclude that [25 U.S.C. § 407, etc.] create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed. Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust. (internal quotations omitted)

Likewise, this Court recognized the significance of judicial oversight of trust fund management in *Short III*, holding that Indian beneficiaries suffer injury where the Secretary distributes their reservation timber revenues in a discriminatory manner.

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[2] The panel majority's reliance on a Hoopa Valley Tribe claim waiver resolution, an issue not decided in the Court of Federal Claims, misses the mark. The Tribe's 1988 resolution did not purport to surrender claims which would not arise until 2007 and did not purport to release claims of individual tribal members, who are the plaintiffs in this suit. *See* n.5, *infra*.

719 F.2d at 1135, 1137. As a result, the United States can be held liable for breach of its fiduciary obligations to the Indians of the Hoopa Valley Reservation. *Id.* at 1135. This case involves the same Indian beneficiaries, reservation assets, and trust funds at issue in *Short*. This case also involves the same allegations of discriminatory trust fund distributions at issue in *Short*. Standing exists here, just as it did in *Short*. "There is, of course, jurisdiction to decide whether claimants are proper beneficiaries (at least if, as here, their claims are substantial and non-frivolous)." *Id.* at 1137.

In more recent decisions, the Supreme Court and this Court have reaffirmed that Indian beneficiaries have standing to sue the United States for breach of trust, so long as the mandates of *Mitchell II* are satisfied (as they are here). *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (affirming plaintiffs right to sue for breach of trust); *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365 (Fed. Cir. 2001) (stating, in suit for tribal timber mismanagement, "a beneficiary is entitled to recover damages for the improper management of the trust's investment assets"); *see also Cheyenne-Arapaho Tribes of Ok. v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975) (stating, in suit for mismanagement of Hoopa timber funds, "our jurisdiction to review discretionary acts of the Secretar[y] of the Interior . . . in administering the trust is broad enough to cover the types of claims made here.").

Both the Supreme Court and this Court have repeatedly confirmed that Indian beneficiaries have standing to seek judicial relief where the executive mismanages their trust assets. The panel majority decision here, taken literally, would permit no judicial oversight over the Secretary's use of tribal trust funds at issue in this case by the interested Indian beneficiaries. Such a result conflicts with *Mitchell II* and *Short III* and requires rehearing or rehearing *en banc*.

B. The Panel Majority Overlooked the Relevance of 25 U.S.C. § 407, Overlooked Sections 4(b), 5(e), and 7(b) of the Hoopa-Yurok Settlement Act, and Misapprehended the Nature of Hoopa Plaintiffs' Interest in the Relevant Indian Trust Funds.

The panel majority found that individual Hoopa Plaintiffs lack any interest in the trust funds addressed by the Hoopa-Yurok Settlement Act. Opinion, at 9. Rehearing is necessary, because the panel majority overlooked the effect of 25 U.S.C. § 407, a statute that is not discussed in the majority opinion. When the trust funds at issue in this case were generated, from the harvest of Hoopa timber, Section 407 mandated that proceeds from timber sales be used for the benefit of the reservation Indians (here, the Indians of the Hoopa Valley Reservation). *Short III*, 719 F.2d at 1136. Congress amended Section 407 in the Settlement Act to prospectively grant Indian tribes additional authority over the use of their timber resources. 25 U.S.C. § 407.[3] However, Congress did not repeal the trust duties

[3] The pre and post-Settlement Act versions of 25 U.S.C. § 407 are found in the Addendum, as is the Hoopa-Yurok Settlement Act.

and fiduciary obligations confirmed by *Mitchell II* or *Short III* with respect to tribal timber revenues that remained under the control of the Secretary. *See Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365 (Fed. Cir. 2001) (applying *Mitchell II* to affirm cause of action for breach of trust relating to timber mismanagement occurring in 1990s).

The panel majority improperly restricted its analysis to the Settlement Act, searching for affirmative confirmation in the text of that Act that the individual Hoopa Indians had a recognized interest in the trust funds at issue in this case. The panel majority entirely overlooked the fact that 25 U.S.C. § 407, as construed in *Mitchell II* and *Short III*, had already established Hoopa Plaintiffs' interest in these funds and the corresponding trust duties long before passage of the Settlement Act, and the Settlement act did not terminate them.

The panel majority also misapprehended and overlooked language of the Settlement Act to erroneously conclude that Congress did not intend individual members of the Hoopa Valley Tribe to share in the Settlement Fund. The Court overlooked Section 7(b) of the Settlement Act, which expressly authorized a per capita distribution of $5,000 to each member of the Hoopa Valley Tribe. 25 U.S.C. § 1300i-6(b). The panel majority also overlooked Section 5(e), which confirmed that persons subsequently enrolled as members in the Hoopa Valley Tribe also may have an interest in the Settlement Fund. 25 U.S.C. § 1300i-4(e). In

Section 3, Congress confirmed the continuing applicability of *Short* to pre-Settlement Act funds held by the United States. 25 U.S.C. § 1300i-2. Contrary to the panel majority's opinion, Congress did consider the interests of Hoopa members and intended them to share in benefits of the Settlement Fund.

Even if Congress had not expressly provided for distributions to individual Hoopa members under the Settlement Act, that is irrelevant to the question of whether the Hoopa Plaintiffs had a pre-existing interest in the trust funds under § 407 sufficient to confer standing in this case – an issue not addressed in the panel majority's opinion. The Hoopa Plaintiffs did not base their standing-to-sue on the Settlement Act alone. The Hoopa Plaintiffs' interest in the trust funds was created prior to the Settlement Act, and was not terminated by the Settlement Act. Under *Mitchell II* and *Short III*, Hoopa Plaintiffs have standing to sue for breach of trust relating to timber revenues derived from their reservation.

The panel majority also overlooked the effect of 25 U.S.C. § 1300i-3(b) and 25 U.S.C. § 162a, which further define the Secretary's obligations pending lawful distribution of the Settlement Fund in the manner expressly directed by Congress. The Settlement Act did not terminate trust duties confirmed by *Mitchell II* and *Short III*, but provided additional limitations on Secretarial discretion. *Short v. United States*, 28 Fed. Cl. 590, 595 (1993) *aff'd*, *Short VII*, 50 F.3d 994, 997 (1995) (stating the Settlement Act is simply another statute that constrains the

Secretary's discretion in new ways). The Settlement Act barred the Secretary from distributing Settlement Funds, except as provided under the terms and conditions of that Act. 25 U.S.C. § 1300i-3(b).

Pending distribution of funds in compliance with the terms and conditions of the Act, the Secretary was mandated to "invest and administer such fund as Indian trust funds" pursuant to 25 U.S.C. § 162a. *Id.* All Indians of the Hoopa Valley Reservation had an interest in those Indian trust funds. 25 U.S.C. § 407. If the distribution scheme established by Congress was not, or could not be, implemented, the Secretary was obligated to continue managing and investing the funds for the benefit of all Indian beneficiaries (including Hoopa Plaintiffs). 25 U.S.C. § 1300i-3(b). Until further direction from Congress,[4] the Secretary was subject to trust duties owed to all Indians of the Hoopa Valley Reservation and subject to judicial review for violations of that trust pursuant to *Mitchell* and *Short*.

C. The Panel Majority's Inference of Congressional Intent to Terminate Hoopa Plaintiffs' Statutory Interest in Hoopa Reservation Timber Assets, Despite the Lack of Statutory Text Evidencing Congressional Intent to Terminate, Conflicts with Supreme Court Precedent.

As discussed above, Hoopa Plaintiffs' interest in the trust funds was established by 25 U.S.C. § 407. That statute mandated that funds derived from the

[4] Congress heard witnesses on distribution of the remaining Settlement Funds. A254-282. At no time did Congress, or Interior, suggest that Hoopa Plaintiffs lacked an interest in the trust funds. Interior's position for nearly 20 years was that the terms of the Settlement Act failed and it could not unilaterally distribute the funds to either Tribe absent further direction from Congress. A231-248.

harvest of reservation timber be "used for the benefit of Indians who are members of the tribe or tribes concerned." *Short III*, 719 F.2d at 1136. Section 407 and related statutes and regulations impose trust obligations on the United States, and establish a corresponding basis for suit under the Indian Tucker Act for breach of trust. *Mitchell II*, 463 U.S. at 228; *Short III*, 719 F.2d at 1135.

Once Congress establishes a trust duty, or otherwise recognizes Indian rights, the Supreme Court has made it clear that only Congress can terminate those rights, and it may do so only through express statutory language. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (stating that Congress may abrogate tribal rights, but it must clearly express its intent to do so); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973) (declining to infer Congressional intent to terminate reservation); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1967) (declining to infer Congressional intent to abrogate tribal rights); *United States ex rel. Hualapai Indians v. Santa Fe Pac R.R.*, 314 U.S. 339, 346, 353 (1941) (stating Congressional intent to abrogate tribal property rights must be "plain and unambiguous" or "clear and plain"). It is improper for courts to infer Congressional intent to terminate Indian rights or to terminate the trust relationship between Indians and the United States. *Id.*

In this case, the panel majority did not find any statutory language expressly terminating the Hoopa Plaintiffs' pre-existing interest in the tribal timber revenues

established by 25 U.S.C. § 407. Nor does any such language exist. Yet, the Court concluded that Hoopa Plaintiffs no longer retained any interest in the trust funds upon Congress' passage of the Settlement Act. By inferring Congress' intent to permanently terminate Hoopa Plaintiffs' interest in the trust fund monies that was previously established by 25 U.S.C. § 407, the panel majority's opinion conflicts with Supreme Court precedent cited above.

In the Settlement Act, Congress exercised its plenary authority to apportion reservation resources as part of a comprehensive settlement of long-standing litigation, subject to specific terms, conditions, and deadlines, some of which were never fulfilled. Hoopa Plaintiffs are not challenging Congress' plenary authority to apportion reservation resources among the Indians of the Hoopa Reservation. *See United States v. Jim*, 409 U.S. 80, 82 (1972) (noting Congress' plenary authority to alter a distribution scheme to Indians). Hoopa Plaintiffs dispute the panel's inference that Congress intended to permanently terminate Hoopa Plaintiffs' pre-existing interest in these specific funds derived from timber resources of the Hoopa Valley Reservation upon mere passage of the Settlement Act.[5]

The distinction between Congressional power to apportion reservation assets among Indian beneficiaries, and Congressional action to permanently terminate

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[5] The Tribe's resolution approved by the Secretary does not "prevent the Hoopa Valley Tribe from enforcing rights and obligations created by the Hoopa-Yurok Settlement Act, *see* S. Rep. 100-564 at 17." A194. *See* n.2, *supra*.

those same Indian beneficiaries' rights is a critical one in this case. *See Karuk Tribe of California v. United States*, 28 Fed. Cl. 694, 697 (1993); *aff'd* 209 F.3d 1366, 1379 (Fed. Cir. 2000) (recognizing distinction between Congress' authority to apportion reservation resources in the Settlement Act and the termination of pre-existing tribal rights). In the Settlement Act, Congress exercised its plenary power to apportion resources. However, nothing suggests that Congress also intended to permanently divest trust beneficiaries of all pre-existing rights under 25 U.S.C. § 407 upon mere enactment of the Settlement Act. *See, e.g.,* 25 U.S.C. §1300i-4(b) (requiring management of Settlement Fund as Indian trust funds under 25 U.S.C. §162a pending distribution of funds as provided in the Settlement Act). Unless the conditions of the Settlement Act were satisfied and the monies lawfully distributed, Hoopa Plaintiffs retained a sufficient interest to seek judicial relief for the Secretary's failure to comply with the duties and distribution scheme established in the Settlement Act. Because the conditions of the Settlement Act were never fulfilled and the funds were never lawfully distributed, Hoopa Plaintiffs' interest in the funds, and their standing to sue for breach of trust in this case, was never terminated.

Under the panel majority's ruling, Hoopa Plaintiffs would have no judicial recourse even if the monies in the Settlement Fund were diverted by the Secretary for undeniably improper purposes. Nothing in the text of the Settlement Act

suggests that Congress intended to bar Hoopa Plaintiffs from seeking judicial relief against the United States in the event that the Secretary made unauthorized distributions or used the monies contained in the Settlement Fund for unlawful purposes. After all, Hoopa Plaintiffs are not merely "concerned bystanders" in this litigation - the monies at issue are derived almost entirely from Hoopa timber – the primary asset of the Hoopa Valley Reservation. *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (stating that the standing doctrine is intended to bar litigation of suits by those who are merely "concerned bystanders"). At minimum, Hoopa Plaintiffs have adequate standing to ensure that monies derived from the historic clear-cutting of their reservation timber resources are distributed in compliance with the express terms and conditions that Congress has directed.

IV. CONCLUSION

Pursuant to *Mitchell II* and *Short III,* the law is clear that Indian beneficiaries have standing to sue the United States for breach of its trust duties arising under 25 U.S.C. § 407. Rehearing and rehearing *en banc* is respectfully requested.

Respectfully submitted this 22nd day of April, 2010.

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ADDENDUM

1. *Hoopa Valley Tribe et al., v. United States*, No. 2009-5084, (Fed. Cir., March 9, 2010).

2. Hoopa-Yurok Settlement Act, Public Law 100-580, *codified in part as amended at* 25 U.S.C. § 1300i, *et seq.*

3. Act of June 25, 1910, *as amended* in 1964 *and further amended in* 1988, 25 U.S.C. § 407.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 03/09/10

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

No costs were taxed in this appeal.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
Clerk

cc: Thomas P. Schlosser
Mary G. Sprague, Jonathan L. Abram

HOOPA VALLEY TRIBE V US, 2009-5084
CFC, 08-CV-072

United States Court of Appeals for the Federal Circuit

2009-5084

HOOPA VALLEY TRIBE on its own behalf, and in its capacity as parens patriae on behalf of its members, OSCAR BILLINGS, BENJAMIN BRANHAM, JR., WILLIAM F. CARPENTER, JR., MARGARET MATTZ DICKSON, FREEDOM JACKSON, WILLIAM J. JARNAGHAN, SR., JOSEPH LEMIEUX, CLIFFORD LYLE MARSHALL, LEONARD MASTEN, JR., DANIELLE VIGIL-MASTEN, LILA CARPENTER and ELTON BALDY,

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v.

UNITED STATES,

Defendant/Third Party Plaintiff-Appellee,

v.

YUROK TRIBE,

Third Party Defendant-Appellee.

Thomas P. Schlosser, Morisset, Schlosser & Jozwiak, of Seattle, Washington, argued for plaintiffs-appellants. With him on the brief was Thane D. Somerville.

Mary Gabrielle Sprague, Attorney, Environment & Natural Resources, Appellate Section, United States Department of Justice, of Washington, DC, argued for defendant/third party plaintiff-appellee. With her on the brief was John C. Cruden, Acting Assistant Attorney General.

Jonathan L. Abram, Hogan & Hartson LLP, of Washington, DC, argued for third party defendant-appellee.

Appealed from: United States Court of Federal Claims

Judge Thomas C. Wheeler

United States Court of Appeals for the Federal Circuit

2009-5084

HOOPA VALLEY TRIBE on its own behalf, and in its capacity as parens patriae on behalf of its members, OSCAR BILLINGS, BENJAMIN BRANHAM, JR., WILLIAM F. CARPENTER, JR., MARGARET MATTZ DICKSON, FREEDOM JACKSON, WILLIAM J. JARNAGHAN, SR., JOSEPH LEMIEUX, CLIFFORD LYLE MARSHALL, LEONARD MASTEN, JR., DANIELLE VIGIL-MASTEN, LILA CARPENTER and ELTON BALDY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant/Third Party Plaintiff-Appellee,

v.

YUROK TRIBE,

Third Party Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-072, Judge Thomas C. Wheeler.

DECIDED: March 9, 2010

Before LINN, FRIEDMAN, and MOORE, Circuit Judges.

Opinion for the court filed by Circuit Judge MOORE. Dissenting opinion filed by Circuit Judge FRIEDMAN.

MOORE, Circuit Judge.

The Hoopa Valley Tribe, on its own behalf and acting as parens patriae, and twelve members of the Hoopa Valley Tribe (collectively, Hoopa Valley) appeal from a final decision of the United States Court of Federal Claims. See Hoopa Valley Tribe v.

United States, 86 Fed. Cl. 430 (2009). The Court of Federal Claims held that Hoopa Valley lacks standing to challenge the distribution of trust funds to the Yurok Tribe, and the court entered judgment in favor of the government. For the reasons set forth below, we agree that Hoopa Valley lacks standing but vacate and remand with instructions to dismiss Hoopa Valley's complaint without prejudice.

BACKGROUND

This case relates to the government's distribution of revenue derived from an Indian reservation. In 1876, President Grant set aside a square tract of land in Northern California as the Hoopa Valley Indian Reservation, which was inhabited mostly by Hoopa Valley Indians. President Harrison extended this reservation in 1891 to include an additional tract of land that was inhabited mostly by Yurok Indians. Both tribes, as well as other individuals, shared this enlarged reservation (the Joint Reservation), which was rich in timber resources and produced substantial revenue. The United States, through the Department of the Interior (DOI), administered this revenue as trustee of the beneficiaries and began distributing the revenue by 1955. Importantly, DOI distributed the revenue only to enrolled members of the Hoopa Valley Tribe, which the Hoopa Valley Indians formed in 1950.

DOI's discriminatory distribution of revenue prornpted what became known as the Short litigation. In 1963, individual Indians not sharing in the revenue, comprised mostly of Yurok Indians, sued the United States for breach of fiduciary duty. The United States Court of Claims ruled in favor of these Indians, holding that the Joint Reservation was "an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an

equal footing with the Indians theretofore resident upon it." Short v. United States, 486 F.2d 561, 567 (Ct. Cl. 1973) (Short I). After Short I, DOI—through its Bureau of Indian Affairs—distributed 30% of the unallotted revenue to enrolled Hoopa Valley Tribe members because these members comprised about 30% of all potential "Indians of the Reservation." DOI retained the remaining 70% in an escrow fund.

The Short litigation spanned several more years and resulted in numerous judicial opinions. For example, in 1981, the Court of Claims remanded for a determination of which plaintiffs constituted "Indians of the Reservation." See Short v. United States, 661 F.2d 150, 159 (Ct. Cl. 1981) (Short II). In 1983, we upheld the trial court's standards for making this determination, emphasizing that "all we are deciding are the standards to be applied in determining those plaintiffs who should share as individuals in the monies from the Hoopa Valley Reservation unlawfully withheld by the United States from them (from 1957 onward)." Short v. United States, 719 F.2d 1133, 1143 (Fed. Cir. 1983) (Short III). We also clarified that our decision "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." Id. The United States Claims Court subsequently concluded that qualified plaintiffs were entitled to "the share they would have received had the distributions been made in a non-discriminatory manner." Short v. United States, 12 Cl. Ct. 36, 41 (1987) (Short IV).

In 1988, in an effort to resolve the dispute relating to the ownership and management of the Joint Reservation, Congress passed the Hoopa-Yurok Settlement Act (the Act), Pub. L. No. 100-580, 102 Stat. 2924 (codified as amended at 25 U.S.C. § 1300i et seq. (2006)). The Act expressly preserved the entitlements established

under, and any final judgment rendered in, the Short cases. 25 U.S.C. § 1300i-2. But the Act also partitioned the Joint Reservation into the Hoopa Valley Reservation and the Yurok Reservation. Id. § 1300i-1. The Act conditioned this partition on the Hoopa Valley Tribe "adopt[ing], and transmit[ting] to the Secretary, a tribal resolution . . . waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter." Id. § 1300i-1(a)(2)(A). Hoopa Valley passed this resolution on November 28, 1988, and the partition was effected upon publication of the resolution in the Federal Register on December 7, 1988.

Importantly, the Act established a fund (the Settlement Fund) that included all undistributed revenue from the Joint Reservation being held in escrow funds and "all accrued income thereon." Id. § 1300i-3(a). For purposes of distributing money from the Settlement Fund, the Act instructed DOI to create a roll (the Settlement Roll) of all persons that were Indians of the Reservation and "(A) who were born on or prior to, and living upon, October 31, 1988; (B) who are citizens of the United States; and (C) who were not, on August 8, 1988, enrolled members of the Hoopa Valley Tribe."[1] Id. § 1300i-4(a)(1). Under § 1300i-5, DOI gave notice to "each person eighteen years or older on such roll of their right to elect" enrollment in either the Hoopa Valley Tribe or the Yurok Tribe, subject to the satisfaction of certain criteria. Rather than elect membership in either tribe, individuals could also elect to receive a lump sum payment out of the Settlement Fund in the amount of $15,000. Id. § 1300i-5(d).

[1] All twelve individual members of the Hoopa Valley Tribe that are named plaintiffs in this case were enrolled members of the Hoopa Valley Tribe on August 8, 1988.

The Act expressly set forth other mechanisms for distributing money out of the Settlement Fund. With respect to the Hoopa Valley Tribe, the Act provided as follows:

> [T]he Secretary shall immediately pay out of the Settlement Fund into a trust account for the benefit of the Hoopa Valley Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of enrolled members of the Hoopa Valley Tribe as of the date of the promulgation of the Settlement Roll, including any persons enrolled pursuant to section 1300i-5 of this title, by the sum of the number of such enrolled Hoopa Valley tribal members and the number of persons on the Settlement Roll.

Id. § 1300i-3(c). The Act conditioned payment of the Tribe's percentage of the Settlement Fund upon execution of the waiver discussed above. Id. §1300i-1(a)(2)(A) (requires "waiving any claim such tribe may have against the United States"). After Hoopa Valley passed the resolution waiving its right to bring suit against the United States with respect to provisions of the Act, DOI paid the Tribe its allotted amount from the Settlement Fund—about 40% of the Settlement Fund or about $34 million. The Act included a similar provision for the Yurok Tribe:

> the Secretary shall pay out of the Settlement Fund into a trust account for the benefit of the Yurok Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of persons on the Settlement Roll electing the Yurok Tribal Membership Option pursuant to section 1300-5(c) of this title by the sum of the number of the enrolled Hoopa Valley tribal members established pursuant to subsection (c) of this section and the number of persons on the Settlement Roll, less any amount paid out of the Settlement Fund pursuant to section 1300i-5(c)(3) of this title.

Id. § 1300i-3(d). Section 1300-5(c)(3) also provided for payment of either $5,000 or $7,500 out of the Settlement Fund to individuals electing membership in the Yurok Tribe, depending on the individual's age. Lastly, under § 1300i-6(a), "[a]ny funds remaining in the Settlement Fund . . . shall be paid to the Yurok Tribe and shall be held by the Secretary in trust for such tribe."

The Act conditioned "apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300-i6" on the Yurok Tribe "adopt[ing] a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter." Id. § 1300i-1(c)(4). The Yurok Tribe adopted a resolution with a waiver that the United States deemed unsatisfactory, and the Yurok Tribe filed a takings claim against the United States. The Yurok Tribe ultimately lost its case, see Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000), and a substantial amount of money remained in the Settlement Fund. Hoopa Valley's suit in this case concerns the remainder of the money in the Settlement Fund.

In March 2002, DOI submitted a report and testified before the Senate Indian Affairs Committee regarding what to do with the remainder in the Settlement Fund. See 25 U.S.C. § 1300i-11(c). According to DOI, the Hoopa Valley Tribe "received their [sic] portion of the benefits as enumerated within the Act" and thus "is not entitled [to] any further portion of funds or benefits under the existing Act." J.A. 246. DOI also concluded that "the Yurok Tribe did not meet the waiver conditions of the Act and is therefore not entitled to the benefits enumerated within the Act." Id. at 247. Nevertheless, DOI recommended that the remainder should not revert to the general fund of the U.S. Treasury. Id. at 247, 282. Rather, DOI recognized that "substantial financial and economic needs currently exist within both Tribes and their respective reservations." Id. at 282. Accordingly, DOI recommended that "the Settlement Fund should be administered for the mutual benefit of both Tribes and their respective reservations, taking into consideration prior distributions to each Tribe from the Fund," and that "the monies remaining in the Settlement Fund should . . . be distributed to one

or both Tribes in some form." Id. DOI sought further instruction and/or legislation from Congress on this issue, but no such legislation was enacted.

In 2007, after reviewing the situation and hearing from both tribes, Ross O. Swimmer, Special Trustee for American Indians, informed both tribes that DOI would distribute the remainder in the Settlement Fund to the Yurok Tribe, provided that the Yurok Tribe submitted a new, satisfactory waiver. The Yurok Tribe complied and received the remainder in the Settlement Fund, which had grown from about $37 million to more than $80 million.

Hoopa Valley subsequently sued the United States, alleging breach of fiduciary duty arising from the distribution of the remainder in the Settlement Fund only to the Yurok Tribe. According to Hoopa Valley, the Yurok Tribe's waiver was invalid. Hoopa Valley moved for summary judgment; the government filed a motion to dismiss, or in the alternative for summary judgment. The government also filed a third-party complaint seeking judgment against the Yurok Tribe if the Court of Federal Claims concluded that the disbursement was improper. The Court of Federal Claims granted the government's motion for summary judgment on the basis that Hoopa Valley lacks standing. Specifically, the court determined that Hoopa Valley cannot show that it suffered an injury in fact. The Court of Federal Claims entered judgment in favor of the government, and Hoopa Valley appeals.

DISCUSSION

We have jurisdiction under 28 U.S.C. § 1295(a)(3). We review the Court of Federal Claims' grant of summary judgment de novo. Winstar Corp. v. United States, 64 F.3d 1531, 1539 (Fed. Cir. 1995). Also, "[w]hether a plaintiff has standing to bring

suit is likewise a question of law, reviewed de novo." S. Cal. Fed. Sav. & Loan Ass'n v. United States, 422 F.3d 1319, 1328 (Fed. Cir. 2005). "Standing is a threshold jurisdictional issue that implicates Article III of the Constitution." Id. According to the Supreme Court, "the irreducible constitutional minimum of standing contains three elements": injury in fact, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). With respect to the first element, "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (citations omitted) (internal quotation marks omitted). Hoopa Valley, the party invoking jurisdiction, bears the burden of establishing the elements of standing. Id. at 561.

Hoopa Valley contends that it is a beneficiary of—i.e., had a legally protected interest in—the Settlement Fund and that it was injured by DOI's distribution of the remainder in the Settlement Fund to the Yurok Tribe. According to Hoopa Valley, it is a direct beneficiary because the remainder was derived from timber resources taken from the Hoopa Valley Reservation. Furthermore, Hoopa Valley maintains that its claims "are mirror images of claims approved by this Court in the Short litigation" and that "[a]bsent valid distributions complying with the Settlement Act or other statute, the Secretary was bound to hold, invest, and administer the Settlement Fund as Indian trust funds for the benefit of all Indians of the Reservation, including the Hoopa Plaintiffs." Appellants' Br. 17–18. The government responds that the Hoopa Valley Tribe was no longer a beneficiary after it received its share of the Settlement Fund in 1991 and that individual Hoopa Valley Tribe members were never beneficiaries of the Settlement

Fund. These arguments by the government form the basis of the Court of Federal Claims' decision. See Hoopa Valley, 86 Fed. Cl. at 435–36.

We agree with the Court of Federal Claims that Hoopa Valley lacks standing because it cannot show an injury in fact. The Hoopa Valley Tribe waived any claim against the government arising from the Act, received its share of the Settlement Fund, and retained no entitlement to the remainder in the Settlement Fund. As such, at the time DOI distributed the remainder to the Yurok Tribe, the Hoopa Valley Tribe was not a beneficiary of, and had no legally protected interest in, the Settlement Fund. Moreover, Hoopa Valley's reliance on the earlier Short litigation is inapposite because entitlement to the Settlement Fund is dictated by the provisions of the Act itself, and Hoopa Valley received all of the money to which it was entitled under the Act. Thus the Hoopa Valley Tribe cannot show an injury in fact based on DOI's distribution. Likewise, individual members of the Hoopa Valley Tribe have no individual entitlement to the Settlement Fund. The Act recognized only two forms of direct distributions to individuals: (1) those individuals not electing membership in either the Hoopa Valley Tribe or the Yurok Tribe, see 25 U.S.C. § 1300i-5(d); and (2) individuals electing membership in the Yurok Tribe, see id. § 1300i-5(c)(3). Furthermore, the corresponding Senate Report explained that the Act "should not be considered in any fashion as a precedent for individualization of tribal communal assets" and should "in no way . . . be construed as any recognition of individual rights in and to the reservation or the funds in escrow." S. Rep. No. 100-564, at 2, 15 (1988). The Court of Federal Claims' summary is particularly apt: "Simply put, the Act provides no mechanism for individual Hoopa Valley Tribe members to receive payment directly from the United States." Hoopa Valley, 86 Fed. Cl. at 436. Because

we conclude that Hoopa Valley lacks standing, we do not address the government's alternative arguments, including specifically that even if the twelve members of the Hoopa Valley Tribe have standing, the Hoopa Valley Tribe lacks standing as parens patriae on behalf of its members.

Although we agree with the court's determination that Hoopa Valley lacks standing, we nevertheless believe that the Court of Federal Claims, which entered judgment in favor of the government, should have dismissed Hoopa Valley's complaint without prejudice. Indeed, the government concedes that dismissal for lack of jurisdiction is appropriate and requests that we remand for this purpose. Accordingly, we vacate the Court of Federal Claims' judgment in favor of the government and remand with instructions for the court to dismiss Hoopa Valley's complaint without prejudice.

VACATED and REMANDED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

2009-5084

HOOPA VALLEY TRIBE on its own behalf, and in its capacity as parens patriae on behalf of its members, OSCAR BILLINGS, BENJAMIN BRANHAM, JR., WILLIAM F. CARPENTER, JR., MARGARET MATTZ DICKSON, FREEDOM JACKSON, WILLIAM J. JARNAGHAN, SR., JOSEPH LEMIEUX, CLIFFORD LYLE MARSHALL, LEONARD MASTEN, JR., DANIELLE VIGIL-MASTEN, LILA CARPENTER and ELTON BALDY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant/Third Party Plaintiff-Appellee,

v.

YUROK TRIBE,

Third Party Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-072, Judge Thomas C. Wheeler.

FRIEDMAN, Circuit Judge, dissenting.

I would affirm the Court of Federal Claims' grant of summary judgment for the United States, thereby dismissing the complaint, but not on the court's ground that the appellants lack standing to bring their claims. I would affirm on the alternative ground, which the record supports, that the appellants have failed to state a claim on which relief can be granted. We may affirm the judgment of that court on any ground the record supports, whether or not that court relied upon that ground or whether the parties

asserted that ground. See Granite Mgmt. v. United States, 416 F.3d 1373, 1378 (Fed. Cir. 2005).

I

The rationale of the Court of Federal Claims' lack-of-standing ruling is that the appellants "have already received their full entitlement to the Fund and thus have no 'injury in fact.'" That court stated:

> The Hoopa Valley Tribe ultimately received more than $34 million from the Fund, the amount determined to be Hoopa's entitlement pursuant to the Act.
>
> Thus, Plaintiffs cannot show that an "invasion of a legally protected interest" occurred in this matter to establish an "injury in fact." The Hoopa Valley Tribe already received its share of the Fund in 1991; only the Yurok were entitled to monies remaining in the Fund in 2007. In short, Plaintiffs already have received the amount of the Fund to which they are entitled, and could not be injured by distribution of monies to which they have no right.

Hoopa Valley Tribe v. United States, 86 Fed. Cl. 430, 436 (2009) (app. citation omitted).

The appellants, however, do not contend that the distribution to the Yurok Tribe violated the Hoopa Valley Tribe's distribution rights under the Settlement Act. They contend that, under that Act and 25 U.S.C. § 407, the funds distributed to the Yurok Tribe were being held by the federal government as Indian trust funds, and that the distribution the Secretary of the Interior made was a breach of that trust because it violated the Settlement Act. Although the alleged breach of trust was based on an alleged violation of the Settlement Act, that does not make the present claim any the less one for breach of trust. As the appellants stated in their brief on the merits, "Hoopa Plaintiffs seek recovery of damages resulting from a breach of trust committed by the United States." The fact that the Hoopa Valley Tribe may have received all it is entitled

to under the Settlement Act does not, automatically or necessarily, eliminate the present independent claim for additional money based on the government's alleged breach of trust in distributing the funds to the Yurok Tribe.

At oral argument, it was pointed out to government counsel that if the Hoopa Valley Tribe has no standing to assert its present breach of trust claim then, even if it has a valid claim, there could be no way to assert it. Government counsel replied that this point raises a separation of powers issue, and that if the Secretary had committed a breach of trust, it was for the President to take appropriate action against the Secretary. Although such presidential action might assuage the Hoopa Valley Tribe members' emotional concerns, it would not satisfy their financial ones. It was the latter, not the former, that presumably led the Hoopa Valley Tribe to file the present suit seeking to recover damages from the United States for a breach of trust.

II

The Hoopa Valley Tribe's breach of trust claim rests primarily on its interpretation of a provision of the Settlement Act that provides:

> (4) The—
>
> (A) apportionment of funds to the Yurok Tribe as provided [in this title] . . . shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this [Act].

25 U.S.C. §§ 1300i-1(c)(4)(A), -1(c)(4)(D).

The Hoopa Valley Tribe contends that, under this provision, the Yurok Tribe's right to receive its share of the fund was contingent upon the Yurok Tribe not filing suit against the United States based upon the Settlement Act, and that it forfeited that right when it filed its takings claim in 1992. The Hoopa Valley Tribe argues that the United

States committed a breach of trust by distributing the Yurok Tribe's portion of the settlement fund to the Yurok Tribe in 2007 after the tribe had executed the waiver following the loss of its takings suit. The Hoopa Valley Tribe stresses that, for many years, the Interior Department had taken the position that, once the Yurok Tribe filed its takings claim, the provisions quoted above precluded the tribe from effecting a valid waiver; and that Interior made the distribution only after it had changed its position on this issue in 2007 and permitted the Yurok Tribe to execute the waiver and receive the funds.

The Settlement Act contains a parallel provision dealing with waiver of claims by the Hoopa Valley Tribe, which states:

> (2)(A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 1300i-7 of this title, shall not become effective unless, within 60 days after October 31, 1988, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:
>
> (i) waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter
>
> . . . .

25 U.S.C. § 1300i-1(a)(2)(A).

There is a critical difference between the waiver provisions covering the two tribes. The Hoopa Valley Tribe is required to execute its waiver "within 60 days after the date of the enactment" of the Act. The Yurok waiver provision, however, contains no time limit but requires only that the waiver be adopted before there is any "apportionment of funds to the Yurok Tribe."

Both waiver provisions were designed to protect the government financially by insuring that, after it had made the Settlement Act distributions to the two tribes, it would

not thereafter be subjected to damages for making those payments. The method the Settlement Act used to accomplish that objective was to require each tribe to waive such claims before it could receive its payment.

That is precisely what occurred here. The Hoopa Valley and Yurok tribes each received its share of the Settlement Act fund only after it had executed a waiver of any claims against the United States based on the Settlement Act. Under this analysis, it is irrelevant that, although the Hoopa Valley Tribe executed its waiver shortly after the Settlement Act was enacted, the Yurok Tribe did not do so until years later, after the latter had unsuccessfully asserted its takings claim against the United States. In both instances, the United States did not distribute the tribe's share of the Settlement Fund until after the tribe had waived any claim it had against the United States based on the Settlement Act.

The Hoopa Valley Tribe contends, however, that, under the Settlement Act, the government had no authority to make any distribution to the Yurok Tribe once the latter had filed its takings suit against the United States. Although the Interior Department had taken this same position over a considerable period—a fact the Hoopa Valley Tribe relies on heavily as supporting its statutory argument—Interior reexamined and changed its position in 2007. It ruled that it would distribute the Yurok Tribe's portion of the Settlement Fund if the tribe executed a waiver, which the tribe promptly did.

As Interior explained to the Chairmen of the two tribes:

> Neither the Act nor its legislative history specifies whether proceeding under one provision would preclude the Yurok Tribe from proceeding under the other, i.e., whether bringing a takings claim and providing a waiver, actions both authorized under the Act, were mutually exclusive. For a number of reasons, we conclude that the takings litigation in

> Karuk Tribe did not result in the Yurok Tribe's forfeiting the benefits established in the Act. For example, the Act does not specify a time limitation, like the limited period to bring a constitutional challenge, on the ability to provide a waiver. Moreover, the Act's Yurok waiver provision is not limited solely to the constitutionally-based property claims authorized by the Act and litigated by the Yurok Tribe. The Act did not provide any contingent distribution arrangements if the Yurok Tribe chose to assert a takings claim. Fundamentally, nothing in the Act states that the Yurok Tribe's choosing to litigate its takings claim would cause the Tribe to forfeit the benefits under the Act.
>
> Because Congress acted as a trustee in passing the Act and because the Hoopa Valley Tribe received already all of its benefits established by the Act, including its designated share of the Fund, we believe that any ambiguity in the Act should be read in favor of providing the other beneficiary, the Yurok Tribe, with its benefits established by the Act. Because the Act specifically authorized either Tribe to bring certain claims against the United States yet did not provide for an alternative distribution of benefits if a Tribe took such an action, we further believe that an interpretation of the Act that avoids penalizing a beneficiary for taking an authorized action and that avoids potentially troublesome constitutional issues to be necessary here. Thus, we believe that it would be unreasonable to read the Act to work a forfeiture of the Yurok's right to receive the monies from the Fund, and we decline to do so.

I see no reason to reject Interior's conclusion. Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

The Hoopa Valley Tribe contends that the Yurok Tribe's waiver was invalid on the further ground it was given by the permanent Yurok Tribal Council, but that the Settlement Act authorized only the Yurok "Interim Council" to grant the waiver.

This reference to the "Interim" Tribal Council, however, is an authorization, not a restriction or limitation. Since the organization of the Yurok Tribe was a complex activity that might take considerable time, and since the inchoate Yurok Tribe might wish to

expedite the waiver to obtain its share of the settlement fund, Congress authorized the tribe's temporary governing body, the Interim Tribal Council, to execute the waiver. Once the Yurok Tribe was organized and its permanent Tribal Council established, however, the latter succeeded to the Interim Tribal Council's authority, including the authority to grant the waiver. As Interior explained in rejecting this argument:

> The Act authorized the Yurok Interim Council, an entity that ceased to exist in 1993, to provide the requisite waiver under the Act. The Act did not preclude or otherwise divest power from the permanent Yurok Council also to waive claims.

Through its breach of trust damages claim in this case, it appears that the Hoopa Valley Tribe is seeking to recover the approximately $90 million that the government paid to the Yurok Tribe as the latter's share of the Settlement Fund. The Hoopa Valley Tribe does not question that that amount accurately reflected the share of the Settlement Fund to which the Yurok Tribe was entitled under the Settlement Act. Nor does the Hoopa Valley Tribe deny that the approximate $34 million it received after executing its waiver gave it all it was entitled to under the Settlement Act.

In 1973, in the first decision in the Short litigation, the Court of Claims rejected the claim by the Hoopa Valley Tribe members that they, and they alone, were entitled to all the proceeds of the timber sales from the portion of the joint reservation they occupied. Short v. United States, 486 F.2d 561. The court held that the land that both tribes occupied constitutes a single reservation and that all the "Indians of the reservation" were entitled to share in the proceeds of the timber revenues from that land. Id. at 567–68. In subsequent decisions, both the Court of Claims and this court

reiterated those principles and standards. Short v. United States, 661 F.2d 1501 (Ct. Cl. 1981), 719 F.2d 1133 (Fed. Cir. 1983).

The Hoopa Valley Tribe apparently now seeks to obtain, under a breach of trust claim, the proceeds of the timber sales. This appears to be a repackaging of the tribal members' original claim—which the Court of Claims rejected more than thirty-five years ago—that they alone, and to the exclusion of the Yurok Tribe members, are entitled to the proceeds of the timber harvested on the portion of the joint reservation the Hoopa Valley Tribe occupied.

In sum, Interior did not breach any trust obligation it had to the Hoopa Valley Tribe by paying to the Yurok Tribe, under a reasonable interpretation of the waiver provision of the Settlement Act, the amount the Yurok Tribe was entitled to receive under that Act. There are no possible facts that the Hoopa Valley Tribe could show that would enable the tribe to recover on its breach of trust claim. I would affirm the judgment of the Court of Federal Claims dismissing this suit.

Public Law 100-580
100th Congress

An Act

Oct. 31, 1988
[S. 2723]

To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Hoopa-Yurok Settlement Act.
25 USC 1300i.

SECTION 1. SHORT TITLE AND DEFINITIONS.

(a) SHORT TITLE.—This Act may be cited as the "Hoopa-Yurok Settlement Act".

(b) DEFINITIONS.—For the purposes of this Act, the term—

(1) "Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary in the accounts entitled—

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056";

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001";

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, Tish-Tang-Atan, South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 2(b) of this Act;

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as the Hoopa Valley Reservation in section 2(b) and the Yurok Reservation in section 2(c) of this Act.

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 4;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 5;

(11) "Short cases" means the cases entitled Jesse Short et al. v. United States, (Cl. Ct. No. 102-63); Charlene Ackley v. United States, (Cl. Ct. No. 460-78); Bret Aanstadt v. United States, (Cl. Ct. No. 146-85L); and Norman Giffen v. United States, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the Short cases;

(13) "trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation;

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 2(c) of this Act; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 9 of this Act.

SEC. 2. RESERVATIONS; PARTITION AND ADDITIONS. 25 USC 1300i-1.

(a) PARTITION OF THE JOINT RESERVATION.—(1) Effective with the publication in the Federal Register of the Hoopa tribal resolution as provided in paragraph (2), the joint reservation shall be partitioned as provided in subsections (b) and (c).

(2)(A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 8, shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:

(i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and

(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.

(B) The Secretary, after determining the validity of the resolution transmitted pursuant to subparagraph (A), shall cause such resolution to be printed in the Federal Register. Federal Register, publication.

(b) HOOPA VALLEY RESERVATION.—Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(c) YUROK RESERVATION.—(1) Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation. The unallotted trust land and assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.

National Forest System.

(2) Subject to all valid existing rights and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 9(d)(2), all right, title, and interest of the United States—

(A) to all national forest system lands within the Yurok Reservation, and

(B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1 E., Section 28, Lot 6: that portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

(3)(A) Pursuant to the authority of sections 5 and 7 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 465, 467), the Secretary may acquire from willing sellers lands or interests in land, including rights-of-way for access to trust lands, for the Yurok Tribe or its members, and such lands may be declared to be part of the Yurok Reservation.

(B) From amounts authorized to be appropriated by the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13), the Secretary shall use not less than $5,000,000 for the purpose of acquiring lands or interests in lands pursuant to subparagraph (A). No lands or interests in lands may be acquired outside the Yurok Reservation with such funds except lands adjacent to and contiguous with the Yurok Reservation or for purposes of exchange for lands within the reservation.

(4) The—

(A) apportionment of funds to the Yurok Tribe as provided in sections 4 and 7;

(B) the land transfers pursuant to paragraph (2);

(C) the land acquisition authorities in paragraph (3); and

(D) the organizational authorities of section 9 shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act.

(d) BOUNDARY CLARIFICATIONS OR CORRECTIONS.—(1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation,

after the partition of the joint reservation as provided in this section, shall be the line established by the Bissel-Smith survey.

(2) Upon the partition of the joint reservation as provided in this section, the Secretary shall publish a description of the boundaries of the Hoopa Valley Reservation and Yurok Reservation in the Federal Register. Federal Register, publication.

(e) MANAGEMENT OF THE YUROK RESERVATION.—The Secretary shall be responsible for the management of the unallotted trust land and assets of the Yurok Reservation until such time as the Yurok Tribe has been organized pursuant to section 9. Thereafter, those lands and assets shall be administered as tribal trust land and the Yurok reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(f) CRIMINAL AND CIVIL JURISDICTION.—The Hoopa Valley Reservation and Yurok Reservation shall be subject to section 1360 of title 28, United States Code; section 1162 of title 18, United States Code, and section 403(a) of the Act of April 11, 1968 (82 Stat. 79; 25 U.S.C. 1323(a)).

SEC. 3. PRESERVATION OF SHORT CASES. 25 USC 1300i-2.

Nothing in this Act shall affect, in any manner, the entitlement established under decisions of the United States Claims Court in the Short cases or any final judgment which may be rendered in those cases.

SEC. 4. HOOPA-YUROK SETTLEMENT FUND. 25 USC 1300i-3.

(a) ESTABLISHMENT.—(1) There is hereby established the Hoopa-Yurok Settlement Fund. Upon enactment of this Act, the Secretary shall cause all the funds in the escrow funds, together with all accrued income thereon, to be deposited into the Settlement Fund.

(2) Until the distribution is made to the Hoopa Valley Tribe pursuant to section (c), the Secretary may distribute to the Hoopa Valley Tribe, pursuant to the provision of title I of the Department of the Interior and related Agencies Appropriations Act, 1985, under the heading "Bureau of Indian Affairs" and subheading "Tribal Trust Funds" at 98 Stat. 1849 (25 U.S.C. 123c), not to exceed $3,500,000 each fiscal year out of the income or principal of the Settlement Fund for tribal, non per capita purposes: *Provided, however,* That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall be deducted from the payment to the Hoopa Valley Tribe pursuant to subsection (c).

(3) Until the distribution is made to the Yurok Tribe pursuant to section (d), the Secretary may, in addition to providing Federal funding, distribute to the Yurok Transition Team, pursuant to provision of title I of the Department of the Interior and Related Agencies Appropriations Act, 1985, under the heading "Bureau of Indian Affairs" and subheading "Tribal Trust Funds" at 98 Stat. 1849 (25 U.S.C. 123c), not to exceed $500,000 each fiscal year out of the income and principal of the Settlement Fund for tribal, non per capita purposes: *Provided, however,* That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall be deducted from the payment to the Yurok Tribe pursuant to subsection (d).

(b) DISTRIBUTION; INVESTMENT.—The Secretary shall make distribution from the Settlement Fund as provided in this Act and, pending payments under section 6 and dissolution of the fund as provided in section 7, shall invest and administer such fund as Indian trust funds pursuant to the first section of the Act of June 24, 1938 (52 Stat. 1037; 25 U.S.C. 162a).

(c) HOOPA VALLEY TRIBE PORTION.—Effective with the publication of the option election date pursuant to section 6(a)(4), the Secretary shall immediately pay out of the Settlement Fund into a trust account for the benefit of the Hoopa Valley Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of enrolled members of the Hoopa Valley Tribe as of the date of the promulgation of the Settlement Roll, including any persons enrolled pursuant to section 6, by the sum of the number of such enrolled Hoopa Valley tribal members and the number of persons on the Settlement Roll.

(d) YUROK TRIBE PORTION.—Effective with the publication of the option election date pursuant to section 6(a)(4), the Secretary shall pay out of the Settlement Fund into a trust account for the benefit of the Yurok Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of persons on the Settlement Roll electing the Yurok Tribal Membership Option pursuant to section 6(c) by the sum of the number of the enrolled Hoopa Valley tribal members established pursuant to subsection (c) and the number of persons on the Settlement Roll, less any amount paid out of the Settlement Fund pursuant to section 6(c)(3).

Appropriation authorization.

(e) FEDERAL SHARE.—There is hereby authorized to be appropriated the sum of $10,000,000 which shall be deposited into the Settlement Fund after the payments are made pursuant to subsections (c) and (d) and section 6(c). The Settlement Fund, including the amount deposited pursuant to this subsection and all income earned subsequent to the payments made pursuant to subsections (c) and (d) and section 6(c), shall be available to make the payments authorized by section 6(d).

25 USC 1300i-4.

SEC. 5. HOOPA-YUROK SETTLEMENT ROLL.

(a) PREPARATION; ELIGIBILITY CRITERIA.—(1) The Secretary shall prepare a roll of all persons who can meet the criteria for eligibility as an Indian of the Reservation and—

(A) who were born on or prior to, and living upon, the date of enactment of this Act;

(B) who are citizens of the United States; and

(C) who were not, on August 8, 1988, enrolled members of the Hoopa Valley Tribe.

(2) The Secretary's determination of eligibility under this subsection shall be final except that any Short plaintiff determined by the United States Claims Court to be an Indian of the Reservation shall be included on the Settlement Roll if they meet the other requirements of this subsection and any Short plaintiff determined by the United States Claims Court not to be an Indian of the Reservation shall not be eligible for inclusion on such roll.

(b) RIGHT TO APPLY; NOTICE.—Within thirty days after the date of enactment of this Act, the Secretary shall give such notice of the right to apply for enrollment as provided in subsection (a) as he deems reasonable except that such notice shall include, but shall not be limited to—

(1) actual notice by registered mail to every plaintiff in the Short cases at their last known address;

(2) notice to the attorneys for such plaintiffs; and

(3) publication in newspapers of general circulation in the vicinity of the Hoopa Valley Reservation and elsewhere in the State of California.

Contemporaneous with providing the notice required by this subsection, the Secretary shall publish such notice in the Federal Register. Federal Register, publication.

(c) APPLICATION DEADLINE.—The deadline for application pursuant to this section shall be established at one hundred and twenty days after the publication of the notice by the Secretary in the Federal Register as required by subsection (b).

(d) ELIGIBILITY DETERMINATION; FINAL ROLL.—(1) The Secretary shall make determinations of eligibility of applicants under this section and publish in the Federal Register the final Settlement Roll of such persons one hundred and eighty days after the date established pursuant to subsection (c). Federal Register, publication.

(2) The Secretary shall develop such procedures and times as may be necessary for the consideration of appeals from applicants not included on the roll published pursuant to paragraph (1). Successful appellants shall be added to the Settlement Roll and shall be afforded the right to elect options as provided in section 6, with any payments to be made to such successful appellants out of the remainder of the Settlement Fund after payments have been made pursuant to section 6(d) and prior to division pursuant to section 7.

(3) Persons added to the Settlement Roll pursuant to appeals under this subsection shall not be considered in the calculations made pursuant to section 4.

(e) EFFECT OF EXCLUSION FROM ROLL.—No person whose name is not included on the Settlement Roll shall have any interest in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Tribe, the Hoopa Valley Reservation, the Yurok Tribe, or the Yurok Reservation or in the Settlement Fund unless such person is subsequently enrolled in the Hoopa Valley Tribe or the Yurok Tribe under the membership criteria and ordinances of such tribes.

SEC. 6. ELECTION OF SETTLEMENT OPTIONS. 25 USC 1300i-5.

(a) NOTICE OF SETTLEMENT OPTIONS.—(1) Within sixty days after the publication of the Settlement Roll as provided in section 5(d), the Secretary shall give notice by certified mail to each person eighteen years or older on such roll of their right to elect one of the settlement options provided in this section. Mail.

(2) The notice shall be provided in easily understood language, but shall be as comprehensive as possible and shall provide an objective assessment of the advantages and disadvantages of each of the options offered. The notice shall also provide information about the counseling services which will be made available to inform individuals about the respective rights and benefits associated with each option presented under this section. It shall also clarify that on election the Lump Sum Payment option requires the completion of a sworn affidavit certifying that the individual has been provided with complete information about the effects of such an election.

(3) With respect to minors on the Settlement Roll the notice shall state that minors shall be deemed to have elected the option of section 6(c), except that if the parent or guardian furnishes proof satisfactory to the Secretary that a minor is an enrolled member of Children and youth.

a tribe that prohibits members from enrolling in other tribes, the parent or guardian shall make the election for such minor. A minor subject to the provisions of section 6(c) shall, notwithstanding any other law, be deemed to be a child of a member of an Indian tribe regardless of the option elected pursuant to this Act by the minor's parent. With respect to minors on the Settlement Roll whose parent or guardian is not also on the roll, notice shall be given to the parent or guardian of such minor. The funds to which such minors are entitled shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such person including all interest accrued.

(4)(A) The notice shall also establish the date by which time the election of an option under this section must be made. The Secretary shall establish that date as the date which is one hundred and twenty days after the date of the publication in the Federal Register as required by section 5(d).

(B) Any person on the Settlement Roll who has not made an election by the date established pursuant to subparagraph (A) shall be deemed to have elected the option provided in subsection (c).

(b) HOOPA TRIBAL MEMBERSHIP OPTION.—(1) Any person on the Settlement Roll, eighteen years or older, who can meet any of the enrollment criteria of the Hoopa Valley Tribe set out in the decision of the United States Court of Claims in its March 31, 1982, decision in the Short case (No. 102-63) as "Schedule A", "Schedule B", or "Schedule C" and who—

(A) maintained a residence on the Hoopa Valley Reservation on the date of enactment of this Act;

(B) had maintained a residence on the Hoopa Valley Reservation at any time within the five year period prior to the enactment of this Act; or

(C) owns an interest in real property on the Hoopa Valley Reservation on the date of enactment of this Act,

may elect to be, and, upon such election, shall be entitled to be, enrolled as a full member of the Hoopa Valley Tribe.

(2) Notwithstanding any provision of the constitution, ordinances or resolutions of the Hoopa Valley Tribe to the contrary, the Secretary shall cause any entitled person electing to be enrolled as a member of the Hoopa Valley Tribe to be so enrolled and such person shall thereafter be entitled to the same rights, benefits, and privileges as any other member of such tribe.

Claims. Jesse Short.

(3) The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Yurok Indian Reservation or the Yurok Tribe or in the Settlement Fund.

(c) YUROK TRIBAL MEMBERSHIP OPTION.—(1) Any person on the Settlement Roll may elect to become a member of the Yurok Tribe and shall be entitled to participate in the organization of such tribe as provided in section 9.

Claims. Jesse Short.

(2) All persons making an election under this subsection shall form the base roll of the Yurok Tribe for purposes of organization

pursuant to section 9 and the Secretary shall determine the quantum of "Indian blood" if any pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(3) The Secretary, subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended (25 U.S.C. 1407), shall pay to each person making an election under this subsection, $5,000 out of the Settlement Fund for those persons who are, on the date established pursuant to section 6(a)(4), below the age of 50 years, and $7,500 out of the Settlement Fund for those persons who are, on that date, age 50 or older.

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except to the extent authorized by paragraph (3), in the Settlement Fund. Any such person shall also be deemed to have granted to members of the Interim Council established under section 9 an irrevocable proxy directing them to approve a proposed resolution waiving any claim the Yurok Tribe may have against the United States arising out of the provisions of this Act, and granting tribal consent as provided in section 9(d)(2).

(d) LUMP SUM PAYMENT OPTION.—(1) Any person on the Settlement Roll may elect to receive a lump sum payment from the Settlement Fund and the Secretary shall pay to each such person the amount of $15,000 out of the Settlement Fund: *Provided,* That such individual completes a sworn affidavit certifying that he or she has been afforded the opportunity to participate in counseling which the Secretary, in consultation with the Hoopa Tribal Council or Yurok Transition Team, shall provide. Such counseling shall provide a comprehensive explanation of the effects of such election on the individual making such election, and on the tribal enrollment rights of that persons children and descendants who would otherwise be eligible for membership in either the Hoopa or Yurok Tribe.

(2) The option to elect a lump sum payment under this section is provided solely as a mechanism to resolve the complex litigation and other special circumstances of the Hoopa Valley Reservation and the tribes of the reservation, and shall not be construed or treated as a precedent for any future legislation.

(3) Any person making an election to receive, and having received, a lump sum payment under this subsection shall not thereafter have any interest or right whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or, except authorized by paragraph (1), in the Settlement Fund.

SEC. 7. DIVISION OF SETTLEMENT FUND REMAINDER. 25 USC 1300i-6.

(a) Any funds remaining in the Settlement Fund after the payments authorized to be made therefrom by subsections (c) and (d) of section 6 and any payments made to successful appellants pursuant to section 5(d) shall be paid to the Yurok Tribe and shall be held by the Secretary in trust for such tribe.

(b) Funds divided pursuant to this section and any funds apportioned to the Hoopa Valley Tribe and the Yurok Tribe pursuant to subsections (c) and (d) of section 4 shall not be distributed per capita to any individual before the date which is 10 years after the date on

which the division is made under this section: *Provided, however,* That if the Hoopa Valley Business Council shall decide to do so it may distribute from the funds apportioned to it a per capita payment of $5,000 per member, pursuant to the Act of August 2, 1983 (25 U.S.C. 117a et seq.).

25 USC 1300i-7.

SEC. 8. HOOPA VALLEY TRIBE; CONFIRMATION OF STATUS.

The existing govening documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

25 USC 1300i-8.

SEC. 9. RECOGNITION AND ORGANIZATION OF THE YUROK TRIBE.

(a) YUROK TRIBE.—(1) Those persons on the Settlement Roll who made a valid election pursuant to subsection (c) of section 6 shall constitute the base membership roll for the Yurok Tribe whose status as an Indian tribe, subject to the adoption of the Interim Council resolution as required by subsection (d)(2), is hereby ratified and confirmed.

(2) The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe and the tribe may organize under such Act as provided in this section.

(3) Within thirty days (30) after the enactment of this Act the Secretary, after consultation with the appropriate committees of Congress, shall appoint five (5) individuals who shall comprise the Yurok Transition Team which, pursuant to a budget approved by the Secretary, shall provide counseling, promote communication with potential members of the Yurok Tribe concerning the provisions of this Act, and shall study and investigate programs, resources, and facilities for consideration by the Interim Council. Any property acquired for or on behalf of the Yurok Transition Team shall be held in the name of the Yurok Tribe.

(b) INTERIM COUNCIL; ESTABLISHMENT.—There shall be established an Interim Council of the Yurok Tribe to be composed of five members. The Interim Council shall represent the Yurok Tribe in the implementation of provisions of this Act, including the organizational provisions of this section, and subject to subsection (d) shall be the governing body of the tribe until such time as a tribal council is elected under a constitution adopted pursuant to subsection (e).

(c) GENERAL COUNCIL; ELECTION OF INTERIM COUNCIL.—(1) Within 30 days after the date established pursuant to section 6(a)(4), the Secretary shall prepare a list of all persons eighteen years of age or older who have elected the Yurok Tribal Membership Option pursuant to section 6(c), which persons shall constitute the eligible voters of the Yurok Tribe for the purposes of this section, and shall provide written notice to such persons of the date, time, purpose, and order of procedure for the general council meeting to be scheduled pursuant to paragraph (2) for the consideration of the nomination of candidates for election to the Interim Council.

(2) Not earlier than 30 days before, nor later than 45 days after, the notice provided pursuant to paragraph (1), the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe on or near the Yurok Reservation, to be conducted under such order of procedures as the Secretary determines appropriate, for the nomination of candidates for election of members of the Interim

Council. No person shall be eligible for nomination who is not on the list prepared pursuant to this section.

(3) Within 45 days after the general council meeting held pursuant to paragraph (2), the Secretary shall hold an election by secret ballot, with absentee balloting and write-in voting to be permitted, to elect the five members of the Interim Council from among the nominations submitted to him from such general council meeting. The Secretary shall assure that notice of the time and place of such election shall be provided to eligible voters at least fifteen days before such election.

(4) The Secretary shall certify the results of such election and, as soon as possible, convene an organizational meeting of the newly-elected members of the Interim Council and shall provide such advice and assistance as may be necessary for such organization.

(5) Vacancies on the Interim Council shall be filled by a vote of the remaining members.

(d) INTERIM COUNCIL; AUTHORITIES AND DISSOLUTION.—(1) The Interim Council shall have no powers other than those given to it by this Act.

(2) The Interim Council shall have full authority to adopt a resolution—

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act, and

(ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act, and

(iii) to receive grants from, and enter into contracts for, Federal programs, including those administered by the Secretary and the Secretary of Health and Human Services, with respect to Federal services and benefits for the tribe and its members.

(3) The Interim Council shall have such other powers, authorities, functions, and responsibilities as the Secretary may recognize, except that any contract or legal obligation that would bind the Yurok Tribe for a period in excess of two years from the date of the certification of the election by the Secretary shall be subject to disapproval and cancellation by the Secretary if the Secretary determines that such a contract or legal obligation is unnecessary to improve housing conditions of members of the Yurok Tribe, or to obtain other rights, privileges or benefits that are in the long-term interest of the Yurok Tribe.

(4) The Interim Council shall appoint, as soon as practical, a drafting committee which shall be responsible, in consultation with the Interim Council, the Secretary and members of the tribe, for the preparation of a draft constitution for submission to the Secretary pursuant to subsection (e).

(5) The Interim Council shall be dissolved effective with the election and installation of the initial tribe governing body elected pursuant to the constitution adopted under subsection (e) or at the end of two years after such installation, whichever occurs first.

(e) ORGANIZATION OF YUROK TRIBE.—Upon written request of the Interim Council or the drafting committee and the submission of a draft constitution as provided in paragraph (4) of subsection (d), the Secretary shall conduct an election, pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 461 et seq.) and rules and regulations promulgated thereunder, for the adoption

of such constitution and, working with the Interim Council, the election of the initial tribal governing body upon the adoption of such constitution.

25 USC 1300i-9.

SEC. 10. ECONOMIC DEVELOPMENT.

(a) PLAN FOR ECONOMIC SELF-SUFFICIENCY.—The Secretary shall—

(1) enter into negotiations with the Yurok Transition Team and the Interim Council of the Yurok Tribe with respect to establishing a plan for economic development for the tribe; and

(2) in accordance with this section and not later than two years after the date of enactment of this Act, develop such a plan.

(3) upon the approval of such plan by the Interim Council or tribal governing body (and after consultation with the State and local officials pursuant to subsection (b) of this section), the Secretary shall submit such plan to the Congress.

(b) CONSULTATION WITH STATE AND LOCAL OFFICIALS REQUIRED.—To assure that legitimate State and local interests are not prejudiced by the proposed economic self-sufficiency plan, the Secretary shall notify and consult with the appropriate officials of the State and all appropriate local governmental officials in the State. The Secretary shall provide complete information on the proposed plan to such officials, including the restrictions on such proposed plan imposed by subsection (c) of this section. During any consultation by the Secretary under this subsection, the Secretary shall provide such information as the Secretary may possess, and shall request comments and additional information on the extent of any State or local service to the tribe.

(c) RESTRICTIONS TO BE CONTAINED IN PLAN.—Any plan developed by the Secretary under subsection (a) of this section shall provide that—

(1) any real property transferred by the tribe or any member to the Secretary shall be taken and held in the name of the United States for the benefit of the tribe;

(2) any real property taken in trust by the Secretary pursuant to such plan shall be subject to—

(A) all legal rights and interests in such land existing at the time of the acquisition of such land by the Secretary, including any lien, mortgage, or previously levied and outstanding State or local tax;

(B) foreclosure or sale in accordance with the laws of the State pursuant to the terms of any valid obligation in existence at the time of the acquisition of such land by the Secretary; and

(3) any real property transferred pursuant to such plan shall be exempt from Federal, State, and local taxation of any kind.

(d) APPENDIX TO PLAN SUBMITTED TO THE CONGRESS.—The Secretary shall append to the plan submitted to the Congress under subsection (a) of this section a detailed statement—

(1) naming each individual and official consulted in accordance with subsection (b) of this section;

(2) summarizing the testimony received by the Secretary pursuant to any such consultation; and

(3) including any written comments or reports submitted to the Secretary by any party named in paragraph (1).

SEC. 11. SPECIAL CONSIDERATIONS. 25 USC 1300i-10.

(a) ESTATE FOR SMOKERS FAMILY.—The 20 acre land assignment on the Hoopa Valley Reservation made by the Hoopa Area Field Office of the Bureau of Indian Affairs on August 25, 1947, to the Smokers family shall continue in effect and may pass by descent or devise to any blood relative or relatives of one-fourth or more Indian blood of those family members domiciled on the assignment on the date of enactment of this Act.

(b) RANCHERIA MERGER WITH YUROK TRIBE.—If a majority of the adult members of any of the following Rancherias at Resighini, Trinidad, or Big Lagoon, vote to merge with the Yurok Tribe in an election which shall be conducted by the Secretary within ninety days after the date of enactment of this Act, the tribes and reservations of those rancherias so voting shall be extinguished and the lands and members of such reservations shall be part of the Yurok Reservation with the unallotted trust land therein held in trust by the United States for the Yurok Tribe: *Provided, however,* That the existing governing documents and the elected governing bodies of any rancherias voting to merge shall continue in effect until the election of the Interim Council pursuant to section 9. The Secretary shall publish in the Federal Register a notice of the effective date of the merger.

Federal Register, publication.

(c) PRESERVATION OF LEASEHOLD AND ASSIGNMENT RIGHTS OF RANCHERIA RESIDENTS.—Real property on any rancheria that merges with the Yurok Reservation pursuant to subsection (b) that is, on the date of enactment of this Act, held by any individual under a lease shall continue to be governed by the terms of the lease, and any land assignment existing on the date of the enactment of this Act shall continue in effect and may pass by descent or devise to any blood relative or relatives of Indian blood of the assignee.

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.—Section 4(c) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss-3) is amended—

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) SPECIAL RULE.—The initial term of the representative appointed pursuant to section 4(c) (11) and (12) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of the members of the Task Force then serving. Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.

16 USC 460ss-3 note.

SEC. 13. TRIBAL TIMBER SALES PROCEEDS USE.

Section 7 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C. 407) is amended to read as follows:

"SEC. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used—

"(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or

"(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.".

25 USC 1300i-11.

SEC. 14. LIMITATIONS OF ACTIONS; WAIVER OF CLAIMS.

(a) Any claim challenging the partition of the joint reservation pursuant to section 2 or any other provision of this Act as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to 28 U.S.C. 1491 or 28 U.S.C. 1505, in the United States Claims Court.

(b)(1) Any such claim by any person or entity, other than the Hoopa Valley Tribe or the Yurok Tribe, shall be forever barred if not brought within the later of 210 days from the date of the partition of the joint reservation as provided in section 2 or 120 days after the publication in the Federal Register of the option election date as required by section 6(a)(4).

(2) Any such claim by the Hoopa Valley Tribe shall be barred 180 days after the date of enactment of this Act or such earlier date as may be established by the adoption of a resolution waiving such claims pursuant to section 2(a)(2).

(3) Any such claim by the Yurok Tribe shall be barred 180 days after the general council meeting of the Yurok Tribe as provided in section 9 or such earlier date as may be established by the adoption of a resolution waiving such claims as provided in section 9(d)(2).

Reports.

(c)(1) The Secretary shall prepare and submit to the Congress a report describing the final decision in any claim brought pursuant to subsection (b) against the United States or its officers, agencies, or instrumentalities.

(2) Such report shall be submitted no later than 180 days after the entry of final judgment in such litigation. The report shall include any recommendations of the Secretary for action by Congress, including, but not limited to, any supplemental funding proposals necessary to implement the terms of this Act and any modifications to the resource and management authorities established by this Act. Notwithstanding the provisions of 28 U.S.C. 2517, any judgment

entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

Approved October 31, 1988.

LEGISLATIVE HISTORY—S. 2723 (H.R. 4469):

HOUSE REPORTS: No. 100-938, Pt. 1, accompanying H.R. 4469 (Comm. on Interior and Insular Affairs).
SENATE REPORTS: No. 100-564 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 134 (1988):
Sept. 30, considered and passed Senate.
Oct. 3, 4, considered and passed House.

ACT OF JUNE 25, 1910, AS AMENDED

* * * * * * *

[SEC. 7. The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to the Act of February 14, 1920, as amended (25 U.S.C. 413), shall be used for the benefit of Indians who are members of the tribe or tribes concerned in such manner as he may direct.]

SEC. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used—

(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary or

(2) in the absense of such a governing body, as determined by the Secretary for the tribe concerned.

CERTIFICATE OF SERVICE

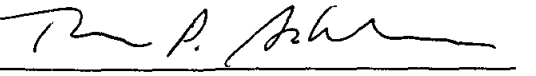
I hereby certify that on April 22, 2010, one original and eighteen copies (19 total) of the Appellants' Combined Petition for Panel Rehearing and Rehearing En Banc were filed with the U.S. Court of Appeals for the Federal Circuit, via USPS Next Day Delivery to:

Clerk of the Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

I further certify that two copies of the Appellants' Combined Petition for Rehearing and Rehearing En Banc were mailed to:

Jonathan L. Abram
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004-1109

Mary G. Sprague
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795



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