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-Appellee.

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

---

OPPOSITION TO COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

MARY GABRIELLE SPRAGUE
United States Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
202-514-2753
mary.gay.sprague@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES :

STATUTES, RULES AND REGULATIONS:

I. INTRODUCTION

In response to the Court's request of May 7, 2010, the United States submits this Opposition to the Combined Petition for Panel Rehearing and Rehearing En Banc filed by the Hoopa Valley Tribe (the "Hoopa Tribe") and twelve individual members (collectively "Hoopa Plaintiffs"). As demonstrated below, Hoopa Plaintiffs have not shown that either panel rehearing or rehearing en banc is warranted.

II. BACKGROUND[1]

This case relates to the former Joint Reservation established in northern California in the late 1800s for the Hoopa and Yurok Tribes. The Joint Reservation was previously at issue in the decades-long *Short* litigation, in which the Court of Claims held that all "Indians of the Reservation" had the right to share in timber revenues from the Joint Reservation, not just members of the Hoopa Tribe. *Short v. United States*, 486 F.2d 561 (Ct. Cl. 1973) ("*Short I*").[2]

In 1988, Congress enacted the Hoopa-Yurok Settlement Act, codified as amended at 25 U.S.C. § 1300i *et seq.* (the "Settlement Act"), to resolve the

---

[1] The United States briefly summarizes herein the detailed Statement of Facts presented in the Brief for Appellee the United States ("U.S. Brief) at 6-26.

[2] Numerous decisions of the Court of Federal Claims and of this Court followed this initial decision. *See* U.S. Brief at 2 n.3, 7-9, 19-20.

longstanding disputes regarding the ownership, management and revenue of the Joint Reservation. Pursuant to the Settlement Act, the Joint Reservation was partitioned between the Hoopa and Yurok Tribes in 1988. Congress gave the Hoopa Tribe about 96% of the trust land within the Joint Reservation and the entire interest in future revenues derived from that land. The Settlement Act also directed the Secretary of the Interior (the "Secretary") to deposit into a new Settlement Fund account all undistributed revenues from the Joint Reservation being held in enumerated escrow funds. The Settlement Act provided detailed instructions for making payments from the Settlement Fund to the (1) Hoopa Tribe, (2) Yurok Tribe, (3) individual members of the Yurok Tribe, and (4) Indians of the Reservation listed on the "Settlement Roll" who did not wish to enroll in either the Hoopa Tribe or Yurok Tribe. The Hoopa Tribe received its specified share of the Settlement Fund in 1991 ($34 million). The designated individuals also received their specified payments in the early 1990s. The Yurok Tribe received its share – the balance of the Settlement Fund with accrued interest, as specified in the Settlement Act – in 2007.

The Hoopa Plaintiffs claim in the instant suit that the Secretary's 2007 distribution to the Yurok Tribe was not consistent with the Settlement Act, and thereby breached the Secretary's trust obligation to them. The Court of Federal

Claims held that neither the Hoopa Tribe nor its individual members were beneficiaries of the Settlement Fund as of 2007, and thus had no standing to litigate the question whether the distribution was consistent with the Settlement Act.

On appeal, this Court analyzed the Settlement Act. The panel concluded unanimously that the Settlement Act does not afford the Hoopa Plaintiffs any right to relief. Judges Linn and Moore agreed with the Court of Federal Claims that Hoopa Plaintiffs' claim was properly rejected for lack of standing. Judge Friedman proceeded to the merits of Hoopa Plaintiffs' claim, and concluded that Hoopa Plaintiffs failed to state a claim upon which relief could be granted.

The Combined Petition is based on the erroneous premise that individual members of the Hoopa Tribe had rights to the Settlement Fund under the decisions in the *Short* case, even though they had no rights under the terms of the Settlement Act. In *Karuk Tribe of California v. United States*, 209 F.3d 1366, 1372 (Fed. Cir. 2000), this Court stated that the "Settlement Act nullified the *Short* rulings." The *Short* decisions apply only to per capita distributions of Joint Reservation revenues made before passage of the Settlement Act. They have no relevance to the Secretary's payment to the Yurok Tribe from the Settlement Fund (or to the Yurok Tribe's subsequent decision to distribute a portion of that money to its

individual members). In enacting the Settlement Act, Congress determined rights to the money transferred into the Settlement Fund, supplanting the prior law that determined rights to revenue derived from the Joint Reservation. Hoopa Plaintiffs have been enjoying the substantial benefits of the Settlement Act for over 20 years, and their claim to damages arising from the Secretary's 2007 payment to the Yurok Tribe of the Yurok share of the Settlement Fund was properly rejected by the panel.

III. ARGUMENT AGAINST PANEL REHEARING AND REHEARING EN BANC

In challenging the panel majority's decision, the Combined Petition largely rehashes the arguments Hoopa Plaintiffs made in their Initial Brief, Reply Brief and oral argument. The panel majority did not overlook or misapprehend any material point of law or fact in rejecting these arguments. Panel rehearing is thus not warranted under Fed. R. App. P. 40. Nor does the panel majority's decision conflict with any Supreme Court or Circuit precedent, or present any question of exceptional importance. Rehearing en banc is thus not warranted under Fed. R. App. P. 35.

A. The Panel Majority's Opinion Does Not Conflict with the Supreme Court's decision in *United States v. Mitchell* or this Court's decision in *Short v. United States*

In the first part of its Combined Petition (at 3-8), Hoopa Plaintiffs fail to demonstrate any conflict with the cases they cite.

In *United States v. Mitchell*, 463 U.S. 206, 226-28 (1983), the Supreme Court held that the United States had a trust responsibility, under certain federal statutes and regulations,[3] to manage the timber resources of the Quinault Reservation, and that beneficiaries could sue the trustee for money damages resulting from a breach of the trust. The panel majority's opinion does not undercut the general principle that injured beneficiaries can sue for breach of trust. Instead, the panel majority held that, under the Settlement Act, Hoopa Plaintiffs were simply not beneficiaries of the Settlement Fund in 2007 when the Secretary distributed the balance of the Fund to the Yurok Tribe. Hoopa Plaintiffs confirm (Combined Petition at 7-8) that it is only "Indian beneficiaries" who have standing to sue the United States for breach of trust. *Mitchell* sheds no light on the question presented in this case – whether the Hoopa Tribe or its individual members were beneficiaries of the Settlement Fund in 2007 when the Secretary made the

---

[3] One of these statutes was 25 U.S.C. § 407. As explained in Part B below, this statute was subsequently amended in 1988 by the Settlement Act.

distribution to the Yurok Tribe. The answer to that question is found in the Settlement Act, which was not at issue in *Mitchell*.

For the same reason, Hoopa Plaintiffs' reliance on *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983) ("*Short III*"), is misplaced. The panel majority correctly held (at 9) that "Hoopa Valley's reliance on the earlier Short litigation is inapposite because entitlement to the Settlement Fund is dictated by the provisions of the [Settlement] Act itself."[4] As the panel majority noted (at 3), the decision in *Short III* only applied "while the situation in the Reservation remain[ed] the same." The situation changed with the enactment of the Settlement Act and creation of the Settlement Fund. Congress intended in the Settlement Act to bring an end to the *Short* litigation, not to initiate a new round of litigation involving distributions from the Settlement Fund. *See* A150 (S. Rep. No. 100-564 (Sept. 30, 1988) (the decisions in *Short*, "while perhaps correct on the peculiar facts and law, have had a very unhappy result")).

---

[4] Judge Friedman agreed that the Settlement Act governs, and similarly rejected (at 8) Hoopa Plaintiffs' reliance on the *Short* decisions as a "repackaging of the [Hoopa] 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."

B. The Panel Majority Did Not Overlook or Misapprehend Any Material Point of Law

In the second part of the Combined Petition (at 8-11), Hoopa Plaintiffs argue unpersuasively that the panel majority overlooked five different statutory provisions. The panel majority had no obligation to address and specifically reject in its opinion every single statutory misinterpretation in Hoopa Plaintiffs' briefs and oral argument. None of these provisions has the legal effect Hoopa Plaintiffs assert and all their arguments based on them were implicitly rejected in the panel majority's well-reasoned opinion.

25 U.S.C. § 407. Hoopa Plaintiffs rely heavily (Combined Petition at 2,3,4,5,6,8,9,10,11,13,14,15) on this generally applicable Indian timber statute, which currently provides that "the proceeds of the sale [of timber] shall be used . . . as determined by the governing bodies of the tribes concerned and approved by the Secretary." The panel majority could not have overlooked this statute, as Hoopa Plaintiffs cited it eleven times in their Initial Brief and twice in their Reply Brief.

The United States demonstrated in its Brief (at 35) that this general timber statute does not trump the express terms of the Settlement Act. This Court had relied on an earlier version of this statute in *Short III*, 719 F.2d at 1136 (noting

that 25 U.S.C. § 407 as originally enacted in 1910 read "for the benefit of Indians of the Reservation" but was amended in 1964 to read "for the benefit of the Indians who are members of the tribe or tribes concerned"). The Settlement Act amended 25 U.S.C. §.407 to remove the language relied on in *Short*. To effectuate its intent that the law of the *Short* case would not apply on any reservation going forward, Congress specified in the amended 25 U.S.C. § 407 that only Indian tribes, not individual tribal members, would have rights to timber revenues. A167-68. Hoopa Plaintiffs' reliance (Combined Petition at 11-12) on the pre-amendment version of 25 U.S.C. § 407 is just another articulation of their erroneous argument that the law of the *Short* case governed rights to the Settlement Fund, which the panel majority expressly, and correctly, rejected.

25 U.S.C. § 1300i-6(b). In challenging the conclusion that individual Hoopa members had no individual entitlement to the Settlement Fund, Hoopa Plaintiffs incorrectly argue (Combined Petition at 9) that the panel majority overlooked this provision of the Settlement Act, which its says "expressly authorized a per capita distribution of $5,000 to each member of the Hoopa Valley Tribe." As the United States explained in its Brief (at 15), this provision permitted the Hoopa Tribe to make a $5,000 per capita distribution to its members from the funds apportioned to the Hoopa Tribe. The Hoopa Tribe received its share of the

Settlement Fund in 1991, and the authorized per capita distribution was promptly made to its members. This provision in no way made individual Hoopa members beneficiaries of the money still in the Settlement Fund as of 2007. As of 2007, the Yurok Tribe was the sole beneficiary of the Settlement Fund.

25 U.S.C. § 1300i-4(e). In the same vein, Hoopa Plaintiffs also point (Combined Petition at 9) to this provision of the Settlement Act:

> (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.

It does not appear that Hoopa Plaintiffs referenced this provision in their prior briefing. Any claim now premised on it is therefore waived. In any event, their prior failure to identify this provision as relevant is not surprising, as this provision does not "confirm," contrary to Hoopa Plaintiffs' present contention, that individual members of the Hoopa Tribe had any individual entitlement to the Settlement Fund as of 2007. As the United States explained in its Brief (at 14-15), the Hoopa Tribe's share of the Settlement Fund was based on its enrollment at the time the Settlement Roll was completed in March 1991; individuals listed on the

Settlement Roll had the option to elect enrollment in the Hoopa Tribe, which could have resulted in an upward adjustment of the Hoopa Tribe's share, but no one was actually enrolled in the Hoopa Tribe under this procedure. Under Section 1300i-4(e), persons who were not on the March 1991 Settlement Roll but who were subsequently enrolled in the Hoopa Tribe (such as children thereafter born to tribal members) were not precluded from benefitting from the land and resources partitioned to the Hoopa Tribe or from the payment from the Settlement Fund made to the Hoopa Tribe in 1991, but nothing in this section provides that such persons were entitled to any distribution from the money in the Settlement Fund account still being held by the Secretary as of 2007.

25 U.S.C. § 1300i-2. Hoopa Plaintiffs incorrectly argue (Combined Petition at 10-11) that the panel majority overlooked Section 1300i-2 of the Settlement Act, which provides that "[n]othing in this subchapter shall affect, in any manner, the entitlement established under decisions of the United States Court of Federal Claims in the Short cases or any final judgment which may be rendered in those cases." To the contrary, the meaning of this provision was fully briefed, and the panel majority implicitly rejected Hoopa Plaintiffs' misreading of Section 1300i-2 when it expressly rejected its reliance on the law of the *Short* case.

As the United States explained in its Brief (at 36-37), the referenced

"entitlement" is the right of non-Hoopa Indians of the Reservation to damages to be paid from the United States Treasury to compensate them for pre-Settlement Act distributions of Joint Reservation revenues to Hoopa Indians. The provision does not more broadly preserve the *Short* rulings and does not make individual Hoopa Indians beneficiaries of the Settlement Fund. The Senate Report confirms the provision's limited meaning: "While the Committee does not believe that this legislation, as a prospective settlement of this dispute, is in any way in conflict with the law of the case in the *Short* cases, to the extent there is such a conflict, it is intended that this legislation will govern." A157. For the purpose of determining the Settlement Fund beneficiaries, the *Short* decisions are irrelevant.

25 U.S.C. § 1300i-3(b). Finally, Hoopa Plaintiffs err in asserting that the panel majority overlooked the requirement that the Settlement Fund was to be invested and administered as an Indian trust fund account pursuant to 25 U.S.C. § 162a. Hoopa Plaintiffs cited this requirement twelve times in their Initial Brief and nine times in their Reply Brief. The United States refuted (U.S. Brief at 32) Hoopa Plaintiffs' argument that this provision somehow gave individual Hoopa members rights to the Settlement Fund: "No one disputes that the Settlement Fund was an Indian trust fund, but this provision did not specify the beneficiaries of the trust fund, either expressly or by implication." After the distributions were made

from the Settlement Fund to the Hoopa Tribe and to the specified individuals (which did not include individual members of the Hoopa Tribe), the Secretary's duty to invest and administer the Settlement Fund as an Indian trust fund was owed to the Yurok Tribe, the sole beneficiary of the Settlement Fund.

C. The Panel Majority's Opinion Does Not Conflict with Supreme Court Precedent Requiring Express Statutory Language to Abrogate Tribal Property Rights

The last part of the Combined Petition (at 11-15) contains several incorrect assertions of fact and law. First, the Hoopa Plaintiffs were not deprived of a reservation. To the contrary, through the Settlement Act, Congress gave the Hoopa Tribe about 96% of the trust land within the former Joint Reservation and the entire interest in future revenues derived from that land. On top of that, Congress gave the Hoopa Tribe about 40% of the Settlement Fund. The Hoopa Tribe promptly adopted a resolution waiving any claim the Tribe may have had against the United States arising out of the Settlement Act and affirming tribal consent to the contribution of the funds in the existing trust accounts to the new Settlement Fund account, clearing the way for partition of the Joint Reservation and payment to the Hoopa Tribe of its share of the Settlement Fund. *See* U.S. Brief at 11-12.

It was the Yurok Tribe which was aggrieved by what it viewed as the

disproportionate partition of Joint Reservation land and resources to the Hoopa Tribe, and which filed suit against the United States in the Court of Federal Claims in 1992 alleging that the partition of the Reservation (and future revenues) effected a taking of its property.[3] The Court of Federal Claims granted summary judgment to the United States on the ground that no tribe or individual Indian had a compensable property interest in the Joint Reservation, and this Court affirmed. *Karuk Tribe of California v. United States*, 28 Fed. Cl. 694 (1993), *aff'd*, 209 F.3d 1366 (Fed. Cir. 2000). Hoopa Plaintiffs' reliance (Combined Petition at 13-14) on *Karuk Tribe* is thus misplaced. This Court's conclusion that no tribe or individual Indian had a compensable property interest in the Joint Reservation prior to the Settlement Act undercuts Hoopa Plaintiffs' reliance on *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), and the other cases it cites in this part of the Combined Petition.

In any event, Congress expressly provided for the distribution of the Settlement Fund to the Hoopa Tribe, Yurok Tribe and certain individual Indians on the Settlement Roll (which did not include members of the Hoopa Tribe). There was no need for the panel majority to make any "[i]nference of

---

[3] This suit was consolidated with suits filed by the Karuk Tribe and some individual Indians.

Congressional intent" (Combined Petition at 11) in concluding that the Hoopa Tribe and its individual members were not Settlement Fund beneficiaries as of 2007. This purported conflict is completely without substance.

IV. CONCLUSION

For the foregoing reasons, the combined petition for panel rehearing and rehearing en banc should be denied.

Respectfully submitted,

MARY GABRIELLE SPRAGUE
United States Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
202-514-2753
mary.gay.sprague@usdoj.gov

May 21, 2010
DJ No. 90-2-20-12425

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Opposition to Combined Petition for Panel Rehearing and Rehearing En Banc have been served, by overnight courier, this 21st day of May, 2010, upon the following counsel of record:

Thomas P. Schlosser
Morisset, Schlosser & Jozwiak
801 Second Ave., Suite 1115
Seattle, WA 98104-1509

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

Mary Gabrielle Sprague