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.

BRIEF FOR APPELLEE THE UNITED STATES

JOHN C. CRUDEN
Acting Assistant Attorney General

KATHRYN E. KOVACS
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

PAGE

TABLE OF AUTHORITIES

PAGE

CASES :

STATUTES, RULES AND REGULATIONS:

MISCELLANEOUS:

STATEMENT OF RELATED CASES

(a) No appeal in or from the same civil action or proceeding in the lower court was previously before this or any other appellate court. However, this case involves the Hoopa-Yurok Settlement Act of 1988, which has been addressed by this Court in other contexts in *Short v. United States*, 50 F.3d 994 (Fed. Cir. 1995) (Circuit Judges Mayer, Michel and Rader), and *Karuk Tribe of California v. United States*, 209 F.3d 1366 (Fed. Cir. 2000) (Circuit Judges Newman, Rader and Schall).

(b) There is no case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction over an appeal from a final decision of the United States Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUE

Whether the Court of Federal Claims correctly held that the plaintiffs were not beneficiaries of the Settlement Fund created by the Hoopa-Yurok Settlement Act of 1988 ("Settlement Act"),[1] could not have been injured when the Department of the Interior paid to the Yurok Tribe its apportioned share of the Settlement Fund, and therefore had no standing to litigate whether the Settlement Act authorized Interior to make that payment.

STATEMENT OF THE CASE

Twelve individual members of the Hoopa Valley Tribe, and the Hoopa Valley Tribe ("Hoopa Tribe") in its alleged capacity as *parens patriae* for its remaining individual members,[2] collectively "Hoopa Plaintiffs," sued the United

---

[1] The relevant provisions of the Hoopa-Yurok Settlement Act of 1988, Pub. L. No. 100-580, 102 Stat. 2924, codified as amended at 25 U.S.C. § 1300i *et seq.*, are in the Addendum. Provisions of the Settlement Act are referred to herein by their U.S. Code section numbers.

[2] While the Hoopa Tribe filed its complaint "on its own behalf" as well as "in its capacity as *parens patriae* on behalf of its members," the Tribe subsequently acknowledged that it has no claim on its own behalf. *See* A8 n.1 ("Plaintiffs concede that the Hoopa Valley Tribe has no residual entitlement to the Fund.").

States in the Court of Federal Claims on February 1, 2008, alleging that Interior breached its trust responsibility to them by disbursing the balance of the Settlement Fund to the Yurok Tribe on April 20, 2007. The Hoopa Tribe had received its apportioned share of the Settlement Fund in 1991. On January 15, 2008, the Yurok Tribe made a per capita distribution of a portion of that money to its members. Hoopa Plaintiffs claim, in effect, that under the law of the *Short* case,[3/] the Yurok Tribe should have included members of the Hoopa Tribe in that distribution. Interior had no statutory or regulatory obligation to approve the Yurok Tribe's decision to make a per capita distribution after Interior disbursed the Settlement Fund balance to the Yurok Tribe. Nevertheless, the Hoopa Plaintiffs claim that when the Yurok Tribe did not include them in the per capita distribution, they became entitled to damages from the United States Treasury in

---

Thus, only individual claims were before the Court of Federal Claims, not a tribal claim.

[3/] *Short v. United States*, 486 F.2d 561 (Ct. Cl. 1973) ("*Short I*"); 661 F.2d 150 (Ct. Cl. 1981) (*en banc*) ("*Short II*"); 719 F.2d 1133 (Fed. Cir. 1983) ("*Short III*"); 12 Cl. Ct. 36 (1987) ("*Short IV*"); 25 Cl. Ct. 722 (1992) ("*Short V*"); 28 Fed. Cl. 590 (1993) ("*Short VI*"); 50 F.3d 994 (Fed. Cir. 1995) ("*Short VII*"). In *Short*, as explained below, this Court held that individual Yurok Indians and other non-Hoopa members were entitled to share in per capita distributions of revenues from a joint reservation in northern California set aside for the benefit of Hoopa, Yurok and other Indians (the "Joint Reservation"). However, as explained below, the Settlement Act supplanted the holding in *Short* with respect to post-Settlement Act distributions.

the amount of the distribution they would have received had the Yurok Tribe included them in the distribution.

Congress enacted the Settlement Act to resolve longstanding disputes regarding the ownership, management and revenue of the Joint Reservation. As directed by the Settlement Act, Interior made payments from the Settlement Fund to the Hoopa Tribe and to specified classes of individual Indians (which did not include individual members of the Hoopa Tribe). In decisions dated March 1, 2007 and March 21, 2007, Ross O. Swimmer, Special Trustee for American Indians at the Department of the Interior, concluded that the Settlement Act authorized payment to the Yurok Tribe of the balance of the Settlement Fund.

Because the Hoopa Tribe had argued to Interior that the Settlement Act did not authorize Interior to make that payment to the Yurok Tribe, Interior afforded the Hoopa Tribe 30 days from its March 21, 2007 decision to file suit in federal district court under the Administrative Procedure Act ("APA") to challenge the decision and move to enjoin the payment. The Hoopa Tribe did not file suit and Interior disbursed the balance of the Settlement Fund to the Yurok Tribe on April 20, 2007. Hoopa Plaintiffs waited nine months – until the Yurok Tribe distributed a portion of the money to its members on January 15, 2008 – and then filed suit in the Court of Federal Claims claiming that, upon the Yurok Tribe's per

capita distribution, in which they did not share, they became entitled to damages from the United States. Hoopa Plaintiffs base their claim on the law of the *Short* case, which they say survived enactment of the Settlement Act and applies to the January 15, 2008 per capita distribution.[4]

Hoopa Plaintiffs filed in the Court of Federal Claims a Motion for Partial Summary Judgment (Dkt. No. 9, filed April 2, 2008), asking for "judgment as a matter of law that the United States is liable for breach of fiduciary obligation resulting from its discriminatory distribution of the proceeds of timber sales and management of the former Joint Hoopa Valley Indian Reservation to fewer than all of the Indians of the Reservation for whom the Indian trust funds were collected."

The United States countered with Defendant's Combined Motion to Dismiss, or in the Alternative for Summary Judgment (Dkt. No. 20, filed July 22, 2008). That motion was based on several legal grounds, the first of which was that the Hoopa Plaintiffs had no interest in the Settlement Fund balance and could not have been injured by the 2007 disbursement to the Yurok Tribe or by the Yurok Tribe's 2008 per capita distribution, and thus had no standing to litigate the

---

[4] The United States filed a third-party complaint against the Yurok Tribe alleging that it properly distributed the Settlement Fund balance to the Yurok Tribe, but in the event it was determined that it made the disbursement through a mistake of fact or law, the United States sought to recover the money erroneously paid to the Yurok Tribe. Dkt. No. 27, filed August 26, 2008.

question whether those actions were authorized by the Settlement Act. It has been the consistent position of the United States – and the Hoopa Plaintiffs have conceded – that Interior paid to the Hoopa Tribe in 1991 all the money the Settlement Act apportioned to it, such that the Hoopa Tribe "has no residual entitlement to the Fund." A8 n.1; Hoopa Br. 36. It has also been the consistent position of the United States that the Settlement Act did not grant the individual members of the Hoopa Tribe any interest in the Fund at all. And it has been the consistent position of the United States that the law of the *Short* case only applies to pre-Settlement Act per capita distributions from Joint Reservation revenues, not to any post-Settlement Act distributions from the Settlement Fund.

The Court of Federal Claims agreed, concluding that the Settlement Act determined rights to the money in the Settlement Fund, and under the "plain meaning" of that Act, the Hoopa Tribe had in 2007 already received its full entitlement from the Settlement Fund and individual Hoopa members had no entitlement to the Settlement Fund at all. A8-9. Accordingly, the Court held that the Hoopa Plaintiffs were not injured by Interior's 2007 disbursement to the Yurok Tribe or by the Yurok Tribe's 2008 per capita distribution, and thus lacked standing to bring this suit. *Id.* The Court granted the United States' motion for

summary judgment (A10) and entered judgment for the United States (A11).[5]

STATEMENT OF FACTS

A. Background

The background facts leading up to the 1988 enactment of the Settlement Act have been repeatedly stated in the *Short* decisions and, most recently, in this Court's decision rejecting the Yurok Tribe's challenge to the Settlement Act. *See Karuk Tribe of California v. United States*, 41 Fed. Cl. 468 (1998), *aff'd*, 209 F.3d 1366, 1373 (Fed. Cir. 2000).

In brief, Congress directed the establishment of Indian reservations in California in the Act of April 8, 1864, An Act to Provide For the Better Organization of Indian Affairs in California, 13 Stat. 39 ("1864 Act"). The "Square" portion of the Hoopa Valley Reservation was established by executive order in 1876. The "Addition" was added by executive order in 1891 to create the Joint Reservation, which was inhabited by both Hoopa and Yurok Indians. *See* A125 (the Square is the "Original Hoopa Valley Reservation" and the Addition includes the "Klamath River Reservation" and the "Connecting Strip"). The Hoopa Indians organized in 1950, but the Yurok Tribe, though federally

---

[5] As a technical matter, having decided that the Hoopa Plaintiffs lacked standing, the Court should have dismissed the suit for lack of jurisdiction.

recognized, remained without a constitution, organized leadership or membership roll. In 1955 the Secretary of the Interior ("Secretary") commenced making distributions of revenues from timber cut within the Square solely to members of the Hoopa Tribe.

B. The *Short* Litigation Prior to the Settlement Act

Hoopa Plaintiffs assert (Br. 5) that the "rulings in *Short* define the contours of the United States' trust obligation and govern the Hoopa Plaintiffs' right to recovery in this case." It is thus important to understand the scope of the *Short* decisions.

In 1963, individual Indians of the Joint Reservation who were not Hoopa members (primarily Yurok Indians) commenced the *Short* litigation in the United States Court of Claims challenging their exclusion from the timber revenue distributions. The Court of Claims held in 1973 that the relevant statute and executive orders had established a single reservation, and that all "Indians of the Reservation" were entitled to share in the timber revenues from the Square. *Short I*, 486 F.2d 561.[9] The scope of the holding in *Short I* was refined in a series

---

[9] In 1974, following *Short I*, Interior set up separate accounts for future timber proceeds, with 70 percent set aside for the *Short* plaintiffs and 30 percent set aside for Hoopa members, based on the relative populations of each group. A126-28. From 1957 through 1980, Hoopa members received per capita distributions totaling more than $29 million. *See Short IV*, 12 Cl. Ct. at 39, 41.

of subsequent decisions.

In a 1981 decision, the Court of Claims addressed the standards for determining which of the plaintiffs were "Indians of the Reservation" entitled to share in the per capita distributions. The court clarified that its holding in *Short I* only applied to "revenues that were distributed to individual Indians." *Short II*, 661 F.2d at 152, 158.

Two years later, in a decision upholding the trial judge's specification of five classes of plaintiffs who were entitled to recover, this Court stressed the limited scope of the *Short* decisions:

> [A]ll we are deciding are the standards to be applied in determining those plaintiffs who would share as individuals in the monies from the Hoopa Valley Reservation unlawfully withheld by the United States from them (from 1957 onward). . . . [T]he decision reached in this court [both the Claims Court and the Court of Appeals for the Federal Circuit] will obtain only for the years until final judgment, and for the years to come while the situation in the Reservation remains the same . . . .

Short III, 719 F.2d at 1143 (emphasis added, quotation marks omitted).

Once Interior completed the list of eligible "Indians of the Reservation," the amount of damages had to be determined for each. In 1987, the Claims Court concluded that the eligible plaintiffs were entitled to the amount "they would have received had the per capita distributions been made in a non-discriminatory

manner," including all per capita distributions made to Hoopa members before and after 1974, and whether made by the Secretary directly or by the Hoopa Tribe from monies received from the Secretary. *Short IV*, 12 Cl. Ct. at 40-42. Notably, the Claims Court rejected the *Short* plaintiffs' argument that distributions made to the Hoopa Tribe and used by the Tribe for governmental purposes should have been included for calculation of damages, explaining that "an individual Indian's rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common." *Id.* at 42.

This is where the *Short* litigation stood when Congress took up the Hoopa-Yurok Settlement Act in 1988.

C. The Legislative History of the Hoopa-Yurok Settlement Act of 1988

After twenty-five years of litigation in the *Short* case, and spurred by a California district court decision regarding governance of the Joint Reservation,[7]

---

[7] In 1980, a number of "Indians of the Reservation" sought to enjoin Interior from continuing to recognize the Hoopa Business Council as the governing council of the Square, claiming that they had rights equal to Hoopa members with respect to the governmental and business affairs of the Joint Reservation. *Puzz v. United States*, No. C80-2908 (N.D. Cal.). After many years of litigation, the district court ruled in favor of plaintiffs and directed Interior to take over management of the Joint Reservation for the benefit of all Indians of the Reservation. *Puzz v. United States*, 1988 WL 188462 (N.D. Cal. April 8, 1988).

Congress sought through the Hoopa-Yurok Settlement Act to provide "a fair and equitable settlement of the dispute relating to the ownership and management of the Hoopa Valley Reservation." A152 (S. Rep. No. 100-564 (Sept. 30, 1988) ("Senate Report")).

The Senate Report (A139-79) explained that the decisions in the *Short* case resulted from the unique circumstances of the federal government's establishment and management of the Joint Reservation. A150 (the decisions in *Short* and *Puzz,* "while perhaps correct on the peculiar facts and law, have had a very unhappy result"). The Act was intended to change the legal status of the reservation, and revenues derived therefrom, so that the law of the *Short* and *Puzz* cases would not apply going forward. The Senate Report explained that the "intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law," which recognizes "tribal property rights and tribal governance of Indian reservations" rather than "individual interests." A140.

The Senate Report expressed the understanding that neither the Hoopa Tribe, the Yurok Tribe nor any individual Indian had a vested interest in the Joint Reservation land and resources. A150-52. Accordingly, Congress believed that it could work out a fair resolution of the competing interests. A152 ("there are no tribal or individual vested rights in the reservation and . . . Congress has full power

to dispose of the reservation as proposed"). The Senate Report also expressed the understanding that no one had any vested rights in the escrow accounts that were to be included in the Settlement Fund. A153 (bill "in no way is to be construed as any recognition of individual rights in and to the reservation or the funds in escrow").

D. Summary of the Settlement Act's Provisions and Implementation

Congress directed three major actions: (1) partitioning the Joint Reservation into the Hoopa Valley Reservation and the Yurok Reservation; (2) distributing equitably the trust funds that were derived from the Joint Reservation prior to partition (and were still held by the Secretary) among the Hoopa Tribe, Yurok Tribe, individual members of the Yurok Tribe, and other "Indians of the reservation" who did not wish to enroll in either the Hoopa Tribe or Yurok Tribe; and (3) organizing the Yurok Tribe so that it could manage the Yurok Reservation.

1. Partition

Congress partitioned the Square to the Hoopa Tribe and the Addition to the Yurok Tribe. 25 U.S.C. § 1300i-1. The Square contained about 89,000 acres of tribal trust land. A144, A275. Although the Addition had originally contained about 58,000 acres of tribal trust land, after allotment to individual Indians and the opening of the remainder to homesteading by non-Indians, the Addition contained

only about 3,000 acres of tribal trust land as of 1988.[8] A144-45, A275.

Before the partition of the Joint Reservation would become effective, the Hoopa Tribe had to adopt a resolution within 60 days of enactment 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 Hoopa escrow monies to the Settlement Fund. 25 U.S.C. § 1300i-1(a). Partition was effected on December 7, 1988 with the publication in the Federal Register of the Hoopa waiver resolution. A194-95 (53 Fed. Reg. 49,361 (Dec. 7, 1988)).

2. Distribution of Pre-Settlement Act Revenues

Creation of the Settlement Fund. The Settlement Act, 25 U.S.C. § 1300i-3(a)(1), directed the Secretary to deposit into a new Settlement Fund account all undistributed revenues from the Joint Reservation being held in the enumerated escrow funds. The Settlement Fund was to be invested and administered as an Indian trust fund account. 25 U.S.C. § 1300i-3(b).

Settlement Roll. Section 1300i-4 then directed the Secretary to prepare a Settlement Roll of persons who were "Indian[s] of the Reservation" as defined in

---

[8] In recognition of the relatively small amount of tribal trust land that would become the Yurok Reservation, Congress provided for the addition of some federal land to the Yurok Reservation and also authorized the Secretary to acquire some additional land for the Yurok Tribe. 25 U.S.C. §§ 1300i-1(c)(2) and (3).

Short but who were not enrolled Hoopa members. The Secretary gave notice of the right to be included on the Settlement Roll. 25 U.S.C. § 1300i-4(b). *See* 53 Fed. Reg. 49,795 (Dec. 9, 1988); 54 Fed. Reg. 5,552 (Feb. 3, 1989) (correcting deadline for applications to April 10, 1989). The Settlement Act directed the Secretary to complete the Settlement Roll within 180 days of that deadline, but Interior received over 8,000 applications and encountered "logistical difficulty" in determining eligibility. *See* S. Rep. No. 101-226, *reprinted in* 1990 U.S.C.C.A.N. 196. Congress amended the Settlement Act to facilitate this process. Pub. L. No. 101-301, 104 Stat. 206 (May 24, 1990). The Settlement Roll was published on March 15, 1991 (56 Fed. Reg. 12,062).

Notice of Options. The next step was to give notice to persons on the Settlement Roll of their right to elect enrollment in (1) the Yurok Tribe (assuming specified qualifications were met), (2) the Hoopa Tribe (assuming specified qualifications were met), or (3) neither Tribe and receive a $15,000 lump sum payment. 25 U.S.C. § 1300i-5. The Secretary provided notice by certified letters dated April 12, 1991, and, pursuant to 25 U.S.C. § 1300i-5(a)(4)(A), stated that the option election date was July 19, 1991 (120 days after publication of the

Settlement Roll). A196-208.[9/]

Distributions to Hoopa and Yurok Trust Accounts. Under the Settlement Act, Sections 1300i-3(c) and (d), the April 12, 1991 notice triggered the Secretary's obligation to determine the Hoopa and Yurok Tribes' shares of the Settlement Fund and to transfer those shares into separate trust accounts. These provisions contained a drafting error. Each Tribe's share was to be calculated using the number of the Tribe's enrolled members (including any persons who would enroll pursuant to 25 U.S.C. § 1300i-5) as the numerator, and the sum of the number of enrolled Hoopa members and the number of Indians on the Settlement Roll as the denominator. The Secretary could not implement these provisions exactly as drafted because it was not possible to make distributions to the Hoopa and Yurok Tribes on the date notice was provided of the option election deadline and to include in these distributions payment for individuals who would thereafter elect enrollment in the Hoopa and Yurok Tribes. The Senate Report had described a two-step process whereby an initial payment would be made to the Hoopa Tribe's account on the notice date based on its then-current membership, followed by an adjustment after the persons on the Settlement Roll made their

---

[9/] While not required by the Settlement Act, the Secretary also published notice of the enrollment options in the Federal Register. A209 (56 Fed. Reg. 22,996 (May 17, 1991)).

enrollment elections. A158. Interior resolved the ambiguity in the statutory text by proceeding on April 12, 1991 as described in the Senate Report. The Hoopa's share was determined to be about $34 million (about 40% of the Settlement Fund, which was then a total of about $86 million).[10/] A211-14 .

Section 1300i-6(b) permitted the Hoopa Tribe to make a $5,000 per capita distribution from its apportioned funds. On April 15, 1991, at the direction of the Hoopa Business Council, the Secretary sent checks to Hoopa members.[11/] A211. The balance of around $14 million was moved into a separate trust account for the Hoopa Tribe. A212.

As to the Yurok Tribe, the Secretary had no way of knowing on April 12, 1991 how many persons on the Settlement Roll would elect membership in the Yurok Tribe and how many would elect the $15,000 lump sum payment, and the Secretary could not practically move the Yurok Tribe's share out of the Settlement

---

[10/] As it turned out, only four persons on the Settlement Roll elected the Hoopa tribal membership option. A107. The Hoopa Tribe opposed their enrollment and none has been enrolled. A107-08. No adjustment to the April 12, 1991 Hoopa share determination was therefore required.

[11/] Where the Secretary holds funds in trust for an Indian tribe, and the tribe determines to make a per capita distribution to tribal members, the Secretary may make the distribution pursuant to 25 U.S.C. § 117a.

Fund into a separate account as the Settlement Act directed.[12] The Yurok Tribe's apportioned share thus remained in the Settlement Fund account set up in 1988.

Individual Payments. Upon election by the persons on the Settlement Roll of one of the three options (July 19, 1991 was the option election deadline), 25 U.S.C. § 1300i-5(c) directed the Secretary to "pay to each person making an election [to become a member of the Yurok Tribe], $5,000 out of the Settlement Fund for those persons who are, on [the option election date], 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." Section 1300i-5(d) provided that, at the same time, "[a]ny person on the Settlement Roll [who does not wish to enroll in either the Hoopa Tribe or the Yurok Tribe] 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."[13] The Secretary made these payments as

---

[12] In a report submitted to Congress on March 15, 2002, Interior noted that, in Fiscal Year 1991, "[a]ccording to the Act, a separate account for Yurok should have been established and [the Yurok's share] transferred." A253.

[13] Pursuant to 25 U.S.C. § 1300i-3(e), the United States made a $10 million contribution to the Settlement Fund toward the cost of these lump sum payments. A158.

directed. A215-17.[14]

The Settlement Act did not provide for any payments from the Settlement Fund to individual Hoopa members, but only permitted the Hoopa Tribe to make per capita distributions from its apportioned share. *See* 25 U.S.C. § 1300i-6(b).

Remainder Distribution to Yurok Account. Upon the completion of payments to the Hoopa Tribe, individual members of the Yurok Tribe, and Indians of the Reservation who opted not to enroll in either the Hoopa Tribe or Yurok Tribe, Section 1300i-6(a) directed that "any 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."[15] While Congress intended that this remainder would be transferred to the Yurok Tribe's separate trust account, the Secretary had not

---

[14] As explained in the October 24, 1991 memorandum of the Acting Director, Office of Tribal Services (A215-17), the United States District Court for the District of Columbia ordered some money withheld from these individual payments to compensate the *Short* plaintiffs' attorneys. In November 1991, the Secretary made partial payments in accordance with the district court's order. Following reversal by the D.C. Circuit on May 18, 1993, *Heller, Ehrman, White & MacAuliffe v. Babbitt*, 992 F.2d 360 (D.C. Cir. 1993), the Secretary paid the individuals the amounts withheld from their 1991 payments.

[15] The references to the "division" of the Settlement Fund remainder in the section's heading and in subsection (b) are remnants of an earlier version of S. 2723 (A134), which had provided that the remainder be apportioned between the Hoopa Tribe and Yurok Tribe. As enacted, however, the Yurok Tribe received the entire remainder.

created a separate account for the Yurok Tribe, as explained above. However, once the required payments to the Hoopa Tribe and to the specified individuals were made, the balance in the Settlement Fund account was in fact a separate trust account for the Yurok Tribe.

Yurok Waiver Requirement. Section 1300i-1(c)(4) precluded the Secretary from releasing these funds to the Yurok Tribe until it adopted a waiver resolution:

> The
> (A) apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 of this title;
> (B) the land transfers pursuant to paragraph (2);
> (C) the land acquisition authorities in paragraph (3); and
> (D) the organizational authorities of section 1300i-8 of 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 subchapter.

As explained below, Congress provided for election of the Yurok Interim Council about six months after the date on which Congress directed the division of funds and establishment of separate accounts for the Hoopa and Yurok Tribes (the date of publication of the option election date).

3. Formation of the Yurok Tribe

Although federally recognized for many years, the Yurok Tribe had no constitution, organized leadership, or membership roll. Congress specified in the Settlement Act, Section 1300i-8, a process for election of a Yurok Interim

Council. The Secretary was directed: (1) within 30 days after the option election date to give written notice to eligible voters of the Yurok Tribe (the "general council") of a general council meeting to be scheduled for the nomination of candidates for election to the Interim Council; (2) within 45 days thereafter, to convene that general council meeting; (3) within 45 days thereafter, to hold an election for the five members of the Interim Council; and then (4) as soon as possible, to convene an organizational meeting of the newly elected members of the Interim Council. That meeting was convened on November 25, 1991. A218.

Section 1300i-8(d)(2) authorized the Yurok Interim Council to adopt the resolution referenced in Section 1300i-1(c)(4). Section 1300i-8(e) provided for election of a permanent Yurok governing body pursuant to the Indian Reorganization Act ("IRA"), and Section 1300i-8(d)(5) further provided for dissolution of the Interim Council not more than two years after the Interim Council was convened.

E. The *Short* Litigation Following the 1988 Settlement Act

After 1988, the complex process of determining the individual damages of the more than 2,000 *Short* plaintiffs continued. In a 1993 decision, the Court of Federal Claims rejected the *Short* plaintiffs' new argument that they were entitled to additional damages because they were excluded from the $5,000 per capita

distribution the Hoopa Tribe made to its members on April 15, 1991. *Short VI*, 28 Fed. Cl. 590. The court explained: "[The pre-Settlement Act] escrow fund no longer exists. Pursuant to the terms of the Settlement Act, the escrow fund was converted into the Settlement Fund, and the Settlement Fund was distributed among various tribes and Indians." *Id.* at 593. The court concluded that "[c]learly, the situation on the Reservation changed with the passage of the Settlement Act." *Id.* at 595.[16]

F. The Yurok Tribe's Takings Claim

While Congress had concluded that it could partition the Joint Reservation and divide the revenues derived – and to be derived – therefrom as it believed fair without giving rise to any claim that its act effected a taking or otherwise provided inadequate compensation, Congress nonetheless anticipated a potential challenge to the Settlement Act, and provided statutes of limitations for such a claim by various parties. 25 U.S.C. § 1300i-11. The Yurok Interim Council, aggrieved by what it viewed as the disproportionate partition of Joint Reservation land and resources to the Hoopa Tribe (over 96% of the trust land within the Joint

---

[16] In the *Puzz* case, the district court similarly recognized that the situation on the Reservation changed with the Settlement Act. Following partition of the Joint Reservation on December 7, 1988, the court vacated its April 18, 1988 decision and dismissed the *Puzz* case as moot. 1988 WL 188462 (N.D. Cal. 1988).

Reservation and the entire interest in future revenues derived from that land), did not then adopt a waiver resolution but instead filed suit against the United States in the Court of Federal Claims on March 10, 1992 alleging that the partition of the Reservation (and future revenues) effected a taking of its property. A225-30. The suit did not challenge the apportionment of the Settlement Fund. The Yurok suit was consolidated with suits filed by the Karuk Tribe and by individual Indians who also claimed an interest in the Joint Reservation.

The Court of Federal Claims granted summary judgment to the United States on the ground that the plaintiffs did not possess a compensable property interest in the Joint Reservation. *Karuk Tribe of California v. United States*, 41 Fed. Cl. 468 (1998). This Court affirmed, observing that the "Settlement Act nullified the *Short* rulings." 209 F.3d 1366, 1372 (Fed. Cir. 2000).

G. Interior's Interpretation of the Yurok Waiver Provisions

Two days after the Yurok Tribe filed its takings suit, the Hoopa Tribe asked Interior to pay it the Yurok Tribe's share of the funds. Interior declined that request. A231-32. Thereafter, Interior consistently interpreted the Settlement Act not to authorize any additional payments to the Hoopa Tribe because the Hoopa Tribe had no remaining interest in the Settlement Fund. For example, Interior's March 15, 2002 report to Congress following the conclusion of the Yurok's

takings suit, submitted pursuant to 25 U.S.C. § 1300i-11(c), stated that the Hoopa Tribe "received their portion of the benefits as enumerated within the Act," and "[a]ccordingly, it is the position of the Department that the Hoopa Valley Tribe is not entitled any further portion of funds or benefits under the existing Act." A246. Interior restated this position at the August 1, 2002 Oversight Hearing on the Department of the Interior Secretary's Report on the Hoopa Yurok Settlement Act before the Senate Committee on Indian Affairs ("Oversight Hearing"). A262-63.

On the question whether Interior could release the Yurok's funds to it, Interior's position evolved. The Assistant Secretary - Indian Affairs initially interpreted the Settlement Act to provide that only the Yurok Interim Council – which would dissolve on November 25, 2003 pursuant to 25 U.S.C. § 1300i-8(d)(5) – had authority to adopt the required resolution. A235 (Letter from Assistant Secretary - Indian Affairs to Yurok Interim Council, dated November 23, 1993). The Yurok Interim Council enacted a waiver resolution (93-61) the next day, but Interior concluded that the terms of that resolution failed to satisfy the Settlement Act's requirements. A236-39 (Letter from Assistant Secretary - Indian Affairs to Yurok Interim Council, dated April 4, 1994).

Subsequently, after considering correspondence from the Yurok Tribal Council, the Assistant Secretary withdrew her earlier interpretation and

acknowledged that "the authority of the former Interim Council was transferred to the Tribal Council [the Tribe's permanent governing body that had since been elected], and with that transfer goes the authority to amend Resolution 93-61." A240-41 (Letter from Assistant Secretary - Indian Affairs to Yurok Tribal Council, dated March 14, 1995).[17] The Assistant Secretary cautioned, however, that the Tribal Council would have to amend the resolution to conform with the Settlement Act prior to the conclusion of the Tribe's takings suit.

In its March 15, 2002 Report to Congress (A242-53) and at the Oversight Hearing (A254-83), the Assistant Secretary - Indian Affairs expressed the view that Interior should not release any money in the Settlement Fund to either Tribe. The "Hoopa Valley Tribe has already received its portion of the benefits under the act and is not entitled to further distributions from the settlement funds under the provisions of the act," and "the Yurok Tribe did not meet the conditions precedent [in 25 U.S.C. § 1300i-1(c)(4)] for the tribe to receive its share of the settlement fund or other benefits." A262-63. Interior recommended that Congress take

---

[17] In their Initial Brief, Hoopa Plaintiffs completely ignore the Assistant Secretary's revised analysis of the issue whether the Settlement Act required a waiver resolution before the dissolution of the Interim Council on November 25, 1993. See Hoopa Br. 13, 52 n.23. In the Court of Federal Claims, the Hoopa Plaintiffs sought to diminish the significance of this reinterpretation by mischaracterizing it as a mere settlement position (Dkt. No. 9 at 14 n.10), but they at least acknowledged the existence of the reinterpretation.

action to address this "quandary":

> We believe the act did not contemplate such a result. The moneys remaining in the settlement fund originated from seven trust accounts which held revenues generated from the joint reservation. Thus, the moneys remaining in the settlement fund should be distributed to one or both tribes in some form.

A263 (emphasis added). At the conclusion of the Oversight Hearing, Chairman Inouye urged the Tribes to negotiate a resolution. A274.

In the following years, despite repeated efforts by both Tribes to persuade Congress to resolve the matter, Congress did not take any action. In 2006, following an inquiry from the California congressional delegation and briefing by both Tribes, the Secretary reevaluated whether the Settlement Act provided authority for an administrative disbursement of the Settlement Fund balance. The Yurok Tribe proposed to provide a new waiver resolution consistent with the Act and argued that such a resolution would clear the way for release of the funds to it. A310-14. The Hoopa Tribe argued that a new waiver would not be effective. A315-21. Although the Hoopa Tribe had initially asked Interior to pay the Settlement Fund balance to it, the Tribe subsequently took the position that only Congress could direct the distribution of that money.

Special Trustee Swimmer concluded on March 1, 2007 that Interior could disburse the funds to the Yurok Tribe if the Tribe submitted a new resolution as it

had proposed. A322-24. He acknowledged Interior's past position on the issue, and explained his rationale for now reaching a different conclusion. In brief, he explained that the Settlement Act did not specifically provide that bringing a takings claim against the United States would result in forfeiture of the benefits of the Act, and because the Hoopa Tribe had already received all its benefits under the Act, "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." A323-24.

On March 21, 2007, the Special Trustee accepted Yurok Tribal Council Resolution 07-037 as satisfying the requirements of the Settlement Act, and gave the Hoopa Tribe 30 days to file suit to seek to enjoin the payment to the Yurok Tribe. A325-27. The Hoopa Tribe did not do so,[18] and Interior disbursed the funds to the Yurok Tribe on April 20, 2007. A337-38. The $37 million the Tribe would have received in 1991 had since grown to over $80 million. A5.

H. The Yurok Tribe's Per Capita Distribution

As explained above, the Settlement Act, Section 1300i-6(b), authorized the Hoopa and Yurok Tribes to make per capita distributions from their apportioned

---

[18] The Hoopa Tribe sought administrative review by the Interior Board of Indian Appeals, which dismissed the appeal for lack of jurisdiction. A328-331. The decisions of the Special Trustee were Interior's final decisions. *See* A335 (Letter from Deputy Solicitor to Chairman, Hoopa Valley Tribe, dated April 20, 2007). IBIA review was thus not a necessary predicate for judicial review under the APA.

funds to their members. However, apart from the $5,000 per capita distribution the Hoopa Tribe was authorized to make at any time (which it made on April 15, 1991), the Tribes were not permitted to make per capita distributions for ten years from the date when Interior made the individual payments (which occurred following the D.C. Circuit's May 18, 1993 decision in the *Heller, Ehrman* litigation).

After receiving its payment from the Settlement Fund on April 20, 2007, the Yurok Tribe decided to make a per capita distribution to its members. Consistent with the Yurok Constitution, the Yurok members voted in favor of the distribution. The Secretary was neither required nor asked to approve the Tribe's decision. The Yurok Tribe made the distribution on January 15, 2008. A339.

SUMMARY OF ARGUMENT

The Court of Federal Claims correctly held that the Hoopa Plaintiffs were not injured by Interior's payment of the Settlement Fund balance to the Yurok Tribe in 2007 or by the Yurok Tribe's 2008 per capita distribution of a portion of that money, and thus had no standing to bring this breach of trust suit based on these actions. The Hoopa Tribe conceded that it was not a beneficiary of the Settlement Fund after it received its share of the Settlement Fund in 1991, and the Settlement Act plainly provided that individual Hoopa members were never

beneficiaries of the Settlement Fund at all. But, of course, that does not mean that Congress did not fairly provide for the members of the Hoopa Tribe. In addition to giving the Hoopa Tribe about 40% of the Settlement Fund, which it could choose to distribute to its members per capita, Congress also 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 Court of Federal Claims properly rejected the argument that individual Hoopa members had some legally cognizable interest in the Settlement Fund under the decisions in the *Short* case even though they did not have one directly under the Settlement Act. The *Short* decisions apply only to per capita distributions made before passage of the Settlement Act and have no applicability to post-Settlement Act per capita distributions. In enacting the Settlement Act, Congress determined rights to the money transferred into the newly established Settlement Fund, supplanting the prior law that determined rights to revenue derived from the Joint Reservation.

Because individual Hoopa members were not injured and have no standing, the Hoopa Tribe has no standing in its asserted capacity as *parens patriae* for its individual members. Moreover, even if the twelve named plaintiffs had standing, the Hoopa Tribe would still not have standing as *parens patriae* for the remaining

members. The general rule is that neither a state nor an Indian tribe can sue the United States in a *parens patriae* capacity. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). A few district courts have recognized an exception to this general rule and have allowed states to sue the United States as *parens patriae* for declaratory and injunctive relief to enforce federal statutes. But whatever the vitality of that exception, it cannot extend so far as to permit states or tribes to sue the United States as *parens patriae* in suits for damages.

In the event this Court were to conclude that the Hoopa Plaintiffs had standing, it should remand the case to the Court of Federal Claims for decision in the first instance of all issues remaining in the case. However, because the Hoopa Plaintiffs went on to argue in their Initial Brief that the Settlement Act did not authorize the Special Trustee to disburse the Settlement Fund balance to the Yurok Tribe, we present herein a short response so as not to leave the incorrect impression that the argument has merit. Because the Settlement Act was ambiguous as to how Interior was to proceed in the event the Yurok Tribe filed a suit challenging the Settlement Act and lost, Interior's interpretation of the Settlement Act is entitled to deference. Special Trustee Swimmer reasonably interpreted the Settlement Act to permit him to accept the Yurok Tribe's 2007

waiver resolution.

STANDARD OF REVIEW

This court reviews a grant of summary judgment by the Court of Federal Claims, including its interpretation of statutes, de novo. *Fathauer v. United States*, 566 F.3d 1352, 1353 (Fed. Cir. 2009). This Court also reviews dismissals for lack of standing without deference. *Lucent Technologies, Inc. v. Gateway, Inc.*, 543 F.3d 710 (Fed. Cir. 2008).

ARGUMENT

A. Hoopa Plaintiffs Were Not Beneficiaries of the Settlement Fund

Hoopa Plaintiffs' breach of trust claim is based on the erroneous assertion that they were beneficiaries of the Settlement Fund under the Settlement Act, the 1864 Act, 25 U.S.C. § 407 and the law of the *Short* case. The short response to this assertion is that the Settlement Act determined the beneficiaries of the Settlement Fund it created, and under the plain language of that Act, individual Hoopa members were not beneficiaries.

1. The Settlement Act Governed Rights to the Settlement Fund and Did Not Give Individual Hoopa Indians Any Rights

The Settlement Act specified the beneficiaries of the Settlement Fund and the specific interest of each in that Fund. The beneficiaries were: (1) the Hoopa Tribe (25 U.S.C. § 1300i-3(c)); (2) the Yurok Tribe (25 U.S.C. §§ 1300i-3(d),

1300i-6(a)); (3) the individuals on the Settlement Roll who would elect membership in the Yurok Tribe (25 U.S.C. § 1300i-5(c)(3)); and (4) the individuals on the Settlement Roll who would elect to receive the $15,000 lump-sum payment option (25 U.S.C. § 1300i-5(d)).

The Settlement Act did not designate any individual member of the Hoopa Tribe as a beneficiary of the Settlement Fund. Hoopa members enrolled as of August 8, 1988 were not eligible for inclusion on the Settlement Roll (25 U.S.C. § 1300i-4(a)(1)(c)), and any Indians included on the Settlement Roll who elected to enroll in the Hoopa Tribe were not entitled to receive any individual payments from the Settlement Fund (25 U.S.C. § 1300i-5(b)).[19/]

The Settlement Act provided that all persons on the Settlement Roll – after electing one of the three options (Hoopa tribal membership, Yurok tribal membership, or lump sum payment) – "shall no longer have any right or interest whatsoever . . . in the Settlement Fund." 25 U.S.C. §§ 1300i-5(b)(4), (c)(4) and (d)(3). It was not necessary for the Settlement Act to include a similar provision for individuals previously enrolled in the Hoopa Tribe because the Act expressly excluded them from the Settlement Roll.

[19/] As noted above, no one was enrolled in the Hoopa Tribe pursuant to this provision. The 12 named plaintiffs were all enrolled members of the Hoopa Tribe prior to August 8, 1988. A107.

Section 1300i-6(b) permitted the Hoopa Tribe to exercise its sovereign authority to make per capita distributions to its members from the money the Tribe received from the Settlement Fund, subject to specified restrictions on timing and amount. And the Hoopa Tribe in fact made a $5,000 per capita distribution within a few days of receiving its share from the Settlement Fund under 25 U.S.C. § 1300i-3(c). But, as Hoopa Plaintiffs acknowledge (Br. 36), "individual Hoopa Plaintiffs, as enrolled members of the Tribe, did not receive any distribution directly from the Settlement Fund." Hoopa Plaintiffs thus concede that neither 25 U.S.C. § 1300i-6(b) nor any other Settlement Act provision made them beneficiaries of the Settlement Fund.

While Hoopa Plaintiffs repeatedly assert that "[t]he beneficiaries of the [Settlement Fund] trust are the 'Indians of the Reservation,' which specifically include Hoopa Plaintiffs" (*see, e.g.,* Br. 20), no provision of the Settlement Act in fact provided that every "Indian of the Reservation" was to be a beneficiary of the Settlement Fund.

Hoopa Plaintiffs cite (Br. 20) the Settlement Act's definition of "Indian of the Reservation," 25 U.S.C. § 1300i(b)(5), but that definition was used only in 25 U.S.C. § 1300i-4(a) to specify one criterion for inclusion on the Settlement Roll. Subsection 1300i-4(a)(1)(C) then excluded enrolled members of the Hoopa Tribe

from the Settlement Roll.

Hoopa Plaintiffs' heavy reliance on 25 U.S.C. § 1300i-3(b) is similarly misplaced. *See* Hoopa Br. 29, 32-33, 34, 35, 37, 38, 43, 44, 45, 47, 56. That section provides:

> The Secretary shall make distribution from the Settlement Fund as provided in this subchapter and, pending payments under section 1300i-5 of this title and dissolution of the fund as provided in section 1300i-6 of this title, shall invest and administer such fund as Indian trust funds pursuant to section 162a of this title.

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.

Hoopa Plaintiffs take issue (Br. 34-36) with the Court of Federal Claims' statement that "only the Yurok were entitled to monies remaining in the Fund in 2007," arguing that "the Yurok Tribe had no right to any monies in the Settlement Fund absent further direction from Congress" because the Yurok Tribe failed to adopt a waiver resolution before November 25, 1993. This argument misses the mark. Under the Settlement Act, while a Yurok waiver resolution was relevant to the issue whether Interior could release the Settlement Fund balance to the Yurok Tribe, it was not relevant to the Yurok Tribe's status as a beneficiary of the Settlement Fund. In order to determine standing, the Court of Federal Claims only

had to determine whether the Hoopa Plaintiffs were beneficiaries of the Settlement Fund as of April 20, 2007 when Interior took the action challenged here and released the Settlement Fund balance to the Yurok Tribe. The Yurok Tribe was the sole beneficiary at that time.

As explained in Statement of Facts Part D.2 (pp. 12-18 above), the Settlement Act provided for funds to be apportioned to the Hoopa Tribe and to the Yurok Tribe, and for these funds to be set aside in separate trust accounts for each tribe, upon the date of publication of the option election date (which occurred on April 12, 1991 when Interior provided personal notice to each person on the Settlement Roll of their enrollment options). Release of the Yurok's separate trust account was made contingent on adoption of a waiver resolution, but that could not be accomplished until at least six months later with the election and convening of the Yurok Interim Council (which occurred on November 25, 1991). Thus, Congress' establishment of a separate trust account for the benefit of the Yurok Tribe was not contingent on a waiver.

This two-step process is evident in 25 U.S.C. § 1300i-1(c)(4), providing that the "apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 . . . shall not be effective" until the Yurok Tribe adopted a waiver resolution (emphasis added). Congress did not direct that the funds would not be

set aside for the Yurok Tribe until it adopted a waiver resolution. All other beneficiaries having already received their payments, the Yurok Tribe was without question the sole beneficiary of the Settlement Fund balance in 2007.

2. Any Statutory Duty the United States Owed to Individual Members of the Hoopa Tribe under the 1864 Act and 25 U.S.C. § 407 Was Superseded by the Settlement Act

Hoopa Plaintiffs also argue incorrectly that they were beneficiaries of the Settlement Fund under the 1864 Act (Br. 2, 19, 31), and under 25 U.S.C. § 407, the general statute governing the sale of timber on Indian reservations (Br. 2, 19, 20, 21, 25, 28, 31, 32). These statutes do not override the specific provisions of the Settlement Act discussed above. Any statutory duties the United States may previously have owed to individual Hoopa Indians under the 1864 Act or 25 U.S.C. § 407 were supplanted by the Settlement Act's specific provisions.

The 1864 Act is relevant only as historical background. It specified the number of Indian reservations to be established in California and provided for the organization of the Indian service in California. The Joint Reservation was established pursuant to the 1864 Act, but the Act did not specify any particular duties relating to the Joint Reservation or revenues derived therefrom. *Accord Karuk Tribe*, 209 F.3d at 1375-76 (neither the 1864 Act nor any other law prior to the Settlement Act established any vested rights to the Joint Reservation in any

party). To the extent the Settlement Act conflicted with the 1864 Act, which it did not, "a specific policy embodied in a later federal statute" controls over an earlier general statute. *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998).

Nor does the general timber statute, 25 U.S.C. § 407, avail the Hoopa Plaintiffs. It 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 Settlement Act amended 25 U.S.C. § 407 to remove the language relied on in *Short*. *See* A192 (Pub. L. No. 100-580 § 13); *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"). 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 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. *See* Hoopa Br. 21 n.11.

3. The Law of the *Short* Case Did Not Govern Rights to the Settlement Fund

Hoopa Plaintiffs repeatedly argue that the Settlement Act endorsed this Court's mandate in *Short* with respect to post-Settlement Act distributions. Hoopa Br. 8, 26, 29, 30. To the contrary, the text and legislative history of the Settlement Act make it clear that Congress intended to redefine rights to the pre-Settlement Act revenues that were still being held by the Secretary and to terminate the law of the *Short* case with respect to all post-Settlement Act per capita distributions made by the Hoopa and Yurok Tribes. As this Court observed in the *Karuk* case, the "Settlement Act nullified the *Short* rulings." 209 F.3d at 1372.

Hoopa Plaintiffs completely ignore the clear statements in the Senate Report that the Settlement Act was intended to end individual rights in the reservation and in the escrowed funds, which were to be transferred to a new Indian trust account – the Settlement Fund – thus bringing the reservation and funds "within the mainstream of federal Indian law." *See* Statement of Facts Part C (pp. 9-11 above). Congress then specified distributions to be made from that account, which did not include any payments to individual Hoopa members.

Hoopa Plaintiffs misread 25 U.S.C. § 1300i-2, 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." 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. Contrary to the Hoopa Plaintiffs' assertion (Br. 29-30), 25 U.S.C. § 1300i-2 does not more broadly "preserve[] the *Short* rulings concerning trust funds generated prior to partition of the Joint Reservation." It 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. Hoopa Plaintiffs fail to address this explanation of Congress' intent in 25 U.S.C. § 1300i-2. For the purpose of determining the Settlement Fund beneficiaries, the *Short* decisions are irrelevant.

The Hoopa Plaintiffs also rely heavily on some language they take out of context from the Court of Federal Claims' 1993 decision in *Short VI*, decided after passage of the Settlement Act. Hoopa Br. 20-21, 28-29, 30, 31, 44. The *Short* plaintiffs had argued that the April 1991 per capita distribution the Hoopa Tribe

made to its members from its portion of the Settlement Fund was a distribution to fewer than all Indians of the Reservation entitling them to damages under the law of the *Short* case. The court correctly rejected this claim to additional damages (just as it correctly rejected the Hoopa Plaintiffs' claim to damages in this case).

The Hoopa Plaintiffs incorrectly read a passage in the opinion to suggest that the law of the *Short* case has continuing applicability to post-Settlement Act distributions. The Court of Federal Claims observed that "the Settlement Act is simply another statute that constrains the Secretary's discretion in new ways." 28 Fed. Cl. at 595. But the court then went on to explain that "[25 U.S.C. § 1300i-2] reflects Congress' general intention not to change the government's liability for damages arising out of unlawful per capita distributions made prior to the Settlement Act," *id.* (emphasis added); that "the Senate committee report on the Settlement Act reflects some congressional intention that the Settlement Act supersede the *Short* case, to the extent there is a conflict between them," *id.*; that this Court's decision in *Short III* acknowledged that the law of the *Short* case only has vitality "'while the situation in the Reservation remains the same,'" *id.* (emphasis supplied by Court of Federal Claims); and that "[c]learly, the situation on the Reservation changed with the passage of the Settlement Act," *id.* This Court had no occasion to address this portion of the Court of Federal Claims'

opinion because the *Short* plaintiffs did not press this particular claim for damages on appeal.

The Court of Federal Claims in this case properly construed the quoted language from *Short VI* in context and found in it no support for the Hoopa Plaintiffs' current claim to be Settlement Fund beneficiaries. And, of course, a statement in a 1993 decision of the Court of Federal Claims, never reviewed by this Court, is not binding precedent in this Court.

B. Because the Hoopa Plaintiffs Were Not Beneficiaries of the Settlement Fund, They Have No Standing to Sue the United States for Breach of Trust

"The party invoking federal jurisdiction bears the burden of establishing [standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In order to establish standing, a plaintiff must demonstrate that he has 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.'" *Lujan*, 504 U.S. at 560 (citations omitted).[20] The Court of Federal Claims correctly concluded that – even if the Hoopa Plaintiffs were

---

[20] "The Court of Federal Claims, though an Article I court, 28 U.S.C. § 171 (2000), applies the same standing requirements enforced by other federal courts created under Article III." *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

correct that the Settlement Act did not authorize Interior to make a payment to the Yurok Tribe in the absence of a waiver resolution adopted before November 25, 2003 – Hoopa Plaintiffs were not entitled to any of the money remaining in the Settlement Fund and thus did not establish any "injury in fact." The conclusion that the Hoopa Plaintiffs lack standing does not require a detailed analysis of the nuances of standing jurisprudence, but flows from the fundamental fact that Hoopa Plaintiffs were not beneficiaries of the Settlement Fund.

Hoopa Plaintiffs assert (Br. 33) that the Court of Federal Claims "erred by requiring [them] to prove that they had a 'legal entitlement' to the trust funds at issue," because, they argue, under the law of the *Short* case, Indians of the Reservation had a right to damages even without a vested interest. But as this Court recognized in *Karuk*, the "Settlement Act nullified the *Short* rulings." 209 F.3d at 1372. The court in this case only required Hoopa Plaintiffs to establish what *Lujan* requires – the "invasion of a legally protected interest." A8. The court properly looked for that interest in the Settlement Act, not in the law of the *Short* case, and found no entitlement there of any nature.[21]

---

[21] Hoopa Plaintiffs' citation (Br. 22, 33) to *Price v. State of Hawaii*, 764 F.2d 623, 630 (9th Cir. 1985) – a case that predates *Lujan* – is unavailing. In that case, a Native Hawaiian tribal body claimed that the State of Hawaii was violating a provision of the Admission Act and sought to compel the State to use the proceeds from a federal land trust for the betterment of native Hawaiians. The Ninth Circuit

The Hoopa Tribe had only a bare hope that it might persuade Congress to enact legislation that would grant some or all of the Settlement Fund balance to it. The Hoopa Tribe has not claimed damages based on the frustration of this hope, no doubt recognizing that one cannot call upon the courts to remedy disappointment of this nature. The purpose of the Article III limitation on standing is to ensure "'the proper – and properly limited – role of the courts in a democratic society.'" *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148 (2009), *quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Hoopa Tribe could ask the President and/or Congress to take the matter up with the Secretary, but could not invoke judicial authority. The Hoopa Tribe thus tried to recast its tribal grievance as a claim by individual Hoopa members for damages under the law of the *Short* case. But that effort fails for all the reasons set forth above.

This case presents a factual scenario opposite to the one presented in *LeBeau v. United States*, 474 F.3d 1334 (Fed. Cir. 2007). In *LeBeau*, plaintiffs (a

---

held that the tribal body had standing to sue because it suffered economic injury from the State's failure to use the trust fund for the specified purpose and because enjoining the violation would redress that injury. The court affirmed dismissal of the case, however, because the tribal body had no private right of action under the Admission Act. The instant case is distinguishable. The Hoopa Plaintiffs did not even try to enjoin the disbursement to the Yurok Tribe, and even if they had, they could not have received any of the money because they were not beneficiaries under the Settlement Act (*i.e.*, there was neither injury nor redressability).

class of Sisseton-Wahpeton Sioux Tribe lineal descendants) were aggrieved because Interior took so long to pay them their share of a Judgment Fund as specified in a 1972 distribution act that Congress had the opportunity in 1998 to enact new legislation readjusting the shares of the various beneficiaries in the Judgment Fund. This Court held that they had no actionable claim against the United States because Congress had the authority to reduce their share as long as the money was still held by the Secretary. *Id.* at 1342. In contrast, the Hoopa Tribe is displeased because Interior did not wait long enough, in its view, to pay the Yurok Tribe the Settlement Fund balance and the Hoopa Tribe thus lost any further opportunity to convince Congress that it should make it a beneficiary of the money still held in the Settlement Fund. Because the *LeBeau* plaintiffs were beneficiaries of the Judgment Fund, their claim was rejected on the merits rather than for lack of standing. In this case, the Hoopa Plaintiffs are not beneficiaries and their suit fails for lack of standing.

C. Even if Individual Members of the Hoopa Tribe Were Beneficiaries of the Settlement Fund, Which They Were Not, the Hoopa Tribe Would Still Not Have Standing to Sue the United States as *Parens Patriae* for its Remaining Members

The United States Supreme Court has clearly stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son*, 458 U.S. at 610 n.16, citing *Mellon*, 262

U.S. at 485-86. This is because it is the United States, not the State, that represents citizens as *parens patriae* in their relation to the Federal Government. It logically follows, then, as the Claims Court held in *Northern Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986), that a tribe, which is "somewhat akin to a state" in the "hierarchy of governments," similarly does not have standing as *parens patriae* to bring an action against the Federal Government. Remarkably, the Hoopa Plaintiffs rely on *Snapp*, a suit brought by Puerto Rico against a private party, in support of their *parens patriae* standing argument (Br. 39, 40, 41) without even acknowledging the Supreme Court's statement in that case that the doctrine cannot be invoked in a suit against the Federal Government.

Hoopa Plaintiffs cite two additional cases in support of their assertion that "[c]ourts recognize the authority of Indian tribes to sue the United States in a *parens patriae* capacity" (Br. 39 n.19), but neither case so holds.

In *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996) ("*Sisseton-Wahpeton II*"), the only reference to *parens patriae* standing is in the caption, which reveals that each of three tribes purported to sue "individually and in its *parens patriae* capacity on behalf of its members." Indeed, the court did not discuss standing at all. The plaintiff tribes were beneficiaries of an Indian Claims Commission Act judgment fund and sued to enjoin Interior from making

payments from the fund to other beneficiaries (nonmember lineal descendants of the aboriginal tribe). The tribes plainly had standing as tribes,[22/] and whether each tribe might also have had standing as *parens patriae* for its members had no bearing on the issues the court addressed in that appeal.

Similarly, the only reference to *parens patriae* standing in *In re Blue Lake Forest Products*, 30 F.3d 1138 (9th Cir. 1994), is in the caption. The tribe in that case sought a declaration that title to certain timber had remained in the tribe and had not passed to the debtor lumber mill such that the tribe was entitled to the proceeds from sale of the lumber. As in *Sisseton-Wahpeton II*, the tribe plainly had standing on its own behalf to litigate the issue before the court and there was no need to discuss standing.

[22/] The pertinent facts of the case are disclosed in an earlier decision, *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588 (9th Cir. 1990) ("*Sisseton-Wahpeton I*"), in which the Ninth Circuit reversed the district court's dismissal of the suit based on the statute of limitations. The three tribes sued the United States in 1987 challenging a 1972 statute providing for distribution of money appropriated to pay an Indian Claims Commission consent judgment to the three tribes and lineal descendants not presently eligible for membership in any of the three tribes. The statute specified percentages to be paid to each of the tribes and to the lineal descendants. The statute authorized each tribe to retain 30% of its award for tribal programs, and directed per capita distribution of the balance to tribal members. Those facts reveal that each tribe plainly had standing on its own behalf. In April 1987, the tribes sued "to block payment to the lineal descendants and to require the United States to pay their share instead to the Tribes." 895 F.2d at 591.

Nor does the article the Hoopa Plaintiffs cite (Br. 39 n.19) reference a single case recognizing the right of an Indian tribe to sue the United States in a *parens patriae* capacity. *See* C. Fraser, Note, *Protecting Native Americans: the Tribe as Parens Patriae*, 5 Mich. J. Race & L. 665 (Spring 2000). It merely noted that some courts have recognized an exception to *Mellon*'s general prohibition for suits by states to enforce federal statutes, and argued that where courts have recognized this exception, courts should also recognize such an exception for tribes. *Id.* at 694. The article cited one case, *Kansas v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990), a suit under the APA for declaratory and injunctive relief relating to Kansas' request to the Federal Emergency Management Agency for declaration of a "major disaster." The *Kansas* case followed the reasoning in *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984), an APA suit for declaratory and injunctive relief relating to a Medicare regulation, which analyzed in some detail the general bar on *parens patriae* suits against the Federal Government and concluded that an exception should be recognized for "a suit brought to enforce a federal statute and to enjoin agency action allegedly in contravention of that statute." *Id.* at 1160. As the *Abrams* court recognized, its rationale for

distinguishing *Mellon* did not apply to suits for damages.[23]

We are aware of only one case in which a court has allowed a plaintiff to sue the United States for damages in a *parens patriae* capacity – *Quechan Indian Tribe v. United States*, 535 F.Supp.2d 1072 (S.D. Cal. 2008), a suit for damages arising from a power line pole-replacement project on a federal easement running across tribal land. In an interlocutory ruling, the district court declined to dismiss the Tribe's allegations made in its capacity as *parens patriae* regarding harm to individual tribal members. 535 F.Supp.2d at 1116-17. That case is ongoing, and the United States reserves the right to seek correction of that ruling, either in further proceedings in the district court, if appropriate, or on appeal, if necessary.[24]

---

[23] States have been permitted to proceed as *parens patriae* in a couple of other suits against the United States for declaratory and injunctive relief. *United States Department of the Interior v. FERC*, 952 F.2d 538, 544 n.4 (D.C. Cir. 1992); *American Rivers v. FERC*, 201 F.3d 1186, 1205 (9th Cir. 2000). However, neither case addressed *Mellon*'s general bar on *parens patriae* suits against the United States, and in both cases the suits could have proceeded even without the states as plaintiffs because the organizational plaintiffs in each case had standing.

[24] The United States has not contested the Quechan Tribe's standing on its own behalf, but challenged the Tribe's standing as *parens patriae*, arguing that allowing *parens patriae* standing in this suit for damages would be tantamount to allowing a class action, which is not permitted under the Federal Tort Claims Act, and would permit the Tribe to introduce evidence of individual members' emotional distress that would not otherwise be admissible. The Tribe countered that *parens patriae* standing would neither increase damages nor expand the scope of relevant evidence, and the district court appeared to credit the Tribe's representations. It therefore remains to be seen what difference, if any, the district

The district court in *Quechan* relied on five cases, all of which involved claims for declaratory and injunctive relief rather than damages. Four of these cases – *American Rivers v. FERC*, *Kansas v. United States*, *Abrams v. Heckler*, and *Sisseton-Wahpeton II* – are discussed above. In the fifth, *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F.Supp. 791 (D.D.C. 1990), the court denied *parens patriae* standing on the ground that the tribe was not acting on behalf of all its members without addressing whether a tribe could ever sue the United States as *parens patriae* for its members. Thus, none of the five cases the *Quechan* district court relied upon supports an expansion of the exception to the general rule barring *parens patriae* suits against the United States. "Expanding" the exception to include damages suits against the United States would effectively eviscerate the general bar announced by the Supreme Court in *Mellon* and reaffirmed in *Snapp*.

Moreover, a group of plaintiffs seeking individual money damages cannot permissibly end run class action procedures by having a state or tribe purport to sue as *parens patriae* on their behalf. In the *LeBeau* litigation, for example, the group of nonmember lineal descendants were permitted to sue as a class for breach of trust allegedly arising from Interior's delay in distributing to them their shares

---

court's ruling on *parens patriae* will have on the outcome of the case. In this case, however, the Hoopa Tribe has no standing in its own right and is unquestionably seeking to increase damages from 12 members to all tribal members.

of a judgment fund. *See LeBeau*, 474 F.3d at 1336.[25]

D. On the Merits, Interior Reasonably Interpreted the Settlement Act to Authorize Release of the Yurok Tribe's Apportioned Share

In the event this Court reverses the "no standing" decision, this Court should allow the parties to brief the merits in light of this Court's direction, and to allow the Court of Federal Claims to decide in the first instance the remaining issues in the case. However, we briefly respond here to their primary argument that the Settlement Act did not authorize Interior to release the Settlement Fund balance to the Yurok Tribe.

Even if this Court were to conclude that the Hoopa Plaintiffs were beneficiaries of the Settlement Fund, their breach of trust claim would still fail. Hoopa Plaintiffs essentially make three arguments at pages 48 to 57 of their Brief: (1) the Settlement Act provided that only the Yurok Interim Council could adopt the required waiver resolution, and it did not; (2) the Yurok Tribe had to adopt a waiver resolution before final judgment in their takings suit, and it did not; and (3) Interior had previously interpreted the Settlement Act to prohibit it from

---

[25] In support of their standing argument, the Hoopa Plaintiffs reference (Br. 40) a document entitled "Proposed Amendments to the Hoopa-Yurok Settlement Act Developed jointly by the Hoopa Valley Tribe and the Yurok Tribe in Formal Mediation," dated December 3, 2003. A290-94. A bill to amend the Settlement Act, S. 2878, was introduced in 2004 (A295-309), but was not enacted. The 2003 proposed amendments have no ongoing vitality.

releasing the Settlement Fund balance to the Yurok Tribe and could not reevaluate its interpretation when the Yurok Tribe proposed to adopt a new resolution. None of these arguments has merit. Congress did not specifically address what would happen if the Yurok Tribe brought a suit challenging the Settlement Act and lost. This Court must therefore defer to Interior's reasonable interpretation of the Settlement Act as authorizing release of the Settlement Fund balance to the Yurok Tribe upon the Tribe's adoption of the 2007 waiver resolution, and therefore conclude that such distribution was not a breach of trust.

The text (25 U.S.C. § 1300i-11) and legislative history of the Settlement Act reveal that Congress contemplated the possibility of lawsuits challenging the Act as a taking of property, and afforded itself some opportunity to respond to a judicial decision adverse to the United States. While 25 U.S.C. § 1300i-11(c)(1) appears to require the Secretary to submit a report to Congress following a final decision in a takings suit whether favorable or adverse to the United States, and the Secretary in fact submitted a report following the "no taking" decision in the *Karuk Tribe* litigation, the purpose of the report – as evident in 25 U.S.C. § 1300i-11(c)(2) and in the legislative history – was to allow Congress to respond to an adverse decision. Section 1300i-11(c) was drafted, at the request of the Department of Justice, to allow Congress to take action, if necessary, to avoid

making payment for a permanent taking. A178. In contrast, neither the text nor legislative history of the Settlement Act reveal that Congress had formed an intent as to how Interior was to proceed in the event of a judicial decision of "no taking."

While Congress might have hoped that the Yurok Interim Council would promptly adopt a waiver resolution and forgo a takings claim, Congress did not expressly provide that the Yurok Tribe would completely forfeit its apportioned share of the Settlement Fund in that event, as the Special Trustee explained in his March 1, 2007 decision. Surely the Act would have expressly stated that there would be such a drastic result if it had been intended. Nor did the Settlement Act specify any contingent arrangement for the money that would be in the Yurok Tribe's separate trust account in the event the Yurok Interim Council filed a lawsuit.[26] The Settlement Act plainly did not authorize the Secretary to give the Yurok's money to anyone else. In addition, while Section 1300i-11 set clear

---

[26] In other situations, Congress has made express provision for the redistribution of trust monies following litigation. For example, the Mississippi Sioux Tribes Judgment Fund Distribution Act (the act at issue in the *LeBeau* case) included provisions that would readjust the distribution of trust funds established under that Act based on the outcome of litigation challenging the constitutionality or validity of those distributions. 25 U.S.C. §§ 1300d-26(a), (b), 1300d-27(a), (e). Likewise, the Cherokee, Choctaw and Chickasaw Nations Claims Settlement Act established a "special holding account" to include ten percent of the trust funds appropriated under that Act in the event that other claimant tribes successfully challenged the Act as extinguishing their interests. 25 U.S.C. § 1779f(b).

deadlines for filing a takings claim, the Act did not set a clear deadline for adoption of a waiver resolution. Interior thus had to interpret the waiver provisions of the Settlement Act, informed by statutory context and the Settlement Act's essential statutory purpose. *See, e.g., United States v. Alvarez-Sanchez,* 511 U.S. 350, 358 (1994); *Deal v. United States*, 508 U.S. 129, 132 (1993); *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157 (1996).

Interior's interpretation of the Settlement Act is entitled to deference. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), the first question is "whether Congress has directly spoken to the precise question at issue." "If the intent of Congress is clear, that is the end of the matter." *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Here, Congress did not express an intent about what would happen to the Yurok's money if the Yurok Tribe filed a takings claim and lost, and the two-year term of the Interim Council ended before the litigation concluded. Congress charged Interior with administering the Settlement Act, and then implicitly left it to Interior to work this out if necessary. "Ambiguities in statutes within an agency's jurisdiction to

administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts." *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

Interior's interpretation was reasonable. Interior started from the fact that the Settlement Act authorized both a takings claim and a waiver resolution, and did not specify that those actions were mutually exclusive. Congress could easily have made it clear that the two actions were mutually exclusive – by stating expressly that the Yurok Tribe would forfeit its apportioned share by filing a takings suit, by providing for a contingent beneficiary in the event the Yurok Tribe filed a takings suit, or by stating a clear deadline for the waiver – but it did not. Given Congress' clear intent to apportion the Settlement Fund between the Hoopa Tribe and the Yurok Tribe, and given that the Hoopa Tribe had already received all the benefits to which it was entitled, Interior permissibly concluded that it was reasonable to resolve the Act's ambiguity in favor of payment to the Yurok Tribe.

Interior was entitled to reconsider its interpretation of the Settlement Act's

waiver provisions. "An initial agency interpretation is not instantly carved in stone," because the agency "'must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Brand X*, 545 U.S. at 981, *quoting Chevron*, 467 U.S. at 863-64. Indeed, as the Court pointed out in *Brand X,* the EPA's statutory interpretation at issue in *Chevron* was upheld even though it was a "recent reversal of agency policy." 545 U.S. at 981-82. If a change in position is explained, as it was here, the agency's interpretation is entitled to deference under *Chevron*. *Id.* at 981. Interior's initial preference understandably was for Congress to provide instruction on the disposition of the Settlement Fund balance, but when Congress declined to provide such instruction, Interior appropriately undertook to reanalyze the statute it had been charged with administering.

Hoopa Plaintiffs argue unpersuasively (Br. 51-53) that the Settlement Act compels the conclusion that the date of dissolution of the Yurok Interim Council was the deadline for the waiver resolution. It is true that the bill that became the Settlement Act originally provided for adoption of a waiver resolution upon a vote of the Tribe's eligible voters as a whole (referred to as the "general council" of the tribe), and that Congress redrafted the legislation to require instead the vote of a Yurok elected governing body. *See* Hoopa Br. 51; A135, 138. The Settlement Act, Section 1300i-1(c)(4), specifically references the "Interim Council." But, as

the Special Trustee explained, the "Act did not preclude or otherwise divest power from the permanent Yurok Council also to waive claims." A324. Without an express statutory deadline for the waiver, Interior reasonably concluded that the waiver could be provided by the Yurok Tribe's governing body, either the Interim Council or the permanent Yurok Tribal Council.

Section 1300i-1(e) is instructive. That subsection provided that the Yurok Tribe would not take over management of the Yurok Reservation "until such time as the Yurok Tribe has been organized pursuant to section 1300i-8." Section 1300i-8 provided for the Tribe to organize under the IRA, but Section 1300i-1(c)(4)(D) precluded the Yurok Tribe from organizing under Section 1300i-8 in the absence of a waiver resolution. The Yurok Tribal Council was thus organized outside of the IRA. Interior reasonably interpreted 25 U.S.C. § 1300i-1(e) not to preclude the Yurok Tribal Council from taking over management of the Yurok Reservation. Congress apparently drafted 25 U.S.C. § 1300i-1 with what it considered the most likely (or perhaps preferred) scenario in mind – that the Yurok Interim Council would adopt a waiver resolution before the short statute of limitations on filing a takings claim ran, and that the permanent Yurok governing body would then organize under the IRA. But in so drafting, Congress did not evidence a clear intent to preclude other scenarios – a waiver

resolution after the Yurok Interim Council dissolved or a non-IRA Yurok governing body managing the Yurok Reservation.

Nor is the lack of a provision specifically authorizing the Yurok permanent governing body to enact a waiver resolution of any significance. The Yurok Interim Council was a special entity created by the Settlement Act with only those limited powers Congress specifically authorized. 25 U.S.C. § 1300i-8(d)(1) ("The Interim Council shall have no powers other than those given to it by this subchapter."). In contrast, the permanent Yurok governing body would possess the full range of powers inherent in a tribal sovereign and there was no need to provide specific authority for adoption of a waiver resolution.

Hoopa Plaintiffs also argue unpersuasively that a waiver resolution after the conclusion of the *Karuk Tribe* litigation was a nullity. Hoopa Br. 53-56. As Interior pointed out upon reexamination of the Settlement Act, the "waiver provision is not limited solely to the constitutionally-based property claims authorized by the Act and litigated by the Yurok Tribe." A323. Hoopa Plaintiffs argue, in essence, that the Settlement Act must be construed as a classic settlement offer, where Party A, in an effort to resolve a disputed liability, offers to pay money to Party B, but only with the understanding that if Party B rejects the offer and litigates, Party A will dispute that it owes anything at all. But "Party A" in

this case was the United States acting as a trustee and using its best judgment to divide and distribute trust assets among beneficiaries in accordance with the Settlement Act. In addition, the trustee told the beneficiaries that if they believed they were entitled to additional compensation, they could seek it in the Court of Federal Claims.[27] In this situation, Interior reasonably interpreted the Settlement Act not to require the forfeiture of benefits that would ordinarily follow the rejection of a classic settlement offer.

Finally, it is not clear whether the Hoopa Plaintiffs are alleging that some action by the United States apart from the disbursement of the Yurok Tribe's share on April 20, 2007 constituted a breach of trust. Hoopa Plaintiffs state incorrectly that "[o]n December 16, 2008, the Special Trustee approved the Yurok Tribe's distribution in per capita payments," citing to a letter of that date from the Special Trustee to the Yurok Chairperson (A340). Hoopa Br. 16. That letter – written eleven months after the Yurok Tribe made the distribution – provided Interior's view on the tax status of the Tribe's distribution, but did not constitute an approval of the distribution. As the letter explained, the Settlement Act itself provided the

---

[27] Contrary to the Hoopa Plaintiffs' suggestion of a double recovery (Br. 55), if the Yurok Tribe had prevailed on its takings claim, it would have received its apportioned share from the Settlement Fund and then would have received from the U.S. Treasury only the additional amount of money required to make the compensation "just."

requisite federal approval to exempt the distributions from federal and state income taxes within the meaning of 25 U.S.C. §§ 117a and 1407. The last action taken by the United States with respect to this matter was the authorized payment to the Yurok Tribe in 2007.

CONCLUSION

For the foregoing reasons, the Court of Federal Claims held correctly that the Hoopa Plaintiffs lack standing. The court entered judgment for the United States, but the correct disposition of the case is a judgment dismissing the case for lack of jurisdiction. This case should be remanded for correction of that technical error.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Mary Gabrielle Sprague
KATHRYN E. KOVACS
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

September 28, 2009
DJ No. 90-2-20-12425

ADDENDUM

Hoopa-Yurok Settlement Act of 1988, *codified in part as amended at* 25 U.S.C. § 1300i *et seq.*

§ 1300h–7. Constitutional amendment

(a) Notwithstanding any other law or provision in the constitution of the Keweenaw Bay Indian Community, the Secretary shall call an election within 90 days of receipt of a resolution of the Keweenaw Bay Tribal Council requesting an election for the purpose of amending provisions of the constitution of the Keweenaw Bay Indian Community.

(b) The Secretary shall accept as voters eligible to vote on any amendments to the constitution of the Keweenaw Bay Indian Community—

(1) all those persons who were deemed eligible by the Keweenaw Bay Indian Community to vote in the most recent election for the Tribal Council, and

(2) any other person certified by the Keweenaw Bay Indian Community Tribal Council as—

(A) a member of the Keweenaw Bay Indian Community, and

(B) eligible to vote in any election for the Tribal Council.

(Pub. L. 100–420, § 9, Sept. 8, 1988, 102 Stat. 1579; Pub. L. 101–301, § 7, May 24, 1990, 104 Stat. 210.)

AMENDMENTS

1990—Pub. L. 101–301 designated existing provisions as subsec. (a) and added subsec. (b).

§ 1300h–8. Compliance with Budget Act

Notwithstanding any other provision of this subchapter, any spending authority provided under this subchapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts. For purposes of this subchapter, the term "spending authority" has the meaning provided in section 651(c)(2)[1] of title 2.

(Pub. L. 100–420, § 10, Sept. 8, 1988, 102 Stat. 1579.)

REFERENCES IN TEXT

Section 651 of title 2, referred to in text, was amended by Pub. L. 105–33, title X, § 10116(a)(3), (5), Aug. 5, 1997, 111 Stat. 691, by striking out subsec. (c) and redesignating former subsec. (d) as (c).

SUBCHAPTER LXXX—HOOPA-YUROK SETTLEMENT

§ 1300i. Short title and definitions

(a) Short title

This subchapter may be cited as the "Hoopa-Yurok Settlement Act".

(b) Definitions

For the purposes of this subchapter, 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 1300i–1(b) of this title;

(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 1300i–1(b) of this title and the Yurok Reservation in section 1300i–1(c) of this title.[1]

(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 1300i–3 of this title;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 1300i–4 of this title;

(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;

[1] See References in Text note below.

[1] So in original. The period probably should be a semicolon.

(15) "Yurok Reservation" means the reservation described in section 1300i–1(c) of this title; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 1300i–8 of this title.

(Pub. L. 100–580, §1, Oct. 31, 1988, 102 Stat. 2924.)

REFERENCES IN TEXT

This subchapter, referred to in subsecs. (a) and (b), was in the original "this Act", meaning Pub. L. 100–580, Oct. 31, 1988, 102 Stat. 2924, which enacted this subchapter, amended section 407 of this title and section 460ss–3 of Title 16, Conservation, and enacted provisions set out as a note under section 460ss–3 of Title 16. For complete classification of this Act to the Code, see Tables.

§ 1300i–1. Reservations; partition and additions

(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) of this section.

(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, 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 subchapter.

(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.

(b) Hoopa Valley Reservation

Effective with the partition of the joint reservation as provided in subsection (a) of this section, 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) of this section, 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.

(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 1300i–8(d)(2) of this title, 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 465 and 467 of this title, 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 section 13 of this title, 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 1300i–3 and 1300i–6 of this title;

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

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

(D) the organizational authorities of section 1300i–8 of 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 subchapter.

(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.

(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 1300i–8 of this title. 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;[1] section 1162 of title 18, and section 1323(a) of this title.

(Pub. L. 100–580, §2, Oct. 31, 1988, 102 Stat. 2925.)

REFERENCES IN TEXT

Section 2 of the Act of April 8, 1864, referred to in subsec. (b), is section 2 of act Apr. 8, 1864, ch. 48, 13 Stat. 40, which was not classified to the Code.

Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912, referred to in subsec. (b), are not classified to the Code.

Executive Order of October 16, 1891, referred to in subsec. (c), is not classified to the Code.

HOOPA VALLEY RESERVATION SOUTH BOUNDARY ADJUSTMENT

Pub. L. 105–79, Nov. 13, 1997, 111 Stat. 1527, as amended by Pub. L. 105–256, §6, Oct. 14, 1998, 112 Stat. 1897, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Hoopa Valley Reservation South Boundary Adjustment Act'.

"SEC. 2. TRANSFER OF LANDS WITHIN SIX RIVERS NATIONAL FOREST FOR HOOPA VALLEY TRIBE.

"(a) TRANSFER.—All right, title, and interest in and to the lands described in subsection (b) shall hereafter be administered by the Secretary of the Interior and be held in trust by the United States for the Hoopa Valley Tribe. The lands are hereby declared part of the Hoopa Valley Reservation. Upon the inclusion of such lands in the Hoopa Valley Reservation, Forest Service system roads numbered 8N03 and 7N51 and the Trinity River access road which is a spur off road numbered 7N51, shall be Indian reservation roads, as defined in section 101(a) of title 23 of the United States Code.

"(b) LANDS DESCRIBED.—The lands referred to in subsection (a) are those portions of Townships 7 North and 8 North, Ranges 5 East and 6 East, Humboldt Meridian, California, within a boundary beginning at a point on the current south boundary of the Hoopa Valley Indian Reservation, marked and identified as 'Post H.V.R. No. 8' on the Plat of the Hoopa Valley Indian Reservation prepared from a field survey conducted by C.T. Bissel, Augustus T. Smith, and C.A. Robinson, Deputy Surveyors, approved by the Surveyor General, H. Pratt, March 18, 1892, and extending from said point on a bearing of north 73 degrees 50 minutes east, until intersecting with a line beginning at a point marked as 'Post H.V.R. No. 3' on such survey and extending on a bearing of south 14 degrees 36 minutes east, comprising 2,641 acres more or less.

"(c) BOUNDARY ADJUSTMENT.—The boundary of the Six Rivers National Forest in the State of California is hereby adjusted to exclude the lands to be held in trust for the benefit of the Hoopa Valley Tribe pursuant to this section.

"(d) SURVEY.—The Secretary of the Interior, acting through the Bureau of Land Management, shall survey and monument that portion of the boundary of the Hoopa Valley Reservation established by the addition of the lands described in subsection (b).

"(e) SETTLEMENT OF CLAIMS.—The transfer of lands to trust status under this section extinguishes the following claims by the Hoopa Valley Tribe:

"(1) All claims on land now administered as part of the Six Rivers National Forest based on the allegation of error in establishing the boundaries of the Hoopa Valley Reservation, as those boundaries were configured before the date of the enactment of this Act [Nov. 13, 1997].

"(2) All claims of failure to pay just compensation for a taking under the fifth amendment to the United States Constitution, if such claims are based on activities, occurring before the date of the enactment of this Act, related to the lands transferred to trust status under this section."

[1] So in original. The semicolon probably should be a comma.

§ 1300i–2. Preservation of Short cases

Nothing 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.

(Pub. L. 100–580, §3, Oct. 31, 1988, 102 Stat. 2927; Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992—Pub. L. 102–572 substituted "United States Court of Federal Claims" for "United States Claims Court".

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

§ 1300i–3. Hoopa-Yurok Settlement Fund

(a) Establishment

(1) There is hereby established the Hoopa-Yurok Settlement Fund. Upon enactment of this subchapter, 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[1] (c), the Secretary may distribute to the Hoopa Valley Tribe, pursuant to section 123c of this title, 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) of this section 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) of this section.

(3) Until the distribution is made to the Yurok Tribe pursuant to section[1] (d), the Secretary may, in addition to providing Federal funding, distribute to the Yurok Transition Team, pursuant to section 123c of this title, 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) of this section 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) of this section.

(b) Distribution; investment

The Secretary shall make distribution from the Settlement Fund as provided in this sub-

[1] So in original. Probably should be "subsection".

chapter and, pending payments under section 1300i–5 of this title and dissolution of the fund as provided in section 1300i–6 of this title, shall invest and administer such fund as Indian trust funds pursuant to section 162a of this title.

(c) Hoopa Valley Tribe portion

Effective with the publication of the option election date pursuant to section 1300i–5(a)(4) of this title, 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 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.

(d) Yurok Tribe portion

Effective with the publication of the option election date pursuant to section 1300i–5(a)(4) of this title, 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 1300i–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.

(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) of this section and section 1300i–5(c) of this title. 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) of this section and section 1300i–5(c) of this title, shall be available to make the payments authorized by section 1300i–5(d) of this title.

(Pub. L. 100–580, § 4, Oct. 31, 1988, 102 Stat. 2927.)

§ 1300i–4. 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, 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.

(2) The Secretary's determination of eligibility under this subsection shall be final except that any Short plaintiff determined by the United States Court of Federal Claims 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 Court of Federal Claims not to be an Indian of the Reservation shall not be eligible for inclusion on such roll. Children under age 10 on the date they applied for the Settlement Roll who have lived all their lives on the Joint Reservation or the Hoopa Valley or Yurok Reservations, and who otherwise meet the requirements of this section except they lack 10 years of Reservation residence, shall be included on the Settlement Roll.

(b) Right to apply; notice

Within thirty days after October 31, 1988, the Secretary shall give such notice of the right to apply for enrollment as provided in subsection (a) of this section 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.

(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) of this section.

(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) of this section.

(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 1300i–5 of this title, 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 1300i–5(d) of this title and prior to division pursuant to section 1300i–6 of this title.

(3) Persons added to the Settlement Roll pursuant to appeals under this subsection shall not be considered in the calculations made pursuant to section 1300i–3 of this title.

(4) For the sole purpose of preparing the Settlement Roll under this section, the Yurok Transition Team and the Hoopa Valley Business Council may review applications, make recommendations which the Secretary shall accept unless conflicting or erroneous, and may appeal the Secretary's decisions concerning the Settlement Roll. Full disclosure of relevant records

shall be made to the Team and to the Council notwithstanding any other provision of law.

(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.

(Pub. L. 100–580, §5, Oct. 31, 1988, 102 Stat. 2928; Pub. L. 101–301, §9(1), (2), May 24, 1990, 104 Stat. 210; Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992—Subsec. (a)(2). Pub. L. 102–572 substituted "United States Court of Federal Claims" for "United States Claims Court" in two places.

1990—Subsec. (a)(2). Pub. L. 101–301, §9(1), inserted at end "Children under age 10 on the date they applied for the Settlement Roll who have lived all their lives on the Joint Reservation or the Hoopa Valley or Yurok Reservations, and who otherwise meet the requirements of this section except they lack 10 years of Reservation residence, shall be included on the Settlement Roll."

Subsec. (d)(4). Pub. L. 101–301, §9(2), added par. (4).

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

§ 1300i–5. Election of settlement options

(a) Notice of settlement options

(1) Within sixty days after the publication of the Settlement Roll as provided in section 1300i–4(d) of this title, 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.

(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 subsection (c) of this section, except that if the parent or guardian furnishes proof satisfactory to the Secretary that a minor is an enrolled member of 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 subsection (c) of this section 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 subchapter 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 1300i–4(d) of this title.

(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) of this section.

(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 October 31, 1988;

(B) had maintained a residence on the Hoopa Valley Reservation at any time within the five year period prior to October 31, 1988; or

(C) owns an interest in real property on the Hoopa Valley Reservation on October 31, 1988,

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.

(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 1300i–8 of this title.

(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 1300i–8 of this title 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 1407 of this title, 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 subsection (a)(4) of this section, 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 1300i–8 of this title 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 subchapter, and granting tribal consent as provided in section 1300i–8(d)(2) of this title.

(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.

(Pub. L. 100–580, §6, Oct. 31, 1988, 102 Stat. 2929.)

§ 1300i–6. Division of Settlement Fund remainder

(a) Any funds remaining in the Settlement Fund after the payments authorized to be made therefrom by subsections (c) and (d) of section 1300i–5 of this title and any payments made to successful appellants pursuant to section 1300i–4(d) of this title 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 1300i–3 of this title 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.).

(Pub. L. 100–580, §7, Oct. 31, 1988, 102 Stat. 2931.)

REFERENCES IN TEXT

Act of August 2, 1983, referred to in subsec. (b), is Pub. L. 98–64, Aug. 2, 1983, 97 Stat. 365, known as the "Per Capita Act", which enacted sections 117a to 117c of this title and repealed section 117 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 117a of this title and Tables.

§ 1300i–7. Hoopa Valley Tribe; confirmation of status

The existing govening[1] 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.

(Pub. L. 100–580, §8, Oct. 31, 1988, 102 Stat. 2932.)

§ 1300i–8. 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 1300i–5 of this title 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) of this section, 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 October 31, 1988, 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

[1] So in original. Probably should be "governing".

budget approved by the Secretary, shall provide counseling and assistance, shall promote communication with potential members of the Yurok Tribe concerning the provisions of this subchapter, and shall study and investigate programs, resources, and facilities for consideration by the Interim Council. The Yurok Transition Team may receive grants and enter into contracts for the purpose of carrying out this section and section 1300i–9(a) of this title. Such grants and contracts shall be transferred to the Yurok Interim Council upon its organization. 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 subchapter, including the organizational provisions of this section, and subject to subsection (d) of this section 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) of this section.

(c) General council; election of Interim Council

(1) Within 30 days after the date established pursuant to section 1300i–5(a)(4) of this title, 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 1300i–5(c) of this title, 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 subchapter.

(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 subchapter, 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 subchapter, 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) of this section.

(5) The Interim Council shall be dissolved effective with the election and installation of the initial tribe[1] governing body elected pursuant to the constitution adopted under subsection (e) of this section 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) of this section, 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.

(Pub. L. 100–580, §9, Oct. 31, 1988, 102 Stat. 2932; Pub. L. 101–121, title III, §315, Oct. 23, 1989, 103 Stat. 744; Pub. L. 101–301, §9(3), May 24, 1990, 104 Stat. 211.)

REFERENCES IN TEXT

The Indian Reorganization Act, referred to in subsecs. (a)(2) and (e), is act June 18, 1934, ch. 576, 48 Stat.

[1] So in original. Probably should be "tribal".

984, as amended, which is classified generally to subchapter V (§ 461 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

AMENDMENTS

1990—Subsec. (a)(3). Pub. L. 101–301 substituted "counseling and assistance, shall" for "counseling,".

1989—Subsec. (a)(3). Pub. L. 101–121 inserted provisions authorizing the Yurok Transition Team to receive grants and enter into contracts for the purpose of carrying out this section and section 1300i–9(a) of this title and directing that such grants and contracts be transferred to the Yurok Interim Council upon its organization.

§ 1300i–9. 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 October 31, 1988, develop such a plan.[1]

(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 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).

(Pub. L. 100–580, § 10, Oct. 31, 1988, 102 Stat. 2934.)

§ 1300i–10. Special considerations

(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 October 31, 1988.

(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 October 31, 1988, 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 1300i–8 of this title. The Secretary shall publish in the Federal Register a notice of the effective date of the merger.

(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) of this section that is, on October 31, 1988, held by any individual under a lease shall continue to be governed by the terms of the lease, and any land assignment existing on October 31, 1988, shall continue in effect and may pass by descent or devise to any blood relative or relatives of Indian blood of the assignee.

(Pub. L. 100–580, § 11, Oct. 31, 1988, 102 Stat. 2935.)

§ 1300i–11. Limitations of actions; waiver of claims

(a) Claims against partition of joint reservation

Any claim challenging the partition of the joint reservation pursuant to section 1300i–1 of

[1] So in original. The period probably should be "; and".

this title or any other provision of this subchapter 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 section 1491 or 1505 of title 28, in the United States Court of Federal Claims. The Yurok Transition Team, or any individual thereon, shall not be named as a defendant or otherwise joined in any suit in which a claim is made arising out of this subsection.

(b) Limitations on claims

(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 1300i–1 of this title or 120 days after the publication in the Federal Register of the option election date as required by section 1300i–5(a)(4) of this title.

(2) Any such claim by the Hoopa Valley Tribe shall be barred 180 days after October 31, 1988, or such earlier date as may be established by the adoption of a resolution waiving such claims pursuant to section 1300i–1(a)(2) of this title.

(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 1300i–8 of this title or such earlier date as may be established by the adoption of a resolution waiving such claims as provided in section 1300i–8(d)(2) of this title.

(c) Report to Congress

(1) The Secretary shall prepare and submit to the Congress a report describing the final decision in any claim brought pursuant to subsection (b) of this section 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 subchapter and any modifications to the resource and management authorities established by this subchapter. Notwithstanding the provisions of section 2517 of title 28, 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.

(Pub. L. 100–580, §14, Oct. 31, 1988, 102 Stat. 2936; Pub. L. 101–301, §9(4), May 24, 1990, 104 Stat. 211; Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992—Subsec. (a). Pub. L. 102–572 substituted "United States Court of Federal Claims" for "United States Claims Court".

1990—Subsec. (a). Pub. L. 101–301 inserted at end "The Yurok Transition Team, or any individual thereon, shall not be named as a defendant or otherwise joined in any suit in which a claim is made arising out of this subsection."

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

SUBCHAPTER LXXXI—POKAGON BAND OF POTAWATOMI INDIANS

§ 1300j. Findings

The Congress finds the following:

(1) The Pokagon Band of Potawatomi Indians is the descendant of, and political successor to, the signatories of the Treaty of Greenville 1795 (7 Stat. 49); the Treaty of Grouseland 1805 (7 Stat. 91); the Treaty of Spring Wells 1815 (7 Stat. 131); the Treaty of the Rapids of the Miami of Lake Erie 1817 (7 Stat. 160); the Treaty of St. Mary's 1818 (7 Stat. 185); the Treaty of Chicago 1821 (7 Stat. 218); the Treaty of the Mississinewa on the Wabash 1826 (7 Stat. 295); the Treaty of St. Joseph 1827 (7 Stat. 305); the Treaty of St. Joseph 1828 (7 Stat. 317); the Treaty of Tippecanoe River 1832 (7 Stat. 399); and the Treaty of Chicago 1833 (7 Stat. 431).

(2) In the Treaty of Chicago 1833, the Pokagon Band of Potawatomi Indians was the only band that negotiated a right to remain in Michigan. The other Potawatomi bands relinquished all lands in Michigan and were required to move to Kansas or Iowa.

(3) Two of the Potawatomi bands later returned to the Great Lakes area, the Forest County Potawatomi of Wisconsin and the Hannahville Indian Community of Michigan.

(4) The Hannahville Indian Community of Michigan, the Forest County Potawatomi Community of Wisconsin, the Prairie Band of Potawatomi Indians of Kansas, and the Citizen Band Potawatomi Indian Tribe of Oklahoma, whose members are also descendants of the signatories to one or more of the aforementioned treaties, have been recognized by the Federal Government as Indian tribes eligible to receive services from the Secretary of the Interior.

(5) Beginning in 1935, the Pokagon Band of Potawatomi Indians petitioned for reorganization and assistance pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., commonly referred to as the "Indian Reorganization Act"). Because of the financial condition of the Federal Government during the Great Depression it relied upon the State of Michigan to provide services to the Pokagon Band. Other Potawatomi bands, including the Forest County Potawatomi and the Hannahville Indian Community were provided services pursuant to the Indian Reorganization Act.

(6) Agents of the Federal Government in 1939 made an administrative decision not to provide services or extend the benefits of the Indian Reorganization Act [25 U.S.C. 461 et seq.] to any Indian tribes in Michigan's lower peninsula.

(7) Tribes elsewhere, including the Hannahville Indian Community in Michigan's upper peninsula, received services from the Federal Government and were extended the benefits of the Indian Reorganization Act [25 U.S.C. 461 et seq.].

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellee the United States have been served, by overnight courier, this 28th day of September, 2009, 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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate procedure 32(a)(7)(B). The brief contains 13,814 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect X3 word processing program in 14 point Times New Roman font.

Mary Gabrielle Sprague