



United States Department of the Interior

OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS

Washington, D.C. 20240

March 1, 2007

Honorable Clifford Lyle Marshall
Chairman, Hoopa Valley Tribe
P.O. Box 1348
Hoopa, California 95546

Honorable Maria Tripp
Chairperson, Yurok Tribe
190 Klamath Boulevard
Klamath, California 95548

Dear Chairman Marshall and Chairperson Tripp:

As you both know too well, issues related to the 1988 Hoopa-Yurok Settlement Act (Act), including the establishment and distribution of the Hoopa-Yurok Settlement Fund (Fund), have a long history. Notwithstanding resolution of decades of disputed issues between the two Tribes and their members, one final issue remains to be resolved nearly twenty years after the Act's passage: distribution of funds still held by the Department pursuant to the Act.

At the request of both the Hoopa Valley Tribe and the Yurok Tribe, as well as the Tribes' Congressional delegation, the Department has evaluated whether authority still exists to distribute these funds administratively or whether the parties must resolve this matter through the courts or Congress. As explained below, the Department has concluded it can distribute these funds to the Yurok Tribe administratively, consistent with the provisions of the Act, if the Yurok Tribe were to submit a new waiver of claims as required by the Act.

Discussion and Analysis

Pursuant to the Act, the Department placed into escrow monies from seven Indian trust fund accounts, representing the proceeds still held in trust by the Department from the resources of the former Joint Reservation, to establish the Fund. The Act envisioned three specific distributions of the Fund: certain individual payments based on tribal membership elections; distribution to the Hoopa Valley Tribe of roughly one-third of the Fund; and distribution to the Yurok Tribe of roughly one-third of the Fund plus the Fund's remainder once the individual payments were made. The Hoopa Valley Tribe received over \$34 million between 1988 and 1991, its designated share under the Act. The Department continues to hold the remaining balance, representing the share set aside in 1991 for the benefit of the Yurok Tribe (roughly \$37 million), with interest accrued over the past fifteen years (now totaling roughly \$90 million), as well as funds authorized by the Act specifically for the Yurok Tribe (roughly \$3.1 million).

The Department has not previously distributed these remaining funds because the Yurok Tribe did not provide the waiver required by the Act in order to receive benefits.

Although purporting to waive claims, the Department interpreted the 1993 Yurok Resolution to preserve the Tribe's claims and thus failed to satisfy the Act's waiver requirement. The Yurok Tribe brought a takings claim, which led to the decision rendered in *Karuk Tribe v. United States*, 41 Fed. Cl. 468 (1998), *aff'd*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

Conclusion of this litigation triggered the Secretary's obligation under the Act to issue a Report to Congress. The Secretary, through the Bureau of Indian Affairs, submitted the Report in March 2002, and the Senate Indian Affairs Committee held a hearing in August 2002, in which the Department and both Tribes participated.

The Department stated then that, because the Yurok Tribe litigated its takings claims rather than waiving them, the Yurok did not meet the Act's condition precedent for the Yurok to receive its share of the Fund or other benefits. The Department stated also the Hoopa Valley Tribe had already received its benefits under the Act and was not entitled to further distributions. Based on those factors, the Department recommended, *inter alia*, that it would be inappropriate to make any general distribution without further instruction from Congress and that Congress should consider the need for additional legislation to address any issue regarding entitlement and to fulfill the Act's intent. Congress has not acted on the Department's recommendations to date.

The Yurok Tribe proposes now to provide the Department with a new, unconditional waiver of claims, a concept not proposed at the time of the 2002 hearing. The Hoopa Valley Tribe argues, in essence, that the Act's authority no longer remains viable and that the fully-litigated takings claim precludes the Yurok Tribe from providing a new waiver. After careful review of all the issues, the Department concludes that the Yurok Tribe can tender a new, unconditional waiver and that the Act provides authority to the Department to act administratively to distribute the remaining funds to the Yurok Tribe upon receipt of such a waiver if it otherwise comports with the waiver requirements under the Act.

Neither the Act nor its legislative history specifies whether proceeding under one provision would preclude the Yurok Tribe from proceeding under the other, *i.e.*, whether bringing a takings claim and providing a waiver, actions both authorized under the Act, were mutually exclusive. For a number of reasons, we conclude that the takings litigation in *Karuk Tribe* did not result in the Yurok Tribe's forfeiting the benefits established in the Act. For example, the Act does not specify a time limitation, like the limited period to bring a constitutional challenge, on the ability to provide a waiver. Moreover, the Act's Yurok waiver provision is not limited solely to the constitutionally-based property claims authorized by the Act and litigated by the Yurok Tribe. The Act did not provide any contingent distribution arrangements if the Yurok Tribe chose to assert a takings claim. Fundamentally, nothing in the Act states that the Yurok Tribe's choosing to litigate its takings claim would cause the Tribe to forfeit the benefits under the Act.

Because Congress acted as a trustee in passing the Act and because the Hoopa Valley Tribe received already all of its benefits established by the Act, including its designated

share of the Fund, we believe that any ambiguity in the Act should be read in favor of providing the other beneficiary, the Yurok Tribe, with its benefits established by the Act. Because the Act specifically authorized either Tribe to bring certain claims against the United States yet did not provide for an alternative distribution of benefits if a Tribe took such an action, we further believe that an interpretation of the Act that avoids penalizing a beneficiary for taking an authorized action and that avoids potentially troublesome constitutional issues to be necessary here. Thus, we believe that it would be unreasonable to read the Act to work a forfeiture of the Yurok's right to receive the monies from the Fund, and we decline to do so.

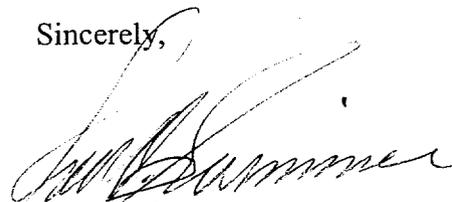
The Act authorized the Yurok Interim Council, an entity that ceased to exist in 1993, to provide the requisite waiver under the Act. The Act did not preclude or otherwise divest power from the permanent Yurok Council also to waive claims. Both the Department and the Hoopa Valley Tribe subsequently acknowledged that the Yurok Tribe, after the expiration of the Interim Council, could "cure" its conditional waiver. Therefore, we also conclude that the current governing body of the Yurok Tribe can submit the waiver required by the Act.

Conclusion

After careful consideration and for the reasons set out briefly above, the Department has concluded that, through administrative action, the remaining funds set aside pursuant to the Act can still be distributed to the Yurok Tribe. The better reading of the Act and the underlying circumstances is to allow the Yurok Tribe to submit an unconditional waiver and to authorize the Department to distribute these funds to the Yurok Tribe upon that proper submission.

The Department appreciates that the underlying issues of this dispute have been argued between the two Tribes (and others) for over 40 years. Both Tribes have argued vigorously and persuasively for their respective positions. In recognition of these divergent views, the Department will not take action on this final decision and distribute the remaining funds until thirty days after the Department has received an unconditional waiver from the Yurok Tribe consistent with the Act.

Sincerely,



Ross O. Swimmer
Special Trustee for American Indians