United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 15 2002

The Vice President
United States Senate
Washington, D.C. 20510

Dear Vice President:

Pursuant to Section 14(c) of the Hoopa-Yurok Settlement Act, Public Law 100-580, I respectfully submit the attached report. The Report includes a general history of the Hoopa-Yurok Settlement Act, and recommendations of the Department in this regard.

The Act requires that a "Report to Congress" be submitted, following the resolution of any claims brought against the United States which would challenge the constitutionality of the Act. After nearly a decade of litigation on the matter, claims filed by the Yurok Tribe of California, were decided earlier this year in favor of the United States. The conclusion of this litigation now triggers the requirement of the Act that this "report" be submitted to Congress. These matters are discussed more fully within the enclosed "report."

Should you have further questions on this matter, please feel free to contact me.

Sincerely,

Neal A. McCaleb

Assistant Secretary - Indian Affairs

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 15 2002

The Honorable J. Dennis Hastert
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

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Sincerely,

Neal A. McCaleb

Assistant Secretary - Indian Affairs

Enclosure

REPORT TO CONGRESS

HOOPA-YUROK

Pursuant TO Section 14(c), Public Law 100-580

Submitted by the Secretary of the Interior
March 2002

REPORT TO CONGRESS
HOOPA-YUROK, Pursuant to Section 14(c) Public Law 100-580
Submitted by the Secretary of the Interior, February 2002

TABLE OF CONTENTS:

Introduction

This report is submitted pursuant to Section 14(c) of the Hoopa-Yurok Settlement Act of 1988 (Public Law 100-580, October 31, 1988) ("Act"). The major purpose of the Act was to establish definitive boundaries for the Hoopa Valley Reservation and the Yurok Reservation. Section14(c) of the Act directs the Secretary of the Interior to prepare and submit to Congress a report describing the final decision in any claim brought pursuant to subsection Section 14(b) against the United States, its officers, agencies, or instrumentalities. The Act further directs the Secretary to include within the report any recommendations of the Secretary for action by Congress. The Act provides that the Secretary shall submit the report to Congress within 180 days of the final judgment of any claim brought pursuant to the Act. Subsequent to the passage of the Act, the Yurok Tribe filed a "takings claim" against the United States. The Yurok claim was initially denied by the United States Court of Federal Claims, and was later denied a Petition for Writ of Certiorari by the U.S. Supreme Court on March 26, 2001.

History

In August of 1988, Senator Cranston introduced S. 2723, a bill to partition certain reservation lands between the Hoopa Valley Indian Tribe and the Yurok Tribe in the northern California. Introduction of the legislation followed a long history of contention and confusion surrounding the establishment and boundaries of the Hoopa Valley Reservation, created in 1891 by an executive order of President Harrison("1891 Reservation"). The 1891 Reservation included areas of land inhabited primarily by Yuroks, areas of land inhabited primarily by Hoopas, and a 25-mile strip of land that connected the two areas. The Hoopa-Yurok Settlement Act was enacted with the primary objective of providing finality and clarity to the contested boundary issue.

The Act concluded that no constitutionally protected rights had vested in any tribe or individual, to the communal lands and other resources of the 1891 Reservation, and provided for a fair and equitable resolution of disputes relating to ownership and management of the 1891 Reservation. Pursuant to and in accordance with the Act the 1891 Reservation was partitioned between the Hoopa Valley Tribe and the Yurok Tribe. The section of the 1891 Reservation known as "the Square" was established as the Hoopa Valley Reservation, and the section known as "the Extension" was established as the Yurok Reservation. The Act also created a Settlement Fund initially comprised of funds derived from economic activity occurring on the 1891 Hoopa Valley Reservation and supplemented by additional funds appropriated by Congress. Particular benefits of the Act, i.e., the provisions related to the partitioning of the Reservation, potential expansion of the newly formed reservations, and participation in the Settlement Fund, were conditioned upon the tribes adopting individual tribal resolution's granting their consent to the partition of the 1891 Reservation and waiving potential claims the tribes may have against the United States.

Subsequent to enactment of the Act, the Hoopa Valley Tribe executed and adopted such a resolution. The Yurok Tribe executed what they have described as a "conditional waiver" which they adopted by resolution.

Yurok "Conditional Waiver"

In November of 1994, the Yurok Tribe submitted documentation to the Department concerning the claims waiver requirement of the Act. This material included Tribal Resolution No. 93-61, which purported to waive claims of the Tribe pursuant to and in accordance with the Act. The Resolution states in relevant part, "[T]o the extent which the Hoopa-Yurok Settlement Act is not violative of the rights of the Yurok Tribe or its members under the Constitution of the United States, or has not effected a taking without just compensation of vested Tribal or individual resources, or rights within, or appertaining to the Hoopa Valley Reservation, the Yurok Tribe hereby waives any claim which said Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act." In a letter dated April 4, 1994, it was communicated to the Yurok Tribe by Assistant Secretary for Indian Affairs, Ada E. Deer, that Resolution No. 93-61 did not effectively waive any Tribal claims as required by the Act, but in fact acted to preserve any such claims.

Entitlement to the Hoopa-Yurok Settlement Fund/Benefits of the Act

In 1988 the Hoopa Valley Tribe executed a waiver of claims, pursuant to the Act, and as a result, received their portion of the benefits as enumerated within the Act. Accordingly, 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.

In 1993, the Yurok Tribe submitted to the Secretary a tribal resolution which according to the tribe, purports to waive potential claims against the United States as required within the Act. As previously stated, the Department responded to Yurok submission with a letter stating that the Department could and would not accept the resolution as a valid waiver within the confines of the Act. The Yurok Tribe subsequently filed a "takings" claim, *Yurok Indian Tribe v. United States*, No. 92-CV-173 (Fed. Cl.), *Karuk Tribe of California v. United States*, 28 Fed. Cl. 694 (1993), *Karuk Tribe of California v. United States*, 41 Fed. Cl. 468 (Aug. 6, 1998), and *Karuk Tribe of California v. Ammon*, 209 F. 3d 1366 (Fed. Cir. 2000), that lasted nearly a decade. In briefings before the U.S. Supreme Court, the Yurok claimed that this was, "the most important Indian-lands takings case to come before the courts in this generation". Possible exposure to the U.S. Treasury was estimated close to $2 billion. The question for the Court was whether the Yuroks had a compensable interest in the 1891 Reservation under the 5th Amendment. In 1864, Congress had authorized the President, "at his discretion", to set apart land, "to be retained by the United States for purposes of Indian Reservations" (Act of 1864, 13

Stat. 39). Both trial and appellate courts held, in two-to-one decisions, that the executive order that created the reservation allowed permissive, not permanent, occupation. The U.S. Supreme Court denied certiorari. Accordingly, it is the position of the Department that the Yurok Tribe did not meet the waiver conditions of the Act and is therefore not entitled to the benefits enumerated within the Act.

Following a request from the Department, each of the interested tribes submitted their written position regarding future actions of the Department with respect to the Settlement Fund, and the Section 14(c) "Report to Congress", required under the Act.The Department has consulted tribes on this report and reviewed information describing both the Hoopa and Yurok Tribes submitted as appendices to this report. Also, attached as appendices to this report, is the historical account information and supplemental present earning potential of the fund.

Recommendations of the Department

Notwithstanding the factual legal standing regarding tribal entitlement to the settlement fund under the existing Act, the Department recognizes that a financial and economic need currently exists within both Tribes and their associated reservations. The presence and extent of this need, combined with the historical difficulties in the administration of the provisions of the Act, make predominant the necessity to take further measures to accomplish the original intent of the Act. Further, it is the opinion of the Department that to withhold funds/benefits of the Act in their entirety, or to allow any accrued funds to revert to the Treasury, would not be an effective administration of the overall intent of Act and would, in effect be in direct opposition to the spirit of the Act. In this regard, it is the opinion of the Department that in addition to partitioning the 1891 Reservation, Congress intended the Act to provide the respective tribes and their reservations with the means to acquire a degree of financial and economic benefit and independence which would allow each tribe to prosper in the years to come.

Therefore, it is the recommendation of the Department that:

I. No additional funds be added to the current HYSA Settlement Fund;

II. Funds comprising the current HYSA Settlement Fund would not revert to the general fund of the Treasury, but would be retained in trust account status by the Department pending future developments;

III. There would be no general "distribution" of the HYSA Settlement Fund dollars to any particular tribe, tribal entity, or individual. But rather, the Fund dollars would be administered for the mutual benefit of both the Hoopa Valley and Yurok tribes, and their respective reservations, taking into consideration benefits either tribe may have heretofore received from the HYSA Settlement Fund;

IV. That Congress in coordination with the Department, and following consultation with the Hoopa and Yurok Tribes, fashion a mechanism for the future administration of the HYSA Settlement Fund;

V. That Congress, in order to accomplish the underlying objective of the HYSA, resolving any future issue of entitlement, give serious consideration to the establishment of one or more new Act(s) that provide the Secretary with all necessary authority to establish two separate permanent Fund(s) with the balance of the current HYSA Fund, for the benefit of the Hoopa and Yurok Tribes in such a manner as to fulfill the intent of the original Act in full measure.

APPENDIX:

I. Financial information on Hoopa-Yurok Settlement Fund
II. Informational submittal of Yurok Tribe
III. Informational submittal of Hoopa Tribe

FINANCIAL INFORMATONAL SHEET – "HYSA" FUND

The Hoopa/Yurok Settlement Fund was established in 1988, pursuant to Public Law 100-580, the Hoopa-Yurok Settlement Act.

The Act was intended to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Tribe, and to clarify the use of timber proceeds from the Hoopa Valley Reservation established originally in 1864.

Recognizing the Federal role in the creating of the problems then associated with the Hoopa Valley Reservation, the Act authorized the appropriation of $10,000,000 in federal funds, to be added to the corpus of the HYSA Fund.

The remainder of the settlement fund was made up of funds held as "Escrow funds" by the federal government, which were derived from the use/resources of the "joint reservation". These funds were held by the Secretary in accounts benefiting both the Hoopa and Yurok tribes, individually.

The Act was intended to settle any dispute over any/all such "Escrow funds".

The original principal balance of the fund was $66,978,335.93

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
OFFICE OF TRUST FUNDS MANAGEMENT
505 MARQUETTE N.W. SUITE 700
ALBUQUERQUE, NEW MEXICO 87102

IN REPLY REFER TO:

ASST A
ASST AD ADMIN
ROUT[redacted]
RESPO
DUE DATE
MEMO
TELE OTHER

AUG 22 1991

Memorandum

To: Area Director, Sacramento Area Office

From: Director, Office of Trust Funds Management

Subject: Distribution of funds awarded the Hoopas and Yuroks under the Hoopa-Yurok Settlement Act

Effective April 12, 1991, the distribution of the subject funds was made in accordance with Public Law 101-277 and in accordance with your request dated April 4, 1991.

The total value of the fund on April 12, 1991 was $85,979,348.37 derived in the following manner:

Fair Market Value of Investment Securities (Refer to Attachment I and II.)	$74,339,997.14
Cash-Unallotted Balance	139,351.23
Add Back: Hoopa Drawdowns	10,000,000.00
Yurok Drawdowns	1,500,000.00
Total:	$85,979,348.37

Hoopa's share of the fund was calculated using 39.55% as provided in you letter dated April 4, 1991.

Total Value of Fund	$85,979,348.37
	X .39552
Hoopa's Share	$34,006,551.87
Less Hoopa's Drawdowns	10,000,000.00
Less April 15, 1991 Drawdown	9,880,000.00
Balance Due Hoopa Tribe:	$14,126,551.87

The balance due was distributed using a percentage of 21.8679479 derived as follows:

Total Value of Fund	$85,979,348.37
Less Hoopa's Drawdowns	19,880,000.00
Less Yurok's Drawdowns	1,500,000.00
Balance of Fund to be Distributed:	$64,599,348.37

Hoopa's Share of Fund	$14,126,551.87	= 0.218679479
Value of Undistributed Fund	64,599,348.37	

The 21.8679479% was applied to each outstanding investment and recorded to Hoopa's appropriation account 7194.

The balance of the fund is Yurok's share which remained in appropriation account 7193.

Subsequent to the above distributions, an internal transfer was done effective August 1, 1991, to transfer $3,000,000.00 into an escrow account to compensate any potential appeal cases. The amounts contributed are $1,186,560.00 and $1,813,440.00 for the Hoopas and the Yuroks respectively. It is our understanding that both tribes agreed to this arrangement. A separate appropriation (J50 A64 7197) was established for this escrow account.

Trust Funds records in the BIA's Finance System are maintained on a cash basis, therefore, income earned but not yet collected by the BIA is not recorded. Only the actual cash transfers and the cost bases of respective investments are shown in the Summary of Trust Funds reports for the Hoopa Tribe.

If you have any questions, please contact Sarah Yepa at FTS 474-3875 or Commercial (505) 766-3875. If you have questions on the valuation of the securities, please contact Fred Kellerup at FTS 474-2975 or Commercial (505) 766-2975.

Jim R. Parris

Attachments

HOOPA-YUROK SETTLEMENT FUND, ESTABLISHED 12/9/88 AS J50/501/7193

DATE	BEGINNING FY BALANCE	FISCAL YEAR END BALANCE	DIFFERENCE			
FY 1989	66,978,335.93	69,982,201.01	3,003,865.08			
FY 1990	69,982,201.01	71,799,321.72	1,817,120.71			
FY 1991	71,799,321.72	48,940,123.38	(22,859,198.34)			
FY 1992	48,940,123.38	37,819,371.79	(11,120,751.59)			
FY 1993	37,819,371.79	39,700,898.45	1,881,526.66			
FY 1994	39,700,898.45	40,600,210.26	899,311.81			
FY 1995	40,600,210.26	42,916,637.49	2,316,427.23			
FY 1996	42,916,637.49	45,103,786.42	2,187,148.93			
FY 1997	45,103,786.42	50,708,006.06	5,604,219.64			
FY 1998	50,708,006.06	53,748,146.46	3,040,140.40			
FY 1999	53,748,146.46	56,912,744.76	3,164,598.30			
FY 2000	56,912,744.76	61,207,883.29	4,295,138.53			
FY 2001	61,207,883.29	64,824,655.61	3,616,772.32			

(1) the date the fund was established,

The Hoopa-Yurok Settlement Fund was established in the BIA's Finance System 12/9/88.

(2) the original principal amount of the fund,

The original principal balance amount of the Fund was **$66,978,335.93.**

(3) the date and amount of the Hoopa disbursement (principal and interest),

Effective April 12, 1991, Hoopa's share of the fund was determined to be **$34,006,551.87.**

Deduction of $19,880,000 for previous drawdowns and Hoopa's per capita payment left a final balance due of **$14,126,551.87.**

which was distributed to Hoopa April 12, 1991.

(4) the breakdown between principal and interest and gain if any, on the balance remaining after the Hoopa disbursement,

The FY 91 year end balance for the account, which was determined to be Yurok's share, was **$48,940,123.38**

According to the Act, a separate account for Yurok should have been established and this amount transferred.

(5) the projected yearly interest on these two amounts.

At 6%, $3,889,479, and at 2%, $1,296,493

YUROK TRIBE

15900 Hwy 101 N. • Klamath, CA 95548
(707) 482-2921
FAX (707) 482-9465

1034 6th Street • Eureka, CA 95501
(707) 444-0433
FAX (707) 444-0437

BACKGROUND

Yurok Waiver Now Effective for Distribution of Settlement Fund and Acreage Pursuant to the Hoopa-Yurok Settlement Act

Hoopa-Yurok Settlement Act

In 1988 Congress passed the Hoopa-Yurok Settlement Act, 25 U.S.C.1301i et seq. ("HYSA"). The HYSA partitioned the former joint Reservation into two separate Reservations. According the the federal courts, prior to partition of the former Hoopa Valley Reservation under the HYSA, there was one single Reservation, and the Hoopa and Yurok Tribes enjoyed communal ownership of the lands and resources of the 90,000 acre joint Reservation.

The HYSA gave the Hoopa Tribe exclusive use and benefit of the 87,000 acres of unallotted trust lands, assets and timber resources of the valley area of the Reservation. The HYSA relegated the much larger Yurok Tribe to the Klamath river area of the Reservation, which contains only a few thousand acres of trust land and a fishery inadequate to provide even for the minimal subsistence needs of Yurok Tribal members.

The HYSA also a Settlement Fund to be paid the Yurok Tribe, and provided for the government's purchase of additional acreage for the Yurok Tribe. This Fund and acreage were to be delivered to the Yurok Tribe upon the Tribe's waiver of its Fifth Amendment claim for an unconstitutional taking without just compensation, which claim Congress anticipated. 25 U.S.C.1301i-1(c). Upon the waiver, the Tribe is to receive:

* Distribution of the Settlement Fund; and

* All right, title, and interest to all national forest system lands within the Yurok Reservation, (approximately 3,000 acres) and

* Specified portions of the Yurok Experimental Forest, part of which shall be held in trust by the United States as part of the Reservation; and

* Federal expenditure of not less than $5 million to acquire land, interests in land, and rights-of-way for the Tribe or its members, to be declared part of the Reservation. Such

lands must be within or contiguous with and adjacent to the Reservation, or if outside the Reservation must be purchased in order to exchange for lands within the Reservation.

Final Disposition of Claim for Taking Without Just Compensation

Due to the HYSA's lopsided division of tribal lands and resources, Congress expressly contemplated that the Yurok Tribe might sue the United States for an unconstitutional taking without just compensation. 25 U.S.C. § 1301i-11. The Yurok Tribe in fact brought such a suit, along with another Tribe and individual plaintiffs. As of March 26, 2001, the takings claim was finally resolved against the Yurok Tribe when the United States Supreme Court denied without comment the Tribe's Petition for Writ of Certiorari to the Federal Circuit. This denial let stand the Federal Circuit's sharply divided 2-1 ruling last year denying the Tribe's takings claim.

The Yurok Tribe's Conditional Waiver

As required by the HYSA, the Tribe by Resolution 93-61 timely executed a waiver of claims on November 24, 1993. In light of Congress' express contemplation of litigation, the waiver was conditioned on exhaustion of legal appeals challenging the constitutionality of the HYSA. It reads as follows:

> 1. To the extent which the Hoopa-Yurok Settlement Act is not violative of the rights of the Yurok Tribe or its members under the Constitution of the United States, or has not effected a taking without just compensation of vested Tribal or individual resources, or rights within or appertaining to the Hoopa Valley Reservation, the Yurok Tribe hereby waives any claim which said Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act.
>
> 2. To the extent which the determination of the Yurok Tribe's share of the Escrow monies defined in the Hoopa-Yurok Settlement Act has not deprived the Tribe or its members of rights secured under the Constitution of the United States, the Yurok hereby affirm its consent to the contribution of the 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 the Hoopa-Yurok Settlement Act.

By contrast, the Hoopa Valley Tribe in 1993 unconditionally waived any claims or rights it might have had, and has fully

received all monies and lands to which it was entitled under the HYSA. The Hoopa Tribe has no remaining interest in the balance of the Settlement Fund or the acreage promised the Yurok Tribe.

The Conditional Waiver Is Now Effective By Operation of Law

As of March 26, 2001, the United States Supreme Court effectively removed the sole condition of the Yurok Tribe's 1993 Conditional Waiver. The Fifth Amendment takings claim has been finally and fully resolved by the courts against the Yurok Tribe. As a legal matter, there has been no unconstitutional taking of Yurok lands and resources. No further legal appeals are available. The Yurok Tribe's waiver, by its terms, is now in full force and effect.

Because the sole condition to the Tribe's 1993 waiver has been removed, the expressed intent of Congress -- to allow litigation of the takings claim and to allow distribution of the Settlement Fund and acreage to the Yurok Tribe upon the final waiver of such claim - has now been satisfied. The Yurok Tribe is now entitled to receive the Settlement Fund and acreage specified by the HYSA.

Proposed Technical Amendment to the HYSA to Confirm and Secure the Waiver

The Yurok waiver is now effective by its own terms and by operation of law. However, should any further certainty be desired, a technical amendment to the HYSA would confirm and secure the waiver and distribution of funds and acreage to the Yurok Tribe.

[FIRST OPTION]

Eliminate the entirety of Section 1300i-1(c)(4)(D).

[SECOND OPTION]

After the word "waiving" in Section 1300i-1(c)(4)(D), add the words "or conditionally waiving".

[THIRD OPTION]

An additional clause may be added to the end of Section 1300i-1(c)(4)(D), as follows:

, or when any claim contemplated by section 1300i-11 has been finally adjudicated against the Yurok Tribe thereby removing the condition of a conditional waiver adopted by the Tribe.

Such an amendment would be encompassed by the provision of the HYSA that requires the Secretary of the Interior to submit a report to Congress after the litigation ends, including recommendations for supplemental funding necessary to implement the Act and for "any modifications to the resource and management authorities" established by the Act. 25 U.S.C.1300i-11(c).

REPORT TO CONGRESS ON THE HOOPA-YUROK SETTLEMENT ACT

Introduction

The 1988 Hoopa-Yurok Settlement Act divided the joint Hoopa Valley Reservation into separate and unequal parts for the Hoopa Valley Tribe and the Yurok Tribe. In the Act, Congress overturned 25 years of litigation that established that all Indians of the Hoopa Valley Reservation, whether or not enrolled in the Hoopa Valley Tribe, have equal rights to share in the resources of the Reservation. The Act disrupted and cut short the orderly and fair administration of the federal courts' judgments in Short v. United States and Puzz v. United States that had for the first time in history recognized the equal and permanent rights of the Yurok people in the joint Hoopa Valley Reservation, part of the aboriginal home of the Yurok people. The Act deprived the Yurok Tribe and its members of rights and resources that the courts had determined belonged to them as a lawful and constitutional mandate.

Congress contemplated that claims would be brought challenging the constitutionality under the 5th Amendment of the partitioning of the former Joint Hoopa Valley Reservation. 25 U.S.C. § 1300i-11. The Yurok Tribe, along with the Karuk Tribe and a group of individuals known as the Ammon plaintiffs, filed such a claim in 1992, alleging that the partitioning of the Reservation was a taking of the Tribe's property without just compensation in violation of the 5th Amendment. This litigation was concluded on March 26, 2001, when the U.S. Supreme Court refused to review lower court decisions dismissing the Tribe's claim on the ground that no tribe or Indian individuals had a property interest in the joint reservation that was a property interest protected by the Constitution.

The conclusion of this litigation triggers the requirement of the Act that the Secretary of the Interior prepare and submit to Congress a report describing "the final decision in any claim" brought against the United States which challenged the constitutionality of the Act. 25 U.S.C. § 1300i-11(c)(1). The report must include "recommendations of the Secretary for action by Congress, including but not limited to, any supplemental funding proposals necessary to implement the terms of [the Act] and any modifications to the resource and management authorities established by [the Act]." 25 U.S.C. 1300i-11(c)(2). The report is due 180 days after the entry of "final judgment," or September 22, 2001.

This report contains the recommendations of the Department for legislative proposals which in our view are required to correct inequities in the Act that Congress either overlooked

or have come to light since the enactment of the Act. The report first provides the factual and legal background leading to the Act, the structure and intent of the Act, the takings claims filed by the Yurok Tribe, Karuk Tribe and Ammon plaintiffs, the disposition by the courts, and finally our recommendations for legislative action.

Background

The Hoopa-Yurok Settlement Act is best understood in the context of a long and complex dispute, which, despite the best intentions of Congress, is not yet finally resolved. The Yurok people were aboriginal residents of the area that later became the joint Hoopa Valley Reservation. In the early 1850s, the federal government adopted a reservation policy as the principal means to reduce recurrent warfare between whites and Indians caused by the California gold rush. In 1855, the President established the Klamath River Reservation, a strip of land a mile in width on either side of the Klamath River from the Pacific Ocean to a point about 20 miles upstream, as a permanent home for the Yurok people who then resided along that River. In 1864, Congress clarified the authority of the President to create reservations in California by authorizing four such reserves for Indians residing there. The 1864 Act evinced Congress' intent that reservations created under the Act were to be occupied and owned by more than one tribe at the President's discretion.

In 1876, the President exercised this authority by issuing a trust patent for the Hoopa Valley Reservation, a 12-mile square bisected by the Trinity River (the "Hoopa Square"). The Hoopa Square was home to several groups of Indians, including the Yurok Tribe. In 1891, the then Hoopa Valley Reservation was extended to encompass what had been known as the Klamath River Reservation (the "Lower 20"), as well as the strip of land a mile in width on either side of the Klamath River from the upper limit of the Klamath River Reservation to the confluence of the Klamath and Trinity Rivers at Weitchpec (the "Connecting Strip"); together these lands became known as the "Extension." These actions of the federal government established this area as a single, unified reservation. The U.S. Supreme Court in Mattz v. Arnett, referred to the entire joint reservation as "recognized," explaining that the enlargement was made under the President's authority pursuant to the 1864 Act. 412 U.S. 481 (1973). Since time immemorial, the Yuroks and other Indians of the joint reservation have centered their lives and cultures on the land within the reservation's boundaries.

In the decades following the consolidation of the Hoopa Valley and Klamath River Reservations, the policies of the Bureau of Indian Affairs concerning the beneficiaries of the Hoopa Valley Reservation varied; for some purposes, and at some times, the B.I.A. treated the Reservation and the Indians thereof as a consolidated whole; at other times, and for other purposes, the B.I.A. regarded the Hoopa Square as separate and distinct from the Extension, and only the individuals enrolled in the Hoopa Valley Tribe were recognized as possessing rights in the Hoopa Square.

In 1892, Congress opened the Klamath River portion of the Hoopa Valley Reservation to non-Indian settlement and homesteading through the allotment process. Act of June 17, 1892, 27 Stat. 52. The allotment of this portion of the Reservation affected the Yurok people, who were the dominant population in the lower 20 and connecting strip. By the time the allotment process had run its course, and taking into account land lost through tax sales after the trust period expired and other means, the number of trust acres left to Yurok people was only about 3,500. The U.S. Supreme Court ruled, however, that despite this tremendous loss of land, the reservation status was not terminated by the 1892 Act. Mattz v. Arnett, 412 U.S. 481 (1973).

In the 1950's, the B.I.A. began authorizing the harvesting of timber from lands within the Hoopa Square portion of the joint Reservation. The B.I.A. distributed the revenues from those harvests; some of the revenues were paid to the B.I.A.-recognized Hoopa Tribal Council; other revenues were distributed per capita to individuals, but only to persons on the roll of the Hoopa Valley Tribe. The Hoopa Valley Tribe came into existence in 1950 with membership limited to those with allotted land on the Reservation, non-landholders voted in by the Tribe, and long-time residents of the Square with a prescribed degree of native Hoopa parentage. Karuk Tribe of California v. Ammon, 209 F.2d 1366, 1372 (Fed. Cir. 2000). The B.I.A. made no payments of timber revenues to the Yurok Tribe, nor to any individual Yuroks or other Indians of the Reservation who were not enrolled in the Hoopa Valley Tribe, on the theory that the Hoopa Square was a separate Reservation from the Extension, and thus that only members of the Hoopa Valley Tribe were entitled to share in the revenues.

In 1963, several thousand individuals, primary Yuroks, filed suit in what then was the U.S. Court of Claims seeking damages for the failure to distribute the revenues from the joint Reservation equally to all Indians of the joint Reservation. Specifically, the plaintiffs in Jessie Short, et al. v. United States alleged that the Hoopa Square and the Extension were part of the same Reservation, that all Indians of that Reservation had equal rights to the Reservation's resources, and thus that the exclusion of Yuroks from the distribution of revenues derived from the harvest of timber on the Hoopa Square was an arbitrary and discriminatory breach of federal fiduciary duties for which the United States was liable in money damages.

In 1973, the Court of Claims granted summary judgment in favor of the Short plaintiffs' claims that the United States had breached its trust obligations by arbitrarily excluding from per capita distributions of timber revenues persons who were not enrolled in the Hoopa Valley Tribe. Short v. United States, 486 F.2d 561 (Ct.Cls. 1973). The court's judgment followed and applied established precedent with regard to the nature of the Government's trust obligations and the right of Indians of permanent reservations to share equally in the resources there. The court made a number of rulings that are relevant to Congress' determination of modifications to the Hoopa-Yurok Settlement Act. These rulings

include: The Yurok people were aboriginal residents of the Hoopa Square (486 F.2d at 565); the Yuroks were beneficiaries of an unratified 1864 treaty that called for the creation of a Reservation (486 F.2d at 565); Congress established the Hoopa Valley Reservation in part for the Yuroks (486 F.2d at 565); the 1891 Executive Order adding the 1855 Klamath River Reservation to the Hoopa Valley Reservation created an enlarged single Reservation (486 F.2d at 567-68); the expansion put the Yurok Indians of the Klamath River Reservation on an equal footing with the Hoopa Indians of the Square, such that the Hoopas did not enjoy exclusive rights to the Square (486 F.2d at 567-68); and the Hoopas obtained no preferential rights to the Square by virtue of their early residence on the Reservation (486 F.2d at 562-63).

The court also ruled that no single tribe or group had vested rights as against any other tribe or group of individuals. The court did not, however, address whether any tribe or group had vested rights enforceable against the United States. (486 F.2d at 564: "Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion"). The next 20 years were spent litigating the questions of the criteria for qualification as an "Indian of the Reservation," evaluating the qualifications of individual claimants, and quantifying damages.

Following the 1973 liability judgment in Short, the B.I.A. began setting aside a portion of the Hoopa Square timber revenues into an escrow account for distribution to the beneficiaries of the Reservation pending identification of Indians of the Reservation eligible to share in the judgment. The Hoopa Valley Tribe and members of that Tribe continued to receive distributions of timber revenues, but no distributions were made to the Yurok Tribe or to Indians of the Reservation who were not enrolled in the Hoopa Valley Tribe.

The Short case did not address the question of how the joint reservation should be governed in light of the finding that all Indians of the Reservation shared equally in the resources found there. A separate case was brought by a group of Yuroks to answer this question, alleging that they were entitled to an equal voice in governing reservation affairs. This suit was also successful. Puzz v. United States, No C 80 2908 TEH (D. N.Cal. 1980). In line with established legal precedent, the Puzz court made the following findings and rulings:

1. Congress and the Executive "never intended one specific tribe, the Hoopas, to have exclusive property or political rights" over the Joint Reservation. Id. at 5.
2. "[T]he 1864 Act did not grant any territorial rights to the Hoopa tribe alone." Id. at 7.
3. The federal government must oversee the governance of the Reservation "for the use and benefit of all, not for the benefit of some to the clear detriment of others." Id. at 20. Federal supervision over Reservation administration,

resource management, and spending of Reservation funds must "ensure that all Indians [of the Reservation] receive the use and benefit of the reservation on an equal basis." Id. at 23.

As an example of both unfair and improper expenditure of Reservation resources, the court cited the use of reservation funds to pay for the Hoopa defendants' litigation costs in Puzz. Id. at 18. With regard to the federal approval of this allocation of Reservation resources, the court opined that "[i]t is an obvious violation of trust to allow the dissipation of reservation income to arm one faction of the Indians of the reservation against another." Id.

4. The federal government "must develop and implement a process to receive and take account of the opinions of non-Hoopas on the proper use of reservation funds." Id. at 18.

5. The federal recognition of the Hoopa Valley Tribe and the federal approval of the Hoopa Valley Tribe's constitution and bylaws was affirmed. Id. at 21. Further, the court recognized the right of the Hoopa Business Council to "lawfully conduct business as a tribal body sovereign over its own members. . . ." Id. at 23.

Accordingly, the result of the Puzz case was an order for the federal government to develop a fair and orderly process for the resources of the Reservation to be equitably used and managed for the benefit of all the Indians of the Reservation. However, before the federal government could develop and implement a process, at the request of the Hoopa Valley Tribe and despite the concerns of Assistant Secretary Swimmer, Congress cut short these efforts and in 1988 enacted the Hoopa-Yurok Settlement Act ("HYSA"), P.L. 100-580, 25 U.S.C. § 1300i et seq. The Yurok Tribe, who at the time was neither organized nor had legal representation, did not participate in the legislative process that led to the HYSA.

Provisions of the Act

Under the HYSA, the former Hoopa Valley Reservation was partitioned into separate Hoopa Valley and Yurok Reservations upon the concurrence of the Hoopa Valley Tribe; the Hoopa Valley Tribe upon execution of its waiver, received its statutorily designated portion (based on its percentage of enrolled population against the enrolled population of the Yurok Tribe) of the escrowed and other funds that Congress had converted into a "Settlement Fund;" the recognition of both the Hoopa Valley and Yurok Tribes was to be confirmed; a Settlement Roll was to be prepared of "Indians of the Reservation" not already included as enrolled members of the Hoopa Valley Tribe; persons on the Settlement Roll were to choose from among Hoopa Tribal membership, Yurok Tribal membership and non-Tribal membership options, each of which included payment of varying amounts of compensation; the Yurok Tribe was to receive the remainder of the Settlement Fund after payment of the Hoopa Valley Tribe's proportional share and deduction of sums paid to individuals; and upon the enactment

of a resolution waiving claims that the Yurok Tribe might have against the United States arising out of the HYSA, the Yurok Tribe was to become eligible for various benefits, including land acquisition authority, appropriations, governmental organization and other federal benefits and programs provided to Indian Tribes.

When the Hoopa Valley Tribe voted in late 1988 to waive its claims against the United States and approve partition of the Reservation, the Hoopa Square included about 89,000 acres of trust land and billions of board feet of timber. By operation of the Act, the Hoopa Valley Tribe received slightly over 40 percent of the Settlement Fund, after having received a previous 30 percentage from timber revenues before escrow. The Hoopa Valley Tribe also became the exclusive beneficial or vested owner under federal law of these lands and resources. At this same time, the Yurok Reservation included only about 3,500 acres of unallotted trust land and no other significant natural resources except rapidly-dwindling runs of salmon that had been inadequate to support even a minimal subsistence fishery for many years. The Act vested the Yurok Tribe with exclusive beneficial ownership of these lands and resources. The Yurok Reservation boundaries also included approximately 55,000 acres held in private ownership by non-Indians.

In developing the HYSA, Congress did not attempt to quantify the relative value of the Hoopa Square and the Extension. Rather, Congress acted on the assumption that neither the Yurok Tribe nor its members had a vested property right in the Reservation, and thus were not entitled to just compensation for the extinguishment of their claims to share in the unallotted lands and resources of the Square (the same would have been true for the right of the Hoopa Tribe and its members to share in the unallotted lands and resources of what would become the Yurok Reservation). However, the legislative history suggests that Congress assumed that the primary value of the Hoopa Square was in its trust land, water and timber resources, while the primary value of the Yurok Reservation was in the right of the Tribe and its members to access and exploit the Klamath River's anadromous fishery resources. Senate Report at 14.

This assumption turned out to be true for the Hoopa Valley Tribe but regrettably not true for the Yurok Tribe. The Yurok Tribe's fishery rarely produces sufficient income to sustain the economy of the Tribe or the livelihoods of its members. The fishery is in decline due to water diversions of the Klamath Irrigation Project and other factors beyond the Tribe's control. The Tribe's commercial fishery is modest by any measurement and produces only periodic income in small amounts for the Tribe. In no year since the Act's passage have tribal earnings in the fishery exceeded the $1 million estimated by the Senate Committee on Indian Affairs at the time of the Act's passage. Id. at 14-15. The principal contribution of the fishery to the economy of the Tribe is as subsistence food for the daily diets of tribal members. A comparison of tribal income for the period is striking. In the first ten years after the Act, the timber income for the Hoopa Valley Tribe has been approximately $80 million, while the fisheries income for the Yurok Tribe has less than $1 million.

The HYSA established procedures for the organization of the Yurok Tribe, for the development of the Settlement Roll and for the distribution of the Settlement Fund. As part of the Tribal organizational process, the HYSA provided for the election of an "Interim Council" having limited powers, including the adoption of a resolution,

> (i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this subchapter[.]
>
> (ii) affirming tribal consent to the contribution of Yurok Escrow monies to the settlement fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act[.]

Among the specific benefits that the HYSA purportedly conferred upon the Yurok Tribe were the transfer to the Yurok Tribe to be held in trust certain federal lands in the Six Rivers National Forest within the boundaries of the old Klamath River Reservation and connecting strip; addition of lands to the Yurok Reservation through consensual acquisitions, the expenditure of not less than $5,000,000 for the purpose of acquiring lands or interests in lands for the Tribe, and apportionment to the Yurok Tribe of the remainder of the Settlement fund after distribution to the Hoopa Valley Tribe and individuals on the Settlement Roll. However, receipt of these benefits, as well as the organizational authorities under the Act, were not to 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 [the Act]." 25 U.S.C. 1300i-1(c)(4).

On November 24, 1993, the Yurok Tribe Interim Council adopted Resolution No. 93-61, which resolved as follows:

1. To the extent which the Hoopa-Yurok Settlement Act is not violative of the rights of the Yurok Tribe or its members under the Constitution of the United States, or has not effecting a taking without just compensation of vested Tribal or individual resources, or rights within, or appertaining to the Hoopa Valley Reservation, the Yurok Tribe hereby waives any claim which said Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act;

2. To the extent which the determination of the Yurok Tribe's share of the escrow monies defined in the [HYSA] has not deprived the Tribe or its members of rights secured under the Constitution of the United States, the Yurok [Tribe] hereby affirms its 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 the Hoopa-Yurok Settlement Act.

While the Department of the Interior initially determined that Resolution 93-61 did not meet the HYSA's requirement that the Tribe adopt "a resolution waiving any claim" against the U.S. under the HYSA, the Yurok Tribe has consistently maintained that its waiver was sufficient to meet the HYSA requirements. Considering the Tribe's waiver in light of both the historical circumstances surrounding the passage of the HYSA and the clear purpose of the HYSA to inter alia establish an adequate land base for the Yurok Tribe as well as to partially compensate it for the loss of its rights to the Square, the Department agrees with the Yurok Tribe as a matter of equity that the language of the tribal resolution should not bar it from receiving Settlement Fund money and an adequate land base under the HYSA. The Department reaches this conclusion based, in part, on the strong legal arguments that exist to support this reading of the HYSA.

The HYSA can fairly be read to allow the Yurok Tribe to pursue a constitutional takings claim and to simultaneously obtain its benefits under the HYSA. Although the HYSA's requirement to waive "any claim" does appears broad, other sections of the Act do indicate that Congress did not intend that the Yurok Tribe give up its constitutional right to sue in order to obtain the benefits to which it is entitled. For example, section 1300i-11 of the HYSA, titled "Limitations of actions; waiver of claims," specifically anticipates and authorizes fifth amendment takings litigation by the Tribe against the United States. Subsection (a) provides that any claim challenging the HYSA "as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought . . . in the United States Court of Claims." 25 U.S.C. § 1300i-11(a). Subsection (b) also affirmatively acknowledges the Tribe's right to file a takings claim under the HYSA and establishes a limitations period. 25 U.S.C. § 1300i-11(b).

In addition, interpreting the HYSA as forcing the Tribe to choose between either accepting its benefits under the HYSA or protecting its constitutional rights by asserting a takings claim would appear to frustrate Congress' intent of establishing an adequate land base for the Yurok Tribe and distributing to the Yurok Tribe a portion of the Settlement Fund. Such a narrow reading would necessitate the view that Congress intended to force such a choice, even in light of the uncertainties of federal takings litigation and the fact that such a scheme would conflict with fundamental principles of fairness. As the Yurok Tribe reasonably maintains, it would be an entirely unfair result if, in addition to divesting the Tribe of its long-standing and legitimate interest in the Square, the HYSA also serves to deny the Tribe its portion of the Settlement Fund and the much-needed land within the Extension simply because the Tribe challenged the underlying constitutionality of the HYSA.

Consistent with this reasoning, the basic legal principle that United States laws must be constitutional and are subject to judicial review for constitutional defects is relevant. Congress should not be imputed with the intent of circumventing the Constitution by forcing parties directly affected by a law to waive their constitutional rights in exchange for obtaining specific federal benefits. This position is supported by the judicial doctrine of unconstitutional conditions, under which the United States may not condition receipt of a government benefit upon the waiver of constitutionally-protected rights, thereby indirectly accomplishing a restriction on constitutional rights. Consistent with these principles, it can fairly be reasoned that Congress, though it demanded a broad waiver under the HYSA, stopped short of requiring the Tribe to forsake its fundamental right to judicial review of the underlying constitutional takings question. The establishment of a statute of limitations for takings claims is evidence of Congress' intent in this regard.

Further, the view that Congress did not intend to present the Yurok Tribe with the unfair choice between receiving the benefits of the HYSA and challenging the Act's underlying constitutionality is also supported by Congress' finding contemporaneous with the passage of the HYSA that the Act does not effectuate a taking. S. Rep. supra, at 30. Given this finding, Congress' allocation of part of the Settlement Fund to the Yurok Tribe could not have been intended as compensation for a taking; but instead as funding to facilitate Yurok self-government and to partially off-set the Tribe's lost interest in the Square. Id. at 22.

Finally in applying the HYSA, the Department has allowed the Yurok Tribe to receive the benefits of the Act and to simultaneously challenge the constitutionality of the Act even though the Yurok Tribe filed a takings claim in 1992. The United States continues to treat the Yurok Tribe in all procedural and substantive respects as a federally-recognized Indian tribe precisely because Congress reconfirmed the federal recognition of the Yurok Tribe and the Tribe's Reservation through enactment of the HYSA. The Secretary's recognition of the Yurok Tribe's Constitution and election results, as well as its treatment of the Yurok Tribe as a federally-recognized tribe for all purposes, is evidence that the Yurok Tribe's 1993 waiver was at least partially effective.

Because the Yurok Tribe did pass a timely waiver resolution in 1993 and given the existence of credible legal arguments that the Yurok Tribe's waiver was sufficient under the HYSA, the Department recommends that the language in the Tribe's waiver resolution not serve as a basis to deny the Yurok Tr

Litigation

The first suit challenging the legality of the Hoopa-Yurok Settlement Act was filed by a group of Yurok individuals led by Lillian Shermoen. The suit was filed in federal district

court in San Francisco, California on August 28, 1990. Shermoen v. United States, No. 90-CV-2460 (N.D. Cal.). The suit sought to invalidate the Act on constitutional grounds, alleging that the Act deprived Yurok people of settled and vested rights in land and resources as adjudged by the courts in Short and Puzz. The principal theories of the suit were unconstitutional taking of land contrary to the Fifth Amendment, and unconstitutional imposition of conditions on the enjoyment of statutory benefits in that the Act sought to force the Yurok Tribe to waive its claims against the United States in order to obtain the organizational benefits of the Act, to access its share of the Settlement Fund and to obtain other benefits of the Act. The district court did not address the merits of these claims because the suit was dismissed on the procedural point that the Hoopa Valley Tribe could not be forced to join the lawsuit as a defendant against its will, and the Tribe refused to consent to have these issues litigated. The Plaintiffs efforts to amend the complaint to assert claims against Hoopa tribal officers were rejected by the court on the ground that the suit in legal effect was against the Hoopa Valley Tribe itself, which enjoyed immunity from unconsented suit. The Court of Appeals affirmed this ruling, Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), and the plaintiffs declined to seek review in the Supreme Court.

Following Shermoen, tribes and individuals aggrieved by the Act sought relief in the form of monetary compensation in the federal claims court. The first claim was filed by the Karuk Tribe in 1990, followed by a similar claim in 1991 by a group of Yurok plaintiffs led by Carol Ammon. The Yurok Tribe filed a takings claim under the Fifth Amendment in 1992. These cases were consolidated for decision by the Court of Federal Claims.

The Yurok complaint asserted a single cause of action alleging that the Yurok Tribe had a compensable interest in the joint Hoopa Valley Reservation, and that the Act took that interest without due process and just compensation as required by the Fifth Amendment to the Constitution. Alternatively, the complaint alleged that the Yurok Tribe had compensable rights based on its 125 years of continuous occupation and use of the joint reservation. Although the complaint sought no relief against the Hoopa Valley Tribe, the Tribe voluntarily intervened in order to protect a perceived threat to the benefits it received under the Act. A successful suit under the Fifth Amendment takings theory advanced by the Yurok Tribe would not have affected the interests of the Hoopa Valley Tribe, inasmuch as the only relief would have been monetary compensation from the United States to the Yurok Tribe for the loss of its rights in the joint reservation.

Judge Margolis ruled that none of the plaintiff tribes or groups had an interest in the joint reservation that was "compensable" under the Constitution. As a result, the court held that the Hoopa-Yurok Settlement Act did not take any property interest of the plaintiffs that was protected by the Constitution. Karuk Tribe of California v. United States, 41 Fed.Cl. 468 (Fed.Cl. 1998).

On April 18, 2000, a sharply divided Federal Circuit Court of Appeals affirmed by a 2-1 vote the decision of the U.S. Court of Federal Claims dismissing the Yurok Tribe's claim. Karuk Tribe of California v. Ammon, 209 F.3d 1366 (Fed.Cir. 2000). The majority ruled that the 1864 Act of Congress that created the Reservation did not give any Indians constitutionally compensable rights in the Hoopa Square. They held that the Square could be terminated or abolished without compensation to the Indian tribes that resided there. Relying on a case from the Termination era of federal Indian law and policy, the court ruled that Indian occupancy may be extinguished by the government "without compensation, unless an Act of Congress has specifically recognized the Indians' ownership rights." Id. at 1380.

The majority accepted the Yurok Tribe's argument that the 1864 Act was designed to secure a permanent peace, but concluded that this was to be accomplished by the President's total discretion to change and abolish the reservations. The court concluded: "Because plaintiffs have not shown possession of compensable property rights, this court need not examine whether the 1988 Settlement Act took or extinguished any rights." Id.

Judge Newman dissented from the decision and wrote an opinion characterizing the majority's reasoning as "incorrect as well as unjust." She particularly faulted the majority for its disregard of the fact that the Yurok Tribe has been in "unchallenged possession" of the Joint Reservation for "over a century." Id. at 1381. She also disagreed with the majority's definition of compensable property rights, finding that "[o]n any definition of the property rights and interests cognizable under the Fifth Amendment, those of the Indian plaintiffs constitute an interest subject to just compensation." Id. at 1382-83.

On March 26, 2001, the U.S. Supreme Court declined to review the decision, and the judgment dismissing the case became final. 121 S.Ct. 1402 (2001).

Settlement Negotiations

In 1996, the Yurok tribe and the Department of the Interior engaged in settlement negotiations. These negotiations were att the behest of the Yurok Tribe and were based on Assistant Secretary Deer's determination that although the Yurok Tribe's conditional waiver, was not yet effective in her view, it was filed in a timely basis and could be amended if negotiations were successful and Yurok Tribe v. United States was then dismissed. Secretary Babbitt appointed a special negotiator and extensive settlement discussions were held that focused on the demonstrated inequity caused by the HYSA in the relative, land, resource, and income base of the two separated and newly created Reservations. The Yurok Tribe was able to demonstrate that the annually the timber resource was economically at least 80 times more lucrative than commercial fishery resource. As noted the Yurok land base was a mere 3500 acres compared to the 89,000 acres of the Hoopa Valley Reservation. The Yurok Tribe asked for a coherent land base, including reacquiring all or most of the lands within the current

Reservation boundaries, a sufficient forestry landbase within the Reservation and from nearby lands (however, not from the Hoopa Valley Reservation), significant money damages, the establishment of a cultural district (pristine wilderness) in an area adjacent to the Reservation necessary to protect the religious and cultural identity of the Yurok people, and a commitment of designated federal program dollars to provide for the necessary infra-structure for the Reservation (roads, bridges, telephone service, electrification), and restoration and enhancement of the Klamath River and its tributaries. Although progress was made in these negotiations, the Department, in concert with the Department of Justice decided to suspend settlement negotiations until the legal issues could be fully litigated.

Recommendations for Legislation

The Department's recommendations for legislation are based on premise that Congress' assumption about fairness of the Act and the relative value of benefits provided to the Hoopa Valley Tribe and the Yurok Tribe have turned out to be erroneous. In fact, Congress provided for this eventuality in section 1300i-11(c), which directs the Department to submit a report to Congress with recommendations for supplemental funding and any "modifications" to the Act required to correct inequities that have arisen. The value of Yurok land received under the Act and the value of the land and resources received by the Hoopa Valley Tribe were grossly disproportionate in favor of the Hoopa Tribe. Congress' apparent reliance on the value of the Yurok fishery was based on the mistaken assumption of its value. The fishery is in steep decline and rarely provides any income to the Tribe. Coho salmon were recently listed as endangered by the National Marine Fisheries Service under the Endangered Species Act, which prohibits the Tribe from harvesting these fish. The listing indicates that other salmon species are in trouble as well.

Under these circumstances, the Department recommends that as a matter of history, fairness and equity, the Yurok Tribe is entitled an enhanced asset base.

a. The Settlement Fund. As noted, the Settlement Fund was made up of escrowed timber revenues from the joint assets of the Reservation, after the decisions in the Short cases, but before the Reservation was divided pursuant to HYSA. These escrow accounts were set up after providing the Hoopa Valley Tribe with 30% of the timber proceeds. At the time of the development of the escrow accounts, it was contemplated that the remaining 70% would go the remaining 70% of the population of the joint Reservation. Instead HYSA transformed these escrowed funds into the Settlement Account. The Hoopa Valley Tribe received 30% off the top from the timber revenues and then under the HYSA another 40% of the balance of the revenues at the time on the distribution to it based on its waiver and relative population. This means that of the 100% of the timber revenues post Short but before the HYSA,, the Hoopa Valley Tribe received approximately 60% of

the funds. While the balance of the Fund, intended for the Yurok Tribe has grown to $70 million through accumulated interest/investment, no new post HYSA timber revenues or federal appropriations have been added to the Account. Since the HYSA, the more than $80 million in timber revenues from the Square has belonged to the Hoopa Valley Tribe. The Department believes there is no further legal or equitable basis for allocating these funds between the two Tribes and that the balance of the fund should be transferred to the Yurok Tribe. The waiver executed by the Hoopa Valley Tribe in 1988, should preclude any claims it may assert on the balance of the funds

b. Clarify that the other benefits provided for in section 2 (c) of the HYSA be transferred to the Yurok Tribe.

c. Congress, should, in cooperation with the Administration and the Yurok Tribe, develop legislation authorizing equitable relief for the Yurok Tribe. Such legislation should be modeled upon the Settlement Negotiations efforts made in 1996 and should include: a land acquisition fund and authority to reacquire the lands within the Reservation boundary; acquisition of adjacent federal lands (not Hoopa lands) to provide an adequate timber resource; the establishment of cultural district adjacent to the Reservation to preserve in a pristine manner the high country used for religious observances; dedicated federal programs to address infra-structure needs(e.g., roads, electrification, telephone service, bridges, etc.); a financial settlement; and enhancement of the Klamath River system (restoration of the vitality of the fishery).

July 27, 2001

Gale Norton, Secretary
Department of Interior
1849 C Street NW
Washington, D.C. 20240

Re: Secretarial Report to Congress Required by Hoopa-Yurok Settlement Act § 14(c)

Dear Secretary Norton:

Litigation anticipated by the Hoopa-Yurok Settlement Act has been completed. Although the United States and the Hoopa Valley Tribe prevailed in that litigation, and the Hoopa-Yurok Settlement Act was upheld in every respect, the Act requires the Secretary to prepare and submit to Congress a report by September 24, 2001 (180 days after denial of certiorari in *Karuk Tribe of California v. Ammon*, 121 S. Ct. 1402 (2001)).

Section 14(c) of the Act requires:

> 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 . . . . 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.

25 U.S.C. § 1300i-11(c).

Attached is our recommendation for that report. Please contact me or our tribal attorney, Tom Schlosser ((206) 386-5200), as issues arise in the preparation of that report.

Sincerely yours,

HOOPA VALLEY TRIBAL COUNCIL

C. Lyle Marshall, Chairman

Enclosure

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REPORT OF THE SECRETARY OF THE INTERIOR PURSUANT TO SECTION 14(c) OF PUB. L. 100-580

1. Introduction.

The landmark Hoopa-Yurok Settlement Act adopted by the 100th Congress was intended to partition certain reservation lands between two tribes in Northern California, the Hoopa Valley Indian Tribe and the Yurok Tribe, to resolve lengthy litigation between the United States, the Hoopa Valley Tribe, and a large number of individual claimants, and to remove the legal impediments to Hoopa Valley Tribe and Yurok Tribe self-governance. Congress accurately foresaw that the Settlement Act would be tested in court. Now that such litigation is completed, this is the report required by § 14(c) of the Act, codified at 25 U.S.C. § 1300i-11(c).[1]

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[1] Section 14(c) provides:

> (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.

25 U.S.C. § 1300i-11(c).

This report will summarize the Settlement Act, the litigation concerning it, the final decision and claims regarding it, and the recommendations of the Secretary for action by Congress. As set forth below, the Secretary recommends that funding be provided for preparation of the plan for economic self-sufficiency of the Yurok Indian Tribe; that Bureau of Land Management parcels adjacent to the reservations be conveyed to the tribes; and that consideration be given to legislation to address the consequences of the Yurok Tribe's refusal to enact the claim waiver required by § 2 of the Settlement Act to obtain certain benefits and to clarify the resource and management authorities approved through ratification of the Hoopa Valley Tribe's Constitution in § 8 of the Act.

2. Reasons for the Hoopa-Yurok Settlement Act.

The lengthy and complex crisis that led to the Hoopa-Yurok Settlement Act grew from a single source: federal actions construed in the *Short* case. The Hoopa Valley Reservation, as it existed from 1891-1988,[2] consisted of three parcels, of which the "Square" was the largest. The first parcel, the Klamath River Reservation was reserved by Executive Order in 1855. In 1864 Congress passed a statute authorizing only four reservations for the Indians in California and later that year the Square was identified as one of them. An Executive Order in 1876 formally defined the boundaries of the Square. The third parcel, a thirty-five mile strip along the Klamath River between the two reservations, gained reservation status in 1891 by an Executive Order that joined

[2] The reservation consisting of the Square, the former Klamath River Reservation, and the Connecting Strip has been referred to variously as the "Hoopa Valley Reservation," "former Reservation" and "Joint Reservation." For clarity, this Report uses the term "1891 Reservation" to refer to the three-parcel reservation as it existed between 1891 and 1988.

the Klamath River and Hoopa parcels. Thus after 1891, the three parcels were enclosed within continuous boundaries.

As connected by the Executive Orders, the 1891 Reservation spanned traditional tribal areas of two tribes, the Hoopas and the Yuroks. Although their traditional areas were connected by Executive Orders, the social structure and political organization of the groups remained separate. The Hoopas on the Square and the Yuroks on the "Extension" (the Klamath River Reservation plus the "Connecting Strip") both rejected the 1934 Indian Reorganization Act. Strong tribal government developed and flourished on the Square, starting just after the turn of the century. Yurok organization splintered, and in the 1950s the Bureau of Indian Affairs declined to approve Yurok constitutions.

The Yurok parcels were largely allotted in the 1890s, including valuable timber land, but most of the timbered areas of the Hoopa Square were reserved from allotment. By 1955 little unallotted land and timber remained on the Extension. In 1955, at the request of the Hoopa Valley Tribe, the Bureau of Indian Affairs began to sell timber from the unallotted lands of the Square. The Bureau distributed the proceeds as directed by the constitutionally-established Hoopa Valley Business Council, primarily in per capita payments to Hoopa tribal members. The Interior Department Solicitor approved this. 65 I.D. 59, 2 Op. Sol. Int. 1814 (1958). Nonmembers of the Hoopa Valley Tribe sued the United States in 1963, claiming that, although they were not enrolled in any tribe, they too should receive per capita payments. *Jessie Short, et al. v. United States*, No. 102-63 (Ct. Cl.).[3]

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[3] *Short v. United States* includes seven reported opinions, 202 Ct. Cl. 870 (1973); 661 F.2d 150 (Ct. Cl. 1981); 719 F.2d 1133 (Fed. Cir. 1983); 12 Cl. Ct. 36 (1987); 25 Cl. Ct. 722 (1992); 28 Fed. Cl. 590 (1993); and 50 F.3d 994 (Fed. Cir. 1995), and hundreds of unreported

In 1973 the *Short* court ruled that from 1891 onward the three reservation parcels were a single unified reservation and that the Bureau had violated statutory trust duties to non-Hoopa "Indians of the Reservation" when it excluded them from tribal per capita payments. 202 Ct. Cl. 870 (1973) (per curiam), *cert. denied*, 416 U.S. 961 (1974). In 1981 the Court of Claims rejected arguments that it was improperly determining tribal membership for the plaintiffs, but it nevertheless directed the trial judge to fashion standards for determining which of the 3,851 plaintiffs were "Indians of the Reservation." The standards were created by adapting five separate membership standards used by the Hoopa Valley Tribe in preparing its roll in 1949-72. 661 F.2d 150 (Ct. Cl. 1981) (en banc), *cert. denied*, 455 U.S. 1034 (1982).

On remand in 1982, the *Short* trial judge defined Standards A, B, C, D and E based on the Hoopa standards and suggested that other plaintiffs could qualify as needed to avoid a "manifest injustice." On appeal, the new court of appeals upheld those standards. It also ruled that 25 U.S.C. § 407, the general tribal timber statute applicable to all reservations (which requires that timber proceeds should be used for the benefit of Indians who are "members of the tribe or tribes concerned"), does not restrict proceeds to federally-recognized tribes, or organized tribes, but instead includes all the individual Indians who were "communally concerned with the proceeds." 719 F.2d 1133, 1136 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

While the *Short* judge worked on the entitlement claims of thousands of individual plaintiffs, six of the *Short* claimants filed a new suit in the federal district court for the Northern District of California. *Puzz v. Department of the Interior and the Hoopa Valley Business Council,*

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orders. *Short*, still pending after 38 years, also spawned many related lawsuits. *Short* is a "breach of trust" case against the United States, filed in the Court of Claims in 1963 because of Bureau of Indian Affairs' handling of timber monies generated from the "Hoopa Square."

No. C 80 2908 TEH (N.D. Cal.). The *Puzz* group sought an order withdrawing federal recognition from the Hoopa Valley Tribe as the governing body of the Square and compelling creation of a tribal government for the entire 1891 Reservation, which would govern both Hoopas and plaintiffs.

In an unreported order dated April 8, 1988, Judge Henderson refused the relief the *Puzz* plaintiffs had requested, but he ruled that the Bureau had a trust obligation to administer the 1891 Reservation for the benefit of all persons who trace their ancestry to Indians connected with any of the three parcels comprising the 1891 Reservation, either now or any time in the past. Judge Henderson prohibited the Bureau from permitting use of tribal timber funds for any purpose that did not equally benefit all "Indians of the Reservation" (a term that he did not define), and he ruled that the Bureau must run the 1891 Reservation for the benefit of the "Indians of the Reservation" and could not permit the Hoopa Valley Business Council to exercise sovereignty over the Hoopa Square as provided in the Hoopa Valley Tribe's constitution.

Settlement efforts in *Short* in the 1970s and 1980s were frustrated by the thousands of individuals involved. No agreement could be reached that suited every claimant. Finally, Judge Henderson's April 8, 1988, order created such a morass that the California congressional delegation acted. On April 24, 1988, the Hoopa-Yurok Settlement Act was introduced by Congressman Bosco as H.R. 4469. Two House and two Senate hearings were held in June and September 1988. The Senate version of the bill, S. 2723, was signed into law on October 31, 1988, as Public Law 100-580, 102 Stat. 2924.[4]

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[4] The Settlement Act mooted the April 8 *Puzz* order, and Judge Henderson vacated it on December 17, 1988.

3. Provisions of the Hoopa-Yurok Settlement Act.

The Settlement Act was tailored to the unique legal situation and problems created by *Short*, *Puzz*, and the related cases. The cases frustrated territorial management by the Hoopa Valley Tribe, made it impossible for the Yurok Tribe to organize, and for either Tribe to effectively define its members. Those cases also held that neither Indian tribes nor individual Indians held vested (Fifth Amendment-protected) rights in the lands of the 1891 Reservation. Instead, 1891 Reservation rights remained subject to alteration and divestment, as did such rights in Hopi and Navajo lands for some time. Basically, therefore, the Settlement Act established a method to divide the 1891 Reservation lands into two reservations, to expedite the completion of the litigation, and to enable the Yurok Tribe to organize a tribal government so that each tribe could exercise sovereignty over its reservation.[5]

Section 2 of the Settlement Act authorized splitting the 1891 Reservation into the new Hoopa Valley Reservation and the Yurok Reservation, conditioned upon the Hoopa Valley Tribe enacting a resolution waiving certain claims. Yurok reservation land benefits were similarly conditioned upon a claims waiver. Section 2 provided the permanent vested legal rights in the new reservations that the *Short* case found lacking.[6]

The Hoopa Valley Business Council adopted the required resolution waiving certain claims. As a result, the 1891 Reservation was partitioned into the Hoopa Valley Reservation and

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[5] The report of the Select Committee on Indian Affairs, *Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, to Clarify the Use of Tribal Timber Proceeds, and for Other Purposes*, S. Rep. 564, 100th Cong., 2nd Sess. (1988), contains the most authoritative legislative history on the Act.

[6] S. Rep. at 2.

the Yurok Reservation on December 7, 1988. 53 Fed. Reg. 49,361. The Hoopa Valley Reservation comprised approximately 89,000 acres (mostly in trust status) and the Yurok Reservation, approximately 58,000 acres (mostly in nontrust status). S. Rep. at 6. As required by § 2(d)(2) of the Act, a description of the boundaries of the two new reservations appeared in the Federal Register. 54 Fed. Reg. 19,465 (May 5, 1989). Later in the year the Assistant Secretary-Indian Affairs withdrew all pre-Settlement Act policy statements on management of resources of the 1891 Reservation or the Hoopa Valley Tribe. This withdrawal mooted old controversies about the Gerard Plan, the Issue-by-Issue Process, and other *Short*-based restrictions on tribal sovereignty.

Section 4 of the Settlement Act established a Hoopa-Yurok Settlement Fund comprising all Hoopa or Yurok trust funds in existence on the date of the Act (about $65 million). Until the fund was divided in 1991, both the Hoopa Valley Tribe and the Yurok Transition Team took advances from it; the Hoopa budget advances were later deducted from the Tribe's shares. Under § 2(c), the Tribes' portions of the Settlement Fund were to be the percentage of the fund determined by dividing the number of enrolled members by the sum of those enrolled tribal members and the persons on the Hoopa-Yurok Settlement Roll, established pursuant to § 5.

Section 5 directed the Bureau to establish the Hoopa-Yurok Settlement Roll in a manner that closely followed eligibility criteria established for Indians of the Reservation in the *Short* case. With respect to *Short* plaintiffs, the Bureau was directed to follow the court's decisions on eligibility. Non-*Short* plaintiffs qualified, if at all, by meeting the court's Standards A, B, C, D, E, or MI (manifest injustice). In Pub. L. 101-301, 104 Stat. 210 (May 24, 1990), the Act was amended to make the criteria for the Settlement Roll more closely conform to rulings in *Short*. *See Making Miscellaneous Amendments to Indian Laws, and for Other Purposes*, S. Rep. 226,

101st Cong., 1st Sess. (1989). The Settlement Roll was completed and published on March 21, 1991. 56 Fed. Reg. 12062.

Section 6 established three choices that were available to persons on the Hoopa-Yurok Settlement Roll: Hoopa tribal membership, Yurok tribal membership, or receipt of a lump sum payment. No person chose Hoopa tribal membership. Approximately 2,955 persons selected the Yurok tribal membership option, together with a $5,000 payment ($7,500 for persons over age 50). The lump sum payment option, selected by approximately 708 persons, provided $15,000 in lieu of membership in the Hoopa Valley or Yurok Tribes and rights in those tribes' reservations. Opting for the lump sum payment had no effect on membership in other tribes, however. Most of the persons selecting Yurok tribal membership (about 1,800) were plaintiffs held qualified in the *Short* case. In addition to the Settlement Act payments made to those members, qualified *Short* plaintiffs ultimately received damage awards of approximately $25,000, depending upon the plaintiff's age. The *Short* damages award included principal, interest, cost reimbursement, and attorney fees under the Equal Access to Justice Act.

Sections 8 and 9 addressed tribal governance problems. Section 8 ratified and confirmed the 1972 Constitution of the Hoopa Valley Tribe. Section 9 established a Yurok Transition Team, appointed by the Secretary. After option selections were made by persons on the Settlement Roll, an Interim Council of the Yurok Tribe was elected in November 1991 to adopt a constitution and perform certain other functions, including consideration of a resolution waiving claims in order to obtain certain benefits offered in the Settlement Act.

By memorandum to the Area Director, Sacramento Area Office, the Assistant Solicitor, Branch of General Indian Legal Activities, decided certain issues raised by the Yurok Interim Council (Feb. 3, 1992):

> 1. The Interim Council of the Yurok Tribe automatically dissolved two years after November 25, 1991;
>
> 2. The Settlement Act permits three separate Yurok Interim Council resolutions, if necessary, to address claim waiver, contribution of escrow monies, and receipt of grants and contracts;
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> 3. Refusal to pass a resolution waiving claims against the United States and/or filing a claim would prevent the Yurok Tribe from receiving the apportionment of funds, the land transfers, and the land acquisition authorities provided by various sections of the Settlement Act, but would not completely preclude the Yurok Tribe from organizing a tribal government;
>
> 4. A tribal resolution waiving claims as required by the Settlement Act is necessary to receipt of specified benefits regardless of the statute of limitations provisions of the Act; and
>
> 5. Those individuals electing the Yurok tribal membership option waive certain claims against the United States, but persons who did not choose an option within the authorized time limit and who refused to cash the check issued to them would be free to pursue litigation.

The Yurok Tribe completed a constitution on October 22, 1993, which was adopted by vote of the membership later that year. As a result, a Yurok Tribal Council was elected to govern the Tribe by the time the Interim Council of the Yurok Tribe was dissolved.

Under § 10, the Bureau, the Yurok Transition Team, and the Interim Council of the Yurok Tribe were to prepare a plan for economic self-sufficiency for presentation to Congress. However, as noted below, the plan was not actually prepared.

The Secretary was required by § 11(b) to conduct secretarial elections on three Yurok rancherias within 90 days after enactment to determine whether those tribes and rancherias would merge with the Yurok Tribe. All three rancherias rejected merger.

Sections 12-14 addressed Indian participation in the Klamath River Basin Fisheries Task Force, amendment of the general timber statute, 25 U.S.C. § 407, and a series of statutes of limitations, which set deadlines for individuals or entities wishing to challenge the legislation dividing the 1891 Reservation. All the statutes of limitation have now expired.

4. Litigation Challenging the Hoopa-Yurok Settlement Act.

On August 28, 1990, 70 individual Indians and the Coast Indian Community of the Resighini Rancheria challenged the constitutionality of the Settlement Act on a variety of grounds. *Shermoen v. United States*, No. 90-CV-2460 (N.D. Cal.). Plaintiffs asserted that, by extinguishing their interest in the Square and conferring vested rights to the Square on the Hoopa Valley Tribe, the Act effected a taking of property for a nonpublic purpose. They also alleged a violation of their First Amendment right of freedom of association in that Indians of diverse tribal affiliations could elect membership in the tribes. Plaintiffs also contended that Congress exceeded its authority over tribes and denied them equal protect of the law.

On May 23, 1991, District Judge Orrick dismissed the action with prejudice pursuant to Fed. R. Civ. P. 19(b), ruling that the absent Hoopa Valley and Yurok Tribes were indispensable parties and immune from suit. Plaintiffs' proposed amended complaint was also rejected. The court of appeals affirmed, noting that plaintiffs' remedy, if any, "must be sought in the forum envisioned by Congress–namely the Court of Claims. *See* 25 U.S.C. § 1300i-11." *Shermoen v.*

United States, 982 F.2d 1312, 1321 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993). The *Shermoen* plaintiffs and others had already initiated precisely such a suit.

On December 7, 1990, the Karuk Tribe of California filed the first taking claim in the United States Claims Court. *Karuk Tribe of California v. United States*, No. 90-3993L (Fed. Cl.). The Karuk Tribe alleged that the Act's partition of the 1891 Reservation extinguished Karuk rights in the 1891 Reservation and effected a taking of Karuk property without just compensation. The Karuk Tribe alleged that Karuk possessed real property rights in the 1891 Reservation, in addition to hunting, gathering, fishing, timber, water, mineral, and other unenumerated rights.

The second taking claim was filed on September 16, 1991, by 13 individual plaintiffs and an "identifiable Indian group," defined much as was the plaintiff group in *Short v. United States*. *Ammon v. United States*, No. 91-1432L (Fed. Cl.). *Ammon* plaintiffs also claimed that the land partition authorized in the Settlement Act extinguished or diminished their rights in the 1891 Reservation and effected a taking of their property without just compensation.

The Yurok Tribe filed the third and last taking claim on March 11, 1992. *Yurok Indian Tribe v. United States*, No. 92-CV-173 (Fed. Cl.). The Yurok Tribe, all of whose members were encompassed in the identifiable Indian group of plaintiffs in *Ammon v. United States*, made claims for a compensable taking similar to the claims made in *Karuk* and *Ammon*.

On the United States' motion, the Court of Federal Claims consolidated the three lawsuits. In 1993, the Hoopa Valley Tribe moved to intervene in the consolidated case as a defendant, and Judge Lawrence Margolis (who has retained jurisdiction of the *Short* case since 1983) granted the Tribe's request. *Karuk Tribe of California v. United States*, 28 Fed. Cl. 694 (1993). Judge Margolis noted that, unlike the *Shermoen* litigation, the takings cases did not challenge the

constitutionality of the Settlement Act. However, the Court concluded that in rendering a judgment it would necessarily resolve (1) whether the plaintiffs had property rights in the 1891 Reservation; (2) if so, whether the Settlement Act took those rights away from the plaintiffs; and (3) if it did, whether the taking was compensable. The Court concluded that the Hoopa Valley Tribe had a legally protectable property interest in its exclusive rights in the Hoopa Square and that the United States could not adequately represent the interests involved, particularly in light of the issues that would arise at stages (2) and (3) of the case.

On cross-motions for summary judgment, Judge Margolis determined that the plaintiff groups did not possess a vested, compensable property interest in the 1891 Reservation. As a result, the Court held that plaintiffs never had a compensable property interest prior to 1988, and the Settlement Act did not take away any private property owned by plaintiffs. *See Karuk Tribe of California v. United States*, 41 Fed. Cl. 468 (Aug. 6, 1998).

On April 18, 2000, the United States Court of Appeals for the Federal Circuit affirmed Judge Margolis, by a two-to-one vote. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). Like Judge Margolis, the appeals court concluded that the 1864 Act which authorized establishment of the 1891 Reservation did not give California Indians vested property rights in the land set aside. However, pursuant to the Settlement Act, the Hoopa Valley Tribe and the Yurok Tribe did obtain permanent property rights to their reservations in 1988.

After the appeals court panel issued its opinion, plaintiffs asked the full Court to reconsider the issue and revise the panel's conclusions, but the Court refused. Plaintiffs petitioned for U.S. Supreme Court review, but on March 26, 2001, the United States Supreme Court decided not to review the case. 121 S. Ct. 1402 (2001). The denial of certiorari marks the final decision in the

claims brought pursuant to 25 U.S.C. § 1300i-11(b) and thus activates the requirement that the Secretary prepare and submit to Congress a report describing the decision and her recommendations.

5. Recommendations and Observations of the Secretary.

a. The Withheld Benefits of the Settlement Act Should Be Distributed Fairly Between the Hoopa Valley and Yurok Tribes.

Section 2 of the Settlement Act, 25 U.S.C. § 1300i-1, withheld the benefits of the settlement from both the Hoopa Valley and Yurok Tribes unless and until those tribes enacted a waiver of claims in favor of the United States and affirmed tribal consent to contribution of monies to the Settlement Fund. *See* 25 U.S.C. § 1300i-1(a)(2) and (c)(4). The claim waiver did not affect plaintiffs' entitlement and judgment in the *Short* case. As noted above, the Hoopa Valley Tribe enacted the requisite resolution in 1988. The Yurok Tribe, however, was unable to act upon the resolution until the Yurok Interim Council was elected pursuant to § 9 of the Act.

The Settlement Act contemplated prompt action by the Hoopa Valley and Yurok Tribes to enact the waivers and obtain the benefits of the Act. *See* HYSA § 2(c)(4)(D), § 9(d)(5). Although elected in 1991, the Yurok Interim Council did not act to make a waiver until November 24, 1993, when it adopted Resolution No. 93-61.

The Department held that Resolution No. 93-61 "is not a resolution 'waiving any claim the Yurok Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act,' within the meaning of 25 U.S.C. § 1300i-1(c)(4) or 25 U.S.C. § 1300i-8(d)(2)." Letter of Ada E. Deer, Assistant Secretary–Indian Affairs, to Susie L. Long, Chair, Interim Tribal

Council, Yurok Tribe (April 4, 1994). What follows is an extensive quotation from Assistant Secretary Deer's letter:

> It is clear to us that the waiver referred to in the above-referenced provisions of the Hoopa-Yurok Settlement Act is a waiver of claims that would challenge the partition of the Joint Reservation or other provision of the Settlement Act as having effected a taking or as otherwise having provided inadequate compensation.
>
> Among other things, Resolution No. 93-61 recites that:
>
> > [T]he Interim Council believes that the Act's purported partition of the tribal, communal or unalloted land, property, resources, or rights within, or appertaining to the Hoopa Valley Reservation as between the Hoopa and Yurok Tribes was effected without any good-faith attempt to define, quantify or value the respective rights therein of the Indians of the Reservation or the Hoopa and Yurok Tribes, and so grossly and disproportionately favored the interest of the Hoopa Tribe over those of the Yurok Tribe as to constitute an act of confiscation rather than guardianship; and
> >
> > [T]he Interim Council does not believe that the Constitution of the United States would allow the federal government simply to confiscate vested Tribal or individual property rights in Reservation lands, resources or other assets without just compensation, or to condition participation in or receipt of federal benefits or programs and enjoyment of tribal property, assets and resources upon acquiescence in an unconstitutional statute.
>
> Following the recitals, the Yurok Interim Council resolved as follows:
>
> > 1. To the extent [to] which the Hoopa-Yurok Settlement Act is not violative of the rights of the Yurok Tribe or its members under the Constitution of the United States, or has not effected a taking without just compensation of vested Tribal or individual resources, or rights within, or appertaining to the Hoopa Valley Reservation, the Yurok Tribe hereby waives any claim which said Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act;
> >
> > 2. To the extent [to] which the determination of the Yurok Tribe's share of the Escrow monies defined in the Hoopa-Yurok Settlement Act has not deprived the Tribe or its members of rights

> secured under the Constitution of the United States, the Yurok [Tribe] hereby affirms its 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 the Hoopa-Yurok Settlement Act.

It is quite clear that Resolution No. 93-61 specifically preserves, rather than waives, the Yurok Tribe's taking claim against the United States. Indeed, the Yurok Tribe has filed a claim in the U.S. Court of Federal Claims asserting that the Hoopa-Yurok Settlement Act effected a taking under the Fifth Amendment of the United States Constitution. See Yurok Indian Tribe v. United States, No. 92-173-L. On February 3, 1992, the Assistant Solicitor, Branch of General Indian Legal Activities, issued a memorandum to the Area Director, Sacramento Area Office, regarding issues raised at the organizational meeting of the Yurok Interim Council held on November 25, 26, 1991. That memorandum discussed several aspects of the claim waiver resolution issue. The Assistant Solicitor stated:

> It is clear that should the Interim Council file a claim in the U.S. Claims Court on behalf of the Yurok Tribe pursuant to 25 U.S.C. § 1300i-11(a), the same consequences would follow as if it fails to enact a resolution waiving claims under 25 U.S.C. § 1300i-1(c)(4).

Accordingly, it follows that Resolution No. 93-61 is not a resolution "waiving any claim the Yurok tribe may have against the United States arising out of the provisions of this Act," within the meaning of 25 U.S.C. § 1300-1(c)(4) or 25 U.S.C. § 1300-8(d)(2). Our conclusion is consistent with your statement to the Assistant Secretary–Indian Affairs, in a letter dated August 20, 1993, that the Interim Council would not provide any such waiver during its term.

Our determination that Resolution No. 93-61 fails to meet the requirements of 25 U.S.C. § 1300-1(c)(4) means that the Yurok Tribe will be unable to enjoy the benefits conferred under Section 2 and 9 of the Hoopa-Yurok Settlement Act upon the passage of a legally sufficient waiver of claims, including the Yurok Tribe's share of the Settlement Fund under Sections 4 and 7 of the Act, the $5 million appropriated under the Snyder Act for the purpose of acquiring lands within or outside the Yurok Reservation, ownership of all Six Rivers National Forest lands within the boundaries of the old Klamath River Reservation or the Connecting Strip, and ownership of and reservation status for the Yurok Experimental Forest lands and buildings.

Shortly after the Yurok Interim Council filed its lawsuit to establish a "taking," the Hoopa Valley Tribe, through its Chairman Dale Risling, wrote to the Assistant Secretary–Indian Affairs

asking that the Interior Department establish Hoopa tribal access to the funds that remained in the Hoopa-Yurok Settlement Fund. Hoopa Chairman Risling's letter noted that proceedings in another case, *Heller, Ehrman, White, and McAuliffe v. Babbitt*, 992 F.2d 360 (D.C. Cir. 1993), established that only 1.26303 percent of the money in the Settlement Fund was derived from the Yurok Reservation and the remainder was derived from the Hoopa Reservation.

On April 13, 1992, Assistant Secretary–Indian Affairs Eddie F. Brown responded to Chairman Risling as follows:

> It is clear that the Interim Council's decision to file the above-referenced claim in the U.S. Claims Court means that the same consequences follow as if it fails to enact a resolution waiving claims against the United States. Therefore, unless and until the Interim Council waives the Tribe's claims and dismisses its case against the United States, it will neither have access to its portion of the Settlement Fund, nor will title to all national forest system lands within the Yurok Reservation, and to the portion of the Yurok Experimental Forest described in the Settlement Act, be taken in trust for the Yurok Tribe. In addition, the Secretary will be unable to proceed with the acquisition of any lands or interests in land for the Yurok Tribe, or with spending any appropriated funds for this purpose.

The Hoopa Valley Tribe has continued to assert its right to a portion of the benefits offered to and rejected by the Yurok Tribe. The Hoopa Valley Tribe has had the "laboring oar" and has incurred substantial expense in the litigation brought by the Yurok Tribe and its members.

Most recently, on April 4, 2001, Hoopa Valley Tribal Council Chairman Sherman wrote to Ronald Jaeger, Regional Director, Pacific Regional Office, Bureau of Indian Affairs, saying:

> We urge the Bureau to be careful not to permit the Yurok Tribe to seize the benefits it has refused, benefits to which it is not lawfully entitled. The Yurok Tribe has occupied the Experimental Forest lands and buildings and may propose timber sales on the former Forest Service properties. These benefits, like the money in the Settlement Fund, account Hoopa-Yurok Settlement–7193, do not belong to the Yurok Tribe .... We recommend that the Interior Department's report ... include a recommendation that the remaining funds from the Hoopa Square be returned to the Hoopa Valley Tribe.

After due consideration, the Secretary recommends that the suspended benefits of the Hoopa-Yurok Settlement Act, which include the national forest system lands within the Yurok Reservation, the improved properties located in the former Yurok Experimental Forest, the $5 million appropriated for land acquisition on and near the Yurok Reservation, and the funds remaining in the account Hoopa-Yurok Settlement–7193, be valued and divided equally between the two tribes. As a portion of its allocation, the Yurok Tribe should receive the Six Rivers National Forest lands within the boundaries of its Reservation and the Yurok Experimental Forest lands and buildings. Those properties should be declared part of the Yurok Tribe's Reservation.

b. <u>The Yurok Tribe Economic Self-Sufficiency Plan Should Be Prepared and Funded</u>.

Section 10 of the Settlement Act required the Secretary to 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 and, upon approval of that plan, to submit it to Congress. 25 U.S.C. § 1300i-9(a). Among other things, that section of the Act required consultation with state and local officials and directed that real property be taken in trust by the United States for the benefit of the Tribe. The Indian Affairs Committee report on the Act explains the self-sufficiency plan as follows:

> The amendment added a new Section 10 direction that a plan for economic self-sufficiency for the Yurok Tribe be developed and submitted to Congress by the Secretary of the Interior, in conjunction with the Interim Council of the Yurok Tribe and the Yurok Transition Team, to determine the long-term needs of the Tribe. The Secretary is expected to seek the assistance and cooperation of the secretaries of Health and Human Services and other federal agencies. The Committee is aware that the Yurok Tribe has not received the majority of services provided to other federally recognized tribes. As a result it lacks adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community. In addition, the Committee is aware that many of the road, realty and

> fisheries management services on the "Addition" have been provided in the past by the Hoopa Valley Tribe. The Committee is, therefore, concerned about how the Bureau of Indian Affairs plans to address these needs, and directs the Secretary to work with the Yurok Tribe to develop proposed solutions to these and other related problems. *The Committee is specifically interested in the feasibility and cost of constructing a road from U.S. Highway 101 to California Highway 96.* It is also concerned that the Department of the Interior does not currently have adequate land records and surveys of the "Addition". The Committee, therefore, expects that the Department will conduct all necessary surveys to ascertain the legal status of such lands. It also expects the plan to address such things as the number of additional federal employees required to service the Yurok tribe and placement of the Tribe's facilities construction needs on the BIA, IHS, and other federal agency construction priority lists. The Committee wishes to clarify, however, that the development of this plan should in no way delay the provision of services to the Yurok Tribe and/or the construction of federal and tribal facilities.

S. Rep. 100-564 at 28-29 (Sep. 30, 1988) (emphasis added).

The economic self-sufficiency plan has never been completed or submitted to Congress, for reasons that are not entirely clear. However, the Committee's clarification that development of the plan should not delay provision of services to the Yurok Tribe has been noted. Indeed, the Yurok Tribe has received tens of millions of dollars through its Self-Governance Compact process as well as similar or greater funding from other federal, state, and local agencies. However, the Secretary is unaware of any feasibility study concerning the cost of constructing a road from U.S. Highway 101 to California Highway 96 and this and other objectives of the self-sufficiency plan should be carried forward at this time.

c. <u>The Effect of the Hoopa Valley Tribe's Ratified Constitution May Need to be Clarified</u>.

Congress addressed tribal authority over the post-1988 Hoopa Valley Reservation in the Settlement Act. The Act restored tribal governmental authority in these words:

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

25 U.S.C. § 1300i-7. This provision responded directly to one of the court cases that led to passage of the Settlement Act, *Puzz v. Department of Interior*, No. C80-2908-TEH, 1988 WL 188462 (N.D. Cal. 1988), which held that because of the peculiar way the 1891 Reservation had been established, unless Congress acted to give tribes authority over the Reservation lands, tribal governments lacked territorial management powers. Congress gave the Hoopa Valley Tribe that authority in 25 U.S.C. § 1300i-7, which gave the force of federal law to provisions of the Tribe's constitution.

The Hoopa Valley Tribe's Constitution was carefully identified in 25 U.S.C. § 1300i(b)(4), and contains specific authorization to the Hoopa Valley Tribal Council to govern all lands within the "Hoopa Valley Reservation." Several provisions of the Tribe's Constitution apply to nontribal members on the Reservation and the Tribe's 1988 claims waiver resolution (which the Bureau approved and published) noted the Tribe's need "to govern non-members." In *Bugenig v. Hoopa Valley Tribe*, No. C98-3409CW (U.S. D.C. N.D. Cal. 1999), Judge Wilken held § 8 of the Act gave to every clause of the ratified Constitution the full force and effect of a congressional statute. However, that holding is challenged in a pending appeal.

Upon division of the 1891 Reservation into a new Hoopa Valley Reservation and a Yurok Reservation, the Hoopa Valley Tribe became the sole beneficial owner of the unallotted (communal) land of its Reservation. 25 U.S.C. § 1300i-1(b). That provision changed the facts that led the *Puzz* court to hold that the Hoopa Valley Tribe lacked territorial management authority over the 1891 Reservation. The result of § 2 of the Act was that non-Indians would own less than

1 percent of the land of the new Reservation and that the Tribe would have the ability to "define the essential character" of the Reservation. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 402, 441 (1989). However, testimony received by the House and the Senate showed that restoring tribal government authority required more–a delegation of express statutory authority to the Tribe to administer matters over all Reservation residents, including nonmembers. As a result, at mark-up the House Interior and Insular Affairs Committee added Section 8 to H.R. 4469, which became part of the final Act and is codified at 25 U.S.C. § 1300i-7.

Congress's "fix" of tribal government authority may need to be clarified because of *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), an opinion that held Congress did not authorize the Hoopa Valley Tribe to regulate the actions of nonmembers because its delegation was not truly "expressed." The court said that "if Congress uses the 'notwithstanding proviso,' which is an easily invoked, court-approved 'gold standard' for delegation, then an appropriate delegation has been made .... [A]lternative language must, on its face, represent a pellucid delegation of the claimed authority." *Bugenig*, slip op. at 12,742-43. The court found Congress's action delegating governmental authority to the Tribe in the Hoopa-Yurok Settlement Act did not meet that high standard. Although this problem arose in the context of the *Bugenig v. Hoopa Valley Tribe* case, it is a broad ruling and by no means limited in scope to protection of archeological sites (the *Bugenig* situation). General land use authority may not be exercisable without congressional action. A technical amendment to § 8 of the Settlement Act could clarify matters by adding the following: "The Tribe shall have jurisdiction in accordance with such documents notwithstanding the issuance of any fee patent or right-of-way."

On February 28, 2001, the Ninth Circuit Court of Appeals issued an order granting rehearing en banc in *Bugenig*, 240 F.3d 1215 (9th Cir. 2001). The case was argued and submitted on June 19, 2001, but remains undecided. Unless the Court of Appeals ultimately agrees with the lower court and concludes that Congress in § 8 of the Settlement Act intended to make the Hoopa Valley Tribe's Constitution applicable to all persons and property within the geographic limits of the Reservation, in accordance with the terms and procedures of the Constitution, then legislative clarification will be necessary.

In the Secretary's view, Congress did consider tribal authority over fee-patented land owned by nonmembers of the Hoopa Valley Tribe. That authority was specifically mentioned by witnesses representing various interests[7] and the Committee reports make clear the Act's intent to approve and confirm in the Hoopa Valley Tribal Council territorial management power throughout its reservation.

d. Bureau of Land Management Parcels Adjacent to the Reservation Should be Conveyed to the Tribes.

In addition to Six Rivers National Forest, a variety of federal agencies have come into possession of lands adjacent to or near the Yurok and Hoopa Valley Indian Reservations. Some of these lands have a clear historical connection to the tribes or the Reservations. These properties should be conveyed to and managed by the Tribes.

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[7] *E.g.*, House Interior Committee Hearing–Serial No. 100-75 (June 21, 1988) at 57, **101**, **145** (nonmember fears zoning her fee land); Senate Select Committee Hearing, S. Hrg. 100-946 (June 30, 1988) at 28; Senate Select Committee Hearing, S. Hrg. 100-949 (Sept. 14, 1988) at 50, 66-67, 152-53; Subcom. of the House Judiciary Committee, Serial No. 77 (Sept. 30, 1988) at 27, 32, 54, 64, **155**.

For example, along the northern boundary of the Hoopa Square, a wedge of BLM land has become known as the "no man's land." The origin of those BLM lands seems to be found in the conflicting efforts of two federal surveying parties, the Bissel-Smith group and the Haughn group, to project the northern boundary of the Hoopa Valley Reservation. Section 2(d) of the Settlement Act provides that the boundary of the Hoopa Valley Reservation and the Yurok Reservation after partition shall be that established by the Bissel-Smith survey. However, that boundary did not resolve the disposition of the BLM parcels in that area which are adjacent to the Hoopa Valley Reservation but do not touch the Yurok Reservation. The Hoopa Valley Tribe and BLM staff have discussed the procedure for transferring these lands to tribal ownership for a number of years, but it is clear that direct legislative authorization is the simplest way to achieve this. Accordingly, conveyances to the Tribe should occur.[8]

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[8] Specifically, these parcels are: T.9N., R.4E., HUM, Section 8, Lot 3, Section 9, Lots 19 and 20, Section 17, Lots 3-6, Section 18, Lots 7-10 (317.16 acres); T.9N., R.3E., HUM, Section 13, Lots 8-12, Section 14, Lot 6, Section 23, Lots 7 and 8, Section 26, Lots 1-3 (228.68 acres); and T.7N., R./4E., HUM, Section 7, Lot 6, Section 7, Lot 1, Section 18, NENE (59.24 acres). The total transfer of BLM land would be 605.08 acres.