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TO: House Committee on the Interior and Insular Affairs
Attention: Frank Ducheneaux

FROM American Law Division

SUBJECT Questions with Respect to Hoopa Valley Reservation Settlement as Proposed in H.R. 4469

This responds to your request to provide a memorandum concerning the Hoopa Valley Reservation dispute settlement proposed in H.R. 4469 as amended by the substitute, a draft of which you enclosed. What follows is an analysis of three specific questions posed by the Committee; a summary appears on the final pages of the memorandum and on a separate page attached for your convenience.

Before proceeding to the questions we will briefly set forth the major provisions of the proposal:

H.R. 4469 as amended

If Hoopa Valley Tribe adopts a resolution to the effect, the Hoopa Valley Reservation is to be partitioned: the Square to the Hoopa Valley Tribe; the Extension to be established as the Yurok Reservation (including National Forest lands and parts of Yurok Experimental Forest), with $5,000,000 authorized for additions.

The Short v. United States (Ct. Cl. No. 102-63) litigation would not be affected.

Claims would be barred 210 days after partition or 120 days after publication of option election data. Yurok claim could be barred by tribal waiver or by expiration of 180 days after the general council meeting.

"Indians of Reservation" roll is to be established; that, together with Hoopa Valley tribal roll, is to constitute settlement roll. Persons listed on settlement roll are to be accorded right to choose: Hoopa Valley Tribe membership (provided other qualifications are met: 18 years of age, meeting Short Hoopa Valley criteria, and residence or property on the Square); Yurok Tribe membership (with $3,000 cash payment); or lump sum, $20,000, payment. Choice effects renunciation of assets of tribe not chosen or, in the case of choice of lump sum payment, any tribal assets. The settlement fund is to be divided between the tribes on a pro-rata basis. After payment of these sums to individual Yuroks from escrow accounts, remainder (including accumulating interest) (plus $10,000,000 authorized to be appropriated) is to be divided between the tribes equally. These sums are to be held in trust by the United States for the benefit for each tribe, not to be distributed per capita until the expiration of ten years. (There is also a provision authorizing up to $3,500,000 million annual expenditure from the fund to be paid to the Hoopa Tribe for tribal purposes.)

The Settlement Roll is to consist of eligible "Indians of the Reservation" who can qualify under *Short*, living on the date of enactment, citizens of the United States, who are not enrolled members of the Hoopa Valley Tribe.

Those choosing Yurok Tribal membership are permitted to join in forming tribe, which may be organized under the Indian Reorganization Act. Secretary is to convene a general council of eligible Yurok Tribe members, who are to nominate members of an Interim Council and to vote on waiving any claim against the United States. Interim Council is empowered to appoint a committee to draft tribal constitution and is to expire upon its adoption or at the end of 2 years.

Essentially, this proposal would effect a division of the present Hoopa Valley Reservation into two Indian reservations: one portion, the Square, a timber rich area, to be held in trust for the Hoopa Valley Tribe, who apparently are currently the chief residents of the Square; the other portion, the Extension, to be held in trust for the Yuroks, who are to include the "Indians of the Reservation," the successful plaintiffs in Short v. United States (Claims Court Docket No. 102-63).

You have asked three questions regarding this proposal:

> 1. What is the legal nature of the interest of persons qualifying as "Indians of the Reservation" in the tribal or communal resources of the Hoopa Valley Indian Reservation, prior to any individualization of such resources?
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> 2. What is the scope of Congressional power over tribal communal property of Indian reservations; membership in Indian tribes; and individual rights to participate in such tribal or communal property?
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> 3. In view of the plenary power of Congress over Indian affairs and its role as guardian of Indian tribes in view of the responses to questions I and 2 above, does Congress have power to deal with the tribal or communal property and assets of the Hoopa Valley Indian Reservation as proposed in H.R. 4469 as amended by the substitute?

We shall attempt to confine our response to those questions and address them in order, avoiding tangential matters, however important their impact upon the proposal. We will, however, supply a brief background, derived from court opinions, in an attempt to set the framework within which your questions and the legislation arise.

Historical and Legal Background. Generally, the situation that exists today on the Hoopa Valley Reservation is a product of the interaction between legal doctrines and historical or political realities. The reservation evolved from two reservations joined because of a legal limitation on the number of

reservations that could be established in California. On this reservation were settled Indians whose traditional organization was either non-existent in the tribal sense or so loose as to fail to make its presence felt in dealings with the federal government. Although there is evidence that the federal government recognized that because the two reservations had been joined members of both units had legal interest in the entire reservation, there is also evidence that the federal government made efforts to segregate the two sections of the reservation. The eventual organization of the Indians on the reservation into .a formal tribal government was in some sense federally inspired and it was centered on one part of the reservation, the Square, wherein resided the primary resource of the reservation, its timber. Indians of the Extension, the other part of the reservation, successfully brought suit in the Court of Claims for damages based on the amount of timber proceeds they would have received had the distribution been equitable in their view. These plaintiffs had been excluded from participation in the tribal government of the Square and excluded from federal per capita distributions of timber proceeds. These plaintiffs included both residents and non-residents of the reservation who qualified as "Indians of the Reservation," base*d on a test analogous to the membership requirements of the organized tribal government of the reservation.

This test was used in the Short[1] case, which currently involves the process of deciding which of the over 3,000 plaintiffs was entitled to receive a per capita share of timber proceeds already distributed.

The specifics of how that situation developed are briefly as follows. The

[1] Short v. United States, 486 F.2d 561, 202 Ct. Cl. 870 (1973), cert. denied, 416 U.S. 961 (1974); Short v. United States, 661 F.2d 150, 228 Ct. Cl. 535 (1981), cert. denied, 455 U.S. 1034 (1982); Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983); Short v. United States, ___ F.2d ___, 12 Ct. Cl. 36 (Fed. Cir. 1987).

Hoopa Valley Reservation as it exists today is shaped like "a square skillet with an extraordinarily long handle."[2] The square section (hereinafter, the Square) derives from the original Hoopa Valley Reservation; the handle or extension (hereinafter the Extension) section derives from a reservation, one mile wide on either bank of the Klamath River, set aside for Indians living on the lower Klamath, primarily the Yuroks, and a connecting strip of land linking it to the Hoopa Valley Reservation. In 1864, by statute the President was authorized to set aside reservations for the Indians of California pursuant to the Act of April 8, 1864, 12 Stat 39, 40, which read, in pertinent part:

> Sec. 2. That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state . . . . And provided, further, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

By executive order of June 23, 1876, President Grant set aside the Hoopa Valley reservation as follows:

> It is hereby ordered that [description of metes and bounds follows) . . . be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of

[2] Short v. United States, 202 Ct. Cl. 870, 873; 486 F.2d 561 (1973), cert. denied, 416 U.S. 961 (1974). For a map of the reservation see Appendix A (attached).

Congress approved April 8, 1864.[3]

That executive order pertained to the square part of the current Hoopa Valley Reservation. it has been described as "a 12-mile square tract of land in Northern California, on the last reach of the Trinity River before it joins the Klamath River."[4] Another reservation had been established by executive order along the Klamath River on November 16, 1855, pursuant to the Act of March 3, 1853, 10 Stat. 226, 238) as amended by the Act of March 3, 1855. 10 Stat. 686, 699. The 1853 legislation, as amended, authorized the President to set aside "five [subsequently seven] military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." 10 Stat. 226, 238. By the 1855 executive order President Franklin Pierce ratified the Department of Interior recommendation for a "Klamath Reservation," a "strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River."[5]

After the 1864 act restricted the President's authority to establishing no more than four California reservations, no definitive action was taken with respect to the Klamath Reservation[6] akin to the June 23, 1876, executive order pertaining to the Hoopa Valley Reservation. The Department of the Interior,

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[3] 1 Kappler, Indian Affairs: Laws and Treaties 815 (1904 ed.) (hereinafter, Kappler).

[4] Short v. United States, 202 Ct. Cl. 870, 873.

[5] 1 Kappler 817.

[6] Some definitive action was taken with regard to other California reservations. For example, the Act of July 27, 1868, 15 Stat. 198, 221, 223, provided for the removal of Indians from the Smith's River reservation to Hoopa Valley and Round Valley reservations, to Hoopa Valley and for the restoration of the Mendocino Indian reservation to the public domain.

however, continued to treat the Klamath River Reservation as a legitimate reservation. In 1888 the federal courts ruled that the Klamath Reservation was not Indian country because it had not been set aside pursuant to the 1864 act.[7]

Subsequently, on October 16, 1891, an executive order[8] extended the Hoopa Valley Reservation "so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean." Lands to which other valid rights attached were excluded. The Supreme Court in Donnelly v. United States,[9] a case requiring a decision on whether the former Klamath River Reservation was Indian country for jurisdictional purposes, upheld the extension of Hoopa Valley Reservation to include the Klamath River Reservation as within the power conferred upon the executive by the Act of 1864. In Mattz v. Arnett,[10] the Court indicated its view of the rationale for the 1892 act:

> The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to 'set apart' no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. These were the Round valley . . . . the Mission, the Hoopa Valley, and the Tule River . . . . Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act [of 1864) to expand an existing, recognized reservation. He [President Benjamin Harrison] enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts. The President's continuing authority so to enlarge reservations and,

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[7] United States v. Forty-eight Pounds of Rising Star Tea, 35 F. 403 (N.D. Cal. 1888), aff'd 30 F. 400 (C.C.N.D. Cal. 1889).

[8] I Kappler 815.

[9] 228 U.S. 243 (1913).

[10] 412 U.S. 481, 493-492 (1973) (footnotes omitted).

> specifically, the legality of the 1891 Executive Order, was affirmed by this Court in Donnelly v. United States . . . .

An Act of June 17, 1892, 27 Stat. 52, permitted opening the former Klamath River Reservation up to settlement with provision for Indian allotments as follows:

> Provided That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, [the General Allotment Act] . . . and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof.[11]

There was a further provision that the funds realized from the sale of land were to "be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children."[12]

Surveying had begun on the Square and temporary allotments made on the basis of authority issued on November 29, 1887,[13] under the authority of the General Allotment Act of February 8, 1887, as amended by the Act of February 23, 1891.[14] Allotments on the Connecting Strip were not specifically authorized under the 1892 legislation, but were authorized by the President under authority of the General Allotment Act.[15] Allotments were made to Indians residing on each of the portions of the Hoopa Valley Reservation;

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[11] 27 Stat. 52.

[12] Id.

[13] Short v. United States, 202 Ct. Cl. 870, 925 (finding 78).

[14] 24 Stat. 388; 26 Stat. 794.

[15] Short v. United States, 202 Ct. Cl. 8709, 928 (finding 82).

first, to those on the Extension[16]; then to those on the Connecting Strip; and, finally the process of making allotments to those on the Square began.[17] In 102, 365 allotments on the Square were approved; by 1932, when a survey indicated that there was relatively little land on the reservation suitable for allotment, i.e., agricultural purposes, there were about 600 Indians on the Square and Connecting Strip who might seek allotments.[18] Some allotments were made in 1933 but at that time, the Commissioner of Indian Affairs gave orders to cease making allotments because of the possibility that "Indians of the Connecting Strip and the Lower Klamath Strip (which he called the 'former Klamath River Reservation') would all be equally entitled to allotment on the Square (which he termed the 'original Hoopa Valley Reservation'), and the available agricultural and grassland would be sufficient for so small a number of those qualified as to work injustice."[19] Overall, the allotments that had been made were made to Hoopas on the Square and Yuroks on the Extension with a few Yuroks on the Square and Hoopas on the Extension, mainly those who had ties by blood or residence.[20] According to the Court of Claims:

> In connection with the allotment program, officials of the Indian Office on a number of occasions ruled that

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[16] Under the 1892 legislation lands not selected by the Indians for allotments on the former Klamath River Reservation were opened to the public for4 settlement. The result was that the Indians of the former reservation, i.,e., the Extension, who did not choose allotments became scattered. 66 I.D. 59, 64 (February 5, 1958); II Opinions of the Solicitor, Department of the Interior, Indian Affairs 1814, 1816.

[17] Short v. United States, 202 Ct. Cl. 870, 928-933 (findings 80-88).

[18] Short v. United States, 202 Ct. Ct. 870, 934-935 (findings 91-92).

[19] Short v. United States, 202 Ct. Ct. 870, 938 (finding 96).

[20] Short v. United States, 202 Ct. Ct. 870, 940- (finding (100).

> Indians of the Addition[21] and the Square--Klamaths and Hoopas and others--were equally entitled to rights in the entire reservation as enlarged and, specifically, in the Square.[22]

The tribal organization of the Indians settled on the Hoopa. Valley Reservation was not maintained into the twentieth century[23], prompting the Department of the Interior to convene a council in 1915 for allotment purposes.[24] That council apparently fell out of use for by 1930, no council existed.[25] In 1933 a business council, with purely advisory powers, limited to the Square and to the Hoopas, was established with the approval of the Interior

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[21] Some sources use the term "Addition" for the area referred to in this paper as the Extension. Others use the terms Addition and Connecting Strip to distinguish the original Klamath River Reservation and the strip of land connecting it to the original Hoopa Valley Reservation.

[22] Short v. United States, 202 Ct. Cl. 970, 938 (finding 101). Findings 101-108 provide specific instances of Indian Department actions or statements over time supporting the contention that no distinction was made in allocating allotments on the reservation.

[23] In 1958, the Deputy Solicitor of the Department of the interior apprized the Commissioner of Indian Affairs as follows:

> A group of Indians had been politically recognized as a Hoopa tribe by the United States as early as 1851 when a treaty was negotiated with the 'Hoo-pah' or, as they were sometimes otherwise called, the Trinity River Indians. Although this treaty was never ratified, it is convincing evidence of the existence of a Hoopa tribal group. Later this tribal group exercised the rudiments of community government over the Indians of an area comprising the twelve mile square original Hoopa Valley reservation and were thus qualified for political recognition as a tribe occupying the reserved area. We have seen no evidence, or contention, that any other tribal group claimed, at that time any governmental or economic jurisdiction over the twelve mile square area of the original Hoopa Valley Reservation.
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> 65 I.D. 59, 61; 11 Opinions of the Solicitor, Department of the Interior, Indian Affairs 1814, 1815-1816 (February 5, 1958).

[24] Short v. United States, 202 Ct. Cl. 870, 950-951 (finding 110).

[25] Short v. United States, 202 Ct. Cl. 870, 951.

Department; a similar council for the Indians along the Klamath River was also established with a subordinate role.[26] Since comparable powers were not approved for the Klamath council, it eventually disappeared.[27] The constitution and by-laws of the Hoopa Valley Business Council were approved on November 20, 1933; no indication of the extent of its jurisdiction was indicated.[28] Members were elected from districts in the Square, Indians of Yurok and Karok blood have been elected to the council; and the council treated of matters having reservation wide impact.[29] Enrollment and membership qualifications, however, were related to the Square.[30] When the government distributed proceeds of timber harvested on the Square, it limited the per capita payments to members of the Hoopa Valley Tribe.[31] In 1958, the Deputy Solicitor of the Department of the Interior ruled that "no Indians other than those entitled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation."[32] Speaking of

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[26] Short v. United States, 202 Ct. Cl. 870, 952 (findings 113-117).

[27] Short v. United States, 202 Ct. C1. 870, 955 (finding 123).

[28] Short v. United States, 202 Ct. C1. 870, 956 (finding 125).

[29] Short v. United States, 202 Ct. Cl. 870, 957-958 findings 127-131).

[30] Short v. United States, 202 Ct. C1. 870, 959-967 (findings 136-156).

[31] Three accounts were created for trust funds held by the United States; one for the lower Klamath River Yurok Indians, one for the upper Klamath River Yuroks, and one for the "Hoopa Valley Indians." Beginning in 1955, upon resolutions of the Hoopa Valley Business Council, the Secretary of the Interior made per capita distributions to the Indians on the official roll of the Hoopa Valley Tribe. Short v. United States, 202 Ct. Cl. 870, 970-980 (findings 166-171).

[32] 65 I.D. 59, 64 (February 5, 1958); 11 Opinions of the Solicitor, Department of the Interior, Indian Affairs 1814, 1819.

the Indians of the Extension, the Deputy Solicitor said:

> The Klamath River Indians, whose ancestors formerly resided on the Klamath River Reservation, have consistently been regarded as an identifiable tribe by the Federal Government . . . . These Indians are also included in the general term 'Yurok' meaning downstream Indians although a Yurok Tribe, as such was not organized until recent years.[33] The 'Yurok Tribe' has never been recognized as having jurisdiction over any part of the 'Hoopa Extension' because is membership is not confined to reservation Indians.[34]

As part of that ruling the Deputy Solicitor found that the 1876 executive order had vested property rights in the reservation in the Hoopa Valley Indians which could not be disturbed by the incorporation of the Klamath River Reservation and its Yurok Indians into the Hoopa Valley Reservation in 1891. The Department, thus, continued to distribute timber proceeds from the Square to members of the Hoopa Valley Tribe.

Those distributions were challenged by the filing of the Short litigation by plaintiffs representing themselves to be affiliated with the Extension and the Connecting Strip. Eventually, the Court of Claims ruled that the 1864 Act was so worded that no tribe settled on one of the reservations authorized thereby "could obtain vested rights to the exclusion of another group or tribe

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[33] The Deputy Solicitor seems to be speaking of the Yurok Tribal Organization, which was not a federally recognized tribe, and, thus, may have been merely a social organization. In Short v. United States, 202 Ct. Cl. 870, 958 (finding 132), the Court of Claims described this organization as "a California corporation, . . . formed in 1949 to represent and promote the interests of all persons of Yurok ancestry, a group described as native to and resident of the Klamath River Basin, an area larger than the Addition." According to the Deputy Solicitor, the organization was "recognized for the purposes for which it was formed namely 'to promote the cultural, social, educational and economical well being of members of the Yurok Tribe.'" 65 I.D. 59, 64, n.3; 11 Opinions of the Solicitor, Department of the Interior, Indian Affairs 1814, 1817, quoting a Letter from Assistant Commissioner to Mrs. Lowana Brantner, November 26, 1954.

[34] 65 I.D. 59, 64; 11 Opinions of the Solicitor, Department of the Interior, Indian Affairs 1814, 1817.

of Indians thereafter authorized by the President to share in the benefits of the reservation."[35] It further ruled that "[t]he Hoopas were not the sole occupants of the Square, either in aboriginal times or thereafter,"[36] and that of the evidence is abundant that the reservation was intended, from the outset, for the accommodation of numbers of tribes of Northern California, including the Klamaths, such as might reside there with Presidential approval . . . ."[37] It also found that:

> President Grant's order of June 23, 1876, establishing the Hoopa Valley Reservation 'as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864' . . . established the reservation not for any specific tribe or tribes, none having been mentioned in the order, but for such tribes as might reside or settle there, then or thereafter, with the approval of the President, and the tribes as were then resident upon it were subject to further exercise of Presidential authority under the act with respect to the reservation.[38]

Finally, the court found that the 1891 executive order created "an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common."[39]

In subsequent proceedings in the Short litigation, the Court of Claims refused to permit the government to substitute the Yurok Tribe for the Short plaintiffs,[40] and held that under the federal Indian timber statutes[41]

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[35] Short v. United States, 202 Ct. C1. 780, 974 (finding 175).

[36] Short v. United States, 202 Ct. Cl. 870, 975 (finding 179).

[37] Short v. United States, 202 Ct. Cl. 870, 975 (finding 180).

[38] Short v. United States, 202 Ct. Cl. 870, 975 (finding 181).

[39] Short v. United States, 202 Ct. Cl. 870, 976 (finding 183).

[40] Short v. United States, 228 Ct. Cl. 535, 661 F. 2d 150 (1981), cert. denied, 455 U.S. 1034 (1982).

[41] 25 U.S.C. § 407.

directing use of timber proceeds for Indians "who are members of the tribe or tribes concerned," the individual Short plaintiffs were entitled to distribution since the term "tribe" was not a term denominating a particular Indian organization but a means of designating the Indians who had a communal interest in the timber property,[42] and that the Short plaintiffs had no claim upon the funds distributed to the Hoopa Valley Tribe since they were suing as individuals.[43]

It is important to note that the Short litigation deals with a statutory right under the Indian timber statutes and that it involves individuals suing as individuals not Indian tribes suing as tribes. It is also noteworthy for what it does not test--i.e., whether there is a vested interest in the reservation land, deprivation of which could entail a Fifth Amendment claim for just compensation for a taking. What it has decided, however, is that individuals, mainly associated with the Connecting Strip or the Extension, whose interest in the Hoopa Valley Reservation is analogous to that of members of the Hoopa Valley Tribe whose interest is associated with the Square, are entitled under federal statutes to a distribution of proceeds of timber harvested on the Square on a par with any per capita distribution to members of the Hoopa Valley Tribe.

Having set forth the main provisions of the proposed legislation as well as the basic historical and legal context in which it arises,- we proceed to analyzing the specific questions that have been presented with respect to the proposal.

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[42] Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983), cert. denied, 467 U.S. 256 (1984).

[43] Short v. United States, 12 Cl. Ct. 36 (1987).

1. The Legal Nature of the Interest of Persons Qualifying as "Indians of the Reservation" in the Tribal or Communal Resources of the Hoopa Valley Indian Reservation, Prior to Any Individualization of Such Resources. In order to discuss the legal nature of the interest of persons qualifying as "Indians of the Reservation" in the Tribal or Communal Resources of the Hoopa Valley Indian Reservation, prior to any individualization of such resources, it is necessary to: (1) identify "Indians of the Reservation," (2) identify the extent to which the courts in the recent Hoopa Valley litigation have dealt with the question, (3) discuss how the courts have treated this question generally, and (4) predict how the courts would treat the question with regard to the Hoopa Valley situation.

A. "Indians of the Reservation." In the 1973 Court of Claims decision in the Short case, the Court of Claims ruled that the Hoopa Valley Reservation constituted a single unit and that Indians of the reservation were entitled to share in any per capita distribution of timber harvested from the Square. Since the United States was found to have acted arbitrarily in restricting the distribution of this property to members of the Hoopa Valley Tribe it was liable in damages to any of the Short plaintiffs who could show that they were "Indians of the Reservation." The term, "Indians of the Reservation," therefore, has two meanings, one applicable generally with respect to the Hoopa Valley Reservation and one applicable to Short plaintiffs. -

B. How the question was treated in recent Hoopa Valley litigation. The central question before the Court of Claims in Short was whether individual plaintiffs claiming ties to the Hoopa Valley Reservation by virtue of having been settled or descended from settlers on the Extension were entitled to participate in distributions of income from the Square. Since the statute

required that such income be used for the benefit of Indians "who are members of the tribe or tribes concerned,"[44] the Court had to decide what tribes were concerned. It decided that by virtue of the Executive Order of 1891, "all the Indians of the reservation as thereby extended--Addition and Square--got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of the Indians of the Square, the Hoopa Valley Tribe or any other Indians of the Reservation."[45] The term, "Indians of the Reservation," may thus mean any Indian or tribe that has any rights in the reservation. In Short, the term also denotes the "non-Hoopa Indians residing on or connected with the reservation-entitled to equal rights in the division of timber profits (and other income) from the unallotted trust land of the reservation."[46]

It does not appear that any court has decided explicitly what tribes have rights in the reservation. In Short, the United States attempted to substitute the Yurok tribe for the plaintiffs to no avail.[47] The Claims Court has, however, decided that the Short plaintiffs have no right to claim a share of any payments made by the United States to the Hoopa Valley tribe.[48] 48

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[44] 25 U.S.C. § 407.

[45] Short v. United States, 202 Ct. Cl. 870, 980 (finding 188).

[46] Short v. United States, 719 F.2d 1133 (Fed. Cir.1983), cert. denied, 467 U.S. 1256 (1984).

[47] Short v. United States, 661 F.2d 150, 228 Ct. Cl. 535 (1981), cert. denied, 455 U.S. 1034 (1982). The Assistant Secretary of Interior for Indian Affairs had begun the process of forming a Yurok Tribe in order to qualify it along with the Hoopa Valley Tribe as "Indians of the Reservation," in order to reach a settlement in the Short litigation: "Since no Yurok tribal organization existed and the membership of the Tribe was not established, the Assistant Secretary announced that the Interior Department would initiate organization of a Yurok Tribe." Short v. United States 661 F. 2d 150, 153.

[48] Short v. United States, 12 Cl. Ct. 36 (1987).

During the course of the Short litigation, the Court of Claims and its successor, the Claims Court, have ruled on tangential issues and have detailed the history of the Hoopa Valley Reservation, explicating the meaning of the various pertinent statutes and executive order. The focus in that case, however, was whether the individual plaintiffs as individuals had a legal claim to share in per capita distributions. No attempt was made to decide what tribal rights were involved in the reservation itself or what individual rights were involved in other property of the reservation, other than the timber proceeds to which there was a statutory right.

In related litigation,[49] individual plaintiffs have somewhat successfully challenged the authority of the Hoopa Business Council to manage the resources of the reservation without the participation of other "Indians of the reservation." The situation is described as follows:

> Other Indians of the reservation, such as plaintiffs, are not eligible for membership in the Hoopa tribe and are not represented by the Hoopa Business Council. Most of these Indians live on the reservation's 'Addition' or 'Extension' along the Klamath river, or in other places distant from the Square, and many of them trace their origin to the Yurok tribe or other historic Indian groups. They have no council or governing body, do not view themselves as a separate tribe or tribes, and have resisted the government's efforts to have them organize themselves as a tribe. Plaintiffs are among these Indians of the reservation, but they sue as individuals, not on behalf of the class of all non-Hoopa Indians of the reservation.[50]
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> Since less than one third of the Indians of the reservation belong to the Hoopa tribe, the interests of the majority of Indians are not represented by any tribal organization. Despite this, the government pursued its

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[49] Puzz v. United States, No. C-80-2908 (N.D. Cal., order filed April 8, 1988).

[50] Puzz, slip op. at 2.

> policy of strengthening tribal self-government by working closely with the Hoopa Business Council in administering the reservation. People not represented by the Hoopa Business Council came to believe that the government's administration of the reservation in conjunction with the HBC was unfair. They claimed that the government was allowing the Hoopa tribe to enrich itself, denying non-Hoopa Indians a fair share of income from reservation resources, administering social services in a discriminatory manner, and denying non-Hoopa Indians a voice in reservation government.[51]

In responding to the plaintiffs' claim for a greater voice in the management of the reservation, the defendants, i.e., the United States, the Department of the Interior, and other federal defendants as well as the Hoopa Business Council, advanced the argument that the reservation was owned by tribes. The court interpreted the 1864 act as conferring "continuing executive discretion to locate any tribe or tribes thereon [on any of the reservations established under the act) and to change the boundaries of the reservation,"[52] and as having an "intent to create the reservation for tribes, not exclusively for the Hoopa tribe."[53]

The court acknowledged "that Congress continued to view the reservation, and reservations in general, as tribally enjoyed," and that "executive administration of the reservation from the time of its creation forward is consistent with the tribal premise."[54] The court, however, said, that 11plaintiffs are Indians of the reservation, which necessarily means that they

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[51] Puzz, slip op., at 3.

[52] Puzz, slip op., at 7.

[53] Puzz, slip. op., at 8.

[54] Puzz, slip. op., at 9, citing Act of May 19, 1958, 72 Stat. 121; Act of June 25, 1910 (as amended, 25 U.S. C. § 407); Act of March 3, 1883 (as amended, 25 U.S.C. § 155) and Thompson v. United States, 44 Ct. Cl. 359, 366 (1909); and Elser v. Gill Net # 1, 54 Cal. Rptr. 568, 575 (1966).

trace their origins to one or another of the Indian tribes or groups for whose benefit the reservation was created."[55] It found that "the reservation is indeed tribally enjoyed, and plaintiffs can make no claim for individual, severable shares of its land or resources . . . . it does not follow that plaintiffs, as Indians of the reservation, have no standing to claim a right to share in the communal enjoyment of the reservation."[56] Because the plaintiffs were not suing as a tribe or as tribal representative, the court had to rule on their claims as individuals.[57] In reaching the merits of the plaintiffs' case, the court first ruled that Congress had set a policy of tribal self-government that was furthered by the Department of Interior's according the Hoopa Business Council authority in reservation matters. Moreover, since such broad discretion was conferred upon the Department, the court could not enjoin it from permitting the Hoopa Business Council to continue to exercise management functions. Looking to the Short findings the court also set up four essential principles to guide it:

> 1. The Square and the Addition constitute one unified reservation for the purpose of distributing income from unallotted trust lands of the Reservation to 'Indians of the Reservation';
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> 2. There are no tribes on the Hoopa Valley Reservation having vested rights to the income from unallotted trust lands on the Reservation;

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[55] Puzz, slip op., at 10.

[56] Id.

[57] "No legislative or executive act has ever consolidated the tribes on the reservation . . . . Therefore, plaintiffs cannot predicate their standing on membership in some new, reservation-wide tribal community . . . . Their status as Indians of the reservation [sic] necessarily entails ties to one or another of the historic Indian groups for which the reservation was created, and these ties create the right to share in the benefits of the reservation." Puzz, slip op. at 11.

> 3. The Indians of the Reservation hold equal rights to income from unallotted trust lands of the Reservation; and
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> 4. The United States Department of the Interior, Bureau of Indian Affairs, acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe as the persons entitled to the income from the unallotted trust lands on the Square.[58]

Proceeding from this base, the court concluded that "the government has a duty to allow all Indians of a reservation to benefit from reservation resources and to participate in self-government, on a non-discriminatory basis"[59] and that "the 1864 Act and subsequent legislative and executive actions do impose on federal defendants a duty to administer the reservation for the use and benefit of all Indians of the reservation."[60] Finally, the court ruled:

> The federal defendants may not dispense funds for any projects or services that do not benefit all Indians of the reservation in a nondiscriminatory manner . . . .
>
> Federal defendants must retain supervisory authority over all spending of reservation funds, to assure that they are used for purposes which benefit non-Hoopa as well as Hoopa Indians of the reservation. To fulfill the responsibility, federal defendants must develop and implement a process to receive and take account of the opinions of non-Hoopas on the proper use of reservation funds.[61]

The federal government is, thus, under order in the Puzz case to inaugurate a procedure for participation in reservation management by all Indians of the reservation. A plan was submitted to the court, given "conditional approval," on June 20, 1988, subject to briefing and oral argument. The United States

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[58] Puzz, slip op. at 14-15.

[59] Puzz, slip op., at 16.

[60] Puzz, slip op., at 17.

[61] Puzz, slip op., at 18.

Court of Appeals for the Ninth Circuit denied a request for a stay on August 9, 1988.[62]

The Puzz case, thus, does not involve any findings on the question of whether the Indians of the reservation have any vested rights in the reservation as against Congressional action. It merely has decided that based on the wording of the executive orders and the 1864 statute, the Department of the Interior is under an obligation to administer the reservation for the benefit of all of its Indians, rather than to funnel most of the resources to .the Hoopa Valley Tribe.

It, thus, is clear that neither the Short decisions or the Puzz decision squarely address the central question of whether any Indians or tribes have any vested rights in the Hoopa Valley Reservation or its resources. Each case has had before it a specific question of statutory and executive order interpretation. Each has concluded that the reservation was founded for no particular Indian tribe but that it was set aside for the Indians of California and that any Indians settled upon the reservation were entitled to share in the reservation resources equally. To the Short court that meant that per capita distributions of timber revenues could not be denied Indians legitimately connected with the reservation. Using the Short rationale the Puzz court concluded that the statutes and executive orders placed a duty on the Department of the Interior to treat all reservation Indians equally in terms of having input into the management of the reservation. No court has held that any of the Indians of the reservation can compel the individualization of the

[62] Puzz v. United States Department of the Interior, (D. N. Cal. No. C-80-2908; THE, order filed June 20, 1988); Puzz v. United States Department of the Interior, (9th Cir. Nos. 88-2834, 8802836, 88-2837, order filed August 9, 1988).

assets of the reservation. Indeed, in Short, the court refused to compel the government to pay damages to the individual plaintiffs to make up for the fiscal disbursements to the Hoopa Tribe that had no parallel in payments to the other Indians of the reservation.

C. How the courts have treated the question in general. In general, tribal property is held to be communal property, to which individual members have a right to participate in any distribution, but no right to compel individualization as would tenants in common.[63] In The Cherokee Trust Funds[64] case, the Supreme Court stated that although Indian tribal lands are owned communally, "that does not mean that each member had such an interest, as a tenant in common that he could claim a pro rata share of the proceeds of sales made of any part of them." Another description of the interest of individual members in tribal property is as follows:

> In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property. It is often said that the individual has only a 'prospective right' to future income from tribal property in which he has no present interest. Other terms used to picture this right are I an inchoate interest,' and a 'float.' These terms aptly characterize the intangible right of the Indian to share in tribal property. Until the property loses its tribal character and becomes individualized, his right can be no more than this, except insofar as federal law, tribal law, or tribal custom may give him a more definite right of occupancy in a particular tract. In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions. In the case of lands, he has no vested right unless the land or some designated interest therein has been et aside for him either severally or as tenants in common.[65]

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[63] Gritts v. Fisher, 224 U.S. 640 (1912).

[64] 117 U.S. 228, 308 (1886).

[65] Felix S. Cohen, Handbook of Federal Indian Law 183-184 (1942).

In addition to the question of whether individuals have rights in tribal or communal property, there is in this instance an issue of whether there is any communal compensable property. The question of whether there are compensable rights in executive order reservations is not completely settled. There are cases holding that such reservations give rise to no compensable rights.[66] Arguments have been made, however, that "Congress has acted in a number of ways to assure that title to many executive order reservations stands on the same footing as title to reservations created by treaty or statute."[67] It is possible that Congress has, thus, barred the executive from disturbing interests in executive order reservations but retains for itself the authority to confirm them or to alter their limits.[68]

A statute exists that could be used to test whether the United States would have to pay damages for a taking in connection with an unconfirmed executive order reservation. Section 1505 of title 28, allows the Claims Court to hear "any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the

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[66] Sioux Tribe v. United States, 316 U.S. 331 (1942); Hynes v. Crimes Packing Co., 337 U.S. 86 (1949).

[67] Cohen, Felix S., Handbook of Federal Indian Law 495 (1982 ed.).

[68] In Felix S. Cohen, Handbook of Federal Indian Law, 495-406 (1982 ed.), the authors list the kinds of Congressional action that have arguably confirmed all executive order reservations: confirming tribal title to some of them; ratifying them as permanent through appropriations as in Shoshone Tribe v. United States, 299 U.S. 476 (1937); and treating executive order reservations like all other Indian lands in various statutes. This, however, leads them to postulate, "it is probable that Congress has expressly or implicitly 'recognized' the title to all executive order reservations created before 1919. This ratification would appear to preclude revocation of the reservations by executive action not specifically authorized by Congress."

United States, or Executive orders of the President . . . ." Whether that statute gives rise to acknowledgment of a compensable interest in executive order reservations has not been decided.[69]

D. How the courts might treat the question with respect to the Hoopa Valley Reservation. The nature of the relationship between the United States and the Indian people has been a government to government relationship, a political relationship, with the Indian tribe, the usual Indian component of the relationship.[70] Generally the rights of Indians to reservation resources prior to individualization are rights as tribal members. It may be that the legal position of Indians of the Hoopa Valley Reservation is not that of members of tribes which have title to property or which are entitled to property held in trust by the United States. It is possible that the courts could find that the Hoopa Valley Reservation is not a tribal reservation. It was not created for a tribe but "for the accommodation of the Indians of said state [California]."[71] The executive orders that set the reservation apart did not mention any particular Indian tribes but ordered that the lands be "set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (23 Stats., p. 39)."[72]

The reservation, moreover, was not given to an Indian tribe in exchange

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[69] Since 1946, Congress has not been in the practice of altering reservation boundaries to the detriment of the Indians involved.

[70] Morton v. Mancari, 417 U.S. 535 (1974).

[71] 13 Stat. 40.

[72] Executive Order, dated June 23, 1876; Executive Order dated October 16, 1891, I Kappler 815.

for a treaty cession of aboriginal rights.[73] It is possible that no tribe, thus, has clearly recognized title compensable under the Fifth Amendment.[74] No Congressional act designated the area as an Indian reservation for any tribe. What is involved is a reservation created by executive orders pursuant to statute with no specific designation of tribes to which the reservation is dedicated. The courts, moreover, that have looked at the question, in Short and in Puzz, concluded that one tribe, the Hoopa Valley Tribe had no vested interest in the resources of the reservation. It, thus, may be that the courts would have to conduct a review of the history of the reservation to determine if there were indeed tribal rights. If tribal rights were found, then the likelihood would be that the courts would find that no individual members had rights in tribal property before it was individualized. On the other hand, the courts might find that no tribal rights have arisen on the reservation and might then address the question of whether the individual Indians settled there

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[73] In Short v. United States, 202 Ct. Cl. 870, 891-897, the court discussed a "'treaty'" made by Austin Wiley, Superintendent of Indian Affairs of California, in August 1864. Article I of that document purports to "set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes." 202 Ct. Cl. 870, 893. That "treaty" was never ratified; it, thus, has no legal power to bind the federal government.

[74] In Tee-Hit Ton v. United States, 348 U.S. 272, 277-279 (1955), the Supreme Court defined the manner in which Indian title to property may be "recognized" or confirmed, giving rise to compensable interest:

The question of recognition may be disposed of shortly.

> Where Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking . . . .
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> . . . There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must always be definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

have vested rights.

The Hoopa Valley Reservation's legal status may be distinct from that of most other executive order reservations. Unlike the majority of executive order reservations created in the nineteenth century, the Hoopa Valley executive order was authorized by specific Congressional authorization.[75] Because the 1864 statute empowered the President to establish the Hoopa Valley Reservation, the argument may be made that Congress has confirmed or recognized Indian title to that reservation and that those Indians or Indian tribes who have rights on the reservation would be entitled to Fifth Amendment damages should their interest be taken away by legislation.[76]

This is not a settled question, however. No court has ruled definitively on whether the combination of the 1864 statute and the subsequent executive orders in fact recognized title to the Hoopa Valley Reservation in whatever Indians were located thereon.[77] We could locate no other decided case with parallel facts.

In addition to the question of whether an executive order reservation

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[75] In United States v. Midwest Oil Co., 236 U.S. 459, 469-470 (1915), in which the Supreme Court conducted an extensive examination of the authority of the President to make withdrawals from the public domain, the Court drew a distinction between those withdrawals made by virtue of a specific statutory authorization, citing Donnelly v. United States, and those made without specific statutory authority. How important this distinction would be in deciding whether rights had vested has not been decided.

[76] See Robert N. Clinton, Statement in Opposition to H.R. 4469 Proposing the Nonconsensual Partition of the Hoopa Valley Reservation between the "Hoopa Valley" & "Yurok" Tribes, Hearing before the House Committee on the Interior and Insular Affairs, Washington, D.C. (June 21, 1988), citing Felix S. Cohen, Handbook of Federal Indian Law 477 (1982).

[77] In Mattz v. Arnett, 412 U.S. 481, 494 (1973), in dictum, the Supreme Court used the term "recognized" in conjunction with this reservation, referring to the president's "authority under the Act to expand an existing, recognized reservation." In the case, however, it was not dealing with a question as to whether there was recognized title in the reservation.

involves a compensable interest, there is the further question as to who would be able to maintain an action for compensation when the reservation involved is one such as the Hoopa that has not been set aside for identifiable tribes. If a court were to decide that there was a compensable interest in the Hoopa Valley Reservation property, it would be faced with the question of how to distribute that interest.

Again there does not seem to be a case on point. There is, however, one situation that seems somewhat analogous in the sense that it illustrates how the courts might handle the issue of deciding whether any tribal rights exist on the Hoopa Valley Reservation. In 1958, Congress passed legislation that confirmed an executive order reservation and recognized title in the words of the executive order in the "Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive Order."[78] The statute also authorized a three-judge district court to hear the conflicting claims of Navajos and Hopis to what had been created in 1882 by executive order as a reservation for the use of Hopi "and such other Indians as the Secretary of the Interior may see fit to settle thereon".[79] In 1963, the court ruled that in the areas that the Navajos had been settled, there was a joint tenancy in which each tribe had identical interests.[80]

The court started from the premise that " . . . an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the

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[78] Pub. L. 85-547, 72 Stat. 403.

[79] Kappler, Indian Affairs: Laws and Treaties 805 (1904).

[80] Healing v. Jones, 210 F. Supp 211 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963).

beneficiaries beyond the pleasure of Congress or the President"[81] and that no rights vested prior to enactment of the 1958 statute. In deciding what Indians had rights on the reservation, the court looked to the history of the executive order settling the Hopis on the reservation. It concluded that the purpose was protecting the Hopis from depredations by nearby whites and Navajos.

It next attempted to construe the "such other Indians" clause, showing it to be customary language in contemporaneous executive orders. It viewed the rights secured to the Hopis by the 1882 executive order in the following terms:

> . . . the Hopis gained non-vested rights of use and occupancy in the entire 1882 reservation. These rights were then exclusive in the sense that unless and until the Secretary thereafter settled other Indians in the reservation, the Hopis were the only Indians entitled to use and occupy that area. These rights were non-exclusive in the sense that the Hopis would be required to share the 1882 reservation with any other Indians the Secretary thereafter saw fit to settle in the reservation. Such rights as the Hopis had in the reservation on July 22, 1958 [the ate of the jurisdictional act] became vested on that date.[82]

The court established the principle that "Indians other than Hopis acquired rights in the 1882 reservation under the executive order in question if: (1) such Indians used and occupied the reservation in Indian fashion, as their continuing and primary area of residence, and (2) the undertaking of such use and occupancy was authorized by the Secretary, exercising the discretion vested in him by the executive order."[83]

It examined the language of the 1882 executive order, in itself, and in contrast with other executive orders and decided that the Navajos were not

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[81] Healing v. Jones, 210 F. Supp. 125, 138.

[82] Healing v. Jones, 210 F. Supp. 125, 170.

[83] Healing v. Jones, 210 F. Supp. 125, 144.

given any rights in 1882 primarily because the executive order did not mention them although some Navajo Indians had made the reservation area their residence prior to 1882.

It then looked to the history of settlement of Navajos on the reservation. Finding no official Department of the Interior document declaring them to be settled on the reservation, it embarked upon a lengthy examination of the course of conduct from 1882 and identified a 1931 Interior Department document approving a recommendation to divide the reservation as implicitly settling all Navajos present on the reservation.[84] Because the department placed no restrictions in terms of number or special qualifications of the Navajos who could settle on the 1882 reservation, the Healing court concluded that the Navajo Tribe, itself, had been settled on the reservation and tribal rights to the reservation were at stake.

Healing is merely analogous to the Hoopa Valley situation. Congress had explicitly confirmed an executive order reservation. The statute and the executive order mentioned one tribe as having vested rights and the court was instructed to decide whether any other tribe had vested rights and the extent of such rights. Hoopa Valley, on the other hand, involves an executive order that does not name tribes, a statute that does not name tribes, and to this date no Act of Congress specifically vesting rights. In the Hoopa Valley

[84] Other departmental actions were viewed as buttressing this conclusion. In 1936, the Department had divided the reservation into land management districts, only one of which was exclusively occupied by Hopi and many of which had Navajos. In the 1940's there were departmental efforts to establish a boundary between Hopi lands and Navajo lands on the reservation. The court's examination of the history of departmental treatment of Navajos on the reservation, moreover, led it to conclude that all Navajos who had entered the reservation for purposes of settling there had been settled there by the Department because they were treated no differently than those whom the court had found to be there at dates on which there was implicit departmental recognition of settlement.

situation, moreover, two judicial decisions to date indicate that there is considerable difficulty in distinguishing tribal affiliations of the Indians settled on the Hoopa Valley Reservation.

Despite these distinctions, however, Healing is illustrative of several points: the importance of the historical circumstances *surrounding the* creation of the reservation, the method for determining if settlement of individual Indians gives rise to tribal rights, and the importance of a detailed examination of the attitude of the Department of the Interior when exercising discretion conferred upon it by executive order.

With the Hoopa Valley situation, the courts have not addressed the question of whether any tribes have been settled on the reservation. Short decided that individual Indians had been settled on the reservation; it refused to substitute a tribe for those individuals, not because there was no possibility of tribal rights arising but because the challenged governmental action involved individual, not tribal, rights. In addition to the Hoopa Valley Tribe, there is the possibility that other tribes may be able successfully to assert tribal rights to the reservation.[85] The Short court recognized this possibility. In deciding how to construct a standard for Indians of the Reservation analogous to one of the criteria used by the Hoopa Tribe for membership, the court had to determine how to define a blood quantum requirement. The Hoopa standard included one-quarter Hoopa blood. The court refused to use this:

[85] In Short, 719 F.2d 1133, 1144, the court allowed blood of the following tribes or bands to be counted as "Reservation blood" for purposes of qualifying Indians of the Reservation: Yurok, Hoopa/Hupa; Grouse Creek; Hunstang/Hoonsotton/Hoonsolton; Miskut/Miscotta/Miscolts; Redwood/Chilula; Saiaz/Nongatl/Siahs; Sermalton; South Fork; Tish-tang-atan; Karok; Tolowa; Sinkyone/Sinkiene; Wailake/Wylacki; Wiyot/Humboldt; Wintun.

> The Hoopa Valley Reservation is not a one-tribe reservation or even a reservation for specific tribes, but was by statute one of several set aside for Indians of California generally. This conclusion went far to establish, in the decision on the nature of the Hoopa Valley Reservation, that no tribe could have exclusive rights to the Reservation. 202 Ct. Cl. at 877-78 (fdg. 175). But it did not follow that all California Indians had rights on the Reservation; the court held, further, that the Hoopa Valley Reservation was established by President Grant in 1876, as was well understood then and throughout the years following, 'for such tribes as might reside or settle there, then or thereafter, with the approval of the President.' 202 Ct. Cl. at 975 (fdg. 181), 877-78, 880-81, 974 (fdg. 175).
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> What then shall be the required blood? To begin, there is Hoopa blood, now, of course, to be enlarged to include at least Yurok blood. It is moreover conceded that Hoopa blood includes the blood of several tribes or bands who have merged into the Hoopas or are deemed 'affiliated' with the Hoopas . . . . the Hunstang, Hupa, Miskut, Redwood, Salaz, Sermalton and Tish-tang-atan Bands . . . . the South Fork and Grouse Creek . . . .[86]

In addition to these tribes, the court confronted the question of whether other assorted bands of California Indians known by various names "were among those residing on the Hoopa Reservation at the time of its creation or settled there by the President."[87]87 Because anthropological evidence and documents from the Department of Interior archives indicated that the Indians of the area had very loose tribal organization which had all but vanished, the court examined various documentary and historical sources and concluded that Karok, Tolowa, Sinkyone, Wiyot, Wylackie, and Wintun blood could qualify as reservation blood for purposes of the standards set for Indians of the reservation. These

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[86] Short v. United States (Ct. Cl. No. 102-63, filed March 31, 1982), slip op., at 36-37.

[87] Short v. United States (Ct. Cl. No. 102-63, filed March 31, 1982), slip op., at 38.

findings in no way directly bear on the question of whether any tribes were settled on the reservation. The historical and anthropological data examined, however, indicates the possibility that a full judicial airing of the question of whether any tribes have tribal rights on the reservation would find at least some materials indicating the presence of various tribes on the reservation. The data examined by the court also indicates another problem that any court deciding whether tribal rights arose on the Hoopa Valley Reservation would have to face: fashioning a legal framework for examining tribal rights of the California Indians. The Short court described them as follows:

> The context for the decision is that California tribes were not formally organized, that their names were inexact and usually referred to a place or area of residence, often the river on which their village was situated. Fdg. 4. The Hoopas themselves were also called the Trinity Indians, after the river on which they lived. Id. The anthropological evidence at the trial showed no signs of sharply bounded tribal areas from which Indians of other tribes would be excluded. Yurok villages were to be found aboriginally, on the Trinity, in what was later called the Square. 202 Ct. Cl. at 880, 887-87 (fdg. 5), 899 (fdg. 22).
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> The word 'tribes,' used in referring to California Indians means peoples. Geography, lack of tribal organization, mingling of residences - of groups and intermarriage operated together to minimize identifiable tribal affiliation. Fdgs. 44, 47. Tribal blood was difficult to verify, and tribal blood as recorded by the Indians themselves was likely to be inaccurate, Fdgs. 3748. In 1929 the Superintendent of the Reservation wrote that it was meaningless to divide the Indians of the Reservation into Hoopas, Klamath River Indians, Lower Klamath Indians and the other tribes of whom census rolls were prepared annually: 'They have lost tribal affiliation to such an extent that very few of them know what tribe they belong to, and if they name a tribe, it is, in fact not a tribe but a band of Indians named after some 1 cal name of a place where they once resided.' Fdg. 44.[88]

[88] Short v. United States (Ct. Cl. No. 102-63, filed March 31, 1982), slip op., at 38-39.

From this description, it is possible that a court: (1) could actually find some tribes to have tribal rights in the reservation; (2) could find that no tribes have tribal rights in the reservation; and (3) could find that the California Indian situation is so unique as to require courts to effectuate the purpose of the 1864 act and the executive orders thereunder to devise a method to protect the rights of the Indians settled on the reservation.

To summarize, generally the courts have held that individual Indians have no vested interest in tribal property prior to individualization. In contemporary Hoopa Valley Reservation litigation the courts have ruled that "Indians of the Reservation" have no interest in reservation property that has not been individualized. Because no court has faced the question squarely, however, there is a remote possibility that should the courts be required to adjudicate the interests of the Indians of the Reservation at this date, without further Congressional action, they might find that because the reservation was established by executive order with specific statutory authority there is a compensable interest and that because the reservation was established for non-tribal Indians, Indians of the reservation have a vested interest in reservation property.

2. The Scope of Congressional Power over Tribal Communal Property of Indian Reservations; Membership in Indian tribes; and Individual Rights to Participate in Such Tribal or Communal Property. Communally held Indian property is generally held in trust by the United States for the Indian beneficial owners. As trustee for this property, the United States has considerable but not unlimited authority over it. The Supreme Court, in a series of cases beginning with United States v. Kagama[89] and Lone Wolf v.

[89] 118 U.S. 375 (1886).

Hitchcock,[90] down to Delaware Tribal Business Committee v. Weeks,[91] has held that Congressional power with regard to Indian tribes and Indian property is plenary. In Delaware Tribal Business Committee v. Weeks the Court upheld a distribution of judgment funds statute that allocated funds to two groups of Delaware Indians, and not a third on the theory that the decision to include only the two groups could be "tied rationally to the fulfillment of Congress' unique obligation towards Indians," a test that derives from Morton v. Mancari.[92] That rational basis test seems to be the test that would be used to test the validity of a statute that dealt with property held communally by Indians. The test that the courts use in determining whether legislation that deals with Indian property is an exercise of the eminent domain power or an exercise of the power of guardianship over Indian property is the test derived from Three Affiliated Tribes of Fort Berthold Reservation v. United States,[93] known as the Fort Berthold test and adapted by the Supreme Court in United States v. Sioux Nation.[94] The test is formulated in terms of the facts of the case in which the government extinguished Indian title to land and compensated the Indians with money:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians'

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[90] 187 U.S. 553 (1903).

[91] 430 U.S. 73 (1977).

[92] 417 U.S. 535 (1974).

[93] 390 F. 2d 686 (Ct. Cl. 1968).

[94] 448 U.S. 371 (1980).

> property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.
>
> . . . .
>
> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.[95]

Congress has in the past legislated the breaking up of Indian lands into allotments, with remaining land sold for the benefit of the tribe. It has also authorized rights of way across Indian lands, sale of some lands for railroads or utilities, and use of Indian lands for water projects. The Supreme Court has upheld such legislation.[96] These cases involved tribal land and not the property of individuals.

Recently, the Court, in Hodel v. Irving,[97] held unconstitutional a provision of the Indian Lands Consolidation Act of 1983,[98] that would have cut off the rights of Indian allottees of fractional shares of 2 percent or less of allotments to devise or their heirs to inherit by intestacy such shares if they earned less than $100 in the preceding year. The court viewed the interest at stake, the right to pass on the remainder interest, as a valuable property interest and as a right long recognized by Anglo-American property law and held

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[95] Three Affiliated Tribes of Fort Berthold Reservation v. United States, 390 F. 2d at 691.

[96] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (disposal of a reservation); Cherokee Nation v. Kansas Railway Co., 135 U.S. 641 (1890) (eminent domain); Missouri, Kansas & Texas Railway Co. v. Roberts, 152 U.S. 114 (1894).

[97] ___ U.S. ___, 107 S.Ct. 2076 (1987).

[98] Pub. L. 97-459, Tit. 11, 96 Stat. 2519.

it to be a compensable right under the Fifth Amendment. The right at stake in Hodel v. Irving, an individual property right, however, is clearly distinguishable from communal property.

To summarize, other than the requirement that the property be communal and not individual, the courts in analyzing Congressional treatment of Indian tribal property require only that the legislative disposition of the property be "an exercise of guardianship," and not "an act of confiscation."[99] The Court has said:

> Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own.[100]

The rights of individual Indians to tribal property is an inchoate right; individualization of the assets may not be compelled.[101] Unless there has been express statutory designation of the property as that of various individuals the courts will permit the United States as trustee to dispose of the property for the benefit of its wards:

> Indians have frequently taken to court the complaint that the tribal property has become vested, by previous act or treaty, in individuals and is no more subject to congressional control than the private property of other individuals. The courts, however, tend to construe such previous acts and treaties, wherever possible against the vesting of private rights in tribal property.[102]

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[99] United States v. Creek Nation, 295 U.S. 103, 110 (1935).

[100] Chippewa Indians v. United States, 301 U.S. 358 (1937).

[101] See supra, 21-22.

[102] Felix S. Cohen, Handbook of Federal Indian Law 95, n. 75 (citations omitted) (1942 ed.).

Delaware Tribal Business Committee v. Weeks may be cited broadly in support of Congressional power to determine membership in tribes for purposes of administering federal law. Tribes, themselves, of course, being separate political entities from the United States, retain a paramount power to determine membership for all tribal purposes.[103] Tribal decisions on tribal membership generally are not reviewable by the federal government.[104] Tribal decisions, however, do not necessarily bind the federal government when administering federal programs. In determining who is entitled to tribal funds, for instance, the Secretary of Interior by statute has broad authority. In 25 U.S.C. § 163, for example, the Secretary is authorized to cause a final membership roll of any tribe (in order to segregate tribal funds) to be composed and given authority to approve such roll. It is, thus, possible that the federal government or Congress could define tribal membership in one way for a specific purpose and the tribe could define its membership in a different way.

3. Whether Congress Has Power to Deal with the Tribal or Communal Property and Assets of the Hoopa Valley Indian Reservation as Proposed by H.R. 4469 as Amended by the Substitute. Generally, the Fort Berthold test would be the applicable test that the courts would use to test the constitutionality of this legislation. At the present time there has been no adjudication to indicate that individual property rights are at stake. Puzz and Short, on the contrary, indicate that no individualized rights are vested. While no court has decided whether tribal rights are vested, the general law on executive

[103] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[104] Cherokee Intermarriage Cases, 203 U.S. 76 (1906) (upholding a tribe's right to set different standards of membership for different categories of members).

order reservations holds that no rights vest without Congressional confirmation. The 1864 statute raises a certain amount of uncertainty about whether rights have vested. The wording of the statute and the subsequent executive order also raise doubts about the nature of the parties, i.e., tribal or individual Indians, who might have obtained any vested rights should rights have vested. The historical circumstances of settling loosely organized California Indians on the reservation combined with the further disintegration of any formal tribal organization of the Indians settled on the reservation indicate that any judicial adjudication of tribal rights could be even more complex, protracted, and bitter than the 25 year-old Short litigation.

All of those factors could influence a court to view any distribution of reservation assets by Congress as an exercise of guardianship. The substitute gives many indices of a good faith effort by Congress: (1) efforts to divide the reservation in a logical as well as historically defensible way; (2) provision for non-Hoopa Indians who have an interest in the reservation to decide to pool their resources or to withdraw monetary remuneration for their share; (3) and authorizing expansion of the portion of the reservation to be allocated to the Yurok Tribe.

With respect to determining Yurok tribal membership, the substitute makes no pretense of establishing an Indian tribe for all purposes. It simply sets standards for a group who are to be given management authority over the portion of the reservation allocated to the Yuroks. It does not require that they form a tribal government; it merely permits a mechanism for their recognition under the Indian Reorganization Act.

Portions the legislation that might be cited as indicative of a confiscatory intent include: (1) the provision that the partitioning of the

reservation is to be triggered by a vote of the Hoopa Valley Tribe rather than by a vote of all Indians who have an interest in the reservation; (2) the fact that the major assets of the reservation have been allocated to the Hoopa Valley Tribe; and (3) the lack of consideration for any other tribes that might have a tribal interest in the reservation.

Using the Delaware Tribal Business Committee v. Weeks standards, however, it is likely that if Congress in the legislative history of this legislation provides evidence of an intent to deal fairly with all the interests in the reservation, the courts will uphold the legislation. The kinds of concerns that might influence the courts would be: (1) an interest in preventing the hostilities engendered by the Short litigation to continue; (2) an interest in giving both the Hoopas and the non-Hoopas contiguous, not checker-boarded areas to administer; (3) a political determination that the Department of Interior's views as propounded in Short that the Hoopa Valley Reservation and Klamath River Reservations were combined for administrative purposes and have never in actuality functioned as one entity; (4) concern that the Hoopas who, unlike the "Indians of the Reservation,"[105] have tended to live on the reservation continue thereon and be accorded sufficient resources to sustain their habitation; and (5) a political judgment that a functioning tribal government fulfilling the federal policy of tribal self-determination deserves greater federal support than does a group of Indians who have no tribal organization, who have refused tribal organization, and many of whom live off-reservation.

[105] A counterargument might be offered to the effect that federal policies drove the non-Hoopas from the reservation.

To summarize the responses to the committee's questions:

1. What is the legal nature of the interest of persons qualifying as "Indians of the Reservation" in the tribal or communal resources of the Hoopa Valley Indian Reservation, prior to any individualization of such resources?

Generally the courts have held that individual Indians have no vested interest in tribal property prior to individualization. In contemporary Hoopa Valley Reservation litigation the courts have ruled that "Indians of the Reservation" have no interest in reservation property that has not been individualized. Because no court has faced the question squarely, however, there is a remote possibility that the case could create a new federal Indian law precedent: i.e., should the courts be required to adjudicate the interests of the Indians of the Reservation at this date, without further Congressional action, they might find that because the reservation was established by executive order with specific statutory authority there is a compensable interest and that because the reservation was established for non-tribal Indians, Indians of the reservation have a vested interest in reservation property.

2. What is the scope of Congressional power over tribal communal property of Indian reservations; membership in Indian tribes; and individual rights to participate in such tribal or communal property?

Other than the requirement that the property be communal and not individual, the courts, in analyzing Congressional treatment of Indian tribal property, require only that the legislative disposition of the property be "an exercise of guardianship," and not "an act of confiscation." The courts have also recognized a broad Congressional power to determine membership in tribes for purposes of administering federal law as well as the power of tribes, themselves, to determine membership for all tribal purposes. It is, thus, possible. that Congress could define tribal membership in one way for a

specific purpose and the tribe could define its overall membership in a different way.

3. In view of the plenary power of Congress over Indian affairs and its role as guardian of Indian tribes in view of the responses to questions 1 and 2 above, does Congress have power to deal with the tribal or communal property and assets of the Hoopa Valley Indian Reservation as proposed in H.R. 4469 as amended by the substitute?

Since the courts require that Congress make a good faith effort when transmuting Indian property from one form to another, if the substitute for H.R. 4469 indicates that Congress has conscientiously attempted to act in the best interest of its Indian wards, there is the likelihood that the courts will uphold the legislation as within the power of Congress.

We emphasize that we are in no position to have studied every aspect of this issue as thoroughly as would be required in any litigation. We can, thus, make only general statements. With that caveat, we can say that if Congress documents its intention to deal fairly with all concerned, on the basis of recent precedents and the long line of cases upholding plenary power in Indian affairs, there is a likelihood that the proposed legislation would be upheld.

/s/
M. Maureen Murphy
Legislative Attorney

SUMMARY

1. What is the legal nature of the interest of persons qualifying as "Indians of the Reservation" in the tribal or communal resources of the Hoopa Valley Indian Reservation, prior to any individualization of such resources?

Generally the courts have held that individual Indians have no vested interest in tribal property prior to individualization. In contemporary Hoopa Valley Reservation litigation the courts have ruled that "Indians of the Reservation" have no interest in reservation property not individualized. Because no court has faced the question squarely, however, there is a remote possibility that the case could create a new federal Indian law precedent: i.e., should the courts be required to adjudicate the interests of the Indians of the Reservation, without further Congressional action, they might find that because the reservation was established by executive order with specific statutory authority there is a compensable interest and that because the reservation was established for non-tribal Indians, Indians of the reservation have a vested interest in reservation property.

2. What is the scope of Congressional power over tribal communal property of Indian reservations; membership in Indian tribes; and individual rights to participate in such tribal or communal property?

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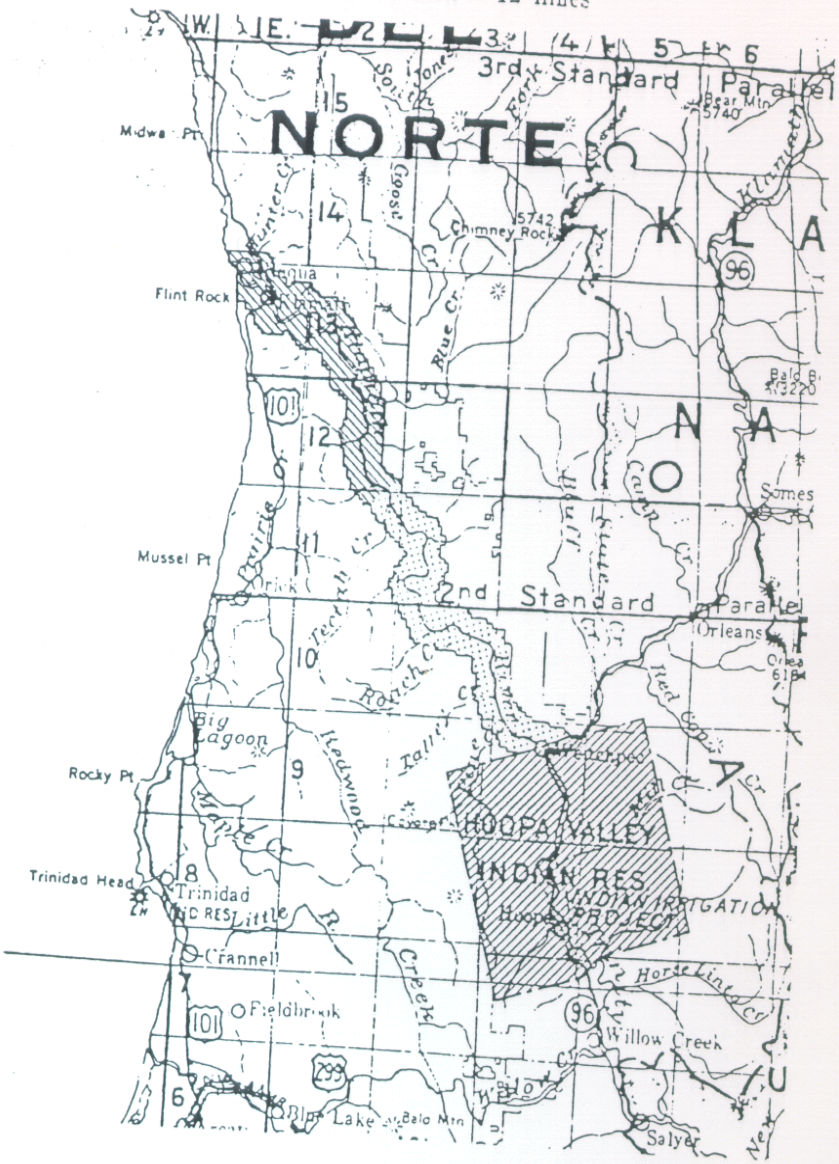
APPENDIX TO OPINION OF THE COURT

Map of Hoopa Valley Indian Reservation, California*

Scale: 1 inch = 12 miles



LEGEND:

- Old Klamath River Reservation.
- Connecting Strip.
- Original Hoopa Valley Reservation.

*United States Department of Interior, General Land Office 1944.

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