No. 2009-5084

In the United States Court of Appeals for the Federal Circuit

HOOPA VALLEY TRIBE, on its own behalf, and in its capacity as *parens patriae* on behalf of its members; OSCAR BILLINGS, BENJAMIN BRANHAM, JR., WILLIAM F. CAPRENTER, JR., MARGARET MATTZ DICKSON, FREEDOM JACKSON, WILLIAM J. JARNAGHAN, SR., JOSEPH LEMIEUX, CLIFFORD LYLE MARCHSALL, LEONARD MASTEN, JR., DANIELLE VIGIL-MASTEN, LILA CARPENTER, and ELTON BALDY,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA,

Defendant/Third Party Plaintiff-Appellee,

v.

YUROK TRIBE,

Third Party Defendant-Appellee.

Appeal from the United States Court of Federal Claims, No. 08-CV-072 (Judge Wheeler)

BRIEF OF THIRD PARTY DEFENDANT-APPELLEE YUROK TRIBE

Jonathan L. Abram
Audrey E. Moog
HOGAN & HARTSON LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5681
Fax: (202) 637-5910

CERTIFICATE OF INTEREST

Counsel for Third Party Defendant-Appellee Yurok Tribe certifies that:

1. The full name of every party represented by me is the Yurok Tribe.

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by me: N/A.

3. There are no parent corporations or any publicly held companies that own 10% or more of the stock of the party represented by me.

4. The names of all law firms and the partners and associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are: Hogan & Hartson LLP, Jonathan L. Abram, Audrey E. Moog.

Dated: September 28, 2009

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Jonathan L. Abram

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STATEMENT OF RELATED CASES

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

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

STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

Whether the Court of Federal Claims properly dismissed the plaintiffs' claims for lack of standing under the Hoopa-Yurok Settlement Act where the plaintiff Hoopa Valley Tribe concedes it received every benefit the Act conveyed to it and where individual plaintiffs, all members of the Hoopa Valley Tribe, were not beneficiaries under the Act?

STATEMENT OF THE CASE

In 1988, Congress enacted the Hoopa Yurok Settlement Act to resolve long-standing conflicts among the Hoopa Valley Tribe, the Yurok Tribe, and the United States. For over a century, the Hoopa, the Yurok, and other Indians had resided on a single reservation (the "Joint Reservation") in Northern California. After the formal organization of the Hoopa Valley Tribe in 1950, the United States began to distribute revenue derived from the Joint Reservation to – and only to – members of the Hoopa Valley Tribe. This discriminatory practice continued unabated over the years, until a group of Yurok and other non-Hoopa Indians brought suit against the United States in 1963. In the Short litigation, the Court of Claims held that there was one Joint Reservation and that all "Indians of the

Reservation" were entitled to share in the timber revenues from the Joint Reservation. Short v. United States, 486 F.2d 561, 567-68 (Ct. Cl. 1973). Thus the Short plaintiffs obtained a judgment for money damages to recover their proportional shares of the prior discriminatory distributions.

The Short litigation highlighted the intractable problems presented by the shared Joint Reservation, but provided no way to resolve the fundamental governance and proprietary issues within the Joint Reservation on a prospective basis. In 1988, Congress stepped in to resolve the matter by enacting the Hoopa-Yurok Settlement Act, Pub. L. 100-580, 102 Stat. 2924 (codified in part at 25 U.S.C. §§ 1300i-1300i-11). The Act's primary purpose was to divide the Joint Reservation into separate reservations, one for the Hoopa Valley Tribe and one for the Yurok Tribe, and to divide a settlement fund comprised primarily from accounts holding proceeds from the Joint Reservation between the two tribes. Because the Yurok Tribe was not at that time a formally organized tribe, the Act also provided a procedure to organize a formal government for the Yurok Tribe.

In order to receive its benefits under the Act, each tribe was required to submit a waiver of claims and consent to the contribution of certain assets to the Settlement Fund. The Hoopa Valley Tribe promptly executed its waiver. Pursuant to the Act, that waiver effectuated the partition of the Joint Reservation and triggered the later release of the Hoopa Valley's full share of the Settlement Fund

While individual members of the Hoopa Valley Tribe were not beneficiaries under the Act, the Hoopa Valley Tribe received its full share of the Settlement Fund, some $34 million, by 1991.

In 1992, the Yurok Tribe, then in its initial stages of formal organization and facing the expiration of a short statute of limitations, filed a taking claim challenging the Act's divestiture of the Yurok Tribe's interest in the portion of the Joint Reservation known as the Square. Thereafter, it issued a waiver of claims conditioned on the constitutionality of the Act. Several years after the litigation concluded, the government determined that it would accept a new waiver from the Yurok Tribe. The Tribe issued the waiver and a month later the government released the remainder of the Settlement Fund to the Tribe. Nearly a year after that, the Yurok Tribe distributed the majority of the funds to its members in a per capita distribution pursuant to Yurok constitutional procedures.

In 2008, the Hoopa Valley Tribe and a number of its members (collectively, the "Hoopa Plaintiffs") sued the United States in the Court of Federal Claims. They complained that the United States breached its fiduciary duty when it released the remainder of the Settlement Fund to the Yurok Tribe.

The Hoopa Plaintiffs moved for summary judgment and the government moved to dismiss, or in the alternative, for summary judgment. The government also filed a contingent third party complaint against the Yurok Tribe,

seeking recovery of the funds distributed to the Yurok Tribe in the event the Court of Federal Claims found it liable for damages to the Hoopa Plaintiffs. The Yurok Tribe moved to dismiss the third party complaint, and submitted a response in support of the government's motion to dismiss.

The Court of Federal Claims held argument on the pending motions, and thereafter issued its written decision granting judgment in favor of the United States. A2 (Slip Op. and Order at 2). 1/ It held that the Hoopa Plaintiffs "ha[d] already received their full entitlement of the Fund" and therefore had not suffered an injury in fact – the invasion of a legally protected interest – on which to maintain their claims. Id. at 7-9. Based on the plain meaning of the Act, the Hoopa Valley Tribe had received its full share of the Fund, in excess of $34 million, and the individual members of the Hoopa Valley Tribe "had no right to an individual entitlement from the Fund." Id. at 8-9. Thus, the Hoopa Plaintiffs suffered no injury as a result of the government's distribution of the Fund to the Yurok. Id. at 9.

1/ In this brief, citations to the Joint Appendix conform to style used by Plaintiffs-Appellants and are denoted "A[page number]." Appellants' Initial Brief is cited as "Pls.' Br. at [page number]" and the government's brief is cited as "Gov't Br. at [page number]." Other citations to the record correlate to the docket entry numbers assigned to respective submissions on the Court of Federal Claims docket found on pages 12 to 21 of the Joint Appendix. As an example, citation to paragraph 1 of Plaintiffs' Amended Complaint would be denoted as "R.5, Am. Compl. ¶ 1."

Because it granted judgment in favor of the government on standing grounds, the Court of Federal Claims did not reach the government's additional jurisdictional arguments. Id. It also denied the Hoopa Plaintiffs' motion for summary judgment, holding that their motion was without merit because the Plaintiffs lacked standing. Id. The Court of Federal Claims dismissed the Yurok Tribe's motion to dismiss the third party complaint as moot. Plaintiffs timely filed their notice of appeal on May 18, 2009.

STATEMENT OF FACTS

A. The Yurok Tribe.

The Yurok Tribe is the largest tribe in California. A268 (Sen. H. 107-648, Test. of S. Masten). Historically, the Yurok territory included not only the area along the Klamath River within its current reservation, but also the vast majority of the area now occupied by the Redwood National Park Forest and by other national forest lands. A270; see also A140-41 (Sen. R. 100-564). The Yurok territory also included areas in what is called the Square -- now the Hoopa Valley Reservation. A270 (Sen. H. 107-648, Test. of S. Masten). Yuroks lived in the Square throughout history, see id., and many hundreds still live there today.

B. Establishment of the Reservation.

After the discovery of gold in California in 1849, the great influx of white settlers soon sought to displace native tribes like the Yurok. A141 (Sen. R.

100-564). In 1855, President Pierce issued an Executive Order establishing the Klamath River Reservation, 20 miles in length along the river and including a one–mile width of land on either bank. A142. At the time it was created, about 2,000 Yurok Indians lived within its 25,000 acres. Id. Nine years later, in 1864, Congress enacted legislation authorizing the President to establish four reservations in California. Id. One of these was located along the Trinity River by the junction of the Trinity and Klamath Rivers. A143. It was called the Hoopa Valley Reservation, and because of its shape it has long been known as the Square. Living within its boundaries were Hoopa Indians, Yurok Indians, Chilula Indians, and others. Id. It was approximately 88,666 acres in size. Id.

By the late 1880s, disputes arose over whether the Klamath River Reservation had the legal status of a reservation due to the subsequent enactment of the Act of April 8, 1864, which had reorganized the Indian Department of California and limited the number of Indian reservations in California to four reservations created under its authority. A144. To protect the Klamath River Reservation, President Harrison issued an Executive Order to enlarge the boundaries of the Hoopa Valley Reservation so that it would include the Klamath River Reservation, linked by the addition of a strip of land 25 miles long along either side of the Klamath. Id. The enlarged reservation encompassed 147,000 acres. The original area of the Hoopa Valley Reservation was known as the Square,

and the area of the prior Klamath River Reservation and the connecting strip came to be called the Addition. Id. Pursuant to an act of Congress in 1892, most of the land within the former Klamath River Reservation was allotted to individual Indians then located there. Id.

From 1891 to the late twentieth century, the Yurok, the Hoopa, and members of other tribes lived on the single, enlarged reservation ("Joint Reservation"). See generally Short v. United States, 486 F.2d 561, 562-64 (Ct. Cl. 1973) (Short I).

C. The Government's Breach of Trust.

The Joint Reservation was rich in timber resources and began to produce substantial revenues in the 1950s. Id. These revenues were administered by the Secretary of the Interior as trustee of the beneficial owners. In 1950, the Hoopa Valley Indians established an organization known as the Hoopa Valley Tribe, whose membership excluded the Yurok. Id. "Beginning in 1955, the Secretary of the Interior, pursuant to requests by the Hoopa Valley Tribe's Business Council, distributed the revenues from the timber sales annually in per capita payments to the Indians on the official roll of the Hoopa Valley Tribe, to the exclusion of the Indians of the Addition." Short v. United States, 661 F.2d 150,

152 (Ct. Cl. 1981) (Short II). 2/ These revenues were substantial: "From March 27, 1957 to June 30, 1974, $23,811,963.75 in tribal or communal monies was distributed per capita to the [Hoopa Valley] Tribe's individual members." Short v. United States, 12 Cl. Ct. 36, 41 (1987) (Short III).

D. The Short Litigation.

In 1963, individual Indians who were excluded from the Secretary's distributions (mostly Yurok) brought suit against the United States, as trustee and administrator of the timber resources of the Reservation, "seeking their shares of the revenues the government had distributed to individual Indians of the Reservation." Short II, 661 F.2d at 152. In 1973, the Court of Claims held that "the Square and the Addition together constituted a single reservation, that all the Indians of that Reservation were entitled to share in all of its revenues that were distributed to individual Indians (including the timber revenues from the Square), and that the plaintiffs who were Indians of the Reservation were entitled to recover the monies the government withheld from them." Id.

Notwithstanding the Court's clear holding, the Bureau of Indian Affairs continued to distribute the timber revenues only to enrolled Hoopa Valley Tribe members and no one else. See Short v. United States, 28 Fed. Cl. 590, 591

2/ The official roll of the Hoopa Valley Tribe "limit[ed] enrollment to allottees of land on the Square, non-landholding 'true' Hoopas voted upon by the Tribe, and long-time residents of the Square of a prescribed degree of Hoopa blood, descended from natives of the Square." Short I, 486 F.2d at 562.

(1993) (Short VI). But the BIA did acknowledge the rights of those who were not enrolled members of the Hoopa Valley Tribe. "After the 1973 decision, the BIA began to distribute only thirty percent of the unallotted Reservation income because it estimated that Hoopa Valley Tribe members comprised thirty percent of the Indians of the Reservation." Id. The BIA retained the remaining seventy percent in an escrow fund, which came to be known as the "Short escrow fund" or the "seventy percent fund." Id. The seventy percent fund grew to over $60 million by the time the Court decided Short VI in 1993. Id.

E. The Hoopa-Yurok Settlement Act.

Some 25 years after the Short litigation began, Congress sought to resolve conflicts over the governance and property of the Joint Reservation on a prospective basis. See generally A139-53 (Sen. R 100-564). In 1988, Congress enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (codified in part at 25 U.S.C. §§ 1300i to 1300i-11) (1988), intending it to be "a fair and equitable" resolution of the "dispute relating to the ownership and management of the [Joint] Reservation." A152 (Sen. R 100-564). The Act explicitly preserved the damages awards and final judgment of the Short cases, see 25 U.S.C. § 1300i-3, but it also sought to resolve the decades of dispute between the Hoopa Valley Tribe and the Yurok by apportioning the assets of the Joint Reservation and by partitioning the reservation into two: the Hoopa Valley

Reservation (the Square) and the Yurok Reservation (the Addition). See 25 U.S.C. § 1300i-1(c).

The partitioning of the Joint Reservation occurred upon "the publication in the Federal Register of the Hoopa tribal resolution . . . (i) waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter, and (ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this subchapter." 25 U.S.C. § 1300i-1(a). The Hoopa Tribe was required to provide this resolution within 60 days of the enactment of the Act (Oct. 31, 1988), see id. § 1300i-1(a)(2)(A), and it did so. A194-95 (Dec. 7, 1988 Federal Register Notice of Resolution of Hoopa Valley Tribe).

The Act also required the Secretary of the Interior to establish the Hoopa-Yurok Settlement Fund ("Settlement Fund" or "Fund"), into which the Secretary of the Interior was directed to deposit the Short escrow funds that had been set aside for the non-Hoopa residents and other trust accounts derived from the Joint Reservation. 25 U.S.C. § 1300i-3(a); id. § 1300i(b)(1).

Pursuant to the Act, the Settlement Fund was divided between the Hoopa Tribe and Yurok Tribe "effective with the publication of the option election date[.]" Id. § 1300i-3(c), (d). The Act called for the Secretary to prepare a

Settlement Roll, listing the names of all the persons who met the criteria for eligibility as an Indian of the Reservation and (a) were alive on the date of enactment, (b) were citizens of the United States, and (c) were not, as of August 8, 1988, enrolled members of the Hoopa Valley Tribe. 25 U.S.C. § 1300i-4(a). 3/ The final Settlement Roll was published in the Federal Register on March 21, 1991. A198 (Settlement Option Notice). Each person on the Roll was required to elect one of three options by the option election date (120 days after the publication of the Roll in the Federal Register). Id. § 1300i-5(a). If an individual met the eligibility criteria established by the Hoopa Valley Tribe and set forth in the Act, he could become a member of the Hoopa Valley Tribe; or, any person on the Roll could become a member of the Yurok Tribe; 4/ or, any person on the Roll could decline to become a member of either tribe and receive a $15,000 payment from the Settlement Fund. 25 U.S.C. § 1300i-5(d); see also A198-207 (Settlement Option Notice). The option election date was July 19, 1991. A198.

"Effective with the publication of the option election date," the Secretary was directed to deposit into a separate trust account for each of the

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3/ To compile the Settlement Roll, the Secretary was directed to give actual notice to each plaintiff in the Short case and to their attorneys, and to publish notice in newspapers of general circulation in the local region and elsewhere in California and in the Federal Register, within thirty days of enactment. 25 U.S.C. § 1300i-4(b).

4/ A person electing membership in the Yurok Tribe also received a $5,000 payment if he was under the age of 50 and a $7,500 payment if he was 50 or older. 25 U.S.C. § 1300i-5(c).

Hoopa Valley Tribe and the Yurok Tribe its respective share of the Settlement Fund, based on the ratio of its enrolled membership to the sum of the number of persons on the Settlement Roll and the number of persons enrolled as members of the Hoopa Valley Tribe. 25 U.S.C. §§ 1300i-3(c), (d); see also A211-214 (Aug. 22, 1991 BIA memorandum detailing allocation of Fund). At that point, a $10 million appropriation was to be deposited into the Settlement Fund to make the payments to persons electing Yurok membership or electing the opt-out payment. 25 U.S.C. § 1300i-3(e). The Act provided that any funds remaining in the Settlement Fund after the individual payments were made "shall be paid to the Yurok Tribe and shall be held by the Secretary in trust for such tribe." Id. § 1300i-6(a).

The Hoopa Valley Tribe promptly sought and received its "portion of the benefits as enumerated within the Act." A246 (Secretary of Interior's March 2002 Report to Congress); see also A253 (balance of Hoopa Valley share of Fund was paid on April 12, 1991). Its share of the Fund amounted to $34,006,551.87. A251 (Aug. 22, 1991 BIA memorandum detailing allocation of Fund).

F. The Yurok Tribe's Initial Organization, Lawsuit, and Waiver.

At the time the Act was enacted, the Yurok Tribe was not formally organized as a tribal government. The Act provided for the initial appointment of a five-member Yurok Transition Team to counsel, assist and communicate with tribe members concerning provisions of the Act. The Act then provided for the

establishment of an Interim Council to undertake the organizational provisions of the Act and to act as the governing body of the tribe until a tribal council was elected. 25 U.S.C. § 1300i-8(b).

The Interim Council, which was composed of five individuals nominated and elected by the general membership of the tribe, was provided with specified powers under the Act. Id. §§ 1300i-8(c)-(d). The Act further provided that the term of the Interim Council would expire two years from its election, unless it was earlier dissolved by the installment of a permanent tribal council. Id. § 1300i-8(d)(5). The Interim Council was installed on November 25, 1991, A219, and its term expired two years later.

The Act also expressly provided that beneficiaries under the Act could bring suit "challenging the partition of the joint reservation . . . or any other provision of this subchapter as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation[.]" 25 U.S.C. § 1300i-11(a). But the Act established a specific statute of limitations for such claims. The Yurok Tribe, which had no tribal constitution or permanent government at the time, was given a period of 180 days

after the general council meeting of the tribe as provided in § 1300i-8. Id. § 1300i-11(b)(3). 5/

The newly-minted Interim Council had only a brief period in which to determine whether to bring suit. The Act had been considered and enacted by Congress in 1988 without the participation or testimony of the Yurok Tribe, and its central provision, the partition of the Joint Reservation, deprived the Yurok Tribe of any rights in the Square, an area within its aboriginal lands and on which its members had lived since before the Square became reservation lands in the 19th century. A270 (S. Hr'g 107-648, Test. of S. Masten). In the eyes of the Yurok Tribe, the partition was deeply inequitable: the Tribe lost all interest in almost 89,000 acres of land in the Square, most of which was held in tribal trust status, and it received a reservation of about 58,000 acres, with only approximately 3,000 acres in tribal trust status. A269-70. Most of the land within the Yurok Reservation was held in fee by commercial timber interests, A269, and was thus unavailable for economic development or governmental services. Indeed, Congress recognized that giving the Hoopa Valley Tribe the Square represented a "financial deference" in favor of that tribe. A153 (S. Rep. No. 100-564). 6/

5/ The general council meeting of all members of the Yurok occurred within 75 days of the Option Election Date on July 19, 1991. See 25 U.S.C. § 1300i-8(c)(1)-(2).

6/ Congress did not appear to be aware that the majority of the acreage in the portion of the Joint Reservation it allocated to the Yurok was held in fee by

Faced with a looming deadline on which to file suit and pressing needs, the Yurok Tribe decided to file a complaint while simultaneously proposing amendments to the Act that would extend the limitations period and provide time for the Yurok Tribe to attempt to obtain a more equitable resolution. See A233-34. 7/ The Yurok Tribe's complaint, filed in the Court of Claims on or about March 10, 1992, raised only one claim, a Fifth Amendment claim for just compensation for the loss of its interest in the Square. A229-30 (Yurok Compl. ¶ 16-19).

The following year, on November 24, 1993, the Interim Council passed a resolution waiving claims against the United States and consenting to the contribution of escrow funds to the Settlement Fund. See A236. In its resolution, the Interim Council stated:

> The Interim Council believes that the Act's purported partition of the tribal, communal or unallotted 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 . . . and so grossly and disproportionately favored the interest of the Hoopa Tribe over

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commercial interests, or that there was a significant disparity in revenue-producing resources between the two areas. See generally A152-53 (S. Rep. No. 100-564) and compare to A269-70 (S. Hr'g 107-648, S. Masten Test.)

7/ As Congress recognized, the Yurok Tribe "ha[d] not received the majority of services provided to other federally recognized tribes," and "[a]s a result, it lack[ed] adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community." A166 (S. Rep. No. 100-564, at 28).

> those of the Yurok Tribe as to constitute an act of confiscation rather than guardianship[.]

A237. The resolution went on to state the Interim Council's position that "the Constitution of the United States would [not] allow the federal government simply to confiscate vested Tribal or individual property rights . . . without just compensation, [n]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." Id. Consistent with its understanding of the law, the Interim Council's resolution then provided the Tribe's waiver of claims arising under the Act "[t]o the extent [to] which the [Act] is not violative of the rights of the Yurok Tribe or its members under the Constitution . . . or has not effected a taking without just compensation[.]" Id.

The government rejected the Interim Council's waiver. A238. However, it soon agreed with the newly elected Yurok Tribal Council that the Tribal Council, the permanent governing body that had replaced the expired Interim Council, had the authority and the opportunity to cure any deficiency in the waiver. A241.

Efforts to settle the lawsuit were unsuccessful and in 2000, the Federal Circuit rejected the Yurok's claims, holding that no matter where they lived, none of the Indian tribes and individuals who resided on the original reservation had vested rights in reservation lands that would require compensation upon the

government's taking of those lands. Karuk Tribe of Cal. v. United States, 209 F.3d 1366, 1378 (Fed. Cir. 2000).

The Act provided that the Secretary prepare a report to Congress on the conclusion of any claim brought pursuant to the Act. 25 U.S.C. § 1300i-11(c). The Secretary prepared a report and Congress held a hearing on the subject in 2002. Despite testimony from the Assistant Secretary for Indian Affairs, the Chairman of the Yurok Tribe and the Chairman of the Hoopa Valley Tribe, all asking Congress to take action on the matter, Congress did not act.

G. The Yurok Executes A Waiver And Receives Its Share of the Fund.

After efforts to resolve the matter through Congress came to nothing and years passed, "the Hoopa Valley Tribe and the Yurok Tribe as well as the Tribes' Congressional delegation" asked the government to give new consideration to the propriety of releasing the Settlement Fund on its own delegated authority. A322. After considering the arguments and positions of both tribes, in 2007, the Special Trustee for American Indians determined that the Yurok Tribe would be entitled to the remainder of the Settlement Fund if it complied with the express terms of the Act by adopting and submitting an unconditional waiver, just as the Hoopa Valley Tribe had done years earlier. A322-24 (Special Tr. for Am. Indians Letter to C.L. Marshall). On March 21, 2007, the Yurok Tribe Council did so, submitting to the Special Trustee an unconditional waiver of any claims it may

have against the United States arising under the Act, in a form substantially the same as the one the Hoopa Valley Tribe had submitted years before. See A326-27 (Resolution No. 07-037 of the Yurok Tribal Council re Waiver of Certain Claims). The Special Trustee promptly issued a letter stating that the Yurok Tribe waiver met the requirements of the Hoopa-Yurok Settlement Act, and that the remaining funds therefore would be distributed to the Yurok Tribe, pursuant to the Act's provisions. A328-31. In April 2007, the Government released the Yurok Fund to the Yurok Tribe without any restriction or reservation. See Pls.' App. 400-02 (Letter of Special Deputy Tr. to SEI Private Trust Co.).

H. Disposition of the Yurok Fund.

The Yurok promptly began preparations to distribute the funds per capita to its members pursuant to the procedures of the Yurok Constitution. 8/ The Hoopa Valley Tribe was well aware that the Yurok Tribe intended to distribute the funds to its members. Indeed, the Hoopa Plaintiffs alleged that they "warned the Special Trustee" that such per capita distributions would occur when the Yurok funds were released to the Tribe. R. 5, Am. Compl. ¶ 63. Neither the Hoopa Valley Tribe nor any of its members sought injunctive relief or took any other

8/ The Constitution of the Yurok Tribe expressly provides that monies from the Settlement Fund "shall not be used until the Tribal Council has prepared a proposal for its intended use and received a majority vote of approval from the Tribal Voting Membership." Yurok Constitution Art. 4, § 5 (available at http://www.yuroktribe.org/government/tribalattorney/tribalattorney.htm).

action to prevent the government from releasing the Yurok Fund or to prevent its distribution to Yurok members.

As expected, following a vote of the Yurok membership, the Yurok Tribe began distributing per capita payments to its members in January 2008. See, A339, 340. Thus, the vast majority – over 90% – of the Yurok Fund was distributed to Yurok members in early 2008.

SUMMARY OF ARGUMENT

To avoid burdening the Court with cumulative briefing, the Yurok Tribe will not restate the arguments the government has already persuasively made and the Tribe expressly joins in the government's arguments set forth in Sections A, B, and D of its brief. See Govt. Br. at 29-42, 48-57. 9/ The judgment of the Court of Federal Claims should be affirmed because the Hoopa Plaintiffs plainly lack standing. Under the Settlement Act, they long ago received every benefit Congress intended to give them, and they have no cause to complain about the government's disposition of the balance of the Settlement Fund.

Nearly twenty years after enactment of the Settlement Act, the government carefully considered the provisions of the Act, Congress's statutory intent, and all the relevant facts. Exercising the discretion and authority to

9/ The Yurok Tribe takes no position with respect to the government's argument set forth in Section C.

administer the Act delegated by Congress, the government determined that the Act should be read in favor of providing the Yurok Tribe with the benefits Congress intended for it to receive under the Act. That decision was well within the government's delegated authority and was well within the bounds of reason. Indeed, the decision was equitable: each tribe has now received exactly what Congress intended to provide it, no more and no less.

STANDARD OF REVIEW

This Court reviews decisions on standing de novo. S. Cal. Fed. Sav. & Loan Ass'n v. United States, 422 F.3d 1319, 1328 (Fed. Cir. 2005). It also reviews summary judgment rulings de novo. Id.

ARGUMENT

A. The Hoopa Plaintiffs Suffered No Injury and Have No Claim Arising From Distribution of the Settlement Fund.

By enacting the Settlement Act, Congress indisputably sought to put an end to decades-long disputes among the Yurok, the Hoopa, and the federal government over the management and allocation of reservation lands and resources, disputes that engendered lengthy and multiple lawsuits 10/ and great uncertainty among the parties. See A139-40 (S. Rep. No. 100-564 at 1-2).

10/ In addition to the Short action, lawsuits included Puzz v. U.S. Department of Interior, Bureau of Indian Affairs, No. C 80 2908 TEH, 1988 WL 188462 (N.D. Cal. Apr. 8, 1988) (order vacated following enactment of HYSA) and Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979).

The Hoopa Valley Tribe concedes it obtained all it was due under the Act and has no grounds for complaint on its own behalf. See Pls.' Br. at 36-37; see also A262-63, 267 (S. Hr'g 107-648 at 7-8, 12). Indeed, the Act was very good to the Hoopa, providing it with a rich land base, the Square, that has generated significant annual income for the tribe. See A270 (S. Hr'g 107-648 at 22) (between 1988 and 2002, Hoopa Reservation timber revenues were $64 million). And it provided that tribe with over $34 million from the Settlement Fund, which the tribe received in full by 1991. See A251-53 (Hoopa-Yurok Settlement Fund summary).

The individual Hoopa plaintiffs also have no basis for complaint. As tribe members, they enjoyed all the tribe's benefits under the Act. More importantly, individual Hoopa members are not direct beneficiaries of the Act. On the contrary, one of the primary purposes of the Act was to allocate reservation lands and resources on a tribal basis and close the door on individual land and money claims. See A140 (S. Rep. 100-564); see also A153 (provision in Act for certain payments to individual Indians "is in no way to be construed as any recognition of individual rights in and to the reservation or the funds in escrow"). The individual plaintiffs can point to no provision of the Act that created rights for individual Hoopa members or imposed duties on the government relating to individual Hoopa members. In sum, neither the Hoopa Valley Tribe nor the

individual plaintiffs can point to any injury arising from the invasion of a legally protected interest under the Act. Indeed, the only "injury" the Hoopa Plaintiffs have experienced is the loss of whatever hope they held that there may have been some chance that Congress or the Secretary might have taken action to distribute some of the Fund to them. That hope does not provide standing for a legal claim.

B. The United States' Decision to Release the Balance of the Settlement Fund to the Yurok Was Lawful And Appropriate.

The judgment of the Court of Federal Claims should be affirmed because the Hoopa Plaintiffs plainly lack standing. If that judgment is reversed, however, the appropriate course would be to remand the matter back to the trial court for further proceedings. Thus, this Court need not and should not address the merits of the Hoopa Plaintiffs' claim. However, we include a brief discussion to demonstrate that the government's decision was permissible under the Act and reasonable under any view of the facts.

The Special Trustee's decision in 2007 to release the remainder of the Settlement Fund to the Yurok was entirely lawful. See Pls.' App. 372-74 (Special Tr. Letter at 1-3). There can be no dispute that the primary purpose of the Act was to divide the land and funds of the former Joint Reservation between the Yurok and the Hoopa Valley tribes. See A139-40 (S. Rep. 100-564 at 1-2); A151 (the Act was intended to be "a reasonable and equitable method for resolving the confusion and uncertainty [then] existing on the [Joint] Reservation"); 25 U.S.C.

§§ 1300i-1, 1300i-3. The Special Trustee's action plainly carried out that purpose, and it was consistent with the authority Congress delegated in the Act. See National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (agency has delegated authority to fill statutory gaps in a reasonable manner and is better equipped than courts to make difficult policy choices).

Nor can there be serious question that the terms of the Act did or were intended to prevent the Yurok Tribe from submitting a renewed unconditional waiver just because it litigated and lost its Constitutional challenge. In the statute, Congress provided that the Yurok must waive "any claim [the] tribe may have against the United States arising out of the provisions of this subchapter." 25 U.S.C. § 1300i-1(c)(4) (emphasis added). Congress required waiver of all potential claims, not just a taking claim, and it did not condition acceptance of the waiver on any finding regarding the validity of any potential claims. Thus, the effectiveness of the Yurok's waiver cannot depend on the speculative analysis by the Hoopa Plaintiffs as to the existence or validity of any claims by the Yurok against the United States. 11/ Indeed, the United States found it unnecessary to

11/ The Hoopa Plaintiffs suggest that the Yurok's waiver was illusory because any claims the Yurok may have had "must be deemed extinguished based on principles of res judicata." Pls.' Br. at 54. But res judicata is an affirmative defense, subject to limitations and to principles of equity, and its application is often uncertain. See, e.g., Stearn v. Dep't of Navy, 280 F.3d 1376, 1380 (Fed. Cir. 2002). Simply because the government may have a viable affirmative defense to a potential claim does not render the waiver of that claim illusory.

determine whether the Hoopa had any valid claims before accepting its waiver, even though the United States presumably believed that the Hoopa never had any such claims. The same approach should apply here. In short, the Yurok waiver has the practical effect of barring it from asserting any claims in the future, regardless of the Hoopa Plaintiffs' speculation about the validity of the potential claims being waived.

Under the plain language of the Settlement Act, the Yurok Tribe's waiver of any remaining claims against the United States – even after the conclusion of the takings litigation – made "effective" the release of its apportioned funds Congress intended under the Settlement Act. See 25 U.S.C. §§ 1300i-1(c)(4);1300i-8(d)(2). After all, neither the waiver provisions, nor any other sections of the Settlement Act, expressly prohibited the Yurok Tribe from adopting a waiver after initially bringing a Constitutional claim against the government. Instead, the statute simply provides that the various provisions of the Settlement Act "shall not be effective unless and until" the Yurok Tribe has adopted a waiver. Id. § 1300i-1(c)(4). Once the Tribe did so, it became entitled to receive its apportioned share of the Fund that Congress directed be distributed to the Yurok pursuant to the Settlement Act.

Nor does the waiver requirement specifically speak only to taking claims. To be sure, Congress had taking claims in mind – it included in the Act a specific provision making clear that such claims were anticipated. See 25 U.S.C. § 1300i-11(a). But it did not include any language in the Act to limit an effective waiver to taking claims, as it easily could have done. Nor, despite the Hoopa Plaintiffs' rhetoric to the contrary, did Congress provide that any legal challenge, and particularly a Constitutional challenge, would work a forfeit of benefits under the Act. 12/

Indeed, neither the Act nor its legislative history includes language providing that the waiver provision of § 1300i-8(d) and the claims provision in § 1300i-11(a) are mutually exclusive. In seeking to resolve the disputes relating to the Joint Reservation, Congress was only attempting to make a fair allocation of property between the two tribes. Had it desired to penalize either tribe for pursuing

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12/ Indeed, as the Yurok maintained from the time the Interim Council issued its conditional waiver, to hold the Tribe to the Hobson's choice between receiving government benefits that it believed were legally inadequate on the one hand and exercising its constitutional right to petition the government for its grievances on the other would constitute an unconstitutional condition. See U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). "Even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Perry v. Sindermann, 408 U.S. 593, 597 (1972); see also United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003). The Yurok Tribe had the right to test the constitutionality of the Act, and the government properly determined that that unsuccessful challenge should not deprive the Yurok of its benefits under the Act.

its rights, it would have said so. Indeed, if that had been Congress' intent, it would have included, at a minimum, some provision directing the use of the Settlement Funds in the event that one or both tribes sued. It did not.

The government also reasonably determined that the requisite waiver could be executed by the Yurok Tribal Council. A324 (Special Tr. Letter at 2). Although the Act provided for execution of the waiver by the Interim Council, that was only a temporary body created to carry out limited governmental authority and actions until the Yurok's permanent government was established. By the time the waiver was authorized and executed, the Interim Tribal Council had long since expired and been replaced by the permanent Yurok Council. Id. Over the course of many years, both the Department and the Hoopa Valley Tribe recognized the authority of the Yurok Council and its ability to "cure" the prior conditional waiver. Id.; see also A241 (A. Deer Letter to Chairperson Long at 2); A319. And absent any statutory language expressly providing otherwise, it would be illogical and inappropriate to ascribe to Congress the intent to hold that the permanent governing body of a tribe has less authority than the "interim" council.

The government considered all these issues before reaching its decision. And it also recognized that "Congress acted as a trustee in passing the Act[.]" A323-24. Because the Hoopa Valley Tribe had received all of its benefits under the Act, the government appropriately determined that "any ambiguity in the

Act should be read in favor of providing the other beneficiary, the Yurok Tribe, with its benefits established by the Act." A324. That determination is entirely consistent with the Indian canon of construction that ambiguities in statutes enacted for the benefit of tribes should be interpreted in favor of the tribes. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the government's brief, the judgment of the Court of Federal Claims should be affirmed.

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Respectfully submitted,

Jonathan L. Abram
Audrey E. Moog
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5681
Fax: (202) 637-5910
E-mail: jlabram@hhlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, a copy of the foregoing Brief of Third Party Defendant-Appellee Yurok Tribe was served by overnight mail on the following counsel for the parties:

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

Mary Gabrielle Sprague
United States Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795, L'Enfant Plaza Station
Washington, DC 20026

_____
Jonathan L. Abram

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,675 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionally spaced typeface using Word 2003 in 14 point Times New Roman font.

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Jonathan L. Abram