UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2009-5084

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

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant/Third Party Plaintiff-Appellee

v.

YUROK TRIBE,

Third Party Defendant.

Appeal from the United States Court of Federal Claims in 08-CV-072, Judge Thomas C. Wheeler

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APPELLANTS' INITIAL BRIEF

THOMAS P. SCHLOSSER, WSBA #6276
THANE D. SOMERVILLE, WSBA #31468
Morisset, Schlosser, & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104
Tel: (206) 386-5200
Facsimile: (206) 386-7322
Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTEREST

Counsel for the appellants certifies the following:

1. The full name of every party or amicus represented by me is: Elton Baldy; Oscar Billings; Benjamin Branham, Jr.; Lila Carpenter; William F. Carpenter, Jr.; Margaret Mattz Dickson; Freedom Jackson; William J. Jarnaghan, Sr.; Joseph LeMieux; Clifford Lyle Marshall; Leonard Masten, Jr.; Danielle Vigil-Masten; Hoopa Valley 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 is: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Law Firm: Morisset, Schlosser & Jozwiak; Attorneys: Thomas P. Schlosser (director); Thane Somerville (associate).

Date: July ___, 2009

_____
Signature of Counsel

Thomas P. Schlosser_____
Printed Name of Counsel

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STATEMENT OF RELATED CASES

(a) No appeal in or from the same civil action or proceeding in the lower court has previously been before this or any other appellate court. However, this case closely relates to litigation that has previously been before this Court in:

1. *Short v. United States*, Case No. 102-63. Reported at 719 F.2d 1133 (Fed. Cir., Oct. 6, 1983) (before Circuit Judges Rich, Davis, Bennett, Smith, and Nies)

2. *Short v. United States*, Case Nos. 93-5193, 93-5208, 93-5209, 94-5016, 94-5020, and 94-5025. Reported at 50 F.3d 994 (Fed. Cir., March 14, 1995) (before Circuit Judges Mayer, Michel, and Rader)

3. *Karuk Tribe of Cal. v. Ammon*, Case Nos. 99-5002, 99-5003, and 99-5006. Reported at 209 F.3d 1366 (Fed. Cir., April 18, 2000) (before Circuit Judges Newman, Schall, and Rader)

(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.

I. STATEMENT OF JURISDICTION

Subject matter jurisdiction in the Court of Federal Claims arises under 28 U.S.C. §§ 1505 and 1491, as this action involves a claim arising under federal laws against the United States for money damages brought by an Indian tribe and individual Indians. The order and judgment appealed in this proceeding are final and dispose of all parties' claims. Hoopa Plaintiffs timely filed notice of appeal on May 15, 2009. This Court has jurisdiction under 28 U.S.C. § 1295(3).

II. STATEMENT OF ISSUES

1. Whether the Court of Federal Claims erred by entering judgment against Hoopa Plaintiffs on grounds that they lack standing to pursue their breach of trust claims against the United States?

2. Whether Hoopa Plaintiffs are entitled to partial summary judgment on their breach of trust claims?

III. STATEMENT OF THE CASE

Individual Hoopa tribal members and the Hoopa Valley Tribe ("Hoopa Plaintiffs") allege that the United States breached its fiduciary trust obligations to the Hoopa Plaintiffs. The United States has statutory duties to use the Indian trust funds in the Hoopa-Yurok Settlement Fund (the "Settlement Fund") for the benefit of all "Indians of the Hoopa Valley Reservation." Hoopa Plaintiffs qualify as "Indians of the Reservation" and the Settlement Fund consists of trust monies

derived pursuant to 25 U.S.C. § 407 primarily from timber resources of the Hoopa Valley Reservation.

The United States violated its statutory and fiduciary trust obligations, causing injury to Hoopa Plaintiffs, by making an arbitrary, discriminatory, and under-inclusive per capita distribution of the funds solely to the members of the Yurok Tribe – to the exclusion of the Hoopa Plaintiffs. *See Short v. United States*, 12 Cl. Ct. 36, 44 (1987) (holding that "if the Secretary decides to make per capita distributions of unallotted Reservation income, all persons who fall into the category of an Indian of the Hoopa Valley Reservation, alive at the time of a given distribution, must be included.").

The United States' action violated statutes, including the Hoopa-Yurok Settlement Act, Pub. L. 100-580, *codified in part as amended at* 25 U.S.C. §§ 1300i, *et seq*. ("Settlement Act"), 25 U.S.C. § 407, and the Act of April 8, 1864, An Act to Provide for the Better Organization of Indian Affairs in California, 13 Stat. 39 ("1864 Act"), and conflicted with this Circuit's and the Court of Federal Claims' multiple decisions in *Short, et al., v. United States, et al*., No. 102-63.[1]

[1] *Short v. United States* includes seven reported opinions that involve essentially the same parties and trust funds at issue in this proceeding: 202 Ct. Cl. 870 (1973) (*Short I*); 661 F.2d 150 (Ct. Cl. 1981) (*en banc*) (*Short II*); 719 F.2d 1133 (Fed. Cir. 1983) (*Short III*); 12 Cl. Ct. 36 (1987) (*Short IV*); 25 Cl. Ct. 722 (1992) (*Short V*); 28 Fed. Cl. 590 (1993) (*Short VI*); 50 F.3d 994 (Fed. Cir. 1995) (*Short VII*); and hundreds of unreported orders.

See Short III, 719 F.2d at 1135 (holding that the pervasive statutory scheme in 25 U.S.C. § 407 creates an actionable fiduciary duty when the Secretary wrongfully distributes timber proceeds in a discriminatory fashion); *Short VII*, 50 F.3d at 1000 (holding that plaintiffs were entitled to damages flowing from unauthorized distribution, because the Secretary failed to operate within the statutory framework established by Congress for administration of reservation resources).

On March 21, 2007, Ross Swimmer, Special Trustee for American Indians, improperly authorized release of the Settlement Fund (over $80 million) to the Yurok Tribe. Subsequently, Mr. Swimmer approved a per capita distribution of approximately $80 million to Yurok tribal members to the exclusion of Hoopa Plaintiffs that qualify as "Indians of the Hoopa Valley Reservation." Hoopa Plaintiffs filed this action on February 1, 2008 and filed an Amended Complaint on March 11, 2008. A22.[2] Hoopa Plaintiffs moved for partial summary judgment on their breach of trust claims on April 2, 2008, and the United States moved to dismiss, or in the alternative for summary judgment on July 22, 2008. A50; A81.

On March 25, 2009, Honorable Judge Thomas C. Wheeler granted the United States' motion for summary judgment, denied Hoopa Plaintiffs' motion for partial summary judgment, and directed the Clerk to enter judgment for the United

[2] References to pages contained in the Appendix are cited as "A___" herein.

States. A1. The sole basis for the Court's rulings is that Hoopa Plaintiffs lack standing to seek relief for the United States' breach of trust. A2.

IV. STATEMENT OF FACTS

A. Creation of the Hoopa Valley Reservation and Escrow Funds.

In 1864, federal officials, acting under the Act of April 8, 1864, established the "Square" portion of the Hoopa Valley Indian Reservation in Northern California. A54-55. Lands known as the Connecting Strip and the Klamath River Reservation (collectively, the "Addition") were added to the Square by Executive Order in 1891.[3] A55. After the 1940s, unallotted trust lands of the Hoopa Square produced substantial revenues because it was heavily timbered. A55. The United States administered these revenues as trustee for the Indian beneficiaries. A55.

Until 1955, timber and other revenues derived from the former Hoopa Valley Reservation (consisting of the Square and the Addition) ("Joint Reservation") were deposited in a single United States Treasury Account entitled "Proceeds of Labor, Hoopa Valley Indians." A56. This account was held and managed by the Bureau of Indian Affairs as an Indian trust account. *Short VII*, 50 F.3d at 996. Beginning in 1955, the United States made per capita payments from this account to Indians identified on the official membership roll of the Hoopa Valley Tribe. A56. The Secretary refused to "distribute any income derived from

[3] A map is provided at A125.

the Square portion of the Hoopa Valley Reservation to any Indians of the Hoopa Valley Reservation other than those who are members of the Hoopa Valley Tribe according to its official roll." A56. This exclusive per capita distribution spawned the *Short* litigation.

B. *Short* Litigation

The *Short* case has been litigated in this Court and is essential to understanding the issues presently before the Court, as this case essentially involves the same parties, trust funds, and claims as in *Short*. The rulings in *Short* define the contours of the United States' trust obligations and govern the Hoopa Plaintiffs' right to recovery in this case.

In 1963, nonmembers of the Hoopa Valley Tribe sued the United States seeking a share of revenues the United States had distributed to Indians on the roll of the Hoopa Valley Tribe. A56. In *Short I*, the Court of Claims held that the Square and the Addition together constituted a single reservation, and that all "Indians of the Reservation" were entitled to share in the distributed revenues. A57. The United States, as trustee and administrator of the timber resources, was held liable to the excluded Indians of the Reservation for payments that the government withheld from them. *Short I*, 202 Ct. Cl. at 980–81.[4]

[4] The portion of the opinion reported at 486 F.2d 561 omits these pages.

In *Short II*, 661 F.2d 150 (Ct. Cl. 1981), the Court directed standards for determining who were "Indians of the Reservation" by adapting five separate membership standards used by the Hoopa Valley Tribe in preparing its roll in 1949-72. In *Short III*, this Court required that all Indians of the Reservation receive "equal rights in the division of timber profits (and other income) from the unallotted trust land of the reservation" and reiterated that the "Government . . . is liable for breach of fiduciary obligation in failing to distribute the sale proceeds (and other income) to all persons entitled to share in those proceeds." *Short III*, 719 F.2d at 1135. To the extent the Secretary makes a distribution of proceeds, he must act "non-discriminatorily." *Id*. at 1137.

Subsequently, in *Short IV*, the Court held that no tribe or individual had any vested ownership right in the escrow trust accounts holding the reservation revenues. 12 Cl. Ct. at 42. However, despite the lack of a vested interest, Indians were entitled to damages for the monies the government withheld from them when the Secretary individualized portions of the trust funds as per capita payments to some, but not all, Indians of the Reservation. *Short IV*, 12 Cl. Ct. at 41-45.[5] A

[5] The Court reasoned that individual Indians rights arise when tribal or unallotted property is individualized (as it was here). It pointed to *United States v. Jim*, 409 U.S. 80 (1972), and *Gritts v. Fisher*, 224 U.S. 640 (1912), as illustrating that Congress could provide the Secretary new authority to apply Indian trust funds without infringing rights of existing beneficiaries where the funds had not yet been individualized. *Short IV*, 12 Cl. Ct. at 42; *see also Short VI*, 28 Fed. Cl. at 595.

final money judgment was entered in 1994 and this Court affirmed in *Short VII*, 50 F.3d 994 (Fed. Cir. 1995).

C. Hoopa-Yurok Settlement Act

Congress responded to the continuing frustration caused by *Short* and related litigation with the adoption of the Hoopa-Yurok Settlement Act ("Settlement Act"), which became law in 1988.[6] Congress specifically endorsed the rulings of the *Short* case with respect to the interest of individual Indians in revenues from the Hoopa Valley Reservation. A150-151; 25 U.S.C. § 1300i-2; *see also* H. Rep. 100-938, 100th Cong. 2d Sess. 18-19 (1988). The Settlement Act, *inter alia,* established a method to divide the former Joint Reservation into two reservations – one for the Hoopa Valley Tribe and one for the Yurok Tribe. A57-58. It thus ended, prospectively, the Joint Reservation. The Settlement Act created a combined trust fund (the "Settlement Fund") comprised of the trust funds already held for all Indians of the Reservation, created a specific mechanism for the tribes to access the Fund and enabled the Yurok Tribe to organize a tribal government so that each tribe could exercise sovereignty over its respective reservation. A57-58.

1. Hoopa-Yurok Settlement Fund

Section 1(b)(1) of the Settlement Act defined the term "Escrow funds" to mean seven specific accounts "derived from the joint reservation" and "held in

[6] The Settlement Act is reproduced in the Addendum, as well as at pages 180-193 of the Appendix.

trust by the Secretary." 25 U.S.C. § 1300i(b)(1).[7] Prior to the Settlement Act's passage, the United States Senate estimated that the escrow funds in the accounts totaled approximately $65 million. A157. Most of the escrow funds originated from logging on the Hoopa Square. A55-56. Funds from the Yurok Reservation amounted to only 1.26303% of the Settlement Fund (prior to deposit of federal appropriations). A215-217; 265.

Section 4 of the Settlement Act combined these accounts, deposited them in the newly established Settlement Fund, and specified how certain distributions could be made from it. 25 U.S.C. § 1300i-3(a). Under the Settlement Act, the Secretary of Interior was required to "invest and administer" . . . "as Indian trust funds pursuant to . . . 25 U.S.C. § 162a" any funds that were not distributed pursuant to the Settlement Act. 25 U.S.C. § 1300i-3(b). Thus, Congress pooled these trust monies into the Settlement Fund and created new options for how the funds could be distributed. *Id.* Unless distributed pursuant to the new authorization of Congress in the Settlement Act, the Secretary was mandated to "invest and administer" the funds as Indian trust funds in accordance with pre-existing statutory trust obligations. *Id*.

[7] The Senate Select Committee on Indian Affairs indicated in its report, S. Rep. 100-564, that the definition of the "escrow funds" was intended to be a comprehensive list of the funds and accounts in federal hands derived from the lands or resources of the Joint Reservation. A157.

2. The Settlement Act Waiver Requirement

The Settlement Act authorized distributions from the Settlement Fund in exchange for litigation claim waivers by individuals qualified for the Settlement Roll, the Hoopa Valley Tribe, and the Interim Council of the Yurok Tribe. A59. Indians already on the membership roll of the Hoopa Valley Tribe were not required to waive claims. *Id.*; 25 U.S.C. § 1300i-4(a), 1300i-5.

The tribal claim waiver provisions appear in Sections 2 and 9 of the Settlement Act. 25 U.S.C. § 1300i-1(a)(2)(A) (Hoopa); § 1300i-1(c)(4) and § 1300i-8 (Yurok). Section 2(c)(4) of the Settlement Act provides in part that the "apportionment of funds to the Yurok Tribe as provided in sections 4 and 7 . . . shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act." 25 U.S.C. § 1300i-1(c)(4) (emphasis added). Congress presented the tribes with a simple choice — waive the claim that the Settlement Act constituted a taking in exchange for a portion of the benefits of the Act, or litigate the takings claim and forgo any right to payment under the terms of the Act. *Id.*

On December 7, 1988, Interior published notice that the Hoopa Valley Tribe had adopted a valid resolution which met the requirements of Section 2(a)(2)(A) of

the Settlement Act. A60; 194-195. In contrast, the Yurok Tribe did not waive claims and chose to litigate. A225, 231.

D. The Yurok Interim Council Rejected the Waiver and Access to the Settlement Fund – Instead Choosing to Litigate its Claims.

The Senate Report accompanying the Settlement Act explains that the authority for certain transfers of funds to the Yurok Tribe:

> [S]hall not be effective unless the Interim Council of the Yurok Tribe adopts a resolution waiving any claims it might have against the United States under this Act and granting consent as provided in section 9(d)(2). Section 9 of the bill provides for an Interim Council to be elected by the General Council of the tribe.

A156. As explained by Assistant Solicitor Duard Barnes, the Yurok Interim Council had a limited time to take action to access the Settlement Fund, and the failure to take such action would have consequences. A221-222. The refusal to pass a resolution waiving claims against the United States and/or filing a claim would prevent the Yurok Tribe from receiving the apportionment of funds, the land transfers, and the land acquisition authorities provided by the various sections of the Settlement Act, but would not preclude the Yurok Tribe from organizing a tribal government. *Id.*

Despite receiving clear warning of the consequences, the Yurok Interim Council failed to enact the waiver required by the Settlement Act. A231. Instead, Yurok chose to litigate its claims, filing a Fifth Amendment takings suit against the

United States on March 11, 1992. A225. The Yuroks litigated for nearly a decade, ultimately receiving an adverse judgment that was affirmed by this Court. *Karuk Tribe, et al., v. United States*, 41 Fed. Cl. 468 (1998), *aff'd* 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

E. Interior's Consistent Interpretation of the Waiver Requirement (1992-2007) Confirmed that Yurok Forfeited its Right to a Distribution Pursuant to the Settlement Act.

Rather than waive its takings claims as directed by Congress to obtain proceeds from the Settlement Fund, the Yurok Interim Council elected to do the opposite, and refused Congress' offer. A62 at ¶ 41; A64 at ¶ 45; A231. From 1992 through early 2007, the United States' consistent position was that Yurok forfeited its rights under the Settlement Act and that the Secretary was bound to invest and administer the escrow funds for the benefit of all Indians of the Reservation. A63-66; A218-224; A231-248.

A February 3, 1992, Interior Department memorandum first addressed the consequences that would flow from the Interim Council's failure to timely waive claims as provided by the Settlement Act:

> The statute simply does not authorize the Interim Council to dispense with the [waiver] resolution requirement in order to be afforded the benefits conferred under specified sections of the Settlement Act for any reason . . .

A222.

On April 13, 1992, after the Yurok filed suit against the United States, Assistant Secretary—Indian Affairs Eddie Brown wrote that the Yurok Interim Council's decision to litigate its claims "means that the same consequences follow as if it fails to enact a resolution waiving claims against the United States." A231. On April 15, 1992, the Acting Assistant Secretary—Indian Affairs wrote to the Yurok Interim Council Chairman, saying much the same thing:

> Unless and until the Interim Council waives the Tribe's claims and dismisses its case against the United States, it will neither have access to its portion of the Settlement Fund, nor will title to all national forest system lands within the Yurok Reservation, and to the portion of the Yurok Experimental Forest described in the Settlement Act, be taken in trust for the Yurok Tribe.

A233 (emphasis added). In other words, the Yurok Tribe's right to an apportionment of the Settlement Fund was lost. Unless the Yurok Interim Council dismissed its case and waived the claims, the Settlement Fund remainder would be administered as an Indian trust account for all the Indian beneficiaries until such time as Congress directed otherwise. 25 U.S.C. § 1300i-3(b).

On November 23, 1993, Assistant Secretary—Indian Affairs Ada Deer wrote to the Yurok Interim Council cautioning that the Yurok Interim Council would, on November 25, 1993, lose the legal powers vested in it by the Settlement Act: "[a]ny subsequent waiver of claims by the Tribe will be legally insufficient." A235. The very next day, in a last ditch effort to both maintain its suit and also

comply with the Act, the Yurok Interim Council enacted a resolution purporting to waive its claims while simultaneously preserving the right to litigate its takings claim. A236-238. On April 4, 1994, Assistant Secretary Deer informed the Chair of the Interim Tribal Council of the Yurok Tribe that Interim Council Resolution No. 93-61 (Nov. 24, 1993) failed to meet the requirements of the Settlement Act. *Id*. The Assistant Secretary reaffirmed Interior's prior conclusion that the Yurok Tribe forfeited its rights under the Settlement Act by choosing to maintain the suit in the Claims Court. *Id.*

On March 14, 1995, Assistant Secretary Deer rejected the Yurok Tribal Council's request for reconsideration of her April 4, 1994 decision. A240. The Assistant Secretary explained that the legislative history of the Act confirms that potential taking claims against the United States were "precisely the type of claims Congress was most concerned about," which explained why waivers of such claims were essential elements to triggering key provisions of the Settlement Act. *Id*.

As a result of the Yurok Interim Council's failure to timely waive its claims and its affirmative decision to litigate for greater compensation, the balance of the Settlement Fund never transferred to the Yurok Tribe under Settlement Act Sections 4 or 7. As required by the Settlement Act, the Secretary continued to

invest and administer the escrow account as Indian trust funds for the benefit of all Indians of the Reservation (until 2007). 25 U.S.C. § 1300i-(3)(b); A245-248.

F. Interior Reports that the Settlement Fund will be Held for the Mutual Benefit of Both Tribes Pending Direction from Congress.

In March 2002, the Secretary of the Interior issued a report to Congress pursuant to Settlement Act Section 14(c) regarding what to do with the unallotted trust monies in the Settlement Fund. A242-248. The report recommended: the Settlement Fund be retained in trust account status; there be no distribution of Settlement Fund dollars to any tribe or individual; the Settlement Fund continue to be administered for the mutual benefit of both the Hoopa Valley and Yurok Tribes; and Congress should fashion a mechanism for the future administration of the Settlement Fund. A247-248.

At an August 2002 Congressional hearing on Interior's report, the Assistant Secretary—Indian Affairs testified that "[i]t is our position that it would be inappropriate for the Department to make any general distribution from the Fund without further instruction from Congress." A282. Following the issuance of the Secretary's report, the Hoopa and Yurok Tribes continued to work with Congress toward developing an appropriate distribution of the Settlement Fund.[8] That work

[8] At the conclusion of the August 2002 hearing, Senator Inouye directed the tribes to agree on how to divide the funds. The Hoopa Valley and Yurok Tribal Councils engaged in mediation and the resulting agreement that funds would not

abruptly ended in 2007 when Special Trustee Swimmer unilaterally released the entire Settlement Fund to the exclusion of Hoopa Plaintiffs. A322-325; 336.

G. In 2007, Special Trustee Swimmer Authorized a General Distribution from the Settlement Fund.

On March 1, 2007, Special Trustee for American Indians Ross Swimmer, issued a letter that overturned years of consistent Department opinions concerning authority to distribute the Settlement Fund remainder. A322-324. Swimmer's decision concluded, for the first time in nineteen years, that the Department "can distribute [the trust] funds to the Yurok Tribe administratively, consistent with the provisions of the Act, if the Yurok Tribe were to submit a new waiver of claims." A322. Swimmer stated that roughly $90 million would be distributed "after the Department has received an unconditional waiver from the Yurok Tribe." A322-324. The March 1, 2007 letter brushed aside the longstanding position of the United States that the Yurok Tribe did not, and now cannot, meet the waiver conditions of the Act, because it failed to waive its claims and instead fully litigated its claims to a final adverse and binding judgment. *Id*.

On March 21, 2007, Swimmer issued a supplemental decision accepting a new waiver. A325. The March 21 letter states that Swimmer received a new waiver from the "Yurok Tribal Council" on that very day. *Id*. Swimmer described

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be unilaterally expended was introduced as S. 2878 in September 2004. A67; 293. That bill failed, but efforts to achieve a fair resolution continued. A101-102.

the resolution as an "unconditional waiver of claims" and declared that it "meets the requirements of the Act." *Id*. Thus, Swimmer announced that the Department would administratively release the funds solely to the Yurok Tribe. *Id*.

H. Swimmer Approved Discriminatory Individualized Disbursement of the Settlement Fund.

On April 20, 2007, Special Trustee Swimmer sent a letter stating that "nothing precludes me from taking action consistent with the decision in this matter. As of 10:00 a.m. Eastern Daylight Time today, I have advised the custodian of the account holding the remaining balance of the Hoopa-Yurok Settlement Fund that its ownership has been transferred solely to the Yurok Tribe." A336-338.

On December 16, 2008, the Special Trustee approved the Yurok Tribe's distribution in per capita payments to only its members of over $80 million from the tribal trust funds that came from the Settlement Fund and 25 U.S.C. § 407. A340; A336-339. Each of approximately 5200 Yurok members received $15,652.89. A339; A70. Hoopa Plaintiffs were excluded from this disbursement of trust funds. A336.

V. SUMMARY OF ARGUMENT

The trial court erred in ruling that Hoopa Plaintiffs lack standing to pursue their breach of trust claims against the United States. As a general principle, a trust beneficiary has standing to sue its trustee for damages resulting from trust

mismanagement or violation of fiduciary duties. This Court and the Supreme Court have repeatedly confirmed the right of Indian beneficiaries to seek relief based on the United States' breach of trust duties.

Hoopa Plaintiffs are direct beneficiaries of the trust funds at issue. The relevant trust funds are derived from timber resources taken from Hoopa Plaintiffs' reservation land. Congress established several trust obligations regarding the management, use, and proper distribution of those funds. Hoopa Plaintiffs allege that the United States violated the terms of the trust and specific fiduciary duties, causing injury to the Hoopa Plaintiffs when it made an unauthorized and discriminatory distribution of such trust funds solely to Yurok Tribe members. Hoopa Plaintiffs' claims are mirror images of claims approved by this Court in the *Short* litigation.[9] As trust beneficiaries, Hoopa Plaintiffs have standing to seek redress for the unauthorized and discriminatory individualizations to members of the Yurok Tribe.

The trial court's finding of no standing is based on an erroneous interpretation of the Settlement Act and a failure to acknowledge Hoopa Plaintiffs' continuing beneficial trust interest in the funds at issue. The Settlement Act did not create, nor did it end, the Hoopa Plaintiffs' beneficial trust interests in the trust

[9] In *Short*, the United States paid up to $24,000 in damages to individual Indians of the Reservation who were excluded from per capita distribution of trust funds from precisely the same sources. *Short VII*, 50 F.3d at 996-1000.

funds. Absent valid distributions complying with the Settlement Act or other statute, the Secretary was bound to hold, invest, and administer the Settlement Fund as Indian trust funds for the benefit of all Indians of the Reservation, including the Hoopa Plaintiffs. The Secretary's failure to do so, and his unilateral decision to distribute funds solely to Yurok Indians, to the exclusion of Hoopa Plaintiffs, violates trust duties and gives rise to a claim of damages under this Court's holdings in *Short v. United States*.

Hoopa Plaintiffs retain a beneficial interest in the trust funds at issue, were injured by the discriminatory distribution of funds by the Secretary, and have a right to seek judicial redress in the form of damages against the United States, their trustee. As there are no material facts in dispute, Hoopa Plaintiffs are entitled to partial summary judgment on their breach of trust claims resulting from the Secretary's distribution of the Settlement Fund to Yurok members.

VI. STANDARD OF REVIEW

Whether a plaintiff has standing to bring suit is a question of law reviewed de novo. *Southern California Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005). This Court reviews rulings on summary judgment de novo. *Id.*

VII. ARGUMENT

A. Hoopa Plaintiffs Are Beneficiaries of a Trust Created by Congress Consisting Primarily of Funds Derived from their Reservation Resources.

Hoopa Plaintiffs seek recovery of damages resulting from a breach of trust committed by the United States. The trust corpus was created through, and governed by, specific enactments including the 1864 Act, 25 U.S.C. § 407, and the Settlement Act.[10] The Supreme Court has confirmed the trust relationship, and corresponding fiduciary duties, created by 25 U.S.C. § 407. *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*); *Short III*, 719 F.2d at 1135. As the creator of the trust, only Congress has authority to revoke the terms of the trust. *See Bogert, Trusts and Trustees (2d ed. revised)* (1995), § 992 (stating "a trustee has no authority to change the trust terms by the trustee's own conduct alone, . . ."). Absent express authority from Congress, neither the trustee nor the beneficiaries may authorize use or distribution of the trust corpus in a manner that is not "consistent with" the direction of Congress. *Short IV*, 12 Cl. Ct. at 45 (noting limits to Secretarial discretion in management of these trust funds).

[10] The components of the statutory trust are as follows: The corpus consists of over $80 million primarily derived from the timber resources of the Hoopa Valley Reservation. Approximately 98% of the monies at issue result from clear-cutting forests on the land specifically reserved to the Hoopa Plaintiffs – the "Hoopa Square." Less than 2% of the monies at issue originate from the "Addition," now known as the Yurok Reservation. *See* A58-59; 216-217; 265.

The beneficiaries of the trust are the "Indians of the Reservation," which specifically include Hoopa Plaintiffs. A129 (term by definition includes Hoopa members); *Short III*, 719 F.2d at 1133 (explaining that all Indian peoples of the Hoopa Valley Reservation are "Indians of the Reservation" and that such "Indians of the Reservation" are "entitled to equal rights in the division of timber profits (and other income) from the unallotted trust land of the [joint] reservation"); *Short IV*, 12 Cl. Ct. at 41-42 (holding that all "Indians of the Reservation" must be benefited by payments made from the resources of the joint reservation); 25 U.S.C. § 1300i(b)(5) (defining "Indian of the Reservation" as "any person who meets the criteria to qualify as an Indian of the Reservation as established in [*Short*]"). As "Indians of the Reservation," Hoopa Plaintiffs are direct beneficiaries of the trust at issue, which consists primarily of funds derived from the timber resources of the Hoopa Square.

The trustee is the Secretary of the Interior. The duties, obligations, and discretion of the trustee are created and constrained by the terms created by Congress. *Short VI*, 28 Fed. Cl. at 595; *Short III*, 719 F.2d at 1135. Here, the trustee's discretion to act with regard to the trust corpus is governed by 25 U.S.C. § 407 and further constrained by the Settlement Act:

> The Secretary's discretion [regarding the Settlement Fund] is constrained by statutes including 25 U.S.C. § § 117a and 407, and by the fiduciary relationship between the Secretary and the Indians.

> *Short III*, 719 F.2d at 1135-37. The Settlement Act is simply another statute that constrains the Secretary's discretion in new ways.

Short VI, 28 Fed. Cl. at 595 (emphasis added). Where Congress has not expressly directed the trustee in the statutory text, the trustee remains bound by its general fiduciary obligations to the Tribe. *Mitchell II*, 463 U.S. at 225 (noting specific trust duties are reinforced by general trust relationship).[11] The common law of trusts also informs the proper interpretation and implementation of the trust. *Mitchell II*, 463 U.S. at 225-26.

B. Individual Hoopa Plaintiffs Have Standing to Sue for Breach of Trust.

1. Trust Beneficiaries Have Standing to Sue the Trustee.

A beneficiary of a trust has standing to sue the trustee for damages resulting from mismanagement or breach of the fiduciary trust duties. *See Bogert, Trusts and Trustees (2d ed. revised)* (1995), § 871 (stating "any beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief. It is not necessary that his interest be vested."); *Graden v. Conexant Sys., Inc.*, 496 F.3d 291 (3d Cir. 2007) (stating when a common-law trustee commits a breach of trust that results in a loss, any

[11] The Settlement Act prospectively amended 25 U.S.C. § 407, the general tribal timber statute that gave rise to most of the trust funds at issue. *See* A192 (Settlement Act, Section 13). Congress did not act retroactively or repeal trust duties construed by *Short* with respect to the trust funds generated by the statute prior to its amendment.

beneficiary whose beneficial interests were affected may sue to compel the trustee to make good on the loss), *citing Restatement (Second) of Trusts, § 214* (1959).

This general rule of trust law is equally applicable to suits brought by Indians for government mismanagement of their trust assets. In *Mitchell*, the Supreme Court stated:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. (Citations omitted). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian Tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

463 U.S. at 226. *See also Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) (reversing trial court's dismissal of breach of trust claim for lack of subject matter jurisdiction); *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007) (holding that each Native Hawaiian plaintiff, as trust beneficiaries, have individual right to sue to enforce trust terms), *citing Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985) (holding that Native Hawaiians alleging a breach of trust had standing); *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003) (holding that Indian tribe had standing to sue for trust fund mismanagement). Hoopa Plaintiffs, as trust beneficiaries, have standing to sue the United States as trustee.

2. Hoopa Plaintiffs have a direct beneficial interest in the trust funds at issue that is sufficient to confer standing.

Article III of the United States Constitution limits the power of the judiciary to resolution of live "cases" or "controversies." *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1338 (Fed. Cir. 2007). The standing inquiry examines *who* is the proper or best party to bring the suit in question. 15 MOORE ET AL., MOORE'S FEDERAL PRACTICE § 101.20 (3d ed. 2005), *citing Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411, fn. 13 (3d Cir. 1992) (standing focuses on "who"). Standing requires that the plaintiff have a direct and personal stake in the action, so that the court is presented with a concrete dispute that will be vigorously advocated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, n. 1 (1992) (stating injury "must affect the plaintiff in a personal and individual way"); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The standing doctrine prevents litigation of suits by those who are merely "concerned bystanders." *Id*.

In this case, Hoopa Plaintiffs are significantly more than "concerned bystanders." As qualified "Indians of the Reservation" with a direct beneficial interest in the trust funds at issue, Hoopa Plaintiffs are the proper plaintiffs and have sufficiently discrete and concrete interests to establish standing.

3. The Supreme Court and this Court have repeatedly confirmed that Indian trust beneficiaries may seek judicial relief for breaches of trust.

This Court has explained that standing "often turns on the nature and source of the claim asserted" and that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow*, 499 F.3d at 1339, *quoting Warth v. Seldin*, 422 U.S. 490, 500 (1975). Similarly, the Supreme Court has advised that the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in other standing cases. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

The Supreme Court and this Court have repeatedly affirmed that beneficiaries of tribal trust funds may sue for enforcement of the trust or damages for mismanagement by the United States. *United States v. White Mtn. Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983); *White Mtn. Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001); *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996); *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983). Thus, the breach of trust claims brought by Hoopa Plaintiffs "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow*, 499 F.3d at 1339. As established in *Short*, Hoopa Plaintiffs have a direct interest in the proceeds of timber sales and other funds

individualized from the Settlement Fund. The Special Trustee lacked authority to disregard that interest. Like the many other tribal plaintiffs who have sued in this Court to enforce the terms of the federal trust created by 25 U.S.C. § 407 and similar statutes, Hoopa Plaintiffs have standing.

4. This Court has affirmed jurisdiction and justiciability in *Short* – a case involving essentially identical funds, parties and claims.

This Court previously affirmed jurisdiction, justiciability, and the right to seek judicial relief in litigation involving essentially the same parties and same trust funds at issue here. *Short II*, 661 F.2d at 155 (stating that "individuals whom the Secretary arbitrarily excluded from per capita distributions have the right to recover"); *Short III*, 719 F.2d at 1137 (plaintiffs who are proper beneficiaries "have a right to sue for the parts of those funds improperly distributed to others or illegally withheld from those claimants"). In *Short*, this Court ruled that plaintiffs could sue for damages from the United States based on discriminatory distributions of trust funds, even though the plaintiffs had no vested ownership interest in those funds prior to individualization. *Short II*, 661 F.2d at 154-156; *Short III*, 719 F.2d at 1137; *Short IV*, 12 Ct. Cl. at 40-45; *Short VI*, 28 Fed. Cl. at 595.

Both *Short* and the present case involve claims of trust mismanagement filed by "Indians of the Reservation." The claims upheld in *Short* are mirror images of those raised now by Hoopa Plaintiffs. *See Wright*, 468 U.S. at 752 (standing issue can be answered chiefly by comparing allegations of particular complaint to those

made in other standing cases). It would be anomalous to find that, after 40-plus years of litigation regarding the trust funds at issue (*Short* is still pending), Hoopa Plaintiffs, as Indians of the Reservation, lack standing.

In *Short*, a case involving Interior's management of trust funds derived from the timber resources of the Hoopa Valley Reservation, Plaintiffs[12] alleged injury stemming from the "discriminatory distribution of the proceeds of the timber sales and management (and other Reservation income)." *Short III*, 719 F.2d at 1135. Addressing motions to dismiss for lack of jurisdiction, this Court stated:

> It has now been decided (in the Court of Claims decisions already cited) that qualified plaintiffs have a direct interest in those funds, which are now or previously were held in Treasury, and are proper beneficiaries. They therefore have a right to sue for the parts of those funds improperly distributed to others or illegally withheld from those claimants. (Citations omitted).

Id. at 1137. The Court's determinations in *Short* bind the defendant as the "law of the case." *Short II*, 661 F.2d at 154 (stating that under the "law of the case" doctrine, a court generally adheres to a decision in a prior appeal in the same case unless exceptional circumstances exist). Even if this Court declines to apply "the law of the case" doctrine, *Short* mandates that Hoopa Plaintiffs, as "Indians of the Reservation," have adequate standing to raise their claims.

[12] Plaintiffs in *Short* were Indians of the Reservation, but not members of the Hoopa Valley Tribe. Here, individual Hoopa Plaintiffs are Indians of the Reservation and members of the Hoopa Valley Tribe.

5. Hoopa Plaintiffs Have Standing to Sue for Breach of Trust.

This Court's prior determinations in the *Short* litigation and general common law trust principles dictate that Hoopa Plaintiffs have standing to sue to enforce terms of the trust and to seek redress for damages flowing from trustee mismanagement. Hoopa Plaintiffs are direct beneficiaries of the trust funds at issue in this case, which are derived from timber resources taken from their land. Congress has established specific trust obligations regarding the management, use, and proper distribution of those funds. Hoopa Plaintiffs allege that the United States violated the terms of the trust and specific fiduciary duties, injuring the Hoopa Plaintiffs when it made an unauthorized and discriminatory distribution of such trust funds to the Yurok individuals.[13] These claims are substantially identical to the claims raised by plaintiffs in the *Short* litigation. As trust beneficiaries, Hoopa Plaintiffs have standing to seek redress for the discriminatory distributions solely to members of the Yurok Tribe.

[13] Specifically, the inapplicability of new distribution authority in the Settlement Act for per capita payments preserved a trust corpus of which Hoopa Plaintiffs are beneficiaries. 25 U.S.C. § 1300i-6(b) prohibited the "per capita" payment at issue here. It provides that funds "shall not be distributed per capita to any individual before the date which is ten years after the date on which the division is made under this section." Because the division anticipated by that section has not occurred, the ten years has not yet begun to run.

C. The Trial Court's Opinion Erroneously Interpreted the Settlement Act and Misunderstood the Nature of Hoopa Plaintiffs' Interest in the Trust Funds.

The trial court granted the United States' motion for summary judgment on the sole ground that Hoopa Plaintiffs lack standing to sue for breach of trust. The Court's opinion was further limited to a determination that Hoopa Plaintiffs suffered no injury by the exclusive distribution of the Settlement Fund to Yurok individuals.[14]

The Court reached its erroneous determination by relying on three incorrect or irrelevant premises, which are: (1) the Settlement Act did not provide individual Hoopa Plaintiffs any individual payment from the Settlement Fund (irrelevant); (2) only the Yurok Tribe was entitled to monies remaining in the Fund in 2007 (incorrect); and (3) Hoopa Plaintiffs received their "full entitlement to the Fund and thus have no 'injury in fact.'" (incorrect and irrelevant).

First, the Settlement Act did not create, nor did it end, Hoopa Plaintiffs interest in the trust funds at issue. Those funds originated as Indian trust funds under 25 U.S.C. § 407 and remained Indian trust funds under the Settlement Act. *Short III*, 719 F.2d at 1136-37 (explaining status of funds under § 407); *Short VI*,

[14] There is no dispute that a causal connection exists between the United States' actions in distributing the Fund to the Yurok individuals and the injury alleged by Hoopa Plaintiffs; nor any dispute that such injury is redressable in form of damages against the United States.

28 Fed. Cl. at 595 (explaining that Settlement Act simply constrains Secretary's discretion in new ways); 25 U.S.C. § 1300i(b)(1) (defining "escrow funds" in Settlement Fund as "monies derived from the joint reservation . . . held in trust"). Only a valid claim waiver by the Yurok Interim Council could have lawfully removed the funds from the trust.

Second, because the terms of the Settlement Act were not complied with, the Yurok Tribe lost its right to a distribution under the Settlement Act. A231-248.[15] Thus, the Secretary had a statutory and fiduciary duty to hold, invest and administer the trust fund remainder for the benefit of all Indians of the Reservation pending further determination by Congress. 25 U.S.C. § 1300i-3(b) (requiring Secretary to invest and administer funds as Indian trust funds pending proper distribution). Absent such legislative action, any use of the trust funds was required to comply with the principles articulated in *Short* – that is, equally to all Indians of the Reservation. *Short III*, 719 F.2d at 1137; *Short IV*, 12 Cl. Ct. at 42.

Finally, nothing in the Settlement Act cut off Hoopa Plaintiffs' beneficial trust interest in the funds derived from their reservation resources. Nor did the Settlement Act alter the mandates of *Short* that entitle Plaintiffs, as Indians of the Reservation, to damages if the Secretary makes an unauthorized and discriminatory distribution. To the contrary, 25 U.S.C. § 1300i-2 preserved the *Short* rulings

[15] Individual Yurok tribal members received separate payments pursuant to 25 U.S.C. § 1300i-5(c).

concerning trust funds generated prior to partition of the Joint Reservation. Hoopa Plaintiffs retain a beneficial interest in the trust funds, were injured by the Secretary's discriminatory distribution, and have a right to seek judicial redress in the form of damages against the trustee.

1. The Court erred in determining that Hoopa Plaintiffs lack an interest in the Settlement Fund sufficient to confer standing.

On page 9 of its Opinion, the Court finds that under the Settlement Act "Plaintiffs, as individual Hoopa Valley Tribe members, had no right to an individual entitlement from the Settlement Fund . . . and thus could not be injured by the distribution of the Fund to the Yurok." A9. This finding has no relevance to Hoopa Plaintiffs standing or right to recover in this case.

The Court's analysis fails to acknowledge that Hoopa Plaintiffs' beneficial trust interest in the funds at issue in this case did not arise from, nor did it end with, the Settlement Act. Rather, Plaintiffs' interest in the trust funds as "Indians of the Reservation" was fully established before passage of the Settlement Act and nothing in the Settlement Act terminates that beneficial trust interest. *Short III*, 719 F.2d at 1136-37; *Short VI*, 28 Fed. Cl. at 595. Because Hoopa Plaintiffs retain an interest in the trust funds held and administered for their benefit, they suffer injury when the Secretary makes an unauthorized and discriminatory distribution that excludes them. *Short III*, 719 F.2d at 1135, 1137 (stating, at 1135, that "the

injury is the discriminatory distribution of the proceeds of the timber sales and management (and other Reservation income)."); *Short IV*, 12 Cl. Ct. at 42.

The Settlement Fund consists of timber trust funds derived from the resources of the Hoopa Valley Reservation. 25 U.S.C. § 1300i(b)(1); *Short II*, 661 F.2d at 151 (stating timber revenues at issue derive from the Square). Trust obligations relating to those funds arise from the 1864 Act and 25 U.S.C. § 407. *Short III*, 719 F.3d at 1136. Pursuant to those Congressional enactments, and the holdings in *Short*, all "Indians of the Reservation," have a beneficial trust interest in those timber trust funds. *Short IV*, 12 Cl. Ct. at 38 (recognizing that all "Indians of the Reservation" have right to receive payments and that discriminatory distribution of proceeds constituted a breach of trust).

The Settlement Act supplements, but does not replace existing trust duties relating to the escrow funds created pursuant to Section 407 and the 1864 Act. Supplementing the existing trust duties, the settlement offers developed by Congress added new duties and constraints on the Secretary's authority to manage, use, and distribute the trust funds. *Short VI*, 28 Fed. Cl. at 595 (stating that the Settlement Act is simply another statute that constrains the Secretary's discretion in new ways). The Settlement Act also preserved the rulings from *Short*. 25 U.S.C. § 1300i-2.

The Settlement Act does not terminate Hoopa Plaintiffs' beneficial interest in the trust funds. To the contrary, the Settlement Act makes clear that: (1) funds may only be distributed as provided by the statute; and (2) pending distribution in conformance with the statute, those funds remain Indian trust funds held for Indian benefit. 25 U.S.C. § 1300i-3(b) (stating "the Secretary shall make distribution from the Settlement Fund as provided in this subchapter and, pending payments . . ., shall invest and administer such fund as Indian trust funds pursuant to section 162a of this title.").

The overarching backdrop of this case is that the monies in the Settlement Fund began, and have always remained, as trust funds of the Indians of the Reservation (including the Hoopa Plaintiffs). Thus, the Secretary remained bound to follow trust duties that arise from 25 U.S.C. § 407, the Settlement Act, and the judicial rulings from *Short*. That Congress did not require an individual distribution to Hoopa Plaintiffs within the Settlement Act is irrelevant to the Hoopa Plaintiffs' beneficial trust interest and their claims presently before the Court. The Yurok Tribe failed to comply with the Act and forfeited its right to payments under the Act. Thus the Secretary was required to invest and administer[16] the funds as trust funds while awaiting any further direction from Congress. 25 U.S.C. § 1300i-

[16] *Short* approved the Secretary's administrative discretion to make non-per capita payments from the trust funds to implement tribal self governance and self-determination policies. *Short IV*, 12 Cl. Ct. at 42. But underinclusive individualizations were expressly prohibited. *Id*. at 44-45.

3(b). The Settlement Act did not terminate the trust relationship between the United States and the Hoopa Plaintiffs, and did not terminate Hoopa Plaintiffs' interest in those funds. Thus, they suffer actual injury when they are arbitrarily excluded from an individualization. *Short III*, 719 F.2d at 1135 (stating "the injury is the discriminatory distribution of the proceeds of the timber sales and management (and other Reservation income)").

The Court also erred by requiring Hoopa Plaintiffs to prove they had a "legal entitlement" to the trust funds at issue for purposes of standing. It is undisputed that none of the plaintiff tribes or individuals who litigated the *Short* cases had a vested ownership interest in the trust funds at issue. *Karuk Tribe of California, et al., v. United States, et al.,* 41 Fed. Cl. 468, 474-76 (1998); *Short I*, 202 Ct. Cl. at 884 ("[n]o vested Indian rights in the Square existed."). However, *Short* also made clear that the lack of a vested compensable expectancy did not diminish the Secretary's trust duties or deprive the plaintiffs of a cause of action for breach of trust and damages where the Secretary failed to comply with his trust obligations. *Short IV*, 12 Cl. Ct. at 44-45; *Short VI*, 28 Fed. Cl. at 595; *see also Price v. State of Hawaii*, 764 F.2d 623, 630 (9th Cir. 1985) (rejecting State of Hawaii's argument that Native Hawaiian plaintiffs lack standing to bring breach of trust claims due to the lack of a formal legally protected right to the trust funds at issue). Hoopa

Plaintiffs retain a beneficial interest in the funds as Indians of the Reservation and have standing to pursue their claim for breach of trust.

2. The Court erred in determining that "only the Yurok were entitled to monies remaining in the Fund in 2007."

The Court incorrectly presumes that Hoopa Plaintiffs could not be injured by a distribution of the Settlement Fund to Yurok, because "only the Yurok were entitled to monies remaining in the Fund in 2007." A9. In fact, after November 25, 1993, and specifically in 2007 and 2008, the Yurok Tribe had no right to any monies in the Settlement Fund absent further direction from Congress. 25 U.S.C. § 1300i-1(c)(4); § 1300i-3(b). Thus, the Secretary's exclusive distribution to the Yurok members was unlawful and a breach of trust duties owed to Hoopa Plaintiffs. *Short III*, 719 F.2d at 1137; *Short IV*, 12 Cl. Ct. at 38.

Prior to receiving any tribal apportionment from the Settlement Fund, the Settlement Act required that the Yurok Interim Council submit a resolution "waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter." 25 U.S.C. § 1300i-1(c)(4). Yurok did not comply with the Settlement Act, did not submit a claim waiver, and instead filed a takings claim against the United States, which was litigated for nearly a decade, long beyond the tenure of the Interim Council. An adverse final judgment was entered against the Yurok plaintiffs and affirmed by this Court in 2000. *Karuk Tribe of California v. United States*, 209 F.3d 1366 (Fed. Cir. 2000).

The consistent position of the United States from 1992 until 2007 was that Yurok forfeited any right to receive a distribution of funds in accordance with the Settlement Act by prosecuting its damages suit against the United States. *See supra* Section IV(E). From 1992 to March 2007, the United States correctly determined that it was required to invest and administer the funds as trust funds for the joint benefit of all Indians of the Reservation pending further direction from Congress. *Id.*; 25 U.S.C. § 1300i-3(b).

Thus, the trial court's statement that "only the Yurok were entitled to monies remaining in the Fund in 2007" is erroneous and inadvertently addresses a question on the merits that the Court did not analyze. No portion of the Settlement Fund was permanently "set aside" for the Yurok. *See* 25 U.S.C. § 1300i-1(c)(4) (stating that "apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 . . . shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act") (emphasis added). The trial court overlooked this. Due to the failure to comply with the requirements of the Settlement Act, the Yurok Tribe and its members had no rights to these funds absent further direction from Congress. And, absent further direction from Congress, the Secretary had no authority to exclusively distribute any funds to Yurok per capita payees. *Short III*, 719 F.2d at 1137 (holding that

Secretary must not exclude any Indians of the Reservation if he distributes § 407 proceeds); *Short IV*, 12 Cl. Ct. at 44.

The Secretary's 2002 report correctly recognized that the optional statutory distribution scheme of the Settlement Act was no longer effective due to Yurok's failure to comply and that the Secretary was bound to hold the funds in trust for the mutual benefit of both tribes pending new direction from Congress. A246-248

3. The Court erred by determining that Hoopa Plaintiffs have received their full entitlement to the Settlement Fund.

On page 8 of its opinion, the Court found that the Hoopa Plaintiffs received "their full entitlement" to the Settlement Fund. A8. First, this is incorrect – individual Hoopa Plaintiffs, as enrolled members of the Tribe,[17] did not receive any distribution directly from the Settlement Fund. 25 U.S.C. § 1300i-4(a)(1)(C). Second, while the Court is correct that the Hoopa Valley Tribe received a distribution in accordance with the Settlement Act, that fact is neither relevant to, nor dispositive of, the individual Hoopa Plaintiffs' current claims for breach of trust with regard to the remaining funds. The rights of the Tribe and its individual members are distinct.

The fact that the Hoopa Valley Tribe took the steps required by Congress to obtain an allocation of trust funds does not terminate the individual Hoopa

[17] *See* A106-107.

Plaintiffs' beneficial interest in how the balance was used, where the Secretary failed to comply with any distribution conditions of the Settlement Act.[18] Yurok's failure to comply with the Settlement Act terminated their right to a tribal distribution under the Settlement Act and absent further direction from Congress, those funds remained trust funds subject to the requirement that the Secretary invest and administer the funds for all Indians of the Reservation, including Hoopa Plaintiffs. 25 U.S.C. § 1300i-3(b).

4. The Court erroneously ignored the mandates of *Short.*

The claims brought by Hoopa Plaintiffs in this case present the question: what are the consequences for the Secretary's unilateral distribution of trust funds without proper authority from Congress? The answer comes from the *Short* litigation. Pursuant to *Short*, if the Secretary unilaterally decides to make additional payments or distributions from resources of the Joint Reservation (which the relevant funds are), all Indians of the Reservation must be benefited by

[18] Under the Court's reasoning, the valid apportionment of funds to the Hoopa Valley Tribe apparently cut off any right that individual Hoopa Plaintiffs have to complain about the Secretary's management or use of the remaining trust funds. Thus, under the Court's theory, Hoopa Plaintiffs would have no cause to complain if the Secretary unilaterally decided to spend the balance of their trust fund for financing the Iraq war, funding bank or auto industry bailouts, or simply decided to give the money to charity. Such a result would be absurd. The funds at issue are derived from Hoopa Plaintiffs' reservation resources and designated by 25 U.S.C. § 407 as trust funds for their benefit. The Secretary is bound by the terms of the relevant statutes and trust duties and the Hoopa Plaintiffs have standing to ensure that the Secretary complies with his statutory and trust duties and obligations.

those payments. *Short III*, 719 F.2d at 1137; *Short IV*, 12 Cl. Ct. at 44. Failure to comply with this mandate gives rise to a claim of damages. *Id*.

The express language of the Settlement Act states that the Secretary must "administer [the Settlement Fund] as Indian trust funds," making clear the existence of the "trust" that runs to the Hoopa "Indians of the Reservation" as a trust beneficiary. 25 U.S.C. § 1300i-3(b); 25 U.S.C. § 1300i(b)(5). As "Indians of the Reservation," Hoopa Plaintiffs are "entitled to equal rights in the division of timber profits (and other income) from the [Joint Reservation]." *Short III*, 719 F.2d at 1133, 1137. The Secretary's frolic outside the Act and the mandates of *Short* gives rise to a claim for damages resulting from the discriminatory and unequal distributions. *Id.* at 1137 (stating that where, as here, there is a discriminatory distribution, "the proper beneficiaries can sue under the Tucker Act if those funds illegally leave the Treasury"); *Short IV*, 12 Ct. Cl. at 41-45.

Given their direct interest as beneficiaries of the trust funds at issue, it should be self-evident that Hoopa Plaintiffs have, at minimum, sufficient standing to pursue their breach of trust claim. *Short II*, 661 F.2d at 155 ("individuals whom the Secretary arbitrarily excluded from per capita distributions have the right to recover"); *Short III*, 719 F.2d at 1137 (plaintiffs who are proper beneficiaries "have a right to sue for the parts of those funds improperly distributed to others or illegally withheld from those claimants"); *Short IV*, 12 Ct. Cl. at 38 ("All 'Indians

of the Reservation' were held entitled to receive payments, and the discriminatory distributions of proceeds of the timber sales (and other Reservation income) constituted a breach of the government's fiduciary duties with respect to the qualified plaintiffs"). Substantially more than "concerned bystanders," Hoopa Plaintiffs have an inchoate interest in the funds held in trust for their benefit, an interest that ripens into a damages claim upon underinclusive distribution to individuals, and have alleged sufficient injury to confer standing.

D. The Hoopa Valley Tribe Has Standing to Sue As *Parens Patriae*.

A sovereign may bring suit on behalf of its citizens as *parens patriae* if it "articulate[s] an interest apart from the interests of particular private parties," "expresse[s] a quasi-sovereign interest," and alleges "injury to a sufficiently substantial segment of its population."[19] *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). The Tribe meets all three elements of the *parens patriae* test.

First the Tribe "articulate[s] an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son*, 458 U.S. at 607. The Hoopa Valley Tribe, as a party to the Settlement Act, a named beneficiary thereof, and as a tribal

[19] Courts recognize the authority of Indian tribes to sue the United States in a *parens patriae* capacity. *E.g., Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996); *In re Blue Lake Forest Prod.*, 30 F.3d 1138 (9th Cir. 1994) (Hoopa Valley Tribe); *see generally* Fraser, C., Note, *Protecting Native Americans: the Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665 (Spring 2000).

sovereign, has been injured by the United States' actions. The Tribe has an interest in the settlement framework enacted by Congress, and was reserved the right to enforce the statute. *See, e.g.*, A155; 194. The resolution of the Hoopa Valley Tribe approved by the United States authorized use of tribal escrow funds as payments to the Yurok Tribe and to individual Yurok members only "as provided in the [Act]." A194. Further, the Tribe's mediation agreement affirmed that no distributions from the Settlement Fund remainder would occur without the approval of both tribes. A293.

The Tribe's right is different from that of its members who are the Indians of the Reservation for whom the Settlement Fund was held. The Tribe and its members are legally separate entities; the Tribe has the right to represent its interests separate from that of its members. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

Second, the Tribe "expresse[s] a quasi-sovereign interest." *Alfred L. Snapp & Son*, 458 U.S. at 607. A "quasi-sovereign interest" has been described as a government's "interest in the health and well-being – both physical and economic – of its residents in general," and the interest "in not being discriminatorily denied its rightful status within the federal system." *Id.* The Tribe has a quasi-sovereign interest in ensuring that these Indian trust responsibilities are adhered to by the United States, and in ensuring that Hoopa Indians of the Reservation are not

discriminatorily denied benefits of the trust administration. *See Moe v. Conf. Salish & Kootenai Tribes*, 423 U.S. 463, 468 n. 7 (1976).

Third, the Tribe alleges "injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son*, 458 U.S. at 607. The Tribe is asserting a claim on behalf of qualifying Hoopa "Indians of the Reservation" which includes a substantial portion—if not all—of the Tribe's members, all of whom were injured when the United States excluded them from a per capita distribution of trust monies derived from timber harvested from the Reservation. *Short IV*, 12 Cl. Ct. at 45 (income from 25 U.S.C. § 407 shall be used for the benefit of the Indians who are members of the tribes concerned). The rights of the Hoopa Valley Tribe *qua* tribe, as well as rights of its members, are implicated and adversely affected by the United States' discriminatory apportionment of the Settlement Fund, a violation of the Settlement Act that the Tribe, as a sovereign government, has a right to contest. The Tribe has *parens patriae* standing.

E. Hoopa Plaintiffs Are Entitled To Partial Summary Judgment On Their Breach of Trust Claims.

Hoopa Plaintiffs are entitled to partial summary judgment on the purely legal question of whether the United States is liable for breach of trust. The United States breached its trust obligations to Hoopa Plaintiffs by making an unauthorized and discriminatory per capita distribution of the Indian trust fund account to only members of the Yurok Tribe – to the exclusion of Hoopa Plaintiffs. This

distribution finds no authorization under the Settlement Act (indeed 25 U.S.C. § 1300i-6(b) prohibits it) and the discriminatory nature of the distribution violates the binding principles of *Short*.

There are no genuine issues of material fact in dispute as to the United States' trust responsibility to manage the Settlement Funds as a trust fund for the benefit of all Indians of the Reservation (including Hoopa Plaintiffs), and there is no set of facts under which the unauthorized and discriminatory distribution to Yurok members would have been lawful.

The discussion of Hoopa Plaintiffs' standing is closely linked to their entitlement to judgment on the merits. By establishing the existence of the trust relationship, their beneficial interest in the trust funds at issue, and the actions that violated the trust as a matter of law, Hoopa Plaintiffs not only establish their standing to sue, but also their legal right to recovery. Hoopa Plaintiffs seek reversal of the order denying their motion for partial summary judgment and seek an order directing judgment in their favor.

1. Congress imposed a fiduciary duty upon the United States to hold and manage the Settlement Fund for all Indians of the Reservation.

A claim for damages for breach of trust under the Indian Tucker Act requires Hoopa Plaintiffs to: (a) identify a substantive source of law that establishes specific fiduciary or other duties; and (b) establish that the Government has failed

to faithfully perform those duties. *Mitchell II*, 463 U.S. at 216-219, 224-226; *Short III*, 719 F.2d at 1135-1137. Hoopa Plaintiffs meet this burden as a matter of law.

The Settlement Act, in conjunction with the 1864 Act and 25 U.S.C. § 407, creates a specific duty to hold the Settlement Fund as an Indian trust fund for all Indians of the Reservation (including Hoopa Plaintiffs). 25 U.S.C. § 1300i-3(b); *Short III*, 719 F.2d at 1135-1137. The United States' disbursement of the Settlement Fund exclusively to the Yurok individuals to the exclusion of Hoopa Plaintiffs is a breach of that trust. *Short IV*, 12 Cl. Ct. at 38 (stating discriminatory distribution constitutes a breach of trust).

a. The Settlement Fund is an Indian trust fund.

The Settlement Fund is a collection of previously existing "escrow accounts" that are Indian trust funds. 25 U.S.C. § 1300i(b)(1). Congress created the Settlement Fund by combining seven accounts consisting of the "escrow funds" which the Secretary held in trust for the "Indians of the Reservation." 25 U.S.C. § 1300i(b)(1) & § 1300i-3(a)(1). The money within the Settlement Fund is derived from timber cut from the Hoopa Square in accordance with 25 U.S.C. § 407. *Short II*, 661 F.2d at 151-152; *Short III*, 719 F.2d at 1135 (internal quotations omitted). The Settlement Act's definition of "escrow funds" makes clear that these are the same trust funds that are the subject of the *Short* litigation. *See, e.g.*, *Short IV*, 12

Cl. Ct. at 38-39. The Settlement Act, 25 U.S.C. § 407, and the 1864 Act[20] conclusively establish a trust relationship to manage and invest the trust corpus.

b. Congress required the Secretary to hold and manage the Settlement Fund for all "Indians of the Reservation."

The Settlement Act added to the duties imposed by the existing statutory trust relationship, imposing additional constraints on the Secretary's discretion. *Short VI*, 28 Fed. Cl. at 595. The Settlement Act authorized distributions from the Settlement Fund only "as provided in this Act." 25 U.S.C. § 1300i-3(b) (emphasis added). Otherwise, Congress required the Secretary to "invest and administer such Fund as Indian trust funds pursuant to [25 U.S.C. § 162a].[21] *Id*. The language stating that the Secretary must "administer such fund as Indian trust funds" is clear enough. Absent Congressional authority, discriminatory distributions are not authorized. *Short IV*, 12 Cl. Ct. at 42; *Short VI*, 28 Fed. Cl. at 595.

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[20] The 1864 Act helps "show that the Government had a fiduciary relationship toward qualified plaintiffs with respect to the Hoopa Valley reservation and also to show that the Secretary's action in excluding [certain Indians of the Reservation] from the distribution of the monies was unlawful." *Short III*, 719 F.2d at 1136.

[21] 25 U.S.C § 162a provides for the holding of "community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States . . ." and makes plain that the "trust responsibilities of the United States" in managing such funds include, inter alia, "providing adequate controls over . . . disbursements." 25 U.S.C. § 162a(a), (d)(2). Congress' intent to create a trust duty is buttressed by the reference to 25 U.S.C. § 162a. *See Cheyenne-Arapaho Tribe v. United States*, 512 F.2d 1390 (Ct. Cl. 1975) (applying statute to these same Hoopa trust funds); *Short IV*, 12 Cl. Ct. at 43 (same).

The Settlement Act did not give the Secretary or the Special Trustee *carte blanche* with respect to the use of the Settlement Fund. *Short VI*, 28 Fed. Cl. at 595 (statutory limits on Secretarial discretion). If the Secretary unilaterally chose to make additional payments from resources of the Joint Reservation, all Indians of the Reservation must be benefited. *Short IV*, 12 Cl. Ct. at 41-42; *Short III*, 719 F.2d at 1137 (noting right to damages for unauthorized and discriminatory distribution). While the Settlement Act prospectively freed the resources of the new reservations for the use of the separate tribes, it added only limited and specific authority to make payments from the old trust funds adjudicated in *Short*.

c. Interior lacked authority to disburse the per capita payments from the Settlement Fund absent further direction from Congress.

The Secretary had no authority to distribute funds to the Yurok members pursuant to the Settlement Act, because Yurok failed to forego its takings claims as required by the Settlement Act. Thus, the balance of the Settlement Fund remains subject to the government's "overriding fiduciary obligation to Indian tribes and individual Indians," *Short IV*, 12 Cl. Ct. at 45, and Section 4(b) of the Settlement Act, which requires the Secretary of the Interior to "invest and administer such fund as Indian trust funds." 25 U.S.C. § 1300i-3(b).

The Settlement Act did not direct what should be done with the unexpended Settlement Fund if one tribe refused to waive its claims. Instead, the Settlement

Act directed the Secretary to report to Congress at the conclusion of any takings litigation, with recommendations upon "any modifications to the resource and management authorities established by this Act." 25 U.S.C. § 1300i-11(c)(2). In 2002, Interior made its recommendation: "it would be inappropriate for the Department to make any general distribution from the Fund without further instruction from Congress." A282.

Congress has not authorized any release of the Settlement Fund remainder. For a period of nineteen years, until 2007, Interior consistently explained that it would not make further distributions of the Settlement Fund. *See Short IV*, 12 Cl. Ct. at 44 (Indians not damaged by holding funds in the Treasury). *See supra* Section IV(E). Nevertheless, in 2007, the Special Trustee unilaterally decided to assign the funds solely to the Yurok Tribe and then approved per capita disbursement. The distribution of the Settlement Fund was not authorized by law, violates the binding principles of *Short*, and breaches trust duties to the Hoopa Plaintiff beneficiaries as a matter of law.

2. Interior violated its fiduciary duties by disbursing the Settlement Fund to some, but not all, Indians of the Reservation.

When acting as a trustee, the Federal Government is required to deal with Indian tribes according to the "most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); Restatement (Second) of Trusts

§ 176 (1957) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"). The Special Trustee has a fiduciary duty to mange the Settlement Fund in accordance with the law. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Cheyenne Arapaho Tribe, supra*, 512 F.2d 1390.

The Special Trustee's unilateral approval of a Yurok-only individualization in 2008 was unlawful under the language of the Settlement Act, resulting in a discriminatory distribution of trust funds to fewer than all Indians of the Reservation, abrogating Congress's exclusive power to allocate the Settlement Fund, and triggering damages for Hoopa Plaintiffs under *Short*. 25 U.S.C. § 1300i-3(b); *Short III*, 719 F.2d at 1137; *Short IV*, 12 Cl. Ct. at 42; *Short VI*, 28 Fed. Cl. at 595.

The Special Trustee breached the government's trust duties as defined in the Settlement Act by ignoring Congress's direction as to how the Settlement Fund should be held and could be disbursed. It is undisputed that the Special Trustee made a disbursement from the Settlement Fund to only the Yurok Tribe and members (A336, 340) even though the Yurok Interim Council failed to comply with the terms of the Act – forfeiting its right to a distribution pursuant to the Act. *Supra* Section IV(D) & (E).

The act of making an unauthorized discriminatory per capita payment from the Settlement Fund, without more, is an actionable breach of the United States fiduciary obligations to the Hoopa Plaintiffs as Indians of the Reservation under the Settlement Act and *Short. Short III*, 719 F.2d at 1137. Indeed, the Hoopa Plaintiffs need only show (1) the existence of the trust duty; (2) the elements of the trust; and (3) the action that breaches that trust in order to be entitled to the requested judgment as a matter of law concerning the breach of trust claim. *Mitchell II*, 463 U.S. at 216-19, 224-26; *Short IV*, 12 Cl. Ct. at 41-45. The wrongful discriminatory payment made by the Special Trustee in contravention of the Settlement Act, and without other Congressional authorization, establishes Hoopa Plaintiffs' entitlement to partial summary judgment for breach of trust.

3. The Special Trustee's Disbursement Failed to Comply with the Settlement Act.

The Settlement Act authorized distribution of Settlement Fund monies to the Yurok Tribe only if the "Yurok Interim Council" submitted a valid claim waiver. 25 U.S.C. § 1300i-1(c)(4). Instead of waiving its claims, the Yurok Interim Council litigated a Fifth Amendment takings lawsuit against the United States. A225. The Yurok Tribe lost its optional portion of the Settlement Fund and the Secretary had no authority to authorize an apportionment to the Yurok Tribe under 25 U.S.C. § 1300i-1(c)(4) or § 1300i-6(a).

In 2007, fourteen years after the deadline expired for submission of a claim waiver by the Interim Council, after conclusion of the Yurok's litigation against the United States, and after repeated acknowledgement by Interior that Yurok had lost its rights to submit a claim waiver, the Special Trustee accepted a document purporting to waive the claims that had already been litigated to a full, binding, and adverse judgment. A322-27. In other words, the Special Trustee accepted a waiver of claims that no longer existed, an illusory promise that furnished no consideration, in exchange for millions of trust fund dollars.[22] Moreover, the Special Trustee accepted the waiver late and from a different entity than required by Congress. 25 U.S.C. § 1300i-1(c)(4) (requiring waiver of claims by Interim Council). The Special Trustee's actions are not supported or authorized by the Settlement Act. The trial court did not decide otherwise.

a. <u>The Settlement Act requires that the Yurok takings claim be waived prior to any distribution to Yurok.</u>

Congress, in the Settlement Act, established a clear mechanism for the Yurok Tribe to receive a share of the Settlement Fund:

> The apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 of this title . . . shall not be effective unless and until the Interim Council of the Yurok

[22] Res judicata protected the United States from the claims "waived." Even if the Yurok Interim Council had provided this "waiver" in 2007, it would have failed on basic contract principles for the same reason its 1993 "waiver" failed - - it preserved the cause of action Congress required it to surrender, and gave nothing in exchange.

> Tribe has adopted a resolution waiving any claim such 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). This section, providing for a distribution to be made under the Settlement Act after the submission of a specific form of claim waiver, was a pre-litigation settlement offer. The government offered the distribution from the Settlement Fund in exchange for not being sued. As the D.C. Circuit Court of Appeals recognized:

> to induce acceptance of the new arrangement [created by the Settlement Act], Congress transferred the 70% escrow fund, along with $10 million in federal appropriated funds and some small Yurok trust funds, into a statutory Settlement Trust Account—the "Settlement Fund"—for the purpose of compensating the Indians for their consent to the new distribution of land and resources.

Heller, Ehrman, White & MacAuliffe v. Babbitt, 992 F.2d 360, 362 (D.C. Cir. 1993). To trigger the entitlement to the Settlement Fund, Congress required the "Interim Council of the Yurok Tribe" to adopt a resolution waiving any claim. 25 U.S.C. § 1300i-1(c)(4). The Interim Council did not waive the claims that Congress, in its discretion, made a condition precedent to apportionment of the funds. A282 (stating that "the Yurok Tribe did not meet the condition precedent established in section 2(c)(4) of the Act for the Tribe to receive its share of the Settlement Fund or other benefits").

b. The plain language of the Settlement Act unambiguously requires that the Yurok claim waiver be made by the Yurok Interim Council.

The unambiguous language of the Settlement Act permitted only the "Yurok Interim Council" to waive the tribal takings claims to trigger access to the Settlement Fund under the Act. 25 U.S.C. § 1300i-1(c)(4). In interpreting a statute, the inquiry begins, and often ends, "with the plain meaning of the statute's language." *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994).

The "Interim Council" is a specific entity, not a generic or ambiguous term. In the Settlement Act, Congress carefully distinguished between the authorities and immunities of the Yurok "Transition Team," the Yurok "Interim Council," the Yurok "General Council," and the "tribe governing body elected pursuant to the constitution" making it clear that those are separate entities that have different powers and serve different purposes. 25 U.S.C. § 1300i-8. The initial provisions of S. 2723 granting the waiver authority to the "General Council" were changed to "Interim Council" prior to enactment. A135, 138.

The "Interim Council" was also a temporary entity; Congress placed a time limit on when the "Interim Council" could act. The Settlement Act provided that "[t]he Interim Council shall be dissolved effective with the election and installation of the initial tribe governing body elected pursuant to the constitution adopted under subsection (e) of this section or at the end of two years after such

installation, whichever occurs first." *Id.*, § 1300i-8(d)(5). The "Interim Council" would cease to exist when the Yurok tribal government organized into existence.[23] *Id.*, § 1300i-8(e); *see also* A219.

In Section 9(d) of the Settlement Act, Congress defined the Interim Council's powers. Among the limited powers granted to the "Interim Council" was the "full authority to adopt a resolution—(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this subchapter . . . ." *Id.*, § 1300i-8(d)(2). This is the only provision in the Act granting any entity the power to waive the Yurok Tribe's claims, and it grants it to only the "Interim Council."

Congress's distinction in terms is purposeful and important. Because statutory language represents the clearest indication of Congressional intent, it should be presumed that Congress meant precisely what it said. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act,

[23] This understanding of the temporal limitation on the Yurok Interim Council's ability to execute the claim waiver was confirmed by the Department of the Interior in 1993: "Under section 9(d) of the Act, the Interim Council created under the authority of the Act will be dissolved on November 25, 1993. In that respect, the authority invested in the Interim Council by section 2(c)(4) of the Act to waive claims against the United States will expire on November 25, 1993. Any subsequent waiver of claims by the Tribe will be legally insufficient to effectuate the apportionment of funds to the Tribe as provided in sections 4 and 7 of the Act . . . ." A235.

it is generally presumed that Congress acts intentionally and purposely."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (noting that it is well-established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms").[24]

c. The Yurok Interim Council fully litigated the claims Congress intended it to waive.

It is uncontested that, despite Congress's clear offer, the Yurok Interim Council did not enact the necessary claim waiver before it ceased to exist in 1993. A62-65; A231-248. In fact, the Interim Council took the opposite tack, choosing to litigate a taking claim against the United States. A225.

The Yurok's complaint against the United States asserted "claims for just compensation under the Fifth Amendment to the Constitution of the United States for the taking of compensable property and property rights of the Yurok Tribe by the United States under the [Settlement Act," and requested the Court to enter "judgment awarding the Yurok Tribe just compensation for the taking of its compensable property rights . . . ." A225-230. This was precisely the claim that was to be waived by the Interim Council before November 25, 1993, in order for

[24] A thorough discussion of this statutory waiver requirement and its legislative history is found in the Hoopa Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment. Dkt No. 9, Attachment 3.

there to be a disbursement from the Settlement Fund to the Yurok Tribe. 25 U.S.C. §§ 1300i-1(c)(4) and 1300i-11(a), (b).

Congress chose the term "claim" in the Settlement Act purposefully. The term "claim" has a well-recognized legal meaning and any "claim" fully litigated by the Yurok Tribe must be deemed extinguished based on principles of res judicata. *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997) (stating that "[r]es judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action"); *see also* 18 MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.01 (3d ed. 2005) (stating that "if the plaintiff loses the litigation, the resultant judgment acts as a bar to any further actions by the plaintiff on the same claim, with limited exceptions"). When claim preclusion applies, a party's claim is extinguished upon final judgment. *Hornback v. United States*, 405 F.3d 999, 1001 (Fed. Cir. 2005). Applying these principles here, it is clear that the Yurok Tribe's takings claims against the United States arising out of the Settlement Act were adjudicated in a final decision on the merits, are extinguished, and are no longer "waiv[able]." *Karuk Tribe of California v. United States*, 209 F.3d 1366, 1372 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

Under the United States' current theory of this case, the Yurok would be entitled to obtain monies from the Settlement Fund even if they had won their takings case and obtained a hundreds-of-million dollar judgment against the United States. Under this theory, Yurok could simply ignore the prescribed deadline for claim-waivers in the Settlement Act, choose to litigate, prevail, and then subsequently submit a sham claim waiver to the United States promising never to sue again. The fact that the Yurok Tribe gambled by choosing to litigate their claims and ultimately lost does not make this theory any less absurd. The Yurok Tribe chose litigation. It obtained final judgment, and thus, it had no claims to waive in 2007 and no right to any distribution except as authorized by the statutes construed in the *Short* case. There is no inconsistency between the statutes authorizing uses of these trust funds; the United States simply disregarded the Act.

The Special Trustee's acceptance for Settlement Act purposes of an illusory document purporting to "waive" the very claims that Yurok had prosecuted, over a decade of litigation, to a final adverse judgment is outrageous, unsupported by law, and a breach of trust. No valid claim waiver that might authorize a Settlement Fund payment was executed by the legal entity designated by Congress, nor in the time permitted by Congress, nor with the effect Congress intended. As such, the Secretary lacked authority to approve per capita funds for Yuroks and was required

to "invest and administer such fund as Indian trust funds," until such time as Congress directed a release of the funds. 25 U.S.C. § 1300i-3(b).

d. Interior's discriminatory disbursement of the Settlement Fund upon receipt of an illusory waiver breaches its trust obligations.

Special Trustee Swimmer's letter on March 1, 2007, marked a 180-degree change in the Department's interpretation of the Act's waiver requirements. *See supra* Section IV(E). The Department consistently took the position that the Yurok Tribe did not meet the waiver conditions of the Act and that the Interim Council's failure to waive could not be cured without amending the Settlement Act. *Id*.

The plain language of the Settlement Act provides that the Secretary is not authorized to make a distribution from the Settlement Fund to the Yurok Tribe unless the Interim Council, and only the Interim Council, submitted the required claim waiver. In addition, as a matter of law, the Yurok Tribe no longer held claims to waive because the Yurok Tribe's takings claim against the United States arising out of the Settlement Act was adjudicated to a final decision on the merits, is extinguished, and is, thus, no longer subject to waiver.

As a matter of law, the new resolution submitted by the Yurok Tribal Council on March 21, 2007, could not meet the requirements of the Settlement Act. A325-327. The Special Trustee's hasty actions, ignoring these fatal defects and proceeding to permit an immediate per capita distribution in the face of the

statutory language and the binding principles of *Short*, is a breach of trust entitling Hoopa Plaintiffs to partial summary judgment.

VIII. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

Hoopa Plaintiffs respectfully request that this Court reverse the Court of Federal Claims' order granting summary judgment for the United States and denying Hoopa Plaintiffs' motion for partial summary judgment. Hoopa Plaintiffs request that this Court remand with a direction to enter partial summary judgment in favor of Hoopa Plaintiffs on their claims of breach of trust and for further proceedings on damages resulting from the breach of trust.

Respectfully submitted this ____ day of July, 2009.

_____

Thomas P. Schlosser, Attorney of Record

ADDENDUM TO APPELLANTS' INITIAL BRIEF

1. Judgment, Opinion and Order of Court of Federal Claims in Case 08-CV-072, Honorable Judge Thomas C. Wheeler

2. Hoopa-Yurok Settlement Act, Public Law 100-580, *codified in part as amended at* 25 U.S.C. § 1300i, *et seq.*

3. Act of June 25, 1910, *as amended* in 1964 *and further amended in* 1988, 25 U.S.C. § 407

4. Act of April 8, 1864, An Act to Provide for the Better Organization of Indian Affairs in California, 13 Stat. 39

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,962 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Date: July ___, 2009

_____
Signature of Counsel

Thomas P. Schlosser, Attorney for Appellants
Printed Name of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2009, 12 copies of the Appellants' Initial Brief were filed with the U.S. Court of Appeals for the Federal Circuit, via First-Class Mail to:

Clerk of the Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

I further certify that two copies of the Appellants' Initial Brief were mailed USPS next day delivery:

Jonathan L. Abram
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004-1109

Mary G. Sprague
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795

Thomas P. Schlosser, Attorney of Record
MORISSET, SCHLOSSER & JOZWIAK
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Tel: (206) 386-5200
Fax: (206) 386-7322
t.schlosser@msaj.com

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