No. 2009-5084

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HOOPA VALLEY TRIBE, on its own behalf, and in its capacity as parens patriae on behalf of its members; OSCAR BILLINGS; BENJAMIN BRANHAM, JR.; WILLIAM F. 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' REPLY BRIEF

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I. SUMMARY OF REPLY ARGUMENT

The government's responsive argument is built upon an incorrect premise that Congress set aside monies at issue in this case for the exclusive benefit of the Yurok Tribe. Gov't Br., 18, 33. If Congress set aside the relevant monies solely for Yurok, the government argues, then Hoopa Plaintiffs have no interest in the monies and thus no standing-to-sue. Gov't Br., 1, 4. The government's argument ignores plain statutory language within the Settlement Act that prohibits, rather than mandates, apportionment of monies in the Settlement Fund to Yurok.

Congress expressly provided that "apportionment" of funds to Yurok "*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)(D) (emphasis added). The statutory language cannot be plainer. Settlement Fund monies could not be apportioned to Yurok unless it waived its claims. Instead, Yurok affirmatively chose to litigate for years against the United States and Hoopa to an unsuccessful final judgment. A245-246.[1] Through its affirmative decision to litigate, Yurok lost any right to an apportionment of the Settlement Fund monies under the terms of the Settlement Act. A247.

[1] References to Appendix pages are cited as "A___" herein.

Since the plain language of the Settlement Act prohibited apportionment of settlement funds to Yurok, the relevant questions become: What was the status of the non-apportioned monies held by Interior in the Settlement Fund and what were Interior's duties with respect to those monies? Congress provided the answer in Section 4(b) of the Settlement Act, which requires the Secretary to invest and administer monies in the Settlement Fund as Indian trust funds pursuant to 25 U.S.C. § 162a. 25 U.S.C. § 1300i-3(b). From 1988 to 2007, Interior did hold, invest, and administer those monies for the future benefit of Hoopa and Yurok. A247. Then, in 2007, Interior abruptly and arbitrarily shifted positions, apportioned and released funds to Yurok, and affirmed a discriminatory per capita payment solely to Yurok members. A336, 340.

The government argues that Congress did not "grant" Hoopa Plaintiffs any rights in the monies within the Settlement Fund. Gov't Br., 5, 30. This is both incorrect and irrelevant to plaintiffs' breach of trust claims. Hoopa Plaintiffs' interest in the Settlement Fund monies, which are derived from timber harvesting revenues of the historic Hoopa Valley Reservation (the "Joint Reservation"), is established under federal law that pre-dates the Settlement Act. *See* 25 U.S.C. § 407; Hoopa Br., 28-33.

The government alternatively contends that Congress, in the Settlement Act, terminated Hoopa Plaintiffs' interest in the relevant monies. Gov't Br., 36.

However, the government fails to cite language from the Settlement Act, or relevant legislative history, that evidences express Congressional intent to terminate Hoopa Plaintiffs' pre-existing interest. Congress, in the Settlement Act, was exercising its plenary authority to manage and allocate reservation resources in an effort to settle long-standing litigation and to extinguish potential future claims against the United States. However, the settlement scheme provided for by Congress never fully materialized due to Yurok's decision to litigate. Congress did not terminate Hoopa Plaintiffs' pre-existing rights in the monies that remained un-apportioned within the Settlement Fund from 1988 to 2007.

The monies that remained in the Settlement Fund were Indian trust funds to be held and administered for the benefit of all Indians of the Reservation. 25 U.S.C. § 1300i-3(b). Pursuant to *Short v. United States*, if a distribution of monies derived from Joint Reservation assets occurs, such distribution must include all Indians of the Reservation. *Short IV*, 12 Cl. Ct. at 38. *See also* 25 C.F.R. § 111.1. Here, Interior permitted a discriminatory distribution of funds solely to members of the Yurok Tribe and to the exclusion of Hoopa Plaintiffs. Failure to provide equal payments to Hoopa Plaintiffs is a breach of trust. *Id.; Short III*, 719 F.2d at 1135.

To avoid the clear mandates of *Short*, and relying on dictum taken out of context, the government inaccurately contends that the Settlement Act "nullified" the *Short* rulings. Gov't Br., 21, 36. To the contrary, Congress expressly

preserved *Short* in Section 3 of the Settlement Act. 25 U.S.C. § 1300i-2. Post-Act judicial decisions, such as *Short VI*, also confirm the continuing applicability of *Short* to distributions of Joint Reservation assets. *Short VI*, 28 Fed. Cl. 590, 595.

Hoopa Plaintiffs suffered compensable loss when Interior allowed Yurok to make per capita distributions of Settlement Fund monies solely to Yurok members, to the exclusion of Hoopa Plaintiffs. *Short III*, 719 F.2d at 1135. Interior failed to ensure that all Indians of the Reservation were included within the distribution. Interior cannot avoid its trust obligations by routing the money through the Yurok Tribe. *Short IV*, 12 Cl. Ct. at 41. Special Trustee Swimmer's new interpretation of the Settlement Act is not entitled to any deference. The apportionment of Settlement Fund monies to the Yurok Tribe for discriminatory per capita distributions was unlawful.

To be clear, Hoopa Plaintiffs do not argue that all distributions to Yurok would have been unlawful. There are three ways that Interior could have properly distributed money for per capita payments to Yurok members. First, Yurok could have complied with the terms of the Settlement Act, waived its claims, and properly received the apportionment provided for by Congress in that Act. Second, Congress could have altered the provisions of the Settlement Act and mandated a new distribution scheme as recommended by Interior in the 2002 Section 14(c) Report. A247-248. The third valid approach would be distribution

of funds in compliance with *Short v. United States*, in which all Indians of the Reservation, both Yurok and Hoopa, would receive an equal distribution. The per capita payments made to Yurok members in this case failed to comply with any of the three permissible methods and are thus unlawful.

II. ARGUMENT AND AUTHORITY

A. Yurok Chose to Litigate Rather than Accept an Apportionment of Funds Under the Terms of the Settlement Act; Thus Congress Expressly Prohibited Apportionment of Settlement Funds to Yurok.

The government incorrectly argues that the Yurok Tribe is the "sole beneficiary" of the monies at issue in this litigation. Gov't Br., 34. Building on that false premise, the government argues that Hoopa Plaintiffs could suffer no injury when Interior gave Yurok "its" money. Gov't Br., 1 (characterizing monies at issue as the Yurok Tribe's "apportioned share" of Settlement Fund). The government suggests that Congress set the relevant monies aside solely for Yurok and Swimmer's 2007 decision did nothing more than implement Congressional intent. Gov't Br., 50-51.

The government's argument ignores the plain language of the Settlement Act and 19 years of consistent contrary interpretations of the Act by Interior. Hoopa Br., 7-15.[2] There is no "apportioned share" of the Settlement Fund for the Yurok; rather, any potential apportionment of funds to Yurok was expressly

[2] References to Hoopa Plaintiffs' Initial Brief are cited as "Hoopa Br., __" herein.

prohibited due to Yurok's affirmative choice to litigate against the United States. A247; 25 U.S.C. § 1300i-1(c)(4); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (stating the plain language of legislation should be conclusive).

The government incorrectly argues that the balance in the Settlement Fund account was in fact a separate trust account for the Yurok Tribe and that Congress' establishment of a separate trust account for Yurok was not contingent on a waiver. Gov't Br., 18, 33. Section 4(d) of the Settlement Act did describe a process by which Interior could place a portion of the Settlement Fund in a separate trust account for the benefit of the Yurok Tribe. 25 U.S.C. § 1300i-3(d). However, that apportionment of funds to Yurok was expressly contingent on execution of a claim waiver by the Yurok Interim Council. Congress stated:

> *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).

Based on the plain language of the Settlement Act, as consistently interpreted by Interior for 19 years, no funds were ever apportioned to the Yurok Tribe, because the Interim Council never submitted a valid claim waiver. A246-247. Section 4(d) was never implemented and no funds were ever put into a

separate trust account for the Yurok. *See* Gov't Br., 16. Those funds remained in the Settlement Fund, subject to the requirements and guidelines of Section 4(b).

The government misleadingly contends that Section 2(c)(4) calls for the "release" (as opposed to "apportionment") of funds to Yurok. Gov't Br., 18, 33-34. Apportionment and release are not synonymous terms. Apportionment is "[t]he division of rights or liabilities among several persons . . . in accordance with their respective interests." Black's Law Dictionary (4th Ed. 1968). Section 2(c)(4) describes the conditions precedent to an initial "apportionment" of funds. Unless and until the Yurok Interim Council complied with the waiver conditions in Section 2(c)(4), no part of the Settlement Fund could be apportioned (let alone released) to Yurok under the terms of the Settlement Act. 25 U.S.C. § 1300i-1(c)(4). Yurok's refusal to submit a valid waiver prevented funds from being apportioned into a separate account for their benefit. *See* A62-65. Once the Interim Council was disbanded, and certainly after Yurok litigated its claims to final judgment, Interior had no authority to apportion (or release) funds solely to Yurok absent new direction from Congress.

The government's current interpretation would effectively read the waiver condition out of the Settlement Act. Under the government's argument, Yurok could receive an apportionment of settlement funds even though they failed to satisfy the express condition precedent in Section 2(c)(4). The Court should

decline the government's invitation to read the express waiver language of Section 2(c)(4) out of the Act. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 238 (1985) (stating a statute should be interpreted so as not to render one part inoperative). As written, the Act bars apportionment of funds to Yurok.

Yurok could have obtained an apportionment of funds by complying with Congressional directives. Instead, unlike the Hoopa Tribe, Yurok took their chances with litigation and lost.[3] Interior warned Yurok of the consequences before Yurok filed suit (A221-222), during the suit (A231-241), and after the suit (A242-248). In 2002, in the Section 14(c) Report mandated by Congress, Interior reported that the Settlement Act could not be further implemented as drafted, that Interior lacked authority to distribute funds to either the Yurok or Hoopa Tribes, and that further Congressional action was needed. A247-248. Interior's position on the Yurok waiver did not "evolve" as suggested in the government's brief. Gov't Br., 22. For 19 years, Interior consistently stated that it lacked authority to apportion funds to Yurok because of its choice to litigate against the United States.[4] Hoopa Br., 10-15. Swimmer's interpretation of the Act in 2007 was an abrupt and arbitrary change, not supported in law.

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[3] The government's assertion that Yurok "did not challenge the apportionment of the Settlement Fund" is plainly incorrect. A228-230.

[4] The government cites a March 14, 1995 letter (A240) from the Assistant Secretary that suggested the Yurok Tribal Council, rather than the Interim Council, could submit a valid claim waiver. Gov't Br., 23. Of course, in 1995, Yurok's

The government also cites Section 7(a) of the Settlement Act, which addressed the Settlement Fund "remainder" (*i.e.*, that portion of the Settlement Fund that would remain after all payments directed by the Settlement Act were made). Gov't Br., 17. Since the distribution scheme developed by Congress was not fully implemented, the funds at issue here are not the "remainder funds" addressed in Section 7(a). That section does not support the government's contention that monies at issue in this lawsuit belong solely to the Yurok Tribe. *See also* 25 U.S.C. § 1300i-1(c)(4)(A).

As stated by Interior in its 2002 Report to Congress, "the Yurok Tribe did not meet the waiver conditions of the Act and is therefore not entitled to the benefits enumerated within the Act." A247. That statement remains true today, notwithstanding Mr. Swimmer's acceptance of a Yurok resolution purporting to waive claims that had been fully litigated and no longer exist. Under the plain language of the Settlement Act, Yurok was not entitled to an apportionment of monies in the Settlement Fund absent further direction from Congress. Interior's

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litigation against the United States had not concluded and the letter was a settlement offer made in the context of ongoing litigation. *See* Hoopa Br., 13 for discussion of the March 14, 1995 letter. The government concedes that the offer in the March 14 letter was contingent on receipt of the waiver *prior to the conclusion of the litigation*. Gov't Br., 23. Yurok rejected the offer and chose to litigate its claims to final judgment. Even if this Court were to ignore the express language of Section 2(c)(4) that requires the claim waiver to come from the Interim Council, the 2007 waiver resolution is still ineffective, because, as of 2007, the Yurok Tribal Council had no claims to waive – having litigated its claims against the government to a final adverse judgment. Hoopa Br., 53-56.

decision to apportion, release, and approve per capita distributions of nearly $16,000 per person solely to Yurok members (to the exclusion of Hoopa Plaintiffs) conflicted with Congressional direction in the Settlement Act and breached trust duties owed to Hoopa Plaintiffs.

B. Interior Had a Duty to Hold, Invest, and Administer the Non-Apportioned Monies as Indian Trust Funds under Section 4(b) of the Settlement Act for the Benefit of All Indians of the Reservation.

Yurok failed to comply with its obligations under the Settlement Act; thus, no apportionment of monies to Yurok ever occurred (prior to 2007). Those monies remained in the Settlement Fund subject to lawful uses or new direction from Congress.

Monies in the Settlement Fund consisted entirely of revenues derived from the Joint Reservation that were held in trust by Interior for all Indians of the Reservation. 25 U.S.C. § 1300i(b); § 1300i-3(a); A126-30. Pending implementation of the Settlement Act's distribution scheme or further direction from Congress, Section 4(b) of the Settlement Act specified Interior's duties with regard to monies in the Settlement Fund. 25 U.S.C. § 1300i-3(b).

Under Section 4(b), Congress directed that "pending payments under section 6 and dissolution of the [Settlement Fund] as provided in section 7," the Secretary shall "invest and administer such fund as Indian trust funds pursuant to the first section of the Act of June 24, 1938 (52 Stat. 1037; 25 U.S.C. § 162a)." *Id*. In

Section 4(b), Congress confirmed that the trust duties that existed prior to creation of the Settlement Fund, and which extended to all Indians of the Reservation, remained in full effect.

In 2002, at the conclusion of Yurok's litigation campaign, Interior reported to Congress and explained that Interior lacked authority to release Settlement Fund monies to either Tribe under the terms of the Settlement Act. A247. Congress failed to take action on Interior's recommendation as to how the remaining funds would be administered for the mutual benefit of both Hoopa and Yurok. A247-248. However, Congress' failure to act did not change Interior's duties or authority regarding the monies that remained in the Settlement Fund. Interior remained bound by its pre-existing trust duties to Indians of the Reservation and Section 4(b)'s mandate to administer the monies as Indian trust funds.

The government attempts to diminish the significance of Section 4(b) by arguing that section did not specify the beneficiaries of the Indian trust fund. Gov't Br., at 32. Of course, there was no reason to specify beneficiaries in Section 4(b), which addressed management of the Indian trust funds *prior to* their distribution under the terms of the Settlement Act since *Short* defined beneficiaries. Pending distribution of the monies under the terms of the Settlement Act, Congress directed Interior to hold and manage the monies in trust pursuant to 25 U.S.C. § 162a, just as they were held prior to the Settlement Act. *See* 25 U.S.C.

§ 162a (discussing investment of "common or community funds of any Indian tribe" and of "funds held in trust by the United States for the benefit of individual Indians").

Section 4(b) does not divest Hoopa Plaintiffs of their pre-existing interest in the Settlement Fund, which consisted of escrow funds from Joint Reservation timber revenues. 25 U.S.C. § 1300i(b)(1). *See* A129. To the contrary, Section 4(b) confirms the United States' obligation to manage and invest the monies in the Settlement Fund for the benefit of all Indians of the Reservation until the distribution scheme enacted by Congress was implemented, if ever.[5] Until 2007, Interior did invest and manage the monies in the Settlement Fund for the future benefit of both Hoopa and Yurok. *See* A246-248. The government's current litigation position is inconsistent with years of Interior interpretations and should be rejected.

C. Hoopa Plaintiffs Retain an Interest in the Non-Apportioned Funds and Suffered Injury when Interior Distributed those Monies without Authority.

The settlement scheme developed by Congress in the Settlement Act was not fully implemented due to the Yurok's decision to litigate and not waive claims. Thus, from 1988 to 2007, Interior held monies in the Settlement Fund, which

[5] Since Yurok was no longer entitled to any apportionment from the Settlement Fund due to their failure to submit a claim waiver and their litigation against the United States, the government's argument that Interior's only duty was to manage the funds for Yurok's benefit is meritless.

originated from Joint Reservation timber revenues, pursuant to its obligations under Section 4(b). 25 U.S.C. § 1300i-3(b). As Indians of the Reservation, Hoopa Plaintiffs retain a beneficial interest in those funds and are entitled to damages for the injury resulting from the Secretary's unlawful and discriminatory disbursement solely to Yurok. *Short III*, 719 F.2d at 1135 (stating that "the injury is the discriminatory distribution of the proceeds of the timber sales"); *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 is a breach of trust).

The government now argues that Hoopa Plaintiffs lack any interest in the Settlement Fund monies because the Settlement Act did not "grant" Hoopa Plaintiffs rights in those monies. Gov't Br., 5. As addressed in Hoopa's opening brief,[6] Hoopa Plaintiffs' beneficial interest in the Joint Reservation assets pre-dates the Settlement Act and is established by pre-existing federal law; thus, it is unnecessary to search for a "grant" of rights in the Settlement Act.[7] Notably, the government does not dispute that: (a) Hoopa Plaintiffs are Indians of the

[6] Hoopa Br., 20, 30-34, 43-45.

[7] Hoopa Plaintiffs do not argue that the 1864 Act or 25 U.S.C. § 407 "override the specific provisions of the Settlement Act." Gov't Br., 34. At the same time, the Settlement Act does not override or conflict with those prior Acts. The Settlement Act was not fully implemented due to Yurok's failure to waive. Thus, the duties and interests created under the prior Acts confirming trust duties owed to Hoopa Plaintiffs remained in effect and were not "supplanted" by the ultimately ineffective provisions of the Settlement Act.

Reservation; (b) pre-existing law granted Hoopa Plaintiffs an interest in the revenues of the Joint Reservation, or that (c) the Settlement Fund is made up of revenues and assets of the Joint Reservation. *See also* A129, A265.

The government alternatively argues that Congress terminated Hoopa Plaintiffs' pre-existing interest in Settlement Fund monies when it passed the Settlement Act. Gov't Br., 30-31, 34. However, the government cannot point to any language in the Settlement Act that terminates Hoopa Plaintiffs' pre-existing interest in the trust revenues derived from their Reservation's timber resources. Absent express Congressional language, this Court may not infer that Congress intended to terminate Hoopa Plaintiffs' pre-existing beneficial interest in Joint Reservation assets or that Congress intended to terminate trust duties owed to Hoopa Plaintiffs. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1967) (declining to infer an implicit divestment of Indians' hunting and fishing rights in a Termination Act and requiring explicit statement of Congress); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (holding Congressional intent to terminate a reservation must be expressed on clear face of Act).

Finding no express language terminating Hoopa Plaintiffs' pre-existing interest, the government contends that Congress implicitly terminated Hoopa Plaintiffs' interest by not including individual Hoopa members on the Settlement Roll. Gov't Br., 12-13, 17, 29-30. The purpose of the Settlement Roll was to

identify those persons who were not enrolled tribal members but who met the *Short* court's standards for Indians of the Reservation, whether or not they were among the named plaintiffs in those cases. Congress did not include Hoopa members on the Settlement Roll because their eligibility was clear -- they were recognized by the Tribe and included on its roll of members.[8] Section 7(b) of the Settlement Act expressly authorized a $5,000 per capita distribution of Settlement Fund monies to Hoopa members. 25 U.S.C. § 1300i-6(b). Although Hoopa members were not included on the Settlement Roll, they were beneficiaries of the Settlement Fund monies.[9]

Congress' purpose in passing the Settlement Act was not to terminate pre-existing interests in the resources of the Joint Reservation. Congress was attempting to settle long-standing litigation and to prevent potential future claims against the United States. A245, A240 (noting the claim waiver provisions are "rationally tied to the Act's purpose to resolve long standing litigation between the

[8] The enrollment standards for the Hoopa Valley Tribe were used by the *Short* court as the basis for defining persons who could qualify as Indians of the Reservation. *See Short III*, 719 F.2d at 1137-38.

[9] The Hoopa Valley Tribe is also an express beneficiary of the Settlement Act. The Tribe also has *parens patriae* standing. *E.g.*, 25 U.S.C. 1300i-4(d)(4). The government argues that *parens patriae* suits generally cannot be brought against the United States. Gov't Br., at 42-47. As recognized in *Quechan Indian Tribe v. United States*, 535 F. Supp.2d 1072 (S.D. Cal. 2008), there are exceptions to this principle and courts have repeatedly allowed Indian tribes to sue the United States as *parens patriae*. *Id.* at 1116-1117.

United States and various Indian interests"). To achieve this goal, Congress exercised its plenary authority over tribal property to reallocate the resources and assets of the Joint Reservation as a comprehensive settlement package. A245. The *Short* cases and related litigation confirmed that Congress had plenary authority over the reservation assets and could re-allocate those assets without being subject to a 5th Amendment takings claim.[10]

Congress' scheme involved the submission of claim waivers in exchange for apportionment of monies and other assets. Due to the Yurok litigation, Congress' scheme was not fully implemented and the monies in the Settlement Fund were not all distributed. Thus, those monies remained subject to pre-existing trust duties and the obligations of Section 4(b), which required investment and management of the monies as Indian trust funds for the benefit of all Indians of the Reservation.

In summary, the Settlement Act does not evidence Congressional intent to terminate Hoopa Plaintiffs' pre-existing interest in the Joint Reservation trust revenues that made up the Settlement Fund. Instead, the Settlement Act authorized new allocations of reservation resources as part of a comprehensive settlement scheme. A245. Unless and until the prescribed payments were made pursuant to

[10] In *Karuk Tribe of California v. United States*, 28 Fed. Cl. 694, 697 (1993), Judge Margolis recognized the distinction between Congress' authority to terminate pre-existing rights and its apportionment of reservation resources in the Settlement Act. *Id.* (stating the "Court may rule . . . that the Settlement Act did not take these [real property, hunting, and fishing] rights away, but rather that the plaintiffs still have such rights in the land, despite the apportionment in the Act.").

the Settlement Act's terms, all Indians of the Reservation (both Hoopa members and non-members) retained their pre-existing interest in the monies. Since Yurok never submitted a valid claim waiver, the payments were not made out of the Settlement Fund (until Swimmer's unlawful action in 2007). Those funds remained held in trust pursuant to Section 4(b) of the Settlement Act for all Indians of the Reservation, pending further direction from Congress.

D. *Short* Governs this Case and Prohibits Distribution of Settlement Fund Monies to Fewer Than All Indians of the Reservation.

As discussed above, the Yurok Tribe failed to comply with Section 2(c)(4) of the Settlement Act. Thus, Yurok did not meet the conditions precedent required by Congress to obtain an apportionment of Settlement Fund monies. A262. Congress did not amend the Settlement Act or grant the Secretary new authority to distribute funds to the Yurok. As of 2007, the Secretary's duty was to invest and administer the monies in the Settlement Fund for the benefit of all Indians of the Reservation, including Hoopa Plaintiffs, pursuant to Section 4(b) of the Settlement Act. Any distributions required compliance with *Short*.

Pursuant to *Short*, a distribution of monies derived from assets of the Joint Reservation to fewer than all Indians of the Reservation is unlawful. The government concedes, as it must, that under *Short*, all Indians of the Reservation are entitled to share in the timber revenues derived from the Joint Reservation. Gov't Br., at 7 (citing *Short I*, 486 F.2d 561). Subsequent opinions in *Short* held

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 1133, 1135. If the Secretary distributes (or permits distribution of) these monies to individual Indians, he must act "non-discriminatorily." *Id.* at 1137.

The government does not dispute that Hoopa Plaintiffs qualify as Indians of the Reservation, or that the funds at issue in this case are escrow funds derived from reservation timber production. Instead, the government argues that the Secretary is no longer bound by the principles set forth in *Short*, because Congress "nullified" *Short* by passing the Settlement Act. Gov't Br., 21, 36. To reach this result, the government again ignores plain language of the Settlement Act, quotes dictum out of context, and misreads legislative history. The principles of *Short* apply, bind the Secretary, and mandate a finding of breach of trust in this case.

First, the government ineffectively attempts to diminish Section 3 of the Settlement Act, which specifically preserves *Short*. Gov't Br., 36-38. That Section reads: "Nothing in this Act shall affect, in any manner, the entitlement established under [*Short*] or any final judgment which may be rendered in those cases." The government argues, incorrectly and without authority, that Section 3

only refers to non-Hoopa Indians. Gov't Br., 37. The *Short* cases confirm that all Indians of the Reservation (both Hoopa and non-Hoopa) are entitled to share in Joint Reservation resources. *See Karuk*, 209 F.3d 1366, 1372 (stating that "In the *Short* litigation, the [court] decided that all Indians who lived anywhere on the reservation (including the addition) were "Indians of the Reservation" entitled to share equally in the timber revenues from the square"). The government also contends that Section 3 did not make the Hoopa Plaintiffs beneficiaries of the Settlement Fund. Gov't Br., 37. Again, this is not relevant, because Hoopa Plaintiffs were beneficiaries of the relevant monies before the Settlement Act and they remained so afterward.

The government cites legislative history that states the Settlement Act should prevail over *Short* to the extent there is a conflict. Gov't Br., 37. This statement only confirms Hoopa Plaintiffs' argument that, when there is no conflict between the Settlement Act and *Short* (as here), the principles of *Short* remain in full effect.[11] Congress expressly preserved *Short* in the Settlement Act and the law developed in *Short* applies here.

The government relies heavily on dictum from the *Karuk Tribe* case that states "the Settlement Act nullified the *Short* rulings." Gov't Br. 21, 36. The

[11] The wording of Section 3 was amended in committee markup to make clear that it broadly preserved the *Short* case instead of being limited to individual entitlements. Compare A137 to A183.

Settlement Act, and the partition of the Joint Reservation, did "nullify" the effect of Short on *future* revenues generated on the partitioned Hoopa Valley and Yurok reservations. Following the Settlement Act's partition of the Joint Reservation, non-members would no longer be entitled to "share equally" in revenues derived on the Hoopa Valley Reservation. *See Karuk Tribe of California v. United States*, 41 Fed. Cl. 468, 470 (1998) (stating "the 1988 Act partitioned the Reservation, granting the use of the Square to the Hoopa as a reservation, and giving the use of the Addition to the Yurok for a reservation"); *see also* 25 U.S.C. § 1300i-1(b) (stating that "effective with the partition of the joint reservation . . . the area of land known as the 'square' . . . shall *thereafter* be recognized and established as the Hoopa Valley Reservation. The unallotted trust land *and assets* of the Hoopa Valley Reservation shall *thereafter* be held in trust by the United States for the benefit of the Hoopa Valley Tribe.") (Emphasis added).

While *Short* has no applicability to revenues and assets generated after the Settlement Act's partition of the Joint Reservation, it continues to apply to the revenues (and other assets) derived from the Joint Reservation prior to its partition. 25 U.S.C. § 1300i-2; *Short VI*, 28 Fed. Cl. at 595. In context, the *Karuk* dictum

merely references the inapplicability of *Short* to post-Settlement Act revenues generated on the partitioned Hoopa and Yurok Reservations.[12]

Short VI and *Short VII* also confirm the continuing applicability of *Short* to the Joint Reservation revenues.[13] In *Short VI*, plaintiffs challenged a 1991 per capita distribution to the Hoopa Tribe. The plaintiffs argued that, pursuant to *Short*, distribution of Settlement Fund monies solely to members of the Hoopa Tribe to the exclusion of non-members was unlawful and entitled plaintiffs to damages. *Short VI*, 28 Fed. Cl. at 594. The Court of Federal Claims did not hold *Short* inapplicable to the monies at issue (which were pre-Settlement Act funds). To the contrary, the Court confirmed the continuing applicability of *Short* to pre-Settlement Act assets, but held that the distribution to Hoopa Plaintiffs was expressly authorized by Congress in Section 7 of the Settlement Act. *Short VI*, 28 Fed. Cl. at 595 (stating "to hold that the April 15, 1991 per capita distribution was

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[12] The government also quotes dictum from *Short III*, in which the court stated that the *Short* decision "will obtain only for the years until final judgment, and for the years to come while the situation in the Reservation remains the same." Gov't Br., 8, 38 (citing *Short III*, 719 F.2d at 1143). This quote refers to the fact that the principles articulated in *Short* apply to Joint Reservation revenues, but would not apply to revenues generated after the partition. Once Congress divided the Joint Reservation in the Settlement Act, the situation on the Reservation did change and future revenues and assets were not subject to *Short.* The case at bar does not address post-Settlement Act assets; rather, it addresses assets derived from the Joint Reservation, to which *Short* continues to apply.

[13] This Court reviewed and affirmed *Short VI* in *Short VII*, 50 F.3d 994, 997 (Fed. Cir. 1995). *Cf.* Gov't Br., 39.

made lawful by the Settlement Act does not interfere with the entitlements established by the *Short* cases").[14] Since there was a direct authorization by Congress for the per capita payment, that express Congressional authorization superseded *Short* in that context. *Id.*

The government also makes much of dictum in *Short VI* that reads: "Clearly, the situation on the Reservation changed with the passage of the Settlement Act." Gov't Br., at 38, citing *Short VI*, 28 Fed. Cl. at 595. The situation on the Reservation vis-à-vis *Short* did change with the Settlement Act, but not as suggested by the government. First, the Reservation was partitioned and assets generated on the Reservation thereafter were no longer subject to division under *Short.* 25 U.S.C. § 1300i-1(b). Second, in certain instances, Congress expressly authorized distributions that would have been unlawful under *Short* such as the Section 7 per capita distribution to Hoopa members. *Short VI*, 28 Fed. Cl. at 595. As this Court stated when it affirmed *Short VI*, "plaintiffs were not entitled to damages for the 1991 *per capita* distribution, because it was specifically authorized by the Settlement Act." *Short VII*, 50 F.3d at 997. In the present case, the Settlement Act did not authorize any per capita distribution to Yurok members,

[14] The United States incorrectly states that *Short* only applies to pre-Settlement Act distributions from Joint Reservation revenues. It is not the *time* of the *distribution* that triggers *Short*; it is the *source* of the *revenues* that matters. A distribution of Joint Reservation assets that occurs after the Settlement Act (as in this case and in *Short VI*) is still subject to *Short*. 25 U.S.C. § 1300i-2; *Short VI*, 28 Fed. Cl. at 595.

because Yurok's failure to submit a valid claim waiver barred apportionment of Settlement Fund monies to Yurok. Thus, *Short* principles apply.

The government latches onto a remark from the Senate Report that the "intent of this legislation is to bring the [tribes] within the mainstream of federal Indian law." Gov't Br., 10. Again, the government fails to understand that the Settlement Act had a prospective effect on future reservation assets, but did not impair the entitlements recognized in the *Short* litigation. 25 U.S.C. §1300i-2. Subsequent legislative history confirms that both Congress and Interior understood the continuing applicability of *Short.* The colloquy between Senator Inouye and Assistant Secretary McCaleb on August 1, 2002, confirms the government's understanding that the monies remaining in the Settlement Fund were generated from the Joint Reservation and subject to *Short.* A265. In his 2002 testimony, McCaleb endorsed future administration of the Settlement Fund "for the mutual benefit of both tribes." A266.

Pursuant to Section 3 of the Settlement Act, Congress intentionally preserved all entitlements established in *Short.* 25 U.S.C. § 1300i-2. Under *Short,* all Indians of the Reservation, including Hoopa Plaintiffs, are entitled to share equally in the revenues of the Joint Reservation. Here, a distribution of approximately $16,000 per person, of Joint Reservation assets, was made solely to

Yurok members to the exclusion of Hoopa Plaintiffs. A339. Under *Short*, this is a breach of trust duties owed to Hoopa Plaintiffs. *Short IV*, 12 Cl. Ct. at 38.

E. The Discriminatory Per Capita Distribution Violates *Short* And Subjects the United States to Liability and Damages for Breach of Trust Duties Owed to Hoopa Plaintiffs.

Pursuant to *Short*, all Indians of the Reservations are entitled to share equally in any distributions that are made by the Secretary to individual Indians. Gov't Br., 7, citing *Short I*, 486 F.2d 561. An individual Indian's rights in Joint Reservation revenues arise upon individualization. Gov't Br., 9, citing *Short IV*, 12 Cl. Ct. at 40-42. Any distributions made of Joint Reservation resources to individual Indians must be made on an equal and non-discriminatory basis. *Short III*, 719 F.2d at 1135, 1137. *See also* 25 C.F.R. § 111.1 ("equally divided among the Indians entitled thereto").

Here, the government attempts to immunize itself from liability by arguing that it merely distributed the money to the Yurok Tribe and then Yurok decided to distribute the entire sum per capita to its members. Gov't Br., 2, 26, 56. A similar attempt to avoid liability for the United States' role in discriminatory per capita distributions was rejected in *Short IV*:

> It is without consequence that the monies were first distributed by the Secretary to the Hoopa Valley Tribe for subsequent distribution to the Tribe's individual members. Where the Secretary's action or failure to act permits a violation of his fiduciary obligations to occur, the United States is liable for the damages sustained.

12 Cl. Ct. at 41.

Here, it is of no consequence that Interior distributed the funds first to the Yurok, who then subsequently distributed the funds per capita to its members. *Id.* The government attempts to avoid liability by arguing that it "was neither required nor asked to approve the Tribe's decision"; however, under *Short*, the Secretary had an affirmative duty to ensure that distributions of Joint Reservation revenues occurred on an equal basis and he failed to do so.[15]

The government also diminishes the role that it played in directly approving the 2007-08 discriminatory per capita expenditures. Gov't Br., 26. Ross Swimmer's letter of December 16, 2008 confirms that "the per capita payments were made by the Tribe pursuant to a plan approved by the Department [of Interior] for purposes of section 117a and 1407 of Title 25 of the United States Code." A340. The government ignores that Congress expressly requires federal approval for such per capita distributions made by an Indian tribe. 25 U.S.C. § 117a. Swimmer's letter confirmed: "The Department did not impose any restrictions on the distributions." A340.[16]

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[15] The government states that "Hoopa Plaintiffs claim . . . the Yurok Tribe should have included members of the Hoopa Tribe in that distribution." Gov't Br., 2. More accurately, as in *Short*, Interior violated trust duties to Hoopa Plaintiffs by failing to ensure that all Indians of the Reservation were included within that distribution of Joint Reservation revenues. *Short IV*, 12 Cl. Ct. at 41.

[16] The government also incorrectly argues that Hoopa Plaintiffs made no efforts to challenge or enjoin the disbursement made by Interior. Gov't Br., fn. 21. Hoopa

F. Swimmer's Interpretation Conflicts with Plain Language of the Settlement Act and Prior Department Interpretations, and Is Not Entitled to Deference.

Throughout its brief, the government argues that Swimmer's interpretation of the Settlement Act, as authorizing apportionment of funds to Yurok Tribe for future per capita distributions exclusively to Yurok members, is reasonable and entitled to deference under *Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This is not correct.

Swimmer's interpretation of the Settlement Act is not entitled to deference under *Chevron*. First, a Court need only defer to an administrative interpretation where the Act in question is ambiguous. *Chevron*, 467 U.S. at 842-43 (stating "if the intent of Congress is clear, that is the end of the matter"). Here, there is no ambiguity. Section 2(c)(4) of the Settlement Act states that apportionment of monies to Yurok "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). As no such valid waiver was ever made in this case, any apportionment to Yurok is invalid under the Act's plain language. *Id*. This was the consistent position of Interior for nineteen years until 2007.

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challenged the decision before Interior's Board of Indian Appeals, and warned of the planned per capita distributions, but Interior refused to hear the Tribe's challenge. A328-332.

Second, *Chevron* deference generally applies only to formal agency regulations, not ad hoc determinations by agency officials, such as Mr. Swimmer. *Chevron*, 467 U.S. at 844; *United States v. Mead Corp*., 533 U.S. 218, 230-31 (2001) (declining to apply *Chevron* deference); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (declining to apply *Chevron* deference outside context of formal adjudication and notice-and-comment rulemaking).

Also, Congress did not leave Interior any "gaps" to fill with regard to administration of Settlement Fund monies. *Chevron*, 467 U.S. at 843-44. Congress expressly conditioned apportionment of settlement funds to Yurok on execution of a claim waiver by the Interim Council. 25 U.S.C. § 1300i-1(c)(4). Congress clearly stated how Interior should manage the monies pending payments under the Settlement Act. 25 U.S.C. § 1300i-3(b). And, if litigation was commenced against the United States and brought to final judgment, Congress required Interior to provide it with recommendations for further action, which Interior did in 2002. 25 U.S.C. 1300i-11(c). No interpretive authority was vested in Interior (or Mr. Swimmer) with regard to the funds at issue and deference is inappropriate.

In cases where *Chevron* deference does not apply:

> the weight [accorded to an administrative] judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.

Mead, 533 U.S. at 228, *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, Swimmer's interpretation is expressed in two conclusory letters. A325, 336. Significantly, Swimmer's interpretation represents a 180-degree turn from the Department of Interior's interpretation of the Settlement Act expressed consistently from 1988 to early 2007. Hoopa Br., 10-15. No deference should be granted to Swimmer's conclusory determination that directly conflicts with the plain language of the Act, and also nineteen years of consistent interpretation by Interior. *See generally*, A194-294.

III. CONCLUSION

The government's response brief fails to support the Court of Federal Claims determination that Hoopa Plaintiffs lack standing to sue for breach of trust in this case. 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. This Court should remand to the Court of Federal Claims with directions 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 30th day of October, 2009.

Thomas P. Schlosser, Attorney of Record

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,981 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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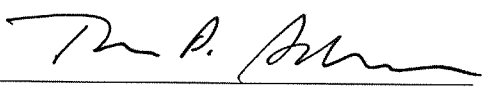

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, 12 copies of the Appellants' Reply Brief were filed with the U.S. Court of Appeals for the Federal Circuit, via First-Class Mail to:

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