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In reply, please address to:
Main Interior, Room 6456

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Memorandum

To: Area Director, Sacramento Area Office

Through: Director, Office of Tribal Services

From: Assistant Solicitor, Branch of General Indian
Legal Activities

Subject: Issues raised at organizational meeting of the
Yurok Interim Council held November 25, 26, 1991

This is in response to your informal request for an opinion on a number of issues relating to the interpretation of certain provisions of the Hoopa Yurok Settlement Act, Pub. L. 100-580, 102 Stat. 2924, 25 U.S.C. §§ 1300i *et seq.* These issues were raised at the organizational meeting of the Interim Council of the Yurok Tribe held in Arcata, California, November 25 and 26, 1991. They are as follows: 1) When does the dissolution of the Interim Council occur under 25 U.S.C. § 1300i-8(d)(5). 2) Whether 25 U.S.C. § 1300i-8(d)(2) requires a single resolution waiving claims against the United States, affirming tribal consent to contribution of Yurok Escrow monies to the Settlement Fund, and authorizing the Interim Council to receive grants and enter into contracts for Federal programs. 3) What are the consequences of refusing to enact a resolution waiving claims against the United States and/or filing a claim under 25 U.S.C. § 1300i-11(a) on the Yurok Tribe's ability to organize or form a government. 4) Whether a tribal resolution waiving claims against the United States is required for purposes of conferring the benefits specified in 25 U.S.C. § 1300i-1(c)(4) notwithstanding the expiration of the statute of limitations in 25 U.S.C. § 1300i-11(b)(3). 5) Whether individuals who receive and cash the payment authorized under the Yurok tribal membership option in 25 U.S.C. § 1300i-5(c) are precluded from filing claims against the United States arising out of the provisions of the Settlement Act. We address these issues seriatim.

1. Dissolution of the Interim Council of the Yurok Tribe

Section 9(d)(5) of the Settlement Act, 25 U.S.C. § 1300i-8(d)(5) provides as follows:

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The 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.

The structure of this subsection is confusing because the words "such installation" would normally be construed to refer to the installation of the initial tribe governing body. However, to so construe this subsection makes the words "whichever occurs first" meaningless. It is clear from the legislative history that Congress intended the Interim Council to be dissolved with the installation of the initial tribal governing body, or at the end of two years after the installation of the Interim Council, whichever occurs first. As stated in the Senate Report accompanying the legislation:

Paragraph (5) provides that the Interim Council shall be dissolved upon election of the initial governing body under such constitution when adopted or at the end of two years after their installation, whichever occurs first. S. Rep. 100-564, 100th Cong., 2d Sess. (September 30, 1988) at 27-28.

Therefore, it is clear that the Interim Council's lifespan is two years from the date of its installation on November 25, 1991, unless a tribal governing body is elected before the expiration of the two-year period, whereupon the Interim Council would be dissolved following such election. If a tribal governing body is not elected within this two-year period, the Interim Council would still be dissolved at the end of the two-year period.

2. Number of Tribal Resolutions Required or Permitted under 25 U.S.C. § 1300i-8(d)(2)

Section 9(d)(2) of the Settlement Act, 25 U.S.C. § 1300i-8(d)(2) provides as follows:

The Interim Council shall have 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, and
- (ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this subchapter, and
- (iii) to receive grants from, and enter into contracts for, Federal programs, including those administered by the Secretary and the Secretary of Health and Human Services, with respect to Federal services and benefits for the tribe and its members.

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It is our understanding that at the organizational meeting held November 25 and 26, 1991, the Bureau of Indian Affairs (BIA) indicated that it did not want to restrict the Interim Council by requiring a single resolution addressing all three concerns, and preferred a more permissive interpretation of this subsection if possible. The section-by-section analysis of the Senate Report, S. Rep. 100-564, states the following with respect to this subsection:

Paragraph (2) provides that the Council shall have full authority to secure the benefits of Federal programs for the tribe and its members, including those administered by the Secretary of the Interior and the Secretary of Health and Human Services and shall have authority to execute the necessary waiver of claims against the United States, and consent to allocation of the escrow funds to the Settlement Fund. Id. at 27.

We believe that the Senate Report language indicates that it is unlikely that Congress intended to tie the award of federal contracts and grants to either the waiver of claims or the contribution of escrow funds. Therefore, we conclude that the statutory language does not preclude the BIA from construing this subsection to permit the Interim Council to enact three separate resolutions at different times.¹

3. Consequences of Refusing to Pass a Resolution Waiving Claims Against the United States and/or Filing a Claim under 25 U.S.C. § 1300i-11(a) on the Yurok Tribe's Ability to Organize

Section 2(c)(4) of the Settlement Act, 25 U.S.C. § 1300i-1(c)(4) provides as follows:

The --

- (A) apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 of this title;
- (B) the land transfers pursuant to paragraph (2);
- (C) the land acquisition authorities in paragraph (3); and
- (D) the organizational authorities of section 1300i-8 of this title 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 subchapter.

¹ Although the statutory language could conceivably be interpreted so as to reach the opposite conclusion, the courts have consistently resolved statutory ambiguities in favor of the Indians, following a traditional canon of construction applicable in Indian law. See Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

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

We do not believe that the Settlement Act precludes the Yurok Tribe from having a government if it refuses to waive claims against the United States. The Yurok Tribe's failure to waive claims only affects its authority to organize under the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, 25 U.S.C. § 461 et seq., pursuant to 25 U.S.C. § 1300i-8. Such an option would be foreclosed without the Settlement Act's specific authorization. Indian tribes, however, are free to form tribal governments independently of the IRA which only provides a certain mechanism for organization, and there are numerous federally recognized Indian tribes presently organized outside of the IRA. See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985). The legislative history supports our interpretation of this provision of the Settlement Act. The Senate Report states the following with respect to the Yurok Tribe's decision to organize under 25 U.S.C. § 1300i-8:

It is not intended by this section that the Indian Reorganization Act shall provide the only means by which the Yurok Tribe may be organized. Nor does the Committee intend that the Constitution prepared by the drafting committee pursuant to subsection (e) is the only one upon which the Secretary may conduct an election in the future. S. Rep. 100-564, supra, at 28.

Therefore, it is our conclusion that the Yurok Tribe's failure to enact a resolution waiving claims against the United States does not prevent the tribe from having a tribal government. Clearly, the Settlement Act neither limits the Yurok Tribe to a single organizational method, nor does it compel the Yurok Tribe to organize under its authority.

4. The Requirement for a Tribal Resolution Waiving Claims against the United States Independently of the Statute of Limitations in 25 U.S.C. § 1300i-11(b)(3)

The Interim Council asked whether it would still be required to pass a tribal resolution waiving claims against the United States to obtain the benefits of §§ 2, 4, and 7 of the Settlement Act notwithstanding their failure to file a Fifth Amendment taking claim in the U.S. Claims Court before expiration of the statute of limitations. Their argument is that such a resolution would have become moot since any claim would be time-barred and no longer valid,

Although it is true that the Yurok Tribe's failure to file a timely claim against the United States in the U.S. Claims Court under the provisions of 25 U.S.C. § 1300i-11 may bar such a

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claim, the statutory requirement for a tribal resolution waiving claims against the United States in 25 U.S.C. § 1300i-1(c)(4) is independent of the running of the statute of limitations. The statute simply does not authorize the Interim Council to dispense with the resolution requirement in order to be afforded the benefits conferred under specified sections of the Settlement Act for any reason, including the expiration of the statute of limitations in 25 U.S.C. § 1300i-11(b)(3). In addition, courts have held that a statute of limitations is subject to waiver, estoppel and equitable tolling under certain circumstances. See Jarrell v. United States Postal Service, 753 F.2d 1088, 1091 (D.C. Cir. 1985). Therefore, it is conceivable that the Yurok Tribe could file a claim against the United States in the U.S. Claims Court after the expiration of the § 1300i-11(b)(3) period on March 12, 1992, and argue that the court should allow the claim to be litigated notwithstanding the running of the limitations period. Under these circumstances, it would be imprudent to permit the fund transfers, land transfers, land acquisition authorities, and organizational authorities to become effective without securing a waiver resolution from the Interim Council.

5. Effect of Cashing the Payment Authorized under the Yurok Tribal Membership Option on an Individual's Ability to File a Claim under 25 U.S.C. § 1300i-11(a)

It is our position that those individuals who affirmatively elected the Yurok tribal membership option, 25 U.S.C. § 1300i-5(c), effectively waived their right to file a claim under 25 U.S.C. § 1300i-11(a). Thus, their cashing the check they received for the payment authorized under the Yurok tribal membership option has no significance with respect to their right to file a claim under 25 U.S.C. § 1300i-11(a). This conclusion is derived from the statutory language itself. Subsection 25 U.S.C.

§ 1300i-5(c)(4) provides as follows:

Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, appertaining to, the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except to the extent authorized by paragraph (3), in the Settlement Fund. Any such person shall also be deemed to have granted to members of the Interim Council established under section 1300i-8 of this title an irrevocable proxy directing them to approve a proposed resolution waiving any claim the Yurok Tribe may have against the United States arising out of the provisions of this subchapter, and granting tribal consent as provided in section 1300i-8(d)(2) of this title.

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As stated in the Senate Report, S. Rep. 100-564, "[this paragraph ... [does] not contemplate that such persons now have any interest, but that, to the extent that they do, it will be automatically relinquished upon an election of one of the options." Id at 23-24.

However, any individual who did not choose an option within the authorized time limit, and who subsequently refuses to accept the payment by refusing to cash the check for it, will not be deemed to have given up any claim he or she may have as a result of the partition, and will have preserved his or her legal right to challenge the provisions of the Act. This interpretation of the Settlement Act is bolstered by the Senate Report language addressing this issue:

The Committee believes it is important that no person on the Hoopa-Yurok Settlement Roll lose benefits and privileges flowing from Yurok tribal membership and connection with the Yurok Reservation by virtue of inadvertence, failure to receive actual notice, accident or other unforeseeable events. Accordingly, persons failing to act timely will be deemed to have elected Yurok tribal membership if they accept and cash the check representing the payment authorized by subsection (c).

The Committee believes that acceptance of the payment also establishes the consensual release of rights that accompanies the election. On the other hand, one who fails or refuses to make an election and refuses to accept the payment authorized by subsection (c) may not be deemed to have granted a release or to have granted a proxy to the Yurok Interim Council. Thus, refusing to accept the payment is one method by which persons who do not wish to join the Yurok Tribe may avoid becoming members. S. Rep. 100-564, supra, at 23.

Thus, in order for a Yurok enrollee who made no election to avoid the preclusion of claims effect of the Yurok tribal membership option by default, refusal to accept the payment is critical.²

In a Notice published on May 17, 1991, in the Federal Register, 56 F.R. 22998, the BIA notified all potential claimants except the Hoopa Valley Tribe and the Yurok Tribe that claims under Section 14 of the Settlement Act, 25 U.S.C. § 1300i-11(a), must be filed by September 16, 1991. As of that date, there were two claims filed in the U.S. Claims Court. The first one was filed by the Karuk Tribe in Karuk Tribe of California v. U.S., No. 90-3993-L, U.S. Cl. Ct; and the second one was filed by 32 individuals as "members of, and on behalf of, an identifiable group of American Indians," in Ammon v. U.S., No. 91-1432 L,

² Mere receipt of the check is not enough to trigger the waiver of claims or grant a release or grant a proxy to the Yurok Interim Council. The check must be both accepted and cashed.

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U.S. Cl. Ct. It follows from our interpretation of the relevant statutory provisions that any individual who accepts and cashes the check representing the payment authorized under 25 U.S.C. § 13001-5(c) would be precluded from recovering under Ammon.

Duard R. Barnes

³ Under our analysis, those individuals who affirmatively selected the Yurok membership option are automatically barred from recovering under Ammon. Therefore, recovery under Ammon, if any, is limited to those individuals for whom the Yurok membership option was selected by default and who subsequently refuse to cash the authorized payment.