PARTITION CERTAIN LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 4469

PARTITION CERTAIN LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS

SEPTEMBER 30, 1988

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PARTITION CERTAIN LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS, TO CLARIFY THE USE OF TRIBAL TIMBER PROCEEDS

FRIDAY, SEPTEMBER 30, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:20 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Frank, Brooks, Glickman, Morrison, Berman, Cardin, Swindall, Coble, and Smith.

Staff present: Janet S. Potts, counsel; Belle Cummins, assistant counsel; Roger T. Fleming, associate counsel; and Florence T. McGrady, legal assistant.

Mr. FRANK. Good morning.

This is a hearing on H.R. 4469. I apologize for being late, but I was in the wrong room. There is a somewhat complicated procedural history here. An original bill was filed where it appears that there was some piece of jurisdiction that was relative to the Judiciary Committee's jurisdictional role, though it was primarily in the Interior Committee.

(A copy of H.R. 4469 follows:)

I

100TH CONGRESS
2D SESSION

H. R. 4469

To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 1988

Mr. BOSCO (for himself, Mr. COELHO, and Mr. MILLER of California) introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs, the Judiciary, Energy and Commerce, and Merchant Marine and Fisheries

---

A BILL

To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. DEFINITIONS.

As used in this Act—

(1) the term "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitutions and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(2) the term "Yurok Tribe" means the Yurok Tribe as recognized by the Secretary;

(3) the term "Secretary" means the Secretary of the Interior;

(4) the term "trust land" means an interest of an Indian or tribe in land held in trust, or subject to a restriction against alienation, by the United States; and

(5) the term "unallotted trust land" means those lands reserved for Indian purposes which have not been allotted.

SEC. 2. RESERVATIONS; DIVISION AND ADDITIONS.

(a) HOOPA VALLEY RESERVATION.—The area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive order of June 23, 1876, and Executive order 1480 of February 17, 1912) is hereby established as the Hoopa Valley Reservation. The unallotted Indian land and assets of the Hoopa Valley Reservation shall continue to be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(b) YUROK RESERVATION.—

(1) The area of land known as the "extension" (defined as the reservation extension under the Executive order of October 16, 1891, but excluding the Resighini Rancheria) is hereby established as the Yurok

Reservation. The unallotted trust land and assets of the Yurok Reservation shall continue to be held in trust by the United States for the benefit of the Yurok Tribe.

(2) Subject to valid existing rights, all national forest system lands within the Yurok Reservation are hereby held in trust for the use and benefit of the Yurok Tribe and shall be part of the Yurok Reservation. Such lands shall be transferred from the Secretary of Agriculture to the Secretary of the Interior.

(3) The Secretary shall seek to purchase land along the Klamath River, California, to be added to the reservation of the Yurok Tribe. There is authorized to be appropriated $2,000,000 to carry out this paragraph.

(c) BOUNDARY CLARIFICATIONS OR CORRECTIONS.—

(1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation is the line established by the Bissel-Smith survey.

(2) The Secretary shall publish a description of the boundaries of the Hoopa Valley and Yurok Reservations in the Federal Register.

(d) MANAGEMENT AND GOVERNMENT OF THE YUROK RESERVATION.—

(1) The Secretary shall manage the unallotted trust land and assets of the Yurok Tribe and govern the Yurok Reservation until the tribe has organized pursuant to section 3. Thereafter, those lands and assets shall be administered as tribal trust land and the reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(2) The Hoopa Valley Reservation and the Yurok Reservation shall be subject to section 1360 of title 28, United States Code, section 1162 of title 18, United States Code, and section 403(a) of the Act of April 11, 1968 (82 Stat. 79; 25 U.S.C. 1323(a)).

(e) LAND EXCHANGES AND RIGHTS-OF-WAY.—

(1) The Secretary may make or approve the exchange of trust land in the Yurok Reservation for an interest in land in or near the reservation.

(2) The Secretary may acquire an interest in land for a right-of-way needed for access to trust land in the Yurok Reservation. The interest may be taken in trust for the beneficial owner of the trust land.

(f) LIMITATION OF ACTIONS; REIMBURSEMENT OF UNITED STATES FOR DAMAGES AWARDED.—

(1) Notwithstanding any other provision of law, any action in any court for damages based on inad-

equate compensation or a taking resulting from the division of land provided under this section shall be forever barred unless the complaint is filed within two years after the date of enactment of this Act.

(2) If the United States is found liable to the Hoopa Valley Tribe or Yurok Tribe, or to the Indians of either tribe, for damages based on inadequate compensation or a taking resulting from the division of land between the tribes provided under this section, the United States shall be entitled to a judgment for reimbursement from the other tribe's future income. Such reimbursement may be sought by joinder of the other tribe in the proceeding against the United States or in a separate action against the other tribe by the United States in United States district court.

SEC. 3. SETTLEMENT OF PENDING LITIGATION.

(a) PARTIAL JUDGMENT AND PER CAPITA PAYMENTS.—For the purpose of providing for partial judgments under section 2517 of title 28, United States Code, the cases entitled Jessie Short against the United States (Cl. Ct. No. 102–63) and Charlene Ackley against the United States (Cl. Ct. No. 460–78) may be treated as cases subject to section 10(e) of the Contract Disputes Act of 1978 (41 U.S.C. 609(e)).

(b) DISTRIBUTION OF ESCROW FUNDS.—

(1) POST 1974 DAMAGES.—Out of amounts in the escrow fund, the Secretary of the Interior shall pay amounts to qualified Jessie Short plaintiffs equal to the per capita share of income from the joint reservation distributed to individual members of the Hoopa Valley Tribe after December 31, 1974. Each such payment shall include simple interest from the date on which each such distribution was made determined in accordance with section D of the opinion filed March 17, 1987, in the United States Claims Court in the two cases referred to in subsection (a).

(2) APPORTIONMENT OF REMAINDER.—

(A) Any amount remaining in the escrow fund after all payments are made under paragraph (1) shall be apportioned between the Hoopa Valley Tribe and the Yurok Tribe. The Hoopa Valley Tribe shall receive 50 percent of such amount and the Yurok Tribe shall receive 50 percent of such amount.

(B) Amounts distributed under subparagraph (A) may not be distributed per capita to any individual before the date which is 10 years after the date on which the apportionment is made under subparagraph (A); and

(3) DEFINITIONS.—For the purpose of this section—

(A) the term "escrow fund" means the moneys derived from the joint reservation which are held in trust by the Secretary in the account, "Indian Money, Proceeds of Labor";

(B) the term "qualified Jessie Short plaintiff" means any plaintiff in either of the two cases referred to in subsection (a) who is determined by the United States Claims Court to be entitled to recover pursuant to either such case; and

(C) the term "joint reservation" means the "square" (defined as the reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), and the Executive order of June 23, 1876) and the "extension" (defined as the reservation extension established under the Executive order of October 16, 1891, but excluding the Resighini Rancheria).

SEC. 4. YUROK TRIBAL ORGANIZATION.

The Yurok Tribe may organize under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 987, 988; 25 U.S.C. 476, 477).

SEC. 5. SPECIAL CONSIDERATIONS.

(a) LIFE ESTATE GIVEN TO THE SMOKERS FAMILY.—The 20 acre land assignment on the Hoopa Valley Reservation made by the Hoopa Area Field Office of the Bureau of Indian Affairs on August 25, 1947, to the Smokers family shall continue for the lives of those family members resident on the assignment on January 1, 1987.

(b) RESIGHINI RANCHERIA MERGER WITH YUROK RESERVATION.—If three fourths of the members of the Resighini Rancheria vote in an election conducted by the Secretary to merge with the Yurok Tribe, and the governing body of the Yurok Tribe agrees, the Resighini Rancheria shall be extinguished and the area shall be part of the Yurok Reservation with the unallotted trust land therein held in trust by the United States for the Yurok Tribe. The Secretary shall publish in the Federal Register a notice of the effective date of the merger.

SEC. 6. HEALTH ISSUES.

(a) CLEANUP OF DUMP SITES.—The Secretary of Health and Human Services shall clean up all dump sites located on the Yurok Reservation on the date of enactment of this Act, with emphasis first given to the dump sites located along the banks of the Klamath River.

(b) SOLID WASTE DISPOSAL.—The Secretary of the Interior, through the Bureau of Indian Affairs, shall seek to enter into a memorandum of understanding with Humboldt

and del Norte counties, California, regarding the disposal of solid waste from the Yurok Reservation pending the organizing of the Yurok Tribe pursuant to section 3.

(c) HEALTH CARE FOR NON-HOOPA INDIANS LIVING ON THE HOOPA RESERVATION.—The Secretary of Health and Human Services, through the Indian Health Service, shall enter into a memorandum of understanding with the Hoopa Valley Tribe to ensure the continued health care for non-Hoopa Indians living on the Hoopa Reservation.

SEC. 7. TREATMENT OF MONETARY RECOVERY FOR TAX PURPOSES AND FEDERAL PROGRAMS.

Any monetary recovery by a plaintiff in the cases entitled Jessie Short against the United States, Charlene Ackley against the United States, Aanstadt against the United States or Giffin against the United States (Cl. Ct. No. 102–63, 460–78, 146–85L, and 746–85L, respectively)—

(1) shall be exempt from any form of taxation, Federal or State, whatever recovered by an original plaintiff or the heirs of a deceased plaintiff; and

(2) neither such funds nor their availability shall be considered as income or resources, or otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which any household or member would otherwise be entitled, under the Social

Security Act or any Federal or federally assisted program.

SEC. 8. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.—Section 4(c) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss–3) is amended—

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "13"; and

(B) by inserting at the end thereof the following new paragraph:

"(11) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is established and Federally recognized, upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is recognized.".

(b) SPECIAL RULE.—The initial term of the representative appointed pursuant to section 4(c)(11) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of the members of the Task Force then serving. Thereafter, the term of such

representative shall be as provided in section 4(e) of such Act.

SEC. 9. TRIBAL TIMBER SALES PROCEEDS USE.

Section 7 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C. 407), is amended to read as follows: "Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use, as determined by the Secretary. After deduction for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used—

"(1) as determined by the governing bodies of the tribes or reservations concerned and approved by the Secretary, or

"(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.".

O

The chairman of the full committee, Mr. Rodino, is concerned about that, and we would not want to be any lacuna in our jurisdictional responsibility. The sponsor of the bill, who has worked very hard, informs me that we have a new version of the bill, and some of the problems that impinged on our jurisdiction are no longer present, and it is his belief that this bill is not generally affected, but that is what we will hear today.

And while there won't be time for a formal action, we do have a full committee meeting this afternoon, and if this is, in fact, as the gentleman described it, we may very well be able to remove any obstacle.

Our first witness is Douglas Bosco.

TESTIMONY OF HON. DOUGLAS H. BOSCO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Bosco. Thank you very much, Mr. Chairman. I want to express my gratitude to you for holding this hearing, especially so quickly, and I do appreciate the Judiciary Committee's interest in our measure.

House Resolution 4469 will divide the Hoopa Valley Indian Reservation in northern California into two reservations, one for the use of the Hoopa tribe, the other for the Yurok tribe. It will enable each to organize and govern itself, and it provides the establishment of tribal roles and the payment to individuals of funds now held in trust by the United States.

As you mentioned, Mr. Chairman, originally this bill did have bearing on the Judiciary Committee, because it provided for the payment of claims under a case pending in the Federal Courts.

However, the Justice Department objected to this provision, because they feel that case is already close to being settled, and any payment of claims at this time would be premature, so that part was depleted—deleted from the bill when it was heard by the Interior Committee, and the Parliamentarian of the House informed me that the Judiciary Committee of the House therefore doesn't have at least any official jurisdiction over the bill.

But Mr. Rodino was concerned that perhaps this bill would reflect on current litigation, and we are very pleased to be here today to answer any of those questions that you or he might have.

Mr. Chairman, each of the Federal judges who have heard matters related to the Hoopa Valley Reservation dispute over the years has said that it is Congress' responsibility to settle many of the contentious issues involved. This legislation meets that responsibility.

I am proud to say that the people who will be affected the most, the Indians of the reservation, have worked hard to resolve their differences. As a result, we have widespread support for this legislation, including the leadership of both tribes, all the national Indian organizations, the major newspapers of California, and even Jessie Short, who filed an original lawsuit some 25 years ago that started these decades of contention, and her hard work, hopefully, will result shortly in an Act of Congress that benefits the thousands of people who heretofore have seen no relief whatsoever.

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I wanted to point out to the committee, for your reference, a fine paper that was done by the American Law Division of the Library of Congress at the request of the Interior Committee. It presents in good detail all of the major legal issues involved in this legislation, both from a present and historical standpoint.

Thank you again for your interest, and I would be happy to answer any questions.

Mr. FRANK. Explain to us, if you could, exactly where the change came with regard to pending litigation in the bill?

Mr. BOSCO. There is a case in the Federal Claims Court called Jessie *Short* v. *the United States.* It was filed some 25 years ago, and challenges the distribution of timber revenues from the Hoopa Valley Reservation. That case, for the most part, has been settled.

The Court now is simply trying to find which Indians of the reservation should be paid under these claims, and the roles of the—are being prepared for that purpose. Our legislation wanted originally to get this money out to people, because it has been some two decades and no one has seen any money from the claims, and so we provided for partial payment of those claims.

As I mentioned, the Justice Department felt that this was premature, that these people will start to get their money shortly in any case, and we didn't want to compromise the legal procedures.

So we dropped that entire provision from the bill, and it no longer calls for the payment of those claims.

Mr. FRANK. All right. I have no further questions.

Anyone else?

Mr. COBLE. Mr. Chairman? Mr. Bosco, you mentioned in your presentation that both tribes agree; what happened to the third tribe? Wasn't there a third tribe involved in this?

Mr. BOSCO. Well, Mr. Coble, the reservation—I shouldn't go into any great detail in this——

Mr. COBLE. This is a friendly question.

Mr. BOSCO. This has long been the home of Indians of various tribes; however, it is recognized that the Yuroks and the Hoopas have claim to the reservation. One other group, the Karuks, are already organized and recognized as a tribe, but their residency is elsewhere. It isn't on this reservation.

Mr. COBLE. So they are not parties to this?

Mr. BOSCO. They want to be, because they want to participate in the funds that will be distributed under it. I think this is borne out by the Congressional Research studies that I alluded to. I feel that they really don't as a tribe have a claim on this particular reservation.

Some individuals, as Karuks, have lived on the reservation and they will have the opportunity under the legislation to receive the benefits of distribution of funds. But the tribe itself I do not believe can make a claim to distribution of funds.

Mr. COBLE. Thank you. No further questions.

Mr. FRANK. Let me ask, have you seen the Justice Department's amendments to this bill?

Mr. BOSCO. As of that time? We have been working with them throughout.

Mr. FRANK. September 30, 1988. It looks like they have two more ideas.

Mr. Bosco. I am not aware of that.

Mr. FRANK. I shall read you what it says. "We worked closely with his staff on this piece of legislation. We have two remaining concerns of the bill."

Mr. Bosco. I am not aware of that.

Mr. FRANK. It is rather strange wording on the part of Justice. One, affirming tribal consent to the contribution of Hoopa escrow moneys to the settlement fund, and affirming to the contribution of Yurok escrow moneys. That is just making it explicit.

Mr. Bosco. I don't think that will be a problem. The Justice Department has been enormously helpful.

Mr. FRANK. And they wanted—they said, it is possible that Congress might take action to make payment unnecessary. They wanted a provision that would deal with that. Notwithstanding, it shall not be paid 180 days after judgment. Payments shall be made—I don't know why we want to do that.

But I wonder if you might want to look at the escrow language. It doesn't sound like you have any problem with it. Perhaps you want to incorporate that.

Mr. Bosco. I will. Their suggestions have always been meritorious, I think. Those changes are made, I am sorry.

Mr. FRANK. So, you incorporated that then?

Mr. Bosco. I am just the front man in all of this.

Mr. FRANK. Mr. Berman?

Mr. BERMAN. I don't want to get bogged down in the lacuna of jurisdictional matters.

Mr. FRANK. The lacunae.

Mr. BERMAN. What, there are more than one? If we don't act, do we just sort of waive our role and it moves on, or is it because it is a joint referral, do we have to pass something or else the bill can't be taken out?

Mr. FRANK. I don't think—is this a joint proposal? Well, if it is joint, we would have to report it out. We have a full committee hearing this afternoon. What the chairman expressed to me, there are two questions here. One is the court dispute, and there is a jurisdiction argument that says any time the U.S. Government is a defendant, it is within our jurisdiction.

I have problems with our being forced to exercise that in every case I think that is right and we ought to have the right to deal with that if we have a particular reason to. This committee does have some expertise in the area of claim to the procedures in general.

Where, however, what is at issue is not procedural in any substantive way, but turns on the substance of the dispute, I am less convinced that while we continue to have the jurisdiction, we should exercise it because we are not the experts in Indian matters or defense matters, we are not the experts in every substantive dispute that comes up.

And I don't think it would be useful for us if the rule was that every bill which affected a claim against the United States had to be substantively decided by this committee. I don't think that we could do that.

The chairman was concerned about a special procedural problem above and beyond that which has to do with an unfortunate prece-

dent that made or followed legislation affecting pending cases. That is the particular piece that seems to be resolved.

So, my inclination would be—it would be for us to waive rather than act, because I don't feel competent to pass on the substantive issue one way or another. The chairman asks us particularly to exercise our charge to look at the procedural question. It does seem like it is getting somewhat resolved.

So that is my sense of where we are right now.

Mr. BERMAN. We will hear from other witnesses, but it sounds like this is a complicated case that in the last week of the session I don't know how we can—I don't know quite how we can thoroughly get into all the merits of this dispute, and so, I guess——

Mr. FRANK. As I said, if there was some particular procedural issue, we would have something to contribute. It has gone through the Interior Committee. It has not passed before the House. People unhappy with it have the option of making argument against it.

But I don't think this committee is in a position, although we have the jurisdiction, we don't have to exercise it in every case in an affirmative way. We have been satisfied it is a procedural problem, and as to the substantive issue, we would defer in this particular instance without setting any kind of binding precedence to do so.

Any further questions?

Mr. Bosco. I might say, Mr. Chairman, that this bill has not lacked scrutiny in the Congress. We have had one hearing in the Interior Committee, and over in the Senate there have been two hearings by Senator Inouye's Select Committee on Indian Affairs.

And we have literally gone over every cent of the bill. It does state a different policy than our Government has had so far toward these particular people. But it hasn't lacked any scrutiny by the Congress.

Mr. FRANK. That gets to the question we just referred to. This subcommittee and, indeed, this full committee has no expertise in what the old policy was. If you put the two down on paper and ask us to pick, we would have a random chance.

This is a substantive sub-matter. Thank you.

[The prepared statement of Mr. Bosco follows:]

TESTIMONY OF
CONGRESSMAN DOUGLAS H. BOSCO
BEFORE THE
HOUSE JUDICIARY SUBCOMMITTEE ON
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
CONCERNING HR 4469
THE HOOPA/YUROK SETTLEMENT ACT

September 30, 1988

Mr. CHAIRMAN -- Let me first express my gratitude to you for agreeing to hold this hearing. H.R. 4469 will divide the Hoopa Valley Indian Reservation in Northern California into two reservations -- one for the use of the Hoopa tribe, the other for the Yurok tribe. It will enable each to organize and govern itself, and it provides for the establishment of tribal roles and the payment to individuals of funds now held in trust by the United States.

Originally this legislation contemplated the payment of sums owed certain individuals under a court of claims case, Jessie Short v. United States. For this reason, it was referred to the House Judiciary Committee. Because this case is nearing settlement on its own, and due to the Justice Department's belief that even partial payments under the case would be premature, this provision was deleted from the legislation. The measure as it now stands, as amended in the House Interior Committee, would not be referred to the Judiciary Committee, according to the House Parliamentarian. Nevertheless, I believe Chairman Rodino had concerns that the legislation would unduly affect existing litigation. We are prepared today to address these concerns.

I would commend to your Committee's attention a fine report issued by the American Law Division of the Congressional Research Service (September 13, 1988 "Question with Respect to Hoopa Valley Reservation Settlement as proposed in H.R. 4469"). This report, requested by the Interior Committee, presents a detailed discussion of the main legal issues and a historical perspective as well.

Mr. Chairman, each of the Federal judges who has heard matters related to the Hoopa Valley Reservation dispute over the years has said that it is Congress' responsibility to settle many of the contentious issues involved. This legislation meets that responsibility. I am proud to say that the people who will be affected the most, the Indians of the reservation, have worked hard to resolve their differences. As a result, we have widespread support for this legislation, including the leadership of both tribes, all the national Indian organizations, the major newspapers of California, and even Jesse Short, who filed the original lawsuit some twenty-five years ago and whose dedication to her people will soon result, we hope, in an act of Congress that benefits the thousands of people who heretofore have seen no relief whatsoever.

Mr. FRANK. We will next hear from Mr. Schlosser. Oh, I forgot the Department of Justice, I am sorry. Why don't you come forward? Go ahead.

TESTIMONY OF JAMES L. BYRNES, DEPUTY ASSISTANT ATTORNEY GENERAL, LANDS DIVISION, DEPARTMENT OF JUSTICE

Mr. BYRNES. Thank you, Mr. Chairman and members of the committee.

On behalf of the Department of Justice, I am pleased to have this opportunity to present our views on H.R. 4469 as amended, legislation to partition reservation lands between the Hoopa Valley Tribe and the Yurok Indians, as introduced by Congressman Bosco. This legislation satisfies our litigation concerns. However, because of budgetary and other policy concerns, we defer to the Department of the Interior for the Administration's position on the bill.

In 1876, a 12-mile square tract of land in northern California, The Square, occupied mainly by Hoopa Indians, was set aside by President Grant as the Hoopa Valley Indian Reservation. In 1891, President Harrison extended the boundaries of the reservation to include the adjoining one-mile-wide strip of land on either side of the Klamath River, the "Addition" or "Extension," which was occupied mostly by Yurok Indians.

Beginning in the 1950s, the Hoopa Valley Tribe, a federally-recognized and organized tribe, began receiving proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments.

In these cases, the United States Claims Court held, contrary to the Government's position, that the Square and the Extension were a single reservation and that all Indians of the reservation were entitled to share in a money judgment based on past distributions of individualized moneys, i.e. the per capita payment.

Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally-recognized but not organized Yurok Tribe.

As amended, H.R. 4469 would provide for the partition of the Hoopa Valley Reservation into two separate reservations, to be held in trust by the United States for the Hoopa Valley Tribe and the Yurok Tribe, respectively. The bill also provides for the establishment and distribution of a Settlement Fund for eligible individuals.

The Department of Justice has worked closely with Congressman Bosco's staff to draft legislation that meets our litigation concerns. We have, however, two remaining concerns with the bill. Our first concern is clarification that no Fifth Amendment taking is intended by the sections providing for the contribution of tribal moneys to the Settlement Fund. This bill already provides for a waiver of claims by the Hoopa Tribe and, under certain circumstances, the Yurok Tribe.

While we understand the waiver language as already evidencing tribal consent, we think a provision requiring express tribal consent could provide a clearer acknowledgment by the tribal government that no taking has occurred.

We, therefore, suggest that section 2(a)(2)(A) be changed to read as follows:

"(2)(A) The partition of the joint reservation as provided in this subsection shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transit to the Secretary, a tribal resolution:

"(i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and——

"(ii) affirming tribal consent to the contribution of Hoopa escrow moneys to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act."

We likewise suggest that section 9(c)(2)(A) be changed to read as follows:

"(A) the adoption of a resolution, by a vote of not less than two-thirds of the voters present and voting:

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Our second concern involves section 13(c)(2) of the bill, which provides that, in the event of a judgment against the United States based on a Fifth Amendment taking, the Secretary of the Interior shall submit a report to Congress recommending possible Congressional modifications to the bill.

Pursuant to this section, Congress could change the nature of the act that constituted a taking, and thus make payment for a permanent taking by the United States unnecessary. In order to ensure that payment is not made in the event that Congress takes action to make the payment unnecessary, we suggest that the following provision be added to section 13(c)(2) of the Act:

"Notwithstanding the provisions of 28 U.S.C. 2517, any judgment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report."

The bill's remaining provisions largely involve budget and policy matters, and we defer to the Department of the Interior on them. I would be pleased to answer any questions you might have.

Mr. FRANK. Any questions?

Mr. COBLE. Mr. Chairman? One brief question.

Is it not true that the United States presently holds the reservation in trust for the benefit of all the Indians of the reservations?

Mr. BYRNES. Yes, it is.

Mr. COBLE. Is that going to be any problem?

Mr. BYRNES. No, sir, this bill exercises Congress' plenary power in establishing how the reservation will be run. The reservation

will continue to be held in trust, however, there will be two separate reservations, one for the Yurok Tribal members, and one for the Hoopa Tribe.

Mr. COBLE. Thank you.

Mr. FRANK. Any others? Thank you.

[The prepared statement of Mr. Byrnes follows:]

Department of Justice

STATEMENT

OF

JAMES L. BYRNES
DEPUTY ASSISTANT ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS
HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

CONCERNING

H.R. 4469, TO PARTITION THE HOOPA VALLEY RESERVATION

ON

SEPTEMBER 30, 1988

I wanted to point out to the committee, for your reference, a fine paper that was done by the American Law Division of the Library of Congress at the request of the Interior Committee. It presents in good detail all of the major legal issues involved in this legislation, both from a present and historical standpoint.

Thank you again for your interest, and I would be happy to answer any questions.

Mr. FRANK. Explain to us, if you could, exactly where the change came with regard to pending litigation in the bill?

Mr. Bosco. There is a case in the Federal Claims Court called Jessie *Short* v. *the United States*. It was filed some 25 years ago, and challenges the distribution of timber revenues from the Hoopa Valley Reservation. That case, for the most part, has been settled.

The Court now is simply trying to find which Indians of the reservation should be paid under these claims, and the roles of the—are being prepared for that purpose. Our legislation wanted originally to get this money out to people, because it has been some two decades and no one has seen any money from the claims, and so we provided for partial payment of those claims.

As I mentioned, the Justice Department felt that this was premature, that these people will start to get their money shortly in any case, and we didn't want to compromise the legal procedures.

So we dropped that entire provision from the bill, and it no longer calls for the payment of those claims.

Mr. FRANK. All right. I have no further questions.

Anyone else?

Mr. COBLE. Mr. Chairman? Mr. Bosco, you mentioned in your presentation that both tribes agree; what happened to the third tribe? Wasn't there a third tribe involved in this?

Mr. Bosco. Well, Mr. Coble, the reservation—I shouldn't go into any great detail in this——

Mr. COBLE. This is a friendly question.

Mr. Bosco. This has long been the home of Indians of various tribes; however, it is recognized that the Yuroks and the Hoopas have claim to the reservation. One other group, the Karuks, are already organized and recognized as a tribe, but their residency is elsewhere. It isn't on this reservation.

Mr. COBLE. So they are not parties to this?

Mr. Bosco. They want to be, because they want to participate in the funds that will be distributed under it. I think this is borne out by the Congressional Research studies that I alluded to. I feel that they really don't as a tribe have a claim on this particular reservation.

Some individuals, as Karuks, have lived on the reservation and they will have the opportunity under the legislation to receive the benefits of distribution of funds. But the tribe itself I do not believe can make a claim to distribution of funds.

Mr. COBLE. Thank you. No further questions.

Mr. FRANK. Let me ask, have you seen the Justice Department's amendments to this bill?

Mr. Bosco. As of that time? We have been working with them throughout.

Mr. FRANK. September 30, 1988. It looks like they have two more ideas.

Mr. Bosco. I am not aware of that.

Mr. FRANK. I shall read you what it says. "We worked closely with his staff on this piece of legislation. We have two remaining concerns of the bill."

Mr. Bosco. I am not aware of that.

Mr. FRANK. It is rather strange wording on the part of Justice. One, affirming tribal consent to the contribution of Hoopa escrow moneys to the settlement fund, and affirming to the contribution of Yurok escrow moneys. That is just making it explicit.

Mr. Bosco. I don't think that will be a problem. The Justice Department has been enormously helpful.

Mr. FRANK. And they wanted—they said, it is possible that Congress might take action to make payment unnecessary. They wanted a provision that would deal with that. Notwithstanding, it shall not be paid 180 days after judgment. Payments shall be made—I don't know why we want to do that.

But I wonder if you might want to look at the escrow language. It doesn't sound like you have any problem with it. Perhaps you want to incorporate that.

Mr. Bosco. I will. Their suggestions have always been meritorious, I think. Those changes are made, I am sorry.

Mr. FRANK. So, you incorporated that then?

Mr. Bosco. I am just the front man in all of this.

Mr. FRANK. Mr. Berman?

Mr. BERMAN. I don't want to get bogged down in the lacuna of jurisdictional matters.

Mr. FRANK. The lacunae.

Mr. BERMAN. What, there are more than one? If we don't act, do we just sort of waive our role and it moves on, or is it because it is a joint referral, do we have to pass something or else the bill can't be taken out?

Mr. FRANK. I don't think—is this a joint proposal? Well, if it is joint, we would have to report it out. We have a full committee hearing this afternoon. What the chairman expressed to me, there are two questions here. One is the court dispute, and there is a jurisdiction argument that says any time the U.S. Government is a defendant, it is within our jurisdiction.

I have problems with our being forced to exercise that in every case I think that is right and we ought to have the right to deal with that if we have a particular reason to. This committee does have some expertise in the area of claim to the procedures in general.

Where, however, what is at issue is not procedural in any substantive way, but turns on the substance of the dispute, I am less convinced that while we continue to have the jurisdiction, we should exercise it because we are not the experts in Indian matters or defense matters, we are not the experts in every substantive dispute that comes up.

And I don't think it would be useful for us if the rule was that every bill which affected a claim against the United States had to be substantively decided by this committee. I don't think that we could do that.

The chairman was concerned about a special procedural problem above and beyond that which has to do with an unfortunate prece-

dent that made or followed legislation affecting pending cases. That is the particular piece that seems to be resolved.

So, my inclination would be—it would be for us to waive rather than act, because I don't feel competent to pass on the substantive issue one way or another. The chairman asks us particularly to exercise our charge to look at the procedural question. It does seem like it is getting somewhat resolved.

So that is my sense of where we are right now.

Mr. BERMAN. We will hear from other witnesses, but it sounds like this is a complicated case that in the last week of the session I don't know how we can—I don't know quite how we can thoroughly get into all the merits of this dispute, and so, I guess——

Mr. FRANK. As I said, if there was some particular procedural issue, we would have something to contribute. It has gone through the Interior Committee. It has not passed before the House. People unhappy with it have the option of making argument against it.

But I don't think this committee is in a position, although we have the jurisdiction, we don't have to exercise it in every case in an affirmative way. We have been satisfied it is a procedural problem, and as to the substantive issue, we would defer in this particular instance without setting any kind of binding precedence to do so.

Any further questions?

Mr. Bosco. I might say, Mr. Chairman, that this bill has not lacked scrutiny in the Congress. We have had one hearing in the Interior Committee, and over in the Senate there have been two hearings by Senator Inouye's Select Committee on Indian Affairs.

And we have literally gone over every cent of the bill. It does state a different policy than our Government has had so far toward these particular people. But it hasn't lacked any scrutiny by the Congress.

Mr. FRANK. That gets to the question we just referred to. This subcommittee and, indeed, this full committee has no expertise in what the old policy was. If you put the two down on paper and ask us to pick, we would have a random chance.

This is a substantive sub-matter. Thank you.

[The prepared statement of Mr. Bosco follows:]

TESTIMONY OF
CONGRESSMAN DOUGLAS H. BOSCO
BEFORE THE
HOUSE JUDICIARY SUBCOMMITTEE ON
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
CONCERNING HR 4469
THE HOOPA/YUROK SETTLEMENT ACT

September 30, 1988

Mr. CHAIRMAN -- Let me first express my gratitude to you for agreeing to hold this hearing. H.R. 4469 will divide the Hoopa Valley Indian Reservation in Northern California into two reservations -- one for the use of the Hoopa tribe, the other for the Yurok tribe. It will enable each to organize and govern itself, and it provides for the establishment of tribal roles and the payment to individuals of funds now held in trust by the United States.

Originally this legislation contemplated the payment of sums owed certain individuals under a court of claims case, Jessie Short v. United States. For this reason, it was referred to the House Judiciary Committee. Because this case is nearing settlement on its own, and due to the Justice Department's belief that even partial payments under the case would be premature, this provision was deleted from the legislation. The measure as it now stands, as amended in the House Interior Committee, would not be referred to the Judiciary Committee, according to the House Parliamentarian. Nevertheless, I believe Chairman Rodino had concerns that the legislation would unduly affect existing litigation. We are prepared today to address these concerns.

I would commend to your Committee's attention a fine report issued by the American Law Division of the Congressional Research Service (September 13, 1988 "Question with Respect to Hoopa Valley Reservation Settlement as proposed in H.R. 4469"). This report, requested by the Interior Committee, presents a detailed discussion of the main legal issues and a historical perspective as well.

Mr. Chairman, each of the Federal judges who has heard matters related to the Hoopa Valley Reservation dispute over the years has said that it is Congress' responsibility to settle many of the contentious issues involved. This legislation meets that responsibility. I am proud to say that the people who will be affected the most, the Indians of the reservation, have worked hard to resolve their differences. As a result, we have widespread support for this legislation, including the leadership of both tribes, all the national Indian organizations, the major newspapers of California, and even Jesse Short, who filed the original lawsuit some twenty-five years ago and whose dedication to her people will soon result, we hope, in an act of Congress that benefits the thousands of people who heretofore have seen no relief whatsoever.

Mr. FRANK. We will next hear from Mr. Schlosser. Oh, I forgot the Department of Justice, I am sorry. Why don't you come forward? Go ahead.

TESTIMONY OF JAMES L. BYRNES, DEPUTY ASSISTANT ATTORNEY GENERAL, LANDS DIVISION, DEPARTMENT OF JUSTICE

Mr. BYRNES. Thank you, Mr. Chairman and members of the committee.

On behalf of the Department of Justice, I am pleased to have this opportunity to present our views on H.R. 4469 as amended, legislation to partition reservation lands between the Hoopa Valley Tribe and the Yurok Indians, as introduced by Congressman Bosco. This legislation satisfies our litigation concerns. However, because of budgetary and other policy concerns, we defer to the Department of the Interior for the Administration's position on the bill.

In 1876, a 12-mile square tract of land in northern California, The Square, occupied mainly by Hoopa Indians, was set aside by President Grant as the Hoopa Valley Indian Reservation. In 1891, President Harrison extended the boundaries of the reservation to include the adjoining one-mile-wide strip of land on either side of the Klamath River, the "Addition" or "Extension," which was occupied mostly by Yurok Indians.

Beginning in the 1950s, the Hoopa Valley Tribe, a federally-recognized and organized tribe, began receiving proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments.

In these cases, the United States Claims Court held, contrary to the Government's position, that the Square and the Extension were a single reservation and that all Indians of the reservation were entitled to share in a money judgment based on past distributions of individualized moneys, i.e. the per capita payment.

Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally-recognized but not organized Yurok Tribe.

As amended, H.R. 4469 would provide for the partition of the Hoopa Valley Reservation into two separate reservations, to be held in trust by the United States for the Hoopa Valley Tribe and the Yurok Tribe, respectively. The bill also provides for the establishment and distribution of a Settlement Fund for eligible individuals.

The Department of Justice has worked closely with Congressman Bosco's staff to draft legislation that meets our litigation concerns. We have, however, two remaining concerns with the bill. Our first concern is clarification that no Fifth Amendment taking is intended by the sections providing for the contribution of tribal moneys to the Settlement Fund. This bill already provides for a waiver of claims by the Hoopa Tribe and, under certain circumstances, the Yurok Tribe.

While we understand the waiver language as already evidencing tribal consent, we think a provision requiring express tribal consent could provide a clearer acknowledgment by the tribal government that no taking has occurred.

We, therefore, suggest that section 2(a)(2)(A) be changed to read as follows:

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We likewise suggest that section 9(c)(2)(A) be changed to read as follows:

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Mr. COBLE. Thank you.

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Department of Justice

STATEMENT

OF

JAMES L. BYRNES
DEPUTY ASSISTANT ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

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H.R. 4469, TO PARTITION THE HOOPA VALLEY RESERVATION

ON

SEPTEMBER 30, 1988

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Beginning in the 1950's, the Hoopa Valley Tribe, a federally recognized and organized tribe, began receiving proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments. Short v. United States, No. 102-63, Cl.Ct.; Ackley v. United States, No. 460-78, Cl.Ct.; Aanstadt v. United States, No. 146-85L, Cl.Ct.; Giffen v. United States, No. 746-85L, Cl.Ct.

In these cases, the United States Claims Court held, contrary to the government's position, that the Square and the Extension were a single reservation and that all Indians of the Reservation were entitled to share in a money judgment based on past distributions of individualized monies, i.e. the per capita payments. Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally recognized but not organized Yurok Tribe.

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The bill's remaining provisions largely involve budget and policy matters and we defer to the Department of the Interior on them. I would be pleased to answer any questions you might have.

Mr. FRANK. Mr. Schlosser?

TESTIMONY OF THOMAS SCHLOSSER, REPRESENTING THE HOOPA VALLEY TRIBE

Mr. SCHLOSSER. Thank you, Mr. Chairman. I was confused about the agenda there for a moment. On behalf of the Hoopa Valley Tribe, I want to express my appreciation to the committee for conducting this hearing. As has already been discussed, some of the merits of the bill involve complicated matters, and we could spend a lot of time on the background complexities, but I know you don't want to hear that.

I think it is important to understand one thing about this bill, which is that this bill, like many bills involving Indian affairs, is premised on a government-to-government relationship between the United States and Indian tribes. It is that relationship that makes special legislation affecting Indians constitutional.

That governmental relationship is key to avoiding constitutional problems. And that is one of the goals of this bill, to restore governmental relationships that are jeopardized.

Now, in a sense, the issue that is before you, as we see it, is a procedural one, but its effects are very substantive. We are at the 11th hour of the 100th Congress. We are considering legislation which has been in the discussion stages for 10 years. It was proposed by many of the plaintiffs in the litigation in 1980; legislation was drafted and circulated by the Hoopa Valley Tribe in 1984, by the Interior Department in 1986, this bill was introduced in 1988.

There have been hearings as have been discussed. But action in this Congress is imperative for several reasons. First, the government today, the Bureau of Indian Affairs is making decisions every day that affect people's lives, that affect the property of these Indians; the Bureau of Indian Affairs is paying its own expenses out of Indian money, it is funding projects which they can't get appropriated money for, or which are improperly prepared.

They are paying it out of Indian money. They are conducting closed meetings, ignoring the Administrative Procedure Act. They are trampling on the rights of these people, and this bill is necessary to stop that. They will continue to do so until the bill is enacted.

The Bureau of Indian Affairs has taken over the operation of this reservation and that is in violation of the fundamental principle of government-to-government relations. Secondly, under the status quo, without this bill, tribal governmental powers are stymied. They are left without the power to zone, without the power to tax, to impose building codes.

The Bureau of Indian Affairs does not have those powers, and so we have a partial vacuum of jurisdictional authority on this reservation. As it now stands, the government is also prevented from helping the Yurok people to organize themselves as a tribe. And I am—I regret to see that on the witness list you have no representative of the Yurok people, who are attempting to form a tribe; that instead, an attorney for five Yurok Indians who oppose this tribal government will be speaking.

I know that there are some statements in the record from Jessie Short, who is one of the Yuroks trying to organize their tribe, and from Lisa Sundberg-Brown, and I hope that you will consider that, because that is a point of view you will not hear in the testimony today.

H.R. 4469 does not improperly interfere with litigation. As already mentioned, the section providing for partial money judgment which would have amended section 2517 of Title 28, was removed some months ago. The changes which the Justice Department has referred to were adopted by the Senate Select Committee, and when the bill was reported out yesterday. Section 3 of the bill as it presently stands we hope makes clear that this legislation is not intended to interfere with the major case, which is the *Short* case.

Now, there are many cases involving this reservation. A search will produce a long list, but the *Short* case and the cases like it are the major cases, they involve 4,000 individuals, and the Hoopa Valley Tribe as a government, and the United States. The case involves five individuals and some other individuals and the United States.

But it is one of the collateral cases, in a way.

Mr. BERMAN. What do you mean by five individuals?

Mr. SCHLOSSER. The five individuals are the plaintiffs, they sued the individual members of the Hoopa Valley Business Council, who are eight people.

Section 3 of the bill says that nothing in the Act shall affect in any manner the individual entitlements already established under existing decisions of the claims court, and so on. It is not the intent of this bill to interferer with this case.

The *Short* case, as many cases which I am sure the committee deals with, is a claim against the United States for money judgment. These are individual claims based on actions that happened between 1957 and the present. The court has decided most of the claims before it—most of the people before it and is rapidly moving to final judgment.

The *Puzz* case is affected in an indirect way, but the *Puzz* case is a case where the court had very little law to apply. The *Puzz* judge was acting on the only law he could find applicable, which was enacted during the Civil War, in 1864. He said that the plaintiffs did not have a constitutional claim here; there was no equal protection violation.

The *Puzz* case was not brought as a class action by Indians of the reservation, which I must warn you is a special term of art. The *Puzz* case said that many of the benefits of tribal government could only be obtained by organization, and that is what this bill attempts to do.

At the moment, the *Puzz* case is held in abeyance pending final action on this bill. There are very serious problems before the judge. He is very concerned about the Bureau of Indian Affairs' actions, and he is basically holding off.

Now, you are going to hear discussions, and there is discussion in the testimony about Fifth Amendment claims. I think Congressman Bosco has hit it on the head in saying those are claims which were discussed at great length before the Interior and Insular Af-

fairs Committee and before the Senate Select Committee on Indian Affairs, rejected by both of those committees.

The Congressional Research Service thinks that the possibility of the plaintiff being correct are remote. And these are claims which have also been rejected in *Short* and in *Puzz*. And so, anything can be called a taking, but under the law, not every action of government is a taking.

Twenty-two years ago, this committee established the precedent that it would favorably act on legislation which has an effect on the *Short* case, an indirect effect. In 1966, the Court of Claims dismissed two of the claims in the *Short* case, and legislation was introduced to expand the jurisdiction of the Court of Claims to hear those two claims that were dismissed.

One of the claims was a claim for tribal membership. This committee favorably reported two bills which would have expanded the jurisdiction of the Court of Claims, but those bills were not enacted. Here we are, 22 years later, hearing at the 11th hour that there is some risk that it would be improper to help these Indians establish their membership and restore tribal government.

And frankly, that is very difficult for the Hoopa Valley Tribe and the Yurok people, who are trying to organize, to accept. There are many precedents for Congress acting on Indian affairs where legislation is somewhere—where litigation is somewhere in the surroundings, there are the main land plants which are settled by Congress. There is the White Earth Reservation in Minnesota, where a dispute was settled by Congress. There is the dispute involving an extension of the Navajo Reservation, which is discussed in the Supreme Court's decision in *United States* v. *Jem*.

Congress has unique obligations concerning Indian affairs, and here the judge and the parties are laboring under the only applicable law they can find, which was passed in the Civil War.

You will also hear from the Karuks. Congressman Bosco has also explained this well. The Karuks are among many Indian tribes in California. There is discussion in the papers about a reservation limitation of four reservations in this Civil War Act.

Actually, there are nearly 100 reservations in California now, because the 1864 Act, which applies to this reservation, was passing fancy of Congressional policy. The Karuks and other tribes, many of whom are not federally-recognized at the present time, have lived in northern California for a long time, and in years past some individuals of those backgrounds moved to the Hoopa Valley Reservation and received allotments of tribal land, and those individuals' descendents, if they meet the court standards, will participate in the Settlement Fund.

The tribe as a whole has no tribal claim, because the courts have held in *Short* and in *Puzz* that no tribes have vested rights to this reservation. And the Karuk tribal claim is dealt with in the Congressional Research Service report. It is one of those remote claims which is out there, but it is not a claim of any substance.

The Hoopa Valley Reservation is outside the aboriginal territory of the Karuk Tribe. The Karuk Tribe has a government-to-government relationship with the United States. They operate under a written constitution. Their constitution defines their aboriginal ter-

ritory, and it does not include any part of the reservation. They have their own properties elsewhere.

Mr. Chairman, we have also prepared some written materials which we would like to submit.

Mr. FRANK. Without objection, they will be put in the record.

[The statement of Mr. Schlosser follows:]

Schlosser
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Testimony of Thomas P. Schlosser
Hoopa Valley Tribe
Before the
House Judiciary Committee
On H.R. 4469
September 30, 1988

My name is Thomas Schlocser. I have been the defending attorney for the Hoopa Valley Tribe since 1981. I want to cover three essential points: (1) whether Congressional action is appropriate in light of the litigation that is pending, (2) key rulings of Short and Puzz, and (3) whether this bill changes rights in a way that would be unconstitutional.

1. Congressional Action Is Appropriate

Congressional action is essential because the lack of sufficient law is a major legal obstacle which prevents the courts from allowing the Tribes of the Hoopa Valley Reservation to govern themselves and meet the challenges of the future. The courts cannot get around the Act of April 8, 1864, the basic law applicable to the Hoopa Valley Indian Reservation, which merely authorizes reservations to accommodate Indians. The courts cannot supply the missing language that would be necessary to reconcile the 1864 Act with modern Congressional policy of Indian tribal self-determination. Federal Indian policy of the 1860s failed and it should not be resurrected.

Fundamentally, the relationship between the United States and Indians is a government-to-government relationship between the federal government and tribal governments. The Supreme Court has repeatedly ruled since 1974 that federal laws for the benefit of Indians are not invidiously discriminatory because the laws are not based upon the racial background of the individuals but rather upon their status as members of Indian tribes. In general a tribe is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular . . . territory," as the United States Supreme Court said in Montoya v. United States. Tribes typically confer benefits on their members as any other nation does upon its citizens. The term "tribe" is variously defined in federal statutes, but it is neither defined nor mentioned in the 1864 Act applicable to this Reservation.

The ambiguity of the 1864 Act has compelled both the Claims Court and the Federal District Court of California to suspend the ability of the Hoopa and Yurok Tribes to define their members for any substantive purpose, and to instead undertake the process of identifying which individuals, scattered throughout the world, qualify as "Indians of the Reservation," the term used by the Short case in the absence of a tribal roll to describe the type

of people entitled to share in distributions of per capita income from reservation timber. The federal courts ought not to attempt to determine the membership of Indian tribes, as the Supreme Court said emphatically in Santa Clara Pueblo v. Martinez, yet, for over 25 years the Claims Court and its predecessor have been forced to perform essentially that task, and now the District Court in the Puzz case has announced that it, too, will have to undertake this and a series of other complex tasks if H.R. 4469 fails of enactment.

Yes, there is litigation pending concerning this Reservation. A Westlaw or Lexis search of federal cases using the term Hoopa or Yurok will produce a list pages and pages long. The litigation has had both positive and negative effects. The four Short cases have produced monetary judgments in favor of 2,445 individuals, over 80% of whom do not live on the Reservation but all of whom have been held to be "Indians of the Reservation." The bill will preserve their judgment and protect against any subsequent rulings of the court which address whether the federal government in the past breached statutory obligation to those individuals. Similarly the Puzz case has produced a District Court ruling that the United States must provide the advantages of participation in Reservation management decisions to the five Indians of the Reservation who have sought that right in this case. This bill provides a rational and equitable method for allowing Yurok Indians, (who comprise most of the judicially-defined "Indians of the Reservation,") to establish a viable tribal government and restore their aboriginal tribal homelands to a fully functioning tribal community. Thus H.R. 4469 preserves the fruits of plaintiffs' victories.

But with the positive rulings have come serious problems: (a) All the parties are bound by court rulings that neither tribes nor individual Indians have constitutionally-protected property rights in the resources of this Reservation; this should be corrected. (b) The Puzz court has held that omissions in the 1864 Act indicate that no tribe can exercise territorial management authority over the Reservation absent an express act of Congress. Thus the Tribes exist without building codes, zoning authority or other police powers essential to protect tribal property from incursions and environmental damage. (c) The Puzz court has conditionally approved (pending final Congressional action on H.R. 4469) a plan drafted by the Bureau of Indian Affairs under which the Bureau retains absolute authority to spend tribal money for purposes selected by the Bureau (BIA). This has opened the flood-gates to proposals drafted by employees of the BIA and the Indian Health Service seeking tribal funds to perform federal program functions which should be paid for from appropriated funds. The Tribes themselves have been deprived of spending authority. Ironically, the BIA "Compliance Plan" as it is called, has produced an outpouring of support for enactment of this bill. One thing the

Indians are agreed upon is that the Bureau of Indians Affairs should not run their lives or their Reservation. Yet the Puzz court has found no alternative to that because of the bare language of the Act of 1864.

Congress has frequently in the past acted to resolve intractable disputes involving Indian rights, although other litigation was pending. The Maine Settlement Act, the White Earth Settlement Act and the Florida Settlement Act are just a few examples.

2. Key Rulings of Short and Puzz

Now, let us turn to Short. The holding of Short is that it was wrong for the Secretary of the Interior to approve the payment of moneys derived from the Hoopa Square to enrolled Hoopa tribal members only, to the exclusion of other "Indians of the Reservation."

To understand whether this bill properly respects the adjudicated rights of the successful plaintiffs in Short one must separate the holdings from the dicta. This is particularly hard to do because the 1972 recommended ruling of a trial commissioner of the old Court of Claims explained the evidence at great length for decision by the Court of Claims. There are enough paragraphs in there to support "a fantasyland of issues," as the former judge himself recently said.

What did Short decide? Judge Margolis, the judge since 1983, put it best (paraphrasing):

> The unique situation on the Reservation, where the only formally organized tribal government includes only some of the Indians for whom the communal lands were available, required the approach taken by the Court of Claims in 1973. Since there was no organized Yurok tribal government with an existing tribal membership roll to determine which plaintiffs were unjustly excluded from per capita distributions, the court adopted approximations of the Hoopa Valley Tribe's membership standards to identify those persons other than Hoopa members who should have been included.

However, the judge stressed that the Short court was "not determining which individuals are members of a 'Yurok Tribe' through the qualification process." Instead, the court was doing the only "sensible and equitable" thing under the circumstances, given that distributions had actually occurred.

What did the individuals get when the court decided to treat them "sensibly and equitably?" They got a right to damages

because they were excluded when communal property was distributed to individual tribal members. They cannot compel future distributions of communal property, but they must share if the property is divvied up.

Since the Puzz suit was built on the foundation of Short, the Puzz court had to decide which points in the Short opinion were its holdings. There are only four; one is important here: "There are no tribes having vested rights to the income" of undivided Reservation land. Order at 14.

The Short ruling that tribes have no vested right to income from the Reservation's lands is critically important. If the Hoopa Tribe had acquired vested property rights in the Hoopa Square decades before the Klamath River Reservation and the Connecting Strip and were appended to the Square, then in 1891 when the reservations were joined the ancestors of the Short plaintiffs could not have acquired anything. Short, however, decided that plaintiffs did acquire something by the 1891 Executive Order, and it reached that conclusion by holding that vested rights are not found on this Reservation. Both Puzz and Short have expressly ruled--though the plaintiffs are dissatisfied with this conclusion--that neither individual Indians, nor tribes, nor groups, nor other aggregations nor descendants of Indians hold vested property rights in the Reservation lands, its resources, its income stream, or its accumulated funds. It is for this reason, as well as others, that various other recognized and unrecognized Northern California tribes, such as the Karuk Tribe, have no legal claim to the Reservation either.

What are vested rights? They are rights that have so completely and definitely accrued that they are not subject to being cancelled by a private person. Government cannot deprive a person of vested rights arbitrarily without doing an injustice. Here, however, one who says now that private property rights would be taken--a violation of the Fifth Amendment--if Congress separates the parts of the Reservation, is ignoring the express holdings in Short and Puzz.

3. This Bill Changes No Rights In Unconstitutional Way

This bill limits the ability of the Hoopa and Yurok Tribes to make per capita distributions in the next ten years. But that practice is well recognized to have been an unwise policy anyway. Nevertheless, this is a direct effect of the bill on qualified Short plaintiffs: it takes away the hope they would otherwise have that if money or something else is individualized in the future, they would have a right to share. A deprivation of this kind is not a compensable event. The Supreme Court has never--to my knowledge--required compensation to individual Indians where

hopes of receiving future communal property were lost or taken away before communal property was individualized. There are many Indian allotment cases expounding on this, as do others, Gritts v. Fisher, United States v. Jim, and Delaware Tribal Business Committee v. Weeks. Perhaps there is an analogy in the situation of a corporate stockholder: until a dividend is declared, an individual has only an expectancy--a hope of gain--not a right to assets. A mere hope that a government or a corporation acting entirely in its discretion, will make a payment to you, can be taken away by Congress when it is necessary to best serve the interests of Indian tribes in general.

The Puzz case relied on the four holdings of Short, plus the general Indian law doctrine of trust responsibility. Thus, Puzz claimants also now have the right to participate in decision-making. They won the right to send cards and letters to the BIA, but this is not a compensable property right. It is no taking to require that input to policy decisions be made through participation in tribal governments rather than by advising the BIA. Under federal law, Indian reservations are governed by elected officials, just as states and localities are.

Puzz plaintiffs can also participate in use of the Reservation. This is not a compensable property right either, because neither the Tribes themselves nor individual plaintiffs have vested rights. Plaintiffs may have an entitlement to participate in benefits as long as they exist, but they have no right to compensation when those benefits are taken away.

Maybe Puzz gives plaintiffs the right to be benefitted by expenditures of reservation income too. But Congress isn't being asked to change the equities of this, only to apportion the income streams and their management in a fair and workable manner. It is not a taking rationally to apportion the sources of funds when the present arrangement is so unmanageable as to destroy tribal government; particularly here, where the courts have specifically held that no one has vested rights in those sources.

Both the Report of the Interior and Insular Affairs Committee, H. Rept. 100-938, and the Report of the Congressional Research Service agree with the conclusion, that this will not constitute a Fifth Amendment taking.

Without legislation Chaos Is Assured

Passage of a public law is essential after the Puzz decision. Puzz, if it withstands appeal, precludes government of the Hoopa Valley Reservation, or any part of it, by Indian tribes. Until Congress provides new law, even if the Short

plaintiffs and the Hoopa Valley Tribe laid aside their decades of strife, and unanimously agreed on how to manage the parts of the Reservation, they would lack governmental powers; they would be collaterally attacked by newcomers claiming to have the necessary ancestral ties to California, and seeking new privileges or payments. Only an Act of Congress can rectify this.

What lies ahead if Congress delays action? Permanent uncertainty about who participates in what. There is too little law and no mechanism other than courts to resolve what really are policy issues. The reach of the term "Indians of the reservation" is the most troublesome: it is a problem with two parts--(1) what standards will be fair and equitable to use, and (2) which people meet the standard. The Short case has consumed 25 years answering these questions with respect to the 3851 persons and estates before the court. The court has qualified 2,445, dismissed 818, and has 588 yet to consider.

But Puzz, if it withstands appeal, clearly indicates that others may qualify for the advisory opportunities available under that court's orders. The court has approved only the five plaintiffs before it, thus far. But Puzz states that all claimants who "can trace their origins" and "have connections with any of the various Indian groups, organized or not, for whom the reservation was created," are "Indians of the reservation." Order at 10.

Already the Puzz judge and the parties are struggling with the classes of potential litigants that vague standard may encompass. Puzz generally speaks of the rights of non-Hoopas; this is very broad. There are at least four different definitions of Puzz "Indians of the reservation" under discussion now. Identifying these people every time a decision must be made or whenever a benefit can be viewed as distributed to an individual will be a never-ending process. This can never work; a court has neither the personnel nor the skill to make timely management decisions that will work for Indian tribes. Ahead lie only lawsuits from those omitted by the BIA from the groups thought to be "Indians of the reservation."

Conclusion

Congress must restore Indian tribal management to its rightful role. Puzz acknowledges that Congress can confer on Reservation tribes the usual rights of tribal governments; there is no legal obstacle in your way.

Mr. Chairman, we've tried to convey that this Tribe is in a battle for its life. These leaders have lived under a state of siege for years. Why? Because of an unanticipated federal mistake.

Mr. Chairman, I have worked with many tribes during my 13 years in this field. These tribal leaders work extremely hard and take their community responsibilities very seriously. Even in the face of all this controversy, they have continued to hire qualified Yurok people, plaintiffs as well as others.

This siege can only be lifted by you. There are Yuroks sincerely working for restoration of their lands and tribal organization; they need to be aided too. This Congress has recognized time and time again its duty to encourage tribal self-government. We must charge you with the responsibility of moving this bill, and fulfilling your duty. Thank you.

35-TPS6.2/4469-TPS.TES

Mr. FRANK. Let me say at this point, also going into the record at this point, if there is no objection, are the statements of Ross O. Swimmer, Assistant Secretary, Indian Affairs, Department of the Interior; Senator Alan Cranston; William Babby, Sacramento Area Director, Bureau of Indian Affairs; Wilfred K. Colegrove; Lisa G. Sundberg-Brown; Jessie Short; Robert N. Clinton; Nell Jessup Newton; and the Colville Confederated Tribes.

[The statement of Mr. Swimmer follows:]

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY-INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, SUBMITTED FOR THE RECORD TO THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, UNITED STATES HOUSE OF REPRESENTATIVES ON H.R. 4469, A BILL TO PARTITION CERTAIN RESERVATION LANDS BETWEEN THE HOOPA VALLEY TRIBE AND YUROK INDIANS.

September 30, 1988

I regret that I am unable to attend today's hearing, but I am submitting this prepared statement which discusses the Department of the Interior's position on H.R. 4469, a bill "To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes." I will be pleased to answer any written questions the Committee may have.

We object to enactment of H.R 4469 unless it is amended to meet our concerns. If the unjustified Federal contribution of $15 million is not deleted, we would recommend that the President veto the bill.

Since the 1950's there has been a dispute among the Indians of the Hoopa Valley Reservation in Northern California as to who is entitled to share in the timber proceeds from the "Square" portion of that Reservation. (The Square is in Hoopa Valley, and the "Extension" follows the Klamath River to the Pacific.) Following a 1958 opinion of the Solicitor's Office that the Hoopa Valley Tribe was entitled to receive all the timber income, individual Indians, now numbering some 3800 of Yurok and other tribal groups, brought suit in 1963 for damages for their exclusion from shares in the income (Jessie Short, et al. v. United States, No. 102-63, United States Claims Court). The Yurok Tribe has never organized itself as a political or corporate entity, and thus has no spokesmen or official representatives.

At the time the litigation was begun, the Square was treated as a separate reservation from the Extension. In 1973, the Court of Claims held that there was but a single reservation. Subsequently, the Court ruled that all the "Indians of the Reservation" are entitled to participate in per capita distributions of the income from the timber on the unallotted (tribal) lands of the Square. From 1974-1978 efforts were made to determine the identity of the "Indians of the Reservation" and to mediate a settlement.

In 1979, the Government moved to substitute the Yurok Tribe for the 3800 individual plaintiffs, and the Hoopa Valley Tribe, as intervenor, moved to dismiss the case. In 1981, the Court of Claims denied the motions and ruled that successful plaintiffs would be determined on standards similar to the standards for membership in the Hoopa Valley Tribe. The Federal Circuit Court of Appeals affirmed. The petitions for certiorari filed by the Hoopa Valley Tribe and 1200 of the plaintiffs, the third unsuccessful effort to obtain certiorari in the case, were denied by the Supreme Court on June 19, 1984.

In 1980 another suit was filed (Lillian Blake Puzz, et al. v. United States et al., No. C-80-2908 TEH, U.S.D.C., N.D. California) by six individuals claiming to be Indians of the Hoopa Valley Indian Reservation whose rights to participate in reservation administration and to benefit from the reservation's resources were allegedly denied by the Federal Government in

violation of their constitutional rights to equal protection. Plaintiffs' claims were initially premised on individual Indian ownership of the unallotted reservation resources, although they later also asserted that all "Indians of the Reservation" constituted one tribe, and that all individual Indians should have a vote in that tribe's government. The Government's position was that the reservation was created for Indian tribes, not individual Indians, and that the recognition of Indian tribes is a political question for determination by the Congress and the Executive Branch and such determinations are not reviewable by the courts.

On April 8, 1988, the court issued an order in which Judge Henderson agreed with the Government that the reservation was created for Indian tribes except that the Hoopa Valley Reservation was not created for a single tribe but for "all tribes which were living there and could be induced to live there." Order at p. 7. The court concluded that Federal recognition of the Hoopa Tribe did not give the tribe exclusive control over any reservation lands and resources.

The court also found that the individual plaintiffs have standing to litigate reservation management issues and that the 1864 statute authorizing the creation of the reservation imposed a trust responsibility on the U.S. Government extending to all the Indians of the Reservation.

Having addressed these issues the court ordered three specific actions:

1. The Federal defendants may lawfully allow the Hoopa Business Council (HBC) to participate in reservation administration, and the HBC may lawfully conduct business as a tribal body sovereign over its own members, and, as an advisory body, participate in reservation administration;

2. Federal defendants shall not dispense funds for any project or services that do not benefit all Indians of the reservation in a nondiscriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefits of the reservation on an equal basis. Specifically, Federal defendants shall not permit any reservation funds to be used for litigation among Indians or tribes of the reservation.

3. To fulfill the requirements of this Order, Federal defendants must develop and implement a process to receive and respond to the needs and views of non-Hoopa Valley tribal members as to the proper use of reservation resources and funds.

On June 7, 1988, we submitted to the court a plan of operation for the management of the Hoopa Valley Reservation resources, as required by the court's April 8, 1988 order. On September 2, 1988 the court denied plaintiffs' motion to strike the plan, although it emphasized that the issues raised in that motion would have to be addressed if this legislation is not enacted and the court is left with the task of approving a final long-term plan for the management of the reservation.

Obviously, the District Court's orders are changing the management of the reservation and its resources. However, we do not believe that they provide

the appropriate vehicle for a satisfactory permanent resolution to all the problems on the Hoopa Valley Indian Reservation. We believe that partitioning the communal reservation and encouraging the Yuroks to organize as a tribe would lead to more satisfactory results.

Now I would like to address our major concerns regarding H.R. 4469. I have attached our technical concerns however, I would like to point out that since we have not yet received the bill as reported by the Committee on Interior and Insular Affairs, our amendments are keyed to the Senate bill S. 2723 which is identical to the House bill as reported.

H.R.4469 partitions the Hoopa Valley Reservation only if the Hoopa Valley tribe passes a resolution waiving any claims they may have against the United States arising out of the provisions of the Act. The resolution must be presented to the Secretary within 60 days of enactment of the Act. The Secretary then publishes the resolution in the Federal Register and the existing communal reservation becomes two reservations. The "square" would become the Hoopa Valley Reservation and the "extension" would become the Yurok Reservation. Additional forest service land would be added to the Yurok Reservation and an authorization of $5 million would be provided for the purchase of additional land for the Yurok Reservation.

We do not believe that expanding the reservation is necessary at this time and strongly oppose the addition of Federal money for this purpose. Currently, there are approximately 400 Yuroks living on the "Extension" which includes 5,373.9 acres (including tribal land and allotments). We recommend that this provision be deleted.

Upon enactment of the act, the existing $50 million communal escrow account is to become the basis of a settlement fund. An additional $10 million is authorized to be appropriated to add to the fund. We do not believe the settlement fund should be established until the communal reservation is partitioned. Further, we believe that the bill should not become effective (except for section 12) until the Hoopa Valley Tribe adopts and sends to the Secretary, the resolution called for in section 2(a).

We strongly oppose the addition of Federal money to this fund and believe that the distribution of the fund should be used for making the payments under section 6 and giving any remaining funds to the Yurok Tribe. The partition of the communal reservation and the communal escrow account should not require the addition of Federal funds. If the amount in the escrow fund is not sufficient, we believe the per capita amounts available to individuals under the bill should be changed so that the escrow funds cover those payments. We believe the bill should be amended to specify that if adequate funds are not available in the Settlement fund to make the payments, such payments shall be pro-rated accordingly. Any funds remaining in the Settlement Fund after all payments have been made or provided for, should be held in trust for the Yurok Tribe.

The Secretary is to prepare a settlement roll of all persons who can meet the criteria established by the Federal court in the Short case for qualification as an "Indian of the Reservation". The Secretary is to provide each eligible person the opportunity to choose one of the following options: 1) become a member of the Hoopa Valley Tribe (if appropriate criteria are met); 2) become

a member of the Yurok Tribe and receive a $3000 payment; or 3) elect to receive a payment of $20,000 and give up all rights to the reservation and all rights to membership in the Yurok Tribe. Parents and guardians of children on the Settlement Roll under the age of 18 would choose an option for their child.

Although we do not object to the provision allowing parents or guardians making the choice for minor children, we believe that the children's payments should be held in trust until they reach age 18. The Settlement Fund could remain in effect and draw interest until each minor reaches age 18 and receives their payments.

We further recommend that the Settlement Roll be established as of the date of the partition of the communal reservation rather than as of the date of enactment of the Act. This could assure that the roll would include all persons having an appropriate interest at the time of the partition. Anyone born after the partition would of course, not have an interest in the previous single communal reservation.

Section 9 provides for the organization of the Yurok Tribe under the Indian Reorganization Act. Within 45 days of the official notice the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe. The General Council would vote on the adoption of a resolution waiving any claim the Tribe may have against the United States arising out of the provisions of this Act and to nominate candidates for an interim council. The general council would elect an Interim Council to represent the tribe until a constitution and tribal council are in place, or for 2 years, which ever is the shorter period. The Interim Council would appoint a drafting committee to draft a tribal constitution and request the Secretary to authorize an election to vote on the constitution.

The time required for the Secretary to provide notice, call general council meetings, and hold elections is unreasonable. The Bureau would not be able to meet such requirements. Amended requirements are included in our technical amendments attached to my written statement.

We would also recommend that the tribe be required to have a constitution and an elected tribal council before they enter into contracts or receive grants from the Federal Government. Under the bill the Interim Council could enter into a contract and then after two years the council would be dissolved. We do not believe this is either good management or fair to the tribal members who may receive services under the contract.

Section 13 provides for statute of limitations for any claim brought against the United States challenging the partition of the communal reservation under this act. We defer to the Department of Justice on these provision.

Mr. Chairman, we urge the Committee to amend the bill to meet our concerns, particularly with respect to the appropriation authorization of $15 million. I have attached a number of technical concerns to my written statement.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.

Recommended Amendments to S. 2723

Section 1(b)(7) defines Karuk Tribe as organized after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs. The Bureau of Indian Affairs did not hold a special election. We recommend the following amendment:

Section 1(b)(7) line 16 (page 3) after "constitution" delete "after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs" and change "April 18" to "April 6".

Section 2 (c)(3)(A) provides authority for the Secretary to take additional land into trust status for the Yurok Tribe. We recommend that the provision clarify that the land would be part of the Yurok Reservation. We recommend the following amendment:

Section 2(c)(3)(A) line 8 (page 7) add at the end "and that such lands may be declared to be part of the Yurok Reservation".

Section 4(a) establishes a Settlement Fund upon enactment of this act. We believe the fund should be established upon the partition of the reservation. We recommend the following amendment:

Section 4(a) line 8 (page 9) delete "enactment of this Act" and insert "the partition of the Hoopa Valley Reservation under section 2 of this act".

Section 4 (a)(2) permits the Hoopa Valley Tribe to use up to $3.5 million annually out of the income or principal of the Settlement Fund for tribal, non-per capita purposes. We believe the Yurok Tribe should also be able to draw from this account. We recommend that Sec. 4 (a)(2) line 12 (page 9) be amended as follows:

"(2) Until the distribution is made to the Hoopa Valley and Yurok Tribes under subsection (c), the Secretary may distribute to both tribes an amount not to exceed income and interest earned less 10 per cent for the current operating year out of the Settlement Fund. These funds may be used for tribal purposes and may not be distributed as per capita payments."

Section 4(b) on page 9, line 23 should be amended by striking out "pending" and inserting in lieu thereof "pending payments under section 6 and".

Sections 4(c) line 3 (page 10) and 4(d) line 13 refer to the wrong paragraph. Section 6(a)(3) should be changed to "6(a)(4)".

Subsections (c), (d), and (e) of section 4 on page 10, line 1 through page 11, line 6 should be deleted.

Section 5 provides for the Secretary to establish a Settlement Roll of eligible persons living on the date of enactment of this Act. We recommend that the roll be established as of the date of the partition of the reservation to avoid any possible problems regaroing the status of a person born between the time of enactment of the Act and the partitioning of the reservation. We also recommend that the Secretary be given more time to complete the necessary procedures for establishing the roll. The following amendments are recommended:

Section 5(a)(A) line 20 (page 11) change "of enactment of this Act" to "of the partition under section 6(a)".

Section 5(b) line 24 (page 11) change "thirty" to "one hundred and twenty".

Section 5(d) line 22 (page 11) change "one hundred and eighty days" to "two hundred and forty days".

Section 6 requires the Secretary to notify all eligible persons of the options available to them under the act. We believe it should be clear that each individual must choose one option. We also recommend that notice be given by certified mail rather than by registered mail. We recommend the following amendments:

Section 6(a) line 23 (page 13) change "registered" to "certified".

Section 6(a) line 1 (page 14) after "elect" insert "one of".

Section 6(a)(3) (page 14) should be amended to designate paragraph "(3)" as "(3)(A)" and add a new subparagraph "(B)" as follows:

"(B) The funds entitled to such minors shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such persons including all interest accrued."

Section 6(b) line 3 (page 15) "March 21" should be "March 31".

Section 6(b)(3) requires the Secretary to assign a blood quantum to persons electing to become enrolled members of the Hoopa Valley Tribe. We recommend the following clarifying amendment:

Section 6(b)(3) line 23 (page 15) should be amended to read: "The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982 decision of the U.S. Court of

Claims in the case of Jessie Short et al. v. United States, (Cl. Ct. No. 102-63)".

Section 6(c)(2) line 17 (page 16) should be amended for clarity and consistency with subsection (b)(3). After "shall" delete "assign each person that quantum of "Indian blood" as may be determined" and insert "determine the quantum of "Indian blood", if any,".

Section 6(c)(3) lines 22 and 23 (page 16) should be amended to read as follows:
"(c) The Secretary shall pay (subject to section 7 of the Act of October 19, 1973, as amended (25 U.S.C. 1407)) to each person".

Section 9 provides for a procedure for the organization of the Yurok Tribe. We believe an interim council should be elected for the primary purpose of drafting a constitution. The Secretary should provide services until the tribe has a constitution and an officially elected tribal council. We recommend the following amendments:

Section 9(c) line 10 (page 19) change "30" to "60".

Section 9(c)(3) line 12 (page 20) change "45" to "60".

Section 9(d)(2) line 6 (page 21) should be amended as follows:

"(2) The Interim Council shall represent the tribe to assist the Secretary in determining the needs and appropriate programs for the tribe. The Council shall be responsible for determining appropriate use of the funds available to the tribe under section 4(a) of this act."

Delete paragraph "(3)" and renumber "(4)"as "(3)".

Renumber paragraph "(5)" as "(4)" and on line 1 (page 22) delete the words "or at the end of two years after such installation, whichever occurs first".

Section 10 allows the merger of existing Rancherias with the Yurok Tribe. There is no Tolowa Rancheria so that reference should be deleted. We also recommend that since the names listed in this section are names of Rancherias and not names of Tribes that the section be amended to reflect that difference.

Section 10(b) line 23 (page 22) should be amended to add "any of the following Rancherias at" after "members of". Delete "the" after the word "of".

Section 10(b) line 24 (page 23) after "Elk Valley" delete "or Tolowa Rancherias".

Section 11 provides for the addition of a member of the Karok and Yurok Tribes to the Klamath River Basin Fisheries Task Force.

The Secretary is to appoint the member for the Yurok Tribe until the Tribe is recognized. Since the tribe is already Federally recognized we recommend this provision be changed to refer to the tribe's organization.

Section 11(b) line 23 (page 23) delete "established and federally recognized" and insert "organized".

Section 11(b) line 2 (page 24) change "recognized" to "organized".

Aod a new section 14 at the end of the bill as follows:

"Sec. 14. This Act (except sections 2(a) and 12) shall be effective upon partitioning of the reservation as provided in section 2(a). Sections 2(a) and 12 shall be effective upon enactment."

[The statement of Senator Cranston follows:]

TESTIMONY OF SENATOR ALAN CRANSTON

BEFORE

THE HOUSE SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENTAL RELATIONS

SEPTEMBER 30, 1988

Mr. Chairman, I am pleased to speak today in support of H.R. 4469, the proposed "Hoopa-Yurok Settlement Act," as reported out unanimously by the House Interior and Insular Affairs Committee. As you know, H.R. 4469 was first introduced in the House by a fellow Californian, my good friend Representative Doug Bosco on April 26, 1988. I applaud the leadership of Representative Bosco for first introducing H.R. 4469, and I look forward to working with him to gain enactment into law a legislative solution which will end the Hoopa-Yurok controversy.

Mr. Chairman, on June 30, 1988, Senator Daniel Inouye of Hawaii, Chairman of the Senate Select Committee on Indian Affairs, held an oversight hearing on the status of the Hoopa Valley Indian Reservation and related issues in Sacramento, California. Testimony was received at this oversight hearing from those in support as well as from those opposed to a legislative solution to the Hoopa-Yurok controversy.

I believe that the field hearing provided an excellent forum in which various parties could not only express their own views, but listen to the views expressed by others in attendance. Moreover, I believe that Senator Inouye's call for Hoopa and Yurok Indian people to participate in the design of "an Indian solution to an Indian problem" was taken to heart by many of those who attended the field hearing in Sacramento. Indeed, Mr. Chairman, the legislative initiative you have before you today is the product of negotiations between Hoopa and Yurok people which began after the Sacramento field hearing. Hence, I deeply appreciate the interest of Senator Inouye and the very positive role he has played.

Mr. Chairman, on August 11, 1988, I introduced as S. 2723, a measure identical to the version of H.R. 4469 unanimously reported out of the House Interior and Insular Affairs Committee. A hearing on S. 2723 was held by the Senate Select Committee on Indian Affairs on September 14, 1988. This hearing produced a number of suggestions which were subsequently incorporated into a substitute amendment. On September 29, 1988, the Select Committee on Indian Affairs adopted an amendment in the nature of a substitute and reported out unanimously S. 2723.

In brief, Mr. Chairman, H.R. 4469 and S. 2723 propose to partition the lands of the Hoopa Valley Reservation between the Hoopa Valley Tribe and the Yurok Tribe in settlement of a dispute as to the ownership and management responsibilities for such lands. This proposed partition is generally consistent with the aboriginal territory of the Hoopa and Yurok tribes. Further,

H.R. 4469 and S. 2723 provide for a number of settlement options to be made available to individual Indians who can meet requirements established by the United States Court of Claims in the case of Jessie Short et al. v. U.S., for qualification as an "Indian of the Reservation".

Mr. Chairman, litigation spanning a quarter of a century, while perhaps correct from a legalistic perspective, has failed to resolve the controversy over ownership and management of the Hoopa Valley Reservation and, indeed, has led to some most unfortunate results. For example, control of the affairs of the Hoopa Reservation has shifted from Indian hands to the Bureau of Indian Affairs -- a dismal result in terms of both Indian self-determination and tribal sovereignty. Additionally, hundreds of the parties to the litigation have died awaiting a judicial solution that still has not been achieved.

It is clear to me that only the Congress, through an exercise of its plenary power, can put an end to the present unhappy situation on the Hoopa Valley Reservation. Mr. Chairman, in order for Congress to carry out the trust responsibilities of the United States, I believe that it is incumbent upon Congress to do no less.

Mr. Chairman, I strongly believe that H.R. 4469 presents a reasonable and equitable legislative solution to the current confusion and uncertainty as to existing ownership and management rights on the Hoopa Valley Reservation. I urge this committee, therefore, to report out favorably H.R. 4469 so that we may have an opportunity to act on this legislative initiative during the remaining days of the 100th Congress.

[The statements of Mr. Colegrove follow:]

TESTIMONY OF WILFRED K. COLEGROVE
HOOPA VALLEY TRIBE
ON H.R. 4469
BEFORE THE
JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE LAW & GOVERNMENT RELATIONS
SEPTEMBER 30, 1988

My name is Wilfred Colegrove and I am the Chairman of the Hoopa Valley Indian Tribe. I live in northern California on that portion of the Hoopa Valley Indian Reservation known as the "Square" where our tribe has lived and governed its affairs for over 10,000 years. On behalf of our Council and all Hoopa people, thank you for this opportunity to testify in support of H.R. 4469.

Background of the Problem

To put my testimony in perspective, I would like to take just a few minutes to explain the background of H.R. 4469. The problem needing corrective legislative action was caused about 100 years ago by the joinder through an Executive Order of two non-contiguous Indian reservations, the Hoopa Reservation in the mountains (known as the Square) and the Klamath River Reservation north of Hoopa along the Klamath River and the coast (known as the Extension). That joinder is the genesis of at least a dozen lawsuits.

In the 1850's and 1860's there was war in California. To help bring about the peace in 1864, Congress authorized the establishment of four tracts of land in California for Indian reservations. Under this Act the Hoopa Reservation was established.

Our trouble began when non-Indians living north of us in the coastal area challenged the legal existence of the Klamath River Reservation in an effort to gain access to the Redwood forests along the River. They argued that the Klamath River Reservation, established in 1855 pursuant to earlier legislation, constituted a fifth reservation in California and, thus, was illegal under the 1864 Act. In 1891 an Executive Order joined the boundaries of the Hoopa Reservation with those of the Klamath River Reservation, thereby reducing the number of reservations in California. Despite the merger, the two tribes have remained, as they were historically, politically and culturally separate.

Beginning in the early 20th Century, land holdings on the Extension were individualized (allotted), and individual Yurok Indians living on the Extension sold their lands and timber. The

Interior Department also sold "surplus" land on the Extension and used the proceeds for the benefit of the Yurok Tribe, not for us. Most of the Hoopa Square remained unallotted, and only small parcels for house lots were allotted to our tribal members.

Because of better access to the coastal transportation systems, most Extension timber had been harvested by the 1950's, when the Interior Department began selling Hoopa tribal timber from the Square. Under federal law the income was used by the Tribe for essential governmental functions, and the remainder distributed to individual tribal members on a per capita basis. The Solicitor of the Department of the Interior issued a legal opinion that timber proceeds from the Square should be used only for the benefit of Hoopa tribal members.

Short Litigation

In 1963, a few people brought the Short lawsuit. According to Mrs. Short and many other Short plaintiffs, their intent in bringing this suit was not to create problems for the Hoopa Tribe, but rather to gain BIA recognition of their status as Indian people eligible for federal services and protection, and to obtain damages for the loss of their lands through federal sales and the allotment process. In searching for a legal basis for those claims, the attorneys developed the argument that the Square and the Extension were one reservation and that Yuroks were entitled to damages for being excluded from the per capita distributions of timber income from the Square. This was the beginning of the legal battle which has lasted for over 25 years.

The Short attorneys rounded up 3,800 individual plaintiffs who were descendants of the pre-1900 Indians of the Klamath River area to intervene in the suit. Only about 500 of these people live on the Square or the Extension, and about another 800 live within 50 miles. The rest are located throughout the State of California and the United States; and a few are even in foreign countries. None of these people have ever organized a Yurok tribal government or identified who among them are actually tribal members. The only community of interest among the majority of plaintiffs is as litigants in Short and Puzz.

Nevertheless, in 1973 the Court of Claims ruled that the Interior Department had been wrong to limit timber per capita payments solely to our tribal members.

Puzz Litigation

Short was followed in 1980 by another suit, Puzz v. United States. This case was brought by 5 individuals who sought to dissolve the Hoopa Tribe and prevent the federal government from

recognizing any tribes on the Reservation. In its decision earlier this year, the Puzz court ruled that federal deference to the authority of the Hoopa Tribe was unlawful. Thus, the court ordered BIA to take over reservation management. Citing this decision, the BIA has assumed total authority of tribal and reservation affairs, and vital social services have been lost or upset because of BIA's inability to decide issues or take action. The Puzz decision was the straw that broke the camel's back.

BIA Takeover Destruction

1. BIA Has Crippled Tribal Government

On April 8, 1988 a Federal District Court Judge issued a ruling in Puzz, which stripped our tribe of governmental authority over the Hoopa Square and directed BIA to run our lives. The judge directed BIA to prepare a plan to comply with his order. BIA has seized the opportunity and applied the order in an extreme and irresponsible manner. Its untimely decisions have totally disrupted social services and tribal government. Even the judge said that he did not intend to destroy the "existing structure of tribal self-government;" yet, BIA has superimposed a six-member body called the "CAC" to advise BIA on all program and budgeting decisions. BIA has refused to deal with the elected Hoopa Tribal Council entirely, instead requiring us to designate three individuals to sit on the CAC.

2. BIA Perpetuates Itself with Trust Funds

BIA has run wild with the Puzz judge's direction. It has used Puzz to try to muzzle the efforts of the Hoopa Tribe and responsible Yurok leaders to obtain enactment of corrective legislation. For example, on August 5th BIA ruled that no tribal trust funds may be used for our legislative office. This is not really because of Puzz but to protect and enhance federal jobs and gain BIA spending authority, which BIA hopes will be the permanent result of the Puzz case. And its hopes are not without foundation. Already the judge has approved payment of BIA's Puzz compliance costs from tribal trust monies.

3. BIA Incompetence Evident in Plan

The Puzz Compliance Plan changes stripes every time you look at it. There are now five separate versions of the Plan, each different than the earlier one, each providing for later and later decision-making, and each confirming the incompetence of BIA to administer federal, much less tribal, programs. For example, the Plan filed with the court in June provided that Reservation programs for the Fourth Quarter of fiscal year 1988 would be approved, funded, and announced in the newspapers the first week of July. Instead, BIA first released an insufficient

amount of tribal funds for the Hoopa Tribe to operate for one month of the Fourth Quarter, and said the rest of its decisions would be postponed until August 10. Then BIA withheld all tribal funds until August 23rd. The Hoopa Tribe reduced employee working hours and program services, borrowed and scraped to maintain tribal programs during the weeks for which tribal funding was withheld. Under the latest version of the Plan BIA will make no decisions about fiscal year 1989 until the fourth week of October, weeks after programs need to begin serving the people.

4. BIA Views Trust Funds Like Kids in Candy Store

But you haven't heard the worst of it yet. BIA employees are acting like kids in a candy store deciding which projects to fund with tribal money: the CAC and BIA received a flood of funding proposals from federal agencies themselves eager to use tribal money to fund activities for which they don't want to use federally appropriated dollars. For example, two different BIA employees dealing with Reservation fisheries designed about six fisheries related projects which they plan to operate directly through the BIA, or personally as consultants. In addition, Indian Health Service has grandiose funding schemes dealing with its personal water and sewage concerns, not the tribes'. BIA has approved five of these requests. Both agencies have federally appropriated funds available for these projects; yet, because of funding priorities or tribal money being more readily available, they want to use Reservation income. Ironically, the Puzz judge says he sees nothing wrong with this. We have appealed to the Court of Appeals, because it is illegal for tribal trust funds to be used without specific authority from Congress. Yet, BIA rushes head-long into doing just that. Perhaps this is the reason that BIA has impounded the majority of our tribal income since 1974, so that what is referred to as the "escrow funds" in H.R. 4469 and S. 2723 have built up to approximately $65 million. BIA hopes and plans to use this money one way or another.

5. BIA Economic Development Project Obstacles

A tribal motel complex, the main positive economic expansion on the Square, was on the verge of construction when the Puzz order was issued in April. In response to Puzz, BIA refused to approve the tribe's use of this unallotted tribal land, blocking our loan guarantee and funding for construction. After a long delay, finally, BIA permitted us to go ahead, but on the condition that for use of our own Reservation land we sign a lease under which we will pay far more that if we had purchased fee patent land right next door.

6. Tribe Without Territorial Sovereignty to Manage Resources

Puzz, with BIA support, has terminated the Hoopa Valley Tribe's territorial sovereignty and set a dangerous precedent for tribal governments nation-wide. BIA is taking the place of our elected leaders. Survival of our Tribe depends on our ability to protect and responsibly manage our natural resources. Yet our tribal court system now has no jurisdiction to enforce tribal ordinances to protect these resources. We have no power to zone commercial development or regulate outsiders who may trespass or steal tribal resources. Without territorial sovereignty we cannot continue tribal jurisdiction under environmental laws such as the Clean Water Act. Neither BIA nor the Puzz court can answer these problems. Nor are they the least bit concerned.

Thus, Hoopa Valley is still without a Reservation hospital or an emergency room, without the necessary BIA agreement for our tribal timber corporation to get logging and timber processing contracts on our own Reservation. Future years' timber sales are delayed, P.L. 93-638 contracts are delayed, and BIA refuses to turn over to the Tribe surplus buildings and property essential for major social service grants. This federal compliance plan is unworkable, oppressive, and is devastating our lives and communities.

Negotiation Failed Repeatedly - Legislative Solution Initiated with H.R. 4469

Soon after Puzz was decided, Congressman Doug Bosco introduced H.R. 4469 to settle the Reservation's problems. He knew that during the 25 years of litigation, there had been many attempts at a negotiated settlement. The House Interior Committee staff has met with the parties. The judge ordered meetings just between parties, meetings just between attorneys, and even meetings in which the judge himself participated. Unfortunately, all of these attempts at a negotiated solution failed and instead led to more motions, more briefs, and more court cases. Realizing that the courts could not solve this problem, Congressman Bosco introduced H.R. 4469, understanding that it was not a perfect bill, but feeling that it might bring the parties to the negotiating table.

Senate Continued with Oversight - Tribes Worked Together

Shortly after introduction of H.R. 4469, the Senate Select Committee on Indian Affairs held an oversight hearing in Sacramento. At that hearing Senator Inouye encouraged us to arrive at "an Indian solution to this Indian problem." As a result, a group of tribally-oriented, on-reservation Yurok people sat down with our Hoopa Tribal Council and began to try to develop a resolution of this problem.

This effort differed from past efforts because the tribally-oriented people felt protected from the Short and Puzz attorneys by congressional interest.

Our negotiations continued for weeks. The Yurok representatives wanted many changes in the bill to better protect Yurok tribal interests, and we reached agreement on the majority of points. We then went together to meet with representatives of all of the members of the House Interior and Insular Affairs Committee to explain our feelings and as a result, H.R. 4469 was amended in Committee.

Hoopa Tribe Accepted Compromise

When the bill finally emerged, it contained many provisions which were not easy for us to support; however, we have agreed to do so in the hope of arriving at a solution to the prolonged problem. For example, the Hoopa Tribe was forced to agree that over $45 million in escrowed trust funds be used to provide operations and development capital to the Yurok Tribe and its members, payments to Short plaintiffs and others; and to agree to the unprecedented requirement that we accept as members persons not meeting our Hoopa enrollment criteria.

Senate Bill Emerged

The Hoopa/Yurok agreement, the proposals reported by the House Committee, and Senator Cranston's hope for resolution of the controversy, led to his introduction of the House reported bill in the Senate as S. 2723. On September 14, 1988 the Senate Select Committee on Indian Affairs held a hearing on S. 2723. The staff has met often with representatives of all viewpoints and has crafted further amendments to S. 2723.

Efforts to Inform All About Legislation

We at Hoopa have gone a long way to ensure that all people affected have accurate information on this legislation. Over 3,000 copies of the House and Senate bills have been distributed in California. We have published a joint full page newspaper ad with the Yurok people. Other members of our tribal council have done radio shows and held community meetings. We are confident in saying that this bill has strong support from both on-reservation and off-reservation Yurok people. Moreover, we will submit for the record expressions of support from many tribes, organizations, and individuals.

Hoopa Supports Yurok Requests

We of the Hoopa Tribe want nothing more than to find a fair answer to our long-range problems. We believe that S. 2723 and H.R. 4469 as reported by the House Interior and Insular Affairs Committee do that. We recognize the importance of ensuring the continued existence of the Yurok Tribe, and we, therefore, support Yurok requests for additional land and program monies. We also support the Yurok proposal for limiting parents' rights to accept the cash settlement option for their children.

Real Meaning of Legislation

Mr. Chairman, the passage of legislation would not only mean the end to 25 years of strife and stalemate, it would also mean the preservation of the Hoopa and Yurok Tribes. We of the Hoopa Valley Tribe cannot put into words what it feels like to have a congressional mistake in 1864 now, 114 years later, leaving our tribal government fighting for its mere existence. This legislation will put an end to our struggle and allow the Hoopa and Yurok people to live at peace and prosper.

We who have had our tribal sovereign authority stripped by five plaintiffs relying on antiquated federal law, who have had the income from our land taken from us and placed in escrow, who have had the federal court and the BIA try to replace our elected officials with BIA bureaucrats, find it difficult to understand how others can claim that this legislation is terminationist. Mr. Chairman, the Puzz case is termination; this bill is not. The Puzz case is a direct attack on the principle of the Indian Self-Determination Act and federal Indian policy as it has existed for the last 30 years. These are policies which the Congress and so many others have worked so long to achieve.

This legislation assures the continued existence of the Hoopa Tribe, provides for the organization and rebuilding of the Yurok Tribe, and resolves many of the problems which have stifled the progress of both. It also expands the acreage of the Yurok Reservation and frees up monies for economic development on both reservations. In addition, it prevents the ad hoc abolishment of tribal government on this and other Indian reservations which is possible as a result of the Puzz decision. This is not termination, as some allege. It is restoration.

Joint Hoopa-York Council Unacceptable - Like Joining U.S. and Canada

Some opponents of this legislation have and will come before this Committee and suggest that legislation is not necessary. They propose in lieu of the establishment of two separate

reservations the establishment of one joint council to govern both the Hoopa and Yurok aboriginal lands.

This may seem to some like a logical and very acceptable proposal. What they do not understand, however, is that this proposal is analogous to the abolishment of the United States and Canada and the creation of a new nation "AmerCan." While the AmerCan analogy may seem a bit silly to some of you I assure you it is not. To us it is exactly the same. The U.S. and Canada are geographically connected on the map. There is some intermarriage. Many of their people have some similarities in language. Our lands have to some extent been managed in comparable ways. But I must emphatically state, Mr. Chairman, that a joint Hoopa-Yurok management council is as unacceptable to the Hoopa people as I hope that an AmerCan nation is to you and the other members of this Committee.

Our people feel in their hearts and know in their minds that we are Hoopa, just like you and the other members of this Committee know you are Americans. Those feelings are based on numerous things: our culture, our way of life, our political beliefs, our language, our religion, and our history. I do not believe that there is one member of this Committee who would vote for legislation to join the United States and Canada, even if the United States was guaranteed its pro rata share of elected representatives in the joint government. Thus, we hope that you can understand why we, as Hoopa people, cannot accept or even consider the idea of a joint government to manage our reservation. We are a nation of people fighting for our homelands, and we will continue to fight until the day we die.

This is not to say that the Hoopa Tribe will be unwilling to work closely with a newly formed Yurok Tribe. We are anxious to do so. Our tribes have many common interests and concerns which I am positive can and will be addressed through the mutual cooperation of our two separate governments.

Basis For Services and Development

You have heard comments about the bleak economic situation on the Extension and about the Square having some services which the Extension lacks. That is true, but the lack of services stems in large part from the litigation and the Yurok Tribe's failure to organize itself so that it can, as do other governments, enter into agreements, pass laws, and receive and administer funding to provide services. The power, phone, and water lines we have are a result of thousands of hours of negotiation and work by our Hoopa Government. The agreements providing for many of these services are and were agreements between government and private businesses and groups of individuals. This legislation will not only begin to correct

many of the problems faced by the Extension, it will improve the economy and way of life on the two reservations and the surrounding communities. The organization of the Yurok Tribe will allow the Yurok people access to federal and state programs now denied. It will free up over $65 million in private funds for economic development on the Square and the Extension. It will allow for the continuation of Hoopa Tribal businesses and the development of Yurok Tribal businesses.

But, above all, it will preserve our traditional homelands and our culture. The Hoopa and Yurok Tribes are composed of many strong and capable individuals, and I do not hesitate to tell you that our communities will look substantially different as soon as this legislation lifts the federal obstacles to development and prevents those outside the tribal community, seeking only to profit from chaos, from sabotaging tribal stabilization and growth.

Passage Will Lift State of Siege and Halt Termination

In their efforts to defeat this legislation, Short & Puzz plaintiffs' attorneys have labeled it terminationist, analogizing it to the 1954 Klamath legislation. This legislation is very different. It does not terminate the federal relationship with the Yurok Tribe. Rather, it reaffirms that relationship and provides the Tribe with essential financial, resource and governmental tools to endure and prosper. And it gives the individuals a variety of choices to make, depending on their own particular circumstances. For example, a plaintiff living in Maine, whose only interest is economic based on being a plaintiff, may choose to buy out. Even for those individuals who do not want to affiliate with either the Hoopa or Yurok Tribe, the legislation does not end the trust status of any lands they hold, and it does not end their federal Indian status. Other plaintiffs who feel a sense of community or tribalism can choose to participate in the revitalized Yurok Tribe. This is genuine self-determination, and it is condescending for plaintiffs' attorneys to say their clients are incapable of making these choices. It is Puzz which is terminationist. Puzz has already begun to terminate the Hoopa and Yurok Tribes.

Moreover, the enhancement of Yurok tribal status and the individuals' options are over and above the substantial monetary recovery of each entitled Short plaintiff. The legislation does not affect their recovery in any way whatsoever.

I cannot stress strongly enough the impact the Puzz decision has had on the Hoopa Valley Tribe. If this bill does not pass this Congress, the BIA will continue to erode the governmental structure which our Hoopa people have worked for generations to develop. Our community is in a state of siege. A state of siege

was imposed by the federal court, but is managed by the BIA. The BIA "reservation management plan" is a disaster which is becoming worse every day.

Mr. Chairman and members of the Committee, on behalf of the Hoopa Council and all Hoopa Valley people, I implore you to pass this bill as soon as possible. It is our only hope. Failure to pass this bill this Congress will mean the termination of the Hoopa Valley Tribe as we know it. Awaiting legislation under BIA management without use of our own funds for essential governmental functions will kill us; and moreover, we do not have the resources to wage this legislative battle again, and those same outside forces which have prevented a resolution in the past will do so again.

Passage, on the other hand, will mean the rebirth of not just one, but two, Indian nations.

Thank you.

July 6, 1988

Senator Alan Cranston
112 Hart Senate Office Building
Washington, D.C. 20510-0510

Senator Daniel Inouye
722 Hart Senate Office Building
Washington, D.C. 20510-1102

Re: Joint discussions between Hoopa Valley Tribe and Traditional Yurok Indians, who reside within Yurok aboriginal territory

Dear Senators:

Thank you for your efforts in bringing about the oversight hearing before the Select Committee on Indian Affairs on Hoopa-Yurok Indian Reservations, held June 30, 1988, in Sacramento, California.

We, the undersigned tribal leaders, have taken to heart your advice, Senator Inouye, and have met and agreed that the time is right for a legislative solution that brings justice to both tribes. We are working very diligently toward an agreement on points to be included in such legislation. This is a joint effort between the elected members of the Hoopa Valley Business Council, and the Traditional Yurok Indian Spokespersons of the Hoopa Valley Reservation Extension. Testimony on this important matter was submitted by Panels 3 and 4 during the June 30, 1988 hearing.

While many issues were discussed at our first joint meeting, two points were clearly agreed upon: the sovereign authority of the Hoopa Valley Tribe and the Yurok Tribe should not be challenged by the Federal Government; and the Yurok Tribe should be allowed to organize and define its members as it sees fit. Therefore, Mr. Thierolf's proposal for: 1) a referendum vote on the organization of a reservation-wide administrative body of all Hoopa Valley members and Short plaintiffs, and 2) the Interior Department's proposal to define all Short plaintiffs as the Yurok Tribe, are both unequivocally

unacceptable. Such proposals voilate the policies of Indian self-determination, tribal sovereignty, and the United States Supreme Court's holding in the Martinez case when tribes defined their own membership because of the inherent sovereignty.

The second meeting of Traditional Yurok Indians and Hoopa Valley Business Council representatives was held July 6, 1988. We agreed to work together, and with you, in the legislative forum to develop a fair solution to Tribal problems. We will forward proposals to you which we urge be considered for inclusion in the final version of the bill reported by the House and Senate committees. We will submit our proposals no later than July 14, 1988.

Very truly yours,

HOOPA VALLEY TRIBE

TRADITIONAL YUROK INDIANS OF THE LOWER KLAMATH

[The statement of Ms. Sundberg-Brown follows:]

Testimony of Lisa G. Sundberg-Brown
on H.R. 4469
before the
House Judiciary Committee
Subcommittee on Administrative Law & Government Relations
September 30, 1988

Mr. Chairman and members of the Committee, thank you for hearing our testimony on this important bill.

My name is Lisa Sundberg-Brown. I am a Yurok Indian. My family comes from 5 different Yurok villages. I am a resident and member of the Trinidad Rancheria, a full time college student seeking a degree in Government and Political Science. I plan to continue on to law school. I am also a consultant for tribes needing assistance in proposal writing and fund raising for economic development projects, and a designer of high fashion Yurok Indian jewelry. I grew up along the Klamath River and attended school there in the summer and fall months. During those years, I spent time with my grandfather and great uncle learning about my culture and participating in our ceremonial dances. My homeland encompasses some of the most beautiful stretches of land in this country.

I was too young to remember when I became a litigant in Jesse Short v. United States. While I was growing up, however, I remember talking with other young plaintiffs about all the money we were going to get from the Short case. As I got older, I began asking some adults what the case was about and when we were going to get this pot of gold. The problem I ran into was that no two people had the same understanding of what Short was all about, except that we would get a sum of money from the government.

Each year we were told by the attorneys that we were going to get our checks the next year. The "next year" came and went, however, over and over again. In the meantime, over 400 plaintiffs died without ever seeing a dime.

The Yurok Tribe failed to organize its government and identify its members because of people's fear of losing their money judgments in Short. As a result, many Yurok people went without the services I was able to enjoy as a member of the Trinidad Rancheria. Because I was an enrolled member of a tribe and my Jesse Short damages were protected, I could not figure out why our attorneys were informing people that their judgment money in Short would be jeopardized if the Yurok Tribe organized. It was at this time I began doing more research on the Short case and learning what it was all about. The more I found out, the more enlightened I became about the danger of this case and its sister case, Puzz, to the future of the Yurok Tribe, and to the sovereignty of tribes across the country.

Mr. Chairman, I view myself as a Yurok Indian, not a Hoopa. I was raised in Yurok territory with Yurok values. I am not white either. Just because I have white blood in me doesn't mean that I am white. I consider myself Indian. I believe that each plaintiff should be allowed to choose for him or herself who they are, and which tribe they identify with. H.R. 4469 allows this, but more importantly it protects the aboriginal territories of the Yurok Tribe.

I know you have heard that because some of us have both Yurok and Hoopa blood, we are one big happy family and should have one big reservation-wide government; however, other tribes have demonstrated that these types of governments are more problems than they are worth. I know from growing up around my elders that it is not the type of blood you have but what cultural and religious values you were raised with which determine tribal political affiliation. As a result, I came to believe that despite the Short case the Yurok Tribe had some very obvious options. Since the Yurok plaintiffs' judgement money would not be affected by tribal organization, I felt that the Tribe could organize, have a membership role, and start to administer federal, state and tribal programs to provide services for its people. As a result, in June of this year (1988) I was actively involved in an effort to organize the Yurok tribe. Unfortunately, however, this effort failed because Short and Puzz activists told people that by organizing they were going to lose their Short money and their rights to the Yurok Tribe, the organizational effort was simply a trick of the BIA. Thus, the time wasn't right and the people voted it down, but only by a narrow margin.

I could not understand why this happened, until I spoke with Mr. Theirolf, the attorney for the Puzz case who was present at the election. During our discussions, I learned that some of the people who voted against organization had been convinced that rather than becoming members of the Yurok tribe, they should instead support the establishment of a reservation-wide government which was and is being advocated by the Puzz activists. This is another avenue of organizing my people; however, in order to achieve this type of government, the Hoopa Tribe would then have to be abolished. I have read that the only power capable of doing this is Congress, not a court, as the 5 Puzz plaintiffs and their attorney are proposing to do. I was outraged by this attempt to abolish a tribe who has been in existence for over 10,000 years but I was more appalled to learn that part of the argument in the Puzz case was that there is no Yurok Tribe. This ran counter to everything I was taught from birth. I was equally shocked to hear that the Puzz attorneys were advocating that as a result of the reservation establishment language in an 1864 Act that no tribe should have rights to this reservation. This position affects not only the Hoopa and Yurok

tribes' sovereignty but the sovereignty of many tribes whose reservation were created with similar language to that found in the 1864 Act, under which the Hoopa Valley Indian Reservation was established. As you are aware, they won in the Puzz case and now, since no one has vested rights to the reservation, the BIA has taken over the management of our tribal resources and accounts, taking 10% off the top of any money allocated as their "management fee". In other words they are paying themselves out of Indian money for a service that is their responsibility in the first place. Furthermore, the BIA is the very culprit who mismanaged our resources and got our people into this protracted 30 year legal battle in the first place!

In an attempt to resolve the many issues surrounding the Hoopa Valley Indian Reservation, Congressman Bosco introduced H.R. 4469, a bill with flaws, but a step in the right direction. To me this was a light at the end of the tunnel. So, instead of killing the baby because it didn't have all of the right features, a group of very dedicated Yurok people who have for years been fighting for Indian programs and Indian issues, even though it has meant sticking their necks on the line in the process, came together and started to work on a more equitable solution to this complex problem.

From the outset, we realized that no one solution will make all of the people happy, and that all parties involved will have to compromise if we are to try and solve our problems and get on with our lives.

I can now have a real appreciation for how it feels to put in long and difficult hours to develop a fair and equitable solution to an Indian problem, only to have myself and that solution viciously attacked by people who don't understand what they are giving up, and by people whose own self-interests are being jeopardized.

We have worked long and hard with Hoopa representatives and with House and Senate staff to make changes in H.R. 4469 and S. 2723 to make the legislation fair to Yurok Indians. We believe we have accomplished that goal.

The final report of the American Indian Policy Review Commission stated, "The ultimate objective of Federal-Indian policy, must be directed toward aiding the tribes in achievement of fully functioning governments exercising authority within the boundaries of the respective reservations. This authority would include the power to adjudicate civil and criminal matters, to regulate land use, to regulate natural resources such as fish and game and water rights, to issue business licenses, to impose taxes, and to do any and all of those things which all local governments within the United States are presently doing." This is our goal for the Yurok Tribe, and one of the main purposes for

my being here today. Only a tribal government can exercise these rights and responsibilities. A citizens group cannot. Thus, for the Puzz attorneys to advocate the continuation of the Community Advisory Council ("CAC") in lieu of the organization of the Yurok Tribe is wrong. The CAC created by the Puzz decision can never have the sovereign authority of an Indian tribe. These powers stem from the inherent sovereignty of Indian tribes and it is clear to me, as I hope it is to you that the CAC is not a tribal government. Sovereign authority of Indian tribes was not given to us by the U.S.; it was merely recognized. These powers can never be held by a mere group of individuals. Thus, it is my belief that people like Ms. Lyle and Mrs. Habberman are misguided in their beliefs. For even if they are successful in the long run, they themselves will lose something which can never be replaced and which anti-Indian groups across this country have been trying to take from them since the white man first came to these shores: their inherent rights as tribal members. Thus, to me the Puzz case, not H.R. 4469, is a form of termination of the Yurok Tribe.

Mr. Chairman and members of this Committee, we are faced with a very ugly scene. I am appalled by the fact that my own attorneys have for the first time finally communicated with their clients about this bill, and then with paid ads in the paper which are both false and misleading. Their failure to print the true facts of this bill has led to twisted interpretations, which has placed fear in many of our people. To give you an example of this, I am hereby submitting as a part of my testimony, these tapes of meetings that have been held by the Puzz attorney, Mr. Theirolf, letters that have been mailed to the plaintiffs by Mr. Wunsch, a letter from Mr. Shearer giving his analysis of the bill, newspaper adds that have been printed to communicate to the plaintiffs the intent of these bills, and newspaper articles that have statements made by the Puzz and Short plaintiffs' attorneys. You will be able to see for yourself the scare tactics being used by these attorneys.

In closing, I believe that the efforts made by the two Indian groups is courageous. I cannot begin to tell you the outright slander that has occurred against all of us because we have been trying to do something I know our ancestors would have done. Many Indian tribes and people support this bill and are happy to finally have a tangible resolution for the 30-year dispute. These people and tribes have been able to decipher what they know is true about tribal government vs. the Short and Puzz attorneys' and their followers' "forked tongues" and "Henny Penny, the sky is falling" rhetoric. The only unfortunate thing is that the majority of the plaintiff supporters are afraid to speak out because they don't want to subject themselves or their families to the harassment and disrespect these people inflict on anyone who questions them. Prolonging this process won't help people understand the bill. It will only allow more political

propaganda to be distributed by desperate people whose motives are extremely questionable!!

The passage of this bill is imperative not only for the Hoopas and the Yuroks but for many other tribes across this nation. This bill reaffirms and strengthens the government-to-government relationship between the tribes and the United States, not terminate it.

Your support is appreciated. Thank you.

[The letter of Ms. Short follows:]

September 28, 1988

Jessie Short
1421 Albee St.
Eureka, Ca. 95501

Janet Potts, of Counsel
United States House of Representatives
Committee of the Judiciary-Administrative Law
and Governmental Relations
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Ms. Potts:

My name is Jessie Short. I was chosen by acclamation in 1963 as attorney in fact of 3323 Yurok Indians and have served my people faithfully in that position for over a quarter of a century.

I would like you to give my request serious thought for I am told that you have decided it is best to hold the Hoopa-Yurok settlement legislation over until next year.

First, I am 83 years old; this Short case was initiated three decades ago...The courts have not been able to resolve this matter. I would like to see it resolved in my lifetime. At this point in time the best possibility for resolving it exists.

Second, if not enacted this year, the Hoopa-Yurok settlement will never be enacted for total control of the case has long been assumed by the Short attorneys who no longer need the voice of their clients and who play one faction against another within the group to maintain control.

Third, although the Short Case was defined as a class action and the class was finally closed and its members defined by the court after many year of being open, we now have other opportunits looming on the horizon, all led by greedy attorneys who smell blood, jostling for position to stake a new claim.

Congress simply must act on this matter which has become a nightmare to the government itself in attempting to deal with Short legal precedents that contradict 100 years of federal Indian policy and the most shocking of all a court ordered takeover of the Hoopa, a organized and federally recognized Indian Tribal Council since 1933. This takeover, the result of a Puzz decision filed by five (5) Indians.

The vast majority of the members of Congress and your peers recognize the need and have moved forward with the goal of enactment of the Hoopa-Yurok settlement act in the 100th Congress. I implore you to accept the judgement of your peers and to allow this matter to come to an end bringing peace to our people.

I know there are large numbers of Indian people, Hoopa, Yurok and other Indians who want this legislation passed this year lest it bring to their reservation the same problems which have plagued our Tribes. I am enclosing a sample of the support I have received from my own Yurok people.

I have traveled to the capitol twice this year, if my health permits I would be there friday. Since it does not I am sending this package for you.

Sincerely,

Jessie Short

Jessie Short

Copy to: Belle Cummins ✓
Danny Jordan

[The statement of Mr. Clinton follows:]

STATEMENT OF

ROBERT N. CLINTON

IN OPPOSITION TO THE NONCONSENSUAL PARTITION OF THE HOOPA VALLEY RESERVATION

BETWEEN THE "HOOPA VALLEY" & "YUROK" TRIBES

Hearing Before the Senate Select Committee on Indian Affairs

Sacramento, California

June 30, 1988

My name is Robert N. Clinton. I am a professor of law at the University of Iowa College of Law. I regularly teach and write in the fields of Native American law. I am a member of the board of editors of F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), co-author of M. Price & R. Clinton, *Law and the American Indian: Readings, Notes, and Cases* (2d. ed. 1983), and have written various law review and related articles on the Indian affairs, usually with particular focus on the constitutional and structural dimensions of such questions. I also teach and write in the fields of constitutional law and federal courts. I am submitting this Statement at the request of the Indians of counsel for some of the so-called excluded Indians of Hoopa Valley Reservation Extension. The views I shall express are my own and should not be attributed to my regular employer, the University of Iowa College of Law.

I oppose the nonconsensual partition of the Hoopa Valley Indian Reservation of California in the fashion contemplated by a bill introduced in the House of Representatives as H.R. 4469. To the best of my knowledge no similar legislation has yet been introduced in the Senate. Thus, this statement will use the plan for partition set forth in H.R. 4469 as reflecting the broad outline of any partition plan currently contemplated for the Reservation. Basically, this proposal calls for the partition of the Hoopa Valley Reservation by giving the most productive and best endowed resources of the Reservation, the so-called Square area created by the executive order of June 23, 1876, to the Hoopa Valley Tribe, a group of Indians comprising approximately thirty percent (30%) of the total population of the Hoopa Valley Reservation, and by leaving the relatively unproductive land of the so-called Extension area in a nonarable and nontimbered canyon along the Klamath River to the remaining seventy percent (70%) of the reservation population. For reference I have attached to this Statement a copy of the map of the Hoopa Valley Reservation taken from the Supreme Court's decision in *Mattz v. Arnett*, 412 U.S. 481 (1973). For clarity, in this statement, I generally shall refer to the Hoopa Valley Reservation as comprising the entire legal area of the Reservation unless the historical context of my statement indicates otherwise. The area designated on the map as the "Original Hoopa Valley Reservation" is the so-called Square created by the executive order of June 23, 1876 and the so-called

Extension is the combination of the two areas labeled on the map as the "Old Klamath River Reservation" and the "Connecting Strip," both of which were added to the Hoopa Valley Reservation for the benefit of all members of the Reservation by the executive order of October 16, 1891.

The basic nature of my opposition to the partition legislation is threefold. First, the legislation never has been presented to or voted on by *all* persons holding beneficial interests in the Hoopa Valley Reservation. Second, it proposes to legislatively subvert, if not completely thwart, the effect of over twenty-five years of litigation[1/] and to overturn the letter and spirit of the judgments and orders secured in those cases. Finally, the partition plan proposed in H.R. 4469 constitutes a taking of Indian property without just compensation in violation of the fifth amendment to the Constitution that may create unanticipated substantial monetary liabilities for the United States and its taxpayers notwithstanding a contingent indemnification provision designed to ameliorate such consequences. In explaining the reasons for my opposition to the nonconsensual partition of the Hoopa Valley Reservation, I shall address in this Statement: (1) the history, background, demography, and economics of the Reservation, (2) the results of the litigation that this legislation seeks to overcome, and (3) the constitutional problems with the plan for partition of the Hoopa Valley Reservation proposed in H.R. 4469.

HISTORY & BACKGROUND OF THE HOOPA VALLEY RESERVATION

Like most of the Indians of the Pacific Northwest, the indigenous occupants of Northern California, including the Indians of the communities along the Klamath and Trinity Rivers, were

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1. *Puzz v. U.S. Department of the Interior*, No. CR0-2908 TEH, slip op. (N.D.Cal. April 8, 1988); Short *v. United States*, 12 Cl. Ct. 36 (1987); (*Short IV*); *Short v. United States*, 719 F.2d 1133 (Fed.Cir.1983), cert. denied, 467 U.S. 1256 (1984) (*Short III*); *Short v. United States*, 228 Ct.Cl. 535, 550-51, 661 F.2d 150, 158-59 (1981), cert. denied, 455 U.S. 1034 (1982) (*Short II*); *Hoopa Valley Tribe v. United States*, 596 F.2d 435 (Ct. Cl. 1979); *Short v. United States*, 202 Ct. C. 870 (1973) (*Short I*). *See also, Maltz v. Arnett*, 412 U.S. 481 (1973); *Donnelly v. United States*, 228 U.S. 243 (1913) (sustaining federal power to add the extension by executive order to the Hoopa Valley Reservation).

not organized in large tribal units at or prior to contact with Euro-American settlers. Rather, they were organized in small family oriented fishing and subsistence village units, usually in close proximity to the rich fisheries of the area.[2] Creation of reservations in Northern California and elsewhere, therefore, involved a process by which the United States recognized, organized, or created larger tribal units or nontribal reservations that had no aboriginal parallel in the community groupings that existed at the time of contact. Misguided proposals for partition of the Hoopa Valley Reservation, of the type reflected in H.R. 4460, derive either from lack of historical understanding of this process or from dissatisfaction with the enforceable property rights that this process engendered. Thus, recounting in some detail the history leading to creation of the Hoopa Valley Reservation is critical to understanding the nature of the property rights involved and the respective interests of all Indians of the reservation who would be affected by the proposed legislation.[3]

After the United States acquired California in 1848 under the Treaty of Guadalupe Hidalgo, establishing some mechanism for the management of Indian affairs in California posed a new and

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2. 8 *Handbook of North American Indians: California* 144-45, 168-71 (1978); A. Kroeber, *Handbook of the Indians of California*, chs. 1-4 (published as Bulletin 78, Bureau of American Ethnology 1-97 (1925); S. Powers, *Tribes of California* chs. 4-5, published as 3 *Contributions to North American Ethnology* 44-64 (1877). The most recent scholarship on such social organizations is reflected in the description of the pre-history of Hoopa areas contained in the 1978 Smithsonian *Handbook of North American Indians*:

> Along the lower course of the Trinity River in northwestern California lived the Hupa . . ., a small ethnic group numbering about 1,000 when first reached by White Americans in 1850. They *shared a distinctive way of life with the adjoining and more populous Yurok and Karok of the Klamath River with whom they had frequent contacts and close relations.*

Id at 164 (emphasis supplied).

3. The history of the Hoopa Valley Reservation has been well canvassed over the last twenty-five years of litigation. The history set forth here is derived primarily for the findings and descriptions contained in *Mattz v. Arnett*, 412, U.S. 481 (1973), *Donnelly v. United States*, 223 U.S. 243 (1913); *Short v. United States*, 202 Ct. Cl. 885-988 (1973) (findings of fact); and *Crichton v. Shelton*, 33 I.D. 205 (1904).

unique problem for federal Indian policy.[4] The Indian policies adopted after the acquisition of California represented the crucible in which nation's ultimate reservation policies developed. The Act of March 3, 1853, 10 Stat. 238, therefore explicitly authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." The Act of March 3, 1855, 10 Stat. 699, further appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore . . . Provided, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for." From the beginning, therefore, the reservation process in California involved collection and concentration of Indians from divergent tribal cultural communities into concentrated, larger Indian communities.

Pursuant to this legislation, President Pierce issued an order of November 16, 1855, establishing the Klamath River Reservation along the Klamath River. I Kappler, *Indian Affairs: Laws and Treaties* 817 (1904) (hereinafter cited as Kappler). The occupants of the villages and communities in this area thereby became known as Klamaths or Yuroks, meaning "down the river" in the Karok language.[5] The Yuroks and other related tribes had lived in the area and at thetime the site was well suited to their needs. When created, it contained some arable land, although limited and subsequently devastated by flooding, and was "peculiarly adapted to the growth of vegetables." 1856 Report of the Commissioner 238. The Klamath River that ran

4. Between 1830 and the acquisition of California, federal policy generally contemplated the removal of indigenous populations westward beyond some mythical frontier line of settlement and outside of the boundaries of any state. While this policy simultaneously was being partially breached by the admission to the Union of Wisconsin in 1848, followed by Kansas in 1861, with unremoved resident Indian populations (which it was then contemplated ultimately would be removed), the acquisition of California posed a new problem because the Pacific Ocean prevented any further westward removal of indigenous populations and transportation, geographic, and other problems precluded removal to the east.

5. As the Supreme Court recognized in *Mattz v. Arnett*, the names of the tribes in the area did not refer to highly organized, distinct ethnological groupings, but, rather, to the people living in the villages and communities of various geographic regions -- Yurok ("down the river"), Karok ("up the river"), and Modok ("head of the river").

through a canyon for the entire length of the reservation contained abundant salmon and other fisheries resources. 1858 Report 286.

Initially, it was thought that the reservation population of around 2500 could be supported by the Reservation. One agent stated, "No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man. The issue of their removal seems to disappear." 1885 Report of the Commissioner 266. In 1861, flooding washed away nearly all the arable lands on the Klamath River Reservation, setting in motion a series of events culminating in an 1891 executive order that added the Klamath River Reservation and other adjacent land occupied by Yuroks to the Hoopa River Reservation. The flooding devastated whatever hopes for subsistence existed on Klamath River. While many Yuroks remained in the reservation area, the population declined to later years, as Yuroks moved elsewhere, presumably including the so-called Square of the Hoopa Valley Reservation, in search of economic subsistence. Subsequent events, culminating in the Executive Order of 1891 that created the present structure of the Hoopa Valley Reservation, can best be understood as a search by the federal government for a set of arrangements for the Yuroks and associated tribes that would provide resources necessary for their subsistence.

Initially, proposals were floated to remove the Yuroks to the Smith River Reservation, established for that purpose in 1862. Only a small number of Yuroks removed to Smith River and nearly all those who did move returned shortly thereafter, Crichton v. Shelton, 33 I.D. 205, 208 (1904), leading ultimately to the termination of the Smith River Reservation. Act of July 27, 1868, 15 Stat. 198, 221.

As the experiments with reservation policy developed in California, the Act of April 8, 1864, 13 Stat. 39, sought to establish a framework in which they could progress in a controlled and limited fashion. The Act designated California as one Indian superintendency. Section 2 of the 1864 Act further provided in relevant part:

> [T]here shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained

> by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of *the Indians of said state*, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for they are intended. Provided, That at least one of said tracts shall be located in what was heretofore been known as the northern district: * * * And provided, further, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended. (emphasis supplied)

The 1864 Act further stated that "the several Indian reservations in California which shall not be retained . . . under . . . this act, shall . . . be surveyed into lots or parcels . . . and . . . be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry." Id., at 40. The Hoopa Valley Reservation was created under authority of this legislation and therefore owes its origin to a process of reservation building that contemplated the collection of various "Indians of such state" onto sizable reservations remote from white settlements, often outside the aboriginal homelands of some of the affected Indians. Many of these reservations, including Hoopa Valley, were nontribal in the sense that they were not intended as homelands for Indians of a particular or limited designated set of tribes, but, rather, for all California Indians whom the President chose to place on the Reservation.

At the time of the passage of the 1864 Act, apparently, three reservations existed in California -- Klamath River, Mendocino, and Smith River. The President took no immediate action after passage of the Act to recognize any of the three existing reservations in California. In default of Presidential action, Congress acted in 1868, discontinuing the Smith River Reservation, 15 Stat. 221, and restoring Mendocino to the public domain. Id., at 223. No similar action was taken with respect to the Klamath River Reservation. Crichton v. Shelton, 33 I.D., at 209. In 1869, Congress made appropriations for two new reservations, the Round Valley Reservation, 15 Stat. 221, and the Hoopa Valley Reservation in 1869, 16 Stat. 37, although neither theretofore had been created by formal Executive Order as contemplated by the 1864 Act. Pursuant to the 1864, Austin Wiley, the Superintendent of Indian Affairs for the State of California, located the Hoopa

Valley Reservation on August 21, 1864, notifying non-Indian settlers in the area to make no further improvements to their lands. The Hoopa Valley Reservation, however, was not formally set apart for Indian purposes by order of a President, as authorized by the 1864 Act, until an Executive Order issued by President Grant dated June 23, 1876. 1 Kappler 815. This Executive Order covers the area generally described as the Square of the Hoopa Valley Reservation. Even at the time of the creation of Square, the Hoopa Valley Reservation obviously was established for an amalgamation of different Indian groups. In his annual report for 1872, the Commissioner of Indian Affairs indicated that the Indians supervised by the agency at Hoopa Valley were the Humboldts (Wiyots and others), Hoonsoltons, Miscolts, Saiaz and several other bands, with a total population of 725. This reservation, was then described by the Commissioner as "set apart per act of April 8, 1864, for these and such other Indians in the northern part of the State as might be induced to settle there." Between the executive orders of 1876 and 1891, the Commissioner's annual reports contained a table giving the names of the tribes "occupying or belonging" to the various California reservations. On the Hoopa Valley Reservation, the tribal names given included Hunsatang,[6/] Hoopa, Klamath River, Redwood, Saiaz, Sermalton, Miskut and Tishtanatan. Thus, it was well understood from the beginning that the reservation was nontribal, containing Indians from several tribes. The Reservation from the outset therefore was intended for whatever tribes might be settled there under the direction of the President pursuant to authority delegated to him under the 1864 Act.

The Klamath River Reservation, although not reestablished by Executive Order or specific congressional action, continued to exist until 1891. Yuroks and others remained on the reservation land which the Department of Indian Affairs regarded as "in a state of reservation" throughout the period from 1864 to 1891. Letter dated Apr. 4, 1888, from the Commissioner of Indian Affairs to the Secretary of the Interior, quoted in *Crichton v. Shelton*, 33 I.D., at 211. No steps were taken to sell the reservation, or parts thereof, under the 1864 Act. In 1879, trespas-

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6. While I profess no expertise in Native American languages, I am informed that in the Hoopa language Hunsatang means or refers to the Yuroks who then lived on or near the Square.

sers were removed from the Klamath Reservation area by the military. In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the Reservation. The allotment process was postponed, however, "on account of the discovery of gross errors in the public surveys." Id.; 1885 Report XLVIII. By Senate resolution, Secretary of the Interior was directed in 1889 "to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian reservation . . . in pursuance of the provisions of the act approved April 8, 1864." 20 Cong.Rec. 1818. The Commissioner of Indian Affairs, by letter dated February 18, 1889, to the Secretary disclosed that no proceedings to this effect had been undertaken:

> In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this.

Ex.Doc. 140, pp. 1, 2, quoted in *Crichton v. Shelton*, 33 I.D., at 212. An assistant Attorney General for the Department of the Interior expressed a similar view in an opinion dated January 20, 1891:

> Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system . . . . It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?
>
> In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to

> deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable.

Quoted in *Crichton v. Shelton*, 33 I.D., at 212--213. Notwithstanding these positions, some contrary views about the continued existence of Klamath River reservation were voiced prior to 1891.[7/]

Pursuant to the authority of the 1864 Act, the reservation's legal existence was clarified and altered by an Executive Order dated October 16, 1891, issued by President Benjamin.[8/] Under that order, the Hoopa Valley Reservation, which was located in 1864 and formally set apart in 1876, and which was situated about 50 miles upstream from the Klamath River's mouth, was extended so as to include all land, one mile in width on each side of the river, from "the present limits" of the Hoopa Valley Reservation to the Pacific Ocean. The former Klamath River Reservation and a connecting strip located between the original Square of the Hoopa Valley Reservation thereby were made part of the Hoopa Valley Reservation, as extended. Under the 1891 Executive Order, these lands were "set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864." Thus,

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7. The United States District Court for the Northern District of California concluded in 1888 that the area within the Klamath River Reservation was not Indian country, within the meaning of Rev.Stat. sec. 2133 (prescribing the penalty for unlicensed trading in Indian country). Concluding that the land comprising the reservation was not retained or recognized as reservation land pursuant to the 1864 Act, the court found, probably inaccurately, that it no longer constituted an Indian reservation. *United States v. Forty-eight Pounds of Rising Star Tea*, 35 F. 403 (N.D.Cal. 1888), aff'd 30 F. 400 (CCND Cal.1889). The Assistant Attorney General, in the 1891 opinion questioned the reasoning of the case, while recognizing the existence of the judgment. He suggested that the court's statements about the terminated reservation status of Klamath River "were dicta and not essential to the decision of the case before the court." *Crichton v. Shelton*, 33 I.D., at 215.

8. "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April (8), 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." 1 Kappler 815.

President Harrison specifically regarded the 1891 Executive Order as part of the process authorized and commenced in 1864 to group various tribal communities together onto no more than four remote reservations.

The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation can be found in the then existing structure of Indian communities in the state and the commands of the 1864 legislation. The 1864 Act authorized the President to create no more than four tracts for Indian reservations in California. By 1891, four reservations already had been created -- the Round Valley, Mission, Hoopa Valley, and Tule River. 1 Kappler 830-831. Recognition of a fifth reservation along the Klamath River was precluded under the 1864 Act. The President therefore utilized his authority under the 1864 Act to expand an existing, recognized reservation. President Harrison enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts.9/ The President's continuing authority to enlarge reservations and, specifically, the legality of the 1891 Executive Order, was affirmed by the Supreme Court in *Donnelly v. United States*, 228 U.S. 243, 255-259 (1913). The Act of June 17, 1892, 27 Stat. 52 entitled "An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation" initiated a process of allotment and opening of the lands of the former Klamath River Indian Reservation. In *Mattz v. Arnett*, 412 U.S. 481 (1973), the Supreme Court ruled that the opening of the former Klamath River Reservation and other parts of the Extension to allotment and homesteading under the 1892 Act had not altered or diminished its status as part of the Hoopa Valley Indian Reservation.

From this description, the geographic and ownership structure of the Hoopa Valley Reservation, including both the Square and the Extension, constitute the logical culmination of a federal policy, traceable to at least 1864, of collecting, grouping, and reorganizing the various Indian tribal and cultural communities onto no more than four separate reservations. Ever since the

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9. See Appendix map. The strip of land between the Hoopa Valley Reservation and the Klamath River Reservation is referred to there as the 'Connecting Strip.' Under the 1891 Executive Order the Hoopa Valley Reservation was extended to encompass all three areas indicated on the map. The connecting strip and the old Klamath River Reservation frequently are referred to as the Hoopa Valley Extension.

1864 Act, this policy contemplated that at least one such reservation would be located in northern California for the benefit of all Indians, presumably from northern California, that the President chose to group on this reservation. As many courts have noted, the legislation and executive orders in California, unlike those applicable to many other Indian areas, "neither . . . mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation." Rather, the reservations were nontribal -- created for the benefit of a group of California Indians (in the language of 1864 Act "for the accommodation of the Indians of said state") for whom the President was expressly authorized by statute to create four reservations as permanent homes.

Where such amalgamation of Indians from various tribal cultures and traditions has occurred on other reservations, the net effect generally has been the creation of a single new confederated tribe under federal supervision. In language seemingly equally applicable to the developments that created the Hoopa Valley Reservation, F. Cohen, *Handbook of Federal Indian Law* 5-6 (1982 ed.) describes the process as follows:

> Congress and the Executive have often departed from ethnological principles in order to determine tribes with which the United States would carry on political relations. Congress has created "consolidated" or "confederated" tribes consisting of several ethnological tribes, sometimes speaking different languages. Examples are the Wind River Tribes (Shoshone and Arapaho), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees, and others were included) and the Confederated Salish and Kootenai Tribes of the Flathead Reservation. These and many other consolidated or confederated groups have been treated politically *as single tribes*. Where no formal Indian political organization existed, scattered communities sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties. Once recognized in this manner, the tribal existence of these groups has continued. (emphasis supplied).

Based on the history of California reservation system, the language of the 1864 Act and the 1876 and 1891 Executive Orders setting aside the Square and Extension respectively as part of the Hoopa Valley Reservation, and the general course of federal Indian policy elsewhere, a reasonable construction of the course of dealings that created the Hoopa Valley Reservation would be that

the federal government had set aside a vested, recognized statutory reservation,[10] comprising *both* the Square and the Extension (including the Connecting Strip), for a single tribe comprised of all eligible Indian residents of *both* areas. As discussed in the next section, the federal courts ultimately have construed the property relations created by this history in an analogous fashion. Nevertheless, an *unauthorized and illegal* course of dealings since 1950 between the United States Department of the Interior and a entity known as the Hoopa Valley Tribe, comprising small minority of eligible Indian population of the Hoopa Valley Reservation, has created legally insupportable expectations and demands among members of the Hoopa Valley Tribe for ownership of and rights to the resources of the Square. These legally illegitimate demands have produced the current partition proposal.

Even before the course of federal administrative dealings affirmatively fueled such expectations on the part of residents of the Square, confusion was engendered by the considerable time lag between the allotment of Extension in 1894 and the allotment of the Square in 1922. This confusion was exacerbated in the 1930s when Indian Office Superintendent O.M. Boggess, who in official correspondence openly doubted the advisability of creating any tribal councils and who was under directions from Washington to assure that any councils created represent all Indians of the Reservation and undertake only an advisory role, responded by supporting indigenous Hoopa and Yurok efforts to create separate tribal business councils. Without any discussion of the legality of such efforts or of the impact of such actions in misallocating reservation resources, Boggess supported the proposal because "the Indians down the Klamath river but seldom come to Hoopa, and their interests in many cases are different it is understood that [the Hoopas] prefer a legally organized body of the Hoopas only; permitting the Klamaths to form a similar organization

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10. For reasons explained more fully in the third section of this Statement, the Hoopa Valley Reservation constitutes a *recognized* statutorily authorized reservation, rather than a nonrecognized executive order reservation. While both the Square and Extension formally were set aside for Indians through an Executive Orders in 1876 and 1891, these orders are unlike other executive orders creating Indian reservations because both orders were expressly issued pursuant to statutorily delegated authority contained in the Act of April 8, 1864. The executive orders involving Hoopa Valley therefore merely constituted formal mechanisms for designating Indian lands and their beneficiaries that Congress expressly authorized to be held as permanent homelands for the affected Indians.

for their people if they should care to do so." He further explained in a letter to the Commissioner:

> Owing to the exceedingly rough nature of this section and the lack of roads it would be exceedingly difficult to require the Indian people along the entire river to meet together for a regular election of councilmen, and as the number of matters requiring their attention is but limited I do not think that they would be justified in going to this expense.

So long as any such council operated only as an advisory committee, as required by the then prevailing directions from the Indian Office, its mere organization based on such considerations of geographic and administrative convenience violated only majoritarian political principles, but few existing property rights of the Indians of the reservation.[11] To the extent, however, that any such council representing less than the entire population of reservation managed or directed reservation resources to which *all* eligible residents of the Reservation were equally entitled, such an organization then and now poses serious legal and constitutional problems. Furthermore, given Boggess' stated opposition to tribal councils and his predecessor's expressed opposition to tribal councils because they were "the biggest source of agitation of anything in the Indian service," one is left to wonder whether Boggess and superintendents the succeeded him at Hoopa Valley might not have supported the idea of *separate* councils as part of a design to divide the Reservation against itself -- a divide and conqueror strategy. Such a strategy, of course, would maximize the power and control of the Indian Service over the Hoopa Valley Reservation resources and minimize the possibility of true indigenous self-government. If this history contributed to current attitudes of the Hoopas of the Square, it would be sadly ironic that, during the current federal policy of supporting government-to-government relations between the federal government and Indian tribes, such historical designs would be vindicated by partitioning the Reservation.

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11. Within a year, however, the organization of such a reservation comprising less than the full population of all those entitled to share in reservation resources probably was made illegal under sections 16-18 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. sec. 476-78.

Ultimately, in a letter dated April 20, 1933, the Indian Commissioner rejected the proposal for *separate* tribal councils for the Hoopa Valley Reservation, indicating that the prior agreement to the organization of a tribal council was intended to authorize only a council that would represent all of "the various tribes of Indians within the Hoopa Valley jurisdiction." He further indicated that the Klamath River (Yurok) Indians could organize separately only for the management of "local matters not involving the whole Hoopa Valley jurisdiction." While the Klamath River efforts at separate organization garnered limited support and died out, Boggess seemed to misread his instructions as authorizing, probably contrary to Commissioner Rhoads' intent, creation of a separate advisory business committee to handle local matters of Hoopas. He thereafter proceeded to develop several such plans, leading to formation of 1933 Hoopa Valley Business Council.

The Constitution and By-Laws of the Hoopa Business Council, ultimately approved by Commissioner Collier on November 20, 1933, were not limited to Indians resident on the Square. Article 3 indicated that the business council "shall be composed of seven enrolled members of the Hoopa tribe; bona fied [sic] residents of Humboldt County, California . . ." and article 18 provided that the constitution would govern "the Hoopa tribe and business council." While possibly not intended by Boggess, Commissioner Collier, in light of earlier correspondence reflecting Boggess' instructions, reasonably could and should have believed that he was approving a constitution that governed *all* Indians of the Hoopa Valley Reservation, rather than only the Indians of the Square. *Short v. United States*, 202 Ct. Cl. at 950-57 (Findings 109-25). Nevertheless, in response to a questionnaire apparently distributed as part of a process leading to Indian Reorganization Act reorganization of United States Indian tribes, Boggess responded, notwithstanding his prior contrary instructions, that Hoopa had a tribal council that represented "only the 12 mile square Hoopa proper [sic]" and further indicating that the Klamath River Extension was "not represented on this council."

While focused on Indians of the Square, the 1933 Hoopa Business Council also was composed of Indians of Yurok and Karok ancestry living on the Square, including David Masten (aka David

Maston) who held allotments on the Extension, who previously had served on earlier councils at Klamath River, and who served as the Hoopa Valley tribal court judge. *Id.* at 957-58 (Findings 128, 131). Thus, some of the strong feelings of separateness asserted by members of the so-called Hoopa Valley Tribe have no basis in the legal documents creating the reservation, but, rather, were engendered, or at least fueled, by the *unauthorized* actions of O.M. Boggess *contrary* to the instructions he received from the Indian Office in Washington. Vindicating these unjustified expectations with the partition of the Hoopa Valley Reservation to the detriment of the majority of the eligible Indians of the Reservation certainly would constitute an ultimate irony!

A critical, and probably unauthorized and illegal, action of the Secretary of the Interior contributed to the current problems. That decision was sparked when in 1950 the Hoopa Valley Business Committee organized and conducted an "election" to establish membership requirements to share in "Hoopa Tribal benefits and moneys." This action crystallized twenty-five years of litigation over entitlements to per capita payments from and control of Hoopa Valley Reservation resources. While the notice of election for the vote on the 1950 Business Council was addressed to "The Electors Of The Hoopa Valley Indian Tribe," the actual voting rolls prepared by the Hoopa Valley Business Committee included only living allottees and their descendants who lived on the Square and certain other designated Indians resident on but not holding allotments on the Square. The overwhelming majority of the Indian population of the Reservation, the Indians of the Extension constituting approximately 70% of the eligible Indian population of the Reservation, while probably constituents and theoretically served by 1933 Hoopa Valley Business Committee, arbitrarily were excluded from participating in the May 13, 1950 election and from participation in the Hoopa Valley Business Committee it approved. Only 106 persons voted in this rump election. They approved the proposed Constitution by a vote of 63 to 33. Under section 1 of the Constitution, the membership of the Hoopa Valley Tribe was limited to persons on the 1949 "official" roll and their descendants, subject to corrections within five years by the Business Council with the approval of the Secretary of the Interior. Article III of the 1950 constitution also limited the territorial jurisdiction of the Hoopa Valley Business Committee to the Square.

The Director of the Sacramento Area Office of the Bureau of Indian Affairs and the Superintendent of the Hoopa Valley Reservation objected to some of these events, indicating that the Extension and the Square were one reservation and funds derived from any part of the Reservation should be "accredited to the Indians of the Hoopa Valley Reservation." Clearly, consistent with earlier directions from the Indian Office and with the 1933 constitution, the Director regarded the Klamath or Yuroks of the Extension as "members of the Hoopa Valley Reservation" and further stated that "the Indians in the so-called Klamath Strip should have representation on the Hoopa Business Council." Nevertheless, on March 25, 1952, the Commissioner of Indian Affairs approved the 1950 constitution of the Hoopa Valley Business Committee. Id. at 859-965 (Findings 136-54). As a result of the principle of substantive majoritarian principle adopted for reservation governance in the Indian Reorganization Act after organization of the 1933 Hoopa Valley Business Council but before the approval in 1952 of the 1950 Constitution and Bylaws of the Hoopa Valley Business Council, the Secretary's 1952 approval was arguably illegal and today represents of a continuing violation of law.[12/] Nevertheless, the federal government has

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12. While the Court of Claims in *Short* made no findings of fact on this question, it appears that organization of the Hoopa Valley Business Committee in 1950 was not done pursuant to sections 16-18 of the Indian Reorganization of Act of 1934 (IRA), codified as amended at 25 U.S.C. secs. 476-78. Possibly that was because the 1933 Hoopa Valley Business Committee was organized and a constitution adopted *before* enactment of the IRA or possibly because votes during the 1930s had rejected IRA organization at Hoopa, although no findings on this question were made in the *Short* case. Nevertheless, organization under the IRA is not critical since the Secretary of the Interior always has had authority to recognize Indian tribes, including their constitutions. *Kerr-McGee Corporation v. Navajo Tribe*, 471 U.S. 195 (1985). For whatever reason Hoopa was not organized under the IRA, however, it is arguable that *after* 1934 the IRA established minimum threshold standards that limited the power and discretion of the Secretary to recognize tribes with constitutions that did not conform to such standards. In particular, it appears that the IRA contemplates the organization of a *single* tribal entity for any reservation by majority vote of *all* Indians of the reservation. Section 16, 25 U.S.C. sec. 476, indicates that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt *an* appropriate constitution and bylaws . . . ." Similarly, section 18, 25 U.S.C. sec. 478, limits the right to organize granted by the IRA by providing that it "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. Furthermore, section 19 of the IRA, 25 U.S.C. sec. 479, defines Indians for these purposes to include "*all* persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation . . . ." Since the Hoopa Valley Reservation, including *both* the Square and the Extension, constitutes a single reservation, IRA

continued to recongize the Hoopa Valley Tribe even though it represents only approximately 30% of the eligible Indians of the Reservation. Threafter, the Hoopa constitution and bylaws were amended in ways not relevant to discussion.

After creation of 1950 Hoopa Valley Business Committee, the Bureau of Indian Affairs illegally undertook to pay per capita and other payments derived from reservation resources to

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organization of the tribe after 1934 clearly would have required approval at an election in which the members of the Extension were eligible to participate and also would have required that any tribal entity thereby created serve *all* Indians of the Reservation, rather than only a small minority of them. The important legal question is whether the Secretary of the Interior has discretion to circumvent these majoritarian requirements of the IRA by choosing to deal with a rump minority of eligible Indians and approving a Constitution for them outside of these minimal threshold requirements of the IRA. While I am unaware of any cases directly addressing this question, I believe that any construction of the IRA that would permit the complete circumvention of its *substantive majoritarian* standards ought to be rejected for that reason and because of the basic anti-democratic, dictatorial nature of such efforts. Thus, in my view, the majoritarian standard of the IRA limits *both* organization under the IRA and the discretion of the Secretary of the Interior to recognize Indian tribal constitutions outside of the authority expressly conferred by the IRA. So construed, sections 16-18 of the IRA removed any discretion from the Secretary or the Commissioner of Indian Affairs to approve a constitution for an alleged Indian tribe representing less than the entire population of the reservation. Thereafter, approval of such a constitution constituted not a political act of executive discretion in recognizing an Indian tribe, but, rather, an *ultra vires* illegal action violative of the majoritarian substantive standards of the IRA. While certain procedural defects in the Commissioner's 1952 approval of the 1950 constitution are under litigation in pending case of *Lillian Blake Puzz v. United States*, No. 80-2908 TEH (N. D. Cal.), no case has contested the legality of the Commissioner's 1952 action or any like approval based on the construction of sections 16-18 advanced here.

Other more limited exceptional cases can be found of dividing the assets or government of a single reservation, such as the partition of the trust fund assets (but not the real property interests) of the Shoshone and Arapaho tribes of the Wind River Reservation in Wyoming authorized by the Act of May 19, 1947, c. 80, 61 Stat. 102, codified at 25 U.S.C. sec. 611 et seq. This situation clearly is distinguishable from the Commissioner's 1952 approval of the Hoopa Valley constitution and from the partition plan advanced in H.R. 4469 on two separate grounds. First, consistent with the limited discretion of the Secretary after enactment of the IRA, the partition was accomplished by statute, rather than mere *ultra vires* executive fiat. Second, the division of assets at Wind River took account of the actual joint tribal ownership by providing an equitable fifty-fifty split of the assets between the two tribes, rather than giving less than 30% of the eligible Indians of the Hoopa Valley Reservation the predominate value of the resources of the reservation, as proposed in H.R. 4469.

It should be noted that the approval of the 1933 Hoopa Business Council's constitution and bylaws was not subject to any such IRA limitation on executive discretion since it was approved *prior* to the enactment of the IRA. Nevertheless, since the instructions to the local agent requested creation of a unified council for the entire reservation and nothing contained in the 1933 constitution, unlike the 1950 constitution, suggested any contrary intent, the 1933 constitution that created the Hoopa Valley Business Committee probably did not violate the IRA directives.

that unit, notwithstanding the fact that it represented only approximately 30% of the eligible Indians of the Reservation. This pattern of administrative mismanagement led to twenty-five years of litigation caused by the Bureau's initial ineptitude in this area and the unreasonable and illegal expectations it created among the Indians of the Square who had improperly organized as the Hoopa Valley Business Committee. As discussed more fully in the next section, federal courts repeated have ruled over the last 25 years that all the Hoopa Valley Reservation, including both the Square and the Extension, was one single reservation and that the eligible Indian residents of both the Square and in the Extension should share equally in all revenues derived from the resources of the reservations, wherever located. The proposed partition legislation emerged to vindicate the legally insupportable demands and expectations of the Hoopas fueled by the Bureau of Indian Affairs, beginning with the actions taken in 1933 by Superintendent O. M. Boggess in contravention of his instructions to assure that any proposed represent "the various tribes of Indians within the Hoopa Valley jurisdiction." From this history, it is evident that any claim of the Hoopa Valley Business Council, as currently composed, to exclusive rights in the Square has no validity in ethnology, history, or law. Partitioning the reservation *without the consent of all eligible Indians of the Reservation* because a small, albeit powerful, group desires greater ownership and control of the significant natural resources of the Square would represent a flagrant disregard of the legitimate rights of the 70% of the reservation Indian population eligible to share in the resources of the Reservation but excluded from membership in the Hoopa Valley Tribe by its 1950 constitution as amended. A far better solution to the problems created by this history would be legislation that supports, rather than subverts and thwarts, the outcome of 25 years of litigation by requiring Secretary of the Interior as a precondition of continued federal recognition of the Hoopa Valley Business Committee to established a federally supervised plan to abrogate the illegitimate and anti-democratic 1950 constitution and to restructure and amend the Hoopa Vally constitutional government so that it serves *all* Indians eligible to share in the resources of the Hoopa Valley Reservation and thereby conforms to the substantive majoritarian principles of the Indian Reorganization Act of 1934 and the 1933 directions from the Commis-

sioner of Indian Affairs. In short, rather than partition, one-person, one-vote should govern the 1891 Reservation as whole, thereby restoring the 70% of the eligible but excluded Indians of the Hoopa Valley Reservation to their rightful political and property rights on the Reservation.

LITIGATION INVOLVING OWNERSHIP AND ENTITLEMENT TO RESOURCES OF THE HOOPA VALLEY RESERVATION

Since there is little arable land or mineral resources on the Hoopa Valley Reservation, the primary source of tribal revenues outside of the fisheries comes from timber resources, most of which are located on timbered areas of the Square. In 1950, when the current Hoopa Valley Business Council was organized, commercial timber operations had not commenced at Hoopa Valley. Until 1955 revenues from any part of the Hoopa Valley Reservation were paid into a single fund that benefitted all parts of the Reservation. *Short v. United States*, 202 Ct. Cl. at 970 (Finding 167). Commencing in 1955 and continuing until at least 1974, two separate deposit accounts were created, without any statutory authorization, and revenues attributable to the Square were deposited in a separate account for the Hoopa Valley Indians represented by the Hoopa Valley Business Council. After the Bureau of Indian Affairs initiated commercial timber operations on lands located on the Square during the 1950s, the Bureau began paying *all* the profits from of such operations to the separate account for the Hoopa Valley Business Committee, the only organized, recognized tribal government at Hoopa Valley, notwithstanding the fact that under its constitution it represented less than on-third of the Indians of the Reservation eligible to share in the resources of the Reservation. Per capita distributions from this account were made only to Hoopa Valley members under the membership rules of the 1950 Constitution, thereby diverting the primary revenues from resources beneficially owned by all Indians of the Reservation to a much smaller group comprising only 30% of the reservation population.

To remedy this situation several lawsuits were filed. In 1963, a suit was filed by certain named plaintiffs individually on behalf of a class of persons now numbering approximately

3800 persons who were Indians of the Extension and their descendants who had been excluded from per capita distributions by the membership requirements of the 1950 Hoopa Valley Business Council and the pattern of resource mismanagement by the Bureau of Indian Affairs described above. This litigation, commended as *Jessie Short v. United States*, No, 102-63, in the former United States Court of Claims, has been pending for over 25 years with several reported opinions and preclusive findings. Subsequently other separately filed claims cases were consolidated with the *Short* case. During the 25 years in which these cases have pending over 400 members of the plaintiff class have died while awaiting final vindication of their legally valid rights to co-equal representation and participation in the Hoopa Valley Reservation. In the most recent reported decision, *Short v. United States*, 12 Cl.Ct. 36 (1987), the highlights of this protracted litigation were summarized as follows:

> Presently at issue is the nature and extent of the damage award. The liability of the defendant United States is established. Jessie Short, et al., v. United States, 202 Ct.Cl. 870, 884, 486 F.2d 561, 568 (1973), cert. denied, 416 U.S. 961, 94 S.Ct. 1981, 40 L.Ed.2d 313 (1974) (Short I). In 1981, the court directed the trial judge to develop standards to determine which plaintiffs were "Indians of the Reservation" entitled to recover. Jessie Short, et al. v. United States, 228 Ct.Cl. 535, 550-51, 661 F.2d 150, 158-59 (1981), cert. denied, 455 U.S. 1034, 102 S.Ct. 1738, 72 L.Ed.2d 153 (1982) (Short II). In 1983, those standards were affirmed, Jessie Short, et al. v. United States, 719 F.2d 1133, 1143 (Fed.Cir.1983), cert. denied, 467 U.S. 1256, 104 S.Ct. 3545, 82 L.Ed.2d 849 (1984) (Short III), and the case-by-case qualification of the 3,800 individual plaintiffs, under those standards, is currently underway.
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> In 1973, the Court of Claims determined that the Hoopa Valley Reservation (Reservation) in northern California was a single unit and that income derived from the unallotted lands on one portion of the Reservation known as the "Square" could not be distributed only to Indians on the official roll of the Hoopa Valley Tribe (Tribe). Findgs. 188-89, Short I, 202 Ct.Cl. at 980-81, 486 F.2d 561. The Hoopa Valley Tribe was organized as an entity in 1950 and its membership includes most of the ethnological Indian tribes and groups who traditionally occupied the "Square." In Short I, the court held that the plaintiffs, mostly Yurok Indians living on another portion of the Reservation known as the "Extension" or "Addition," should have participated in per capita distributions made by the Secretary of the Interior (Secretary). All "Indians of the Reservation" were held entitled to receive payments, and the discriminatory distributions of the proceeds of the timber sales (and other Reservation income) constituted a breach of the government's fiduciary duties with respect to the qualified plaintiffs. Short III, 719 F.2d at 1135. Although this opinion deals primarily with the timber revenues, the principles enunciated herein generally apply to the other Reservation income as well.

The Secretary first began to distribute proceeds derived from the unallotted trust lands of the Square exclusively to Hoopa Valley Tribe members in 1955. Monies, consisting of revenues and earned interest, were paid per capita to individual Indians on the Tribe's official roll, and were also paid to the Hoopa Valley Tribe (as a government) for the purpose of developing or maintaining services for the Reservation. The plaintiffs did not receive any per capita distributions, nor were any payments made to a Yurok tribal government, as the Yuroks were not formally organized. To date, efforts to organize a Yurok tribal government have been unsuccessful, largely because of this case. See Short II, 228 Ct.Cl. at 540, 661 F.2d at 153.

Following the liability decision in Short I, the Bureau of Indian Affairs restricted the distributions made to the Hoopa Valley Tribe to only thirty percent (30%) of the unallotted Reservation income. The thirty percent figure was selected because the number of Hoopa tribal members, when compared with the number of Short plaintiffs in 1974, represented about 30% of the total number of potential "Indians of the Reservation." Hoopa Valley Tribe v. United States, 219 Ct.Cl. 492, 502-03, 596 F.2d 435, 440 (1979). However, additional per capita payments were made to the plaintiffs' exclusion after 1974 when the Secretary released these funds to the Hoopa Valley Tribe.

On six separate occasions commencing on August 6, 1974 and ending on March 7, 1980, per capita payments amounting to some $5,293,975 were made to individual Hoopa Indians on the official roll of the Hoopa Valley Tribe, with the knowledge, acquiescence or cooperation of the Secretary. The remaining seventy percent (70%) of the funds has been held in trust by the Secretary in "Indian Monies, Proceeds of Labor" accounts (IMPL accounts), pending resolution of this case. These accumulated monies, sometimes referred to as the Short escrow fund, now total over $60,000,000 and remain in the United States Treasury, accumulating interest pursuant to statute.

The plaintiffs seek a share of what the Hoopas received directly through per capita payments and indirectly through monies paid to the Hoopa Valley Tribe as a government. Under the plaintiffs' theory, the monies paid to the Tribe would be prorated among the Tribe's membership, and each plaintiff would receive an amount equal to one prorated share. Monies spent by the Tribe to preserve the timber lands and other governmental services that benefited the entire Reservation would be offset against the plaintiffs' award. The plaintiffs also seek interest on the award and the balance of the escrow fund, arguing that these accumulated monies represent their exclusive share of the Reservation resources collected after 1974.

In the 1987 order, Judge Margolis of the United States Claims Court determined that:

Recovery of damages for those plaintiffs who qualify as Indians of the Reservation will be calculated based upon their wrongful exclusion from prior per capita distributions, which includes their shares as calculated above, plus interest as provided by statute. The Short escrow funds remain subject to the Secretary's discretion, and shall be expended as the Secretary determines, for the benefit of the Indians of the Reservation as provided by statute, and in a manner otherwise consistent with this opinion and previous court decisions.

The *Short*, which case involved a breach of trust claim brought against the federal government, of course only measured damages only for *past* mismanagement of tribal trust assets. It was initiated by individually named complainants suing in their individual capacity. Indeed, in *Short II* the Court of Claims rejected government efforts to substitute a nonorganized entity known as the Yurok Tribe for the individual plaintiffs in the case, indicating that since the individuals had sued in their personal capacities, the communal interests asserted by any such tribe would be of a different nature and involve overturning prior decisions. Thus, the *Short* litigation involves only some of the potential claims that could be made relative to federal mismanagement since 1952 of Hoopa Valley resources to the detriment of the excluded Indians of the Extension. In the 1987 order in *Short IV*, for example, Judge Margolis excluded from the damage calculation nonindividualized assets and payments, because the plaintiffs had only sued as individuals. Under 28 U.S.C. sec. 1491, the court found that the plaintiffs could not enforce on behalf of the eligible Yurok and other Indians of the Extension any *communal* rights they might have in the nonindividualized assets of the reservation. The 1987 order, however, seemed to acknowledge, as had the 1973 decision in *Short I*, the existence and enforceability, presumably under 28 U.S.C. sec. 1505, of such communal rights of the Indians of the Extension to share equally in the resources and proceeds of the entire Hoopa Valley Reservation.

In response to the 1973 order in *Short I*, the Bureau of Indian Affairs began placing 70% of the revenues of the reservation in escrow for the nonorganized Indians of the Extension, dispersing only 30% to the Hoopa Valley Business Council. Thereafter, the Hoopa Valley Business Council disingenuously filed suit in the United States District Court for the Northern District of California (No. C-76-1405 RHS) against the Secretary of the Interior, without ever mentioning the *Short* decision, to contest the allegedly illegal sequestration of "70% of the plaintiff's income." The case was transferred to the Court of Claims, which ultimately dismissed the suit, ruling that Hoopa Valley claims had been decided adversely to the Hoopa Valley Tribe in the *Short I* decision and that the earlier decision, in which the Hoopa Valley Business Council had participated as

both amicus curiae and intervenor, was *res judicata* and precluded relitigation of the same claims. *Hoopa Valley Tribe v. United States*, 219 Ct. Cl. 492, 596 F.2d 435 (1979).

Since the *Short* case only sought damages for past mismanagement of Hoopa Valley assets, a separate suit was filed to restructure the future relations of the Bureau of Indian Affairs and the Indians of the Hoopa Valley Reservation. *Lillian Blake Puzz v. U.S. Department of the Interior*, No. C80-2908 TEH (N.D.Cal.). Among other things, the *Puzz* complaint sought to prospectively impose on the Bureau of Indian Affairs an obligation to deal fairly and equally with all Indians of the Reservation in the distribution of benefits and resource revenues and in the management of assets of the Reservation. *Puzz* further challenged the 1952 recognition of the Hoopa Valley Tribal Council based on certain procedural noncompliance with the Administrative Procedure Act. On April 8, 1988, two weeks before introduction of H.R. 4469, the court partially granted plaintiff's motion for summary judgment, ordering:

> 2. Plaintiff's motion is granted in part, in that the federal defendants shall not dispense funds for any projects or services that do not benefit all Indians of the reservation in a nondiscriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefit of the reservation on an equal basis. Specifically, federal defendants shall not permit any reservation funds to be used for litigation among any Indians or tribes of the reservation.
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> 3. To fulfill the requirements of this Order, federal defendants must develop and implement a process to receive and respond to the needs and views of the non-Hoopas as to the proper use of reservation resources and funds.

Lillian Blake Puzz v. U.S. Department of the Interior, No. C80-2908 TEH, sl. op. 23-24 (N.D.Cal., April 8, 1988).

Other significant litigation during this century over the legal status of the Hoopa Valley Reservation includes *Mattz v. Arnett*, 412 U.S. 481 (1973) (opening of Extension to allotment under 1892 legislation did not terminate or diminish the boundaries of the Hoopa Valley Reservation, under the 1891 executive order included and continues to include the Extension) and *Donnelly v. United States*, 228 U.S. 243 (1913) (sustaining federal power to add the extension by executive order to the Hoopa Valley Reservation).

The *Puzz* order represented the successful culmination of a twenty-five year effort to rectify an unauthorized and illegal action taken by the Commissioner of Indian Affairs in 1952 in recognizing the Hoopa Valley Business Council and thereafter in mismanaging the commercial resources of the reservation, most of which are located on the Square, so that they benefited less than 30% of the eligible Indians of the Reservation. Since that order precluded any further reservation funds from being "used for litigation among any Indians or tribes of the reservation," the Hoopa Valley Business Council shifted its strategy for thwarting vindication of legal rights of excluded Indians of the Reservation from the federal courts to the halls of Congress. Within two weeks, with the support of three members of the House of Representatives, H.R. 4469 was introduced to partition the Reservation and to overturn 25 years of litigation by legislative fiat. The partition plan proposed in H.R. 4469, therefore, proposes to legislatively impose the unequal, arbitrary, and illegal division of tribal assets that every court since *Short I* has rejected. Even the Department of the Interior rejected such arrangements in 1933, only to precipitate the current long-running dispute by reversing its position when the Commissioner of Indian Affairs approved the 1950 constitution. Vindication of illegal and unrealistic expectations of the Hoopa Valley Tribe through a nonconsensual partition of the Reservation imposed by act of Congress would constitute a rejection of the work and careful findings of the many capable federal judges that have reviewed this question over the past 25 years of litigation. It also would disrupt and abrogate the vested enforceable legal rights of the excluded Indians of the Extension that were vindicated in these cases and would frustrate the legal rights of over 70% of the population of the Reservation. A less appealing solution to the problems at Hoopa Valley is hard to imagine!

What is even more remarkable is that H.R. 4469 proposes overturning the hard won legal rights of the excluded Indians of the Hoopa Valley Reservation without providing any requirement for a referendum vote of *all* eligible Indians of Hoopa Valley Reservation. While Congress may have theoretical power to partition a reservation, subject to paying just compensation for the taking of vested rights, why it should act in this instance when not requested to do so by a majority of the owners of the beneficial interests in the Reservation is utterly mystifying. I

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submit that, as with the requirements of section 18 of the Indian Reorganization Act, an absolute prerequisite of any bill providing for participation of a reservation should be a requirement for approval by a majority vote of all adult Indians eligible to participate in the resources of and revenues from the Reservation. The essence of protecting tribal self-government is to allow the affected Indians to chart their own destiny, rather than having Congress, sitting as the paternalistic Great Father, dictate their future without full consultation and plebescite. A sufficient reason for opposing the partition plan contained in H.R. 4469 therefore is the paternalistic, dictatorial, and anti-democratic nature of the proposal.

Thus, quite apart from the unconstitutional aspects of the partition plan proposed in H.R. 4469 (addressed in more detail in the next section), I oppose the nonconsensual partition proposal as bad policy. It is an arrogant, paternalistic, anti-democratic effort to subvert the legal processes by which Indian rights are enforced through courts. Passage of such high-handed legislation would place the stability of all Indian rights, indeed, perhaps all property rights, in jeopardy. The involuntary, nonconsensual partition plan proposed in H.R. 4469 certainly represents a threat to concept of the rule of law in the field of Indian affairs and possibly to the legal processes by which all property is protected.

NONCONSENUAL PARTITION OF THE HOOPA VALLEY RESERVATION UNDER THE PROPOSED PLAN CONSTITUTES A TAKING OF INDIAN PROPERTY WITHOUT JUST COMPENSATION

Except for the fisheries resources of the Reservation, which are not addressed at all in the partition plan set forth in H.R. 4469, the most valuable unallotted, tribally held natural resources of the Hoopa Valley Reservation are the timber resources predominately located on the Square. The Square contains approximately 89,000 acres of land held in unallotted trust status, much of it timbered. By contrast, the Extension contains only 3,000 unallotted acres with little timber or unallotted resources. The nonconsenual partition plan of H.R. 4469 proposes to separate the

Extension from the Square giving the Hoopa Vally Tribe, representing 30% of the eligible Indians of the Reservation, the valuable resources of the Square, while leaving the remaining considerably less valuable resources of the Extension for the remaining 70% of the eligible Indians of the Reservation who are not permitted to be members of the Hoopa Valley Tribe under the 1950 Constitution as amended. This group of excluded eligible Indians of the Hoopa Valley Reservation is designated in the partition legislation and authorized to organize as the Yurok Tribe, even though they are not all Yurok in ancestry and, indeed, include some persons of Hoopa ancestry excluded from Hoopa Valley Tribe by reason of residence. Furthermore, section 3 of the proposed legislation calls for a settlement of the pending litigation by following the March 17, 1987 order of the United States Claims Court as to amounts distributed to individual members on or before December 31, 1974 (a 70-30 formula) and splitting any other amounts in the escrow fund on a equal basis (a 50-50 formula) between the Hoopa Valley Tribe (representing less than 30% of the Reservation Indians) and the Yuroks (representing approximately 70% of the eligible Indians of the Reservation).

While the partition bill contains no provisions whatsoever for compensating for rights lost by this amazing legislative redistribution of property rights, the plan apparently recognizes the possibility that such a gross misallocation of natural resources and tribal assets constitutes a taking. It therefore contains two separate provisions that might be deemed relevant to the compensation question. First, section 2(f) of the proposed legislation contains provisions establishing a special two year statute of limitation for any such taking claim and, more significantly, a contingent indemnification provision contained in section 2(f)(2) providing that "[i]f the United States is found liable to the Hoopa Valley Tribe or Yurok Tribe, or to the Indians of either tribe, for damages based on inadequate compensation or a taking resulting from the division of land between the tribes . . . the United States shall be entitled to a judgment for reimbursement from the other tribe's future income." Thus, the legislation explicitly and correctly contemplates that the contemplated partition is a taking in violation of fifth amendment to the United States Constitution and further seeks to assure that United States will not bear the financial burden

imposed by its own actions through a system of contingent indemnification. Second, and seemingly not intentionally related to the question of just compensation, section 2(b)(3) of the legislation proposes to appropriate up to $2,000,0000 to purchase land to be added to the reservation of the Yurok Tribe that would be established under the legislation.

Notwithstanding these provisions, I believe that the partition plan proposed in the legislation constitutes an unconstitutional taking of recognized Indian property interests without just compensation and that the contingent indemnification provisions of section 2(f)(2) will not insulate the United States from liability for such unconstitutional conduct. First, the partition plan of H.R. 4469 constitutes a taking of *both* the individual and communal rights of the eligible Indians of the Hoopa Valley Reservation. The identifiable group of Indians adversely affected, who, under the partition bill are designated the so-called Yurok Tribe,[13/] therefore would have a cause of action against the United States for full compensation for rights and resources lost through the partition. Second, I further believe that the enlargement of the Yurok Reservation contemplated in section 2(b)(3) of H.R. 4469 neither is contemplated as nor constitutes additional or just compensation for this taking. Third, I submit that the contingent indemnification provisions of section 2(f)(2) make it plain that the exercise of eminent domain power contemplated by the partition plan are not for a "public purpose," as required by the fifth amendment, but rather for the private benefit and gain of the Hoopa Valley Business Council and the Hoopa Valley Tribe. This observation poses the potential that the entire partition legislation

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13. For purposes of this Statement, I assume that composition of the so-called Yurok Tribe authorized to organize under the partition legislation would be co-extensive with the ethnologically mixed group of eligible but excluded Indians of the Hoopa Valley Reservation who comprise the plaintiff group in *Short*. It should be noted, however, that if the membership in this so-called Yurok Tribe does not include all eligible *Short* plaintiffs and their descendants, the communal and individual rights of any excluded but otherwise eligible Indians would be entirely taken by the partition plan which only divides the resources and assets of the Reservation only between the Hoopa Valley Tribe and the Yurok Tribe. Yet, the proposed legislation contains no provisions assuring that all eligible *Short* plaintiffs can secure membership in either the Hoopa Valley or so-called Yurok Tribe, thereby posing a further potential for United States monetary liability under the fifth amendment takings clause. It also should be noted that the contingent indemnification clause as currently drafted would not cover any liability for a taking by an eligible Indian of the Reservation who could not become a member of either the Hoopa Valley or Yurok Tribes recognized under the bill.

could and should be constitutionally invalidated. Finally, the legislation plainly fails to provide just compensation since it utterly fails to make any good faith effort to appraise the current value of all resources of the Reservation being partitioned and to divide them in the only equitable manner available for a nontribal reservation like Hoopa Valley, i.e. on the basis of equal population entitlement (the 70-30 formula of the *Short* litigation). Indeed, while not contituting proper treatment for a nontribal reservation like Hoopa Valley, the bill does not even contemplate allocating the resources as co-equally owned by the two tribes recognized under the plans, a treatment that at least would require an equal division of assets between the two tribes (a 50-50 formula of the type employed in 25 U.S.C. sec. 611 et seq. in partitioning the trust funds, but not land or other resources, of the two tribes of the Wind River Reservation of Wyoming -- a tribal reservation).

Several important points must be made to explain these conclusions. These include the following: (1) the land and natural resources of the Hoopa Valley Indian Reservation constitute recognized, property rights in a statutory, rather than merely an executive order, reservation that are *communally* vested in the all eligible Indians of the Reservation; (2) the partition bill would abrogate or curtail both individualized and communally held rights and the takings claim created by the partition plan might be enforced either by eligible Indians of the Reservation who were adversely affected suing in both their individual capacities and as members of an identifiable group of Indians or, insofar as communal rights are concerned, by the Yurok Tribe organized and recognized under authority of the partition bill as the successor in interest to these rights; (3) the partition bill provides no compensation whatsoever for lost rights and thereby blatantly constitutes an unconstitutional taking under the standards established in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); (4) the contingent indemnification provisions of section 2(f)(2) of the proposed legislation potentially invalidate the entire legislation by manifestly indicating that the exercise of eminent domain power contemplated by the bill is for a private, rather than public, purpose, and (5) the contingent indemnification provisions of the proposed partition plan, if invoked, would constitute a taking of property from the tribe forced to pay

such indemnification and, therefore, may not have the intended effect of holding the United States harmless from liability for the massive redistribution of tribal property contemplated by the partition plan.

A. Introduction

While the courts have suggested that Congress has plenary authority to deal with Indian affairs, that power is subject to the fifth amendment requirements of paying just compensation for the taking of property for public purposes. *E.g., United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Hodel v. Irving*, ___ U.S. ___, 107 S.Ct. 2076 (1987). Furthermore, as the Supreme Court recently suggested, the mere fact that legislation addresses a serious public problem or otherwise furthers important public policy interests does not prevent the act from constituting an unconstitutional taking in violation of the fifth amendment. Thus, in *Irving* the Court recognized that fractionation of Indian allotted lands constituted a serious problem addressed directly by the escheat provision of the Indian Land Consolidation Act. Nevertheless, the Court held the escheat provision unconstitutional because it completely abolished the expectations of descent and devise that reasonably were created when the Indian land was allotted in severalty and placed in individual Indian trust title. The basic dividing line between the legitimate exercise of supervisory Congressional power over Indian affairs and a taking was set forht in the *Sioux Nation* case. This test requires a determination of whether Congress has made a good faith effort to give the Indians the full value of their lands. Specifically, the Supreme Court in *Sioux Nation* approved the following formulation first advanced in *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968):

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it things is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

> Some guidelines must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.

Thus, where Congress in good faith seeks to provide full compensation for the extinguishment of vested, recognized property rights, no taking generally will be found. Where, however, recognized property rights are extinguished, as proposed by the Hoopa Valley partition plan set forth in H.R. 4469, without providing any compensation whatsoever for the extinguished rights and without providing for any appraisal or equitable distribution formula based on the preclusive *Short* 70-30 equal participation formula, a taking has definitely occurred under the language of the *Sioux Nation* test.

B. The Hoopa Valley Reservation Constitutes a Recognized, Statutory Indian Reservation Fully Protected by the Takings Clause of the Fifth Amendment

For purposes of the fifth amendment taking clause, a distinction sometimes is drawn between Indian reservations with rights authorized and recognized by Congress through treaty, statute, or otherwise and those with otherwise legally enforceable rights derived from legal sources not recognized by Congress. Where Indian property rights have been authorized and recognized by Congress, a vested property right is granted that is fully protected by the fifth amendment requirement for the payment of just compensation for any taking. *See e.g., United States v. Sioux Nation*, 448 U.S. 371 (1980); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938). On the other hand, where Indians possess rights not otherwise confirmed by Congress, such as rights held through aboriginal possession, the courts have ruled that such nonrecognized title does not constitute a vested property right protected by the fifth amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In *Sioux Tribe v. United States*, 316 U.S. 317 (1942), the Court approved the

executive practice of setting land aside from the public domain for Indian reservations, but suggested that executive order reservations of short duration that have not been approved by Congress created no compensable property protected by the fifth amendment. *See also, Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947). The *Sioux Tribe* analysis must be invoked with care, however, since the sole basis for finding that the executive order reservation involved in that case, a temporary executive withdrawal designed to create a liquor buffer zone between white settlement and Indian country, created no recognized, vested property right protected by the fifth amendment was the fact that the reservation had been created by executive order without any prior Congressional authorization or subsequent Congressional ratification. Thus, the Court, while recognizing the power of the President to make temporary withdrawals from the public domain, believed that such withdrawals could not create compensable property interests. Otherwise, the President could improperly deprive Congress of its power under article IV, section 3, paragraph 2 "to dispose of . . . the Territory or other Property belonging to the United States." The theory of *Sioux Tribe* regarding the noncompensability of executive order reservation rights therefore applies only to executive order reservations that neither were previously authorized nor subsequently ratified by Congress. Indeed, in the original 1942 edition of F. Cohen, *Handbook of Federal Indian Law* 302 (1942), Felix Cohen anticipated precisely this point when he wrote:

> Occasionally a treaty leaves a good deal of discretion to administrative authorities in establishing a reservation, and the courts must look to administrative correspondence, maps, and other records to determine the date, extent, and character of the reservation. Here we are on the borderline between treaty and Executive order reservations. In fact, the connection between treaty and Executive order is characteristic of many, if not most, of the early Executive orders and *provides a legal basis of unquestioned validity for such Executive orders.*

Even with this limiting gloss, the theory of *Sioux Tribe* has been subject to considerable scholarly criticism. F. Cohen, *Handbook of Federal Indian Law* 494-97 (1942); Note, Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right, 69 *Yale L. J.* 627 (1960); Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government, 33 *Stan. L. Rev.* 979, 1037-38 n.305 (1981).

With respect to the Hoopa Valley Reservation, both the 1876 Executive Order setting aside the Square and the 1891 Executive Order adding the Extension to the Hoopa Valley Reservation plainly were authorized by Congress in authority delegated by the 1864 Act. Both Executive Orders expressly purport to be issued pursuant to such delegated authority. These Executive Orders therefore are unlike those at issue in *Sioux Tribe*, *Hynes*, or *Confederated Utes* and, like any statutorily authorized reservation set apart as a permanent homeland for Indians, created a vested property right fully protected by the fifth amendment from the date they were entered. F. Cohen, *Handbook of Federal Indian Law* 477 (1982) describes this process in its section on recognized, statutory Indian title as follows:

> In some statutes the designation of the Indian beneficiaries of the reservation is delegated to administrative discretion. Such statutes typically provide that given lands shall be reserved for the use and occupancy of certain bands or tribes "and such other Indians as the Secretary of the Interior may see fit to locate thereon."

See also, Id at 986 (nonrecognized executive order reservations include only those for which "Congress has not acted in a manner sufficient to recognize the property right"). These sources and the reasoning of *Sioux Tribe* therefore all suggest that since both the 1876 and 1891 Executive Orders were expressly authorized by act of Congress and since the President clearly issued each order pursuant to such delegated legislative authority, the property rights created by such orders have been recognized, vested property rights protected by the fifth amendment since the date of those orders.

Even if it is assumed that the Hoopa Valley Reservation constitutes an Executive Order, rather than statutorily, created Indian reservation, the communal ownership of *all* Indians of the Reservation still constitutes a vested property right fully protected by the fifth amendment. Speaking directly to the question of nonrecognized executive order title, F. Cohen, *Handbook of Federal Indian Law 495* (1982 ed.) states, "[i]f an executive order reservation has been in existence for several decades, there is an increased inference of congressional ratification of the reservation's permanent existence by appropriation of funds and other actions supporting continuous use of the lands for Indians purposes." Thus, even if it is assumed, contrary to the

actual facts, that the Hoopa Valley Reservation constitutes reservation created solely by Executive Order, the long course of dealings between Congress and the people of the Reservation no doubt would enable any recognized group or tribe of Indians adversely affected by the partition plan to enforce a fifth amendment taking claim for the diminution of their interest in the Reservation in action against the United States.

C. The Proposed Nonconsensual Partition Plan Would Abrogate and Abridge Both Individual And Communal Rights of the Excluded Indians of Hoopa Valley Reservation in the Resources of the Square

Outside of fisheries resources (the partition of which H.R. 4469 entirely ignores), by far, the most valuable unallotted natural resources of the Hoopa Valley Reservation are the timber resources located on the Square. The *Short* litigation established that the Hoopa Valley Reservation constitutes a single reservation and that all Indians of the Reservation have an enforceable legal right to share equally in the revenues derived from these resources. Thus, the residents of the Square have no greater claim to or right in the valuable resources of the Square than the residents of the Extension. The partition bill would overturn these established property relationships by (1) altering individual entitlements to share in the revenues of the Square by giving such rights only to the 30% of the Reservation who are members of the Hoopa Valley Tribe, while leaving far less valuable resources to remaining 70% of the reservation and by (2) curtailing the co-equal ownership of the Square as between the Hoopa Valley and the Yurok Tribes without compensating the excluded Indians of the Extension in any way for loss of their co-equal communal ownership rights in the resources of the Square. Each of these changes represents a taking of a recognized, vested Indian property right without any compensation.

At the present time, the timber resources of the Square are the major source of revenue from which are distributed the per capita payments over which the Short litigants have been fighting for 25 years. The ability of the *Short* plaintiffs to recover judgments against the federal

government for past mismanagement of those resources indicates that the individual members of the Hoopa Valley Reservation have an *individual* right to share in the income of the reservation on an equal basis once that income has been individualized and parceled out per capita. Such eligibility to income resources resembles a future interest since the right does not become possessory until the individualized per capita payments have been authorized. The fact that the right resembles a future interest, however, does not prevent its abrogation from constituting a taking requiring the payment of just compensation. Generally the extinguishment of a future interest is treated as a taking so long as the event that would make the future interest possessory when viewed from the time of the extinguishment of the right was "probable or imminent." S. Kurtz & H. Hovenkamp, *Cases and Materials on American Property Law* 817-18 (1987); Browder, The Condemnation of Future Interests, 48 *Va. L. Rev.* 461 (1962). Given the pattern and practice of individualizing revenues from the Square through per capita payments, the expectations of the excluded Indian residents of the Extension to share in revenues derived from the Square vindicated in the *Short* litigation certainly is probable, if not also imminent. Indeed, in many ways, the right to share on an equal basis in the individualized resources and revenues of the Reservation resembles the future expectancy of the ability to pass property by devise or descent that the United States Supreme Court found in *Hodel v. Irving* had been taken by the escheat provisions of the Indian Land Consolidation Act. Thus, insofar as the partition proposal curtails such individual expectations of revenue from the resources of the Square, in my judgment, it takes a compensable property interest protected by the fifth amendment takings clause and subjects the United States to substantial potential liabilities through an inverse condemnation suit. Such a suit could be brought individually by disaffected Indians in the United States Claims Court under 25 U.S.C. sec. 1491. In *Short IV*, the Claims Court was confronted with precisely the same argument. It was argued that interest was due on the *Short* judgment fund since the mismanagement of the individual entitlements constituted a taking. The court found it unnecessary to resolve the question since interest also was provided by statute. Nevertheless, the court did not reject the suggestion that abrogation of such individual expectancies to share in the

revenues from the Square distributed per capita to eligible Indians of the Reservation might constitute a fifth amendment taking.

More significantly, the proposed nonconsensual partition plan terminates the existing co-equal *communal* ownership of the resources of the Square among the Indians from the various tribes of the Hoopa Valley Reservation. It leaves the eligible but excluded Indians of the Extension, who under the partition plan would be recognized and authorized to organize as the Yurok Tribe,[14/] with no ownership interest in the most valuable unallotted resources of the reservation. This feature of the bill surely constitutes a taking of the vested communal property rights of the excluded but eligible Indians of the Hoopa Valley Reservation in the resources of the Square. The extinguishment of recognized Indian title to valuable timber and other natural resources has long been recognized as imposing on the federal government a constitutional obligation under the fifth amendment to pay just compensation, i.e. full market value for the property rights in the resources extinguished plus interest from the date of the taking. *E.g. United States v. Shoshone Tribe*, 302 U.S. 111 (1938) and *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938). Since the Yurok Tribe under the proposed partition plan would

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14. The partition plan of H.R. 4469 refers to the Yurok Tribe and the federal government already has recognized the a nonorganized but identifiable group of Indians known as the Yurok Tribe of the Hoopa Valley Reservation. Since, as found in *Short*, there are persons of Yurok descent who are members of the Hoopa Valley Tribe under the 1950 Constitution, the designation Yurok Tribe, as used in this Statement and, apparently, as contemplated in the partition bill does not refer to an ethnological unit with historical antecedents, but, rather, more aptly refers to the eligible but excluded Indians of the Hoopa Valley Extension, i.e. the *Short* plaintiffs and their descendants, many, but not all, of whom are of Yurok ancestry. Among the *Short* plaintiff group are persons with other ancestry, including persons of Karuk, Tolowa, and Chetco ancestry. While the federal government seemingly has vacillated on the composition of the identifiable group that it recognizes as the Yurok Tribe and has otherwise harassed the *Short* plaintiffs and their descendants by requiring extraordinary forms of proof and denying entitlements, benefits, and services, presumably any effort to limit this group of persons to any subgroup that is less than the *Short* plaintiffs and their descendants would pose more serious takings problems for reasons addressed in the preceding footnote.

Likewise, the lack of coextensiveness between ethnological groupings and the tribal division proposed in the partition plan is also evident from the name chosen for tribe seeking to acquire greater rights to the Square -- the Hoopa *Valley* Tribe. Even today, the Hoopa Valley Business Council serves a group of members who are not merely of Hoopa ethnicity. Rather, while predominately Hoopa in ancestry, their primary connection is that most, but not all, of the membership lives or had ancestors who lived on the Square.

succeed to the assets of the excluded Indians of the Reservation and since the Yurok Tribe already is an identifiable group of Indians recognized by the United States government, 50 Fed. Reg. 6055 (1985), should the proposed partition legislation pass, a valid claim seeking full compensation for the abrogation of the co-equal tribal rights in the resources of the Square could be maintained by the Yurok Tribe recognized and organized under the partition legislation[15/] against the United States under the provisions of 25 U.S.C. sec. 1505.

While the Yurok Tribe organized as contemplated in the partition legislation could sue as the successor in interest under 28 U.S.C. sec. 1505 to vindicate the fifth rights of the excluded but eligible Indians of the Hoopa Valley Reservation to co-equal communal title in all Hoopa Valley Reservation resources, that section also provides that any "identifiable group of American Indians residing within the territorial limits of the United States" can sue thereunder for claims against the United States arising under the Constitution, including fifth amendment taking claims. Thus, the excluded but eligible Indians of the Hoopa Valley Reservation, the *Short* plaintiffs and their descendants, could sue collectively for the taking of their communal ownership rights in the resources of the Square, just as either the Hoopa Valley Tribe or its members as a class could sue for the extinguishment of their communal ownership in the far less valuable lands of the Extension.

The Claims Court decision in *Short IV* is not to the contrary. In that case, the court noted that the plaintiffs had only filed suit under 28 U.S.C. sec. 1491 to enforce their *individual* claims to per capita payments paid out of the revenues derived from resources of the Square. No claim

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15. It should also be noted that very short two year statute of limitation and provisions authorizing Yurok Tribe organization under the provisions of the Indian Reorganization Act seem to be in conflict and pose a further potential takings or due process fifth amendment problem. Since organization of a Yurok Tribal government pursuant to the provisions of the proposed partition legislation presumably may take some time, possibly as long as two years, as a result of delays that in some situations could be attributed to the federal government, there may be no realistic possibility, for an organized Yurok Tribal government created under the provisions of the partition legislation to initiate inverse condemnation proceedings to vindicate the fifth amendment rights of the excluded but eligible Indians of the Hoopa Valley Reservation. In such a case, the statute of limitations may itself violate due process of law or constitute a taking. *Cf., Tulsa Professional Investment Services, Inc. v. Pope*, ___ U.S. ___, 108 S.Ct. 1340 (1988) (due process violated by reliance on short statute of limitation in probate proceedings rather than individualized notification to extinguish valid claims).

had been actively pursued under section 1505 to secure payment for impairment of communal rights. Thus, since the plaintiffs were not pressing collective communal claims, but, rather, were pursuing their claims individually, the court held that they had no right to have the mismanagement of communal assets not individualized by a per capita distribution calculated as part of their individual damage claim. That ruling did not mean, however, an "identifiable group of Indians" might not press a suit under 28 U.S.C. sec. 1505 to enforce against the United States its tribal and communal ownership rights or that it would not have a compensable claim. Such claims regularly are entertained under section 1505. The point of the 1987 ruling in *Short IV* merely was that no such cognizable claim to communal assets had been pressed on the court and that such a claim could not be filed by the plaintiffs under 28 U.S.C. sec. 1491. This observation also explains why the Court of Claims in *Short III* rejected the government's motion to substitute the Yurok Tribe for the individual plaintiffs in *Short*. While ultimately involving ownership rights to the Hoopa Valley Reservation, the *Short* litigation directly laid claim primarily to individual entitlements to per capita payments and challenged under section 1491 the federal mismanagement that deprived the plaintiffs of such payments. The court's ruling that the Yurok Tribe could not substitute for the individual plaintiffs was plainly correct insofar as the Yurok Tribe has no enforceable legal right to *individual* per capita payments due to tribal members. That ruling did not imply, however, that the Yurok Tribe or the excluded members of the Extension as a group might not have enforceable tribal and communal rights to the resources of the Square that, when taken or mismanaged by the federal government, could be enforced through an action against the United States under section 1505. These rulings only indicated that no such action had been actively pursued.

Neither *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) nor *United States v. Jim*, 409 U.S. 80 (1972), indicate a contrary conclusion. While the Court found that the congressional actions in these cases did not constitute a taking of Indian property, these two cases are distinguishable from the problem posed by the proposed partition legislation for two reasons. First, in both cases, Congress merely was enlarging the class of persons that were entitled to

share in Indian resources, just as the 1891 Executive Order enlarged the class of persons entitled to share in the resources of the Hoopa Valley Reservation. In neither of these cases were Indians excluded from tribal or individual rights in Indian resources, while the proposed partition plan clearly excludes the Indians of the Extension, the so-called Yurok Tribe, from vested rights they currently enjoy to share tribally and individually in the highly valuable resources of the Square . Conversely, the partititon plan also excludes the Hoopa Valley Tribe and its members from their vested ownership rights in the far less valuable resources of the Extension. In *Jim*, the Court pointed out that "Congress has not deprived the Navajo Tribe of the benefits of mineral deposits on their tribal lands." Id. at 83. By contrast, the proposed partition legislation does deprive the eligible Indians of the Extension, or the Yurok Tribe, of their valuable rights to share on an equal basis in the timber and other resources of the Square. It therefore constitutes a taking. Second, in neither *Hollowbreast* nor *Jim* did the Congressional legislation affect a recognized, vested property interest. In *Hollowbreast* the interest was not a present possessory right, but rather a future interest. Furthermore, according to the Court, the reversionary interest in that case did not, unlike the rights of the *Short* plaintiffs and their descendents, involve a future interest the vesting of which was either imminent or probable. In *Jim* the Court even held that a statute suggesting that certain royalties for mineral resources owned by the Navajo Tribe as a whole be held for the Indians of a small subpart of the Navajo Reservation created no vested property right that prevented the enlargement of the legislative class to include other members of the Navajo tribe. While neither *Hollowbreast* nor *Jim* involved vested rights of the plaintiffs, the involuntary partition of the Hoopa Valley Reservation in the fashion proposed in H.R. 4469 takes two different vested rights, one of which is a present possessory right. First, the co-equal tribal or communal ownership of the Indians of the Extension, or the Yurok Tribe, in the Square and, conversely, the rights of the Hoopas to share co-equally in the ownership and resources of the Extension were created, vested, and recognized by the 1891 Executive Order and have been a vested, possessory property right from the date of that Order. Thus, the partition plan, unlike the legislation at issue in these other two cases, clearly abroga-

tes existing, vested, possessory property rights. Second, the *Short*-based individual rights of the eligible Indians of the Reservation to share on an equal basis in the individualized resources of the Reservation, such as the per capita payments, also is far more probable and imminent the reversionary interests involved in *Hollowbreast*. Thus, these rights also represent vested, albeit not possessory, property rights taken by the partition plan.

In short, the partition plan abrogates important recognized and vested property rights both of the Yurok Tribe as a community and of eligible Indians of the Extension, as individuals. The fifth amendment therefore requires the payment of full just compensation for the extinguishment of these interests. Yet, the proposed partition legislation provides no compensation whatsoever for the extinguishment of these valuable rights. The partition plan therefore is constitutionally fatally flawed and should be opposed on that basis alone.

D. The Nonconsensual Partition Plan Provides No Compensation Whatsoever for Lost Rights and Thereby Blatantly Contemplates an Unconstitutional Taking Under the Standards Established In *United States v. Sioux Nation of Indians*

As previously noted, in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court held that where Congress abrogates or abridges vested Indian property rights, whether tribally or communally held rights as in *Sioux Nation* or individually held rights as in the *Irving* case, a taking will be found unless it can be shown that Congress was exercising its authority as trustee of Indian land and resources by making a good faith effort to secure the full value of the resources for affected Indians. In the proposed partition plan absolutely no compensation whatsoever has been provided. The only payment to the excluded Indians of the Extension that might even be thought to provide compensation is the provision in section 2(b)(3) of H.R. 4469 authorizing the Secretary of the Interior to spend up to $2,000,000 to acquire additional land along the Klamath River to be added to the reservation arbitrarily assigned to the so-called Yurok Tribe under the partition plan.

The provision authorizing purchase of land for enlargement of the Yurok Reservation created under the partition plan should not be considered compensation at all, let alone *just* compensation, for several reasons. First, the provision does not mandate the acquisition of additional land for Reservation, it only authorizes the expenditure of such funds and mandates the Secretary to use his best efforts "to purchase land" along the Klamath River for these purposes. If Congress was using "good faith efforts" to compensate for the large and valuable property rights of the Indians adversely affected by the partition plan, as required by law, the Secretary would be mandated to spend the funds in question and given eminent domain powers to condemn lands for these purposes so that the affected Indians necessarily would receive such compensation irrespective of the willingness of current owners of the land to sell. Second, the figure of $2,000,000 in land apparently constitutes an arbitrarily selected figure dictated by the size of the federal budget, rather than the value of the rights lost through the partition plan to the excluded but eligible Indians of the Hoopa Valley Reservation. If Congress were seriously intending to add lands to the Reservation, "good faith efforts" would require appraisal of the full value of both the communal and individual rights abrogated by the partition plan and an effort should be made to assure that all property rights abrogated by the partition plan are fully compensated, presumably based on a calculation utilizing the 70-30 equal entitlement formula of *Short*. Anything less does not constitute Congressional good faith efforts to provide full and fair compensation and therefore under the *Sioux Nation* test constitutes a compensable taking. The partition plan, of course, calls for no such complete appraisal of the communal and individual property rights in the Hoopa Valley Reservation and makes no effort to divide these resources along the 70-30 equal entitlement principle of *Short*. It therefore plainly includes no good faith efforts to secure full and fair market value for the excluded but eligible Indians of the Hoopa Valley Reservation. Third, neither the context nor language of section 2(b)(3) nor the arbitrarily selected figure of $2,000,000 suggests that this provision in the legislation is intended as compensation. In *Sioux Nation*, the Supreme Court confronted a similar question in connection with the question of whether Congress meant to provide compensation through provisions in the 1877

legislation taking title to the Black Hills from the Sioux Nation that extended the boundary of Sioux lands northward to include 900,000 acres of grazing land not previously included therein. As I believe also would be found in the case of the provisions of section 2(b)(3) of H.R. 4469, the Court in *Sioux Nation* rejected the suggestion that such additions to the reservation constituted any form of compensation that should be considered in the applying its good faith efforts test. The Court said:

> The Government has placed some reliance in this Court on the fact that the 1877 Act extended the northern boundaries of the reservation by adding some 900,000 acres of grazing land. . . . Congress obviously did not intend the extension of the reservation's northern border to constitute consideration for the property rights surrendered by the Sioux. The extension was effected in that article of the Act redefining the reservation's borders; it was not mentioned in the article of the Act redefining the reservation's borders; it was not mentioned in the article which stated the consideration given for the Sioux' "cession of territory and rights." . . . Moreover, our characterizing the 900,000 acres as assets given to the Sioux in consideration for the property rights they ceded would not lead us to conclude that the terms of the exchange were "so patently adequate and fair" that a compensable taking should not have been found.

448 U.S. at 418 n.31. Likewise, the mere authorization of section 2(b)(3) of H.R. 4469 to the Secretary of the Interior to purchase up to $2,000,000 in additional land to be added to the Yurok Reservation created by the partition plan is so arbitrarily selected and is not "'so patently adequate and fair' that a compensable taking should not have been found."

Other than the completely inadequate provisions of section 2(b)(3) of H.R. 4469, there is not one shred of effort to provide just compensation for the recognized, vested property rights abrogated by the partition plan.[16/] Indeed, there is no argument that the proposed partition plan makes any effort, let alone any good faith effort, to provide just compensation. It makes no effort to appraise the resource value of the reservation, it makes no effort to divide those assets along the 70-30 equal entitlement principle of *Short*, and it provides no compensation whatsoever for the vested property rights abrogated or curtailed under the proposal. Thus, there is little

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16. The provisions of section 3(b) of H.R. 4469 obviously do not constitute compensation since they involve distribution of funds already co-equally owned by the eligible Indians of the Hoopa Valley Reservation, including both the members of the Hoopa Valley Tribe and the excluded but eligible Indians of the Extension.

question that under the *Sioux Tribe* case, the partition plan would be treated as taking, rather than a good faith effort by Congress to exercise its trusteeship authority over Indian affairs.

D. The Contingent Indemnification Provision Constitutionally Invalidates the Partition Plan as a Taking of Private Property for Other Than Public Purposes

The fifth amendment taking clause permits private property to be taken only "for public use," provided just compensation is paid. The contingent indemnification provision of section 2(f)(2) of H.R. 4469 reveals the partition plan for precisely what it is -- an unconstitutional property redistribution scheme that extinguishes the recognized, vested, and enforceable individual and communal rights in the Square of the excluded but eligible Indians of the Hoopa Valley Reservation for the benefit of the Hoopa Valley Tribe and its members. The contingent indemnification provision attempts to provide, albeit unsuccessfully as discussed in the next section, that any liabilities incurred under the partition scheme will be borne by its true beneficiaries, the Hoopa Valley Tribe and its members, rather than the public. The Supreme Court long has held that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937) (gas proration order invalidated as an uncompensated taking of private property for private benefit). The Court's most recent pronouncement on the "public use" requirement of the fifth amendment is *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In *Midkiff*, the Court sustained a plan of the Hawaii legislature to redistribute land ownership in Hawaii *with compensation* and to thereby remedy the oligarchical control of land in Hawaii caused by the vestiges of the early monarchical land holdings. The Court relied on the fact that the taking in question was fully compensated and further found that there was a reasonable public purpose in light of the effort to more broadly distribute land and remedy the societally dysfunctional aspects of the land oligopoly on the public land market in Hawaii. Specifically, the Court said:

> **The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market, and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a States police powers.**

The partition plan proposed in H.R. 4469 can be distinguished from the Hawaii land redistribution scheme on at least two grounds. First, it constitutes an *uncompensated* taking. Second, unlike the situation in *Midkiff* in which governmental action enlarged the class of persons eligible to share in property in order to combat for public purposes the evil effects of oligopoly of ownership, the partition plan of H.R. 4469 concentrates ownership in the Hoopa Valley Tribe oligopoly by extinguishing the valid co-equal ownership rights of the 70% of the reservation population constituting the excluded but eligible Indians of the Reservation. Thus, the partition plan proposed in H.R. 4469 has precisely the opposite effect of the Hawaii land redistribution plan -- it concentrates land ownership to public detriment and in violation of the legitimate property rights of the majority of the present owners of the Reservation. Thus, *Midkiff* supports the idea that the partition plan proposed in H.R. 4469 constitutes a constitutionally invalid effort through an uncompensated taking to appropriate private property for *private* use.

Furthermore, the contingent indemnification provision of section 2(e)(2) plainly manifests on the fact of the partition legislation the intent to appropriate property to private purposes. In *Midkiff*, the Court indicated that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" The bizarre contingent indemnification provisions of section 2(e)(2) and the obvious concomitant unwillingness of Congress to shoulder the costs of providing full compensation for the extinguishment of rights engendered by the proposed partition plan, plainly make it impossible to defer to the presumption of public use. The entire partition scheme proposed in H.R. 4469 therefore, as in the *Thompson* case, constitutes a constitutionally invalid uncompensated taking of property for private purposes.

E. The Contingent Indemnification Provision Will Not Insulate the United States from Monetary Liability for Takings Effectuated by the Partition Plan

The contingent indemnification provision of section 2(e)(2) is designed to assure that the United States will not incur any monetary liability for the obvious taking of vested Indian property rights contemplated by the partition plan. This provision constitutionally cannot successfully accomplish that result. Basically, the provision requests that the tribe benefitting from the gross reallocation of property rights contemplated in the partition plan pay for the benefits that it receives. The constitutional infirmity of this provision is evident from the legal dilemma that it creates. If, as is obviously correct, the reason for this provision is that the Hoopa Valley Tribe and its members, rather than the public, would benefit by the plan, the plan constitutes, as discussed above, an uncompensated taking of property for *private* purposes. On the other hand, if the partition plan is thought to be for public benefit, the only theory that would sustain such an involuntary partition, then under the fifth amendment the federal government is constitutionally obligated by the fifth amendment to pay full compensation for the taking. The contingent indemnification provision of the Act seeks to cast this obligation on the tribe benefited by the partition and then limit the indemnification recovery only to taken from the benefited tribe's "future income." This effort to involuntarily force the benefited tribe to pay for an exercise of eminent domain powers undertaken ostensibly "for public use" might constitute a taking of Indian property for public use itself. Thus, were the partition plan to take effect and were the contingent indemnification provision triggered, the benefited tribe, The Hoopa Valley Tribe, probably would have a valid cause of action against the United States under the fifth amendment takings clause that it could enforce in the United States Claims Court under 28 U.S.C. sec. 1505 claiming that confiscation of its property to pay for the takings liabilities incurred by the United States as a result of the partition plan constituted an involuntary taking of its property for public use, i.e. to pay obligations of the United States. Even though the Hoopa Valley Business Council may currently support the plan, they are both legally and pract-

ically capable of disingenuously turning around and attacking the contingent indemnification provisions as a taking should they ever be successfully invoked against them. Indeed, the Hoopa Valley Business Council demonstrated just such behavior when it disingenuously and, ultimately unsuccessfully, filed suit in the United States District Court for the Northern District of California (No. C-76-1405 RHS) against the Secretary of the Interior, without ever mentioning the *Short* decision, to contest the allegedly illegal sequestration of "70% of the plaintiff's income."

The nonconsensual partition plan contained in H.R. 4469 certainly constitutes an uncompensated taking. Either it constitutes an uncompensated taking for *private* use, in which case it is entirely unconstitutional, as discussed above, or it constitutes a taking for public use, in which the United States must assume the obligation to pay full compensation or a *voluntary* compensation structure must be established by the Act. The contingent indemnification provision therefore cannot conceivably insulate the United States from liability. Either the provision constitutionally invalidates the entire partition scheme or its takes for public use the property of the tribe required to pay such compensation. Under the fifth amendment, there simply is not and constitutionally should not be any way to escape alternative conclusions.

CONCLUSION

The nonconsensual partition plan for the Hoopa Valley Reservation constitutes a cynical, arrogant, and unconstitutional effort to overturn the judicial vindication of the vested and recognized property rights of the excluded but eligible Indians of the Hoopa Valley Reservation. It would overturn judgments and orders secured after 25 years of litigation and it would reward the Hoopa Valley Business Council, the small minority of the Reservation who currently compose the Hoopa Valley Tribe, and the Bureau of Indian Affairs for actions that numerous courts have found to be illegal. Furthermore, the partition plan is completely anti-democratic and therefore violates the substantive majoritarian principle of the Indian Reorganization Act of 1934 that has been the cornerstone of twentieth century federal policies of furthering Indian tribal self-

government. Finally, the partition plan is blatantly unconstitutional since it takes vested, recognized Indian property rights, both individual and communal rights, for private purposes and otherwise constitutes a completely uncompensated taking. Thus, involuntary partition of the Hoopa Valley Reservation in the fashion contemplated in H.R. 4469 is both bad policy and unconstitutional.

If Congress believes that federal legislative intervention is appropriate into the almost 40 year dispute involving the political and economic structure of the Hoopa Valley Reservation, a far better and more constitutional policy would be to require restructuring of a single tribe for the entire Hoopa Valley Reservation, both the Square and the Extension, which would comply with the substantive majoritarian principle of the Indian Reorganization Act of 1934, which would include, serve and allow equal participation for all eligible Indians of the whole Reservation. Such legislation would vindicate, rather than thwart, the hard won rights of the plaintiffs in *Short* and *Puzz*. Such legislation merely would rectify past administrative errors and illegal actions that created the current exclusion of 70% of the eligible Indians of the Reservation from ful participation in the Hoopa Valley Reservation government and from full enjoyment of equal benefits from the economic resources of the Reservation.

[The statement of Ms. Newton follows:]

STATEMENT OF

NELL JESSUP NEWTON

IN OPPOSITION TO PROPOSED LEGISLATIVE

PLANS TO RESOLVE DISPUTES ON THE

HOOPA VALLEY RESERVATION BY

NONCONSENSUAL PARTITIONING OF THE RESERVATION

Hearing before the Senate

Committee on Indian Affairs

Sacramento, California

June 30, 1988

My name is Nell Jessup Newton. I am an associate professor of law at the Columbus School of Law at the Catholic University of America. I have taught and written in the field of Indian law since 1977. I have also taught constitutional law since 1980. My research and writing has focused particularly on questions regarding confiscation and mismanagement of Indian property. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215 (1980); Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 Oregon L. Rev. 245 (1982); Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 Catholic Univ. L. Rev. 635 (1982); and, the limits of federal plenary power over Indians: Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Penn. L. Rev. 195 (1984).

At the request of counsel representing some of the Indians on the extension, I am submitting this memorandum. The views expressed represent my own, however, and not those of my employers, the Catholic University of America.

Congressional power over Indians has too often been invoked to impose legislative solutions to Indian problems against the wishes of the Indian people themselves. On June 21, 1988, the Committee on Interior and Insular Affairs of the House held a hearing on a bill, H.R. 4469, designed to partition the Hoopa Valley Reservation between two groups of Indians -- the Hoopa Valley tribe and the Yurok tribe. It is my understanding that

the Senate's hearing in Sacramento on June 30 represents a preliminary inquiry into possible solutions to the property and political disputes on the Hoopa Valley Reservation.

Because the House bill is the only one introduced to date, I will refer to that bill to argue that any bill modeled on H.R. 4469 should be rejected and that any other solution that is not based on the consensus of the affected people also be rejected.

The history of the Hoopa Valley Reservation dispute has been ably told elsewhere, in the numerous opinions in the Jessie Short case: *Short v. United States*, 12 Cl. Ct. 36 (1987) (*Short IV*); *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1266 (1984) (*Short III*); *Short v. United States*, 661 F.2d 150 (Ct. Cl. 1981, *cert. denied*, 455 U.S. 1034 (1982) (*Short II*; *Short v. United States*, 202 Ct. Cl. 870 (1973) (*Short I*). What follows is merely a brief outline of this history.

Indians in California belonged to some 500 separate and distinct bands who originally claimed aboriginal title to some 75,000,000 acres of land in the state. After statehood, Congress authorized commissioners to negotiate treaties with these diverse bands of Indians to obtain relinquishment of their land claims in return for the promise of reservations and food, clothing, tools, and supplies. The eighteen treaties so negotiated provided for more than 8,000,000 acres of reservations to be established as the permanent homes of the

signatory tribes. The Treaty of 1851 with the Taches, 4 Kappler 1092, art. 3, contains this typical provision:

> Art. 3. It is agreed between the parties that [a defined district] shall be set apart and forever held for the sole use and occupancy of said tribes of Indians; in consideration of which . . . the said tribes hereby forever quit claim to the government of the United States to any and all lands to which they or either of them may ever have had any claim or title.

Although the California Indians kept their part of the bargain, by moving to the locations specified as reservations in the treaties, political pressure by the California state delegation resulted in the Senate refusing to ratify the very treaties the Senate had earlier authorized the president to make.[1] Congress thus embarked on a much more modest reservation system.Several acts of Congress authorized the president to create military reservations to collect the Indians. Act of Mar. 3, 1853,

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1. For more detailed accounts, see Goodrich, *The Legal Status of the California Indians*, 14 Calif. L. Rev. 6 (1914). After securing a special jurisdictional statute, the Caliornia Attorney General Earl Warren presented the California Indians' claims to the Court of Claims, eventually settling the case for $5,000,000. *See Indians of California v. United States*, 98 Ct. Cl. 583 (1942) (statutory liability established).

10 Stat. 238; Act of Mar. 3, 1855, 10 Stat. 699. Pursuant to this legislation, three Executive order reservations were created, including the Klamath River Reservation established for Indians living along the Klamath river in 1855. 1 C. Kappler, *Indian Affairs: Laws & Treaties* 817 (1904).

To provide for removal of the remaining California Indians, Congress enacted "An Act for the Better Organization of Indian Affairs in California," 13 Stat. 39. The law created one superintendent for the entire state (section 1), provided for the establishment of 4 reservations within the state (section 2), and the sale of all reservation land not needed for this purpose.(section 3). Section 2 of the act is the source of the present dispute. It states, in pertinent part:

> That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land . . . to be retained by the United States for the purpose of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state . . . Provided, that at least one of said tracts shall be located in what has heretofore been known as the northern district: . . . And provided, further, that said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be

> provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

Pursuant to this law, President Grant issued an Executive order on June 23, 1876 precisely defining the boundaries of the Hoopa Valley Reservation, declaring the reservation "be, and hereby is, withdrawn from public sale and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. 1 C. Kappler, Indian Affairs: Laws & Treaties 815 (1904). This original reservation is know as "the Square."

Note that although the reservation was called the Hoopa Valley Reservation, neither the 1864 statute nor the Executive order ever specified any particular tribe or group of Indians by name. The congressional policy was to collect Indians from the many different tribal groups in California on a few large reservations away from the general population. As trial Judge Schwartz stated in *Short I*, 486 F.2d 561, 564 (Ct. Cl. 1973): "in the north, in the area of the Hoopas and the Yuroks, almost every river and creek had its own tribe." Thus, the legislative scheme mandated the creation of reservations to accommodate "the Indians of said state," but delegated to the

President discretion to determine which tribes should be placed on each reservation.

From the beginning the Hoopa Valley Reservation was occupied by members of other tribes as well as Hoopas, including some Yuroks. Members of still other tribes soon joined them, including Klamaths, Redwoods, Humboldts, Hoonsoltons, Miscolts, and Saiaz, a fact which is amply documented by references in the Annual Reports of the Commissioners of Indian Affairs between 1876 and 1891, when the extension was added. See *Short I*, 486 F.2d 561, 565-66 (Ct. Cl. 1973).

This extension, too, was added by Executive order, dated October 16, 1891, 1 C. Kappler, Indian Affairs: Laws & Treaties 815 (1904). The order added a 1 mile wide strip extending 45 miles to the ocean. This strip included the previously established Klamath River Reservation. Thus, at that point the reservation resembled "a square skillet with an extraordinary long handle." *Short I*, at 562.

As the United States Supreme Court said in *Mattz v. Arnett*, 412 U.S. 481, 493-94 (1973):

> The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. . . . Thus recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly the President turned to his authority under the Act to expand an existing,

> cognized reservation. Again, the 1891 Executive order, issued pursuant to the 1864 law, did not specify a particular tribe as beneficiary of the addition or the reservation, referring instead to the reservation as "a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized" by the 1864 law.

The Square is heavily timbered. In 1950 the Indians of the Square, including enthnological members of the Hoopa Valley tribe as well as other tribes who inhabited the square, organized as the Hoopa Valley Tribe. In 1957, the Secretary of the Interior began distributing revenues from that timber solely to the members of that tribe. In 1963, 3300 excluded Indians primarily living on the extension, brought suit seeking their share in the per capita distribution. In 1973, the Court of Claims held that all the Indians of the Reservation were equally entitled to share in any per capita distributions made from revenues derived from timber anywhere on the reservation. (*Short I*).

Subsequent proceedings to determine who were Indians of the reservation entitled to share and the extent of liability continued for 14 years. According to Judge Margolis of the United States Claims Court: "This case, filed in the United States Court of Claims on March 27, 1963, has outlasted some 400 now deceased plaintiffs, the original trial judge, several deceased attorneys, and even the court in which it was originally filed." *Short IV*, 12 Cl. Ct. 36, 38 (1987).

Some $60 million remained in the Treasury in 1987 waiting final determination of who are Indians of the reservation.

The *Short* case only resolved a narrow question however -- that of who was entitled to share in whatever per capita distributions were made. Decisions regarding how reservation resources were to be managed, including to what extent per capita distributions should be made, were made by the federal government and the Hoopa Valley Tribe through its business council. Thus, decisions regarding the use of revenues derived from unallotted reservation land that was not distributed per capita, some 70% of the revenues, were made that favored the Hoopa Valley tribe and its business council and not the excluded group. For example, 25 U.S.C. § 407 (1982) gives the secretary discretion to disburse timber revenues from unallotted land. The Secretary continued to use this money to support the activities of the Hoopa Valley tribe including money to fund services that the excluded group, not being members, were ineligible to receive. As a result, individual Indians of the reservation sued the Hoopa Business Council and the United States government arguing they were entitled to a voice in administering the reservation. In *Puzz v. United States*, Civ. No. 80-2908 (April 8, 1988), the district court ordered the federal government to exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that "all Indians of the reservation receive the use and benefit of the reservation on an equal basis." slip opin. at 23. The court further ordered the government to devisea plan to ensure that

nonmembers are included in decisionmaking. As an example of the government's discrimination in favor of the Hoopa Valley tribe, the court noted that the government had permitted reservation funds to be used to defend that very litigation and ordered this practice stopped.

Only two weeks after the decision in *Puzz*, H.R. 4469 was introduced. It is apparent that the bill proposed in the House was designed to undercut the results in the *Puzz* case.

The bill introduced in the House contains a remarkably simplistic and completely unfair resolution to the dispute. Simply put, the bill would sever the Square and the extension into two reservations. The members of the Hoopa Valley tribe will be the beneficial owners of the Square. The members of the Yurok tribe will become the beneficial owners of the Extension. After the *Short* plaintiffs are paid their share of the per capita payments, the bill provides that the rest of the escrow fund be divided 50-50 between the two tribes.

The bill contains no provision for just compensation in the constitutional sense. It provides for some transfer of money to the Yurok Tribe, however. It directs the transfer of any National Forest lands within the boundaries of the proposed Yurok Reservation to the reservation and it authorizes the appropriation of $20 million to permit the Secretary "to seek to purchase land along the Klamath River." Finally, the bill provides that any successful suit against the United States for just compensation by either tribe will entitle the United

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States to "a judgment for reimbursement from the other tribe's future income."

The bill as proposed favors the members of the Hoopa Valley tribe, a minority of the Indians of the reservation, over the nonmembers, who make up a majority of the Indians of the reservation. The Hoopa Valley tribe members comprise 30% of the tribal reservation population, yet the timber revenues from the Square account for 70% of reservation revenues. Dividing the *Short* escrow fund 50-50 also favors the Hoopas, because 30% of the population would be receiving 50% of the money.

Moreover the two groups created by the statute are artificial. The Hoopa Valley tribe itself was created artificially by Indians of various ethnological background living on the Square at the time of organization under the IRA. As stated earlier, some 15 ethnological groups are represented in the lineage of reservation members (Many Extension residents, primarily Yuroks, for instance, are related to persons on the Square). Although the bill provides for organization of a Yurok Tribe under the Indian Reorginization Act, will all non-Hoopas be eligible to vote or will some quantum of Yurok blood be required? If the latter, the bill could work to disenfranchise these people.

Finally, the bill is bad policy and bad law. It is bad policy because it subverts the 20 year struggle of the excluded Indians to achieve peacefully through the courts a remedy to great injustice. After careful consideration of the entire

history of the United States government's dealings with the Indians on the Hoopa Valley Reservation, the Court of Claims has determined that all the Indians of the reservation have consistently been intended by Congress as the beneficiaries of reservation resources. Thus, the excluded reservation residents have won the right to share in the per capita payments. Moreover, the federal district court in California has concluded that the present Hoopa Valley Business Council, which does not represent the interests of the nonmembers of the Hoopa tribe, functions illegally when it makes decisions affecting reservation resources. In the future, a truly majoritarian system of government must be set up to protect the interests of all the people of the reservation. Despite these court victories, in fact because of them, the House bill proposes to divide the reservation, giving the greatest wealth to the Hoopa Tribe.[2] "The message thus sent to all Indian peoples is that they cannot trust the "courts of the conqueror," because judicial victories will be overturned by a vengeful Congress. It echoes the plenary power era, now theoretically discredited, in which Congress claimed the right

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2. The bill does preserve the victory of the *Short* plaintiffs to their share of the per capita payments made in the past. The rest of the huge escrow amount is to be divided 50-50 between the two tribes, however. More important, future income from the valuable timber reserves on the Square will inure solely to the Hoopa Tribe.

to treat Indian money and land as public money and land. It is bad law, because in my opinion it violates the fifth amendment takings clause. The rest of this statement will be directed to an analysis of the constitutionality of any bill that partitions the Hoopa Valley Reservation without the consent of all affected individuals.

The Fifth Amendment Takings Clause

The fifth amendment takings clause protects a cardinal value. "The Fifth Amendment's guarantee . . . was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public at large." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). When a regulation of land leaves it in its present ownership, but drastically affects the value or use of the property, the determination of whether a taking has occurred requires a balancing of the detrimental economic effect of the regulation against the public good to be furthered. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Predicting whether such a "regulatory taking" exists can be difficult in a given case. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987). In a case like the present, however, determining whether a taking exists is a straightforward inquiry, because the proposed government action would effect a

permanent physical occupation of property presently owned by all Indians of the reservation, giving a portion claimed by all of them to one favored group. Such actions create a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-35 (1982).

These fifth amendment takings clause principles have not been applied neutrally to cases involving Indian land, however. Most notable is *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), in which the Supreme Court held that aboriginal Indian title is not "property" within the meaning of the takings clause. The rule of *Tee-Hit-Ton* is that the takings clause only applies to Indian property that has been "recognized . . . by action authorized by Congress." *Id.* at 288-89. Moreover, Executive order reservations created by the president on his own authority out of public domain lands are not recognized, absent further congressional action, according to two cases decided in the 1940's, *Sioux Tribe v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947). Finally, even Indian property that has been so recognized by Congress, is subject to a further analytical hurdle before compensation can be granted for a physical invasion. According to *United States v. Sioux Nation*, 448 U.S. 371 (1980), the government may be insulated from liability if the governmental act resulting in a loss of property arose from an exercise of guardianship rather than exercise of sovereign power. In other words, if a reviewing

court determines the government acted as a guardian of Indian land, transmuting the land into money, even against the wishes of the tribe, a taking has not occurred. In *Sioux Nation*, the Supreme Court held that if the government "fairly (or in good faith) attempts to provide [its] ward with property of equivalent value," a reviewing court should declare the governmental action to be that of a guardian. *Id.*, at 416. Consequently the affected tribe would only have a claim for breach of trust and not for a fifth amendment taking.

My research into Indian property law convinces me that any nonconsensual partition of the Hoopa Valley Reservation would be a fifth amendment taking, because the Hoopa Valley Reservation has been recognized by Congress in the *Tee-Hit-Ton* sense. Thus, it is property within the meaning of the fifth amendment and the cases denying compensation for a taking of unrecognized Executive order land do not apply. Second, even if the reservation has not been recognized, I believe the Court is ready to reexamine the broad language in *Sioux Tribe* and *Confederated Utes* in light of its greater sensitivity to minority rights since those cases were decided, the expansion of the concept of property for purposes of the due process clause, and its recent application of general fifth amendment principles, instead of specialized "Indian" fifth amendment principles in *Hodel v. Irving*, 107 S. Ct. 1076 (1987), decided just this past term. If it does decide to reconsider *Tee-Hit-Ton*, a case involving an Executive order reservation

which has been home to a group of Indians for the last 100 years will present an appealing vehicle to distinguish them, especially since there are no recent precedential hurdles to such a narrowing interpretation and both cases are very narrow decisions, easily confined to their facts.

Congress Has Recognized the Hoopa Valley Reservation

In *Tee-Hit-Ton Indians v. United States*, the Supreme Court held that neither the Organic Act, 23 Stat. 24 or the Act of June 6, 1900, 31 Stat. 321, providing for a civil government for the State, recognized the Alaskan natives' ownership right to land they inhabited in Alaska. Instead, the Court interpreted the relevant statutes as designed merely to preserve the status quo until Congress could decide what should be done with the Natives. *Id.* at 278. Recognition required, according to the Court, evidence that "Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently." *Id.* at 277. Later in the opinion, the Court clarified to some extent the requirement for recognition by stating: "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights." *Id.* at 278-79.

During the late eighteenth and early nineteenth century, several presidents removed land from the public domain for various purposes (including some 99 establishing or enlarging

Indian reservations) by issuing Executive orders. Many of these withdrawals were made without any statutory authorization. This practice was attacked as interfering with congressional prerogatives under the property clause, granting Congress the exclusive right to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, sec. 3. The Supreme Court upheld the president's power to make withdrawals without an express statutory delegation on the theory that the prevalence of the practice and the failure of congress to object demonstrated congressional acquiescence and thus an implied delegation. *See, e.g., Mason v. United States*, 260 U.S. 545 (1923). In 1919, Congress decided that the practice had been abused, and explicitly forbade the executive to withdraw any further land. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (current version codified at 43 U.S.C. § 150 (1982). The 1919 act did not in anyway remove authority for the earlier reservations, however.

Sioux Tribe and *Confederated Utes*, *supra*, involved unauthorized presidential removals of public domain to enlarge temporarily existing Indian reservations. It was the absence of any explicit congressional authorization that caused the Supreme Court to declare that the Executive orders did not create any compensable right.

In contrast, the 1864 statute directing the president to establish four reservations in California provided explicit authorization for the Executive orders of 1876 and 1891, a fact the Court noted in its extensive treatment of Executive order reservations in *United States v. Midwest Oil*, 236 U.S. 466, 469 (citing *Donnelly v. United States*, 228 U.S. 243 (1913), a case upholding presidential power to add the Extension to the Hoopa Valley Reservation).

In my opinion, the 1864 act granted the Indians of the reservations to be established a compensable property interest. The question whether a reservation has been recognized is a matter of ascertaining congressional intent. Standard principles of statutory construction do not apply to statutes enacted to benefit Indian tribes, however. These statutes must be construed liberally in favor of the Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The 1864 statute directed the president to exercise his discretion in the "best interests of the Indians to be provided for," thus indicating congressional intent to benefit the California Indians. In addition, the 1864 statute evidences congressional intent that the land be used "for the purposes of Indian reservations." Moreover, the legislative history of the 1864 statute indicates congressional intent to move the California Indians onto the four reservations which they could regard as their home to compensate them for the loss of their land through the unratified treaties and to clear the way for the

further settlement of California. Finally, the statute must be read in conjunction with the general policy regarding Indians at the time it was enacted. In 1864 Congress regarded Indian reservations as permanent homes, for Indian policy prevailing from 1850 to 1887 was to relocate (and confine) Indian tribes on permanent reservations. It was not until the Dawes Act in 1887 (24 Stat. 388) that congressional policy favored breaking up the reservations.

Comparable treaty language has been held to recognize title. For instance the phrase "held and regarded as an Indian reservation" has been construed to grant a vested property right. *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938). *See also Menominee Tribe v. United States*, 391 U.S. 404 (1968) ("held as Indian lands are held.") *See generally*, Cohen's Handbook of Federal Indian Law 475-76 (R. Strickland & C. Wilkinson eds. 1982).

Not all treaties creating reservations have been held to recognize title, of course, but cases in which the court of claims has held language insufficient to create vested rights are easily distinguishable. For instance, clear treaty language stating that the reservation boundaries could be diminished at the discretion of the president, has been held insufficient. *See, e.g., United States v. Kiowa, Comanche & Apache Tribes*, 479 F.2d 1369 (Ct. Cl. 1973), *cert. denied sub nom. Wichita Indian Tribe v. United States*, 416 U.S. 936 (1974). No such language of divestment is present in either

the authorizing statute or the Executive order in this case. The Court of Claims has also held that where contemporary history clearly indicated a congressional intent to deprive the tribe of the land despite language in the treaty, *Strong v. United States*, 518 F.2d 556 (Ct. Cl. 1975), such clear congressional intent could outweigh treaty language apparently granting the land to the tribe. Again, the legislative history in this case is to the contrary.

In sum, I believe the 1864 statute authorized the president to create a property interest in whatever tribes were settled on the reservation. The 1876 Executive order setting aside the reservation and the 1891 Executive order extending its boundaries to include the Extension were thus fully authorized and created vested property rights. In fact, in 1973, the Supreme Court referred to the entire reservation as recognized explaining the Extension was made under the president's "authority under the Act to expand an existing, recognized reservation." *Mattz v. Arnett*, 412 U.S. 481, 494 (1973) (emphasis added) (holding the opening of the old Klamath River Reservation to allotment had not disestablished the boundaries of the reservation). This conclusion is inescapable when one considers activities occurring after the Hoopa Valley reservation was established. The Supreme Court has sanctioned the practice of reading federal statutes expansively in light of both events existing at the time the statute was enacted and

also events occurring since the enactment of the statute. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *see also Solem v. Bartlett*, 465 U.S. 463 (1984). Congressional appropriations, which began in 1869 before the Hoopa Valley Reservation had been formally established by Executive order, 16 Stat. 37, and other actions taken during the last 100 years can be interpreted as recognizing the Hoopa Valley Reservation as the permanent home of the tribes settled there. *See Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

Congressional Recognition of All Executive Order Reservations

A later statute can also create a property interest in a particular reservation, *see, e.g., Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968). In addition, other statutes may be interpreted as creating compensable property interests in all Executive order reservations. It has been argued, for instance, that the Mineral Leasing Act of 1927, Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347, codified at 25 U.S.C. §§ 398a-398e (1982) indicated a congressional intent to recognize title in Executive order reservations. Note, *Tribal Property Interests in Executive order Reservations: A Compensable Indian Right*, 69 Yale L. J. 627 631-39 (1960). Although this position has been rejected by a federal district court in Arizona, *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1192-93 (D. Ariz. 1978), *aff'd in part, rev'd in part*, 619 F.2d 801 (9th Cir. 1980), that court held that the land at issue (9 million acres on the Navajo Reservation) had been recognized by a specific federal statute, 48 Stat. 960.

Moreover, the Court in *Sioux Tribe* considered an argument that section 1 of the General Allotment Act of 1887, ch. 119, 24 Stat. 389, codified as amended at 25 U.S.C. § 331 (1982), demonstrated a congressional intent to treat Executive order lands as recognized Indian title by expressly authorizing the allotment in severalty to tribal members of land located on reservations "created for [Indian] use by treaty stipulations, Act of Congress, or Executive order . . . ." The Court's reasons for rejecting the argument were very narrow, however. The Court stated:

> "We think that the inclusion of Executive order reservations meant no more than that Congress was willing that the lands within them should be allotted to individual Indians according to the procedure outlined. Since the lands involved in the case before us were never allotted -- indeed, the Executive orders of 1879 and 1884 terminated the reservation even before the Allotment Act was passed, -- we think the Act has no bearing upon the issue presented."

Shoshone Tribe at 330.

The Court's decision thus leaves open the argument that reservations allotted subsequent to the General Allotment Act, like the Hoopa Valley reservation, were recognized by that statute.

These two statutes are illustrative and not exhaustive. Since Congress has not followed the practice of taking Executive order reservations without compensation, it has not

been necessary to make the kind of intensive search of Title 25 that the enactment of a bill partitioning the Hoopa Valley reservation would, no doubt, engender. Other statutes, read liberally, might also be held to have recognized title in all Executive order reservations.

The Continuing Validity of Sioux Tribe and Confederated Utes.

Even if a court concluded that no congressional recognition of the right to occupy the reservation permanently existed, I do not believe the conclusion that Executive order title is noncompensable is inevitable. To begin with, a careful examination of both cases reveals that the decisions were very narrow. In neither was there any congressional authorization. in both the Executive orders enlarged existing reservations created by and protected as property under treaties. In both, the existing reservations were extensive to begin with and the Executive orders were not in effect long enough to create any reasonable expectations. In *Sioux Tribe*, the Executive order additions were designed to serve as a buffer for liquor traffic. The Executive order itself made clear the addition was temporary: "This order of reservation to continue during the pleasure of the President." 1 C. Kappler, Indian Affairs: Laws & Treaties 865 (1904). Only four years later this purpose had been met and the land was restored to the public domain. In *Confederated Utes*, the lands had been added to the reservation in 1875 to resolve a boundary dispute arising under an 1868 treaty. The Executive order did not use language

reserving discretion to the President to revoke the order. 1 C. Kappler, Indian Affairs: Laws &Treaties 834 (1904). The lands were restored to the public domain only 7 years later as punishment for the so-called "Meeker massacre," perpetrated by the Utes. In contrast, the Executive orders creating the Hoopa Valley Reservation were created as part of the general quid pro quo by which the United States gained clear title to California and got the Indians of that state to remove themselves peacefully to permanent settlements where they have remained for almost 100 years.

Both federal Indian law and constitutional jurisprudence have changed considerably since the 1940's when *Sioux Tribe* and *Confederated Utes* were decided, and even since 1955 when *Tee-Hit-Ton* was decided. Specifically, concepts of what constitutes property have been broadened considerably since then. For example, a legitimate claim of entitlement can suffice to create a property interest under the due process clause. *Board of Regents v. Roth*, 408 U.S. 564 (1972). As the Court explained in *Roth*: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. 408 U.S. at 577. This legitimate

claim of entitlement may be grounded in a statute but also in an understanding created by the facts of a given situation. For instance, a professor at a state university may still have a property interest in his or her job if he or she can prove that the university had created a de facto tenure system by renewing all teachers' contracts every year. *Perry v. Sindermann*, 408 U.S. 593 (1972). Having inhabited the Hoopa Valley Reservation for almost 100 years with no threat of congressional expulsion, the Indians of the reservation may claim a government-sponsored legitimate claim of entitlement. Recent scholarship has stressed that the definition of property for takings clause purposes must be evaluated in light of "the broader definition of property interests now employed in the law of procedural due process." L. Tribe, American Constitutional Law 590-92, n.11 (2d ed. 1988).

In addition to broadening the concept of property in due process cases, the Supreme Court has also shown a far greater solicitude to the property rights of reservation Indians and less deference to congressional reordering of property rights on a reservation. In *Hodel v. Irving*, 107 S. Ct. 2076 (1987), the Supreme Court invalidated a provision of the Indian Lands Consolidation Act, stating that even though the legislative purpose -- remedying the fractionated heirship problem -- was laudable, the method -- escheating small estates to the tribe -- violated the classic fifth amendment principle that the few should not be sacrificed to benefit the many. A noteworthy

aspect of this opinion was that the court rejected an argument that the right to devise property was not vested. Admittedly, the property at issue was presumably recognized title because the allotments were created on the Sioux Reservation, which in turn had been recognized by treaty. Nevertheless, the Court nowhere mentioned the character of the title at issue or referred to the *Tee-Hit-Ton* principle.

As to the *Tee-Hit-Ton* principle, I have argued elsewhere that an opinion based on ethnocentric [3] and out-moded [4] notions regarding Indian land tenure should be overruled, or at least limited in effect to land not presently occupied by an Indian tribe. Congress should not perpetuate this unjust distinction between recognized and unrecognized title by relying on the case to immunize it from liability. The Proposal is a Taking Without Just Compensation

Once the reservation is seen as property protected by the fifth amendment takings clause, the conclusion that the proposed partition is a taking in the constitutional sense is

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3. Although written during the same year as *Brown v. Board of Education*, *Tee-Hit-Ton* refers to Indians as "savages" whose aboriginal land claims could be characterized as "permission from the Whites to occupy."]

4. The case was written at the height of the Termination Era, now repudiated by Congress.

easy to support. As Professor Tribe states in his treatise:

> Before the taking, an object or a piece of land belonged to X, who could use it in a large number of ways and who enjoyed legal protection in preventing others from doing things to it without X's permission. After the taking, X's relationship to the object or the land was fundamentally transformed; he could no longer use it at all, and other people could invoke legal arguments and mechanisms to keep him away from it exactly as he had been able to invoke such arguments and mechanisms before the taking had occurred.Tribe, American Constitutional Law 592 (2d ed. 1988).

The proposed partition is a textbook example of a taking. Before the partition all the Indians of the reservation had communal property interest in the reservation. Moreover, all individual Indians of the reservation had an individual property interest in the per capita payments from timber revenues. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (state's taking of interest of funds deposited in court during interpleader proceeding held a taking of property requiring just compensation).[5]

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5. In *Short IV*, 12 Cl. Ct. 36, 43 (1987), the Claims court did not reach the question whether interest was due on the individual claims to the per capita payment because their exclusion from payment was a fifth amendment taking. Because a statute specifically provided for interest in such funds, the court avoided reaching the question.

After partition, both property interests would be lost.

The partition plan does not attempt to provide property of equivalent value to the Indians of the reservation losing their land. Thus, under the rule of *Sioux Nation, supra*, the action is an "act of confiscation and not the exercise of guardianship." This case is distinguishable from both *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) and *United States v. Jim*, 409 U.S. 80 (1972), two cases involving individual claims to tribal property. First, in each case the Court held that the statutes at issue had not granted vested property rights to individual Indians. In *Hollowbreast* the Court held that the statutory language had only granted an expectancy and not a vested future interest, because the statute at issue evidenced congressional intent to retain control over the subsurface estate of the allotted lands for the benefit of the entire tribe. In *Jim* the Court upheld a statute expanding the class of beneficiaries under an earlier statute providing for education benefits from those residing on the Aneth extension to all Navajo Indians in the county. Second, in both cases the affected individuals retained their communal ownership in valuable tribal resources. In contrast, the proposed bill would take both vested individual property rights to future perlcapita payments as well as vested communal property rights.

Moreover, the provisions in the bill for addition of some

land to the proposed Yurok reservation cannot be regarded as just compensation. In the *Fort Berthold* case, *supra*, the court of claims rejected an argument that a provision for partial payment in the statute taking reservation land somehow insulated the government from liability under the fifth amendment takings clause. The court stated: "If Congress pays the Indians a nominal amount, or . . . an amount arbitrarily arrived at with no effort to ascertain if it corresponds to the true market value of the land, then it cannot be said that Congress is merely authorizing the conversion of one form of tribal property to another." 390 F.2d at 695.

Furthermore, a provision designed to escape liability by forcing the benefited tribe to indemnify the government if the deprived tribe successfully presses a fifth amendment takings clause claim, in turn violates the principles of that clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) did involve a statutory scheme providing for state condemnation of property to be sold to long-term lessees, with payment for the property for the most part provided by the lessees themselves. The legislative scheme in *Hawaii Housing Authority* is radically different from the scheme proposed in H.R. 4469, however. The Hawaii statute left the tenant free to choose whether to buy the property; the proposed bill by legislative fiat requires reimbursement by the benefited tribe out of future profits. Forcing an unwilling private party to pay

compensation would, perversely, result in a second taking.

28 U.S.C. § 1505 Creates a Statutory Claim for Compensation.

The Court of Claims has stated that the Indian Claims Commission Act created statutory claims for compensation for taking of Executive order land. *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968). Although a federal law had subsequently recognized title to some of the Executive order land involved in the case, another portion of the land was added after the statute. Thus, the court held that the later Executive order did not create recognized title. Thus, the court was forced to reach the issue of the compensability of Executive order title. Although the case itself involved claims accruing before 1946, the court of claims stated that the same argument would hold for claims accruing after 1946, presented in the Court of Claims under 28 U.S.C. § 1505. The court based its conclusion on the plain meaning of the Indian Claims Commission Act. Section 2 of that statute (60 Stat. 1050) gave the Indian Claims Commission jurisdiction over claims "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President." More important, section 24 of the Indian Claims Commission Act, codified at 28 U.S.C. § 1505 (1982) contains similar language granting to the Court of Claims jurisdiction over claims arising under the "Constitution, laws or treaties of the United States, or Executive orders of the President." The court of claims reasoned that this language could only be

interpreted, in the context of Indian claims, as intended to create claims based on land set aside as reservation land under an Executive order. The court stated:

> The only conclusion that can be drawn from the inclusion of such interests in the act is that Congress must have intended to make them compensable. Otherwise Congress would be doing a meaningless act -- granting the Indian Claims Commission and the Court of Claims jurisdiction to hear a class of cases for which no recovery can be had. *Id.* at 696.

The court of claims reasoning is sound, and has been supported by other scholars. *See, e.g.*, Cohen's Handbook of Federal Indian Law 496 (R. Strickland & C. Wilkinson eds. 1982).

Remedies

The nonconsensual partition of the Hoopa Valley reservation would create a claim for money damages whether or not the reservation has been recognized in the sense that word is used in the *Tee-Hit-Ton* opinion, because at the very least, the affected Indians would have a statutory claim. In fact, the only difference in the amount of damages payable for a constitutional versus a statutory claim is that a constitutional claim entitles the plaintiff to interest on the award from the date the wrong occurred. *United States v. Sioux Nation*, 448 U.S. 371 (1980). Thus, the non-Hoopa tribal members would still be entitled to the difference between the fair market value and the amount, if any, actually paid. Given

the estimated value of the timber on the Square, a successful statutory claim would subject the government to considerable liability.

In addition, I agree with Professor Clinton that the nonconsensual partitioning of the Hoopa Valley reservation can be enjoined as a prohibited taking of property for private instead of public use. Normally, when the government pays compensation for a taking this fact by itself demonstrates the public use requirement has been met. The theory is that a government's willingness to compensate for the loss of property, even property that will eventually be in the hands of private parties, demonstrates, absent extraordinary evidence to the contrary, that the purpose of the taking is to benefit the public at large. See L. Tribe, American Constitutional Law 590 (2d. ed. 1988). The most recent challenge based on the public use requirement, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), failed primarily because the loss of land <u>was</u> compensated and because of the unique situation of land tenure in Hawaii, in which a few people owned most of the land in the islands, necessitated a redistribution plan. In fact, although private tenants benefited from the land redistribution, the redistribution plan itself was a classic case of taking from the few to benefit the many, a public use under the fifth amendment takings clause. As the Court stated, "Regulating oligopoly and the evils associated with it is a classic exercise of the police power." *Id.* at 242.

By contrast the nonconsensual partition of the Hoopa Valley reservation would have the perverse effect of taking from the many and redistributing to the favored few valuable timber reserves, thus creating an oligopoly instead of regulating it. The public at large, even if the public is defined as the entire reservation population, will not benefit by this legislation. Thus, the non-Hoopa members should be able to enjoin the partition, which would be classified as "a purely private taking," and thus void. *Id.* at 245.

Finally, it must be noted that the equities are strong in a case involving congressional divestment of an Executive order reservation. Many of these reservations were created for friendly tribes who had no treaties with the United States because they never fought wars against the newcomers. The tribes inhabiting the Square and the Extension illustrate this point. Congress must not solve the admittedly complex problems on the Hoopa Valley Reservation by taking the property on the Square away from the Indians of the Extension. If it does so, attempting to avoid liability by claining using the excuse that the Executive order reservation inhabited by the Indians of the reservation for nearly 100 years is not property within the meaning of the takings clause is administering justice with an "evil eye and an unequal hand." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Such an action surely will cause Indians across the country, not just those inhabiting Executive

order reservations, to fear reprisals for successful court challenges of federal actions. Indeed, such an action might well impel the judiciary, whose careful opinions in the *Short* cases have protected the property rights on the entire reservation, to invalidate the law or hold it to be confiscatory, which would subject the federal government to enormous liability.

[The letter of the Colville Confederated Tribes follows:]

Colville Confederated Tribes

P.O. Box 150 · Nespelem, Washington 99155 (509) 634-4711

September 9, 1988

The Honorable Daniel J. Evans
SH 324 Hart Senate Office Building
United States Senate
Washington, D.C. 20510-4702

Dear Senator Evans:

We are writing to express our concerns on companion measures, H.R. 4469 and S.2723, dealing with ownership and management issues on the Hoopa and Yurok Indian Reservation in California.

There are amendments to the legislation in the House bill, which could have unintended adverse consequences for other tribes across the country. We are specifically concerned with language dealing with the termination aspects of the bill and the issue of takings of individual interests in violation of constitutional guarantees.

As the bill presently stands, we would recommend against its enactment and ask that you seek postponement of this legislation until the next session and that field hearings be held to look into these concerns.

Sincerely,

COLVILLE CONFEDERATED TRIBES

Mel Tonasket

Mel Tonasket, Chairman
Colville Business Council

MT:sd

Mr. FRANK. I misspoke about something. I have no objection whatsoever for Congress dealing with something that is under litigation. In fact, very often that is something we should do.

The problem that I wanted to address was whether or not there was a retroactivity problem. Only in very rare cases do I think we ought to—if people have gone to the trouble of litigating and there has been a decision should we undo that decision in a way that affects vested rights. That is the thing that I think violates the pretty strong precedent that this committee has set.

But that is our job. If we did our job better and wrote more clearly, you wouldn't have to have litigation, and if someone brings a lawsuit to determine what Congress meant by something and we can resolve that by clarifying what we meant, we will do that.

I don't think there is any problem with us acting in matters that are under litigation. There is, except in very rare circumstances, I think, a problem with us upsetting a settled claim. I have no further questions.

Mr. Coble?

Mr. COBLE. Very briefly, Mr. Chairman.

Mr. Schlosser, it has been alluded to all morning about pending cases; how many pending cases are there?

Mr. SCHLOSSER. What we have termed the *Short* cases, there are actually four, and they are all pending in the Claims Court, and they are assigned to Judge Margolis. It depends on how far afield you want to go. If you did a lexis search, you would get a page long.

Mr. COBLE. I don't disagree with what the chairman said, but I am concerned about what the chairman said concerning the possible unsettling result. Now, here we are in the 11th hour of this Congress, Mr. Chairman, I am just wondering, would the parties' rights be adversely affected if we delayed six months? If that would happen?

Here at the last minute, every piece of legislation is trying to get into the hopper, and sometimes in that sort of haste, bad law may well be the result. Would the rights be adversely affected if the delay results?

Mr. SCHLOSSER. They really would, and I appreciate your concern. It has been discussed for many years, so it is not last-minute in the sense that the parties are familiar with it. The effect on the parties of a delay of six months or a year is really very severe. You have the Bureau of Indian Affairs taking over that reservation, pre-empting the role of the Indian tribal governments, refusing to deal with the Council, spending the Indians' money for their own expenses, mailing expenses and throwing $20,000 of the Indians' money at that.

Those are violations of law. Now, the judge has said that there are serious questions raised about his decision in April of this year, and he has also said that he has concerns about the Bureau of Indian Affairs. But he will not take it up unless this bill fails. Here again is where I wish you could hear from the Yurok Indians who want to organize their tribe. These leaders, including Jessie Short herself, the lead plaintiff in this case for——

Mr. FRANK. When we receive statements—off the record.

[Discussion off the record.]

Mr. COBLE. Mr. Schlosser, you referred to the Bureau of Indian Affairs. How long have they been running—or calling the shots?

Mr. SCHLOSSER. Since June.

Mr. COBLE. June of this year? Thank you.

Mr. FRANK. Thank you.

Mr. Berman?

Mr. BERMAN. Could you react to what will apparently be subsequent testimony, referring to your statement? These bills turn that history on its head, at the behest of the Hoopa Valley Tribe, a minority of the Indians of the reservation. This is so that the Hoopa Valley Tribe can get exclusive control of the Square's timber, to the detriment of the rest of the Indians of the reservation, disregarding the fact that the courts have said it is not entitled to such control.

In the process, these bills would terminate the Indian tribal and reservation status of many persons who do not belong to the Hoopa Valley Tribe and leave the rest with the option of organizing a government, which at worst might never be formed, and which at best will merely have jurisdiction over the relatively worthless 3,600 acres.

The bills would nullify legal rights and relationships confirmed throughout five years of litigation between these Indians and the Government.

Mr. SCHLOSSER. There are a lot of charges there, Mr. Berman. It does not nullify any of the rulings in Jessie Short, which involve individual claims for particular distribution in particular years. It is a prospective settlement.

The court, in Jessie Short, particularly in the Federal Circuit's opinion in 1973, indicated that the Court in *Short* was not issuing a general declaratory judgment. It was acting on particular claims.

The term "termination" is a term of art in Federal Indian law which refers to a period in the Fifth Amendment when Congress ended the government-to-government relationship with tribes in Wisconsin, some in Oregon and some in California, and ending Federal supervision over Indian lands.

This bill is totally unlike that, and the committees have addressed this point and have heard this charge, and have refuted that claim. This bill, instead of terminating the rights of people who will be in the Yurok Tribe, actually allowed them to exercise tribal rights because, as it stands, the Yurok Tribe has no constitution, no council, no governing body, no roll of members.

So, these people have no tribal right at present. And what the bill allows is for them to become organized and to exercise tribal rights. The courts have not said that there is any bar to the Hoopa Valley Tribe exercising self-government. What the court in *Puzz* has said is that the only law applicable, known to the Court, was one which didn't directly confer authority on the Hoopa Valley Tribe.

And so, the Fourth struggled with the tension between Federal policy, promoting tribal self-government and this Civil War statute which doesn't say much, and says, under the circumstances, the BIA would have to run it, and the Indians could advise the Bureau and send cards and letters and so on.

The valuation claims about the worthlessness of the Extension and the value of the Square are completely made up. The Extension is extremely valuable and has running through it one of California's major rivers, the Klamath River. And the value of the commercial fishery in the last couple of years has been in the range of $1 million a year.

Now, it is true that the Yurok Tribe will probably permit its members to take most of that by value, by letting the fishery members take the catch. That is their policy charge. It doesn't reflect the worthlessness of any property down there.

Mr. CARDIN. No questions.

Mr. FRANK. Thank you very much.

Mr. FRANK. Mr. Thierolf?

TESTIMONY OF RICHARD THIEROLF, REPRESENTING A GROUP OF YUROK INDIANS

Mr. THIEROLF. Mr. Chairman, I am Richard Thierolf, and I am here on behalf of the elected representatives of the majority of the Indians on the reservation, people who do not belong the Hoopa Valley Tribe. I am also the lawyer who has handled the *Puzz* case that we have been discussing here today, since its beginning, a case which stands on the shoulders of the Jessie *Short* case, which we have also been discussing.

And I want to first say that my perception of what has been discussed in the other hearings about this bill has not focused on legal issues, Fifth Amendment issues and so forth. The is the first committee before which this bill has come that has legal expertise and a particular focus on the legal ramifications of this proposed legislation.

The second thing I want to clarify is that all the claims that we have been talking about, both the adjudicated *Short* case, in which the government was adjudged libel, adjudged libel in 1973, and the *Puzz* case and related litigation, are not land claims, because there is no dispute over the ownership of the reservation.

But rather, they are claims against the United States for arbitrary actions by the Bureau of Indian Affairs; a claim for damages in the Court of Claims to rectify that arbitrary action, and a claim for an injunction; the *Puzz* case in the United States District Court.

So, the Bureau has to reform the way it manages its reservations. What we are talking about is a trust, a trust which was established in 1964 and confirmed through administrative actions over the history of the reservation; a trust that consists of one reservation. There is a map of it over there. It was one reservation when it was established. And it was one reservation in 1981. That is the law as laid down by Congress and construed by the courts.

In the *Jessie Short* case, in the United States Court of *Mattz* v. *Arnett,* which I refer to in my written submission, and the *Puzz* case and every other case that has looked at this reservation. It is a reservation because it is held for the common benefit of all, for the Bureau of Indian Affairs cannot pick one group against another, allowing one to benefit at the expense of the rest, allowing one group to benefit from the reservation's lands and resources to

the detriment of the others, or to benefit from the money that those lands and resources produce.

Excuse me. The Bureau of Indian Affairs violated this trust by pitting the Hoopa Valley Tribe against the rest of the Indians of the reservation. The Hoopa Valley Tribe is an organization created in 1950, representing a minority of all the Indians of the reservation. By that, I am speaking about the Indian people who live on the reservation——

Mr. FRANK. If you hold for one second. Mr. Coble has another meeting. If he goes to vote, he won't be able to come back. We will finish your statement after the vote.

Mr. COBLE. Thank you, Mr. Chairman. Thank you, sir.

I wonder if there has been a referendum vote among the Indians of the reservation to determine whether or not they want this bill.

Mr. THIEROLF. There has not been. And I think that is one of the major problems with this bill. I think because there is a trust responsibility, the least that the Government could do if it is going to so drastically alter the existing rights on this reservation is to ask the people affected what they think about it.

Mr. COBLE. Thank you, sir.

Thank you, Mr. Chairman.

Mr. FRANK. We will recess and continue with your statement when we return.

[Recess.]

Mr. BERMAN.[presiding] We will resume the hearing. We were in the process of hearing from Mr. Thierolf. And why don't you pick up where you left off before the recess?

Mr. THIEROLF. The reservation is a trust, the property exists for the benefit of all the Indians of the reservation, it is a single reservation. The Bureau of Indian Affairs violated this trust in the beginning of the 1950s by pitting the members of the Hoopa Valley Tribe against the rest of the Indians of the reservation. The Hoopa Valley Tribe is an organization.

Mr. BERMAN. How did they do that?

Mr. THIEROLF. They allowed it to benefit from the rest of the Indians, from the reservation's resource revenues, by paying the members of the Hoopa Valley Tribe shares of these revenues in per capita payments, and by allowing the Hoopa Valley Tribe to operate programs with reservation resource revenues that discriminated against the other Indians of the reservation, both in terms of employment and in terms of who was eligible to benefit from the services that these programs provided.

In other words, the majority of the Bureau of Indian Affairs excluded the majority of the Indians of the reservation from benefiting from the reservation in terms of benefits from the lands, from the resources and from the—from the land, the resources and the revenues that those resources produced.

It also consistently denied the entreaties of the majority of the Indians of the reservation for administration of the reservation, which fairly represented all the Indians. They did this consistently, and it did this consistently from the 1950s through the 1970s and eighties.

This triggered litigation. The *Short* case that we have discussed was a case in which the excluded group, 3,800 of them totally, sued

the Government for damaged on account of the arbitrary actions that I have been describing, the Bureau of Indian Affairs' arbitrary actions in allowing discrimination on the reservation.

And in 1973, the Court of Claims unanimously ruled that the Bureau of Indian Affairs' action was arbitrary and that the plaintiffs who were eligible, such of the plaintiffs that were deemed eligible to recover would receive damages from the Government because of the arbitrary action by the Bureau of Indian Affairs.

The Supreme Court denied review of the case twice following that 1973 liability decision. It is a final judgment, and it has res judicata effect, as evidenced in the case of *Hoopa Valley Tribe* v. *United States,* which is a 1979 case in the Court of Claims, so there is no doubt about its finality, that the issues were adjudicated and decided absolutely.

But the Bureau of Indian Affairs continued to allow the Hoopa Valley Tribe to benefit to the detriment of the others. In particular, it continued to pay per capita payments and allow the Hoopa Valley Tribe to run programs which discriminate against other tribes of the reservation, and perhaps most egregiously, it allowed the Hoopa Valley Tribe access to reservation resource revenues that pay its attorneys to continue to litigate against the majority of the Indians of the reservation, and the majority of the Indians of the reservation, having never received any benefit from the reservation resource revenues, were in a very disadvantageous position.

And that is why the litigation has gone on for so long, in large part because of the disparate ability of the parties to bring the case to a close. So long as the Hoopa Valley Tribe was armed with money that belonged to all the Indians of the reservation to fight the majority of the Indians of the reservation.

The *Puzz* case, which is a civil rights action which we filed in 1980, on April 8, 1988 enjoined further discrimination. It enjoined the Bureau of Indian Affairs from pitting one group against the other and from allowing one group to benefit from the reservation's resource revenues, and so forth, to the detriment of the other Indians of the reservation, and this decision, which provided injunctive relief, based upon the final judgment in the *Short* case in 1973, is the reason that this bill was introduced.

This bill is designed to nullify the *Puzz* case and to nullify the trust principles whereby the reservation now exists, the trust principles which underlie the judgment in the *Short* case and the related litigation concerning the reservation. The bill will give the Hoopa Valley Tribe, which is a minority of the Indians of the reservation, the Square, which consists of 85,000 acres, in allotted communal trust status. It will give the Hoopa Valley Tribe the right to govern that area, a right that it does not now have.

Because all the Indians of the reservation are beneficiaries of the trust that now exists, give it the right to discriminate against the other Indians of the reservation. For example, by taxing and zoning their property, deciding who works in programs financed with the resource revenues of the Square, and this is a reservation where there is 60 to 80 percent unemployment; who decide if they will be able govern, who benefits from the timber and the other resources; and most significantly, the bill prevents redress in the courts by the majority group, the Yurok Tribe, for these inequities

the bill creates by shortening the statute of limitations to an effective period of 180 days for filing claims.

That is something that is terrible about this bill. The rest of the Indians of the reservation under this bill will be left with the Extension, which contains 3,600 acres of land for the benefit of Indian people. It will add 600 acres of Forest Service land to that 3,600 acres. And in the process, the bill provides for the termination of the Indian tribal status and reservation rights of as many of the people who get on a so-called settlement roll that the bill will create as want to receive a payment of $20,000.

So, to the extent that the policy of the United States Government is to strengthen Indian communities and tribalism, this bill flies squarely in the face of that policy. The bill contains no provision whatsoever for finding out what the Indians of the reservation want.

There is no provision for a referendum, as I explained earlier. There has been no referendum in the past, and so we really don't know. But I have here, and I would like to submit for the record letters and petitions which indicate that many of the Indians of the reservation are opposed to this bill. I also have—is it received?

Mr. FRANK [presiding]. Yes.

[The information follows:]

Governors' Interstate Indian Council, inc.

Established 1949

The National Association of State Indian Commissions and Offices of Indian Affairs

September 6, 1988

The Honorable Charles Pashayan, Jr.
House of Representatives
129 Cannon HOB
Washington, D.C. 20515

SEP ' : 1988

Dear Representative Pashayan:

I have been informed that legislation for the Hoopa Tribe and Yurok Tribes in California, HR 4469/SB 2723, sponsored by Senator Cranston and Representative Bosco of California, is scheduled to be heard by the Senate Select Committee on Indian Affairs, on September 14, 1988. Backers of this legislation are eagerly waiting for this bill to get to the Senate floor for passage by the Senate.

Please correct me if I am wrong, but as I understand the bill, it proposes to pay-off tribal members for their rights in the Yurok Tribe, an "individual buy-out" of the Yurok's rights by a lump sum payment of $20,000+. If this is true, it has drastic implications of "termination".

I, as well as many other American Indians, are opposed to this type of legislation, and as a matter of fact, we are opposed to any legislation that has anything to do with the termination of Indian rights.

I also feel that the bill has not been thought out because it doesn't take into account the impact this could have on other tribes throughout the Nation. A question of whether the hearings were appropriately held on this piece of legislation also arises. The bills are unfair and they interfere with the tribe's sovereignty. I feel that bills such as these, need to be rolled over and mark-up prevented, in order to avoid any threats of terminations to tribes and tribal rights.

Respectfully yours,

Travis N. Parashonts
President
GIIC

TNP:lb

Travis N. Parashonts, Utah Division of Indian Affairs
6262 State Office Building, Salt Lake City, Utah 84114 (801) 538-3046

JUL 26 1985

FOR YOUR INFORMATION

Tribal Government Services - TX

Mr. Victor Crutchfield
2255 Eastern Ave.
Arcata, CA 95521

Dear Mr. Crutchfield:

Thank you for your recent letter to the Secretary concerning the April 8, 1988 Order entered by Judge Henderson in Yuse v. United States. Your letter has been referred to this office for response.

After full consideration, we have prepared a plan for the non-discriminatory management of the resources of the Hoopa Valley Indian Reservation. Under this plan, we believe it will be possible to manage the resources of the reservation with the appropriate participation of the Hoopa Valley Tribe and the non-organized Indians of the reservation until a legislative solution to the reservation problems can be enacted. Under the terms of the plan, the Hoopa Valley Tribe will be able to use and manage its fair share of the reservation funds and resources. You may be assured that we are aware of and will not lose sight of the importance of the Hoopa Valley Tribe's self-determination and self-government rights. Finally, we do not believe that this case will have any impact on other organized and federally recognized tribes, in light of the Hoopa Valley Indian Reservation's unique circumstances.

Accordingly, at our request, the Department of Justice filed the plan with the court on June 7, 1988, as required by the court's April 8 Order. Should the court disapprove the plan, we anticipate recommending to the Department of Justice that an appeal be prosecuted and that a stay be sought.

We appreciate your interest in this matter, and hope that this information has been useful. Please do not hesitate to contact us if you have any additional questions concerning this matter.

Sincerely,

Hazel E. Elbert

Deputy to the Assistant Secretary -
Indian Affairs (Tribal Services)

Mr. THIEROLF. Thank you.

I also have a telegram here expressing adamant opposition to the enactment of these bills, because they reflect the wholesale termination of Indian rights, and the telegram requests that the matter be considered further if Congress is to interfere in the existing rights and relationships on this reservation.

Mr. FRANK. That will go in the record.

[The information follows:]

Mr. THIEROLF. It is said that the litigation is interminable, but on the other hand, Mr. Schlosser and Mr. Bosco testified that the *Short* case is winding down.

Mr. FRANK. One more minute. I will give you one more minute.

Mr. THIEROLF. OK.

The *Puzz* case, which this bill will nullify, has put teeth in the legal principles which govern the legislation. It has put teeth in the legal principles adjudicated in the Court of Claims, and will end any delays caused by arming the Hoopa Valley Tribe with money.

It allows for a referendum concerning how the reservation should be administered from now on, because the judge has said that all Indians of the reservation have an equal right to self-determination, and it provides the opportunity for the first time for the Indians of the reservation to express their will in how the reservation will be governed, instead of having to accept the dictates of the Bureau of Indian Affairs.

Also, the *Puzz* case, by holding that the Bureau of Indian Affairs cannot allow the Hoopa Valley Tribe to benefit to the detriment of other Indians, is getting money to the people for the first time, the majority of the people who have reservation rights. Their hopes and expectations which people have poured their lifetimes into, based upon the belief and the principle that this reservation represents a trust between the United States and the Indians of the reservation, this bill will shatter those legitimate expectations and embitter people and pit them against one another.

And it will, in fact, nullify the legal principles by which the reservation has existed in for the last 100 and some-odd years, and which have been the bedrock of the court decisions which define the rights and relationships of the Indians of the reservation.

[The statement of Mr. Thierolf follows:]

THIEROLF

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IN REPLY REFER TO

MEMORANDUM

From: Richard B. Thierolf, Jr., attorney for the successful Yurok Indian plaintiffs in Lillian Blake Puzz et al. v. United States Department of Interior, Bureau of Indian Affairs et al. (no. C-80-2908 TEH, USDC/ ND Calif.), who are among the 3800 plaintiffs in Short et al v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied 416 U.S. 961 (1973); 661 F.2d 150 (Ct. Cl. 1981) cert. denied 455 U.S. 1034 (1982); 719 F.2d 1133 (Fed. Cir. 1983) cert. denied 467 U.S. 1256 (1984); 12 Cl. Ct. 36 (1987).

To: The United States House of Representatives Judiciary Committee.

Date: September 28, 1988

Re: HR 4469/HR 5340 (bills to divide the Hoopa Valley Indian Reservation, to terminate tribal and property rights of Indians of the reservation who do not belong to the Hoopa Valley Tribe, and to nullify principles confirmed in the above-listed cases)

The Hoopa Valley Reservation in northern California is shaped like a square skillet with long handle. The skillet, or "square" contains 85,000 acres of unallotted trust land held for Indian purposes. This acreage holds over 1 billion board feet of merchantable coniferous timber. The panhandle, or "extension", contains 3,600 acres of unallotted trust land; and this 3,600 acres is practically devoid of timber or any other merchantable resource.[1/] Attached is a map of the reservation.

1/ The timber on the square is capable of producing over $1 million annually for the Indians to share communally on a sustained-yield basis. The extension has a federally protected Indian commercial fishery. It has produced no more the $190,000 annually for the Indians to share communally.

The reservation's history is well-documented in the courts, especially Short v. United States, 202 Ct. Cl. 870 (1973). These bills turn that history on its head, at the behest of the Hoopa Valley Tribe - a minority of the Indians of the reservation. This is so that the Hoopa Valley Tribe can get exclusive control of the square's timber to the detriment of the rest of the Indians of the reservation, disregarding the fact that the courts have said it is not entitled to such control. In the process, these bills would terminate the Indian tribal and reservation status of many persons who do not belong to the Hoopa Valley Tribe, and leave the rest with the option of organizing a government which at worst might never be formed and which at best will merely have jurisdiction over the relatively worthless 3,600 acres.

The bills would nullify legal rights and relationships confirmed throughout 25 years of litigation between these Indians and the government. There has been no referendum on these bills, nor any indication that the Indians of the reservation as a whole want Congress to act in this matter at all. There is no reason for passage of this legislation except to unjustly enrich the Hoopa Valley Tribe.

This memorandum outlines the reservation's history to provide an understanding of what the litigation has been about. It also explains how the bills would trigger further claims against the government if they are enacted. Finally, this memorandum urges that any political questions should be left to the Indians of the reservation to resolve among

themselves, and that congressional action is inappropriate. These bills will accomplish nothing good that the Indians of the reservation themselves, if given an equal chance to exercise self-determination, cannot accomplish.

I. HISTORICAL BACKDROP

The reservation was authorized by the Act of April 8, 1864 (13 Stat. 39), which provided for the location of four reservations for the Indians of California. The reservation's boundaries were officially located by executive orders in 1876 (as to the square) and 1891 (as to the extension). Despite the fact that its formal boundary was not located until 1876, the square had been considered a reservation since 1864, by virtue of a "reservation notice" published by an local Indian agent. The extension's lower 20 miles also were considered a reservation, the "Klamath River Reservation", in the 1850's and 1860's; although the reservation status of this land became ambiguous after those decades, until the 1891 executive order extended the Hoopa Valley reservation to include it. This extension created the one unified reservation which exists today.

Neither Spanish, Mexican, nor aboriginal title are issues in the case of this reservation. The Act of March 3, 1851 (9 Stat. 631) settled the issue. The act required persons claiming title which antedated the Treaty of Guadalupe Hidalgo to file claims with the government in order to prove such title. The Indians failed to file claims under this act, which required claims to be filed by 1853. Therefore,

any such title was extinguished. See United States ex rel. Chunie v. Ringrose, 788 F. 2d 638, 644-46 (9th Cir., 1986).

The purpose of the 1864 Act was to protect Indian people from depradations by white settlers. This is why the text of the act required that the reservations be located "as remote from white settlements as may be found practicable." White settlers had occupied the square as of 1864, so the government paid them to clear title to the land. See 202 Ct. Cl. at 880-901.

The Indian tribes of northern California were not organized or large entities. See 202 Ct. Cl. at 886. In aboriginal times, as now, the square was a homeland for Yurok and Hoopa Indians, and was used by Karuk Indians as well. Pursuant to the 1864 Act, location of the Hoopa Valley Reservation was meant to benefit ". . . Indians in the northern part of the State as might be induced to settle there." See 202 Ct. Cl. at 880 (quoting the 1872 annual report of the Commissioner of Indian Affairs).

No tribal organization administered the reservation before the 1950's. From 1915 through the 1940's the Indians dealt with the BIA in an advisory capacity. The land rights of all the Indians were equal throughout the reservation. For example, people could trade land allotments on the extension for ones on the square. 202 Ct. Cl. at 949-950.

After World War II, timber on the square became merchantable. In 1948, Indians on the square began organizing in order to control the timber revenue for themselves. The

organizers did not include all the Indians on the square; nor did they all come from one tribe. They had one thing in common - an allotment of land on the square, or an ancestor who had such an allotment. 202 Ct. Cl. at 959-967. They completed their organizational process on May 13, 1950, by adopting a constitution and by-laws by a vote of 63 to 33. They denoted themselves the Hoopa Valley Tribe. They claimed jurisdiction over the square. Id. at 961-962. In other words, the Hoopa Valley Tribe did not exist before 1950. It is not a tribe from time immemorial. Hoopa Valley Tribe v. United States, 596 F. 2d 435, 441 (Ct. Cl. 1979).

The residents of the square include many Indians who do not belong to the Hoopa Valley Tribe. About 900 Hoopa Valley Tribe members live on the reservation. Over 1000 other Indians of the reservation live there. Over half the Indian students at Hoopa High School on the square (the reservation's only high school) are not Hoopa Valley Tribe members.

In the communities within a 100-mile radius of the reservation, among the Indian people who have reservation rights, non-Hoopa Valley Tribe members far outnumber Hoopa Valley Tribe members. The overall population ratio of the two groups is 70-30, according to the BIA and the courts.

From the 1950's until this year, the BIA allowed the Hoopa Valley Tribe to administer the square as through it owned it. This action of the BIA is illegal, because the Hoopa Valley Tribe as a tribe does not own the reservation; and the Hoopa Valley Tribe's members are not the only Indians

with rights in the reservation's lands, resources, and resource revenues.

II. PRESENT LITIGATION OVER RESERVATION RIGHTS

Hoopa Valley Tribe v. United States, 596 F.2d 435, 439-441 (Ct. Cl. 1979) sums up the litigation through 1979 as follows:

> In the late 1950's the Secretary of the Interior, on the basis of an opinion by the Solicitor, 65 Dec. Dept. Int. 59 (1958), began to distribute the revenues from the unallotted trust timberlands if the Square, annually, to the members of the (Hoopa Valley) Tribe per capita, to the exclusion of the Indians of the Addition.[2/]
>
> In 1963 the excluded Indians brought suit for what they claimed was their fair share of the timber revenues.[3/] Some 3,300 persons joined as plaintiffs. . .
>
> * * * *
>
> [I]n Short, in which conflicting claims were made to ownership of the timberlands on the Square and the proceeds therefrom, the court decided that (the Hoopa Valley Tribe) was not a tribe from time immemorial but was created in 1950, not long before the first distribution of timber revenues; that neither (the Hoopa Valley Tribe) nor its members exclusively owned the unallotted trust lands of the Square and that (the Hoopa Valley Tribe's) members were not entitled to more than shares equal to those of all the Indians of the Reservation.

The court went on to say that "Short decided that the reservation was a single, integrated reservation, all of whose

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2/ These distributions also excluded Indians of the square who did not belong to the Hoopa Valley Tribe. See e.g., 202 Ct. Cl. 982 (fdg. 191), 984 (fdg. 205), and 986 (fdg. 211).

3/ Jessie Short v. United States.

inhabitants were to be treated equally and indistinguishably." Id. at 448.

As of 1976, there were approximately 3,800 Short plaintiffs. In subsequent actions, small numbers of additional Indians in the excluded group have filed claims for damages an account of the BIA having allowed only the Hoopa Valley Tribe to benefit from timber revenues, but in general all these actions fall under the rubric of Short.

Subsequent proceedings in Short have consumed the past fifteen years. The court has ruled that the plaintiffs' claim is justiciable, and that the individual plaintiffs (as opposed to the federally-recognized Yurok Tribe) are the proper claimants. 661 F.2d 150 (Ct. Cl. 1981). Also, the court certified criteria for deciding who among the individual plaintiffs is entitled recover a share of the Judgment award, and denied a motion to dismiss the case for lack of jurisdiction. 719 F.2d 1133 (Fed. Civ. 1983). Approximately 2,450 plaintiffs have been ruled eligible to recover.

The court also has ruled on the measure of damages it may award pursuant to 28 U.S.C. § 1491, one of the two jurisdictional bases for Short. It limited this measure to a share of per capita payments made to Hoopa Valley Tribe members. 12 Cl. Ct. 36 (1987). Its decision in this respect is interlocutory, and turned on a reading of jurisidiction under 28 U.S.C. §1491, as opposed to the merits of whether the Hoopa Valley Tribe is exclusively entitled to monies other than per capita payments.

The BIA also has distributed millions of dollars to the Hoopa Valley Tribe for purposes other than per capita payments. This includes money for attorney fees to fight the plaintiffs in Short. The Short plaintiffs seek damages for all such distributions to the extent that the distributions were intended to benefit only Hoopa Valley Tribe members. On May 6, 1988, they filed a motion for group damages under 28 U.S.C. §1505, the other jurisdictional basis for Short. That motion is pending.

One BIA response to the 1973 liability decision in Short was to escrow 70 per cent of post-1974 reservation resource revenues for the plaintiffs' benefit. Hoopa Valley Tribe v. United States was the tribe's response. The court upheld the BIA's action.4/

The other BIA responses have been a campaign of stonewalling, in various ways. For example, the BIA continued to allow per capitas exclusively for Hoopa Valley Tribe members after 1974, disregarding the 1973 judgment in Short that all Indians of the reservation were entitled to share equally in reservation resource revenues. See 12 Cl. Ct. 36,

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4/ HR 4469 and HR 5340 would undo this escrow by dividing the fund contrary to the scheme established by the BIA and upheld in Hoopa Valley Tribe v. United States. The only money for termination payments which is certain to be available would be from this fund. The BIA strenously opposes adding federal dollars to the fund. The termination provisions of the bill have been called a "buy-out", but the people will be paid with their own money. This cannot rightly be called a buy-out.

51. The BIA armed the Hoopa Valley Tribe's lawyers with hundreds of thousands of dollars to litigate and lobby against the rest of the Indians of the reservation, disregarding the court's holding that these monies belong equally to all the Indians (communally, so that all belongs to all). The BIA rejected the demands of the non-Hoopa Valley Tribe members to reform reservation administration, for example, be rejecting the the demand that there be a reservation-wide government to allow every Indian of the reservation an equal voice and a vote in the administration of the common lands, resources, and resource revenues, reflective of their equal ownership.

Six Klamath River/Yurok Indians filed an action to enjoin further such BIA mismanagement in 1980. Lillian Blake Puzz et al. v. United States Bureau of Indian Affairs, et al, (case no. C-80-2908-TEH, USDC/ND Calif.).[5/] On April 8, 1988,

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5/ The BIA has constantly tried to induce the excluded group to deal with it as the Yurok Tribe, disregarding the fact that the excluded group contains Hoopa, Karuk, and other Indians, and that neither the Hoopa Valley Tribe nor the Yurok Tribe owns the reservation. See e.g., Short, 202 Ct. Cl. 870, 959 (fdg. 135); Hoopa Valley Tribe v. United States, 596 F.2d at 441-442 (all Indians of the reservation own equal shares and Hoopa Valley Tribe lacks title to timber lands); and Short, 661 F.2d 150, 155. The BIA has made it clear that it intended to split the reservation between the two tribes if the excluded group dealt with it as a tribe, so the excluded group has avoided government-to-government relations with the BIA. See 661 F.2d at 153. Given the BIA's track record in dealing with the people, their course of action makes sense. HR 4469 and 5340 are apparently an attempt to punish them for following this course, because the bills deprive them of the reservation they have fought so long to keep. These people want government-to-government relations with the BIA, but

(footnote cont'd)

the court enjoined the BIA from administering the reservation in a discriminatory manner (i.e. - by favoring the members of the Hoopa Valley Tribe simply because they belong to that tribe). It required the BIA to allow all Indians of the reservation an equal chance to benefit from reservation resources and revenues, and services. In so doing, it expressly protected the sovereign prerogatives of the Hoopa Valley Tribe over its members; but the court ordered the BIA to submit a plan to ensure that its order was carried out. This is discussed in more detail in section IV of this memorandum.

HR 4469 and 5340 are part of the Hoopa Valley Tribe's strategy to avoid sharing the reservation's revenues and resources with the rest of the reservation's Indians. The other prong of its strategy is to appeal the district court's order; but the Ninth Circuit Court of Appeals has denied The Hoopa Valley Tribe's motion for a stay of the April 8 order.

The litigation should be drawing to a close. The eligibility decisions in Short have largely been made. The damages issue is close to resolution.

The apparent reason the case has lasted so long is that the defendants have done everything possible to tie the court in knots in order to create the impression that Congress

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(footnote cont'd)

concomitantly the BIA must respect their entitlement to the reservation equally with the members of the Hoopa Valley Tribe.

must act. The Hoopa Valley Tribe's, former general counsel, Howard Dickstein, said in the June, 1985, American Lawyer, that, "Delaying tactics-that's the point of all those things" (i.e. - motions to dismiss filed years after the judgment on liability, etc.). Indeed, within two weeks after he suggested that the Hoopa Valley Tribe change its strategy to one of cooperation with the Short plaintiffs on resolving reservation issues, he was fired.

It is hoped that by enjoining the BIA from further arming the Hoopa Valley Tribe's lawyers with reservation resource revenues for litigation against the rest of the Indians, the district court is speeding the end of reservation litigation.[6/] The case likely would be over now, if the BIA itself had stopped the flow of attorney fee money to the Hoopa Valley Tribe's lawyers after the 1973 judgment on liability in Short.

It is also hoped that from now on all the Indians of the reservation can begin working to develop the reservation for the common benefit of everyone, instead of for the benefit of the few at the majority's expense. There is no question

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6/ The attorneys representing the Short plaintiffs do so on a contingent-fee basis. Until the judgment award is paid, they will not be paid. The writer represents the Puzz plaintiffs. He has been paid by private arrangement, and hopes to recover fees through the Equal Access to Justice Act. The total amount he has ever been paid is but a small fraction of what the Hoopa Valley Tribe's lawyers have gotten each year.

now that the BIA's trust duty requires it to foster this effort, but these bills are destructive of that objective.

III. HR 4469 AND 5340 WILL ENGENDER FIFTH AMENDMENT CLAIMS.

This reservation was located by executive orders. The court in Short stated that "[T]he Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy the square with Presidential authority." 202 Ct. Cl. at 878. The court also stated that the Hoopas got no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion. Id. Finally, the court said that in 1891 no vested Indian rights in the square existed. Id. at 884.7/

From the foregoing, it is argued that there are no vested rights protected by the fifth amendment in this reservation. Evidently, because of this argument, or simply because the government does not want to commit the necessary funds, the bills make no attempt to compensate the excluded Indians for what they will lose if the bills are enacted.8/

7/ Reference here to the Hoopa Tribe must not be mistaken for reference to the Hoopa Valley Tribe. The latter did not exist until 1950. Hoopa Valley is a place, not an ethnic term, and the organization which formed in 1950 took the name of the place from which it sought to control the square.

8/ The argument is rejected by experts in the field. See the June 30, 1988, statement of Professor Robert N. Clinton concerning the April 26 version of HR 4469, and the June 30, 1988, statement of Professor Nell Jessup Newton. Both

(footnote cont'd)

There should be no doubt, however, that as of 1892, when the reservation attained its current boundaries, the rights of the Indians were vested. Congress intended that this be so. The reservation became permanent, and any diminution of Indian rights in the reservation (such as these bills would cause) is a compensable taking. Litigation will follow in the wake of enactment of HR 4469 or 5340. Further litigation is not a result for which Congress should strive.

There is a theory that Indian property interests in executive order reservations are neither legal nor equitable, and that Congress can abolish them without compensation. In the case of this reservation, the issue arose in connection with the plaintiffs' claim for interest on their damages in Short, 12 Cl. Ct. 36, 40-42 (1987), but the court declined to decide it, instead relying on a statute to award interest to the plaintiffs.9/

9/ The theory stems from cases such as Hynes v. Grimes Packing Co., 337 U.S. 86, 103-104; (1947). The idea that executive order title might not be compensable is largely an anachronism, and its application in modern cases is limited in scope. It would be dangerous to labor under this idea in considering these bills. F. Cohen, Handbook of Federal Indian Law Ch. 9 Sec. A 2b p. 494 (1982 ed.) notes that the passage from Hynes v. Grimes Packing Co. cited above is "clearly dictum". The case has to do with whether certain fishing requlations were statutorily authorized. See also Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government, 33 Stan. L. Rev. 979, 1037 n. 305 (1981), discussing Hynes v. Grimes Packing Co., and Sioux Tribe v. United States 316 U.S. 317. (1942).

(footnote cont'd)

According to 69 Yale L. Journ. at 631 "(A) statute may constitute recognition of a reservation defined by Executive order and in existence at the passage of the statute." Mattz v. Arnett, 412 U.S. 481 (1973) identified the Act of June 17, 1892, 27 Stat. 52, as congressional ratification of the 1891 Executive Order. 412 U.S. at 493-99. Mattz v. Arnett specifically concerned that part of the extension known as the "lower twenty" (i.e. - lower twenty miles of the extension) which had been the Klamath River Reservation in the 1850's and 1860's, but it is clear that the Court understood the lower twenty to be as much a part of the Hoopa Valley Reservation as the square. The Court observed that the 1891 Executive Order had incorporated this land in the Hoopa Valley Reservation, thus "expanding" the Reservation. It said that the reason for this incorporation was "apparent", because the 1864 Act

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(footnote cont'd)

Note, Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right, 69 Yale L. Journ. 627 (1960) cites Sioux Tribe v. United States, and Confederated Bands of Ute Indians v. United States, 330 U. S. 169(1947) as examples of the Court's limited application of the non-compensabiltiy doctrine to land taken during the 19th century. 69 Yale L. Journ. at 627-28. The note is cited in F. Cohen, Handbook of Federal Indian Law Ch. 9, Sec. A 2b, pp. 496 n. 202 (1982 ed.) as support for the statement that the modern practice of Congress has been to provide compensation for the taking of executive order reservations. The Handbook continues, "(T)he distinctions between recognized and unrecognized title may be of chiefly historical significance with respect to executive order reservations." Id. at 497. The Handbook, id. at 495, refers to Sioux Tribe v. United States as a special case because of the short existence of the reservation in question and the fact that it was intended to be a buffer against liquor traffic.

authorized no more than four Indian reservations in California, and as of 1891 "four reservations already had been so set apart." Id. at 493-94. The Court noted that the 1892 Act spoke of the Klamath River Reservation in the past tense. The Court reasoned that this was consistent with the lower twenty's inclusion in the Hoopa Valley Reservation the previous year. Id at 498-99.

Mattz v. Arnett identifies other congressional acts after 1892 repeatedly recognizing the land's reservation status,

> .... by extending the period of trust allotments for this very reservation by the 1942 Act ... 25 U.S.C. §348a ... and by restoring to tribal ownership certain recent and undisposed-of ceded lands in the reservation by the 1958 Act (Act of May 19, 1958, 72 Stat. 121).

Id, at 505.

The 1864 Act required that if the lower twenty was to retain its status as Indian country, it had to be as part of the Hoopa Valley Reservation, and not as a separate reservation. Congress neither abridged the 1864 Act nor abrogated the 1891 Executive Order when it passed the 1892 Act. Therefore, the 1892 Act (and the subsequent laws to which Mattz v. Arnett refers) benefitted the entire Hoopa Valley Reservation. The 1892 Act is congressional recognition that the executive department's location of the Hoopa Valley Reservation as Indian country was to be permanent. No later than 1892, the Indians of the Reservation acquired a

compensable equitable title to its unallotted trust lands and resources.10/

Moreover, the Indians of the reservation are "Indians of California" who bought and paid for it. In The Indians of California v. United States, 98 Ct. Cl. 583 (1942), cert. denied 319 U.S. 764 (1943), individual descendants of Indians living in California as of June 1, 1852, sued the United States for a breach of trust in failing to ratify treaties negotiated in 1851. Jurisdiction was pursuant to the Act of May 18, 1928, 45 Stat. 602, as amended by the Act of April 29, 1930, 46 Stat. 259. (These acts appear as 25 U.S.C. §651, et seq.) The plaintiffs obtained a favorable judgment, reported as 102 Ct. Cl. 837 (1944). The value of the California Indian reservations, including the Hoopa Valley Reservation, was offset against their judgment award, at the rate of $1.25 per acre. This payment is an additional source of compensable Indian rights under the fifth amendment in the Hoopa Valley Reservation. The reservation should be left as it is.11/

10/ The 1892 Act is congressional action establishing the Reservation's permanency as Indian country. The question of who are the beneficiaries of the Reservation is a separate issue, which turns on construction of the 1864 Act. The answer is that the Indians of the Reservation are its beneficiaries, Puzz v. United States, Order of April 8, 1988, at 16 (trust duty extends to every Indian alike). See also Hoopa Valley Tribe v. United States, 596 F. 2d at 448.

11/ The September 13, 1988, Congressional Research Service

(footnote cont'd)

IV. THIS LEGISLATION WILL NOT NORMALIZE FEDERAL-INDIAN RELATIONS WITH THE TRIBES WHOSE MEMBERS ARE INDIANS OF THE RESERVATION.

Submitted herewith is a detailed analysis of HR 4469 by the writer. It is sufficient to say here that these bills do not follow through in addressing the consequences of the changes they will effect. The bills adopt a termination strategy which is especially apparent in sections 6(a)(3), (4)(A), and 6(d). They do not guarantee that the Yuroks will have a reservation of their own unless the Hoopa Valley Tribe waives its claims under section 2(a)(2)(A).

The bills' supporters say they wish to strengthen tribal government. This is a good objective. The ultimate point of the litigation on this reservation has been to establish that Indian self-determination is more than a patronizing shibboleth. The reason the majority of the

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(footnote cont'd)

(CRS) report on HR 4469 concludes that there is a "remote" possibility that there is a compensable interest in this reservation. The report fails to cite Indians of California v. United States. Cf. Thompson v. United States, 122 Ct. Cl. 348 (1952) (non-tribal claim by group of individual California Indians under provision of Indian Claims Commission Act similar to 28 U.S.C. § 1505 was within court's jurisdiction).

The CRS report cites Healing v. Jones, 210 F. Supp. 125 (D.Ariz., 1962). That concerned the Navajo-Hopi dispute. It involved an executive order which specifically refers to a tribe, the Hopi Tribe, unlike the executive orders involved in the present matter. No statute vested any rights in the Hopi before 1958, unlike the 1892 act construed in Mattz v. Arnett. Healing v. Jones is not a precedent for this case; and indeed the CRS report seems to acknowledge the weakness of the analogy it tries to draw at pp. 29-30. The source of the Navajo-Hopi dispute and the source of this dispute are entirely different.

Indians of the reservation have fought all these years in court is because the reservation belongs to all the Indians. The claims are based on the fact that the BIA and the Hoopa Valley Tribe tried to take the reservation away from the majority in the 1950's, and the BIA would not back away from its discriminatory policies.

The court in Puzz ruled that it could not compel the political reorganization of the reservation. April 8, 1988, slip opinion at p. 19. But is also ruled that the government has a trust responsibility to protect all Indians and their property. It held that it has a duty to allow all the Indians to participate in self-government on a non-discriminatory basis. Id at 15-16.

The dispute reflected in this proposed legislation is about property-the reservation's lands, resources, and revenues. In the litigation, the excluded Indians have established that the BIA was mistaken in its policy that the Hoopa Valley Tribe owns the reservation. Therefore, there is no basis for the BIA allowing the Hoopa Valley Tribe to run the reservation to the detriment of the excluded Indians. The Indians as a whole will have to decide how the reservation should be run, or self-determination is just on empty phrase. A referendum is the only way for them to decide this question; and that is all the Puzz plaintiffs want.

The BIA's compliance plan in Puzz entails the identification of those who are entitled to use and benefit from the reservation, and the election of representatives from

the non-Hoopa Valley Tribe members. The election took place on August 6. Three of the most respected people on the reservation were elected-Dorothy Haberman, Ardith McConnell, and Sam Jones, Jr. They sit on a Community Advisory Committee to plan and budget for reservation-wide programs with the Hoopa Valley Tribe and the BIA. This is a significant start towards normalization of reservation administration. The excluded group is dealing with the BIA in a forum other than the courts for the first time in decades.

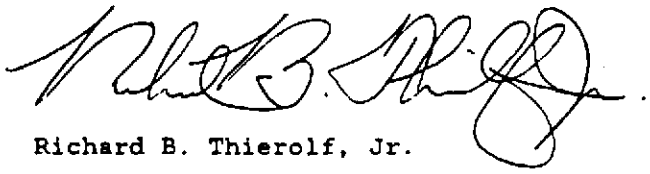
The next step is underway. Although the court has said it cannot compel the political reorganization of the reservation, certainly the Indians of the reservation can. They will petition the BIA to convene a referendum about whether the Indians want a reservation-wide council to act in an administrative, as opposed to an advisory, capacity. The petition does not ask what kind of council, but only whether some kind is wanted. If a reservation-wide council is desired, then the Indians can plan what kind it will be. This is basic self-determination, applied equally among all the Indians of the reservation. If Congress stays its hand, then the Indians of the reservation can decide for themselves how to manage their property. If the BIA tries to thwart this initiative, the courts can look at the problem.

If the legislation passes, Congress will take property from the many, give it to the minority, and dictate how the Indians must govern themselves. The courts will be embroiled in more litigation than they are now. The Short

case will continue (the bills specifically state that it will continue), to be joined by other cases. Congress will become involved again too, sooner or later, because these bills will create problems, not solve them.

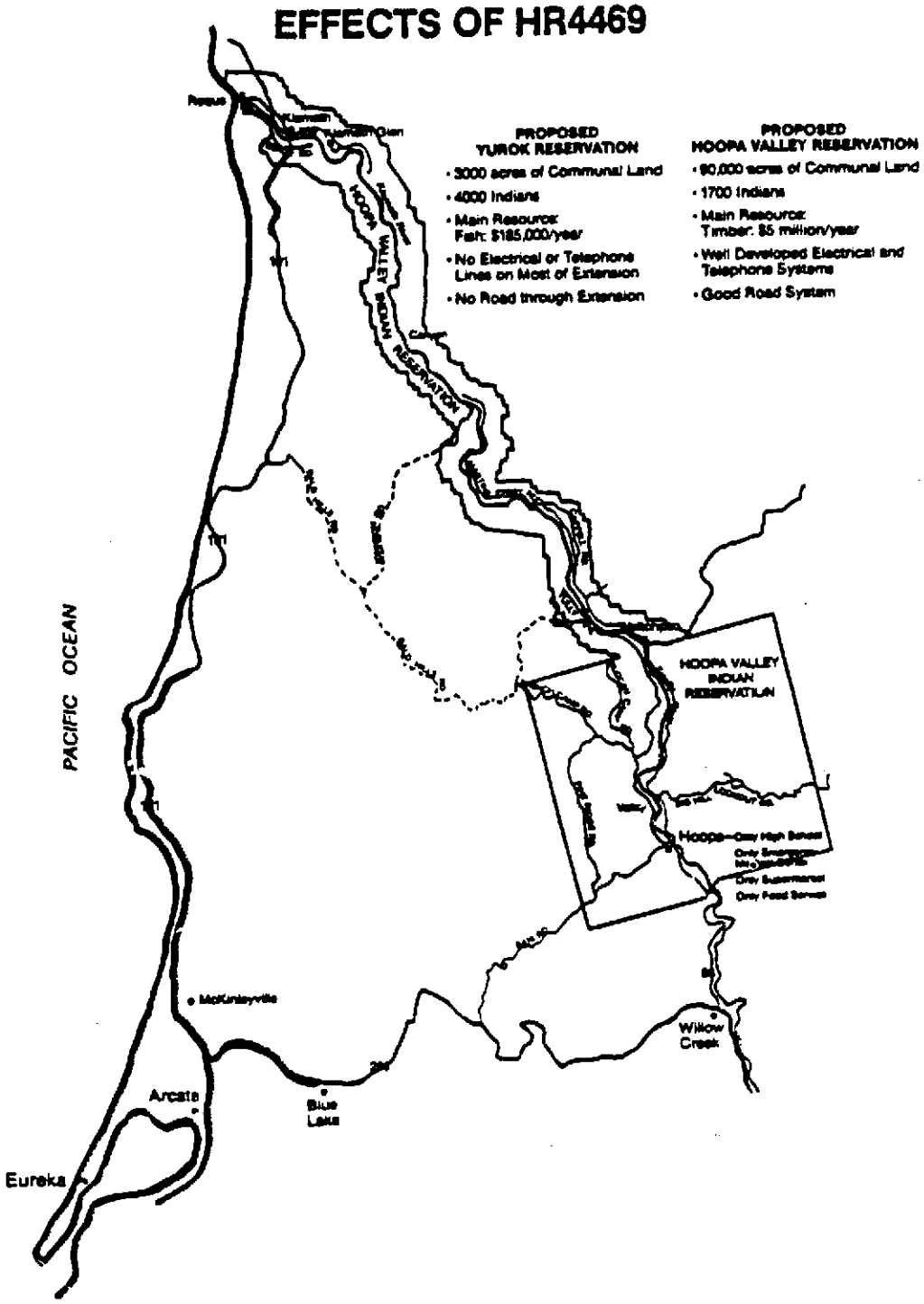
Respectfully

JACOBSON, JEWETT, & THIEROLF, PC



Richard B. Thierolf, Jr.

EFFECTS OF HR4469



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September 6, 1988

MEMORANDUM DISCUSSING KARUK TRIBAL RIGHTS AT HOOPA VALLEY RESERVATION

Pending before Congress are two bills which propose to legislate certain Indian and tribal rights of the Hoopa Valley Reservation of California (herein known as the "Reservation"). The legislation is H.R. 4469, sponsored by Congressman Douglas H. Bosco (D-Cal.), and S. 2723, sponsored by Senator Alan Cranston (D-Cal.).

Both bills ignore the adjudicated legal rights at the Reservation of the Karuk Tribe of California and, indeed, would legislatively terminate those rights without compensation or tribal consent. This would constitute a "taking" in derogation of the Fifth Amendment to the United States Constitution, for which we believe the Karuks would have a monetary claim against the United States.

Among those rights to be terminated are hunting, fishing, gathering and entitlement to Reservation revenues. The value of those rights has not been calculated, but it almost certainly would be a sum in the millions of dollars.

As will be discussed in detail below, there are several indisputable facts which should bear upon Congress' ultimate judgment on the merits of the legislation:

1. The Reservation was established for 16 distinct Indian groups and tribes: (1) Yurok; (2) Hoopa or Hupa; (3) Grouse Creek; (4) Hunstang, Hoonsotton or Hoonsolton; (5) Miskut, Miscotts or Miscolts; (6) Redwood or Chilula; (7) Saiaz, Nongatl or Siahs; (8) Sermalton; (9) South Fork; (10) Tish-tang-atan;

(11) Karok (now "Karuk"); (12) Tolowa; (13) Sinkyone or Sinkiene; (14) Wailake or Wylacki; (15) Wiyot or Humboldt; and (16) Wintun.

2. The groups and tribes identified at paragraph 1 have full and coequal rights at the Reservation, and the rights of the Hoopa or Yurok Tribes are no greater than those of any of the others.

3. As a matter of federal law, the Hoopa Tribe has never been recognized as the governing body of the so-called "Square" within the Reservation.

4. As a matter of federal law, the Yurok Tribe has never been recognized as the governing body of the so-called "Extension" or "Addition" within the Reservation.

Detailed histories of the Reservation and its establishment for the above-identified tribes in addition to Hoopa and Yurok are found in the series of rulings known as the "Short Litigation." The central line of rulings is found at Short v. United States, 486 F.2d 561, 202 Ct.Cl. 870 (1973), cert. denied, 416 U.S. 961 (1974) ["Short I"]; Short v. United States, 661 F.2d 150, 228 Ct.Cl. 535 (1981), cert. denied, 455 U.S. 1034 (1982) ["Short II"]; Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983), cert. denied, 467 U.S. 1256 (1984) ["Short III"]. Other significant rulings in this same long-standing litigation over individual and tribal entitlements at the Reservation are, chronologically: Hoopa Valley Tribe v. United States, 596 F.2d 435, 219 Ct.Cl. 492 (1979); Short v. United States, ___ F.2d ___, 12 Cl.Ct. 36 (Fed. Cir. 1987); Puzz v. United States, No. C-80-2908, United States District Court for the Northern District of California (April 8, 1988). A copy of Puzz is attached hereto as Appendix A.

A. Establishment of the Reservation.

The Reservation was established pursuant to the Act of April 8, 1864 (13 Stat. 39), which authorized the President to locate not more than four Indian reservations within California and stipulated that at least one would be situated in the northern part of the state. The original tract was a 12-mile square (the "Square") and it was formally identified and set aside by President Grant in the Executive Order of June 23, 1876 (1 Kapp. 815). By President Harrison's Executive Order of October 16, 1891 (1 Kapp. 815), the Reservation was enlarged through the addition of a tract along the Klamath River (known as the "Extension" or the "Addition").

The Reservation was set aside for the Indian tribes of Northern California. A critical element to this matter is that the 1864 statute sought to establish a reservation for any and

all tribes which were living there or could be induced to live there.[1]

B. The Reservation Was Created for 16 Tribes.

Throughout the Short litigation, the Hoopas have claimed that they have exclusive jurisdiction over the Square, an argument which has been rejected each time it has been raised.[2] This is because of the Reservation's history, as noted at Section A above, that it was created for the various tribes residing in the vicinity prior to the intrusion into Northern California of the nonIndian population.

Despite the consistent rejection of their position, the Hoopas have continued to press their "exclusivity" claim to the present time.[3] And some non-Hoopas promoted the same argument in the recently decided case of Puzz v. United States, supra. The Puzz Court noted the plaintiffs' suggestion that the "Indians of the [R]eservation"[4] are now unified as a single tribe for the purposes of managing the Reservation. This argument, the Court said --

> is inaccurate. No legislative or executive act has ever consolidated the tribes on the [R]eservation. Indeed, this could not be done without the consent of all tribes. . . . [Plaintiffs'] status as Indians of the [R]eservation necessarily entails ties to one or another of the historic Indian groups for which the [R]eservation was created, and those ties create the right to share in the

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[1] Short I, 486 F.2d at 565; Puzz v. United States, supra, Appendix A at p.7.

[2] See, e.g., Short I; Short III, 719 F.2d at 1133; Hoopa Valley Tribe v. United States, supra, 596 F.2d at 441-42.

[3] By the pending legislation which they are promoting, the Hoopas would effectively control the Square and give the Extension -- which they don't want -- to the Yuroks.

[4] Throughout the Short litigation, the courts have attempted to identify the Indians for whom the Hoopa Reservation was established. In this, the phrase "Indians of the Reservation" has been developed.

benefits of the [R]eservation. [Emphasis supplied.][5]

And we know who those historic groups are because identity of the tribes for which the Reservation was established is both (i) a historical fact and (ii adjudicated. They are as follows: (1) Yurok; (2) Hoopa or Hupa; (3) Grouse Greek; (4) Hunstang, Hoonsotton or Hoonsalton; (5) Miskut, Miscotts or Miscolts; (6) Redwood or Chilula; (7) Saiaz, Nongatl or Siahs; (8) Sermalton; (9) South Fork; (10) Tish-tang-atan; (11) Karok (now "Karuk") (12) Tolowa; (13) Sinkyone or Sinkiene; (14) Wailake or Wylacki; (15) Wiyot or Humboldt; and (16) Wintun.[6]

C. Karuk Is a Tribe of the Reservation.

Until recently, the Karuk Tribe of California was known by the name "Karok" -- the spelling was adjusted to reflect the correct pronunciation. As noted by the Court in Short I, the Reservation was created for more than one tribe; and, as noted in Short III, Karuk (or "Karok") is one of the tribes other than Hoopa for which the Reservation was established.

That Karuk rights at the Reservation are still in existence and enforceable is a matter of federal law. For until those rights have been extinguished (e.g., by Congress) or voluntarily surrendered, they are (i) preserved and (ii) federally protected.[7]

In this regard, it is irrelevant that the Karuk Tribe maintains its tribal headquarters at a site not within the Reservation and that many Karuks live away from the Reservation. In the course of the Short litigation, the courts have specifically found that Indians are entitled to share in the proceeds of Reservation property who do not reside within the Reservation.[8] Moreover, lack of any residency requirement in

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[5] Puzz v. United States, supra, Appendix A at 11.

[6] Short III, 719 F.2d at 1144.

[7] See, e.g., Dobbs v. United States, 33 Ct.Cl. 308, 317 (1898); Puzz v. United States, supra, Appendix A at 11; Act of May 17, 1882, as amended, 25 U.S.C. § 63.

[8] Short III, 719 F.2d at 1136. In this same regard, in 1964, (Footnote Continued)

order for Indians and tribes of the Reservation to exercise rights at the Reservation is buttressed by the adjudicated principle that tribes can be "of the Hoopa Reservation" despite their failure to organize a formal government at the Reservation![9]

D. The Karuk Tribe Has Substantive Rights at the Reservation.

Thus, the law is clear that Karuk Indians need not reside within the Reservation in order to enjoy full benefits flowing from and through the Reservation.[10] And this rule is consistent with the rule previously established for another West Coast reservation established for multiple tribes: the Quinault Indian Reservation ("QIR") of Western Washington. Like the Reservation's Square, the QIR was a heavily forested area not suited for the traditional allotment purposes of agriculture and grazing. Nonetheless, a non-Quinault Indian of the Quileute Tribe sought an allotment within the QIR on the grounds that his tribe was one of several for which the QIR was established; the Supreme Court upheld his claim and ordered that he be given an allotment.[11] This was followed by suits for allotments within the QIR filed by members of other tribes not residents within the QIR, and the Supreme Court again sustained their entitlements as "Indians of the reservation."[12] Central to this ruling was the Court's determination that every tribe for which the QIR was established has rights at the reservation equal to those of the Quinaults, and that they all were "affiliated" at the QIR.[13] That these affiliated tribes had rights equal to those of the QIR resident tribe -- the Quinault Tribe -- was further reiterated in

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(Footnote Continued)
Congress amended and reenacted 25 U.S.C. § 407 to direct the use of timber proceeds from Indian lands. In so doing, Congress was careful to clearly allow coverage of Indians who were entitled to proceeds from reservation property but who were not reservation residents. See H.Rpt. No. 88-1292 (88th Cong., 2d Sess.), 1964 U.S. Code Cong. & Adm. News 2162-63. Also, see Hoopa Valley Tribe v. United States, supra, 596 F.2d at 439, 441.

[9]Puzz v. United States, supra, Appendix A at 12.

[10]Again, see Hoopa Valley Tribe v. United States, supra, 596 F.2d at 439, 441.

[11]United States v. Payne, 264 U.S. 446 (1924).

[12]Halbert v. United States, 283 U.S. 753 (1931).

[13]Ibid, 283 U.S. at 758-59.

The Quinaielt [sic] Tribe of Indians v. The United States, 102 Ct.Cl. 822 (1945), when the court found that the Quinault Tribe could not lawfully litigate a dispute over QIR boundaries since such a dispute would affect the rights of all of the other tribes with jurisdiction over the QIR -- including those not resident at the reservation -- and those tribes were not participants in the litigation.[14]

Just as the nonresident tribes at the QIR have substantial rights equal to the Quinault Tribe at that reservation, so too does the Karuk Tribe have rights at the Hoopa Reservation equal to, inter alia, the Hoopa Tribe.

E. The Law Is Settled That More Than One Tribe Can Have Rights at a Reservation.

The Short litigation already has confirmed that equal tribal rights are enjoyed by the Hoopas and Yuroks. And, with this, we note that notion is not novel that more than one tribe can be resident at a reservation -- each with substantive rights.[15]

Thus, the Karuks are only asserting tribal rights which are well-established as a matter of federal law.

F. This Legislation Would Repeal the Federal Duty to Aid Karuk Indians.

The United States has a duty to aid all Indians of the Reservation.[16] The legislation would invalidate the Reservation status of Karuk Indians, in effect repealing the federal duty and terminating Karuk rights.

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[14] 102 Ct.Cl. at 835.

[15] See Short I, 486 F.2d at 563; Solicitor's Opinion M-27796. In addition, the federal government recognizes two tribes at the Wind River Reservation and, conversely, the Minnesota Chippewa Tribe is the governing body of six reservations. (See 44 Fed. Reg. 7235-36.)

This same point has been confirmed by the Ninth Circuit in two recent decisions. Williams v. Clark, 742 F.2d 549 (9th Cir. 1984); Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176 (9th Cir. 1981).

[16] Puzz v. United States, supra, Appendix A at 12.

CONCLUSION

The Karuk Tribe has adjudicated and federally-protected rights at the Hoopa Reservation. In the rush to promote the narrow and exclusionary interests of the Hoopa and Yurok Tribes, Congress proposes to terminate the rights of 14 Indian groups and tribes -- including the federally recognized Karuk Tribe. Such an action is unfair, would terminate Karuk entitlements and take Karuk aboriginal rights in violation of the Fifth Amendment of the United States Constitution.

Dennis J. Whittlesey

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Mr. FRANK. Thank you.

I am impressed by much of what you say. The problem I have in this context is that almost everything you say is something that the Interior Committee has jurisdiction over. So, while I have some questions, I will want to pursue in my capacity as a member because I have to vote on this bill on the Floor, I don't see here in the thrust of what your problems are, Judiciary issues as opposed to Interior issues. There were obviously there and will be raised again on the Floor.

Mr. THIEROLF. There is a significant difference between the matters that the Interior Committee customarily looks at and the problems we are talking about here. The Interior Committee, I mean.

Mr. FRANK. The question you raised is whether they customarily looked at them one way or another, what the relationships ought to be, what the policy with regard to tribes and Indians, that is their jurisdiction, not ours.

Mr. THIEROLF. What we are talking about is claims by individuals against Government agencies for arbitrary action. It is not claims brought by tribes and in that respect——

Mr. FRANK. The way you phrased it, your merits of your arguments were almost exclusively arguments that deal with the Interior Committee. When you got into the merits, it had to do with the nature of what the policy ought to be, vis-a-vis these individuals, given their Indian status, and what the policies have been.

The fact that something is a claim against the Government does not make it substantively our jurisdiction, because then we would end up with everything. The substantive—the reasons that I heard you giving were that you don't like this bill, are not primarily within our jurisdiction, but with the Interior Department. That doesn't mean that we as individual members have an obligation to weigh them fully. But I don't see this as a basis to bring it before the Judiciary Committee.

Mr. THIEROLF. These are claims by individuals concerning property just as any other individuals in the United States can bring claims against the Government when the Government wrongfully deals with their property. The fact that they are Indian people is a fact, but it is not the essence——

Mr. FRANK. The arguments you gave in defense of their regular claims and the way the bill does it all have substantively to do with Indian policy.

Mr. THIEROLF. Because the statute is about an Indian reservation.

Mr. FRANK. Right, and that is why it is primarily the Interior Committee, it would seem to me, that whole network.

Mr. THIEROLF. The problem about the shortening of the statute of limitations is a matter which the Judiciary Committee has jurisdiction over. It involves the jurisdiction of the courts in general, and——

Mr. FRANK. You said the statute of limitations, you mean the period that they can file in? I do have—I thought the statute of limitations in a different context. The filing period after.

Mr. THIEROLF. Yes, and it also involves matters of the Fifth Amendment and vested rights to property, and again, what I am talking about is rights which belong to individuals in terms of their

relationship with the Government. So, it is not a matter which involves claims between tribes in the United States, all the litigation has been brought on behalf of individuals and—and we are also talking about claims——

Mr. FRANK. OK. I think, unless you have some new point which hasn't previously been raised——

Mr. THIEROLF. Yes, it is. There is fund which the bill governs, it is called the Settlement Fund. It consists of proceeds from the reservation's resource revenues which the Bureau of Indian Affairs has escrowed for the benefit of the majority of the Indians of the reservation, the *Short* plaintiffs, in order to protect the Government from further liability for damages on account of the 1973 liability judgment in that case.

This bill completely alters and changes the principles whereby that money has been escrowed for the benefit of these people by dividing it in a completely different proportion and contrary to what the courts have settled as being the proper division of the reservation's resource revenues, that is a fund which is held by the United States Treasury in which this bill directly affects.

That is an issue in which nobody has discussed, but the matter has been thoroughly adjudicated in the case of *Hoopa Valley Tribe* v. *the United States,* and in the *Short* case. And this bill would drastically affect that and basically undo the decisions which govern the Bureau of Indian Affairs' discretion over those funds, as ruled by the courts in the cases that I mentioned.

Nobody has brought that up.

Mr. FRANK. OK. Thank you. If you have nothing else, we will go to our next witness.

Mr. FRANK. We will now hear from Mr. Terry Supahan, accompanied by Dennis Whittlesey.

TESTIMONY OF TERRY SUPAHAN, BUSINESS MANAGER OF KARUK TRIBE, ACCOMPANIED BY DENNIS WHITTLESEY

Mr. SUPAHAN. Thank you, Mr. Chairman.

My comments will be as brief as possible, so our attorney can give the salient points. I am the Travel Business Manager for my tribe. I serve at the pleasure and discretion—it has been a number of years working to get to this position.

I would like to give some brief history of why we are here at this time. The—in 1983, the—Jessie Short claims case indicates that—and was affirmed by the Federal District Court—that not only my tribe, but a number of other tribes had historical connection to the reservation.

Unfortunately, the reservation and the ancestral lands that my people had signed a treaty with the United States Congress for, with the Government, was never ratified by this body. It is—it is difficult to be here at this time, and I recognize that there are a number of groups that have not been heard, and I feel that to ignore those issues moves ahead on this legislation at a pace that other tribes would like to know why it cannot be dealt with in another session of Congress.

Mr. FRANK. Please continue.

Mr. WHITTLESEY. Mr. Chairman, on legal points, which I think this subcommittee is concerned with, and certainly the full committee, the Karuk Tribe is an adjudicated tribe constituting one of the tribes for whom the reservation was created, and this was important in *Short*, the Karuk Indians are adjudicated Indians of the reservation.

This legislation, I might respond, and I don't mean to do so in a pot-shot manner, but I can respond perhaps on these points to Mr. Schlosser's testimony. When he said that this would not overturn any adjudications as they affected people, he was perhaps correct. But he skips over the fact that it will overturn adjudicated legal principles which will affect other individuals in the future, including in my case my client, the adjudicated Karuk Tribe Indians of the reservation; they are the forgotten tribe on this reservation.

Similarly, it would overturn established legal principles in *Short* and *Puzz*, as they affect people and will continue to affect people in the future. We are not talking about a group of litigants who have come to the Congress and said, we have our adjudicated rights, let's fix them, let's lock them in, and we are all going to be happy and now let's make new law.

The adjudicated principles affect other people. This would overturn court rulings, specifically in the *Short* litigation, that, among others, the Karuks are Indians of the reservation. There are 16 defined groups or Indians of the reservation, and yet this legislation says there will only be two groups who in the future will be Indians of the reservation, we are going to terminate the adjudicated rights, the established legal principles as they affect others, not now, not now in the Yurok or Hoopa Tribe.

Finally, there was a misstatement, and I think in justification, obviously there has been a new referendum. There has been no determination of Yurok interests, what the Yurok people say. Mr. Schlosser says where the Yuroks have no tribal rights because they don't have the formally established tribal government. Of course, they have tribal rights which indeed will be affected by this legislation.

It is convenient to say they don't have them; what they don't have is a, perhaps a systematic exercise of individual rights as member of a tribe, rights which flow from those existing and adjudicated tribal rights.

Finally, I was somewhat amazed to hear Mr. Schlosser state, and this is aside from this committee's jurisdiction, but I would like to respond to it, that the value of the Extension and the Square in his opinion are roughly equal. Perhaps if that is so, the Hoopas wouldn't mind moving to the Extension and giving all of the other Indians of the Hoopa Valley Reservation full entitlements to the Square, and I suspect I can speak for my clients to tell you we would be glad to have part of that bargain.

Mr. FRANK. Yes.

Mr. SUPAHAN. If I could just also reiterate a point made earlier about the issues that we have raised, and some of the tribes that could not be here who are petitioning for Federal recognition.

We attempted to testify when the House Interior Committee held hearings on this bill. We were not allowed to at that time. We did not present testimony at the field hearings when the Senate Select

Committee on Indian Affairs held hearings on this bill in California.

Mr. FRANK. You were not invited to at that time? Our you chose not?

Mr. SUPAHAN. There is an interesting system here that you need to know people and that helps open things up in this city, and we didn't know anyone. We were—we have only been—the United States Government has only recognized our existence.

Mr. FRANK. You didn't know me, either, for the record. A lot of people are vaguely acquainted with——

Mr. SUPAHAN. We did meet with your people in August, and it took a period of time before we were able to find which doors were necessary to be knocked on. And in regards to testimony that has been given at past hearings, I don't believe the House Interior and Insular Affairs Committee has heard all of the arguments regarding Indian policy to this bill. We feel that it is best if this bill is put on the table and dealt with in the next session of Congress so that all the tribes can work for a comprehensive solution to these reservation matters.

Mr. FRANK. Yes?

Mr. WHITTLESEY. While preserving their legal rights, and is recognized as ongoing by the courts.

Mr. FRANK. But you did agree that while this will have a negative effect, you believe in the future, nothing specifically litigated will be taken away from anybody by this bill?

Mr. WHITTLESEY. The adjudicated rights, Mr. Chairman, are that the Karuk Tribe is one of the groups for which this reservation was created. Now, what the adjudicated rights——

Mr. FRANK. And what case?

Mr. WHITTLESEY. They would be terminated under this legislation.

Mr. FRANK. Is there a decision of a court that says that the Karuk Tribe has a right to assets which this bill would take away from them?

Mr. WHITTLESEY. The decision of the court doesn't say it in those words, but in Short 3, and it is cited in the papers as such, specifically said that the Karuks were one of the Indian tribes for which this reservation was created. The entitlements as adjudicated in other cases for Indians of reservations, including the 9th Circuit in 1981 and 1984 in litigation involving another multi-tribe, said that those tribal rights are significant, and as an Indian of the reservation, each of the tribes are fully entitled to equal participation.

Mr. FRANK. But not specifically for the Karuks in this specific instance? Why was no case ever brought?

Mr. WHITTLESEY. I wish I could answer, I have only been working for these people since August. I can assure you if I had been working for them for 10 years, we might have a different procedural history here. But in the Ninth Circuit——

Mr. FRANK. That is when the Ninth Circuit was not overturned by the Supreme Court?

Mr. WHITTLESEY. I say with pride, Mr. Chairman, that both the *Wicomico* and *Williams* v. *Clark* in 1984 were not overturned, and the Supreme Court wouldn't hear them.

Mr. FRANK. No news is good news as far as the Supreme Court is concerned.

[The statement of Mr. Supahan follows:]

SUPAHAN

TESTIMONY OF TERANCE J. SUPAHAN

In Opposition to H.R. 4469

Before the House Committee on the Judiciary
Subcommittee pn Administrative Law and Governmental Relations
September 30, 1988

I am Terry Supahan, Business Manager of the Karuk Tribe of California, a federally recognized Indian Tribe with tribal offices in Orleans, Happy Camp and Yreka, California. I am a resident of the Hoopa Valley Reservation.

On behalf of my Tribe and my people, I want to thank the Committee for permitting me to appear and testify here today. We have been forgotten in the dialogue about the Hoopa Valley Reservation, and our tribal entitlements have been ignored. For me to be allowed to speak here today is important for our people, because we feel that our interests are not important to certain officials who have been involved in the drive to "resolve" the "Hoopa problem."

Our tribe is federally-recognized. We have over 1,600 enrolled members, each of whom can trace ancestry to the aboriginal Karuk Tribe. This is important, since the courts have determined that ours is one of 16 Indian tribes for which the Hoopa Valley Reservation was originally established.

Our members have ties to the Hoopa Valley Reservation -- despite what you may have heard to the contrary. In addition to me, we have over 100 members residing within the Reservation. Moreover, scores of Karuk Indians have been adjudicated in the Jesse Short litigation to be entitled to share in the Reservation timber revenues. I should add that most of our people have not yet attempted to intervene in Short, but we and our attorneys believe that they have a right to do so and I fully expect to see hundreds of Karuks seek intervention within the next several months.

We oppose this legislation for the simple reason that it ignores the rights of not only our tribe but of other Indian tribes and bands for which the Reservation was established.

The Short litigation has determined that the Reservation was established for 16 tribes. Of the 16, two got together and divided the Reservation and all entitlements attaching thereto. I point to my tribe, which is federally recognized, and the Tolowa and Wintun, which are seeking federal acknowledgment through administrative processes at the Department of the Interior. What about our rights? This legislation would carve the Reservation into two parts only: Hoopa and Yurok. The rest of us are left without land, without aboriginal rights and without remedies other than litigation before the United States Claims Court.

We are not afraid of litigation, but view this result as a sad commentary on the Congressional process.

Our attorneys have prepared a legal memorandum which explains the legal basis for our claims. I have made that legal opinion Exhibit A to this testimony.

A Senate hearing on September 14 disclosed an additional fact of concern for all of us. Every witness addressing the Yurok considerations admitted that nobody has ever polled the Yurok members to determine whether they support or oppose the legislation. Thus, although there is no data base from which Congress can make a judgment as to support from one directly affected group, this legislation continues to move toward passage. And, I reiterate that others such as my tribe, the Tolowas and Wintuns were never even considered.

I did not originally come to Washington to stop this legislation; I only came to obtain some equity for my people. But I now know that this legislation does not care about equity and it does not consider our federally-protected rights; for this reason, we oppose it.

You should table this bill and send all of the tribes of the Hoopa Valley Reservation back to the negotiating table to develop legislation which resolves all of the issues and does not leave some tribes with empty promises and litigable claims.

Thank you.

Mr. FRANK. I have no further questions, and I appreciate it. If you have any material that you want submitted, we will put it into the record. The hearing is adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

ADDITIONAL MATERIAL

HR 4469/5340

BEFORE THE HOUSE JUDICIARY COMMITTEE

SEPTEMBER 30, 1988

TESTIMONY OF WEYMAN I. LUNDQUIST, COUNSEL FOR THE MAJORITY OF INDIANS OF THE HOOPA VALLEY RESERVATION, IN OPPOSITION TO HR 4469/5340, BILLS TO DIVIDE THE HOOPA VALLEY RESERVATION AND TERMINATE YUROK INDIANS

For the past 13 years, my law firm has represented the majority of the Indians of the Hoopa Valley Reservation in the case entitled Jessie Short v. United States, No. 102-63, Claims Court. On behalf of those 4000 Indians, who were never asked by referendum or otherwise whether they wanted this bill, I strongly urge this Committee to prevent this termination bill from becoming law.

The proponents of this bill ask you to step into the middle of an ongoing lawsuit, one which has been in the courts for 25 years. They ask you to reverse the 13 federal judges who have ruled that the majority of the Indians of the Reservation have exactly the same rights in their Reservation as does the minority. They ask you to reward their litigation strategy, which has been to

delay and complicate the litigation in the hope that Congress would eventually step in and undo everything which was accomplished in the courts. I urge you to take no action which will reverse this ongoing litigation. Congress should pass no law affecting Indian rights without first conducting a referendum on the Reservation to determine the wishes of the people.

The Hoopa Valley Reservation was created in 1864. It was not created for any particular tribe or group of people, but rather for all the Indians of Northern California who chose or were induced to settle there. There were at least 11 different tribal groups in the area who were given rights on the Reservation. Until 1950, the Reservation ran smoothly for the benefit of all of its Indian people.

In 1950, the BIA created a political organization called the Hoopa Valley Tribe, which represents only a minority of the Indians with rights on the Reservation. The majority of the Indians were, with BIA complicity, excluded from that organization. The BIA then allowed the minority group to claim exclusive control of the vast timber resources of the Square part of the Reservation to the exclusion of the majority. The majority sued the BIA in 1963, claiming that they too were entitled to share in the resources and revenues of their Reservation.

In 1973 the Court of Claims issued a well reasoned and lengthy decision, with 218 findings of fact, which held that

all Indians of the Reservation owned equal rights in their land, and that all must be treated equally. To reach this simple and obviously fair principle, the Court studied thousands upon thousands of documents, listened to expert witnesses and considered the problem for many years. The Court's decision was a fair one, a just one and the only one supported by the facts and the law. The Supreme Court has refused three times to reverse the decision. A total of 13 federal judges have considered the complex issues surrounding the Hoopa Valley Reservation, and each one has ruled that the majority of individuals must be treated equally with the minority.

Unfortunately, justice has been slow in coming to the majority. Despite the Court's final decision, the BIA and the Hoopa Valley Tribe have poured millions of dollars in attorneys' fees into the litigation to stall and delay the case as long as possible. Even though the BIA has been funding the losing party's lawyers with the communal revenues of the Reservation, the case is finally near its end. Nearly every issue necessary to conclude the case has been resolved. For the most part, the few remaining matters are fully briefed and already before the Claims Court for decision.

Now, having stalled the case for the past 15 years, the losing parties come to you, the Congress, and ask you to reverse those 13 federal judges, to make legal those actions of the

BIA which the Court held were illegal; in essence, to bring us back to where we were when the Short case was filed in 1963.

It is clear that this bill will not end litigation, nor will it solve the Reservation's problems. The bill explicitly states that the Jessie Short case must continue to its completion to determine the Indians' past damages. But what the bill does not explicitly tell you is that it will result in a number of additional lawsuits. Professor Clinton, a renowned Indian law scholar from the University of Iowa, testified before the House Interior Committee that this bill would constitute an unconstitutional taking of private property for a private purpose. Lawsuits will be filed to enjoin the implementation of this bill. Professor Clinton has also concluded that the bill would constitute a Fifth Amendment taking of property for which the Government would have to pay fair compensation. The Congressional Research Office recently issued a report citing a few of the portions of the bill which demonstrate its confiscatory intent: (1) that the Hoopa Valley Tribe is given the power to stop the partition but the Yurok Tribe is not, (2) that the major assets of the Reservation are given to the minority, and (3) the lack of consideration for any other tribes with rights in the Reservation.

The proponents of the bill have not obtained an appraisal of the Reservation, nor have they made any attempt to provide just and fair compensation in the bill. Most of the money for

termination payments comes from an escrow fund already owned by the Indians, a fund which is the subject of competing claims in court. Various estimates of the value of the land range from $500 million and up. Recognizing that a Fifth Amendment suit will likely be successful, the authors of the bill have included an unconstitutionally short statute of limitations period. Do they hope to shorten the statute of limitations so much that these 4000 individuals are deprived of the opportunity to vindicate their rights through our court system?

Additional lawsuits will also be filed. The bill does not settle the issue of fishing, hunting or gathering rights on the Reservation. The termination provisions of the bill will also result in litigation. In short, this bill would interfere with and reverse a 25-year old case which is coming to a close, only to create new lawsuits.

As I said earlier, the reason this case has taken so long is that delay has been the tactic of defendants. The BIA has funded the losing party in the litigation with millions of dollars of communal revenues in order to stall the case. But you need not take my word for it. In 1985, the American Lawyer interviewed the Hoopa Valley Tribe's former counsel, Howard Dickstein, for a June, 1985 article. He discussed the Government's and the Hoopa Valley Tribe's unsuccessful attempt to force the majority of Indians to create an artificial Yurok Tribe, a maneuver which wasted two full

years in the litigation. The Hoopa Valley Tribe's counsel stated: "Delaying tactics -- that's the point of all those things". Soon after, Mr. Dickstein suggested that the Hoopa Valley Tribe change its tactics and join with the Short plaintiffs to resolve the Reservation's problems. Two weeks later he has fired.

It is apparent that the proponents of this bill believed that if they could delay and confuse the final resolution of the Short case for enough years, they could convince Congress that it must act. Passage of this bill would send a message to litigants, a message that misuse of the court process is a good tactic; that if you can delay long enough, then Congress will step into ongoing lawsuits to reverse them. I urge you to reject this bill, to send a message that Congress will not reward such conduct.

The majority of the Indians of the Reservation are not wholly opposed to a legislative solution, if it turns out that eventually one is necessary. What they are opposed to is any legislative solution which reverses the principles established by the courts, any solution which divides their Reservation and families, any solution which terminates Indian rights, and any solution which violates their civil and constitutional rights.

The majority group has tried to work with the authors of the bill to reach a solution which implements, rather than reverses, the court decisions. Assistant Secretary Ross Swimmer testified at the Senate hearing that a Confederated Tribe of the

Reservation might work, or some other solution which does not split the Reservation. But the authors of the bill have not listened. They have refused to even consider any legislative solution that does not begin with a provision splitting the Reservation into two parts, with the 90,000 acre part going to the losing minority group and the 3,000 acre part going to the majority group.

Our clients have asked the authors to include a referendum provision, one requiring the BIA to conduct an election on the Reservation to determine what the Indians want before any bill takes effect. That is the essence of Indian self-determination. Yet the authors have steadfastly refused to even discuss such a provision. I ask a simple question: If this bill is fair, if this bill is the result of a consensus, if the Indians truly want this bill, then what do the authors have to fear from a referendum?

After 25 years of court struggle, the majority of the Indians of the Reservation have finally been given a say in Reservation government. Only two months ago, three respected elders were elected to represent the majority of Indians of the Reservation on the Reservation's newly formed Community Advisory Council. All three of those elected leaders oppose this bill. The political process of self-determination on this Reservation has finally begun to work. The BIA's policy of excluding the majority of Indians has finally, thanks to the court system, begun to

change. But the court decisions need time to work. The BIA created this problem over 38 years. It cannot be fixed overnight. I urge you to reject this bill, and let the Indians decide what is best for their future. All an imposed solution will do is create more problems and more litigation for this Reservation.

September 29, 1988

Honorable Peter Rodino
House Judiciary Committee
Washington D.C. 20515

Honorable Peter Rodino

I am writing to oppose Congressman Doug Bosco's bill to separate the Hoopa Valley Indian Reservation. While I am not an Indian, I have two minor children who are Yurok Indians. This bill deprives my children of their legal right to revenues from the entire reservation. As the legal guardian of my children, I feel an obligation to seek a legal course of action against the United States Government should this bill pass.

Congressman Bosco is trying to back the Yurok Indians into a corner so that they have no recourse to sue for a violation of their fifth amendment rights. I may not be a Yurok Indian but this bill deprives my children and myself of their per capita share of income from the reservation. This is income that I can use to help support my children until they are eighteen years of age. It is income that would ensure that my children would receive the education and other economic benefits that are entitled to them because of their special status as Indians of the Hoopa Valley Indian Reservation.

While I am the legal guardian of two Yurok children, I have never received any correspondence from Congressman Bosco regarding the contents of this bill. Congressman Bosco has not initiated or supported any effort to publicly solicit input from the persons affected by this legislation. The only information I have received regarding the bill has been what I have read in the local newspapers and by word-of-mouth. Considering the magnitude of this bill's consequences on Northcoast California Indians, I think it would be appropriate for Congress to initiate a full investigation of the consequences of passing this bill. It may also be appropriate for the U.S. Justice Department to investigate the methods that have been used by Congressman Bosco to push this legislation through congress. Congressman Bosco's claims to alturistic reasons for supporting the bill are highly suspect after observing the methods he has used to support this legislation. After talking to staff members of Congressman Bosco, the local newspapers have more than once printed incorrect information about the bill. This has had the affect of confusing both Indian and non-Indians. He has refused to meet with Yuroks that are opposed to the bill. Instead he has selected a handful of Yuroks that will support him on his legislation. These individuals have been provided direct access to influential government employees, while Yuroks opposing the bill have been excluded from these private meetings. In exchange for their support Congressman Bosco has allowed these non-elected Yuroks to provide major input into the writing of the bill. It is beginning to appear as if the Hoopa Valley Tribal Council, Congressman Bosco, his

staff, and various government officials are acting in collusion to deprive thousands of Yuroks Indians of fair and impartial treatment and their legal and aboriginal rights.

I would like to thank you for your careful review of this legislation. I cannot minimize the negative impact that this bill will have on the lives of Yuroks and the United States Government for years to come.

Sincerely

Peggy O'Neill
1905 Papke Court
Eureka, CA 95501