No. _____

In the

Supreme Court of the United States

ROBERTA BUGENIG,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit held that Congress granted to the Hoopa Valley Indian Tribe regulatory jurisdiction over fee simple property belonging to nonmembers (including non-Indians) when it enacted the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. §§ 1300i-7.

1. When delegating regulatory jurisdiction over nonmember owned fee simple property to an Indian tribe, must Congress describe that delegation in express and unambiguous language that refers to nonmember owned fee simple property?

2. Does Congress have the authority to delegate regulatory jurisdiction over fee simple property belonging to a nonmember to the Hoopa Valley Indian Tribe?

LIST OF ALL PARTIES

Petitioner: Roberta Bugenig.

Respondents: Hoopa Valley Tribe; the Hoopa Valley Tribal Council; the Tribal Court of the Hoopa Valley Tribal Reservation; Byron Nelson, Jr., Honorable Judge of the Hoopa Valley Tribal Court; Merv George, Chairman of the Hoopa Valley Tribal Council.

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PETITION FOR WRIT OF CERTIORARI

Roberta Bugenig respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, en banc, in *Bugenig v. Hoopa Valley Tribe*, is reported at 266 F.3d 1201 (9th Cir. 2001), and is reproduced as Appendix A. The Ninth Circuit's order vacating an earlier decision and granting rehearing en banc is reported at 240 F.3d 1215 (9th Cir. 2001), and reproduced as Appendix B. The original, now vacated, decision of the Ninth Circuit Court of Appeals is reported at 229 F.3d 1210 (9th Cir. 2000), and reproduced as Appendix C. The final judgment of the United States District Court, Northern District of California, March 8, 1999, is unreported and is reproduced as Appendix E. That court's amended Order of March 31, 1999, is unreported and reproduced as Appendix D.

A prior case in this matter was litigated in Tribal Court. For this Court's convenience, the Opinion of the Northwest Regional Tribal Supreme Court in and for Hoopa Valley, decided on April 28, 1998, and reported at 25 Indian L. Rep. 6139 (1998), is attached as Appendix F. The Order of the Hoopa Valley Tribal Court, July 11, 1996, is attached as Appendix G.

JURISDICTION

The final opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 11, 2001. This petition is timely filed under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Indian Commerce Clause, United States Constitution, Article I, section 8, gives Congress power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7, states:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

Relevant excerpts of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i, *et seq.*, are reproduced at Appendix H.

The Hoopa Tribal Constitution, the Preamble, Articles I, II, III, and relevant portions of Article IX, are reproduced at Appendix I.

STATEMENT OF THE CASE

In 1995, Roberta Bugenig purchased 40 acres of fee-simple land on which she wished to retire. The land was located within the boundaries of the Hoopa Valley Indian Reservation, near where her family had lived for nearly 150 years. The land is accessible by and adjacent to a public highway that Indians and non-Indians traverse freely.

Mrs. Bugenig is not a member of the Hoopa Valley Indian Tribe and cannot participate in its government.

So that she could raise enough money to build her retirement home (and to make room for that home), Mrs. Bugenig was obliged to cut down some of the second-growth trees on her land. Her plans were designed to be consistent with state and county land use policies and practices. She developed her plans in cooperation with the California Department of Forestry and the Humboldt County Planning and Building Department. Throughout the planning process, she intended only to achieve her modest goal of building a home in which to live.

In July of 1995 Mrs. Bugenig received the necessary certification from the Humboldt County Planning Division and a "Less Than 3 Acre Conversion Exemption" from the California Department of Forestry (CDF). On July 26, 1995, Mrs. Bugenig, relying on the exemption, began cutting trees on her land.[1]

Unbeknownst to Mrs. Bugenig, however, the Hoopa Valley Indian Tribe had adopted a timber management plan on January 28, 1995 (and ratified that plan on February 2, 1995), that claimed a permanent buffer zone that prohibited all timber harvesting activities within one-half mile on either side of the site of a deer skin dance trail, a trail that begins south of Mrs. Bugenig's property near the banks of the Trinity River, proceeds northward along a public highway, and then proceeds to a gathering spot to the west of the highway which itself is to the west of Mrs. Bugenig's parcel. The dance takes place every

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[1] *See* Excerpt of Record (ER) at 36, filed with Mrs. Bugenig's opening brief to the Ninth Circuit Court of Appeals. For the Court's convenience, citations to the trial court record will be placed in footnotes.

other year in this area.[2] All of Mrs. Bugenig's property is located within the buffer zone. Appendix at A-10. Two days after Mrs. Bugenig began harvesting her trees, the Hoopa Valley Tribal Council (Council) issued to Mrs. Bugenig a CEASE AND DESIST NOTICE asserting that ONLY the Hoopa Valley Tribal Council has the authority to make land use changes.[3] Furthermore, the Council threatened to take criminal and civil actions against Mrs. Bugenig.[4] On August 10, 1995, the Hoopa Valley Tribal Court issued an Order of Preliminary Injunction restraining her from cutting down any trees on her property.[5] In turn, the Tribe brought other legal proceedings against Mrs. Bugenig and Mrs. Bugenig objected, claiming that the Tribe lacked jurisdiction over her property.[6]

On October 10, 1995, the California Department of Forestry and Fire Protection sent a letter to Mrs. Bugenig revoking her conversion exemption.[7] In a letter sent the following week, the department advised her that it was

> withhold[ing] judgment on whether or not the tribe has the authority to impose their zoning ordinances

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[2] United States District Court Docket Entry (DE) at Tab 3, Exh. 6, Declaration of Byron Nelson; *see also* Walter R. Goldschmidt & Harold E. Driver, *The Hupa White Deerskin Dance*, 35 U. of Cal. Publications in American Archeology & Ethnology 1934-1943 103, 106 (A.L. Krober ed. 1943).

[3] ER at 6-7; *see also* Appendix at A-10.

[4] ER at 6-7.

[5] ER at 14-15; *see also* Appendix at A-10 to A-11.

[6] *See, e.g.*, DE at 21, Tab 1, Tab 16, and DE at 21, Tab 44.

[7] DE at 21, Tab 48 at 33-34 (Appendix).

> on non-tribal lands or whether the Department will enforce such ordinances.[8]

On July 11, 1996, the tribal trial court issued its final decision and order, granting judgment in favor of the Hoopa Valley Tribe, ruling in particular that

> Humbolt [sic] County does not have authority or subject matter jurisdiction within the exterior boundaries of the Hoopa Valley Reservation to regulate land use. This jurisdictional authority lies exclusively with the Hoopa Valley Tribal Council and membership of the Hoopa Valley Tribe.

Appendix at G-6.

On July 19, 1996, Mrs. Bugenig timely filed her notice of appeal from the decision and order of the Hoopa Valley Tribal Court, based in part on the assertion that the Tribal Court was without jurisdiction to hear the matter.[9] Subsequently, the Tribe placed a lien, which is still in place, on Mrs. Bugenig's property in a dispute over the removal of the trees that had been previously cut.[10]

The decision of the tribal trial court was affirmed by the Northwest Regional Tribal Supreme Court in and for Hoopa Valley on April 28, 1998. *See* Appendix F. The court ruled that the Tribe had jurisdiction under the second exception of *Montana v. United States*, 450 U.S. 544 (1981), to the general

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[8] DE at 21, Tab 48 at 35 (Appendix). State law, incidentally, specifically protects Native American religious resources. Cal. Pub. Res. Code § 5097.9. By utilizing state resources, the Tribe can (and did) get the state to put a hold on timber harvesting pending further analysis.

[9] DE at 21, Tab 44.

[10] ER at 28-29; *see also* Appendix at A-11.

rule that tribes do not have jurisdiction over private non-Indian owned fee property. Specifically, it held that Mrs. Bugenig's timber harvesting activities would threaten the health and welfare of the Tribe by affecting the sanctity of the location of the dance. Appendix at F-23. The court did not address the assertion of tribal jurisdiction alleged to be contained in the language of the Hoopa-Yurok Settlement Act of 1988 (Settlement Act) (the sole basis of the decision by the Ninth Circuit below). The court determined, furthermore, that there was no consensual relationship between Mrs. Bugenig and the Tribe that would invoke the first exception of *Montana*. Appendix at F-23.

Mrs. Bugenig filed her complaint in federal district court in the present case on September 4, 1998.[11] The tribal defendants filed a motion to dismiss on November 30, 1998. The district court entered an order dismissing the case on March 4, 1999. Judgment was entered March 8, 1999. Appendix E. An amended order was filed March 31, 1999. Appendix D. The district court below based its decision on its interpretation of the Settlement Act, an issue not reached by the tribal appellate court, finding that the language of the statute served to give the Tribe jurisdiction over Mrs. Bugenig's property. *Id.* at D-8 to D-9. The court's decision did not touch upon the Tribe's suggestion that the two exceptions in *Montana* applied.

A three-judge panel of the Ninth Circuit Court of Appeals reversed on October 3, 2001. Appendix at C-26. The panel began by noting: "The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe." Appendix at C-11. Turning to the legislative history of the Act, the court found no clear

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[11] ER at 39-45.

indication that Congress had intended to grant to the Tribe jurisdiction over fee simple property such as Mrs. Bugenig's: "The legislative history contains no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig." Appendix at C-11. Examining the words of the Act itself, the court noted that nowhere in the statute were the usual words or indications that this Court has always found to be persuasive in determining that there has been an express delegation. Appendix at C-14 to C-18. Finding no express delegation the court found no reason to examine the constitutional question of whether Congress *could* have granted the Tribe jurisdiction in this case. Appendix at C-18 n.5. Finally, the court concluded that none of the *Montana* exceptions provided authority for tribal jurisdiction over Mrs. Bugenig's property.

The Ninth Circuit granted the Tribe's petition for rehearing en banc. Appendix B.

A divided en banc panel of the Ninth Circuit affirmed the district court decision. In words described by three dissenters as "a marvelous act of interpretation, bordering on thaumaturgy," Appendix at A-43 (Fernandez, J., dissenting), the court held that the Settlement Act delegated to the Tribe regulatory authority over Mrs. Bugenig's property. It relied on language in that Act that Congress "ratified and confirmed" the Tribal Constitution and thereby adopted language in that Tribal Constitution, and the local laws enacted pursuant to that constitution, all of which together allegedly served to extend tribal jurisdiction to all land within reservation boundaries, including fee simple property owned by non-Indians. Appendix A, *passim*. The court further held that Congress had the constitutional authority to make such a delegation. Appendix at A-13 to A-16, A-27 to A-37. The court did not reach the question of whether tribal jurisdiction over Mrs. Bugenig's

property could be supported by any of the exceptions of *Montana.*

Three judges dissented, describing the purported language of delegation as being too ambiguous and too lost in "the midst of a fuliginous cloud of words" for there to be an effective and express delegation. Appendix at A-38 (Fernandez, J., dissenting). Employing a gladitorial metaphor of a warrior with a net and trident, the dissenting opinion further suggested that the court should not "decide that by using the constitution's unexceptional language the Tribe, like a retiarius, ensnared and skewered Congress, thereby obtaining exceptional jurisdiction." Appendix at A-42 (Fernandez, J., dissenting). The dissenters further described the tribal "constitution's bland language as a power grab over land and peoples not related to the Tribe itself or to its government." *Id.* at A-42 (Fernandez, J., dissenting).

REASONS FOR GRANTING THE WRIT

It is undisputed that the fee land that is now owned by Mrs. Bugenig first became private property as a result of the Indian General Allotment Act, 24 Stat. 390 (1887) (current version at 25 U.S.C. § 331, *et seq.* (2001)). The General Allotment Act, after the passage of a trust period, provided that patent should issue and then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. 25 U.S.C. § 349. The end result of the Allotment Act was to diminish tribal jurisdiction over certain non-Indian owned fee lands. As this Court has made clear, because the intent of the Allotment Act was to do away with the reservation system, it was only natural that the non-Indian owners of the allotments were to be under state, rather than tribal, jurisdiction.

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; quoted most recently in *Atkinson Trading Company v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1830 n.1 (2001). This Court in *Montana* noted exceptions to the general rule that tribes lack jurisdiction over fee property purchased by non-Indians:

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express congressional delegation.*

450 U.S. at 564 (emphasis added). The opinion further elaborated the exceptions to the general rule against tribal jurisdiction:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

While the tribal supreme court found tribal jurisdiction through the political integrity exception, the Ninth Circuit relied instead upon the finding of an "express congressional delegation." However, it did so by relying on ambiguous

statutory language that purported to incorporate an ambiguous Tribal Constitution. This manner of "express" delegation is in conflict with every other delegation countenanced by Congress or this Court. The Ninth Circuit also purported to find a delegation of authority that Congress never had in the first place, a delegation in conflict with numerous decisions of this and other courts relating to the extent of federal jurisdiction over allotted lands on Indian reservations.

This leads to the questions presented to this Court: Did Congress expressly grant to the Tribe jurisdiction over fee simple property using language far more ambiguous than the delegation standards of this Court and a lower court that examined the issue? And, did Congress actually have authority under the United States Constitution to grant to the Tribe land use regulation that had previously been exercised exclusively by the State of California?

I

THE COURT BELOW FOUND AN "EXPRESS" DELEGATION USING STANDARDS EMPLOYED BY NO OTHER COURT

The Ninth Circuit's finding of a delegation to the Hoopa Valley Indian Tribe of regulatory authority over fee simple land owned by non-Indians is unprecedented both in terms of the scope of the delegation, granting unlimited regulatory authority over fee lands, but also in the manner in which the delegation is purported to have been effected. As will be shown, there is not a single word in the Settlement Act itself that discusses such a delegation of jurisdiction. Instead, the delegation is purported to exist in the Tribal Constitution that the Settlement Act "ratified and confirmed." 25 U.S.C. § 1300i-7. As will be further shown, the Tribal Constitution is also quite ambiguous, and there is no clear indication of the unprecedented usurpation of jurisdiction that the Ninth Circuit reads into that document. In every other case of delegation, both Congress and this Court

have been very careful to make sure that the language of delegation is clear and unambiguous. In fact, in every other case of delegation, Congress has employed explicitly clear language that expressly refers to patented fee lands. The utter lack of any such reference in the Settlement Act puts the Ninth Circuit's opinion in stark contrast to and in conflict with numerous holdings of this Court.

A. The History Behind the Settlement Act Provides No Support for the Notion That Congress Meant to Grant the Tribe Jurisdiction over Fee Simple Property Owned by Non-Indians

The Settlement Act does not discuss in terms ambiguous or otherwise any express delegation of jurisdiction to the Tribe. Absent any statutory ambiguity, resort to legislative history should be unnecessary. However, to the extent that a majority of the en banc court below was able to find an express delegation of authority contained within the Settlement Act, there is at least an argument that the language is ambiguous. Therefore, in order to understand whether the language of the Settlement Act contains the language of delegation that courts traditionally have relied upon, it is helpful first to understand the historical context of the Settlement Act. Prior to the Settlement Act, no one tribe had exclusive jurisdiction over the reservation. This fact led to a long and bitter dispute between members of the Hoopa Valley Tribe and members of other tribes that lived on the reservation. The problem was that members of the Hoopa Valley Indian Tribe collected all the timber revenues from reservation lands, to the exclusion of members of other tribes who had been lawfully settled upon the reservation. *See, e.g.*, *Short v. United States*, 486 F.2d 561, 564 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974) (*Short I*); *Short v. United States*, 661 F.2d 150 (Ct. Cl. 1981) (*Short II*), *aff'd*, 719 F.2d 1133 (Fed. Cir. 1983) (*Short III*), *cert. denied*,

467 U.S. 1256 (1984). This dispute was not resolved until the passage of the Settlement Act.[12]

The history of the reservation, as summarized in the *Short* opinions, as well as in *Mattz v. Arnett*, 412 U.S. 481 (1973), shows that the core of the reservation (the Square) was first created in 1864 by the California Superintendent of Indian Affairs pursuant to powers ratified in the Indian Affairs Act of April 8, 1864, ch. 48, 13 Stat. 39. Since the reservation was formed, the Hoopa Valley Indian tribe was only one of many Indian tribes that occupied the reservation. *Short I*, 486 F.2d at 565. The *Short I* court expressly found the Hoopa Indians did not have exclusive or vested rights in the resources of the reservation. *Id.* Nor were the Hoopa Indians the sole aboriginal occupants of the Square. *Id.* at 564.

Unlike the traditional view of Indian reservations, where resources are considered held in trust for the tribal entity, the *Short* courts found that the resources were not held by the Hoopa Valley Indian tribe, or any other tribe. Instead, these resources were owned by the individual members of all the tribes inhabiting the reservation. *Short II*, 661 F.2d at 154 (rejecting theory that the Reservation and its resources are tribal property rather than the common property of the individual Indians); at 155-56 (noting that it was appropriate that individual Indians (rather than the tribes) receive payments and that there was no functioning tribal entity for the Yuroks). In fact, the Hoopa Valley Tribe was recognized only in 1950, *Short III*, 719 F.2d at 1136, many years after new allotments on the reservation had ceased being issued in 1933, *Short I*, 486 F.2d at 568. As the Hoopa Valley Tribe did not have jurisdiction over the resources on the reservation it would be

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[12] Even with the Act, some disputes remain. *See, e.g.*, *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

illogical to presume that it had jurisdiction over fee-simple property.

It was with this often bitter history in mind that Congress passed the Settlement Act in order to give the Hoopa Valley Indian Tribe jurisdiction over the "Square," the Yuroks jurisdiction over an "addition" to the reservation, and to help resolve the status and rights of the many other Indians, who were not members of either the Hoopa or Yurok tribes, but who had been settled on the reservation. Congress wanted to ensure that the Hoopas could govern the Hoopa reservation without the acrimony and uncertainty caused by the claims brought by the Yuroks and members of other tribes.[13] *See* 134 Cong. Rec. S13967 (Sept. 30, 1988) (statement of Sen. Inouye), at S13972:

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[13] *See* 134 Cong. Rec. H9406 (Oct. 3, 1988) (statement of Rep. Bosco), at H9410:

> As the Hoopa Tribe began to take advantage of a booming timber market, however, a dispute arose over the distribution of revenues from timber sales. This dispute turned the people against each other. It brought them to the courtrooms of Eureka, San Francisco, and the U.S. Supreme Court in a legal battle that has lasted some 25 years.
>
> Sadly, these people are some of the poorest in our country, suffering unemployment rates of over 60 percent. The money and energy expended on this protracted legal battle could better have been spent to strengthen these tribes and build the schools, health facilities, roads and other improvements needed by these people.
>
> The legislation recognizes that some Yurok Indians prefer to live in an organized community and others would simply want to receive funds held in trust for the tribes. This legislation will make funds available to the organized tribes and to individuals who heretofore would not be entitled to a distribution of such funds.

> As a result of some 25 years of litigation, the Hoopa Valley Tribe has lost its capacity to govern . . . the reservation square, and provide those programs it has so long delivered.

There is absolutely nothing, however, in the legislative history demonstrating any congressional desire to give either tribe jurisdiction over fee simple property belonging to non-Indians. With this history in mind, attention must be turned next to the language of the purported delegation.

B. The Purported Express Congressional Delegation Is Ambiguous and Overly Reliant upon a Strained Interpretation of the Tribal Constitution

The purported delegation reads in its entirety:

> The existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

25 U.S.C. § 1300i-7. This, of course, says nothing on its face about there being any delegation of authority from the United States to the Tribe of land-use regulatory authority over fee simple property. Nevertheless, the Ninth Circuit began its odyssey of delegation by focusing on the words "ratified and confirmed," finding that these words served to incorporate the Tribe's constitution as federal law, and then finding that the language of the Tribal Constitution unambiguously exerted jurisdiction over fee simple land belonging to non-Indians. This delegation is unlike any delegation of congressional authority previously encountered, and falls far short of the standards traditionally followed for determining whether there has been a delegation.

The three dissenters on the en banc panel quoted verbatim the original panel's vacated finding that this "ratify and confirm" language is not an express delegation:

> The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe. Moreover, the Settlement Act uses the same "ratified and confirmed" language to recognize the newly created Yurok Tribe, 25 U.S.C. § 1300i-8, which suggests that this language may simply represent Congress's attempt to establish the Hoopa Valley Tribe and the Yurok Tribe as the governing authorities for their respective reservations, rather than a consciously made delegation of authority to the tribes to exercise jurisdiction over nonmembers . . . .
>
> Despite this ambiguity with respect to the Settlement Act as a grant of power over tribal nonmembers, the district court interpreted § 1300i-7 as a congressional delegation of authority to the Tribe to exercise such jurisdiction. The district court reasoned that § 1300i-7's "ratified and confirmed" language works to "give[] every clause in the document being ratified the full force and effect of a congressional statute."

Appendix at A-39 to A-40 (Fernandez, J., dissenting), Appendix at C-11 to C-12.

There being no express delegation within the four corners of the Settlement Act, the district court and the en banc panel below focused instead on two articles, Article III and Article IX, of the "ratified and confirmed" Tribal Constitution as containing the grant of delegation. These will be taken in turn.

Article III states:

> The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.

Appendix at I-1 to I-2. The court below saw the perfunctory "all lands" reference as being the sine qua non of the delegation. However, this really is not clear at all. Referring to this section the dissenters noted that

> the district court was surely wrong when it determined that the language in question clearly conferred jurisdiction over non-Indians on non-Indian land within the boundaries of the reservation. There is not a whisper of that in the language in question; nor is there any reason to think that Congress divined that intention lurking in the words. To assume that jurisdiction means a general plenary jurisdiction over others and that all we need to do is ruminate on its territorial scope is to beg the question.
>
> . . . .
>
> As it is, there is nothing remarkable about a tribal constitution's declaration that the reach of tribal authority will extend to its own boundaries, and that is all the language at hand declares. That is a far cry from saying that the tribe will have unrestricted authority to regulate the use of non-Indian land within those boundaries, regardless of the fact that a tribe generally has no such powers.

Appendix at A-41 (Fernandez, J., dissenting). Another reason why the "all lands" language is inadequate as an express grant

of jurisdiction is because the final clause of Article III refers "to other lands as may hereafter be acquired by or for the Hoopa Valley Indians." These "other lands" logically include fee simple property that belongs to non-Indians such as Mrs. Bugenig. If that is a logical reading of this part of Article III, then this is anything *but* an express congressional delegation.

Second, the panel below found that Article IX, section 1(1), of the Tribal Constitution dispositive. That section reads in relevant part:

> Section 1. The Tribal Council shall have the following powers subject to any limitations imposed by federal statutes or by the Constitution of the United States.
>
> . . . .
>
> (l) To safeguard and promote the peace, safety, morals and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.

Appendix at I-2. The en banc panel found that this section of its constitution is "unambiguous" and that it "unequivocally" delegates jurisdiction over nonmembers if that jurisdiction is claimed in any tribal ordinance. Appendix at A-23. But as the dissenters and vacated panel decision point out, "that language appears to do no more than allow for regulation of 'consensual commercial dealings between tribal members and nonmembers.'" Appendix at A-41 n.2 (quoting Appendix at C-13).

The court below overreached when it translated the words of Article IX, "directly affecting nonmembers," into a blanket congressional grant of regulatory jurisdiction over nonmember activities on non-Indian fee land. This provision could best and most easily be interpreted to refer to *in personam* jurisdiction over non-Indians within the reservation, an interpretation that would be consistent with the presumption against tribal regulatory jurisdiction over non-Indian fee lands. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251, 264-65 (1992). Because this section refers to the nonmembers and not their fee land, the Tribe's interpretation is too much of a reach. In short, there is no showing that Congress understood that it was agreeing to anything except allowing for Hoopa tribal regulation of activities (by members and nonmembers) involving Hoopa *reservation* lands.[14]

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[14] The court's expansive reading of the words "ratifies and confirms" has some potentially significant ramifications for other congressional acts dealing with Indian Tribes that have employed similar language. *See, e.g.*, 25 U.S.C. § 1725(b)(1) (ratifying and confirming the Maine Implementing Act, affecting state jurisdiction over the Passamaquoddy Tribe and the Penobscot Nation); 25 U.S.C. § 941m(e)-(f) (settlement agreement between South Carolina and Catawaba Tribe "ratified and confirmed," including ability of State and Tribe to amend the settlement agreement). *See also* various ratifications and confirmations of other tribal settlement agreements at 25 U.S.C. § 640d (Navajo and Hopi); § 672 (Ute); § 1750b (Miccosukee); § 1771 (Wampanoag); § 1773 (Puyallup); § 1776b (Crow); and § 1778b (Torres-Martinez Desert Cahuilla). Similarly, statehood acts employ such language in ratifying and confirming state constitutions. *See, e.g.*, Idaho Admission Act, ch. 656, 26 Stat. 215 (1890); Alaska Statehood Bill, Pub. L. No. 85-508, 72 Stat. 339 (1958).

C. The Finding of an Express Delegation Is in Conflict with Decisions of This and Other Courts Requiring Truly Express and Unambiguous Language of Delegation

There can be no argument that before the Settlement Act the State of California had regulatory jurisdiction over fee simple property on the Hoopa Valley Indian Reservation. Similarly, there can be no argument that tribes are presumed *not* to have regulatory jurisdiction over non-Indian fee lands. *See Montana*, 450 U.S. at 565-66. As emphasized by this Court last term:

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.

Nevada v. Hicks, 121 S. Ct. 2304, 2310 (2001).

And, absent a relevant exception of *Montana*, there must be a valid congressional delegation of authority in order for the Tribe to regulate non-Indian fee property. Furthermore, in order to find that Congress has delegated the power to regulate such fee lands to tribes, this Court has always required that such an intent be made in express terms. *See, e.g.*, *Montana*, 450 U.S. at 564.[15]

The usual and traditional way for Congress to express its intent to delegate to a tribe regulatory authority over non-Indian fee property has been to include specific language in the particular act in question. Thus, when Congress passes a statute

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[15] Similarly, with respect to attempts to convey navigable waters to a tribe, this Court warned one "must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain' . . . or was rendered 'in clear and especial words.'" *Montana,* 450 U.S. at 552 (citations omitted).

giving tribes authority to carry out some governmental function on fee simple lands, Congress expressly states that the statute applies to all land in a reservation "*notwithstanding the issuance of any patent.*" *See, e.g.*, 18 U.S.C. § 1151 (defining Indian Country in context of tribal and federal criminal jurisdiction); 23 U.S.C. § 402(i) (jurisdiction of highway safety programs); 25 U.S.C. § 3902(3)(A) (defining Indian country for purposes of open dump cleanups on Indian lands); 30 U.S.C. § 1291(9) (jurisdiction over surface mining operations); 33 U.S.C. § 1377(h) (defining Indian reservations for possible treatment as state in Clean Water Act regulation); 42 U.S.C. § 7410(o) (defining scope of jurisdiction over tribal air quality plans pursuant to "tribal implementation plans" in Clean Air Act). Each one of these statutes contains the express "notwithstanding the issuance of any patent" language and each one therefore contains an unambiguous expression of congressional intent to delegate to the Tribe regulatory authority over fee simple non-Indian property.

Indeed, in the only cases where this Court has found that Congress delegated regulatory jurisdiction over fee lands to a tribe, the "notwithstanding the issuance of any patent" language was dispositive. Thus, this Court in *United States v. Mazurie*, 419 U.S. 544, 547 n.3 (1975), and in *Rice v. Rehner*, 463 U.S. 713, 729 (1983), found congressional delegations to the tribes (and states) of the federal authority to regulate the sale of liquor on Indian reservations contained in a combination of 18 U.S.C. § 1151 and § 1161, the former of which contains the "notwithstanding" proviso.

Similarly, in *Seymour v. Superintendent*, 368 U.S. 351, 353 (1962), this Court noted that the "notwithstanding the issuance of any patent" language removed any "uncertainty" over the extent of federal criminal jurisdiction in "Indian country."

Since Congress has always employed the "notwithstanding the issuance of any patent" language in its express delegations, and since this Court has found express delegations *only* when that language has been present, the decision of the Ninth Circuit is in conflict with the holdings of this Court.

There has been only one other significant case resolving whether there has been an express delegation of congressional authority to an Indian tribe. In *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied, sub nom. Michigan v. Environmental Protection Agency*, 121 S. Ct. 1600 (2001), the United States Court of Appeals for the D.C. Circuit found that Congress had authorized tribal jurisdiction over non-Indian fee property for purposes of 42 U.S.C. § 7601(d)(2), a provision of the Clean Air Act. Section 7601(d)(2) allows tribes, under certain circumstances, to enforce the Clean Air Act within the boundaries of an Indian reservation. The Court found that Congress provided an express delegation of federal authority over fee property despite the absence of the "notwithstanding the issuance of any patent" language in this subsection. 211 F.3d at 1288. Nevertheless, the court also noted that the particular "notwithstanding" language was found elsewhere in the act, at 42 U.S.C. § 7410(o), which deals with tribal enforcement of "tribal implementation plans" and which cross-references § 7601(d)." 211 F.3d at 1295.

Judge Ginsburg, however, wrote in dissent that although there was an express delegation of federal authority (utilizing the "notwithstanding" language) to the tribes over fee simple non-Indian land in section 7410(o), that such a delegation could not be imputed to the more expansive section 7601(d)(2). 211 F.3d at 1302-03. In language that was adopted by the original, now vacated, Ninth Circuit decision in *Bugenig*, Judge Ginsburg found that employment of the "notwithstanding the issuance of any patent" language was the "gold standard" for delegations. While congress may certainly express its intent to

delegate its authority in other ways, he wrote, it ought to at least be as clear and unambiguous, rather than an "obscure and never-before-attempted formulation to accomplish the same result." 211 F.3d at 1303.

Nonetheless, unlike the Settlement Act at issue in this case, at least Congress had employed the "notwithstanding" proviso somewhere in the Clean Air Act and cross-referenced that proviso to other provisions of the statute.

D. Assertions of Federal Authority That Impinge upon State Sovereignty Must Be Strictly Construed and Not Based upon Ambiguous Language

Another reason why this Court should grant Mrs. Bugenig's petition for writ of certiorari is that the decision below is inconsistent with this Court's repeated admonitions not to find congressional intent that impinges on state sovereignty unless Congress' intent is plain. Thus, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court wrote that when interfering with attributes of state sovereignty,

> "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. We explained recently: "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' . . . Congress should make its intention 'clear and manifest.'"

501 U.S. at 460 (citations omitted).

Pointedly, this Court called for "special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause." *Id.* at 463 n.*. The same principle should apply with equal force to the Indian

Commerce Clause. As shown above, the Settlement Act is, at best, ambiguous as to whether it demonstrates a congressional intent to delegate authority to the Tribe. As this Court also noted: "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." 501 U.S. at 464 (citing Laurence H. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

More recently, in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001), this Court determined that ambiguous language in the Clean Water Act did not give the Corps jurisdiction over isolated wetlands. This Court noted that the "[r]egulation of land use [is] a function traditionally performed by local governments," 531 U.S. at 174 (citation omitted), and refused to acquiesce to an administrative interpretation of a statute that impacted a local government function; especially when that very statute expressed an intent *not* to interfere with "the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)).

The decision of the court below conflicts with this Court's wariness to find congressional intrusions upon state sovereignty and land use planning prerogatives.

II

THE NINTH CIRCUIT'S FINDING THAT CONGRESS HAS CONSTITUTIONAL AUTHORITY TO GIVE THE TRIBE REGULATORY JURISDICTION OVER FEE SIMPLE PROPERTY CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT THE FEDERAL GOVERNMENT LACKS PLENARY REGULATORY AUTHORITY OVER FEE LANDS BELONGING TO NON-INDIANS

Even if Congress had expressed an intent to grant the Tribe jurisdiction over fee simple property, the question remains whether Congress had the power to do so. The problem here is that once lands were allotted, they became subject to state regulatory jurisdiction in derogation of tribal and federal control. The Ninth Circuit suggests, however, that the federal government retains "plenary" authority over the reservations and therefore can delegate its plenary authority to the tribes. Appendix at A-28 to A-32.

The term "plenary" may be an accurate enough description of the federal government's power to regulate tribal relations and the reservation land that remains in trust for the Indian tribes. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-46 (1980). But there is no authority for the proposition that the federal government retains any sort of plenary regulatory authority over nonmember fee land. Instead, the court below infers, incredibly, such authority from *Montana* because that case recognized that the tribes might, in exceptional circumstances, have jurisdiction under the exceptions of that case. Appendix at A-30. This not only turns *Montana* on its head, but it is in conflict with virtually every case that has examined the extent of federal jurisdiction over allotted lands–including cases from the Ninth Circuit.

Numerous decisions of several courts have held that once a patent is issued for an allotment the trust relationship between

the federal government and the owner of the fee ends. For example, in an opinion affirmed by the Ninth Circuit, the District of Montana held:

> The issuance of the fee patent had a broader effect than merely to free plaintiff to sell her land—it freed the United States from its trustee duties and altered the relationship of the land and plaintiff to the State of Montana.

Dillon v. Antler Land Co. of Wyola, 341 F. Supp. 734, 741 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975).

In *Levindale Lead & Zinc Mining Co. v. Coleman*, 241 U.S. 432, 438 (1916), this Court noted:

> We find no indication of an intent that they [federal restrictions on trust land] should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe.

Cited with approval in Bailess v. Paukune, 344 U.S. 171, 173 (1952).

Similarly, this Court found: "As to them [patented allotments] the Government has no further interest in or control over the lands." *United States v. Waller*, 243 U.S. 452, 463 (1917). Continuing, the Court wrote:

> With those restrictions entirely removed and the fee simple patent issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands *naturally would fall within the scope and operation of the laws of the State.*

243 U.S. at 463 (emphasis added).

The District of Columbia Circuit has noted that once allotted lands are patented the federal supervision ceases:

> [T]he supervision of the Secretary over the royalties collected under the lease automatically ceased with the removal of the restrictions which occurred on . . . the termination of the special estate.

United States ex rel. Warren v. Ickes, 73 F.2d 844, 847 (D.C. Cir. 1934). Continuing, the court held:

> On removal of the restrictions the owner of the land and the funds was at full liberty to use, dispose of, and contract with relation to them in his or her individual capacity, without reference to approval or disapproval of the Secretary of the Interior, subject only to approval of the court of competent jurisdiction, in this instance the *county court of Hughes county, Okl.*

Id. at 848 (emphasis added). *Cited with approval in United States ex rel. Noel v. Moore Mill & Lumber Co.*, 313 F.2d 71, 73 (9th Cir. 1963).

In sum, these cases demonstrate that once a fee patent issued on these allotted lands, the federal government had divested itself of direct (or plenary) regulatory oversight over these properties.

Nor is the Indian Commerce Clause a carte blanche for federal or tribal jurisdiction. For example, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982), the Court held:

> To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference, and has not relied on the Clause to authorize tribal

> regulation of commerce without any constitutional restraints.

Congress no more has plenary land use regulatory authority over fee simple non-Indian owned land on Indian reservations deriving from the Indian Commerce Clause than it has plenary land use regulatory authority over fee simple non-Indian owned land outside the reservation pursuant to the (ordinary) Commerce Clause. The court below is in conflict with this great weight of authority.

The Ninth Circuit is also in error when it relies on liquor cases such as *Mazurie* in support of the notion that the federal government retains land use authority over fee simple property owned by non-Indians. *See* Appendix at A-30. That is because the very activity regulated, liquor sales to Indians, implicates actual *commerce* with Indians rather than an activity with limited impact on tribal members or tribal governments. Indeed, courts have long upheld restrictions on liquor sales from allotted fee property. In *Dick v. United States*, 208 U.S. 340, 354 (1908), this Court explained:

> [I]t was necessary that the Indians, remaining on the unallotted and retained lands, should be protected against the pernicious influences that would come from having the allotted lands used by citizens of the United States as a storehouse for intoxicants. Only the authority of the United States could have adequately controlled the conduct of such citizens. If intoxicants could be kept upon the lands of the allottees in severalty, it is easy to perceive what injury would be done to the Indians living on the other lands, who, in order to obtain intoxicating liquor, could go regularly or frequently to the places near by, on some allotted lands, where intoxicants were stored for sale or exchange.

In contrast to local land use regulation, the ability to regulate the sale of liquor within Indian Country is squarely within the ambit of the Indian Commerce Clause. Liquor sales within Indian Country were banned at least since 1832, and lesser bans were effected during the Colonial Era. *Rice v. Rehner*, 463 U.S. at 722. There is nothing in the terms of the Allotment Act that served to rescind the long-standing prohibition against liquor sales in Indian Country. The regulation of liquor sales was delegated to Indian Tribes in 1953. *See* 18 U.S.C. § 1161, *United States v. Mazurie*, 419 U.S. at 547.[16] In *Mazurie*, the Court upheld this delegation, finding first that Congress had the power to regulate liquor sales in Indian Country and second that it could delegate this power to Indian tribes.[17]

Mazurie, however, does not stand for the blanket proposition that Congress can take jurisdiction over regulatory activities that it never had and delegate that authority to a tribe. The regulation of activities on private fee property that do not involve commerce with Indians is not subject to Congress' authority under Article 1, section 8, unless either of the *Montana* exceptions exist. As noted, the court below did not rely on a *Montana* exception for its holding. Because Congress has no inherent power to assert land use regulation over

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[16] Because the 1953 act required conformance with state law, the regulation of liquor in Indian Country can best be described as concurrent jurisdiction. *Rice*, 463 U.S. at 722-23. The concept of concurrent jurisdiction is not at issue in this case as the Tribe asserts that only it has regulatory jurisdiction over Mrs. Bugenig's property. Appendix at G-6. Furthermore, there is no authority for finding that prohibitory land use regulation is amenable to concurrent jurisdiction.

[17] To be precise, this Court upheld the federal enforcement of federal law that incorporated a tribal liquor regulation.

Mrs. Bugenig's property, it cannot delegate that power to the Tribe.[18]

To the extent that the court below relies on cases involving federal jurisdiction over crimes committed by non-Indians on tribal and allotted lands, *see, e.g.*, *Seymour v. Superintendent*, Appendix at A-30, the court confuses *in personam* jurisdiction over non-Indians who happen to be within Indian Country with *in rem* jurisdiction over activities on fee simple property. This Court has made the distinction plain. In *County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251, this Court was confronted with the question of whether the County could impose certain real estate taxes on fee lands within the Yakima reservation. The Tribe argued, citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that the Allotment Act had essentially been repealed and that any state assertion of jurisdiction over fee lands was unlawful. This Court disagreed. When looking at the entirety of the Allotment Act, this Court concluded that because "Yakima County's assertion of jurisdiction over reservation fee-patented land . . . is in rem rather than in personam, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* at 264-65. The Court therefore found that the county could impose certain taxes over all fee lands—owned by Indians and non-Indians alike. In other words, cases like *Seymour* that provide federal *in personam* jurisdiction over non-Indians acting within Indian country do not diminish the weight of authority against finding any federal authority over land use on fee simple property.

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[18] To the extent that Congress has delegated to tribes regulatory authority in the context of clean air and clean water legislation, such a delegation would be permissible if Congress asserted appropriate Commerce Clause authority over all activities that significantly affect clean air and clean water.

Thus, the federal government's power over activities on allotted lands is limited to those powers enumerated in the Constitution; this has never been held to include the police power of general land use regulation over private property. That leaves the State of California as the only entity with appropriate regulatory jurisdiction over timber harvesting activities on Mrs. Bugenig's property. The decision of the Ninth Circuit, therefore, is in conflict with the decisions of this and the lower federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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