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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HOOPA VALLEY TRIBE, on its own behalf, and in its capacity as *parens patriae* on behalf of its members; Elton Baldy; Oscar Billings; Benjamin Branham, Jr.; Lila Carpenter; William F. Carpenter, Jr.; Margaret Mattz Dickson; Freedom Jackson; William J. Jarnaghan, Sr.; Joseph LeMieux; Clifford Lyle Marshall; Leonard Masten, Jr.; Danielle Vigil-Masten Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 08-72-TCW Judge Thomas C. Wheeler

HOOPA PLAINTIFFS' REPLY TO
THIRD PARTY DEFENDANT YUROK TRIBE'S RESPONSE TO
PLAINTIFFS' AND DEFENDANT'S CROSS-MOTIONS
FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The underlying history of this litigation is long and complex, but the Hoopa Plaintiffs' entitlement to partial summary judgment on the United States' trust breach rests on basic principles, which are either ignored[1] or mischaracterized in the Yurok Tribe's Response Brief ("Y Response"). First, the Hoopa-Yurok Settlement Act ("Settlement Act" or "HYSA"), working in conjunction with 25 U.S.C. § 407 and other federal laws, imposes specific fiduciary duties on the Secretary to hold and manage the Settlement Fund (including any undistributed portion thereof) as an "Indian trust fund" for the benefit of tribes and individual Indians of the Reservation. Second, the Hoopa Plaintiffs are, by definition, Indians of the Reservation entitled to the benefit of that trust duty. Third, under this Court's *Short* rulings, a discriminatory per capita distribution of these Indian trust funds to fewer than all Indians of the Reservation subjects the United States to a claim of damages by the excluded trust beneficiaries unless Congress has expressly approved that distribution. Fourth, the Yurok Tribe failed to execute a claim waiver that complied with the Settlement Act and thus the Secretary had no authority to use the funds for per capita distributions to the Yurok Tribe members under the Settlement Act. The Hoopa Plaintiffs have established, as a matter of law, that the United States breached its fiduciary trust duty and are entitled to partial summary judgment.

II. REPLY TO YUROK BACKGROUND DISCUSSION

A. From 1992 until March 2007, the Interior Department's Consistent Position was that the Yurok Tribe Forfeited its Right to any Additional Settlement Funds.

The Settlement Act provides that the "apportionment of funds to the Yurok Tribe as provided in sections 1300i-3 and 1300i-6 of this title . . . shall not be effective unless and until

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[1] The Yurok Tribe does not controvert any of Hoopa Plaintiffs' Proposed Findings of Uncontroverted Fact, D.E. 9-1.

the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this subchapter." 25 U.S.C. § 1300i-1(c)(4). The Yurok Tribe engages in wishful thinking in asserting that the Interior Department "has consistently acknowledged" that the Tribe's affirmative decision to litigate its claims against the United States "did not deprive the Yurok of its statutory entitlement to the remainder of the Settlement Fund." Y Response at 7. The contrary is true. [2]

The Interior Department's consistent rulings that the Yurok Tribe would forego any right to a portion of the Settlement Fund if the Interim Council did not timely drop its litigation and waive the claim, and its subsequent statement that the Yurok Interim Council had failed to meet the requirements of the Act, are found at Hoopa MSJ Appendix Exhibits 15, 18, 19, 21, 22, 23, 24, and 25, App. 159-347, and summarized below.[3]

A February 3, 1992, Interior Department Solicitor's memorandum first addressed the consequences that would flow from the Interim Council's failure to timely waive claims as provided by the Settlement Act. The memorandum, found at Hoopa MSJ Appendix Exhibit 15, provides:

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

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[2] The Yurok Tribe's confusion is relatively recent. On March 5, 1992, Yurok Interim Council Chairman Richard Haberman testified to Congress that the Tribe was "faced with either providing technical consent to P.L. 100-580 in order to receive the residual balance of the Settlement Fund . . . or suing the United States in the Court of Claims for damages arising out of the partition." App. at 167. Chairman Haberman was correct.

[3] References to "App. at ___" denote pages in the Appendix of Exhibits to Hoopa Motion and Memorandum in Support of Motion for Partial Summary Judgment, D.E. 9-4 (hereafter "Hoopa MSJ"). App. 1-405 were filed on April 2, 2008, and subsequent pages are attached to several later filings.

> The statute simply does not authorize the Interim Council to dispense with the resolution requirement in order to be afforded the benefits conferred under specified sections of the Settlement Act for any reason . . .
>
> It would be imprudent to permit the fund transfers, land transfers, land acquisition authorities, and organizational authorities to become effective without securing a waiver resolution from the Interim Council.

App. at 162-163.

Despite receiving clear warning of the consequences, the Interim Council affirmatively chose to litigate the Yurok claims against the United States, filing a Fifth Amendment takings suit on March 3, 1992. Hoopa MSJ Appendix Exhibits 16, 17, 20, App. at 166-175; 180-181. After the Yurok Tribe filed suit, the Assistant Secretary of Indian Affairs wrote to the Yurok Interim Council on April 15, 1992, and explained:

> We also agree with your assessment of the consequences to the Yurok Tribe of failing to pass an ordinance waiving claims against the United States, and filing a claim in the U.S. Claims Court. Unless and until the Interim Council waives the Tribe's claims and dismisses its case against the United States, it will neither have access to its portion of the Settlement Fund, nor will [other actions follow].

App. at 178; *see also* App. at 176; Letter of Assistant Secretary – Indian Affairs to Hoopa Valley Tribe Chairman Dale Risling Sr., (April 13, 1992) (explaining to Hoopa Valley Tribe that the Yuroks would not have access to the Settlement Fund unless the Interim Council waived Yurok's claims against the United States and dismissed the suit).

On November 23, 1993, the Assistant Secretary of Indian Affairs again informed the Yurok Interim Council that any claim waiver effectuated after dissolution of the Interim Council would be ineffective under the Settlement Act:

> Under section 9(d) of the Act, the Interim Council created under the authority of the Act will be dissolved on November 25, 1993. In that respect, the authority vested in the Interim Council by section 2(c)(4) of the Act to waive claims against the United States will expire on November 25, 1993. Any subsequent waiver of claims by the Tribe will be legally

> insufficient to effectuate the apportionment of funds to the Tribe as provided in sections 4 and 7 of the Act. . . .

Hoopa MSJ Appendix Exhibit 21, App. at 182.

The Interior Department again confirmed its position on April 4, 1994, responding to the purported "conditional" waiver of claims passed by the Interim Council on November 24, 1993:

> It is quite clear that Resolution No. 93-61 specifically preserves, rather than waives, the Yurok tribe's taking claim against the United States. Indeed, the Yurok Tribe has filed a claim in the U.S. Court of Federal Claims asserting that the Hoopa-Yurok Settlement Act effected a taking under the Fifth Amendment of the United States Constitution. . . . Our determination that Resolution No. 93-61 fails to meet the requirements of 25 U.S.C. § 1300-1(c)(4) means that the Yurok Tribe will be unable to enjoy the benefits . . . of the Hoopa-Yurok Settlement Act upon the passage of a legally sufficient waiver of claims. . .

App. at 185; *see also* App. at 187-188; Letter of Assistant Secretary – Indian Affairs to Susie L. Long (Mar. 14, 1995) (reaffirming Interior decision that the purported waiver filed by Interim Council was insufficient and stating that any attempt to cure deficiencies in the waiver must be accompanied by a pre-judgment dismissal with prejudice of the Tribe's taking claim against the United States).

After the conclusion of the Yurok's suit against the United States, which produced a judgment in favor of the United States after a decade of litigation, the Department of the Interior prepared the Report to Congress required under Section 14(c) of the HYSA. Hoopa MSJ Appendix Exhibit 24, App. at 189. In the Report, Interior restated its long-standing and consistent position: "Accordingly, it is the position of the Department that the Yurok Tribe did not meet the waiver conditions of the Act and is therefore not entitled to the benefits enumerated within the Act." App. at 194. Rather, the Department recommended to Congress that the Settlement Fund should be "administered for the mutual benefit of both the Hoopa Valley and Yurok tribes, and their respective reservations . . . ." *Id.*

On August 1, 2002, Assistant Secretary – Indian Affairs Neal McCaleb represented the Department of Interior at Senate hearings on the Interior Department's Section 14(c) Report. McCaleb summarized to the Senate Committee the Interior Department's position that Interior could not distribute funds to the Yurok because Yurok did not comply with the terms of the Act:

> Because the Yurok Tribe litigated its claims against the United States based on the passage of the Act rather than waiving those claims, the Department is of the view that the Yurok Tribe did not meet the conditions precedent to the establishment of section 2(c)(4) of the act for the [Yurok] tribe to receive its share of the settlement fund or other benefits.

App. at 251. Clearly, the Department's consistent position from the date of the organizational meeting of the Yurok Tribe, throughout the lifetime of the Yurok Interim Council and for the decade thereafter, was that the Yurok Tribe had forfeited the benefits offered by the HYSA.

Other than the stunning March 1, 2007 letter of Special Trustee Ross O. Swimmer, which unilaterally reversed the long-standing position of the Interior Department, the Yurok Tribe's Response mentions only the August 13, 1992 letter of Assistant Secretary-Indians Affairs Eddie Brown. The 1992 letter does not support the Yurok's argument; it says, in material part: "Therefore, unless and until the Interim Council waives the Tribe's claims <u>*and dismisses its case*</u> against the United States, it will neither have access to its portion of the Settlement Fund nor [other benefits under the Act]." App. 176-77 (emphasis added). It is undisputed that the Interim Council did not waive the Yurok Tribe's claims, nor did it drop its case, but instead the Yurok Interim Council and its successors chose to litigate their case against the United States for nearly a decade to final judgment. Mr. Brown's letter says nothing to suggest that "the Yurok Tribe," rather than the Interim Council established by the Act, had continuing authority to execute a valid claim waiver. *Cf.* Y Response at 7. To the contrary, the letter, like all other letters, memoranda, official and unofficial statements of the Interior Department until the 2007 Swimmer decision, take the consistent position that the Yurok Tribe's affirmative choice to

litigate its claims against the United States resulted in a waiver of any rights to the Settlement Fund conferred under the Settlement Act. Thus, because the apportionment of funds to the Yurok Tribe authorized by the Settlement Act never became effective, the Special Trustee's action cannot be justified by the Settlement Act's provisions.

B. This Court Has Previously Confirmed that the Yurok Tribe Has No Ownership Interest, Claim, or Right to the Settlement Fund.

The Yurok Response states that the Hoopa Valley Tribe received the distribution offered by Section 4(b) of the Act, but then jumps to the wrong conclusion that "[t]he rest of the monies in the Settlement Fund belonged to the Yurok Tribe, held in trust by the Department of Interior pending execution of a waiver by the Yurok Tribe." Y Response at 6. In fact, the Yurok Tribe's ownership claims to the Reservation revenues in the Settlement Fund were rejected in its Fifth Amendment takings case. *Karuk Tribe, et al. v. United States*, 209 F.3d 1366, 1372 (Fed. Cir. 2000) ("this litigation is the latest attempt by plaintiffs to receive a share of the revenues from timber grown on the square"), *cert. denied*, 532 U.S. 941 (2001). The Interior Department repeatedly (until 2007) stated: "Because the Yurok Tribe litigated its claims against the United States based on passage of the Act rather than waiving those claims, . . . the Yurok Tribe did not meet the condition precedent established in section 2(c)(4) of the Act for the Tribe to receive its share of the Settlement Fund or other benefits." S. Hrg. 107-648 at 88 (August 1, 2002), App. at 332; *see also supra* Section I.A. In short, the monies in the Settlement Fund never belonged to the Yurok Tribe;[4] they were held for the Indian beneficiaries for whom they were collected, as

[4] Because the Act gave the Yurok Interim Council until November 25, 1993 (more than five years after passage of the Act) to waive the Tribe's claims, App. at 182, some early documents describe Settlement Fund amounts offered to the Yurok Tribe as "Yurok's share." *E.g.,* App. at 153 (Memorandum of Aug. 22, 1991). But the fact that funds were temporarily segregated as an offer to the Yurok Tribe, like the fact that the Yurok Transition Team was permitted to take draws from the Settlement Fund by Section 4(a)(3), does nothing to show the Settlement Fund belonged to the Tribe when the Yurok Interim Council rejected the offer.

prescribed in 25 U.S.C. § 407 and other federal laws, not for the Yurok Tribe. *See Short III*, 719 F.2d 1133, 1137 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984). The monies in the Settlement Fund were collected into trust accounts prior to passage of the HYSA; these funds were the subject of rulings in *Short*.

C. Congress Did Not Simply Apportion the Settlement Fund between Two Tribes.

The Yurok Tribe's current claim to the Settlement Fund gains no strength from the fact that a portion of it was offered to the Yurok Tribe in 1991-93. The Yurok Motion incorrectly states that "the Secretary divided the Settlement Fund . . . between the Hoopa Valley Tribe and the Yurok Tribe, roughly in proportion to the number of Indians in each Tribe." Y Response at 5. The Settlement Fund was divided many ways, not just two ways, because Congress chose to use trust funds to resolve a controversy among the United States, several Indian tribes, and thousands of individual Indians. The Settlement Fund was not simply apportioned between two tribes; rather, it benefited a much broader class that included all qualified Indians of the Reservation. *E.g.,* "[T]he 1864 statute authorizing creation of the reservation imposed a trust responsibility on the U.S. Government extending to all the Indians of the Reservation." Testimony of Ross Swimmer, S. Rep. 100-564 (1988), App. at 111.

Sections 4(c) – (e) of the Settlement Act, 25 U.S.C. 1300i-3(c)-(e), describe how tribal portions could be calculated and paid out, subject to conditions precedent imposed elsewhere in the Act. Payments also went to individual qualified *Short* plaintiffs and others who qualified for inclusion in the Hoopa-Yurok Settlement Roll, pursuant to Sections 6(c) and (d) of the Act, 25 U.S.C. §§ 1300i-5(c), (d). It may be helpful to refer to the chart showing the Hoopa-Yurok Settlement Act funding history, an attachment to Interior's 2002 testimony to the Senate Indian

Affairs Committee, S. Hrg. 107-648, App. at 333.[5] The trust income generated from the former Joint Reservation was authorized by the HYSA to be used for many individuals and groups of Indians of the Reservation; it was not simply divided up by two tribes.

D. The Relative Values of Resources Provided to the Hoopa Valley and Yurok Tribes Does Nothing to Show that the Settlement Fund Remainder Belonged to the Yurok Tribe.

The Yurok Response acknowledges that "over 98 percent of the funds generated on the land and now part of the Settlement Fund originated from timber taken from the Square," Y Response at 5, but the Response leaps from that fact to the conclusion that the Hoopa Reservation "was far richer in timber and other resources than the 'addition' allocated to the Yurok Indians." *Id*. Following this premise, the Yuroks further leap to the conclusion that Congress intended to rectify this perceived unfairness by providing supplemental funds to the Yurok. *Id.* at 5-6. This is revisionist history at best.

In fact, Congress never attempted to make any precise determination about the relative values of the Hoopa and Yurok Reservation lands. *See* S. Rep. 100-564, App. 91-92 ("The Committee intends to deal fairly with all the interests in the reservation, and believes it has done so. The nature of the interests involved here, however, is such that Congress need not precisely determine, or provide, the full value that a fee simple interest in these lands and resources might have."). The Senate Report further suggests that Congress thought the relative resource values of the "Square" and the "Addition" to be comparable. App. at 91-92.

It is undisputed that nearly all of the monies in the Settlement Fund are derived from the resources of the Hoopa Square. The reality is that those escrow funds were generated by clear

[5] This shows, for example, that the federal contribution payment authorized by section 4(e) of the Act, plus additional monies from the Settlement Fund, went to individual Indians who elected the "buyout," instead of membership in either the Hoopa Valley or Yurok Tribes.

cutting the Hoopa Square, leaving lasting environmental damage. *See e.g.* App. at 290-97 (photos). Repair of this damage requires expenditures of hundreds of thousands of dollars of Hoopa tribal revenues each year. *See* App. at 290 (noting expenditures of $200,000 - $400,000 per year just to maintain old timber roads that cause sediment and erosion). Any allegations of unfairness raised by Yurok are at best irrelevant and at worst exceeded by the lasting damage to Hoopa lands, water and environmental resources. The unlawful use of Settlement Funds that came almost exclusively from timber cut from the Hoopa lands, cannot now be justified under the Yurok Tribe's theory that lands allocated to the Hoopa Valley Tribe by the Settlement Act were richer in timber than lands received by the Yurok Tribe.

III. REPLY TO YUROK LEGAL ARGUMENT

A. The Hoopa Plaintiffs Have Established All Necessary Elements of Their Breach of Trust Claim Against the United States.

The Hoopa Plaintiffs have established: (1) the existence of the United States' specific fiduciary trust duties (25 U.S.C. § 1300i-3(b); 25 U.S.C. § 407; 13 Stat. 39 ("1864 Act")); (2) the elements of that trust (*id.*; §§ 1300i-3(a), 1300i(b)(1)); and (3) the action of the United States that breaches the trust (*id.* § 1300i-1(c)(4)(D) and *Short IV*, 12 Cl. Ct. at 41-42, 44-45). The Court should award partial summary judgment in favor of the Hoopa Plaintiffs on the question of whether the United States breached its fiduciary trust obligation by making a discriminatory per capita distribution to only members of the Yurok Tribe.[6]

In their Response, the Yurok first contend that the Hoopa Plaintiffs are not "Indians of the Reservation" and alternatively that the Settlement Act "brought an end to the concept of

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[6] *Short IV*, 12 Cl. Ct. at 41, establishes the proper measures of damages to Hoopa Plaintiffs: If the $81.4 million individualized in 2008 had been correctly divided by the total of the 5,200 Yurok tribal members and the 2,213 Hoopa tribal members enrolled as of the same date, each qualified Indian of the Reservation would have received about $10,980. *See* D.E. 9-2, ¶ 3. In sum, the 2008 payments to Hoopa Plaintiffs should have been $24.3 million.

'Indians of the Reservation.'" Y Response at 8-9. Yurok does not offer any supporting authority for these odd and incorrect assertions.

The term "Indians of the Reservation" is codified in the HYSA and incorporates the definition of that term used in the *Short* proceedings. 25 U.S.C. § 1300i(b)(5). As the Court explained:

> The Hoopa Valley Indians lived in the Hoopa Valley along the Trinity River. Therefore, the square -- now the Hoopa Valley Indian Reservation -- was historically the homeland of the Hoopas . . .
>
> In the *Short* litigation, the United States Court of Claims decided that all Indians who lived anywhere on the reservation (including the addition) were "Indians of the reservation" entitled to share equally in the timber revenues from the square.

Karuk Tribe of California v. United States, 209 F.3d 1366, 1371-72 (Fed. Cir. 2000). "Indians of the Hoopa Valley Reservation, by definition, include the Indians of the Hoopa Valley Tribe." Letter of Finale (1975), App. at 4. Thus, Hoopa Plaintiffs are Indians of the Reservation and are trust beneficiaries of the Indian trust funds at issue; 98% of which are derived from the timber taken from their Reservation.

The Hoopa Plaintiffs, as qualified "Indians of the Reservation" are "entitled to equal rights in the division of timber profits (and other income) from the unallotted lands of the [joint] reservation." *Short III*, 719 F.2d at 1133. The Settlement Act did not end the Hoopa Plaintiffs' status as "Indians of the Reservation" or cut off their beneficial interest in the escrow funds that were combined in the Settlement Fund. *See* 25 U.S.C. § 1300i-2; *Short VI*, 28 Fed. Cl. 590, 595.

The Settlement Act did not displace or alter the Secretary's pre-existing trust duties to "Indians of the Reservation" under Section 407 or the 1864 Act, but instead provided the Secretary with new specific authority to distribute funds to the Hoopa and Yurok Tribes, and to

eligible "Indians of the Reservation" in accordance with the express terms of the Act.[7] *Id.* However, the distribution authorities of the Settlement Act did not authorize what the Secretary did in 2008. *Cf. Short VI* and § III.C, *infra*. For this reason, the Settlement Act is not "in irreconcilable conflict" with the Secretary's preexisting trust duties. *E.C. Term of Years Trust v. United States*, 127 S. Ct. 1763, 1768 (2007).

There is no basis for finding an implicit repeal of the Secretary's preexisting trust duties concerning the escrow funds. In fact, this is why the Interior Department, recognizing that escrow funds remained in the Settlement Fund, recommended to the Senate Indian Affairs Committee in 2002 that the Settlement Fund "should be administered for the mutual benefit of both Tribes and their respective reservations." App. at 252, 332. Here the trust duties established by § 407 and the 1864 Act are easily reconciled with the additional authorities granted in the Settlement Act, as demonstrated in *Short VI*, 28 Fed. Cl. 590, 595.[8]

The Yuroks correctly assert that, by enacting the HYSA, Congress sought to settle a number of complex and long-standing claims between the Hoopa, Yurok, United States, and individual tribal people. Y Response at 9. However, it was the Yurok Tribe that disrupted complete execution of this Congressional intent. By rejecting the Act and choosing to litigate against the United States, the Yurok Tribe lost its entitlement to share in the Fund absent further Congressional action that has not yet occurred. *See supra* Section I.A.

[7] Not all Indians of the Reservation were eligible to receive the individual payments offered by the Settlement Act. Instead, only persons on the Hoopa-Yurok Settlement Roll had a right to receive those payments in exchange for claim waivers. Thus, while enrolled members of the Hoopa Valley Tribe are and were Indians of the Reservation, they did not participate in the individual payments or sign claim waivers under the Act. 25 U.S.C. § 1300i-4(a).

[8] In a more difficult case, *Wolfchild v. United States*, 62 Fed. Cl. 521, 555 (2004) (CAFC appeal pending No. 2008-5018), the CFC found that a trust was created in connection with appropriations acts in 1888-90 for the benefit of the Loyal Mdewakanton Sioux and that trust was not extinguished by a 1980 Act which transferred the United States' legal title to certain tribes.

Without new Congressional direction on how to distribute the Settlement Fund remainder, the Secretary remained constrained by the strict fiduciary obligations established in the *Short* case.

> From its original enactment in 1910 until its amendment and reenactment in April 1964, § 407 provided that proceeds from the sale of timber on unallotted lands 'shall be used for the benefit of *Indians of the Reservation*' (emphasis added). The 1964 substitution of "members of the tribe or tribes concerned' for 'Indians of the Reservation' was obviously not designed to cut off existing rights of Indians of a reservation with respect to communal land (or to change the definition of those entitled) but rather more clearly to allow coverage of Indians who were entitled to proceeds from reservation property but who happened to reside elsewhere than on the reservation.

Short III, 719 F.2d at 1136 (footnote omitted). *See also id.*, at 1137 ("[I]f the Secretary decides to distribute proceeds [derived from] § 407, he must act non-discriminatorily."); *see also* 25 U.S.C. § 1300i-2. Absent further direction from Congress, the remainder of the Settlement Fund is required to be managed as Indian trust funds for the benefit of all "Indians of the Reservation." *Short IV*, 12 Cl. Ct. at 38 ("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"). Here, the Special Trustee's unilateral and unauthorized decision to allocate funds to some, but not all "Indians of the Reservation" was an actionable breach of trust. *Short III*, 719 F.2d at 1137 (recognizing that trust beneficiaries "have a right to sue for the parts of those funds improperly distributed to others or illegally withheld from those claimants").

The Settlement Act did not supersede the rulings or displace the applicable legal principles from *Short*. To the contrary, the Settlement Act expressly preserved the *Short* rulings. 25 U.S.C. § 1300i-2. Moreover, the Hoopa Plaintiffs' argument does not create any conflict between the Settlement Act and the *Short* rulings. If the Settlement Act had authorized the 2008

per capita payment to Yurok Tribe members, then this case would never have been brought. However, the terms of the Settlement Act as related to the Yurok Tribe payment never became effective; thus, the monies remained as "Indian trust funds" to be managed, invested, and administered for the benefit of all "Indians of the Reservation" until further direction from Congress. 25 U.S.C. § 1300i-3(b).[9]

B. As Already Determined by this Court in *Short III*, 25 U.S.C. § 407 and the 1864 Act are Money-Mandating Statutes that Support Plaintiffs' Claims.

The Yurok response re-states the United States' argument that the Hoopa Plaintiffs must support their breach of trust claim with "specific rights-creating or duty-imposing statutory or regulatory prescriptions" and allegations that the government "has failed faithfully to perform those duties." Y Response at 11. Like the United States, Yurok ignores the fact that this Court, in *Short III*, has already ruled that the statutes that gave rise to the Settlement Fund remainder, 25 U.S.C. § 407 and the 1864 Act, provide the necessary money-mandating source of rights underlying the Hoopa Plaintiffs' trust breach claims. *Short III*, 719 F.2d at 1135. Thus, Hoopa Plaintiffs have identified money-mandating sources for their breach of trust claim founded on substantive sources of law establishing specific fiduciary duties. Amend. Compl. ¶¶ 5, 26-28, 65-66.

The Yurok brief improperly looks solely to the HYSA as the source of the Hoopa Plaintiffs' interest in the Settlement Fund. Y Response at 12. The source of the trust duties is not only from the HYSA, but also 25 U.S.C. § 407 and the 1864 Act. The monies individualized from the Settlement Fund are derived from timber cut from the Hoopa Square in accordance with

[9] The Yurok motion repeats the argument that the Hoopa Valley Tribe's resolution waiving certain claims affects this case. Y Response at 9. However, that resolution was addressed to other matters and has no applicability here as explained in Plaintiffs' Response to Defendant's Motion to Dismiss at 13-18, D.E. 29. The Tribe's resolution, which is also misquoted in the Y Response at 9, is at App. 133-34.

25 U.S.C. § 407 which at the time these monies were collected, provided that the proceeds "shall be used for the benefit of Indians who are members of the tribe or tribes concerned in such manner as [the Secretary] may direct." App. at 118. This statute "established a fiduciary relationship" under which "the Government should be liable in damages for the breach of its fiduciary duties." *Short III*, 719 F.2d at 1135 (internal quotations omitted). The 1864 Act helps "show that the Government had a fiduciary relationship toward qualified plaintiffs with respect to the Hoopa Valley Reservation and also to show that the Secretary's action in excluding [certain Indians of the Reservation] from the distribution of the monies was unlawful." *Id.*

The Settlement Act did not terminate, as Yurok contends, all pre-existing trust duties that flow to the Hoopa Plaintiffs, but merely changed "the nature of government's discretion to make per capita payments from the escrow fund." *Short VI*, 28 Fed. Cl. 590, 595 (1993). There, the Court stated:

> The Secretary's discretion [regarding the Settlement Fund] is constrained by statutes including 25 U.S.C. §§ 117a and 407, and by the fiduciary relationship between the Secretary and the Indians. *Short III*, 719 F.2d at 1135-37. The Settlement Act is simply another statute that constrains the Secretary's discretion in new ways.

Short VI, 28 Fed. Cl. 590, 595. The assertion that the Settlement Act ended the United States' duties to the Hoopa Plaintiffs, pre-existing through 25 U.S.C. § 407 and the 1864 Act, is unsupported by authority in the Yurok Response.

The Yurok Response attempts to confuse the rights of individual Hoopa members with those of the Tribe arguing that "the Hoopa Valley Tribe . . . obtained all it was due under the HYSA." Y Response at 11. The Yurok also offer an unsupported contention that the individual Hoopa plaintiffs "have no basis for complaint" because "they enjoyed all the tribe's benefits under the HYSA." *Id.* at 12. The Court should reject Yurok's effort to conflate the rights and interests of the Tribe and its members. The Tribe and its members are legally separate entities

with distinct rights and interests. *E.g., Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988) (stating "Indian tribes can be viewed as specific governmental and legal entities distinct from their members"); S. Rep. 100-564, App. 88-91. *See also Short III*, 719 F.2d at 1137 (recognizing that the right to share in Reservation's timber proceeds is "a matter of individual entitlement not of tribal membership for other purposes").

The Hoopa Plaintiffs' individual entitlements to share in distributions from the Settlement Fund arise from the fact that they are statutory beneficiaries of reservation timber proceeds arising under 25 U.S.C. § 407. The monies placed in, and distributed from, the Settlement Fund derived from timber cut from the Hoopa Square in accordance with 25 U.S.C. § 407, as that statute existed when these funds were placed in trust.[10] 25 U.S.C. § 407 established a fiduciary relationship between the United States and the Hoopa Plaintiffs who are entitled to share in the proceeds of timber taken from their Reservation and individualized. *Short III*, 719 F.2d at 1135 (noting the "fiduciary relationship" created under Section 407).

It is misleading for the Yurok Tribe to state that the Hoopa Plaintiffs are not direct beneficiaries of the HYSA, because they are, in fact, beneficiaries of the monies addressed in the HYSA, due to Section 407 and the 1864 Act. Y Response at 12. Nothing in the Settlement Act cuts off the beneficial interests of the Hoopa Plaintiffs in the escrow funds that remained in the Settlement Fund after all payments authorized by the Act had been made. The Yurok Response cites nothing for its sweeping proposition that the Settlement Act "redefined the trust obligations owed to beneficiaries." Y Response at 13. Moreover, the fact that the Hoopa Valley Tribe, as an entity, received a lawful payment under the HYSA does not mean that the Secretary could ignore

[10] In fact, more than 98% of the monies in the Settlement Fund were derived from clear-cutting forests on the unallotted trust lands of the Hoopa Plaintiffs' Reservation under the authority of Section 407.

Section 407 and his independent duties to the Hoopa Plaintiffs when he exercised authority outside that conferred by the HYSA. *See* S. Rep. 100-564 at 17, App. at 94.

Yurok also argues that the Hoopa Plaintiffs have no "individual interest" or "vested right" in Settlement Fund monies. Under *Short*, Yurok's assertion is irrelevant to this claim. The Court repeatedly held that the plaintiffs, *i.e.*, Indians of the Reservation, were not "entitled" to the trust funds at issue, but yet were entitled to damages if those monies were individualized or otherwise handled contrary to law. *E.g., Short IV*, 12 Cl. Ct. at 44-45; *Short II*, 661 F.2d at 152 (stating that "all the Indians of the Reservation were entitled to share in all of its revenues *that were distributed to individual Indians*") (emphasis added).

Yurok also argues that Congress was free to allocate property under the HYSA without subjecting the United States to liability. Y Response at 12, 14. This is not the issue raised. The question is not whether Congress had authority to make allocations or distributions of Indian trust assets; the question is whether the action taken by the Special Trustee was authorized by the HYSA.[11] It was not and, as a result, the United States is liable for damages resulting from distributions that, under other applicable law, were discriminatory. *See Short VI* at 594-95.

C. The United States Lacked Authority to Distribute the Remainder of the Settlement Fund to the Yurok Tribe.

The Yurok brief states that the Special Trustee's decision to distribute the remaining Settlement Funds to the Yurok tribe "rested on the clear language of the HYSA." Y Response at 15. Notably, the Yuroks do not quote or cite any language from the HYSA, because no language from the Act supports that claim. The Special Trustee's action of distributing the Settlement

[11] Under the Yurok Tribe's interpretation of the Settlement Act, the 2007 "waiver" resolution triggered the payment to the Yurok Tribe mentioned in Section 7(a) of the Act. If so, the Yurok Tribe's further assertion that the 2008 per capita distribution was "the direct and intended result of Congress's enactment of the HYSA," Y Response at 15, is refuted by Section 7(b) of the Act which expressly forbids per capita distributions within 10 years after payment to the Yurok Tribe of monies from the Settlement Fund.

Fund to the Yurok Tribe violated both the express language and the Congressional intent of the claim waiver provisions of the HYSA. *See* 25 U.S.C. § 1300i-1(c)(4) (stating "the apportionment of funds to the Yurok Tribe . . . shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act."). Yurok argues that Congress "dictated the distribution about which plaintiffs now complain." Y Response at 13. To the contrary, the express language of the Settlement Act prohibits such a distribution. 25 U.S.C. § 1300i-1(c)(4).

The Settlement Act expressly permitted only the "Yurok Interim Council" to submit the claim waiver necessary to trigger access to the Settlement Funds under the Act. 25 U.S.C. § 1300i-1(c)(4). The "Interim Council" was a specific entity, carefully defined by Congress in the Settlement Act. 25 U.S.C. § 1300i-8(b). Most significantly, the "Interim Council" was a temporary entity; Congress placed an express two-year time limit on when the "Interim Council" could act. 25 U.S.C. § 1300i-8(d)(5); (e). By failing to enact the statutorily required claim waiver within the prescribed period, and by choosing to litigate the Yurok Tribe's claims against the United States to a final judgment, Yurok lost any claim to Settlement Funds under the Settlement Act, absent additional action by Congress.

There is nothing "illogical" about Congress' express determination to restrict the decision to waive claims to the Interim Council. *Cf.* Y Response at 17. The fact that the Interim Council of the Yurok Tribe would exist for a defined and limited time period is critically important to understanding the operation of the waiver provision. Congress put the Interim Council to a choice: waive your claims and receive funds under the Settlement Act; or pursue your claims against the United States and forego Settlement Funds. The Interim Council chose the latter.

See App. at 167-75. Allowing a different governmental body of the Yurok Tribe to submit a purported claim waiver, twenty years after the fact, and after fully litigating to judgment the very claims sought to be waived mocks the express language and purpose of the Settlement Act.

In addition to the plain language of the Settlement Act, the accompanying legislative history confirms that Congress intended to vest the claim waiver authority solely in the Interim Council. The Senate bill initially provided that the Yurok Tribe waiver be granted or rejected in the organizational meeting of the General Council of the Yurok Tribe. *See* App. at 15, 28 (S. 2723 § 2(c)(4)(D) and § 9(c)(2)(A) (Aug. 10, 1988)). Congress changed this requirement in the Public Law and assigned the responsibility to the Interim Council which would exist for only two years. This allocation of responsibility meant that individual Yurok tribal leaders had five years to discuss and deliberate upon the issue. Meanwhile, the Settlement Roll was prepared, individuals on the Roll chose Yurok membership, the membership conducted an organizational meeting to nominate representatives (described in the Solicitor's Opinion, App. at 159-65), and the Bureau of Indian Affairs conducted elections to establish the Yurok Interim Council. That initial governing body would <u>then</u> have 24 months within which to decide whether to litigate claims arising from the Act or to grant the waiver and accept the benefits of the Act. HYSA § 9(d)(5), App. at 128; App. at 160, 162.

The Yurok Response states that the HYSA "included provisions under which a tribe could bring a takings claim and provisions under which a tribe could provide a waiver, but included no language indicating those provisions were mutually exclusive." Y Response at 15-16. Thus, under the Yurok theory, the Yurok would be entitled to obtain monies from the Settlement Fund even if they had <u>won</u> their takings case and obtained a billion dollar judgment against the United States. Under their theory, Yurok could simply ignore the prescribed deadline

for claim waivers in the HYSA, choose to litigate, prevail, and then subsequently submit a meaningless claim waiver to the United States promising never to sue again. The fact that the Yurok Tribe gambled by choosing to litigate their claims and ultimately lost does not make the Yurok argument any more compelling. Again, Congress required the Yurok to choose between further litigation and settlement of claims. The Yurok chose litigation. Its case was dismissed and all appeals were exhausted; thus, it had no claims to waive in 2007. *See Hornback v. United States*, 405 F.3d 999 (Fed. Cir. 2005). Absent a re-evaluation by Congress directing how the remainder of the Settlement Fund should be distributed, the Secretary had no authority to use the funds for underinclusive per capitas.

The Yuroks argue that Indian canons of construction, which require ambiguities in statutes enacted for the benefit of tribes to be interpreted in favor of tribes, support the Special Trustee's discriminatory distribution in this case. Y Response at 16. However, the law is clear that Indian canons of construction have no applicability in disputes between tribes and do not permit the United States, as trustee, to favor one group of Indians over another. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976) (finding that the canon that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor" has no application in case involving an inter-tribal dispute); *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (same). The canons of construction effort is unavailing here.

IV. CONCLUSION.

The Court should enter partial summary judgment as to liability for breach of trust and fiduciary duties in favor of Hoopa Plaintiffs.

Respectfully submitted this 8th day of December, 2008.

MORISSET, SCHLOSSER & JOZWIAK

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons required to be served in this proceeding.

DATED this 8th day of December, 2008.

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