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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' RESPONSE TO THIRD PARTY DEFENDANT YUROK TRIBE'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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The Hoopa Valley Tribe and individual Hoopa Plaintiffs take no position concerning whether the Yurok Tribe's Motion to Dismiss the United States' Third Party Complaint should be granted at this juncture. Hoopa Plaintiffs agree that no purpose is served by subjecting the Yurok Tribe to the burden of participating in this case. Hoopa Plaintiffs also agree that the United States' effort to embroil the Yurok Tribe in this litigation will exacerbate historical conflicts between the Tribes. Nevertheless, Hoopa Plaintiffs feel compelled to correct several errors of fact and law presented in Third Party Defendant Yurok Tribe's Motion (hereinafter generally "Y Motion").

I. INTRODUCTION.

The Hoopa Plaintiffs' suit against the United States raises the following question: whether the United States breached its fiduciary trust obligations to the Indians of the Hoopa Valley Reservation when it discriminatorily distributed the balance of the Hoopa-Yurok Settlement Fund, an Indian trust account held for the benefit of Indians of the Reservation, as a per capita payment to only members of the Yurok Indian Tribe in violation of the Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i, *et seq*., 25 U.S.C. § 407, and the Act of April 8, 1864, 13 Stat. 39.[1] *See* Hoopa Valley Tribe and Individual Hoopa Tribal Members' Memorandum in Support of Partial Summary Judgment on Question of Breach of Trust Responsibility, p. 1 (hereafter "Hoopa MSJ"). The subsidiary question is what damages the Hoopa Plaintiffs are entitled to recover from the United States as a result of its trust breach.

For obvious reasons, the Yurok Tribe supports the actions taken by the United States that give rise to the Hoopa Plaintiffs' suit, as the Yurok Tribe and its members were the direct

[1] The Hoopa-Yurok Settlement Act, Pub. L. 100-580, as amended, is central to this litigation. However, the Act is only partly codified at 25 U.S.C. § 1300i - § 1300i-11. *Cf*. Y Motion at 5. Other parts of the Settlement Act are codified at 25 U.S.C. § 407 (tribal timber statute) and 16 U.S.C. § 460ss-3.

financial beneficiaries of the United States' wrongful and discriminatory conduct. Despite having no recognizable legal interest in the Settlement Fund, the Yurok Tribe encouraged the United States to distribute the remaining Settlement Fund monies to it and its members – in violation of the United States' fiduciary trust duties to the Hoopa Plaintiffs.

The Yurok's motion to dismiss the United States' third-party complaint contains many errors of law and fact that, if left uncorrected, could prejudice the Hoopa Plaintiffs' case against the United States. Thus, the Hoopa Plaintiffs are compelled to respond.

II. CORRECTIONS TO FACTUAL RECORD.

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 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 Motion at 7. The contrary is true.

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.[2]

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). . . .
>
> 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 Yuroks affirmatively chose to litigate their 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 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 title to all national forest system lands within the Yurok Reservation, and to the portion of the Yurok Experimental Forest described in the Settlement Act, be taken in trust for the Yurok Tribe.

[2] References to "App. at ___" denote pages in the Appendix to the Hoopa MSJ. App. 1-405 were filed on April 2, 2008, and subsequent pages are attached to several later filings.

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 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 again 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 Settlement Act.

Other than the stunning March 1, 2007 letter of Special Trustee Ross O. Swimmer, which unilaterally reversed, without authority, the long-standing position of the Interior Department, the Yurok Tribe's Motion mentions only the August 13, 1992 letter of Assistant Secretary-Indians Affairs Eddie Brown. The 1992 letter, which does not support the Yurok

Motion, is reproduced at App. 176-77. It says, in material part: "Therefore, 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 [other benefits under the Act]" In this case it is undisputed that the Interim Council did not waive the Yurok Tribe's claims, nor did it dismiss its case against the United States, but instead the Yurok Interim Council and its successors chose to litigate its case against the United States for nearly a decade to final (and adverse) 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 Motion at 7. To the contrary, the letter, like all other letters, memoranda, official and unofficial statements of the Interior Department until the March 2007 Swimmer decision, take the consistent position that 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.

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

The Yurok Motion 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 Motion. 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 Department is of the view that 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 II.A. In short, the monies in the Settlement Fund never belonged to the Yurok Tribe;[3] they were held for the Indian beneficiaries for whom they were collected, as prescribed in 25 U.S.C. § 407, not for the Yurok Tribe. *See Short III*, 719 F2d 1133, 1137 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

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 Motion, at 5. The Settlement Fund was divided many ways, not just two ways, because the Settlement Fund was made up of monies from the former Joint Reservation which Congress chose to use 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, the Settlement Fund was created for the benefit of a much broader class that included all qualified Indians of the Reservation.

[3] 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. 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), do nothing to show the Settlement Fund belonged to the Tribe when the Yurok Interim Council rejected the offer.

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. But 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 the Assistant Secretary of Interior's 2002 testimony to the Senate Indian Affairs Committee, S. Hrg. 107-648, reproduced at Hoopa MSJ App. at 333. This shows, for example, that the federal contribution payment authorized by section 4(e) of the Act, plus additional monies from the Hoopa-Yurok Settlement Fund, went to individual Indians who elected the "buyout," rather than membership in either the Hoopa Valley or Yurok Tribes. In short, the trust income generated from the former Joint Reservation was authorized by the Settlement Act 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 Motion 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 Motion at 5, n. 5, but the Motion 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.* at 5. 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.* 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* Senate Report of the Committee on

Indian Affairs, 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 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 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 Indian Tribe.

III. RESPONSE TO YUROK LEGAL ARGUMENTS.

A. The Settlement Fund Remainder Was Not Properly Distributed to the Yurok Tribe.

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" is 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 two-year period, and by choosing to litigate the Yurok's claims against the United States to a final judgment, the Yurok lost any claim to the Settlement Funds under the Settlement Act, absent additional action by Congress.

The Yurok Tribe defends the Department's release of Settlement Funds for a per capita distribution to Yurok Tribe members, and briefly attempts to explain the relevance of the "Interim Council," in a footnote of its brief. Y Motion, at 9, footnote 8. The Yurok Motion footnote stresses the transitional nature of the Yurok Interim Council, but fails to understand the importance of the Interim Council's limited lifespan.

The fact that the Interim Council of the Yurok Tribe would exist for only two years 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. 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 language and purpose of the Settlement Act.

In addition to the plain unambiguous 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* S. 2723 § 2(c)(4)(D) and § 9(c)(2)(A) (Aug. 10, 1988) App. at 15, 28. 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 the issue could be discussed and considered at length. The Settlement Roll was prepared, individuals on the Roll chose Yurok membership, the membership conducted an organizational meeting (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 then 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. 128.

The Yurok's arguments about the Interim Council rely on one sentence, taken out of context, from the 1988 Senate Report supporting the Settlement Act. *See* App. at 104. Page 27 of the Report states:

> Subsection (b) provides for the creation of an Interim Council for the Yurok Tribe of five members to represent the Yurok Tribe in the implementation of the Act and to act as the tribal governing body until a Tribal Council is elected under a Constitution adopted pursuant to this section . . . .

Significantly, the Yurok Motion omits the detailed and limiting provisions that follow that sentence in the Report, including:

> Paragraph (5) provides that the Interim Council shall be dissolved upon election of the interim governing body under such Constitution when adopted or at the end of two years after their installation, whichever occurs first.

S. Rep. 100-564 at 27-28, App. at 104-05. The time limit for action is overlooked by the Yurok Motion. The Yurok Motion also ignores the relevant portion of the Senate Report which clearly states that the only governmental entity authorized to waive the Yurok's claims was the Interim Council. S. Rep. 100-564, at 18, App. at 95 ("the transfer of funds to the Yurok Tribe . . . shall not be effective unless the Interim Council of the Yurok Tribe adopts a resolution waiving any claims it might have against the United States . . .").

The Yurok Motion simply ignores the logic of the Act's provisions: The Yurok waiver had to be granted by the Yurok Interim Council; the Interim Council would exist for two years; therefore, the Yurok waiver had to be provided, if at all, within two years after election of the Yurok Interim Council. It is only by ignoring the logic of the Act's provisions that the Yurok Tribe reaches the conclusion that a valid waiver could be provided 19 years after passage of the Settlement Act, long after litigation of the claims that Congress sought to avoid by requiring a waiver in the first place.[4]

The Yurok Motion also is mistaken in asserting that the Interim Council was "not to be the exclusive arbiter of whether or not a waiver of claims should be issued." Y Motion at 9, n.8. In fact, precisely the opposite is true, as § 2(c)(4)(D) expressly requires that decision to be made by the Yurok Interim Council. The same mistake is repeated on the following page in which the Yurok Motion states "Congress imposed no time limit, nor did it adopt any provision aimed at punishing or depriving a tribe that did not immediately adopt a waiver." Y Motion at 10. To the contrary, there were deadlines -- the Hoopa Valley Tribe's waiver had to be granted, if at all, "within 60 days after the date of enactment of this Act" § 2(a)(2)(A), and the Yurok Tribe's waiver had to be granted, if at all, during the lifetime of the Yurok Interim Council which was chosen at an election held 45 days after the Yurok General Council meeting required by § 9(c)(2) and ended "at the end of two years after [their] installation." § 9(d)(5). The deadlines of the organizational provisions of the Act were consistently applied by the Interior Department until 2007. *See supra* Section II.A (citing and discussing Interior's 1992-2007 position on operation of the Settlement Act).

B. Under *Short,* the Hoopa Plaintiffs Suffered Compensable Damage by the

[4] After all, the litigation could have succeeded. The Yurok Tribe's reasoning would allow it to recover a judgment that the Settlement Act was a taking of its property and then later issue a "waiver" and collect the Settlement Fund remainder.

Secretary's Breach of Trust.

The Yurok Motion continues to confuse the question of whether the Hoopa Valley Tribe had a claim to additional distributions from the Settlement Fund under the Act with the entirely separate question of whether Hoopa Plaintiffs were damaged by the Secretary's discriminatory and unauthorized decision to permit Settlement Fund monies to be distributed in per capita payments to Yurok tribal members alone.[5] This confusion ignores rulings on the issue that plagued the *Short* litigation until its resolution in *Short IV*. Plaintiffs in the *Short* case believed these same Reservation revenues, which had not been distributed but were held in Treasury accounts for the benefit of all Indians of the Reservation, should be handed over to them. The court refused, emphasizing that until the Secretary took an action with respect to the funds which damaged Plaintiffs they had no right to damages. *Short IV*, 12 Cl. Ct. 36, 39-42 (1987), a*ff'd*, 50 F.3d 994 (Fed. Cir. 1995). The court cited an underinclusive per capita payment as an example of a damaging action. *Id*. at 42. That is just what happened here.

Because of the governing principles in *Short IV*, which are preserved in § 3 of the Act, Hoopa Plaintiffs do not assert that the undistributed funds should have been paid over to the Hoopa Valley Tribe or to its members by the Secretary, absent additional direction from Congress. This is because the remaining authorizations in the Settlement Act did not allow any general distributions. However, when the Interior Department, acting without authorization in the Settlement Act or other law, permitted over 90% of the Settlement Fund to be distributed in per capita payments to Yurok tribal members alone, the Department committed precisely the same breach of trust for which it had been found liable in the *Short* litigation. *Short IV*, 12 Ct.

[5] To be clear, the Hoopa Valley Tribe does not contend here that it was entitled to additional distributions from the Settlement Fund. Instead, Hoopa Plaintiffs' claims arise from the Secretary's under-inclusive distribution of trust funds to fewer than all of the qualified Indians of the Reservation.

Cl. at 44 (stating Secretarial action of making discriminatory distributions to individual Indians would give rise to action for money damages).

Hoopa Plaintiffs do not assert that the Settlement Fund should have been paid over to the Hoopa Valley Tribe. Instead they assert that when the Settlement Fund was individualized to fewer than all of the Indians of the Reservation for whom it was collected and held in trust, the Secretary breached his trust obligation to the excluded Indians, Hoopa tribal members.

C. The Yurok Tribe Induced the United States to Breach its Trust Duties to Hoopa Plaintiffs.

The Yurok Motion asserts that:

> Yurok had absolutely no role in the management of the relevant trust assets. . . . Nowhere does the United States allege that the Yurok played any intermediary role in the Government's trust relationship with the Hoopa Valley plaintiffs. Nor does the United States allege that the Yurok engaged in any wrongful or negligent conduct in connection with release of the Yurok fund.

Y Motion at 11-12. While the government has not made those allegations, those issues are presented in Hoopa Plaintiffs' Complaint. Hoopa Plaintiffs show in detail the Yurok Tribe's efforts to induce the Interior Department to turn over the Settlement Fund to their uses. *See, e.g.* App. at 370-77; 391-402 (documenting discussions surrounding Yurok proposal to submit new "unconditional waiver" of Yurok "claims" to Interior Department); *see also* App. at 424-29 (Hogan & Hartson letter requesting release of Settlement Fund to Yurok). The Interior Department was well aware of the Yurok Tribe's plan to distribute the Funds in per capita payments to their members, as noted in the Hoopa Valley Tribe's Petition for Reconsideration, Docket No. IBIA 07-90-A (Apr. 17, 2007), App. at 385. ("The Yurok Tribe is now poised to distribute the tribal trust funds held as part of the Settlement Fund to its members through a per capita payment . . . . Such a payment of federal trust monies committed to the benefit of all 'Indians of the Reservation' to only Yurok members plainly violates the fiduciary relationship.")

Thus, this case does include allegations of Yurok Tribe inducement of the breach of trust committed by the United States.

D. The Yurok Tribe Had Notice of the Potential Breach of Trust by the United States.

The Yurok Motion alleges that the Tribe "had no notice that the Government's distribution would ever be held to be a breach of its duties." Y Motion at 14. That claim of ignorance is not credible. The Act contemplated that at the conclusion of litigation concerning the effect of the Act, the Secretary of the Interior would make a report with recommendations for Congressional action. HYSA § 14(c). The August 1, 2002 hearing conducted by the Senate Indian Affairs Committee reviewed the recommendations of that report and the contention of the Hoopa Valley Tribe and others that the United States was violating its trust duties. In that hearing, the Interior Department recommended further legislation and made plain that they believed they could not make any general distribution of the Fund without new Congressional authority. *E.g.*, App. at 252, 332.

It is not true that the Yurok Tribe received the funds "because no one else had the sole right to the remainder under HYSA." Y Motion at 14. In fact, Congress had the sole right to appropriate the remainder, and reserved to itself the possible need for "supplemental funding proposals," and "modifications to the resource and management authorities established by this Act." HYSA § 14(c)(2). After the Special Trustee's abrupt reversal of position on March 1, 2007, the Hoopa Valley Tribe's appeal to the Interior Board of Indian Appeals and the correspondence with the Interior Department were more than adequate to put the Yurok Tribe on notice that the government was about to breach its trust obligations to Hoopa Plaintiffs. Perhaps the United States has omitted such allegations in its Third Party Complaint, but the uncontested

facts before this Court make plain that the Yurok Tribe had notice that the government's distribution could be held to be a breach of its trust duties.

IV. CONCLUSION.

The Tribe takes no position on the Yurok Tribe's motion to dismiss the United States' third-party complaint against it. Regardless of how the Court resolves that motion, two principles remain: (1) the United States breached its trust duty to the Hoopa Plaintiffs by making a discriminatory per capita distribution to only members of the Yurok Indian Tribe; and (2) the Hoopa Plaintiffs, pursuant to the principles enunciated by this Court in *Short* are entitled to recover damages from the United States for its breach.

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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