IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HOOPA VALLEY TRIBE, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant and Putative Third Party Plaintiff v. YUROK TRIBE, Putative Third Party Defendant.	)	Case No. 08-72 L Judge Thomas C. Wheeler

THIRD PARTY DEFENDANT YUROK TRIBE'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The Yurok Tribe, by its counsel, respectfully moves to dismiss the United States' Third Party Complaint, or in the alternative for entry of summary judgment in favor of the Yurok. First, let there be no mistake: the Yurok fully support the United States' pending dispositive motion. The Government's distribution of the Yurok Fund to the Yurok was not only entirely lawful but affirmatively mandated by the Hoopa-Yurok Settlement Act ("HYSA"). 1/ But even if the Hoopa Valley plaintiffs' claim against the United States were to be found to require trial, basic principles of trust law preclude any contingent recovery of the Yurok Fund from the Yurok Tribe or from its members. Thus, the United States' claim should be dismissed as a matter of law.

1/ Pursuant to the Court's order dated October 27, 2008, the Yurok will file a response to the pending cross-motions on the Hoopa Valley plaintiffs' complaint against the United States on November 21, 2008.

An immediate dismissal is fully warranted because no purpose is served by subjecting the Yurok to the burden of defending the claim brought by the Hoopa Valley Tribe. Even if the United States had a contingent claim against the Yurok, which it does not, there would be time enough to address that claim in the (unlikely) event the United States were found liable to the Hoopa Valley plaintiffs. The United States' attempt to embroil the Yurok in this litigation now serves no legitimate litigation purpose, and risks exacerbating historical conflicts between the neighboring Yurok and Hoopa Valley Tribes.

Thus, this case should be dismissed because the United States' third-party claim against the Yurok fails as a matter of law, or in the alternative, because there will be time enough to address it in the unlikely event the United States is found liable for distributing the Yurok's funds to the Yurok.

BACKGROUND

The claims in this case relate almost exclusively to the Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i et seq. The HYSA in turn arose from, and ultimately resolved, claims relating to the Unites States' dismal history of mistreating both tribes--particularly the Yurok. That history is now established beyond debate in court decisions over the years. The facts material to this motion are those relating to the recent distribution of the Yurok Fund to the Yurok under the HYSA and are undisputed. 2/

Establishment of the Reservation. In the 1900s, both the Yurok Tribe and the Hoopa Valley Tribe lived in the same general area in Northern California. In 1876, President

2/ Many of the facts related in this section are found in prior court decisions and in the legislative history of HYSA. The Court may take judicial notice of such facts, and need not convert this motion to dismiss into a motion for summary judgment. Commonwealth Edison Co. v. United States, 46 Fed.Cl. 158 (2000), aff'd 271 F.3d 1327 (2001) (court may take judicial notice of factual findings in legislative history); Kawa v. United States., 77 Fed.Cl. 294 (2007) (court may take judicial notice of factual findings in prior judicial decisions); see also Sebastian v. United States., 185 F.3d 1368, 1374 (Fed. Cir. 1999) (same). The remaining facts are alleged in the complaints of the plaintiffs and third party plaintiff and are properly considered, and assumed true, on a motion to dismiss.

Grant set aside a 12-mile square tract of land in Northern California where the Trinity River joins the Klamath River as the Hoopa Valley Indian Reservation. "Most but not all of the Indians of the tract, called the Square, were and have been Hoopa Indians." Short v. United States, 486 F.2d 561 (Ct. Cl. 1973) (Short I). The 1876 executive order did not identify any Indian tribe by name, nor did it "intimate[ ] which tribes were occupying or were to occupy the reservation." Id. at 563.

Some years later, in 1891, President Harrison issued an executive order creating "an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an equal footing with the Indians theretofore resident upon it." Id. at 567. Under the executive order, the boundaries of the Hoopa Valley Indian Reservation were extended to include an adjoining one-mile wide strip of land on each side of the Klamath River, from the confluence of the two rivers to the ocean about 45 miles away. Id. at 562. Most of the Indians of the added tract, called the Addition (and sometimes called the "extension"), were and have been Yurok Indians, also known as Klamaths. Id. From 1891 to the late twentieth century, the Yurok, the Hoopa, and members of other tribes lived on the single, enlarged reservation.

The Government's Breach of Trust. The Square was rich in timber resources and began to produce substantial revenues in the 1950s. Id. These revenues were administered by the Secretary of the Interior as trustee of the beneficial owners. In 1950, the Hoopa Indians established an organization known as the Hoopa Valley Tribe, whose membership excluded the Yurok. Id. "Beginning in 1955, the Secretary of the Interior, pursuant to requests by the Hoopa Valley Tribe's Business Council, distributed the revenues from the timber sales annually in per capita payments to the Indians on the official roll of the Hoopa Valley Tribe, to the exclusion of

the Indians of the Addition." Short v. United States, 661 F.2d 150, 152 (Ct. Cl. 1981) (Short II) 3/ These revenues were substantial: "From March 27, 1957 to June 30, 1974, $23,811,963.75 in tribal or communal monies was distributed per capita to the [Hoopa Valley] Tribe's individual members." Short v. United States, 12 Cl. Ct. 36, 41 (1987) (Short IV).

The Short Litigation. In 1963, individual Indians who were excluded from the Secretary's distributions (mostly Yurok) brought suit against the United States, as trustee and administrator of the timber resources of the Reservation, "seeking their shares of the revenues the government had distributed to individual Indians of the Reservation." Short II, 661 F.2d at 152. In 1973, the Court of Claims held that "the Square and the Addition together constituted a single reservation, that all the Indians of that Reservation were entitled to share in all of its revenues that were distributed to individual Indians (including the timber revenues from the Square), and that the plaintiffs who were Indians of the Reservation were entitled to recover the monies the government withheld from them." Id.

Notwithstanding the Court's clear holding, the Bureau of Indian Affairs continued to distribute the timber revenues only to enrolled Hoopa Valley Tribe members and no one else. See Short v. United States, 28 Fed. Cl. 590, 591 (1993) (Short VI). "After the 1973 decision, the BIA began to distribute only thirty percent of the unallotted Reservation income because it estimated that Hoopa Valley Tribe members comprised thirty percent of the Indians of the Reservation." Id. The BIA retained the remaining seventy percent in an escrow fund, which came to be known as the "Short escrow fund" or the "seventy percent fund." Id. The escrow fund grew to over $60 million by the time the Court decided Short VI in 1993. Id. at 37.

3/ The official roll of the Hoopa Valley Tribe "limit[ed] enrollment to allottees of land on the Square, non-landholding 'true' Hoopas voted upon by the Tribe, and long-time residents of the Square of a prescribed degree of Hoopa blood, descended from natives of the Square. Short I, 486 F.2d at 562.

The Hoopa-Yurok Settlement Act. Some 25 years after the Short litigation began, Congress addressed the issue by enacting the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. §§ 1300i to 1300i-11) (1988) ("HYSA" or "Act") . The Act explicitly preserved the holdings and final judgment of the Short cases, see 25 U.S.C. § 1300i-3, but it also sought to resolve the decades of dispute between the Hoopa Valley Tribe and the Yurok by partitioning the reservation into the Hoopa Valley Reservation (the Square) and the Yurok Reservation (the "addition" along the Klamath River). 25 U.S.C. § 1300i-1(c). The Act also required the Secretary of the Interior to establish a "Settlement Fund," comprising the Short escrow funds and other monies. 25 U.S.C. § 1300i-3(a).

Pursuant to the Act, the Secretary divided the Settlement Fund (the " Fund") between the Hoopa Valley Tribe and the Yurok Tribe, roughly in proportion to the number of Indians in each Tribe. See Short VI, 28 Fed. Cl. at 591. 4/ Although the Hoopa and Yurok peoples had shared a single reservation for nearly a century, the area allocated to the Hoopa, the Square, was far richer in timber and other resources than the "addition" allocated to the Yurok Indians. On this, there is no dispute. 5/ And it explains why Congress determined that not only would the Yurok receive a population-based allocation from the Fund, but that "any funds remaining in the Settlement Fund . . . shall be paid to the Yurok Tribe and shall be held by the Secretary in Trust for such tribe." 25 U.S.C. § 1300i-6(a). 6/

4/ After the initial division, the Act authorized Congress to contribute $10,000,000 to the Settlement Fund. 25 U.S.C. § 1300i-3(e). The Act also provided for distributions to Indians who did not elect to join the Yurok or Hoopa Valley Tribe and to Indians who wrongfully were left off the Settlement Roll. 25 U.S.C. § 1300i-5(d).

5/ The Hoopa Valley Tribe has acknowledged 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, which has since been given to the Hoopa. See Pls' Am. Compl. ¶ 24.

6/ After allocation of the timber-rich square to the Hoopa, there is no dispute about the Yurok's need. In the Select Committee on Indian Affairs Report on the Hoopa-Yurok Settlement bill, the Committee recognized that the Yurok Tribe "has not received the majority of services provided to other federally recognized tribes," and "[a]s a

The Hoopa Valley Tribe promptly sought and received its allocated share of the Settlement Fund. The Act required that before either Tribe could do so, it must first submit a waiver of "any claim . . . against the United States arising out of the provisions of th[e] [Act]." 25 U.S.C. §§ 1300i-1(a)(2)(A) & (c)(4), 1300i-8(d)(2). The HVT executed such a waiver immediately. On November 28, 1988, the Hoopa Valley Tribe passed a resolution waiving "any claim the Hoopa Valley Tribe may have against the United States arising out of the provisions of the Hoopa-Yurok Settlement Act." Resolution of the Hoopa Valley Tribe, 53 Fed. Reg. 49,361-01, 49,361-62 (Bureau of Indian Affairs Notice Dec. 7, 1988); Pls' Am. Compl. ¶ 34. On the strength of this waiver of rights, the Hoopa Valley Tribe received its full allocated distribution from the Settlement Fund thereafter.

Since that time, the Department of the Interior has consistently maintained that "the Hoopa Valley Tribe has already received its portion of the benefits under [HYSA] and is not entitled to further distributions from settlement funds under the provisions of the act." N. McCaleb Testimony, S. Hrg. 107-648 (Aug. 1, 2002). The 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 similar to the one executed by the Hoopa Valley Tribe. 7/

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result, it lacks adequate housing and many of the facilities, utilities, road and other infrastructure necessary for a developing community." Sen. Select Comm. on Indian Affairs, Rep.: Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians to Clarify the Use of Tribal Timber Proceeds, and for Other Purposes, S. Rep. No. 100-564, at 28 (1988).

7/ By 2002, it was clear that the Government had fulfilled its statutory obligations to the Hoopa Valley Tribe, while its obligations to the Yurok remained:

> The Chairman. In your opinion, were all the provisions of the Act benefiting the Hoopa Valley Tribe implemented?
> Mr. McCaleb. Yes.
> The Chairman. Would you say the same of the act benefiting the Yurok Tribe implemented?
> Mr. McCaleb. No; that's not correct.
> The Chairman. So the Hoopa Valley got all the benefits, Yurok did not?

N. McCaleb Testimony, S. Hrg. 107-648 (Aug. 1, 2002).

Dispossessed of their rights in the timber-rich Square, the Yurok filed a takings case in the Court of Federal Claims in 1992. Shortly thereafter, the Yurok submitted a conditional waiver that preserved their rights under the Fifth Amendment. In 2000, the Federal Circuit rejected the Yurok's claims, holding that no matter where they lived, none of the Native American residents of the original reservation had vested rights in reservation lands that would require compensation upon the government's taking of those lands. Karuk Tribe of California v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000)

The Yurok Executes A Waiver And Receives Its Share of the Fund. The Department of Interior has consistently acknowledged that the Yurok Tribe's decision to pursue its rights under the Fifth Amendment did not deprive the Yurok of its statutory entitlement to the remainder of the Settlement Fund. On April 13, 1992, for example, after the Yurok had filed the takings claim, Assistant Secretary-Indian Affairs Eddie F. Brown responded to an inquiry by the Hoopa Valley Tribe requesting additional distribution from the Settlement Funds by observing that the Yurok Tribe still would be able to access its portion of the Settlement Fund by executing a waiver of the Tribe's claims. See Pls' Am. Compl. ¶ 40.

On March 1, 2007, the Office of the Special Trustee for American Indians indicated that the Yurok Tribe would be entitled to the remainder of the Settlement Fund if it adopted and filed an unconditional waiver, just as the Hoopa Valley Tribe had done years earlier. Id. On March 21, 2007, the Yurok Tribe Council did just that by submitting to the Special Trustee an unconditional waiver of any claims it may have against the United States arising under the Act, in a form substantially the same as the one the Hoopa Valley Tribe had submitted years before. Id. The Special Trustee promptly issued a letter stating that the Yurok Tribe waiver met the requirements of the Hoopa-Yurok Settlement Act, and that the remaining funds

therefore would be distributed to the Yurok Tribe, pursuant to the Act's provisions. Id. In April 2007, the Government released the Yurok Fund to the Yurok Tribe without any restriction or reservation. Id.

Disposition of the Yurok Fund. The Yurok promptly began preparations to distribute the funds pursuant the Yurok Constitution per capita to its members. The Hoopa Valley Tribe was well aware that the Yurok Tribe intended to distribute the funds to its members. Indeed, the Hoopa Valley plaintiffs have alleged that the Tribe "warned the Special Trustee" that such per capita distributions would occur when the Yurok funds were released to the Tribe. Pls' Am. Compl. ¶ 63. Neither the Hoopa Valley Tribe nor any of its members sought injunctive relief or took any other action to prevent the Government from releasing the Yurok Fund or to prevent its distribution to Yurok members.

As expected, following a vote of the Yurok membership, the Yurok Tribe began distributing per capita payments to its members in January 2008. Id. Thus, the vast majority – over 90% – of the Yurok Fund was distributed to Yurok members nearly a year ago. See id.

STANDARD OF REVIEW

For purposes of a motion to dismiss, the Court must accept the factual allegations in the Complaint and construe those facts in the light most favorable to the plaintiffs but "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." Blaze Constr., Inc. v. United States, 27 Fed. Cl. 646, 650 (1993). See also Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1965 (2007) ("[f]actual allegations must be enough to raise a right to relief above the speculative level;" a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). The court "must consider the complaint in its entirety, as well as other sources courts

ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., __ U.S. __, 127 S. Ct. 2499, 2509 (2007) (citation omitted).

ARGUMENT

A. The Yurok Fund Was Properly Distributed to the Yurok Tribe

The Hoopa Valley plaintiffs have asked this Court to find that the United States breached its trust obligations when it distributed the Yurok's statutorily allocated funds to the Yurok. As the HYSA and its legislative history make clear, however, that distribution was not only authorized but mandated by Congress. The Government has shown in its own filings that the Department of the Interior acted entirely lawfully when it transferred the Yurok Fund to the Yurok Tribe pursuant to HYSA's mandate. The Department's action was precisely what federal law required it to do, and the Yurok received nothing more than it was entitled to under the Act. 8/

The plain language of the statue required only that the relevant party first waive "any claim such tribe may have against the United States." 25 U.S.C. § 1300i-1(c)(4)(D)

8/ To facilitate distribution of funds under the Act, Congress took it upon itself to "provide[] for the development of a membership for a Yurok Tribe and for its organization" in the Hoopa-Yurok Settlement Act. See S. Comm. on Indian Affairs, Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians to Clarify the Use of Tribal Timber Proceeds, and for Other Purposes, S. Rep. No. 100-564, at 26 (1988). Recognizing that formal and final organization of the Tribe, including drafting and passage of a constitution, could take many years, Congress created an "Interim Council" to enable the Yurok Tribe to receive the benefits of the Act as quickly as possible. Indeed, recognizing that even the Interim Council would take over a year to form, Congress provided for the formation of a Transition Team of individuals appointed by the Department "to aid the Yurok Tribe's organizational process." See id. The Yurok Interim Council was formed 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," not to be the exclusive arbiter of whether or not a waiver of claims should be issued. Id. at 27. In the years since, the Tribe has formed a permanent governance structure, which duly adopted the March 2007 waiver. The whole purpose of creating an Interim Council was to permit the Yurok Tribe to receive the benefits of the Act even without a formal governance structure. Now, after that governance structure has been long in place, the Hoopa Valley plaintiffs' claim that only the "Interim" Council could execute a waiver turns the purpose of that "interim" body on its head. The Department was quite right to reject it.

(emphasis added). That was what the Hoopa Valley Tribe did before receiving its share years ago, and it is what the Yurok Tribe did before receiving its share – it waived any present or future claim it "may have." 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. Thus, the Department was quite right that the Act mandated release of the Yurok Fund to the Yurok upon execution of a waiver. Even if it were not, the Hoopa Valley Tribe would still have no claim since it received all Settlement Fund monies to which it was entitled years ago. For those and other reasons briefed by the Government, the Hoopa Valley plaintiffs have no valid claim against the United States, so there is no contingent liability on which to base a third-party claim against the Yurok.

B. Principles of Indian Trust Law Bar The Government's Third Party Complaint

Even if the Government had erred somehow in releasing the Yurok Fund to the Yurok, it would still have no third-party claim against the Yurok Tribe because such a claim is fundamentally at odds with the Government's relationship as trustee for the Yurok Tribe. As trustee for Indian tribes, the Government's actions must be consistent with its overriding fiduciary obligation to Indian tribes and individual Indians in the management of their resources, property, and affairs. United States v. Mitchell, 463 U.S. 206, 226 (1983); Short v. United States, 719 F.2d 1133, 1135 (1983) (Short III);White Mountain Apache Tribe of Arz. v. United States, 11 Cl. Ct. 614, 669 (1987), aff'd, 5 F.3d 1506 (1993). The United States is held to the "most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942); see also American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981) ("The standard of duty as trustee for Indians is not mere reasonableness, but the highest fiduciary standards.").

In the event that the Court ultimately finds the Government breached its trust duties owed to the Hoopa Valley plaintiffs, the remedy is an award of money damages against the United States – not the recovery of the Yurok Fund, which Congress plainly intended for the benefit of the Yurok Tribe. Mitchell II, 463 U.S. at 226; Short III, 719 F.2d at 1135; White Mountain Apache Tribe, 11 Cl. Ct. at 669.

The Government's third party complaint asserts a bare entitlement to look to the Yurok Tribe to indemnify it for any liability. See Third Party Compl. ¶ 14. So far as counsel for the Yurok can discern, the Government's position is unprecedented. No court has ever found a tribe or individual Indian liable for trust payments wrongly distributed by the Government. Indeed, there appear to be only a few cases that even reference the possibility of such a recovery, and in those cases, the hypothetical claim was based not on mere receipt of trust assets but on the tribe's role actively managing the trust assets on behalf of the United States.

For example, in Wolfchild v. United States, the plaintiffs (not the government) sought to summon certain tribes as third parties because they had allegedly acted "as agents of the federal government in administering the trust property[.]" 72 Fed. Cl. 511, 534-35 (2006). Without citation to any authority, the court commented that, if judgment were entered against the government, "it would be left to the discretion of the government to determine whether to seek indemnification from the [tribes]." Id. at 535.

Here, the Yurok had absolutely no role in the management of the relevant trust assets. Instead, the Yurok was simply a recipient of trust assets – assets that the HYSA apportioned to the Yurok alone. 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. The Government owes the highest fiduciary duties to the Yurok, including the duty of loyalty. This apparently unprecedented complaint turns those duties on their head and should be dismissed.

C. Under General Trust Law, The Government Cannot Equitably Recover The Yurok Fund

While the Government remains subject to "most exacting fiduciary standards" in its relationship with Indian trust beneficiaries rather than the reasonableness standard applied under general trust law, courts sometimes look to other aspects of general trust law in adjudicating issues arising from the trust relationship between the Government and a tribe. Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339, 1348 (Fed. Cir. 2004); Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 5.05(2) (2005) (quoting Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001)).

Under general trust law, the United States has no claim against the Yurok. That is so because while a trustee can be liable for wrongful distributions to beneficiaries, the trustee may seek to recover those distributions from other beneficiaries only in limited circumstances. As a matter of equity, the trustee is barred from seeking such recovery if the beneficiary "has so changed his position that it is inequitable to compel him to make repayment." Restatement (Second) of Trusts § 254 (1959) (citations omitted); see also George Bogert, Trusts & Trustees § 814 (rev. 2d ed. 1981). In other words, the trustee cannot recover a wrongful distribution from a beneficiary "where the beneficiary has changed his position in detrimental reliance on the correctness of the [distribution]." Hoffa v. Fitzsimmons, 673 F.2d 1345, 1354 & n.27 (D.C. Cir. 1982). In that case, "[t]he beneficiary is entitled to retain part or all of the overpayment to the extent necessary to avoid injustice." Id.

Even if this Court finds that the Government somehow breached its duties to the Hoopa Valley plaintiffs, the United States cannot claw back funds from the Yurok because the equitable factors plainly weigh in favor of barring that relief.

1. The Yurok Tribe's Subsequent Transfer of the Trust Funds to its Members Bars the United States From Recovering The Yurok Fund.

Even if the Government's distribution to the Yurok had been unlawful, the Yurok Tribe cannot be compelled to give back money it no longer has in its possession. Under the governing equitable principles, the subsequent disposal of improperly distributed funds weighs heavily in favor of finding detrimental reliance and refusing recovery. See, e.g., Gallagher v. Park West Bank & Trust Co., 11 F. Supp. 2d 136, 139 (D. Mass. 1998) (inequitable to recover distribution from beneficiary who had spent "a considerable portion of the monies distributed to her to pay off debts and reduce her mortgage"); Thesenvitz v. Kaiser Eng'rs, 796 F. Supp. 447, 452, 453 (E.D. Wash.. 1992), rev'd on other grounds, 15 F.3d 1090 (9th Cir. 1994) ("inequitable and unjust" to recoup overpayments to distributees who made "major expenditures on recreational vehicles, remodeling projects . . . and acceptance of additional family responsibilities").

The facts here are undisputed. Some nine months after the Government distributed the Yurok Fund to the Yurok in April 2007, the Yurok distributed the vast majority of the sum – over 90% – in per capita payments to its members, who have presumably spent the money on personal expenses or otherwise disposed of it. The United States does not deny any of this, and certainly does not allege that the funds remain with the Tribe or that they can be recovered from the Tribe members. In sum, the Yurok Tribe has detrimentally relied on the Department of the Interior's distribution of the Yurok Fund by disposing of the funds to members, and equity bars any recovery by the United States.

2. The Government Has Not Alleged that the Yurok Had Notice of Any Potential Breach By the United States.

The Yurok received only that portion of the Settlement Fund to which it was entitled after it executed the waiver. By that time, all the other beneficiaries under HYSA – individual Indians as well as the Hoopa Valley Tribe – had long since received their respective statutory payments. Third Party Compl. ¶ 5. As the only unpaid beneficiary left, the Yurok had no notice that the Government's distribution would ever be held to be a breach of its duties. See, e.g., Dandurand v. Unum Life Ins. Co. of America, 150 F. Supp. 2d 178, 186 (D. Me. 2001) (equity bars recovery of trust overpayment where beneficiary has no notice of trustee's mistake and reasonably believed the payments were correct); see also Restatement (Second) of Trusts § 254 comment (d). Nor does the United States allege that the Yurok were on notice or even constructive notice of an overpayment. The Yurok Tribe received the exact amount of money that was held in trust for its benefit because no one else had a claim to it under HYSA. The United States makes no allegation to the contrary.

The undisputed facts plainly demonstrate that the balance of equities weighs heavily in favor of barring the United States from recovering any of the funds distributed to the Yurok Tribe as mandated by HYSA.

CONCLUSION

For the foregoing reasons, the Yurok Tribe's Motion to Dismiss should be granted.

Dated: November 7, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2008, a copy of the foregoing Third Party Defendant Yurok Tribe's Motion To Dismiss Or In The Alternative For Summary Judgment was electronically filed via the CM/ECF system on the following counsel for the parties:

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