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 RESPONSE TO PLAINTIFFS' AND DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

The United States Department of the Interior did exactly what it was required by law to do when it distributed the Yurok Tribe's share of the Hoopa-Yurok Settlement Fund to the Yurok Tribe. This case should be therefore be dismissed or judgment entered for the United States for at least two reasons. First, the Hoopa Valley plaintiffs have no cognizable claim as a result of the distribution to the Yurok because the Hoopa had no right to the Yurok's statutory share of the Fund. And second, even if the Court had subject matter jurisdiction over plaintiffs' claims, plaintiffs' breach of fiduciary duty claims are profoundly misguided because the distribution to the Yurok Tribe was not only lawful but affirmatively required by the applicable statute, the Hoopa-Yurok Settlement Act ("HYSA" or "Act").

Pursuant to the Court's Order dated October 27, 2008, the Yurok Tribe therefore submits this response to the pending cross-motions to express its complete agreement with and joinder in the United States' Motion to Dismiss or for Summary Judgment and supporting briefs. 1/ For the reasons given below and for those grounds set forth by the United States, the plaintiffs' complaint should be dismissed with prejudice, or in the alternative, judgment should be entered in favor of the United States.

BACKGROUND

Establishment of the Reservation. In the 1800s, the Yurok Tribe and the Hoopa Valley Tribe lived in the same general area in Northern California. In 1876, President Grant set aside a 12-mile square tract of land 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, 562 (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 added additional lands by 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

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1/ In this submission, the Yurok Tribe refer to and cites the parties' pleadings and briefs as follows: First Amended Complaint (D.E. 5) ("Pls.' Am. Compl."), Hoopa Valley Tribe and Individual Hoopa Tribal Members' Motion for Partial Summary Judgment on Question of Breach of Trust Responsibility (D.E. 9) as "Pls.' Br. at __," and Defendants' Combined Motion to Dismiss, or in the Alternative for Summary Judgment, and Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment (D.E. 20) as "U.S. Br. at __." Citation to "Pls.' App. __" refer to the Appendix submitted with Plaintiffs' Motion for Summary Judgment (D.E. 9-4 through 9-8).

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 ("Joint Reservation").

The Government's Breach of Trust. The reservation 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 Valley 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). 2/ 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 III).

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

2/ 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 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). But the BIA did acknowledge the rights of those who were not enrolled members of the Hoopa Valley Tribe. "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.

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 damages awards 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 that had been set aside for the non-Hoopa residents, along with 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. 3/ 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. See Pls.' App. 250 (over 98 percent of the funds generated on the Joint Reservation and placed in the Settlement Fund originated from timber taken from the Square). Indeed, the Hoopa Valley Tribe "petitioned [ ] Congress to enact a law confirming the Hoopa Square as the property of the Hoopa Valley Tribe[,]" which ultimately led to the enactment of HYSA. Pls.' App. 133 (Resolution of the Hoopa Valley Tribe, 53 Fed. Reg. 49,361-01, 49,361 (Dec. 7, 1988)). Congress recognized that giving the Hoopa Valley Tribe the Square represented a "financial deference" in favor of the Hoopa Valley, Pls.' App. 92 (S. Select 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 15 (1988)), which explains why Congress determined that the Yurok should receive a population-based allocation from the Fund, and also that "[a]ny funds remaining in the Settlement Fund . . .

3/ 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).

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). 4/

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 Hoopa Valley Tribe 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." 53 Fed. Reg. 49,361-01 at 49,361-62; Pls.' Am. Compl. ¶ 34. On the strength of this waiver of rights, the Department of the Interior distributed to the Hoopa Valley Tribe its full allocated distribution from the Settlement Fund.

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." Pls.' App. 251-52 (N. McCaleb Test., S. Hr'g 107-648 at 7-8 (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.

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. See Pls.' App. 183-84. In 2000, the Federal Circuit rejected the Yurok's claims, holding that no matter where they lived,

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4/ Congress recognized that the Yurok Tribe "ha[d] not received the majority of services provided to other federally recognized tribes," and "[a]s a result, it lack[ed] adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community." Pls' App. 105 (S. Rep. No. 100-564, at 28).

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 Cal. v. Ammon, 209 F.3d 1366, 1378 (Fed. Cir. 2000).

The Yurok Executes A Waiver And Receives Its Share of the Fund. The Department of Interior has repeatedly 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 lawful share of the Settlement Fund by executing a waiver of the Tribe's remaining claims. See Pls.' App. 176-77 (E. Brown Letter to D. Risling, Hoopa Valley Chariman).

On March 1, 2007, the Office of the Special Trustee for American Indians restated this view, acknowledging once again 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. Pls.' App. 372-74 (Special Tr. for Am. Indians Letter to C.L. Marshall). 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. See Pls.' App. 376 (Resolution No. 07-037 of the Yurok Tribal Council re Waiver of Certain Claims). 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. Pls.' App. 375 (Letter of Special Trustee for Am. Indians to C.L. Marshall). In April 2007, the Government released the Yurok Fund to the Yurok Tribe without any restriction or reservation. See Pls.' App. 400-02 (Letter of Special Deputy Tr.to SEI Private Trust Co.).

Disposition of the Yurok Fund. The Yurok promptly began preparations to distribute the funds per capita to its members pursuant the procedures of the Yurok Constitution. 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. See, e.g., Pls.' App. 405; Pls.' Am. Compl. ¶ 63. Thus, the vast majority – over 90% – of the Yurok Fund was distributed to Yurok members nearly a year ago.

ARGUMENT

I. The Hoopa Plaintiffs Suffered No Injury and Have No Claim Arising From Distribution of the Settlement Fund.

A. Plaintiffs' Claims Based On Their Alleged Status As "Indians of the Reservation" Fail.

Plaintiffs' breach of trust claims are premised on an untenable theory. They claim that, like the Short plaintiffs, they are "Indians of the Reservation" who have been injured by the government's distribution of the remaining portion of the HYSA Settlement Fund to the Yurok.

See Pls.' Br. at 2, 25. 5/ Plaintiffs apparently claim a right to an award of damages on the theory that, like the Short plaintiffs, they were denied an equal share of the distributions made to the Yurok. Id. at 2-3, 18, 26. That is absurd as a matter of history and wrong as a matter of law. The history is clear: The Hoopa Valley Tribe already received its "share" of the Settlement Fund. It executed its waiver of all claims against the United States and collected its statutory share almost 20 years ago.

And the law is just as clear. By enacting the HYSA, Congress indisputably sought to put an end to decades-long disputes among the Yurok, the Hoopa, and the federal government over the management and allocation of reservation lands and resources, disputes that engendered lengthy and multiple lawsuits 6/ and great uncertainty among the parties. See Pls.' App. 78-79 (S. Rep.No. 100-564 at 1-2). HYSA's provisions logically and legally preclude plaintiffs' efforts to graft pieces of Short into the statutory language of the Act. HYSA allowed each Tribe to decide whether to abide by its allocation of the Funds by executing a waiver of all claims against the United States and obtaining its statutory share of the Fund. The Hoopa Valley Tribe did just that. Pls.' App. 133 (53 Fed. Reg. 49361, 49362, Hoopa Valley Tribe Resolution, waiving claims and "consent[ing] to the contribution of Hoopa Escrow monies to the settlement fund and for their use a spayments to the Yurok Tribe"). There is no further ground for any claim by the Hoopa.

5/ Their claimed interest in the Fund appears to rest on the fact that the Fund was pooled from a collection of escrow and tribal accounts derived from the revenues of the Joint Reservation. Pls.' Br. at 20-21.

6/ In addition to the Short action, lawsuits included Puzz v. U.S. Department of Interior, Bureau of Indian Affairs, No. C 80 2908 TEH, 1988 WL 188462 (N.D. Cal. Apr. 8, 1988) (order vacated following enactment of HYSA) and Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979).

To be sure, Congress expressly provided that nothing in the HYSA shall itself affect "the entitlement established under decisions of the United States Claims Court in the Short cases or any final judgment which may be rendered in those cases." 25 U.S.C. § 1300i-2. In other words, as the legislative history makes clear, enactment of HYSA did not itself cut off the Short plaintiffs' right to collect individual damage awards based on the government's unlawful distributions of timber revenues to some (Hoopa members) 7/ but not all residents of the Joint Reservation over the period of time at issue there. See Pls.' App. 96 (S. Rep. No. 100-564 at 19). ("When final judgment is entered [in Short], the court . . . will have determined the amount of monetary damages to which each [ ] individual plaintiff is entitled[;] nothing in this legislation is intended to affect the right of such individuals to that final award under the law of the case"). But to the extent there was any conflict between the HYSA and the Short decisions, Congress "intended that [HYSA] will govern." Id.

The HYSA was intended to and did bring an end to the era of the joint reservation and shared resources. In that way, the HYSA superseded Short on a "prospective" basis. Id. In particular, apart from the court's duty to resolve the claims of the Short plaintiffs over historical disbursements in that litigation, HYSA brought an end to the concept of "Indians of the Reservation." Under the HYSA, an individual could elect membership as a Yurok, could qualify for membership in the Hoopa Valley Tribe, or could disclaim membership in either tribe and take a payout. 25 U.S.C. 1300i-5; Pls.' App. 98-102 (S. Rep. No. 100-564 at 21-25). Once that

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7/ These sums were significant. Between 1955 and 1969, the government distributed over $12.5 million dollars to Hoopa Valley Tribe members. Pls.' App. 85. From 1969 to 1980, the government distributed another $16.6 million to individual Hoopas. Id. The Yurok and other Indians on the joint reservation received nothing. See id.

process was completed – which occurred in 1991 – there were no more "Indians of the Reservation." See Pls.' App. 137 (DOI Settlement Option Notice at 1) 8/

B. Plaintiffs' Breach of Trust Claims Fail For Want of Jurisdiction.

The Hoopa plaintiffs have utterly failed to state any basis for their breach of trust claims against the United States. "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (citations omitted). The government's waiver must be 'unequivocally expressed'[.]" Id. A statute creates a right capable of grounding a claim for damages within the waiver of sovereign immunity only if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Id. (citing United States v. Mitchell, 463 U.S. 206, 217 (1983)). In order to state a breach of trust claim against the United States, the plaintiffs must identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" and allege that the government "has failed faithfully to perform those duties." United States v. Navajo Nation, 537 U.S. 488, 506 (2003).

The plaintiffs can satisfy none of this. For its part, the Hoopa Valley Tribe concedes it obtained all it was due under the HYSA and has no grounds for complaint on its own behalf. See Pls' Br. at 3 n.3; see also Pls.' App. 251-52, 256 (S. Hrg. 107-648 at 7-8, 12). Indeed, the HYSA was very good to the Hoopa. The HYSA provided that tribe with a rich land

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8/ Plaintiffs attempt to frame the issue as "the Secretary's (trustee) duty to manage the Settlement Fund (trust corpus) for Indians of the Reservation (beneficiaries)." Pls.' Br. at 20. But plaintiffs' mix-and-match of the HYSA terms and Short excerpts is erroneous and disingenuous. The HYSA created the Settlement Fund and provided for its allocation and distribution. The beneficiaries of the Fund were not "Indians of the Reservation" defined in Short, but were the Hoopa Valley Tribe and the Yurok Tribe, along with limited and long-expired rights for certain individuals who elected not to join one of the tribes. See 25 U.S.C. § 1300i-3.

base, the Square, that has generated significant annual income for the tribe. See Pls.' App. 266 (S. Hrg. 107-648 at 22) (between 1988 and 2002, Hoopa Reservation timber revenues were $64 million). And it provided that tribe with over $34 million from the Settlement Fund, which the tribe received by 1991. See Pls.' App. 200 (Hoopa-Yurok Settlement Fund summary).

The individual Hoopa plaintiffs also have no basis for complaint. As tribe members, they enjoyed all the tribe's benefits under the HYSA. More importantly for present purposes however, individual Hoopa members are not direct beneficiaries of the Act, and both the Act and prior court decisions established that the individual plaintiffs have no individual interest in reservation lands or revenues prior to the enactment of the HYSA.

The HYSA certainly created no such individual rights. On the contrary, one of the primary purposes of the Act was to allocate reservation lands and resources on a tribal basis and close the door on individual land and money claims. See Pls.' App. 79 (S. Rep. 100-564 at 2). 9/ The individual plaintiffs can point to no provision of the HYSA that created rights for individual Hoopa members or imposed duties on the United States relating to individual Hoopa members. 10/ So the HYSA itself cannot be the source of alleged rights or duties underlying plaintiffs' claims.

9/ The Act also provided a procedure for individual Indians to enroll as members of the respective tribes or decline tribal membership and collect a specified amount of money in compensation. The federal government contributed $10 million for such payments. See 25 U.S.C. § 1300i-3(e). The ultimate amount of money each tribe was allocated under the Settlement Fund was based on the ratio of the tribe's total membership to the total number of Indians on the Joint Reservation.

10/ Plaintiffs' reliance on Section 1300i-3(b) is unavailing. See Pls.' Br. at 19-20, 27. That provision only provides that "the Secretary shall make distributions from the Settlement Fund as provided in this Act and, pending payments under section 6 and dissolution of the fund as provided in section 7, shall invest and administer such fund as Indian trust funds pursuant to the first section of the Act of June 24, 1938 (52 Stat. 1037; 25 U.S.C. § 162a)." 25 U.S.C. § 1300i-

Plaintiffs also point to the 1864 Act and 25 U.S.C. § 407, which relates to timber resources. As the government explains, neither of these creates a specific right or duty on which to base plaintiffs' claims in this action. See U.S. Br. at 20-22. Fundamentally, neither the 1864 Act nor Section 407 can possibly ground relief here, in view of the later specific enactment on the issue, the HYSA, in which Congress exercised its plenary power to regulate Indian affairs, redefined the trust obligations owed to beneficiaries as identified by that Act, allocated the Settlement Funds, allowed each Tribe to opt in to that allocation, and ultimately dictated the distribution about which plaintiffs now complain.

1. Plaintiffs Had No Vested Rights in the Joint Reservation or its Funds.

The courts have also made clear that individuals have no claim of vested rights to the Joint Reservation or its resources. Before and after enactment of the HYSA, courts have conclusively and consistently held that neither individual Indians nor specific tribes held a vested interest in either the former Joint Reservation or its resources. See Short I, 486 F.2d at 564-65; ; and Karuk, 209 F.3d at 472-73. Congress agreed. After its analysis of the relevant law and history, the Senate Committee on Indian Affairs concluded:

> [U]nder the general theories of Federal-Indian law and under the law of the Short cases, it is the Committees' conclusion that no individual, including persons meeting the qualifications of the court as an "Indian of the Reservation" or members of the Hoopa Valley Tribe, separately or collectively, have any legally enforceable right in the lands and resources of the reservation.

Pls.' App. 99 (S. Rep. No. 100-564 at 22). See also Pls.' App. 89-90 (S. Rep. No. 100-564 at 12-13) (discussing non-vested nature of interests in Joint Reservation). That meant that Congress' "extraordinarily broad" authority over Indian matters, Santa Clara Pueblo v. Martinez, 436 U.S.

3(b) (emphasis added). By its terms, the provision only relates to the Secretary's duties as set forth in HYSA itself.

49, 72 (1978), was not constrained, and Congress could and did determine that the HYSA was "a reasonable and equitable method for resolving the confusion and uncertainty [then] existing on the [Joint] Reservation." Pls.' App. 90 (S. Rep. No. 100-564 at 13).

2. In the Absence of Vested Rights, Congress Was Free To Allocate Property Under HYSA Without Subjecting the United States to Liability.

In taking legislative action to pool assets in the Settlement Fund and partition the reservation, Congress was well within its constitutional authority to regulate Indian affairs and the government incurred no liability to plaintiffs or the tribes for the diminishment or alteration of alleged entitlements claimed under prior enactments or regulations. LeBeau v. United States, 474 F.3d 1334, 1337 (Fed. Cir.), cert. denied, 127 S. Ct. 3013 (2007). See also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 90 (1977) (Congress retains the power to revise its original allocation of judgment funds before distribution of the funds is made); N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 653-56 (1976) (Congress had authority to terminate mineral rights that had not vested in the allottees); United States v. Jim, 409 U.S. 80, 82-83 (1972) (it is "well within the power of Congress" to alter the distribution scheme of an earlier statute by expanding the pool of Indian beneficiaries of royalties from oil and gas leases, and thereby diminishing the share of the original smaller group of beneficiaries). Accordingly, Congress was fully empowered to allocate the Settlement Fund notwithstanding the Short decisions addressing the rights of "Indians of the Reservation" to recover damages over the Secretary's historical distributions to only Hoopa Valley Tribe members. Because Congress devised a superseding distribution plan in the HYSA, any breach of trust claim must be based on that statute, and there is none.

In short, the recent distribution to the Yurok Tribe is not "fairly traceable" to a so-called discriminatory distribution to only some "Indians of the Reservation" under the holding of Short, see Pls.' Br. at 20, but was instead the direct and intended result of Congress' enactment of the HYSA. Plaintiffs' effort to claim a right as "Indians of the Reservation" under the Short decisions fails both under the HYSA and the Short decisions. None of the plaintiffs has individual rights under the HYSA, under which the Hoopa Valley Tribe waived its claims and received its share long ago. And the individual plaintiffs had no vested rights in the Joint Reservation or the revenue it generated or in the Settlement Fund, either under HYSA or under the decisions in the Short litigation on which to base any claim.

II. The United States' Decision to Release the Balance of the Settlement Fund to the Yurok Was Not Only Lawful But Affirmatively Required by the HYSA.

The Special Trustee's decision in 2007 to release the remainder of the Settlement Fund to the Yurok was entirely lawful. See Pls.' App. 372-74 (Special Tr. Letter at 1-3). There can be no dispute that primary purpose of the HYSA was to divide the land and funds of the former Joint Reservation between the Yurok and the Hoopa Valley tribes. See Pls.' App. 78-79 (S. Rep. 100-564 at 1-2); 25 U.S.C. §§ 1300i-1, 1300i-3. The Special Trustee's action plainly carried out the letter and intent of that Act .

Conditioned on the receipt of a "new, unconditional waiver of claims," the Special Trustee determined that the Act provided the Department with authority to "to act administratively to distribute the remaining funds to the Yurok Tribe[.]" Pls.' App. 373 (Special Tr. Letter at 2). That decision rested on the clear language of the HYSA. The Special Trustee took into account various factors in reaching this decision. He noted that the HYSA included provisions under which a tribe could bring a taking claim and provisions under which a tribe could provide a waiver, but included no language indicating that those provisions were mutually

exclusive. Id. He also concluded that the Yurok's unsuccessful takings challenge did not cause the Yurok to forfeit the benefits established under the Act. Id. In particular, the Special Trustee recognized that the Act did not "specify a time limitation, like the limited period to bring a constitutional challenge, on the ability to provide a waiver[,]" and that the waiver provision was not limited "solely to the constitutionally-based property claims authorized by the Act[.]" Id. Importantly, the Act "did not provide any contingent distribution arrangements if the Yurok Tribe chose to assert a takings claim." Id. Based on all these factors, the Department concluded that "nothing in the Act states that the Yurok Tribe's choosing to litigate its taking claim would cause the Tribe to forfeit the benefits under the Act." Id.

The Department further recognized that "Congress acted as a trustee in passing the Act[.]" Id. Because the Hoopa Valley Tribe had received all of its benefits under the Act, the Department appropriately determined that "any ambiguity in the Act should be read in favor of providing the other beneficiary, the Yurok Tribe, with its benefits established by the Act." Id. at 374. That determination is entirely consistent with the Indian canon of construction that ambiguities in statutes enacted for the benefit of tribes should be interpreted in favor of the tribes. See, e.g., Montana v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985).("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.")

The Department also correctly determined that the requisite waiver could be executed by the Yurok Tribal Council. See Pls.' App. 373 (Special Tr. Letter at 2). Although the Act provided for execution of the waiver by the Interim Tribal Council, that was only a temporary body created for tribal governance until its permanent governance could be established. By the time the waiver was authorized and executed, the Interim Tribal Council had long since expired and been replaced by the permanent Yurok Council. Id. Over the course of

many years, both the Department and the Hoopa Valley Tribe recognized the authority of the Yurok Council and its ability to "cure" the prior conditional waiver. Id.; see also Pls.' App. 188 (3/14/95 A. Deer Letter to Chairperson Long at 2). And absent any statute expressly providing otherwise, it would be illogical and inappropriate to ascribe to Congress the intent to hold that the permanent governing body of a tribe has less authority than the "interim" council.

CONCLUSION

Even though the Hoopa Valley Tribe received rich lands as its share of the Joint Reservation and a distribution of its full share of the Fund as allocated under the HYSA, plaintiffs now claim to be injured by the belated distribution of the Yurok's share to the Yurok Tribe. The Yurok received only what the HYSA required, just as the Hoopa Valley Tribe did long ago. That is precisely the outcome Congress envisioned when it enacted the HYSA, and it is precisely the outcome the HYSA requires upon each Tribe's waiver of claims. The matter should now be allowed at last to rest.

The Yurok Tribe therefore urges the Court to bring this long battle to an end by dismissing the plaintiffs' complaint with prejudice or by granting summary judgment in favor of the United States.

November 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2008, a copy of the foregoing Third Party Defendant Yurok Tribe's Response to Plaintiffs' and Defendant's Cross Motions for Summary Judgment was electronically filed via the CM/ECF system on the following counsel for the parties:

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