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

YUROK TRIBE'S REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The Yurok Tribe, by its counsel, respectfully submits this brief Reply in support of its motion to dismiss the United States' Third Party Complaint. The Government's Response defends against arguments the Yurok Tribe did not raise, perfunctorily dismisses the issues raised by the Tribe, and attempts to justify its complaint against the Yurok Tribe by wrongly suggesting that it is at risk for a "double liability." And critically, it fails to provide a basis in law to support its third party claim. The Hoopa Plaintiffs, in turn, also filed a response to the Yurok Tribe's motion even though they agree they have no stake in the outcome. Instead, their purpose is to seize another opportunity to restate their futile breach of trust action.

ARGUMENT

A. The Government's Third Party Complaint Is Due to be Dismissed.

As noted in the Tribe's Motion to Dismiss, the United States' third party complaint asserted only a bare entitlement to recover from the Yurok Tribe. See Mot. at 11; Third Party Compl. ¶¶ 13-14. Its 14-paragraph complaint contains only this as a "cause of action": "[i]f this Court determines that the United States disbursed the settlement funds to the Yurok Tribe under a mistake of fact or law, the Government seeks judgment against the Yurok to recover the money erroneously paid to it." Third Party Compl. ¶ 14. Alleging that the Government seeks a judgment says nothing about the Government's "cause of action" – i.e., the basis for its entitlement to the relief requested. And the Government's Response adds nothing. The Government states no claim because it has none. It's third-party complaint should be dismissed because it fails to meet the basic rule of pleading that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2).

The Government's failure to make allegations "showing [ ] it is entitled to relief" is all the more glaring because its Response shows it cannot point to a single case in which it has ever sued an Indian tribe directly to recover alleged wrongful trust payments, let alone a single case in which the Government used Rule 14 to bring a third party tribe into another tribe's breach of trust action. 1/ Instead of offering any relevant authority in support of its "claim" against the Yurok, the Government offers two pages of discussion explaining that if it had a

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1/ The United States cites Wolfchild v. United States, 68 Fed. Cl. 779, 800 (68 Fed. Cl. 779, 800 (2005), in general support of its use of Rule 14 to summon the Yurok Tribe. The Government does not mention that in this opinion, the Court noted the possibility of using Rule 14 to bring tribes into a case involving on-going use and administration of trust property, and declined to do so. Id. at 801. In a subsequent decision, after the Court issued third party summonses on the motion of the plaintiffs (not the Government), the Court quashed the summonses. See Mot. to Dismiss at 11 (discussing Wolfchild v. United States, 72 Fed. Cl. 511, 534-35 (2006)).

claim, the Yurok would not enjoy sovereign immunity from suits by the United States. That is an issue raised only by the Government in its Response; the Yurok Tribe made no such claim.

To be sure, the Yurok Tribe strongly believes that the Government's third party complaint seeking recovery of Indian trust funds is utterly incompatible with its "highest fiduciary duties" to the Yurok Tribe. Seminole Nation v. United States, 316 U.S. 286, 297 (1942); see also Mot. to Dismiss at 10-11. After all, the Government as trustee of the Yurok is claiming a right to recover funds (now largely gone) that the Government itself says were properly distributed pursuant to HYSA. This is a claim the Government has never made before, 2/ it is one for which the Government offers absolutely no legal support, and it flies in the face of the Government's obligation as fiduciary to make distributions as required by law. See Mot. to Dismiss at 11.

Even if its simple demand for judgment could be said to state a claim, the Government's third party complaint also fails because it rests on a misapprehension of the Hoopa Plaintiffs' claim. Ordinarily, 41 U.S.C. § 114 is employed to address competing claims to the same fund. See, e.g., Great American Insurance Company v. United States, 397 F.2d 289, 291-92 (Cl. Ct. 1968) (surety and bank both sought same funds held by Government as the unpaid balance on a contract). But there are no such competing claims here. To the contrary, the Hoopa Plaintiffs concede that they had no vested right in the Settlement Fund. Hoopa Pls.' Response to Yurok Mot. to Dismiss at 13. Instead, the Hoopa Plaintiffs claim – in error, but it is their theory – that no one had a vested right to the Fund, and therefore under Short, if the Government made

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2/ The Government cites authority holding that tribes are not immune from suits by the United States (which is not disputed), but not one of its authorities is remotely analogous to the circumstance here. So far as counsel can discern, the Government has not previously sued an Indian tribe, contingently or otherwise, to recover disbursements from an Indian trust account. .

any distributions, it was required to do so in a manner that did not discriminate against others of the former Joint Reservation. Id. 3/ Thus, in the event the Hoopa Plaintiffs were to prevail, then like the plaintiffs in Short, they would be entitled to money damages in compensation for injury suffered at the hands of the United States. Mitchell II, 463 U.S. at 226; Short III, 719 F.2d at 1135; White Mountain Apache Tribe, 11 Cl. Ct. at 669. They would not be entitled to the (now distributed) Fund itself. In seeking to maintain its third party complaint against the Yurok Tribe, the Government wrongly equates the Hoopa Plaintiffs' alleged injury with a demand for the Fund.

And the Government is also wrong to assert that it seeks to protect itself from double liability. See U.S. Resp. to Mot. to Dismiss at 6 (claiming that the Government "as protector of the public fisc" must seek to prevent the "Treasury [from] be[ing] subject to double liability"). There is no risk of a double liability here. The Fund was not part of the public fisc; it derived from long-ago revenues of the former Joint Reservation and was in an Indian trust account. See Mot. to Dismiss at 5. If the Government were found liable to the Hoopa Plaintiffs – a big if – that liability would be its first, last and only liability arising from HYSA.

3/ The Hoopa Plaintiffs persist in their theory that the law of Short applies to this action, stating that "the governing principles of Short IV [ ] are preserved in § 3 of [HYSA]." Hoopa Pls.' Resp. to Mot. to Dismiss at 13. That is wrong. The Act's provisions plainly superseded Short and replaced the unvested interests of the "Indians of the Reservation" with a defined set of federal obligations to defined recipients. Moreover, Section 3 of HYSA carefully provides not that the principles of Short were preserved for the Act's beneficiaries, but only that "[n]othing in this Act shall affect, in any manner, the entitlement established under decisions [in Short] or any final judgment which may be rendered in those cases." 25 U.S.C. § 1300i-1. In other words, the plaintiffs in Short retained their rights to collect judgments for the Government's historical breach of trust found in Short. The provision preserves the Short plaintiffs rights to their judgment, it did not import Short into HYSA.

The funds the Government seeks were lawfully distributed to the Yurok Tribe, which has now lawfully distributed the vast majority of the funds to members of the Yurok Tribe. The Government has stated no claim to recover anything from the Yurok Tribe.

B. The Hoopa Plaintiffs' Response Distorts HYSA and History.

The Hoopa Plaintiffs' Response to the Yurok Tribe's Motion to Dismiss is largely repetitive of their other briefs, but they sound a few notes that prompt a short reply. First, in an effort to appear wronged, they persistently refer to the Fund as if it derived from Hoopa assets. Second, they repeatedly suggest that the Yurok forfeited any interest in the Settlement Fund, even though that drastic and inequitable consequence is not expressed anywhere in Congress' Act. And third, they continue to argue that a temporary governing council – not the Yurok's Constitutionally-installed Tribal Council – was the only entity that could qualify for the Yurok Fund by executing the requisite waiver. Each of these contentions is wrong.

Yurok Funds. In an effort to suggest that the Fund was taken from the Hoopa or that it rightfully belongs to the Hoopa, the Hoopa Plaintiffs refer to the Settlement Fund as holding money derived from the Square or from "Hoopa lands". See, e.g., Hoopa Pls.' Resp. to Mot. to Dismiss at 9. This is misleading and revisionist. The Hoopa Plaintiffs know full well that the Fund derived from the Joint Reservation accounts. To be sure, today, after HYSA, the Square belongs to the Hoopa Valley Tribe alone. But as Short found, for decades in the mid-20th century, the Joint Reservation was inhabited by members of several Tribes, yet only those who were members of the Hoopa Valley Tribe ever received any revenues from the Joint Reservation lands. Mot. to Dismiss at 3-4. As a result of Short, the era of the Hoopa Valley Tribe's exclusive enjoyment of the Joint Reservation's revenues came to an end, and they were required to share the Joint Reservation's benefits. As the Short litigation continued, the Government for

another lengthy period continued to withhold revenue from non-Hoopa Indians and at the same time distribute 30% of the revenue to Hoopa Indians. Id. at 4-5. The other 70% went into an escrow fund that was earmarked for the non-Hoopa Indians – mostly Yurok – and was not distributed. And later in the litigation, the Government began to hold all revenues from the joint Reservation in an escrow fund. These funds account for the vast majority of what became the Settlement Fund. See also, e.g., Pls.' App at 3, 96, 254.

In HYSA, Congress pooled these accounts and a few others with the intent to divide the vast majority into two parts, one for the Hoopa Valley Tribe, one for the Yurok Tribe, which was yet to be formally organized. Pls.' App at 79, 96. Thus, what became the bulk of the Fund when HYSA was enacted was the 70% escrow account – to which the Hoopa Indians had no claim (because they had already received their 30% share) and the later-accruing undistributed revenue fund in which the Hoopa had approximately a 30% interest. Thus, the monies in the Fund were not monies to which the Hoopa had any superior claim or a greater interest. Under HYSA, the Hoopa Valley Tribe executed a waiver of claims and received nearly approximately 40% of the Fund, over $34 million, in 1991. See Pls.' App. 200. The Hoopa Plaintiffs' complaint that there is something discriminatory or unfair in the Yurok Tribe finally receiving its share simply cannot be credited.

Yurok Waiver. The Hoopa Plaintiffs also spill a lot of ink trying to show that the Yurok Tribe forfeited its rights under HYSA. See, e.g., Hoopa Response to Motion to Dismiss at 5, 10. First of all, the Hoopa Plaintiffs have no standing to make this argument. Even if it were correct, which it decidedly is not, the Hoopa Valley Tribe would have no claim to the funds.

Secondly, the Yurok forfeited nothing. As the Yurok explained in its Response to the Cross Motions for Summary Judgment, there is nothing in the express terms of the HYSA that supports the view that the Congress intended the Yurok Tribe's assertion of a constitutional claim to permanently bar the Yurok's receipt of its portion of the Fund. 4/ Moreover, that reading is fundamentally at odds with the purposes of HYSA, which was to divide the former Joint Reservation into two and tribalize the assets held in trust from that Joint Reservation for the benefit of the Hoopa Valley Tribe and the Yurok Tribe.

Of all of the many materials quoted at length in the Hoopa Plaintiffs' response, none establish that the Yurok forfeited their rights under the HYSA. At best, the record merely reflects that up until the Yurok Tribe provided its 2007 waiver, the Department consistently maintained that the Yurok Tribe had not yet met the requirements set forth in HYSA for the release of the Fund.

The Hoopa Plaintiffs also try to cobble together an argument based on the Yurok Interim Council, claiming that like the Hoopa Valley Tribe, the Yurok were under a time limit in which to execute a waiver. Hoopa Resp. to Mot. to Dismiss at 10-12. Not so. HYSA set out an express 60-day time limitation by which the Hoopa Valley Tribe was required to provide a

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4/ In its initial waiver, the Yurok preserved its constitutional claims. As both the United States and the Hoopa Plaintiffs are well aware, the Yurok Tribe consistently maintained that its initial waiver was sufficient because it only conditioned its waiver on the constitutionality of the Act. See, e.g., Pls.' App 212-13. Because the United States cannot lawfully impose unconstitutional conditions on beneficiaries of its acts, the Yurok Tribe understood the Act as allowing constitutional claims, notwithstanding its waiver provisions as to claims generally. See Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (the Constitution does not permit Congress to imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge). In 2000, the Federal Circuit rejected the Yurok's constitutional claim. Karuk Tribe of California v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000). The Government later accepted the Yurok Tribe's unconditional waiver and distributed the Yurok Tribe's share of the Fund to the Yurok. That was entirely as it should be.

waiver. 25 U.S.C. § 1300i-1(a)(2)(A). There is no parallel provision that relates to the Yurok. That is not surprising or unfair under the circumstances. Unlike the Hoopa Valley Tribe, which had been organized as a government for decades and was actively involved in proposing and advocating for enactment of HYSA, the Yurok Tribe was not even formally organized when HYSA was enacted and did not participate in its formulation through the political process. See Pls.' App. 251, 266. HYSA attempted to address this by providing a process in the statute under which the Yurok Tribe could organize. That process included the establishment of an Interim Council. See 25 U.S.C. § 1300i-8. The Hoopa Plaintiffs contend that the power to issue a waiver died with the Interim Council. But that is wishful thinking by the Plaintiffs, not a reasonable interpretation of the terms of the statute. The bare and indisputable facts are that the statute set no deadline for the Yurok waiver of claims as it did with respect to the Hoopa Valley Tribe. And the statute contains no term even suggesting that the Interim Council was the only entity that would have authority to issue a waver. On the contrary, the Interim Council, as a temporary entity established under the Act, was expressly given only limited powers. Id. § 1300i-8(d). Congress properly made no provisions for – and set no limitations on -- the authority of the permanent Yurok Council because the permanent government, once established, would have the same full authority of all recognized Indian tribes, including the authority to govern its own affairs and the authority to conduct relations with the Federal Government on a government-to-government basis. See id. § 1300i-8(e). 5/

Lastly, the Hoopa Plaintiffs go too far when they claim the Yurok Tribe "induced" the Government to its breach of trust. Hoopa Resp. to Mot. to Dismiss at 14-15. First,

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5/ The Department of the Interior certainly shares this view. As early as 1995, after expiration of the Interim Council , the Department maintained that the Yurok Tribal Council could execute a valid waiver under the Act. See Pls.' App. 188 ("the exercise of the authority [to execute a waiver] is consistent with the provisions of the Act').

of course, the United States did not breach any duties to these plaintiffs when it distributed Yurok Funds to the Yurok Tribe. In any event, the Hoopa Plaintiffs are beyond the pale in characterizing the Yurok' Tribe's communications with the Government as inducement to breach. Like all citizens and sovereigns within our federal system, the Yurok Tribe is free to petition the government and to try to persuade it toward or against particular actions. See U.S. Const., amend. 1. Here, the Yurok Tribe did nothing but ask the United States to make a distribution required by law. The Hoopa Plaintiffs are also wrong that the Yurok Tribe was on notice of the alleged breach of trust. See Hoopa Resp. to Mot. to Dismiss at 15-16. Of course, the Yurok Tribe was aware that the Hoopa Valley Tribe protested the distribution to the Yurok. But the Yurok Tribe had no reason to know that the distribution could be (as it cannot) a breach of trust as to Hoopa members, the parties in interest here, because the Hoopa tribe members are not direct beneficiaries under HYSA and thus have neither injury nor standing to support a claim.

The Hoopa Plaintiffs and the Yurok Tribe agree on the one point critical to this motion to dismiss: the Yurok Tribe has no place in Plaintiffs' breach of trust action against the United States. The Government's third-party complaint should be dismissed because the United States has no claim against the Yurok Tribe.

CONCLUSION

For the foregoing reasons, the Yurok Tribe's Motion to Dismiss or in the Alternative for Summary Judgment should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2008, a copy of the foregoing Third Party Defendant Yurok Tribe's Reply in Support of 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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