IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

The United States submits this brief in opposition to Third Party Defendant Yurok Tribe's Motion to Dismiss or in the Alternative for Summary Judgment. The United States' contingent claim against the Yurok Tribe ("the Yurok") is proper and the Yurok have not presented any valid basis for dismissal from this case. The Yurok do not have sovereign immunity as against the United States. Further, the Yurok's claim that the United States' contingent claim against it is in violation of the United States' duties as a trustee does not hold weight for several reasons. First, the United States' trust responsibilities must be established in applicable law, such as statutes and regulations, and the Yurok have not presented any source of law establishing a particular duty to the Yurok in this case. Second, the United States has other

obligations and responsibilities, particularly in litigation, and in a situation such as the one at issue here, the role of a private fiduciary is not controlling. Finally, the United States is not acting as a trustee of the Yurok in its contingent claim, but as a protector of the public fisc. Accordingly, the United States respectfully requests that this Court deny the Yurok's motion to dismiss or in the alternative for summary judgment.[1/]

I. The Yurok Do Not Have Sovereign Immunity As Against the United States.

It is well-established that Indian tribes do not enjoy sovereign immunity as against the United States. *See E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001) ("Indian tribes do not, however, enjoy sovereign immunity from suits brought by the federal government."); *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1134 (11th Cir. 1999) (noting that tribal sovereignty does not bar suits by the United States); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) ("Tribal sovereign immunity does not bar suits by the United States."); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459–60 (9th Cir. 1994) ("Thus, tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers."); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) (concluding that "it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States").

While the Yurok assert that this case is unique in that the United States seeks to have the Yurok found liable if the Yurok had no right to the funds that were disbursed, there have been

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[1/]Because the factual background has been fully briefed in the United States Combined Motion to Dismiss, or in the Alternative for Summary Judgment, and Response in Opposition to Plaintiff's Motion for Summary Judgment [Dkt. No. 20], it is not repeated here.

many instances where the government has brought suit against an Indian tribe. *See, e.g., Karuk Tribe Housing Authority*, 260 F.3d at 1075; *Quilete Indian Tribe*, 18 F.3d at 1460; *Red Lake Band of Chippewa Indians*, 827 F.2d at 382; *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986).

Further, Rule 14 of the Rules of the Court of Federal Claims (RCFC) does not make an exception for Indian tribes. RCFC 14 permits the joinder of parties in instances "where the government may have transferred property erroneously or disbursed or paid over funds to the wrong party, and the property or funds have been put at issue in the case at hand." *Wolfchild v. United States*, 68 Fed. Cl. 779, 800 (2005); *S. California Edison Co. v. United States*, 226 F.3d 1349, 1355 (Fed. Cir. 2000) (Section 114(b)[2/] "provides for jurisdiction in situations where the government is seeking the recovery of a sum of money disbursed to the wrong party"). In this case, the United States requested that the Yurok be joined in the case on a contingent basis in order to avoid double liability, to promote judicial economy by avoiding relitigating the same issues in a later case, to prevent inconsistent judgments, and to allow the Yurok to present its side of the case. The Yurok have not shown that RCFC 14 is not applicable in this case.

II. The United States' Trust Responsibilities Do Not Prevent Joinder of the Yurok.

The main premise of the Yurok's motion to dismiss is that principles of Indian trust law bar the United States' contingent claim against the Yurok. This argument does not withstand scrutiny. Specific fiduciary duties found in statutes and regulations "define the contours of the

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[2/] "RCFC 14 implements the authority set forth in 41 U.S.C. § 114." *See* RCFC 14, Rules Committee Note, Rule 14, 2002 Revision.

United States' fiduciary responsibilities." *Mitchell v. United States*, 463 U.S. 206, 224 (1983); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995); *see also Cobell v. Norton*, 240 F.3d 1081, 1098–99 (D.C. Cir. 2000). Therefore, general trust principles do not prevent the United States' contingent claim against the Yurok. Although common law principles may inform the interpretation of legal mandates imposed upon the United States, an Indian tribe must first identify a trust duty deriving from a source of law, such as a statute or regulation, when seeking to enforce a trust obligation against the United States. *Cobell v. Norton*, 392 F.3d 461, 471 (D.C. Cir. 2004), vacated on other grounds, 428 F.3d 1070 (D.C. Cir. 2005); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 29–31 (D.D.C. 1999); aff'd *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). Accordingly, the Yurok must identify a specific statute or regulation that prevents their joinder in this case. Because the Yurok have not done so, this Court should deny the Yurok's motion to dismiss.

In addition, the United States does not stand in the same position as a private trustee. The United States has numerous, and occasionally conflicting, obligations under law and cannot be held to the same standard as a private trustee. *See Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981) (noting that "all the rules governing the relationship between private fiduciaries and their beneficiaries do not necessarily apply in full vigor to Indian claims against the United States"), aff'd, 463 U.S. 206 (1983); *see also Nevada v. United States*, 463 U.S. 110, 128, 142 (1983) ("The Government does not compromise its obligation to one interest . . . by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.").

Further, the United States has "a substantial amount of discretion" in litigation decisions, despite its fiduciary obligations. *Cobell*, 240 F.3d at 1099; *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"). The role of the United States in litigation involving Indian natural resource rights is described, in part, by guidance contained in a May 31, 1979 letter from former Attorney General Griffin Bell to then Secretary of the Interior Cecil Andrus. *See* Appendix (hereafter "App."), Exh. 1. As the letter notes, the representation of the United States in litigation involving Indian tribes "is but one aspect — albeit an important one — of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519." *See id.* The letter explains the relationship between the government's role in litigation involving Indian property rights both as trustee for Indian tribes and as a representative of the people of the United States.

> It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indians. Thus in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

Id. at 3; *see also Shoshone-Bannock Tribes*, 56 F.3d at 1482–83 (finding that United States did not breach trust responsibility by refusing to assert tribes' water right claims in adjudication). Thus, even in circumstances directly affecting tribal trust property, positions taken in litigation

contrary to the position advocated by the interested Indian tribe does not automatically result in a breach of the government's trust responsibilities to that tribe.[3/] The United States would not violate any fiduciary duty to the Yurok by filing suit for money that the tribe had no right to have. Likewise, no injustice would result from requiring a party to discharge funds to which it does not have a valid right.

In addition, the United States has a responsibility to protect the public fisc. If the United States is found liable to the Hoopa for breach of trust, it necessarily means that the money was distributed to the Yurok in error. The United States, as protector of the public fisc, must seek to correct the mispayment and recoup monies paid in error instead of letting the Treasury be subject to double liability.

Finally, the Yurok's motion raises several issues with regard to "clawing back funds" that have already been distributed to individual Yurok members. While such concerns may be relevant if the Court finds in favor of the Hoopa against the United States, the fact that it may be difficult to enforce a judgment is not a valid basis for a motion to dismiss. The first step is for the Court to determine liability. Enforcement can be dealt with separately, if necessary.

Respectfully submitted this 8th day of December, 2008,

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/s/ Sara E. Costello
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[3/]Indeed, the United States' position on the merits of this case is consistent with the Yurok's position regarding the Yurok's entitlement to the fund and the decision to distribute the fund to the Yurok.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I filed the foregoing **UNITED STATES' BRIEF IN OPPOSITION TO THIRD PARTY DEFENDANT YUROK TRIBE'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties in this matter.

DATED this 8th day of December, 2008.

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