IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROUND VALLEY INDIAN TRIBES,	)	
	)	
Plaintiff,	)	No. 06-900L
	)	
v.	)	Hon. Susan G. Braden
	)	
THE UNITED STATES OF AMERICA,	)	Electronically filed
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Round Valley Indian Tribes ("Plaintiff" or "Tribe") seeks to assert in this action claims for an equitable accounting, alleged trust fund mismanagement, and alleged non-monetary trust asset mismanagement, from 1855 to the present. Docket No. 1. Plaintiff makes these allegations, even though it has already litigated and received a money judgment against the United States on some of its claims—and it could have brought the remainder of its present claims—in two prior cases. The United States has paid Plaintiff, and Plaintiff's members, the amount of money ordered in those judgments. Given this litigation and payment history, all of the trust accounting and trust fund mismanagement claims that Plaintiff is prosecuting in this action and that pre-date July 20, 1964, *i.e.* the date of the previous judgment, are barred under the well settled principles of *res judicata* or claim preclusion, waiver, and release.

Independent of the foregoing, Congress, in the Indian Claims Commission Act, forever barred and extinguished all Indian tribal claims at law, in equity, or based upon "fair and honorable dealings" that existed as of August 13, 1946, and that were not presented to the Indian Claims Commission by August 13, 1951. To the extent that Plaintiff now seeks to assert claims that existed as of August 13, 1946, those claims have been extinguished by Congress and this Court has no jurisdiction to entertain those claims in this action.

Therefore, the United States herein moves for summary judgment in its favor on Plaintiff's claims, or portions thereof, that pre-date July 20, 1964. There are no genuine issues of material facts or law. Therefore, this Court should grant the United States' motion and issue judgment to the United States as a matter of law on Plaintiff's claims (or the relevant portions thereof) that pre-date July 20, 1964.

II. QUESTIONS PRESENTED

1. Are Plaintiff's claims (or the portions thereof) that pre-date July 20, 1964 barred by the doctrine of *res judicata*?

2. Are Plaintiff's claims (or the portions thereof) that pre-date July 20, 1964 barred by the doctrines of waiver and release?

3. Are Plaintiff's claims (or the portions thereof) that pre-date August 13, 1946 barred by section 12 of the Indian Claims Commission Act?

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Round Valley Indian Tribes, formerly known as the Covelo Indian Community, is a federally recognized Indian tribe. Docket No. 104, ¶ 1; Docket No. 110-6, ¶ 1.

2. The Round Valley Indian Tribe is the successor community to eight different tribes, who were moved onto the Round Valley Indian Reservation in California between 1856 and 1873. Docket No. 104, ¶ 2; Docket No. 110-6, ¶ 2.

3. Plaintiff, Plaintiff's predecessor tribes, and Plaintiff's members' ancestors resided in the State of California before it was acquired by the United States from Mexico. See Docket No. 103-3, 3 ("The Yuki people have lived in Round Valley for thousands of years.").

4. Congress enacted the Act of May 18, 1928 to allow the United States Court of Claims to hear "[a]ll claims of whatsoever nature the Indians of California. . . . have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interests in said lands in said State which the United States appropriated to its own purposes without the consent of said Indians." 45 Stat. 602.

5. The Act of May 18, 1928 also provided that "[t]he claims of the Indians of California under the provisions of this Act shall be presented by petition, which shall be filed within three years after the passage of this Act." Id.

6. Pursuant to the Act of May 18, 1928, "[o]n August 14, 1929, the Attorney General of California, acting in his official capacity, duly filed in the Court of Claims of the United States a petition verified by him." Indians of California by Webb v. United States, 98 Ct. Cl. 583, 595 (1942).

7. On October 30, 1944, the United States and the Indians of California stipulated and agreed that judgment be entered by the Court of Claims in the sum of $5,024,842.34 in satisfaction of the Indians of California's claims. The stipulation for judgment further provided:

> [T]hat said judgment when entered shall be in full and complete settlement, satisfaction, and discharge of any and all claims and demands of every kind and character whatsoever which the plaintiff Indians, or any of them, may have against the United States under and by virtue of the Act of May 18, 1928, 45 Stat. 602.

0408ADC0000007-8; Appendix of Exhibits ("App."), Ex. 1.

8. Judgment was entered, and $5,024,842.34 was appropriated for "Judgments, Court of Claims, Department of the Interior, Indians" in Fiscal Year 1945. J51FMS0004253; App., Ex. 2.

9. On August 13, 1946, Congress enacted the Indian Claims Commission Act ("ICCA"). 60 Stat. 1049.

10. The ICCA gave the Indian Claims Commission ("ICC") jurisdiction to hear claims against the United States by "any Indian tribe, band, or other identifiable group of American Indians within the territorial limits of the United States or Alaska" at law, in equity, and/or "based

upon fair and honorable dealings that are not recognized by any existing rule of law or equity." ICCA, § 2.

11. The ICCA required that all claims under the Act be presented within five years after enactment of the Act, and further provided:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claims existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

60 Stat. 1049, 1052.

12. On July 20, 1948, Clyde F. Thompson, *et al.*, filed a petition with the ICC seeking, *inter alia*:

> [T]hat Defendant make a full and true discovery and disclosure of the acreage used, occupied and possessed, in the accustomed Indian manner, by the Indians of California and (1) taken and sold for its own account and (2) taken and appropriated for its own use, as aforesaid, and render a complete and accurate account thereof and of all relevant facts connected therewith. . . and that Defendant be adjudged liable to the Indians of California for such taking and appropriation in such amount as upon a complete and accurate accounting this Commission may find due and owing to Indians of California as just or proper compensation. . . .

0408ADC000081; App., Ex. 3.

13. The Thompson action was brought on behalf of "all Indians who were residing in the State of California on June 1, 1852 and their descendants now living." 0408ADC0000796.

14. On September 14, 1948, the Council of California Indians, Inc. filed a petition with the ICC seeking, *inter alia*:

> [T]hat Defendant make a full and true discovery and disclosure of the acreage used, occupied and possessed, in the accustomed Indian manner, by the Indians of California and which were taken from them by the United States and appropriated

> to its own purposes without their consent and render a complete and accurate account thereof and of all relevant facts connected therewith. . . . and that defendant be adjudged liable to the Indians of California for such taking and appropriation in such amount as upon a complete and accurate accounting this Commission may find due and owing to the Indians of California as just and proper compensation. . . .

0408ADC0001773; App., Ex. 4.

15. The Council of California Indians, Inc. action was brought on behalf of "all Indians who were residing in the State of California on June 1, 1852 and their descendants now living." 0408ADC0001768.

16. On March 24, 1949, an amended petition was filed in Council of California Indians, Inc., *sub nom* Ernest Risling, *et al.* 0408ADC0001807; App., Ex. 5.

17. On April 28, 1949 an amended petition was filed in the Thompson action. 0408ADC0000774; App., Ex. 6.

18. A special meeting of the Covelo Indian Community Council was held on August 17, 1963. The purpose of the special meeting was to discuss the Indians of California claims against the United States. At that meeting:

> The first business discussed was the forming of a committee to represent the Covelo community at meetings pertaining to the Indians of California. . . . The Council has decided to invite Clude Thompsin to a meeting to discuss the per capita payments to the California Indians.

1007J510001908; App., Ex. 7.

19. On March 3, 1964, the ICC issued an opinion in the Thompson and Risling cases. 0408ADC001711-17; App., Ex. 8. In that opinion, the ICC clarified which Indians were members of the identifiable group plaintiff in those actions. The ICC held:

> In this case that identifiable group represented by petitioners in Dockets 31 and 37

> and entitled to the ultimate award envisioned by this Commission would be the Indians of California except those tribes, bands or identifiable groups which filed their own separate claims, as specifically defined in out decisions of January 20, 1958, and October 6, 1958.

0408ADC0001716.

20. The Covelo Indian Community, Plaintiff's predecessor in interest[1/], did not file its own separate claim with the ICC. See Order of January 20, 1958 (0408ADC0001233-44) [App., Ex. 9]; Order of October 6, 1958 (0408ADC0001400-402) [App., Ex. 10].

21. On April 3, 1964, the Thompson and Risling Indians of California moved jointly with the United States for an entry of final judgment in the Indians of California action. 0408ADC0000444-54; App., Ex. 11. The parties jointly requested that judgment be entered in the amount of $29,100,000 in favor of the Indians of California, after hearing by the Court, consistent with the terms of the stipulations attached to the joint motion. Those stipulations provided, in part:

> The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said dockets (expressly including Dockets 80-A, 80-B and 80-C) have asserted or could have asserted against defendant in any of said cases, either before or after any consolidation, and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.

0408ADC0000448.

22. On July 20, 1964 the ICC entered final judgment in the Thompson and Risling Indians of California actions. 0408ADC0001697-98; App., Ex. 12. Judgment was entered in the

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[1/] See Complaint, ¶ 2, Docket No. 1 ("The Round Valley Indian Tribes, formerly known as the Covelo Indian Community, is a sovereign Indian tribe and is recognized as such by the United States.").

amount of $29,100,000, and the order further provided:

> [T]hat said determination or judgment be a single judgment in favor of all of the petitioners (as representatives of the tribes, bands or groups on whose behalf said petitioners were presented, as construed and defined by our order of March 3, 1964 in Dockets 31, 37 and 319) as a single class.

0408ADC0001698.

23. On October 14, 1964 $29,100,00 was appropriated from the Judgment Fund to satisfy the final judgment in Thompson and Risling. App, Ex. 13. That same day, $29,100,00 was transferred from the Judgment fund into appropriation 14x7426, the principal account created for the judgment award. App, Ex. 14. By warrant dated November 17, 1964, those judgment funds were "covered" into Treasury and became available funds. App, Ex. 15.

24 Since 1990, Congress has included, as a rider to the Department of the Interior's budget appropriation acts, language substantially similar to the following:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

P.L. 111-8 (2009); 123 Stat. 524, 712-13.[2/]

25 On December 27, 2006, Plaintiff filed its Complaint in this action. Complaint, Docket No. 1.

26. The Complaint seeks money damages for alleged breaches of trust duties "in

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[2/] The original version provided, *inter alia*, "Notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds." 104 Stat. 1915. The Act was modified, with minor changes, every year until the current language was adopted in 2003. 117 Stat. 11, 236.

regard to the management by Defendant of the trust funds of the Round Valley Tribe from 1855 to present." Complaint, ¶ 1.

IV. STANDARD OF REVIEW

The United States may move, at any time, for judgment on part of Plaintiff's claims in this case. See Rule 56(b) of the Rules of the United States Court of Federal Claims ("RCFC"). The Court may summarily adjudicate undisputed material facts, liability, and part of Plaintiff's claim, even if there remain other disputed issues for trial. RCFC 56(d).

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005). Only genuine disputes of material facts that might affect the outcome of the suit will preclude entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. . . . That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."). The existence of "some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. . . ." Id. Therefore, to avoid summary judgment, the non-moving party must put forth evidence sufficient for a reasonable fact-finder to return a verdict for that party. Id. at 248-50 (citations omitted).

The United States may meet its initial burden on a motion for partial summary judgment

with or without presenting evidence. RCFC 56(b). Once the United States makes its initial showing that it is entitled to judgment as a matter of law, the burden shifts to Plaintiff to present admissible evidence showing a genuine issue of material fact that could entitle it to judgment at trial. Novartis Corp. v. Ben Venue Labs., 271 F.3d 1043, 1046 (Fed. Cir. 2001).

Where a motion for summary judgment presents a pure issue of law, it is appropriate for the Court to adjudicate that issue. See AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. United States, 67 Fed.Cl. 657, 660 (2005) ("The court is left with a pure issue of law upon which summary judgment appropriately may be rendered."); Favell v. United States, 16 Cl.Ct. 700, 717 (1989) (contract interpretation was pure issue of law appropriate for summary judgment). Questions of law are particularly appropriate for summary judgment. Dana Corp. v. United States, 174 F.3d 1344, 1347 (Fed. Cir. 1999). Disputed issues of law are decided by the Court in the first instance and are reviewed *de novo*. Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1380 (Fed. Cir. 2000).

V. ARGUMENT

A. The Doctrine of *Res Judicata* or Claim Preclusion Bars Plaintiff's Claims (or Portions Thereof) That Pre-Date July 20, 1964.

Plaintiff previously sued the United States twice for historical breaches of trust. Undisputed Facts ("UF") 6, 12, 14. Plaintiff's members were compensated twice by the United States for historical breaches of trust. UF 7, 22. In the most recent action, Plaintiff was a member of a representative group that sued the United States under the ICCA, a statute that allowed Indians to present claims (irrespective of any statute of limitation) in law, equity, and/or "based upon fair and honorable dealings that are not recognized by any existing rule of law or

equity." UF 7, 22. On July 20, 1964, Plaintiff's ICCA claims were disposed of by final judgment, upon a stipulated settlement between the parties, for $29,100,000. UF 21, 22. The United States paid that judgment. UF 23. Under the doctrine of *res judicata* or claim preclusion, Plaintiff is now barred from re-litigating claims that were, or could have been, advanced in its ICCA action. Plaintiff should not get a third bite at the apple.

Under the doctrine of *res judicata* or claim preclusion, parties and their privies are barred from bringing a subsequent lawsuit based on claims that were or could have been litigated in a prior action that went to judgment. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Claim preclusion reaches not only those matters that were previously litigated and decided, it bars subsequent litigation on matters that were never litigated but could have been advanced in the earlier suit. Sharp Kabushiki Kaisha v. Thinksharp, Inc., 448 F.3d 1368, 1370 (Fed. Cir. 2006). For claim preclusion based on a judgment in which the claim was not previously litigated, there must be (1) an identity of parties or their privies, (2) a final judgment on the merits of the prior claim, and (3) the second claim must be based on the same transactional facts as the first and should have been litigated in the prior case. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n. 5 (1979). If these elements are met, claim preclusion applies, even if Plaintiff intends to present new evidence, new grounds, or new theories that were not presented in the prior actions. PCL Const. Servs., Inc v. United States, 84 Fed. Cl. 408, 422 (2008) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 25(1) (1982)).

The claims that Plaintiff asserts in this case were or could have been brought in the prior actions, *i.e.*, Indians of California by Webb, Thompson, or Risling. Plaintiff's instant claims are based on the same transactional facts as were at issue in the prior actions, which resulted in

judgments on the merits. Plaintiff was a party to those prior actions. Therefore, Plaintiff's claims (or the portions thereof) that pre-date the last judgment in the prior actions—July 20, 1964—are barred by the doctrine of *res judicata* or claim preclusion.

1. Plaintiff is in Privity with the Indians of California.

The defendant in the Indians of California by Webb, Thompson, and Risling actions was the United States of America. See Indians of California by Webb, 98 Ct. Cl. 583; 0408ADC0001807; 0408ADC0000774. The defendant here is the United States of America. Complaint, ¶ 3. There is an identity of party defendant between the prior actions and this action.

The Act of May 18, 1928 required that any claim under that Act be brought on Plaintiff's behalf by the Attorney General of California. Act of May 18, 1928, § 2 (claims may be brought "by the attorney general of the State of California acting for an on behalf of said Indians"), § 4 ("Said petition shall be signed and verified by the attorney general of the State of California."); 45 Stat. 602. Plaintiff and Plaintiff's members are "Indians of California," as defined in the Act of May 18, 1928. Id., § 1 ("[F]or the purposes of this Act the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."); UF 1, 2, 3. Plaintiff, therefore, was a represented party in Indians of California by Webb and is bound by the judgment in that action. See RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982) ("A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party."); Klamath Irr. Dist. v. United States, 75 Fed.Cl. 677, 687 (2007) (parties represented in prior action by association are bound by that prior judgment). There is an identity of parties between Indians of California by Webb and the instant action.

The ICCA permitted claims to be presented to the ICC on behalf of any "identifiable group of American Indians residing within the territorial limits of the United States or Alaska." ICCA, § 2; 60 Stat. 1049, 1050. Both Thompson and Risling were representative actions brought on behalf of the Indians of California. UF 13, 15. As defined in those petitions, "The Indians of California constitute an identifiable group of Indians composed of all Indians who were residing in the State of California on June 1, 1852 and their descendants now living." See 0408ADC0001809 (Amended Petition in Risling). Plaintiff and Plaintiff's members are Indians of California as defined in Thompson and Risling. UF 1, 2, 3.

In Thompson and Risling, the ICC clarified further the representative group of Indians that were represented by the plaintiffs in those actions. The ICC did so after individual California tribes began filing claims with the ICC that potentially overlapped with the claims advanced in Thompson and Risling. In its majority opinion of January 20, 1958, the ICC determined that the individual tribes who had sued the United States in their own capacity could maintain their own suits for damages based upon their own lands, but that the Thompson and Risling plaintiffs could "prosecute claims for all lands in California not covered in the tribal suits." 0408ADC0001239. Subsequently, on October 6, 1958, the ICC divided the claims of the Indians of California into two "areas," with "Area A" encompassing the lands of the individual tribes who had instituted their own ICCA actions, and "Area B" encompassing "all lands within the State of California, except those in Area A, and the determination of the rights of the Indians of California to lands in said State shall be confined to the lands in Area B, including the lands of the Yokish, Yana and Shasta tribes whose claims therefor were merged with the claims of the Indians of California by the Order of the 6th day of October, 1958." 0408ADC0001401-2.

The ICC again clarified whom the Thompson and Risling plaintiffs represented in its order of March 3, 1964. In that order, the ICC held:

> In this case that identifiable group represented by petitioners in Dockets 31 and 37 and entitled to the ultimate award envisioned by this Commission would be the Indians of California except those tribes, bands or identifiable groups which filed their own separate claims, as specifically defined in our decisions of January 20, 1958, and October 6, 1958.

0408ADC0001716.

Plaintiff and Plaintiff's members were represented parties in the Thompson and Risling actions. Plaintiff was an Indian of California that did not file its own independent ICC action. Therefore, Plaintiff was in privity with the Thompson and Risling plaintiffs and is bound by the judgment in those actions. There is an identity of parties between the Thompson and Risling actions and this action.

The mere fact that Plaintiff did not chose to participate directly in the Thompson or Risling actions, or file its own, independent, complaint before the ICC, as other Indian tribes in California had done, does not negate the fact that Plaintiff was a represented party in the Thompson and Risling actions. "An Indian claim under the [ICCA] is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward." Western Shoshone Legal Defense and Ed. Ass'n v. United States, 531 F.2d 495, 504 (Ct. Cl. 1976). This Court has previously held that a member of an ICCA identifiable group is bound by ICCA litigation prosecuted by a representative of the identifiable group. Stark v. United States, 2005 WL 697315, *8 (Fed. Cl. 2005) (Braden, J.) ("Plaintiff is identified as a member of the Native Western Shoshone Ely Colony Tribe and provided documentation that he is a member of such tribe. Plaintiff's claims relating to the Ruby

Valley Treaty, however, previously were litigated, and therefore are barred by the doctrine of *res judicata*."). The same conclusion is warranted here. As members of the representative group that litigated Thompson and Risling to judgment, Plaintiff is bound by the judgment entered in Thompson and Risling and there is an identity of parties or their privies.

2. The Indians of California Actions Resulted in Final Judgments on the Merits.

Indians of California by Webb was disposed of by final judgment on the merits. UF 7, 8. Thompson and Risling were disposed of by final judgment on the merits. UF 21, 22. It is of no moment that the prior actions were resolved by stipulated judgments agreed to by the parties. "For res judicata purposes, an agreed or stipulated judgment is a judgment on the merits." Baker v. Internal Revenue Service, 74 F.3d 906, 910 (9th Cir. 1996); see also United States v. International Bldg. Co., 345 U.S. 502, 505-06 (1953). "For claim preclusion purposes, consent judgments are considered to have the same force and effect as judgments entered after a trial on the merits." Hallco Mfg. Co., Inc. v. Foster, 256 F.3d 1290, 1294-95 (Fed. Cir. 2001) (citation omitted).

Based upon the judgments in the prior actions, the United States paid $5,024,842.34 and $29,100,000 to the Indians of California. UF 8, 23. The United States has fully discharged the terms of those judgments by transferring the requisite sums of money into trust for Plaintiff's benefit. Id.

3. The Claims (Or Portions Thereof) Asserted by Plaintiff in this Action Are Based on the Same Transactional Facts as the Ones in the Prior Indians of California Actions and Therefore Were, or Should or Could Have Been, Litigated in the Indians of California Actions.

When determining what claims are barred by a final judgment on the merits, the United

States Court of Appeals for the Federal Circuit follows the rule delineated by the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), which holds that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Vitaline Corp. v. General Mills, Inc., 891 F.2d 273, 275 (Fed. Cir. 1989). Under the doctrines of merger and bar a plaintiff is barred from litigating a "subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief." Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983). It is not necessary that the identical claim or cause of action had been plead in the prior action, inasmuch as the doctrine of *res judicata* or claim preclusion also extends to bar subsequent litigation of claims that should or could have been raised in the prior action. Federated Dep't Stores, Inc., 452 U.S. at 398.

As described below, the claims (or portions thereof) asserted by Plaintiff in this action are based on the same transactional facts as the ones in the previous Indians of California actions and therefore were, or should or could have been, litigated in those prior actions.

The Thompson and Risling plaintiffs asserted jurisdiction before the ICC under the ICCA. See, e.g., Thompson Amended Petition, ¶ V; 0408ADC0000776. The ICCA was a broad jurisdictional grant to the ICC. It allowed claims based upon:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or

> otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

ICCA, § 2. At the time that the Thompson and Risling actions were prosecuted, the rules of the ICC, much like the modern RCFC, required claimants to liberally set forth all of their claims (even if presented in the alternative) in their petition:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts of defenses. . . . A party may also state as many separate claims or defenses as he has, regardless of the consistency and regardless of the nature of the grounds on which they are based.

25 C.F.R. § 503.7 (1949).

In the Thompson and Risling petitions before the ICC, the Indians of California set forth broad allegations of breach of trust against the United States:

> From July 4, 1848, when the United States assumed dominion over the lands in California, Defendant has been guardian and trustee of the property and affairs of the Indians of California and as such is subject to the same principles of law and equity as would apply to an ordinary fiduciary; and under the express provisions of Section 2 of the Indian Claims Commission Act, *supra*, is subject to the principle of fair and honorable dealings with the Indians of California in connection with the claims herein described.

Risling Amended Petition, ¶ XV; 408ADC0001814.

Although written almost 50 years earlier, the foregoing Risling allegation is similar in substance to one of Plaintiff's allegation in the Complaint in this action:

> Because the United States holds tribal land in trust, it has assumed the obligations of a trustee. *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). As trustee, the United States has a fiduciary relationship and obligations of the highest responsibility and trust to administer the trust with the greatest skill and care possessed by the trustee. The United States has a fiduciary duty to the Tribe to meet "the most exacting fiduciary

> standards" in managing the Tribe's land and mineral estate and trust funds. *Navajo Tribe of Indians v. United States*, 176 Ct. Cl. 502, 507 (1966).

Complaint, ¶ 14.

In the Thompson and Risling ICCA actions, the Indians of California requested:

> [T]hat Defendant be adjudged liable to the Indians of California for such taking and appropriation in such amount as upon a complete and accurate accounting this Commission may find due and owing to the Indians of California as just and proper compensation, less any proper offsets, and for such other relief as to the Commission may seem proper.

Risling, Prayer (emphasis added); 0408ADC0001814.

Again, this is substantively identical to the relief requested by Plaintiff here:

> WHEREFORE, Plaintiff Round Valley Indian Tribes prays for a judgment in its favor and against Defendant as follows:
>
> 1. An Order directing Defendant to prepare a full and complete accounting, reconciliation, and certification of the Tribe's trust funds;
>
> 2. Monetary damages in Plaintiff's favor and against Defendant in an amount to be determined at trial based upon a full and complete accounting of the Tribe's trust funds.
>
> * * * *
>
> 5. For such other relief as the Court deems equitable and just.

Complaint, Prayer for Relief.

The Thompson and Risling actions did, or could have or should have, sought an accounting, damages for trust fund mismanagement, and damages for non-monetary trust asset mismanagement. Those are the same claims advanced by Plaintiff in its instant Complaint. The Thompson and Risling actions were based upon the United States' fiduciary obligations as trustee to Indian tribes. Risling Amended Petition, ¶ XV. The Complaint in this case is based upon the United States' fiduciary obligations as trustee to Indian tribes. Complaint, ¶¶ 3, 13, 14, 15, 16. Plaintiff's accounting, trust fund mismanagement, and non-monetary trust asset mismanagement

claims that pre-date July 20, 1964, were, or could have or should have been, brought in the Thompson and Risling ICCA actions and are based on the same transactional facts as are at issue here.

Although the jurisdiction conferred on the Court of Claims under the Act of May 18, 1928 was more proscribed than the broad grant of jurisdiction under the ICCA, Indians of California by Webb also involved claims that Plaintiff seeks to re-litigate in the instant action. The Act of May 18, 1928 granted jurisdiction to the Court of Claims to compensate the Indians of California for all equitable claims that may have arisen against the United States by reason of lands taken from the Indians of California in the State of California. Act of May 18, 1928, § 2. The Complaint herein appears to seek compensation for the equitable "taking" of Plaintiff's trust corpus, including its lands. See Complaint, ¶¶ 8 ("The Reservation has been enlarged, and otherwise affected by various laws and Executive Secretarial Orders, including those described in Paragraph 4.1 herein."), 15 ("The trust obligations of the United States include, among other duties, the duty to ensure that tribal trust property [is]. . . . preserved. . . ."); 17 (discussing "other conveyances of interests in trust lands of the Tribe"), 18 ("mismanagement of the land").

For the reasons discussed above, all of Plaintiff's instant claims were, or could or should have been, brought in the Thompson and Risling actions. Alternatively and concurrently, to the extent that Plaintiff seeks compensation for aboriginal land or trust property acquired by the United States without just compensation, those claims were, or could or should have been, brought in Indians of California by Webb and are based on the same transactional facts at issue in Indians of California by Webb.

4. All of the Elements of *Res Judicata* or Claim Preclusion Are Present Here, and the United States Is Entitled to Judgment as a Matter of Law on Plaintiff's Claims (or Portions Thereof) That Pre-date July 20, 1964.

The Indians of California have twice sued the United States for money damages. Plaintiff is in privity with the Indians of California because the prior Indians of California actions were prosecuted on behalf of an identifiable group, of which Plaintiff is a member. Both the Indians of California actions under the ICCA and the action under the Act of May 18, 1928 proceeded to final judgment on the merits. The United States paid those judgments. Some of Plaintiff's current claims for an accounting, trust fund mismanagement, and non-monetary trust asset mismanagement some of them were specifically advanced by the ICCA Indians of California plaintiffs. All of Plaintiff's current claims for an accounting, trust fund mismanagement, and non-monetary trust asset mismanagement could or should have been brought under the ICCA. To the extent that Plaintiff advances any claims arising out of the United States' alleged taking of Plaintiff's trust lands or property, those claims were previously litigated in the Act of May 18, 1928 Indians of California action. All of the elements of *res judicata* have been established. Parklane Hosiery Co., 439 U.S. at 327 n. 5. Therefore, the United States is entitled to judgment in its favor, as a matter of law, as to all of Plaintiff's claims (or portions thereof) that pre-date July 20, 1964.

B. The Doctrines of Waiver and Release Bar Plaintiff's Claims (or the Portions Thereof) That Pre-date July 20, 1964.

In addition to being barred by the doctrine of *res judicata*, the claims (or portions thereof) asserted by Plaintiff in this case that pre-date July 20, 1964 are barred by the stipulations for judgment in Indians of California by Webb, Thompson, and Risling. Plaintiff released and waived

all trust accounting, trust fund mismanagement, and non-monetary trust asset mismanagement claims that it had, has, or might have had in this case that pre-date July 20, 1964, when it entered into the stipulations and judgments entered in those prior actions. Under those stipulated judgments, those claims have been resolved, and the United States has been released of any liability for those claims. It would be improper to allow Plaintiff to re-litigate those claims in this case and obtain further recovery.

Releases are interpreted according to federal law. Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986). If the language of the release clearly bars the asserted claim, the plain language governs. King v. Department of the Navy, 130 F.3d 1031, 1033 (Fed. Cir. 1997). Waiver is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It is axiomatic that binding settlement agreements, stipulations, and stipulated judgments, are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. Peckham v. United States, 61 Fed.Cl. 102, 109 (2004).

The stipulation for entry of final judgment in Indians of California by Webb plainly and unambiguously released and waived all claims that were, or could have been, asserted under the Act of May 18, 1928:

> [S]aid judgment when entered shall be in full and complete settlement, satisfaction, and discharge of any and all claims and demands of every kind and character whatsoever which the plaintiff Indians, or any of them, may have against the United States under and by virtue of the Act of May 18, 1928, 45 Stat. 602.

UF. 7.

Judgment was entered in Indians of California by Webb pursuant to the terms of the

stipulation for entry of final judgment, and the United States paid the judgment amount. UF 8. The plain language of the Indians of California by Webb stipulation released and waived all claims that were, or could have been brought, under the Act of May 18, 1928, even if those claims were not actually set forth in the Attorney General of the State of California's verified petition or prosecuted in the action. Therefore, the plain language of the stipulation for entry of final judgment in Indians of California by Webb releases and discharges the United States from any liability in this action for: equitable or legal compensation for the taking, acquisition, appropriation, or mismanagement of Plaintiff's aboriginal lands. See Act of May 18, 1928, § 2.

The joint stipulation for entry of final judgment in Thompson and Risling clearly and unequivocally released and waived all claims that were, or could have been, asserted by Plaintiff against the United States under the ICCA:

> The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said dockets (expressly including Dockets 80-A, 80-B and 80-C) have asserted or could have asserted against defendant in any of said cases, either before or after any consolidation, and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.

UF 21 (emphasis added).

The final judgment in Thompson and Risling explicitly incorporated the waiver and release provision set forth in the joint stipulation for entry of final judgment into the final judgment. 0408ADC0001697 ("Upon motion for judgment filed pursuant to a stipulation of compromise settlement, filed herein and incorporated by reference in this determination or judgment. . . .") (emphasis added). The United States paid that judgment. UF 23. Therefore, the plain language of the joint stipulation for entry of final judgment in Thompson and Risling releases and

discharges the United States for any liability in this action for: a legal or equitable full and complete historical accounting of Plaintiff's trust funds or non-monetary trust assets (see, e.g., 0408ADC0000801, UF 12, 14, 15, 16); all claims at law, in equity, or based upon "fair and honorable dealings" for alleged mismanagement of Plaintiff's trust funds (see ICCA, § 2); and all claims at law, in equity, or based on "fair and honorable dealings" for alleged mismanagement of Plaintiff's non-monetary trust assets (id.).

The claims asserted by Plaintiff in this case for a trust accounting, for alleged trust fund mismanagement, and for alleged non-monetary trust asset mismanagement, that pre-date July 20, 1964 have been waived and released by the stipulations and judgments in the prior Indians of California actions. The stipulations and judgments entered in Indians of California, Thompson, and Risling, broadly released the United States by the plain language of the agreements. Had the parties intended to preserve claims, or leave open the possibility that Plaintiff could re-litigate certain claims in future actions, such an agreement would have to be clear, explicit, and "manifest." United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U.S. 118, 128 (1907); see also Merritt-Chapman & Scott Corp. v. United States, 458 F.2d 42, 45 (Ct. Cl. 1972) (approving contract appeals board's statement that "[o]n a settlement of such broad scope as that contemplated by the contracting parties in this case, any reservation of particular items for future claim and payment should be clear and explicit. . . ."). None of Plaintiff's claims in the instant action that pre-date July 20, 1964, was so reserved by the prior stipulations and judgments. Therefore those claims are barred by the doctrines of waiver and release from being re-litigated here by Plaintiff.

C. Alternatively, Section 12 of the ICCA Bars Plaintiff's Claims (or Portions Thereof) That Pre-date August 14, 1946.

Even absent the *res judicata* or claim preclusion effect of Plaintiff's prior judgments, this Court lacks subject matter jurisdiction over any of Plaintiff's claims that existed on or before August 13, 1946. Congress barred claims against the United States that pre-date August 13, 1946, and that were not filed before the ICC by August 13, 1951. The ICCA states, in no uncertain terms:

> The Commission shall receive claims for a period of five years after the date of approval of this Act [August 13, 1946] and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

ICCA, § 12; see also Sioux Tribe v. United States, 500 F.2d 458, 489 (Ct. Cl. 1974) ("The Act provides in no uncertain terms that any claim existing prior to August 13, 1946, must be filed within five years (i.e., before August 13, 1951), and if it is not filed within that period, it cannot thereafter be submitted to any court . . . for consideration. There is no doubt about the fact that Congress intended to cut off all claims not filed before August 13, 1951.").

Through the ICCA, Congress intended to vest the ICC with time-limited, exclusive jurisdiction to hear Indian tribes' and identifiable groups' pre-1946 claims against the United States. "The 'chief purpose of the [Act was] to dispose of the Indian claims problem with finality.'" United States v. Dann, 470 U.S. 39, 45-46 (1985) (quoting 92 Cong. Rec. 5312 (1946) and H. R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945)). Moreover, Congress intended "'the jurisdiction of the Commission ought to be broad enough so that no Tribe could come back to Congress ten years from now and say that it had a meritorious claim.'" Navajo Tribe of Indians v.

New Mexico, 809 F.2d 1455, 1465 (10th Cir. 1987) (quoting 92 Cong. Rec. 5312 (1946)). These Congressional goals, as well as the plain wording of Section 12 of the ICCA, firmly establish that the ICC was the only tribunal with authority to adjudicate pre-1946 Indian tribal, and identifiable group, claims against the United States. Plaintiff did, could have, and should have, brought any pre-1946 claims before the ICC. Under the plain and explicit provisions of the ICCA, all of Plaintiff's claims, whether presented to the ICC or not, that pre-date August 14, 1946 are now barred. ICCA, § 12.

To ensure that it would leave no tribal or identifiable group claims against the United States outstanding, Congress vested the ICC with jurisdiction of unprecedented breadth to hear and determine all tribal and Indian identifiable group claims against the United States that existed as of August 13, 1946, including legal, equitable, and even moral claims or claims not otherwise congnizable in federal courts. The ICCA provided the ICC with jurisdiction over the following:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by an existing rule of law or equity.

ICCA § 2. This exceptionally broad jurisdictional grant encompassed the pre-1946 tribal accounting and trust mismanagement claims that Plaintiff seeks to assert in this action. See UF 26.

Congress vested the ICC with that novel and uniquely broad jurisdiction because it intended the ICC to serve as the comprehensive forum for resolving all possible tribal claims existing before 1946. "It is well established that the Indian Claims Commission Act bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before 1946 and were not brought by August 13, 1951." Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States Army Corps of Eng'rs, 570 F.3d 327, 331-2 (D.C. Cir. 2009); see also Navajo Tribe, 809 F.2d at 1469-71 (10th Cir. 1987) (ICCA "provided the . . . opportunity to litigate the validity of [Indian] titles and to be recompensed for Government actions inconsistent with those titles. The Tribe was unambiguously given a five-year period to assert its title to these lands 'or forever hold [its] peace.'") (quoting 92 Cong. Rec. 5313 (1946)); Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States, 650 F.2d 140, 142 (8th Cir. 1981) (The ICCA's "statutory language reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.").

The ICCA's exclusive jurisdictional grant and the associated time-based jurisdictional bar extended to and encompasses Plaintiff's trust accounting and trust mismanagement claims, among other claims. Therefore, under the plain language of the ICCA, Plaintiff's pre-August 13, 1946 claims (or portions thereof) were extinguished in 1951. ICCA, § 12.

D. The Appropriations Acts Do Not Revive or Resurrect Plaintiff's Claims (or Portions Thereof) that Pre-Date August 13, 1946.

The various appropriations acts riders which have been attached to the Department of the Interior's budget since 1990 (see UF 23) do not reopen Plaintiff's extinguished claims. The

appropriations act riders provide, in relevant part:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Id.

The appropriations act riders do not reopen the ICCA's time for bringing claims because the ICCA is a statute of repose, not a statute of limitations. The appropriations act riders most clearly, directly, and appropriately apply to the statue of limitations found in 28 U.S.C. §§ 2401 and 2501. The appropriations act riders do not apply, however, to claims barred by the ICCA such as the trust accounting and trust mismanagement claims (or portions thereof) pre-dating August 13, 1946 asserted by Plaintiff herein.

"[T]he differences between statutes of limitations and statutes of repose are substantive, not merely semantic." Burlington N. & Santa Fe Ry. Co., Inc. v. Poole Chem. Co., 419 F.3d 355, 362 (5th Cir. 2005). A statute of repose sets fort a time for filing claims that is independent of the time that the wrong has been or should have been discovered. See Prince Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1218 (10th Cir. 1991) ("statute of repose typically bars the right to bring an action after the lapse of a specified period"). The ICCA is a statute of repose because the time for filing claims against the United States was independent of the date those claims accrued. Sioux Tribe, 500 F.2d at 489 ("The Act provides in no uncertain terms that any claim existing prior to August 13, 1946, must be filed within five years (i.e., before August 13, 1951), and if it is not filed within that period, it cannot thereafter be submitted to any court . . .

for consideration."). Substantively, a "statute of repose . . . is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace." Underwood Cotton Co., Inc. v. Hyundai Merch. Marine (Am.), Inc., 288 F.3d 405, 408-09 (9th Cir. 2002)

Instead of voiding the ICCA's jurisdictional bar, Congress explicitly limited the scope of the appropriations act riders by providing that "statute of limitations shall not commence to run on any claim. . . ." UF 24. Congress clearly referred to the term of art "statute of limitations," and not to a "statute of repose," so this Court must defer to Congress' clear choice. See Abuelhawa v. United States, ___ U.S. ___, 129 S.Ct. 2012, 2016 (2009) ("we presume legislatures act with case law in mind" and that Congress "was familiar with the traditional judicial limitation on applying [terms of art]"). Congress did not intend the provisions of the appropriations act riders on statutes of limitation to apply to the ICCA's statute of repose.

Congress knew how to draft the appropriations act riders to apply to the ICCA's statute of repose had it so intended because Congress has done so in other circumstances. The Act of September 18, 1996 conferred jurisdiction upon the United States Court of Federal Claims to hear, determine, and render judgment on land claims by the Pueblo of Isleta Indian Tribe of New Mexico against the United States. 110 Stat. 2418. In that jurisdictional act, Congress explicitly provided that jurisdiction would lie "[n]otwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946 (60 Stat. 1052) (the ICCA), or any other law which would interpose or support a defense of untimeliness." Id. The appropriations act riders, conversely, are silent as to the ICCA's statute of repose.

It would be improper for this Court to repeal the ICCA by implication through the appropriations act riders. Repeals by implication are disfavored, particularly, as here, "when the

provision advanced as the repealing measure was enacted in an appropriations bill." United States v. Will, 449 U.S. 200, 221-22 (1980). This "doctrine disfavoring repeals by implication. . . . applies with even greater force when the claimed repeal rests solely on an Appropriations Act." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (emphasis omitted). The appropriations act riders did not explicitly address, much less explicitly repeal, the ICCA's jurisdictional bar. Courts should not interpret those appropriations act riders to repeal by implication and act that has governed pre-August 13, 1946 tribal and identifiable group claims for over half a century.

The United States Court of Appeals for the Federal Circuit's opinion in Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339 (Fed. Cir. 2004), does not bear on the foregoing analysis because the Federal Circuit did not address claims that had been extinguished by the ICCA. In Shoshone, the Federal Circuit held that the appropriations act riders delay accrual of Indian tribes' claims for: mismanagement of trust funds; failure or delay in collecting payments from natural resource leases or contracts; failure or delay in depositing monies collected from natural resource leasing or contracting into the tribe's interest bearing trust accounts; and/or failure or delay in assessing penalties for late payment on natural resource leases or contracts. Id. at 1350. But not at issue in Shoshone were claims that had been extinguished by the ICCA:

> On October 10, 1979, the Tribes brought suit in the United States Court of Claims, alleging that the Government breached fiduciary and statutory duties owed to the Tribes from August 14, 1946 onward by mismanaging the reservation's natural resources and the income derived from such resources. The date of August 14, 1946 chosen by the Tribes coincides with the passage of the ICC Act. The ICC Act provided a five-year window of time during which tribes could submit to the Indian Claims Commission all of their claims against the Government that accrued

> before August 13, 1946. Courts have therefore held that claims "accruing before August 13, 1946" that were not filed with the Commission by August 13, 1951 cannot be submitted to any court, administrative agency, or the Congress.

Id. at 1343. The Federal Circuit acknowledged in Shoshone the fact that the ICCA forever extinguished claims that pre-date the ICCA.

To the extent that that Plaintiff had claims against the United States for a trust accounting or for trust mismanagement prior to August 13, 1946, Plaintiff had a limited time to bring such legal, equitable, or moral claims. Moreover, given the ICCA's express intent to direct all pre-1946 claims against the United States exclusively to the ICC for disposition, this Court now lacks jurisdiction over any such claims. The ICCA's jurisdictional bar applied to, and requires the dismissal of, any trust accounting or trust mismanagement claims (or portions thereof) that existed as of August 13, 1946. Put another way, Plaintiff cannot identify or assert any applicable waiver of the United States' sovereign immunity for those claims and the United States is entitled to judgment as a matter of law on those claims (or portions thereof).

VI. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court enter judgment in its favor on all claims (or portions thereof) advanced by Plaintiff that pre-date July 20, 1964, under the doctrines of *res judicaia* or claim preclusion, waiver, and release. Alternatively and concurrently, the United States respectfully requests that this Court enter judgment in its favor on all claims (or portions thereof) advanced by Plaintiff that pre-date August 14, 1946 as barred by the ICCA.

Respectfully submitted this 3rd day of September, 2010.

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