Case No. 2011-3113

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HARVEST INSTITUTE FREEDMAN FEDERATION, LLC, *ET AL.*

Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA, *ET AL.*

Defendants- Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:10-CV-01131

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS HARVEST INSTITUTE FREEDMAN FEDERATION, LLC, ET AL.

Percy Squire, Esq. (0022010)
Percy Squire Co., LLC
514 S. High Street
Columbus, OH 43215
614-224-6528 Telephone
614-224-6529 Facsimile
psquire@sp-lawfirm.com
Attorney for Plaintiffs-Appellants

2011-3113

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARVEST INSTITUTE FREEDMAN FEDERATION, *ET AL.*
Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA, *ET AL.*
Defendants- Appellees.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1, Appellants make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

s/Percy Squire _____ April 18, 2011
Percy Squire
Counsel for Appellants

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

In accordance with the provisions of Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Appellants respectfully request oral argument. This appeal presents for review important questions involving the Article III jurisdiction of a federal court to hear a challenge to a federal statute that, violates the United States Constitution. Appellants allege, *inter alia,* that Title I of the "Claims Resolution Act of 2010", HR 4783 perpetuates the effects of past racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. This constitutional challenge presents a legal question that is cognizable in federal court.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this honorable court deems relevant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

On December 16, 2010, Plaintiffs-Appellants Harvest Institute Freedman Federation, LLC and Leatrice Tanner-Brown ("Appellants") filed Individually and as Representatives of a Putative Appellants' Class, a complaint against the United States and the Secretary of the Department of the Interior, challenging the constitutionality of Title I of H.R. 4783, the "Claims Resolution Act of 2010"(hereinafter "The Act"). The jurisdiction of the United States district court was predicated on 28 U.S.C. §1331, 1343(a)(3), 1346(a)(2), 2201 and 2202. (R-2., Complaint)

On December 22, 2010, the Attorney General filed a motion to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Appellants do not have standing and that the United States has not waived sovereign immunity (R-9, Motion to Dismiss)

On January 31, 2011, the district court granted the motion on standing grounds, dismissing the complaint for lack of jurisdiction. (R-17, Order). The district court did not address the sovereign immunity issue.

On January 31, 2011, Appellants filed a timely notice of appeal. (R-19, Notice of Appeal). This appeal is from a final order and judgment that disposes of all parties claims. This court has jurisdiction under 28 U.S.C. §1291.

PRELIMINARY STATEMENT

This is an appeal from an order dismissing Appellants' action for a declaration of unconstitutionality and an injunction against implementation of federal legislation that is racially biased and threatens to cause immediate, grave and irreparable harm to Appellants and members of their putative class. Title I of HR 4783, the "Claims Resolution Act of 2010" (hereinafter "The Act") was signed into law by the President of the United States on December 8, 2010. The Act should be enjoined for the reason, Title I, of HR 4783 which expands the jurisdiction of the United States District Court for the District of Columbia and authorizes the expenditure of $3.4 Billion dollars to fund a settlement in Eloise Pepion Cobell, et al. v. Ken Salazar, Case No. 1:96-cv-01285 (D.D.C), is racially discriminatory and causes present injury to Appellants by perpetuating past unlawful racial discrimination. By reason of the perpetuation of past racial discrimination against Appellants, HR 4783 is violative of the Fourteenth Amendment to the United States Constitution. Past racial discrimination was visited upon Appellants' ancestors by reason of purposeful violation by the Department of Interior and its agents of treaties, which conferred equal civic status upon Freedmen[1], slaves of the Five Civilized Tribes, as upon tribal members. The full nature and character of this purposeful discrimination is detailed below. The

[1] See, Exhibit A for definitions of Freedmen from various Administrations.

treaties that were violated were entered into between the United States and "Five Civilized Indian Tribes" at the close of the Civil War in 1866. An example of the treaties is at Exhibit B. A copy of the discriminatory portion of HR 4783 known as the "Individual Indian Money Account Litigation Settlement." is attached at Exhibit C. This Act perpetuates past discrimination by excluding Appellants from the benefits of HR 4783 based upon discriminatory criteria and practices developed over a century ago by the Department of Interior in connection with implementation of the 1866 Treaties, the Curtis Act of 1898 and the Act of May 27, 1908, criteria which the United States is utilizing today in its application and interpretation of HR 4783. In other words the prerequisites for Cobell class membership relied upon by the Act are predicated on strategies developed and grounded in unlawful race-based policies devised over a century ago by the Department of Interior to facilitate the alienation of allotments from Freedmen. The Act carries these unlawful policies forward. These practices must be enjoined for the reason:

> If it is constitutionally impermissible to base a present official action on a discriminatory official decision that occurred a day before, only a "peculiar necromancy" could lead to the conclusion that it is somehow permissible to ground the later action on a discriminatory governmental decision that occurred a decade or a century earlier. Indeed, the history and purpose of the fourteenth amendment support and conclusion that reliance on decisions made in the distant past, when discrimination was more widespread and virulent, should be scrutinized even more closely than conduct cased on more recent events. When official conduct is shaped by a constitutionally

> forbidden purpose, it is irrelevant whether the person whose decision embodied that purpose is present to witness its final implementation or lies in some long-forgotten grave.

See, "Perpetuation of Past Discrimination," by Eric Schnapper, 96 Harv. L. Rev. 842, citing Guinn v. U.S. 238 U.S. 347 (1915). A copy of the Cobell settlement agreement is at Exhibit D.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Appellants have standing to challenge Title I of HR 4783.

II. Whether the United States is presently discriminating against Appellants on the basis of race.

III. Whether Title I to HR 4783 perpetuates past unlawful racial discrimination.

STATEMENT OF THE CASE

On December 16, 2010, Appellants filed a Complaint for immediate injunctive and declaratory relief against implementation of Title I of HR 4783, "The Claims Resolution Act of 2010," which expanded the jurisdiction of the United States district court for the District of Columbia by authorizing it to approve a monetary settlement for trust mismanagement and breach of trust claims against the United States as Trustee brought by Native American trust beneficiaries who are owners of Individual Indian Money accounts (hereinafter, "IIM") held in trust by the United States.

The specific settlement authorized by the Act arose from District of Columbia Case No. 96-1285, Cobell v. Salazar. The Cobell action:

> Involves the federal government's handling of the Individual Indian Money (IIM) trust. The IIM trust has much in common with a standard common-law trust. Like other trusts, the IIM trust was created by the settlor with the intent to hold income generated by the trust corpus, in this case individual Native American land allotments, in trust for the benefit of its beneficiaries, who are all Native American individuals. In general terms, the trust income is generated from the mineral, agricultural, and timber leases of these land allotments. Federal law allows these monies to be deposited with the Department of the Treasury and requires these funds to be properly invested, at the discretion of the Secretary of the Interior. See, 25 U.S.C. §161; 25 U.S.C. §161a(b); 25 U.S.C. §162a.
>
> The IIM trust also has several features that distinguish it from a standard common-law trust. First, the federal government acts as settlor and trustee of the trust. In 1887, Congress statutorily authorized the holding of Native American allotments in trust. See,

> General Allotment Act §5, 25 U.S.C. §331, *et seq*. As described more fully below, this act marked the beginning of the government's pervasive federal control over Native American allotments and, more importantly for the purposes of this case, the funds that these allotments generated. Second, the creation of this trust and the inclusion of the trust corpus into the trust appear to have rested more upon the plenary power of the sovereign than the will of the beneficiaries, as can be seen from the unique history surrounding the establishment of the IIM trust relationship between Native Americans and the government...
>
> In short, and most importantly for the purposes of this case, the federal government kept legal title of these individual allotments, in trust, for the benefit of the equitable owners who are the Appellants in this case. This period of limited trusteeship by the government was originally set for 25 years in the General Allotment Act. See, 25 U.S.C. §348. The period was later extended indefinitely by the Indian Reorganization Act of 1934, 25 U.S.C. §462. Although the government in the past four decades has moved toward a policy of self-determination, see, 25 U.S.C. §450 *et seq.*, which is premised on the idea that Native American tribes are the basic governmental units of Native American policy, the IIM trust system of individual land allotments and proceeds therefrom still remains an area of pervasive and complete federal control.

Cobell, (emphasis added).

Appellants are the descendants of persons held in bondage by ancestors of the so-called Five Civilized Indian Tribes, the Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes, all of whom have members who received allotments and have funds held in trust by the United States. Under terms of post-antebellum treaties between the Five Civilized Tribes and the United States, and

subsequent legislation, most notably the Curtis Act of 1898[2], members of the Five Civilized Tribes and persons formerly held in bondage by these Tribes or living among them (Freedmen), received allotments of, forty, sixty, eighty or one hundred sixty acre tracts of land.

By reason of the pervasive nature of the federal government's control over this land, even subsequent to allotment, a fiduciary relationship arose between the allottees and the United States, including the Freedmen by reason of equal status in relation to the United States, being conferred upon the Freedmen by the 1866 Treaties. This fiduciary relationship was explicitly recognized by the United States Supreme Court in Cherokee Nation v. Journey Cake, 155 U.S. 196 (1894) and also in United States v. Mitchell, 463 U.S. 206 (1983) ("Mitchell II"), where the Court stated:

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such moneys or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statutes (or other

[2] The Curtis Act of 1898 was an amendment to the United States Dawes Act that brought about the allotment process of lands of the Five Civilized Tribes of Indian Territory; the Choctaw, Chickasaw, Muscogee, Cherokee, and Seminole. These tribes had been previously exempt from the 1887 General Allotment Act, also known as the Dawes Act (also known as the Dawes Severalty Act, named for its sponsor and author Senator Henry Laurens Dawes). By effectively abolishing tribal courts and tribal governments in the Indian Territory of Oklahoma, the act enabled Oklahoma to attain statehood, which followed some years later.

> fundamental document) about a trust fund, or a trust or fiduciary connection.
>
> Id. At 225 (second alteration in original) (citation omitted). Based upon these findings, the court held that the fiduciary duties arising out the timber-trust were established, thereby providing the allottee-beneficiaries a cause of action and a remedy against the government. Id. At 224-28.

In Cobell, it was determined "the same statutorily based relationship of comprehensive control exists as to the IIM trust involved in this case." Cobell v. Babbitt, 91 F. Supp. 2d 1, 7 (D.D.C. 1999). Cobell also states:

> In summary, the fiduciary relationship that serves as the basis of Appellants' breach of trust claim is grounded in and defined by statute and has arisen from the pervasive, complete federal governmental control of Appellants' IIM funds. As with any trust, the beneficiaries are entitled to an accounting. In the context of the IIM trust, because it is a statutory trust, this duty has been established by Congress. As discussed more fully below, incident to the trust relationship and their right to an accounting, Appellants are entitled to seek injunctive and declaratory relief to secure the rights given to them by Congress, viewed in light of the area of law in which Congress was legislating-common law of trust...
>
> The logic of Mitchell II shows that the common law remedies typically available in breach of trust cases are available to Appellants. Although in Mitchell II Appellants sought an entirely different remedy, money damages, the basic principles announced in that decision control this case. After finding the existence of a trust, the Supreme Court stated that the statutes and regulations before it could be "clearly interpreted" as providing a damages remedy. Mitchell II, 463 U.S. at 226. More specifically, the Court held that:
>
> > [g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See, *Restatement (Second) of the Law of Trusts*, §205-212(1959); G. Bogert, *The*

> *Law of Trusts & Trustees* §862 (2d ed. 1965); 3 A. Scott, *The Law of Trusts* §205 (3d ed. 1967). Id.
>
> Simply put, it is just as clear that a beneficiary of a trust may turn to injunctive and declaratory remedies, as opposed to money damages, to have the trustee compelled to carry out its trust duties. [12] Section 199 of the *Restatement (Second) of Trusts* summarizes the common law as providing for at least five equitable remedies, which include a declaratory action to establish the duties of the trustee, an injunctive action for specific performance to compel compliance with trust duties:
>
> > The beneficiary of a trust can maintain a suit
> >
> > (a) to compel the trustee to perform his duties as trustee;
> >
> > (b) to enjoin the trustee from committing a breach of trust;
> >
> > (c) to compel the trustee to redress a breach of trust;
> >
> > (d) to appoint a receiver to take possession of the trust property and administer the trust; and
> >
> > (e) to remove the trustee.
>
> It may well be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States.

Id.

Appellants' challenge to the Act is grounded in the fact, as will be discussed in greater detail below, that in certain instances when their ancestors received allotments, under the Treaties and the Curtis Act, the United States took control of royalties from these allotments and either failed to establish IIM's or mismanaged these royalties. Under the relevant Treaties and federal statutes, the Freedmen are

entitled to equal civic status as Native American members of the Five Civilized Tribes. Accordingly, the United States owed trust obligations to Freedmen who for statutorily enumerated reasons had restrictions imposed on royalties derived from their allotments, to the same extent, if not more, than the trust obligations are owed to full blooded Native Americans[3].

The district court, from which this appeal arises, took judicial notice of the January 14, 2011 Opinion, District Court of Cherokee Nation Nash v. Cherokee Nation Registrar, Case No. Cv-07-40, (Cherokee District Court, January 14, 2011). which explained the equal civic status of Cherokee Freedmen under the post Civil War treaties as follows: "Article IX of the treaty addressed the status of freed slaves ("Freedmen")", within the Cherokee nation and provided that the Freedmen and their descendants "shall have all the rights of native Cherokees." (R-20) (Emphasis added) These rights include trust beneficiary status.

The Cherokee district court also noted:

> From time immemorial, the Cherokee Nation, and in its predecessor forms, has entered into agreements or Treaties and honored and complied with the provisions thereof on its part as part of its law and tradition. Upon the entry of the Europeans to the North American continent the Cherokee Nation abided by such agreements made with the different entities be they French, Spanish, English, or, eventually, the United States. In a number of instances, those nations failed to honor their agreements or treaties resulting in loss and harm to the Cherokee people. One of the most egregious, or course, being the

[3] It should be noted that in many instances the Native American beneficiaries actually had more education, business acumen, and political power than Freedmen as evidenced by the fact the Native Americans held the Freedmen in involuntary servitude.

> seizing of Cherokee property and the removal of the Cherokee people from their ancestral homes to Indian Territory. This does not mean that the Cherokee Nation should descend into such manner of action and disregard their pledges and agreements.

Id. (Emphasis added). The treatment be imposed by the United States on the descendants of the Freedmen in this case is another example of the disregard of pledges and agreements.

Appellant's action in the district court here was based upon the grounds that not only did the United States by reason of racial discrimination, corruption and mismanagement violate its fiduciary duties owed to the Freedmen in relation to management of royalties from their allotments. Enactment and implementation of Title I to the Claim Resolutions Act of 2010 on the basis proposed in Cobell, perpetuates historic racial discrimination by advancing the historic wrongs committed by the United States against for Freedmen and by now utilizing this invidious historical criteria as a prerequisite for Cobell Class Membership, thereby causing new injuries to Appellants here.

On December 22, 2010, the United States moved to dismiss Appellants' Complaint (R-9, Motion to Dismiss).

On January 31, 2011, in an order that totally misapprehended the grounds for Appellants' Complaint, the district court granted the motion to dismiss (R-17).

Appellants' timely appealed on January 31, 2011 (R-19).

STATEMENT OF THE FACTS

Contrary to the finding of the district court, Appellants in this action do not seek legislation that would provide them with money damages to redress historic injury. Also contrary to the finding of the district court, what Appellants seek here is redress from implementation of HR 4783. HR 4783 perpetuates past racial discrimination against Appellants. This perpetuation will be remedied if HR 4783 is declared unconstitutional for the reason the United States will be prevented from once again discriminating against Appellants on the basis of their race, an injury separate and apart from previous claims raised by Appellants. See, Harvest Institute Freedman Federation v Kempthorne, Court of Federal Claims, Case No. 06-906L.

HR 4783 is unconstitutional by reason of its perpetuation of the blatant racially disparate treatment of the descendants of persons who rebelled against the United States during the Civil War and the descendants of persons held in bondage by the aforementioned rebels.

During the Civil War, the Five Civilized Tribes, the Seminole, Cherokee, Choctaw, Creek and Chickasaw, entered into treaties with the Confederacy, severing their relations with the United States. As a result of these acts of disloyalty the Five Civilized Tribes forfeited all tribal lands and their status as government wards. In 1866, the United States made treaties with each of the Five

Civilized Tribes, setting the terms on which the tribes would continue to exist within the United States, regain their land and trust beneficiary status. All of the treaties with the Five Civilized Tribes eradicated slavery within the tribes and provided that the emancipated "Freedmen" would have certain rights within the tribes. Although these Treaties had a common purpose, the provisions of the various Treaties were not identical. However, under the treaties the Freedmen were emancipated and given civic status equal to Indians whether the Freedmen were adopted into the Tribes or not. This included trust beneficiary status in relation to the United States. The following is a summary of the provisions of the treaties pertinent to this action and clear proof that if the members of the Four Civilized Tribes are entitled to trust beneficiary status, so too are the Freedmen.

The Seminole Treaty: The United States entered into its first antebellum treaty with the Seminole in 1866. 14 Stat. 755. The treaty provided that the Freedmen members would have rights equal to those of Seminoles by blood:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

14 Stat. 755, 756. In 1898, the Seminole entered into an agreement with the United States to allot its land held in common to individual members. 30 Stat. 567.

The agreement made no distinction between the Freedmen members and the members by blood.

The Creek Treaty: The United States' treaty with the Creek is similar to its treaty with the Seminole. It provided that the Creek Freedmen would have all the rights of members by blood, including the right to share equally in land and funds:

> [A]nd inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter those persons lawfully residing in said Creek country under their laws and usages…shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatever race or color, who may be adopted as citizens or members of said tribe.

14 Stat. 785, 786. In 1897, the United States and the Creek Nation agreed to terms on which the Creek Nation's common lands would be allotted. 30 Stat. 496, 514. The agreement made no distinction between Creeks by blood and the Freedmen. In 1901, the Creek entered a second agreement with the United States. 31 Stat. 861. Like the first, this agreement made no distinction between Creek Indian and Freedmen members.

The Cherokee Agreement: The United States entered into a treaty with the Cherokee in 1866. The treaty of 1866, *inter alia* is a basis for Appellants' claims here. A treaty with the Cherokee Tribe and the United States was concluded on July 19, 1866. Article IV of that Treaty provided that "…[a]ll of the

Cherokee freed Negros who were formerly slaves to any Cherokee, and all free Negros not having been slaves, who resided in the Cherokee nation prior to June 1, 1861…shall have the right to settle in and occupy the Canadian district…and will include a quantity of land equal to 160 acres for each person who may so elect to reside in the territory…" Thus, as in the case of the Choctaw and Chickasaw Freedmen, the Cherokee Freedmen were "adopted into the tribe [and] [c]onsequently, they and their descendants were entitled to participate in the allotment of lands equally with members of the tribe by blood." Ross v. Ickes, 130 F.2d 415 (D.C.C. 1942).

The Choctaw and Chickasaw Treaty: The United States entered into a treaty with the Choctaw and Chickasaw Tribes on April 28, 1866. 14 Stat. 769. This treaty provided that the tribes had a choice about how to deal with their Freedmen. If the tribes made their Freedmen members within two years, the tribes would receive a portion of a trust fund, and the Freedmen would receive 40-acre allotments once the Choctaw, Chickasaw and Kansas Indians had made their selections. If the tribes did not adopt their Freedmen and the Freedmen voluntarily removed themselves to other land within Indian Territory, the tribes would get nothing and the [Freedmen would receive a portion of the trust fund. *Id*] The Choctaw and Chickasaw resisted adopting the Freedmen, so the Freedmen were not entitled to the 40-acre allotments. In 1883, the Choctaw adopted the Freedmen

into the tribe and declared each was entitled to 40 acres. The tribe made no allotments at that time either. Choctaw Nation of Indians v. United States, 318 U.S. 423, 425 (1943). The Chickasaw never did adopt their Freedmen into the tribe.

In 1897, the United States entered into an agreement with the Choctaw and Chickasaw whereby their lands held in common would be allotted. 30 Stat. 496, 505-506. This agreement provided that the Choctaw Freedmen would receive 40-acre allotments. 30 Stat. 506. Before any allotments were made, the United States entered into another agreement with the tribes. This second agreement also provided that Choctaw and Chickasaw Freedmen would receive 40 acres. 32 Stat. 641.

Discussed in greater depth below is a detailed discussion of the failure of the United States to properly discharge its trust responsibility to the Freedmen held in bondage or residing in Indian Country at the end of the Civil War. In contrast, through the Cobell settlement the United States is rectifying its breach of fiduciary duty owed to the descendants of the rebellious Five Civilized Tribe slave masters, but denying its fiduciary obligations to the descendants of the slaves of those rebellious tribes, notwithstanding violation by the Department of Interior of past legislation aimed to curb abuses against these former slaves. This is blatant and unlawful perpetuation of past racial discrimination. The slaves did not rebel

against the United States, and were all of African descent. Whereas, the rebel Tribes were Native American, rebelled, but are now receiving redress for the same racially based mismanagement and breaches of fiduciary duty committed against the Freedmen. The United States is not only rectifying the wrongs committed against the Tribes, and refusing to acknowledge and rectify the wrongs against the Freedmen, it is perpetuating these wrongs by basing Cobell class membership on past discriminatory policies. This is particularly troublesome for the reason the fiduciary duties emanate from the same Treaties and Legislation.

The Cobell settlement reaffirms the existence of a trust relationship between the United States and Native Americans dating back to 1887, the time of enactment of the General Allotment Act of 1887, known as the "Dawes Act." The bulk of trust assets alleged within the Cobell action to have been mismanaged by the United States are proceeds of various transactions in land allotted to individual Indians under the Dawes Act. See, Cobell v. Salazar, July 24, 2009, Opinion of the United States Court of Appeals for the District of Columbia, Case No. 08-5500, p. 2. By reason of racism and misfeasance, members of the putative Appellants' class although receiving allotments and being entitled to royalties from those allotments were, by reason of breaches of trust by the United States, not the recipients of IIM's. In point of fact, under 1866 treaties between the United States and the Five Civilized Tribes, Freedmen were accorded equal civic status in relation to the

United States as members of the Five Civilized Tribes, whether the Freedman were adopted into the tribes or not. Since Cobell establishes that trust obligations are owed and have been owed by the United States to Indians since the close of the Civil War, Freedman having equal civic status under the 1866 treaties to members of the Five Civilized Tribes are by logical extension, also owed equal fiduciary duties by the United States.

The Cobell settlement is evidence that the United States has never repudiated its fiduciary duty as trustee to Native American beneficiaries, i.e. the Cobell Appellants.

Contrary to the rulings of the United States Court of Federal Claims in Harvest Institute Freedman Federation, et al. v. United States, Case No. 06-907L and its affirmance by the United States Court of Appeals for the Federal Circuit, the six year statute of limitations applicable to claims against the United States under the Tucker Act 28 U.S.C. § 2501, does not, under the repudiation rule[4],

[4] There is a general "repudiation rule" with regards to equitable trusts that says the statute of limitations will not begin to run on claims to enforce a trust against a trustee until repudiation of the trust relationship. The underlying rationale is that the trustee's possession of the trust assets is presumed to be possession for the beneficiary (i.e. the cestui que trust), and the time should begin to run on claims against the trustee only when the trustee has taken some acts or communicated in a way that is inconsistent with that presumption, so as to provide notice that the trustee has disavowed the trust relationship or is no longer acting in the interests of the beneficiary. The repudiation rule is applicable in the Harvest action for the reason the Freedmen are seeking recovery of trust property itself, and the Government as evidenced by Cobell has not already repudiated its trust relationship with the Freedmen.

The repudiation rule has appeared in cases involving Native American trust claims. For example, in Tunica-Biloxi Tribe v. United States, 1991 U.S. App. LEXIS 10716 (Fed. Cir. May 17, 1991).

> Under the law of trust, a cause of action for breach of a fiduciary obligation owed by a trustee does not accrue until the trust is repudiated or terminated. Manchester Band of Pomo Indians, Inc. v.

begin to run in relation to claims by the Harvest Institute Appellants, et al. until the United States as trustee repudiates its trust responsibility to the Five Civilized Tribes, an event which Cobell establishes has never occurred. This truth is described in great detail below where it was expressly addressed by Judge Lamberth in excerpts from Cobell. In summary, as it relates to trust beneficiary status, the Cobell Plaintiffs and Appellants here stand on equal footing. However, by reason of racial discrimination the United States has refused to acknowledge this equality and through the Act seeks to perpetuate this historic disparate treatment by attaching present dispositive significance to unlawful Department of Interior policies devised to defraud Freedman over a century ago.

United States, 363 F. Supp. 1238, 1249 (N.D. Cal 1973) (citing United States v. Taylor, 104 U.S. 216 (1881)

SUMMARY OF THE ARGUMENT

Controlling precedent firmly establishes that it is a violation of the Fourteenth Amendment for the government to engage in activity which perpetuates past unlawful racial discrimination. Implementation of Title I to HR 4783 will perpetuate past racial discrimination by conditioning Cobell class membership on discriminatory criteria developed in the past and only redressing mismanagement of royalties from allotments and Individual Indian Money accounts for the descendants of Native American members of the Five Civilized Tribes who held slaves, but failing to redress mismanagement of royalties from allotments belonging to slaves of the Five Civilized Tribes, the ancestors of Appellants here. The Equal Protection Clause condemns this form of racial discrimination. It has been stated that:

> Vestiges of past discrimination do not exist gratuitously or only to a small degree – creating systematic, pervasive, and enduring vestiges is what effective discrimination was and is all about. Like a terrorist pouring poison into a city water system, an official who engages in racial discrimination intentionally sets in motion events that will cause harms that he cannot predict to victims whom he will never know. Because it is this evil that the Fourteenth Amendment was designed to halt, the Equal Protection Clause should be construed to provide redress for present injuries caused by past discrimination. The passage of time between the discriminatory intent and the resulting harm is irrelevant both to the purpose and to the effect of that discrimination and thus cannot be permitted to limit the protection afforded by the Constitution.

"Perpetuation of Past Discrimination," Eric Schnapper 96 Harv. L. Rev. 828, 839 (1982-1983), citing, Keyes v. School District No. 1, 413 U.S. 189, 210-11 (1973), which states:

> "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"

Historically, the United States' failure to properly manage and account for funds derived from royalties on the allotments of the ancestors of Appellants was in large measure the product of intentional racial discrimination. The exclusionary injuries resulting from those actions continue to exist today. Implementation of Title I to HR 4783 on the basis of discriminatory criteria caused or developed by Department of Interior officials one hundred fifty years ago perpetuates this unlawful racial discrimination and exclusion and is therefore violative of the Fourteenth Amendment. Specific examples of the operation of these past practices are outlined below.

ARGUMENT

I. Standard of Review

This court reviews *de novo* the district court's dismissal of a complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Hertz v. United States, 560 F.3d 616, 618 (6th Cir. 2009). When "reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings." Nichols v. Muskingum Coll., 318 F.3d 674, 677 (6th Cir. 2003).

II. Appellants Have Standing to Advance Their Constitutional Claims

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," Warth v. Seldin, 422 U.S. 490, 498 (1975). In order to invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984).

The "judicial power…defined by Art. III is not an unconditional authority to determine the constitutionality of legislative or executive acts" but, rather, is limited to the resolution of "cases" and "controversies." Valley Forge Christian Coll. V. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). An

"essential and unchanging part" of that limitation is the doctrine of standing. Lujan, 504 U.S. at 560. Indeed, "[t]he Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." Allen v. Wright, 468 U.S. 737, 750 (1984). "At an irreducible minimum, Art. III requires the party who invokes the court's authority to show (1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, that (2) the injury fairly can be traced to the challenged action, and (3) is likely to be redressed by a favorable decision." Valley Forge, 454 U.S. at 472 (internal citations omitted).

Beyond these constitutional requirements, a plaintiff must also satisfy certain prudential standing requirements, based on the principle that the judiciary should "avoid deciding questions of broad social import where no individual rights would be vindicated." Phillips Petroleum Co., v. Shutts, 472 U.S. 797, 804 (1985). Prudential standing requires, inter alia, that a party "assert his own legal interests rather than those of third parties," Id. At 804, and that a claim must not be a "generalized grievance" shared in by all or a large class of citizens, Warth v. Seldin, 422 U.S. 490, 499 (1975). Prudential standing also addresses whether "the constitutional or statutory provision on which [a plaintiff's] claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." See, Id. at 499-500. Thus, the litigant's complaint must fail within the

"zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Valley Forge, 454 U.S. at 475.

Article III limits federal jurisdiction to disputes involving an actual "case or controversy," and not merely "a difference or dispute of a hypothetical or abstract character." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). As the Supreme Court has recently observed, there exists no bright-line rule for determining whether an action satisfies the case or controversy requirement. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007). Rather, "[t]he difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941). Consequently, "the analysis must be calibrated to the particular facts of each case." Cat Tech LLC v. TubMasters, Inc., 528 F. 3d 871, 879 (Fed. Cir. 2008).

Article III standing is a jurisdictional issue. See, United States v. Viltrakis, 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." See, A-Z Intern v. Phillips, 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete

and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtle. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, (1992)).

A federal court cannot "pronounce any statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool Steamship Co., v. Commissioners of Emigration, 113 U.S. 33, 113 U.S. 39."

"The Party who invokes the [judicial] power must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Id. at 262 U.S. 488.

"It is an established principle that , to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action, and it is not sufficient that he had merely a

general interest common to all members of the public." Ex party Lerift, 302 U.S. 633, 634 (1939).

"The party who invokes the power [of the Judiciary to declare a statute unconstitutional] must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Fairchild v. Hughes, 258 U.S. 126 (129) (1922).

"[Standing will be denied where a plaintiff] has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted." Tyler v. Judges of Court of Registration, 179 U.S. 405, 406 (1900).

"Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that at least in the absence of a statute expressly conferring standing, federal Appellants must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." Linda R.S v. Richard, D., et al., 410 U.S. 614 (1973).

In this case Appellant's allegations of a present injury in fact are clearly set forth in the Complaint.

In point of fact the Complaint states:

1. This action seeks a declaration of unconstitutionality and an injunction against implementation of federal legislation which is racially biased and threatens to cause immediate, grave and irreparable harm to Appellants and members of their putative class. Title I of HR 4783, the "Claims Resolution Act of 2010" signed into law by the President of the United States on December 8, 2010, should be enjoined for the reason, Title I which expands the jurisdiction of the United States District Court for the District of Columbia and authorizes the expenditure of $3.4 Billion dollars to fund a settlement in Civil Action 96-1285, Elouise Pepion Cobell, et al. v. Ken Salazar, is racially discriminatory and perpetuates past unlawful racial discrimination. HR 4783, is violative of the Fourteenth Amendment to the United States Constitution as well as the provisions of treaties, which conferred equal civic status upon Freedmen slaves of the Five Civilized tribes, as upon tribal members. These treaties were entered into between the United States and "Five Civilized Indian Tribes" at the close of the Civil War in 1866…

2. HR 4783 is unconstitutional by reason of its blatant racially disparate treatment of the descendants of persons who rebelled against the United States during the Civil War and the descendants of persons held in bondage by the aforementioned rebels.

3. During the Civil War, the Five Civilized Tribes, the Seminole, Cherokee, Choctaw, Creek and Chickasaw, entered into treaties with the Confederacy, severing their relations with the United States. As a result of these acts of disloyalty the Five Civilized Tribes forfeited all tribal lands and their status as government wards. In 1866, the United States made treaties with each of the Five Civilized Tribes, setting the terms on which the tribes would continue to exist within the United States, regain their land and trust beneficiary status. All of the treaties with the Five Civilized Tribes eradicated slavery within the tribes and provided that the emancipated "Freedmen" would have certain rights within the tribes. Although these Treaties had a common purpose, the provisions of the various Treaties were not identical. However, under the treaties the Freedmen were emancipated and given civic status equal to Indians whether the Freedmen were adopted into the Tribes or not…

9. Discussed in greater depth below is a detailed discussion of the failure of the United States to properly discharge its trust responsibility to the Freedmen held in bondage or residing in Indian Country at the end of the Civil War. In contrast, through the Cobell settlement the United States is rectifying its breach of fiduciary duty owed to the descendants of the rebellious Five Civilized Tribe slave masters, but denying its breach of fiduciary duty to the slaves of those rebellious tribes. This is blatant and unlawful racial discrimination. The slaves did not rebel against the United States, and were all of African descent. Whereas the rebel Tribes were Native American, rebelled, but now are receiving compensation for the same breaches of fiduciary duty owed to the Freedmen that the United States refuses to acknowledge.

10.The Cobell settlement reaffirms the existence of a trust relationship between the United States and Native Americans dating back to 1887, the time of enactment of the General Allotment Act of 1887, known as the "Dawes Act." The bulk of trust assets alleged within the Cobell action to have been mismanaged by the United States are proceeds of various transactions in land allotted to individual Indians under the Dawes Act. See, Cobell v. Salazar, July 24, 2009, Opinion of the United States Court of Appeals for the District of Columbia, Case No. 08-5500, p. 2. By reason of racism and misfeasance members of the putative Plaintiff class were excluded from the receipt of proceeds of these land transactions and therefore did not have individual money accounts established, although under the treaties with the defendants establishment of these accounts for Freedmen was mandatory.

11.In point of fact, under 1866 treaties between the United States and the Five Civilized Tribes, Freedmen were accorded equal civic status in relation to the United States as members of the Five Civilized Tribes, whether the Freedman were adopted into the tribes or not.

12.Since Cobell establishes that trust obligations are owed and have been owed by the United States to Indians since the close of the Civil War, Freedman having equal civic status under the 1866 treaties to members of the Five Civilized tribes are also owed fiduciary duties by the United States.

> 13.The Cobell settlement is evidence that the United States has never repudiated its fiduciary duty as trustee to Native American beneficiaries, i.e. the Cobell Appellants.
>
> 14.Contrary to the rulings of the United States Court of Federal Claims in Harvest Institute Freedman Federation, et al. v. United States, Case No. 06-907L and its affirmance by the United States Court of Appeals for the Federal Circuit, the six year statute of limitations applicable to claims against the United States under the Tucker Act 28 U.S.C. § 2501, does not, under the repudiation rule, begin to run in relation to claims by the Harvest Institute Appellants, et al. until the United States as trustee repudiates its trust responsibility to the Five Civilized Tribes, an event which Cobell establishes has never occurred.
>
> 15.In light of the above it is inequitable and will result in the perpetuation of racial discrimination against the Freedman Appellants in the Harvest Institute action (hereinafter "Harvest Appellants) to settle claims accruing to the benefit of members of the Five Civilized Tribes, descendants of slaveholders and persons who were disloyal to the United States while failing to resolve claims against the United States by the Harvest Institute Freedmen's Federation's putative class.

These allegations state a claim of sufficient specificity and personal nature to establish standing on Appellant's behalf.

Discrimination of the nature alleged in the Complaint was addressed by the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) as follows:

> When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the…general Welfare of the United States" and

> "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment…
>
> Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant…Congress may employ racial or ethnic classifications in exercising its Spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective or remedying the present affects of past discrimination is narrowly tailored to the achievement of that goal.

Id.

In reviewing an Act that relies upon ethnic and racial classifications, Courts should engage in a City of Richmond v. Croson, 488, U.S. at 500 type analysis.

A Court should "undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the Croson Court… Id. Although Congress is entitled to no deference in its ultimate conclusion that race-based relief is necessary, "the fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." Id. at 1322 n. 14 (citing Croson, 488, U.S. at 500). In Adarand v. Pena, 515 U.S. 200 (1995) it was held that strict scrutiny applies to federal affirmative action programs. Strict scrutiny must also be applied to an Act, whereas here it creates and relies upon racial classifications.

The Complaint alleges that the Act perpetuates past racial discrimination by the United States which arose from the disparate treatment accorded to members of

the Five Civilized Tribes and their slaves at the time of the allotments and creation of Individual Indian Money Accounts. By reason of past racial discrimination by the United States, it is a violation of the Fourteenth Amendment to a one hand settle claims with Native American slave masters based on the continued existence of trust responsibilities and on the other hand deny the existence of trust responsibility to the descendants of their slaves, when these trust obligations both have their roots in the same 1866 Treaties and subsequent legislation.

As was noted by Spencer Overton in "Voices from the Past: Race, Privilege and Campaign Finance" 79 N.C. L. Rev. 1541 (2000-2001)

> Governmental entities have long used racial identity to define and allocate property rights. Official government action in the form of proclamations, statutes, and court decisions took land from Native Americans based on their racial and cultural identity, and reallocated this property to private actors who were white. The law contemplated and enforced the appropriation of labor from African Americans through slavery, which primarily benefited white private actors. The law promoted immigration from European countries, essentially determining the racial makeup of those who would count as full citizens in the United States. As white Americans moved west in the 1800s, the law tolerated discriminatory practices in southwestern states that stripped Mexican Americans of the any opportunities to own property. In addition to conquest, slavery, and immigration policy, well-known public and private racial barriers in education, employment, and business have disadvantaged people of color while enuring to the benefit of others through artificially reduced competition.
>
> Other, less apparent factors also contribute to the perpetuation of economic disparities between whites and people of color. The benefits given by facially discriminatory government policies may be multiplied by facially neutral government policy and economic

> markets, and may thus have a greater impact today than they did when originally enacted and enforced.
>
> Id.

Here the United States permitted Indian Money Accounts to be created initially utilizing racial and ethnic criteria. Due to discriminatory government policies, accounts were not established for statutorily eligible Freedmen despite their entitlement under the 1866 treaties to these accounts, by reason of the creation of restricted Freedman allotments, and the collection of royalties from these restricted allotments, the specific criteria for establishment of an IIM. Now the United States seeks to perpetrate this historic racial discrimination against the Freedmen by redressing its breaches of trust to Native Americans, while denying any trust obligations are owed to the Freedmen.

In addition to the minimum constitutional requirements, the courts impose prudential limits on litigants' standing. A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Warth, 422 U.S. at 499.

"Prudential standing requirements preclude litigation in federal court 'when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens,' or where instead of litigating his own legal rights and interest,' the plaintiff instead purports to 'rest his claim to relief on the legal

rights or interests of third parties.'" Prime Media, Inc. v. City of Brentwood, 485 F.3d at 343, 349 (6th Cir. 2007) (citation & internal quotation marks omitted).

Appellants here meet all standing requirements:

1. Appellants have suffered an injury in fact for the reason the Act is under inclusive, inasmuch as it perpetuates the effects of past racial discrimination against Appellants' legally protected interests to have the Act operate on a racially just basis, not on the basis of discriminatory criteria developed a century ago;
2. The injury is traceable to the Act for the reason it both perpetuates past discrimination and notwithstanding the government's past discrimination against Appellants' economic interests[5] the Appellants are challenging the government's contemporary efforts, through implementation of an Act, which proposes to discriminatorily provide redress to the economic interests of descendants of persons disloyal to the United States, but not to the economic interests of their slaves' descendants; and
3. A favorable decision will provide redress for the reason if the Act is declared unconstitutional the historic injury to Appellants economic interests will not be repeated and reinforced.

[5] Appellants have the requisite personal stake in this action to render their claims both justifiable and cognizable in Federal Court.

Prudential standing is also satisfied here for the reason, Appellants seek to vindicate their personal economic interests, not those of third persons.

III. Historic Racial Discrimination against Appellants' Ancestors

Abundant evidence is available to support Appellants' claim of historic racial discrimination against their ancestors. For instance, the grandfather of Appellant Leatrice Tanner-Brown, George Curls, was enrolled on the Rolls of the Cherokee Freedmen, under the Dawes Act on July 1, 1902. See, Exhibit E for transcript of the enrollment hearing before the Department of Interior, Commissioner to the Five Civilized Tribes, July 1, 1902. At the time of the 1902 hearing, George Curls was five years old. See, Exhibit F.

Mr. Curls received a forty acre allotment deed on December 5, 1910. See, Exhibit G for Certified Copy of "Allotment Deed" and Exhibit H for a Certified Copy of the twenty acre "Homestead Deed," also received by Mr. Curls. Under these two deeds, Mr. Curls received allotments equaling 60 acres. These allotments were received at a point in time when Mr. Curls was a minor, thirteen years old.

Under the Act of May 27, 1908, Exhibit I, restrictions against alienation of Freedmen allotments, such as Mr. Curls' were removed. However, by reason of Mr. Curls' status as a minor, royalties from leases on his allotment were still under the control of the Department of Interior. See, Sections 2 and 6 of Exhibit I.

Accordingly, any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of the Sections 2 and 6 of the 1908 Act. Instead the Interior Department has no record of these royalties and a guardian was not appointed for Mr. Curls as required by the 1908 Act. By reason of these failures an IIM was not established for Mr. Curls. These failures were not innocent. They were the result of a deliberate strategy to swindle land from Freedmen.

A pervasive system of corruption and racism was ongoing in Indian Country during the period following the discovery of oil and Oklahoma Statehood, the timeframe when Mr. Curls received his allotment. See, *And Still Waters Run*, Angie Deboe, Princeton University Press, 1940. One of the primary methods utilized to circumvent restrictions on alienation of allotments was the practice of allotting land to mixed blood Indians and Freedmen under the Act of 1908. By granting allotments to Freedmen, the protections designed to prevent illiterate and uneducated allottees from being swindled by unscrupulous persons could be overcome. In the case of Mr. Curls, he was a resident of Chelsea, Oklahoma, in Rogers County. His allotment was granted while he was a minor in distant Nowata County in the midst of oil rich Cherokee Country.

According to Angie Deboe:

> The Federal Government also assumed the administration of the affairs of the individual allottee. Because of their inexperience in the

control of real estate, the agreements and the various acts of Congress had attempted to safeguard the Indians in the leasing and sale of their allotments.

Leases for agriculture and grazing purposes were restricted in all the tribes. The Seminole Agreement contained regulations to protect the allottee, and gave the Chief supervisory authority. The Atoka Agreement contained similarly safeguards but its enforcement was left to the Federal courts. The Creek Supplemental Agreement and the Cherokee Agreement specified that grazing leases for more than one year and agricultural leases for longer than five years should be subject to Departmental approval. In 1905 Congress authorized the Secretary to investigate any lease of allotted land in the Indian Territory and to refer cases of apparent fraud to the Attorney-General. The Five Tribes Act provided that all lease contracts longer than one year for the surplus of fullbloods were subject to Departmental approval, and that the homesteads of full bloods could be leased only in cases of old age or infirmity through special authorization by the Secretary.

The Department made elaborate regulations for the approval of long-tenure Creek and Cherokee leases under the agreements of 1902, but few were submitted. Most lessees preferred to secure contracts from the individual allottee by taking chances on a fraudulent lease of making a legal lease for a shorter period. In 1906, 1,740 leases were rewritten by the Agency, doubling or even trebling the amount of the rental contract, and fifty were referred to the courts for cancellation; but this number constituted only a small proportion of the hundred thousand allotments.

The Department exercised greater supervision over mineral leases. No important leasing occurred in the Choctaw, Chickasaw, and Seminole nations, but the oil and gas development of the Cherokee and Creek country was one of the spectacular consequences of allotment.

The Creeks and Cherokees were so strongly opposed to the tribal ownership of minerals provided by the Curtis Act that the Department rejected all applications for leases, except in special cases, until agreements could be adopted in accordance with the Indians' desires. A few informal permits were granted to Cherokee citizens to mine

coal, chiefly for local consumption; a few coal operators working in the Creek Nation were allowed to continue; and finally in 1902 thirteen oil and gas leases were approved because the lessees showed that they had secured them from the Cherokee government before the passage of the Curtis Act. After the ratification of the Cherokee Agreement these tribal leases were changed to the individual form.

The first oil in the Indian Territory was discovered west of Chelsea by Edward Byrd, who had secured a contract from the Cherokee Nation. He had six wells, drilled to a depth of 165 feed, and each produced a barrel a day. Oil in paying quantities was discovered in the Red Fork section of the Creek Nation in 1901, and great excitement resulted. By that time the Curtis Act had been superseded by the Creek Agreement. This compact provided for the individual ownership of minerals, but since it contained no regulations for leasing and forbade the allottee to alienate his land, the Department ruled that ll leasing was illegal. The oil development was accordingly halted, by the town lots in Red Fork and Tulsa were appraised and sold in 1902 and drilling was resumed within the townsights.

Just at that time the Department was given complete control of mineral leasing by the ratification of the Creek Supplemental and the Cherokee agreements. Detailed regulations were adopted in 1903, and leasing developed rapidly. By 1907 there were 4,366 oil and gas leases in effect, covering about 363,000 acres. A deep field extended from the Kansas line along the western boundary of the Cherokee Nation through the Bartlesville and Dewey district, and reached sixty-five miles south to Tulsa in the Creek Nation. A shallow field included Chelsea and Coody's Bluff in the Cherokee nation, and extended up the Verdigris River almost to the Kansas line. The Glenn Pool, a small tract south of Tulsa discovered in 1905, had become one of the most spectacular producing pools in the world.

The lessees began to bid against each other by offering bonuses to the allottees. This amount usually ran from three to five dollars an acre, but in 1907 one minor creek received $43,000 for the lease of a twenty-acre tract in the Glenn Pool. In 1907 one Indian was receiving over $3,000 a month in royalty, several were receiving more than $2,000 each, and many had monthly incomes of over $300. Ironically enough, the main Creek development occurred in the fullblood sections, especially in the broken country where the Snakes had been

> arbitrarily allotted and where the "newborns" had received the worthless land that remained after the desirable allotments were taken. The grotesque tricks of chance that were to attract national attention to the Five Tribes Indians were already apparent…
>
> The Department collected the royalty from the lessee and paid it to the fortunate Indian by a monthly check. The collections began with $1,300 from the first thirteen leases in 1903-1904, rose to $91,624 in 1904-1905, and soared to $323,555.40 in 1905-1906 and $775,489.15 in 1906-1907.
>
> Oil men complained loudly of the delay occasioned by Departmental "red tape" in securing approval of a lease, but apparently the industry was not seriously retarded. The regulations aimed to prevent monopoly control, by limits on acreage and strict supervision of transfers; and judging from the alternate expressions of approval and complaint, and the failure of certain attempts to evade them, they were eminently successful. As a result the oil industry was a free-for-all scramble, with the great Mellon and Standard interests, the young oil worker who could scrape together enough money to drill a well of his own, and the gambler who must try one more "sure thing," all entering into the most unrestricted rivalry. The wild, speculative, active spirit of the oil field gave a lurid phase to the early development of the Indian Territory.

See, Angie Deboe, "And Still the Waters Run", (Princeton University Pres., 1940) p. 85.

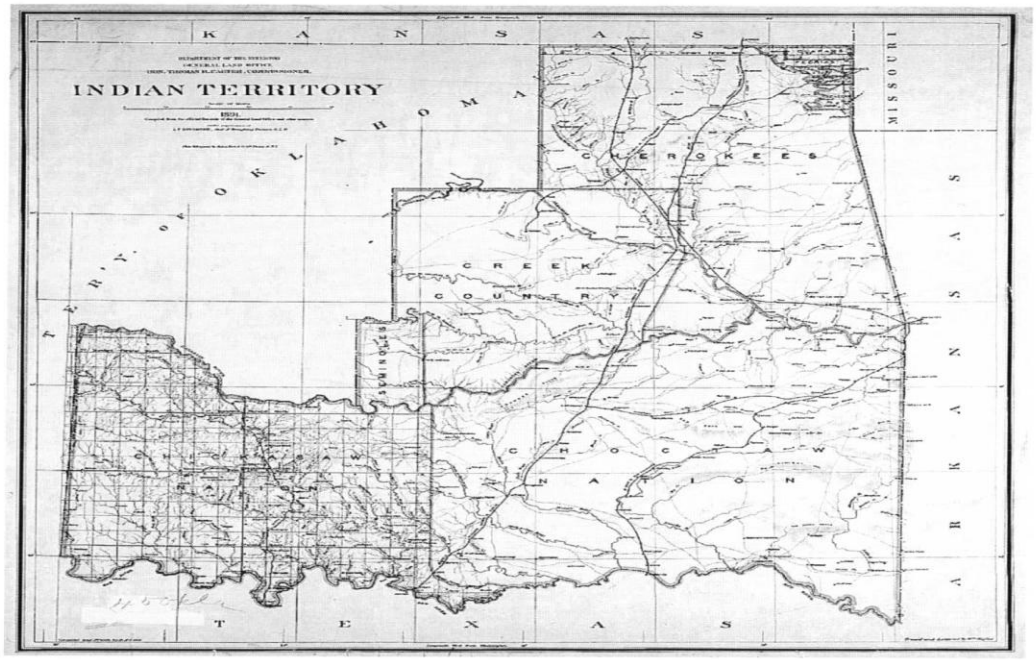
Although George Curls did not receive his allotment until 1910, the discovery of oil led to political pressure to make allotments freely alienable. Due to this context, in violation of the fiduciary duties to Freedmen who were often less educated and sophisticated than their former slave masters, the United States on racially motivated grounds through the Act of 1908 permitted these allottees to be exploited by grafters and speculators anxious to obtain oil rich lands for little or no

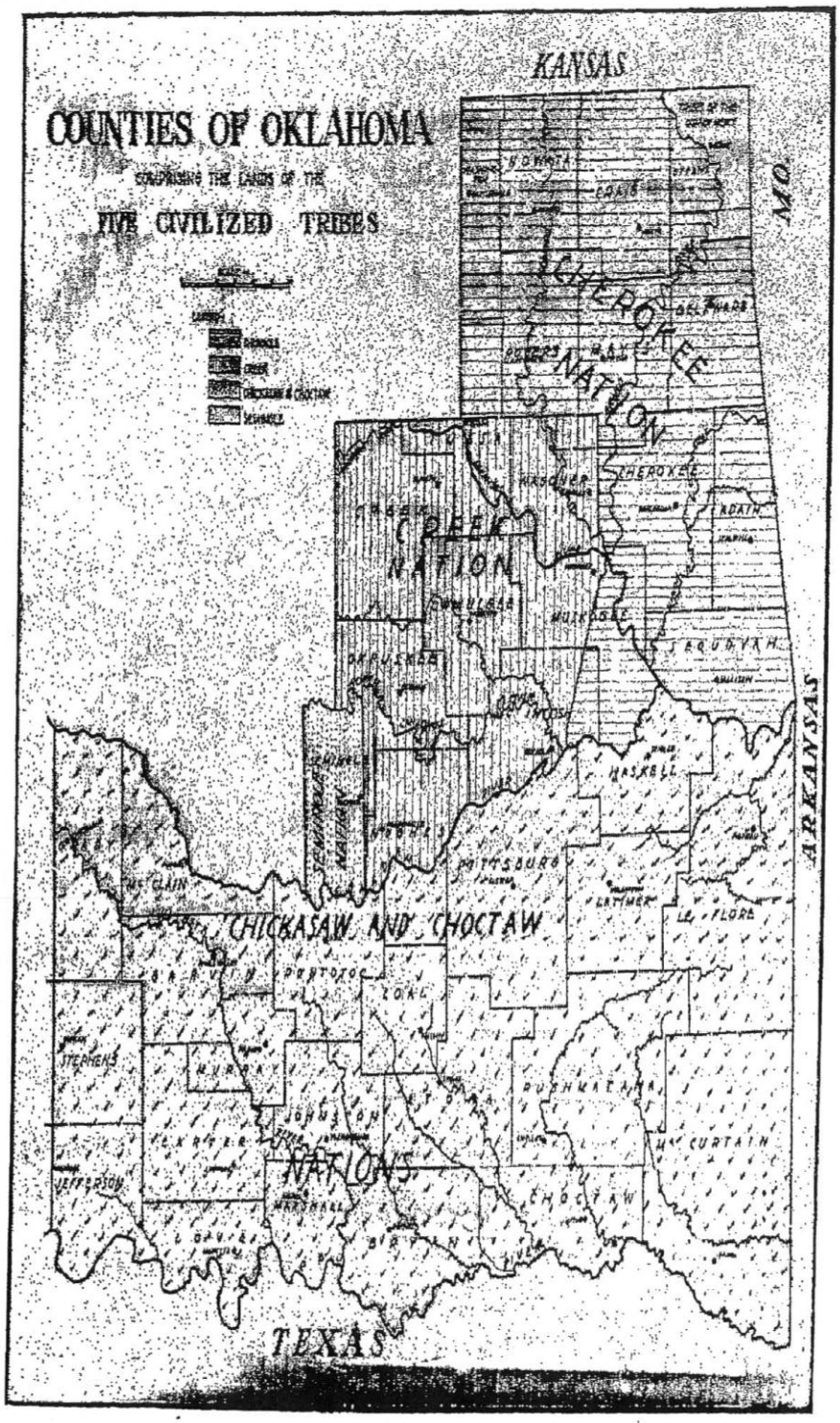
payment to allottees. The allotments belonging to George Curls were in Nowata County, as stated in the midst of this oil rich territory. The Curls allotment is located North of the lucrative Alluwe Oil Field in the vicinity of the Cherokee Shallow Sands Oil Fields where oil was located a mere thirty-six feet below the surface[6] in 1904.

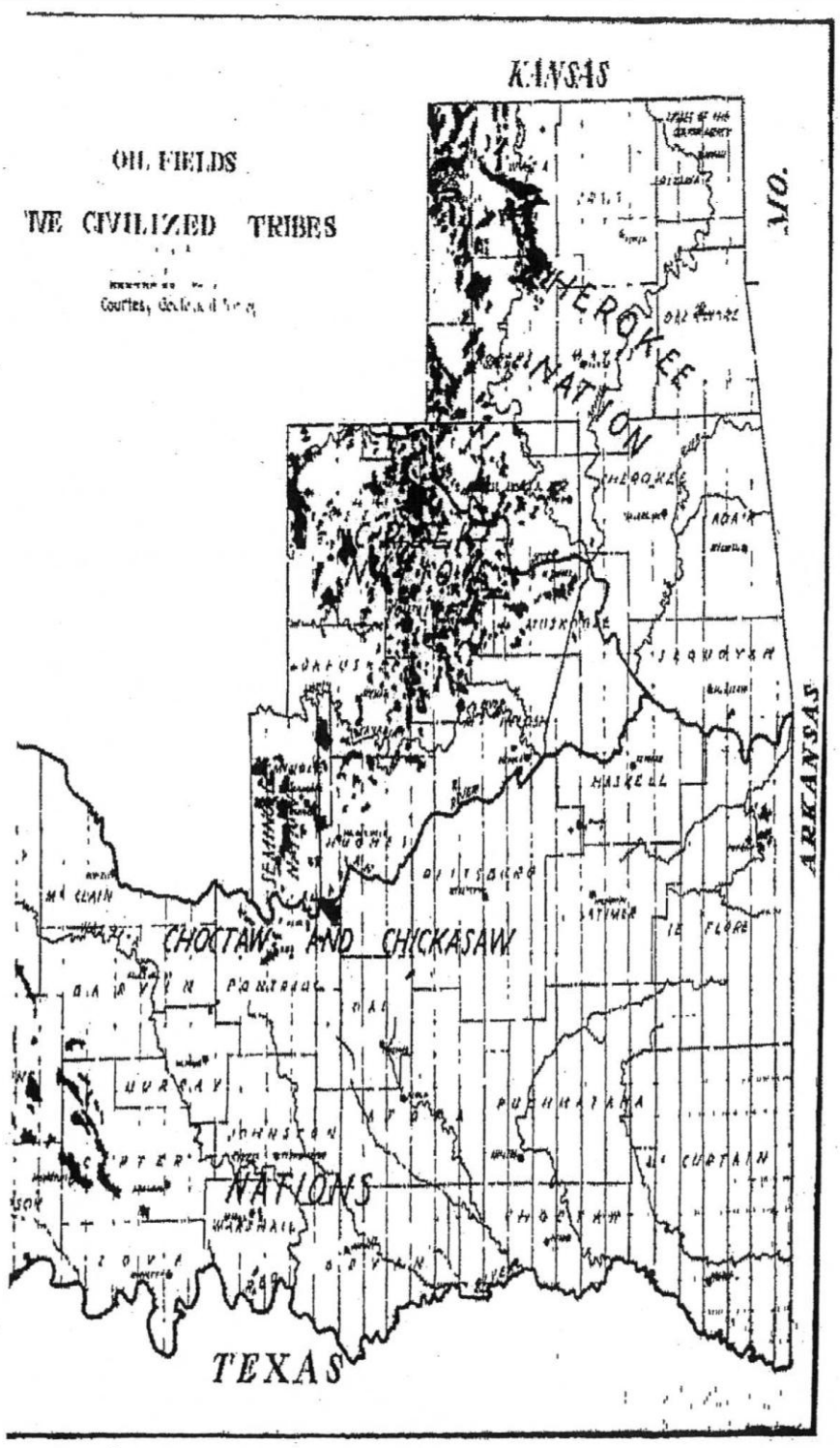
Allotments in the hands of minor Freedmen were susceptible to being transferred free from the restrictions placed upon allotments in the hands of Native Americans.

The maps that follow demonstrate that George Curls Nowata County allotments being located in an oil rich were the type that Deboe states were ripe for exploitation.

[6] Gary L. Cheatham, "Nowata County, " Encyclopedia of Oklahoma History and Culture, March 28, 2007, and Kenny A Franks, "Petroleum." Id.


INDIAN TERRITORY
K A N S A S
MISSOURI
O K L A H O M A
CHEROKEE
CREEK
COUNTRY
CHICKASAW
NATION
ARKANSAS
T E X A S


COUNTIES OF OKLAHOMA
SHOWING THE LANDS OF THE
FIVE CIVILIZED TRIBES
KANSAS
MO
ARKANSAS
CHEROKEE NATION
CREEK NATION
CHICKASAW AND CHOCTAW NATIONS
TEXAS


KANSAS
OIL FIELDS
VE CIVILIZED TRIBES
MO.
CHEROKEE
NATION
ARKANSAS
CHOCTAW AND CHICKASAW
NATIONS
TEXAS

According to Deboe:

> The Five Tribes Act provided that all the rolls should close March 4, 1907. But some duplications were afterwards cancelled, and 312 names were added by act of Congress in 1914. The rolls included several small groups that had been incorporated into the tribes, especially about seven hundred Euchees, who formed a part of the Creek Nation, and about a thousand Delawares, who had purchased the right to Cherokee citizenship in 1867. The quantum of blood indicated by the rolls is somewhat misleading, partly because of inaccuracies in matter that t the time seemed unimportant, and partly because fullblood Indians of mixed tribal descent were classed as mixed bloods. The final rolls are as follows:

	INDIANS			WHITES	**FREEDMAN**	TOTAL
	Fullbloods	mixed	total			
Cherokees	8,703	27,916	36,619	286	**4,919**	41,824
Choctaws	7.087	10,401	17,488	1,651	**6,029**	25,168
Miss. Choc.	1,357	303	1,660			1,660
Chickasaws	1,515	4,144	5,659	645	**4,662**	10,966
Creeks	6,858	5,094	11,952		**6,809**	18,761
Seminoles	1,254	887	2,141		**896**	3,127
TOTAL	26,774	48,745	75,519	2,582	**23,405**	101,506

Deboe, p. 47.

> Although the law of 1908 had certainly entrusted [the department] with the responsibility of protecting all minor allottees, it was decided at the very beginning to limit such protection to restricted children. It was, of course, the unrestricted children of Negro, mixed Indian and white, or mixed Indian blood who were subject to the greatest exploitation, but the Department officials believe it wiser to concentrate upon the "real Indians"; as Kelsey said in 1910, with reference to some especially shocking pillaging of unrestricted children, "in my judgment the only remedy … is for the general citizenship of the State of Oklahoma to awake to the fact that the less intelligent residents of the community are being robbed by the

> connivance of grafters and dishonest officials, and that sooner or later these people who have been robbed will become public charges, and to avoid this ultimate condition public sentiment with respect to getting what the allottee has must change and the citizens must elect honest officers who will protect the minors, whether they be white, red, or black.
>
> But although the district agents' work was limited by such administrative decisions,, there was so much need for reform that like Stolper they accomplished a great deal. During the last six months of the first year of their employment they recovered about $548,306.78. House Reports, 61 Cong., 2 Seas., No. 2273, Vol. II, appendix, 1322-23. Department of the Interior, Annual Report, 1912, II, 486; Indian Office Files, 72545/08 Five Tribes 311. Each agent made a monthly report showing the exact sums that he recovered in specific cases, and these amounts were added to form the totals.
>
> Id.

The $300,000 recovered by the Department on behalf of minor Freedmen in 1910 and $548,306.78 in 1911-12, a point in time when George Curls was a minor allottee with land in oil rich Nowata County, which it is unclear he even knew at the time had been allotted to him, represent royalties that should have been placed in an Individual Indian Money account by the Department. By reason of overtly racist motives discussed above by Deboe, that did not happen. Mr. Curls allotment is located squarely within an area known to contain oil in 1910 and to be subject to a lease. The racist acts of Interior Department officials in 1910 against George Curls are being perpetuated by HR 4783 because in order to come within the ambit of the Act, one must own an IIM in which funds from restricted allotments were deposited. The past failure of the Department to properly administer royalties

owed to George Curls' now is causing renewed harm to Appellant Leatrice Tanner-Brown and persons similarly situated. The example of Leatrice Tanner-Brown is just one case. Appellants have evidence of many others e.g. A. Z. Dickson a descendant of Creek Freedmen and Angela Molette, a Choctaw descendant. See, Exhibits J and K.

Under the terms Sec. 6 of the Act of 1908, royalties from the allotment held by George Curls were under the ultimate supervision of the Secretary of Department of Interior until Curls reached the age of majority. Accordingly, from December 5, 1910, until January 3, 1918, all royalties on Curls' land were restricted and should have been held in trust by the Secretary. Curls was entitled to an Individual Indian Money account for that purpose. According to Deboe, as set forth on p. 85, of her writing royalties were collected from Cherokee lands in Nowata and Rogers Counties during this period. To the extent these royalties were owed to a minor Freedmen such as George Curls, the Secretary of Interior had a duty to place the royalties into an IIM. The lawful beneficiaries of proceeds from royalties on restricted allotments, such as Mr. Curls descendants, are entitled to be included in the Cobell Class. By reason of the under inclusive terms of the "Act" Appellants here are not included. This exclusion by reason of its reliance on past racially deleterious criteria renders the Act unconstitutional on equal protection grounds.

IV. Continued Discrimination

Appellants instituted litigation against the United States in the Federal Court of Claims on December 28, 2006, seeking relief for breach of fiduciary duties and trust mismanagement against the Department of Interior, Federal Court of Claims Case No. 06-907L. Case No. 06-907L was dismissed on January 15, 2008. Following the announcement of the Cobell settlement, based upon the identity of issues in the Cobell and CFC, Case No. 06-907L on March 15, 2010, Appellants moved for reconsideration in the Court of Claims. Reconsideration of Appellants' newly filed action is now pending in the United States Court of Appeals for the Federal Circuit, Case No. 2010-5104, having been denied by the Court of Federal Claims on March 26, 2010.

The United States has continually denied that any obligation is owed to the Freedmen and or their descendants, despite the clear statements in the 1866 Treaties and related legislation that the Freedmen are entitled to the "same rights" as members of the Five Civilized Tribes. The United States analyzes its obligations to Native Americans through a totally different spectrum than its obligations to slaves held by their Native American ancestors. This racial discrimination is at the root of Appellants' claims here.

The United States proposes to settle Cobell, a trust mismanagement claim, but argues that the Freedmen case is barred by the statute of limitations and that no general trust obligations are owed to the Freedmen. This approach by the United States is violative of equal protection.

Under the 1866 Treaties, Freedmen and Five Civilized Tribes members are to be treated equally. However, the United States takes an irrational paternalistic view towards the tribes while totally rejecting the proposition that any, duty whatsoever is owed to the Freedmen. This is pure racial discrimination. In point of fact. As Judge Lamberth determined in Cobell v. Babbitt, 91 F.Supp.2d. 1 (D.D.C. 1999).

> It would be difficult to find a more historically mismanaged federal program than the Individual Indian money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbit testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now plaintiffs in this lawsuit. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, whatsoever. "If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined." Cherokee Nation v. Georgia 30 U.S. (5Pet.) 1, 15, 8 L.Ed 25(1831) (Marshall, C.J.)…
>
> As Chief justice Marshall noted in 1831, the United States Indian relationship is "perhaps unlike that of any two people in existence" and marked by peculiar and cardinal distinctions which exist nowhere

else." Cherokee Nation, 30 U.S. at 16, 8 L.Ed. 25" In the early 1800s, the United States pursed the policy of "removal", *i.e.*, the relocation of tribal communities from their homelands in the East and Midwest to remote locations in the newly acquired Louisiana Purchase territory. Trial Tr at 846. In 1824, the Bureau of Indian Affairs (BIA) was created to implement that removal policy. [2] Trial Tr. at 152-53;846. For the majority of the Nineteenth Century, the federal government entered into a series of treaties and agreements identifying the lands owned by the tribes. These treaties and agreements were frequently violated or amended to reduce Indian holdings and to open more land to non-Indian settlers. Trial Tr. at 848-49. During this time period, the tribes held their land communally, so there was very little individual ownership of land. Non-Indian land, whether community or individually owned, could be sold without the approval of the federal government. Trial Tr. at 849-50.

By the late 1870s, the government had embarked upon the reservation era. This era was a particularly miserable time for the Indians because the reservation policy deprived Indians of their traditional economy and made them depend upon the federal government. Trial Tr. at 851-52. During the reservation era, the BIA became the provider of foods and goods to the tribes. Trial Tr. at 852. hence, by the 1870's, the government had successfully placed Native Americans in a state of coerced dependency.

After this relationship of dependency between the United States and the Indian people were forcibly established, the allotment era began. Driven by a greed for the land holdings of the tribes, Congress passed the 1887 General Allotment Act, also known as the Dawes Act. *See 25* U.S.C. § 348. Through the allotment process established by the Dawes Act, a delegation of American "peace commissioners" would negotiate with the tribes for the allotment of their reservations. The tribes were compensation for their land, and each head of household was allotted some amount of property, usually in 40-, 80-, or 160-acre parcels. The "surplus" lands that were not allotted to Indian individuals were then opened to non-Indian settlement. Trial Tr. at 852-56. Allotted land was held in trust by the United States for the individual Indians. Therefore, the Indians could not lease, sell or burden their property without the approval of the federal government. More importantly, the United States had against successfully managed to deprive the Indian people of more land, this

> time in return for the creation of a trust status. Between 1887 and 1934, 90 million acres-about sixty-five percent of Indian land-left Indian ownership. Trial Tr. at 857-57.

The United States has conceded what Judge Lamberth found above to be true, but continues to advance defenses against the Freedmen that have been specifically rejected in Cobell. Other examples are: disparate treatment in connection with the government's handling of the Motion to dismiss Appellants' case, discussions of trust status and the statute of limitations. In regard to these three factors, Cobell held in 30 F. Supp.2d 24 (D.D.C. 1998), as follows:

> Several courts have recognized and as the plaintiffs allege, allegations of breach of trust against government officials with regard to the administration of Indian trusts arise under the federal common law.. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (explaining that federal question jurisdiction existed in an ejectment action brought by Indian plaintiffs based, in part, on federal common law) Vizenor v. Babbitt, 927 F.Supp. 1193 (D.Minn.1996) (holding that, in a suit against the Secretary and Assistant Secretary of the Interior for breach of trust, the claims arose under federal common law); White v. Matthews, 420 F.Supp. 882, 887-88 (D.S.D. 1976) (holding that allegations of breach of trust against the government in a suit brought by Indian plaintiffs involved federal question jurisdiction under federal common law). Actions arising under federal common law fall within the general federal question jurisdiction conferred by 28 U.S.C. § 1331. Illinois v. City of Milwaukee, 406 U.S. 91, 100, 92 S.Ct. 1385, 31 L.Ed2d 712 (1972) The Supreme Court has repeatedly upheld the existence of a trust relationship between the government and the Indian people. *See e.g.* United States v. Mitchell II, 463 U.S. at 225, 103 S. Ct. 2961. The plaintiffs allege that the government, including the Secretary of the Treasury (to a limited extent) has breached these recognized duties. Therefore, because the plaintiffs' allegations against the Secretary of the Treasury arise under the statutory law and common

law of the United States, this Court has "arising under" jurisdiction over the plaintiffs' claim.

Statute of Limitation. First, the case law in this Circuit shows a strong disfavor of making determinations on limitations issues at the motion to dismiss stage. *See* Firestone v. Firestone, 76 F.3d 1205, 1210 (D.C.Cir. 1996) holding that the district court erred by dismissing a case with prejudice on a motion to dismiss rather than summary judgment); Richards v. Mileski, 662 F.2d 65, 73(D.C.Cir. 1981) ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense.") *Jones*, 442 F.2d at 775 *n.* 2 ("The issue of when plaintiffs decedent discovered the injury, or through the exercise of reasonable diligence should have known of the facts giving rise to the claim, is properly one for the trier of fact, save for the exceptional case when it can be established that there is no material issue of fact."). Second, even though the Court may properly judge a motion to dismiss for lack of jurisdiction that raises the limitations defense at the juncture under a summary judgment standard, *see In re Swine Flu Immunization prods. Liability Litigation,* 880 F.2d 1439, 1441-43 (D.C.Cir. 1989), to do so would be premature at this point for the same reasons that summary judgment itself is premature Namely, discovery has not been completed and to decide whether genuine issues of material fact exist at this point would be imprudent. The Freedmen's Case was dismissed on only 12(b)(6) prior to any discovery.

The defendants move to dismiss the plaintiffs Complaint based upon the defense of laches. The defendants bear the burden of proving this defense. *See* Anzalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp. 782 F.2d 1455, 1459, (8th Cir. 1986). The Court must accept the factual allegations of the Complaint as true on a motion to dismiss for failure to state a claim upon which relief can be granted *See Conley,* 355 U.S. at 45-46, 78 S.Ct. 99. In general, the time period for a laches analysis cannot begin to run until a repudiation of the trust has occurred and the plaintiffs have actual notice of it.. *See* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 964, at 73 (rev.2d ed.1983). The Complaint alleges neither. Therefore, the

> defendants' motion to dismiss based on the laches defense will be denied. Again, the defendants can raise this argument again i8f they so choose at the summary judgment stage based upon the contested facts. At this time, however, the Court cannot accept the defendants' factual allegations.

Not withstanding specific rejection of the statute of limitations argument and affirmation at general trust status, the government continues to argue that the Freedmen are not entitled to the same treatment as Cobell Plaintiffs, that their claims are barred by the statute of limitations and they do not have a general trust relationship with the United States. The arguments applicable to the Native American Claims decided by Judge Lamberth are equally applicable for the claims of the Freedmen. However, the United States continues to apply disparate rationale to the respective racial classifications, Native Americans versus Freedmen.

V. Sovereign Immunity

Although the district court did not reach Appellants' argument that their claims are not barred by Sovereign Immunity, Appellant's discuss this issue below.

"The United States, as sovereign, is immune from suit and save it consent to be sued, and the terms of its consent to be sued in any court, define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980). "A waiver of sovereign immunity can not be implied but must be unequivocally expressed." Id. At 538.

A claim is "properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makorova v. United States, 201 F.3d 110, 113 (2d Cir.2000). "When jurisdiction is challenged, the plaintiff, 'bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists." Arar v. Ashcroft, 532 F.3d 157, 168 (2d Cir. 2008) (quoting APWU v. Potter, 343 F. 3d 619, 623, (2d Cir. 2003)). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." Shipping fin. Servs. Corp. v. Drakos. 140 F. 3d 129, 131 (2d Cir. 1998) (citation omitted). As such, the Court may rely on evidence outside the pleadings, including declarations submitted in support of the motion and the records attached to these declarations. See, Makarova, 201 F. 3d at 113 ("In resolving a motion to dismiss…under Rule 12(b)(1), a district court… may refer to evidence outside the pleadings."). Appellants here also rely on 28 U.S.C. § 2201 (1994), does not enlarge the jurisdiction of the federal courts…and that a declaratory judgment action must therefore have an independent basis for subject matter jurisdiction." Concerned Citizens of Cobocton Valley, Inc. v. N.Y. State Dep't of Envtl. Conservation, 127 F. 3d 201, 206, (2d Cir. 1997) (citing Skelly Ohio Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950)). The independent basis here is the Fifth Amendment.

Appellees argue that sovereign immunity serves to bar this action. Courts, however, routinely entertain actions against federal agencies alleging violations of the Constitution. See, e.g., Reno v. ACLU, 521 U.S. 844 (1997). The only claims raised here are of Constitutional nature.

In Marbury v. Madison, 5 U.S. 137 (1803), the Supreme Court held that an appropriate party may sue the United States, notwithstanding sovereign immunity, for injunctive relief based on violation of constitutional rights. Since Marbury, there have been numerous examples of such litigation. See, e.g., Reno v. ACLU, 521 U.S. 844 (1997). Jurisdiction is based on 28 U.S.C. § 1331 because this case is indisputably an action "arising under the Constitution…of the United States."

> We emphasized in Johnson v. Robinson, 415 U.S. 361 (1974), that were Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. Id. At 415 U.S. 373-374. *n* Weinberger v. Salfi, 422 U.S. 749 (1975), we affirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

In such circumstances, the Supreme Court has held that Congress did not intend to preclude enforcement of constitutional rights through private actions. See, Wright v. Roanoke, 479 U.S. 418, 427-28 (1987). Indeed, even where Congress has created a statutory remedy, if that remedy is not coextensive with the remedy provided by the Constitution, Appellants may still bring a separate action

to enforce the Constitution. See, Fitzgerald v. Barnstable School Committee, _____ U.S. _____, 129 S. Ct. 788 (2009).

Appellants' claim here was brought under the general federal question jurisdiction provisions of 28 U.S.C. §1331. The claim is a facial challenge to the Constitutionality of an act of Congress under the fifth and Fourteenth Amendments. The United States Supreme Court has stated, access to the Court for resolution of Constitutional questions is essential. See, Weinberger v. Salfi, 422 U.S. 761 (1975) and Califano v. Sanders, 430 U.S. 99 (1977). Specifically, the Supreme Court has stated: "When constitutional questions are at issue, the availability of judicial review is presumed," and will not be foreclosed unless Congress' intent to do so is manifested by clear and convincing evidence. See, Weinberger v. Salfi, 422 U.S. 761, 762 (1975) and Johnson v. Robinson, 415 U.S. 361 (1974).

Judicial consideration of Appellants constitutional claims must be available in federal court, lest the bedrock principle articulated in Marbury v. Madison, 5 U.S. (1 Cranchy) 137 (1803) be rendered meaningless. It was stated in Johnson v. Robinson, the intent of Congress to restrict judicial review of a statute must be demonstrated through clear and convincing evidence. Id. At 373. Nothing in the Act here suggests that the presumption of reviewability should not attach.

At issue in this dispute is legislation that relies on racial and ethnic based

conditions to define and allocate property. The Supreme Court has stated legislation that employs racial or ethnic criteria, even in the remedial context, calls for close judicial examination. See, Fullilove v. Klutznick, 448 U.S. 448 (1980); Adarand v. Pena, 515 U.S. 200 (1995); and Croson v. City of Richmond, 488 U.S. 469 (1989). Congress must justify any race or ethnic based appropriation of funds under the strictest judicial scrutiny. See, Fullilove, Croson. Adarand and Rothe v. Dept. of Defense, 262 F.3d 1306 (Fed.Cir. 2001).

Congress may only employ racial and ethnic classifications in exercising its spending or other legislative powers only if these classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment, Fullilove.

As outlined above, the authority of federal courts to review legislation based on racial and ethnic classifications is well established in our jurisprudence. Accordingly, Appellees' sovereign immunity defense should be rejected for the reason Appellant's seek to vindicate personal Constitutional rights through their challenge to the Act.

CONCLUSION

For reasons stated above, the district court should be reversed and this action remanded for an evidentiary hearing.

Respectfully submitted,

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)
Percy Squire Co., LLC
514 S. High Street
Columbus, OH 43215
614-224-6528 Telephone
614-224-6529 Facsimile
psquire@sp-lawfirm.com
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

In accordance with the provisions of Fed. R. App. P. 32, the undersigned certifies that this appellate brief complies with the type limitations of this Rule.

1. The brief contains no more than 13,974 words in its entirety.
2. The brief has been prepared in 14-point Times New Roman typeface using Microsoft Word 2007.

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the court's electronic mail service, April 20, 2011, upon the following:

John J. Stark (0076231)
Assistant United States Attorney
303 Marconi Boulevard, Suite 200
Telephone: (614) 255-1585
Facsimile: (614) 469-5240
Email: john.stark@usdoj.gov

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS AND EXHIBITS

RECORD ENTRY NO.	DESCRIPTION
R-2	Complaint
R-3	Motion for Temporary Restraining Order
R-9	Attorney General's Motion to Dismiss
R-14	Plaintiffs' Response to Motion to Dismiss
R-16	Attorney General's Reply to Plaintiffs' Response
R-17	Order Granting Attorney General's Motion to Dismiss and Dismissing Complaint for Lack of Jurisdiction
R-19	Notice of Appeal

EXHIBIT LIST

EXHIBIT A	Definitions of Freedmen from various Administrations
EXHIBIT B	Example of treaties between the United States and "Five Civilized Indian Tribes" entered into at the close of the Civil War in 1866.
EXHIBIT C	"Individual Indian Money Account Litigation Settlement"
EXHIBIT D	Cobell Settlement Agreement
EXHIBIT E	Transcript of the enrollment hearing before the Department of Interior, Commissioner to the Five Civilized Tribes, July 1, 1902.
EXHIBIT F	George Curls, Sr. Certificate of Death
EXHIBIT G	Certified copy of forty acre "Allotment Deed" of George Curls
EXHIBIT H	Certified copy of twenty acre "Homestead Deed" of George Curls
EXHIBIT I	Act of May 27, 1908
EXHIBIT J	Freedmen Roll of Creek Nation listing minor ancestors of A.Z. Dickson all of whom received restricted allotments.
EXHIBIT K	Allotment records of ancestors of Angela Molette, Chickasaw