

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HISTORIC EASTERN PEQUOTS	:	
	:	
Plaintiffs	:	
	:	
	:	
v.	:	1:12-cv-00058(EGS)
	:	
	:	
KENNETH SALAZAR, et al	:	
	:	
Defendants.	:	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS, OR CHANGE OF VENUE**

Plaintiffs, the Historic Eastern Pequots, individually and collectively submit the forthcoming Opposition to Defendants' Motion to Dismiss for lack of subject matter jurisdiction, and oppose a transfer of venue. In Support of their Opposition, the Plaintiffs state that at all matters presented for review are within this Court's jurisdiction.

I STATEMENT OF FACTS

The plaintiffs are members of one of the oldest tribes in the country and have continuously occupied its reservation since 1683. The tribe has engaged in government to government relations since the earliest formation of the colonial government. In addition to the reservation, the plaintiffs have had dealings with the Crown in the early years and more recently with the federal government.

Throughout its history plaintiffs have had to endure great deprivation of its rights due to a failure of both the Federal and State governments to fulfill their respective fiduciary trust responsibilities. These duties are ongoing and as such the defendants have failed to acknowledge these responsibilities and continue to cause plaintiffs great harm.

In 1978, the Plaintiffs initiated its efforts to attain federal recognition as an Indian tribe pursuant to 25 CFR part 83. At all times during this process, Plaintiffs were a statutorily state recognized tribe in Connecticut and had a continuous government to government relationship with the state. The relationship has been antagonistic throughout with the State taking an adverse position to the Tribe in its efforts to become federally recognized. The State has treated Plaintiffs as second class citizens both amongst the five state tribes and amongst the citizenry as a whole. The State has supported the gambling efforts of the two federally recognized tribes and received billions on dollars for this support and has thwarted the efforts by the plaintiffs who are statutorily identical.

On June 24, 2002, after a 24 year effort, the Assistant Secretary issued a Final Determination (FD) concluding that the “historical Eastern Pequot Tribe, represented by the two petitioners, the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut, satisfied the regulatory criteria for federal acknowledgement. Subsequently, On May 12, 2005, the Interior Board of Indian Appeals issued an Order Vacating and Remanding the Determination. Subsequently, the

Associate Deputy Secretary of the Interior issued a Reconsidered Final Determination notice published in the Federal Register on October 14, 2005. On January 13, 2006, the IBIA ruled that it did not have jurisdiction to review the RFD as requested by the petitioners.

On October 13, 2011 Plaintiffs filed a Petition for Secretarial Review setting forth alleged abuses within the Defendant Agency that corrupted the decision-making process. The Secretary has failed to respond to plaintiff's request to review agency conduct. Plaintiff's then filed this action on January 13, 2012.

Plaintiffs' initial complaint was filed on behalf of the Eastern Pequot Tribal Nation, the constitutional government formed in 2003. However, the government at the behest of outside contractors, requested that this action be withdrawn. Plaintiffs were granted substitution of party plaintiff and filed an Amended Complaint alleging amongst other things, abuse in the acknowledgement process including undue influence and illegal conduct.

II. STANDARD OF REVIEW

The court in determining whether to dismiss a case under Rule 12(b)(1), the Court must "treat the complaint's factual allegations as true ...and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) The Court may consider extrinsic

evidence outside materials outside the pleadings as it deems appropriate to resolve the question of jurisdiction in the case. *Herbert v. National Academy of Scis.*, 974 F.2d 192. 197 (D.C. Cir. 1992)

In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), cases should be dismissed where it appears “beyond doubt that the plaintiff can proof no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Federal Rule of Civil Procedure require that “the complaint be liberally construed in favor of the plaintiff, who must be granted the benefits of all inferences that can be derived from the facts alleged.” *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir 1979).

III. ARGUMENT

A. THE TRUST RELATIONSHIP BETWEEN THE PARTIES OBVIATES THE DEFENSE OF STATUTE OF LIMITATIONS

The Plaintiffs have been a recognized tribe with a continuously occupied reservation since 1683 and as such is entitled to a trust relationship with the United States government. This trust relationship with the federal government exists without the benefit of the acknowledgement process to which the plaintiffs sought to participate in good faith. Throughout this process the federal government, through the Defendants, has refused to abide by its own rules or more importantly has attempted to abdicate and

waive its ongoing trust responsibilities owed to Plaintiffs.

The trust relationship between defendants and plaintiffs would negate defendants' arguments with respect to the Motion to Dismiss for failing to state a claim in light of failing to file a claim within the statute of limitations. As such, 25 CFR 1.4 provides that the Bureau of Indian Affairs rules apply and that states are prohibited from exercising jurisdiction over tribal lands and individuals because there is statutory and regulatory trust relationship between the tribe and the federal government. The failure to recognize a tribe or individuals or to deny a petition for a tribe which resides on tribal lands subject to the Non-intercourse Act is an ongoing violation of federal law.

In the applicability of rules of the Bureau of Indian Affairs, 25 CFR 1.4(a) provides under state and local regulation of the use of Indian property, "none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof...governing, regulating, or controlling the use or development of any real or personal property...shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian Tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

The Secretary and the BIA have an ongoing regulatory and statutory obligation to the Plaintiffs which has been and continue to be breached on a continuing basis as long as the Secretary fails to fulfill its obligations to the Tribe, including a failure to review the acknowledgement issues submitted prior to the initiation of this action.

It is well established that the statute of limitations is not a defense which may be used when there is an ongoing breaches of trust and the non-intercourse act. The tribe and all its members simply by virtue of existing on and possessing lands which are subject to a restraint on alienation, are subject to federal trust protection under 25 CFR 1.4(a) moreover, the Non-intercourse Act makes it a violation of the law for the state to engage in intercourse relative to these lands and the rights of the individual and tribe who are the owners and occupiers.

In *Worcester v. Georgia*, 31 US. (6 Pet.) 515, 8 L. Ed 483 (1832), Chief Justice Marshall noted that federal authority over Indian affairs was plenary, and that the grant to regulate “Commerce” amongst the Indian tribes gave the federal government authority to regulate all practically all aspects of Indian Affairs.

The central issue involving the trust relationship between older Eastern tribes was decided in the leading case of the *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In that case the tribe located in Maine on two reservations, filed an action seeking declaratory relief that the tribe was entitled to federal protection under the Indian Non-intercourse Act , 25 USC § 177. The district Court found that “the Passamaquoddy Tribe to be within the language of the Nonintercourse Act, “any ...tribe of Indians.” It read the quoted language as encompassing all tribes of Indians. The Court reasoned that the Act should be given its plain meaning...that the policy of the United States is to protect Indian title; that there is no requirement that a tribe must be otherwise recognized by the federal government to come within the

Nonintercourse Act; and even if “tribe” is thought to be ambiguous, it should be construed non-technically and to the advantage of Indians so as to include the Passamaquoddy Tribe.” Id at 376.

Congress’ power to regulate commerce with Indian tribes is found in U.S Const. Art. I, § 8. There is nothing in the Act to suggest that ‘tribe’ is to be read to exclude a bona fide tribe not otherwise federally recognized. See *United States v. Candelaria*, 271 U.S 432, 442, 70 L. Ed 1023, 46 S. Ct. 561 (1926).

A state’s duties to the tribe did not cut off whatever federal duties existed. Assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection. See *State v Dibble*, 62 U.S. (21 How.) 366, 16 L. Ed 149 (1858) The purpose of the Act has been held to acknowledge and guarantee the Indians right of occupancy, *United States v Santa Fe Pacific R. Co.*, 314 U.S. at 348, and there can be no meaningful guarantee without a corresponding duty to investigate and take such action as may be warranted in the circumstances. *Passamaquoddy v Morton*, Id at 378. The Court also found that argument citing Court of Claims jurisdiction go more to the scope of the federal governments duties under particular circumstances than to the existence of a trust relationship. The Court held the finding of a trust relationship and the finding that the federal government may not decline to litigate on behalf of the Tribe on the sole ground that there is no trust relationship. Id at 379.

In *Mohegan Tribe v State of Connecticut*, 638 F.2d 612, 613 (2nd Cir. 1980) the

Court found the defenses based upon adverse possession laws and statute of limitations have been consistently rejected. The Court found that the Nonintercourse Act contained no language of limitation, and must apply to all Indian lands. *Id.* at 621

In the matter before this Court, the Plaintiffs are clearly and unambiguously an Indian tribe currently inhabiting Indian lands, and were dispossessed of lands directly under Defendants' jurisdiction and thus have property with restraints on alienation and subject to the federal trust relationship. Matters claimed in Plaintiffs' complaint specifically cite an alienation of Indian land in contravention of the Non-intercourse Act and are entitled to federal trust protection. As such the duties of the Defendants are ongoing and not subject to the statute of limitations defenses raised by the Defendants.

B. FRAUDULENT CONCEALMENT TOLLS ANY CLAIMS OF STATUTE OF LIMITATIONS

The complaint alleges claims of conspiratorial conduct on the part of a number of participants in an attempt to subvert Plaintiffs' recognition efforts in order to thwart efforts to obtain federal acknowledgment and engage in lawful commerce. As such Plaintiffs assert that any statute of limitations should be tolled as a consequence of fraudulent concealment. The doctrine of fraudulent concealment, as developed at common law was explicitly recognized in *Bailey v. Glover*, 88 US 342 (1874).

Both federal law and the law of the District of Columbia recognize that fraudulent

concealment tolls the running of the statute of limitations. *Hobson v. Wilson*, 237 U.S. App. DC 219, 737 F.2d 1, 35 (D.C. Cir. 1984). Fraudulent concealment is an equitable doctrine that is read into every federal statute of limitations. The elements of fraudulent concealment are the same in both the federal and District of Columbia law. *Id* at 33. The Court found that there must be ‘some misleading, deceptive or otherwise contrived action or scheme, in the course of committing wrong, that is designed to mask the existence of a cause of action....Any statement, word or act which tends to suppress the truth raises the suppression to that level. *Id* at 35.

The Supreme Court has recognized that fraudulent concealment tolls the statute of limitations in civil RICO claims as long as plaintiffs performed due diligence. *KLEHR v. A.O. Smith Corp.*, 521 U.S. 179, 195-96(1997). The Connecticut Supreme Court has ruled that where an allegation of fraud, self-dealing, or conflict of interest is made against a fiduciary, the burden shifts to the fiduciary to prove that it acted fairly. 247 Conn. 396, 400, 721 A.2d 1181, 1183-84 (1998).

In the Plaintiffs case before this Court the causes raised satisfy that the statute of limitations be tolled for the conduct alleged.

C. THE DEFENDANTS SHOULD BE EQUITABLY ESTOPPED FROM CHALLENGING ON THE GROUNDS OF STATUTE OF LIMITATIONS

Where there is collusion involving governmental entities with regulatory responsibilities as is the case before this Court, the defendants should be equitably

estopped from challenging the statute of limitations. The failure to properly regulate allowed fraudulent manipulation of the BIA process and a caused a breach of the trust obligations to protect the tribe and act in its best interests.

Likewise, the state should be estopped from claiming statute of limitations when they were part of the effort to prevent the Plaintiffs from knowing about the fraud and anti trust violations, and were challenging recognition efforts despite their trust obligations.

D. PLAINTIFFS FILED THE COMPLAINT IN A TIMELY MANNER

The Plaintiffs filed their complaint within the prescribed statutory limit when it initiated this cause of action. The Interior Board of Indian Appeals docketed their final action on January 13, 2006. The IBIA played a pivotal role in denying Plaintiffs' due process rights and failed provide any recourse or avenue of participation in the process following Plaintiffs original FD. Thus it was not until their ruling denying Plaintiffs access or recourse, that the due process denial was effectuated. Accordingly, the filing of the action within the limitation of that date was within the proscribed statute of limitations date.

IV. CHANGE OF VENUE

The defendant's have moved that the venue in this action be transferred to the

District Court of Connecticut. The Plaintiffs request that this Court maintain venue in all matters before the Court. Plaintiffs assert that it would be in the interests of justice to continue this cause in the District of Columbia. The Plaintiff's have raised issues with the various aspects of the Defendants' agency involving the BIA, IBIA and the NIGC. The allegations raised in this action directly involve not only the administration of various governmental entities. Throughout the recognition process many interests regularly and routinely came to Washington to influence the process to thwart Plaintiffs efforts. The State and its towns came here only to oppose the Plaintiffs efforts at self determination. Communities in Connecticut hired high priced lobbyists such as Haley Barbour to do the bidding and to keep the tribe in a vulnerable position.. Many came to Washington to attack the BIA process after the Tribe received its favorable initial decision. Many elected officials including Congressman and Senators openly opposed recognition efforts. Much of the influence was exerted in Washington on the Defendant agency and its subdivisions.

Plaintiffs have not received any justice in Connecticut for most of its history and from an equitable perspective, would prefer that this case remain in this venue due to its unique issues set forth involving a far reaching conspiracy to thwart it recognition efforts for economic gain, while putting the Plaintiffs on the brink of technical extinction.

V. CONCLUSION

For the reasons aforementioned and others which may come to the attention of the Court, Plaintiffs respectfully request that Defendants Motions to Dismiss, and alternately, transfer of venue be DENIED.

Respectfully submitted

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