**IN THE UNITED STATES**
**COURT OF FEDERAL CLAIMS**

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| SHINNECOCK INDIAN TRIBE | ) | |
| | ) | Electronically Filed: |
| Plaintiff, | ) | February 19, 2013 |
| | ) | |
| v. | ) | No. 1:12-cv-00836-ECH |
| | ) | |
| | ) | Chief Judge Emily C. Hewitt |
| THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**UNITED STATES' MOTION TO DISMISS AND**
**MEMORANDUM IN SUPPORT**

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## INTRODUCTION

The Shinnecock Indian Nation (hereinafter "Plaintiff" or "Shinnecock"), seeks $1.1 billion based on a court decision by the Eastern District of New York (hereinafter "Eastern District" or "District Court") to dismiss claims brought by the Shinnecock against New York and the Town of Southampton. The Shinnecock brought claims against New York and others claiming that certain land transactions in 1859 were barred by the Non-Intercourse Act because the transactions were not approved by the United States. The Eastern District applied Supreme Court and Second Circuit precedent, and dismissed the claims based on the doctrine of laches. Plaintiff alleges the dismissal prevents them from obtaining "effective redress" for the 1859 land transactions and seeks money damages from the United States based on the Non-Intercourse Act and the United Nations Declaration on the Rights of Indigenous Peoples.

The United States moves to dismiss Plaintiff's Complaint because this Court either lacks jurisdiction to consider the claims or the Complaint does not state a claim upon which relief may be granted. First, Plaintiff's primary complaint that a court decision by the Eastern District of New York to dismiss their Non-Intercourse Act claims against New York denies them "effective redress" for such claims is not ripe. Plaintiff has filed a motion for reconsideration of the dismissal decision and an appeal with the Second Circuit. The Eastern District or Second Circuit could reverse the previous decision and thus, there would be no case in controversy for this Court to decide. Second, Plaintiff's claims that the Supreme Court, Second Circuit and Eastern District have denied them "effective redress" and established "invidiously discriminatory rules that apply only to 'Indian claims'" should be dismissed because the Federal Circuit has

long held that the due process clause of the Fifth Amendment does not establish money-mandating duties. Likewise, neither the Non-Intercourse Act nor the United Nations Declaration on the Rights of Indigenous Peoples create specific enforceable money-mandating fiduciary duties that the United States has breached sufficient to establish jurisdiction in this Court. Finally, Plaintiff's assertions that the United States has foreclosed "effective redress" and provided no forum for remedying a historical wrong are undercut by Congress's establishment of the Indian Claims Commission. The Commission had jurisdiction to hear legal as well as claims based on moral wrongs. Here, the historical wrong Plaintiff seeks recourse for occurred in 1859 and Plaintiff could have availed itself of that forum. Based on the reasons stated herein, the Court should dismiss Plaintiff's Complaint.

## BACKGROUND[1]

### I. Shinnecock Indian Tribe

The Shinnecock Indian people are among the original inhabitants, occupants and residents of Long Island, New York. Pl.'s Compl. ¶ 18. In 1640, 1649 and 1703, the Shinnecock reached various agreements with the English settlers in the area and reserved certain lands to itself but also authorized the settlers to make certain uses of the land. Id. at ¶¶ 12, 20-22. The lands reserved comprise approximately 5,258 acres of land located in the Town of Southampton, New York. Id. at ¶ 13. Shinnecock alleges that in 1859 the

[1] This background statement contains facts material to jurisdictional issues raised in the instant motion to dismiss, and also general background facts for the Court's convenience that are not material to the jurisdictional or other threshold legal issues raised in the instant motion. We note that to the extent we accept Plaintiff's allegations, this is based solely on the nature of our motion, which is a motion to dismiss under the Rules of the Federal Court of Federal Claims, Rules 12(b)(1) and 12(b)(6). The United States does not concede that any of the Plaintiff's allegations are true or correct, even though the Court must take the allegations as true for purposes of deciding this Motion.

majority of the reserved lands were wrongfully conveyed and released to the Town of Southampton. Id. at ¶ 16-17, 33-34.

## II. The Non-Intercourse Act, 25 U.S.C. § 177

The Non-Intercourse Act provides in pertinent part that:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. The Non-Intercourse Act "bars conveyances by Indians to non-Indians unless made or ratified by Congress." Seneca Nation of Indians v. New York, 382 F.3d 245, 248 (2d Cir. 2004); see also Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1566 (Fed. Cir. 1993) (Under the Non-Intercourse Act, "transfers of title to Native American lands [a]re prohibited unless [made] pursuant to a treaty approved by the United States."). The Act's purposes are to "prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the [g]overnment, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent," Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960), and to prevent Indian unrest over encroachment by white settlers on Indians lands. Mohegan Tribe v. Connecticut, 638 F.2d 612, 621-22 (2d Cir. 1980).

## III. Previous and Ongoing Efforts by the Shinnecock to Litigate Non-Intercourse Act Claims

In 1978, by letter to the Department of the Interior, the Shinnecock requested that the United States pursue claims against New York for violations of the Non-Intercourse Act. Pl.'s Compl. ¶ 42. In 1979, the United States declined to bring such a suit. Id. In

2005, the Shinnecock filed suit against New York alleging Non-Intercourse Act claims in the Eastern District of New York. Id. ¶ 46 (citing Shinnecock Indian Nation v. State of New York, et al., No. 05-CV-2887 (E.D.N.Y.) (First Amended Complaint filed August 5, 2005)). In 2006, the district court applied Supreme Court and Second Circuit precedent and dismissed Plaintiff's Non-Intercourse Act claims. Pl.'s Compl. ¶¶ 47-49; see also Shinnecock Indian Nation v. New York, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006). Shinnecock has filed a motion for reconsideration of that decision and an appeal to the Second Circuit. See ECF No. 37 Shinnecock Indian Nation v. New York, No. 05-CV-2887 (E.D.N.Y.) (Notice of Appeal filed Dec. 29, 2006); see also id. at ECF No. 84 (staying ruling on reconsideration until March 1, 2013); see also Ex. C. Neither has been decided. Id.

Also in 2005, the Tribe again requested that the United States join in that land claim or file its own suit against New York. Shinnecock Indian Nation v. Kempthorne, No. 06-CV-5013, 2008 WL 4455599, at *1 (E.D.N.Y. Sept. 30, 2008). Interior responded by letter and stated that "[a]t this time, the Department [of the Interior] has yet to receive any historical records concerning the merits of the land claim you allege" and as such, "it is premature to consider intervention in your lawsuit." Id. at *19-20. Plaintiff brought suit against the Department of the Interior in district court under the Administrative Procedures Act alleging, among other claims, violations of the Non-Intercourse for not continuing to investigate and for not deciding whether to intervene. Id. In 2008, the district court dismissed Plaintiff's Administrative Procedure Act claims. Id.

By letter dated March 11, 2011, Plaintiff renewed its request for the United States to intervene in its land claim and submitted additional information on February 11, 2013. Plaintiff's Complaint does not mention this renewed request. Due to the confidential nature of the on-going investigation into Plaintiff's allegations, the United States has only provide a redacted portion of the February 11, 2013, which contains factual representations regarding the status of its pending land claim against New York. See Ex. C. At the Court's request, the United States will make the full text of these letters available for in camera review.

**IV. The United Nations Declaration on the Rights of Indigenous Peoples**

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous People, GA Res. 61/295 (Sept. 13, 2007). Pl.'s Compl. ¶ 30; see also Ex. A. Article 26 (3) provides:

> States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 provides:

> States shall establish and implement, in conjunction with indigenous people concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28 provides:

> Indigenous peoples have the right to redress, by means that can include restitution, or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 40 provides:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

In 2010, the United States announced its support for the United Nations Declaration on the Rights of Indigenous Peoples by stating that "[t]he United States supports the Declaration, which – while not legally binding or a statement of current international law – has both moral and political force." See Ex. B (Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples). The statement of support can also be found at the website cited below but is provided as an exhibit for the Court's convenience. See www.state.gov/documents/organization/153223.pdf (last visited Feb. 19, 2013).

**V. Claims Presented and Relief Sought in Plaintiff's Complaint**

Plaintiff brings two claims alleging breaches of trust. Pl.'s Compl. ¶¶ 57-67. The first claim alleges that the Non-Intercourse Act, 25 U.S.C. § 177, sets forth "legal obligations to Plaintiff to protect against loss of Indian tribal lands" and that "these legal obligations include the obligations to Plaintiff to provide effective redress for the unlawful taking of the Shinnecock Stolen Lands." Id. at ¶ 58-60. Plaintiff further alleges that "Defendants' courts" have "violated these legal obligations," id. at ¶ 61 [sic], by dismissing Plaintiff's Non-Intercourse claims against New York. Id. ¶¶ 46-49. Claim two alleges the same violation – that of "Defendants' courts [sic]" not providing "effective redress" but bases the claim on the United Nations Declaration on the Rights of

Indigenous Peoples, customary international law and the federal common law. Id. at ¶¶ 26-32, 63-67. Plaintiff requests $1.1 billion in money damages for the alleged breaches of trust. See Prayer for Relief, Pl.'s Compl.

**STANDARD OF REVIEW**

RCFC 12(b)(1) provides for dismissal of a claim if the court lacks jurisdiction over the subject matter of a claim. The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. United States Dep't. of Energy v. Ohio, 503 U.S. 607, 615 (1992); Renne v. Geary, 501 U.S. 312, 316 (1991). "A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936)). "Subject matter jurisdiction is strictly construed." Leonardo v. United States, 55 Fed. Cl. 344, 346 (2003) (citations omitted).

In considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), a court must accept as true all factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor. See Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001). Where it appears beyond doubt that a plaintiff cannot prove any set of facts that would entitle him to relief, a court may dismiss the cause of action. See Conti v. United States, 291 F.3d 1334, 1338 (Fed. Cir. 2002). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claim. See Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 938 (Fed. Cir. 2007). Nevertheless, while a

complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citation and quotations omitted); Esch v. United States, 77 Fed. Cl. 582, 587 (2007); see also Steward v. United States, 80 Fed. Cl. 540, 543 (2008) (explaining that the "court must inquire whether the complaint meets the 'plausibility standard'"); May v. United States, 80 Fed. Cl. 442, 448 (2008) (emphasizing that plaintiff must establish her right to relief above the speculative level).

## ARGUMENT

### I. Plaintiff's Claims Are Not Ripe

Plaintiff's claims alleging the District Court's decision in 2006 to dismiss the Tribe's Non-Intercourse Act claims against the State of New York are not ripe because the Tribe has filed an appeal of that decision, which remains pending and unresolved by the Second Circuit. See supra at 4; see also Ex. C at 17. Likewise, Plaintiff's claims alleging the United States had declined to pursue Non-Intercourse Acts claims against the State of New York are not ripe because Plaintiff has recently resubmitted a new request to the federal government asking that the United States exercise its prosecutorial discretion and file suit against New York. See supra at 4-5.

The ripeness doctrine is based on the "case or controversy" requirement of Article III of the Constitution, Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 138 (1974), which is a necessary predicate to a federal court's subject matter jurisdiction over a plaintiff's claim, see Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc., 527 F.3d 1278, 1290 (Fed. Cir. 2008). As a constitutional doctrine, ripeness ensures the existence of a

justiciable case or controversy by forcing federal courts to withhold consideration of premature adjudication. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). The critical question is, ultimately, whether a case involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotation omitted); see also Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583 (Fed. Cir. 1993). In fact, "[a] claim is not ripe 'if it is premised upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Bannum, Inc. v. United States, 56 Fed. Cl. 453, 462 (2003) (quoting Texas, 523 U.S. at 300). "If a claim is not ripe, the court does not have jurisdiction to hear the case, and it must be dismissed without prejudice." Id. (citing Crawford v. United States, 53 Fed. Cl. 191, 195 (2002)).

A ripeness dispute requires the application of a two-part test by which a court must evaluate (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. Caraco Pharm. Labs., 527 F.3d at 1294-95 (citing Abbott Labs., 387 U.S. at 149). As to the former, "an action is fit for judicial review where further factual development would not 'significantly advance [a court's] ability to deal with the legal issues presented.'" Id. at 1295 (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003)). The latter anticipates an assessment of whether "withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an 'immediate and substantial impact' on the plaintiff." Id. (quoting Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171 (1967)). A sufficient risk of immediate hardship may warrant prompt adjudication.

Cedars-Sinai Med. Ctr., 11 F.3d at 1580-81. Both prongs of the two-part test must be satisfied for a claim to be found ripe. Id. at 1581.

Here, Plaintiff's main argument is that a court decision by the Eastern District of New York to dismiss their Non-Intercourse Act claims against New York denies them "effective redress" for such claims. Pl.'s Compl. at ¶¶ 46-50, 60-61, 65-66. In 2006, the Eastern District of New York applied Supreme Court and Second Circuit precedent and held that Plaintiff's claims against New York should be dismissed because the claims fall within the doctrine of laches. See Shinnecock Indian Nation v. New York, No. 05-cv-2887, 2006 WL 3501099 (Nov. 28, 2006); see also Pl.'s Compl. at ¶ 46-50. Regardless of the merits of whether the Eastern District was correct, Plaintiff has filed for reconsideration of that decision and an appeal to the Second Circuit. See supra at 4; see also Ex. C at 17. That appeal remains pending. Id. Indeed, Plaintiff recently told the Department of the Interior that "[t]he Nation's intention never was to 'abandon' such [Non-Intercourse Act] claims, which were dismissed under Rule 12(b)(6) and which *we believe remain preserved for appeal*." Ex. C at 17 (emphasis added). The Second Circuit could reverse the Eastern District and if the Second Circuit upholds the Eastern District, Plaintiff could seek rehearing en banc or certiorari from the Supreme Court. Accordingly, Plaintiff's allegations in Count I and II that the United States' courts have denied them recourse and "effective redress" for New York's actions in 1859 may never need to be decided in this forum. The Court should therefore dismiss Plaintiff's Complaint as not ripe in its entirety.

Additionally, Plaintiff recently resubmitted its request that the United States bring an enforcement action pursuant to the Non-Intercourse Act.[2] "[T]he Department [of the Interior] considers requests to litigate in concert with the Department of Justice. A host of factors are reviewed and considered by both agencies in making such a decision." Shinnecock, 2008 WL 4455599 at *20. No decision has been made on Plaintiff's renewed request to intervene or whether the United States will commence Non-Intercourse Act claims against New York. As such, Plaintiff's claim alleging the United States has failed to redress violations of the Non-Intercourse Act by New York are not ripe.

To be clear, even if the Second Circuit affirms the dismissal of Plaintiff's Non-Intercourse Act claims, or if the United States ultimately decides not to intervene, the United States' view is that Plaintiff cannot set forth a claim because, as discussed in detail below, the Act does not contain specific, enforceable, money-mandating fiduciary duties. For purposes of ripeness, Defendant simply argues that in its current iteration, Plaintiff's Complaint does not present ripe claims, is premature, and should be dismissed.

## II. Any Claims Based Upon Plaintiff's 1978 and 2005 Requests Are Outside the Statute of Limitations

On the other hand, Plaintiff's Complaint also contains claims that it brings too late. Plaintiff's Complaint discusses Plaintiff's 1978 request to bring an enforcement action. Pl.'s Compl. at ¶ 42. In 2005, Shinnecock brought an action against the United States under the Administrative Procedure Act claiming that a letter responding to their

[2] Curiously Plaintiff's Complaint does not mention its resubmission but does discuss its 1978 and 2005 requests. Pl.'s Compl. at ¶ 42 (1978 request), ¶ 25 (citing case in which Shinnecock challenged the 2005 request). Any claims here regarding these earlier requests fall outside the applicable six-year limitations period and are discussed below.

2005 request to join in their land claim violated the Non-Intercourse Act. Shinnecock, 2008 WL 4455599. To the extent Plaintiff alleges these actions form the basis for any relief sought here, they are outside the applicable statute of limitations.

Civil actions brought against the United States in the Court of Federal Claims must be filed within six years of the accrual of the cause of action. 28 U.S.C. § 2501. "This statute of limitations is a jurisdictional limitation on the government's waiver of sovereign immunity and therefore must be construed strictly." Wolfchild v. United States, 62 Fed. Cl. 521, 547 (2004) (citing Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)). In deciding the issue of dismissal on statute of limitations grounds, the Court focuses on "first accrual," the 28 U.S.C. § 2501 condition on the waiver of sovereign immunity. Under the Indian Tucker Act, a claim first accrues "when all events have occurred to fix the government's alleged liability, entitling the claimant to demand payment and sue here for money." Samish Indian Nation v. United States, 419 F.3d 1355, 1369 (Fed. Cir. 2005) (citation omitted). "It is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." Fallini v. United States, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Instead, "for purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the *consequences* of the acts [become] most painful.'" Navajo Nation v. United States, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)) (emphasis in original). An Indian beneficiary, no less than anyone else, is charged with notice of whatever facts an inquiry appropriate to the circumstances

would have uncovered. See, e.g., Littlewolf v. Hodel, 681 F. Supp. 929, 942 (D.D.C. 1988).

Plaintiff's Complaint alleges that the United States notified the Tribe by letter in 1979 that it was declining to bring suit against New York under the Non-Intercourse Act. Pl.'s Compl. at ¶ 42. This alleged breach of trust and failure to take action occurred decades ago and therefore well outside the limitations period. See Shinnecock, 2008 WL 4455599 at *20, n.16; see also San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1359 (Fed. Cir. 2011) (holding that the facts as alleged in plaintiff's complaint can set the accrual time for the government's alleged liability). The same is true with regard to Plaintiff's 2005 request. At the latest, Plaintiff was certainly on actual notice of the events at the time of filing its district court complaint and claimed that the 2005 request created Administrative Procedures Act liability. As such, all of Plaintiff's claims accrued decades before the filing of the Amended Complaint and long before the applicable six year statute of limitations.

## III. Plaintiff's Complaint Does Not Set Forth Specific Money-Mandating Fiduciary Duties

### A. The United States' limited waiver of sovereign immunity in the Tucker Acts

As long held by the Supreme Court, claims by Indians against the United States for breaches of the general trust relationship are outside this Court's subject-matter jurisdiction. See United States v. Mitchell, 445 U.S. 535, 542 (1980) ("Mitchell I") (General Allotment Act created only "limited trust relationship" that did not give rise to enforceable fiduciary obligations against the United States). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a

prerequisite for jurisdiction." United States v. Navajo Nation, 537 U.S. 488, 502 (2003) ("Navajo I") (quoting United States v. Mitchell, 463 U.S. 206, 212 (1983) ("Mitchell II")). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," FAA v. Cooper, ___ U.S. ___, 132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver has to be "strictly construed . . . in favor of the sovereign," Lane v. Peña, 518 U.S. 187, 192 (1996), and "not 'enlarge[d] . . . beyond what the language requires.'" United States Dep't of Energy, 503 U.S. at 615 (citation omitted); see Cooper, 132 S. Ct. at 1448.

The Tucker Act provides a "[l]imited" waiver of the United States' immunity from suit (United States v. Navajo Nation, 556 U.S. 287, 289 (2009) ("Navajo II")) by granting this Court jurisdiction over

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The corresponding Indian Tucker Act, 28 U.S.C. § 1505, provides essentially the "same access" to relief. Mitchell I, 445 U.S. at 540.

While the text of the two Tucker Acts addresses damages claims "founded . . . upon" (28 U.S.C. § 1491(a)(1)) or "arising under" (28 U.S.C. § 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." Mitchell II, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 216-17 (quoting United States

v. Testan, 424 U.S. 392, 400 (1976)); accord Navajo I, 537 U.S. at 503.

An Indian tribe asserting a non-contract claim under the Tucker Act or Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. Navajo II, 556 U.S. at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" Id. (quoting Navajo I, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. Navajo I, 537 U.S. at 506; see United States v. Jicarilla Apache Nation, ___ U.S. ___, 131 S. Ct. 2313, 2325 (2011) (holding that specific enforceable trust duties are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles"); Navajo II, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" Navajo II, 556 U.S. at 290-91 (quoting Navajo I, 537 U.S. at 506) (brackets and citation omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that themselves require payment of a damages remedy. Testan, 424 U.S. at 400-401; id. at 397-398; see also Navajo I, 537

U.S. at 503, 506; Mitchell II, 463 U.S. 216-218.

"[T]he basis of the federal claim whether it be the Constitution, a statute, or a regulation"—that is identified in the first step of the analysis can in turn give rise to a claim for money damages under the Tucker Act only if "that basis 'in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Testan, 424 U.S. at 401-02 (ellipsis and citation omitted). The Tucker Acts therefore "waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)" "only if " the "other source of law" creating "the right or duty" that the government has allegedly violated "'can fairly be interpreted as mandating compensation by the Federal Government.'" Navajo II, 556 U.S. at 290 (quoting Testan, 424 U.S. at 400); accord Army & Air Force Exchange Serv. v. Sheehan, 456 U.S. 728, 739-741 (1982) (Tucker Act "jurisdiction . . . cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages.").

"Congress may style its relations with Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." Jicarilla, 131 S. Ct. at 2323 (quoting Mitchell I, 445 U.S. at 532, 542 and Mitchell II, 463 U.S. at 224). Thus, the general trust relationship between the United States and Indians is insufficient to invoke this Court's subject-matter jurisdiction and Indian tribes, like other litigants before this Court, have to clear both jurisdictional hurdles, Navajo II, 556 U.S. at 290-91, before proceeding to the merits of their claim.

### B. Plaintiff Has to Plead Jurisdictional Facts Bringing its Claims Within the Tucker Acts' Limited Waiver of Sovereign Immunity

Plaintiff bears the burden of establishing this Court's jurisdiction. See FW/PBS,

Inc. v. Dallas, 493 U.S. 215, 231 (1990) (holding that the burden is on the plaintiff to allege facts sufficient to establish jurisdiction). A plaintiff in this Court needs to identify and plead a contractual relationship, constitutional provision, federal statute, or executive agency regulation that provides a substantive right to money damages, independent of the Tucker Acts. See Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) ("The Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages."). "In determining whether the Court of Federal Claims has jurisdiction, all that is required is a determination that the claim is founded upon a money-mandating source and the plaintiff has made a nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source." Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1309 (Fed. Cir. 2008). "[T]his Court requires a petitioner, in the event his claim is founded upon an act of Congress, to specify in his petition 'the act and the section thereof on which plaintiff relies.' . . . While the Court desires to be liberal in a case of this character, it may not always supply and remedy major deficiencies in pleading." McMahon v. United States, 104 Ct. Cl. 366, 372 (1945). Thus, at a minimum, to state a claim within this Court's subject-matter jurisdiction an Indian tribe has to plead those specific statutory or regulatory obligations, money-mandating in breach, it believes the United States has violated and to allege facts establishing that it is within the class of plaintiffs entitled to recover under those money-mandating sources. Plaintiff's Complaint identifies the Non-Intercourse Act and the United Nations Declaration on the Rights of Indigenous Peoples but, as discussed below,

neither meets the applicable requirements for waiving the United States' sovereign immunity.

### C. Any Claims Based on the Alleged Denial of "Effective Redress" or the Creation of "Invidiously Discriminatory Rules" by Courts Under the Due Process Clause of the Fifth Amendment Should Be Dismissed

Again, Plaintiff's primary complaint throughout both of its claims is that a court decision by the Eastern District to dismiss their Non-Intercourse Act claims against New York denies them "effective redress" for such claims. Pl.'s Compl. at ¶¶ 46-50, 60-61, 65-66. Plaintiff acknowledges that the Eastern District applied existing Supreme Court and Second Circuit precedent, but avers that the precedent amounts to "the imposition of newly-formed and invidiously discriminatory rules that apply only to 'Indian claims'" that disregard legislation and executive policy, and thereby the dismissal order by the Eastern District should result in an award of money damages. Id. at ¶¶ 5, 47-49, 61, 66. Putting aside the pending motion for reconsideration and appeal of that decision, it appears that Plaintiff is asking this Court to hold that when a district court applies Supreme Court and Circuit precedent that that action can result in a money damages award. Such a holding would be extraordinary and is not permitted. See Meeks v. United States, 2007 WL 5172431, at *4 (Fed. Cl.) ("The Court of Federal Claims lacks jurisdiction to review the decisions of district courts in cases where the district courts possess jurisdiction.") (citing Maracalin v. United States, 52 Fed. Cl. 736, 741 (2002)).

Additionally, Plaintiff alleges that the Supreme Court, Second Circuit and Eastern District have denied them "effective redress" and established "invidiously discriminatory rules that apply only to 'Indian claims,'" and cites the Fifth Amendment. See Pl.'s Compl. ¶¶ 5, 8, 47-49, 61, 66. As the Federal Circuit has long noted, not all rights

granted by the Constitution or the laws of the United States are money-mandating property rights that would support jurisdiction in this Court, see Adams v. United States, 20 Cl. Ct. 132, 135 (1990), and the due process clause is not a money-mandating provision of the Constitution and therefore cannot be used to confer jurisdiction upon the Court under the Tucker Act. See Proctor v. United States, 95 Fed. Cl. 437, 441 (Fed. Cl. 2010) (citing Samish Indian Nation v. United States, 90 Fed. Cl. 122, 147–48 (2009)).

**D. The Non-Intercourse Act Does Not Set Forth A Specific, Enforceable, Mandatory Trust Duty Requiring the United States to Bring An Enforcement Action, Nor Can the Act Be Fairly Interpreted As Mandating Compensation**

Plaintiff claims that in the Indian Non-Intercourse Act, 25 U.S.C. § 177, Congress has set forth a specific, enforceable mandatory trust duty requiring the United States to "protect against loss of Indian tribal lands." Pl.'s Compl. ¶ 25, 58. Plaintiff further claims that the Non-Intercourse Act requires that the United States "provide effective redress" and that "Defendants' courts have barred any and all judicial means of effective redress . . . ." Id. at ¶ 59-61. As discussed above, the Non-Intercourse Act "bars conveyances by Indians to non-Indians unless made or ratified by Congress." Seneca Nation of Indians v. New York, 382 F.3d 245, 248 (2d Cir. 2004); see also Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1566 (Fed. Cir. 1993) (Under the Non-Intercourse Act, "transfers of title to Native American lands [a]re prohibited unless [made] pursuant to a treaty approved by the United States."). As set forth above, the Act has three purposes: (1) prevent the unfair disposition of Indian lands, by requiring consent by the United States to the transaction; (2) enable the United States to vacate any disposition that violates this provision; and (3) prevent unrest due to encroachment by settlers. See supra background at 3.

The Non-Intercourse Act does not set forth a specific duty making the United States liable in money damages for land transactions that were conducted without the United States' consent. The Non-Intercourse Act states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. While the Act prohibits and voids conduct by others, it does not set forth specific mandatory fiduciary duties with respect to the United States. Indeed, the Supreme Court has observed that "[Section] 177 is not applicable to the sovereign United States." Tuscarora, 362 U.S. at 120. In sum, the Non-Intercourse does not provide that the United States will insure against the loss of all Indian lands.

Likewise, the Act cannot be fairly interpreted as providing for money damages against the United States. The Act states that "[e]very person who, not being employed under the authority of the United States, attempts to [purchase lands held by Indians] is liable to a penalty of $1000." 25 U.S.C. § 177. The Act clearly contemplates the payment of money damages from others, but not from the United States. Plaintiff's Complaint in no way claims that the actors who conveyed the lands did so at the bequest of the United States. Accordingly, Plaintiff has not identified a specific, money-mandating fiduciary duty and has not properly invoked this Court's jurisdiction.

Plaintiff's Complaint cites three cases presumably for the proposition that the Non-Intercourse Act sets forth specific fiduciary duties to prevent loss of Indian lands and to mandate that the United States bring suit to enforce land transactions that violate the Non-Intercourse Act. Pl.'s Compl. ¶ 25 (citing Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51 (2d Cir. 1994); Joint Tribal Council of the Passamaquoddy Tribe v.

Morton, 528 F.2d 370 (1st Cir. 1975); Shinnecock Indian Nation v. Kempthorne, No. 06-CV-5013, Slip. Op., 2008 WL 4455599 (E.D.N.Y. Sept. 30, 2008). These cases do not stand for such propositions. In Golden Hill, the Second Circuit states that "[t]he Act created a trust relationship between the federal government and American Indian tribes with respect to tribal lands covered by the Act." 39 F.3d at 56 (citing Passamaquoddy, 528 F.2d at 379). This is the entirety of the Second Circuit's statement on the matter. In the cited portion of the First Circuit's decision by the Second Circuit, the First Circuit relied on cases brought under the Indian Claims Committee Act in deciding whether there is a general trust relationship in the factual circumstances of that case. See Passamaquoddy, 528 F.2d at 379 (clarifying that the First Circuit was addressing whether there was a trust relationship and declining to address what specific duties followed from that relationship because "no question of spelling out specific duties is presented [here]."). Of particular note, the First Circuit specifically declined to decide if the Non-Intercourse Act revoked the United States' discretion or requires the filing of an enforcement action. See Passamaquoddy, 528 F.2d at 379 ("it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship."); Shinnecock, 2008 WL 4455599 at *20, n.15 ("[T]he court in Passamaquoddy Tribe declined to hold that the government was obligated to litigate on behalf of the Passamaquoddy . . . ."); Shoshone Bannock Tribes v. Reno, 56 F.3d 1476, 1483 (D.C. Cir. 1995). Additionally, even assuming the First Circuit's holding in Passamaquoddy broadly states that the Non-Intercourse Act provides specific fiduciary duties, that decision does not survive the Supreme Court's holdings in Mitchell I, Mitchell II, Navajo I, or Navajo II because, as

discussed above, the language of the Non-Intercourse Act does not set forth a specific duty to protect all Indian lands or to bring trespass actions.

Moreover, to the extent that Plaintiff is arguing that the Non-Intercourse Act requires the United States to bring an enforcement action against the State of New York, Plaintiff's claim would fail to state a claim for relief because any enforcement action by the United States is distinctly discretionary. Importantly, the Supreme Court has recognized this discretion with respect to claims against the United States for failure to bring actions on behalf of the Creek Nation to protect trust property. Creek Nation v. United States, 318 U.S. 629, 639 (1943) ("It must be remembered that the Secretary was traditionally given wide discretion in the handling of Indian affairs and that discretion would seldom be more necessary than in determining when to institute legal proceedings."); see also Heckmann v. United States, 224 U.S. 413, 446 (1912) ("In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under acts of Congress to the discretion of the Executive Department."). "[A]n Indian Tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." Shoshone–Bannock Tribes, 56 F.3d at 1482. In sum, where government action is discretionary by law and no statute eliminates that discretion, there is no money-mandating provision. See Hirschmann v. United States, 11 Cl. Ct. 338, 341 (1986). In sum, the Non-Intercourse Act does not set forth specific enforceable money-mandating fiduciary duties requiring the United States to protect against the disposition of Indian lands or to bring enforcement actions. The Court should dismiss Count I on this basis.

**E. The United Nations Declaration on Indigenous Peoples Does Not Set Forth A Specific, Enforceable, Mandatory Trust Duty Requiring**

**United States' Courts to Not Follow Supreme Court Precedent, Nor Can the Declaration Be Fairly Interpreted As Mandating Compensation**

Plaintiff's second claim alleges that the United States has violated customary international law, the United Nations Declaration on the Rights of Indigenous Peoples and federal common law. Pl.'s Compl. at ¶¶ 26-32, 63-67. In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Sept. 13, 2007). Pl.'s Compl. at ¶ 30 (citing Articles 26-28, 40); see also Ex. A. In showing its support of the Declaration, the United States clearly emphasized that the document contains aspirational goals, and that the United States does not view the Declaration as "legally binding or a statement of current international law." See Ex. B. The Announcement further clarifies that "[t]he United States will interpret the redress provisions of the Declaration to be consistent with the existing system for legal redress in the United States, while working to ensure that appropriate redress is in fact provided under U.S. law." Id. at 8. Moreover, only Congress can waive the United States' sovereign immunity. The Declaration was not approved by Congress, nor is it equivalent to federal statute or regulation enacted pursuant to congressionally delegated authority. As such, the Declaration does not form the basis for a specific, enforceable money-mandating fiduciary duty sufficient to waive the United States' sovereign immunity. The Court should dismiss Count II of Plaintiff's Complaint.

## IV. Congress Provided a Forum for Historical Wrongs in the Indian Claims Commission.

Moreover, Plaintiff's claim that the United States has never provided effective redress for the alleged taking of lands in New York is belied by the existence of the Indian Claims Commission ("ICC"). The primary purpose of the Indian Claims

Commission Act ("ICCA") was to ensure that "there . . . [would] be a prompt and final settlement of all claims between the government and its Indian citizens, . . . and bring them to a conclusion once and for all." Te-Moak Bands of W. Shoshone Indians of Nev. v. United States, 18 Cl. Ct. 74, 80 (1989) (quoting United States v. Dann, 470 U.S. 39, 46 (1985)). Congress vested the ICC with wide-ranging jurisdiction to hear all possible historic Indian claims. In enacting the ICCA:

> Congress wished to settle all meritorious claims of long standing of Indian Tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature not cognizable in courts of the United States under any existing rules of law or equity.

Otoe & Missouria Tribe of Indians v. United States, 131 F. Supp. 265, 275 (Ct. Cl. 1955) (providing a detailed legislative history of ICCA). Accordingly, the ICC was vested with broad jurisdiction over all possible claims accruing before 1946 such as:

> 1) claims in law or equity arising under the Constitution, laws, treaties of the United States . . . , 2) all other claims in law or equity including those sounding in tort, . . . , 3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact or any other ground cognizable in equity; 4) claims arising from a taking by the United States, whether as a result of a treaty or otherwise; 5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 895, n.26 (D. Ariz. 2003) (summarizing 25 U.S.C. § 70a (1976)); 25 U.S.C. § 70k (1976). "[T]he 'fair and honorable dealings' provision gives redress for 'extralegal or moral claims of Indians against the United States.'" See United States v. Oneida Nation of New York, 576 F.2d 870, 881 (1978) (internal citations omitted). In fact, Tribes did bring fair and honorable

dealing claims regarding the taking of lands by the States. See Oneida Nation of New York, 576 F.2d at 870; Seneca Nation v. United States, 173 Ct. Cl. 917 (1965) (holding the United States was liable under the Indian Claims Commission Act for land transactions that violated the Non-Intercourse Act).

Plaintiff had the opportunity to litigate any and all claims, accruing before August 13, 1946, it might have had against the United States pursuant to the ICCA--including those where the alleged wrongful course of government conduct occurred before this date and continued thereafter. See, e.g., San Carlos Apache Tribe, 272 F. Supp. 2d at 894-7. Plaintiff could have brought a claim for damages resulting from the taking of land in 1859 by the City of Southampton or New York before the ICC. Thus, regardless of whether or not Plaintiff did pursue such a claim, Congress did provide a remedy. The Announcement in support of the Declaration also supports this position. Ex. B at 6 (stating that the United States "has taken steps to ensure the protection of Native American lands and natural resources, and to provide redress where appropriate" and calling on other nations to recognize the rights of Indigenous peoples); id. at 8 (noting that the examples listed "demonstrate not only that the United States has a well-developed court system that provides a means of redress for many wrongs suffered by U.S. citizens, residents and others – including federally recognized tribes and indigenous individuals and groups – but also that redress is available from the U.S. Congress under appropriate circumstances."). Consequently, Plaintiff's claim that the United States has never provided a forum or "effective means of redress" for historical wrongs should be dismissed for failing to state a claim.

**CONCLUSION**

For the aforementioned reasons, the United States requests that the Court dismiss Plaintiffs' Complaint.

Respectfully submitted this February 19, 2013,

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