No. 2012-5118

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HARVEST INSTITUTE FREEDMAN FEDERATION
BLACK INDIANS UNITED LEGAL DEFENSE FUND
Plaintiffs

and

WILLIAM WARRIOR
Plaintiff-Appellant

and

LEATRICE TANNER-BROWN
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

ON APPEAL FROM THE COURT OF FEDERAL CLAIMS
HON. ROBERT H. HODGES. JR.

BRIEF FOR APPELLEE THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for the United States makes the following representations:

1. This Court previously affirmed the dismissal of the Complaint in this case. *Harvest Institute Freedman Federation v. United States*, 324 Fed. Appx. 923, cert. denied, 558 U.S. 1149; reh'g denied, 130 S.Ct. 1943 (2010); and summarily affirmed the denial of a prior motion for post-judgment "reconsideration." 437 Fed. Appx. 895 (2011).

2. Counsel is unaware of cases pending in other courts that will be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is contested. On January 30, 2008, the Court of Federal Claims ("CFC") entered final judgment dismissing the Complaint in this case for lack of subject matter jurisdiction and failure to state a claim. *Harvest Institute Freedman Federation v. United States*, 80 Fed. Cl. 197 (2008). This Court affirmed that judgment on May 14, 2009. *Harvest Institute Freedman Federation v. United States*, 324 Fed. Appx. 923. Subsequently, on May 27, 2011, this court summarily affirmed the CFC's denial of a motion to reopen this case. 437 Fed. Appx. 895. This appeal arises from the plaintiffs' second motion to reopen this case. The CFC did not accept this second motion for filing, and instead ordered it returned unfiled to the plaintiffs on June 14, 2012. On July 11, 2012, plaintiff Warrior and an individual not named as a plaintiff[1/] in this case (collectively "Warrior") initiated the instant appeal from that order. Br. 1.

[1/] Leatrice Tanner-Brown is listed on the Federation's appellate brief as a "plaintiff-appellant." However, this individual is not named as a plaintiff in the Complaint in this case, and did not subsequently intervene. Nor was any of the factual material relating to the alleged injury to her ancestor, addressed at length in the Federation's Brief (Br. 5-7, 24-30) presented to, or considered by, the CFC.

ISSUES PRESENTED

Plaintiffs[2/] filed a motion in the CFC, seeking to vacate that Court's January 15, 2008, judgment dismissing the complaint in this case, and its March 26, 2001, Order denying a motion to set aside the earlier judgment and reopen the case. The motion relied on an alleged change of relevant law relating to trust relationships with the United States. The clerk of the CFC rejected the motion. The CFC then ordered the clerk to return the motion unfiled because the case in which it had been filed was closed. The CFC observed that principles of *res judicata* might bar the motion because prior decisions in this case have established that no trust relationship exists between the plaintiffs and the United States. The issues are:

1. Whether this Court has jurisdiction over an appeal from an order that concurs in a decision by the clerk declining to file papers lodged with the CFC, but does not adjudicate the issues addressed in those papers.

2. Assuming this Court has jurisdiction, whether the Federation may seek post-judgment relief on the ground that in later litigation, the law relevant to an issue of law previously and finally decided by the court has changed.

3. Assuming this Court has jurisdiction, whether *Shoshone Indian*

[2/] Harvest Institute Freedman Federation and Black Indians United Legal Defense Fund, who were plaintiffs in this case and appellants in the prior appeals, were among the parties who filed the motion in the CFC in April 2012, but are not appellants in this case.

Tribe of the Wind River Reservation, Wyoming v. United States, 672 F.3d 1021 (2012), changed the law relevant to this case.

STATEMENT OF THE CASE

In this appeal, Warrior challenges the Court of Federal Claims' ("CFC") failure to consider a motion filed in 2012, four years after the final judgment in this case. Warrior's motion, purportedly filed under Fed. R. Civ. P. Rule 60(b) (see Fed'n Br. 1), sought to vacate the CFC's judgment, entered in 2008, and its decision denying a 2010 motion to reconsider the judgment. The basis for the motion was a decision entered in other litigation, which purportedly changed the law regarding the statute of limitations for filing claims for breach of trust. The CFC did not rule on the 2012 motion, and instead struck the motion to vacate from the docket, and returned it unfiled to Warrior on June 14, 2012.[3/] Warrior appeals from that order.

STATEMENT OF FACTS

In 2006, Plaintiffs Harvest Institute Freedman Federation, Black Indians United Defense Fund and William Warrior (collectively"the Federation") filed the Complaint in this action in the Court of Federal

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[3/] The docket indicates that the motion was stricken because it was filed by an attorney who had been suspended from practice. In response to the United States' motion to dismiss this case, the appellants asserted (Doc. 37 at 2) that on June 1, 2012, they filed a *pro se* motion that was returned unfiled. No evidence of such a motion appears on the record, either in the CFC or in this Court.

Claims ("CFC"), seeking a declaration of the rights and liabilities of persons represented by an individual and two associations of Freedmen – former slaves and other tribal members of African descent – under various nineteenth-century treaties, and "at least" $50 million in damages for failure to perform certain duties allegedly created by those treaties. The CFC dismissed the claims for lack of subject matter jurisdiction under Court of Federal Claims Rule ("CFCR") 12(b)(1), on the ground that the claims were barred by the statute of limitations, and under CFCR 12(b)(6), because the Complaint failed to state a claim for which relief could be granted.

The Federation appealed on the ground, *inter alia*, that the statute of limitations had not run on its claims, because – under the "repudiation rule" – the statute can run only after the trustee has repudiated the trust. The Federation asserted that certain post-civil war treaties created a trust that had not been repudiated by the United States. Rejecting that argument, this Court affirmed the CFC's dismissal of the Complaint without decision on May 14, 2009.[4/]

[4/] Both the CFC and this Court declined to reach a further jurisdictional defect in dismissing the Complaint on statute-of-limitations and failure-to-state-a-claim grounds. As we explained in our briefs to the CFC and in the original appeal in this case (see Doc. 10 at 19-21, Doc. 23 at 13-15, No. 2008- 5036 Brief for Appellee at 17-18), the Federation's Complaint did not identify any concrete and particularized injury to any plaintiff that was (continued...)

On March 21, 2010 (CR 44), the Federation filed a motion for post-judgment "reconsideration" pursuant to Rule 60, Fed. R. Civ. P., on the ground that the law regarding the "repudiation rule" had changed. The CFC denied the motion on March 26, 2010 (CR 45), finding that the Federation had not properly invoked the court's authority to grant relief based on an intervening change of law, and that even if it had, the asserted change would not affect the outcome of the case as affirmed by this Court (CR 44). The Federation appealed the denial of its motion for post-judgment relief to this Court, which summarily affirmed the CFC's denial of the motion on May 27, 2011. In its opinion affirming the denial of the Federation's motion for reconsidertation, this Court reiterated that it previously had affirmed the CFC's judgment that the Complaint failed to state a claim because the treaties on which it relied "did not vest the Freed,em with property rights or impose any obligation on the United States; and that the statute-of-limitations, 28 U.S.C. § 2501, would

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[4/] (...continued)
fairly traceable to action or inaction by the United States. Nor could the Harvest Institute Freedman Federation establish standing to seek damages on behalf of its members. Damages claims require proof of individualized harm to each plaintiff. See, *e.g., Connecticut State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337 (11th Cir. 2009) ("We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members.").

otherwise have barred Harvest's claims because any alleged claim regarding allocation of land or omission thereof would have started to accrue no later than 1902." 437 Fed. Appx. at 896.

On April 26, 2012, the Federation filed a motion to vacate both of the earlier decisions affirmed by this Court, once again on the ground that a change of law relevant to the "repudiation rule" regarding the statute of limitations for breach-of-trust claims warranted vacatur of the CFC's earlier decisions and reopening of its case. However, on the same day, the CFC removed the motion from the docket because it had been filed by an attorney who had been suspended from the practice of law. Warrior asserts (see Doc. 37 at 2) that the plaintiffs then filed a *pro se* motion to vacate the earlier decisions. The CFC did not accept any such later motion for filing, and on June 14, 2012, the CFC ordered that a motion be returned unfiled. Whether the order addressed the stricken motion or a later-lodged motion is not apparent from the record.

The order to return Warrior's motion unfiled stated that "[p]laintiffs' motion for reconsideration of rulings made by this Court in 2008 and 2010, and affirmed by the Court of Appeals for the Federal Circuit, well beyond the applicable statute of limitations, was rejected for filing by the Clerk of Court." It appears, therefore, that Warrior did not file a proper motion for relief from judgment or other post-judgment pleading, and instead filed a motion that did not conform to the rules for filing such motions in the CFC.

But because Warrior has chosen not to include a copy of his motion in the appendix to its brief, the United States and the Court can only speculate as to the reason for its rejection.

The CFC further noted that the motion – which was based on a purported change in the relevant law – relied on a case concerning a trust relationship. The CFC observed that because it is the law of this case that no such relationship exists between the parties, there is a likelihood that *res judicata* principles would bar that court's consideration of the motion. Further, the CFC agreed with the clerk's rejection of the motion.

Warrior appealed from the order, and the United States moved to dismiss the appeal for lack of appellate jurisdiction. On June 4, 2013, this Court denied the United States' motion (Doc. 40) and ordered the United States to respond to Warrior's opening brief.

SUMMARY OF ARGUMENT

The Federation purports to appeal from the CFC's refusal to entertain its motion for post-judgment relief. But because the CFC did not act on that motion, and instead returned it to the Federation unfiled, there is no final decision for review by this Court. Nor has the Federation established any other basis for an assertion of jurisdiction by this Court. Accordingly, this Court lacks jurisdiction over the Federation's current appeal, which accordingly must be dismissed.

Moreover, even if the order returning the motion unfiled could be treated as a final decision to deny the motion, it must be affirmed. The

basis for the Federation's motion was its assertion that a decision of this Court, *Shoshone Indian Tribe of the Wind Rivers Reservation of Wyoming v. United States*, 672 F.3d 1021 (2012), constituted a significant change in the law that renders continued enforcement of the judgment in this case detrimental to the public interest. As relevant to the Federation's motion, the *Shoshone* decision concerned the statute of limitations for filing claims based on the United States' alleged breach of trust duties to Indian tribes. But it is firmly established that the Complaint in this case does not state a claim for breach of trust duties. In 2008, this Court affirmed the CFC's conclusion that the Federation's Complaint should be dismissed for failure to state a claim because the treaties on which the Federation's claims are based did not impose any trust obligation on the United States. Accordingly, the law pertaining to the statute of limitations for filing a breach-of-trust claim has no bearing on whether this case, which does not state such a claim, should be reopened. It is well established that Rule 60(b) relief may not be based on later-decided cases in a case in which a ruling addressing the relevant issue has been entered and is law of the case. Because it is the law of this case that the United States does not owe the alleged trust duty to the Federation, the CFC could not have granted the relief sought in the Federation's motion.

And in any event, *Shoshone* did not change any relevant law. It merely applied well-established precedent concerning a proposition of law on which the Federation unsuccessfully sought relief at an earlier stage of

this litigation. Accordingly, there was absolutely no basis on which Rule 60(b) relief could have been granted here, even if the CFC had considered the motion, which it was not obliged to do.

Warrior has not met the standards for relief pursuant to Rule 60(b), and the claims in this case were fully adjudicated in 2008. This Court therefore must dismiss this appeal. The order from which Warrior purports to appeal reflects the CFC's recognition that it lacks jurisdiction to further consider this case despite the plaintiffs' frequent, meritless and vexatious filings. In the event that this Court were to conclude that it has jurisdiction, it should deny the motion on its merits to prevent the further commitment of judicial resources to the long-resolved claims in this matter.

ARGUMENT

I. Standard of Review

Assuming, arguendo, that the district court's order to the clerk may be treated as a final decision denying a motion for relief from judgment pursuant to CFC Rule 60(b), this Court should review the decision for abuse of discretion. This Court reviews decisions denying post-judgment relief for abuse of discretion. *Browder v. Dir., Ill. Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978). An abuse of discretion exists "when the trial court's decision is clearly unreasonable, arbitrary or fanciful, or is based on clearly erroneous findings of fact or erroneous conclusions of law." *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1382 (Fed.Cir.2002) (citing

Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1460 (Fed.Cir.1998) (*en banc*)).

II. This Court Lacks Jurisdiction to Hear this Appeal

As we explained in our motion to dismiss for lack of appellate jurisdiction (Doc. 30), this Court's jurisdiction to hear appeals from "final decisions" (see *Spread Spectrum Screening LLC v. Eastman Kodak Co.* 657 F.3d 1349, 1354 (Fed. Cir. 2011)) does not extend to an appeal from the June 14, 2012, order purportedly appealed in this case. Regardless whether the order addresses the stricken April 14, 2012, motion or a subsequent, *pro se* motion to vacate, the CFC's June 14, 2012, order did not address any legal issue or resolve any claim in this case. Instead, the order instructed the clerk of court (Doc.51) to return the motion unfiled, because final judgment has been entered in this case, and the case is closed.

The Complaint in this case was dismissed, and final judgment was entered, in 2008. The CFC dismissed the Federation's claims as time-barred, and further concluded that the Complaint failed to state a claim upon which relief could be granted. *Harvest Institute Freedman Federation v. United States*, 80 Fed.Cl. at 200 (Fed.Cl. 2008). The claims in this litigation are founded on the United States' alleged breach of duties established by certain treaties. The CFC concluded that those treaties did not create any duties to the Freedmen on the part of the United States. *Ibid.* This Court rejected the Federation's appeal from that judgment and

affirmed the CFC's judgment of dismissal, *Harvest Institute Freedman Federation v. United States*, 324 Fed. Appx. 923. The judgment of dismissal, accordingly, is final; and it is the law of the case that the treaties underlying the claims in this case did not create trust duties on the part of the United States. The Federation's motion did not seek relief that is available by way of a post-judgment motion, and it was filed after the entry of final judgment. By returning the improper motion unfiled, the CFC did not enter any new decision that is reviewable in this Court, and this appeal therefore must be dismissed.

In response to the United States' motion to dismiss this appeal, the Federation asserted that it may invoke this Court's jurisdiction to review an order directing that an improper motion be returned unfiled, because the effect of that order in the circumstances here is to "put the plaintiff out of court." Doc. 37 at 11. But even if the question for this Court were whether Warrior now finds himself "effectively out of Court" (see *ibid.*), this Court would lack jurisdiction because the CFC did not enter a decision that is subject to review by this Court. And in any event, Warrior finds himself out of court because his claims have been fully adjudicated, and not because of the CFC's 2012 order.

Warrior has conceded that the order from which he appeals is not a final, appealable decision. (Doc. 37 at 10) ("the United States contends that Docket 51 is not a final appealable decision. * * * We agree.")) It argues (*id.* at 12), however, that *Moses H. Cone Memorial Hospital v. Mercury*

Construction Corporation, 460 U.S. 1 (1983), stands for the proposition that a non-final order is appealable if it ends the litigation. Warrior is incorrect.

The Supreme Court in *Moses H. Cone* concluded that the circumstances of that case rendered an interlocutory order that might not otherwise have been appealable,[5/] a final, appealable decision. But the order in that case, unlike the order at issue here, amounted to a dismissal on the merits. In *Moses H. Cone*, the issue was whether a federal district court order staying proceedings to compel arbitration pending resolution of a parallel state-court proceeding was appealable. The sole issue in both proceedings – State and federal – was whether the dispute at issue was subject to arbitration. The Court held that, because the state court proceeding would have *res judicata* effect on the federal action, the stay order was, in effect, a dismissal on the merits, and therefore was final and appealable. 460 U.S. at 8-9.

No such circumstances are present here. Unlike *Moses H. Cone*, this case concerns claims that have already been considered by the CFC and this Court; and they have been dismissed. The order at issue therefore did not "put the plaintiffs out of court;" it merely retained the *status quo*. Moreover, the order had no effect on Warrior's ability to seek post-

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[5/] The Court also concluded that the order was appealable under the collateral order doctrine established in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). The order at issue here meets none of the standards for review under the *Cohen* doctrine.

judgment relief. The June 14, 2012, Order did not adjudicate the merits of any motion to reopen the judgment, and instead returned the motion unfiled as an improper filing in a closed case. Thus, although the order noted that the papers returned by the clerk – which relied on authority involving a trust relationship, although this Court previously held *in this case* that no trust relationship exists between the United States and the plaintiffs – did not appear to present grounds for reopening the judgment (see Doc. 51), it did nothing to prevent the filing and consideration of a proper motion for post-judgment relief in this case.

As we explained in our motion to dismiss (Doc. 30 at 7), the relief Warrior seeks in this Court is unavailable; and it is unnecessary in any event. Warrior is free to seek an order reopening the judgment in this case in the CFC if he can demonstrate that grounds meeting the heightened standard for the application of CFCR 60(b) exist. See, *e.g.*, *Gonzalez v. Crosby,* 545 U.S. 524, 535 (2005). Warrior cannot, however, invoke this Court's jurisdiction at this time, because the CFC order from which he purports to appeal had no effect on his claims. The docket indicates that on April 26, 2012, a post-judgment motion to vacate was filed and subsequently removed from the docket because the attorney responsible for filing it had been suspended from practice.[6/] The CFC lacked jurisdiction to

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[6/] As noted above, Warrior has asserted (Doc. 37 at 2) that a second motion was filed on June 1, 2012, and that the instant appeal is from the CFC's action on the June 1, 2012, motion. However, no evidence of such a motion (continued...)

consider the motion removed from the docket because it was filed in violation of CFC Rules requiring that counsel be admitted to practice. This this Court lacks jurisdiction to review the clerk's decision to remove the motion from the docket. And even assuming that the order from which the Warrior purports to appeal was directed at a different post-judgment motion to vacate this Court's earlier decisions, the CFC was under no obligation to accept the motion for filing, because the Rules of the CFC do not provide for any such motion. See CFCR Rule 60(b) (on motion, court may "relieve a party or its legal representative from a final judgment, order, or proceeding"). Nothing in the rules of that court contains any suggestion that a post-judgment motion to *vacate* an earlier final judgment may be entertained by the CFC. This appeal accordingly must be dismissed.

III. The CFC Correctly Rejected the Plaintiffs' Improper Post-Judgment Motion

A. Warrior May Not Seek Relief Pursuant to Rule 12(b)(5) or 12(b)(6) on the Basis of Shoshone Because it Is the Law of this Case That No Trust Relationship Exists Between the United

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[6]/(...continued)
appears on the docket in this case, and despite repeated requests that counsel for Warrior provide a copy of the *pro se* motion purportedly filed in June of 2012, no evidence of such a motion has emerged. Instead, on June 18, 2013, in response to our requests for copies of this second, *pro se*, motion, Percy Squires, on behalf of counsel for Warrior, provided a copy of the April 26, 2012, motion. Mr. Squires' suspension from the practice of law resulted in the CFC's decision to strike that motion from the docket. We received no other response to our several requests, which were directed to Warrior's current counsel, William C. Wilkinson.

States and the Plaintiffs.

Warrior devotes less than two pages (Br. 35-36) of his 37-page brief[7/] to his contention that a purported change in the law warrants reopening of the judgment, but it makes clear that its reasons for seeking to reopen this case lack merit. On grounds similar to those supporting the Federation's earlier effort to reopen the judgment in this case based on alleged changes in the law reflected in developments in the *Cobell* litigation, Warrior now asserts (Br. 37) that this Court's decision in *Shoshone Indian Tribe of the Wind Rivers Reservation, Wyoming v. United States*, 672 F.3d 1021 (Fed. Cir. 2012), constituted a significant change in the law that renders continued enforcement of the judgment in this case detrimental to the public interest. Once again, Warrior's belief that a significant change in relevant law has occurred is incorrect.

This Court has held that litigants are not entitled to reopen judgments based on later-decided cases if there is a ruling in their case which addressed the issue and is law of the case. See *Constant v. United States*, 929 F.2d 654 (Fed Cir. 1991). In this case, the CFC held, and this

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[7/] Although it is undisputed that an appeal from the denial of Rule 60(b) post-judgment relief does not bring up the underlying judgment for review, *Browder v. Dep't of Corr.*, 434 U.S. 257, 263 n. 7 (1978), Warrior's brief on appeal is devoted almost exclusively to various factual allegations and legal arguments aimed at reversing the judgment in this case. See Br. 13-35. These factual and legal assertions cannot be addressed in the context of this appeal. We note in addition that the factual discussion in the brief addresses matters outside the allegations of the Complaint and is not supported by any documentation contained in the record of this case.

Court affirmed, that the complaint failed to state a claim because the treaties on which it was based did not vest the Freedmen with property rights or impose any obligation on the United States. See 437 Fed. Appx. 895. This Court also affirmed the CFC's alternative holding that the statute of limitations, 28 U.S.C. § 2501, would in any event have barred the plaintiffs's claims because any claim regarding allotment of land – or failure to allot – would have started to accrue no later than 1902. *Ibid*. This Court affirmed the judgment without opinion on May 14, 2009. *Ibid.* In addition, this Court has rejected Warrior's argument that the "repudiation rule" prevented the statute of limitations from running on the claims. *Ibid*. Consistent with *Constant v. United States*, therefore, Warrior is not entitled to reopen the judgment here based on *Shoshone.*

In appropriate circumstances, plaintiffs may allege that the violation of certain statutory or regulatory provisions constitutes a money-mandating breach of a trust duty. See *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009) ("*Navajo II*"). No such allegations are or could have been presented in this case, because there is no trust relationship between the parties to this case: The treaties created no trust duties, the plaintiffs do not hold trust or allotted lands and the United States does not manage lands, funds or resources for them. Warrior nonetheless asserts (Br. 5) that a federal statute ("P.L. 108-108" or "Interior Appropriations Act") that tolls the statute of limitations for claims based on losses to or mismanagement of Indian trust funds provides a basis for reopening the judgment in this

case. As explained above, the Complaint in this case did not allege violations of statutory duties to manage lands or funds, and instead sought compensation for the United States' alleged withholding of lands and funds promised to Freedmen under post-Civil War treaties with the Tribes. The Interior Appropriations Act by its terms has no application here, because the United States has no duty to manage funds on behalf of the plaintiffs. See *Shoshone*, 672 F.3d at 1034-35 (Interior appropriations act applies only to trust funds.).

The pivotal question on the merits of this case was whether each of the plaintiffs' claims was grounded in a specific duty separately set forth in a treaty, statute or regulation. See *United States v. Navajo Nation*, 537 U.S. 488, 506; *United States v. Mitchell*, 463 U.S. 206, 209-211 (1983) (*"Mitchell II"*). These precedents hold that plaintiffs 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." *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009) ("*Navajo II*").

B. Shoshone Did Not Change the Existing Law Regarding the Statute of Limitations Applicable to This Case.

In any event, the judgment here is entirely consistent with *Shoshone.* The 2008 decision in this case held that no trust duties were created, and no fiduciary relationship existed, between the United States and the plaintiffs under the treaties on which the claims at issue were based. *Ibid.* This Court therefore rejected the plaintiffs's claim in their last prior appeal

that developments in the *Cobell* litigation – which they alleged had relevance to the "repudiation rule" – constituted a change in the relevant law warranting post-judgment relief. 437 Fed.Appx. 895.

Warrior incorrectly asserts in this appeal that he can state a Tucker Act claim on behalf of the Freedmen (see Br. 2-3), because *Shoshone* changed the law relevant to determining when the claims accrued. He seeks (Br. 4) a ruling that the "repudiation rule," which holds that a cause of action for breach of trust only accrues when the trustee repudiates the trust and the beneficiary has knowledge of the repudiation, applies to claims filed by Freedmen, and not just to claims by Native Americans. But the claims here were dismissed on the ground that no trust duties were created by the treaties that formed the basis for the claims in the first instance. And in any event, as discussed above, this Court's rejection of the plaintiffs' prior attempt to reopen the judgment here – which was based in part on the repudiation rule – precludes reopening on this ground.

Nor does *Shoshone* reflect a change in relevant law. In *Shoshone,* the plaintiff Tribes sued to recover royalties on oil and gas resources extracted from land held in trust by the United States. The CFC held that the Tribes' claims were barred by the statute of limitations. The Tribes appealed that conclusion and this Court affirmed the CFC's dismissal of the claims, except to the extent that they reflected continuing trespass claims. See *Shoshone*, 672 F.3d at 1036. With regard to continuing trespass, this Court found that the statute of limitations on claims alleging the breach of

specific statutory and regulatory duties might not have expired (*id.* at 1038) and remanded for a determination whether the statutes and regulations at issue established a relevant duty. *Id.* at 1041.

In this case, in contrast, this Court has previously affirmed the CFC's conclusion that *no* duties were created by the treaty provisions underlying the plaintiffs' claims. Because this case was dismissed on the ground that the treaties did not create trust duties, *Shoshone* has no relevance here. Moreover, in the original appeal in this case, this Court affirmed the conclusion that"if the Government breached an obligation to the Freedmen, it did so at the turn of the [twentieth] century in a single, discrete act,"when it allotted lands, allegedly excluding the Freedmen. *Harvest Institute*, *supra*, 80 Fed. Cl. at 201. There is accordingly no issue here regarding a continuing trespass. Moreover, *Shoshone* reaffirmed that repudiation of a trust occurs when the trustee takes actions inconsistent with his responsibilities as a trustee. *Shoshone*, *supra*, 672 F.3d at 1021. Even if a trust relationship once existed, therefore, Warrior should have known that the trust was repudiated more than 100 years before the Complaint was filed. There is accordingly no basis for a conclusion that *Shoshone* amounted to a change in relevant law, much less a change in the law sufficient to warrant relief under Rule 60(b)(5) Fed.R.Civ.P. See, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).")

The CFC found that the plaintiffs in this case had failed to identify a substantive source of law that establishes the duties on which it relies. *Harvest Institute, supra*, 80 Fed. Cl. at 201 ("the treaties did not create a governmental obligation and we cannot infer one in the absence of specific language in the treaties"). Nothing in *Shoshone* provides any basis for reconsidering the CFC's decision that the plaintiffs have failed to identify such a provision of law in this case. Accordingly, neither the repudiation rule nor the Interior Appropriations Act could toll the statute of limitations here, because Warrior has entirely failed to establish the existence of a trust duty in the first instance. Accordingly, even if this Court had jurisdiction to order the CFC to hear Warrior's motion (which it does not) Warrior has failed to establish any change in law or other extraordinary circumstance that would warrant reopening the judgment.[8/]

[8/] We note that Fed.R. App. P. 38 provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." An appeal can be deemed frivolous in two ways, either of which alone can support the imposition of sanctions. *Finch v. Hughes Aircraft Co.,* 926 F.2d 1574 (Fed. Cir. 1991). In this case, "the legal authority contrary to appellant's position is so clear that there is really no appealable issue." See *Harvest Institute v. United States*, 437 Fed.Appx. at 896. This appeal therefore is "frivolous as filed," *Romala Corp. v. United States*, 927 F.2d 1219 (Fed. Cir. 1991) (quoting *Finch*, 926 F.2d at 1579), and the plaintiffs may be subject to sanctions.

CONCLUSION

In light of the foregoing, the United States respectfully submits that this Court lacks appellate jurisdiction and accordingly must dismiss the appeal in this case. If the Court finds jurisdiction, it should deny the appellants' motion on its merits.

Respectfully submitted,

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JUNE 2013
90-2-20-12136

CERTIFICATE OF COMPLIANCE

pursuant to Fed. R. App. P. 32(a)(7)(B)-(C) and Fed. Cir. R. 32(b), I certify that the text of this brief, including any headings, footnotes and quotations therein, uses a proportionally spaced 14-point serif font and contains approximately 5,451 words.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief of Appellee the United States have been served upon counsel on this 28th day of June 2013, through this Court's CM/ECF system.

s/*Elizabeth Ann Peterson*

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