2012-5118

United States Court of Appeals for the Federal Circuit

HARVEST INSTITUTE FREEDMEN FEDERATION, AND BLACK INDIANS LEGAL DEFENSE AND EDUCATIONAL FUND,
Plaintiffs,

and

WILLIAM WARRIOR,
Plaintiff-Appellant,

and

LEATRICE TANNER-BROWN,
Plaintiff-Appellant,

v.

UNITED STATES
Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 06-CV-907
SENIOR JUDGE ROBERT H. HODGES, JR.

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS WILLIAM WARRIOR AND LEATRICE TANNER-BROWN

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Harvest Institute Freedmen Federation, et al. v. United States

No. 2012-5118

CERTIFICATE OF INTEREST

Counsel for Appellants certifies the following:

1. The full name of every party or amicus represented by me is: Harvest Institute Freedmen Federation, Black Indians United Legal Defense Fund, William Warrior and Leatrice Tanner-Brown.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: William C. Wilkinson, Esq., alone will represent all Appellants.

October 2, 2012 /s/William C. Wilkinson
Date William C. Wilkinson, Esq.

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STATEMENT OF RELATED CASES

The Opinion of the United States district court for the District of Columbia in Cobell v. Salazar, 1:96-cv-01285 addressed the question when the statute of limitations runs on a beneficiary's breach of trust claim against a trustee, the underlying issue in this appeal. This issue was also decided by this Court in Shoshone Indian Tribe of Wind River Reservation Wyoming v. United States, Case No. 2012-5150.

JURISDICTIONAL STATEMENT

Jurisdiction over this appeal arises in the United States Court of Appeals for the Federal Circuit under the provisions of 28 U.S.C. §1295(3) in that the United States Court of Federal Claims has issued a final order denying Appellants' Fed. R. Civ. P. 60(b) motion for relief from judgment. Appellants filed their Notice of Appeal on July 11, 2012, within thirty days after entry of the trial court order issued on June 14, 2012.

STATEMENT OF THE ISSUES

Whether the trial court erred in denying Appellants' Fed. R. Civ. P. 60(b) motion for relief from its Order dismissing, on statute of limitations grounds, Appellants' breach of trust action against the United States, in light

of the opinion of this Court in The Shoshone Indian Tribe of Wind River Reservation Wyoming v. United States, Case No. 2012-5150, decided January 7, 2012 which held a cause of action for breach of trust only accrues when the trustee repudiates the trust and the beneficiary has knowledge of that repudiation, and the statute of limitations applicable to that cause of action does not commence to run until that time.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Federal Claims denying Appellants' Fed. R. Civ. P. 60(b) motion to vacate, based upon the decision in Shoshone Indian Tribe of Wind River Reservation Wyoming v. United States, Case No. 2010-5150 (hereinafter "Shoshone"). The claims in this action were brought by persons seeking relief for breach, by the United States, of fiduciary duties owed to Appellants under post Civil War treaties, and related subsequent legislation governing the relationships between the United States and the Five Civilized Tribes, the Seminole, Cherokee, Creek, Choctaw and Chickasaw Indians. Appellants are the descendants of persons held in bondage by those Tribes. Appellants' breach of trust claims were dismissed by the trial court on grounds that Shoshone

has now held were improper. Accordingly, Appellants seek an order that requires the trial court to reinstate and adjudicate their claim.

This action was commenced by the filing of a Complaint which was amended in response to an initial motion to dismiss. The Amended Complaint contained class allegations and sought relief on behalf of the Appellants in the form of an accounting and compensation for breach of fiduciary duties owed by the United States to Appellants. The United States moved to dismiss the claim as being barred by the six year statute of limitations applicable to claims before the Federal Court of Claims. On January 15, 2008, the trial Court granted the United States motion to dismiss. That ruling was affirmed by this Court on appeal.

In January 2012, this Court decided Shoshone. On the basis of Shoshone, Appellants moved the trial court to vacate the January 15, 2008 Order dismissing their Amended Complaint. The trial Court refused even to consider Appellants' motion and stated:

> Plaintiffs' motion for reconsideration of ruling 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 fling by the Clerk of Court. We agree with the Clerk that this motion is inappropriate because the case to which it relates is closed. The plaintiffs here are likely subject to *res judicata* principles as well. The case that plaintiffs rely on involved a trust relationship, whereas the courts evidently held that no such relationship between the

> United States and these plaintiffs existed. We ask that the Clerk of Court return plaintiffs' motion unfiled.

Docket No. 51.

Appellants seek review of the trial court order denying their motion to vacate.

In light of the Shoshone Opinion the trial court should have vacated its order of dismissal and addressed the following issues:

> 1) Whether the holding in Shoshone Indian Tribe of Wind River Reservation Wyoming v. United States, Case No. 2010-5150, decided January 9, 2012, United States Court of Appeals for the Federal Circuit, (hereinafter "Shoshone") 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" citing Shoshone II, 364 F.3d at 1343, Hopland Band of Pomo Indians, 855 F.2d at 1578; Restatement (Second) of Trusts §219 (1992); and Cobell v. Norton, 260 F. Supp. 2d 98, 105 (D.D.C. 2003) applies not only to breach of trust claims filed in the United States Court of Claims by Native Americans, but also to claims filed by Freedmen[1].

[1] For the definition of Freedmen, see December 28,2009 correspondence from Paul Tsosie, Chief of Staff to the Assistant Secretary-Indian Affairs, United States Department of the Interior to Harvest putative class member Angela Mollette ,"Depending upon the tribe in question, these people may be descendants of slaves, inter-married black and Indian mix-blood Indians, or other combinations of heritage that are recognized by the respective Indian Tribes. In the case of the Five Civilized Tribes…these people are commonly referred to as Freedmen". See, Cobell v. Salazar, United States District Court for the District of Columbia Case No 1:96- CV- 01285, (hereinafter" Cobell") Docket No.3747-1. See, Exhibit A

2) Whether Public Law 108-108[2], November 10, 2003, applies to claims against the United States concerning losses to or mismanagement of trust funds filed by descendants of Freedmen, as it applies to claims filed by Native Americans.

3) Whether limiting the holding in Shosone or the applicability of PL 108-108 to Native Americans and excluding Freedmen from their scope violates the Equal Protection Clause of the Fifth Amendment.

STATEMENT OF THE FACTS

Appellant, Harvest Institute Freedmen Federation, LLC ("Harvest"), is an Ohio limited liability company with its principal place of business in Columbus, Ohio. Harvest was formed for the specific purpose of seeking redress through the courts for breach of fiduciary duties owed by the United States to descendants of persons held in bondage by the Five Civilized Indian Tribes[3] under various Indian treaties and federal statutes. The specific federal laws involved are, the Treaties of 1866, the Curtis Act of 1898, and the Act of May 27, 1908, 35 Stat. 312.

Appellant, Leatrice Tanner-Brown, is a representative of the putative class of Freedmen descendants who by reason of their interests in restricted

[2] The full text of PL 108-108, tolling the statute of limitations on Indian trust mismanagement claims is at Exhibit F.

[3] The Five Civilized Tribes were: Choctaw, Creek, Chickasaw, Cherokee and Seminole.

allotments under the Curtis Act of 1898, the ante-bellum Treaties of 1866, lost or mismanaged trust property, have standing to sue the United States for breaches of trust related to allotted lands or lease and royalty payments from restricted land. The grandfather of Appellant, Leatrice Tanner-Brown, George Curls, was enrolled on the Dawes Roll of the Cherokee Freedmen, pursuant to the Dawes Act on July 1, 1902. See, Exhibit B – Cherokee Freedmen Roll, Cherokee Freedman 4204.. At the time of his enrollment, George Curls was five years old, having been born to former Cherokee slave parents in Indian Country, Oklahoma in 1897. See, Exhibit C, for George Curls' death certificate.

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

Under the Act of May 27, 1908, Exhibit D, (hereinafter "Act of 1908") restrictions against alienation of Freedmen allotments or royalties received therefrom, were retained for minors, such as Mr. Curls. Under the

Act of 1908 any royalties from allotments owned by minor Freedmen were to be controlled by the Department of Interior. See, Sections 2 and 6 of Exhibit E. Any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of Sections 2 and 6 of the 1908 Act. However, the Interior Department has no records of these royalties, despite evidence that the land was leased for oil and gas drilling. Moreover, a guardian, as required by Congress under the Act of 1908, was appointed to protect the interests of Mr. Curls, but there are no records, as mandated by the Act of 1908, detailing the disposition of proceeds from leases on Mr. Curls' allotments. The Interior Department failed to take any measures whatsoever, as required by Congress under the Act of 1908, to protect the pecuniary interests of Freedmen minors such as George Curls. It is this conduct, among other acts of misfeasance and nonfeasance, that gives rise to the breach of trust and fiduciary duty claims against the United States that are the subject of this action.

Appellants, Black Indian United Defense Fund, a separate nonprofit organization, is the legislative advocacy arm for Black Indian descendants of the Five Civilized Tribes. The Fund's purpose is to engage in any lawful act or activity for which corporations may be organized under the general

corporation law of Oklahoma. The Fund is focused on educating members, and the general public regarding the history, culture and political rights of those particular to the Dawes Enrollment. To promote, assist in collecting, and preserving Oklahoma Black Indian history and artifacts, to promote the unique cultural diversity of Black Indian descendants for the general benefit and good of individuals, collective Tribes, representative communities, in the States and Nations

The Fund is incorporated as an advocacy organization with the mission of educating public officials about Black Indian descendants rights under the treaties of 1866 between the Five Civilized Tribes (Chickasaw, Choctaw, Creek, Seminole and Cherokee), Black Indians and their Descendants and the United States.

Appellant, William Warrior, is a descendant of Black Indians from the Five Civilized Tribes and a person of Native American ancestry. Mr. Warrior is a direct descendant of Chief John Horse's band of Seminoles. This Band was promised land by the United States under treaties respecting an Oklahoma settlement known as "Wewoka." The Appellees breached their duty to convey land to Warrior's predecessors. This treatment by the United States of ethnic members of the Native American tribes was

commonplace and resulted in widespread denial of real property and other valuable resources to Warrior's class.

Appellants are representatives of a putative class of Freedmen descendants with breach of trust claims against the United States for violation of the Treaties of 1866 and the Act of May 27, 1908, by failing to account for proceeds from royalties, leases, and conveyances and for failure to properly invest these proceeds. Appellants' claims arise from these substantive sources of law, which impose specific fiduciary duties upon the United States in relation to Freedmen sufficient to sustain claims for money damages under the Tucker Act, 28 U.S.C. §2501.

Appellee, The Bureau of Indian Affairs, (BIA), has responsibility for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes and Alaska Natives and to implement the terms of treaties between Native American tribes and the United States.

Appellants, descendants of persons held in bondage by the Five Civilized Indian Tribes[4], desire to pursue claims against the United States

[4] The Five Civilized Tribes allied themselves with the Confederacy during the Civil War and attempted to maintain slaves following the War. As a result of the Tribes disloyalty to the United States during the Civil War all territory owned by the Tribes was forfeited. The status of the Tribes was reestablished under Treaties entered in 1866.

for breaches of fiduciary duty in relation to trust property mismanaged by the Department of Interior.

The Treaties of 1866 came into existence as a result of the post-civil war reconciliation effort, and provided a means for the Five Tribes to re-establish their government-to-government relations with the United States, following their ill-concerned alliances with the Confederate States of America and long history of slavery. The Treaties addressed a number of issues for readmitting the Five Tribes back into the federal union, including amnesty for all war crimes committed by its citizens, establishment of federal courts in the Indian territory, the settlement of "civilized friendly Indians" within the Tribes and the adoption of all freed slaves and free colored persons into the Tribes as tribal citizens. Article IX of the Cherokee Treaty is an example, and provides:

> The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that **all freedmen who have been liberated by voluntary act of their former owners by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents there in, or who may return within six months, and their descendants, shall have all the rights of native Cherokees:** Provided, that owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.

Under the 1866 Treaties, Freedmen and their descendants, were to receive all the rights of native Tribe members. "All rights" can only be read to mean all rights, including but not limited to, the right of citizenship. See, Appellant Brief, Cherokee Nation v. Nash, Case No. SC-2011-02, Supreme Court of the Cherokee Nation,(emphasis added).

Appellants alleged in 2006 in the United States Court of Federal Claims mismanagement by the Department of Interior of trust property owned by Appellants' Freedmen ancestors, which has caused economic harm to Appellants. On January 15, 2008, the Court of Federal Claims dismissed Appellants' claims. The Court determined that Appellants' claims were barred by the six year statute of limitation applicable to claims under the Indian Tucker Act, 28 U.S.C. §2501 and that no general trust relationship existed between the United States and Appellants' ancestors, the Freedmen. The United States Court of Appeals affirmed the District Court on March 30, 2008. The United States Supreme Court declined review on January 19, 2010. A Petition for Rehearing was denied by the United States Supreme Court on March 22, 2010.

On March 22, 2010, Appellants filed a Motion for Reconsideration in the United States Court of Claims based upon the rationale expressed in Elouise Cobell, et al. v. Salazar, United States District Court for the District of Columbia, Case No. 96-1285, that contrary to the January 15, 2008 Opinion of the Federal Court of Claims, the 1866 Treaties, the Dawes Act and Curtis Act, imposed specific fiduciary duties upon the Department of Interior sufficient to sustain claims for money damages by the Five Civilized Tribes against the United States. The motion was denied.

Appellants appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit dismissed Appellants' second appeal. However, prior to dismissing, the Appellate Court for the Federal Circuit required the United States to respond to Appellants' Motion for Rehearing and Rehearing en banc. The Court of Appeals dismissed Appellants' second appeal on December 14, 2011. The Shoshone Opinion was issued by the Court of Appeals on January 7, 2012. By reason of the Shoshone Opinion, Appellants moved the trial Court to vacate the Order dismissing their claim on statute of limitations grounds. As described above, that motion was rejected.

SUMMARY OF THE ARGUMENT

The United States Court of Federal Claims abused its discretion in refusing to vacate its Order which concluded that Appellants' breach of trust claims against the United States were barred by the statute of limitations in light of this Court's January 7, 2012 decision in Shoshone River Tribe of Wind River Reservation Wyoming v. United States.

THE ARGUMENT

A. STANDARD OF REVIEW

The standard of review in this appeal is abuse of discretion. Agostini v. Felton, 521 U.S. 203 (1997).

B. BACKGROUND

Appellants are descendants of persons held in bondage by ancestors of the Five Civilized Indian Tribes, the Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes. Appellants' ancestors received land allotments. By reason of the specific fiduciary obligations imposed upon the Secretary of Interior toward Freedmen minors by the Act of May 27, 1908, Section 6, age, or lack of education, royalties from these allotments should have been held in trust by the United States. This did not occur and the United States has failed to maintain records. Accordingly, the United States should be required through this action to account for the funds required to be held in trust and to compensate Appellants for any losses.

Under the Curtis Act of 1898[5], members of the Five Civilized Tribes and persons formerly held in bondage by these Tribes or living among them

[5] The Curtis Act of 1989 was an amendment to the Dawes Act that brought about the allotment process of lands of the Five Civilized Tribes of Indian Territory; the Choctaw, Chickasaw, Muscogee, Cherokee, and Seminole. These tribes had been previously exempt from the 1887 General Allotment

(Freedmen), received allotments of, forty, sixty, eighty or one hundred sixty acre tracts of land. Fiduciary duties were owed to the Freedmen by the United States in relation to these allotments. It is clear that fiduciary responsibilities were owed to the Freedmen under the Act of May 27, 1908. However, there is also a "general trust relationship between the United States and the Indian people," United States v. Mitchell, 463 U.S. 206, 225 (1983), which stems from "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S. 286, 296 (1942). However, the existence of this general trust relationship, unlike that created by the Act of May 1908, does not create a specific fiduciary duty to protect the rights of the Freedmen. As the D.C. Circuit has held:

> While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. United States v. Mitchell, 463 U.S. 206, 224-25 (1983) (Mitchell II); United States v. Mitchell, 445 U.S. 535, 542 (1980) (Mitchell I). We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement

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Act, also known as the Dawes Act (also known as the Dawes Severalty Act, named for its sponsor and author Senator Henry Laurens Dawes). By effectively abolishing tribal courts and tribal governments in the Indian Territory of Oklahoma, the Act enabled Oklahoma to attain statehood, which followed some years later.

> imposes, expressly or by implication, that duty. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." National Wildlife Fed'n v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980).

Shoshone Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995); see also Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006), cert denied, 128 S.Ct. 176 (2007).

The basic elements of a fiduciary relationship must still be found. A fiduciary relationship, including the one between the United States and Indians, requires a trust corpus. See, e.g., Mitchell, 463 U.S. at 224; United States v. Friday, 525 F.3d 938, 957 (10th Cir. 2008); Intertribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1995). The Freedmen's citizenship rights within the Five Tribes do not form a trust corpus. Nero v. Cherokee Nation of Oklahoma, 892 F. 2d 1457, 1465 (10th Cir. 1989); Wheeler v. United States Dep't of Interior, 811 F.2d 549 (10th Cir. 1987). However, to the extent that a trust corpus exists between the United States and the Five Civilized Tribes, an equivalent trust corpus exists as to the Freedmen by reason of the citizenship parity provisions of the 1866 Treaties.

On January 7, 2012, the United States Court of Appeals for the Federal Circuit held in the Shoshone Indians Tribe of Wind Tower

_____, Case No. 2010-5150. A cause of action for breach of trust, …only "accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." Shoshone II, 364 F.3d at 1348 (emphasis added) (citing Hopland Band of Pomo Indians, 855 F.2d at 1578; Restatement (Second) of Trusts § 219 (1992); Cobell v. Norton, 260 F.Supp.2d 98, 105 (D.D.C.2003); Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238, 1249 (N.D.Ca1.1973)). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. Jones v. United States, 801 F.2d 1334, 1336 (Fed .Cir.1986) (citing Philippi v. Philippe, 115 U.S. 151, 157 (1885)); see also Shoshone II, 364 F.3d at 1348 ("[P]lacing the beneficiary on notice that a breach has occurred," is sufficient to establish the beneficiary's knowledge of the repudiation).

The Repudiation Rule[6] is fully applicable to this action and for this reason Appellants' Complaint should be reinstated. This conclusion is

[6] "The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. 'When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.' Rather, the general relationship between Indian tribes and defendant traditionally has been understood to be in the nature of a guardian-ward relationship. 'A guardianship is not a trust.' 'The duties of a trustee are more intensive than the duties of some other fiduciaries.' Furthermore, a guardian-ward relationship implies that, at some

supported not only by Shoshone, but also Public Law 108-108. See, Exhibit F.

> **Public Law 108-108**
>
> Congress determined in Public law 108-108:
>
> > notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Emphasis added). This trust fund provision serves to prevent the statute of limitations period from beginning to run on claims involving losses or mismanagement of Indian trust funds until an accounting has been provided.

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point, the ward will begin to take responsibility for handling its own affairs. By contrast, a private trust relationship is a static relationship, with all encompassing duties forever on the trustee." *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 573 (1990) (citations omitted).

In contrast the relationship between the Freedmen and the United States established under the 1866 treaties is that typified by a private trust. The lower courts ignored this critical distinction.

"This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' This principle has long dominated the Government's dealings with Indians." *Mitchell II*, 463 U.S. at 225.

Appellants here have never been provided an accounting and therefore the determination that Appellants' claims are barred by the statutes of limitations is erroneous.

In Felter v. Kempthorne, 679 F. Supp 2d 1 (D.D.C.2010), the Court held that in order to determine whether a statute applies retroactively, a court, "first look[s] for an express command regarding the temporal reach of the statute,…or, in the absence of language as helpful as that, determine[s] whether a comparably firm conclusion can be reached upon the basis of the normal rules of [statutory] construction." Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936, 939 (D.C. Cir. 2009) (internal quotation marks and citations omitted); see also Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006)); Martin v. Hadix, 527 U.S. 343, 354 (1999) (stating that a court looks for an unambiguous directive that the statute should be applied retroactively). "[C]ases where [the Supreme] Court has found truly 'retroactive' [applicability] adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.'" INS v. St. Cyr, 533 U.S. 289, 316-17 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)). Next, if the statute contains no such express command and a firm conclusion cannot be otherwise reached, the court must determine "whether the new statute would have retroactive

effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004) (quoting Landqraf v. USI Film Prods., 511 U.S. 244, 280 (1994)). Finally, if the statute has a retroactive effect, a court then looks to whether the general "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence," id. at 265, is overcome because "Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 946 (1997). "The 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" Id. at 946 (quoting Landqraf, 511 U.S. at 265). "'Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1971 (2009) (quoting Landqraf, 511 U.S. at 272-73). Legislative history can be considered when assessing Congress' intention regarding retroactivity. Lytes, 572 F.3d at 939-40 ("If applying the statute would have such a disfavored effect, then we do not apply it absent clear evidence in the legislative history that the Congress intended retroactive application.").

A statute can contain an express command regarding its temporal scope even if it does not contain the word "retroactive." Language in a provision stating that it "'shall apply to all proceedings pending on or commenced after the date of enactment . . . unambiguously addresses the temporal reach of the statute.'" Martin, 527 U.S. at 354 (quoting Landqraf, 511 U.S. at 280); see also Sandhvani v. Chertoff, 460 F. Supp. 2d 114, 121 (D.D.C. 2006) (noting that the amendment was retroactive where Congress stated that the change was "effective immediately and applicable to cases in which the final administrative order of removal . . . was issued before, on, or after the date that the [original] Act was enacted" (internal quotation marks omitted)). Courts have also found the statutory language that "[n]otwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996" to apply retroactively to change the definition of an aggravated felony under the Immigration and Nationality Act, regardless of the conviction date. Martinez v. INS, 523 F.3d 365, 370 (2d Cir. 2008); United States v. Kwan, 407 F.3d 1005, 1009 (9th Cir. 2005).

P.L. 108-108 applies “to any claim in litigation pending on the date of the enactment of this Act.” Therefore, the statute of limitations "shall not commence to run" on a claim until the Appellants have been furnished with

an accounting. Even though the language does not contain an explicit directive to revive stale claims, it is identical to the language that the Supreme Court hypothesized would indicate an express command for retroactive application in Martin and Landsqraf.

Legislative history reveals that Congress intended this retroactive effect. While P.L. 108-108 was passed in 2003, the original version of this Indian trust fund provision was passed in 1990. Cobell, 30 F. Supp. 2d at 43 n.20. The legislative history of the original 1990 trust fund provision reflected an intent to:

> extend the statute of limitations with relation to Indian trust fund management. Since the audit and [reconciliation] of such funds, as directed by the Committee, will require at least 5 years to complete, it is possible that the statute of limitations for any significant discrepancies uncovered during this process may have expired by the time such audits are completed. Therefore the Committee has agreed to provide this extension in order to protect the rights of the tribes and individuals involved should such protection prove necessary.

Accordingly, aside from the Repudiation Rule and the Shoshone Opinion, Appellants' motion to vacate should also have been granted by reason of PL 108-108.

C. THE ACT OF MAY 27, 1908

The Court of Claims dismissal should be vacated for the reason the court failed to give credence to the Act of May 27, 1908 which contains

express directives from Congress to the Department of Interior to manage and protect allotments issued under the Curtis Act to Freedmen minors, such as George Curls.

Specifically the Act states:

> SEC 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of May be appointed said minors.[sic]. The probate courts may, in their discretion appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

> And said representatives of the Secretary of the Interior are further restricted lands, authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, with out charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance,mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

See, Exhibit F.

Failure to rule favorably on this appeal will result in the perpetuation of past racial discrimination against the Freedmen[7] by the Department of the

[7] For evidence of overt racial discrimination by the United States against Freedmen, See, August 11,1938 correspondence from the Commissioner of Indian Affairs to the Solicitor United States Department of the Interior and October 1,1941, Response , Exhibit C to United States Court of Appeals Case No.11-5158, D.C.Circuit Court of Appeals, Docket No.1351644. In this correspondence officials in the United States Department of Interior conspire in writing to formulate means to circumvent the provisions of the 1866 Treaties by excluding, on race-based grounds ,Freedmen from tribal citizenship. Specifically, the Commissioner of Indian Affairs requests that the Department Solicitor opine concerning the status of the Freedmen of the Five Civilized Tribes in order to "find some way to eliminate the Freedmen". The Solicitor's legally erroneous Response to the Commissioner's request was that the Tribes could use the Oklahoma Welfare Act of June 26, 1936, to eliminate Freedmen from tribal

Interior. See, Exhibit G, for correspondence evidencing overt racial discrimination by the United States against Freedmen.

Abundant evidence is available to support the claim of historic racial discrimination against their ancestors. The grandfather of Appellant Leatrice Tanner-Brown, George Curls, was enrolled on the Rolls of the Cherokee Freedmen, under the Dawes Act on July 1, 1902.

Under the Act of May 27, 1908, restrictions against alienation of Freedmen allotments, such as the allotments to Mr. Curls', were not removed. Accordingly, any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of the Sections 2 and 6 of the 1908 Act. Instead the Interior Department has no record of these royalties, the guardian did not account for royalties owed to Mr. Curls as required by the 1908 Act, and the Secretary of Interior did not and has not taken any action. These failures were not

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membership. This correspondence is additional evidence of the blatant and historically racially discriminatory attitude of the United States towards Freedmen. Compare the 1938 correspondence to that at Appendix 3 issued September 11, 2011, by the Assistant Secretary of Interior for Indian Affairs, Larry Echohawk, explaining the historically recognized status of Freedmen as follows:"The Department's position is, and has been, that the 1866 Treaty…vested…Freedmen with rights of citizenship in the Nation…"The Tribes and the United States were attempting to include quantum of Indian blood as a condition to tribal citizenship. Blood quantum was never a criterion for tribal citizenship under the 1866 Treaties. The renewed focus on blood quantum is part of an ongoing racially-based strategy to deprive Freedmen of tribal benefits and land.

innocent. They were the result of a deliberate strategy to swindle land and money from Freedmen.

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

According to Angie Deboe:

> The Federal Government also assumed the administration of the affairs of the individual allottee. Because of their inexperience in the control of real estate, the agreements and the various acts of Congress had attempted to safeguard the Indians in the leasing and sale of their allotments.

> Leases for agriculture and grazing purposes were restricted in all the tribes. The Seminole Agreement contained regulations to protect the allottee, and gave the Chief supervisory authority. The Atoka Agreement contained similar safeguards but its enforcement was left to the Federal courts. The Creek Supplemental Agreement and the Cherokee Agreement specified that grazing leases for more than one year and agricultural leases for longer than five years should be subject to Departmental approval. In 1905 Congress authorized the Secretary to investigate any lease of allotted land in the Indian Territory and to refer cases of apparent fraud to the Attorney-General. The Five Tribes Act provided that all lease contracts longer than one year for the surplus of fullbloods were subject to Departmental approval, and that the homesteads of full bloods could be leased only in cases of old age or infirmity through special authorization by the Secretary.
>
> Oil men complained loudly of the delay occasioned by Departmental "red tape" in securing approval of a lease, but apparently the industry was not seriously retarded. The regulations aimed to prevent monopoly control, by limits on acreage and strict supervision of transfers; and judging from the alternate expressions of approval and complaint, and the failure of certain attempts to evade them, they were eminently successful. As a result the oil industry was a free-for-all scramble, with the great Mellon and Standard interests, the young oil worker who could scrape together enough money to drill a well of his own, and the gambler who must try one more "sure thing," all entering into the most unrestricted rivalry. <u>The wild, speculative, active spirit of the oil field gave a lurid phase to the early development of the</u> Indian Territory.

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

Although George Curls did not receive his allotment until 1910, the discovery of oil led to political pressure to make allotments freely alienable.

Due to this context, in violation of the fiduciary duties to Freedmen who were often less educated and sophisticated than their former slave masters, the United States, on racially motivated grounds, through the Act of 1908 permitted these allottees to be exploited by grafters and speculators anxious to obtain oil rich lands for little or no payment to allottees. The allotments belonging to George Curls were in Nowata County, in the midst of this oil rich territory. The Curls allotment is located North of the lucrative Alluwe Oil Field in the vicinity of the Cherokee Shallow Sands Oil Fields where oil was located a mere thirty-six feet below the surface[8] in 1904.

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

George Curls' Nowata County allotments were located in one of the oil rich areas that according to Deboe was ripe for exploitation.

According to Deboe:

> The Five Tribes Act provided that all the rolls should close March 4, 1907. But some duplications were afterwards cancelled, and 312 names were added by act of Congress in 1914. The rolls included several small groups that had been incorporated into the tribes, especially about seven hundred Euchees, who formed a part of the Creek Nation, and about a thousand Delawares, who had purchased the right to Cherokee

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

citizenship in 1867. The quantum of blood indicated by the rolls is somewhat misleading, partly because of inaccuracies in matters of this nature at that time seemed unimportant, and partly because fullblood Indians of mixed tribal descent were classed as mixed bloods. The final rolls are as follows:

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

Deboe, p. 47.

Although the law of 1908 had certainly entrusted [the department] with the responsibility of protecting all minor allottees, it was decided at the very beginning to limit such protection to restricted children. It was, of course, the unrestricted children of Negro, mixed Indian and white, or mixed Indian blood who were subject to the greatest exploitation, but the Department officials believe it wiser to concentrate upon the "real Indians"; as Kelsey said in 1910, with reference to some especially shocking pillaging of unrestricted children, "in my judgment the only remedy … is for the general citizenship of the State of Oklahoma to awake to the fact that the less intelligent residents of the community are being robbed by the connivance of grafters and dishonest officials, and that sooner or later these people who have been robbed will become public charges, and to avoid this ultimate condition public sentiment with respect to getting what the allottee has must change and the citizens must elect honest officers who will protect the minors, whether they be white, red, or black.

> But although the district agents' work was limited by such administrative decisions,, there was so much need for reform that like Stolper they accomplished a great deal. During the last six months of the first year of their employment they recovered about $548,306.78. House Reports, 61 Cong., 2 Seas., No. 2273, Vol. II, appendix, 1322-23. Department of the Interior, Annual Report, 1912, II, 486; Indian Office Files, 72545/08 Five Tribes 311. Each agent made a monthly report showing the exact sums that he recovered in specific cases, and these amounts were added to form the totals.
>
> Id.

The $300,000 recovered by the Department on behalf of minor Freedmen in 1910 and $548,306.78 in 1911-12, a point in time when George Curls was a minor allottee with land in oil rich Nowata County, and it is unclear whether he even knew at the time that land had been allotted to him, represent royalties that should have been placed in an Individual Indian Money account by the Department. By reason of overtly racist motives discussed above by Deboe, that did not happen. Mr. Curls' allotment is located squarely within an area known to contain oil in 1910 and to be subject to a lease. Nonetheless no accounting has been provided and no records are available. This is a breach of fiduciary duty.

Under the terms of Sec. 6 of the Act of 1908, royalties from the allotment held by George Curls were under the ultimate supervision of the Secretary of Department of Interior until Curls reached the age of majority.

Accordingly, from December 5, 1910, until January 3, 1918, all royalties on Curls' land were restricted and should have been held in trust by the Secretary. Curls was entitled to an Individual Indian Money account for that purpose. According to Deboe, as set forth on p. 85, of her writing, royalties were collected from Cherokee lands in Nowata and Rogers Counties during this period. To the extent these royalties were owed to a minor Freedmen such as George Curls, the Secretary of Interior had a duty to place the royalties into an IIM.

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

The United States has settled Cobell, a trust mismanagement claim brought Native Americans, but argues that the Freedmen case is barred by the statute of limitations and that no trust obligations are owed to the

Freedmen. This approach by the United States is violative of equal protection.

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

> It would be difficult to find a more historically mismanaged federal program than the Individual Indian money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbit testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now Appellants in this lawsuit. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, whatsoever. "If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined." Cherokee Nation v. Georgia 30 U.S. (5Pet.) 1, 15, 8 L.Ed 25(1831) (Marshall, C.J.)…
>
> As Chief justice Marshall noted in 1831, the United States Indian relationship is "perhaps unlike that of any two people in existence" and marked by peculiar and cardinal distinctions which exist nowhere else." Cherokee Nation, 30 U.S. at 16, 8 L.Ed. 25" In the early 1800s, the United States pursed the policy of "removal", *i.e.*, the relocation of tribal communities

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

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

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

> approval of the federal government. More importantly, the United States had again successfully managed to deprive the Indian people of more land, this time in return for the creation of a trust status. Between 1887 and 1934, 90 million acres-about sixty-five percent of Indian land-left Indian ownership. Trial Tr. at 857-57.

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

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

> Ct. 2961. The Appellants allege that the government, including the Secretary of the Treasury (to a limited extent) has breached these recognized duties. Therefore, because the Appellants' allegations against the Secretary of the Treasury arise under the statutory law and common law of the United States, this Court has "arising under" jurisdiction over the Appellants' claim.
>
> Statute of Limitation. First, the case law in this Circuit shows a strong disfavor of making determinations on limitations issues at the motion to dismiss stage. *See* Firestone v. Firestone, 76 F.3d 1205, 1210 (D.C.Cir. 1996) holding that the district court erred by dismissing a case with prejudice on a motion to dismiss rather than summary judgment); Richards v. Mileski, 662 F.2d 65, 73(D.C.Cir. 1981) ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the Appellant can raise factual setoffs to such an affirmative defense.") *Jones*, 442 F.2d at 775 *n.* 2 ("The issue of when Appellants decedent discovered the injury, or through the exercise of reasonable diligence should have known of the facts giving rise to the claim, is properly one for the trier of fact, save for the exceptional case when it can be established that there is no material issue of fact."). Second, even though the Court may properly judge a motion to dismiss for lack of jurisdiction that raises the limitations defense at the juncture under a summary judgment standard, *see In re Swine Flu Immunization prods. Liability Litigation,* 880 F.2d 1439, 1441-43 (D.C.Cir. 1989), to do so would be premature at this point for the same reasons that summary judgment itself is premature Namely, discovery has not been completed and to decide whether genuine issues of material fact exist at this point would be imprudent.

Id.

The Freedmen case was dismissed here without any opportunity for discovery.

The defendants moved to dismiss the Appellants Complaint

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

Id.

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

D. RULE 60(b)-THE TRIAL ERRED IN REFUSING TO GRANT APPELLANTS' MOTION FOR RELIEF FROM JUDGMENT

The denial of a motion for relief from judgment is reviewed for abuse of discretion. Patton v. Secretary of Department of Health and Human Services, 25 F.3d 1021 (Fed. Cir. 1994).

Rule 60(b)(5) permits a party to obtain relief from a judgment or order if, *inter alia*, "applying [the judgment or order] prospectively is no longer equitable." It provides a means by which the Court of Federal Claims can modify or vacate a judgment or order where a significant change in the factual conditions or legal landscape renders continued enforcement of the judgment or order harmful to the public interest. See, Horne v. Flores, 129 S. Ct. 2579,2593 (2009) (discussing analogous Federal Rule of Civil Procedure 60(b)(5)). Rule 60(b)(6) is a catchall provision that enables the Court of Federal Claims to grant relief from a judgment "for any other reason that justifies relief." It is generally available only in the presence of extraordinary circumstances. See, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988) (quotation omitted (discussing analogous Federal Rule of Civil Procedure 60(b)(6)).

The United States Supreme Court held in Horne that Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order]

prospectively is no longer equitable." Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992). The party seeking relief bears the burden of establishing that changed circumstances warrant relief, *id*. at 383, but once a party carries this burden, a court abuses its discretion "when it refuses to modify an injunction or consent decree in light of such changes." Agostini v. Felton, 521 U.S. 203, 215 (1997).

The Court's Opinion in Shoshone constituted a change in the law of such significance that Appellants' Rule 60(b) motion should have been granted under either 60(b)(5) or 60(b)(6). The trial court's refusal to even entertain the motion was an abuse of discretion.

It is respectfully requested that this matter be remanded with instructions to the trial court to vacate Docket no. 36 and to adjudicate Appellants' breach of trust claim.

CONCLUSION

It is respectfully requested that the rejection of Appellants' motion to vacate be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November 2012, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Federal Circuit this CORRECTED BRIEF OF THE APPELLANTS, and further certify that opposing counsel will be notified of this filing through the Notice of Docket Activity generated by this electronic filing.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman Font.

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ADDENDUM

US Court of Federal Claims Order of June 14, 2012

In the United States Court of Federal Claims

* * * * * * *

HARVEST INSTITUTE FREEDMAN FEDERATION, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 06-907L

Filed: June 14, 2012

* * * * * * *

ORDER

Plaintiffs' 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 statue of limitations, was rejected for filing by the Clerk of Court. We agree with the Clerk that this motion is inappropriate because the case to which it relates is closed. The plaintiffs here are likely subject to *res judicata* principles as well. The case that plaintiffs rely on involved a trust relationship, whereas the courts evidently held that no such relationship between the United States and these plaintiffs existed. We ask that the Clerk of Court return plaintiffs' motion unfiled.

Robert H. Hodges, Jr.
Judge