2014-5015

United States Court of Appeals for the Federal Circuit

SHINNECOCK INDIAN NATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
Case No. 12-CV-00836
Chief Judge Emily C. Hewitt

BRIEF OF PLAINTIFF-APPELLANT SHINNECOCK INDIAN NATION

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April 11, 2014

Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Shinnecock Indian Nation v. United States

No. 14-5015

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellant certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Shinnecock Indian Nation

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:

N/A

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:

N/A

4. ☑ 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:

Fredericks Peebles & Morgan LLP
Steven J. Bloxham, John M. Peebles, Darcie L. Houck, Tim Hennessy

April 11, 2014
Date

/s/ Steven J. Bloxham
Signature of counsel

Steven J. Bloxham
Printed name of counsel

Please Note: All questions must be answered

cc: _____

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STATEMENT OF RELATED CASES

There have been no prior appeals in this case. Counsel for the Shinnecock Indian Nation ("Nation") knows of no cases pending in this or any other court that will directly affect or be directly affected by this Court's decision in the instant appeal.

JURISDICTIONAL STATEMENT

The Nation asserts that the Court of Federal Claims ("CFC") had jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. The Nation is a federally recognized Indian tribe. Its complaint asserts claims against the United States arising under the Non-Intercourse Act ("NIA"), 25 U.S.C. § 177; the Fifth Amendment, U.S. Const. amend. V; and federal common law.

The Court of Appeals for the Federal Circuit has jurisdiction over this appeal from a final decision of the CFC pursuant to 28 U.S.C. § 1295(a)(3). The CFC issued an order on August 29, 2013, granting the United States' motion to dismiss and denying the Nation's request for leave to amend its complaint. On August 30, 2013, the CFC issued judgment for the United States and dismissed the Nation's complaint. The Nation timely filed a notice of appeal on October 25, 2013. 28 U.S.C. § 2522; Fed. R. App. P. 4(a)(1)(B). This appeal is from a final order and judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the Nation's claims are ripe for adjudication;

2. If the Nation's claims are not ripe, whether the CFC should have dismissed the action without prejudice, rather than deciding the Nation's claims on the merits;

3. Whether the Indian Tucker Act confers jurisdiction to hear the Nation's claim for damages based on the federal courts' alleged violation of the NIA;

4. Whether the Indian Tucker Act confers jurisdiction to hear the Nation's claim for damages based on the federal courts' alleged violation of the Nation's right under federal common law to redress for the unlawful taking of its land;

5. Whether the Nation should be allowed to amend its complaint to state a claim for a judicial taking of its cause of action for compensation for such loss of its land, for which the Fifth Amendment requires the United States to pay just compensation.

STATEMENT OF THE CASE

In this case the Nation seeks money damages from the United States for the government's breach of its duties to the Nation. The United States owes legal duties to the Nation under the NIA, the Fifth Amendment, and federal common

law. The NIA requires the United States to protect the Nation against the loss of its Indian tribal lands in violation of federal law and policy. 25 U.S.C. § 177. Under the Fifth Amendment, the United States may not take private property for public use without just compensation. U.S. Const. amend. V. Federal common law incorporates binding customary international law and obliges the United States to afford the Nation redress for lands taken without its consent. *The Paquete Habana*, 175 U.S. 677, 700 (1900); Restatement (Third) of Foreign Relations Law of the United States § 111 (1987); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 28 (Sept. 13, 2007).

The United States breached these duties through its judicial branch. The federal courts have barred the Nation from seeking redress for the illegal transfer of the Nation's land, violating obligations owed under federal statutory and common law, and taking from the Nation the property right to be compensated for the land. For these breaches of duty and taking of property, the United States owes the Nation compensation.

The CFC erroneously determined it could not hear the Nation's claims because they were not ripe, were not within the CFC's jurisdiction, and did not identify a compensable property interest or a government action that effected a taking under the Fifth Amendment. The CFC's order is published at *Shinnecock Indian Nation v. United States*, 112 Fed.Cl. 369 (2013) ("*Order*").

STATEMENT OF FACTS

Centuries of history underlie this case and provide necessary context. It must be emphasized, however, that these historical facts are not themselves the immediate basis for the Nation's claims. Rather, the Nation is suing to recover damages and just compensation for the violation by the United States courts, beginning in 2005 and culminating in 2006, of the United States' duty to allow the Nation to enforce its right to compensation or other effective redress for the unlawful taking of its traditional lands. The facts stated below are supported with additional detail in the Nation's complaint.

A. The Nation's Land and How It Was Stolen.

From time immemorial, the Shinnecock Indian Nation occupied and owned the land in and around what is now known as the Town of Southampton, on Long Island in the State of New York. Agreements between the Nation and the English settlers in 1640, 1649, and 1703, memorialized the Nation's rights to 5,258 acres of this land.

In 1790, the first United States Congress enacted the original version of the NIA. Indian Trade and Intercourse Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137. Congress re-enacted this Act several times in its early years, and the current version has been in force since 1834. Act of June 30, 1834, ch. 161, § 12, 4 Stat.

729, reenacted as Revised Statutes § 2116, now codified at 25 U.S.C. § 177. The NIA provides in part:

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

25 U.S.C. § 177. Under the NIA, "the extinguishment of Indian title required the consent of the United States." *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 414 U.S. 661, 678 (1974).

In 1859, the Town of Southampton acquired the Nation's lands by fraud and in violation of the NIA. The State of New York enacted legislation purporting to authorize the conveyance of all of the Nation's "right, title and interest" in its land to the government of the Town of Southampton. Ch. 46 of the New York Laws of 1859. Pursuant to this law, 4,422 acres of the Nation's land were conveyed from the Nation to the Town. The Nation never authorized the conveyance. The United States did not give its consent.

On July 25, 1859, Shinnecock tribal members filed a lawsuit in state court challenging the fraudulent conveyance. This lawsuit was dismissed under the prevailing state law, for the Nation's lack of capacity and its members' lack of standing to sue in state court. Until 1987, Indian tribes in New York State were unable to prosecute lawsuits in their tribal names in the state courts without the express consent of the State legislature.

B. The Nation's District Court Land Claim Lawsuit and the Decisions of the Second Circuit and the District Court.

Historic land claims by Eastern tribes were first authorized in federal courts in 1974, when the Supreme Court decided *Oneida Indian Nation of N.Y.*, 414 U.S. 661. In 1982, Congress indefinitely tolled the statute of limitations for certain land claims identified by the Secretary of the Interior, including the Nation's. Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Title I, §§ 2-6, 96 Stat. 1966, 28 U.S.C. § 2415(a) & (b) & § 2415 Note; Statute of Limitations Claims List, 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983).

The Nation sued New York and other institutional defendants (but no individual private landowners) in the U.S. District Court for the Eastern District of New York in 2005, seeking to vindicate the Nation's rights to its stolen lands. *See Shinnecock Indian Nation v. New York*, No. 05-cv-02887, 2006 WL 3501099, at *1 (E.D.N.Y. Nov. 28, 2006). The Nation claimed violations of the NIA and sought damages and related relief from the original wrongdoers for the loss of all the stolen lands, and ejectment of the named defendants from those portions of the stolen lands (approximately one-third) claimed by those defendants. *Id.*

Two weeks after the Nation sued the State, the Second Circuit Court of Appeals decided *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied* 547 U.S. 1128 (2006) ("*Cayuga*"). In *Cayuga*, the court overturned a judgment of nearly $250 million in favor of the Cayuga Indian Nation

and the United States as the Cayugas' trustee. *Cayuga* at 271-73. The district court had found the State of New York liable for violating the NIA when it entered into unlawful treaties with the Cayugas resulting in the transfer of the Cayugas' land to the State in 1795 and 1807. *Id.* at 268-271. While the *Cayuga* appeal was pending, the Supreme Court had decided *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). There the Court held the Oneidas' purchase of land on the open market within the area of its historic reservation did not "revive its ancient sovereignty" over the parcels. *City of Sherrill* at 202-03. "[T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221. The *Cayuga* court held the equitable doctrines applied in *City of Sherrill* with respect to the disruptive unilateral revival of Tribal sovereignty (which *Cayuga* repeatedly referred to as "laches") also barred possessory Indian land claims and any associated claim to damages. *Cayuga* at 277.

In 2006, following the holding of *Cayuga*, the district court dismissed the Nation's land claim case. The district court summarized three principles "unveiled" in *Cayuga*:

> (i) equitable defenses apply to disruptive Indian land claims, such as possessory land claims, and are not limited to claims seeking a revival of sovereignty; (ii) equitable defenses apply to both actions at law and in equity, because the focus is on the potentially disruptive nature of the claim, and (iii) equitable defenses can be applied at the pleading stage to dismiss disruptive possessory land claims.

Shinnecock Indian Nation v. New York at *4. Because the Nation's claim was "exactly the type of claim that the *Cayuga* court found barred by laches," the district court dismissed the case. *Id.* at *4, *6.

The Nation moved for reconsideration and to alter the judgment to allow the Nation leave to amend, and appealed the order and judgment. The appeal was immediately stayed pending the district court's ruling on the motions, and the motions were stayed until the Second Circuit resolved a similar land claim case brought by the Oneida Indian Nation.

The Second Circuit reaffirmed the *Cayuga* decision in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied* 132 S.Ct. 452 (2011) ("*Oneida*"). The court acknowledged this time that *Cayuga*'s equitable doctrine is not really "laches," and (in complete contradistinction to the Supreme Court's application of the doctrine in *City of Sherrill*, 544 U.S. at 216-18, 221) that it "does not focus on the elements of traditional laches," but instead on the "disruptive nature of claims long delayed." *Id.* at 127. Thus, for example, the court dismissed the Cayugas' claims even though the tribe was not responsible for any delay and the delay was not unreasonable. *Cayuga*, 413 F.3d at 279. *See also*

Oneida at 127 (it was "ultimately unimportant" that the "traditional laches" elements of unreasonable delay and prejudice to the defendant were not present). The *Oneida* court reiterated that "no matter what specific relief" might be awarded, "'disruptiveness is inherent in the claim itself.'" *Id.* (quoting *Cayuga* at 275).

Based on the Second Circuit's emphatic endorsement of the "new laches" doctrine on which the district court based its decision, the Nation was compelled to withdraw its motion for reconsideration. Plaintiff's Letter at 1, *Shinnecock Indian Nation v. New York*, No. 05-cv-02887 (E.D.N.Y. letter filed Oct. 20, 2011), ECF No. 70. The Nation's appeal and its motion to amend the complaint remain stayed, pending a decision by the Department of the Interior on the Nation's request for litigation assistance.

C. The Nation's Claims in This Action.

In its complaint, the Nation alleged that application by the federal judiciary of the newly-minted *Cayuga-Oneida* "equitable" defense to bar the Nation's land claim violated the United States government's fiduciary obligation to the Nation arising under the NIA.

The Nation also alleged that application of the *Cayuga-Oneida* "equitable" bar violated the Nation's right to redress for the unlawful taking and forced dispossession of the Nation and its members from their lands. The Nation alleged that this right is part of federal common law, which has always recognized Indian

tribal rights and which incorporates customary international human rights law also guaranteeing such right. The Nation asserted jurisdiction under the fourth class of claims under the Tucker Act, which vests the CFC with jurisdiction over "any claim" for "unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

The Nation's complaint alleged facts that support a claim for an uncompensated "judicial taking" of the Nation's property under the Fifth Amendment, though it was not articulated as a separate claim. In its response to the United States' motion to dismiss, the Nation requested the CFC to allow amendment of the complaint if the Court deemed it necessary.

The CFC dismissed the Nation's claims as unripe and as otherwise not within its jurisdiction, and denied leave to amend on the ground that the Nation could not state any claim for judicial taking. *Order* at 387.

SUMMARY OF THE ARGUMENT

The Second Circuit created an entirely new "equitable" defense ("new laches") based upon which it ordered the dismissal of all Indian tribes' historic NIA land claims. The elements and application of this "new laches" are entirely contrary to longstanding principles of equity, as well as inconsistent with applicable Supreme Court precedent and Congressional legislation and policy.

Adhering to the Second Circuit's directive, the district court dismissed the Nation's land claim.

These judicial acts breached the government's duty under the NIA to protect the Nation's lands, giving rise to a claim for money damages. These acts also violated federal common law, which in accordance with customary international law mandates redress for the unconsented alienation of traditional lands, including money damages. These acts also constituted a Fifth Amendment taking of the Nation's compensable property right in its cause of action for compensation for the loss of its land. The CFC has jurisdiction over each of the Nation's claims under the Indian Tucker Act.

STANDARD OF REVIEW

The Court of Appeal reviews de novo the decision of the CFC to dismiss for lack of jurisdiction. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The CFC's determination with respect to ripeness is also reviewed de novo. *McGuire v. United States*, 707 F.3d 1351, 1357 (Fed. Cir. 2013). The CFC's denial of leave to amend based upon its finding that the proposed amendment would fail to state a claim as a matter of law, is also subject to de novo review. *Askins v. Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013); *accord Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013); *Cockrell*

v. Sparks, 510 F.3d 1307, 1310 (11th Cir. 2007); *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006).

ARGUMENT

I. If the Nation's Claims Were Not Ripe, as the Court of Federal Claims Ruled, then the Court Erred in Reaching the Merits.

The CFC determined the Nation's claims were "not ripe for adjudication … and must be dismissed for lack of jurisdiction." *Order* at 379. The CFC relied upon its earlier decision in *Bannum, Inc. v. United States*, 56 Fed.Cl. 453 (2003), which held, "[i]f a claim is not ripe, the court does not have jurisdiction to hear the case, and it must be dismissed without prejudice." *Order* at 376 (quoting *Bannum, Inc.* at 462). *Accord Crawford v. United States*, 53 Fed.Cl. 191, 195 & n.8 (2002); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Pennzoil Co. v. FERC*, 645 F.2d 394, 400 (5th Cir. 1981). Unlike all of the cases just cited, however, including *Bannum, Inc.* and *Crawford*, two prior CFC decisions, here the CFC did not simply dismiss the case without prejudice upon finding the claims were premature. Instead, the CFC proceeded to rule *on the merits* of whether the Nation stated claims sufficient to come within the Indian Tucker Act.

This Court explained in *Spruill v. Merit Systems Protection Bd.*, 978 F.2d 679 (Fed. Cir. 1992):

> [F]ailure of proof of an element of the cause of action means the petitioner is not entitled to the relief he seeks. *To conclude in such a case that the petitioner loses because the forum is "without*

> *jurisdiction" is to obscure the nature of the defect.* It would be more accurate to conclude that the petitioner has failed to prove the necessary elements of a cause for which relief can be granted. …
>
> Unfortunately, in suits against the Federal Government these two notions have not always been kept separate. … These are the cases in which the facts which establish jurisdiction are intertwined with the facts which determine the merits of the cause.

Id. at 687-88 (emphasis added). Thus, a decision whether a claim satisfies a Tucker Act jurisdictional requirement is simultaneously a decision on the merits. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005).

When the CFC dismissed the Nation's claims because (in addition to being unripe, in the court's view) "they are not otherwise within the jurisdiction of the Court of Federal Claims," *Order* at 387, the court in fact was *exercising* jurisdiction and determining the Nation had not proven elements of its claims necessary to allow them to come within the Tucker Act's waiver of immunity – a decision on the merits. The Court similarly exercised jurisdiction to rule on the merits of the Nation's judicial taking claim, holding that an amended complaint including such a claim "would [not] state a claim on which relief could be granted." *Id.* at 383.

"[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995). "Whether the complaint states a cause of action on which relief

could be granted is a question of law and just as issues of fact it *must be decided after and not before the court has assumed jurisdiction* over the controversy." *Bell*, 327 U.S. at 682 (emphasis added). *See also Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2373, p. 766 (3d ed. 2008) ("[T]he district court cannot make its order an adjudication on the merits if it lacks the power to decide the merits.").

Therefore, if this Court determines the Nation's claims were not ripe for adjudication, it should specify that any dismissal is *without prejudice* and vacate those portions of the CFC's decision that adjudicated the merits of the Nation's claims. Alternatively, if the claims are not yet ripe, but have accrued for purposes of the statute of limitations (as discussed in section II), then justice requires this Court to vacate the dismissal along with the extrajurisdictional adjudications on the merits, and direct the CFC to stay the case until it ripens. *Aulston v. United States*, 823 F.2d 510, 514 (Fed. Cir. 1987).

II. The Court of Federal Claims Was Wrong in Concluding that the Nation's Claims Were Not Ripe.

"Ripeness is peculiarly a question of timing.… Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580 (1985) (internal citations, quotations, and alterations omitted). A

disagreement is ripe for adjudication when its effects are felt in a concrete way. *Id.* at 581. Determining whether a claim is ripe requires the court "'to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 330 F.3d 1345, 1346-47 (Fed. Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300-01 (1998)). A claim is fit for decision "where further factual development would not significantly advance a court's ability to deal with the legal issues presented." *Caraco Pharmaceutical Laboratories., Ltd. v. Forest Laboratories, Inc.*, 527 F.3d 1278, 1295 (Fed. Cir. 2008) (internal quotations and alteration omitted). An issue that is "purely legal" need not wait, because it "will not be clarified by further factual development." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. at 581.

A plaintiff suffers "hardship" from delayed review "where the complained-of conduct has an 'immediate and substantial impact' on the plaintiff," *Caraco Pharmaceutical Laboratories* at 1295 (quoting *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967)), "in a fashion that harms or threatens to harm him." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). The harm can be "adverse effects of a strictly legal kind," *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998), or "significant practical harm," *id.* at 733-34 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54 (1967)).

A. The Nation's Claims Do Not Require Further Factual Development.

The CFC erroneously held the Nation's claims were unfit for decision, based in part on an obvious mistake the court made. The CFC was mistaken in thinking a motion for reconsideration remained pending in relation to the district court's dismissal of the Nation's land claim case. *Order* at 375, 378, 379. In fact, no motion for reconsideration remained pending. The Nation had brought a reconsideration motion in which it had argued the district court applied *Cayuga* beyond what the Second Circuit intended, but the subsequent *Oneida* decision reiterated and expanded *Cayuga*. Faced with the Second Circuit unmistakably ratifying the district court's implementation of *Cayuga*, the Nation was compelled to withdraw its motion for reconsideration. Plaintiff's Letter at 1, *Shinnecock Indian Nation v. State of New York*, No. 05-cv-02887 (E.D.N.Y. letter filed Oct. 20, 2011), ECF No. 70.

Still pending in the district court is the Nation's motion to alter or amend the judgment to allow the Nation to amend its complaint to state additional claims for violations of the Nation's and its members' civil rights. These civil rights violations *relate* to the taking of the Nation's land, but they are *based* on the longstanding denial of the Nation's access to state and federal courts to challenge that taking and seek compensation for it. These proposed civil rights claims are

not claims for the land itself and they are not based on the NIA. They cannot affect the district court's judgment dismissing the Nation's land claim.

The ripeness of a claim is virtually always synonymous with its accrual. *Reiter v. Cooper*, 507 U.S. 258, 267 (1993); *Ladd v. United States*, 630 F.3d 1015, 1024 (Fed. Cir. 2010); *Bayou Des Familles Development Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997). Claims under the Tucker Act accrue "'when all the events which fix the government's alleged liability have occurred.'" *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1359 (Fed. Cir. 2013) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). A taking claim based on an act of Congress, for example, accrues when the act in question goes into effect. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed. Cir. 1994). A claim based on an act of a court accrues upon entry of the judgment in question. *Smith v. United States*, 709 F.3d 1114, 1117 (Fed. Cir. 2013); *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1351, 1354 (Fed. Cir. 2011). Events arising after the accrual date "cannot be necessary elements of the claim." *Ladd* at 1024. Thus, for instance, "'later judicial pronouncements simply explain, but do not create, the operative effect'" of the event that fixes liability. *San Carlos Apache Tribe* at 1354 (quoting *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993)). *See also Loveladies Harbor, Inc. v. United States*, 27 F.3d

1545, 1555-56 (Fed. Cir. 1994) (lawsuit challenging validity of agency action does not delay accrual of regulatory taking claim). Here the government's alleged liability was fixed by the district court's entry of final judgment against the Nation. Nothing that occurs after that date can be a necessary element of the Nation's claims. The judgment is no less final because an appeal is available, or even because an appeal is pending. "[A] judgment otherwise final remains so despite the taking of an appeal." Restatement (Second) of Judgments § 13 cmt. f (1982). Therefore further factual development cannot be not required to ripen the claims.

Furthermore, the potential for the Second Circuit to reverse the dismissal of the Nation's NIA land claim is more illusory than real. As the CFC acknowledged, it is the Second Circuit *itself* which has mandated dismissal of *all* NIA land claims. *Order* at 375, 386. In *Cayuga*, the Second Circuit created and invoked an entirely new "equitable" defense which mandated dismissal of the Cayuga Indian Nation's NIA land claims, based upon the passage of time and the inevitable "disruptive" nature of any "possessory land claim." 413 F.3d at 274-77. The Second Circuit's subsequent decisions in 2010 and 2012 made clear that *all* NIA land claims must be dismissed. *Oneida*, 617 F.3d at 135; *Onondaga Nation v. New York*, 500 Fed.Appx. 87, 89 (2d Cir. 2012), *cert. denied* 134 S.Ct. 419 (2013). The U.S. Supreme Court denied certiorari of all three decisions, even though the United States itself was a co-plaintiff in both *Cayuga* and *Oneida* and had petitioned the

Supreme Court for review. Both courts have had multiple opportunities to alter or disapprove of the *Cayuga-Oneida* "equitable" defense in recent years and they have refused to do so. In fact, given the chance the Second Circuit even expanded its application of the "equitable" defense. *Oneida*, 617 F.3d at 135. In view of the Second Circuit's thrice-affirmed stance and the Supreme Court's firm acquiescence, absent a full about-face by one of these courts, there is no realistic chance the Second Circuit will disturb the district court's judgment dismissing the Nation's land claim.

The possibility that the law might someday change in a way that no longer disfavors the Nation cannot render its claims unripe, for then no claim challenging government policy would ever be ripe. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 76 (1965) ("[T]he mere contingency that the Attorney General might revise the regulations at some future time does not render premature their challenge to the existing requirements."); *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 139-40 (1974) ("[T]he possibility that a court may later decline to enforce the Rail Act as written because of its unconstitutionality cannot constitute a contingency pretermitting earlier consideration of the constitutionality of the Act."); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (holding that a claim challenging arbitrators' preliminary ruling was ripe, where it was "almost certain[]" that the ruling would control the

parties' conduct); *Hendler v. United States*, 952 F.2d 1364, 1366 (Fed. Cir. 1991) ("All takings are 'temporary,' in the sense that the government can always change its mind at a later time.").

Moreover, the issues presented are "purely legal," and therefore they "will not be clarified by further factual development." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. at 581; *Rothe Development Corp. v. Dept. of Defense*, 413 F.3d 1327, 1355 (Fed. Cir. 2005). The Nation's claims do not turn on the specifics of the district court's judgment. The issue is essentially whether the federal courts' policy of rejecting historic Indian land claims as "disruptive" violates the United States' legal duties to the Nation and constitutes a compensable taking of the Nation's property right, its cause of action. Only the legal significance of the federal courts' decisions regarding historic Indian land claims – in particular, the Nation's claim – is at issue. The very nature of the Nation's claims in this case precludes the need to await further factual development: the facts are in, and the remaining questions are purely legal. The Nation's claims are fit for judicial decision.

B. The Nation Will Suffer Hardship If Its Claims Are Not Adjudicated Because the Claims Will Be Barred by the Statute of Limitations.

In assessing the ripeness of a claim, courts consider whether the plaintiff will suffer hardship as a result of withholding adjudication. *National Park Hospitality*

Ass'n, 538 U.S. at 808. The plaintiff's hardship need not be definite; a "sufficient risk of suffering immediate hardship [warrants] prompt adjudication." *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1580-81 (Fed. Cir. 1993).

The hardship to the Nation in this case is that if its claims are not heard now, they will be barred in the future by the statute of limitations. As discussed above, the Nation's claims accrued when the district court entered final judgment on December 5, 2006. *See Smith v. United States*, 709 F.3d at 1117; *San Carlos Apache Tribe v. United States*, 639 F.3d at 1351. The Nation filed its complaint in the CFC on December 5, 2012, to come within the six year limit prescribed by 28 U.S.C. § 2501. Absent the CFC's consideration of this case at this time, the Nation will forever be barred from bringing its claims in the future. Even after events unfold such that the CFC would agree the case is fit for adjudication, the Nation will have no legal recourse. *See Love Terminal Partners v. United States*, 97 Fed.Cl. 355, 383-84 (2011). This is the principal "immediate and significant impact" facing the Nation.

In *Confederated Tribes and Bands of the Yakama Nation v. United States*, 89 Fed.Cl. 589 (2009), the CFC held that the impending (though uncertain) expiration of the statute of limitations imposed a sufficient hardship on the plaintiffs to satisfy the second prong of the ripeness inquiry. *Id.* at 616. *See also South Carolina Wildlife Federation v. South Carolina Dept. of Transp.*, 485 F.Supp.2d 661, 671

(D.S.C. 2007) (holding that because statute of limitations would bar some of plaintiff's claims, "[d]elayed review would … significantly limit plaintiffs' ability to seek a remedy," causing substantial hardship sufficient to find ripeness). The same conclusion holds in the instant case.

The CFC did not determine the Nation's accrual date or even address the issue, asserting inaccurately that the Nation had not explained the basis of its hardship. *Order* at 379; compare Pl. Opp. Brief at 16-18. A determination that the claims have not yet accrued would alleviate the Nation's hardship. Absent that, substantial risk exists that the statute of limitations will immediately bar the Nation from reasserting its claims when they ripen to the CFC's satisfaction. The Nation's claims will be barred even before it is allowed the opportunity to bring them.

Because the Nation's claims are fit for judicial review and the Nation will suffer hardship if the Court withholds adjudication, the claims are ripe. The Nation requests that the Court reverse the CFC's dismissal on this basis.

III. The Non-Intercourse Act Creates a Money-Mandating Fiduciary Obligation Applicable to the Judicial Action Complained of in This Case.

Tucker Act jurisdiction requires that a claimant identify a source of substantive law "reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S.

465, 473 (2003). Where a claimant identifies a federal law establishing a fiduciary relationship, common law plays a role in determining the scope of the government's liability. *United States v. Jicarilla Apache Nation,* --- U.S. ----, 131 S.Ct. 2313, 2325 (2011); *United States v. White Mountain Apache Tribe* at 475-78; *United States v. Mitchell,* 463 U.S. 206, 224-26 (1983); *Jicarilla Apache Nation v. United States*, 100 Fed.Cl. 726, 731-38 (2011).

The NIA, on which the Nation relies for its first claim, prohibits the transfer of Indian tribal lands without the consent of the United States. 25 U.S.C. § 177; *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960). Under the NIA, the United States owes to Indian tribes the specific fiduciary duty to protect the tribes against land transfers undertaken in violation of the NIA. All branches of the United States government are bound by this fiduciary duty. When the government violates the duty, as the judicial branch has done by creating a new "equitable" roadblock preventing Indian tribes from achieving any legal redress for illegal land transfers, the NIA mandates that the United States pay money damages.

A. The Non-Intercourse Act Creates Specific Fiduciary Duties Owed by the United States Government.

It has long been held that the NIA imposes a fiduciary obligation on the United States in favor of Indian tribes with lands subject to the protections of the Act. "That the Nonintercourse Act imposes upon the federal government a

fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975), *affirming* 388 F.Supp. 649 (D.Me. 1975). The right of Indian tribes to "all the lands within [their territorial] boundaries … is not only acknowledged [in the NIA] but guaranteed by the United States." *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832) (emphasis added). "Clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances." *Passamaquoddy* at 379. The Act "'acknowledges and guarantees the Indian tribes' right of possession and imposes on the federal government a fiduciary duty to protect the lands covered by the Act.'" *Tonkawa Tribe of Okla v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (quoting *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984)).

The Court of Claims held in 1965 that the NIA "created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions." *Seneca Nation of Indians v. United States*, 173 Ct.Cl. 917, 925 (1965). The court amplified: "The concept is obviously one of full fiduciary responsibility, not solely of traditional market-place morals." *Id.* Among the

supporting authorities for the Court of Claims' holding was a speech given by President George Washington to the Seneca Indians in December 1790, "a few months after the enactment of the Trade and Intercourse Act," in which the President stated of the Act: "'Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but *it will protect you in all your just rights*.'" *Id.* at 923 (quoting Washington Address to Senecas, Dec. 29, 1790, *reprinted in* 4 *American State Papers* 142 (1832)).

In the decision below, the CFC held the fiduciary duty imposed by the NIA was not sufficiently *specific*. *Order* at 380. The government's *specific* obligations, however, need not be expressed in the statute itself. *United States v. White Mountain Apache Tribe*, 537 U.S. at 475. "[T]he applicable statutes and regulations need not spell out every duty of the government as trustee." F. Cohen, *Handbook of Federal Indian Law* § 5.05[2], p. 427 (2012 ed.). Where the federal statute creates a fiduciary relationship, a "fair inference" of the government's duties and the corresponding scope of its liability can be drawn from applicable common law principles. *United States v. White Mountain Apache Tribe* at 477; *United States v. Jicarilla Apache Nation*, 131 S.Ct. at 2325.

The CFC relied on *Passamaquoddy*, which emphatically recognized the fiduciary relationship the NIA created, but did not on appeal "attempt to spell out what duties are imposed." *Passamaquoddy*, 528 F.2d at 379. This cannot mean, however, that the Act does not in fact establish specific fiduciary duties. In *Passamaquoddy*, the "dispute [arose] merely from the [Interior Secretary's] flat denial of any trust relationship; no question of spelling out specific duties [was] presented," because it was the agency's prerogative "initially at least to give specific content to the declared fiduciary role." *Id*. The government's specific duty depends on the context: it must "take such action as may be warranted in the circumstances." *Id.*

And, in fact, courts *have* found specific duties. In *Passamaquoddy*, the First Circuit affirmed the district court decision, which had included an order directing the Interior Department to litigate a land claim on behalf of the Passamaquoddy Tribe as part of its NIA obligation. 528 F.2d at 380; 388 F.Supp. at 653-54 & nn.5 & 6. Additionally, as the CFC recognized, several decisions by the Court of Claims are based on the United States' "duty not to allow receipt of unconscionably low consideration for Indian lands." *Order* at 380. *See, e.g.*, *Fort Sill Apache Tribe v. United States*, 477 F.2d 1360, 1366 (Ct. Cl. 1973); *United States v. Oneida Nation*, 477 F.2d 939, 942-45 (Ct. Cl. 1973); *Seneca Nation of Indians v. United States*, 173 Ct.Cl. 917, 925-26 (1965). In *United States v.*

Oneida Nation, for instance, the Court of Claims held that the federal government owed the tribal claimant a fiduciary duty to "protect the rights of the Indians" from illegal property treaties with the State of New York, regardless of whether the United States participated in the treaties. 477 F.2d at 944. The NIA's fiduciary obligation imposes upon the government the duty to undertake every act necessary under the circumstances to protect the rights of Indians from property alienation not permitted by the NIA, and to refrain from undertaking any act inconsistent with this duty of protection. This duty is consistent with the common law of trusts, in which the trustee bears a "duty of protecting the trust estate" from loss or damage, the specific manner of administration depends on the circumstances, and the "trustee may commit a breach of trust by improperly failing to act." Restatement (Third) of Trusts § 76 cmts. b & d (2007). *See also* Uniform Trust Code § 809 (2000).

The CFC distinguished the Court of Claims decisions cited above on the grounds that they "deal with liability under the Nonintercourse Act in conjunction with the Indian Claims Commission Act [Pub. L. No. 79-726, ch. 959 § 2, 60 Stat. 1049, 1050 (1946), hereafter "ICCA")], which is not applicable here." *Order* at 380. But the government's duties under the NIA are not altered by the presence of the new and additional rights of action accorded Indian tribes by the ICCA. The

inapplicability of the ICCA to the present case does not affect the independent duty owed to the Nation under the NIA.

B. A Violation of Duties Under the Non-Intercourse Act Is "Money-Mandating."

A breach of the fiduciary obligations created by the NIA is compensable by an award of damages, as a number of decisions have recognized. In *Seneca Nation of Indians v. United States*, the Court of Claims held that the United States was liable for such breaches under the ICCA. The court found liability not only under clause 5 of ICCA § 2, which granted the Claims Commission jurisdiction over "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," but also, independently, under clause 3 of section 2. *Seneca Nation of Indians v. United States*, 173 Ct.Cl. at 925-26 ("On either theory the United States would be liable, as a fiduciary with special responsibility, for the failure of the vendee to make a conscionable and just exchange."). *See also United States v. Oneida Nation*, 477 F.2d at 942-45 (potential liability for breach of fiduciary duty under NIA under clauses 3 and 5 of ICCA § 2); *accord Cayuga Nation of Indians v. United States*, 28 Ind.Cl.Comm. 237, 239 (1972), and 36 Ind.Cl.Comm. 75 (1975); *Stockbridge Munsee Community v. United States*, 41 Ind.Cl.Comm. 192 (1978); *Alabama-Coushatta Tribe of Texas v. United States*, 28 Fed.Cl. 95 (1983), *aff'd in part, rev'd in part* 2000 WL 1013532, *50 (Fed. Cl. Jun. 19, 2000).

Clause 3 provides for "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity." ICCA § 2(3). Under clause 3, liability was thus founded on the notion that the sale of the Tribe's land, treated as if it were an agreement between the Tribe and United States (because the federal government's participation was a "necessary prerequisite" to any sale, *Seneca Nation of Indians v. United States*, 173 Ct.Cl. at 926), was a violation of the United States' fiduciary duty under the NIA, and under existing law the "claim which would result if" the agreement were revised in equity to comport with the United States' duties was a claim for money – the money owed to the Tribe under the equitably revised agreement. *Id.* In awarding money damages pursuant to clause 3 of the ICCA's jurisdictional grant, courts recognized that under the law *independent of the ICCA*, a violation of the United States' NIA duties would result in a claim for money. *See also Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 236-40 (1985) (NIA incorporates common-law remedies for violation of the Act). The NIA is therefore "a source of substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003).

C. Fiduciary Duties Under the Non-Intercourse Act Are Applicable to the Federal Judicial Branch as Part of the United States Government with Responsibilities Under the Act.

There is good reason to conclude that duties inhere in the judicial branch as part of the United States government, and that the federal courts may violate the government's obligations in certain circumstances. The Supreme Court has explained that "the unique trust relationship between the United States and the Indians" guides the manner in which the federal courts must deal with Indian litigants. *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. at 247. The judiciary's Indian law "canons of construction," requiring, *inter alia*, that treaties and statutes "should be construed liberally in favor of the Indians," are "rooted in" this fiduciary relationship. *Id.*; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).[1]

[1] The government's trust duty toward Indians is borne also by Congress, which exercises "plenary control … in legislating for the protection of the Indians under its care," *Heckman v. United States*, 224 U.S. 413, 445 (1912), and the executive branch – primarily the Bureau of Indian Affairs, which "is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States," *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968), but also other agencies such as the Department of Justice, with the particular obligations varying according to circumstances. *United States v. Jicarilla Apache Nation*, 131 S.Ct. at 2329-30; *Nevada v. United States*, 463 U.S. 110, 135 n.15, 141-43 (1983). The "trust responsibility extends not just to the Interior Department, but to the federal government as a whole." *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (Commerce Department has duty to Indians); *see HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000) (EPA and "all federal agencies" have duty to Indians).

The reason the fiduciary obligation created by the NIA applies to the judiciary is this: The fiduciary obligation applies to the United States government; the federal judiciary is part of the United States government, not separate and apart from it; and it stands to reason that the obligation of the United States government extends to whatever branch is in the position to effectuate the obligation. Put another way, the United States' obligation to protect Indian tribes' lands may not be ignored or violated simply because it is the judicial branch that is ignoring or violating the obligation undertaken by Congress rather than, for instance, the executive branch. In fact, as *Passamaquoddy* indicated, and *Cayuga* and *Oneida* reflect, the executive branch often must seek the assistance of the judicial branch to comply with the executive's obligation. *See Passamaquoddy*, 528 F.2d at 380; 388 F.Supp. at 653-54. And put yet another way, there is nothing inherent in the fiduciary obligation Congress imposed on the United States government that limits the obligation to only one or two branches of the government but not the third.

The First Circuit in *Passamaquoddy* held that the federal government's fiduciary obligation under the NIA required it to "take such action as may be warranted in the circumstances." 528 F.2d at 379. Similarly, in a case where the government's fiduciary obligation was based on a treaty, the Court of Claims ruled that "[t]he measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The

real question is: Did the Federal Government do whatever it was required to do, in the circumstances." *Oneida Tribe of Indians of Wis. v. United States*, 165 Ct.Cl. 487, 494 (1964). Just as the government's general trust duties give rise to the courts' employment of the Indian law canons to guide statutory interpretation, the NIA's land-protection duty requires the courts to use the tools at their disposal – namely to adjudicate claims – in a manner consistent with that duty. When a federal court is presented with an NIA land claim, the government action that is "warranted in the circumstances" is for the court to enforce the statute in accordance with its terms – i.e., to adjudicate the claim on the merits – instead of simply holding the claim barred as a matter of law by the nature of the claim itself.

The CFC asserted that the Nation did not "describe how such a fiduciary obligation would function (beyond requiring the district court to reject equitable defenses to plaintiff's claims)." *Order* at 381. But the CFC failed to appreciate that the entire premise of the Nation's claims is that what the Second Circuit did (and what the district court implemented) was a subterfuge – exceeding the judicial function to not only create legislative policy, but to violate legitimate policy already legislated. The Second Circuit did not merely fail to "reject equitable defenses" to Indian tribes' (including the Nation's) NIA claims. The U.S. Supreme Court had previously ruled that no "applicable statute of limitations or other relevant legal basis" could support a holding that NIA claims were barred, *Oneida*

County, N.Y. v. Oneida Indian Nation, 470 U.S. at 253, and authoritatively argued in considered dicta responding to the dissent that "the application of laches would appear to be inconsistent with established federal policy," *id.* at 245, n.16. *See infra* at § V.B. Congress had previously determined that such claims were not barred by the passage of time. Indian Claims Limitation Act, 28 U.S.C. § 2415 Note. And while the Nation appreciates that to a certain extent what is and is not "equitable" is in the eye of the beholder, it is objectively true that the Second Circuit created a kind of defense it labeled equitable, but which was not based upon, and in fact violated, existing principles of the law of equity. *Oneida*, 617 F.3d at 127; *Cayuga*, 413 F.3d at 277. The NIA simply requires that the government, acting through its judicial branch, refrain from erecting new, inequitable barriers to Indian tribes' enforcement of the rights the Act guarantees to them.

The Nation's complaint states a claim that the United States has acted in violation of its duties to the Nation under NIA, for which the payment of monetary compensation is mandated. The CFC's dismissal of the Nation's first claim based on a contrary holding should be reversed.

IV. The Tucker Act Confers on the CFC Jurisdiction to Render Judgment upon Non-Tort Claims against the United States for Unliquidated Damages Based on Federal Common Law.

The Nation's second claim arises under federal common law. The Tucker Act grants the CFC jurisdiction over "four distinct classes of cases." *Dooley v. United States*, 182 U.S. 222, 224 (1901).[2] In the fourth class, jurisdiction exists for "any claim against the United States … for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). This provision confers jurisdiction over common law causes of action for money damages, so long as the claims are not tort claims. The CFC's contrary holding, on the basis of which it dismissed the Nation's second claim for lack of jurisdiction, should be reversed.

There are few precedents concerning this class of claims. The Court of Claims noted three decades ago that it was "the least developed and least known of our kinds of jurisdiction," *Menominee Tribe of Indians v. United States*, 607 F.2d 1335, 1342 (Ct. Cl. 1979), and that the statutory language had "never been fully and authoritatively construed." *Mitchell v. United States*, 664 F.2d 265, 270 n.7 (Ct. Cl. 1981) (en banc), *aff'd*, 463 U.S. 206 (1983). That remains true today. *See U.S. Marine, Inc. v. United States*, 722 F.3d 1360, 1366 n.2 (2013) (noting that the

[2] They are: (1) Cases founded upon the Constitution or an Act of Congress; (2) cases founded upon a regulation of an executive department; (3) cases founded upon a contract with the government; (4) actions for damages in cases not sounding in tort. *Dooley v. United States*, 182 U.S. at 224; 28 U.S.C. § 1491(a)(1). In *Dooley* the Supreme Court held the "words 'not sounding in tort' are in terms referable only to the fourth class of cases." 182 U.S. at 224, 228.

"grammatical reach of the 'cases not sounding in tort' phrase is not immediately apparent," and declining to construe the phrase definitively).[3]

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The Tucker Act expressly vests the CFC with jurisdiction over "any claim against the United States" for "unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The correct interpretation must be that this fourth class of claims *must* include at least *some* claims based on the common law, otherwise it would have made no sense for Congress to have expressly *excluded* tort claims – which are and always have been based on the common law[4] – from the reach of the fourth class.

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[3] In an unpublished opinion, this Court may have recognized that the CFC's jurisdiction includes non-tort common law claims. In *Whitehead v. United States*, 155 F.3d 574 (Fed. Cir. 1998) (unpublished), the plaintiff asserted claims against the United States for negligence, reckless or intentional misrepresentation, privacy violations, intentional infliction of emotional distress, breach of contract, copyright infringement, and misappropriation. *Id.* at *1. The Court affirmed the dismissal of those claims that sounded in tort, but as to the non-tort claims, including misappropriation, the Court held, "these claims are within the jurisdiction of the Court of Federal Claims." *Id.* at *2. The misappropriation claim in *Whitehead* appears to have been a common law claim, though the decision does not expressly say so.

[4] "'We may … define a tort as a civil wrong for which the remedy is a common-law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.'" *Black's Law Dictionary*, tort (9th ed. 2009) (quoting R.F.V. Heuston, *Salmond on the Law of Torts* 13 (17th ed. 1977)).

The exclusion of tort claims is literally the exception that proves the rule. Furthermore, the fourth class must include common law claims because the Act has already enumerated the other types of claims – Constitutional and statutory, regulation-based, and contractual. The "cases" over which the CFC has jurisdiction in the fourth class must be different from the types of cases already named; if the fourth class did not include common law claims, it would be a meaningless redundancy. Therefore it is no answer, and is wholly inaccurate, for the CFC to assert that "the language of the Tucker Act does not mention federal common law claims." *Order* at 382.

It is therefore also incorrect to state, as the CFC did below, that to recognize that the Tucker Act grants jurisdiction over common law claims would "imply a waiver of sovereign immunity" or "enlarg[e] the waiver contained in the Tucker Act beyond what the language requires." *Order* at 382 (internal citations quotations omitted). On the contrary, the Nation asks the Court to construe the Act's language according to its plain meaning, and insists that it must not be construed as a nullity, adding nothing to the Act's three other classes of claims. Rather than attempting to actually construe the statutory language and determine whether the Nation's claim was of the type comprehended in the fourth class of claims, the CFC simply read the fourth class of claims out of the Tucker Act altogether.

The CFC quoted *Ramirez v. United States*, 36 Fed.Cl. 467, 472 (1996), for the proposition that "'Common law causes of action … are not included in [the Tucker Act's] jurisdictional grant.'" *Order* at 382 (alteration in original). This broad statement is not supported by the reasoning of the *Ramirez* opinion. In *Ramirez*, a plaintiff sought to enforce a foreign judgment against the United States pursuant to the common law doctrine of comity. *Ramirez* at 472. The CFC noted that in a suit under the Tucker Act, a plaintiff must identify some source, other than the Tucker Act, that gives the plaintiff a substantive right to money damages from the United States. *Id.* The court then stated: "[C]omity is a common law doctrine. It does not possess the legislative mandate of a constitutional provision, a statute or even a regulation. Common law doctrines giving rise to relief do not include suits against the sovereign. The Tucker Act's consent to suit does not extend to common law causes of action." *Id.* This was circular reasoning. The *Ramirez* court's conclusion that the Tucker Act did not provide jurisdiction rested on the notion that common law claims for money "do not include suits against the sovereign" – but it is the Tucker Act itself that provides the necessary waiver of sovereign immunity, if common law claims are construed to come within the Act's phrase, "cases not sounding in tort." *United States v. Mitchell*, 463 U.S. 206, 216, 218 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit…. The Tucker Act itself provides the

necessary consent."). The *Ramirez* court made no attempt to explain why a common law "claim … for … damages in cases not sounding in tort" falls outside the scope of the Act. *Ramirez* is unpersuasive as precedent.

Furthermore, *Ramirez* dealt specifically with comity, a common law "doctrine relating to the discretionary degree of recognition that one nation or jurisdiction accords to the judicial or legislative acts of another nation or jurisdiction." *Ramirez*, 36 Fed.Cl. at 470. Comity has never been understood as providing a right of recovery of any sort, but only informing how courts deal with certain claims with cross-jurisdictional aspects. To the extent the *Ramirez* court's holding was founded on the basis that enforcement of a judgment is not a claim for damages, or that comity does not itself provide for monetary recovery, it may well have been correct. *See id.* at 472 (discussing "money-mandating" requirement). *See also United States v. Navajo Nation*, 537 U.S. at 502 (substantive law must "mandat[e] compensation"). But the common law on which the Nation bases its claim *does* mandate compensation by the sovereign.

The Nation alleged in its complaint, and argued before the CFC, that federal common law incorporates the current binding customary international law right of indigenous peoples "to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation" for the taking without their consent of the lands they have traditionally owned or occupied. Complaint at ¶¶ 4,

26-32, 63-67 & esp. ¶ 30; Pl. Opp. Brief at 30-37 & esp. 35 (quoting United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") art. 28.1). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). "Customary international law is considered to be like common law in the United States, but it is federal law." Restatement (Third) Foreign Relations Law § 111 cmt c. *See generally* Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43 (2004). The "right to compensation" under customary international law, as articulated by the UNDRIP, "shall take the form of lands, territories and resources … or of monetary compensation…." Complaint at ¶ 30; Pl. Opp. Brief at 35 (quoting UNDRIP, art. 28.2). By their nature, some of the United States' international obligations apply to the judiciary, and actions by courts can constitute breaches of the United States' international obligations. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491 (2008).

The Nation alleged and argued that this federal common law right to redress applies to the federal courts in cases such as the Nation's NIA land claim, and that the right was money-mandating for the breach. Although a "question of law," determining the content of customary international law can require factual inquiry, "including expert testimony," Restatement (Third) Foreign Relations Law § 113

cmts. b & c, and in its brief to the CFC the Nation made an offer of proof as to the relevant customary international law, including through expert testimony. Pl. Opp. Brief at 34-35. The CFC expressed no view on whether the current state of customary international law is as the Nation alleged, or of whether such provisions of customary international law have been incorporated into federal common law, having held that no common law claims of any kind were within its jurisdiction. *Order* at 382. The question is therefore not before this Court, and the determination of this issue is appropriately left for the CFC on remand. It is sufficient to note the Nation has made these allegations, stating a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Because the Nation's second claim is within the CFC's jurisdiction as expressed in the Tucker Act, and because it "invoke[s] a rights-creating source of substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained," *United States v. Navajo Nation*, 537 U.S. at 503 (internal quotation omitted), the Nation requests that the Court reverse the CFC's dismissal of the Nation's second claim.

V. The Nation Should Be Allowed to Amend Its Complaint to Add a Judicial Taking Claim.

In its brief opposing the United States' motion to dismiss, the Nation asked the CFC, if it granted the motion, to grant the Nation leave to amend its complaint. The Nation intended to add a claim for "judicial taking." The CFC denied leave to

amend on the ground that amendment would be futile because in the court's view, such a claim is not one on which relief could be granted. *Order* at 382-87. The CFC's analysis of the issue was incorrect for several reasons, and the Nation asks this Court to conclude that the Nation should be allowed to state a judicial taking claim in an amended complaint.

The Federal Circuit employs a "two-part test" to determine whether a taking has occurred: "First … the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment…. Second … the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed.Cir. 2004). Both parts of this test are satisfied here.

A. The Nation's Land Claim Is a Valid Property Interest for Fifth Amendment Purposes.

The Federal Circuit has unambiguously held that "a legal cause of action is property within the meaning of the Fifth Amendment." *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). *See Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004). *See also Abrahim-Youri v. United States*, 139 F.3d 1462, 1465 (Fed. Cir. 1997) (holding that plaintiffs' "choses in action" were "property rights" that could be the subject of a Fifth Amendment takings claim); *Catawba Indian Tribe v. United States*, 982

F.2d at 1568 n.6 (assuming Tribe's claim for historic lands was a "property interest in the nature of a chose in action, and could be subject to 'taking' by the Government under the Fifth Amendment"). In *Alliance of Descendants*, Mexican citizens had claims to certain Texas lands the United States had seized from them before Texas separated from Mexico, until a treaty between the United States and Mexico "extinguished claimants' legal rights against the United States." *Alliance of Descendants*, 37 F.3d at 1481, 1483. Making a Fifth Amendment takings claim, the "claimants allege[d] the United States 'took' their property interest in a legal cause of action. The claimants do not in this suit allege a taking of the land in Texas itself. Rather they allege that the United States took away their legal right to sue for compensation for that land." *Id.* at 1481 (emphasis added). The Nation's claim in this case – and its property interest – is essentially identical: by flatly barring all land claims like that of the Nation, the United States took away the Nation's legal right to sue for compensation for its stolen land. Just as this Court held in *Alliance of Descendants*, the Nation has "properly alleged possession of a compensable property interest." *Id.*

In *Adams v. United States*, the Court explained the basis for its holding in *Alliance of Descendants*. *Adams* affirmed that "a cause of action may fall within the definition of property recognized under the Takings Clause," but only when "the cause of action protects a legally-recognized property interest." 391 F.3d at

1225-26. It is therefore "the underlying subject matter" of the cause of action that determines whether the cause of action qualifies as a compensable property interest. *Id.* at 1226. The *Adams* Court explained that the *Alliance of Descendants* cause of action was a property interest for purposes of the Takings Clause because "the cause of action there was to recover compensation for an interest in land, a property interest cognizable under established takings jurisprudence because land is, beyond question, property under state and common law." *Id.* Again, this squarely describes the Nation's land claim. Moreover, it distinguishes the cases on which the CFC relied.

The CFC fundamentally misunderstood the Nation's property interest and the manner in which the United States took it. The CFC focused on the Nation's ultimate recovery on its land claim – a judgment awarding the Nation compensation for its land having been taken. The lower court would require the Nation to first "secure[] a final unreviewable judgment *in its favor* on its Nonintercourse Act claim" before the Nation's property right can acquire constitutional protection. *Order* at 384-85 (emphasis added). The whole point, however, is that the Nation *can never secure a judgment in its favor*. And the reason the Nation can never prevail is that the United States took its "cause of action … to recover compensation for an interest in land." *Adams* at 1226. Under

the CFC's logic, the taking itself shields the United States from having to compensate the Nation for the taking. This analysis cannot be sustained.

The CFC cited a number of decisions for the principle that a cause of action must be "vested" before the Constitution protects it from uncompensated taking, and that vesting occurs when there is a final, unreviewable judgment. *See Order* at 384-85. They are not on point and not persuasive. For instance, in *Bowers v. Whitman*, 671 F.3d 905 (9th Cir. 2012), the Ninth Circuit explained that a cause of action is generally not vested, and thus cannot be the subject of a Fifth Amendment taking claim, until final judgment, because until then "it is inchoate and does not provide a certain expectation in that property interest." *Id.* at 914. *Bowers* held there was no compensable property interest based on state-issued "waivers" from land-use restrictions, where the waivers contained no promise that the recipients were entitled to any particular benefit at all. *Id.* at 915. Those who lost the right to claim any benefits under their waivers when the law changed had nothing to lose but whatever the state had "voluntarily and benevolently" provided, and for this no compensation was required. *Id.*[5] The *Bowers* court, however, also reiterated the

[5] Similarly, the Court in *Rogers v. Tristar Products, Inc.*, Nos. 2011-1494 and 2011-1495; 2012 WL 1660604, (Fed. Cir. May 2, 2012) held there was no compensable property interest in maintaining a qui tam "false marking" action, alleged to have been "taken" when Congress eliminated the qui tam provision on which the action was predicated. *Id.* at *2. There the plaintiff's claim was not for compensation for injury to any cognizable property interest owned by the plaintiff, but rather was based only on an "assignment" of the government's interest,

Ninth Circuit's previous holding "that 'there is no question that claims for compensation are property interests that cannot be taken for public use without compensation.'" *Id.* at 915 (quoting *In re Aircrash in Bali, Indon.*, 684 F.2d 1301, 1312 (9th Cir. 1982)). The distinction between *Bowers* and *In re Aircrash* was ultimately "based on certainty of expectations." *Id.* (internal citations and quotations omitted).

In re Aircrash examined whether a treaty-based limitation on recovery available to plaintiffs in a wrongful death action effected a Fifth Amendment taking. 684 F.2d at 1310-12. The court had no trouble concluding the plaintiffs' "right under California law [and federal common law] to recover damages caused by the wrongful death of their decedents" was a property interest, compensable under the Fifth Amendment. *Id.* at 1312 & n.9. The Ninth Circuit's reasoning was similar to that of this Court in *Adams* and *Alliance of Descendants*: the critical

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"revocable" at any time prior to judgment and "wholly within the control of Congress." *Id.* at *3. The statement the CFC quoted from *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), which did not involve a taking claim, is purely dicta. In *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997), the court simply held the government contract from which plaintiff claimed its property interest arose did not by its terms make the promise the plaintiff asserted. *Id*. at 1579-80 & n.8. *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), evaluated the asserted property interest in the context of a due process claim, expressly declining to decide whether a taking claim could be made. *Id*. at 11, 15. The Federal Circuit has explained that references to property interests within the meaning of the Due Process Clause "have no relevance to whether they are 'property' under the Takings Clause." *Adams*, 391 F.3d at 2020 n.4.

factor was the underlying subject matter of the cause of action that was lost or limited. The plaintiffs in *In re Aircrash* lost a portion of "an independently existing right under state law…. This is precisely the type of property to which the Fifth Amendment is addressed." *Id.* at 1312 n.10.

In the terms used by *Bowers* and by the CFC in the decision below, a claim to be compensated for wrongful death (as in *In re Aircrash*) or for the loss of real property (as in *Alliance of Descendants* and the Nation's land claim) carries the necessary "certainty of expectation," and therefore has "vested," because the underlying subject matter of the claim for compensation (i.e., the land or the decedent's life) is itself a cognizable property interest. The fiduciary guarantee of the NIA, which voids any transfer of Indian land without the federal government's consent, as well as the undisputed historical facts on which the Nation's land claim is based, establish that the Nation owned a cognizable property interest in the land itself, and after the loss of the land owned an equivalent interest in its claim for compensation from those who stole it. When the United States took away that claim for compensation, the Fifth Amendment required the United States to pay for it.

B. The Actions of the Federal Courts Constitute a Compensable Taking of the Nation's Property Interest.

The Second Circuit and the district court that followed it took away the Nation's claim for compensation for the loss of its land. What the Second Circuit

did to accomplish this was to *invent* an "equitable" defense, itself completely at odds with the law of equity, to bar not just a remedy, but an entire class of claims based on the nature of the (congressionally created and preserved) claims themselves. The new "equitable" defense visits inequity upon innocent parties in favor of the guilty parties and their successors – it operates even in favor of parties responsible for the illegal actions that are the subject of the claims; it penalizes delay by parties with no responsibility for the delay in favor of parties actually responsible for the delay. In short, it rewards illegal activity by immunizing that illegal activity due to the success in having unlawfully avoided responsibility for such illegal activity for a long period of time.

Palpably, the Second Circuit did this in order to require the Nation and the other Indian tribes to which its newly-invented rule applied, to "'alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game and Fish Com'n v. United States*, --- U.S. ----, 133 S.Ct. 511, 518 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). For this burden the Constitution requires the government to compensate the Nation. *Id.*, *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

In direct opposition to the CFC's decision below, the Federal Circuit recognizes claims for judicial takings. *Smith v. United States*, 709 F.3d 1114, 1116-17 (Fed. Cir. 2013), *cert. denied*, 134 S.Ct. 259 (2013). In *Smith*, this Court

described the Supreme Court's split decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010), where the Supreme Court denied a claim that the Florida Supreme Court had effected a taking of beachfront property, stating, "In that case the Court recognized that a takings claim can be based on the action of a court." *Smith v. United States*, 709 F.3d at 1116. The Court in *Smith* went on to hold that "it was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property…. [T]he theory of judicial takings existed prior to 2010. The Court in *Stop the Beach* did not create this law, but applied it." *Id.* at 1116-17; *compare Order* at 385 (the "theory of judicial takings … has not been adopted in the federal courts"). It is decided law in the Federal Circuit that a judicial takings claim can be a valid cause of action. Therefore, contrary to the CFC's opinion, a complaint alleging a Fifth Amendment taking does not fail to state a claim solely because the alleged taking was a judicial action.

Furthermore, there is no reason for this Court to depart from its recognition of a judicial taking cause of action. The plurality opinion in *Stop the Beach* made a compelling case that "the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Stop the Beach*, 560 U.S. at 715 (opinion of Scalia, J.). Justice Kennedy's concurring opinion expressed reservations, mainly to the effect that a due process

analysis might be preferable to a takings analysis, but he would only hold that the case did not require the Court to decide whether a judicial decision can constitute a taking. *Id.* at 733-34 (Kennedy, J., concurring in part and concurring in the judgment).[6] Justice Breyer's concurring opinion did "not claim that [the plurality's] conclusions are unsound," and like Justice Kennedy's, merely took a "cautious approach," primarily out of a reticence for federal courts to unduly interfere in shaping state property law. *Id.* at 743-44 (Breyer, J., concurring in part and concurring in the judgment).[7] Certainly there is no binding authority requiring this Court to overturn its holding in *Smith v. United States*, and the well-reasoned opinion of the *Stop the Beach* plurality remains highly persuasive.

The second question under the Federal Circuit's two-part analysis is whether the Nation has identified a government action that amounts to a taking. *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d at 1372. The test for judicial takings is not yet finely honed. The plurality in *Stop the Beach* described a broadly-worded test: "whether the state court has declared that what was once an established right of private property no longer exists." *Stop the Beach*, 560 U.S. at

[6] Due process violations are not within the CFC's jurisdiction because the Due Process Clauses are not "money-mandating" sources of law. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995). In this case the Nation does not have the option to have its taking claim construed as a due process claim.

[7] Justice Breyer's concerns are not present in this case, where a federal court, not a state court, is alleged to have taken the Nation's property, and the property interest in question is defined by federal law, not state law.

717 (internal quotations and alteration omitted); *see also id.* at 715. As the plurality recognized, Justice Breyer's concurrence "necessarily implies agreement" with that test. *Id.* at 717.

The *Stop the Beach* plurality discussed the "unpredictability test" proposed in Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967). *Stop the Beach* at 728. In *Hughes* Justice Stewart suggested that a judicial taking occurs when a court decision "constitutes a sudden change in … law, unpredictable in terms of the relevant precedents," in such a manner that the court is "asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. at 296-97. The *Stop the Beach* plurality stated the test should not focus on "whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established." *Stop the Beach* at 728. "[A] judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is." *Id.* And "a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking." *Id.* Under the *Stop the Beach* test or the *Hughes* test, the Nation can state a claim for a judicial taking.

The Second Circuit effected a drastic and unpredictable change in the treatment of historic Indian land claims, and thereby eliminated an established

private-property right, when it created the new breed of "equitable" defense in *Cayuga*, 413 F.3d 266. The district court eliminated the Nation's established private-property right when it applied the Second Circuit's Orwellian brand of "equity" to the Nation's land claim. *Shinnecock Indian Nation v. New York*, No. 05-cv-02887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006).

The *Cayuga* court held the equitable doctrines applied in *City of Sherrill*, 544 U.S. 197, to deny an assertion of tax immunity, also extended to bar Indian land claims. *Cayuga* at 273-74. It is important to understand that *City of Sherrill* was not precedent with respect to applying any equitable defenses to NIA land claims. *City of Sherrill* only concerned the question of tribal sovereignty on land an Indian tribe owned in fee within the tribe's former reservation. It did not concern a tribal claim to regain possession of land or damages for wrongful dispossession. *City of Sherrill* at 221. The *Cayuga* court itself was clear about this, stating, "While the equitable remedy sought in *Sherrill* – a reinstatement of Tribal sovereignty – is not at issue here, this case involves comparably disruptive claims, and other, comparable remedies are in fact at issue." *Cayuga* at 274. The court took *City of Sherrill*'s holding on one subject, the disruptive unilateral piecemeal revival of tribal sovereignty, and expanded it to encompass a different category of claims: "the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable

defenses, including laches." *Id.* at 277. And the *Cayuga* court made plain that its ruling was a new statement of the law: "[W]hatever the state of the law in this area before *Sherrill*, … we conclude … that, after *Sherrill*, equitable defenses apply to possessory land claims of this type." *Id.* at 276.

In its 2010 *Oneida* decision, the Second Circuit acknowledged the "equitable" defense *Cayuga* applied to Indian land claims was not laches at all, and that the term was only used "as a convenient shorthand." *Oneida*, 617 F.3d at 127. The *Cayuga-Oneida* defense "does not focus on the elements of traditional laches." *Id.* The cause of the plaintiff's delay, the delay's unavoidability, the unclean hands of the defendants – all are irrelevant. Instead, its "dispositive question … is … whether a plaintiff's claim is inherently disruptive." *Id.* at 136. The claim need not even be possessory. *Id.* Even if the tribe's land claim seeks only money damages, the claim's "essential premise threatens to disrupt justified societal expectations." *Id.* at 138. Under the *Cayuga-Oneida* rule, the mere allegation of a violation of the NIA is inequitable.

The *Cayuga-Oneida* "new laches" bar on Indian land claims was contrary to the Supreme Court's considered dicta in one of its earlier decisions on the Oneida's claims. "[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 19 (1st Cir. 1991). The Supreme Court noted in 1985 "that application of the equitable defense of laches in an action at law would be novel indeed." *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. at 244 n.16. Laches "'cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.'" *Id.* (quoting *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922)). The Court reiterated also that "extinguishment of title requires a sovereign act" and that the "statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law." *Id*. The Supreme Court therefore concluded, "the application of laches would appear to be inconsistent with established federal policy." *Id.* The Second Circuit itself had held in 1982 that the Oneida's claim was not barred by any time-based or delay-based defense, whether under state or federal law. *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1084 (2d Cir. 1982). In order to brush both aside, the Second Circuit speciously asserted that *City of Sherrill*, which did not involve a land claim, had "thus addresse[d] the question reserved in *Oneida*," 470 U.S. 226 (1985), and had "effectively overruled" the circuit court's 1982 decision. *Cayuga*, 413 F.3d at 277 & n.6.

The Second Circuit's *Cayuga-Oneida* rule also contravened the considered judgment of Congress (which expressly tolled the running of the statute of

limitations in the Indian Claims Limitation Act against any covered Indian land claim. 28 U.S.C. § 2415 Note; *see Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. at 243 & n.15) notwithstanding that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute," *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001), and that "[l]aches within the term of the statute of limitations is no defense at law … [l]east of all is it a defense to an action by the sovereign," *United States v. Mack*, 295 U.S. 480, 489 (1935). And it contravened the judgment of the Department of the Interior, which identified the claims of the Oneidas, Cayugas, and the Shinnecock Indian Nation among the claims covered by the tolling provisions of the Claims Limitation Act. Statute of Limitations Claims List, 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983).

Prior to the Second Circuit's application of its new non-laches, non-equitable rule, Indian tribes such as the Nation owned the right under federal law – including the NIA and federal common law – to enforce a claim for the unlawful taking of their traditional lands. Now, in federal courts within the Second Circuit, such claims must be dismissed as inherently disruptive. *See Shinnecock Indian Nation v. New York*, 2006 WL 3501099. By writing the *Cayuga-Oneida* rule into law, the court eliminated the Nation's established property right.

The CFC's one-sentence analysis of the governmental action mischaracterized nature of the action. The court stated: "In this case, the district

court made no change in substantive property law and merely ruled that, under binding precedent established in other cases, equitable defenses were available and warranted dismissal of plaintiff's claim." *Order* at 386. As described above, it is not relevant under *Stop the Beach* that the district court decision followed precedent, when the precedent itself eliminated established property rights. *Stop the Beach* at 728 (opinion of Scalia, J.).

The Second Circuit eliminated, as a matter of law, the established right of Indian tribes to pursue a claim for compensation for lands taken in violation of the NIA, and the right to have that claim adjudicated. It did so on the basis that those who unlawfully took the lands have been shutting their victims out of court long enough for the character of the lands' use to change. The court rewarded wrongdoers for succeeding in their wrongdoing for a long period of time.

The acts of the district court and the Second Circuit constitute a taking of the Nation's established property interest. For this taking the Fifth Amendment requires the government to compensate the Nation.

CONCLUSION

The Nation respectfully requests the Court reverse the CFC's order and judgment and remand with direction to allow the Nation to state a claim for a judicial taking and to adjudicate each of the Nation's claims on the merits.

Respectfully submitted,

Dated: April 11, 2014 by: /s/ Steven J. Bloxham

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ADDENDUM

112 Fed.Cl. 369
United States Court of Federal Claims.

SHINNECOCK INDIAN NATION, Plaintiff,
v.
The UNITED STATES, Defendant.

No. 12–836 L | E–Filed: August 29, 2013

Synopsis

Background: Native-American tribe brought action against federal government, alleging that government, acting through federal court system, denied any and all judicial means of effective redress for unlawful taking of lands currently comprising New York town from tribe and its members. Government moved to dismiss tribe's claims as unripe and outside court's jurisdiction.

Holdings: The Court of Federal Claims, Hewitt, Chief Judge, held that:

[1] tribe's claims were not ripe, in light of its pending district court case against government;

[2] Nonintercourse Act was not substantive source of law establishing specific fiduciary duties that government owed to tribe;

[3] federal common-law was not substantive source of law that could fairly be interpreted as mandating compensation by government for damages sustained;

[4] tribe's interest in Nonintercourse Act claim was not protected by Takings Clause; and

[5] government took no action that amounted to taking of tribe's Nonintercourse Act cause of action.

Motion granted.

Attorneys and Law Firms

Steven J. Bloxham, Sacramento, CA, for plaintiff. John M. Peebles and Darcie L. Houck, Sacramento, CA, of counsel.

Maureen E. Rudolph, with whom was Ignacia S. Moreno, Assistant Attorney General, Natural Resources Section, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, for defendant.

Opinion

Court Lacks Jurisdiction over Claims by Federally Recognized Indian Tribe for Denial of Effective Redress in Federal Courts; Amendment of Pleadings; Judicial Takings Claim Fails to State a Claim upon Which Relief Can Be Granted

OPINION

HEWITT, Chief Judge

The Shinnecock Indian Nation (the Shinnecock Nation or plaintiff), is a federally recognized Indian tribe whose historical territory included the area that is now the town of Southampton, New York. Compl., Docket Number (Dkt. No.) 1, ¶¶ 9, 11.[1] In this action, plaintiff asserts that the United States (the government or defendant), acting through the federal court system, has "denied any and all judicial means of effective redress for the unlawful taking of lands from Plaintiff and its members." *Id.* ¶ 5. Plaintiff asserts two claims for relief: (1) based on the government's alleged trust obligations to the plaintiff, *id.* ¶¶ 57–62 (claim one), and (2) ***373** based on federal common law (specifically, on international law norms that plaintiff contends are incorporated into federal common law), *id.* ¶¶ 63–67 (claim two); *see also infra* Part III.A–B (discussing plaintiff's claims for relief).

1 The Complaint, Docket Number (Dkt. No.) 1, is organized into numbered paragraphs. Because the numbering of the paragraphs begins again in the "Prayer for Relief" section of the Complaint, the court cites this section of the Complaint by page number.

Defendant has moved to dismiss plaintiff's claims, contending that they are not ripe and are not otherwise within the court's jurisdiction. *See* United States' Mot. to Dismiss & Mem. in Supp. (defendant's Motion or Def.'s Mot.), Dkt. No. 7, at 1–2. Defendant also contends that plaintiff should not be granted leave to amend its Complaint as requested to add a third claim for relief—which would characterize the government's actions as a "judicial taking"—because such an amendment would be futile. *See infra* Part III.C.

Before the court are: defendant's Motion, filed February 19, 2013; Plaintiff's Memorandum in Opposition to United States' Motion to Dismiss (Pl.'s Resp.), Dkt. No. 10, filed April 22, 2013; and United States' Reply in Support of Motion to Dismiss (Def.'s Reply), Dkt. No. 13, filed May 16, 2013.

I. Background

A. The Nonintercourse Act

In 1790 Congress enacted the first Indian Trade and Intercourse Act (the Nonintercourse Act), which, among other things, "bars sales of tribal land without the acquiescence of the Federal Government." *City of Sherrill v. Oneida Indian Nation of N.Y. (City of Sherrill)*, 544 U.S. 197, 204, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005); *see also* Nonintercourse Act, ch. 33, § 4, 1 Stat. 137, 138 (codified in relevant part, as amended, at 25 U.S.C. § 177 (2006)). The Nonintercourse Act "remain[s] substantially in force today." *City of Sherrill*, 544 U.S. at 204, 125 S.Ct. 1478. In its current form, it provides, in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.

25 U.S.C. § 177.

B. The Conveyance of Plaintiff's Land and Plaintiff's Early Attempts to Challenge the Conveyance

On or about March 16, 1859 the state of New York enacted legislation that permitted a group of trustees to convey land belonging to the Shinnecock Nation to others. Compl. ¶ 33. On or about April 21, 1859 the trustees conveyed title to "a substantial portion" of plaintiff's land—approximately 4,422 of 5,258 acres—to the town of Southampton. *Id.* ¶¶ 13, 16–17, 34. Although the trustees purported to act on its behalf, the Shinnecock Nation itself did not authorize or ratify the conveyance and was not a party to the agreement. *Id.* ¶¶ 33–34.

On or about July 25, 1859 members of the Shinnecock Nation filed suit to challenge the conveyance in state court. *Id.* ¶ 35. Other members of the Shinnecock Nation may have filed additional suits. *Id.* However, each of these actions was dismissed on the ground that such an action could not be brought by a tribe or its members. [2] *See id.*

[2] Because copies of the relevant decisions have not been provided to the court, this description is drawn from the allegations made by the Shinnecock Indian Nation (the Shinnecock Nation or plaintiff) in the Complaint. Specifically, plaintiff alleges that the suits were dismissed on the following four grounds: (1) the Shinnecock Nation and its members were not natural persons; (2) the Shinnecock Nation and its members were not citizens; (3) the Shinnecock Nation could not bring such an action in its own name; and/or (4) the Shinnecock Nation's members could not bring such an action asserting the Shinnecock Nation's rights. Compl. ¶ 35.

C. Plaintiff's Current Attempt to Challenge the Conveyance: The District Court Litigation

According to plaintiff's allegations, plaintiff remained barred from challenging the conveyance of its land until relatively recently. Specifically, plaintiff states that from the ***374** time of the conveyance of its land until approximately "December 23, 1987, Indian tribes in New York State were unable to prosecute lawsuits in their tribal names in the courts of the State ... without the express consent of the New York State legislature." *Id.* ¶ 36. Additionally, plaintiff claims, until approximately "January 21, 1974, the courts of the United States were closed to the [Shinnecock] Nation and its individual tribal members for claims of violations of the Indian Non–Intercourse Act." *Id.* ¶ 39.

The court understands plaintiff's mention of the date January 21, 1974 to be a reference to the decision of the United States Supreme Court (Supreme Court) in *Oneida Indian Nation of N.Y. v. Cnty. of Oneida (Oneida I)*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), which was filed on that day. In *Oneida I*, the Oneida Indian Nation of New York and the Oneida Nation of Wisconsin (each or collectively, the Oneidas), relying on the Nonintercourse Act, sought to invalidate the sale of certain land by the Oneidas in 1795 to the state of

New York. *Oneida I,* 414 U.S. at 663–65, 94 S.Ct. 772. The Oneidas sought damages equal to "the fair rental value of the land for the period January 1, 1968, through December 31, 1969." *Id.* at 665, 94 S.Ct. 772. Construing the case as "essentially a possessory action," *id.* at 666, 94 S.Ct. 772, the Supreme Court found that the Oneidas' claims arose under federal law and could be brought in federal courts, *see id.* at 678, 682, 94 S.Ct. 772. Following a trial on remand, the plaintiffs were awarded damages equal to the fair rental value of the land during the two-year period they had specified. *Cnty. of Oneida v. Oneida Indian Nation of N.Y. (Oneida II),* 470 U.S. 226, 230, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). The Supreme Court upheld the damages award, stating:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.

Id. at 253, 105 S.Ct. 1245. However, the court "express[ed] no opinion" as to "whether equitable considerations should limit the relief available" to the Oneidas. *Id.* at 253 n. 27, 105 S.Ct. 1245.

On or about June 15, 2005 plaintiff filed suit in the United States District Court for the Eastern District of New York (the district court) against the state of New York, among others, "seeking to vindicate the [Shinnecock] Nation's rights" to the 4,422 acres of land conveyed to the town of Southampton (the district court litigation). *See* Compl. ¶¶ 16–17, 46. Specifically, plaintiff sought damages "for the period from 1859 to present, a declaration that the [Shinnecock] Nation has possessory rights to the [conveyed lands], immediate ejectment of all defendants from the lands, and other declaratory and injunctive relief as necessary to restore the [Shinnecock] Nation to possession of the lands." *Shinnecock Indian Nation v. New York (Dist.Ct.Op.),* No. 05–CV–2887 (TCP), slip op. at 2, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006), Dkt. No. 33. Like the Oneidas, plaintiff based its claims on the Nonintercourse Act. *See id.*

D. The *City of Sherrill* and *Cayuga* Decisions

While the district court litigation was pending, two decisions unfavorable to plaintiff's claims and binding on the district court were issued in other cases. Both decisions addressed the availability of equitable defenses to Nonintercourse Act claims. The first decision, *City of Sherrill,* concerned several parcels of land that had been part of the Oneida reservation until 1805 and that were subsequently repurchased by the Oneidas in 1997 and 1998. *City of Sherrill,* 544 U.S. at 202, 125 S.Ct. 1478. The Oneidas sought to avoid paying taxes to the city of Sherrill, New York on the purchased property "on the ground that [the Oneidas'] acquisition of fee title ... revived the Oneidas' ancient sovereignty piecemeal over each parcel." *Id.* A corollary of the Oneidas' argument was that "regulatory authority over [the Oneidas'] newly purchased properties no longer reside[d] in Sherrill." *Id.*

***375** In the *Oneida II* case, the Supreme Court had reserved the question of "whether equitable considerations should limit the relief available" for Nonintercourse Act claims. *See Oneida II,* 470 U.S. at 253 n.27, 105 S.Ct. 1245. The Court addressed this question in *City of Sherrill,* holding "that standards of federal Indian law and federal equity practice preclude the [Oneidas] from rekindling embers of sovereignty that long ago grew cold." *City of Sherrill,* 544 U.S. at 214, 125 S.Ct. 1478 (internal quotation marks omitted). The Court noted that the land at issue had increased substantially in value, *id.* at 215, 125 S.Ct. 1478, and had been under the sovereign control of the state, its counties and municipalities for nearly two centuries, *id.* at 216, 125 S.Ct. 1478, during which time it had become "overwhelmingly populated by non-Indians," *id.* at 219, 125 S.Ct. 1478. Although the Court left its ruling in *Oneida II*—which concerned damages for the Oneidas' dispossession—intact, it concluded that "the Oneidas' long delay in seeking equitable relief ... and developments in the City of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221, 125 S.Ct. 1478.

The plaintiffs in the second decision sought relief pursuant to the Nonintercourse Act including ejection of all defendants and damages for trespass. *See Cayuga Indian Nation of N.Y. v. Pataki (Cayuga),* 413 F.3d 266, 269–70 (2d Cir.2005). Relying on *City of Sherrill,* the United States Court of Appeals for the Second Circuit (Second Circuit) "conclude[d] that the possessory land claim alleged [in *Cayuga*] is the type of claim to which a laches defense can be applied." *Id.* at 268. Applying the district court's findings of fact to determine that

the doctrine of laches barred the plaintiffs' claims, the Second Circuit ruled for the defendants. *Id.*

E. Dismissal of the District Court Litigation and Commencement of this Action

In plaintiff's district court litigation, the district court found that "pragmatic concerns" of the type discussed in the *City of Sherrill* and *Cayuga* decisions "permeate here and warrant dismissal based on equitable considerations, including laches." *Dist. Ct.* Op. 2 (internal quotation marks omitted). The district court noted that the Shinnecock Nation had not occupied the relevant land since 1859, that more than 140 years had passed since its alleged dispossession and that only .2% of county residents were of Native American descent. *Id.* at 10. It also noted that the Shinnecock Nation sought relief similar to the relief sought in *Cayuga. Id.* "To be sure," the district court stated, "the wrongs about which the Shinnecocks complain are grave, but they are also not of recent vintage, and the disruptive nature of the claims that seek to redress these wrongs tips the equity scale in favor of dismissal." *Id.* at 12. Plaintiff filed a motion for reconsideration and an appeal of the district court's dismissal of its claims, both of which remain pending. *See* Notice of Mot. for Recons., *Shinnecock Indian Nation v. New York,* No. 05–CV–2887 (TCP) (E.D.N.Y. Dec. 19, 2006), Dkt. No. 36 (requesting reconsideration); Notice of Appeal, *Shinnecock Indian Nation v. New York,* No. 05–CV–2887 (TCP) (E.D.N.Y. Dec. 29, 2006), Dkt. No. 37; Order of June 6, 2013 at 3, *Shinnecock Indian Nation v. New York,* No. 05–CV–2887 (TCP) (E.D.N.Y. June 6, 2013), Dkt. No. 87 (extending the stay of litigation in plaintiff's district court litigation through September 1, 2013).

Plaintiff filed this action in the United States Court of Federal Claims (Court of Federal Claims) on December 5, 2012, *see generally* Compl., seeking $1,105,000,000 in money damages, *id.* at 19. Plaintiff also seeks costs, attorney's fees, interest and "[s]uch other and further relief as this honorable Court deems just and proper." *Id.*

II. Legal Standards

A. Jurisdiction

1. Ripeness

[1] [2] [3] [4] [5] [6] "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " ***376** *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580–81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)). The " 'basic rationale [of the ripeness doctrine] is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.' " *Thomas,* 473 U.S. at 580, 105 S.Ct. 3325 (internal quotation marks omitted). Determining whether claims are ripe for adjudication requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). "As to the first prong, an action is fit for judicial review where further factual development would not 'significantly advance [a court's] ability to deal with the legal issues presented.' " *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc. (Caraco),* 527 F.3d 1278, 1295 (Fed.Cir.2008) (alteration in original) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of the Interior,* 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003), *abrogated on other grounds by MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007)). "As to the second prong, withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an 'immediate and substantial impact' on the plaintiff." *Id.* (quoting *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 171, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967)). "If a claim is not ripe, the court does not have jurisdiction to hear the case, and it must be dismissed without prejudice." *Bannum, Inc. v. United States,* 56 Fed.Cl. 453, 462 (2003).

2. The Indian Tucker Act and the Tucker Act

[7] "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941) (internal citations omitted). The United States' consent to be sued by Indian tribes in the Court of Federal Claims is contained in the Indian Tucker Act, which provides as follows:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians

> residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (2006). The final clause of the Indian Tucker Act alludes to the Tucker Act, "which waives immunity with respect to any claim 'founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.' " *United States v. Navajo Nation (Navajo II)*, 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) (quoting 28 U.S.C. § 1491(a)(1)).

[8] **[9]** "Although the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims, it is not itself a source of substantive rights." *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 503, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). To invoke the court's jurisdiction, "a tribal plaintiff must invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' " *Id.* (quoting *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 218, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). This requires the tribe to clear "two hurdles." *Navajo II*, 556 U.S. at 290, 129 S.Ct. 1547. First, the "[t]ribe 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." *Navajo I*, 537 U.S. at 506, 123 S.Ct. 1079. "If that threshold is passed, the court must then determine whether the relevant source of ***377** substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].' " *Id.* (alterations in original) (quoting *Mitchell II*, 463 U.S. at 219, 103 S.Ct. 2961).

3. Motions to Dismiss for Lack of Jurisdiction

[10] **[11]** **[12]** In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), the court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. [3] *See Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed.Cir.2011). However, "[w]hen a party challenges the jurisdictional facts alleged in the complaint, the court may consider relevant evidence outside the pleadings to resolve the factual dispute." *Arakaki v. United States*, 62 Fed.Cl. 244, 247 (2004) (citing, inter alia, *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed.Cir.1988)). The court may also consider undisputed facts contained in the record. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C.Cir.1992). The burden is on the plaintiff to show jurisdiction by a preponderance of the evidence. *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed.Cir.2002). If the court determines that it does not have jurisdiction, it must dismiss the claim. *See*RCFC 12(h)(3).

[3] The Rules of the United States Court of Federal Claims (RCFC) generally mirror the Federal Rules of Civil Procedure (FRCP). *See*RCFC 2002 rules committee note ("[I]nterpretation of the court's rules will be guided by case law and the Advisory Committee Notes that accompany the [FRCP]."). Rule 12 of the RCFC is substantially similar to Rule 12 of the FRCP. *Compare*RCFC 12*with*FRCP 12. The court therefore relies on authority interpreting FRCP 12 as well as authority interpreting RCFC 12.

B. Motions to Amend Pleadings

[13] **[14]** **[15]** With certain exceptions not applicable here, a party may amend a pleading only with the court's consent. *See*RCFC 15(a)(1)-(2). The court's rules state that "[t]he court should freely give leave [to amend a pleading] when justice so requires." RCFC 15(a)(2). However, leave should not be granted when amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). [4] "When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted...." *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1354–55 (Fed.Cir.2006).

[4] Because the RCFC generally mirror the FRCP, *see supra* n. 3, and because Rule 15 of the RCFC is substantially similar to Rule 15 of the FRCP, *compare*RCFC 15*with*FRCP 15, the court relies on authority interpreting FRCP 15 as well as authority interpreting RCFC 15.

To state a claim on which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to

'state a claim to relief that is plausible on its face.' " *See*Ashcroft v. Iqbal (Iqbal), 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When determining whether a plaintiff has stated a claim upon which relief can be granted, the court "must accept as true all the factual allegations in the complaint" and make "all reasonable inferences in favor of the nonmovant." *See Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed.Cir.2001). However, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

III. Discussion

In its Complaint, plaintiff pleads two claims for relief based on the district court's dismissal of its claims. In claim one, plaintiff alleges that the district court violated trust obligations created by the Nonintercourse Act by failing to adjudicate the merits of plaintiff's claims. *See* Compl. ¶¶ 57–62 (claim one) (stating that the government failed to meet its obligation to provide effective redress for the unlawful taking of Shinnecock land); *see also* Pl.'s Resp. 29 (stating that the ***378** district court was required by the government's trust obligations pursuant to the Nonintercourse Act to reach the merits of plaintiff's claims). In claim two, plaintiff contends that the district court's dismissal of its claims violated its right to effective redress, pursuant to federal common law (informed by international law norms), for the loss of its land. *See* Compl. ¶¶ 63–67 (claim two); *see also* Pl.'s Resp. 35 (claiming that "federal common law (based on international law)" provides a mandatory right to compensation).

For the first time in its Response, plaintiff asserts a third claim for relief, characterizing the district court's actions as a "judicial taking." *See* Pl.'s Resp. 1; *id.* at 16 ("Plaintiff is challenging a 'judicial taking' occasioned by dismissal and entry of final judgment against Plaintiff on its Non–Intercourse Act land claim."). Plaintiff acknowledges that its Complaint did not "expressly enumerate a Fifth Amendment 'Takings' claim among its 'Claims for Relief,' " but requests that, if the court grants defendant's Motion, dismissal of plaintiff's Complaint "be without prejudice, with leave to amend." *Id.* at 2 n.2. The court construes plaintiff's request as a motion for leave to amend its Complaint to add a third claim for relief.

Defendant moves for dismissal of plaintiff's claim one and claim two on two jurisdictional grounds. First, defendant argues, "Plaintiff's Complaint does not present ripe claims," Def.'s Mot. 11, because plaintiff filed a motion for reconsideration and appeal, both of which remain pending, *seeid.* at 10, 18. Second, defendant asserts, the court lacks jurisdiction over plaintiff's claim one and claim two because claims based on the Nonintercourse Act and federal common law are not within the waiver of sovereign immunity created by the Tucker Act and the Indian Tucker Act. *Id.* at 16–18. With respect to plaintiff's request to amend its Complaint, defendant contends that amendment should not be permitted because it would be futile. *See* Def.'s Reply 6.

The court addresses defendant's ripeness argument in Part III.A and defendant's sovereign immunity argument in Part III.B. In Part III.C, the court addresses plaintiff's request to amend its Complaint to add a judicial takings claim.

A. Plaintiff's Claim One and Claim Two Are Not Ripe for Adjudication

Defendant describes plaintiff's "main argument" as being "that [the district court's decision] to dismiss their Non–Intercourse Act claims against New York denies them effective redress for such claims." Def.'s Mot. 10 (internal quotation marks omitted); *see also* Compl. ¶¶ 57–67 (claim one and claim two) (premising plaintiff's claims for relief on the government's obligation to provide plaintiff "effective redress"). Defendant notes that plaintiff has filed a motion for reconsideration and an appeal of the district court's decision, both of which remain pending. *See* Def.'s Mot. 10, 18. Because the district court could reconsider its dismissal of plaintiff's claims and because the dismissal could be reversed on appeal, defendant contends that plaintiff's claims "may never need to be decided in this forum." *See*id.

In its Response, plaintiff agrees that "litigation of the [Shinnecock] Nation's land claim has not run its entire course" but contends that plaintiff's claims in this case are nonetheless ripe for adjudication because the district court's judgment has an "immediate" preclusive effect. Pl.'s Resp. 15–16. Therefore, plaintiff states, "[i]t is only the possibility of reversal of final judgment [rather than the events upon which plaintiff's claims rest] that is contingent." *Id.* at 16. Plaintiff also contends that "withholding court consideration would cause hardship to Plaintiff because the complained-of conduct has an immediate and substantial impact on the plaintiff," but plaintiff does not further describe the nature of the purported "immediate and substantial impact." *See*id. (internal quotation marks omitted).

[16] "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300, 118 S.Ct. 1257 (internal quotation marks omitted). To determine whether plaintiff's claims are ripe, the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding ***379** court consideration." *Cf.Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507. "As to the first prong, an action is fit for judicial review where further factual development would not significantly advance [a court's] ability to deal with the legal issues presented." *Caraco*, 527 F.3d at 1295 (alteration in original) (internal quotation marks omitted). Here, further factual development would significantly advance the court's ability to deal with the issues presented by plaintiff's claims. *Cf.id.* As the parties agree, plaintiff's district court litigation is still pending. *See* Pl.'s Resp. 15; Def.'s Mot. 10. The district court has dismissed plaintiff's claims, *see Dist. Ct. Op.*2, but could grant plaintiff's motion for reconsideration or be reversed on appeal. Accordingly, the court cannot assess plaintiff's claim that it has been denied "effective redress" in the district court litigation while that litigation and a related appeal are still underway. Therefore, the first prong of the *Abbott Laboratories* test suggests that plaintiff's claims are not ripe for adjudication. *Cf.Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507 (requiring that the court first evaluate "the fitness of the issues for judicial decision").

[17] "As to the second prong, withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an immediate and substantial impact on the plaintiff." *Caraco*, 527 F.3d at 1295 (internal quotation marks omitted). Plaintiff cites this standard, *see* Pl.'s Resp. 15, but does not describe how denying consideration of this action would have an immediate and substantial impact on plaintiff. In fact, the presence of such an impact is belied by plaintiff's delay in pursuing its claims in the district court litigation. According to the allegations in plaintiff's Complaint, the jurisdictional impediments that prevented plaintiff from bringing its claims in federal court were eliminated in 1974. *See* Compl. ¶ 39. Yet, plaintiff did not file the district court litigation until 2005, *id.* ¶ 46, more than thirty years later. In light of this unexplained delay and plaintiff's failure to explain how withholding court consideration would cause "an immediate and substantial impact on ... plaintiff," the court concludes that withholding consideration until the conclusion of plaintiff's district court litigation (including any related appeals) would not cause a significant hardship to plaintiff. *Cf.Caraco*, 527 F.3d at 1295 (internal quotation marks omitted). Therefore, the second prong of the *Abbott Laboratories* test also suggests that plaintiff's claims are not ripe for adjudication. *Cf.Abbott Labs*, 387 U.S. at 149, 87 S.Ct. 1507 (requiring the court to evaluate "the hardship to the parties of withholding court consideration").

Accordingly, the court concludes that plaintiff's claims are not ripe for adjudication, *cf.id.* (describing the test for ripeness), and must be dismissed for lack of jurisdiction, *cf.Bannum, Inc.*, 56 Fed.Cl. at 462 (stating that a claim that is not ripe must be dismissed for lack of jurisdiction). Defendant's Motion is GRANTED insofar as defendant requests dismissal on this ground.

B. Even if Plaintiff's Claims Were Ripe for Adjudication, the Court Lacks Jurisdiction over Plaintiff's Nonintercourse Act and Federal Common Law Claims on Other Grounds

1. Claim One: The Nonintercourse Act

[18] Plaintiff's claim one is based on the government's alleged obligations under the Nonintercourse Act. *See* Compl. ¶¶ 57–62 (claim one). Plaintiff contends that the Nonintercourse Act created a trust relationship between plaintiff and the government, a relationship which entails fiduciary obligations for the government, *see* Pl.'s Resp. 25 (" 'That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question ....' " (emphasis omitted) (quoting *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir.1975))), and further contends that this court's predecessor has found a breach of these fiduciary obligations "to be compensable by an award of damages," *seeid.* at 27 (citing *Seneca Nation of Indians v. United States*, 173 Ct.Cl. 917, 925–26 (1965)). Plaintiff "submits that the fiduciary obligation of the United States is broad enough to apply to the judicial branch as well as the legislative and executive branches," *id.* at 28, ***380** requiring the district court to have addressed plaintiff's claims on their merits, *id.* at 29.

Defendant contends that the court lacks jurisdiction over plaintiff's claim one, Def.'s Mot. 1–2, because the Nonintercourse Act "does not set forth a specific, enforceable mandatory trust duty" and cannot "be fairly interpreted as mandating compensation," *id.* at 19 (emphasis and some capitalization omitted); Def.'s Reply 13 (same). Instead,

defendant maintains, "[t]he Non–Intercourse Act creates a discretionary general trust duty that *permits* enforcement of its provisions." Def.'s Reply 14 (emphasis added). Defendant further contends that, "[r]egardless of whether there are specific duties in the Non–Intercourse Act, the Act in no way prohibits a federal district court from dismissing a case" and "does not remove defenses or mandate that a federal district court must hear a case brought under it on the merits." *Id.* at 15.

With respect to claim one, plaintiff has failed to "identify a substantive source of law that establishes *specific* fiduciary or other duties" and to "allege that the Government has failed faithfully to perform those duties." *Cf.Navajo I,* 537 U.S. at 506, 123 S.Ct. 1079 (emphasis added). For example, *Joint Tribal Council of the Passamaquoddy Tribe,* relied upon by plaintiff in support of its argument that the Nonintercourse Act is substantive source of law establishing specific fiduciary duties, *see* Pl.'s Resp. 25–26, 28, expressly states that "it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship" created by the Nonintercourse Act, *Joint Tribal Council of the Passamaquoddy Tribe,* 528 F.2d at 379.[5] Similarly, *Seneca Nation of Indians* and other Indian Claims Commission Act cases relied upon by plaintiff, *see* Pl.'s Resp. 25–27, fail to support plaintiff's argument because they deal with liability under the Nonintercourse Act in conjunction with the Indian Claims Commission Act, which is not applicable here, and, specifically, with the duty not to allow receipt of unconscionably low consideration for Indian lands, *cf.Seneca Nation of Indians,* 173 Ct.Cl. at 925–26 ("[W]herever [the Nonintercourse Act] applies the United States is liable, under the Indian Claims Commission Act, for the receipt by the Indians of an unconscionably low consideration.").

5 The court also notes that *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir.1975), in addition to being nonbinding on the court, was decided in 1975—that is, before the United States Supreme Court articulated the current standard for recovering under the Indian Tucker Act based on a breach of fiduciary duty, *see, e.g., United States v. Navajo Nation,* 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (stating as the threshold requirement under the current standard that a tribal plaintiff "must identify a substantive source of law that establishes *specific* fiduciary or other duties" (emphasis added)).

Moreover, to the extent that the Nonintercourse Act, standing alone, may create specific fiduciary duties, *see, e.g.,id.* at 925 (stating that the federal government's responsibility under the Nonintercourse Act includes "be [ing] present at [tribal land] negotiations," prevention of "actual fraud, deception, or duress" with respect to tribal land transactions, and related concerns regarding "improvidence, unfairness, [and] the receipt of an unconscionable consideration"), plaintiff has not persuaded the court that the Nonintercourse Act gives rise to any specific fiduciary duties that are applicable to the judiciary and that would serve as a basis for requiring the district court to adjudicate plaintiff's claims on the merits. Plaintiff "submits that the fiduciary obligation of the United States is broad enough to apply to the judicial branch as well as the legislative and executive branches," Pl.'s Resp. 28, but does not explain why this is the case, describe how such a fiduciary obligation would function (beyond requiring the district court to reject equitable defenses to plaintiff's claims) or cite any authority in support of its position. And nothing in the plain language of the Nonintercourse Act suggests that any trust relationship would extend to the judicial branch and function to bar equitable defenses from the adjudication of Nonintercourse Act claims.

The court therefore concludes that plaintiff's claim one, which is based on the Nonintercourse Act, does not "invoke a rights-creating source of substantive law that can fairly be interpreted as mandating compensation ***381** by the Federal Government for the damages sustained," and must be dismissed for lack of jurisdiction. *Cf.Navajo I,* 537 U.S. at 503, 123 S.Ct. 1079 (internal quotation marks omitted). Defendant's Motion is GRANTED insofar as defendant requests dismissal of plaintiff's claim one on this ground.

2. Claim Two: Federal Common Law Right to Redress

[19] Plaintiff's claim two is that the district court's dismissal of its claims violated its right to effective redress, pursuant to federal common law (informed by international law norms), for the loss of its land. *See* Compl. ¶¶ 63–67 (claim two); *id.* ¶¶ 26–30 (citing, inter alia, United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration or U.N. Decl.), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007)); Pl.'s Resp. 32 (stating that the U.N. Declaration is "an important and authoritative articulation of the broad and perhaps universal global consensus of the application of the broader international Human Rights norms in the specific context of the world's indigenous peoples, including Plaintiff"). Plaintiff contends that "[t]he universal (or near universal) global consensus ... is that '[i]ndigenous peoples have the right to redress ... for the lands, territories [and] resources ... which have been confiscated, taken, [occupied],

used or damaged without their free, prior and informed consent.' " Pl.'s Resp. 35 (third omission in original) (quoting U.N. Decl. art. 28, ¶ 1).

Included in the Indian Tucker Act's jurisdictional grant is the power to decide claims "which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group," 28 U.S.C. § 1505, that is, claims that could otherwise be brought under the Tucker Act, *Navajo II*, 556 U.S. at 290, 129 S.Ct. 1547. Plaintiff contends that its federal common law claim is such a claim. *See* Pl.'s Resp. 29 (referring to the Tucker Act's grant of jurisdiction).

However, plaintiff "does not claim" that the sources of international law that it cites "constitute ... money-mandating source[s] of law sufficient to provide a basis for jurisdiction under the Tucker Act." *Id.* at 32; *see also id.* ("United Nations declarations generally do not in and of themselves have any binding force...."). Instead, plaintiff relies on the portion of the Tucker Act that grants the court jurisdiction over claims " 'for liquidated or unliquidated damages in cases not sounding in tort,' " *seeid.* at 29–30 (quoting 28. U.S.C. § 1491(a)(1)), which plaintiff contends " 'has never been fully and authoritatively construed,' " *id.* at 29 (quoting *Cape Fox Corp. v. United States*, 4 Cl.Ct. 223, 230 (1983)). Without citation to authority, plaintiff appears to take the position that this portion of the Tucker Act should be read as enlarging the Tucker Act's waiver of sovereign immunity beyond claims founded on the Constitution, statutes, regulations and contracts to claims based on federal common law which, plaintiff maintains, may be informed by international law. *Seeid.* at 35 (claiming "that federal common law (based on international law) provides a right to compensation itself" and "that such common law-based right to compensation is mandatory by its terms"). Plaintiff appears to contend that the district court violated the government's obligation under federal common law (informed by international law norms) to provide effective redress to plaintiff for the taking of its land. *Seeid.* at 31 ("[T]he obligation[s] of the United States under customary international law [are] broad enough to apply to the judicial branch as well as the legislative and executive branches."); *id.* at 35 ("The universal (or near universal) global consensus ... is that '[i]ndigenous peoples have the right to redress ... for the lands, territories [and] resources ... which have been confiscated, taken, [occupied], used or damaged without their free, prior and informed consent.' " (third omission in original) (quoting U.N. Decl. art. 28, ¶ 1)); *see also* Compl. ¶¶ 63–67 (claim two).

Defendant responds that "the text of [the Tucker Act and the Indian Tucker Act] plainly does not waive sovereign immunity from claims arising under 'common law' principles" and that "[o]nly Congress ... can ... waive sovereign immunity under the Indian Tucker Act." Def.'s Reply 16.

***382** Defendant is correct: "Common law causes of action ... are not included in [the Tucker Act's] jurisdictional grant." *Ramirez v. United States*, 36 Fed.Cl. 467, 472 (1996). Although the portion of the Tucker Act relied upon by plaintiff has, in fact, "never been fully and authoritatively construed," *Mitchell v. United States*, 229 Ct.Cl. 1, 9 n.7, 664 F.2d 265, 270 n.7 (1981) (en banc), *aff'd*, *Mitchell II*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580, it does not waive sovereign immunity for claims based on federal common law principles, *cf. United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969) (stating that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed"). Waivers of sovereign immunity, such as the Tucker Act, "must be construed strictly in favor of the sovereign and not enlarge[d] ... beyond what the language requires." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (alteration and omission in original) (internal citation and quotation marks omitted).

The language of the Tucker Act does not mention federal common law claims. The Tucker Act waives sovereign immunity specifically with respect to "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The court may not imply a waiver of sovereign immunity with respect to federal common law claims, *cf. King*, 395 U.S. at 4, 89 S.Ct. 1501 (stating that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed"), or accommodate such claims by enlarging the waiver contained in the Tucker Act "beyond what the language requires," *cf. Nordic Vill., Inc.*, 503 U.S. at 34, 112 S.Ct. 1011 (internal quotation marks omitted).

Because the Tucker Act does not grant the Court of Federal Claims jurisdiction over claims against the United States based on federal common law, plaintiff's claim two is not a claim "which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe,

band or group." *Cf.*28 U.S.C. § 1505; *Navajo II,* 556 U.S. at 290, 129 S.Ct. 1547 (stating that this provision of the Indian Tucker Act alludes to claims that could be brought under the Tucker Act). Because plaintiff has not "invoke[d] a rights-creating source of substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained" for purposes of the Indian Tucker Act, plaintiff's claim two must be dismissed for lack of jurisdiction. *Cf.Navajo I,* 537 U.S. at 503, 123 S.Ct. 1079 (internal quotation marks omitted). Defendant's Motion is GRANTED insofar as defendant requests dismissal of plaintiff's claim two on this ground.

C. Amendment of Plaintiff's Complaint to Add a Judicial Takings Claim Would Be Futile

The court has construed plaintiff's request that, if the court grants defendant's Motion, dismissal of plaintiff's Complaint "be without prejudice, with leave to amend," *see* Pl.'s Resp. 2 n.2, as a motion to amend the Complaint. Plaintiff seeks leave to add a claim for relief characterizing the district court's actions as a "judicial taking," *seeid.* at 18–23 (discussing judicial takings claim), a claim for relief that plaintiff acknowledges was not "expressly enumerate[d]" in its Complaint, *id.* at 2 n.2. Plaintiff contends that the district court effected a judicial taking by dismissing its claims on the basis of equitable defenses and by entering judgment. *Id.* at 1; *seeid.* at 16 ("Plaintiff is challenging a 'judicial taking' occasioned by dismissal and entry of final judgment against Plaintiff on its Non–Intercourse Act land claim."). Plaintiff contends that " 'claims for compensation are property interests that cannot be taken for public use without compensation.' " *Id.* at 18 (quoting *In re Aircrash in Bali, Indon. on Apr. 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982)).

With certain exceptions not applicable here, a party may amend a pleading only with the court's consent. *See*RCFC 15(a)(1)-(2). The court's rules state that "[t]he court should freely give leave [to amend a pleading] when justice so requires." ***383** RCFC 15(a)(2). However, leave should not be granted when amendment would be futile. *See Foman,* 371 U.S. at 182, 83 S.Ct. 227. "When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted...." *Kemin Foods, L.C.,* 464 F.3d at 1354–55. Therefore, whether plaintiff should be permitted to amend its Complaint to specifically include a judicial takings claim depends on whether such a complaint would state a claim on which relief could be granted. *Cf. id.*

Defendant contends that plaintiff's judicial takings argument is unavailing because "Plaintiff has not set forth a compensable property interest that could be taken." Def.'s Reply 9. Defendant maintains that "a cause of action against the government is not a property interest protected by the Fifth Amendment's takings clause." *Id.* at 10 (citing *Sharkey v. United States,* 17 Cl.Ct. 643, 648 (1989)). Furthermore, defendant argues, "[a]lthough a cause of action is 'a species of property protected by the Fourteenth Amendment's Due Process Clause,' " *id.* (quoting *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)), " 'a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained,' " *id.* at 10 n.1 (quoting *Bowers v. Whitman,* 671F.3d 905, 914 (9th Cir.), *cert. denied sub nom. Bruner v. Whitman,*—— U.S. ——, 133 S.Ct. 163, 184 L.Ed.2d 234 (2012)); *see alsoid.* at 10 (stating that "Plaintiff did not have a vested interest or a guarantee that its Non–Intercourse Act claim would proceed on the merits" because "[one] of the background principles that shape any expectation with respect to bringing a case is that it may be subject to a defense").

[20] Defendant further contends that, even if plaintiff had identified a valid property interest, applying the judicial takings "theory" as the rule of decision in this case would be inappropriate. [6] *Seeid.* at 7. Defendant argues that " '[t]he constitutional obligation not to take property does not fall equally on all branches,' " *id.* (quoting *Brace v. United States,* 72 Fed.Cl. 337, 359 (2006)), *aff'd per curiam,*250 Fed.Appx. 359 (Fed.Cir.2007) (unpublished), because "[c]ourts do not 'make' the law, or fabricate it from whole cloth; courts interpret the law," Def.'s Reply 7. Accordingly, defendant contends, the judiciary's "conclusions regarding the law" should be treated "differently from those of the legislature or the executive," and "judicial decisions are not similar enough to legislative or executive actions that take property" to justify application of a judicial takings theory. *Id.*

6 Defendant also contends that, to the extent that plaintiff is attempting (by characterizing its claim as one for a "judicial taking") to relitigate the merits of the claims it brought before the United States District Court for the Eastern District of New York (the district court), "this Court lacks subject-matter jurisdiction to scrutinize the decisions of other federal courts." United States' Reply in Supp. of Mot. to Dismiss, Dkt. No. 13, at 8. Defendant argues that, if plaintiff disagrees with the merits of the district court's decision and the binding precedent the

district court applied, plaintiff must file an appeal with the United States Supreme Court. *Id.*

Defendant is correct that the court does not have jurisdiction to consider a takings claim that merely asserts that another court committed an error of law. *Cf.Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed.Cir.2001) ("[T]he [United States] Court of Federal Claims cannot entertain a taking claim that requires the court to 'scrutinize the actions of' another tribunal." (quoting *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed.Cir.2001))). Therefore, to the extent that plaintiff, by asserting a taking claim, is asserting that the district committed an error of law, this court lacks jurisdiction to consider such an argument. *Cf. Vereda, Ltda.*, 271 F.3d at 1375.

[21] The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. To prevail on a takings claim, a property owner must satisfy a two-part test. *See Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed.Cir.2004). "First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment." *Id.* This is because " 'only persons with a valid property interest at the time of the taking are entitled to compensation.' " *Id.* (quoting ***384** *Wyatt v. United States*,271 F.3d 1090, 1096 (Fed.Cir.2001)). "Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Id.*

[22] "[T]he Constitution does not itself create or define the scope of 'property' interests protected by the Fifth Amendment." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed.Cir.2005). " 'Instead, existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking.' " *Id.* (quoting *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed.Cir.2003)). "The concept of property for purposes of the fifth amendment has been interpreted broadly and can include every sort of interest the citizen may possess." *Shanghai Power Co. v. United States*, 4 Cl.Ct. 237, 240 (1983) (internal quotation marks omitted), *aff'd*,765 F.2d 159 (Fed.Cir.1985) (unpublished table decision).

[23] Defendant's contention that "a cause of action against the government is not a property interest protected by the Fifth Amendment's takings clause," Def.'s Reply 10, is beside the point. Plaintiff's action in the district court did not name the United States as a defendant. *See* First Am. Compl. at 1, *Shinnecock Indian Nation v. New York*, No. 05–CV–2887 (TCP) (E.D.N.Y. Aug. 5, 2005), Dkt. No. 5 (listing the defendants in plaintiff's district court litigation). It is therefore not plaintiff's view that it has been deprived of a cause of action against the United States. Defendant is correct, however, *see* Def.'s Reply 10, that, for the reasons stated below, plaintiff has not identified a valid property interest for purposes of the Takings Clause, *cf. Am.Pelagic Fishing Co.*, 379 F.3d at 1372 ("First, ... the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.").

[24] **[25]** The "Takings Clause prevents the Legislature (and other government actors) from depriving private persons of *vested* property rights except for a 'public use' and upon payment of 'just compensation.' " *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (emphasis added); *cf., e.g.,Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1580 n.8 (Fed.Cir.1997) (rejecting the plaintiff's takings claim because the plaintiff lacked a vested property right). For purposes of the Takings Clause, "no 'vested' right [in a cause of action] attaches until there is a final, unreviewable judgment." [7] *Rogers v. Tristar Prods., Inc.*, Nos.2011–1494 and 2011–1495, 2012 WL 1660604, at *2 (Fed.Cir. May 2, 2012) (per curiam) (unpublished); *see also Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801)) (stating same). *But see Abrahim–Youri v. United States*, 139 F.3d 1462, 1465 (Fed.Cir.1997) (suggesting in dicta that the plaintiffs had cognizable property interests in pending claims against the Iranian government). This is because, until a final unreviewable judgment has been entered, the cause of action "is inchoate and does not provide a certain expectation in that property interest." *Bowers*, 671 F.3d at 914. Therefore, because plaintiff has not secured a final unreviewable judgment in its favor on its Nonintercourse Act claim, plaintiff's interest in its Nonintercourse Act claim has not ***385** vested and is not protected by the Takings Clause. *Cf.Landgraf*, 511 U.S. at 266, 114 S.Ct. 1483; *Rogers*, 2012 WL 1660604, at *2.

7 The same is true in the context of the Due Process Clause. *See In re TMI*, 89 F.3d 1106, 1113 (3d Cir.1996) (stating that "a pending tort claim does not constitute a vested right"); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989) ("[A] legal claim affords no

definite or enforcible [sic] property right until reduced to final judgment."); *Austin v. City of Bisbee*, 855 F.2d 1429, 1435–36 (9th Cir.1988) (stating that "[a] cause of action is a species of property protected by the Fourteenth Amendment'sDueProcess Clause," but that "it is inchoate and affords no definite or enforceable property right until reduced to final judgment" (internal quotation marks omitted)); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (" 'No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.' This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained." (internal citations omitted) (quoting *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 198, 37 S.Ct. 247, 61 L.Ed. 667 (1917)).

[26] **[27]** Plaintiff also fails to meet the second part of the test applied to takings claims by identifying a government action that amounts to a taking. *Cf. Am.Pelagic Fishing Co.*, 379 F.3d at 1372 ("Second, ... the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest."). Significantly, plaintiff's takings claim relies entirely on a theory of judicial takings that has not been adopted in the federal courts. *SeeBrace v. United States*, 72 Fed.Cl. 337, 358–59 (2006) ("Generally speaking, court orders have never been viewed themselves as independently giving rise to a taking."), *aff'd per curiam*,250 Fed.Appx. 359 (Fed.Cir.2007) (unpublished). The theory of judicial takings, as explained in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot. (Stop the Beach)*, 560 U.S. 702, 130 S.Ct. 2592, 2602, 177 L.Ed.2d 184 (2010), posits that "the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking." *Stop the Beach*, 130 S.Ct. at 2602 (plurality opinion) (emphasis omitted). Accordingly, "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.*; *see alsoSmith v. United States*, 709 F.3d 1114, 1116–17 (Fed.Cir.2013) (characterizing the plurality opinion in *Stop the Beach* as "recogniz[ing] that a takings claim [could] be based on the action of a court" and noting that, prior to *Stop the Beach*, academic discussion recognized "that judicial action could constitute a taking of property" (citing Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L.Rev. 1449 (1990)).

However, the portion of the Supreme Court's decision in *Stop the Beach* that discussed the standard for finding that a judicial taking had occurred and stated that a judicial taking was a valid cause of action was signed by only four justices, *see Stop the Beach*, 130 S.Ct. at 2597, 2601–10 (plurality opinion), and therefore did not create binding precedent, *accordBurton v. Am. Cyanamid Co.*, 775 F.Supp.2d 1093, 1099 (E.D.Wis.2011) ("In [*Stop the Beach*], four justices supported [the idea that there can be a judicial taking], not enough to establish a binding precedent"). The four other justices participating in the decision of the case—Justice Kennedy (joined by Justice Sotomayor) and Justice Breyer (joined by Justice Ginsburg)—did not join this portion of the opinion and wrote that it was unnecessary to determine whether the actions of a court could effect a taking.[8] *Stop the Beach*, 130 S.Ct. at 2613 (Kennedy, J., concurring in part) (stating that "this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause"); *id.* at 2619 (Breyer, J., concurring in part) ("There is no need now to decide more than ... that the Florida Supreme Court's decision in this case did not amount to a 'judicial taking.' "). Accordingly, the plurality portion of the Court's opinion is not binding precedent. *Cf.Texas v. Brown*, 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (stating that a position not adopted by a majority of the deciding justices is not binding precedent).

8 Justice Stevens did not participate in deciding the case. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 130 S.Ct. 2592, 2613, 177 L.Ed.2d 184 (2010).

In another case addressing judicial takings, *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), the Supreme Court considered the effect on landowners of the Washington Supreme Court's reversal of its longstanding position that land accreting along the edge of riparian property belonged to the owner of the adjoining property instead of to the state. *Hughes*, 389 U.S. at 290–96, 88 S.Ct. 438. In a concurring opinion, Justice Stewart, noting that the change in Washington's property law was "unforeseeable," wrote that, "[a]lthough the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so." *Id.* at 297–98, 88 S.Ct. 438 (Stewart, ***386** J., concurring). "[T]he Due Process Clause of the Fourteenth Amendment," Justice Stewart continued, "forbids such confiscation by a State, no less through its courts than through its legislature." *Id.* at 298, 88 S.Ct. 438. However, Justice Stewart's concurrence in *Hughes*, which argued that a judicial taking had occurred,

has not been followed by a majority of the United States Supreme Court. *See*Brace, 72 Fed.Cl. at 359 n.35 (quoting W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L.Rev. 1487, 1510 (2004) (stating that "Justice Stewart's concurrence [in *Hughes*] 'has never been followed by a majority of the Court, and the Court has since declined offers to take up the issue again' ")).

Indeed, plaintiff cites no case in which a property owner prevailed on a judicial takings claim, and the cases plaintiff relies upon in addition to *Stop the Beach* and *Hughes*,*see* Pl.'s Resp. 19, 21–23, do not support plaintiff's position. For example, in *Petro–Hunt, L.L.C. v. United States*, 105 Fed.Cl. 37 (2012), the Court of Federal Claims ruled only that the plaintiff's judicial takings claim was not barred by a jurisdictional statute not relevant here. *See*Petro–Hunt, 105 Fed.Cl. at 44–45. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir.1985), was later vacated by the Supreme Court. *Ariyoshi v. Robinson*, 477 U.S. 902, 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986); *cf. Brace*, 72 Fed.Cl. at 359 n.35 (stating that Robinson was the only example the court could identify of any court finding a judicial taking and that it had been vacated). Finally, in *Ultimate Sportsbar, Inc. v. United States*, 48 Fed.Cl. 540 (2001), the Court of Federal Claims stated that "[a] judicial taking occurs where a court's decision that does not even 'arguably conform[ ] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.' " *Ultimate Sportsbar, Inc.*, 48 Fed.Cl. at 550 (alteration in original) (quoting *Hughes*, 389 U.S. at 296, 298, 88 S.Ct. 438 (Stewart. J., concurring)). This statement, however, was dicta in that it only clarified that the court had not "intended to preclude [judicial takings] claims from being cognizable in this tribunal in the future." *See*id.

As Justice Kennedy noted in his concurring opinion in *Stop the Beach*, judicial alteration of established property rights has traditionally—and " 'more appropriate[ly]' "—been examined under a due process framework. *Stop the Beach*, 130 S.Ct. at 2614 (Kennedy, J., concurring) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (Kennedy, J., concurring)). Adopting a judicial takings framework would require courts to resolve "certain difficulties," including that, "as a matter of custom and practice," it has been the role of the legislative and executive branches to decide what property to condemn. *Id.* at 2613–14. In fact, based on the text of the Fifth Amendment and on the case law interpreting the Takings Clause, it is not clear that courts have the same power as the legislative and executive branches to take private property for public use. *See*id. at 2614 ("When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision.").

Further, even if a judicial takings theory were a viable basis for a cause of action in this court, the district court's actions do not resemble the judicial action at issue in *Hughes* or *Stop the Beach.* In both *Hughes* and *Stop the Beach*, the issue was whether court decisions held that that established property rights no longer existed, thereby turning private property into public property. *See*Stop the Beach, 130 S.Ct. at 2610 (describing the plaintiff's contention that a decision by the Florida Supreme Court deprived her of the established right to littoral accretions and to have her property touch the water); *Hughes*, 389 U.S. at 294–95, 88 S.Ct. 438 (Stewart, J. concurring) (describing the Washington Supreme Court's holding that oceanfront accretions belong to the state). In this case, the district court made no change in substantive property law and merely ruled that, under binding precedent established in other cases, equitable defenses were available and warranted dismissal of plaintiff's claim. *See Dist. Ct. Op.* 2; *cf.*In re Lazy Days' RV Ctr. Inc., 724 F.3d 418, 425, No. 12–4047, 2013 WL 3886735, at *6 (3d Cir. July 30, 2013) (stating, in the context of bankruptcy that, pursuant to *Stop the Beach*, ***387** the "adjudication of disputed and competing claims cannot be a taking").

For the reasons stated, plaintiff has failed to identify a valid property interest or a government action that amounts to a taking of that property interest, and it would therefore be futile for plaintiff to amend its complaint to add a judicial taking claim. *Cf. Kemin Foods, L.C.*, 464 F.3d at 1354–55 (stating that amendment should be denied on the ground of futility when the proposed pleading does not state a claim upon which relief can be granted); *Am.Pelagic Fishing Co.*, 379 F.3d at 1372 (stating that, to prevail on a takings claim, a plaintiff must identify a valid property interest and a government action that amounts to a taking of that property interest). Plaintiff's request to amend its Complaint is therefore DENIED.

IV. Conclusion

For the foregoing reasons, the court concludes that plaintiff's claim one and claim two are not ripe, *see supra* Part III.A, and, even if they were, that they are not otherwise within the jurisdiction of the Court of Federal Claims, *see supra* Part III.B. Defendant's Motion is therefore GRANTED. The

Clerk of Court shall ENTER JUDGMENT for defendant, dismissing plaintiff's Complaint.

Plaintiff's request to amend its Complaint to add a third claim for relief, construed as a motion to amend plaintiff's Complaint, would be futile and is therefore DENIED. *See supra* Part III.C.

No costs.

IT IS SO ORDERED.

FORM 30. Certificate of Service

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FOR THE FEDERAL CIRCUIT

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