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

REPLY BRIEF OF PLAINTIFF-APPELLANT SHINNECOCK INDIAN NATION

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I. The CFC Erroneously Ruled on the Merits of the Nation's Claims.

If the Nation's claims are unripe, as the CFC determined, the court should have dismissed them without prejudice on that basis alone, or, in view of the Nation's statute of limitations problem, stayed them until they ripen. To hold that the claims are not ripe is to hold that the CFC is without jurisdiction to rule on the merits.

The United States does not respond to this argument except to insist that the Tucker Acts are only jurisdictional statutes, and therefore the CFC's determination that the Nation's claims did not come within the Tucker Act's requirements was not a ruling on the merits. The United States' position is inconsistent with this Court's pronouncement that the Tucker Act comprises a combined "jurisdictional and merits test," decided by the CFC in "a single step." *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005). "The single step would be one in which the trial court determines both the question of whether the statute provides the predicate for its jurisdiction, and lays to rest for purposes of the case before it the question of whether the statute on the merits provides a money-mandating remedy." *Id.*

The United States relies on *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), which held that in some circumstances, a federal court may dismiss a case

for lack of *personal* jurisdiction without first deciding its *subject matter* jurisdiction. *Id.* at 584-585. When there is a jurisdictional question and a merits question, however, the court must affirmatively answer the first before reaching the second. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). Courts are forbidden from deciding even "an 'easy' merits question … *on the assumption* of jurisdiction." *Id.* at 99 (emphasis in original). "Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* at 101. This disapproval is founded on the Article III requirement of a "case or controversy." *Id.* The roots of the ripeness doctrine, too, are found in part in Article III. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). This is true even in the CFC, an Article I court. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1359 (Fed. Cir. 2003); *see also Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003); *CW Government Travel, Inc. v. United States*, 46 Fed.Cl. 554, 557-58 (2000) (CFC is subject to same "case or controversy" requirements as courts established under Article III). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co.* at 101-02.

If the Nation's claims were not ripe, then the CFC was fundamentally without authority to assert "hypothetical jurisdiction" and "pronounce upon the meaning" of the federal laws on which the Nation based its claims, including the Tucker Act and the Non-Intercourse Act ("NIA"), 25 U.S.C. § 177. *Steel Co.* at 101-02. Its judgment on the merits was beyond its powers, and should be vacated.

II. The Nation's Claims Are Ripe.

A. The Pending Appeal of the Nation's NIA Land Claim Does Not Render its Claims in This Action Unripe.

The United States' ripeness analysis misplaces its focus on the Nation's appeal to the Second Circuit, contending that until the Nation loses there, its claims are premature. This, however, is really an argument against potential mootness. While an unlikely Second Circuit reversal might *moot* the Nation's present claims or otherwise affect them *at that time*, the "case or controversy" that arose from the district court's dismissal need not await appellate endorsement or any further factual development to be fit for judicial decision.

The United States analogizes to the "finality" principle applicable to judicial review of agency actions, relying on language drawn from cases articulating the standard for actions subject to review under the Administrative Procedure Act ("APA"). *See* Response Br. at 14 (quoting *Systems Application & Technologies, Inc. v. United States*, 691 F.3d 1374, 1383-84 (Fed. Cir. 2010) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997))). It is a useful analogy, but it favors the

Nation's position, not the United States'. Under the APA, "final agency action" is "subject to judicial review." 5 U.S.C. § 704. In the review of agency actions under the APA,

> [A]n appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [5 U.S.C. § 704]."

Darby v. Cisneros, 509 U.S. 137, 154 (1993) (emphasis in original). If this were an APA case, the fact that authorities superior to the district court have not yet had the opportunity to review the action in question would be irrelevant to the action's status as "final," both because any such appeal is optional and because the judgment is not "made inoperative" pending that review. No further "judicial exhaustion" is needed to arrive at a final action.

The United States relies on an inapposite citation to *Axel Johnson Inc. v. Arthur Anderson & Co.*, 6 F.3d 78 (2d Cir. 1993), in which the issue was whether the Constitution permitted Congress to direct the retrospective application of a new, lengthier, statute of limitations to revive a claim previously dismissed as untimely. *Id.* at 80. The court noted the rule that a judgment is not "final for Fifth Amendment and separation of powers purposes" until any appeals are completed or the time to appeal has expired. *Id.* at 84. The court's reference to the Fifth Amendment was specifically to the due process clause. *Id.* at 83. Under this rule,

when a direct appeal of a judgment remains available, the judgment is subject to changes in the law, whether by the mandatory retroactive effect of a decision by a higher court, *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90 (1993), or the retroactive effect of new legislation, if Congress so intends (within limits), *see Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994). But the principles governing the point at which a court's judgment is "final" in the sense that it can no longer be affected by changes in the law are completely different from the principles underlying ripeness, and have no application to this case.

When challenging agency actions, the ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), overruled on unrelated grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977). This case concerns a judicial rule rather than one created by an executive agency, but the rationale is the same regardless of the branch of government challenged. *See, e.g., Texas v. United States*, 523 U.S. 296, 301 (1998) (evaluating ripeness of state's challenge to judicial preclearance requirement under Voting Rights Act); *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580-81

(1985). Here, the Second Circuit created a new rule to bar all NIA land claims. The rule was "formalized" when the Second Circuit announced it in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). Like the rule in *Abbott Laboratories*, the rule is "quite clearly definitive," neither "informal," nor "only the ruling of a subordinate official," nor "tentative." *Abbott Laboratories* at 151.[1] The Nation has suffered the rule's effects "in a concrete way" from the time the district court dismissed the Nation's NIA land claim. Previously the Nation could count among its assets a claim to the ownership of its stolen lands (and with it, a claim to monetary damages for their theft). Now, it cannot.

The United States' asserted concern about "double recovery" is unwarranted. If some future development reinstates the Nation's land claim, the damages that may then be awarded can be adjusted, if appropriate, to reflect any

[1] The Second Circuit recently endorsed *Cayuga* again, affirming yet another dismissal of an NIA land claim based on the "disruptive nature of claims long delayed." *Stockbridge-Munsee Community v. New York*, 756 F.3d 163, 165 (2d Cir. 2014). *See also* Order Denying Petition for Rehearing En Banc, *Stockbridge-Munsee Community v. New York*, No. 13-3069 (2d Cir. Aug. 11, 2014). This despite the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 132 (2014), in which the Court authoritatively denied the Second Circuit's asserted rationale for the *Cayuga* "new laches" doctrine, stating the rule has no basis in Supreme Court precedent, notwithstanding *Cayuga*'s assertion to the contrary. *Petrella*, 134 S.Ct. at 1973-74 (holding that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief," and that equitable defenses do not apply to actions at law, citing *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985)).

duplicative damages the Nation may have recovered in this action. *See Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317, 1327 (Fed. Cir. 2003).

B. Hardship and Accrual.

For the reasons discussed above and in the Nation's opening brief, the Nation's claims accrued upon the district court's dismissal of its land claim, and cannot now be refiled within the six-year statute of limitations, which is a hardship favoring a conclusion that the claims are ripe. However, if the Court makes a different accrual finding, the Nation respectfully requests that the Court specifically indicate in its decision that the Nation's claims have not yet accrued, and identify the event that will trigger accrual.[2]

[2] The United States and the CFC both contend there is no hardship because of the Nation's "unexplained delay" in filing its land claim. *See* Response Br. at 19, *Order* at 379. In fact, any "delay" in filing the land claim is a direct result of the United States' failure to meet its trust obligations to the Nation. The Nation formally requested litigation assistance from the United States to litigate its land claim in 1978. While that request was pending, the Interior Department adopted regulations creating the administrative acknowledgement process, and published the first list of "federally recognized" Indian tribes, but left the Nation off the list. The Department then denied any trust obligation to the Nation (due to the Nation not being "recognized") and treated the litigation assistance request as a petition for acknowledgement under the new process. Unable to prove its status as a recognized Indian tribe, and in view of the Department's primary jurisdiction to make that determination, the Nation lacked standing to pursue its NIA land claim. *See Golden Hill Paugussett Tribe of Indians v. Weiker*, 39 F.3d 51, 57-60 (2d. Cir. 1994). The Interior Department finally acknowledged the Nation's status in 2010. Indian Entities Recognized…, 75 Fed. Reg. 66124 (Oct. 27, 2010). The history of much of that 32-year quest for "recognition" is recounted in *Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599 (E.D.N.Y. Sept. 30, 2008). The Nation was only able to plausibly assert standing to file its NIA claim in 2005 because its

III. Non-Intercourse Act.

A. The NIA Establishes a Fiduciary Obligation.

The United States incorrectly characterizes the duty the federal government owes Indian tribes under the NIA. Describing the government's trust duty as "discretionary," the United States cites inapposite cases such as *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1483 (D.C. Cir. 1995), which concerned the government's limited responsibilities under a treaty and a different federal statute, and which expressly distinguished the NIA. In *Inupiat Community of Arctic Slope v. United States*, 680 F.2d 122 (Ct. Cl. 1982), the court's only engagement with the NIA was a statement that the Act did not waive the government's sovereign immunity. *Id.* at 131. Its discussion of Congress' "discretion" "to protect or fail to protect" the land in which the Inupiats held "unrecognized aboriginal title," *id.* at 129, is unrelated to the obligation Congress affirmatively undertook with the NIA. *Heckman v. United States*, 224 U.S. 413 (1912), held that the federal government has the "capacity to prosecute" a suit concerning Indian title, acting pursuant to its own interests, *id.* at 437, 444; the Court did not consider the government's obligations to Indian tribes under the NIA.

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status under federal common law was in the process of being determined in unrelated litigation. *See New York v. Shinnecock Indian Nation*, 400 F.Supp.2d 486 (E.D.N.Y. 2005).

The United States' citation to *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), is misleading. The Court stated that the NIA was "not applicable to the sovereign United States" in the sense that the United States itself, or its authorized licensee, can acquire Indian lands by eminent domain regardless of the NIA's restrictions. *Id.* at 120. The federal government's ability to acquire or authorize the acquisition of Indian land is irrelevant to the question of its duties when Indian land is acquired without such authorization.

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), did not hold that the government's obligations under the NIA were "discretionary," as the United States now suggests. *Passamaquoddy* held the NIA "acknowledge[s] and guarantee[s] the Indian tribes' right of occupancy, … and 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." *Id.* at 379. Acknowledging that the actions required of a trustee can vary according to the circumstances is not the same as holding the trustee has unreviewable discretion, in particular circumstances, freely to act in support of the principal's interests, or to not act, or to act contrary to the principal's interests.

The United States' comparison of the NIA to the Indian Mineral Leasing Act ("IMLA") is misplaced. The IMLA handed control over mineral leasing to Indian tribes and limited the formerly expansive role of the federal government, and the

Supreme Court therefore concluded it imposed no fiduciary duty upon the government to ensure the fairness of a mineral lease. *United States v. Navajo Nation*, 537 U.S. 488, 494, 506-08 (2003) ("*Navajo I*"). Nor is the NIA comparable to the General Allotment Act, which directed that the Indian tribe or Indian allottee was principally to control the asset in question, and federal involvement was limited to subsidiary aspects of the asset's management. *United States v. Mitchell*, 445 U.S. 535, 544 (1980) ("*Mitchell I*"). Instead, the NIA "imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act." *Passamaquoddy*, 528 F.2d at 379. The trust duty is inherent in the NIA. However, neither that duty nor the relationship from which it arises was created by the NIA itself. Rather, the relationship and consequent duty predate the inception of the United States.

The fiduciary duties embedded in the NIA must be construed against the long historical backdrop of the fiduciary relationship between the Indian tribes and the British Crown and colonies and the government of the fledgling United States. The restraint on alienation was first imposed by the British Crown in the Royal Proclamation of 1763 and was applicable to all of the colonies, including what later became the United States. The Supreme Court of Canada explained in a seminal decision (fully applicable in relevant regard to the United States' relationship with Indian tribes within its borders) that a "distinctive fiduciary

obligation" is necessarily inherent in the trustee nations' treatment of tribal lands, "since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown [in the Royal Proclamation of 1763] was to facilitate the Crown's ability to represent the Indians in dealings with third parties." *Guerin v. R.*, [1984] 2 S.C.R. 335, para. 93 (Can.). *See also Johnson v. M'Intosh*, 21 U.S. 543, 594 (1823) (describing the Royal Proclamation of 1763). The U.S. Supreme Court early recognized that this relationship, and the duty to exercise fiduciary care to protect Indian tribes' interests in any conveyance of Indian lands, were carried forward when the United States formed and the first Congress enacted the Indian Trade and Intercourse Act of July 22, 1790. *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832). The 1834 version of the NIA, still in effect today, retains the same fiduciary relationship and duties. *Passamaquoddy*, 528 F.2d at 379; *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996); *United Sates v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984).[3] *See also Guerin v. R.*, paras. 78-81 (describing similar continuity from Royal Proclamation of 1763 to § 18 of Canada's present Indian Act).

[3] *See also Seneca Nation of Indians v. United States*, 173 Ct.Cl. 917, 925 (1965) (interpreting the "language, contemporaneous construction, and history" of the NIA to discover the responsibilities therein assumed by the government); *United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 942-43 (Ct. Cl. 1973).

Thus, while the NIA does not expressly state that the government must consider the needs and best interests of the Indian tribal landowner, the statute has always been understood as mandating that responsibility. With the fiduciary trust responsibility toward Indian lands firmly established as inherent in the statute, the statute need not expressly state the government's specific duties. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). Instead, the government's obligations can be based on a "fair inference" drawn from the facts and the fundamental common law of trusts. *Id.*[4] The "fair inference" required in *White Mountain* is consistent with the Court's statement in *Navajo I* (decided the same day as *White Mountain*) that the substantive source of law should "establish specific fiduciary or other duties." *Navajo I*, 537 U.S. at 506. In short, the NIA establishes that the government owes to Indian tribes the duty to protect tribal land from unfair or unapproved conveyances.

B. The NIA is Money-Mandating.

Congress codified the federal fiduciary responsibility toward Indian lands by mandating the tight control of any conveyance. "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation

[4] In *White Mountain*, the Court used a "fair inference" test informed by common law trust principles not only to conclude that the government should be liable in damages for breach, as acknowledged in *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009) ("*Navajo II*"), but also at the first stage, to identify the government's duty itself. *White Mountain* at 475; *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2325 (2011).

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. Congress reserved to itself alone the power to convey in any fashion any Indian tribal lands. The government's control is not "elaborate," as it was in *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"), but it is express and absolute control over the most important stick in the bundle of rights and the *only* one relevant to the Nation's NIA claim, the right to convey the property. By reserving for itself this control over the right to convey Indian lands, Congress confirmed the federal government's fiduciary role with respect to tribal land ownership. "All of the necessary elements of a common-law trust are present: a trustee (the United States) a beneficiary ([the Nation]), and a trust corpus (Indian … lands …)." *Mitchell II* at 225. "Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Id*. (brackets and quotation marks omitted). "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.* at 226.

The decisions under the Indian Claims Commission Act ("ICCA") finding liability for NIA breaches point to the same conclusion. Section 2 of the ICCA authorized the Indian Claims Commission (and, on appeal, the Court of Claims) to hear five categories of claims, each set forth in a numbered clause. Pub. L. No. 79-726, ch. 959 § 2, 60 Stat. 1049 (1946). In cases such as *Seneca Nation of Indians v. United States*, 173 Ct.Cl. 917 (1965), the Court of Claims held that damages were available for breach of the government's NIA duty based on Clause 3. Clause 3 provides jurisdiction for the "claims which would result" if a treaty, contract, or other agreement were revised in equity. The language, "claims which would result," contemplates a claim that would arise under one of the other bases of ICCA jurisdiction: "claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President" (Clause 1, similar to the Tucker Acts); "all other claims in law or equity" (Clause 2); and claims arising from the government's failure to pay the agreed amount for lands it has taken from the claimant (Clause 4).[5] In *Seneca*, the Court of Claims held that damages were available under Clause 3: treating the land-sale agreement as if it were between the Senecas and the United States, the agreement, so revised, would represent a breach of the United States' fiduciary responsibility to the Senecas.

[5] The term "claims which would result" does not, however, encompass claims arising under Clause 5, because this category of claims was expressly beyond "any existing rule of law or equity."

That fiduciary responsibility arose from the NIA, as the Court of Claims explained in detail. *Seneca* at 922-27. Thus, the "claim which would result" after revising the agreement was a claim for breach of the United States' duties under the NIA – a claim "arising under the … laws … of the United States." The Court of Claims held the Senecas could recover money for such a claim if they proved their allegations. The substantive source of law, the NIA, gave rise to a claim for damages.

In this case, the Nation asserts an identical claim: a breach of the United States' duties under the NIA.[6] The NIA is the same in 2014 as it was when the Court of Claims decided *Seneca* in 1965; the United States has not cited any decision overruling *Seneca* or holding the NIA is not money-mandating. The NIA remains a statute that mandates monetary damages as a remedy for the government's breach. The Nation's claim under the NIA is therefore cognizable under the Tucker Acts.

IV. Common Law Claim.

The Tucker Act waives the United States' sovereign immunity for claims within its terms. *Mitchell II*, 463 U.S. at 212-216. It "allows plaintiffs to sue the

[6] In determining whether the law provides a claim for damages, "[t]he important factor is the existence of administrative error or wrong leading to injury, not the specific character of the particular defect." *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009, n.9 (Ct. Cl. 1967). Therefore it is immaterial to the conclusion that the NIA is "money mandating" that the particular breach alleged here is a court's refusal to hear the Nation's NIA claim.

United States for claims founded upon the Constitution, Acts of Congress, agency regulations, contracts with the United States, 'or for liquidated or unliquidated damages in cases not sounding in tort.'" *Banks v. United States*, 741 F.3d 1268, 1275-76 (Fed. Cir. 2014), quoting 28 U.S.C. § 1491. Because the Tucker Act unequivocally provides a waiver, it is unnecessary to find a second waiver in the substantive law on which a claim under the Tucker Act is founded, and the rule of strict construction often applicable to waivers of sovereign immunity does not apply to the substantive source of law. *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. at 472-73; *Mitchell II* at 218-19.

A. The Tucker Act Waives the United States' Immunity from Non-Tort Common Law Claims for Damages

The United States does not identify any Supreme Court decisions holding the Tucker Act's grant of jurisdiction over claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. § 1491(a)(1), is not a grant of jurisdiction to hear claims based on common law. The cases cited simply repeat the familiar pronouncement that a claimant must identify a substantive source of law that creates a right enforceable against the United States remediable by money damages, and then deal only with constitutional, statutory, or regulatory provisions. *See* Response Br. at 30-32, citing *Navajo I*, *Navajo II*, and *Jicarilla*

Apache Nation. None of these decisions directly confront the "fourth class" of Tucker Act cases.

The United States also relies on two lower court decisions, neither of which is persuasive. The Nation addressed the infirmities of *Ramirez v. United States*, 36 Fed. Cl. 467 (1996) in its opening brief. *Inupiat*, 680 F.2d 122, is similarly unhelpful. There the court held that the "liquidated or unliquidated damages" clause added nothing to the jurisdiction granted under the other portions of the Tucker Act. *Id.* at 131-32. The court did not attempt to explain its reasons. It stated only that it did *not* adopt a commentator's gloss that the purpose of the "liquidated or unliquidated damages" clause is simply to clarify that an action under the Tucker Act "'may seek unliquidated damages as well as sums illegally exacted or amounts fixed by contract.'" *Id.*, quoting 1 James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.65[2.-3] at 700.112 n.39 (2d ed. 1982). Not only did the Court of Claims in *Inupiat* expressly refuse to interpret the Tucker Act's "liquidated or unliquidated damages" language to be as meaningless as the Moore treatise had urged, but subsequent revisions of *Moore's Federal Practice*, including the current edition, have dropped the interpretation altogether. *See* 16 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 105.25 (3d ed. 2014).

Neither the United States nor the authorities on which it relies offer any explanation why the "liquidated or unliquidated damages" clause does not

establish a "fourth class" of claims cognizable under the Tucker Act, as the Supreme Court held long ago. *Dooley v. United States*, 182 U.S. 222, 224 (1901). The Supreme Court also specifically held in *Dooley* that the words "not sounding in tort" refer "only to the fourth class of cases." *Id.* The alternative construction would have the whole clause, "or for liquidated or unliquidated damages not sounding in tort," modify the first three clauses, which is contrary to *Dooley*. This construction also effectively eliminates the word "or" from the beginning of the clause, a word that indicates what follows is part of an ongoing list, and not a modifier for what comes before. It is inconsistent with the principles of statutory interpretation known as *noscitur a sociis*, that "words grouped in a list should be given related meaning," *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990), and *ejusdem generis*, which means that where a general term follows an enumeration of more specific terms, the things embraced in the general term are of the same kind as those denoted by the specific terms. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994). In the Tucker Act, the first three clauses describe types of claims within the jurisdiction of the CFC, and the list then concludes with a final item. Statutory construction principles tell us the final term in the list is of the same type as the other terms: a variety of claim within the CFC's jurisdiction. It does not introduce an entirely new subject absent from the surrounding context. The only reading of § 1491(a)(1) that follows the rules of

statutory construction rules and the basic principle that courts should "give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883), and that adheres to the limited Supreme Court precedent addressing the "fourth class" of claims, is to conclude that the Tucker Act gives the CFC jurisdiction to hear claims for damages against the United States arising under federal common law, except for any such claims sounding in tort.

The statutory canon calling for strict construction of waivers of sovereign immunity "is a tool for interpreting the law" that does not "displace[] the other traditional tools of statutory construction." *Richlin Sec. Service Co. v. Chertoff*, 553 US. 571, 589 (2008). Where, as here, there is "no ambiguity left … to construe," there is no need "to resort to the sovereign immunity canon." *Id.* Moreover, "strict construction does not mean strained construction," *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989), and "strict construction does not mean absolute destruction." *Mengel Co. v. United States*, 20 C.C.P.A. 399, 405 (1933). The United States urges a construction of the Tucker Act that is not even minimally plausible, disregarding the structure, context, and actual words of the Act. The Supreme Court has repeatedly rejected the government's persistent efforts to tortuously construe anything related to waivers of sovereign immunity in the name of "strict" construction. *E.g.*, *Dolan v. U.S. Postal Service*, 546 U.S. 481, 491-92 (2006); *see* Gregory C. Sisk, *Twilight for the*

Strict Construction of Waivers of Federal Sovereign Immunity, 92 N.C. L. Rev. 1245 (2014).

B. The UNDRIP is Evidence of Binding Customary International Law, Incorporated into Federal Common Law.

The United States does not respond to the substance of the relevant provision of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), which, as described previously, calls for "monetary compensation" for violation of the legal rights articulated therein. UNDRIP, art. 28.2. On remand, the CFC will evaluate the UNDRIP as evidence relevant to determining the content of binding customary international law, which is incorporated into federal common law (regardless of any subsequent labeling of the document as "aspirational") if the government has not "dissociated itself" during the law's formation. *See* Restatement (Third) Foreign Relations Law §§ 102, 103, 111 (1987).[7]

None of the lower court cases cited by the United States considered the question of treating claims growing out of customary international law as federal

[7] The United States recently reaffirmed its commitment to the rights UNDRIP protects by joining the General Assembly's adoption of the Outcome Document of the World Conference on Indigenous Peoples, G.A. Res. 69/2, U.N. Doc. A/RES/69/2 (Sept. 25, 2014) (e.g., para. 21, recognizing the "commitments made by States, with regard to the [UNDRIP], to establish at the national level … processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources.").

common law claims. Instead, they were analogized to claims arising from treaties or implied contracts. *Gimbernat v. United States*, 84 Fed.Cl. 350, 354 & n.2 (2008); *Miller v. United States*, 67 Fed.Cl. 195, 199-200 & n.3 (2005); *Phaidin v. United States*, 28 Fed.Cl. 231, 234 n.1 (1993). Nor did these cases involve Indian tribal claimants, who are not precluded from bringing treaty-based claims. 28 U.S.C. § 1505.

V. Judicial Taking Claim.

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

The Takings Clause protects the right to sue for compensation for the loss of a constitutionally protected property right. *Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004) (citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994)); *In re Aircrash in Bali, Indon.*, 684 F.2d 1301, 1312 & n.10 (9th Cir. 1982).

The United States asserts that notwithstanding these cases, a cause of action is not covered by the Takings Clause "until it is reduced to a final unappealable judgment." Response Br. at 37-38. The Nation previously distinguished all the cases on which the United States relies (Opening Br. at 44-45 & n.5), except *Axel Johnson Inc.*, *supra*, 6 F.3d 78. *Axel Johnson Inc.* was not a taking case; the cited portion focused on due process and separation of powers. *Id.* at 83. The case is inapposite because characterizations of particular rights as "'property interests'

within the meaning of the Due Process Clause … have no relevance to whether they are 'property' under the Takings Clause." *Adams v. United States*, 391 F.3d at 1220 n.4.[8]

The Nation's point is not that it is "inequitable," Response Br. at 39, but that it is *illogical* (as well as contrary to precedent) to assert that the right embodied in a cause of action can never be property compensable under the Constitution until the cause of action is reduced to final judgment. In addition to the explanations given in the Nation's prior brief, this is so because at that stage the property is no longer the cause of action – it is the judgment itself, into which the cause of action has merged (from a winning plaintiff's perspective) or which bars the cause of action (for a winning defendant). The recipient of a judgment award owns that judgment as property. But before judgment, a plaintiff owns only the claim. The recognition that a claimant can allege a compensable property interest in the form of a cause of action, as in *Alliance of Descendants*, *In re Aircrash*, and others, e.g. *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (majority opinion), 691 (Powell, J., concurring and dissenting in part) (1981), necessarily means the property

[8] The "separation of powers component" in *Axel Johnson Inc.* only concerned the limits of legislative action against a final judgment, *if* the judgment is protected for due process purposes. *Axel Johnson Inc.* at 83-84.

interest exists and is compensable before final judgment, at which time the cause of action, and any property rights it embodies, merges with the judgment.[9]

B. The CFC Has Jurisdiction to Award Compensation for Property Taken by a Federal Court.

The Nation does not ask this Court or the CFC to sit in direct review of the district court, or to overturn its judgment. The Nation's claims in this action accept the district court's judgment as it stands, and move on to the question of the judgment's consequences. The Nation asserts that as a result of issuing the judgment, the government is required to pay damages for breach of its duty, and compensation for taking the Nation's property. The CFC, exercising its jurisdiction under the Tucker Act, is the exclusive forum for hearing such claims. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1344 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003).

In *Boise*, a district court had enjoined the plaintiff corporation from certain logging activities without a permit. The U.S. Fish and Wildlife Service then

[9] The United States erroneously claims Congress can freely shorten a statute of limitations anytime until there is a final, unappealable judgment, and therefore the Nation's land claim cannot have been protected before a decision in its favor. Response Br. at 39-40. In fact, Congress may shorten a statute of limitations (or establish a new one) only if it gives potential plaintiffs a "reasonable time" to commence an action before the new bar takes effect. *Terry v. Anderson*, 95 U.S. 628, 632-33 (1877); *Union Mfg. Co., Inc. v. U.S. Intern. Trade Com'n*, 781 F.2d 186, 189-90 (Fed. Cir. 1985). Only by allowing a reasonable time does the government avoid a taking, requiring just compensation. *Littlewolf v. Hodel*, 681 F.Supp. 929, 944 (D. D.C. 1988).

determined the permit was no longer required, and the district court lifted the injunction. Boise sued the government in the CFC, "seeking just compensation for the 'temporary taking of merchantable timber, which it was prevented from logging' due to the injunction…." *Boise* at 1342. The United States argued, just as it does in this case, that the CFC lacked jurisdiction over Boise's taking claim because it would require the court to "review the merits of a decision made by a United States district court." *Boise* at 1343-44 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995); *Vereda, Ltda. v. United States*, 271 F.3d 1367 (Fed. Cir. 2001); and *Allustiarte v. United States*, 256 F.3d 1349 (Fed. Cir. 2001)). But the Federal Circuit disagreed, holding that "[b]ecause the takings claim does not require the trial court to review the district court's actions, there is no constitutional defect in the Court of Federal Claims' assertion of jurisdiction over this case." *Boise* at 1344.

Boise distinguished the same cases on which the United States now relies. In *Allustiarte*, 256 F.3d 1349, the CFC lacked jurisdiction over a takings claim based on alleged errors by a court-appointed bankruptcy trustee. *Allustiarte* at 1351. The claim was dismissed because, unlike in *Boise* and this case, it required the court to review the merits of the district court's decision. *Id.* at 1352; *Boise* at 1345.

Vereda, 271 F.3d 1367, and the more recent *Innovair Aviation Ltd. v. United States*, 632 F.3d 1336 (Fed. Cir. 2011) (which the United States cites, Response Br. at 40 n.9), held the CFC's jurisdiction over certain takings claims was preempted by the comprehensive authority given to district courts by the Controlled Substances Act ("CSA"). *Vereda* at 1374-75; *Innovair* at 1343. The CSA gave district courts – not the CFC – jurisdiction to review the merits of administrative forfeitures and provided mechanisms for district courts to provide just compensation for property the government had wrongfully seized. *Vereda* at 1375, *Innovair* at 1344; *see Boise* at 1344-45. The takings claims were based on an allegedly invalid forfeiture of property (*Vereda* at 1374) and an allegedly insufficient amount of compensation following an admittedly invalid forfeiture of property (*Innovair* at 1344). Under the CSA, the CFC was not free to determine "the correctness" of the forfeiture (*Vereda* at 1375), or to alter the amount the district court awarded as just compensation for the wrongful forfeiture (*Innovair* at 1344).

In the instant case, there is no comprehensive statutory scheme that shifts the jurisdiction to hear taking claims from the CFC to the district courts. As in *Boise*, "the Court of Federal Claims is the *only* forum in which [the Nation's] takings claims could have been brought." *Boise* at 1345. Whether the judgment caused a taking of the Nation's property was not before the district court, nor could it have

been. *See id.* at 1344. The Nation's taking claim "is not based on the propriety of the district court's decision, and the trial court therefore would not be called upon the review the merits of the district court's decision in order to decide the merits of [the Nation's] claim." *Boise* at 1345. The issues for the trial court are whether the district court has declared that what was once the Nation's established right of private property no longer exists, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Resources*, 560 U.S. 702, 717 (2010) (opinion of Scalia, J.), and, if so, what amount will justly compensate the Nation for the taking.

The *Boise* Court identified one other feature that distinguished *Allustiarte*: the federal government "chose to effectuate its mandate to enforce the [Endangered Species Act] through a court action…." *Boise* at 1345. The district court fulfilled its role when it decided the agency was entitled to the injunction it sought. The fact that the government acted via this route, "rather than through an agency cease and desist order, for instance, cannot insulate the United States from its duty to pay compensation that may be required by the Fifth Amendment." *Id*. This reflects the constitutional principle on which Justice Scalia based his plurality opinion in *Stop the Beach*: "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.) (emphasis original). *See Texas v. Brown*, 460 U.S. 730, 737 (1983) (although plurality opinion is "not a binding

precedent, as the considered opinion of four Members of the Court it should obviously be the point of reference for further discussion of the issue").

There is no basis to limit judicial taking claims only to those situations where the executive branch initiated the action resulting in the order in question. Indeed, the Ninth Circuit found a compensable taking in the Hawaii Supreme Court's *sua sponte* declaration that the state would henceforth follow the English common law doctrine of riparian rights. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1470, 1474 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986), and case dismissed as unripe, 887 F.2d 215, 219 (9th Cir. 1989). Such a limitation would mean that takings of the type alleged here would *always* be insulated from the duty to pay compensation, ignoring the mandate of the Fifth Amendment.

As for the concern that takings claims will overwhelm the CFC, one must presume the federal courts will not routinely eliminate established property rights on the public's behalf. To the extent losing litigants advance implausible judicial takings claims, "ordinary protections against frivolous litigation must suffice." *Dolan*, 546 U.S. at 491.

CONCLUSION

The Nation asks the Court to reverse and remand, allowing adjudication of all the Nation's claims on their merits.

Respectfully submitted,

Dated: October 20, 2014 by: /s/ Steven J. Bloxham

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FORM 30. Certificate of Service

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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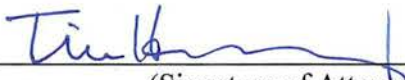

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