IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on November 4, 2015)

WYANDOT NATION OF KANSAS, a/k/a/ WYANDOT TRIBE OF INDIANS,	)	
Plaintiff,	)	No. 15-560L
v.	)	Hon. Thomas C. Wheeler
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S MOTION TO FILE A SUR-REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S REPLY BRIEF

Pursuant to Rule 1 of the Rules of the U.S. Court of Federal Claims, plaintiff, WYANDOT NATION OF KANSAS, a/k/a/ WYANDOT TRIBE OF INDIANS, respectfully requests the Court for leave to file the attached 16-page sur-reply memorandum in opposition to defendant's reply brief. Plaintiff's counsel has been advised that defendant, UNITED STATES OF AMERICA, does not consent to this motion.

Plaintiff's motion is based on two main points: First, defendant's reply brief raises, for the first time, the issues of standing, timeliness of claims and subject matter

jurisdiction as grounds for dismissal. It is procedurally improper for the government to argue these issues for the first time in a reply pleading after declining to do so in its moving papers. This denies plaintiff the opportunity consider and respond. Second, should the Court consider the untimely arguments, the new positions taken by the Government are without merit.

Accordingly, plaintiff respectfully requests that the Court grant this motion for leave to file the attached 16-page sur-reply brief in response to defendant's reply brief.

Dated: November 4, 2015

Respectfully submitted,

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I. INTRODUCTION

In its Reply Memorandum of Points and Authorities in Support of Motion to Dismiss, the United States for the first time raises certain defenses against Plaintiff's action. This has necessitated Plaintiff's filing of a Sur-Reply. For the reasons set forth in detail below, the defenses raised by the Government are unavailing, and its motion to dismiss must be denied.

II. ARGUMENT

B. PLAINTIFF HAS STANDING TO MAINTAIN ITS CLAIMS REGARDING THE HURON CEMETERY

1. The United States Is Foreclosed From Raising the Standing Issue at this Late Date

In its Reply Memorandum, the United States for the first time raises the issue of standing as a defense against Plaintiff's claims in regard to the Huron Cemetery. The Government did not raise the standing defense in its motion to dismiss nor has it filed for leave to amend its motion to dismiss to include this defense.

This Court has previously stated that it "will not consider arguments that were presented for the first time in a reply brief[.]" *Arakaki v. United States*, 62 Fed. Cl. 244, 246 n. 9 (2004). This includes arguments that challenge the plaintiff's standing. *L-3 Communications EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 651 n. 6 (2008), *appeal dismissed*, 356 Fed. Appx. 390 (Fed. Cir. 2009).

Because the United States raised the issue of standing for the first time in its Reply Memorandum, the Court should disregard this defense as untimely raised. *See id.*;

Arakaki, 62 Fed. Cl. at 246 n. 9. Hence, Plaintiff's Huron Cemetery claims are not subject to dismissal on the basis of lack of standing.

2. Plaintiff Has Standing to Assert Its Huron Cemetery Claims

Even if the Court should consider the issue of standing, it must be concluded that Plaintiff has standing to assert its claims pertaining to the Huron Cemetery. Contrary to the Government's contentions, Plaintiff is, in fact, a federally recognized Indian tribe that has a beneficial ownership interest in the Huron Cemetery lands.

In both its Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, Plaintiff clearly demonstrated that its tribal existence as a federally recognized Indian tribe has never been extinguished by Congress. As explained in those pleadings, the 1867 Treaty established federal recognition of Plaintiff's status as an Indian tribe. The United States is unable to point to any Act of Congress that extinguished this federal recognition. Indeed, on page 7 of its responsive memorandum, the United States even admits that the tribe created under the 1867 Treaty is, in fact, federally recognized.

As discussed in Plaintiff's Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, an Indian tribe need not have a constitution and bylaws under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, to be federally recognized as an Indian tribe. Indeed, the largest tribe in the United States, the Navajo Nation, exists as a federally recognized tribe without an IRA constitution and bylaws. *See Chavez v. Navajo Nation Tribal Cts.*, 465 Fed. Appx. 813,

813 (10th Cir. 2012); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1210 (9th Cir. 2008); *Navajo Nation v. United States*, 347 F.3d 1327, 1328 (Fed. Cir. 2003), *on remand*, 68 Fed. Cl. 805 (2005), *order rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *judgment rev'd & remanded*, 556 U.S. 287 (2009).

Rather, as discussed in Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss, Plaintiff meets the definition of an Indian tribe, as set forth in the 1994 American Indian Trust Fund Management Reform Act ("Trust Fund Management Reform Act"), 25 U.S.C. § 4001. Plaintiff is eligible for and actually receives special services from the United States due to tribal members' status as Indians. See Verified Complaint, Doc. 1, ¶ 44. As a result, Plaintiff qualifies as an Indian "tribe" within the meaning of Trust Management Reform Act. *See* 25 U.S.C. § 4001(2).

Next, the United States incorrectly contends that the Department of the Interior holds the Huron Cemetery lands in trust for the Wyandotte Nation of Oklahoma[1] and not Plaintiff. In support of this contention, the United States mistakenly relies on *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, *Wyandotte Nation v. Sac & Fox Nation of Mo.*, 534 U.S. 1078 (2002), and *City of Kansas City, Kan. v. United States*, 192 F. Supp. 179 (D. Kan. 1960).

[1]As pointed out in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the official name of the Oklahoma Tribe in Article 1 of its federally recognized Constitution is the "Wyandotte Tribe of Oklahoma" and not, as the United States suggests, the "Wyandotte Nation of Oklahoma."

Contrary to the United States' contentions, *Sac & Fox Nation* did not hold that the Huron Cemetery is held in trust solely for the Oklahoma Wyandottes. The case simply held that the Huron Cemetery was not set aside for purposes of occupation by tribal members and, therefore, was not an Indian reservation of the Oklahoma Wyandottes within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719. *Sac & Fox Nation*, 240 F.3d at 1267.

Notably, *Sac & Fox Nation* did not consider the 1923 Act acknowledgment of the Huron Cemetery as an Indian Reservation. As discussed in Plaintiff's Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, that Act clearly provided the Huron Cemetery was the Indian reservation of the Conley sisters, who were wards of the Government and members of the Wyandotte Tribe of Indians.

In *Conley v. Ballinger*, 216 U.S. 84, 90 (1910), the United States Supreme Court stated that the Huron Cemetery "remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use by the Wyandottes." In other words, the land was held in the name of the United States in trust for the Historic Wyandott Nation. As discussed in Plaintiff's previous pleadings, the Historic Wyandott Nation was later replaced by the "Wyandotte Tribe of Indians" pursuant to Article 13 of the 1867 Treaty, and then later changed its name to the "Wyandot Nation of Kansas."

As the foregoing facts demonstrate, *Sac & Fox* is not directly relevant to the present case. Instead, that case applied only to the parties to that action. The Wyandot Nation of Kansas was not a party to the action. *See Sac & Fox Nation*, 240 F.3d at 1250.

The Government's reliance on *City of Kansas City, Kan.* is similarly misplaced. That case merely followed the holding in *Conley* that the ownership of the Huron Cemetery is in the Wyandotte Tribe of Indians as a whole and not in any individual members of the tribe. *City of Kansas City, Kan.*, 192 F. Supp. at 182.

Further, the fact that the Oklahoma Wyandottes have been federally recognized does not, as the Government suggests, somehow serve to extinguish the treaty rights of the Wyandot Nation of Kansas. The Oklahoma Band of the Wyandotte Tribe of Indians made the discretionary decision to separate from the tribe and reorganize as a separate tribe under the 1936 Oklahoma Indian Welfare Act ("OIWA"). Under the OIWA, "any recognized tribe or band of Indians *residing in Oklahoma*" has the right to "organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." 25 U.S.C. § 503 (emphasis added). This provision "merely provides statutory authority for a federally recognized Indian tribe *residing in Oklahoma* to organize and adopt a constitution and bylaws under rules and regulations prescribed by the Secretary of the Interior[.]" *Cheyenne-Arapahoe Tribes of Okla. v. Beard*, 554 F. Supp. 1, 3 (W.D. Okla. 1980), *declined to follow on other grounds*, *Kaw Nation v. Springer*, 341 F.3d 1186 (10th Cir. 2003) (emphasis added).

The Kansas band of the Wyandotte Tribe of Indians reside in Kansas and not in Oklahoma. Therefore, the Kansas band was not qualified to join in the reorganization of the Oklahoma band under the OIWA. *See id.*; *see also* 25 U.S.C. § 503. The members of the Kansas band did not participate in the 1937 referendum vote and instead continued their separate, federally recognized tribal existence as the Wyandot Tribe of Indians under the 1867 Treaty. (*See* Certification of Adoption of the OIWA Constitution and Bylaws of the Wyandotte Tribe of Oklahoma at http://www.loc.gov/law/help/american-indian-consts/PDF/37028936.pdf).

Thus, in 1937, a new tribe called the Wyandotte Tribe of Oklahoma was created under the OIA. The Wyandots who remained in Kansas did not become part of this new tribe but rather continued their existence as the original Wyandot Tribe of Indians. *See* Comments & Notes, *"Miami County Vice" &"Why Not the Wyandottes?": Two Tales of the Struggle to Bring New Indian Gaming Facilities to Kansas*, 68 UMKC L. Rev. 711, 731-36 (Summer 2000).

Contrary to the Government's suggestions, the Oklahoma band is not the only Indian tribe that can have treaty rights under the 1867 Treaty. It is common for bands of Indian tribes to separate. In such instances, all bands retain existing treaty rights. For example, the seven Sioux Teton bands that were parties to the 1851 and 1868 Ft. Laramie treaties separated and now reside on different Indian reservations, and yet all bands claim rights under both treaties. *See Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468, 471-81 (1985).

Finally, the United States misapprehends the significance of the "Brownback Amendment," Public Law 105-83 (111 Stat. 1543). Although the Amendment does not expressly address the beneficial ownership of the Huron Cemetery, the Amendment specifically limits the permissible uses of the Cemetery to religious and cultural purposes and for a burial ground.

The significance of the Brownback Amendment becomes apparent when the historical context in which this Amendment was passed is considered. In 1997, the Oklahoma Wyandottes "made public [the] tribe's plan to build a high-stakes bingo hall directly 'over' the Huron Cemetery." Comments & Notes, 68 UMKC L. Rev., at 734. The Kansas band of Wyandots strongly opposed this proposed use of the Huron Cemetery:

> Also opposed to the Huron Cemetery site were members of the Wyandot Nation of Kansas, who supported the State of Kansas and the Kansas City, Kansas government in a lawsuit against the [Oklahoma] Wyandottes to determine who had rights to the land. The Wyandot Tribe also claimed an interest in the land, though it had no gaming plans. *Instead, the Wyandot Tribe opposed the [Oklahoma] Wyandottes because it considered the casino plans an affront to their culture and the memory of Wyandot ancestors*. "From a cultural and emotional standpoint, [the Huron Cemetery casino plan] shows no respect or honor to our elders. To abandon one's family and traditions for financial gain is . . . repulsive."

Id. at 735 (footnotes omitted & emphasis added).

Due to the opposition of the Kansas band and the State against the Oklahoma band's plan to build a casino over the Huron Cemetery, a protracted legal battle ensued. "The opposition won round one when U.S. Senator Sam Brownback of Kansas managed

to attach an amendment to an appropriations bill which contained a provision prohibiting the use of the Huron Cemetery as anything but burial grounds." *Id.* at 736 (footnote omitted). In July 1998, the Oklahoma Wyandottes acquiesced to this legislation by reaching an agreement with the Kansas band to reserve the Huron Cemetery only as a burial ground. *Id.* (footnote omitted).

In 1998, Alaska Representative Don Young introduced legislation that would compensate the Oklahoma band for the 1997 "taking" of the use of the Huron Cemetery that was effected by the Brownback Amendment. *Id.* (footnote omitted). Kansas Representative Vince Snowbarger objected to this proposed legislation on the grounds that it would be inappropriate for Congress to "arbitrarily choos[e] one tribe," *i.e.*, the Oklahoma band, "over the other," *i.e.* the Kansas band. *Id.* (footnote omitted).

This legislative history clearly demonstrates that Congress never intended for the Oklahoma band to be recognized as the sole beneficial owner of the Huron Cemetery. Rather, Congress recognized that the Oklahoma band of Wyandottes and the Kansas band of Wyandots were separate Indian tribes, and that each band had a beneficial ownership claim to the land. Further, through the adoption of the Brownback Amendment, Congress demonstrated a preference for the beneficial ownership interest evinced by the Kansas band of Wyandots. In direct contrast to the Oklahoma band, the Kansas band had maintained the firm desire to retain the Huron Cemetery as an ancestral burial ground and not to build a casino over that land.

For all of the above reasons, Plaintiff has standing to maintain its claims in regard to the Huron Cemetery. Plaintiff has at all times relevant to this action continued its existence as a federally recognized Indian tribe that has a beneficial ownership interest in the Huron Cemetery. The Government's arguments to the contrary are not well-taken and should be rejected outright.

B. PLAINTIFF'S HURON CEMETERY CLAIMS WERE TIMELY FILED

In incorrectly arguing that Plaintiff's claims pertaining to the Huron Cemetery are time-barred, the United States misapprehends the nature of those claims. Plaintiff is not, as the Government contends, asserting a trust *asset* mismanagement claim that is subject to a six-year statute of limitations that accrues from the date the beneficiary had knowledge of the trustee's repudiation. *See Shoshone Indian Tribe of the Wind River Reservation v. United States* ("*Shoshone IV*"), 672 F.3d 1031 1034-35 (Fed. Cir. 2012). Plaintiff is not seeking any declaration of ownership in the Cemetery lands. As discussed above, that issue was settled several years ago to Plaintiff's satisfaction. Rather, Plaintiff contends that the United States has failed to provide a full and accurate accounting of trust *funds* pertaining to those lands.

As the United States concedes, claims pertaining to the mismanagement of Indian trust *funds* are not subject to the general accrual rules enunciated in *Shoshone IV*. (Def's Reply Memo., p. 9.) Instead, the statute of limitations applicable to trust fund claims accrues only after the tribe receives an accounting of trust funds from the United States.

See 25 U.S.C. § 4044; *Osage Nation v. United States*, 57 Fed. Cl. 392, 398 (2003). Because Plaintiff has never received an accounting from the United States pertaining to the trust funds arising from the use of the Huron Cemetery lands, no statute of limitations has yet accrued on Plaintiff's Huron Cemetery claims. *See* 25 U.S.C. § 4044; *Osage Nation*, 57 Fed. Cl. at 398.

In addition, even if the general accrual rules enunciated in *Shoshone IV* are found to apply to this case, Plaintiff's Huron Cemetery claims were still timely filed. The attachment of a newspaper article containing a 1959 photo of the Cemetery as Exhibit B to the Complaint does not necessarily mean that Plaintiff knew of the encroachment in 1959. Further, the United States had complete control over the management of the Cemetery from 1857 to the present time.

Moreover, for the reasons set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss, the United States is estopped from asserting that Plaintiff's Huron Cemetery claims are time-barred. As the documents previously submitted to the Court in connection with the *Wyandot Nation of Kansas v. Norton* case plainly show, the Government expressly -- and repeatedly -- promised over a period of nine years to provide a complete accounting of Plaintiff's trust funds and non-monetary trust funds. Under such circumstances, the doctrine of equitable estoppel applies to bar the United States from claiming, as it is presently attempting to do, that Plaintiff's action is time-barred. *See Renz v. Beeman*, 589 F.2d 735, 750 (2nd Cir. 1978), *cert. denied*, 444 U.S. 834 (1979).

C. PLAINTIFF'S TRUST FUND MISMANAGEMENT CLAIMS WERE TIMELY RAISED

For the reasons asserted above, the United States is estopped from claiming that Plaintiff's trust fund mismanagement claims were not timely filed. *See id.* The Government's arguments concerning the statute of limitations and statute of repose should, therefore, be rejected.

In addition, the United States misapprehends and mischaracterizes Plaintiff's argument as to why the language of the 2015 appropriations act did not render Plaintiff's trust fund mismanagement claims untimely. Contrary to the Government's assertions, the appropriations acts of prior years did not change existing law but rather corresponded with and supplemented such laws. Those laws could not be repealed by implication merely through the absence of certain language in the 2015 appropriations act. *See Wolfchild v. United States*, 559 F.3d 1228, 1258 n. 13 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1086, *and cert. denied*, *Zephier v. United States*, 559 U.S. 1067 (2010); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1369 (Fed. Cir. 2002).

Next, the United States incorrectly asserts that it is an indisputable fact that the "Schedule A" trust funds in question were disbursed in the late 1880s and, therefore, that Plaintiff's claims are time-barred. This contention is fundamentally flawed. In this regard, it must be recognized that the Complaint describes amounts that the United States *claims to have paid* to the tribe. Plaintiff has nowhere admitted that such payments were actually made. Rather, Plaintiff has requested an accounting to ascertain whether and to

what extent payments were ever made by the Government to the tribe. Also, the question as to whether money was paid by the United States to the tribe goes to the quantum of relief to which Plaintiff is entitled and not to the validity of Plaintiff's request for an accounting and corresponding damages. *See* 25 U.S.C. § 4001; *Osage Nation*, 57 Fed. Cl. at 398.

The United States also incorrectly contends that Plaintiff is not a federally recognized Indian tribe to whom the 1994 Trust Fund Management Reform Act applies. As demonstrated above and in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, Plaintiff is, in fact, a federally recognized tribe. Thus, Plaintiff is within the "zone of interest" of the 1994 Act and is entitled to an accounting or reconciliation under that Act. *See* 25 U.S.C. § 4001(2).

Finally, the Government's suggestion that *Osage Nation* does not apply to the present case is not legally meritorious. First, the Government incorrectly attempts to use *Sioux Tribe v. United States*, 500 F.2d 458 (Ct. Cl. 1974), a case decided almost 30 years *before Osage Nation* to rebut this Court's holding in *Osage Nation*.

Old cases lack persuasive value if they conflict with later case law from this Court. *Westchester Fire Ins. Co. v. United States*, 52 Fed. Cl. 567, 582 n. 13 (2002). Thus, the Government cannot legitimately rely on the old *Sioux Tribe* case to negate the later-decided case of *Osage Nation*. Rather, *Osage Nation* trumps or takes preference over the *Sioux Tribe* case decided almost 30 years previously. *Westchester Fire Ins. Co.*, 52 Fed. Cl. at 582 n. 13.

Second, *Osage Nation* has never been overruled and remains valid law. In *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014), the Supreme Court generally discussed the differences between statutes of limitation and statutes of repose. Contrary to the Government's suggestion, nothing in *Waldburger*'s general discussion had the effect of overruling or negating any aspect of *Osage Nation*.

Finally, the Government's attempt to factually distinguish *Osage Nation* from the present case is unavailing. For the reasons discussed above and in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the absence of certain language in the 2015 appropriations act is insufficient to change or negate existing statutory law, specifically, the Trust Fund Management Reform Act, 25 U.S.C. §§ 4001 *et seq.* Accordingly, the 2015 appropriations act cannot be relied upon to render untimely Plaintiff's trust fund mismanagement claims.

As the foregoing analysis demonstrates, the United States has failed to show that Plaintiff's trust fund management claims were untimely filed. Hence, these claims are not subject to dismissal on statute of limitations ground.

D. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S ACCOUNTING CLAIMS.

The United States incorrectly asserts that because Plaintiff seeks an accounting from the Government in order to determine the amount of damages to which it is entitled, Plaintiff's claims are equitable in nature and, therefore, outside the subject matter jurisdiction of this Court. In making this argument, the United States overlooks the well-

established principle that although the Court of Federal Claims does not have jurisdiction to grant specific equitable remedies, "[t]his principle does not preclude courts from exercising equitable powers as an incident of our general jurisdiction." *Pauley Petroleum, Inc. v. United States*, 591 F.2d 1308, 1315 (Ct. Cl.), *cert. denied*, 444 U.S. 898 (1979); *see also Ambase Corp. v. United States*, 61 Fed. Cl. 794, 797 (2004); *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 488 (1966). The mere labeling of a claim as "equitable" in nature does not serve to divest the Court of jurisdiction. *Ambase Corp.*, 61 Fed. Cl. at 797.

Toward this end, the Court of Federal Claims "may order an accounting in conjunction with its jurisdiction to render a money judgment." *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 582 (1990); *see also Klamath & Modoc Tribes*, 174 Ct. Cl. at 490. The Court may exercise its equitable power to order an accounting as an incident of its general jurisdiction to award monetary damages to a claimant. *Klamath & Modoc Tribes*, 174 Ct. Cl. at 490. This is exactly the form of relief that Plaintiff has requested here.

Plaintiff seeks a monetary judgment from the Court for the Government's mishandling of various tribal trust fund accounts. In order to determine the amount of damages to which Plaintiff is entitled, an accounting from the United States is necessary. The Court has the authority to order such an accounting in conjunction with its jurisdiction to issue a monetary judgment in this case. *Cherokee Nation of Okla.*, 21 Cl. Ct. at 582; *Klamath & Modoc Tribes*, 174 Ct. Cl. at 490.

III. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the United States' motion to dismiss should be denied in its entirety.

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