IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on August 28, 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.	)	

MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES

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MOTION TO DISMISS

The United States moves, pursuant to Rules 7 and 12 of the Rules of the United States Court of Federal Claims, to dismiss plaintiff's complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim. Plaintiff's claims pertaining to trust funds disbursed no later than 1888, and alleged rights-of-way across land held in trust for a different tribe, are untimely under the statute of limitations. Further, this Court lacks subject-matter jurisdiction to adjudicate plaintiff's tribal membership claims, and, in any event, plaintiff has failed to state a claim upon which relief can be granted because the United States holds no funds or land in trust for plaintiff's benefit. This motion is based upon the accompanying memorandum of points and authorities and any arguments that may be advanced in reply, at argument, or with leave of Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of decisions made by the ancestors of plaintiff's members to terminate their trust status with the United States in 1855, and the disposition of trust property made by 1888. As a result of those acts disposing of trust property, the United States does not hold any funds or lands in trust for plaintiff's benefit. Accordingly, the United States owes plaintiff no statutory or regulatory fiduciary duties. Plaintiff, a non-federally recognized Indian entity, nonetheless seeks to advance claims arising out of payments called for under a treaty executed in 1867 that were paid out of trust by the government by 1888. Plaintiff also alleges an ownership interest in rights-of-way across a parcel of land held in trust by the government for another, federally-recognized, Indian tribe, and seeks damages for hypothetical income from those rights-of-way. Those rights-of-way were created in 1857 and were known or knowable to plaintiff by no later than 1959. These claims are patently untimely, are barred by the statute of

limitations, and are outside this Court's subject-matter jurisdiction. Also, to the extent the resolution of these claims would require this Court to become involved in plaintiff's membership dispute with the federally-recognized Wyandotte Nation of Oklahoma, that is a non-justiciable political question outside this Court's subject-matter jurisdiction. Finally, even if all of the factual allegations in plaintiff's complaint are accepted as true, plaintiff concedes that the United States holds no funds or lands in trust for its benefit and plaintiff therefore has failed to state a claim for "breach of trust" against the United States. Plaintiff's complaint should be dismissed in in its entirety.

II. QUESTIONS PRESENTED

1. Should plaintiff's complaint be dismissed for lack of subject-matter jurisdiction because plaintiff's claims are barred by the statute of limitations?

2. Should plaintiff's complaint be dismissed for lack of subject-matter jurisdiction because this Court cannot adjudicate political intra-tribal membership disputes?

3. Should plaintiff's complaint be dismissed for failure to state a claim because the United States holds no funds or assets in trust for plaintiff's benefit?

III. STANDARD OF REVIEW

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

The United States may assert by motion the defense of "lack of subject matter jurisdiction." Rules of the United States Court of Federal Claims ("RCFC") 12 (b)(1). If the Court, at any time, determines that it lacks subject-matter jurisdiction over a case or claim, it has to be dismissed. RCFC 12(h)(3).

Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is

plaintiff's responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)). Once the Court's subject-matter jurisdiction is put into question, it is "incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. . . . [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citation omitted); *accord M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. *Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (2009). When a motion to dismiss challenges the Court's subject-matter jurisdiction, the Court may also look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). The determination of whether this Court has subject matter jurisdiction to hear plaintiff's claims is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002).

B. Motion to Dismiss for Failure to State a Claim.

The United States may assert by motion that plaintiff's complaint fails to state a claim upon which relief can be granted. RCFC 12(b)(6). "The purpose of [Rule 12(b)(6)] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail . . . ." *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir.

1993) (citation omitted). "A dismissal for failure to state a claim . . . is a decision on the merits which focuses on whether the complaint contains allegations that, if proven, are sufficient to entitle a party to relief." *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) (citation omitted).

In resolving a Rule 12(b)(6) motion, the Court should assess whether plaintiff's complaint adequately states a claim for relief under the implicated statute and regulations and whether plaintiffs have made "allegations plausibly suggesting (not merely consistent with)" entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (rephrasing *Twombly* standard as requiring "a claim to relief that is plausible on its face"); *accord Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). Although plaintiff's factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). Plaintiff "must provide 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Twombly*, 550 U.S. at 555).

The Court thus "'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the non-movant'" to evaluate whether plaintiff has stated a claim upon which relief can be granted. *Chapman Law Firm Co. v. Greenleaf Const. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001)). "At the same time, a court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Acceptance Ins. Cos. v. United States*, 583

F.3d 849, 853 (Fed. Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

IV. RELEVANT BACKGROUND FACTS

The following facts are taken from plaintiff's complaint, ECF No. 1 ("Compl."), and accepted as true solely for purposes of this motion, or are facts that may be judicially noticed because they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned," Fed. R. Evid. 201(b)(2).

A. The Treaties of 1842, 1848, 1850, and 1855.

The Wyandottes[1/] historically resided in what is now Ohio and Michigan. Compl. ¶ 8. By Treaty of March 17, 1842, the Wyandottes ceded and relinquished to the United States all the lands and possessions owned or claimed by the tribe within the States of Ohio and Michigan in exchange for a promise of 148,000 acres west of the Mississippi. *Id.*; s*ee also* Treaty of April 1, 1850, Preamble, 9 Stat. 987, 987 ("Treaty of 1850"). The grant of land west of the Mississippi to the Wyandottes did not come to pass and, in 1848, the Wyandotte Tribe agreed to purchase from the Delaware Tribe 1,920 acres located between the Missouri and Kansas Rivers in modern-day Kansas. A Resolution to sanction an Agreement made between the Wyandotts and Delawares for the Purchase of certain Lands by the former of the latter Tribe of Indians, 9 Stat. 337 (1848).

In the middle-Nineteenth Century, the Wyandottes were desirous of terminating their tribal status and becoming citizens of the United States.[2/] *See* Treaty of 1850, Preamble [9 Stat. at 987] ("Whereas, the people composing the Wyandot tribe or nation of Indians have manifested

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[1/] Numerous spellings have been employed over time for the tribe and its people, including "Wyandot," "Wyandott," and "Wyandotte." For ease of reference, the United States will employ herein plaintiff's preferred spelling, "Wyandot," when referring to plaintiff, and "Wyandotte" to refer to the historic tribe, except where noted.

[2/] Indians did not enjoy full citizenship rights until passage of the Indian Citizenship Act of 1924. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253.

an anxious desire to extinguish their tribal or national character and become citizens of the United States. . . ."); *see also* Compl. ¶ 15. In furtherance of that desire, in 1850, the Wyandotte Tribe proposed to cede and relinquish all its land and terminate its existence as a tribe in exchange for (1) payment of $479,000; (2) extinguishment of their debt to the Delaware Tribe for the land purchased in 1848; and (3) fee simple title to its members of the land purchased in 1848. Treaty of 1850 [9 Stat. at 987-93]. Congress rejected the Wyandotte Tribe's proposal and, instead, rescinded any claim the Wyandotte Tribe may have to the 148,000 acres promised in the Treaty of 1842 in exchange for payment of $100,000 and extinguishment of the tribe's debt to the Delaware Tribe for the lands purchased in 1848.[3/] *Id.*, Art. I (amended by Congress) [9 Stat. at 994].

In 1855, the United States again entered into a treaty with the Wyandotte Tribe. Treaty With the Wyandotts, Jan. 31, 1855, 10 Stat. 1159 ("Treaty of 1855"). Therein, the tribe agreed to be "dissolved and terminated." *Id.*, Art. 1 [10 Stat. at 1159]. The tribe also agreed to

> relinquish, and release the United States from, all their rights and claims to annuity, school moneys, blacksmith establishments, assistance and materials, employment of an agent for their benefit, or any other object or thing, of a national character, and from all the stipulations and guarantees of that character, provided for or contained in former treaties, as well as from any and all other claims or demands whatsoever, as a nation, arising under any treaty or transaction between them and the government of the United States. . . .

Id., Art. 6 [10 Stat. at 1855]. In exchange for the foregoing, the tribe: (1) ceded its lands purchased from the Delaware Tribe (*id.*, Art. 2 [10 Stat. at 1159-60]) so those lands could be divided and patented in fee "to the individuals and members of the Wyandott nation" (*id.; see also id.*, Art. 3 [10 Stat. at 1160]); (2) was to be paid $380,000 "to be equally distributed and

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[3/] "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights" and "Congress can alter the terms of an Indian treaty . . . ." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Thus, even if the administration and the Indians had a different intent in a treaty, Congress is the ultimate arbiter of tribal rights.

paid to all the individuals and members of the said nation" (*id.*, Art. 6 [10 Stat. at 1162]); and (3) agreed to have the $100,000 invested under the Treaty of 1850 "together with any accumulation of said principal sum" equally distributed and paid to all the individuals and members of the tribe (*id.*, Art. 7 [10 Stat. at 1162]).

B. The Treaty of 1867.

Six years after the Treaty of 1855, the Civil War commenced. Although the Wyandottes were loyal to the Union during the war, many Indians were "driven from their reservations early in the late war, and suffered greatly for several years and being willing to sell a portion of their lands to procure such relief; and. . . . a portion of the Wyandottes. . . . although taking lands in severalty, have sold their lands and are still poor. . . ." Treaty between the United States and the Senecas, *et al.*, Feb. 23, 1867, Preamble, 15 Stat. 513, 513 ("Treaty of 1867"). Thus, in 1867, the United States entered into a treaty with several Indian tribes, including the historic Wyandotte Tribe. *Id.*

The Treaty of 1867 set aside lands ceded by the Seneca Nation of Oklahoma to become a reservation for a newly-reconstituted Wyandotte Tribe. *Id.*, Art. XIII [15 Stat. at 516]. Under the Treaty of 1867, plaintiff's ancestors were given a choice. Each Indian could chose to become members of the newly-reconstituted tribe, or they could elect to not join the tribe and instead become citizens of the United States.

The Treaty of 1867 called for

> [a] register of the whole people, resident in Kansas and elsewhere, [to] be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, . . . which shall show the names of all those who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans. . . .; and all such persons, *and those only*, shall hereinafter constitute *the tribe*.

Id., Art. XIII [15 Stat. at 516] (emphasis added). The newly-reconstituted tribe is known as the Wyandotte Nation of Oklahoma, and was federally-recognized. This federally-recognized tribe

arose from those Wyandotte Indians that elected to remain Indians and to join the newly-reconstituted tribe. The Wyandotte Nation of Oklahoma is the only "Wyandotte" tribe or Indian entity recognized by the United States and the only Wyandotte entity to have a trust relationship with the United States.

The Wyandotte Nation of Oklahoma[4/] is the successor-in-interest to the tribal rights granted in the treaties of 1855 and 1867. This is confirmed by the act restoring the government-to-government relationship between the United States and the Wyandotte Nation of Oklahoma after that relationship was terminated in 1956. In 1978, Congress reinstated to the Wyandotte Tribe of Oklahoma all rights and privileges that it might have lost under the 1956 Termination Act. Pub. L. No. 95–281, 92 Stat 246 (1978) (codified at 25 U.S.C. § 861); *see also* Act of Aug. 1, 1956, Pub. L. No. 84-887, §§ 2(a), 2(c), 2(d), and 5(c), 70 Stat. 893, 893-94 (defining "Tribe" as the "Wyandotte Tribe of Oklahoma" and calling for the sale of the Huron Cemetery which constituted "lands" and "Tribal property"). Those restored rights included continuing treaty rights under the Treaties of 1855 and 1867.

All Wyandotte Indians were entitled, at the Secretary of the Interior's discretion, to compensation under the Treaty of 1867, regardless of their election to join the newly-reconstituted tribe. The Treaty of 1867 provided that "the Secretary of the Interior is hereby authorized and required to appoint three persons whose duty it shall be to ascertain and report to the department the amount of money, if any, due by the United States to the Wyandott[e] Indians

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[4/] The Wyandotte Nation of Oklahoma refers to itself simply as the "Wyandotte Nation," *see* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1,942, 1,946 (Jan. 14, 2015), but it has previously been identified as, *inter alia*, the "Wyandotte Nation, Oklahoma," *see* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,813 (Oct. 1, 2010). To distinguish the federally-recognized Indian tribe from plaintiff, the United States uses "Wyandotte Nation of Oklahoma" to refer to the former herein.

under existing treaty stipulations. . . ." *Id.*, Art. XIII (amended by Congress) [15 Stat. at 526-27]. That sum of money, if any, was to be "divided, and that portion equitably due to the citizens of said people shall be paid to them, or their heirs, under the direction of the Secretary of the Interior." *Id.*, Art XIV [15 Stat. at 516-17]. After such a division, any balance was to inure to the newly-reconstituted tribe. *See* i*d.* (". . . .and the balance, after [deductions]. . . ., shall be paid to the *Wyandott[e] tribe* per capita. . . .") (emphasis added).

Congress appropriated the funds to pay for the aforementioned three-person panel in 1869. Appropriation Act of April 10, 1869, 16 Stat. 13, 34. The panel submitted its report on March 2, 1869, and on May 29, 1872, based upon that report, Congress appropriated $11,703.56 for "taxes unjustly collected by the territorial government of Kansas" and $5,000 "to enable the Wyandottes to establish themselves in their new homes in the Indian Territory," totaling $16,703.56 "to be paid under the direction of the President of the United States." Appropriation Act of May 29, 1872, 17 Stat. 165, 189.

An appropriation of $16,703.56 appears—identified as "Fulfilling Treaties with the Wyandotts"—in the Department of the Interior's Appropriations and Expenditures for the Fiscal Year Ending June 30, 1872. *See* Attachment 1 hereto. That $16,703.56 carries through to the Department of the Interior's Appropriations and Expenditures for the Fiscal Year Ending June 30, 1873, and therein it is reported that those funds were disbursed, leaving a zero balance at the end of Fiscal Year 1873. *See* Attachment 2 hereto.

C. The Huron Cemetery.

Under the Treaty of 1855, certain Wyandotte lands were exempted from assignment to individual members, specifically a church and cemetery, a ferry, and lands adjacent to the river used for the ferry. Treaty of 1855, Art. 2 [10 Stat. at 1159-60]. In 1856, the church "was burned down . . . and never rebuilt." Compl. ¶ 21. In 1906, Congress authorized the Secretary of the

Interior to remove remains from the cemetery plot identified in the Treaty of 1855; to reinter those remains at the "Wyandotte Cemetery at Quindaro, Kansas" (*i.e.*, the Huron Cemetery); and to sell the cemetery and ferry lands. 1906 Appropriation Act for the Indian Department, 34 Stat. 325, 348-49. The proceeds from those sales (less costs) were to be paid per capita to "the Wyandotte tribe of Indians." *Id.* The ferry lands were sold under this Act. *See* Compl. ¶ 51 (acknowledging land was sold but questioning whether sales price was adequate).

In 1908, the Attorney General issued an opinion on the title status of the Huron Cemetery. The Attorney General concluded that title to the Huron Cemetery was in the United States, subject to the right of Indians to use the cemetery as a burial ground. Right of the United States to Dispose of Wyandotte Cemetery, Kansas City, Kan., 26 Op. Atty. Gen. 491 (1908). The Attorney General also found that the Wyandotte Nation of Oklahoma had abandoned the Huron Cemetery, having long since reorganized and removed to Indian Territory in Oklahoma. *Id.* at 495. In 1910, the Supreme Court confirmed that the Huron Cemetery was held in trust by the United States for the Wyandotte Nation of Oklahoma, not for any individual Wyandotte Indians or for plaintiff, and that the United States had the authority to sell the land. *Conley v. Ballinger*, 216 U.S. 84, 91 (1910).

The sale of the Huron Cemetery never occurred, however, and in 1913, Congress repealed the Secretary of the Interior's authority to sell the Huron Cemetery. Act of Feb. 13, 1913, 37 Stat. 668. In 1916, Congress appropriated $10,000 for the "preservation and improvement" of the Huron Cemetery "owned by the government of the United States, the use of which was conveyed by treaty to the Wyandotte Tribe of Indians . . . ." Act of Sept. 8, 1916, 39 Stat. 844. In 1918, the United States and the City of Kansas City, Kansas, entered into a personal care contract for maintenance of the Huron Cemetery. Compl. ¶ 57.

Ever since, the Huron Cemetery has been held in trust by the United States for the Wyandotte Nation of Oklahoma. In 1996, the Department of the Interior recognized the Huron Cemetery as part of the Wyandotte Nation of Oklahoma's "reservation" for purposes of the Indian Gaming Regulatory Act. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001) *superseded by statute at* Pub. L. No. 107–63, § 134 (2001). Accordingly, at all relevant times, the United States has continuously held the Huron Cemetery in trust for the Wyandotte Nation of Oklahoma. The United States does not hold the Huron Cemetery in trust for plaintiff or plaintiff's members. *City of Kansas City, Kan. v. United States*, 192 F. Supp. 179, 181-82 (D. Kan. 1960) *aff'd* 360 U.S. 568 (1961).

D. Plaintiff's Membership Dispute.

As mentioned above, under the terms of the Treaty of 1867, the federally-recognized Wyandotte Nation of Oklahoma was to consist of only those Indians that elected to become members of the newly-constituted tribe. Treaty of 1867, Art. XIII [15 Stat. at 516]. Plaintiff alleges that its members' ancestors elected to remain Indians and to become members of the newly-constituted tribe, but were excluded from the tribe. Compl. ¶ 27. Alternatively, plaintiff claims that its members' ancestors were adopted into the Wyandotte Nation of Oklahoma in 1872. *Id.* ¶¶ 32-34. After 1872, the Wyandotte Nation of Oklahoma's members moved to the new reservation in Oklahoma, but plaintiff's members' ancestors remained in Kansas. *Id.* ¶ 36. Accordingly, when the Wyandotte Nation of Oklahoma organized under the Oklahoma Indian Welfare Act in 1937[5/], plaintiff's members' ancestors were effectively dis-enrolled. *Id.* ¶¶ 39-40. As a result, plaintiff is not a federally-recognized Indian tribe and plaintiff's members are not

[5/] *See* Constitution of the Wyandotte Nation of Oklahoma, Preamble, *available at* http://www.wyandotte-nation.org/government/legal-documents/constitution/ (last visited July 24, 2015).

members of the federally-recognized Wyandotte Nation of Oklahoma.

V. ARGUMENT

A. Plaintiff's Claims Are Barred by the Statute of Limitations.

Although allegations in plaintiff's complaint and facts that may be judicially noticed establish that the United States does not hold any funds or assets in trust for plaintiff, even if that were not true, plaintiff's claims for (1) treaty payments called for under the Treaty of 1867 that were paid in 1873, 1881, 1888, Compl. ¶¶ 75-85, 102-108; and (2) claims arising out of rights-of-ways in existence by no later than 1959, *see* Compl. ¶¶ 68-101, 109-117, should be dismissed because they are barred by the statute of limitations. Plaintiff knew or should have known of these claims more than six years ago and did not file its damages claims within six years of the alleged breaches of trust. Accordingly, all claims in plaintiff's complaint are barred by the statute of limitations, 28 U.S.C. § 2501, and this Court lacks subject-matter jurisdiction over plaintiff's claims.

Claims by Indian tribes for breach of trust are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578 (Fed. Cir. 1988). Furthermore, "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Id.* at 1576.

The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). For Indian breach of trust claims, a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge

of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (citations omitted) ("*Shoshone II*"). The "knowledge of that repudiation" element of the accrual test set forth by the Federal Circuit is further defined as "placing the beneficiary on notice that a breach of trust has occurred." *Id.* This "on notice" standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citation omitted); *see also San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) ("This objective standard applies to the accrual of a claim for breach of fiduciary duty." (citation omitted)).

1. Plaintiff's trust fund mismanagement claims are untimely.

Plaintiff's claims that payments called for under the Treaty of 1867 were mismanaged are barred by the statute of limitations because those funds were paid out of trust by no later than 1888. Compl. ¶¶ 75-85, 102-108. The Treaty of 1867 called for the following payments. First, it called for the payment of $83,314.40 representing "the full claim of the Wyandottes against the United States under former treaties." Treaty of 1867, Schedule A [15 Stat. at 524]; *see also* Art. XIII [15 Stat. at 516]. Any balance from the "Schedule A" sum of $83,314.40, less "the cost of the land purchased from the Senecas," was to be paid per capita to the members of the Wyandotte Nation of Oklahoma. *Id.* Art. XIV [15 Stat. at 517]. Second, the treaty required the United States to pay the Wyandotte Nation of Oklahoma $11,727.74 for "taxes levied under the authority of the State of Kansas, contrary to the terms of the treaty of [1855]." *Id.* Art. XIV [15 Stat. at 517]. Third, the United States promised to pay $5,000 "to enable the Wyandott[e]s to establish themselves in their new homes." *Id.* Finally, the Secretary was to examine land sales made by "incompetent" Wyandots to "confirm the said sales, or require an additional amount to

be paid, or declare such sales entirely void." *Id.* Art. XV [15 Stat. 517]. Any amounts the Secretary determined to be owed to the Wyandots as a result of his examination of land sales were to be paid to those affected Indians. *Id.* Art. XIV [15 Stat. 517].

In March and April 1882, the United States paid $28,109.51, which represented the "Schedule A" payments, less the cost of the purchase price of the Seneca land. Compl. ¶ 78. That $28,109.51 was disbursed from trust accounts by 1888. *Id.* ¶ 79. Thus, plaintiff's members who were entitled to a share of this distribution[6/] received payments by 1888. Indeed, plaintiff admits that individuals entitled to "Schedule A" payments received them in 1882. Compl. ¶ 78. Upon receipt of those payments, plaintiff and plaintiff's members were on inquiry notice to ascertain whether the payment amount was correct. To the extent plaintiff and plaintiff's members did not receive payments, plaintiff is presumed to know the law, including the terms of the Treaty of 1867, *Harris Corp. v. Ericsson, Inc.*, 417 F.3d 1241, 1263 (Fed. Cir. 2005) (Ginsburg, J. dissenting) (citing *Pittsburgh & L.A. Iron Co. v. Cleveland Iron Mining Co.*, 178 U.S. 270, 278 (1900) ("Everyone is presumed to know the law")), and was, at a minimum, on inquiry notice that it was not paid. Thus, because plaintiff's "Schedule A" trust fund mismanagement claims accrued no later than 1888, plaintiff had until 1894 to advance those claims against the United States. Plaintiff's claims for "Schedule A" trust fund mismanagement for the period 1855 to 1888, Compl. ¶ 81, are untimely and should be dismissed. 28 U.S.C. § 2501.

The $11,727.74 in improperly levied state taxes plus the $5,000 relocation payment, totaling $16,703.56, were appropriated in 1872. Attachment 1 hereto. That $16,703.56 carries

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6/ The United States does not concede, and disputes, that plaintiff has standing to assert claims on behalf of its individual members.

through to the Department of the Interior's Appropriations and Expenditures for the Fiscal Year Ending June 30, 1873, which shows that those funds were disbursed, leaving a zero balance at the end of Fiscal Year 1873. *See* Attachment 2 hereto. Thus, plaintiff's trust fund mismanagement claims (if any) related to these Treaty of 1867 payments accrued no later than 1873 when the government publicly reportes that they were fully disbursed. Again, those funds were to be paid out per capita, so plaintiff and plaintiff's members were on inquiry notice of their claims when those per capita payments were made or not received. Those claims are untimely and should be dismissed. 28 U.S.C. § 2501.

As for the third category of payments called for under the Treaty of 1867, payments to "incompetent" Wyandots, it appears from plaintiff's complaint that plaintiff does not advance any claims with respect to these payments. *See* Compl. ¶¶ 75-85, 102-108. Additionally, plaintiff has no standing to assert claims for individual Indians entitled to receive individualized payments "as the very right of the several cases may require." Treaty of 1867, Art. XV [15 Stat. at 517]. Accordingly, those claims, if any, should also be dismissed.

a. No tolling provision applies to plaintiff's trust fund mismanagement claims.

Plaintiff's trust fund mismanagement claims are subject to the six-year statute of limitations and no tolling provisions apply to those claims. Plaintiff appears to argue that its trust fund mismanagement claims are subject to tolling by operation of various appropriations act riders enacted between 1990 and 2005. Compl. ¶ 66. Plaintiff is incorrect.

Plaintiff filed its complaint in 2015. Congress omitted the appropriations act rider that the United States Court of Appeals for the Federal Circuit held tolls the statute of limitations with respect to losses to or mismanagement of trust funds, *Shoshone II*, 364 F.3d at 1350, in the Consolidated Appropriations Act of 2015. *See* Pub. L. No. 113-235, Div. F, Title I, 128 Stat.

2130, 2413 (2014). As last enacted (in the Consolidated Appropriations Act of 2014) the tolling provision provided

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

Pub. L. No. 113-76, § 2, Div. G, Title I, 128 Stat. 5, 305-306 (2014). Again, this provision was not included in the Fiscal Year 2015 appropriations act. Thus, Congress eliminated the tolling provision prior to the time that plaintiff filed its complaint.

The United States Court of Appeals for the District of Columbia Circuit held that

> [w]hile appropriation acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year. In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.

Building & Constr. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 273-74 (D.C. Cir. 1992) (internal citations omitted). The District of Columbia Circuit's holding is consistent with Supreme Court precedent that requires Congress to "reveal an intention" to effectuate a substantive change in law in an appropriations act in "the plain words of the statute." *United States v. Will*, 449 U.S. 200, 222 (1980); *see also* 31 U.S.C. § 1301(c). Thus, because the tolling provision relied upon by plaintiff was eliminated in the Fiscal Year 2015 appropriations act, a rebuttable presumption attaches that the prior provisions are no longer in effect.

To rebut the presumption of no continuing effect, plaintiff must show that the prior appropriations acts established an "express[] [congressional intent to] provide[] otherwise." *Martin*, 961 F.3d at 274. Express intent to make a permanent and substantive change to law has

been found when Congress uses the phrase "hereafter." *See, e.g.*, *United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *Cella v. United States*, 208 F.2d 783, 790 (7th Cir. 1953) ("The use of the word 'hereafter' by Congress as a method of making legislation permanent is a well-known practice."). None of the appropriations act provisions use the word "hereafter." Instead, they refer to claims filed in the Fiscal Year or "in litigation pending on the date of the enactment of this Act."

The Comptroller General has opined on words that could express permanency, and includes "after the date of approval of this act." Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, 65 Comp. Gen. 588, 589 (1986). Again, the appropriations acts do not reference events after approval of the act, but instead reference claims pending *before* passage of the act.

The General Accounting Office ("GAO") has, in addition to the foregoing, identified "with respect to any fiscal year" as additional language that suggests permanency. U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-36 (3d Ed. 2004) ("Redbook"). The appropriations acts have never used the phrase "with respect to any year."

Congress eliminated the tolling provision from the Fiscal Year 2015 appropriations act and therefore there is a presumption that prior years' appropriations act provisions do not apply to plaintiff's complaint filed in Fiscal Year 2015. Plaintiff cannot overcome that presumption because none of the factors identified by the courts or the Comptroller General indicating permanency of an appropriations act provision are present here. Thus, plaintiff's "Schedule A" trust fund mismanagement claims are not entitled to any tolling of the statute of limitations.

b. Even if the appropriations act riders applied, plaintiff's claims are still untimely.

Even if the Court were to determine that the appropriations act riders apply to plaintiff's

"Schedule A" trust fund mismanagement claims, those claims are still untimely and should be dismissed for lack of subject-matter jurisdiction. The "Schedule A" payments called for under the Treaty of 1867 were not held in trust for plaintiff's benefit and, even if they were, plaintiff objectively knew or should have known of its mismanagement claims at the time those funds were disbursed in 1882 or 1888. The appropriations act riders (if applicable to plaintiff's complaint) do not apply to the "Schedule A" claims, they are untimely, and they should be dismissed for lack of subject-matter jurisdiction.

As explained by the Federal Circuit, the only claims covered by the appropriations act riders are "those for which an accounting matters in allowing a claimant to identify and prove the harm-causing act at issue; otherwise, the [appropriations act riders] would give claimants the right to wait for an accounting that they do not need." *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) ("*Wolfchild II*"). If a "'final accounting' was unnecessary to put the Tribe on notice of the accrual of its claim," then the appropriations act riders do not apply, even if the claim is one for losses to or mismanagement of trust funds. *San Carlos Apache*, 639 F.3d at 1355. "It is settled . . . that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their legal rights." *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed. Cir. 1984).

Here, plaintiff's "Schedule A" trust fund mismanagement claims were objectively known or knowable by no later than 1888. "Schedule A" of the Treaty of 1867 set forth a discrete sum of money due to the Wyandot Tribe. 15 Stat. at 524. "Schedule A" funds were appropriated in 1881. Compl. ¶ 78. Appropriations acts are public laws, and plaintiff objectively knew the precise amount appropriated in satisfaction of the Treaty of 1867. *See Harris Corp.*, 417 F.3d at 1263 (plaintiff is presumed to know the law). Moreover, those appropriated funds were distributed in 1882 and/or 1888. Compl. ¶¶ 78-79, 81. Thus, just as in *Wolfchild II*, "the claim

made here would not be the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim, because [plaintiff] knew or should have known that the money was publicly distributed in [1888]." 731 F.3d at 1291.

2. Plaintiff's trust fund mismanagement claims are also untimely by operation of the Indian Claims Commission Act's statute of repose.

Plaintiff's "Schedule A" payment claims and Treaty of 1867 trust fund mismanagement claims are also barred by the Indian Claims Commission Act's statute of repose because all such claims existed no later than 1888, well before August 13, 1946. In the Indian Claims Commission Act ("ICCA"), Pub. L. No. 79-726, 60 Stat. 1049 (1946), Congress barred claims by Indian tribes or identifiable groups of Indians against the United States that pre-date August 13, 1946, and that were not filed before the Indian Claims Commission by August 13, 1951. The Act provided that

> [t]he Commission shall receive claims for a period of five years after the date of approval of this Act [August 13, 1946] and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

ICCA, § 12 [60 Stat. at 1052]; *see also Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974) ("The Act provides in no uncertain terms that any claim existing prior to August 13, 1946, must be filed within five years (i.e., before August 13, 1951), and if it is not filed within that period, it cannot thereafter be submitted to any court . . . for consideration. There is no doubt about the fact that Congress intended to cut off all claims not filed before August 13, 1951.").

Through the ICCA, Congress intended to vest the Indian Claims Commission with time-limited, exclusive jurisdiction to hear Indian tribes' and identifiable groups' pre-1946 claims against the United States. "The 'chief purpose of the [ICCA was] to dispose of the Indian claims problem with finality.'" *United States v. Dann*, 470 U.S. 39, 45-46 (1985) (quoting H.R. Rep.

No. 79-1466 at 10 (1945)). Moreover, Congress intended that "'the jurisdiction of the Commission ought to be broad enough so that no tribe could come back to Congress ten years from now and say that it had a meritorious claim . . . .'" *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1465 (10th Cir. 1987) (quoting 92 Cong. Rec. 5312 (1946)). These congressional goals, as well as the plain wording of Section 12, firmly establish that the Indian Claims Commission was the only tribunal with authority to adjudicate pre-1946 Indian tribal, and identifiable group, claims against the United States. Failure to advance pre-1946 claims before the Indian Claims Commission warrants dismissal of those claims when filed later.

Section 12 is a statute of repose. "[T]he differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). A statute of repose sets forth a time for filing claims that is independent of the time that the wrong has been or should have been discovered. *See Prince Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1218 n.2 (10th Cir. 1991) ("statute of repose typically bars the right to bring an action after the lapse of a specified period"). Section 12 is a statute of repose because the time for filing claims against the United States was independent of the date those claims accrued. *Sioux Tribe*, 500 F.2d at 489 ("The Act provides in no uncertain terms that any claim existing prior to August 13, 1946, must be filed within five years (i.e., before August 13, 1951), and if it is not filed within that period, it cannot thereafter be submitted to any court . . . for consideration."). Substantively, a "statute of repose . . . is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace." *Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002).

As a statute of repose, Section 12 applies independently of when a claim accrues. *CTS*

Corp. v. Waldburger, 573 U.S. ___, 134 S. Ct. 2175, 2182 (2014) ("That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). Also, as a statute of repose, Section 12 is not subject to tolling. *Id.* at 2183. Thus, the various appropriations act riders (tolling the statute of limitations) have no application to Section 12's statute of repose.

Several courts have recognized and applied the clear statute of repose contained in Section 12 of the ICCA to pre-1946 claims by Indians and Indian tribes. "It is well established that the Indian Claims Commission Act bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before 1946 and were not brought by August 13, 1951." *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 331-32 (D.C. Cir. 2009); *see also Navajo Tribe*, 809 F.2d at 1469-71 (10th Cir. 1987) (ICCA "provided the . . . opportunity to litigate the validity of [Indian] titles and to be recompensed for Government actions inconsistent with those titles. The Tribe was unambiguously given a five-year period to assert its title to these lands 'or forever hold [its] peace.'") (quoting 92 Cong. Rec. 5313 (1946)); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 142 (8th Cir. 1981) (The ICCA's "statutory language reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.").

Because plaintiff's Treaty of 1867 trust fund mismanagement claims existed no later than 1888, plaintiff and plaintiff's members (as an identifiable Indian group) had until 1951 to

advance those claims before the Indian Claims Commission.[7/] By operation of Section 12 of the ICCA, this Court lacks jurisdiction over those claims in this case filed in 2015, and plaintiff's complaint should be dismissed.

3. Plaintiff's Huron Cemetery claims are untimely.

Plaintiff's claims to a partial beneficial ownership interest in the Huron Cemetery, Compl. ¶¶ 86-101, 109-117, are also barred by the statute of limitations and should be dismissed for lack of subject-matter jurisdiction. Plaintiff's claims that easements or rights-of-way were unlawfully permitted on portions of the Huron Cemetery land or that the Department of the Interior allegedly failed to earn rents or royalties from hypothetical easements or rights-of-way that should have been, but were never, issued, *id.*, are trust asset mismanagement claims. A "claim premised upon the Government's failure to collect royalties in accordance with a hypothetical lease is a claim for mismanagement of trust assets." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035 (Fed. Cir. 2011) ("*Shoshone IV*"). Accordingly, plaintiff's Huron Cemetery claims are not subject to the appropriations act's tolling provision (were it to apply at all). *Id.*

Plaintiff alleges an ownership interest in rights-of-way for city streets that have traversed the Huron Cemetery land "since 1857." Compl. ¶ 73. Plaintiff knew or should have known of "[a] July 12, 1959," newspaper article that showed that the rights-of-way likely traversed the Huron Cemetery. *Id.* ¶ 87. Plaintiff was also aware of "official maps of the City of Kansas City, Kansas," which show the location of public roads adjacent to the Huron Cemetery. *Id.* ¶ 88. Thus, plaintiff knew or should have known of its claims of allegedly unauthorized easements or

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[7/] Plaintiff did, in fact, advance treaty claims before the Indian Claims Commission in Dockets 139 and 141, and were compensated as a result of those actions. See *Strong v. United States*, 618 F.2d 119 (1979) (affirming award); Pub. L. No. 97-371, 96. Stat. 1813 (1982) (appropriating funds to be distributed to, *inter alia*, the "Absentee Wyandottes.")

rights-of-way across the Huron Cemetery by no later than 1959. Plaintiff's claims for unearned rights-of-way rentals or fees are accordingly untimely and should be dismissed.

Plaintiff's Huron Cemetery claims are also patently untimely in light of several judicial decisions addressing that property. In 1910, the Supreme Court held that the Huron Cemetery was owned by the United States and held in trust for the Wyandotte Nation of Oklahoma, not plaintiff or plaintiff's members. *Conley*, 216 U.S. at 91. In 1960, the United States District Court for the District of Kansas held that non-member descendants of the historic Wyandot Tribe (which would include plaintiff's members) did not have standing to challenge a proposed sale of the Huron Cemetery. *City of Kansas City, Kan.*, 192 F. Supp. at 181-82. In 1996, the Department of the Interior recognized the Huron Cemetery as part of the Wyandotte Nation of Oklahoma's "reservation" for purposes of the Indian Gaming Regulatory Act. *Sac & Fox Nation of Mo.*, 240 F.3d at 1256. Thus, by no later than 1996 plaintiff knew from these published judicial decisions that the United States did not recognize plaintiff as having any beneficial ownership interest in the Huron Cemetery, and that the United States was not collecting any revenue for plaintiff from that land. Because plaintiff did not bring this action until 2015, plaintiff's Huron Cemetery claims are barred by the statute of limitations and should be dismissed for lack of subject-matter jurisdiction.

B. This Court Lacks Subject-Matter Jurisdiction to Adjudicate Plaintiff's Membership Dispute Claims.

Because plaintiff's trust fund mismanagement claims and Huron Cemetery claims are predicated on plaintiff's belief that it was wrongfully excluded from the federally-recognized Wyandotte Nation of Oklahoma, Compl. ¶¶ 2, 27, 34, 37, 38-41, 43, this Court also lacks subject-matter jurisdiction over plaintiff's complaint because it cannot adjudicate intra-tribal membership disputes. The Supreme Court held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49

(1978), that a tribe is immune from federal court jurisdiction in disputes regarding challenges to membership in the tribe. That case involved a tribal membership ordinance denying tribal membership to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. *Id.* at 51. A female member who had married outside the tribe brought suit for declaratory and injunctive relief against the tribe, alleging that the membership criteria violated the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. The Supreme Court held that "Indian tribes are 'distinct, independent political communities [that] retain[] their original natural rights' in matters of local self-government." *Santa Clara Pueblo*, 436 U.S. at 55 (citation omitted); *see also Montana v. United States*, 450 U.S. 544, 564 (1981). The Court stated that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. The Court therefore held that it did not have jurisdiction over the tribal membership dispute. *Id.* at 72.

Accordingly, this Court lacks subject-matter jurisdiction to adjudicate plaintiff's claims that its members are or should be recognized as members of the federally-recognized Wyandotte Nation of Oklahoma. Additionally, this Court lacks subject-matter jurisdiction over plaintiff's claims that it was not properly recognized by the government, Compl. ¶¶ 42-44. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005) ("As a political determination, tribal recognition is not justiciable."). Since plaintiff's claims all rest upon an allegation that it is federally-recognized for limited purposes, Compl. ¶ 44, or that its members should have been included in the federally-recognized Wyandotte Nation of Oklahoma due to the "1896 Olive Roll," *id.* ¶ 70, and those determinations are non-justiciable political issues, this Court lacks subject-matter jurisdiction over plaintiff's complaint and it should be dismissed.

C. Plaintiff Has Failed to State a Claim Upon Which Relief Can Be Granted.

Plaintiff's complaint should also be dismissed because plaintiff has failed to allege facts, if accepted as true, that establish that any land or funds are held in trust by the government for plaintiff's benefit. The Huron Cemetery is held in trust for the benefit of the Wyandotte Nation of Oklahoma, not for plaintiff. *Conley*, 216 U.S. at 91; *Sac & Fox Nation of Mo.*, 240 F.3d at 1256; *City of Kansas City, Kan.*, 192 F. Supp. at 181-82. The Huron Cemetery does not generate trust revenue for plaintiff, and plaintiff's claims are based exclusively on hypothetical trust income that could be earned under hypothetical rights-of-way agreements. *See* Compl. ¶ 69 (defining "Category Two" funds as funds "that should have been collected"). Also, the United States does not hold any Treaty of 1867 funds in trust, as those funds were completely disbursed from government trust accounts no later than 1888. Compl. ¶¶ 75-85, 102-108. Thus, the allegations in plaintiff's complaint (accepted as true for purposes of this motion) establish that the United States does not hold any funds or land in trust for plaintiff's benefit.

It is axiomatic that an Indian tribe cannot sue the government for "breach of trust" where it fails to identify land or funds actually held in trust by the government. *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 732 (2013). The government's general fiduciary relationship with Indian tribes "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). Courts have repeatedly held that a tribe must demonstrate that it possesses trust property in order to pursue a claim for breach of fiduciary duties against the United States. *Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (finding that the Interior Department did not owe plaintiff tribe a fiduciary duty, because there was no trust property involved in the case); *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549, 553 (10th Cir. 1987) (finding that *United States v. Mitchell*, 463 U.S.

206 (1983) ("*Mitchell II*") did not apply because there was no trust property involved); *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1154-55 (D. Kan. 2013) (no trust obligations owed by government to tribe because "the Park City land is not held in trust by the United States"); *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 69 (Fed. Cl. 2008) ("Because plaintiff has not shown the existence of trust property, there necessarily can be no trustee to manage the trust property or beneficiary for whom the trust property is managed."), *aff'd in part, rev'd in part*, 657 F.3d 1330 (Fed. Cir. 2011), *vacated in part*, 133 S. Ct. 423 (2012).. Because plaintiff has not, and cannot, allege that the United States holds any funds or lands in trust for its benefit, it has failed to state a "breach of trust" claim and its complaint should be dismissed for failure to state a claim.

VI. CONCLUSION

Plaintiff's trust fund mismanagement claims for payments made in the Nineteenth Century are patently untimely and are barred by the ICCA's statute of repose. Those claims should be dismissed for lack of subject matter jurisdiction. Plaintiff's Huron Cemetery claims are also untimely because the hypothetical revenue sought by plaintiff as damages are based upon rights-of-way that were constructed and open and notorious by no later than 1959. Plaintiff's complaint is barred by the statute of limitations and should be dismissed for lack of subject matter jurisdiction. The Court should also decline plaintiff's invitation to adjudicate its membership disputes with the Wyandotte Nation of Oklahoma because the Court lacks subject matter jurisdiction over those claims.

Even if the Court determines it has subject matter jurisdiction, plaintiff's complaint should be dismissed for failure to state a claim. The facts alleged in plaintiff's complaint establish that the Department of the Interior holds no funds or assets in trust for plaintiff's benefit. Accordingly, plaintiff cannot advance a breach of trust claim against the United States.

Plaintiff's complaint should be dismissed in its entirety.

Respectfully submitted, August 28, 2015,

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