IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on September 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.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Wyandot Nation of Kansas a/k/a Wyandotte Tribe of Indians (hereafter "Wyandot Nation of Kansas") hereby submits its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss.

Dated: September 28, 2015

Respectfully submitted,

/s/ Brian J. Leinbach

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I. INTRODUCTION

This case involves claims by the Plaintiff Wyandot Nation of Kansas a/k/a Wyandotte Tribe of Indians (hereafter "Wyandot Nation of Kansas") that past and present federal agencies and officers of the United States breached their constitutional, treaty, statutory, and common law fiduciary duties. Contrary to the Government's assertions, this Court has subject matter jurisdiction over the action. In addition, Plaintiff has stated a proper claim upon which relief can be granted.

II. QUESTIONS PRESENTED

1. Does the Court have subject matter jurisdiction over the present action?
2. Does the Complaint state a claim for which relief may be granted?

III. STANDARD OF REVIEW

A. Defendant's Motion to Dismiss

The United States' motion to dismiss is brought under Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims ("RCFC"). This Rule parallels Rule 12(b) of the Federal Rules of Civil Procedure. (*See* RCFC 12, Rules Committee Notes, 2008 Amendment).

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction. If the motion makes a facial attack on jurisdiction, the court's review is restricted to the face of the pleadings, and the Complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974) (internal quotation marks omitted).

If, on the other hand, the Rule 12(b)(1) motion makes a factual attack upon the court's jurisdiction, the court "may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). In such cases, the plaintiff has the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists. *Banks v. United States*, 741 F.3d 1268, 1277 (Fed. Cir. 2014).

Pursuant to Rule 12(b)(6), a Complaint may be dismissed, in whole or in part, for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the allegations of the Complaint. *United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007). When considering such a motion, the court must accept as true all well-pleaded factual allegations in the Complaint, and those allegations and the inferences arising therefrom must be viewed in the light most favorable to the party opposing the motion. *Id.*; *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The court's role in ruling on a Rule 12(b)(6) motion is limited to determining whether the plaintiff is entitled to offer evidence in support of its claims. *Ford Motor Co.*, 497 F.3d at 1336.

Under Rule 12(b)(6), dismissal is appropriate only if, accepting as true all of the facts alleged in the Complaint, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). If the factual allegations are sufficient to "raise a reasonable expectation that discovery will reveal evidence of" each necessary element of the plaintiff's claim, dismissal is unwarranted. *Id.* at 556, 127 S. Ct. at 1965.

IV. FACTUAL ALLEGATIONS AND EVIDENTIARY SUPPORT

A. Historic Wyandott Nation Treaty of 1843 (9 Stat. 337)

In the 1843 Treaty, the Historic Wyandott Nation purchased 36 sections of trust land from the Delaware Nation located the confluence of the Missouri River and Kansas River in eastern Kansas. The Delaware Nation also donated and quitclaimed to the Wyandott Nation an additional 3 sections of trust land "lying and being situated at the point of the junction of the Missouri and Kansas Rivers." The 39 sections of land were held in trust for the Historic Wyandott Nation by the United States and became the Wyandot Nation Indian Reservation in Kansas. (1843 Treaty, Arts. 1 and 2); Verified Complaint (hereinafter "Compl."),[1] (Doc. 1), ¶¶ 10 and 11, and Ex. "A" (map of 1843 Wyandott Indian Reservation).

[1] Fed. R. Civ. P. provides in pertinent part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters stated therein. Sworn

B. Historic Wyandott Nation Treaty of 1855 (10 Stat. 1159)

In the 1855 Treaty, the Historic Wyandott Nation's organization and government-to-government relations with the United States was dissolved and terminated "except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein," and that every Wyandott Nation tribal member was declared to be a citizen of the United States. (1855 Treaty, Art. 1; Compl. ¶ 18).

Prior to the 1924 Indian Citizenship Act (43 Stat. 253, 8 U.S.C. 1401), it was incompatible to be a U.S. citizen and a tribal member at the same time. (Compl. ¶ 15). The 1855 Treaty also terminated the tribal membership of all the members of the Historic Wyandot Nation by declaring them to be U.S. citizens. (*Id.*).

The 1855 Treaty also provided that the Historic Wyandott Nation cede the 39 sections of trust land that it purchased from the Delaware Nation to the United States **except for "[t]he portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose; . . ."** (1855 Treaty, Art. 2; Compl. ¶ 19). The burying ground referred to in Article 2 of the 1855 Treaty is called the "Huron Cemetery" and is located in Kansas City, Kansas. (Compl. ¶ 19; Aff. of Kristen E. Zane, ¶¶ 2 and 3 and Exs. A and B).

A July 12, 1959 article in the *Kansas City Kansan* newspaper showed photos of two

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to or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." The conversion of a verified Complaint to an affidavit "is appropriate only with respect to the factual assertions in the Complaint that complied with the requirements for affidavits specified in Fed. R. Civ. P. 56, that is, the factual assertions that were made on personal knowledge and showed affirmatively that the affiant was competent to testify to the matters stated therein." *Szymankiewicz v. Picard, et al.*, Slip Op. No. 04-C-1886-C (W.D. Wisc., May 13, 2005) p. 3, *Citing Ford v. Wilson*, 90 F.3d 245 (7th Cir. 1996). Janith English executed the Verified Complaint before a notary public under oath. She also filed an Affidavit herewith in which she stated in Paragraph 1 that she was competent to testify to the facts contained in the affidavit, and in Paragraph 3 that [t]he affidavit is intended to supplement "facts that she verified under oath in the Verified Complaint." Thus, the Verified Complaint (Doc. 1) can be treated as an affidavit of Janith English in so far as the factual allegations contained therein are based on her personal knowledge. As Principal Chief, Janith English has personal knowledge of all the factual statements contained in the Verified Complaint, including those relating to the history of her tribe.

portions of Huron Cemetery that extended onto Minnesota Avenue and Seventh Street in Kansas City, Kansas. (Compl. ¶ 87 and Ex. B; Defendant's Memorandum of Points and Authorities (hereinafter "D. Memo") (Doc. 7), p. 22).

The City of Kansas City, Kansas has been using the two Huron Cemetery tracts for its streets without valid, federally approved easements for grants of rights-of-way from 1857 up to the filing date of this civil action without payment of any compensation to the Wyandot Nation of Kansas for their proportionate ownership interest in the cemetery. (Compl. ¶ 69, Exs. B and C; Aff. of Kristen E. Zane, Exs. A and B).

The Federal Government has a fiduciary duty under federal law to collect compensation from the City of Kansas City, Kansas on behalf of the Wyandot Nation of Kansas for easements for grant of rights of way across and over the two tracts of Huron Cemetery used for city streets, and to deposit the funds in U.S. Treasury trust accounts in the name of the Wyandot Nation of Kansas and to account for, and invest said funds after they are deposited. (25 U.S.C. §§ 177, 323, 325 and 4001 *et seq.*; *PROCEDURAL HANDBOOK, Grants of Easement for Right-of-Way on Indian lands,*" March 6, 2006, Sec. 4, Step 3; *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004)).

C. Historic Wyandott Nation Treaty of 1867 (15 Stat. 513)

The Historic Wyandott Nation was not immediately dissolved and terminated as a federally recognized Indian tribe under Article 1 of the 1855 Treaty, and in fact, the Defendant, in two letters sent to Chief George Zane of the Wyandot Nation of Kansas, dated March 15, 1996 and June 3, 1996, by Bureau of Indian Affairs (hereafter "BIA") Director of Tribal Services Deborah J. Maddox, informed Chief Zane that the BIA conceded "1867 as the last date of unambiguous prior acknowledgment" of the Historic Wyandot Nation. (Compl. ¶ 24; Aff. of Janith K. English, ¶ 4 and Exs. B and C). In other words, according to BIA and Ms. Maddox, the members of the Wyandot Nation of Kansas descended from members of the Historic Wyandott Nation who were declared to be U.S. Citizens in the 1855 Treaty, and therefore as "Absentee Wyandots," they are barred from Federal Acknowledgement by the BIA. (Compl. ¶ 35; Aff. of

Janith K. English, ¶ 4 and Ex. C).

In the March 15, 1996 and June 3, 1996 letters, the BIA and Ms. Maddox totally misapprehended the fact that the 1867 Treaty: (1) created a new federally recognized Indian tribe called the "Wyandotte Tribe of Indians" that replaced the terminated historic Wyandott Nation, (2) established a new membership roll for the new tribe called a "Register," (3) the Register included "the whole [Wyandott] people, **residence in Kansas** and elsewhere" and would contain the "names of all who declare their desire to be and remain Indians, and in a tribal condition . . . and **all such persons, and those only, shall hereafter constitute the tribe** . . .," and (4) that the ancestors of all the current members of the Wyandot Nation of Kansas elected to become non-citizens and were listed on the Register as members of the newly created Wyandotte Tribe of Indians. (1867 Treaty, Art. 13; Compl. ¶¶ 26, 27 and 35; Aff. of Janith K English, ¶ 4 and Exs. B and C).

The name of the new 1867 Treaty tribe was the "Wyandotte Tribe of Indians" as acknowledged by the Secretary of the Interior and other BIA officials in the following documents and in Acts of Congress:

- The Letter of January 28, 1871 letter to Commissioner Parker that stated that "all Wyandotte, who were not classified as Citizens under provisions of the treaty of 1855-- as all who were classified as citizens, under said provisions, without their knowledge or consent, as appears by their testimony (See full report from this office 6/14/1870) should constitute the **Wyandotte tribe of Indians.**". (Compl. ¶ 30; Aff. of Louisa A. Libby, ¶ 4 and Ex, D);
- The Letter of March 30, 1872 from Secretary of the Interior C. Delano to Commissioner of Indian Affairs Francis A. Walker, which quoted a June 11, 1872 letter of BIA Agent Hoag regarding a list of 65 Wyandotte citizens "certified by the Agent, as being adopted to membership with the **Wyandotte tribe of Indians**." (Compl. ¶ 33; Aff. Of Louisa A. Libby, ¶ 4 and Ex. D), and
- The Act of September 8, 1916 (39 Stat. 844) in which Congress appropriated

> $10,000 "for the preservation and improvement of **Huron Cemetery, a tract of land in the city of Kansas City, Kansas**, owned by the government of the United States, the use of which was conveyed by treaty to the **Wyandotte Tribe of Indians** as a cemetery for the members of the tribe . . ." (Compl. ¶ 56).

The tribe created under Article 13 of the 1867 Treaty, called the "Wyandotte Tribe of Indians," changed its name in 1959 to the "Wyandot Nation of Kansas" to avoid confusing it with the "Wyandotte Tribe of Oklahoma," which consisted of a band of the Wyandotte Tribe of Indians that splintered off from the tribe and reorganized as a separate tribe under Section 3 of the 1936 Oklahoma Indian Welfare Act (hereinafter "OIWA") (49 Stat. 1967, 25 U.S.C. § 503. Compl. ¶ 38; Aff. of Janith K. English, ¶ 9). The new name of the OIWA tribe under its federally approved Constitution and Bylaws was the "Wyandotte Tribe of Oklahoma." (*Id.*)[2]

Moreover, Defendant concede that the "newly-constituted tribe . . . was federally recognized." (D. Memo, p. 7).

The Seneca Nation ceded 20,000 acres of their reservation in Oklahoma to the United States for $20,000 in the 1867 Treaty. (1867 Treaty, Art. 1; Compl. ¶ 29), and the United States set it apart as a reservation for the Wyandotte Tribe of Indians "to be owned in common." (1867 Treaty, Art. 13). However, the $20,000 was deducted from trust funds owed by the Government to the Wyandotte Tribe of Indians. (1867 Treaty, Art. 14; Compl. ¶ 29). So the Wyandotte Tribe of Indians actually paid for the 20,000 acre reservation in Oklahoma.

The 1867 Treaty also 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, by the United States to the Wyandott[e] Indians under existing treaty stipulations, and the items mentioned in Schedule A, appended to this treaty and the report of the persons so appointed, with the evidence taken, shall be submitted to Congress for action at its next session." (1867 Treaty, Art. 13; Compl. ¶ 76).

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[2] Article I of the Constitution and Bylaws of the Wyandotte Tribe of Oklahoma provides that "[t]he name of this organization shall be the Wyandotte Tribe of Oklahoma." WTOO Const., Art. I, (Appendix, No. 14).

The 1867 Treaty also provided in pertinent part that "[w]henever the register . . . shall have been completed and returned to the Commissioner of Indian Affairs, the amount of money in such Article [13] acknowledged to be due to the Wyandottl[e]s [in Schedule A of the Treaty] shall be divided, and that portion equitable due to the citizens of said people shall be paid to them and their heirs . . . **and the balance . . . shall be paid to the Wyandotte[e] tribe per capita"** and that the sum of $5,000.00 would be made available "to enable the Wyandott[e]s to establish themselves in their new home, shall be paid to the Wyandott[e] tribe per capita." (1867 Treaty, Art. 14). The $5,000.00 per capita fund became known as the "Immigrants Fund." (*Id.*; Aff. Janith K. English, ¶ 8). The 1867 Treaty stated specifically, that all of the persons whose names were on the 1867 Treaty Register "**shall hereafter constitute the tribe.**" (*Id.*, Art. 13).

Schedule A of the 1867 Treaty is described as a "Schedule showing the several items embraced in the sum agreed to be paid to the Wyandottes by the thirteenth Article of the foregoing treaty." (1867 Treaty, Schedule A; Compl. ¶ 77). Defendant has never made a full financial accounting of the funds described in Schedule A, or any accrued interest earned on said funds, from 1867 up to the filing date of this civil action. (Compl. ¶¶ 84 and 85).

D. <u>Status of Enrolled Members of the Wyandot Nation of Kansas</u>

The 1867 Treaty provided in pertinent that: "a **register** of the whole [Wyandott] people, **resident in Kansas** and elsewhere . . . **shall hereafter constitute the tribe** . . . ." (1867 Treaty, Art. 13, Aff. of Louisa A. Libby, ¶4 and Ex. B (copy of 1867 Treaty Register). One hundred forty (140) new citizen Wyandots were added to the Register by a March 30, 1872 letter and a June 18, 1872 letter from Secretary of the Interior C. Delaney to Commissioner of Indian Affairs Francis A. Walker. (Compl. ¶¶ 32 and 33; Aff. of Louisa A. Libby ¶ 4, Ex. D). The names on the original Register, and the 140 names added to it, constituted the Wyandotte Tribe of Indians. (Compl. ¶¶ 34 and 35).

The Wyandotte Tribe of Indians, as established under the 1867 Treaty Register, still exists under the name, the "Wyandot Nation of Kansas," and its organization and government-to-government relationship with the Federal Government has never been terminated by Treaty or

Act of Congress. The Wyandot Nation of Kansas governs its governmental affairs under a Tribal Constitution adopted by its enrolled members. (Compl. ¶ 37; Aff. of Louisa A. Libby, ¶ 4 and Ex. E). The splintering off and reorganization of the Oklahoma Band of the Wyandotte Tribe of Indians as a separate tribal entity under the 1936 OIWA did not terminate the continued existence of the Kansas Band of the Wyandotte Nation of Indians that constituted the remainder of the Tribe. (Compl. ¶¶ 25 and 67).

Moreover, the Wyandot Tribe of Indians, as the continuation of the Wyandotte Tribe of Indians, succeeded to the treaty rights of the Historic Wyandotte Nation and those treaty rights were reaffirmed by the Act of March 3, 1871 (RS 2079; 25 U.S.C. § 71) . (Compl. ¶ 41).[3]

The ancestors of **all** the current enrolled members of the Wyandot Nation of Kansas elected to become non-citizen Indians and were listed in the Register, and all of them became enrolled members of the newly created tribe called the Wyandotte Tribe of Indians. Their off-spring today, constitute the enrolled membership of the Wyandot Nation of Kansas a/k/a Wyandotte Tribe of Indians. (Compl. ¶¶ 27, 30 and 34; Affidavit of Janith K. English, ¶ 6).

E. <u>The Two Bands of the Wyandotte Tribe of Indians</u>

After 1872, the Wyandotte Tribe of Indians gradually separated into two divisions and by 1896 were included on two separate federal census rolls:

- Those that moved to the 20,000 acre reservation in Oklahoma were included in the Quapaw Agency Census Rolls; and
- Those that remained in Kansas were included in the "1896 Olive Roll."

(Compl. ¶ 36; Aff. of Janith K. English, ¶ 4 and 7, and Ex. A (the Olive Roll)). The two divisions are referred to herein as the "Kansas Band" and the "Oklahoma Band." (Compl. ¶ 36).

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[3] Indian tribes retain their vested treaty rights regardless of whether the Federal Government recognizes them as federally or non-federally recognized tribes. *Greene v. Bab*bitt, 64 F.3d 1266, 1270 (9th Cir. 1995) ("[n]onrecognition of tribe by the federal government . . . can have no impact on vested treaty rights"); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) ("the fact that a tribe is not administratively recognized does not affect that tribe's vested treaty rights"); (Compl.¶ 67).

Together, the Kansas Band and the Oklahoma Band of the Wyandotte Tribe of Indians hold an undivided ownership interest in all the Historic Wyandott Nation's trust property in Kansas City, Kansas, including Huron Cemetery. (Compl. ¶ 41). This was acknowledged in the Act of June 21, 1906 (34 Stat. 325, 348-49) that authorized the Secretary of the Interior to sell Huron Cemetery and move the remains of deceased persons interred there to the Quindaro Cemetery, with appropriate monuments over their remains. The Act also authorized the Secretary of the Interior to deduct the costs of moving the remains of the deceased persons from the proceeds of the sale of the cemetery, and from the sale of the ferry, if the claims to the ferry were just and equitable. And any remaining money derived from the sale of the cemetery and ferry would be **paid per capita to members of the Wyandotte Indians that were parties to the 1855 Treaty**. The Kansas Band was a party to the 1855 Treaty, so its undivided ownership interest was acknowledged in the 1906 Act, which was repealed by the Act on February 13, 1913 (37 Stat. 668). (Compl. ¶¶ 51 and 54).

The Wyandot Nation of Kansas' undivided ownership interest in the Historic Wyandotte nation's trust properties was also acknowledged in the Act of Act of December 20, 1982 (96 Stat. 1813) and Act of November 2, 1994 (108 Stat. 4791, that authorized per capita payments to the members, i.e., the Absentee Wyandots in Indian Claims Commission Docket 149 and Court of Claims Dockets 151, 212 and 213 (Compl. ¶ 41).

F. Congressional Recognition of Huron Cemetery as Tribal Trust Land

The status of Huron Cemetery as trust property stems from its original trust status as trust property under the 1834 Trade and Intercourse Act (25 U.S.C. § 177) and 1843 Treaty (9 Stat. 337, Art.1 and 2), and its reserved status as trust property under Article 2 of the 1855 Treaty (10 Stat. 1159, Art. 2). (Compl. ¶¶ 6 and 19).

The United States holds legal title to all trust land held by an Indian tribe or individual Indian allottees (or their heirs). The tribe and allottees (or their heirs) on the other hand hold beneficial or equitable title to trust land until such time as the Federal Government issues an unrestricted fee patent to them. After an unrestricted fee patent is issued them, they can alienate

the land to whomever they chose without the approval of the Federal Government. (Compl. ¶ 55).

In the Act of September 8, 1916 (39 Stat. 844) Congress appropriated $10,000 "for the preservation and improvement of Huron Cemetery, a tract of land in the city of Kansas City, Kansas, **owned by the government of the United States**, the **use of which was conveyed by treaty to the Wyandotte Tribe of Indians** as a cemetery for the members of the tribe . . . ." The 1916 Act confirmed and acknowledged that Huron Cemetery was trust land in which the United States held legal title and the Wyandotte Tribe of Indians held equitable or beneficial title. Because the cemetery is trust land, the Board of Trustees of Haskell Institute (a Native American vocational school) located in Lawrence, Kansas, was assigned to administer the funds and assure the perpetual maintenance of the cemetery. (Compl. ¶ 56).

An agreement with the City of Kansas City, Kansas for the carrying out the preservation and improvement of Huron Cemetery under the 1916 Act was signed on March 20, 1918. As part of the agreement the Government was to pay $1,000 to the City, and the City in turn agreed:

> To forever maintain, care for, preserve the lawns and trim the trees and give the grounds the same and usual attention that it gives to its city parks within the main part of the city, and particularly Huron Park adjoining the Cemetery; and that the City of Kansas City, Kansas, will furnish police protection equivalent to that furnished for the protection of Huron Park; and furnish all electrical energy free of charge for the maintaining of the electric lights, as provided for in the plans and specifications, maintaining and keeping in place all globes and fixtures, and give said Cemetery any and all care that a park of its nature in the heart of a city should demand.

The agreement was signed by Henry B. Peairs, Superintendent of Haskell Institute, for and in behalf of the Commissioner of Indian Affairs, and by H. A. Mendenhall, Mayor of Kansas City, Kansas. It was subsequently approved on April 17, 1918, by E. B. Merritt, Acting Commissioner of Indian Affairs. (Compl. ¶ 57).

In the Act of June 30, 1919 (41 Stat. 3) Congress provided that the Secretary of the Interior be, and he is hereby authorized to pay the authorities of Kansas City, Kansas, the sum of $1,000 in consideration of the agreement of said authorities forever to maintain and care for the **Huron Cemetery, a tract of land in the city of Kansas City, Kansas , owned by the Government of the United States**, as provided in the contract for said purposes with the said city of Kansas City, Kansas, **the use of which was conveyed by treaty to the Wyandot tribe of Indians as a cemetery for members of said tribe**, such payment to be made from the $10,000 appropriated for the preservation and improvement of said cemetery by the city of September 8, 1916 (thirty-ninth Statute at Large, page eight hundred and forty-four).

This language in the 1916 and 1919 Acts confirmed that the Huron Cemetery is trust land, the legal title of which is held by the Federal Government, and the beneficial or equitable title of which was held for the Wyandotte Tribe of Indians. (Compl. ¶¶ 56 and 58).

G. Status of Huron Cemetery as an Indian Reservation

The status of the Huron Cemetery as the Indian reservation of the Wyandot Nation of Kansas stems from its reservation status under the 1843 Treaty, and the1923 Act. In the 1923 Act Congress reaffirmed that Huron Cemetery was an "**Indian reservation in Kansas City, Kansas.**" (42 Stat 185; Compl. ¶ 59).

The Huron Cemetery was part of the Historic Wyandott Reservation established by the 1843 Treaty. (1843 Treaty, Art. 1 and 2; Compl. 10 and 11). Its status as a reservation was reserved in the 1855 Treaty. (1855 Treaty, Art. 2, Compl. ¶ 19). It was later reaffirmed in the 1923 Act (42 Stat 185; Compl. ¶ 59).

Once an Indian reservation is established by Congress, only Congress can thereafter disestablish it. *United States v. Clestine*, 215 U.S. 278 (1909) (all tracts included within it remain a part of the reservation until separated therefrom by Congress).

H. Members of the Wyandot Nation of Kansas as Wards of the Federal Government

In the 1923 Act, Congress referred to Conley sisters as "wards" of the Government." (42 Stat. 185; Compl. ¶ 59). This was congressional recognition that the Conley sisters were on the 1867 Treaty Register as enrolled members of the Wyandotte Tribe of Indians. (Aff. of Louisa A. Libby, ¶ 4 and Ex. B).

This status of the members of the Wyandot Nation of Kansas, as wards of the Government was reaffirmed in *United States of America on behalf of heirs to the Absentee Wyandotte allotment of Laura M. Van Pelt v. Weyerhaeuser Company*, 765 F.Supp. 643 (D. Ore., 1991). In upholding the Government's responsibility to protect an "Absentee Wyandotte allotment on the public domain in Oregon under the 1904 Act, the *Van Pelt* court held that "the legislative history of the 1904 Act states '[i]t is the duty of Congress, **upon which devolves the care of its wards**, the Indians, by and through the honorable Secretary of the Interior, to afford him an opportunity to give relief to these unfortunate Wyandottes.'H.R.Rep. No. 2681, 57th Cong., 1st Sess., at 2 (1902). **The Absentee Wyandotte Indians were not emancipated**." *Id.* at 648-649. (Compl. ¶ 49).

The status of the members of the Wyandot Nation of Kansas, as wards of the Government, was also reaffirmed when some members, or their heirs, holding restricted fee allotments were paid for their share of the *Cobell* settlement through their IIM trust Accounts. (Aff. of Louisa A. Libby, ¶ 1 and Ex. A).

I. Current Status of the Kansas Band of the Wyandotte Tribe of Indians

Under the 1867 Treaty, the persons whose names were on the Register were the tribe. (1867 Treaty, Art. 13; Compl. ¶ 26). After 1867, the treaty allowed for citizens to become tribal members "with the free consent of the tribe after its incorporation." (*Id.*). All the members of the Kansas Band and Oklahoma Band that were on the Register, and their off-spring, were the members of the Wyandotte Tribe of Indians after 1867. (*Id.*, Compl. ¶¶ 27, 46 and 59).

When the Oklahoma Band splintered off the Wyandotte Tribe of Indians and reorganized as a separate tribe under the 1937 OIWA, the remainder of the Wyandotte Tribe of Indians consisting of the Kansas Band continued to the existence of the Wyandotte Tribe of Indians.

(Compl. ¶ 37). The Wyandot Tribe of Indians changed its name in 1959 to the Wyandot Nation of Kansas to avoid confusing it with the Wyandotte Tribe of Oklahoma. (Compl. ¶¶ 2 and 71; Aff. of Janith K. English, ¶ 7).

No act of Congress has ever dissolved and terminated the Wyandotte Tribe of Indians (now the Wyandot Nation of Kansas) as a federally recognized Indian tribe. (Compl. ¶ 25).

J. Allotments in Severalty Issued to Members of the Wyandotte Tribe of Indians

Many members of the Kansas Band of the Wyandotte Tribe of Indians applied at Quapaw Agency for allotments on the 20,000 acre reservation in Oklahoma under the General Allotment Act of February 8, 1887 (24 Stat. 388; 25 U.S.C. §§ 331 *et seq.*) but were too late because all the available reservation lands were already allotted to tribal members. (Compl. ¶ 47). Congress responded by passing the Act of August 15, 1894 (2 Stat. 286) that allowed them to be allotted land elsewhere in "Indian territory" in Oklahoma. (*Id.*) And the Act of June 10, 1896 (29 Stat. 321) specified that they be allotted on the Choctaw and Chickasaw Nations land based on the 1896 Olive Roll. (*Id.*, Aff. of Janith K. English, ¶ 4 and Ex. A (attached copy of Olive Roll).

When the Kansas Wyandots were unable to get allotments on the Choctaw or Chickasaw lands, Congress passed the Act of April 28, 1904 (33 Stat. 519), which provided that all living Absentee Wyandot Indians whose names appeared on the December 17, 1896 Olive Roll:

> [M]ay select in person, under such rules and regulations as the Secretary of the Interior may prescribe, from the surveyed public non-mineral domain, eighty acres of agricultural land wherever there may be such lands subject to entry; and the heirs of any deceased Absentee Wyandotte Indians so enrolled may in like manner select a like quantify of land in the name of their deceased ancestor . . . and when lands shall have so selected by any person entitled to make such selection and such selection is approved by the Secretly of the Interior, he shall cause a patent to issue in the name of the enrolled Absentee Wyandotte . . . which patent shall

> contain the condition that the lands covered thereby shall not be aliened without the consent of the Secretary of the Interior.

(Compl. ¶ 48).

Under the 1904 Act, members of the Kansas Band of the Wyandotte Tribe of Indians, i.e., the "Absentee Wyandots," took restricted fee allotments on available public domain lands throughout several western states. Some of these allotments are still held in restricted fee status by the heirs of the original Absentee Wyandot allottees, who are still regarded as unemancipated wards of the Federal Government by the federal courts. (*United States of America on behalf of heirs to the Absentee Wyandotte allotment of Laura M. Van Pelt v. Weyerhaeuser Company, supra*; Compl. ¶ 49).

Many members of the Kansas Band of the Wyandotte Tribe of Indians did not move to 20,000 acre reservation in Oklahoma for different reasons, including the following: (1) the Wyandotte people were farmers and the Oklahoma reservation did not contain good farm land, (2) many were not provided with money from the $5,000 "immigrant fund" and could not afford to move, and (3) 113 members ended up on the Seneca Reservation under the protection of the Confederate States of America during the Civil War while the those in Kansas were members of the Methodist Episcopal Church North and were anti- slavery and sided with the Union, which created political, philosophical and theological differences between them. (Aff. of Janith K. English, ¶¶ 4 and 8 and Exs. D, E and F).

K. <u>The Sale of Huron Cemetery under the 1906 Act</u>

In 1906, a dispute arose between the Kansas Band and the Oklahoma Band of the Wyandotte Tribe of Indians over the sale of Huron Cemetery. The Oklahoma Band wanted to remove the graves from the cemetery and sell it because of its high commercial value. The Kansas Band resisted the sale because it was their relatives that were buried in the cemetery and they regarded the cemetery as Sacred Ground. (Compl. ¶ 50).

The dispute began when the Oklahoma Band got Congress to pass the Act of June 21, 1906 (34 Stat. 325, 348-49) that authorized the Secretary of the Interior to sell Huron Cemetery

and move the remains of deceased persons interred there to the Quindaro Cemetery,[4] with appropriate monuments over their remains. (Compl. ¶ 51).

Lyda Conley and her sisters opposed the sale of the Huron Cemetery and erected a structure on the cemetery, where they lived around the clock for several years, to protect it. They took turns standing guard with muskets, and put up "No trespassing" signs around it. Lyda attended law school and became a licensed Kansas attorney so she could challenge the 1906 Act in the federal courts. She eventually filed a lawsuit while the sale of the cemetery was pending, that she appealed all the way to the U.S. Supreme Court. (Compl. ¶ 52). *See Conley v. Ballinger*, 216 U.S. 84, 89 (1910). Lyda Conley became the first Native American woman to become a licensed Kansas attorney and the first to argue a case before the U.S. Supreme Court. (*Id.*)

In 1907, the Federal Government offered to sell Huron Cemetery to the City of Kansas City, Kansas $75,000.00 pursuant to the 1904 Act. The Defendant is estopped from denying that the value of the Huron Cemetery was $75,000 in 1907, since it offered to sell it for that amount in 1907. (Compl. ¶ 53).

As the *Conley* Supreme Court case gained national attention, the Conley sisters gained the support of Senator Curtis of Kansas, who got an Act passed to prevent the sale of the Huron Cemetery on February 13, 1913 (37 Stat. 668; Compl. ¶ 54).

L. Protection of Huron Cemetery as a cemetery under the 1997 Brownback Act

In 1997, Principal Chief Janith K. English and the Wyandot Nation of Kansas General Council had a bill drafted to protect the Huron Cemetery from commercial development, i.e., a proposal by the Wyandotte Tribe of Oklahoma to remove the human remains to Quindaro Cemetery and build a Class II and III casino on the two-acre tract of trust land that would be owned and operated by Oklahoma Tribe. They got Senator Sam Brownback of Kansas to

[4] The Quindaro Cemetery is not the Huron Cemetery. The Methodist Episcopal Church ended up within a Town named "Quindaro," which was named after the wife of Abelard Guthrie, a Wyandott woman. The Quindaro Cemetery was located on two acres of trust land assigned to the Methodist Episcopal Church (now part of Kansas City, Kansas) that was reserved under the 1855 Treaty. (1855 Treaty, Art. 2; Compl. ¶ 21).

introduced the bill in Congress. (Compl. ¶ 62). On November 14, 1997, Congress enacted the Brownback Bill into law as Public Law 105-83 (111 Stat. 1543). Section 125 (2) (A) and (B) of Public Law 105-83 provided that:

(2) The lands of the Huron Cemetery shall be used only—

(A) for religious and cultural uses that are compatible with use of the lands as a cemetery; and

(B) as a burial ground.

Section 125 (3) of the Act also contained the following legal description of the cemetery based on the August 15, 1888 Williams Millor Survey. (Compl. ¶ 63).

The amount of acres described in Public Law 105-83 for Huron Cemetery is "2 acres or more." It appears that the cemetery is "more" that two acres according to a November 9, 1859 letter to Commissioner of Indian Affairs A. B. Greenwood from J. C. McCoy. (Compl. ¶ 64, Aff. of Kristen E. Zane, ¶ 4).

M. Wyandot Nation of Kansas v. Norton case

On December 30, 2005, Plaintiff filed an action in the United States District Court for the District of Columbia against Federal Government representatives that involved many of the same claims that Plaintiff asserts in the instant case, including claims for declaratory and injunctive relief for failure to provide a proper accounting and corresponding monetary damages claims. This case was captioned *Wyandot Nation of Kansas v. Norton*, and contained docket number No. 1:05-cv-02491-TFH. (Complaint submitted in *Norton* (Doc. 1)).

In the *Norton* district court proceedings, the Federal Government engaged in protracted settlement negotiations with Plaintiff that began in 2006 and extended through April 2015. (Civil Docket for *Norton*, Case #1:05-cv-02491-THF). In that case, the Federal Government repeatedly promised to provide an accounting of Plaintiff's trust funds and non-monetary trust funds. (Defendants' Memorandum in Support of Motion for Remand and Stay of Litigation, submitted in *Norton* (Doc. 42, pp. 16-36); Joint Status Report, filed in *Norton* (Doc. 80, pp. 1-3).

The parties were unable to reach a settlement. On May 8, 2015, Plaintiff voluntarily dismissed the *Norton* district court case. (Notice of Voluntary Dismissal, submitted in *Norton* (Doc. 82).

On June 1, 2015, Plaintiff filed its Complaint in the Court of Federal Claims. (Doc. 1). On August 28, 2015, Defendant filed its Motion to Dismiss and Memorandum of Points and Authorities. (Doc. 7).

V. ARGUMENT

A. Plaintiff's Claims Are Not Barred by the Statute of Limitations

Plaintiff's Complaint sets forth four causes of action against the United States: (1) an action for an accounting of Plaintiff's Category One (Schedule A) 1867 Treaty trust funds; (2) an audit of Plaintiff's Category Two Huron Cemetery rights-of-way trust funds; (3) monetary damages for mismanagement of Category One treaty trust funds and accounts; and (4) monetary damages for mismanagement of Category Two Huron Cemetery rights-of-way trust funds. The United States incorrectly contends that these causes of action are all barred by the statute of limitations.

1. Plaintiff's Trust Fund Mismanagment Claims

Plaintiff's first two causes of action request a full trust fund accounting from the United States. In the first cause of action, Plaintiff seeks an accounting of the funds paid to Plaintiff and managed by the Federal Government under the 1867 Treaty. In the second cause of action, Plaintiff requests an accounting of the funds paid to Plaintiff for easements for grants of rights-of-way over and across two tracts of the Huron Cemetery trust lands.

In moving for dismissal of these claims on statute of limitations grounds, the United States misapprehends the accrual date of Plaintiff's causes of action. Although the first cause of action dates back to the Treaty of 1867 and the payment of trust funds in the late 1880s, that is not when Plaintiff's claim began to accrue for statute of limitations purposes.

By the Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329, Congress required the Federal Government to audit and reconcile tribal trust funds and to provide an accounting of

such funds. Congress reaffirmed these mandates in subsequent statutes, namely the Act of October 22, 1989, Pub. L. 101-121, 103 Stat. 701; the Act of November 5, 1990, Pub. L. 101-512, 104 Stat. 1915; and the Act of November 3, 1991, Pub. L. 101-154, 105 Stat. 990. These Acts require that the Federal Government certify, through an independent party, the results of the reconciliation of tribal trust funds as the most complete reconciliation possible of such funds.

To satisfy these requirements, the United States retained the accounting firm of Arthur Andersen LLP to prepare and issue reports to federally recognized Indian tribes. To date, Plaintiff has not received an Arthur Andersen Report or any other accounting of its trust fund accounts from the Federal Government.

The statute of limitations on a claim for losses to or mismanagement of Indian or tribal trust funds does not arise until the date that the affected tribe or individual Indian has been furnished with an Arthur Andersen Report, or other accounting of its trust accounts. *See* Act of November 5, 1990, Pub. L. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. 104-134, 110 Stat, 1341; Act of September 30, 1996, Pub. L. 104-208; 110 Stat. 3009; Act of November 14, 1997, Pub. L. 105-83, 111 Stat. 1543; Act of October 21, 1998, Pub. L. 105-227, 112 Stat. 2681; Act of November 29, 1999, Pub. L. 106-113, 113 Stat. 1501; Act of October 11, 2000, Pub. L. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. 107-63; Pub. L. 109-158 (December 30, 2005).

These appropriation acts, known as the Indian Trust Accounting Statute ("ITAS") for the Department of the Interior "suspend accrual of the statute of limitations for certain tribal trust claims." *The Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States* ("*Shoshone I*"), 93 Fed. Cl. 449, 459 (2010), *vacated on other grounds*, 672 F.3d 1021 (Fed. Cir. 2012). Specifically, the ITAS applies to claims "concerning losses to or mismanagement of [tribal] trust funds."*Goodeagle v. United States*, 111 Fed. Cl. 716, 721 (2013) (internal quotation marks omitted).

Under the ITAS, the statute of limitations "will not begin to run on a tribe's claims until an accounting is completed." *Shoshone Indian Tribe of the Wind River Reservation v. United States* ("*Shoshone II*"), 364 F.3d 1339, 1346 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973, *and cert. denied*, *E. Shoshone Tribe of Wind River Reservation v. United States*, 544 U.S. 973 (2005). In other words, the trust beneficiary must be provided with a meaningful accounting before the statute of limitations begins to accrue on a claim alleging mismanagement of trust funds by the Federal Government. *Id.* This is true even if the "operative facts "show the Federal Government's mismanagement of tribal trust funds "began occurring decades ago[.]" *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 732 (2013).

As explained above, Plaintiff has not yet received an Arthur Andersen Report or any meaningful accounting of the Federal Government's management of its Category One or Category Two trust funds. The funds at issue are held in trust within the Federal Government's possession. Hence, the ITAS applies by its express terms. It follows that the statute of limitations applicable to Plaintiff's first two causes of action has not yet begun to accrue. *See Shoshone II*, 364 F.3d at 1346; *see also Osage Nation v. United States*, 57 Fed. Cl. 392, 397 (2003) (Arthur Andersen Report was the first reconciliation by United States that may have qualified as a reconciliation report that triggered the accrual of statute of limitations applicable to tribe's claims regarding mismanagement of tribal trust funds). This necessarily means that these claims were timely filed.

In an effort to avoid this conclusion, the United States asserts that the Fiscal Year 2015 appropriations act did not expressly contain the language of the ITAS. According to the Government, the lack of this language in the 2015 appropriations act necessarily means that the ITAS does not apply to Plaintiff's trust claims.

The Government's position is fundamentally flawed. Contrary to the Government's contentions, the ITAS did not substantively change existing law for one fiscal year. Rather, the ITAS corresponded with existing statutory law, specifically, the Trust Management Reform Act, 25 U.S.C. §§ 4001 *et seq.* Pursuant to that Act, the United States is required to prepare

reconciliation reports for each tribal trust account. 25 U.S.C. § 4044. The reconciliation requirements of § 4044 were adopted from appropriations bills that were in effect prior to 1994. (Defendants' Memorandum in Support of Motion for Remand and Stay of Litigation, submitted in *Wyandot Nation of Kansas v. Norton*, Case No. 1-05-cv-02491-TFH, in the United States District Court for the District of Columbia (Doc. 42, p. 8).

"The law strongly disfavors repeals by implication". *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1369 (Fed. Cir. 2002). Thus, implied repeals of appropriation acts are disfavored. *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). Similarly, "[c]onstruing a statute as a repeal by implication is generally disfavored[.]" *Xianli Zhang v. United States*, 640 F.3d 1358, 1368 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 2375 (2012).

Because the ITAS did not change but rather corresponded with and supplemented existing statutory law, the ITAS could not be repealed by implication through the absence of certain language in the 2015 appropriations act. *See Wolfchild*, 559 F.3d at 1258 n. 13; *Inter-Coastal Xpress*, 296 F.3d at 1369. Instead, a repeal of the ITAS could only be accomplished through express language by Congress. No such express repeal has been made. Indeed, the accounting and reconciliation requirements set forth by the Trust Management Reform Act and 25 U.S.C. § 4044 currently stand as valid and enforceable law.

The evidence is undisputed that Plaintiff has never received a reconciliation report from the Federal Government. As a result, the statute of limitations pertaining to Plaintiff's first and second causes of action against the United States that seek an accounting of the Federal Government's management of Plaintiff's trust accounts cannot have expired. *See Osage Nation*, 57 Fed. Cl. at 397.

Moreover, even if the ITAS does not apply to Plaintiff's trust claims, those claims were still timely filed. Generally speaking, claims against the Federal Government are subject to the six-year statute of limitations set forth in 28 U.S.C. § 2501. Under this statute, a claim against

the United States must be brought within six years "after such claim first accrues." 25 U.S.C. § 2501.

A claim for breach of trust accrues "when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone II*, 364 F.3d at 1348; *see also Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578 (Fed. Cir. 1988). "A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone II*, 364 F.3d at 1348. Even so, it is common for a trust beneficiary to be unaware that a trustee has breached his or her fiduciary responsibilities in the management of the trust property. *Id.* As a result, the statute of limitations for breach of trust does not begin to accrue "until a final accounting has occurred that establishes the deficit of the trust." *Id.*

In the present case, it is undisputed that no final accounting has been rendered to Plaintiff. Thus, the statute of limitations applicable to Plaintiff's trust actions has not yet begun to accrue. *See id.*

To combat this conclusion, the United States incorrectly asserts that Plaintiff was on notice more than six years prior to the filing of the instant Complaint that a potential breach of fiduciary duty by the Government occurred. This assertion presents a question of material fact that cannot be determined on a legal motion.

"The question of when a claimant should know of its claim is a fact-bound inquiry that depends on the reasonableness of the claimant's actions." *Sikorsky Aircraft Corp. v. United States*, 105 Fed. Cl. 657, 672 (2012). No genuine issue of material fact exists here as to when Plaintiff was on notice of the United States' alleged mismanagement of its trust accounts. This is particularly true given the fact that the Federal Government has never provided Plaintiff with any accounting of those trust accounts. *See ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 986 (Fed. Cir. 2014) (whether party had actual or constructive notice of misappropriations by a specific date presented a factual issue that could not be appropriately resolved at the Complaint stage); *see also Puterman v. Lehman Bros., Inc.*, 332 Fed. Appx. 549, 552 n. 3 (11th Cir. 2009)

("Inquiry notice [is] a fact question [that] generally is inappropriate for resolution on a Rule 12(b)(6) motion"); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 367 (7th Cir. 1997) ("Whether a plaintiff had sufficient facts to place him on inquiry notice of a claim for securities fraud . . . is a question of fact, and as such is often inappropriate for resolution on a motion to dismiss under Rule 12(b)(6)").

Moreover, the United States is estopped from claiming that Plaintiff's action is time-barred. In a prior proceeding between the parties before the United States District Court for the District of Columbia, the Federal Government engaged in protracted settlement negotiations with Plaintiff in regard to Plaintiff's request for a full accounting of Plaintiff's tribal trust accounts. These negotiations began in 2006 and extended through April 2015.

During the course of these negotiations, the Federal Government repeatedly promised to provide a complete accounting of Plaintiff's trust funds and non-monetary trust funds. (Defendants' Memorandum in Support of Motion for Remand and Stay of Litigation, submitted in *Norton* (Doc. 42, pp. 16-36); Joint Status Report, filed in *Norton* (Doc. 80, pp. 1-3). However, no settlement was ultimately achieved, and Plaintiff voluntarily dismissed the district court action on May 8, 2015.

In cases where a defendant lulls the plaintiff into failing to take action or to adopt a disadvantageous legal position, the doctrine of equitable estoppel applies to prevent the defendant from asserting the statute of limitations as a defense against the action. *Smith v. City of Chicago Heights*, 951 F.2d 834, 840-41 (7th Cir. 1992); *McConnell v. Gen. Tel. Co. of Cal.*, 814 F.2d 1311, 1317 (9th Cir. 1987), *cert. denied*, *Gen. Tel. Co. of Cal. v. Addy*, 484 U.S. 1059 (1988); *Renz v. Beeman*, 589 F.2d 735, 750 (2nd Cir. 1978), *cert. denied*, 444 U.S. 834 (1979). By repeatedly assuring Plaintiff that the Federal Government would provide a complete accounting of Plaintiff's trust funds, the Government gave Plaintiff a false sense of security and lulled Plaintiff into keeping the district court case alive for over nine years. Under the circumstances, the United States should be deemed equitably estopped from asserting the statute of limitations as a defense against Plaintiff's action before this Court. *See Renz*, 589 F.2d at 750.

2. Effect of Indian Claims Commissions Act

The United States incorrectly alleges that the Indian Claims Commission Act ("ICCA"), Pub. L. No. 79-726, 60 Stat. 1049 (1946), is a statute of repose that bars the first two causes of action contained in Plaintiff's Complaint. The ICCA bars a tribe from bringing a claim against the United States that existed as of August 13, 1946. 60 Stat. 1052; *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500, 520 (2011).

The ITAS prevents the accrual of claims for losses to or mismanagement of tribal trust funds from August 14, 1946 forward. *Id.* However, in cases like the present one where a tribe has not received an accounting of trust funds from the United States, the ICCA is not applicable. *Osage Nation*, 57 Fed. Cl. at 398.

The Trust Fund Reform Act provides that the Federal Government's reconciliation report concerning tribal trust funds must include "as full and complete accounting as possible of the account holder's funds to the earliest possible date." 25 U.S.C. § 4044. This language provides "further indication of the intent of Congress to allow Indian tribes to file tribal trust fund mismanagement claims within six years after an accounting of the trust fund is furnished to the Tribe no matter when the mismanagement may have occurred." *Osage Nation*, 57 Fed. Cl. at 398. As the language of the Trust Fund Reform Act and corresponding case law demonstrates, the ICCA does not bar Plaintiff's first and second causes of action.

3. Plaintiff's Huron Cemetery Claims

The United States incorrectly alleges that Plaintiff's second cause of action is time-barred because Plaintiff knew no later than 1996 that the United States did not recognize Plaintiff as having any beneficial ownership interest in the Huron Cemetery. Plaintiff, however, is not seeking a declaration of an ownership interest in the cemetery lands. Rather, Plaintiff contends that the United States has failed to provide a full and accurate accounting of the Category Two (easements for grants of rights-of-way) trust funds and has taken actions that deprive Plaintiff of the ability to determine whether and to what extent it has suffered a monetary loss. (Compl. ¶ 101).

As explained above, no statute of limitations accrues where a tribe has not received an accounting of trust funds from the United States. *See* 25 U.S.C. § 4044; *Osage Nation*, 57 Fed. Cl. at 398. The tribe is permitted to file trust fund mismanagement claims within six years after an accounting of the trust fund is finally furnished to the Tribe "no matter when the mismanagement may have occurred." *Osage Nation*, 57 Fed. Cl. at 398. Hence, Plaintiff's Huron Cemetery claims are not time-barred.

B. This Action Does Not Involve an Intra-Tribal Dispute

Contrary to the Government's contentions, this case does not involve an intra-tribal dispute over which the Court lacks subject matter jurisdiction. Plaintiff's claims are not, in fact, predicated on its exclusion from the Wyandotte Nation of Oklahoma. Rather, as detailed in the Statement of Undisputed Facts, the Oklahoma and Kansas Bands are wholly separate tribes. The interests of each tribe were completely bifurcated long ago.

The Act of March 3, 1871 (RS 2079; 25 U.S.C. § 71) provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe, prior to May 3, 1871, shall be hereby invalidated or impaired.*

(Emphasis added).

The 1871 Act also reaffirmed Plaintiff's undivided ownership interest in the Huron Cemetery trust lands. The Oklahoma Band has a separate ownership interest in these lands. The instant case pertains only to Plaintiff's claim that the United States has mismanaged Plaintiff's proportionate share of the Huron Cemetery lands. The Oklahoma Band's interest in these lands is not at issue.

The United States clouds the matter by making the specious claim that Plaintiff's members "were effectively dis-enrolled" from the Wyandotte tribe when the Wyandotte Nation of Oklahoma was organized under the OIWA in 1937. (Def's Mot. to Dismiss, p. 11). In so

doing, the United States incorrectly suggests that Plaintiff is a non-federally recognized entity and is not a separate tribe from the Oklahoma Band.

The facts, however, show that Plaintiff was created and organized under Articles 13 and 14 of the 1867 Treaty. Plaintiff's members have always continued and maintained the 1867 Treaty tribe and its membership rolls, as the off-spring of tribal members listed on the Register.

Articles 13 and 14 of the 1867 Treaty established a new tribe called the "Wyandotte Tribe of Indians." The members of the new tribe were those non-citizen Wyandots listed on a Register, plus 140 others added to the Register by Interior in 1872. The split in the Wyandotte Tribe of Indians came about in 1937 when the Oklahoma Band reorganized as a separate tribe under the 1936 OIWA. However, this action did not dissolve the remainder of the Wyandotte Tribe of Indians residing in Kansas. The Kansas Band still exists as the Wyandot Nation of Kansas, having changed the name of the Wyandotte Tribe of Indians to the Wyandot Nation of Kansas in 1959. A tribe does not need an OIWA constitution or bylaws, 25 U.S.C. § 503, or 1934 Indian Reorganization Act constitution and bylaws, 25 U.S.C. § 476, to be federally recognized.

The Wyandot Nation of Kansas is a tribe that is still recognized by Congress and meets the definition of an Indian tribe under the Trust Management Reform Act. This Act defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C.§ 4001(2).

The Wyandot Nation of Kansas and its members currently receive special services provided by the United States as a result of their status as Indians. These services include allowing its members to attend BIA schools as acknowledged in the March 15, 1996 letter to Chief George Zane from BIA Director of Tribal Services Deborah J. Maddox; entering into a maintenance agreement on behalf of the Wyandotte Tribe of Indians with the City of Kansas City, Kansas in 1918 to perpetually maintain, care for, and preserve the Huron Cemetery; paying for attorney fees resulting from the occupation of Huron Cemetery by the Conley sisters as

provided in the Act of March 2, 1923 (42 Stat. 185); creating IIM trust Accounts for ICC and Court of Claims Judgment Funds set aside by the BIA in special trust account for minor children until they reached their majority, some of whom recently received money from the *Cobell* Settlement, and providing title services for the Huron Cemetery and "Absentee Wyandotte" Indian allotments. (Aff. of Janith K. English, Ex. B. *See* 25 C.F.R. §.150.5 (d) ("The Bureau Central Office, Washington, D.C., provides title services for . . . the Absentee Wyandottes").

Accordingly, the Wyandot Nation of Kansas qualifies as an "Indian "tribe " within the meaning of Trust Management Reform Act. *See* 25 U.S.C. § 4001(2). The Kansas tribe is completely separate from the Wyandotte Tribe of Oklahoma and has legal and equitable interests in trust lands wholly distinct and apart from those of the Oklahoma tribe.

The undivided ownership interests of the Kansas and Oklahoma tribes in the trust lands at issue were bifurcated in prior proceedings before the Indian Claims Commission and Court of Claims. Specifically, in the Indian Claims Commission Docket 139 and Court of Claims Dockets 141, 212 and 213, awards were initially made under the 1982 Wyandot Distribution Act (96 Stat. 1813) based on the 1896 Olive Roll (for the Kansas tribe) and the Quapaw Roll (for the Oklahoma tribe). Plaintiff's participation the Indian Claims Commission and Court of Claims awards conclusively established that it had and has an undivided ownership interest in the Huron Cemetery lands. The Government is estopped by the application of the doctrines of res judicata and/or collateral estoppel from now claiming that the interests of the two tribes cannot be separated. *See Martin v. United States*, 30 Fed. Cl. 542, 546-50, *aff'd*, 41 F.3d 1519 (Fed. Cir. 1994).

The Oklahoma tribe is not a party to and has no interest in the present litigation. Hence, principles associated with intra-tribal immunity are not applicable to this case. *See United States v. Wadena*, 152 F.3d 831, 846 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050, *and cert. denied, Clark v. United States*, 526 U.S. 1050, *and cert. denied, Rawley v. United States*, 526 U.S. 1050 (1999) (intra-tribal immunity principles did not apply in case involving tribal council officials' conspiracy to commit voter fraud).

To bring a suit for breach of trust within the scope of the Indian Tucker Act, a tribe only has to show that the statute or regulation in question "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as trustee and liable in damages for breach." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003). The Federal Government's control and management of Indian resources and land brings a claim for breach of trust squarely within the Indian Tucker Act's Jurisdiction. *Id.*; *United States v. Mitchell*, 463 U.S. 206, 226 (1983).

The United States does not dispute that Plaintiff's Complaint definitively establishes jurisdiction on these grounds. Hence, it must be concluded that this Court has subject-matter jurisdiction over Plaintiff's claims.

C. Plaintiff Has Stated a Claim Upon Which Relief Can Be Granted

The Federal Government has a fiduciary duty under the Tucker Act and Indian Tucker Act to prudently invest tribal and individual Indian money trust funds. 25 U.S.C. § 162a; 28 U.S.C. §§ 1491 and 1505; *Cobell v. Norton*, 392 F.3d 461, 470-71 (D.C. Cir. 2004); *Goodeagle v. United States*, 122 Fed. Cl. 292, 295 (2015). The Federal Government may be held liable for breach of fiduciary duty for the mismanagement of the trust funds. *United States v. Navajo Nation ("Navajo Nation II")*, 129 S. Ct. 1547, 1554 (2009).

In the present case, the Complaint details the myriad ways in which the Federal Government has grossly mismanaged, and continues to grossly mismanage, Plaintiff's Category One and Category Two trust funds. (Compl. ¶¶ 102-117). These allegations sufficiently state viable causes of action against the United States. *See Cobell*, 392 F.3d at 470-71.

In an effort to avoid this conclusion, the United States contends that Plaintiff's claims are speculative because they do not assert a specific amount of damages but rather are based on hypothetical trust income. At best, the Government's allegations concern the quantum of relief to which Plaintiff is entitled once an accounting is made and not Plaintiff's underlying right to relief. The fact that the amount of damages Plaintiff has sustained is unclear does not negate Plaintiff's entire cause of action.

In this regard, it if well-settled that as long as a plaintiff establishes the fact that he or she has been damaged, any uncertainty as to the amount of damages sustained does not serve to defeat the cause of action. "If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery." *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (quoting *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960)); *see also Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002).

The facts alleged in the Complaint clearly show that Plaintiff has been damaged by the Federal Government's gross mismanagement of tribal trust funds. The fact that uncertainty exists as to the actual amount of damages does not preclude Plaintiff's legal right of recovery. *See Seaboard Lumber Co.*, 308 F.3d at 1302; *Ace-Federal Reporters*, 226 F.3d at 1333. Hence, the Government's motion to dismiss should be denied.

VI. CONCLUSION

For the foregoing reasons, the United States' motion to dismiss should be denied in its entirety and an order should be entered declaring that Court has subject matter jurisdiction over this matter under the Tucker Act, 28 U.S.C. § 1491, and Indian Tucker Act, 25 U.S.C. § 1505.

Dated: September 28, 2015

Respectfully submitted,

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