**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

(Electronically filed on October 13, 2015)

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| 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. | ) | |

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**

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## I. INTRODUCTION

It has been clearly established as a matter of law for over a century that, with respect to the Huron Cemetery, "the United States retained the same power that it would have had if the Wyandotte tribe had continued in existence after the treaty of 1855; that the only rights in and over the cemetery were tribal rights." *Conley v. Ballinger*, 216 U.S. 84, 91 (1910). It is also clearly established as a matter of law that plaintiff, the Wyandot Nation of Kansas, is not a federally recognized Indian tribe, that plaintiff is not the successor-in-interest to the Historic Wyandott Tribe, and that the United States holds the Huron Cemetery in trust for the Wyandotte Nation of Oklahoma.[1/] *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001) *superseded by statute at* Dep't of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107–63, § 134, 115 Stat. 414, 442-43 (2001); *City of Kansas City, Kan. v. United States*, 192 F. Supp. 179, 181-82 (D. Kan. 1960) *aff'd* 360 U.S. 568 (1961); Act of May 15, 1978, Pub. L. No. 95–281, 92 Stat. 246 (codified at 25 U.S.C. § 861); Act of Aug. 1, 1956, Pub. L. No. 84-887, §§ 2(a), 2(c), 2(d), and 5(c), 70 Stat. 893, 893-94. Thus, as a matter of law, plaintiff lacks standing to assert claims with respect to the Huron Cemetery because the United States owes no treaty, statutory, or regulatory obligations, money-mandating in breach, *to plaintiff* with respect to the cemetery.

Even if plaintiff were to have some beneficial interest in the Huron Cemetery—which it does not—plaintiff's claims are untimely. Plaintiff admits that it knew of alleged encroachments on Huron Cemetery land by no later than 1959, Plaintiff's Opposition to Defendant's Motion to

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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, "Wyandott" when referring to the terminated Historic Wyandott Tribe, and "Wyandotte" when referring to the federally-recognized Wyandotte Nation of Oklahoma.

Dismiss ("Opp'n") 3-4, ECF No. 8, and that it has never received compensation for any rights-of-way that cross the Huron Cemetery, *id.* at 4. There are no issues of fact to be resolved through discovery. The allegations in plaintiff's complaint, and as confirmed in plaintiff's opposition, clearly establish that its Huron Cemetery claims are untimely and should be dismissed.

Plaintiff admits in its opposition that, as alleged in its complaint, all "Schedule A" payments due under the Treaty of 1867 (Treaty between the United States and the Senecas, *et al.*, Feb. 23, 1867, 15 Stat. 513 ("Treaty of 1867")) were made between 1882 and 1888. Compl. ¶¶ 78-79, ECF No. 1. Accordingly, those claims are also facially untimely and are barred by the Indian Claims Commission Act's statute of repose. In light of the foregoing undisputed facts, plaintiff now argues it seeks "a full financial accounting of the funds described in Schedule A," Opp'n 7, 17, but that claim is beyond this Court's subject-matter jurisdiction because this Court cannot order equitable accountings. Plaintiffs Schedule A claims should therefore be dismissed.

In sum, plaintiff, a non-federally recognized entity that is not the successor-in-interest to the treaties with the Historic Wyandott Tribe, lacks standing to assert claims pertaining to lands held in trust for another Indian tribe, the Wyandotte Nation of Oklahoma. Also, plaintiff's claims (both its land claims and its funds claims) are patently untimely and are barred by the statute of limitations. Thus, plaintiff's complaint should be dismissed in its entirety.

## II. ARGUMENT

### A. Plaintiff Lacks Standing to Assert Any Claims Regarding the Huron Cemetery.

To assert a breach of trust claim against the United States in this Court, an Indian tribe must point to a treaty, statutory, or regulatory fiduciary obligation owed by the government to the tribe that is money-mandating in breach. *United States v. Navajo Nation*, 556 U.S. 287, 290

(2009) ("*Navajo II*") (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")). This requirement, whether viewed as an Article III standing issue, *see Historic E. Pequots v. Salazar*, 934 F. Supp. 2d 272, 277 (D.D.C. 2013) (complaint dismissed for lack of standing because "Historic Eastern Pequots" failed to establish they were the same entity as "Eastern Pequot Indians of Connecticut" or "Paucatuck Eastern Pequot Indians of Connecticut" identified in revised final decision), or under the "zone of interest" test, *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. ___, 134 S. Ct. 1377, 1387 (2014), means that plaintiff must first establish that it is an entity recognized *by the government* as a beneficial owner of the Huron Cemetery before advancing breach of trust claims with respect to that property. As a matter of law, plaintiff cannot make this showing.

**1. Plaintiff cannot assert statutory or regulatory claims because it is not federally-recognized.**

Federal recognition of Indian tribes is a question of law. *LaPier v. McCormick*, 986 F.2d 303, 305-06 (9th Cir. 1993). By statute, the Department of the Interior must annually publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a). As stated by Congress when it passed the Federally Recognized Indian Tribe List Act of 1994 ("List Act"):

> The question of whether a Native American Group constitutes an Indian tribe is one of immense significance in federal Indian law. Because Congress' power to legislate for the benefit of Indians is limited by the Constitution to Indian tribes, for most federal purposes it is not enough that an individual simply be an Indian to receive the protections, services, and benefits offered to Indians; rather, the individual must also be a member of an Indian tribe. "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent

> nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary. Finally, it imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members. In other words, unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by the Department of the Interior's Bureau of Indian Affairs (BIA), and establishes tribal status for all federal purposes.

H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768 (footnotes omitted). Accordingly, whether a group constitutes a "tribe" is a matter that is committed to the discretion of Congress and the Executive Branch, and courts should defer to their judgment. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *James v. U.S. Dep't of Health and Human Serv.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

Here, plaintiff does not dispute that the Department of the Interior recognizes the Wyandotte Nation of Oklahoma as the successor entity to the Historic Wyandott Tribe. 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). Further, courts have unequivocally found that the Department of the Interior holds the Huron Cemetery in trust for the Wyandotte Nation of Oklahoma, not plaintiff. *Sac & Fox Nation of Mo.*, 240 F.3d at 1256; *City of Kansas City, Kan.*, 192 F. Supp. at 181-82. Because plaintiff is not a federally-recognized Indian tribe and is not the beneficial owner of the Huron Cemetery, it is not within the "zone of interest" of statutory or regulatory fiduciary obligations owed to Indians, and cannot state a claim for breach of trust for violation of those statutory or regulatory prescriptions that are money-mandating in breach.[2/]

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[2/] Plaintiff admits that the Bureau of Indian Affairs is of the view that the Wyandot Nation of Kansas is ineligible for federal acknowledgement through the administrative process. Affidavit of Janith K. English Ex. C, ECF No. 8-12. Thus, only Congress can restore federal recognition to the Wyandot Nation of Kansas, which it has not done. This claim is therefore beyond this Court's subject-matter jurisdiction. *See United Tribe of Shawnee Indians v. United*

**2. Because Congress and the Department of the Interior recognize the Wyandotte Nation of Oklahoma as the successor-in-interest to Wyandott treaties, plaintiff's treaty-based claims are non-justiciable.**

Plaintiff also may not advance treaty-based claims to the Huron Cemetery because the United States and Congress recognize the Wyandotte Nation of Oklahoma as the successor-in-interest to the Huron Cemetery provisions of the Treaty of 1867. While, "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, [it] can have no impact on vested treaty rights." *United States v. Washington*, 520 F.2d 676, 692-93 (9th Cir. 1975) ("*Washington II*"). At the same time, "[t]he recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government." *United States v. Washington*, 384 F. Supp. 312, 400 (W.D. Wash. 1974) ("*Washington I*").

In 1956, Congress passed an act terminating the government-to-government relationship between the United States and the Wyandotte Nation of Oklahoma. Pub. L. No. 84-887 (1956). In the termination act, Congress specifically addressed the Huron Cemetery as property of the Wyandotte Nation of Oklahoma:

> Title to the tract of land in Kansas City, Kansas, that was reserved for a public burying ground under article 2 of the treaty dated January 21, 1855 (10 Stat. 1159) with the Wyandotte Tribe of Indians shall be transferred or sold in accordance with subsections (a) and (b) of this section, and the proceeds from any sale of the land may be used to remove and reinter the remains of persons who are buried there, to move any monuments now located on the graves, and to erect at reasonable cost one appropriate monument dedicated to the memory of the departed members of the Wyandotte Tribe . . . .

*Id.* § 5(c). In the termination act, Congress acknowledged that the Wyandotte Nation of

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*States*, 253 F.3d 543, 548, 551 (10th Cir. 2001) ("UTSI can only prevail on its contention if we accept its bare assertion that it is the present-day embodiment of the Shawnee Tribe.").

Oklahoma—not plaintiff—was the successor-in-interest to the Huron Cemetery provision of the Treaty of 1855 (Treaty With the Wyandotts, Jan. 31, 1855, 10 Stat. 1159 ("Treaty of 1855")), and included the Huron Cemetery in the Act as the Wyandotte Nation of Oklahoma's property. *See* Pub. L. No. 84-887 § 2(a) ("'Tribe' means the Wyandotte Tribe of Oklahoma").

Congress enjoys broad plenary power over Indian affairs and it may modify or alter treaty terms. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Because Congress recognized the Wyandotte Nation of Oklahoma as the successor-in-interest to the Huron Cemetery provision of the Treaty of 1855, this Court lacks jurisdiction to review that political question. *See People of Bikini ex rel. Killi/Bikini/Ejit Local & Gov't Council v. United States*, 554 F.3d 996, 1000-1001 (Fed. Cir. 2009) (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942) for the proposition that what government is to be regarded as the representative of a sovereign is a political question). There is no more Historic Wyandott Tribe, and it is up to the Legislative and Executive Branches, not the judiciary, to determine which modern-day Indian entity is the successor-in-interest to the Historic Wyandott Tribe. Congress has deemed the Wyandotte Nation of Oklahoma the successor-in-interest to the Wyandott treaties, and this Court should defer to Congress's judgment. *Holliday*, 70 U.S. at 419.

Congress confirmed its views when it restored the government-to-government relationship between the United States and the Wyandotte Nation of Oklahoma. In the restoration act, Congress "reinstated" to "the Wyandotte Indian Tribe of Oklahoma" "all rights and privileges . . . under Federal treaty, statute, or otherwise which may have been diminished or lost" in the termination act. 25 U.S.C. § 861(a) and (c). In other words, Congress restored to the Wyandotte Nation of Oklahoma, not plaintiff, the Huron Cemetery treaty rights addressed in section 5(c) of the termination act.

There is simply no statute, regulation, or treaty that affords plaintiff any continuing treaty interest in the Huron Cemetery. Still, plaintiff argues that a judgment fund distribution act, Pub. L. No. 97-371, 96 Stat. 1813 (1982), gives it a beneficial ownership interest in the Huron Cemetery. Opp'n 9. Plaintiff is incorrect, the distribution act arising out of the judgments in Indian Claims Commission Dockets 139 and 141 says nothing about beneficial ownership of the Huron Cemetery. This is unsurprising, since the Wyandot Indian Claims Commission Act cases involved land claims for lands ceded in Ohio. Those Wyandot Indians from Ohio (and their descendants) "who had failed to register at the Quapaw agency with the rest of the Tribe and who were subsequently given 80 acre allotments from the public domain lands" were known as "Absentee Wyandots." While the Absentee Wyandots were not members of the Wyandotte Nation of Oklahoma, Congress believed they were entitled to an equitable share of the awards for those Ohio land claims because their ancestors migrated from Ohio. H.R. REP. NO. 97-819, at 1-2 (1982). But, in awarding an equitable portion of the Ohio land claims judgment to the Absentee Wyandots, Congress made no determination as to the beneficial ownership of land in Kansas, including the Huron Cemetery.

Similarly, the "Brownback Amendment," Opp'n 15-16, is also silent as to the beneficial ownership of the Huron Cemetery. Dep't of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83 § 125, 111 Stat. 1543, 1567 (1997). This appropriations act rider limited the permissible uses of the Huron Cemetery to use for religious and cultural purposes and as a burial ground, but says nothing about who is the beneficial owner of the land. *Id.*

In addition to Congress's recognition of the Wyandotte Nation of Oklahoma as the successor-in-interest to the Huron Cemetery provisions of the Treaty of 1855, the Department of the Interior also recognizes the Wyandotte Nation of Oklahoma as the treaty successor-in-

interest. 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. This administrative determination of beneficial ownership is also beyond judicial review in this Court. *See, e.g.*, *Aulston v. United States*, 823 F.2d 510, 513 (Fed. Cir. 1987) (Claims Court lacked jurisdiction to review Interior Board of Land Appeals' property ownership determination).

Neither Congress nor the Department of the Interior recognizes plaintiff as the successor-in-interest to the Huron Cemetery provisions of the Treaty of 1855. To the contrary, both Congress and the Department of the Interior acknowledge the Wyandotte Nation of Oklahoma as the successor-in-interest to those treaty provisions. That political decision is beyond this Court's subject-matter to review, and plaintiff lacks standing to challenge that political decision in this Court.[3/]

**3. Plaintiff's Huron Cemetery claims should be dismissed.**

As a matter of law, plaintiff's assertion that it has an "undivided ownership interest in all the Historic Wyandott Nation's trust property in Kansas City, Kansas, including Huron Cemetery," Opp'n 9, is incorrect and need not be accepted as true on this motion to dismiss. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) ("[A] court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Bell Atl.*

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[3/] Plaintiff's lengthy discussion of the fact that certain of its members received allotments, had Individual Indian Money ("IIM") accounts, or were class members in *Cobell*, Opp'n 11-14, 25-26, is a red herring for two reasons. First, none of plaintiff's members are beneficial owners of the Huron Cemetery, their allotments are elsewhere. Second, and more fundamentally, plaintiff lacks standing to assert claims on behalf of its individual members. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Berez*, 458 U.S. 592, 610 n.16 (1983) ("[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923))); *accord N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986) (holding tribe lacked standing to sue on behalf of members in *parens patrie* capacity).

*Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Because the United States does not hold the Huron Cemetery in trust for plaintiff, *see* Motion to Dismiss ("Mot.") 25-26, ECF No. 7, plaintiff cannot state a claim for breach of trust regarding that land. Because plaintiff is not a federally-recognized tribe, it is not within the "zone of interest" of a trust statute or regulation that is money-mandating in breach. Also, because the government recognizes the Wyandotte Nation of Oklahoma as the successor-in-interest to the Huron Cemetery provisions of the Treaty of 1855, plaintiff lacks standing to assert treaty-based claims with respect to that property. Plaintiff's second and fourth claims for relief should be dismissed.

**B. Plaintiff's Huron Cemetery Claims are Untimely.**

Plaintiff does not dispute, because it cannot, that its Huron Cemetery claims are "trust asset mismanagement" claims, *see Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035 (Fed. Cir. 2012) ("*Shoshone IV*"). Opp'n 23-24. As explained by the United States Court of Appeals for the Federal Circuit, "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 IV*, 672 F.3d at 1035. Plaintiff claims that the "City of Kansas City, Kansas has been using the two Huron Cemetery tracts for its street without valid, federally approved easements for grants of rights-of-way . . . ." Opp'n 4. Plaintiff's Huron Cemetery claims are unquestionably trust asset claims because it seeks damages for hypothetical easements that it claims should have, but were not, issued by the government. *Id*.

The Federal Circuit made clear in *Shoshone IV* that the Department of the Interior appropriations act riders apply only to trust *fund* mismanagement claims, and that trust *asset* mismanagement claims are subject to the six-year statute of limitations. 672 F.3d at 1034. Thus, accrual of plaintiff's asserted Huron Cemetery claims are not dependent upon receipt of any "accounting." Accordingly, plaintiff's Huron Cemetery claims accrued 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*"). Here, that alleged repudiation occurred when the Department of the Interior allegedly permitted the City of Kansas City to construct streets on Huron Cemetery land without an easement or right-of-way. Furthermore, plaintiff did not need actual knowledge of the repudiation for the claim to accrue, instead actual or constructive knowledge ("knew or should have known") will suffice. *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)).

The allegations in plaintiff's complaint, accepted as true for purposes of this motion, Compl. ¶¶ 73, 86-88, and plaintiff's admissions in its opposition, Opp'n 4, clearly establish that plaintiff knew or should have known of allegedly undocumented rights-of-way across the Huron Cemetery by no later than 1959, Compl. ¶ 87, and as early as 1867, *id.* ¶ 73. Where a statute of limitations defect appears on the face of the complaint it may be decided on a Rule 12 motion to dismiss. *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n. 12 (2d Cir. 2014) (citation omitted); *see also Shoshone IV*, 672 F.3d at 1030 (statute of limitations challenge treated as Rule 12(b)(1) motion). Plaintiff's plea to defer resolution of the statute of limitations until a merits decision, Opp'n 21-22, is therefore misguided and should be rejected in light of the fact that plaintiff's Huron Cemetery claims are on their face untimely, as admitted in the complaint. Compl. ¶¶ 73, 86-88.

The statute of limitations is jurisdictional and is not subject to equitable tolling, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008), and the United States may not

waive subject-matter jurisdiction, *see United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Estoppel is available against government actors only in cases involving "affirmative misconduct." *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003); *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989). The United States cannot be estopped from asserting the statute of limitations as a bar to subject-matter jurisdiction, and, even if it could, the government's good-faith involvement in settlement negotiations with plaintiff in its prior lawsuit, Opp'n 22, hardly amounts to affirmative misconduct warranting the extraordinary application of estoppel against the government.

To be clear, in 2007, the government filed a motion in thirty-seven cases pending in the United States District Court for the District of Columbia seeking a voluntary remand of Indian trust accounting cases to develop a historical accounting plan. Motion for Remand, ECF No. 42 in *Wyandot Nation of Kansas v. Kempthorne*, No. 05-cv-2491 (D.D.C. filed Aug. 11, 2007). That motion was denied. Order of Dec. 19, 2007, ECF No. 48 in *Wyandot Nation of Kansas v. Kempthorne*. And, nowhere in the government's motion did it promise that any historical accounting plan would include an "accounting" of non-monetary trust assets (such as the Huron Cemetery) or an "accounting" for plaintiff, an entity that is not a federally-recognized Indian tribe. This should be patently obvious from the fact that in the *Cobell* litigation, the Department of the Interior scoped out of its historical accounting plan, *inter alia*, closed accounts, *Youpee* escheatments, and administrative fees. *Cobell v. Salazar*, 573 F.3d 808, 814-15 (D.C. Cir. 2009). The government never promised plaintiff any accounting. Instead, the parties voluntarily engaged in settlement negotiations until it because evident that resolution through settlement was unlikely. Joint Status Report, ECF No. 80 in *Wyandot Nation of Kansas v. Kempthorne*. Plaintiff, in turn, unilaterally and voluntarily dismissed its complaint. Opp'n 17. Plaintiff's

estoppel argument is without merit.

In sum, plaintiff's Huron Cemetery claims are trust asset mismanagement claims, and plaintiff knew or should have known of those claims by no later than 1959. The six-year statute of limitations applies to plaintiff's Huron Cemetery claims, and they are untimely based upon allegations on the face of plaintiff's complaint. The United States is not estopped from raising the statute of limitations, and plaintiff's Huron Cemetery claims should be dismissed now.

### C. Plaintiff's Trust Fund Mismanagement Claims are Untimely.

#### 1. Plaintiff's trust fund mismanagement claims are subject to the six-year statute of limitations and are untimely.

Plaintiff's trust fund mismanagement claims (its "Schedule A" claims) are untimely because plaintiff admits, as it must, that its claims "date[] back to the Treaty of 1867 and the payment of the trust funds in the late 1880s." Opp'n 17. Thus, plaintiff concedes that the United States has not held funds in trust for plaintiff's benefit since the Nineteenth Century. *See* Mot. 25-26. Nonetheless, plaintiff argues its "Schedule A" claims are timely because of appropriations act riders that lapsed before plaintiff filed its complaint and because it believes it is entitled to some form of an accounting, even though it can point to no statute or regulation that requires the United States to account for trust funds disbursed in the Nineteenth Century. Opp'n 17-22. Plaintiff's arguments lack merit, the six-year statute of limitations applies, and even if the appropriations act riders apply, plaintiff's claims are still untimely.

The United States explained in its opening brief that there is a rebuttable presumption that appropriations act provisions do not change substantive law and are only effective during the fiscal year addressed by the appropriations act. Mot. 15-17 (citing, *inter alia*, *Building & Constr. Trades Dep't v. Martin*, 961 F.2d 269, 273-74 (D.C. Cir. 1992)). Plaintiff responds only by noting that repeals by implication of substantive laws are disfavored. Opp'n 20. While this is

true, appropriations acts are presumptively *not* substantive law. *Building & Constr. Trades Dep't*, 961 F.2d at 273-74. Thus, the rule against repeal of substantive laws by implication does not apply to the appropriations act riders.

Although the presumption that appropriations act provisions do not effectuate substantive law may be rebutted, plaintiff has made no argument or showing that any of the factors identified by the courts, Mot. 16-17, the Comptroller General, *id.* at 17, or the General Accounting Office, *id.*, apply here. Opp'n 19-20. Because there is no indication that Congress intended the appropriations act riders to be permanent—and Congress intentionally omitted the provision it had included in every appropriations act for over twenty years in the Fiscal Year 2015 appropriations act—the appropriations act riders no longer apply as a matter of law.

The facts alleged in plaintiff's complaint, accepted as true for purposes of this motion, establish that plaintiff's claims are untimely. Plaintiff knew or should have known of any issues with the management or disbursement of the "Schedule A" funds by "the late 1880s," when they were disbursed. Opp'n 17; *San Carlos Apache Tribe*, 639 F.3d at 1350. Accordingly, those claims are untimely and plaintiff's second and fourth causes of action should be dismissed. 28 U.S.C. § 2501.

**2. Even if the appropriations act riders apply, plaintiff's trust fund mismanagement claims are still untimely because the United States has no obligation to account for funds disbursed in the Nineteenth Century.**

Plaintiff is incorrect when it argues that the United States had an obligation under the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), Pub. L. No. 103-412, 108 Stat. 4239, to provide plaintiff with an "accounting" of the "Schedule A" funds. Opp'n 18-21. By its express terms, the 1994 Act only applies to funds "deposited or invested pursuant to" 25 U.S.C. § 162a, 25 U.S.C. § 4011(a), or tribal trust accounts "for which the Secretary *is*

responsible" as of passage of the 1994 Act, 25 U.S.C. § 4044 (emphasis added). As to 25 U.S.C. § 4011, 25 U.S.C. § 162a was enacted in 1938, 52 Stat. 1037 (1938), *after* the "Schedule A" funds were disbursed. As to 25 U.S.C. § 4044, it also does not apply because the "Schedule A" funds were disbursed prior to 1994, when that provision was enacted.

Moreover, the 1994 Act's application is limited to federally-recognized Indian tribes. 25 U.S.C. § 4001(2). "[R]ecognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," *id.*, is a phrase of art that is taken from the List Act, 25 U.S.C. § 479a-1(a). Because plaintiff is not federally-recognized, it is not within the "zone of interest" of the 1994 Act and is not entitled to the accountings or reconciliations called for under that Act.

Plaintiff's "Schedule A" trust fund mismanagement claims accrued no later than the "late 1880s," when they were disbursed. Opp'n 17. Plaintiff objectively knew or should have known of its claims at that time. *San Carlos Apache Tribe*, 639 F.3d at 1350. The United States has no statutory or regulatory obligation to account to plaintiff for the "Schedule A" funds disbursed in the Nineteenth Century, and the appropriations act riders do not apply to plaintiff's trust fund mismanagement claims. No accounting is or was necessary to place plaintiff on notice of its "Schedule A" claims, and plaintiff has no "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*"). Plaintiff's "Schedule A" trust fund mismanagement claims are untimely based upon the allegations on the face of plaintiff's complaint and should be dismissed for lack of subject-matter jurisdiction.

### D. Plaintiff's Trust Fund Mismanagement Claims Are Barred by the Indian Claims Commission Act's Statute of Repose.

In its motion, the United States demonstrated that plaintiff's "Schedule A" trust fund mismanagement claims are barred by the Indian Claims Commission Act's statute of repose

because they were claims "existing before" August 13, 1946, that were not presented to the Indian Claims Commission by August 13, 1951. Indian Claims Commission Act ("ICCA") § 12, Pub. L. No. 79-726, 60 Stat. 1049, 1052 (1946); Mot. 19-22. In response, plaintiff relies exclusively on Judge Hewitt's decision in *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003). Opp'n 23. But *Osage*'s holding cannot be squared with binding precedent in the Federal Circuit holding that the ICCA

> 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.

*Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974). Judge Hewitt did not mention or discuss *Sioux Tribe* in *Osage*. *Osage Nation*, 57 Fed. Cl. at 397-98. Also, Judge Hewitt applied accrual concepts (a statute of limitations test) to the ICCA's statute of repose, *id.*, something that the Supreme Court recently reaffirmed is improper. *CTS Corp. v. Waldburger*, 573 U.S. ___, 134 S. Ct. 2175, 2183 (2014). *Osage* is not binding on this court and should not be followed here.

*Osage* is also distinguishable from this case. In *Osage*, Judge Hewitt determined that the appropriations act riders deferred the accrual of the tribe's claims to 1999, and therefore the ICCA did not apply. *Osage Nation*, 57 Fed. Cl. at 397-98. But, as explained above, *see* Section II.C, *supra*, those appropriations act riders expired before plaintiff filed its complaint and do not apply to plaintiff's case. The ICCA's statute of repose clearly bars plaintiff's "Schedule A" trust fund mismanagement claims which existed no later than the "late 1880s," Opp'n 17, and those claims should be dismissed for lack of subject-matter jurisdiction.

### E. This Court Lacks Subject-Matter Jurisdiction Over Plaintiff's Accounting Claims.

Since plaintiff characterizes its first two causes of action as seeking "(1) an action for an accounting of Plaintiff's Category One (Schedule A) 1867 Treaty trust funds; [and] (2) an audit of Plaintiff's Category Two Huron Cemetery rights-of-way trust funds," *id.*, those claims should alternatively be dismissed for lack of subject-matter jurisdiction. It is well established that any accounting obligation of the United States owed to Indians is equitable, not legal. *Cobell*, 573 F.3d at 811 (in reversing an award of restitution the court held "[w]e now take that reasoning a step further, and instruct the district court to use its equitable power to enforce the best accounting that Interior can provide, with the resources it receives, or expects to receive, from Congress."). Thus, "accounting" and "audit" claims are not cognizable in this Court because it lacks subject-matter jurisdiction to award an equitable accounting. *Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 487-88 (1966) (citations omitted) (holding that "[i]t is fundamental that an action for an accounting is an equitable claim," which exceeds the subject-matter jurisdiction of this Court). As such, plaintiff cannot advance a claim for an equitable accounting in this Court. Because plaintiff admits its "first two causes of action request a full trust fund accounting from the United States," Opp'n 17, those claims should be dismissed for lack of subject-matter jurisdiction.

## III. CONCLUSION

The Supreme Court and the Tenth Circuit have held as a matter of law that the Huron Cemetery is held in trust by the United States for the Wyandotte Nation of Oklahoma. Thus, as a matter of law, plaintiff lacks standing to assert claims with respect to the Huron Cemetery. Even if plaintiff did have standing, its Huron Cemetery claims are admittedly trust asset mismanagement claims, are subject to the six-year statute of limitations, and are untimely

because plaintiff admits it knew or should have known of those claims by 1959. Plaintiff's Huron Cemetery claims should be dismissed.

Plaintiff's trust fund mismanagement claims accrued and existed, by plaintiff's own admission, by no later than the "late 1880s." Thus, these claims are subject to the six-year statute of limitations and are untimely. The United States has no obligation to account for funds disbursed in the Nineteenth Century under the 1994 Act or otherwise. Also, plaintiff's trust fund mismanagement claims are barred by the ICCA's statute of repose.

Plaintiff's claims for an equitable accounting are outside this Court's limited subject-matter jurisdiction. Plaintiff's complaint should be dismissed in its entirety.

Respectfully submitted, October 13, 2015,

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