No. 2016-1654

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WYANDOT NATION OF KANSAS, A/K/A WYANDOTTE TRIBE OF INDIANS,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

On Appeal from the United States Court of Federal Claims,
No. 15-560, Honorable Thomas C. Wheeler

BRIEF OF THE UNITED STATES AS APPELLEE

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STATEMENT OF RELATED CASES

No appeal from this civil action has been before this Court or any other appellate court previously. Undersigned counsel is not aware of any pending related cases within the meaning of Fed. Cir. R. 47.5.

JURISDICTIONAL STATEMENT

Plaintiff invoked the jurisdiction of the Court of Federal Claims ("CFC") under the Tucker Act, 28 U.S.C. § 1491 and the Indian Tucker Act, 28 U.S.C. § 1505. (Appx.16¶4). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3) to review the CFC's January 4, 2016, final order and judgment dismissing plaintiff's complaint for lack of subject matter jurisdiction. (Appx.1-10). Plaintiff filed a timely notice of appeal from the CFC's final order and judgment on March 4, 2016. (Appx.488).

STATEMENT OF THE ISSUES

Suits alleging a breach of trust must be filed within six years after the trustee repudiates the alleged trust expressly or by taking actions inconsistent with her responsibility. In addition, any Indian claim accruing before 1946 must have been filed before 1951. Since at least the 1880s, the United States has denied holding any Indian funds or Indian lands in trust for plaintiff. Are plaintiff's breach of Indian trust claims filed in 2015 timely? Also, does plaintiff have standing to challenge the United States' management of Indian trust lands where the United States holds no Indian trust lands for plaintiff's benefit?

STATEMENT OF THE CASE

Plaintiff is an entity incorporated under Kansas law, which refers to itself as the "Wyandot Nation of Kansas." (Appx.15¶2, SAppx37). Although plaintiff refers to itself as an Indian tribe, the United States does not recognize it as such. *See generally* 80 Fed. Reg. 1,942 (Jan. 14, 2015) (list of federally-recognized Indian tribes). This case arises out of decisions made by the alleged ancestors of plaintiff's members to terminate their trust status in 1855 and become United States citizens (Appx.22-25), and the disposition of alleged trust funds made by 1882. As a result of those acts disposing of alleged trust funds, the United States does not hold any funds in trust for plaintiff's benefit and owes plaintiff no fiduciary duties. Plaintiff nonetheless seeks to advance claims arising out of payments called for under a treaty executed in 1867, which the government paid out in 1882. (Appx.51-57, 63-65). Plaintiff also claims a beneficial interest in the Huron Cemetery, a parcel of land held in trust by the government for a different Indian tribe that is federally-recognized, and plaintiff seeks damages for hypothetical income from rights-of-way across cemetery land that were created in 1857. (Appx.57-63, 65-69). Because plaintiff's claims accrued

in the 1800s or at least six-years before the filing of the complaint in 2015, the CFC concluded that the six-year statute of limitations in 28 U.S.C. § 2501 precluded it from exercising subject matter jurisdiction over plaintiff's claims. (Appx.4-6, 9). The CFC also concluded that plaintiff lacks standing to raise its Huron Cemetery claims because plaintiff has no ownership or beneficial interest in the property. (Appx.7-8). Plaintiff appeals. (Appx.488).

I. LEGAL BACKGROUND

A. American Indian Trust Fund Management Reform Act of 1994 ("Reform Act").

The Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994),[1] among other things, states that "the Secretary [of the Interior] shall account for. . .all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to [25 U.S.C. §] 162a." 25 U.S.C. § 4011(a). It also states that the Secretary shall transmit a report "for each tribal trust fund account for which the Secretary *is* responsible" as of passage of the Reform Act in 1994. 25 U.S.C. § 4044 (emphasis added). But the Reform

[1] The Act was codified as enacted in scattered sections of Title 25.

Act makes these accountings and reports available only to Indian tribes, which the Reform Act defines as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village . . ., 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).

B. Federally Recognized Indian Tribe List Act of 1994 ("List Act").

Eight days after Congress enacted the Reform Act, Congress enacted the List Act, Pub. L. No. 103-454 (1994), which requires the Secretary of the Interior to annually "publish in the Federal Register 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. The List Act defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." *Id.* § 479a(2). The 2015 list of federally-recognized Indian tribes is found at 80 Fed. Reg. at 1,942; *see also* 2016 List, 81 Fed. Reg. 5,019 (Jan. 29, 2016). Plaintiff is not listed on the list of federally-recognized Indian tribes. *Id.*

II. FACTUAL BACKGROUND[2]

A. The Treaties of 1842, 1843, 1850, and 1855.

Plaintiff alleges that it is comprised of the descendants of members of the Historic Wyandotte Tribe.[3] (Appx.15¶2). The Wyandottes historically resided in what is now Ohio and Michigan. (Appx.18¶8). By the Treaty of March 17, 1842, the Wyandottes ceded and relinquished to the United States all the lands and possessions owned or claimed by the tribe within Ohio and Michigan in exchange for a promise of 148,000 acres west of the Mississippi. *Id.*; *see also* Treaty of April 1, 1850, Preamble, 9 Stat. 987, 987 ("Treaty of 1850"). The land grant west of the Mississippi to the Wyandotte Tribe did not happen and, in 1843, the Wyandotte Tribe agreed to purchase from the Delaware Tribe 1,920 acres located in modern-day Kansas. *See*

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[2] The following facts are taken from plaintiff's complaint, and accepted as true solely for purposes of this appeal, or are facts that may be judicially noticed because they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned," Fed. R. Evid. 201(b)(2).

[3] Numerous spellings have been employed over time for the tribe and its people, including "Wyandot," "Wyandott," and "Wyandotte." The United States will use plaintiff's preferred spelling, "Wyandot," when referring to plaintiff, and "Wyandotte" to refer to the historic tribe.

Agreement with the Delawares and Wyandot, 1843, 9 Stat. 337 (ratified July 25, 1848). (Appx.19¶10).

In the middle of the Nineteenth Century, the Wyandottes desired to terminate their tribal status and become United States citizens.[4] *See* Treaty of 1850, Preamble, [9 Stat. at 987]; *see also* (Appx.21¶15). In furtherance of that desire, in 1850, the Wyandotte Tribe proposed to cede and relinquish all of its land and terminate its existence as a tribe in exchange for (1) payment of $479,000; (2) extinguishment of their debt to the Delaware Tribe for the land purchased in 1848; and (3) fee simple title to its members of the land purchased in 1848. *See* Treaty of 1850, [9 Stat. at 987-93]. Congress rejected the Wyandotte Tribe's proposal and, instead, rescinded any claim the Wyandotte Tribe may have to the 148,000 acres promised in the 1842 Treaty in exchange for payment of $100,000 and extinguishment of the Wyandotte Tribe's debt to the Delaware Tribe for the lands purchased in 1848.[5] *Id.*, Art. I (amended by Congress) [9 Stat. at 994].

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

[5] "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights" and "Congress can alter the

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

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

Id., Art. 6 [10 Stat. at 1162]. In exchange for the foregoing, the tribe (1) ceded its lands purchased from the Delaware Tribe (*id.*, Art. 2 [10 Stat. at 1159-60]) so those lands could be divided and patented in fee "to the individuals and members of the Wyandott nation" (*id.*; *see also id.*, Art. 3 [10 Stat. at 1160]); (2) was to be paid $380,000 "to be equally distributed and paid to all the individuals and members of the said nation" (*id.*, Art. 6 [10 Stat. at 1162]); and (3) agreed to have the $100,000 invested under the Treaty of 1850 "together with any

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terms of an Indian treaty." *South Dakota v. Yankton Sioux Trib*e, 522 U.S. 329, 343 (1998).

accumulation of said principal sum" equally distributed and paid to all the individuals and members of the tribe (*id*., Art. 7 [10 Stat. at 1162]).

B. The Treaty of 1867.

Six years after the Treaty of 1855, the Civil War commenced. The Wyandottes were loyal to the Union during the war, but many Indians, including some Wyandottes, suffered greatly during the war and were forced to sell their lands. *See* Treaty between the United States and the Senecas, *et al*., Feb. 23, 1867, Preamble, 15 Stat. 513, 513 ("Treaty of 1867"). Thus, in 1867, the United States entered into a treaty with several Indian tribes, including the Historic Wyandotte Tribe. *Id.*

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

The Treaty of 1867 called for

> [a] register of the whole people, resident in Kansas and elsewhere, [to] be taken by the agent of the Delawares, under the direction of the Secretary of the Interior,. . . which shall show the names of all those who declare their desire to

> be and remain Indians, and in a tribal condition, together with incompetents and orphans.. . .; and all such persons, *and those only*, shall hereinafter constitute *the tribe*.

Id., Art. XIII [15 Stat. at 516] (emphasis added). The newly-reconstituted tribe is known as the "Wyandotte Nation." The Wyandotte Nation is a federally-recognized Indian tribe, *see* 80 Fed. Reg. at 1,946, with its tribal headquarters in Wyandotte, Oklahoma. The Wyandotte Nation of Oklahoma[6] arose from those Wyandotte Indians that elected to remain Indians and to join the newly-reconstituted tribe. The Wyandotte Nation of Oklahoma is the only Wyandotte tribe or Indian entity recognized by the United States, (*id*.), and the only Wyandotte entity to have a trust relationship with the United States. *See City of Kansas City, Kan. v. United States*, 192 F. Supp. 179, 181-82 (D. Kan. 1960), *aff'd*, 365 U.S. 568 (1961) ("Since the incorporation of the Wyandottes of Oklahoma, the United States has dealt with them as the sole representatives of the Wyandotte Indians.").

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[6] The federally-recognized Indian tribe refers to itself as the "Wyandotte Nation," *see* 80 Fed. Reg. at 1,946, but it has previously been identified as, *inter alia*, the "Wyandotte Nation, Oklahoma," *see* 75 Fed. Reg. 60,810, 60,813 (Oct. 1, 2010). To distinguish the federally-recognized Indian tribe from plaintiff, we will use "Wyandotte Nation of Oklahoma" to refer to the former herein.

The Treaty of 1867 provided that "the Secretary of the Interior is hereby authorized and required to appoint three persons whose duty it shall be to ascertain and report to the department the amount of money, if any, due by the United States to the Wyandott[e] Indians under existing treaty stipulations,[7] and the items mentioned in Schedule A, appended to this treaty." (Appx.344). Schedule A called for the payment of $83,314.40 representing "the full claim of the Wyandottes against the United States under former treaties." (Appx.345). The money, if any, was to be "divided, and that portion equitably due to the citizens of said people shall be paid to them, or

[7] Congress appropriated the funds to pay for the aforementioned three-person panel in 1869. *See* Appropriation Act of April 10, 1869, 16 Stat. 13, 34. The panel submitted its report on March 2, 1869, and on May 29, 1872, based upon that report, Congress appropriated $11,703.56 for "taxes unjustly collected by the territorial government of Kansas" and $5,000 "to enable the Wyandottes to establish themselves in their new homes in the Indian Territory," totaling $16,703.56 "to be paid under the direction of the President of the United States." Appropriation Act of May 29, 1872, 17 Stat. 165, 189. An appropriation of $16,703.56 appears—identified as "Fulfilling Treaties with the Wyandotts"—in the Department of the Interior's Appropriations and Expenditures for the Fiscal Year Ending June 30, 1872. (SAppx5). That $16,703.56 carries through to the Department of the Interior's Appropriations and Expenditures for the Fiscal Year Ending June 30, 1873, and therein it is reported that those funds were disbursed, leaving a zero balance at the end of Fiscal Year 1873. (SAppx10).

their heirs, under the direction of the Secretary of the Interior." (*Id.*). After such a division, any balance, less "the cost of the land purchased from the Senecas," was to be paid per capita to the members of the newly-reconstituted Wyandotte tribe, *i.e.*, the Wyandotte Nation of Oklahoma. (*Id.*). It was subsequently determined that $28,109.51, represented the "Schedule A" payments, less the cost of the purchase price of the Seneca land. (Appx.54¶78, citing 1881 Report of Commissioner of Indian Affairs) (Addendum (Add.) at 2)). In March and April 1882, the United States paid that amount upon verifying that the individual claimants were the rightful beneficiaries. (Appx.54¶78, citing 1882 Report of Commissioner of Indian Affairs) (Add. at 2, 4)).

C. The Huron Cemetery.

The Huron Cemetery is a historic Wyandotte burial ground in present-day downtown Kansas City, Kansas. Rights-of-way for city streets have traversed the cemetery since at least 1857. (Appx.51¶73, 57-58¶87, 58¶88). The property also has been the subject of a dispute between the Wyandotte Nation of Oklahoma that has wanted to sell the property or use it to promote its casino gaming interests and non-tribal member individuals of Wyandotte descent which have wanted to

preserve it as a burial ground. (Appx.39¶¶50-51). This dispute has resulted in numerous lawsuits dating back more than 100 years. *See Conley v. Ballinger*, 216 U.S. 84, 91 (1910); *City of Kansas City*, 192 F. Supp. at 181-82; *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001), *superseded in part by statute* at Pub. L. No. 107–63, § 134 (2001).

Under the Treaty of 1855, certain Wyandotte lands were exempted from assignment to individual members, including the Huron Cemetery. *See* Treaty of 1855, Art. 2 [10 Stat. at 1159-60]. When the Wyandotte Nation of Oklahoma was reconstituted under the Treaty of 1867, it assumed beneficial interest of the Huron Cemetery. *See Conley*, 216 U.S. at 91.

In 1906, Congress authorized the Secretary of the Interior to remove remains from the Huron Cemetery and to reinter those remains at the Wyandotte cemetery in Quindaro and then sell the property. *See* 1906 Appropriation Act for the Indian Department, 34 Stat. 325, 348-49.[8] The proceeds from the sale (less costs) were to be paid per capita to

[8] The 1906 Act also authorized the Secretary to sell lands used for a ferry that also were exempted from assignment in the 1855 Treaty.

"the Wyandotte tribe of Indians." *Id*. In 1908, the Attorney General issued an opinion on the title status of the Huron Cemetery. The Attorney General concluded that title to the Huron Cemetery was in the United States, subject to the right of Indians to use the cemetery as a burial ground. *See* Right of the United States to Dispose of Wyandotte Cemetery, Kansas City, Kan., 26 Op. Atty. Gen. 491 (1908). The Attorney General also found that the Wyandotte Nation of Oklahoma had abandoned their right to use the Huron Cemetery, having long since reorganized and removed to Indian Territory in Oklahoma. *Id.* at 495. This meant that the United States was free to sell the property. *Id.*

In 1910, the Supreme Court confirmed that the Huron Cemetery was held in trust by the United States for the Wyandotte Nation of Oklahoma, not for any individual Wyandotte Indians or for plaintiff's claimed ancestors, and that the United States had the authority to sell the land. *See Conley*, 216 U.S. at 91. The Huron Cemetery sale never occurred, however, and in 1913, Congress repealed the Secretary of the Interior's authority to sell the cemetery. *See* Act of Feb. 13, 1913, 37

These lands were sold under this Act. (Appx.38-40¶51) (acknowledging the lands were sold, but questioning the sales price).

Stat. 668. In 1916, Congress appropriated $10,000 for the "preservation and improvement" of the Huron Cemetery "owned by the government of the United States, the use of which was conveyed by treaty to the Wyandotte Tribe of Indians." Act of Sept. 8, 1916, 39 Stat. 844. In 1918, the United States and the City of Kansas City, Kansas, entered into a personal care contract for maintenance of the Huron Cemetery. (Appx.41-42¶57).

In 1956, Congress once again authorized the sale of the Huron Cemetery when, consistent with the government's then-policy of assimilation, it terminated the government-to-government relationship between the United States and the Wyandotte Nation of Oklahoma. *See* Pub. L. No. 84-887, § 5(c) (1956). In 1960, a group of non-tribal member individuals of Wyandotte descent sought to enjoin the cemetery's sale, but the United States District Court for the District of Kansas found that they lacked standing or failed to state a cause of action because the United States held title to the cemetery in trust for the Wyandotte Nation of Oklahoma. *See City of Kansas City*, 192 F. Supp. at 181-82. Once again, however, the sale of the cemetery never occurred and, in

1978, Congress restored the Wyandotte Nation of Oklahoma's federal recognition and repealed the 1956 Act. *See* 25 U.S.C. § 861(a) and (c).

In 1996, the Department of the Interior issued a decision recognizing that the Huron Cemetery is a "reservation" of the Wyandotte Nation of Oklahoma for purposes of the Indian Gaming Regulatory Act. *See Sac & Fox Nation*, 240 F.3d at 1256. That same year, the United States took a parcel of land adjacent to the cemetery into trust for the tribe. *Id.* at 1257. These two decisions facilitated the Wyandotte Nation of Oklahoma's plan to open a casino on the parcel of land adjacent to the cemetery and prompted lawsuits from plaintiff, various Indian tribes, and the State of Kansas.[9] *Id.* at 1253.

In 1998, plaintiff resolved its suit by entering into a settlement agreement with the Wyandotte Nation of Oklahoma in which the parties agreed that the Huron Cemetery forever would be limited to its use as a cemetery. (SAppx38§3). The agreement recognized that the United States claims to hold title to the cemetery in trust for the

[9] The United States eventually prevailed in that litigation. *See Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010). In 2008, the Wyandotte Nation of Oklahoma opened the 7th Street Casino on the property adjacent to the cemetery.

Wyandotte Nation of Oklahoma and thus not for plaintiff or plaintiff's members. (SAppx38§5,39§7). The agreement further states that plaintiff is *not* a federally-recognized Indian tribe (SAppx36), but that the Wyandotte Nation of Oklahoma would take no action to oppose plaintiff's efforts to obtain federal recognition as an Indian tribe, (SAppx42§13).

III. PROCEDURAL BACKGROUND

On June 1, 2015, plaintiff filed this lawsuit seeking an accounting of, and monetary damages for alleged mismanagement of, alleged trust funds described in Schedule A of the 1867 Treaty ("Category One claims") and funds hypothetically derived from rights-of-ways across the Huron Cemetery ("Category Two claims"). (Appx.14-70).

Acting on the United States' motion to dismiss, the CFC found that plaintiff's Category One claims were precluded by the general six-year statute of limitations for claims over which the CFC has jurisdiction, 28 U.S.C. § 2501, because plaintiff knew or should have known of any breach of duty on the part of the government by the late 1880s. (Appx.4-6). The CFC concluded that plaintiff could not resurrect its Category One claims by relying on the Reform Act's accounting or

reporting provisions because those provisions applies only to federally-recognized Indian tribes and plaintiff is not a federally-recognized Indian tribe under the List Act. (Appx.4-5). Similarly, because plaintiff is not a federally-recognized Indian tribe under the List Act and thus is not owed an accounting, plaintiff also could not rely on the tolling provisions of various Department of the Interior Appropriations Act riders from 1990 through 2014, which provided that certain claims for losses due to mismanagement of trust funds do not accrue until the affected tribe or individual Indian has been furnished with an accounting. (Appx.6) (citing, *e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 § 2, Div. G, 128 Stat. 5, 305-06).

The CFC found that plaintiff lacks Article III standing to assert its Category Two claims because it failed to show that it has a legal interest in the Huron Cemetery property. (Appx.7-8). The CFC noted that plaintiff previously has acknowledged that the United States does not hold the Huron Cemetery in trust for plaintiff, but instead for the Wyandotte Nation of Oklahoma. (Appx.8). The CFC further concluded that, even if plaintiff had Article III standing, its Category Two claims were precluded by the six-year statute of limitations because "[p]laintiff

knew or should have known of the events giving rise to its Huron Cemetery claims at some point in the 20th century, if not the 19th century." (*Id.*). The CFC thus granted the government's motion to dismiss for lack of subject matter jurisdiction (Appx.9), and entered final judgment for the United States (Appx.10).

SUMMARY OF ARGUMENT

At the threshold, while plaintiff seemingly seeks to litigate its status as a non-federally recognized entity, it is well-established that the recognition of an Indian tribe is a political question that is not subject to judicial review. Plaintiff is a Kansas corporation, not an Indian tribe. As plaintiff itself previously has admitted, the United States does not recognize plaintiff's corporation as an "Indian tribe" or as the political successor-in-interest to the Historic Wyandotte Tribe. The Wyandotte Nation of Oklahoma is the federally-recognized Indian tribe and the only political successor-in-interest to the Historic Tribe. As such, this Court must disregard any of plaintiff's arguments that depend on its false legal claim of being federally-recognized Indian tribe or a political successor-in-interest to the Historic Tribe.

As to the claims raised in plaintiff's complaint, the CFC correctly dismissed them for lack of subject matter jurisdiction. Because trust fund mismanagement claims accrue when the trustee repudiates the trust, the general six-year statute of limitations for claims filed in the CFC bars the CFC's jurisdiction over plaintiff's Category One claims filed in 2015. Since at least 1882 when the United States announced that it had distributed all funds owed under the 1867 Treaty to the rightful recipients, the United States continually has repudiated any trust relationship by denying such a relationship's existence. The Indian Claims Commission Act's statute of repose also bars plaintiff's claims because claims accruing before 1946 had to be filed by 1951. The United States owes plaintiff no accounting because it holds no funds in trust for plaintiff and because plaintiff identifies no duty of the United States to provide an accounting beyond obligations owed only to federally-recognized Indian tribes, which plaintiff is not. An accounting also would not assist plaintiff here because the receipt of an accounting in 2015 cannot revive claims that began to accrue no later than 1882 and thus expired by at least 1888.

Plaintiff's Category Two claims also are untimely under the general six-year statute of limitations. Plaintiff admits that it knew of alleged encroachments on Huron Cemetery land in the 1800s and certainly by no later than 1996, and that it has never received compensation for any rights-of-way across the Huron Cemetery. Moreover, both Congress and the Executive branch recognize that the United States holds title to the Huron Cemetery in trust not for plaintiff, but for the Historic Wyandotte Tribe's actual successor-in-interest, the federally-recognized Wyandotte Nation of Oklahoma. Thus, plaintiff lacks standing to assert its Category Two claims relating to the Huron Cemetery because the United States owes no treaty, statutory, or regulatory obligations, to plaintiff relating to the cemetery.

Finally, because all facts necessary to decide the motion to dismiss either are admitted by plaintiff or are judicially noticeable, there are no issues of fact to be resolved through discovery here and the CFC properly dismissed the lawsuit in its entirety.

STANDARDS OF REVIEW

This Court reviews *de novo* the CFC's dismissal of plaintiff's complaint under Rule 12(b)(1) of the United States Court of Federal

Claims for a lack of subject matter jurisdiction. *See Microsoft Corp. v. GeoTag, Inc.*, 817 F.3d 1305, 1311 (Fed. Cir. 2016); *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002) (whether court has subject matter jurisdiction is a question of law); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008) (statute of limitations in 28 U.S.C. § 2501 is jurisdictional).

When deciding a motion to dismiss, a court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. *See Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (2009). When a motion to dismiss challenges the Court's subject-matter jurisdiction, the Court may also look beyond the pleadings and inquire into jurisdictional facts to determine whether Article III jurisdiction exists. *See Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991).

Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiff's responsibility to allege facts sufficient to establish the Court's subject-

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

ARGUMENT

I. PLAINTIFF IS NOT A FEDERALLY-RECOGNIZED INDIAN TRIBE.

At the threshold, plaintiff's assertion (at 20-24) that it is a federally-recognized Indian tribe is false and appears to be an attempt to gain federal recognition by judicial decree. Such an attempt is improper because "[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." *United States v. Washington*, 384 F. Supp. 312, 400 (W.D. Wash. 1974). "As a political determination, tribal recognition is not

justiciable." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005). Federal courts thus must defer to the determinations of the political branches of government on the legal status of an Indian entity. *See 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). Accordingly, the question of whether a claimed Indian entity is a federally-recognized Indian tribe or is the legitimate political successor to a historically-recognized Indian tribe is a matter of law decided by the political branches. *See United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015); *see also Spectrum Stores v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011) (holding that political questions should be dismissed as a matter of law on a motion to dismiss for lack of subject matter jurisdiction).

The CFC resolved this legal question by looking to the federal list of recognized Indian tribes. *See Zepeda*, 792 F.3d at 1114 ("In most cases, the judge will be able to determine federal recognition by consulting the relevant BIA List"). 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) (emphasis added). While the "Wyandotte Nation," meaning the Wyandotte Nation of Oklahoma, appears on the list, plaintiff does not. *See* 80 Fed. Reg. at 1,946. Plaintiff's absence from this list is dispositive of its status as a non-federally-recognized entity. *See W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("We therefore conclude that the Tribe's absence from this list is dispositive" of its status as a non-federally-recognized Indian entity).

Plaintiff contends (at 20) that not appearing on the list is not dispositive of its status as a non-federally recognized entity because "the List Act does not purport to include all federally recognized Indian tribes." But the List Act actually says the opposite of what plaintiff contends. The List Act requires "a list of *all* Indian tribes which are eligible for special programs and services provided by the United States to Indians because of their status as Indians." 108 Stat. 4791, § 104(a) (emphasis added). While plaintiff is correct that there are multiple means of demonstrating federal recognition, including by an act of Congress, the annual list reflects *all* currently recognized Indian tribes that are eligible for special programs and services no matter the means

by which the formal government-to-government relationship with the Indian tribe was established. *Id.*; *see also* H.R. Rep. No. 103-781, at 2-3 (1994).

If any Indian entity is not on the annually published list of federally-recognized Indian tribes, the List Act and its regulations provide a process for that entity to be put on the list. *See James*, 824 F.2d at 1136. This process generally involves the filing of a petition for acknowledgement[10] with the Department of the Interior and pursuing that petition to completion. *See* 25 C.F.R. pt. 83. Pursuant to federal regulations, a petition for acknowledgement and completion of the federal acknowledgement process is a prerequisite for those entities seeking federal recognition in the first instance, 25 C.F.R. §§ 83.3, 83.11, as well as those entities seeking federal recognition premised on historical acts of federal recognition such as through treaties or prior acts of Congress, *id.* § 83.12. *See James*, 824 F.2d at 1136.

For those Indian entities seeking federal recognition premised on prior acts of federal recognition, the regulations require the petitioner

[10] "The terms 'recognize' and 'acknowledge' are often used interchangeably." Felix S. Cohen. *Cohen's Handbook of Federal Indian Law*, § 3.02[3] n.25 (2005 ed.).

tribe to present during the regulatory process unambiguous evidence of that prior acknowledgement. 25 C.F.R. § 83.12(a). If the petitioner tribe provides such evidence, then the tribe must show under the factors listed at 25 C.F.R. §§ 83.11(b), (c) that it has been a continuous and autonomous community since the point of last federal recognition. *Id.* § 83.12(b). Federal regulations require these showings because historically-recognized Indian tribes sometimes cease to exist as a factual matter. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 219 (D.C. Cir. 2013) ("a once-recognized tribe can fade away") (citing *Miami Nation of Indians of Indiana v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001)). And sometimes the government-to-government relationship has been "expressly terminated or forbidden" by Congress as a legal or political matter. 25 C.F.R. §§ 83.4(c), 83.11(g).

That Congress sometimes expressly terminates the government's relationship with tribes is particularly relevant here. Plaintiff forgets that it pursued a petition for federal acknowledgment under the List Act regulations in 1996.[11] (SAppx11-21). The Department of the Interior

[11] There is no merit to plaintiff's argument (at 23-24) that it is an Indian tribe under the Reform Act's definition because its members receive some services as a result of their status as Indians. The Reform Act

responded to that petition concluding that Interior could not recognize plaintiff because Congress had terminated the United States' relationship with its tribal government and thus only Congress could recognize it. (SAppx20). Interior told plaintiff to provide any evidence refuting this conclusion within 60 days and that a failure to respond will be considered a response. (SAppx21). Plaintiff thereafter did not pursue its petition. Thus, plaintiff's allegation that it is a federally-recognized Indian tribe fails not only because it implicates a political question but also because plaintiff has failed to exhaust its administrative remedies. *See James*, 824 F.2d at 1136-39.[12] If plaintiff has evidence that Congress did not terminate the relationship with it as

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defines "'Indian tribe'" to "mean[] any Indian *tribe* … 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) (emphasis added). Assuming that some of plaintiff's members receive some benefits as individuals does not mean plaintiff is a "tribe" "recognized as eligible for" special services within the meaning of the Reform Act. The List Act contains a nearly identical definition of Indian tribe, 25 U.S.C. § 479a-1, and, as explained in the main text, plaintiff is not a federally-recognized Indian tribe under the List Act.

[12] The doctrine of primary jurisdiction provides yet another basis for rejecting plaintiff's arguments. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57-61 (2d Cir. 1994).

a government, it should try to pursue its petition and present that evidence to Interior.

Thus, this Court does not have jurisdiction to provide plaintiff with the federal recognition it appears to seek. But even if it had, plaintiff's legal argument that it is a federally-recognized Indian tribe is wrong. As explained at *supra* at 7-10 and in Interior's response to plaintiff's recognition petition (SAppx20-21), Congress terminated the Historic Wyandotte Tribe by Treaty of 1855. By Treaty of 1867, the United States recognized the Wyandotte Nation of Oklahoma as the political successor-in-interest to the Historic Wyandotte Tribe.

Plaintiff's contrary assertion of federal recognition relies largely on the notion (at 8-9, 22) that, in 1937, after the Wyandotte Nation of Oklahoma organized under the federal Oklahoma Indian Welfare Act (OIWA), plaintiff became the "Wyandotte Tribe of Indians." But that notion is a legal, political, and historical fiction. Even after the OIWA organization, the only "Wyandotte Tribe of Indians" recognized by the United States was the Wyandotte Nation of Oklahoma, which refers to itself as the "Wyandotte Nation." What happened instead as a result of the OIWA organization was that plaintiff's members' ancestors, to the

extent they ever were part of the reconstituted tribe, were effectively dis-enrolled.[13] Plaintiff may not like the result of the OIWA organization, but tribal-membership decisions are internal tribal political matters and, as such, are not subject to judicial review. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding Indian tribes are immune from suits challenging tribal membership). And even if such membership decisions were justiciable, plaintiff's claim would be time-barred.

Plaintiff's assertion of federal recognition is especially unfounded considering that plaintiff previously has admitted that it is not a federally-recognized Indian tribe. In the agreement resolving the prior suit against the federally-recognized Wyandotte Nation of Oklahoma over its plan to operate a casino gaming facility near the Huron Cemetery, plaintiff acknowledged that the Wyandot Nation of Kansas was *not* a federally-recognized Indian tribe. (SAppx36). Plaintiff's prior

[13] *See* Tribal Enrollment Ordinance of the Wyandotte Nation, §§ 1-2, available at, http://www.wyandotte-nation.org/government/legal-documents/enrollment-ordinance/ (last visited June 27, 2016).

representations in federal court thus directly contradict plaintiff's assertions about its recognized status before this Court.

In sum, plaintiff is not a federally-recognized Indian tribe and any claim that it nevertheless should be recognized is not justiciable. The United States does not recognize plaintiff as an Indian tribe. This Court thus must disregard any of plaintiff's arguments that depend on its false legal and political claim of federal recognition.

II. PLAINTIFF'S CATEGORY ONE CLAIMS FAIL.

A. Plaintiff's Category One claims are barred by the applicable statutes of limitations and repose.

Regardless of any non-justiciable claim for federal recognition that plaintiff may be trying to pursue here, the CFC correctly dismissed plaintiff's Category One claims as untimely. (Appx.4-6.) Plaintiff's claims that the Category One funds were mismanaged are barred by the six-year statute of limitations for claims filed in the CFC, 28 U.S.C. § 2501, because those funds were paid out by no later than 1882. *See Schrimpsher v. Stockton*, 183 U.S. 290, 296 (1902) (finding that the limitations period on claims brought by heirs of Wyandotte allottee against good faith purchasers started to run when restrictions on alienation were removed by the Treaty of 1867). Moreover, because

plaintiff's Category One claims pre-date 1946 and they were not brought to the Indian Claims Commission before 1951, plaintiff's claims also are barred by the Indian Claims Commission Act's ("ICCA") statute of repose, Pub. L. No. 79-726, 60 Stat. 1049 (1946).

1. The CFC correctly concluded that it lacked subject matter jurisdiction because plaintiff failed to file its Category One claims within the six years provided under the statute of limitations.

Assuming that the Category One funds were held in trust at some point in history,[14] any claim that the government committed a breach of trust by mismanaging those funds is now time-barred by the six-year statute of limitations, as the CFC concluded (Appx.4-6). "[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Thus, claims by Indian tribes for breach of trust are subject to the same six-year statute

[14] Simply because a treaty called for the appropriation of money to Indians or Indian tribes does not necessarily mean those payments were held in trust. *See Wolfchild v. United States,* 559 F.3d 1228, 1238-41 (Fed. Cir. 2009) ("*Wolfchild I*"). Plaintiff alleges those funds were held in "interest-bearing trust accounts" (Appx.54¶79), but does not plead sufficient facts showing that to be true.

of limitations under 28 U.S.C. § 2501 that applies to other litigants against the United States under the Tucker Act. *Id.* at 1578.

The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. *See Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). For Indian breach of trust claims, a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (citations omitted) ("*Shoshone II*"). The "knowledge of that repudiation" element of the accrual test is further defined as "placing the beneficiary on notice that a breach of trust has occurred." *Id.* This "on notice" standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. *See Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008); *see also San Carlos Apache Tribe*

v. United States, 639 F.3d 1346, 1350 (Fed. Cir. 2011). Under that standard, the CFC properly dismissed plaintiff's claims.

a. The United States repudiated any ongoing trust relationship by no later than 1882.

Even if the Category One funds were held in trusts, those trusts ceased to exist after the United States repudiated the trusts by announcing that it had distributed all funds to the rightful recipients. Indeed, plaintiff acknowledges that individuals entitled to "Schedule A" payments received them in 1882. (Appx.54-55¶78,79). Upon receipt of those payments, plaintiff or plaintiff's members were on notice to inquire whether the payment amount was correct or, if they were not paid, why they were not paid. By 1882, the United States openly and publicly repudiated any ongoing trust relationship, to the extent one existed, by announcing that the government had provided full payment of Category One funds. (Appx.54-55¶78,79). As the CFC concluded, at least by that date, plaintiff knew or should have known of its claims. *See San Carlos Apache Tribe*, 639 F.3d at 1350.

The United States thus publically has denied the existence of any trust relationship over the Category One funds for over 120 years. Although plaintiff implies (at 31) that repudiation may occur only when

a trustee rejects the findings of a reconciliation report or compels suit, there are many acts that may constitute a repudiation. One of the more obvious acts constituting repudiation is what occurred here—when a trustee denies the existence of a trust because all trust funds have been dispersed to the rightful beneficiaries. *See Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) ("*Wolfchild II*") ("When a claim concerns an open repudiation of an alleged trust duty, 'a 'final accounting' is unnecessary to put the [claimants] on notice of the accrual of their claim.'"). Thus, any trust fund mismanagement claim accrued no later than 1882 and expired no later than 1888. Because plaintiff filed this action in 2015 more than 120 years after any claim accrued, the CFC correctly concluded that the six-year statute of limitations in 28 U.S.C. § 2501 bars its jurisdiction.

b. The Reform Act is inapplicable.

Plaintiff is incorrect (at 25) that Reform Act requires the United States to prepare an accounting or reconciliation report on Category One funds or somehow revives a claim that expired over 120 years ago. Two provisions of the Reform Act address accountings, but neither applies here because both sections apply only to funds distributed long

after the Category One funds were distributed in the 1882. First, the Secretary "shall account" for certain funds "deposited or invested pursuant to [25 U.S.C.] § 162a," a statute not enacted until 1938. 25 U.S.C. § 4011(a). Second, the Secretary shall transmit a report "for each tribal trust fund account for which the Secretary *is* responsible" as of passage of the Reform Act in 1994. 25 U.S.C. § 4044 (emphasis added). Thus, neither provision applies to the fund distributed in 1882.

Moreover, the Reform Act's application is limited to federally-recognized Indian tribes. 25 U.S.C. § 4001(2). Specifically, the Reform Act applies only to Indian tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," *id.*, which is a phrase of art defined in the List Act, 25 U.S.C. § 479a-1(a). Where Congress enacted the Reform Act and List Act a mere eight days apart and used identical language to define "Indian tribe" in each statute, the CFC correctly concluded that Congress intended to refer to the same group of Indian tribes in each statute. (Appx.4-5). Thus, because plaintiff is not federally-recognized under the List Act, it is not entitled to the accountings or reconciliations called for under the Reform Act.

Regardless, plaintiff is wrong about the significance of an accounting for the accrual of its Category One claims. The statute of limitations would have no significance in trust funds cases if a plaintiff could resurrect a claim that expired in 1888 simply by demanding an accounting in 2015. *Cf. Wolfchild II*, 731 F.3d at 1291 ("When a claim concerns an open repudiation of an alleged trust duty, 'a 'final accounting' is unnecessary to put the [claimants] on notice of the accrual of their claim.'"). Plaintiff thus misstates the law when it declares (at 25) that "the statute of limitations applicable to trust fund claims accrues *only* after a tribe receives an accounting of trust funds from the United States." (emphasis added). Rather, as plaintiff later concedes (at 29, 31), a trust fund claim accrues when the trustee repudiates the trust relationship, which occurred here by 1882. (Appx.54-55¶¶78-79).

Here, plaintiff's Category One claims were objectively known or knowable by no later than 1882. "Schedule A" of the Treaty of 1867 set forth a discrete sum of money due to the Wyandotte Tribe. 15 Stat. at 524. "Schedule A" funds were appropriated by Congress in 1881. (Appx.54¶78). Appropriations acts are public laws, and plaintiff

objectively knew the precise amount appropriated in satisfaction of the Treaty of 1867. *See Harris Corp. v. Ericsson, Inc.*, 417 F.3d 1241, 1263 (Fed. Cir. 2005) (plaintiff is presumed to know the law). Moreover, plaintiff knew or should have known that those appropriated funds were distributed in the 1882. (Appx.54-55¶¶ 78-79, 81). Thus, just as in *Wolfchild II*, "the claim made here would not be the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim, because [plaintiff] knew or should have known that the money was publicly distributed in [1882]." 731 F.3d at 1291.

Osage Nation v. United States, 57 Fed. Cl. 392 (2003), does not assist plaintiff. *Osage* involved the management of a trust where the United States admitted to its ongoing role as trustee. An accounting might be necessary before a claim accrues where the claim is mismanagement of existing funds because the accounting provides a basis for the claim. Where the United States repudiates the trust by disavowing any continuing role as trustee, as happened here by at least 1882, a claim accrues immediately and an accounting is unnecessary. *See Wolfchild II*, 731 F.3d at 1291. Thus, no accounting was necessary

to place plaintiff on notice of its Category One claims, and plaintiff has no "right to wait for an accounting that they do not need." *Id*.

c. The appropriations act riders also are inapplicable.

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

There is another problem with plaintiff's reliance on the appropriations act riders. Plaintiff filed its complaint in 2015. But Congress omitted the appropriations act rider that this Court held tolls

the statute of limitations with respect to certain losses to or mismanagement of trust funds, *Shoshone II*, 364 F.3d at 1350, in the Consolidated Appropriations Act of 2015. *See* Pub. L. No. 113-235, Div. F, Title I, 128 Stat. 2130, 2413 (2014). As last enacted (in the Consolidated Appropriations Act of 2014) the tolling provision provided

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

Pub. L. No. 113-76, § 2, Div. G, Title I, 128 Stat. 5, 305-306 (2014). Again, no similar provision was included in the Fiscal Year 2015 appropriations act. Thus, Congress eliminated the tolling provision prior to the time that plaintiff filed its complaint.

As the D.C. Circuit has stated,

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

> language clearly indicates that it is intended to be permanent.

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

To rebut the presumption of no continuing effect, plaintiff must show that the prior appropriations acts established an "express[] [congressional intent to] provide[] otherwise." *Martin*, 961 F.3d at 274. And nothing in the tolling provisions rebuts the presumption; the provisions in fact lack any language suggesting an intent to make a permanent, substantive change in law. In particular, the tolling provisions lack the words and phrases that that Congress has used to indicate permanency for other provisions.

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

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

The U.S. General Accounting Office ("GAO") has, in addition to the foregoing, identified "with respect to any fiscal year" as additional language that suggests permanency. *See* GAO, *Principles of Federal*

Appropriations Law, 2-36 (3d ed. 2004) ("Redbook"). The tolling provisions here have never used the phrase "with respect to any year."

Congress eliminated the tolling provision from the Fiscal Year 2015 appropriations act and therefore there is a presumption that prior years' appropriations act provisions do not apply to plaintiff's complaint filed in Fiscal Year 2015. Plaintiff cannot overcome that presumption because none of the factors identified by the courts, the Comptroller General or GAO indicating permanency of an appropriations act provision are present here. Indeed, that Congress re-enacted the riders every year demonstrates that Congress did not intend the riders to have permanent effect. The riders thus do not assist plaintiff here.

Plaintiff's reliance on dicta from *United States v. Tohono O'Odham Nation*, 563 U.S. 307 (2011), is unconvincing. *Tohono O'Odham* was a Section 1500 case. 563 U.S. at 311-18. *Tohono O'Odham* did not address when an Indian trust claim accrues—it merely makes an observation that Section 1500's operation in Indian trust cases is unlikely to lead to inequitable results because Congress has "provided in every appropriations Act for the Department of Interior since 1990 that the statute of limitations on Indian trust

mismanagement claims shall not run until the affected tribe has been given an appropriate accounting." *Id.* at 316-17. The Supreme Court thus was addressing the impact of the appropriations act riders as a factual matter and was not opining, as a legal matter, that an Indian trust fund claim accrues *only* after a tribe receives an accounting of trust funds. Ultimately, because plaintiff's claims accrued and expired in the 1880s, and where neither the Reform Act nor the now-expired appropriation act riders revived expired claims, the CFC correctly dismissed plaintiff's Category One claims for lack of jurisdiction.

d. The United States never promised to provide plaintiff with an accounting and, regardless, it cannot be estopped from asserting a statute of limitations defense.

Finally, contrary to plaintiff's statements (at 3, 30), the United States has never promised to provide plaintiff with an accounting inside or outside of its confidential settlement discussions with plaintiff.

Initially, it is unclear how any such promises, even if they were made, are relevant. Because the statute of limitations is jurisdictional, *John R. Sand*, 552 U.S. at 134-39, the United States cannot waive it through its conduct, *see United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Moreover, estoppel is available against

government actors only in cases involving "affirmative misconduct." *Rumsfeld v. United Techs.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003); *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989). Even if the statute of limitations was not jurisdictional, the United States' good-faith involvement in settlement discussions is not affirmative misconduct.

In any event, plaintiff's assertion is false. The United States did not promise to provide plaintiff with an accounting. Because prior settlement discussions with plaintiff are confidential,[15] the United States will not introduce evidence of its settlement offers here. But this Court does not need to see those confidential documents because the document on which plaintiff relies does not support its assertion. That document is the motion for voluntary remand that the government filed in thirty-seven different Indian trust cases that were pending in 2007, including in plaintiff's prior suit (what plaintiff calls the "*Norton* case"). In that motion the government sought, but was denied, a voluntary remand of Indian trust cases so it could develop historical accounting plans. *See* Motion for Remand, *Wyandot Nation of Kansas v.*

[15] *See* Fed. R. Evid. 408 and Stipulation for Protective Order, *Wyandot Nation of Kansas v. Kempthorne*, No. 05-cv-2491 (D. D.C. Nov. 14, 2007), ECF No. 45 (approved by Minute Order of Feb. 29, 2008).

Kempthorne, No. 05-cv-2491 (D. D.C. Aug. 11, 2007), ECF No. 42; Order Denying Motion, *Wyandot Nation of Kansas v. Kempthorne*, No. 05-cv-2491 (D. D.C. Dec. 19, 2007), ECF No. 48. The motion noted that each of the thirty-seven plaintiffs had different situations (Motion for Remand, *supra*, at 18-19), and the motion highlighted the fact that plaintiff in particular had not received a Tribal Reconciliation Project (TRP) report, (Motion for Remand, *supra*, at 9 n.5). Simply because the motion did not further address plaintiff's unique situation vis-à-vis the other Indian entities suing the government does not mean plaintiff was promised an accounting, even if the voluntary remand had been granted. But the motion was not granted, so the parties voluntarily engaged in settlement discussions until it became evident that resolution through settlement was unlikely. Plaintiff, in turn, unilaterally and voluntarily dismissed its complaint.

2. Plaintiff's Category One claims are also barred as untimely by operation of the ICCA's statute of repose.

Plaintiff's Category One claims are also barred by the ICCA's statute of repose because all such claims existed no later than 1882, well before August 13, 1946. Section 12 of the ICCA provided that

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

ICCA, § 12 [60 Stat. at 1052]. Thus, in the ICCA, Congress barred claims by Indian tribes or identifiable groups of Indians against the United States that pre-date August 13, 1946, and that were not filed before the Indian Claims Commission by August 13, 1951.

Through the ICCA, Congress vested the Indian Claims Commission with time-limited, exclusive jurisdiction to hear Indian tribes' and identifiable groups' pre-1946 claims against the United States. "The 'chief purpose of the [ICCA was] to dispose of the Indian claims problem with finality.'" *United States v. Dann*, 470 U.S. 39, 45-46 (1985) (quoting H.R. Rep. No. 79-1466 at 10 (1945)). Moreover, Congress intended that "'the jurisdiction of the Commission ought to be broad enough so that no tribe could come back to Congress ten years from now and say that it had a meritorious claim.'" *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1465 (10th Cir. 1987) (quoting 92 Cong. Rec. 5312 (1946)). Thus, the Indian Claims Commission was the only tribunal with authority to adjudicate pre-1946 Indian tribal, and

identifiable group, claims against the United States. Plaintiff's failure to advance its pre-1946 claims before the Indian Claims Commission warrants dismissal of those claims here. *See Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 331-32 (D.C. Cir. 2009) ("It is well established that the Indian Claims Commission Act bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before 1946 and were not brought by August 13, 1951."); *Navajo Tribe*, 809 F.2d at 1469-71 (10th Cir. 1987) (ICCA "provided the . . . opportunity to litigate the validity of [Indian] titles and to be recompensed for Government actions inconsistent with those titles. The Tribe was unambiguously given a five-year period to assert its title to these lands 'or forever hold [its] peace.'") (quoting 92 Cong. Rec. 5313 (1946)); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 143 (8th Cir. 1981) (The ICCA's "statutory language reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.").

Section 12 of the ICCA is a statute of repose. "[T]he differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). Substantively, a "statute of repose . . . is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace." *Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002). A statute of repose establishes a deadline for filing claims that is independent of the time that the wrong has been or should have been discovered. *See Prince Alexander v. Beech Aircraft Corp*., 952 F.2d 1215, 1218 n.2 (10th Cir. 1991) ("statute of repose typically bars the right to bring an action after the lapse of a specified period"); *CTS Corp. v. Waldburger*, 573 U.S. ___, 134 S. Ct. 2175, 2182 (2014) ("That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). Section 12 is a statute of repose because the time for filing claims against the United States was independent of the date those claims accrued. *See Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974).

Although plaintiff does not address the statute of repose in its brief, plaintiff relied on the lower court decision in *Osage* before the CFC. Such reliance was misplaced. *Osage* conflicts with binding precedent 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, 500 F.2d at 489. *Osage* did not mention or discuss *Sioux Tribe* and thus is not persuasive. 57 Fed. Cl. at 397-98.

Osage is also distinguishable. *Osage* determined that the appropriations act riders tolled the accrual of the federally-recognized Indian tribe's claims to 1999, and therefore the ICCA did not apply. 57 Fed. Cl. at 397-98. But, as a statute of repose, Section 12 is not subject to tolling, as the Supreme Court has recently made clear. *See CTS Corp*, 134 S. Ct. at 2183. Accordingly, the provisions of the various appropriations act riders on which plaintiff relies that potentially could have tolled the statute of limitations from 1990 to 2014 have no application to Section 12's statute of repose. And, as explained above,

those appropriations act riders expired before plaintiff filed its complaint here. The ICCA's statute of repose bars plaintiff's Category One claims which existed no later than the "late 1880s," and the CFC properly dismissed those claims for lack of subject-matter jurisdiction.

III. PLAINTIFF'S CATEGORY TWO CLAIMS ARE BARRED AS UNTIMELY AND PLAINTIFF LACKS STANDING TO BRING THEM.

A. Plaintiff's Category Two Claims Are Untimely.

1. Plaintiff knew or should have known of its Category Two claims in the Nineteenth or Twentieth Centuries.

Plaintiff's claims to a partial beneficial ownership interest in the Huron Cemetery, (Appx.57-63, 66-69), are also barred by the statute of limitations. The facts, as alleged in the complaint and understood by the CFC, show that "[p]laintiff knew or should have known of the events giving rise to its Huron Cemetery claims at some point in the 20th Century, if not the 19th Century." (Appx.8). Plaintiff alleges an ownership interest in rights-of-way for city streets that have traversed the Huron Cemetery land "since 1857." (Appx.51¶73). But plaintiff asserts that its members regularly have used the cemetery since 1843. (SAppx51). Plaintiff thus has known of the events giving rise to its Category Two claims for over 150 years. If nothing else, plaintiff knew or should have known of "[a] July 12, 1959," newspaper article that

showed that the rights-of-way likely traversed the Huron Cemetery. (Appx.57-58¶87). Plaintiff was also aware of "official maps of the City of Kansas City, Kansas," which show the location of public roads adjacent to the Huron Cemetery. (Appx.58¶88). Thus, plaintiff knew or should have known of its Category Two claims of allegedly unauthorized easements or rights-of-way across the Huron Cemetery in the 1800s and by no later than 1959. Plaintiff's claims for unearned rights-of-way rentals or fees are accordingly untimely and the CFC properly dismissed them.

Plaintiff's Category Two Huron Cemetery claims are also untimely in light of the judicial proceedings addressing that property. In 1910, the Supreme Court held that the Huron Cemetery was owned by the United States and held in trust for the Wyandotte tribe, meaning the Wyandotte Nation of Oklahoma. *See Conley*, 216 U.S. at 91. In 1960, a three-judge panel of the District of Kansas held that non-tribal member descendants of the Historic Wyandotte Tribe (which would include plaintiff's members) did not have standing to challenge the constitutionality of the act of Congress that authorized the sale of the Huron Cemetery because the United States held the cemetery in trust

for the Wyandotte Nation of Oklahoma. *See City of Kansas City*, 192 F. Supp. at 181-82 ("It is our conclusion that plaintiffs do not have a cause of action and are without standing in court to test the constitutionality of the Act"). These judicial proceedings thus placed plaintiff on notice decades ago that the United States recognized the Wyandotte Nation of Oklahoma as the only beneficiary to the Huron Cemetery provisions of the 1855 Treaty.

There is another more recent event that also put plaintiff on notice of its claims accruing more than six-years before the filing of this suit. 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. *See generally Sac & Fox Nation*, 240 F.3d at 1264-67. Plaintiff and others filed suit to stop the prospect of casino gaming at the site. Plaintiff's suit eventually was resolved by settlement with the Wyandotte Nation of Oklahoma. (SAppx36-47). The settlement agreement states in relevant part that "the United States claims to hold title to the Huron Cemetery in trust for the benefit of the Oklahoma Wyandotte." (SAppx38§5,39§7). Thus, under the plain language of plaintiff's agreement, plaintiff had actual

knowledge in 1996 that the United States disavowed holding title in trust for plaintiff. Yet, despite this knowledge, plaintiff did not file its Huron Cemetery claims until 2015, after the time for filing had lapsed.

Thus, by 1857, 1910, 1959, 1960 and certainly no later than 1996 plaintiff knew or should have known that the United States did not recognize plaintiff as having any beneficial interest in the Huron Cemetery, and thus that the United States was not collecting any revenue for plaintiff from that land. Where plaintiff did not bring this action until 2015, the CFC properly concluded that it lacked jurisdiction over this suit because plaintiff's Category Two claims are barred by the six-year statute of limitations, 28 U.S.C. § 2501. (Appx.8).

2. An accounting was not necessary to put plaintiff on notice of its obligation to file any claims within the six-year statute of limitations period.

Plaintiff's contention (at 32-33) that its Category Two claims accrue only upon the receipt of an accounting fails for the reasons already discussed, *see* Argument II.A.2. Because the United States has repudiated any trust relationship with plaintiff by denying its existence for decades, an accounting was not necessary to put plaintiff on notice of

its obligation to file any trust asset mismanagement claims within the limitations period. *See Wolfchild II*, 731 F.3d at 1291.

Moreover, to the extent plaintiff's argument relies on the now-expired appropriations act riders, there is one more problem with plaintiff's Category Two claims in addition to those problems already discussed with plaintiff's reliance on those riders, *see* Argument II.A.3. As explained by this Court, a "claim premised upon the Government's failure to collect royalties in accordance with a hypothetical lease is a claim for mismanagement of trust assets." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035 (Fed. Cir. 2011) ("*Shoshone IV*"). Under that definition, plaintiff's claims that easements or rights-of-way were unlawfully permitted on portions of the Huron Cemetery land or that the Department of the Interior allegedly failed to earn rents or royalties from hypothetical easements or rights-of-way that should have been, but were never, issued, are trust *asset* mismanagement claims. *Id.* But the appropriations act riders apply only to trust *fund* mismanagement claims. *Id.* at 1034. Trust *asset* mismanagement claims are still subject to the six-year statute of limitations. *Id.* Accordingly, because plaintiff's Category Two

claims are trust *asset* mismanagement claims the appropriations act riders would not apply, even if plaintiff had filed its suit before 2015.

B. Plaintiff lacks Article III standing to assert its Category Two claims.

The CFC also correctly concluded that plaintiff had failed to demonstrate its Article III standing to pursue its Category Two claims. (Appx.7-8). As a matter of law, plaintiff's assertion that it has an "undivided ownership interest in all the Historic Wyandotte Nation's trust property in Kansas City, Kansas, including Huron Cemetery" is incorrect and need not be accepted as true on this motion to dismiss. *See Acceptance Ins. Companies 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. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Because the United States recognizes the Wyandotte Nation of Oklahoma as the successor-in-interest to the Huron Cemetery provisions of the 1855 Treaty, plaintiff lacks a legal interest in, and therefore Article III standing to advance its claims to, the Huron Cemetery.

There are several acts of Congress and Executive branch decisions that confirm that the Wyandotte Nation of Oklahoma has the sole

beneficial interest in the Huron Cemetery under the 1855 Treaty. In 1956, Congress passed an act terminating the government-to-government relationship between the United States and the Wyandotte Nation of Oklahoma. *See* Pub. L. No. 84-887, 70 Stat. 893 (1956). In the termination act, Congress 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), 70 Stat. 894. Congress also acknowledged that the Wyandotte Nation of Oklahoma—not plaintiff—was the successor-in-interest to the Huron Cemetery provision of the 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), 70 Stat. 893 ("'Tribe' means the Wyandotte Tribe of Oklahoma").

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.

There is no statute, regulation, or treaty that affords plaintiff any continuing treaty interest in the Huron Cemetery. Still, plaintiff incorrectly states (at 10) that a judgment fund distribution act, Pub. L. No. 97-371, 96 Stat. 1813 (1982),[16] gives it a beneficial ownership interest in the Huron Cemetery. The distribution act arising out of the judgments in the Indian Claims Commission and Court of Claims says nothing about beneficial ownership of the Huron Cemetery. This is unsurprising, since the cases involved land claims for lands ceded in Ohio. Those Wyandot Indians from Ohio (and their descendants) "who

[16] Plaintiff also cites (at 10) the List Act, Pub. L. 103-454, 108 Stat. 4791, but does not explain how it is relevant.

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 Bill" mentioned by plaintiff (at 15) is also silent as to the beneficial ownership of the Huron Cemetery. *See* 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 (*i.e.*, non-gaming purposes), but is silent 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 1855 Treaty, the Executive Branch 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).

As mentioned, that administrative determination prompted plaintiff to file suit against, among others, the Wyandotte Nation of Oklahoma to stop potential casino gaming at the cemetery. Plaintiff resolved that suit by agreeing, among other things, that

> because the United States claims to hold title to the Huron Cemetery in trust for the benefit of the Oklahoma Wyandotte, the Oklahoma Wyandotte hereby warrant and represent that the Oklahoma Wyandotte shall execute all documents necessary to obtain the approval of this Agreement by the United States.

(SAppx38§5). As the CFC noted, that plaintiff previously has admitted that the United States claims to hold the Huron Cemetery in trust for

the Wyandotte Nation of Oklahoma "directly contradict[s] its ability to assert a claim." (Appx.8).

In sum, 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 1855 Treaty, 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, 1000-01 (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). The Historic Wyandotte Tribe no longer exists, and it is up to Congress and the Executive Branch, not the judiciary, to determine which modern-day Indian entity is the successor-in-interest. To that end, both Congress and the Executive Branch have deemed the Wyandotte Nation of Oklahoma to be the successor-in-interest to the Wyandotte treaties, and this Court should defer to the judgment of the other branches on this political question. *See Holliday*, 70 U.S. at 419. Where plaintiff lacks

any legal interest in the Huron Cemetery, the CFC correctly concluded that plaintiff lacks standing to pursue its Category Two claims.

IV. PLAINTIFF IS NOT ENTITLED TO DISCOVERY.

Plaintiff contends (at 34-36) that the CFC erred in granting the motion to dismiss prior to discovery. But the allegations in plaintiff's complaint, accepted as true for purposes of this appeal, (Appx.51, 57-58 ¶¶ 73, 86-88), establish that plaintiff knew or should have known of allegedly undocumented rights-of-way across the Huron Cemetery by no later than 1959, (Appx.57¶87), and as early as 1857, (Appx.51¶73). And plaintiff knew or should have known of its Category One claims in the 1880s. (Appx.54-55¶¶78,79). Where a statute of limitations defect appears on the face of the complaint it may be decided on a motion to dismiss. See *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n.12 (2d Cir. 2014).[17] The judicially-noticeable judicial decisions and settlement agreement provisions further support the conclusion that

[17] *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, 130 F. Supp. 3d 391, 397 (D.D.C. 2015), does not assist plaintiff. Here, unlike in *Sisseston Wahpeton Oyate*, the complaint and other judicially-noticeable facts conclusively establish that plaintiff actually knew or at least objectively should have known of the accrual of its claims more than six years before the filing of the complaint.

plaintiff knew or should have known of the accrual of its claims more than six years before this suit. Plaintiff's plea to defer resolution of the statute of limitations until after discovery should be rejected in light of the fact that plaintiff's claims are on their face untimely, as admitted in the complaint, Appx. 51, 54, 55, 57-58 ¶¶ 73, 78-79, 86-88, and as shown by other judicially-noticeable facts. The CFC thus did not err in granting the motion to dismiss. S*ee Shoshone IV*, 672 F.3d at 1030 (statute of limitations challenge treated as Rule 12(b)(1) motion).

CONCLUSION

This Court should affirm the dismissal of plaintiff's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,827 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in a proportionally-spaced typeface, Century Schoolbook 14-point.

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ADDENDUM

Index:

REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, October 24, 1881.

SIR: I have the honor to submit herewith the annual report of the Indian Bureau for the year 1881.

In the outset, I desire to urge with earnestness the absolute necessity for a thorough and radical change of the Indian policy in some respects, and in so doing I shall touch upon points which will be referred to more at length hereafter under special headings.

It is claimed and admitted by all that the great object of the government is to civilize the Indians and render them such assistance in kind and degree as will make them self-supporting, and yet I think no one will deny that one part of our policy is calculated to produce the very opposite result. It must be apparent to the most casual observer that the system of gathering the Indians in bands or tribes on reservations and carrying to them victuals and clothes, thus relieving them of the necessity of labor, never will and never can civilize them. Labor is an essential element in producing civilization. If white men were treated as we treat the Indians the result would certainly be a race of worthless vagabonds. The greatest kindness the government can bestow upon the Indian is to teach him to labor for his own support, thus developing his true manhood, and, as a consequence, making him self-relying and self-supporting.

We are expending annually over one million dollars in feeding and clothing Indians where no treaty obligation exists for so doing. This is simply a gratuity, and it is presumed no one will question the expediency or the right of the government, if it bestows gratuities upon Indians, to make labor of some useful sort a condition precedent to such gift, especially when all of the products of such labor go to the Indian. To domesticate and civilize wild Indians is a noble work, the accomplishment of which should be a crown of glory to any nation. But to allow them to drag along year after year, and generation after generation, in their old superstitions, laziness, and filth, when we have the power to elevate them in the scale of humanity, would be a lasting disgrace to our government. The past experience of this government

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whites, and stubbornly refuse to abandon their Indian traditions and customs. It is to be regretted that they will not consent to receipt properly for their annuities, as many of them are in want, and I am persuaded almost all would make a good use of the money. It might be wise and humane, now that they are permanently located in Iowa, with the approval of the State, and on land bought with their own money, to make, if possible, a satisfactory arrangement between them and that part of the tribe now in Indian Territory, so that the census just taken, or one more complete, if obtainable, may be agreed upon as a basis for a permanent division of their annuities, and a compliance with the law, which says, "They (the whole tribe) shall be paid *pro rata*, according to their numbers."*

Wyandottes.—By an act to supply deficiencies in appropriations, and for other purposes, approved March 3, 1881, the sum of $28,109.51 was appropriated to pay the Wyandottes their claim under treaty of February 23, 1869. Soon after the passage of this act the United States Indian agent at Quapaw Agency, Indian Territory, was instructed to take a census of the Wyandottes, distinguishing between those who are citizens and those who are not, that the payment might be made *per capita*, and as directed.

Since that time he has referred to this office, under different dates, the names of a number of claimants for enrollment, whose rights to share in this fund are disputed by members of the council of the tribe on various grounds, and many communications have been received from Wyandottes who became citizens under the treaty of January 31, 1855, asserting their right to participate in this fund, claiming that it was appropriated in pursuance of the findings of a commission appointed in accordance with an amendment to the treaty of 1867. In order to determine the rights of the various claimants in the premises, a thorough examination of the report of that commission became necessary, as well as a careful and impartial consideration of all evidence and proofs submitted by claimants, particularly by those whose claims are contested.

A claim has also been filed by Isaiah Walker to a ferry franchise purchased of the Wyandottes, under treaty of 1855, amounting to $17,999, which, in view of statements made by his attorneys, requires examination and final decision, before these funds can be paid to the Wyandottes. A conclusion has not as yet been reached in the matters above set forth, and therefore the payment has been withheld.

Poncas.—The same act contains a provision for the purpose of indemnifying the Ponca Indians for losses sustained in consequence of their removal to the Indian Territory, and directs that $20,000 of the money thereby appropriated be paid to them, in cash, the sum of

*Since the above was written a delegation of these Indians has visited Washington and consented on behalf of their people to the signing of the new roll. The money due them will therefore soon be paid.

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1882.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.

CONFEDERATED PEORIAS AND MIAMIS.

The confederated Peorias and Miamis have a reservation of 50,301 acres, which they own jointly, although their funds are not in common. They number 203, and have had the past year 2,916 acres under cultivation. They support each a separate school with their own funds, and I am proud to say the schools would do credit to any community in the States. The untutored savage, so far as this agency is concerned, is a thing of the past, and in these tribes we find as smart, intelligent men as you are in the habit of meeting in any agricultural community. Where once stood the rickety shanty now rises the comfortable home, and a drive over their reservation surrounds you with beautiful and well-regulated farms. Christianity and benevolence have gone hand in hand with the advances in civilization, and universal improvement is the order. They take a lively interest in education, and from their own funds support eight of their children in colleges in the State of Indiana, at an annual cost of $250 each. The children selected were bright, and it is needless to say are making most rapid progress, and when their course is completed I am sure will be an honor to their people. Their reservation in extent and richness is about equal to the Quapaws, and their advanced condition makes them desirous of having their lands allotted. In my judgment this should be done. They have made fair progress the past year, but I am sure would succeed much better if their advancement was encouraged by the allotment of their lands.

OTTAWAS.

The Ottawas number 115, and have a reservation of 14,860 acres. They have under cultivation 811 acres this season. Their lands, taken as a whole, are the best under the agency. Instead of a wild, rough farm of stony, stumpy hills, and fields of barren, poverty-stricken soil, such as you find in some of the Eastern States, you find a noble expanse of gently undulating prairie, free from obstructions, and ready to receive the plowshare; yielding enormous crops from year to year without the expensive process of an annual recuperation by dressing and manuring. This tribe contains some men of energy and intelligence, and they have done better the past year than they have before for years, but their progress is not what it should be with the advantages they have had. They claim to be citizens of the United States; many of them should be, and ought never to have been made Indians after having once assumed such responsibilities. Their lands should be surveyed and allotted. They have a high regard for religion and appreciate education. Two of their boys are making good progress at the Carlisle school.

EASTERN SHAWNEES.

The Eastern Shawnees number 72, and hold a reservation of 13,088 acres, two-thirds of which is rough and broken, while all is good grass land, and well adapted for stock-raising. They have done reasonably well; but the death of John Jackson, their chief, was a serious loss. He was the foremost man in the tribe, and had one of the best regulated farms of 225 acres under the agency. There is not a man in the tribe who can take his place, and his loss will prove a great one to these people. The tribe is small, and several of their now leading men set a very bad example, being hard drinkers. I know of no tribe who possess more kindly feelings; as a rule they are honest and industrious, but do not appreciate the school privileges as they should. The $2,000 appropriated by Congress, and paid them in April last, was a great relief to many who lost their crops last year by the drought.

WYANDOTTES.

The Wyandottes are the largest tribe we have, numbering 287. Their reservation of 21,806 acres embraces a great deal of very poor land. Their name is more familiar to the general public than any other tribe, as they have mingled within the bounds of civilization for several generations. Many of them have been citizens, and, for that matter, should be to-day. Smart, energetic, industrious, and educated are the majority, while the tribe still possesses some of the most backward Indians we have. Their progress is marked, and fine farms, comfortable houses, good stock, and an air of prosperity prevails. The $28,109.51 paid them in March and April could not have been placed where it would have done more good. No people could take a more lively interest in the education of their children, and they fully appreciate the generosity of the government in this respect. During the year there has been under cultivation 1,818 acres of land, and like all other crops in the agency the yield will be large.

They still cling to some of their old practices. The custom of celebrating August

15th was observed by them in a most appropriate manner. This practice dates back farther than the memory of the oldest living members of the tribe, but the manner of celebrating has changed from year to year as they have advanced in civilization, and this year witnessed a good old-fashioned basket picnic. Speeches were made, the new-born children were named, a full-fledged brass band, composed of Indians entirely, discoursed sweet music, and all joined in singing. All the tribes of the agency joined with them and perfect order prevailed. Had it not been for the red faces one would have thought they were mingling with the whites of our Western progressive sister States. No one thing that has transpired during the year goes farther to show the real progress these people are making. Instead of the old-fashioned pow-wows and hootings, the green corn, and dog-dances, these people have stepped from superstition to our own degree of civilization.

SENECAS.

The Senecas are the second tribe in numbers, being 222 souls. In some things they are the most backward tribe we have; they cling to many of their old customs, and still dance to drive away sickness, and hold their yearly green-corn feast, but have abolished many of the objectionable features. They own 51,954 acres in the south-east corner of the agency, a large majority of it being only fit for grazing and timber. They are good workers, and have made more grain this year than ever before.

It is difficult to keep pace with the age we live in, even among Indians. If you look back 100 years and see this tribe as they were, knowing their natures as we now do, it is hard to realize the great advancement they have made and the progress they are making now, although apparently slow at times. Ignorant, ill-fed savages, living in huts of bark and wigwams of skins, and for a subsistence hunting their competitors, the wild beasts, or turning up the soil with wooden plows, or following the voice of their chiefs to stand as marks for cross-bows, or in telling tales of bloody wars, or engaged in the dance, dressed in outrageous attire, without the excuse of modern multiplicity. To-day they are an orderly, quiet people, realizing fully the march of civilization and the necessity of being ready to fall into line. Their children are bright, and none in our schools have made better progress, although it is only a few years since they refused to send them at all.

MODOCS.

Too much cannot be said in praise of the Modocs since they removed to the Territory. Nine years ago they were devils incarnate—today they are docile, tractable, law-abiding, and peaceable, have fully adopted civilized dress and customs, till the soil for a living, send their children to school with regularity, and are in fact the best working Indians we have. Although cramped for work animals, they have, without aid from any one, cultivated 409 acres this year, and the crops promise them a bountiful return for their hard labor. Their reservation embraces 4,000 acres, the greater portion of which is very poor land. They take great interest in religion, and a more eager people to learn I never saw. Even old men are learning to read and write. No better progress or results could be hoped for than they have made. They now number 97; they are the only Indians who draw rations, all others being supported by their farms and money annuities. Superstition still prevails to some extent. They no longer burn the bodies of their dead, but some few of the older ones insist in burying the clothing, &c., of the deceased with the body and then go into a sweat house for five days—believing if they do not that they will die soon with the same disease as the deceased had. They are hospitable and kind, and are more happy and contented than in former years, although they often come to me and cry, begging the privilege of a visit to their old mountain home. Drinking and gambling was formerly a common vice but they have "thrown it away."

STOCK-RAISING.

No finer natural range for cattle can be found in the West. Grass is abundant and nutritious, and beautiful creeks fed by clear springs are abundant. Some of our Indians have graded stock, and are quite extensively engaged in stock-raising. In my judgment it is the best and most profitable business they can engage in.

The Texas cattle fever has visited this agency during the past month; it is a very fatal disease and refuses to yield to any treatment which has yet been tried, and the majority of cases have proven fatal. The infection seems to be taken from cattle which appear to be perfectly well, but that have been driven from south of this locality, either from Arkansas or the southern part of the Territory. No Texas cattle have been driven into the agency this year; but the disease has every appearance of the Texas fever. Those who have tried the experiment say that green corn fed to the stock in large quantities when they are first attacked produces good results, and often checks its ravages when not too far advanced. The fear of this terrible disease causes

CERTIFICATE OF SERVICE

I certify that on August 11, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. All case participants are CM/ECF users, so they will be served by the CM/ECF system.

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