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.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:15-CV-0560-TCW

BRIEF OF APPELLANT

Brian J. Leinbach, Esq.
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Boulevard
12th Floor
Los Angeles, CA 90067
(310) 552-3800

Lead Counsel for Appellant

Mario Gonzalez, Esq.
MARIO GONZALEZ LAW
522 Seventh Street
Suite 202
Rapid City, SD 57701
(605) 716-6355

Of Counsel for Appellant

*Gibson*MOORE APPELLATE SERVICES, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

CERTIFICATE OF INTEREST

As required by Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for Plaintiff-Appellant Wyandot Nation of Kansas, a/k/a Wyandotte Tribe of Indians certifies the following:

1. The full name of every party represented by me is:

Wyandot Nation of Kansas, a/k/a Wyandotte Tribe of Indians

2. The name of the real party in interest represented by me is:

Wyandot Nation of Kansas, a/k/a Wyandotte Tribe of Indians

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented me are:

There is no such corporation or company.

4. The names of all law firms and the partners and associates that have appeared for the party represented by me in the trial court or are expected to appear in this Court are:

Walter J. Lack
Brian J. Leinbach
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd., 12th Floor
Los Angeles, CA 90067-4113

Thomas V. Girardi, Esq.
GIRARDI & KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017-1904

Mario Gonzalez, Esq.
GONZALEZ LAW OFFICE, PROF. LLC
522 Seventh Street, Suite 202
Rapid City, SD 57701

Gregory A. Yates, Esq.
LAW OFFICES OF GREGORY YATES
16830 Ventura Boulevard, Suite 250
Encino, CA 91436

Gregory Smith, Esq.
LAW OFFICES OF GREGORY SMITH
9100 Wilshire Blvd., Suite 345E
Beverly Hills, CA 90202

Wyandot Nation of Kansas a/k/a
Wyandotte Tribe of Indians

Dated: May 6, 2016

By: /s/ Brian J. Leinbach
Brian J. Leinbach

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Constitutional Provision:

Rules and Regulations:

Legislative History and Materials:

STATEMENT OF RELATED CASES

Under Federal Circuit Rules 28(a)(4) and 47.5, counsel for Plaintiff-Appellant Wyandot Nation of Kansas a/k/a Wyandotte Tribe of Indians ("Wyandot Nation") states: (a) no other appeal in or from the same civil action in the trial court was previously before this or any other appellate court; and (b) no other case known to counsel to be pending in this or any other court will directly affect or be affected by this Court's decision in this appeal.

JURISDICTIONAL STATEMENT

Under Federal Rule of Appellate Procedure 28(a)(4) and Federal Circuit Rule 28(a)(5), Plaintiff-Appellant Wyandot Nation states:

(a) This appeal arises from a case alleging that the United States breached its legal duties concerning the management and accounting of Indian treaty trust funds and trust land that the Federal Government holds in trust for the Wyandot Nation. The United States Court of Federal Claims had subject-matter jurisdiction over the matter under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

(b) Because the United States Court of Federal Claims entered a final order dismissing the action, this Court has exclusive jurisdiction over this appeal based on 28 U.S.C. § 1295(a)(3).

(c) The final order granting the dismissal of the action was entered on January 4, 2016. The Wyandot Nation timely filed a notice of appeal on March 4, 2016. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1).

(d) The Wyandot Nation appeals from a final order that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims ("CFC") erred in dismissing the Wyandot Nation's claims against the United States for an accounting of two categories of Indian tribal trust funds and for monetary damages arising from the mismanagement of such funds on statute of limitations grounds.

2. Whether the CFC erred in concluding that the Wyandot Nation lacks standing to assert claims relating to tribal trust funds for the Huron Cemetery because the tribe does not have an ownership interest in the land.

STATEMENT OF THE CASE

This case involves the United States' management and accounting of certain Indian tribal trust funds. The Wyandot Nation contends that past and present federal agencies and officers of the United States breached legal duties owed to the tribe concerning the management and accounting of two categories of tribal trust funds and trust lands.

The Wyandot Nation's action against the United States essentially began on December 30, 2005, with the filing of a lawsuit in the United States District Court for the District of Columbia captioned *Wyandot Nation of Kansas v. Norton*, and containing docket number 1:05-cv-02491-TFH. In that action, the Wyandot Nation sought an accounting and monetary damages from the United States, as well as declaratory and injunctive relief, based on the Federal Government's

breach of constitutional, treaty, statutory, and common law fiduciary duties owed to the tribe in relation to the same trust funds and lands that are at issue in this appeal.

In the *Norton* district court proceedings, the United States engaged in protracted settlement negotiations with the Wyandot Nation that began in 2006 and extended through April 2015. (Civil Docket for *Norton*, Case #1:05-cv-02491-THF, hereinafter, "*Norton case*") Throughout that time period, the Federal Government repeatedly promised to provide an accounting of the Wyandot Nation's trust funds. (*Norton* Docket #42, pp. 16-36; *Norton* Docket #80, pp. 1-3).

The parties were unable to reach a settlement. As a result, on May 8, 2015, the Wyandot Nation voluntarily dismissed the *Norton* district court case. (*Norton* Docket #82).

On June 1, 2015, the Wyandot Nation filed a new Complaint against the United States in the CFC. (hereinafter, "Compl." Appx14 – 80). This new Complaint stated claims involving two types of tribal trust funds and lands: (A) "Category One trust funds" established in Schedule A of the Treaty of February 23, 1867 ("1867 Treaty"), and (B) "Category Two trust funds" that were derived from easements for grants of rights-of-way for a city's use of two tracts of trust land in the Huron Cemetery since 1857. (Appx49-70). Specifically, the Complaint set forth four causes of action: (1) an accounting of the Wyandot Nation's Category

One (Schedule A) 1867 Treaty trust funds; (2) an audit or accounting of the Wyandot Nation's Category Two Easements for Grants of Right-of-way trust funds relating to the Huron Cemetery; (3) monetary damages for mismanagement of Category One treaty trust funds and accounts; and (4) monetary damages for mismanagement of Category Two Huron Cemetery trust funds.

On August 28, 2015, the United States filed a motion to dismiss the CFC Complaint. (Appx13, 84-116). The motion to dismiss contended that the Wyandot Nation's accounting and trust fund mismanagement claims were untimely, that the CFC lacked subject matter jurisdiction to adjudicate the Wyandot Nation's membership dispute claims, and that the Complaint failed to state a claim upon which relief could be granted. (Appx4-116). In its Reply, the United States also argued that the Wyandot Nation lacked standing to assert any claims regarding the Huron Cemetery. (Appx372-393).

In an opinion filed on January 4, 2016, the CFC granted the United States' motion to dismiss. Primarily based on its findings that the Wyandot Nation is not a federally recognized Indian tribe and that the tribe's claims against the Federal Government accrued many years ago, the CFC concluded that the Complaint was time-barred. (Appx483). In regard to the Wyandot Nation's Huron Cemetery claims, the court also ruled that the tribe "is not the owner of the land, and thus has no standing to assert these claims." (Appx1-9).

STATEMENT OF THE FACTS

The Plaintiff-Appellant Wyandot Nation is the successor-in-interest to the Historic Wyandott Nation. (Appx2, 15-16). An understanding of this historical context is a necessary prerequisite to the ability to accurately analyze the validity of the Wyandot Nation's claims in this case.

In the Historic Wyandott Nation Treaty of 1843 (9 Stat. 337, Appx332-371), the Historic Wyandott Nation purchased 36 sections of trust land from the Delaware Nation located at the confluence of the Missouri River and the Kansas River in eastern Kansas. The Delaware Nation also donated and quitclaimed to the Historic Wyandott Nation an additional three sections of adjoining trust land. The United States held the 39 sections of land in trust for the Historic Wyandott Nation. This land became the Wyandot Nation Indian Reservation in Kansas. (1843 Treaty, Arts. 1 & 2; Appx19, 74-75).

The Historic Wyandott Nation Treaty of 1855 (10 Stat. 1159) dissolved and terminated the Historic Wyandott Nation's organization and government-to-government relations with the United States, "except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein." (1855 Treaty, Art. I; Appx23, 332-371). The 1855 Treaty also required that the Historic Wyandott Nation cede the 39 sections of trust land it received from the Delaware Nation to the United States **except for "[t]he portion**

now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose . . . .” (emphasis added) (1855 Treaty, Art. 2; Appx24). This “burying ground” is now called the “Huron Cemetery” and is located in present-day Kansas City, Kansas. (Appx24, 324-371, 74-77).

The City of Kansas City, Kansas has been using two Huron Cemetery tracts at issue in this case for two of its streets without valid, federally approved easements for grants of rights-of-way from 1857 through the present. (Appx49-50, 76-80, 324-371, 74-77). At no time has the Wyandot Nation received any monetary compensation for its proportionate ownership interest in the Cemetery. (*Id.*).

Despite the language of the 1855 Treaty, the Historic Wyandott Nation was not immediately dissolved and terminated but rather continued in existence. By letters dated March 15, 1996 and June 3, 1996, the Bureau of Indian Affairs (“BIA”) conceded that the Historic Wyandott Nation was still in existence in 1867. (Appx14-80, 265-323 & 76-80).

Under Article 13 of the Treaty of February 23, 1867 (15 Stat. 513, Appx332-371) (“1867 Treaty”), the Historic Wyandott Nation was replaced by a new federally recognized tribe called the “Wyandotte Tribe of Indians” (a/k/a the Wyandot Nation of Kansas). Also in the 1867 Treaty, the United States set apart as a reservation for the Wyandotte Tribe of Indians 20,000 acres in Oklahoma that formerly belonged to

the Seneca Nation. (1867 Treaty, Art. 1; Appx28). However, the 1867 Treaty specifically stated that all persons whose names were on the 1867 Treaty Register "***shall hereafter constitute the tribe."*** (emphasis added) (1867 Treaty, Art. 13, Appx26-28). The 1867 Treaty further provided that "[w]henever the register . . . shall have been completed and returned to the Commissioner of Indian Affairs, the amount of money . . . acknowledged to be due to the Wyandottl[e]s [in Schedule A of the Treaty] shall be divided, and that portion equitably due to the citizens of said people shall be paid to them and their heirs, and under the direction of the Secretary of the Interior, ***and the balance, after deducting the cost of the land purchase from the Senecas by the first article hereof . . . shall be paid to the Wyandotte[e] tribe per capita.***" (emphasis added) (*Id.*). See Appx21-22, for the distinction between citizen Indians and non-citizen Indians in the 1800s. The Category One trust funds at issue in this case were derived from the sale of the Historic Wyandott Nation treaty lands that were placed in U.S. Treasury trust accounts. (Appx50-51). Schedule A of the 1867 Treaty is described as a "Schedule showing the several items embraced in the sum agreed to be paid to the Wyandottes by the thirteenth Article of the foregoing treaty." (Appx53-54).

The United States has never made a full financial accounting of the Category One funds described in Schedule A, or of any accrued interest earned on said funds, from 1867 through the present time. (Appx56-57). Moreover, since

the Schedule A funds were to be paid out in per capita payments pursuant to Article 14 of the 1867 Treaty, an accounting of any unpaid per capita payments to members of the Kansas band can now be claimed by the Wyandot Nation under 25 U.S.C. § 164.

Following the execution of the 1867 Treaty, some members of the Wyandotte Tribe of Indians moved to the Oklahoma land that was provided to the tribe by the United States. After 1872, the Wyandotte Tribe of Indians gradually separated into two divisions and by 1896 were included on two separate federal census rolls: (1) those that moved to the Oklahoma reservation and were included in the Quapaw Agency Census Rolls; and (2) those that remained in Kansas and were included in the "1896 Olive Roll." (Appx35-37; 31-32 & 7 & 265-275).

Because the Kansas Band was a part of a federally recognized tribe, *i.e.*, the Wyandotte Tribe of Indians, the 1896 Olive Roll was established so it could be determined which of its members were eligible to receive allotments in severalty. **Only enrolled members of federally recognized Indian tribes could receive allotments in severalty that were held in trust or restricted fee status by the United States**. Because not enough land was available in Oklahoma for allotments to the Kansas Band, Congress allowed them, as members of a federally recognized Indian tribe, to select allotments on the Public Domain. Appx37-38. Thus, from 1867 to 1936, the Wyandotte Tribe of Indians

existed as a single tribe, with two different bands whose members were all included on the 1867 Treaty Register or additional names added to the Register. (Appx268-269).

In 1937, the Oklahoma band of the Wyandotte Tribe of Indians separated from the Tribe and reorganized as a separate tribe under Section 3 of the 1936 Oklahoma Indian Welfare Act ("OIWA") (49 Stat. 1967; 25 U.S.C. § 503; Appx32-33, 270). Section 3 provided in part that "[a]ny recognized tribe or ***band of Indians residing in Oklahoma*** shall have the right to organize for its common welfare . . . ." (emphasis added). Thus, only the Oklahoma band was qualified to reorganize under the OIWA since it was the only band of the Wyandotte Tribe of Indians residing in Oklahoma in 1936.

However, the Oklahoma Band's organization under the OIWA did not terminate the continued existence of the Kansas band of the Wyandotte Tribe of Indians. After the reorganization of the Oklahoma band under the OIWA, the Kansas band alone became the "Wyandotte Tribe of Indians" under Article 13 of the 1867 Treaty. In 1959, the Kansas band changed its name to the "Wyandot Nation of Kansas." This name change was effectuated to avoid confusion of the Kansas tribe with the separate tribe known as the "Wyandotte Tribe of Oklahoma." (Appx32).

The Wyandotte Tribe of Indians, as established under the 1867 Treaty Register, still currently exists under the name of "Wyandot Nation of Kansas," and its organization and government-to-government relationship with the United States pursuant to Article 13 of the 1867 Treaty has never been terminated by Treaty or Act of Congress. The ancestors of all the current enrolled members of the Wyandot Nation of Kansas elected to become non-citizen Indians and were listed in the 1867 Treaty Register, and all of them became enrolled members of the Wyandotte Tribe of Indians. Their offspring today constitute the enrolled membership of the Plaintiff-Appellant Wyandot Nation. (Appx27-31, 268). Thus, the Plaintiff-Appellant Wyandot Nation always has been, and continues to be, a federally recognized tribe under Article 13 of the 1867 Treaty.

Together, the Kansas Band and the Oklahoma Band of the Wyandotte Tribe of Indians jointly hold a vested, Fifth Amendment protected ownership interest in all the Historic Wyandott Nation's trust property in Kansas, including the Huron Cemetery in Kansas City, Kansas. (Appx33-34). This was acknowledged in the Act of June 21, 1906 (34 Stat. 325, 348-49). The Plaintiff-Appellant Wyandot Nation's undivided, Fifth Amendment protected property interest in the Historic Wyandotte Nation's trust properties was also acknowledged in the Act of December 20, 1982 (96 Stat. 1813), and the Act of November 2, 1994 (108 Stat. 479), that authorized per capita payments to its members, *i.e.*, the "Absentee Wyandots," from

monetary judgment awards in Indian Claims Commission Docket 149 and Court of Claims Dockets 151, 212, and 213. (Appx33-34). Any unpaid per capita payments to it members can also be claimed by the Wyandot Nation under 25 U.S.C. § 164.

As mentioned above, the Category Two claims at issue in this appeal involve trust land in the Huron Cemetery. The status of Huron Cemetery as **trust property** stems from its original trust status as trust property under the 1834 Trade and Intercourse Act (25 U.S.C. § 177) and 1843 Treaty (9 Stat. 337, Art. 1 and 2), and its reserved status as trust property under Article 2 of the 1855 Treaty (10 Stat. 1159, Art. 2). (Appx17, 23-24).

In the Act of September 8, 1916 (39 Stat. 844), Congress appropriated $10,000 "for the preservation and improvement of Huron Cemetery, a tract of land in the city of Kansas City, Kansas, owned by the government of the United States, the use of which was conveyed to the Wyandotte Tribe of Indians as a cemetery for members of the tribe . . . ." This Act confirmed and acknowledged that Huron Cemetery was trust land in which the United States held legal title, and the Wyandotte Tribe of Indians held equitable or beneficial title. Because the cemetery is trust land, the Board of Trustees of Haskell Institute, a Native American vocational school located in Lawrence, Kansas, was assigned to administer the funds and assure the perpetual maintenance of the cemetery. (Appx14-80).

An agreement with the City of Kansas City, Kansas for the carrying out the preservation and improvement of Huron Cemetery under the 1916 Act was signed on March 20, 1918. In the Act of June 30, 1919 (41 Stat. 3), Congress provided that "the Secretary of the Interior be, and he is hereby authorized, to pay the authorities of Kansas City, Kansas, the sum of $1,000 in consideration of the agreement of said authorities forever to maintain and care for the Huron Cemetery . . . ." The language in the 1916 and 1919 Acts confirmed that the Huron Cemetery is trust land, the legal title of which is held by the Federal Government, and the beneficial or equitable title of which was held for the Wyandotte Tribe of Indians. (Appx41-43).

The status of the Huron Cemetery as the **Indian reservation** of the Plaintiff-Appellant Wyandot Nation stems from its reservation status under the 1843 Treaty and the 1923 Act. The Huron Cemetery was part of the Historic Wyandott Reservation established by the 1843 Treaty. (1843 Treaty, Art. 1 & 2; Appx19-20). Its status as a reservation was reserved in the 1855 Treaty. (1855 Treaty, Art. 2; Appx23-24). In the 1923 Act, Congress reaffirmed that Huron Cemetery was an "Indian reservation in Kansas City, Kansas." (42 Stat. 185; Appx43-44). Once an Indian reservation is established by Congress, only Congress can thereafter disestablish it. (108 Stat. 4791, § 103(7)). *United States v. Celestine*, 215 U.S. 278, 285 (1909) ("When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefore by Congress").

It is also worthy of notice that the 1923 Act also referred to the Conley sisters, who were members of the Kansas band of the Wyandotte Tribe of Indians, as "***Indian wards of the Government***." (emphasis added). Appx43-44. Only enrolled members of a federally recognized tribe can qualify as "Indian wards of the Government." In the 1923 Act, Congress conclusively established that the Kansas band was a constituent part of the Wyandotte Tribe of Indians, a federally recognized Tribe, by recognizing its members as "Indian wards of the Government."

In 1906, a dispute arose between the Kansas Band and the Oklahoma Band of the Wyandotte Tribe of Indians over the sale of Huron Cemetery. The Oklahoma Band wanted to remove the graves from the cemetery and sell the land because of its high commercial value, and because that band had its own cemetery in Oklahoma and was not interested in keeping its ownership interest in the Huron Cemetery. The Kansas Band resisted the sale because it was their relatives that were buried in the cemetery and they regarded the cemetery as Sacred Ground. (Appx39).

The dispute began when the Oklahoma Band got Congress to pass the Act of June 21, 1906 (34 Stat. 325, 348-49) that authorized the Secretary of the Interior to sell Huron Cemetery and move the remains of deceased persons interred there to the Quindaro Cemetery, with appropriate monuments over their remains. (Appx39-40).

Lyda Conley and her sisters opposed the sale of the Huron Cemetery under the 1906 Act, and erected a structure on the cemetery, where they lived around the clock for several years, to protect it. They took turns standing guard with muskets, and put up "No trespassing" signs around it. Lyda attended law school and became a licensed Kansas attorney so she could challenge the 1906 Act in the federal courts. She eventually filed a lawsuit, while the sale of the cemetery under the 1906 Act was pending, that she appealed all the way to the U.S. Supreme Court. (Appx40). See *Conley v. Ballinger*, 216 U.S. 84 (1910). In 1907, the Federal Government offered to sell Huron Cemetery to the City of Kansas City, Kansas pursuant to the 1904 Act for $75,000. (Appx40).

As the *Conley* Supreme Court case gained national attention, the Conley sisters eventually gained the support of Senator Curtis of Kansas, who introduced, sponsored and got an Act passed in Congress in 1913 to prevent the sale of the Huron Cemetery. Act of February 13, 1913 (Appx40-41).

In 1997, the Wyandotte Tribe of Oklahoma proposed to build a casino over the Huron Cemetery land. Chief Janith English and the General Council of the Wyandot Nation had a bill drafted to protect the Huron Cemetery from such commercial development. They got Senator Sam Brownback of Kansas to introduce the bill in Congress. (Appx45).

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

> (2) The lands of the Huron Cemetery shall be used only--
>
> (A) for religious and cultural uses that are compatible with use of the lands as a cemetery; and
>
> (B) as a burial ground.

Appx45-46.

On June 25, 1998, the Wyandot Nation executed a settlement agreement with the Wyandotte Tribe of Oklahoma. This settlement agreement provides that the use of the Huron Cemetery "shall forever be limited" to its use as a cemetery and burial ground for the parties, their members and families, and for compatible religious and cultural uses. (Appx1-9).

In the meantime, Congress passed several laws pertaining to tribal trust accounts. In 1991, the BIA hired the accounting firm Arthur Andersen LLP to provide an accounting of tribal trust accounts. In 1994, Congress created the Office of the Special Trustee for American Indians and charged the Special Trustee with the duty to ensure that the Department of Interior properly performed its obligations for discharging its trust fund management duties. 25 U.S.C. §§ 4041-4043. The Special Trustee oversees the "fair and accurate accounting" of trust accounts. 25 U.S.C. § 4043(b)(2)(A).

In 1994, Congress also enacted the American Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 161a, 162a, 4001-4061 ("Trust Fund Reform Act"). The Trust Fund Reform Act requires the Department of Interior ("Interior") to reconcile tribal trust accounts. 25 U.S.C. § 4044. This requirement was adopted from the appropriation bills of prior years. (*Norton* Doc. #42, p. 8)

Plaintiff-Appellant Wyandot Nation never received any Arthur Andersen Report or any other reconciliation report from the Federal Government that provides an accounting of the Government's management of the Wyandot Nation's tribal trust funds. (Appx48-49). This is true with respect to both the Category One and Category Two trust funds.

SUMMARY OF THE ARGUMENT

The CFC improperly dismissed the Wyandot Nation's Complaint. Contrary to the CFC's determination, the Wyandot Nation is a federally recognized tribe; therefore, the statute of limitations applicable to the tribe's accounting and trust mismanagement claims may be tolled. This is exactly what occurred here.

In this regard, the first and second causes of action seeking an accounting of two categories of tribal trust funds are not time-barred. The Wyandot Nation has never received an accounting of these funds from the United States; therefore, the statute of limitations applicable to these claims has never accrued. This is so regardless of the date the tribe had notice of its potential claims.

The second and fourth causes of action seeking monetary damages for the mismanagement of tribal trust funds were also timely filed. The statute of limitations applicable to these claims did not accrue until the Federal Government repudiated the trust, which occurred at the earliest on May 8, 2015.

In any event, the CFC's outright dismissal of the Complaint on statute of limitations grounds, prior to the exchange of any pretrial discovery, was inappropriate. The Wyandot Nation should be afforded the opportunity to develop a factual record through discovery on when its claims accrued.

Finally, the Wyandot Nation has standing to pursue the Huron Cemetery claims set forth in the second and fourth causes of action. The tribe has an un-extinguished, Fifth Amendment protected property (ownership) interest in the trust land in question.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The Federal Circuit reviews CFC judgments and final orders "to determine whether they are 'incorrect as a matter of law' or premised on 'clearly erroneous' factual determinations." *Whitney Bens., Inc. v. United States*, 926 F.2d 1169, 1171 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991). Questions of law are reviewed *de novo*, whereas any underlying factual determinations are reviewed for clear error. *Hewlett Packard Co. v. Acceleron LLC*, 587 F.3d 1358, 1361 (Fed. Cir. 2009).

The CFC's determination that the Wyandot Nation's four causes of action against the United States were barred by the statute of limitations presents a question of law that is reviewed *de novo*. *See Henke v. United States*, 60 F.3d 795, 802 (Fed. Cir. 1995), *on remand*, 43 Fed. Cl. 15 (1999). Further, the Federal Circuit "review[s] statutory interpretation, which is a question of law, without deference." *AstraZeneca Pharms. LP v. Apotex Corp.*, 669 F.3d 1370, 1376 (Fed. Cir. 2012); *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d 1364, 1366 (Fed. Cir. 2001), *on subsequent appeal*, 334 F.3d 1358 (Fed. Cir. 2003). Thus, to the extent that the CFC's final order was dependent on its interpretation of federal statutes or United States treaties, this Court should conduct a *de novo* review.

In addition to the statute of limitations, the CFC also dismissed for lack of standing the Wyandot Nation's second cause of action for an accounting and fourth cause of action for damages arising from the mismanagement of trust funds relating to the Huron Cemetery. (Appx2). In this regard, the CFC concluded that the Wyandot Nation was not the owner of the land in question. (*Id.*)

A trial court's dismissal of a claim for lack of standing is a dismissal on jurisdictional grounds under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002); *Rogers v. United States*, 95 Fed. Cl. 513, 514 (2010). As a result, this Court's review of the CFC's ruling on the

standing issue is *de novo*. *Hewlett Packard Co.*, 587 F.3d at 1361; *GAF Bldg. Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 481 (Fed. Cir. 1996).

In reviewing the United States' motion to dismiss for untimeliness and lack of standing, this Court "must accept as true all well-pled material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999). This means that all reasonable inferences must be indulged in favor of the Wyandot Nation as plaintiff. *See Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007).

If the facts "reveal any reasonable basis upon which the [complaining party] may prevail, dismissal is inappropriate." *Pixton v. B & B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002), *appeal after remand*, 143 F. App'x 365 (Fed. Cir. 2005). Under this standard, the CFC's dismissal of the Wyandot Nation's case may be upheld only if it appears "beyond doubt that [the tribe] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999), *on remand*, 206 F.3d 1377 (11th Cir. 2000) (internal quotation marks omitted); *see also Chapman Law Firm Co.*, 490 F.3d at 938 ("The court must determine whether the claimant is entitled to offer evidence to support the claims, not whether the claimant will ultimately prevail") (internal quotation marks omitted). This stringent standard is not satisfied in this case; therefore, the CFC's order of dismissal must be reversed.

II. THE CFC ERRED IN DISMISSING THE WYANDOT NATION'S COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS

A. The Wyandot Nation Is a Federally Recognized Tribe

The CFC's dismissal of the Wyandot Nation's entire Complaint on statute of limitations grounds was largely premised on the determination that the Wyandot Nation is not a federally recognized Indian tribe. (Appx1-4). Based on this determination, the CFC ruled that the Wyandot Nation was not entitled to an accounting under the Indian Trust Accounting Statute ("ITAS") or the 1994 Trust Fund Reform Act and, therefore, the tribe's claims against the United States were untimely filed. (Appx4-9). The CFC's reasoning in this regard is fatally flawed and must be rejected.

In erroneously concluding that the Wyandot Nation is not a federally recognized Indian tribe, the CFC relied on the fact that the Wyandot Nation is not specifically listed as a federally recognized tribe in the Federally Recognized Tribe List Act of 1994 ("List Act"), Pub. L. No. 103-454, § 103(6), 108 Stat. 4791. (Appx4). The problem with this reasoning is that the List Act does not purport to include all federally recognized Indian tribes. (108 Stat. 4791, § 103(7)). Rather, the List Act expressly states that an Indian tribe "may be recognized by Act of Congress," and that a tribe which has been so recognized "***may not be terminated except by an Act of Congress.***" (emphasis added). (*Id.* § 103(3), (4)). The express

language of the statute is conclusive and must be enforced as written. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Gilead Scis., Inc. v. Lee*, 778 F.3d 1341, 1347 (Fed. Cir. 2015).

As the Federal Circuit has recognized, inclusion on the List Act does not provide the sole means by which an Indian tribe may achieve federal recognition. Rather, "[t]here are generally **three means** by which the federal government can recognize an Indian tribe. The government can enter into a treaty with the tribe. Congress can recognize a tribe by enacting a specific statute . . . . Or the executive can recognize a tribe pursuant to the authority delegated by Congress." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1369-70 (Fed. Cir. 2005) (internal citations & footnotes omitted) (emphasis added); *see also Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 145 & n.11 (D.D.C. 2015) (declining to adopt Federal Government's assertion that the sole means of federal recognition of an Indian tribe is through the Indian Reorganization Act and the corresponding List Act).

In the present case, federal recognition of the Wyandot Nation was legitimately accomplished through a treaty, specifically the 1867 Treaty. *See Samish Indian Nation*, 419 F.3d at 1369-70. This Treaty is equivalent to an Act of Congress. *See Xerox Corp. v. United States*, 41 F.3d 647, 659 (Fed. Cir. 1994), *cert. denied*, 516 U.S. 817 (1995) ("A treaty, when ratified, supersedes prior domestic law to the contrary, and is equivalent to an act of Congress") (internal

citation omitted). Hence, the Wyandot Nation is an Indian tribe that is "recognized by Act of Congress" and that can only be terminated by a similar Act of Congress. (108 Stat. 4791, § 103(3), (4), and (7)).

Neither the United States nor the CFC cited any Act of Congress -- and none appears to exist -- that terminated the Wyandot Nation's status as a federally recognized Indian tribe. The CFC's finding that the Bureau of Indian Affairs' approval of a 1998 Settlement Agreement between the Wyandot Nation and the Wyandotte Tribe of Oklahoma pursuant to 25 U.S.C. § 81 is fatally flawed and must be rejected because there is no language in § 81 authorizing the Bureau of Indian Affairs to terminate a federally recognized Indian tribe. Section 81 only requires the approval of the Secretary of the Interior for agreements "that encumbers Indian lands for a period of 7 or more years . . . ." 25 U.S.C. § 81(b). It does not constitute an "Act of Congress" authorizing the Bureau of Indian Affairs to terminate the federal recognition of any Indian tribe pursuant to an inter-tribal agreement.

Furthermore, the Oklahoma Band's creation of a separate tribe under the OIWA does not qualify as an Act of Congress that terminated federal recognition of the remainder of the existing portion of the Wyandotte Tribe of Indians consisting of the Kansas band. *See Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468, 471-81 (1985) (recognizing that although the seven Sioux Teton bands that were parties

to the 1851 and 1868 Ft. Laramie treaties separated and now reside on different Indian reservations, all bands claim may legitimately claim rights under both treaties). Hence, the express language of the List Act mandates the conclusion that the Wyandot Nation is currently a federally recognized Indian tribe under the 1867 Treaty. (108 Stat. 4791, § 103(3), (4), Appx332-371). *See Samish Indian Nation*, 419 F.3d at 1369-70.

Contrary to the CFC's reasoning, this conclusion is unaffected by the language of the Trust Fund Reform Act. (Appx4-5). The fact that the definition of the term "Indian tribe" in that Act echoes some of the language of the List Act does not foreclose the possibility that the Wyandot Nation is a federally recognized Indian tribe. The cases cited by the CFC on this point interpret identical words "used in different parts *of* ***the same act***[.]" (emphasis added). *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012), *on remand*, 688 F.3d 984 (9th Cir. 2012). As the CFC's opinion acknowledges, the List Act and the Trust Fund Reform Act are completely separate statutes. (Appx5). Thus, the rule of statutory construction on which the CFC relied is inapplicable here.

Moreover, as a practical matter, the Wyandot Nation and its members meet the Trust Fund Reform Act's definition of an "Indian tribe" because the tribe and its members currently receive special services provided by the United States as a result of their status as Indians. *See* 25 U.S.C. § 4001(2). These services include

allowing members to attend BIA schools; entering into a maintenance agreement on behalf of the Wyandotte Tribe of Indians with the City of Kansas City, Kansas in 1918 to perpetually maintain, care for, and preserve the Huron Cemetery; paying for attorney fees resulting from the occupation of Huron Cemetery by the Conley sisters as provided in the Act of March 2, 1923 (42 Stat. 185); creating individual Indian money trust Accounts for Indian Claims Commission and Court of Claims Judgment Funds set aside by the BIA in special trust accounts for minor children until they reached their majority; and providing title services for the Huron Cemetery and "Absentee Wyandotte" Indian allotments. (Appx35-36, 265-270, 276-285). *See* 25 C.F.R. § 150.5(d) ("The Bureau Central Office, Washington, D.C., provides title services for . . . the Absentee Wyandottes").

As the foregoing analysis demonstrates, the CFC failed to cite any Act of Congress, other than 25 U.S.C. § 81, that terminated the federal recognition of the Wyandot Nation as required by the List Act. The Wyandot Nation has been a federally recognized Indian tribe since 1867, pursuant to Article 13 of the 1867 Treaty. As a federally recognized Indian tribe, the Wyandot Nation is entitled to an accounting under the ITAS and the Trust Fund Reform Act, and the tolling provisions of those statutes may apply here. *See* 25 U.S.C. § 4044. Hence, it cannot reasonably be concluded that the entire Complaint must be dismissed out of hand. Instead, the merits of each count must be examined.

B. The Wyandot Nation's First Cause of Action for an Accounting of Category One Trust Funds Was Timely Filed

The Complaint's first cause of action seeks an accounting of Category One trust funds established in Schedule A of the 1867 Treaty. The CFC erred in ruling that this claim is time-barred.

The Trust Fund Reform Act requires that United States prepare reconciliation reports for each Indian tribal trust account. 25 U.S.C. § 4044. This reconciliation report must include "as full and complete accounting as possible of the account holder's funds to the earliest possible date." *Id.*

Notably, the statute of limitations applicable to trust fund claims accrues only after a tribe receives an accounting of trust funds from the United States. *See id.*; *see also United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316-17 (2011), *on remand*, 423 F. App'x 997 (Fed. Cir. 2011); *Osage Nation v. United States*, 57 Fed. Cl. 392, 398 (2003). This statutory language is reflective of a Congressional intent "to allow Indian tribes to file tribal trust fund mismanagement claims within six years after an accounting of the trust fund is furnished to the Tribe ***no matter when the mismanagement may have occurred***." (emphasis added). *Osage Nation*, 57 Fed. Cl. at 398

Under the clear language of the Trust Fund Reform Act, the statute of limitations applicable to the Wyandot Nation's first cause of action for an accounting of Category One trust funds would expire six years after an accounting

of such funds was provided to the tribe. 25 U.S.C. § 4044; *Tohono O'Odham Nation*, 563 U.S. at 316-17. This is true regardless of when the Federal Government's mismanagement of the trust funds occurred or when the Wyandot Nation had notice of the Government's breach of duty. *Osage Nation*, 57 Fed. Cl. at 398l.

It is undisputed that the United States has never provided the Wyandot Nation with a reconciliation report providing an accounting of the tribe's Category One trust funds. As a result, the statute of limitations pertaining to the Wyandot Nation's first cause of action against the United States never began to run. 25 U.S.C. § 4044. It necessarily follows that this cause of action is not time-barred, and the CFC erred in concluding otherwise. *See Tohono O'Odham Nation*, 563 U.S. at 316-17; *Osage Nation*, 57 Fed. Cl. at 397.

This conclusion is reinforced by the tolling provision in the Interior Appropriations Act. This provision expressly provides that "notwithstanding any other provision of law," the statute of limitations on a claim for losses to or mismanagement of Indian or tribal trust funds does not arise until the date that the affected tribe or individual Indian has been furnished with an accounting of such funds from the Federal Government. *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1034 (Fed. Cir. 2012); *see* Act of November 5, 1990, Pub. L. 101-512, 104 Stat. 1915; Act of November 13, 1991,

Pub. L. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. 104-134, 110 Stat, 1341; Act of September 30, 1996, Pub. L. 104-208; 110 Stat. 3009; Act of November 14, 1997, Pub. L. 105-83, 111 Stat. 1543; Act of October 21, 1998, Pub. L. 105-227, 112 Stat. 2681; Act of November 29, 1999, Pub. L. 106-113, 113 Stat. 1501; Act of October 11, 2000, Pub. L. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. 107-63; Pub. L. 109-158 (December 30, 2005.

These appropriation acts, known as the ITAS, suspend accrual of the statute of limitations for certain tribal trust claims. *Shoshone*, 672 F.3d at 1034. Specifically, the ITAS applies to claims "concerning losses to or mismanagement of [tribal] trust funds." *Goodeagle v. United States*, 111 Fed. Cl. 716, 721 (2013) (internal quotation marks omitted).

Under the ITAS, the statute of limitations "will not begin to run on a tribe's claims until an accounting is completed." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973, *and cert. denied, E. Shoshone Tribe of Wind River Reservation v. United States*, 544 U.S. 973 (2005). In other words, the trust beneficiary must be provided with a meaningful accounting before the statute of limitations begins to accrue on a claim alleging mismanagement of trust funds by

the Federal Government. *Id.* This is true even if the "operative facts" show the Federal Government's mismanagement of tribal trust funds "began occurring decades ago[.]" *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 732 (2013).

As explained above, the Wyandot Nation has not yet received any reconciliation report or meaningful accounting of the United States' management of its Category One trust funds. The funds at issue are held in trust within the Federal Government's possession. Hence, the ITAS applies by its express terms. It follows that the statute of limitations applicable to the tribe's first cause of action has not yet begun to accrue, and the claim was timely filed.

In an apparent attempt to avoid this conclusion, the CFC stated that the Wyandot Nation objectively knew or should have known of the United States' breach of fiduciary duty regarding the 1867 Treaty (Schedule A) trust funds back in the late 1800s and, therefore, the tribe's cause of action accrued more than six years before the instant Complaint was filed. Pursuant to 28 U.S.C. § 2501, the CFC's authority to exercise jurisdiction over a dispute is limited to claims that are filed within six years of the date of accrual. *Hornback v. United States*, 55 F. App'x 536, 536 (Fed. Cir. 2002). This determination, however, contravenes the express language of the ITAS and, therefore, is not legally meritorious.

In addition, the CFC's reasoning completely overlooks certain well-established legal principles. When a fiduciary relationship between the parties exists, "the universal rule is that 'a statute of limitation does not begin to run . . . until the relationship is repudiated.'" *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973) (quoting *Kasey v. Molybdenum Corp. of Am.*, 336 F.2d 560, 569 (9th Cir. 1964)); *see also Oldland v. Gray*, 179 F.2d 408, 416 (10th Cir.), *cert. denied*, 339 U.S. 948 (1950) (statute of limitations does not begin to run against a trust "until it is openly disavowed by the trustee"); *Cobell v. Norton*, 260 F. Supp. 2d 98, 104 (D.D.C. 2003) (statute of limitations "does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated") (internal quotation marks omitted).

In regard to an action for an accounting of an Indian tribal trust account, the Federal Government repudiates a claim when it rejects the findings of a reconciliation report. *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl. 673, 678 (2015). Repudiation may also occur when the United States compels a tribe to file suit. *Id.*

As discussed above, the United States has never provided the Wyandot Nation with a reconciliation report of any kind. In addition, the Federal Government effectively forced the Wyandot Nation to file the instant lawsuit when

it rejected the tribe's settlement offers in the prior district court *Norton* litigation. (Civil Docket for *Norton*, Case #1:05-cv-02491-THF). As discussed above, from 2006 through May 8, 2015, the Federal Government repeatedly promised to provide an accounting of the Wyandot Nation's trust funds and non-monetary trust funds. (*Norton* Doc. #42, pp. 16-36; *Norton* Doc. #80, pp. 1-3). Because settlement could never be reached, the Wyandot Nation was forced to dismiss that action and re-file their Complaint in the present case. The instant Complaint was filed on June 1, 2015, just twenty-four days after the dismissal of the *Norton* case. Thus, even if the Federal Government repudiated the Category One trust on May 8, 2015 when its settlement negotiations with the Wyandot Nation failed, the instant action was timely filed within six years of that date. 28 U.S.C. § 2501. Accordingly, the CFC's order dismissing the first cause of action must be reversed.

C. The Third Cause of Action Seeking Monetary Damages for the United States' Mismanagement of Category One Treaty Trust Funds Was Not Untimely

The third cause of action in the Complaint seeks monetary damages arising from the United States' mismanagement of the Wyandot Nation's Category One (Schedule A) 1867 Treaty trust funds. Because these funds were supposedly paid by the Federal Government to the Wyandotte Tribe of Indians (now the Wyandot Nation) in the late 1880s, the CFC ruled that the action was untimely. (Appx6).

As discussed in Argument Part II(B), *supra*, the statute of limitations applicable to a claim for breach of trust does not begin to accrue until the trustee repudiates the trust. *Oldland*, 179 F.2d at 416; *Cobell*, 260 F. Supp. 2d at 104; *Manchester Band of Pomo Indians*, 363 F. Supp. at 1249. This rule applies with equal force in cases seeking relief for the United States' alleged breaches of fiduciary duty in regard to the management of tribal trust accounts under the Trust Fund Reform Act. *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, No. 13-00601, 2015 WL 5474487, at *4 (D.D.C. Sept. 17, 2015). Even if the tribe receives a reconciliation report, its breach-of-fiduciary duty claims do not begin to accrue until the date that the Federal Government, as trustee, actually repudiates the trust. *Id.* Repudiation occurs when the Federal Government rejects the findings of the reconciliation report or compels the tribe to file suit. *Quapaw Tribe of Okla.*, 123 Fed. Cl. at 678.

For the reasons described in Argument Part II(B), *supra*, the earliest date that the United States reasonably could be found to have repudiated the Wyandot Nation's Category One trust claims was May 8, 2015, the date that the Federal Government's settlement negotiations with the Wyandot Nation failed. The instant Complaint was filed just twenty-four days of that date. As a result, the CFC erred in concluding that the Wyandot Nation's third cause of action was time-barred. The CFC's order dismissing this claim must, therefore, be reversed.

D. The Wyandot Nation's Category Two Claims Pertaining to the Huron Cemetery Are Not Barred by the Statute of Limitations

The second and fourth causes of action in the Complaint involve the Wyandot Nation's Category Two claims regarding the Huron Cemetery. In the second cause of action, the tribe seeks an audit or accounting of the Easements for Grants of Right-of-way trust funds relating to the Huron Cemetery. The fourth cause of action seeks monetary damages from the United States for mismanagement of Category Two Huron Cemetery trust funds.

In ruling that these causes of action were time-barred, the CFC incorrectly determined that the claims accrued over six years prior to the filing of the instant Complaint because the Wyandot Nation knew or should have known of the events giving rise to these claims "at some point in the 20th century[.]" (Appx8). In so ruling, the CFC relied on the general language of 28 U.S.C. § 2501, which states that the six-year statute of limitations runs from the date that the plaintiff's claim "first accrue[s]." (Appx8).

The CFC's analysis is fundamentally flawed because it relied on the Wyandot Nation's alleged notice of its potential claims. In regard to the second cause of action for an accounting, the Wyandot Nation's claim never accrued because the tribe never received an accounting from the United States of the Category Two Huron Cemetery trust funds. *See* 25 U.S.C. § 4044; *Tohono*

O'Odham Nation, 563 U.S. at 316-17; *Osage Nation*, 57 Fed. Cl. at 398. The tribe is permitted to file trust fund mismanagement claims within six years after an accounting of the trust fund is finally furnished to the Tribe "no matter when the mismanagement may have occurred." *Osage Nation*, 57 Fed. Cl. at 398. Whether the tribe was on notice of its potential claim before that date is irrelevant. *See id.*

Similarly, the fourth cause of action is not time barred because the statute of limitations applicable to a breach of fiduciary duty claim does not accrue until the date that the trustee repudiates the trust. *Oldland*, 179 F.2d at 416; *Cobell*, 260 F. Supp. 2d at 104; *Manchester Band of Pomo Indians*, 363 F. Supp. at 1249. As discussed above, this rule is applicable in cases seeking relief for the United States's alleged breaches of fiduciary duty in regard to the management of tribal trust accounts under the Trust Fund Reform Act. *Sisseton Wahpeton Oyate of the Lake Traverse Reservation*, 2015 WL 5474487, at *4.

For the reasons detailed in Argument Part II(B), *supra*, the earliest date that the United States reasonably could be found to have repudiated the Wyandot Nation's Category Two trust claims was May 8, 2015. Because the instant Complaint was filed within six years of that date, the CFC erred in ruling that the Wyandot Nation's fourth cause of action was barred by the statute of limitations. The CFC's order dismissing the Wyandot Nation's Huron Cemetery claims must, therefore, be reversed.

E. The Outright Dismissal of the Complaint on Statute of Limitations Grounds, Prior to Discovery, Was Inappropriate

Finally, the CFC erred in dismissing the Complaint outright on statute of limitations grounds at such an early stage of the proceedings. The Wyandot Nation has not had any opportunity to obtain discovery to develop a factual record on when its claims against the United States accrued.

In *Sisseton Wahpeton Oyate*, ten federally recognized Indian tribes filed suit on April 30, 2013, against certain Federal Government authorities and agencies for breach of fiduciary duty in the management of tribal trust accounts. Because it was undisputed that the tribes had received reconciliation reports fourteen years earlier, in 1996, the Federal Government filed a motion to dismiss on statute of limitations grounds. 2015 WL 5474487, at *3. However, the court found that neither the ITAS nor the legislative history related to the statute clearly provided that the mere receipt of a reconciliation report was sufficient to trigger the statute of limitations applicable to tribal trust claims against the United States based on the Federal Government's mismanagement of such funds. *Id.* at *4.

The *Sisseton Wahpeton Oyate* court declined to take a position on the statute of limitations issue on the Federal Government's motion to dismiss. *Id.* In so doing, the court stated: "The parties have not yet had the opportunity to develop a record through discovery on when Plaintiffs' claims accrued, and the factual issues

related to accrual preclude deciding the issue of the statute of limitations at the motion to dismiss stage." *Id.*

The *Sisseton Wahpeton Oyate* court's reasoning is directly applicable to the present case. Because the United States chose to file a motion to dismiss rather than to answer the Complaint, the Wyandot Nation has not had any opportunity to engage in discovery to develop a record on when its claims against the Federal Government accrued. Further, the question as to when accrual occurred involves factual determinations, such as if and when the tribe received any reconciliation report and when the United States repudiated the trust. *See id.* Given the presence of these factual issues, it was inappropriate for the CFC to dismiss the Complaint outright, without providing the Wyandot Nation any opportunity to engage in pretrial discovery on the issue as to when the tribe's claims against the Federal Government accrued. *See id.*

As the District of Columbia Circuit has explained:

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense. The filing of an answer, raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal.

Richards v. Mileski, 662 F.2d 65, 72 (D.C. Cir. 1981), *on remand*, 567 F. Supp. 1391 (D.D.C. 1983).

As a matter of basic fairness, the Wyandot Nation should be permitted to obtain discovery and develop a factual record concerning the issue as to when its claims against the United States accrued. Hence, the Court should reverse the CFC's order dismissing the tribe's entire Complaint on statute of limitations grounds.

III. THE WYANDOT NATION HAS STANDING TO MAINTAIN ITS CATEGORY TWO HURON CEMETERY CLAIMS

In addition to incorrectly finding the Wyandot Nation's claims pertaining to the Huron Cemetery to be time-barred, the CFC also incorrectly ruled that the tribe does not have standing to maintain these causes of action. This ruling was based on the Wyandot Nation's alleged admission in a settlement agreement entered in a 1998 case that the United States is the record owner of the land. (Appx8). In ruling that the 1998 agreement negates the tribe's standing in this case, the CFC misconstrued the language of the settlement agreement.

On June 25, 1998, the Wyandot Nation executed a settlement agreement with the Oklahoma Wyandottes. This settlement agreement provided that the use of the Huron Cemetery "shall forever be limited" to its use as a cemetery and burial ground for the parties, their members and families, and for compatible religious and cultural uses." (CFC Doc. 14-3, § 3). The settlement agreement also stated that the "United States claims to hold title to the Huron Cemetery in trust for the benefit of

the Oklahoma Wyandotte[.]" (*Id* .§ 5). Thus, the express language of the settlement agreement provided that the United States holds the Huron Cemetery **in trust** for at least one of the two bands that constituted the Wyandotte Tribe of Indians under Article 13 of the 1867 Treaty.

Contrary to the CFC's determination, the language of the settlement agreement does not contradict the Wyandot Nation's assertion in this case that the tribe has a beneficial ownership interest in the Huron Cemetery. The 1998 settlement agreement is based on the proposition that the United States holds the legal title to the land **as trustee** for the Indian tribe. (*Id.*) This necessarily means that the entire Wyandott Tribe of Indians (that is, both the Oklahoma Band and the Kansas Band) established under Article 13 of the 1867 Treaty currently has an ownership interest in the land that is beneficial or equitable in nature. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939) ("[u]nder . . . established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale").

Moreover, because both the Oklahoma Band and the Kansas Band of the Historic Wyandott Nation have beneficial interests in the Huron Cemetery, it was unnecessary for the Plaintiff-Appellant Wyandot Nation to dispute the Oklahoma Band's beneficial interest claim in the 1998 settlement agreement. The express

language of the settlement agreement provides that "the United States **claims to hold title** to the Huron Cemetery in trust for the benefit of the Oklahoma Wyandotte[.]" (emphasis added) (CFC Doc. 14-3, § 5). Given this understanding, it was most practical for the Oklahoma Wyandottes to assume the responsibility of executing the necessary documents to obtain the Federal Government's approval of the settlement agreement. Under the circumstances, there was simply no need for the Kansas Wyandot Nation to be involved in the negotiations with the United States.

By stating in the settlement agreement that the United States only "claims to hold title" to the Huron Cemetery for the benefit of the Oklahoma Wyandottes, neither the Kansas Wyandot Nation nor the Oklahoma Wyandottes acquiesced that the Federal Government's asserted position was, in fact, correct. *See Benfield v. Dep't of Army*, 347 F. App'x 586, 588 (Fed. Cir. 2009) (settlement agreement cannot be interpreted in a manner contrary to the plain language of the agreement); *see Wichita & Affiliated Bands of Indians in Okla. v. United States*, 89 Ct. Cl. 378, 420-21 (1939) (treaties could not be interpreted as an admission by the United States of title in favor of any Indian tribe). In short, the truth or falsity of the Government's belief was of no relevance to the underlying purpose of the settlement agreement, which was to maintain the Huron Cemetery as burial ground rather than allow for commercial development. (CFC Doc. 14-3). Thus, the

Wyandot Nation neither acquiesced in nor denied the Government's asserted ownership interest in the land. The CFC's use of the 1998 settlement agreement against the Wyandot Nation here is contrary to the both the express language and the spirit of that agreement.

In *Conley v. Ballinger*, 216 U.S. 84, 90 (1910), the United States Supreme Court stated that the Huron Cemetery "remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use by the Wyandottes." This language accords with the 1998 settlement agreement in stating that the Huron Cemetery was held in the name of the United States in trust for the (Historic) Wyandott Tribe of Indians.

Additionally, the CFC erred in failing to recognize and give due credence to the Wyandot Nation's Fifth Amendment protected property interest in the Huron Cemetery. As the United States Supreme Court has concluded, when tribal property is recognized under a treaty, it is protected under the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). The trust land constituting the Huron Cemetery was part of the Wyandot Reservation created by Articles 1 and 2 of the 1843 Treaty (9 Stat. 337), and its ownership and trust status was "permanently reserved" as a cemetery under Article 2 of the 1855 Treaty (10 Stat. 1159). The ownership and trust status of the Huron Cemetery was recognized as the property of the Historic Wyandotte Tribe of Indians under the 1871 Act (Rev.

Stat. 2079, as amended; 25 U.S.C. § 71). Thus, the Wyandot Nation and its members have held since the 1843 Treaty, and continue to hold, a vested Fifth Amendment property interest in the Huron Cemetery that has never been taken by Congress for a lawful public purpose, or with due process of law and just compensation, as required by the Fifth Amendment. It follows that the Wyandot Nation still holds a constitutionally-protected property interest in the Huron Cemetery.

Moreover, the CFC failed to acknowledge that the Act of March 2, 1923 (42 Stat. 1785), as alleged in the Complaint and which should have been accepted as true for purposes of the Government's motion to dismiss, is the "Indian Reservation" of the Wyandot Nation. (Appx36, 43-44). As discussed above, once an Indian reservation is established by Congress, only Congress can thereafter disestablish it. (108 Stat. 4791, § 103(7)); *United States v. Celestine*, 215 U.S. at 285.

Congress has never disestablished the Huron Cemetery as an Indian Reservation of the Wyandot Nation. Hence, the land must be classified as owned by the Wyandot Nation, regardless of any documents to the contrary. (*Id.*)

For all of the above reasons, it must be concluded that the Wyandot Nation is a federally recognized tribe that currently has an unextinguished, Fifth Amendment protected property interest in the Huron Cemetery. As a result, the tribe has

standing to pursue its Category Two claims involving the Huron Cemetery against the United States. *See Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005). The CFC's order dismissing the second and fourth causes of action of the Complaint must, therefore, be reversed.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the CFC's order dismissing the Wyandot Nation's Complaint should be reversed, and the case should be remanded to the CFC for further proceedings therein.

Dated: May 6, 2016

Respectfully submitted,

/s/ Brian J. Leinbach

Brian J. Leinbach, Esq.
California State Bar No. 161739
Bleinbach@ellaw.com
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd., 12th Floor
Los Angeles, CA 90067-4113
Tel.: 310-552-3800
Fax: 310-552-9434
Counsel of Record for Appellant

Of Counsel:
Mario Gonzalez, Esq.
South Dakota State Bar No. 612
Mario@mariogonzalezlaw.com
522 Seventh Street, Suite 202
Rapid City, SD 57701
Tel.: 605-716-6355
Fax: 605-716-6357

ADDENDUM

TABLE OF CONTENTS
Addendum to Brief

Page:

In the United States Court of Federal Claims

No. 15-560C

(Filed: January 4, 2016)

WYANDOT NATION OF KANSAS, a/k/a WYANDOTTE TRIBE OF INDIANS, Plaintiff, v. THE UNITED STATES, Defendant.	Indian Tribe Claims for Tribal Trust Fund Mismanagement; Rule 12(b)(1) and (b)(6) Motion to Dismiss; Fiduciary Duties Owed to Indian Tribes; 28 U.S.C. § 2501; Statute of Limitations; Effect of Appropriations Act Riders; Standing.

Brian J. Leinbach, with whom were *Walter J. Lack*, Engstrom, Lipscomb & Lack, Los Angeles, California, *Thomas V. Girardi*, Girardi & Keese, Los Angeles, California, *Gregory A. Yates*, Gregory A. Yates, P.C., Encino, California, *Mario Gonzalez*, Law Offices of Mario Gonzalez, Rapid City, South Dakota, *Gregory Smith*, Law Offices of Gregory W. Smith, Beverly Hills, California, Of Counsel, for Plaintiff.

Laura W. Duncan, Trial Attorney, with whom were *John C. Cruden*, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., *Gladys Cojocari*, Office of the Solicitor, U.S. Department of the Interior, Of Counsel, for Defendant.

OPINION AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

WHEELER, Judge.

This case involves an Indian Tribe's claims that accrued in the nineteenth century. For Indian Tribes that qualify for a "full and complete accounting" of their treaty trust funds pursuant to the American Indian Trust Fund Management Reform Act of 1994, Congress has permitted claims relating to the treaty trust funds to be brought within six years after the Government furnishes the accounting. However, in this case, Plaintiff is not a federally recognized Indian Tribe, and therefore is not entitled to an accounting. For

claims relating to cemetery land in Kansas City, Kansas, Plaintiff is not the owner of the land, and thus has no standing to assert these claims. For the reasons explained in greater detail below, Defendant's motion to dismiss must be granted.

Factual and Procedural History

Plaintiff, the Wyandot Nation of Kansas ("Wyandot Nation"), is an Indian tribe whose members trace their ancestry to the Historic Wyandott Nation and the Wyandotte Tribe of Indians. Compl. ¶ 2. The Historic Wyandott Nation's government-to-government relations with the United States were dissolved and terminated 160 years ago by the Treaty of January 31, 1855, 10 Stat. 1159 ("1855 Treaty"). Id. Following the Historic Wyandott Nation's termination, the Wyandotte Tribe of Indians was established as a reorganized tribe under Article 13 of the Treaty of February 23, 1867 ("1867 Treaty"). Id. Plaintiff claims to be both a successor-in-interest to all of the treaties entered into by the Historic Wyandott Nation with the United States and a part of the reorganized Wyandotte Tribe of Indians. Id. Plaintiff changed its name to the Wyandot Nation of Kansas in 1959 to avoid confusion with the separate, federally-recognized Wyandotte Tribe of Oklahoma. Id. ¶ 37.[1]

The Wyandot Nation's claims in this case involve treaty trust funds and trust land that the Government allegedly holds in trust for the Wyandot Nation. The funds Plaintiff claims the Government holds in trust for it fall into two categories. Id. at 69. Plaintiff's "Category One trust funds are those funds described in Schedule A of the 1867 Treaty." Id. ¶ 69. According to Plaintiff, its Category One funds ". . . were derived from the sale of Historic Wyandott Nation lands that were placed in U.S. Treasury trust accounts." Id. ¶ 72. Plaintiff's "Category Two trust funds are derived from easements for grants of rights-of-way for the use of two tracts of the Huron Cemetery trust land for Kansas City, Kansas streets since 1857." Id. ¶ 73.

The Wyandot Nation commenced this action on June 1, 2015 by filing a complaint against the United States for money damages arising from the Government's alleged breach of trust and fiduciary obligations owed to the Wyandot Nation. The complaint contains the following four causes of action: (1) breach of fiduciary duties based on a failure to provide a full, accurate, and timely accounting of Category One treaty trust funds; (2) breach of fiduciary trust responsibilities based on a failure to collect, deposit, account for, and invest trust funds that should have been collected for use of Huron Cemetery trust lands by the City of Kansas City, Kansas; (3) mismanagement of Category One treaty trust funds

[1] According to the Wyandot Nation, "[t]he Wyandotte Tribe of Oklahoma was formerly part of the Wyandotte Tribe of Indians and consists of members of the Wyandotte Tribe of Indians residing in Oklahoma that splintered off from the Wyandotte Tribe of Indians, and reorganized as a separate tribe under Section 3 of the 1936 Oklahoma Indian Welfare Act." Compl. ¶ 2 (citing 25 U.S.C. § 503).

and accounts; and (4) mismanagement of Category Two Huron Cemetery trust funds. Id. ¶¶ 75-117. Plaintiff requests full trust fund accountings from the United States based on the allegations in its first and second claims, and monetary damages from the Government based on the alleged mismanagement of Plaintiff's funds and property in its third and fourth claims.

On August 28, 2015, Defendant filed a motion to dismiss Plaintiff's complaint. In its motion, Defendant contends that Plaintiff's claims should be dismissed as untimely, for failure to allege sufficient jurisdictional facts, or for failure to state a claim upon which relief can be granted. Def.'s Mot. 12-25. Additionally, Defendant argues that Plaintiff lacks standing to assert any claims regarding the Huron Cemetery. Reply 2-9. Having now been fully briefed and argued, Defendant's motion is ready for decision.

Analysis

I. Standard of Review

Jurisdiction is a threshold matter which must be established "before the court may proceed with the merits[.]" Overview Books, LLC v. United States, 72 Fed. Cl. 37, 40 (2006) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998)). When ruling on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Court of Federal Claims ("RCFC"), the Court must accept all undisputed factual allegations as true and draw all reasonable inferences in favor of the plaintiff. Estes Exp. Lines v. United States, 739 F.3d 689, 692 (Fed. Cir. 2014). The burden lies with the plaintiff to establish jurisdiction through a preponderance of evidence. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). The Court will grant a motion to dismiss for lack of subject matter jurisdiction when it is clear beyond a doubt that there is no set of facts the plaintiff could prove that would enable this Court to grant relief. See Frymire v. United States, 51 Fed. Cl. 450, 454 (2002).

Rule 12(b)(6) authorizes this Court to dismiss an action for failure to state a claim upon which relief can be granted. Pursuant to RCFC 12(b)(6), the Court must dismiss a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." W. Shoshone Nat. Council v. United States, 73 Fed. Cl. 59, 62 (2006) aff'd, 279 F. App'x 980 (Fed. Cir. 2008) (quoting Conley v. Gibson, 355 U.S. 41, 46 (1957)). A plaintiff is only required to offer "'a short and plain statement,'" showing a plausible claim for relief to survive a motion to dismiss. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley, 355 U.S. 41, 47 (1957)). In reviewing a motion to dismiss, the Court must accept as true all factual allegations submitted by the plaintiff. Bell Atl. Corp., 550 U.S. at 555.

II. Discussion

A. Category One 1867 Treaty Trust Fund Claims

1. Breach of Category One Trust Fund Fiduciary Duties and Action for an Accounting

In its first cause of action, Plaintiff alleges that the United States breached its fiduciary duty to the Wyandot Nation by failing to provide a full and timely accounting of Plaintiff's Category One treaty trust funds. Compl. ¶ 76-77. Specifically, Plaintiff refers to Schedule A of the 1867 Treaty, which lists "the several items embraced in the sum agreed to be paid to the Wyandottes" by Article 13 of the 1867 Treaty. Opp'n. 7. Plaintiff claims the United States "has never made a full financial accounting of the funds described in Schedule A [Category One], or any accrued interest earned on said funds, from 1867 up to the filing date" of its complaint. Id. Thus, Plaintiff contends it is "entitled to a full and complete accounting" of its treaty trust funds pursuant to the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"). Compl. ¶¶ 80-84 (citing 25 U.S.C. §§ 4001-61).

The Government contends that the Wyandot Nation is not a federally recognized Indian tribe and therefore the 1994 Act does not apply to it. Reply 14. If Plaintiff is not entitled to an accounting under the 1994 Act, the Government argues that Plaintiff's action for an accounting is otherwise untimely and thus this Court lacks jurisdiction to consider Plaintiff's first cause of action. The Court agrees.

Pursuant to the Federally Recognized Indian Tribe List Act of 1994 ("List Act"), "the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, § 103(6), 108 Stat 4791. As currently codified, section 479a-1 of the List Act requires the Secretary to "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 (emphasis added). The Wyandot Nation of Kansas is not included among the 566 tribal entities currently recognized by the Secretary in the Federal Register. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 8, 2015).

In relevant part, the 1994 Act, the statute upon which Plaintiff relies to assert its accounting and mismanagement claims, defines the term "Indian tribe" using identical language to that found in the List Act. 25 U.S.C. § 4001(2) (defining the term "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community . . .

which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.") (emphasis added). The List Act and the 1994 Act were passed within eight days of each other. Both statutes describe actions required of the Secretary of the Interior for the benefit of Indian tribes. Although found in two separate statutes, it is nevertheless reasonable to interpret the use of identical language as signaling Congress's intent to refer to the same group of tribes given the fact that each statute describes the Secretary of the Interior's responsibilities vis-a-vis Indian tribes. See Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2004-05 (2012) (explaining "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal citations omitted); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) (stating that "[a] standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."). Accordingly, the Court holds that as a matter of law, Plaintiff is not federally recognized pursuant to the List Act and is therefore not entitled to an accounting under the 1994 Act, which limits eligible tribes to those recognized by the Secretary of the Interior.

Also, the Court notes that contrary to Plaintiff's position in this case, Plaintiff has admitted elsewhere that it is not a federally recognized tribe. See Def.'s Resp. at Ex. 3, ¶ 3 (1998 Settlement Agreement). A 1998 Settlement Agreement executed between the Wyandot Nation of Kansas and the Wyandotte Tribe of Oklahoma and subsequently approved by the Bureau of Indian Affairs pursuant to 25 U.S.C. § 81 includes the stipulation that "the Kansas Wyandot is a non-federally recognized, State of Kansas recognized, Indian Tribe. . . [.]" Id.

The Wyandot Nation acknowledges that its "first cause of action dates back to the Treaty of 1867 and the payment of trust funds in the late 1880s." Opp'n 17. Based on Plaintiff's assertions, it is apparent to the Court that Plaintiff objectively knew, or should have known of any breach of duty on the part of the Government well before June 1, 2009, the last date on which Plaintiff's claim could have accrued in order for Plaintiff's current action for an accounting to be timely. 28 U.S.C. § 2501. As Plaintiff is not entitled to an accounting pursuant to the 1994 Act, which mandates an accounting for "each tribal trust fund for which the Secretary is responsible," 25 U.S.C. § 4044, regardless of when the tribe had knowledge of any wrongdoing, the Court holds that Plaintiff's action for an accounting is untimely and therefore this Court lacks jurisdiction to consider Plaintiff's first cause of action.

2. Category One Treaty Trust Funds Mismanagement Claim and Request for Monetary Damages

In its third cause of action, Plaintiff argues that "it has been deprived of substantial sums of money that it would have received from its Category One treaty trust funds, had they not been mismanaged by the Federal Government." Compl. ¶ 107. As detailed above, Plaintiff claims its Category One trust funds stem from payments listed under Schedule A of the 1867 Treaty. Admittedly, Plaintiff "is uncertain as to the exact amount of damages to which it is entitled." Id. ¶ 108. Nevertheless, Plaintiff contends that "[t]he fact that uncertainty exists as to the actual amount of damages does not preclude Plaintiff's legal right to recover." Opp'n. 28. The Government argues that Plaintiff's Schedule A, 1867 Treaty trust fund mismanagement claim is barred by the statute of limitations because those funds were disbursed and paid out in 1873 and 1888, and therefore accrued no later than 1888. Def.'s Mot. 14-15. Thus, Defendant argues, Plaintiff had until 1894 to advance its Category One claims. Id. at 14.

The Wyandot Nation argues that its mismanagement claim is timely because under the various Department of Interior Appropriations Act riders issued each year from 1990 through 2014, 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. See, e.g., Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 2, 128 Stat. 5, 305-306 ("the Appropriations Act"). Here, however, the Wyandot Nation is not entitled to an accounting and therefore cannot rely on the Appropriations Act riders to delay the accrual of its Category One treaty trust fund claim.

"A cause of action against the government has first accrued when all of the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (internal citation omitted). Plaintiff alleges that the United States "supposedly paid" the Wyandot Nation its Schedule A funds in 1888. Compl. ¶ 78. Based on Plaintiff's own assertion, it is apparent to the Court that Plaintiff objectively knew or should have known of the events giving rise to its trust fund mismanagement claim by the late 1880s. Thus, as Plaintiff is not entitled to an accounting under the 1994 Act that would delay the accrual of its mismanagement claim, its trust fund mismanagement claim is barred by this Court's six-year statute of limitations and must be dismissed for lack of jurisdiction. 28 U.S.C. § 2501.

B. Category Two 1867 Treaty Huron Cemetery Easement Claims

1. Breach of Fiduciary Duties to Collect and Manage Funds and Action for an Accounting

In its second cause of action, Plaintiff alleges that the United States has breached its duty to collect and manage Plaintiff's Category Two, Huron Cemetery trust funds and has failed to provide a full, accurate, and timely accounting of those funds. According to Plaintiff, the Huron Cemetery, an Indian burial ground located on a tract of land in Kansas City, "is trust land, the legal title of which is held by the Federal Government, and the beneficial or equitable title of which was held for the Wyandotte Tribe of Indians." Compl. ¶ 58. Plaintiff argues that the Government holds the Huron Cemetery as "trust land in reservation status" for the Wyandot Nation because its enrolled members are offspring of the Wyandotte Tribe of Indians. Id. ¶¶ 59-60. As with Plaintiff's first cause of action, the Wyandot Nation claims it is entitled to an audit of its Category Two trust funds and accounts pursuant to the 1994 Act. Id. ¶ 101. Specifically, Plaintiff requests an accounting of funds that were or should have been "paid to Plaintiff for easements for grants of rights-of-way over and across two tracts of Huron Cemetery trust lands." Opp'n 17.

The Government argues that the Wyandot Nation lacks standing to assert its Huron Cemetery claims because it "is not a federally-recognized Indian tribe and is not the beneficial owner of the Huron Cemetery." Reply at 4. Additionally, the Government argues that given Plaintiff's prior representations in the United District Court for the District of Kansas, Plaintiff knew or should have known of the right-of-way encroachments on the Huron Cemetery land more than six years ago. Def.'s Resp. 2-3, Ex. 4 at 24 (quoting an affidavit by Janith K. English, a Chief of the Wyandot Nation of Kansas, swearing that "Kansas Wyandots have practiced religious ceremonies, including traditional prayers at the Huron Cemetery, since its establishment in 1843 to the present time.").

a. Standing

The Federal Circuit has held that although the Court of Federal Claims is an Article I court, this Court "applies the same standing requirements enforced by other federal courts created under Article III." Anderson v. United States, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003). Whether a plaintiff has met these standing requirements is "a threshold jurisdictional issue," Myers Investigative & Security Services v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002), such that a "lack of standing precludes a ruling on the merits." Media Techs. Licensing LLC v. Upper Deck Co., 334 F.3d 1366, 1370 (Fed. Cir. 2003). To establish standing, a plaintiff must show: (1) that it has suffered an "injury in fact," an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that there is "a causal connection between

the injury and the conduct complained of," and (3) that the injury is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-66 (1992) (internal citations and quotation marks omitted).

As the party invoking the jurisdiction of this Court, the Wyandot Nation bears the burden to establish that it has standing to pursue its Huron Cemetery claims. Myers, 275 F.3d at 1369 (citing, *inter alia*, Lujan, 504 U.S. at 561). Plaintiff has not met this burden. In the 1998 Settlement Agreement, both the Oklahoma Wyandotte and the Kansas Wyandot agreed "that the United States is the record titleholder of the Huron Cemetery." Def.'s Resp. at Ex. 2, Part 1, § 2 (1998 Settlement Agreement). Plaintiff does not contradict this statement in the present litigation. Plaintiff does however contradict its prior assertion that "the United States claims to hold title to the Huron Cemetery in trust for the Oklahoma Wyandotte. . . [.]" Id. § 5. Based on this prior assertion, Plaintiff and the Oklahoma Wyandotte agreed that the Oklahoma Wyandotte would assume full responsibility for executing whatever documents were necessary to obtain the United States' approval of their 1998 Settlement Agreement involving the future use and care of the Huron Cemetery. Id. Although Plaintiff now maintains that it has a beneficial interest in the Huron Cemetery, Plaintiff's prior representations in federal court directly contradict its ability to assert a claim. See Rocovich v. United States, 933 F.2d 991, 993-94 (Fed. Cir. 1991) (explaining that when jurisdiction is disputed, this Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists). Given Plaintiff's contradictory statements, Plaintiff has not shown that it has suffered an actual and concrete injury in fact. Therefore, the Court holds that Plaintiff lacks standing to assert its Huron Cemetery claims.

b. Subject Matter Jurisdiction

Even assuming Plaintiff did have standing to bring its Huron Cemetery claims, those claims are barred by this Court's six-year statute of limitations. 28 U.S.C. § 2501. As an exhibit to its complaint, Plaintiff included a July 12, 1959 newspaper article published in the Kansas City Kansan that includes photos of the portions of the Huron Cemetery over which the city built roads using easements for rights-of-way granted by the Federal Government. Compl. at Ex. B. Given the sworn statement from Ms. Janith K. English, a Chief of the Wyandot Nation of Kansas, that the Wyandot Nation has been using the Huron Cemetery since 1843, it is apparent to the Court that Plaintiff 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, thereby triggering the statute of limitations on its Huron Cemetery claims. See Menominee Tribe of Indians v. United States, 726 F.2d 718, 720 (Fed. Cir. 1984) (explaining that, under 28 U.S.C. § 2501, the six-year statute of limitation runs from when plaintiff's claim "first accrue[s]").

As with its Category One claims, Plaintiff argues that because it "has never received an accounting from the United States pertaining to the trust funds arising from the use of the Huron Cemetery lands, no statute of limitations has yet accrued on Plaintiff's Huron Cemetery Claims." Pl.'s Sur-Reply 10. However, as previously explained, Plaintiff is not entitled to an accounting under the 1994 Act. Accordingly, Plaintiff is also not entitled to a tolling of its claims pursuant to the Appropriations Acts. Therefore, Plaintiff's Category Two, Huron Cemetery breach of fiduciary duty and accounting claim is patently untimely and this Court lacks jurisdiction to consider it.

2. Mismanagement of Huron Cemetery Funds and Request for Monetary Damages

In its fourth cause of action, Plaintiff seeks money damages for the Government's alleged mismanagement of Plaintiff's Huron Cemetery trust funds. For the reasons stated above, Plaintiff lacks standing to bring its fourth cause of action as it has not shown that it has a legally protected interest in the Huron Cemetery. Even if Plaintiff could establish standing, its fourth claim is untimely for the same reasons as are its first three causes of action. Finally, Plaintiff's fourth claim fails to state a claim upon which this Court can grant relief. Given that Plaintiff has failed to show that it has any legal interest in the Huron Cemetery, Plaintiff will necessarily be unable to prove a "set of facts in support of [its] legal claim which would entitle [Plaintiff] to relief." W. Shoshone Nat. Council, 73 Fed. Cl. at 62 (quoting Conley, 355 U.S. at 46).

Conclusion

For the reasons explained above, the Government's motion to dismiss Plaintiff's claims is GRANTED. The Clerk is directed to dismiss Plaintiff's complaint without prejudice.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

In the United States Court of Federal Claims

No. 15-560 L

WYANDOT NATION OF KANSAS, a/k/a WYANDOTTE TRIBE OF INDIANS

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed January 4, 2016, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed, without prejudice.

Hazel C. Keahey
Clerk of Court

January 6, 2016 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on May 6, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Melissa A. Dockery
Melissa A. Dockery
GIBSON MOORE APPELLATE SERVICES
P.O. Box 1460
Richmond, VA 23218
(804) 249-7770
melissa@gibsonmoore.net

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 9,696 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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:

   this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated May 6, 2016

/s/ Brian J. Leinbach
Brian J. Leinbach, Esq.