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I. INTRODUCTION

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 v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001) *superseded by statute at* Dep’t of the Interior & Related Agencies Appropriations Act, 2002, Pub.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

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

^{1/} Numerous spellings have been employed over time for the tribe and its people, including “Wyandot,” “Wyandott,” and “Wyandotte.” For ease of reference, the United States will employ herein plaintiff’s preferred spelling, “Wyandot,” when referring to plaintiff, “Wyandott” when referring to the terminated Historic Wyandott Tribe, and “Wyandotte” when referring to the federally-recognized Wyandotte Nation of Oklahoma.

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768 (footnotes omitted).

Accordingly, whether a group constitutes a “tribe” is a matter that is committed to the discretion of Congress and the Executive Branch, and courts should defer to their judgment. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *James v. U.S. Dep’t of Health and Human Serv.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

Here, plaintiff does not dispute that the Department of the Interior recognizes the Wyandotte Nation of Oklahoma as the successor entity to the Historic Wyandott Tribe. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1,942, 1,946 (Jan. 14, 2015). Further, courts have unequivocally found that the Department of the Interior holds the Huron Cemetery in trust for the Wyandotte Nation of Oklahoma, not plaintiff. *Sac & Fox Nation of Mo.*, 240 F.3d at 1256; *City of Kansas City, Kan.*, 192 F. Supp. at 181-82. Because plaintiff is not a federally-recognized Indian tribe and is not the beneficial owner of the Huron Cemetery, it is not within the “zone of interest” of statutory or regulatory fiduciary obligations owed to Indians, and cannot state a claim for breach of trust for violation of those statutory or regulatory prescriptions that are money-mandating in breach.^{2/}

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

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

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

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

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

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

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

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

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

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

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

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

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

interest. In 1996, the Department of the Interior recognized the Huron Cemetery as part of the Wyandotte Nation of Oklahoma's "reservation" for purposes of the Indian Gaming Regulatory Act. *Sac & Fox Nation of Mo.*, 240 F.3d at 1256. This administrative determination of beneficial ownership is also beyond judicial review in this Court. *See, e.g., Aulston v. United States*, 823 F.2d 510, 513 (Fed. Cir. 1987) (Claims Court lacked jurisdiction to review Interior Board of Land Appeals' property ownership determination).

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

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

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

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

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

B. Plaintiff’s Huron Cemetery Claims are Untimely.

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

The Federal Circuit made clear in *Shoshone IV* that the Department of the Interior appropriations act riders apply only to trust *fund* mismanagement claims, and that trust *asset* mismanagement claims are subject to the six-year statute of limitations. 672 F.3d at 1034. Thus, accrual of plaintiff’s asserted Huron Cemetery claims are not dependent upon receipt of any “accounting.” Accordingly, plaintiff’s Huron Cemetery claims accrued when “the trustee

‘repudiates’ the trust and the beneficiary has knowledge of that repudiation.” *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (citations omitted) (“*Shoshone II*”). Here, that alleged repudiation occurred when the Department of the Interior allegedly permitted the City of Kansas City to construct streets on Huron Cemetery land without an easement or right-of-way. Furthermore, plaintiff did not need actual knowledge of the repudiation for the claim to accrue, instead actual or constructive knowledge (“knew or should have known”) will suffice. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citation omitted); *see also San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (“This objective standard applies to the accrual of a claim for breach of fiduciary duty.” (citation omitted)).

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

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

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

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

estoppel argument is without merit.

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff’s “Schedule A” trust fund mismanagement claims accrued no later than the “late 1880s,” when they were disbursed. Opp’n 17. Plaintiff objectively knew or should have known of its claims at that time. *San Carlos Apache Tribe*, 639 F.3d at 1350. The United States has no statutory or regulatory obligation to account to plaintiff for the “Schedule A” funds disbursed in the Nineteenth Century, and the appropriations act riders do not apply to plaintiff’s trust fund mismanagement claims. No accounting is or was necessary to place plaintiff on notice of its “Schedule A” claims, and plaintiff has no “right to wait for an accounting that they do not need.” *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) (“*Wolfchild II*”). Plaintiff’s “Schedule A” trust fund mismanagement claims are untimely based upon the allegations on the face of plaintiff’s complaint and should be dismissed for lack of subject-matter jurisdiction.

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

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

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

provides in no uncertain terms that any claim existing prior to August 13, 1946, must be filed within five years (i.e., before August 13, 1951), and if it is not filed within that period, it cannot thereafter be submitted to any court . . . for consideration. There is no doubt about the fact that Congress intended to cut off all claims not filed before August 13, 1951.

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

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

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

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

III. CONCLUSION

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

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

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

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

Respectfully submitted, October 13, 2015,

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on November 4, 2015)

WYANDOT NATION OF KANSAS,)	
a/k/a/ WYANDOT TRIBE OF INDIANS,)	
)	No. 15-560L
Plaintiff,)	
)	Hon. Thomas C. Wheeler
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

PLAINTIFF'S MOTION TO FILE A SUR-REPLY MEMORANDUM
IN OPPOSITION TO DEFENDANT'S REPLY BRIEF

Pursuant to Rule 1 of the Rules of the U.S. Court of Federal Claims, plaintiff, WYANDOT NATION OF KANSAS, a/k/a/ WYANDOT TRIBE OF INDIANS, respectfully requests the Court for leave to file the attached 16-page sur-reply memorandum in opposition to defendant's reply brief. Plaintiff's counsel has been advised that defendant, UNITED STATES OF AMERICA, does not consent to this motion.

Plaintiff's motion is based on two main points: First, defendant's reply brief raises, for the first time, the issues of standing, timeliness of claims and subject matter

jurisdiction as grounds for dismissal. It is procedurally improper for the government to argue these issues for the first time in a reply pleading after declining to do so in its moving papers. This denies plaintiff the opportunity consider and respond. Second, should the Court consider the untimely arguments, the new positions taken by the Government are without merit.

Accordingly, plaintiff respectfully requests that the Court grant this motion for leave to file the attached 16-page sur-reply brief in response to defendant's reply brief.

Dated: November 4, 2015

Respectfully submitted,

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WYANDOT NATION OF KANSAS,)	
a/k/a/ WYANDOT TRIBE OF)	
INDIANS,)	No. 15-560L
)	
Plaintiff,)	Hon. Thomas C. Wheeler
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

**PLAINTIFF'S SUR-REPLY MEMORANDUM IN
OPPOSITION TO DEFENDANT'S REPLY BRIEF**

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I. INTRODUCTION

In its Reply Memorandum of Points and Authorities in Support of Motion to Dismiss, the United States for the first time raises certain defenses against Plaintiff's action. This has necessitated Plaintiff's filing of a Sur-Reply. For the reasons set forth in detail below, the defenses raised by the Government are unavailing, and its motion to dismiss must be denied.

II. ARGUMENT

B. PLAINTIFF HAS STANDING TO MAINTAIN ITS CLAIMS REGARDING THE HURON CEMETERY

1. The United States Is Foreclosed From Raising the Standing Issue at this Late Date

In its Reply Memorandum, the United States for the first time raises the issue of standing as a defense against Plaintiff's claims in regard to the Huron Cemetery. The Government did not raise the standing defense in its motion to dismiss nor has it filed for leave to amend its motion to dismiss to include this defense.

This Court has previously stated that it "will not consider arguments that were presented for the first time in a reply brief[.]" *Arakaki v. United States*, 62 Fed. Cl. 244, 246 n. 9 (2004). This includes arguments that challenge the plaintiff's standing. *L-3 Communications EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 651 n. 6 (2008), *appeal dismissed*, 356 Fed. Appx. 390 (Fed. Cir. 2009).

Because the United States raised the issue of standing for the first time in its Reply Memorandum, the Court should disregard this defense as untimely raised. *See id.*;

Arakaki, 62 Fed. Cl. at 246 n. 9. Hence, Plaintiff's Huron Cemetery claims are not subject to dismissal on the basis of lack of standing.

2. Plaintiff Has Standing to Assert Its Huron Cemetery Claims

Even if the Court should consider the issue of standing, it must be concluded that Plaintiff has standing to assert its claims pertaining to the Huron Cemetery. Contrary to the Government's contentions, Plaintiff is, in fact, a federally recognized Indian tribe that has a beneficial ownership interest in the Huron Cemetery lands.

In both its Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, Plaintiff clearly demonstrated that its tribal existence as a federally recognized Indian tribe has never been extinguished by Congress. As explained in those pleadings, the 1867 Treaty established federal recognition of Plaintiff's status as an Indian tribe. The United States is unable to point to any Act of Congress that extinguished this federal recognition. Indeed, on page 7 of its responsive memorandum, the United States even admits that the tribe created under the 1867 Treaty is, in fact, federally recognized.

As discussed in Plaintiff's Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, an Indian tribe need not have a constitution and bylaws under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, to be federally recognized as an Indian tribe. Indeed, the largest tribe in the United States, the Navajo Nation, exists as a federally recognized tribe without an IRA constitution and bylaws. *See Chavez v. Navajo Nation Tribal Cts.*, 465 Fed. Appx. 813,

813 (10th Cir. 2012); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1210 (9th Cir. 2008); *Navajo Nation v. United States*, 347 F.3d 1327, 1328 (Fed. Cir. 2003), *on remand*, 68 Fed. Cl. 805 (2005), *order rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *judgment rev'd & remanded*, 556 U.S. 287 (2009).

Rather, as discussed in Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss, Plaintiff meets the definition of an Indian tribe, as set forth in the 1994 American Indian Trust Fund Management Reform Act ("Trust Fund Management Reform Act"), 25 U.S.C. § 4001. Plaintiff is eligible for and actually receives special services from the United States due to tribal members' status as Indians. See Verified Complaint, Doc. 1, ¶ 44. As a result, Plaintiff qualifies as an Indian "tribe" within the meaning of Trust Management Reform Act. *See* 25 U.S.C. § 4001(2).

Next, the United States incorrectly contends that the Department of the Interior holds the Huron Cemetery lands in trust for the Wyandotte Nation of Oklahoma¹ and not Plaintiff. In support of this contention, the United States mistakenly relies on *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, *Wyandotte Nation v. Sac & Fox Nation of Mo.*, 534 U.S. 1078 (2002), and *City of Kansas City, Kan. v. United States*, 192 F. Supp. 179 (D. Kan. 1960).

¹As pointed out in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the official name of the Oklahoma Tribe in Article 1 of its federally recognized Constitution is the "Wyandotte Tribe of Oklahoma" and not, as the United States suggests, the "Wyandotte Nation of Oklahoma."

Contrary to the United States' contentions, *Sac & Fox Nation* did not hold that the Huron Cemetery is held in trust solely for the Oklahoma Wyandottes. The case simply held that the Huron Cemetery was not set aside for purposes of occupation by tribal members and, therefore, was not an Indian reservation of the Oklahoma Wyandottes within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719. *Sac & Fox Nation*, 240 F.3d at 1267.

Notably, *Sac & Fox Nation* did not consider the 1923 Act acknowledgment of the Huron Cemetery as an Indian Reservation. As discussed in Plaintiff's Complaint and its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, that Act clearly provided the Huron Cemetery was the Indian reservation of the Conley sisters, who were wards of the Government and members of the Wyandotte Tribe of Indians.

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." In other words, the land was held in the name of the United States in trust for the Historic Wyandott Nation. As discussed in Plaintiff's previous pleadings, the Historic Wyandott Nation was later replaced by the "Wyandotte Tribe of Indians" pursuant to Article 13 of the 1867 Treaty, and then later changed its name to the "Wyandot Nation of Kansas."

As the foregoing facts demonstrate, *Sac & Fox* is not directly relevant to the present case. Instead, that case applied only to the parties to that action. The Wyandot Nation of Kansas was not a party to the action. *See Sac & Fox Nation*, 240 F.3d at 1250.

The Government's reliance on *City of Kansas City, Kan.* is similarly misplaced. That case merely followed the holding in *Conley* that the ownership of the Huron Cemetery is in the Wyandotte Tribe of Indians as a whole and not in any individual members of the tribe. *City of Kansas City, Kan.*, 192 F. Supp. at 182.

Further, the fact that the Oklahoma Wyandottes have been federally recognized does not, as the Government suggests, somehow serve to extinguish the treaty rights of the Wyandot Nation of Kansas. The Oklahoma Band of the Wyandotte Tribe of Indians made the discretionary decision to separate from the tribe and reorganize as a separate tribe under the 1936 Oklahoma Indian Welfare Act ("OIWA"). Under the OIWA, "any recognized tribe or band of Indians *residing in Oklahoma*" has the right to "organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." 25 U.S.C. § 503 (emphasis added). This provision "merely provides statutory authority for a federally recognized Indian tribe *residing in Oklahoma* to organize and adopt a constitution and bylaws under rules and regulations prescribed by the Secretary of the Interior[.]" *Cheyenne-Arapahoe Tribes of Okla. v. Beard*, 554 F. Supp. 1, 3 (W.D. Okla. 1980), *declined to follow on other grounds*, *Kaw Nation v. Springer*, 341 F.3d 1186 (10th Cir. 2003) (emphasis added).

The Kansas band of the Wyandotte Tribe of Indians reside in Kansas and not in Oklahoma. Therefore, the Kansas band was not qualified to join in the reorganization of the Oklahoma band under the OIWA. *See id.*; *see also* 25 U.S.C. § 503. The members of the Kansas band did not participate in the 1937 referendum vote and instead continued their separate, federally recognized tribal existence as the Wyandot Tribe of Indians under the 1867 Treaty. (*See* Certification of Adoption of the OIWA Constitution and Bylaws of the Wyandotte Tribe of Oklahoma at <http://www.loc.gov/law/help/american-indian-consts/PDF/37028936.pdf>).

Thus, in 1937, a new tribe called the Wyandotte Tribe of Oklahoma was created under the OIA. The Wyandots who remained in Kansas did not become part of this new tribe but rather continued their existence as the original Wyandot Tribe of Indians. *See* Comments & Notes, “*Miami County Vice*” & “*Why Not the Wyandottes?*”: *Two Tales of the Struggle to Bring New Indian Gaming Facilities to Kansas*, 68 UMKC L. Rev. 711, 731-36 (Summer 2000).

Contrary to the Government’s suggestions, the Oklahoma band is not the only Indian tribe that can have treaty rights under the 1867 Treaty. It is common for bands of Indian tribes to separate. In such instances, all bands retain existing treaty rights. For example, the seven Sioux Teton bands that were parties to the 1851 and 1868 Ft. Laramie treaties separated and now reside on different Indian reservations, and yet all bands claim rights under both treaties. *See Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468, 471-81 (1985).

Finally, the United States misapprehends the significance of the “Brownback Amendment,” Public Law 105-83 (111 Stat. 1543). Although the Amendment does not expressly address the beneficial ownership of the Huron Cemetery, the Amendment specifically limits the permissible uses of the Cemetery to religious and cultural purposes and for a burial ground.

The significance of the Brownback Amendment becomes apparent when the historical context in which this Amendment was passed is considered. In 1997, the Oklahoma Wyandottes “made public [the] tribe’s plan to build a high-stakes bingo hall directly ‘over’ the Huron Cemetery.” Comments & Notes, 68 UMKC L. Rev., at 734. The Kansas band of Wyandots strongly opposed this proposed use of the Huron Cemetery:

Also opposed to the Huron Cemetery site were members of the Wyandot Nation of Kansas, who supported the State of Kansas and the Kansas City, Kansas government in a lawsuit against the [Oklahoma] Wyandottes to determine who had rights to the land. The Wyandot Tribe also claimed an interest in the land, though it had no gaming plans. *Instead, the Wyandot Tribe opposed the [Oklahoma] Wyandottes because it considered the casino plans an affront to their culture and the memory of Wyandot ancestors.* “From a cultural and emotional standpoint, [the Huron Cemetery casino plan] shows no respect or honor to our elders. To abandon one’s family and traditions for financial gain is . . . repulsive.”

Id. at 735 (footnotes omitted & emphasis added).

Due to the opposition of the Kansas band and the State against the Oklahoma band’s plan to build a casino over the Huron Cemetery, a protracted legal battle ensued. “The opposition won round one when U.S. Senator Sam Brownback of Kansas managed

to attach an amendment to an appropriations bill which contained a provision prohibiting the use of the Huron Cemetery as anything but burial grounds.” *Id.* at 736 (footnote omitted). In July 1998, the Oklahoma Wyandottes acquiesced to this legislation by reaching an agreement with the Kansas band to reserve the Huron Cemetery only as a burial ground. *Id.* (footnote omitted).

In 1998, Alaska Representative Don Young introduced legislation that would compensate the Oklahoma band for the 1997 “taking” of the use of the Huron Cemetery that was effected by the Brownback Amendment. *Id.* (footnote omitted). Kansas Representative Vince Snowbarger objected to this proposed legislation on the grounds that it would be inappropriate for Congress to “arbitrarily choos[e] one tribe,” *i.e.*, the Oklahoma band, “over the other,” *i.e.* the Kansas band. *Id.* (footnote omitted).

This legislative history clearly demonstrates that Congress never intended for the Oklahoma band to be recognized as the sole beneficial owner of the Huron Cemetery. Rather, Congress recognized that the Oklahoma band of Wyandottes and the Kansas band of Wyandots were separate Indian tribes, and that each band had a beneficial ownership claim to the land. Further, through the adoption of the Brownback Amendment, Congress demonstrated a preference for the beneficial ownership interest evinced by the Kansas band of Wyandots. In direct contrast to the Oklahoma band, the Kansas band had maintained the firm desire to retain the Huron Cemetery as an ancestral burial ground and not to build a casino over that land.

For all of the above reasons, Plaintiff has standing to maintain its claims in regard to the Huron Cemetery. Plaintiff has at all times relevant to this action continued its existence as a federally recognized Indian tribe that has a beneficial ownership interest in the Huron Cemetery. The Government's arguments to the contrary are not well-taken and should be rejected outright.

**B. PLAINTIFF'S HURON CEMETERY CLAIMS WERE
TIMELY FILED**

In incorrectly arguing that Plaintiff's claims pertaining to the Huron Cemetery are time-barred, the United States misapprehends the nature of those claims. Plaintiff is not, as the Government contends, asserting a trust *asset* mismanagement claim that is subject to a six-year statute of limitations that accrues from the date the beneficiary had knowledge of the trustee's repudiation. *See Shoshone Indian Tribe of the Wind River Reservation v. United States* ("Shoshone IV"), 672 F.3d 1031 1034-35 (Fed. Cir. 2012). Plaintiff is not seeking any declaration of ownership in the Cemetery lands. As discussed above, that issue was settled several years ago to Plaintiff's satisfaction. Rather, Plaintiff contends that the United States has failed to provide a full and accurate accounting of trust *funds* pertaining to those lands.

As the United States concedes, claims pertaining to the mismanagement of Indian trust *funds* are not subject to the general accrual rules enunciated in *Shoshone IV*. (Def's Reply Memo., p. 9.) Instead, the statute of limitations applicable to trust fund claims accrues only after the tribe receives an accounting of trust funds from the United States.

See 25 U.S.C. § 4044; *Osage Nation v. United States*, 57 Fed. Cl. 392, 398 (2003).

Because Plaintiff 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. *See* 25 U.S.C. § 4044; *Osage Nation*, 57 Fed. Cl. at 398.

In addition, even if the general accrual rules enunciated in *Shoshone IV* are found to apply to this case, Plaintiff's Huron Cemetery claims were still timely filed. The attachment of a newspaper article containing a 1959 photo of the Cemetery as Exhibit B to the Complaint does not necessarily mean that Plaintiff knew of the encroachment in 1959. Further, the United States had complete control over the management of the Cemetery from 1857 to the present time.

Moreover, for the reasons set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss, the United States is estopped from asserting that Plaintiff's Huron Cemetery claims are time-barred. As the documents previously submitted to the Court in connection with the *Wyandot Nation of Kansas v. Norton* case plainly show, the Government expressly -- and repeatedly -- promised over a period of nine years to provide a complete accounting of Plaintiff's trust funds and non-monetary trust funds. Under such circumstances, the doctrine of equitable estoppel applies to bar the United States from claiming, as it is presently attempting to do, that Plaintiff's action is time-barred. *See Renz v. Beeman*, 589 F.2d 735, 750 (2nd Cir. 1978), *cert. denied*, 444 U.S. 834 (1979).

C. PLAINTIFF'S TRUST FUND MISMANAGEMENT CLAIMS WERE TIMELY RAISED

For the reasons asserted above, the United States is estopped from claiming that Plaintiff's trust fund mismanagement claims were not timely filed. *See id.* The Government's arguments concerning the statute of limitations and statute of repose should, therefore, be rejected.

In addition, the United States misapprehends and mischaracterizes Plaintiff's argument as to why the language of the 2015 appropriations act did not render Plaintiff's trust fund mismanagement claims untimely. Contrary to the Government's assertions, the appropriations acts of prior years did not change existing law but rather corresponded with and supplemented such laws. Those laws could not be repealed by implication merely through the absence of certain language in the 2015 appropriations act. *See Wolfchild v. United States*, 559 F.3d 1228, 1258 n. 13 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1086, and *cert. denied*, *Zephier v. United States*, 559 U.S. 1067 (2010); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1369 (Fed. Cir. 2002).

Next, the United States incorrectly asserts that it is an indisputable fact that the "Schedule A" trust funds in question were disbursed in the late 1880s and, therefore, that Plaintiff's claims are time-barred. This contention is fundamentally flawed. In this regard, it must be recognized that the Complaint describes amounts that the United States *claims to have paid* to the tribe. Plaintiff has nowhere admitted that such payments were actually made. Rather, Plaintiff has requested an accounting to ascertain whether and to

what extent payments were ever made by the Government to the tribe. Also, the question as to whether money was paid by the United States to the tribe goes to the quantum of relief to which Plaintiff is entitled and not to the validity of Plaintiff's request for an accounting and corresponding damages. *See* 25 U.S.C. § 4001; *Osage Nation*, 57 Fed. Cl. at 398.

The United States also incorrectly contends that Plaintiff is not a federally recognized Indian tribe to whom the 1994 Trust Fund Management Reform Act applies. As demonstrated above and in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, Plaintiff is, in fact, a federally recognized tribe. Thus, Plaintiff is within the "zone of interest" of the 1994 Act and is entitled to an accounting or reconciliation under that Act. *See* 25 U.S.C. § 4001(2).

Finally, the Government's suggestion that *Osage Nation* does not apply to the present case is not legally meritorious. First, the Government incorrectly attempts to use *Sioux Tribe v. United States*, 500 F.2d 458 (Ct. Cl. 1974), a case decided almost 30 years before *Osage Nation* to rebut this Court's holding in *Osage Nation*.

Old cases lack persuasive value if they conflict with later case law from this Court. *Westchester Fire Ins. Co. v. United States*, 52 Fed. Cl. 567, 582 n. 13 (2002). Thus, the Government cannot legitimately rely on the old *Sioux Tribe* case to negate the later-decided case of *Osage Nation*. Rather, *Osage Nation* trumps or takes preference over the *Sioux Tribe* case decided almost 30 years previously. *Westchester Fire Ins. Co.*, 52 Fed. Cl. at 582 n. 13.

Second, *Osage Nation* has never been overruled and remains valid law. In *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014), the Supreme Court generally discussed the differences between statutes of limitation and statutes of repose. Contrary to the Government's suggestion, nothing in *Waldburger*'s general discussion had the effect of overruling or negating any aspect of *Osage Nation*.

Finally, the Government's attempt to factually distinguish *Osage Nation* from the present case is unavailing. For the reasons discussed above and in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the absence of certain language in the 2015 appropriations act is insufficient to change or negate existing statutory law, specifically, the Trust Fund Management Reform Act, 25 U.S.C. §§ 4001 *et seq.* Accordingly, the 2015 appropriations act cannot be relied upon to render untimely Plaintiff's trust fund mismanagement claims.

As the foregoing analysis demonstrates, the United States has failed to show that Plaintiff's trust fund management claims were untimely filed. Hence, these claims are not subject to dismissal on statute of limitations ground.

D. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S ACCOUNTING CLAIMS.

The United States incorrectly asserts that because Plaintiff seeks an accounting from the Government in order to determine the amount of damages to which it is entitled, Plaintiff's claims are equitable in nature and, therefore, outside the subject matter jurisdiction of this Court. In making this argument, the United States overlooks the well-

established principle that although the Court of Federal Claims does not have jurisdiction to grant specific equitable remedies, “[t]his principle does not preclude courts from exercising equitable powers as an incident of our general jurisdiction.” *Pauley Petroleum, Inc. v. United States*, 591 F.2d 1308, 1315 (Ct. Cl.), *cert. denied*, 444 U.S. 898 (1979); *see also Ambase Corp. v. United States*, 61 Fed. Cl. 794, 797 (2004); *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 488 (1966). The mere labeling of a claim as “equitable” in nature does not serve to divest the Court of jurisdiction. *Ambase Corp.*, 61 Fed. Cl. at 797.

Toward this end, the Court of Federal Claims “may order an accounting in conjunction with its jurisdiction to render a money judgment.” *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 582 (1990); *see also Klamath & Modoc Tribes*, 174 Ct. Cl. at 490. The Court may exercise its equitable power to order an accounting as an incident of its general jurisdiction to award monetary damages to a claimant. *Klamath & Modoc Tribes*, 174 Ct. Cl. at 490. This is exactly the form of relief that Plaintiff has requested here.

Plaintiff seeks a monetary judgment from the Court for the Government’s mishandling of various tribal trust fund accounts. In order to determine the amount of damages to which Plaintiff is entitled, an accounting from the United States is necessary. The Court has the authority to order such an accounting in conjunction with its jurisdiction to issue a monetary judgment in this case. *Cherokee Nation of Okla.*, 21 Cl. Ct. at 582; *Klamath & Modoc Tribes*, 174 Ct. Cl. at 490.

III. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the United States' motion to dismiss should be denied in its entirety.

Respectfully submitted,

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#405930

In the United States Court of Federal Claims

No. 15-560L

(Filed: November 5, 2015)

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

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

On November 4, 2015, counsel for the Plaintiffs filed a motion for leave to file a sur-reply memorandum in opposition to Defendant's reply brief. The Defendant does not consent to Plaintiffs' motion. Nevertheless, for good cause shown, Plaintiffs' motion is GRANTED. The Court accepts Plaintiffs' sur-reply.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on November 10, 2015)

WYANDOT NATION OF KANSAS, a/k/a/)	
WYANDOT TRIBE OF INDIANS,)	
)	
Plaintiff,)	No. 15-560L
)	
v.)	Hon. Thomas C. Wheeler
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

ENTRY OF APPEARANCE

TO THE CLERK OF COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Laura Duncan hereby enters her appearance as the attorney for the United States in the above captioned matter pursuant to RCFC 83.1(c)(4)(B). Ms. Duncan is registered to use this Court's Case Management/Electronic Case Filing System ("CM/ECF"), and therefore may be served electronically using CM/ECF. If necessary, notices, orders, or other papers may alternatively be sent to Ms. Duncan as indicated below.

Service of all papers by U.S. Mail, whether regular mail or Express (U.S.) Mail, should be addressed to:

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Respectfully submitted, November 10, 2015,

JOHN C. CRUDEN
Assistant Attorney General

s/ Laura Duncan
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OF COUNSEL:

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Office of the Solicitor

In the United States Court of Federal Claims

No. 15-560L

(Filed: November 18, 2015)

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

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

As discussed with counsel for the parties, the Court will hear oral arguments telephonically regarding Defendant's motion to dismiss on Monday, December 14, 2015 at 2:00 PM (EST). Prior to the conference, the Court will send counsel an e-mail with instructions on joining the call.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on December 7, 2015)

WYANDOT NATION OF KANSAS, a/k/a/)	
WYANDOT TRIBE OF INDIANS,)	
Plaintiff,)	No. 15-560L
v.)	
UNITED STATES OF AMERICA,)	Hon. Thomas C. Wheeler
Defendant.)	
_____)	

MOTION FOR LEAVE TO FILE A LIMITED RESPONSE TO PLAINTIFF'S SUR-REPLY

The United States seeks leave, pursuant to RCFC 7.2(d), to file a three page response to Plaintiff's sur-reply in order to apprise the Court of Plaintiff's role and public admissions in the *Sac and Fox Nation of Missouri v. Norton* proceedings that are directly contrary to jurisdictional statements made in Plaintiff's sur-reply.

There is good cause to consider this limited response because it is necessary for the Court to be presented with an accurate description of Plaintiff's participation in a case that was consolidated with *Sac and Fox Nation*. Plaintiff's sur-reply states "*Sac & Fox* is not directly relevant to the present case . . . the case applied only to the parties to that action . . . [and] The Wyandot Nation of Kansas was not a party to the action." Dkt. 10 at 13. In actuality, Plaintiff was a party to a case consolidated with *Sac and Fox Nation* called *Kickapoo Tribe of Indians v. Babbitt*. See, e.g., *Sac and Fox Nation of Missouri v. United States*, No. 96-4129, 1996 U.S. Dist. LEXIS 13275, at *1—2 (D. Kan. Sept. 3, 1996). In addition, while considering Plaintiff's sur-reply assertions in preparation for the upcoming oral argument, the United States uncovered several representations by Plaintiff to the *Kickapoo Tribe* court that contradict its assertion of jurisdiction in this case. For example, in addressing the *Kickapoo Tribe* court, Plaintiff

affirmatively stated that it is not a federally recognized tribe and acknowledged that the United States takes the position that the Huron Cemetery is held in trust for the Wyandot Nation of Oklahoma. *See* Proposed Response at 1–2; Ex. 2 at 6, 8. In its sur-reply in this case, however, Plaintiff stated that it “has at all times relevant to this action continued its existence as a federally recognized tribe that has a beneficial ownership interest in the Huron Cemetery.” Dkt. 10 at 9. Plaintiff’s prior statements are relevant to the United States’ dismissal motion and properly considered by this Court. *See Rocovich v. United States*, 933 F.2d 991, 993–94 (Fed. Cir. 1991) (court may look beyond pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists); *Martinez v. United States*, 48 Fed. Cl. 851, 858 (2001), *aff’d in part*, 281 F.3d 1376 (Fed. Cir. 2002) (considering evidence of prior litigation in assessing jurisdictional facts); *Katzin v. United States*, 120 Fed. Cl. 199, 214 (2015) (considering evidence of public documents and meetings from 1980s in determining jurisdictional facts).

Plaintiff’s statements to the *Kickapoo Tribe* court also establish, contrary to the sur-reply, that its Huron Cemetery claims are time-barred because its members have regularly used the cemetery since 1843, putting it on notice of the encroachments that were in place since at least 1857. This issue is central to the United States’ dismissal motion and as set forth in the proposed response, it is appropriate for the court to consider these materials in adjudicating that motion. *See Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 571 (1990) (considering tribe’s prior Congressional testimony and its letters to the Bureau of Indian Affairs as jurisdictional evidence that the tribe was aware of facts underlying some of its claims more than six years prior, rendering those claims time-barred).

For the reasons stated above, the United States respectfully requests leave to file the attached three page response and three corresponding publically filed documents from the *Kickapoo Tribe* case.

Respectfully submitted, December 7, 2015,

JOHN C. CRUDEN
Assistant Attorney General

s/ Laura Duncan
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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on December 7, 2015)

WYANDOT NATION OF KANSAS, a/k/a/)	
WYANDOT TRIBE OF INDIANS,)	
Plaintiff,)	No. 15-560L
v.)	
UNITED STATES OF AMERICA,)	Hon. Thomas C. Wheeler
Defendant.)	
_____)	

**RESPONSE TO PLAINTIFF'S SUR-REPLY TO
THE UNITED STATES' MOTION TO DISMISS**

The United States submits the following limited response to Plaintiff's sur-reply (Dkt. 10) and in further support of the United States' motion to dismiss. As shown below and by the attached exhibits, Plaintiff's sur-reply and other filings contain various allegations that are contradicted by Plaintiff's prior assertions in another case. Thus, Plaintiff's sur-reply is without merit, and this Court should grant the United States' motion and dismiss this case.

In its sur-reply, Plaintiff stated that it was not a party to the *Sac and Fox Nation of Missouri v. Norton* action and, therefore, there is no basis for this court to rely on the case. Dkt. 10 at 5. Plaintiff failed to disclose, however, that it was a party to a case that was consolidated with *Sac and Fox Nation* called *Kickapoo Tribe of Indians v. Babbitt*. See, e.g., *Sac and Fox Nation of Missouri v. United States*, No. 96-4129, 1996 U.S. Dist. LEXIS 13275, at *1—2 (D. Kan. Sept. 3, 1996). An order from the court in *Kickapoo Tribe* and Plaintiff's representations to that court are relevant to the standing and statute of limitations issues presented in the United States' motion to dismiss.¹

¹ See *Rocovich v. United States*, 933 F.2d 991, 993–94 (Fed. Cir. 1991) (court may look beyond pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists); *Cherokee Nation of Oklahoma v. United*

In the *Kickapoo Tribe* case, the plaintiffs, including the Wyandot Nation of Kansas, moved to dismiss themselves from the case pursuant to a settlement agreement they had entered into with the Wyandotte Nation of Oklahoma. Exhibits 1, 2. That motion for dismissal and settlement agreement contradict Plaintiff's assertions in this case regarding its standing to bring Huron Cemetery claims. Specifically, Plaintiff contends that it "has at all times relevant to this action continued its existence as a federally recognized Indian tribe that has a beneficial ownership interest in the Huron Cemetery." Dkt. 10 at 17. Plaintiff also asserts "the United States *incorrectly contends* that the Department of the Interior holds the Huron Cemetery lands in trust for the Wyandotte Nation of Oklahoma and not Plaintiff." Dkt. 10 at 11 (emphasis added). In the *Kickapoo Tribe* case, Plaintiff takes the opposite position by affirmatively acknowledging that "the Kansas Wyandot is a non-federally recognized, State of Kansas recognized, Indian Tribe . . ." and by agreeing that "the United States claims to hold title to the Huron Cemetery in trust for the benefit of the Oklahoma Wyandotte . . ." Exhibit 2 at 6, 8. Plaintiff's prior representations in federal court, therefore, directly contradict Plaintiff's assertions about its standing regarding the Huron Cemetery.

Plaintiff's representations in *Kickapoo Tribe* also contradict its sur-reply regarding the statute of limitations. Exhibit 3. Plaintiff filed a Temporary Restraining Order (TRO) application in *Kickapoo Tribe* that demonstrates it should have been well aware of the various encroachments on the Huron Cemetery at least since 1843:

Huron Cemetery is the most sacred site of the Kansas Wyandot, and is central and indispensable to the free exercise of traditional Wyandot religious ceremonies

States, 21 Cl. Ct. 565, 571 (1990) (considering tribe's prior Congressional testimony and its letters to the Bureau of Indian Affairs as jurisdictional evidence that the tribe was aware of facts underlying some of its claims more than six years prior, rendering those claims time-barred); *Martinez v. United States*, 48 Fed. Cl. 851, 858 (2001) *aff'd in part*, 281 F.3d 1376 (Fed. Cir. 2002) (considering evidence of prior litigation in assessing jurisdictional facts); *Katzin v. United States*, 120 Fed. Cl. 199, 214 (2015) (considering evidence of public documents and meetings from 1980s in determining jurisdictional facts).

since it is the *last remaining religious site of the Kansas Wyandots*. Kansas Wyandots have practiced religious ceremonies, including traditional prayers at Huron Cemetery, *since its establishment in 1843 to the present time*. Other traditional ceremonies conducted at the Huron Cemetery have included the *purification of the Cemetery at various time[s] during the year* with sage, cedar or sweet grass and blessings for the ancestors. *Individual W[y]andots frequently visit the cemetery* to offer nuts, berries or items of healing such as herbs and other objects for their ancestors in their journey to the spirit world.

Exhibit 3 at 24 (quoting affidavit of Second Chief of the Wyandot Nation of Kansas Judith English, also an affiant in the present case (Dkt. 8-10)) (emphasis added).

Thus, Plaintiff's TRO motion in *Kickapoo Tribe* supports Plaintiff's allegations in this case that the Huron Cemetery encroachments have been in place since at least 1857 (*see* Complaint, Dkt. 1 at 38, 44–45 (citing newspaper articles from 1959 that discuss the asserted encroachments)), and the United States' contention that Plaintiff's claims regarding the Cemetery encroachments are untimely and therefore barred by the six-year statute of limitations. Finally, Plaintiff's TRO motion vitiates Plaintiff's assertion in its sur-reply that Plaintiff did not necessarily know of the encroachments as of 1959. Dkt. 10 at 18. Based on Plaintiff's own representations in federal court, there can be no legitimate dispute that Plaintiff knew or should have known about the encroachments more than six years ago, and its claims are now time-barred.

For the foregoing reasons, as well as those set forth in the United States' opening and reply memoranda (Dkts. 7 at 9–26; 9 at 3–16), this Court should grant the United States' motion and dismiss this case.

Respectfully submitted, December 7, 2015,

JOHN C. CRUDEN
Assistant Attorney General

s/ Laura Duncan

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OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KICKAPOO TRIBE IN KANSAS, et al.,

Plaintiffs,

v.

BRUCE BABBITT, Secretary of the Interior,
et al.,

Defendants.

96-4130-RDR

ORDER DISMISSING CERTAIN PLAINTIFFS

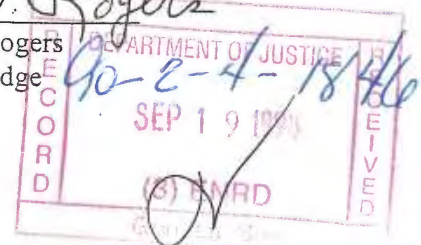
Upon the motion of the Wyandot Nation of Kansas, Inc. (a/k/a Absentee Wyandots), George D. Zane III, Janith K. English, Marie Hathorn, Darren Zane English, Florence M. Bickenbach-Brown, and Ruby L. Vickers, plaintiffs in 96-4130-RDR, the Court finds that the Wyandot Nation of Kansas, Inc., George D. Zane III, Janith K. English, Marie Hathorn, Darren Zane English, Florence M. Bickenbach-Brown, and Ruby L. Vickers, should be and hereby are ordered dismissed as plaintiffs in case no. 96-4130.

IT IS SO ORDERED.

This 29th day of September, 1998.

Richard D. Rogers

Honorable Richard D. Rogers
United States District Judge



Submitted by,

WYANDOT NATION OF KANSAS, INC.,
et al., Plaintiffs

By: HR Zane

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of Kansas and Individually Named
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KICKAPOO TRIBE IN KANSAS, et al.
Plaintiffs,

v.

BRUCE BABBITT, Secretary of the
Interior, et al.

Defendants.

96-4130-RDR

MOTION FOR DISMISSAL OF CERTAIN PLAINTIFFS

COMES NOW Plaintiffs Wyandot Nation of Kansas, Inc. (a/k/a Absentee Wyandottes); George D. Zane III; Janith K. English; Marie Hathorn; Darren Zane English; Florence M. Bickenbach-Brown; and Ruby L. Vickers, and hereby move the Court for an Order dismissing them as plaintiffs in 96-4130-RDR..

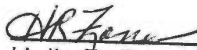
In support of this Motion, Plaintiffs show the Court that on the 11th day of July, 1998, the attached Settlement Agreement was executed by and between the Wyandotte Tribe of Oklahoma and the Wyandot Nation of Kansas, Inc., and was subsequently approved by the Bureau of Indian Affairs pursuant to 25 U.S.C. § 81.

The above-named plaintiffs further state that their request for an Order dismissing them as plaintiffs does not affect 96-4130, which continues with the Kickapoo Tribe in Kansas as plaintiff. This request for dismissal of the above-named plaintiffs does not affect 96-4129, which was consolidated with 96-4130, but in which the above-named plaintiffs are not named as parties plaintiff.

A proposed Order of Dismissal is presented herewith for the Court's use if approved.

Respectfully submitted this 9th day of September, 1998.

WYANDOT NATION OF KANSAS,
INC., et al., Plaintiffs,

BY: 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was sent by regular United States mail, postage prepaid, on the 9th day of September, 1998 to:

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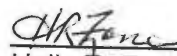
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BY:


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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KICKAPOO TRIBE IN KANSAS, et al.,)	
)	
Plaintiffs,)	96-4130-RDR
)	
v.)	
)	
BRUCE BABBITT, Secretary of the Interior,)	
et al.,)	
Defendants.)	
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ORDER DISMISSING CERTAIN PLAINTIFFS

Upon the motion of the Wyandot Nation of Kansas, Inc. (a/k/a Absentee Wyandots), George D. Zane III, Janith K. English, Marie Hathorn, Darren Zane English, Florence M. Bickenbach-Brown, and Ruby L. Vickers, plaintiffs in 96-4130-RDR, the Court finds that the Wyandot Nation of Kansas, Inc., George D. Zane III, Janith K. English, Marie Hathorn, Darren Zane English, Florence M. Bickenbach-Brown, and Ruby L. Vickers, should be and hereby are ordered dismissed as plaintiffs in case no. 96-4130.

IT IS SO ORDERED.

This ____ day of _____, 1998.

Honorable Richard D. Rogers
United States District Judge

Submitted by,

WYANDOT NATION OF KANSAS, INC.,
et al., Plaintiffs

By: HR Zane

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Plaintiffs
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SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT is made and entered into this 11 day of July, 1998, by and between the WYANDOTTE TRIBE OF OKLAHOMA, a federally-recognized Indian tribe (the "Oklahoma Wyandotte"), organized pursuant to the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967) and a Constitution approved by the Secretary of the Interior, having a principal place of business at State Highway 60, Wyandotte, Oklahoma 74370 and the WYANDOT NATION OF KANSAS, INC., a non-federally recognized, State of Kansas recognized Indian Tribe, and a Kansas non-profit corporation (the "Kansas Wyandot"), having a principal place of business at 7th and Armstrong Streets, Kansas City, Kansas.

WHEREAS, The Kansas Wyandot is one of the plaintiffs and the Oklahoma Wyandotte is one of the defendants in Kickapoo Tribe, et al v. Bruce Babbitt, et al, CIV. No. 4130 (D.C. Kan. 1996) (hereafter "Kansas Lawsuit"); and

WHEREAS, the Kansas Wyandot is a non-federally recognized, State of Kansas recognized, Indian Tribe, and both the Kansas Wyandot and the Wyandotte Tribe of Oklahoma claim to be successors in interest to the historic Wyandot Nation who migrated to the confluence of the Kansas and Missouri Rivers in 1843; and

WHEREAS, the Oklahoma Wyandotte is a federally-recognized Indian tribe organized pursuant to the Oklahoma Indian Welfare Act and a Constitution approved by the Secretary of the Interior with the right to conduct gaming on lands under the Tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 et seq. ("IGRA"); and

WHEREAS, the Kansas Wyandot and the Oklahoma Wyandotte both claim an interest in the Huron Cemetery because the ancestors of both the Oklahoma Wyandotte and Kansas Wyandot were parties to the Treaty of 1855; and

WHEREAS, the Oklahoma Wyandotte has acquired a parcel of real property in Kansas City, Kansas contiguous to the Huron Cemetery (the "Shriner's Building"), and allege that the United States has accepted title to the Shriner's Building in trust for the benefit of the Oklahoma Wyandotte for gaming purposes pursuant to 25 U.S.C. § 2719 of IGRA; and

WHEREAS, the Oklahoma Wyandotte asserts, and the Kansas Wyandot deny, the Oklahoma Wyandotte has the legal authority under IGRA to construct and operate a tribal gaming facility on the Huron Cemetery and in the Shriner's Building; and

WHEREAS, the Kansas Wyandot and the Oklahoma Wyandotte desire to preserve and protect the sanctity and dignity of the land of the Huron Cemetery as a cemetery and burial ground and for religious and cultural uses that are compatible with the use of the land as a cemetery and burial ground; and

WHEREAS, the Kansas Wyandot and the Oklahoma Wyandotte desire that the Huron Cemetery should be preserved as a cultural and religious site for future generations in perpetuity; and

WHEREAS, the Oklahoma Wyandotte desire to develop and operate a tribal gaming facility at the site other than the Huron Cemetery or the Shriner's Building (the "Proposed Facility"), and have identified certain sites in the Kansas City area for the Proposed Facility which would provide a better location and return on investment; and

WHEREAS, the Oklahoma Wyandotte have entered into a Memorandum of Understanding with the Unified Government of Kansas City and Wyandotte County pursuant to which the Oklahoma Wyandotte have agreed to develop and operate the Proposed Facility on a site other than the Huron Cemetery or the Shriner's Building; and

WHEREAS, the Oklahoma Wyandotte and the Kansas Wyandot are children of the same mother, retaining common traditions and shared history in Kansas City, Kansas; and

WHEREAS, the Kansas Wyandot and the Oklahoma Wyandotte are desirous of resolving their differences amicably, avoiding further litigation, and seeking ways to cooperate for their mutual benefit.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND ADEQUACY OF WHICH THE PARTIES HEREBY ACKNOWLEDGE, THE PARTIES AGREE AS FOLLOWS:

PART 1: HURON CEMETERY

With respect to the Huron Cemetery, which was reserved by Article 2 of the Treaty with the Wyandot of 1855 (10 Stat. 1159), the parties agree as follows:

Section 1. The legal description of the Huron Cemetery is as follows:

The tract of land in the NW 1/4 of Sec. 10, T. 11, R. 25 E., of the sixth principal meridian, in Wyandotte County, Kansas (as surveyed and marked on the ground

on August 15, 1888, by William Millor, Civil Engineer and Surveyor), described as follows:

Commencing on the Northwest corner of the Northwest Quarter of the Northwest Quarter of said Section 10; Thence South 28 poles to the 'true point of beginning'; Thence South 71 degrees, East 10 poles and 18 links; Thence South 18 degrees and 30 minutes West 28 poles; Thence West 11 and one-half poles; Thence North 19 degrees 15 minutes East 31 poles and 15 feet to the 'true point of beginning', containing 2 acres or more.

Section 2. Neither the Oklahoma Wyandotte nor the Kansas Wyandot contest the fact that the United States is the record titleholder of the Huron Cemetery.

Section 3. The parties agree that the use and enjoyment of the Huron Cemetery has been, and shall forever be limited to the preservation, protection, restoration, maintenance and use of the Huron Cemetery as a cemetery and burial ground and for religious and cultural uses that are compatible with the use of the land as a cemetery and burial ground for the parties, their members and families.

Section 4. The parties mutually agree that they shall not authorize or permit any construction, development or business activity on, over, or under the Huron Cemetery. Further, the parties agree that neither party shall in any way restrict the other parties use of the Huron Cemetery for burial and other religious purposes under the American Indian Religious Freedom Act. Finally, the Oklahoma Wyandotte agree that they shall not sell, transfer, convey or in any way encumber their interests in and to the Huron Cemetery.

Section 5. 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. Immediately upon execution of this Agreement and any and all documents required pursuant hereto, the Oklahoma Wyandotte shall submit this Agreement and all such documents to the United States for approval, and the Oklahoma Wyandotte, at their own cost and expense, shall take all reasonable steps which either they or the Kansas Wyandot believe necessary to secure the United States approval of this Agreement and all documents executed pursuant to this Agreement.

Section 6. Each of the parties agree to execute, deliver and if necessary, record any and all additional instruments, certifications, amendments, modifications and other documents as may be required by the United States or any applicable statute, rule or regulation in order to effectuate, complete, perfect, continue or preserve the respective rights, obligations, liens and interests of the parties thereto to the fullest extent permitted by law; provided, that any such additional instrument, certification, amendment, modification or other document shall not materially change the respective rights, remedies or obligations of the parties pursuant to this Agreement or any other agreement or document related hereto.

PART 2: SHRINER'S BUILDING

With respect to the Shriner's Building, located contiguous to the Huron Cemetery, the parties agree as follows:

Section 7. The Shriner's Building shall be used solely for governmental purposes consistent with the use of the Huron Cemetery, including, without limitation, the development and operation of a Community Cultural Center/Museum (the "Cultural Center"). Because the United States claims to hold title to the Shriner's Building in trust for the benefit of the Oklahoma Wyandotte, the Oklahoma Wyandotte hereby warrant and represent that simultaneously with the execution of this Agreement and all documents executed pursuant hereto, the Oklahoma Wyandotte shall execute all documents and take such reasonable action as is necessary to obtain approval of this Agreement by the United States.

Section 8. Immediately upon execution of this Agreement and any and all documents required pursuant hereto, the Oklahoma Wyandotte shall submit this Agreement and all documents executed pursuant hereto to the United States for approval, and the Oklahoma Wyandotte, at their own cost and expense, shall take all reasonable steps which either they or the Kansas Wyandot believe necessary to secure the United States approval of this Agreement.

Section 9. Each of the parties agree to execute, deliver and if necessary, record any and all additional instruments, certifications, amendments, modifications and other documents as may be required by the United States or any applicable statute, rule or regulation in order to effectuate, complete, perfect, continue or preserve the respective rights, obligations, liens and interests of the parties thereto to the fullest extent permitted by law; provided, that any such additional instrument, certification, amendment, modification or other document shall not materially change the respective rights, remedies or obligations of the parties pursuant to this Agreement or any other Agreement or document related hereto.

Section 10. In the event that the Oklahoma Wyandotte ever enter into a contract or other agreement to sell or otherwise dispose of its interest in the Shriner's Property (a "Purchase Agreement"), the Kansas Wyandot shall have the right to purchase the Shriner's Property upon the same terms and conditions as set forth in the Purchase Agreement. To facilitate this right of first refusal, the Oklahoma Wyandotte warrant and represent that upon entering into a Purchase Agreement, the Oklahoma Wyandotte shall provide the Kansas Wyandot with written notification, by registered mail, which shall include a copy of the Purchase Agreement. The Kansas Wyandot shall have twenty (20) working days from the date of receipt of such written notification to advise the Oklahoma Wyandotte, in writing, whether the Kansas Wyandot wish to purchase the Shriner's Property upon the terms and conditions set forth in the Purchase Agreement. If a written response is not received from the Kansas Wyandot within the twenty (20) working day period provided for in this Section 10, the Oklahoma Wyandotte shall be free to sell or otherwise convey its interests in and to the Shriner's Property, and the Kansas Wyandot shall have no rights whatsoever regarding the Shriner's Property. In the event that the Kansas Wyandot provide the Oklahoma Wyandotte with written notice of an election to purchase the Shriner's Property, the

Kansas Wyandot agree to indemnify and hold harmless the Oklahoma Wyandotte from and against any losses or claims against the Oklahoma Wyandotte arising from the failure of the Kansas Wyandot to purchase the Shriner's Property.

PART 3: HURON CEMETERY COMMISSION

Section 11. For purposes of ensuring the perpetual conservation and maintenance of the Huron Cemetery, and the operation of the Cultural Center, the parties shall incorporate the Huron Cemetery Commission, Inc. (the "Commission"), as a not for profit corporation under the laws of the State of Kansas. The Commission shall be charged with preserving the cultural, historical and religious significance of the Huron Cemetery, and Commission, the parties agree as follows:

(a) The Commission shall consist of five (5) members, two each from the Oklahoma Wyandotte, and the Kansas Wyandot, and one (1) member to be appointed by a majority vote of the other four members. The Chairmanship of the Committee shall rotate between the Oklahoma Wyandotte and Kansas Wyandot.

(b) The Commission shall be charged with the restoration, maintenance, operation, preservation and protection of the Huron Place, including the Huron Cemetery and the Cultural Center.

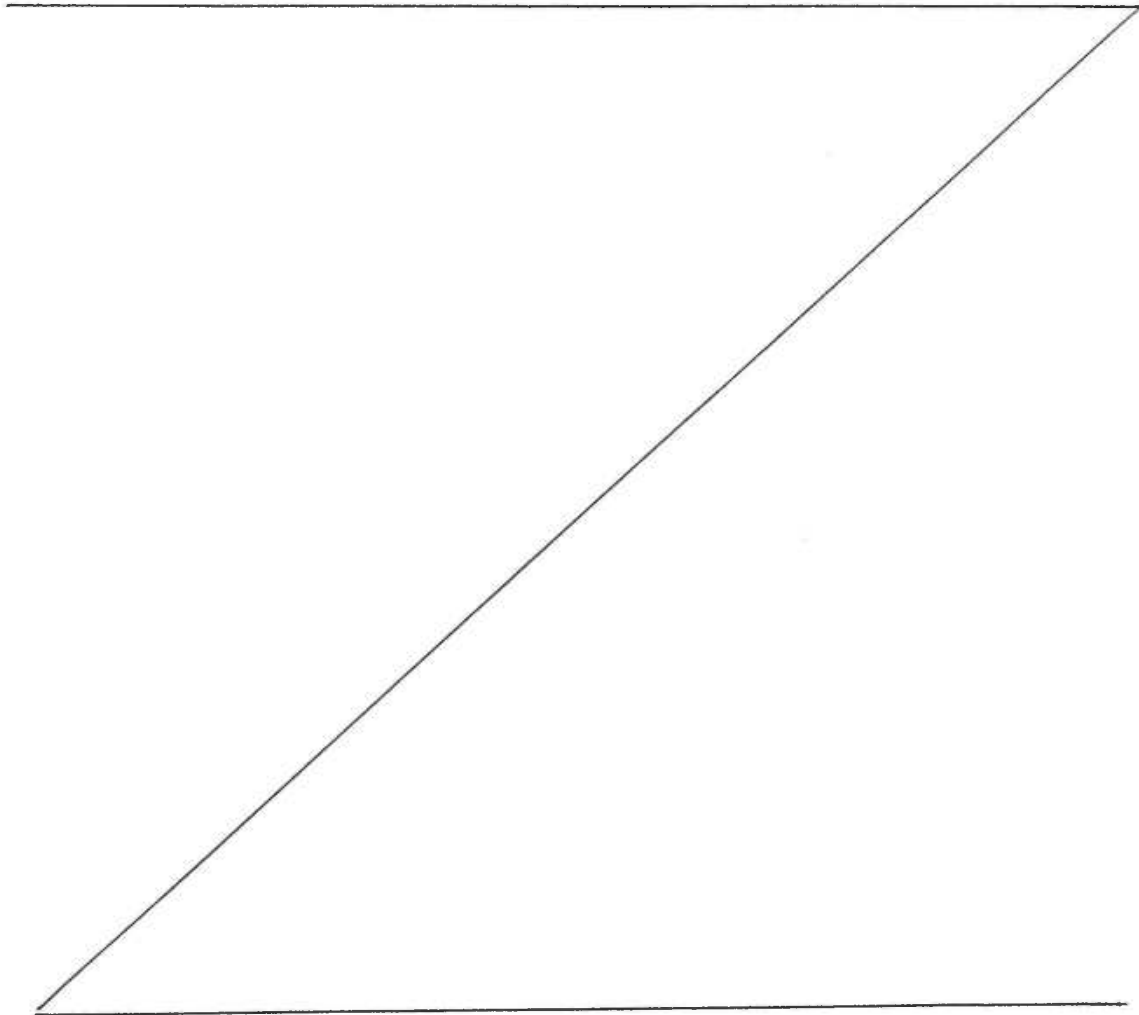
(c) The Commission shall pursue all funding sources (i.e. State and Federal grants) which may be available to assist in the restoration, maintenance, preservation and protection of the Huron Cemetery and the Cultural Center. The Oklahoma Wyandotte shall make annual contributions to the Commission, from the proceeds of the Proposed Facility, in an amount necessary to fund the Commission's approved annual budget for the restoration, maintenance, operation, preservation and protection of the Huron Cemetery and the Cultural Center, provided, however, that such annual contribution shall not exceed Two Hundred and Fifty Thousand Dollars (\$250,000). Notwithstanding the foregoing, the Oklahoma Wyandotte's first annual contribution to the Commission shall be in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000), and shall be due and payable one hundred and eighty (180) days after the Proposed Facility is open to the general public for the conduct of gaming by the Oklahoma Wyandotte pursuant to and in accordance with IGRA, with subsequent annual contributions due and payable no later than February 15 of the year for which such contribution is made.

(d) The Commission shall develop its own rules and regulations for the accomplishment of its mission, including, without limitation, rules and regulations regarding (i) regular meetings, (ii) special meetings, (iii) notice of meetings, (iv) quorum, (v) majority voting requirements, and (vi) modification of the retaining walls or other structural features or landscaping of the Huron Cemetery, the Shriner's Building, and any other property located within Huron Place over which the parties or the Commission may exercise control. The Commission's rules and regulations will be submitted simultaneously to both the Oklahoma Wyandotte and Kansas Wyandot for approval, which approval shall not be unreasonably withheld. Nothing contained herein is intended or shall be construed as a modification, amendment or termination of

any agreement to which Kansas City, Kansas is a party regarding the care of the Huron Cemetery, and any such agreement shall remain in full force and effect.

(e) The Commission shall obtain adequate insurance necessary to provide coverage for and to (i) the Huron Cemetery, (ii) the cultural center, (iii) the Commission, (iv) members of the Commission, and (v) entities appointing members to the Commission.

(f) The Commission shall use its best efforts to (i) convince the Unified Government of Kansas City and Wyandotte County to demolish the buildings located adjacent to the Huron Cemetery, (ii) rename the area presently known as "Huron Cemetery" as "The Wyandott National Cemetery in Huron Place" and (iii) enter into an Agreement pursuant to which all properties located within the present Huron Place are utilized in a manner consistent with this Agreement.



PART 4: CULTURAL & ECONOMIC COOPERATION

Section 12. Each party shall use its best efforts, in good faith, to advance the aims and objectives of the other party through cooperation and collaboration in appropriate activities and enterprises which are supported by the membership of both parties.

Section 13. The Oklahoma Wyandotte shall take no action in opposition to the efforts of the Kansas Wyandot to obtain Federal recognition as an Indian tribe.

Section 14. The parties mutually agree to facilitate the sharing of cultural, historical and genealogical data and material.

PART 5: WAIVER OF IMMUNITY/DISPUTE RESOLUTION

Section 15. In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Agreement, such party may invoke the following procedure:

- a. The party asserting noncompliance shall serve written notice on the other party. The notice shall specially identify the alleged noncompliance and the date and time of the alleged noncompliance. The parties shall thereafter meet within thirty (30) working days of receipt of the Notice and attempt to resolve the dispute.
- b. In the event the dispute is not resolved within sixty (60) working days after receipt of the notice, either party may request that the dispute be submitted to arbitration. The place of arbitration shall be within Metropolitan Kansas City, Kansas/Missouri agreed upon by the parties. The arbitration proceedings shall be conducted under the Commercial Arbitration rules of the American Arbitration Association. All costs and fees for filing the demand for arbitration shall be paid by the Oklahoma Wyandottes.
- c. The arbitrator shall decide all questions of law and fact submitted based upon the evidence presented. The arbitrator shall issue a written award and shall state the basis of the award and include a detailed findings of fact and conclusions of law. Any United States District Court of competent jurisdiction may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act; (ii) where the arbitrator's findings of fact are not supported by substantial evidence; or (iii) where the arbitrator's conclusions of law are erroneous.
- d. Pre-arbitration discovery shall be available to both parties and shall be governed by the Federal Rules of Civil Procedure. Information obtained by either party during the Course of discovery shall be kept confidential, shall not be disclosed to any third party, shall not be used except in connection

- with the arbitration proceeding, and at the conclusion of the proceeding, shall be returned to the other party.
- e. Nothing in this Section shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Agreement. The parties hereby waive the defense of sovereign immunity from suit to the extent necessary to allow enforcement of this Agreement by arbitration or through an action at law or in equity. Except as provided in this Agreement, the parties do not waive their sovereign immunity from suit.
 - f. Each party waives any requirement to exhaust Tribal remedies prior to initiating arbitration or filing suit to enforce the provisions of this Agreement.

PART 6: GENERAL PROVISIONS

Section 16. The parties shall immediately submit a copy of this Agreement to the Secretary of the Interior for approval pursuant to Federal statutes including 25 U.S.C. §§ 81, 177 and 476 and regulations thereto.

Section 17. The rights, responsibilities and obligations of the parties hereunder with respect to the Shriner's Property are expressly conditioned upon, and shall become effective when the Oklahoma Wyandottes open the Proposed Facility to the general public for the conduct of Class III gaming.

Section 18. Simultaneously with the execution of this Agreement, the Kansas Wyandot shall execute a Stipulation of Dismissal, in the form attached hereto as Exhibit A, dismissing with prejudice the Kansas Lawsuit. The Stipulation of Dismissal shall be placed in escrow with Holman, Hanson & Colville, P.C., and shall be filed with the United States District Court only after approval of this Agreement by the United States.

Section 19. The Oklahoma Wyandotte warrant and represent that it shall comply with the terms of the injunction entered on the 17th day of July, 1996, as the same has been extended by agreement of the parties. In the event that the Oklahoma Wyandotte (i) fail to comply with the terms of the July 17 injunction, as extended, or (ii) fail to comply with the terms set forth herein after the satisfaction of any and all conditions precedent contained herein, the Oklahoma Wyandotte will not oppose the imposition of injunctive relief by a Court of competent jurisdiction to enforce either the terms of the July 17 injunction or the terms of this Agreement.

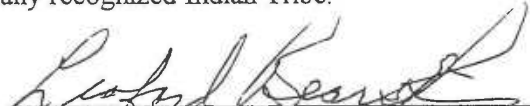
Section 20. Notwithstanding any term or provision of this Settlement Agreement, or any other document contemplated herein to the contrary, nothing contained herein is intended or shall be construed as a waiver of any claim or defense which either party asserted or could have asserted in the Kansas Lawsuit. By entering into this Agreement, the Parties hereto do not admit or abandon any claim or defense which has been or could have been raised in the Kansas Lawsuit.

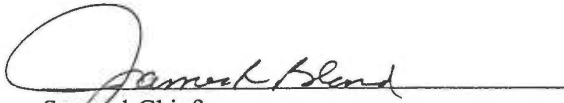
Section 21. The term of this Agreement shall be construed pursuant to the laws of the State of Kansas.

WHEREFORE, this Settlement Agreement is made and entered as of the date first written above.

THE WYANDOTTE TRIBE OF OKLAHOMA,
a federally recognized Indian Tribe.

By:


Leaford Bearskin, Chief


Second Chief

Secretary/Treasurer

Council Member

Council Member

Council Member

2/13

THE WYANDOT NATION OF KANSAS, INC.,
A non-federally recognized, State of Kansas recognized Indian Tribe,
and A Kansas non-profit Corporation

By:

Janeth K. English
Janeth K. English, Chief

James J. Gilliford Sr.
James J. Gilliford Sr., Second Chief

Frances B. Davidson
Frances B. Davidson, Secretary/Treasurer

Louis P. Armstrong
Louis P. Armstrong, Business Committee

Robert I. Zane
Robert I. Zane, Council of Elders

Holly R. Zane
Holly R. Zane, Attorney General

Approved As To Substance and Form,
UNITED STATES OF AMERICA,

By:

James E. Fields (Signature)
James E. Fields (Name)
Atty. Gen. Dir. Gen. (Title)

LEAFORD BEARSKIN
Chief

Phone (918) 678-2297
Phone (918) 678-2298
Fax (918) 678-2944



JAMES R. BLAND
2nd Chief

P.O. Box 250
Wyandotte, OK 74370

WYANDOTTE TRIBE OF OKLAHOMA

BUSINESS COMMITTEE

RESOLUTION NO. 980625 A

WHEREAS, the Wyandotte Tribe of Oklahoma is a federally-recognized Indian tribe organized consistent with the Oklahoma Indian Welfare Act (Act of June 26, 1936, 49 Stat. 1967) having Indian country in Oklahoma and Kansas; and

WHEREAS, the Wyandotte constitution authorizes the Business Committee to act on behalf of the tribe; and

WHEREAS, the United States holds the Huron Cemetery in Kansas City, Kansas in trust for the benefit of the Wyandotte; and

WHEREAS, the Wyandotte has acquired a parcel of real property in Kansas City, Kansas contiguous to the Huron Cemetery (the "Shriner's Building"), and the United States has accepted title to the Shriner's Building in trust for the benefit of the Wyandotte for gaming purposes pursuant to Section 20 of IGRA; and

WHEREAS, the Wyandotte has the legal authority under ICA to construct and operate a tribal gaming facility on the Huron Cemetery and in the Shriner's Building; and

WHEREAS, the Wyandotte desire to develop and operate a tribal gaming facility at a site other than the Huron Cemetery or the Shriner's Building and have identified certain sites in the Kansas City area for the gaming facility which would provide a better location and return on investment; and

WHEREAS, HR 3797 is currently pending in the Congress of the United States and said HR 3797 would allow the Wyandotte to purchase land in Wyandotte County, Kansas for the development of a Class III gaming facility; and

WHEREAS, the Wyandot Nation of Kansas, Inc., a non-profit corporation, comprised of individuals who are descendents of the Wyandotte Nation as it existed prior to 1855 and who retain common traditions and shared history in Kansas City, Kansas, desire to insure that the Huron cemetery is forever used as a cemetery; and

WHEREAS, the Wyandot Nation of Kansas, Inc. and the Wyandotte are currently engaged in litigation concerning the Shriner's property but both entities have a common goal of perserving the Huron cemetery and are desirous of resolving their differences amicably, avoiding further litigation, and seeking ways to cooperate for their mutual benefit, including the passage of HR 3797.

NOW, THEREFORE, BE IT RESOLVED that the Business Committee of the Wyandotte Tribe of Oklahoma hereby authorizes and directs Chief Leaford Bearskin execute the "Settlement Agreement" between the Wyandotte Tribe of Oklahoma and the Wyandot Nation of Kansas, Inc., a non-profit corporation presented to the Business Committee on June 25, 1998.

BE IT FURTHER RESOLVED, that should changes be proposed to the "Settlement Agreement" document by the Wyandot Nation of Kansas, Inc., a non-profit corporation, Chief Bearskin is authorized to negotiate the changes and to execute the agreement or any collateral documents necessary to result in a final agreement with the Wyandot Nation of Kansas, Inc., a non-profit corporation, and to take whatever other actions are reasonable and necessary to comply with the directions in this resolution.

WYANDOTTE INDIAN TRIBE OF OKLAHOMA

By


Chief

Certification

The foregoing resolution was duly adopted by the Business Committee of the Wyandotte Tribe of Oklahoma in a regular session held on the 25 day of June, 1998, with a quorum being declared. The vote on this resolution was: 5 FOR, 0 AGAINST, 0 ABSTAIN, ABSENT.

[SEAL]

Business Committee
Wyandotte Tribe of Oklahoma


Leaford Bearskin, Chief


Vivian Fink, Secretary/Treasurer

June 25, 1998
Date

Mario Gonzalez (S.D. # 0965)
Russel L. Barsh (Wash. # 5956)
Attorneys for Kickapoo Tribe in Kansas
P.O. Box 191
Horton, Kansas 66439-0271
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Holly R. Zane (Kan. # 12955)
3005F S.W. Randolph Avenue
Topeka, Kansas 66611
Telephone: 913-266-8246
Attorney for Wyandotte Nation
of Kansas, Inc. and Individually
named Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

SAC AND FOX TRIBE OF MISSOURI,)	
IOWA TRIBE OF KANSAS AND)	
NEBRASKA, PRAIRIE BAND OF)	Case No. 96-4129-RDR
POTAWATOMI INDIANS, and BILL)	
GRAVES, Governor of the State)	
of Kansas,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
BRUCE BABBITT, Secretary of the)	
Interior of the United States,)	
)	
Defendant.)	
_____)	
)	
KICKAPOO TRIBE IN KANSAS; et al.,)	Case No. 96-4130-RDR
)	
Plaintiffs,)	
)	
vs.)	
)	
BRUCE BABBITT, Secretary of the)	
Interior, et al.,)	
)	
Defendants.)	
_____)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO JOIN CASE NO. 96-4129 PLAINTIFFS' MOTION FOR
A TEMPORARY RESTRAINING ORDER, OR ALTERNATIVELY FOR A PRELIMINARY INJUNCTION

COMES NOW Case No. 96-4130 plaintiffs and in support of their motion for leave to join Case No. 96-4129 Plaintiffs' motion for a temporary restraining order (TRO), or alternatively, for a Preliminary Injunction against the Wyandotte Tribe of Oklahoma (hereinafter "Wyandotte Tribe") state and allege as follows:

1. STATEMENT OF THE NATURE OF THE MATTER BEFORE THE COURT.

A. The parties to Case No. 96-4130.

Plaintiff Kickapoo Tribe in Kansas is a federally recognized tribe whose reservation is located within the State of Kansas. It has an interest, as a local tribe, in preserving historical and cultural resources relating to Indians in northeast Kansas, including Indian religious sites such as Huron Cemetery located within the City of Kansas City, Kansas. First Amended Verified Complaint, Paragraph 4; Affidavit of Fred Thomas at 2.

Plaintiff Wyandot Nation of Kansas, Inc. is a state recognized Indian tribe whose members consists of an association of persons of Wyandot ancestry commonly referred to as "Absentee Wyandots" that reside in the Kansas City, Kansas area. It is a successors-in-interest to the Wyandot Nation (hereinafter the "historic Wyandot Nation") that was a party to the 1855 Wyandot Treaty.¹ First Amended Complaint,

¹There can be no doubt that the Kansas Wyandots are successors-in-interest to the historic Wyandot Nation since they participated in the Indian Claims Commission's award of monetary compensation for ancestral Wyandot lands in Ohio and Michigan. See James Strong et al. v. United States, 10 Ind. Cl. Comm. 337, 356 (May 23, 1973) (Each of the tribal plaintiffs -- including Wyandot Tribe -- has the right and capacity under section 2 of the Indian Claims Commission Act (60 Stat. 1049) to bring and maintain these actions . . . on behalf of their respective predecessors"); Saginaw Chippewa Indian Tribe et al. v. United States, 30 Ind. Cl. Comm.

Paragraph 5; Affidavit of George Zane III at 2 and Exhibits A and C.

Individually named plaintiffs are direct descendants of the historic Wyandot Nation who have ancestors and relatives buried in Huron Cemetery. They have used the cemetery continuously from 1843 up to the present time. First Amended Verified Complaint, Paragraph 6; Supplemental Affidavit of Janith K. English at 2. Also see Articles VII, Section 1 (a) and 4, Article XI, Section 3 (d) of Constitution and Bylaws of Wyandotte Tribe attached as Exhibit C to the Affidavit of Mario Gonzalez ("jurisdictional area" of Wyandotte Tribe in its federal approved constitution and bylaws is restricted to a radius of 45 miles from Wyandotte, Oklahoma).

Defendant United States of America is a party to the 1855 Treaty. Amended Complaint, Paragraph 8. It has a trust responsibility and duty to carry out the terms and conditions of the 1855 Treaty.

Defendant Bruce Babbitt and the other individually named Federal Defendants are responsible for the management of all Indian affairs and of all matters arising out of Indian relations. 25 U.S.C. 2; First Amended Complaint, Paragraph 7. This includes a duty to protect the rights of the Wyandot plaintiffs to use Huron Cemetery as a public burial ground as provided in the 1855 Treaty.

The Wyandotte Tribe is a federally recognized tribe organized under the Oklahoma Indian Welfare Act (25 U.S.C. 501). It is not the historic Wyandot Nation that was a party to the 1855 treaty, but a splinter group of Wyandot Indians that left Kansas in 1867 to live on a 20,000 acre reservation purchased for them by the United States from the Seneca Indians. City of Kansas City v. United States, 192 F.Supp . 179, 181 (D. Kan. 1960). Also see Articles 1 and 13 of the Treaty of February 23, 1867 (15 Stat. 513); Seneca-Cayuga Tribe of Oklahoma v. Deputy

388,405 (June 13, 1973) (same); P.L. 98-602 (98 Stat. 3149); Affidavit of Fran B. Davidson at 3.

Assistant Secretary - Indian Affairs, 89 Interior Dec. 441, 442 (Sept. 2, 1982).

The Wyandot Tribe resides on reservation lands located entirely within the state of Oklahoma and has no authority under federal law to exercise powers of self-government in the State of Kansas. First Amended Verified Complaint, Paragraph 10; Affidavit of Janith K. English at 4.

B. The procedural history of Case No. 96-4130.

On or about April 21, 1996, the Wyandotte Tribe completed its application to Defendant Babbitt to purchase and take into trust .52 acres (the Shriner 's Tract) on behalf of the Tribe, adjacent to the Huron Cemetery. Defendant Babbitt was asked to purchase and take the land into trust with the express understanding that the land will be developed into a gaming casino by the Wyandotte Tribe of Oklahoma.

Defendant Babbitt issued a Notice of Final Agency Determination on June 6, 1996, to purchase and take the .52 acres into trust, without having given Plaintiffs the requisite 30-day notice and comment period, thereby depriving Plaintiffs of their administrative appeal rights. On June 12, 1996, Defendant Babbitt took final agency action by publishing a Notice of Final Agency Determination to purchase and take the .52 acres into trust, triggering a 30-day period for commencement of judicial review pursuant to 25 C.F.R. 151.12 and written agency policy.

Plaintiffs alleged that Defendant Babbitt's actions were not authorized under Section 5 of the Indian Reorganization Act of 1934 (25 U.S.C. 465) or Section 3 of the Oklahoma Indian Welfare Act of 1936 (25 U.S.C. 503). Defendant Babbitt is sued, in part, over his administrative pronouncement absent historical or legal support that the Huron Cemetery is a "reservation" of the Wyandotte Tribe (which reservation status is a prerequisite to lawful gaming on the .52 acres). First Amended Verified Complaint, Paragraphs 52, 53 and 54. Defendant Babbitt in part based his June 6, 1996, decision to take the .52 acres of land into trust on an Interior Department

legal opinion by an assistant solicitor that the Huron Cemetery constituted, as of October 17, 1988, "Reservation land" of the Wyandotte Tribe of Oklahoma. Amended Verified Complaint, Paragraph 43. As elaborated below, this conclusion is historically and legally incorrect.

The original complaint in the instant case was filed on July 12, 1996. On the same day the Honorable Dale Saffels entered a Temporary Restraining Order (TRO) in Case No. 96-4129 restraining Federal Defendants from taking .52 acres adjacent to Huron Cemetery into trust for the Wyadotte Tribe. On July 15, 1996, upon the Emergency Application of the Wyandotte Tribe, which had not yet intervened in the case, Tenth Circuit Judges Broby and Lucero dissolved the TRO. On July 17, 1997, Judge Belot issued a second TRO in the instant case against Federal Defendants as follows:

Officers, employees and agents of the Department of the Interior and/or the Bureau of Indian Affairs are restrained from taking any action pursuant to any federal status, including but not limited to, the Indian Reorganization Act, the Quiet Title Act, and any regulations, procedures or rules thereunder; or any

internal departmental regulations, procedures and rules which are intended or will have the effect of correcting any errors or furthering or analyzing the land acquisition pertaining to the .52 acres of land involved in this case, more specifically described in the Federal Register Notice, or precluding judicial review of any actions already taken with respect to said property.

See Transcript of July 17, 1996 Hearing on TRO at 101-102.

Since the court consolidated the instant case with Case No. 96-4130, the TRO entered in the instant case served to stay both consolidated cases. The Court entered its Order and Stipulation continuing the TRO as follows:

The parties hereto consent to continuing the Temporary Restraining Order . . . until November 1, 1996, or until the final judgement on the claims in these actions is rendered, or until the claims are dismissed with or without prejudice, except that a party may move at any time for the Temporary Restraining Order to be dissolved on nor less than 30 days notice or to be converted into a preliminary injunction. If a party so moves, the motion shall be heard by the District Judge after notice to the parties.

The right to obtain judicial review of all issues raised in the complaint in these cases is preserved.

IT IS THEREFORE ORDERED that the Temporary Restraining Order remains in effect until otherwise ordered by the Court . . .

See Court Order of August 8, 1996. The Wyandotte Tribe consented to this stipulated extension of the TRO. Id. at 4 and 5.

Although the extant TRO pertains to federal action on the .52 acres, it presupposes that a threshold issue for adjudication is the status of Huron Cemetery as an Indian reservation. If the cemetery is not the reservation of the Wyandotte Tribe, than the .52 acres can not be taken into trust for the Wyandotte Tribe or be used for gaming, absent compliance with many additional legal requirements.

C. Reason for application for a Temporary Restraining Order and Preliminary Injunction in Case No. 96-4130.

On August 29, 1997, the Wyandotte Tribe announced to the City of Kansas City, Kansas, that it intended to survey the Huron Cemetery and promptly build a gaming facility on stilts over the Cemetery and conduct Class II and Class III gaming on the Cemetery.² See August 29, 1997 letter of Leaford Bearskin, attached as Attachment "A" to the Supplemental Affidavit of Janith K. English. Such action would preempt this Court's adjudication of the merits of Case No. 96-4130, and would effectively nullify the Court's July 17, 1996 TRO (as extended by stipulation of the parties). Plaintiffs' motion for injunctive relief seeks to halt such ultra vires action by the Wyandotte Tribe and preserve the status quo pending this Court's ruling on the merits of Plaintiffs' claims.

II. CONCISE STATEMENT OF THE FACTS.

By treaty dated March 17, 1842 (11 Stat. 581), the historic Wyandot Nation ceded to the United States all their remaining lands in Ohio and Michigan, in return for certain payments and a 148,000 acre reservation west of the Mississippi River. First Amended Verified Complaint, Para. 10.

In 1843, following the failure of the United States to provide the promised reservation, the historic Wyandot Nation entered into an agreement with the Delaware Nation, then residing in Kansas, to acquire 39 sections of land (36 by purchase and 3 by donation) at the confluence of the Kansas and Missouri Rivers for the sum of \$46,080.00. This agreement was confirmed by a Joint Resolution of Congress on July 25, 1848 (9 Stat. 337, No. 19). First Amended Verified Complaint, Para. 11; Affidavit of Janith K. English at 3; Affidavit of Florence M. Bickenbach-Brown at 3.

²Class II and III gaming is defined in the National Indian Gaming Regulatory Act. 25 U.S.C. 2701 et seq.

By treaty dated April 1, 1850 (9 Stat. 987), the United States acknowledged its failure to provide the reservation promised in 1842, and the historic Wyandot Nation relinquished their claim to the 148,000 acres for a payment of \$185,000. Amended First Amended Verified Complaint, Para. 12; Affidavit of Janith K. English at 3.

By treaty dated January 31, 1855 (10 Stat. 1159), the historic Wyandot Nation agreed to dissolve their tribal relations and become citizens of the United States. They also agreed to cede to the United States all their right, title and interest in the land they purchased from the Delaware Nation for the purpose of obtaining a reconveyance of such land to individual tribal members in fee simple, except for a two-acre tract that was permanently reserved as a public burial ground (and commonly referred to as the "Huron Cemetery") for all members and descendants of the historic Wyandot Nation. First Amended Verified Complaint, Para. 13.

After the Civil War, in 1867, a minority of the historic Wyandot Nation were allowed to resume tribal relations in Oklahoma on land ceded to the United States by the Seneca Nation. See Treaty of February 23, 1867 (15 Stat. 513). These Oklahoma Wyandots -- now referred to as the Wyandotte Tribe of Oklahoma -- ceased using Huron Cemetery in the 1870s, City of Kansas City, *supra*, 192 F. Supp. at 181, and established their own burial ground in Oklahoma. First Amended Verified Complaint, Paragraph 14; Affidavit of Janith K. English at 3.

The remaining Wyandots (and their descendants) who stayed in Kansas continued to use Huron Cemetery as a public burial ground, City of Kansas City, *supra*, 192 F. Supp. at 181, and continue to use it up to the present time; they have grandparents, aunts, uncles, cousins and other close relatives buried there. Family members that served in the War of 1812, the Civil War, the Spanish American War and World War I are buried there. They regard the cemetery as Sacred Ground. First

Amended Verified Complaint, Para. 15; Affidavit of Florence M. Bickenbach-Brown at 2-3; Affidavit of Janith K. English at 2; Affidavit of James J. Gilliford, Sr. at 2; Affidavit of Russel J. Powell at 2; Affidavit of James Stephen Powell at 2; Affidavit of Frances Ann Brown Davidson at 1-2.

Huron Cemetery also contains the bodies of Union soldiers from Topeka Battery, 2nd Regiment, Kansas State Militia, that died in Battle of Westport in 1864. Although some bodies (including the bodies of Black Union soldiers) were later reinterred in Topeka, some still remain buried in the cemetery. First Amended Verified Complaint, Para. 16; Affidavit of Randy Thies at 2; Affidavit of Florence M. Bickenbach-Brown at 3; Affidavit of James Stephen Powell at 2.

In the building booms of the late 1880s and early 1900s, Huron Cemetery became valuable "commercial property" to the Wyandotte Tribe. In 1898, the Tribe devised a plan to sell the cemetery and move the graves to Oklahoma. The Kansas Wyandots successfully defeated their plan. First Amended Verified Complaint, Para. 17.

On June 21, 1906, the Wyandotte Tribe quietly obtained Congressional authorization to sell the cemetery. The authorization provided for removal of graves to Quindaro Cemetery and proceeds from the sale to be divided among the members of the Tribe and their heirs. First Amended Verified Complaint, Para. 18.

Among the Kansas Wyandots who opposed the sale of the cemetery in 1906 were sisters Lyda and Helena Conley. Faced with pending removal of the graves and tombstones of their deceased relatives, the sisters seized control of the cemetery and filed a suit in federal court to restrain the Secretary of the Interior from selling the cemetery. The suit ended up in the Supreme Court, which ruled in Conley v. Ballinger, 216 U.S. 84 (1910) that individual Wyandots did not have standing to challenge a disturbance of the cemetery. First Amended Verified Complaint, Para. 19; Affidavit of Janith K. English at 4.

Public opinion gradually swung over to the side of the Conley sisters, and on February 13, 1913, Congress passed Senator Charles Curtis' bill repealing the 1906 Act. First Amended Verified Complaint, Para. 20.

In 1916, Congress approved an authorization of \$10,000.00 for improvements to Huron Cemetery. An agreement with the City of Kansas City, Kansas for the carrying out of these improvements was signed on March 20, 1918. As part of the agreement, the Federal Government paid \$1,000.00 to the city to maintain the cemetery. First Amended Verified Complaint, Para. 22.

Under the Act of June 30, 1919 (41 Stat. 3, 13), Congress authorized the sum of \$1,000.00 to be paid to the City of Kansas City, Kansas "in consideration of the agreement of said authorities forever to maintain and care for the Huron Cemetery, a tract of land in the city of Kansas City, owned by the Government of the United States, . . . the use of which was conveyed by treaty to the Wyandotte tribe of Indians as a cemetery for the members of said tribe" First Amended Verified Complaint, Para. 23.

Maintenance of Kansas City Parks (and Huron Cemetery) was virtually abandoned by the City of Kansas City, Kansas during the McCombs Administration (1927-1947). This resulted in extensive damage to several large monuments at Huron Cemetery caused by vandals. First Amended Verified Complaint, Para. 24.

Between 1931 and 1934, the United States repeatedly advised the Wyandotte Tribe that the Huron Cemetery was not an "Indian reservation" but rather was land held in fee simple by the United States in which the rights of the Wyandot Indians were limited to "cemetery purposes." First Amended Verified Complaint, Para. 25. Also see Affidavit of Mario Gonzalez, Exhibit B.

After WWII, the Wyandotte Tribe renewed their efforts to sell Huron Cemetery. The first attempt came in 1947-49, and was vigorously and successfully resisted by

Congressman Errett P. Scrivner on behalf of the Kansas Wyandots. First Amended Verified Complaint, Para. 28.

On August 1, 1956, Congress terminated the Wyandotte Tribe of Oklahoma's status as a federally supervised and recognized tribe and authorized the sale and transfer of Huron Cemetery with a stipulation that the matter be concluded by August 1, 1959, after which the authorization was to be automatically rescinded. First Amended Verified Complaint, Para. 29.

The Act of August 1, 1956, also expressly revoked the constitution and bylaws and corporate charter of the Wyandotte Tribe. From 1956 to 1978, when the Tribe's federal supervision and recognition was restored by Congress, no legal entity existed which could have held a beneficial interest to a "reservation" in Kansas City, Kansas, or elsewhere. First Amended Verified Complaint, Para. 30.

The constitutionality of the 1956 Act was challenged by the City of Kansas City, Kansas and the Kansas Wyandots in City of Kansas City v. United States, 192 F. Supp. 179 (D. Kan. 1960), which followed the 1910 Conley decision and dismissed the case on the basis of plaintiffs' lack of standing to maintain the action. The sale and removal of the cemetery was eventually stopped by adverse public reaction and outrage. First Amended Verified Complaint, Para. 31.

Although the Wyandotte Tribe decided in 1964 that it would not authorize further burials in the Huron Cemetery, ancestors of the individually named plaintiffs were subsequently buried there without protest or hinderance of the Wyandotte Tribe. First Amended Verified Complaint, Para. 26.

In September, 1965, based on a resolution passed by the Wyandotte Tribe of Oklahoma supporting the classification of Huron Cemetery as a historic site, the Kansas City, Kansas Urban Renewal Agency initiated a project making a second major renovation of the cemetery one of its major features. At the agencies request,

Kansas City adopted its first historic landmarks ordinance in 1970 and listed just one site: the Huron Cemetery. This was followed by entering Huron Cemetery on the National Register of Historic Places on September 3, 1970. First Amended Verified Complaint, Para. 32; Affidavit of Ramon Powers at 2 and Exhibits A and B; Affidavit of Larry K. Hancks at 2 and Exhibit A, B and C; Affidavit of Ramon Powers at 2 and Exhibit A and B.

At the ground breaking ceremonies for the Huron Cemetery project held on May 16, 1978, it was announced that President Jimmy Carter had signed an act restoring the Wyandotte Tribe's federally recognized status the previous day.³ First Amended Verified Complaint, Para. 33.

On December 1, 1983, the City of Kansas City, Kansas passed City Ordinance No. 64554 creating the "Huron Place Historic District" pursuant to the city's Landmarks Ordinance. Included within the district were three adjoining sites currently listed on the National Register of Historic Places: (a) the Huron Cemetery, (b) the Scottish Rite Temple (which is also the site of the first African Methodist Episcopal Church in Kansas City, Kansas); and (c) the Elks Club Building (also known as the Huron Building). First Amended Verified Complaint, Para. 34.

In 1984, Congress passed P.L. 98-602 (98 Stat. 3149), which appropriated funds for the Oklahoma Wyandotte Tribe and the "Absentee Wyandots," i.e., the Kansas Wyandots, in satisfaction of Indian Claims Commission judgments. Section 105 (b) (1) of the Act provided that "\$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the Tribe."⁴

³A new tribal constitution was adopted by the Wyandotte Tribe in 1985. See Affidavit of Mario Gonzalez, Exhibit C.

⁴In a January 12, 1979 Memorandum from an Acting Deputy Commissioner of Indian Affairs reporting the results of an Indian Claims Commission award, the Commissioner stated that "[s]ince

First Amended Verified Complaint, Para. 35.

In 1988, Congress passed the Indian Gaming Regulatory Act. Around 1993-1994, the Wyandotte Tribe (now federally recognized) developed a plan to move the graves from Huron Cemetery to Oklahoma and develop a Bingo Palace at the site. First Amended Verified Complaint, Para. 36.

On March 17, 1994, the Bureau of Indian Affairs Area Director for the Miami Area Office sent a memorandum to the BIA Superintendent at Miami Agency regarding BIA's "potential responsibilities in light of the Wyandotte Indian Tribe's proposal to relocate several hundred individuals now interred in the Huron Cemetery in Kansas City, Kansas." The area Director indicated that no graves could be removed from the cemetery until BIA complied with the Native American Graves Protection and Repatriation Act, the Religious Freedom Restoration Act, and the National Historic Preservation Act. First Amended Verified Complaint, Para. 39.

In April, 1994, Kansas Wyandots (including some of Plaintiffs) traveled to Oklahoma to meet with Chief Leaford Bearskin. Chief Bearskin informed them that the Huron Cemetery belonged to the Wyandotte Tribe and the Tribe would use it anytime it wanted. He informed them that the Bingo Palace project was a "done deal;" that the project was a ruse to pressure Kansas state officials to give the tribe another piece of property in lieu of the cemetery for a Bingo Palace-Casino facility, but if the cemetery eventually stood between him and the Bingo Palace-Casino project, he would personally get a shovel and dig up the dead bodies at Huron Cemetery and

1904, there have been two identified groups of Wyandotte . . . Therefore, we find the Wyandotte Tribe of Oklahoma and those listed on Special Agent Olive's 'Census of the Absentee or Citizen Wyandotte Indians' of November 18, 1896, as corrected, or their descendants to be the beneficiaries of the funds awarded by the Indian Claims Commission in Docket 139." See Affidavit of Frances Ann Brown Davidson at 3 and Exhibit C.

move them to Oklahoma. First Amended Verified Complaint, Para. 37; Affidavit of Kristen E. Zane at 2; Additional Affidavit of Janith K. English at 3.

Chief Bearskin also informed the Kansas Wyandot delegation that if the Wyandotte Tribe eventually decides to use Huron Cemetery for a gaming facility, the Tribe would purchase adjoining land and place the facility on a suspended bridge over the cemetery or, alternatively, place the facility on stilts over the cemetery. First Amended Verified Complaint, Para. 38; Affidavit of Janith K. English at 5.

In December 13, 1995, Frank Shinook of CED Co., the Oklahoma Wyandotte Tribe's project developer, made a public statement that the Tribe was planning a \$50 million to \$300 million Las Vegas-style casino that would extend over Huron Cemetery, and that nearby buildings (including the Elks Club Building A/K/A the Huron Building) would be razed. First Amended Verified Complaint, Para. 42. Local citizens of Kansas City, Kansas filed petitions requesting a halt to any gaming facility at the Cemetery. Affidavit of Janith K. English at 7 and Attachments B and C.

On February 13, 1996, Robert T. Anderson, an Associate Solicitor for the Interior Department, issued an opinion that Section 105 (b) (1) of the 1984 Act mandated federal approval of a fee-to-trust land application filed the Oklahoma Wyandotte Tribe to place four parcels of land contiguous to Huron Cemetery in trust for the Tribe for a Class III gaming facility, since the cemetery was an Indian reservation prior to enactment of the National Indian Gaming Regulatory Act on October 17, 1988 and NEPA was not applicable to trust land acquisitions. First Amended Verified Complaint, Para. 43.

Pursuant to the Anderson opinion, Defendant Ada Deer issued a June 6, 1996 memorandum to the BIA Muskogee Area Director directing him to approve the Oklahoma Wyandotte Tribe's application to acquire approximately .52 acres of land (the

Shriner Tract A/K/A the Scottish Rite Temple) adjoining Huron Cemetery in trust for the Tribe for a gaming facility. First Amended Verified Complaint, Para. 45; Affidavit of Janith K. English at 3.

On June 12, 1996, Defendant Ada Deer also published a 30-day notice in the Federal Register indicating that she made a final agency determination on June 6, 1996 to acquire the .52 acre tract in trust for the Wyandotte Tribe, and that interested parties had 30 days to seek judicial review pursuant to 25 C.F.R. 151.12 (b). First Amended Verified Complaint, Para. 46; Affidavit of Janith K. English at 5.

Plaintiffs filed Case No. 96-4130 on July 12, 1996 and obtained the extant TRO against Federal Defendants from Judge Belot on July 17, 1996.

III. STATEMENT OF THE QUESTION PRESENTED.

Whether Defendant Wyandotte Tribe should be temporary and preliminary enjoined from implementing its announced intent to immediately begin surveying, disturbing, building over, and thereby desecrating the Huron Cemetery in Kansas City, Kansas, pending this Court's resolution of the factual and legal claims of Plaintiffs, which claims go directly to the status of Huron Cemetery and the Wyandotte Tribe's right to use, alter, disturb, or dispose of the cemetery and its human remains?

IV. ARGUMENT SUPPORTING ISSUANCE OF A TEMPORARY RESTRAINING ORDER AGAINST THE WYANDOTTE TRIBE OF OKLAHOMA.

A. All the criteria for granting a TRO and Preliminary injunction exists in Case No. 96-4130.

The issuance of a TRO and preliminary injunction is within the sound discretion of the court. Tri-State Generation & Transportation Ass'n. V. Shoshone River Power, Inc., 805 F.2d 351, 354 (10th Cir. 1986). To obtain a preliminary injunction in federal court, the movant has the burden of establishing that: (1) the party will suffer irreparable injury unless the injunction issues; (2) the

threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest, and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits. Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992). Also see Walmer v. United States Dept. of Defense, 52 F.3d 851, 854 (10th Cir. 1995).

Where, as here, the moving party satisfies the first three elements, the standard for meeting the fourth requirement, i.e., likelihood of success on the merits, generally becomes more lenient. In such cases, the movant need only show that the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation. Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986); Franklin Savings Ass'n., 732 F.Supp. 1123, 1124-25 (D. Kan. 1990).

1. Plaintiffs will suffer irreparable injury if a TRO and preliminary injunction is not issued.

If the Wyandotte Tribe is allowed to desecrate Huron Cemetery and build a casino over the cemetery before the adjudication of the issues in this case, the Plaintiffs will be irreparably harmed. Once the Cemetery is commercialized and desecrated in any way it will cease being a cemetery, a place of prayer, worship, reverence and burial. In addition, all plaintiffs will be denied the effect of this Court's extant TRO preserving the status quo pending the adjudication of the status of the Huron Cemetery. Once the cemetery is destroyed, the cultural, historical and religious values being protected by this Court pendente lite will be lost forever.

The specific irreparable injury to Plaintiffs Wyandot Nation of Kansas, Inc. and individually named plaintiffs in the instant case is evident: Their ancestors, including uncles, cousins, sisters, brothers, mothers, fathers, grandparents, great-grandparents, etc., are buried at the Huron Cemetery, and they have maintained and

used the Cemetery as a historical, cultural, and sacred site since 1843. In addition, the Kansas Wyandots claim rights to the Cemetery flowing from the Treaty of 1855, rights that were disregarded by Defendant Babbitt and that the Wyandotte Tribe of Oklahoma would now extinguish without due process of law. Such a loss of due process itself constitutes irreparable harm. See e.g., Community Communications v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981) (First Amendment Rights); Swearson v. Meyers, 455 F.Supp. 88 (D.C. Kan. 1978) (First Amendment Rights).

The specific irreparably injury to the Kickapoo Tribe is also evident: It adversely affects the Tribe's interest, as a local tribe, in preserving historical and cultural resources relating to Indians in northeast Kansas, including Indian religious sites such as Huron Cemetery.⁵

Finally, the plaintiffs are irreparably harmed by the Defendants' admitted and utter failure to comply with the many requirements of the National Environmental Policy Act (NEPA) (16 U.S.C. 4321 et seq.), National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.), the Archaeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.), the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.), American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996), and Religious Freedom Restoration Act (RFRA) (42 U.S.C. 2000bb). These statutes specifically address the concerns raised by Plaintiffs here; to the extent they are disregarded, the Plaintiffs lose congressionally mandated rights.

⁵The issue of the status of the cemetery may be raised by the Kickapoo Tribe under 28 U.S.C. 1362, which authorizes Indian tribes to litigate federal questions in U.S. District Courts, as well as under the Administrative Procedure Act (5 U.S.C. 701-706), since the Tribe seeks (in part) a review of federal agency action.

Moreover, same issue may be raised by the Wyandot Plaintiffs under 28 U.S.C. 1331, since they hold an undivided interest in the beneficial use of the cemetery under the 1855 Treaty.

Indeed, the Wyandotte Tribe has made quite clear its intention to avoid all such laws by simply "bulldozing" the historic property. See 2/23/96 Memo to George Skibine, Administrative Record (hereinafter "AR") at 0149. Under NEPA and the Secretary's own regulations, the first step in that process -- the acquisition of land in trust -- is major federal action that triggers the preparation of the environmental report. If this requirement is disregarded, then the entire purpose of NEPA -- to give the public and decision makers an opportunity to participate in the planning, design and impact mitigation process for major projects such as this -- will be lost to Plaintiffs and the rest of the community.

In sum, in the absence of a TRO and Preliminary Injunction the Defendants will immediately destroy the cemetery, and the Plaintiffs will have permanently lost their right to use the cemetery as a public burial ground as guaranteed under the 1855 Treaty. The Wyandots Plaintiffs' will have lost everything, their past, present and future (all embodied in this sacred religious site) and the their ancestors resting therein. This constitutes irreparable harm by any standard.

**2. A TRO and Preliminary Injunction Does Not Harm Defendant
Wyandotte Tribe of Oklahoma.**

An injunction pending litigation of these issues on the merits does not harm the defendant Wyandotte Tribe, who has no legal right of ownership or control Huron Cemetery under the 1855 Treaty and its federally approved Constitution and Bylaws (which limits the Tribes "jurisdictional area" to a radius of 45 miles of Wyandotte, Oklahoma). The Wyandottte Tribe's purported loss of gambling revenues -- if there would be any in the face of the above-described legal problems and specifically the lack of any colorable claim to Kansas lands -- may be delayed for the duration of the litigation or any injunction. Such purely financial (and wholly speculative) loss does not constitute irreparable harm, and would be quickly remedied should the Wyandotte Tribe prevail on the merits of Plaintiffs' claims.

3. The issuance of a TRO and Preliminary Injunction will be in the public's interest.

Simply put, there is no public interest in allowing the Wyandotte Tribe to desecrate or destroy Huron Cemetery before this case is adjudicated and the rights of the parties established.

The public has an immediate and vital interest in assuring that this historic property is preserved, all federal treaties and laws are observed, and an environmental assessment will be undertaken. Proper determination of the intent and affect of the 1855 Treaty by a court of competent jurisdiction is also in the interest of the public. The court's issuance of the requested injunctive relief would, therefore, not be adverse to the public interests.

4. Plaintiffs are likely to succeed on the merits.

Among the pertinent issues this litigation will address is whether the Huron Cemetery is a "reservation" of the Oklahoma tribe, whether the Cemetery is held by the federal government for the benefit of the Wyandot Nation of Kansas, Inc. (Absentee Wyandots) and whether the actions of Federal Defendants and Defendant Wyandotte Tribe of Oklahoma are in violation of NEPA, IGRA, NHPA, ARPA, AIRPA and NAGPRA. The Plaintiffs are substantially likely to prevail on all of these issues.

a. Huron Cemetery is not the reservation of the Wyandotte Tribe of Oklahoma.

Defendant Babbitt based his decision to take .52 acres into trust on an Interior Department legal opinion that the Huron Cemetery constituted (as of October 17, 1988) the "Reservation land" of the Wyandotte Tribe which was held in trust prior to 1988. The Wyandotte Tribe likewise bases its decision to survey and engage in other preconstruction and construction activity at the Cemetery on the basis that it is reservation land held in the name of the United States in trust for the Tribe. Thus, the first and foremost legal issue that must be decided by the

court is whether Huron Cemetery is an Indian reservation that is held in trust for the Wyandotte tribe. Resolution of this legal issue will clarify the authority of the Wyandotte Tribe to establish a Class II and III gaming facility on the cemetery (and on the adjacent .52 acres).

There is no general statutory definition of "Indian reservation." For example, the Indian Child Welfare Act, 25 U.S.C. 1903 (10) equates "reservation" with "Indian country" as that term is defined in 18 U.S.C. 1151, while 18 U.S.C. 1151 explains that all "reservations" are "Indian country."

The Supreme Court has concluded that for the purpose of 25 U.S.C. 1151, at least, an Indian reservation is land "validly set apart for the use of the Indians as such, under the superintendence of the Government." Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991), relying on U.S. v. John, 437 U.S. 634, 649 (1978). Ordinarily there must be evidence of some formal Federal action, "indicating that the land is designated for use by Indians," such as Interior Department approval of the acquisition of the land in accordance with 25 C.F.R., Part 151. Buzzard v. Oklahoma Tax Commission, 992 F.2d 1073, 1076 (10th Cir.), cert denied 114 S.Ct. 555 (1993). Based on these court decisions, the cemetery cannot have reservation status since Article II of the 1855 Treaty refers to the cemetery as a "public" burial ground rather than as land "reserved for the use" of an Indian tribe.⁶

Moreover, "Indian reservation" is defined, for purposes of land acquisition

⁶ It should be noted that Federally-owned lands set aside for Indian schools and hospitals have not been considered "Indian reservations" unless part of a larger tract expressly set aside for Indians' occupation and use. Compare C.M.G. v. State, 594 P.2d 798 (Okla. 1979), cert. denied 444 U.S. 992, with U.S. v. Meyers, 206 F. 387 (8th Cir. 1913).

and consolidation, as "lands over which the tribe is recognized by the United States as having governmental jurisdiction," 25 U.S.C. 151.2 (f). The Wyandot Tribe cannot exercise governmental jurisdiction over the cemetery since its federally approved tribal constitution and bylaws limits its Tribe's jurisdiction to within 45 miles of Wyandotte, Oklahoma. Affidavit of Mario Gonzalez, Exhibit C. Also see Wyandotte Tribe of Oklahoma, 28 IBIA at 247 where the Interior Board of Indian Appeals found that the Wyadnotte Tribe "does not occupy a current reservation in Kansas."

If Huron Cemetery was not already a "Indian reservation" in 1855 -- by force of the 1855 Treaty -- then the Interior Department could not make it into one today except by the authority contained in 25 U.S.C. 467, as implemented by 25 U.S.C., Part 151.

b. Huron Cemetery is not the trust land of the Wyandotte Tribe of Oklahoma.

It is the Wyandot Plaintiffs' position that Huron Cemetery is in fact trust land, but it is not land held in trust for the Wyandotte Tribe. It is land held in the name of the United States in trust for the individual Wyandot Indians that were members of the historic Wyandot Nation,⁷ and their descendants. This position is substantiated in a March 8, 1934 letter to the Wyandotte Business Committee (through their BIA Superintendent) from BIA Commissioner John Collier, which reads as follows:

So far as is known in this Office, there is no uncertainty regarding the title to the cemetery. As you and the Business Committee have previously been advised, on

⁷The Wyandotte Tribe is not the historic Wyandot Nation; it is a splinter group of the historic Wyandotte Nation that moved to Oklahoma and organized as a "tribe" under the Oklahoma Welfare Act in 1936. See Seneca-Cayuga Tribe of Oklahoma v. Deputy Assistant Secretary - Indian Affairs, 89 Interior Dec. 441, 442 (Sept. 2, 1982); 25 U.S.C. 503. It therefore has no authority under federal law to treat the cemetery as its exclusive property.

February 4, 1908, the Attorney General held that under the provisions of article II of the treaty of January 3, 1855 (10 Stat. L., 1159), fee title to the cemetery is in the United States, subject to the right of the Wyandotte Indians to use the land perpetually for cemetery purposes.* The confusion on the part of the members of the Committee apparently arises because they do not fully understand the present state of the title.

When it is stated that the United States holds fee title, it is not meant that the United States is the real owner of the land, but that it holds as trustee for the Wyandotte Indians. The equitable or beneficial title remains in the Indians. this is the same manner in which practically all Indian land in the United States is held.

It is requested that you explain fully to the members of the Business Committee that the United States holds fee title not as the real owner of the land but [as] trustee for its wards, the Wyandotte Indians, and that they remain the real owners of the land included in the Huron Place Cemetery. It is believed that if the members of the Committee understand that the Indians are still the owners of the beneficial title to the land, and that the United States hold the fee title only as trustee, they will agree there is not question as to the title to the cemetery. [Emphasis Supplied].

Affidavit of Mario Gonzalez, Exhibit B.

When one considers the fact that federal recognition of the historic Wyandot Nation was terminated in the 1855 Treaty, and that "Wyandotte Tribe" did not come into existence until after the passage of the Oklahoma Welfare Act of 1936, and that the Wyandotte Tribe was terminated in 1956 and reinstated as a federally supervised and recognized tribe in 1978, it is clear that the intent of the 1855 Treaty was to take the cemetery in the name of the United States in trust for the individual Wyandot Indians that were members of the historic Wyandot Nation, and their

*The 1908 Attorney General's Opinion can be found at 26 U.S. Op. Atty. Gen. 491 (February 4, 1908). In the opinion, the Attorney General found that "it would seem that fee title to this land has always been in the United States, subject, after 1855, to the right of the Wyandotte's to use it for the purpose indicated." Id. at 495.

descendants. Also see Conley, supra, 216 U.S. at 89-90 ("If a trust is declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff").

Once Congress has established a trust relationship with an Indian tribe, only Congress can terminate the relationship, and any withdrawal of the trust obligations would have to be plain and unambiguous to be effective. Joint Tribe Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975). Thus, only Congress can terminate the trust relationship between Wyandot Plaintiffs in the instant case and the United States in regards to said plaintiffs' treaty rights to use Huron Cemetery as a public burial ground.

In sum, the Huron Cemetery is not a reservation under federal law or policy. The plaintiffs are substantially likely to prevail on this point. They are entitled to a TRO and preliminary Injunction.

c. The Wyandotte Tribe of Oklahoma's actions violate the rights of the Wyandot Plaintiffs to the free exercise of religion under the First Amendment and the American Indian Religious Freedom Act.

On August 29, 1997, the Wyandotte Tribe of Oklahoma officially announced that it intends to "begin development and construction" of a gaming facility over Huron Cemetery "immediately." See Supplemental Affidavit of Janith K. English at 1 and Attachment "A." Thus, there is no dispute that the Wyandotte Tribe, with the blessing and active participation of Federal Defendants, intends to engage in construction activities that will change the natural topography of the cemetery and interfere with individually named plaintiffs right to use the cemetery as a public burial ground.

It cannot be disputed that Huron Cemetery is held in fee simple by the United States Government subject to the restrictions contained in Article II of the 1855

Wyandot Treaty. As federal property, the cemetery is subject to the rights of individually named plaintiffs to bury their dead and practice traditional religious ceremonies there under the First Amendment and the American Indian Religious Freedom Act (42 U.S.C. 1996).

It is also beyond dispute that the cemetery is sacred ground to the Wyandot Plaintiffs. Describing the cemetery as "a sacred site of the Kansas Wyandot," Plaintiff Janith K. English, a Chief of the Kansas Wyandot Nation, explained that the cemetery is:

Huron Cemetery is the most sacred site of the Kansas Wyandot, and is central and indispensable to the free exercise of traditional Wyandot religious ceremonies since it is the last remaining religious site of the Kansas Wyandots. Kansas Wyandots have practiced religious ceremonies, including traditional prayers at Huron Cemetery, since its establishment in 1843 to the present time. Other traditional ceremonies conducted at the Huron Cemetery have included the purification of the Cemetery at various time during the year with sage, cedar or sweet grass and blessings for the ancestors. Individual Whatnots frequently visit the cemetery to offer nuts, berries or items of healing such as herbs and other objects for their ancestors in their journey to the spirit world. A very important feature of traditional Wyandot belief is that the burial ground must be left open to the skies and the four winds; it's topographic integrity maintained; and that the cemetery be protected as hallowed ground. Wyandot traditional belief mandates that a burial ground be used for no other purpose and that it be kept as a sacred spot for ones spirit to spiritually commune with those of ones ancestors.

* * * * *

Any desecration of Huron Cemetery, including changing its natural topography, or interfering with or removing any of the graves, is contrary to traditional Wyandot beliefs and will destroy the status of the cemetery as a sacred burial ground.

Supplemental Affidavit of Janith K. English at 2.

In addition, Frances Ann Brown Davidson, a practitioner of traditional Wyandot religion, explained that:

[S]he and her family members have continually honored and practiced the Huron traditions and beliefs in the Huron Indian Cemetery forever 150 years, since its establishment in 1843."

* * * * *

The Huron Cemetery site was originally chosen because of its topography; it was the highest point in the area. traditional Wyandot belief is that the burial ground must be left open to the skies and four winds; its topographical integrity maintained; and that the cemetery be protected as hallowed ground. wyandot traditional belief mandates that a burial ground be used for no other purpose and that it be kept as a sacred spot for ones spirit to spiritually commune with their ancestors.

Affidavit of Frances Ann Brown Davidson at 3.

For an infringement of religion to exist, in the First Amendment sense, it is not necessary that religious practices be altogether abolished -- only that practitioners be compelled to act inconsistent with, or to abandon some of their beliefs. Wisconsin v. Yoder, 406 U.S. 205 (1972). The nature of religious beliefs, and whether the governmental action compels inconsistent conduct, is a matter peculiarly within the knowledge and competence of practitioners. It is sufficient for plaintiffs to establish their beliefs are sincere. Hence in United States v. Lee, 102 S.Ct. 1051 (1982), where the issue was Amish refusal to pay federal income taxes, the Court reasoned:

Although the government does not challenge the sincerity of this belief, the government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief of observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the government has proper interpretation of scriptural interpretation." Thomas v. Review Bd. of Indiana Employment Sec., 101 S.Ct. 1425, 1431, 450 U.S. 707, 716, 67 L.Ed.2d 624 (1981). We therefore accept appellee's contention that both payment and receipt of social security is forbidden by the Amish faith.

Id. at 1055. For the same reasons, the testimony of Plaintiff Janith K. English and

Frances Ann Brown Davidson above should be accepted by the court. Here individually named plaintiffs will clearly be compelled to act inconsistent with their religious beliefs.

Moreover, the American Religious Freedom Act expressly includes "access to sites" among the religious freedoms of American Indians. This statutory clarification must overcome any reluctance to recognize religious liens on land, independent of record title, see Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (rejecting district court's view that record ownership of land is a material issue notwithstanding the American Indian Religious Freedom Act), especially as here, where an Indian treaty expressly imposes a lien on the cemetery by reserving its use as a burial ground for a designated group of beneficiaries, including individually named plaintiffs.

Moreover, enclosing a cemetery by placing a casino on stilts over it is a form of denial of physical access, since changing the cemetery's natural topography and removal of bodies from the cemetery will destroy the sacredness of the cemetery, thereby denying plaintiffs' access to a sacred site.

The Wyandot plaintiffs have therefore established a prima facie case of infringement by the Wyandotte Tribe of their freedom to worship at the cemetery in derogation of the constitutional and statutory rights.

d. The Wyandotte Tribe of Oklahoma has failed to comply with the National Environmental Policy Act.

The Wyandotte Tribe has not caused the preparation of an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*⁹ NEPA requires the preparation of an environmental impact statement for a major federal action such as disturbing a historic register site and building a casino over it. 42 U.S.C. 4332 (C). See generally Sierra Club v. Hodel, 848 F.2d. 1068, 1088-89 (10th Cir. 1988). IGRA itself requires preparation of an environmental impact statement prior to construction of the casino. See 25 C.F.R. 531.1 (16). Because the Secretary's action is the first step in that process, and because the land will be used solely for gambling, the Secretary is obligated to prepare the Environmental Impact Statement (or Environmental Assessment) now. The Bureau of Indian Affairs states as much in 1994. See AR, Doc. Nos. 51, 52 and 61.

Defendant Secretary, who holds legal title to the cemetery, admitted in several documents filed as part of the administrative record on the trust application that required statutory reviews would have to be undertaken prior to any construction-related activities on the site. See, e.g., AR, Doc. Nos. 51, 52 and 61. More specifically, at Doc. 52, federal government officials acknowledged that "the actual use and disturbance of the property [] would require compliance" with an attached list of environmental and other laws. AR, Doc. No. 52 at 0287-91, Letter from Supervisory Realty Specialist BIA Department of Interior to Acting Area

⁹ Even if Defendants are not required to conduct a formal evaluation of potential adverse impacts of the casino on the cultural and historic values of the cemetery, plaintiffs have grounds to demand such an evaluation in accordance with Section 102 of NEPA (42 U.S.C. 4332) and Section 106 of NHPA (16 U.S.C. 476). NEPA includes not only ecology, but other "important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. 4331 (b) (4). In 1971, Huron Cemetery was listed on the National Register of Historic Places. Its historic and cultural values include (among other things) the Wyandot burials, as well as the Civil War grave.

Director, dated April 25, 1996. The Associate Solicitor whose opinions green-lighted every legally problematic area of this trust acquisition, Robert T. Anderson, acknowledges that "it is plain that federal approval of gaming activity, construction and related leases will trigger the need for NEPA compliance and with it, a review for consistency with other applicable federal laws." AR, Doc. 61 at 0325, Memorandum from Robert T. Anderson, Associate Solicitor of Division of Indian Affairs to Director, Indian Gaming Management Staff, dated May 30, 1996.

In seeking to have the .52 acres placed in trust for the Wyandotte Tribe without prior compliance with reviews required by NEPA and other federal statutes, the attorney for the Tribe, David McCollough, acknowledged that tribal activities to develop the cemetery on the Shriner's tract might trigger the review process, stating "future development plans for the property . . . may require an EA (Environmental Assessment) prior to development." AR, Doc. No. 19 at 0091, Letter from David McCollough, Attorney for Wyandotte Tribe to Interior officials, dated December 7, 1995. In his argument to Interior that the review process could be postponed until after the land is taken in trust, Mr. McCollough cited cases holding that it is the future development of property which triggers the NEPA review. *Id.* at 0091. ("[E]ven if NEPA is applicable, it is not the trust acquisition itself, but rather the future development of the tract, that may have an impact on the environment" which requires NEPA compliance").

Having been successful before the BIA in arguing that environmental review should and could be postponed until on-site activities commenced, the Tribe cannot argue that it is prejudiced by entry of an order restraining it now from proceeding absent such review.

Plaintiffs are substantially likely to prevail on their call for preparation of the required environmental analyses by Defendant. They are entitled to a

preliminary or emergency injunction.

e. The Wyandotte Tribe of Oklahoma have failed to comply with the National Historic Preservation Act.

Because the Huron Cemetery is federal land, the Secretary is the Trustee of that land, and the National Indian Gaming Commission ("NIGC") has jurisdiction over any gaming facility constructed on the land, the National Historic Preservation Act is fully applicable.

Congress passed the NHPA in 1966, and ARPA in 1979. The stated purpose of these Acts include the strengthening of the government's role in protecting the nation's rich historical and cultural heritage for the benefit of future generations. 16 U.S.C. 470.

Under the Act the heads of all federal agencies -- here the Department of the Interior and NIGC -- must assume responsibility for the preservation of historic properties that are owned or controlled by that agency, and must establish a preservation program for the identification, evaluation, protection, and nomination to the National Register or Historic Places. The agency must implement its preservation activities in consultation with Tribes carrying out historic preservation planned activities, and must also consult with Tribes regarding the means by which adverse effects on such properties will be considered. 16 U.S.C. 470h-2 (a) (2).

Each federal agency that is responsible for the protection of historic resources, including archeological resources, must also ensure that: (1) all actions taken by its employees or contractors meet professional standards and regulations regarding archeology, architecture, conservation, history, landscape architecture, and planning; (2) all such employees and contractors meet federal qualification standards for their respective specialties; and (3) all records and other data, including data produced by historical research and archeological surveys and

excavations, are permanently maintained in appropriate data bases and made available to potential users. 16 U.S.C. 470h-4 (a).

The Act requires that any federal agency undertaking a project that might affect any "district, site, building, structure, or object" that is included on or eligible for inclusion on the National Register must first give the Advisory Council on Historic Preservation a reasonable opportunity to comment on the project. 16 U.S.C. 470f. The agency must also act "to the maximum extent possible" take measures to "minimize harm" to a National Landmark before the project is approved. 16 U.S.C. 470h-2(f). A federal agency must dispose of Native American cultural items from federal or tribal land according to the rules established by NAGPRA. 16 U.S.C. 470h-2(a)(2)(E)(iii); 25 U.S.C. 3002(c). Under NAGPRA, the individually named plaintiffs in Case No. 96-4130 are lineal descendants of those buried in Huron Cemetery would have first priority, over that of the Wyandotte Tribe of Oklahoma as to the disposition of graves.

Moreover, the head of a federal agency or other public official receiving grants under the Act must, after consultation with the Secretary of the Interior and Advisory Council on Historic Preservation, withhold from public disclosure information about the location, character, or ownership of a historic resource, and restrict access, if such disclosure would "(1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. 16 U.S.C. 470w-3.

Because the cemetery is a traditional religious site and both the cemetery and the Shriner's tract are National Register historic sites, review of the project under historic preservation statutes is required and the Wyandotte Tribe of Oklahoma should not be allowed to proceed without such reviews. The regulations implementing the National Historic Preservation Act, found at 36 C.F.R. 800, describe the review

process and its purposes:

Section 106 of the National Historic Preservation Act, 16 U.S.C. 470, et seq., requires that "a federal agency head with jurisdiction over a federal, federally assisted or federally licensed undertaking must take into account the effects of the undertaking on properties included in . . . the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110 (f) of the Act requires that federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly or adversely affected by an undertaking and, prior to approval of such undertaking, afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment.

36 C.F.R. 800.1.

There is no showing that Federal Defendants and the Wyandotte Tribe or the Secretary have complied with any of the above requirements as they pertain to the Huron Cemetery. Under these circumstances, this court can and should issue a preliminary injunction to enforce compliance with federal law. See Ross, et al. v. Federal Highway Administration, Case No. 97-2131-GTV (D.Kan., April 15, 1997) (preliminary enjoining further activities by Douglas County and State of Kansas officials relating to construction on the South Lawrence Trafficway, pending completion of a supplemental environmental impact review and statement). The Wyandotte tribe of Oklahoma's threatened actions will be in blatant violation of federal law. Plaintiffs are certain to succeed on this issue, and merit a preliminary or emergency injunction to preserve the status quo.

f. The Wyandotte Tribe of Oklahoma has failed to comply with the Archeological Resource Protection Act.

ARPA specifically addresses "material remains of past human life" if over 100 years old, including:

pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.

16 U.S.C. 470bb. Congress intended to protect and prevent the loss and destruction of these archeological resources and sites resulting from uncontrolled excavations and pillage, and to foster increased cooperation and information exchange among government agencies, professional researchers, and private collectors. 16 U.S.C. 470aa.

The cornerstone of the Act is the requirement of a permit before excavating or removing any archeological resources located on public land or Indian lands. 16 U.S.C. 470cc. A federal land manager, such as the BIA here, is obligated to notify Indian tribes if a permit may result in harm to, or destruction of, any religious or cultural site, and to impose permit terms and conditions necessary to effect the purpose of the Act. 16 U.S.C. 470cc. Individual Plaintiffs (and other Kansas Wyandots) have regularly performed traditional religious ceremonies within the Huron Cemetery. Supplemental Affidavit of Janith K. English at 2.

Any person who attempts to or actually excavates, removes, damages, or otherwise alters or defaces any archaeological resource located on public lands or Indian lands is subject to civil and criminal penalties, including imprisonment, fines, compensation, and forfeiture. Similarly, any person who sells, purchases, exchanges, transports, or receives such archaeological resources, or offers to do such things without the required permit, is also subject to similar penalties. Any person who knowingly solicits or procures someone else to engage in these acts is also subject to the same penalties. 16 U.S.C. 470ee.

There is no indication that the Wyandotte Tribe of Oklahoma has obtained a permit for the desecration of the Cemetery. Defendant Babbitt would violate the spirit of the extant TRO and abuse its discretion in granting such a permit pending the adjudication of these claims. A Preliminary Injunction should, therefore, be issued to preserve the status quo.

g. The Wyandotte tribe of Oklahoma's actions violate the Native American Graves Protection Repatriation Act.

In 1990 Congress passed the Native American Graves Protection and Repatriation Act. 25 U.S.C. 3001. The Act has two major objectives: (1) to protect and establish ownership of Native American human remains and cultural items found on federal or Native American lands after November 16, 1991; and (2) to assure that all federal agencies and all "museums" identify and inventory all Native American human remains and cultural items in their possession or control, and promptly return such items to the appropriate Native American individuals or organizations under specified circumstances.

Cultural items can be removed or excavated from federal or Indian lands only after consultation with relevant Native organizations and pursuant to a permit properly issued under ARPA. If such items are found, they can only be excavated or removed with the consent of the Native Organization. Regardless of who removes such items, the ownership and right of control of such items remains with the lineal descendants. 25 U.S.C. 3002 (c). The Wyandot Plaintiffs, as lineal descendants of those buried in the Huron Cemetery, have never consented to the excavation or removal of any material, items, human remains, or graves of deceased relatives within the Huron Cemetery. Moreover, no permit has been issued to the Wyandotte Tribe under NAGPRA.

V. CONCLUSION.

The Wyandotte Tribe, with the blessings and active participation of Federal Defendants, has publicly acknowledged that it will immediately desecrate Huron Cemetery, and will do so despite the extant temporary restraining order entered in Case No. 96-4130, and extended by stipulation of the parties, before this court adjudicates whether the Wyandotte Tribe has the right to do so in the first instance. Adding insult to injury, the Wyandotte Tribe of Oklahoma flaunts the

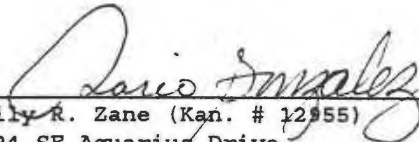
requirements of NEPA, IGRA, ARPA, AIRFA and NAGPRA.


It cannot be seriously disputed that the plaintiffs will suffer irreparable harm if Huron Cemetery is desecrated, that this harm far outweighs any speculative financial harm to the Wyandotte Tribe, that an injunction will serve the public interest and that plaintiffs are likely to succeed on the merits.

A temporary restraining order and preliminary injunction should therefore issue.

Date: October 14, 1997

RESPECTFULLY SUBMITTED,


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In the United States Court of Federal Claims

No. 15-560L

(Filed: December 8, 2015)

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

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

On December 7, 2015, counsel for the Government filed a motion for leave to file a response to the sur-reply memorandum Plaintiff filed on November 4, 2015. Plaintiff has not consented to the Government's motion. Nevertheless, for good cause shown, the Government's motion is GRANTED. The Court accepts the Government's response to Plaintiff's sur-reply.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on December 11, 2015)

WYANDOT NATION OF KANSAS,)	
a/k/a/ WYANDOT TRIBE OF INDIANS,)	
)	No. 15-560L
Plaintiff,)	
)	Hon. Thomas C. Wheeler
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

TO THE HONORABLE COURT, AND TO ALL PARTIES AND THEIR ATTORNEYS OF
RECORD:

Plaintiff hereby gives notice of relevant authority, to wit:

1. Order denying Defendant's Motion to Dismiss in *San Carlos Apache Tribe v. United States*, No. 14-1045-EGB (ECF No. 14, filed July 31, 2015). For the Court's convenience, a copy of the Order is attached.

Respectfully submitted, December 11, 2015

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ATTACHMENT

TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

San Carlos Apache Tribe v. United States

No. 14-1045-EGB (ECF No. 14, filed July 31, 2015)

In the United States Court of Federal Claims

No. 14-1045L
(Filed: July 31, 2015)

THE SAN CARLOS APACHE TRIBE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

As stated on the record during the oral argument held telephonically on July 29, 2015, defendant's motion to dismiss, filed on February 23, 2015, is denied without prejudice. The Joint Preliminary Status Report is due within 21 days after the filing of the Answer.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Judge

FORM 2. Notice of Appeal to the United States Court of Appeals for the Federal Circuit from a Judgment or Order of the
UNITED STATES COURT OF FEDERAL CLAIMS

United States Court of Federal Claims

Case Number 1:15-cv-00560-TCW

WYANDOT NATION OF KANSAS ,

Plaintiff,

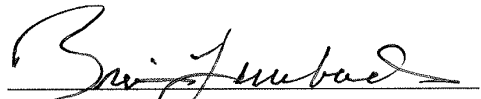
v.

NOTICE OF APPEAL

United States,

Defendant.

Notice is hereby given that WYANDOT NATION OF KANSAS (name all parties * taking the appeal) in the above named case hereby appeal to the United States Court of Appeals for the Federal Circuit from the Final Judgment (from the final judgment) ((from an order) (describe the order)) entered in this action on January 6, 2016 (date).


(Signature of appellant or attorney)

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(Address of appellant or attorney)

*See Fed. R. App. P. 3(c) for permissible ways of identifying appellants.