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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, Plaintiff, vs. UNITED STATES OF AMERICA; et al., Defendants.	Case No. 4:18-cv-285-DCN **REPLY TO THE CITY OF POCATELLO IN SUPPORT OF MOTION TO RECONSIDER [Dkt. 114].**

REPLY TO THE CITY OF POCATELLO IN SUPPORT OF MOTION TO RECONSIDER [Dkt. 114]

COMES NOW, the Shoshone-Bannock Tribes (Tribes"), by and through their attorneys, and submits the following reply brief to the Defendant City of Pocatello's Memorandum in Opposition to Plaintiff's Motion to Reconsider [Dkt.122] and in support of its Motion to Reconsider [Dkt. 114]. The City of Pocatello ("City") appears to allege that the establishment of a trail system was adverse to the wishes of the Tribes. The City also alleges that the Tribes had a duty to investigate and initiate the lawsuit within the statute of limitations. The City incorrectly assumes that the Tribes see the trail as adverse. Moreover, the City incorrectly understand the trust responsibilities held by the United States ("Tribal Trustee") in the handling of tribal trust lands and that prior representations should estop the United States from taking contrary positions.

A. The Indian Reorganization Act imposes a fiduciary relationship upon United States to prevent alienation of the Tribes trust lands.

The Tribes understand that Indian law is unique and not commonly understood. The City appears to place burdens on the Tribes to police the actions of the Tribal Trustee like it would any third person. This position does not recognize the trust responsibility owed to the Tribes. In prior cases, the US Supreme Court has "found that the Government had established the trust relationship in order to impose its own policy on Indian lands." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 180, 131 S. Ct. 2313, 2326–27, 180 L. Ed. 2d 187 (2011) citing *Mitchell I*, 445 U.S., at 544, 100 S.Ct. 1349 (Congress "intended that the United States 'hold the land ... in trust' ... because it wished to prevent alienation of the land").

The Government has invoked its trust relationship to prevent state interference with its policy toward the Indian tribes. See *Minnesota v. United States*, 305 U.S. 382, 386, 59 S.Ct. 292,

83 L.Ed. 235 (1939); *Candelaria*, 271 U.S., at 442–444, 46 S.Ct. 561; *United States v. Kagama*, 118 U.S. 375, 382–384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). And the exercise of federal authority thereby established has often been "left under the acts of Congress to the discretion of the Executive Department." *Heckman, supra*, at 446, 32 S.Ct. 424. In this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes. See *United States v. Rickert*, 188 U.S. 432, 443, 23 S.Ct. 478, 47 L.Ed. 532 (1903) (trust relationship " 'authorizes the adoption on the part of the United States of such policy as their own public interests may dictate' " (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28, 22 Ct.Cl. 476, 7 S.Ct. 75, 30 L.Ed. 306 (1886))).

The Tribal Trustee has breached trust duties imposed on it by the Indian Reorganization Act. In the present case, the genesis for plaintiffs' trust the section 4 and 5 of the Act, 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). In relevant part, that section provides:

> SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians. …
>
> … The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108.

Section 5108 creates a fiduciary obligation in the United States to promote, manage, and maintain all assets and enterprises acquired by Indians pursuant to the Act.

The relevant inquiry, of course, is the scope of the fiduciary relationship intended by Congress through the Act. See *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (Mitchell). The Mitchell plaintiffs had alleged that the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), placed certain Indian lands in trust and thereby imposed fiduciary responsibilities as to the management of allotted timber lands.

The Court of Claims looked at 25 U.S.C. § 5108 (formerly Section 5 and 15 U.S.C. 465) in the case *Hydaburg Co-op. Ass'n v. United States*, 667 F.2d 64, 67–68 (Ct. Cl. 1981). It examined section 5 of the Indian Reorganization Act and held the Act does speak of a trust relationship. The Court continued "[i]t follows, we think, that the "trust" established by section 5 of the Act imposes only a duty on the United States to hold the acquired Indian lands so as to prevent continued alienation." *Id*. Therefore, the Tribal trustee has a statutory duty under the Indian Reorganization Act along with the Act of 1888 to prevent the alienation of its trust lands.

B. Once the fiduciary duties are established, general laws governing fiduciary obligations apply.

Now that that Indian Reorganization Act and the Act of 1888 identify the trust duties, general trust law now becomes applicable. Statutes may limit the obligations of the United States as trustee. See *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (upholding government's assertion of attorney-client privilege and declining to apply common-law trust principles that would require disclosure of documents related to trust accounting because Trust Fund Management Reform Act, 15 U.S.C § 162a(d) required a more limited disclosure). Statutes may of course require more than common law trust principles as well.

In *Cobell v. Norton*, the D.C. Circuit stated "while the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional

equitable terms. *Cobell v. Norton*, 240 F. 3d 1081, 1099 (D.C. Cir. 2001). To explain its rational, the court opined:

> Where Congress uses terms that have accumulated settled meaning under other equity or common law, [courts must infer] that Congress means to incorporate the established meaning of those terms [and] that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.

Cobell v. Norton, 240 F. 3d 1081, 1099 (D.C. Cir. 2001) (quoting *NLRB v Amax Coal Co*. 453 U.S. 311, 329-330 (1981).

The US Supreme Court held "[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement. In addition, by the time government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." *United States v. Mitchell*, 463 U.S. 206, 224–28, 103 S. Ct. 2961, 2971–74, 77 L. Ed. 2d 580 (1983).

1. The Tribal Trustee commits self-dealing by trying to convert the Tribes land to its own uses.

"Perhaps the most fundamental duty of a trustee is the trustee's duty of loyalty to the beneficiaries, often stated as the duty to act solely in the interests of the beneficiaries. This duty is sometimes stated as the rule of undivided loyalty. The trustee must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons." *Trustee's duty of loyalty to the beneficiaries*, Bogert's The Law of Trusts and Trustees § 543. "The conflict of interest between the trustee's fiduciary and personal interests means that the trustee is not acting *solely* in the interests of the trust beneficiaries. This type of conflict is sometimes called self-dealing." *Id*.

In its pleading and motions filed with the Court. The Tribal Trustee appears to take a position that it is not protecting the Tribes trust land as trust. These actions appear to be without consideration for the Tribes' interests to protect against alienation of the trust lands and should be considered self-dealing.

2. Trust duties prevent the start of statute of limitations until there has been a clear repudiation of the Trust by the trustee.

It has been broadly stated that the statute of limitations does not apply to express trusts. *Clark v. American Nat'l Bank & Trust Co. of Chattanooga,* 531 S.W.2d 563, 567 (Tenn.App.1974), *cert. denied,* 423 U.S. 1053, 96 S.Ct. 786, 46 L.Ed.2d 644 (1976). The more precise rule, however, is that a trustee cannot assert the statute of limitations defense against a beneficiary of an active trust for possession of the trust assets while the trustee has possession of the trust funds and the trust relationship is continuing. *Id.* (quoting *Third Nat'l Bank v. Nashville Trust Co.,* 191 Tenn. 123, 232 S.W.2d 7 (1950)); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 951, at 627–29 (2d ed. 1995).

The principle underlying this rule is that in equity the possession of the trust property by the trustee is the same as possession by the beneficiary and thus cannot be adverse. *Clark,* 531 S.W.2d at 567; Bogert & Bogert, *supra,* § 951, at 927–28. Consequently, no statute of limitations can run against a beneficiary on a claim for possession until the trustee's possession becomes adverse. *Clark,* 531 S.W.2d at 567. When a trustee violates one or more of his obligations to the beneficiary or repudiates the trust, however, a cause of action exists against the trustee, and the statute of limitations is applicable. *See Jones v. United States,* 801 F.2d 1334, 1335–36 (Fed.Cir.1986), *cert. denied,* 481 U.S. 1013, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987) (action for breach of trust accrues when beneficiary knew or should have known of breach, statute of

limitations then begins to run); *Jefferson Nat'l Bank of Miami Beach v. Central Nat'l Bank in Chicago*, 700 F.2d 1143, 1151 (7th Cir.1983) (quoting *Kay v. Village of Mundelein*, 36 Ill.App.3d 433, 344 N.E.2d 29, 33 (1975)) (when trustee violates trust, statute of limitations is applicable); *Brodeur v. American Rexoil Heating Fuel Co.*, 13 Mass.App.Ct. 939, 430 N.E.2d 1243, 1244–45 (1982) (applying statute of limitations to repudiation of trust); Bogert & Bogert, *supra*, § 951, at 629–30. The statute begins to run from the date that the beneficiary knew or reasonably should have known of the breach or repudiation. *Jones*, 801 F.2d at 1335; *Jefferson Nat'l Bank*, 700 F.2d at 1151.

Repudiation of a trust occurs when the trustee, by words or conduct, denies the existence of a trust and claims the property as his own. *See* Bogert & Bogert, *supra*, § 951, at 630; *see also Coto Settlement v. Eisenberg*, 595 F.3d 1031, 1039 (9th Cir. 2010) (applying Washington trust law). Because the trustee then holds the trust property adversely to the beneficiary, the trustee's possession and that of the beneficiary are no longer identical. The statute of limitations defense is therefore unavailable only in cases in which the trustee of an *unrepudiated* trust asserts it to defeat a beneficiary's claim for possession of trust property. *See id.* § 951, at 627 (trustee does not hold property adversely during continuing recognition of the trust); *Clark*, 531 S.W.2d at 568 (statute of limitations does not begin to run until termination of trust, repudiation, or assertion of adverse claim by trustee).

The Tribal Trustee has not repudiated the trust status of the lands. As indicated, the trust was created by Congress and only Congress can repudiate the trust. Instead, the Declaration of Bill Bacon shows repeated verbal and written representations by the Tribal Trustee recognizing the Tribes interests I the land and expressing that it was working at correctly listing the property in the trust inventory of the BIA. Even as noted in the Decision of this Court, the United States

still has not answered the question of whether the land are trust assets. [Dkt. 102 at 8]. The Tribal Trustee has neither answered whether it has the lands in trust status nor repudiated the trust relationship under which it is obligated.

3. Fiduciary obligations to prevent alienation of trust land invokes the Continuing Wrongs Doctrine to prevent application of the statute of limitations.

Breach of fiduciary duty may constitute a continuing wrong that "is not referable exclusively to the day the original wrong was committed." *Kaymakcian v. Board of Managers of Charles House Condominium*, 49 A.D.3d 407, 854 N.Y.S.2d 52 (NY 2008). Under the continuing wrong doctrine, however, "where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury." 54 C.J.S. Limitation of Actions § 177 (1987). In other words, "the statute of limitations does not begin to run until the wrong is over and done with." *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir.1983).

In the current matter, the Tribal trustee has a continuing obligation to prevent the alienation of trust land. As discussed prior, only Congress can change the status of the land being considered trust land. Therefore, everyday the Tribal trustee refuses to place the trust land into trust inventory is a continuing wrong and the statute of limitations can not run against their wrongful act.

C. US should be equitably estopped from an adverse claim against the Tribes.

The Tribes also assert equitable estoppel against Defendants for reneging on various representations that there was no adverse US claim before or after the 2012 Settlement Agreement. A defendant is estopped from raising the statute of limitations as a bar to plaintiff's action where defendant's representations or conduct dissuaded the plaintiff from prosecuting his or her cause of

action during the statutory period. *Theriault v. A.H. Robins Theriault v. A.H. Robins Co.*, 698 P.2d 365 (1985); *Gregory v. Stallings*, 468 P.3d 253 (Idaho 2020). The party asserting equitable estoppel must plead: "(1) knowledge of the true facts by the party to be estopped, (2) intent to induce reliance or actions giving rise to a belief in that intent, (3) ignorance of the true facts by the relying party, and (4) detrimental reliance." *Estate of Amaro*, 653 F.3d at 813 (*quoting Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991)).

The Tribes have alleged all the above elements and factors to overcome statute of limitations arguments. Am. Compl., Dkt. 21 ¶¶ 231, 232, 237, 242, 259, **277,** 280, 285, 286, 287. The DOI, BIA, and DOJ all deal directly with the Tribes as part of the US Defendants' legal and fiduciary obligations as a trustee for the Tribes, which imputes knowledge to the US Defendants about the trust status of the disputed parcels. The second element, which is intent to induce reliance (or actions giving rise to that belief), is also met here because the Tribes were clearly led to believe that all federal agencies would work favorably with the Tribes on these claims until long after the Tribes negotiated the 2012 Settlement Agreement. Am. Compl., Dkt 21. If the Tribes had known the US would oppose its reversionary claims, there is evidence the Tribes would have explicitly retained its claims against adverse United States interests, even if the Tribes did not mean third parties mentioned in the non-waiver in the Settlement Agreement, to also include the United States. Fourth, The Tribes have expended thousands of dollars and decades trying to protect these reversionary rights. The change in the US Defendants' position since 2018 led to detrimental reliance because the Tribes still do not have access to their land.

The US should be estopped even though it is a government. Estoppel against the government requires affirmative misconduct beyond mere negligence, and wrongful acts causing serious injustice. *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir., 1989) (*en banc*) (applying

equitable estoppel "where justice and fair play require it"); *Estate of Amaro*, 653 F.3d at 813. Finally, the public's interest must not suffer undue damage by imposition of liability. *Id.* Loss of trust land should not depend on the Tribes' lack of knowledge after 2004 that the US as trustee had adverse claims against it because beneficiaries are entitled to protection from their trustees. 25 C.F.R. 169.405, 410, 413, 415. The Government committed misconduct as trustee by delaying the Congress' statutory duty to return the land ever since the 2004 FOIA request when it was clear to the US that there were legitimate Tribal claims to the land. Defendants have not alleged any harm to the public if the Tribes reacquire equitable title to the land. In fact, the Tribes are just as competent if not more competent to run the City Creek Park and other parcels as the first stewards and owners over the subject land than the City of Pocatello.

The Federal Government has been equitably estopped from a civil action seeking to reduce the boundary of a national forest that was set up by Congress. *U.S. v. Georgia-P. Co.*, 421 F.2d 92 (9th Cir. 1970). In *Georgia-Pacific Co.,* The 9th Circuit Court relied on Georgia-Pacific's use of the rule of equitable estoppel, which as a rule of justice, that "prevails over all other rules." *Id*. at 96. The court held that the Government was not immune from estoppel because the government had to give effect to Congressional statutes despite implied and express presidential orders reducing national forest boundaries. *Id.* at 102-103. Effect must be given to statutes unless Congress intent to repeal the Tribes right is clear. *United States v. Borden Co.,* 308 U.S. 188, 198-199, (1939). Congress has not repealed the 1882 and 1888 Acts.

The QTA statute of limitations should be equitably tolled until the Tribes should have reasonably known the U.S. would claim the land adverse to the Tribes. A plaintiff must know of the existence of a possible claim before the statute of limitations can begin. *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002) (Articulating the doctrine for equitable tolling). Constructive notice

of the adverse agency claim to the land could not have started until 2013. Am. Compl., Dkt. 21 ¶¶ 260-264. The Tribes could not have filed a lawsuit in good faith against its trustee because every agency interaction was positive until 2013 and it had no knowledge of adverse claims. There is no dispute that the US Defendants were considering and supporting affirmative litigation support for the Tribes, until they changed their position in 2018.

D. Trail use by the City is not adverse to the Tribes.

The City alleges that somehow its use of the trail system was open and adverse to the Tribes. Just the opposite. The evidence shows that the Tribes were a part of the discussions for the nature trial and endorsed its use for the public. The Tribes attended meetings and even offered improvements. It has placed its signs declaring ownership of the City Creek are since 2016 which still remain in place today. In fact, the City even helped installing the ownership sign when it was knocked down. (2nd Decl. Bill Bacon, Exhibit B May 25, 2017 e-mail). The City even has requested to issue a statement about the collaboration and improvements to the City Creek trail system between the City and the Tribes. (2nd Decl. Bill Bacon Ex. B August 20, 2019 e-mail).

E. The Declarations of the Tribes have not been refuted with any contrary admissible evidence.

As a final note, the Tribal Trustee has provided no evidence to contradict the Declarations of the Tribes which declare that the United States agents and representatives repeatedly acknowledged the Tribes ownership of the lands in question. Neither has the City has provided no admissible evidence to support its general averments to the contrary.

DATED this August 9, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, the foregoing was electronically filed through the Court's CM/ECF system, which caused the following parties or counsel to be served by electronic
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