No. 12-504

In The Supreme Court of the United States

HARVEST INSTITUTE FREEDMEN FEDERATION, LLC, LEATRICE TANNER-BROWN,
Petitioners

v.

UNITED STATES,
Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

Whether the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064 enacted November 30, 2010 and signed into law by the President on December 8, 2010 authorizing settlement of United States District Court for the District of Columbia, Case No. 1:96-cv-01285 (TFH) Eloise Pepion Cobell, et al. v. Ken Salazar, violates the Equal Protection Clause by reason of racial discrimination against Petitioners, Freedmen.[1].

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[1]For the definition of Freedmen, see December 28,2009 correspondence from Paul Tsosie, Chief of Staff to the Assistant Secretary-Indian Affairs, United States Department of the Interior to Harvest putative class member Angela Mollette ,"Depending upon the tribe in question, these people may be descendants of slaves, inter-married black and Indian mix-blood Indians, or other combinations of heritage that are recognized by the respective Indian Tribes. In the case of the Five Civilized Tribes...these people are commonly referred to as Freedmen". See, Cobell v. Salazar, United States District Court for the District of Columbia Case No 1:96- CV- 01285, (hereinafter" Cobell") Docket No.3747-1.

PARTIES

Petitioner, Harvest Institute Freedmen Federation, LLC ("Harvest"), is an Ohio limited liability company with its principal place of business in Columbus, Ohio. Harvest was formed for the specific purpose of seeking redress through the courts for breach of fiduciary duties owed by the United States to descendants of persons held in bondage by the Five Civilized Indian Tribes[2] under various Indian treaties and federal statutes. The specific federal laws involved are, the Treaties of 1866, the Curtis Act of 1898, and the Act of May 27, 1908, ("Act of 1908"), 35 Stat. 312. Petitioners' claims arise from these substantive sources of law that establish specific fiduciary duties upon the United States in relation to Freedmen sufficient to sustain claims for money damages under the Tucker Act, 28 U.S.C. §2501. The Federation has conducted research, provided financial support and legal resources, including counsel, to seek redress on behalf of Freedmen. The Federation's membership is comprised of persons of African and Native American ancestry, each of whom has standing to sue in their own right. The interests which the Federation seeks

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[2]The Five Civilized Tribes were: Choctaw, Creek, Chickasaw, Cherokee and Seminole.

to protect are germane to its purpose and do not require the participation of individual Freedmen descendants.

Petitioner, Leatrice Tanner-Brown, is a representative of the putative class of Freedmen descendants who by reason of their interests in restricted allotments under the Curtis Act of 1898, the ante-bellum Treaties of 1866 or lost or mismanaged trust property, have standing to sue the United States for breaches of trust related to allotted lands or lease and royalty payments from restricted land. The grandfather of Petitioner Leatrice Tanner-Brown, George Curls, was enrolled on the Dawes Roll of the Cherokee Freedmen, under the Dawes Act on July 1, 1902. Exhibit E App. Brief, Cherokee Freedman No. 4304. At the time of his enrollment, George Curls was five years old, having been born to former Cherokee slave parents in Indian Country, Oklahoma in 1897. See, George Curls' death certificate. Exhibit F, App. Brief.

Mr. Curls received a forty acre allotment deed from the Cherokee Tribe under the Curtis Act on December 5, 1910. See Certified Copy of "Allotment Deed" and Docket No. 3747-8 for a Certified Copy of a twenty acre "Homestead Deed," also received by Mr. Curls. Exhibits G and H, App. Brief. Under

these two deeds, Mr. Curls received Curtis Act allotments equaling 60 acres. These allotments were received at a point in time when Mr. Curls was a minor, thirteen years old.

Under the Act of May 27, 1908, Appendix I, App. Brief, restrictions against alienation of Freedmen allotments or royalties received therefrom, were retained for minors, such as Mr. Curls. Under the Act of 1908 any royalties from allotments owned by minor Freedmen were to be controlled by the Department of Interior. See, Sections 2 and 6 of Appendix I. Any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of Sections 2 and 6 of the Act of 1908. Instead, the Interior Department has no records of these royalties, despite evidence that the land was leased for oil and gas drilling. Moreover, a guardian, as required by Congress under the Act of 1908, was not appointed to protect the interests of Mr. Curls. The Interior Department failed to take any measures whatsoever, as required by Congress under the Act of 1908, to protect the allotment interests of Freedmen minors such as George Curls. It is this conduct, among other acts of misfeasance and nonfeasance, that are the basis for Petitioners' breach of trust and fiduciary

duty claims against the United States. The "CRA" authorities resolution of breach of trust claims by Native Americans on these grounds, but not the Freedmen. This is a denial of equal protection of the law.

Petitioner, Angela Mollette, is a Freedmen descendant and a representative of the entire class of such persons, a class too numerous to list individually as Petitioners in this action. Specifically, Petitioner Mollette is the founder and Chief Executive Officer of the Black Indian United Legal Defense and Educational Fund, an organization formed to provide structural educational and policy guidance to descendants of Freedmen.

Petitioner, William Warrior, is a Freedmen descendant and a representative of the entire class of such persons, a class too numerous to list individually as Petitioners in this action. Specifically, Petitioner Warrior is a lineal descendant of Chief John Horse's Band of Ethnic Seminole Nation Citizens. Petitioners are representatives of a putative class of Freedmen descendants with breach of trust claims against the United States for violation of the Treaties of 1866 and the Act of May 27, 1908, by failing to account for proceeds from royalties,

leases, and conveyances and for failure to properly invest these proceeds.

Respondent is the United States Department of the Interior, the federal agency with jurisdiction over the Bureau of Indian Affairs (BIA). BIA has responsibility for the administration and management of all land held in trust by the United States for American Indians, Indian tribes and Alaskan Nations.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

January 31, 2011 Opinion of the United States District Court for the Southern District of Ohio.(Appendix B)

July 13, 2012 Opinion of the United States Court of Appeals for the Sixth Circuit. (Appendix A)

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming the United States District Court for the Southern District of Ohio was entered July 3, 2012. Jurisdiction here is based on 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX)

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Sixth Circuit, Case No. 2011-3113.

Petitioners, descendants of persons held in bondage by the Five Civilized Indian Tribes[3],

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[3]The Five Civilized Tribes were Seminole, Cherokee, Creek, Choctaw and Chickasaw, all of which allied themselves with the Confederacy during the Civil War and attempted to maintain slaves following the War. As a result of the Tribes, disloyalty to the United States during the Civil War all territory owned by the Tribes was forfeited. The status of the Tribes was reestablished under Treaties entered in 1866.

The Treaties of 1866 came into existence as a result of the post-civil war reconciliation effort, and provided a means for the Five Tribes to re-establish their government-to-government relations with the United States, following their ill-concerned alliances with the Confederate States of America and long history of slavery. The Treaties addressed a number of issues for readmitting the Five Tribes back into the federal union, including amnesty for all war crimes committed by its citizens, establishment of federal courts in the Indian territory, the settlement of "civilized friendly Indians" within the Tribes and the adoption of all freed slaves and free colored persons into the Tribes as tribal citizens. Article IX of the Cherokee Treaty is an example, and provides:

> The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by

have pursued claims against the United States for breaches of fiduciary duty in relation to trust property held by the Department of Interior. Petitioners alleged in 2006 in the United States Court of Federal Claims, mismanagement by the Department of Interior of trust property owned by Petitioners' Freedmen ancestors, which has caused

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> an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree **that all freedmen who have been liberated by voluntary act of their former owners by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents there in, or who may return within six months, and their descendants, shall have all the rights of native Cherokees**: Provided, that owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.

Under the 1866 Treaties, Freedmen and their descendants, were to receive all the rights of native Tribe members. "All rights" can only be read to mean all rights, including but not limited to, the right of citizenship. See, Appellant Brief, Cherokee Nation v. Nash, Case No. SC-2011-02, Supreme Court of the Cherokee Nation,(emphasis added).

economic harm to Petitioners. On January 15, 2008, the Court of Federal Claims dismissed Petitioners' claims. The Court determined that Petitioners' claims were barred by the six year statute of limitation applicable to claims under the Indian Tucker Act, 28 U.S.C. §2501 and that no general trust relationship existed between the United States and Petitioners' ancestors, the Freedmen. The United States Court of Appeals affirmed the District Court on March 30, 2008. The United States Supreme Court declined review on January 19, 2010. A Petition for Rehearing was denied by the United States Supreme Court on March 22, 2010.

On March 22, 2010, Petitioners filed a Motion for Reconsideration in the United States Court of Claims based upon findings made in the case of Elouise Cobell, et al. v. Salazar, United States District Court for the District of Columbia, Case No. 96-1285, that contrary to the January 15, 2008 Opinion of the Federal Court of Claims, the 1866 Treaties, the Dawes Act and Curtis Act, created fiduciary duties between the Department of Interior and the Five Civilized Tribes. In addition, in Cobell the Court determined that the Tucker Act six year statute of limitations was not a bar to breach of fiduciary duty claims under the Curtis Act by

members of the Five Civilized Tribes. Five Civilized Tribe members are included within the class certified in the Cobell breach of fiduciary duty action against the United States.

Notwithstanding the direct conflict between the Court of Federal Claims and the United States District Court for the District of Columbia concerning whether fiduciary duties arose under the 1866 Treaties and the Curtis Act between the United States, the Five Civilized Tribes and their members, which by operation of the civic parity provisions of the 1866 Treaties would also apply to Freedmen of the Five Civilized Tribes, the Court of Claims again dismissed Petitioners' breach of fiduciary duty claims for trust mismanagement by the United States.

Petitioners appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit dismissed Petitioners' second appeal. However, prior to dismissing, the Appellate Court for the Federal Circuit required the United States to respond to Petitioners' Motion for Rehearing and Rehearing en banc. The Court of Appeals dismissed Petitioners' second appeal on December 14, 2011.

During the pendency of Petitioners' request for reconsideration in the Federal Court of Claims,

Congress enacted the Claims Resolution Act of 2010, authorizing settlement of Cobell v. Salazar.

Among the class of persons covered by the Cobell settlement are:

> Individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Administration Claim of a Land Administration Claim prior to the filing of the Amended Complaint), had a recorded or other demonstrable beneficial ownership interest in land held in trust of restricted status, regardless of the existence of an IIM account and regardless of the proceeds, if any, generated from the trust land, except that the Trust Administrative Class does not include beneficiaries deceased as of September 30, 2009 and does not include the estate of any deceased beneficiary whose IIM Accounts or other trust assets had been open in probate as of September 30, 2009.

See, Class definition Cobell v. Salazar, supra. (Emphasis added.)

In Cobell it was alleged that the United States had breached fiduciary duties to the Cobell class through the following conduct:

> Defendants, the officers charged with carrying out the trust obligations of the United States, and their predecessors, have grossly mismanaged, and continue grossly to mismanage, such trusts and trust assets in at least the following respects, among others:
>
> (a) They have failed to keep adequate records and to install an adequate accounting system, including but not limited to their failure to install an adequate accounts receivable system;
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> (b) They have destroyed records bearing upon their breaches of trust;
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> (c) They have failed to account to the trust beneficiaries with respect to their money;
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> (d) They have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries; and
>
> (e) They either have unlawfully obstructed the appointment of a qualified and competent Special Trustee

or unlawfully have prevented the Special Trustee for American Indians, appointed pursuant to the American Indian Trust Fund Management Reform Act of 1994 ("the 1994 Act"), P.L. 103-412, 108 Stat. 4239, codified to 25 U.S.C. §§ 162a(d) and 4001-4061, from carrying out duties and responsibilities conferred upon him by law to correct their unlawful practices and procedures with respect to IIM accounts.

(f) They have mismanaged trust funds held or to be held for individual Indians in the following respects:

(1) They have failed to collect or credit funds owed under leases, sales, easements or other transactions, including without limitation, having failed to collect or credit all money due, to audit royalties and to collect interest on late payments;

(2) They have failed to invest trust funds;

(3) They have underinvested trust funds;

(4) They imprudently have mismanaged and invested trust funds;

(5) They have made erroneous or improper distributions or disbursements of trust funds, including to the wrong person or account;

(6) They have charged excessive or improper administrative fees;

(7) They have misappropriated, or failed to take steps to prevent the misappropriation of trust funds;

(8) They have withheld unlawfully the distribution and disbursement of trust funds;

(9) They have deposited trust funds above FDIC insurance coverage in accounts in failed depository institutions, resulting in lost principal and interest;

(10) They have failed to control, or investigate allegations of theft, embezzlement, misappropriation, fraud, trespass, and other misconduct regarding trust assets and have failed to make restitution or seek compensation for same;

(11) They have failed to pay or credit to IIM Accounts accrued interest, including interest on special deposit accounts;

(12) They have lost funds and investment securities as well as income or proceeds earned from such funds or securities;

(13) They have lost funds through accounting errors;

(14) They have failed to deposit or disburse funds in a timely fashion; and

(15) They have engaged in conduct of like nature and kind arising out of Defendants' breaches of trust in connection with mismanagement of IIM Trust funds.

(g) They have mismanaged land and resources, including oil, natural gas, mineral, timber, grazing, and other resources and rights (the "resources"), on, and corresponding subsurface rights, in land held in trust for the benefit of Plaintiffs in the following respects:

(1) They have failed to lease land, approve leases, or otherwise make trust lands or assets productive;

(2) They have failed to obtain fair market value for leases, easements, rights-of-way or sales;

(3) They have failed to prudently negotiate leases, easements, sales or other transactions;

(4) They have failed to impose and collect penalties for late payments;

(5) They have failed to include or enforce terms which require that land and other natural resources be conserved, maintained, or restored;

(6) They have permitted loss, dissipation, waste, or ruin, including failing to preserve trust land whether involving agriculture (including but not limited to failing to control agricultural pests), grazing, harvesting (including but not limited to permitting overly aggressive harvesting); timber lands (including but not limited to failing to plant and cull timber land for maximum yield), and oil, natural gas, mineral resources or

other resources (including but not limited to failing to manage oil, natural gas, or mineral resources for maximum production);

(7) They have allowed the misappropriation of trust assets;

(8) They have failed to control, investigate allegations of, or obtain relief in equity and at law for, trespass, theft, misappropriation, fraud or misconduct regarding trust land;

(9) They have failed to correct boundary errors, survey or title record errors, and have failed to properly apportion and track allotments; and

(10) They have engaged in conduct of like nature and kind arising out of their breaches of trust in connection with mismanagement of trust lands.

See, Cobell Settlement, supra.

Given that equal status was conferred upon Petitioners under the 1866 Treaties as upon members of the Five Civilized Tribes and that the conduct of

the United States with respect to breaches of fiduciary duty in relation to land allotments under the 1866 Treaties and the Curtis Act was the same, Petitioners moved to intervene into the Cobell action for purposes of objecting to the settlement on Equal Protection grounds. Petitioners also filed an action in United States District Court for the Southern District of Ohio challenging the constitutionality of the "CRA" on equal protection grounds. That is to say, Petitioners question why the Curtis Act and 1866 Treaties created fiduciary duties between Native Americans and the United States, but not the Freedmen. Petitioner's also questioned why the "Repudiation Rule" operated to save Cobell class members breach of fiduciary duty claims, but not the breach of fiduciary duty claims of Petitioners, persons entitled to equal treatment under the 1866 Treaties as Five Civilized Tribe members of the Cobell class. The Cobell court denied Petitioners Motion to Intervene in Cobell for purposes of appearing at the Fairness Hearing to object to the Cobell Settlement on racial discrimination grounds. The United States Court of Appeals affirmed the district court's dismissal and denied rehearing on July 13, 2012.

This Petition for Certiorari pertains to the Sixth Circuit's affirmance of the S.D. Ohio dismissal of Petitioners' Equal Protection Claim.

A. STATEMENT OF THE FACTS

During the Civil War, the Five Civilized Tribes, the Seminole, Cherokee, Choctaw, Creek and Chickasaw, entered into treaties with the Confederacy, severing their relations with the United States. As a result of these acts of disloyalty the Five Civilized Tribes forfeited all tribal lands and their status as government wards. In 1866, the United States made treaties with each of the Five Civilized Tribes, setting the terms on which the tribes would continue to exist within the United States and regain their land and trust beneficiary status. All of the treaties with the Five Civilized Tribes eradicated slavery within the tribes and provided that the emancipated "Freedmen" would have equal rights within the tribes. Although these Treaties had a common purpose, the provisions of the various Treaties were not identical. However, under the treaties the Freedmen were emancipated and given civic status equal to Indians whether the Freedmen were adopted into the Tribes or not. The following is a summary of the provisions of the treaties pertinent to this action.

The Seminole Treaty: The United States entered into its first antebellum treaty with the Seminole in 1866. 14 Stat. 755. The treaty provided that the Freedmen members would have rights equal to those of Seminoles by blood:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

14 Stat. 755, 756. In 1898, the Seminole entered into an agreement with the United States to allot its land held in common to individual members. 30 Stat. 567. The agreement made no distinction between the Freedmen members and the members by blood.

The Creek Treaty: The United States' treaty with the Creek is similar to its treaty with the Seminole. It provided that the Creek Freedmen would have all the rights of members by blood, including the right to share equally in land and funds:

> [A]nd inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter those persons lawfully residing in said Creek country under their laws and usages...shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatever race or color, who may be adopted as citizens or members of said tribe.

14 Stat. 785, 786. In 1897, the United States and the Creek Nation agreed to terms on which the Creek Nation's common lands would be allotted. 30 Stat. 496, 514. The agreement made no distinction

between Creeks by blood and the Freedmen. In 1901, the Creek entered a second agreement with the United States. 31 Stat. 861. Like the first, this agreement made no distinction between Creek Indian and Freedmen members.

The Cherokee Agreement: The United States entered into a treaty with the Cherokee in 1866. The treaty of 1866, inter alia is a basis for Appellants' claims here. A treaty with the Cherokee Tribe and the United States was concluded on July 19, 1866. Article IV of that Treaty provided that "...[a]ll of the Cherokee freed Negros who were formerly slaves to any Cherokee, and all free Negros not having been slaves, who resided in the Cherokee nation prior to June 1, 1861...shall have the right to settle in and occupy the Canadian district...and will include a quantity of land equal to 160 acres for each person who may so elect to reside in the territory..." Thus, as in the case of the Choctaw and Chickasaw Freedmen, the Cherokee Freedmen were "adopted into the tribe rand], [c]onsequently, they and their descendants were entitled to participate in the allotment of lands equally with members of the tribe by blood." Ross v. Ickes, 130 F.2d 415 (D.C.C. 1942).

The Choctaw and Chickasaw Treaty: The United States entered into a treaty with the Choctaw

and Chickasaw Tribes on April 28, 1866. 14 Stat. 769. This treaty provided that the tribes had a choice about how to deal with their Freedmen. If the tribes made their Freedmen members within two years, the tribes would receive a portion of a trust fund, and the Freedmen would receive 40-acre allotments once the Choctaw, Chickasaw and Kansas Indians had made their selections. If the tribes did not adopt their Freedmen and the Freedmen voluntarily removed themselves to other land within Indian Territory, the tribes would get nothing and the [Freedmen would receive a portion of the trust fund. Id] The Choctaw and Chickasaw resisted adopting the Freedmen, so the Freedmen were not entitled to the 40-acre allotments. In 1883, the Choctaw adopted the Freedmen into the tribe and declared each was entitled to 40 acres. The tribe made no allotments at that time either. Choctaw Nation of Indians v. United States, 318 U.S. 423, 425 (1943). The Chickasaw never did adopt their Freedmen into the tribe.

In 1897, the United States entered into an agreement with the Choctaw and Chickasaw whereby their lands held in common would be allotted. 30 Stat. 496, 505-506. This agreement provided that the Choctaw Freedmen would receive 40-acre allotments. 30 Stat. 506. Before any allotments were made, the

United States entered into another agreement with the tribes. This second agreement also provided that Choctaw and Chickasaw Freedmen would receive 40 acres. 32 Stat. 641.

Petitioners are descendants of persons held in bondage by ancestors of the Five Civilized Indian Tribes, the Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes. Petitioners' ancestors received allotments. In numerous cases, by reason of age or lack of education, royalties from these allotments should have been held in trust by the United States. This did not occur and the United States has failed to maintain records.

Under terms of post-antebellum treaties between the Five Civilized Tribes and the United States, and subsequent legislation, most notably the Curtis Act of 1898[4], members of the Five Civilized Tribes and persons formerly held in bondage by these

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[4]The Curtis Act of 1989 was an amendment to the United States Dawes Act that brought about the allotment process of lands of the Five Civilized Tribes of Indian Territory; the Choctaw, Chickasaw, Muscogee, Cherokee, and Seminole. These tribes had been previously exempt from the 1887 General Allotment Act, also known as the Dawes Act (also known as the Dawes Severalty Act, named for its sponsor and author Senator Henry Laurens Dawes). By effectively abolishing tribal courts and tribal governments in the Indian Territory of Oklahoma, the Act enabled Oklahoma to attain statehood, which followed some years later.

Tribes or living among them (Freedmen), received allotments of, forty, sixty, eighty or one hundred sixty acre tracts of land. Trust responsibilities arose between the Freedmen and the United States in relation to these allotments. There is a "general trust relationship between the United States and the Indian people," United States v. Mitchell, 463 U.S. 206, 225 (1983), which stems from "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S. 286, 296 (1942). However, the existence of this general trust relationship does not create a specific fiduciary duty to protect the rights of the Freedmen. As this D.C. Circuit has held:

> While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. United States v. Mitchell, 463 U.S. 206, 224-25 (1983) (Mitchell II); United States v. Mitchell, 445 U.S. 535, 542 (1980) (Mitchell I). We agree with the district court that an

> Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." National Wildlife Fed'n v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980).

Shoshone Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995); see also Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006), cert denied, 128 S.Ct. 176 (2007).

The basic elements of a fiduciary relationship must still be found. A fiduciary relationship, including the one between the United States and Indians, requires a trust corpus. See, e.g., Mitchell, 463 U.S. at 224; United States v. Friday, 525 F.3d 938, 957 (10th Cir. 2008); Intertribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1995). The Freedmen's citizenship rights within the Five Tribes do not form a trust corpus. Nero v. Cherokee Nation of Oklahoma, 892 F. 2d 1457, 1465 (10th Cir. 1989); Wheeler v. United States Dep't of Interior, 811 F.2d 549 (10th Cir. 1987).

However, to the extent the Cobell Court determined that a trust corpus exists between the United States and the Five Civilized Tribes, an equivalent trust corpus exists as to the Freedmen by reason of the citizenship parity provisions of the 1866 Treaties.

The question in this appeal is whether the "CRA" violates the Equal Protection Claim.

B. COURSE OF PROCEEDINGS

On January 31, 2011 the Southern District of Ohio dismissed Petitioner's challenge to the "CRA". On July 13, 2012, the Sixth Circuit affirmed.

C. REASONS FOR GRANTING THE PETITION

Certiorari should be granted here for the following reasons:

1.) On January 12, 2012, the United States Court of Appeals for the Federal Circuit held in the Shoshone Indians Tribe of Wind Tower Reservation Wyoming v. United States. Case No. 2010-5150. A cause of action for breach of trust, ...only "accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." Shoshone II, 364 F.3d at 1348 (emphasis added) (citing Hopland Band of Pomo Indians, 855 F.2d at 1578; Restatement (Second) of Trusts § 219 (1992);

Cobell v. Norton, 260 F.Supp.2d 98, 105 (D.D.C.2003); Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238, 1249 (N.D.Ca1.1973)). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. Jones v. United States, 801 F.2d 1334, 1336 (Fed .Cir.1986) (citing Philippi v. Philippe, 115 U.S. 151, 157 (1885)); see also Shoshone II, 364 F.3d at 1348 ("[P]lacing the beneficiary on notice that a breach has occurred," is sufficient to establish the beneficiary's knowledge of the repudiation).

It perpetuates past racial discrimination against Petitioner to acknowledge the claims of Native Americans but not Freedmen.

2) Congress determined in Public law 108-108:

> notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting

> of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Emphasis added). This trust fund provision serves to stop the statute of limitations period from beginning to run on claims involving losses or mismanagement of Indian trust funds until an accounting has been provided.

Petitioners here have never been provided an accounting and therefore the determination that Petitioners' claims are barred by the statutes of limitations is erroneous.

In Felter v. Kempthorne, 679 F. Supp 2d 1 (D.D.C.2010), the Court held that in order to determine whether a statute applies retroactively, a court, "first look[s] for an express command regarding the temporal reach of the statute,...or, in the absence of language as helpful as that, determine[s] whether a comparably firm conclusion can be reached upon the basis of the normal rules of [statutory] construction." Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936, 939 (D.C. Cir. 2009) (internal quotation marks and citations omitted); see also Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006)); Martin v. Hadix, 527 U.S. 343, 354 (1999)

(stating that a court looks for an unambiguous directive that the statute should be applied retroactively). "[C]ases where [the Supreme] Court has found truly 'retroactive' [applicability] adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.'" INS v. St. Cyr, 533 U.S. 289, 316-17 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)). Next, if the statute contains no such express command and a firm conclusion cannot be otherwise reached, the court must determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994)). Finally, if the statute has a retroactive effect, a court then looks to whether the general "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence," id. at 265, is overcome because "Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 946 (1997). "The 'principle that the legal effect of conduct should

ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" Id. at 946 (quoting Landgraf, 511 U.S. at 265). "'Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1971 (2009) (quoting Landgraf, 511 U.S. at 272-73). Legislative history can be considered when assessing Congress' intention regarding retroactivity. Lytes, 572 F.3d at 939-40 ("If applying the statute would have such a disfavored effect, then we do not apply it absent clear evidence in the legislative history that the Congress intended retroactive application.").

A statute can contain an express command regarding its temporal scope even if it does not contain the word "retroactive." Language in a provision stating that it "'shall apply to all proceedings pending on or commenced after the date of enactment . . . unambiguously addresses the temporal reach of the statute.'" Martin, 527 U.S. at 354 (quoting Landgraf, 511 U.S. at 280); see also Sandhvani v. Chertoff, 460 F. Supp. 2d 114, 121 (D.D.C. 2006) (noting that the amendment was

retroactive where Congress stated that the change was "effective immediately and applicable to cases in which the final administrative order of removal . . . was issued before, on, or after the date that the [original] Act was enacted" (internal quotation marks omitted)). Courts have also found the statutory language that "[n]otwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996" to apply retroactively to change the definition of an aggravated felony under the Immigration and Nationality Act, regardless of the conviction date. Martinez v. INS, 523 F.3d 365, 370 (2d Cir. 2008); United States v. Kwan, 407 F.3d 1005, 1009 (9th Cir. 2005).

P.L. 108-108 applies "to any claim in litigation pending on the date of the enactment of this Act." Therefore, the statute of limitations "shall not commence to run" on a claim until the plaintiffs have been furnished with an accounting. Even though the language does not contain an explicit directive to revive stale claims, it is identical to the language that the Supreme Court hypothesized would indicate an express command for retroactive application in Martin and Landsgraf.

Legislative history reveals that Congress intended this retroactive effect. While P.L. 108-108 was passed in 2003, the original version of this Indian trust fund provision was passed in 1990. Cobell, 30 F. Supp. 2d at 43 n.20. The legislative history of the original 1990 trust fund provision reflected an intent to:

> extend the statute of limitations with relation to Indian trust fund management. Since the audit and [reconciliation] of such funds, as directed by the Committee, will require at least 5 years to complete, it is possible that the statute of limitations for any significant discrepancies uncovered during this process may have expired by the time such audits are completed. Therefore the Committee has agreed to provide this extension in order to protect the rights of the tribes and individuals involved should such protection prove necessary.

Certiorari should be granted for the reasons both appellate courts failed to give credence to PL 108-108.

3) Certiorari should also be granted for the reason the Sixth Circuit failed to give credence to the

Act of May 27, 1908 which contains express directives from Congress to the Department of Interior to manage and protect allotments issued under the Curtis Act to Freedmen minors, such as George Curls.

Specifically the Act states:

> SEC 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate

in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of May be appointed said minors.[sic]. The probate courts may, in their discretion appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further restricted lands, authorized, and it is

made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, with out charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance,mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

4) Failure to grant review will result in the perpetuation of past racial discrimination against the Freedmen[5].

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[5]For evidence of overt racial discrimination by the United States against Freedmen, See, August 11,1938 correspondence from the

1. PETITIONERS HAVE BEEN DENIED EQUAL PROTECTION OF THE LAW

Controlling precedent firmly establishes that it is a violation of the Fifth Amendment for the

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Commissioner of Indian Affairs to the Solicitor United States Department of the Interior and October 1,1941, Response , Exhibit C to United States Court of Appeals Case No.11-5158, D.C.Circuit Court of Appeals, Docket No.1351644. In this correspondence officials in the United States Department of Interior conspire in writing to formulate means to circumvent the provisions of the 1866 Treaties by excluding, on race-based grounds ,Freedmen from tribal citizenship. Specifically, the Commissioner of Indian Affairs requests that the Department Solicitor opine concerning the status of the Freedmen of the Five Civilized Tribes in order to "find some way to eliminate the Freedmen". The Solicitor's legally erroneous Response to the Commissioner's request was that the Tribes could use the Oklahoma Welfare Act of June 26, 1936, to eliminate Freedmen from tribal membership. This correspondence is additional evidence of the blatant and historically racially discriminatory attitude of the United States towards Freedmen. Compare the 1938 correspondence to that at Appendix H issued September 11, 2011, by the Assistant Secretary of Interior for Indian Affairs, Larry Echohawk, explaining the historically recognized status of Freedmen as follows:"The Department's position is, and has been, that the 1866 Treaty...vested...Freedmen with rights of citizenship in the Nation..."The Tribes and the United States were attempting to include quantum of Indian blood as a condition to tribal citizenship. Blood quantum was never a criterion for tribal citizenship under the 1866 Treaties. The renewed focus on blood quantum is part of an ongoing racially-based strategy to deprive Freedmen of tribal benefits and land.

government to engage in activity which perpetuates past unlawful racial discrimination. The actions of the United States in refusing to permit Petitioners to proceed in the Court of Claims while simultaneously settling Cobell, without some provision to address Petitioners' claims, will perpetuate past unlawful racial discrimination. As it stands, Cobell class membership, conditioned on discriminatory criteria developed in the past, and only redressing mismanagement of royalties from allotments and Individual Indian Money accounts for the descendants of Native American members of the Five Civilized Tribes who held slaves, but failing to redress mismanagement of royalties from allotments belonging to slaves of the Five Civilized Tribes, the ancestors of Petitioners here, is unlawful racial discrimination. The Equal Protection Clause condemns this form of racial discrimination. It has been stated that:

> Vestiges of past discrimination do not exist gratuitously or only to a small degree - creating systematic, pervasive, and enduring vestiges is what effective discrimination was and is all about. Like a terrorist pouring poison into a city water system, an official who engages in racial discrimination

> intentionally sets in motion events that will cause harms that he cannot predict to victims whom he will never know. Because it is this evil that the Fourteenth Amendment was designed to halt. the Equal membership under the 1866 Treaties. This condition was part of a renewed strategy to defraud Freedmen. Protection Clause should be construed to provide redress for present injuries caused by past discrimination. The passage of time between the discriminatory intent and the resulting harm is irrelevant both to the purpose and to the effect of that discrimination and thus cannot be permitted to limit the protection afforded by the Constitution.

"Perpetuation of Past Discrimination," Eric Schnapper 96 Harv. L. Rev. 828, 839 (1982-1983), citing, Keyes v. School District No. 1, 413 U.S. 189, 210-11 (1973), which states:

> "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"

Historically, the United States' failure to properly manage and account for funds derived from royalties on the allotments of the ancestors of Appellants was in large measure the product of intentional racial discrimination. The exclusionary injuries resulting from those actions continue to exist today. Implementation of the Settlement on the basis of discriminatory criteria, caused or developed by Department of Interior officials one hundred fifty years ago, perpetuates this unlawful racial discrimination and exclusion, and is therefore violative of the Fifth Amendment. Specific examples of the operation of these past practices are outlined below.

Discrimination of the nature being perpetuated here was addressed by the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) as follows:

> When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with

> appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the...general Welfare of the United States" and "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment...
>
> Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant...Congress may employ racial or ethnic classifications in exercising its spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective or remedying the present affects of past discrimination is narrowly tailored to the achievement of that goal.

Id.

In reviewing an Act that relies upon ethnic and racial classifications, Courts should engage in a City

of Richmond v. Croson, 488, U.S. at 500 type analysis.

A Court should "undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the Croson Court... Id. Although Congress is entitled to no deference in its ultimate conclusion that race-based relief is necessary, "the fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." Id. at 1322 n. 14 (citing Croson, 488, U.S. at 500). In Adarand v. Pena, 515 U.S. 200 (1995) it was held that strict scrutiny applies to federal affirmative action programs. Strict scrutiny must also be applied to a review of the "CRA", where as here it creates and relies upon racial classifications.

The "CRA" perpetuates past racial discrimination by the United States which arose from the disparate treatment accorded to members of the Five Civilized Tribes and their slaves. By reason of past racial discrimination by the United States, it is a violation of the Fifth Amendment on one hand to settle claims with Native American slave masters based on the continued existence of trust responsibilities and on the other hand deny the existence of trust responsibility to the descendants of

their slaves, when these trust obligations both have their roots in the same 1866 Treaties and subsequent legislation.

As was noted by Spencer Overton in "Voices from the Past: Race, Privilege and Campaign Finance" 79 N.C. L. Rev. 1541 (2000-2001)

> Governmental entities have long used racial identity to define and allocate property rights. Official government action in the form of proclamations, statutes, and court decisions took land from Native Americans based on their racial and cultural identity, and reallocated this property to private actors who were white. The law contemplated and enforced the appropriation of labor from African Americans through slavery, which primarily benefited white private actors. The law promoted immigration from European countries, essentially determining the racial makeup of those who would count as full citizens in the United States. As white Americans moved west in the 1800s, the law tolerated discriminatory practices in southwestern states that stripped Mexican Americans of any opportunities to own property. In addition to conquest, slavery, and immigration

> policy, well-known public and private racial barriers in education, employment, and business have disadvantaged people of color while enuring to the benefit of others through artificially reduced competition.
>
> Other, less apparent factors also contribute to the perpetuation of economic disparities between whites and people of color. The benefits given by facially discriminatory government policies may be multiplied by facially neutral government policy and economic markets, and may thus have a greater impact today than they did when originally enacted and enforced.

Id.

Here the United States exercised trust oversight, initially utilizing racial and ethnic criteria. Due to discriminatory government policies, accounts were not established for statutorily eligible Freedmen despite their entitlement under the 1866 treaties to these accounts. The royalties due to minors were never invested, records were not kept as required under the Act of May 27, 1908, and restrictions on allotments to Freedmen minors were violated with impunity. Now the United States seeks to perpetrate this historic racial discrimination against the

Freedmen by redressing its breaches of trust to Native Americans, while denying any trust obligations are owed to the Freedmen.

2. HISTORIC RACIAL DISCRIMINATION AGAINST PETITIONERS' ANCESTORS

Abundant evidence is available to support Appellants' claim of historic racial discrimination against their ancestors. For instance, the grandfather of Appellant Leatrice Tanner-Brown, George Curls, was enrolled on the Rolls of the Cherokee Freedmen, under the Dawes Act on July 1, 1902.

Under the Act of May 27, 1908, restrictions against alienation of Freedmen allotments, such as the allotments to Mr. Curls', were not removed. Accordingly, any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of the Sections 2 and 6 of the 1908 Act. Instead the Interior Department has no record of these royalties and a guardian was not appointed for Mr. Curls as required by the 1908 Act. These failures were not innocent. They were the result of a deliberate strategy to swindle land from Freedmen.

A pervasive system of corruption and racism was ongoing in Indian Country during the period following the discovery of oil and Oklahoma Statehood, the timeframe when Mr. Curls received his allotment. See, *And Still Waters Run*, Angie Deboe, Princeton University Press, 1940. One of the primary methods utilized to circumvent restrictions on alienation of allotments was the practice of allotting land to mixed blood Indians and Freedmen under the Act of 1908. By granting allotments to Freedmen, the protections designed to prevent illiterate and uneducated allottees from being swindled by unscrupulous persons could be overcome. In the case of Mr. Curls, he was a resident of Chelsea, Oklahoma, in Rogers County. His allotment was granted while he was a minor in distant Nowata County in the midst of oil rich Cherokee Country.

According to Angie Deboe:

> The Federal Government also assumed the administration of the affairs of the individual allottee. Because of their inexperience in the control of real estate, the agreements and the various acts of Congress had attempted to safeguard the Indians in the leasing and sale of their allotments.

Leases for agriculture and grazing purposes were restricted in all the tribes. The Seminole Agreement contained regulations to protect the allottee, and gave the Chief supervisory authority. The Atoka Agreement contained similar safeguards but its enforcement was left to the Federal courts. The Creek Supplemental Agreement and the Cherokee Agreement specified that grazing leases for more than one year and agricultural leases for longer than five years should be subject to Departmental approval. In 1905 Congress authorized the Secretary to investigate any lease of allotted land in the Indian Territory and to refer cases of apparent fraud to the Attorney-General. The Five Tribes Act provided that all lease contracts longer than one year for the surplus of fullbloods were subject to Departmental approval, and that the homesteads of full bloods could be leased only in cases of old age or infirmity through special authorization by the Secretary.

The Department made elaborate regulations for the approval of long-tenure Creek and Cherokee leases under the agreements of 1902, but few were submitted. Most lessees preferred to secure contracts from the individual

allottee by taking chances on a fraudulent lease by making a legal lease for a shorter period. In 1906, 1,740 leases were rewritten by the Agency, doubling or even trebling the amount of the rental contract, and fifty were referred to the courts for cancellation; but this number constituted only a small proportion of the hundred thousand allotments.

The Department exercised greater supervision over mineral leases. No important leasing occurred in the Choctaw, Chickasaw, and Seminole nations, but the oil and gas development of the Cherokee and Creek country was one of the spectacular consequences of allotment.

The Creeks and Cherokees were so strongly opposed to the tribal ownership of minerals provided by the Curtis Act that the Department rejected all applications for leases, except in special cases, until agreements could be adopted in accordance with the Indians' desires. A few informal permits were granted to Cherokee citizens to mine coal, chiefly for local consumption; a few coal operators working in the Creek Nation were allowed to continue; and finally in 1902 thirteen oil and gas

leases were approved because the lessees showed that they had secured them from the Cherokee government before the passage of the Curtis Act. After the ratification of the Cherokee Agreement these tribal leases were changed to the individual form.

The first oil in the Indian Territory was discovered west of Chelsea by Edward Byrd, who had secured a contract from the Cherokee Nation. He had six wells, drilled to a depth of 165 feet, and each produced a barrel a day. Oil in paying quantities was discovered in the Red Fork section of the Creek Nation in 1901, and great excitement resulted. By that time the Curtis Act had been superseded by the Creek Agreement. This compact provided for the individual ownership of minerals, but since it contained no regulations for leasing and forbade the allottee to alienate his land, the Department ruled that all leasing was illegal. The oil development was accordingly halted, but the town lots in Red Fork and Tulsa were appraised and sold in 1902 and drilling was resumed within the town sights.

Just at that time the Department was given complete control of mineral

leasing by the ratification of the Creek Supplemental and the Cherokee agreements. Detailed regulations were adopted in 1903, and leasing developed rapidly. By 1907 there were 4,366 oil and gas leases in effect, covering about 363,000 acres. A deep field extended from the Kansas line along the western boundary of the Cherokee Nation through the Bartlesville and Dewey district, and reached sixty-five miles south to Tulsa in the Creek Nation. A shallow field included Chelsea and Coody's Bluff in the Cherokee nation, and extended up the Verdigris River almost to the Kansas line. The Glenn Pool, a small tract south of Tulsa discovered in 1905, had become one of the most spectacular producing pools in the world.

The lessees began to bid against each other by offering bonuses to the allottees. This amount usually ran from three to five dollars an acre, but in 1907 one minor creek received $43,000 for the lease of a twenty-acre tract in the Glenn Pool. In 1907 one Indian was receiving over $3,000 a month in royalty, several were receiving more than $2,000 each, and many had monthly incomes of over $3,000. Ironically enough, the main Creek

development occurred in the fullblood sections, especially in the broken country where the Snakes had been arbitrarily allotted and where the "newborns" had received the worthless land that remained after the desirable allotments were taken. The grotesque tricks of chance that were to attract national attention to the Five Tribes Indians were already apparent...

The Department collected the royalty from the lessee and paid it to the fortunate Indian by a monthly check. The collections began with $1,300 from the first thirteen leases in 1903-1904, rose to $91,624 in 1904-1905, and soared to $323,555.40 in 1905-1906 and $775,489.15 in 1906-1907.

Oil men complained loudly of the delay occasioned by Departmental "red tape" in securing approval of a lease, but apparently the industry was not seriously retarded. The regulations aimed to prevent monopoly control, by limits on acreage and strict supervision of transfers; and judging from the alternate expressions of approval and complaint, and the failure of certain attempts to evade them, they were eminently successful. As a result the oil industry was a free-for-all scramble,

> with the great Mellon and Standard interests, the young oil worker who could scrape together enough money to drill a well of his own, and the gambler who must try one more "sure thing," all entering into the most unrestricted rivalry. The wild, speculative, active spirit of the oil field gave a lurid phase to the early development of the Indian Territory.

See, Angie Deboe, "And Still the Waters Run", (Princeton University Pres., 1940) p. 85.

Although George Curls did not receive his allotment until 1910, the discovery of oil led to political pressure to make allotments freely alienable. Due to this context, in violation of the fiduciary duties to Freedmen who were often less educated and sophisticated than their former slave masters, the United States, on racially motivated grounds, through the Act of 1908 permitted these allottees to be exploited by grafters and speculators anxious to obtain oil rich lands for little or no payment to allottees. The allotments belonging to George Curls were in Nowata County, as stated in the midst of this oil rich territory. The Curls allotment is located North of the lucrative Alluwe Oil Field in the vicinity of the Cherokee Shallow Sands Oil Fields where oil

was located a mere thirty-six feet below the surface [6] in 1904.

Allotments in the hands of minor Freedmen were susceptible to being transferred, free from the restrictions placed upon allotments in the hands of Native Americans.

George Curls' Nowata County allotments were located in one of the oil rich areas that according to Deboe was ripe for exploitation.

According to Deboe:

> The Five Tribes Act provided that all the rolls should close March 4, 1907. But some duplications were afterwards cancelled, and 312 names were added by act of Congress in 1914. The rolls included several small groups that had been incorporated into the tribes, especially about seven hundred Euchees, who formed a part of the Creek Nation, and about a thousand Delawares, who had purchased the right to Cherokee citizenship in 1867. The quantum of blood indicated by the rolls is somewhat misleading, partly because of inaccuracies in matters of

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[6]Gary L. Cheatham, "Nowata County, " Encyclopedia of Oklahoma History and Culture, March 28, 2007, and Kenny A Franks, "Petroleum." Id.

this nature at that time seemed unimportant, and partly because fullblood Indians of mixed tribal descent were classed as mixed bloods. The final rolls are as follows:

INDIANS		WHITES	FREEDMAN	TOTAL
Fullbloods	mixed	total		
		Cherokees		
8,703	27,916	36,619	286 **4,919**	41,824
		Choctaws		
7.087	10,401	17,488	1,651 **6,029**	25,168
		Miss. Choc.		
1,357	303	1,660		1,660
		Chickasaws		
1,515	4,144	5,659	645 **4,662**	10,966
		Creeks		
6,858	5,094	11,952	**6,809**	18,761
		Seminoles		
1,254	887	2,141	**896**	3,127
		TOTAL		
26,774	48,745	75,519	2,582 **23,405**	101,506

Deboe, p. 47.

Although the law of 1908 had certainly entrusted [the department] with the responsibility of protecting all minor allottees, it was decided at the very beginning to limit such protection to restricted children. It was, of course, the unrestricted children of Negro, mixed Indian and white, or mixed Indian blood who were subject to the greatest exploitation, but the Department officials believe it wiser to concentrate upon the "real Indians"; as Kelsey said in 1910, with reference to some especially shocking pillaging of unrestricted children, "in my judgment the only remedy ... is for the general citizenship of the State of Oklahoma to awake to the fact that the less intelligent residents of the community are being robbed by the connivance of grafters and dishonest officials, and that sooner or later these people who have been robbed will become public charges, and to avoid this ultimate condition public sentiment with respect to getting what the allottee has must change and the citizens must elect honest officers who will protect the minors, whether they be white, red, or black.

But although the district agents' work was limited by such

> administrative decisions,, there was so much need for reform that like Stolper they accomplished a great deal. During the last six months of the first year of their employment they recovered about $548,306.78. House Reports, 61 Cong., 2 Seas., No. 2273, Vol. II, appendix, 1322-23. Department of the Interior, Annual Report, 1912, II, 486; Indian Office Files, 72545/08 Five Tribes 311. Each agent made a monthly report showing the exact sums that he recovered in specific cases, and these amounts were added to form the totals.
>
> Id.

The $300,000 recovered by the Department on behalf of minor Freedmen in 1910 and $548,306.78 in 1911-12, a point in time when George Curls was a minor allottee with land in oil rich Nowata County, which it is unclear he even knew at the time had been allotted to him, represent royalties that should have been placed in an Individual Indian Money account by the Department. By reason of overtly racist motives discussed above by Deboe, that did not happen. Mr. Curls' allotment is located squarely within an area known to contain oil in 1910 and to be subject to a lease. The racist acts of Interior

Department officials in 1910 against George Curls are being perpetuated by the "CRA" because in order to come within the ambit of the statute the Courts below have stated, one must own an IIM in which funds from restricted allotments were deposited. The past failure of the Department to properly administer royalties owed to George Curls' now is causing renewed harm to Petitioner, Leatrice Tanner-Brown and persons similarly situated. The example of Leatrice Tanner-Brown is just one case. Appellants have evidence of many others e.g. A. Z. Dickson a descendant of Creek Freedmen and Angela Molette, a Choctaw descendant. See, App. Brief.

Under the terms of Sec. 6 of the Act of 1908, royalties from the allotment held by George Curls were under the ultimate supervision of the Secretary of Department of Interior until Curls reached the age of majority. Accordingly, from December 5, 1910, until January 3, 1918, all royalties on Curls' land were restricted and should have been held in trust by the Secretary. Curls was entitled to an Individual Indian Money account for that purpose. According to Deboe, as set forth on p. 85, of her writing, royalties were collected from Cherokee lands in Nowata and Rogers Counties during this period. To the extent these royalties were owed to a minor Freedmen such

as George Curls, the Secretary of Interior had a duty to place the royalties into an IIM. The lawful beneficiaries of proceeds from royalties on restricted allotments, such as Mr. Curls' descendants, are entitled to be included in the Cobell Class or to file an independent action. By reason of the under inclusive interpretation of the "Settlement" Petitioners here were excluded and also told their claims are barred by the statute of limitations.. This exclusion by reason of its reliance on past racially deleterious criteria, renders the Settlement unconstitutional on equal protection grounds.

The United States has continually denied that any obligation is owed to the Freedmen and or their descendants, despite the clear statements in the 1866 Treaties and related legislation that the Freedmen are entitled to the "same rights" as members of the Five Civilized Tribes. The United States analyzes its obligations to Native Americans through a totally different spectrum than its obligations to slaves held by their Native American ancestors. This racial discrimination is at the root of Appellants' claims here.

The United States proposes to settle Cobell, a trust mismanagement claim, but argues that the Freedmen case is barred by the statute of limitations

and that no trust obligations are owed to the Freedmen. This approach by the United States is violative of equal protection.

Under the 1866 Treaties, Freedmen and Five Civilized Tribes members are to be treated equally. However, the United States takes an irrational paternalistic view towards the tribes, while totally rejecting the proposition that any duty whatsoever is owed to the Freedmen. This is pure racial discrimination. In point of fact, as Judge Lamberth determined in Cobell v. Babbitt, 91 F.Supp.2d. 1 (D.D.C. 1999).

> It would be difficult to find a more historically mismanaged federal program than the Individual Indian money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbit testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now plaintiffs in this lawsuit. Generations of IIM trust

beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, whatsoever. "If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined." Cherokee Nation v. Georgia 30 U.S. (5Pet.) 1, 15, 8 L.Ed 25(1831) (Marshall, C.J.)...

As Chief justice Marshall noted in 1831, the United States Indian relationship is "perhaps unlike that of any two people in existence" and marked by peculiar and cardinal distinctions which exist nowhere else." Cherokee Nation, 30 U.S. at 16, 8 L.Ed. 25" In the early 1800s, the United States pursed the policy of "removal", i.e., the relocation of tribal communities from their homelands in the East and Midwest to remote locations in the newly acquired Louisiana Purchase territory. Trial Tr at 846. In 1824, the Bureau of Indian Affairs (BIA) was created to implement that removal policy. [2] Trial Tr. at 152-53;846. For the majority of the Nineteenth Century, the federal government entered into a series of treaties and agreements

identifying the lands owned by the tribes. These treaties and agreements were frequently violated or amended to reduce Indian holdings and to open more land to non-Indian settlers. Trial Tr. at 848-49. During this time period, the tribes held their land communally, so there was very little individual ownership of land. Non-Indian land, whether community or individually owned, could be sold without the approval of the federal government. Trial Tr. at 849-50.

By the late 1870s, the government had embarked upon the reservation era. This era was a particularly miserable time for the Indians because the reservation policy deprived Indians of their traditional economy and made them depend upon the federal government. Trial Tr. at 851-52. During the reservation era, the BIA became the provider of foods and goods to the tribes. Trial Tr. at 852. Hence, by the 1870's, the government had successfully placed Native Americans in a state of coerced dependency.

After this relationship of dependency between the United States and the Indian people was forcibly

established, the allotment era began. Driven by a greed for the land holdings of the tribes, Congress passed the 1887 General Allotment Act, also known as the Dawes Act. See 25 U.S.C. § 348. Through the allotment process established by the Dawes Act, a delegation of American "peace commissioners" would negotiate with the tribes for the allotment of their reservations. The tribes were compensated for their land, and each head of household was allotted some amount of property, usually in 40-, 80-, or 160-acre parcels. The "surplus" lands that were not allotted to Indian individuals were then opened to non-Indian settlement. Trial Tr. at 852-56. Allotted land was held in trust by the United States for the individual Indians. Therefore, the Indians could not lease, sell or burden their property without the approval of the federal government. More importantly, the United States had again successfully managed to deprive the Indian people of more land, this time in return for the creation of a trust status. Between 1887 and 1934, 90 million acres-about sixty-five percent of Indian land-left Indian ownership. Trial Tr. at 857-57.

The United States has conceded what Judge Lamberth found above to be true, but continues to advance defenses against the Freedmen that have been specifically rejected in Cobell. Other examples are: disparate treatment in connection with the government's handling of Petitioners' case, discussions of trust status and the statute of limitations. In regard to these three factors, Cobell held in 30 F. Supp.2d 24 (D.D.C. 1998), as follows:

> Several courts have recognized and as the plaintiffs allege, allegations of breach of trust against government officials with regard to the administration of Indian trusts arise under the federal common law.. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (explaining that federal question jurisdiction existed in an ejectment action brought by Indian plaintiffs based, in part, on federal common law) Vizenor v. Babbitt, 927 F.Supp. 1193 (D.Minn.1996) (holding that, in a suit against the Secretary and Assistant Secretary of the Interior for breach of trust, the claims arose under federal common law); White v. Matthews, 420 F.Supp. 882, 887-88 (D.S.D. 1976) (holding that allegations

of breach of trust against the government in a suit brought by Indian plaintiffs involved federal question jurisdiction under federal common law). Actions arising under federal common law fall within the general federal question jurisdiction conferred by 28 U.S.C. § 1331. Illinois v. City of Milwaukee, 406 U.S. 91, 100, 92 S.Ct. 1385, 31 L.Ed2d 712 (1972) The Supreme Court has repeatedly upheld the existence of a trust relationship between the government and the Indian people. *See e.g.* United States v. Mitchell II, 463 U.S. at 225, 103 S. Ct. 2961. The plaintiffs allege that the government, including the Secretary of the Treasury (to a limited extent) has breached these recognized duties. Therefore, because the plaintiffs' allegations against the Secretary of the Treasury arise under the statutory law and common law of the United States, this Court has "arising under" jurisdiction over the plaintiffs' claim.

Statute of Limitation. First, the case law in this Circuit shows a strong disfavor of making determinations on limitations issues at the motion to dismiss stage. *See* Firestone v. Firestone, 76 F.3d 1205, 1210 (D.C.Cir. 1996) holding that the district court

erred by dismissing a case with prejudice on a motion to dismiss rather than summary judgment); Richards v. Mileski, 662 F.2d 65, 73(D.C.Cir. 1981) ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense.") *Jones*, 442 F.2d at 775 n. 2 ("The issue of when plaintiffs decedent discovered the injury, or through the exercise of reasonable diligence should have known of the facts giving rise to the claim, is properly one for the trier of fact, save for the exceptional case when it can be established that there is no material issue of fact."). Second, even though the Court may properly judge a motion to dismiss for lack of jurisdiction that raises the limitations defense at the juncture under a summary judgment standard, *see In re Swine Flu Immunization prods. Liability Litigation*, 880 F.2d 1439, 1441-43 (D.C.Cir. 1989), to do so would be premature at this point for the same reasons that summary judgment itself is premature Namely, discovery has not been completed and to decide

whether genuine issues of material fact exist at this point would be imprudent.

The Freedmen case was dismissed here without any opportunity for discovery.

> The defendants moved to dismiss the plaintiffs Complaint based upon the defense of laches. The defendants bear the burden of proving this defense. *See* Anzalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp. 782 F.2d 1455, 1459, (8th Cir. 1986). The Court must accept the factual allegations of the Complaint as true on a motion to dismiss for failure to state a claim upon which relief can be granted *See Conley*, 355 U.S. at 45-46, 78 S.Ct. 99. In general, the time period for a laches analysis cannot begin to run until a repudiation of the trust has occurred and the plaintiffs have actual notice of it.. *See* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 964, at 73 (rev.2d ed.1983). The Complaint alleges neither. Therefore, the defendants' motion to dismiss based on the laches defense will be denied. Again, the defendants can raise this argument again if they so choose at the summary judgment stage based upon the contested facts. At this time,

however, the Court cannot accept the defendants' factual allegations.

Not withstanding specific rejection of the statute of limitations argument and affirmation at general trust status, the government continues to argue that the Freedmen are not entitled to the same treatment as the Cobell Plaintiffs, that their claims are barred by the statute of limitations, and the Freedmen do not have a trust relationship with the United States. The arguments applicable to the Native American claims decided by Judge Lamberth are equally applicable for the claims of the Freedmen. However, the United States continues to apply disparate rationale to the respective racial classifications, Native Americans versus Freedmen.

3. THE LOWER COURTS FAILED TO ADDRESS PETITIONERS' REPUDIATION RULE ARGUMENT

As the recent opinion of the Federal Circuit establishes, there is a general "repudiation rule" in relation to equitable trusts that says the statute of limitations will not begin to run on claims to enforce a trust against a trustee until repudiation of the trust relationship. The underlying rationale is that the trustee's possession of trust assets is presumed to be possession for the beneficiary (i.e. the cestui que

trust), and the time should begin to run on claims against the trustee only when the trustee has taken some acts or communicated in a way that is inconsistent with that presumption, so as to provide notice that the trustee has disavowed the trust relationship or is no longer acting in the interests of the beneficiary. The repudiation rule is applicable here for the reason the Freedmen are seeking recovery of trust property itself, and the Government has not already repudiated its trust relationship with the Freedmen more than six years before the lawsuit was commenced.

The repudiation rule has appeared in cases involving Native American trust claims. For example, the Court of Appeals for the Federal Circuit affirmed the Claims Court's dismissal of the Tunica-Biloxi Tribe's claims on the basis of statute of limitations in Tunica-Biloxi Tribe v. United States, 1991 U.S. App. LEXIS 10716 (Fed. Cir. May 17, 1991). The Tribe argued that the claims were saved by the repudiation rule, but the Court rejected that contention because the claims were for nonfeasance or malfeasance, as opposed to claims for "recovery of trust corpus." *Id.* at *3-4. It explained:

The Tribe contends, however, that the statute of limitations does not bar its claim because it is based on breach by the government of a fiduciary obligation and, under the law of trusts, a cause of action for breach does not accrue until the trust is repudiated or terminated. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973) (*citing* United States v. Taylor, 104 U.S. 216 (1881). If we assume a trust relationship existed, the rule relied on by the Tribe is applicable to a claim for recovery of corpus under an express trust, see, e.g., Hopland Band, 855 F.2d at 1578, which is not involved here. At best, the assertions of the Tribe are for nonfeasance or malfeasance of the government as trustee. The Tribe contends that the government "failed as trustee to protect the Tribe's landholdings in Louisiana from being illegally possessed by third persons," [Br. at 2] and "failed to instruct its land commissioners as to the modalities of aboriginal use and occupancy, the applicable Spanish law, and neglected to supervise and oversee the operations of the land commission" which "dispossessed the Tribe [sic] of almost all of its landholdings." [Br. at 2-3]

> In a malfeasance or nonfeasance case, the alleged breach giving rise to the cause of action can be sufficient to repudiate the trust and start the statute of limitations running. Jones v. United States, 9 Cl. Ct. 292, 295 (1985), *aff'd on other grounds*, 801 F.2d 1334 (Fed. Cir. 1986); *see also* Hopland Band, 855 F.2d at 1578. When the government allegedly breached its trust obligations, causing the Tribe to be divested of substantially all of its land over a forty-year period prior to 1840, the claimed trust relationship was effectively repudiated. *Jones*, 801 F.2d at 1336. Accordingly, the Tribe's cause of action was not in any way tolled under trust concepts and the Claims Court's holding that the Tribe's complaint was time-barred under 28 U.S.C. § 2501 was not erroneous.

Similarly, in Jones v. United States, the Claims Court held that the repudiation rule could not be invoked as preserving claims for misfeasance or nonfeasance, explaining:

> This rule is not applicable where the claim is for damages arising from misfeasance or nonfeasance by the trustee, rather than for recovery of the

trust corpus. For example, in United States v. Taylor the claim was for money held in trust for more than six years by the Secretary of the Treasury. The Court explained that the six year statute of limitations did not apply because the proceeds belonged to plaintiff, and the Secretary was under a ministerial duty to hand it over upon application: "The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time." 104 U.S. at 221. *Accord Russell*, 37 Ct. Cl. at 117-18; *Wayne*, 26 U.S. at 289-90. The theory of these cases appears to be that money which is conceded to be held in trust is not a debt. Since entitlement to the trust corpus is not in dispute, ownership need not be established by means of lawsuit to which the statute of limitations applies. Only when the trust is repudiated by the trustee, and entitlement to the corpus (or a portion thereof) is claimed adversely to the beneficiary, does the relationship change to that of debtor and creditor, and a lawsuit then becomes necessary to establish entitlement. At that point

the statute of limitations begins to run. *Taylor*, 104 U.S. at 222; *Russell*, 37 Ct. Cl. at 118; *Wayne*, 26 Ct. Cl. at 289.

The suit here, for damages arising from misfeasance of the trustee, is fundamentally different from *Taylor*, *Russell* and *Wayne*. This is not a dispute as to entitlement to a trust corpus that defendant is holding adversely to plaintiffs. Here, the theory of recovery is based upon damages suffered because of defendant's mishandling of its trust responsibilities, an action akin to breach of contract, as to which the fact and extent of liability would normally be in dispute. G. Bogert, *The Law of Trusts and Trustees* §§ 861-880 (2d ed. 1984). The question is not whether defendant will give plaintiffs what belongs to them, but whether it will be forced to indemnify them for losses suffered in dealings with a third party. Such claims are not covered by the rule expressed in *Taylor* or its progeny, and suit thereon must be brought within six years of defendant's breach of trust. *Menominee*, 726 F.2d at 721-22. In any case, defendant's gross and protracted failure to fulfill its fiduciary responsibility constituted an implicit repudiation of the trust

> relationship, which should have put the beneficiary on notice that she might suffer damages."

9 Cl. Ct. 292, 295-96 (1985) (footnotes omitted).

In Hopland Band of Pomo Indians v. United States, the Court of Appeals for the Federal Circuit held that plaintiffs' claims arising out of an alleged improper conveyance of trust property in 1967 were time barred because a statute passed by Congress had expressly terminated the trust for the plaintiffs almost 20 years before they filed suit in 1986, even though the Government later reaffirmed the trust. 855 F.2d 1573, 1578-79 (Fed. Cir. 1988).

The repudiation rule may be applied to claims that seek recovery of the assets themselves, such as land and monetary benefits. Here, the Freedmen are seeking to recover trust property currently held by the Government, their claims to that property is preserved by the repudiation doctrine. The Government has not expressly repudiated its trust relationship with the Freedmen, thus the statute of limitations has not run.

The lower court failed to address the Repudiation Rule argument at all in its opinion.[7]

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[7]"The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. 'When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.' Rather, the general relationship between Indian tribes and defendant traditionally has been understood to be in the nature of a guardian-ward relationship. 'A guardianship is not a trust.' 'The duties of a trustee are more intensive than the duties of some other fiduciaries.' Furthermore, a guardian-ward relationship implies that, at some point, the ward will begin to take responsibility for handling its own affairs. By contrast, a private trust relationship is a static relationship, with all encompassing duties forever on the trustee." *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 573 (1990) (citations omitted).

In contrast the relationship between the Freedmen and the United States established under the 1866 treaties is that typified by a private trust. The lower courts ignored this critical distinction.

"This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' This principle has long dominated the Government's dealings with Indians." *Mitchell II*, 463 U.S. at 225.

CONCLUSION

By reason of the operation of the Repudiation Rule, PL 108-108, the specific directive in the Act of May 27, 1908 and the Equal Protection Clause decision of the Sixth Circuit below should be reversed and this case should be remanded to the United States District Court for the Southern District of Ohio for adjudication on the merits.

Respectfully submitted,

October1, 2012

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 12a0715n.06

Case No. 11-3113

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED

Jul 03, 2012

LEONARD GREEN, Clerk

HARVEST INSTITUTE FREEDMAN FEDERATION, LLC; LEATRICE TANNER-BROWN,	)
	) ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Plaintiffs-Appellants,	
v.	
UNITED STATES OF AMERICA; THE HONORABLE KEN SALAZAR, SECRETARY OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES,	
Defendants-Appellees.	

BEFORE: BATCHELDER, Chief Judge; McKEAGUE, Circuit Judge; QUIST, District Judge.*[1]

ALICE M. BATCHELDER, Chief Judge. Plaintiffs-Appellants Harvest Institute Freedman Federation and Leatrice Tanner-Brown want the federal courts to hold that the Claims Resolution Act, No. 111-291, 124 Stat. 3064 (2010) ("the Act"), is unconstitutional because it perpetuates racial discrimination against former slaves—known as the Freedmen—of certain Native American tribes. Congress enacted the Act to implement the settlement between the parties in *Cobell v. Salazar*, No. 1:96CV01285-JR (D.D.C.), which was a class-action lawsuit brought by a number of individual Native Americans against the Secretaries of the Departments of the Interior and of the Treasury. The class in *Cobell* claimed that the United States had breached its fiduciary duty to administer properly the Individual Indian Money (IIM) Accounts held on the behalf of certain Native Americans.

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*The Honorable Gordon Jay Quist, United States District Judge for the Western District of Michigan, sitting by designation.

The Harvest plaintiffs claim that the Freedmen were wrongfully excluded from ownership of the IIM Accounts due to racism, and that it perpetuates racial discrimination for Congress to not address their claims at the same time that it addresses the claims of the *Cobell* class. Along with their Complaint, the Harvest plaintiffs moved the district court for a temporary restraining order; the United States responded by filing Rule 12(b)(1) and 12(b)(6) motions to dismiss based on lack of subject matter jurisdiction and failure to state a claim, respectively.

The district court dismissed the case, holding that the Harvest plaintiffs did not have standing because any injury to them is not fairly traceable to the United States and because the injury will not be redressed by a favorable decision. The Harvest plaintiffs timely appealed.

After carefully reviewing the district court's opinion, the briefs, and the record in this case, we conclude that the district court did not err in dismissing the case. As the district court correctly set out the applicable law and correctly applied that law to the undisputed material facts contained in the record, issuance of a full written opinion by this court would serve no jurisprudential purpose.

Accordingly, for the reasons stated in the district court's well-reasoned opinion, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Harvest Institute Freedman Federation, LLC, et al.,
Plaintiffs,

-v-

The United States of America, *et al.*
Defendants.

Case No. 2:10-cv-1131
JUDGE SMITH
Magistrate Judge Abel

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Motion For a Temporary Restraining Order (Doc. 3) and Defendants' Motion to Dismiss (Doc. 9). These motions have been briefed and are ripe for disposition. For the reasons that follow, the Court **GRANTS** Defendants' motion and **DISMISSES** this action.

I. Background

On December 16, 2010, Plaintiffs filed a complaint and a motion for a temporary restraining order against Defendants seeking to enjoin the United States from implementing and effectuating

Title I of H.R. 4783, the "Claims Resolution Act of 2010" (the "Claims Resolution Act" or "Act"). The enactment of this legislation is necessary for the implementation of the pending settlement in *Cobell v. Salazar*, No. 1:96V01285-JR (D.D.C.), a class action originally filed in 1996 by individual Indians against the Secretaries of the Department of the Interior and the Department of the Treasury.

In *Cobell*, the class sought to redress alleged breaches of trust by the United States government, and its trustee-delegates, regarding the management of Individual Indian Money ("IIM") Accounts held on behalf of individual Indians. The class sought, *inter alia*, declaratory and injunctive relief construing the trust obligations of the United States government to members of the class and declaring that the United States government had breached and was in continuing breach of its trust obligations to the class members. The matter was litigated for years. Ultimately, in December 2009, the parties were able to reach a settlement agreement, which was contingent on legislation that would authorize the settlement and fund the government's obligations under the agreement.

In May 2010, Plaintiffs initiated an action in this Court seeking to enjoin the United States Congress from enacting legislation that would authorize the *Cobell* settlement. Plaintiffs sought an order declaring the pending legislation unconstitutional. The government moved to dismiss the complaint for lack of jurisdiction. This Court determined that it lacked subject matter jurisdiction and accordingly dismissed the action. *See Harvest Inst. Freedman Fed'n v. United States*, No. 10-cv-449 (S.D. Ohio May 25, 2010) ("the Court is not empowered to consider the merits of Plaintiffs' constitutionality claim or grant the relief that Plaintiffs request"). In a footnote, this Court "note[d] that an essential premise of Plaintiffs' action against Defendants was rejected in previous litigation." *Id.* (citing *Harvest Inst. Freedman Fed'n v. U.S.*, 80 Fed. Cl. 197 (2008), *aff'd*, 324 Fed. App'x 923 (Fed. Cir. 2009), *cert denied*, 130 S.Ct. 1147 (2010)). In *Harvest Inst. Freedman Fed'n v. U.S.*, 80 Fed. Cl. 197, the United States Court of Federal Claims rejected the claim of the Harvest Institute Freedman Federation that the ancestors of the "Freedmen," ex-slaves once owned by certain Indian tribes, were entitled to monetary relief for an alleged breach of post-Civil War treaties

between the United States and the "Five Civilized Tribes," on the bases that the claims were barred by the applicable statute of limitations and that these treaties did not create a governmental obligation to the Freedmen.

In November 2010, the United States Congress passed legislation authorizing the settlement in the *Cobell* case (H.R. 4783). The President signed the bill on December 8, 2010, and it became Public Law No. 111-291, 124 Stat. 3064 (2010) (the Claims Resolution Act). Title I of the Claims Resolution Act authorizes, ratifies, and confirms the *Cobell* settlement agreement. By filing this action and the corresponding motion for a temporary restraining order, Plaintiffs attempt to challenge this law and seek to prevent its implementation. Plaintiffs allege that the portion of the Act approving the *Cobell* settlement is unconstitutional because it perpetuates racial discrimination against the Freedmen. On December 22, 2010, Defendants filed their motion to dismiss, arguing that this case should be dismissed for lack of subject matter jurisdiction. The pending motions are ripe for disposition.[1]

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[1]After filing their memorandum in opposition to Defendants' motion to dismiss, Plaintiffs moved for this Court to take

II. Defendants' Motion to Dismiss

Because it resolves this matter, the Court will first address Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

A. Subject Matter Jurisdiction Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal when the court lacks subject matter jurisdiction. Pursuant to Article III of the United States Constitution, federal jurisdiction is limited to "cases" and "controversies," and standing is "an essential and unchanging part of" this requirement. U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A federal court must not go "beyond the bounds of authorized

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judicial notice of an order of the District Court of the Cherokee Nation filed January 14, 2011, regarding the 1866 Treaty between the United States and the Cherokee Nation (Doc. 15). Plaintiffs assert that this order supports its contention that the United States has a continuing general trust obligation to the Freedmen. The Court **GRANTS** the motion and takes judicial notice of the order. The Court notes, however, that the decision of the Cherokee Nation court is not pertinent to whether the case at bar must be dismissed for lack of subject matter jurisdiction.

judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). If the plaintiff lacks standing, the federal court lacks jurisdiction. Thus, Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.*

Standing under Article III has three elements. "First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (Internal alterations omitted). Third, it must be likely that the injury will be "redressed by a favorable decision." *Id.* at 561. The "fairly traceable" requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas" the "redressability" requirement "examines the causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468

U.S. 737, 753 n.19 (1984). The burden is on the party invoking federal jurisdiction to demonstrate Article III standing. *Stalley v. Methodist Healthcare*, 517 F.3d 911, 916 (6th Cir. 2008). And each element of standing must be supported with the "manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561.

B. Discussion

Plaintiffs seek to enjoin the implementation of Title I of the Claims Resolution Act, which approves and funds the *Cobell* settlement. Defendants argue that Plaintiffs cannot establish an injury fairly traceable to the challenged action of Defendants, or that this alleged injury will be redressed by a favorable decision. This Court agrees. Plaintiffs' alleged injury is that the legislation, while funding the *Cobell* settlement, does not redress their allegations of harm as descendants of the Freedmen in relation to treaties between certain Indian tribes and the United States government after the Civil War. Plaintiffs allege that the legislative approval of the settlement violates the Equal Protection Clause of the United States Constitution because it vindicates the rights of Native Americans but does not redress the harm to the Freedmen. But

Plaintiffs were not a party in the *Cobell* action and they independently sought to vindicate their rights by filing the action described above in the Court of Federal Claims. Even though the claims in the *Cobell* case concern rights and obligations under treaties between Native Americans and the United States government, the claims presented by the *Cobell* plaintiffs are different than the claims asserted by the Plaintiffs in this action. The legislation approving the *Cobell* settlement does not address Plaintiffs' claims.

In essence, Plaintiffs seek legislation that would provide them with money damages to redress injury to the Freedmen. An order declaring the *Cobell* settlement approval legislation unconstitutional would prevent the resolution of the *Cobell* matter, while at the same time have no impact on Plaintiffs' claims against the United States government (which have already been judicially resolved against Plaintiffs). Furthermore, basic principles of the separation of powers doctrine prevents this Court from mandating legislation that would provide Plaintiffs with money damages redressing harm to the Freedmen. Therefore, the Court concludes that Plaintiffs fail to demonstrate the necessary standing for this Court to have jurisdiction over their claims.

III. Conclusion

For the reasons set forth above, the Court **GRANTS** Defendants' Motion to Dismiss (Doc. 9) and hereby **DISMISSES** this action. Plaintiffs' motion for a temporary restraining order is **DENIED** as moot.

The Clerk shall remove Documents 3, 9, and 15 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

annual financial statement of the Department of the Interior bureaus and offices funded in this Act.

OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS

FEDERAL TRUST PROGRAMS

For the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $189,641,000, to remain available until expended: *Provided*, That of the amounts available under this heading not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support: *Provided further*, That nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103–412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a)

Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004: *Provided further*, That funds for trust management improvements and litigation support may, as needed, be transferred to or merged with the Bureau of Indian Affairs, "Operation of Indian Programs" account; the Office of the Solicitor, "Salaries and Expenses" account; and the Departmental Management, "Salaries and Expenses" account: *Provided further*, That funds made available to Tribes and Tribal organizations through contracts or grants obligated during fiscal year 2004, as authorized by the Indian Self-Determination Act of 1975 (25 U.S.C. 450 et seq.), shall remain available until expended by the contractor or grantee: *Provided further*, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss: *Provided further*, That

notwithstanding any other provision of law, the Secretary shall not be required to provide a quarterly statement of performance for any Indian trust account that has not had activity for at least 18 months and has a balance of $1.00 or less: *Provided further*, That the Secretary shall issue an annual account statement and maintain a record of any such accounts and shall permit the balance in each such account to be withdrawn upon the express written request of the account holder: *Provided further*, That not to exceed $50,000 is available for the Secretary to make payments to correct administrative errors of either disbursements from or deposits to Individual Indian Money or Tribal accounts after September 30, 2002: *Provided further*, That erroneous payments that are recovered shall be credited to and remain available in this account for this purpose.

PUBLIC LAW 108–108—NOV. 10, 2003

117 STAT. 1241

Public Law 108–108
108th Congress

An Act

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes, namely:

TITLE I—DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For necessary expenses for protection, use, improvement, development, disposal, cadastral surveying, classification, acquisition of easements and other interests in lands, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau, and assessment of mineral potential of public lands pursuant to Public Law 96–487 (16 U.S.C. 3150(a)), $850,321,000, to remain available until expended, of which $1,000,000 is for high priority projects, to be carried out by the Youth Conservation Corps; $2,484,000 is for assessment of the mineral potential of public lands in Alaska pursuant to section 1010 of Public Law

96–487; (16 U.S.C. 3150); and of which not to exceed $1,000,000 shall be derived from the special receipt account established by the Land and Water Conservation Act of 1965, as amended (16 U.S.C. 460l–6a(i)); and of which $3,000,000 shall be available in fiscal year 2004 subject to a match by at least an equal amount by the National Fish and Wildlife Foundation for cost-shared projects supporting conservation of Bureau lands; and such funds shall be advanced to the Foundation as a lump sum grant without regard to when expenses are incurred; in addition, $32,696,000 is for Mining Law Administration program operations, including the cost of administering the mining claim fee program; to remain available until expended, to be reduced by amounts collected by the Bureau and credited to this appropriation from annual mining claim fees so as to result in a final appropriation estimated at not more than $850,321,000; and $2,000,000, to remain available until expended, from communication site rental

ACT OF MAY 27, 1908

35 Stat. 312

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Be it enacted by the Senate and Hause of Representatives of the United States of America inn Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be

subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nine teen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continu ing to remove restrictions as heretofore, and nothing herein shall-be construed to impose restrictions removed from land by or under any law prior to the passage of this Act No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other

persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclu sive evidence as to the age of said citizen or freedman.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and

acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made,before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

SEC 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as

otherwise specitically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to re port said matter in full to the proper probate court arid take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or

representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of May be appointed said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further restricted lands, authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, with out charge, except the necessary court and recording fees and expen ses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or

attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases author ized bylaw, by order of the court or otherwise.

And there is hereby further appropriated, out of any money in the suits in the Treasury not otherwise appropriated, to be immediately available and available until exynded as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma; *Provided*, That the sum of ten thousand dollars of the above amount, or so such thereof as may be

necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismised and the title quieted upon payment of the full balance due on the original appraisement of such lot: Provided, That such investigation must be concluded within six months after the passage of this Act.

Nothing in this act shall be construed as denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contratcs of any other kind or charcter whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the

necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

SEC. 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

SEC 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma".

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee:

Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixt, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations

respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw mations, and drawn on the national treasures thereof prior to January first, nineteen hundred and seve, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

SEC. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leased of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper

representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

SEC. 12. That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties.

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Sep 09 2011

The Honorable S. Joe Crittendon
Acting Principal Chief, The Cherokee Nation
P.O. Box 948
Tahlequah, Oklahoma, 74465-0948

Dear Chief Crittendon:

We have followed the news of the upcoming election for Principal Chief with interest and growing concern. I write to advise you that the Department of the Interior (Department) has serious concerns about the legality of the Cherokee Nation's with respect to the Cherokee Freedmen, as well as the planned September 24, 2011, elections.

On August 22, 2011, the Supreme Court of the Cherokee Nation issued its decision in the matter of the *Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02. In this decision, the Court vacated and reversed the earlier decision of the Cherokee District Court, as well as the temporary injunction

that maintained the citizenship of the Freedmen. We have carefully reviewed this most recent decision. I am compelled to advise you that the Department respectfully disagrees with the Court's observations regarding the meaning of the Treaty of 1866. between the United States of America and the Cherokee Nation (Nation), 14 Stat. 799, as well as the status of the March 3, 2007, amendment to the Cherokee Constitution.

The Cherokee Constitution ratified by the voters in June 1976 expressly provides that Inio amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative," which is the Secretary of the Interior. The Department declined to approve the 2003 amendments of the 1976 Constitution, as evidenced by the August 30, 2006, letter from Associate Deputy Secretary James Cason to Principal Chief Chad Smith and the March 28. 2007. letter from Assistant Secretary - Indian Affairs (AS-IA) Carl Artman to Principal Chief Smith, copies of which are enclosed. Although on August 8, 2007, AS-1A Artman approved a June 23, 2007, amendment to the 1976 Constitution that removes the requirement for Secretarial approval of amendments, that decision is not retroactive. Thus,

the decision of the Cherokee Nation Supreme Court appears to be premised on the misunderstanding that both the unapproved Constitution adopted in 2003. and the March 3, 2007. amendment that would make Freedmen ineligible for citizenship, are valid. The Department has never approved these amendments to the Cherokee Constitution as required by the Cherokee Constitution itself.

Furthermore, we understand that in 2010 the Nation adopted new election procedures which will govern the upcoming election for Principal Chief. Those procedures were never submitted to. nor approved by, the Secretary of the Interior or any designated Department of the Interior official as required by the Principal Chiefs Act, (Pub. L. 91-495, 84 Stat. 1091). Pursuant to the Principal ' Chiefs Act, enacted by Congress in 1970, the Secretary is required to approve procedures for the selection of the Principal Chief of the Cherokee Nation.

We are concerned that the recent decision from the Cherokee Nation Supreme Court, together with 2010 election procedures that have not been approved by the Secretary of the Interior as required by the Principal Chiefs Act, will be the

basis for denying Cherokee Freedmen citizenship and the right to vote in the upcoming election. The Department's position is, and has been. that the 1866 Treaty between the United States and the Cherokee Nation vested Cherokee Freedmen with rights of citizenship in the Nation, including the right of suffrage.

I urge you to consider carefully the Nation's next steps in proceeding with an election that does not comply with Federal law. The Department will not recognize any action taken by the Nation that is inconsistent with these principles and does not accord its Freedmen members full rights of citizenship. We stand ready to work with you to explore ways to honor and implement the Treaty.

Sincerely,

/s/Larry Echo Hawk
Larry Echo Hawk
Assistant Secretary - Indian Affairs

Enclosures