

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)	
SHELDON PETER WOLFCHILD, <i>et al.</i> ,)	
)	
)	
Plaintiff,)	
)	
v.)	Case No. 03-2684L and
)	Case No. 01-568L (consolidated)
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

**THE UNITED STATES' OPPOSITION TO PLAINTIFFS'
MOTIONS TO AMEND COMPLAINTS**

IGNACIA S. MORENO
Assistant Attorney General

JODY H. SCHWARZ
Sara Costello
Daniel Steele
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0245 (tel.)
(202) 305-0506 (fax)
jody.schwarz@usdoj.gov

Attorneys for the United States

OF COUNSEL:
James Porter
Department of the Interior
Washington, DC 20240

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 2

III. PROPOSED AMENDED COMPLAINT 3

IV. ARGUMENT 4

A. Legal Standards 4

**B. Plaintiff’s Motion to Amend Should be Denied on the Basis of Futility
..... 5**

**1. The Federal Circuit Did Not Recognize a Claim for Statutory
Use Restriction 6**

**2. The Court Lacks Jurisdiction under the Tucker Act or Indian
Tucker Act Regarding Plaintiffs’ Claim for Statutory Use
Restriction 11**

**3. The United States has no Fiduciary Duty to Plaintiffs because
the 1980 Act Transferred Equitable Title to the 1886 Lands to
the Three Communities 14**

**4. Plaintiffs’ Claims Are Barred by the Statute of Limitations
..... 15**

**a. Plaintiffs’ Claims, if any, Accrued over Six Years before
the Inception of this Suit 15**

b. The Appropriations Rider does not apply 16

5. This Court Lacks Jurisdiction Regarding Plaintiffs Request for

	an Order Setting Aside the Three Communities' Provisions and Remanding Matters to Interior	17
6.	The February 1863 Act does not Provide a Claim upon Which Relief May Be Sought	18
V.	CONCLUSION	19

TABLE OF AUTHORITIES

CASES

Duncan Energy Co. v. U.S. Forest Service, 109 F.3d 497 (8th Cir. 1997) 9

American Int’l. Specialty Lines Ins. Co. v. United States, 71 Fed. Cl. 37 (2006) 6

Connecticut Nat’l Bank v. Germain, 503 U.S. 249 (1992) 14

Foman v. Davis, 371 U.S. 178 (1962) 4, 5

Giles v. Schotten, 449 F.3d 698 (6th Cir. 2006) 8

Herrington v. County of Sonoma, 12 F.3d 901 (9th Cir. 1993) 7

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 7

Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289 (3d Cir. 1988) 4

LeBeau v. United States, 474 F.3d 1334 (Fed. Cir. 2007) 5

Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 71 Fed.Cl. 172 (2006) 4

Te-Moak Bands of W. Shoshone Indians of Nevada v. United States, 948 F.2d 1258 (Fed.Cir.1991) 4

United States v. Alpine Land & Reservoir Co., 983 F.2d 1487 (9th Cir. 1992) 7

United States v. Navajo Nation, 537 U.S. 488 (2003) 11

White Mountain Apache Tribe v. United States, 249 F.3d 1364 (Fed. Cir. 2001) .. 11

Wolfchild v. United States (“Wolfchild VI”), 559 F.3d 1228 (Fed. Cir. 2009) . *passim*

Wolfchild v. United States, 62 Fed. Cl. 521 (“Wolfchild I”) (2004) 2, 15, 16,

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 4

STATUTES

117 Stat. 1241 16

12 Stat. 652 (“February 1863 Act”) 18

12 Stat. 819 (1863) 18

25 Stat. 217 (1888)	12
25 Stat. 980 (1889)	12, 13, 14
26 Stat. 336 (1890)	12, 13, 14
28 U.S.C. § 1292(d)(2)	2
28 U.S.C. § 1491(a)(2)	17
28 U.S.C. § 2501	15
Pub. L. No. 108-108 (2003)	16
Pub. L. No. 96-557 (1980)	15

RULES

RCFC 15(a)	4
-------------------------	----------

MEMORANDUM

I. INTRODUCTION

Plaintiffs' motions for leave to amend their complaints should be denied because these motions are futile.¹ This Court lacks jurisdiction over Plaintiffs' claim for the reasons set forth herein and for the reasons set forth in the United States' pending motion to dismiss. As the Federal Circuit has recognized, the appropriations acts created no trust relationship between the United States and the loyal Mdewakanton or their lineal descendants. In fact, the Federal Circuit held that the Appropriations Acts created no vested interest, legal or equitable, in the loyal Mdewakanton. *Wolfchild v. United States* ("*Wolfchild VI*"), 559 F.3d 1228, 1255 (Fed. Cir. 2009). It would be a grave misreading of the Federal Circuit's opinion to now determine that gratuitous appropriations legislation somehow grants Plaintiffs an interest in the 1886 lands and proceeds because of a statutory use restriction. The Federal Circuit recognized no such cause of action in its opinion. In addition, to the extent that the Appropriations Acts bestowed some kind of interest upon the loyal Mdewakanton and their lineal descendants, the 1980 Act terminated whatever interest they may have had. Furthermore, Plaintiffs cannot overcome the statute of limitations. As this Court previously found in dismissing Plaintiffs' breach of contract claim, Plaintiffs were aware of their cause of action more than six years prior to filing their

¹ Plaintiffs and Plaintiff-Intervenors have filed a Joint Memorandum of Law in Support of Motion to Amend and each group has filed separate motions and proposed amended complaints. See Dkt. No. 737. The proposed amended complaints are identical with the exception of the Julia DuMarce Group and the Harley D. Zephier Group of Plaintiff-Intervenors. These groups filed motions and proposed complaints containing an additional count, Count VI, which alleges that the United States has violated a statutory obligation to set aside land pursuant to the Act of Feb. 16, 1863. See Dkt. Nos. 742 and 768. The United States addresses all of these complaints in this opposition. The Lower Sioux Indian Community did not file a motion to amend its Complaint in Intervention (Dkt. No. 140). This complaint's sole claim is for "Breach of Fiduciary Duty/Trust Mismanagement." Pursuant to the Federal Circuit's opinion, this complaint should be dismissed.

complaints. Plaintiffs' proposed amendments cannot cure the jurisdictional defect of their complaints nor can they overcome the statute of limitations. Therefore, Plaintiffs' motions must be denied.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their initial complaint on November 18, 2003. Dkt. No. 1. The Court granted subsequent leave for additional plaintiffs to be added to the Wolfchild Complaint and also for other individuals to join the case as Plaintiff-Intervenors. The United States moved to dismiss, and Plaintiffs moved for partial summary judgment on Plaintiffs' First Amended Complaint.³ The Court granted partial summary judgment to Plaintiffs. *Wolfchild v. United States*, 62 Fed. Cl. 521 (2004) ("*Wolfchild I*").

On July 16, 2007, the United States filed a motion pursuant to 28 U.S.C. § 1292(d)(2) to certify interlocutory appeal of three questions: (1) "[w]hether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; (2) [i]f the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act; and (3) [w]hether the Lower Sioux, Prairie Island and Shakopee Indian Communities act as the agents of the United States as a result of the 1980 Act." Def.'s Mot. to Certify Orders for Interlocutory Appeal (Dkt. No. 510) at 4-5. On

³ Plaintiffs have filed subsequent amended complaints that include similar allegations. The current operative complaint, the Fifth Amended Complaint, contains the revisions of the Third Amended Complaint, which removed Count II, Breach of Contract, and subsumed the separately-pled claims of minor Plaintiffs, thus removing Count III. Proposed 6th Amend. Compl. (Dkt. 736-1) ¶¶ 3-4 (hereinafter "Compl."). Otherwise the amendments have been to include a request that the Court direct the Secretary of the Interior to take certain actions relating to the litigation proceedings and adding additional named Plaintiffs.

September 26, 2007, the Court certified the first two questions for appeal. Dkt. No. 626. The Federal Circuit granted the United States' petition for appeal on December 10, 2007 (Dkt. No. 661), and the United States filed notice of the appeal on December 13, 2007 (Dkt. No. 662). On interlocutory appeal, the Federal Circuit held that the Appropriations Acts did not create a trust and that, even if the Appropriations Acts had created a trust, Congress terminated that trust through the 1980 Act. *See Wolfchild VI*, 559 F.3d at 1255-56.

III. PLAINTIFFS' PROPOSED AMENDED COMPLAINT

Plaintiffs' filed their joint and separate motions to amend their complaints on July 9, 2010. The proposed amendment substitutes Plaintiffs' breach of trust claim with a claim premised on an alleged statutory use restriction. Plaintiffs assert that "[a]lthough the...lands are presently held in trust by the United States for the communities, the Statutory Use Restriction . . . still requires the Department of the Interior to ensure that the uses and benefits of all reservation lands benefit exclusively and equally all 1886 Mdewakanton lineal descendants," (Compl., ¶ 46) and that any appropriated funds must be expended for the equal benefit of Plaintiffs. Compl., ¶ 67. Plaintiffs allege that the Department of the Interior violated this statutory use restriction by not collecting and disbursing money from the three Communities generated by economic enterprises to all loyal Mdewakanton lineal descendants (Compl., ¶¶ 45, 84-86, 97) and by not disbursing any other funds collected, specifically the frozen funds accounts, to Plaintiffs (Compl., ¶ 81).

Plaintiffs include an additional claim requesting that the Court issue an order setting aside provisions in the three Communities' constitutions, ordinances, resolutions,

censuses, rolls, and tribal revenue allocation plans on the basis that such documents contain provisions allegedly “repugnant to the Statutory Use Restriction.” Compl. ¶ 116.

Plaintiffs also request that the Court remand “appropriate, related matters” to the Department of the Interior. *Id.*

IV. ARGUMENT

A. LEGAL STANDARDS

The grant or denial of a motion for leave to amend a complaint lies within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). The exercise of this discretion is governed by RCFC 15(a). Rule 15(a) provides that leave to amend a pleading should “be freely given when justice so requires.” *Id.* However, leave to amend should be denied for reasons such as “undue delay, bad faith or dilatory motive on the part of the movant . . . [and] futility of the amendment.” *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, 71 Fed.Cl. 172, 176 (2006) citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Amendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss. *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988)² (discussing identical F.R.C.P. 15(a) and affirming district court’s denial of motion to amend where proposed amendment would have alleged a claim that was barred by the applicable statute of limitations) (citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983)); *see also Shoshone Indian Tribe*, 71

² RCFC 15(a) is identical to Federal Rule of Civil Procedure 15(a) and case law construing the latter may be used to interpret the former. *See Te-Moak Bands of W. Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1260 n. 4 (Fed.Cir.1991); *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, 71 Fed.Cl. 172, 177 n. 7 (2006).

Fed.Cl. at 176 (“A motion to amend may be deemed futile if a claim added by the amendment would not withstand a motion to dismiss.”) (citing *Slovacek v. United States*, 40 Fed.Cl. 828, 834 (1998)).

B. PLAINTIFFS’ MOTION TO AMEND SHOULD BE DENIED ON THE BASIS OF FUTILITY

Plaintiffs’ motion to amend their complaint must be denied because it is futile. *See Foman*, 371 U.S. at 182. Here, amendment would be futile because the change Plaintiffs propose making to their complaint, the transformation of their breach of trust claim to one for violation of a statutory use restriction, will not cure the jurisdictional defects identified by the United States in its motion to dismiss. Plaintiffs proposed amendment also fails to recognize that the Federal Circuit has held that they have no interest in the 1886 lands, legal or beneficial, through the Appropriations Acts. Plaintiffs repackage their breach of trust claims in an attempt to overcome this fact. Plaintiffs even state in their joint motion that, “[i]n this litigation, for all intents and purposes, a statutory use restriction is the same as a trust for Plaintiffs. In fact, the only practical difference between a trust and statutory use restriction is Congress can terminate a statutory use restriction without it being a taking requiring just compensation—not so with a trust.” Memo at 7 n. 2.³ Whether Plaintiffs couch their claim as a breach of trust or a violation of a statutory use restriction, which the Federal Circuit did not recognize as a claim, they must identify a money-mandating duty for which they are entitled to compensation. Plaintiffs do not and cannot cite to any case law or statute for this support. Even if Plaintiffs could

³ This distinction is not true. The court noted in *LeBeau* that even if Congress created a trust, the termination of that trust does not result in a taking. *See LeBeau v. United States*, 474 F.3d 1334, 1342 (Fed. Cir. 2007) (Lineal descendants’ had no vested interest in trust and thus were not entitled to damages for breach of that trust).

successfully argue that they have a cause of action, which they cannot, they have filed their complaint too late. Plaintiffs were on notice of their claim more than six years prior to the filing of their lawsuit. Because Plaintiffs' claim is barred by the statute of limitations, their proposed motion would be futile and should be dismissed.

The United States notes that it filed a Motion to Dismiss on July 9, 2010, based on the Court's order dated and telephonic status conference held on May 11, 2010. Dkt. No. 765. The motion seeks dismissal of the current operative complaints filed by Plaintiffs and Plaintiff-Intervenors. Although the operative complaints do not allege a claim for breach of an alleged statutory use restriction, the United States, based on the May 11 conference, also argues in its motion to dismiss that a separate cause of action, such as an alleged statutory use restriction, cannot be maintained.⁴

1. The Federal Circuit Did Not Recognize a Claim for Statutory Use Restriction

The Federal Circuit did not recognize a viable claim for statutory use restriction in its opinion holding that Plaintiffs could not assert a claim for breach of trust. Plaintiffs state that they have filed their motion "for one reason: to respond to the Federal Circuit's decision . . . reversing this Court's partial summary judgment ruling on Count I – trust

⁴ When an amended complaint is filed while the United States' motion to dismiss the operative complaint is being briefed by the parties, as here, the United States is not required to respond with the filing of another motion to dismiss the amended complaint if some of the defects subject to the motion to dismiss and raised in the original pleading remain in the amended pleading. *See* Wright, Miller and Kane (2nd Ed.), *Federal Practice and Procedure*, § 1476. The Court of Federal Claims has deemed this guidance appropriate in a case almost identical to the case development presented here in *American Int'l. Specialty Lines Ins. Co. v. United States*, 71 Fed. Cl. 37, 39 (2006) (If some defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading). The United States, therefore, maintains its motion to dismiss as supplemented with this opposition, which also addresses the Plaintiffs' amended complaints.

mismanagement claim – and remanding for further proceedings on the Appropriation Acts’ statutory use restriction.” Memo at 1. The Federal Circuit, however, did not remand for further proceedings on the Appropriations Acts’ statutory use restriction. The Federal Circuit only held that “[i]n light of our disposition of the two certified questions, we reverse and remand for further proceedings in the trial court.” *Wolfchild VI*, 559 F.3d at 1260. The Federal Circuit did not remand this case for further proceedings on the basis of any statutory use restriction.

Plaintiffs confuse the doctrines of remand and the law of the case in their motion to amend, arguing that both doctrines, as applied to the Federal Circuit’s decision, support their proposed amended complaint. Neither doctrine supports their interpretation of the effects of the Federal Circuit’s opinion. When an argument is appealed, the interrelated doctrines of rule of mandate and law of the case are implicated. “On remand, the . . . court ‘must proceed in accordance with the mandate and such law of the case as was established by the appellate court.’” *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1491 (9th Cir. 1992) (citations omitted); *see also In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (lower court “is bound by the decree as the law of the case, and must carry it into execution according to the mandate”). Only those matters left open by the mandate may be reviewed on remand. *In re Sanford Fork & Tool Co.*, 160 U.S. at 256. Under the narrower law of the case doctrine, courts are generally required to follow legal decisions of the same or a higher court in the same case. *See generally Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (“The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case”) (citation omitted).

Plaintiffs cannot now assert a claim for statutory use restriction and rely on the Federal Circuit's opinion as identifying that as a viable claim. As courts recognize, it is possible that when a case is remanded, events can happen that were not considered at all by the appellate court or addressed by the remand instructions. Claims may become moot, amended pleadings may create new issues, and parties may change litigation strategy. *See Giles v. Schotten*, 449 F.3d 698, 703 (6th Cir. 2006). In this case, Plaintiffs seek to change their litigation strategy and create a new claim through an amended pleading. Plaintiffs' decision, however, has not been mandated by the Federal Circuit and they cannot take any comfort that their proposed amended complaint can survive a RCFC 12(b)(6) motion. As the United States has argued in its motion to dismiss, their proposed claim for violation of an alleged statutory use restriction is not a viable claim.

Plaintiffs make much of the fact that the Federal Circuit once used the phrase "statutory use restriction." *Wolfchild VI*, 559 F.3d at 1240. Plaintiffs' quote at length from the Federal Circuit's opinion but fail to explain how the Federal Circuit's mention of "statutory use restriction" could provide Plaintiffs with some new right or interest in the 1886 lands. Rather, the Federal Circuit's use of that phrase was to differentiate the Appropriations Acts from the very thing Plaintiffs alleged they created: a trust. The Federal Circuit's identification of the nature of an appropriations enactment was solely to explain the difference between the effects of an appropriation enactment and the effects that would flow from a trust. The Federal Circuit stated: "we conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship through which the 1886 Mdewakantons and their descendants obtained beneficial ownership rights in the 1886

lands.” *Id.*

This case is similar to the circumstances of *Duncan Energy Co. v. U.S. Forest Service*, in which the appellate court’s passing comments were held to be the law of the case. 109 F.3d 497, 499 (8th Cir. 1997). In *Duncan*, on appeal, the appellate court noted that, in passing, it had discussed the expeditiousness of the Forest Service’s consideration of a surface use plan. The trial court, on remand, issued an injunction based on that discussion. The government appealed the decision and the appellate court noted that it was an error to construe the discussion as a mandate. Rather, the discussion was noting a representation made at oral argument. To construe it as mandating a strict time frame was to read it too broadly. *Id.* at 499-500. Likewise, Plaintiffs here read the Federal Circuit’s discussion too broadly: simply stated, a statutory use restriction in any appropriations legislation would be directly contrary to the Federal Circuit’s findings and cannot be a basis for a lawsuit against the United States. Such an interpretation contradicts the Federal Circuit’s holding that no trust was created and Plaintiffs never had any interest in the 1886 lands. *Wolfchild VI*, 559 F.3d at 1255 (“[N]either Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone.”).

Furthermore, the Federal Circuit never stated that the 1980 Act did not repeal a “statutory use restriction” created through the enactment of the Appropriations Acts. *See* Plaintiffs’ Memo at 7. Despite the Federal Circuit’s clear holding that Plaintiffs have no interest in the 1886 lands, Plaintiffs ignore this and have reiterated all of their previous claims to a beneficial interest in the 1886 lands, effectively asserting that a statutory use restriction vests them with exactly the same interest that a trust would have. Plaintiffs,

however, continually misstate and misconstrue the reasoning and the statements made by the Federal Circuit. The Federal Circuit made it very clear that even if the Appropriations Acts vested Plaintiffs with an interest in the 1886 lands, the 1980 Act terminated that interest. *Wolfchild VI*, 559 F.3d at 1257. It is not a matter of whether the Appropriations Acts were repealed. The proper focus is on what impact the 1980 Act had on Plaintiffs' interests. In that situation, as the Federal Circuit clearly stated, the 1980 Act terminated whatever interest Plaintiffs had in the 1886 lands. *Id.* Likewise, the 1980 Act terminated whatever interests Plaintiffs try to claim in the proceeds of the 1886 lands. To say that "for all intents and purposes, a statutory use restriction is the same as a trust for Plaintiffs," (Memo at 7 n. 2) ignores and defies the holding of the Federal Circuit.

Finally, footnote 14 of the Federal Circuit's opinion provides no support to their assertion that the Federal Circuit recognized that the Appropriations Acts created a statutory use restriction and further litigation was appropriate. Memo at 6, 8. In footnote 14, the Federal Circuit states that the parties have "devote[d] some attention to the question whether it was lawful for the Interior Department . . . to transfer to the three communities approximately \$60,000 . . . given that the 1980 Act was silent as to the disposition of those funds." As the Federal Circuit correctly pointed out, that exact issue was not before it because it was not one of the two questions certified for interlocutory appeal. The Federal Circuit instead left "that issue to be addressed, to the extent necessary, in further proceedings before the trial court." *Wolfchild VI*, 559 F.3d at 1259 n.14. What the Federal Circuit did not do, as Plaintiffs wrongly suggest, is state that Plaintiffs had a claim based upon a statutory use restriction.

2. The Court Lacks Jurisdiction under the Tucker Act or Indian Tucker Act Regarding Plaintiffs' Claim for Statutory Use Restriction

Plaintiffs still do not cite to a statute or regulation that provides this Court with jurisdiction to hear their proposed claim for violation of an alleged statutory restriction. Plaintiffs state that they seek jurisdiction under 28 U.S.C. § 1491, 1505, et. seq. Compl., ¶6. This bare assertion is not enough. Plaintiffs still need to “point to some other source of law . . . that imposes an obligation on the United States” in order to state a claim. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001).

Here, Plaintiffs have asserted a claim for violation of a statutory use restriction created by the Appropriations Acts. Plaintiffs cannot claim a money-mandating remedy premised on the limited restriction in the use of gratuitous appropriations related to the Appropriations Acts. The Appropriations Acts are not a separate source of substantive law that create a right to money damages. The Appropriations Acts create no individual entitlement in Plaintiffs for the payment of monetary damages.

As established by the Federal Circuit, and as discussed in the United States' motion to dismiss, the Appropriations Acts of 1889 and 1890 gave only “minimal directives” for expenditure of funds so that each Indian “shall receive, as nearly as practicable, an equal amount in value of this appropriation.” *Wolfchild VI*, 559 F.3d at 1238-9. The loyal Mdewakantons were not given “enforceable rights as trust beneficiaries.” *Id.* at 1238. The Appropriations Acts do not provide the “specific rights-creating or duty-imposing statutory or regulatory prescriptions” that are required to create a money-mandating duty. *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

Plaintiffs recite certain provisions of the Appropriations Acts as elements of an

alleged statutory use restriction. Plaintiffs, however, misquote the Appropriations Acts and attribute language from one act to all acts. This mischaracterizes the reach of the Appropriations Acts and provides Plaintiffs with an appearance of being a beneficiary of the acts when they are not.

First, Plaintiffs allege that the Appropriations Acts “provide that the appropriations would be for the exclusive benefit of all Mdewakanton who resided in Minnesota since May 20, 1886 or who were then engaged in moving to Minnesota as of that date and their lineal descendants. This is an element of the Statutory Use Restriction.” Compl., ¶ 19. This is an oversimplification and misstatement. The text of the Appropriations Acts provided that the funds were “[f]or the support of the full-blood Indians in Minnesota, belonging to the Medawakanton [sic] band of Sioux Indians, who have resided in said State since [May 20, 1886], and severed their tribal relations. . . .” 1888 Act, 25 Stat. 217. The 1889 Act, 25 Stat. 980, added the additional qualification that recipients “who were then engaged in removing to said State, and have since resided therein” were eligible. The 1890 Act, 26 Stat. 336, further modified the recipients to include Indians of both “full and mixed blood.” What the Appropriations Acts do not provide is that they were for the exclusive benefit of lineal descendants. Congress did not include lineal descendants as a beneficiary of the acts and its use of the word “family” did not create any vested ownership rights in the purchased land. *Wolfchild VI*, 559 F.3d at 1242. As the Federal Circuit found, the language was not “directed at creating rights of inheritance in the properties purchased, but instead was simply part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds.” *Id.* The language was to insure that the authorization extended to cover the needs of the families of the 1886 Mdewakanton and

not just the 1886 Mdewakanton themselves. *Id.* “It does not speak to the nature of the interest created in any real property purchased with the funds.” *Id.* Accordingly, the Appropriations Acts cannot be interpreted as creating any duties as to the descendants of the loyal Mdewakanton.

Second, Plaintiffs assert that the “Appropriation Acts state that as nearly as practicable an equal value of the appropriation is to be shared among the 1886 Mdewakanton and their lineal descendants. This is an element of the Statutory Use Restriction.” Compl., ¶ 20. Although the 1889 and 1890 Appropriations Acts contained a requirement that each of the loyal Mdewakanton “shall receive, as nearly as practicable, an equal amount in value of this appropriation,” this clause does not include lineal descendants and was qualified that it was to be done only “as far as practicable.” As discussed above, the Appropriations Acts created no vested rights in lineal descendants. The Federal Circuit noted that this clause, “which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.” *Wolfchild VI*, 559 F.3d at 1239. Likewise, it is plainly insufficient to serve as an element of some type of statutory use restriction.

Finally, Plaintiffs assert that “[t]he Appropriation Acts do not require the 1886 Mdewakanton to move from their location and move onto appropriated lands to receive an equal value as practicable of the appropriation. This is an element of the Statutory Use Restriction.” Compl., ¶ 21; ¶ 37 (“the Appropriation Acts commanded that no Indian living off of the 1886 lands would be required to move from his or her location to move

onto the acquired lands. This is consistent with the Appropriation Acts' Statutory Use Restriction"). Plaintiffs appear to make this statement because it would support their assertion that they are entitled to benefits under the Appropriations Acts no matter where they reside. The actual language, however, provides, "[t]hat as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will." 1889 and 1890 Acts. Here, the plain language of the 1889 and 1890 Appropriations Acts is that lands should be acquired where the Indians were then living. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992) (Courts are to presume that a legislature says in a statute what it means and means in a statute what it says). The legislation makes no provision that funds should be given in lieu of lands under the Appropriations Acts.

Thus the Appropriations Acts provide no support that the lineal descendants were entitled to any benefits, as the Federal Circuit has found, and there is no evidence that they created a statutory use restriction under which Plaintiffs may benefit. They impose no money-mandating duty on the United States and cannot be used as a basis for jurisdiction.

3. The United States has no Fiduciary Duty to Plaintiffs because the 1980 Act Transferred Equitable Title to the 1886 Lands to the Three Communities

In their motion and amended complaint, Plaintiffs fail to recognize the impact of the 1980 Act on their claim. To the extent that a statutory use restriction was created by the Appropriations Acts, any interest Plaintiffs may have had in the 1886 lands and the frozen funds was terminated by the 1980 Act. Although the 1980 Act did not repeal the Appropriations Acts, it terminated any possible interest Plaintiffs may have had as a result

of their enactment. The fact that the 1980 Act stated that nothing in the Act shall “alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment,” did not mean that a statutory use restriction would remain in place giving Plaintiffs and interest in the 1886 lands and frozen funds. Act of December 19, 1980, Pub. L. No. 96-557, 1980 U.S.C.C.A.N. (94 Stat.) 3262. As the Federal Circuit found, “[t]he fact that the savings clause was regarded as necessary to protect the current assignees is a clear indication that the drafters viewed the Act as otherwise terminating any equitable interests of the 1886 Mdewakantons.” *Wolfchild VI*, 559 F.3d at 1259. Just as the 1980 Act terminated any interests in the Plaintiffs from the existence of a trust, it also terminated any possible interests from the existence of an alleged statutory use restriction.

4. Plaintiffs’ Claims Are Barred by the Statute of Limitations

This Court lacks subject matter jurisdiction over Plaintiffs’ statutory use restriction claim because, pursuant to 28 U.S.C. § 2501, such a claim would have accrued beyond the time allowed by the statute of limitations to bring suit. The United States’ argument is more fully set out in its motion to dismiss.

a. Plaintiffs’ Claims, if any, Accrued over Six Years before the Inception of this Suit

The basis of the United States’ position with regard to the strict applicability of the statute of limitations as a jurisdictional matter here is wholly consistent with this Court’s reasoning in rejecting Plaintiffs’ breach of contract claim. *See Wolfchild I*, 62 Fed. Cl. at 548-49. There the Court granted the United States’ motion to dismiss Plaintiffs’ breach of contract claim because the claim had not taken place in the last six years. *Id.* The Court found that, “[t]he United States’ refusal to assign lands or send trust

proceeds to lineal descendants who did not belong to the communities should have made plaintiffs aware of the alleged breach of contract . . . any alleged breach of contract took place in 1981 at the latest.” *Id.*

Likewise, Plaintiffs’ claims that the United States was obligated under a statutory use restriction “to ensure that the uses and benefits of all reservation lands benefit exclusively and equally all 1886 Mdewakanton lineal descendants” (Compl., ¶ 46) and to disburse funds collected to Plaintiffs (Compl., ¶ 81), clearly exceed the statute of limitations. As with Plaintiffs’ dismissed breach of contract claim, the United States’ refusal to assign lands or send proceeds to lineal descendants who did not belong to the communities should have made Plaintiffs aware of the alleged violation of a statutory use restriction and any alleged violation “took place in 1981 at the latest.” *Wolfchild I*, 62 Fed. Cl. at 548-49.

b. The Appropriations Rider does not apply

As the United States argued in its motion to dismiss, the Appropriations Rider, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (“PL 108”) does not toll Plaintiffs’ claim against the United States. When this Court granted the United States’ motion to dismiss Count II on the basis that the claim had not taken place in the last six years, (*See* “*Wolfchild I*, 62 Fed. Cl. 548-49), the Court also rejected applicability of the Indian Trust Accounting Statute as a “specific exception” to the six-year prohibition. *Id.* at 548. Likewise, because the Federal Circuit has found that the Plaintiffs are not trust beneficiaries, they cannot use PL 108 to toll their claims based on a statutory use restriction when there is no trust or trust assets at issue.

Consequently, any rights here Plaintiffs assert to the 1886 lands and frozen funds accounts on the basis of a statutory use restriction violation should be rejected for the same reasons this Court rejected Plaintiffs' breach of contract claim.

5. This Court Lacks Jurisdiction Regarding Plaintiffs Request for an Order Setting Aside the Three Communities' Provisions and Remanding Matters to Interior

Because Plaintiffs' cannot identify a statute or regulation that provides this Court with jurisdiction to hear a claim based on an alleged statutory use restriction, for all the reasons stated above, this Court does not have jurisdiction pursuant to 28 U.S.C. § 1491(a)(2) to set aside any provisions or remand "appropriate, related matters to Interior." Compl., ¶ 116. This claim is also barred by the statute of limitations. Any alleged approval or interpretation of the Communities' documents took place decades ago. To the extent that Plaintiffs believe that Interior's alleged approval somehow violated their rights to the 1886 lands and proceeds, they were on notice, by 1981 at the latest, that the United States was holding the land in trust for the Communities and that the United States was not disbursing proceeds of the land to them.

Furthermore, while the Tucker Act provision invoked by Plaintiffs may permit a court to mandate changes to federal records, Plaintiffs seek an order of the court to change non-federal records—but in fact, the organic documents of the Communities, which are domestic, dependent nations, who enjoy quasi-sovereign status. The federal government has no jurisdiction to compel the Communities to alter their constitutions, and no mandamus issued by this Court could create such jurisdiction.

6. The February 1863 Act does not Provide a Claim upon Which Relief May Be Sought

The Julia DeMarce Group and the Harley D. Zephier Group of Plaintiff-Intervenors filed motions and proposed complaints containing an additional count, Count VI, which alleges that the United States has violated a statutory obligation to set aside land pursuant to the Act of Feb. 16, 1863, 12 Stat. 652 (“February 1863 Act”). *See* Dkt Nos. 742 and 768. These groups argue that the February 1863 Act created a statutory obligation on the United States to set apart certain lands for the loyal Mdewakanton and their heirs. The Federal Circuit, however, disposed of this argument. Although the Federal Circuit noted that the language of the February 1863 Act “clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute,” *Wolfchild VI*, 559 F.3d at 1241, the Federal Circuit further noted that this statute was superseded by another statute two weeks later, which did not prescribe any particular form of ownership and cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands. *Id.* at 1242; Act of Mar. 3, 1863, 12 Stat. 819 (1863). The Secretary never exercised his authority under these statutes. The Federal Circuit held that “the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution.” *Wolfchild VI*, 559 F.3d at 1242. Therefore, these Plaintiff-Intervenors cannot maintain a claim under this statute.

Furthermore, for the reasons discussed above, this claim is barred by the statute of limitations and is not otherwise tolled. Plaintiffs were on notice of their claim more than

six years before filing their complaints, even as early as 1888, when the first of the Appropriations Acts was passed and the land designated under this particular statute was not acquired for the benefit of the loyal Mdewakanton.

V. CONCLUSION

Plaintiffs' attempt to amend their complaints is futile because the Court has no jurisdiction to consider this claim. Their claim of violation of a statutory use restriction cannot be brought in the Court of Federal Claims under the Tucker Act or the Indian Tucker Act. Plaintiffs fail to identify a money-mandating statute or regulation fitting under the Tucker Acts' jurisdiction. To the extent the Court deems that Plaintiffs meet the jurisdictional requirements of the Tucker Acts, Plaintiffs claims are barred as untimely. For the reasons discussed above, the Court should deny Plaintiffs' motion to amend their complaints, and the Court should grant the United States' pending motion to dismiss Plaintiffs' complaints.

Respectfully submitted this 9th day of August, 2010

IGNACIA S. MORENO
Assistant Attorney General

/s/ Jody H. Schwarz

Jody H. Schwarz

Sara Costello

Daniel Steele

U.S. Department of Justice

Environment & Natural Resources Division

Natural Resources Section

P.O. Box 663

Washington, D.C. 20044-0663

(202) 305-0245 (tel.)

(202) 305-0506 (fax)

jody.schwarz@usdoj.gov

Attorneys for the United States

OF COUNSEL:
James Porter
Department of the Interior
Washington, DC 20240

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2010, a copy of the United States' Opposition to Plaintiffs' Motion to Amend Complaint was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

DATED: this 9th day of August, 2010.

/s/ Jody H. Schwarz
Jody H. Schwarz