

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' REPLY IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFFS' COMPLAINTS AND OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

A. Legal Standards2

B. Plaintiffs’ Motion for Partial Summary Judgment Should Be Denied and Defendant’s Motion to Dismiss Should Be Granted3

1. Only Certain Substantive Sources of Law Waive Sovereign Immunity Under the Tucker Acts3

C. Plaintiffs’ Cited Substantive Sources of Law Have Been Held to Not Waive Sovereign Immunity Under the Tucker Acts.....5

1. The IRA Is Not a Money-Mandating Statute7

2. The IGRA Is Not a Money-Mandating Statute9

3. 25 U.S.C. §155 Is Not a Money-Mandating Statute.....11

4. The Appropriations Acts Are Not Money-Mandating and Do Not Provide a Basis for a Cause of Action11

5. The Statutes Now Relied Upon by Plaintiffs Do Not Create a Statutory Scheme in which a Money-Mandating Duty May Be Found.....17

D. *Carcieri* Is Inapplicable to this Case19

E. The Statute of Limitations Bars Plaintiffs’ Claims20

1. PL 108 Is Inapplicable21

2. The Continuing Claims Doctrine Does Not Apply23

a. The Continuing Claims Doctrine Does Not Waive the Requirement that Plaintiffs Demonstrate Money-Mandating Obligations to Which They Are Owed23

b. Assuming a Money-Mandating Obligation, the Continuing Claims Doctrine is Unavailing Where the Event Complained of is Singular, Discrete, or Unitary	24
3. The Claims of the Minors Cannot Be Tolloed.....	26
III. CONCLUSION.....	27

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)2

Applegate v. United States, 25 F.3d 1579 (Fed. Cir. 1994)25

Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728 (1982)4

Avenal v. United States, 33 Fed. Cl. 778 (1995)2

Bayou Land & Marine Contractors, Inc. v. United States, 23 Cl. Ct. 764 (1991)2

Black v. United States, 84 Fed. Cl. 439 (2008)20

Brown Park Estates-Fairfield Dev. Co. v. United States, 127 F.3d 1449 (Fed. Cir. 1997)
24, 25

Carcieri v. Salazar, 129 S. Ct. 1058 (2009)19

De Arnaud v. United States, 151 U.S. 483 (1894)27

Del. State Coll. v. Ricks, 449 U.S. 250 (1980)20

Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995)20

Goewey v. United States, 612 F.2d 539 (Ct. Cl. 1979)27

John R. Sand & Gravel Co. v. United States, 457 F.3d 1345 (Fed. Cir. 2006)21

Jamal Indian Village v. Hunter, Case No. 95-131 (S. D. Cal. Sept. 9, 1996)10

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 259
 F. Supp. 2d 783 (D. Wis. 2003)22

Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353 (Fed. Cir. 2002)
2

Lincoln v. Vigil, 508 U.S. 182 (1993)9

Martinez v. United States, 333 F.3d 1295 (Fed. Cir. 2003)20

Morton v. Mancari, 417 U.S. 535 (1974)7

Perri v. United States, 340 F.3d 1337 (Fed. Cir. 2003)4
 Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996)10
 Rosales v. United States, 89 Fed. Cl. 565 (2009)25
 Rosebud Sioux Tribe v. United States, 75 Fed. Cl. 15 (2007)26
 Samish Indian Nation v. U.S., 419 F.3d 1355 (Fed. Cir. 2005)4
 Samish Indian Nation v. United States, 82 Fed. Cl. 54 (2008)5, 17
 Smith v. Babbitt, 875 F. Supp. 1353 (D. Minn. 1995)10, 22
 Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022 (10th Cir. 1992)3
 United Keetoowah Band of Cherokee Indians of Okla. v. United States, 86 Fed. Cl. 183
 (2009)4
 United States v. 1020 Electronic Gambling Machines, 38 F. Supp. 2d 1213 (E.D. Wa.
 1998)10
 United States v. Hvoslef, 237 U.S. 1 (1915)6
 United States v. Mitchell (“Mitchell I”), 445 U.S. 535 (1980)10
 United States v. Mitchell (“Mitchell II”), 463 U.S. 206 (1983)4, 10, 23
 United States v. Navajo Nation (“Navajo I”), 537 U.S. 488 (2003)5, 17, 18, 23
 United States v. Navajo Nation (“Navajo II”), 129 S.Ct. 1547 (2009)3, 5
 United States v. Testan, 424 U.S. 392 (1976)4
 United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)18
 University Of Rochester v. G.D. Searle & Co., Inc., 358 F.3d 916 (Fed. Cir. 2004)
12
 Vivid Technologies, Inc. v. American Science & Engineering, Inc., 200 F.3d 795 (Fed. Cir.
 1999)2
 Vizenor v. Babbitt, 927 F. Supp. 1193 (D. Minn. 1996)10, 22
 Voisin v. United States, 80 Fed. Cl. 164 (2008)23, 25

Wolfchild v. United States (“Wolfchild I”), 62 Fed. Cl. 521(2004).....13
Wolfchild v. United States (“Wolfchild VI”), 559 F.3d 1228 (Fed. Cir. 2009) *passim*
Wopsock v. Natchees, 454 F.3d 1327 (Fed. Cir. 2006)7

STATUTES

25 U.S.C. § 15511
25 U.S.C. § 27029
25 U.S.C. § 27109
25 U.S.C. § 4628
28 U.S.C. § 250120, 26
Pub. L. No. 108-10821

REGULATIONS

25 C.F.R. § 115.00221

MEMORANDUM

I. INTRODUCTION

Plaintiffs attempt to reopen matters already decided, namely that the Appropriations Acts did not vest them with any rights in the 1886 lands, and that to the extent they did, the passage of the 1980 Act terminated whatever interest Plaintiffs may have had in the 1886 lands. *See generally, Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) (*Wolfchild VI*). Plaintiffs admit that their claim for breach of a statutory use restriction “is the same as a trust for Plaintiffs. In fact, the only practical difference between a trust and a statutory use restriction is Congress can terminate a statutory use restriction without it being a taking requiring just compensation.” Pls.’ Mot. to Amend, 7 n.2 (Dkt. No. 737). The Federal Circuit rejected their trust claim and did not recognize a cause of action for a breach of a statutory use restriction. There can be no such claim where the Federal Circuit held that the Appropriations Acts conferred no legal or beneficial interest in the 1886 lands to Plaintiffs and even if the acts did, such interest was terminated by the 1980 Act.

It is a simple matter. Plaintiffs must prove this Court has jurisdiction through the Tucker Act and a statute giving rise to a fair inference of a money-mandating duty. Plaintiffs have not identified any such statute, regulation, or series of statutes and regulations. The Appropriations Acts, the Indian Gaming Regulatory Act, the Indian Reorganization Act, and 25 U.S.C. § 155 provide no fair inference. Without a statute that requires compensation for Interior’s alleged breaches of statutory obligations, there is no claim that may be heard in this Court. Even if the Appropriations Acts are somehow interpreted as providing a money-mandating duty through the creation of a statutory use

restriction, Congress extinguished any rights Plaintiffs may have had to the 1886 land when it passed the 1980 Act, declaring that the 1886 lands shall be held in trust for the three Communities. It was at that time that Plaintiffs' claim accrued. Therefore, the time to file a claim long passed before Plaintiffs filed this lawsuit.

II. ARGUMENT

A. LEGAL STANDARDS

As moving party, Plaintiffs have “the burden of establishing that there are no genuine material issues in dispute and that [they are] entitled to judgment as a matter of law.” *Bayou Land & Marine Contractors, Inc. v. United States*, 23 Cl. Ct. 764, 768 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In making this determination, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” are viewed “in a light most favorable to the non-moving party.” *Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.*, 285 F.3d 1353, 1357 (Fed. Cir. 2002) (citations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A party cannot meet its burden of supporting its asserted undisputed material facts by unsupported statements in the party's brief. *See Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 812 (Fed. Cir. 1999) (“Vivid did not meet its initial burden of coming forward with evidence to establish the factual premise and support summary judgment based on this issue,” as “[u]nsworn statements set forth in a brief or memorandum of law submitted by a party generally are not proper summary judgment evidence.”); *Avenal v. United States*, 33 Fed. Cl. 778, 784 (1995) (“Argument and assertions of counsel cannot substitute for factual statements under oath that establish a

genuine issue of material fact.”) (citing *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984)); *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1025 (10th Cir. 1992) (“statements of counsel are not summary judgment evidence”).

B. Plaintiffs’ Motion for Partial Summary Judgment should be denied and Defendant’s Motion to Dismiss should be granted.

For the reasons set forth in the United States’ prior briefings in this case, as well as those set forth herein, the United States denies that Plaintiffs are entitled to any judgment in this case, including the partial judgment sought here, and the United States’ motion to dismiss should be granted. Plaintiffs cannot overcome the fact that there is no statute giving rise to a money-mandating duty. Therefore, the Tucker Act does not vest this Court with jurisdiction. Furthermore, as found by the Federal Circuit, Plaintiffs have no interest in the subject matter of this suit—the 1886 lands and their proceeds.

Plaintiffs’ action is limited to the Tucker Act and Indian Tucker Act. The Tucker Acts only operate to waive sovereign immunity where the claimant has identified a substantive source of law that establishes a specific duty that can fairly be interpreted as mandating compensation for damages sustained as a result of the breach and, further, demonstrates that Defendant breached that specific duty. *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009) (“*Navajo II*”). In this case, Plaintiffs’ Motion for Partial Summary Judgment fails to identify a statute or act of Congress that gives rise to a money-mandating duty.

1. Only Certain Substantive Sources of Law Waive Sovereign Immunity under the Tucker Acts

As discussed in the United States’ Motion to Dismiss, the Indian Tucker Act does not itself create “any substantive rights enforceable against the United States for money

damages.” *United Keetoowah Band of Cherokee Indians in Okla. v. United States*, 86 Fed. Cl. 183, 187 (2009). “Unless the statute *requires* the payment of money damages, there has been no waiver of the government’s sovereign immunity from liability for such damages, and the Court of Federal Claims would not have jurisdiction to entertain the claim.” *Perri v. United States*, 340 F.3d 1337, 1340–41 (Fed. Cir. 2003) (emphasis added).

The Supreme Court has observed that “the substantive source of law may grant the claimant a right to recover damages either ‘expressly or by implication.’” *United States v. Mitchell*, 463 U.S. 206, 217 n.16 (1983) (“*Mitchell I*”); *but cf. Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739–40 (1982) (“the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly.”). But the Supreme Court has been reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. *See United States v. Testan*, 424 U.S. 392, 400 (1976) (“We are not ready to tamper with these established principles [concerning the reach of the Tucker Act] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.”); *see also Mitchell II*, 463 U.S. at 218 (“Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States’ consent to suit.”) (citation omitted).

A statute is expressly money-mandating “where the statutory text leaves the government no discretion over payment of claimed funds.” *Samish Indian Nation v. U.S.*, 419 F.3d 1355, 1364, 1368 (Fed. Cir. 2005) (finding no money-mandating duty under the Indian Self Determination Act and a “basket” of other treaties and statutes, including the

Snyder Act). According to the “the network theory” of jurisdiction under the Tucker Act and Indian Tucker Act, a network of statutes and regulations may, under some circumstances, substitute for a clear money-mandating statute. *See United States v. Navajo Nation* (“*Navajo I*”), 537 U.S. 488, 504-06 (2003) (explaining that a network of statutes and regulations can only satisfy this court’s Indian Tucker Act jurisdiction when the “network” establishes specific rights and duties that go beyond a general trust relationship); *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 61-66 (2008) (recounting the history of the network theory and explaining that a network of statutes may satisfy this court’s jurisdictional requirement of a money-mandating source when the network establishes a fiduciary relationship between the government and an Indian tribe). However, *Navajo I* foreclosed the application of this theory in most cases, by requiring that a plaintiff identify “specific rights-creating or duty-imposing statutory or regulatory prescriptions” in place of a clear money-mandating statute. 537 U.S. at 506; *see Navajo II*, 129 S.Ct. at 1554-55 (explaining that *Navajo I* foreclosed application of the network theory where the statutes comprising the network only created an implied duty). Although Plaintiffs allege that they have “identified the necessary statutory prescription,” (Pls.’ Br. at 26) (Dkt. No. 775), the statutes to which they cite do not waive sovereign immunity and, with the exception of the Appropriations Acts, do not even apply to Plaintiffs.¹

C. Plaintiffs’ Cited Substantive Sources of Law Have Been Held to Not Waive Sovereign Immunity under the Tucker Acts

¹ The United States notes that Plaintiffs cite to statutes in their summary judgment brief that they have not cited to in their current operative complaints or their proposed amended complaints. For the sake of this Reply and Opposition, the United States assumes that Plaintiffs meant to rely upon these statutes as the jurisdictional basis for their proposed amended complaints.

Those substantive sources of law identified by Plaintiffs are not money-mandating. Plaintiffs argue that certain statutes give rise to a fair inference of a money-mandating duty. Plaintiffs allege:

Thus, the question in *Wolfchild* is whether the Appropriations Acts' statutory use restriction can fairly be interpreted as requiring compensation for Interior's breaches of its statutory obligations to the 1886 Mdewakanton. In conducting this analysis, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." Particular statutes or regulations may provide such a fair inference, as the Appropriations Acts' statutory use restriction, IRA, 25 U.S.C. § 155 and IGRA do here.

Pls.' Br. at pp. 38-39. Plaintiffs then cite to *United States v. Hvoslef*, 237 U.S. 1 (1915) for support. A review of the *Hvoslef* case does not shed light on its relevance. In *Hvoslef*, the Supreme Court held that tax stamps imposed on cargo ships leaving the United States violated the Constitution's "Export Clause." In deciding whether the district court had jurisdiction to hear the claim, the Supreme Court examined the subsequent history of other "refunding statutes" passed by Congress and found:

It thus appears that the act of 1912-upon which the present claim is based-was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims, and it follows that these claims must be deemed to be founded upon a 'law of Congress' within the meaning of the provisions of the Tucker act, now incorporated in the Judicial Code.

Hvoslef, 237 U.S. at 10. The Supreme Court examined the language of the act in context of the Constitution's Export Clause. Finding that the stamps had no other effect or purpose than to tax exports, the Supreme Court struck down the statute. Thus in *Hvoslef*, the court applied the plain meaning and intent of a provision in the Constitution to a federal statute and found that statute unconstitutional. The case did not discuss the issue of "fair

inference” for a statute to be money-mandating nor did it discuss the specific acts upon which Plaintiffs rely. Although the Supreme Court, as cited above, found that the statutes at issue left no question that Congress intended to create an obligation on the part of the United States, this observation as to these particular statutes in *Hvoslef* cannot support Plaintiffs’ assertion of jurisdiction in this case nor can Plaintiffs general recitation of *Mitchell I* and its progeny. None of Plaintiffs’ referenced sources of substantive law are money-mandating nor do these new statutes that Plaintiffs rely upon even apply to Plaintiffs to create some sort of statutory scheme upon which jurisdiction could be based.

1. The IRA Is Not a Money-Mandating Statute

The Federal Circuit has found that the Indian Reorganization Act (“IRA”) is not a money-mandating statute. The Supreme Court has stated that “[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.” *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Federal Circuit found that the IRA created limited, specific duties for the Secretary of the Interior — *e.g.*, to call and hold elections upon tribal request. *Wopsock v. Natchees*, 454 F.3d 1327, 1332 (Fed. Cir. 2006). However, because the “overriding purpose” of the IRA was to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,” the court found no money-mandating duty established by the IRA. *Id.* at 1332–33 (internal quotation omitted). Consequently, the IRA does not serve as the requisite money-mandating statute needed to establish jurisdiction.

Furthermore, the IRA is not even applicable to Plaintiffs. Plaintiffs argue that it preserves the Appropriations Acts’ statutory use restriction in perpetuity because it

provides that “[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.” Pls.’ Br. at 6 quoting 25 U.S.C. § 462. Plaintiffs misconstrue the IRA. The Historical Notes to this section provide:

This section applicable, notwithstanding section 478 of this title, to all Indian tribes, all lands held in trust by the United States for Indians, and all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of Indians in the lands, see section 478-1 of this title.

25 U.S.C. § 462. When the IRA was passed, many Indians held allotments in “restricted fee,” which is not trust land. The IRA is inapplicable because the 1886 lands were neither held by the United States in trust nor was title held by Indians in restricted fee. The land was always held in fee simple by the United States.

Plaintiffs also suggest that through the IRA and the Federal Circuit’s holding that the United States had non-trust fiduciary obligations to the 1886 Mdewakanton continuing after the passage of the 1980 Act, their claim is valid. Pls.’ Br. at 7. First, as discussed above, the IRA does not apply. Second, the Federal Circuit never held that the United States had non –trust fiduciary obligations continuing after the passage of the 1980 Act. Plaintiffs cite to *Wolfchild VI*, 559 F.3d 1241, 1249 for support. On page 1241 of its opinion, the Federal Circuit found that:

[T]he 1886 Mdewakantons and their descendants never obtained vested rights in the 1886 lands. In short, nothing in the Appropriations Acts or the conduct of the Interior Department had the effect of conveying equitable title in the 1886 lands to the 1886 Mdewakantons and ultimately their lineal descendants.

Likewise, page 1249 contains no support for Plaintiffs’ statement and in fact contradicts it.

There, the Federal Circuit held that:

[T]he 1886 Mdewakantons were merely the intended beneficiaries of a congressional appropriation, and their descendants were merely the beneficiaries of an interim Interior Department policy designed to approximate Congress' purpose in the Appropriations Acts pending legislation settling the ownership issue. We conclude that . . . is the better view.

Thus, any rights of Plaintiffs were completely extinguished when Congress passed the 1980 Act, settling the ownership issue.

2. The IGRA Is Not a Money-Mandating Statute

Likewise, the Indian Gaming Regulatory Act ("IGRA") does not serve as a money-mandating statute upon which jurisdiction may be found. Congress's central purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Gaming proceeds are the profits of tribal businesses. The United States has no management role in the operation of such businesses or the distribution of gaming profits. IGRA provides for the operation of casinos exclusively by "Indian tribes." 25 U.S.C. §§ 2702 (1), 2710 (a)(1),(b)(2)(A). IGRA requires that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710 (b)(2)(A). Indian gaming facilities are owned and operated by Indian tribes and not the United States. Under IGRA, Indian tribes make per capita distributions to their members directly from casino profits. 25 U.S.C. §§ 2710(b)(2)(B), (b)(3)(A).

The United States has a general trust responsibility toward Indian tribes. *Lincoln v. Vigil*, 508 U.S. 182, 194-5 (1993). Without an unambiguous declaration by Congress that clearly outlines the extent of the trust, however, the United States' trust responsibility is only a limited one. Federal agencies only incur specific judicially enforceable trust

duties toward particular Indian tribes when required by statute to comprehensively manage or operate Indian lands or resources. *Mitchell II*, 463 U.S. at 226 (specific duties defined by statute and regulation), compare with *United States v. Mitchell*, 445 U.S. 535, 545-6 (1980) (“*Mitchell I*”) (general limited trust). A review of IGRA shows that it does not give the Department a detailed and comprehensive control over the daily operation and management of the royalties generated from Indian gaming facilities, as required by *Mitchell II*. See also *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1298 (D.N.M. 1996), *aff’d*, 104 F.3d 1546 (10th Cir. 1997) (“The Secretary has no detailed, comprehensive control over the daily management of the casino or the money earned by such operations.”); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1201 (D. Minn. 1996) (finding that “[u]nlike *Mitchell II*, no fiduciary duty created by an elaborate regulatory scheme exists [under the IGRA.]”); *United States v. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d 1213, 1216 (E.D. Wa. 1998) (“[T]here is no basis for imposing specific trust duties upon the United States due to the Commission’s role in Indian gaming.”). Indeed, the IGRA “cannot be fairly interpreted as imposing fiduciary obligations.” *Pueblo of Santa Ana*, 932 F. Supp. at 1298; see also *Jamul Indian Village v. Hunter*, Case No. 95-131 (S.D. Cal. Sept. 9, 1996) (attached as Exhibit A) (finding that the IRA, IGRA, and National Historic Preservation Act do not provide a proper basis for a Little Tucker Act claim). IGRA mandates that only the tribe operating a particular casino may derive the benefit from that casino. Contrary to Plaintiffs’ assertion that the United States breached an IGRA-created duty to provide direct benefits to Plaintiffs, IGRA does not contemplate distribution to persons other than members of the recognized tribes and only when the recognized tribes choose to distribute to their members. See *Smith v. Babbitt*, 875 F.

Supp. 1353, 1369 (D. Minn. 1995) (“Nothing in the language of IGRA indicates that Congress imposed a duty on the Secretary or his subordinates to determine tribal membership for eligibility for per capita payments under a gaming distribution plan. Similarly, the federal government does not have a fiduciary obligation to challenge the Community’s membership determinations in this case.”).

3. 25 U.S.C. § 155 Is Not a Money-Mandating Statute

25 U.S.C. § 155 has no applicability to this case and cannot be used as a substantive statute for finding jurisdiction. 25 U.S.C. § 155, “Disposal of Miscellaneous Revenues from Indian Reservations,” concerns the disbursement of miscellaneous revenues “derived from Indian reservations, agencies and schools.” *Id.* The money contained in the frozen funds account was derived from the proceeds from the sale of 1886 land that was not assigned and later proceeds of the 1886 lands that were not attributable to an individual assignee. Plaintiffs, having no vested or beneficial interest in the 1886 lands, had no vested or beneficial interest in these funds and were not the beneficiaries. As to these funds, Interior was not required to convert them to a Treasury account and distribute them to Plaintiffs. In fact, to the extent this statute is applicable, the statute conferred on the Secretary the discretion to make the funds available for the benefit of the Indian tribes on whose behalf they were collected, which is what Interior ultimately did.

4. The Appropriations Acts Are Not Money-Mandating and Do Not Provide a Basis for a Cause of Action

As the United States has detailed in its Motion to Dismiss and Opposition to Plaintiffs’ Motion to Amend, the Federal Circuit did not recognize a cause of action for

statutory use restriction. Further, the Appropriations Acts cannot serve as a basis for jurisdiction under the Tucker Acts. The Federal Circuit explained:

Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose.

Wolfchild VI, 559 F.3d at 1238. Thus, the Federal Circuit has defined the use restriction as nothing more than limiting the uses for which the Secretary could expend the appropriated funds. When the Secretary directed that certain lands be purchased with the appropriations, he followed Congress' limited restrictions on the use of the funds. The Federal Circuit expressly rejected the notion that the Appropriations Acts—even with the use restriction—created any beneficial interest for Plaintiffs. *Wolfchild VI*, 559 F.3d at 1255.

Plaintiffs make much of the Federal Circuit's comment that the 1980 Act did not repeal the Appropriations Acts, relying on the comment to assert the existence of an ongoing statutory use restriction. See *Wolfchild VI*, 559 F.3d at 1258, n13. But the Federal Circuit's observation provides no support for the idea of a perpetual statutory use restriction.² When a statute, whether one of general legislation or one appropriating funds from the treasury, is repealed, it is as if that statute never existed. *University Of Rochester v. G.D. Searle & Co., Inc.*, 358 F.3d 916, 922 (Fed. Cir. 2004). In this case, as recognized by the Federal Circuit, the Appropriations Acts were not repealed by the 1980 Act. This is

² On page 26 of their brief, Plaintiffs argue that the Federal Circuit held that a statutory use restriction existed and it is the law of the case. As the United States has set forth in its Opposition to Plaintiffs' Motion to Amend Their Complaints, the Federal Circuit never found any such cause of action. Rather, the Federal Circuit noted that restrictions on how an agency may expend appropriated money is the essence of an appropriations bill. The Court rejected the idea that such standard appropriations law language could result in the formation of a trust and noted the broad discretion that the Secretary had. It is not the law of the case that the Federal Circuit recognized a cause of action for violation of a statutory use restriction.

an issue the United States does not dispute. The Appropriations Acts did exist and the Secretary of the Interior, at the time of their passage, followed Congressional directive and purchased land for the 1886 Mdewakanton. For the Appropriations Acts to have been repealed, this would never have happened. Rather, the Federal Circuit was responding to a point raised by the trial court, which had concluded that construing the 1980 Act to transfer the 1886 lands in trust to the three communities constituted an implied repeal of the Appropriations Acts, and that the United States' construction of the 1980 Act was therefore suspect in light of the doctrine that implied repeals are disfavored. *See Wolfchild v. United States*, 62 Fed. Cl. 521, 543-44 (2004) (*Wolfchild I*). The Federal Circuit found that it was not necessary to address whether there was an implicit repeal because, “[w]e do not agree that the 1980 Act, as construed by the government, would effect a repeal of the Appropriations Acts, implied or otherwise. The 1980 Act simply provides for the long-term disposition of the property purchased pursuant to the Appropriations Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years.” *Wolfchild VI*, 559 F.3d at 1258, n.13.

But the fact that the Appropriations Acts were not repealed is completely irrelevant. The question is whether the “statutory use restriction” upon which Plaintiffs’ entire case is based still has some effect. Plaintiffs have made it clear that they view the alleged statutory use restriction the same as a trust of which they are the beneficiaries. By contrast, the Federal Circuit explicated that the statutory use restriction in the Appropriations Acts imposed “limited restrictions *as to how the appropriated funds are to be spent.*” *Id.* at 1238 (emphasis added). Thus the *only* thing “restricted” by the statutory use restriction is what the Secretary can do with the money appropriated – here, money

appropriated in 1888, 1889, and 1890. It is plainly impossible to violate such a restriction once those funds have been expended. Plaintiffs point to many acts by the Secretary which they claim to be violations. In fact, the only way the Secretary could have violated a statutory use restriction would have been to expend the appropriations in a manner inconsistent with the directives of the acts. The Secretary did not expend the funds in violation of a statutory use restriction. None of the actions by Interior that Plaintiffs construe as having the same consequences as a breach of trust are in fact violations of a statutory use restriction, and nothing in the Federal Circuit opinion supports Plaintiffs' construction of the law.

The alleged statutory use restriction might arguably serve as the basis of a claim for Plaintiffs only if it gave them beneficial or vested rights to something, here the 1886 lands and their proceeds. But the Federal Circuit has held that Plaintiffs had no rights and have had no rights to the 1886 lands. Plaintiffs fail to grasp the implication of the Federal Circuit's directive.³ The Federal Circuit could not have recognized a cause of action for violation of a statutory use restriction in an opinion in which it held that Plaintiffs have no interest, vested or beneficial, in the 1886 lands. It is inconsistent to find that Plaintiffs have an interest because of this statutory use restriction, based on appropriations language the Federal Circuit rejected as creating a beneficial interest.

Likewise, Plaintiffs ignore the plain meaning of the Federal Circuit's holding that, in the alternative, the 1980 Act terminated whatever interest they may have had in the 1886 lands. Plaintiffs are wrong to state that, "the government has failed to point to any statute,

³ Plaintiffs allege "[e]ven though the Federal Circuit did not find a trust, clearly language that is strong enough to create a trust, even though it does not, is strong enough to create a statutory obligation on Interior." Pls.' Br. at 36.

including the 1980 Act, that repeals the Appropriations Acts' statutory use restriction because there isn't one." Pls.' Br. at 25. The United States' consistently cites to the Federal Circuit opinion holding that the 1980 Act terminated whatever interest Plaintiffs may have had in the 1886 lands, even though Plaintiffs never had any interest in the first place. Whether Plaintiffs choose to label their claim as one for breach of trust or violation of a statutory use restriction, the fact remains, whatever their claim of interest, the 1980 Act terminated their interest.

Plaintiffs' interpretation of the Federal Circuit's opinion also would be at odds with every finding the Federal Circuit made. The consequences flowing from Plaintiffs' statutory use restriction claim would put back into place all the tensions the Federal Circuit found would have existed if the Appropriations Acts were viewed as creating a trust. Just as a trust on a trust was never Congress' intention, a statutory use restriction that "is the same as a trust obligation" (Pls.' Br. at 33) would make the 1980 Act a nullity. The Federal Circuit found:

A further problem with the trial court's interpretation of the 1980 Act is that it is in tension with the provision in the Act that declares the transferred 1886 lands to be "part of the reservations of the respective Indian communities." 94 Stat. at 3262. As previously noted, the term "reservation" typically denotes property for which legal title is in the United States and equitable title is in the tribe. Lands that the Secretary adds to existing reservations are designated by statute as reserved "for the exclusive use of Indians entitled to enrollment or by tribal membership to residence at such reservations." 25 U.S.C. § 467. In light of that statutory provision dedicating new reservation lands to the use of tribal members only, it would be anomalous to construe the 1980 Act, which made the 1886 lands part of the three communities' reservations, to mean that those lands would be held in trust for the class of 1886 Mdewakanton descendants, many of whom were not enrolled or eligible for enrollment in any of the three communities.

Wolfchild VI, 559 F.3d at 1257. It would be anomalous to construe the 1980 Act to mean that the 1886 lands would be encumbered by a statutory use restriction in favor of

Plaintiffs. *See Id.* at 1256 (“[I]f [Plaintiffs’] interpretation of the 1980 Act is correct, it is hard to understand what the 1980 Act accomplished.”). In fact, the Federal Circuit disposed of this issue when it found that:

Nothing in the very straightforward language of the statute (and nothing in any of the legislative history) suggests that Congress intended to create a “trust on trust” or any other elaborate structure in which the three communities would assume some undefined role between the continuing holder of legal title (the United States) and what the plaintiffs see as the continuing holders of equitable title (the 1886 Mdewakanton descendants).

Id. at 1257 (emphasis added). The Federal Circuit could not have recognized an action for statutory use restriction where it found that the language of the Appropriations Acts did not suggest that Congress intended to create an elaborate structure, such as a perpetual statutory use restriction, where Plaintiffs would have equitable title to the 1886 lands.

Lastly, the Federal Circuit recognized that the 1980 Act foreclosed any claim Plaintiffs have that they are still the beneficiaries of a perpetual statutory use restriction.

The Federal Circuit held:

If the 1980 Act had no effect on the equitable rights of the 1886 Mdewakantons in the 1886 lands, as the plaintiffs contend, there would have been no need for a savings clause to preserve the interests of the current assignment holders from the adverse effects of the 1980 legislation. The 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 in those lands.

Id. at 1259. The 1980 Act terminated the equitable interests of Plaintiffs, whether termed as a trust relationship or one based on a statutory use restriction. By means of the 1980 Act, Congress terminated whatever interests Plaintiffs may have had in the 1886 lands and the proceeds therefrom.

5. The Statutes Now Relied Upon by Plaintiffs Do Not Create a Statutory Scheme in which a Money-Mandating Duty May Be Found

Plaintiffs seem to argue that these statutes, the Appropriations Acts, the IRA, the IGRA, and 25 U.S.C. § 155, linked together, create some sort of statutory scheme upon which a money-mandating duty can be found. Besides the fact that these statutes do not contain the requisite duties, they in no way can be read as creating any sort of “scheme” by which the United States had full responsibility to manage Indian resources and lands for Plaintiffs’ benefit. These statutes do not provide money-mandating bases for jurisdiction under the Tucker Act and Indian Tucker Act in the Court of Federal Claims, absent express statutory and regulatory language supporting existence of a fiduciary relationship, and such elaborate or comprehensive government control over Indian property as to constitute a common-law trust. *See Samish Indian Nation*, 82 Fed. Cl. at 67-68 (finding that the network of statutes comprising the Indian health care system did not create a money-mandating duty or constitute a trust). When these statutes are examined in light of the Supreme Court’s rulings, they woefully fail to meet the requirements. In each of the Supreme Court cases, key to the decision was the existence of a trust relationship. Here, such a relationship does not exist.

In *Navajo I*, the Supreme Court addressed the “money-mandating test” by comparing *Mitchell I*, in which the Court concluded that the statute at issue (the Indian General Allotment Act) was not money-mandating, to *Mitchell II*, in which the Court found that the relevant timber management statutes could be interpreted as money-mandating. 537 U.S. at 503. In doing so, the Court focused on the degree to which the statutes in each case created a trust relationship between the United States and

the respondents. The Court observed that the statute in *Mitchell I* “created only a limited trust relationship . . . that does not impose any duty upon the Government to manage timber resources,” while the statute in *Mitchell II*, “clearly give[s] the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” *Navajo I*, 537 U.S. at 504-05. The Court found that the provision at issue, the Indian Mineral Leasing Act, and its regulations did not “contain[] any trust language with respect to coal leasing” and rejected the respondent’s claim for compensation. *Id.* at 508. Compare *Navajo I*, 537 U.S. at 508, with *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-5 (2003) (finding the statute in question to be money-mandating because it provides that “Fort Apache [is] ‘held by the United States in trust for the White Mountain Apache Tribe’ ” and because “elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch”).

None of the statutes and regulations Plaintiffs rely upon work together to establish a trust and create specific fiduciary duties that the United States is alleged to have failed to faithfully perform. Plaintiffs allege that these statutes create some sort of fiduciary duty between them and the United States. Such an argument is precluded where the Federal Circuit has held that no trust relationship exists. There is no fiduciary relationship between the United States and Plaintiffs arising from the Appropriations Acts, the IRA, IGRA, and 25 U.S.C. § 155. As discussed above, under the IRA, IGRA, and 25 U.S.C. § 155, the Secretary is neither assigned a comprehensive managerial role nor invested with any responsibility to secure the needs and bests interests of the Plaintiffs because these statutes are not even applicable to Plaintiffs.

Because Plaintiffs fail to identify any basis in substantive law to support their contention that the United States has a money-mandating duty to ensure that Plaintiffs receive benefits from the 1886 lands and their proceeds, this Court lacks jurisdiction over their claims under the Tucker Acts. Therefore, Plaintiffs cannot be entitled to judgment as a matter of law, and their Motion for Partial Summary Judgment should be denied and the United States' Motion to Dismiss should be granted.

D. *Carciere* Is Inapplicable to this Case

Plaintiffs' suggestion that the Supreme Court's decision in *Carciere v. Salazar*, 129 S. Ct. 1058 (2009), mandates the relief they seek is without merit. *Carciere* addressed the Secretary's authority under the IRA to acquire land and hold it in trust "for the purpose of providing land for Indians." *Id.* at 1060 (quoting 25 U.S.C. § 465). Because the IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," the Supreme Court concluded that the statute "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 1060-1061. As the Federal Circuit correctly concluded, the Secretary's authority under the IRA is not relevant to the questions raised in this case—whether the Appropriations Acts created a "statutory use restriction" and whether, if they did, the 1980 Act terminated that restriction or the United States is in violation of that restriction.⁴ Moreover, as relevant to this case, the Secretary never exercised any

⁴ The Federal Circuit found that: "The plaintiffs have called our attention to the Supreme Court's recent decision in *Carciere v. Salazar*, --- U.S. ----, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), which involved the construction of a provision of the 1934 Act. They contend that *Carciere* supports their argument that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants. We do not regard *Carciere* as in any way relevant to that issue." *Wolfchild VI*, 559 F.3d at 1251, n8.

authority to acquire land and hold it in trust under the IRA.⁵ *Carcieri* is irrelevant to this case.

E. The Statute of Limitations Bars Plaintiffs' Claims

The statute of limitations applies to bar Plaintiffs' claims for violation of an alleged statutory use restriction. Plaintiffs assert that this Court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and Indian Tucker Act, 28 U.S.C. § 1505 (6th Amend. Compl. at 3). Claims under the Tucker Acts are subject to a six-year statute of limitations. 28 U.S.C. § 2501. Unlike most statutes of limitations, which are typically treated as affirmative defenses, § 2501 is "a jurisdictional requirement for a suit in the Court of Federal Claims" and one that "may not be waived." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008); *see also Black v. United States*, 84 Fed. Cl. 439, 450 (2008) ("[E]quitable tolling of ... § 2501 is foreclosed by the Supreme Court's decision in *John R. Sand & Gravel Co.*").

A claim accrues under § 2501, and the six-year limitations period begins to run when "all events have occurred to fix the government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (citation omitted). Further, "it is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Instead, the proper focus "is upon the time of the [defendant's] acts, not upon the time at which the

⁵ The United States notes that the United States took land into trust for the Prairie Island and Lower Sioux Communities under the IRA after those communities were recognized in the 1930s. But the authority for the United States to take the 1886 lands into trust for the Communities is the 1980 Act, not the IRA.

consequences of the acts became most painful.” *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (citation omitted).

1. PL 108 Is Inapplicable

Here, the statute of limitations applies precisely because of the Federal Circuit’s finding of no trust. As discussed in the United States’ motion to dismiss, the Appropriations Rider, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (“PL 108”) provides:

[T]he statute of limitations shall not commence to run on any claim . . . 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.

117 Stat. at 1263 (emphasis added). Plaintiffs argue that PL 108 applies to toll their claims because “[PL 108] covers claims involving Interior’s treasury accounts held for the benefit of individual Indian beneficiaries” and that these accounts “fit within the plain meaning of the [PL 108]’s use of the phrase ‘trust funds.’” Pls.’ Br. at 48.

The Bureau of Indian Affairs regulations define a “trust account” as “a trust fund account for a federally recognized tribe that is maintained and held in trust by the Secretary.” 25 C.F.R. § 115.002. “Trust funds” are “money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust. *Id.* “Trust lands” are “any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or individual Indian.” *Id.* “Trust assets” are “trust lands, natural resources, trust funds, or other assets held by the federal government in trust for Indian tribes and individual Indians.” *Id.* Here, the Interior Department holds no trust funds for the benefit of Plaintiffs.

As the Federal Circuit found, the 1886 lands were never held in trust for the Plaintiffs and were not trust lands until Congress placed the lands in trust for the three Mdewakanton Sioux Communities. Any funds derived from the lands and held by Interior between “1944 and 1982” (Pls.’ Br. at 49) were not trust funds because they were not derived from the sale or use of trust lands. Plaintiffs’ reliance on the Court’s decision in *Wolfchild I* holding that PL 108 applied is unavailing and indeed supports the United States’ Motion to Dismiss. The Court in *Wolfchild I* premised its jurisdictional finding on its own finding that Plaintiffs were beneficiaries of a trust. The Federal Circuit’s reversal of that decision removes the basis for jurisdiction over Plaintiffs’ claims. Where there is no trust, PL 108 cannot apply.

Plaintiffs’ argument that the Communities’ distribution of their gaming revenue tolls their claims under PL 108 is wrong. The Communities’ gaming revenues are not trust funds subject to PL 108. Courts analyzing whether these funds are trust funds have rejected such claims. *See Smith v. Babbitt*, 875 F. Supp. at 1369 (“[T]he funds used to make per capita gaming distributions do not form part of this trust corpus[,]” because “[t]hese funds are generated by the [Indian] Community’s corporate gaming enterprise, are managed by the [Indian] Community, and have no different status than other revenues from tribal businesses.”). Likewise, in *Vizenor v. Babbitt*, the district court rejected a claim that the Interior Department had a fiduciary duty to take action as to misappropriation of gambling funds, in part, because “[t]he [gambling] monies that were the subject of the alleged misappropriations, however, do not constitute property held in trust by the federal government, but are instead tribal property.” 927 F. Supp. at 1203. *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United*

States, 259 F. Supp. 2d 783, 791 (D. Wis. 2003) (noting that the IGRA “does not create a situation in which the federal government holds resources in trust for the Indians”).

Because the funds at issue are not trust funds, PL 108 does not apply to toll the statute of limitations.

2. The Continuing Claims Doctrine Does Not Apply

The doctrine referred to as “continuing claims” does not cure the statute of limitations jurisdictional defects inherent in Plaintiffs’ Amended Complaint. Typically pertaining to civil rights, employment discrimination, and most recently environmental claims, the continuing claims doctrine is inapplicable and cannot serve as a basis to restore Plaintiffs’ barred claims. *Voisin v. United States*, 80 Fed. Cl. 164, 176 (2008) (noting that the doctrine is largely limited to tort actions). Assertion of a continuing claim from the time the events complained of accrued, at the very latest 1982, to within six years of the lawsuit does not resurrect these long-expired claims.

a. The Continuing Claims Doctrine Does Not Waive the Requirement that Plaintiffs Demonstrate Money-Mandating Obligations to Which They Are Owed

To satisfy the requirements of “first” or “ordinary accrual,” it is incumbent on Plaintiffs to state a cognizable claim for money damages against the United States in the first instance. Plaintiffs “must demonstrate that the source of substantive law [they rely] upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” *Mitchell II*, 463 U.S. at 216-17 (internal quotation marks omitted); *see also Navajo I*, 537 U.S. at 506. As the United States has discussed above and in its objection to Plaintiffs’ motion to amend their complaints, Plaintiffs must first

sustain their burden of demonstrating, first, the basis of the United States' liability in this case and the source of any money-mandating duties to Plaintiffs, which the United States has shown that they cannot. Without first making this showing, an effort to demonstrate that the lawsuit is timely is unavailing.

b. Assuming a Money-Mandating Obligation, the Continuing Claims Doctrine is Unavailing Where the Event complained of is Singular, Discrete, or Unitary

Assuming the Court's subject matter jurisdiction, over Plaintiffs' claims and a money-mandating obligation by the United States, which the United States disputes, the paramount basis to any continuing claim analysis is the question of whether, based on the claim for violation of an alleged statutory use restriction contained in gratuitous appropriations enactments, Plaintiffs suffered harm within the limitations period. Plaintiffs' complaint was filed on November 18, 2003. Therefore, cognizable claims must have accrued no earlier than November 18, 1997, to fall under the continuing claims doctrine.

The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely when the claims are "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages," and when at least one of these events falls within the limitations period. *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) (citing *Friedman v. United States*, 310 F.2d 381, 384 (Ct. Cl. 1962)). However, "a claim upon a single distinct event, which may have continued ill effects later on, is not a continuing claim." *Id.* (claims arose from discrete events that occurred more than six years prior to suit and, therefore, were barred by the Statute of Limitations, 25 U.S.C. §

2510); *see also Applegate v. United States*, 25 F.3d 1579, 1584 (Fed. Cir. 1994) (rejecting application of continuing claims doctrine because the case “does not involve a string of distinct events”). A claim cannot be construed as continuing “when all the events have occurred which fix the liability of the Government and entitle the claimant to institute and action.” *Brown Park Estates-Fairfield Develop. Co.*, 127 F.3d at 1455 (quoting *Brighton Village Assocs. v. United States*, 52 F.2d 1056, 1060 (Fed. Cir. 1995)).

Courts have refused to apply the continuing claims doctrine where plaintiffs alleged that the United States’ “continued and repeated refusal to recognize [plaintiffs] as the rightful owners of [the disputed parcel] should be considered a continuing wrong.” *Voisin v. United States*, 80 Fed. Cl. at 176; *Rosales v. United States*, 89 Fed. Cl. 565, 579 (2009) (finding that, with respect to ownership of parcels, it was a single act by the government in not recognizing them as owners that marked the final event fixing the government’s alleged liability) *aff’d*, ___ Fed. Cir. ___ (Sept. 17, 2010). Here, the accrual date of the alleged wrongful acts simply cannot be traced to a wrong that occurred in the six years prior to the filing of this suit. The United States’ acts in not recognizing an alleged statutory use restriction culminated in 1980 when Congress passed the 1980 Act and Interior was deemed to hold the 1886 lands in trust for the three Communities. Shortly thereafter, the frozen funds containing proceeds of the lands were distributed to the Communities. It was at this time that their claims, based upon those actions arose and fixed the United States’ alleged liability. Plaintiffs’ argument that these events continue to have adverse effects, by itself, does not constitute a continuing claim as a legal matter.

Plaintiffs’ cite to *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15 (2007) is misleading. The Federal Circuit, in that case, did not recognize that the continuing claims

doctrine applies in this type of case as Plaintiffs state. Pls.' Br. at 50, n.121. In *Rosebud*, the plaintiff tribe brought suit against the federal government alleging that it breached its fiduciary duties in handling various lawsuits arising out of the government-approved lease of tribal lands. *Rosebud*, 75 Fed. Cl. at 16-22. The court did not find that the continuing claims doctrine applied. Rather, the court noted that, "[a]lthough not addressed by the parties, the continuing claims doctrine may also serve to insulate claims from the statutory bar." *Id.* at 24. After discussing the provisions of the continuing claims doctrine, the court found that, "[i]t cannot be said at this early stage of the litigation that the Complaint does not, or could not, encompass claims that are not barred by the statute of limitations, and factual issues in this regard preclude summary dismissal." *Id.* at 25. Although the court in *Rosebud* determined that it did not have the factual record before it to determine if the continuing claims doctrine applied, the record in this case shows that the doctrine is inapplicable. Accordingly, Plaintiffs cannot rely upon the continuing claims doctrine to salvage their claims.

3. The Claims of the Minors Cannot Be Tolled

The claims of the minors cannot be tolled. While it is true 28 U.S.C. § 2501 provides that "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claims accrues may be filed within three years after the disability ceases," such an accrual is an instance in which the claimant, because of his or her disability, is unable to file a claim within the jurisdictional provision of six years. The purpose of the provision is to provide relief from some personal handicap or impediment affecting an individual litigant and preventing him from bringing a timely suit. Such provisions are based on the presumption that courts are open and that every person without a handicap

will not unreasonably delay in filing a suit. *See Goewey v. United States*, 612 F.2d 539 (Ct. Cl. 1979); *see also De Arnaud v. United States*, 151 U.S. 483 (1894). It is not to toll a claim that has already been filed. In this case, the claims of the minors have been filed and are not subject to tolling under this provision.

III. CONCLUSION

Plaintiffs' complaints should be dismissed and their motion for partial summary judgment denied. The Court has no jurisdiction to consider their claims. Their claims 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.

Respectfully submitted this 20th day of September, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2010, a copy of the United States' Reply in Support of Its Motion to Dismiss and Opposition to Plaintiffs' Motion for Partial Summary Judgment 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 20th day of September, 2010.

/s/ Jody H. Schwarz
Jody H. Schwarz