

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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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' MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT**

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SHELDON PETER WOLFCHILD, <i>et al.</i> ,)	
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Plaintiff,)	
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THE UNITED STATES OF AMERICA,)	
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**THE UNITED STATES' MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT**

Defendant, the United States of America, respectfully moves this Court, pursuant to Rule 12(b)(1) of the Court of Federal Claims, to dismiss Plaintiffs' Fifth Amended Complaint, and all Intervenor Complaints, in the above-captioned matter. A memorandum in support of this motion follows.

MEMORANDUM

QUESTION PRESENTED

Are there any remaining viable claims in this action given the Federal Circuit's ruling in *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009)?

STATEMENT OF THE CASE

I. INTRODUCTION

In this case, the parties disputed whether the United States held certain land in trust for Plaintiffs' benefit pursuant to three appropriations acts Congress passed in the late 1880s, and whether the United States then breached this trust when it vested beneficial interest in the subject land to three Minnesota Indian communities via legislation in 1980. In 2004, after extensive briefing on the matter, the trial court issued partial summary judgment in favor of Plaintiffs, holding that the appropriations acts created a trust and that the 1980 legislation did not terminate Plaintiffs' interest in that trust. Because the issue of whether a trust was created is a prerequisite for Plaintiffs' cause of action, the Court allowed for the interlocutory appeal of two questions: (1) did the three appropriations acts create a trust; and (2) if a trust was created, was it terminated by the 1980 legislation. On March 10, 2009, the Federal Circuit held that the appropriations acts did not create a trust and that even if the acts could somehow be construed as creating a trust, the 1980 legislation terminated whatever interest the Plaintiffs could have had. *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) ("*Wolfchild VP*") (*cert. denied*, 130 S. Ct. 2090 (2010)).

The effect of the Federal Circuit's ruling should be the dismissal of Plaintiffs' complaint. Plaintiffs' sole cause of action is premised on the United States' breach of

fiduciary duties relating to an alleged trust between the parties and the accompanying jurisdictional waiver of sovereign immunity found by the Court. *See Wolfchild v. United States*, 68 Fed. Cl. 779, 786 (2005) (court rejected United States' argument that an express trust was not created). Without the existence of the trust, Plaintiffs have not alleged a viable cause of action. In any event, a separate cause of action cannot be maintained because there is no statute or regulation alleged that mandates compensation.

Plaintiffs' claims concerning certain proceeds relating to the land at issue must also be dismissed. Plaintiffs have not and cannot allege a viable claim for the funds because, pursuant to the Federal Circuit's decision, Plaintiffs did not hold any interest in the land. They, therefore, have no interest in the proceeds from the land. *Wolfchild VI*, 559 F.3d at 1259 n.14 ("That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed, *to the extent necessary*, in further proceedings before the trial court.") (emphasis added). Furthermore, just as the appropriations acts did not create a trust for any claim relating to the land, the appropriations acts did not create a trust for the proceeds of the land.

Additionally, Plaintiffs' claims for proceeds from the 1886 lands must be dismissed because they are barred by the applicable six-year statute of limitations.

II. BACKGROUND AND PROCEDURAL HISTORY

The parties and the courts have extensively briefed the historic background of the events relating to this case. A summary of the relevant facts is included below.

A. Purchase of the 1886 Lands

In 1858, Congress approved a treaty with the Sioux that established a reservation along the Minnesota River in south-central Minnesota. Act of June 19, 1858, 12 Stat.

1031. In 1862, the Minnesota Sioux revolted against the United States in response to the United States' failure to provide the supplies and money previously promised in exchange for Sioux lands. After the 1862 Sioux Uprising, Congress annulled the treaty with the Sioux and confiscated Sioux lands in Minnesota. Act of February 16, 1863, 12 Stat. 652. However, Congress permitted some "friendly [Mdewakanton Sioux] Indians" who had not participated in the uprising to remain in Minnesota. *Id.* at 654; *see also Cermak v. Babbitt*, 234 F.3d 1356, 1358 (Fed. Cir. 2000).

In 1888, 1889, and 1890, Congress appropriated funds for the purpose of purchasing land and agricultural supplies for this group of loyal Mdewakanton Sioux who were landless and destitute at the time. *See* Act of June 29, 1888, 25 Stat. 217 ("1888 Appropriations Act"); Act of March 2, 1889, 25 Stat. 980 ("1889 Appropriations Act"); Act of August 19, 1890, 26 Stat. 336 ("1890 Appropriations Act") (collectively referred to as the "Appropriations Acts"). The funds were "[f]or the support of the full-blood Indians in Minnesota, belonging to the Medwakanton [sic] band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations" The Appropriations Acts directed the Secretary of the Interior to purchase agricultural implements, cattle, horses, and land. *See id.*; 1889 Appropriations Act; 1890 Appropriations Act.

In 1886 and in 1889, the Office of Indian Affairs compiled a roll of the "friendly Indians," generally referred to as the 1886 roll, who had been loyal to the United States during the Sioux Uprising of 1862 and had severed their tribal relations. The Commissioner of Indian Affairs purchased land and, starting in 1904, made assignments of land to members of the 1886 roll. *See Gitchel v. Minneapolis Area Director*, 28 IBIA 46,

46 (1995). The lands were held by the United States in fee and are referred to as the 1886 lands. The land assignments issued by the Bureau of Indian Affairs (“BIA”) to members of the 1886 rolls “convey[ed] only ‘conditional occupancy and use’ to the [assignment] certificate holders.” *Id.* at 46; *Brewer v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 10 IBIA 110, 89 I.D. 488 (1982). In *Cermak*, the Court of Appeals for the Federal Circuit determined that these land assignments were not “allotments” as provided for in 25 U.S.C. § 348. 234 F.3d at 1362.

After enactment of the Indian Reorganization Act of 1934 (“IRA”), the Prairie Island and Lower Sioux Communities organized into self-governing communities recognized by the BIA. *See* H.R. 1409, 96th Cong. (1980); S.Res. 1047, 96th Leg., Sess. Cong. (State. 1980). The Shakopee operated as part of the Lower Sioux Community until 1969, when they organized under the IRA. *See, e.g.*, H.R. 1409, 96th Cong. (1980). Additional lands were acquired in trust for the benefit of the three Communities. *Id.* The constitution and bylaws of the Communities established two classes of members: all members of the community who were entitled to the benefits of the tribal lands acquired under the IRA and members who were descendants of the 1886 Mdewakanton and who were eligible to receive assignments to the 1886 lands. *Id.*

B. The 1980 Act

In 1980, Congress placed the lands purchased under the Acts of 1888, 1889, and 1890 in trust for the three Mdewakanton Sioux Communities that had formed around these parcels of land. Act of December 19, 1980, Pub. L. No. 96-557, 1980 U.S.C.C.A.N. (94 Stat.) 3263 (“1980 Act”). The 1980 Act provides, in material part:

That all right, title, and interest of the United States in those lands

(including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States —

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

Sec. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

Sec. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Thus, after implementation of the 1980 Act, the 1886 Lands were held in trust for the three Communities. In addition to becoming the beneficiaries of the lands held in trust by the United States, the three Communities took over responsibility for managing the 1886 lands and issuing new assignments. *See Smith v. Haliburton*, 1982 U.S. Dist. Lexis 14243, *4-*5 (D. Minn. Aug. 23, 1982) (describing how in 1977 the BIA issued land assignments for a parcel of the 1886 Lands but in September, 1981, the Shakopee Mdewakanton Sioux Community issued assignments for parcels of the same land) *aff'd Smith v. Haliburton*, 709 F.2d 508 (8th Cir. 1983) (per curiam) (affirming “for the reasons set forth in [the district court] opinion”). The United States did continue to oversee assignments that had been

made before 1980 and were covered by Section 3 of the 1980 Act but issued no new assignments. However, because the assignments “conveyed only ‘conditional occupancy and use’ to the certificate holders,” the property went to the appropriate Sioux Community upon the death of the assignee. *Gitchee*, 28 IBIA at 48.

C. Frozen Funds Account

The parties dispute whether Plaintiffs have any interest in a monetary account that holds proceeds from the sale of certain 1886 lands and money generated from mineral resources and leasing. The background of the disputed account, referred to as the “frozen funds” account, is below.

1. The Wabasha Land Transfer

On June 13, 1944, Congress enacted a statute authorizing the Secretary of the Interior to transfer approximately 110.24 acres of 1886 lands in Wabasha County. *See* An Act to Add Certain Lands to the Upper Mississippi Wild Life and Fish Refuge, Pub. L. No. 78-355, 58 Stat. 274 (1944). The Wabasha transfer statute noted that the parcels to be transferred had been acquired “for Indian use, but are no longer used by Indians.” *Id.* The statute specified that the \$1,261.20 to be furnished as compensation for the land was “hereby made available for transfer on the books of the Treasury of the United States to the credit of the Medawakanton and Wahpakoota Bands of Sioux Indians . . . and shall be subject to disbursement under the direction of the Secretary of the Interior for the benefit of the Medawakanton and Wahpakoota Bands of Sioux Indians.” *Id.* The statute further provided that “[w]here groups of such Indians are organized as tribes under the [IRA], the Secretary of the Interior may set apart and disburse for their benefit and upon their request a proportionate part of said sum, based on the number of Indians so organized.” *Id.*

On October 6, 1944, payment of \$1,261.20 for the 1886 lands at Wabasha was credited to the United States Treasury Account 147436, "Proceeds of Labor, Medawakanton and Wahpakoota Bands of Sioux Indians, Minnesota." *See* letter from F.G. Hutchinson to E.M. Pryse, February 24, 1955 (Ex. A); and letter from C.B. Emery to D.C. Foster, June 8, 1951 (Ex. B). On May 15, 1968, the funds in account 147436 and in associated interest account 147936 were allotted to the Lower Sioux and Prairie Island Indian communities, with half of the funds slated to go to Lower Sioux and half to Prairie Island. In November of 1968, the Prairie Island portion totaling \$1,217.14 was disbursed to that community. No disbursement to Lower Sioux occurred at this time, however, and the \$1,217.14 allotted to that community remained in accounts 147436 and 147936. Accountant's Report, Income to Mdewakanton Sioux Lands, Minneapolis Area Office, Field Work Complete February 5, 1975 at 4-3 ("1975 Report") (Ex. C).

2. Leasing and Revenues from Sand and Gravel Mining

Prior to the establishment of the Lower Sioux Indian Community, the Department of the Interior's policy was that sand and gravel deposits on the 1886 lands were owned by the Government and were not subject to sale by assignees.¹ After the establishment of the community, the BIA endorsed the language of the Lower Sioux Constitution that provided that the sand and gravel on the 1886 lands within the reservation constituted a community resource. *See* Constitution and Bylaws of the Lower Sioux Indian Community, Approved June 6, 1936, Article XI, Section I (Ex. E) ("Lower Sioux Indian

¹ For example, *see* November 22, 1930, communication from the Pipestone Superintendent to an assignee, in which the Superintendent informed the individual that "it has been reported that you have been selling gravel from your Government land which, of course, is not the proper thing to do as this land is only loaned you as long as you make a home there. . . . [T]he people buying the gravel also are violating the Government regulations and would be subject to fine for trespassing on Government land." Letter from J.W. Balmer to E. Pendleton, November 22, 1930 (Ex. D).

Community shall have the authority to protect and develop all mineral resources to which it now has, or hereafter shall have, title.”).

3. 1975 Report and Distribution of the Frozen Funds

On March 19, 1974, Acting Associate Solicitor for Indian Affairs Durand R. Barnes wrote an opinion concerning the leasing of 1886 lands and proposed that further action be taken to ascertain whether a legislative disposition of title to the lands would be recommended. Proceeding in accordance with that opinion, the BIA began to deposit income derived from 1886 lands in suspense accounts. See 1975 Report. The BIA also ordered that all income from the 1886 lands be identified and set in a separate account. Letter from M. Boyd to Minneapolis Area Director, dated March 21, 1975 (Ex. F).

As a result, BIA accountants completed the 1975 Report. The 1975 Report found no evidence of any income from assigned land deposited to Tribal Treasury accounts prior to 1950 with the exception of the Wabasha land transfer. 1975 Report at 2. Furthermore, the 1975 Report did not include income distributed to assignees. *Id.* The report found a total of \$61,725.22 of such funds in seven treasury and IIM accounts. The sum included \$1,261.20 derived from the Wabasha land transfer and placed in treasury account 147436 (Proceeds of Labor, Mdewakanton and Wahpakoota Band of Sioux Indians – Minnesota), a total of \$58,784.96 in four Lower Sioux treasury and IIM accounts, and a total of \$1,679.06 in two Prairie Island treasury and IIM accounts. According to the 1975 Report, all of the money in the Lower Sioux and Prairie Island accounts was generated in 1950 or thereafter. For most of the period covered by the report, leasing revenue from unassigned lands at Prior Lake went to Lower Sioux. In this context, the 1975 Report did not find any Shakopee Mdewakanton Sioux tribal accounts containing money from the 1886 lands.

All funds were placed in account 147436 and its associate interest account, 147936, and these funds became known as the “frozen funds.”

On June 27, 1975, BIA officials met with representatives of the three Communities to address questions concerning the disbursement of the frozen funds. *See Minutes of Meeting Held on June 27, 1975*, prepared by Richard L. McLaughlin (Ex. G). The parties agreed that the Communities would submit resolutions requesting distribution of the frozen funds and requesting Congressional directive as to the 1886 lands. *Id.* The three Communities submitted resolutions in March and April of 1976 and representative from the three Communities, a consultant for Lower Sioux, BIA officials, and the executive director of the Minnesota Sioux Tribe met on September 24, 1980, to discuss the frozen funds. *See letter to Commissioner of Indian Affairs from Lower Sioux Indian Community dated July 30, 1975 (Ex. H); September 16, 1980, Memorandum from Richard L. McLaughlin to Director, Minneapolis Area Office with attachments (Ex. I); Minutes from 1886 Frozen Monies Meeting dated September 24, 1980 (Ex. J).* As a result of this meeting, the three Communities signed an agreement requesting release of the funds and agreeing that, retroactively to January 1, 1978, funds and interests from the 1886 lands should be divided equally among the three communities. *See Ex. I.* The communities further agreed that any funds and interest from the 1886 lands generated from January 1, 1978, forward “shall be paid to the community from which it was derived.” *Id.*

Disbursement of the frozen funds began soon after passage of the 1980 Act. On January 9, 1981, the BIA disbursed \$37,835.88 to the Shakopee Mdewakanton, with \$36,210.01 coming from account 147436 and \$1,625.87 coming from associated interest account 147936. Public Voucher dated December 30, 1980 (Ex. K). On March 3, 1981,

the BIA likewise disbursed \$37,835.88 to the Lower Sioux, with \$27,601.78 coming from account 147436 and the remainder coming from a Lower Sioux proceeds of labor and interest account. Public Voucher dated February 23, 1981 (Ex. L). On April 23, 1981, the BIA disbursed \$37,835.88 to Prairie Island with \$25,450.48 coming from accounts 147436 and 147936 and the remainder coming from a Prairie Island proceeds of labor and associated interest account. Public Voucher dated April 21, 1981 (Ex. M). Additional disbursements of funds from account 147136 occurred in 1981 and 1982, with the Shakopee Mdewakanton receiving an additional \$6,249.72, the Lower Sioux receiving an additional \$5,115.85, and Prairie Island receiving an additional \$6,429.71. Resolutions and Authorization for Disbursements from 1983 (Ex. N).

D. The Breach of Trust Allegations²

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*”). In doing so, the Court concluded that “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

² The intervenor complaints filed in this matter also allege a cause of action for breach of the United States' alleged fiduciary duties relating to a trust. See Fourth Amended Complaint filed by the Johnson Law Group at ¶¶ 13-16; Complaint of Parties Moving to Intervene filed by Philip W. Morgan at ¶¶ 11-15; Complaint in Intervention filed by Gary Montana at ¶¶ 44-52; Complaint in Intervention filed by Francine Hall at ¶¶ 1, 5-12; Complaint in Intervention filed by Sam Killinger at ¶¶ 10-19; Complaint in Intervention filed by Douglas Kettering at ¶¶ 18-22; Complaint in Intervention of the Lower Sioux Indian Community at ¶¶ 14-17; Anonymous Walker Group Second Amended Complaint in Intervention.

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. Compl. ¶¶ 3-4. 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.

Mdewakanton Sioux and their lineal descendants,” that the trust was not terminated by the 1980 Act, and that the United States breached the trust through actions taken in December 1980 and thereafter. *Id.* at 555. The Court subsequently certified the first of those three holdings for interlocutory appeal, and the Federal Circuit granted leave to appeal.

E. The Federal Circuit Opinion Finding No Trust

The Federal Circuit held that the Appropriations Acts did not create a trust. *See Wolfchild VI*, 559 F.3d at 1255. The Federal Circuit observed that “[t]he simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress’s part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries. *Id.* at 1238. Noting that “the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations,” the Federal Circuit reasoned that “[i]t is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship.” *Id.* at 1239. The Federal Circuit further determined that “nothing in the legislative history” of the Appropriations Acts “indicates that they were designed to create a trust relationship.” *Id.* at 1240. The Federal Circuit also held that nothing in the Department of the Interior’s implementation of the statutes suggested that Congress intended to create a trust in the Appropriations Acts. *Id.* at 1241-45.

The Federal Circuit addressed the second question; whether, if the Appropriations Act created a trust, Congress terminated that trust in the 1980 Act. Under that statute, the Federal Circuit observed, “the United States’ interest in the lands [was] converted into a

trust for the three communities” in the area where the 1886 lands were located, “whereby the United States would hold legal title to the lands and each of the three communities would hold equitable title.” *Id.* at 1255-56. The Federal Circuit explained that “the [1980] Act is difficult to understand only if viewed in the way [petitioners] view it—as intended to preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants.” *Id.* at 1257-58. Instead, the Federal Circuit held that, “[i]f the [1980] Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the wording of the Act achieves that purpose clearly and simply.” *Id.* at 1257.

The Federal Circuit concluded that “neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone. Instead, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated.” *Id.* at 1255.

ARGUMENT

III. LEGAL STANDARDS

A. Standard of Review

Defendants move to dismiss Plaintiffs’ complaint for lack of jurisdiction as provided by Court of Federal Claims Rule 12(b)(1). “[S]ubject matter jurisdiction is strictly construed.” *Leonardo v. United States*, 55 Fed. Cl. 344, 346 (2003). The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. *Renne v. Geary*, 501 U.S. 312, 316 (1991). Plaintiffs bear

the burden of proving that the Court has jurisdiction over the subject matter of the complaint. See *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). “In ruling on a motion to dismiss for lack of jurisdiction, the Court must construe the allegations of the complaint in the light most favorable to the plaintiff.” *Anderson v. United States*, 59 Fed. Cl. 451, 455 (2004); see also *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). However, “[f]act-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint . . . are challenged.” *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999). “If the court concludes that it lacks subject matter jurisdiction over a claim, RCFC 12(h)(3) requires the court to dismiss that claim.” *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 58 (2008).

IV. PLAINTIFFS’ COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM

Plaintiffs’ complaint must be dismissed for failure to allege a cause of action. The Federal Circuit has held that the Appropriations Acts did not create a trust relationship between the United States and Plaintiffs, and that Plaintiffs had no vested or beneficial interest in the 1886 lands. *Wolfchild VI*, 559 F.3d at 1255. Plaintiffs’ sole cause of action seeks relief relating to the United States alleged breach of its statutory and fiduciary duties relating to a trust created by the Appropriations Acts. Compl., Count 1 (“Trust Mismanagement”); see also Johnson Compl., Count 1 (“Breach of Fiduciary Duty/Trust Mismanagement”); Morgan Compl., Count 1 (“Trust Mismanagement”); Montana Compl., IV (“Cause of Action A. Breach of Trust Responsibility”); Hall Compl. at ¶ 11 (“The United States of America as trustee of the property has violated its fiduciary responsibilities.”); Killinger Compl., Count 1 (“Trust Mismanagement and Breach of

Fiduciary Duties”); Kettering Compl., ¶¶ 18-22 (“Breach of Fiduciary Duty/Trust Mismanagement”); Lower Sioux Compl., Count 1 (“Breach of Fiduciary Duty/Trust Mismanagement”); Walker Compl., Count I (“Trust Management”). Because no trust was created, Plaintiffs cannot allege a cause of action on the grounds that the United States violated any statutory or fiduciary duties relating to mismanagement of a trust. Therefore, Plaintiffs’ operative complaint, and all complaints filed by intervenors, must be dismissed.⁴

V. PLAINTIFFS’ COMPLAINT MUST BE DISMISSED FOR LACK OF JURISDICTION UNDER THE TUCKER ACT OR INDIAN TUCKER ACT

The United States cannot be sued without its consent. *United States v. Navajo Nation*, 129 S. Ct. 1547, 1551 (2009) (“*Navajo I*”); *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (“*Mitchell I*”). In determining whether such consent is present, the Supreme Court has long held that “[a] waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *Mitchell I*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

Congress has consent to suit against the United States for certain claims for money damages in the Court of Federal Claims (“CFC”). The Tucker Act provides the CFC

⁴ The United States notes that the Montana Intervenors, in addition to asserting that the Appropriations Acts created a trust, appear to assert that an earlier statute passed by Congress in 1863 created a trust and that the Appropriations Acts merely added to that trust’s corpus. Montana Compl. ¶¶ 32-36, 45-51; Act of February 16, 1863, § 9, 12 Stat. 654 (1863) (“February 1863 Act”). The Federal Circuit’s opinion disposes 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 1241-42. Therefore, to the extent that the Montana Intervenors’ complaint may be read as alleging a breach of trust created by the 1863 Act and not the Appropriations Acts, it must be dismissed.

jurisdiction “over any claims against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States” 28 U.S.C. § 1491(a)(1) (2004). The Indian Tucker Act was enacted in 1946 to ensure that Indian or tribal claimants would enjoy the same rights and remedies in suits against the United States as non-Indians, but no more. 28 U.S.C. § 1501; *Mitchell I*, 445 U.S. at 538-39; see *United States v. Mitchell*, 463 U.S. 206, 212 n.8 (1983) (“*Mitchell II*”); H.R. Rep. No. 79-1466 at 13 (1945). Like the Tucker Act, the Indian Tucker Act requires that a plaintiff “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).

Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act and the Tucker Acts themselves do “not create any substantive right enforceable against the United States for money damages,” but they waive sovereign immunity for claims based on other sources of law. *Mitchell II*, 463 U.S. at 216 (quoting *Mitchell I*, 445 U.S. at 538). Under the principle that waivers of sovereign immunity must be unequivocally expressed, the courts have been reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. *Mitchell II*, 463 U.S. at 218; *United States v. Testan*, 424 U.S. 392, 400 (1976). “The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it can fairly be interpreted as mandating compensation by the Federal Government.” *Navajo II*, 129 S. Ct. at 1552 (internal quotation marks omitted) (quoting *Testan*, 424 U.S. at 400). A

statute or regulation is only sufficient to be a premise for Tucker Act jurisdiction if it is “reasonably amenable to the reading that it mandates a right of recovery in damages.”

U.S. v. White Mountain Apache Tribe, 537 U.S. 465, 473 (2003).

When a statute is found to mandate a right of recovery in damages, it is considered to be “money-mandating.” *See Perri v. United States*, 340 F.3d 1337, 1340 (Fed. Cir. 2003). A statute is not money mandating, however, where “it does not specify the amount to be paid or the basis for determining such amount. As the court in *Eastport S.S. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), noted, “the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.” 372 F.2d at 1007 (citations omitted); *see also Perri*, 340 F.3d at 1342. “Unless the statute requires the payment of money damages, there has been no waiver of the government’s sovereign immunity for such damages, and the Court of Federal Claims [does] not have the jurisdiction to entertain the claim.” *Perri*, 340 F.3d at 1341 (citations omitted).

Here, Plaintiffs have asserted a claim for breach of fiduciary duty based upon the Appropriations Acts. The Federal Circuit’s ruling that there is no basis to conclude that there is a trust, that Plaintiffs were made beneficiaries, or that any trust relationship was not terminated in 1980 precludes any recovery under a breach of trust theory. Likewise 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, no matter how Plaintiffs characterize their claim.

A. The United States Has No Fiduciary Duty to Plaintiffs Because the Appropriations Acts Did Not Create a Trust

Because no trust was created by the Appropriations Acts, there was never a trust to give rise to a money-mandating duty. “It is, of course, well established that the [g]overnment in its dealings with Indian tribal property acts in a fiduciary capacity.” *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). That federal responsibility, however, “do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests.” *Id.* The essential elements that must be present in order to create a trust are (1) a trustee, (2) a beneficiary, and (3) a trust corpus (or trust property). *Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995); *see also Mitchell II*, 463 U.S. at 225 (same). Here, just as in *Inter Tribal Council of Arizona, Inc.*, the elements of a fiduciary trust relationship do not exist. Congress did not by the Appropriation Acts create a trust res or trust beneficiaries. *See Wolfchild VI*, 559 F.3d at 1240 (“nothing in the legislative history of the [Appropriations Acts] indicates that they were designed to create a trust relationship.”).

Importantly, this Court has previously stated that the existence of a trust was the necessary predicate for finding a money-mandating duty that provided for jurisdiction in this case. In this case, however, the Federal Circuit found no such predicate to exist, holding that the Appropriations Acts did not create a trust relationship between the United States and Plaintiffs. Thus, there can be no money-mandating duties based upon that classification.

B. The Appropriations Acts and Subsequent BIA Actions Do Not Establish a Money-Mandating Duty

Neither the Appropriations Acts nor the subsequent Department of the Interior role in issuing assignments and collecting land proceeds creates a substantive entitlement in Plaintiffs to any compensation.

The Appropriations Acts provide funds “[f]or the support of” Mdewakanton Sioux on the 1886 rolls and direct the Secretary of the Interior to spend the funds “as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family.” 1890 Appropriations Act. The Appropriations Acts do not indicate whether the land and other implements are to be given outright or assigned for a period of time. 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 1239, 1238. The loyal Mdewakantons were not given “enforceable rights as trust beneficiaries.” *Id.* at 1238. Congress did not view them as entitlements but “viewed these as ordinary appropriations provisions,” eliminating a carry-over provision that unspent money be used and expended for the purposes for which the same amount was appropriated because it was inappropriate for an appropriations bill to have this type of provision. *Id.* at 1239.

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. *Navajo Nation v. United States*, 537 U.S. 488, 506 (2003); *see also Nat’l Science Center for Mfg. Sciences v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997) (if court affirmed transfer of case to Court of Federal Claims, the government would

seek dismissal of the complaint on the ground that an appropriations act is not a money-mandating statute); *Perri*, 340 F.3d at 1341-42 (distinguishing between a money-mandating statute, which grants the claimant, expressly or by implication, a right to be paid a certain sum, and a money-authorizing statute, which provides discretion and cannot fairly be interpreted as waiving sovereign immunity and thereby creating a substantive new right to compensation).

The text of the Appropriations Acts simply instructs the Secretary of the Interior to make certain purchases for the support of a group of Indians and does not establish any money-mandating duty on the part of the United States to manage those resources. *See Rueben Quick Bear v. Leupp*, 210 U.S. 50, 77, 80-82 (1908) (Supreme Court held that “appropriations made by the government out of the public moneys of the United States” were gratuitous appropriations of public funds that did not belong to Indians and instead “relate[] to public moneys belonging to the government.”); *Lincoln v. Vigil*, 508 U.S. 182, 193-94(1993) (discussing agency discretion over gratuitous appropriations). Just because property or money is allocated to Indian uses is not enough to create a claim for money damages. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (“[t]he off-reservation school was not part of Indian lands, but was merely allocated by the BIA for use by the Tribes” citing *Inter Tribal Council of Arizona, Inc.*); *Marceau v. Blackfeet Housing Authority* 540 F.3d 916, 927 (9th Cir. 2008) (“No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so.”). A statute is not money mandating where it does not specify the amount to be paid or the basis for determining such amount. As *Eastport* noted, “the allegation must be that the particular provision of law relied upon grants the

claimant, expressly or by implication, a right to be paid a certain sum.” 372 F.2d at 1007 (citations omitted); *Perri*, 340 F.3d at 1342. The Appropriations Acts, aside from providing the amount of the expenditure, as all appropriations do, contain no language specifying an amount to be paid, the basis for determining such amount, or the right to be paid a certain sum. Instead, the Federal Circuit found that the Appropriations Acts were “analogous to the language typically used in expenditures deemed to be gratuitous appropriations in the *Quick Bear* case.” *Wolfchild VI*, 559 F.3d at 1240 (citing *Quick Bear*, 210 U.S. at 77).

Nor does the Department of the Interior’s practice of issuing assignments impose any money-mandating duty because the Interior Department was not managing trust assets for beneficiaries. In 1904, the Department started making assignments to individual Indians, which provided the assignee the right to occupy and use the assignment until his or her death subject to certain conditions such as a prohibition against sub-leasing the assignment. *Gitchel*, 28 IBIA at 46. The assignee was responsible for making productive use of the assignment. Thus, once the assignment was made, the Department had no ongoing role in managing the assignment; it merely monitored compliance with the few conditions of the assignment such as the prohibition against sub-leasing. After an assignment became available, it did not transfer to the former-assignee’s descendants. Instead the next assignee was selected from all eligible to receive an assignment. This minimal degree of involvement is entirely unlike the statutes analyzed by the court in *Samish* where the court found that: (1) express statutory language supporting the existence of a fiduciary relationship, and (2) elaborate or comprehensive government control over Indian property so as to constitute a common-law trust created a money-mandating duty.

Samish Indian Nation v. United States, 82 Fed. Cl. 54, 66 (2008). None of those factors are present here.

First, the Appropriations Acts simply refer to how the funds should be “expended” in the first instance, granting the Secretary discretion to choose how to best expend the funds. If the money was not expended, it would revert to Treasury and was not carried over. The Federal Circuit explained that the Appropriations Acts’ “minimal directives” on how the Secretary of the Interior was to spend the appropriated funds “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.

A statute can only fairly be interpreted as mandating compensation “where the statutory text leaves the government no discretion over payment of claimed funds.”

Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005).

Money-mandating duties have also been found with certain discretionary statutory schemes, but only when the statutes at issue: (1) “provide ‘clear standards for paying money’ to recipients;” (2) “state the ‘precise amounts’ that must be paid;” or (3) “as interpreted, compel payment on satisfaction of certain conditions.” *Id.* at 1364. As this Court has recognized:

The Federal Circuit additionally determined that a cooperating witness cannot rely on the asset forfeiture statute as the basis for a claim against the government because “[i]t provides no standards for determining ‘payment of awards’ [or] ... the amount to be paid.” *Perri*, 340 F.3d at 1342 (quoting 28 U.S.C. § 524(c)(1)(B)). Thus, the asset forfeiture statute fails to create a substantive right to recovery against the United States.

Aboo v. United States, 86 Fed. Cl. 618, 626 (2009).

While the Appropriations Acts provided minimal restrictions on how the Secretary may spend the appropriated funds, each statute gave the Secretary considerable discretion: he was to spend the funds “as in his judgment he may deem best,” and even the directive that each Indian receive “an equal amount in value” was to be fulfilled only “as far as practicable.” *See* Appropriations Acts. That broad discretion is inconsistent with the creation of a money-mandating duty to the loyal Mdewakanton and their lineal descendants. *Samish*, 82 Fed. Cl. at 67-68 (court found that statutes did not create a money-mandating duty where they contained no detailed, prescriptive language or explicit trust language found in other statutes).

Second, the Appropriations Acts do not create any duty to manage an assignment system or insure that the members of the 1886 rolls continue to benefit equally from the appropriation. Thus, once the lands and other goods were purchased and initial assignments made at the Secretary’s discretion, the Appropriations Acts were satisfied. The Appropriations Acts are unlike the statutes before the courts in *Mitchell II* and *White Mountain Apache*, where the courts found a money-mandating duty based on elaborate and comprehensive control over Indian property by the government. *Samish*, 82 Fed. Cl. at 66-67. Instead, they are more akin to the money-authorizing statute discussed in *Perri*. In *Perri*, the court found that the statute at issue, legislation granting the Attorney General discretion to pay awards for information or assistance leading to a criminal forfeiture, was money-authorizing and not a money-mandating duty upon which there could be jurisdiction. 340 F.3d at 1342. The court found that the legislation could not be money-mandating because there were no detailed standards and the Attorney General was to use his discretion. *Id.* Likewise, the Appropriations Acts placed discretion with the

Secretary of the Interior on how best to allocate the appropriated funds and did not set forth detailed standards.⁵ The Appropriations Acts cannot be viewed as granting Plaintiffs a right to be paid a certain sum. To interpret the Appropriations Acts in this manner would create a substantive new right to compensation not articulated by Congress. *Samish*, 82 Fed. Cl. at 67.

Third, the Appropriations Acts do not include clear standards under which the lineal descendants could be considered recipients of the funds. 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 Mdwakanton and not just the 1886 Mdwakanton 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 Mdwakanton.

Fourth, neither the Appropriations Act nor the assignment system provides descendants of the members of the 1886 rolls with a vested property interest in the 1886 lands or proceeds from the lands. *Cf. Gitchel*, 28 IBIA at 48 (holding that assignments

⁵ Although the 1889 and 1890 Appropriations Acts contained a requirement that each of the loyal Mdwakanton “shall receive, as nearly practicable, an equal amount in value of this appropriation,” this clause does not evidence the right to a sum certain. As the Federal Circuit noted, 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.

created no inheritable interest); *Wolfchild VI*, 559 F.3d at 1255 (“neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone.”). The Appropriations Acts direct the Secretary to expend the funds “for the support of” members of the 1886 rolls. The Secretary fulfilled his duty to expend the funds “for the support of” members of the 1886 roll when he provided the original members of the 1886 roll land assignments. Thus, once the Secretary has “support[ed]” the original members of the 1886 rolls, the Act does not require that the Secretary continue to “support” descendants of the 1886 rolls. Because the descendants do not even have a claim to continued support, they cannot have a vested interest in the 1886 lands and cannot identify any money-mandating duty to equally partition the 1886 lands. The lack of a vested property interest or any trust res at all distinguishes this case from *Mitchell II*, where Indians were the beneficial owners of the timber assets at issue. 463 U.S. at 225.

Thus, there is no statute or regulation that imposed a money-mandating duty on the United States.

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

As the Federal Circuit has held, the loyal Mdewakantons held no beneficial or vested interest in the 1886 lands. *Wolfchild VI*, 559 F.3d at 1255. The 1980 Act vested equitable title to the 1886 lands in the three Communities. *Id.* “All right title and interest of the United States in those lands . . . which were acquired and are now held by the United States for the use and benefit of certain Mdewakanton Sioux Indians . . . are hereby declared to be held by the United States . . . in trust for” the three respective Communities.

1980 Act § 1. Prior to the 1980 Act, The only property interests were the conditional life estates in specific assignments held by individual assignees. The passage of the 1980 Act foreclosed the issuance of new assignments by BIA.⁶ *Wolfchild VI*, 559 F.3d at 1257-58.

For this reason, Plaintiffs' remaining claim must be dismissed for lack of jurisdiction because Plaintiffs fail to identify any "rights-creating source of substantive law" upon which to base their claims. *Navajo Nation*, 537 U.S. at 506.

D. The Court of Federal Claims Lacks Jurisdiction over Plaintiffs' Claim Concerning the Frozen Funds Account Because There Is No Statute or Regulation that Entitle Plaintiffs to Compensation with Respect to the Frozen Funds Account

The arguments set out above to show that there is no basis for the Court to exercise jurisdiction over Plaintiffs' claims respecting the 1886 lands apply equally to bar jurisdiction over claims respecting the frozen funds. There is no statute or regulation that provides Plaintiffs with jurisdiction to assert a claim as to the frozen funds. The only statutes relied upon by Plaintiffs are the Appropriations Acts, which, as discussed above, cannot serve as a waiver of sovereign immunity.

1. The Appropriations Acts Did Not Give Plaintiffs Any Interest in Proceeds from the 1886 Lands

The Appropriations Acts do not give Plaintiffs any interest in any income, profits, or proceeds from the 1886 lands. *See* Plaintiffs' Compl. ¶ 32. The Appropriations Acts created no vested or beneficial interest in the loyal Mdewakanton for the 1886 lands.

Wolfchild VI, 559 F.3d at 1255. Just as they created no vested or beneficial interest in the

⁶ Many of the persons who were eligible for land assignments by virtue of their status as descendants of individuals on the 1886 Roll were also members of the Indian Communities that, under the 1980 Act, received the 1886 lands in trust. In enacting the 1980 Act, Congress essentially transferred that responsibility from the government to the three Communities. Congress plainly has power to make such a change, constrained only by the need to satisfy requirements under the Fifth Amendment.

lands, the Appropriations Acts cannot create any vested or beneficial interest in proceeds from the land. Nor can the Appropriations Acts create any entitlement based on a theory that they created a statutory use restriction.

2. The Frozen Funds Are Not from Assigned Lands

Plaintiffs also do not have any interest in the frozen funds account. First, the money contained in that account was not from assigned lands or lands in which Plaintiffs held an interest. Rather, as the 1975 Report found, the money arose from the transfer of land located in Wabasha and land that was not assigned to any individual.

Nor were the funds generated by lease entered into by assignees. Interior took the position that the land could not be leased and that “it was intended that [the assignees] should go to work and cultivate the same, and in order to hold a land hereby assigned to them, they must be required to do so.” *See* letter from E.A. Hitchcock to Commissioner of Indian Affairs dated November 21, 1904 (Ex. O). The land assignment certificates approved in 1904 contained provisions explicitly prohibiting assignees from leasing their parcels. *See* Indian Land Certificate, draft form, 1904 (Ex. P). This policy was enforced by BIA through the years and the superintendent even issued a public notice warning lessees that “their occupancy of [assigned] lands must cease, or they will be liable to prosecution under the law.” *See* F.T. Mann, Notice to Whom It May Concern, dated June 26, 1914 (Ex. Q).

The BIA did develop a set of procedures under which assignees could augment their income by renting out their assignments under short term permit arrangements. In general, the permits provided for the rental of assignments for one year periods and specified that rent payments be made to the superintendent of the Pipestone School for the

use and benefit of the assignees. Permit forms also specified that the instrument was not a lease but instead constituted a “mere naked permit, terminable and revocable in the discretion of the Secretary of the Interior. . . .” *See* Permits for Assignment No. 2 and Assignment No. 15 dated April 22, 1916 (Ex. R). Consistent with BIA policy that assignees should themselves utilize their assignments if at all possible, the rental permit files in some cases included statements concerning why assignees could not cultivate the land themselves and therefore needed to rent the tracts out. *See id.* The money was, by the terms of the permits, to be paid to the local agent “for the use and benefit of the Indian allottee [sic],” not into a pool to be divided among all individual descendants of the 1886 Mdewakanton. *Id.*; *see also* 1975 Report (showing that the money in the frozen funds account, with the exception of the Wabasha land transfer, was generated after 1950).

3. The Secretary’s Distribution of the Frozen Funds Was Permissible

The frozen funds account was not subject to any statutory use restriction giving Plaintiffs any “enforceable rights” in the funds and the Secretary’s distribution of the funds was permissible. *See Wolfchild VI*, 559 F.3d at 1239. The Federal Circuit’s discussion of statutory use restriction was explicitly in the context of refuting the argument that the Appropriations Acts created a trust relationship. The plain reading of *Wolfchild VI* shows that, in identifying a “statutory use restriction” on how the Department of the Interior may use the appropriated funds, the Federal Circuit was specifically distinguishing the legal effect of “appropriating funds subject to a statutory use restriction” from “creating a trust relationship through which [Plaintiffs] obtained beneficial ownership rights in 1886 lands.” 559 F.3d at 1240; *see also id.* at 1238 (“The simple statutory directives as to the

expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons.”). To assert that Plaintiffs now somehow have rights to the proceeds of the land, when the Federal Circuit has held that they did not even have an interest in the land itself, is to disregard the plain meaning of the Federal Circuit's holding.

Insofar as Congress has left to the Secretary's sole judgment the determination of the manner for providing assistance to the loyal Mdewakanton, the Secretary's distribution was permissible and the Court lacks jurisdiction to otherwise review his decision. *See Milk Train, Inc. v. Veneman*, 310 F.3d 747 (D.C. Cir. 2002) (Court found that where Congress appropriated money “to provide assistance directly to . . . dairy producers, in a manner determined appropriate by the Secretary,” the plain language of the appropriation act indicated that Congress left to the Secretary the decision about how the moneys could best be distributed consistent with its general policy to provide emergency assistance to dairy farmers). Likewise, Congress left it to the Secretary of the Interior's discretion on how to best allocate the appropriations, providing that the Secretary was to expend the money “in such manner as in his judgment he may deem best.” Appropriations Acts.

To the extent the funds in the account were traceable to the Wabasha land transfer; the Secretary's distribution was permissible because such distribution was left to his discretion and Plaintiffs have no vested or beneficial interest in the funds. The statute effecting the transfer of the land specified that the \$1,261.20 to be furnished as compensation for the land was “hereby made available for transfer on the books of the Treasury of the United States to the credit of the Mdewakanton and Wahpakoota Bands of Sioux Indians . . . and shall be subject to disbursement under the discretion of the Secretary

of the Interior.” *Id.* The statute provided that, “[w]here groups of such Indians are organized as tribes under the [IRA], the Secretary of the Interior may set apart and disburse for their benefit and upon their request a proportionate part of said sum, based on the number of Indians so organized.” *Id.* Pursuant to the statute’s directives, the funds from the Wabasha transfer were disbursed.

Plaintiffs, as alleged lineal descendants of the loyal Mdewakanton from the 1886 Rolls, have no greater rights to the proceeds of the Wabasha land transfer because of that status. As the Federal Circuit noted, “payment was made to a tribe, not to a group of individuals, and in particular not to the lineal descendants of the 1886 Mdewakantons.” *Wolfchild VI*, 559 F.3d at 1251. The Federal Circuit further held that the statute evidenced that no “particular individuals had obtained vested rights in the property as to which consent or compensation was legally required.” *Id.* The Secretary was to use his discretion in disbursing the funds for the benefit of the bands of Sioux Indians, not just for the loyal Mdewakanton. Because Congress left the disbursement to the Secretary’s discretion, as discussed above, the Secretary’s disbursement was permissible. Because Plaintiffs had no interest in the Wabasha land and the Secretary’s distribution was permissible, there is no claim.

V. PLAINTIFFS’ CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND THEREFORE MUST BE DISMISSED

This Court lacks subject matter jurisdiction over any claim Plaintiffs assert 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. Claims against the United States in the Court of Federal Claims must be filed within six years of the accrual of the cause of

action. 28 U.S.C. § 2501. “This statute of limitations is a jurisdictional limitation on the government’s waiver of sovereign immunity and therefore must be construed strictly.” *Wolfchild v. United States*, 62 Fed. Cl. 521, 547 (2004) (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)). In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) the Supreme Court expressly held that the provision is jurisdictional. The Federal Circuit has recognized that *John R. Sand & Gravel Co* forecloses any equitable tolling of 28 U.S.C. § 2501. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008). “Exceptions to the limitations and conditions upon which the government consents to be sued are not to be implied.” *Hopland Band*, 855 F.2d at 1577 (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

In deciding the issue of dismissal on the statute of limitations ground, the Court must focus on a “*first accrual*,” the 28 U.S.C. § 2501 condition on the waiver of sovereign immunity. Accordingly, presuming a duty or obligation, the relevant question is when events first transpired entitling the claimant to bring suit alleging the breach. *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966). Plaintiffs are not required to know all of the facts, or the cause of action, before the statute begins to run. *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996) (citing *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 826 (1984)). Indeed, it is when the operative facts exist and are not inherently unknowable that determines first accrual. *Menominee Tribe*, 726 F.2d at 720-22.

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

Assuming *arguendo* a proper legal basis of Plaintiffs' claims to "income, profits, proceeds from all reservation businesses, and other tangible benefits arising from the trust corpus" (Compl. ¶ 31)⁷ pursuant to the 1888, 1889, and 1890 Appropriation Acts, a matter that the United States disputes, or any other claims Plaintiffs may make, 28 U.S.C. § 2501 bars such claims.

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. 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." In either case, applying statute of limitations principles, the 1980 Act fixed the Government's purported liability and bar any claim Plaintiffs may make here.

Plaintiffs' claims to revenues from the 1886 lands clearly exceed the statute of limitations. As noted above, monies derived from the 1886 lands were placed in account 147436 (Proceeds of Labor, Mdewakanton and Wahpakoota Band of Sioux

⁷ *See also* Johnson Law Group Compl. ¶ 14 ("trust included land, improvements to land, and monies as the corpus"); Morgan Compl. ¶ 12 ("ensure that trust proceeds from all reservation land . . ."); Montana Compl. ¶ 51 ("United States has breached its fiduciary trust obligations by allowing income, profits and proceeds . . . to be distributed . . ."); Killinger Compl. ¶ 11 ("receive the benefits of the 1886 Land including any and all revenue generated therefrom. . ."); Kettering Compl. ¶ 16 ("benefits, and revenue generated from the 1886 Lands . . ."); Lower Sioux Compl. ¶ 2 ("income, profits, proceeds, and other tangible benefits . . ."). The United States notes that the Hall Complaint does not allege any interest in any property other than the 1886 lands. *See* Hall Compl. ¶ 1 ("claim an interest in the property which is the subject of this action.")

Indians – Minnesota) and its associated interest account 147936. Shortly after the passage of the 1980 Act, these funds were distributed to the Lower Sioux, Prairie Island, and Shakopee Mdewankanton Sioux Indian communities. *See* exhibits K-N. All of these disbursements were made by 1983 at the latest. As courts have held, a plaintiff need not have actual knowledge of the events fixing liability for a claim to accrue. *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, No. 79-4592 L, *8 (May 27, 2010). “Where the Government’s actions are open and notorious, the plaintiff is on inquiry notice, and the statute of limitations begins to run.” *Id.* quoting *Otay Mesa Property L.P. v. United States*, 86 Fed. Cl. 774, 786 (2009).

Indeed, Plaintiffs were aware of the distribution of the frozen funds and took part in the decision on how to distribute the funds by submitting to the BIA an agreement requesting distribution of the funds to the Communities. *See* Attachment E to Plaintiffs’ Supplemental Brief on Application of the Statute of Limitations (Dkt. No.25), Lower Sioux Indian Community Resolution providing that, “[a]ccording to agreement, the sharing of the frozen funds between Prairie Island, Shakopee and Lower Sioux will be 33.3% for each community. Prairie Island and Shakopee agree to each pay Lower Sioux \$3,500 for expense of backfilling for gravel pit;” and first page of the agreement between the three Communities specifying how the frozen funds shall be distributed among the communities (Agreement and Resolution are attached as part of Ex. I). The BIA solicited the input of the Communities and held a public meeting at which members of the Communities and a representative of an organization purporting to represent at-large Sioux interests in Minnesota attended. *See* Ex. G. At that meeting an agreement was reached on how the funds would be distributed. *See*, Ex. I, Agreement. It was at this

point that the operative facts, namely that the frozen funds were being distributed to the Communities and not to individuals, existed and were not “inherently unknowable,” thus dictating first accrual. *See Menominee Tribe v. United States*, 726 F.2d at 720-22; *Sisseton-Wahpeton Sioux Tribe v. U.S.*, 895 F.2d 588, 590, 592-93 (9th Cir. 1990) (action time-barred because the plaintiff tribes participated in creating distribution plan and had actual knowledge of plan and its effects).

This Court held that the contract cause of action premised on the same facts was barred by limitations. *See Wolfchild I*, 62 Fed. Cl. 548-49. After this court’s ruling, the Supreme Court in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), expressly held that the provision is jurisdictional and is not tempered by any equitable principles. *See also Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008). Plaintiffs certainly are not permitted to sit on their rights and challenge wrongful deprivations that, if they occurred, occurred over six years ago. *See Wolfchild I*, 62 Fed. Cl. at 549; *Brown v. United States*, 195 F.3d 1334, 1338 (Fed. Cir. 1999) (court found that claim concerning leases was barred because at least one of the allottees, though not a party to the suit, discovered the claim and court saw no reason why his diligence should not be imputed to the other plaintiffs).

Moreover, Plaintiffs themselves recognize the untimeliness of their claims. Plaintiffs consistently argue that it was “only after the United States’ complete breach of trust in 1980 . . .,” Compl. ¶¶ 9 and 26; *see also* Compl. ¶¶ 34-35 (“[s]ince 1980, the United States has violated its fiduciary duty . . .”), did certain events take place. Thus on the face of their Complaint, Plaintiffs concede that they have or should have been on notice of their claims approximately twenty years ago, well over six years before they

brought their claims in 2004.

B. The Appropriations Rider does not apply

The Appropriations Rider, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (“PL 108”) does not toll Plaintiffs’ claims against the United States. PL 108 provides that:

[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). This statute is inapplicable to Plaintiffs’ claims based upon funds and land which were not held in trust by the United States for Plaintiffs.

When this Court granted the Government’s 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. The Court noted that the statutory exception only applied “to trust mismanagement and to specific kinds of losses” (citing *Shoshone Ind. Tribe v. United States*, 364 F.3d 1339, 1334, n. 2 (Fed. Cir. 2004)). As stated by the *Shoshone* court and reiterated in this Court’s 2004 opinion, such waivers of the statute of limitations must be strictly construed. *Id.*⁸ *Shoshone Indian Tribe of the Wind Reservation*, 364 F.3d at 1350 (Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7 applies to “trust *funds* rather than losses to

⁸ In an attempt to show that their claims are not time-barred, Plaintiffs have previously cited to the case of *Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322 (Ct. Cl. 2005) (“*Osage Tribe*”). *Osage Tribe*, however, concerned claims for trust fund mismanagement and is not applicable to this case. *Osage Tribe*, 68 Fed. Cl. at 324.

mineral trust *assets*"); *Rosales v. United States*, 89 Fed. Cl. 565, 581-82 (2009) (PL 108 did not apply to plaintiffs' breach of fiduciary duty claims centered on parcels of land); *Oenga v. United States*, 83 Fed. Cl. 594, 609 (2008) (PL 108 did not apply to claim of breach of trust obligations by failing to collect or require a fair annual rental from oil company); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (2006) (because case dealt with the alleged mismanagement of trust assets, PL 108 did not apply).

Consequently, any rights here Plaintiffs assert to the frozen funds accounts on the basis of funds mismanagement-styled claims should also be rejected for the same reasons this Court rejected Plaintiffs' breach of contract claim.

VI. CONCLUSION

Plaintiffs' claims of breach of fiduciary duty arising from the United States' alleged trust management and any other claim that may be read from Plaintiffs complaint cannot be brought in the Court of Federal Claims under the Tucker Act or the Indian Tucker Act because Plaintiffs fail 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 statutes, Plaintiffs claims are barred as untimely. For the reasons discussed above, the Court must dismiss Plaintiffs' complaints in their entirety.

Respectfully submitted this 9th day of July, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2010, a copy of the United States' Motion to Dismiss and Memorandum in Support 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 July, 2010.

/s/ Jody H. Schwarz
Jody H. Schwarz