IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WINNEMUCCA INDIAN COLONY, a Federally recognized Indian Colony, Plaintiff, v. UNITED STATES OF AMERICA *ex rel.* SECRETARY OF THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Defendant.	Case No. 20-1618 L Judge Kathryn C. Davis (e-filed: March 18, 2022)

UNITED STATES' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

The United States moves to dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). Plaintiffs seek relief for claims that are barred by the statute of limitations in 28 U.S.C. § 2501 and by the jurisdictional ban of 28 U.S.C. § 1500. Further, many of Plaintiffs' claims fail to identify specific money-mandating fiduciary duties as required by 28 U.S.C. § 1491 and 28 U.S.C. § 1505 and by well-established Supreme Court precedent. Therefore, this Court lacks jurisdiction to hear these claims and should dismiss them under RCFC 12(b)(1) and 12(h)(3). Plaintiffs also seek relief for the United States' alleged failure to prevent the construction of a road alongside Colony lands and to protect Plaintiffs' alleged *Winters* Doctrine rights. Those claims should be dismissed for failure to state a claim under RCFC 12(b)(6).

The particular grounds for this motion are set forth in the Supporting Memorandum of Points and Authorities and Exhibits that are appended thereto, as well as any Reply Memorandum that the United States may file and any oral argument that undersigned counsel for the United States may be permitted to present.

Respectfully submitted, this 18th day of March, 2022.

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QUESTIONS PRESENTED

1. Whether Plaintiffs have established their standing to bring this case on the Colony's behalf?
2. Whether this Court lacks jurisdiction under 28 U.S.C. § 1500 because Plaintiffs' related district court claims were "pending" when Plaintiffs filed this action?
3. Whether Plaintiffs' claims are time-barred under 28 U.S.C. § 2501?
4. Whether the *Winters* Doctrine, the Native American Housing Assistance and Self-Determination Act of 1996, or the Indian Non-Intercourse Act creates specific money-mandating fiduciary duties giving this Court jurisdiction under the Tucker Act?
5. Whether the Department of the Interior ("Interior" or "DOI") violated any specific money-mandating fiduciary duties by refusing to recognize Plaintiffs' faction as the Tribal Council of the Winnemucca Indian Colony?
6. Whether this Court can award Plaintiffs the equitable and declaratory relief they seek?

INTRODUCTION

This case arises from a long-standing membership and leadership dispute within the Winnemucca Indian Colony ("the Colony"). Plaintiffs seek $208 million in damages, an additional $1 million (per person) for the alleged deprivation of use of Colony lands by an unidentified and unnumbered group of Colony members, and equitable and declaratory relief for what they see as a failure by the Bureau of Indian Affairs ("BIA") to select and recognize one competing Colony government over another faction during a complicated and lengthy internal Tribal dispute. This Court lacks jurisdiction over the Complaint for no fewer than five reasons.

First, a court lacks subject matter jurisdiction over a suit purportedly brought on behalf of a tribe by a tribal faction that does not constitute a BIA-recognized tribal government. Plaintiffs have not met their burden of showing that they have authority to speak for the Colony here, so the Court does not have jurisdiction to adjudicate this matter.

Second, 28 U.S.C. § 1500 requires that Counts One through Eight and Counts Ten and Eleven be dismissed because a case filed in the Nevada District Court based upon the same operative facts as this matter was pending at the time Plaintiffs filed this action.

Third, Plaintiffs' claims under Count One, part of Count Two, and Counts Three through Six are barred by the statute of limitations proscribed by 28 U.S.C. § 2501. The majority of the events leading to the alleged impairment of the Colony's resources occurred more than six years before the Complaint was filed. Plaintiffs have not satisfied their burden of showing that their claims are timely and not barred by the statute of limitations.

Fourth, Counts Three through Seven and Counts Nine and Ten, to the extent that Counts Nine and Ten request monetary damages, must be dismissed for lack of Tucker Act jurisdiction. The Complaint fails to allege a violation of any specific money-mandating fiduciary duty prescribed by constitutional provision, statute, or regulation. Plaintiffs cannot overcome this deficiency by making generalized allegations that the BIA violated its fiduciary duties by not selecting a tribal government. After nearly a decade of litigation in the Ninth Circuit, Plaintiffs have been unsuccessful in showing that BIA's actions violated the Administrative Procedure Act ("APA"), and there are no other statutes or regulations that could be interpreted as requiring BIA to recognize Plaintiffs' faction as the Colony's government. Absent an alleged violation of specific statutory or regulatory duties, Plaintiffs cannot establish this Court's jurisdiction to award money damages.

Finally, the Court of Federal Claims lacks jurisdiction to provide the equitable and declaratory relief Plaintiffs seek in Counts Eight through Eleven.

Further, Plaintiffs' claims relating to the United States' alleged failure to prevent the construction of a road alongside Colony lands, *see* Count 2, and to protect Plaintiffs' alleged Winters Doctrine water rights, *see* Count 3, should be dismissed for failure to state a claim under RCFC 12(b)(6).

The Amended Complaint should therefore be dismissed.

TABLE OF JURISDICTIONAL ARGUMENTS

Count	Claim	Standing	Section 1500	Tucker Act or Indian Tucker Act Jurisdiction	Statute of Limitations	Equitable/ Declaratory Jurisdiction
1	Violation of 25 U.S.C. § 323 et seq.— unauthorized land use by third parties (roadway)	X	X		X	
2	Violation of 25 USC § 323 et seq. — unauthorized land use by third parties (energy station, road, utility lines)	X	X		X (in part)	
3	Breach of Trust (*Winters* doctrine) — unauthorized third party water diversion	X	X	X	X	
4	Violation of 25 U.S.C.§ 4101 — Unauthorized use of tribal housing by non-members	X	X	X	X	
5	Breach of Trust under the Indian Non-Intercourse Act (road, power station, utility lines, water diversion, loss of funding and use of buildings, etc.)	X	X	X	X	
6	Breach of Fiduciary Duty (failure to survey Colony land and prevent encroachment, failure to recognize a Tribal Council, and interference with the efforts of the Tribe to re-open the Smoke Shop)	X	X	X	X	

7	The Winnemucca Indian Colony has no other means of recovering the loss of the value and income from its property	X	X	X		
8	Request for Equitable Relief —Demand for Documents and Accounting	X	X			X
9	Declaratory Judgment— Right to Royalties for Use of Land	X		X		X
10	Declaratory Judgment— Loss of use of lands and rights by the individual Colony members	X	X	X		X
11	Declaratory Judgment — Right to lands granted to the other western tribes of BLM and other government lands pursuant to the repatriation of Tribal Lands process.	X	X			X

FACTUAL & PROCEDURAL BACKGROUND

The Winnemucca Indian Colony is a federally recognized Indian Tribe. ECF. No 22 ¶ 2. The leadership and membership dispute that gives rise to this case has been at the heart of numerous judicial and administrative proceedings, including proceedings in this Court.

I. The Intra-Tribal Dispute and the Pending District Court Litigation

A. The Wasson and Bills/Ayer Factions

The Colony's leadership saga began in February 2000. At that time, the Colony's governing body, or Council, consisted of five members, including Chairman Glenn Wasson and Vice-Chair William Bills. *See Wasson v. W. Reg'l Dir. ("Wasson IV")*, 42 IBIA 141, 142 (Jan.

24, 2006). After Glenn Wasson was murdered on February 2000, the Superintendent for BIA recognized Mr. Bills as the Council's Chair. *Id.* The Council then split into two factions—the "Wasson Group," and what was then known as the "Bills Group." *Id.* Both factions claimed they were entitled, as the proper tribal government, to exercise exclusive control over the Colony's economic assets, including two income-producing smoke shops. *Id.* at 142-44; *Winnemucca Indian Colony v. United States ex rel. Dep't of the Interior*, No. 3:11-cv-00622-RCJ-VPC, 2013 WL 1792295, at *2 (D. Nev. Apr. 25, 2013);[1] *Winnemucca*, No. 3:11-cv-00622-RCJ-VPC, 2012 WL 2789611, at *5 (D. Nev. July 9, 2012).

The Wasson Group believed that members of the Bills Group did not qualify for Tribal membership and consequently were not eligible for Tribal leadership positions or to vote in Tribal elections. *See* ECF No. 19-1 at 2-4; *see also* ECF No. 22 (First. Am. Compl.) ¶ 23 ("[C]ertain persons requesting recognition, referred to as the Ayer Group and the Bills Group, did not qualify for membership, nor did any person residing on the Winnemucca Indian Colony without right or authority (referred to herein as 'the trespassers')."); *Id.* ¶ 43 ("BIA knew that persons claiming to support William Bills as the Chairman were not qualified to be members of the Winnemucca Indian Colony based upon the ancestry research done in 1986-1987."); ECF No. 19 at 1-2 ("The United States has only to review its own files to know that the circumstances at the Winnemucca Indian Colony are not a dispute between members of the Tribe.").[2] To complicate matters further, the intra-tribal factions later reorganized. Mr. Bills apparently joined the Wasson group or disappeared altogether, leaving the Bills group to other individuals, who

[1] All orders and filings associated with *Winnemucca Indian Colony v. United States ex. rel Dep't of the Interior*, No. 3:11-cv-00622-RCJ-VPC are hereinafter identified as "*Winnemucca*, No. 3:11-cv-00622-RCJ-VPC."

[2] As discussed below, the United States postulates that the Wasson faction of the Colony has brought the present suit. *See infra* pp. 11, 16.

became known as the Ayer Group. *See Wasson v. W. Reg'l Dir. ("Wasson V")*, 50 IBIA 342, 345 n.3 (Nov.19, 2009); *Wasson v. Acting W. Reg'l Dir. ("Wasson VI")*, 52 IBIA 353, 354 (Dec. 17, 2010).

B. Proceedings from 2000-2011

In the early 2000s, the Wasson and Bills/Ayer factions turned to the Tribal Courts for recognition as the proper Tribal government but received conflicting orders that did not resolve the leadership and membership dispute. *See Wasson IV*, 42 IBIA at 155–56. By January 2006, there were three ongoing tribal processes for determining the legitimate Council: (1) the procedures established by three Tribal judges known as the "Minnesota Panel" in 2002; (2) the procedures set forth in a 2004 decision by the Inter-Tribal Court; and (3) a December 2004 settlement stipulation between the Wasson Group and the Inter-Tribal Court.[3] *Id.* at 146, 155-56. In 2007, the Inter-Tribal Court of Appeals dismissed the matter for lack of appellate jurisdiction, leaving only the 2002 Minnesota Panel decision in place. *Bank of Am. v. Bills*, No. 3:00–cv–00450–BES–VPC, 2008 WL 682399, at *2-3 (D. Nev. 2008). The Minnesota Panel had determined that "the [lawful] Council consisted of Chairman Sharon Wasson, Vice-Chairman William Bills, and members-at-large Thomas Wasson, Elverine Castro, and Tom Magiera." Order and Inj., *Winnemucca,* No. 3:11-cv-00622-RCJ-VPC at 2-3 (D. Nev. Sept. 25, 2012) (ECF No. 151) (attached as Ex. 1).

While these Tribal Court proceedings were ongoing, a separate but related federal interpleader action by Bank of America was also pending. *Bank of Am. v. Bills*, No. CV-N-00-450-HDM (VPC) (D. Nev. Aug. 28, 2000). Bank of America sought a determination as to which

[3] In 1992, when the Inter-Tribal Court of Appeals of Nevada was created by BIA, the Colony began relying on the Inter-Tribal Court as the appellate tribunal for the Colony. *Wasson IV*, 42 IBIA at 143 n.4.

faction was legally "entitled to control of the Colony's money and finances . . . ." *Wasson V*, 2009 WL 4543130 at 346. Consequently, in March 2008, the district court in the *Bank of America* litigation concluded that the Minnesota Panel's decision was controlling because of the Inter-Tribal Court's 2007 dismissal. *See Bank of Am. v. Bills*, 2008 WL 682399, at *5-6 (D. Nev. Mar. 6, 2008), *aff'd sub nom.*, *Bank of Am. v. Swanson*, 400 F. App'x 159 (9th Cir. 2010). The Ninth Circuit's October 2010 decision affirming the *Bank of America* district court order clarified that the courts should recognize the Minnesota Panel decision as the final outcome of the various tribal processes.

Between 2002 and 2008 (before the Ninth Circuit's decision in *Bank of America*), the Wasson Group made numerous requests for BIA to recognize it as the Colony's proper Council. *Wasson IV*, 42 IBIA at 147-149. Each time, the Regional Director denied the Wasson Group's petitions. *See, e.g.*, *id.* at *153–54 (explaining that in his 2004 and 2005 decisions, the Regional Director found that the Wasson Group "had not exhausted tribal remedies for determining the identity of the legitimate Council" and that their "request for recognition as the Colony Council is fatally flawed because it does not . . . [identify] any particular right to or need for the establishment of a government-to-government relationship with a tribal council."). The Interior Board of Indian Appeals ("IBIA") consistently affirmed the Regional Director's numerous decisions. In November 2009, however, the IBIA decided that Plaintiffs had (perhaps) finally identified sufficient context to require the issuance of a BIA decision regarding Colony leadership for purposes of conducting government-to-government relations. *Wasson V,* 50 IBIA at 352; *see also Wasson VI*, 52 IBIA at 354 (explaining that under the *Wasson V* decision, the Regional Director was required to provide the Wasson Group with either "a substantive decision explaining why the Regional Director was declining to recognize them as the Tribe's leaders or,

in the alternative, explaining why a decision by BIA regarding tribal leadership was not required in order for BIA to respond to Appellants' allegations of trespass on tribal lands."). Following that ruling, but prior to the Ninth Circuit's decision in *Bank of America*, the Regional Director issued a decision declining to recognize the purportedly elected Council as the duly elected Colony leadership. *See Wasson VI*, 52 IBIA at 353-54. On review, the IBIA remanded that decision to the Regional Director in December 2010 to provide a better explanation for his conclusions. *Id.* at 359–60.

C. The Nevada District Court Appoints a Tribal Representative

Before the BIA could issue a decision on the 2010 remand from the IBIA, the Wasson Group filed suit in the United States District Court for the District of Nevada. *See* Compl. for Inj. & Decl. Relief ("Nev. Compl."), *Winnemucca*, No. 3:11-cv-622 (D. Nev. Aug. 29, 2011) (ECF No. 1) (attached as Ex. 2). In addition to raising other issues, the Wasson Group sought a declaratory judgment establishing them as the Colony's sole duly elected government. *See* Am. Compl. for Inj. and Decl. Relief ("Nev. Am. Compl.") 4, 15–16, *Winnemucca*, No. 11-cv-622 (D. Nev. Jan. 27, 2012) (ECF No. 56) (attached as Ex. 3). William Bills and the Ayer Group both intervened in the District of Nevada action. *See Winnemucca,* 2013 WL 1792295 at *1.

Soon after the filing of the Nevada case, presiding Judge Robert C. Jones ordered the BIA to recognize one or more persons as the government representatives of the Colony for the purposes of its conducting government-to-government relations with the BIA. *Id.* The BIA first recognized both Thomas Wasson and Williams Bills, but Judge Jones ruled that "the recognition of both Wasson and Bills amounted to the recognition of no government at all and ordered BIA to choose again." *Id.* (citing *Goodface v. Grassrope*, 708 F.2d 335, 338–39 (8th Cir. 1983)). Subsequently, the BIA looked to the Minnesota Panel order and noted that the only surviving Council members identified in that order were Vice-Chairman William Bills and member-at-

large Thomas Wasson. *Id.* Given that William Bills outranked Thomas Wasson, BIA chose to recognize Bills as the Colony's representative for government-to-government purposes. *Id.* at 2. In 2012, Judge Jones decided that BIA had abused its discretion by selecting Bills as the Colony's representative because "BIA based its decision purely on its interpretation of tribal law." Order and Inj., *Winnemucca*, No. 3:11-cv-622 at 3-4 (D. Nev. Sept. 25, 2012) (ECF No. 151) (attached as Ex. 1).

Therefore, the court ordered the BIA to recognize Thomas Wasson as the Colony Council representative and also ordered Mr. Wasson to appoint a membership committee, receive membership applications under conditions identified by the court, and hold an election when all membership appeals were exhausted. *Id.* at 5-6. After reviewing the parties' proposals for a neutral Tribal judge to adjudicate any enrollment and election issues, Judge Jones granted subject matter jurisdiction to resolve any complaints to Judge Timothy Shane Darrington of the Duck Valley Tribal Court. *Winnemucca*, No. 3:11-cv-622 at 1-2, 4 (D. Nev. Mar. 4, 2014) (ECF No. 213) (attached as Ex. 4).

The election was eventually conducted in October 2014. *See Winnemucca*, No. 3:11-cv-622 at *1 (D. Nev. Nov. 19, 2014) (ECF No. 231) (attached as Ex. 5) (listing the newly elected Council members as Judy Rojo, Misty Morning Dawn Rojo Alvarez, Katherine Hasbrouck, Eric Magiera, and Thomas Magiera II). The Nevada district court ordered BIA to recognize those election results. *Id.*; *see also Winnemucca*, No. 3:11-cv-622 at *1 (D. Nev. Dec. 30, 2014) (ECF No. 242) (attached as Ex. 6) (noting that the election results remained "subject to appeals to [Tribal] Judge Darrington and [Inter-Tribal Court of Appeals of Nevada], and their [new council's] terms of service are also presumably limited by tribal law."). Those election results were later challenged before Tribal Judge Darrington, who determined that he lacked jurisdiction

to consider the challenge and dismissed the case; this dismissal was affirmed on appeal to the Inter-Tribal Court of Appeals of Nevada. *See* Resp. to Pls.' Status Report, *Winnemucca*, No. 3:11-cv-622 at *1-2 (D. Nev. June 11, 2018) (ECF No. 292) (attached as Ex. 7). In October 2018, Judge Jones decided that "tribal enrollment and election disputes were resolved and concluded by a tribal court . . . ." *Winnemucca*, No. 3:11-cv-622, 2018 WL 4714755 at *1 (D. Nev. Oct. 1, 2018) (ECF No. 303). The Ayer Group filed a notice of appeal to the Ninth Circuit shortly thereafter. Notice of Appeal and Representation Statement, *Winnemucca*, No. 3:11-cv-622 at 1 (D. Nev. Oct. 31, 2018) (ECF No. 308) (attached as Ex. 8).

D. The Ninth Circuit Court of Appeals Vacates all District Court Orders from 2011 to 2018 and Remands with Orders to Dismiss

On June 15, 2020, the Ninth Circuit Court of Appeals decided that "the [Nevada] district court lacked subject matter jurisdiction" and "remand[ed] with instructions to dismiss." *Winnemucca Indian Colony v. United States ex. rel. Dep't of Interior*, 819 F. App'x 480, 483 (9th Cir. 2020). The court explained:

> The Administrative Procedure Act (APA) provides for judicial review of final agency actions. . . Under our cases, if there is no final agency action, the court lacks subject matter jurisdiction. . . . There was no final agency action here because at the time the complaint was filed, the Bureau of Indian Affairs (BIA) had not reached a final decision on whether it would recognize any group as the Colony's tribal council, or whether any such recognition was warranted. Instead, the BIA was in the middle of complying with a remand order from the Interior Board of Indian Appeals (IBIA) to answer those very questions. Any decision by the BIA would have been appealable to the IBIA, further demonstrating that the Wasson faction failed to exhaust administrative remedies to secure a final decision. 25 C.F.R. § 2.6(a).

Id. at 482-83 (also noting that exhaustion of remedies before the BIA and IBIA would not have been futile) (citations omitted). The ruling vacated all orders issued by the Nevada District Court between 2011 and 2018 involving the Colony's membership and leadership issues. The Ninth

Circuit declined to opine on the impact the decision would have on the 2014 election results, explaining that it was a question "for the tribal courts or the BIA, as appropriate." *Id.* at 483.

E. BIA Proceedings 2020-2022

Following the Ninth Circuit's 2020 remand, two groups of individuals submitted letters to BIA requesting recognition as the Colony's governing body or challenging the BIA's court-ordered 2014 recognition of the "Wasson Group." ECF No. 16-1 at 2 (explaining that the Wasson Group was primarily comprised of Chairwoman Judy Rojo, Vice-Chairman Eric Magiera, Secretary/Treasurer Misty Rojo-Alvarez, Shannon Evans, and Merlene Magiera). In April 2021, due to BIA's need to administer Indian Self-Determination and Education Assistance contracts with the Colony under P.L. 93-638, it issued an interim tribal government recognition to the Wasson Group. *See* ECF No. 16-1 at 9-12; *see also id.* at 12 (explaining that the interim recognition would expire when a tribal forum resolved the underlying intra-tribal dispute or BIA rendered a final recognition decision).

On January 11, 2022, the Acting Regional Director of the Western Regional Office of the BIA issued a final decision letter on how the Western Regional Office will continue necessary government-to-government relations with the Colony. *See* ECF No. 20-1. First, the Acting Regional Director found that "outstanding disputes over the Colony's governing body [are] primarily related to issues of membership . . . [and that] [a]ny resolution of the election disputes would therefore require addressing Colony membership disputes." *Id.* at 12-13. The Acting Regional Director concluded that, because the Tribal Court, not the BIA, is the appropriate forum for adjudicating tribal membership disputes and interpreting tribal law, the BIA was in no position to opine on "the validity, or lack thereof, of the current Colony government." *Id.* at 12; *see also id.* at 14 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)).

Second, the Acting Regional Director decided to continue recognizing the Wasson Group

for government-to-government contracting purposes under P.L. 93-638 unless and until "an adjudication of the underlying membership and election disputes by a tribal forum" requires BIA to change course. *Id.* at 14-15.

II. 2013 Court of Federal Claims Suit

Separate from all the above, in November 2013, Willis Evans filed suit in the CFC in the name of the Colony and in an individual capacity as the Colony's purported Chairman (collectively, the "2013 Plaintiffs"). 2013 CFC Compl., Ex. 9. The 2013 Plaintiffs asserted jurisdiction under 28 U.S.C. § 1505. *Id.* ¶ 1. Plaintiffs stated four claims for relief against the United States: (1) breach of trust, *id.* ¶¶ 88–95; (2) breach of fiduciary duty, *id.* ¶¶ 96–101; (3) a demand for an accounting, *id.* ¶¶ 102–104; and (4) a request for declaratory relief. *Id.* ¶¶ 105–107. The 2013 Plaintiffs sought $108 million in damages; a declaratory judgment entitling Plaintiffs to "fair and reasonable compensation for past, present and future use of the Colony's water, land and property rights"; and "[a]n accounting for all distributions, annuities and other monies, including interest thereon." *Id.* at 19-20 (Prayer for Relief).

The United States moved to dismiss the 2013 CFC Complaint, arguing that Counts One, Two, and Three should be dismissed for two reasons. *See* Mem. Supp. Mot. Dismiss ("2013 Mot. Dismiss"), *Winnemucca Indian Colony v. United States*, No. 13–874, 10 (Fed. Cl. Mar. 4, 2014) (ECF No. 9-1) (attached as Ex. 10). First, the United States argued that dismissal was proper under 28 U.S.C. § 1500 because the [Nevada] district court litigation was pending when the CFC Complaint was filed. *Id.* Second, the United States argued that Plaintiffs failed to identify a specific money-mandating statutory or regulatory duty the United States had allegedly violated by refusing the recognize a tribal government, as is required to establish this Court's jurisdiction to award money damages under the Indian Tucker Act. *Id.* The United States also argued that Counts Three and Four should be dismissed because the CFC lacks jurisdiction to grant the

equitable and declaratory relief Plaintiffs sought. *Id.* The court dismissed the case, finding that 28 U.S.C. § 1500 precluded the court's jurisdiction over Counts One and Two. Order Dismissing Case for Lack of Subject Matter Jurisdiction, *Winnemucca Indian Colony v. United States*, No. 13–874, 2014 WL 3107445, at *4 (Fed. Cl. July 8, 2014).

III. The Instant Action

On November 18, 2020, the "Winnemucca Indian Colony," presumably members of the Wasson Group, filed the present suit. The United States moved to dismiss on March 19, 2021. ECF No. 8 (arguing that this Court lacked jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1500, 28 U.S.C. § 2501, 28 U.S.C. § 1491, and 28 U.S.C. § 1505). In May 2021, Plaintiffs notified the United States that Plaintiffs intended to amend their Complaint. *See* Joint Motion to Hold in Abeyance United States' Motion to Dismiss Plaintiffs' Complaint ("Joint Abeyance Motion"). The United States agreed to ask the Court to hold the 2021 Motion to Dismiss in abeyance until the United States had had the opportunity to review Plaintiffs' Amended Complaint. *Id.* Notably, counsel for the United States requested that Plaintiffs' Amended Complaint specifically identify Plaintiffs so that the United States could more fully respond to Plaintiffs' allegations and assess Plaintiffs' standing.

Plaintiffs moved for leave to file the Amended Complaint in July 2021. The Amended Complaint fails to explain which individual or group within the Colony is purporting to have authority to bring this suit on the Colony's behalf. ECF No. 15-1. The United States opposed Plaintiffs' Motion for Leave to Amend on futility grounds. *See* ECF No. 17. However, the Court granted Plaintiffs' motion on January 26, 2021, noting that the United States would need to answer or otherwise respond to the Amended Complaint within 45 days of the docketing of the

Amended Complaint. ECF No. 21. Plaintiffs filed their Amended Complaint on February 1, 2022.[4]

Large portions of the Amended Complaint's factual allegations are virtually indistinguishable from those made in the 2013 CFC Complaint. Plaintiffs assert eleven claims for relief against the United States: (1) Violation of 25 U.S.C. § 323 et seq.— alleging unauthorized construction and usage of a road on Colony lands by third parties; (2) Violation of 25 USC § 323 et seq.—alleging unauthorized construction and usage of an electrical substation, utility lines, and a road that impedes the flow of water onto Colony lands by third parties; (3) Breach of Trust—alleging unauthorized third party diversion of water away from Colony lands; (4) Violation of 25 U.S.C. §4101—alleging unauthorized use of tribal housing by non-members; (5) Breach of Trust and Violation of Law pursuant to the Indian Non-Intercourse Act —alleging unauthorized construction and usage of a road, electrical substation, utility lines, water diversion, buildings, etc. by third parties and loss of funds, economic development, and loss of right to conduct government functions; (6) Breach of Fiduciary Duty—alleging failure to survey Colony lands and failure prevent encroachment and trespass, failure to properly recognize a Tribal Council of the Colony, and interference with the efforts of the Tribe to re-open the Smoke Shop; (7) "The Winnemucca Indian Colony has no other means of recovering the loss of the value and income from its property wherein it was denied management, access and use of its property other than to seek damages from the United States;" (8) Demand for Documents and Accounting—request for accounting to determine damages; (9) Declaratory Judgment—seeking declaration that Plaintiffs are entitled to $91,000,000.00 as compensation for past, present and future use of the Colony's water, land and other property rights; (10) Declaratory Judgment—seeking

[4] The United States notes that Plaintiffs failed to comply with the Court's order requiring the Amended Complaint be filed "no later than January 31, 2022." ECF No. 21.

declaration that each tribal member is entitled to $1,000,000 as compensation for alleged inability to use lands because of the "lack of recognition of the government of the Winnemucca Indian Colony;" and (11) Declaratory Judgment—seeking a declaration that the Colony is entitled to petition BLM for the conveyance of land to the Tribe. ECF No. 22 ¶¶ 150-228. As remedies, Plaintiffs seek $208 million in damages, an additional $1 million "per tribal member" for the alleged deprivation of use of Colony lands by an unidentified and unnumbered group of Colony members,[5] several declaratory judgments, an accounting for all "distributions, annuities, grants, and allotments and other monies," and costs and attorney's fees. *Id.* ¶¶ 1-6 (Prayer for Relief).

STANDARD OF REVIEW

Jurisdiction must be established before a court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). The determination of whether the court has subject matter jurisdiction over a plaintiff's claims is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002). Federal courts are presumed to lack subject matter jurisdiction unless it is affirmatively indicated by the record. *Renne v. Geary*, 501 U.S. 312, 316 (1991). It is a plaintiff's responsibility to allege facts sufficient to establish a Court's subject matter jurisdiction. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006).

Generally, the Court accepts as true the undisputed factual allegations in the complaint and draws all reasonable inferences in a plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). However, the court may also look to evidence outside of the pleadings and

[5] The loss of land use claim is vague as to the identity and number of the claimants, and also amorphous as to the damages claimed, which appear to be stated as $2.76 million (*id.* ¶ 94); "in excess of $432,000" (*id.* ¶ 33); and "in excess of $1,000,000 per tribal member." *Id.*, *Prayer for Relief* ¶ 4.

inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). Once a court's subject matter jurisdiction is challenged, a plaintiff cannot rely solely on factual allegations in the complaint but must bring forth relevant adequate proof to establish jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Thus, Plaintiffs bear the burden of proving by a preponderance of the evidence facts sufficient to establish that the Court possesses subject matter jurisdiction. *Id.* at 189; *Reynolds*, 846 F.2d at 748; *accord M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The RCFC 12(h)(3) requires the dismissal of a claim if the court concludes that it lacks subject matter jurisdiction.

A motion to dismiss under RCFC 12(b)(6) tests the legal sufficiency of a complaint in light of RCFC 8(a), which requires "a plausible 'short and plain' statement of the plaintiff's claim, showing that the plaintiff is entitled to relief." *K–Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282 (Fed. Cir. 2013) (quoting *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (internal quotation marks omitted)). A plaintiff must plead factual allegations, which, if accepted as true and construed in the light most favorable to the plaintiff, would, "raise a right to relief above the speculative level." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim. *Evans v. United States*, 107 Fed. Cl. 442, 448 (2012) (citing *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998)). A court should dismiss a complaint "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

ARGUMENT

The Court lacks jurisdiction over all claims in the Complaint. First, Plaintiffs have not met their burden of showing that they have authority to speak for the Colony here, so the Court does not have jurisdiction to adjudicate this case. Second, at the time this action was initially filed, the Colony had a similar case pending in the Ninth Circuit. That case—like Counts One through Eight, Ten, and Eleven in the present action—involved the same operative facts related to the Colony's leadership dispute and BIA's alleged failure to recognize the Colony's Tribal government. Thus, Counts One through Eight, Ten, and Eleven should therefore be dismissed under 28 U.S.C. § 1500. Third, the Court lacks jurisdiction over Count One, part of Count Two, and Counts Three through Six because they are barred by the six-year statute of limitations. Second, this Court lacks jurisdiction over Counts Three through Seven (and Counts Nine and Ten, to the extent those Counts seek monetary damages), because the Amended Complaint fails to make the necessary allegations of violations of specific, money-mandating fiduciary duties. Finally, Counts Eight through Eleven seek equitable relief in the form of an accounting and a declaratory judgment—remedies the CFC does not have jurisdiction to provide. The Complaint should therefore be dismissed in its entirety.

I. Plaintiffs Lack Standing Because They Have Failed to Demonstrate They Represent the Colony.

Plaintiffs have failed to sufficiently demonstrate standing to assert claims against the United States on the Colony's behalf. Before a court can hear the merits of a suit brought by tribal plaintiffs, it "must first determine whether they have standing to sue on behalf of the Tribe." *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 936 (D.C. Cir. 2012). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing the elements of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016). "To meet this

burden at the pleading stage, the complaint must clearly and specifically set forth facts sufficient to satisfy the standing requirements." *Barzillai v. United States*, 137 Fed. Cl. 788, 802-03 (2018); *see also McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1557 (Fed. Cir. 1986) ("The facts alleged in the complaint, taken as true for purposes of a standing analysis, must be sufficient to show that a party has suffered, or is likely to suffer, an injury in fact."). Further, "where the authority of an individual initiating litigation on behalf of a tribe has been called into dispute," the court must determine whether there is sufficient basis in the record to support the court's jurisdiction. *Cayuga Nation v. Tanner*, 824 F.3d 321, 328 (2d Cir. 2016). Since Plaintiffs have not met their burden, the Court does not have jurisdiction to adjudicate this matter.

The claims asserted here purport to be made on behalf of the Colony and seek to vindicate the Colony's interests in real estate, asserting, among other things, that the United States: allowed an "unlawful[] occup[ation]" of the Colony's lands; allowed the granting of unauthorized "easements . . . over colony land;" allowed "encroachments . . . on the Colony's lands;" allowed the "diver[sion]" of Colony waters. ECF No. 22 at 1-2. Any such land-centered claims must be brought by the Colony and cannot be brought by its individual members. *United States v. 43.47 Acres of Land More or Less, Situated in Cnty. of Litchfield, Town of Kent*, 855 F. Supp. 549, 551 (D. Conn. 1994). It is, after all, *the Colony's* lands that have allegedly been damaged. As explained above, the BIA Regional Director has recently recognized the Wasson Group as the Colony government in order to maintain an ongoing government-to-government relationship with the Colony. *See supra* pp. 9-10. The United States infers, but Plaintiffs have not confirmed, that the Wasson Group initiated this lawsuit on the Colony's behalf. Even assuming that the Wasson faction brought the present action, BIA's recognition decision does not solve Plaintiffs' standing problem for two reasons.

First, the Amended Complaint does not identify which faction has authorized this suit, nor does it alleged the suit was authorized by those with authority to speak for the Colony. That missing allegation is significant in light of the leadership dispute. Indeed, the Amended Complaint contains no reference to the BIA's interim recognition decision or subsequent final recognition decision. ECF No. 22; *see supra* pp. 9-10 (discussing BIA's recognition decision letters). The Amended Complaint has therefore failed to allege sufficient facts to establish that this suit was brought on the Colony's behalf. That failure is fatal to Plaintiffs' suit, and their claims must be dismissed. *Timbisha*, 678 F.3d at 938-39; *see also Spokeo, Inc.*, 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element [of standing]" (alteration in original) (citation omitted)).

Second, the timing of the present suit is significant. At the time of the original Complaint in November 2020, BIA had not yet opined on the question of which faction had authority to speak for the Colony for the purposes of government-to-government relations. *See Winnemucca Indian Colony*, 819 F. App'x at 482-83 (explaining that BIA was not able to issue a decision between 2011 and 2020 because of the Wasson Group's decision to abandon administrative proceedings with BIA in favor of filing suit in the District Court of Nevada). A court lacks subject matter jurisdiction over a suit purportedly brought on behalf of a tribe by a tribal faction that does not constitute a BIA-recognized tribal government. *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 WL 1957076, at *6 (W.D. Wash. May 11, 2017) (finding that, while a membership and leadership dispute was pending, the "holdover" tribal council did not have authority to bring suit against the federal government when neither "DOI [n]or BIA have [] recognized *any* Nooksack tribal leadership"); *accord Timbisha*, 678 F.3d at 938-39 (directing the district court to dismiss for lack of jurisdiction where the plaintiff tribal faction lacked standing

because the BIA had recognized a different faction as the tribal government); *Cayuga Nation,* 824 F.3d at 328 ("[D]eference to the Executive Branch is appropriate" in addressing whether an "individual may bring a lawsuit on behalf of the tribe.").

Plaintiffs have not demonstrated that they were authorized to bring suit on behalf of the Colony when they filed their original Complaint and, consequently, lacked standing at the time they filed suit. *Lujan*, 504 U.S. at 570 n.4; *Nooksack Indian Tribe*, 2017 WL 1957076 at *6; *Timbisha*, 678 F.3d at 938-39; *Cayuga Nation,* 824 F.3d at 328.[6] Any subsequent amendment to the Complaint to allege the facts necessary to establish standing would not correct this jurisdiction deficiency. *Lujan*, 504 U.S. at 570 n.4. Therefore, Plaintiffs' Amended Complaint must be dismissed for lack of standing.

II. Under 28 U.S.C. § 1500, the District Court Litigation Bars Jurisdiction in the Court of Federal Claims Over Counts One through Eight, Ten, and Eleven

The CFC is "prohibited . . .from hearing a case" when (1) "there is an earlier-filed suit 'pending' in another court" and (2) "the claims asserted in the earlier-filed case are 'for or in respect to' the same claims asserted in the later-filed CFC action." 28 U.S.C § 1500; *see Winnemucca Indian Colony*, 2014 WL 3107445, at *2 (citations omitted). This Court should dismiss Counts One through Eight, Ten, and Eleven of the Amended Complaint pursuant to 28 U.S.C. § 1500 for the same reason that it dismissed Counts One, Two, and Three in the largely indistinguishable 2013 CFC case: when Plaintiffs filed their initial Complaint, the Nevada District Court Claims, based on the same operative facts as the current action, were still pending in the Ninth Circuit.

[6] *Timbisha* discusses this issue as one of standing; *Nooksak* argues that the question goes not to standing but to the named plaintiffs' authority to bring suit on the Tribe's behalf. However framed, the issue is jurisdictional. *Nooksack*, 2017 WL 1957076, at *4 ("Though not a question of constitutional standing, that issue nonetheless implicates the subject matter jurisdiction of this Court" (*quoting Cayuga Nation*, 824 F.3d at 327 (2d Cir. 2016))).

First, it is clear that the Nevada litigation was "pending" for the purposes of 28 U.S.C. § 1500. "[T]he question of whether another claim is pending 'is determined at the time at which the suit in the [CFC] is filed." *See Pellegrini v. United States*, 103 Fed. Cl. 47, 51 (2012) (citation and internal quotation marks omitted). The Nevada litigation was still pending at the time Plaintiffs filed the present suit because the Ninth Circuit had not yet issued its mandate.

As outlined above, Plaintiffs filed their complaint in the Nevada District Court in 2011 and did not receive a final order in that court until 2018, when the district court decided largely in their favor. *Winnemucca*, No. 3:11-cv-00622-RCJ-VPC, 2018 WL 4714755 (D. Nev. 2018). That order was promptly appealed by the Ayer Group to the Ninth Circuit. *See Winnemucca Indian Colony,* 819 F. App'x at 482. In June 2020, the Ninth Circuit vacated the district court's various orders relating to the 2011 complaint for lack of subject matter jurisdiction — due to Plaintiffs' failure to exhaust administrative remedies— and "remanded with instructions to dismiss." *Id.* at 483.

At the Plaintiffs' request, however, the Ninth Circuit stayed this mandate in August 2020. *See* Order Staying Mandate, *Winnemucca*, No. 3:11-cv-622 (D. Nev. Aug. 3, 2020) (ECF No. 331) (attached as Ex.11). While this stay was in effect, the case was still "pending" for purposes of 28 U.S.C. § 1500. *See UNR Indus. v. United States,* 962 F.2d 1013 (Fed. Cir. 1992) (a prior-filed, but stayed, district court action is "pending" within the contemplation of section 1500); *Winnemucca Indian Colony*, 2014 WL 3107445, at *3 ("Unless a claim has been dismissed or denied, it is considered to be pending, regardless of the reason that it remains in the court."). The Ninth Circuit did not lift the stay and issue the mandate until December 23, 2020. *See* Mandate of USCA, *Winnemucca,* No. 3:11-cv-00622-RCJ-VPC (D. Nev. Dec. 23, 2020) (ECF No. 332) (attached as Ex. 12). The district court did not vacate its decisions and dismiss the case before it

until December 29, 2020, forty-two days *after* Plaintiffs filed their Complaint in this Court. *See* Order on Mandate, *Winnemucca*, No. 3:11-cv-00622-RCJ-VPC (D. Nev. Dec. 29, 2020) (ECF No. 333) (attached as Ex. 13); ECF No. 1. Therefore, the Nevada litigation was "pending" when Plaintiffs filed the present action and the § 1500 prohibition remains even though the claim was "later dismissed by the other court." *Prophet v. United States*, 106 Fed. Cl. 456, 465 (2012).

Second, as required by Section 1500, "the claims asserted in the earlier-filed case are 'for or in respect to' the same claims asserted in the [instant] CFC action." This Court has already determined that the Nevada litigation is based on substantially the same operative facts as 2013 CFC case. *Winnemucca Indian Colony*, 2014 WL 3107445, at *3-4 (Fed. Cl. July 8, 2014). The Court's emphasis in its 2014 decision is equally applicable here:

> [B]oth cases involve factual questions of who, if anyone, constituted the legitimate Colony leadership; whether the individuals in question had authorization from that leadership to enter Colony lands; and when and under what circumstances BIA took (or did not take) action to recognize a government, prevent entry by Colony members, or address concerns over unauthorized occupation. The fact that the subject complaints set forth different claims for relief does not alter this result[.]

Id. at *4.

Though some of the allegations have been reorganized and Plaintiffs have chosen to rephrase several paragraphs, provide additional background information, and offer a handful of minor factual clarifications, the differences between the 2013 Complaint and 2020 Complaint are inconsequential for Section 1500 purposes.[7] The fact that the 2020 Complaint raises new legal

[7] C*ompare* ECF No. 22 ¶¶ 6-28 (providing background and historical context) *with* 2013 CFC Compl., Ex. 9 ¶¶ 11-32 (same), *and* ECF No. 22 ¶ 35 *with* 2013 CFC Compl., Ex. 9 ¶ 35, a*nd* ECF No. 22 ¶ 29, 30, 33, 79, 119 (alleging that non-member residents of HUD homes were allowed to live on the 20 acre parcel without paying rent, "effectively excluding" Colony members from residential housing on Colony lands) *with* 2013 CFC Compl., Ex. 9 ¶¶ 71-73 (alleging that BIA "effectively excluded" members of the Colony from use of the 20 acre parcel by failing to require the purportedly unauthorized persons/nonmembers living there to leave");

theories is "irrelevant." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1166 (Fed. Cir. 2011); *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011) ("Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit."). The Amended Complaint and the Nevada litigation are based on substantially the same operative facts. Accordingly, the claims should be dismissed under RCFC 12(b)(1).

Though the Nevada case was dismissed before Plaintiffs filed their Amended Complaint, the Section 1500 jurisdictional bar still applies. "[J]urisdiction of the court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Glob. Grp. L.P.*, 541 U.S. 567, 570 (2004) (citation omitted). The Federal Circuit has found that there is "no doubt" that a complaint barred by Section 1500 at the time of filing "cannot be rescued by subsequent action of either party or by resolution of the co-pending litigation." *Cent. Pines Land Co., LLC v. United States*, 697 F.3d 1360, 1365-66 (Fed. Cir. 2012). A court "must look only to [a plaintiff's] Original Complaint, rather than [to a plaintiff's] First Amended Complaint," when determining if Section 1500 bars jurisdiction. *HealtheSTATE, LLC v. United States*, 146 Fed. Cl. 681, 683 n.2 (2020) (citing *Res. Invs., Inc. v. United States*, 785 F.3d 660, 660 (Fed. Cir. 2015)), *reissuing,* 149 Fed. Cl. 244 (2020), *and mot. to certify appeal denied,* 825 F. App'x 919 (Fed.

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and ECF No. 22 ¶¶ 30 (alleging that "certain persons requesting recognition, referred to as the Ayer Group and the Bills Group, did not qualify for membership") *with* 2013 CFC Compl., Ex. 9 ¶ 37, 40 (same); ECF No. 22 ¶¶ 132-129 (alleging encroaching or trespassing substation, power lines, and roads) *with* 2013 CFC Compl., Ex. 9 ¶ 16, 94 (same); ECF No. 22 ¶¶ 140-43 (discussing loss of income due to non-members occupying the Colony's smoke shop) *with* 2013 CFC Compl., Ex. 9 ¶ 86 (same); ; ECF No. 22 ¶¶ 168 (alleging that the 320 acres has no water because water in excess of 60 cfs is being held in upstream wells and holding tanks) *with* 2013 CFC Compl., Ex. 9 ¶ 15, 94 (alleging that water in excess of 60 cfs that used to run across Colony lands had been dammed up for use by an upstream subdivision "within the past ten years"); ECF No. 22 at 2, ¶¶ 13-14 (alleging that members of the Colony were not able to obtain funding, support payments, or P.L. 93-638 contracts while BIA refused to recognize a tribal government) *with* 2013 CFC Compl., Ex. 9 ¶ 100 (same).

Cir. 2020) (per curiam); *see Low v. United States*, 90 Fed. Cl. 447, 451 (2009) (holding that an amended complaint's filing date is "irrelevant" for purposes of § 1500 because the filing date of the original complaint controls).

Therefore, since Section 1500 barred jurisdiction at the time the Complaint was filed, *see* ECF No. 8 at 14-16, Plaintiffs' subsequent amendments cannot overcome this fatal defect. *See Cent. Pines Land Co. v. United States,* 99 Fed. Cl. 394, 397 (2011) ("Challenges to this court's jurisdiction may be raised at any time and may not be waived by the government."), *aff'd,* 697 F.3d 1360 (Fed. Cir. 2012); *Cent. Pines Land Co. v. United States*, 697 F.3d 1360, 1367 (Fed. Cir. 2012) ("The [Claims Court] suit must be dismissed and refiled to avoid § 1500." (alteration in original) (quoting *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1166 n.2 (Fed. Cir. 2011))).

In summary, because the Nevada litigation was both based on substantially identical operative facts as the current CFC suit and was "pending" when this suit was originally filed, Section 1500 precludes this Court's jurisdiction over these claims.

Because each of Plaintiffs' claims must be dismissed for independently sufficient reasons, however, Plaintiffs' refiling their complaint will not cure the Court's lack of jurisdiction; dismissal with prejudice is accordingly appropriate.

III. Count One, Part of Count Two, and Counts Three through Six Are Time-Barred by 28 U.S.C. § 2501

Even if Plaintiffs had demonstrated authorization to file suit on behalf of the Colony and Section 1500 were not applicable, Counts One, part of Count Two, and Counts Three through Six would still need to be dismissed as untimely under the six-year statute of limitations in 28 U.S.C. § 2501. Each of those claims accrued before November 18, 2014. "The 6–year statute of limitations on actions against the United States is a jurisdictional requirement attached by

Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 –77 (Fed. Cir. 1988) (citing cases). Plaintiffs bear the burden of proving that their claims are timely by a preponderance of the evidence. *See Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015) (citing *Brandt v. United States*, 710 F.3d 1369, 1373 (Fed. Cir. 2013)).

The statute of limitations begins to run when a "claim first accrues." 28 U.S.C. § 2501. A claim against the United States accrues '"when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'" *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (citation omitted); *Mitchell v. United States*, 13 Cl. Ct. 474, 477 (1987).

Specifically, in tribal trust cases, a claim accrues where a) the United States repudiates the trust, which can be done "by taking actions inconsistent with [its] responsibilities as trustee," and b) the Tribe has actual or inquiry notice of that repudiation, which a Tribe will have as soon as it is "capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1348 (Fed. Cir. 2004); *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984); *see also Shoshone Indian Tribe of Wind River Reservation, Wyo.*, 672 F.3d 1021, 1030-33 (Fed. Cir. 2012) (statute of limitation accrued where tribes were not prevented "from being aware of the material facts that gave rise to their claim," even if they were not "aware of the full extent of their injury"); *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("[A] plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."). The accrual of the limitations period is only delayed if

the facts are either concealed by the United States, or unknowable. *Menominee Tribe*, 726 F.2d at 721; *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 69 (2006), *aff'd*, 279 F. App'x 980 (Fed. Cir. 2008).

A. Available Information Shows that Plaintiffs' Physical Encroachment Claims are Untimely

Plaintiffs allege that that the United States breached its trust responsibilities by: 1) allowing construction projects to move forward on or around the Winnemucca Indian Colony without what Plaintiffs characterize as proper approvals or consent; and 2) failing to secure proper compensation for the Tribe and to protect the Colony's resources from loss, waste, and encroachment. ECF No. 22 at 1-2; *id.* ¶ 154. Specifically, Plaintiffs allege that they are entitled to relief in relation to the construction of: 1) "Highland Road" or "Highland Street," *id.* ¶¶ 138; 152-54; 191 [Counts One & Five]; 2) granting a "subdivision [approval] for ingress and egress from a back parking lot over Colony lands," *id.* ¶¶ 154, 160 [Count One]; 3) an electrical substation, *see id.* ¶¶ 158, 160-62, 191 [Counts Two & Five]; 4) overhead power lines, *see id.* ¶¶ 158-62, 191 [Counts Two & Five]; 5) facilities or wells now or formerly owned by the Offenhauser Development Company that divert water from a stream bed, *id.* ¶¶ 168-172, 191 [Counts Three & Five]; 6) structures owned by the Offenhauser Development Company that "remove water from wells from which water was able to reach the Colony's lands," *id.* ¶¶ 168-172 [Count Three]; and 7) a "garage, shed, part of a trailer park, road, and driveway" adjacent to the 20 acres. *Id.* ¶¶ 173-79, 191, 196 [Counts Four, Five, & Six].

It is difficult to tell exactly the structures to which Plaintiffs refer. The Amended Complaint does not specifically identify where these structures are located, nor provide any other identifying information. Nonetheless, the United States has been able to identify what we believe

to be the location of each structure described in the Complaint. *See* Map/Satellite Photo Overview of Winnemucca Indian Colony (attached as Ex. 14).[8]

Historical satellite data shows that the structures the United States believes to be what Plaintiffs refer to as "Highland Road," the "subdivision for ingress and egress,"[9] the "overhead power lines," and the electrical substation were all constructed more than six years before the Complaint was filed.[10] Other records indicate that these structures were likely in existence for many years and that the right of way for certain power lines expired more than six years ago.[11] Further, it is clear that Plaintiffs have had actual knowledge of the existence of the electrical substation and the overhead power lines for at least six years because it was alleged that the Colony was entitled to damages in relation to those structures in the 2013 CFC Complaint. 2013 Compl. ¶¶ 15-16, Ex. 9 ("The 320 acres . . . is no longer a square of land as surveyed because of encroachment . . . by a[n] electrical substation and overhead power lines . . . a blacktopped two-lane road . . . now crosses the 320 acres of the lands of the Colony").

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[8] This map and any other satellite photos have been attached as exhibits to this motion solely for the purpose of demonstrating that Plaintiffs' claims are time-barred by 28 U.S.C. § 2501, a jurisdictional defect that Plaintiffs bear the burden of correcting. *Reynolds v. Army and Airforce Exchange Serv.*, 846 F.2d 746, 748 (Fed Cir. 1988). The exhibits should not be interpreted as making any representation about the Colony's land rights or property boundaries.

[9] The United States understands Plaintiffs to be referring to Water Canyon Estates, a subdivision created by the Offenhauser Development Company. If Plaintiffs are referring to some other subdivision near the 320 acres, Plaintiffs must identify it and clarify when it came into existence if they are to satisfy their burden of showing that the statute of limitations does not bar their claims.

[10] *See* 2013 Satellite Photo Showing South Highland Drive (attached as Ex. 15); Satellite Photo Showing "Subdivision for Ingress and Egress/Water Canyon Estates" 2013 (attached as Ex. 16) Satellite Photo Showing Overhead Power Lines 2013 (attached as Ex. 17, Ex.18); Satellite Photo Showing Electrical Substation 2013 (attached as Ex. 19).

[11] *See* 1989 Offenhauser Recorded Map for Development on Water Canyon Road (attached Ex. 20); 1989 Sierra Pacific Quitclaim Deed for Eastern Boundary Overhead Power Lines (attached Ex. 21); 1997 Right of Way Application for Hanson Road Overhead Power Lines (attached as Ex. 22); 1974 Land Survey Showing S.P.P. Substation (attached as Ex. 23).

The Complaint's description of the structures that divert stream and well water is too vague for the United States to know the structures to which Plaintiffs refer. ECF No. 22 ¶¶ 124, 168-172, 191. However, since Plaintiffs alleged that the United States breached its fiduciary duties by failing to prevent this diversion in its November 2013 CFC Complaint, Plaintiffs have had actual knowledge of its existence for more than the six years allowed by the statute of limitations. *Compare* ECF No. 22 ¶ 168 ("Defendants allowed Offenhauser Development Company to divert a stream and remove water from wells . . . on the 320 acres which renders no water available . . . to the 320 acres in an amount in excess of 60 cfs for use in an upstream diversion and impoundment.") *with* 2013 Compl. ¶ 15, Ex. 9 ("[W]ater in an amount in excess of 60 cubic feet per second (CFS) ran across the lands of the Colony, however that water has been dammed up for use by an upstream subdivision *within the past ten years*.") (emphasis added).

Likewise, the historical satellite images show that a trailer park and a road, as well as other unidentified structures, have existed on the Colony's twenty- acre parcel since at least 2013. Satellite Photo (2013): Aerial Photo of 20 Acre Parcel (attached as Ex. 24). The United States believes that these may be some or all of the structures to which Plaintiffs refer in paragraph 196 of the Amended Complaint. ECF No. 22 ¶ 196. Plaintiffs have had actual knowledge of the trailer park's existence since at least November 2013; they alleged that "none of those persons [residing on the twenty acres] had authority to be on the lands of the Winnemucca Indian Colony" in their 2013 CFC Complaint. 2013 Compl. ¶ 71, Ex. 9. Further, in the instant Complaint, Plaintiffs again note that "BIA has failed and refused to remove persons who are non-members and non-Indians living in makeshift, unhealthy and unauthorized housing

on [the twenty acres]," and that people are living in "HUD homes" on the twenty acres.[12] ECF No. 22 ¶¶ 110; 112; 119. According to the Complaint, these "HUD leases expired at the latest in 1997," twenty-four years before the instant Complaint was filed. *Id.* ¶ 110.

In the background portion of the Complaint, Plaintiffs also allege that the United States breached its fiduciary duties by allowing storm sewer runoff from the subdivision designed by the Offenhauser Development Company to "discharge directly onto the 320 acres." *Id.* ¶ 127. Plaintiffs do not mention this alleged breach in their Claims for Relief. *Id.* ¶¶ 150-228. Nevertheless, the United States has confirmed that, in 2011 or early 2012, the Chairman of the Colony at the time, Thomas Wasson, discussed an "easement in favor of the City of Winnemucca for storm water drainage" in exchange for "hooking up the water and sewer for the Colony's smoke shop on the 320 acres in Winnemucca." 2011-2012 Correspondence Regarding Storm Water Drainage, at 2 (attached as Ex. 25). Therefore, if this is the drainage to which Plaintiffs are referring, they have had knowledge of this drainage for at least eight years. *Id.*

The information presented above calls this Court's subject matter jurisdiction into question by challenging the timeliness of Plaintiffs' claims. Plaintiffs must therefore come forward with evidence establishing the court's jurisdiction by a preponderance of the evidence or the Complaint should be dismissed. *Reynolds v. Army and Airforce Exchange Serv.*, 846 F.2d 746, 748 (Fed Cir. 1988).

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[12] The issue of whether the individuals residing in the trailer park on the twenty acres are truly "non-members" and should be evicted as Plaintiffs have requested is a major flashpoint in the ongoing membership dispute. ECF No. 22 ¶¶ 110, 112,119. *See generally* https://thenevadaindependent.com/article/residents-fear-loss-of-homes-during-disputed-clean-up-effort-at-winnemucca-indian-colony (May 17, 2020); https://thenevadaindependent.com/article/court-halts-cleanups-and-demolitions-at-winnemucca-indian-colony-questions-councils-legitimacy (June 18, 2020).

IV. Counts Three through Seven Must be Dismissed for Failure to Identify Violations of Money-Mandating Constitutional, Statutory, or Regulatory Duties

Even putting aside the arguments above, Counts Three through Seven would still need to be dismissed for lack of jurisdiction. Plaintiffs assert jurisdiction under both 28 U.S.C. § 1491 ("Tucker Act") and 28 U.S.C. § 1505 ("Indian Tucker Act"), which offer a limited waiver of the United States' sovereign immunity. *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 289-90 (2009); ECF No. 22 ¶ 1. Both the Tucker Act and the Indian Tucker Act are jurisdictional statutes only; neither creates "a substantive right enforceable against the Government by a claim for money damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Navajo Nation* ("*Navajo I"*), 537 U.S. 488, 503, 506 (2003). In order to establish jurisdiction under these statutes, Plaintiffs must identify a substantive source of law, distinct from the Tucker Act or Indian Tucker Act, that satisfies the two-part test outlined by the Supreme Court. *Navajo II*, 556 U.S. at 290.

First, the substantive source of law must "establish[] specific fiduciary or other duties" and Plaintiffs must allege that the Government has "failed faithfully to perform those duties." *Navajo II*, 556 U.S. at 290-91 (quoting *Navajo I*, 537 U.S. at 506); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (emphasizing that the government's duties to Indian tribes are defined by specific trust-creating statutes or regulations, not common-law trust principles). A statute or regulation "that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Mitchell I*, 445 U.S. at 542- 44.

Second, the source of substantive law must be one that "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Navajo II*, 556 U.S. at 290–91 (quoting *Navajo I*, 537 U.S. at 506).

To be money-mandating in breach, "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." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Fed. Cl. 1967). "If the statute is not money-mandating, the [CFC] lacks jurisdiction, and the dismissal should be for lack of subject matter jurisdiction.' *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 876 (Fed. Cir. 2007)).

Counts Three through Seven require dismissal because Plaintiffs have failed to clear the two hurdles the Supreme Court has identified for Tucker Act jurisdiction. *See Navajo II*, 556 U.S. at 290–91. In fact, Counts Three through Seven are devoid of any citations to specific statutory or regulatory duties at all, much less any money-mandating duties.

A. Plaintiffs Have Not Identified a Specific Money-Mandating Fiduciary Duty Regarding the Colony's Water Rights

Count Three must be dismissed because Plaintiffs have not identified a source of law imposing a money-mandating duty on the United States to manage Plaintiff's alleged *Winters* Doctrine water rights. Plaintiffs have not identified a single source of law (treaty, statute, executive order, or regulation) that imposes a specific fiduciary duty on the United States to take actions in relation to its alleged responsibilities under the *Winters* Doctrine, something they must do to assert a legally cognizable claim for breach of a fiduciary duty. *Navajo II*, 556 U.S. at 302; *Navajo I*, 537 U.S. at 506. In fact, Plaintiffs have not identified any substantive source of law at all. In paragraph 166 of the Amended Complaint, Plaintiffs cite *Hopi Tribe v. United States* as support for its argument. 782 F.3d 662, 669 (Fed. Cir. 2015). But *Hopi Tribe* merely noted that, under the *Winters* doctrine, the United States has "the power to exclude others from . . . diverting waters that feed the reservation." *Id. Hopi Tribe* does not stand for the notion that the United States has a mandatory duty to do so or is answerable in damages for not performing such a duty.

Id. at 670-71 (affirming the dismissal of the Tribe's water claims for failure to satisfy the requirements of *Navajo II*).

Given that Plaintiffs have not identified a source of law imposing specific duties, there is no need to discuss the second element of the jurisdictional test that must be also applied to Count Three. Because Plaintiffs have not identified any specific fiduciary duties, they have not met their burden to show this Court has jurisdiction over Count Three.[13]

B. 25 U.S.C. § 4101 Does Not Contain Money-Mandating Fiduciary Duties.

Count Four asserts a claim under the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 4101–4243. *See* ECF No. 22 ¶¶ 1, 29, 33, 173-79. Plaintiffs allege that BIA and HUD caused five homes on Winnemucca land to be leased to persons whose membership in the Colony Plaintiffs dispute. ECF No. 15-1 ¶¶ 29, 33. They suggest that by providing housing to persons whom Plaintiffs regard as non-members of the Colony, BIA and HUD somehow prevented Colony members from living on the Colony's reservation lands. ECF No. 22 ¶¶ 176-78. Plaintiffs seek damages in the form of rental payments allegedly due from the occupants of the five dwellings, as well as damages for the occupants' alleged deposition of "hazardous, solid and infectious waste" on the land. ECF No. 22 ¶ 178. Plaintiffs' claim under NAHASDA need not detain the Court long because the Court of Appeals in *Lummi Tribe* expressly held that "the Claims Court erred in finding NAHASDA to be a

[13] In addition, and equally dispositive, Plaintiffs have not alleged injury-in-fact sufficient to survive dismissal. Plaintiffs' water rights claim seeks compensation for the value of the water allegedly diverted (ECF No. 22 ¶ 168). The dispositive case here is *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018), which affirmed the dismissal of water diversion claims like those made here on the grounds that *Winters* only confers rights to sufficient water to fulfill the purposes of the Reservation; unless those purposes have been frustrated, the court held, the alleged diversion does not constitute actionable injury. *See* 900 F.3d at 1356

money-mandating statute" and that "the Claims Court is [therefore] without jurisdiction over [a] case" by a tribe alleging NAHASDA noncompliance. 870 F.3d at 1317. [14]

The same result was reached in *Blackfeet Hous. v. United States*, 106 Fed. Cl. 142 (2012), *aff'd,* 521 F. App'x 925 (Fed. Cir. 2013) (*per curiam*). "Indeed," the court noted the structure of the statute is aimed at empowering Tribes, rather than giving the government controlling responsibilities: "it appears as though the NAHASDA actively seeks to empower entities such as plaintiff with the responsibilities for the care of tribal property." *Id*. at 151. The Supreme Court has held that it "would be out of line" for a statute to impose fiduciary duties where one of the principal statutory purposes is enhancing Tribal self-determination in the management of their resources. *See Navajo I,* 537 U.S. at 491 (citation omitted). And, as in *Blackfeet Housing*, Plaintiffs here do not even attempt to identify "a specific statutory provision that establishes trust duties on the United States." *Id*. This is fatal to their proposed Fourth Count. *Id*. at 149 (finding "[a plaintiff] must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." (alteration in original) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009))). Thus, 25 U.S.C. § 4101 cannot be used to establish jurisdiction under the Tucker Act or Indian Tucker Act.

[14] Earlier CFC decisions held that to the extent Section 4111 of NAHASDA *requires* HUD to make housing grants (in wholly non-discretionary terms), the statute is "money-mandating" for jurisdictional purposes. *See Lummi v. United States*, 99 Fed. Cl. 584, 594-97 (2011); *Yakama Nation Hous. Auth. v. United States*, 102 Fed. Cl. 478, 486 (2011), *opinion vacated in part*, 106 Fed. Cl. 689 (2012). Even if these decisions retain vitality after the Court of Appeals' 2017 *Lummi Tribe* decision, which seems doubtful, they do not help Plaintiffs here who do not allege a failure to make mandatory grants under Section 4111.

C. The Indian Non-Intercourse Act Does Not Create Specific Money-Mandating Fiduciary Duties

Count Five must be dismissed because the Indian Non-Intercourse Act does not contain the money-mandating duties needed to establish this Court's jurisdiction. The Indian Non-Intercourse Act, 25 U.S.C. § 177, has three purposes: (1) to prevent the unfair disposition of Indian lands by requiring the United States' consent to transactions; (2) to enable the United States to vacate any disposition that violates the Act; and (3) to prevent unrest due to encroachment by settlers. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621-22 (2d Cir. 1980). The Act "bars conveyances by Indians to non-Indians unless made or ratified by Congress." *Seneca Nation of Indians v. New York*, 382 F.3d 245, 248 (2d Cir. 2004). While the Act prohibits conduct by others and imposes monetary penalties on individuals who attempt to purchase lands held by Indians without the United States' permission, it does not impose specific mandatory fiduciary duties upon the United States nor make the United States liable in money damages for land transactions conducted without the United States' consent. *See Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 380–81 (2013); *Tuscarora*, 362 U.S. at 120; 25 U.S.C. § 177.

D. No Money-Mandating Fiduciary Duty Exists with Respect to the Department of Interior's Recognition of Tribal Governments

Like much of Plaintiffs' Amended Complaint, Count Six is based, in part, upon what Plaintiffs perceive to be a BIA failure to recognize a legitimate tribal government for the Colony. *See* ECF No. 22. ¶ 199.[15] Plaintiffs claim that, as a result of the alleged failure, the Colony and

[15] Count Six also claims that BIA breached fiduciary duties owed to the Tribe by failing to conduct a survey of the Colony's twenty- acre parcel and prevent encroachment. ECF No. 22 194-197. Count Six does not, however, identify a substantive source of law, distinct from the Tucker Act or Indian Tucker acts, that establishes money-mandating fiduciary duties. Thus, this claim is not within the Court's jurisdiction. *See Navajo II*, 556 U.S. at 290.

its members have suffered substantial damage and harm. *Id*. To implicate the Tucker Act's waiver of sovereign immunity and establish CFC jurisdiction, however, Plaintiffs must identify a BIA duty to recognize a tribal government that: (1) is grounded in a specific statutory or regulatory provision; and (2) can fairly be interpreted as requiring monetary compensation. *See Navajo II*, 556 U.S. at 290–91. Plaintiffs have not pointed to any statute or regulation that creates a money-mandating duty to recognize a tribal government.

"[N]o statute or regulation imposes on BIA a free-standing obligation to intervene in a tribal dispute solely for the tribe's sake—i.e., to save a tribe from its own disfunctionality . . . ." *Cayuga Indian Nation of N.Y. v. E. Reg'l Dir.*, 58 IBIA 171, 179 (Jan. 16, 2014). Broader principles of tribal sovereignty illustrate the point. "[O]ne of the fundamental aspects of tribal existence is the right to self-government." *Wheeler v. U.S. Dep't of Interior, BIA*, 811 F.2d 549, 551 (10th Cir. 1987). "[W]hen a dispute is an intertribal matter, the Federal Government should not interfere." *Id*. Further, when it comes to recognizing tribal governments, the BIA is acting in an administrative, rather than fiduciary, role. *Accord id*. at 553 (contrasting *Mitchell II* by noting "our case involves no corpus, and no statute or regulation requires Department involvement in [Tribal] election disputes; rather, as noted previously, federal law precludes Department action."). There is no statutory or regulatory duty to for the BIA to recognize a tribal government, much less a money-mandating duty. This Claim, therefore, fails the first step of the *Navajo II* two-step standard.

E. Count Seven Fails to Identify Money-Mandating Fiduciary Duties

Count Seven must also be dismissed for lack of jurisdiction. Plaintiffs do not cite to any source of substantive law, instead simply claiming that they are entitled to relief because "they have no other remedy at law or administrative appeal." ECF No. 15-1 ¶ 204.

F. Public Law 93-638 Does Not Create Specific Money-Mandating Fiduciary Duties

Public Law 93-638 is the 1975 Indian Self-Determination and Education Assistance Act (ISDA). *See* Pub. L. No. 93-638, 88 Stat. 2203 (Jan. 4, 1975) (codified as amended at 25 U.S.C. §§ 450–458ddd-2; currently codified as amended at 25 U.S.C. § 5301-et seq.) The Act requires the relevant Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof" which the Secretary previously administered for the benefit of Indians pursuant to her statutory authority. 25 U.S.C. § 450f(a)(1), currently codified as amended at 25 U.S.C. § 5321(a)(1). But, absent a contract, the ISDA itself does not create money-mandating duties. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1365–68 (Fed. Cir. 2005).

Though the IDSA is not discussed in Plaintiffs' Claims for Relief, Plaintiffs seem to be concerned that BIA's alleged failure to take sides in the intra-tribal dispute denied Plaintiffs the opportunity to seek financial support by entering into an ISDA contract. *See* ECF No. 22 at 2, ¶¶ 12-13, 57, 104. They do not allege that BIA breached an existing ISDA contract, and thus this Court would not have Tucker Act or Indian Tucker Act jurisdiction over any ISDA claims Plaintiffs may make. *See Samish*, 419 F.3d at 1366 ("Absent a contract," Plaintiffs are not entitled to damages under the ISDA merely for a "wrongful refusal to accord [Plaintiffs] . . . recognition (thereby precluding entry into a self-determination contract).").

Plaintiffs have not identified any specific money-mandating fiduciary duties in Counts Three through Seven, and those Counts should therefore be dismissed.[16]

[16] Plaintiffs also cite 28 U.S.C. § 116, suggesting that it creates a money-mandating duty. *See* ECF No. 22 ¶ 14. The statute is irrelevant; it creates judicial districts in the State of Oklahoma.

V. Plaintiffs Have Failed to Allege Sufficient Facts to Show that their Only Claim that is not Time-Barred can Survive a 12(b)(6) Motion to Dismiss

In Count Two, Plaintiffs allege that they are entitled to compensation because an unidentified road constructed *alongside* Winnemucca Indian Colony lands in 2018 is simultaneously "imped[ing] water running onto the lands of the Colony" and causing "erosion and disruption" on Colony land in violation of 25 U.S.C. § 323. ECF No. 22 ¶ 158. At least at the pleading stage, any claim Plaintiffs may raise as a result of the road being constructed in 2018 would not be time-barred. Plaintiffs have not, however, shown that this claim is "plausible on its face." *Square One,* 152 Fed. Cl. at 545 (citation omitted).

Section 323 is entitled, "Rights-of-way for all purposes across any Indian lands." As the title suggests, it grants the Secretary of the Interior authority to grant rights-of-way for all purposes over lands held in trust for Indian Tribes. 25 U.S.C. § 323; *see also* 25 C.F.R. § 169.4(a). This statute empowers the Secretary to grant rights-of-way or easements, but does not contain any specific legal obligation to do so. Instead, the statutes provide the Secretary with discretionary authority. Relevant here, the implementing regulations explain that individuals must obtain a right-of-way or easement from Interior for "[w]ater control and use projects (including but not limited to, flowage easements, irrigation ditches and canals, and water treatment plant lines)." 25 C.F.R. § 169.5(a)(7). Plaintiffs have not alleged sufficient facts to

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We assume Plaintiffs intended to cite 25 U.S.C. § 116, which provides that "[a]ll Indians, when they shall arrive at the age of eighteen years, shall have the right to . . . all annuity money that may be due or become due to them . . . ". By its terms, this language, enacted March 1, 1899 (*see* 30 Stat. 947; *State v. Phelps*, 19 P.2d 319, 321 (Mont. 1933)), creates no entitlement to payments of any kind, but instead only specifies the age at which Indians will begin receiving such annuity payments as might otherwise be owing. Plaintiffs offer no basis for suggesting that they are owed any annuity payment. Thus, Plaintiffs fail to adequately allege how the Government breached any money-mandating duties.

show that a "[w]ater control and use project[]" exists on the Colony's lands in relation to this unidentified road.

A flowage easement grants the holder the right to either permanently or intermittently overflow, flood, and submerge the lands owned by another. *Flowage Easement Definition, Law Insider*, https://www.lawinsider.com/dictionary/ flowage-easement, last visited Aug. 30, 2021; *see also Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353-55 (Fed. Cir. 2003). There are no allegations of permanent or intermittent flooding here. Likewise, there are no allegations relating to the use of irrigation ditches, water treatment lines, or other structures along this road. Thus, the Amended Complaint does not allege sufficient facts to create a "reasonable expectation that discovery will reveal" that a trespassing "water use and control project" exists on the Colony's lands in relation to an unidentified road on an adjacent property and, consequently, could not survive a motion to dismiss. *Golden*, 819 F. App'x at 931.

VI. Counts Eight through Eleven Should Also Be Dismissed Because the CFC Lacks Jurisdiction Over Plaintiffs' Claims for Equitable or Declaratory Relief[17]

Counts Eight through Eleven should also be dismissed because they request relief unavailable in the CFC. In Count Eight, Plaintiffs seek equitable relief; in Counts Nine, Ten, and Eleven they seek declaratory relief. ECF No. 22 ¶¶ 207-228. The CFC, however, has never been afforded general equitable powers or authority to render declaratory judgments. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716-17 (Fed. Cir. 1998) (*per curiam*). The power of this Court to award equitable relief is limited to narrow statutorily defined circumstances. *See Suess v. United States,* 33 Fed. Cl. 89, 92 (1995). The CFC has statutory

[17] Counts Nine and Ten seek "declaratory judgements" that Plaintiffs are entitled to specific monetary damages. ECF No. 22 ¶¶ 217, 222. To the extent that these Counts are construed as requests for monetary damages, the Court lacks jurisdiction because Plaintiffs have not identified any specific money-mandating fiduciary duties in these Counts and the Court.

authority to award equitable relief in some tax cases, *see* 28 U.S.C. § 1507; in disputes under the Contract Disputes Act of 1978, *see* 28 U.S.C. § 1491(a)(2); and also as part of its bid protest jurisdiction, *see* 28 U.S.C. § 1491(b)(1)–(2). In cases where equitable relief is "incident of and collateral to" a money judgment, a court may "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2); *see James v. Caldera,* 159 F.3d 573, 580 (Fed. Cir. 1998).

Thus, were a plaintiff able to invoke jurisdiction in the CFC—which Plaintiffs here have failed to do—and liability were to be established, the Court could then hear evidence to aid in judgment to assess damages, including ordering an accounting. *See Muscogee (Creek) Nation of Okla. v. United States*, 103 Fed. Cl. 210, 218 (2011); *N. Colo. Water Conservancy Dist. v. United States*, 88 Fed. Cl. 636, 665 (2009). The instant case does not fit within any of the limited circumstances in which this Court has the power to order equitable relief. Plaintiffs do not invoke the Contract Disputes Act or the Court's bid protest jurisdiction, and this is not a tax case. Nor does Plaintiffs' request for relief fit within the categories allowed under 28 U.S.C. § 1491(a)(2) because liability has not been established.

Instead, Plaintiffs seek a standalone accounting of Tribal monies allegedly withheld while BIA did not recognize a Colony government. *See* ECF No. 22 ¶¶ 207-212. Such a free-standing general accounting claim before a determination of liability is premature and outside of this Court's jurisdiction. *W. Shoshone Nat'l Council*, 73 Fed. Cl. at 68–69; *Am. Indians Residing on Maricopa-Ak Chin Rsrv. v. United States,* 667 F.2d 980, 983 (Ct. Cl. 1981).

The Court similarly lacks jurisdiction to provide the declaratory relief Plaintiffs seek in Counts Nine, Ten, and Eleven. Plaintiffs rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, as authority for this Court to grant declaratory relief for Count Nine. *See* ECF No. 22 ¶

217. But Congress decided specifically "not to make the Declaratory Judgment Act applicable to the [CFC]." *Nat'l Air Traffic*, 160 F.3d at 716–17; *see Tchakarski v. United States,* 69 Fed. Cl. 218, 221 (2005). Plaintiffs have likewise failed to identify a federal statute that grants this Court jurisdiction to provide the relief they seek in Counts Ten and Eleven. *See Leitner v. United States,* 92 Fed. Cl. 220, 223 (2010) ("This Court may issue declaratory judgments or offer equitable relief only under an express grant of such jurisdiction in a federal statute."). Thus, there is no jurisdictional basis for Counts Nine through Eleven, and the claims should be dismissed.

CONCLUSION

The Court lacks jurisdiction over all eleven Counts in the Amended Complaint. Further, Plaintiffs have not alleged sufficient facts to demonstrate a plausible claim for relief for the United States' alleged violation of the *Winters* Doctrine (Count Three) and failure to prevent a road from being constructed alongside the Colony in 2018 (Count Two). The Amended Complaint must be dismissed with prejudice.

DATE: MARCH 18, 2022

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