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: July 27, 2022)

UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

The Amended Complaint should be dismissed for lack of jurisdiction. First, under the circumstances here, Plaintiffs lack standing because they fail to allege that they represent the Colony. Second, 28 U.S.C. § 1500 bars jurisdiction because, though the United States was not a party to the Ninth Circuit proceedings, the underlying Nevada district court action based on the same operative facts as the present litigation remained pending until the Ninth Circuit issued its mandate. Third, Plaintiffs have effectively conceded that evidence shows their claims relating to "encroaching" structures are time-barred. Fourth, four of the eleven Counts in Plaintiffs' Amended Complaint fail to identify jurisdictionally requisite money-mandating duties. Finally, this Court lacks authority to award the declaratory relief Plaintiffs seek.[1]

RECENT FACTUAL DEVELOPMENTS

We begin by reporting on two recent factual developments that may be relevant to the Court's review of our motion to dismiss.

I. Members of a Rival Faction Have Appealed the BIA Recognition Decision to IBIA

In January 2022, twelve individuals appealed to the Interior Board of Indian Appeals ("IBIA") the Bureau of Indian Affairs' ("BIA") January 2022 decision to recognize—only for purposes of continued relations with the Colony and certain contracting—members of the Wasson/Rojo Faction as the Colony's Tribal Council. *See* Ex. A ("Notice of Appeal"). Under 25 C.F.R. § 2.6, because "interested parties" have appealed, BIA's recognition decision is not final.[2]

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[1] Plaintiffs appear to have dropped the argument that a road alongside Colony lands was "imped[ing] water running onto the lands of the Colony" in violation of 25 U.S.C. § 323 et seq. *See* First Am. Compl ¶ 158, ECF No. 22; Pls.' Opp'n to Def.'s Mot. to Dismiss at 37, ECF No. 25. So, we do not address this claim here.

[2] Section 2.6(a) states that an appealed decision of the agency is not final for purposes of judicial review under 5 U.S.C. § 704 unless Interior determines that "public exigency requires that the decision be made effective immediately." No exigency determination was made here.

So, any contention that the BIA decision resolved the leadership dispute with finality is incorrect.

II. The "Trespassers" Have Filed Suit Alleging that the United States Violated Duties Owed to Them By Failing to Monitor the Wasson Group's Eviction Efforts

Ten individuals living on the Colony's twenty-acre parcel have filed suit against the United States in the District Court for the District of Nevada. *Brown v. Haaland*, No. 3:21-cv-00344, 2022 WL 1692934, at *1 (D. Nev. May 26, 2022). These individuals are referred to as the "trespassers" by the Plaintiffs in the instant action. Pls.' Opp'n to Defs.' Mot. to Dismiss & Mem. in Supp. at 1, ECF No. 25. In May 2022, the Nevada district court denied, in part, the United States' motion to dismiss, concluding that the individuals on the twenty-acre parcel had plausibly alleged that BIA violated the Administrative Procedures Act ("APA") by failing to (1) investigate whether the Wasson/Rojo Council had "endanger[ed]" their "health, safety, and welfare" by attempting to evict them and demolish their homes (2) assess whether there were grounds for BIA to rescind the Colony's Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 5301-5423 ("ISDEAA") contracts for law enforcement and judicial services and reassume control over those programs. *Brown*, 2022 WL 1692934 at *15.

ARGUMENT

I. The Amended Complaint Does Not Allege Sufficient Facts to Establish Standing

Plaintiffs contend that the United States spends "almost twenty pages" arguing that the Wasson Group has either not been recognized as the Colony's governing Council for the purposes of government-to-government relations with the United States or that the recognition was made only on an interim basis. ECF No. 25 at 1-2, 11. Plaintiffs misunderstand the United States' arguments. The United States does not suggest that Plaintiffs lack standing to bring their claims because no tribal government has been recognized or that the recognition was made only on an interim basis. Indeed, our brief thoroughly describes BIA's January 2022 recognition

decision and references it throughout. *See* Def.'s Mot. to Dismiss Am. Compl., ECF No. 23 at 11-12, 18; Ex. A to Defs.' Notice of Additional Authority, ECF No. 20-1. The issue is not whether *the Colony* has standing; nor whether, at the time of suit, the Wasson Group constituted Tribal leadership (the Ninth Circuit mandate did not issue until the month after this suit was filed).[3] The issue is simply one of disclosure: whether the Amended Complaint shows that Plaintiffs are members of the Wasson Group and have authority to speak as the Colony. It does not, so the case must be dismissed.

Plaintiffs contend that there is no law requiring the Complaint to identify the Colony's Council members and that it was sufficient to simply provide that this action was brought "by and through [the Colony's] duly appointed Council and their attorneys." ECF No. 25 at 10 (citation omitted). While this may be generally true in a typical case, it is not so here where multiple groups have held themselves out as the rightful Colony leadership and questions of tribal membership and leadership are central to the claims in the case. ECF No. 23 at 4-12; *see Timbisha Shoshone Tribe v. U.S. Dep't of Interior*, No. 2:11–cv–00995–MCE–DAD, 2011 WL 1883862, at *4 (E.D. Cal. May 16, 2011) (refusing to accept the allegation that "the Kennedy Council has the authority to bring this suit as the duly elected Tribal Council of the Tribe" as sufficient to establish jurisdiction when this allegation "assumes the correctness of the very question at issue in this case.") (alteration and internal citation omitted).

Plaintiffs dismiss any claims to authority made by members of rival factions. *See* Pls.' Reply in Supp. of Mot. to File 1st Am. Compl. at 1-2, ECF No 19 (arguing that no *real*

[3] The correct date from which to judge the Ninth Circuit's vacatur of the district court's orders is the date of the mandate rather than the date of the opinion. Thus, we agree that, from a technical perspective, per the Nevada district court's now-vacated recognition orders, *see infra* pp. 10, the Wasson Group still constituted tribal leadership at the time this case was filed. Though our arguments are focused on the time of filing, the recent IBIA appeal and any future BIA decisions may present other jurisprudential issues for the case going forward, should it proceed.

leadership dispute exists because members of the rival faction do not satisfy membership requirements); ECF No. 22 ¶ 23 (same); *id.* ¶¶ 38, 88 (arguing that William Bills was adopted, was 100% Filipino by blood quantum, and did "not qualify as an Indian"). But those other factions contest the legitimacy of Plaintiffs' leadership authority with equal conviction. *See* Ex. A at 3 (arguing that BIA should not have recognized the Wasson/Rojo Council for government-to-government purposes because "Ms. Judy Rojo has been unable to produce evidence that she is Native American."). Absent additional allegations explaining who, specifically, brought the present suit, there is no way to know from the face of the Complaint whether this action was filed by members of the Wasson Group, the Bills/Ayer Group, or some other faction. So, under the unique circumstances presented here, Plaintiffs have not satisfied their burden of alleging facts sufficient to establish standing.

II. The Nevada District Court Action Was Pending Until the Ninth Circuit Mandate Issued, and 28 U.S.C. § 1500 Bars Jurisdiction

As the United States explained, 28 U.S.C § 1500 creates a jurisdictional bar against an action 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." ECF No. 23 at 20 (citation omitted). Plaintiffs' claims are barred by § 1500 because, at the time they filed the original Complaint, the Ninth Circuit mandate dismissing the Nevada district court litigation involving the same operative facts had not yet issued. *Id.* at 20-24. Plaintiffs' subsequent amendment of the original Complaint does not cure this jurisdictional defect because a complaint barred by § 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, 1365-67 (Fed. Cir. 2012).

Plaintiffs make no attempt to refute the United States' argument that the instant action

and the action filed in the Nevada district court are based on the same operative facts and that that the Nevada litigation was pending in the Ninth Circuit at the time the present suit was filed. ECF No. 25 at 12-13. Plaintiffs instead argue that § 1500 does not apply because the United States was not a party to the appellate proceedings in the Ninth Circuit. *Id.* Though Plaintiffs are correct that the United States did not participate in the Ninth Circuit proceedings, this does not foreclose the United States' § 1500 arguments.

A district court action continues to be pending while its judgment is being appealed. *Brandt v. United States*, 710 F.3d 1369, 1378 n. 6 (Fed Cir. 2013) ("[T]he majority rule is that a lawsuit is determined pending throughout the time in which appellate review of the original judgment may be taken." (quoting *Winkler v. Andrus*, 614 F.2d 707, 714 (10th Cir. 1980))); *Eikenberry v. Callahan*, 653 F.2d 632, 635 (D.C. Cir. 1981) (*per curiam*) ("The ordinary meaning of "'pending' includes cases pending on appeal."). As best we can tell, neither this Court nor the Federal Circuit has addressed the question of whether a district court action remains "pending" for § 1500 purposes when a notice of appeal is filed by Plaintiffs, but the United States is not a party to the appellate proceedings. *See* ECF No. 25 (offering no case law in support of Plaintiffs' position). Nevertheless, there is ample case law illustrating that, if such an action was not considered "pending," it would contravene the tenets underpinning § 1500.

For example, in *Scott Aviation v. United States*, the question was whether § 1500 barred a complaint filed in the CFC while a separate case regarding the same operative facts was pending in the Federal Circuit. 23 Cl. Ct. 573, 575-76 (1991). This Court explained that "[t]he purpose of [Section 1500] includes avoiding 'the possibility of inconsistent judicial resolution of similar legal issues, unfair burden to the defendant, and unnecessary crowding of this court's docket and general administrative chaos.'" *Id.* at 575 (internal citation and alteration omitted). With these

principles in mind, the Court held that the appeal precluded simultaneous action in the CFC. *Id.* The Court reasoned that "Congress could not have meant to allow," in the event of a remand, "two identical cases pending before this court for a decision on the merits." *Id.* at 576.

Similarly, here, if the Ninth Circuit had remanded to the district court for further proceedings, there would have been two cases "for or in respect to the same claims" pending in this Court and the Nevada district court, *see* ECF No. 23 at 20-24, creating the "possibility of inconsistent judicial resolution of similar legal issues" at odds with Congress' goals in enacting the statute. *Scott Aviation*, 23 Cl. Ct. at 575-76. Thus, § 1500 bars Plaintiffs' claims despite the government's decision not to participate in the appeal.

III. Plaintiffs Have Not Met Their Burden of Showing That Their Claims Are Timely

Even assuming that Plaintiffs have established standing and that § 1500 is not applicable, the case would still need to be dismissed because the Colony's claims are time-barred. "Claims by individual Indians or tribes for breach of trust are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act." *Oenga v. United States*, 83 Fed. Cl. 594, 609 (2008). "To defeat a motion to dismiss based on [this] statute of limitations, a plaintiff must establish 'jurisdictional timeliness.'" *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 193 (2020) (citation omitted), *appeal filed,* No. 21-1366 (Fed. Cir. Dec. 4, 2020). To establish "jurisdictional timeliness," a plaintiff "cannot rely merely on the allegations in the complaint." *Id.* (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988)). "Because [a] plaintiff bears the burden of proof by a preponderance of the evidence, it must offer relevant, competent evidence to show that it filed suit within six years of the accrual of its claims." *Osage Nation v. United States*, 57 Fed. Cl. 392, 396 (2003).

Here, Plaintiffs have offered no such evidence, and their Amended Complaint must be dismissed. With respect to the Colony's land-based claims, the Amended Complaint identifies seven allegedly encroaching or trespassing structures: 1) "Highland Road" or "Highland Street;" 2) a subdivision's entranceway; 3) an electrical substation; 4) overhead power lines; 5) facilities that divert water from a stream bed; 6) fixtures that "remove water from wells;" and 7) structures on or adjacent to the twenty acres. *See* ECF No. 23 at 26. While the Amended Complaint is vague in its description of these alleged encroachments, the United States has shown that the structures to which the United States believes Plaintiffs are referring were constructed more than six years before this suit was filed (*i.e.*, by November 18, 2014). The United States has also shown that authorization for these structures was either obtained or expired more than six years prior to the filing of this suit. ECF No. 23 at 26-29. Plaintiffs' Response makes no attempt to demonstrate that the United States has misunderstood their allegations, nor does it proffer evidence refuting that which was presented by the United States.

Plaintiffs instead offer various tolling arguments in an attempt to save the Colony's otherwise untimely claims. First, Plaintiffs allege that the Colony's claims did not accrue at the time these purported encroachments occurred because: 1) the United States never repudiated the trust; and 2) an accounting was never performed. ECF No. 25 at 13-15; *see Chemehuevi*, 150 Fed. Cl. at 197 (explaining that there is a "tolling of the accrual" of the statute when something keeps the running of a statute from commencing). Second, and in the alternative, Plaintiffs argue that the Court should find that the statute of limitations did not begin to run until December 2014, when BIA allegedly first recognized the Wasson/Rojo Group as the tribal council. ECF No. 25 at 16. Third, Plaintiffs argue that several Interior Appropriations Acts toll the statute of limitations. ECF No. 25 at 16-17. Finally, Plaintiffs argue that the continuing claims doctrine

tolls the statute. ECF No. 25 at 17-23. We explain, in turn, why each argument is incorrect.

A. If, as the Colony Now Claims, the United States Has Not "Repudiated" the Relevant Portion of its Trust Relationship with WIC, the Amended Complaint Does Not State a Claim for Breach of Trust.

Plaintiffs contend that their claims have not accrued and the "statute of limitations has not begun to run" because the United States has not formally repudiated the trust. ECF No. 25 at 14. But to state a claim for relief in a tribal trust case, a plaintiff must first show that a repudiation or breach of trust has occurred.[4] *See Chemehuevi*, 150 Fed. Cl. at 206 ("[W]here a plaintiff states a claim as a matter of law sufficient to survive a motion to dismiss pursuant to RCFC 12(b)(6), the claim necessarily accrued at the latest on the date the plaintiff filed the complaint." (emphasis omitted)). Therefore, to the extent that Plaintiffs are arguing that the government has not repudiated or breached the trust such that their claims have not yet accrued, their suit should be dismissed because there is no trust claim in the first place. *See id.* at 201.

B. Given the Nature of Plaintiffs' Claims, an Accounting is Not Necessary

Plaintiffs also contend that their claims have not accrued because they cannot determine the extent of the Colony's injuries until they receive an accounting. ECF No. 25 at 15. Again, Plaintiffs are mistaken. "[T]he accrual standard for breach of trust has two components: (1) when was the trust repudiated, and (2) when did the beneficiary 'learn[ ] that the trustee ... failed to fulfill his responsibilities.'" *Oenga*, 83 Fed. Cl. at 614 (second and third alterations in original) (citation omitted). As to the first component, "[a] trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone,*364 F.3d at 1348. As to the second component, "a plaintiff does not have to possess actual knowledge of

[4] In the statute of limitations context, the term "repudiation" simply means that the "trustee has failed to fulfill his responsibilities." *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). The United States need not repudiate the entirety of its trust relationship with a tribe before a claim for breach of trust can accrue. *Id.*

all the relevant facts in order for the cause of action to accrue," *Rosales v. United States*, 89 Fed. Cl. 565, 578 (2009) (citation omitted); the test is whether the claimant "knew or should have known" that an injury had occurred. *Id.* at 578-79 (citation omitted) (concluding that plaintiffs did not "meet the stringent standard for accrual suspension" because their "injury [is not] inherently unknowable."). Accrual is not tolled simply because the "the full extent of the damage" is unknown. *Chemehuevi*, 150 Fed. Cl. at 198 (quoting *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011)).

Plaintiffs are correct that equitable principles may counsel against allowing the statute to run against a tribal plaintiff until a meaningful accounting is performed. ECF No. 25 at 14-15. But the accounting-based accrual theory is only applicable (if at all) when, absent an accounting, the tribal plaintiff cannot determine *whether* it has been injured such that it cannot state a plausible claim for monetary relief. *Wolfchild*, 731 F.3d at 1290-91. The logic is that it would be unfair to allow the statute to run on any money claims a tribal trust beneficiary may bring against the United States in this court while it seeks an accounting in the district court to determine whether fiduciary duties were breached. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316–17 (2011). It is not applicable where a Plaintiff simply claims to be unsure of the extent of its injuries. *Navajo Nation*, 631 F.3d at 1277.

Here, Plaintiffs claim only that they cannot determine the extent of the Colony's injuries, and do not purport to need an accounting in order to figure out whether an injury has occurred. The limitations period thus began to run without an accounting. Indeed, if the Colony did need an accounting to determine whether the United States' actions have caused it harm, its remedy (if any) is in district court, not here. *Chemehuevi*, 150 Fed. Cl. at 201.

It is also clear that the Colony's claims had already accrued and the statute of limitations

had already begun to run by the time Plaintiffs—assuming Plaintiffs here are the Wasson Group—filed their largely identical Complaint in this Court in November 2013. With few exceptions, Plaintiffs' 2013 Complaint alleges the very same acts or omissions that are at issue in this case. *See* ECF No. 23 at 22 n.7 (comparing Plaintiff's 2013 and 2020 Complaints). Clearly, by November 2013, the government's supposed breach of trust, as described in the 2013 and 2020 Complaints, had already occurred, and Colony members had actual knowledge of the facts underlying that alleged breach. So, nearly all of the claims alleged in the Amended Complaint had accrued, at the latest, in 2013. As result, this case, filed in November 2020, came at least one year too late. *See Chemehuevi*, 150 Fed. Cl. at 201.

C. Even if the Statute of Limitations Did Not Begin to Run until a Tribal Council Was Recognized, Plaintiffs' Claims are Still Untimely

Plaintiffs are wrong to argue that the limitations period did not expire until December 13, 2020, "six years from the date upon which BIA recognized the tribal council." ECF No. 25 at 16. These claims belong to the Colony, not a faction of it. Plaintiffs offer no authority to suggest that an internal leadership dispute somehow tolls the jurisdictional statute of limitations for a Tribe.

Further—even assuming, without conceding, that the limitations period did not begin to run until a decision recognizing the Wasson Council as the Colony leadership for government-to-government purposes—the Nevada district court, usurping the authority of BIA, first recognized Thomas Wasson as Colony leadership in September 2012, and the Nevada district court later clarified that BIA was to recognize the "Wasson Council," in March 2013. *Winnemucca Indian Colony v. United States*, No. 3:11–cv–00622–RCJ–VPC, 2012 WL 4472144 (D. Nev. Sept. 25, 2012); 2013 WL 1110757, at *3 (D. Nev. Mar. 11, 2013).[5] Thus, from 2012 until December

[5] District Judge Robert C. Jones' oral order explained that BIA was immediately barred "from doing anything," and announced that Judge Jones was going to handle government-to-

2020, when the Ninth Circuit mandate issued, there was a recognized Colony government. So, even under Plaintiffs' theory, the Colony could have brought suit.

D. The Interior Appropriations Acts Did Not Toll the Statute of Limitations

In a series of Interior Department Appropriations Acts, Congress tolled the accrual of the statute of limitations for claims related to the mismanagement of tribal "trust funds" until a "meaningful accounting" had been furnished to the tribe. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat 5, 305-06 (Jan. 17, 2014); *Shoshone*, 364 F.3d at 1347. These Acts "cove[r] any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes . . . ." *Shoshone*, 364 F.3d at 1351. It does not cover losses to or mismanagement of nonmonetary trust assets. *Shoshone Indian Tribe of the Wind River Reservation v. United States (Wind River Reservation)*, 672 F.3d 1021, 1034-35 (Fed. Cir. 2012) (citing *Shoshone*, 364 F.3d at 1350-51).

The Appropriations riders do not toll the statute of limitations here for several reasons. First, Plaintiffs' claims concern nonmonetary assets. Second, the Appropriations Acts are not relevant here given the original Complaint's date. The most-recent Appropriations Act to include this tolling provision was passed in 2014. *See Wyandot Nation of Kan. v. United States*, 124 Fed. Cl. 601, 605–06 (2016) (acknowledging cessation of Appropriations Act riders after 2014), *aff'd*, 858 F.3d 1392 (Fed. Cir. 2017). Third, the tolling provision, even if it were applicable, does not apply to Plaintiffs' claims because Plaintiffs have purportedly been able to discern whether or not they have been injured without an accounting. As is explained above, if a tribe "has alleged facts, which, if proven, demonstrate that the government is liable to the Tribe," then "the Tribe is

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government relations with the Colony in BIA's stead. Exhibit B at 18, 24, 52 ("Transcript of September 4, 2012 District of Nevada Hearing").

on notice of a breach" and the "claim already has accrued and the statute of limitations has begun to run." *Chemehuevi*, 150 Fed. Cl. at 200-02; *see Wolfchild*, 731 F.3d at 1291.

E. The Continuing Claims Doctrine Does Not Toll the Six-Year Statute of Limitations

"The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely," "so long as the last in a series of related, on-going actions falls within the six-year statute of limitations." *Rosales*, 89 Fed. Cl. at 579 (citation omitted); *Bank of Am. v. United States*, 51 Fed. Cl. 500, 511 (2002), *aff'd sub nom Bank of Am. v. Doumani,* 495 F.3d 1366 (Fed. Cir. 2007). If any one of those actions falls within the limitations period, "then the plaintiff can bring the suit for all of the breaches." *Simmons v. United States*, 71 Fed. Cl. 188, 192 (2006).

The continuing claims doctrine does not save the Colony's otherwise untimely claims for three reasons. First, with one exception, the Amended Complaint itself does not allege that any "distinct events or wrongs" have taken place in the six years preceding the filing of the original Complaint. *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997); *see* ECF No. 23 at 22-26; *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 213 (2013) ("[T]he continuing claims doctrine [is not] applicable when all the events necessary to the claim occurred . . . more than six years before the claim was brought."). With respect to that one exception, Plaintiffs' Response confirms that, contrary to allegations in the Amended Complaint, the event falls outside of the limitations period.[6] ECF No. 25 at 9, 37. Plaintiffs

[6] Plaintiffs' Amended Complaint alleges that "in 2018, [Defendant] allowed NV Energy to grade a road alongside the lands of the Winnemucca Indian Colony without authorization . . . ." ECF No. 22 ¶ 158. In response to the United States' argument that Plaintiffs had failed to plausibly allege that the construction of a road "alongside" Colony lands would have resulted in injury to the Colony, *see* ECF No. 23 at 37, Plaintiffs assert that the unidentified road graded in 2018 "actually runs across Colony lands" and is known as "Highland Road." ECF No. 25 at 9, 37 (citing ECF No. 22 ¶ 152). Satellite images show that "Highland Road" existed in 2013, and was not constructed in 2018, as Plaintiffs suggest. 2013 Satellite Photo, ECF No. 23-15. Consequently, Plaintiffs cannot rely on this "event" to support their continuing claims argument.

cannot correct their deficient pleadings by raising new claims for relief in their Response. *Jarvis v. United States*, 154 Fed. Cl. 712, 718-19 (explaining that, unless a plaintiff is proceeding *pro se*, "allegations raised for the first time in a response brief cannot defeat a motion to dismiss" (internal alterations, citations and quotation marks omitted)), *recons. denied,* 156 Fed. Cl. 393 (2021), *and aff'd,* No. 2022-1006 2022 WL 1009728 (Fed. Cir. Apr. 5, 2022) (*per curiam*) (explaining that, unless a plaintiff is proceeding *pro se*, "allegations raised for the first time in a response brief cannot defeat a motion to dismiss" (internal citations and quotations omitted)).

Second, even if this Court were to consider the new claims identified for the first time in Plaintiffs' Response, the Colony's new claims are not a "continuation" of the Amended Complaint's alleged breaches and are not themselves "continuing." Plaintiffs' Response identifies a host of allegedly wrongful BIA actions, including: (1) BIA's alleged denial of the Colony's ISDEAA contract applications; (2) BIA's alleged "diversion" of ISDEAA funds; (3) BIA's alleged refusal to provide "direct services" to the Colony in lieu of awarding ISDEAA contracts; (4) the BIA WNA Superintendent's alleged order "[p]rohibiting all communications between the Trustee and WIC" between 2018 and 2020; and (5) BIA's alleged denial of the trust status of the twenty acre parcel. ECF No. 25 at 18-23. With the exception of the denial of the twenty-acre parcel's trust status, each of the allegedly wrongful actions taken by BIA is wholly unrelated to the purported land-based "harms" identified in the Amended Complaint. *See supra* pp. 7. Consequently, these events are not a part of a "series of related, on-going actions" and do not constitute a "continuing harm" for the purposes of the Colony's land-based claims. *Bank of Am.*, 51 Fed. Cl. at 511; s*ee Keehn v. United States*, 110 Fed. Cl. 306, 325 (2013) (rejecting invocation of the continuing claims doctrine for "unrelated single agreements that took place on single occasions" (internal quotation marks and citations omitted)); *compare Brown Park*

Estates, 127 F.3d at 1456 (providing an example of a traditional "continuing claim").

Even though BIA's 2015 denial of the twenty-acre parcel's trust status is connected to Plaintiff's land-based claims, it is still not a "continuing" claim. Plaintiffs allege that the government first repudiated the trust status of the twenty-acre parcel in 1997 by approving conveyances of HUD homes without Colony authorization and that it has "failed and refused" to assist the Colony with removing individuals from those homes since. ECF No. 22 ¶¶ 33, 111-12. BIA's 2015 denial of the trust status is not a new "wrong" that is "independent and distinct" from this "fail[ure] and refu[sal]." *Id.*; *Rosales*, 89 Fed. Cl. at 579; *see also* ECF No. 25 at 23 (describing the 2015 denial, not as a new right of action, but as a "pretense" that the government used to justify its continued refusal to act). There is a "single governmental action" here, BIA's refusal to remove the "trespassers," and Plaintiffs had actual knowledge of this refusal no later than 2013. *Voisin v. United States*, 80 Fed. Cl. 164, 177 (2008) (citation omitted); CFC Compl. ¶¶ 71-73, ECF No. 23-9. Indeed, the CFC has previously held the continuing claims doctrine does not apply to circumstances similar to those presented here. *See Simmons*, 71 Fed. Cl. at 192-93 (explaining that a trespass claim accrues as soon as the plaintiff is made aware of the government's refusal to remove trespassers, and holding that the government's continued failure to "pursue the trespassers" did not amount to a "continuing claim").

Finally, even if the new "claims" Plaintiffs raise in their Response could be considered "continuing," they are not "plausible on [their] face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57, 570 (2007). The continuing claims doctrine only applies when "a new cause of action arises each time the government breaches that duty." S*immons*, 71 Fed. Cl. at 192 (alteration in original) (internal quotation marks and citation omitted)). In order plausibly to show that a cause of action for breach of trust exists in this Court, a tribal plaintiff must identify a substantive

source of law establishing specific fiduciary duties and explain how the government's actions breached those duties. *United States v. Navajo Nation (Navajo II)*, 556 U.S. 287, 290-91 (2009). Plaintiffs make no attempt to do so in their Response. ECF No. 23 at 17-24. They identify no source of law to support their "continuing claims," much less attempt to explain what statute or regulation or specific trust duty was violated by BIA's actions. *Id.* Thus, Plaintiffs' new "claims" are not "claims" at all, and must be disregarded.

IV. This Court Further Lacks Jurisdiction to Hear Claims Three, Four, Five or Six

Because neither the Tucker Act nor the Indian Tucker Act creates "a substantive right enforceable against the Government by a claim for money damages," a plaintiff seeking damages in this Court must establish that the United States has violated a federally-enacted money-mandating duty. *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); *Navajo II*, 556 U.S. at 290-91. Plaintiffs have not done so through either their Amended Complaint or Response.

A. Count Three: the alleged diversion of *Winters* water by third parties

In opposing our motion with respect to Count Three, Plaintiffs invoke the decisions in *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) and *Winters v. United States*, 207 U.S. 564, 577 (1908). Neither creates a money-mandating duty for Plaintiffs' third claim.

In *Hopi*, the Federal Circuit affirmed that the Tribe had failed to identify a source of law creating a money-mandating obligation for the United States to provide funds necessary to improve the naturally-degraded water quality on plaintiff's reservation. 782 F.3d at 665-66. Plaintiffs stress the *Hopi* court's observation that, under *Winters*, "the United States [has] the power to exclude others from . . . diverting waters that feed the reservation," arguing that because the United States has the *authority* to block third party interference with tribal water

rights, it has a *money-mandating duty* to do so. ECF No 25 at 25-26 (citing 782 F.3d at 669).

But the fact that the United States has the authority to prevent others from interfering with tribal property does not mean that it has a mandatory duty to do so. *See Ute Indian Tribe of Unitah v. United States*, No. 18-359 L, 2021 WL 1602876, at *1, 6 (Fed. Cl. Feb. 12, 2021), *appeal docketed*, No. 21-1880 (Fed. Cir. Apr. 23, 2021) (dismissing claims that the United States failed to "preserve [the tribe's] reserved water rights" for failure to identify a money-mandating trust duty "to ensure adequate water delivery" to the tribe's reservation). Such authority necessarily follows from the existence of the trust relationship, and the Supreme Court has insisted that, in the context of federal/tribal affairs, specific trust duties cannot be inferred from the fact of trusteeship – a "bare trust" – but must instead be specified by statute. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983); *White Mountain Apache*, 537 U.S. at 474-76; *see Ute Indian Tribe*, 2021 WL 1602876, at *4 ("[I]t is insufficient to cite a statute or regulation that recites a general trust relationship between the United States and the Indian People.").

Further, even if the United States had a duty to prevent others from interfering with the amount of water necessary to sustain a reservation under *Winters*,[7] Plaintiffs have identified no source of law indicating that such a duty would be money-mandating. ECF No. 22, ECF No. 25. Thus, Plaintiffs also fail the second requirement of *Navajo II*. 556 U.S. at 290-91.

B. Count Four: Native American Housing Assistance & Self-Determination Act

[7] The Ninth Circuit recently held that the government has a trust duty "to ensure adequate water for the health and safety of [a tribe's] inhabitants." *Navajo Nation v. U.S. Department of the Interior*, 26 F.4th 794 (9th Cir. 2022), *petition for cert. docketed,* No. 22-51 (U.S. Jul. 19, 2022). The United States believes that the Ninth Circuit's holding is erroneous and that the *Winters* doctrine imposes no such enforceable duty. *See Federal Appellees' Petition For Rehearing en Banc*, No. 19-17088 (9th Cir. July 29, 2021), ECF No. 62. But even under the Ninth Circuit's reasoning, Plaintiffs' suit is not rescued. The court did not assess whether the purported trust duties were money-mandating. 26 F.4th at 809 (declining to do so because "Supreme Court decisions concern[ing] suits brought for money damages" in the CFC were irrelevant to a request for injunctive relief under the APA). So, this decision has no bearing on whether this Court has jurisdiction over Plaintiffs money damages claims under *Navajo II*. 556 U.S. at 290-91.

Count Four seeks damages for the government allegedly allowing third parties to live on Colony land. ECF No. 22 at ¶¶ 173-179. Nothing in NAHASDA purports to provide Plaintiffs a money remedy for the government's alleged failing to sort out residential entitlement disputes on reservations or to collect rents on a Colony's behalf. Instead, it provides grants for housing support. While the Amended Complaint (ECF No. 22 ¶¶ 176, 179) recites the word "grant," it nowhere alleges that the Colony was eligible or applied for NAHASDA grants. Indeed, the Amended Complaint alleges that the Colony was unable to make such an application. *Id.* ¶ 176.

But even if Plaintiffs alleged that the Colony was wrongfully denied NAHASDA grants, the Federal Circuit in *Lummi Tribe of the Lummi Reservation v. United States (Lummi Tribe II)* held that a suit to compel payment of §4111 grants lies outside this Court's jurisdiction. 870 F.3d 1313 (Fed. Cir. 2017). In our moving papers we noted that the vitality of earlier contrary holdings by the Claims Court is doubtful. Plaintiffs' response demonstrates that those earlier decisions are indeed overruled. ECF No. 25 at 29 (citing *Lummi Tribe II,* 870 F.3d at 1318-19). The Court of Appeals' discussion of the many ways in which a suit to compel §4111 payments seeks equitable relief, rather than a simple money judgment (870 F.3d at 1318-19, discussed by Plaintiffs at ECF No. 25 at 29), confirms that an action to compel payments under §4111 lies beyond this Court's jurisdiction.[8]

C. Count Five: the Non-Intercourse Act

In Count Five, Plaintiffs claim that BIA violated the Non-Intercourse Act, 25 U.S.C. § 177, by its "unreasonable failure" to recognize a Council, to properly police and survey Colony

[8] Plaintiffs' suggestion that the Federal Circuit did not overrule the CFC decision in *Lummi Tribe of Lummi Reservation* v. *United States (Lummi Tribe I),* 99 Fed. Cl. 584, 606 (2011), ECF No. 25 at 28, is misleading. The court actually took the extraordinary step of granting interlocutory review in order to reverse the holding that NAHASDA creates money-mandating duties under *Navajo II*. *Lummi Tribe II,* 870 F.3d at 1315.

lands, to obtain water, and to remove trespassers. ECF No. 22 at ¶ 190. But, the Non-Intercourse Act does not create money-mandating duties. ECF No. 23 at 34.

Plaintiffs are correct that *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369 (2013), was vacated, in part, on procedural grounds and is not precedential. ECF No. 25 at 33; *see Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1351 (Fed. Cir. 2015) (concluding that the CFC's holding that "the Non-Intercourse Act failed to provide a money-mandating remedy upon which the Nation could base its cause of action" was premature because the claims were not ripe). Nonetheless, the decision discusses the exact issue to be decided here and is both persuasive and instructive. *See Return Mail, Inc. v. United States*, 159 Fed. Cl. 187, 197 (2022) (vacated decision may be consulted "for its persuasive value, especially where the pertinent decision was reversed on a procedural question . . ." (citations omitted)), *appeal filed,* No. 22-1898 (Fed. Cir. June 13, 2022). This Court should likewise find that the Non-Intercourse Act does not impose specific mandatory fiduciary duties upon the United States nor make the United States liable in money damages. *Shinnecock*, 112 Fed. Cl. at 380-81; ECF No. 23 at 34.

Like the plaintiff in *Shinnecock*, Plaintiffs here attempt to rely on *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* and *Seneca Nation of Indians v. United States* in support of their argument that the Non-Intercourse Act imposes money-mandating duties. ECF No. 25 at 31 (citing 528 F.2d 370, 379 (1st Cir. 1975); 173 Ct. Cl. 917 (1965)). But, these case are easily distinguishable. In *Joint Tribal Council*, the Court "expressly state[d] that 'it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship' created by the Nonintercourse Act." *Shinnecock I*, 112 Fed. Cl. at 380, 380 n.5 (citing 528 F.2d at 379) (noting that *Joint Tribal Council* was decided before "the current standard for recovering under the Indian Tucker Act based on a breach of fiduciary duty"). *Seneca Nation* "deal[s] with

liability under the Nonintercourse Act in conjunction with the Indian Claims Commission Act ["ICCA"] . . . . specifically, with the duty not to allow receipt of unconscionably low consideration for Indian lands." *Id.* (citing 173 Ct. Cl. at 925–26). *Seneca Nation* is not helpful here where there are no ICCA claims based on unconscionable compensation. *See* ECF No. 22.

Equally unhelpful is *Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000), a congressional reference case (under 28 U.S.C. § 1492) seeking compensation for loss of aboriginal title. The right of action there was granted by special House Resolution. 2000 WL 1013532 at *2-3 (citing H.R. Res. 69, 98th Cong., 1st Sess. (1983)). Also, like most of the cases Plaintiffs cite, *Alabama-Coushatta* was decided under the ICCA, in particular, under its "fair and honorable dealings" clause (section 2, clause 5). 2000 WL 1013532, at *56. The court thus had no occasion to consider whether the Non-Intercourse Act contains money-mandating duties under *Navajo II*, and the case is irrelevant. Count Five must be dismissed.

D. Count Six: Long-Term Leasing Laws

Contrary to what Plaintiffs assert, the plain language of Count Six indicates that it is largely based on the government's alleged "failure to act from 2000 through 2014 . . . to properly recognize a Tribal Council of the Colony."[9] ECF No. 22 at ¶ 199; ECF No. 25 at 37. In response to the United States' argument that no money-mandating fiduciary duty exists with respect to the recognition of tribal governments, ECF No. 23 at 34, Plaintiffs try to revive their Sixth Claim by citing the Indian Long-Term Leasing Act (25 U.S.C. § 415) and implementing regulations (25 C.F.R. part 162), and cases construing those laws. ECF No. 25 at 34-35 (citing *Rosebud Sioux*

[9] The United States acknowledges at this stage of the litigation that 25 U.S.C. § 323, which forms the basis for Counts One and Two, may create money-mandating fiduciary duties. *See* ECF No. 23 at 30. But Plaintiffs' passing reference to 25 U.S.C. 323 in Count Six does not create a plausible claim for relief, and Count Six must be dismissed.

Tribe v. United States, 75 Fed. Cl. 15 (2007); *Oenga v. United States*, 83 Fed. Cl. 594 (2008)). It is true that "the commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government in its dealings with the Indian allottee-lessors." *Brown v. United States*, 86 F.3d 1554, 1556 (Fed. Cir. 1996). But, the Amended Complaint makes no mention of the Indian Long Term Leasing Act nor 25 C.F.R. part 162, *see* ECF No. 22, and Plaintiffs cannot rescue their deficient pleadings by raising new claims, for the first time, in their Response. *See supra* pp. 13 (citing 154 Fed. Cl. at 718-19).

V. This Court Lacks Jurisdiction Over Claims for Equitable or Declaratory Relief

In their Response, Plaintiffs concede that they are not entitled to the pre-decisional, standalone accounting they seek in Count Eight of their Amended Complaint, and that this Court can only entertain their request for an accounting after liability has been established. ECF No. 25 at 38; *see also Winnemucca Indian Colony v. United States*, No. 13–874, 2014 WL 3107445, at *4 (Fed. Cl. July 8, 2014) ("[E]quitable relief is only available as an incident to a money judgment."). Plaintiffs offer no substantive response to our argument that that this Court cannot grant declaratory relief, except to say that if the Court decides to dismiss Counts Eight through Eleven, it should do so without prejudice because the claims are not "ripe for judicial review." ECF No. 25 at 38. But, the question is not whether Plaintiff's claims are ripe, but rather whether this Court has jurisdiction to issue declaratory relief in the first place. It clearly does not. *Lummi Tribe*, 99 Fed. Cl. at 595 ("[This] court could only enter a money judgment and not prospective, declaratory relief."). Thus, these Counts should be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed.

DATE: July 27, 2022

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