

No. 06-5092

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*IN THE*  
**UNITED STATES COURT OF APPEALS**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**ORANNA BUMGARNER FELTER, ET AL.,**

*Plaintiffs/Appellants*

v.

**DIRK KEMPTHORNE, SECRETARY OF INTERIOR, ET AL.,**

*Defendants/Appellees.*

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On Appeal from the United States District Court for the  
District of Columbia, No. CV-02-2156 RWR

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**APPELLANTS' OPENING BRIEF**

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### **Certificate As To Parties, Rulings, And Related Cases**

Pursuant to D.C. Circuit Rule 28(a), Appellants certify that the Certificate as to Parties, Rulings and Related cases provided to this Court by Appellees Gale A. Norton, *et al.* on May 1, 2006 is correct except that “Dirk Kempthorne” is substituted for “Gale A. Norton”, as Secretary of the Interior.

## **Corporate Disclosure Statement**

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Appellees in this case submit this Corporate Disclosure Statement:

There are no parent corporations or publicly held corporations that own ten percent or more of the stock of any of the individual Appellants.

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**INTRODUCTION**

This case arises out of the failed and repudiated federal institution of “termination”, a broadly based but failed social movement in the United States to assimilate Indians and liberate them from federal supervision. The allegations in Plaintiffs/Appellants’ (“Appellants”) Amended Complaint (“Complaint”) retell the generally acknowledged horrors of the institution of “termination”, and the confused and malignant actions of federal and tribal sovereigns, entities, and individuals that supported that institution. Termination is a rejected relic of a deplorable period in our



Nation's history toward its own original indigenous citizens except that it lives on in the State of Utah as a "Jim Crow" type law of the worst sort.

Next, Appellants' Complaint ask the Federal Courts to reexamine a tragic period in our Nation's history and to hold the federal Defendants/Appellees ("Appellees") liable for "numerous wrongs committed against them by defendants as the result of the premature, incorrectly implemented and unlawful termination of the federally-recognized "Indian" status of each individual plaintiff as a member of the Uinta Band of Utes. . .". See Complaint, ¶ 1, Docket No. 5 ("Dkt #"), Appellants' Appendix, ("App.") at 1.

The case before this Court of Appeals involves efforts by "terminated" individuals to be "made whole" after the harsh and faulty implementation of the Ute Partition Act ("UPA" or "Act"), P.L. No. 671, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa 1982). Simply put, the *Felter* Appellants are fighting for all of the property rights that they would have had absent termination, including the return of their identity as federally-recognized "Indians".

Further, this case deals with the important policy issue of whether the government should escape liability for deploying the Act to wipe out extremely valuable vested rights to land and monies owned by the Uinta Band and its members *prior to* 1961. However, the District Court ruled that Plaintiffs' claims cannot be heard in 2006 in a court of law although Federal Appellees have never accounted for the disposition of very valuable properties owned by them *before* their termination.

The Appellants respectfully requests that this Court reverse the dismissal of the lower court, and remand this case to the District Court for determination on the merits.

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## **JURISDICTION**

Appellants alleged that the District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 5 U.S.C. § 701, *et seq.*, 25 U.S.C. §§ 677-677aa (1982), 28 U.S.C. § 1346(b), 25 U.S.C. § 345, 28 U.S.C. § 1353, 28 U.S.C. § 2201 and § 2202. Final judgment was entered by the District Court on January 27, 2006, and a timely Notice of Appeal was filed March 24, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court erred as a matter of law in finding that the statute of limitations set forth in 28 U.S.C. § 2401(a) accrued when a list of the 490 Mixed-Bloods was published in the Federal Register, pursuant to the UPA, in 1954 and 1961;

2. Whether the District Court erred as a matter of law in finding that the “continuing violations” doctrine cannot apply to save Appellants’ Causes of Action alleging money damages, restoration of rights to reservations assets and accounting; and

3. Whether the District Court erred as a matter of law in finding that the “equitable tolling” doctrine cannot apply to save Appellants’ Causes of Action alleging money damages, restoration of rights to reservations assets and accounting.

### **STATUTES AND REGULATIONS**

The pertinent statutes involved in this appeal of the lower court’s Order dismissing this case are the “Ute Partition and Termination Act”, enacted August 27, 1954, P.L. No. 671, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa (1982) and 28 U.S.C. § 2401(a). Another more recent law enacted that is pertinent to the Complaint’s Eight Cause of Action for an Accounting is P.L. 108-108. The

pertinent language of P.L. 108-108 is attached hereto and included in the Addendum bound with this Opening Brief.

Other statutes referenced in this appeal are 25 U.S.C. § 677t., titled “Water Rights” reads: “Nothing in this subchapter shall abrogate any water rights of the tribe or its members.” 25 U.S.C. § 677r., titled “Indian claims unaffected” reads: “Nothing in this subchapter shall affect any claim heretofore failed the United States by the tribe, or the individual bands comprising the tribe.”

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Appellants’ Complaint sought redress in the federal courts to obtain a determination which recognized their rights and ownership in property on the Uinta & Ouray Reservation in the State of Utah *prior to* the enactment of the UPA in 1954. They also sought damages in the form of monetary compensation for the loss of their rights and property vested *prior to* 1961, the date of the publication in the Federal Register of the list of terminated members. In effect, the Complaint alleged that the enactment of the Act in 1954 did not justify the overtaking, severance or transfer of those pre-UPA rights of the Uinta Band and its individual members, all without compensation. Thus, they alleged that the UPA was incorrectly implemented pursuant to its provisions and it must be declared null and void. [*See* App. 1, First Cause of Action, Dkt # 5, pp. 45-49, ¶¶ 56-68; p. 61, ¶¶ 1-2].

### **Course of the Proceedings**

This lawsuit was filed November 4, 2002, in the United States District Court for the District of Columbia and it was initially entitled *Felter, et al. v. Norton, et al.*, Case No.1:02 CV 2156. The case was assigned to the Honorable Royce C. Lamberth pursuant to a Notice of Related Case contending that *Felter* was related, under Local

Civil Rule 40.5, to *Cobell v. Norton*. [*Id.*, Dkt #2]. By Minute Order, dated June 25, 2006, Judge Lamberth determined that *Felter* was not related to *Cobell* and transferred the case to the Calendar Committee for random reassignment. [App. 2, Dkt # 15]. The case was reassigned to Judge Richard W. Roberts.

On May 5, 2003, Appellees filed a Motion to Dismiss. [*Id.*, Dkt #14]. Appellants filed their Opposition to the Motion to Dismiss on October 6, 2003. [App. 3, Dkt #18]. On November 26, 2003, Appellees filed their Reply in support of their Motion to Dismiss. [*Id.*, Dkt #22]. On January 27, 2006, Judge Roberts issued his Memorandum Opinion granting Appellees' Motion to Dismiss on the basis of the applicable statute of limitations, 28 U.S.C. § 2401(a). [App. 5, Dkt #34; Memorandum Opinion at App. 7 - 23].

### **Disposition Below**

The court first examined the Eight Causes of Action in the Complaint to determine whether some were subject to dismissal under Federal Rules of Civil Procedure (“FRCP”) Rule 12(b)(1) or FRCP Rule 12(b)(6). [*Id.* at 12]. The court cited *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 176, (D.D.C. 2004) as requiring that when a party files a FRCP Rule 12(b)(1) motion to dismiss that the plaintiff bears the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction. The court then cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) for the principle that a motion filed under FRCP Rule 12(b)(6) to dismiss for failure to state a claim should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” [*Id.*].

The court shifted its analysis of the Rule 12(b)(1) or Rule 12(b)(6) dichotomy to whether a motion to dismiss a suit against the United States implicated a lack of

subject matter jurisdiction because of its concomitant sovereign immunity. *Kendall v. Army Board for Corrections of Military Records*, 996 F.2d 36, 366 (D.C. Cir. 1993). [App. 12]. The court opined that if the statute of limitations was deemed jurisdictional, then it would act as an absolute bar that could not be overcome by the application of judicially recognized exceptions. *Soriano v. United States*, 352 U.S. 270, 276 (1957). The court then described these exceptions as “waiver”, “estoppel” “equitable tolling”( *Gordon v. Nat’l Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982)), “fraudulent concealment”, the “discovery rule” (*Nelson v. Int’l Paint Co.*, 716 F.2d 640, 645 (9<sup>th</sup> Cir. 1983)), and the “continuing violations doctrine” (*Cato v. United States*, 70 F.3d 1103, 1108-09 (9<sup>th</sup> Cir. 1995). [*Id.*].

After concluding that exceptions were available in certain limited situations, the court drew reference to recent Supreme Court and D.C. Circuit decisions holding that the “equitable tolling doctrine applies to analogous statutes of limitation.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). [*Id.* 12-13]. Going further, the court applied this Court’s holding in *Chung v. Dep’t of Justice*, 333 F.3d 273, 276-277 (D.C. Cir. 2003) that the Privacy Act limitation section is subject to the general rebuttable presumption of equitable tolling and was no longer a jurisdiction bar. The district court employed the analysis in *Chung* to deem Appellants’ claims seeking money damages, an accounting and claim for restoration of rights to reservation assets as similar to private actions sounding in the traditional tort concept of seeking monetary recovery from an injury. [App. 15]. After reaching this conclusion, the court found that the defendants had not rebutted the presumption that equitable tolling applied to the statute of limitations at issue in this case. [*Id.*]. “Thus, an expiration of the statute of limitation on these claims for damages would not subject them to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), but

would subject them to a motion to dismiss under Rule 12(b)(6) for failure to state a claim.” [Id. at 16].

On the other hand, the court could find no *Chung* “analogue” in private litigation that would void the Secretary’s 1961 regulation and restore the Indians to their former status as federally-recognized individual members of the Uinta Band of Ute Indians. [Id. at 17]. For these causes of action, the court found that the running of the statute of limitations serves as an absolute jurisdictional bar under Rule 12(b)(1) and no equitable exceptions would apply to save their dismissal. [Id.]. When the “restoration of Indian status” related causes of action were examined in relation to 28 U.S.C. § 2401(a), the court considered that the “bright line” action by the government in this case was the publication in the 1961 Federal Register of the list of terminated members: : “Here, plaintiffs’ injuries stem directly from the termination of their status as recognized Ute Indians and the disbursement of their Reservation assets.” [Id. at 18]. These “Indian status” related causes were dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

As for the remaining claims, the court recognized that under *Chung*, 333 F.3d at 278, they may be subject to only two of the equitable exceptions to the statute of limitations: the continuing violation doctrine and the equitable tolling doctrine. [Id.]. The court quickly disposed of Appellants’ claims seeking money damages, an accounting and claim for restoration of rights to reservation assets because they failed to alleged that defendants committed any wrongful acts during the period *prior to* November 4, 2002, the date the *Felter* case was filed. [App. at 21]. The court reasoned that Appellants’ complaint alleged *only* injuries that had occurred as a result of the 1954 passage of the UPA and the 1961 Federal Register publication of the list of terminated Mixed-Blood Uintas and their Complaint alleged no actual wrongful

acts committed *after* 1961. According to the lower court, prolonged failure by the Appellees to recognize Appellants' status as members of the Ute Tribe did not constitute contemporary wrong acts upon which to apply the continuing violations doctrine. [ *Id.* at 21].

The court described that the equitable tolling doctrine can toll the running of the statute of limitations for a complaint filed after its expiration where a plaintiff demonstrates: 1) that he has been pursuing his rights diligently; and 2) that some extraordinary circumstance stood in his way. [ *Id.*]. Dismissing any chance that Appellees here could use the equitable tolling doctrine, the court held that their complaint did not plead factual assertions warranting its application. [ *Id.* at 23]. He concluded, once again, that they had only asserted that they continued to suffer as a result of their wrongful termination and erroneous distribution of Reservation assets but not why they had not filed their claim earlier.

### **STATEMENT OF FACTS**

Appellants brought suit against the United States of America, the United States Department of Interior, the Secretary of Interior, and the Assistant Secretary of Indian Affairs, and other officials of the Bureau of Indian Affairs, (“BIA”). The Appellants claimed that BIA breached its trust responsibility by unlawfully implementing the UPA in a manner that deprived them of property vested while they were federally-recognized Indians and members of the Uinta Band of Indians. [App. 1, Dkt #1, p. 31, ¶ 4, p. 40, ¶ 39, p. 42, ¶ 44, p. 44, ¶ 53].

The end result of this faulty execution of the UPA was transfer of very valuable shares in the Ute Distribution Corporation (“UDC”), an entity created under the UPA to non-Indian individuals and large corporations. [ *Id.* at p. 45, ¶ 54; *Id.*, ER 3, Dkt # 18, p. 9]. The UDC was created to allow the Ute Indian Tribe and the terminated

Mixed-Blood Uintas to jointly manage all “divisible and indivisible” property as defined in the UPA. One of the most glaring failures of the Appellees’ execution of the UPA against the Appellants legal interest resulted in the transfer of ownership in UDC shares to wholly non-Indian corporations like the “Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints” (6 UDC shares), “William T. Piper Joint Venture” (162 shares), “Wayne Hummer & Company” (100 shares) and, incredibly, the “Ute Indian Tribe” itself (874 shares). [App. 26, 27, 28, 29, Dkt #18]. In their Complaint, Appellants stated: “Defendants simply failed to keep separate the separately defined pre-UPA and post-UPA properties and that failure led to the loss of lands, water, minerals and other appurtenances to non-Indians and the Ute Indian Tribe.” [ *Id.* at 1, Dkt # 5, p. 9, ¶ 9].

The dispute that led to this lawsuit began in and around August 21, 1951 when an arrangement called the “share and share alike” agreement was enacted by Congress granting to Appellants a legal right to share in a \$32,000,000 Indian Claims Commission settlement. [*Id.*, p. 44, ¶ 53, *See* Opinion at App. 8]. Appellants’ right to the \$32,000,000 Claims Commission settlement vested *three years before the enactment of the UPA and at a time when Appellants were federally-recognized Indians*. Calvin C. Hackford, one of the lead Plaintiffs in *Felter*, stated in his sworn declaration, dated October 5, 2003:

In 1951, the three tribes entered into a Share and Share Alike Agreement in which they were to invest in lands that would become the property of the Ute Indian Tribe. These lands would fall subject to the complete control of the Constitution of the Ute Indian Tribe. [*See* App. 3, Dkt # 18].



Hackford's declaration speaks for the fact that he has experienced confusion over whether the UPA was actually executed as intended by Congress. He describes a situation where "shares" in the "Rock Creek Cattle" and "Antelope Sheep" Corporations representing only grazing rights somehow eventually included water, timber, gathering rights, hunting and fishing rights. [ *Id.* at 32, ¶ 12]. These two corporations were formed by the Affiliated Ute Citizens and now are predominately managed and controlled by non-Indians who have benefitted immensely from the fact that Appellees allowed grazing rights to become something greater than the UPA specified.

In their Opposition to the Motion to Dismiss , [App. at 3, Dkt # 18, p. 9] Appellants argued:

For this reason, Defendants' failure to protect and "safeguard" the *pre-1954* trust status of the lands constitutes a breach of the federal trust relationship *as to* those specific and quantified rights of Plaintiffs that were lumped in and commingled with lands and other property defined by Congress in the UPA as *separate and apart from the pre-1954 land and assets owned by both the Uinta Band and its individual members, their Estates, their children and their descendants.*

They also argued that the Appellees simply failed to keep segregated the separately defined pre-UPA and post-UPA monies and properties and this failure led to the loss of lands, water, minerals and other appurtenances to non-Indians and the Ute Indian Tribe. *Id.*

At the time that the Act was being implemented on the Uinta & Ouray Reservation in Utah, Appellants were unsophisticated and very susceptible to overreaching. [See Complaint, p. 54, ¶ 87, p. 55, ¶¶ 88-90].

### SUMMARY OF ARGUMENT

Appellants have cast their challenge to the lower court's Memorandum Opinion in terms of an attack on the "bright line" rule that established 1961 as date from which the six (6) year statute of limitations began to run. 28 U.S.C. § 2401(a). The court used 1961 as the date causes of action accrued for any of the 490 terminated Uintas whose names were published in the Federal Register. According to the court, the loss of status as a federally-recognized member of the Uinta Band of Utes in 1961 removed any possibility that the federal government had any obligation or duty to account for land, property and money the Appellants owned or were entitled to *before* 1954 and 1961.

It was this "lumping" of property and other valuable assets into the UPA defined category of divisible and indivisible property that Appellants allege was distributed in the form of UDC shares to non-intended beneficiaries like those corporations named above. [App. 3, Dkt #18, See Memorandum in Opposition, p. 25]. Clearly, the Complaint's Eight Cause of Action, at 61, seeks an "accounting" of funds deposited to their benefit by Act of Congress on August 21, 1951 or *before the date Appellants' were terminated*. This request for relief is a "historical accounting" that was addressed by this Court of Appeals in *Cobell v. Norton*, 392 F.3d 461, 465 (D.C. Cir. Dec. 10, 2004). In this *Cobell* decision, the Court found that Pub. L. No. 108-108 included a sentence that provided that the statute of limitations would not run on any claim for losses or mismanagement of trust funds "until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the

beneficiary can determine whether there has been a loss.” *See* Addendum. On August 21, 1951, the *Felter* Plaintiffs were individual Indians and members of the Uinta Band of Ute Indians, a separate Band of Ute Indians granted separate governing powers under the Indian Reorganization Act Constitution of the Ute Indian Tribe, approved on January 19, 1937. [*See* Complaint at 40 - 43].

The District Court’s strict delineation of the date any causes of action based *on* the UPA accrued under § 2401(a), 1954 or 1961, missed the point of the Complaint that the Appellants’ injuries did not stem directly from the termination of their status as recognized Ute Indians and the disbursement of their Reservation assets. [App. at 18]. The court’s use of 1961 as the date on which any causes of action accrue *if* Appellants were suing directly on the UPA. However, they are suing on allegations that the federal government used the UPA to illegally take property and money to which they had a legal right as federally-recognized Indians and members of the Uinta Band of Ute Indians. This is where the lower court erred in its characterization of the relief the *Felter* Plaintiffs were seeking. This erroneous characterization allows Appellees to ignore a completely permissible demand for an accounting for property and money deposited to their use before 1954 by saying their status as terminated Indians grants them no right to relief. This also permits the federal government to evade any legal responsibility for mismanaging their *pre*-UPA assets by merely stating that they are no longer “Indians” so “tough luck.” Pub. L. 108-108 removes this convenient excuse.

The District Court erred in finding that the “equitable tolling” doctrine did not apply to save Plaintiff’s Causes Action alleging money damages, restoration of rights to reservations assets and accounting. The Complaint asserts that property and money belonging to the *Felter* plaintiffs was wrongfully taken from them and has never been

accounted for by the federal government because they were “terminated” Indians. Appellants could not have filed an action for an accounting of their *pre*-UPA property and money because the federal government continually stopped their efforts to find out if they had been deprived of Indian Commission Settlement funds earmarked and targeted for distribution under Act of Congress enacted in 1951 under the “share and share alike” agreement. [ *See* Complaint at 44, ¶ 53 and 45, ¶ 54].

## ARGUMENT

### A. Standard Of Review

This Court reviews the district court’s dismissal of the complaint *de novo* and “accept[s] all of the factual allegations in [the] complaint as true.” *Sloan v. U.S. Dep’t of Housing & Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001) (second alteration in original) (quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)) (internal quotation marks omitted).

**B. The District Court erred as a matter of law in finding that the statute of limitations set forth in 28 U.S.C. § 2401(a) accrued when a list of the 490 Mixed-Bloods was published in the Federal Register, pursuant to the UPA, in 1954 and 1961.**

The District Court did not properly take into account the allegations in the Complaint establishing the existence of laws enacted to protect the Uintas’ property from loss unless the Constitution and Bylaws of the Ute Indian Tribe were scrupulously followed. [App. 3, Dkt #18, pp. 7 - 10]. The court ignored the fact that when the separate Bands of Ute Indians formed a consolidated tribal government in 1937, each Band explicitly agreed that “no property rights shall be acquired or lost through membership in the modernly created entity known as the “Ute Indian Tribe” except in the manner(s) specified in the governing document.” [See Complaint, ¶¶ 35

- 36]. Appellants alleged that the terms of the 1937 IRA Constitution and By-Laws of the Ute Indian Tribe protected any *prior existing* rights to Uinta Band membership and the *prior existing* and vested rights of the Band, as a tribal entity, and its individual Band members to their previously allotted lands. [ *Id.* at 45, ¶ 57]. Appellees were obligated to account for these prior transfers of land and other appurtenances and the limitations imposed by law on all Bands of Ute Indians. These are the interest that the *Felter* plaintiffs were seeking to vindicate when they filed their Complaint.

Further, the court did not recognize that in and around 1950, as a consequence of a series of complex transactions involving claims before the Indian Claims Commission, a “share and share alike” agreement between the three Bands occupying the Uinta’ Reservation was executed. *Id.* at 40, ¶¶ 37-39, p. 41, ¶¶ 40-43. The court does mention the \$32,000,000 Indian Claims Commission “taking judgment”, noting that the judgment was to be divided among the Ute Tribe members. [Opinion, App. 8]. However, the court also states: “The Act also terminated the mixed-blood’ rights to the \$32,000,000 ICC judgment because, as a result of the UPA, the mixed-bloods were no longer considered members of the Ute Tribe.” [ *Id.* at 9]. The Complaint alleged that UPA could not effectuate the taking of property rights pre-existing its enactment in 1954. [Complaint at 45, ¶ 57].

It is obvious that until 1954, the Uinta Band and its individual allotted tribal members maintained *solid and vested legal rights to land, property, water and other appurtenances, including minerals, that could be accounted for by the Defendants named herein.* These were the substantive rights that Appellants sought to vindicate in their lawsuit. No language in the UPA appears to allow for this kind of taking.

As discussed above at p. 7, the court reasoned that Appellants' Complaint alleged *only* injuries that had occurred as a result of the 1954 passage of the UPA and the 1961 Federal Register publication of the list of terminated Mixed-Blood Uintas and their Complaint alleged no actual wrongful acts committed *after* 1961. In reaching this conclusion, the court ignored numerous factual allegations in the Complaint that described how property and money owned by them before 1954 and 1961 were commingled as a result of Appellee's faulty implementation of the UPA and lost to them and their heirs. These factual allegations must be construed in favor of Appellants. No accounting has been made to Appellants of their pre-existing non-UPA property and money that were maintained and managed by the BIA. As individual Uinta Ute Indians and members of the Ute Indian Tribe *before* August 27, 1954, Appellants are owed an accounting as described in the Complaint without reference to 28 U.S.C. § 2401(a). P.L. 108-108 applies to Appellants regardless of the fact that they were terminated in 1954:

*Provided further*, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning the losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. 108-108 was enacted on November 10, 2003, almost a year after the *Felter* plaintiffs filed their initial action on November 4, 2002. Appellants filed their Memorandum in Opposition the Motion to Dismiss on October 6, 2003 or over a month before Pub. L. 108-108 became law. In their Complaint, Appellants alleged

that the Appellees had “failed to account for the principal and interest of funds owed to them as members of the Uinta Band of Utes by Act of Congress that was lost to them and their children, including the mishandling and maladministration of “offsets” charged against them when they were full members of the Uinta Band.” [See Complaint at p. 60, ¶ 108]. In light of the recent enactment of P.L. 108 - 108, the District Court erred in dismissing Appellants’ Eight Causes of Action by establishing the date for accrual of causes of action as either 1954 or 1961. In particular, the Cause of Action requesting an accounting should not have been dismissed. It is obvious that in this very unique area of the federal trust responsibility that Congress removed the application of 28 U.S.C. § 2401(a) from cases alleging similar historical accounting causes of action that were set out below in *Felter*.

**C. The District Court erred as a matter of law in finding that the “continuing violations” doctrine could not apply to save Appellants’ Causes of Action alleging money damages, restoration of rights to reservation assets and accounting.**

The continuing violations doctrine, although slightly different from the discovery rule, allows the plaintiff to file an action when there is a continuous series of injuries stemming from the same injury. Under this doctrine, the statute of limitations are not tolled *per se*, but rather left open until a final injury has accrued. See *Heard v. Sheahan*, 253 F.3d 316, 319 (7<sup>th</sup> Cir. 2001). Without any continuing unlawful actions by defendant, plaintiff’s claims accrued when he was “first harmed”. *Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978).

The court drew analogies between traditional tort concepts, specific performance and the substance of Appellants’ claims seeking money damages, claims for accounting and claims for restoration of rights to reservation assets. The court

then found that these specific causes of action were subject to dismissal pursuant to FRCP Rule 12(b)(6) if the plaintiff could not establish sufficient allegations in their Complaint that defendants committed any wrongful acts during the limitations period prior to this action being filed. [App. 20]. The court did not find that Causes of Action One, Two and Three going directly to Appellants' status as terminated Uinta Ute Indians were capable of review under a Rule 12(b)(6) analysis. [App. 17].

The District Court erred when it concluded that the continuing violations doctrine could not apply to exempt Appellants remaining Causes of Action from the statute of limitations period because they failed to allege the Appellees committed any wrongful acts during the limitations period prior to this action being filed: "Plaintiffs allege injuries that occurred as a result of the 1954 passage of the UPA and the 1961 Federal Register publication." [App. 20].

The gravamen of Appellants' Complaint is that they lost valuable property and other rights *vested* in federal "wards", the Uinta, before the enactment of the UPA and there has never been an accounting to this day, or over 52 years later. What the District Court failed to realize is that a failure to account for these *pre-UPA vested rights* falls within the very unique area of "Federal Indian Law." Losing \$32,000,000 so it could not be used by the terminated Uintas as they moved into "mainstream" America is no small "past discriminatory act" that is isolated in history beyond the six year statute of limitations. [App. 19]. It is obvious that in enacting P.L. 108-108 Congress recognized the uniqueness of the federal defendants' "continuing" duty to account for alleged failures to provide historical accountings to individual "Indians" when they were federally-recognized "Uinta Indians."

Clearly, Congress' treatment of the federal government's legal obligation to account to its federal wards under Pub. L. 108-108 lies in an entirely different region



than those cases cited in the District Court's Memorandum Opinion. A failure to account to Indians *is* a "wrongful act." *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999) is inapplicable where a plaintiff is alleging that a defendant has wrongfully withheld money or deprived them of their right to property *before* the defendant acted to affect their status then excuses their duty to account because of the loss of "Indian" status. A failure to account is not a lingering effect of an unlawful act but it is itself a continuing unlawful act that goes beyond the "bright line" drawn by the court as starting in 1961. It might be said that the *Felter* plaintiffs could not file claims for injuries suffered as a result of actions by the federal government authorized under the UPA. However, Appellants' Complaint established the existence of rights to money and property vested in them when they were federally-recognized Uinta Ute Indians and members of the Ute Indian Tribe. The Federal Appellee's continual failure to recognize Appellants' status as members of the Ute Tribe to evade a duty to account to them is concrete evidence of "contemporary wrongful acts" that injure them by depriving them of a right to an accounting.

Appellants' assertions are not merely a veiled attempt to circumvent the statute of limitations for their underlying claims susceptible to Rule 12(b)(6) analysis. In these circumstances, even Congress generally agreed that a failure to account to Appellants or explain how the UPA can deprive them of immensely valuable Indian Claims Commission settlement monies and other pre-UPA property vested and owned by them is "new unlawful conduct" and not "merely a continuing adverse consequence of prior unlawful conduct."

**D. The District Court erred as a matter of law in finding that the “equitable tolling” doctrine cannot apply to save Plaintiff’s Causes Action alleging money damages, restoration of rights to reservation assets and accounting.**

“Equitable tolling applies when a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim.” *Brademas v. Indiana Housing Finance Authority*, 354 F.3d 681, 686-87 (7<sup>th</sup> Cir. 2004). The District Court concluded that the Complaint did not include factual assertions that would warrant the application of the equitable tolling doctrine. [App. 22]. Specifically, the court held that: “No extraordinary circumstances beyond plaintiffs’ control are alleged.” [*Id.*]. The record does not support the court’s conclusion. The record does support Appellants’ assertion that Appellees had a duty to disclose any plans, secret or otherwise, to terminate the individual mixed-blood members of the Uinta Band that would result in their exclusion from obtaining any share of the \$32,000,000 Indian Claims Commission judgment and to exclude them from their aboriginal homelands. [*See* Complaint at p. 46 -47]. Appellants also alleged that the federal government failed or refused to give the Uinta Band mixed-bloods accurate and adequate information so they could understand their rights and the obligations of the United States under the UPA. [*Id.*].

Here, the record reveals facts that support Appellants’ position that the fact of their “termination” and loss of status as members of the Uinta Band of Ute Indians does indeed constitute an “extraordinary circumstance beyond plaintiffs’ control”. The loss of their status as “Uinta Indians” has been used for over 50 years as an unjustifiable pretext for the federal government not answering Appellants and accounting to them for the whereabouts of the judgment. Even Congress agreed on

November 10, 2003 that there existed extraordinary circumstances in the general area of the federal government's management of the Indians' monies that it passed a law eliminating § 2401(a) from applying to *any claim concerning losses or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.* See Addendum.

Thus, the court clearly should have resolved the factual issues going to the existence of extraordinary circumstances in favor of the Appellants. At the very least, the court should have resolved any ambiguities through an evidentiary hearing. More appropriately, these issues should have been addressed at summary judgment, where statute of limitations issues are more commonly addressed, if not raised prior to a responsive pleading. See generally *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983). (It was improper for the District Court to sustain the government's factual challenge to subject matter jurisdiction without conducting an evidentiary hearing on the merits). This Court should correct the error of the court below by reversing the District Court's order, and remanding this case for a determination on the merits.

Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." 4 *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedures* § 1056, at 239 (3d. ed. 2002). A plaintiff invoking the equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or due diligence could have obtained, the necessary information. Congress enacted Pub. L. 108-108 and tolled the operation of § 2401(a) until Appellees can prove they accounted as requested by Appellants in their Complaint.

By virtue of the trust relationship between the government and Indian tribes, the government, through the BIA, is pervasively involved in Indian affairs. With respect to their involvement, “The most substantial activities of the Bureau are probably the provision of education and the management of tribal resources, particularly lands.” WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW*, at 47 (1998). At all times prior to the enactment of the UPA, the BIA managed Appellants’ trust property and the monies derived from the Indian Claims Commission settlement discussed in the Opening Brief. The government decided on a path in 1954, and this Court should not allow them to evade the consequences of their decision not to account to Appellants today by saying to them “you are terminated and we have no duty to let you know where your share of the Indian Claims Commission judgment went.”

### **CONCLUSION**

Since their historical inception and federal recognition as a separate Band, the mixed-blood Uintas saw their status as “Uinta Indians” stripped from them without the federal government accounting for land, water, mineral wealth and judgment monies that were legally theirs before August 27, 1954, the date Congress enacted the UPA.

Until recently, the common thread that connected all of their dealings with the BIA was that their status as “terminated” mixed-blood Uinta Ute Indians allowed the BIA to ignore their request for a historical accounting. However, the mixed-blood Uintas had and still have rights under P.L. 108-108 to demand an accounting from Appellees.

The difference is that the Appellees must now justify why Appellants are not owed an accounting. Basic fairness demands this. Accordingly, the Appellants respectfully requests that this Court reverse the judgment below, and remand the case



## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I do certify that this Opening Brief complies with the type-volume limitation. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 7,089 words. This certificate was prepared in reliance on the word-count function of the word-processing system (WordPerfect 10.0 used to prepare this Opening Brief.

DATE: August 21, 2006

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Dennis G. Chappabitty

CERTIFICATE OF SERVICE

I, Dennis G. Chappabitty, certify that on this 21<sup>st</sup> day of August 2006, I served the foregoing Opening Brief of Appellants, by First Class Mail, postage prepaid to:

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