UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiffs,	)	
v.	)	CASE NO. 1: 02 CV 2156 (RWR)
KENNETH SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS

Extensive litigation has taken place regarding the Ute Partition and Termination Act ("UPA" or "the Act"), 25 U.S.C. §§ 677-677aa, and its effects on the rights of "mixed-blood" members[1/] of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Indian Tribe"). Oranna Bumgarner Felter's, et al. ("Plaintiffs") demand for an accounting, Pls.' Am. Compl. ¶¶ 105-112, is precluded by determinations of the Supreme Court of the United States, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 143-144 (1972), the United States Court of Appeals for the Tenth Circuit, Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992), and the United States Court of Claims, Affiliated Ute Citizens of Utah v. United States, No. 156-69, 199 Ct. Cl. 1004, 1972 WL 5188, at *1 (1972), that the rights to jointly manage the indivisible assets of the Ute Indian Tribe, including

[1/] "Inasmuch as the statute specifically employs the terms 'full-blood' and 'mixed-blood,' we feel compelled, for purposes of consistency and clarity, to do the same. No slur or offense whatsoever is intended." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 134 n.3 (1972).

"unadjudicated and unliquidated claims against the United States," belong to the Ute Distribution Corporation ("UDC"), not the Plaintiffs or their other representatives. Undergirding this is the principle that participation in the joint management of indivisible tribal assets is a collective, not individual, right. Affiliated Ute Citizens, 406 U.S. at 144. The Plaintiffs' claim for an accounting, if allowed to proceed, will undermine prior decisions that the UDC is the authorized representative of the mixed-blood Uintah Band members. Plaintiffs are also estopped because their representatives could have brought their claim for an accounting in prior litigation, including litigation regarding their share of the assets belonging to the Ute Indian Tribe.

I. Factual and Procedural Background[2/]

On July 13, 1950, the Court of Claims entered a judgment for $31,938,473.43 (the "Colorado judgment") in favor of the Confederated Bands of Colorado Utes, of whom the Uncompaghre and White River Bands — but not the Uintah Band — were members. Confederated Bands of Ute Indians v. United States, Nos. 45585, 46640, 47564, 47566 117 Ct. Cl. 433, 1950 WL 5001 (July 13, 1950).[3/] The Uintah Band's interest in the Colorado judgment accrued separately: under the "Share and Share Alike" agreement adopted by the Ute Indian Tribe, the Uintah Band relinquished its separate claims against the United States in exchange for a portion of the Uncompaghre and White River Bands' share of the Colorado judgment. In effect, the Uintah Band acquired the right to share in the Colorado judgment by

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[2/] The relevant factual background is set forth in greater detail in Defendants' Motion to Dismiss (Dkt. No. 14) and Defendants' Renewed Motion to Dismiss (Dkt. No. 41).

[3/] The Uncompaghre and White River Bands were awarded 60% of the judgment. See Confederated Bands of Ute Indians v. United States, Nos. 45585, 46640, 47564, 47566, 120 Ct. Cl. 609, 1951 WL 5396, at *48 (November 6, 1951).

releasing its claim in a separate action before the Indian Claims Commission. Following the agreement, Congress adopted the "Share and Share Alike" agreement. 25 U.S.C. § 672. The Plaintiffs demand an accounting of the funds from the Colorado judgment for a period of about 10 years.

The UPA mandated partition and distribution of the assets belonging to the Ute Indian Tribe between "mixed-blood" and "full-blood" members, in proportion to their numbers, and terminated federal supervision over property belonging to mixed-blood Utes. 25 U.S.C. §§ 677-677aa. After the two groups were identified and divided, implementation of the UPA led to the immediate partition and distribution of tribal assets susceptible to equitable and practicable distribution. Id. at § 677i. Not all of the Ute Indian Tribe's assets were susceptible to division.

As to those assets not susceptible to equitable and practicable distribution—described in the UPA as "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution"—the UPA called for joint management by the Tribal Business Committee (representing the full-blood members) and the authorized representatives of the mixed-blood members of the Uintah band. Id. The mixed-blood Utes authorized Affiliated Ute Citizens of Utah ("AUC") to act as their representative. Id. at § 677e. In turn, AUC chartered UDC and irrevocably delegated to it authority to manage "jointly with the Tribal Business Committee of the full-blood group . . . all unadjudicated or unliquidated claims against the United States . . . ." Articles of Incorporation of the Ute Distribution Corporation, Art. IV. As to the management of the remaining indivisible assets of the Ute Indian Tribe, the UDC represents the mixed-blood Utes; it exists "specifically to manage mineral rights and unadjudicated claims against the United

States jointly with the business committee." Affiliated Ute Citizens, 406 U.S. at 143; see also Ute Distribution Corporation, Articles of Incorporation, Art. VI ("[t]he stockholders, in exchange for said stock, delegate to the corporation and the officers thereof, without further act or deed, authority to manage jointly with the Tribal Business Committee of the full-blood group . . . all unadjudicated or unliquidated claims against the United States.").

II. Legal Background

A. Collateral Estoppel

Issue preclusion or collateral estoppel, "prevents the relitigation of any issue that was raised and decided in a prior action." Novak v. World Bank, 703 F.2d 1305, 1309 (D.C. Cir. 1983); Allen v. McCurry, 449 U.S. 90, 94 (1980); see also Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992). Collateral estoppel applies when an issue was already raised and contested in prior litigation and was "actually and necessarily determined by a court of competent jurisdiction in that prior case." Yamaha Corp., 961 F.2d at 254. Preclusion does not apply, however, if its application in the second case would "work a basic unfairness to the party bound by the first determination." Id. at 254; Consolidated Edison Co. of New York v. Bodman, 449 F.3d 1254, 1258 (D.C. Cir. 2006). For example, an issue is not precluded if its role in the current litigation is "of a vastly greater magnitude" than in the prior litigation. Yamaha Corp., 961 F.2d at 254. Collateral estoppel upholds a "fundamental precept of common-law adjudication," Montana v. United States, 440 U.S. 147, 153 (1979), that "later courts should honor the first actual decision of a matter that has been actually litigated," Wright & Miller, Federal Practice and Procedure: Jurisdiction 2d § 4416 (2002), as a means of safeguarding judicial efficiency and avoiding inconsistent results. See also Consolidated Edison,

449 F.3d at 1257.

Collateral estoppel applies even where the later action involves a new claim, so long as a single determinative issue has already been decided. Yamaha Corp., 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting Allen, 449 U.S. at 94). A claim is precluded if three criteria are satisfied. First, "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case." Id. Second, the same issue must have been "actually and necessarily determined" in the prior case, meaning that the issue is essential to a valid and final judgment. Id. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)). Third, "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." Id.

B. Res Judicata

Res judicata or claim preclusion, precludes parties or their privies "from relitigating issues that were or could have been raised" in a prior action. Allen, 449 U.S. at 94. Res judicata bars a claim if three elements are satisfied: (1) a final judgment on the merits in the first action; (2) the present claim is the same as the claim that was raised or that might have been raised in the first proceeding; and (3) that the party against whom res judicata is asserted was a party or in privity with a party in the previous case. Nevada v. United States, 463 U.S. 110, 129-31 (1983); Allen, 449 U.S. at 94; Advantage Health Plan, Inc. v. Knight, 139 F. Supp. 2d 108, 110 (D.D.C. 2001).

Parties cannot raise a new claim that "share[s] the same 'nucleus of facts'" with the claims litigated in a prior case. Apotex, Inc. v. Food & Drug Admin., 393 F.3d 210, 217 (D.C. Cir. 2004) (quoting Drake v. FAA, 291 F.3d 59, 66 (D.C. Cir. 2002)). A common nucleus of

fact exists when the facts "are related in time, space, origin, or motivation," "form a convenient trial unit," and their "treatment as a unit conforms to the parties' expectations or business understanding or usage." Id. (quoting I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 723 F.2d 944, 949 n.5 (D.C. Cir. 1983)). New legal theories are not relevant to this inquiry, only the discovery of "material facts that were not in existence" when the original suit was adjudicated. Id. at 218.

III. Plaintiffs' Claims Must be Dismissed

A. Collateral Estoppel prevents Plaintiffs from litigating who is the mixed-blood Utes' authorized representative for indivisible tribal assets

Plaintiffs' claim in the instant case rests upon their foundational assumption that they are the authorized representatives charged by Congress with the responsibility of managing the Ute Indian Tribe's assets. Their complaint and opposition to the Federal Defendants' motion to dismiss points to no such statutory or judicial authority. The Supreme Court, Affiliated Ute Citizens, 406 U.S. at 143-44, the Tenth Circuit, Murdock, 975 F.2d at 687, and the Court of Claims, Affiliated Ute Citizens, 1972 WL 5188, at *1, have, over the course of two decades, determined that the UDC represents the mixed-blood members' interest in the indivisible assets of the Ute Indian Tribe. Those indivisible assets include, among other assets not susceptible to equitable and practicable distribution, "unadjudicated and unliquidated claims against the United States." 25 U.S.C. § 677i. The Plaintiffs' claim for an accounting is precluded because the proper party to bring a claim, on behalf of the "mixed blood" members of the Ute Indian Tribe is the UDC.

Prior litigation has focused on the legitimacy of the UDC and its activities, but in each instance the outcome is the same: "UDC was lawfully created, [] UDC is the 'authorized

representative' of the mixed-bloods under the Partition Act, and [] the termination proclamation ended all federal supervision and trust relationship with respect to the UDC shares." Affiliated Ute Citizens, 1972 WL 5188, at *1-2 (citing Affiliated Ute Citizens, 406 U.S. at 136-37, 143-44, 149-50); see also Murdock, 975 F.2d at 686.[4/] Simply put, Plaintiffs' claim for an accounting undermines prior judgments that recognized the UDC's position as the mixed-blood Utes' authorized representative for liquidated and unliquidated claims against the United States. 25 U.S.C. §§ 676(a), 677(i). The judgments recognizing UDC's authority meet all the requirements for collateral estoppel.

i. The UDC's status as the authorized representative is the same issue previously determined by the Supreme Court

The issue here is whether the UDC is the authorized representative of the mixed-blood members for purposes of managing their interest in the Ute Indian Tribe's indivisible assets. The Plaintiffs, like those in Yamaha Corp., are attempting circumvent the prior judgments that narrow the scope of their rights in favor of the Congress's chosen representative, the UDC. 961 F.2d at 255. In Yamaha Corp., a plaintiff alleged that a regulation violated "due process and equal protection by denying" it the "rights provided by the customs laws that [were] enjoyed by other domestic U.S. trademark holders." Id. In a prior case, that plaintiff had argued, without success, that the same customs laws granted it a bundle of rights. Id. The court concluded "the issue that was litigated . . . was whether or not [the plaintiff] had any rights" under the customs laws, not the validity of the regulation. Id. Thus, the plaintiff's regulatory challenge, based on rights allegedly created by the customs statutes, could not go forward when the courts had

[4/] Federal Defendants do not concede that the Ute Distribution Corporation could bring a claim for an accounting.

already determined that the customs statutes conferred no rights to the plaintiff. Id.

So too here, Plaintiffs are attempting to ignore the established statutory and caselaw framework that vests the UDC with authority to manage the mixed-blood members' interest in the indivisible assets of the Ute Indian Tribe. UDC's legitimacy cannot be contested again: the Supreme Court determined that "UDC's formation and structure were contemplated by the [UPA], and the AUC itself created and breathed life and vigor into UDC. All this was within Congress' Power." Affiliated Ute Citizens, 406 U.S. at 143-44. Nor can UDC's management authority over indivisible tribal assets, including all unadjudicated and unliquidated claims against the United States, be challenged. In Murdock, the Tenth Circuit held that the Supreme Court holding in Affiliated Ute Citizens collaterally estopped the AUC's claim that it, and not the UDC, was the "authorized representative of the mixed-blood Utes for purposes of managing the mixed-blood Utes' portion of the Ute Tribe's indivisible assets." 975 F.2d at 684. Accordingly, the Plaintiffs' may not insert themselves into the management of the Ute Indian Tribe's indivisible assets, which include unadjudicated and unliquidated claims against the United States, because that role is reserved for the UDC and the joint tribal committee.

The Supreme Court recognized that the "UDC was formed by mixed-bloods in 1958 specifically to manage mineral rights and unadjudicated claims against the United States jointly with the business committee." Affiliated Ute Citizens, 406 U.S. at 143. Congress determined that "all unadjudicated or unliquidated claims against the United States" are among those "assets not susceptible to equitable and practicable distribution" ("indivisible assets"). 25 U.S.C. § 677i. With regards to those assets, the federal government's relationship with the UDC is limited. In affirming Reyos v. United States, 431 F.2d 1337 (10th Cir. 1970), as it related to the United

States, the Supreme Court held that "[n]o form of wardship or of federal trust relationship existed with respect to the [UDC] shares after" 1961. Affiliated Ute Citizens, 406 U.S. at 149. Following that Supreme Court holding, the Court of Claims determined that these indivisible assets were represented by UDC shares and that the "termination proclamation ended all federal supervision and trust relationships with respect to the UDC shares." Affiliated Ute Citizens of Utah, 1972 WL 5188, at *1 (citing Affiliated Ute Citizens, 406 U.S. at 136-37, 143-44, 149-50).

The Supreme Court decision in Affiliated Ute Citizens identifies the UDC as the organization responsible for all unliquidated and unadjudicated claims against the United States. 406 U.S. at 136-37, 143-44, 149-50. As a result, the Plaintiffs may not bring a claim against the United States relating to the Ute Indian Tribe's indivisible assets and are precluded from attempting to relitigate their right to do so.

ii. The Supreme Court holding that the indivisible tribal assets were assigned to UDC was actually and necessarily determined

The Supreme Court resolution of UDC's status was a necessary part of the Court's resolution of the Reyos v. United States portion of its opinion, although it was not necessary to the resolution of the "AUC" portion of opinion.[5/] The Tenth Circuit held, in Murdock, that the "Supreme Court [] had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless,"and the Court could not have addressed the securities and damages claims raised against a bank and its officers in that case regarding UDC stock. 975 F.2d 683, 684, 688 (10th Cir. 1992). Accordingly, the issue was (1)

[5/] In the AUC portion, the Supreme Court affirmed the district court's dismissal for lack of subject matter jurisdiction. Affiliated Ute Citizens, 406 U.S. at 157.

properly raised; (2) submitted for determination; and (3) actually and necessarily determined. See RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. d (1982).

The Tenth Circuit's decision in Murdock also actually and necessarily determined the UDC's validity. The issue in that case was whether "collateral estoppel precludes the litigation of claims" that the UDC was not "the authorized representative of mixed-blood Utes for purposes of managing the mixed-blood Utes' portion of the Ute Tribes indivisible assets." Murdock, 975 F.2d at 684. That court determined that collateral estoppel barred the claim, because the Supreme Court had decided the matter in Affiliated Ute Citizens. Id. Because a determination of UDC's status relative to the AUC's was the purpose of the lawsuit, the issue was actually and necessarily raised. The Plaintiffs may not now seek to accumulate unto themselves, at the expense of the UDC, the right to manage the UDC's unliquidated and unadjudicated claims.

iii. Plaintiffs had an incentive to fully litigate the management rights of indivisible assets in their prior litigation

The Plaintiffs are collaterally estopped from pursuing issues that AUC had the full and fair opportunity to litigate. Although the Plaintiffs were not parties to Affiliated Ute Citizens, they "may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties." Sea-Land Servs. v. Gaudet, 414 U.S. 573, 593-94 (1974) (citing F. James, CIVIL PROCEDURE § 11.28, p. 592 (1965)); see also Taylor v. Sturgell, 128 S.Ct. 2161, 2172-73 (2008); Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, 590 F.2d 1209, 1217 (D.C. Cir. 1978), rev'd on other grounds sub nom GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375 (1980). The Plaintiffs were represented in prior litigation by

the AUC, an organization formed under 25 U.S.C. § 677e to select "authorized representatives with power 'to take any action that is required by [the Act] to be taken by the mixed-blood members as a group.'" Affiliated Ute Citizens, 406 U.S. at 135 (quoting 25 U.S.C. § 677e).

The AUC initiated Afilliated Ute Citizens and Reyos on its "own behalf and as representative of its 490 mixed-blood members . . . ." Affiliated Ute Citizens, 406 U.S. at 139. The same attorneys represented the AUC and Reyos plaintiffs before the Supreme Court, filed a single brief, and asked the Supreme Court to decide whether it, or the UDC was authorized to exercise management privileges for its members with respect to unadjudicated legal claims. See Reply Br. of Petitioner at 22-31, 36-37, 41, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (No. 70-78), 1970 WL 122545 (Oct. 1970). In response, the UDC filed an amicus brief, asserting its rights. Brief of the Indian Tribe of the Utintah and Ouray Reservation and Ute Distribution Corporation, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (No. 70-78), 1971 WL 133689 (Aug. 27, 1971). Likewise, when AUC attempted to relitigate the same issue in Murdock, the Plaintiffs were again represented by AUC. 975 F.2d at 688-89.

In both Affiliated Ute Citizens and Murdock, the stakes were high and the losing parties had significant incentives to litigate the status of the UDC. The parties to Affiliated Ute Citizens[6/] briefed the issue, and losing meant that the UDC, not the AUC, was entitled to participate in the management of the Ute Tribe's indivisible assets. The decision had an

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[6/] Reply Br. of Petitioner at 22-31, 36-37, 41, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (No. 70-78), 1970 WL 122545 (Oct. 1970); Brief of the Indian Tribe of the Utintah and Ouray Reservation and Ute Distribution Corporation, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972) (No. 70-78), 1971 WL 133689 (Aug. 27, 1971).

immediate and real effect: one entity got to continue making decisions regarding tribal assets and the other did not. This was important enough that the AUC sought a determination in Murdock, that it, and not the UDC, was entitled to participate in the management of the Ute Indian Tribe's indivisible assets. 975 F.2d at 684. Just as the AUC claim in Murdock was barred by collateral estoppel, the Plaintiffs' claim for an accounting is barred because it attempts to wrest from the UDC its role in managing the indivisible assets of the Ute Tribe, an issue decided at least twice. Id.

B. Res judicata bars the Plaintiffs' claim for an accounting

As explained below, the doctrine of res judicata or claim preclusion precludes the Plaintiffs from relitigating issues that were or could have been raised in Affiliated Ute Citizens, 1972 WL 5188 and Affiliated Ute Citizens of Utah v. United States, No. 156-69, 215 Ct. Cl. 935, 1977 WL 25897 (October 28, 1977).

The Supreme Court noted, in Affiliated Ute Citizens, that the cash distribution to the 490 mixed-blood Utes "was attributable primarily to the tribe's 60% share of the settlement judgment of $31,000,000,000 obtained in Confederated Bands of Ute Indians v. United States." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 134 n.4 (1972) (citation omitted). The distribution of that judgment, and other assets, was the subject of litigation before the Court of Claims. In that litigation, the AUC claimed the tribal assets were improperly distributed[7] and that the federal government failed to divide the assets pursuant to the UPA.[8] The Court of Claims held that the AUC's claims, regarding both divisible and indivisible tribal assets, were

[7] Affiliated Ute Citizens, 1972 WL 5188, at *1; Affiliated Ute Citizens, 1977 WL 25897.

[8] 25 U.S.C. §§ 677-677aa.

barred by the statute of limitations. Affiliated Ute Citizens, 1972 WL 5188, at *1 (claims related to "tangible property and the group of 'intangibles' consisting of oil, gas, and mineral rights, and unadjudicated and unliquidated claims against the United States" were barred by the statute of limitations); Affiliated Ute Citizens, 1977 WL 25897, at *2 (claims concerning water, fishing, and hunting rights, and rights to future growth of timber were barred by the statute of limitations).

Res judicata or claim preclusion applies to this case, because the Court of Claims reached a final judgment on the merits in the earlier litigation. Nevada, 463 U.S. at 129. "A dismissal based on the statute of limitations in the Court of Claims is a decision on the merits and is res judicata in the [f]ederal district courts." Calhoun v. Lehman, 556 F. Supp. 67, 68 (D.D.C. 1982), remanded on other grounds, 725 F.2d 115 (D.C. Cir. 1983) (citations omitted); see also Carter v. Dep't of the Navy, 2006 WL 2471520 *2 n.5 (August 24, 2006) ("to the extent that the plaintiff has alleged claims in the present case concerning his 1978 military discharge that were or could have been raised in the Court of Federal Claims, the relitigation of such claims is barred by res judicata"). Indeed, in Smalls v. U.S, the D.C. Circuit explained that "for purposes of res judicata, 'the rules of finality . . . treat a dismissal on statute-of-limitations grounds . . . as a judgment on the merits.'" 471 F.3d 186, 192 (D.C. Cir. 2006) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (additional citations omitted). Accordingly, the D.C. Circuit upheld the dismissal of the plaintiff's Administrative Procedures Act claim. Id.

Furthermore, the AUC's claim for proper distribution shares a common nucleus of fact with the Plaintiffs' claim for an accounting. Apotex, Inc., 393 F.3d at 217 ("Whether two cases implicate the same cause of action turns on whether they share the same nucleus of facts."). In

the prior case, the AUC claimed that until August 27, 1964, "the United States had a continuing duty with respect to the tribal assets" and that the United States failed to partition the assets properly, in accordance with the UPA. Affiliated Ute Citizens, 1972 WL 5188, at *1. Decades later, the Plaintiffs allege, once again, that the United States was "charged with carrying out the trust obligations . . . until the UPA was implemented as intended by Congress." Pls.' Am. Compl. ¶ 109. Plaintiffs further allege that the United States "mismanaged and continue[d] to grossly mismanage[] trust funds . . . ." Pls.' Am. Compl. ¶ 110. The Plaintiffs' claim for an accounting is based on Federal Defendants' alleged failure to properly implement the UPA. Likewise, the AUC's claims alleged that the United States failed to distribute tribal assets in the manner proscribed by the UPA. Each claim shares the same motivation and origination: allegations that the United States did not properly implement the UPA. These claims should have been brought together, before the statute of limitations expired.

When the AUC sought a determination that the federal government failed to divide the Ute Tribe's assets properly, and that they received less tangible property than to which they were entitled,[9/] it might have also raised its claim that its members were entitled to an accounting in aid of a money judgment. But it did not. Instead, based on the accounting given to them by the government,[10/] the AUC sought a judgment that they received less than that to which they were entitled. Affiliated Ute Citizens, 1972 WL 5188 at *1. The Plaintiffs' claim for an accounting is res judicata because the AUC proceeded to seek a money judgment based on the Government's

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[9/] Affiliated Ute Citizens, 1972 WL 5188, at *1.

[10/] Defendants' Renewed Motion to Dismiss (Dkt. No. 41), Memorandum of Points and Authorities, p.9., Exhibit #1.

accounting of the tribal assets, without claiming that the Government had failed to fulfill its duties prior the Plaintiffs' termination.

The Plaintiffs are also in privity with AUC. Supra III.A.ii. The doctrine of privity encompasses all "those whose interests are represented by one with authority to do so." United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980). The AUC was authorized "to perform all the duties and functions of the mixed-blood members" under the UPA. Affiliated Ute Citizens, 1972 WL 5188 *1. The tribal property, prior to its distribution "belonged to the tribe as a community, and not to the members severally or as tenants in common." Gritts v. Fischer, 224 U.S. 640 (1912). The UPA anticipated "authorized representatives" for the mixed-blood Utes and the AUC served in this capacity, including its decision to delegate responsibility of the Ute Tribe's indivisible assets to the UDC. Because the AUC was the authorized representative of the mixed-blood Utes, the plaintiffs are in privity with them. Accordingly, the AUC's failure to bring a claim for an accounting in aid of a money judgment, at a time where it brought claims arising from the same nucleus of common facts as its claims that the United States failed to distribute tribal assets properly, binds the Plaintiffs and bars their claim for an accounting.

IV. Conclusion

Based on the aforementioned and the arguments contained in the Defendants' Renewed Motion to Dismiss and Reply in Support of Defendants' Motion to Dismiss, Defendants respectfully request that the Court dismiss the Plaintiffs' Amended Complaint.

Dated: January 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 2010, I electronically filed the foregoing document with the clerk of court by using the CM/ECF system which will send notice of electronic filings to the following:

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