UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiff,	)	Civil Action No. 02-2156 (RWR)
v.	)	
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' RENEWED MOTION TO DISMISS

Defendants Dirk Kempthorne, Secretary of the Interior, et al. ("Defendants") move to dismiss Plaintiffs Oranna Bumgarner Felter, et al.'s ("Plaintiffs") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs' claims must be dismissed, because the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) ("P.L. 108-108") does not revive long expired claims. Secondly, P.L. 108-108 does not apply, because Plaintiffs were provided with an accounting. Finally, Plaintiffs' claims do not fall within the ambit of P.L. 108-108.

Dated: August 31, 2007

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S RENEWED MOTION TO DISMISS

In this case, Plaintiffs Oranna Bumgarner Felter, et al. ("Plaintiffs") challenge the actions of Defendants Dirk Kempthorne, Secretary of the Interior, et al. ("Defendants") "in connection with the purported termination of the Indian status of the indigenous people of the [Uintah] Band" pursuant to the Ute Partition and Termination Act ("UPA"), 25 U.S.C. § 677 *et seq*. Upon examination of Plaintiffs' claims, both this Court and the D.C. Circuit concluded that "none of the acts underlying any of [Plaintiffs'] claims occurred within the six years prior to the filing of the [C]omplaint in 2002." *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007).

At this time, the case has been remanded for an examination of whether the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) ("P.L. 108-108") applies to any of Plaintiffs' claims. P.L. 108-108, however, fails to salvage Plaintiffs' time barred claims. Specifically, Plaintiffs' claims must be dismissed, because P.L. 108-108 does not revive long expired claims. In addition, P.L. 108-108 does not apply, because Plaintiffs were provided with an accounting. Furthermore, Plaintiffs' claims do not fall within the ambit of P.L. 108-108. Accordingly, Defendants move to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

I. Factual and Procedural Background[1/]

Enacted in 1954, the UPA provided for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between "mixed blood" and "full blood" members, and for the termination of federal supervision over property of the "mixed-

[1/] The relevant factual background was previously set forth in greater detail in Defendant's Motion to Dismiss (Dkt. No. 14).

blood" members of that tribe. 25 U.S.C. § 677.

On November 4, 2002, Plaintiffs filed a Complaint (Dkt. No. 1) for relief in this matter. On January 27, 2003, Plaintiffs filed an Amended Complaint (Dkt. No. 5) challenging the actions of federal officials "in connection with the purported termination of the Indian status of the indigenous people of the [Uintah] Band" pursuant to the UPA. Pls.' Am. Compl., ¶ 8. On May 20, 2003, Defendants moved to dismiss Plaintiffs' Amended Complaint on the basis that Plaintiffs' claims were barred by res judicata and collateral estoppel, exceeded the statute of limitations, and that no waiver of sovereign immunity existed in regard to such claims. After the parties completed briefing, the Court entered an Order (Dkt. No. 34) granting Defendants' Motion to Dismiss (Dkt. No. 14) on January 27, 2006. The Court held that:

> Even assuming that [P]laintiffs' claim did not accrue until the most recent act alleged in their [C]omplaint – the publication in the 1961 Federal Register of the list of terminated members (see Am. Compl. ¶ 14) – the six-year statute of limitations expired before [P]laintiffs filed this action.

Ct.'s Order of January 27, 2006, 12. The Court further concluded that neither the continuing violations doctrine nor the equitable tolling doctrine applied to Plaintiffs' claims. *Id*. at 13-16.

On March 30, 2006, Plaintiffs filed a Notice of Appeal in regard to the Court's Order dismissing their Complaint. Following the completion of briefing and argument regarding Plaintiffs' appeal, the D.C. Circuit entered an Order on January 19, 2007. The D.C. Circuit Court of Appeals stated that:

> In this case, as the district court found, none of the acts underlying any of [Plaintiffs'] claims occurred within the six years prior to the filing of the [C]omplaint in 2002. . . . The district court also correctly held that neither the continuing violation nor the equitable tolling doctrines provides a safe harbor for [Plaintiffs'] claims.

Felter, 473 F.3d at 1259; *see also id.* at 1256 ("we agree with the district court's reasoning . . .").

The D.C. Circuit, however, noted that Plaintiffs argued "that a recently-enacted statute preserve[d] [their] claims." *Id*. at 1260. After a discussion regarding the statute at issue, the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) ("P.L. 108-108"), the D.C. Circuit held that:

> Here, the government seeks dismissal of [Plaintiffs'] action under 28 U.S.C. § 2401(a), but in order to interpret that statute correctly, it must be determined whether it has been modified by P.L. 108-108. Because the district court had no opportunity to consider that question, and because the parties have not fully briefed the issue here, we remand to the district to court to determine whether P.L.108-108 applies to any of [Plaintiffs'] claims.

Id. at 1261.

P.L. 108-108, however, fails to salvage Plaintiffs' claims. Accordingly, Defendants file this Renewed Motion to Dismiss and the instant Memorandum in support thereof.

II. Statutory Background

1. 28 U.S.C. § 2401(a).

Section 2401(a) provides, in part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) . "Unlike general statutes of limitations, however, section 2401(a) is not merely a procedural requirement; it is a condition attached to the sovereign's consent and, like all waivers of sovereign immunity must be strictly construed." *Spannaus v. United States Dep't of Justice*, 643 F. Supp. 698, 700 (D.D.C. 1983), *aff'd*, 824 F.2d 52 (D.C. Cir. 1987), (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)). Furthermore, "exceptions to the limitations and conditions upon which the government consents to be sued are not to be implied." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (citing *Soriano*, 352 U.S. at 276). "Accordingly, strict compliance with this statute of

limitations is a jurisdictional prerequisite to suit that can neither be waived by the government, . . . nor relaxed by the courts for equitable considerations." *Spannaus*, 643 F. Supp. at 700 (citations omitted).

In deciding an issue of dismissal on the grounds of statute of limitations, the proper focus is on a "*first accrual*," the 28 U.S.C. § 2401(a) condition of the waiver of sovereign immunity (emphasis added). Accordingly, the relevant question is when did events first transpire entitling the claimant to bring suit alleging the breach. *Kosnik v. Peters*, 31 F. Supp. 2d 151, 156 (D.D.C. 1998) ("An action first accrues as soon as the plaintiff challenging the agency action can maintain a suit in court.") (citations omitted). It is when the operative facts exist and are not inherently unknowable that dictates first accrual. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1988). The rationale of this rule is that an Indian beneficiary, no less than anyone else, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered. *See, e.g., Littlewolf v. Hodel*, 681 F. Supp. 929, 942 (D.D.C. 1988).

2. P.L. 108-108.

"The Indian Trust Accounting Statute, with minor variations, has been enacted for fiscal years 1991 to 2006 as part of the annual appropriations statute for the Department of the Interior." *Wolfchild v. United States*, 77 Fed. Cl. 22, 25 n. 5 (Fed. Cl. 2007).[2/] P.L. 108-108

[2/] *See* Act of Nov. 5, 1990, Pub. L. No. 101-512, Tit. I, 104 Stat. 1930; Act of Nov. 13, 1991, Pub. L. No. 102-154, Tit. I, 105 Stat. 1004; Act of Oct. 5, 1992, Pub. L. No. 102-381, Tit. I, 106 Stat. 1389; Act of Nov. 11, 1993, Pub. L. No. 103-138, Tit. I, 107 Stat. 1391; Act of Sept. 30, 1994, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511; Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-175; Act of Sept. 30, 1996, Pub. L. No. 104-208, Tit. I, 110 Stat. 3009-197; Act of Nov. 14, 1997, Pub. L. No. 105-83, Tit. I, 111 Stat. 1559; Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, Tit. I, 113 Stat. 1501A-153; Act of Oct. 11, 2000, Pub. L. No. 106-291, Tit. I,

(fiscal year 2004 version) provides, in part, that:

> [N]otwithstanding 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 losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

117 Stat. at 1263.[3/]

III. Plaintiffs' Claims Must be Dismissed.

1. P.L. 108-108 Does Not Revive Plaintiffs' Long Expired Claims.

Plaintiffs' claims expired long ago. Because P.L. 108-108 does not revive such claims, they must be dismissed. The tolling provision of the Indian Trust Accounting Statute was examined extensively in *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998).[4/] In *Cobell*, the court concluded that the statute did not provide for the "revival of potentially long stale claims." *Id*. at 43; *see also Cobell v. Norton*, 260 F. Supp. 2d 98, 103 (D.D.C. 2003). In reaching this

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114 Stat. 939; Act of Nov. 5, 2001, Pub. L. No. 107-63, Tit. I, 115 Stat. 435; Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 236; Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263; Act of Dec. 8, 2004, Pub. L. No. 108-447, 118 Stat. 3039; Act of Aug. 2, 2005, Pub. L. No. 109-54, Tit. I, 119 Stat. 499.

[3/] As noted above, provisions similar to P.L. 108-108 have been in place since 1991. Accordingly, it is clear that Plaintiffs' attempt to portray this statute as "recently enacted" after the filing of their Complaint misses the mark.

[4/] The provision examined in *Cobell* is substantially similar to P.L. 108-108. It provides, in relevant part:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds.

Pub. L. No. 101-512, 104 Stat. 1915.

determination, the court examined both the plain language of the statute and the legislative history. *Cobell*, 30 F. Supp. 2d at 44. The *Cobell* court found that the statute "clearly stops the clock from commencing to run on the plaintiffs' viable claims as of October 1, 1990. But nothing in this legislative history shows that the 'tolling provision' was ever intended to do more than its name suggests." *Id*. at 43-44 (examining H.R.Rep. No. 103-158, 103rd Cong., 1st Sess. 57 (1993) and finding that "[n]othing in this statement of legislative intent supports an argument that the 'rights' being protected include stale causes of action"). The court explained "[i]n other words, the provision only tolls a clock that has not commenced running. It cannot revive claims for which the clock stopped running long ago." *Id*. at 44. Consequently, the *Cobell* court noted that "any claims that accrued before October 1, 1984, would have been time barred before the enactment of the tolling provision in the 1990 appropriations act." *Id*. Thus, such claims are not viable.[5/]

Additional authority also supports the finding that P.L. 108-108 does not revive Plaintiffs' long expired claims. As a general rule, "[s]ubsequent extensions of a limitations period will not revive barred claims in the absence of a clear expression of contrary legislative intent." *Resolution Trust Corp. v. Seale*, 13 F.3d 850, 853 (5th Cir. 1994). *See also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) ("[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."); *Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir.

[5/] *But see Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (the Indian Trust Accounting Statute eliminated barriers to plaintiffs' claims, regardless of when such claims accrued, because plaintiffs had not previously received an accounting).

1994) ("[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme.") (quoted in *Hughes Aircraft*, 520 U.S. at 950); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990) (new statute extending a limitations period presumptively would not apply to a claim that became barred under the old law before the new one was enacted) (quoting *United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986)).

In this case, Plaintiffs' claims expired long before October 1, 1984. As determined by this Court and the D.C. Circuit, "the alleged misapplication of the UPA and the resulting termination of trust status and asset distribution occurred in the 1950s and 1960s." *Felter*, 473 F.3d at 1259; *see also* Ct.'s Order of January 27, 2006, 12. Plaintiffs' "effort to recharacterize [their] claim by asserting that Interior's failure to rectify its past illegal termination constitutes a current breach of trust cannot save [their] case." *Felter*, 473 F.3d at 1259. "Any such claim accrued in 1961 when Interior repudiated its trust relationship with [Plaintiffs] and the other 'mixed blood' Utes, regardless of whether that repudiation conformed to Interior's statutory and fiduciary obligations." *Id*. (citing *Hopland Band of Pomo Indians v. United States*, 855 F.3d 1573, 1578-79 (Fed. Cir. 1988)) (emphasis added); *see also* Ct.'s Order of January 27, 2006, 12 (statute of limitations has expired even assuming Plaintiffs' claims did not begin to accrue until the list of terminated members was published in the Federal Register in 1961).[6/]

[6/] The Court's ruling reflects the allegation contained in paragraph 58 of Plaintiffs' Complaint that the "Final Roll of Mixedbloods" was published in the Federal Register on August 27, 1961. In actuality, the date of publication was April 5, 1956, 21 Fed. Reg. 2208. On August 26, 1961, the Termination Proclamation was published in the Federal Register. 26 Fed. Reg. 8042 (1961).

In addition to the findings made in this matter, previous rulings also confirm that Plaintiffs' claims are barred by the statute of limitations. In *Affliated Ute Citizens v. United States*, the plaintiff, representing the "mixed bloods," brought claims regarding the pro-rata share of tangible tribal property (land, cash, and personal property) and intangible tribal property (oil, gas and mineral rights, and unadjudicated and unliquidated claims against the United States). 199 Ct. Cl. 1004 (1972). The Court of Claims held that such claims were barred by the statute of limitations, stating in regard to the tangible tribal property:

> The court holds that plaintiffs' claim, first filed here on March 19, 1969, is barred by the six-year statute of limitations. . . . These tangible assets were all divided and distributed by August 27, 1961, when the Secretary of the Interior issued the termination proclamation.

Id. In regard to the intangible tribal property, the court held that such claims were also barred, because those "rights were distributed, before August 1961, in the form of shares in the [Ute Distribution Corporation." *Id*. In a later decision, the court found that the plaintiffs' claims regarding water, hunting, fishing, future timber growth rights were also time-barred. 215 Ct. Cl. 935 (1977).

As detailed above, P.L. 108-108 provides no grounds to displace the running of Section 2401(a). Accordingly, it is clear that Plaintiffs' Complaint is time barred and must be dismissed for lack of subject-matter jurisdiction.

2. P.L. 108-108 Does Not Apply, Because Plaintiffs Were Provided With An Accounting.

P.L. 108-108 states that the statute of limitations is tolled regarding certain claims "until the affected tribe or individual Indian has been furnished with an accounting of such funds." 117 Stat. at 1263. Because Plaintiffs were provided with an accounting in connection with previous

litigation, P.L. 108-108 fails to salvage Plaintiffs' claims.

As Defendants set forth in their initial Motion to Dismiss, considerable litigation has taken place regarding the UPA. Defs.' Mot. 5, 8-19 (discussing *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp*., 507 U.S. 1042 (1993); *Affiliated Ute Citizens*, 199 Ct.Cl. 1004; *Affiliated Ute Citizens*, 215 Ct. Cl. 935 (1977); *United States v. Murdock*, 132 F.3d 534 (10th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *Ute Indian Tribe v. Probst*, 428 F.2d 491 (10th Cir. 1970) (on rehearing), *cert. denied*, 400 U.S. 926). In *Affliated Ute Citizens v. United States*, an accounting was completed regarding the division of judgment funds and the property of the Ute Indian Tribe of the Uintah and Reservation subject to equitable and practicable distribution pursuant to the UPA. Defs.' Ex. 1 (Affidavit of James J. Clear); Defs.' Ex. 2 (Affidavit of Stewart V. Thompson).[7] Defendants' Exhibit 1 provided information concerning the amounts of the various judgment funds awarded to the Ute Indian Tribe, attorneys fees, and offsets. Defs.' Ex. 1, 109. It also details the division of such funds between the Southern Ute Tribe, Ute Mountain Tribe, and the Uintah and Ouray Tribe. *Id*. In regard to the Uintah and Ouray Tribe, Defendants' Exhibit 1 further showed the amounts received by the "full-blood" members and the "mixed-blood" members. *Id*. It also tracks where such funds are deposited or paid. *Id*. Defendants' Exhibit 2 explained that the property subject to equitable and practicable distribution "was either distributed in kind to the Mixed-Blood and Full-Blood groups with appropriate cash adjustments to reflect any imbalance in value of the distributed property, or it

[7] Defendants' Exhibit 1 and 2 were originally filed as attachments to Defendant's Brief in Support of its Motion for Summary Judgment in *Affliated Ute Citizens v. United States*, 199 Ct. Cl. 1004 (1972).

was sold and the proceeds shared by the two groups." Defs.' Ex. 2 at 9. "In each instance the partition percentage agreed to by the two groups was used." *Id*. Because an accounting has been provided to Plaintiffs, P.L. 108-108 has no application to this action.

3. Plaintiffs' Claims Do Not Fall Within the Ambit of P.L. 108-108.

As detailed above, P.L. 108-108 does not revive Plaintiffs' long expired claims. In addition, P.L. 108-108 has no applicability to this case because Plaintiffs were provided with an accounting. Furthermore, Plaintiffs' allegations do not fall within the sorts of claims salvaged by P.L. 108-108.

In *Shoshone Indian Tribe of Wind River Reservation*, the court provided a detailed analysis of the Indian Trust Accounting Statute and concluded that the statute only applied to "trust mismanagement and specific kinds of losses." *Wolfchild v. United States*, 62 Fed. Cl. 521, 548 (Fed. Cl. 2004) (discussing *Shoshone*, 364 F.3d at 1351). For example, the *Shoshone* court concluded that the statute did not apply to claims involving trust assets. 364 F.3d at 1350 ("The Act covers claims concerning 'losses to . . . trust *funds*' rather than losses to mineral trust *assets*.") (emphasis in original). *See also Wolfchild*, 62 Fed. Cl. at 548 (the Indian Trust Accounting Statute did not apply to the plaintiffs' breach of contract claims); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (Fed. Cl. 2006) (because the case dealt with the alleged mismanagement of trust assets, the Indian Trust Accounting Statute did not apply); *Western Shoshone Nat. Council v. United States*, 73 Fed. Cl. 59, 70 (Fed. Cl. 2006) (same). Indeed, when a plaintiff's right to sue the United States is made subject to a statute of limitations, "the limitations provision constitutes a condition of the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). In such cases, "the Government's consent to be sued

must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

Plaintiffs' claims do not fall within the ambit of P.L. 108-108. *See, e.g.*, Pls.' Am. Compl., ¶¶ 56-68 (seeking declaratory relief alleging that Defendants violated the "1937 IRA Constitution and By-laws"); ¶¶ 69-78 (seeking declaratory relief alleging that Defendants have failed to acknowledge that Plaintiffs are full members of the Uintah Band); ¶¶ 79-83 (seeking declaratory relief on behalf of certain Plaintiffs who allegedly should have been enrolled as members of the Uintah Band); ¶¶ 84-92 (challenging, pursuant to the APA, the actions of federal officials "in connection with the purported termination of the Indian status of the 'mixed blood' people of the [Uintah] Band . . . "); ¶¶ 93-97 (seeking damages for an alleged breach of the UPA); ¶¶ 98-101 (seeking damages for an alleged violation of Plaintiffs' due process rights); ¶¶ 102-104 (seeking damages for alleged breaches of federal trust obligations regarding the distribution of assets and termination of the Indian status of the "mixed blood" people of the Uintah Band); ¶¶ 105-112 (seeking an accounting for funds allegedly set aside for them under the "share and share alike" provision of the Act of Congress of August 21, 1951 and an accounting of all sums "classified as 'offsets'" and charged against Plaintiffs when they "were duly enrolled members of the [Uintah] Band."). None of Plaintiffs' claims fit within the scope of P.L. 108-108, because the provisions setting aside the statute of limitations until an accounting is provided apply only to cases of trust fund mismanagement, not improper termination of federally recognized Indian Status, asset mismanagement, or demands for an accounting. Because P.L.

108-108 does not apply to Plaintiffs' claims, they must be dismissed.[8/]

IV. Conclusion.

Based on the aforementioned, Defendants respectfully request that the Court grant Defendants' Renewed Motion to Dismiss and dismiss Plaintiffs' Amended Complaint.

Dated: August 31, 2007

Respectfully submitted,

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[8/] In the event that the Court concludes that P.L. 108-108 does salvage Plaintiffs' claims, Defendants contend that such claims are barred by res judicata, collateral estoppel, and lack of the requisite waiver of sovereign immunity. Def.'s Mot. to Dismiss, 8-19, 21-18; Def.'s Reply, 5-9.

CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2007, I electronically transmitted the foregoing document to the Clerk of the Court, using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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