UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:02 CV 2156 (RCL)
GALE NORTON, Secretary of the Interior, et al.	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants Gale A. Norton, Secretary of the Interior; Aurene M. Martin, Assistant Secretary - Indian Affairs; Wayne Nordwall, Director, Bureau of Indian Affairs, Southwestern Regional Office; and Chester Mills, Superintendent, Bureau of Indian Affairs, Uinta and Ouray Agency, respectfully move to dismiss the Amended Complaint herein, pursuant to Rule 12 (b) (1) and (6), Federal Rules of Civil Procedure.

Defendants' memorandum of points and authorities in support of this motion follows below. A separate proposed order is being filed at the same time.

MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants are moving to dismiss this case on four grounds. Plaintiffs have failed not only to establish the subject matter jurisdiction of this Court and but also to identify an operative waiver of the government's sovereign immunity. Furthermore, the action is completely barred by the statute of limitations, 25 U.S.C. § 2401, and all claims are barred by res judicata and collateral estoppel.

INTRODUCTION

This case involves the Ute Partition and Termination Act, enacted August 27, 1954, 25 U.S.C. §§ 677-677aa ("the UPA" or "the Act"). The UPA provides for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah ("the Tribe"), between those members who remained members, which the UPA referred to as "full-blood" members (or "full-bloods") and those 490 members whom the UPA terminated from federal supervision and trust relationship and referred to as "mixed-bloods." 25 U.S.C. § 677.[1/]

Plaintiffs allege that they are individuals whose status derives from their relationship as "one of the 490" "mixed-blood" members of the "Uinta Band," or as a descendant from a person classified by the Federal Defendants as among the "originally labeled 490," as well as an undetermined number of persons "who were not denominated as 490 'mixed-blood' members" of the Uintah Band, but who were born prior to the publication of the termination proclamation in 1961. Plaintiff' Amended Complaint ("AC"), ¶¶ 16-18. Plaintiffs allege that attempts to

---

[1/] "The Act was one of a series of termination statutes enacted primarily in the years 1954-1956." Affiliated Ute Citizens v. United States, 406 U.S. 128, 132, n.1 (1972).

terminate their status as "Indians" generally, and "mixed-blood" members of Uinta Band within the Ute Tribe specifically, were defective and they therefore claim to retain their status as Indians and as members of the Uintah Band to this day. Id., ¶ 3.

In this case Plaintiffs challenge defendants' implementation of the UPA, including the constitutionality of its application. There are even suggestions in the Amended Complaint that plaintiffs may be challenging the constitutionality of the UPA.

HISTORICAL AND STATUTORY BACKGROUND OF THE UTE PARTITION ACT

In 1954, Congress enacted the UPA, in which provision was made for the division of tribal assets between the "full-blood" and "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation of Utah, and for the termination of Federal supervision over the property of the "mixed-blood" individuals. 25 U.S.C. § 677; Affiliated Ute Citizens v. United States, 406 U.S. 128, 133-34 (1972). The Supreme Court, in previously deciding the central and controlling legal issues that plaintiffs seek to litigate in the instant case, has specifically found that the Act was the result of proposals initiated by the Tribe itself, and that the Tribe helped draft the Act. Id., at 143.

The UPA provided for the pro-rata division of tribal assets between the "full-blood" and "mixed-blood" members of the Tribe, and for termination of federal guardianship, and supervision of the"mixed-blood"s and their property. The Act provided for the publication by the Secretary of the Interior of final membership rolls identifying the "full-blood" and"mixed-blood" members of the Tribe living on August 27, 1954. 25 U.S.C. § 677g.

"Full-blood" is defined as:

> . . . a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become

mixed-bloods by choice. . . .

25 U.S.C. § 677 a(b).

"Mixed-blood" is defined as:

> . . . a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice. . . .

25 U.S.C. § 67a7a.

The rolls of "mixed-blood"s, and "full-bloods" were published in the Salt Lake Tribune February 2, 1955; and the Secretary published the final rolls in the Federal Register on April 5, 1956, 21 Fed. Reg. 2208-2220. The final rolls listed 490 "mixed-blood" members of the Tribe, and 1,314 "full-blood" members of the Tribe. The UPA provides that, effective on the date of such publication, the Ute Tribe "shall thereafter consist exclusively of full-blood members" and that "mixed-blood members shall have no interest therein. . . ." 25 U.S.C. § 677d. Thereafter the Tribe was to determine its own requirements for membership through its constitution and bylaws. *Id.* Thus, the blood quantum requirement for tribal membership–including band membership is determined by the Tribe through constitutional provisions, or through tribal ordinances.

As part of the statutory termination process, the UPA required that the assets of the Tribe be divided pro-rata between the "mixed-blood" group, and the Tribe based upon the relative number of persons comprising the final membership roll of each group. 25 U.S.C. § 677i. Those assets not susceptible to equitable and practicable distribution remained in trust for the Tribe, and were to be managed jointly by the Tribal Business Committee, and the authorized representative of the "mixed-blood" group, which is the Ute Distribution Corporation (UDC).

25 U.S.C. §§ 677i, 6771; Affiliated Ute Citizens v. United States, 406 U.S. at 133-35, 141-44. At the time of the division of assets, the "estimated value of the cash, accounts receivable, and land owned by the tribe was $20,702,885." The "tribe possessed additional assets consisting of oil, gas and mineral rights . . . , and unadjudicated and unliquidated claims against the United States." Id., at 406 U.S. at 134. The final distribution ratio meant that once the termination process was complete, the Tribe would retain approximately 72.8% of the pre-termination assets, and 27.2% would be divided to the "mixed-blood" group. *Id*., at 135.

The UPA provides for removal of federal restrictions on the "property of each individual "mixed-blood" member of the tribe," and requires that, on the removal of such restrictions, the Secretary "publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated." 25 U.S.C. § 677v. The result of such termination is clearly spelled out:

> Thereafter such individual shall not be entitled to any of the services performed for Indians because, of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

Id. (Emphasis added.)

On August 26, 1961, the Secretary published in the Federal Register the required proclamation, entitled "Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, Termination of Federal Supervision over the Affairs of the Individual mixed-blood Members" ("Termination Proclamation"). 26 Fed. Reg. 8042.

HISTORY OF PRIOR LITIGATION ARISING UNDER THE UPA

After the enactment of the UPA, considerable litigation was brought raising different claims under the Act. Important decisions have been handed down by the Supreme Court, as well as numerous ones from courts of appeal and the district court in Utah addressing and deciding issues pertinent to all the claims plaintiffs allege here. These decisions, discussed in full in Part I of the Argument in this memorandum, we will submit, show that all these issues, decided previously against the plaintiffs with whom these plaintiffs are in privity, fully dispose of this case. Among the many others too numerous to discuss, these primary cases and the pages of discussion about them, below, are:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (p. 10, infra);

Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992), cert. denied, Murdock v. Ute Distribution Corp., 507 U.S. 1042 (1993) (p. 14, infra);

Affiliated Ute Citizens v. United States, 199 Ct.Cl. 1004 (Ct.Cl. 1972) (p. 17, infra);

Affiliated Ute Citizens v. United States, 215 Ct. Cl. 935, 936-37 (1977) (p. 19, infra);

United States v. Murdock, 132 F.3d 534, 541-42 (10th Cir. 1997), cert. denied, 525 U.S. 810 (1998) (p. 14, note 3, infra); and

Ute Indian Tribe v. Probst, 428 F.2d 491, 498-99 (10th Cir. 1970) (on rehearing), cert. denied, 400 U.S. 926 (p. 14, note 3 infra).

THE NATURE OF PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs sue for redress of alleged wrongs defendants have committed against them resulting in plaintiffs' "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 ('Uninta Band'), a separate and independent Band of Ute Indians" of the Uninta and Ouray Reservations, Utah. AC, ¶ 1. Plaintiffs also claim defendants wronged them that resulted in "the loss of their ownership and interest in federal trust property" that defendants should have retained in trust until "their special status as 'Indians' and members of the Unita Band was 'terminated' in accordance with laws passed by Congress and the intent behind the various 'termination'

laws. . . ." Id., ¶ 2.

The redress plaintiffs seek takes many forms and is expressed in eight separate causes of action:

1. Plaintiffs seek declaratory judgments that defendants incorrectly implemented and executed the UPA towards plaintiffs thereby rendering their termination void and that they remain fully entitled to continued federal Indian programs and benefits. Id. ¶ 3 and Prayer First Count, p. 61.

2. Plaintiffs ask for a declaration that they are entitled to restoration of their status and privileges, and immunities and to their rights to land, water rights and other valuable property of the Uinta Band. Id., Prayer in Second Count, pp. 61-62.

3. Plaintiffs who claim they were born before and living at the time of the 1961 termination proclamation required by the UPA but who were not on the final roll of the 490 "mixed-bloods" seek a declaration that they "retained their status at all times in the un-extinguished tribal sovereign entity knows as the 'Uinta Band' pursuant to custom and tribal law mandating that a child born of parents who are members of a tribe retain their tribal identity at

the time they are born" and that their membership status "never ceased to exist." Id., Third Count, p. 62.

4. All the plaintiffs seek a declaration that the past and current actions of federal officials and employees in "the purported" termination of the trust status of the lands and the Indian status of the mixed-blood people" under the UPA were and are contrary to Acts of Congress, Executive Orders and the federally-approved Constitution and By-laws of the Ute Indian Tribe of the Uinta and Ouray Reservation and continue to deprive plaintiffs of their "aboriginal status" and federal rights. Id., Fourth Count, p. 62-63.

5. Plaintiffs also ask for a finding that defendants' conduct and failure to follow unspecified federal statutes has caused each plaintiff damages in the amount of $10,000, plus interests and costs. Id., Fifth Count, p. 63.

6. Plaintiffs also seek a ruling that the allegedly illegal extinguishment of their tribal status violates the Fifth Amendment of the U.S. Constitution entitling them to submit to defendants damages – in an unspecified amount – for their claimed loss of their continuing rights in the Tribe from date of judgment back until the date the UPA became effective. Id., Sixth Count, p. 63.

7. Plaintiffs seek damages of $3,000,000 per plaintiff for breach of trust in terminating the "mixed bloods." Id., Seventh Count, pp. 63-64.

8. Finally, plaintiffs seek an accounting of all proceeds of money due and owing them and 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' by the defendant [sic] and charged against" when plaintiffs "were duly enrolled members of the Uinta Band. Id., Eighth

Count, p. 64. (Emphasis added.)

ISSUES PRESENTED

1. Are plaintiffs barred from asserting these claims by the doctrine of res judicata or by issue preclusion?

2. Do plaintiffs have standing to litigate the claims they have asserted?

3. Does the Court have subject matter jurisdiction over the claims herein alleged?

4. Are the claims barred by the statute of limitations, 25 U.S.C. § 2401?

5. Should this case be transferred to the U.S. Court of Federal Claims pursuant to 28 U.S.C. § 1631?

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL BECAUSE THEY HAVE ALL BEEN DECIDED PREVIOUSLY AGAINST PLAINTIFFS OR AGAINST THOSE WITH WHOM ALL THESE PLAINTIFFS ARE IN PRIVITY.

The issues raised in the Amended Complaint have previously been the subject of litigation and decisions against the "mixed-blood" individuals on numerous occasions. The primary prior decisions, discussed below, involve the very same transactions and issues raised in the Amended Complaint here. As will be shown, these cases preclude the relitigation of those issues here.

The principles of res judicata as needed to determine the instant case are beyond debate. The Supreme Court has enunciated the principals on numerous occasions, as when it wrote:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are

> thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

C.I.R. v. Sunnen, 333 U.S. 591, 597 (1948).

The distinction between res judicata and collateral estoppel has been explained by the Court as follows:

> The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. [footnote omitted.] Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

It is also clear that where, as in one the most relevant prior decisions in connection with the case at bar, a prior decision dismisses a cause of action as being barred by the statute of limitations, particularly a federal statute, it is an adjudication on the merits. Rose v. Town of Harwich, 778 F.2d 77, 80 (1st Cir. 1985); cert. denied , 476 U.S. 1159 (1986); PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2nd Cir.), cert. denied, 464 U.S. 936 (1983); Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989); Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc., 880 F.2d 818 (5th Cir. 1989); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981); Myers v. Bull, 599 F.2d 863 (8th Cir.); cert. denied, 444 U.S. 901 (1979); Murphy v. Klein Tools, Inc., 935 F.2d 1127 (10th Cir.), cert. denied, 502 U.S. 952 (1991).

It will be evident by reviewing the prior decisions immediately below that the instant

case is barred by the foregoing principles of res judicata and collateral estoppel.

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)

The landmark case among these prior suits is the Supreme Court decision in 1972 in Affiliated Ute Citizens, 406 U.S. at 128, supra. The AUC was organized as an unincorporated association in 1956 pursuant to section 6 of the UPA, 25 U.S.C. § 677e "to take any action that is required by [the UPA] to be taken by the "mixed-blood" members as a group." Affiliated Utes Citizens, 406 U.S. at 135-36. These members thereby empowered AUC's board of directors to delegate to corporations organized under the UPA "such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized." Id. (quoting from the AUC Constitution, Article V, § 1(b)).

The Ute Distribution Corporation ("the UDC") was incorporated in 1958 with the stated purpose

> to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all 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 to which the mixed-blood members of the said tribe . . . are now or may hereafter become entitled . . . and to receive the net proceeds therefrom and to distribute the same to the stockholders of this corporation. . . .

Affiliated Ute Citizens, 406 U.S. at 136. As the Court then found, the formation of the UDC was part of the plan formulated by the "mixed-bloods" for the distribution of assets to the individual members of their group. The AUC's board of directors with a quorum present and voting, approved the articles of UDC, which the Secretary of the Interior also approved. In January 1959 the AUC directors by a unanimous vote (5-0) irrevocably delegated authority to UDC [and two

other related corporations of the "mixed-bloods"[2/]] to accomplish the purposes for which the UDC was formed. Id. Each "mixed-blood" was given 10 shares of the UDC capital stock, alienable only under specified statutory conditions "for the purpose of distributing to the stockholders in the future their respective shares in the proceeds or income from all claims and assets in which the mixed-blood members . . . have or will have an interest under the provisions of [the UPA]." Id., at 136, 138.

Against this statutory scheme and Indian organization, two cases from the district of Utah and the Tenth Circuit, Affiliated Ute Citizens v. United States, 431 F.2d 1349 (10th Cir. 1970) ("Affiliated Ute") and Reyos, et al., v. First Security Bank of Utah N.A., 431 F.2d 1337 (10th Cir. 1970) ("Reyos"), were merged on certiorari in the Supreme Court in its 1972 Affiliated Ute Citizens case.

The AUC brought Affiliated Ute on its own behalf and as representative of its 490 "mixed-blood" members against the United States seeking (1) pro rata distribution to the individual members of the 27.16186% of the mineral estate underlying the reservation, and (2) a determination that AUC and not UDC is entitled to manage that property jointly with the business committee of the "full-bloods". The United States successfully moved to dismiss the case in the district court and the Tenth Circuit affirmed. 431 F.2d at 1349.

The Reyos case was brought by Anita Reyos and 84 other "mixed-bloods" against the First Security Bank of Utah, certain bank employees, and certain automobile dealers, charging violations of the federal securities laws in connection with the sales by plaintiffs of their shares

---

[2/]The Antelope-Sheep Range Company and the Rock Creek Cattle Range Company. See § 13 of the Act, 25 U.S.C. § 677l(3)

in UDC which, as stated, was created to manage interests in tribal assets not susceptible to equitable and practicable distribution. By subsequent amendment to the complaint the United States was added as a party defendant. Although the district court ruled against the United States, the Tenth Circuit reversed and remanded. 431 F.2d 1337 (1970).

The Supreme Court consolidated the two different cases because their roots were found in the formation of the UDC. 406 U.S. at 141. The Court noted that the UPA "was the result of proposals initiated by the tribe itself" and "[t]he tribe also drafted the Act." Id., at 143. The Court further found that the "mixed blood" members themselves formed the AUC in accordance with § 6 of the Act and that the "AUC itself created and breathed life and vigor into UDC." Affiliated Ute Citizens, 406 U.S. at 143-44. The Court further stated:

> All this was within Congress' power. United States v. Waller, 243 U.S. 452, 246 . . . (1917); Tiger v. Western Investment Co., 221 U.S. 286 . . . (1911). UDC's legitimacy was further recognized by its anticipatory exemption from federal income tax, under the Act of August 2, 1956, § 3, 70 Stat. 936; by the freeing of its shares from mortgage, levy, attachment, and the like, so long as the shares remained in the ownership of the original shareholder or his heirs or legatees, under the Act of September 25, 1962, 76 Stat. 597, 598; and by the inclusion of UDC by name as an entity to receive the trust fund resulting from the judgment against the United States in favor of the Confederated Bands of Ute Indians, under the Act of August 1, 1967, 81 Stat. 164, as amended, 82 Stat. 171, 25 U.S.C. s 676a.

Id., at 144. It then held "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights [of the "mixed-bloods"] with the committee of full-bloods." Id.

This holding of the Affiliated Ute case, having been brought by the AUC as legal representative of all the "mixed-bloods" (id., at 139), is binding on all the "mixed-bloods" (and any plaintiffs who claim from or through any of them). It stands for the continuing proposition that none of the plaintiffs here has an individual interest to distribution of any of property

interests jointly managed by UDC and the Ute Tribe since 1961.

The Reyos case dealt with whether the United States had authority to restrict the sale of UDC stock subsequent to the effective date of the termination proclamation, which was August 27, 1961 at 12 midnight. Each of the 490 "mixed-blood" names listed on the final roll of "mixed-bloods" had received 10 shares of stock in the UDC. Such shares represented the right to receive net proceeds in the nature of money from the assets that were non-distributable under the Act. The Act imposed, for a brief period of time, limitations upon the ability of the individual mixed- blood to dispose of his or her interest in tribal assets. Included in the gamut of tribal assets is the UDC stock issued to each "mixed-blood." Any "mixed-blood" could dispose of his interest in tribal assets prior to the effective date of termination of federal supervision, subject to Secretarial approval. 25 U.S.C. S 677n. There was an additional limitation imposed upon each "mixed-blood" that lasted for three years following termination of federal supervision. Id.

The Reyos case dealt with sales of UDC stock during this latter three year period of time and the issue was whether the Secretary did have or did not have any trust responsibility over such shares following the termination proclamation of 1961. The Supreme Court answered in the negative, by holding:

> The proclamation of August 26, 1961, was contemplated by Section 23 of the Act, 25 U.S.C.S. S 677v. To the extent the nature of the property so permitted, this marked the fulfillment of the purpose set forth in § 1 of the Act, 25 U.S.C.S. S 677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods. It stated specifically that the mixed-blood thereupon "shall not be entitled to any of the services performed for Indians because of his status as an Indian." This broad reference obviously includes the shares of UDC . . . . The UDC stock itself, however, was free of restriction; as to it, federal termination was complete. Each mixed-blood could sell his shares as he wished and to whom he pleased, subject thereafter only to the restrictions imposed by UDC's own articles. There was no remaining governmental authority over those shares. And without such authority there can be no liability on the

United States for failure to restrain a sale.

406 U.S. at 149-50. (Emphasis added.)

In Affiliated Ute Citizens, the Supreme Court upheld the constitutionality of the UPA.[3/] Id., at 144. The Supreme Court further held that the authority and therefore the responsibility of the Secretary of the Interior over portion of the tribal assets the UPA provided for the "mixed-blood"individuals pursuant to the termination process ended on the effective date of the termination proclamation, which was August 27, 1961, at 12 midnight. Id., at 149-50. The Court also held that all federal executive action necessary to effect fully and finally all the requirements of the termination of the "mixed-bloods" and of the UPA has been completed. Id. The Court further determined that the UDC is the authorized representative of the "mixed-bloods" as regards those assets not susceptible to equitable and practicable. Id.

Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992)

It has also been previously held that the two holdings in Affiliated Ute Citizens are binding upon the all "mixed-bloods" and their successors. In Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992), cert. denied, Murdock v. Ute Distribution Corp., 507 U.S. 1042 (1993), the AUC, one of its members and the son of a member brought an action seeking a determination that the AUC represented the "mixed-blood" Utes – those persons terminated under the Act – for purposes of managing indivisible tribal assets, rather than the UDC. 975 F.2d at 684.

[3/]The constitutionality of the UPA has also been upheld against allegations that it was racially discriminatory and failed to afford due process to the "mixed-blood" individuals. United States v. Murdock, 132 F.3d 534, 541-42 (10th Cir. 1997), cert. denied, 525 U.S. 810 (1998). It was also upheld against allegations of lack of due process in Ute Indian Tribe v. Probst, 428 F.2d 491, 498-99 (10th Cir. 1970) (on rehearing), cert. denied, 400 U.S. 926.

In denying the Murdock plaintiffs any relief, the Tenth Circuit established in 1992 that the very claims now before this Court are barred by res judicata. That court held:

> We conclude that the Supreme Court's opinion in Affiliated Ute Citizen v. United States, 406 U.S. 128 . . . precludes the appellants from relitigating this issue. Accordingly, we affirm the district court's grant of summary judgment in favor of the Ute Distribution Corporation and its co-appellee.

975 F.2d at 684. As its basis for this holding, the court explained:

> For almost twenty-five years, the AUC has sought to challenge the legitimacy of UDC's status as authorized representative of the mixed-blood Utes for purposes of managing their portion of the indivisible tribal assets. In a 1972 opinion, the Supreme Court concluded that the AUC had permanently delegated that authority to the UDC and stated, "Clearly it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods."

975 F.2d at 685.

> The UDC and the Secretary of the Interior argued that collateral estoppel now prevents the appellants from relitigating this issue. The district court agreed . . . and dismissed the UDC and the Secretary of the Interior from the suit.

Id. (Emphasis added.) The Tenth Circuit observed that AUC had sponsored both the Affiliated Ute and the Reyos cases that were consolidated on petition for certiorari by the Supreme Court in Affiliated Ute Citizens v. United States, supra, 406 U.S. at 128. 975 F.2d at 686.

The Tenth Circuit then considered the issue of collateral estoppel:

> Collateral Estoppel, also known as issue preclusion, refers "to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 . . . (1985). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Allen v. McCurry, 449 U.S. 90, 94 (1980).

975 F.2d at 686.

In summary, Murdock determined that the question whether the AUC or the UDC represented the "mixed-bloods" as regards non-divisible assets was the identical issue decided

by the Supreme Court in Affiliated Ute Citizens. 975 F.2d at 687. In Murdock, the Tenth Circuit held that the Supreme Court made a final adjudication on the merits in Affiliated Ute Citizens with regard to the Reyos portion of that case that the rights to the indivisible assets of the "mixed-blood" individuals had been assigned to the UDC and were no longer held in trust by the United States for the "mixed-blood" individuals. 975 F.2d at 688. The Tenth Circuit held, too, that the individual plaintiff-appellants in Murdock were in privity with the AUC, and it also ruled that the Murdock plaintiffs were in privity with the Affiliated Ute plaintiffs and the Reyos plaintiffs who were parties in Affiliated Ute Citizens, supra, 406 U.S. at 128. Murdock, 975 F.2d at 688-89. The Tenth Circuit further determined all interested parties, including the Murdock plaintiffs, had previously had a full and fair opportunity for hearing in the proceedings leading to the Supreme Court in Affiliated Ute Citizens to litigate the issue of representation over the non-divisible assets of the Ute Tribe. Murdock, 975 F.2d at 689-90.

The Tenth Circuit further emphasized the preclusive effect of the Supreme Court's disposition of the matter by saying:

> Under these circumstances, the AUC cannot now complain that it did not have a full and fair opportunity to litigate the issue. It raised the issue in its initial complaint in one of the cases. It asked the Supreme Court to decide the issue in its brief and it argued its position extensively. The Supreme Court did decide the issue. . . . We hold that the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets.

975 F.2d at 690. The court of appeals also extended the res judicata effect of the Supreme Court's decision on one of the Murdock plaintiffs who was the son of a "mixed-blood":

> to the extent that he [Mac Eugene Murdock, son of a mixed-blood] would not benefit from a declaratory judgment that the AUC is the mixed-blood Ute's authorized representative for purposes of the indivisible tribal assets, he has no standing to argue the issue. To the extent that he would benefit from such a

> judgment, the same reasoning regarding privity that we apply to his father also applies to him.

975 F.2d at 689, n6.

Thus, all parts of the consolidated Affiliated Utes Citizens case are binding on all members of the AUC and their descendants.

This confirmation of the preclusive effect of res judicata and collateral estoppel by the Tenth Circuit, while not binding on the District Court for the District of Columbia in the instant case as a general proposition, is binding on the parties now before this Court because either they or their legal representatives had bound them to the result in Affiliated Utes Citizens, 406 U.S. at 128.

Affiliated Ute Citizens v. United States, 199 Ct. Cl. 1004 (1972)

Another binding decision in litigation brought by the AUC as representative of the "mixed-bloods" in Affiliated Ute Citizens V. United States, 199 Ct. Cl. at 1004, involved claims to a pro-rata share of both tangible tribal property (land, cash, and personal property), and intangible property (oil, gas and mineral rights, and unadjudicated and unliquidated claims against the United States). The Court of Claims did not reach the merits but held both property claims, initially filed in 1969, were barred by the statute of limitations after August 27, 1967, six years after the issuance of the termination proclamation.

As regards claims for tangible tribal property:

> The court holds that plaintiffs' claim, first filed here on March 14, 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.

199 Ct. Cl. at 1004. As regards claims for intangible tribal property the "court likewise holds the

claim barred by limitations. These rights were distributed, before August 1961, in the form of shares in the [UDC]." Id., at 1005.

This ruling is also binding on these plaintiffs because of their privity with and membership in the AUC.

The Court of Claims ruled that the Affiliated Ute Citizens and, by extension, all the "mixed-blood" individuals that the association represented could not claim that they did not know of, and were not chargeable as Indians with knowledge of, the claims until much later, but the court ruled: "The facts were all available and an Indian group's ignorance of it legal rights does not toll the running of limitations." Id., at 1004.

As for plaintiffs' claims that "they lacked legal capacity to sue until after the close of the Secretary's ten-year period of potential supervision on August 27, 1964," the Court of Claims ruled:

> The second point is likewise unacceptable. Plaintiff Affiliated Ute Citizens was organized in May 1956, and . . . acquired the right to sue (with respect to the tangible property) no later than the date of the termination proclamation in August 1961 which ended all federal supervision over those assets.

Id., at 1004-05.

Plaintiffs asserted that until August 27, 1964 "the United States had a continuing duty with respect to the tribal assets," but the court ruled: "the tangible property, divided and distributed before the termination proclamation, was no longer in a trust status after that date. . . ." Id, at 1005.[4/]

[4/]The court ruled that it could not determine whether or not limitations also barred the claim with respect to the class of intangible" property consisting of water rights, fishing rights, hunting rights, and rights to future growth of timber." 199 Ct.Cl. 1006. The Court of Claims, however, in its later decision in the same case, held that those water rights, hunting and fishing rights, and

Affiliated Ute Citizens v. United States, 215 Ct. Cl. 935 (1977).

This is the final order in the foregoing A.C. action in the Court of Claims was subsequently issued and provided:

> The division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land; whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967. . . . [W]hatever rights the mixed-bloods took were fixed in 1961, after which the Federal Government took no actions affecting the parties' division of assets. . . . In short, plaintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation.

Affiliated Ute Citizens v. United States, 215 Ct. Cl. 935, 936-37 (1977), cert. denied, 436 U.S. 903 (1978). (Emphasis added.)[5/] no longer in a trust status after that date. . . ." Id, at 1005.

From the foregoing decisions, it is definitively established that all of plaintiffs' claims here are barred by res judicata and, as well, barred by the statute of limitations. Affiliated Ute Citizens v. United States, 406 U.S. at 128; Murdock v. Ute Indian Tribe, 975 F.2d at 683; Affiliated Ute Citizens v. United States, 199 Ct.Cl. at 1004; Affiliated Ute Citizens v. United States, 215 Ct. Cl. at 936-37.

---

rights to future timber growth were indeed time-barred. 215 Ct.Cl. 935 (1977).

[5/]This case also held that the statute of limitations barred claims for water rights, hunting and fishing rights, and right to the future growth of timber. See note 6, supra.

II. THIS COURT LACKS JURISDICTION BECAUSE ALL OF PLAINTIFFS' CLAIMS ARE TIME-BARRED.

Section 2401 of Title 28 requires that every claim against the United States shall be barred unless action is commenced within six years of when the action first accrues. The statute of limitations is jurisdictional. Block v. North Dakota, 461 U.S. 273, 287 (1983)("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); Soriano v. United States, 352 U.S. 270, 273 (1957); Hart v. United States, 910 F.2d 815, 817-818 (Fed. Cir. 1990). The statute of limitations must be strictly construed. United States v. Kubrick, 444 U.S. 111 (1979).

Plaintiffs' Amended Complaint asserts claims against Defendants concerning the termination of the Indian status of members of the Uinta Band and the transfer of Tribal assets. Every act performed by an officer of the United States, or by the United States Congress regarding the enactment of the UPA occurred on or before August 27, 1954. Every act performed by an officer of the United States regarding the termination of the "mixed-blood" group occurred prior to August 27, 1961. Although Plaintiffs claim a continuing relationship between the United States and the class of Plaintiffs, no acts of which Plaintiffs complain occurred subsequent to August 27, 1961. Every act performed by an officer of the United States, or inaction of an officer of the United States regarding (1) the division of assets between the "full-blood", and "mixed-blood" groups; (2) the distribution of assets to "mixed-bloods" individually; and (3) the termination of the "mixed-bloods" individually, and termination of the trust relationship to all property, and assets divided, conveyed, or distributed to the "mixed-bloods," individually or as a group, occurred prior to August 27, 1961, the termination date of the federal relationship to the :mixed-bloods." All manner of property held in trust were

distributed by August 27, 1961.

> [T]he tangible property (land, cash, and personal property), . . . were all divided and distributed by August 27, 1961. . . .With respect to the class of 'intangible' property consisting of oil, gas and mineral rights, and unadjudicated and unliquidated claims against the United States . . . were distributed, before August 1961, in the form of shares in the Ute Development Corporation.

Affiliated Ute Citizens v. United States, 199 Ct.Cl. 1004 (1972).

Affiliated Ute Citizens v. United States, 215 Ct.Cl. 935 (1977), cert. denied, 436 U.S. 903 (1978), further held that the intangible property rights, defined therein as water rights, fishing rights, hunting rights and rights to future growth of timber, were divided by August 27, 1961. Therefore, all trust assets were distributed at least by August 17, 1961 and the Plaintiffs' cause of action accrued at least by that date.

Therefore, the action is barred by the statute of limitations, 28 U.S.C. § 2401.

Even if we look to a standard of known and knowable, which is not applicable here in an APA test for final agency action, the termination act severed the trust relationship between the United States and the "mixed-bloods" putting all plaintiffs on notice that a potential cause of action has accrued. Therefore, as of August 27, 1961, by an unequivocal act of the United States Congress, the trust relationship ceased to exist. Any cause of action must, therefore, have accrued at least by that date. Cobell v. Norton, ___F.Supp. _____ (D. D.C. decided April 28, 2003).

Plaintiffs' alleged causes of action, even if arguendo they could be construed as within a grant of jurisdiction of this Court, which defendant opposes, are time-barred by 28 U.S.C. § 2401.

III. PLAINTIFFS' FAIL TO IDENTIFY ANY STATUTE GRANTING THIS COURT JURISDICTION THAT SPECIFICALLY WAIVES THE FEDERAL

GOVERNMENT'S SOVEREIGN IMMUNITY FOR THE CLAIMS MADE HERE.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Navajo Nation, ___ U.S. ___ , 123 S.Ct 1079, 1089 (2003)(Quoting United States v Mitchell, 463 U.S. 206, 212 (1983)). The terms of the United States' consent to be sued in any court define the jurisdiction of that court to entertain the suit. United States v. Testan, 424 U.S. 392, 399 (1976).

Specific Congressional authorization is necessary in order that any suit may be brought against the United States.

> It is elementary that '[the] United States, as sovereign is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' United States v. Sherwood, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' United States v. King, 395 U.S. 1, 4 (1969).

United States v. Mitchell, 445 U.S. 535, 538 (1980).

A specific waiver of sovereign immunity by Congress is mandatory to establish jurisdiction of the court whether or not the case involves Indians.

> The United States, of course, may not be sued without its consent. United States v. Sherwood, 312 U.S. 584, 586 (1941). This long-established principle has been applied in actions for the possession or conveyance of real estate. Malone v. Bowdoin, 369 U.S. 643 (1962). It has been applied to Indian lands, the title to which the United States holds in trust. Minnesota v. United States, 305 U.S. 382 (1939); Oregon v. Hitchcock, 202 U.S. 60, 70 (1906). It has been applied, specifically, in a suit by an Indian who has a beneficial interest in land. Naganab v. Hitchcock, 202 U.S. 473 (1906).

Affiliated Ute Citizens v. United States, supra, 406 U.S. at 141-42.

When the defendant mounts a factual challenge to the jurisdiction of the Court pursuant to Fed.R.Civ.P. 12(b)(1), the burden shifts to plaintiffs to establish the jurisdiction of the Court

by a preponderance of the evidence. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Arctic Corner, Inc. v. United States, 845 F.2d 999 (Fed. Cir. 1988). See also Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

Plaintiffs mistakenly assert that a number of statutes effects a waiver of sovereign immunity and grants this Court jurisdiction, namely: In paragraph 8 plaintiffs assert the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the Federal Question statute 28 U.S.C. § 1331, and the Ute Partition Act ("UPA"), Pub. L. No 671, 68 Stat. 868, 25 U.S.C. §§ 677-677 aa as jurisdictional enactments. In paragraph 11, plaintiffs assert jurisdiction for breach of contractual, statutory and fiduciary obligations pursuant to 28 U.S.C. § 1346(b). In paragraph 12, plaintiffs assert jurisdiction pursuant to the Allotment Statutes 25 U.S.C. § 345 and 28 U.S.C. § 1353. Finally, in paragraph 13, plaintiffs assert jurisdiction pursuant to the Declaratory Relief statute 28 U.S.C. §§ 2201 and 2202. Each of these assertions will be examined.

Two of these statutes have been so unquestionably and consistently held not to waive sovereign immunity solely on their own terms that they do not need the more extensive discussion on the other enactments, below, that plaintiffs have cited.

Title 28 U.S.C. § 1331 does not waive the sovereign immunity of the United States, which instead must be found in some other statute, as the Supreme Court has said:

> [F]or purposes of § 1331 an action "arises under [federal law] if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law."

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust For Southern California, 463 U.S. 1, 9 (1983); National Ass'n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988).

The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, is neither a jurisdictional grant in the first place nor does it waive the government's immunity in the second place.. That provisions was enacted in order to expand the scope of available remedies, it does not expand the jurisdiction of the Court. Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71 n. 15 (1978).

> It is settled that 28 U.S.C. § 2201 does not confer jurisdiction on a federal court where none otherwise exists. That statute was adopted by Congress to enlarge the range of remedies available in federal court, and does not extend subject matter jurisdiction to cases in which the court has no independent basis for jurisdiction.

Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981).

The Declaratory Judgment Act also does not waive the sovereign immunity of the United States. Balistrieri v. United States, 303 F.2d 617, 619 (7th Cir. 1962).

The other jurisdictional statutes plaintiffs have cited likewise, and, in this instance, just as certainly, fail to waive federal sovereign immunity.

A third statute cited as a basis of jurisdiction by plaintiffs, the UPA itself, 25 U.S.C. §§ 677-67aa, contains no provision that even approximates such a grant or a waiver of sovereign immunity. In fact, the Act contains an express prohibition with regard to at least some causes of action, as the next section, infra, discusses.

A. THE UPA EXPRESSLY PRECLUDES PLAINTIFFS FROM RAISING CAUSES OF ACTION UNDER THE ADMINISTRATIVE PROCEDURES ACT FOR PURPOSES OF THESE CLAIMS.

Plaintiffs assert that they seek "judicial review of the past and current actions of federal officers, agents and employees in connection with the purported termination" under the Administrative Procedure Act, 28 U.S.C. §§ 701 et seq. ("APA"). Complaint ¶ 8. However, no other mention of the APA and the supposed agency actions for which judicial review is sought

can be found in the complaint except in paragraph 55, which reads in part:

> Defendants orchestrated a program designed to lead to the failure of the UPA by disregarding the notice and rule-making provisions of the APA.

Complaint ¶ 89.

Plaintiffs do not meet their burden of showing that in the circumstances of this case there is any waiver of sovereign immunity. In order to obtain relief from an agency action under the APA, they must show that they have "suffer[ed] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. (Emphasis added.) This grant of authority, however, does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Id. See Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984); National Coalition to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001).

In this case, however, plaintiffs are faced with a substantive statute, the UPA, that, as part of the partitioning of the "mixed-blood" individuals, specifically forbids such. As more fully set forth above, the UPA, 25 U.S.C. § 677i, provides that the "full-blood" group, and the "mixed-blood" group shall, with the approval of the Secretary, divide the assets of the tribe that are susceptible to equitable and practicable distribution. However, if the two groups are unable to agree, the Secretary is authorized to partition the assets. The section then provides:

> Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe.

Id. It does not appear that plaintiffs would have had previously or have now a means under the APA or otherwise to challenge the implementation of the UPA by defendants. That this is the case seems fully consistent with Supreme Court's decison in Affiliated Ute Citizens, 406 U.S. at

143, when it held that the courts lacked jurisdiction pursuant to the UPA in questions concerning distribution of the "mixed-bloods'" percentage of the mineral estate of the reservation.

Combining the APA and UPA provisions appears to foreclose judicial review of any agency action, if any were specified, which none is, pursuant to the APA.

B. THE ALLOTMENT STATUES, 25 U.S.C. § 348 AND 28 U.S.C. § 1353, DO NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES NOR GRANT THIS COURT JURISDICTION OVER THEIR CLAIMS.

Although plaintiffs assert jurisdiction pursuant to allotment statutes, their suit is not based upon allotment. This issue was taken up by the Supreme Court in Affiliated Ute Citizens, supra., which stated:

> The consent [by the Federal Government to be sued], it is claimed, exists in 25 U.S.C. § 345. This, however, is an allotment statute. Allotment is a term of art in Indian law. U.S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding. Reynolds v. United States, 174 F. 212 (CA8 1909). *See* the Act of February 8, 1887, 24 Stat. 388, as amended, 25 U. S. C. §§ 331-334. Section 345 authorizes, and provides governmental consent for, only actions for allotment. First Moon v. White Tail, 270 U.S. 243 (1926); Harkins v. United States, 375 F.2d 239 (CA 10 1967); United States v. Preston, 352 F.2d 352, 355 (CA9 1965). See Arenas v. United States, 322 U.S. 419 (1944).
>
> * * *
>
> Although the interest in the mineral estate that A.C. seeks to have conveyed pro rata to the individual mixed-bloods perhaps could be made the subject of an allotment, it has never been so subjected. Neither is it appurtenant to an allotment. The interest relates to the tribal land of the reservation. It remains tribal property. Further, § 10 of the 1954 Act, 25 U. S. C. § 677i, itself contemplates and provides specifically for the non-allocation of that interest.
>
> We therefore readily conclude that § 345 has no application here. Neither do 28 U. S. C. §§ 1399 and 2409 afford a basis for jurisdiction; they have application only to partition suits where the United States is a tenant in common or a joint tenant. That is not this

situation.

Affiliated Ute Citizens, 406 U.S. at 142-43.

Since none of Plaintiffs' claims have been made the subject of an allotment, and are not appurtenant to any particular allotment, the allotment statutes have no applicability here, do not effect a waiver of sovereign immunity, nor grant this Court jurisdiction.

C. SECTION 1346 OF TITLE 28 DOES NOT WAIVE SOVEREIGN IMMUNITY OF THE UNITED STATES NOR GRANT THIS COURT JURISDICTION OVER PLAINTIFFS' CLAIMS.

In the Amended Complaint paragraph 11, plaintiffs assert jurisdiction pursuant to 28 U.S.C. § 1346(b), which authorizes jurisdiction for claims brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. However, plaintiffs proceed to allege that their claims are "not sounding in tort." If plaintiffs' claims do not sound in tort, it is axiomatic that they cannot claim jurisdiction to assert those claims under the Federal Tort Claims Act. In any event, they cannot proceed under the Federal Tort Claims Act since they failed to satisfy the conditions precedent to filing a tort claim in federal court. They have failed to first submit their claims to the federal agency involved. Therefore, this Court would lack jurisdiction to proceed under 28 U.S.C. § 2675(a).

The plaintiffs may have erred in their citation, meaning to have cited 28 U.S.C. § 1346(a)(2) ("Tucker Act"). However, in this instance this statute would not avail plaintiffs since it does not grant jurisdiction to this Court. The Tucker Act vests the United States district court and the United States Court of Federal Claims with concurrent jurisdiction over civil actions or claims against the United States which do not exceed $10,000 in amount, 28 U.S.C. § 1346(a)(2). Actions against the United States seeking damages in excess of $10,000 must be

brought in the United States Court of Federal Claims, which has exclusive jurisdiction over such claims pursuant to 28 U.S.C. § 1491(a)(1). Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

Plaintiffs each seek relief in excess of $10,000. In the Fifth Cause of Action of the Amended Complaint, p. 63, plaintiffs allege that each plaintiff should be awarded $10,000 plus interest and costs. In addition, in the Seventh Cause of Action of the amended complaint at page 63-64, plaintiffs claim $3,000,000 for each of the plaintiffs. From the aggregate of these two claims, each plaintiff seeks damages in excess of the $10,000 maximum jurisdictional amount of this Court as set forth in §1346(a)(2) (The Tucker Act). Therefore, the exclusive jurisdiction to hear plaintiffs claim, if any, "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department" is exclusively committed to the Court of Federal Claims.

IV. THIS ACTION SHOULD NOT BE TRANSFERRED TO THE UNITED STATES COURT OF FEDERAL CLAIMS BECAUSE THAT COURT LACKS JURISDICTION OVER THESE CLAIMS AND SUCH TRANSFER WOULD NOT BE IN THE INTERESTS OF JUSTICE.

When an action is brought in a court that lacks jurisdiction, a transfer is permitted to a court that has jurisdiction, if the transfer is in the interest of justice:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed. . . (Emphasis Supplied.)

28 U.S.C. § 1631.

However, this statute is not applicable here. First, this action could not be maintained in the Court of Federal Claims because the Court of Federal Claims does not have jurisdiction.

Secondly, since the Court of Federal Claims would not have jurisdiction, it would not be in the interest of justice to transfer the matter to that court just to have it dismissed.

The Court of Claims has already decided that it has no jurisdiction over the same kind of claims under the UPA as are raised herein because the claims are barred by the statute of limitations. Affilitated Ute Citizens, 199 Ct.Cl. at 1004. For good measure, similar claims by other similarly situated to plaintiffs here were even more recently dismissed by the Court of Federal Claims on the same grounds. Tabbee v. United States, 30 Fed.Cl. 1994 (1994), appeal dismissed for lack of prosecution, 36 F.3d 1114 (Fed. Cir.).

Furthermore, an action under the Tucker Act, 28 U.S.C. § 1491(a) or under 28 U.S.C. § 1346 can only be brought in the Court of Federal Claims within six years of the cause of action accruing, 28 U.S.C. § 2501. Since compliance with the statute of limitations is a condition precedent to a waiver of sovereign immunity, failure to timely bring the action is jurisdictional. Soriano v. United States, 352 U.S. 270, 273 (1957). As discussed above, the most recent date that a cause of action for violating trust responsibilities could have accrued was August 27, 1961. Therefore, an action would have had to have been brought in the Court of Federal Claims no later than August 27, 1967. This suit was filed on January 23, 2003, more than 41 years from the date plaintiffs causes of action, if any, would have accrued and well past the six years permitted by statute. Therefore, this action could not have been filed in the Court of Federal Claims on January 23, 2003, as that court would have lacked jurisdiction. In addition, since the Court of Federal Claims lacks jurisdiction over the matter, it would not be in the interest of justice to transfer this action merely to have it thereafter be dismissed by the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed on all counts because the Court lacks jurisdiction over the subject matter of it, because the Amended Complaint is barred by the statute of limitations and by res judicata.

Dated this 20h day of May, 2003.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General

By: _____

R. ANTHONY ROGERS (D.C. Bar No. 54056)
Senior Attorney
STUART SCHOENBURG
Trial Attorney
General Litigation Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20004
Telephone: (202) 305-0483
Fax: (202) 514-8865/-305-0506
Attorney for Defendants

Of Counsel:

William McConkie
Attorney
Office of the Solicitor
Pacific Southwest Region
6201 South State Street
Salt Lake City, Utah 84138-1180
Telephone: (801) 524-5677 ext. 227
Fax: (801) 524-4506

Scott Keep
Assistant Solicitor
Branch of Tribal Governments and Alaska
Division of Indian Affairs
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
MS 6456
Washington, D.C. 20240
Telephone: (202) 208-6456
Fax: (202) 208-3490