UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs, acting individually, filed this case challenging the Defendants' failure to properly implement the Ute Partition and Termination Act, enacted August 27, 1954, P.L. No. 671, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa (1982)) ("the UPA" or "the Act"). Plaintiffs' First Amended Complaint targets the culpability of the federal Defendants for using the UPA as a lethal "weapon" in a campaign what can only be characterized as racism and cultural genocide against a proud and spiritual Indigenous People, the Uinta Band of Ute Indians, the original inhabitants and grantees of the Uinta and Ouray Reservation in the present State of Utah.[1] Plaintiffs' First Amended Complaint ("AC"), ¶¶ 1-7, 15, 24, 43, 55, 72. The Act was deployed to wipe out prior extremely valuable vested rights to land owned by the Uinta Band and its members *prior to*

[1] Plaintiffs' believe that the UPA was a proverbial small-pox infected blanket given to them by Congress and delivered to their reservation by the Department of the Interior: disguised as a gesture of kindness and concern over the health and welfare of the "mixed-blood" Uintas. Plaintiffs allege the germ laden blanket of the UPA had untold and perhaps incalculable deadly consequences. Its victims have been repeatedly exploited to the point of financial and physical ruin, deprived of basic services such as access to adequate health care, overwhelming despair, broken and split family relationships and a list of social ills that goes on and on.

1961. ¶ 2, 5, 12, 25, 36, 57, 63, 64, 66, 75, 77, 91, 92, 99, 100, 101, 103, 106, 107, 108, 109, 110, 111, 112. Plaintiffs' Amended Complaint does not seek to contest the division of property specifically defined in the UPA: they seek redress in the federal courts to obtain a determination which recognizes those *"prior existing rights and ownership in property",* compensates them for loss of those *"pre-1961"* rights and property and acknowledges that the Act "plowed" under and handed them to undeserving parties all without accounting for various Treaties, Acts of Congress, the Constitution of the United States of America and Amendments thereto, the Indian Reorganization Act[2] ("IRA") Constitution and By-Laws of the Ute Indian Tribe"not specifically extinguished" by the UPA. Plaintiffs appropriately reference these numerous pre-UPA laws as *"substantive and independent federal laws and regulations."* ¶¶ 49, 57, 59, 60, 66, 67, 70, 80. The United States Congress did not intended the UPA to overtake, sever and transfer pre-UPA rights of the Uinta Band and its individual members all without compensation. If Congress had intended this, language of the UPA would have stated *that any and all prior vested rights to land on the reservation or claim to money arising from any claim related to the reservation of any Mixed-Blood Ute subject to termination would be taken from them, without compensation, and placed in the ownership of the Ute Indian Tribe, consisting of only full-blood Utes, non-Indians and non-Indian corporation.*

In effect, Plaintiffs' Amended Complaint directly targets the concerted, intentional, and surreptitious efforts of the Federal Government to employ the Act as a type of "Trojan Horse" very effectively wielded against them to sneak into their midst and rob them of their identity, land, water rights, mineral rights, and the quiet enjoyment of their ownership rights firmly established by Act of Congress, federal law and regulation *ante* the Act's enactment by Congress in 1954. AC, ¶¶ 10,

[2] The Wheeler-Howard Act or IRA, U.S. code, vol. 25, §§ 461-79 (1994).

11, 12, 16, 12, 23, 25, 26.

In their Motion to Dismiss, Defendants characterize Plaintiffs' Amended Complaint as a "challenge" to the Defendants' multi-layered and supremely complicated implementation of the UPA and to the erroneously applied principles that led other courts to judicial validate the constitutionality of the Act's implementation and application.[3] Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ("Defs' Mot."), p. 2. This is far from accurate. When viewed against the backdrop of the federal Defendants' tactical decision to begin their historical and statutory review *only after* August 27, 1954, the Federal Government's misleading portrayal of the *Felter* case becomes apparent.

When correctly viewed within the broader framework of the historical treatment of Plaintiffs (and their predecessors in interest) by the United States Government, the Plaintiffs' emphasis on the 94 year span between 1861 to 1954 places the UPA in the proper "strategic" context as a separate and distinct "tool" employed by Defendants to illegally overtake and deprive Plaintiffs of their vested land-based ownership rights and rights to unaccounted for funds, both of which have been subsequently swept up into the hands of the unterminated Bands of the Ute Indian Tribe and into the hands of non-Indians. Neither of these types of beneficiaries-in-fact was ever intended by Congress to enjoy the benefits conferred on the "490" and their families. AC, ¶¶ 64, 77, 91, 107. In fact, the their past and current possession of resources rightfully belonging to the Mixed-Blood people is in direct contravention of the stated objectives of the Act, which specifically provided that such transfers were <u>not allowable under its terms</u>.

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[3] While civil rights battles for Black Americans were fought out in the deep south during the 50's and 60's to eradicate another poisonous federal racial apartheid policy labeled "Jim Crow." Meanwhile, the Federal Government and one member of Congress, Arthur Watkins, an adherent of the Mormon faith, were diligently doing their handiwork in a remote yet starkly beautiful part of Utah to eradicate a culture and race of Uintas by an overt racially-based Act of Congress . AC, ¶¶ 43-45, 49.

Plaintiffs are not arguing the myriad legal and factual issues addressed in numerous cases, e.g., the constitutionality of the UPA, joint management through the UPA, pro-rata share of tangible and intangible property, etc., all filed after the enactment of the UPA and the publication of the "Final Roll of Mixed-bloods" in the Federal Register on August 27, 1961. In this regard, Defendants' failure to address the factual allegations contained within the 94- year span indicates either a misunderstanding of the plainly understandable allegations of the Amended Complaint or yet another ploy to draw Plaintiffs into a "minefield" or "no man's land" of legal precedent created on a heavily tilted battle field. AC, ¶¶ 88-91.

If Defendants' misunderstanding of the Amended Complaint is attributable to sheer ignorance of the Uintas' too-long-lived plight, then no reply to this Opposition is necessary. If, on the other hand, Defendants' Motion to Dismiss is merely a preliminary step in an artfully crafted ploy by the Federal Government to try to legitimize and perpetuate the crimes visited on the Plaintiffs and their predecessors, then the Federal Government "beast" will reply in full force to twist the plain and simple allegations of a plain and spiritual - people who only want their pleas for help heard in a court of law without facing again the incomprehensible, convoluted, endless legal arguments that come straight from the intestines of the UPA - legislated illegally and enacted over the protest of the very people whose assent was legally required for it to take effect.

Rhetoric aside, Plaintiffs control the battle field in this case through their well-pleaded causes of action, causes which are legitimate, thoroughly documented, and should be susceptible to the same type of remedies and reparations available to all others who seek and have sought satisfaction for claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

HISTORICAL AND STATUTORY BACKGROUND OF PRE-UPA OWNERSHIP RIGHTS

In laying the foundation for the factual basis of their claims, Plaintiffs recited in their

Amended Complaint firm factual allegations beginning in 1861 when a sizeable amount of land was set aside for the Uinta Band so they could live and "be free from the depredation by non-Indians."[4] AC, ¶ 27. Further, Plaintiffs allege that members of the Uinta Band were the sole legal occupants of the "Uinta & Ouray Reservation" ("Reservation") . Id., ¶ 28. In their Amended Complaint, Plaintiffs alleged that the actions of the Defendants were contrary to Acts of Congress, Executive Orders and the federally-approved IRA Constitution and By-laws of the Ute Indian Tribe of the Uinta and Ouray Reservation. AC, ¶ 10. Plaintiffs claimed that these illegal actions deprived them of their status as Uinta Band members and deprived them of "other vested federal rights" in violation of the Constitution and laws of the United States. Id. As of 1861, it is plain that the Uinta Band had certain well-defined and quantified lands and other valuable property set aside for them by Executive Order.[5]

The Colorado Tabequache (Uncompaghre) Band of Utah Indians were limited by Treaty to residing on certain defined lands in Colorado:[6]

> ARTICLE II. Said Tabeguache band of Utah Indian hereby cede, convey and relinquish all of their claims, right, title, and interest in and to any and all of their lands within the territory of the United States, wherever situated, excepting that which is included within the following boundaries, viz.: –

Due to pressure placed on them by the discovery of gold near present-day Denver in 1958, Governor John Evans of Colorado called for a meeting of all the Ute bands in Colorado to persuade them to

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[4] The Executive Order was confirmed by Act of Congress in 1864 - 13 Stat. 63 (Act of May 5, 1864, Chapter 77).

[5] "Likewise the Partition Act did not change the trust relationship set by the 1906 Act. *See Hackford v. Babbitt,* 14 F.3d 1457, 1468 (10th Cir. 1994).

[6] Treaty with the Utah-Tabeguache Band, October. 7, 1863, 13 Stat., 673, Ratified Mar. 25, 1864, Proclaimed Dec. 14, 1864.

relinquish their mineral-rich lands.[7] AC, ¶ 55. As a result of these negotiations, a Treaty with the Ute (Tabequache Band) of Colorado was made that plainly stated that *all* of its provisions *not inconsistent with the provisions of this treaty, were re-affirmed and declared to be applicable and to continue in force as to the Tabequache band of Utah Indians.*[8] One of the provision of the 1868 Treaty, at issue by implication in Plaintiffs' Amended Complaint, is Article 3 whereby the Tabequache (Uncompaghre) Indians forever "relinquished all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding Article 2." Article 2 of the 1868 Treaty specified a quantified and definite broad expanse of land that the Uncompaghre Band would occupy after the Band departed its ancestral homelands in Colorado for lands reserved for them in Utah. Although Plaintiffs' Amended Complaint does not draw specific reference to the "Treaties" binding Uncompaghre (Tabequeche) and the United States Government, described above, the allegations present a scenario where it is implied that Ute Bands were moved on to the Uinta Reservation by some official federal action, including Treaties. AC, ¶¶ 23, 24, 29, 30, 31, 37. Nonetheless, the Amended Complaint refers to "Acts of Congress".

It is patently clear that the Uncompaghre Band of Utes were strictly bound to the plain and simple terms of the 1864 and 1868 Treaties strictly limiting them to: 1) giving up all of its claims, right, title, and interest in land *anywhere* in the United States and 2) giving up all of its claims, right, title, and interest in land *anywhere* in the United States in return for moving to a reservation created for the Band in Southeastern Utah, *separate from* the original Reservation set aside for the Uintas by Executive Order in 1861: "Prior to 1881, the only Indians from the territory of Utah to occupy

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[7] Reference to *The Discarded Indians of Utah,* University of Nebraska Press, 2002, R. Warren Metcalf, p. 14.

[8] Treaty with the Ute, Mar. 2, 1868, 15 Stats., 619, Ratified, July 25, 1868, Proclaimed, Nov. 6, 1868.

the Reservation were members of the Uinta Band." AC, ¶ 28. Allotment of land to individual Uncompaghre on the Uintas' Reservation did not confer upon them the authority to exercise governance over the Uintas' lands or the Uinta Band.

"A precursor to the allotment policy was the provisions of the 1880 removal agreement which stipulated that the Uncompaghres were to be given lands in severalty." [9] Under this same Agreement, the Whiteriver Band of Ute Indians were removed from Colorado to the Uintas Reservation. AC, ¶ 29.

Near the turn of the 19th Century, the Uintas Reservation was subjected to allotments acts passed by Congress that resulted in surplus lands. To this point, the Whiterivers and the Uncompaghre could not exercise governance over the Uintas' Reservation as "allotted Indians." During all of these historical phases of land cessations affecting the Uintas' original Reservation, Plaintiffs allege that there is no indication that the United States withdrew its originally stated intent to create, by Executive Order in 1861, the Uintas' Reservation *exclusively* for the sole occupation of the tribal band from which all Plaintiffs originate. Id., ¶¶ 31, 32. Each Band of Utes residing on the Uinta' Reservation maintained their separate and individual status as federally-recognized Tribes. Id., ¶ 33.

When the separate Bands of Ute Indians formed a consolidated tribal government in 1937, each Band explicitly agreed that "no property rights shall be acquired or lost through membership in the modernly created entity known as the "Ute Indian Tribe" except in the manner(s) specified in the governing document."[10] Id., ¶ ¶ 35, 36. Plaintiffs allege that the terms of the 1937 IRA

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[9] *The Discarded Indians of Utah*, supra., p. 27.

[10] *See* 25 U.S.C. § 463. Restoration of lands to tribal ownership - Protection of existing rights: ". . . That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act."

Constitution and By-Laws of the Ute Indian Tribe memorialized any *prior existing* rights to Uinta Band membership and the *prior existing* and vested rights of the Band, as a tribal entity, and its individual Band members to their allotted lands. Id., ¶ 57. Defendants were obligated to account for these prior transfers of land and other appurtenances and the limitations imposed by law on all Bands of Ute Indians.

In and around 1950, as a consequence of a series of complex transactions involving claims before the Indian Claims Commission, a "share and share alike"agreement between the three Bands occupying the Uinta' Reservation was executed. Id., ¶¶ 37-42. It is obvious that up and until the 1950's, the Uinta Band and its individual allotted tribal members maintained *solid and vested legal rights to land, property, water and other appurtenances, including minerals, that could be accounted for by the Defendants named herein.* These are the substantive rights that Plaintiffs seek to vindicate in their lawsuit.

Unfortunately, through the political chicanery of a Mormon Senator from Utah, Arthur Watkins, bent on forcing his religious tenants on American Indians to make them "white and delight some", the ill-fated federal experiment of "termination" began to take shape and was executed with the same cast of characters responsible for the internment of Japanese aliens and Japanese-American citizen during WWII.[11] Id., ¶¶ 43-45.

Senator Watkins, in effect, used economic "blackmail" to confuse and mix all of the previously acknowledged *substantive* rights of the Uinta Band members and the Uinta Band that

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[11] Dillon S. Meyer was appointed as Commissioner of Indians in May 1950, During WWII, Myer served as the director of the Wartime Relocation Authority. *The Discarded Indians of Utah*, supra., p. 78-79. Mormon religious tenants hold that Indians are a "fallen race" destined only to become "white and delight some" again when converted to the restored gospel. Id., p. 45.

existed prior to the enactment of the UPA in 1954 and 1961 when the final termination proclamation was published in the Federal Register. Id., ¶ 53. This resulted in a commingling of separate and identifiable vested rights, protected by *"substantive and independent federal laws and regulations"* of the Uinta Band and its membership being lumped into and mixed with the divisible and indivisible property defined by the UPA. Id., ¶¶ 49, 57, 59, 64, 80. When the UPA divided up the property, separately defined under its provisions, the commingled *pre-existing vested rights of the Uinta Band and its members were handed out by the Defendants to everyone but the Plaintiffs and the Uinta Band.* Plaintiffs consider this nothing but officially sanctioned theft and unlawful termination.

Plaintiffs have alleged that all Defendants were under a moral and legal obligation and common law duty to immediately take proper actions to correct the plain and open violations of the *substantive* federally-approved and enforceable IRA governing document of the Ute Indian Tribe and the Act of Congress, dated August 21, 1951, enacting the "share and share alike" agreement. Id., ¶ 60. For this reason, Defendants' failure to protect and "safeguard" the *pre-1954* trust status of the lands constitutes a breach of the federal trust relationship *as to* those specific and quantified rights of Plaintiffs that were lumped in and commingled with lands and other property defined by Congress in the UPA as *separate and apart from the pre-1954 land and assets owned by both the Uinta Band and its individual members, their Estates, their children and their descendants.* Id., ¶¶ 70, 103.

Defendants simply failed to keep separate the separately defined pre-UPA and post-UPA properties and that failure led to the loss of lands, water, mineral and other appurtenances to non-Indians and the Ute Indian Tribe. In fact, a non-tribal entity, the "Real Estate Division of the Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints", owns six shares of the Ute Development Corporation and, on information and belief, does not have to pay

federal taxes on the income received from these very valuable shares. Exhibit A., "Ute Distribution Corporation" List of Shareholders, dated July 15, 2003, p. 6. While Sen. Watkins proceed to pave the way to turn the Uinta into "white and delight some" people, he was also opening the door to, i.e. "let the foxes into the hen house", for his cohorts and fellow Mormons to get their hands on the valuable assets owned by the Uinta Plaintiffs named herein. AC, ¶¶ 49, 53, 54, 64.

Further, Plaintiffs allege that United States knew of this scheme *prior to* the publication of the Proclamation of August 26, 1961 and even employed another military tactic, "divide and conquer" to relegate the Uinta Band and its so-called "mixed-blood" members to the most defenseless and weakened state so they would be unable to defend their property and culture from destruction - a right that Defendants claim Plaintiffs cannot exercise like all other United States citizens. AC, ¶ 72.

Prior to August 27, 1954, the Defendants delivered a *coup de grace* by promoting an illegal meeting, held without proper notice under the terms of the Ute Tribe's IRA Constitution and By-Laws, where Article II, §§ 1 and 2 were violated. Id., ¶ 46, 47. To this day, defendants fraudulently hold out, without evidentiary proof, that the Mixed-Blood members of the Uinta Band voted overwhelmingly to voluntarily terminate their relationship, as individual Indians, with the United States Government on that fateful day 49 years ago. Id., ¶ 58.

THE NATURE OF PLAINTIFFS' AMENDED COMPLAINT

Contrary to the Defendants' description of Plaintiffs' Amended Complaint, an examination of the entire pleading shows that the redress sought is directed toward the loss of ownership and interest in *pre-UPA* lands and rights. Debs' Mot. pp. 5-6; AC, ¶ 2. The "Factual Basis for Claim", carefully describes a historical scenario and those Treaties, statutes, and federal and tribal laws that establish cognizable claims for loss of those property and rights as described above. Id., ¶¶ 27-55.

The redress Plaintiffs seek in their eight separate causes of action arise from defendants'

violation of the *pre-UPA* barriers erected to protect plaintiffs' rights and to prevent absorption of those rights into the "black hole" where, if they did emerge, they went into the ownership of everyone else in the universe except the true owners, the Uinta Band and its individual members.

First Cause of Action

Plaintiffs First Cause of Action is directed toward substantive and pre-existing laws, statutes or regulations such as: 1) the 1937 IRA Constitution and By-Laws (¶¶ 57, 58, 66,68); 2) the "share and share alike" agreement between the three Bands approved by Congress on August 21, 1951 by Congress. (¶ 59, 66, 68) . Plaintiffs are alleging that defendants indeed "incorrectly implemented and executed the UPA" toward plaintiffs' well-grounded expectation that the defendants would protect their *pre-UPA* rights and not deploy the Act to absorb their interest in land, water, oil and gas, and other appurtenances in a manner unintended by Congress. For 49 years since the passage of the Act, Plaintiffs allege that the defendants were in complicity with the modern Ute Indian Tribe, non-members of the "Ute Distribution Corporation" and other non-Indian business entities to take their rights and property. AC, ¶ 63, 64.

Because of the way the Defendants used the Act to their own advantage, e.g., no accounting as plead in the Eighth Cause of Action, and the advantage of others by eradicating the pre-existing rights of the Uinta Band and its individual Mixed-Blood members, it is not without precedent that an act for termination should be deemed null and void for failure to do what it promised - place the Mixed-Blood Uinta, including minors among the 490, in position where their valuable assets would used to achieve the American "dream" of equality and fair treatment.

Second Cause of Action

The individual Plaintiffs allege that the stated purposes of the UPA were to partition and distribute the assets of the Ute Indian Tribe between the Mixed-Blood Uinta and the Full-Bloods of the Whiteriver and the Uncompaghre Bands and not to prevent them, through secretive and

fraudulent means, from knowing that the 1937 Constitution guaranteed that "[each plaintiff's status to enjoyment of the special federal trust relationship is a property right that cannot be lost through the execution of a vote by only two (2) of the Bands undertaken in an illegal manner and in violation of the IRA-approved Constitution and By-Laws of the "Uinta (sic) Indian Tribe". AC, ¶ 35. Defendants are alleged to have known or were put on notice, by virtue of Secretarial approval of the 1937 IRA Constitution, bound all Bands that "no property rights shall be acquired or lost through membership in the modernly created entity known as the "Ute Indian Tribe" except in the manner(s) specified in the governing document." Id.

Once again, the target of the individual Plaintiffs' in this Second Cause of Action is a declaration that the UPA must be declared as null and void because of Defendants' schemed overtaking of the pre-UPA rights of the Uinta Band and the individual plaintiffs. Hence, the invalidity of the Act negates the purported termination of Plaintiffs and restores the federal trust relationship with them and the Uinta Band as a federally-recognized Tribe at all times before August 27, 1954.

It is not without precedent that the Plaintiffs would ask for a declaration from this Court that they are entitled to restoration of their status, privileges, immunities, their rights and other valuable property of the Uinta Band. AC, Prayer in Second Count, pp. 61-62.

Third Cause of Action

Unfortunately, societies influenced by manipulative outside forces are more than likely to victimize their own minorities. Id., ¶¶ 24, 25, 26, 53. Too often the children of those minority victims are needlessly punished for whatever perceived sins or societal wrongdoings allegedly attributed to their parents. The fact that their parents are driven off and stripped of their tribal identities by a governmental act does not, within the *substantive* tribal custom, law and tradition, deprive the innocent new born of their identity as member of the Uinta Band of Utes. Plaintiffs have

determined, no lawsuit has ever been filed or decision reached on the merits raising the unique factual, tribal common law ("individual aboriginal rights"), misuse of an Act of Congress to eliminate significant and cognizable *pre-UPA* legal rights of the "should have been enrolled" Plaintiffs, all without Due Process. If the Act was "silent" on whether the newborns were terminated, then Congress did not intend to terminate them. *United States v. Felter,* 752 F.2d 1505 (10th Cir. 1985), *affirming,* 546 F. Supp. 1002 (D. Utah 1982). No one has ever sought to vindicate the rights of these unfortunate forgotten survivors of a horrific chapter of American history. They have never been named as "Plaintiffs" in any legal proceeding.

Fourth Cause of Action

This Cause of Action poses a unique question - Is there a justiciable cause of action arising from a scheme to violate an Act of Congress, the UPA, to the injury of all Plaintiffs by engaging in a overt scheme to defraud the judicial system so that breaches of the 1937 Constitution and the Congressionally approved "share and share alike" agreement are "papered over" to make Defendants' implementation of the Act appear as proper in all regards? Id., ¶¶ 85-92. Plaintiffs Fourth Cause of Action, in effect, raises a fraud scenario where Defendants are accused of employing unscrupulous and overreaching methods before Courts of Law toward its own unknowing and unsophisticated wards. Plaintiffs seek to examine those cases not for the purpose of disturbing the decision in the series of UPA challenges but to examine, under 5 U.S.C. § 701 et seq. standards of review, the "continuing" and past actions of defendants where false and misleading facts were given to various Courts of Law to obtain favorable decisions for the Defendants and others. The focus of the allegations in the Fourth Cause of Action is directed toward the 1937 Constitution and the "share and share alike" agreement and the manner whereby Defendants allowed the UPA to overtake and eliminate those two and other protective devices meant to protect Plaintiffs' *pre-UPA* legal interest. Plaintiffs, on information and belief, believe they can point to page, line and word

in the briefs in the cavalcade of cases cited by Defendants where outright false statements were made to reach favorable ruling for them in the Courts of Law. Debs. Mot., p. 5

Fifth Cause of Action

Plaintiffs' Fifth Cause of Action seeks to vindicate injuries sustained when the Defendants breached the "share and share alike" agreement, approved by Act of Congress and for breach of the UPA in that the Act was misused to eliminate valuable legal rights of all Plaintiffs. Plaintiffs can proceed on this Cause of Action without disturbing any of those cases and their holdings discussed in Defendants' Motion to Dismiss.

Sixth Cause of Action

Unless Defendants can point to any judicial or administrative decision or other literal language in any Act of Congress, law or regulation that authorizes the UPA to extinguish Plaintiffs' legal rights and property absorb those pre-Act rights and property into the sweep of the Act. Plaintiffs are not questioning the internal mechanism of the UPA but the overall manner whereby the Act was abused and deprived all Plaintiffs of their 5th Amendment Due Process Rights.

Seventh Cause of Action

The 1937 IRA Constitution and By-Laws of the Ute Indian Tribe imposed, at the time of the March 31, 1954 General Council meeting, a firm federal trust responsibility to insure the integrity of the vote taken on that date to expel the original 490 and to send them into silent exile. This same Constitution also had within it federally-approved provisions mandating the Defendants to insure that the "property rights" brought by the individual members of the Uinta Band and the Uinta as a federally-recognized tribal entity would not be lost through membership in the "consolidated" modern day "Ute Indian Tribe of the Uinta & Ouray Reservation, Utah". Id., ¶¶ 46, 47. The breach of the 1937 Constitution directly preceded the passage of the Act. Id., ¶ 49. Plaintiffs allege that the Defendants engaged in a massive coverup to hide their failure to enforce a federally-approved

tribal constitution by acts of fraud and other obstructionist tactic so the statute of limitation would purportedly run out.

Eight Cause of Action

The United States Congress never intended that pre-existing *vested and protected* rights of the Uinta Band of Ute Indians and its individual members would be absorbed into the distribution process defined in the Act. When the Defendants allowed the commingling of vested *pre-UPA* land and other valuable rights to occur, they owed those affected by this alleged illegal acquisition an accounting of those separate and identifiable rights and assets. Plaintiffs are not raising issue with any of the cases cited by Defendants in the Motion to Dismiss but with the failure of the United States to account for those items specifically described in this equity-based Cause of Action.

ANALYSIS

Legal Standards of Review

In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. Pro. Rule 12(b)(1), the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g., Jitney Bows v. United States Postal Serv.*, 27 F. Supp. 15, 19 (D.D.C. 1998) (Urbina, J.). On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *See District of Columbia Retirement Bd. v. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). In evaluating whether subject-matter jurisdiction exist, the court must accept all uncontroverted, well-pleaded facts as true and attribute all reasonable inferences to the plaintiffs. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). *E.W.F. v. St. Stephen's Indian High Sch*., 264 F.3d 1297, 1303, 1305 (10th Cir. 2001). The Court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are case as factual allegations. *See, e.g. Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990).

Moreover, the court need not limit itself to the allegations of the complaint. *See Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, "[t]he court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case." *Scolaro v. D.C. Bd. of Elections and Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 2002))

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plaint statement of the claim and the grounds on which it rest. *See* Fed. R. Civ. P. Rule 8; *Conley v. Gibson,* 355 U.S. 41 (1957); *Leatherman v. Tarrant County,* 507 U.S. 163, 168 (1993). A motion to dismiss under Rule 12(b)(6) test not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *See* Fed. R. Civ. P. Rule 12(b)(6); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *See Hison v. King & Spalding,* 467 U.S. 69,73 (1984); *Atchison v. District of Columbia,* 73 F.3d 418, 422 (D.C. Cir. 1996). Moreover, the court should draw all reasonable inferences in the nonmovant's favor. *See United Parcel Serv., Inc.. v. International Bhd of Teamsters,* 859 F. Supp. 590, 593 (D.D.C. 1994); *Judicial Watch, Inc. v. Clinton,* 880 F. Supp. 1, 7 (D.D.C. 1995).

PLAINTIFFS' CLAIMS ARE NOT BARRED BY <u>RES JUDICATA</u> AND COLLATERAL ESTOPPEL BECAUSE THEY HAVE NOT BEEN DECIDED PREVIOUSLY AGAINST PLAINTIFFS OR AGAINST THOSE WITH WHOM ALL THESE PLAINTIFFS ARE IN PRIVITY

The linchpin of the issues raised by Plaintiffs in their Amended Complaint are allegations concerning the existence of rights to land, water rights and other valuable property accrued and vested *prior to* March 31, 1954 when the defendants participated in a General Council meeting of

the consolidated Ute Indian Tribe, consisting of three separate Bands of Utes. The Amended Complaint draws limited reference to *post*-1954 facts only to show how the UPA was executed by the Defendants to destroy previously accrued and vested rights. The central and cohesive elements of Plaintiffs lawsuit are: 1) the provisions of the 1937 federally-approved IRA Constitution and By-Laws of the Ute Indian Tribe and its restrictions on prohibiting the loss of property rights that became effective on January 19, 1937; and 2) the "share and share alike" agreement of June 1, 1950 that they allege was never valid because of failure of the Defendants to conduct a separate vote by the Uinta Band on the agreement in accordance with the 1937 Constitution. AC, ¶¶ 33, 35, 36, 39-42. The central and cohesive elements of Plaintiffs well-pleaded Amended Complaint are not at issue in any of those six federal cases cited in Defendants' Motion to Dismiss. Debs Mot., p. 5. The Defendants' refusal to discuss the impact of the *pre-1954* factual allegations and the interaction between the central elements and the Act practically assures them that the legal principles of res judicata and collateral estoppel will not save their Motion to Dismiss.

The United States Supreme Court has "long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties.'" *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981) (quoting *Baldwin v. Traveling Men's Assn.,* 283 U.S. 522, 525 (1931)); *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.,* 723 F.2d 944, 946-47 (D.C. Cir. 1983). The Court has "stressed that '[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts. . ." Id.., (ellipses in original) (quoting *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294,299 (1917)).

The doctrine of res judicata, or claim preclusion, "is intended to relieve parties of the cost

and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication."[12] *Satsky v. Paramount Communications, Inc.,* 7 F .3d 1464, 1467 (10th Cir. 1993).

Claim preclusion "prevents 'the parties or their privies from relitigating issues that were or could have been raised in' an earlier action." *See American Forest Res. Council v. Shea,* 172 F.Supp. 2d 24, 31 (D.D.C. 2001); *Mitchell v. City of Moore, Okla.,* 218 F.3d 1190, 1202 (10th Cir. 2000) (quoting *Clark v. Haas Group, Inc.,* 953 F.2d 1235, 1238 (10th Cir.), *cert. denied,* 506 U.S. 832 (1992)). Claim preclusion bars a claim "if three elements exist: (1) a final judgment on the merits in the prior suit; (2) the prior suit involved identical claims as the claims in the present suit; and (3) the prior suit involved the same parties or their privies." *Satsky,* 7 F .3d at 1467. Claim preclusion "is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements." *Nwosun v. General Mills Restaurants. Inc.,* 124 F.3d 1255, 1257 (10th Cir. 1997) *cert. denied,* 523 U.S. 1064 (1998).

The Tenth Circuit "has adopted the transactional approach of the Restatement (Second) of Judgments in determining what constitutes identity of the causes of action." *Yapp v. Excel Corp.,* 186 F.3d 1222, 1227 (10th Cir. 1999) (citations omitted). "The transactional approach provides that a claim arising out of the same 'transaction, or series of connected transactions' as a previous suit, which concluded in a valid and final judgment, will be precluded." Id., (quoting Restatement (Second) of Judgments § 24 (1982)). "Under this approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." *Nwosun,* supra. "The transactional test has been rearticulated by courts in a variety of

[12] The Tenth Circuit Court of Appeals prefers to use the term "claim preclusion." *Yapp,* supra., at 1226 n. 1.

ways, most of which focus upon whether the two suits are both based upon a discrete and unitary factual occurrence." *Yapp,* 186 F.3d at 1227. "Whether or not the first judgment will have preclusive effects depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *National Labor Relations Bd. v. United Technologies Corp.,* 706 F.2d 1254, 1260 (2nd Cir. 1983). Finally, the Tenth Circuit noted that "[i]t is immaterial that the legal basis for the relief sought in the two complaints is different; it is the occurrence from which the claims arose that is central to the 'cause of action' analysis." *Nwosun*, 124 F.3d at 1257. Plaintiffs will explain below how each of the cases cited against Plaintiffs' Amended Complaint do not meet the requirements of claim preclusion and therefore bar plaintiffs' claims which were or could have been raised in these earlier actions.

***Did Affiliated Ute Citizens v. United States (1972), Murdock v. Ute Indian Tribe, Affiliated Ute Citizens (Ct. Cl.), Affiliated Ute Citizens (1977) and United States v. Murdock,* Involve Identical Causes of Action as Those in the Present Suit?**

Applying the 10th Circuit Court of Appeal's transactional approach of the Restatement (Second) of Judgment from *Yapp* and *Nwosun*, it is evident that the Causes of Action pled in *Affiliated Ute Citizens y. United States*. 406 U.S. 128 (1972) (Debs Mot., p. 10); *Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp.*, 507 U.S. 1042 (1993) (Debs Mot, p. 14); *Affiliated Ute Citizens v. United States*, 199 Ct.Cl. 1004 (Ct.Cl. 1972) (Debs Mot., p. 17); *Affiliated Ute Citizens v. United States,* 215 Ct. Cl. 935, 936-37 (1977) (Debs Mot., p. 19); *United States v. Murdock*, 132 F.3d 534, 541-42 (10th Cir. 1997), *cert. denied.* 525 U.S. 810 (1998)(Debs Mot., p. 14, note 3) are not identical to those alleged in *Felter*. To the extent that the *Felter* pleads a "face-off" between the Act and the *pre*-Act Treaties and the limitations imposed on the Whiteriver and Uncompahgre Bands by these Supreme Law of the Land, the Dawes Allotment Act distributions under which individual member of the Uinta Band were

allotted, the 1937 Constitution, and the "share and share alike" agreement of 1951, none of these six cases presents the crucial "identical" element.

First, the case of *Affiliated Utes Citizens*, 406 U.S. at 128, supra., concerned the issue of whether the formation of the Ute Distribution Corporation ("UDC") was validly created and lawfully incorporated in accordance with instruction in the UPA. Debs. Mot., pp. 10-12. Without discussing the factual allegations concerning all of the *pre*-UPA restrictions on one Band or the other tampering with the membership interest and property rights of the other(s), the defendants state that the *Affiliated Ute* case: ". . .stands for the continuing proposition that none of the plaintiffs here has an individual interest in distribution of any of the property interest jointly managed by the UDC and the Ute Tribe since 1961." Id., at p. 12-13. To the contrary, Plaintiffs are alleging that they do maintain individual interest in the distribution of Uinta Band and their own allotted property and appurtenances thereto to unintended beneficiaries by unlawful seizure under the UPA. AC, ¶¶ 58, 61, 63-67, 70, 71, 74, 76, 77, 85, 91, 97, 99, 103, 104,106, 107, 108, 109, 112. It is patently clear that Plaintiffs are speaking about separately protected rights to land, water, oil and gas rights previously vested, accrued and quantified by Defendants v before the enactment of the UPA. From a transactional viewpoint, Plaintiffs Amended Complaint does not rely on the same claims and legal theories or the same transactions and occurrences that plaintiffs in *Affiliated Utes Citizens* relied upon. Plaintiffs in this case are not contesting the formation of the UDC or any other issue of joint management or ownership of the types of property defined in the Act: they are arguing the unlawful acquisition of separately owned property rights and rights to funds by actions taken by Defendants outside of the Act which resulted in a loss to the "true" beneficiaries. How the UDC was created or managed to handle distributions of property owned by the "Ute Indian Tribe" is of no concern to Plaintiffs. Their concern is how the UDC has absconded with *pre*-UPA property and money acquisitions that were supposed to be set aside and beyond the scope of the Act. The issues the

Felter Plaintiffs raise in this action are clearly not identical to those raised in *Affiliated Ute Citizens*.

Likewise, the other cases cited by Defendants miss the mark. The case of *Affiliated Ute Citizens v. United States*, 199 Ct. Cl. 1004 (Ct. Cl. 1972), could *only* address a cause of action alleging the lawful acquisition of tangible and intangible tribal property that was the intended *corpus* defined in the UPA. Plaintiffs allege that unless the Defendants produce evidence or case precedent that Congress intended the UPA to result in the acquisition of *pre*-Act property owned by the Uinta Band and its individual members, then their allegations of an unlawful acquisition must be viewed in their favor. Defendants had no incentive to divulge to the U.S. Supreme Court or any other court that unintended and separately owed Uinta Band property and allotments owned by its individual members were acquired and swallowed up by the UDC in violation of the Act.

It is important note that the "shares" of the UDC addressed in the Court of Claims *Affiliated Ute Citizens* case are likely valued today upon the presence of the acquisitions unlawfully acquired from Plaintiffs and distributed in the form of shares to the Antelope-Sheep Range Company and Rock Creek Cattle Range Company. "The shares represented in these corporations represented no other interest except grazing rights." Declaration of Calvin C. Hackford, p. 2, ¶ 12. It is that unlawfully acquired part of these currently valued shares that Plaintiffs seek an accounting. AC, ¶ 112; Prayer for Relief, p. 64. Similarly, there is a basis to allege that the UDC and Ute Indian Tribe have unlawfully acquired lands intended to be held under the 1937 Constitution under the "share and share alike" agreement executed in 1951. Id., p. 1, ¶ 6; p. 4, ¶ 22.

The Plaintiffs in *Felter* are not challenging 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. Debs. Mot., p. 15. Equally, Plaintiffs in *Felter* could care less about the question of whether the AUC or the UDC represents the "mixed-bloods" as regards to non-divisible assets properly and lawfully within the ownership and control of those entities. *Murdock v. Ute Indian*

Tribe, 975 F.2d 683 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp.*, 507 U.S. 1042 (1993). *Murdock* and *Felter* are based upon different legal theories and, thus, rely on different transactions or dissimilar series of transactions.[13] *National Labor Relations Bd. v. United Technologies Corp.,* supra. at 1260. One transaction is the management of indivisible asserts under the intended terms of the UDC; the other transaction questioned in *Felter* is the unlawful and unintended transfer of property belong to the Uinta Band and its members as based on the 1937 Constitution. The causes of action in each case are divergent: one approaching the courts with a question on the management, by the UDC, of *all lawfully acquired property labeled as "indivisible" assets* and the instant *Felter* case approaching the courts with a question of whether the UDC is managing the *unlawfully acquired property owned by the Uinta Band under pre-UPA provisos and conditions prohibiting such acquisitions.* The nature of the "discrete and unitary factual occurrences" as discussed in *Yapp,* supra. at 1227, one lawfully executed under an Act of Congress and the other unlawful under the *substantive laws in existence before the enactment of the UPA* in *Felter* are at polar extremes. Whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *National Labor Relations Bd. v. United Technologies Corp.,* supra. at 1260. Because of the black and white differences in the nature of the cases, different evidence will be used in *Felter.* No where in *Murdock v. Ute Indian Tribe* did the plaintiffs argue the "illegal acquisition" theory in violation of an Act of Congress. Accordingly for purposes of determining res judicata, the claims in *Felter* are not identical to the "landmark case" of *Affiliated Utes Citizens* or the 1992 *Murdock v. Ute Indian Tribe* case.

The remaining cases, *Affiliated Ute Citizens v. United States*, 199 Ct.Cl. 1004 (Ct.Cl. 1972);

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[13] The D.C. Circuit has adopted the "pragmatic, transactional" approach found in the Restatement (Second) of Judgments § 23(2) (1982). *See U.S. Industries v. Blake Construction Co.,* 765 F.2d 195, 205 (D.C. Cir. 1985).

Affiliated Ute Citizens v. United States, 215 Ct. Cl. 935, 936-37 (1977); *United States v. Murdock*, 132 F.3d 534, 541-42 (10th Cir. 1997), *cert. denied.* 525 U.S. 810 (1998) are subject to similar disabilities in relation to the application of res judicata when analogized to the discussion directly above.

Do the Six Cases Involve the Same Parties?

"Privity is essentially the concept of legal similarity–who are the parties and whether they are legally identical." *Yankton Sioux Tribe,* 925 F. Supp. at 664. The United States Supreme Court has stated that "[i]dentity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same." Id. (quoting *Chicago. R.I. & P. Rv. v. Schendel,* 270 U.S. 611, 629 (1926) (citations omitted). Although there is no strict test for privity, the linchpin is whether the non-party was adequately represented in the original action. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990).

The court in *Los Angeles Unified School District v. Los Angeles Branch of NAACP* stated that:

> [t]hough the plaintiffs in the instant action are not the same persons as those who instituted [the earlier action], the action was brought to vindicate the rights of all minority school children and parents affected by the actions and policies of the . . .Board. There is a strong community of interest between the [earlier class] and the Bronson plaintiffs and both actions sought relief on behalf of the same large group of black citizens. For the purposes of [preclusion] we do not consider the plaintiffs in the present action to be "strangers" to the [earlier] action.

714 F.2d 935, 943 (9th Cir. 1983) (quoting *Bronson v. Board of Education*, 525 F.2d 344, 349 (6th Cir. 1975)). Importantly, in deciding whether the parties are identical, the court concluded that the interest of the subsequent parties "were well represented." Id. It goes without saying that the parties in the litigation cited by the Defendants as constituting the basis for dismissal that legal counsel

could not have given adequate representation to the current Plaintiffs in any prior case over the UPA. Counsel would have arguably committed malpractice if they questioned whether the UDC was correctly managing indivisible assets unlawfully acquired. If counsel in the cases cited by Defendants had sought the same relief in *Felter*, they would have been devaluing the overall assets of the UDC and, thus, reducing the value of the UDC shares that miraculously went from representing simple grazing rights to rights encompassing a vast range of valuables allegedly obtained outside the lawful scope of the Act.

In the Tenth Circuit, the issue of privity is a question of fact. *Lowell Staats Mining Co., Inc. v. Philadelphia Co.,* 878 F.2d 1271, 1276 (10th Cir. 1989). None of the cited cases listed individual plaintiffs deriving their alleged standing from their special relationship with the Uinta Band of Ute Indians as Plaintiff have done here. Nor have any of those cases sought to vindicate the rights of the Plaintiffs in *Felter* who "should have been" enrolled since they were not subjected to the UPA. On the present record, the Court cannot conclude that the Plaintiffs' interest were adequately represented in all of the six cases. In their brief, Defendants never affirmatively argued that the representation in the prior cases was adequate, nor did it offer any direct or circumstantial evidence of adequate representation. Therefore, without providing any evidence of adequate representation, Defendants fail to meet the burden to establish that the parties in the six cases were in privity with those Plaintiffs named in *Felter*. And, because privity has not been established, Defendants have not met their burden of proving the elements of res judicata. On the other hand, Plaintiffs have established that the representation in the six cases was inadequate since counsel in those cases would have gone against the interest of their own clients by arguing against that the UPA was employed unlawfully by the Federal Government to reduce the ultimate value both divisible and indivisible property as defined in the Act and that such wrongfully transferred and converted assets should be returned to the *Felter* Plaintiffs. The facts on this point of inadequate representation and ethical

violations if counsel in those past cases were to argue as Plaintiffs argue now cannot be in dispute.

Finally, none of the six cases argued the "breach of trust" toward the Plaintiffs as set out in Plaintiffs' Seventh Cause of Action.[14] AC, ¶ 70, 78. Failure to argue the breach of trust issue is yet another reason for denying Defendants Motion for Dismissal. Moreover, fraud or concealment are exceptions to the rule of issue preclusion.[15]

PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED

Because Plaintiffs have alleged claims for relief against the United States, their claims are barred by the statute of limitations if they were not brought within six years after their right of action accrued. The key issue thus becomes whether Plaintiffs' claims have "accrued" for purposes of 28 U.S.C. § 2401(a).

The Defendants arguments on the statute of limitations are merely presumed in the absence of reliable proof that Defendants knew of the misappropriation of their legal interest and property by non-intended beneficiaries. Defendants limitations contention is couched in a *post-UPA* scenario that Plaintiffs allege as unlawfully conducted at least to the wrongful acquisition of valuable rights vested before 1954. The Defendants statute of limitation argument does not account for the numerous allegations that they concealed the fact of unlawful implementation resulting in a "lumping" of property and other valuable assets into the category of divisible and indivisible property that was distributed in the form of UDC shares to non-intended beneficiaries as alleged. AC, ¶¶ 49, 53, 62, 63, 64, 86-93. Dismissal without discovery in this case at this stage in the

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[14] Bogert on Trust, § 956, citing Restatement Second, Trust § 220 and *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

[15] Scott on Trust, § 260: "The trustee is not protected, however, if in rendering the account he has been guilty of fraud or fraudulent concealment". "On the other hand, although an account is settled and approved, it may be reopened where the trustee was guilty of fraudulent concealment or misrepresentation in presenting his account or in obtaining the approval of the court."

litigation would not allow Plaintiffs to develop a factual record proving that the Defendants, as trustees, fraudulently conceal or obstructed them from information them.

PLAINTIFFS' ALLEGED WAIVERS OF SOVEREIGN IMMUNITY

Plaintiffs' Complaint asserts several jurisdictional bases for litigating "*pre-UPA"* rights," including 28 U.S.C. §1331 for causes of action "arising under the Constitution, laws, or treaties of the United States." These bases survive this Court's dismissal of Plaintiffs' treaty-recognized limitations on the Defendants to allow the Ute Indian Tribe to convert Uinta Band rights via the UPA. It follows that this Court continues to have subject-matter jurisdiction to hear this case.

The cases cited for sovereign immunity are inapposite or irrelevant or both. *U.S.* v. *Mitchell,* 463 U.S. 206 (1983), was a claim by individual allottees of land in an Indian reservation to recover damages for alleged mismanagement. Plaintiffs claim that their interest in *pre-UPA* allotments were lost though the misapplication of the UPA. 25 U.S.C. § 1353. The Supreme Court found a waiver of sovereign immunity in that case under the Tucker Act, 28 U.S.C. § 1491, and other statutes.

In *Gilbert* v. *DaGrossa,* 756 F.2d 1455 (9th Cir., 1985), plaintiff brought suit seeking damages from Internal Revenue Service employees. Similarly, *Holloman* v. *Watt,* 708 F.2d 1399 (9th Cir., 1983), was a suit for money damages for loss of tribal privileges arising out of acts of officials of the Bureau of Indian Affairs.

In deciding immunity defenses, courts look to the existence of statutory waivers. For example, in *Mitchell,* above, the Court stated:

> . . . by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims. 463 U.S. at 212.

In cases like the one at bar, where Plaintiffs allege injury by official agency action "under color of legal authority" and seek equitable relief, sovereign immunity is expressly waived by statute as Plaintiffs have amply alleged in their Amended Complaint:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. 5 U.S.C. §702.

The waiver stated in 5 U.S.C. §702 meets the test that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *"Holloman,* 708 F.2d at 1401, (internal citations omitted).

Federal Defendants' assertion of lack of jurisdiction as to the request for declaratory relief cited in First, Second, Third and Eight Causes of Action must fail in the face of such a clear waiver of immunity, As the Court stated in *Taos* v. *Andrus,* 475 F. Supp. 359 (D.C., 1979):

> "It is a well-recognized principle that the doctrine of sovereign immunity bars suits against government agencies or officials for monetary damages, but does not bar suits for injunctive or declaratory relief." 475 F.Supp. at 364. (internal citations omitted).

The difference between damages and equitable relief for purposes of applying immunity doctrine has been part of United States law since at least *Ex Parte Young,* 209 U.S. 123 (1908). While that case dealt with immunity of a state, the crucial distinction between damages and prospective relief has been an enduring principle. See *Edelman* v. *Jordan,* 415 U.S. 651 (1974), referring to *Young* (,s "a watershed case." 415 U.S. at 664.

As for the Fourth Cause of Action, the fullest explication of the difference was stated by the United States Supreme Court in a case centering precisely on the meaning of 502 U.S.C. §702:

> Our cases have long recognized the distinction between an action at law for damages -- which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation -- and an equitable action for specific relief -- which may include an order providing for the reinstatement of an employee with backpay, or for "the
> recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Bowen v.*

Massachusetts, 487 U.S. 879, 893 (1988). (internal citations omitted).

Plaintiffs in the case at bar seek no different relief in their Fourth Cause of Action from that contemplated and sustained by the Supreme Court in *Bowen.* In short, there is no "immunity" to bar this Court's assertion of jurisdiction in the circumstances of this case.

As for Plaintiffs' Third Cause of Action regarding the "should have been" enrolled Plaintiffs, Defendants assertion that the Complaint fails to state a cause of action for individual aboriginal or "substantive tribal custom, law and tradition" based rights is not sustained by any of the arguments raised by Defendants. Plaintiffs' allegations of individual aboriginal rights in the Fourth Cause of Action are particularly stated, This Cause in the Amended Complaint is sufficient to state claims for relief under the principle of "notice pleading" embodied in the Fed. R. Civ. Pro.

CONCLUSION

Plaintiffs' Amended Complaint will shed light on and resolve the following lingering unresolved issues: 1) what comprised "tribal property" in 1954 which became the subject of the UPA's division of between the Mixed-Blood and Full-Blood Groups; 2) what lands and other property were owned by the Uinta prior to 1954 and were they taken by operation of the UPA without compensation?; and 3) after 1961, did the terminated Mixed-Blood Utes take their rights with them that were protected by a long line of laws and not subjected to the language of the UPA?. Light must also be shed on whether the Defendants engaged in a concerted effort to hide from Plaintiffs the unlawful transfer to their rights and property interest under pursuant to the UPA. With no accounting from the Defendants on the status of *pre-UPA* Uinta property to determine whether the property was subsumed into the UPA and distributed out to unintended 3rd parties without compensation, there are good faith grounds to allege that fraud tolls the statue of limitations.[16]

[16] Defendants have used 1961 as a "bright line" for refusing to have any official dealings with the eliminated Mixed-Blood Uintas, including listening to their request for accounting.

Dismissal of Plaintiffs Amended Complaint must not be granted. Anyone who has been subjected to the wrongful use of the UPA, as alleged herein, by Defendants should have no problem in seeing a trial held on the merits of the Eight Causes of Action alleged in this Amended Complaint so that they may be resolved once and for all.

Oral argument is requested.

DATE: October 6, 2003

Respectfully submitted,

_____

Dennis G. Chappabitty, OBA #1617
Attorney for Plaintiffs

PROOF OF ELECTRONIC SERVICE

I, Linda C. Amelia, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is P.O. Box 292122, Sacramento, CA 95829.

On September 6, 2003, I served on each party listed below by transmitting a true and correct version, in Adobe PDF Format, to:

R. ANTHONY ROGERS
General Litigation Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 2004

_____
Linda C. Amelia