2010-5028

United States Court of Appeals
for the
Federal Circuit

WALTER ROSALES AND KAREN TOGGERY,

Plaintiffs-Appellants,

vs.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Case No. 08-CV-512, Judge Lawrence J. Block.

BRIEF OF PLAINTIFFS-APPELLANTS

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Walter Rosales et al. v. United States

No. 2010-5028

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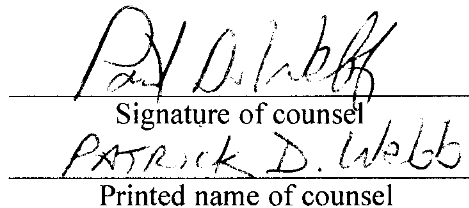
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STATEMENT OF RELATED CASES

This appeal involves the following two related cases, assigned to one judge, of the United States Court of Federal Claims ("CFC"):

Walter J. Rosales and Karen Toggery v. United States, No. 08-512L ("*Rosales X*"), and

Walter Rosales, et al. v. United States, No. 98-860L ("*Rosales VI*").

The CFC issued one opinion filed in both cases, which is the subject of this appeal, Appendix ("A") 1, and erroneously applied the doctrine of issue preclusion, based upon the decisions in the following cases, which will be referred to in the same manner employed by the CFC:

Rosales v. United States, No. 01-951 (S.D. Cal. Feb. 14, 2002) ("*Rosales VII*"), *aff'd on other grounds,* 73F.App*x 913 (9th Cir. 2003);

Rosales v. United States ("*Rosales IX*"), No. 07-624, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed for failure to prosecute*, No. 08-55027 (9th Cir. Aug. 12, 2009).

JURISDICTIONAL STATEMENT

This appeal arises under the jurisdiction of the United States Court of Federal Claims (the "CFC"), pursuant to the Tucker Act, 28 U.S.C. 1491, and the Indian Tucker Act, 28 U.S.C. 1505. A380. This appeal concerns two parcels of land in San Diego County, parcels 597-080-04 and 597-080-05.[1] The CFC entered an final order dismissing the action with prejudice. A25. Jurisdiction in this Court therefore rests on 28 U.S.C. 1295(a)(3).

The Tucker Act provides the CFC with "jurisdiction to render judgment upon any claim against the United States[2] founded either upon the Constitution, or any Act of Congress or any regulation of an executive department...." 28 U.S.C. 1491(a)(1). The Indian Tucker Act, 28 U.S.C. 1505, gives individual Indians the same access to the CFC provided to individual claimants under the Tucker Act. *United States v. Mitchell,* 445 U.S. 535, 539 (1980) ("Mitchell *I"); United States v. White Mountain Apache Tribe* (*White Mountain)*, 537 U.S. 465, 472-3 (2003)*;* *Coast Indian Community v. United States* ("*Coast*"), 550 F.2d 639, 651 (Ct. Cl. 1977); *Tee-Hit-Ton Indians v. United States (Tee-Hit-Ton)*, 120 F.Supp. 202, 204

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[1] These are the County of San Diego tax assessor's parcel numbers, and will be referred to herein as parcel 04 and 05.

[2] The United States will be referred to herein as the "government."

(Ct. Cl. 1954); *Menominee Tribe v. United States (Menominee)*, 388 F.2d 998, 1001 (Ct. Cl. 1967); *Hydaburg Coop. Ass'n v. United States* (*Hydaburg*), 667 F.2d 64, 67 (Ct. Cl. 1981), *cert. denied*, 459 U.S. 905 (1982); *Bear Claw Tribe, Inc. v. United States* (*Bear Claw*), 36 Fed. Cl. 181, 191 (CFC 1996).

Appellants "identify the substantive source of law that establishes specific fiduciary or other duties, and allege that the government has failed to perform those duties," pursuant to *United States v. Navajo Nation (Navajo Nation), 537* U.S. 488, 506 (2002), *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983), and *Fisher v. United States (Fisher I)*, 364 F.3d 1372 (Fed. Cir.2004), and *Fisher v. United States* (*Fisher II*), 402 F.3d 1167, 1172 (Fed. Cir.2005).

Based upon the comprehensive nature of the federal statutes and regulations adopted pursuant to Titles 25 and 16 of the United States Code, and the fact that the Federal government has taken on, controlled, and supervised the Appellants' Indian trust properties, human remains, and funerary objects, the Indian Reorganization Act ("IRA"), 25 U.S.C. 465 et seq., and the Native American Graves Protection Act ("NAGPRA"), 25 U.S.C. 3001 et seq., and the Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq., can "fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties the governing law imposes," including fiduciary duty,

common law trust duty, and a general trust responsibility, for the management of Indian affairs, as described in *Mitchell I; Mitchell II*; *Seminole Nation v. United States*, 316 U.S. 286, 296-96 (1942); *Navajo Nation* at 506; See also, *White Mountain; Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996); *Navajo Tribe v United States*, 364 F.2d 320 (Ct. Cl. 1966); *Coast*, at 651-53, and cases cited at fn 41 and 44; *Tee-Hit-Ton*; *Menominee*; *Hydaburg*; *Bear Claw*; *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 27 (CFC 2007); *Osage Tribe of Indians of Okla. v. U.S.*, 72 Ct. Cl. 629 (CFC 2006); and *Smith v. United States*, 515 F. Supp. 56, (N.D. Cal. 1978), discussed in Appellants' Brief below, A182-198, and *See*, *Yankton Sioux Tribe v. United States Army Corps of Engineers,* 83 F.Supp.2d 1047 (D. S.D. 2000)*(Yankton Sioux I)*, *Yankton Sioux Tribe v. United States Army Corps of Engineers* (*Yankton Sioux II*)*,* 209 F. Supp.2d 1008, 1021-22 (D.S.D. 2002), and *Yankton Sioux Tribe v. United States Army Corps of Engineers* (*Yankton Sioux III*)*,* 258 F. Supp.2d 1027, 1032-5 (D.S.D. 2003); *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003), for a catalogue of the government's fiduciary duties under NAGPRA, discussed in Appellants' brief below. A198-210.

The government's breach of fiduciary duty and taking are not discretionary acts by definition, since the government has a mandatory duty to prevent any

alienation of Appellants' beneficial ownership of parcel 04, including, but not limited to, (1) enforcing the beneficial ownership, (2) blocking eviction, and (3) returning the property wrongfully alienated. *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986); *Coast*, at 652-53.

STATEMENT OF THE ISSUES

Appellants are Native American individuals who assert that the United States breached its fiduciary duty, and allowed a taking to occur, with regard to parcel 04, which is held in trust by the United States for the beneficial ownership of the Appellants. The issues on appeal are:

1. Whether the Appellants' claims were filed within the six year limitations period under the Tucker Acts. 28 US.C. 1501;

2. Whether Appellants' claims were subject to issue preclusion, based upon the Southern District of California's finding that the Appellants' tribe was a necessary and indispensable, yet absent party, under the predecessor F.R.C.P. Rule 19; and

3. Whether Appellants' tribe is a required, but absent party, precluding the CFC from exercising its jurisdiction as a matter of equity and good conscience, under the amendment of R.C.F.C. Rule 19.

STATEMENT OF THE CASE

Appellants filed their original claims for breach of fiduciary duty and taking, among other claims, in the CFC, Case No. 98-860 L, on November 12, 1998. A490-530.

The original action was stayed on April 19, 2000, A29.5, pending Appellants' appeal to the U.S. Court of Appeals for the D.C. Circuit in *Rosales et al. v. United States et al.*, No. 03 Civ 1117, (D.D.C. March 8, 2007). The D.C. Circuit affirmed summary judgment in favor of the government in *Rosales v. United States*, 477 F. Supp.2d 119 (D.D.C. 2007), in an unpublished disposition. *See* 275 Fed. Appx. 1 (D.C. Cir. 2008).

On July 15, 2008, Appellants filed a supplemental complaint in the CFC, which was amended on June 24, 2009, alleging subsequent acts by the government breaching its fiduciary duty and constituting a further taking in Case No. 08-512 L. A26 and A377-471. On August 12, 2008, the government filed a Notice of Related Case, noting that both the original action, Case No. 98-860 L and the subsequent supplemental action, Case No. 08-512 L, alleged claims that the government had failed to enforce the Appellants' beneficial ownership of the land at issue, breaching its fiduciary duty and constituting a taking of the property. A12, A531-33. Appellants moved to consolidate the two cases. A357-60, and A535-547.

On September 26, 2008 the stay of Case No. 98-860 L was lifted. A29.8. On October 1, 2008, both cases were transferred to CFC Judge Lawrence Block, since they involved common issues of fact and law, concerned the same parties and claims regarding the same parcel of land, and since transfer would be likely to conserve judicial resources and promote an efficient determination of both actions. A534.

On June 24, 2009 Appellants filed a motion to amend the pleadings in both actions, which was granted on October 7, 2009, by the CFC, finding that the Third Amended Complaint in Case No. 98-860L is a verbatim copy of the Amended Complaint in Case No. 08-512L, "with three notable though ultimately inconsequential exceptions." A22.

On October 7, 2009, the CFC granted the government's motion to dismiss both actions in a single opinion, finding that they both "arise out of a common set of facts and implicate similar principles of law." A2.

On November 25, 2009, Appellants timely filed a notice of appeal of the CFC's October 7, 2009 joint order dismissing both actions. A488.

STATEMENT OF FACTS

A. Appellants' Beneficial Ownership of Parcel 04

For more than 100 years, the Native American Appellants' families have resided upon, and inhumed hundreds of their families' remains, associated funerary objects, and objects of cultural patrimony, below, on, and above, the Indian graveyard, part of which is known as San Diego County parcel 04. A381-2.

By virtue of these acts, a Native American sanctified cemetery, place of worship, religious and ceremonial site, and sacred shrine, as defined by 25 U.S.C. 3009(4) and Cal. Pub. Res. Code 5097.9, and Cal. Health & Safety Code sections 8551-53, have been dedicated, and notice thereof has been given to the United States. A388.

On December 27, 1978, the prior fee simple owners granted parcel 04, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." A424-27. This grant deed created the fiduciary duty and general trust responsibility of the government to protect those half-blood Jamul Indians then occupying the property, and those that had been inhumed, interred, deposited, dispersed, and placed in perpetuity thereon, against all forms of alienation, trespass, desecration, mutilation, and disinterment of those living and dead. A382.

The government subsequently designated the individual Appellants and their Native American families then possessing and residing on parcel 04, as the beneficial owners thereof, consistent with the federal regulations for unorganized groups of individual Indians, by locating said individual Indians on the parcel, providing for their needs, acquiescing in their continued presence on, and use of, the parcel for more than 28 years. A382-3 and 391-2.

The government provided strong and uncontroverted evidence of this designation of the beneficial owners of the trust property by building houses for the Appellants on the parcel, providing services usually accorded to Indians living on such property, and by allowing them to inhume, inter, deposit, disperse and place their families' remains and funerary objects, below, on, and above parcel 04. A382-5.

This designation of the Appellants as beneficial owners of the parcel 04, is a matter of law, based upon the words of the grant deed and the government's actions for 28 years, as set forth in *Coast*, 550 F.2d at 651, n32; *United States v. State Tax Comm*., 535 F.2d 300, 304 (5th Cir.1976); *United States v. Assiniboine Tribe]* ("*Assiniboine Tribe*"), 428 F.2d 1324, 1329-30 (Ct. Cl. 1970), and 1 *Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-1974* ("*Mem. Sol. Int.*") at 668, 724, 747, and 1479, concerning the Mississippi Choctaws, the St. Croix Chippewas, the Nahma and Beaver Indians,

and the Nooksack Indians, A382-3 and A453-463; and recognized in *Carcieri v. Salazar* ("*Carcieri*"), 555 U.S., 129 S. Ct. 1058, 1061, 1064-65, 1068 (February 24, 2009).

The December 27, 1978 grant deed was recorded nearly three years before the constitution of the Jamul Indian Village was adopted, and nearly four years before any acting deputy assistant secretary of the United States purported to recognize the creation of the Jamul Indian Village, as an Indian tribe under the Indian Reorganization Act ("IRA") of 1934. A383-4, A426. This deed was accepted by the United States, pursuant to 25 U.S.C. 81 and Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465. A427.

Parcel 04, was not acquired for any Indian tribe, and has never been recognized by the government as being a parcel over which the entity, known as the Jamul Indian Village, exercises governmental power. Nor has it ever been lawfully subject to the exercise of any tribal governmental power. Congress has yet to recognize, and has never lawfully exercised, federal jurisdiction over the Jamul Indian Village. A383-4.

Nor could parcel 04 have been acquired for a tribe that did not then exist, leaving only the possibility under 25 U.S.C. 465, that it was purchased in trust for the individual Native American families, including the Appellants, then possessing and residing on the parcel, as recognized in *Carcieri*, at 1061, 1064-65, 1068, and

Coast, *Assiniboine Tribe*, and *Mem. Sol. Int*., *supra*. A384. As the beneficial owners of parcel 04, the Appellants were entitled to be secure in their homes, and to exclude all others, save the United States, from parcel 04. A384-85.

On May 9, 1981, Appellant Walter Rosales, Chairperson of those Indians seeking to adopt a constitution, certified on behalf of the election board, that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution. An acting deputy assistant secretary of Interior approved the constitution on July 7, 1981, but still did not recognize the existence of the tribe. On or about, November 24, 1982, the BIA first listed the Jamul Indian Village, as an Indian tribe, by publication in 47 *Federal Register* 53130, 53132 (Nov. 24, 1982). A386.

Thus, the Jamul Indian Village was a "created tribe," and not a "historical tribe," and therefore "not an inherent sovereign." A467. It has yet to be recognized by Congress, which still has never put the village "under federal jurisdiction," nor has Congress granted the village "jurisdiction" over parcel 04, after 31 years. A386 and A390-91. Only Congress has plenary power over Indian affairs, and therefore only Congress (not the executive branch) can create a tribe's jurisdiction.[3] *South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998);*

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[3] *See for e.g.,* Pub. L. No. 92-470, 86 Stat. 783(1972), in which the Payson Community of Yavapai-Apache Indians was the first of only 16 tribes since 1934, which does not include the Jamul Indian Village, "recognized [by Congress] as a tribe of Indians within the purview of the Act of June 18, 1934."

United States v. Sandoval, 231 U.S. 28, 46 (1913), citing *United States v. Holliday*, 70 U.S. 407, 418 (1865); *United States v. Wheeler*, 435 U.S. 313, 323 (1978)(noting that only unilateral action by Congress may grant a tribe sovereign rights); *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001)("An Indian tribe's jurisdiction derives from the will of Congress"). The Jamul Indian Village is one of 88 "created tribes," which has ostensibly been given "executive recognition" by the BIA, arguably in violation of the separation of powers,[5] but certainly has never been granted any jurisdiction over parcel 04, by either the BIA or Congress.

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[5] *Full Committee Oversight Hearing on the "Supreme Court decision Carcieri v. Salazar Ramifications to Indian Tribes": Before the House Natural Resources Comm.,* 111th Cong., 1st Sess. (April 1, 2009)(written testimony of Donald Craig Mitchell, the former vice-president and general counsel of the Alaska Federation of Natives, and counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations), "...the Deputy Commissioner of Indian Affairs asserted that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to create new "federally recognized tribes" in Congress' stead...However, those statutes contain no such delegation of authority. See William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition*, and 25 C.F.R. 83, 17 American Indian Law Review 37, 47-48 (1992)(5 U.S.C. 301 and 25 U.S.C. 2 and 9 discussed). *See also*, *Federal Recognition of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 14 (1978)(Letter from Rick V. Lavis, Acting Assistant Secretary, to the Honorable Morris Udall, dated August 8, 1978, admitting that "there is no specific legislative authorization" for the Secretary's tribal recognition regulations), found at resourcescommittee.house.gov., and 2009 WL 850102, *9 (F.D.C.H.).

When the Jamul Indian Village was created it was a landless governmental entity. To date, no branch of the United States government has set aside or created an Indian reservation for the Jamul Indian Village. A386-87. The Bureau of Indian Affairs, August 3, 2000 response to the Appellants' Freedom of Information Act (FOIA) request, concedes that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village." A429. This is consistent with the tribe's constitution, Article II, Territory, which fails to identify the 4.66 acres, parcel 04, as within the territory of the Jamul Indian Village. A387 and A442.

Moreover, *Carcieri* now holds that the United States did not have the authority to take parcel 04 into trust for a tribe that was not "under the jurisdiction" of the United States in 1934. *Carcieri* at 1061, 1064-5, 1068. Therein, Justice Thomas held that the IRA, 25 U.S.C. 479: " ...limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust." *Carcieri*, 1061. Similarly, here, because the

record in this case establishes that the Jamul Indian Village was not "under federal jurisdiction" when the IRA was enacted in 1934, the government did not take parcel 04 into trust for the Jamul Indian Village, as a matter of the highest law of the land. A388-9.

The BIA Director of the Office of Tribal Services concluded on July 1, 1993:

> The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery. On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley a portion of the land known as "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate."...The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934 [25 U.S.C. 465, and 479 respectively]...
>
> The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise. A number of "tribes" have been created, from communities of adult Indians, or expressly authorized by Congress under provisions of the IRA and other Federal statutes. For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution and are considered to be IRA "tribes." However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. They are not an inherent sovereign. Rather, that entity is a created tribe exercising

delegated powers of self-government. Such is the case with Jamul Indian Village. A389-90 and A466-67.

The Jamul Indian Village therefore has never had jurisdiction, nor lawfully exercised governmental power, over parcel 04. There has never been a lawful transfer of the parcel to the subsequently recognized tribe. Nor has the government ever designated the subsequently recognized tribe to be the beneficial owner of parcel 04. Hence, the Village tribal court simply had no jurisdiction to evict the Appellants. A390-1, A398.

The Jamul Indian Village is only a purported tribal governmental entity, landless at its creation, that did not exist until it was created in 1981, remains without any trust land today, and still has not been recognized by the United States' Congress. A390. Nor has Congress ever granted the Jamul Indian Village "jurisdiction" over parcel 04. Therefore the express beneficiaries of the deed to the United States for parcel 04 were, and still are, the individual half-blood Jamul Indians who have been allowed to reside on the property since 1978, and not the tribal governmental entity that was subsequently recognized by an acting deputy assistant secretary in 1982, acting without delegation by Congress. A390-91.

Thus, the government is estopped to deny, that the "only possible" designation that exists in the grant deeds, as a matter of law, is that parcel 04 was

taken in trust for "individual" "Jamul Indians of one-half degree or more Indian blood," including the individual Appellants and their families, as held in *Coast*, at 651, n32, and *State Tax Comm.*, at 304, *Assiniboine Tribe*, at 1329-30, and *Mem. Sol. Int.*, 668, 724, 747, and 1479. See also, *Carcieri* at 1061, 1064-5, 1068, 1070. A391-2.

Coast, held on nearly identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [Indian Reorganization] Act that it was purchased for individual Indians." 550 F2.d 639, 651, n. 32. The *Coast* deed "was conveyed to the United States: ...'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior...'" 550 F.2d 641-41. The Jamul deed was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." A391 and A425-27.

The U.S. has no evidence that the subsequently created "tribe," known as the "Jamul Indian Village," was ever designated as the beneficiary of parcel 04, nor that a grant deed ever lawfully transferred the parcel to the tribe. In fact, the only evidence is that the Secretary of the Interior designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of parcel 04, by

allowing them to reside upon the trust land for 28 years, just as occurred in *Coast*, 550 F.2d at 651, n32. A391-2 and A425-27.

The government failed to follow Congress' guidelines for recording a grant deed to a recognized tribe, and therefore the existing grant deed for parcel 04, as a matter of law, only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Mem. Sol. Int.*at 668, 724, 747, and 1479; Exhibit J; *Carcieri* at 1070; Cohen, *Handbook of Federal Indian Law* ("*Handbook*"),[6] §3.02, 135 (DOI 2005). A392-98. In fact, the Interior Solicitor specifically advised the BIA field personnel that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old-fashioned way by recording a grant deed to the subsequently recognized tribe. *Id*. No such deed was granted in this case. A392-93.

The Government also cannot deny that its own *Handbook,* Ch. 11, B3, pp. 615-16 (DOI 1982), and §16.03, p. 883 (DOI 2005), concedes that the Appellants must consent to any transfer of their individual beneficiaries' designation to a

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[6] Congress directed the Secretary of Interior to revise and republish Cohen's *Handbook of Federal Indian Law* in the Indian Civil Rights Act of 1968. 25 U.S.C. 1341(a)(2). Hence, the United States is bound by its admissions with regard to the lands held in trust for individual Indians.

subsequently recognized "tribe," before any lawfully recognized "tribe" may be designated as the beneficiary and acquire "jurisdiction" over the parcel. *Id*. A393. Here, there is no evidence of any such consent by the Appellants. Nor did the government record any subsequent grant deed, transferring the individual Indian beneficiaries' interest in the parcel to any lawfully recognized tribe, including the Jamul Indian Village. A393-4.

Where, as here, no subsequent grant deed was recorded, the individual Appellants' beneficial ownership of the trust property cannot, as a matter of law, have been transferred to any lawfully recognized tribe. A394-98; *Handbook,* §3.02, p. 135, 146 (n99) Footnote 105 (DOI 2005); *Handbook,* Ch.1, Sec. B2e, at 15-16, fn 86 (DOI 1982), and *Handbook*, § 3.02, 146 (n99) Footnote 105 (DOI 2005); *Mem. Sol. Int*. at 1479; See also, Justice Breyer's concurring opinion, and Justice Stevens dissenting opinion, in *Carcieri* at 1070 and 1074-75, citing *Mem. Sol. Int*. at 706-707, 724-725, 747-748. A453-463. Where the grant deed, as here, fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never decided to transfer their beneficial ownership to any lawfully recognized tribe. A395.

This is exactly what happened here. The original grant deed, A425-27, failed to contain the final phrase transferring beneficial ownership in the property to the subsequently recognized Jamul Indian Village. It is undisputed that the tribe did not exist and was not "under federal jurisdiction" in 1934, nor in 1978, when the Government accepted the grant deed for the parcel in trust for the designated individual Jamul Indians. The tribe was not even created until 1981, when it was arguably unlawfully recognized by the BIA, and still has not been recognized by Congress. A396.

Here, no grant deed ever transferred the individual Indians' designated beneficial ownership of parcel 04 to any tribe. A392, A396. The original deed was never corrected, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to put the property into trust for the tribe, after the tribe was recognized. Nor does it state: "and then in trust for such organized tribe." A396-98.

Therefore, as a matter of law, the government is estopped by its own Solicitor's memoranda to deny that parcel 04 is held in trust for the designated individual Jamul Indian beneficiaries, who are of one-half degree Indian blood, including the Appellants, since the government concedes that the "Jamul Indians of one-half degree or more Indian blood,"did not exist as a tribe, and were not

recognized as a tribe in 1978, let alone in 1934. *Memos. Sol. Int.* at 668, 724, 747, 1479. A390, A398, A453-63.

Hence, since there was never a subsequent transfer of the individual Indians' beneficial interest in parcel 04 to the subsequently recognized tribe, the individual Appellants' beneficial ownership of trust parcel 04 has never lawfully been under the governmental power of the Jamul Indian Village, and as such, remains in trust for the Appellants' possession, use and quiet enjoyment, including the sepulcher of their dead. A398.

B. First Notice of the Government's Repudiation of Appellants' Beneficial Ownership of Parcel 04, on February 5, 2001

Contrary to the CFC's finding, A11-12, the government did not begin to repudiate the Appellants' beneficial ownership of parcel 04, until after the original complaint was filed on November 12, 1998. In fact, the government did not repudiate the Appellants' ownership, until well after the Tribal Operations Memo conceded that no one had made a claim that parcel 04 was beneficially owned by the tribe, before May 9, 2000.

The first time the tribe claimed, and the government acknowledged the tribe's claim, that parcel 04 was not beneficially owned by the Appellants, was on February 5, 2001, when they jointly issued a Notice of Land Acquisition

Application. Request for Judicial Notice ("RJN"), Ex. A. This was the date originally alleged by Appellants, when the Southern District of California refused to exercise its jurisdiction in the absence of the tribe, A144, as conceded by the government below. A53. It was also the first time Appellants were put on notice that their homes might be "razed." RJN, Ex. A, p.88.

Thereafter, the government has continuously breached its fiduciary duty and general trust responsibility to the Appellants by failing to:

(1) enforce the grant deed for parcel 04, and the Appellants' beneficial ownership of parcel 04;

(2) block the Appellants' eviction from parcel 04;

(3) seek the return of the possession, use and quiet enjoyment of parcel 04 to Appellants; and

(4) prevent further mutilation, disinterment, wanton disturbance, and willful removal of Appellants' families' human remains, grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in 25 U.S.C. 3001, 43 C.F.R. 10.2, and Cal. Pub. Res. Code 5097.9-5097.99, in violation of 25 U.S.C. 3001, 3002, 3009(4), 43 C.F.R. 7.5, 10.3, 10.3(b)(1), 10.5(a), (b), and (e), 10.6, and 10.10(a) and (b)(1), 16 U.S.C. 470aa et seq., 25 C.F.R. 262 et seq., and Cal. Health & Safety Code 7050.5 and 7500, Cal.

Pub. Res. Code 5097.9-5097.99, without the required written plan, transfer of custody, repatriation, mediation, preservation in place, and generally accepted cultural and archaeological standards of appropriate dignity. A405-6.

Since the first notice of repudiation by the government on February 5, 2001, Appellants have repeatedly demanded, and the government has continuously refused, to protect their beneficial ownership of parcel 04, and prevent the desecration and mutilation of their families' remains and funerary objects. A410-12. As a result, the government has breached its fiduciary duty, and parcel 04 has been taken from the Appellants without just compensation. A410-12.

On March 10, 2007, Appellants were forcibly removed from their residences at gunpoint, against their will, after they were beaten and pepper sprayed in violation of their rights under the U.S. and California Constitutions, and deprived of their religious freedom to protect the sepulcher of their dead. A400. On March 12, 2007, the Appellants' homes were illegally demolished by bulldozers. A400.

STANDARD OF REVIEW

The Court reviews judgments of the CFC to determine whether they are premised on clearly erroneous factual determinations or otherwise incorrect as a matter of law. *Wheeler v. United States,* 11 F.3d 156, 158 (Fed. Cir. 1993). This Court reviews *de novo* whether the CFC possessed jurisdiction and whether the CFC properly dismissed for failure to state a claim upon which relief can be granted, as both are questions of law. *Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992).

In determining whether it has jurisdiction over a case under R.C.F.C. 12(b)(1) or 12(b)(6), this Court has held that it must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir.1995), citing *Sheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974).

Rule 12(b) does not countenance "dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Even where the moving party suggests that the facts plead are not true, they must still be accepted as true for the purposes of this motion, since the moving party has not proven the contrary facts at trial or upon a proper motion for summary judgment. *Neitzke* at 327.

Moreover, where the "jurisdictional issue is intertwined with the merits of the case," a decision on a motion to dismiss for lack of jurisdiction "should await a determination of the merits either by the [] court on a summary judgment or by the fact finder at the trial."*Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2001); 5B Wright & Miller, *Federal Practice and Procedure* § 1340 (3d. 2004). The uniform preferred practice, when the jurisdictional facts are intertwined with the elements of the claim, as here, is to assume subject matter jurisdiction exists and decide the case on the merits. *Bell v. Hood*, 327 U.S. 678, 681-83 (1946); *Trauma Service Group v. United States*, 33 Fed. Cl. 426, 433 (CFC 1995); *Ransom v. United States*, 17 Cl. Ct. 263, 267 (Cl. Ct. 1989). "The pleader is entitled to whatever procedures are reasonably necessary to prove its case, including an evidentiary hearing if need be." *Total Medical Management Inc. v. United States*, 29 Fed. Cl. 296, 301 (CFC 1993).

When jurisdictional facts are intertwined with the facts of the claim, as here, such questions generally should not be resolved under R.C.F.C. 12(b)(1). *Spruill v. Merit Systems Protection Board,* 978 F.2d 679, 686 (Fed. Cir.1992). When jurisdictional facts are so intertwined with the facts on the merits, the responding party must be given an opportunity to develop its facts and the jurisdictional determination must be delayed. *Metzger, Shadyac, and Schwartz v. United States,*

10 Cl. Ct. 107, 109-10 (Cl. Ct. 1986); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430-31, n. 24 (9th Cir. 1977); *see also*, *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999), citing *Reynolds v. Army and Air Force Exch. Serv.* 846 F.2d 746, 747 (Fed. Cir. 1988).

The question of jurisdiction and the merits of an action are considered intertwined, where "the question of the court's jurisdictional grant blends with the merits of the claim." *Fisher v. United States* (*Fisher II*), 402 F.3d 1167, 1171-72 (Fed. Cir.2005). Here, the IRA and NAGPRA, provide the basis for both the subject matter jurisdiction of the Court and the plaintiff's substantive claims for relief. *See for e.g.*, *Samish Indian Nation v. United States*, 2006 WL 5629542, *2 (CFC 2006), where discovery was required before ruling on the government's motion to dismiss, since the plaintiff there, as here, claimed that a wide array of statutes and regulations comprised a network of programs and benefits fairly comprising the money-mandating requirement for the court's jurisdiction, and since "the Federal Circuit[] hold[s] that a 'fiduciary duty can also give rise to a claim for damages within the Tucker Act or Indian Tucker Act.'" *Id.*, citing *Samish Indian Nation v. United States*, 419 F.3d 1355, 1358 (Fed. Cir. 2005).

It is an abuse of discretion to dismiss for lack of subject matter jurisdiction without giving the Plaintiffs a reasonable opportunity, where requested, as here,

A180-82, to conduct discovery to support the jurisdictional allegations in the complaint. *Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1323 (Fed. Cir. 2005); *Laub v. United States Dept. of Interior,* 342 F.3d 1080, 1093 (9th Cir. 2003); *Wells Fargo* at 430-31, fn. 24.

"In assessing a motion to dismiss for failure to state a claim upon which relief can be granted, the court's task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkievicz v. Sorema* 534 U.S. 506, 511 (2002). A motion to dismiss under R.C.F.C. 12(b)(6) should not be granted, where "a claim has been adequately stated, [and] may be supported by any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

SUMMARY OF ARGUMENT

Appellants are Native Americans and the individual beneficial owners of land in San Diego County, identified as parcel 04. Appellants claim that the United States breached its fiduciary duty to protect the Appellants from their removal from parcel 04 at gunpoint, and ratified the wrongful eviction of the Appellants, thereby taking their property without due process of law.

The U.S. Court of Federal Claims ("CFC"), granted the government's motion to dismiss, based upon three errors at law:

(1) Appellants' claims to beneficial ownership of parcel 04 were barred by the six year statute of limitations under the Tucker Acts, 28 U.S.C. 1491 et seq. and 25 U.S.C. 1505, since the Ninth Circuit found the tribe's constitution was adopted in 1981, even though its "territory" did not include parcel 04, A11-12;

(2) Appellants were subject to "issue preclusion," based upon the Southern District of California's finding that the Appellants' tribe was a necessary and indispensable, yet absent party, under the former F.R.C.P. Rule 19, A14-18; and

(3) even if there were no issue preclusion, the tribe was still a "required," but absent, party, precluding the CFC from exercising its jurisdiction as a matter of equity and good conscience, under R.C.F.C. Rule 19. A19-21.

Appellants' Claims are Timely

Appellants' claims for breach of fiduciary duty and taking were timely filed on November 12, 1998, within the six year limitation period of the Tucker Acts, 28 U.S.C. 1491 et seq. and 25 U.S.C. 1501, and 1505. The CFC erroneously granted the government's motion in the face of disputed material facts and substantial admissible evidence, that the government took no action to repudiate the existence of the Appellants' beneficial ownership of parcel 04, more than six years before this action was filed.

***Carcieri* Prevents Issue Preclusion**

Amazingly, the CFC failed to cite, let alone heed, the U.S. Supreme Court's recent decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (February 24, 2009), which fundamentally changed the law, and found that a tribe obtains no beneficial ownership interest in land taken into trust, if it was "not under federal jurisdiction" in 1934. *Id*., at 1061. Thus, *Carcieri* precludes any claim by the tribe to parcel 04, as a matter of law, and requires reversal of the CFC's erroneous application of issue preclusion under R.C.F.C. Rule 19.

CFC's Erroneous Presuppositions Ignore the Evidence and the Law

The CFC erroneously presupposed, even though no prior court had ruled on the merits, that the Appellants' tribe has a claim to parcel 04, when it doesn't; and that it can just start claiming an interest, even though no interest was ever granted, to preclude the true individual owners from establishing their beneficial ownership interest.

The CFC improperly rejected Appellants' beneficial ownership of parcel 04, as a "legal just-so story," A20, in spite of undisputed evidence that Appellants' beneficial ownership of parcel 04 was established as a matter of law, and this Court's mandate to assume the facts in the Amended Complaint are true. The CFC simply ignored, without citation, *Coast Indian Comm. v. United States*, 550 F.2d 639, 652-653 (Ct. Cl. 1977), and 68 years of precedent cited therein, as if, it was not "just-so," when, in fact, the United States has long been held liable for its breach of fiduciary duty and negligence resulting in the loss of an individual Indian's trust property.[7]

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[7] Contrary to the government below, A277, *Coast* is not limited to claims for the loss of right of way, but applies to any loss of use or occupancy of trust property caused by the government trustee's breach of the highest fiduciary duty. *Id*.

Appellants do not appeal the CFC's finding that their claims as to parcel 05 are barred by the statute of limitations, because the face of the 1982 deed for parcel 05 names the tribe as beneficiary. Even though the government was not permitted to take the land into trust for the tribe, as now held in *Carcieri*, the CFC is jurisdictionally precluded from awarding damages for claims that are more than six years old.

However, the face of the 04 deed does not mention any tribe, and only designates individual half-blood Jamul Indians as beneficial owners. Therefore, the CFC erred in assuming, without any evidence, that the tribe's 1981 constitution barred Appellants' timely claims as to their beneficial ownership of parcel 04. The tribe's constitution identifies no territory, but that known as the Jamul Indian Village, A442, and the government concedes the Jamul Indian Village was never known to include parcel 04. A429.

There simply is no evidence of any claim by the tribe or the government, or any governmental act, which could be construed to repudiate Appellants' beneficial ownership of parcel 04, more than six years before this action was filed on November 12, 1998. Moreover, the government's own records evidence that no such claim was ever made prior to the filing of this action. The government has

long conceded that prior to its May 9, 2000 memorandum, it has "no record of the 1978 trust parcel [04] being known as the Jamul Indian Village." A429.

The Merits of Appellants' Claims Have Not Yet Been Decided

Remarkably, after more than 14 years of litigation, not a single court has yet ruled on the merits of Appellants' beneficial ownership of parcel 04. Nor has any court rendered a binding factual determination that Appellants are not the beneficial owners of parcel 04. As with so many Indian law cases, like the six *Rosebud Sioux* cases before the CFC,[8] or the six appeals concerning the Mexican land grant of parcel 04, A382, there are often many lawsuits before the merits are finally reached.

In every instance, where the Appellants' raised their beneficial ownership of parcel 04, the courts have assiduously avoided ruling on the merits, exercising their discretion in "equity and good conscience" not to decide the merits of Appellants' beneficial ownership.[9] Now that the Supreme Court has changed the

[8] *See for e.g., Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 26-22 (Ct. Cl. 2007), listing the five prior cases.

[9] This is not to say that the So. Dist. of Cal. did not express an erroneous opinion as to the merits, but only that its opinion is not binding on the Appellants or this Court, and has been superceded by *Carcieri*'s fundamental change in the law, which precludes the tribe's asserted claim.

law, the lower court decisions are no longer binding, and the CFC's erroneous issue preclusion must be reversed.

Quite understandably then, Appellants' California counsel has zealously advocated Appellants' claims, "repeating the same claims across multiple suits and venues," and "wholesale copying of previous filings in other venues," A24, since the merits of Appellants' beneficial ownership have yet to be finally decided. *ABA Model Code of Professional Responsibility*, Preamble [2], and former DR 7-101 (requiring a lawyer to represent a client zealously).[10]

For all of these reasons, the CFC's dismissal of Appellants' claims should therefore be reversed.

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[10] *See also*, the litigation privilege of Cal. Civil Code 47(2), referred to as "the backbone to an effective and smoothly operating judicial system." *Silberg v. Anderson*, 50 Cal.3d 205, 214-15 (1990).

ARGUMENT

I. Appellants' Claims Were Filed Within the Tucker Acts' Six Year Limitation Period

A. The Government First Repudiated Appellants' Beneficial Ownership of Parcel 04 on February 5, 2001

Contrary to the CFC's finding, A11-12, the government did not begin to repudiate the Appellants' beneficial ownership of parcel 04 (as opposed to parcel 05), until after the original complaint was filed on November 12, 1998. The government did not repudiate the Appellants' ownership of parcel 04, until February 5, 2001, when, for the first time the tribe wrongfully claimed, and the government acknowledged the tribe's erroneous claim, that parcel 04 was not beneficially owned by the Appellants in a Notice of Land Acquisition Application. RJN Ex. A.

The February 5, 2001 notice was originally alleged by Appellants, and conceded by the government, when the Ninth Circuit first affirmed dismissal in the absence of the tribe in 2003. A53, A144; 73 Fed. Appx. 913, 914. The amended complaint does not state when the government first breached its fiduciary duty. The amended complaint does allege that Appellants were not actually damaged or deprived of their possession and use of parcel 04, until they were evicted and their homes were bulldozed, between March 10-12, 2007. A400.

The CFC misapprehended when Appellants' claims accrued, and erred, as a matter of law, as to who became the beneficiaries of title to parcel 04, when the trust was originally created. Had oral argument been allowed, A28, this fundamental misapprehension of the difference between usufructuary rights in Indian land and fee simple title, could have been prevented.

Despite the absence of any evidence that the Village ever claimed to be the beneficial owner of parcel 04 before February 5, 2001, the CFC conjured that it would "defy imagination" that Appellants did not have actual or constructive notice that the government "recogniz[ed] the Village as the beneficial owner of parcel 04," and that the government's "recognition" occurred when the "initial grant" deed was recorded. A11 and A23.

However, there is no evidence to support this erroneous conclusion. There is only the truth that defies the CFC's imagination. A23. Undisputed evidence established that the government never recognized any "claim" that the Village was the beneficial owner of parcel 04 (as opposed to parcel 05), more than six years before this action was filed. In fact, the only evidence before the CFC, confirmed that the government conceded that the term "Jamul Indian Village," was never known (let alone "claimed") to include parcel 04, prior to May 9, 2000, A429, and that the tribe made no claim to parcel 04, until February 5, 2001. A53, and A144.

The CFC treated both parcels, as if the title documents were identical and granted beneficial ownership to the Appellants' tribe when recorded, thereby purportedly "repudiating" some prior trust in favor of the Appellants. A12. The CFC erroneously held that simply by taking title to parcel 04, "by that act," the government "repudiated any trust obligation that it allegedly owed" Appellants. A11-12.

However, the deeds were not identical, and there was no prior trust over either parcel to be repudiated. Moreover, the tribe did not exist when the title to parcel 04 was recorded in 1978. A386. Therefore, the 1978 deed first granted beneficial ownership of parcel 04 to the Appellants, and the 1982 deed granted parcel 05 to the tribe, after it was recognized, as a matter of law.[11] A425-27 and A431-32.

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[11] *Carcieri* subsequently held that the government was not permitted to take property into trust for a tribe, and a tribe cannot become a beneficial owner of trust property, where it "was not under federal jurisdiction in 1934." *Carcieri* at 1061. Since, the Jamul Indian Village was not under federal jurisdiction, until November 24, 1982, the government was not permitted to take either parcel into trust for the tribe, and the designation of the tribe in the 1982 deed for parcel 05 is now void. Appellants do not appeal the CFC's decision with regard to parcel 05, since the CFC found that the designation of the tribe in the 1982 deed, even though impermissible, existed for more than 6 years before this action was filed, from 1982, until the *Carcieri*, decision on February 24, 2009. This is not the case with parcel 04, since the tribe did not exist in 1978, is not mentioned in the deed, and the government affirmatively designated the Appellants as the beneficial owners of parcel 04, building houses and providing services accorded individual Indian beneficial owners on such property for 28 years. *Coast,* at 651, n32.

This evidences the CFC's fundamental misunderstanding of an individual Indian's beneficial ownership in trust land, as opposed to full fee simple title. *See for e.g., United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946), *affirming*, *Alcea Band of Tillamooks v. United States*, 59 F.Supp. 934, 959, 962-3 (Ct. Cl. 1945), *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 782 (Ct. Cl. 1968), finding beneficial ownership based upon an Indian's exclusive use and occupancy of the land for which they were entitled to compensation.[12]

An Indian's beneficial ownership rights are not the same as full fee simple title. The Indian's beneficial ownership rights include all rights to possess, use and quietly enjoy the trust land, except the right to freely transfer the fee simple title, which remains exclusively with the government. This is often referred to as the right to exclude all others, save the United States, which remains obligated to protect the individual Indian from any alienation of the property by the tribe or any other third party. *Alcea Band of Tillamooks,* 329 U.S. at 46; *United States (Tabbytite) v. Clarke*, 529 F.2d 984, 986 (9th Cir. 1976).

Congress specifically enacted 25 U.S.C. 465, to ensure that trust land acquired for individual Indians would not be alienated by anyone without the

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[12] *See also*, Justice Stevens *dissent* in *Carcieri*, finding the IRA "reflects Congress' intent to extend certain benefits to individual Indians, including taking land into trust for individual Indians." *Id*., at 1074.

government's express approval. The IRA provides for the acquisition of land by the United States for the benefit of individual Indians "through purchase, relinquishment, gift, exchange, or assignment...for the purpose of providing land for Indians." 25 U.S.C. 465.

> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe **or individual Indian** for which the land is acquired, and such lands or rights shall be exempt from State and local taxation. 25 U.S.C. 465. (emphasis added).

The 1934 House Report on the IRA clearly evidences a policy that includes acquiring land in trust for individual Indians, and not just for recognized tribes: "Section 5 [25 U.S.C. 465] authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934). So does the Federal government's own *Handbook*, Ch. 1, Sec. D3c, p. 40-41 (DOI 1982), and §3.04 (n114) Footnote 443 (DOI 2005), citing *City of Tacoma v. Andrus*, 457 F. Supp. 342 (D.D.C. 1978), and *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978). "The Act not only authorized the Secretary to acquire land for Indians, 25 U.S.C. 465, but continued the trust status of restricted lands indefinitely, 25 U.S.C. 462..." *Id*., at 1016.

Therefore, as a matter of law, the government could not have "repudiated" a trust that did not then exist, "by the act" of taking title to parcel 04 in 1978, expressly for the benefit of the designated individual "half-blood Jamul Indians," which included the Appellants. A382-83 and A384-85. Hence, Appellants' claims could not have accrued, until the government took some subsequent action to "repudiate" the trust that was first created at the time of the recording of the deed for parcel 04 in 1978. In fact, the government did not take any action to repudiate the trust over parcel 04, until the government published the tribe's notice of their Land Acquisition Application on February 5, 2001, three years after this action had already been filed in 1998. A53; A144; RJN, Ex. A.

The statute of limitations does not begin to run, until the government acts to repudiate the trust. *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd* 801 F.2d 1334, 1335-36 (Fed. Cir. 1986), finding that the statute of limitations runs from the act of misfeasance or nonfeasance by the government trustee. An action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach. *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720 (Fed. Cir. 1984). "It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages." *Terteling v. United States*, 334 F.2d 250, 254 (Ct. Cl. 1964); *Rosebud Sioux Tribe v. United*

States , 75 Fed. Cl. 15, 24 (Ct. Cl. 2007). "Beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets." *Shoshone Indian Tribe of Wind Riv. Res. v. United States*, 364 F.2d 1339, 1347 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 1824, 1826 (2005).

The CFC further erroneously found that Appellants' breach of fiduciary duty and taking claims as to parcel 04, accrued "sometime in 1981, when the Jamul Indian Village was formed...," erroneously reasoning that the tribe "began exercising jurisdiction over that parcel," when it was formed. A12. However, that finding was contrary, not only to the evidence attached to the pleadings, but, to the claims in the amended complaint, A382-83, A384-85, A386-87, A390-92, A393-94, A396, A397-98, which must be assumed to be true on the government's motion to dismiss. *Henke v. United States*, 60 F.3d 795, 797 (Fed.Cir.1995). It is also contrary to *Carcieri*'s holding that the government could not have taken parcel 04 into trust for a tribe that did not exist in 1934, as also plead in the amended complaint. A388-89.

The CFC also erroneously referred to the Ninth Circuit's factually unsupported non-binding observation in 2003 "that the Jamul Indian Village began asserting beneficial ownership over parcel 04 no later than 1981." A12. However,

the CFC apparently did not review the only evidence submitted by the government, upon which the Ninth Circuit based its non-binding observation.

According to the government, Appellants "'knew or should have known' that the United States claimed to hold the Parcel in trust as of July 7, 1981, when Interior approved the constitution of the Jamul Indian Village"and "when Interior published notice in the *Federal Register*, (47 Fed. Reg. at 53,132) that the Jamul Indian Village was a federally recognized Indian tribe." RJN, Ex. B.

First, the Ninth Circuit concluded that it could not, and did not, make a binding determination as to who was the beneficial owner of parcel 04 in equity and good conscience under the former F.R.C.P. Rule 19. 73 Fed. Appx. 913, 914. Second, *Carcieri* supercedes the Ninth Circuit's observation, since the tribe has never had a legally protected interest in parcel 04. Third, the government's only "evidence" of the alleged but unproven claim, was the tribe's 1981 constitution and the publication of the purported "recognition" of the tribe in the *Federal Register*, both of which failed to identify the tribe's territory, and made no reference whatsoever to parcel 04. A442. Fourth, the government concedes that after the BIA purported to recognize the tribe in 1981, it accepted parcel 05 in trust for the beneficial ownership of the tribe. A431-32.

It is this parcel 05, and only this parcel, over which the tribe has lawfully claimed beneficial ownership since 1981. Hence, the CFC merely repeated a non-binding and erroneous observation, that was superceded by the Supreme Court, and was not supported by any substantial evidence of any actual claim by the tribe to beneficial ownership of parcel 04, prior to the February 5, 2001 notice. A53 and A144.

Contrary to the CFC's opinion, there was no evidence that the government ever repudiated the Appellants' beneficial ownership of parcel 04, more than six years before this action was filed on November 12, 1998. Nor any evidence that the government acceded to any prior claim by the Village that it was the beneficial owner of parcel 04, or ever acquired or exercised jurisdiction over parcel 04, more than six years before this action was filed. At most, the tribe had only "claimed" jurisdiction over parcel 05, based upon the face of the July 22, 1982 deed, naming "the Jamul Indian Village," as the beneficial owner of parcel 05. A431-32.

A third party's claim of interest in parcel 04 is insufficient to constitute a government "repudiation" of the Appellants' trust interest. This is particularly true, where the government affirmatively located the Appellants on the parcel, provided for their needs, acquiesced in their continued presence on, and use of, the parcel, built houses for them on the parcel, and provided them with services usually

accorded to Indians living on such property, allowing them to inhume, inter, and place the human remains and funerary objects of their dead, below, on, and above the property, for more than 28 years. *Coast* at 651, n32.

The government's conduct over nearly three decades, provides strong and uncontroverted evidence of Appellants' designation as the beneficial owners of the parcel, as a matter of law, within the meaning of the grant deed, just as in *Coast* at 651, n32; *Assiniboine Tribe*, at 1329-30; and *Mem. Sol. Int.* at 668, 724, 747, and 1479, A453-63; and as recognized in *Carcieri* at 1061, 1064-65, 1068. All of which is alleged in the amended complaint, and must be assumed to be true upon review of a motion to dismiss.

It therefore appears that the CFC wrongfully used the tribe's "claim" over parcel 05 to erroneously find that the Appellants beneficial ownership of parcel 04 was somehow "repudiated" by the government more than six years before Appellants filed this action, even though there is no evidence that the government took any action that could be construed to be a repudiation of Appellants' beneficial ownership of parcel 04, more than six years before this action was filed.

There is no evidence that the government's first notice of the tribe's claim to beneficial ownership of parcel 04, on February 5, 2001, caused any immediate damage to Appellants' beneficial interest in the property. Moreover, even if the

February 5, 2001 notice is held to have immediately caused the Appellants' damage, this action was already pending, thereby permitting the Appellants to supplement their claims with the additional damage resulting from having to "defend" against the government and the tribe's 2001 erroneous claims, and mere threat to raze the Appellants' homes. *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009), and cases cited in B, *infra*.

No court has reached a non-appealable final judgment that Appellants suffered any damage to their beneficial interest in parcel 04 more than six years before this action was filed. Appellants continued their quiet enjoyment of their possession and beneficial interest in Parcel 04, until March 10, 2007, before the government failed to enforce their deed, and failed to prevent their wrongful eviction and the destruction of their homes. A400.

"The continuing claims doctrine [also] operates to save later arising claims even if the statute of limitations has lapsed for earlier events." *Hayes v. United States*, 73 Fed. Cl. 724, 729 (CFC 2006), citing *Ariadne Fin. Servs. Pt. v. United States* 133 F.3d 874, 879 (Fed. Cir. 1998). "The claim will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of

limitations." *Felter v. Norton*, 412 F.Supp.2d 118, 125 (D.D.C. 2006), citing *Lightfoot v. Union Carbide Corp.*, 110 F3.d 898, 9907 (2d Cir. 1997).

For example, the government's failure to enforce the Appellants' beneficial ownership and return parcel 04 was a continuing breach of trust bringing Appellants' claims within the six year period immediately prior to the filing of the complaint. *Jones v. United States*, 9 Cl. Ct. 292, 295, *aff'd* 801 F.2d 1334 (Fed. Cir. 1986). The continuing claim doctrine has also been applied to 25 U.S.C. 466 which created ongoing governmental duty to regenerate a forest, so that each year that went by without replanting created a new cause of action. *Mitchell v. United States*, 13 Cl. Ct. 474, 479-80 (Cl. Ct. 1987); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 25 (Ct. Cl. 2007).

Here, as in *Rosebud*, "the factual issues in this regard preclude summary dismissal." 75 Fed. Cl. 15, 25. "All events that gave rise to the claim obviously could not have occurred until [the damage] occurred. Since the [damage] took place within six years of the filing of this suit, the claim is not time-barred." *Mitchell v. United States*, 18 Cl. Ct. 474, 484 (Cl. Ct. 1987).

Here, not only did the damage first occur within six years of filing this action, the action had been pending for 3 years before the first notice of the government's repudiation of the Appellants' beneficial ownership of parcel 04

could have caused any damage. Moreover, the 2001 Notice of Land Acquisition Application merely threatened Appellants with the razing of their homes. Appellants did not suffer any loss of use or possession of parcel 04, until March 10-12, 2007, when the threat to raze their homes was finally carried out. A400.

For all of these reasons, Appellants' breach of fiduciary duty and taking claims were timely filed within the six year limitation period of the Tucker Acts, and the CFC's order dismissing this action must be reversed.

B. The CFC Correctly Applied the Relation Back Doctrine to Both Amended Complaints

The CFC correctly found in footnote 16 that the Amended Complaint in Case No. 08-512L, "qualifies for relation back to the original filing date, pursuant to R.C.F.C. 15(c)(1),""asserting the identical claims and arising out of the identical 'conduct, transaction, or occurrence' set out in the original complaint." A14. The CFC also correctly assumed in footnote 22, A22, without deciding, that the Third Amended Complaint in Case No. 98-860L, related back to the filing of the original action, since it "arose out of the conduct, transaction, or occurrence set forth...in the original pleading." R.C.F.C. Rule 15(c); A22.

Moreover, the Appellants remain entitled to such relation back, since the November 12, 1998 complaint stated causes of action for breach of fiduciary duty

and taking under the Fifth Amendment, when the tribal hall was torched and certain mobile homes were destroyed between 1992 and 1998. A495, ¶¶ C and D. *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1369-70 (Fed. Cir. 2004), citing *Snoqualmie v. United States*, 372 F.2d 951 (Ct. Cl. 1967); *United States v. Lower Sioux Indian Comm. in Minn.*, 519 F.2d 1378, 1383-87 (Ct. Cl. 1975).

Even the government acknowledged that the filing of an original complaint would toll the statute of limitations, and that subsequent supplemental filings would be additional evidence of the original claims still pending in *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009). "In a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations." *Henderson v. United States*, 517 U.S. 654, 657, n2 (1996). "It has long been held that, at least for federal causes of action, the result of Rule 3 is that the filing of a complaint stops the running of the statute of limitations." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1353 (Fed. Cir. 2000). *See also*, *Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985), the institution of plaintiff's suit suspends the running of limitations on a compulsory counterclaim while the original suit is pending, and *Addison v. California*, 21 Cal.3d 313, 317-18 (1978), "[T]he running of the limitations period is tolled when an injured person

has several legal remedies and reasonably and in good faith, pursues one," before pursuing another during the pendency of the first.

This is consistent with this Court's instruction to litigants to concurrently file their challenges to regulatory action in District Court, with their takings claims in the CFC, and have the takings claim stayed, pending resolution of the regulatory action. *Loveladies Harbor Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994)*; Creppel v. United States,* 41 F.3d 627, 633 (Fed. Cir. 1994), the Court of Federal Claims must hear the takings claim even if the regulatory challenge consumes more than six years, as it did in this case, 1998-2008. *See also*, 28 U.S.C. 1367, tolling the period of limitations for such supplemental claims, which applies to the concurrent jurisdiction of district courts and the CFC. 28 U.S.C. 1346.

Appellants followed that instruction, and the CFC stay has been lifted. Therefore, the supplemental claims for breach of fiduciary duty and taking in Case No. 08-512L are not time barred, because Case No. 98-860L tolled the running of the statute of limitations as of November 12, 1998, and was still pending, when the supplemental action was filed on July 15, 2008.

2. The CFC Erroneously Applied the Issue Preclusion Doctrine

Amazingly, the CFC failed to acknowledge that the Supreme Court fundamentally changed in the law in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009),

thereby precluding the application of the issue preclusion doctrine in this case.[13] The CFC also failed to entertain the February 7, 2009 requested oral argument, A28, which could have avoided its disregard of one of the biggest exceptions to the application of issue preclusion.

The Supreme Court has long held,"even if the core requirements for issue preclusion are met, an exception to the doctrine's application would be warranted due to [the Supreme] Court's intervening decision...", citing the RESTATEMENT

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[13] The CFC appropriately did not hold that either *Rosales VII* or *Rosales IX* precluded any claim in this action, since dismissal under R.C.F.C. Rule 12(b)(7) due to an absent required party under R.C.F.C. Rule 19 is without prejudice, and therefore is not an adjudication on the merits, and thus does not have claim preclusive effect. *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987); *Costello v. United States*, 365 U.S. 265, 286-87 (1961).

Moreover, since the Ninth Circuit in *Rosales VII* ordered the So. Dist. of Cal. not to exercise its jurisdiction in equity and good conscience under F.R.C.P. Rule 19, and in *Rosales IX*, the So. Dist. of Cal. followed that order, there still has been no decision on the merits of the Appellants' beneficial ownership, and the So. Dist. Cal.' statements concerning such ownership are not binding on this Court, nor do they preclude any of the Appellants' claims here. "When a judgment is based upon alternative grounds or multiple grounds, and on appeal it is affirmed on only one ground, without reaching the others, only the issue reached on appeal is a basis for collateral estoppel." *Janicki Logging Co. Inc. v. U.S.*, 36 Fed. Cl. 338, 340 (Ct. Cl. 1996), *aff'd* 124 F.3d 226 (Fed. Cir. 1997)(table); *see also*, *Trauma Service Group, Ltd. v. United States* 33 Fed. Cl. 426, 433, fn. 5 (CFC 1995). No more may be read into summary disposition on appeal than is essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979).

(SECOND) OF JUDGMENTS, §28, Comment *c* (1982), which also states: "where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes." *Bobby v. Bies*, 129 S.Ct. 2145, 2152-53 (2009); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. United States,* 440 U.S. 147, 162 (1979);[14] *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

As this Court noted in *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997), "Courts have crafted an exception to the collateral estoppel principle when there has been a change in the applicable law between the time of the original decision and the subsequent litigation in which collateral estoppel is invoked." Many other Circuit Courts of Appeal have recognized as sufficiently significant changes, an intervening judicial declaration, a modification or clarification of legal principles as enunciated in intervening decisions, and an alteration in a pertinent statutory interpretation. *See for e.g., Graphic Communications Int'l Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 11-12 (1st Cir. 2009), citing *O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1069 (3d Cir. 1991); *Del Rio Distrib., Inc. v. Adolph Coors Co.*,

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[14] Cited, but not discussed, by the CFC. A14.

589 F.2d 176, 179 (5th Cir. 1979); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)("Issue preclusion does not compel reapplication of a remedy since held erroneous as a matter of law."); *B.N. Spradling v. City of Tulsa*, 198 F.3d 1219, 1223 (10th Cir. 2000).

The CFC itself has also long held to this exception to collateral estoppel and issue preclusion. *Texaco, Inc. v. United States*, 579 F.2d 614, 617 (Ct. Cl. 1978); *Southern Maryland Agricultural Ass'n v. United States*, 147 F. Supp. 276, 280 (Ct. Cl. 1957); *Boeing v. United States*, 98 F.Supp. 581, 586 (Ct. Cl. 1951). "Without doubt, the intervening decision of the Supreme Court in the Waterman case on the identical issue litigated previously in this court, qualifies as a change in the legal atmosphere, which renders the bar of collateral estoppel inapplicable here." *Texaco, Inc.* at 617.

Here, the CFC erroneously held that: "plaintiffs cannot maintain any claims that assert, explicitly or implicitly, beneficial ownership of...Parcel 04...without joining the Village, a 'necessary and indispensable' party," and "[t]he doctrine of issue preclusion bars plaintiffs from challenging that determination." A14, citing

Rosales VII Affirmance at 914-15; *Rosales IX* at *5-*6.[15] The CFC also erroneously stated: "The *Rosales IX* court held that plaintiffs could not dispute the ownership of that land in the absence of the Village, whose ownership interest was directly implicated, and whose joinder was barred by sovereign immunity." A15.

However, the CFC erred, as a matter of law, in applying the doctrine of issue preclusion, where the law regarding the issue the CFC found precluded has been fundamentally changed since the prior decisions in *Rosales VII* and *IX*. Here, the Supreme Court's decision in *Carcieri* fundamentally changed the law, and precludes the tribe's claim to any beneficial ownership in parcel 04, as a matter of law. *Carcieri* now holds that a tribe obtains no beneficial ownership interest in land taken into trust, if it was "not under federal jurisdiction" in 1934. *Id.*, at 1061.

There can be no dispute that *Carcieri* fundamentally changed the law, and that the opinion itself identifies the government's prior prevalent practice for the last 75 years to take land into trust for many of the 104 tribes that were "not under Federal jurisdiction" in 1934, of the total of 562 tribes listed in the 72 *Federal Register* 13648. *Carcieri* at 1065, "the Secretary's current interpretation is at odds

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[15] Of course, the CFC ignores the fact that the So. Dist. of Cal. refused to find issue preclusion based upon the Ninth Circuit's summary disposition in *Rosales VII*, since the issues were not identical, and the parties had not been provided a fair opportunity to litigate the issue in the trial court. *Rosales IX*, 2007 WL 4233060, *4.

with the Executive Branch's construction of this provision at the time of enactment," 1070, referencing the Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Mole Lake Tribe, St. Croix Chippewas and Nahma and Beaver Indians, 1074-75, referencing the Shoshone Indians of Nevada; *See also*, testimony of Donald Mitchell before Congress, 2009 WL 850102, *5 (F.D.C.H.), cited in fn.5.

Since the Jamul Indian Village was "not under federal jurisdiction," and did not exist in 1934, the tribe never had a beneficial interest in parcel 04, which was taken into trust for individual "half-blood Jamul Indians," including the Appellants in 1978. Now that the Supreme Court has enunciated the law of the land,[16] and parcel 04 was not taken into trust for the tribe that was "not under federal jurisdiction" in 1934, the Jamul Indian Village has no beneficial ownership interest in parcel 04, and is not a "required" party under the 2007 amendment to R.C.F.C. 19, or a "necessary and indispensable" party under the former F.R.C.P. Rule 19, as improvidently found in *Rosales VII* and *Rosales IX*.

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[16] As the Supreme Court reminds us every now and then, even though there should be no need for citation: "once the [Supreme] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312 (1994).

Therefore, these prior decisions are no longer controlling, and the CFC erred, as a matter of law, in applying the doctrine of issue preclusion based upon those decisions. For this reason also, the CFC dismissal of Appellants' claims should be reversed.

3. The Appellants' Tribe is not a Required Party under R.C.F.C. Rule 19

Since *Carcieri* holds that land cannot be taken into trust for a tribe that was not "under Federal jurisdiction" in 1934, and since the Jamul Indian Village did not exist and was not "under Federal jurisdiction" in 1934, it has never had a legally protected interest in parcel 04, and therefore cannot ever have been a "required" party under the amended R.C.F.C. Rule 19, or a "necessary and indispensable" party under the former F.R.C.P. Rule 19, as a matter of law.[17]

The CFC erroneously presupposed, merely because no prior court had ruled on the merits, that the tribe has an interest in parcel 04, even though no interest was ever granted, and the tribe didn't even exist when the parcel was deeded. The CFC "flatly rejected," Appellants' beneficial ownership as a "just-so story," in spite of

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[17] "F.R.C.P. 19 is identical, in pertinent part, to R.C.F.C. 19;" "the word 'necessary' was replaced with 'required' in subparagraph (a), and the term 'indispensable' was deleted from subparagraph (b), for being both redundant and conclusory. *See* Advisory Committee's Notes on 2007 Amendment to F.R.C.P. 19." A15, fn. 19. Hence, cases cited under the former Rule 19 remain authority for deciding when a party is now "required."

undisputed evidence, prior precedent, and this Court's mandate to assume the facts in the Amended Complaint are true. A20. Without so much as a mention of the more than 30 year history of precedent in *Coast Indian Comm. v. United States*, 550 F.2d 639, 651, n32 (Ct. Cl. 1977),[18] *U.S. v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir.1976); and *United States v. Assiniboine Tribe* ("*Assiniboine Tribe*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970), the CFC also flatly ignored the 75 year history of the Interior Solicitor's legal memoranda, all of which establish Appellants' beneficial ownership of parcel 04, as a matter of law. *Mem. Sol. Int.* at 668, 724, 747, 1479, referenced in *Carcieri* at 1070 and 1074-75.

The CFC erred in assuming that a tribe, that did not exist when parcel 04 was deeded, can just start claiming an interest in the parcel, and thereby preclude the true individual beneficial owners from having the merits of their ownership determined. If that were the law, the Supreme Court would have been precluded,

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[18] *Coast* has been relied upon by this Court in *Texas State Bank v. United States*, 423 F.3d 1370, 1378 (Fed. Cir. 2005), *Shoshone Indian Tribe of Wind River Res. v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004), *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1378 (Fed. Cir. 2001), *Brown v. United States*, 86 F.3d 1554, 1566 (Fed. Cir. 1996), and in *United States v. Wilson*, 881 F.2d 596, 599 (9th Cir. 1989), and in more than 20 CFC cases, recently *Osage v. United States*, 72 Fed. Cl. 629, 643 (CFC 2006) *Innovair Aviation Ltd. v. United States*, 83 Fed. Cl. 498, 500 (Ct. Cl. 2008).

sua sponte, from deciding *Carcieri*, since the Narragansett Tribe clearly claimed an interest in a piece of Rhode Island. However, that is not the law.

A tribe is not a "required," or "necessary and indispensable" party in a lawsuit for money damages against the government, where it does not have a direct ownership interest in the subject property. The CFC ignores this Court's mandate, that it is not deciding whether the tribe had an interest in the property, but whether the Appellants were damaged by the government's breach of fiduciary duty or taking. *United Keetoowah Band of Cherokee Indians of Okla. v. United States ("UKB")*, 480 F.3d 1318, 1326-27 (Fed. Cir. 2007). *See also*, *Wolfchild v. United States* (*Wolfchild IV)*, 77 Fed. Cl. 22, 29-30 (CFC 2007).

"An absent party that claims it is 'necessary' [now "required"] under R.C.F.C. 19(a)(2) to adjudicate an action must show that its 'interest' in the subject matter of the underlying action is not 'indirect or contingent' but is 'of such a direct and immediate character that the [absent party] will either gain or lose by the direct legal operation and effect of the judgment.' *Id*. Our understanding of the 'interest' required in R.C.F.C. 19(a)(2) is supported by a majority of circuits that have addressed the issue. [citations omitted]" *UKB* at 1324-25. "Because the UKB's action is a claim for damages under a statute, the CNO does not have a"“‘legally protectable interest' in the UKB's extinguished claims, [or] a sufficient

'interest' under R.C.F.C. 19(a) to permit it to intervene as a party who is 'necessary' to adjudicate the UKB's action against the federal government." *UKB* at 1327.

Here, just as in *UKB*, "the actual subject matter of the [] Band's claim...was... the... damages it was seeking from the government. [not the property] 480 F.3d at 1326-27. The exclusive remedy available to the Band...was money damages, and the Cherokee Nation's interest in retaining its alleged exclusive rights to certain lands was merely 'indirect' and 'contingent.' *Id*. (citing *American Mar. Transp. Inc. v. United States,* 870 F.2d 1559, 1561 (Fed. Cir. 1989)." *UKB* at 1325-26; *Wolfchild IV*, at 30. "[T]he CNO's 'interest' in retaining exclusive rights to the Riverbed Lands is an 'indirect' and a 'contingent' interest to the UKB's statutory claims against the federal government." *UKB* at 1326-27.

Karuk Tribe of Cal. v. United States, 27 Fed. Cl. 429, 431-32 (CFC1993), denied intervention, on the ground that "the interest that the applicant-intervenors assert is not direct, but indirect and contingent on other events. The direct result of a judgment in favor of the plaintiff in this case would only be a monetary award from the government to the plaintiff... Here, the plaintiffs are not suing to gain possession of the reservation; they are suing only to recover damages from the government for having excluded them from possession of the reservation."

Here, the tribe cannot be a necessary or indispensable party to Appellants' action, because it never had a "legally protected interest" in parcel 04, according to *Carcieri*. The decisions of the CFC and this Court are consistent with the other Circuits. Where "plaintiffs' action focuses solely on the propriety of [governmental action], the absence of [an affected] Tribe does not prevent the plaintiffs from receiving their requested declaratory relief." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001); *Kansas v. United States,* 249 F.2d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe an indispensable party, since "the Federal Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests..."

In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land; *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996)(same); *Antoine v. United States* 637 F.2d 1177, 1181-82 (8th Cir. 1981),"the government may be held liable for damages, regardless of the presence or absence of other potential parties." A "legally

protected interest" excludes those "claimed" interests that are "patently frivolous." *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land ....this "interest" is merely an expectation...This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. *Potawatomi*, 17 F.3d 1292, 1294.

Here, per *Carcieri*, the tribe's claim to parcel 04 is also merely an expectation that has not yet occurred, since it never obtained a legally protected interest in parcel 04. Just as the 1872 Act did not create any "trust interest" in the Absentee-Shawnee tribe, the 1978 grant deed here did not, and could not, create any legally protected interest in a "tribe" that had yet to be created, adopt a constitution, or be recognized, and simply did not exist, in 1978. *Carcieri* at 1061, 1068. Moreover, there is no evidence that any protected interest in parcel 04 was ever subsequently transferred to the tribe. A382-83, A388-89, A390-393, A394, A395-96, and A429.

Since the tribe never acquired a legally protected interest in parcel 04, it has never lawfully exercised jurisdiction over parcel 04, and its tribal court has no legally protected interest in any rulings concerning property not within the tribe's beneficial ownership. The tribe's constitution does not identify parcel 04 within its "territory," and the government has conceded that there is no record of parcel 04

ever being known as the Jamul Indian Village. A429. Hence, the tribal court did not have jurisdiction to evict the Appellants, or make any rulings as to possession or beneficial ownership of parcel 04. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001), "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction;" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, n12 (2001), "there can be no assertion of civil authority beyond tribal lands." Therefore, the tribe has no legally protected interest in the tribal court eviction order, which is void for lack of jurisdiction.

Also contrary to the CFC's finding, there are no competing claims between the tribe and the Appellants in this lawsuit. The tribe has no interest in the Appellants' monetary claims. If the tribe perceives that the government has wrongfully deprived it of some future interest in parcel 04, just as the UKB found in *Cherokee Nation of Okla. v. United States*, 54 Fed. Cl. 116, 119 (CFC 2002), the tribe can always assert its own claim against the government for damages, for e.g., if Congress adopts a *"Carcieri* fix" and the government then transfers beneficial ownership to the tribe.

Finally, the CFC failed to address "the absence of an alternative forum [which] should weigh heavily, if not conclusively against dismissal;" *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001); particularly, where

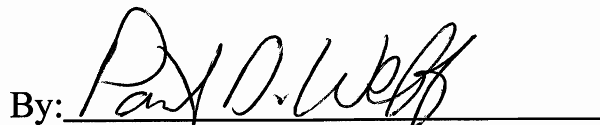
"there does not appear to be any alternative forum in which plaintiffs' claims can be heard." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). The effect of the CFC's dismissal has, yet again, wrongfully deprived the Appellants of a forum to determine the merits of their beneficial ownership of parcel 04.

As in *UKB,* the tribe does not have a "legally protected interest" in the Appellants' claims for money damages, caused when their beneficial ownership of parcel 04 was taken at the point of a gun, and their homes were bulldozed without compensation. The tribe has never had an ownership interest in parcel 04, per *Carcieri*. Therefore, the tribe is neither a "required," nor a "necessary and indispensable" party to this action, and the CFC's dismissal under R.C.F.C. 19, must be reversed.

CONCLUSION

For the foregoing reasons, the CFC's October 7, 2009 order and October 14, 2009 judgment of dismissal should be reversed.

Respectfully submitted

By: 

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ADDENDUM

United States Court of Federal Claims

October 7, 2009

No. 08-512 L

Walter J. Rosales and
Karen Toggery,

***Plaintiffs*,**

v.

United States of America,

Defendant.

Statute of Limitations; Issue Preclusion; RCFC 19; Necessary and Indispensable Party; Indian Trust Accounting Statute; Continuing Claims Doctrine; Sovereign Immunity; Subject Matter Jurisdiction

No. 98-860 L

Walter J. Rosales, *et al.*,

***Plaintiffs*,**

v.

United States of America,

Defendant.

Patrick D. Webb, Webb & Carey, San Diego, CA, for plaintiffs.

Samantha Klein, Natural Resources Section, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

Block, *Judge.*

Two cases before this court, *Walter J. Rosales and Karen Toggery v. United States*, No. 08-512 L ("*Rosales X*"), and *Walter Rosales, et al. v. United States*, No. 98-860 L ("*Rosales VI*"), arise out of a common set of facts and implicate similar principles of law. For the purposes of judicial economy, the court addresses both cases in this single opinion.

Both cases stem from internecine disputes among the members and purported members of the Jamul Indian Village ("Village"), a federally-recognized tribal government.[1] The two complaints before this court, in *Rosales VI* and *Rosales X*, represent but the most iterations of plaintiffs' persistent attempts—in the face of repeated dismissals and unfavorable judgments over the course of fifteen years—to invalidate a series of tribal elections and to wrest from the Village the beneficial ownership of two parcels of tribal land. Plaintiffs have litigated or sought to litigate these same and related issues in no fewer than fourteen legal actions brought before tribal tribunals, administrative boards, and federal courts in California and the District of Columbia, all without success.[2] Indeed, what this court previously observed in *Franklin Sav.*

[1] The court will use "Village" to refer to the recognized government of the Jamul Indians and "Tribe" to refer to the Jamul Indians as an organized group.

[2] The first round of litigation comprised administrative challenges, before the Department of the Interior Board of Indian Appeals ("IBIA"), concerning various Village elections, electoral procedures, and membership eligibility. These cases are: (1) *Rosales v. Sacramento Area Dir.* ("*Rosales I*"), 32 I.B.I.A. 158 (1998); (2) *Rosales v. Sacramento Area Dir.* ("*Rosales II*"), 34 I.B.I.A. 50 (1999); (3) *Rosales v. Sacramento Area Dir.* ("*Rosales III*"), 34 I.B.I.A. 125 (1999); and (4) *Rosales v. Sacramento Area Dir.* ("*Rosales IV*"), 39 I.B.I.A. 12 (2003).

Contemporaneously, plaintiffs brought challenges in federal courts, seeking review of various matters relating to the election disputes at issue in *Rosales I–IV*. These cases are: (5) *Jamul Indian Vill. v. Hunter*, No. 95-131 (S.D. Cal. voluntarily dismissed Sept. 30, 1996) (seeking to enforce a "judgment" from the "tribal court" of a faction of the Tribe that had lost in tribal elections); (6) *Rosales v. Townsend* ("*Rosales V*"), No. 97-769 (S.D. Cal. voluntarily dismissed Nov. 19, 1998); and (7) *Rosales v. United States* ("*Rosales VIII*"), 477 F. Supp. 2d 119 (D.D.C. 2007) (granting defendant's motion for summary judgment, and upholding IBIA's decisions in *Rosales I–IV*), *aff'd*, 275 F. App'x 1 (D.C. Cir. 2008).

In their most recent round of litigation, plaintiffs sought to secure beneficial ownership of several parcels of land that the Village has claimed. These cases are: (8) *Rosales VI*; (9) *Rosales v. United States*, No. 01-951 (S.D. Cal. Feb. 14, 2002) ("*Rosales VII*"), *aff'd on other grounds*, 73 F. App'x 913 (9th Cir. 2003) ("*Rosales VII Affirmance*"), *cert. denied*, 541 U.S. 936 (2004); (10) *Rosales v. United States* ("*Rosales IX*"), No. 07-624, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed for failure to prosecute*, No. 08-55027 (9th Cir. Aug. 12, 2009); and (11) *Rosales X*. As noted, *Rosales VI* and *Rosales X* are the subjects of the instant opinion.

Additionally, there are several cases which arise out of the same set of facts, but are tangential to the issues before this court. Plaintiffs' counsel in this case also filed a challenge to the Village's casino gaming plan in (12) *Rosales v. Kean Argovitz Resorts, Inc.*, No. 00-1910

Corp. v. United States, 56 Fed. Cl. 720, 721 (2003), seems doubly apt here: "Despite vainly prosecuting myriad legal claims in every conceivable forum and fruitlessly propounding inventive and novel legal theories, plaintiffs have continually stared down the face of defeat, personifying Mason Cooley's aphorism, 'if you at first don't succeed, try again, and then try something else.'" Plaintiffs' current attempt to defy their fate—an attempt this court strongly admonishes plaintiffs to make their last—miscarries again.

The court hereby grants defendant's motion to dismiss the complaint in *Rosales X*, and dismisses, on its own motion, the complaint in *Rosales VI*.

I. BACKGROUND

The Village is a tribal governmental entity of the Kumeyaay Indians, which Congress recognized[3] pursuant to section 16 of the Indian Reorganization Act ("IRA") of 1934, 25 U.S.C. § 476. *Rosales VIII* at 122. The Village is located in Jamul, an unincorporated community in San Diego County, California. *See id.* The Village came into being in 1981, after twenty individuals petitioned the Bureau of Indian Affairs to organize as a community of "half-bloods"[4]

(S.D. Cal. Apr. 18, 2001), *aff'd*, 35 F. App'x 562 (9th Cir. 2002), *cert. denied*, 537 U.S. 975 (2002). In parallel with *Jamul Indian Vill. v. Hunter*, plaintiffs' counsel filed (13) *Jamul Indian Vill. v. Sacramento Area Dir.*, 29 I.B.I.A. 90 (1996), purportedly on behalf of the Jamul Indian Village, but IBIA rejected that appeal as premature and procedurally deficient, *id.* at 90–91. Finally, IBIA also summarily dismissed a case that Walter Rosales and Marie Toggery filed, along with San Diego County and the Board of Directors of the San Diego Rural Fire Protection District, (14) *San Diego Cty. v. Pac. Reg'l Dir.*, 37 I.B.I.A. 233 (2002). In that case, the appellants sought review of a Finding of No Significant Impact ("FONSI"), made by the Pacific Regional Director of the Bureau of Indian Affairs, as to the proposed acquisition of approximately 101 acres of land for the Village pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321–70. *Id.* at 233. Because the Regional Director indicated that the Bureau of Indian Affairs was withdrawing its FONSI in favor of a full Environmental Impact Statement, IBIA dismissed the case as moot. *See id.* at 233–34.

[3] "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society and institutionalizing the government-to-government relationship between the tribe and the federal government." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (2005). That recognition creates a fiduciary relationship between the government and the tribe, formalizes the tribe's power to tax and to establish its own judiciary, and determines the tribe's eligibility for the congressionally-created programs and services that the Department of the Interior's Bureau of Indian Affairs provides. *See id.*; *see generally* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001).

[4] Section 19 of IRA, 25 U.S.C. § 479, defines the term "Indian" to include "all other persons of one-half or more Indian blood." In reviewing a tribal constitution, the Department of the Interior has historically sought to exclude from tribal membership "a large number of applicants with a small degree of Indian blood." *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*,

pursuant to IRA and submitted a proposed "Village Constitution."[5] *See id.* (citing *Rosales I* at 159–60). Of the twenty-three individuals eligible to vote on the proposed Constitution, sixteen did so, all in favor. *Id.* (citing *Rosales I* at 160). The Acting Deputy Assistant Secretary of Indian Affairs approved the Village Constitution on July 7, 1981. *Id.* This original constitution made tribal membership available only to individuals with no less than "1/2 degree California Indian blood quantum." *Id.*

Plaintiffs in *Rosales X*, Walter Rosales and Karen Toggery, are Native American residents of San Diego County, California, of one-half or more degree of California Indian blood. *Rosales X*, Compl. ¶ 1. Of the twelve plaintiffs named in the original complaint in *Rosales VI*, only two remain, Joe Comacho (also a Native American resident of San Diego County, *Rosales VI*, 3d Am. Compl. ¶ 1) and Walter Rosales; all other named plaintiffs have either died or withdrawn consent for suit since counsel filed the original complaint.[6]

A. *The Underlying Dispute*

The path to the instant cases began in 1994, when a faction led by then Vice-Chairman Jane Dumas ("Dumas Faction") held an election to recall and replace four Village officials[7] who had been elected in 1992 ("Incumbent Faction"). *Rosales VIII* at 122–23. The Superintendent

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33 AM. INDIAN L. REV. 243, 262–69 (2009) (explaining the history and application of the Indian "blood quantum" and its role in tribal membership).

[5] Section 16 of IRA, 25 U.S.C. § 476, details the procedures for an Indian tribe to organize as a political unit and to establish the rules for its self-governance.

[6] Six of the original plaintiffs revoked permission for the attorney of record, Patrick D. Webb, to represent them in any pending litigation; five of those stated that they had *never* authorized Webb to represent them. *Rosales VI*, Updated Mot. to Dismiss, Ex. 11, Declaration of Kenneth Meza ("Meza Decl."), Ex. B. Another two plaintiffs withdrew from the litigation. *Id.* Kenneth Meza, the elected Tribal Chairman of Jamul Indian Village, has stated that five of the original plaintiffs are now deceased: Marie Toggery, along with four (Sarah Aldamas, Vivian Flores, Valentino Mesa, William Mesa) of the six plaintiffs who had previously revoked their permission for Webb to represent them. Meza Decl. ¶ 7. Finally, a tenth plaintiff, Bernice Mesa, is not named in the Third Amended Complaint submitted by plaintiffs in June of this year; the court presumes that Mesa, too, has either withdrawn from the suit or passed away. Plaintiffs seek leave to substitute Karen Toggery for Marie Toggery (Karen is Marie's daughter and the personal representative of Marie's estate), arguing that the Federal Circuit has held that the court should be lenient in permitting substitution. *Rosales VI*, Pls.' June Mot. at 9–10 (citing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999)). While the ninety-day window to move for substitution may not yet have expired, *see Grass Valley Terrace v. United States*, 69 Fed. Cl. 506, 509 (2006), plaintiffs have not formally moved for substitution, as RCFC 5 and RCFC 25(a)(3) require, so this court need not consider whether it should allow the substitution.

[7] These officials are Raymond Hunter, Marcia Goring-Gomez, Mary Alveraz, and Lee Shaw-Conway. *Rosales I* at 161.

and Area Director of the Bureau of Indian Affairs ("the Bureau") refused to uphold the 1994 recall election because the Dumas Faction had failed to comply with the Village Constitution's procedural requirements. *Id.* at 123 (citing *Rosales I* at 160). Had the Bureau upheld the recall election, plaintiff Karen Toggery would have been the Secretary-Treasurer of the Village. *Id.* at 123 n.3. Instead, the Bureau continued to recognize the Incumbent Faction. *Id.* at 123. In 1995, each faction held its own separate election, and, as a result of its respective contest, claimed to have the authority to lead the Village. *Id.* The Dumas Faction's disputes of the 1994 and 1995 elections trickled through the Department of the Interior's administrative review process, ultimately coming before the Department of the Interior Board of Indian Appeals ("IBIA"). *Rosales I* at 158–59. IBIA could not determine whether either faction's 1995 election was valid, thus leaving the Incumbent Faction in control, because the 1992 election that had brought them to power was the most recent unchallenged election. *Rosales VIII* at 123; *Rosales I* at 167.

The Dumas Faction, including Mr. Rosales, Ms. Toggery, and others, continued to challenge tribal election results at IBIA. Next, they contested the propriety of the Village's 1996 "secretarial" election, concerning a proposed amendment to the Village Constitution that would reduce the blood quantum requirement for Village membership from one-half to one-quarter. *See Rosales II*, 34 I.B.I.A. at 51–52. The Village had voted in favor of, and the Deputy Commissioner of Indian Affairs had ultimately approved, that amendment. *Id.* IBIA dismissed the Dumas Faction's challenge for being procedurally defective, *see id.* at 51–54, evidently to plaintiffs' profound dismay.

Plaintiffs' grievance over the results of these tribal elections, in particular, the lowered blood quantum requirement for Village membership and plaintiffs' exclusion from membership in the Village (i.e., the tribal government), would set off what is now a fifteen-year campaign of legal challenges.

In their suits against defendant United States, plaintiffs have advanced two theories for relief, alleging defendant's breach of various fiduciary and trust duties. The first theory is founded upon plaintiffs' challenge to the validity of tribal elections and the legitimacy of the current Village membership, while the second rests upon plaintiffs' claim to beneficial ownership of two parcels of tribal land. The various complaints and amended complaints filed in the two cases before this court have invoked both theories for relief.

B. *The Instant Litigation*

1. *Rosales v. United States*, No. 08-512 ("*Rosales X*")

Before the court are two iterations of plaintiffs' complaint: the original complaint, filed on July 15, 2008, and a proposed Amended Complaint, filed on June 24, 2009 along with plaintiffs' pending motion to amend and to consolidate this case with *Rosales VI*. *Rosales X*, Pls.' June 24, 2009 Mot. to Amend. ("Pls.' June Mot."). The Amended Complaint adds nine pages (and nine numbered paragraphs), but is *substantively identical* to the original complaint (compare concurrent citations below).

Plaintiffs' *Rosales X* claims focus on two parcels of tribal land. *See, e.g.*, *Rosales X*, Compl. ¶¶ 69, 74 (stating the primary basis for plaintiffs' two claims for relief); Am. Compl. ¶¶ 78, 83 (same). The first of these, a parcel of land currently designated 597-080-04 ("Parcel 04"),

is the 4.66-acre portion of the original Mexican land grant of Rancho Jamul that Donald and Lawrence Daley conveyed, in 1978, to "'[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.'" *See Rosales X*, Compl. ¶ 11, Ex. D (the 1978 Deed); Am. Compl. ¶ 13. The other parcel, designated 597-080-05 ("Parcel 05"), comprises 1.372 acres of an original 2.21-acre plot of land that the Roman Catholic Bishop of San Diego conveyed on July 27, 1982, "to the United States of America in trust for the Jamul Indian Village." *See Rosales X*, Compl. ¶ 21, Ex. F (the 1982 Deed); Am. Compl. ¶ 24. The remaining 0.838 acres of that 2.21-acre plot, designated 597-080-06 ("Parcel 06"), remains the property of the Bishopric and is not at issue in either case. *See Rosales X*, Compl. ¶ 22; Am. Compl. ¶ 25.

Plaintiffs in *Rosales X* assert that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. *See Rosales X*, Compl. ¶ 69 and Am. Compl. ¶ 74 (claiming that defendant breached its duties to plaintiffs by "failing to enforce the deed to, and Plaintiffs' beneficial ownership of, [Parcels 04 and 05]"); *Rosales X*, Compl. ¶¶ 74–76 and Am. Compl. ¶¶ 83–85 (claiming that this same failure effected a taking). Plaintiffs previously made the same assertions in *Rosales IX*. *See Rosales IX* at *4 (discussing plaintiffs' underlying assertion of their beneficial ownership interest in Parcel 04). Echoing *Rosales IX*, plaintiffs also argue that the federal government has duties, under the Native American Graves Protection and Repatriation Act ("NAGPRA"),[8] to prevent inadvertent discoveries of human remains on those parcels of land, Parcels 04 and 05 among them, where Native American remains and funerary objects exist. *Compare Rosales X*, Compl. ¶ 63(4)–(10) *and* Am. Compl. ¶ 71(4)–(10) (setting forth plaintiffs' NAGPRA allegations) *with Rosales IX* at *8–*10 (rejecting plaintiffs' arguments that NAGPRA imposes has any such affirmative duties upon the federal government). Plaintiffs assert that defendant violated these duties—duties allegedly owed to them as the beneficial owners of Parcels 04 and 05—primairly by failing to prevent the Village's grading of, and other construction activity on, the land. *Rosales X*, Compl. ¶ 63(4); Am. Compl. ¶ 71(4). Based on a panoply of statutes, including IRA and NAGPRA, plaintiffs allege that defendant breached its fiduciary and common law trust duties to manage Indian affairs (1) by failing to enforce plaintiffs' claims of, and rights to, beneficial ownership of Parcels 04 and 05, (2) by failing to prevent interference with the graves therein, and (3) by failing to prevent plaintiffs' eviction from these parcels. *Rosales X*, Compl. ¶¶ 67, 69; Am. Compl. ¶¶ 76, 78. Plaintiffs also charge that, through this allegedly unlawful inaction, defendant effected a taking of Parcels 04 and 05 without compensation, in violation of the Fifth Amendment. *Rosales X*, Compl. ¶¶ 74–76; Am. Compl. ¶¶ 83–85. Finally, plaintiffs claim that IRA and NAGPRA taken together constitute a money-mandating source, sufficient to invoke this court's jurisdiction.[9] *Rosales X*, Pls.' Mem. in

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[8] Codified, in pertinent part, at 25 U.S.C. §§ 3001–3013, NAGPRA lays out federal agencies' procedures and obligations when Native American human remains or associated funerary objects are discovered. *See Rosales IX* at *2 n.3. NAGPRA also sets forth the responsibilities of museums and federal agencies that controlled such remains or objects before NAGPRA became law. *Id.*

[9] According to the "the network theory" of jurisdiction under the Tucker Act and Indian Tucker Act, a meshwork of statutes and regulations may, under some circumstances, substitute for a clear money-mandating statute. *See United States v. Navajo Nation* ("*Navajo Nation I*"), 537 U.S. 488, 504–06 (2003) (explaining that a network of statutes and regulations can satisfy this

Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n.") at 6.

Defendant has moved to dismiss the original complaint for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the RULES OF THE COURT OF FEDERAL CLAIMS ("RCFC"). *Rosales X*, Mot. to Dismiss at 10–14. Defendant identifies plaintiffs' failure to bring their claims within the Tucker Act's six-year statute of limitations as a jurisdictional defect mandating dismissal. *Id.* In addition, defendant argues that the Village, whose joinder is barred by sovereign immunity, is a necessary and indispensable party to the adjudication of plaintiffs' claims, and that issue preclusion bars plaintiffs from relitigating that threshold issue, which has been fully litigated and previously ruled upon by the *Rosales IX* court. *Rosales X*, Mot. to Dismiss at 14–21.[10] Defendant has also moved to strike plaintiffs' motion to amend (along with the proposed Amended Complaint). *Rosales X*, Def.'s July 7, 2009 Mot. to Strike Pls.' Mot. to Amend.

2. *Rosales v. United States*, No. 98-860 ("*Rosales VI*")

After losing its election challenge in *Rosales I*, and in an apparent attempt to attack that decision collaterally, the Dumas Faction brought suit in this court, filing the first *Rosales VI* complaint in 1998.[11] More than a decade and several amendments later,[12] the court has before it two wholly divergent incarnations of plaintiffs' complaint.

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court's Indian Tucker Act jurisdiction when the "network" establishes specific rights and duties that go beyond a general trust relationship); *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 61–66 (2008) (recounting the history of the network theory and explaining that a network of statutes may satisfy this court's jurisdictional requirement of a money-mandating source when the network establishes a fiduciary relationship between the government and an Indian tribe). However, *Navajo Nation I* foreclosed the application of this theory in most cases, by requiring that a plaintiff identify "*specific* rights-creating or duty-imposing statutory or regulatory prescriptions" in place of a clear money-mandating statute. 537 U.S. at 506 (emphasis added); *see United States v. Navajo Nation* ("*Navajo Nation II*"), _ U.S. _, 129 S. Ct. 1547, 1554–55 (2009) (explaining that *Navajo Nation I* foreclosed application of the network theory where the statutes comprising the network only created an implied duty).

[10] In the alternative, defendant has moved to dismiss for failure to state a claim, pursuant to RCRC 12(b)(6), but, curiously, does not cite RCFC 12(b)(7) (which permits dismissal for failure to join a party under Rule 19).

[11] Plaintiffs' counsel, Patrick D. Webb, filed *Rosales VI* despite not being admitted to this court's bar at the time. *See Rosales VI*, Compl. at 1; *Rosales VI*, Defect Slip, Mar. 17, 1999 (stating that the complaint did not comply with RCFC 81(d)(1) because Mr. Webb was not admitted to this court's bar).

[12] The court first stayed *Rosales VI* from April 19, 2000 through February 26, 2004, and ordered the parties to file a joint status report following the conclusion of *Rosales IV*. *Rosales VI*, Docket No. 39 (Order of Apr. 19, 2000 Granting Stay) & Docket No. 40 (Order of Feb. 26, 2004). The court stayed *Rosales VI* a second time, from March 19, 2004 through September 26, 2008, at the parties' request, pending the outcome of *Rosales VIII*. *Rosales VI*, Docket No. 43 (Order of Mar.

The Second Amended Complaint, the last amendment filed with the court's leave, essentially continues the election challenges first launched in *Rosales I.* Plaintiffs claim that defendant breached its trust responsibilities by "dealing with non-members of JAMUL as if they were, in fact, members of JAMUL, and by independently and in conspiracy with the NON-MEMBERS,[13] violating the Jamul Constitution and ordinances." *Rosales VI*, 2d Am. Compl. ¶ 41. The complaint also challenges defendant's recognition of the Incumbent Faction, *see id.* ¶ 19 (complaining of the purported NON-MEMBERS' receipt of federal funding and benefits), its "funding and facilitating . . . [the] staging of an illegal election for an illegal amendment to the JAMUL INDIAN VILLAGE Constitution," *id.* ¶ 20 (referring to the 1996 secretarial election), and state and federal law enforcement officials' treatment of the Incumbent Faction as the lawful tribal government, *see id.* ¶ 26. The source of all of these charges is the series of Village elections that the Dumas Faction lost, along with IBIA's refusal in *Rosales I–IV* to overturn them. *See id.* ¶¶ 24–25 (asserting the validity of the Dumas Faction's tribal court judgments, despite the unambiguous language of *Rosales III* to the contrary). Defendant has moved to dismiss the Second Amended Complaint, on jurisdictional and justiciability grounds, notably, plaintiffs' lack of standing to bring suit either individually or on behalf of the Jamul Tribe. *Rosales VI*, Updated Mot. to Dismiss at 14–27.

On March 6, 2009, plaintiffs filed a memorandum, opposing defendant's updated motion to dismiss and seeking to consolidate this case with *Rosales X*, along with an eleven-page exhibit purporting to be a Third Amended Complaint. *Rosales VI*, Pls.' Mem. in Opp'n to Def.'s Updated Mot. to Dismiss ("Pls.' Opp'n.") at 2; Ex. A. In their memorandum, plaintiffs "voluntarily dismiss[ed] those portions of their Second Amended Complaint not contained in their proposed Third Amended Complaint." *Rosales VI*, Pls.' Opp'n. at 2. On June 24, 2009—the same day they filed their *Rosales X* motion to amend—plaintiffs filed a formal motion to amend the complaint in *Rosales VI*, along with an expanded, 41-page iteration of their Third Amended Complaint. *Rosales VI*, Pls.' June 24, 2009 Mot. to Amend. ("Pls.' June Mot."). Plaintiffs' *Rosales VI* June motion reiterates their abandonment of the elections-based claims, stating that, "[a]s pleaded in the proposed [third] amended complaint, Plaintiffs no longer make claims based upon their being the lawfully elected leaders of the tribe. Nor do they make claims for injury to tribal property, tribal assets, or any tribal interests." *Rosales VI*, Pls.' June Mot. at 4. Instead, in an apparent attempt to sidestep defendant's updated motion for dismissal and to start this case anew, plaintiffs' Third Amended Complaint in *Rosales VI* is a *verbatim duplicate* of the *Rosales X* Amended Complaint.[14] *Compare Rosales VI*, 3d Am. Compl. ¶¶ 6–75 *with*

19, 2004 Granting Parties' Stay Request); Order of Sept. 26, 2008 Lifting Stay. Then-Chief Judge Damich transferred *Rosales VI* to this judge on September 26, 2008. *Rosales VI*, Docket No. 75 (Order Transferring Case).

[13] These styled "NON-MEMBERS" include the four members of the Incumbent Faction whose recall was at issue in *Rosales I. Compare* note 7, *supra* (listing the officials at issue), *with Rosales VI*, 2d Am. Compl. ¶ 7 (including those same officials in the list of "NON-MEMBERS"). *See also id.* ¶ 9 (alleging that the "NON-MEMBERS" have never been enrolled members of the Village).

[14] There are only two differences between the two complaints: (1) the inclusion of Joe Comacho

Rosales X, Am. Compl ¶¶ 5–74. Defendant has moved to strike plaintiffs' motion to amend. *Rosales X*, Def.'s July 7, 2009 Mot. to Strike Pls.' Mot. to Amend.

C. The Court Admits the Amended Complaints

In *Rosales VI*, the court hereby grants plaintiffs' motion for leave to substitute the Third Amended Complaint. Accordingly, the court denies as moot defendant's updated motion to dismiss, which was based on the claims asserted in the now-abrogated Second Amended Complaint.

In *Rosales X*, the court hereby grants plaintiffs' motion for leave to substitute the Amended Complaint. Because the Amended Complaint in *Rosales X* alters nothing of the substance of the original complaint, however, the court deems defendant's previously filed motion for dismissal to apply to the Amended Complaint.

The court admits the newly amended complaints not because the circumstances satisfy the Supreme Court's standard for granting leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Indeed, plaintiffs arguably fail that standard in both cases and on multiple counts, including likely prejudice to defendant at this late stage in the suit (in both cases), bad faith on the part of plaintiffs (especially in *Rosales VI*, given the enormous departure that the purported "amendment" represents), and the futility of the amendments (in both cases). *See id.* To the contrary, the court grants leave to amend, for one *last* time in each case, in the hope of persuading plaintiffs of the inexorable futility of their obstinate fifteen-year campaign. In *Rosales VI*, the court would have granted defendant's updated motion to dismiss the Second Amended Complaint, on precisely the grounds articulated therein, and now dismisses *sua sponte* plaintiffs' Third Amended Complaint. Moreover, with two negligible exceptions (*see supra* note 14, and *infra* Section III), plaintiffs' Third Amended Complaint in *Rosales VI* and the Amended Complaint in *Rosales X* are *verbatim duplicates*, leaving before the court a single complaint, in all but name. In the shadow of plaintiffs' fifteen-year campaign of legal challenges, perpetuated in the face of repeated dismissals and adverse judgments on the merits, a campaign that has already wasted enormous administrative and judicial resources, the court will not refuse plaintiffs' inadvertent gift.

Having, in part, unscrambled the Rubik's Cube of where *Rosales VI* and *Rosales X* currently stand, and with identical complaints now before the court in both cases, the court's analysis begins—and ends—with the threshold question of whether it can adjudicate the merits of plaintiffs' claims in either case.

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as a plaintiff, and (2) the recitation of two additional, wholly subordinate claims in the *Rosales VI* Third Amended Complaint (see *infra* Section III for discussion of these differences).

II. *ROSALES X*

Because of the significance for the court's decision of the near-identity of the Third Amended Complaint in *Rosales VI* and the Amended Complaint in *Rosales X*, the court routinely cites *both* complaints in the discussion below.

A. The Tucker Act's Statute of Limitations Is a Jurisdictional Bar to Plaintiffs' Claims

Before adjudicating the merits of a case, a court must first ensure that it has jurisdiction to hear and decide the matter before it. *E.g., Hardie v. United States*, 367 F.3d 1288, 1290 (Fed. Cir. 2004); *PIN/NIP, Inc. v. Platt Chem. Co.*, 304 F.3d 1234, 1241 (Fed. Cir. 2002). As the Supreme Court recently reiterated, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing th[at] fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The court should begin by "presum[ing] that a cause of action lies outside the limited jurisdiction of the federal courts." *Blueport Co. v. United States*, 533 F.3d 1374, 1381 (Fed. Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994)). Plaintiffs, as the party requesting the exercise of judicial power, bear the burden of establishing, by a preponderance of the evidence, the court's jurisdiction. *See Blueport*, 533 F.3d at 1381.

1. The Tucker Act's Statue of Limitations Is a Jurisdictional Requirement for Suits in This Court

This court's jurisdiction flows principally from the Tucker Act, codified in pertinent part at 28 U.S.C. § 1491. Claims under the Tucker Act are subject to a six-year statute of limitations: "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Unlike most statutes of limitations, which are typically treated as affirmative defenses, § 2501 is "a jurisdictional requirement for a suit in the Court of Federal Claims" and one that "may not be waived." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130, 128 S. Ct. 750 (2008); *see also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitation for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."). Accordingly, this court has an ongoing duty to address, even *sua sponte*, the application of § 2501 to the instant cases. *See, e.g., Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) ("[s]ubject-matter jurisdiction may be challenged at any time by the parties or by the court *sua sponte*"). Moreover, because § 2501 is a jurisdictional requirement, the running of the limitations period is "not susceptible to equitable tolling." *John R. Sand & Gravel Co.*, 128 S. Ct. at 755; *see also Black v. United States*, 84 Fed. Cl. 439, 450 (2008) ("[E]quitable tolling of . . . § 2501 is foreclosed by the Supreme Court's decision in *John R. Sand & Gravel Co.*").

2. Claim Accrual Under § 2501

A claim accrues under § 2501, and the six-year limitations period begins to run, "when all events have occurred to fix the government's alleged liability, entitling the claimant to

demand payment and sue here for his money." *Martinez*, 333 F.3d at 1303. Further, "it is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Instead, the proper focus "is upon the time of the [defendant's] *acts*, not upon the time at which the consequences of the acts became most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

A narrow "accrual suspension" rule allows "the accrual of a claim against the United States [to be] suspended, for purposes of 28 U.S.C. § 2501, ... [only if] the plaintiff [can] either show that the *defendant has concealed its acts* with the result that plaintiff was unaware of their existence or . . . that its injury was *inherently unknowable* at the accrual date." *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (emphasis added) (internal quotation marks an citations omitted). The accrual suspension rule is strictly and narrowly applied. *Martinez*, 333 F.3d at 1319. In line with the Supreme Court's foreclosure of equitable considerations under § 2501, *John R. Sand & Gravel*, 128 S. Ct. at 755, the accrual suspension rule does not create a constructive notice requirement of the traditional sort:

> It is sometimes stated that accrual . . . will be suspended until the claimant "knew or should have known" that the claim existed. That articulation of the rule is not meant to set forth a different test . . . . [T]he "concealed or inherently unknowable" formulation . . . is both more common and more precise and we therefore endorse that formulation as the preferable one.

Ingrum v. United States, 560 F.3d 1311, 1315 n.1 (Fed. Cir. 2009) (internal citations omitted). Indeed, absent active concealment by defendant, accrual suspension requires what is tantamount to sheer impossibility of notice. *See Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967) ("An example of [an inherently unknowable injury] would be when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit."); *Roberts v. United States*, 312 Fed. App'x 340, 342 (Fed. Cir. 2009) (affirming dismissal of plaintiffs' claims as untimely under § 2501, where plaintiff failed to demonstrate that his military service records were wholly unavailable).

3. Plaintiffs' Claims Accrued No Later Than 1982

Plaintiffs' claims all arise out of defendant's recognition of the Village as the beneficial owner of Parcels 04 and 05, and its failure to enforce plaintiffs' purported ownership interest in these parcels. *See, e.g.*, *Rosales X*, Am. Compl. ¶¶ 71, 78, 83; *Rosales VI*, 3d Am. Compl. ¶¶ 72, 83, 88. Plaintiffs' focus, *Rosales X*, Pls.' Opp'n at 2, 37, on their 2007 eviction is misguided. *See Del. State Coll.*, 449 U.S. at 258. While this eviction may be an additional injury resulting from defendant's act, and while it may set the accrual date for a hypothetical claim against the *Village*, it is wholly immaterial to accrual of the claims against defendant. *Id.* Similarly, any on-going grading, excavation, or other construction activity conducted by the Village, on Parcels 04 and 05, flows from the Village's exercise of beneficial ownership of these parcels. While this construction activity may represent further injury to plaintiffs, and may be the "most painful" yet of the consequences of defendant's acts, it is irrelevant to setting the accrual date for plaintiffs' claims. *Id.* Therefore, the NAGPRA violations alleged by plaintiffs are likewise tethered to defendant's initial grant of beneficial ownership over Parcels 04 and 05 to the Village. By that

act, defendant repudiated any trust obligation that it allegedly owed plaintiffs—whether under IRA, NAGPRA or the common law—and, if plaintiffs were indeed the rightful beneficial owners of the land, effected a taking without just compensation. *See Jones v. United States*, 801 F.2d 1334, 1335–36 (Fed. Cir. 1986) ("A trustee may repudiate an express trust by words . . . or by actions inconsistent with his obligations under the trust.").

The same reasoning leads the court to reject plaintiffs' contention that the "continuing claims" doctrine restores the timeliness of their claims. *See Rosales X*, Pls.' Opp'n at 37–38. The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely when the claims are "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages," and when at least one of these events falls within the limitations period. *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) ("*Brown Park*"). However, "a claim upon a single distinct event, which may have *continued ill effects* later on, is *not* a continuing claim." *Id.* (emphasis added). On similar facts, the court previously refused to apply the continuing claims doctrine where plaintiffs alleged that the United States' "continued and repeated refusal to recognize [plaintiffs] as the rightful owners of [the disputed parcel] should be considered a continuing wrong." *Voison v. United States*, 80 Fed. Cl. 164, 176 (2008). Plaintiffs here conclude that their claims did not accrue until March 10, 2007, the date on which the Village allegedly evicted them from their homes. *Rosales X*, Pls.' Opp'n at 2. By their logic, it is unclear to the court why they do not contend that their claims are accruing still, since they allege that the grading and excavation of Parcels 04 and 05 are on-going. *See, e.g.*, *Rosales X*, Am. Compl. ¶¶ 60, 71(4); *Rosales VI*, 3d Am. Compl. ¶¶ 61, 72(4). Regardless, plaintiffs' contention is flawed. While the 2007 eviction may be a belated injury caused by defendant's acts, it is not an "independent and distinct event or wrong," *Brown Park*, 127 F.3d at 1456, for which defendant is responsible, and thus does not support application of the continuing claims doctrine.

In sum, it is a single act by defendant, with respect to each of these two parcels, that marked the final event "fix[ing] the government's alleged liability, entitling [plaintiffs] to demand payment and sue here for [their] money." *Martinez*, 333 F.3d at 1303. Based largely on plaintiffs' own pleadings, the court fixes the time of this accrual-triggering event at nearly three decades ago. Plaintiffs claim that defendant failed to enforce the deeds to, and plaintiffs' beneficial ownership of, Parcels 04 and 05. *Rosales X*, Am. Compl. ¶ 71(1); *Rosales VI*, 3d Am. Compl. ¶ 72(1). Parcel 04 was conveyed to the United States, in trust for "half-blood Jamul Indians," on December 12, 1978; the grant deed was recorded on December 27 of that year. *Rosales X*, Am. Compl. ¶ 13; *Rosales VI*, 3d Am. Compl. ¶ 14. As the Ninth Circuit previously observed in 2003, the Jamul Indian Village began asserting beneficial ownership over Parcel 04 no later than 1981. *See Rosales VII Affirmance*, 73 F. App'x at 914. Parcel 05 was deeded to the United States "in trust for the Jamul Indian Village"—not for plaintiffs as individuals—on July 27, 1982. *Rosales X*, Am. Compl. ¶ 24, Ex. F; *Rosales VI*, 3d Am. Compl. ¶ 25, Ex. F. Therefore, as to Parcel 05, plaintiffs' claims accrued on July 27, 1982, when defendant accepted that parcel in trust for the Village. As to Parcel 04, plaintiffs' claims accrued some time in 1981, when the Jamul Indian Village was formed, *Rosales X*, Am. Compl. ¶ 22, *Rosales VI*, 3d Am. Compl. ¶ 23, and began exercising jurisdiction over that parcel, *Rosales VII Affirmance*, 73 F. App'x at 914.

Finally, defendant's acts must have been actively concealed or inherently unknowable for plaintiffs' claims to be eligible for accrual suspension. *Ingrum*, 560 F.3d at 1315 n.1. Plaintiffs have not alleged that defendant concealed, or sought to conceal, its acceptance of Parcels 04 and 05 in trust for the Jamul Tribe collectively or its recognition of the Village as the beneficial owner of these parcels. Nor was this injury inherently unknowable, by any stretch of the imagination. Plaintiffs, therefore, cannot hope to meet the stringent standard for accrual suspension.

4. The Indian Trust Accounting Statute Is Unavailable to Suspend the Accrual of Plaintiffs' Claims

In the alternative, plaintiffs contend that the Indian Trust Accounting Statute ("ITAS"), Pub. L. No. 108-108, 117 Stat. 1263 (2003),[15] operates to suspend the accrual of their claims until defendant provides plaintiffs with a complete accounting of their trust. *Rosales X*, Pls.' Opp'n at 35–37. Defendant responds that ITAS only applies to trust *funds*, not trust assets such as the land parcels at issue. The court agrees. ITAS states, in pertinent part:

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

Pub. L. No. 108-108, 117 Stat. 1263 (2003). Thus, when ITAS applies, the Tucker Act's statute of limitations does not begin to run, nor does a claim accrue for breach of fiduciary duty regarding a trust fund, until the complaining Indian tribe or individual has received an accounting, thereby learning of the trustee's repudiation. *See Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347–48 (Fed. Cir. 2004).

Shoshone held that ITAS only applies to trust *funds*, and that the statute does not toll a claim for breach of fiduciary duty regarding trust *assets*. *See id.* at 1348–50. As the Federal Circuit explained, claims regarding trust funds include claims concerning the trustee's duty (1) to collect payments under tribe contracts, (2) to deposit collected money into the tribes' interest-bearing trust accounts, and (3) to assess contractual penalties for late payment against breaching parties. *Id.* at 1350. In contrast, ITAS does not apply to *assets* held in trust, such as sand and gravel, timber, or oil and gas assets. *See Shoshone*, 364 F.3d at 1350 (holding that ITAS did not apply to gravel and sand assets); *Oenga v. United States*, 83 Fed. Cl. 594, 609 (2008) (holding ITAS only extended the statute of limitations concerning the collection of royalties from gas and oil assets, i.e., funds); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (2006) (holding that ITAS did not apply to a claim for breach of fiduciary duty for government mismanagement of timber assets).

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[15] ITAS was first adopted in 1990, and has been readopted each year since without any material changes. Because plaintiffs cite to the 2003 version of ITAS, so does the court.

Here, plaintiffs' claims for breach of fiduciary duty center on parcels of land, which are assets held in trust, not trust funds. ITAS is therefore unavailable to toll the accrual of plaintiffs' claims.

5. Plaintiffs' Claims Are Barred by the Statute of Limitations

Plaintiffs' claims accrued in 1981 and 1982, as to Parcels 04 and 05, respectively. The six-year limitations period, under § 2501, thus expired no later than 1988, nearly two decades before plaintiffs filed their original complaint in *Rosales X*, on July 15, 2008.[16] Because plaintiffs' claims are ineligible for accrual suspension, and because neither ITAS nor the continuing claims doctrine are apposite, plaintiffs' claims cannot clear the jurisdictional bar of the Tucker Act's statute of limitations.

B. Issue Preclusion Bars Adjudication of Plaintiffs' Claims

Assuming, *arguendo*, that plaintiffs' claims in *Rosales X* are timely, the Village's absence as a party to this litigation is a sufficient, independent ground for dismissal. Plaintiffs' claims in *Rosales X* rest upon the foundational assumption that plaintiffs, not the Village, are the rightful beneficial owners of Parcels 04 and 05. *See Rosales X*, Am. Compl. ¶¶ 75–87. Over the course of the labyrinthine history of these disputes, other courts have determined that plaintiffs cannot maintain any claims that assert, explicitly or implicitly, beneficial ownership of tribal land, such as Parcels 04 and 05, without joining the Village, a "necessary and indispensable" party. *Rosales VII Affirmance* at 914–15; *Rosales IX* at *5–*6. The doctrine of issue preclusion bars plaintiffs from challenging that determination.

Issue preclusion, or collateral estoppel,[17] is "grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen v. United States*, 157 Ct. Cl. 798, 798 (1962). Issue preclusion "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 & n.5 (1979); *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1274 (Fed. Cir. 2005). Granting preclusive effect to the determination of issues upholds a "fundamental precept of common-law adjudication," namely, that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties . . . ." *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

[16] The Amended Complaint in *Rosales X*, asserting the identical claims and arising out of the identical "conduct, transaction, or occurrence" set out in the original complaint, qualifies for relation back to the original filing date, pursuant to RCFC 15(c)(1).

[17] While this court prefers the doctrine's more precise label of "issue preclusion," many courts continue to use the term "collateral estoppel" either exclusively or interchangeably with "issue preclusion."

subsequent action between the parties, whether on the same or a *different claim*." RESTATEMENT (SECOND) OF JUDGMENTS[18] § 27 (1982) (emphasis added).

Plaintiffs' claims in the instant case rest upon the foundational assumption that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. Adjudication of their claims thus requires, as a first step, a determination of the ownership status of these two parcels. The success of plaintiffs' claims in *Rosales IX* was likewise contingent on their claim of beneficial ownership to Parcel 04. *See Rosales IX* at *4. In that case, plaintiffs claimed, as they do before this court, that the Native American Graves Protection and Repatriation Act (NAGPRA) imposed an affirmative duty of trust upon the federal government to prevent construction on those parcels of land, including Parcel 04, where Native American remains allegedly exist. *See Rosales IX* at *2, *8–*10. Plaintiffs asserted that this duty was owed to them as the beneficial owners of Parcel 04. *Id.* The *Rosales IX* court held that plaintiffs could not dispute the ownership of that land in the absence of the Village, whose ownership interest was directly implicated, and whose joinder was barred by sovereign immunity. *Id.* at *5–*6. Concluding that the United States could not adequately represent the Village's interests, the *Rosales IX* court refused to allow its plaintiffs to "make an end run around tribal sovereign immunity by suing the United States" and litigating the ownership status of Parcel 04 without the Village. *Id. Rosales IX* held that, pursuant to Rule 19 of the FEDERAL RULES OF CIVIL PROCEDURE ("FRCP"),[19] the Village is a "necessary and indispensable" party to any such litigation; the court granted, with prejudice, the government's motion for dismissal. *Id.* at *10. Significantly, that court denied plaintiffs leave to amend their complaint, noting that any amendment asserting that the land at issue is federal, rather than tribal, would be futile. *Id.*

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[18] In *Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305, 1314 (Fed. Cir. 1983), the Federal Circuit cited and quoted relevant provisions of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) in order to determine issues of *res judicata*, collateral estoppel, and issue and claim preclusion. The Federal Circuit continues to rely on the RESTATEMENT to guide its analysis of preclusion, and continues to cite *Young Engineers* in support of that reliance. *See, e.g.*, *Jet, Inc. v. United States*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (citing *Young Engineers* for the proposition that the "Federal Circuit would receive guidance from RESTATEMENT (SECOND) OF JUDGMENTS (1982)").

[19] FRCP 19 is identical, in pertinent part, to RCFC 19. As part of the 2007 amendments to FRCP 19, the word "necessary" was replaced with "required" in subparagraph (a), and the term "indispensable" was deleted from subparagraph (b), for being at once redundant and conclusory. *See* Advisory Committee's Notes on 2007 Amendment to FRCP 19. The current version to RCFC 19 follows suit. Many courts, however, including the *Rosales IX* court, have continued to use the label of "necessary and indispensable," in referring to a party whose joinder is required under Rule 19(a), but who cannot be joined, and without whom the court decides, pursuant to Rule 19(b), that it cannot proceed. This court prefers to follow the current language of the rule. However, the significance of the *Rosales IX* opinion to this court's present holding counsels in favor of using the language of "necessary and indispensable party," lest differences in terminology obfuscate the substantive similarities between the two matters.

Pointing to the holding in *Rosales IX*, defendant raises issue preclusion as a bar to plaintiffs' claims.[20] *Rosales X*, Mot. to Dismiss at 15–16. Under the Federal Circuit's test, the party invoking issue preclusion must show that:

> (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action.

Innovad Inc. v. Microsoft Corp., 260 F.3d 1326, 1334 (Fed. Cir. 2001). The court addresses the four prongs of this test, *seriatim*.

1. Identity of the Issue

Under the first prong of the test, the question is whether the issue of the Village's status as a necessary and indispensable party is the same in the instant litigation as it was in *Rosales IX*.

The *Rosales X* claims rest no less critically upon plaintiffs' assertion of beneficial ownership of tribal land (Parcels 04 and 05) than did their unsuccessful claims in *Rosales IX*. *Compare Rosales X*, Am. Compl. ¶¶ 78 (claiming that defendant breached its duties to plaintiffs by "failing to enforce the deed to, and Plaintiffs' beneficial ownership of, [Parcels 04 and 05]") *and* 83–85 (claiming that this same failure effected a taking), *with Rosales IX* at *4 (discussing plaintiffs' claims of beneficial ownership in Parcel 04). Plaintiffs still rely, as they did in *Rosales IX*, upon NAGPRA to establish defendant's alleged breach of its fiduciary duty, in failing to stop construction activity on Parcels 04 and 05. *Compare Rosales X*, Am. Compl. ¶ 71(4)–(10) (setting forth plaintiffs' NAGPRA claims) *with Rosales IX* at *8–*10 (rejecting plaintiffs' arguments that the government has any affirmative duties pursuant to NAGPRA to prevent the inadvertent discovery of human remains on these same parcels).

Moreover, the facts that plaintiffs marshal in support of their *Rosales X* claims duplicate, in large swaths, the facts alleged in *Rosales IX*. *Compare, e.g.*, *Rosales X*, Am. Compl. ¶¶ 11–21, 28–51 (detailing plaintiffs' claims to beneficial ownership of Parcel 04) *with Rosales IX*, Am. Compl. ¶¶ 19–30, 33–42, 44–54 (same); *see also Rosales VI*, 3d Am. Compl. ¶¶ 12–22, 29–52 (same). The evidence that plaintiffs use to support their present complaint is likewise recycled: of thirteen exhibits that accompanied the *Rosales IX* complaint, plaintiffs have attached eleven to their *Rosales X* Amended Complaint (and to the Third Amended Complaint in *Rosales VI*). *Compare Rosales X*, Am. Compl., Exs. List, *with Rosales IX*, Am. Compl, Exs. List; *see also Rosales VI*, 3d Am. Compl, Exs. List. Even typographical errors in the *Rosales X* complaint (and in the *Rosales VI* Third Amended Complaint) unwittingly reveal the extent to which plaintiffs are re-litigating *Rosales IX*. Specifically, the complaints share the same mistyped citation to a Memorandum of the Solicitor of the Department of the Interior: "*supra* not [sic] 76, at 1497." *Compare Rosales X*, Am. Compl. ¶ 42 *and Rosales VI*, 3d Am. Compl. ¶ 43 *with Rosales IX*, Am. Compl. ¶ 45.

[20] Remarkably, in arguing that issue preclusion should not bar their claims, plaintiffs cite cases from the Sixth, Eighth, and Ninth Circuits, whose precedent is not binding upon this court, while failing to cite a single Federal Circuit case, concerning the effect or scope of issue preclusion. *See Rosales X*, Pls.' Opp'n at 40–44.

Thus, it is manifest that *Rosales IX* decided the identical issue now before this court, namely, whether the Village is an indispensable party to the adjudication of claims challenging the Village's ownership interest in tribal land.

Finally, aside from the exact identity of the issue, the policy underlying the doctrine of issue preclusion supports its application in this instance. Where exact identity of an issue is lacking, "[t]he problem involves a balancing of important interests: on the one hand a desire not to deprive the litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute." RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c (1982). After myriad chances, in numerous venues, to litigate their claims—either disputing the results of tribal elections and defendant's recognition thereof, or asserting that defendant unlawfully transferred plaintiffs' land to the Village—plaintiffs cannot plausibly protest that they have been deprived of their day in court. This court can only conclude that plaintiffs in *Rosales X* have simply recycled their NAGPRA-based breach of duty claims from *Rosales IX*, while adding sparse references to IRA in an attempt to invoke this court's jurisdiction.

2. Whether the Issue Was Actually Litigated

The second prong of the Federal Circuit's test for issue preclusion asks whether the issue has been litigated previously. *See Innovad*, 260 F.3d at 1334. This prong merely requires that the issue was (1) properly raised (by the pleadings or otherwise), (2) submitted for determination, and (3) determined. *Franklin Sav. Corp.*, 56 Fed. Cl. at 738 (citing *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) and RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. d (1982)).

First, upon review of the procedural history in *Rosales IX*, it is clear that the Village's status as a necessary and indispensable party was properly raised in that case. The claims in the *Rosales IX* complaint, as cited above, clearly implicate this issue. Second, the parties in *Rosales IX* obviously submitted this issue for determination: the issue was addressed in the defendant's motion to dismiss and in plaintiffs' opposition thereto, and was the subject of oral argument before the *Rosales IX* court. *See Rosales IX*, Mot. to Dismiss at 12–17; *Rosales IX*, Pls.' Opp'n at 25–31. Finally, the *Rosales IX* court made clear that its dismissal, with prejudice and without leave to amend, was grounded squarely in its determination that the Village was a necessary and indispensable party to the adjudication of any claims implicating the ownership status of the land at issue. *Rosales IX* at *5–6, *10. The second prong of the test for erecting issue preclusion as a bar to plaintiffs' claims is thus easily met.

3. Whether Determination of the Issue Was Essential to the Resulting Judgment

The inquiry under the third prong of the test does not require that the prior determination of an issue "be so crucial that, without it, the [prior] judgment could not stand." *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983). Rather, this third requirement seeks to prevent a mere incidental or collateral determination of a nonessential issue from precluding that issue's determination in a later litigation. *Id.* The final judgment in *Rosales IX* was a dismissal without leave to amend. *Rosales IX* at *10. Significantly, the *Rosales IX* court

emphasized that any attempts to amend the complaint would be futile because "plaintiffs cannot assert a claim that the land is federal without joining the [Village]." *Id.* Thus, it is clear that this prior determination of the issue in question—that the Village is a necessary and indispensable party in any dispute implicating the ownership status of tribal land—was not incidental, but necessary to the final judgment in *Rosales IX*.

4. Whether Plaintiffs Had a Full and Fair Opportunity to Litigate

Finally, a party against whom issue preclusion is sought must have had a "full and fair opportunity" to litigate in the prior proceeding. *Banner*, 238 F.3d at 1354; *Jet, Inc.*, 223 F.3d at 1366. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(C) (1982). In assessing whether a party had such an opportunity, the court should consider: (1) whether there were significant procedural limitations in the prior proceeding; (2) whether the party had incentive to fully litigate the issue; and (3) whether the nature of, or relationship between, the parties limited effective litigation. *See Banner*, 238 F.3d at 1354 (citing 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4423 (1981)).

Here, the court can easily dispense with the latter two factors. As their filings in that case indicate, plaintiffs clearly had a strong incentive to litigate *Rosales IX*. There, as in *Rosales X*, plaintiffs alleged that their family members' gravesites were being desecrated and their remains and associated funerary objects removed or destroyed by on-going excavation and construction. *Compare, e.g.*, *Rosales X*, Am. Compl. ¶¶ 52–55, 60 (detailing plaintiffs' factual allegations concerning their family members' remains), *with Rosales IX*, Am. Compl. ¶¶ 62–63, 67–73 (reciting identical allegations). According to plaintiffs, that interference with their family members' remains "has caused and will continue to cause severe personal, physical, and bodily injury, including severe emotional distress." *Id.* ¶¶ 72–73. This court cannot conclude that plaintiffs' incentive to litigate *Rosales IX* was in any way insufficient. *See Franklin*, 56 Fed. Cl. at 739 (citing WRIGHT, MILLER & COOPER for the proposition that the stakes of prior litigation may prove the full incentive to litigate). The multiple cases in which plaintiffs have previously litigated related or similar claims, *see supra* note 2, also indicates the strength of their incentive to litigate. *See id.* at 739–40 (inferring the existence of this incentive "from the she[e]r number of times [the plaintiff] litigated [its] claims). As for the third factor, the nature or relationship of the parties did not limit plaintiffs' opportunity to litigate in *Rosales IX*, because plaintiffs were neither members of a disabled class requiring a guardian nor were they *pro se* litigants. *See id.* at 740 (citing WRIGHT, MILLER & COOPER).

Nor do plaintiffs fare any better on the first factor, which considers whether there was a significant procedural hurdle in *Rosales IX*. As the Supreme Court has observed, "the full and fair opportunity to litigate" criterion is generally satisfied as long as the procedures in the first action comported with minimum due process requirements. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982). In other words, plaintiffs cannot establish this factor without establishing that they were unrepresented by counsel, unable to appeal, denied a public hearing, or deprived of necessary facts fraudulently concealed by the government. *See Franklin* 56 Fed. Cl. at 741. Plaintiffs have not identified any such procedural hurdle. In short, the *Rosales IX* plaintiffs had, and certainly made the most of, their full and fair opportunity to litigate.

Having satisfied all four prongs of the Federal Circuit's test for issue preclusion, the *Rosales IX* decision thus bars the adjudication of plaintiffs' claims in *Rosales X*, absent the Village. Because plaintiffs have not and cannot cure the defect of the Village's absence, this court cannot permit "[s]uch a fundamental departure from traditional rules of preclusion," as adjudicating plaintiffs' claims would require. *See Kremer*, 456 U.S. at 485.

C. The Village Remains a Necessary and Indispensable Party

Assuming, *arguendo*, that plaintiffs' claims could escape the preclusive effect of *Rosales IX*, the court nonetheless must dismiss the complaint in *Rosales X*, pursuant to RCFC 19, for failure to join the Village, a necessary and indispensable party. As the court has noted repeatedly, plaintiffs' claims in *Rosales X* rest critically upon plaintiffs' assertion that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. This court is convinced, for many of the reasons recited above in Section II.B, that the Village must be a party to this or *any* litigation in which its ownership interests are implicated and, indeed, would be implicitly abrogated by a judgment in favor of plaintiffs. Simply put, this court agrees with the substantive analysis of the *Rosales IX* court.[21]

1. The Village Is a Necessary Party, Whose Joinder Is Required Under RCFC 19(a)

Pursuant to RCFC 19, this court must ask whether an absent party is necessary to the litigation, and its joinder thus required. *United Keetoowah Band of Cherokee Indians of Okla. v. United States* ("*UKB*"), 480 F.3d 1318, 1324 (Fed. Cir. 2007); *see* RCFC 19(a). In relevant part, RCFC 19(a) states that joinder is required if:

> [T]hat [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may: (i) as a practical

[21] This court disagrees, however, with the jurisdictional label that the *Rosales IX* court attached to its determination. *See Rosales IX* at *5 ("Because the Tribe enjoys sovereign immunity and cannot be joined, the court lacks subject matter jurisdiction."). Both RCFC 19(b) and FRCP 19(b) (the latter governing the *Rosales IX* court) state that a court must decide "in equity and good conscience," whether to dismiss an action for non-joinder of a required party. In other words, Rule 19 codifies an *equitable* doctrine, not a jurisdictional requirement as the *Rosales IX* court suggested. Indeed, the "indispensability question . . . is not, nor has it ever been, jurisdictional." *Rippey v. Denver United States Nat'l Bank*, 42 F.R.D. 316, 318–319 (D. Colo. 1967). Rather, Rule 19 calls for determining whether the court ought to proceed without the absent party, not whether it has jurisdiction to proceed against those who are present." *Id.* In *Shields v. Barrow*, the Supreme Court explained that "when speaking of a case where an indispensable party [is] not before the court, we do not put th[e] case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." 58 U.S. 130, 141 (1855). *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1611 (3d ed. 1998). Needless to say, Rule 19 does codify a threshold inquiry, which, like the jurisdictional inquiry, may operate to foreclose adjudication on the merits.

> matter *impair or impede the [party]'s ability to protect the interest*; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

RCFC 19(a) (emphasis added).

Plaintiffs' contention that the Village's interest is merely "indirect and contingent," *Rosales X*, Pls.' Opp'n at 46, is at odds with reality. Defendant has a duty as the trustee of Parcels 04 and 05, and is liable to the beneficial owners for any breach of that duty. Adjudicating plaintiffs' claims would require determining the threshold question of plaintiffs' beneficial ownership of Parcels 04 and 05, and thus necessarily implicates the Village's ownership interest. *See, e.g.*, *Rosales IX* at *5–*6. This court would require from the Village a waiver of sovereign immunity, which waiver the court does not have, in order to render a judgment in this matter. Any potential judgment in plaintiffs' favor, requiring defendant to remedy what plaintiffs characterize as interference with their ownership rights to Parcels 04 and 05, would necessarily "impair or impede" the Village's ownership interest in that land.

The Village has the additional and "substantial interest in protecting the rulings of its judicial system from collateral attack." *St. Pierre v. Norton*, 498 F. Supp. 2d 214, 220 (D.D.C. 2007). The Jamul Tribal Court has determined, in upholding plaintiffs' 2007 eviction, that plaintiffs were *not* the beneficial owners of Parcel 04. *Rosales X*, Mot. to Dismiss, Exs. 7–8. Plaintiffs' contention that the recognized Jamul Tribal Court is invalid, *Rosales X*, Pls.' Opp'n at 43–45, is irrelevant. Even if this court were inclined to agree, contrary to the decisions of all previous courts and administrative bodies adjudicating the Village's electoral disputes, the Village would *still* have an interest in challenging that determination and asserting the validity of its court's decisions.

Finally, this court rejects plaintiffs' conclusory contention that the Village has no legally protected interest at issue in the instant case. *See Rosales X*, Pls.' Opp'n at 48–49. That contention is based on plaintiffs' oft-asserted, but never-successful theory that the Village, a political entity permitting membership to those of at least *one-quarter* Jamul Indian blood, has never had proper beneficial ownership of Parcels 04 or 05, which parcels instead remain in trust only for individuals of *one-half* Jamul Indian blood. *Id.* at 49 (citing *Rosales X*, Compl. ¶¶ 14–15, 27–28, 31–37, 40, 44–46 & Ex. E); *see also Rosales VI*, Pls.' Opp'n. at 48–49 (making the same argument). Both the *Rosales VII* and *Rosales IX* courts flatly rejected this legal just-so story; so, too, does this court.

Rather, the Village has substantial interests in the outcome of this case, and those interests would be impaired by proceeding in the Village's absence. Joinder of the Village is, therefore, required under RCRC 19(a). That joinder, which ordinarily is subject to court order, is barred by the Village's sovereign immunity.

2. The Village Is an "Indispensable" Party

Where joinder is required under RCFC 19(a) but is not feasible, a court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or be dismissed." RCFC 19(b). If a court decides that the matter should be dismissed, the absent

party is thus deemed "indispensable." *See, e.g.*, *UKB*, 480 F.3d at 1324. Rule 19 identifies four factors that are relevant to deciding whether a matter may proceed without the absent party:

> (1) the extent to which a judgment rendered in the [party]'s absence might prejudice that [party] or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
> (3) whether a judgment rendered in the [party]'s absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

RCFC 19(b).

The claims that plaintiffs advance—seeking redress for the United States' alleged breach of its duty to them as beneficial owners of Parcels 04 and 05—directly implicate the Village's ownership interests in, and its exercise of jurisdiction over, that land. Therefore, this court cannot fashion relief that would not prejudice the interests of the Village in asserting its beneficial ownership of the land at issue, *see Rosales VII Affirmance* at 914; *Rosales IX* at *5–*6, or in enforcing the judgments of its tribal courts, *St. Pierre*, 498 F. Supp. 2d at 220.

This court is persuaded by the Ninth Circuit's body of precedent, which holds that the United States cannot adequately represent the interests of an absent tribe in an "intertribal" dispute, a category that includes disputes between a tribe and non-tribe groups or individuals. Upon similar facts, the Ninth Circuit held that "no partial or compromise remedy exists that will not prejudice the [tribal government], since a finding that the [claimants have] rights to the beneficial ownership of the [land] or that the [United States] government owes certain duties to the [claimants] will prejudice the [tribal government]'s right to govern the Tribe, which is the designated beneficial owner of the land." *Pit River Home & Agr. Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994). Further persuasive is the *Rosales VII Affirmance*, which held, upon review of the same facts giving rise to the instant action, that "[t]he United States is not an adequate representative of the Village's interests in this action because the United States cannot adequately represent the interests of one tribe in an intertribal dispute." 73 F. App'x at 914.

Because the United States cannot adequately represent the interests of the Village, and because the court cannot otherwise fashion relief that would not prejudice those substantial interests, this court cannot, in equity and good conscience, proceed to adjudicate plaintiffs' claims in the Village's absence. Because the Village has not waived its sovereign immunity, the court is without power to compel the Village's joinder. The Village is, therefore, an indispensable party to the instant action. Assuming, *arguendo*, that all other grounds for dismissal are inadequate, the court must nonetheless dismiss the complaint in *Rosales X*, pursuant to RCFC 19.

III. *ROSALES VI*

The Third Amended Complaint in *Rosales VI* is a verbatim copy of the *Rosales X* Amended Complaint, with three notable, though ultimately inconsequential exceptions.

A. The Two Additional Claims Raise No New Issues

In their Third Amended Complaint, the *Rosales VI* plaintiffs recite four claims for relief: the two claims made in *Rosales X*—(1) taking, and (2) breach of trust—along with two additional claims for (3) breach of contract, and (4) accounting. *Rosales VI*, 3d Am. Compl. ¶¶ 76–79, 93–98. The two additional claims, however, raise no new issues for the court to consider: they rest upon the identical allegations of fact and the identical theories of defendant's liability as do the *Rosales X* claims. Most significantly, these additional claims rest squarely upon the same foundational assumption that plaintiffs, not the Village, are the beneficial owners of parcels 04 and 05, and thus likewise implicate the Village's interests.

B. The Earlier Filing Date Still Leaves the Claims in Rosales VI Untimely Under § 2501

The original complaint in *Rosales VI* was filed on November 12, 1998, nearly a decade before the original *Rosales X* filing. However, because the six-year limitations period for plaintiffs' claims expired in 1988, the 1998 filing date in *Rosales VI* is still a decade too late.[22]

Claim accrual under § 2501 may be suspended only where the injury is actively "concealed or inherently unknowable," *Ingrum*, 560 F.3d at 1315 n.1, a standard that plaintiffs cannot hope to satisfy. There is otherwise no traditional requirement of notice, in order for a claim to accrue, or for the limitations period to run, under § 2501. Prior to the Supreme Court's holding in *John R. Sand & Gravel*, however, language in some opinions, issued by the Court of Federal Claims and by the Federal Circuit, arguably suggested otherwise. In *Mitchell v. United States*, 10 Cl. Ct. 63, 68 (1986), the court declared that "[k]nowledge of a cause of action sufficient to trigger the running of the [Tucker Act's] statute of limitations may, therefore, be as much a matter of constructive notice as of actual notice." Nearly a decade later, the Federal Circuit seemed to sound a similar note, writing that "[t]he question whether the pertinent events [for claim accrual] have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini*, 56 F.3d at 1380. While the quoted language unambiguously disavowed a requirement of *actual* notice, it seemed to evince a *constructive*-notice requirement under § 2501.

Defendant, in its motion to dismiss *Rosales X*, cites to these cases, apparently conceding that constructive notice may be required. *See Rosales X*, Mot. to Dismiss at 11. Accordingly, defendant cites the language of the 1982 deed to Parcel 05, *see supra* Section III.A.3, which the court agrees is sufficient to support a finding of constructive notice. *Rosales X*, Mot. to Dismiss

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[22] The court assumes, without deciding, that the Third Amended Complaint qualifies for relation back to the date of the original complaint, under RCFC 15(c)(1). Absent this assumption, of course, the Third Amended Complaint, submitted in 2009, would be even tardier than the original complaint in *Rosales X*.

at 13. As to parcel 04, defendant's *Rosales X* motion points only to plaintiffs' admission to having *actual* notice, in 2001, of defendant's recognition of the Village's beneficial ownership of that parcel. *Id.* at 12 (citing *Rosales VII*, Compl. ¶¶ 18–19). Defendant is content to rely on the 2001 date, in its *Rosales X* motion, because even that date is early enough to render time-barred plaintiffs' 2008 complaint. The original *Rosales VI* complaint, on the other hand, was filed in 1998. Lest plaintiffs, in their litigious zeal, see an opening here, the court assures them there is none.

No hypothetical notice requirement can restore the timeliness of plaintiffs' complaint in *Rosales VI.* In order for the 1998 filing to be timely, plaintiffs' claims need to have accrued no earlier than November 13, 1992. Defendant recognized the Village's beneficial ownership of parcels 04 and 05, in 1981 and 1982, respectively. It defies the imagination that, over the course of the subsequent decade, plaintiffs did not have *actual*, let alone constructive, notice of defendant's act, or of conduct by the Village inconsistent with their beneficial ownership, as individuals, of the land in question.

C. The Village's Status As an Indispensable Party Is Unaltered by the Presence of a New Plaintiff

Of the twelve plaintiffs named in the original *Rosales VI* complaint, only two remain: Walter Rosales and Joe Comacho. *See supra* note 6. Plaintiff Comacho was not a named plaintiff in *Rosales IX* and thus would ordinarily be exempt from the preclusive effect of that judgment. *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue . . . . Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."). *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 238 (1998) ("In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication.").

However, the claims in *Rosales VI* implicate no less than do the *Rosales X* claims the Village's interests in asserting its beneficial ownership over Parcels 04 and 05, and in protecting the integrity of its judicial system. Mr. Comacho's presence as a plaintiff, therefore, cannot alter this court's own substantive holding that the Village is a necessary and indispensable party, in whose absence the court cannot proceed to adjudicate the merits of plaintiffs' claims.

Nor is there consequence to the absence of a party motion for dismissal on this ground. Because the court admits plaintiffs' Third Amended Complaint through its present order, defendant has not had an opportunity to submit a new motion to dismiss, responsive to plaintiffs' revised complaint, and thus has not raised the issue of the Village's absence as a ground for dismissal in *Rosales VI.* However, as the Supreme Court recently reiterated, a court may consider *sua sponte* the absence of a required party, under Rule 19, and dismiss an action for non-joinder. *Philippines v. Pimentel*, _ U.S. _, 128 S. Ct. 2180, 2188 (2008) (reversing the lower court's decision to adjudicate an interpleader action amongst the remaining parties, after two parties originally named in the suit invoked sovereign immunity and were dismissed).

Therefore, despite the above differences between the *Rosales X* and *Rosales VI* complaints, the court's grounds for dismissing the former support no less surely dismissal of the latter.

IV. CONCLUSION

Plaintiffs' motion to admit the Amended Complaint in *Rosales X* is **GRANTED**. The court concludes that plaintiffs' claims in *Rosales X* are untimely under the Tucker Act's statute of limitations, leaving the court without jurisdiction to hear them. To the extent that any of plaintiffs' claims are timely, the doctrine of issue preclusion nonetheless bars plaintiffs from relitigating the defect that mandated dismissal in *Rosales IX*. Finally, even if plaintiffs' claims were both timely and somehow exempt from the preclusive effect of *Rosales IX*, this court concludes that it must dismiss the action due to the absence of the Village, a necessary and indispensable party. Accordingly, defendant's motion to dismiss in *Rosales X* is **GRANTED**, and plaintiffs' motion for summary judgment and all other outstanding motions in *Rosales X* are therefore **DENIED-AS-MOOT**.

Plaintiffs' motion to admit the Third Amended Complaint in *Rosales VI* is **GRANTED**. As in *Rosales X*, the court concludes that plaintiffs' claims in *Rosales VI* are untimely under the Tucker Act's statute of limitations, leaving the court without jurisdiction to hear them. To the extent that any of plaintiffs' claims are timely, the Village remains a necessary and indispensable party, in whose absence the court must dismiss the action. Accordingly, the Third Amended Complaint in *Rosales VI* is **DISMISSED**, and defendant's updated motion to dismiss the prior Second Amended Complaint and all other outstanding motions in *Rosales VI* are therefore **DENIED-AS-MOOT.**

Furthermore, based on plaintiffs' history of repeating the same claims across multiple suits and venues, and their pattern, in these proceedings, of non-responsive filings, of repeated noncompliance with the rules of this court, of poor citation practices, and of wholesale copying of previous filings in other venues that were dismissed with prejudice, this court assigns **COSTS TO DEFENDANT**.

IT IS SO ORDERED.

s/ *Lawrence J. Block*
Lawrence J. Block
Judge

In the United States Court of Federal Claims

Nos. 08-512 L & 98-860 L

**WALTER J. ROSALES AND
KAREN TOGGERY,**

and

WALTER J. ROSALES, ET AL.,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion and Order, filed October 7, 2009,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the Amended Complaint in 08-512 L is dismissed, and the Third Amended Complaint in 98-860 L is dismissed. Costs to defendant.

Hazel Keahey
Clerk of Court

October 14, 2009 By: s/Lisa L. Reyes

Deputy Clerk

<u>NOTE</u>: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of <u>all plaintiffs</u>. Filing fee is $455.00.

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Federal Circuit
No. 2010-5028

--)
WALTER ROSALES and KAREN TOGGERY,
Plaintiffs-Appellants,
v.
UNITED STATES,
Defendant-Appellee.
--)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by WEBB & CAREY APC, Attorneys for Plaintiffs-Appellants to print this document. I am an employee of Counsel Press.

On the **29th Day of January, 2010**, I served the within **Brief of Plaintiffs-Appellants** upon:

Robert P. Stockman
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Washington, DC 20026-3795
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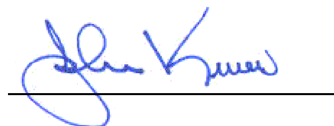
via Express Mail, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

Unless otherwise noted, 12 copies have been hand-delivered to the Court on the same date as above.

January 29, 2010



CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. P. 32(a)(7)(B) because:

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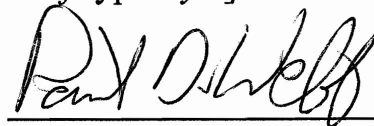

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