IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORIC EASTERN PEQUOTS,

Plaintiff,

v.

KENNETH SALAZAR, Secretary of the Interior, and DEL LAVERDURE, Acting Assistant Secretary for Indian Affairs,[1] UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 1:12-CV-00058 (EGS)

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Del Laverdure is substituted for Larry Echohawk as Defendant as Mr. Laverdure has been appointed Acting Assistant Secretary-Indian Affairs.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

Defendants, Ken Salazar, Secretary of the Department of the Interior ("Department" or "DOI") and Del Laverdure, Acting Assistant Secretary-Indian Affairs, (collectively, the "Federal Defendants"), respectfully submit this memorandum in response to Plaintiff's opposition to the Federal Defendants' motion to dismiss Plaintiff's complaint (ECF. No. 13), and in further support of the motion to dismiss (ECF No. 8).

INTRODUCTION

In its Amended Complaint (ECF No. 4), Plaintiff challenges the Reconsidered Final Determination ("RFD") issued by the Department under the Federal acknowledgment regulations, 25 C.F.R. Part 83, which denied acknowledgment or federal recognition to the "Historical Eastern Pequot Tribe." The RFD became final on October 14, 2005 upon its publication in the Federal Register. Plaintiff's claims, however, were first brought in an original complaint filed in January 2012, several months after the applicable statute of limitations had expired.[2] The Federal Defendants therefore moved to dismiss of all of Plaintiff's claims because the Court lacks subject matter jurisdiction. In addition, the Federal Defendants raised questions as to who exactly the current Plaintiff, the Historic Eastern Pequots ("HEP"), is, and whether it has standing to challenge the RFD.[3]

[2] In addition to challenging the RFD, in counts eight and nine of the Amended Complaint, Plaintiff attempted to state antitrust and tort claims challenging the management of gaming in Connecticut. As the Federal Defendants explained in their motion to dismiss, these claims are also outside the applicable statutes of limitations. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 11-13 (ECF No. 8-1) ("Defs.' Mem."). Further, Plaintiff failed to exhaust administrative remedies. Plaintiff does not respond to these arguments but rather links these counts to the administrative process that resulted in the RFD, more than six-years ago. *See* Mem. in Supp. of Pl.'s Opp'n at 2 (ECF 13-1) ("Pl.'s Opp'n") ("thwarting recognition efforts and impeding plaintiffs' efforts to engage in lawful commerce"). Plaintiff's opposition provides no additional support for counts eight and nine nor does it allege exhaustion under the FTCA. For the uncontested reasons in the motion to dismiss, these counts merit dismissal.

[3] The HEP was substituted as party plaintiff for the Eastern Pequot Tribal Nation ("EPTN"), the group in whose name the original complaint was filed, after the EPTN disclaimed this lawsuit. *See* letter from James A. Cunha, Jr., Chairman, EPTN (ECF No.2); Pl.'s Mot. to Substitute (ECF No.3); Court's Minute Order dated Feb. 22, 2012. Neither the Amended Complaint nor Plaintiff's opposition

In its opposition to the Federal Defendants' motion to dismiss, Plaintiff focuses exclusively on the Federal Defendants' argument that Plaintiff's claims in its first seven causes of action exceed the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). *See* Defs.' Mem. at 6-8. Plaintiff fails to answer, or even address, the Federal Defendants' threshold questions of who, exactly, Plaintiff is, and whether it has standing to challenge the RFD. *See id*. at 2-3 & n. 1,2,3. The Federal Defendants posit that the Amended Complaint is subject to dismissal on these threshold grounds alone, as well as on the ground that the claims are barred by the statutes of limitations and thus outside the Court's subject matter jurisdiction.

In its opposition, Plaintiff attempts to evade the bar of the statute of limitations by invoking the Nonintercourse Act, 25 U.S.C. § 177, and the doctrines of fraudulent concealment and equitable estoppel. These efforts, however, fail because they are not in accord with the Amended Complaint, and moreover, are unavailing because neither the statute nor the equitable doctrines upon which Plaintiff relies are applicable to its claims.

ARGUMENT

I. THE NONINTERCOURSE ACT DOES NOT ALLOW PLAINTIFF TO EVADE THE BAR OF THE STATUTE OF LIMITATIONS

In its Amended Complaint, Plaintiff asserted a total of nine causes of action against the Federal Defendants. The first seven causes of action purport to state claims for violations of Plaintiff's rights under the Constitution or pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). In opposing the Federal Defendants' motion to dismiss, Plaintiff attempts to recharacterize its claims as being grounded upon the Non Intercourse

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distinguishes the HEP from the EPTN, which suffered the alleged injury.

Act. Plaintiff alleges that the Nonintercourse Act and 25 C.F.R §1.4[4] create an ongoing trust relationship between Plaintiff and the Federal Government, and that, in issuing the RFD in 2005 denying federal acknowledgment as an Indian tribe, the Federal Defendants breached, and continue to breach that relationship.[5] Pl.'s Opp'n at 5. Plaintiff then contends that the statute of limitations is not applicable to bar claims alleging "an ongoing breaches [sic] of trust and the non-intercourse act." *Id.* at 6.

1. Plaintiff has not pleaded a claim under the Nonintercourse Act

Plaintiff's belated effort to evade the bar of the statute of limitations is unavailing. First, Plaintiff's recharacterization of its claims is belied by its own pleadings. The Amended Complaint does not allege claims against the Federal Defendants based on any violation of the Nonintercourse Act, nor does it allege jurisdiction pursuant to that statute. Rather, Plaintiff alleges denial of due process and violation of equal protection pursuant to the United States Constitution, Am. Compl. ¶¶ 18-26, 45-53, and it asserts that certain of the Department's actions in issuing the RFD were "contrary to law," "arbitrary and capricious," "unlawful," and "an abuse of discretion" in violation of the APA. *Id.* ¶¶ 27-30, 31-39, 41-44, 54-61. The Amended Complaint mentions the Nonintercourse Act once in a single sentence in one

[4] This regulation concerns "the use or development of any real or personal property . . . belonging to any Indian or Indian tribe, band, or community that is held *in trust by the United States*. . ." 25 C.F.R. 1.4(a) (emphasis added). The United States holds no property in trust for Plaintiff, and this regulation is thus not relevant.

[5] Plaintiff's argument overlooks the fact that the Nonintercourse Act does not establish a specific trust responsibility. The United States' role and obligations as trustee arise only if there is a specific act or direction of Congress that requires the government to do something for the Indian tribe, and in order to create liability based on the type of fiduciary relationship alleged by Plaintiff, courts require demonstration of specific statutes and regulations that "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983)). In the present matter, there is no specific direction of Congress that requires the United States to grant Plaintiff federal acknowledgment. As provided in *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1168 (N.D. Ind. 1995), "Congress has not unambiguously expressed an intent that all Indian tribes be recognized, much less that all groups claiming to be Indian tribes be recognized as such." Plaintiff thus cannot state a claim for breach of trust.

paragraph of the sixth cause of action, wherein Plaintiff alleges that: "[a]s trustee, the *State* effectuated the illegal sale of the reservation land for . . . mining interests in 1872 in contravention of the 1790 Non -Intercourse Act." Am. Compl. ¶ 55 (emphasis added). The plain language of this sentence does not allege that the Federal Defendants violated the Nonintercourse Act, nor does it form the basis for any of Plaintiff's claims. Paragraph 55 also references that Federal government is only an "implied trustee" and that the silica mining operation lasted for 125 years, thus ending in 1997. Any claim on these allegations fails also under *Jicarilla Apache Nation* and under any applicable statute of limitations.

2. Plaintiff cannot state a claim under the Nonintercourse Act.

Second, even assuming *arguendo* that the Nonintercourse Act was somehow a basis for Plaintiff's claims, the statute is unavailing to Plaintiff. As the First Circuit held more than thirty years ago in *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979), and subsequently in *James v. Watt*, 716 F.2d 71 (1st Cir. 1983), a claim under the Nonintercourse Act must be brought by a tribe. Here, assuming that Plaintiff has standing to challenge the RFD, then Plaintiff has been found in the RFD *not* to be a tribe within the meaning of federal law.[6]

Plaintiff's status is not merely distinguishable, but, in fact, wholly different from that of the plaintiff in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) the case upon which Plaintiff principally relies. *See* Pl.'s Opp'n at 6-8. In *Passamaquoddy*, which predated the Federal acknowledgment regulations, the parties stipulated that the plaintiff was a "tribe." The court then found that, to come within the meaning of the Nonintercourse Act, a "tribe" need not be federally recognized. 528 F.2d at

[6] "'[W]hat is an Indian tribe?' The purpose of the [Federal acknowledgment] . . . regulations is to develop uniform standards and procedures to answer that question." *Indiana Miami*, 887 F. Supp. at 1167.

376-377. The court certainly did not hold that a group that has been expressly found not to be a tribe for purposes of federal law nevertheless can bring an action under the Nonintercourse Act, nor is the First Circuit's ruling sufficiently broad to provide persuasive authority for that result here.

Plaintiff also relies on *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980), which is also readily distinguishable. *See* Pl.'s Opp'n at 7-8, In *Mohegan Tribe,* the plaintiff was a federally recognized Indian tribe that had filed suit under the Nonintercourse Act seeking to regain possession of land in Connecticut. The State of Connecticut, in moving to dismiss, argued that the Nonintercourse Act was intended to apply only to land in "Indian Country" and as such, did not apply to the land in question. 638 F. 2d at 614. The district judge denied the State's motion, and certified the question concerning a geographic limitation to the Second Circuit. *Id.* The appellate court held only that the language of the Non Intercourse Act contained no geographic limitation, and therefore the statute "must . . . be read as applying to all Indian lands." *Id.* at 621. The appellate court also noted in *dicta*, that, in previous, similar land claims asserted by East Coast tribes against a state, "[d]efenses based on *state* adverse possession laws and *state* statutes of limitation have been consistently rejected." *Id.* at 614-15 (emphases added). Contrary to Plaintiff's characterizations, *see* Pl.'s Opp'n at 7-8, the court did not even consider whether claims against the Federal Government could be barred by a statute of limitations. Plaintiff's argument, relying on *Mohegan Tribe*, that the statute of limitations is not an applicable defense to claims alleging "ongoing breaches of trust and the non-intercourse act." Pl.'s Opp'n at 6, is thus simply wrong as a matter of law.

3. The continuing claims doctrine is also unavailing

Finally, in claiming that the Amended Complaint alleges "ongoing breaches of trust," Pl.'s Opp'n at 6, Plaintiff is perhaps attempting to avail itself of the continuing claims doctrine (also known as the continuing wrong, or continuing violation doctrine) as an exception to the bar of the statute of limitations. *See San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 896 (D. Ariz. 2003), *aff'd* 417 F.3d 1091 (9th Cir. 2005) (citing *Boling v. United States*, 220 F.3d 1365, 1373-74 (Fed. Cir. 2000) (other citations omitted) (explaining that "the continuing claims doctrine applies when the government owes a continuing duty to the plaintiffs . . . [such that] [e]ach time the government breaches the duty, a new cause of action arises."). That doctrine however, is of no help to Plaintiff here.

Plaintiff claims that Federal Defendants' failure to "estopp" the State from challenging Plaintiff's quest for federal recognition constitutes a continuing breach of fiduciary duty. Am. Compl. at 22. However, as the Federal Defendants explained in their opening brief and in footnote 5 above, Plaintiff has not identified any law that imposes such a fiduciary duty on the Government with respect to the HEP or the EPTN.[7]

Moreover, even if there were a breach of any fiduciary duty, the continuing claims doctrine is a limited one, which does not apply in cases where a single governmental action—here, issuance of the RFD denying federal acknowledgment to the Historical Eastern Pequot—is alleged to have caused continuing deleterious effects, even if those effects continue after the initial action. *See San Carlos Apache Tribe*, 272 F. Supp. 2d at 897. In this regard, the Ninth Circuit has expressly found that "the continuing violations doctrine is not

[7] Indeed, to the contrary, the acknowledgment regulations specifically provide for state participation. 25 C.F.R § 83.1 ("'Interested party' includes the governor and attorney general of the state in which a petitioner is located.").

applicable in the context of an APA claim for judicial review." *Hall v. Regional Transp. Comm'n of S. Nev.*, 362 F. App'x. 694, 695 (9th Cir. 2010) (quoting *Gros Ventre Tribe v. United States*, 344 F. Supp.2d 1221, 1229 n. 3 (D. Mont. 2003) (internal quotation marks omitted) (explaining that the continuing violations doctrine "has evolved in the context of tort and nuisance law" and is thus not applicable to APA claims). *See also San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1228 (E.D. Cal. 2011); *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1229–30 (S.D. Cal. 2011). Here, the government's alleged wrong —denial of federal recognition to the Historical Eastern Pequots —was one action, not one of many "repeated instances or continuing acts of the same nature." *See Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation*, 895 F. 2d 588, 597 (1990). Plaintiff's alleged injuries as the result of that action were "definite, readily discoverable, and accessible" as of October 14, 2005, when the RFD became final upon publication in the Federal Register, and as of that date, nothing impeded Plaintiff from seeking redress through judicial review. *See Dziura v. United States*, 168 F.3d 581, 583 (1st Cir. 1999). In these circumstances, the continuing violation doctrine "is generally thought to be inapposite." *Id. See also Keohane v. United States*, 669 F.3d 325, 329 (D.C. Cir. 2012) (quoting *Dziura*, 168 F.3d at 583).

Finally, even if the continuing claims doctrine were applicable to this factual situation, it nevertheless would not toll the statute of limitations. This Court has consistently held that section 2401(a) is jurisdictional, and that it is therefore not subject to tolling on the basis of the continuing violations doctrine. *See, e.g., W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 143 (D.D.C. 2008); *Bigwood v. Defense Intelligence Agency*, 770 F. Supp. 2d 315, 318 (D.D.C. 2011); *Keohane v. United States*, 775 F. Supp. 2d 87 (D.D.C. 2011),

aff'd 669 F.3d 325, 329 (D.C. Cir. 2012); *Terry v. U.S. Small Bus. Admin.*, 699 F. Supp. 2d 49, 54 (D.D.C. 2010).

Plaintiff's claims in the Amended Complaint resemble the time-barred claim for federal acknowledgment that was raised in *Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp. 253, 255 (N.D. Ind. 1993). In that case, as here, the Department had issued a final decision finding that the petitioning Indian group did not meet the criteria necessary for acknowledgment as an Indian tribe. The Indiana Miami contended, however, "that Congress recognized its tribal status in [an] 1854 Treaty, and that Congress has never terminated that status," *id.* at 256, and it argued that a Departmental decision in 1897 unlawfully withdrew its recognition because only Congress could terminate a tribe. *Id.* at 253. Accordingly, the Indiana Miami asserted that the Department had a continuing duty to acknowledge its tribal status, and that the Department's refusal to so acknowledge was a continuing breach of that duty. *Id.* The court rejected the claim finding it to be outside the statute of limitations. *Id.* at 257 ("This case was filed in 1992; all necessary events that allegedly fixed the government's liability . . . occurred in 1897."). The reasoning is equally applicable to the claims here.

Applying section 2401 (a), it is clear that the Plaintiff's complaint was filed after the six-year statute of limitations period applicable to Plaintiff's claims. The time for Plaintiff to challenge the Department's RFD denying recognition to the Historical Eastern Pequot and the process that culminated in that determination arose in October 2005 when all necessary events that allegedly fixed the Department's liability occurred. Here, as in *Indiana Miami*, the statute of limitations applicable to Plaintiff's claims has unquestionably expired.

II. NO FRAUDULENT CONCEALMENT PREVENTED PLAINTIFF FROM KNOWING THE EXISTENCE OF A CAUSE OF ACTION, AND EVEN IF PROPERLY ALLEGED, FRAUDULENT CONCEALMENT DOES NOT TOLL THE STATUTE OF LIMITATIONS

In its effort to forestall the bar of the statute of limitations, Plaintiff's opposition raises a second new argument regarding fraudulent concealment. *See* Pl.'s Opp'n at 8. Plaintiff did not allege fraudulent concealment in its Amended Complaint and this argument is therefore improperly raised for the first time in its opposition. *See George v. Bank of Am. N.A.*, 821 F. Supp. 2d 299, 303 n.7 (D.D.C. 2011). And, even if such a claim had been properly pleaded, it would not toll the statute of limitations.

A cause of action accrues, when a plaintiff is "armed with the facts about the harm done to him." *United States v. Kubrick,* 444 U.S. 111, 123 (1979). Plaintiff attempts to excuse the patent untimeliness of this action by invoking the equitable tolling principle of fraudulent concealment, but this excuse is not available to a tardy plaintiff who, notwithstanding the alleged concealment, had "actual [ ] or constructive knowledge of the facts constituting his claim for relief." *See Clulow v. Oklahoma*, 700 F.2d 1291, 1301 (10th Cir.1983) (quoting *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir.1978)). "The doctrine of fraudulent concealment has no applicability . . . if the plaintiff was on notice of the wrong complained of." *Foltz v. U.S. News & World Report, Inc*., 627 F. Supp. 1143, 1150 (D.D.C. 1986) (citing *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984)).[8]

[8] In *Kubrick*, government doctors in the course of treating a patient did not "suggest [during relevant periods] the possibility of negligence" in the treatment, and "repeated unequivocal assertions by the Veterans Administration that there was no negligence on the part of the government" were made. 444 U.S. at 114 (citation omitted). Yet despite what the dissent characterized as "not only the Government's denials, but, worse, what may have been a fabrication," *id.* at 128, the Court held that the plaintiff's cause of action did not toll. *Id.* at 123-24. Here, no action of the Department precluded Plaintiff from knowing of its causes of action. In fact, the Department provided actual notice to the Pequot. *See* Defs'. Mem., Ex. 1. Moreover, the Schaghticoke of Connecticut litigated and lost claims similar to those belatedly attempted to be litigated here. *See Schaghitcoke Tribal Nation v.*

"Fraudulent concealment is an equitable doctrine employed to 'toll [ ] the running of [an applicable] statute of limitations'" where a defendant is alleged to have improperly concealed the existence of a cause of action." *Acosta Orellana v. CropLife Int'l.*, 711 F. Supp. 2d 81, 95 (D.D.C. 2010) (citing *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191 (D.C. Cir.1980) (to invoke the doctrine of fraudulent concealment "the defendant must have done something of an affirmative nature designed to prevent discovery of the cause of action"); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981) ("Under the law of the District of Columbia, fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff"). *Accord Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 130 F.3d 1083, 1087 (D.C. Cir. 1997) (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C.Cir.1977)) (fraudulent concealment tolls a statute of limitations when: "(1) there has been 'deliberate concealment' of (2) 'material facts' relating to the alleged wrongdoing and (3) the wronged party does not know of those facts and could not have discovered them through 'reasonable diligence.'").

In *MOWA Band of Choctaw Indians v. United States*, No. 07-0508-CG-B, 2008 WL 2633967 (S.D. Ala. July 2, 2008), like Plaintiff here, the MOWA Band argued that fraudulent concealment should be applicable to toll the statute of limitations on its claims arising from the Department's denial of federal acknowledgment. 2008 WL 2633967, at *2. The court rejected that argument, however, because it found that the plaintiff had been informed and "was clearly on notice of the decision that it was not entitled to Federal acknowledgment and had been notified of the finality of that decision," *id.* at *3, and also, that it had not shown any

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Kempthorne, 587 F.3d 132 (2d Cir. 2009, *cert. denied*, 131 S. Ct. 127 (2010).

misrepresentations or affirmative actions by the United States that constituted concealment. *See id.* at *3-4. Here, as in *MOWA Band*, Plaintiff unquestionably had notice of the Department's determination that it was not entitled to federal acknowledgment. In fact, the Department provided actual notice to the Pequot, *see* Defs.' Mem., Ex. 1, and Plaintiff requested reconsideration of the RFD in an attempt to secure its reversal. Thus, Plaintiff clearly possessed the requisite notice to start the running of the statute of limitations.

Moreover, even if fraudulent concealment were properly pleaded here, it would not equitably toll the statute of limitations. The D.C. Circuit has long held that "section 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (citations omitted). The jurisdictional nature of the statute of limitations is significant because such a limitation "cannot be overcome by the application of judicially recognized exceptions . . . such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, . . . and the continuing violations doctrine." *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 138 (citation omitted). And, in *W. Va. Highlands Conservancy*, the court further explained that the Supreme Court's decision in 2008 in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) now forecloses the argument that equitable tolling is applicable to limitations period set forth in a statute of limitations that has been found to be jurisdictional. *See id* at 142. Accordingly, this court has since reiterated that "when a statute of limitations has been regarded as jurisdictional, 'it has acted as an absolute bar [that cannot] be overcome by the application of judicially recognized exceptions" such as fraudulent concealment. *Terry*, 699 F. Supp. 2d at 54-55; *Keohane*, 775

F. Supp. 2d at 90 (same) (citations omitted). *See also Bradshaw v. Architect of the Capitol*, No. 11-CV-00536, 2012 WL 1378313, at *11 (D.D.C. April 20, 2012).

Finally, even if equitable tolling were possible, Plaintiff has completely failed in either the Amended Complaint or its opposition to allege that any actions by the United States constitute fraud. Under District of Columbia law, to succeed on a claim for fraud, a plaintiff must establish: (1) that the defendant made a false representation or willful omission of a material fact; (2) that the defendant had knowledge of the misrepresentation or willful omission; (3) that the defendant intended to induce the plaintiff to rely on the misrepresentation or willful omission; (4) that the defendant actually relied on that misrepresentation or willful omission; and (5) that the defendant suffered damages as a result of his reliance. *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1198 (D.C.1997) (citing *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C. Cir. 1981)). Moreover, Federal Rule of Civil Procedure 9(b), which requires any party alleging fraud or mistake to "state with particularity the circumstances constituting fraud or mistake," is also applicable to claims of fraudulent concealment, *Acosta Orellana*, 711 F. Supp. 2d at 95 n.15, and in order to plead fraud with the requisite specificity, a "pleader must state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud."). *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (citation omitted).

Plaintiff has failed, either in the Amended Complaint or in its opposition, to allege any acts by the United States that would support any of these requisite elements. The word "misrepresentation" does not appear in the Amended Complaint, and "fraudulent" appears only once. The single reference to fraud appears in the ninth cause of action (titled

"Defendants' negligent regulation of gaming has tortiously interfered with plaintiffs business expectancy"), and this reference does not allege or mention any fraudulent acts or acts of concealment by the United States or the Federal Defendants. *See* Am. Compl. ¶ 97 ("The failure of the Defendants to require the return of the fraudulently taken land from the Mashantuckets . . . has caused the Plaintiffs great financial harm and loss of Business expectancy and contract in contravention of law."). Allegations of fraud by others are not cognizable against the United States, and in any case Plaintiff has failed to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Accordingly, there is no claim for fraudulent concealment properly raised that could support equitable tolling of the six-year statute of limitations applicable to Plaintiff's claims.[9]

III. ALTERNATIVELY, TRANSFER OF VENUE IS APPROPRIATE

In the alternative, if this Court finds the case is not barred by the statute of limitations, the case should be transferred to the District of Connecticut. Plaintiff argues that it is not in the interest of justice to transfer venue to Connecticut for two primary reasons: first, that "allegations raised in this action directly involve . . . the administration of various governmental entities," and second that "many interests regularly and routinely came to Washington to influence the process." Pl.'s Opp'n at 11. Neither of these arguments is sufficient because, as the Federal Defendants previously explained, venue is most appropriate

[9] Because there is no proper allegation of fraud by the United States it would also be inappropriate to "equitably estopp [the United States] from challenging on the grounds of statute of limitations" due to this alleged fraud. Pl.'s Opp'n at 9. Further, although Plaintiff asserts a breach of trust claim related to the alleged fraud, again, Plaintiff fails to provide the specific statute or regulation that would establish the contours of the trust. *See Jicarilla Apache Nation*, 131 S. Ct. at 2325. Plaintiff's claim thus is not cognizable against the United States.

in Connecticut where the Plaintiff resides and where the facts relevant to the underlying administrative proceeding occurred.[10]

Plaintiff is correct that officials in Washington D.C. were involved in the administrative process that culminated in the RFD. However, mere involvement of federal agencies and officials located in Washington, D.C., "is not determinative" for purposes of venue. *Shawnee Tribe v. United States,* 298 F. Supp. 2d 21, 25-26 (D.D.C. 2002) (transferring case although the Tribe communicated with agency officials located in Washington, D.C.); *see also DeLoach v. Philip Morris Cos., Inc.*, 132 F. Supp. 2d 22, 25 (D.D.C. 2000) (venue is not appropriate in the District of Columbia, where "the only real connection [the] lawsuit has to the District of Columbia is that a federal agency headquartered here [ ] is charged with generally regulating and overseeing the [administrative] process."); *see also Wyandotte Nation v. Salazar,* No. 11-1361, 2011 WL 5841611, at *8 (D.D.C. Nov. 22, 2011).

The mere fact that representatives from the State of Connecticut and towns within Connecticut traveled to D.C. during the administrative process likewise does not favor D.C. as the appropriate venue. In fact, this participation shows the significant interest from State and local government in the controversy, and thus favors transfer to the District of Connecticut. When a case affects the rights and interests of citizens of a particular state or locality, conducting hearings or trials in that state or locality is appropriate as a "way for the courts to show respect to those citizens' interests." *Nat'l Ass'n of Home Builders v. U.S. E.P.A.*, 675 F.

[10] Plaintiff raises no challenge to the United States' arguments that Plaintiff's choice of forum is not entitled to deference, that the local community has a strong interest in hearing the controversy in Connecticut, and that the District of Connecticut is already familiar with the subject matter of this suit. *See* Defs.' Mem. at 15-19.

Supp. 2d 173, 177 (D.D.C. 2009) (citing *Adams v. Bell*, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983)).

The decision to deny the Pequots federal acknowledgment was based on facts and events arising in, and of concern primarily to, Connecticut, and the direct impact of the resolution this case is upon the citizens and the State of Connecticut. For these reasons, although officials in the District of Columbia were the final arbiters of the decision, the District of Connecticut is nevertheless the more appropriate forum for this action.

CONCLUSION

For the foregoing reasons and those set forth in the Federal Defendants' Motion to Dismiss and Memorandum in Support, Plaintiff's Amended Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6). Alternatively, if the Court determines that Plaintiff's Amended Complaint states one or more plausible claims for which the Court has subject matter jurisdiction, this case should appropriately be transferred to the U.S. District Court for the District of Connecticut.

Respectfully submitted this 14th day of May, 2012,

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