IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RED CLOUD et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	No. 20-608C
v.	)	(Senior Judge Damich)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint of the plaintiffs, Red Cloud *et al.*, wherein plaintiffs seek $100 million each from the United States for its alleged violation of the Treaty with the Sioux, 1868 (Treaty). In support of this motion, we rely on the following brief and the pleadings.

STATEMENT OF THE ISSUES

1. Whether this Court should dismiss the complaint for lack of jurisdiction because the claims are time-barred.

STATEMENT OF FACTS

Five plaintiffs allege that Dr. Stanley Weber sexually abused them while he served as an Indian Health Service (IHS) employee in Pine Ridge, South Dakota. Compl. ¶ 6. The youngest plaintiff was born in 1995 and reached the age of majority in 2013. *Id*. at ¶ 16.

ARGUMENT

I. Standard Of Review For Motions To Dismiss Under RCFC 12(b)(1)

Subject matter jurisdiction is a threshold issue. *E.g., Int'l Mgmt. Servs., Inc. v. United States*, 80 Fed. Cl. 1, 4 (2008). The Court must have jurisdiction in order to entertain the

plaintiffs' complaint. *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005). The Court's "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted). In determining whether it has subject matter jurisdiction, the Court should presume all undisputed factual allegations to be true and construe all reasonable inferences in plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974).

The Tucker Act vests this Court with jurisdiction over money-mandating claims against the United States not sounding in tort. 28 U.S.C. § 1491(a)(1).

The six-year statute of limitations, set forth in 28 U.S.C. § 2501, applicable to this Court "is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988); *accord John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–35 (2008) (providing that the six-year limitations period is an "absolute" limit on the ability of the Court to reach the merits of a dispute).

If this Court's jurisdiction is challenged, a plaintiff cannot rely merely on the allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). The plaintiff bears the burden of establishing the Court's jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). And, "[b]ecause the Tucker Act's statute of limitation is jurisdictional, the plaintiffs bear the burden of proving that their claims are not time-barred." *Katzin v. United States*, 908 F.3d 1350, 1358 (Fed. Cir. 2018) (citations omitted)).

II. Plaintiffs' Claims Should Be Dismissed For Lack Of Jurisdiction Because The Latest Any Plaintiff Could Have Timely Filed Was During 2016

Under the applicable statute of limitations, typically, plaintiffs must file their complaints within six years of accrual. 28 U.S.C. § 2501 ("Every 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."); *see also San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1349-50 (Fed. Cir. 2011).

The six-year limitation period commences on a plaintiff's claim when the plaintiff is, or should be, aware of the pertinent events that fix any potential Government liability. *San Carlos Apache Tribe*, 639 F.3d at 1350; *accord FloorPro, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (applying rule to a contract claim). "The question whether the pertinent events 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 v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). Notably, "the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful.'" *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). Consistent with this objective standard, "[i]t is settled . . . that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their legal rights." *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed. Cir. 1984) (emphasis omitted); *accord Hopland Band of Pomo Indians*, 855 F.2d at 1576 ("[S]tatutes of limitation are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." (citations omitted)).

A. The Latest Any Claim By A Plaintiff Accrued Was 2013 When That Plaintiff's Legal Disability Of Infancy Ceased

In this case, plaintiffs maintain that the alleged abuse occurred when they were under the legal disability of infancy. Compl. ¶¶ 11, 14, 17, 20, and 23; *Felix v. Patrick*, 145 U.S. 317, 330 (1892) (recognizing "legal disabilities, such as those arising from infancy, lunacy, or converture"); *Evans v. United States*, 107 Fed. Cl. 442, 453 (2012) ("it appears that 'legal disability' includes such conditions as infancy"). In that situation, 28 U.S.C. § 2501 extends the statute of limitations for legal disability, but only until "three years after the disability ceases." *Id.; see also Wolfchild v. United States*, 101 Fed. Cl. 54, 75–76 (2011) ("[T]he pertinent statute of limitations, 28 U.S.C. § 2501, 'treats children as if they were legally unable to file suit and allows filing within three years after a child reaches majority status.'"), *as corrected* (Aug. 18, 2011), *aff'd in part, rev'd in part*, 731 F.3d 1280 (Fed. Cir. 2013).

Mr. Red Cloud alleges that the abuse at issue occurred when he was 11 to 13 or 14 – during the approximate years of 2000 to 2003. Compl. ¶ 10. Assuming plaintiff turned 13 sometime during 2000 (an assumption that maximizes Mr. Red Cloud's time to timely file) it necessarily follows that he turned 18 no later than 2005. S.D. Codified Laws § 26-1-1 ("Minors are natural male persons and natural female persons under eighteen years of age."); *Wolfchild*, 101 Fed. Cl. at 76 (2011) (applying state law to determine age of majority for Native Americans for purposes of statute of limitation). Allowing Mr. Red Cloud the requisite three years from the termination of his legal disability of infancy, he had until some date in 2008 to file his claim. Instead, Mr. Red Cloud filed his claim in 2020, at least 11 years too late.

Mr. Trueblood alleges that the abuse at issue occurred when he was 12 to 21 – during the approximate years of 1999 to 2008. Compl. ¶ 13. He was born in 1987. *Id.* It necessarily follows that he turned 18 no later than 2005. Allowing Mr. Trueblood the requisite three years

from the termination of his legal disability of infancy, he had until some date in 2008 to file his claim. Instead, Mr. Trueblood filed his claim in 2020, at least 11 years too late.

Mr. Hunts Horses III alleges that the abuse at issue occurred when he was 13 to 15 during the approximate years of 2008 to 2010. Compl. ¶ 16. He was born in 1995. *Id*. It necessarily follows that he turned 18 no later than 2013. Allowing Mr. Hunts Horses III the requisite three years from the termination of his legal disability of infancy, he had until some date in 2016 to file his claim. Instead, Mr. Hunts Horses III filed his claim in 2020, at least 3 years too late.

Mr. Martin alleges that the abuse at issue occurred when he was 9 to 13 or 14 during the approximate years of 1995 to 2000. Compl. ¶ 19. Plaintiff was born in 1986. *Id*. It necessarily follows that he turned 18 sometime during 2004. Allowing Mr. Martin the requisite three years from the termination of his legal disability of infancy, he had until some date in 2007 to file his claim. Instead, Mr. Martin filed his claim in 2020, at least 12 years too late.

Mr. Gayton alleges that the abuse at issue occurred when he was 12 to 13 during the approximate years of 2003 to 2004. Compl. ¶ 22. He was born in 1991. *Id*. It necessarily follows that he turned 18 sometime during 2009. Allowing Mr. Martin the requisite three years from the termination of his legal disability of infancy, he had until some date in 2012 to file his claim. Instead, Mr. Gayton filed his claim in 2020, at least 7 years too late.

At bottom, because the youngest plaintiff turned 18 during 2013 (Compl. ¶ 16), the latest any plaintiff could timely file was 2016. As such, the complaint fails to satisfy this Court's jurisdictional statute of limitations for every plaintiff, and therefore must be dismissed pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. *Katzin*, 908 F.3d at 1358.

B. Plaintiffs' Position That Accrual Did Not Occur "Until A Date Within Six Years Of The Institution Of This Action" Is Unfounded

In apparent recognition of the challenge posed by the statute of limitations, the complaint suggests that each plaintiff will allege that his claim is not time-barred because he was unaware: (1) that the alleged abuse had occurred; and (2) of facts that (in plaintiffs' view) fix liability because such facts were concealed until public reporting in 2019.

1. Plaintiffs' Allegations That They Were Unaware Of The Alleged Abuse Is Insufficient To Prevent Accrual And Insufficient To Suspend Accrual

"Every claim of which th[is Court] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first *accrues*." 28 U.S.C. § 2501 (emphasis added). This is equally true for plaintiffs' claims, even though plaintiffs are Native Americans. *Hopland Band of Pomo Indians*, 855 F.2d at 1576. Moreover, the Supreme Court has held that statutes of limitations are not to be lightly extended:

> When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would "extend the waiver beyond that which Congress intended."

Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983) (citation omitted).

Thus, to remain true to the statute of limitations at issue, this Court must determine when plaintiffs' claims accrued. 28 U.S.C. § 2501. On that score, the Federal Circuit has held that: "[a] claim first accrues when all the events have occurred that fix the alleged liability of the government and entitle the claimant to institute an action." *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009). Here, the parties appear to agree that "the events . . . that fix the alleged liability of the government and entitle the claimant to institute an action," *Ingrum*, 560

F.3d at 1314, are the alleged abuses because those are the alleged "wrong[s] upon the person[s] or property of the Indian[s]," Treaty, Art. 1. Compl. ¶ 32 ("The sexual abuse . . . was a wrong committed upon the person of a Native American Indian."); *see also id*. at ¶ 34. Thus, plaintiffs' claims accrued when the alleged abuse occurred. *Lucas v. United States*, 137 Fed. Cl. 628, 630 (2018) (dismissing alleged sexual assault based on accrual at time of assault).

There is, however, a strict and narrow "accrual suspension" rule under which a claim against the United States may be suspended if the circumstances result in a plaintiff being unaware of his claim. *Ingrum*, 560 F.3d at 1314. The necessary circumstances that a plaintiff must show are that: (1) the injury was inherently unknowable when the cause of action accrued, or (2) the defendant has concealed its acts. *Id*. at 1315. We address the first circumstance (inherently unknowable) in this section, and the second (concealment) below in part II.B.2.

Every plaintiff maintains that he only recently became aware of the alleged abuse.[1] Specifically, the complaint provides – for every plaintiff – that:

> As a result of the psychologically self-concealing nature of childhood sexual abuse, [he] did not know, and could not have known, of the abuse, the injury, and/or the causal connection between the abuse and his injury. He was unaware of the wrongfulness of the actions of Dr. Weber until a date within six years of the institution of this action.

Compl. ¶¶ 11, 14, 17, 20, 23. Thus, each plaintiff alleges he was unaware of "the abuse, the injury," "the causal connection between the abuse and [the] injury," or any "wrongfulness."[2] *Id*.

[1] The brevity of the plaintiffs' complaint, including its failure to alleged any specific facts – for any plaintiff – that would establish the elements of accrual suspension, apparently sought to be alleged in paragraphs 11, 14, 17, 20, and 23, has required that we infer certain facts that plaintiffs may allege. We have done so to provide plaintiffs the opportunity to respond and address the issue, such that we may file a comprehensive reply to aid the Court. To any extent that our inferences are errant, we reserve our right to alter any position.

[2] Plaintiffs appear to frame their assertion of "unawareness" in terms of the "discovery" rule. *Id*.; *see generally* 9 A.L.R.5th 321 at § 2[a] ("claimed unawareness until subsequent

Apparently contending that their injury was "inherently unknowable," each plaintiff alleges that "[a]s a result of the psychologically self-concealing nature of childhood sexual abuse, [he] did not know, and could not have known, of the abuse." *Id*. But that is insufficient to establish suspension of accrual. For that purpose, something is "inherent" when it is "involved in the constitution or essential character of something : belonging by nature or habit : INTRINSIC." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inherent (last visited Sept. 11, 2020). Despite plaintiffs' contrary allegations ("the psychologically self-concealing nature of childhood sexual abuse"), it is neither the constitution nor essential character of sexual abuse of minors that the injury is unknowable. Nevertheless, plaintiffs appear to ask this Court to presume – for each plaintiff – that their alleged abuse was unknowable to them until a date within six years of the filing of their complaint. Compl. ¶¶ 11, 14, 17, 20, 23. We are unaware of a legal basis for that presumption.[3] 9 A.L.R.5th 321 at § 2[a].

'discovery' of necessary elements, including the conduct constituting the abuse itself (§ 5[a]), the extent of the injury or the causal relationship between the injury and the abuse (§ 7[a]), and the wrongful nature of the acts involved (§ 8[a])"). But the "discovery" rule is a tort concept that was first applied by the United States Supreme Court to delay the accrual of a tort cause of action. *Urie v. Thompson*, 337 U.S. 163 (1949). That concept is inapplicable here, given that this Court lacks jurisdiction over cases "sounding in tort." 28 U.S.C. § 1491; *see also Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322 (Fed. Cir. 2011) (declining to read "discovery rule" into a Vaccine Act that exempts plaintiffs from tort requirements). In fact, plaintiffs concede that their claims cannot be analyzed under a tort framework by: (1) filing their complaint in this Court, and (2) stating that their "claim[s] for damages against the United States [are made] pursuant to the 'bad men' clause of Article 1 of the Treaty." Compl. ¶ 34.

[3] The underlying assumption of plaintiffs' "discovery" rule argument appears to be the "traumatic psychological repression of the conscious awareness of intolerable facts." 9 A.L.R. 5th 321 at § 2[a]. As evinced in other "discovery" rule cases – a rule inapplicable here – the argument is that " to maintain functional sanity, the victim of the abuse has literally and excusably forgotten all or critical aspects of the experience, and should be treated, for purposes of the 'discovery' rule, as if he or she had never known these facts until the conscious awareness of them was restored either by psychotherapy or by some other strong emotional experience which 'triggered' the memory of the elements of the cause of action." *Id*. But even under the inapplicable "discovery" rule, the burden is on the plaintiff. *Id*. (recognizing that even for courts

In any event, 28 U.S.C. § 2501 has already addressed a minor plaintiff's potential need for additional time by extending the statute of limitations for minors for "three years after the disability ceases." 28 U.S.C. § 2501. If this Court were to suspend accrual such that the statute of limitations was extended even further, it would be improperly creating an exception not enumerated by 28 U.S.C. § 2501. *Soriano v. United States*, 352 U.S. 270, 273-74 (1957) (this Court cannot add exceptions to those already enumerated under 28 U.S.C. § 2501).

2. Plaintiffs' Allegations That The United States Has Concealed Its Acts Are Insufficient To Suspend Accrual

The second potential circumstance a plaintiff may show to suspend accrual is that the defendant has concealed its acts. *Ingrum*, 560 F.3d at 1315. Plaintiffs appear to attempt such showing with broad assertions of Government concealment. Compl. ¶ 26 ("the facts which fix the liability of the United States government were exclusively in the possession of the United States government and concealed"). They certainly have not done so with the specificity required to plead concealment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (requiring that complaint contain factual allegations sufficient to suggest plausible claim). Nor can they.

Actionable injury under the Treaty at issue is the "wrong upon the person or property of the Indian." Treaty, Art. 1. The wrongs alleged in the complaint, wrongs "upon the person," were, as alleged, open and notorious and, necessarily, immediately evident to those present. They were not "exclusively in the possession of the United States government" – plaintiffs had them as well. Compl. ¶ 26. The fact that officials of the United States not present during the incidents might have subsequently become aware of and investigated these incidents does not equate to concealment *eo tempore*.

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that can consider whether to apply the "discovery" rule, the burden is on the plaintiff to allege facts supporting the plaintiff's unawareness). It may happen in some cases, but we are unaware of any presumption that minors that have suffered sexual abuse have unknowable injuries.

CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court dismiss the plaintiffs' complaint, as set forth above, under RCFC 12(b)(1).

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Steven J. Gillingham
STEVEN J. GILLINGHAM
Assistant Director

s/Douglas T. Hoffman
DOUGLAS T. HOFFMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
Tel: (202) 353-0547

Attorneys for Defendant

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