IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

THOMAS EUGENE SMITH, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Civil Action No. 25-1718L

THE UNITED STATES' REPLY IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Introduction

The Complaint should be dismissed in its entirety. This case centers on land, initially set aside for the Sioux half-breeds in 1830, that was sold to private owners generations ago. Plaintiffs' claims are long-stale and far outside the six-year statute of limitations provided in 28 U.S.C. § 2501. All but one of the claims was also extinguished by the Indian Claims Commission Act (ICCA). There are other jurisdictional roadblocks to Plaintiffs' claims because the claims challenge land title, sound in tort, and seek broad equitable relief. Additionally, Plaintiffs cannot identify a specific money-mandating duty in support of its three breach-of-trust claims. Further, Plaintiffs also do not adequately allege a Fifth Amendment takings claim. As a result, the United States' motion to dismiss should be granted and all Plaintiffs' claims dismissed.

Argument

I. Plaintiffs' claims are time-barred.

The United States' opening brief showed that Plaintiffs' claims are barred by the six-year statute of limitations provided in § 2501. Dkt. No. 9 at 7-13. Although Plaintiffs attempt to refute the United States' argument, they cannot change the fact that the events that would have fixed any liability of the United States occurred mostly in the 1800s and by 1979 at the latest (for Count VI, alleged breach of the Revenue Sharing Act). Plaintiffs make much of an 1864 Attorney General Opinion, but it does not establish that Plaintiffs' claims are timely. Plaintiffs also assert several arguments for why the accrual date for their claims should be suspended. But Plaintiffs cannot satisfy either of the accrual suspension rule's requirements. Plaintiffs fail to show that the United States concealed its acts such that Plaintiffs' ancestors (and Plaintiffs themselves) were "unaware of their existence," nor can Plaintiffs show that their "injury was inherently unknowable" at the time the cause of action accrued. *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (citation modified).

A. Plaintiffs' allegations about an 1864 Attorney General Opinion do not establish that the Court has jurisdiction.

Plaintiffs' response conflates issues raised in the United States' motion with the ultimate merits of Plaintiffs' legal claims. Central to Plaintiffs' theory of the case is an 1864 Attorney General Opinion (11 U.S. Op. Atty. Gen. 59; Compl., Ex. 19, Dkt. No. 1), which Plaintiffs claim confirms their alleged ancestors' supposed property interests in the Lake Pepin Reservation. Dkt. No. 14 at 4-7. But the issue here is whether Plaintiffs have asserted timely and valid causes of action over which the Court has jurisdiction and whether they have stated a valid takings claim. The meaning of the 1864 Attorney General Opinion, or whether Plaintiffs' interpretation of this document is the correct one, has little applicability to those threshold issues.

In its opening brief, the United States described the background underlying the establishment of the Lake Pepin Reservation under the 1830 Treaty. Dkt. No. 14 at 2-5. The United States explained that the 1854 Act authorized a survey of this land. *Id*. The Act also directed the issuance of Sioux scrip land patents[1] to the Sioux half-breeds in exchange for their interest in the reservation. *Id*. The United States also described the land sales to private owners starting in the mid-1800s. *Id*.

The Attorney General Opinion considered whether the State of Minnesota had title to certain lands within the Lake Pepin Reservation. 11 U.S. Op. Atty. Gen. 59. The Opinion concluded township sections 16 and 36 in the relevant area could not have

[1] The scrips were certificates, issued by the United States, that could be used to claim or acquire public lands. Compl. ¶ 144.

passed to Minnesota at statehood in 1858 (as they otherwise would have) because Congress had provided for those lands in 1854 to the Sioux half-breeds. *Id*. at *2. Plaintiffs contend the Attorney General Opinion "vested a superior property interest in the 1830 Treaty beneficiaries." Dkt. No. 14 at 5. But Plaintiffs do not identify any authority that would have allowed the Attorney General to establish any property interests. And Plaintiffs concede that land sales occurred within the Lake Pepin Reservation between 1857 and 1947, Compl. ¶¶ 142, 210-12, 380, Ex. 17, Ex. 28 at 143-52. The Attorney General Opinion, however, says nothing about disposition of the land by other means after the 1854 Act. Plaintiffs acknowledge that this land has been privately owned for many years. *Id*. ¶¶ 382-83.

In any event, the United States' motion to dismiss does not turn on title questions. The point, instead, is that such claims accrued at the time of the alleged federal taking or interference with Plaintiffs' alleged ancestors' interests. For similar reasons, the brief argued that most of Plaintiffs' claims were extinguished by the ICCA. None of those arguments turn on the legal significance of the Attorney General Opinion.[2] As described below, Plaintiffs fail to rebut the United States' arguments.

B. Plaintiffs cannot show that the United States concealed material facts.

Plaintiffs compare this case to *Wood v. Carpenter*, 101 U.S. 135 (1879), Dkt. No. 14 at 7-8. There, the Supreme Court held that to evade the statute of limitations "[t]here must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Id*. at 143. But Plaintiffs cannot show that there was active deception at play here. While

[2] Nor do the other jurisdictional challenges to Plaintiffs' claims or the United States' argument that Plaintiffs failed to adequately allege a takings claim.

Plaintiffs contend that federal and county property records necessary to put them on notice were concealed, Dkt. No. 14 at 7-8, they offer no evidence of this. Indeed, issuance of federal land patents and other records in the public record is the opposite of concealment. *See McCluskey v. United States*, No. 19-1516L, 2022 WL 4008740, at *2 (Aug. 15, 2022). These acts "publicly proclaimed" the land sales, patents, and the status of the land. *Id.* at *3, n.2. "Real estate transactions are filed for public notice and record." *Bellamy v. United States*, 7 Cl. Ct. 720, 726 (1985). Similarly, *Red Cloud v. United States*, 158 Fed. Cl. 500 (2022), provides no support for Plaintiffs' arguments. There, the court explained that, to meet the accrual suspension rule based on concealment, the plaintiffs "must show they had no way of knowing" of the wrongdoing "because of the Government's actions." *Id.* at 516 (finding plaintiffs failed "to prove concealment for purposes of suspending the accrual of their claim"). Given the land sales and the associated property records, Plaintiffs (or their ancestors) cannot show that they had no way of knowing of their alleged injuries.

Plaintiffs also contend that the government took actions that resulted in the Lake Pepin Reservation's Indian Country and title status being "invisible in the federal and county property records." Dkt. No. 14 at 8. Plaintiffs' argument relies on an 1870 letter from a Commissioner of the Department of the Interior's General Land Office that again addressed whether township sections 16 and 36 passed to Minnesota. *Id.*; Compl., Ex. 38. The document referenced by Plaintiffs does not affirmatively order or direct anyone to act. Compl., Ex. 38. But, according to Plaintiffs, after the 1870 letter, the government omitted the title encumbrances and issued "clean" patents without title encumbrances. Dkt. No. 14 at 9. In Plaintiffs' view, "the land patents should have contained a written notation of the 1830 Treaty, 1854 Law and 1858 Law Indian title encumbrances and protective provisions." Compl., ¶ 265. But nothing cited by Plaintiffs amounts to the affirmative sort of concealment necessary to suspend the accrual of Plaintiffs' claims. In *Wood*, the Supreme Court emphasized that "[c]oncealment by mere silence is not enough." 101 U.S. at 143. Everything needed to provide Plaintiffs or their ancestors with notice of the material facts underlying their claims was public record that was legally available and constructively known. Plaintiffs acknowledge that the federal land patents and other property records were recorded, which is in keeping with the normal operation of the federal property recording system. The 1870 letter was published, Compl., Ex. 38; as was the 1864 Attorney General's Opinion, 11 U.S. Op. Atty. Gen. 59; and the treaty and other statutes were public law; 7 Stat. 328 (1830), 10 Stat. 304 (1854), 11 Stat. 292 (1858). Thus, Plaintiffs cannot show that accrual of their claims should be suspended. *See Shoshone Indian Tribe of Wind River Rsrv., Wyo. v. United States*, 672 F.3d 1021, 1031-33 (Fed. Cir. 2012) (finding the government's alleged misinformation and omissions "did not prevent the Tribes from being aware of the material facts that gave rise to their claim" and thus did not suspend claim accrual).

C. None of the exceptions to the six-year limitations period apply.

Plaintiffs' argument that the government fostered a "lethal environment" in the mid-1800s that acted as a "jurisdictional blockade to notice," Dkt. No. 14 at 10, cannot indefinitely stop accrual. The statute of limitations in § 2501 is not subject to equitable tolling. *San Carlos Apache Tribe v. U.S.*, 639 F.3d 1346, 1349-50 (Fed. Cir. 2011). "By its terms, the limitations period of § 2501 begins to run when the claim 'first accrues' . . . . " *Red Cloud*, 158 Fed. Cl. at 511. Congress has not permitted any exceptions to the six-year limitation period based on the historical environment facing claimants. *See* 28 U.S.C. § 2501 (including certain limited exceptions for petitions based on the termination of river and harbor improvements operations, the legal disability of infancy or for persons beyond the seas, and suits for the fees of an officer of the United States). Even acknowledging the violent events between 1862 and 1870 described by Plaintiffs, the Court cannot apply § 2501 "in a way that extends it beyond these express limits or that reads into it exceptions that are not present." *Red Cloud*, 158 Fed. Cl. at 511 (citation omitted) (recognizing harms suffered by plaintiffs but finding their claims time-barred); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

D. Plaintiffs' alleged injury was not inherently unknowable.

Contrary to Plaintiffs' argument (Dkt. No. 14 at 11), they cannot show that their alleged injury was inherently unknowable. Plaintiffs attached property records to their Complaint showing that such facts were *clearly* discoverable. *See*, *e.g.*, Compl., Exs. 17, 28 at 143-52. "Any matter of public record is by definition knowable." *Cent. Pines v. United States*, 61 Fed. Cl. 527, 534 (2004). "A party will be charged with knowing any facts that are discoverable in public records, and ignorance of one's legal rights arising from those facts is not a sufficient excuse to justify tolling the statute of limitations." *Id*. *See Duncan v. United States*, 98 Fed. Cl. 318, 326 (2011) (finding because the property conveyances were recorded when executed, "it is nearly impossible for plaintiff to show concealment or that the acts were inherently unknowable") (citation modified). Accrual of a claim is "determined under an objective standard" and Plaintiffs did not have to possess actual knowledge of all the relevant facts for their causes of action to accrue. *See Fallini v. United States,* 56 F.3d 1378, 1380 (Fed. Cir. 1995). Plaintiffs filed their Complaint more than 150 years after the events cited in their brief. They have no basis for arguing that they did not possess actual knowledge—let alone that they could not have known—of the circumstances that formed the cornerstone of their claims before 2019 (six years before the Complaint was filed).[3]

E. The continuing claim doctrine does not save Plaintiffs' time-barred claims.

The continuing claim doctrine (Dkt. No. 14 at 11-13) fails to preserve Plaintiffs' time-barred claims. According to Plaintiffs, the United States has "an ongoing, daily duty to manage and protect" the Lake Pepin Reservation and to maintain accurate records of title encumbrances. *Id*. at 12. As the United States pointed out (Dkt. No. 9 at 13), the doctrine does not apply "where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach." *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). In line with this rule, Plaintiffs' citation to *Ariadne Fin. Services Party Ltd. v. United States* shows that the claims here exceed the statute of limitations. Dkt. No. 14 at 13. In *Ariadne*, the Federal Circuit found that the continuing claims doctrine did not apply to claims seeking "compensation for repudiation of a contract that promised continuing performance into the future." 133 F.3d 874, 879-80 (Fed. Cir. 1998). In doing so, the court recognized that the plaintiff was suffering continued harm each year. *Id*. But, as here, the harm resulted from "a single repudiation" by which the government made

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[3] Neither of Plaintiffs' citations to out-of-circuit cases (Dkt. No. 14 at 11) suggest that their injuries were inherently unknowable. Both cases involved Administrative Procedure Act suits and 28 U.S.C. § 2401(a). And both predated *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. System*, where the Supreme Court examined "accrual" under § 2401(a) and when a plaintiff has an actionable APA claim. 603 U.S. 799, 809 (2024) (holding that "a litigant cannot bring an APA claim unless and until she suffers an injury"). If this line of authority has any applicability here, the Complaint makes clear that any injuries suffered by Plaintiffs occurred long ago. *See*, *e.g*., Compl. ¶ 384, Ex. 28.

clear its intent. *Id*. at 879. Accordingly, the claim for damages arising from that event were time-barred. *Id*. at 880. So too here.

Plaintiffs cite a handful of cases (Dkt. No. 14 at 12-13) where the doctrine has been applied. But these cases involved present-day lands or assets held in trust by the United States for the benefit of tribes or Indian landowners and active, ongoing trust management obligations. Not land that—as Plaintiffs acknowledge—was all sold to private owners decades ago. Compl. ¶¶ 380, 382-84, Ex. 28 at 80-142. And even when courts have applied the doctrine, it has not preserved long stale claims like those Plaintiffs present here. For example, in *Confederated Tribes of the Colville Reservation*, while not all the Tribe's claims were time-barred, the court dismissed claims that the Tribe was "well aware of" before it filed the case and that accrued more than six years before the filing of the complaint. 171 Fed. Cl. 622, 652, 655 (2024); *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, 179 Fed. Cl. 779-82, 787 (2025) (dismissing claims that accrued before March 2012 and in 1967 and rejecting certain tolling arguments). Plaintiffs allege that the United States breached its trust obligations many years before the filing of the Complaint, starting as early as the mid-1800s.[4] As such, the continuing claims doctrine does not apply to Plaintiffs' claims.

F. None of Plaintiffs' claim-specific arguments show their claims are timely.

Plaintiffs also make claim-specific timeliness arguments. None are successful. Plaintiffs suggest that the statute of limitations for Count III (illegal conversion of land sale proceeds) is tolled by a prior Interior Department appropriation act provision. Dkt. No. 14 at 19 (citing Pub. L. No. 113-76, 128 Stat. 5, 305-06 (2014)). But, as the United

[4] *See*, *e.g*., Compl. ¶¶ 142, 364, 380-84, 465, 494, 503, 549-50, 563, 574-75, 578.

States, previously pointed out, there is no tolling provision in place now. Dkt. No. 9 at 14. The 2014 appropriation rider, cited by Plaintiffs, was the last of these provisions. *Wyandot Nation of Kansas v. United States*, 124 Fed. Cl. 601, 605-06 (2016), *aff'd*, 858 F.3d 1392 (Fed. Cir. 2017). So this argument does not salvage Count III. Relying on *Samish Indian Nation v. United States*, Plaintiffs also assert that the accrual period for Count VI is suspended. Dkt. No. 14 at 18 (citing 419 F.3d 1355, 1368-69 (Fed. Cir. 2005), vacated on grounds of mootness, 568 U.S. 936, 937 (2012)). But *Samish* involved a tribe that administratively sought federal acknowledgment for statutory benefits and met all requirements for federal acknowledgment. 419 F.3d at 1355; 61 Fed. Reg. 15,825 (Apr. 9, 1996). That is not the case here. Plaintiffs concede that they have never appeared on the list of federally recognized tribes, Compl. ¶¶ 574-75, 578, nor do they allege they have applied for recognition through Interior's administrative process. In any event, the Revenue Sharing Act claim was dismissed as moot in *Samish*. 568 U.S. at 937. *Samish* offers no support for Plaintiffs' claim.

In conclusion, Plaintiffs filed their "claim[s] too late" and the "six-year statute of limitations, therefore, has long since run." *Wolfchild v. United States*, 731 F.3d 1280, 1290, 1293 (Fed. Cir. 2013). So, Plaintiffs' claims must be dismissed.

II. All but one of Plaintiffs' claims was extinguished by the ICCA.

The United States' opening brief also explained that the ICCA also extinguished all but Count VI. Dkt. No. 9 at 15-16. The ICCA explicitly bars Plaintiffs from bringing pre-August 13, 1946 Indian claims against the government. ICCA § 12, 60 Stat. at 1052. Plaintiffs contend that their claims did not legally accrue prior to 1946. Dkt. No. 14 at 13. But Plaintiffs' argument hangs on their "invisibility" theory, *id.*, which, as discussed above, lacks merit. As argued above, Plaintiffs were on notice of the material facts through the associated property records. *Supra* pp. 4-6. Given that all the land sales occurred long ago, the information that was publicly available, and the records of land sales and copies of land patents attached to the Complaint, Plaintiffs have identified no factual support to plausibly argue that Claims I-V and VII did not accrue before the ICCA's deadline.

III. Plaintiffs fail to establish standing

The United States' opening brief showed that Plaintiffs lack standing. Dkt. No. 9 at 16-19. Plaintiffs' response falls short of showing that they suffered an injury in fact. Dkt. No. 14 at 1-4. Plaintiffs' allegations fail to establish that they—as opposed to their alleged ancestors—have a property interest in the Lake Pepin Reservation and the related land patents or scrips.

Plaintiffs initially take issue with the United States' statement that it "does not have a government-to-government relationship with the alleged descendants from the Lake Pepin Reservation, nor does it treat them as a federally recognized tribe." Dkt. No. 14 at 1 (quoting Dkt. No. 9 at 1). But the Complaint supports the United States' position. *See* Compl. ¶¶ 574-75, 578 (conceding that the purported descendants have never appeared on the list of federally recognized tribes, nor has the Reservation, itself); *id.* ¶¶ 585, 587 (asking the Court to restore the federally recognized tribal status). Plaintiffs also rely on the 1830 Treaty and two later unratified treaties to argue that the United States' conduct confirms a government-to-government relationship. Dkt. No. 14 at 2. But this misunderstands the United States' standing argument. The United States did not argue that the Lake Pepin Reservation never existed. Nor did the United States argue that the 1830 Treaty did not permit the Sioux Nation in Council to "gift" a tract of land for the Sioux half-breeds. *Id.*

Instead, the United States argued that the Complaint lacked allegations that personally linked Plaintiffs to the property or any specified ancestor or relative that had a connection to the property or held a scrip. Dkt. No. 9 at 17. In their response, Plaintiffs still fail to fully address the United States' standing arguments.[5] For example, Plaintiffs allege that 290 individuals received scrips, Compl. ¶ 210, but Plaintiffs make no attempt to show that any interest in a scrip would have passed upon death of the original holder. Dkt. No. 9 at 18. What is more, Plaintiffs have not shown that a specific scrip would have passed to any of the named Plaintiffs. Neither the 1854 Act nor the 1858 Act set up an inheritance scheme for scrips. On the contrary, the 1854 Act specified that no transfer or conveyance of scrips would be valid. 10 Stat. 304, § 1. Despite this prohibition, Plaintiffs allege that the scrips "dwindled to nothing" as they were sold in land transactions. Compl. ¶ 383. But Plaintiffs do not grapple with the United States' argument that if a scrip was sold during a person's lifetime (even if invalidly), it is unclear how Plaintiffs would maintain a right to compensation. Dkt. No. 9 at 18-19.[6]

Relying on *Wolfchild v. United States*, Plaintiffs also contend that they are an identifiable group satisfying the jurisdictional requirements of the Indian Tucker Act, 28 U.S.C. § 1505. Dkt. No. 14 at 3 (citing 72 Fed. Cl. 511, 540 (2006), *rev'd on other grounds*, 559 F.3d 1228). The United States' standing argument did not turn on whether

[5] The United States acknowledges that Plaintiffs have submitted about 1,500 pages of genealogical information with the motion for class certification. The United States does not discuss the merits of such information at this juncture, but even so Plaintiffs have not shown that they have a *present-day* property interest.

[6] Plaintiffs' allegations about the 1855 census do not address these arguments either. *See* Dkt. No. 14 at 3 (citing Compl. ¶¶ 195-205). Plaintiffs contend that the census historically identified approximately 640 specific individuals as beneficiaries, but this does not speak to whether Plaintiffs have a current property interest.

Plaintiffs can meet this requirement. *See* Dkt. No. 9 at 16-19. In any event, *Wolfchild* does not show that Plaintiffs can allege an injury in fact in *this* litigation. Although Plaintiffs claim they "have established the critical evidentiary link" through "genealogical records derived from the *Wolfchild* litigation," that case involved a different claimant group with distinct genealogical claims. Dkt. No. 14 at 3; *see also* 72 Fed. Cl. at 513 (noting that the case was brought by individuals claiming descent from persons who were members of the Mdewakanton band of Sioux Indians who assisted settlers during the 1860s); Compl. ¶ 19 (alleging that *Wolfchild* involved a different group of beneficiaries and different lands). And ultimately, in *Wolfchild*, the Federal Circuit concluded that there was no money-mandating trust duty, that any remaining statutory and treaty theories failed or were barred by the statute of limitations, and that no viable Indian Tucker Act claim existed. 731 F.3d at 1288-95. Plaintiffs lack standing.

IV. Plaintiffs' claims suffer from additional jurisdictional deficiencies.

The United States' opening brief identified numerous other jurisdictional barriers to Plaintiffs' Counts I-IV, VI-VII. Dkt. No. 9 at 19-29. Plaintiffs fail to allege facts sufficient to establish the Court's subject-matter jurisdiction for these claims.

A. Count I should be dismissed because it challenges land title.

The United States' opening brief explained that Count I (government-issued patents are invalid) challenges land title and seeks equitable relief. Dkt. No. 9 at 19-21. But the Court lacks jurisdiction to decide land title questions. *Sioux Tribe of Indians v. United States*, 3 Cl. Ct. 536, 538 (1983); *Dwen v. United States*, 62 Fed. Cl. 76, 80 (2004). Plaintiffs offer little substantive response, *see* Dkt. No. 14 at 18, simply stating that Count I is a predicate to adjudicating monetary liability arising from the seizure of the reservation's title status. Count I, however, seeks more than just monetary liability—

Plaintiffs want the Court to cancel or reform land title, correct land patents to include title encumbrances, and incorporate all corrected land patents into the federal property recording system to ensure they are Indian Country under 18 U.S.C. Code § 1511. Compl. ¶¶ 467-86. The Tucker Act does not provide jurisdiction for those remedies. Thus, Count I should be dismissed.

B. Plaintiffs fail to identify a money-mandating statutory regulatory duty for Counts II and IV.

The United States also explained that the Court should dismiss Counts II (breach of trustee obligations) and IV (breach of fiduciary duty) because Plaintiffs have not identified a specific money-mandating statutory duty that could support jurisdiction. Dkt. No. 9 at 21-25. In doing so, the United States analyzed each of the alleged sources of fiduciary duty identified by Plaintiffs and explained how none provided jurisdiction for Plaintiffs' claims. *Id.* (explaining that neither the 1830 Treaty, the 1854 and 1858 Acts, nor the general investment statutes, 25 U.S.C. §§ 161a and 162a create money-mandating statutory or regulatory trust duties for Counts II and IV).

In response, Plaintiffs identify several additional alleged sources of fiduciary duty, but none of these authorities establish jurisdiction either. Dkt. No. 9 at 14-16. Plaintiffs reference *Fletcher v. Peck*, 10 U.S. 87 (1810) and the 1864 Attorney General Opinion. Dkt. No. 14 at 15. But neither have the force of a treaty, statute, or regulation. Thus, Plaintiffs cannot rely on them to confer jurisdiction. *Arizona v. Navajo Nation* (*Navajo III*), 599 U.S. 555, 563-64 (2023) (finding that to maintain a breach of trust claim, "the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States"). Even if Plaintiffs could rely on these authorities, they do not contain any "rights-creating or duty-imposing" language that required the United States to put land sales proceeds in trust, Compl. ¶ 494; or disclose title encumbrances on land certificates and other government-issued documents to clear Indian title, *id.* ¶¶ 494, 496, 519, 523, 529-31. While *Fletcher* discusses Indian title and "occupancy for the purpose of hunting," 10 U.S. at 121, it does not speak to the United States' specific obligations regarding the Lake Pepin Reservation. The Attorney General's Opinion opines on Minnesota's title, but it does not direct the United States to take any specific actions. 11 U.S. Op. Atty. Gen. 59. Nor does it specify anything about the proceeds from the land sales that later occurred. *Id.* Further, the Attorney General's Opinion does not impose any duty on the United States to clear Indian title, correct land patents, or take any affirmative steps to protect the descendants' title. *Id.* And even if it did, the Attorney General's Opinion cannot override the 1854 and 1858 Acts. Plaintiffs also cite the 1849 and 1851 Treaties, that they acknowledge were not ratified. Dkt. No. 14 at 2, 15; Compl. ¶¶ 133-38, Exs. 7-8. But "an agreement with an Indian tribe is given the force of law when 'ratified' by Congress." *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1213 (9th Cir. 2001) (discussing *Antoine v. Washington*, 420 U.S. 194 (1975)). Plaintiffs cannot rely on unratified treaties to show that the United States expressly *accepted* any specific obligations regarding the Lake Pepin Reservation. *Navajo III*, 599 U.S. at 564.[7]

Plaintiffs also rely on the United States' alleged comprehensive control over the Lake Pepin Reservation. Dkt. No. 14 at 15. But step one of the jurisdictional test requires

[7] Plaintiffs also cite the Takings Clause, which is money-mandating if a party has a nonfrivolous takings claim. *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005). But the United States did not move to dismiss Plaintiffs' takings claim (Count V) for lack of a money-mandating fiduciary duty.

that Plaintiffs identify statutory or regulatory provisions that *expressly* create a duty. "The Supreme Court has made clear that '[t]he Federal Government's liability cannot be premised on control alone.'" *Hopi Tribe v. United States*, 782 F.3d 662, 670 (Fed. Cir. 2015) (quoting *United States v. Navajo Nation* (*Navajo II*)*,* 556 U.S. 287, 301 (2009)). So even if Plaintiffs could establish that the United States has control over the Lake Pepin Reservation (which again, Plaintiffs admit was sold to private owners long ago) or the sale proceeds, this cannot alone establish a specific fiduciary obligation for Counts II and IV.

Plaintiffs' attempt to satisfy the second requirement for Tucker Act jurisdiction also fails. Dkt. No. 14 at 15-16. Plaintiffs rely on the Takings Clause but Counts II and IV are not based on that constitutional provision. *See* Compl. ¶¶ 487-500, 518-35. And none of the cases cited by Plaintiffs support finding an applicable treaty, statute, or regulation here that contains an express provision for monetary relief or contemplates monetary relief. *Hopi Tribe v. United States*, 782 F.3d 662, 671 (Fed. Cir. 2015) was dismissed for lack of jurisdiction and *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 288 (2013), involved general investment statutes which are inapplicable here.[8] In sum, Plaintiffs have not identified a substantive source of law containing a specific fiduciary or other duty in support of Counts II and IV. Plaintiffs' failure to do so is a jurisdictional deficiency that compels dismissal of these claims.

C. Count III should be dismissed because it is a tort claim.

[8] After *Am. Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (1981), the Supreme Court clarified that the government's liability cannot depend on control alone. *Navajo II*, 556 U.S. at 301.

The United States also argued Count III (illegal conversion of land sale proceeds) sounds in tort, so it should be dismissed because the Court lacks "jurisdiction to entertain tort claims." *Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993). Dkt. No. 9 at 25. In response, Plaintiffs contend that Count III is a trust mismanagement claim predicated on the general investment statutes, 25 U.S.C. §§ 161a and 162a. Dkt. No. 14 at 19. But Count III is based on Plaintiffs' claim that the United States illegally "pocketed" land sales proceeds. *Id*. Property theft is the sort of tort claim that falls outside the Court's jurisdiction. *Locklear v. United State*s, No. 18-1174C, 2019 WL 365770, at *4-5 (Jan. 29, 2019); *Belt v. United States*, No. 10-466C, 2010 WL 5300927, *5 (2010) (claims of theft "have consistently been held to sound in tort"); *Husband v. United States*, 90 Fed. Cl. 29, 35 (2009) (claim that the government seized and failed to return property sounded in tort). But if Count III is read as a breach of trust claim, it should be dismissed because Plaintiffs have not identified any fiduciary duties related to land sale proceeds. Although Plaintiffs rely on the general investment statutes, they fail to show that these statutes apply here. Plaintiffs make no attempt to counter the United States' argument that §§ 161a and 162a do not apply because the sale proceeds were not trust funds. Dkt. No. 9 at 22. Plaintiffs also fail to respond to the United States' point that the land sales started long before these laws were enacted. *See id.*; Act of Feb. 12, 1929, 45 Stat. 1164; June 24, 1938, c. 648, § 1, 52 Stat. 1037.

D. Plaintiffs fail to identify a money-mandating statutory regulatory duty for Count VI.

As with Counts II and IV, Plaintiffs have not identified any fiduciary duties related to their Revenue Sharing Act claim, Count VI. The United States' opening brief showed that the Revenue Sharing Act Pub. L. No. 92-512, 86 Stat. 919, which was created in 1972 and ran until 1986, applied to federally recognized tribes, § 108(b)(4). Dkt. No. 9 at 25-26. In response, Plaintiffs contend that the Act allocated funds to any "Indian tribe or Alaskan native village which has a recognized governing body which performs substantial governmental functions," § 108(b)(4). Dkt. No. 14 at 16. But Plaintiffs do not show that they would have qualified for such funding. Plaintiffs do not allege that their ancestors participated in a governing body performing governmental functions between 1972 and 1986. *See, e.g.*, Compl. ¶¶ 568-81. Plaintiffs do describe themselves as an "identifiable group." Compl. ¶ 5; Dkt. No. 14 at 17. But qualifying as an "identifiable group" for Indian Tucker Act jurisdiction, 28 U.S.C. § 1505, is not the same as being a tribe with a governing body performing governmental functions.[9] Indeed, Plaintiffs claim that an organized tribe "no longer exists or represents the interests of the claimant group." Compl. ¶ 5 (quotation marks and citation omitted). And the case cited by Plaintiffs does not support their position. *Leelanau Indians, Inc. v. U.S. Dept. of Housing and Urban Development*, 502 F. Supp. 741, 743 (W.D. Mich. 1980), involved HUD regulations and a tribe that was ultimately federally recognized.

As the United States explained in its opening brief, Dkt. No. 9 at 26-27, even if the Revenue Sharing Act could be interpreted as money-mandating, Plaintiffs' claims would not be justiciable by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341. *Abrantes v. United States* and *Wetsel-Oviatt Lumber Co. v. United States* (Dkt. No. 14 at 17-18) do not suggest otherwise. *Abrantes* involved payments made after a lapse in appropriations ended and funding was restored. 54 F.4th 1332, 1334 (Fed. Cir. 2022).

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[9] Claimants may qualify as an identifiable group if they cannot sue as a tribe or when there is no existing tribal organization to represent their claims. *See Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 673-74 (2006).

And *Wetsel-Oviatt* considered government contracts, not a congressionally created financial assistance program. 38 Fed. Cl. 563, 564 (1997). Neither involved a situation, as here, where the program and associated funding ended nearly 40 years before Plaintiffs filed suit.

E. Count VII should be dismissed because it seeks equitable relief.

Plaintiffs also fail to establish that the Court has jurisdiction to order the strikingly broad equitable relief requested in Count VII. Plaintiffs request that the Court order the United States to conduct, complete, and publish an accounting regarding the alleged Lake Pepin Reservation; restore the legal status of the Lake Pepin Reservation (even though that land is privately owned); alter and record land patents; conduct, complete, and publish a census of the alleged beneficiary class members; and recognize the Sioux half-breed lineal descendants as a federally recognized tribe. Compl., ¶¶ 582-595; 116-17. But Plaintiffs make little attempt to respond to the United States' argument that the Court lacks jurisdiction over these types of claims, *see* Dkt. No. 14 at 20. Contrary to Plaintiffs' suggestion, this type of declaratory and injunctive relief is not incident of and collateral to a money judgment as required by 28 U.S.C. § 1491(a)(2). Dkt. No. 9 at 27-29. Plaintiffs do not identify any Court of Federal Claims precedent where this type of relief has been awarded. Plaintiffs contend that their request for a "forensic accounting" is "jurisdictionally sound." Dkt. No. 14 at 20. But Plaintiffs fail to specify that this relief is in aid of judgment. And the Court cannot provide Plaintiffs with a separate and independent accounting. *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 582 (1990) (citation omitted). Nor have Plaintiffs shown that their request for a census is within the Court's jurisdiction. *Locklear*, 2019 WL 365770, at *5.

V. Plaintiffs fail to adequately allege a Fifth Amendment takings claim.

Along with the jurisdictional problems with Plaintiffs' claims, Plaintiffs have not adequately alleged the elements necessary to show that relief could be granted on its Count V takings claim. Dkt. No. 9 at 29-30. Plaintiffs have not identified a cognizable Fifth Amendment property interest in the alleged Lake Pepin Reservation, the land patents, or the scrips at the time of the taking. *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). Plaintiffs' allegations center on events from the mid-1800s and confirm that the alleged dispossession of these lands occurred generations ago. Dkt. No. 14 at 13-14 (alleging that the 1870 letter resulted in a taking along with the federal land patents and sales). "Precedent requires that the property owner prove its ownership *at the time* of the alleged taking." *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (emphasis added). But the land sales here occurred almost entirely before these Plaintiffs were born. Compl., Ex. 28 at 80-142. And, as described above, Plaintiffs do not show they have any current interest in scrips or land patents. *Supra* p. 11. "If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court['s] task is at an end." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). Plaintiffs have not identified a cognizable property interest in any of the property at issue here and the Court should dismiss Count V.

If the Court proceeds to the second step of the takings test, Plaintiffs continue to improperly rely on alleged government inaction. *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1357 (Fed. Cir. 2018). Plaintiffs identify three potential affirmative acts: the land sales, the land patents, and the 1870 letter. Dkt. No. 14 at 13-14. Although Plaintiffs describe the sales as "federal," *id.* at 14, the sales are non-federal land transactions—not affirmative acts by the government. Plaintiffs make this clear in the Complaint alleging that approximately 290 Sioux half-breed descendants received scrip land patents and that some individuals traded their scrips to settlers. Compl., ¶ 282. Similarly, the Complaint alleges that a few individuals sold their interest or were defrauded out of it. *Id.* ¶ 283. Later in the Complaint, Plaintiffs contend that "[t]he government's failure to prevent the widespread sale of certificates, scrip and patents to non-beneficiaries" injured the beneficiaries. *Id.* ¶ 348. Indeed, the Complaint focuses on affirmative actions taken by *others* rather than the government. *See, e.g.*, *id.* ¶¶ 304 (alleging that the scrips were "vulnerable to potential trade to non-beneficiaries" and "susceptible to settler misconduct"); 305 (alleging that the government's negligence invited "speculators to exploit the system"); 306 (alleging the government allowed speculators to "gain control of the certificates, scrip and patents"). Plaintiffs' claims about the land patents are also connected to the government's alleged failure to act (failure to record Indian title encumbrances on the patents). *Id.* ¶ 320; Dkt. No. 14 at 9 (alleging the government issued "clean" patents without title encumbrances). And the 1870 letter does not affirmatively order or direct anyone to take action. Compl., Ex. 38. "On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government." *St. Bernard Par. Gov't*, 887 F.3d at 1357. Plaintiffs cannot rely on government inaction theories to support their takings claim.

Plaintiffs have no plausible claim to any takings related to the Lake Pepin Reservation, the land patents, or the scrips. If the Court does not dismiss the entire action for lack of subject matter jurisdiction, the Court should dismiss Count V for failure to state a claim. For the reasons above and in the United States' opening brief, the United States' motion to dismiss should be granted. All Plaintiffs' claims should be dismissed.

Respectfully submitted this 1st day of May, 2026.

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