IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MUSCOGEE CREEK INDIAN FREEDMEN BAND, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 18-cv-01705 (CKK)
RYAN ZINKE, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, AND JAMES FLOYD,	)	
Defendants.	)	

REPLY MEMORANDUM
IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

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Interior has moved for dismissal of Claims One (alleging violations of the U.S. Constitution and various federal laws), Two (judicial review of agency action under the APA), and Three (equal protection) because the claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2401(a). Federal Defendants established—and Plaintiffs do not dispute—that the complaint challenges Interior's actions related to the Muscogee (Creek) Nation's ("Tribe") October 1979 ratification of a constitution that altered the standards for tribal citizenship and allegedly made Plaintiffs no longer eligible, a process that took place under the supervision of this district court. *See* Federal Defendants' Memorandum in Support of the Motion to Dismiss (Mem.) (ECF No. 20) at 10-12, ECF No. 20; Am. Compl. ¶¶ 56-63, 73, ECF No. 12; Pl. Opp. at 2, ECF No. 23. Plaintiffs' claims thus first accrued in 1979, far more than six years ago, and are barred.

Plaintiffs attempt to save their case by identifying purported agency actions or inactions that have taken place in the last six years. But this does not change the fact that the agency decision being challenged took place in 1979, and has not changed since that time. The recent alleged actions or inactions that Plaintiffs identify are merely the natural and anticipated effects of the 1979 Constitution's provisions. And, because the statute of limitations in Section 2401(a) is jurisdictional, a claim that first accrued more than six years ago cannot be saved by asserting that there are "continuing violations" that occurred within the limitations period. Plaintiffs also have not alleged any recent actions, or nondiscretionary statutory actions that Interior failed to take, that fall within the scope of this doctrine. Plaintiffs have not met their burden to establish the Court's jurisdiction, *see Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007), and their claims against Federal Defendants should be dismissed.

ARGUMENT

I. Plaintiffs' Claims First Accrued in 1979, and Are Thus Barred by the Statute of Limitations.

Plaintiffs do not genuinely dispute that the crux of their complaint stems from the fact that in 1979, the Muscogee (Creek) Nation adopted a new constitution under procedures established by this Court, under which Plaintiffs were no longer eligible for tribal membership.[1] As described in detail in Federal Defendants' Memorandum, the Complaint is dominated by allegations regarding the adoption of the 1979 Constitution and the accompanying changes to eligibility for tribal membership. *E.g.,* Am. Compl. ¶¶ 2, 3, 4-10, 21, 52-55, 56-57, 65, ECF No. 12. According to Plaintiffs' own allegations, it was the 1979 Constitution that caused the Tribe to "declare[] that all Freedmen were not entitled to MCN citizenship and would no longer be recognized or allowed to be citizens of MCN," *id.* ¶¶ 60-61, and they allege that Federal Defendants "violated the Treaty of 1866 when DOI approved the 1979 Constitution." *Id.* ¶ 73. Plaintiffs' relief is aimed entirely at invalidating the 1979 Constitution and redefining the membership standards of the Tribe. *E.g.*, Am. Compl. Prayer for Relief ¶¶ a-e, g-k, ECF No. 12.

Plaintiffs' opposition brief concedes that "the 1979 Constitution is an instance of wrongdoing by the Federal Defendants" (Pl. Opp. at 2, ECF No. 23) that forms the basis of their

[1] For purposes of this Rule 12(b)(1) motion, the Federal Defendants have "treat[ed] the complaint's factual allegations as true," *Brown v. District of Columbia*, 514 F.3d 1279, 1283 (D.C. Cir. 2008), but contrary to several statements in Plaintiffs' Opposition, this does not mean that the allegations and legal conclusions in Plaintiffs' complaint are undisputed. *E.g.*, Pl. Opp. at 1, ECF No. 23 (claiming "there is no dispute that the Treaty of 1866 remains a valid obligation…."); *id.* at 4 (characterizing legal effect of the Oklahoma Indian Welfare Act); *id.* at 7 (asserting "Federal Defendants do not and cannot take the position that the Treaty of 1866 was abrogated."). This motion focuses on the lack of jurisdiction due to the statute of limitations bar, which presents a simple and straightforward basis for dismissal of all claims. However, if the Court disagrees, Federal Defendants reserve the right to assert other legal and factual defenses to the claims in this suit.

complaint. *See also* Pl. Opp. at 7, 17-18 (arguing that children not yet born in 1979 should be allowed to challenge the approval of the 1979 Constitution). Thus, Plaintiffs' cause of action first accrued in 1979. *See Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007) (Actions under section 2401(a) "accrue when they come into existence." (internal quotation marks and alterations omitted)).

Every subsequent injury that they claim has occurred since 1979 flows from the adoption of the Constitution. Because of the 1979 Constitution, Plaintiffs are not eligible for tribal membership. Because they are not tribal members, they are not eligible to vote in tribal elections, including the 2015 Principal Chief election and all other elections held since 1979, and are not eligible for tribal programs and services, including those that receive federal funding. It was clear in 1979 that future tribal membership determinations, voter eligibility, and access to tribal services would be handled in compliance with the 1979 Constitution, and Plaintiffs do not suggest otherwise. *See, e.g.*, Pl. Opp. at 3, ECF No. 23 (asserting that Federal Defendants "repeatedly approved actions that violated federal law" more than six years ago).

This Court has rejected similar efforts to salvage a challenge to a long-ago agency action by pointing to more recent applications of the original decision. For example, in *Alaska Community Action on Toxics v. U.S. EPA*, 943 F. Supp. 2d 96 (D.D.C. 2013), the Court rejected plaintiff's argument that it was challenging specific recent applications of a regulation enacted by EPA more than thirty years before, concluding that "nothing about that decision has changed in the nearly thirty years since it was made"; rather, the agency was simply implementing "the decision made and spelled out long ago." 943 F. Supp. 2d at 104-05. *Alaska Community Action* relied, in turn, on *Harris v. FAA*, 353 F.3d 1006 (D.C. Cir. 2004), in which the D.C. Circuit dismissed a challenge by air traffic controllers to the FAA's decision to hire them at the GS-9

grade level, finding that the statute of limitations began to run when the FAA issued a recruitment notice establishing the agency's position on employment terms, not when the individual plaintiffs were actually hired, which simply implemented the original agency decision. 353 F.3d at 1010-11. The same is true here—nothing has changed with respect to Interior's approval of the 1979 Constitution, including its membership standards, in the nearly forty years since that decision was made, and Interior's subsequent government-to-government dealings with the Tribe with respect to this issue have simply implemented the decision made long ago.

As discussed in more detail in Federal Defendants' opening brief, the principle that claims accrue when the original agency action occurred has been applied with equal force to agency decisions affecting the rights of tribes and former members.[2] *See Felter*, 473 F.3d at 276-77 (challenge to Interior's implementation of a termination statute was barred by the statute of limitations); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578 (Fed. Cir. 1988) (breach of trust claims accrued at the latest when federal government terminated federal trust relationship over band); *Ute Distribution Corp. v. Sec'y of the Interior*, 584 F.3d 1275, 1283 (10th Cir. 2009) (terminated Indians' claims accrued during termination process). Plaintiffs attempt to distinguish these cases as involving the termination of the Indian status of these groups or individuals, Pl. Opp. at 15-16, ECF No. 23, but it is exactly the same here, since with the adoption of the 1979 Constitution, Plaintiffs became ineligible for tribal membership.

The agency decision at the heart of Plaintiffs' claim is the approval of the 1979 Constitution, and any and all subsequent agency actions simply reflect "continued adherence to

[2] Plaintiffs note that this Court considered issues related to the Seminole Tribe's efforts to redefine its membership to exclude Freedmen descendants in *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002). Pl. Opp. at 10-11, ECF No. 23. But that case was a challenge by the Tribe to a specific, recent agency action, not a suit by Freedmen descendants, and did not suffer from the same jurisdictional defects as this case.

its earlier decision." *Alaska Community Action*, 943 F. Supp. 2d at 105. Plaintiffs cannot re-start the limitations period by pointing to purported recent agency action.

II. The Continuing Violation Doctrine Does Not Toll the Limitations Period.

Plaintiffs' claim is based on an agency action that occurred outside the limitations period. *See* Am. Compl. ¶¶ 56-63, 73, Prayer for Relief, ECF No. 12; Pl. Opp. at 2, ECF No. 23 (admitting that the approval of the 1979 Constitution is a challenged "instance of wrongdoing by Federal Defendants"). Although they do not style it as such, Plaintiffs seek to invoke the continuing violation exception by pointing to additional, more recent purported agency actions in an effort to toll the limitations period. *E.g.*, Pl. Opp. at 3, 6, 12-15, ECF No. 23. *See Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.D.C. 2006) (rev'd on other grounds, *Felter v. Norton*, 473 F.3d 1255 (D.C. Cir. 2006) ("The continuing violation exception is invoked when a claim alleges that a wrongful act occurred during the statute of limitations but also includes other wrongful acts that occurred outside the statute of limitations."). These actions include Interior's purported approval of the 2015 Principal Chief election, Interior's distribution of federal funds to the Tribe, and Interior's alleged failure to take actions to protect Plaintiffs' claimed rights within the Tribe.

This does not save their claims. First, the continuing violation doctrine does not apply to Section 2401(a), which is jurisdictional. Second, even if it did apply, the more recent actions (or inactions) that Plaintiffs identify do not fall within the continuing violation exception. In fact, these actions could not form the basis of a claim at all, much less support the application of this exception to the statute of limitations.

A. The Continuing Violation Doctrine Is Not an Exception to the Jurisdictional Statute of Limitations in 28 U.S.C. § 2401(a).

Plaintiffs do not contest that Section 2401(a) is jurisdictional. *See Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) ("Unlike an ordinary statute of limitations,

Section 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." (citing *United States v. Mottaz,* 476 U.S. 834 (1986); *Soriano v. United States,* 352 U.S. 270, 276 (1957)). As a result, equitable exceptions to Section 2401(a), including the continuing violation doctrine, do not apply. *See, e.g.*, *Burt Lake Band of Ottawa and Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70, 76 (D.D.C. 2018) ("Because the Court finds that section 2401(a) is applicable and jurisdictional, and that the six-year period has lapsed, it is stripped of its subject matter jurisdiction and cannot apply the equitable tolling doctrine" or equitable estoppel); *Horvath v. Dodaro*, 160 F. Supp. 3d 32, 43 (D.D.C. 2015) ("Because [Section 2401(a)] is jurisdictional, neither waiver nor equitable tolling is applicable.") (citing *Bigwood v. Def. Intelligence Agency*, 770 F. Supp. 2d 315, 319 (D.D.C. 2011)); *Alaska Community Action*, 943 F. Supp. 2d at 108 (where claims first accrued outside of statute of limitations, application of continuing violations doctrine is inconsistent with jurisdictional nature of Section 2401(a)). This Court has applied this rule to bar claims purportedly based on "ongoing breaches of trust" of the sort Plaintiffs allege here. *E.g., Historic Eastern Pequots v. Salazar*, 934 F. Supp. 2d 272, 281 (D.D.C. 2013) (statute of limitations for claims by putative Indian tribe challenging denial of federal recognition and alleging ongoing breaches of trust is not tolled by continuing violation doctrine).[3] Following this precedent, the continuing violation exception does not apply here, and Plaintiffs may not rely on these alleged recent events to save their time-barred claims.

[3] In addition, the Ninth Circuit has held that the continuing violation doctrine "is not applicable in the context of an APA claim for judicial review." *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1229–30 (S.D. Cal. 2011), *aff'd,* 540 F. App'x 587 (9th Cir. 2013) (citing *Hall v. Regional Transp. Comm'n of S. Nev.*, 362 Fed App'x 694 (9th Cir. 2010)).

B. Even if the Continuing Violation Doctrine Could Toll the Statute of Limitations, Plaintiffs Have Not Stated a Continuing Violation.

Even assuming the continuing violation doctrine applies to Section 2401(a), it does not save Plaintiffs' claims. The D.C. Circuit has recognized at least two applications of the doctrine, neither of which applies here. First, a continuing violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period, typically because it is only its cumulative impact (as in the case of a hostile work environment) that reveals its illegality." *Keohane v. United States*, 669 F.3d 325, 329 (D.C. Cir. 2012) (quoting *Taylor v. F.D.I.C.,* 132 F.3d 753, 765 (D.C. Cir. 1997)); *see also Earle v. D.C.*, 707 F.3d 299, 306 (D.C. Cir. 2012). Only if such a violation is alleged may the plaintiff rely on conduct that took place outside the limitations period. *Earle*, 707 F.3d at 306.

Here, even accepting Plaintiffs' allegations in the complaint in the light most favorable to them, the harm to Plaintiffs from the 1979 Constitution's revised tribal citizenship standards and Interior's approval thereof was apparent in 1979, and Plaintiffs do not suggest otherwise. Indeed, Plaintiffs note efforts taken well over six years ago to challenge the denial of tribal membership in tribal court. *See* Am. Compl. ¶¶ 63-71, ECF No. 12. As this Court found in *Horvath v. Dodaro*, "Plaintiff was certainly aware of the putative violation," and even took steps to challenge the action; "no 'cumulative effect' was necessary to reveal its supposed illegality." 160 F. Supp. 3d at 44-45 (quoting *Keohane*, 669 F.3d at 330).

Furthermore, "'a lingering effect of an unlawful act is not itself an unlawful act.'" *Id.* (quoting *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007)); *see also Felter*, 412 F. Supp. 2d at 125 ("Continuing violations occurring within the statute of limitations must be actual acts committed, rather than merely effects of prior acts.") (citing *Lightfoot v. Union Carbide*

Corp., 110 F.3d 898, 907 (2d Cir. 1997)); *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) ("a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim"). And, "the mere failure to right a wrong … cannot be a continuing wrong … for that is the purpose of any lawsuit and the exception would obliterate the rule." *Earle*, 707 F.3d at 306 (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977)). Here, Plaintiffs have not pointed to any actual discrete acts by Interior within the last six years—as opposed to the continuing effects of the loss of their tribal citizenship rights in 1979—that that could form the basis of a claim against the government. Rather, they assert a "mere failure to right a wrong," which cannot support their claim. *Earle*, 707 F.3d at 306.

C. There Is No Continuing Violation Because Federal Defendants Have No Enforceable Duty to Protect the Rights of Plaintiffs.

The D.C. Circuit has "occasionally recognized a second application of the continuing violation doctrine if the text of the pertinent law imposes a continuing obligation to act or refrain from acting." *Earle*, 707 F.3d at 307. The determination of whether an obligation is "continuing" is a question of statutory construction, *id.*, but there is no such question here because, as discussed in more detail below, Plaintiffs have pointed to ***no law*** that imposes any continuing obligation to act or refrain from acting. Thus, they may not avail themselves of this application of the continuing violation doctrine either.

None of the purported actions or inactions by Interior—characterized by Plaintiffs as a general failure to protect Plaintiffs' rights, and specifically the "approval" of the 2015 Principal Chief election, the failure to "promote tribal political integrity" in the 2015 election, and the disbursement of federal funds to the Tribe (Pl. Opp. at 7-12, ECF No. 23)—present a nondiscretionary, statutory duty imposed on Interior. *Earle*, 707 F.3d at 307 (continuing

violation applies only where "the text of the pertinent law imposes a continuing obligation to act or refrain from acting."). Plaintiffs do not point to any such statutory obligation, and neither the Treaty of 1866, the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* ("ICRA"), nor the cases cited by Plaintiffs expressly or unambiguously mandate Federal Defendants take such actions.[4] Because Plaintiffs fail to establish that Federal Defendants have any such duty, their argument provides no support for finding that their claims are timely.

Plaintiffs' opposition is based largely on the notion that Federal Defendants have an "ongoing duty" to the Creek Freedmen. *See* Pl. Opp. at 6-7, ECF No. 23; *see also id.* at 10-12, 16. But it is insufficient for Plaintiffs to merely invoke the "moral obligations" of the United States to carry out its trust relationship with Indian tribes. Pl. Opp. at 7, ECF No. 23 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)). That general trust relationship does not, by itself, create legally-enforceable obligations for the United States. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (United States is "not a private trustee" and accepts fiduciary duties only as expressly defined by statute). Instead, Plaintiffs must point to a treaty, statute, or regulation that imposes a specific duty on Federal Defendants with regard to Plaintiffs' rights. *Id.* at 177; *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty"). But neither the Treaty of 1866, ICRA, nor the cases cited by Plaintiffs expressly or unambiguously mandate Federal

[4] Plaintiffs make no attempt to show that they have a cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), which provides judicial authority to "compel agency action unlawfully withheld or unreasonably delayed. . . ." *Id*. And there is no indication that Plaintiffs could meet the standard necessary to do so. A claim under this provision "can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All*., 542 U.S. 55, 64 (2004).

Defendants take such actions or imposes a mandatory duty to protect Plaintiffs' rights within the Tribe. *See, e.g.*, *Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016) (plaintiffs identified no "authority suggesting an uncabined trust duty requiring the BIA to protect their membership rights at any cost").

Plaintiffs rely on Article 2 of the Treaty with the Creeks, 1866. *See* Pl. Opp. at 7, ECF No. 23. In that provision, the Creek Nation agreed that "persons of African descent … lawfully residing in said Creek country under their laws and usages … and their descendants … shall have and enjoy all the rights and privileges of native citizens. . . ." 14 Stat. 785, art. 2. But the Treaty does not impose any obligations on the United States in this provision. Indeed, Article 2 makes no mention of the United States at all, much less suggests that Federal Defendants have an obligation to ensure that tribal elections comply with the Treaty and ICRA, promote political integrity in the 2015 election, protect the rights of the Creek Freedmen, or ensure that they receive federal funds.[5]

Similarly, ICRA does not set forth a specific enforceable duty requiring Federal Defendants to take action regarding the rights of the Creek Freedmen or undertake any other obligations for Plaintiffs. "ICRA does not operate against the federal government." *Cal. Valley Miwok Tribe v. Salazar*, 967 F. Supp. 2d 84, 93 (D.D.C. 2013). *See also Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006) (ICRA "does not impose duties on the federal government or its officials"); *Hammond v. Jewell*, 139 F. Supp. 3d 1134, 1138 (E.D. Cal. 2015) (dismissing claim that Interior violated ICRA by failing to reinstate former tribal official). Instead, it imposes restrictions upon tribal governments. *See* 25 U.S.C. § 1302(a)(8) ("No *Indian tribe* in

[5] Because the Treaty of 1866 does not include the obligations suggested by Plaintiffs, the argument that the Treaty has not been abrogated does nothing to salvage Plaintiffs' claims. *See* Pl. Opp. at 12, ECF No. 23.

exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .") (emphasis added); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (ICRA does not authorize suits against the tribe or tribal officers).

Plaintiffs' citation to *United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 77 (1992), does not show that ICRA imposes obligations on Federal Defendants. *See* Pl. Opp. at 8, ECF No. 23. The Interior Board of Indian Appeals has held that "ICRA, standing alone, does not provide BIA with authority to intervene in tribal disputes in order to provide a remedy to individuals who allege that a tribe has violated their civil rights . . . ." *Hazard v. Eastern Regional Director*, 59 IBIA 322, 322 (2015); *see also id.* at 325 (citing IBIA decisions). Furthermore, even if these agency decisions stood for the proposition Plaintiffs suggest, they are not a statutory obligation of the sort that could support a continuing violation claim. *Earle*, 707 F.3d at 307.

And none of the other cases cited by Plaintiffs show that Federal Defendants have a duty regarding the rights of the Creek Freedmen. For example, Plaintiffs rely on *Seminole Nation*, 316 U.S. at 296-97. Pl. Opp. at 7, 11-12, ECF No. 23. But *Seminole Nation* did not create a general fiduciary duty on the part of the United States to intervene in tribal elections. Rather, *Seminole Nation* supports the rule that prior to finding a fiduciary duty on the part of the United States, there must be a trust corpus and a treaty, statute, or regulation defining the United States' obligations. Unlike here, that case involved funds designated to benefit individual Indians (the trust corpus) and a federal duty clearly defined by law.[6] *Seminole Nation*, 316 U.S. at 294.

[6] Plaintiffs point to only one payment to the Tribe, a settlement of trust accounting and mismanagement claims brought by the Tribe, *Muscogee (Creek) Nation v. Jewell*, No. 06-cv-

Cont.

Plaintiffs also rely on several cases involving discretionary decisions made by Interior. *See* Pl. Opp., Zorn Decl. Ex. A, ECF No. 23, (Opp. to Mot. for Preliminary Injunction, *Nooksack Indian Tribe v. Zinke*, No. 2:17-cv-00219 (W.D. Wash. Apr. 3, 2017)) (challenge to decision not to recognize tribal council actions taken without a quorum); *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d at 201 (challenge to suspension of a federal contract and Interior's conclusion that there was no government-to-government relationship with the tribe); *Seminole Nation of Oklahoma*, 223 F. Supp. 2d at 129 (challenge to decision that a Seminole election was unlawful). These cases did not involve a request that Interior be forced to take a specific mandatory, non-discretionary action.[7] To the contrary, these rulings support the ability of Interior to use its discretion to take appropriate action in accordance with federal law, taking into account the general principles "in favor of tribal self-determination and against Federal Government interference."[8] *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549, 551-52 (10th Cir. 1987); *Seminole Nation*, 223 F. Supp. 2d at 137. They do not establish that Federal Defendants

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02161 (D.D.C. Aug. 30, 2016), and assert they were denied "a proper share of a multi-million (sic) settlement payment." Pl. Opp. at 14-15, ECF No. 23. Plaintiffs appear to misunderstand the nature of that settlement, which provided for a payment to the Tribe, not to individual tribal members. They point to no statute that imposes an obligation on Federal Defendants to take any particular action with respect to this or any other payment to the Tribe.

[7] Similarly, in *Cherokee Nation v. Nash*, the Court granted Interior declaratory judgment regarding the meaning of the Cherokee Treaty provision addressing the Freedmen descendants, but did not find that Interior had any duty to protect the rights of the Cherokee Freedmen. 267 F. Supp. 3d 86 (D.D.C. 2017). Moreover, the *Nash* Court did not reach the question of the viability of the Cherokee Freedmen's claims against the Federal Defendants.

[8] The Ninth Circuit recognized this distinction in *Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016), when it found that the D.C. Circuit's decision in *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) "held only that the Secretary's decision not to approve the rogue constitution … was a reasonable exercise of her discretion," but "did not hold that the BIA *must* refuse to respect the governing document of a tribe … if Plaintiffs complain that it does not reflect their wishes."

had a duty to intervene in the 2015 tribal election[9] or to take any specific actions regarding Plaintiffs. *Cf. Shoshone Bannock Tribes*, 56 F.3d at 1481-82 (rejecting argument that Attorney General was obliged to assert claims on behalf of tribe).

Plaintiffs also make much of boilerplate caveat language in the 1979 approval document stating that "nothing in this approval shall be construed as authorizing any action under the constitution that would be contrary to Federal Law." Mot. to Dismiss, Blaha Decl. Ex. 4, ECF No. 20-2. This language in an agency approval document is not a federal law, nor does it "impose[] a continuing obligation to act or refrain from acting," *Earle*, 707 F.3d at 307, and thus cannot form the basis of a continuing violation. Furthermore, it would be nonsensical to interpret this general caveat in the document approving the 1979 Constitution as *withholding approval* of the membership standards contained within that document or subsequent tribal actions taken to implement those standards. It cannot bear the weight that Plaintiffs place on it.

In sum, Federal Defendants do not have an ongoing statutory duty with regard to the rights of the Creek Freedmen, and there is no continuing violation that excepts their claims from the six-year statute of limitations in 28 U.S.C. § 2401(a).

III. The Presence of a Minor Plaintiff Does Not Save Plaintiffs' Claims.

Plaintiff suggest, without citing any authority, that the statute of limitations should not bar N.K.'s claim because he or she is a minor and was born more than six years after 1979. Pl. Opp. at 17, ECF No. 23. But Section 2401(a) specifically addresses the tolling of the statute of

[9] Although Plaintiffs baldly assert that Interior "approved a tribal election" in 2015 (Pl. Opp. at 8, ECF No. 23), they do not point to any actual agency action recognizing or refusing to recognize the Principal Chief. *Compare Seminole Nation*, 223 F. Supp. 2d at 126 (challenge to BIA letters specifically addressing the recognition of the Principal Chief, Assistant Chief, and General Council of Tribe). Thus, there is no "action" on which to support a continuing claims theory, or to support a claim at all.

limitations for persons "under legal disability," such as minors, and does not save N.K.'s claim. Section 2401(a) provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." As discussed above, the right of action in this case accrued in 1979. *See, e.g.*, *Harris*, 353 F.3d at 1010 ("[t]he right of action first accrues on the date of the final agency action."). A legal disability must have existed at the time the claim accrued in order to toll the statute of limitations.[10] *See Shinogee v. Fanning*, 234 F. Supp. 3d 39, 44 (D.D.C. 2017) (citing *Tansil v. United States*, 113 Fed. Cl. 256, 264 (2013)); *see also Sabree v. United States*, 90 Fed. Cl. 683, 697 (2009) (Plaintiff did not meet the legal disability standard under 28 U.S.C. § 2501 as he had not proved a disabling condition at the time of his discharge from the military); *Bennett v. United States*, 36 Fed. Cl. 111, 113 (1996) (plaintiff must be disabled at the time the cause of action accrued). N.K. was not under legal disability when the claim accrued because N.K. was not yet born; thus, the limited exception in Section 2401(a) does not save the claim.[11]

Plaintiffs' arguments are also contravened by the common-law principle that once a parent's claim is time-barred, so too are all derivative claims their children might bring. For example, the Fifth Circuit found minor children's claims related to their father's alleged unlawful imprisonment were barred when their father's claim was barred, despite their legal disability, because their claims were derivative of his. *Brandley v. Keeshan*, 64 F.3d 196, 199 (5th Cir.

[10] "Section 2401(a) originated in the Tucker Act, which contains a nearly identical provision regarding legal disability." *See Shinogee v. Fanning*, 234 F. Supp. 3d 39, 43 (D.D.C. 2017) (citing *Howard v. Pritzker*, 775 F.3d 430, 436 (D.C. Cir. 2015) and 28 U.S.C. § 2501). Thus, the *Shinogee* Court considered case law interpreting Section 2501.

[11] Furthermore, the claims of all minor children who were affected by the 1979 change to tribal membership criteria are now time barred, since the latest that the statute of limitations could expire is 2001 (i.e., an infant in 1979 would turn 18 in 1997, and must bring a claim within three years of that date, 2001).

1995), abrogated on other grounds by *Wallace v. Kato*, 549 U.S. 384 (2007). *Cf. Jastremski v. United States*, 737 F.2d 666, 669 (7th Cir. 1984) (child's minority does not toll the running of period of limitations under Section 2401(b)). Where, as here, a parent failed to bring a timely claim, the right of action no longer exists for his children.

As the D.C. Circuit stated, "[w]here clear language restricts [the court's] jurisdiction, we may not overturn it merely by invoking spirits and thrusts." *Spannaus*, 824 F.2d at 55. The Court lacks jurisdiction over Plaintiffs' time-barred claims, and the claims against Interior should be dismissed.

CONCLUSION

Plaintiffs' Claims One, Two, and Three against Interior should be dismissed for lack of jurisdiction.

Respectfully submitted,

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NOVEMBER 2, 2018