No. 2010-5067

In the United States Court of Appeals for the Federal Circuit

SAMISH INDIAN NATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 02-CV-1383
Hon. Margaret M. Sweeney

BRIEF FOR THE UNITED STATES

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STATEMENT OF RELATED CASES

Aside from this Court's previous decision in *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005), Counsel for Appellee is not aware of any other pending cases that qualify as related cases.

JURISDICTIONAL STATEMENT

The United States Court of Federal Claims did not have jurisdiction to hear the claims of the Samish Indian Nation ("Tribe" or "Samish") because none of the statutes under which relief is sought are money-mandating and they therefore cannot supply the court with jurisdiction under the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505. Arguments concerning the lack of jurisdiction in the Court of Federal Claims are addressed thoroughly below.

Jurisdiction in this Court is based on 28 U.S.C. § 1295(a)(3). The Appellants filed a timely notice of appeal on January 13, 2010. *See* 28 U.S.C. § 2522; Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

In this case, the Tribe contends that, starting in 1969, the United States failed to treat it as federally recognized and that it therefore is entitled to certain federal benefits. The Tribe seeks damages in the precise amount it claims it would have received under the Tribal Priority Allocation ("TPA") system and the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act"), Pub. L., No. 92-512, 86 Stat. 919 (A608-A619) if it had been recognized. The issues on appeal are:

1. Whether the Court of Federal Claims lacked jurisdiction over the Tribe's two claims because neither the TPA system nor the Revenue Sharing Act,

upon which its claims are based, are money-mandating so as to fall within the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505.

2. Whether the Court of Federal Claims' ability to provide a monetary remedy is limited by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

STATEMENT OF THE CASE

A. The Federal Acknowledgement Process.

Federal acknowledgment of Indian tribes establishes a government-to-government relationship with the United States, acknowledges the Tribe's sovereign powers and immunities, and is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes. 25 C.F.R. § 83.2. This includes the right to potential access to funding for social programs. *Id.* § 83.12(c).

In the early nineteenth century, Congress delegated to the Executive branch the power to recognize Indian tribes. 25 U.S.C. §§ 2, 9; *Miami Nation of Indians, Inc. v. Department of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001). The Indian Reorganization Act ("IRA") of 1934 led to the need for federal recognition of tribal status because the Act provided benefits only to members of federally recognized Indian tribes and their descendants. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). The Department of the Interior

("Interior") recognized Indian tribes on an *ad hoc* basis from 1934 until 1978, when it established a uniform regulatory process for the review and approval of petitions for acknowledgment of Indian tribes. *See* 25 C.F.R. Part 83; *see also* 43 Fed. Reg. 39,361 (1978); 59 Fed. Reg. 9,280 (1994) (amendment).

Under current regulations, acknowledgment is granted to Indian groups that can establish a "substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. § 83.3(a). Groups apply for acknowledgment by filing a petition that addresses the seven mandatory criteria set forth in the regulations: (a) that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900; (b) that a predominate portion of the petitioning group comprises a distinct community from historical times until the present; (c) that the petitioner has maintained political influence or authority over its members as an autonomous entity throughout history; (d) that the group presents a governing document; (e) that the group's membership descends from a historical Indian tribe or from historical tribes which combined and functioned as a single autonomous entity; (f) that the membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe; and (g) that Congress has not expressly terminated or forbidden a Federal relationship with the group. *Id.* § 83.7.

After a group submits a petition and supporting documentation, a team of experts evaluates it and prepares a recommendation for the Assistant Secretary for Indian Affairs, who then issues a proposed finding. *Id.* § 83.10(h). Following a public comment period and submission of further evidence, the Assistant Secretary's staff reevaluates the record and prepares another recommendation as to whether the petitioner meets the regulatory criteria for acknowledgment, and the Assistant Secretary issues a final determination. *Id.* § 83.10(l). The petitioner or an interested party may file a request for reconsideration with the Interior Board of Indian Appeals, *id.* § 83.11, which may affirm or vacate and remand the final determination to the Assistant Secretary, or remand certain issues to the Secretary. *Id.* § 83.11(e), (f).

Once a group gains federal acknowledgment as an Indian tribe, it becomes "eligible" to apply for certain programs, services, and benefits that are available only to federally recognized Indian tribes. *Id.* § 83.12; *see also id.* § 83.2 ("Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes."). However, acknowledgment does "not create immediate access to existing programs." *Id.* § 83.12(c). A tribe may participate only "after it meets the specific program requirements, if any, and upon appropriation of funds by Congress." *Id.* Congress has provided funding for

newly acknowledged tribes through special appropriations. *See, e.g.*, A447 (Department of Interior Budget Justification, F.Y. 1997, providing New Tribes funding totaling $374,000 for the Portland area).

B. Factual Background.

The Tribe alleges that it "has continuously existed as an Indian tribe," and that the United States "wrongfully and arbitrarily refused to treat the Tribe as a recognized tribe" from 1969 to 1996. A65 ¶1. As a result, the Tribe contends that it and its members "were denied valuable rights, programs, services and benefits from 1969 to 1996." A65 ¶2. In this case, the Tribe seeks compensation for that allegedly wrongful denial of benefits in the precise amount of the benefits it would have received under those programs and statutes. *See* Br. at 46.

This action is the latest in a long line of suits filed by the Tribe to obtain treaty rights and assert claims against the United States. In the Treaty of Point Elliott of 1855, several Indian tribes relinquished most of their land, but reserved certain fishing rights. *See Greene v. United States*, 996 F.2d 973, 975 (9th Cir. 1993). The United States filed suit in 1970 to protect the tribes' fishing rights, and in 1974, the district court held that the treaty tribes were entitled to take up to 50% of certain fish runs. *Id.* (citing *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S.

1086 (1976)). Shortly after that decision, the "Samish Indian Tribe," among other groups, intervened to assert its fishing rights.

The district court found that the Tribe was composed of individuals who were descended in part from Indians known in 1855 as Samish Indians, who were parties to the treaty and were represented by the signer for the Lummi Tribe. *United States v. Washington*, 476 F. Supp. 1101, 1106 (W.D. Wash. 1979). The court observed that the Treaty did not provide a reservation for the Samish Indians, most of whom moved to the Lummi Reservation, and later to the Swinomish Reservation. *Id.* The Lummi and Swinomish Tribes include descendants of the 1855 Samish Indians. *Id.*

The district court further found that, although Samish had, prior to 1979, "adopted a constitution and bylaws pursuant to which it has a tribal council and a tribal chairman and purported to operate as an identifiable and distinct entity on behalf of its members, it did not exercise attributes of sovereignty over its members and territory, and was not recognized by the United States as a sovereign tribe entitled to federal benefits." *Id.* It found that the Samish and their ancestors "do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community," and that the "present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity." *Id.* It accordingly

found that the Samish Tribe was "not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott," and that the citizens comprising the Samish "have not maintained an organized tribal structure in a political sense." *Id.*

Based on these findings, the district court concluded that Samish was not entitled to share in the fishing rights secured by the Treaty. 476 F. Supp. at 1110. The district court also held that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." *Id.* Because of its findings regarding the lack of a continuous organized political structure, it concluded that Samish was not "at this time a treaty tribe in the political sense" and did not "hold[] for itself or its members fishing rights secured by any of the [] treaties identified in [] this case." *Id.* at 1110-1111.

The Ninth Circuit affirmed, holding that the evidence presented by the Tribe did not establish that it was the successor to a treaty signatory. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) ("*Washington II*"); *see also Greene v. Lujan*, No. C89-645Z, 1992 WL 533059, at *3 (W.D. Wash. Feb. 25, 1992). The Ninth Circuit held that the question of federal recognition was separate from whether the Tribe was entitled to treaty rights. The relevant inquiry to determine if "a group of Indians descended from a treaty

signatory" could exercise those treaty rights was whether the "the group [] maintained an organized tribal structure." *Washington II*, 641 F.2d at 1371, quoting *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975). The court affirmed the district court's finding that the Samish "had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communit[y]'" and that "[a]lthough the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required." *Washington II*, 641 F.2d at 1373. The Ninth Circuit concluded that, even under a standard that did not take account of federal recognition or non-recognition, "[w]e cannot say . . . that the finding of insufficient political and cultural cohesion is clearly erroneous," and accordingly affirmed the determination that Samish was not entitled to exercise treaty fishing rights. *Washington II*, 641 F.2d at 1373-1374.

The "Samish Indian Tribe of Washington" also petitioned for federal recognition in 1972. *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995). After Interior adopted regulations governing the acknowledgment process, the Tribe filed a revised petition in 1979, which the Secretary denied on February 5, 1987. *Id.* The Tribe challenged the denial, claiming Interior had violated its due process rights by failing to hold a formal hearing on its petition. To establish a property

right cognizable under the Fifth Amendment, the Tribe asserted that it had received governmental benefits based on its tribal status, but the court found the evidence of that inconclusive. *Greene*, 1992 WL 533059, at *4-6. The Tribe asserted that it had previously been federally recognized, but again the court found that the evidence was inconclusive. *Id.* The court nonetheless held that members of the Tribe had lost federal benefits due to the Tribe's lack of federal recognition, and those members were entitled to a formal hearing before those benefits were cut off. *Id.* at *8. The court remanded for a formal adjudication of the Tribe's petition for acknowledgment. *Id.* at *9. The Ninth Circuit affirmed. *Greene v. Babitt*, 64 F.3d 1266 (9th Cir. 1995).

On remand to Interior, an Administrative Law Judge ("ALJ") held a hearing and recommended that the Tribe be acknowledged. *Greene v. Babbitt*, 943 F. Supp. 1278, 1282 (W.D. Wash. 1996). The Assistant Secretary agreed in a final decision dated November 8, 1995. *Id.*; *see also* A210-A211 (61 Fed. Reg. 15,825 (April 9, 1996) (publication of final decision)). However, the Assistant Secretary rejected three of the ALJ's proposed factual findings, including the finding that "the Department could not adequately explain why the Samish had been omitted from a list of federally recognized tribes prepared during the 1970s." 943 F. Supp. at 1283, 1284. The Assistant Secretary also noted that two other tribes contested the validity of the Samish's status. *See* A211 (61 Fed. Reg. 15,825 (Apr. 9, 1996)).

The Tribe filed suit and asserted that the rejection of those findings "may have preclusive effect in future litigation concerning . . . government liability for past benefits." 943 F. Supp. at 1284. The district court concluded that certain *ex parte* contacts violated the Due Process Clause and the APA. *Id.* at 1289. The court reinstated the ALJ's proposed findings, including the finding that Interior "could not adequately explain" the omission of "the Samish" from a 1970s list of recognized tribes. A213 (final judgment); *see also* A127 (findings of ALJ).

Upon its acknowledgment in 1996, the Tribe received "New Tribes" funding, which was "money intended (among other things) to assist them in developing their own tribal government." *Samish Indian Nation v. U.S. Department of Interior*, 2004 WL 3753252, at *1 (W.D. Wash. Sept. 22, 2004). The Tribe continues to receive funds from Interior annually. *Id.*

On September 14, 2002, the Tribe filed a complaint under the Administrative Procedure Act ("APA") in the Western District of Washington, alleging the Bureau of Indian Affairs ("BIA") inequitably allocated funding to it after it received recognition in 1996. *Id.* In 2004, in two separate rulings, the district court dismissed the Tribe's claims for lack of subject matter jurisdiction, for lack of standing, and because there was no "final agency action," which would provide for judicial review under the APA. *Id.* at *3; *see also Samish Indian*

Nation v. U.S. Department of Interior, 2004 WL 3753251, at *1 (W.D. Wash. Feb. 6, 2004).

The Tribe also filed a motion to reopen the 1979 judgment in *United States v. Washington* that had denied the Tribe's claim to fishing rights under the Treaty of Point Elliott. *United States v. Washington*, 593 F.3d 790, 796-98 (9th Cir. 2010). The Ninth Circuit sitting en banc ultimately held that the recognition obtained by the Tribe was not an extraordinary circumstance warranting the reopening of the previous denial of treaty rights. *Id.* at 798-99.

C. Procedural History.

1. The Initial Complaint In The Court Of Federal Claims.

On October 11, 2002, the Tribe filed the instant suit in the Court of Federal Claims seeking compensation for federal benefits and services it claims it should have received from 1969 to 1996, the period during which the Tribe alleges the United States unlawfully failed to treat it as recognized, as well as compensation for benefits the Tribe alleges have been wrongfully denied since it gained acknowledgment in April 1996. The Court of Federal Claims dismissed the complaint, holding that the six-year statute of limitations in 28 U.S.C. § 2501 barred all but one of its claims, and 28 U.S.C. § 1500 barred the remaining claim. *See Samish Indian Nation v. United States*, 58 Fed. Cl. 114, 116-17 (2003) ("*Samish I*").

2. *The First Appeal In The Federal Circuit.*

On appeal, this Court affirmed in part and remanded the case to the Court of Federal Claims. *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005) ("*Samish II*"). This Court found that the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 et seq., and the Snyder Act, 25 U.S.C. §§ 2, 13, are not money-mandating with respect to the Tribe's claims. *Id.* at 1358. This Court reversed the Court of Federal Claims' holding that the Tribe's claim with respect to benefits for 1969 to 1996 was time barred and remanded "for further proceedings to determine whether the remaining statutes underlying the claim are money-mandating." *Id.* at 1358, 1374.

3. *The Remand To The Court Of Federal Claims And The Decision Underlying This Appeal.*

On remand, the Tribe filed a second amended complaint alleging two claims for relief. *See* A65-A96. The first claim seeks damages for the government's failure to provide it with benefits from 1969 to 1996 under a myriad of federal statutes and programs, alleging that either the underlying legal framework of the programs or the statutes creating the programs are money-mandating. Compl. at ¶¶ 31-36 (A90-A93); *see Samish Indian Nation v. United States*, 2006 WL 5629542, at *1 (Fed. Cl. July 21, 2006) (interim discovery order in instant case construing first claim) ("*Samish III*") (Supplemental Appendix ("SA") 02). The second claim alleges that the "network" of programs and statutes providing federal benefits to all

federally-recognized tribes created a fiduciary duty, which the government breached by failing to provide the Tribe with benefits under those statutes and programs. Compl. at ¶¶ 37-44 (A93-A95); *see Samish III*, 2006 WL 5629542, at *2 (construing second claim) (SA02).

The United States moved to dismiss Samish's complaint on the grounds that not one of the programs or statutes was money-mandating so as to allow the Tribe's claims to fall within the scope of the Tucker Act or the Indian Tucker Act's waiver of sovereign immunity. *See Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 128-129 (2009) ("*Samish V*") (A18-A52). The Court of Federal Claims granted the motion to dismiss the Tribe's claims, explaining its reasoning in two separate opinions. *See Samish Indian Nation v. United States*, 82 Fed. Cl. 54 (2008) ("*Samish IV*") (A2-A17); *Samish V*, 90 Fed. Cl. at 122 (A18-A52).

On appeal, the Tribe challenges the Court of Federal Claims' dismissal of its two claims, but limits its arguments to two programs it alleges are money-mandating: the TPA system and the Federal Revenue Sharing program. The Tribe makes no arguments on appeal concerning any other federal programs or benefits raised in its Complaint.

The Court of Federal Claims held, in its first opinion, that the TPA system was not money-mandating and thus it did not have jurisdiction over either of the Tribe's claims. *Samish IV*, 82 Fed. Cl. at 68-69 (A16-A17). The TPA system is an

internal Department of Interior ("Interior") process by which the BIA prepares its budgetary requests, presents its requests to Congress, and then distributes its congressional appropriations for the operation of Indian programs. *See* A217 ¶9 (McDivitt Affidavit); A98 ¶3 (Affidavit of Debbie L. Clark, Deputy Assistant Secretary, Indian Affairs, Department of Interior).

The Court of Federal Claims first found that the TPA system was not a "statute" or "discrete statutory program," but rather, was a budgetary mechanism. *Id.* at 59, 65-66 (A7, A13-A14). Therefore, by itself, it could not impose a money-mandating duty on the United States. *Id.* at 66 (A14) ("analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.") (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")); *id.* at 68 (A16) (precedent concerning "discretionary" schemes did not apply).

Relying on *White Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003), and *Navajo I*, 537 U.S. at 488, the Court of Federal Claims next found that the TPA system did not create a fiduciary duty on the part of the United States or a specific trust. *Samish IV*, 82 Fed. Cl. at 68 (A16). The court analyzed the statutes authorizing programs funded by the TPA. *Id.* at 66-67 (A14-15). None of those statutes imposed a fiduciary obligation on the United States. *Id.* The statutory language was "merely an expression of the general trust relationship between the United States and the Indian people" and the statutes included "no [] detailed,

prescriptive [statutory] language" imposing an obligation on the United States. *Id.* at 67-68 (A15-16). "Because [the Tribe] has not shown the existence of trust property, there necessarily can be no trustee to manage the trust property or beneficiary for whom the trust property is managed." *Id.* at 69 (A17). Because there was no fiduciary obligation imposed by the TPA system, or relevant statutes, it could not be interpreted as money-mandating. *Id.* at 68 (A16-A17).

In its second opinion, the Court of Federal Claims held that though the Federal Revenue Sharing program was money-mandating, to the extent that Samish's claims relied upon it, those claims were not justiciable by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341. *Samish V*, 90 Fed. Cl. at 133-137 (A33-A38). The Federal Revenue Sharing program was created by the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act"), Pub. L. No. 92-512, 86 Stat. 919 (A608-A619), and Congressional appropriations for the program ceased in 1983.[1] 90 Fed. Cl. at 133 n.11 (A33-A34).

The court analyzed the Tribe's claim for statutory damages under the Revenue Sharing Act, but did not address the Tribe's breach of trust claim and whether the Revenue Sharing Act imposed a fiduciary duty upon the United States

[1] The program was extended twice by the State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341, and the State and Local Fiscal Assistance Act Amendments of 1980, Pub. L. No. 96-604, 94 Stat. 3516, and terminated on September 30, 1983.

to provide it with funds authorized by the Act. With respect to the Tribe's first claim, the court found that the Act was money-mandating because it was framed as an "entitlement" and included the following language: "[t]he Secretary of the United States Department of the Treasury shall, for each entitlement period, pay out . . . to each State government . . . and . . . each unit of local government a total amount equal to the entitlement of such unit." 90 Fed. Cl. at 133 (A33-34); *see also* A608 (86 Stat. 918 at Sec. 102).[2]

In holding that the Revenue Sharing Act was money-mandating, the court declined to follow the District of Columbia Circuit's decision not to "interpret the Revenue Sharing Act as mandating compensation in the absence of clear Congressional intent." 90 Fed. Cl. at 135 (A35) (citing *National Association of Counties v. Baker*, 842 F.2d 369, 375 (D.C. Cir. 1988)). Instead, the Court of Federal Claims found that the Federal Circuit's precedent in *Agwiak v. United States*, 347 F.3d 1375 (Fed. Cir. 2005), which addressed the statutory construction of the terms "is entitled" and "shall pay," was controlling, and required an interpretation of the Revenue Sharing Act as money-mandating. 90 Fed. Cl. at 135-136 (A35-A36). In *Agwiak*, the plaintiff-appellants were government

[2] Section 108(b) provided that if "there is an Indian tribe [] which has a recognized governing body which performs substantial governmental functions, then . . . there shall be allocated to such tribe [an] amount. . ." A616 (86 Stat. 918 at Sec. 108(b)(4)).

employees who sought, among other things, remote worksite pay pursuant to 5 U.S.C. § 5942(a), which provided that an employee "is entitled . . . to an allowance" that "shall be paid . . . ." *Id.* (citing *Agwiak*, 347 F.3d at 1376-79). The Federal Circuit held that the terms "is entitled" and "shall be paid" meant that the statute and its implementing regulations were money-mandating. *Id.* (citing *Agwiak*, 347 F.3d at 1380). This reasoning was grounded upon prior precedent that "the use of the word 'shall' generally makes a statute money-mandating." *Id.* (citing *Agwiak*, 347 F.3d at 1380).

Nevertheless, the Court of Federal Claims found that its ability to award any damages mandated by the Revenue Sharing Act was limited by the Anti-Deficiency Act. 90 Fed. Cl. at 136-137 (A36-A37). The Anti-Deficiency Act prohibits a court from "award[ing] funds if an appropriation has lapsed unless an aggrieved party files suit before the appropriation lapses." *Id.* at 136 (A37). Because the appropriations for the Revenue Sharing Act lapsed in 1983, and the Samish did not bring their claims until 2002, the court held that the Tribe's claims were not justiciable. 90 Fed. Cl. at 136-137 (A36-A37). The Tribe now appeals those rulings.

STANDARD OF REVIEW

The Court of Federal Claims' dismissal for lack of jurisdiction is reviewed de novo. *Caraco Pharmaceutical Laboratories, Ltd. v. Forest Laboratories, Inc.*, 527 F.3d 1278, 1290-91 (Fed. Cir. 2008).

SUMMARY OF ARGUMENT

The Court of Federal Claims has no subject matter jurisdiction under the Tucker Act and the Indian Tucker Act to hear the Tribe's claims for damages because the Tribe points to no statute or regulation imposing an obligation on the United States, the breach of which obligates the United States to pay money damages.

There is no statute or regulation obligating the United States to have treated the Tribe as recognized or to have provided it with benefits prior to 1996. On this basis alone, the Tribe's two claims must be dismissed for lack of jurisdiction.

To the extent the Tribe's claims for statutory damages and breach of trust rely on the TPA system, the TPA system cannot supply the requisite money-mandating source of law that would support jurisdiction in the Court of Federal Claims. The TPA system is not a statute or regulation. It is simply the manner in which the BIA requests and allocates lump sum Congressional appropriations. The only relevant statutes are the annual Appropriations Acts that provided TPA funds and the statutes creating programs supported by TPA funds. Samish has waived its

arguments with respect to these statutes. Regardless, this Court cannot interpret the Appropriations Acts as imposing an obligation, fiduciary or otherwise, upon the United States whose breach gives rise to a claim for money damages because there is no relevant prescriptive language in the Acts. The Appropriations Acts did nothing more than appropriate money to the BIA to operate Indian programs.

To the extent that the Tribe's claims for statutory damages and breach of trust rely on the Revenue Sharing Act, the Act does not supply the requisite source of law to support jurisdiction in the Court of Federal Claims. The Revenue Sharing Act is not money-mandating because it provides discretion to the Secretary to distribute funds and does not impose a fiduciary duty on the United States. In addition, Congress expressly provided for limited judicial review of the Secretary's funding decisions under the Act, which did not include a remedy for monetary damages. Accordingly, the Act cannot fairly be interpreted as money-mandating.

Even if this Court finds that the Revenue Sharing Act is money-mandating, the Court of Federal Claims' ability to award damages under this statute is limited by the Anti-Deficiency Act, 31 U.S.C. § 1341, which prevents courts from awarding damages authorized by statutes whose appropriations have lapsed. The Judgment Fund is not available to satisfy any judgment in this case because the Tribe's claims rest on a program that was funded by specific appropriations.

ARGUMENT

I. THE JURISDICTION OF THE COURT OF FEDERAL CLAIMS IS LIMITED.

The United States is "immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity must be "unequivocally expressed in statutory text." *Lane v. Peña*, 518 U.S. 187, 192 (1996). The scope of a waiver of sovereign immunity must be "strictly construed . . . in favor of the sovereign," *id.*, and "not enlarged . . . beyond what the language requires." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Without a waiver of sovereign immunity, the Court of Federal Claims lacks jurisdiction to hear the suit. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

The United States has provided a limited waiver of its sovereign immunity under 28 U.S.C. § 1491 ("Tucker Act"), and under 28 U.S.C. § 1505 ("Indian Tucker Act"). The Indian Tucker Act states:

> The Court of Claims shall have jurisdiction of any claim against the United States . . . in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505. The Tucker Act contains similar language. 28 U.S.C. § 1491 (providing jurisdiction to hear claims based "upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . for liquidated or

unliquidated damages"). The Tucker Act and the Indian Tucker Act thus provide a limited waiver of sovereign immunity for claims to enforce substantive rights to money damages that appear in *other* sources of law, such as the Constitution, statutes, or regulations. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"); *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) ("*Navajo III*").

To bring a claim in the Court of Federal Claims under the Tucker Act or Indian Tucker Act, and fall within the scope of Congress's waiver of sovereign immunity, the Samish must satisfy two distinct requirements, as clarified in the Supreme Court's decision in *Navajo III*.

The first of the two requirements is that a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo III*, 129 S.Ct. at 1552 (citation omitted); *see also Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. § 1491(a)). The obligations identified must arise out of specific statutory or regulatory prescriptions that govern the conduct at issue. *Navajo I*, 537 U.S. at 506; *Navajo III*, 129 S. Ct. at 1558 (citation omitted). A "threshold" requirement for non-constitutional claims is the identification of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish the "specific fiduciary or other duties" that the government allegedly has failed to fulfill.

Navajo I, 537 U.S. at 506. In *Navajo III*, the Supreme Court squarely rejected the notion that something other than the Constitution, a statute, or a regulation could impose an obligation on the United States for whose breach it would be liable under the Tucker Act or Indian Tucker Act. 129 S. Ct. at 1557-1558.

If the tribe identifies a law that imposes specific obligations, then the court may proceed to the second inquiry, which requires the court to "determine whether the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo III*, 129 S. Ct. at 1552 (citation omitted). The law must be "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache Tribe*, 537 U.S. at 473.

The inquiry into whether a law can be interpreted as mandating compensation is distinct from the initial question of whether the government has violated a specific statutory or regulatory provision. *Cf. id.* at 480 (Ginsburg, J., concurring) (explaining that *Navajo I* addressed the threshold question of whether a statute or regulation "impose[d] any concrete substantive obligations," whereas the "dispositive question" in *White Mountain Apache* was whether a statute "mandate[d] compensation" for its violation.). The separation of these two inquiries rests upon the premise that not all statutes mandate the award of money damages. *United States v. Testan*, 424 U.S. 392, 400-401 (1976).

With respect to this second requirement, this Court must look to Congressional intent to determine whether a statute or regulation may be interpreted as creating a right to money damages. *Samish II*, 419 F.3d at 1365. "To determine Congressional intent the court begins with the language of the statutes at issue," as well as "the design of the statute as a whole and to its object and policy." *Id.* (citations omitted). A statute providing some "discretion" to the government "over payment of claimed funds" can provide a right of recovery if the statute at issue "(1) [] provide[s] 'clear standards for paying' money to recipients; (2)[] state[s] the precise amounts that must be paid; or (3) as interpreted, compel[s] payment on satisfaction of certain conditions." *Samish II*, 419 F.3d at 1364.

In the context of claims brought by tribes against the United States, when the statutory or regulatory rights-creating or duty-imposing language "bears the hallmarks of a conventional fiduciary relationship," a court may look to "principles of trust law" to help "draw[] the inference that Congress intended damages to remedy a breach." *Navajo III*, 129 S. Ct. at 1552, 1558 (citation omitted); *see also White Mountain Apache*, 537 U.S. at 477.

In *White Mountain Apache*, for example, the statute specified that the United States held the property at issue "in trust," but nonetheless directed the United States to use the property for its own purposes. 537 U.S. at 474-75. The Supreme Court found that the term "in trust" was a "term of art" that is "commonly

understood to entail certain fiduciary obligations." *Id.* at 475-76, 480. The use of the term "in trust" in combination with the statute's language directing the United States "to make direct use of portions of the trust corpus" led the Supreme Court to conclude that the statute created a statutory obligation to preserve the trust corpus. *Id.* at 480 (J. Ginsburg, concurring). Borrowing on principles of trust law, the Court found that the fiduciary duties imposed by the statute were money-mandating. *Id.* at 475-76.

No court has interpreted a network of statutes, as outlined in *Mitchell II*, 463 U.S. 206, as creating fiduciary obligations or as being money mandating if the relevant laws do not impose specific duties. *See Navajo III*, 129 S.Ct. at 1558 (emphasizing the duty imposed must stem from a statute or regulation). Thus, to the extent that the Samish make the argument that a common law trust was established, without pointing to relevant sources of statutory or regulatory language, this argument is precluded by the Supreme Court's recent ruling in *Navajo III*.

Only in the limited situation where a Tribe alleges both that the United States violated a statute or regulation that imposes an obligation on it, and that Congress intended for that law to be money-mandating does the Court of Federal Claims have jurisdiction to entertain claims for damages against the United States under the Tucker Act or the Indian Tucker Act.

II. THERE IS NO STATUTE OR REGULATION IMPOSING A DUTY UPON THE UNITED STATES TO TREAT THE SAMISH AS A FEDERALLY RECOGNIZED TRIBE PRIOR TO 1996.

The Tribe's two claims rest on the argument that the United States had a duty to the Samish Tribe to treat it as federally recognized prior to 1996. However, the Tribe does not identify a substantive source of law—a statute or regulation—that imposed an obligation upon the United States to treat it as federally recognized prior to its formal recognition in 1996 or to provide it with federal benefits during that period. In fact, regulations provide that recognized tribes are not automatically entitled to federal benefits. 25 C.F.R. § 83.12(c) (acknowledgment does "not create immediate access to existing programs."). The Tribe therefore cannot meet the first requirement of *Navajo III,* 129 S.Ct. at 1552. Because there is no statute or regulation imposing such an obligation on the United States, this Court need not even reach the question of whether the TPA system or the Revenue Sharing Act raised by the Samish can be interpreted as mandating compensation for damages.

The Tribe cannot rely on 25 U.S.C. § 479a-1 and 25 U.S.C. § 476(f) to supply a relevant source of law, Br. at 40-44, because the statutes do not obligate the United States to provide benefits to tribes that do not have federal recognition. The first statute the Tribe relies upon, 25 U.S.C. § 479a-1, requires the Secretary of Interior to annually publish "a list of all Indian tribes which the Secretary

recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The term "Indian tribe" is defined to mean "any Indian . . . tribe . . . that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a(2). The second statute the Tribe relies upon, 25 U.S.C. § 476, governs the organization of Indian Tribes and prohibits federal agencies from "diminish[ing] the privileges and immunities available to [a recognized] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." Both of these statutory provisions were enacted in 1994. *See* Pub. L. No. 103-454, 1994 H.R. 4180 (enacting 25 U.S.C. §§ 479a, 479a-1); Pub. L. No. 103-263 §5(b), 108 Stat. 709 (enacting 25 U.S.C. § 476(f)). These statutes apply to recognized tribes only. Nothing in these statutes imposes a duty upon the United States to provide monetary benefits to tribes that are not recognized. There is no language in the statutes indicating that they are retroactive, and they are therefore inapplicable to the Tribe's claims.

Nor can the Tribe rely upon the district court's decision in *Greene v. Babbitt*, 943 F. Supp 1278 (W.D. Wash. 1996), or this Court's decision in *Samish II*, 419 F.3d at 1369, 1373-74, to establish that the United States engaged in actionable "wrongful" conduct when it failed to provide benefits to the Samish prior to its recognition in 1996. Br. at 8-10 (citing *Greene*, 943 F. Supp 1278). The Tribe

mischaracterizes both of these prior decisions. Contrary to the Tribe's assertions, neither the district court nor this Court found that the United States should have recognized the Tribe earlier, treated the Tribe as though it was recognized earlier, or retroactively recognized it.

In *Greene*, the district court found that Interior violated the APA and the Fifth Amendment Due Process Clause when it engaged in ex parte communications with Interior's lawyer during the administrative acknowledgement process. 943 F.Supp. at 1289. The district court previously held that members of "the Samish were entitled to Fifth Amendment due process in connection with their recognition proceedings." 943 F. Supp. at 1285; *see also Greene*, 1992 WL 533059, at *7-*8 (members had property interest in benefits implicating due process). The court did not find that the United States should have recognized the Tribe earlier.

In the first appeal in this case, this Court, while holding that the statute of limitations on the Tribe's claims had not yet expired, explained that "the Samish cause of action for retroactive benefits did not accrue until they obtained a final determination from the district court, through their APA challenge, that the government's conduct underlying its refusal to accord federal recognition, before 1996, was arbitrary and capricious." *Samish II*, 419 F.3d at 1373. This Court went on to say that "the district court's determination provides a predicate 'wrongful'

element in this action." *Id.* at 1373-1374. These statements were made in the context of this Court's ruling on the statute of limitations on a motion to dismiss, in which the Court is obligated to assume all facts in favor of the Tribe. 419 F.3d at 1363-1364. This Court did not rule on the merits of the Tribe's claim.

Nor has the United States conceded the merits of any elements of the Tribe's claims. Federal recognition is a non-justiciable political act. *Samish II*, 419 F.3d at 1373. Until the Tribe was formally recognized in 1996, *Samish Indian Nation*, 2004 WL 3753252, at *1, it was not clear that the Tribe was entitled to federal recognition. *See* Section B, *supra*. For example, the Ninth Circuit held in 1983 that the Tribe had not functioned since treaty times as a continuous distinct and cohesive cultural and political community. *Washington II*, 641 F.2d at 1373. The District Court for the Western District of Washington also held in 1992 that there was not sufficient evidence to show that the Tribe had previously "received benefits because of their tribal status." *Greene*, 1992 WL 533059, at *3-*4.

To allow the Samish to rely on prior rulings to ground its claims would be to interpret an agency's violation of the APA and the Fifth Amendment Due Process Clause as giving rise to a claim for monetary damages. Aside from the fact that these judicial opinions are not statutes or regulations, this interpretation is directly contrary to the text of the APA, which provides for judicial review of agency action in suits "seeking relief other than money damages," 5 U.S.C. § 702, and

previous Federal Circuit precedent holding that the Due Process Clause is not money-mandating. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995).

Moreover, to the extent that "government official[s] engage[d] in *ultra vires* conduct" when they made determinations concerning the Tribe's status, those officials did not "in any legal or constitutional sense, represent the United States." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (citation omitted). Thus, "what [they did], without the authority of Congress, cannot create a claim against the Government" that provides the Tribe with a money-damages remedy. *Id.*

Because the Tribe cannot point to any statute or regulation obligating the United States to have recognized the Tribe earlier, treated the Tribe as though it was recognized earlier, or retroactively recognize the Tribe, it cannot state a claim for relief and the Court of Federal Claims lacks subject matter jurisdiction over its claims.

III. THE TRIBAL PRIORITY ALLOCATION SYSTEM, APPROPRIATIONS STATUTES, AND STATUTES AUTHORIZING INDIAN PROGRAMS ARE NOT MONEY-MANDATING AND CANNOT SUPPLY JURISDICTION IN THE COURT OF FEDERAL CLAIMS UNDER THE TUCKER ACT OR INDIAN TUCKER ACT.

The TPA system cannot supply jurisdiction under the Tucker Act or Indian Tucker Act for either of the Tribe's claims because it is not a statute or a regulation. No relevant statutes, including the Appropriations Acts and the statutes

creating Indian programs supported by TPA, impose actionable duties upon the United States that would provide jurisdiction for the Tribe's claims. The Samish do not point to a single "specific rights-creating or duty-imposing statutory or regulatory prescription" to support their jurisdictional allegations. *Navajo I*, 537 U.S. at 506. Accordingly, the Court of Federal Claims does not have jurisdiction to hear the Samish's claims for breach of trust and damages under the TPA system.

A. The Tribal Priority Allocation System Is Not A Statute Or A Regulation And Therefore Cannot Support Jurisdiction Under The Tucker Act Or Indian Tucker Act.

The TPA system is not a statute or a regulation, and therefore it cannot provide a relevant source of law, as required by *Navajo III*, to provide jurisdiction under the Tucker Act or Indian Tucker Act. 129 S. Ct. at 1557-1558. The TPA system refers to the BIA's internal budgeting process, which includes preparation of BIA's budgetary requests, presentation of BIA's requests to Congress, and distribution of its congressional appropriations for the operation of Indian programs authorized under different statutes. *See* A217 ¶9 (McDivitt Affidavit); A98 ¶3 (Affidavit of Debbie L. Clark, Deputy Assistant Secretary, Indian Affairs, Department of Interior) (stating that TPA is a budgetary device that allows BIA to "categorize and describe how it plans to allocate funds to Indian Tribes."); *see* 25 C.F.R. § 46.2 ("Tribal Priority Allocation (TPA) means the BIA's budget formulation process that allows direct tribal government involvement in the setting

of relative priorities for local operating programs."). Before 1993, the funding process operated in a similar way, though it was not called the TPA system. A229-230 ¶¶33-34. The Tribe does not raise a claim under the earlier system, or any other Appropriations Acts prior to 1993, or allege any wrongful conduct after it received recognition in 1996. *See* A487-A512 (Appropriations Acts for 1993-2001); Compl. at ¶¶ 34-36, 40-44 (alleging wrongful treatment from 1969 to 1996, but not after the Tribe was recognized in 1996) (A92-A95). Hence, this claim concerns the years 1993 to 1996 only.

BIA requests TPA funds annually through Interior's budget. A97-98 ¶¶2-3. The BIA also prepares a Budget Justification, explaining the budget request and how BIA plans to use the money. A218 ¶11. Congress then appropriates the funds to BIA as a lump sum through the enactment of annual Appropriations Acts. A97-98 ¶¶2-3. Once it receives the funds, BIA allocates the funds among recognized tribes. A217-A219 ¶¶9, 13; A99 ¶7. Tribes may either opt to receive services provided by BIA or may use the funds to provide those services through negotiated agreements for programs authorized under a variety of statutes.[3] A98-100 ¶¶5, 7, 11. The purpose of the TPA system was to "further Indian self-determination by giving the tribes the opportunity to establish their own priorities and to move funds

[3] Some of the Indian programs funded are authorized by statute. However, for reasons discussed below, in Sections III.B. and III.C., neither the Appropriations Acts nor the program-creating statutes can supply the requisite statutory basis for jurisdiction in the Court of Claims.

among programs accordingly, in consultation with BIA." A230 ¶33. TPA is the "category of funding over which tribes can exercise the broadest discretionary authority." A231 ¶34.

To the extent that the Tribe might argue that the TPA system is a regulation or statute, this argument has been waived, as the Tribe does not argue or explain this in its brief. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (arguments not raised or explained are waived).

Regardless, the TPA process is not a statute or a regulation. *C.f. Samish Indian Nation*, 2004 WL 3753252, at *2-*3 (holding that BIA's post-1996 tribal budgetary allocation process did not guarantee a tribe would receive funding and that the BIA's "budget request[s]" were "tentative recommendation[s]."). BIA did not create any regulations when it underwent its budget appropriations process. An agency's provisions may be considered a regulation for purposes of the Tucker Act or Indian Tucker Act if:

> (1) the promulgating agency was vested with the authority to create such a regulation; (2) the promulgating agency conformed to all procedural requirements, if any, in promulgating the regulation; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute.

Hamlet v. United States, 63 F.3d 1097, 1105 (Fed. Cir. 1995). BIA did not create the TPA system through any rule-making process. Nor did it intend for its Budget Justifications, outlining its proposed allocations, to constitute a binding rule, either

on itself or on third parties. *See Samish Indian Nation*, 2004 WL 3753252, at *3 (BIA's tribal "budget request[s]" were "tentative recommendation[s]."); *c.f. Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that an agency's decision to allocate funds is committed to agency discretion by law); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 616 (1990) (legislative history itself is not binding on an agency and does not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating"). BIA's Budget Justifications are simply detailed requests for sums of money from Congress for Tribal Priority Allocations. *See, e.g.*, A323-452 (Dep't of Interior Budget Justifications for F.Y.s 1992-1998).

Because the TPA system is a not a statute or a regulation, it cannot create a right or impose an obligation that would satisfy the threshold requirement of *Navajo III* or could reasonably be read to impose duties enforceable by monetary damages. *Navajo III*, 129 S.Ct. at 1558; *Navajo I*, 537 U.S. at 506. To the extent that Samish relies on the TPA budgetary process as supplying jurisdiction in the Court of Claims, its claims were properly dismissed.

B. Samish Waived Its Arguments Concerning Annual Appropriations Acts And Other Statutes.

There are only a handful of statutes relevant to Samish's TPA claim that could possibly provide a "source of law" that creates rights or imposes obligations on the United States. Those statutes are the annual Appropriations Acts and the

statutes that establish programs supported by TPA funds. However, Samish did not argue in its opening brief that these statutes supply the statutory rights-creating language necessary for jurisdiction in the Court of Federal Claims and hence has waived any such argument. *SmithKline Beecham Corp.*, 439 F.3d at 1320.

Samish never cites to or quotes language from any specific Appropriations Act or explains why the Appropriations Acts created a right or obligation owed, and breached, by the United States. Aside from the heading on page 30 of the Tribe's Brief, the Tribe never makes, let alone explains, the argument that the Appropriations Acts are money-mandating. A single statement in a heading "do[es] not amount to a developed argument." *SmithKline Beecham Corp.*, 439 F.3d at 1320 (citations omitted); *see also Dow Chemical Co. v. Mee Industries, Inc.*, 341 F.3d 1370, 1380 (Fed. Cir. 2003) (declining to consider argument not explained or elaborated in brief). Because Samish does not brief these arguments on appeal, they have been waived. 439 F.3d at 1319.

On appeal, Samish does not contest the holding of the Court of Federal Claims that the statutes establishing programs for which TPA funds were used did not contain specific duty-imposing prescriptions.[4] Samish mentions these statutes

[4] TPA funds are used, in part, to fund programs pursuant to the following statutes: (1) the Johnson O'Malley Act, 25 U.S.C. §§ 452-457 (education, medical attention, agricultural assistance, and social welfare); (2) the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (child and family services programs); (3) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C.

only once, while explaining the TPA system in a footnote in its Statement of Facts. *See* Samish Br. at 11-12 n.8. Therefore, any potential arguments relying on these statutes are waived. *SmithKline Beecham*, 439 F.3d at 1319-1320.

C. The Appropriations Acts Do Not Impose A Duty On The United States.

Even if this Court considers the Appropriations Acts in determining whether the Court of Federal Claims has jurisdiction over Samish's TPA claim, the statutes did not impose a duty upon the United States and the United States did not breach any such duty. There is, in fact, no language in any of the Appropriations Acts that funded years 1993-2001 that creates rights or imposes duties relevant to the Tribe's claims. Instead, the Appropriations Acts provided BIA with lump sum appropriations. Therefore Samish cannot meet the threshold requirement of identifying a substantive source of law that establishes specific fiduciary or other duties and its claims must be dismissed for lack of jurisdiction. *Navajo III*, 129 S. Ct. at 1552 (citation omitted).

The Appropriations Acts merely provided money to the BIA, specifically, "sums . . . appropriated . . . [f]or operation of Indian programs." *See* A487-A488, A491-A492, A495-A496, A500, A503, A506-A507, A512-A513 (Appropriations

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§§ 2401-2455 (programs for prevention and treatment of alcohol and substance abuse); (4) the Indian Child Protection and Family Violence Protection Act, 25 U.S.C. §§ 3201-3210 (Indian Child Protection and Family Violence Protection programs); and (5) the Higher Education Tribal Grant Authorization Act, 25 U.S.C. §§ 3301-3307 (higher education grants for Indian students).

Act for 2001, Pub. L. No. 106-291, 114 Stat. 922 (Oct. 11, 2000), stating "sums are appropriated . . . [f]or expenses necessary for the operation of Indian programs, as authorized by law"). For example, the Appropriations Act for 1993 states:

> Be it enacted . . . [t]hat the following sums are appropriated . . . for the Department of the Interior and related agencies for the fiscal year . . ., and for other purposes, namely: For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations . . . ; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs . . . ; for the general administration of the Bureau of Indian Affairs . . ., $1,353,899,000 . . .

A487-A488 (Appropriations Act for 1993, Pub. L. No. 102-381, 106 Stat. 1388 (Oct. 5, 1992)). Subsequent Appropriations Acts in the record include the same opening language as quoted above, though the Acts also contain provisions unique to each year (*i.e.*, different amounts and dates). A491-A515 (Appropriations Acts for 1994 to 2001).

Each Act resulted in the provision of lump-sum funds to the BIA for, among other things, the operation of Indian programs. An agency's allocation of funds is committed to that agency's discretion. As the Supreme Court has stated, "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally

binding restrictions." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (Indian Health Service's decision to discontinue clinical services unreviewable under the APA). Therefore, a Congressional lump sum appropriation is insufficient to establish a duty or obligation on the part of the Government to provide funds to tribes.

Because Samish cannot point to any statutory or regulatory language that imposes an obligation upon the United States, this Court need not reach the next inquiry of whether the statute or regulation is money-mandating.

D. Congress Did Not Intend For The Appropriations Acts To Give Rise To Claims For Money Damages By Tribes That Were Not Federally Recognized.

Even assuming the Appropriations Acts impose a duty on the United States, the Tribe's claims fail because the Appropriations Acts cannot be "fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo III*, 129 S. Ct. at 1552 (citation omitted).

The statutory language is nothing like the language of other statutes that have been found to be money-mandating. It does not explicitly create an obligation on the part of the BIA to give a certain sum of money to recognized tribes. *Compare Kanemoto v. Reno*, 41 F.3d 641, 643, 646-47 (Fed. Cir. 1994) (holding that a statute stating "the Attorney General shall . . . pay out of the fund to each eligible individual the sum of $20,000" created a "mandate for the payment of

money over which the Court of Federal Claims has jurisdiction.") (citations omitted). The Appropriations Acts do not provide a clear standard for paying money to recognized tribes, state the amounts to be paid to any tribe, or compel payment on satisfaction of certain conditions. *See Perri v. United States*, 340 F.3d 1337, 1342 (Fed. Cir. 2003); *Samish II*, 419 F.3d at 1364.

The Appropriations Acts also do not impose a fiduciary obligation on the United States to hold TPA funds in trust for tribes. *See Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908) (distinguishing between appropriations and trust money); *Sac and Fox Tribe of Indians of Oklahoma v. Apex Const. Co., Inc.*, 757 F.2d 221, 222-23 (10th Cir. 1985) (same); *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970) (same). Unlike the statute in *White Mountain Apache*, the Appropriation Acts never state that the money appropriated is to be held "in trust" for an Indian tribe or tribes. *White Mountain Apache*, 537 U.S. at 475, 480. In addition, as the Court of Federal Claims correctly noted, the Appropriations Acts for the TPA system did not establish a trust corpus and the Tribe concedes that point. *Samish IV*, 82 Fed. Cl. at 68. The only thing that the Appropriations Acts did was appropriate a lump sum to BIA for the operation of Indian programs. BIA allocated funds in a way that gave Indian tribes autonomy over spending. *See* A230 ¶33. Because the Appropriations Acts do not establish a trust duty, this

Court cannot draw on general principles of trust law to interpret the Acts as money-mandating. *Navajo III*, 129 S. Ct. at 1552, 1558

Congress cannot have intended for its Appropriations Acts to mandate the payment of money damages to now-recognized tribes for the period during which they were not recognized regardless of whether the failure to recognize the tribe was in some sense "wrongful." Recognition is, in part, an acknowledgement that tribes existed continuously as distinct communities since European settlement. *See* A210-211 (citing 25 C.F.R. Part 83, the regulations governing the acknowledgement of tribes); *Washington*, 593 F.3d at 801 (federal recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." (citation omitted)). Allowing the Tribe's claim to proceed would potentially allow all acknowledged tribes to sue for benefits they did not receive for the period before they were federally recognized. No statute or regulation authorizes the Secretary to treat non-recognized groups as tribes. To the contrary, in 1975 Congress predicated the receipt of federal benefits on obtaining recognition. *See Greene*, 1992 WL 533059, at *7 (citing 25 U.S.C. § 450b(e)).

Instead of allowing newly recognized tribes to seek past federal benefits, Congress provides special funds, outside of the TPA system, for newly recognized tribes. A224 ¶22. It appropriates funds separately, through a New Tribes program,

so that funds allocated for the operation of Indian programs that benefit existing tribes will not be depleted by the recognition of new tribes. *Id.* Many tribes received benefits under this program when they were initially recognized. *Id.*; *see, e.g.*, A447 (Budget Justification allocating money to "New Tribes" program). Samish also received New Tribes funds in 1996 when it was first recognized. *See Samish Indian Nation v. U.S. Department of Interior*, 2004 WL 3753252, at *1.

In addition, to allow a damages claim against the United States under the TPA system or Appropriations Acts would provide the Tribe with an unintended windfall. This Court previously held that the Tribe could not seek damages under the provisions of the ISDA that provided for "contract support costs" because the Tribe never incurred any of those costs. *Samish II*, 419 F.3d at 1366-1367. The Appropriations Acts provided funding that was allocated for ISDA contracts. *See, e.g.*, A492-A493 (1994 Appropriations Act, Pub. L. No. 103-138, 107 Stat. 1390 (Nov. 11, 1993)) ("the funds made available to tribes [] through contracts [] obligated during [the] fiscal year [under the ISDA] shall remain available until expended"). As this Court held, the Tribe did not incur costs under the ISDA, 419 F.3d at 1367, or any of the programs supported by TPA funds prior to its recognition in 1996. To allow the Tribe to obtain funds for costs it never incurred "would provide [it] nothing but a windfall," a result that Congress could not have intended in appropriating TPA funds. *Id.*

Aside from generalized statements of Congressional intent, the Tribe points to no other support for its claims. *See* Br. at 30-43. To permit general statements of Congressional intent in legislative history to support a claim for damages would vastly expand the Government's limited waiver of sovereign immunity in the Tucker Act and Indian Tucker Act in a manner that runs contrary to well-established precedent. *Dep't of Energy*, 503 U.S. at 615; *Navajo III*, 129 S.Ct. at 1552. Accordingly, this Court should affirm the dismissal of the Tribe's claims with respect to the TPA system.

IV. THE REVENUE SHARING ACT CANNOT SUPPLY JURISDICTION UNDER THE TUCKER ACT AND INDIAN TUCKER ACT BECAUSE IT IS NOT MONEY-MANDATING, AND, REGARDLESS, THE TRIBE'S CLAIMS ARE NOT JUSTICIABLE.

The Revenue Sharing Act does not create jurisdiction under the Tucker Act and Indian Tucker Act because it cannot fairly be interpreted as money-mandating. Regardless, the Samish's claims are not justiciable because the Revenue Sharing Act's appropriations lapsed in 1983, and the Anti-Deficiency Act, 31 U.S.C. § 1341, bars this Court from requiring the Government to pay more funds than were appropriated. The Judgment Fund is not available to pay the Tribe's claims.

A. The Revenue Sharing Act Is Not Money-Mandating.

The Revenue Sharing Act did not mandate the government to pay specific funds to State, local, or tribal governments. Nor did it impose a specific fiduciary duty upon the United States, a breach of which mandates compensation.

Accordingly, the Court of Federal Claims does not have subject matter jurisdiction to hear the Tribe's claims with respect to the Revenue Sharing Act.

1. The Revenue Sharing Act Establishes A Discretionary Program.

Though the Revenue Sharing Act contains the words "shall be paid," and "is entitled to," the Act "does not expressly mandate compensation." *National Association of Counties v. Baker*, 842 F.2d 369, 374-375 (D.C. Cir. 1988); *cf. Taylor v. United States*, 310 Fed. Appx. 390, 392 (Fed. Cir. 2009) (a regulation which stated an "agency shall provide full relief" to individuals who are discriminated against was not money-mandating because the Court of Federal Claims has no jurisdiction over Title VII claims, which was the statute upon which the claim was based). When the words "shall pay" are viewed in the context of the entire statute, it becomes clear that the Revenue Sharing Act cannot be interpreted as money-mandating.

The Revenue Sharing Act gave broad discretion to the Secretary of the Treasury to allocate sums to state, local, and tribal governments. Unlike other statutes that have been found to be money-mandating, this statute did not mandate the payment of an exact sum of money. *National Association of Counties*, 842 F.2d at 374 (there is no "specific language in the Revenue Sharing Act which commands the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet" (citation omitted)); *see Samish II*, 419 F.3d at

1364 (statutes are money-mandating when they require payment of specific sums of money or upon satisfaction of conditions); *see, e.g, Kanemoto*, 41 F.3d at 643 ("the Attorney General shall . . . pay out of the fund to each eligible individual the sum of $20,000"). The Secretary was to allocate an amount according to a formula that took into account a variety of factors, such as population, tax revenues, and need. *See* A612 (86 Stat. 918 at Sec. 106); A624, A629-630 (Legislative History). The factors gave the Secretary discretion to determine the exact amount to be allocated. *Id.*

The Secretary also had discretion to transfer appropriated money back to the general fund of the Treasury if he determined the money would not be needed by potential recipients. A611 (86 Stat. 919 at Sec. 105(c)). The fact that the Secretary was not obligated to allocate all the appropriated money indicates that the Revenue Sharing Act did not establish a mandatory payment program. Thus, the Act cannot provide jurisdiction for the Tribe's claim for statutory damages. *See* Compl. at ¶36 (claiming a "violation of [the Tribe's] statutory rights") (A93).

2. *The Revenue Sharing Act Did Not Impose A Fiduciary Obligation On The United States.*

The Revenue Sharing Act cannot provide jurisdiction for the Tribe's claim for breach of trust, Compl. at ¶43 (A94), because it contains no explicit language imposing a fiduciary obligation upon the United States with respect to the Samish Tribe or giving management of a trust corpus to the United States for the benefit of

the Samish Tribe. *See* A608-A619 (entire act); *see* Section I, *supra*. Congress intended that the statute provide broad assistance to state, local, and tribal governments that would be free from Congressional interference and would come with few strings attached. *See Goolsby v. Blumenthal*, 581 F.2d 455, 459 n.4 (5th Cir. 1978); A620-A622 (Legislative History for Revenue Sharing Act).

The Act is unlike the statutes and regulations in *White Mountain Apache Tribe*, 537 U.S. at 473, and *Mitchell II*, 463 U.S. at 216, which were considered money-mandating because they mandated exclusive federal control over Indian assets and imposed fiduciary duties upon the United States in managing those assets for the benefit of Indian tribes. *See National Association of Counties*, 842 F.2d at 375-376 (fund established by Revenue Sharing Act did not impose any fiduciary obligations on United States). Because the Revenue Sharing Act does not impose a fiduciary duty upon the United States, this Court cannot interpret the Act as money-mandating. *Navajo III*, 129 S. Ct. at 1552, 1558.

3. Congress's Explicit Provision Of Certain Remedies Precludes A Suit For Damages In The Court Of Federal Claims.

Instead of providing monetary damages for violations of the statute, Congress limited the availability of judicial review of allocation decisions made under the Revenue Sharing Act. There are two provisions under the Revenue Sharing Act that provide for judicial review. One of the provisions authorizes the Secretary of the Treasury to bring a civil action in the event that a State, local, or

tribal government has failed to comply with the non-discrimination provision of the Revenue Sharing Act. *See* 31 U.S.C. § 1242(a)-(c) (Supp. V 1975) (complete Act as published in 1975) (SA16-SA17); *see also* 31 U.S.C. §§ 6716-6718 (1982) (complete Act as published in 1982) (amended Revenue Sharing Act) (SA48). Another provision allows for a State, local, or tribal government to bring a petition for review in the courts of appeals if it believes that the Secretary (1) wrongfully reduces payments under Section 1226(b), which gives the Secretary authority to reduce payments, or (2) wrongfully withholds funds under Section 1223(b), which prohibits governments from using funds in certain ways, or under Section 1243(b), which requires recipient governments to follow procedures for spending and accounting for funds. *See* 31 U.S.C. § 1263(a)-(d) (Supp. V 1975) (SA18-SA19); *see also* 31 U.S.C. § 6722 (1982) (amended Revenue Sharing Act) (SA52).

Congress's explicit provision of certain forms of judicial review in limited circumstances indicates that it did not intend for this Court to interpret the statute as money-mandating. The D.C. Circuit has held that Congress's express provision of certain actions under the Revenue Sharing Act precluded other actions. In *Council Of & For the Blind of Delaware Valley v. Regan*, the D.C. Circuit held that the express provision of direct private suits against Revenue Sharing fund recipients precluded certain suits against the federal enforcement agency, the Office of Revenue Sharing. 709 F.2d 1521, 1524, 1530-31 (D.C. Cir. 1983) (en

banc). The D.C. Circuit has also held that the Revenue Sharing Act contains "no provision that expressly makes the United States liable for mismanagement of the Revenue Sharing [funds]" and there was no "indication in the legislative history that Congress intended to provide the local government with a substantive right to recover money damages." *National Association of Counties*, 842 F.2d at 375.

Similarly, in *City of Newark, N.J. v. Blumenthal*, the D.C. district court held that the Revenue Sharing Act committed allocation of funds to the Secretary's discretion and that Congress's explicit provision for "judicial review by the Courts of Appeals of any decision by the Secretary to reduce or withhold payments to a state or unit of local government" meant that it did not authorize an "affirmative grant of jurisdiction to review the general scheme of allocation or any recipient's proportionate share of that allocation." 457 F. Supp. 30, 32 (D.D.C. 1978).

This case is no different. Congress's express grant of judicial review in limited situations indicates that it did not intend for the Revenue Sharing Act to also allow monetary damages in the Court of Federal Claims.

4. Congress's Provision Of "New Tribes" Money Indicates That It Did Not Intend To Provide A Claim for Monetary Damages Under The Revenue Sharing Act To Newly-Recognized Tribes.

Congress did not intend for the Revenue Sharing Act to mandate the payment of money damages to now-federally recognized tribes for the period during which they were not federally recognized. Congress intended for newly-

recognized tribes to receive funds through the New Tribes program only, which is what the Tribe received when it obtained recognition in 1996. *See* Section III.D.

The Tribe's claims under the Revenue Sharing Act also fail because statutes providing payments to certain classes cannot support claims by individuals who do not fall into those classes. *See, e.g., In re United States*, 463 F.3d 1328, 1334-1335 (Fed. Cir. 2006) (dismissing for failure to state a claim a case seeking compensation under a statute detailing salaries brought by a former bankruptcy judge whose appointment was not renewed). The Revenue Sharing Act provides for the payment of money to tribes "which ha[ve] a recognized governing body which performs substantial governmental functions." A616 (86 Stat. 918 at Sec. 108(b)(4)). Samish did not have a recognized governing body during the period in which the United States paid funds under the Revenue Sharing Act. *See Washington II*, 641 F.2d at 1371-1373. Nor was it clear at the time the United States was distributing money under the Revenue Sharing Act (between 1972-1983), that the Samish Tribe was entitled to federal recognition. *Id.*

In light of the foregoing, and because the scope of the Government's waiver of sovereign immunity must be strictly construed in favor of the sovereign, *Lane*, 518 U.S. at 192, this Court should find that the Revenue Sharing Act cannot be fairly interpreted as money mandating.

B. Even If The Revenue Sharing Act Is Money-Mandating, The Tribe's Claims Are Moot By Operation Of The Anti-Deficiency Act, 31 U.S.C. § 1341.

Should this Court find that the Revenue Sharing Act is money-mandating, it nonetheless should affirm the dismissal of the Tribe's claims seeking damages under the Act. A court's subject matter jurisdiction ceases when an event occurs "that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Because the Court of Federal Claims is prevented by the Anti-Deficiency Act, 31 U.S.C. § 1341, from awarding damages under the Revenue Sharing Act, it lacks jurisdiction over the Tribe's claims.

The Court of Federal Claims interpreted the Tribe's claims, as they relate to the Revenue Sharing Act, as claims for damages directly under the Act. *Samish V*, 90 Fed. Cl. at 133-136; *see also Samish III*, 2006 WL 5629542, at *1-*2 (SA02). Samish seeks a payment of money in the exact amount of the sum it would have received under the Revenue Sharing Act had it been federally recognized at an earlier date. Count One of its Complaint states that its "statutory rights" were violated. Compl. at ¶36 (A93). The Tribe's brief states that "[t]he Tribe seeks damages here to compensate it for this loss, which can be measured by the value of the federal funds that the government would have provided to the Tribe under TPA

and Federal Revenue Sharing if the Tribe had been properly treated as federally recognized." Br. at 46.

The Anti-Deficiency Act, 31 U.S.C. § 1341, prevents the Court of Federal Claims from granting relief to the Tribe because it bars the award of funds pursuant to a statute for which the appropriations have lapsed or have been capped, unless the aggrieved party files suit before the appropriation lapses. *City of Houston, Tex.*, 24 F.3d at 1426. The Anti-Deficiency Act provides that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A) (2006); *see Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (an "agency may not spend more money for a program than has been appropriated").

Courts, including this Court, have interpreted the Anti-Deficiency Act as prohibiting judicial awards of money over the amount appropriated if appropriations for a program are capped and the funds spent, the appropriation lapses, or if Congress rescinds the appropriation. *See Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005); *City of Houston, Tex v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *Star-Glo Associates, LP v. United States*, 59 Fed. Cl. 724, 728-729 (2004). In these situations, a court

lacks jurisdiction to hear a claim for money from a specific fund pursuant to a statute because the court is unable to grant the relief requested. *Church of Scientology*, 506 U.S. at 12. Only if a lawsuit is brought before an appropriation lapses may a court award funds. *City of Houston*, 24 F.3d at 1426.

The Anti-Deficiency Act bars the Tribe from recovering the relief it seeks because the appropriations to the Revenue Sharing Act lapsed in 1983. *See Star-Glo Assoc*, 59 Fed. Cl. at 728-29; *City of Houston, Tex.*, 24 F.3d at 1426. Samish cited three statutes in the Court of Federal Claims that appropriated Revenue Sharing funds for the periods of 1972-1976, 1977-1980, and 1980-1983. *See* 90 Fed.Cl. at 136-137 (A37). The funding lapsed in 1983, long before Samish brought suit in 2002.

In addition, the Anti-Deficiency Act also prevents the Tribe from obtaining the relief it requests because the amounts appropriated under the Revenue Sharing Act were capped on an annual basis. Congress annually appropriated a certain amount of funds to be distributed under the Revenue Sharing Act. A611 (86 Stat. 918 at Sec. 105). In the event that "the total amount appropriated" for a period was "not sufficient to pay in full the additional amounts allocable" under the law, the Secretary was not authorized to pay additional sums, but rather, was required to "reduce proportionately the amounts so allocable." A613 (86 Stat. 918 at Sec. 106(c)(2)). Congress did not intend to provide additional funding under the

Revenue Sharing Act once the appropriations were spent. Because the funds were capped, this Court cannot authorize the payment of additional funds under the statute. *See Star-Glo Associates*, 414 F.3d at 1354-55; *City of Houston, Tex.*, 24 F.3d at 1426; *see also Greenlee County, Ariz v. United States*, 487 F.3d 871, 878-879 (government's liability under a statute is limited if appropriations are capped by Congress).

In order to grant Samish the particular relief it requests, the court would have to order the Government to pay money greater than the amount appropriated. This relief is no longer available due to the Anti-Deficiency Act, *see Highland Falls*, 48 F.3d at 1171, and therefore this Court must affirm the dismissal of the Tribe's claims.

C. **The Judgment Fund Is Unavailable To Pay The Tribe's Claims.**

The Tribe argues that its claims are not moot because the Court of Federal Claims can award damages under the Judgment Fund, 31 U.S.C. § 1304(a). However, the Judgment Fund is not available to pay the Tribe's claims because the Samish seeks its alleged share of funds appropriated under the Revenue Sharing Act. The appropriations for the Revenue Sharing Act were capped annually and lapsed in 1983. Because the appropriations were capped and have lapsed and the Judgment Fund is not available, the Court of Federal Claims cannot award relief to

the Tribe and lacks subject matter jurisdiction over the Samish's claims. *Church of Scientology*, 506 U.S. at 12.

The Judgment Fund is a "permanent, indefinite appropriation for the payment of judgments." *See* U.S. Government Accountability Office, 3 Principles of Federal Appropriations Law ("GAO, Principles"), at 14-31 (3d ed. Sept. 2008), available at http://www.gao.gov/special.pubs/d08978sp.pdf. However, the Judgment Fund is only available to pay damages in limited situations. The statute creating the Judgment Fund provides that it is only available "to pay final judgments . . . when – (1) payment is not otherwise provided for." 31 U.S.C. § 1304(a).

The Judgment Fund is not available to pay the Tribe's claims because the statute's first requirement—that the payment sought must not be otherwise provided for—is not satisfied. *See County of Suffolk, N.Y. v. Sebelius*, --F.3d----, 2010 WL 2025524, at *6 (2nd Cir. May 24, 2010) (holding that the Judgment Fund was unavailable to pay a claim for money previously authorized under a statute because the statute supplied the proper source of funds). Here, the Revenue Sharing Act provided a proper source of funds. Under Supreme Court and District of Columbia Circuit precedent, the Tribe, like any other state or local government, could have brought a claim seeking judicial review of the Secretary's decisions under the Revenue Sharing Act in the district court or court of appeals. *See*

National Association of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988) (challenge to Secretary's decision to make 180 million dollars unavailable for allocation under Revenue Sharing Act properly brought in district court); 31 U.S.C. § 1263(a)-(d) (Supp. V 1975) (authorizing petition for review of certain decisions reducing or withholding payments in specific circumstances) (SA18-SA19); *c.f. Bowen v. Massachusetts*, 487 U.S. 879, 907 n.42 (1988) (challenge to United States' decision not to reimburse state for certain Medicaid expenditures properly brought in district court).

The statute creating the Judgment Fund cannot be interpreted as available to pay the Tribe's claims because "payment is . . . otherwise provided for." 31 U.S.C. §1304(a). Where "payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available." GAO, 3 Principles, at 14-39. The unavailability of funds under the Revenue Sharing Act does not make the Judgment Fund available to pay the Tribe's claims. *See County of Suffolk*, 2010 WL 2025524 at *6. "There is only one proper source of funds in any given case." GAO, 3 Principles, at 14-40.

Paying this particular claim, which seeks to recover specific appropriated funds, not compensation generally, out of the Judgment Fund, would render the Anti-Deficiency Act meaningless. In addressing the interaction of these two

statutes, this Court is "not at liberty to pick and choose among congressional enactments." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* The Anti-Deficiency Act bars the payment of money pursuant to a statute once the appropriations for it have lapsed. To allow the Judgment Fund to supply money in this situation would obligate Congress to pay money under the Revenue Sharing Act, even though its appropriations lapsed in 1983. This ruling would render the Anti-Deficiency Act invalid.

On the other hand, a ruling that the Judgment Fund is not available to pay the Tribe's claims does not render the statute creating the Judgment Fund invalid. It simply recognizes that the Judgment Fund is not available here because funds have been "otherwise provided for" by Congress. *See* 31 U.S.C. § 1304(a). Because there is a possible construction of the two statutes that "give[s] effect to both," this Court should find that the Judgment Fund is not available in this particular case. *Mancari*, 417 U.S. at 551 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

Because the Judgment Fund is unavailable and the appropriations for the Revenue Sharing Act have lapsed, the Court of Federal Claims cannot grant the

requested relief and does not have subject matter jurisdiction over the Tribe's claims. *Church of Scientology*, 506 U.S. at 12.

V. ANY CLAIM FOR POST-1996 BENEFITS HAS BEEN WAIVED.

The Tribe raised claims for post-1996 benefits in its first complaint in the Court of Federal Claims and in a similar complaint under the APA in the District Court for the Western District of Washington. *See Samish II*, 419 F.3d at 1363. The Court of Federal Claims dismissed without prejudice the Tribe's claim for post-1996 benefits under 28 U.S.C. § 1500. *Samish I*, 58 Fed. Cl. at 122. This Court affirmed without prejudice.[5] *Samish II*, 419 F.3d at 1363. The District Court for the Western District of Washington ultimately dismissed the Tribe's claim for post-1996 benefits for lack of standing and subject matter jurisdiction under the APA. *Samish Indian Nation*, 2004 WL 3753252, at *1; *see* Section B, *supra*.

The Tribe did not renew its claim for post-1996 benefits in this case on remand before the Court of Federal Claims. *See* Compl. at ¶¶ 34-36; 40-44 (A92-A95). Nor did it raise this claim or argument in its opening brief in this appeal. Therefore, the Tribe is barred from raising this claim in future litigation. *C.f.*

[5] In *Tohono O'Odham Nation v. United States*, this Court interpreted the scope of 28 U.S.C. § 1500 when it reversed the Court of Federal Claim's decision dismissing a tribe's action on the grounds that it was precluded by Section 1500. 559 F.3d 1284, 1287-1292 (Fed. Cir. 2009). This case has been granted certiorari by the United States Supreme Court. *United States v. Tohono O'Odham Nation*, 130 S.Ct. 2097 (2010) (pending).

Conoco, Inc. v. Energy & Environmental Intern., L.C., 460 F.3d 1349, 1358-1359 (Fed. Cir. 2006) (litigants cannot raise new arguments or claims on appeal); *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995) (issues not raised before judgment in the district court are waived on appeal).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 13,501 words.

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