

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONNELLY R. VILLEGAS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. CV-12-0001-EFS

**ORDER GRANTING DEFENDANTS' MOTION
TO DISMISS OR FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

Before the Court, without oral argument, is Defendants Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA"), Bureau of Land Management ("BLM"), Bureau of Safety and Environmental Enforcement ("BSEE"), Office of Natural Resources Revenue ("ONRR"), Environmental Protection Agency ("EPA"), Lisa P. Jackson, Stan Speaks, Kenneth L. Salazar, Robert Abbey, and James Watson's (collectively, "Defendants") Motion to Dismiss or for Summary Judgment. ECF No. 154. Defendants contend that Plaintiff's Amended Complaint must be dismissed because the Defendants have not waived sovereign immunity for Plaintiff's claims; Defendants also assert that one of Plaintiff's claims is precluded by a settlement agreement in a different case. Having reviewed the pleadings and the record in this matter, this Court is fully informed. For the reasons set forth below, the Court

grants Defendants' Motion to Dismiss or for Summary Judgment, ECF No. 154, and dismisses this action.

II. BACKGROUND

A. **Factual History**¹

Plaintiff Donnelly Villegas is an enrolled member of the Spokane Tribe of Indians (hereinafter, "Spokane Tribe"), a federally-recognized Indian tribe. The Spokane Indian Reservation was created on January 18, 1881, by Executive Order of President Rutherford B. Hayes. In 1902, Congress opened the Spokane Reservation to mineral development, providing that the Reservation "shall be subject to entry under the laws of the United States in relation to the entry of mineral lands." Act of May 27, 1902, ch. 888, 32 Stat. 245 (1902). In a separate Joint Resolution passed later that year, Congress directed the Secretary of the Interior to:

make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the

¹ The facts set forth herein are largely - but not exclusively - based on the factual allegations contained in the Amended Complaint, ECF No. 153. For purposes of this motion, this court construes the facts and pleadings in the light most favorable to the Plaintiff and accepts all well-pled factual allegations in the Amended Complaint, along with all reasonable inferences drawn therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). The Court also takes judicial notice of various pleadings and orders filed in *Cobell v. United States*, D.D.C. No. 96-cv-1285. See *Horne v. Potter*, 392 Fed. Appx. 800, 802 (11th Cir. 2010) (noting that court records from proceedings in other jurisdictions can be considered in deciding Rule 12(b) motions, particularly when the cases involve the same litigants).

1 lands in said reservation not allotted to Indians or used
2 or reserved by the Government, or occupied for school
3 purposes, shall be opened to exploration, location,
4 occupation, and purchase under the mining laws.

5 Cong. J. Res. 31, 32 Stat. 744 (1902). In 1908, Congress directed the
6 Secretary of the Interior to make allotments to all members of the
7 Spokane Tribe who had not received allotments, and to sell and dispose
8 of all unallotted "surplus" lands for use in agriculture and timber
9 production. Act of May 29, 1908, 35 Stat. 458 (1908). This process
10 of allotment and distribution was consistent with the United States'
11 policy of "assimilation" of Indian tribes in the period surrounding
12 the turn of the nineteenth century.

13 1. Allotment No. 156

14 In 1910, pursuant to the Acts of Congress described above,
15 Allotment No. 156 was issued to Edward Boyd. The issuing instrument
16 stated that the United States would hold the land in trust for twenty-
17 five years for the sole use and benefit of Mr. Boyd, and that at the
18 end of that period, the United States would convey the 120-acre
19 property in fee to Mr. Boyd or his heirs. Mr. Boyd died intestate in
20 1939, at which time his interest in the allotment was divided between
21 his spouse and six children. By 1956, following the death of a number
22 of Mr. Boyd's children, the interests in the allotment became
23 concentrated in Lucy and Richard Boyd.

24 In a 1973 order entered in an otherwise-unspecified
25 adjudication titled *In the Matter of the Estates of Richard Boyd*, a
26 one-half interest in Allotment No. 156 was awarded to the Spokane
Tribe, and the remaining 60-acre interest was divided equally between

1 Plaintiff and his sister, Ortencia Ford. As part of this probate
2 settlement, Plaintiff was also awarded an interest in stockpiles of
3 high-grade uranium located in Ford, Washington. The funds derived
4 from these interests were to be paid into a trust account for the
5 benefit of Plaintiff and his sister, managed by William Sharpe and ONB
6 Bank and Trust until October 1974.

7 Fee title to the land was never transferred to Mr. Boyd or his
8 heirs; however, Plaintiff retains his one-half interest in a 60-acre
9 portion of Allotment No. 156, currently held in trust by the United
10 States.

11 2. Establishment of the Midnite Mine

12 In 1954, Dawn Mining Company, LLC (hereinafter "Dawn Mining")
13 leased approximately 571 acres of the Spokane Indian Reservation from
14 the United States for the purpose of mining uranium. Floyd H.
15 Phillips, Superintendent of Defendant DOI's Colville Indian Agency,
16 entered into the lease "for and on behalf of the Spokane Tribe of
17 Indians." Compl. ¶ 27, ECF No. 153, at 9. The land covered by the
18 1954 lease included unallotted land that was part of the original
19 Spokane Reservation, as well as the entirety of Allotment No. 156. In
20 1956, the Superintendent of the Colville Indian Agency again leased
21 the allotment to Dawn Mining and Newmont USA Limited (hereinafter
22 "Newmont") for a period of 15 years because "the individual Indian
23 ownership was not entirely clear due to pending probate." *Id.* ¶ 29.
24 Both leases were approved by Defendant BIA's Acting Area Director.
25 Mr. Boyd's heirs were neither consulted about nor informed of either
26 lease.

1 The 1956 lease required Dawn Mining and Newmont to submit
2 monthly reports to the Superintendent of the Colville Indian Agency
3 and to pay annual rents and royalties directly to the Superintendent,
4 who would then issue rents and royalties to the allottees. The
5 Superintendent was also tasked with directing audits of each lessee's
6 accounts and books, while the Mineral Management Service was tasked
7 with conducting audits of the rents and royalties paid to the Colville
8 Indian Agency. Both the 1954 and 1956 leases also provided the
9 Secretary of the Interior with authority to suspend mining operations,
10 collect a bond, inspect the property, approve the lessee's attempts to
11 terminate the lease upon showing that full provision had been made for
12 the conservation and protection of the property, and terminate each
13 lease for violations of the lease's terms and conditions. In 1964,
14 Mr. Boyd's heirs and ONB Bank and Trust entered into a ten-year mining
15 lease with Dawn Mining and Newmont under the same terms as the 1956
16 lease. The site leased by Dawn Mining and Newmont was developed into
17 the "Midnite Mine."

18 3. Conclusion of Mining Operations & EPA Superfund Cleanup

19 In 1981, the Midnite Mine closed. Due to the radioactive ore
20 and toxic metals that were extracted from the mine, the land
21 surrounding the mine (including Allotment No. 156) was heavily
22 contaminated with radioactive materials. A 2008 Seattle Times
23 article, quoted by Plaintiff in his Amended Complaint, identifies some
24 of the serious environmental damage incurred near the mine site; it
25 also cites a scientific model used by Defendant EPA that concluded
26 that "someone living on food gathered in the [nearby area] and using

1 the water for sweat lodges had a 1-in-5 change of getting cancer from
2 the added radiation." Am. Compl. ¶ 56, at 15-16 (citing Warren
3 Cornwall, *Radioactive Remains: The Forgotten Story of the Northwest's*
4 *Only Uranium Mines*, Seattle Times, Feb. 24, 2008, available at
5 http://seattletimes.nwsources.com/html/pacificnw/2004191779_pacificpura
6 [nium24.html](http://seattletimes.nwsources.com/html/pacificnw/2004191779_pacificpura_nium24.html)). BIA has since determined that portions of Allotment No.
7 156 cannot be logged due to extensive environmental damage and
8 radioactivity.

9 In July 1998, the EPA sought support to include the Midnite Mine
10 on the Superfund National Priorities List (NPL) of sites eligible for
11 cleanup funds. In May 2000, the Midnite Mine was listed on the NPL,
12 and over the following years, EPA regularly shared information with
13 and sought input from members of the Spokane Tribe on the cleanup
14 effort. On October 5, 2005, EPA issued its proposed cleanup plan.
15 After a 105-day comment period and three public meetings, EPA adopted
16 the proposal. The Midnite Mine is currently the subject of a \$152-
17 million environmental cleanup project. In January 2012, Senior U.S.
18 District Judge Justin Quackenbush signed a consent decree between the
19 United States, Dawn Mining, and Newmont regarding their respective
20 obligations to fund the environmental cleanup. See *United States v.*
21 *Newmont USA Ltd. and Dawn Mining Co.*, No. CV-05-020-JLQ, ECF No. 553
22 (E.D. Wash. Jan. 17, 2012)

23 4. Specific Disputes Concerning Allotment No. 156

24 From the inception of the Midnight Mine until the mine
25 eventually closed in 1981, Plaintiff contends that Defendants engaged
26 in an ongoing course of conduct to improperly deprive him of the funds

1 to which he was entitled. He also alleges that Defendants breached
2 fiduciary duties by improperly managing his assets, failing to
3 adequately supervise the other Defendants, and failing to adequately
4 keep him informed about the nature of his accounts and the uses of
5 Allotment No. 156.

6 Trust Account & Missing Funds. William J. Sharp and ONB Bank
7 and Trust were charged with managing a trust account on Plaintiff's
8 behalf. The funds derived from Plaintiff's interests in Allotment No.
9 156 were to be paid into that trust account until October 1, 1974.
10 Plaintiff contends that BIA continued to make payments into the
11 account until March of 1978 - payments which Plaintiff claims he never
12 received. Plaintiff also argues that charges were withdrawn from the
13 trust account without explanation, and that some of the explanations
14 listed on royalty ledgers issued by Defendants have been inexplicably
15 redacted. According to Plaintiff, Dawn Mining and Newmont paid rents
16 and royalties directly to Defendants, who failed to properly
17 distribute monies owed to Plaintiff. Plaintiff also contends that
18 Dawn Mining and Newmont improperly deducted mine reclamation and
19 restoration costs and other services from Plaintiff's escrow account,
20 in violation of federal law.

21 Misappropriation of Uranium Ore & Improper Deductions.
22 Plaintiff avers that Dawn Mining and Newmont, under the supervision of
23 Defendants, devalued and improperly disposed of Plaintiff's assets,
24 including mixing low-grade ore with high-grade ore and under-measuring
25 the quantity of ore. According to Plaintiff, Defendants processed
26

1 and/or sold several stockpiles of uranium obtained from the Midnite
2 Mine, for which Plaintiff has received little or no payment.

3 **B. Procedural History**

4 1. The Present Suit

5 Plaintiff's initial Complaint, filed on January 3, 2012, named
6 the present Defendants, along with Dawn Mining, Newmont, Washington
7 Water Power/Avista, ONB Bank and Trust, and the Estate of Willard
8 Sharpe. Compl. ¶¶ 14-20, ECF No. 1 at 5-7. In that complaint,
9 Plaintiff brought seven claims against the present Defendants. On
10 February 2, 2012 and July 25, 2012, the Court dismissed ONB Bank and
11 Trust, ECF No. 17, and Washington Water Power/Avista, ECF No. 128,
12 respectively. On May 17, 2012, the Court dismissed Dawn Mining and
13 Newmont, finding Plaintiff's claims against those entities to be
14 barred by the applicable statute of limitations or otherwise lacking
15 in factual support. ECF No. 116. On March 30, 2012, Defendants filed
16 their first motion to dismiss. ECF No. 61. On January 30, 2013, the
17 Court granted the motion and afforded Plaintiff leave to amend his
18 Complaint. ECF No. 152.

19 Plaintiff filed the Amended Complaint on March 1, 2013. Am.
20 Compl. ¶¶ 13-14, at 5. Plaintiff now brings two claims against
21 Defendants: 1) an accounting for profits claim, and 2) unspecified
22 violations of the Administrative Procedures Act ("APA"). Plaintiff
23 asks the Court to 1) declare that Defendants are in violation of
24 federal common law, the APA, and fiduciary responsibilities owed to
25 Plaintiff; 2) declare that Defendants have never provided Plaintiff
26 with a full and complete accounting; 3) identify the accounting

standards governing Plaintiff's trust; 4) direct Defendants to provide Plaintiff with a complete accounting of his trust, to preserve documents concerning that trust, and to correct the trust balance; 5) direct Defendants to develop plans and processes for implementing and achieving the relief granted; 6) retain jurisdiction to supervise implementation of relief granted; and 7) award costs of suit. On March 18, 2013, Defendants again moved to dismiss. ECF No. 153.

2. Court of Federal Claims Suit

On December 27, 2011, approximately one week before filing the original Complaint in the instant suit, Plaintiff filed a near-identical Complaint in the Court of Federal Claims. *Villegas v. United States et al.*, No. 11-903-LJB, ECF No. 1 (Fed Cl. Dec. 27, 2011). Plaintiff's complaint in that case names the same Defendants as named in the original Complaint before this court; it also asserts the same legal claims and seeks the same monetary relief, although it omits the equitable relief Plaintiff sought in his original complaint. *Id.* By joint motion of Plaintiff and Defendants, the suit before the Court of Federal Claims has been stayed pending final resolution of this case. *Id.*, ECF No. 15 (June 4, 2012).

3. Cobell Class Action

Plaintiff is a class member in a suit alleging breach of fiduciary duties by the United States in mismanaging Indian trust assets. See *Cobell v. Salazar*, D.D.C. No. 96-cv-1285.² The Amended

² *Cobell* was a complex class action lawsuit filed on behalf of all Indian plaintiffs with land misuse claims against the United States; the case

1 Complaint in that suit sought to compel the United States to provide a
2 historical accounting to Indian beneficiaries, and it asked the court
3 to award the plaintiffs appropriate legal and equitable relief for the
4 mismanagement of trust funds, trust lands, and other non-monetary
5 assets. *Id.*, Am. Compl. ¶¶ 43-52, ECF No. 3671.

6 The *Cobell* court recently approved a final settlement in which
7 all class members have agreed to release future claims that could have
8 been asserted in that suit. *Id.*, Order Granting Final Approval to
9 Settlement, ECF No. 3850, *aff'd*, 679 F.3d 909 (D.C. Cir. 2012), *cert.*
10 *denied*, No. 12-234, 2012 WL 4008066, at *1 (Oct. 29, 2012). The
11 settlement agreement established two settlement classes: the
12 Historical Accounting Class and the Trust Administration Class. *Id.*,
13 Settlement Agreement, ¶¶ A.15-16, ECF No. 3660-2. The Historical
14 Accounting Class was a non-opt-out class, *id.* ¶ C.2.a, while the Trust
15 Administration Class was an opt-out class, *id.* ¶ C.2.b. Upon final
16 approval of the settlement, members of the Historical Accounting Class
17 were "deemed to have released, waived and forever discharged the
18 United States . . . from the obligation to perform a historical
19 accounting of his or her [Indian trust fund] account or any individual
20 Indian trust asset" *Id.* ¶ I.1. Members of the Trust
21

22 recently settled after almost two decades of litigation. See *Indian*
23 *Trust Settlement*, available at <http://www.cobellsettlement.com/index>.
24 Since the original Complaint in *Cobell* was filed in 1996, see *Cobell*,
25 ECF. No. 1, the case has been appealed to the D.C. Circuit Court of
26 Appeals several times under several different names, including *Cobell v.*
Norton, *Cobell v. Babbitt*, *Cobell v. Salazar*, and *Cobell v. Kempthorne*.

1 Administration Class who did not opt-out were "deemed to be forever
2 barred and precluded from prosecuting any and all claims and/or causes
3 of action that were, or should have been, asserted in the Amended
4 Complaint . . . with respect to . . . matters stated in the Amended
5 Complaint for Funds Administration Claims or Land Administration
6 Claims" against the United States. *Id.* ¶ 1.2.

7 Notice of the *Cobell* settlement was mailed to all members of the
8 class who could be identified, and it was published in print media, by
9 radio, on the internet, and on television. *Villegas*, Decl. of
10 Katherine Kinsella, ECF No. 154-1.³ On June 20, 2011, the district
11 court held a fairness hearing and determined that: 1) the settlement
12 was fair for absent class members; 2) "[t]he best notice practicable
13 ha[d] been provided class members;" and 3) the judgment was binding on
14 all members of the Trust Administration Class, meaning any future
15 claims against the United States were barred. *Cobell*, Order Granting
16 Final Approval to Settlement, ECF No. 3850, at 4-8. This agreement
17 became final after all possible appeal periods had expired on
18 November 24, 2012. *Id.*, Order of Dec. 11, 2012, ECF No. 3923.

19 Here, neither party disputes that Plaintiff is a member of both
20 settlement classes in the *Cobell* suit. Defendants argue that the
21 claims in the instant suit are barred by the *Cobell* settlement, but
22 Plaintiff contends he did not receive proper notice of the *Cobell* suit
23 or settlement and therefore cannot be bound by its terms. To make the

24
25 ³ This declaration was prepared for the *Cobell* litigation, but attached by
26 Defendants to this motion.

1 requisite factual showing to survive summary judgment on this issue,
2 Plaintiff asks the Court to defer summary judgment, pursuant to
3 Federal Rule of Civil Procedure 56(d), so Plaintiff can conduct
4 limited discovery on the *Cobell* settlement and notice procedures.

5 **III. LEGAL STANDARDS**

6 **A. Motion to Dismiss for Failure to State a Claim**

7 A motion to dismiss under Rule 12(b)(6) tests the legal
8 sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d 729, 732
9 (9th Cir. 2001). A complaint may be dismissed for failure to state a
10 claim under Rule 12(b)(6) where the factual allegations do not raise
11 the right to relief above the speculative level. *Ashcroft v. Iqbal*,
12 552 U.S. 662 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007).
13 Conversely, a complaint may not be dismissed for failure to state a
14 claim where the allegations plausibly show that the pleader is
15 entitled to relief. *Twombly*, 550 U.S. at 555. In ruling on a motion
16 under Rule 12(b)(6), a court must construe the pleadings in the light
17 most favorable to the plaintiff and accept all material factual
18 allegations in the complaint, as well as any reasonable inferences
19 drawn therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

20 **B. Motion to Dismiss for Lack of Subject-Matter Jurisdiction**

21 "Federal courts are courts of limited jurisdiction. . . . It is
22 to be presumed that a cause lies outside this limited jurisdiction,
23 and the burden of establishing the contrary rests upon the party
24 asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*,
25 511 U.S. 375, 377 (1994) (internal citations omitted). Jurisdiction
26 is a threshold issue and must be addressed prior to any consideration

1 of the merits of a case. *Steel Co. v. Citizens for a Better Env't*,
2 523 U.S. 83, 93-94 (1998) (universally rejecting the approach taken by
3 numerous lower courts in "'assuming' jurisdiction for the purpose of
4 deciding the merits"). Under Rule 12(b), the Court must dismiss an
5 action if it determines that it lacks subject-matter jurisdiction.
6 Fed. R. Civ. P. 12(b)(1) (authorizing parties to seek pre-answer
7 dismissal if the court lacks subject matter jurisdiction); *id.*
8 12(h)(3) (requiring the Court to *sua sponte* dismiss the action if it
9 "determines at any time that it lacks subject matter jurisdiction"
10 (emphasis added)). "A motion to dismiss for lack of subject matter
11 jurisdiction may either attack the allegations of the complaint or may
12 . . . attack[] the existence of subject matter jurisdiction in fact."
13 *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733
14 (9th Cir. 1979).

15 Unlike a motion to dismiss for failure to state a claim under
16 Rule 12(b)(6), a Rule 12(b)(1) motion to dismiss for lack of subject
17 matter jurisdiction permits a court to consider "affidavits or any
18 other evidence properly before the court," even material extrinsic to
19 the pleadings. *Ass'n. of Am. Med. Colls. v. United States*, 217 F.3d
20 770, 778 (9th Cir. 2000). Once jurisdiction has been raised, the
21 party opposing the motion to dismiss must "'satisfy its burden of
22 establishing that the court, in fact, possesses subject matter
23 jurisdiction.'" *Id.* (quoting *St. Clair v. City of Chico*, 880 F.2d
24 199, 201 (9th Cir. 1989)).

25 //

26 //

1 **C. Sovereign Immunity**

2 "It is elementary that the United States, as sovereign, is
3 immune from suit save as it consents to be sued . . . , and the terms
4 of its consent to be sued in any court define that court's
5 jurisdiction to entertain the suit." *United States v. Mitchell*, 445
6 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 548,
7 586 (1941)) (internal quotations omitted). Waivers of sovereign
8 immunity must be "unequivocally expressed in the statutory text[,]
9 . . . strictly construed in favor of the United States, and not
10 enlarged beyond what the language of the statute requires." *United*
11 *States v. Idaho*, 508 U.S. 1, 6-7 (1993) (internal citations and
12 quotations omitted); see also *Tobar v. United States*, 639 F.3d 1191,
13 1195 (9th Cir. 2011). A suit against a federal agency or officer
14 which seeks relief against the sovereign is, in effect, a suit against
15 the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S.
16 682, 687-88 (1949). Thus, the principles of sovereign immunity apply
17 whenever a federal agency is sued. *Id.*; see *Beller v. Middendorf*, 632
18 F.2d 788, 796-98 (9th Cir. 1980), *overruled on other grounds by*
19 *Lawrence v. Texas*, 539 U.S. 558 (2003).

20 Sovereign immunity is a jurisdictional bar: unless a statutory
21 waiver exists, courts lack jurisdiction to entertain a suit against
22 the United States or its agencies. *Sherwood*, 312 U.S. at 586. For
23 that reason, a motion to dismiss that asserts sovereign immunity is
24 essentially a motion to dismiss for lack of subject-matter
25 jurisdiction, and the same legal standards apply. See *McCarthy v.*
26 *United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("The question

whether [of] whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction."). Plaintiff carries the burden to find and prove an explicit waiver of sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007); see also *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) (holding that because the plaintiff sought relief, "it follows that he must carry throughout the litigation the burden of showing that he is properly in court").

D. Summary Judgment

Summary judgment is appropriate if the record establishes "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing summary judgment must point to specific facts establishing a genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). If the non-moving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

IV. DISCUSSION

The Court concludes that Plaintiff's generalized APA claim is insufficiently pled; moreover, Defendants have not waived sovereign immunity for this claim because the claim was not administratively exhausted. As to Plaintiff's accounting for profits claim, Defendants have waived sovereign immunity, but Plaintiff is precluded from

1 pursuing this claim due to his membership in the *Cobell* settlement
2 class. Although Defendants seek dismissal of both claims under Rule
3 12(b) or, in the alternative, by way of summary judgment pursuant to
4 Rule 56, this distinction is inconsequential: no material facts are in
5 dispute, and Plaintiff has not shown that further discovery is
6 warranted. Accordingly, dismissal is warranted under either approach.
7 The Court discusses these issues in turn below.

8 **A. Sufficiency of Pleadings**

9 The Court need not consider whether Defendants have waived
10 sovereign immunity for Plaintiff's generalized APA claim, because the
11 claim is insufficiently pled and must be dismissed under Rule
12 12(b)(6).⁴ The Amended Complaint alleges that Plaintiff has "suffered
13 legal wrongs because of final agency action that is arbitrary,
14 capricious, an abuse of discretion, or otherwise contrary to law, and
15 from unlawful withholding of or unreasonably delayed agency action."
16 Am. Compl. ¶ 82, ECF No. 153, at 25. Although the Court has
17 previously cautioned Plaintiff that this type of generalized assertion
18 does not state a valid APA claim, see ECF No. 152, at 41, this
19 assertion is nearly identical to the one Plaintiff made in his
20 original Complaint, see Compl. ¶ 117, at 28.

21 It is axiomatic that a complaint must "'give the defendant fair
22 notice of what the plaintiff's claim is and the grounds upon which it
23 rests.'" *Swierkiwicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)

24
25 ⁴ Plaintiff's accounting for profits claim, on the other hand, was
26 sufficiently pled; therefore, the Court addresses that claim below.

(quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The above allegation from Plaintiff's Amended Complaint is precisely the sort of "naked assertions devoid of further factual enhancement," that the Supreme Court has found insufficient in an initial pleading. See *Iqbal*, 556 U.S. at 678. Plaintiff completely failed to identify, either generally or specifically, the allegedly wrongful agency action or withholding of agency action in the Amended Complaint; and even if Plaintiff had identified such action or withholding of action, there is no indication it was "final agency action" as required by the APA. 5 U.S.C. § 704. Plaintiff was previously advised that he needed to properly identify and provide the necessary factual support for his APA claim in his complaint, see ECF No. 152, at 40-41; however, he has failed to do so.

In response, Plaintiff asserts that the final agency action that gives rise to his generalized APA claim is Defendants' failure to provide an accounting. Pl.'s Resp. in Opp'n, ECF No. 161, at 18. But Plaintiff also asserts that his separate accounting claim is **not** a claim that arises under the APA, but is rather a creature of statute.⁵ *Id.* at 17. Plaintiff cannot have it both ways. If the only final agency action that Plaintiff can identify is the failure to provide an accounting, his APA claim merely duplicates his accounting claim.

⁵ This argument will be addressed below in detail. See part IV. B.1.

1 **B. Sovereign Immunity**

2 Defendants claim the Court lacks subject-matter jurisdiction to
3 hear both claims in this suit because the United States has not waived
4 sovereign immunity. As explained below, Defendants have waived
5 sovereign immunity for Plaintiff's accounting claim; however,
6 Defendants have not waived sovereign immunity for Plaintiff's APA
7 claim because Plaintiff has not administratively exhausted his claims
8 with the BIA as required by 5 U.S.C. § 704.

9 1. Accounting Claim

10 Plaintiff claims he is entitled to an accounting from Defendants
11 based on certain fiduciary obligations in relation to management of
12 Indian trusts. Am. Compl. ¶¶ 65-80, at 19-24. Plaintiff cites a
13 litany of statutes in his Amended Complaint, *id.* ¶ 70, that set out
14 mandates that are sufficient to establish fiduciary duties that arise
15 under trust law. See *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 22 (D.D.C.
16 1999) ("Cobell III") ("The basic contours of defendants' fiduciary
17 duties under this [Indian] trust are established by the statutes and .
18 . . construed in light of the common law of trusts."). The key
19 statutes referenced in *Cobell III* were 25 U.S.C. § 161-162, *id.*, which
20 are also referenced in Plaintiff's Amended Complaint, Am. Compl. ¶ 70,
21 ECF. No 153. Of particular importance to Plaintiff's claim is §
22 162a(d)(1), which requires that the Secretary of the Interior
23 "[p]rovid[e] adequate systems for accounting for and reporting trust
24 fund balances" to Indian trust members. 25 U.S.C. § 162a(d)(1). The
25 Amended Complaint specifically alleges that Plaintiff has not received
26 any accounting for, or reporting of, his trust fund balances, despite

1 repeated requests. Am. Compl. ¶ 74, ECF No. 153, at 22. At one point
2 in the *Cobell* litigation, the D.C. Circuit concluded that 25 U.S.C. §
3 161-162 was sufficient to establish a fiduciary duty owed by the
4 United States to Indian plaintiffs. *Cobell v. Norton*, 392 F.3d 461,
5 471 (D.C. Cir. 2004).

6 Defendants argue that Plaintiff's accounting for profits claim
7 cannot rest on the APA's waiver of sovereign immunity without first
8 alleging final agency action; however, this argument is not
9 persuasive. The APA provides a waiver of sovereign immunity in suits
10 seeking judicial review of a federal agency action under 28 U.S.C. §
11 1331. *Gallo Cattle Co. v. U.S.D.A.*, 159 F.3d 1194, 1198 (9th Cir.
12 1998). This waiver, however, is limited by 5 U.S.C. § 704, which
13 provides that only "[a]gency action made reviewable by statute and
14 final agency action for which there is no other adequate remedy in a
15 court are subject to judicial review." *Id.* (quoting § 704).

16 Defendants argue that they have not waived sovereign immunity under
17 the APA because Plaintiff has not alleged a "final agency action."
18 But, as noted above, Plaintiff's accounting for profits claim arises
19 from a breach of statutory duties codified in 25 U.S.C. § 161-162.
20 Because *Cobell* recognized a statutory cause of action under 25 U.S.C.
21 § 161-162, *see Cobell v. Norton*, 392 F.3d at 471, Plaintiff's
22 accounting for profits claim falls under the "agency action made
23 reviewable by statute" provision of § 704. Therefore, Plaintiff need
24 not allege any final agency action to maintain this claim, and
25 Defendants have waived sovereign immunity for it.

26 //

2. APA Claim

Even if Plaintiff had specifically identified agency action giving rise to an APA claim, his generalized APA claim fails because Defendants have not waived sovereign immunity for this claim. Under the general review provisions of the APA, the United States has only waived sovereign immunity for suits arising from final agency action. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990). To demonstrate final agency action, Plaintiff must show that either the agency reached the "consummation" of its decision-making process, or the agency action determined the "rights and obligations" of the parties or is one from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An agency action is not final until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). "When an 'agency rule dictates that exhaustion of remedies is required, the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete.'" *Timbisha Shonshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988)).

BIA regulations provide that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704[.]" 25 C.F.R. § 2.6(a). The Code of Federal Regulations establishes the chain of authority to decide appeal of agency decisions, including agency

1 inaction. *See, e.g.,* 25 C.F.R. §§ 2.3, 2.4(a), 2.6(a) & 2.8. As was
2 the issue with his original Complaint, Plaintiff has not demonstrated
3 that he properly raised his vaguely-pled APA violations at any level
4 of BIA review, much less exhausted such claims. In fact, Plaintiff
5 tacitly admits that he has not exhausted these administrative
6 remedies, instead arguing that pursuit of these remedies would be
7 futile. Pl.'s Resp. in Opp'n, at 19 n.14, ECF No. 161. Even assuming
8 that this Court could waive the APA's administrative exhaustion
9 requirement, the futility exception is a high bar. *See Smith v. Blue*
10 *Cross & Blue Shield United of Wisc.*, 959 F.2d 655, 659 (7th Cir. 1992)
11 ("In order to come under the futility exception [to the exhaustion
12 requirement], the [plaintiffs] must show that it is certain that their
13 claim will be denied on appeal, not merely that they doubt an appeal
14 will result in a different decision."). Plaintiff has not made such a
15 showing in his Amended Complaint; therefore, he may not avail himself
16 of the futility exception.

17 Accordingly, the vague APA violation Plaintiff alleges does not,
18 as pled, constitute final agency action u 5 U.S.C. § 704. Plaintiff's
19 failure to pursue agency remedies renders § 702's waiver of sovereign
20 immunity inoperative; accordingly, the Court lacks jurisdiction to
21 hear his APA claim. *See Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-
22 94 (9th Cir. 1993) ("On three occasions, we have upheld the dismissal
23 of lawsuits challenging BIA decisions under the [APA] on the ground
24 that the plaintiff failed to take the required administrative appeal.
25 In so doing, we have noted the jurisdictional nature of the
26 administrative appeal requirement." (citations omitted)).

1 **C. Preclusion Under the Cobell Settlement**

2 Although Defendants have waived sovereign immunity for
 3 Plaintiff's accounting claim, the claim cannot survive dismissal or –
 4 alternatively – summary judgment, because of the preclusive effect of
 5 the *Cobell* settlement. On its face, the settlement clearly waives
 6 Plaintiff's right to bring his accounting claim, and both parties
 7 agree that Plaintiff is a member of that settlement. Plaintiff
 8 objects to the preclusive effect of the settlement, alleging he
 9 received insufficient notice of the settlement; however, as discussed
 10 below, his objection is untimely, raised in an inappropriate forum,
 11 and ultimately irrelevant. Accordingly, Plaintiff is precluded from
 12 pursuing the present accounting claim due to his membership in the
 13 *Cobell* settlement. Although Defendants seek dismissal of this claim
 14 under Rule 12(b) or summary judgment under Rule 56, the distinction is
 15 immaterial: no material facts are in dispute, and Plaintiff has not
 16 shown that any further discovery is warranted.

17 1. Dismissal Pursuant to Rule 12(b)

18 Claim preclusion defenses, such as *res judicata*, may be
 19 considered by way of a Rule 12(b)(1) motion to dismiss. See *Gupta v.*
 20 *Thai Airways Inter. Ltd.*, 487 F.3d 759, 763, 765 (9th Cir. 2007).
 21 Generally, the affirmative defenses of "*res judicata*, estoppel, or any
 22 other matter constituting an avoidance . . . must be affirmatively
 23 [plead]." Fed. R. Civ. P. 8(c)(1); *Zeligson v. Hartman-Blair, Inc.*,
 24 135 F.2d 874, 876 (10th Cir. 1943). Therefore, consideration of these
 25 issues is often left for post-answer dispositive motions. An
 26 affirmative defense can, however, "be adjudicated on a motion to

1 dismiss so long as (i) the facts establishing the defense are
 2 definitively ascertainable from the complaint and the other allowable
 3 sources of information, and (ii) those facts suffice to establish the
 4 affirmative defense with certitude." *Rodi v. S. New Eng. Sch. of Law*,
 5 389 F.3d 5, 12 (1st Cir. 2004).

6 A Rule 12(b)(1) motion to dismiss for lack of subject matter
 7 jurisdiction permits a court to consider "affidavits or any other
 8 evidence properly before the court," even material extrinsic to the
 9 pleadings. *Ass'n. of Am. Med. Colls. v. United States*, 217 F.3d 770,
 10 778 (9th Cir. 2000). Court records from other jurisdictions can be
 11 relied upon in 12(b) motions, especially when the cases involve the
 12 same litigants. *See Horne v. Potter*, 392 Fed. Appx. 800, 802 (11th
 13 Cir. 2010). Accordingly, the Court takes judicial notice of the
 14 settlement documents and relevant order from the *Cobell* litigation,
 15 which does not convert this motion into a motion for summary judgment.
 16 *See id.*⁶

17 //

18
 19 ⁶ Generally, "a district court may not consider any material beyond the
 20 pleadings in ruling on a [Rule] 12(b)(6) motion." *Branch v. Tunnell*, 14
 21 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds*, *Galbraith v.*
 22 *Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). There is, however,
 23 one relevant exception that applies here: courts may take judicial
 24 notice of "a fact that is not subject to reasonable dispute because it
 25 can be accurately and readily determined from sources whose accuracy
 26 cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Court
 records may be considered under Rule 201(b)(2). *See Horne*, 392 Fed.
 Appx. at 802. Therefore, even if this motion was considered under Rule
 12(b)(6) instead of Rule 12(b)(1), the result remains the same.

1 District courts have the power to enforce "an agreement to
2 settle a case pending before it." *Callie v. Near*, 829 F.2d 888, 890
3 (9th Cir. 1987). This rule applies to members of class action suits
4 who attempt to bring subsequent litigation that was waived as a part
5 of the original settlement. See *Cooper v. Fed. Reserve Bank of*
6 *Richmond*, 467 U.S. 867, 874 (1984). ("[U]nder elementary principles
7 of prior adjudication[,] a judgment in a properly entertained class
8 action is binding on class members in any subsequent litigation.").
9 Class judgment is still binding when that judgment was reached as a
10 result of a settlement agreement. *Wyly v. Weiss*, 679 F.3d 131, 143
11 (2d Cir. 2012). Neither party disputes Plaintiff's membership in the
12 *Cobell* settlement; nor is there any disagreement that that settlement
13 precludes class members from bringing a subsequent accounting claim
14 against the United States. Thus, Plaintiff's entire argument for
15 avoiding the preclusive effect of the *Cobell* settlement rests on his
16 self-serving and unsupported contention that he did not personally
17 receive notice of the settlement in time to dispute his membership in
18 the *Cobell* settlement class. Plaintiff contends that lack of actual
19 notice could lead to avoidance of the settlement's preclusive effects
20 on due process grounds, and he asks for the opportunity to conduct
21 additional discovery regarding execution of the *Cobell* settlement
22 program. The problem with Plaintiff's argument is two-fold: first,
23 actual notice is not required to comport with due process in this
24 case; and second, his argument is an impermissible collateral attack
25 that should have been raised before the *Cobell* court or on appeal
26 before the D.C. Circuit.

1 Actual notice need not be provided to absent members of a class
2 action settlement to bind them, assuming the notice provided was the
3 "best practicable notice." *Silber v. Mabon*, 18 F.3d 1449, 1453-54
4 (9th Cir. 1994). The issue of adequate notice for absent class
5 members was litigated in *Cobell*, and the district court determined
6 that the notice executed was the best practicable. *Cobell*, Order
7 Granting Final Approval to Settlement, ECF No. 3850, at 6. The D.C.
8 Circuit affirmed in all respects on this issue. *See Cobell v.*
9 *Salazar*, 679 F.3d 909 (D.C. Cir. 2012). Plaintiff cannot now attempt
10 to relitigate that issue in this forum. *See In re Diet Drugs*, 431
11 F.3d 141, 146 (3d Cir. 2005) ("Once a court has decided that due
12 process protections did occur for a particular class member or group
13 of class members, the issue may not be relitigated."). Plaintiff had
14 ample opportunity to oppose the *Cobell* court's conclusion by appealing
15 the decision to the D.C. Circuit, but he chose not to pursue such an
16 appeal.⁷

17 Plaintiff argues that this is not an impermissible collateral
18 attack on the *Cobell* settlement because he does not challenge the
19 sufficiency of notice for the class as a whole but instead disputes
20 only the sufficiency of the notice afforded to him personally. In
21 support of this argument, Plaintiff cites a number of cases that
22 allegedly establish an individual right to dispute the fairness of
23

24 ⁷ In fact, Plaintiff did appeal the *Cobell* settlement in the proper forum,
25 but voluntarily dismissed his appeal to pursue the present case. Pl.'s
26 Resp. in Opp'n., at 12-13 n.7, ECF No. 161.

1 notice in class action suits after a court has already determined that
2 notice was fair for the class as a whole. *See, e.g., Friedman v. Cal.*
3 *State Emp. Ass'n*, 2010 WL 2880148, at *6 n.4 (E.D. Cal. July 21,
4 2010); *DeJulius v. New England Health Care Emp. Pension Fund*, 429 F.3d
5 935, 947 n.14 (10th Cir. 2005); *Torrissi v. Tucson Elec. Power Co.*, 8
6 F.3d 1370, 1375 (9th Cir. 1993). The strongest case in support of
7 this claim is *Torrissi*, which states that an individual who "claims he
8 did not receive adequate notice and therefore should not be bound by
9 the settlement," can "litigate that issue on an individual basis when
10 the settlement is raised as a bar to a lawsuit he has brought." 8
11 F.3d at 1375.

12 But *Torrissi* does not apply here, for two reasons. First, the
13 cited language is pure dictum. *See id.* (noting that "the question
14 before us today is not whether some individual [class members] got
15 adequate notice"). Plaintiff does not cite any case that permitted an
16 individual class member to avoid the preclusive effect of a binding
17 settlement in which notice provided to the class as a whole was
18 determined to comport with due process. On the other hand, Defendants
19 cite a recent Ninth Circuit decision that holds that an individual
20 class member's failure-to-receive-notice challenge to a class action
21 settlement from another jurisdiction was an impermissible collateral
22 attack. *Skilstaf, Inc. v. CVS Corp.*, 669 F.3d 1005, 1024 (9th Cir.
23 2012). *Skilstaf* controls here.

24 Second, Plaintiff *had* an opportunity to "litigate [his] issue on
25 an individual basis", *Torrissi*, 8 F.3d at 1375, in the D.C. Circuit but
26 chose not to do so. Plaintiff could have followed through with his

1 appeal in the D.C. Circuit, or he could have sought relief directly
2 from the district court under Rule 60. Notably, Plaintiff filed an
3 appeal in the D.C. Circuit, but voluntarily dismissed it because "it
4 became clear that the relief he was seeking was not available in that
5 forum." Pl.'s Resp. in Opp'n, ECF No. 161, at 12-13 n.7. Plaintiff
6 states that he chose not to fully pursue an appeal or a Rule 60(b)
7 motion because, as he was not challenging notice for the class as a
8 whole, an appeal would have been futile. *Id.* at 12. But, notably,
9 the district court in *Cobell* also made a determination that all absent
10 class members who had not yet objected and been excluded from the
11 class had "released, waived, and forever discharged" any claims that
12 could have been asserted as a part of the *Cobell* litigation. Order
13 Granting Final Approval to Settlement, ECF No. 3850, at 8. This is
14 the **exact** determination that Plaintiff is attempting to avoid in this
15 case; but instead of appealing the final approval order or seeking
16 Rule 60(b) relief, Plaintiff asks this Court to uphold his collateral
17 attack on the *Cobell* court's conclusion. The Court declines to do so.
18 Plaintiff abandoned his efforts to seek relief in the appropriate
19 district and appellate courts; accordingly, he remains a member of the
20 *Cobell* settlement, and his accounting claim is barred.

21 2. Summary Judgment Pursuant to Rule 56

22 Even if Plaintiff's accounting claim is more properly addressed
23 through summary judgment and not by way of a motion to dismiss,
24 summary judgment for Defendants is warranted. Plaintiff asks the
25 Court to deny or defer summary judgment under Rule 56(d), which
26 requires such relief in cases where a nonmovant shows that it cannot

1 present facts necessary to oppose the motion. Fed. R. Civ. P. 56(d).
2 Specifically, Plaintiff alleges that summary judgment is improper
3 because he has not had sufficient opportunity to discover whether the
4 notice required by the *Cobell* settlement was actually provided to him.
5 However, Defendants are entitled to summary judgment because, as
6 discussed above, actual notice is not required to enforce a
7 settlement's preclusive effects.

8 For a nonmovant to prevail under Rule 56(d), the Ninth Circuit
9 requires that party "make (a) a timely application which (b)
10 sufficiently identifies (c) relevant information, (d) where there is
11 some basis for believing that the information sought actually exists."
12 *Emplrs. Teamsters Local Nos. 175 & 505 v. Clorox*, 353 F.3d 1125, 1129
13 (9th Cir. 2004) (quotation omitted). Generally, if a summary judgment
14 motion is filed "before a party has had any realistic opportunity to
15 pursue discovery relating to its theory of the case, district courts
16 should grant any Rule 56[(d)] motion fairly freely." *Burlington N.*
17 *Santa Fe R.R. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 773 (9th
18 Cir. 2003). However, a court "does not abuse its discretion by
19 denying further discovery if . . . the movant fails to show how the
20 information sought would preclude summary judgment." *Cal. Union Ins.*
21 *v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990)
22 (citations omitted).

23 Denial of Plaintiff's 56(d) request is appropriate because the
24 information that Plaintiff seeks would not preclude summary judgment.
25 Plaintiff seeks to discover information that would allow him to
26 determine whether notice was properly executed as to him. However,

1 his request is moot for three reasons. First, as stated above, such
2 discovery could only lead to an impermissible collateral attack on the
3 D.C. Circuit's finding in *Cobell* that "[t]he best notice practicable
4 has been provided to class members, including individual notice where
5 members could be identified through reasonable effort." Order
6 Granting Final Approval to Settlement, ECF No. 3850, at 6.
7 Plaintiff's disagreement with this conclusion should have been taken
8 up as a part of the *Cobell* litigation. Second, even if the collateral
9 attack is permitted, the information that Plaintiff seeks does not
10 require discovery. The Kinsella declaration includes the process for
11 the notice program that was approved in *Cobell*. Decl. of Katherine
12 Kinsella, ECF No. 154-1. In addition, there were two relevant
13 declarations of Jennifer Keogh in the *Cobell* litigation that Plaintiff
14 had access to. The first was a declaration outlining the general
15 notice process for the settlement agreement. *Cobell*, Decl. of
16 Jennifer Keogh, May 16, 2011, ECF No. 3762-4. The second, which was
17 filed in response to **Plaintiff's** *Cobell* appeal, outlines the notice
18 process that was executed in regards to Plaintiff specifically. *Id.*,
19 Decl. of Jennifer Keogh, October 3, 2011, ECF No. 3869-1. The
20 information that Plaintiff seeks has therefore been available for
21 months; he has proffered no explanation of why additional discovery is
22 necessary. Third, even if Plaintiff was allowed to conduct additional
23 discovery, the adequacy of the personal notice executed in regards to
24 Plaintiff is not a material fact that would preclude summary judgment.
25 Even if Plaintiff's assertions regarding his lack of actual notice are
26 taken as true, due process does not require that class members

1 actually receive notice. *See Juris v. Inamed Corp.*, 685 F.3d 1294,
2 1320-1322 (11th Cir. 2012), *cert. denied*, 135 S.Ct. 940 (2013) (actual
3 notice not required for absent class member). The Ninth Circuit only
4 requires that absent class members receive the "best practicable"
5 notice, not "actual notice." *Silber*, 18 F.3d at 1453-54. Thus, the
6 only material fact is whether the best practicable notice was provided
7 for class members, and the District Court found that the *Cobell* notice
8 program was the "best practicable." Therefore, Plaintiff could not
9 discover any facts which would change his status within the *Cobell*
10 settlement. Thus, additional discovery pursuant to Rule 56(d) is not
11 warranted, and Defendants are entitled to summary judgment on
12 Plaintiff's accounting claim.

13 **V. CONCLUSION**

14 Plaintiff's generalized APA claim is insufficiently pled and
15 fails to demonstrate a valid waiver of sovereign immunity.
16 Plaintiff's accounting for profits claim is precluded by the *Cobell*
17 settlement. Accordingly, each of these claims is dismissed. Even if
18 summary judgment were the appropriate procedural device for granting
19 such a dismissal, Plaintiff has failed "to show how the information
20 sought would preclude summary judgment." *Cal. Union Ins.*, 914 F.2d at
21 1278 (9th Cir. 1990). Thus, Plaintiff's request to defer summary
22 judgment pursuant to Rule 56(d) is denied.

23 In opposing the instant motion, Plaintiff does not request
24 further leave to amend his complaint; accordingly, the Court dismisses
25 the Amended Complaint with prejudice and directs entry of judgment.

26 //

For the foregoing reasons, **IT IS HEREBY ORDERED:**

1. Defendants' Motion to Dismiss, **ECF No. 154**, is **GRANTED**.

2. The Amended Complaint, **ECF No. 153**, is **DISMISSED WITH PREJUDICE**.

3. All pending motions, deadlines, and hearings are **STRICKEN**.

4. The Clerk's Office is directed to **ENTER JUDGMENT** in favor of Defendants and to **CLOSE** this file.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 5th day of August 2013.

s/Edward F. Shea

EDWARD F. SHEA

Senior United States District Judge