UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CASIMIR L. LEBEAU, CLARENCE MORTENSON, RAYMOND CHARLES HANDBOY, SR., and FREDDIE LEBEAU on behalf of themselves and all other persons similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA Defendant.	Civ. 12-4178-KES

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant, the United States, by and through counsel, Department of Justice Attorney Stephen Finn, respectfully requests that this Court dismiss Plaintiffs' Complaint that seeks declaratory and injunctive relief. The Complaint must be dismissed on several grounds. First, this Court lacks jurisdiction because Plaintiffs have failed to identify an applicable waiver of the United States' sovereign immunity from suit. Second, Plaintiffs lack standing under Article III. Third, Plaintiffs fail to state a claim upon which the requested relief can be granted. In short, there is no "case or controversy" properly pending before this Court, and this Court should dismiss Plaintiffs' Complaint.

FACTUAL BACKGROUND

The United States Army Corps of Engineers constructed the Oahe Dam and Reservoir from the 1940s to 1962. *See* Compl. ¶¶ 1-2 (ECF No.1); S. Rep. No. 109-343, at 1 (2006). To build the dam and reservoir, the federal government acquired 104,492 acres of land from the Cheyenne River Sioux Tribe ("Tribe") and individual landowners of the Tribe. *See* Compl. ¶¶ 2, 4; Cheyenne River Sioux Tribe Equitable Compensation Act of 2000 ("Act"), Pub. L. No. 106-511, § 102(a)(3), 114 Stat. 2365. In 1954, Congress provided compensation to the Tribe and individual landowners for acquisition of that land. *See* Compl. ¶¶ 4, 19; Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191. Individual landowners additionally had the right to reject the appraised value of the land offered in compensation and require the Army Corps of Engineers to file condemnation proceedings in federal district court to determine the value of the land.[1/] Act of Sept. 3, 1954, Pub. L. No. 83-776, §

[1/] Plaintiffs assert that they bring the Complaint "based upon an unlawful taking without just compensation . . ." Compl. at 1. However, Plaintiffs do not set forth a count in the Complaint for a takings claim for compensation under the Fifth Amendment of the United States Constitution. Indeed, pursuant to Section XV of the Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. at 1194, individual landowners were provided the right to reject appraisal amounts offered in settlement forcing the United States Army Corps of Engineers to file condemnation proceedings in federal district court where the court could determine the value of the lands and improvements. This right was not extended to the Tribe. *Id.* To the extent Plaintiffs availed themselves of condemnation proceedings under the Act of Sept. 3, 1954, a claim under the present Complaint would be barred under the doctrines of collateral estoppel and res judicata. Further, Plaintiffs' Complaint lacks reference to any waiver of

XV, 68 Stat. at 1194.

Recognizing the inadequacy of the prior compensation to the Tribe, in 2000 Congress passed, and the President signed into law, the Cheyenne River Sioux Equitable Compensation Act, Pub. L. No. 106-511, 114 Stat. 2365. *See* Compl. ¶ 4. The purposes of the Act were: to "provide for additional financial compensation to the Tribe for the acquisition" of 104,492 acres of land for the Oahe Dam and Reservoir project and to provide for the establishment of the Cheyenne River Sioux Tribal Recovery Trust Fund ("Trust Fund") "to make payments to the Tribe to carry out projects under a plan prepared by the Tribe." Act § 102(b)(2), 114 Stat. at 2366; *see* Compl. ¶¶ 4, 5; U.S. Gov't Accountability Office, GAO/RCED-98-39, Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam.

The Act required the Department of Treasury to create a Trust Fund and deposit $290,722,958 into it. *See* Compl. ¶¶ 4, 20; Act § 104(a)-(b), 114 Stat. at 2366-67. The Act further provided that beginning in 2011 the Secretary of

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the statute of limitation to the individual member's takings claims. *Henderson v. United States*, 517 U.S. 654, 677 (1996) ("[W]e have long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the district court's jurisdiction . . .") Any right to appeal the district court's determinations on condemnation proceedings brought under the Act of Sept. 3, 1954, or for a takings claim has long since run. *See* 28 U.S.C. § 2501 (civil actions against the United States barred unless the complaint is filed within six years after the right of action first accrues); *Nichols v. Rysavy*, 809 F.2d 1317(8th Cir. 1987); 28 U.S.C. § 2409a (12-year statute of limitations under the Federal Quiet Title Act).

the Treasury would withdraw and transfer to the Secretary of the Interior the annual interest from the Trust Fund to make payments to the Tribe pursuant to tribal resolutions. *See* Compl. ¶¶ 6, 24-25; Act § 104(d)(1)-(2), 114 Stat. at 2367. However, the Act required the Tribe to prepare a plan to use the payments for the purposes enumerated in the statute, i.e., promote economic and infrastructure development, and the education, health, recreation, and social welfare objectives of the Tribe and its members. *See* Compl. ¶ 24; Act § 104(f)(2), 114 Stat. at 2367. The Act required the Tribe to consult with the Secretary of the Interior in preparing and revising the plan. Act § 104(f)(3)(C), 114 Stat. at 2367. The Act specifically prohibited "per capita" payments "to *any* member of the Tribe." Act § 104(g), 114 Stat. at 2368 (emphasis added); Compl. ¶ 25.

Several years later, Congress considered amending the Act to allow the Tribe to compensate individual landowners from the Trust Fund. S. Rep. No. 109-343, at 2-3 (2006); H.R. Rep. No. 110-128 (2007); Compl. ¶ 28. On December 7, 2006, the Senate passed Senate Bill 1535, 109th Cong., amending the Act to include providing compensation to individual landowners; however, it was held at the desk and not signed by the President. In the same Congress, House Bill 3558 was referred to subcommittee where hearings were held but no further action taken. In the 110th Congress, House Bill 487 was passed on May 7, 2007, where it was read twice and referred to committee. To

this date, the Act has not been amended.

On March 13, 2011, the Tribe finalized its plan for the distribution of interest from the Trust Fund and, subsequently, the Secretary of the Interior distributed the interest for fiscal year 2011. Compl. ¶¶ 6, 25.

OVERVIEW OF APPLICABLE LAW

I. Lack Of Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) allows for dismissal of a complaint where the court lacks subject matter jurisdiction. A threshold issue in every federal court case is whether the court maintains jurisdiction over the action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). The party seeking to invoke federal jurisdiction holds the burden to prove by a preponderance of the evidence that jurisdiction exists. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

A "facial attack" on a claim restricts the court to a review of the pleadings to determine whether the plaintiff has alleged a basis of subject matter jurisdiction. *Brooks v. Wiesz*, 572 F. Supp. 2d 1134, 1136 (D.N.D. 2008) (citation omitted). Facial attacks are subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Mattes v. ABC Plastics, Inc.,* 323 F.3d 695, 698 (8th Cir. 2003).

A. Sovereign Immunity

When the Federal Government is named as a defendant, the United States' consent to suit is a prerequisite of federal court jurisdiction. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983).

> [T]he United States, as a sovereign, cannot be sued without its consent. The consent must be expressed unequivocally and cannot be implied. The waiver of sovereign immunity requires consent as to the particular tribunal that is to exercise that jurisdiction. Moreover, a substantive basis must exist for the government's liability. Courts are not free to extend or restrict waivers of sovereign immunity beyond what Congress intended. The terms of the congressional waiver establish the parameters of the court's subject matter jurisdiction.

Manypenny v. United States, 948 F.2d 1057, 1063 (8th Cir. 1991) (citations omitted); *see also United States v. Nordic Vill., Inc.,* 503 U.S. 30, 33-34 (1992). The plaintiff always has the threshold burden of establishing the court's jurisdiction. *V S Ltd. P'ship,* 235 F.3d at 1112. Thus, a failure to identify a waiver of sovereign immunity warrants dismissal for lack of jurisdiction pursuant to Rule 12(b)(1). *See Brown v. United States*, 151 F.3d 800, 803-04 (8th Cir. 1998).

Under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2011), the federal government "consents to judicial review of agency action where such action results in a legal wrong or adversely affects the plaintiff 'within the meaning of a relevant statute.'" *Preferred Risk Mut. Ins.*

Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996)(footnote omitted); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.") "[T]his waiver contains two separate requirements: 1) the person claiming a right to review must identify some agency action, and 2) the party seeking review must show that he has suffered a legal wrong or been adversely affected by that action within the meaning of a relevant statute." *Preferred Risk Mut. Ins.*, 86 F.3d at 792 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990)). The APA merely provides the procedural framework for review of agency action but no substantive requirements. *Preferred Risk Mut. Ins.*, 86 F.3d at 792 (citing *Defenders of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1303 (8th Cir. 1989)).

The Court has no power to award compensatory monetary relief under the APA because the waiver of sovereign immunity in Section 702 applies only for "relief other than money damages . . ." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-63 (1999) (emphasis omitted)(equitable lien sought against the Federal Government under the APA, constitutes a claim for money damages as "its goal is to seize or attach money in the hands of the Government as compensation for" loss). Further, a district court may only review agency action if the action has been made reviewable by statute or if it is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

When reviewing agency action under 5 U.S.C. §706(2)(A), a court may only "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

B. Standing.

Standing is a constitutional requirement imposed pursuant to the "cases or controversies" provision of Article III. *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1378 (8th Cir. 1997). The requirement serves to identify those disputes that are appropriately resolved through the judicial process. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). No principle is more fundamental to the judiciary's proper role than the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). If the action does not satisfy the case-or-controversy requirement, a court does not have jurisdiction to proceed on the claims alleged, and they must be dismissed pursuant to Rule

12(b)(1). *See Starr v. Mandanici*, 152 F.3d 741, 747 (8th Cir. 1998).

The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff seeking to invoke a federal court's jurisdiction must establish: (1) that it has suffered an "injury in fact–an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id*. at 560 (citations and quotation marks omitted); (2) that its injury is fairly traceable to the challenged action of the defendant and not the result of the "independent action of some third party not before the court," *id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); and (3) that it is "likely as opposed to merely speculative that the injury will be redressed by a favorable decision." *Id.*, 504 U.S. at 561 (citing *E. Ky. Welfare Rights Org.*, 426 U.S. at 38) (quotation marks omitted)). These three elements constitute an "irreducible minimum" required by Article III of the Constitution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

II. Failure to State a Claim

A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint to eliminate those actions "which are fatally flawed in their legal premises and de[s]igned to fail, thereby sparing litigants

the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles,* 244 F.3d 623, 627 (8th Cir. 2001) (quoting *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Further, "[a] complaint must contain factual allegations sufficient 'to raise a right relief above the speculative level[.]'" *Parkhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009)(quoting *Bell Atl.*, 550 U.S. at 555). Although a plaintiff need not provide "detailed" facts in support of his allegations, the "short and plain statement" required of Rule 8(a)(2) of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl.*, 550 U.S. at 555).

ARGUMENT

Plaintiffs' Complaint should be dismissed because this Court lacks jurisdiction and Plaintiff has failed to state a claim upon which relief may be granted. First, Plaintiffs have failed to identify an applicable waiver of sovereign immunity. Second, Plaintiffs lack standing to assert a claim under the Act because they have not suffered injury to a legally protected interest that is concrete and particularized. Finally, even assuming jurisdiction, Plaintiffs' Complaint should be dismissed for failure to state a claim because the premise

of the Complaint is fatally flawed.

I. Plaintiffs Have Not Identified an Applicable Waiver of Sovereign Immunity

A. Plaintiffs May Not Seek Compensation Under the APA

When the Federal Government is named as a defendant, the United States' consent to suit is a prerequisite of federal court jurisdiction. *See Mitchell*, 463 U.S. at 212. Any waiver of sovereign immunity must be clear and unequivocal, and strictly construed in favor of the sovereign. *See Nordic Vill.*, 503 U.S. at 33–34. Here, Plaintiffs rely on the Act and 28 U.S.C. § 1331 (federal question jurisdiction) as the basis for this Court's jurisdiction. *See* Compl. ¶ 14. Neither the Act nor 28 U.S.C. § 1331 constitute a waiver of sovereign immunity. *See Murray v. United States*, 686 F.2d 1320, 1325 (8th Cir. 1982) (Section 1331). This leaves only the APA, 5 U.S.C. §§ 701-706, as a basis for the court's jurisdiction. *See* Compl. ¶ 14. Plaintiffs have failed to show that their claims fall within the APA's limited waiver of sovereign immunity and their claims should be dismissed for lack of jurisdiction.

Plaintiffs seek relief not permitted under the APA, namely, additional compensation for their land. *See* Compl. ¶¶ 6, 7 ("Thus the Individual Landowners remain unfairly *compensated* to this day despite express Congressional recognition that the previous *compensation* for this taking was grossly inadequate . . . The Plaintiffs have brought this suit to obtain a declaration that the Individual Landowners and their heirs are entitled to

compensation for their land that was taken without just *compensation*, and an accounting to determine the amount of *compensation* owed to the Plaintiffs and the putative class.") (incorporated by reference in the Claims for Relief at ¶¶ 38, 43, and 50) (emphasis added). However, money damages, i.e., compensation, are not available under the APA. 5 U.S.C. § 702; *Blue Fox, Inc.*, 525 U.S.C. at 260-63.

In determining if a case seeks money damages under the APA, the court "must look beyond the form of the pleadings to the substance of the claim." *Suburban Mort. Assocs., Inc., v. U.S. Dep't of Hous. and Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007). Where the claim is at base for money, and relief is properly sought under the Tucker Act, 28 U.S.C. § 1491, the proper forum is the Court of Federal Claims, *Cathedral Square Partners Limited Partnership v. South Dakota Housing Development Authority*, 679 F. Supp. 2d 1034, 1041 (D.S.D. 2009) (citing *Suburban Mort. Assocs.,* 480 F.3d at 1126), or district court but only if the claim is for $10,000 or less under the Little Tucker Act, 28 U.S.C. § 1346(a). *Cathedral Square*, 679 F. Supp. 2d at 1039.

The APA limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Although, the APA may waive sovereign immunity for challenges to agency actions in district court, 5 U.S.C. § 702, Section 704 of the APA "excludes from the APA's sovereign immunity waiver those claims for

which adequate remedies are elsewhere available." *Consol. Edison Co. v. U.S. Dep't of Energy*, 247 F.3d 1378, 1383 (Fed.Cir.2001) (citing 5 U.S.C. § 704); *McBride Cotton and Cattle Corp. v. Veneman*, 116 Fed.Appx. 89, 90, 2004 WL 2403915, 1 (9th Cir. 2004); *Western Shoshone Nat. Council v. United States*, 357 F.Supp.2d 172 (D.D.C. 2004); *see also Transohio Sav. Bank v. Dir, OTS*, 967 F.598, 607 (D.C. Cir. 1992).[2/]

Section 704 thus makes clear that where agency action is otherwise reviewable in a court and an adequate remedy is available in conjunction with that review, the APA's waiver of sovereign immunity under Section 702 is not available. *See Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir.1994); *Mitchell v. United States*, 930 F.2d 893, 895-96 (Fed. Cir. 1991); *Consol. Edison Co.*, 247 F.3d at 1382-1385. The Tucker Act is an adequate remedy, and thus there is no waiver here under the APA.

"[T]he APA, by authorizing equitable relief but not money damages against the United States, does not waive the government's sovereign immunity from monetary relief that is 'compensation for the loss,' even if that monetary relief is 'equitable.'" *United States v. Hall*, 269 F.3d 940, 942-43 (8th Cir. 2001)

[2/] *See Attorney General's Manual on the Administrative Procedure Act* § 10(c), p. 101 and n. 15 (1947) ("This act does not apply to [the Court of Claims and similar courts] procedure nor affect the requirement of resort thereto" *Id.* at n. 5). Plaintiffs cannot meet their burden of establishing the waiver of sovereign immunity. *Brazos Elec. Power Co., Inc v. United States*, 52 Fed. Cl. 121, 133 (2002); *see Consol. Edison Co.*, 247 F.3d at 1382.

(quoting and discussing *Blue Fox*, 525 U.S. at 263). "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting for the defendant's breach of legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)).

Plaintiffs characterize the Complaint as one for declaratory and injunctive relief. But Plaintiffs cannot circumvent the APA's limitation on the waiver of sovereign immunity to claims for "relief other than money damages . . ." 5 U.S.C. § 702. The Complaint categorically seeks additional "compensation" for takings that occurred many years ago and for which Congress previously provided them not only compensation but an opportunity for district court review–a procedural opportunity that was not afforded to the Tribe. *See supra* note 1; Compl. ¶¶ 5-10, 20, 25, 34, 39, 42, 49; *Enos v. United States*, 672 F. Supp. 1391, 1394 (D. Wyo. 1987)(finding plaintiffs complaint sought money damages although styled as an action for mandamus). Compensation that substitutes for a suffered loss are damages "where as specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Cobell v. Babbitt*, 30

F.Supp.2d 24, 41 (D.D.C. 1998) (citing Dan B. Dobbs, *Handbook on the Law of Remedies* 135 (1973)).

This case is controlled by *Blue Fox*. In *Blue Fox*, the Supreme Court refused to allow a subcontractor to seek an equitable lien against the United States. The Supreme Court found that the subcontractor's claim was "a claim for money damages" because the goal of the claim was to seize "money in the hands of the Government as compensation." *Blue Fox,* 525 U.S. at 263 (internal quotations omitted). Here, like *Blue Fox*, Plaintiffs' goal is to obtain compensation from funds in the hands of the United States for the loss resulting from the land acquisition. Plaintiffs' attempt to recast this as a trust mismanagement claim is meritless. Ultimately, Plaintiffs' Complaint seeks a second round of compensation. Unfortunately for Plaintiffs, the waiver of sovereign immunity under the APA is limited and does not include claims that seek money damages. Therefore, under Section 702, this court has no jurisdiction to consider such a claim and Plaintiffs' Complaint should be dismissed.

B. Assuming Arguendo A Valid APA Claim, Plaintiffs Have Failed to Exhaust Administrative Remedies

Plaintiffs assert claims based on their dissatisfaction with the Secretary of the Interior for distributing interest on the Trust Funds only to the Tribe. The doctrine of exhaustion of administrative remedies, however, prevents a party from seeking judicial review of agency action prior to having fully

pursued all administrative remedies. Here, Plaintiffs have, in fact, ignored available administrative means of resolving their claims. Therefore, even if a viable APA claim existed, the doctrine of exhaustion of administrative remedies would bar consideration of any APA claim.

"Under the doctrine of exhaustion of administrative remedies, 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)) (additional citation omitted). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required." *Id.* (citing *White Mountain Apache Tribe v. Hodel*, 840 F. 2d 675, 677 (9th Cir. 1988)). "Without an exhaustion requirement, people would be encouraged to ignore the administrative dispute resolution structure, destroying its utility." *Fort Berthold Land and Livestock Ass'n v. Anderson*, 361 F. Supp. 2d 1045, 1051 (D.N.D. 2005) (citing *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984)).

As the Tenth Circuit explained in *Franks v. Nimmo*:

> The purposes of the doctrine of exhaustion of administrative remedies include avoidance of premature interruption of administrative process, allowing the agency to develop the necessary factual background on which to decide the case, giving the agency a chance to apply its expertise or discretion and possibility of avoiding the need for the court to intervene.

683 F.2d 1290, 1294 (10th Cir. 1982) (citing *McKart*, 395 U.S. 185).

In addition, in *Runs After v. United States*, the Eighth Circuit explained:

> [T]he [Bureau of Indian Affairs] has special expertise and extensive experience in dealing with Indian affairs. The interest of the [Bureau of Indian Affairs] and its parent Department of [the] Interior in administrative autonomy also supports requiring exhaustion of administrative remedies. Moreover . . . the somewhat anomalous and complex relationship between the quasi-sovereign Indian tribes and the federal government also supports, in general, requiring [plaintiffs] to initially seek an administrative solution through the [Bureau of Indian Affairs] and the Department of [the] Interior.

766 F.2d 347, 352 (8th Cir. 1985).

Exhaustion is mandated here by the Department of the Interior's regulations at 25 C.F.R. Part 2. The exhaustion requirement applies to challenges to alleged inaction by the Department of the Interior or Bureau of Indian Affairs. In *Coosewoon v. Meridian Oil Co.*, the Tenth Circuit explained that "[c]onsistent with the exhaustion requirement, the Secretary has instituted an administrative procedure by which a party may challenge the Secretary's inaction concerning a particular issue." 25 F.3d 920, 925 (10th Cir. 1994) (finding that the district court properly dismissed the plaintiff's claim for failure to exhaust). *See also Davis v. United States*, 199 F. Supp. 2d 1164, 1179 (W.D. Okla. 2002) (dismissing Plaintiff's claims because they failed to exhaust administrative procedures pursuant to 25 C.F.R. Part 2 and stating that, "even in the absence of requested action of a [Bureau of Indian Affairs] official, [Bureau of Indian Affairs] regulations still require a plaintiff to exhaust its

specified administrative procedures before requesting judicial review").

Section 2.8 sets forth the proper procedure for challenging agency inaction, providing that:

> (a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:
>
> > (1) Request in writing that the official take the action originally asked of him/her;
> >
> > (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;
> >
> > (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, *an appeal shall be filed in accordance with this part*.

(Emphasis added).

Plaintiffs' claims are founded on DOI and BIA's purported failure to distribute Trust Funds to them and to account for the Trust Funds. Compl. ¶¶ 6-7, 33-34, 39-42, 44-49, 51-54. The Department of the Interior has adopted, by rule, a specific procedure for addressing such claims, and therefore, Plaintiffs cannot seek judicial review of their claims if they have not exhausted those procedures as mandated by *Coosewoon* and 25 C.F.R. Part 2 prior to raising their related claims in this Court.

Plaintiffs have failed to appeal their claims administratively, and the APA

therefore prevents this Court from reviewing Plaintiffs' claims. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, a suit filed before exhausting available administrative remedies is premature and should be dismissed); *Butler v. Kempthorne*, 532 F.3d 1108, 1110-1111 (10th Cir. 2008) (upholding dismissal based on failure to exhaust administrative remedies for lack of subject matter jurisdiction); *Silverton Snowmobile Club v. United States Forest Serv.*, 433 F.3d 772, 787 (10th Cir. 2006) (same); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) ("On three occasions, we have upheld the dismissal of lawsuits challenging BIA decisions under the [APA] on the ground that the plaintiff failed to take the required administrative appeal. In doing so, we have noted the jurisdictional nature of the administrative appeal requirement.") (citations omitted); *Davis*, 199 F. Supp. 2d at 1179 ("[E]xhaustion of the appeal procedures is a jurisdictional prerequisite to judicial review.")[3/]

II. Plaintiffs Have Not Demonstrated Standing Under Article III

Plaintiffs have also failed to demonstrate they have Article III standing as a necessary predicate to court jurisdiction over this case The question of standing involves both Constitutional limitations on a federal court's jurisdiction and prudential limitations on its exercise. *See Warth v. Seldin*, 422

[3/] *But see Coosewoon*, 25 F.3d at 924-25 (upholding dismissal pursuant to Fed. R. Civ. P. 12(b)(6). To the extent that the Court finds that exhaustion is mandatory but not jurisdictional, Federal Defendants also move to dismiss Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(6).

U.S. 490, 498 (1975). Article III of the Constitution confines the jurisdiction of the federal courts to actual "cases" or "controversies." This requirement serves to identify those disputes that are appropriately resolved through the judicial process. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

In *Defenders of Wildlife*, the Supreme Court stated that the elements of standing are "not mere pleading requirements but rather an indispensable part of [plaintiffs'] case." 504 U.S. at 561. Plaintiffs therefore must prove the three constitutional requirements of:

> (1) an "injury in fact" that is both (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's conduct; that is, that the injury is "fairly traceable" to the challenged action; and (3) that it is likely that a favorable decision will redress the injury.

Ben Oehrleins, 115 F.3d at 1378 (citations omitted). Plaintiffs have failed to meet the elements of standing.

First, the Trust fund was create by legislation that specifically defined that the money was to be distributed to the Tribe and not to individuals. The individuals have no injury in fact, because Congress created no entitlement in them and the money was distributed exactly as Congress provided. *Hoopa Valley Tribe v. United State*, 597 F.3d 1278, 1283 -1284 (Fed. Cir. 2010)(The "Hoopa Valley received all of the money to which it was entitled under the Act. As such, at the time DOI distributed the remainder to the Yurok Tribe, the

Hoopa Valley Tribe was not a beneficiary of, and had no legally protected interest in, the Settlement Fund.")

Second, the Plaintiffs do not have an injury in fact because the funds are held in trust for the benefit of the Tribe, not Plaintiffs.[4/] Compl. ¶ 6, 28, 33. Plaintiffs have failed to show they have a legally protected interest in the compensation fund. Tribal property interests are secured to the Tribe itself, rather than to individual Indians. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979). "[A]n individual Indian's rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common." *Short v. United States,* 12 Cl. Ct. 36, 42 (1987) (citing *United States v. Jim*, 409 U.S. 80, 82–83 (1972)) (additional citations omitted). Thus, it has long been "established that a tribe has full authority to use and dispose of tribal property and that no individual Indian has an enforceable right in the property." *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51, 59 (W.D.N.Y. 1972) (citations omitted); *see Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966).

[4/] Plaintiffs base their Complaint on the belief that some of the trust fund monies implicitly belong to them. See Compl. ¶¶ 6, 21-22, 25, 33, 39-40, 44-47, 52. But such an assumption is nothing more than speculative and hypothetical. Speculation cannot be used to establish an injury under Article III. *See Defenders of Wildlife*, 504 U.S. at 560-61.

It is well settled that tribal members lack standing to sue as to tribal assets. *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994). Indeed, the United States Court of Appeals for the Federal Circuit has held that in certain situations individual Indians hold no vested property right in Indian Claims Commission-awarded Tribal funds even *after* Congress has passed a statute calling for per capita distribution. *See LeBeau v. United States*, 474 F.3d 1334, 1342-43 (Fed. Cir. 2007). Absent some Congressional "individualization" of the money here, Plaintiffs lack any vested interest in the trust funds and have no legally protected interest, i.e., no injury in fact, that would confer standing. Plaintiffs cannot claim a vested interest in any of the funds they seek. The funds are held in trust for the benefit of the Tribe, not Plaintiffs. Compl. ¶ 6, 28, 33.

Furthermore, absent a vested interest in the funds, Plaintiffs' Complaint amounts to an abstract request that the funds be redistributed contrary to the Act. But the injury-in-fact test for standing requires more than an injury to a general interest. Instead, "a party seeking review must [also] allege facts showing that he is himself adversely affected." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977). Plaintiffs' status as individual landowners is insufficient for purposes of Article III standing. Plaintiffs have not shown how they are adversely and directly affected by Defendant's disbursement of interest

on the Trust Funds. *See Defenders of Wildlife*, 504 U.S. at 563 (citing *Morton*, 405 U.S. at 739). Because Plaintiffs do not themselves currently hold a legal interest in the trust fund monies, they cannot show a personal stake in the Secretary's act of distributing the interest of the trust funds in 2011 to the Tribe, and they have no injury that could confer standing. *See Hoopa Valley Tribe,* at 597 F.3d at 1283-84.

Plaintiffs' claims require an assumption that they are entitled to distribution of the funds. But such an assumption is nothing more than speculative and hypothetical. Speculation cannot be used to establish an injury under Article III. *See Defenders of Wildlife*, 504 U.S. at 560-61. Plaintiffs' claimed injury also ignores the beneficial interest the Tribe holds in the funds. The Tribe's property interests are secured to the Tribe itself. *See Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 679; *Omaha Indian Tribe*, 442 U.S. at 665.

III. Plaintiffs Have Failed To State A Claim Under The Act Because The Terms Of The Act Creates A Tribal Fund With The Tribe As The Sole Beneficiary

Plaintiffs' Complaint must be dismissed because they have not stated a claim under the Act. Plaintiffs' claim exceeds the prudential limits of standing. The purpose of the Act was to provide compensation to the Tribe that would provide the Tribe with funds for tribal benefit but that would also extinguish any monetary claims against the United States for the takings that were a result

of the Oahe Dam and Reservoir Project. Act §§ 102(b), 107, 114 Stat. at 2366, 2368. Plaintiffs' interest, seeking a disbursement not authorized under the Act, is not related to the Act's purposes and it cannot be reasonably assumed that Congress intended to permit the individual landowners a cause of action when the Act expressly precludes them from receiving a distribution from the Trust Funds. *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399 (1987)(notwithstanding presumption of judicial review of agency action, "presumption is 'overcome whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.'")(quoting *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984)). Indeed, Plaintiffs concede that their cause of action is entirely at odds with the text of the Act:

> The trust fund expressly intended to provide just compensation for the total 104,420 acres of land taken for the construction of the Oahe Dam, which included the 46,275 acres of land owned by the Individual Landowners. Yet, the legislation creating the trust fund, the Cheyenne River Sioux Equitable Compensation Act ("the 'Act'"), Pub. L. No. 106-511, 114 Stat. 2365, *failed to expressly address the issue of compensation for Individual Landowners* . . . .

Compl. ¶ 5 (emphasis added). "[W]hen Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were 'problematic,' the remedy provided is generally regarded as exclusive." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (citations omitted). Here, Plaintiffs' claims fall outside of the remedy provided by Congress and their claims must be

dismissed.

Plaintiffs have also failed to allege facts that are sufficient to raise a right to relief. Plaintiffs' Complaint alleges that the Secretary should have distributed funds in 2011 to the individual members. Compl. ¶¶ 6, 25, 33. The Secretary's responsibility under the Act included to consult with the Tribe in preparation of the plan. Act § 104(f)(3)(C), 114 Stat. at 2367-68. As the Secretary informed Plaintiffs in 2011, the Act required the Tribe to consult with the Secretary in development of the plan but the Act did not require the Secretary to approve it. Letter from Alice A. Harwood, Acting Regional Director, Great Plains Regional Office, Bureau of Indian Affairs, United States Department of the Interior, to The Honorable Kevin Keckler, Chairman, Cheyenne River Sioux Tribe, dated October 27, 2011 at 1 (attached as Exhibit 1) ("The Act does not require the plan to be approved by the Department of the Interior, only that the Secretary be consulted in its development . . . I would not disapprove the Plan or any of its components, but rather communicate to the Tribe and the Office of Special Trustee any proposed plan components that appear to be clearly outside the permissible purposes of the Act, which may delay distribution.")

Section 104(d)(2) of the Act then provides that the Secretary of the Interior will use the interest payments from the trust fund to make payments to the Tribe eleven fiscal years after enactment of the Act. Act § 104(d)(2), 114 Stat. at 2367. In making interest payments and not carving out specific payments to

Plaintiffs, the Secretary is acting wholly consistent with the requirements. To make payments to the Tribe, Section 104(d)(2) of the Act requires that the Tribe make a request by tribal resolution, provided the plan for use of the payments is already in place. Act § 104(d)(2), 114 Stat. 2365, 2367. Indeed, if the Secretary had paid Plaintiffs from the funds, it would be a clear violation of the Act because the Secretary must pay the interest to the Tribe and is specifically barred from making per capita payments.[5/] Act § 104(d)(2) & (g), 114 Stat. at 2367-68 ("No portion of any payment made under this title may be distributed to any member of the Tribe on a per capita basis.") The Act specifically defines the "Tribe" as the recipient of the funds and has no requirement or authorization for payment to individual members or any other entity or person. Act §§ 103, 104(d), 114 Stat. at 2366-67.

Moreover, the legal premise of Plaintiffs' Complaint, that the statute requires they be paid, is entirely flawed. A plain reading of the statute demonstrates that interpretation to be erroneous. The Secretary's interpretation of the Act is correct and is subject to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). *See* Exhibit 1; *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). In the end, Plaintiffs' Complaint is "the-defendant-unlawfully-harmed-me," and it should be dismissed. *Iqbal*, 556 U.S.

[5/] Regulations define "per capita" payments as "that aspect of a plan which pertains to the individualization of the judgments funds in the form of shares to tribal members or to individual descendants." 25 C.F.R. § 87.1(1).

at 678 (citation omitted).

IV. Plaintiffs Have Failed To State An Actionable Claim For Trust Mismanagement

The United States' fiduciary and trust obligations to Indians must be grounded in relevant statutes and regulations.

> Although "the undisputed existence of a general trust relationship between the United States and the Indian people" can "reinforc[e]" the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient to support jurisdiction . . . Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.

United States v. Navajo Nation, 537 U.S. 488, 506 (2003)(quoting *United States v. Mitchell*, 463 U.S. at 225).

> [T]he applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell*, 463 U.S. at 224. When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." [*United States v. Navajo Nation*, 556 U.S. 287, 302 (2009)]. *The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.*

United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2325 (2011) (emphasis added). Further, the Department of the Interior's interpretation of its statutory trust obligations is entitled to deference. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (deferring to a permissible interpretation of a statute

espoused by the agency entrusted with its implementation); *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009) (Interior's interpretation of Indian statutes entitled to "muted deference").

Plaintiffs assert that their claim "arises under the United States' fiduciary and trust obligations owed to the Individual Landowners" as established by the Act, Pub. L. No. 106-511, 114 Stat. at 2365. Compl. ¶ 14. However, the Act does not create any trust responsibilities between Plaintiffs and the United States. Indeed, Plaintiffs fail to articulate specific responsibilities in the Act that create trust and fiduciary duties.

The Act established and funded the Trust Fund. *See* Act § 104(a), (b); 114 Stat. at 2366-67. The Act required the Secretaries of the Treasury and Interior to invest the monies in the Trust Fund and make payments of interest to the Tribe provided the Tribe prepared a plan, in consultation with the Secretaries of the Interior and Health and Human Services. *Id.* § 104(d)-(f), 114 Stat. at 2367. In the Act, Congress did not expressly create any obligations or duties owed by Defendant to Plaintiffs.

Plaintiffs cite Congress' findings under the Act to support their contention that they are due compensation under the Act.[6/] Compl. ¶ 21. However, in the

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[6/] Although the Findings and Purposes Section of the Act makes several references to the tribal members in the historical recap under Sections 102(a)(2)(C), the remainder of the Findings and Purposes refers strictly and only to the Tribe. Act § 102(a)(3)(A) & (B), (5), (6), (b)(1) & (2), 114 Stat. at 2365-66.

Act Congress defined the "Tribe" as the "Cheyenne River Sioux Tribe, which is comprised of the Itazipco, Siha Sapa, Minniconjou, and Oohenumpa bands of the Great Sioux Nation that reside on the Cheyenne River Reservation, located in central South Dakota." Act 106-511 § 103(1), 114 Stat. at 2366. The responsibilities directed at the Defendant in the Act create obligations due the "Tribe," as defined in the statute. Individual members are not an element of the definition of "Tribe" under the Act.

As Plaintiffs concede, the Act "failed to expressly address the issue of compensation for Individual Landowners . . . ." Compl. ¶ 5. Where "Congress has directly spoken to the precise question at issue . . . [i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). Because Congress did not include the individual members within the definition of "Tribe" under the Act, no fiduciary or trust obligations were created for the individual members. *See Lebeau*, 474 F.3d at 1343. "To permit recovery for a breach of trust claim in a case such as this . . . would defeat Congressional intent." *Id.*

V. The Indian Trust Accounting Statute Does Not Apply and Plaintiffs' Claim for an Accounting Must be Dismissed

Count III of Plaintiffs' Complaint presents a claim for an accounting of the Trust Fund under the Indian Trust Accounting Statute ("ITAS"), Pub. L. No.

108-108, 117 Stat. 1241 (2003). *See generally*, *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004). The premises of Plaintiffs' accounting claim are that Defendant owed Plaintiffs a fiduciary duty arising from the Act and that Defendant mismanaged the trust fund by distributing interest in 2011. Compl. ¶¶ 51-52. As set forth above, those premises are faulty. Therefore, Plaintiffs' assertions of mismanagement and a right to an accounting should be rejected, and this claim dismissed.

Certain Department of the Interior Appropriations Act riders provide, in relevant part:

> [T]he statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 109-54, 119 Stat. 499, 519 (2005).[7] But the Appropriations Act riders do not create a cause of action for trust mismanagement. The Appropriations Acts merely toll the statute of limitations for claims falling within its ambit.

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[7] The first version of this provision was adopted in 1990. The original version provided, *inter alia*, "[N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds." Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990). This provision was modified, with minor changes, every year until the current language was adopted in 2003. Pub. L. No. 108-7, 117 Stat. 11, 236 (2003).

Plaintiffs cite 25 U.S.C. § 4011, the American Indian Trust Fund Management Reform Act, suggesting that Defendant is obliged to provide Plaintiffs with "a full and complete accounting of their trust funds." Compl. 51. The Reform Act requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian . . . ." 25 U.S.C. § 4011(a). Individual Indians do not have vested interests in tribal accounts. *See Wash. State Commercial Passenger Fishing Vessel*, 443 U.S. at 679; *Omaha Indian Tribe*, 442 U.S. at 665; *Holt*, 364 F.2d at 41; *Seneca Constitutional Rights*, 348 F. Supp. at 59. Plaintiffs' Complaint does not allege that the Secretary holds funds in the Trust Fund specifically for identified individual Indians. Therefore, Plaintiffs have not alleged, much less demonstrated, a vested right in the funds that would allow them to demand an accounting. The ITAS simply does not apply to the facts and law presented in Plaintiffs' claim.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion and dismiss Plaintiffs' Complaint in its entirety.

Dated: January 11, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served upon the plaintiff a true and correct copy of the foregoing memorandum in support of motion to dismiss by electronic filing and electronic notice on counsel Judith K. Zeigler at judy@jkzlaw.com on January 11, 2013.

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CERTIFICATION OF WORD COUNT

I hereby certify that this brief complies with the page limitation on briefs set forth in Local Rule 7.1B1 in that the WordPerfect word count is 8004.

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