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.	CASE NO. CIV. 12-4178-KES

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

This case represents but another unfortunate chapter in the ongoing relationship between the indigenous people of this country and Defendant, the United States of America. As is too often the case in relations between Indians and the United States, the United States has taken on trust and fiduciary responsibilities (in this case through the Cheyenne River Sioux Tribe Equitable Compensation Act of 2000), only to then discharge those duties in a careless and irresponsible fashion. Plaintiffs have properly invoked this Court's jurisdiction and stated claims to vindicate the trust and fiduciary obligations owed to them. The United States' motion rests wholly on a mischaracterization of Plaintiffs' claims and a misunderstanding of the relevant law. The United States' motion to dismiss should be denied and Plaintiffs should be allowed to have their day in court.

FACTUAL AND PROCEDURAL HISTORY

Nearly 70 years ago, Congress enacted a law authorizing the Army Corps of Engineers to construct the Oahe Dam—a dam which impounds Lake Oahe, an artificial reservoir stretching almost the entire distance from Pierre, South Dakota, to Bismarck, North Dakota. Compl. ¶ 1. In building this dam, the United States flooded a vast area of North and South Dakota, including over 104,492[1] acres of land, some of which was owned by the governing body of the Cheyenne River Sioux Tribe (the "Tribe"), and some of which was owned by individual members of the Tribe (the "Individual Landowners"). *Id.* ¶¶ 2, 18. The Individual Landowners were forced to evacuate their homes and abandon their land and its valuable resources to make way for an energy project benefiting only those downriver. *Id.* ¶ 3. The Oahe Dam destroyed more Indian land than any other public works project in the history of this nation. *Id.* Over 180 families—families which included the Plaintiffs or their ancestors—were forced to sever profound cultural connections that they had to the land. *Id.*

The land used for the project was originally taken by the United States in 1948 without any compensation whatsoever. *Id.* ¶¶ 4, 19. Six years passed before any funds were appropriated to compensate for the land that was taken. *Id.* In 1954, Congress authorized payments to the Tribe and the Individual Landowners. *Id.* ¶ 19. These payments were long recognized as grossly disproportionate to the true value of the land taken and led to a sustained

---

1 The Complaint alleges that 104,420 acres were taken, which has been reiterated in other cases. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679 (1993). The Act, however, recites that 104,492 acres were taken. This discrepancy is immaterial to the present motion but underscores the necessity of the relief sought, particularly an accounting.

lobbying campaign to provide for just compensation. *Id.* ¶ 19.

After years of lobbying, in 2000, Congress passed the Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. No. 106-511, 114 Stat. 2365 (hereinafter "the Act"), which created a trust fund of nearly $300,000,000 plus interest to provide just compensation for the land taken for the building of the Oahe Dam, including the allotted land owned by the Individual Landowners (the "Trust Fund"). *Id.* ¶ 30. The Trust Fund was intended to provide just compensation for *all* the land taken by the building of the Oahe Dam. *Id.* ¶ 20. Yet, the legislation creating the Trust Fund failed to expressly address the issue of compensation for Individual Landowners and their heirs whose lands were taken. *Id.*

Both the text of the Act and its legislative history make clear that Congress intended for the Individual Landowners and their heirs to be compensated. *Id.* ¶¶ 21-23. For example, Section 102(a)(2)(C) of the Act specifically notes that "the Oahe Dam and Reservoir project . . . severely damaged the economy of the Tribe *and members of the Tribe* by inundating the fertile, wooded bottom lands of the Tribe along the Missouri River that constituted the most productive agricultural and pastoral lands of the Tribe and the homeland *of the members of the Tribe*." *Id.* ¶ 21 (emphasis added). Section 102(a)(3)(A) also demonstrates an intent to make the Individual Landowners and their heirs whole, as it explicitly refers to the "104,492 acres of land" taken by the government to build the Oahe Dam. *Id.* ¶ 22. It is undisputed that roughly 44 percent of the 104,492 acres of land belonged to the Individual Landowners, not the Tribe's governing body ("Tribal Government"). *Id.* ¶ 20. Similarly, the applicable Senate committee report contains numerous references to the damages suffered by the Individual Landowners. *Id.* ¶ 23. The report specifically notes that "181 families," or 30 percent of the Tribe's population, were forced to relocate when the Oahe Dam was built. *Id.* (citing S. Rep. No. 106-217, 1999 WL 1024199, at

*1 (1999)). The Senate committee report also notes that "*members* lost 30,000 head of livestock," and that this loss would not have happened if river bottom lands had been available to protect the animals. *Id.* (citing S. Rep. No. 106-217, at *1 (emphasis added)). Finally, the report states that neither the Tribe *nor its members* received the benefits of irrigation that others did as a result of the dam-building project. *Id.* (citing S. Rep. No. 106-217, at *2).

The Bureau of Indian Affairs ("BIA" or "Bureau") was made aware of the interests of the Individual Landowners and their heirs and the Bureau's trust obligations to these individuals at least as early as 2002, when the Tribal Government submitted Resolution No. 142-02-CR to the BIA's Aberdeen Area Office. *Id.* ¶ 26. This resolution acknowledged that nearly half of the land inundated by the dam's construction was owned by the Individual Landowners, and that, as a result, those Individual Landowners and their heirs were entitled to share in the funds disbursed under the Act. *Id.*

In 2003, the Tribal Government, by Resolution No. 85-03-CR, created the Oahe Landowners Association (the "OLA"), a "non-profit, non-governmental entity" whose purpose is "to protect and promote the interests of individual tribal members or their heirs who lost their lands" as a result of the Oahe Dam project, "by providing an entity through which the individual landowners and their heirs can address land loss and compensation issues." *Id.* ¶ 27. Since its founding, the OLA has repeatedly sought the Bureau's assistance to ensure just compensation to the Individual Landowners and their heirs, but to no avail. *Id.*

An attempt to expressly allow the Individual Landowners and their heirs to share in disbursements of the Trust Fund's proceeds was made in 2005, with a bill that passed the Senate, 152 Cong. Rec. S11548 (Dec. 7, 2006), but did not advance past Committee in the House of Representatives. The bill was reintroduced in 2007 and passed the House of Representatives,

153 Cong. Rec. 11422 (May 7, 2007), but did not pass the Senate. In light of these attempted legislative fixes, and the Bureau's receipt of Resolution No. 142-02-CR, the Bureau was aware and on notice that the Individual Landowners and their heirs were entitled to disbursements under the Act. Compl. ¶ 28.

Prior to the release by Defendant of the first distribution of interest from the Trust Fund, the OLA, on behalf of its constituents, asked the Tribal Government in 2010 to share with the Individual Landowners and their heirs the payments that the Tribal Government would receive as a result of the Act. *Id.* The Tribe expressed concern that a distribution of the interest on the Trust Fund to the Individual Landowners and their heirs based on the proportional appraised value of the land at the time of the original taking ("Appraisal Distribution") would violate the Act, which forbids distribution to individual members of the Tribe on a "per capita" basis. *Id.*

On September 28, 2011, counsel for the Plaintiffs wrote a letter to the BIA Director, BIA Regional Director, Superintendent of the Cheyenne River Agency, Fiduciary Trust Officer of the Cheyenne River Agency, and the Office of Trust Fund Management, requesting that the Bureau

> take appropriate action to ensure that an accounting is made of funds to be disbursed under the Cheyenne River Sioux Equitable Compensation Act of 2000 and that the proportion of funds paid as compensation for lands held by individual landowners be withheld from distribution to the Tribe and disbursed only to individual tribal members based on the relative value of land for which compensation is being paid.
> . . . .
> Any disbursement by the Department of Interior that would allow the Tribe to spend the portion of funds intended to compensate for individually held acres would violate the plain language and legislative intent of the Cheyenne River Sioux Equitable Compensation Act, the procedures established under 25 C.F.R. Part 1200 for disbursement of tribal trust funds, and the Department's trust obligations to the individual landowners and heirs whose lands were affected by the Oahe Dam and Reservoir project.

Id. ¶ 29; Declaration of Vernle C. Durocher, Jr. ("Durocher Decl.") ¶ 4; Ex. B. The letter concluded that

> [u]nless the Bureau takes action to ensure that an accounting is made and that the proportion of funds paid as compensation for lands held by individual landowners is withheld from distribution to the Tribe within 10 days of receipt of this letter, or establishes a date by which action will be taken and such date does not further impair the interests of the individual landowners, an appeal shall be filed in accordance with 25 C.F.R. § 2.8.

Id.

Counsel for the Plaintiffs subsequently sent another letter dated October 14, 2011, explaining the legality of an Appraisal Distribution to the BIA's Great Plains Regional Office. *Id.* ¶ 30. The BIA never responded to this correspondence. *Id.* ¶ 32.

The Tribal Government also submitted a "Request for Opinion" to the Regional Solicitor's Office on September 26, 2011, requesting an interpretation of whether the Tribal Government was authorized to use a portion of the Trust Funds to compensate the Individual Landowners. *Id.* ¶ 28. The Bureau responded to the Tribal Government's inquiry on or about October 27, 2011, stating that an Appraisal Distribution would violate the Act. *Id.* ¶ 31.

In 2011, the Secretary of the Interior distributed the interest on the Trust Fund established by the Act to the Tribal Government alone, even though nearly half the flooded lands belonged to the Individual Landowners. *Id.* ¶ 33.

On October 15, 2012, Plaintiffs filed this lawsuit against the United States on behalf of themselves and all others similarly situated, seeking declaratory relief ordering Defendant to perform its fiduciary duties as trustee of the individual Plaintiffs' trust monies pursuant to federal law and common law trust principles, including an accounting of the monies owed to Plaintiffs and the putative classes.

MOTION TO DISMISS STANDARD

In order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir.1990) (citation omitted). Because Defendant has asserted a Rule 12(b)(1) facial attack, Plaintiffs receive "the same protection as [they] would defending against a motion brought under Rule 12(b)(6)." *Id.* at 729 (quotations omitted).

"To survive a motion to dismiss [under Rule 12(b)(6)], the factual allegations in a complaint, assumed true, must suffice 'to state a claim to relief that is plausible on its face.' " *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addressing a motion to dismiss, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010); *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011).

ARGUMENT

Contrary to Defendant's arguments, this Court has subject matter jurisdiction over Plaintiffs' claims. Plaintiffs have identified a valid waiver of Defendant's sovereign immunity under 5 U.S.C. § 702, which applies to Plaintiffs' claims against Defendant. Further, Plaintiffs have suffered an injury-in-fact as a result of Defendant's failure to provide an accounting of the Trust Funds belonging to the Individual Landowners and therefore have standing to bring their claims. Plaintiffs, on the face of their Complaint, have established a claim that would entitle

them to declaratory and injunctive relief. Defendant's mischaracterization of Plaintiffs' claims and interests and the relief Plaintiffs seek, evinces the lack of any legitimate argument in support of Defendant's motion to dismiss. Thus, the Court should deny Defendant's motion to dismiss.

I. Defendant Has Waived Its Sovereign Immunity Under Section 702 of the Administrative Procedure Act

Defendant first alleges that this Court lacks jurisdiction because Plaintiffs have failed to identify an applicable waiver of the United States' sovereign immunity from suit. Defendant is wrong.

In the Complaint, Plaintiffs allege that the United States has waived its immunity pursuant to § 702 of the Administrative Procedure Act ("APA"). Compl. ¶ 16. Defendant alleges that Plaintiffs cannot properly rely on the waiver contained in § 702 because they "seek relief not permitted under the APA, namely, additional compensation for their land," and because Plaintiffs have an adequate remedy in the Federal Court of Claims under the Tucker Act, 28 U.S.C. § 1491. Def.'s Mem. 11-12. Plaintiffs, however, are not seeking "money damages" in this action, and the plain language of § 702 makes clear that the APA effects a waiver of sovereign immunity in all cases seeking relief other than money damages. Defendant's argument that § 704 of the APA excludes from § 702's waiver those claims for which adequate remedies are elsewhere available also fails. This argument improperly commingles two different statutory provisions and wrongly assumes that Plaintiffs' claims (as opposed to their basis for a waiver) are brought pursuant to the APA. Because Plaintiffs have properly alleged a waiver of Defendant's sovereign immunity, the Court should deny Defendant's motion to dismiss for lack of jurisdiction.

A. The APA Contains a Waiver of Sovereign Immunity

1. The APA Expressly Waives the United States' Sovereign Immunity

Since its enactment in 1946, the APA has instructed that 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." Act of June 11, 1946, ch. 324, § 10(a), 60 Stat. 237, 243 (codified at 5 U.S.C. § 702). In 1976, Congress amended the APA and expressly removed the defense of sovereign immunity as a bar to judicial review of federal administrative action. To ensure the existence of a waiver, Congress added the following sentence to 5 U.S.C. § 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (codified at 5 U.S.C. § 702); *see also* H.R. Rep. No. 94-1656, at 3, *as reprinted in* 1976 U.S.C.C.A.N. at 6123 ("The amendment made to section 702 of title 5 would eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency."). Congress took this step to provide a "safety valve to ensure greater fairness and accountability in the administrative machinery of the [Federal] Government." H.R. Rep. No. 94-1656, at 9 (1976).

2. Courts Have Consistently Held That the APA Waives the United States' Sovereign Immunity

The waiver of sovereign immunity found in the APA thus allows a person to sue the federal government over unlawful agency action for suits seeking declaratory and injunctive relief. Courts, including the U.S. Supreme Court, have consistently held that § 702 waives sovereign immunity in all actions against the United States seeking other than money damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("There are two reasons why the plain language of this amendment does not foreclose judicial review of the actions brought by the State challenging the Secretary's disallowance decisions. First, insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages. Second, and more importantly, even the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in the law."); *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("Trudeau has limited the relief he seeks to a declaratory judgment and an injunction, and there is no doubt that § 702 waives the Government's immunity from actions seeking relief other than money damages."); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) (similar).

B. The APA's Waiver Is Not Limited to APA Claims

Despite Defendant's claims, the waiver in the APA is not limited to claims brought under the APA. Courts could not be clearer on this issue: the "[a]bolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every action in a court of the United States seeking relief other than money damages. . . . No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA." 4 K. Davis, *Administrative Law Treatise*, § 23:19 at 195 (2d ed. 1983); *see also Red Lake Band of Chippewa Indians v. Barlow*, 846 F. 2d 474, 476 (8th Cir. 1988) ("Contrary to the Secretary's second argument, the waiver of sovereign immunity contained in section 702 is not

dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief."); *Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech.*, 12 F.3d 737, 740-41 (8th Cir. 1993) (holding that § 702's waiver of sovereign immunity is not limited to cases brought under the Administrative Procedure Act); *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) ("[T]he United States does not enjoy immunity from Raz's injunctive-relief action, because section 702 of the Administrative Procedure Act (APA) expressly waives sovereign immunity as to any action for nonmonetary relief brought against the United States."); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."); *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) ("With respect to claims for non-monetary relief, the 1976 amendments to § 702 of the Administrative Procedure Act . . . eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity.").

C. The APA's Waiver Applies to Plaintiffs' Claims

1. Plaintiffs' Claims Fall Squarely Within the Waiver of Section 702

As noted above, pursuant to § 702 Congress has expressly authorized suits against the United States for claims that an agency or an officer or employee thereof acted or failed to act, and seeking relief other than money damages. Moreover, the plain language and legislative history of § 702 make clear that the waiver contained in this statutory provision acts as a general consent to suits requesting equitable relief from administrative action or inaction. *See United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 227 n.32 (1983); *Bowen* , 487 U.S. at 900. Here, Plaintiffs' Complaint unambiguously seeks equitable relief. Plaintiffs request the following relief:

- An order certifying classes consisting of (1) the original owners of land that was taken by the federal government to construct the Oahe Dam and Lake Oahe and (2) the heirs of the original owners of land that was taken by the federal government to construct the Oahe Dam and Lake Oahe. Compl. at 16, Prayer for Relief ¶ A.

- A decree construing Defendant's trust obligations to Plaintiffs and members of the putative classes, declaring the Defendant has breached its trust obligations to the named Plaintiffs and the classes, and directing practices in conformity with Defendant's obligations. Compl. at 16, Prayer for Relief ¶ B.

- A declaration that Defendant's failure to distribute monies from the Trust Fund to the Individual Landowners and their heirs is a breach of its common law fiduciary duty to distribute monies from the Trust to the Individual Landowners as part of the intended just compensation to owners of the 104,420 acres of land taken. Compl. at 16, Prayer for Relief ¶ C.

- A declaration that Defendant has not provided Plaintiffs and members of the class with a full and complete accounting of their trust funds. Compl. at 16, Prayer for Relief ¶ D.

- A decree ordering an accounting of the trust funds owed to the Individual Landowners and their heirs. Compl. at 16, Prayer for Relief ¶ E.

- Plaintiffs' attorneys' fees and costs, to the extent allowed by applicable law. Compl. at 16, Prayer for Relief ¶ G.

- Any such further relief as the Court deems just and equitable. Compl. at 16, Prayer for Relief ¶ H.

Plaintiffs are clearly seeking relief other than money damages, and the waiver contained in APA § 702 applies.

2. Defendant's Efforts to Avoid the APA's Waiver Are Meritless

a. Plaintiffs' Complaint Seeks Relief Other Than Money Damages

Despite the foregoing, Defendant argues that there is no waiver of sovereign immunity. Defendant first argues, mistakenly, that there is no waiver because Plaintiffs seek money damages. Defendant is wrong. As noted above and made plain in the Complaint, Plaintiffs seek equitable relief. In its brief, Defendant attempts to construe the relief sought by Plaintiffs as

money damages based on Plaintiffs' use of the word "compensation" in the Complaint. But Plaintiffs could not be clearer that they do not seek in this action to recover any money damages. In fact, as Defendant concedes, "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." Def. Mem. 11-12 (citing Compl. ¶¶ 6, 7) (emphasis added). And as noted above, claims for declaratory and injunctive relief fall squarely within § 702's waiver provision. *Bowen*, 487 U.S. at 893.[2]

Even assuming Defendant's characterization of Plaintiffs' claims as seeking the payment of money had merit, this Court would still have jurisdiction under § 702 of the APA. The Supreme Court in *Bowen* clarified that not all actions seeking the payment of money are actions for "money damages" under § 702. In *Bowen*, the State of Massachusetts brought suit to overturn a decision by the United States disallowing reimbursement under the Medicaid Act. The Supreme Court held the State's suit was not one "seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [was] a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Bowen*, 487 U.S. at 900. Similarly, Plaintiffs are seeking to enforce the Act, which recognized that the individual landowners whose lands were flooded by the Oahe Dam and Reservoir Project were unjustly compensated for the taking of their land and provided a mechanism whereby additional compensation would be provided for the land taken. As outlined

---

[2] The Supreme Court in *Bowen* recognized the breadth of the waiver contained in § 702 and the narrowness of the exception for actions seeking money damages: "Thus, the combined effect of the 1970 Hearing and the 1976 legislative materials is to demonstrate conclusively that the exception for an action seeking 'money damages' should not be broadened beyond the meaning

in Plaintiffs' Complaint, both the text of the Act and its legislative history make clear that Congress intended for the Individual Landowners and their heirs to be compensated.[3] Here, as in *Bowen*, Plaintiffs are " 'seeking funds to which a statute [] entitles [them], rather than money in compensation for the losses, whatever they may be,' " that Plaintiffs will suffer by virtue of the withholding of those funds. *See Bowen*, 487 U.S. at 901 (quoting *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

Defendant's reliance on *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) is misplaced. In *Blue Fox*, the plaintiff brought an action seeking an equitable lien against funds held by the Army. The Court noted that an equitable lien, by its very nature, is a means to the end of satisfying a claim for the recovery of money. Here, unlike in *Blue Fox*, Plaintiffs are not seeking "money in the hands of the Government as compensation." *Blue Fox*, 525 U.S. at 263. Plaintiffs seek only declaratory and injunctive relief, and as such, *Blue Fox* is inapposite.

b. Section 704 of the APA Does Not Apply

Defendant also argues that "Section 704 of the APA excludes from the APA's sovereign immunity waiver those claims for which adequate remedies are elsewhere available." Def.'s Mem. 13. Defendant further argues the Tucker Act provides an adequate remedy to Plaintiffs, and, therefore, there is no waiver under the APA. *Id.* These assertions are based on a fundamentally flawed understanding of Plaintiffs' claims, are contrary to Supreme Court precedent and the plain language and legislative history of the APA's waiver provision, and are factually and legally inaccurate.

---

of its plain language." *Bowen*, 487 U.S. at 900.

[3] *See* Compl. ¶¶ 18-21.

Defendant's argument is based on a mischaracterization of Plaintiffs' claims. As explained above, Plaintiffs make no claim for money damages, but seek only equitable and declaratory relief. Consequently, the Tucker Act, which gives the Court of Federal Claims exclusive jurisdiction over damages actions in excess of $10,000, does not apply to Plaintiffs' claims in this case. 28 U.S.C. § 1491; *see also Bowen*, 487 U.S. at 901-02. Further, Plaintiffs' claims arise not under the APA, but under the United States' breach of its fiduciary and trust obligations. Therefore, the APA's review provisions, including those under § 704, do not apply to Plaintiffs' action.

Defendant's argument confuses two separate provisions of the APA—§§ 702 and 704. Only § 702 in fact deals with the issue of sovereign immunity. Under § 702, the only requirement that must be met for § 702's waiver to apply is that the action seek relief other than money damages. That requirement has been satisfied.

Even if Plaintiffs had to satisfy the provisions of § 704 in order to assert a waiver under § 702, Plaintiffs clearly meet that burden. Section 704 provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Contrary to Defendant's assertions, the Tucker Act does not present an "other adequate remedy in court" for the equitable relief sought by Plaintiffs. The Supreme Court rejected this same argument in *Bowen*, concluding that "[t]he Secretary's novel submission that the entire action is barred by § 704 must be rejected because the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court." *Bowen*, 487 U.S. at 901. The Federal Court of Claims does not have the general equitable powers of a district court to grant prospective relief. Indeed, the Supreme Court has recognized that the Court of Claims has no power to grant equitable relief whatsoever. *Id*. at

905; *see also Richardson v. Morris*, 409 U.S. 464, 465 (1973). Moreover, the availability of any review of Plaintiffs' claims in the Federal Court of Claims is doubtful. It is therefore clear that the theoretical relief available to Plaintiffs in the Court of Claims is not an adequate substitute for prospective relief available in this Court.

Defendant has waived its sovereign immunity under § 702, and this Court has jurisdiction over Plaintiffs' claims.

II. Plaintiffs' Claims Are Not Barred by Any Failure to Exhaust Administrative Remedies

Defendant also argues that Plaintiffs are barred from seeking judicial review for their claims on the grounds that they have failed to exhaust administrative remedies. This argument runs contrary to both the facts—ignoring entirely the actions taken by Plaintiffs to challenge the Bureau's action—and the applicable legal standard. Incorrectly asserting that Plaintiffs have not taken advantage of available administrative remedies in bringing this action, Defendant fails to recognize Plaintiffs' efforts to resolve this matter directly with the BIA. Further, Defendant's argument rests on the false assumption that Plaintiffs' claims arise under the APA, which they do not.[4] And even if the APA's exhaustion requirement applied to Plaintiffs' claims, under the circumstances, Plaintiffs have met their burden—effectively exhausting administrative remedies or meeting applicable exceptions to the exhaustion requirement.

A. Plaintiffs' Claims Are Not Brought Under the APA

Plaintiffs have not brought this action under the APA seeking to "hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706. Rather, Plaintiffs' claims arise under the United

---

[4] *See supra* Section I.

States' breach of its fiduciary and trust relationships, as established by the Cheyenne River Sioux Equitable Compensation Act, and the general trust relationship recognized in *Mitchell II*. Plaintiffs' action is not, nor does it need to be, in any way grounded in the APA. Plaintiffs' Complaint relies on the APA only for the requisite waiver of sovereign immunity provided by § 702. *See* Compl. ¶ 16. Defendant's reliance on APA cases to support its argument that exhaustion is a "jurisdictional prerequisite" is therefore misplaced. *See* Def.'s Mem. 18. For the same reasons that § 704 requirements do not apply to Plaintiffs' claims, the APA requirement that Plaintiffs exhaust available administrative remedies also does not apply. *See Trudeau*, 456 F.3d at 187 (finding that the final agency action requirement of § 704 does not affect § 702's waiver of sovereign immunity because the waiver is not limited to APA cases and, thus, it applies regardless of whether the elements of an APA cause of action are satisfied).

B. The Bureau Has Taken "Final Agency Action" Subject to Review

Even if the APA requirement that the challenged agency action be "final agency action" applied to Plaintiffs' claims, Defendant has taken final agency action subject to judicial review. The Supreme Court utilizes a two-part test to determine whether an agency action is final for purposes of judicial review: "First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted).

Defendant baldly argues that Plaintiffs "ignored available administrative means of resolving their claims," but fails to specifically identify what actions Plaintiffs were required to take to meet their burden to exhaust administrative remedies. Defendant wholly ignores the steps taken by Plaintiffs in attempting to resolve this matter directly with the BIA. Additionally,

Defendant fails to acknowledge its October 27, 2011, letter expressly denying Plaintiffs' claims, and its action distributing the interest on the Trust Funds established by the Act to the Tribal Government alone. These actions by Defendant satisfy the Supreme Court's test for final agency action and are therefore properly subject to review.

On September 28, 2011, counsel for Plaintiffs submitted a written request on behalf of the OLA and its constituents to, among other recipients, the BIA Director and appropriate Regional Director for the same claims asserted in Plaintiffs' Complaint—namely, that an accounting of funds be disbursed under the Act and that the portion of the funds rightfully belonging to Plaintiffs be properly withheld from distribution to the Tribe. In compliance with the requirements set forth in 25 C.F.R. Part 6, the letter concluded that

> [u]nless the Bureau takes action to ensure that an accounting is made and that the proportion of funds paid as compensation for lands held by individual landowners is withheld from distribution to the Tribe within 10 days of receipt of this letter, or establishes a date by which action will be taken and such date does not further impair the interests of the individual landowners, an appeal shall be filed in accordance with 25 C.F.R. § 2.8.

Plaintiffs' counsel subsequently sent another letter dated October 14, 2011, explaining the legality of an Appraisal Distribution of the interest on the Trust Fund to the Individual Landowners and their heirs to the Great Plains Regional Office of the Bureau. The Tribal Government, through its tribal chairman, also submitted a "Request for Opinion" to the Regional Solicitor's Office on September 26, 2011, requesting an interpretation of whether an Appraisal Distribution to the Individual Landowners and their heirs would be legal. The Bureau responded to the Tribal Government's inquiry, indicating that an Appraisal Distribution would violate the Act. The Bureau never responded to the Plaintiffs' counsel's correspondence. Shortly thereafter, the Secretary of the Interior distributed the interest on the Trust Funds established by the Act to the Tribal Government alone. The Secretary did not withhold any portion of the funds

for compensation for lands held by the Individual Landowners, and nothing was distributed to them.

The Bureau's October 27, 2011, response and subsequent disbursement of funds to the Tribe each constitutes final agency action under the test set forth in *Bennett*, 520 U.S. 154. The action by the Secretary of the Interior of releasing the funds to the Tribe marked the consummation of the BIA's decision-making process—once the funds were released, there was no further action required by the agency. Further, the release of these funds to the Tribe, in combination with the Bureau's October 27, 2011, letter, effectively established the rights and obligations of the Individual Landowners and the Bureau.

Plaintiffs diligently pursued administrative remedies until the Secretary made the final decision interpreting the Act and released the funds to the Tribe alone. The Regional Director's October 27, 2011, response to the Tribe effectively denied Plaintiffs' requests, stating that the BIA itself "has no federal funding to assist the Oahe Landowners Association" and would not take any further action to assist Plaintiffs. Durocher Decl. ¶ 5; Ex. C. Under these circumstances, the BIA has taken a final agency action.[5]

---

[5] Although the Regional Director's letter was addressed to the Tribal Government, in it, the Regional Director references the Plaintiffs' September 28, 2011, letter and bases a significant portion of its response on Cheyenne River Sioux tribal resolution 142-02, a draft of which Plaintiffs had attached to their letter. Additionally, the first and last paragraphs of the BIA response letter offers to provide a "courtesy copy" to Plaintiffs' attorneys. In the context of the doctrine of exhaustion of administrative remedies, this denial response is sufficient to constitute a "final agency action." *See* 5 U.S.C. § 701(b)(2) (stating that 5 U.S.C. § 551(13) provides the applicable definition of "agency action," which therein is defined as "the whole or a part of an agency rule, order, license, sanction, *relief, or the equivalent or denial thereof, or failure to act*" (emphasis added)). Moreover, the Secretary of Interior's distribution of interest on the Trust Funds solely to the Tribal Government, which is the actual purpose of Plaintiffs' Complaint, is in itself a final agency action. Defendant does not argue these points.

C. Plaintiffs' Interest in Judicial Resolution of Their Claims Outweighs Defendant's Interest in Requiring Further Agency Review

Even if this were an APA action requiring exhaustion of remedies (which it is not), in determining whether further exhaustion is required, this Court must balance the interest of Plaintiffs in retaining prompt access to a federal judicial forum against countervailing governmental interests favoring exhaustion. "[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *West v. Bergland*, 611 F. 2d 710, 715 (8th Cir. 1979). Application of this balancing principle is "intensely practical," *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986), because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided. In light of the actions taken by Plaintiffs in their attempt to resolve this matter administratively, the lack of any real interest on the part of Defendant to require further exhaustion, and the obvious futility of further administrative exhaustion, the balance of interest weighs in favor of a finding that further exhaustion by Plaintiffs was not required.

First, Defendant has not stated any compelling governmental interest which would be supported by requiring additional administrative review under the circumstances here. As stated in Defendant's Memorandum in Support of its Motion to Dismiss,

> [t]he 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.

Def.'s Mem. 16; *see also West*, 611 F.2d at 715-17 (noting that governmental interest in requiring exhaustion includes allowing the agency to perform functions within its special

competence, discouraging frequent and deliberate flouting of the administrative process, allowing the agency to have the first opportunity to develop the facts and apply the law it was designed to administer, and allowing agencies to correct their own errors). None of these interests is compelling here.

As discussed above, allowing judicial review at this stage would not interrupt the administrative process because the agency has already reached a final decision. Plaintiffs are not sidestepping the Bureau or its administrative processes, and the agency was provided with ample opportunity to develop its factual record in the first instance and initially interpret the law at issue. Plaintiffs' counsel submitted a specific written request directly to the Director and Regional Director of the BIA setting forth Plaintiffs' claims. The Bureau's subsequent response, along with its actual disbursement of funds to the Tribal Government in contravention of Plaintiffs' request, demonstrates that the Bureau has made its final decision on the matter. Plaintiffs have not "ignored" the BIA, as Defendant attempts to frame it. Rather, Plaintiffs took efforts to engage with the agency directly, and the agency responded by making clear that it would not take any action to assist Plaintiffs as requested. Requiring Plaintiffs to engage in additional administrative appeal would not further any legitimate governmental interests of Defendant in requiring further exhaustion of administrative remedies.

In contrast, Plaintiffs have a significant interest in immediate judicial resolution of their claims. The Supreme Court has recognized a number of circumstances in which the interests of the individual weigh heavily against requiring further exhaustion. Of most relevance to the circumstances here, where the administrative body is shown to be biased or has otherwise predetermined the issue before it, the interests of the individual will be found to weigh heavily against requiring further exhaustion. *See, e.g.*, *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)

("[A]n administrative remedy may be inadequate where the administrative body . . . has otherwise predetermined the issue before it.");[6] *Gibson* v. *Berryhill*, 411 U.S. 564, 575 n.14 (1973) (noting the same).

Plaintiffs should not be required to pursue this matter any further with the BIA than they already have because doing so would be futile based on BIA's correspondence, acts, and decisions in contravention of Plaintiffs' requested relief. The Regional Director's letter dated October 27, 2011, expressly indicated that the Bureau did not intend to assist the Individual Landowners or their heirs. The letter also adopted the firm position that payment to the Individual Landowners and their heirs was neither required nor permitted under the Act. In light of this position, any further attempts by Plaintiffs to seek administrative relief from the BIA would be futile. Moreover, the Secretary of Interior—the highest official in the administrative agency—has since disbursed the Trust Funds to the Tribal Government alone, providing no accounting or withholding for the Individual Landowners as requested. The Secretary has effectively *preannounced* any further decision in this matter. Requiring Plaintiffs to wade through the exercise of filing yet another request to BIA is futile. *See McCarthy*, 503 U.S. at 148 ("[A]n administrative remedy may be inadequate where the administrative body . . . has otherwise predetermined the issue before it."); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (holding that no administrative remedies are required when high official has already interpreted the law adversely to petitioner); *West*, 611 F.2d at 719 (stating that this court may assess the

---

[6] This rule of law has been superseded by statute in the limited context of prison litigation. *See* Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, 42 U.S.C. § 1997(e)(a), as recognized in *Booth v. Churner*, 532 U.S. 731, 741 (2001). But the Eighth Circuit has made clear that "[t]he rule of *McCarthy* . . . remains valid outside of the prisoner context." *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 757 n.1 (8th Cir. 2003) (citing *United States v. Dico, Inc.*, 136 F.3d 572, 576 (8th Cir. 1998)).

probability of an adverse agency decision in determining whether full exhaustion is required); *see also White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988); *Wright v. Inman*, 923 F. Supp. 1295, 1299 (D. Nev. 1996) ("[W]here the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and not required." (citing *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994)).

For these reasons, even assuming Plaintiffs had any obligation to exhaust administrative remedies, Plaintiffs have effectively and sufficiently exhausted all administrative remedies pursuant to the exhaustion doctrine.

III. Plaintiffs Have a Legally Protected Interest in the Trust Funds

A single thread binds Defendant's arguments related to standing, the terms of the Act, trust mismanagement, and accounting: Defendant assumes in a perfunctory and misleading fashion that the Act does not create an interest for Plaintiffs. Because Defendant assumes its own conclusion, its rote analysis is entirely uninformative and unpersuasive. Contrary to Defendant's assertions, the Act's plain language, its structure, its more than half-century of history, and Congress's unmistakable intent all culminate in a single, inescapable conclusion—a portion of the Trust Funds belongs to the Individual Landowners and their heirs and equitable relief, including an accounting, is necessary to compel Defendant to meet its trust and fiduciary obligations to the Individual Landowners and their heirs regarding the Trust Funds.

The essence of this case is statutory interpretation. The most basic canon of federal statutory interpretation is that courts must give effect to the plain and ordinary meaning of the words of the statute. *United States v. Allmon*, 702 F.3d 1034, 1036 (8th Cir. 2012) ("When interpreting a statute, we first look to its plain language." (quotation omitted)). Consistent with this fundamental rule, courts should not presume Congress made a mistake or error in drafting a

statute. *Corley v. United States*, 556 U.S. 303, 315-16 (2009). The overall structure of a statute further informs the analysis; a statute should be construed to give effect to all its provisions. *Id.* at 314-15; *see also Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 863 (8th Cir. 2011). Where a statute is ambiguous, courts may resort to its legislative history and any other authorities that might aid in discerning Congress's intent. *Owner-Operator*, 651 F.3d at 863. "Statutory interpretation is a question of law[.]" *Johnson v. Arden*, 614 F.3d 785, 790 (8th Cir. 2010).

A. The Plain Language of the Act, in Context, Provides Compensation for Plaintiffs

Section 102 of the Act unambiguously states "the Federal Government acquired *104,492 acres of land of the Tribe* for [the Oahe Dam and Reservoir] project." CRSTECA § 102(a)(3)(A) (emphasis added). It is a matter of historical fact (and United States does not and cannot dispute) that those more than 104,000 acres were owned by *both* the Tribal Government and individual members of the Tribe. Compl. ¶ 2. Rather than assuming (as Defendant does, contrary to the Supreme Court's decision in *Corley*) that this was a drafting error and Congress mistakenly used the number 104,492 instead of 58,145 (the approximate number of acres actually owned by the Tribal Government, *see* Compl. ¶ 5), the Court should recognize, as other courts have, that the word "tribe" has a latent ambiguity: it may refer to either a group of individual Indians or the governing body of those individuals.[7] *See, e.g.*, *United States v. Cherokee Nation*, 202 U.S. 101, 126-132 (1906) (recognizing ambiguity of "Cherokee Nation" in that it could refer to body politic or individual citizens and allowing members of Eastern Cherokee, not affiliated with body

---

[7] This ambiguity is latent in many words that refer to both ethnic groups and bodies politic. For example, the statement "I will give $1 million to the French" is ambiguous as to whether the speaker will give money to French citizens equally, to all French speakers equally, to the

politic of Cherokee Nation, to recover funds appropriated by Congress in satisfaction of treaty obligations). The presence of a drafting error is made further improbable by Congress's evinced ability to refer to only the Tribal Government when necessary. *See* CRSTECA § 104(f)(1) (requiring the "governing body of the Tribe" to prepare a plan for use of payments).

Defendant may argue in response that some references to the word "Tribe" in the Act plainly refer to the Tribal Government alone. For example, under the Act, requests for Trust Funds are made "by the Tribe pursuant to tribal resolution." CRSTECA § 104(d)(1). Clearly, the Tribal Government is the only entity that can pass a tribal resolution. But it does not follow that "Tribe" as used in the Act only encompasses the Tribal Government. The presumption that identical words used in a statute have the same meaning is extremely weak and readily yields whenever there is such variation in the use of the word as to reasonably warrant the conclusion it was used with different intent in different parts of the statute. *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1360 (2012); *see Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *19 (D.C. Cir. Dec. 20, 2012) (collecting cases). Indeed, the presumption of the same meaning for identical words is so weak it can yield even in the face of a specific statutory definition of the word.[8] *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Here, when Congress referred to the taking of the 104,492 acres, unjust compensation for that

---

governing body of the French Republic, or some other combination.

8 The Act provides a statutory definition of "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." CRSTECA § 103(1). This definition merely restates the latent ambiguity in "Tribe," which is also present in the word "band." The Complaint alleges the Individual Landowners are members of the Tribe. Compl. ¶¶ 2, 8-11. They are, therefore, *ipso facto* also members of the Itazipco, Siha Sapa, Minniconjou, and Oohenumpa bands of the Great Sioux Nation that reside on the Cheyenne River Reservation. If the Government wishes to contest this point, Plaintiffs request leave to amend the Complaint to that effect.

taking, and additional compensation for that taking, it *must* have been using "Tribe" to include the Individual Landowners because they indisputably owned some (almost half!) of those 104,492 acres that were taken. As a result, the Act's provision of compensation for that taking to the "Tribe" plainly envisions compensation for the Individual Landowners and their heirs. The plain language of the Act and the *Cherokee Nation* decision alone mandate this construction. But to the extent any ambiguity remains as to the proper construction of the Act, an examination of the half-century history culminating in the Act removes all doubt.

B. The Act Was Passed to Rectify Deficiencies in the Prior Appraisal That Compensated Individual Landowners

In passing the Act, Congress expressly stated that at the time of construction of the Oahe Dam, the United States did not "justify, or fairly compensate" the taking of 104,492 acres of land, and the purpose of the Act was to "provide for additional financial compensation . . . for the acquisition . . . of [the] 104,492 acres of land[.]" CRSTECA §§ 102(a)(3)(A), 102(b)(1). This begs the question of precisely *why* the initial compensation was inadequate.

In 1954, Congress provided compensation, inadequate as it was, to both the Tribal Government and the Individual Landowners based on an appraisal conducted by the Missouri River Basin investigation staff (the "MRBI Appraisal"). 68 Stat 1191, Pub. L. No. 776, § 2. Federal statutes should be interpreted in light of their predecessors. *N. Valley Commc'ns, LLC v. Sprint Commc'ns Co. Ltd. P'ship*, 618 F. Supp. 2d 1076, 1083 (D.S.D. 2009) (citing *Global Crossing Telecomm., Inc. v. Metrophones Telecomm.*, Inc., 550 U.S. 45, 52 (2007)). The predecessor to the Act, Public Law 83-776, provided for compensation to Individual Landowners based on the MRBI Appraisal and delegated the responsibility to distributing funds to the Tribal Government. 68 Stat. 1191. This is hardly atypical as the United States often delegates Indian affairs functions to Indian tribes. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 556-57

(1975) (discussing delegation of federal liquor licensing authority to tribal officials on Wind River Reservation).

Viewed in this historical context, Congress clearly intended to rectify the deficiencies in the MRBI Appraisal, which affected both the Individual Landowners and Tribal Government as landowners and delegated responsibility to disburse funds to the Tribal Government. While the United States can delegate responsibility to disburse funds, it cannot delegate its trust and fiduciary responsibilities. Restatement (Second) of Trusts § 171 (1959). And, even in jurisdictions that allow delegation, the trustee owes continuing duties to exercise care in the delegation and supervise and monitor the delegation. Restatement (Third) of Trusts § 80 (2007). Because the United States has inadequately safeguarded the interest of the Individual Landowners and their heirs, and has acquiesced in the distribution of the Trust Funds in a manner that does not provide the Individual Landowners compensation, it has breached its trust and fiduciary duties.

Furthermore, the Act is not merely any federal statute, it is a statute concerning the regulation of Indian affairs. Federal statutes concerning Indian affairs must be interpreted "in light of the time and circumstances" and "in the sense in which they would naturally be understood by the Indians." *Brewer-Elliot Oil & Gas Co. v. United States*, 270 F. 100, 106 (8th Cir. 1920) (quotation omitted); *cf. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 197 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."). *At the time of the passage of the Act*, the Indians affected by the Act, including both the Tribal Government and the Individual Landowners, understood that the Trust Funds belonged, in part, to the Individual Landowners. Indeed, the Tribal Government expressed an opinion to that very effect in early 2002. Compl. ¶ 26. In light

of the canons of construction that uniquely apply to statutes regarding Indian affairs, the Act clearly creates a protected interest in the Trust Funds for the Individual Landowners and their heirs. And as discussed below, the legislative history of the Act further confirms that the Individual Landowners and their heirs are entitled to compensation.

C. The Legislative History of the Act Confirms Plaintiffs Are Entitled to Compensation

The interpretation of ambiguous text is properly aided with the use of legislative history. *Owner-Operator*, 651 F.3d at 863. The legislative history of the Act includes numerous references to the hardships suffered by the Individual Landowners when their lands were inundated, such as the loss of livestock, family relocation, and lack of irrigation benefits received by others. S. Rep. No. 106-217, 1999 WL 1024199, at *1 (1999). It is ludicrous to suggest that Congress would make such statements without intending for the Individual Landowners to have an interest in the Trust Funds designed to compensate those very losses.

This Act also has subsequent legislative history. The primary import of the subsequent history was that it alerted the Bureau of its trust and fiduciary obligations. But this history also bolsters Plaintiffs' reading of the Act. The value of post-enactment history is low because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *see also Cobell v. Norton*, 428 F.3d 1070, 1074-76 (D.C. Cir. 2005) (noting that "post-enactment legislative history is not only oxymoronic but inherently entitled to little weight" but that it "can't be completely disregarded" and ultimately adopting position of subsequent Congress in interpreting Individual Indian Money trust requirements (citation omitted)). Nevertheless, where both Houses of Congress have acted to clarify their intentions without an express presidential veto, courts may afford subsequent history persuasive value. *Taylor v. United States*, 749 F.2d 171, 173-74 (3d Cir. 1984) (finding

post-enactment amendments to Equal Access to Justice Act persuasive for construction of statutory terms, notwithstanding fact of President's "pocket veto").

Here, both Houses of Congress (albeit at different times), acted to clarify that, under the Act, the payment could be made to Plaintiffs under the Tribal Plan. S. 1535, 109th Cong. § 3; H.R. 487, 110th Cong. § 3. This was not a case of Congress realizing it made a mistake earlier in referring to the 104,492 acres and providing more funding for the landowners. Under both bills, the trust fund would continue to be about $290 million (in fact Congress would have provided $42.00 *less*). S. 1535, 109th Cong. § 3; H.R. 487, 110th Cong. § 3.

As discussed above,[9] this is not a backdoor attempt by Plaintiffs to receive money damages. The Individual Landowners are not seeking at this time "substitute or compensatory relief rather than specific relief." *Blue Fox*, 525 U.S. at 26. The Act already provides compensation for the Individual Landowners. The Individual Landowners, through this lawsuit, seek vindication of their rights under the Act by way of a declaration and accounting of exactly how much of the Trust Funds is properly theirs.

D. The Payment of Compensation to the Individual Landowners and Their Heirs Is Not a Prohibited Per Capita Payment Under the Act

Defendant's argument rests almost exclusively on Defendant's repeated, conclusory, and incorrect statement that the Act does not provide compensation to the Individual Landowners. In addition to those bald assertions, however, Defendant also argues that compensation to the Individual Landowners and their heirs would be prohibited "per capita" payment under the Act. This is the same mistaken position advanced by the BIA in 2011 in its consultation with the Tribe under the Act. *See* Compl. ¶¶ 30-31.

---

9 *See* discussion at Section I(C)(2)(a).

The plain language[10] of the Act and its other provisions preclude Defendant's position. "Per capita" payment is a term of art in Indian affairs with a very plain, and very entrenched, definition for those in Indian Country. "[I]t is a '*cardinal rule* of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.' " *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)) (emphasis added). Plaintiffs have alleged, and would offer conclusive evidence if discovery were allowed to proceed, that those in Indian Country understand a "per capita" payment is payment equally divided among all individuals. Compl. ¶ 30. Not only is this the definition advanced in the Complaint, it is also the dictionary definition. *See* Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/per%20capita (defining "per capita" as "equally to each individual"). Most tellingly, it is also the definition ultimately adopted by the Tribal Government itself in its Tribal Equitable Compensation Act Ordinance ("TECA Ordinance") to authorize the release of Trust Funds under the Act. Durocher Decl. ¶ 6; Ex. 6 at § 74-103(l) ("Per capita—This term means: divided equally among all individuals.").

Defendant's citation to regulations that do not apply to the facts of this case is not to the contrary, when read in its proper context. The regulation cited, 25 C.F.R. § 87.1(l), is within a section of regulations applicable only to the Indian Tribal Judgment Funds Use or Distribution

---

10 Defendant asserts that the BIA's interpretation of "per capita" is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). Def.'s Mem. 26. Defendant, however, does not actually apply *Skidmore* to analyze the thoroughness of the validity, consistency, or other persuasive factors of the BIA's reasoning. *See Skidmore*, 323 U.S. at 139-40. If such an analysis were undertaken, it is plain that the BIA's position is unpersuasive and erroneous, as explained throughout this memorandum of law. *See, e.g.*, *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497-98 (5th Cir. 2003) (declining to defer to agency interpretation of regulation that was at odds with its plain language).

Act. 25 C.F.R. §§ 87.1(a), 87.2. That act applies only to judgments in favor of Indian *tribes*. Indian Tribal Judgment Funds Use or Distribution Act, Pub. L. No. 93-134, 87 Stat. 466. Such funds are, by definition, communally and equally owned by all tribal members. *See* Cohen's Handbook of Federal Indian Law (2012 ed., Nell Jessup Newton, et al., eds.) § 15.02 ("Tribal property is a form of ownership in common."). Therefore, "individualization" (while not a word found in most dictionaries) of "shares" of a judgment clearly connotes equal allocation among individuals, and this is the practice followed in Indian Country.

The Individual Landowners do not seek an equal distribution of the Trust Funds along with all other tribal members, or any subset thereof. Rather, they seek a declaration and accounting of how much of the $290 million of Trust Funds is owed to them, based on the taking of their portion of the 104,492 acres.

IV. Because the Act Provides for Compensation to the Individual Landowners, They Have Standing and Each Count States a Claim upon Which Relief May Be Granted

A. Plaintiffs Have Standing to Bring Their Claims

Under the status quo, due to the United States' failure to provide an accounting of the Trust Funds, those Trust Funds that belong to the Individual Landowners are being distributed, and without judicial intervention will continue to be distributed, to someone else. This is an injury-in-fact that is concrete and particularized and is actual, not conjectural. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (noting injury-in-fact requirement of standing is met with showing of a concrete and particularized injury that is actual or imminent, not hypothetical or conjectural).

Apart from Defendant's mischaracterization of the terms of the Act, debunked above, Defendant curiously cites cases regarding the lack of standing of individual tribal members to challenge action with regard to unallotted property. Def.'s Mem. 21-22 (citing *Short v. United*

States, 12 Cl. Ct. 36, 42 (1987); *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51, 59 (W.D.N.Y. 1972); *Holt v. Comm'r*, 364 F.2d 38, 41 (8th Cir. 1966); *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994)). Of course, here the entire premise of Plaintiffs' Complaint is that the Individual Landowners held allotted and fee property that was taken for construction of the Oahe Dam, Congress later established the Trust Funds to compensate them for that taking, and, on account of Defendant's sloppy procedures, those funds will not be so used. Cases regarding unallotted land are wholly inapposite for the claims here, which are premised on allotted and individual fee land holdings.

Defendant further argues that there must be some "vested" right for the Individual Landowners in the Trust Fund. The Act provides compensation for the Individual Landowners based on their land that was taken, which sufficiently "vests" their rights. The United States breached its trust obligations and fiduciary duties to the Individual Landowners and their heirs by not more particularly describing how the Trust Funds should compensate them. To require more to invoke the Court's jurisdiction would completely eviscerate equitable accounting as a remedy and is not the law. *See, e.g.*, *Stabler v. Stabler*, 326 S.W.3d 561, 565 (Mo. Ct. App. 2010) (holding plaintiff had standing to seek accounting based on allegations that she was beneficiary of trust).

LeBeau v. United States, 474 F.3d 1334 (Fed. Cir. 2007), cited by Defendant, is not to the contrary. There, a judgment fund was established as compensation for tribal property under certain treaties. *Id.* at 1336-37. Then, Congress passed a distribution act to provide for distribution of the tribal property to individuals. *Id.* at 1337. Relying in part on post-enactment legislative history (specifically certain 1998 amendments to the distribution act), the court ruled the plaintiffs could not state a claim for breach of trust because Congress had retained the right to

alter the distribution scheme. *Id.* at 1342-44. The court took particular pains to note its requirement of vesting for a breach-of-trust claim was contradictory to the common law of trusts and applied only in the "special circumstances" of the case where Congress had acted. *Id.* at 1342 n.6.

The case at bar is distinguishable in two significant respects. First, unlike the unallotted property at issue in *LeBeau*, the property here was allotted or fee land. All individual rights, therefore, are sufficiently vested. Moreover, to the extent Congress's vagueness in describing precisely how the Trust Funds should be divided between the Tribal Government and Individual Landowners creates some vesting problem, the "special circumstances" of *LeBeau* are not present. Here, Congress has not acted to reduce or alter the amount of distribution to the Individual Landowners. Congress has acted only to clarify that, under the terms of the Act, the Individual Landowners are entitled to compensation. Therefore, the common law of trusts should continue to apply. *See* Cohen's at § 5.05[1][a] ("[C]ourts frequently have turned to the common law of trusts to determine the nature and extent of duties owed to tribes and to apply the appropriate remedies."). The financial interests of the Individual Landowners and their heirs have been adversely affected and are threatened to continue to be so until a proper accounting of their interests in the Trust Fund is had; they have standing to bring their claims. *LeBeau*, 474 F.3d at 1342 n.6 (noting that absent "special circumstances" of that case, any beneficiary of trust that had threatened financial wrong could bring a claim for relief).

B. Plaintiffs State Claims for Breach of Trust and Breach of Fiduciary Duty upon Which Relief Is Proper

The elements of breach of trust and breach of fiduciary claims for mismanagement of assets belonging to Indians are well-established. Plaintiffs need only show all the necessary elements of a common-law trust are present: a trustee, a beneficiary, and a trust corpus. *Mitchell*

II, 463 U.S. at 225. "When the Federal Government takes on or has control or supervision over [Indian] monies or properties, the fiduciary relationship normally exists with respect to such monies or properties." *Id.* This is the law for both money and property belonging not only to Indian tribes but also individual Indians.

Here, as discussed above, the Act calls for compensation for the Individual Landowners from the Trust Funds; therefore, all common law elements of a trust are established. The Trust Funds are supervised and controlled under the Act by the United States, and under the plain terms of the Act, belong to the Individual Landowners. Nothing more is required for Plaintiffs' breach of trust and fiduciary duty claims.

V. Even if the Act Did Not Provide for Compensation for the Individual Landowners, Plaintiffs Have Alleged Actionable Breach of Trust and Fiduciary Duty Claims Against the Government

Defendant's argument for dismissal takes for granted that the *Mitchell II* framework applies. It does not. Even if the Act did not provide for compensation for the Individual Landowners, Plaintiffs still have an actionable claim against the United States as trustee of their allotted lands. Defendant's arguments to the contrary rest on a fundamental misunderstanding of federal Indian law.

In *United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1980), the Supreme Court ruled that individual allottees had no claim against the Government for mismanagement of timber resources on allotted lands based on the trust relationship created by the General Allotment Act. *Id.* at 542. The *Mitchell I* Court ruled that the scope of such a "limited trust" did not extend to management of timber resources. *Id.* at 542-46.

A "limited trust," however, is not synonymous with a "meaningless trust." In cases concerning the "limited" or "bare" trust responsibilities, the United States continues to owe fiduciary duties to the trust beneficiary concerning the limited scope of that trust. *See* Cohen's at

§ 5.05[1][b] ("[A] statute may create a "bare or limited trust" . . . . Breach of this limited obligation would certainly give rise to a claim for equitable relief."). As acknowledged in *Mitchell I*, the purpose of the "limited trust" created by the General Allotment Act was to prevent alienation of Indian lands. 445 U.S. at 544. The entire controversy presently before the Court relates to the taking, *i.e.*, *the alienation*, of lands belonging to the Individual Landowners and within the scope of the limited trust of the General Allotment Act.

Moreover, the land at issue here was set aside for the members of the Tribe by virtue of the Fort Laramie Treaty of 1868, 15 Stat. 635, and the Act of March 2, 1889, 25 Stat. 888. These sources of law also protected the Individual Landowners against alienation of their land and disturbance by non-tribal forces. The Fort Laramie Treaty provides, "no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory." The Treaty further provides that any individual Indian engaged in farming shall have a tract of land to be "occupied and held in the exclusive possession of the person selecting it." This language is unaffected by the 1889 Act, which provides a "permanent reservation" for the Individual Landowners on the Cheyenne River Sioux Reservation. These federal laws also create limited trust responsibilities on behalf of the United States to protect the occupancy of the Individual Landowners in their ancestral lands.

Federal Indian law is a complex field because the United States oftentimes wears more than one hat. In the case of the takings here, it wore the hats of trustee and condemnor of the same lands. While the United States may have been liable for taking the land (which Plaintiffs will not brief because they are not pursuing such claims in this action), liability may also now

attach in the United States' capacity as trustee. Once the United States, in its capacity as condemnor, decided to provide additional compensation for the taking of those lands (which cannot be disputed because the Act applies to all 104,492 acres on its face), it owed a continuing duty to the Individual Landowners in its capacity as trustee for those lands. *See* Restatement (Second) of Trusts § 344 cmt. h (noting trustee has continuing duty to exercise reasonable care and skill in winding up trust), § 345 cmt. j (noting trustee is liable to beneficiary for conveying trust property to person not entitled to property). If the Act does not provide compensation for the Individual Landowners (which it does, as discussed above), it would be manifestly unfair for the United States to provide the Individual Landowners' share of the additional compensation to someone else. The Individual Landowners are entitled to a declaration that these trust and fiduciary duties were breached and an accounting of what compensation would relieve that breach.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss in its entirety. Given the complexity of Defendant's motion, Plaintiffs request oral argument pursuant to D.S.D. Civ. LR 7.1(C).

Respectfully submitted,

Dated: February 22, 2013

/s/ Judith K. Zeigler
Judith K. Zeigler
JUDITH K. ZEIGLER LAW, PC
PO Box 1448
Sioux Falls, SD 57101-1448
(605) 274-0086 (telephone)
(888) 809-9084 (facsimile)

Vernle C. Durocher, Jr. (Minn. Bar #0208966),
Kristin M. Stastny (Minn. Bar # 0390193),
Forrest K. Tahdooahnippah (Minn. Bar # 0391459)
Admitted pro hac vice

Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
(612) 340-2600 (telephone)
(612) 340-2868 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies pursuant to Local Rule 71B.1 of this Court that Plaintiffs' foregoing brief is produced using 12-point Time New Roman type 35 including footnotes and contains approximately 11,578 words, excluding the Caption, Signature lines, this Certificate of Compliance and the Certificate of Service, and said word count is less than the total words permitted by the rules of the Court. Counsel relies on the word count of the Microsoft Word (2010) software program used to prepare the brief.

Dated: February 22, 2013

/s/ Judith K. Zeigler
_____
Judith K. Zeigler

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2013, a true and correct copy of the attached PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS was served upon the following, by placing the same in the service indicated, as follows:

Ms. Jan L. Holmgren
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638 (605) 357-2343(voice)
(605) 330-4402 (fax)
Jan.Holmgren@usdoj.gov

Mr. Stephen Finn
Trial Attorney
Environmental and Natural
Resources Division
P.O. Box 7611
Washington D.C. 20044-7611
202-305-3284 (voice)
202-514-8865 (fax)
Stephen.finn@usdoj.gov

[ ]	U.S. Mail	[ ]	Hand Delivery
[ ]	Facsimile	[x]	Electronic Case Filing

/s/ Judith K. Zeigler

Judith K. Zeigler