IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

SKOKOMISH INDIAN TRIBE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civ. Action No. 11-658L Hon. Lawrence M. Baskir

MEMORANDUM IN SUPPORT OF UNITED STATES'
MOTION TO DISMISS

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INTRODUCTION

The Skokomish Indian Tribe ("Tribe") and individually named members of the Tribe (collectively "Plaintiffs") seek money damages from the United States related to the construction and operation of the Cushman Dam hydroelectric project ("Project") near Tacoma, Washington. Pursuant to the Federal Power Act, an agency of the United States, the Federal Energy Regulatory Commission ("FERC") licensed the Project in 1924. The Project is owned and operated solely by the City of Tacoma, Washington ("City" or "Tacoma" or "Licensee"). The construction of the Project immediately upon completion resulted in the flooding of a portion of the Skokomish Reservation and diverted the flow of the Skokomish River's North Fork. Additionally, Plaintiffs seek compensation based on damages to the Skokomish Reservation attributable to aggradation of the river, which occurs when deposits of sediment cause the floor of the river to build up over time, from the continued operation of the Project.

The Skokomish Tribe has objected to the Cushman Dam Project since the 1920s and has brought repeated lawsuits in attempts to remedy damage to the Skokomish Reservation. Congress provided a remedy for when trespass damage occurs from the construction and operation of a hydroelectric dam in the Federal Power Act in that the Act allows for

property owners to sue the license holder. 16 U.S.C. § 803(c). Simultaneously, the Act provides that "in no event shall the United States be liable [for damage from the construction, maintenance, or operation of a hydroelectric project]." Id.

Here, Plaintiffs availed themselves of that statutorily provided remedy and brought suit against the license holder, the City of Tacoma. Plaintiffs ultimately settled with the licensee for harm caused from the construction and operation of the Cushman Project. In that same lawsuit, Plaintiffs brought tort claims against the United States for construction, maintenance and operation of the Cushman Project. After holding that the United States was not liable for claims based on the construction, maintenance or operation of the Cushman Project pursuant to the Federal Power Act, the Ninth Circuit transferred the Treaty based tort claims to this Court. The Ninth Circuit also held that the inverse condemnation claim based on aggradation damages asserted against Tacoma accrued at least ten years before the filing of the lawsuit (in 1989) and thus, was barred by the statute of limitations.

Following transfer from the Ninth Circuit, Plaintiffs amended the Complaint and now seek to recover damages for three claims: 1) that the Treaty of Point-No-Point establishes a fiduciary duty to protect the

resources on the Reservation from damages incurred based on the construction, maintenance and operation of the Cushman Project pursuant to the Federal Power Act, 2) that a slew of federal statutes and regulations (including the Federal Power Act) create money mandating fiduciary duties requiring the United States to bring action against or to remedy damage caused by a third party's trespass, and 3) that the United States has temporarily taken a flow easement based on aggradation damage without just compensation in violation of the Fifth Amendment of the United States Constitution.

The United States moves to dismiss Plaintiffs' case, first, because the transfer from the Ninth Circuit was not proper. A claim or case may be transferred from one court to another assuming the receiving court would have had jurisdiction over the originally filed complaint. Here, the originally filed complaint was a tort action, over which the Court of Federal Claims does not have jurisdiction. Likewise, the original complaint contains no Tucker Act claims that could be pursued in this Court. As such, the Court should treat Plaintiffs' Amended Complaint as newly filed.

Regardless of whether the transfer was proper, this Court either lacks jurisdiction to consider the claims in the Amended Complaint or Plaintiffs do not state a claim upon which relief may be granted. The Ninth Circuit's

previous holdings are considered law of the case. As such, the holdings that: (1) the United States is not liable for damages from the construction, maintenance or operation of the Cushman Project and (2) concluding that the aggradation based claims accrued in 1989 and are barred by the statute of limitations, resolve the same claims here. Additionally, the takings claim and the claims based on breach of fiduciary duties from the various federal statutes and regulations were not part of the original complaint, and thus were not transferred by the Ninth Circuit. Therefore these newly filed claims should not be treated as if they were filed in 1999 (the filing date of the original complaint), and these claims accrued long before the filing of the Amended Complaint. The Federal Power Act, Section 10(c), bars the remainder of the federal statutory and regulatory claims because all the claims are based on damage occurring as a result of the construction, maintenance and operation of the Cushman Project. Moreover, none of the identified statutes or regulations creates a specific enforceable money-mandating fiduciary duty that the United States has breached sufficient to establish jurisdiction for purposes of the little Tucker Act. The takings claim also does not state a claim because the United States' role in licensing the Project does not form the necessary causation for purposes of a takings claim against the United States; the United States

does not own or operate the Cushman Project and did not flood the Skokomish Reservation or create a physical taking in the form of a temporary flowage easement across the property.

The revamped broad Treaty claim Plaintiffs plead in their Amended Complaint is also barred based on the Federal Power Act, Section 10(c) as the claims are based on the construction, maintenance and operation of the Cushman Project. The statute of limitations further precludes Plaintiffs' Treaty based claims as the claimed harm to the Tribe's hunting and fishing rights from the diversion of the river occurred immediately following construction of the dam in 1929. The Tribe could have brought its lack of access to fish claims before the Indian Claims Commission ("ICC"), and the Tribe waived its right to bring these claims here when it settled the ICC case it did bring. The Court should grant the Defendant's Motion and dismiss Plaintiffs' Complaint.

BACKGROUND[1]

I. The Skokomish Indian Tribe's Reservation and the Treaty of Point-No-Point

The Skokomish Indian Tribe's five-thousand-acre reservation is located near the mouth of the Skokomish River in Washington state. ECF No. 6 at ¶¶ 7-9, 11. In 1855, the United States and the Tribe entered into the Treaty of Point No-Point ("Treaty") in which the Tribe ceded the Tribe's territory to the United States and reserved a tract of land for the Tribe." Id. ¶ 8. The Treaty also reserved for the Tribe "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States" and "the privilege of hunting and gathering roots and berries on open and unclaimed lands." Id. ¶ 12-13. The Supreme Court has held that this language provides the Tribe with a right of access to fish at historical places regardless of whether on or off the Tribe's reservation. See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

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[1] This background statement contains facts material to jurisdictional issues raised in the instant motion to dismiss, and also general background facts for the Court's convenience that are not material to the jurisdictional or other threshold legal issues raised in the instant motion. To the extent we accept the allegations in Plaintiffs' Complaint, this is based solely on the nature of our motion, which is a motion to dismiss. This background discussion does not concede that any of Plaintiffs' allegations are true or correct.

II. History of the Licensing Proceedings for the Cushman Dam Project

In 1923, the City of Tacoma, Washington ("City" or "Tacoma" or "Licensee") applied for and received a 50-year minor-part license for the Cushman Hydroelectric Project ("Project"). ECF No. 6 at ¶¶ 49, 58. The minor part license authorized the flooding of 8.8 acres of the Skokomish Reservation in connection with the construction by Tacoma of a dam on the North Fork of the Skokomish River; the purpose of the dam being to raise the level of Lake Cushman to produce hydroelectric power. Id. ¶ 58. The project is a completely City-owned project comprised of two dams, two reservoirs, diversion works, two power houses and transmission lines. See Skokomish Indian Tribe v. United States, 410 F.3d 506, 509 (9th Cir. 2005). The Federal Energy Regulatory Commission's predecessor, the Federal Power Commission, issued the 50-year minor part license pursuant to the Federal Water Power Act of 1920. ECF No. 5 at ¶ 58.

As such, the project, completed in 1929, flooded over thirty acres of federal land in a total project area of 4700 acres located upstream from the Tribe's land. Skokomish, 410 F.3d at 509. Immediately upon completion, the project diverted the flow of the Skokomish River's North Fork to power-generating facilities. Id.; ECF No. 6 at ¶ 60. Over time, this diversion has contributed to aggradation of the river, which occurs when deposits of

sediment cause the floor of the river to build up over time, leading to increased flooding and elevated water tables. Skokomish, 410 F.3d at 510 n.1.

At the expiration of the 1924 license, in 1974, Tacoma filed an application for a major project license and then filed a revised application in late 1976. See Skokomish Indian Tribe v. F.E.R.C., 121 F.3d 1303, 1304 (9th Cir. 1997). Commission staff completed its analysis of Tacoma's application, but the Commission could not act, because the project had not received water quality certification from the State of Washington under § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1972). The Washington Department of Ecology issued final certification in December 1987. See City of Tacoma, 67 F.E.R.C. 61,152 (1994), reh'g denied, 71 F.E.R.C. 61,381 (1995).

In 1996, the Department of the Interior commissioned and released a number of technical studies regarding impacts from the Cushman Project to the Skokomish Reservation. ECF No. 6 at ¶¶ 86-86.5 (listing five technical reports). On November 1, 1996 and August 4, 1997, the Secretary of the Interior prescribed conditions under Section 4(e) of the Federal Power Act for the protection and utilization of the Skokomish Reservation. Id. ¶¶ 88, 97.

After many rounds of litigation, FERC issued a new license for the dam, which includes conditions imposed by the Secretary of the Interior to mitigate damage to the Tribe's fishing rights caused by the Cushman Project. See City of Tacoma, Washington v. F.E.R.C. 460 F.3d 53, 60 (D.C. Cir. 2006) (describing history); City of Tacoma, Washington, Order Issuing Subsequent Major License, Dismissing Complaint As Moot, and Rejecting Motion to Intervene, 84 F.E.R.C. 61,107 (1998). According to Plaintiffs, as stated in the Amended Complaint here, the conditions imposed in the July 15, 2010 license "are intended to provide for prospective protection and utilization of the . . . Cushman Project, by inter alia, providing for: instream flows for fisheries as well as increased sediment transport flows to address flooding and groundwater impacts to the Reservation, ramping rates, telemetered stream gages [sic], fish passage, fisheries habitat restoration projects and removal of certain obstructions, fish stocking, wetlands and wildlife management." ECF No. 6 at ¶ 97.

III. Ninth Circuit Litigation and Transfer to the Court of Federal Claims

Pursuant to the Federal Tort Claims Act, in 1999, Plaintiffs brought suit for damages against the United States for alleged violations of fiduciary duties in the 1855 Treaty by allowing continued operations of the Project

and for failing to take legal action on behalf of the Tribe. Skokomish, 410 F.3d at 510. Plaintiffs also brought Federal Power Act claims against the United States for failing to submit and include license conditions protective of the Skokomish Reservation fish and wildlife. Id. at 511-512. The Ninth Circuit dismissed the Federal Power Act claims against the United States based on Section 10(c) of the Federal Power Act, which provides that all damages from a hydroelectric project will be borne by the licensee. Id. at 512. With respect to the tort claims based on the Treaty, the Ninth Circuit held that "because we lack subject matter jurisdiction over the Tribe's damages claims against the United States, but believe they might properly have been brought under the Indian Tucker Act, we exercise our discretion to transfer these claims to the Court of Federal Claims." Id. at 511 (citing 28 U.S.C. § 1631).

In the same Ninth Circuit case, Plaintiffs also set forth damages claims against the City of Tacoma for inverse condemnation under the Washington state constitution. Id. at 516. In dismissing the inverse condemnation claim, the Ninth Circuit held that "the Tribe's aggradation-related claims began to accrue no later than February 16, 1989," id. at 517, and that "the aggradation-related claims . . . are time-barred." Id. at 518.

Plaintiffs ultimately settled with the City of Tacoma for $35 million plus a share of the revenues from Cushman Dam 2 going forward.

STANDARD OF REVIEW

RCFC 12(b)(1) provides for dismissal of a claim if the court lacks jurisdiction over the subject matter of a claim. The Supreme Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. United States Dep't. of Energy v. Ohio, 503 U.S. 607, 625 (1992); Renne v. Geary, 501 U.S. 312 (1991). "A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936)). "Subject matter jurisdiction is strictly construed." Leonardo v. United States, 55 Fed. Cl. 344, 346 (2003).

RCFC 12(b)(6) also forms a basis for dismissal of Plaintiffs' claims. Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard

to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." Neitzke, 490 U.S. at 327 (quoting Hishon, 467 U.S. at 73). Thus, claims should be dismissed under Rule 12(b)(6) where, as here, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." Conley, 355 U.S. at 102. In assessing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must take the well-pleaded allegations of the complaint as true and draw all reasonable factual inferences in the plaintiffs' favor. Xechem Int'l., Inc. v. Univ. Of Tex. M.D. Anderson Cancer Ctr., 382 F.3d 1324, 1326 (Fed. Cir. 2004) cert. denied, 125 S. Ct. 1314 (Feb. 22, 2005).

ARGUMENT

I. Because Transfer Under 28 U.S.C. § 1631 Occurred in the Absence of a Claim Within the Jurisdiction of the Court of Federal Claims, the Claims in the Amended Complaint Must Be Treated As Newly Filed.

After upholding the dismissal of the United States from all damages claims arising from the construction, maintenance or operation of the Cushman Project, the Ninth Circuit transferred Plaintiffs' tort claims to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. Skokomish, 410 F.3d at 511. 28 U.S.C. § 1631 provides:

> [w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action

> or appeal to any other such court in which the action or appeal could have been brought at the time it was filed . . . .

The purpose of this statute is to allow for a claim or case that was filed in the wrong court to be transferred to a court with jurisdiction to allow plaintiff's claim or case to proceed as if originally filed in the court with jurisdiction. For example, if a plaintiff files a takings claim asserting over $10,000 in damages in a district court, that district court could then transfer the case to the Court of Federal Claims and the case would proceed as if originally filed in the Court of Federal Claims. See, e.g., Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379 (2004); see also W. Shoshone v. United States, 357 F.Supp.2d 172, 175-176 (D.D.C. 2004) (transferring plaintiffs' claims from the district court to the Court of Federal Claims that sought to challenge its Indian Claims Commission decision because the district court did not have jurisdiction, but this Court did). As the Federal Circuit has held, the answer to whether the action "could have been brought at the time it was filed or noticed" in the transferee court is dispositive of whether transfer is permissible. Souders v. S.C. Pub. Serv. Auth., 497 F.3d 1303, 1307 n.4 (Fed. Cir. 2007). Plaintiffs originally filed tort claims against the United States pursuant to the Federal Torts Claims Act. See Ex. A (Original Complaint in Skokomish Indian Tribe v. United

States, Civ. No. 99-5606, ECF No. 1 at ¶¶ 170-215 (W.D. Wash. Nov. 19, 1999) (setting forth negligence, trespass, public nuisance, private nuisance, conversion, tortuous interference with property and violation of the Administrative Procedure Act ("APA") claims against the United States)). Congress did not provide jurisdiction over tort (or APA) claims in the Court of Federal Claims. See 28 U.S.C. § 1491 ("Court of Federal Claims shall have jurisdiction to render judgment upon any claim . . . for [] damages in cases *not sounding in tort*) (emphasis added). Thus, this case, as plead by Plaintiffs here could not have been filed in the Court of Federal Claims and transfer to this Court was not proper.

Moreover, the Federal Circuit has held that how the plaintiff chooses to pursue his or her case is what determines whether there is jurisdiction. Souders, 497 F.3d at 1307-1308 (holding that whether a claim could be construed as falling within the jurisdiction of the Court is "irrelevant" and that the Federal Circuit will not construe a plaintiff's claim as coming within the jurisdiction of the Court if the plaintiff has plead its case in a manner that does not fall within the jurisdiction of the Court); see also The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("The party who brings a suit is master to decide what law he will rely on."). Here, even though Plaintiffs claims were brought pursuant to the Federal Torts Claims Act and

alleged tort violations, the Ninth Circuit described the claims as really being "claims that the United States violated its obligations under the Treaty" and allegations "that the United States failed to abide by its contractual obligations to the Tribe under the Treaty." Skokomish, 410 F.3d at 510-11. Regardless of that characterization of Plaintiffs' claims, the fact remains that the Plaintiffs plead tort claims against the United States. See Ex. A at ¶¶ 170-215. The Ninth Circuit could not transform Plaintiffs' claims into those for which Congress has provided jurisdiction in the Court of Federal Claims. Of note, neither Plaintiffs nor the United States sought to have this case transferred to this Court; the Ninth Circuit sua sponte decided to transfer it.

Importantly, amendment of the complaint after transfer does not cure this jurisdictional defect. See Rogers v. United States, 26 Cl. Ct. 1023 (1992) (holding that because plaintiff had not averred a claim in its original complaint, amendment of the transferred complaint did not create jurisdiction); Brown v. United States, 84 Fed. Cl. 400, 405 n.5 (2008) (noting that plaintiff had only raised the contract claims at issue for the first time in the amended complaint -- they were not part of the district court complaint -- and thus, the claims in the amended complaint would proceed

as newly filed). In sum, the Court should dismiss the tort claims originally filed by Plaintiffs and treat Plaintiffs' Amended Complaint as newly filed.

II. The Applicable Six-Year Statute of Limitations Bars this Lawsuit.

This Court lacks subject matter jurisdiction regarding Plaintiffs' newly filed claims because the claims exceed the statute of limitations set out in 28 U.S.C. § 2501. Civil actions brought against the United States in the Court of Federal Claims must be filed within six years of the accrual of the cause of action. 28 U.S.C. § 2501. "This statute of limitations is a jurisdictional limitation on the government's waiver of sovereign immunity and therefore must be construed strictly." Wolfchild v. United States, 62 Fed. Cl. 521, 547 (2004) (citing Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)). "Exceptions to the limitations and conditions upon which the government consents to be sued are not to be implied." Hopland Band, 855 F.2d at 1577 (citing Soriano v. United States, 352 U.S. 270, 276 (1957)). The Indian Tucker Act (28 U.S.C. § 1505) constitutes a waiver of the United States' sovereign immunity to suit, but is conditioned by the six-year statute of limitations. John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008) (Section 2501 is a condition upon the waiver of sovereign immunity and must be strictly observed).

In deciding the issue of dismissal on statute of limitations grounds, the Court focuses on "first accrual," the 28 U.S.C. § 2501 condition on the waiver of sovereign immunity. Accordingly, the relevant question is when did events first transpire entitling the claimant to bring suit alleging the breach. Nager Electric Co. v. United States, 368 F.2d 847, 851 (Ct. Cl. 1966). It is when the operative facts exist and are not inherently unknowable that dictates first accrual. Menominee Tribe v. United States, 726 F.2d 718, 720-22 (Fed. Cir. 1984).[2] The date of "ordinary accrual" for a breach of statutory or regulatory dates is when the wrong began.

[2] In Menominee Tribe, the Federal Circuit addressed arguments that elements of the claims were "inherently unknowable." The factual basis for Menominee Tribe's principal claim, despite involving technical forestry principals, i.e., that the annual harvest limitation was too low, did not make the factual basis for the claim "inherently unknowable." Id. at 721, n.8. As the Circuit stressed:

> Nor were the facts of potential injury from Interior's conduct "inherently unknowable" at the ordinary accrual date in 1952. Plaintiffs charge Interior's officials with that very knowledge which was also available to the Indians if they sought advice. The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. . . .Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable."

Id. (citing Affiliated Ute Citizens v. United States, 199 Ct. Cl. 1004 (1972).

Menominee, 726 F.2d at 721; see also Jones v. United States, 801 F.2d 1334, 1335 (Fed. Cir. 1986). The rationale of this rule is that an Indian beneficiary, no less than anyone else, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered. See, e.g., Littlewolf v. Hodel, 681 F. Supp. 929, 942 (D.D.C. 1988).

Importantly, under the Indian Tucker Act, a claim first accrues "when all events have occurred to fix the government's alleged liability, entitling the claimant to demand payment and sue here for money." Samish Indian Nation v. United States, 419 F.3d 1355, 1369 (Fed. Cir. 2005) (citation omitted). "It is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." Fallini v. United States, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Instead, "for purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful.'" Navajo Nation v. United States, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

Here, Plaintiffs state that upon completion:

> [t]he Cushman Project diverted the entirety of the North Fork of Skokomish River from its watershed, thereby decimating fish runs and destroying the Tribe's usual and accustomed fishing

> places on the North Fork of the Skokomish River and destroying fishery and estuary habitats on the Main Stem.

ECF No. 6 at. ¶ 60. Plaintiffs' Treaty claim, takings claim and claims regarding the other alleged breaches of fiduciary duties all flow from the initial construction of the Cushman Project. See Id. ¶ 115 (claiming the United States has breached alleged fiduciary duties in the Treaty of Point-No-Point to "maintain, preserve, and protect the Reservation lands and Treaty-protected hunting and fishing rights from waste and other damages"), ¶ 119-122 (claiming the United States has breached alleged fiduciary duties to prevent trespass and "failing to protect the Reservation and Plaintiffs' Trust Corpus from the impacts of the Cushman Project"); ¶ 127 ("[a]s a result of the United States' actions involving the Cushman Project, Skokomish Reservation lands and natural resources . . . were flooded and damaged constituting a temporary taking . . . .).

In short, all the events which fix the government's alleged liability occurred upon completion of the Cushman Project; it was upon completion of the Project in 1929, according to the Complaint, that the Skokomish River was entirely diverted, the fish runs were decimated and the Tribe's usual and accustomed fishing places destroyed. "All events necessary to fix the Government's alleged liability" occurred upon completion of the Cushman Project. See San Carlos Apache Tribe v. United States, 639

F.3d 1346, 1359 (Fed. Cir. 2011) (holding that the language of plaintiff's complaint sets the accrual time for the government's alleged liability); see also Colo. River Indian Tribes v. United States, 156 Ct. Cl. 712 (1962) (holding that claims for the taking of tribal land "[f]irst accrue[ ]" when the government first exercised dominion over the plaintiff's lands.). As such, all of Plaintiffs' claims accrued decades before the filing of the Amended Complaint and long before the applicable six year statute of limitations. The same is true with regard to the claims based on failure to take enforcement actions: each of these alleged failures to act occurred—at the absolute latest—in the 1990s, and therefore well outside the limitations period.[3]

[3] Compare ECF No. 6 at ¶¶ 65-67 (in 1930, district court held the Tribe could not independently pursue suit against Tacoma) with id. ¶ 116.2 (United States violated trust obligation by "restricting the Tribe from pursuing legal, regulatory, or other action to enjoin or mitigate" damage caused by the Project); see also id. ¶¶ 68-69 (DOJ and DOI "declined to bring suit, or take any other action, to protect the Tribe's rights in the early 1930s."); id. ¶¶ 70-72 (In the 1920s and 1930s, United States Attorney Dennis "recommended against the United States filing suit against Tacoma" and DOJ "took no action to protect the Tribe's rights."); Compare id. ¶¶ 78-80 (DOI recommended that DOJ bring suit against Tacoma to seek compensation for derogation of fishing and water rights; DOJ took no action) with id. ¶¶ 116-116.1 (United States allegedly breach trust duties by "[f]ailing to take any regulatory, legal or other action to enjoin or mitigate the derogation, damage and diminishment of the Reservation and the Plaintiffs [sic] Treaty-protected fishing and hunting rights…."). Compare id. ¶ 75 (DOI "took no action…to impose conditions on the continued operation of the Project for the protection and utilization of the Skokomish Reservation.

Moreover, Plaintiffs acknowledge they were fully on notice of the aggradation claims by 1996. Plaintiffs' Complaint states that the damages based on aggradation were known as of the completion of five technical reports in 1996. ECF No. 6 at ¶ 86 (listing and describing the five technical reports that were completed in 1996); see also id. at ¶ 86.1-86.3 (explaining that three of the technical reports concluded that aggradation of the Skokomish River was the cause of the frequent flooding, the adverse impacts to the River's fishery and caused the groundwater levels to rise); see also id. ¶ 86.4-86.5 (explaining that the other two technical reports concluded that the Cushman Project impacted wildlife resources and the Tribe's cultural resources). At the very latest, Plaintiffs' claims for

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Nor did the United States take any action to mitigate the harm to affected environmental, fish, and water resources, or to bring suit against Tacoma….") with id. ¶¶ 116.6-116.8, 116.11-116.12 (Claim that United States violated trust obligation by authorizing and licensing Project without imposing conditions to protect the Tribe's interests including obstruction and diminishment of waters). Compare id. ¶ 77 ("[T]he United States repeatedly denied the Tribe's requests for funding necessary studies, preventing identification and quantification of the Tribe's injuries and damages."); id. ¶¶ 81-84 (In the 1970s and 80s, BIA did not provide funding to estimate damages, bring suit, or hire technical experts) with id. ¶ 116.3 (United States violated trust obligation by "[f]ailing to provide funds to the Tribe for the purpose of pursuing legal, regulatory or other action to enjoin or mitigate the derogation, damage, and diminishment" caused by the Project.). Compare id. Plf. Compl. ¶ 72 (United States did not take "compensatory action relating to damages" caused by the Project) with id. ¶¶ 116.9-10, 116.13 (United States violated trust obligation by failing to provide compensation and/or seek compensation for damage caused by the project).

aggradation related damages accrued in 1996; again, well before the filing of the aggradation related claims sought against the United States here.

Even if the transfer from the Ninth Circuit was proper, that court already adjudicated the accrual date for the takings claims due to impacts from aggradation. Skokomish, 410 F.3d at 517. The Tribe brought inverse condemnation claims against the City of Tacoma based on state law for the same aggradation claims it seeks now to bring against the United States; in ruling on the inverse condemnation claims, the Ninth Circuit held that those claims accrued in 1989. Id. As such, that holding is law of the case the takings claims based on aggradation accrued in 1989. See Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) (collecting cases, which hold "Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts."). Here this exact issue was fully litigated in this case before being transferred.

Even if this Court were to find that the Ninth Circuit's specific holding with respect to the same factual circumstances is not law of the case, the holding would have collateral estoppel effect and the takings claim should be dismissed. The doctrine of collateral estoppel, or issue preclusion, provides that once a court of competent jurisdiction has decided an issue of fact or law necessary to its judgment, that determination is conclusive in

subsequent litigation on a different cause involving a party or a privy to the prior case. Montana v. United States, 440 U.S. 147, 153-54 (1979). As the Supreme Court and other courts have recognized, collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980). Collateral estoppel applies even where the second action involves a new claim or cause of action, so long as the determinative issue has already been decided. See Larson v. United States, 89 Fed. Cl. 363, 390 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)). The Federal Circuit applies a four-part test, in which the party invoking collateral estoppel must show that: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action. Innovad Inc. v. Microsoft Corp., 260 F.3d 1326, 1334 (Fed. Cir. 2001). Here, all the prerequisites for applying collateral estoppel are satisfied.

If the Court views the Amended Complaint as newly filed, the holdings of the Ninth Circuit still govern the accrual date of the takings

claim because the exact same Plaintiffs and Defendant are present before this Court. Collateral estoppel applies between co-parties to the first action even where the co-parties were not arrayed as adversaries in the prior litigation. Union Pacific Railroad Co. v. United States, 292 F.2d 521, 522-23 (Ct. Cl. 1961); see also Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 845 (3d Cir. 1974). Plaintiffs had a full and fair opportunity to raise and fully brief the accrual date for the aggradation claims in the Ninth Circuit that they bring in the Amended Complaint against the United States, and, in fact, it did. At the very least, the Ninth Circuit's holding on accrual for any taking claims is persuasive and this Court should likewise hold that Plaintiffs' claims accrued in 1989. The Court should dismiss Plaintiffs' Amended Complaint because all of the claims accrued more than six years before the filing of the Complaint.

III. Plaintiffs' Treaty Claim is Barred by the Exclusive Jurisdiction of the Indian Claims Commission Act.

This Court likewise lacks subject matter jurisdiction regarding Plaintiffs' Treaty claim regarding its right of access to hunt and fish at usual and accustomed areas, because the alleged interference occurred immediately upon completion of the Cushman Project. Put another way, any claims the Skokomish might have or had stemming from the loss of access to fish in the North Fork of the Skokomish River accrued before

August 13, 1946 for which the ICC had exclusive jurisdiction. See San Carlos Apache Tribe v. United States, 272 F.Supp.2d 860, 895 (D. Ariz. 2003), aff'd, 417 F.3d 1091 (9th Cir. 2005) (holding the ICCA bars a breach of trust challenge to the Globe Equity Decree of 1935). Moreover, the Tribe did bring suit under the ICCA and could have asserted this claim, but did not. Accordingly, the Tribe waived its "exclusive remedy" for this claim.

The primary purpose of the ICCA was to ensure that "there . . . [would] be a prompt and final settlement of all claims between the government and its Indian citizens, . . . and bring them to a conclusion once and for all." Te-Moak Bands of W. Shoshone Indians of Nev., 18 Cl. Ct. 74, 80 (1989) (quoting United States v. Dann, 470 U.S. 39, 46 (1985). Congress vested the ICC with wide-ranging and exclusive jurisdiction to hear all possible historic Indian claims; it also established a strict statute of limitations in which such claims were required to be presented to the ICC. In enacting the ICCA:

> Congress wished to settle all meritorious claims of long standing of Indian Tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity.

Otoe & Missouria Tribe of Indians v. United States, 131 F. Supp. 265, 275 (Ct. Cl. 1955) (providing a detailed legislative history of ICCA) (emphasis in original). Accordingly, the ICC was vested with jurisdiction broad enough to include *all possible* claims such as:

> 1) claims in law or equity arising under the Constitution, laws, treaties of the United States . . . , 2) all other claims in law or equity including those sounding in tort, . . . , 3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact or any other ground cognizable in equity; 4) claims arising from a taking by the United States, whether a a result of a treaty or otherwise; 5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

San Carlos Apache Tribe, 272 F. Supp. 2d at 895, n.26 (D. Ariz. 2003) (summarizing 25 U.S.C. § 70a (1976)).

The ICCA, though, "limit[ed] jurisdictionally the time within which claims [were required to] be filed to be heard by the [ICC], or, for that matter, any authority." United States v. Lower Sioux Indian Cmty. in Minnesota, 519 F.2d 1378, 1382 (Ct. Cl. 1975) (citation omitted). Section 12 of the ICCA established that:

> The Commission shall receive claims for a period of five years after August 13, 1946 and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

25 U.S.C. § 70k (1976) (emphasis added); see also Navajo Tribe of Indians v. United States, 601 F.2d 536, 538 (Ct. Cl. 1979) ("The applicable statute of limitations in the [ICCA], is a jurisdictional limitation upon the authority of the Commission to consider claims."). Importantly, "[i]n effect, pre-August 13, 1946 causes of action were either presented before August 13, 1951 or forever relinquished." Lower Sioux, 519 F.2d at 1383; see also 28 U.S.C. § 1505 (This court has jurisdiction of claims brought by an Indian group against the United States *accruing after* August 13, 1946) (emphasis added).

Courts have repeatedly recognized the exclusive jurisdiction of the ICCA regarding such claims, as Plaintiffs attempt to bring here. Hannahville Indian Cmty. v. United States, 4 Cl. Ct. 445, 450 (1983) (Plaintiffs' attempt to seek recovery based upon eight additional treaties is "uniformly time-barred by virtue of [ICCA]."); Navajo Tribe v. State of New Mexico, 809 F.2d 1455, 1464-1470 (10th Cir. 1987) (rejecting "Tribe's assertion that the ICC was only empowered to hear controversies involving a 'taking' of land") (citation omitted); Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States, 650 F.2d 140, 142-43 (8th Cir. 1981), cert denied, 455 U.S. 907 (1982) (upholding dismissal of Tribe's action to quiet title to the Black Hills of South Dakota, because "Congress . . .

deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the [ICCA].").

Indeed, as set out above, the Skokomish Tribe brought claims (Docket No. 296) within the exclusive jurisdiction of the ICC (in which they could have asserted their present claim) and a full discharge was made. See Skokomish Tribe of Indians v. United States, 12 Ind. Cl. Comm. 211a (1963) (entering final judgment based on negotiated compromise). Furthermore, Plaintiffs had the opportunity to litigate any and all claims, accruing before August 13, 1946, it might have had against the United States pursuant to the ICCA--including those where the alleged wrongful course of government conduct occurred before this date and continued thereafter. Thus, regardless of whether or not Plaintiffs did pursue a claim for damages resulting from the immediate diversion of the North Fork of the Skokomish River upon completion of the Cushman Dam Project before the ICC, Plaintiffs' claim is barred because their exclusive remedy for this claim was under the ICCA and before the ICC. Consequently, this Court lacks subject matter jurisdiction over Plaintiffs' claim and it should be dismissed.

IV. Congress has Exempted the United States For Damages Claims Resulting From the Construction, Operation and Maintenance of the Cushman Project.

In the Federal Power Act, Congress explicitly declined to waive the United States' sovereign immunity for damages suits that are based on the construction, operation and maintenance of a hydropower project. All of Plaintiffs' claims here flow from the licensing of the Cushman Project by the United States, but the United States does not have any ownership interests in the Project and, as discussed below, has not effectuated any physical or regulatory taking of Plaintiffs' property. Therefore, per the policy decision made by Congress, the United States cannot be held liable for damages caused by the construction, operation or maintenance of the Cushman Project.

The Federal Power Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 180 (1946). The Commission licenses hydropower projects on federal lands and on waterways that are subject to Congressional regulation under the Commerce Clause. See Federal Power Act § 4(e), 16 U.S.C. § 797(e). Under the standards set forth in

Federal Power Act §§ 4(e) and 10(a), 16 U.S.C. § 803(a), the Commission may issue a license for a project that it determines in its judgment:

> is best adapted to a comprehensive plan … for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife …, and for other beneficial public purposes, including irrigation, flood control, water supply, and recreational and other purposes . . ..

In enacting the Federal Power Act, Congress was cognizant that the building of hydroelectric projects could impact Indian Reservations. 16 U.S.C. § 797(e). Congress provided that such flooding was permissible if there was an affirmative determination that it could occur. Id. Congress also provided a mechanism whereby a licensee pays a "reasonable annual charge" for the use of tribal lands within Indian Reservations. 16 U.S.C. § 803(e). Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), further provides:

> [e]ach licensee [under Part I of the Federal Power Act] shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, *and in no event shall the United States be liable therefor*.

(Emphasis added). The starting point for interpreting a statute is the language of the statute itself. Chevron, USA, Inc. v. Natural Res.Def. Council, 467 U.S. 837, 843 (1984); Bailey v. United States, 516 U.S. 137, 144-45 (1995); Hallstrom v. Tillamook Cnty., 493 U.S. 20, 25 (1989). If the

language of the statute is unambiguous, it is conclusive. The language of the Federal Power Act is very plain; the United States is not liable for damages caused by a federally-licensed hydropower project. Rather, the remedy for plaintiffs aggrieved or injured by the decision making process is to challenge FERC's licensing determination in Federal Circuit Court. See 16 U.S.C. § 825*l*(b). As to damages resulting from the construction, maintenance or operation of a project, plaintiffs' sole remedy is against the licensee. See 16 U.S.C. § 797(e); see also 16 U.S.C. § 803(c).

The Ninth Circuit has held that the United States was not liable for alleged injuries resulting from the Cushman Project due to section 10(c) of the Federal Power Act. Skokomish, 410 F.3d at 512 ("The plain language of the FPA is clear. It differentiates between the United States and licensees, and unequivocally exempts the United States from liability."). Based on the case law discussed above, this holding by the Ninth Circuit is either law of the case, has res judicata/collateral estoppel effect or at the very least is persuasive authority. Other courts likewise uniformly agree that Section 10(c) is intended to shield the United States from liability connected with hydro power projects. See, e.g., DiLaura v. Power Authority of New York, 982 F.2d 73, 78 (2nd Cir. 1992) (finding that in enacting Section 10(c), "Congress simply wanted to preserve the right of injured

property owners to bring actions for damage against licensees … and to shield the United States against liability.") (citation omitted); Pacific Gas & Electric Co. v. F.E.R.C., 720 F.2d 78, 87 n.21 (D.C. Cir. 1983) ("[S]ection 10(c)'s plain purpose is to ensure that licensees, not the United States, bear the full costs of their projects."); Pike Rapids Power Co. v. Minneapolis St. P & SSMR Co., 99 F.2d 902, 912 (8th Cir. 1938), cert. denied, 305 U.S. 660, (1938) (Section 10(c) "must be construed as intended for the purpose primarily of saving the United States harmless from claims for damages."); Grand River Dam Authority v. Wyandotte Bd. of Educ., 147 P.2d 1003 (Ok. 1943), cert. denied, 322 U.S. 733 (1944) (noting Section 10(c)'s bar against federal liability and citing earlier state cases to that effect).

Given the words of the statute, Congress intended to make clear that it did not intend to waive the United States' immunity for claims arising out of the construction or operation of dams, but to ensure that the licensee remained responsible for any such claims. See S.C. Pub. Serv. Auth. v. F.E.R.C., 850 F.2d 788, 794-95 (D.C. Cir. 1988); Jerves v. United States, 966 F.2d 517, 521 (9th Cir. 1992); Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995). Under the clear Congressional directive of Section 10(c), the United States has no liability for damages resulting from a licensee's construction, maintenance, or operation of the Cushman Dam

Project. In short, Congress has expressly prohibited actions against the United States such as the one brought by Plaintiffs. Therefore, the Court has no jurisdiction over Plaintiffs' claims against the United States and should dismiss.

V. None of the Sources of Federal Law Cited by the Tribe Establish Money Mandating Fiduciary Duties.

Plaintiffs claim the United States has breached specific fiduciary duties owed to the Tribe found in the Treaty of Point-No-Point, the Indian Non-Intercourse Act, the Act of June 30, 1834, the Act of March 3, 1893, the Act of June 25, 1910, the Indian Reorganization Act of 1934, the American Indian Agricultural Resource Management Act and the Federal Power Act. ECF No. 6 at ¶¶ 119-122 (Second Cause of Action: Violation of the Duties Assumed by the United States to the Tribe Under the Treaty of Point-No-Point, Federal Statutes, and Regulations). Plaintiffs first claim that the Treaty of Point-No-Point requires the United States to maintain the Tribe's historic fishery unaltered by man-made actions. Plaintiffs further claim that these sources of law require the United States to either have brought an enforcement against the City of Tacoma as a trespasser on the Reservation based on the construction, maintenance and operation of the Cushman Dam Project, or the United States was required to provide the

Tribe with funding to bring its own action. Under either circumstance, the Tribe claims that the failure to take these actions should result in an award of money damages. Contrary to the Plaintiffs' position, none of the cited authorities provide specific fiduciary duties beyond the government's general trust obligations sufficient to invoke this Court's jurisdiction or provide for money damages.

For jurisdiction pursuant to the Indian Tucker Act, "a tribal plaintiff must invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.'" United States v. Navajo Nation, 537 U.S. 488, 503 (2003) ("Navajo I") (quoting United States v. Mitchell, 463 U.S 206, 218 (1983) ("Mitchell II")). A "money-mandating" source of law is one that must be "'fairly interpreted' or 'reasonably amen[ ]able' to the interpretation that it 'mandates a right of recovery in damages.'" Adair v. United States, 497 F.3d 1244, 1250 (Fed. Cir. 2007) (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472–73 (2003)).

The United States Government has a "general trust relationship" with Tribes. See Mitchell II, 463 U.S. 206, 225 (1983); Lincoln v. Vigil, 508 U.S. 182, 194-95 (1993). As recently reiterated by the Supreme Court, "Congress may style its relations with the Indians a 'trust' without assuming

all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." United States v. Jicarilla Apache Nation, ---U.S. ----, ----, 131 S.Ct. 2313, 2323 (2011) (citing United States v. Mitchell, 445 U.S. 535, 542 (1980) ("Mitchell I") and Mitchell II, 463 .S. at 224).

Thus while the general trust relationship between the United States and the Tribe may "'reinforc[e]' the conclusion that the relevant statute or regulation imposes fiduciary duties," the general "trust relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." Navajo I, 537 U.S. at 506 (quoting Mitchell II, 463 U.S. at 225); see also United States v. Navajo Nation, 556 U.S. 287 (2009) ("Navajo II") (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.").

Rather, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." Navajo I, 537 U.S. at 506. "*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a conventional fiduciary relationship . . . *then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages,'" Navajo II,

556 at 309 (citations omitted, emphasis in original). The determination of whether an Act is money-mandating is based on the text of the statute. See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); see also Sursely v. Peake, 551 F.3d 1351, 1355 (Fed. Cir. 2009). At issue here, then, is whether Congress has imposed any "specific prescriptions" on the United States that would require the United States to bring an enforcement action against the City of Tacoma based on the maintenance and operation of the Cushman Project. As discussed below, as a legal matter, Plaintiffs have not plead or otherwise identified any positive law – emanating from statutes, treaties, executive orders, regulations, or similar law – that imposes specific fiduciary duties on the United States that would require the United States to bring (or to fund) an enforcement action to eject the City of Tacoma from the Skokomish Reservation.

Moreover, all of sources of law must be examined in the context of the Federal Power Act's provision that expressly precludes monetary liability for the United States from the construction, maintenance or operation of a hydropower project. When Congress has expressly withheld any monetary liability for the United States, a money mandating duty cannot be fairly interpreted from any statute, regulation or treaty as fairly implying a damage remedy for the exact same damages Congress has

withheld. Even if money mandating duties were otherwise viewed to exist (which we contend they do not) in light of Congress express statements there cannot be implied a money damages remedy. See Lebeau v. United States, 474 F.3d 1334, 1343 (Fed. Cir. 2007), cert denied, 551 U.S. 1446 (2007). To permit recovery for a breach of trust claim in a case such as this . . . would defeat Congressional intent." Id. Plaintiffs' Complaint should be dismissed.

1. Treaty of Point-No-Point

Plaintiffs assert that the Treaty of Point-No-Point establishes "a duty to maintain, preserve, and protect the Reservation lands and Treaty-protected hunting and fishing rights from waste and other damages . . . ." ECF No. 6 at ¶ 115. Specifically, Plaintiffs allege that the United States allowed the City of Tacoma to "operat[e] [] a federally –licensed project [since its inception] without determining whether the project conditions were inconsistent with the purposes for which the Skokomish Reservation was created." Id. ¶ 116.5; see also id. ¶¶ 116.4, 116.6-116.11. Plaintiffs seek to have the Court find that there is a money-mandating duty that requires restoration of the Tribe's traditional hunting and fishing lifestyle to the extent these rights were exercised by Tribal members at the time of the signing of the Treaty. As discussed below, the Treaty language does not

provide a fair inference of money damages based on a fiduciary duty to maintain the fishery or traditional hunting areas unaffected by man-made impacts in its natural habitat.

The Treaty of Point-No-Point is one of a series of treaties negotiated by Territorial Governor Isaac Stevens with various Pacific Northwest Indian tribes in the mid-1800s. 10 Stat. 1133; see generally Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 661-62, 699 (1979). Pursuant to the Treaty, the Skokomish relinquished their interest in most of their territory in exchange for monetary payments. In addition, certain parcels of land were reserved for their use, and they were afforded other guarantees, including protection of their "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." 10 Stat. 1133.

The Treaty protects the Tribe's interest in "available" fish and that in order for the Tribe's fishing right to have meaning, there should be fish in the river. The Supreme Court emphasized the need for a meaningful fishery in order to fulfill the reserved fishing right, recognizing inter alia: the historical abundance of the fishery and dependence on those resources by the tribes, Fishing Vessel, 443 U.S. at 664-66, 678; the relative stability and predictability of anadromous fish runs, analogizing the ability to harvest fish

to more traditional "crops," id. at 663; the express treaty language providing for the "right of taking fish," id. at 674-85; and the fact that the tribes were unlikely to perceive the rights they reserved in their treaties as "merely the chance . . . to dip their nets into the territorial waters" and come out empty. Id. at 679; see also United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980) ("The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."). See also Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033, 1035 (9th Cir. 1985) (approving district court order releasing water from a water project to preserve nests of salmon eggs so as to preserve the Indian right of taking off-reservation fish "in common with citizens");

However, the treaty fishing right is not unlimited. Indeed, the Supreme Court has affirmed that the right secures to the Tribes up to a 50% allocation, so long as that amount would not cause the tribes to exceed a "livelihood" or a "moderate standard of living." Fishing Vessel, 443 U.S. at 675-81. Importantly, using the gauge of the "moderate living" standard means that:

> Indian tribes are not generally entitled to the same level of exclusive use an exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource.

United States v. Adair, 723 F.2d 1394, 1415 (1984).

The Treaty of Point-No-Point does not create an absolute right for preservation of the fishery from all man-made impacts. See United States v. Washington, 694 F.2d 1374 (9th Cir. 1982), on en banc reh'g, 759 F.2d 1353, 1355 (9th Cir. 1985) (failing to determine whether "the right to take fish necessarily includes the right to have those fish protected from man-made despoliation"); Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 810 (D. Idaho 1994) (holding that a Northwest Indian treaty similar to the one in this case "does not provide a guarantee that there will be no decline in the amount of fish available to take.").

Moreover, "[t]o be money-mandating, a statute, regulation, or treaty must impose a specific obligation on the part of the Government." Harvest Inst. Freedman Fed'n v. United States, 80 Fed. Cl. 197, 200 (2008); Samish Indian Nation v. United States, 657 F.3d 1330, 1335 (Fed. Cir. 2011). And "[w]hile the right to money damages may be inferred, the governmental obligation may not." Harvest Institute Freedman Federation, 80 Fed. Cl. at 201 (2008) (holding treaties at issue "did not create a governmental obligation and we cannot infer one in the absence of specific language in the treaties."). See also United States. v. Seminole Nation, 299 U.S. 417, 421–25 (1937) (dismissing suit brought to enforce treaty rights where Congress had authorized by statute suits only for limited

time—after this time expired there was no government obligation to hear suit and no waiver of sovereign immunity).

Here, all of the alleged harms to the Tribe's hunting and fishing rights happened due to man-made impacts: the construction, maintenance and operation of the Cushman Project. The Treaty of Point-No-Point does not contain language establishing a fiduciary duty to maintain the fishery in its natural habitat. Likewise, as discussed in detail above, the Federal Power Act provides that the United States shall not be liable in money damages for such harms. The Federal Power Act does not abrogate the Tribe's treaty right, but instead Congress has precluded money damage claims against the United States, and makes the license holder responsible for all such damages.

The Treaty further does not contain language requiring the United States to bring an enforcement action. ECF No. 6 at ¶¶ 116.1-116.3. "An Indian Tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." Shoshone–Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995). The D.C. Circuit concluded that the Treaty of Fort Bridger, which provided the Tribes' hunting rights, did not expressly or by implication impose a mandatory obligation on behalf of the federal government to

protect the Tribes' rights. The Tribe's Treaty right to hunt and fish at usual and accustomed places similarly does not create a mandatory duty to bring an enforcement action to protect that right.

2. The Indian Non-intercourse Act

Plaintiffs claim that the Indian Non-intercourse Act (25 U.S.C. § 177) "created a cause of action in federal court against any trespass of lands set aside for any Indian" and that by not bringing claims against the City of Tacoma under this provision, the United States has breached a money-mandating fiduciary duty. ECF No. 6 at ¶¶ 120.1, 121. The Non-Intercourse Act "bars conveyances by Indians to non-Indians unless made or ratified by Congress." Seneca Nation of Indians v. New York, 382 F.3d 245, 248 (2d Cir. 2004); see also Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1566 (Fed. Cir. 1993) (Under the Non-Intercourse Act, "transfers of title to Native American lands [a]re prohibited unless [made] pursuant to a treaty approved by the United States."). Its purpose is to "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress and to enable the [g]overnment, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made

without its consent." Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

Plaintiffs appear to be alleging that in licensing the Project, the United States somehow conveyed the Tribe's land to the City of Tacoma without the consent of the United States. First, the licensing of the Cushman Project did not transfer title to the Tribe's Reservation to the City of Tacoma and the Non-Intercourse Act is not implicated in this factual circumstance. Second, the Supreme Court has long held that the Non-Intercourse Act does not apply to actions by the United States. See id. ("[Section] 177 is not applicable to the sovereign United States."). Moreover, here, Congress provided consent for the licensing of hydro power dams across Indian Reservations and Plaintiffs acknowledge that the license was issued with knowledge that it would impact the Reservation. See 16 U.S.C.§ 797(e); ECF No. 6 at ¶¶ 56-57. Likewise, the language of the Non-Intercourse Act does not create an affirmative duty to bring an enforcement action against a trespasser, see 25 U.S.C. § 177, and even if it did, any such enforcement action would be discretionary. See Heckler v. Chaney, 470 U.S. 821, 831 (1985).

3. The Act of June 30, 1834

Plaintiffs claim the Act of June 30, 1834, 25 U.S.C. § 180 provides a money-mandating fiduciary duty to prohibit a third party from trespassing on Indian lands. ECF No. 6 at ¶ 120.2. The Act of June 30, 1834 provides:

> Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.

25 U.S.C. § 180. This Act was passed with specific intent to prevent "unlawful occupation or homesteading of Indian lands by non-Indians." Cherokee Nation of Oklahoma v. U.S., 21 Cl. Ct. 565, 574 (1990). This case does not involve settlements on the Tribe's land and does not apply to this factual situation. Cf. United States. v. Lewis. 5 Ind.T. 1, 76 S.W. 299 (Indian. Terr. 1903).

Moreover, a distinction lies between statutes that employ mandatory language such as "shall" and those that use permissive language such as "may" or similar terms. Compare Greenlee Cnty. v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007) (Payment in Lieu of Taxes Act, 31 U.S.C. §§ 6901–07, was money-mandating where pertinent provision stated that Secretary of Interior "shall make a payment" to the local government), and

Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003) (5 U.S.C. § 5942(a) was money-mandating where it provided that employees were "entitled" to certain pay and such funds "*shall be paid* under regulations prescribed by the President"), with Perri v. United States, 340 F.3d 1337, 1341 (Fed. Cir. 2003) (28 U.S.C. § 524 was "money-authorizing statute, not a money-mandating one," where statute established the Department of Justice Assets Forfeiture Fund and provided that funds for the payment of certain awards "shall be available to the Attorney General"); and Hopi Tribe v. United States, 55 Fed. Cl. 81, at 83, 87–92 (25 U.S.C. § 640d–7(e) was not money-mandating where the pertinent provision stated "[t]he Secretary of Interior is authorized" to pay the legal fees of certain tribes). As applied to the Act of June 30, 1834, the discretionary nature of the statutory language does not create substantive duties. See Cherokee Nation, 21 Cl. Ct. at 574 ("[T]he statute indicates defendant may take such measures 'as he may judge necessary.' The language leaves any action to defendant's discretion."). Therefore the Act of June 30, 1834 similarly fails to establish jurisdiction.

4. The Act of March 3, 1893

The same is true of the Act of March 3, 1893. The Tribe claims this Act requires the United States to bring an enforcement act to eject the City

of Tacoma from the Skokomish Reservation. ECF No. 6 at ¶ 120.3. This act provides that "In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity." 25 U.S.C. § 175. Even though Section 175 uses the language "shall," courts have held that Section 175 does not impose a mandatory duty on behalf of the United States Attorney to represent an Indian tribe and that the language is discretionary. See, e.g., Rincon Band of Mission Indians v. Escondido Mut. Water Co., 459 F.2d 1082, 1085 (9th Cir. 1972); United States v. Gila River Pima–Maricopa Indian Community, 391 F.2d 53, 56 (9th Cir. 1968); Siniscal v. United States, 208 F.2d 406, 410 (9th Cir. 1953); Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095, 1096 (D.C. Cir. 1974); Salt River Pima–Maricopa Indian Comty. v. Arizona Sand & Rock Co., 353 F. Supp. 1098, 1099–1101 (D. Ariz. 1972); Shoshone–Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995).

In reaching this determination, courts have relied on the fact that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). The exercise of the discretion to bring enforcement actions is judicially reviewable only

under extremely limited circumstances, none of which are present here. Senate of California v. Mosbacher, 968 F.2d 974, 976 (9th Cir. 1992); Ry. Labor Executives Ass'n v. Dole, 760 F.2d 1021, 1025 (9th Cir. 1985) (concurring and dissenting opinion); Shoshone–Bannock Tribes v. Reno, 56 F.3d 1476, 1480–1482 (D.C. Cir. 1995); Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974). In sum, the discretionary language of Section 175 does not mandate that the United States bring litigation against the City of Tacoma with respect to the Cushman Dam nor does it provide money damages in the event the United States decided not to bring an enforcement action against the owner of a hydropower dam.

5. The Act of June 25, 1920 and the Indian Reorganization Act of 1934

Plaintiffs allege that the Act of June 25, 1910, the timber provisions of the Indian Reorganization Act of 1934, and the BIA's regulations create a money mandating fiduciary duty to "preserve [the Tribe's forest] lands in [a] perpetually productive state." ECF No. 6 at ¶ 120.4. The Act of June 25, 1910, the timber provisions of the Indian Reorganization Act of 1934, and the BIA's regulations do not apply to the Skokomish Reservation. The Treaty of Point-No-Point did not intend to preserve the Skokomish Reservation's timber resources; both the Treaty and the General Allotment Act of 1887 allowed for allotment of the entirety of the Skokomish

Reservation and permitted the harvesting of timber on allotted lands; and any potential United States liability was resolved through a settlement that was approved by the Indian Claims Commission in 1963.

The Treaty contains provisions that require Reservation lands to be cleared and broken up for cultivation, and that allow for the allotment of the entirety of the Reservation. See Articles 6 and 7 of the Treaty of Point-No-Point, 12 Stat. 933. Moreover, the General Allotment Act of 1887 required the allotment of tribal lands and the distribution of allotments to tribal members for agricultural and grazing purposes. The Supreme Court has held that in order for tribal members to engage in agriculture and grazing that allottees (tribal members) may cut and sell their timber without approval of the United States. United States v. Paine Lumber Co., 206 U. S. 467 (1907). Both the Treaty provisions and the General Allotment Act would be meaningless if the United States was required to preserve the forest and thickets of underbrush that were present on the Skokomish Reservation.

Moreover, the United States compensated the Tribe for aboriginal title to 3,840 acres of the Skokomish Reservation and 2,000 acres of inland water, and valued the land at its highest and best use for timber. See 12

Ind. Cl. Comm. 209. The United States and the Tribe agreed to a total compensation of $373,577 for the land, and the Tribe agreed not to appeal

6. The American Indian Agricultural Resource Management Act

Plaintiffs claim the American Indian Agricultural Resource Management Act ("AIARMA") establishes a mandatory duty to "protect, conserve, utilize and maintain the highest production potential on Indian Agricultural lands." ECF No. 6 at ¶ 120.5. Congress did not create any specific duties in AIARMA. Indeed, the statute states "nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom." 25 U.S.C. § 3742. Accord El Paso Natural Gas Co. v. United States. 774 F.Supp.2d 40, 49 (D.D.C. 2011). Additionally, the language Plaintiffs rely on is from the congressional findings portion of the statute and does not constitute or create a mandatory duty on behalf of the United States. As such, AIARMA does not impose the specific fiduciary duties necessary to establish jurisdiction.

7. The Federal Power Act

Plaintiffs claim that Section 4(e) "requires the Secretary of the Interior to develop and impose conditions for the protection and utilization of any

reservation used by a licensed project," ECF No. 6 at ¶ 120.6, and that the United States has failed to comply with this mandatory duty. Id. ¶¶ 121-122. The Federal Power Act provides:

> [t]hat licenses . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

16 U.S.C. § 797(e). This language places the decision of whether to impose conditions and the extent of any conditions directly within the discretion of the Secretary of the Interior by saying that it is for the Secretary to "deem necessary" what conditions should be applied. The D.C. Circuit has held that once the decision is made to impose conditions that those conditions are then mandatory and must become part of the license. See City of Tacoma v. F.E.R.C., 460 F.3d 53, 64-66 (D.C. Cir. 2006). But Congress did not create a mandatory duty requiring that the Secretary of the Interior impose conditions or what any conditions would entail.

Moreover, regardless of whether the Federal Power Act creates such a mandatory duty, Plaintiffs acknowledge that the Secretary of the Interior has set forth conditions and FERC has incorporated those conditions into the current license. ECF No. 6 at ¶¶ 93-94. If Plaintiffs wished to challenge the license conditions they should have brought an action in the

courts of appeal. The Federal Power Act also establishes a process for challenging decisions made by federal agencies such as Interior during the licensing of a hydropower project. 16 U.S.C. § 825*l*. Other federal agencies' determinations become part of a Commission-issued license, and are subject to review in the courts of appeal, as any other aspect of the license. See e.g., Am. Rivers v. F.E.R.C., 201 F.3d 1186, 1210 (9th Cir. 2000) (conditions required by secretaries of other agencies are reviewed as part of the licensing order in the courts of appeal); Bangor Hydro-Electric Co. v. F.E.R.C., 78 F.3d 659, 663 (D.C. Cir. 1996) (Commission serves as "neutral forum" for compiling the record regarding mandatory agency conditions, which court then reviews); see also Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778-79 and n.20-21 (1984) (review of mandatory conditions incorporated in license occurs on review of license as a whole). Here, Plaintiffs challenged many aspects of the relicensing process for Cushman Project, but Plaintiffs did not challenge the Secretary's conditions in the 2010 license. Plaintiffs' challenge to the license conditions should be dismissed.

VI. Plaintiffs Have Not Set Forth a Cognizable Takings Claim Where Actions of a Third Party Have Caused the Alleged Harm.

Count III of Plaintiffs' Complaint alleges a temporary taking[3/] based on the creation of flowage easement due to the licensing the Cushman Project–a project solely owned and operated by the City of Tacoma. Plaintiffs argue the United States is responsible for the flooding and that the act of licensing the Project has temporarily taken the Tribe's property. ECF No. 6 at ¶¶ 123-127. A necessary and fundamental precondition to holding the United States liable for a taking is that the United States–not another party–actually caused the taking.

Fundamentally, "[f]or a takings claim to prevail against a motion to dismiss in this court, the action complained of must be attributable to the United States." May v. United States, 80 Fed. Cl. 442, 445 (2008) (citing Erosion Victims of Lake Superior Regulation v. United States, 833 F.2d 297, 301 (Fed. Cir. 1987)); Hufford v. United States, 87 Fed. Cl. 696, 704 (2009) (dismissing action where plaintiff did not properly allege "the United States was responsible for taking her property"); Ark. Game and Fish Comm'n v. United States, 87 Fed. Cl. 594, 615 (2009) (To win a takings

[3/] Plaintiffs assert a temporary taking. A temporary taking is generally not doctrinally distinct from a permanent taking. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 482 U.S. 304, 318 (1987) ("'[T]emporary' takings . . . are not different in kind from permanent takings. . . ."). As a general matter, a temporary taking differs from a permanent taking primarily because a temporary taking is limited in duration or is acknowledged to be reversible. See, e.g., Yuba Natural Res., Inc. v. United States, 821 F.2d 638, 641-42 (Fed. Cir. 1987).

claim on the merits, plaintiff must prove that the government's actions were the "direct and proximate cause" of the harms to its property interest.).

Here, the United States is only a licensor of the Project at issue–not the owner or operator. The United States' actions are not the direct or proximate cause of the alleged damage to the Skokomish Reservation; the actions of a third party, the City of Tacoma, are what caused the alleged damage both upon completion of the Cushman Project and any damages attributable to aggradation. Therefore the United States is not liable for a taking.

The situation here is different from one where the permitee–Tacoma–is acting as an agent for the United States. See Lion Raisins, Inc., v. United States, 416 F.3d 1356, 1363 (Fed. Cir. 2005) (United States can be liable for actions of its agents); see also Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 21-22 (1940) (government liable where private company, carrying out a government contract, built river dikes which destroyed privately-owned land). However, liability premised on an agency relationship requires, inter alia, that the principal (here the United States) express assent that the agent (Tacoma) take action on the principal's behalf. REST. 3D AGENCY § 3.01 (2006); see Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (common law agency is test for

determining when takings accomplished by others are attributable to the federal government). Tacoma does not operate the Cushman Project on behalf of the United States. Likewise, the United States did not contract with Tacoma to build the dam, as in Yearsley–rather, Tacoma desired to build the dam, and merely sought a license from the United States. Thus there is no evidence of an agent relationship here.

"The federal government is not liable for the actions of nonfederal parties who are not agents of the United States." Moorish Sci. Temple of Am. v. United States, No. 11–30 C, 2011 WL 2036714 at *6 (Fed. Cl. May 25, 2011) (citing Fullard v. United States, 78 Fed. Cl. 294, 296, 300 (2007) ("A plaintiff cannot invoke Tucker Act jurisdiction by merely naming the United States as the defendant in the caption of the complaint but failing to assert any substantive claims against the federal government."). Therefore no taking can result under the facts as plead in Plaintiffs' Complaint. A contrary result would vastly increase the liability of the United States, whose agencies permit many activities that may ultimately result in damage to property caused by permitees.

Finally, even if a cognizable takings claim existed for the treaty rights at issue in this case, Plaintiffs acknowledge that it was rejected by the District Court. Skokomish Tribe et. al. v. United States of America,

Opening Brief of Appellant Skokomish Indian Tribe, 2002 WL 32100049 at *31 (2002) ("The court held that its first summary judgment order erased all fishery damage claims...."); id. at *33 (referencing "[t]he court's rejection of every single fishing-based claim...."); Skokomish Indian Tribe v. United States, 161 F.Supp.2d 1178, 1178 (2001) ("By Order entered June 5, 2001, this Court dismissed" claims related to treaty-based fishing rights). The Ninth Circuit did not alter this holding. As such it represents either binding law of the case, has res judicata, collateral estoppel effect or is persuasive authority directly on point. Therefore, the Court should dismiss Count III of Plaintiffs' Complaint.

CONCLUSION

For the aforementioned reasons, the United States requests that the Court dismiss Plaintiffs' Complaint.

Dated: April 13, 2012

Respectfully Submitted,

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