UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CASIMIR L. LEBEAU, CLARENCE MORTENSON, RAYMOND CHARLES HANDBOY, SR., and FREDDIE LEBEAU on behalf of themselves and all other persons similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA Defendant.	Civ. 14-4056-KES

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Defendant United States of American hereby submits this brief in support of its Motion to Dismiss Plaintiffs' Complaint for Declaratory and Equitable Relief ("Complaint") (ECF No. 1). Plaintiffs allege that the United States took their property without adequate compensation when Congress authorized the United States Army Corps of Engineers ("Corps") to construct the Oahe Dam and reservoir. Compl. ¶¶ 1–4. According to Plaintiffs, this taking took place in 1948 and Plaintiffs were compensated for the taking. Compl. ¶ 4. Plaintiffs now bring suit, alleging that the United States breached its trust and fiduciary obligations and that they have already received compensation for the taking of their property interest.

Plaintiffs' Complaint should be dismissed on several grounds. First, this Court lacks jurisdiction over the Complaint because the Complaint on its face is barred by the statute of limitations, given that Plaintiffs allege the taking took place in 1948. Plaintiffs also fail to state a claim upon which relief can be granted because they have not identified any substantive statute or regulation that the United States violated. In addition, Plaintiffs' Complaint is barred by the doctrines of res judicata, collateral estoppel, and waiver. Plaintiffs cannot relitigate claims that were brought in other litigation, nor can they challenge the compensation they received for their property when they either agreed to the appraised value or required the Corps to bring condemnation proceedings in United States district court. Finally, this Court lacks subject matter jurisdiction over Plaintiffs' Complaint because there is no valid waiver of sovereign immunity. Plaintiffs seek compensation for an alleged taking, and such a claim must be brought in the Court of Federal Claims. As such, this Court should dismiss all of Plaintiffs' claims.

I. BACKGROUND

A. General Factual Background

"In the Fort Laramie Treaties of 1851, 11 Stat. 749 (1851), and 1868, 15 Stat. 635 (1868), Congress established the boundaries of the Great Sioux Reservation." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 813 (8th Cir. 1983). In 1889, Congress released some 9 million acres of the Great Sioux Reservation back to the public domain and divided the rest into smaller reservations, including the Cheyenne River Reservation. *South Dakota v.*

Bourland, 508 U.S. 679, 682 (1993); *Lower Brule*, 711 F.3d at 813; *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 329–30 (D.C. Cir. 2009) (noting congressional actions to diminish size of reservation).

In the Flood Control Act of 1944, Congress "authorized the establishment of a comprehensive flood control plan along the Missouri River, which serves as the eastern border of the Cheyenne River Reservation," known as the Pick-Sloan plan. *Bourland*, 508 U.S. at 683; Compl. ¶¶ 1, 4, 25. Subsequent acts of Congress authorized takings of Indian lands for hydroelectric and flood control dams on the Missouri River, including for the Oahe Dam and Reservoir Project. *Bourland*, 508 U.S. at 683 (citing *Lower Brule*, 711 F.2d at 813 n.1); *Missouri v. Andrews*, 787 F.2d 270, 276 (8th Cir. 1986) ("The Oahe reservoir in South Dakota was one of the main-stem reservoirs constructed pursuant to the Pick-Sloan plan."), *aff'd*, ET SI Pipeline Project v. Mo., 484 U.S. 495 (1988). Construction of this project required the Corps to flood approximately 370,000 acres in North Dakota and South Dakota, of which 104,492 acres was within the exterior boundaries of the Cheyenne River Sioux Indian tribe's (the "Tribe") reservation. Compl. ¶¶ 2, 26; *see also Bourland*, 508 U.S. at 683. Approximately 46,275 acres consisted of allotted and deeded land. Compl. ¶¶ 2, 26. Plaintiffs are members of the Tribe who assert that they owned or are heirs to those who owned land taken by the United States to build Oahe Dam and reservoir. Compl. ¶¶ 6–10.

In 1954, Congress provided compensation to the Tribe and individual landowners for acquisition of that land. Compl. ¶¶ 28, 31; Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 ("the 1954 Act"). This Act also memorialized "[t]he Tribe's agreement to 'convey to the United States all tribal, allotted, assigned, and inherited lands or interests' needed for the project." *Bourland*, 508 U.S. at 683. Individual landowners had the right to reject the appraised value of the land offered in compensation and require the Army Corps of Engineers to file condemnation proceedings in federal district court to determine the value of the land. 68 Stat. at 1194, § XV.

In 2000, Congress passed the Cheyenne River Sioux Tribe Equitable Compensation Act (the "Equitable Compensation Act"), which acknowledged that "the Federal Government did not justify, or fairly compensate the Tribe for, the Oahe Dam and Reservoir project when the Federal Government acquired 104,492 acres of land of the Tribe for" the Oahe Dam and Reservoir project. Pub. L. No. 106-511, § 102(a)(3)(A), 114 Stat. 2365, 2365–66. The Equitable Compensation Act provided additional financial compensation for the Tribe for the acquisition of tribal land for the Oahe Dam and Reservoir project, and established a trust fund "to be managed by the Secretary of the Treasury in order to make payments to the Tribe to carry out projects under a plan prepared by the Tribe." *Id.* at § 102(b), 114 Stat. at 2366.

B. Plaintiffs' Complaint

Plaintiffs allege that the compensation they received for their land the Corps took for the Oahe Dam and Reservoir project was insufficient and that

similarly situated non-Indians with land flooded by Pick-Sloan projects received more compensation than Plaintiffs did. Compl. ¶¶ 30, 31. Plaintiffs assert three claims for relief: (1) breach of trust obligations for "failing to exercise reasonable care in preventing the alienation of and providing compensation for the real property rights" of Plaintiffs, Compl. ¶¶ 36–38; (2) breach of fiduciary duty by "failing to deal fairly with the" Plaintiffs, *id.* ¶¶ 40–41; and (3) a declaratory judgment claim that would require the United States "to provide Plaintiffs with a full and complete accounting of their trust funds," *id.* at ¶¶ 43–46. Plaintiffs seek to have this case certified as a class action.

C. Previous Litigation

Pursuant to the 1954 Act, individuals had the right to either accept the appraised value of the land or to reject the final appraisal and have the United States bring a condemnation suit in the United States District Court. *See* 68 Stat. at 1194, § XV.

Plaintiffs brought suit in 2012 against the United States, asserting similar claims for breach of trust obligations, breach of fiduciary duty, and accounting with regard to the United States' determination that the Equitable Compensation Act applied only to compensate the Tribe and not individual landowners. *LeBeau v. United States*, Case No. 4:12-cv-4178-KES (D.S.D. filed Oct. 15, 2012). This Court found that Plaintiffs lacked standing to bring an action under the Equitable Compensation Act because they are not a party to the trust relationship created by the Act. *Id.*, 2013 WL 4780079, at *7 (D.S.D. Sept. 5, 2013). The Court also found that Plaintiffs did not plead a breach of

trust or breach of fiduciary duty claim separate from the Act. *Id.* The Court therefore dismissed Plaintiffs' Complaint. In so doing, the Court noted that "[i]f plaintiffs believe they are entitled to additional compensation, they should go to Congress for that compensation." *Id.*

II. LEGAL STANDARD

A. Lack of Subject Matter Jurisdiction

"If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Fed. R. Civ. Pro. 12(h)(3); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). Federal court jurisdiction is limited, present only where authorized by statute or the Constitution. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. *Id.* If a plaintiff cannot meet this burden, the case should be dismissed. *See High Country Res. v. FERC*, 255 F.3d 741, 747 (9th Cir. 2001). When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside of the complaint without converting the motion to dismiss into a motion for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

The United States is immune from suit unless it consents to be sued. Congress alone may consent to suit, and its consent — which is in effect a

waiver of sovereign immunity — "must be 'unequivocally expressed' in the statutory text." *United States v. Idaho, ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, is a limited waiver of sovereign immunity that provides for judicial review of federal agency actions for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

While the APA itself does not contain a specific statute of limitations, the statutory time bar for civil actions provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 758–59 (8th Cir. 2009). "A 'claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Izaak Walton*, 558 F.3d at 759 (quoting *Chandler v. U.S. Air Force*, 255 F.3d 919, 921 (8th Cir. 2001)). Once a plaintiff knows, or should know through the exercise of reasonable diligence, that he has a claim, his claim accrues for purposes of 28 U.S.C. § 2401(a). *Id.* (quoting *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997)).

Failure to file within the statute of limitations deprives this Court of subject matter jurisdiction. *See Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) ("Because a statute of limitations is one of the terms of

Congress's consent, a time-barred claim against the Government is an unconsented claim, over which a district court has no jurisdiction."); *Loudner*, 108 F.3d at 900 ("Filing within the applicable statute of limitations is treated as a condition precedent to the government's waiver of sovereign immunity, and cases in which the government has not waived its immunity are outside the subject-matter jurisdiction of the district courts."). "Because 28 U.S.C. § 2401 is a condition of the waiver of sovereign immunity, courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended." *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990). Moreover, "Indian tribes are not exempt from statutes of limitations governing actions against the United States." *Id.; see also Loudner*, 108 F.3d at 901 ("The fact that plaintiffs are beneficiaries of a trust does not mean that they are exempt from the running of the statute of limitations.").

B. Failure to State a Claim Upon Which Relief can be Granted.

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal* and *Twombly* endorse a "two-pronged" approach to deciding a motion to dismiss, under which a court first "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Next, if any well-pleaded allegations remain, the court will "assume

their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* When considering a Rule 12(b)(6) motion, the Court may consider "'some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.'" *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014) (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)).

C. Res Judicata and Issue Preclusion

"Under claim preclusion, also called res judicata, 'a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action.'" *Knutson v. City of Fargo,* 600 F.3d 992, 996 (8th Cir. 2010) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). In the Eighth Circuit, in order for claim preclusion to apply, five elements must be satisfied:

> (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action. Furthermore, the party against whom res judicata is asserted must [(5)] have had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect.

Rutherford v. Kessel, 560 F.3d 874, 877 (8th Cir. 2009) (quoting *Costner v. URS Consultants,* 153 F.3d 667, 673 (8th Cir.1998)). "Under issue preclusion, previously known as collateral estoppel, 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

case.'" *Knutson*, 600 F.3d at 996 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

III. ARGUMENT

This Court should dismiss Plaintiffs' claims. First, Plaintiffs' Complaint on its face is barred by the statute of limitations. Second, Plaintiffs have failed to state a claim upon which relief can be granted because they have not identified any substantive statute or regulation that the United States violated. Nor is the general trust relationship sufficient to support their claims.

Third, the doctrines of collateral estoppel and res judicata bar Plaintiffs' claims. Finally, this Court also lacks subject matter jurisdiction over Plaintiffs' claim because Plaintiffs' claim ultimately seeks money damages in compensation for an alleged taking, not equitable relief under the APA. As such, Plaintiffs must bring their Complaint in the Court of Federal Claims and there is no valid waiver of sovereign immunity in this Court.

A. Plaintiffs' Complaint is Time-Barred.

This Court lacks subject matter jurisdiction over Plaintiffs' Complaint because Plaintiffs failed to bring their claim within the six-year statute of limitations. Plaintiffs' Complaint challenges the alleged taking of their land for the Oahe Dam and reservoir in 1948, and the adequacy of the compensation they received for that land. Compl. ¶ 4. Plaintiffs' claims are time-barred.

Plaintiffs assert that "[t]he United States has waived its sovereign immunity under 5 U.S.C. § 702" of the APA, and, thus, the six-year statute of limitations in 28 U.S.C. § 2401 applies. *See* Compl. ¶ 14; *Izaak Walton*, 558

F.3d at 758–59. According to the Complaint, the taking occurred in 1948 and compensation was provided in 1954. Compl. ¶ 4. Plaintiffs assert that the named Plaintiffs "and other surviving landowners have been denied just compensation for the taking of this land for over 70 years." *Id.* ¶¶ 6–8. Given that this action was filed in 2014, Plaintiffs are well outside the six-year statute of limitations.

Plaintiffs certainly were aware of any taking at the time it occurred, as they were required to move from their land. *See* Compl. ¶ 29. In a similar case, the Eighth Circuit Court of Appeals held that when the federal government acquired more than 62,000 acres of land for the Garrison Diversion Project, a tribe claiming title to the land either knew or should have known of its claim, given the visibility of the major public works project. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 738 (8th Cir. 2001).

Moreover, the 1954 Act that provided compensation to Plaintiffs for their land included a provision that gave the option to individual land owners to appeal the final appraisal of their property to the district court. The individual landowners thus could either accept the appraised value of their land or reject the appraisal and request that the United States file a condemnation proceeding in the district court. *Id.* Plaintiffs therefore cannot argue that they were unaware of the alleged taking at the time it occurred. *See Spirit Lake Tribe*, 262 F.3d at 738 (holding that tribe was aware or should have been aware of claim when land was taken for major public works project); *Sisseton-Wahpeton Sioux*, 895 F.2d at 592–93 (finding that statute of limitations began

to run when tribes had "immediate knowledge" of injury). Because the claims accrued at the latest in the 1950s, Plaintiffs' claims were brought well outside the six-year statute of limitations and are barred under 28 U.S.C. § 2401(a).

There also exists no valid waiver or tolling of the statute of limitations. Because the statute of limitations is a condition of the United States' waiver of sovereign immunity, this Court should not extend the waiver beyond that which Congress intended. *See Sisseton-Wahpeton Sioux*, 895 F.2d at 592. Here, Plaintiffs had the opportunity to challenge the appraised value of the property at the time, and either accepted the appraised value or litigated it in a condemnation proceeding brought by the United States. 68 Stat. at 1194, § XV. There is no reason, therefore, to toll the statute of limitations for a period of 70 years. Plaintiffs offer no explanation in their Complaint as to why they could not have brought suit at the time the alleged taking occurred. *See* Compl.

Nor can Plaintiffs assert a "continuing violations" theory for extending the statute of limitations. The Eighth Circuit, like several other circuits, has rejected the continuing violations analysis in similar APA cases. *See Izaak Walton*, 558 F.3d at 761; *see also Hall v. Reg'l Transp. Comm'n,* 362 F. App'x 694, 695 (9th Cir. 2010) ("[T]he 'continuing violations' doctrine 'is not applicable in the context of an APA claim for judicial review.'" (quoting *Gros Ventre Tribe v. United States,* 344 F. Supp. 2d 1221, 1229 n.3 (D. Mont. 2004))). And certainly here the continuing violations theory cannot apply, as there was a definitive agency "act" — the alleged taking and compensation for

Plaintiffs' property — that fixed Plaintiffs' injury. *See Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) ("As we have held, '[a] lingering effect of an unlawful act is not itself an unlawful act.'" (quoting *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999))); *Boling v. United States*, 220 F.3d 1365, 1373–74 (Fed. Cir. 2000) (noting that continuing claims doctrine "does not apply in cases where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach").

To the extent that Plaintiffs rely upon their accounting claim as a means to toll the statute of limitations, that argument must fail. In appropriations acts riders, Congress has stated that:

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

See Pub. L. No. 109-54, 119 Stat. 499, 519 (2005). This Act does not apply here, however, because Plaintiffs do not allege a loss to or mismanagement of trust funds. Plaintiffs have not alleged that the United States has held funds in trust for them at any time. The subject of their Complaint is real property. The Federal Circuit has interpreted similar appropriations act language as limited to "any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to collect amounts due and owing." *See Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1351 (Fed. Cir. 2004). Plaintiffs

do not advance either of these types of claim in the Complaint. Thus, by its terms, the appropriations act does not apply here to prevent the statute of limitations from running.

In addition, "the claim made here would not be the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim" because Plaintiffs knew or should have known that the Corps acquired their land for the Oahe Dam and reservoir. *See Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1516 (2014). In *Wolfchild*, the Federal Circuit noted that the appropriations act riders were meant to protect plaintiffs from their claims running before they could determine that there was a loss to their trust fund. *Id.* "When a claim concerns an open repudiation of an alleged trust duty, 'a final accounting is unnecessary to put the claimants on notice of the accrual of their claim.'" *Id.* (quoting *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1355 (Fed. Cir. 2011) (alterations omitted)). Here, Plaintiffs did not need an accounting to determine whether they had suffered a harm because they were unable to use their property after the Corps acquired their land nearly seventy years ago. The injury was obvious, and the appropriations act riders do not save these claims from untimeliness. *See id.*

In short, Plaintiffs' Complaint was brought long after the statute of limitations has passed, and should be dismissed as time-barred.

B. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' Complaint also must be dismissed because Plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs have not alleged a specific source of law giving a trust or fiduciary duty that the United States violated. Nor does 25 U.S.C. § 4011 apply to the facts of the Complaint. Thus, even assuming the facts in their Complaint to be true, Plaintiffs are not entitled to relief and their Complaint must be dismissed.

1. Plaintiffs Have Not Alleged a Valid Source of Substantive Law for Their Breach of Trust and Breach of Fiduciary Duty Claims.

Plaintiffs also have failed to state a claim for relief for their breach of trust and breach of fiduciary duty claims. They base their breach of trust and breach of fiduciary duty claims on the 1868 Treaty of Fort Laramie, the General Allotment Act, and the Act of March 2, 1889. Compl. ¶ 12. None of these provide a substantive source of law establishing specific fiduciary duties that the United States allegedly violated.

The United States' general "fiduciary and trustee obligations" to federally recognized Indian tribes does not provide a waiver of sovereign immunity or a cause of action against the United States. *See, e.g., United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (holding that tribe must point to specific statutes and regulations that give the government fiduciary duties); *United States v. Mitchell* (*"Mitchell I"*), 445 U.S. 535, 542 (1980) (noting that limited trust relationship between United States and Indian allottees did not provide waiver of sovereign immunity); *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) ("But this general trust relationship alone does

not afford an Indian tribe with a cause of action against the Government . . . ."). Nor does "the mere invocation of trust language in a statute (as in the Allotment Act)" create a cause of action for breach of trust. *El Paso Natural Gas*, 750 F.3d at 893. Instead, plaintiffs must "'identify a substantive source of law that establishes' [a] specific fiduciary duty." *Id.* at 895 (quoting *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003)). "This 'analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id.* at 895 (quoting *Navajo*, 537 U.S. at 506). The requirement of a specific statutory duty applies even in APA cases. *See id.* ("These principles control here, even though the claim is for equitable relief (not money damages) and even though sovereign immunity is waived under § 702 of the APA (and not the Indian Tucker Act)."); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006) (holding that for APA claims, plaintiffs must identify a "specific duty that has been placed on the government with respect to Indians").

Here, Plaintiffs have failed to establish an enforceable fiduciary duty. Plaintiffs do not point to any specific provision of any source of law that gives the United States a specific fiduciary duty. They state that the Treaty of Fort Laramie, the General Allotment Act, "and/or Act of March 2, 1889, impose trustee obligations upon the United States for real property rights of individual members of the Cheyenne River Sioux Tribe within the Cheyenne River Sioux Indian Reservation, and to protect these lands against alienation." Compl. ¶ 36. They allege the same sources of law impose fiduciary obligations on the

United States. *Id.* ¶ 40. But Plaintiffs' Complaint does not, and cannot, show that these sources of law establish specific fiduciary duties for the United States.

As an initial matter, the General Allotment Act does not provide a specific trust or fiduciary duty enforceable in this Court. The United States Supreme Court has held that the General Allotment Act creates only a limited trust relationship that does not impose any specific duty on the United States. *See Mitchell I*, 445 U.S. at 542. Consequently, Plaintiffs cannot rely on the General Allotment Act as a substantive source of law under the APA.

Similarly, Plaintiffs also point to no provision in the Treaty or the Act of 1889 that establishes a specific fiduciary duty that the United States violated. This Treaty does not represent the United States "unambiguously agreeing" to protect the tribe's land from alienation but, at best, represents a general or limited trust obligation. *See Gros Ventre Tribe*, 469 F.3d at 812 (noting that 1855 Treaty of Fort Laramie does not establish fiduciary or other duties). Plaintiffs cite to language in the Treaty stating that the Great Sioux Reservation should be held for the "absolute and undisturbed use and occupation" of Sioux Tribes. Compl. ¶ 18; 15 Stat. 635, 636 (1868); *Bourland*, 508 U.S. at 683. Even if construed as sufficient to create a trust duty on behalf of the United States to prevent the alienation of reservation land, would create tribal rights, not individual rights. *See Dry v. United States,* 235 F.3d 1249, 1256 (10th Cir. 2000) (noting that it is "well-settled that 'the very great majority of Indian treaties create tribal, not individual, rights'"). Moreover, courts have recognized

that this Article of the Treaty was later modified or abrogated by Congress through the passage of other acts, including the General Indian Allotment Act of 1887 and the Act of March 2, 1889, 25 Stat. 888, which split up the reservation and transferred land back into the public domain. *See Lower Brule*, 104 F.3d at 1022 (noting that "[t]reaty rights obtained by the Tribe under the Fort Laramie Treaty, however, were abrogated by Congress with the passage of the General Indian Allotment Act of 1887"); *Oglala Sioux*, 570 F.3d at 329–30 (noting congressional actions to diminish size of reservation); *U.S. ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1555 (8th Cir. 1997) (noting that in 1908, Congress opened a significant portion of the reservation to non-Indian settlement). The Act of 1889 divided the reservation into smaller reservations for each tribe, and diminished the amount of land reserved. *See Oglala Sioux*, 570 F.3d at 329 (noting Act of 1889 restored 9 million acres of land to the public domain and divided remaining territory into six smaller reservations). As such, this provision did not create an enforceable trust or fiduciary duty for the United States at the time the taking occurred.

Nor do the other articles Plaintiffs cite (none of which relates to the type of land Plaintiffs allegedly lost nor the manner of its acquisition by the government) create a duty on the part of the United States. *See* Compl. ¶¶ 19–20. Article VI allows individual tribal members to select tracts of land for farming, which they may occupy and hold so long as they continue to cultivate the land. 15 Stat. at 637. But this Article does not establish that the United States would assume additional responsibilities with regard to these tracts,

much less specific duties to prevent these tracts from alienation. *Id.* Nor do Plaintiffs actually allege that United States violated this provision, given that at the time of the taking, they owned allotments of land. Likewise, Article XII provides that the tribe may cede some of its reservation land, but such cessation shall not be construed to deprive any individual member of his rights to a tract of land selected by him under Article VI. 15 Stat. at 639. Again, however, this provision does not establish a specific fiduciary duty on behalf of the United States to prevent land from being alienated. Nor do Plaintiffs here allege that they lost their land due to cessation of a portion of the reservation by the tribe. Like Article II, these portions of the Treaty were modified by later congressional acts, including the Act of 1889 and the General Allotment Act. *See Oglala Sioux*, 570 F.3d at 419.

Plaintiffs fare no better with the Act of 1889, 25 Stat. at 891, because nothing in that statute establishes a specific fiduciary duty for the United States. *See* Compl. ¶ 24 (citing 25 Stat. at 891). Instead, Plaintiffs cite to a provision establishing that certain land shall be allotted to tribal members and held in trust for twenty-five years. This act, however, actually incorporates the General Allotment Act, which as noted has been held not to establish a specific fiduciary duty. *See* 25 Stat. at 891 ("And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eight, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations . . . ."); *Mitchell I*, 445 U.S. at

542. The Act of 1889 also does not establish a sufficient duty to support Plaintiffs' cause of action for breach of trust and breach of fiduciary duty.

Even assuming, however, that the 1868 Treaty of Fort Laramie or the Act of March 2, 1889, establish specific fiduciary or other duties to protect lands from alienation, such a duty cannot apply as against Acts of Congress. Congress holds plenary authority over Indians, giving it the authority "to abrogate the provisions of an Indian treaty [when] circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *see Menominee Tribe v. United States*, 607 F.2d 1335, 1342 (Ct. Cl. 1979) (noting that "it has also been established for at least seventy years that Congress has the unilateral and plenary power (to the extent that there is no violation of the Constitution, including the Just Compensation Clause) to abrogate or modify, by statute, a prior treaty with Indians"). Here, Congress exercised its plenary power through the Pick-Sloan program, which authorized the acquisition of land for the Oahe Dam and Reservoir, and the 1954 Act, which provided compensation for the acquisition, to abrogate the Treaty of Fort Laramie and the Act of March 2, 1889. In so doing, Congress specifically authorized the Corps to acquire land for the Oahe Dam and reservoir, and provided due process and compensation for this acquisition. *See* 68 Stat. at 1191–95. As the Court of Claims noted, because Congress has the unilateral power to abrogate or modify treaties, "a valid, constitutional statute abrogating,

modifying, or 'breaching' a prior Indian treaty" cannot form the basis for a violation of fiduciary duty. *Menominee Tribe*, 607 F.2d at 1342.

Prior to the enactment of the 1954 Act, the United States negotiated with the Tribe and individual landowners to determine compensation for the inundated lands. The parties were not able to reach a full agreement, however, so the 1954 Act ultimately included a provision that gave individual land owners the option to appeal the final appraisal of their property to the District Court. 68 Stat. at 1195, § XV; S. Rep. No. 106-217, at 3 (1999). Thus, the United States acted within the scope of the Fifth Amendment and Plaintiffs were afforded all rights owed under the Fifth Amendment.[1] Accordingly, Congress properly exercised its plenary authority and Plaintiffs' Claims must be dismissed.

2. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted for Their Accounting Claim.

Plaintiffs also fail to state a claim upon which relief can be granted for their Accounting – Declaratory Judgment claim. This claim states that Plaintiffs' taken property qualifies "as 'trust funds' under the Indian Trust Accounting Statute ("ITAS")[2], and a constructive trust of funds in the Treasury

[1] Plaintiffs assert that they bring the Complaint "based upon an unlawful taking without just compensation." Compl. at 1. However, Plaintiffs do not set forth a count in the Complaint for a takings claim for compensation under the Fifth Amendment of the United States Constitution. Indeed, pursuant to Section XV of the Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. at 1194, individual landowners were provided the right to reject appraisal amounts offered in settlement, which would force the United States Army Corps of Engineers to file condemnation proceedings in federal district court where the court could determine the value of the lands and improvements.

[2] Plaintiffs refer to 25 U.S.C. § 4011 as the "Indian Trust Accounting Statute," but it is part of the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4248, 25 U.S.C. §§ 4001, *et seq.* Some courts have referred to the appropriations acts

exists with respect to the sum of money that would provide just compensation for the taking of such properties which also qualify as 'trust funds' under the ITAS." Compl. ¶ 43 (citing 25 U.S.C. § 4011). Plaintiffs' claim is not plausible on its face and should be dismissed.

Plaintiffs do not have any funds held in trust for them by the United States. The American Indian Trust Fund Management Reform Act ("Reform Act"), 25 U.S.C. § 4011, requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of" Title 25 of the United States Code. *See* 25 U.S.C. § 4011(a). Plaintiffs' Complaint, however, alleges that they were individual landowners of property that was taken by the United States. Compl. ¶¶ 26–28. They do not allege that the United States held funds in trust for them. *See id.* In addition, the Reform Act applies only to trust funds actually held, not to "a constructive trust of funds," such as alleged in the Complaint. *See* Compl. ¶ 43.

Similarly, the ITAS also applies only to funds, and does not apply to other property. *See Begay v. Public Serv. Co. of New Mexico*, 710 F. Supp. 2d 1161, 1202 (D.N.M. 2010) ("The United States Court of Federal Claims, however, has held that the ITAS applies only to trust funds and not to other property such as parcels of land."); *Rosales v. United States*, 89 Fed. Cl. 565,

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provisions that prevent the statute of limitations from running "on any claim . . . concerning losses to or mismanagement of trust funds" as the "Indian Trust Accounting Statute." *See, e.g., Wolfchild v. United States*, 731 F.3d 1280, 1290 (Fed. Cir. 2013) (citing Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003)).

580 (2009) ("*Shoshone* held that ITAS only applies to trust funds, and that the statute does not toll a claim for breach of fiduciary duty regarding trust assets."); *Oenga v. United States*, 83 Fed.Cl. 594, 611 (2008) (noting that "according to the Federal Circuit, the ITAS extends only to cases where money was lost to the trust fund by virtue of the government's failure to collect the amount stipulated in a given contract or lease"); *Shoshone*, 364 F.3d at 1348–50. Again, Plaintiffs here do not claim that the United States mismanaged their trust funds. Instead, they assert that their alienated property qualifies as "trust funds" under the ITAS. *See* Compl. ¶ 43. This statement is contrary to established law. Plaintiffs cannot rely on ITAS to toll claims for breach of duty regarding trust assets, and Plaintiffs have not stated a claim for relief under ITAS or the Reform Act because their Complaint simply does not assert that they had funds held in trust.

For the foregoing reasons, Plaintiffs have not stated a claim upon which relief can be granted, and their Complaint should accordingly be dismissed.

C. Plaintiffs' Claims Must Be Dismissed on Collateral Estoppel, Res Judicata, and Waiver Grounds.

To the extent that Plaintiffs are raising claims that were addressed in previous lawsuits, those claims are barred here by the doctrine of res judicata and collateral estoppel. Plaintiffs have also waived any claims regarding the amount of compensation they received for their property.

The doctrine of *res judicata* bars Plaintiffs' claims that the United States breached its trust or fiduciary responsibilities by providing compensation to the Cheyenne River Sioux Tribe only, rather than to the individual members,

pursuant to the Equitable Compensation Act, 114 Stat. 2365. *See* Compl. ¶¶ 31, 33(e). Plaintiffs litigated this claim fully in 2012. This Court determined that Plaintiffs lack standing to assert an action under the Equitable Compensation Act because they are not a party to the trust relationship created by the Act. 2013 WL 4780079, at *7. The parties to both cases are the same. Any claims relating to those allegations are thus barred here.

In addition, Plaintiffs' claims with regard to the compensation they received for their land are also barred by the doctrines of *res judicata*, issue preclusion, and waiver. When Congress passed the 1954 Act to compensate the Cheyenne River Sioux Tribe and its members for the acquisition of land required for the Oahe Dam and reservoir, it provided an amount of money "which sum shall be in final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs arising out of the construction of the Oahe project. . . ." 68 Stat. at 1191, § II. Pursuant to the Act, individual members had the right to either accept the Department of the Interior's appraisal of their project, or reject the appraisal and go through condemnation proceedings. 68 Stat. at 1191, § II; 1194, § XV. Thus, Plaintiffs should be deemed to have waived their claims as to the amount of compensation they received because they either accepted the appraisal or the value of their land was determined through condemnation proceedings in United States District Court.

Moreover, the 1954 Act explicitly states that the money is provided "in final and complete settlement of all claims, rights, and demands of said Tribe

or allottees or heirs thereof arising out of the construction of the Oahe project." 68 Stat. at 1191, § II. Having accepted the appraisal and the compensation, Plaintiffs cannot now argue that said compensation was insufficient. Plaintiffs simply are not entitled to receive additional compensation based on issues that were litigated or waived long ago.

D. Plaintiffs' Claims Must be Dismissed Because This Court Lacks Subject Matter Jurisdiction.

Plaintiffs' claims should also be dismissed for lack of jurisdiction because this Court lacks subject matter jurisdiction. Plaintiffs have not alleged a valid waiver of sovereign immunity because they cannot demonstrate a substantive source of law that the United States violated. In addition, Plaintiffs assert what is, in essence, a takings claim. Although they request declaratory relief and an accounting of their alleged "constructive trust" funds, their claims can only be remedied by money damages. As such, there is no waiver of sovereign immunity in this Court, and the proper court for their claims is the Court of Federal Claims.[3]

Plaintiffs have not alleged a valid waiver of sovereign immunity. They assert that the APA's waiver of sovereign immunity applies. Compl. ¶ 14. The APA is a procedural statute that provides a framework for judicial review, but does not establish any substantive requirements. *See Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996). "Thus, although the plaintiff need not demonstrate the substantive statute independently waives

[3] Plaintiffs' claims would also be barred by the statute of limitations in the Court of Federal Claims, and subject to dismissal for the other reasons outlined in this motion.

federal sovereign immunity, which is the function of section 702, the plaintiff must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States." *Id.*

As demonstrated above, Plaintiffs have not identified any substantive sources of law that were transgressed by agency action. Their breach of trust and fiduciary duty claims do not rely on any specific rights-creating duties. *See, e.g., El Paso Natural Gas*, 750 F.3d at 895–96 (holding that tribes must identify a substantive source of law that establishes specific fiduciary duties even in cases brought under the APA); *Gros Ventre*, 469 F.3d at 812 (holding that for APA claims no less than claims for money damages, plaintiffs must identify a "specific duty that has been placed on the government with respect to Indians"). Similarly, the ITAS and the Reform Act do not create a right of action here because Plaintiffs do not have funds held in trust by the United States. Thus, the United States had no responsibility to perform an accounting. Because Plaintiffs have failed to identify a substantive source of law sufficient to establish waiver under the APA, their claims must be dismissed for lack of jurisdiction. *See Preferred Risk Mut. Ins.*, 86 F.3d at 792.

In addition, Plaintiffs' Complaint, while styled as an action for declaratory relief, is in fact a request for compensation for an alleged taking that occurred many years ago. *See, e.g.,* Compl. at 1 (noting that Plaintiffs were not fairly compensated and discharge of the United States' trust and fiduciary obligations would be accomplished through compensation to Plaintiffs

and putative class), ¶ 4 ("leaving the Individual Landowners without just compensation"); ¶¶ 6–8 (alleging denial of just compensation for the taking of land), ¶¶ 30–31 (alleging breach due to failure to provide compensation); ¶ 37 (alleging failure to provide compensation); ¶ 38 (requesting accounting "for what compensation would discharge said duties"). "[A] claim for just compensation under the Taking Clause must be brought to the Court of Federal Claims in the first instance . . . ." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998); *see also United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Court of Federal Claims] to hear and determine."); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992) (recognizing "the general rule that takings claims must be brought as claims for money damages in the Claims Court").

Plaintiffs cannot avoid this jurisdictional limitation by bringing a claim for a declaration or accounting of damages in the district court. *See Eagle-Pitcher Indust., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) ("'A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.'" (quoting *Rogers v. Ink*, 766 F.3d 430, 434 (10th Cir. 1985))). The only purpose of getting a declaratory judgment or accounting here is to later receive compensation. *See Great-West Life & Annuity Ins. Co. v.* Knudson, 534 U.S. 204, 210 (2002) ("'Almost invariably . . . suits seeking (whether by

judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting))). This suit, therefore, must be brought in the Court of Federal Claims and this Court lacks jurisdiction.

Moreover, the APA waives sovereign immunity for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, assuming that Plaintiffs had brought their claims in a timely manner and subject to the United States' other defenses, Plaintiffs would have an adequate remedy in the Court of Federal Claims under the Tucker Act. Consequently, the APA does not waive the United States' sovereign immunity here and this Court accordingly lacks subject matter jurisdiction.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court dismiss Plaintiffs' claims.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served upon the plaintiffs a true and correct copy of the foregoing Defendant's Memorandum in Support of Its Motion to Dismiss by electronic filing and electronic notice on the following counsel:

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CERTIFICATION OF WORD COUNT

I hereby certify that this brief complies with the page limitation on briefs set forth in Local Rule 7.1B1 in that the WordPerfect word count is 7,880.

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