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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CATHERINE RAMONA LIBERTY,	)	CV 14-77-M-DLC
	)	
Plaintiff,	)	**Defendants' Memorandum in**
	)	**Support of Their Motion to**
v.	)	**Dismiss Plaintiff's Amended**
	)	**Complaint or Alternatively,**
SALLY JEWEL, et al.,	)	**Motion for Summary**
	)	**Judgment**
Defendants.	)	

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Defendants, Department of the Interior, Sally Jewell, Secretary of the Interior, in her official capacity, and Kevin Washburn, Assistant Secretary-Indian Affairs, in his official capacity (hereinafter "Defendants") submit their Memorandum of Authorities in Support of Their Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or alternatively, their Motion for Summary Judgment under Fed. R. Civ. P. Rule 56.

I. INTRODUCTION

Plaintiff's complaint raises two claims for relief. Plaintiff's first claim alleges a breach of trust concerning her interest in land allotted to Julia Matt Hawkins. Am. Compl. ¶¶ 25-27. Plaintiff's second claim asserts a violation of the Indian Land Consolidation Act and Indian Self-Determination Act. *Id.* ¶¶ 28-57. Plaintiff seeks a declaration (1) that Defendants have breached their trust responsibilities to Plaintiff; (2) restraining Defendants and other third parties from interfering with the Special Trustee's statutory actions respecting Plaintiff's interest in the allotment; and (3) awards of costs of suit. *Id.*, Prayer for Relief ¶¶ 1-3.

Plaintiff's claims must be dismissed. Plaintiff fails to demonstrate a waiver of sovereign immunity or grant of subject matter jurisdiction. Alternatively, Defendants are entitled to judgment as a matter of law because Plaintiff, as a certified class member in *Cobell v. United States*, D.D.C. No. 96-cv-1285

("*Cobell*"), compromised, waived, and released Defendants from any liability associated with her allegations in this case of mismanagement of trust assets occurring prior to September 30, 2009, as part of the *Cobell* final settlement.

II. STANDARDS OF REVIEW

A. Fed. R. Civ. P. 12(b)(1).

Pursuant to Rule 12(b)(1), a Court may dismiss a complaint, or any claim, for lack of subject matter jurisdiction. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may . . . attack[] the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When considering a motion that challenges the existence of jurisdiction in fact, no presumption of truthfulness attaches to plaintiff's allegations. *Id.* Jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). A party invoking federal jurisdiction, once challenged, has the burden of proving its existence. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court is not limited to allegations in the complaint but may consider materials outside the pleadings. *Assoc. of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Review of such extrinsic evidence does not convert the motion to dismiss into a motion for

summary judgment. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988)).

B. Fed. R. Civ. P. 12(b)(6).

A motion to dismiss pursuant to Rule 12(b)(6) is a challenge to the sufficiency of the pleadings set forth in the complaint. A Rule 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although the court must accept plaintiff's allegations of fact as true, it is not required to accept as correct the legal conclusions the plaintiff would draw from such facts. "Legal conclusions . . ., [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "'naked assertion[s]' devoid of further factual enhancement,'" do not suffice to state a cause of action and must be disregarded. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Claims should be dismissed under Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

C. Fed. R. Civ. P. 56(a).

The Court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

In cases like this one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Celotex*, 477 U.S. at 324 (quotations omitted). Once the moving party properly makes and supports a motion for summary judgment, the burden shifts to the nonmoving party to point toward "specific facts" in the record that establish a genuine issue of material fact. *Id.* In doing so, the nonmoving party must offer more than categorical denials or conclusory statements. "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own

affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issues for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)). If the nonmoving party fails to meet its burden, then the motion for summary judgment should be granted.

III. STATEMENT OF UNDISPUTED FACTS

Plaintiff is an enrolled member of the Confederated Salish and Kootenai Tribes ("Tribe"). August 14, 2014, Order ("August Order") ¶ 4.a. (ECF 10). This lawsuit concerns her interest in a parcel of land known as allotment #3025 (the "Allotment"). Am. Compl. ¶ 29; August Order at ¶ 4.a.

The Allotment was originally held in trust for Plaintiff's mother Julia Matt Hawkins, an enrolled member of the Tribe, pursuant to the Allotment Act. Am. Compl. ¶ 28. In 1946, Ms. Hawkins died intestate and her family inherited her beneficial interest in the allotment. *Id.* Plaintiff inherited her interest in trust. Plaintiff's father, however, inherited his interest in fee status because he was a non-Indian. August Order, ¶ 4.f. Interior Records do not indicate that Plaintiff's father ever conveyed his inherited interest to his children. *Id.*

In addition to the interest in the Allotment that Plaintiff inherited directly from her mother, Plaintiff inherited undivided interests in the Allotment from two siblings who died intestate in 1956 and 1964 respectively. Exhibit A, BIA

Individual Interests Report. Plaintiff's current undivided trust interest in Allotment 3025 is 71/756. *Id.*

Plaintiff's brother Wilbur Hawkins also inherited an interest in Julia Matt Hawkins' allotment. He died intestate and Interior probated his estate. His interest in the Allotment was inherited by his wife and children. Am. Compl. ¶ 25(a); Exhibit B, BIA Administrative Record on Probate of Estate. Notice of the Order Determining Heirs was mailed on December 1, 1970. The Notice stated that the decision became final 60 days from Notice date unless a petition for rehearing was submitted. No one filed a petition for rehearing and the estate was distributed in accordance with the final order. Ex. B at 2-3. No petition to reopen the estate has been filed. Mr. Hawkins' wife sold a part of his interest in the Allotment under the ILCA Program. August Order, ¶ 4.e; Am. Compl. ¶ 45.

On March 8, 2007, Plaintiff filed a FOIA request regarding her mother's probate with the Flathead Agency Office of Special Trustee. August Order, ¶ 4.g. Plaintiff was supplied with an appraisal, approved in January 2009, which valued the interests held in trust for the Allotment in the amount of $291,750.00. *Id.*, ¶ 4.h.

D. Plaintiff's Amended Complaint.

On March 18, 2014, Plaintiff filed her complaint, and on September 19, 2014, she filed her amended complaint. ECF 1, 12. In her amended complaint

Plaintiff asserts one claim for breach of trust and another claim for alleged violations of the Indian Land Consolidation Act ("ILCA") and the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"). Am. Compl. ¶¶ 25, 28-57. Specifically, Plaintiff alleges that Defendants have breached their trust duties to her by failing to properly administer her brother's (Wilbur Hawkins) estate, failing to buy-out the other living descendants' interests in the Allotment, failing to provide information about the Allotment to Plaintiff, and failing to properly value the Allotment. *Id.* ¶¶ 2, 25. As to her second claim, Plaintiff alleges that Defendants, under the ILCA and the ISDEAA, have failed to respond to her requests for information about the Allotment, have failed to provide compensation for her interest in the Allotment, and have interfered with the Special Trustee's ability to provide assistance to Plaintiff. *Id.* ¶¶ 55-57. Plaintiff seeks declaratory and mandamus relief for alleged breaches of trust and violations of the ISDEAA and the ILCA. *Id.* ¶¶ 1-6, 10.

E. The *Cobell* Litigation.

The *Cobell* complaint was filed on June 10, 1996. In the original *Cobell* complaint, plaintiffs alleged that officials of the United States violated their fiduciary duties as trustee to individual Indians and sought an accounting of their trust funds held in IIM accounts. *Cobell v. Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009) ("*Cobell XXII*"). On December 21, 2010, with leave of court, and pursuant

to the jurisdictional grant of the Claims Resolution Act of 2010 (Pub. L. 111-291; 124 Stat. 3064), plaintiffs filed an amended complaint. Amended Complaint (*Cobell* ECF 3671).

The *Cobell* Amended Complaint asserted three causes of action: (1) that the United States be compelled to provide a historical accounting to IIM beneficiaries; (2) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of plaintiffs' IIM trust funds; and (3) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of plaintiffs' trust lands and non-monetary trust assets. *Cobell* Am. Compl. at ¶¶ 43-52.

In their amended complaint, the *Cobell* plaintiffs alleged, in pertinent part, that they sustained damages due to the United States' breaches of trust with respect to money, land, and natural resource assets, *id.* at ¶ 1, that the United States mismanaged plaintiffs' land, funds, and resources, *id.* at ¶ 3, and that the United States owes certain fiduciary obligations to individual Indians with respect to their trust funds and lands. *Id.*, ¶¶ 19, 20, 22.

With respect to the United States' management of Indian trust lands, plaintiffs alleged that the United States' fiduciary obligations included, among other things:

> Leasing trust land and otherwise prudently contracting for the use of trust lands;
>
> Ensuring fair market value of leases;
>
> Preventing loss, dissipation, waste, or ruin of trust land; and
>
> Preventing misappropriation.

Id. at ¶ 22. The *Cobell* Amended Complaint was filed pursuant to the terms of a settlement agreement. Settlement Agreement, Terms of Agreement at ¶ B.3.a.

F. The Settlement Agreement.

The *Cobell* Settlement Agreement established two settlement classes, the Historical Accounting Class, *id.* at ¶ A.16, and the Trust Administration Class, *id.* at ¶ A.35. The Historical Accounting Class was a non-opt-out class. *Id.* at ¶ C.2.a. Upon final approval of the settlement, the members of the Historical Accounting Class released, waived, and discharged the United States from an obligation to perform a historic accounting of class plaintiffs' IIM account or other trust asset. *Id.* at ¶ I.1. Also upon final approval of the settlement, the Historical Accounting Class was barred from prosecuting any claims for a historical accounting that were, or could have been, asserted in the Amended Complaint. *Id.*

The Trust Administration Class was an opt-out class. *Id.* at ¶ C.2.b. Upon final approval of the settlement, the members of the Trust Administration Class who did not opt-out released, waived, and discharged the United States for Funds Administration Claims or Land Administration Claims and barred class plaintiffs

from prosecuting all claims that were or could have been asserted in the Amended Complaint. *Id.* at ¶ I.2. "Land Administration Claims" are defined as "known and unknown claims that could have been asserted through [September 30, 2009] for [the United States'] alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources . . . ." *Id.* at ¶ A.21.

G. Authorizing Legislation.

On December 8, 2010, Congress passed the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. The Claims Resolution Act, among other things, "authorized, ratified, and confirmed" the *Cobell* settlement (§ 101(c)(1)); conferred subject-matter jurisdiction on the United States District Court for the District of Columbia over the *Cobell* Amended Complaint (§ 101(d)(1)); and permitted certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure" (§ 101(d)(2)).

H. Class Certification.

On February 4, 1997, the District Court certified *Cobell* as a class action under Fed. R. Civ. P. 23(b)(1)(A) and (b)(2). (Order of Feb. 4, 1997 (*Cobell* ECF 27)). On July 27, 2011, the District Court re-certified and gave final approval to the Historical Accounting Class, Order of Dec. 21, 2010 (*Cobell* ECF 3670) at 1-2, and certified the Trust Administration Class consisting, in pertinent part, of

individual Indians who had an IIM account at any time after approximately 1985 or, as of September 30, 2009, had a recorded or other demonstrable beneficial ownership interest in land held in trust or restricted status. *Id.* at 2.

I. Class Notice.

Notice of the settlement, which, among other things, informed Trust Administration Class members of their opt-out rights, was mailed to "[a] list of all readily identifiable Class Members whose names and addresses were readily available and provided by the Department of Interior . . ., or whose addresses could be reasonably obtained through advanced legal research." Declaration of Katherine Kinsella, May 16, 2011, *Cobell* ECF 3762-2, at ¶ 11. Notice of the settlement was also provided in print media, *id.* at 20-22, 43-46, by radio, *id.* at 23-24, 34-42, 47, on the internet, *id.* at 25-26, and on television, *id.* at 27-33.

J. Plaintiff Is a Member of Both Classes.

On December 21, 2010, the District Court granted preliminary approval to the Settlement Agreement. Order of Dec. 21, 2010 (*Cobell* ECF 3667). Pursuant to the Court's Order, plaintiffs that wanted to opt-out of the Trust Administration Class had 120 days, to April 20, 2011, to postmark their opt-out or objection forms. *Id.* at ¶ 11. Plaintiff did not opt-out and is a member of the Trust Administration Class. Declaration of Michelle D. Herman dated December 2, 2014 ("Herman Decl.") at ¶¶ 3, 10, attached as Exhibit C (Herman Decl. refers to

previous declaration filed in *Cobell*); *see also* July 27, 2011, Order Granting Final Approval to Settlement (*Cobell* ECF 3850), Exs. A and B. Plaintiff is also a member of the Historical Accounting Class. Dec. 2 Herman Decl. at ¶¶ 3, 10.

K. Fairness Hearing and Final Approval of Settlement.

On June 20, 2011, the District Court held a fairness hearing on the proposed Settlement Agreement. Order Granting Final Approval to Settlement at 3-4. On July 27, 2011, the District Court granted final approval to the Settlement Agreement (as amended). *Id.* at 7. The District Court found, among other things, that the settlement terms were fair, reasonable, and adequate and that the settlement satisfied due process. *Id.* at 4. The District Court further found that "[t]he best notice practicable has been provided class members, including individual notice where members could be identified through reasonable effort." *Id.* at 6.

The District Court ordered that "[t]he Settlement Agreement and this Order and Judgment are binding on all members of the Trust Administration Class who are not identified among the excluded class members" and "[s]uch members . . . shall be deemed to have released, waived and forever discharged" the United States. *Id.* at 8.

Final judgment in *Cobell* was entered on August 4, 2011. Judgment in a Civil Action (*Cobell* ECF 3853). The District Court's final judgment was affirmed

by the United States Court of Appeals for the District of Columbia on May 22, 2012. *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) ("*Cobell XXIII*"); *Good Bear v. Salazar*, 2012 WL 1884702 (D.C. Cir. May 22, 2012). The Settlement Agreement became effective on November 24, 2012, after all possible appeal periods expired. Order of Dec. 11, 2012 (*Cobell* ECF 3923).

IV. ARGUMENT

A. Plaintiff has failed to demonstrate a waiver of sovereign immunity.

"It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 548, 586 (1941) (internal quotations, alterations, and omissions removed)). Waivers of sovereign immunity must be "unequivocally expressed in the statutory text . . . strictly construed in favor of the United States . . . not enlarged beyond what the language of the statute requires." *United States v. Idaho*, 508 U.S. 1, 6-7 (1993) (internal quotations and citations omitted); *see also Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011).

The burden is on the plaintiff to find and prove an explicit waiver of sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007); *see also McNutt v. Gen. Motor Acceptance Corp. of Indiana*, 298

U.S. 178, 189 (1936) (holding that because the plaintiff is the party seeking relief, that "it follows that he must carry throughout the litigation the burden of showing that he is properly in court."). This bar is jurisdictional—unless a statutory waiver exists, the district court lacks jurisdiction to properly entertain a suit against the United States or its agencies. *Sherwood*, 312 U.S. at 586. Plaintiff does not identify an unequivocal waiver of immunity in her Complaint. Instead, she identifies two bases for the Court's jurisdiction, which are discussed below.

B. Reliance on the General Jurisdictional Provision Contained in 28 U.S.C. 1331 Is Insufficient.

Plaintiff cites to 28 U.S.C. § 1331, the general federal question statute, as a basis for federal jurisdiction. Am. Compl., ¶ 10. However, it is well settled that while that section affords a grant of jurisdiction to the district courts for matters raising federal questions, it does not, itself, constitute a waiver of federal sovereign immunity. *Dunn & Black, P.S.*, 492 F.3d at 1088, n.3 (Section 1331 does not provide a waiver of sovereign immunity); *Villegas v. United States*, 926 F. Supp. 2d 1185, 1200 (E.D. Wash. 2013).

C. The Mandamus Act, 28 U.S.C. § 1361, Does Not Provide a Waiver of Sovereign Immunity.

Plaintiff asserts that section 1361 confers jurisdiction because her complaint seeks to compel an officer of the United States to perform a duty owed her. Am. Compl. ¶ 10. The Mandamus Act provides that "[t]he district courts shall have

original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Although the Mandamus Act confers subject matter jurisdiction, the Ninth Circuit has unequivocally held that the Mandamus Act does not waive sovereign immunity. *See White v. Adm'r of Gen. Serv. Admin.*, 343 F.2d 444, 447 (9th Cir. 1965); *see also Smith v. Grimm*, 534 F.2d 1346, 1353 n.9 (9th Cir. 1976). Accordingly, Plaintiff may not rely on the Mandamus Act as waiving sovereign immunity for her suit and instead must point to another statute that provides the requisite waiver. Plaintiff has not done this.

D. Claim-Specific Waivers of Sovereign Immunity.

Because Plaintiff has not demonstrated that either the general subject matter jurisdiction statute or the Mandamus Act provide the requisite waiver of sovereign immunity, she must demonstrate that Defendants have waived sovereign immunity for her claims. Although Plaintiff has not alleged that any other statute specifically waives Defendants' sovereign immunity, because she has alleged that Defendants are in violation of the ILCA and the ISDEAA, Defendants consider these claims below. Neither of these statutes, however, provide the necessary waiver of sovereign immunity.

1. Indian Self-Determination and Education Assistance Act.

Congress enacted the ISDEAA, codified as amended at 25 U.S.C. §§ 450 – 458hh, in 1975 to maintain:

> the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b); *accord id.* § 450. The first title of the Act constitutes the Indian Self–Determination Act, which, among other things, provides for the execution of contracts between tribes and the federal government to plan, conduct, and administer programs for the benefit of Native Americans. *See* Pub. L. No. 93–638, tit. I, §§ 101–102, 88 Stat. at 2203, 2206. The ISDEAA, however, does not provide a waiver of federal sovereign immunity for Plaintiff's claims. The ISDEAA provides a limited waiver of sovereign immunity for suits by Indian tribes or tribal organizations involving claims arising only under self-determination contracts between tribal organizations and the appropriate Secretary. *Demontiney v. United States*, 54 Fed. Cl. 780, 789-90 (2002); *aff'd* 81 Fed. Appx. 356 (Fed. Cir. 2003). Therefore, Plaintiff cannot use the ISDEAA as a basis for waiving Defendants' sovereign immunity for this lawsuit.

2. Indian Land Consolidation Act.

The ILCA, 25 U.S.C. §§ 2201, *et seq.*, was first enacted in 1983 and was intended to address the general problem of Indian land fractionation. In 2000, Congress significantly amended the ILCA and established a pilot program for the acquisition of fractional interests. 25 U.S.C. § 2212. The program was made permanent in 2004. The ILCA provides that the Secretary of the Interior "may acquire, *at the discretion of the Secretary*" fractional interests in trust land that will thereafter be held by the United States in trust for the local tribe. 25 U.S.C. § 2212(a)(1) (emphasis added). The Secretary is also directed to "consult with the tribal government that exercises jurisdiction over the land involved in determining which tracts to acquire on a reservation" and to "coordinate the acquisition activities with the acquisition program of the tribal government that exercises jurisdiction over the land involved." 25 U.S.C. § 2212(b)(3)(A) and (B).

Interior has not promulgated any regulations to cover this program. The ILCA does not place any obligation upon or otherwise require the Secretary to acquire any particular fractional interest, and does not impose any fiduciary duty to acquire a fractional interest solely because the owner desires to sell such interest. *See* 25 U.S.C. § 2212(a). Rather, the authority granted to the Secretary is discretionary. *Id.* As such, the ILCA provides no waiver of sovereign immunity

for Plaintiff's claims. Therefore, this Court must dismiss Plaintiff's claim for violation of the ILCA and the ISDEAA for lack of subject matter jurisdiction.

E. Plaintiff's Claim for Breach of Trust Must Be Dismissed for Lack of Subject Matter Jurisdiction (No Waiver of Sovereign Immunity) and for Failure to State a Claim for which Relief can be Granted.

In addition to alleging violations of the ILCA and the ISDEAA, Plaintiff alleges a generalized claim that Defendants have failed to comply with their responsibilities as a trustee regarding Plaintiff's interest in the Allotment. Am. Compl. ¶ 25. As explained below, Plaintiff's breach of trust claim must be dismissed for lack of subject matter jurisdiction because Congress has not waived sovereign immunity to sue Defendants on such claim. Alternatively, Plaintiff's claim must be dismissed pursuant to Rule 12(b)(6) because the allegations fail to state any claim for which relief can be granted.

1. This Court Lacks Subject Matter Jurisdiction over Plaintiff's Breach of Trust Claim.

First, Plaintiff's allegation of a breach of trust does not provide the necessary predicate to support a valid waiver of Defendants' sovereign immunity. *See Navajo Nation v. U.S. Dep't of the Interior*, --- F. Supp. 2d ---, 2014 WL 3610948, at *10 (D. Ariz. July 22, 2014) (allegation of general breach of trust does not provide a waiver of sovereign immunity). While the Ninth Circuit recognizes that the United States owes a general trust responsibility to Indians, "unless there is a

specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting [Indians]." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

Here, Plaintiff cites to general violations of the ILCA, ISDEAA, and the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), 25 U.S.C. §§ 162a, 4001 – 4061. These statutes do not create any specific, enforceable trust obligation between Plaintiff and Defendants. The ISDEAA is a statute that provides for contracting between the United States and tribes or tribal organizations. It does not apply to an individual Indian plaintiff—let alone create any enforceable trust duties. The ILCA provides the Secretary with discretion to acquire fractional interests in land held in trust. The authority provided to the Secretary is discretionary; she is not under an obligation to acquire an allotment even if the allottee requests. The statute does not create any affirmative obligations to acquire an individual Indian's interest in an allotment and cannot serve as the basis for any enforceable trust duties. The 1994 Act created the Office of the Special Trustee but did not create any enforceable trust obligations to a specific plaintiff with respect to acquiring an individual Indian's interest in an

allotment. Although Plaintiff has alleged that Defendants owe a duty under the 1994 Act to not interfere with the work of the Special Trustee (Am. Compl. ¶ 57), such allegation does not identify a relevant, specific duty that was owed to Plaintiff that would either support Plaintiff's general breach of trust claim or her claim that Defendants have breached a specific duty to Plaintiff in administering her interest in the Allotment. Therefore, Plaintiff's breach of trust claim should be dismissed for lack of subject matter jurisdiction.

2. In the Alternative, Plaintiff's Breach of Trust Claim Must Be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because It Fails to State a Claim Upon Which Relief May Be Granted.

Even if sovereign immunity was not an insurmountable obstacle to this Court's exercise of jurisdiction over Plaintiff's breach of trust claim, this claim is not justiciable. Plaintiff fails to state facts establishing that Defendants have a discrete affirmative trust duty to take the actions Plaintiff alleges they must concerning her interest in the Allotment.

Defendants acknowledge that a relationship exists between the United States and Indians, variously described by the Supreme Court as a "fiduciary," "guardianship," or "trust" relationship. *See, e.g., United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-18 (1938); *United States v. Candelaria*, 271 U.S. 432,

442 (1926); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). That relationship does not always result in a cause of action. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008). An actionable trust duty "can only arise from a statute, treaty, or executive order." *N. Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1998) (Secretary's trust responsibility to Alaska Natives fulfilled by compliance with environmental statutes). Because "[t]he trust obligations of the United States to [Indians] are established and governed by statute rather than the common law," *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011), a court must look first for an unambiguous provision by Congress that clearly outlines a federal trust responsibility.

An individual asserting that the United States has violated a trust duty "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) ("*Navajo II*") (dismissal required where plaintiffs had failed to identify "a specific, applicable, trust-creating statute or regulation that the Government violated"). The Supreme Court recently reiterated that, although the relationship between the United States and Indians has been described as a trust, "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." *Jicarilla*, 131 S. Ct. at 2323 (citing *United States v. Mitchell*, 445 U.S. 535 (1979) ("*Mitchell I*"); *Mitchell II*, 463 U.S. at 224.

Plaintiff's allegations that Defendants have breached what amounts to a general trust relationship do not state a claim that can survive a Rule 12(b)(6) dismissal motion. Plaintiff fails to plead or otherwise identify any positive law (treaty, statute, executive order, or otherwise) that imposes a specific fiduciary duty on Defendants to take discrete actions regarding her interest in the Allotment, something she must do to assert a legally cognizable claim for breach of a fiduciary duty. *See Navajo II*, 556 U.S. at 302; *Navajo I*, 537 U.S. at 506; *Mitchell I*, 445 U.S. at 545; *see also Jicarilla*, 131 S. Ct. at 2325.

The only substantive statutes Plaintiff cites to support her breach of trust claim are the ILCA and the 1994 Act.[1] Plaintiff does not identify the specific

[1] Plaintiff does not appear to allege that Defendants breached any trust duties to Plaintiff arising from the ISDEAA. *See* Am. Compl., ¶¶ 2, 21-22. Nor could she. The ISDEAA grants no rights to individuals. As discussed above, it directs the Secretary to enter into contracts with Tribes to perform programs, functions, services, or activities that the Department provides to Indians due to their status as Indians. *See* 25 U.S.C. § 450f. It does not create any trust relationship between Defendants and Plaintiff.

sections or provisions of either act that she alleges establish specific fiduciary duties Defendants have failed to undertake. This omission is fatal to Plaintiff's claims, for it is axiomatic that she must point to specific statutes and regulations both to "establish [the] fiduciary relationship" and to "define the contours of the United States' fiduciary responsibilities." *Jicarilla*, 131 S. Ct. at 2325 (quoting *Mitchell II*, 463 U.S. at 224); *Flute v. United States*, 2014 WL 4375881, at *7 (D. Colo. Sept. 4, 2014) (no enforceable trust duty based on "laws [that] directed the government to make one-time payments or other discrete transfers of property to the specified individuals"). Because Plaintiff's breach of trust claim does not allege that Defendants are in noncompliance with any treaty, statute, regulation, or executive order specifically requiring Defendants to acquire her interest in the Allotment and value it in a certain manner, her claim is fatally defective and must be dismissed under Rule 12(b)(6).[2]

[2] Plaintiff also fails to state a claim for breach of trust regarding Interior's probate of her brother's estate because no petition for rehearing within 60 days of the Notice of Order Determining Heirs was submitted. Ex. B at 2-5. Plaintiff is not entitled to judicial review of any heir determination because she failed to exhaust her administrative remedies. *Mammedaty v. Kleppe*, 412 F. Supp. 283, 284-85 (W.D. Okla. 1976) (plaintiffs were not entitled to judicial review of administrative determination approving will and ordering distribution of estate because of failure to exhaust administrative remedies).

F. Alternatively, Defendants Are Entitled to Summary Judgment in Their Favor under the Doctrines of Waiver and Release.

Even if subject matter existed for Plaintiff's suit, it must still be dismissed because Plaintiff, as a certified class member of the Trust Administration Class in *Cobell*, compromised, waived, and released the United States from any liability regarding the "responsibilities of a trustee with respect to the interest of the Plaintiff in the land allotted to Julia Hawkins." Am. Compl. ¶ 25.

A settlement agreement, for enforcement purposes, has the same attributes of a contract; and it is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) ("It is well settled that a district court has the equitable power to enforce summarily an agreement to settle a case pending before it."); *TNT Marketing, Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986) (citations omitted).

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). The binding effect of a class judgment is not diminished when the judgment is pursuant to a settlement agreement. *See Ortiz v. Fireboard Corp.*, 527 U.S. 815, 849 (1999) (District Court's certification requires heightened attention where

settlement class is certified because of "the justifications for binding the class members"); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 378 (1996) (court "would afford preclusive effect to settlement judgment . . . notwithstanding the fact that [class members] could not have pressed their Exchange Act claims in the Court of Chancery."). It is beyond cavil that unnamed members of a class action are bound "even though they are not parties to the suit." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011).

Here, both the Settlement Agreement and the District Court's judgment expressly waive and release Plaintiff's claims. The Settlement Agreement waives, releases, and forever discharges the United States from liability for and forever bars and precludes Plaintiff "from prosecuting, any and all claims and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed . . . by reason of, or with respect to, or in connection with, or which arise out of" claims for alleged Land Administration Claims, "through the Record Date of any and all IIM accounts and any assets held in trust . . . including . . . Land and funds held in any account." *Cobell* Settlement Agreement, ¶¶ A.14, 15, 21. "Land Administration Claims" include claims for "[f]ailure to obtain fair market value for . . . sales" (*id.* at ¶ A.21.b); for "[f]ailure to prudently negotiate leases . . . or other transactions" (*id.* at ¶ A.21.c); for "[m]isappropriation" (*id.* at ¶ A.21.g); for "[f]ailure to control, investigate allegations of, or obtain relief in equity and at law

for, . . . theft, misappropriation, fraud or misconduct regarding Land" (*id.* at ¶ A.21.h); for [f]ailure to correct boundary errors, survey or title record errors, or failure to properly apportion and track allotments" (*id.* at ¶ A.21.i); and for "[c]laims of like nature and kind arising out of allegations of Interior Defendants' breach of trust and/or mismanagement of Land through the Record Date, that have been or could have been asserted" (*id.* at ¶ A.21.j).

Plaintiff now seeks to litigate in this case the same claims that were "waived, released, and forever discharged" in the *Cobell* settlement. Plaintiff alleges claims for failure to properly probate an estate in 1970 (Am. Compl. at ¶ 25.a); for leasing land without consent (*id.* at ¶ 25.f); for failure to purchase interest in the Allotment in 2007 (*id.* at ¶¶ 25.g, 32-33); for undervaluing allotment land (*id.* at ¶¶ 25.h, 40-41); for dissipation of allotment property (*id.* at ¶ 26.a); and for failure to allow access to land records in 2007 (*id.* at ¶ 29). Thus, Plaintiff generally claims that Defendants wrongfully leased property, wrongfully granted interest in property, misappropriated, undervalued, and breached its trust duties regarding Plaintiff's interest in the Allotment prior to the Record Date. *Cf. Cobell* Settlement Agreement at ¶ 21.

A plaintiff may waive a future cause of action in a settlement agreement, even one yet to accrue, predicated on the wrongful actions of a defendant antecedent to the settlement. *See, e.g., Adams v. Philip Morris, Inc.*, 67 F.3d 580,

584 (6th Cir.1995) (acknowledging that a settlement agreement may waive claims for future effects of past discrimination); *Allen v. Nicholson*, 573 F. Supp. 2d 35, 38-39 (D.D.C. 2008) (upholding settlement agreement where plaintiff "waives his right to pursue future causes of action against the Agency based on facts in existence as of the date" of the agreement).

Here, the *Cobell* Settlement Agreement explicitly waives all "known and unknown claims" that fall within the Land Administration Claims definition in existence as of the record date. *Cobell* Settlement Agreement at ¶ A.21. Thus, when or how Plaintiff learned the full extent of any alleged damages resulting from the management of her interest in the Allotment is irrelevant to the waiver and release analysis. All of Plaintiff's Allotment claims existed as of September 30, 2009, and are claims encompassed by the Settlement Agreement. *See Villegas*, 963 F. Supp. 2d at 1152-53.

In sum, the unambiguous intent of the *Cobell* Settlement Agreement was to "wipe the slate clean" as to the Trust Administration Class's Land Administration Claims that existed as of September 30, 2009. The Settlement Agreement contains a full and complete release of these claims, "known and unknown," for Trust Administration Class members that did not opt-out of the Settlement Agreement. Plaintiff will be compensated for her Land Administration Claims and has waived, released, and forever discharged the United States from liability for those claims.

Thus, Defendants are entitled to judgment in their favor as a matter of law on Plaintiff's Amended Complaint by operation of the doctrines of waiver and release.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss all of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), or 56.

Respectfully submitted this 2nd day of December, 2014.

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CERTIFICATE OF COMPLIANCE WITH
LOCAL RULE 7.1(d)(2)(E)

In compliance with Local Rule 7.1(d)(2)(E), the number of words in the brief, excluding the caption, certificate of service, certificate of compliance, table of contents and authorities, and exhibit index is 6,434. The word count was obtained from Microsoft Word, the word-processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2014, a copy of the foregoing document was served on the following persons by the following means:

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