2017-2340

United States Court of Appeals for the Federal Circuit

CROW CREEK SIOUX TRIBE,

Plaintiff – Appellant,

v.

UNITED STATES,

Defendant – Appellee.

Appeal from the United States Court of Federal Claims in Case No. 1:16-cv-00760-RHH, Robert H. Hodges, Jr., Senior Judge

OPENING BRIEF OF PLAINTIFF-APPELLANT CROW CREEK SIOUX TRIBE

Austin Tighe
Nix, Patterson & Roach LLP
3600 N. Capital of Texas Highway
Suite B350
Austin, Texas 78746
Ph: (512) 328-5333
Fax: (512) 328-5335
atighe@nixlaw.com
Counsel for Plaintiff-Appellant

October 10, 2017

COUNSEL PRESS, LLC (888) 277-3259

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Crow Creek Sioux Tribe **v.** United States

Case No. 2017-2340

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☒ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Crow Creek Sioux Tribe

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Crow Creek Sioux Tribe	Crow Creek Sioux Tribe	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Austin Tighe, Nix, Patterson & Roach, LLP

5. The title and number of any case know to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

None

October 10, 2017 — Date

/s/ Austin Tighe — Signature of counsel

Please Note: All questions must be answered

Austin Tighe — Printed name of counsel

cc:

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STATEMENT OF RELATED CASES

No appeal from this civil action has previously been before this Court or any other appellate court. There is no case pending in this Court or any other court that will directly affect or be directly affected by the Court's decision here. There are no other cases related to this dispute.

STATEMENT OF JURISDICTION

The Crow Creek Sioux Tribe filed its Complaint against the United States pursuant to the Tucker Act, 28 U.S.C. § 1491 (a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505, in the Court of Federal Claims on June 29, 2016. Appx11.

The United States contested the Court of Federal Claims' jurisdiction in a motion to dismiss the Complaint. Appx38. On June 1, 2017, the Court of Federal Claims granted the United States' motion to dismiss, and on June 2, 2017, entered final judgment against the Crow Creek Sioux Tribe. Appx1, Appx6. The Court of Federal Claims' order and judgment disposed of all parties' claims. On July 20, 2017, the Crow Creek Sioux Tribe filed a timely notice of appeal with this Court. Appx315. *See* Fed. R. App. P. 3(a) & 4(a)(1)(B).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) from the final order and judgment of the Court of Federal Claims.

STATEMENT OF ISSUES

1. Whether the Court of Federal Claims, in granting a 12(b)(1) dismissal of claims which were based on a money-mandating statute and constitutional provision, failed to follow the law of this Circuit, including its *en banc* holding in *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005) and its holding in *Jan's Helicopter Service, Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

2. Whether the Court of Federal Claims applied the proper legal standard under 12(b)(1) when it held that it did not have subject matter jurisdiction because the Tribe could not prove damages.

STATEMENT OF THE CASE

The appeal of this case can be simply stated: Did the plaintiff's Complaint in the Court below invoke a money-mandating statute or constitutional provision, and make a nonfrivolous assertion that plaintiff is entitled to relief under that statute or provision? If the answer is yes, then under the law of this Circuit (primarily *Fisher* and *Jan's Helicopter*), dismissal was improper and should not stand.

The Crow Creek Sioux Tribe ("Tribe") filed its Complaint against the United States ("Government") pursuant to the Tucker Act, 28 U.S.C. § 1491 (a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505, in the Court of Federal Claims on June 29, 2016. Appx11.

The Complaint alleged that the Government had failed to meet its statutory obligations under 25 U.S.C. 162a(d)(8) in managing and appropriating the Tribe's water and attendant rights, and that the Government had taken the Tribe's water without just compensation in violation of the Fifth Amendment. Appx13.

25 U.S.C. 162a (d)(8) requires the Government to appropriately manage the Tribe's natural resources, which would of course include the natural resource of water. The Fifth Amendment Takings Clause requires just compensation for the taking of property.

The Tribe has lived along the Missouri River since time immemorial, and has aboriginal rights to the water necessary for traditional, cultural, developmental, domestic and agricultural subsistence purposes. The Supreme Court has held that the establishment of an Indian Reservation implies a right to sufficient unappropriated water to accomplish its purposes. *Winters v. United States*, 207 U.S. 564, 576-578, 52 L. Ed. 340, 28 S. Ct. 207 (1908). These *Winters* reserved water rights vest on the date of the creation of the Indian reservation. *Id.* at 577. The Government's involvement with the Tribe's water is "comprehensive" and "pervasive". *United States v. Mitchell*, 463 U.S. 206, 209, 219 (1983) ("*Mitchell II*"). The *Winters* doctrine, along with 25 U.S.C. 162a(d)(8), provides the statutory and resulting common law bases for the Tribe's claim.

The Complaint alleged that through a series of acts and omissions giving rise to the Tribe's claims—including, *inter alia*, misappropriating, diverting, retaining, selling and storing—the Government has mismanaged and misappropriated the Tribe's water and *Winters* reserved water rights in favor of its own use, as well as non-Indian reclamation, urban development, and consumption. *See* Appx11-12, Appx21, Appx31, Appx33.

In order to determine whether the claims establish subject matter jurisdiction, courts in this Circuit must first determine whether a plaintiff has alleged a money-mandating statute or constitutional provision. *Fisher* 402 at 1173 (*en banc* portion). The Complaint alleged both (1) a money-mandating statute, 25 U.S.C. 162a(d)(8), and (2) a money-mandating constitutional provision, the Fifth Amendment's Takings Clause.

The Government filed a 12(b)(1) motion to dismiss, arguing that the Court of Federal Claims lacked subject matter jurisdiction. Appx38. The motion had several bases, including standing, ripeness, limitations, and the purported absence of a money-mandating statute or constitutional provision. Appx1.

On June 1, 2017, the Court of Federal Claims granted the Government's 12(b)(1) motion to dismiss. Appx1. The following aspects of the five-page order are particularly relevant to the Statement of the Case:

Appx1: The order states that this is a "Fifth Amendment taking" case. This is primarily a 25 U.S.C. 162a(d)(8) case, which requires the Government to manage the Tribe's natural resources and if breached, is money-mandating. Appx28, Appx20.

Appx1: The order states that at the hearing, "plaintiff urged the court to permit sufficient discovery for it to address defendant's jurisdictional arguments." *See also* Appx3, Appx5. In fact, plaintiff made no such request for jurisdictional discovery. Counsel repeatedly stated at the hearing his belief that jurisdiction had been adequately established in the Complaint and supported by briefing (*see, e.g.,* Appx.290-291, Appx312), and that proof of damages at this stage was premature and not relevant to jurisdiction (*see, e.g.,* Appx295, Appx303, l. 9-22).

Appx2: The order states that the Fifth Amendment Takings claim is based in part on the flooding of the Tribe's land. There is no claim for flooded lands pled in the Complaint. In fact, the Government has already resolved those claims and paid the Tribe $105,000,000. Appx17.

Appx4: The order states that "[d]uring oral argument, plaintiff's counsel did not point to an actual or imminent injury to the Tribe…" In fact, the Tribe's counsel pointed to actual injury throughout the hearing. *See, e.g.,* Appx25-26, Appx27, Appx38.

Appx.4: The order states that plaintiff conceded "the Tribe has no means of calculating damages." Not so. While the Tribe contends that calculation of damages is not required at this stage, counsel did identify the means by which damages would be calculated. Appx30-31, l.18-l.3.

Following the May 5, 2017 hearing, the Court of Federal Claims issues its order and judgment disposing of all parties' claims. Appx1, Appx6. On July 20, 2017, the Crow Creek Sioux Tribe filed a timely notice of appeal with this Court. Appx315.

SUMMARY OF ARGUMENT

The Court of Federal Claims erred in granting 12(b)(1) dismissal because the Tribe alleged claims based on a money-mandating statute and a money-mandating constitutional provision, either of which was sufficient to establish subject matter jurisdiction. The Court of Federal Claims further erred by holding the Tribe to a standard far above that required to establish subject matter jurisdiction, dismissing the case at the pleading stage by concluding that the Tribe could not prove damages. At the 12(b)(1) hearing, the court stated:

> It's sort of a shortcut, I have to admit. These cases tend to go on and on often and I always feel like if we can resolve the case sooner rather than later, that's better for everybody, regardless of how…It strikes me that – I mean, [Tribe's counsel] may be right. It may be early to address an issue in a dispositive way at this stage.

> But if I cannot see any possibilities that you're going to be able to show you have been damaged by this now, what's the point in going through all this briefing and arguing and experts if it's not going to fly?

Appx296, l. 7-19. That was the standard the Court of Federal Claims applied in finding that it did not have subject matter jurisdiction—a conclusion that the Tribe could not prove damages. *See also* Appx1, Appx4-5, Appx270. But that is not the appropriate standard.

This Circuit instructs that when engaging in a jurisdictional analysis, a court must first determine whether a plaintiff has alleged a money-mandating constitutional provision, statute, or regulation. *Fisher* 402 F.3d at 1173 (*en banc* portion). "If the court's conclusion is that the constitutional provision, statute, or regulation meets the money-mandating test, the court **shall** then proceed with the case in the normal course." *Id.* (emphasis added). The Tribe's primary "constitutional provision, statute, or regulation" is 25 U.S.C. 162a, specifically section (d)(8) (the trust responsibilities of the United States shall include (but are not limited to) "appropriately managing natural resources"). 25 U.S.C. 162a "give[s] rise to a fiduciary obligation". *Jicarilla Apache Nation v. United States (Jicarilla II")*, 100 Fed. Cl. 726, 731-32 (2011). The Tribe contends that the Government has failed to appropriately manage its water, in breach of 25 U.S.C. 162a(d)(8).

Courts have expressly found 25 U.S.C. 162a to be money-mandating. *Evans v. United States*, 107 Fed. Cl. 442, 457 (2012); *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1, 26 (2010); *United States v. Mitchell II*, 463 U.S. at 211, 228. Additionally, the Tribe has alleged a Fifth Amendment Takings claim. The "just compensation" required by the Fifth Amendment Takings Clause makes it a money-mandating constitutional provision. *See Russell v. United States,* 78 Fed. Cl. 281, 289 (2007); *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987).

That should have been the end of the jurisdictional inquiry, right there. Since the Tribe alleged both a money-mandating statute and a money-mandating constitutional provision, under the *en banc* directive of the Federal Circuit dismissal was improper and the Court of Federal Claims should have "proceed[ed] with the case in the normal course." *Fisher,* 402 F.3d at 1173. In fact, the Court below acknowledged at the 12(b)(1) hearing that money-mandating was not a present concern (Appx269, l. 16-18), and the dismissal order neither adopts the Government's arguments on money-mandating, nor relies upon them in any way in dismissing the case. Consequently, *Fisher* required the 12(b)(1) motion be denied, and the case to proceed.

Instead, the Court of Federal Claims became fixated on the Tribe's ability, or lack thereof, to prove damages. Whether couched in terms of standing or ripeness,

as it was throughout the dismissal order, calculating and proving damages is not a requisite for either. *See Petro Hunt, LLC v. United States*, 90 Fed. Cl. 51, 71 (2009) (warning against "collaps[ing] discovery, summary judgment and trial into the pleading stage of the case"); *Fed. Circuit Litecubes, LLC v. Northern Light Prods, Inc.,* 523 F.3d 1353, 1360 (Fed. Cir. 2008) (subject matter jurisdiction does not fail simply because plaintiff may not be able to prove its case).

Rather, "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007); *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 76, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents.").

The Tribe alleged both a statutory and constitutional claim, each of which "can be properly understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow* at 1339. The statute, 162a(d)(8), expressly applies to Indians, and the Taking and continuing trespass of Appellant's *Winters* water rights, as asserted in the Complaint, are actual injuries because they allege "an invasion of a legally protected interest" that is concrete and actual. *See Lujan*, 504 U.S. at 560-

61. Indian water rights "are present perfected rights." *Arizona v. California*, 373 U.S. 546, 600 (1963).

The other over-arching basis for reversing dismissal is that the Government's arguments relied upon by the Court below are, at least in large part, merit-based. Where the resolution of jurisdiction is intertwined with the merits of the case (*e.g.* 162a(d)(8) does not impose any duty here, the Tribe's water was not taken, etc.), the decision on jurisdiction should await a determination on the merits, either by the court on summary judgment motion or by the trier of fact. *Kawa v. United States*, 77 Fed. Cl. 294, 304 n. 4 (2007); *Oswalt v. United States,* 41 Fed. Appx. 471, 472-473 (Fed. Cir. 2002).

Ultimately, jurisdiction is established by the Complaint; not by proving damages at the pleadings stage of the case. Because the Tribe alleged a money-mandating statute and a money-mandating constitutional provision, the Court of Federal Claims had subject matter jurisdiction. Furthermore, since proof of damages at the pleading stage is not required to establish standing or ripeness—both of which are established in pleading that same money-mandating statute and constitutional provision—the Court of Federal Claims erred in granting dismissal.

ARGUMENT

I. Standard of Review

This Court's review of the district court's dismissal for lack of standing under 12(b)(1) is *de novo*. *Abbott Point of Care Inc. v. Epocal, Inc.*, 666 F.3d 1299, 1302 (Fed. Cir. 2012); *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc).

The Federal Circuit has instructed that when engaging in a jurisdictional analysis, a court must first determine whether a plaintiff has alleged a money-mandating constitutional provision, statute, or regulation. *Fisher* 402 at 1173 (*en banc* portion). "If the court's conclusion is that the constitutional provision, statute, or regulation meets the money-mandating test, the court **shall** then proceed with the case in the normal course." *Id.* (emphasis added).

In regard to that analysis, the Court "must view the alleged facts in the complaint as true, and if the facts reveal any reasonable basis upon which the non-movant may prevail, dismissal is inappropriate." *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *see also Travelers Indem. Co. v. United States*, 72 Fed. Cl. 56, 59 (2006) (the court must accept all facts pled in the complaint and "draw all reasonable inferences in plaintiff's favor."). And where the resolution of jurisdiction is intertwined with the merits of the case, the decision on jurisdiction

should await a determination on the merits, either by the court on summary judgment motion or by the trier of fact. *Oswalt,* 41 Fed. Appx. at 472-473.

Dismissal must be denied "unless it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

II. In granting 12(b)(1) dismissal of claims based on a money-mandating statute and constitutional provision, the Court of Federal Claims failed to follow the law of this Circuit, including its en banc holding in Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005).

The Federal Circuit has instructed that when engaging in a jurisdictional analysis, a court must first determine whether a plaintiff has alleged a money-mandating constitutional provision, statute, or regulation. *Fisher* 402 at 1173 (*en banc* portion). "If the court's conclusion is that the constitutional provision, statute, or regulation meets the money-mandating test, the court **shall** then proceed with the case in the normal course." *Id.* (emphasis added).

The Tribe's primary "constitutional provision, statute, or regulation" is 25 U.S.C. 162a, specifically section (d)(8) (the trust responsibilities of the United States shall include (but are not limited to) "appropriately managing natural resources"). 25 U.S.C. 162a "give[s] rise to a fiduciary obligation". *Jicarilla Apache Nation v. United States ("Jicarilla II")*, 100 Fed. Cl. 726, 731-32 (2011). The Tribe has claimed that the Government breached or violated 162a by a series of specific acts and omissions relating to the management of the Tribe's water and attendant rights.

See, e.g., Appx12-13, Appx21, Appx31. Furthermore, courts have expressly found 25 U.S.C. 162a to be money-mandating. *Evans v. United States*, 107 Fed. Cl. 442, 457 (2012); *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1, 26 (2010); *United States v. Mitchell II*, 463 U.S. at 211, 228.

Additionally, and in the alternative, the Tribe alleged a Fifth Amendment “Takings” claim. The “just compensation” required by the Fifth Amendment Takings Clause makes it a money-mandating constitutional provision. *See Russell v. United States,* 78 Fed. Cl. 281, 289 (2007); *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987).

As such, per the *en banc* directive of the Federal Circuit in *Fisher*, the Court of Federal Claims had subject matter jurisdiction based on both the 162a(d)(8) claim and the Fifth Amendment Takings Clause claim, and was required to “proceed with the case in the normal course.” *Fisher,* 402 F.3d at 1173. Simply put, it is the law of this Circuit that if a plaintiff invokes a money-mandating statute and makes a nonfrivolous assertion that it is entitled to relief under that statute, “the Court of Federal Claims has subject-matter jurisdiction over the case." *Jan's Helicopter Service, Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

The Tribe’s water can, of course, be mismanaged without actually being taken. Had the Court of Federal Claims properly considered the Tribe’s statutory claim, it would have found that the threshold for subject matter jurisdiction had been

met. 162a(d)(8) imposes a trust duty to appropriately manage natural resources, which of course includes water. No greater specificity is required. *See Jicarilla II*, 100 Fed. Cl. at 737-39; *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (rejecting Government's argument that trust duties must be "spell[ed] out specifically); *Navajo Tribe*, 624 F.2d at 988 (court not required to find all fiduciary obligations "within the specific terms of the authorizing statute…"); *Rite-Hite Corp. v. Kelley Co*., 56 F.3d 1538, 1547 (1995) (*en banc*) ("Express language is not required, however. Statutes speak in general terms rather than specifically addressing every detail"). In fact, in discussing 25 U.S.C. 162a duties, the court in *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 33 (D.D.C. 1998), noted that "[i]t would have been difficult for Congress to choose less discretionary language with regard to the trust duties."

Instead, the Court of Federal Claim's only analysis of 25 U.S.C. 162a(d)(8) was that it needed to "more affirmatively" direct the Government to manage the water, otherwise it did not trigger jurisdiction. Appx5. But that analysis is inconsistent with the *en banc* holding in *Fisher* and the cases cited immediately above, and with the plain language of the statute itself.

In arguing against the applicability of 162a(d)(8), the Government asserted that rather than imposing duties to manage natural resources like water, 162a instead concerns only the management of money. *See* Appx74. However, neither of the

cases cited by the Government held that 162a(d)(8) applies solely to money management … nor does *any* case. The Government relied upon a footnote in *Hopi* that says 162a(d)(8) applies to trust funds, citing *Hopi Tribe v. United States*, 782 F.3d 662, 670 n. 1. However, *Hopi* did *not* hold that it applies *only* to trust funds. In fact, 162a(d)(8) was not even pled as a substantive law basis for jurisdiction in *Hopi*. Rather, it was included in a list of statutes that plaintiff alleged created a common law duty as to water *quality*. The substantive law basis for jurisdiction in Hopi was the Act of 1958, not 126a(d)(8). The other case the Government cites is *Jicarilla I*, 564 U.S. 162 (2011), which held that a Tribe could not use 162a to avoid the attorney-client privilege. There was no further analysis of 162a (other than noting that it bore "the hallmark[] of a conventional fiduciary relationship"), and certainly no holding that it was limited solely to monetary funds. *Id.* at 195.

To the contrary, the Government *itself* has previously argued that 162a(d)(8) applied in a case involving natural resources, not monetary trust funds. Specifically, that it applied to water rights. Appx15-16, Government's Brief to the Supreme Court in *United States v. Klamath Water Users Protective Ass'n.* The Government never explained the contradiction between that assertion and the position it has taken in this case.

If that were not enough, when interpreting a statute a court must "start[] with the plain language." *Barela v. Shinseki*, 584 F.3d 1379, 1382 (Fed. Cir. 2009); *see*

also Murakami v. United States, 388 F.3d 1342, 1352 (Fed. Cir. 2005) (words of a statute are given "ordinary, contemporary, common meaning..."). "If the plain language of a statute is clear, there is a strong presumption that the plain language expresses congressional intent." *Bull v. United States*, 479 F.3d 1365, 1377 (Fed. Cir. 2007). Additionally, in construing a statute, effect must be given, if possible, to every word so that no part is rendered superfluous. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147 (1883).

25 U.S.C. 162a says in relevant part: "(d) Trust responsibilities of Secretary of the Interior: The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." The plain language of (d)(8) is "natural resources", not monetary funds. To overcome the plain meaning of the words in the statute, the party challenging that plain meaning by reference to legislative history must establish that the legislative history embodies "an extraordinary showing of contrary intentions.'" *Glaxo*, 894 F.2d at 396 (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984)). The Government never cited any legislative history that approaches the "extraordinary showing of contrary intentions" that the Federal Circuit and the Supreme Court require of parties seeking to construe statutes in ways that conflict with their plain meaning.

Were there any question as to whether (d)(8) applied to *natural resources*, or had a singular more restricted application limited only to *trust funds*, the canons of construction require that the answer be the former. "Even if there were some doubt as to the scope of referral to the jurisdiction of this Court, such doubt, rather than resolved in favor of the United States, must be resolved in favor of the [] Tribe." *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *see also South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 506 (1986) ("Doubtful expressions of legislative intent must be resolved in favor of the Indians."); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) ("statutes passed for the benefit of Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians."); *Mucogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1996) ("if the [Act] can reasonably be construed as the Tribe would have it construed it must be construed that way."); *Pueblo of San Juan*, 276 F.3d at 1194 (construction of statutes affecting Indians call for "broad construction when the issue is whether Indian rights are reserved or established, and for narrow construction when Indian rights are to be abrogated or limited.").

While it is true that 25 U.S.C. 162a is entitled "Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required", a section title cannot substitute for the operative text of the statute. *See Pennsylvania Dep't of Corrs. v. Yesky*, 524 U.S. 206, 212 (1998)

("[T]he title of a statute…cannot limit the plain meaning of the text."). Moreover, if limited exclusively to trust funds, the directive to appropriately manage natural resources would be meaningless. "[W]hen interpreting a statute, the court must assume that Congress did not mean to pass meaningless legislation, but rather acted with a purpose." *Coyne & Delany Co. v. Blue Cross and Blue Shield of Virginia,* 102 F.3d 712, 715 (4th Cir. 1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (if fiduciary duty only applied to "activities already controlled by other specific legal duties, it would serve no purpose").

The Government has argued that the Tribe cannot rely on general fiduciary duties to support subject matter jurisdiction. Appx75. Which is true, up to a point. True, the Tribe cannot rely *solely* upon general or common law trust duties. But once a trust relationship imposing a trust duty on the United States is established, as it is in 162a, courts may look to the common law of trusts to further inform the scope of that duty. *See Jicarilla II*, 100 Fed. Cl. at 738 (noting that in *Jicarilla I*, the court reemphasized that the language of the trust-creating statute does not cabin defendant's fiduciary duties); *Fletcher*, 730 F.3d at 1210 (courts "*may* refer to traditional trust principles when those principles are consistent with the statute and illuminate its meaning."); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C.C. 2001) ("The general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law."); *White*

Mountain Apache Tribe, 537 U.S. at 472-73 (while the premise to a Tucker Act claim will not be lightly inferred, "a fair inference will do").

As to *Winters* water, courts have found that the Government has a common law fiduciary duty to assert its authority to the fullest extent possible to preserve water for the Tribe. *See Pyramid Lake Paiute Tribe v Morton*, 354 F. Supp. 252 (D.D.C. 1972) (failure to formulate a "closely developed regulation that would preserve water for the tribe" was a breach of fiduciary duty); *Menominee Tribe v. United States*, 30 Ind. Cl. Comm. 201 (1973) (monetary damages where Indian fisheries mismanaged); *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) ("[t]he Tribe's federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."). In fact, "Indians have a federal common law rights to sue to enforce their aboriginal [property] rights." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

In addition, Congress expressly used the word "trust" in promulgating 162a(d): "Trust responsibilities of Secretary of the Interior: The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following…" The word "trust" is a legal term of art. *See White Mountain Apache Tribe*, 537 U.S. 480-81. "[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of

learning from which it was taken…" *FAA*, 132 S.Ct. at 1149. The court can "apply common law trust principles where Congress has indicated it is appropriate to do so", as Congress has here by using the word "trust" as it did (twice) in 162a(d). *See White Mountain Apache Tribe*, 537 U.S. at 480.

Common law trust responsibilities here would include managing the Tribe's natural resources solely in the best interest of the Tribe, as opposed to for the benefit of the Government and non-Indian uses. *See, e.g.*, Restatement (Third) of Trusts § 78 (2007); *Pegram v. Herdrich*, 530 U.S. 211, 223-25 (2000). For example, the Government as trustee is forbidden from self-dealing, and must "exclude all selfish interest and all consideration of the interests of third persons." *Id.* Furthermore, a trustee is obligated to take all actions necessary to preserve the trust *res* as trustee would preserve its own property. *See* G. Bogert, The Law of Trusts and Trustees, § 582 (2d ed. Revised 1980); Restatement (Second) of Trusts § 176 (1959).

It is no wonder that the Government was so strident in its effort to negate 162a(d)(8) (devoting half its motion to dismiss to the claim), since once it is triggered, the full spectrum of the Government's woeful history of managing the Tribe's *Winters* water, held up against the full extent of Government's statutory and common law duties, plainly warrants these claims being adjudicated in the Court of Federal Claims. Yet the Court of Federal Claims undertook no such analysis.

The Government next argued in the Court below that even if 25 U.S.C. 162a is a substantive source of law that establishes the requisite fiduciary duty, it "cannot be fairly interpreted as mandating compensation". Appx76. That is demonstrably false. Courts have repeatedly found 162a to be money-mandating. *See Evans v. United States*, 107 Fed. Cl. 442 (2012); *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1 (2010) (breach of 162a entitles Tribe to money damages); *Mitchell II*, 463 U.S. at 211, 228. As such, if the Tribe is within the class of plaintiffs entitled to bring a claim under 162a, controlling law holds that it has pled a money-mandating statutory claim. The Government's argument on dismissal was "telling" in that it was "essentially the same" argument made by the dissent, and rejected by the majority, in *Mitchell II*. *See Jicarilla II*, 100 Fed. Cl. at 742, n. 11. But again, the Court of Federal Claims undertook no such analysis.

While a proof of damages is not requisite to jurisdiction, it is worth noting that given the duty on the part of the Government to appropriately manage the Tribe's *Winters* water, "it naturally flows that the Government should be liable for damages for breach of its fiduciary duties." *White Mountain Apache Tribe*, 537 U.S. at 475-77. Concurring in *Nevada v. United States*, 463 U.S. 110, 145-46 (1983) and discussing Tribes and water rights, Justice Brennan wrote that the law "can and should require those whose rights are appropriated for the benefit or others receive appropriate compensations." *See also Cobell v. Norton*, 240 F.3d at 1108 (Supreme

Court has long recognized the "right of Native Americans to seek relief for breaches of fiduciary obligations, including suits for money damages.").

As to jurisdiction and 162a(d)(8), the Tribe cleared both jurisdictional hurdles: (1) the Tribe is within the class of plaintiffs entitled to bring a claim under 162a(d)(8), which imposes "specific fiduciary or other duties" to appropriately manage the Tribe's natural resources (which axiomatically include *Winters* water), and the Complaint alleges the Government failed to do; and (2) that statute has been appropriately deemed to be money-mandating. Accordingly, the Court of Federal Claims had subject matter jurisdiction over the claim. *Brodoway v. United States*, 482 F.3d 1370, 1375 (Fed. Cir. 2007) ("Where plaintiffs have invoked a money-mandating statute and have made a nonfrivolous assertion that they are entitled to relief under the statute, we have held that the Court of Federal Claims has subject-matter jurisdiction over the case."); *Jan's Helicopter Service*, 525 F.3d at 1309 (Fed. Cir. 2008) (where plain language of the statute provides the Court with jurisdiction "[t]here is no further jurisdictional requirement that the court determine whether the additional allegations of the complaint state a nonfrivolous claim on the merits.").

The Government focused almost entirely on 162(a) as its basis for dismissal. It did not directly address the effect, in this context, of the Tribe's other claim based on a money-mandating source: Count II, the Tribe's allegation of a Fifth Amendment Taking. Perhaps because (1) the Court of Federal Claims

fundamentally possesses jurisdiction over Fifth Amendment Takings claims, *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987), and (2) "[i]t is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction." *Jan's Helicopter Serv., Inc.*, 525 F.3d at 1309 (Fed. Cir. 2008); *see also Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005) ("[T]he Takings Clause of the Fifth Amendment is money-mandating. Thus, to the extent [plaintiff has] a nonfrivolous takings claim founded upon the Fifth Amendment, jurisdiction under the Tucker Act is proper."). Notably, while the Court of Federal Claims passingly referenced the Tribe's statutory claim in its dismissal order (Appx5), it did not consider the Tribe's Takings claim as a money-mandating source of jurisdiction.

Because both 25 U.S.C. 162a and the Fifth Amendment Takings Clause are money-mandating, and the Tribe made non-frivolous assertions that it is entitled to direct damages as relief under both, both—or either—establish subject matter jurisdiction.

Additionally, 12(b)(1) dismissal should have been denied because the Government's challenge to subject matter jurisdiction was inextricably intertwined with the merits of the Tribe's claim. In challenging the applicability of 162a(d)(8), the Government argued that the statute does not "impose[] a specific fiduciary duty on the United States to take certain actions regarding its Winters doctrine rights on

the Missouri River…" Appx76. Juxtaposed with the plain language of 162a(d)(8), that is a merits argument – to wit, that the Tribe had no claim under 162a(d)(8) regarding water rights – not a jurisdictional argument. The same is true as to Tribe's Fifth Amendment Takings claim. The Government argued only that there was no subject matter jurisdiction because there had been no taking, and hence, no injury. *See* Appx70-71. Again, that is in large part a merits argument.

Such arguments are not relevant to, nor do they affect, jurisdiction. In *Kawa v. United States*, 77 Fed. Cl. 294, 304 n.4 (2007), the court denied the 12(b)(1) motion to dismiss because "the allegations relating to jurisdiction and to the merits of plaintiff's claim are necessarily intertwined, because plaintiff has pleaded an express or implied contract with the Government both as a basis for jurisdiction and as a basis for recovery on the merits." That court ordered the case to proceed, stating that it would "address the merits of plaintiff's claim when they are presented to the Court, either on a motion for summary judgment or at trial." *Id; see also Riviera Drilling & Exploration Co. v. United States*, 61 Fed. Cl. 395, 400-401 (2004) ("The better rule appears to be that when this court has subject matter jurisdiction over the type of non-frivolous claim asserted, the court should take jurisdiction, even if the court's inquiry may eventually prove that the claim asserted fails, on the specific facts presented, to be within this court's jurisdiction."); *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000) (stating that when "the jurisdictional

issue and the merits are inextricably intertwined, and the former cannot be resolved without considering and deciding (at least in part) the latter," the court may "bypass[] the jurisdictional question and decide the merits"); *Ransom v. United States*, 17 Cl. Ct. 263, 267 (1989) ("Where, as here, the jurisdictional facts alleged are closely intertwined with the merits, the preferred practice is to assume subject matter jurisdiction exists and address the merits."); *Truckee-Carson Irrigation Dist. v. United States*, 14 Cl. Ct. 361, 369 (1988) (where "a decision on the jurisdictional issue constitutes at the same time a ruling on the merits, the courts have counseled against deciding the merits of the case summarily under the auspices of deciding the jurisdictional issue, without going to trial").

In this case, 162a(d)(8) provides both a basis for subject matter jurisdiction, and a basis for a breach of fiduciary duty claim. Jurisdiction and merits are inextricably intertwined. Based on the legion of exemplar cases cited in the paragraph above, the Court of Federal Claims should have denied the 12(b)(1) motion and addressed the merits of the Tribe’s claim either in a motion for summary judgment, or at trial.

In sum, to establish Tucker Act jurisdiction, the Tribe needed only to make a "nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source" identified in its Complaint. *Jan's Helicopter Serv., Inc. v.* 525 F.3d at 1309. The Tribe made nonfrivolous allegations (the

Government has never claimed frivolity) pursuant to a money-mandating statute (and alternatively, a money-mandating constitutional provision), and as an Indian tribe is certainly "within the class of plaintiffs" entitled to recovery under that statute (and under the Fifth Amendment). Accordingly, the Court of Federal Claims had subject matter jurisdiction, and 12(b)(1) dismissal was improper.

III. The Court of Federal Claims failed to apply the proper legal standard when it held that it did not have subject matter jurisdiction because the Tribe could not prove damages.

The Court of Federal Claims dismissed the Tribe's case based on a conclusion that the Tribe could not prove damages. The Court of Federal Claims took the Government's three-page argument on standing and imposed upon the Tribe to a standard far above that required to establish subject matter jurisdiction—it dismissed the case at the pleading stage because it did not believe the Tribe could prove damages at trial. At the 12(b)(1) hearing, the Court stated:

> It's sort of a shortcut, I have to admit. These cases tend to go on and on often and I always feel like if we can resolve the case sooner rather than later, that's better for everybody, regardless of how…It strikes me that – I mean, [Tribe's counsel] may be right. It may be early to address an issue in a dispositive way at this stage.
>
> But if I cannot see any possibilities that you're going to be able to show you have been damaged by this now, what's the point in going through all this briefing and arguing and experts if it's not going to fly?

Appx296, l. 7-19.

That was the standard which the Court of Federal Claims applied in dismissing the case. *See* Appx4 (“Plaintiff has not suggested what damages the Tribe might have incurred…or how the court could determine the amount of damages”, and neither the Complaint nor argument suggest “how the court could calculate damages.”); Appx270, l. 5-8 (“In trying to essentially assess the case and think about an opinion, I’m concerned about where I would find $200 million worth of damages or any damages…”). But that is not the appropriate standard to apply in determining subject matter jurisdiction.

A party does not need to prove damages, or even establish the proper measure of damages, at the pleadings stage of the case. *See Fed. Circuit Litecubes, LLC*, 523 F.3d at 1360 (Fed. Cir. 2008) (subject matter jurisdiction does not fail simply because plaintiff may not be able to prove liability or damages). Rather, to establish jurisdictional standing, a plaintiff must show only (1) an injury-in-fact, meaning "an invasion of a legally protected interest that is . . . concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (2) that there is "a causal connection between the injury and the conduct complained of”; and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61.

Whether couched in terms of standing or ripeness, as it was intermittently throughout the dismissal order, proof of damages at the pleadings stage is not a

requisite for jurisdiction. "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007) (Standing "often turns on the nature and source of the claim asserted... Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."); *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 76, 111 S. Ct. 1700, 114 L. Ed. 2d 134 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents.").

The Tribe alleged both a statutory and constitutional claim, each of which "can be properly understood as granting persons in the plaintiff's position a right to judicial relief." *Morrow* at 1339. The statute, 162a(d)(8), expressly applies to Indians, and the Taking and continuing trespass of Appellant's *Winters* water rights, as asserted in the Complaint, are actual injuries because they allege "an invasion of a legally protected interest" that is concrete and actual. *See Lujan*, 504 U.S. at 560-61; *Arizona v. California*, 373 U.S. 546, 600 (1963))Indian water rights "are present perfected rights."); *Fort Mojave Indian Tribe v. United State*s, 23 Cl. Ct. 417, 426 (1991) (tribe had standing to assert that United States failed to adequately represent

tribe's interests relating to water rights). The deprivation of those rights by taking and using the Tribe's water and water rights gives rise, as alleged, to an injury-in-fact.

Did the Government take the water? Did the Government fail to properly manage the water? In what amount was the Tribe damaged by any such taking or mismanagement? Those are all questions to be resolved on summary judgment or by the trier of fact. They are not jurisdictional questions.

The Tribe's statutory claim in Count I of its Complaint is that the Government failed to comply with 162a(d)(8). "[T]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing…" *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The failure of the Government to abide by that statute is a concrete, actual invasion of a legally (statutorily) protected interest—an injury-in-fact. *See Lujan*, 504 U.S. at 560-61. That statutory provision delineates duties owed by the Government to the Tribe, and as such "can be understood as granting persons in plaintiff's position a right to judicial relief." *Warth*, 422 US at 500. The actions giving rise to the statutory violation are indisputably traceable to the Government, and because the statute is money-mandating and thereby would entitle the Tribe to damages if liability is proven at trial, it provides the requisite redress. *See Lujan*, 504 U.S. at 560-61. That is sufficient to establish standing.

While injury-in-fact must be found in every case regardless of the statutory provision at issue, it is nonetheless a "very generous" test, requiring only that claimants "allege[] some specific identifiable trifle of injury . . . ." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3rd Cir. 1982) (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (rejecting the argument that plaintiffs' interests must be "significantly" affected, noting that only an "identifiable trifle" is sufficient). The Tribe alleged factual harm—certainly more than the threshold “trifle” required by the Supreme Court in SCRAP—as a result of the Government’s violation of 162a(d)(8), and the attendant common law breaches of fiduciary duty. *See* Appx17-19, Appx21, Appx33.

The Government’s arguments in the Court below demonstrate selective amnesia regarding its long history of recognizing and asserting these same injuries *on behalf of* tribes. *See* Appx25-27, including *Skeem v. United States*, 273 F. 93 (9th Cir. 1921) (United States argued for Tribal water rights, asserting that water appurtenant to the Reservation was permanently reserved for Indian use), and *United States v. Powell*, 305 U.S. 527 (1939) (United States argued that non-Indians are not entitled to divert Indian water from Indians). Any appropriation of that *Winters* water for the Government’s own use—as the Complaint repeatedly alleges, and irrespective of the Tribe’s use or non-use—is a “classic taking” that requires compensation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

Planning Agency, 553 U.S. 302, 324 (2002); *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).

And this is true even if, as the Government argues, the Tribe's *Winters* water carries simply a right to "some presently undetermined amount of water necessary to fulfill the purposes of the reservation." *See* Appx10-12. Such a right to water is vested and "presently perfected" per *Arizona*, and the Government continues to fail to protect those rights. Appropriating that presently perfected and vested right to the Government's own use, whether the Tribe was using the water or not, is "an invasion of a legally protected *interest*" that is concrete and actual. *See Lujan*, 504 U.S. at 560-61 (emphasis added); *Wilkinson*, 440 F.3d at 977 (first prong of *Lujan* satisfied where plaintiff alleged deprivation of property interest); *United State v. Shoshone Tribe*, 304 U.S. 111, 115-16) (tribe has compensable interest in its resources which Government cannot "give to others or appropriate to its own use" without just compensation); *Nevada v. United States*, 463 U.S. 110, 145-46 (1983) (Justice Brennan writing that as to the past century of federal water policy, a tribe "whose rights are appropriated for the benefit of others [shall] receive appropriate compensation."); *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 458 (2011) (it is "axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation.").

In this case, the Tribe has specifically alleged that the annual if not daily diversion, retention, and appropriation of its *Winters* water for Governmental and non-Indian use constitutes a Taking. *See* Appx31, Appx33-34. The court in *Tulare Lake Basin v. United States*, 49 Fed. Cl. 313 (2001) held that the complete occupation of "plaintiff's water-use rights", which occurred by defendant using the water for its own benefit, prevented plaintiff from using that very water to which it otherwise would have been entitled, rendering the "usufructuary right" to that water—the water presently being used by defendant—valueless, thereby effecting a physical taking. *Id.* at 314-15. The court in *Dugan v. Rank*, 372 U.S. 609 (1963), analogizing a taking of water rights to interfering with air space over land, concluded that "when the Government acted here with the 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses 'whenever it saw fit,' 'with the result of depriving the owner of its profitable use [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made.'" Id. at 625.

Per *Tulare Lake Basin* and *Dugan*, the Government's diversion, retention, and appropriation subordinated the Tribe's water rights and rendered the "usufructuary right" to that water—the water presently being used by the Government on an annual if not daily basis—valueless, thereby effecting a Taking if the Tribe proves those allegations at trial. Likewise, in *Casitas Mun. Water Dist. v. United States* 543 F.3d

1276, 1292-1294 (Fed. Cir. 2008), the Government occasionally diverted the flow of the river, resulting in a reduction in the amount of water available to be put to beneficial use by a water rights holder. The Court held that the plaintiff was not required to prove that the government directive resulted in a seizure, appropriation, diversion, or impoundment of water to show that a physical taking had occurred—it was sufficient to show that the government's policy reduced the amount of available water for plaintiff's use. *Id.* at 1292. Because the Government's actions limited the amount of water that could be put to use, those actions constituted a physical taking of water rights. *Id.* at 1292. "When the government diverted the water to the fish ladder, it took Casitas' water. **The water, and Casitas' right to use that water, is forever gone**." *Id.* at 1294 (emphasis added).

As such, contrary to the Government's (merits) arguments in the Court below (*e.g.* Appx220-221), the Tribe's water rights do not remain intact, and its uses have been diminished—in fact, made "**forever gone**"—by the acts and omissions alleged in the Complaint, including diversion for the Government's own uses. *See* Appx12, Appx16-19, Appx21, Appx33. Nothing more is required to establish standing. Calculating the monetary damages caused by those acts and omissions—which restricted and limited the Tribe's use of the water and water rights per *Casitas*, *Tulare Lake Basin* and *Dugan*—is not, at the pleading stage, a prerequisite to establishing standing.

The Government attempts to cabin the Tribe's claims by asserting that because the Tribe can still go down to the river and claim *Winters* water, there is no injury to the Tribe. Appx220-221. Not even the Court below, in its premature focus on damages, limited the Tribe's claims in the manner the Government attempted to limit them. The Tribe's *actual* claims, as pled and basically uncontested, are that the Government and others took and used its water and water rights, in which it had a presently perfected property right. When the Government took and used the Tribe's water and water rights—whether the Tribe was using that water at the time or not, and despite the natural flow continuing along the river's banks—it breached its duty under 162a(d)(8) to appropriately manage the water, and alternatively, violated the Takings Clause by taking a fully vested property interest from the Tribe.

The question of whether the Tribe's claims entitle it to damages is appropriately a merits inquiry, not a standing inquiry. In fact, a standing inquiry actually requires the court to *assume* the merits of the Tribe's case. *See Warth v. Seldin*, 422 U.S. 490, 500-01, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (finding that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal" and holding that when deciding standing, "courts must accept as true all material allegations of the complaint"). The Court of Federal Claims did not follow the directives of *Warth*.

All told, the Government's argument of "no injury" is essentially a merits argument, claiming that the Tribe's *Winters* water rights asserted in the Complaint are not Takings. *See* Appx70-71. The Government's arguments should have been disregarded as outside the purview of a 12(b)(1) motion. *See Nicholson v. United States*, 77 Fed. Cl. 605, 615 (2007) (deciding to analyze whether plaintiffs' claims constituted Fifth Amendment takings in the context of a motion for summary judgment); *Bagwell v. United States*, 21 Cl. Ct. 722, 726 (1990) (finding a lack of sufficient evidence to determine whether plaintiffs were alleging torts or Fifth Amendment Takings and therefore declining motion to dismiss).

By the Government's own admission, its one-page argument on ripeness merely repeats its standing argument. Appx72. The Tribe does not lack standing as to its 162a claim or its Takings claim, as demonstrated above. For those same reasons, those claims are ripe. The allegations of mismanagement in breach of 162a(d)(8) include acts and omissions relating to, *inter alia*, transferring, diverting, misappropriating, encumbering, and improperly using of the water and attendant rights; permitting misuse and overuse; and failing to protect, quantify, and assert those attendant rights or the water itself. Appx21, Appx31. They are not limited, as the Government wishes, by the potential for future use and access to the water. Instead, they are historic, and thereby ripe.

The single case cited by the Government and relied upon by the Court of Federal Claims on "ripeness" is distinguishable on its facts. In that case, the court actually recognized that the Government *had* interfered with plaintiff's ability to divert water—and had done so continuously since the opening of the fish passage facility. However, since plaintiff was still able to sell water to its customers (what California law calls "beneficial use"), the claim was not ripe. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1359-60 (Fed. Cir. 2013). In the present case, the Complaint outlines the Government's acts and omissions presently preventing the Tribe's "beneficial use" of its *Winters* water and attendant rights, including appropriating the Tribe's *Winters* unappropriated water for its own use. Those allegations should be resolved in another motion, or by the trier of fact. Not in the context of a 12(b)(1) motion.

Finally, the only other case discussed by the Court below in support of dismissal is *Navajo Nation v. US Dep't of the Interior*, 34 F. Supp. 3d 1019 (D. Ariz. 2015). The tribe's claims in that case were dismissed because the tribe did not cite to a specific statute in support of its claim that the Government had failed to act. Here, the Tribe cites to 25 U.S.C. 162a(d)(8). Even if, *arguendo*, the Tribe's allegations for some reason did not rise to the level of a Fifth Amendment Taking, they certainly give rise to a mismanagement claim in breach of 162a(d)(8), and thereby establish the subject matter jurisdiction of the Court of Federal Claims.

CONCLUSION

It is the law of this Circuit, per the *en banc* holding in *Fisher,* that if a plaintiff invoked a money-mandating statute or constitutional provision, and makes a nonfrivolous assertion that it is entitled to relief under that statute or provision, the Court of Federal Claims has subject-matter jurisdiction over the case. *Fisher*, 402 F.3d at 1173; *Jan's Helicopter Service, Inc.* 525 F.3d at 1309 (Fed. Cir. 2008) (stating the test, and holding "[t]here is no further jurisdictional requirement".)

The Tribe invoked a money-mandating statute and a constitutional provision, and made a nonfrivolous assertion that it is entitled to relief under that statute and/or constitutional provision. As such, the Court of Federal Claims had jurisdiction.

For the reasons set forth above, the Tribe respectfully requests that this Court reverse the jurisdictional dismissal decision of the Court of Federal Claims below and, accordingly, reinstate its Complaint.

Dated: October 10, 2017

Respectfully submitted,

NIX, PATTERSON & ROACH LLP

_/s/ Austin Tighe _____________________
Austin Tighe
atighe@nixlaw.com
Michael Angelovich
mangelovich@nixlaw.com
3600 Capital of Texas Highway
Suite B350
Austin, Texas 78746
Telephone No. (512) 328-5333
Facsimile No. (512) 328-5335

Attorneys for Appellant Crow Creek Sioux Tribe

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Date Filed	Docket #	Docket Text	Page No.
06/01/2017	22	Reported Opinion	Appx1
06/02/2017	23	Judgement entered, pursuant to Rule 58, the plaintiff's complaint is dismissed. No costs.	Appx6

United States Court of Federal Claims

No. 16-760 C
June 1, 2017

CROW CREEK SIOUX TRIBE,

***Plaintiff*,**

v.

THE UNITED STATES,

Defendant.

Native American; Crow Creek Sioux Tribe; Motion To Dismiss; Lack of Subject Matter Jurisdiction; *Winters v. United States;* Breach of Fiduciary Duty; Fifth Amendment Taking

Austin Tighe, Esquire, Nix Patterson & Roach, LLP, Austin, TX, for plaintiff.

John P. Tustin, Esquire, United States Department of Justice, Environment and Natural Resources Division, Washington, DC, for defendant.

OPINION AND ORDER

Hodges, *Senior Judge*.

Plaintiff Crow Creek has sued the United States through the Department of the Interior alleging a Fifth Amendment taking of its reserved water rights. See *Winters v. United States*, 207 U.S. 564, 576-78 (1908). Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Its motion has several bases, including standing, ripeness, and issues related to the statute of limitations. Defendant also contends that the Government's bare trust relationship with Crow Creek does not provide the "money-mandating" statute or regulation necessary for jurisdiction in this court. See *United States v. Testan*, 424 U.S. 392, 400 (1976).

Plaintiff's pleadings do not show how damages from an alleged taking could have accrued currently, and oral arguments did not clarify this threshold issue. Nevertheless, plaintiff urged the court to permit sufficient discovery for it to address defendant's jurisdictional arguments. Given the opportunity to inquire into the extent of defendant's diversion of its rights in the waters of the Missouri River, the Tribe argued it would be able

to definitively establish damages. Plaintiff believes that granting defendant's dispositive motion at this stage would be premature.

Crow Creek would pursue expensive and time-consuming litigation to find some evidence that defendant has taken an amount of water that the Tribe could have used for another, unnamed purpose. For example, counsel stated during oral arguments that plaintiff could hire experts to submit reports on various methods of obtaining appraised values for those waters. Plaintiff believes that those values would supply evidence of the damages that its case now lacks.

The relationship between Native American tribes and the United States is a special one in this court; plaintiff is entitled to every latitude in its efforts to establish a cause of action. In this case, however, opening discovery in response to defendant's motion to dismiss would result in a waste of resources for both parties. We must grant defendant's motion for the reasons described below.

BACKGROUND

The Crow Creek Sioux Tribe is a federally-recognized Native American tribe that has been situated on a reservation in present-day South Dakota since 1863. The reservation's western boundary runs along the Missouri River. The Tribe is a constituent band of the Great Sioux Nation and a signatory to the Fort Laramie Treaties of 1851 and 1868. These treaties discussed several key elements of the relationship between Indian tribes and the United States, including delineating the bounds of their reservations, the nature of certain rights held, and expected uses of the land occupied by the tribes. The treaties were generally silent on the issue of tribal water rights, however.

Congress authorized a flood control scheme for the Missouri River in 1944, known as the Pick-Sloan Plan; the plan directed the construction of several dams along the Missouri River. Two of the dams led to the inundation of approximately 15,000 acres of plaintiff's reservation. The Fort Randall Dam and the Big Bend Dam have been in operation since 1953 and 1964, respectively. Congress authorized $4.4 million in 1962 to compensate the Tribe for the loss of its land caused by that inundation. Both dams have been in continuous operation since soon after completion of their original construction.

Plaintiff filed suit in this court alleging that the United States had abdicated its fiduciary trust responsibilities to the tribe as articulated in *Winters*, namely the preservation of its reserved water use rights. The Tribe complained that defendant is using water that the Tribe is entitled to use for its own purposes, and that defendant is failing to manage and protect those rights for the Tribe's benefit. Crow Creek also alleged that defendant's mismanagement of that water and its construction of dams that flooded the reservation violated the Fifth Amendment's prohibition on takings without just compensation.

Plaintiff seeks $200 million in damages for these alleged injuries, along with declaratory and injunctive relief intended to define the scope of its right of access to the waters of the Missouri River. The United States contends that plaintiff's case must be dismissed for lack of subject matter jurisdiction. Its contentions in support of its Rule 12(b)(1) motion are that: the six-year statute of limitations has expired on plaintiff's claim; the Complaint includes demands for equitable and declaratory relief that must be related to a decision on money damages; plaintiff lacks standing because its claim is not ripe; and no money-mandating statute or regulation applies to the general trust relationship between the Tribe and the United States. In this Opinion, we focus on the threshold issue of standing or ripeness.

DISCUSSION

The sources of plaintiff's claim for relief are its water rights granted pursuant to the *Winters* doctrine and its trust relationship with the United States. The *Winters* doctrine guarantees most Indian tribes in this country the right to sufficient water for the purposes of their reservations. *Winters*, 207 U.S. at 576-78. The statutory source for defendant's trust obligations regarding Indian tribal resources is found at 25 U.S.C. § 162a(d).

Defendant's primary argument is that plaintiff cannot show that it has been damaged by diversion of water from the Missouri River for which the Government is responsible. That is, the Tribe has not experienced a reduction of its water supply as a result of the alleged taking of plaintiff's water rights. If it had, plaintiff has not shown or even alleged that such a reduction has resulted in its not having sufficient water for the reservation's own purposes.

Plaintiff's argument in response is: (1) The *Winters* doctrine and related cases grant unto the Tribe a "presently perfected" possessory interest in the waters of the Missouri River. In taking or diverting waters from the Missouri River for whatever purpose, the United States converts to its own use an asset that belongs to the Crow Creek Tribe; and (2) discovery will enable the Tribe to calculate damages by showing the amount of water that has been diverted. Expert testimony will then permit plaintiff to calculate the value of that water.

The Supreme Court ruled in *Winters v. United States* that Indian tribes are entitled to an amount of water necessary to fulfill the purposes of their reservations, "without which [the reservations] would be useless." *Winters*, 207 U.S. at 576. Defendant does not dispute the fact that plaintiff is entitled to draw all the water it needs to supply the reservation, in this case from the Missouri River.

The Government's pertinent obligations as trustee for Native American tribes are codified at 25 U.S.C. § 162a. This statute includes language directing the Secretary of the Interior to "appropriately manag[e] the natural resources located within the boundaries of

Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8). Most cases addressing these responsibilities have been concerned with the Government's trust obligation to manage the Tribes' trust assets; none has held that the statute defines specific obligations regarding a tribe's natural resources. Thus, the United States must account for a tribe's trust assets and maximize their value. Neither the statute nor related case law specifies what the Government must do to protect or account for a tribe's natural resources.

RULING

Plaintiff has not suggested what damages the Tribe might have incurred from the Government's diversion of water from the Missouri River or how the court could determine the amount of such damages. During oral argument, plaintiff's counsel did not point to an actual or imminent injury to the Tribe that had yet occurred, conceding that at present, the Tribe has no means of calculating damages resulting from defendant's alleged breach of its common law and statutory trust obligations.

The basis for plaintiff's lawsuit seems to be that the *Winters* doctrine grants unto the Tribe a "presently perfected possessory interest" in the waters of the Missouri River. When the United States permits construction of dams on the river for purposes other than to supply the reservation, it is converting a trust asset belonging to the Crow Creek Tribe. The court should order an accounting of how much water defendant has diverted and award damages accordingly.

The *Winters* doctrine guarantees plaintiff and other Native American tribes in this country the right to sufficient water for the needs of their reservations. Damages for violation of *Winters* doctrine rights typically result from circumstances in which the Government's diversion causes the tribes to experience a shortage of water needed for their reservations.

Defendant has withdrawn or diverted water from the Missouri River for flood control, and its diversion has provided benefit to others in the area, but plaintiff has not alleged that such uses have reduced the amount of water available to the Crow Creek Sioux. Neither plaintiff's Complaint nor counsel's arguments in court suggest how the Tribe could have incurred damages in such circumstances, much less how the court could calculate such damages.

If plaintiff had applied for and been granted the authority to sell its water, for example, or had proposed other uses, it might be entitled to sufficient water for those purposes in addition to its own. The Tribe has not shown that it has a need for the water other than for its own consumption, or that the water it obtains pursuant to the *Winters* doctrine is insufficient for its intended pursuits.

In cases dealing with water use rights, a common threshold concern is whether the use of water by one party infringes on the rights of another party to a sufficient degree to cause an actual or imminent injury. In *Casitas Mun. Water Dist. v. United States*, the plaintiff's Fifth Amendment taking claim was dismissed as unripe because it could not show that a federal requirement that water be diverted down a fish ladder had harmed its property interest in a right to the beneficial use of that same water. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013). Without demonstrating some impact on its protected right of beneficial use, the court in *Casitas* had no jurisdiction to hear that plaintiff's unripe claim. Additionally, in *Navajo Nation v. US Dep't of the Interior*, the Navajo Nation's claim that the government had breached fiduciary obligations to quantify the tribe's water rights under the *Winters* doctrine was dismissed because the tribe could not indicate a regulation or statute which defined specific duties the government had failed to fulfill. *Navajo Nation v. US Dep't of the Interior*, 34 F. Supp. 3d 1019 (D. Ariz. 2015).

The trust relationship between the United States and Indian tribes, while robust, imposes only general obligations except where more specific obligations have been assumed by the government via regulation or statute. 25 U.S.C. § 162a(d)(8) does direct the government to manage the natural resources of Indian tribes, but does not direct any specific actions to be taken by the government in that management. This stands in contrast to much of the rest of 25 U.S.C. § 162a and § 162a(d), which are principally concerned with trust funds and assets and which provide clear instructions for their management. Absent statutory authority to direct the government to more affirmatively manage Indian natural resources, and absent an actual compensable injury, this court lacks jurisdiction to hear Crow Creek's claim.

CONCLUSION

The jurisdictional problem of standing or ripeness arises from plaintiff's inability to identify an injury to the Tribe that has yet occurred. If we were to permit discovery for the purposes that plaintiff proposes, assuming that we had jurisdiction to order the accounting that it seeks, that effort could only establish the value of water that has been diverted from the Missouri River over a period of time. Such a value would not equate to damages suffered by the Tribe in the circumstances of this case.

For these reasons, we GRANT defendant's motion to dismiss pursuant to Court of Federal Claims Rule 12(b)(1). The Clerk of Court will DISMISS plaintiff's Complaint. No costs.

IT IS SO ORDERED.

s/*Robert H. Hodges, Jr.*

Robert H. Hodges, Jr.
Senior Judge

In the United States Court of Federal Claims

No. 16-760 C

CROW CREEK SIOUX TRIBE

Plaintiff,

v.

THE UNITED STATES,

Defendant.

JUDGMENT

Pursuant to the court's Opinion and Order, filed June 1, 2017, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed. No costs.

Lisa L. Reyes
Acting Clerk of Court

June 2, 2017 By: s/ Anthony Curry

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

United States Court of Appeals
for the Federal Circuit
Crow Creek Sioux Tribe v. US, 2017-2340

CERTIFICATE OF SERVICE

I, Simone Cintron, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by NIX PATTERSON & ROACH, LLP, counsel for Appellant to print this document. I am an employee of Counsel Press.

On **October 10, 2017** counsel has authorized me to electronically file the foregoing **Brief** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the other parties:

Amber Beth Blaha
U.S. Department of Justice
ENRD/LPS
PO BOX 4390
Ben Franklin Station
Washington, DC 20044-4390
202-616-5515
amber.blaha@usdoj.gov

Paper copies will also be mailed to the above principal counsel at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

October 10, 2017

/s/ Simone Cintron
Counsel Press

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Dated: October 10, 2017

__*/s/ Austin Tighe*____________________
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Attorney for Appellant Crow Creek Sioux Tribe