2017-2340

United States Court of Appeals

for the

Federal Circuit

CROW CREEK SIOUX TRIBE,

Plaintiff-Appellant,

– v. –

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 1:16-CV-00760-RHH ROBERT H. HODGES, SENIOR JUDGE

REPLY BRIEF FOR PLAINTIFF-APPELLANT

AUSTIN TIGHE
NIX, PATTERSON & ROACH LLP
3600 Capital of Texas Highway
Suite B350
Austin, Texas 78746
Telephone No. (512) 328-5333
Facsimile No. (512) 328-5335
atighe@nixlaw.com

Attorney for Plaintiff-Appellant

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I. Introduction

The Court of Federal claims failed to follow the law of this Circuit, including *Fisher* and *Jan's Helicop*ter, and did not apply the proper legal standard under 12(b)(1) by holding that there was no jurisdiction because it didn't think the Tribe would ever be able to prove damages. Since the Government's Response Brief is an exercise in obfuscation, it necessitates a recap of the controlling legal principles here.

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 v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005). "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). 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). That is the entirety of the test.

The Tribe pled claims invoking both a money-mandating statute and money-mandating constitutional provision. Neither the Government nor the Court of Federal Claims has asserted that those are frivolous claims. 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.

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. To wit, 162a(d)(8) is pled as both a basis for jurisdiction and a basis for liability on the merits. Here, where the resolution of jurisdiction is intertwined with the merits—162a(d)(8) does not impose any duty here and the Government did not breach that provision, 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).

II. The Tribe has adequately alleged an actual injury in pleading its statutory and constitutional claims

The Government admits that the Tribe has water rights which, if taken or mismanaged, would give rise to breach of trust and Takings claims. Resp. Br. 14. It simply argues that the Tribe has not been injured or damaged because it can still go down to the river and use the water. *Id.* That is beside the point, is essentially a

merits argument and, regardless, is not determinative of the Tribe's statutory duty and constitutional claims at this stage of this case.

The Tribe has 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 v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007). The statute, 25 U.S.C. 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 what the Government concedes is an invasion of a "legally protected interest[s]", which are both concrete and actual. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *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); *see also* Br. 31. The deprivation of those rights—by mismanaging, taking and using the Tribe's water and water rights, etc.—gives rise, as pled, to an injury-in-fact.

To be clear, 162a(d)(8) applies to tribes, and requires proper management of water. The Tribe claims the Government failed to abide by that statute. That is a

properly-pled injury-in-fact. And under the controlling law of this Circuit as cited herein, that should end the inquiry[1].

The Government argues that the Tribe has not "shown" how it was injured. Resp. Br. 16. But the Tribe does not need to "show" how it was injured or damaged in order to meet the requisite pleading standard. The Tribe's statutory claim as pled is that the Government failed to comply with its management duties under 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 (1975). The failure of the Government to abide by that statute as pled is a concrete, actual invasion of a legally (statutorily) protected interest. That is an injury-in-fact, and is sufficient to establish standing. *See Lujan*, 504 U.S. at 560-61.

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

[1] That same analysis applies to the Tribe's alternative claim of a Fifth Amendment Taking, as demonstrated herein and in the Tribe's opening Brief.

"identifiable trifle" is sufficient). The Tribe has 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). *See, e.g.*, Appx17-19, Appx21, Appx33. A plaintiff must make only a *prima facie* showing of jurisdictional facts in order to avoid dismissal. *Jennette v. United States*, 77 Fed. Cl. 126, 129 (Fed. Cl. 2007). The Tribe's Complaint does so. Did mismanagement under 162a(d)(8) and/or a compensable Taking occur? If so, is the Tribe entitled to damages, and by what measure? Those are questions for summary disposition or the trier of fact; they are not threshold burdens of pleading.

The Government's attempt to negate the Tribe's rights by calling them merely "usufructuary" fails, as does its attempt to distinguish *Casitas I and II, Tulare Lake* and *Dugan*. Resp. Br. 17-19. In fact, the Government's assertion that *Winters* water rights are merely "usufructuary" actually supports the Tribe's standing. The Tribe has alleged that the annual if not daily diversion, retention, and appropriation of its *Winters* water for Governmental and non-Indian use constitutes a constitutional taking. Appx31-34. The court in *Tulare Lake Basin v. United States*, 49 Fed. Cl. 313 (2001) held that when the Government rendered the "usufructuary right" to that tribe's water valueless, it effected a physical taking. *Id.* at 314-15. The Government arguing that it didn't contest standing in *Tulare Lake* (Resp. Br. 19) does not change that holding. The same is true of the Government's attempt to distinguish *Dugan v.*

Rank, 372 U.S. 609 (1963) on the same "no contest" grounds. Resp. Br. 19-20. In *Dugan*, subordinating water rights "whenever it saw fit" resulted in "depriving the owner of its profitable use", which "constitute[ed] an appropriation of property for which compensation should be made.'" *Id.* at 625. Finally, the Government returns to its "go down to the river" argument to "distinguish" *Casitas I* and *II*. Resp. Br. 18-19. But *Casitas II* does not negate the holding of *Casitas I*, since it is based on California state law regarding water appropriation rights and beneficial use, and not 162a or the Fifth Amendment. If *Casitas II* were persuasive, presumably the Government would have relied upon it in the Court below.

Still, there is an even more fundamental reason why dismissal at the pleadings stage was improper. The Tribe pled 162a(d)(8) as *both* a basis for subject matter jurisdiction, *and* a basis for a breach of fiduciary duty claim. Where the resolution of jurisdiction is inextricably intertwined with the merits of the case (*e.g.*, 162a(d)(8) does not impose any duty here to manage the Tribe's water (Appx76), the Tribe's water was not really taken (Appx70-71)), a decision on jurisdiction should await a determination on the merits, either by the court on summary judgment motion or by the trier of fact. *See Kawa v. United States*, 77 Fed. Cl. 294 (2007); *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) (in a case based on a federal statute, "when the jurisdictional facts are inextricably intertwined with those central to the merits,

the [district] court should resolve the relevant factual disputes only after appropriate discovery").

In *Kawa*, the court denied a 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." As such, the 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." *Kawa*, 77 Fed. Cl. At 304 n.4; *see also Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299 (Fed. Cir. 2008). *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").[2]

[2] *Riviera Drilling & Exploration Co. v. United States*, 61 Fed. Cl. 395, 400-401 (2004) summarized the rule in the Federal Circuit as follows:

> 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. *See 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[]

Here, 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 thus inextricable intertwined, and the case should proceed forward until merits are addressed in summary judgment, or trial.

In a last-ditch challenge to standing, the Government closes by arguing that since the Court of Federal Claims cannot grant injunctive relief, the case should have been dismissed. Resp. Br. 19-21. This Court does have jurisdiction to grant such equitable relief when it is incident of and collateral to a money judgment. It is only in that context that the Tribe would seek an accounting—in aid of a judgment of liability. Such relief would be only incident of and collateral to a money judgment, and is permissible in that context. In fact, "when a plaintiff [in this Court] requests monetary damages for breach of trust, plaintiff is, in substance, also asking for an accounting in support of that award." *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225, 234 (2008) (accounting and quantification are merely incident of and

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> 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.")….

See also United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999) (where the jurisdictional issue required the same proof needed to win on the merits under the statute, the jurisdictional issues in Title VII case were not suited for 12(b)(1) dismissal); *Bell v United States*, 127 F.3d 1226 (10th Cir. 1997) (issue of whether plaintiff's claims fell within the FTCA was generally a jurisdictional fact intertwined with merits).

collateral to a money judgment against Defendant); *see, also, Eastern Shawnee Tribe v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009).

In sum, to establish Tucker Act jurisdiction, a plaintiff need only make a "nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source" identified in the Complaint. *Jan's Helicopter Serv., Inc. v.* 525 F.3d at 1309. Plaintiff has made nonfrivolous allegations pursuant to a money-mandating statute (and a money-mandating constitutional provision), and as an Indian Tribe is certainly "within the class of plaintiffs" entitled to recovery under that statute.

III. The Court of Federal Claims did not rule that the Tribe's claims were barred by the statute of limitations. Where the Government owes a continuing duty, application of limitations at the pleading stage would be improper.

The Court of Federal Claims did not rule that the Tribe's claims were barred by the statute of limitations. Nowhere in the two-page Ruling was limitations even mentioned. The Government's attempt to invoke limitations on appeal merely highlights the infirmities of its injury and 162a arguments. And so, the Government hopes this Court upholds dismissal on an argument not considered below. This Court should decline that invitation, for to accept it would be improper under the requisite standard of review.

In arguing to invoke limitations, the Government in essence attempts to rewrite the Tribe's claim. It must do so, because it needs to reduce the Tribe's claims

to a *single* event or point in time prior to 2010 in hopes of avoiding application of the continuing claims doctrine, which insulates claims where "at least one wrongful act occurred during the statute of limitations period and it was committed in furtherance of a continuing wrongful act or policy, or is directly related to a similar wrongful act committed outside the statute of limitations." *Lightfoot v. Union Carbide Corp*., 110 F.3d 898, 907 (2d Cir.).

Reading the Complaint under the requisite standard of review, the Tribe is not asserting here that a one-time event of building a dam(s) in 1964 is what gives rise to the Tribe's claims. Rather, the Tribe alleges that its claims arise out of the continuing and distinct harms that occur annually, if not daily, regarding its *Winters* water, including improper and inappropriate management, failure to maintain and protect, sale, failure to share revenue, misuse, self-dealing, storage control, diversion, and retention. Appx12, 16-18, 20-22, 28-31. These claims are "inherently susceptible to being broken down into a series of events or wrongs, each having its own associated damages." *Hayes v. United States*, 73 Fed. Cl. 724, 729 (2006).[3]

[3] For example, the Tribe attached to its pleadings a 2016 Army Corp of Engineers Report addresses how Plaintiff's *Winters* water will be used, outlining repeated series of independent and distinct actions, including releases of water as needed for downstream navigation, and how "drawdown of Fort Randall (Dam) was started after Labor Day in early September and was completed near the end of November." Appx117-157. It details daily, even hourly, diversions and releases of water for hydroelectric power, navigation, and other uses for the sole benefit of Defendant and/or non-Indian uses. *Id.* Another report shows the average monthly refill of dam reservoirs with Missouri River water, including Plaintiff's *Winters*

In *Shoshone IV*, the plaintiff-tribe brought a claim for mismanagement of trust assets arising from the extraction of oil and gas from their land parcels. *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021, 1039 (Fed. Cir. 2012). The Tribe argued the oil companies were continuing trespassers, with each extraction creating its own action and six-year statute of limitations. Because of the lower court's "incorrect conclusion that no continuing trespass had been asserted as a matter of law," the Federal Circuit remanded the case for argument on whether any relevant statute or regulation created a duty to remove trespassers. *Id.* at 1041. In the present case, there is such a "relevant statute" creating a duty—162a(d)(8).

The Government *itself* used this same principle successfully in *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999), where it argued *on behalf of* the Southern Ute Indian Tribe that it had a right to collect for the continued taking of natural resources by Hess, even though the first minerals were taken more than six years prior to suit. In ruling for the Government, the Court found that "each distinct gravel

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water. In the 2016 Report, Defendant states "Tribes have reserved water rights to the Missouri river and its major tributaries. In no way does this AOP attempt to define, regulate or quantify water rights or any other rights that the Tribes are entitled to by law or treaty." But that very *failure* to regulate ("appropriately manage") is a breach of 162a(d)(8). Furthermore, the Government has acknowledged that the Tribe has a right to share in hydropower revenues, revenues which Plaintiff alleges it has not appropriately received. *See* Appx16-18.

sale was an individual trespass and thus, a new cause of action arose with each individual act." *Id.* at 1174-75; *see also* Appx29-31.

Furthermore, it has long been the law of this Circuit that where the government owes a *continuing* ***duty***, a new cause of action arises *each* time the government breaches that duty. *See Mitchell v. United States*, 10 Cl. Ct. 63, *modified on reh'g*, 10 Cl. Ct. 787, 788-89 (1986) (the continuing claims doctrine applies when the Government owes "an ever-present duty" where "non-performance of the duty is properly viewed as giving rise to a series of actionable breaches."). At issue in *Mitchell II* was a different natural resource—trees. Plaintiff alleged that Defendant had a broadly-defined management duty to replant after harvesting trees on Indian land as part of its duty to manage the Tribe's natural resources. In applying the continuing claims doctrine and permitting the claims to proceed, the Court held "the existence of a *continuing duty* to regenerate means that on each day the BIA failed in its duty to regenerate a given [tree] stand, there arose a new cause of action." *Id.* at 788 (emphasis added).[4] Here, 162a(d)(8) imposes a continuing duty.

[4] Similarly, in *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 574-77 (1990), the Court in denying defendant's motion to dismiss stated that the Tribe had a claim if it could "show with particularity the statutes and regulations applicable to its claim" and how defendant "failed to comply with those requirements"); *Wells v United States*, 420 F.3d 1343, 1347 (Fed. Cir. 2005) ("Each alleged wrong constituted an alleged violation of a statute or regulation - 5 U.S.C. § 5514(a) - that accrued when that particular wrong occurred, independent of the accrual of other wrongs."). *Central Pines Land Co. v. United States*, 61 Fed. Cl. 527 (Fed. Cir. 2004) (limitations dismissal denied where plaintiff alleged

In *Goodeagle v. United States*, 111 Fed. Cl. 716 (2013), tribal members asserted that the Government had breached its continuing duty to manage the Tribe's natural resources in the context of a mining operation. Plaintiffs relied in part on 162a(d)(8), which the Court referred to as "the Government's fiduciary duty." *Id.* at 723. Citing to *Mitchell II*, the Federal Circuit stated:

> "The Government had a duty to protect the environment and manage the natural resources on the Quapaw land. The duty to manage and supervise the mining operations arguably arose each day mining activity occurred on the land, with each failure to fulfill that duty giving rise to a separate claim."

Id. at 724. Ultimately, the Federal Circuit declined to apply the continuing claims doctrine though, because mining operations had ceased more than twenty years prior to suit. Implicit in that opinion is that *if* mining operations had been ongoing, the doctrine *would* have been applied. Notably, the Government did not try to argue that limitations began to run when the mine became operational—the argument it is making here regarding "the dams". (Nor, tellingly, did the Government argue in *Goodeagle* that 162a(d)(8) *only* applied to monetary funds.)

Again, 162a(d)(8) imposes a continuing duty, and the Government's Response Brief does not address—let alone, distinguish—application of that

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continuing restrictions on, and prohibitions as to, mineral rights). *see also Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.C. Cir. 2006) (continuing if "at least one wrongful act occurred during the statute of limitations period, and [] it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations.").

continuing duty component of the continuing claims doctrine. On that doctrine alone, dismissal on limitations is improper at the pleadings stage.

IV. The Tribe has adequately pled both a money-mandating statute and constitutional provision

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 Government's primary challenge to 25 U.S.C. 162a(d)(8) is that it is not specific enough. Resp. Br. 28-30. Since there is no case that has ever held that, the Government instead primarily cites *United States v. Navajo Nation*, 537 U.S. 488 (2003) which involved an entirely different statute. Resp. Br. 29. In that case, the claim was based on 25 U.S.C. § 396a. That one-sentence statute is *prima facie* distinguishable. Unlike 162a, it never mentions the word trust, nor imposes any obligations whatsoever on the Government.

Next, the Government substitutes attorney argument in place of actual authority, opining that 162a is inapplicable because "natural resources" is an undefined term, and that maybe water is not even really a natural resource. Resp. Br. 29. That misconstruction speaks for itself. Unabashedly continuing forth down

this path, the Government then posits that 162a(d)(8) is not specific enough because it does not define "appropriate management", nor the Government's specific obligations. Resp. Br. 30. But this Court has stated in an *en banc* opinion that such "[e]xpress language is not required. Statutes speak in general terms rather than specifically addressing every detail." *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995). The Tribe cites numerous additional cases supporting its claim that 162a(d)(8) is sufficiently specific. Br. 14. The Government does not refute this authority, instead arguing in a footnote that the cases may not reflect an undefined current "direction" on fiduciary law. Resp. Br. 30, fn 5.

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. Resp. Br. 30. The Government relies on 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 162a(d)(8).

The plain language of the statute controls. Br. 16-18. 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). The Government's only footnoted retort to this canon of construction is that the Supreme Court has never said that it specifically applies to a Tucker Act inquiry. Resp. Br. 31, fn. 6. The obvious converse to that argument is that the Supreme Court has never held that it does *not* apply in this context, in considering a jurisdictional statute such as 25 U.S.C. 162a(d)(8).

The Government continues on its path of attorney argument without actual authority, arguing that "the better reading" of 162a is the Government's reading, and any other reading "strains credulity". Resp. Br. 32. What truly strains credulity is the Government's attempt, at footnote 7, to avoid *its own* assertion in *United States v. Klamath Water Users Protective Ass'n* that 162a(d)(8)—the very statute pled here—applied to natural resources, specifically water, and not just monetary trust funds. Appx25-26.

Next, the Government attempts to invoke legislative history as a backstop. Resp. Br. 33. But a party relying on legislative history must establish that said history demonstrates "an extraordinary showing of contrary intentions." *Garcia v.*

United States, 469 U.S. 70, 75 (1984). Nothing in the Government's one-page argument rises to that level.

In the end, as to 162a, 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*, 525 at 1309. The Tribe invoked the money-mandating 25 U.S.C. § 162a, and it is uncontested that its claim is nonfrivolous. The Government's arguments against the applicability of 162a, when held up to the standard of review, do not support dismissal at the pleadings stage.

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.

Clearly uncomfortable with its preceding argument as to the applicability of 162a, the Government closes by arguing that even if 162a "could clear the first hurdle for Indian Tucker Act jurisdiction, it fails the second hurdle" because 162a is not money-mandating. Resp. Br. 38-39. But that page-and-a-half argument is expressly belied by the holdings in *Evans v. United States*, 107 Fed. Cl. 442, 457 (2012), and *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1, 26 (2010). The Government fails to negate either of those cases, both of which recognize 162a as a money-mandating statute. Instead, it again offers mere argument without actual authority. When the Government does attempt to distinguish *Mitchell II*, 463 U.S. 206, 211, 228 (1983), it is nothing more than what *Jicarilla II* called "essentially the same" argument made by the dissent, and rejected by the majority, in *Mitchell II*. *See Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 742, n. 11 (2011). The importance of these holdings cannot be overstated, because it is the *en banc* law of this Circuit that if the applicable statute is money-mandating, "the court **shall** then proceed with the case in the normal course." *Fisher* 402 F.3d at 1173 (*en banc* portion).

Fisher also controls as to the Tribe's Fifth Amendment Takings claim, which the Government completely ignores except to argue that no Taking occurred—which again, is a merits argument. Fundamentally, the Court of Federal Claims has jurisdiction over Fifth Amendment Taking claims. *Murray v. United States*, 817

F.2d 1580, 1583 (Fed. Cir. 1987). The "just compensation" required by the Fifth Amendment Takings Clause makes it a money-mandating constitutional provision. *Jan's Helicopter Serv., Inc.*, 525 F.3d at 1309 (Fed. Cir. 2008) ("It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction."); *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."). Even with the Court of Federal Claims having characterized the Tribes case as a Fifth Amendment Takings case (Appx1), the Government fails to address, let alone distinguish, these holdings. Accordingly, *Fisher* requires that the Tribe's nonfrivolous Fifth Amendment Taking claim—ignored in the Response Brief and unaddressed by the Court below—proceed forward "in the normal course." *Fisher*, 402 F.3d at 1173. This is true irrespective of how this Court rules on the Tribe's 25 U.S.C. 162a(d)(8) claim.

V. Conclusion

It is the law if this Circuit that when a Complaint invokes a money-mandating statute or constitutional provision and makes a nonfrivolous claim—and no one, not even the Government, has argued that the Tribe's claim under 162a or the Fifth Amendment is frivolous—the Court of Federal Claims has subject matter

jurisdiction and dismissal under 12(b)(1) is improper. *See Brodoway*, 482 F.3d at 1375; *Jan's Helicopter Service*, 525 F.3d at 1309.

We are before this Court because the Court of Federal Claims 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 never prove damages. *See also* Appx1, Appx4-5, Appx270.

But that is not the appropriate standard. 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.

Again, 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). 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).

Plaintiff has pled two money-mandating substantive law sources, 25 U.S.C. § 162a and the Fifth Amendment Takings Clause; made nonfrivolous allegations that

are within the class of plaintiffs entitled to recover under those money-mandating sources; and thereby made a *prima facie* showing of jurisdictional facts sufficient to avoid dismissal. These claims are continuing, primarily because Defendant is under a continuing duty and a new cause of action arises *each* time Defendant breaches that duty, and as such are not barred by 28 U.S.C. § 2501. Finally, issues of jurisdiction and merits here are inextricably intertwined, and the claims should therefore be resolved either on a motion for summary judgment or at trial.

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

Dated: January 19, 2018.

Respectfully submitted,

NIX, PATTERSON & ROACH LLP

/s/ Austin Tighe

Austin Tighe
atighe@nixlaw.com
3600 Capital of Texas Highway
Suite B350
Austin, Texas 78746
Telephone No. (512) 328-5333
Facsimile No. (512) 328-5335

Attorney for Appellant Crow Creek Sioux Tribe

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

I, Robyn Cocho, 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 **January 19, 2018** counsel has authorized me to electronically file the foregoing **Reply 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

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January 19, 2018

/s/ Robyn Cocho
Counsel Press

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Austin Tighe
Attorney for Appellant Crow Creek Sioux Tribe