No. 17-2340

IN THE 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, CASE NO. 1:16-CV-00760 (HON. ROBERT H. HODGES)

RESPONSE BRIEF FOR THE UNITED STATES

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STATEMENT OF RELATED CASES

Counsel for the United States is aware of no previous appeals in this action and no related cases that will directly affect or be affected by this court's decision in this case.

INTRODUCTION

Under federal law, the establishment of an Indian Reservation—whether by treaty, statute, or executive order—impliedly reserves water sufficient to fulfill the purposes of that reservation. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 597-602 (1963). In this case, Plaintiff Crow Creek Sioux Tribe ("Tribe") alleges that the United States effected a taking of, and breached a fiduciary duty to protect, water reserved to accomplish the purposes of the Tribe's Reservation. The Tribe's claims stem from the construction of two dams on the Missouri River between 1946 and 1952 as part of the Pick-Sloan Plan, which the Tribe alleges resulted in the diversion, sale, and retention of its water in violation of its water rights. The Tribe further alleges that 25 U.S.C. § 162a(d)(8), which includes "appropriately managing the natural resources located within the boundaries of Indian reservations" among a list of the United States' trust responsibilities, establishes an enforceable duty to manage the Tribe's water rights. The Tribe alleges that the operation of the Pick-Sloan dams, as well as other unspecified acts and omissions of the United States, have resulted in a breach of that duty. The Tribe seeks at least $200 million in damages, as well as declaratory and injunctive relief.

As explained herein, the Court of Federal Claims properly dismissed the suit for lack of jurisdiction. The Tribe's claims fail on both standing and ripeness grounds because the Tribe has not alleged any actual or concrete injury to its water right. The Tribe's claims should be dismissed for the additional, alternative reason that they are

barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501, because the Tribe has been aware of the federal government's operation of the Pick-Sloan dams and any alleged impact on tribal water rights since at least 1964. Finally, the Tribe's breach-of-trust claim was properly dismissed because 25 U.S.C. § 162a(d)(8) does not establish specific fiduciary duties or mandate compensation for damages relating to the management of tribal water rights. Accordingly, the judgment of the Court of Federal Claims should be affirmed.

STATEMENT OF JURISDICTION

The Tribe brought suit against the United States and invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) and the Indian Tucker Act, 28 U.S.C. § 1505. Appx13-14. On June 2, 2017, the Court of Federal Claims entered a final judgment dismissing the Tribe's suit for lack of jurisdiction. Appx6. On July 20, 2017, the Tribe filed a timely notice of appeal. Appx315; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Tribe can demonstrate Article III standing to pursue its claims without pleading any facts showing that its water supply is insufficient to accomplish the purposes of the Reservation.

2. Whether the Tribe's claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501 because they accrued no later than 1964, the year of the last federal action referenced in the Complaint.

3. Whether 25 U.S.C. § 162a(d)(8) is a money-mandating statute that confers jurisdiction on the Court of Federal Claims to hear the Tribe's breach-of-trust claim.

STATEMENT OF THE CASE[1]

A. Federal Reserved Water Rights

Water rights are usufructuary in nature; that is, the property right "consists not so much of the fluid itself as the advantage of its use." *Casitas Mun. Water District v. United States* (*Casitas II*), 708 F.3d 1340, 1353 (Fed. Cir. 2013) (quoting *Eddy v. Simpson*, 3 Cal. 249, 252 (1853)); *see also Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246 (1954) (water rights in question "are usufructuary rights to use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself"). The water rights of most landowners and water users in the United States, including in South Dakota, are governed by state law. *See generally* S.D. Cod. L. § 46-1-3 ("all water within the state is the property of the people of the state but the right to the use of water may be acquired by appropriation as provided by

[1] Because the Tribe's suit was dismissed at the pleading stage, the following recitation of facts draws from the allegations in the Complaint. The recitation of those facts, however, does not constitute an admission of their veracity.

law"); *see also Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (describing South Dakota water law history).

In a series of cases commencing with *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court and other federal and state courts have held that the establishment of a federal reservation of land also implicitly reserves an amount of unappropriated water needed to accomplish the purpose of the reservation. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 599-600 (1963). This doctrine extends to Indian reservations reserved by treaty, statute, or executive order as well as generally to other non-Indian federal land reservations. *See, e.g.*, 373 U.S. at 597-98; *Cappaert*, 426 U.S. at 143-46. "Vested no later than the date each reservation was created, these Indian [reserved water] rights are superior in right to all subsequent appropriations under state law." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 574 (1983). Federal reserved rights, or "*Winters* rights," are not lost for non-use under state-law concepts such as abandonment and forfeiture. *See, e.g.*, *Winters*, 207 U.S. at 577.

A fundamental purpose of most Indian reservations was to have Indians adopt a more agrarian lifestyle, thus one measure of *Winters* rights is the amount of water needed to irrigate the reservation's "practicably irrigable acreage" (PIA). *Arizona v. California*, 373 U.S. at 600. Other cases recognize that Indian reservations may be set aside for additional purposes, and thus courts have recognized that an Indian tribe's *Winters* rights generally include more than just PIA. *See, e.g.*, *United States v. Adair*, 723

F.2d 1394, 1408-10 (9th Cir. 1984) (recognizing *Winters* rights for hunting, fishing, and gathering purposes as well as for agricultural purposes); *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 35 P.3d 68, 79 (Ariz. 2001) (recognizing a "homeland purpose").

Many reserved water rights claims, including tribal rights, have yet to be quantified. The most common method of quantification is by adjudication in court, often in a general stream adjudication. A general stream adjudication is a large, complex, and lengthy case (typically in state court) involving all water users in a particular river system, in which the court determines the existence and the elements (such as priority date, purpose, quantity, etc.) of existing rights to use water in that stream system. *See, e.g. New Mexico v. Trujillo*, 813 F.3d 1308, 1313 (10th Cir. 2016) (federal court general stream adjudication involving approximately 3,000 defendants); *see also In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 989 P.2d 739, 742 (Ariz. 1999) ("The purpose of a comprehensive general stream adjudication is to determine the nature, extent, and relative priority of the water rights of all who use the water of a river system and source." (internal quotation marks omitted)). Although there are general stream adjudications ongoing across the western half of the United States, there is no such action pending in South Dakota.

Although the United States often asserts water rights claims on behalf of tribes, tribes may also bring their own suits to adjudicate water rights. *See* 28 U.S.C. § 1362 (granting district courts jurisdiction over civil actions brought by any Indian tribe

under federal law); *San Carlos Apache Tribe*, 463 U.S. at 559 (federal courts have jurisdiction to hear water rights suits brought by Indian tribes). Where settlements of Indian reserved water rights claims are reached, Congress typically enacts legislation to give effect to such settlements. *See, e.g.,* Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, tit. IV, 124 Stat. 3064, 3097-3122.

B. The Crow Creek Sioux Reservation and the Pick-Sloan Project

The Crow Creek Sioux Tribe is a federally recognized Indian tribe. Appx14. The Crow Creek Indian Reservation ("Reservation") in central South Dakota was originally established in 1863, and the "Missouri River overlies the western boundary of the Reservation." Appx14; *see also* Act of Mar. 2, 1889, ch. 405, § 6, 25 Stat. 888, 889-90 (delineating boundaries of the Reservation). Consistent with the *Winters* doctrine discussion above, the Tribe holds reserved water rights to accomplish the purposes of its Reservation with a priority date no later than the establishment of its Reservation. No general stream adjudication has been conducted for this stretch of the Missouri River or the watershed that includes the Reservation, however, and neither the United States nor the Tribe has ever brought suit to adjudicate the Tribe's water rights.

In 1938, Congress initiated a comprehensive plan "for flood control and other purposes in the Missouri River Basin," including irrigation and hydroelectric power. Act of June 28, 1938, ch. 795, 52 Stat. 1215, 1218. Six years later, Congress authorized additional comprehensive plans for the Missouri River Basin project, which

collectively became known as the Pick-Sloan Plan. Act of Dec. 22, 1944, ch. 665, 58 Stat. 887, 897-98. The Plan provided for multiple dams on the main stem of the Missouri River, including the Fort Randall Dam (erected between 1946 and 1952, operational in 1953) and the Big Bend Dam (erected between 1959 and 1963, operational in 1964). Appx16; Appx51, Appx83, Appx85. Construction of these dams flooded part of the Reservation. To compensate the Tribe, Congress enacted two statutes by which the United States acquired more than 15,000 acres of the Reservation and paid the Tribe and its members more than $5 million "in settlement of all claims, rights, and demands of" the Tribe "arising out of" dam construction. Pub. L. No. 87-735, § 1(a)(2), 76 Stat. 704, 704 (1962) (Big Bend Dam); Pub. L. No. 85-916, § 1, 72 Stat. 1766, 1766 (1958) (Fort Randall Dam).

In 1996, Congress found that "the economy on the [Reservation] remains underdeveloped, in part as a consequence of the failure of the Federal Government to fulfill [its] obligations" under those two statutes. Pub. L. No. 104-223, § 2(a)(7), 110 Stat. 3026, 3027 (1996). Consequently, Congress established a new trust fund for the Tribe, to be funded with up to $27.5 million in hydroelectric-power revenue from the Pick-Sloan Plan. *Id.* § 4, 110 Stat. at 3027-28. Interest from the trust fund is to be used for projects that benefit the Tribe, including "the construction, operation, and maintenance of a municipal, rural, and industrial water system for the [Reservation]." *Id.* § 5(b)(3), 110 Stat. at 3029.

C. Court of Federal Claims Proceedings

In 2016, the Tribe filed suit in the Court of Federal Claims seeking at least $200 million in damages for the United States' alleged mismanagement of the Tribe's reserved water rights. The Tribe pleaded two claims "in the alternative" (Appx32): a Fifth Amendment takings claim and a breach-of-trust claim.[2] The takings claim is premised on the federal government's "diversion, sale, conversion, retention and storage control over … the waters and natural flow of the Missouri River" in accordance with the Pick-Sloan Plan. Appx33. The breach-of-trust claim is founded upon 25 U.S.C. § 162a(d)(8), which provides that "the trust responsibilities of the United States" to Indian tribes include "[a]ppropriately managing the natural resources located within the boundaries of Indian reservations." The Tribe alleges that the United States violated this "money-mandating statute" through unspecified "transactions, acts, and omissions," including the operations associated with the Pick-Sloan Plan. Appx28-29; *see also* Appx18-19.

The Court of Federal Claims granted the United States' motion to dismiss the Tribe's claims under that court's Rule 12(b)(1) for lack of subject-matter jurisdiction. *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408 (2017), at Appx1-5. The United

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[2] The Complaint includes a third "claim" that seeks different forms of relief but does not allege a distinct violation of law. Appx34-35. The Court of Federal Claims dismissed that claim, Appx5, and the Tribe has not argued for its reinstatement, so we do not address that issue further. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived.").

States offered several grounds for dismissal, but the court focused its analysis on "the threshold issue of standing or ripeness." Appx3.

The court recognized, in light of the parties' agreement for the purposes of the motion to dismiss, that the Tribe "is entitled to draw all the water it needs to supply the reservation … from the Missouri River," that the Tribe's standing turned on whether its Complaint contained well-pleaded facts showing that the Pick-Sloan Plan "resulted in [the Tribe's] not having sufficient water for the reservation's own purposes." Appx3. The court rejected the Tribe's view that any "taking or diverting waters from the Missouri River for whatever purpose" by the United States necessarily compromises the Tribe's reserved water rights. Appx3-5. Instead, the court explained, the Tribe must "allege[] that such uses have reduced the amount of water available to the [Reservation]" to accomplish its purposes. Appx4. Yet the court could find nothing in the Complaint suggesting that the Tribe was "experienc[ing] a shortage of water" or that its current water supply from the Missouri River was "insufficient for its intended pursuits." Appx4. Even after affording the Tribe "every latitude in its efforts to establish a cause of action," Appx2, the court concluded that the suit must be dismissed because it could not "identify an injury to the Tribe that has yet occurred," Appx5.

The court also addressed 25 U.S.C. § 162a(d)(8), the statute that the Tribe characterized as money-mandating. Although this provision is "concerned with the Government's trust obligation to manage … trust assets," the court explained, no

authority supported the Tribe's argument "that the statute defines specific obligations regarding a tribe's natural resources." Appx4. The court observed that it could not hear a breach-of-trust claim that was premised on "only general obligations" imposed by the "trust relationship between the United States and Indian tribes." Appx5.

SUMMARY OF ARGUMENT

The Tribe's takings and breach of fiduciary duty claims were properly dismissed because they lack an essential element to support jurisdiction—a genuine case or controversy. The Tribe fails to allege that it lacks sufficient water or that the government's actions have prevented it from using its water rights, and thus it fails to make any showing of concrete injury. Further, any claimed injury could not be redressed: the Tribe seeks an order requiring the United States to assert and quantify Tribal water rights, but that relief exceeds the authority of the Court of Federal Claims. Applying either a standing or a ripeness analysis, the Tribe's allegations fail to allege a justiciable dispute.

The Court of Federal Claims lacked jurisdiction for an additional reason not reached by the court below: the Tribe's claims are barred by the jurisdictional six-year statute of limitations in 28 U.S.C. § 2501. The claims stem from the construction and operation of the Fort Randall and Big Bend dams, which were completed by 1964. And the Complaint identifies no recent specific action by the United States that falls within the six-year limit.

Finally, the Tribe's breach-of-trust claim fails for want of a specific money-mandating provision. The general instruction in 25 U.S.C. § 162a(d)(8) that the United States "appropriately manag[e] … natural resources" is not the sort of "specific" duty that a court may enforce in a breach-of-trust action brought by an Indian tribe against the United States. Congress did not define "natural resources" or provide even rudimentary guidance as to what would be "appropriate" management of any such resource, much less how to manage a "right" to a particular resource. Those courts that have suggested that other provisions of Section 162a (in combination with other statutory mandates) establish a specific fiduciary duty have done so only in the context of trust funds, not management of water rights or natural resources themselves. For this independent reason, the Court of Federal Claims lacked subject-matter jurisdiction over the Tribe's claims.

The judgment of dismissal should be affirmed.

STANDARD OF REVIEW

Subject-matter jurisdiction is a question of law that this Court reviews de novo. *Hopi Tribe v. United States*, 782 F.3d 662, 666 (Fed. Cir. 2015). The Tribe bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Id.* At the pleading stage, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

ARGUMENT

A "federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). This brief presents three threshold grounds supporting dismissal of the Tribe's claims: (1) Article III standing or ripeness; (2) the statute of limitations; and (3) for the breach-of-trust claim, the absence of a money-mandating statute. This Court may affirm the decision of the Court of Federal Claims on any or all of these grounds. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1368 (Fed. Cir. 2005)

I. The Tribe Does Not Present an Article III Case or Controversy.

The Constitution limits judicial authority to the resolution of actual "cases" or "controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The doctrines of standing and ripeness "originate" from that limitation and help to ensure that federal courts hear only those disputes appropriately resolved through the judicial process. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Although the constitutional standing requirements are derived from Article III of the United States Constitution, those same requirements apply to actions in the Court of Federal Claims. *See Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

To establish constitutional standing, the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. The plaintiff bears the burden of establishing standing for each of its claims

and for each form of relief that is sought. *Davis v. FEC*, 554 U.S. 724, 734 (2008). To survive a motion to dismiss for lack of standing, the plaintiff must "'clearly … allege facts demonstrating' each element" of standing. *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Ripeness is a constitutional doctrine that ensures the existence of a justiciable case or controversy by avoiding premature adjudication. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The ripeness inquiry considers the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003); *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1348 (Fed. Cir. 2015).

"The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 n.6 (Fed. Cir. 2008) (noting that injury-in-fact inquiry can also be viewed through ripeness doctrine). Where, as here, standing and ripeness issues "boil down to the same question," the Supreme Court typically applies a standing analysis. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) (citations omitted). This brief adopts that approach.

A. The Tribe Has Not Alleged Any Actual or Imminent Injury to Its Right to Use Missouri River Water to Accomplish the Purpose of Its Reservation.

To establish injury in fact, the Tribe must show that it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547-48 (internal citations and quotations omitted); *see also Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) (injury in fact is "a hard floor of Article III jurisdiction"). The United States assumes for the purposes of its standing argument that the Tribe possesses a federal reserved water right to Missouri River water that (if taken) could form the basis of a Fifth Amendment claim and that (if mismanaged) could form the basis of a breach-of-trust claim. *See* Appx14, Appx18. Interference with a legally protected reserved water right is a concrete and particularized injury. But, as the Court of Federal Claims correctly held, the Tribe has failed to identify any concrete interference with the Tribe's water right that has yet occurred. Appx5. Put differently, the Tribe has not alleged any "actual or imminent" injury to its cognizable interest that could confer federal jurisdiction over its claims. *Spokeo*, 136 S. Ct. at 1548.

The Complaint is devoid of any allegations that the Tribe's right or ability to use the water in or around the Missouri River has been injured, damaged, or impaired in any way. For example, the Tribe has not alleged that it has tried to use water from the Missouri River for the purposes of the Reservation. Nor has the Tribe alleged that it even has the ability to use such water, but was unable to do so because of the

actions of the United States. *Cf. Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (finding no taking where government "neither physically appropriated nor denied meaningful access to Appellant's water rights"). Nor has the Tribe alleged that it is entitled to use a particular amount of water to meet the purposes of the Reservation, but that such amount is not available to it because of government action. The Court of Federal Claims correctly focused on this utter lack of alleged injury, noting at oral argument that the Tribe had not argued "that you don't have sufficient water." Appx297. Counsel for the Tribe did not disagree, conceding that "[t]here isn't any [Missouri River] water being used on the reservation at this time." Appx298.

At most, the Tribe has suggested that the Pick-Sloan dams generally affect water flows and water management on the Missouri River, to which the Tribe has water rights. Appx33. But the Tribe does not (and could not) contend that it has a right to *all* water from the river. The Tribe has reserved water rights only "to the extent needed to accomplish the purpose of the reservation." *Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559, 561 (Fed. Cir. 1982); *accord* Brief for Plaintiff-Appellant ("Br.") at 3. And because the Tribe's water right is usufructuary, an upstream diversion does not infringe on that right unless the diversion actually prevents the Tribe from using the water to which it is entitled. *See supra* p. 3; *Casitas II*, 708 F.3d at 1352-53. The Complaint alleges no facts showing that water management by the Pick-Sloan dams prevents or limits the Tribe from accessing sufficient water to achieve the purposes of the Reservation. Without some allegation of actual

infringement of the Tribe's right to use water, any injury to that right is "conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548.

The Tribe suggests (Br. 28, 31) that its injury is "actual" because its reserved water rights are not inchoate but rather "present perfected rights."[3] *See also* Appx3 (reciting this argument). Assuming arguendo that the Tribe's characterization of its rights is correct, the mere existence of a right does not show that it has been infringed. The question for purposes of standing is whether the Tribe's (actual) water right has actually been—or imminently will be—injured by actions of the United States. The allegation of actual or imminent harm is simply missing from the Complaint.

The Tribe argues (Br. 30) that it "alleged factual harm" in unspecified portions of five pages of its Complaint (Appx17-19, Appx21, and Appx33). But these pages contain only conclusory allegations of injury due to unspecified actions of the federal government. *E.g.*, Appx19 ("Defendant's zeal to develop non-Indian water interests unfortunately left Tribal rights and needs to languish."). Such "threadbare recitals" of injury-in-fact, "supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of Article III standing] must be supported in the

[3] The term "present perfected rights" as used in *Arizona v. California* originates in the Colorado River Compact. It is a term that the Supreme Court defined for purposes of its decree relating to that river system, not as a term of generally applicability. *See* 376 U.S. 340, 341 (1964) (decree); 373 U.S. 546 (1963) (opinion).

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation."). Nor can the Tribe rest on "legal conclusion[s] couched as … factual allegation[s]." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see, e.g.*, Appx21 ("Defendant is liable for the following breaches, acts and omissions, *inter alia*, in violation of substantive law …."); Appx33 ("Defendant's actions … amount to a Fifth Amendment taking of Plaintiff's water and water rights.").

Many of the Tribe's alleged harms are also based on the faulty premise that it possesses "water" instead of a "water right." *Compare* Appx17 ("*Winters* reserved water rights"), Appx33 ("water rights) with Appx21 ("Plaintiff's water and *Winters* reserved water rights"); Appx33 ("Plaintiff's water"). As a matter of law, the Tribe has no compensable property interest in particular molecules of "water." *See, e.g.*, *Casitas II*, 708 F.3d at 1354 (water rights holder "does not have a possessory property interest in the corpus or molecules of the water itself" under California law); *supra* p. 3 (interest in water is usufructuary). Standing may not be based on a purported injury to an interest that does not exist as a legal matter. *See Spokeo*, 136 S. Ct. at 1548 (standing must be based on a "legally protected interest"); *see also Warth v. Seldin*, 422 U.S. at 500 (standing "often turns on the nature and source of the claim asserted").

The Tribe suggests that the Court of Federal Claims' decision was based primarily on a concern about calculating damages. Br. 7-8, 10, 26-27. But the court's primary concern was not that the Tribe was unable to prove the *amount* of damages at

this stage of the case, but rather that it was unable to show that it had been damaged *at all*. *See* Appx1 ("Plaintiff's pleadings do not show how damages from an alleged taking could have accrued currently."); Appx4 ("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.").

The Tribe relies (Br. 32-33) on *Casitas Municipal Water District v. United States* (*Casitas I*), 543 F.3d 1276 (Fed. Cir. 2008), to suggest that it need only plead that "the government's policy reduced the amount of available water for plaintiff's use" because "the water, and Casitas' right to use that water, is forever gone." This Court later clarified, however, that mere diversion of water does not establish an injury to a downstream water rights holder. *Casitas II*, 708 F.3d at 1352-53. *Casitas I*, cited by the Tribe, did not "substantively consider[] the scope of [the plaintiff's] rights in the diverted water nor address[] whether a taking actually occurred." *Id.* at 1353.

Casitas II, which was decided on ripeness grounds, set forth a more stringent test for subject-matter jurisdiction over claims for the taking of water rights. The plaintiff must demonstrate that government action has injured its specific, legally protected water-use right. *Id.* at 1359. Thus, even though the plaintiff there possessed a contractual right to use up to a specified quantity of water, its legally protected water right was limited by state law. The court thus lacked jurisdiction unless and until the plaintiff could show that actions of the United States "caused [the plaintiff] to deliver

to its customers less water than it would otherwise have delivered." *Id.* at 1358. Similarly, the Tribe has not alleged that its legally protected water right—the right to use sufficient water to fulfill the purposes of the Reservation—has been impaired.

The Tribe also relies (Br. 32) on *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001). But the plaintiffs in *Tulare Lake* made allegations of injury that are lacking here—namely, that they were water users with permitted rights to use specific quantities of water and that government water-use restrictions deprived them of the right to use this quantity of water—and the United States did not contest standing in that case. *Id.* at 315-17. The same is true for *Dugan v. Rank*, 372 U.S. 609, 613-14, 616 (1963) (Br. 32-33), in which there was no dispute among the parties as well as a previous court finding that Bureau of Reclamation project actually interfered with plaintiffs' water rights. The Tribe's claims here, in contrast, are devoid of the required showing of concrete harm to its water-use right.

B. The Tribe's Requested Relief Cannot Redress Any Alleged Injury.

To satisfy the third prong of the standing analysis, there must be "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). The Tribe requests monetary damages for "the value of trust assets and natural resources lost through Defendant's actions and omissions" (Appx28), damages for the alleged taking (Appx34), and a judgment requiring the United States to establish, measure, quantify, and assert the Tribe's water rights (Appx34).

As discussed above, the Tribe has not identified any particular diversion or deficiency of the Tribe's water supply that has caused it injury, and the Tribe has not alleged the capacity to use water that it has been denied. Instead, the Tribe makes vague, broad claims regarding speculative losses to its "water" or its water rights. Because of how the Tribe has framed its purported injury, such injury could be redressed only by a quantification of the Tribe's water rights, which would permit damages to be calculated based on the scope of those rights and any loss of use created by the federal government's actions. Indeed, the Tribe expressly seeks declaratory and injunctive relief requiring the United States to "establish and measure," "quantify," and "assert" water rights on the Tribe's behalf, as well as to "record legal title to water held in trust" for the Tribe. Appx34; *see also* Appx31 (claiming breach of trust stems from failure to "protect, quantify, assert, or record Plaintiff's water rights").

But quantifying the Tribe's water rights can be conclusively accomplished only through the filing of an action either in state court or in federal *district* court (or via a legislative settlement resolving claims asserted in such litigation). *See supra* p. 5. The Court of Federal Claims simply lacks authority to conduct that adjudication itself, for it "has no general power to provide equitable relief against the Government or its officers." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011). Nor does the Court of Federal Claims have any power to order the United States to institute litigation elsewhere on behalf of the Tribe. To the contrary, the decision to file a claim

in court, including a water rights claim on behalf of an Indian tribe, is squarely within the discretion of the Department of Justice, 28 U.S.C. §§ 516, 519, and is "presumptively immune from judicial review." *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-81 (D.C. Cir. 1995); *accord, e.g.*, *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972). Requested relief that exceeds the court's authority cannot support standing. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (court must evaluate whether requested injunctive relief is within court's authority, and if not, whether plaintiffs' injuries were nonetheless redressable). Because the Court of Federal Claims lacks authority to quantify the Tribe's water rights or to order the United States to file suit to quantify the Tribe's water rights, the Tribe's requested relief cannot redress any purported injury.

For this reason, and because the Tribe has not alleged any actual or imminent injury, the Tribe lacks standing to press its claims.

II. The Tribe's Claims Are Barred by the Statute of Limitations.

The Tribe's takings and breach-of-trust claims should be dismissed for an additional, alternative reason: they are barred by the statute of limitations. Congress has barred "[e]very claim of which the United States Court of Federal Claims has jurisdiction unless … filed within six years after such claim first accrues." 28 U.S.C. § 2501. This limitations period is jurisdictional and not subject to equitable tolling. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1349 (Fed. Cir. 2011).

A. The Tribe's Breach-of-Trust Claim Accrued No Later than 1964.

The Tribe's claim accrued "when all the events which fix the government's alleged liability have occurred and [the Tribe] was or should have been aware of their existence." *San Carlos Apache Tribe*, 639 F.3d at 1350. This is an objective standard; the Tribe "does not have to possess actual knowledge of all of the relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). A breach of trust claim accrues when "the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). "The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as trustee or by express words." *Id.*

According to the Complaint, the United States' purported breach of trust stems from the construction of the Fort Randall Dam in 1946 and the Big Bend Dam in 1960. Appx16.[4] The Tribe alleges that "[a]ll this time"—i.e., in the 1940s, 1950s and 1960s—Plaintiff's *Winters* reserved rights were simply ignored" and that Plaintiff failed to receive economic benefits from Pick-Sloan "despite the fact that said benefits were derived from Plaintiff's (and other Missouri River Tribes') *Winters* reserved water rights." Appx16; *see also* Appx28. The Tribe concedes that the Bureau of Indian Affairs "fully informed Plaintiff of the damage it would eventually suffer to Tribal

[4] Construction of the Big Bend Dam actually commenced in 1959. *See* Appx83.

lands" in 1949. Appx16. Construction of the two dams spanned seventeen years, from 1946 to 1963. Appx83-85. It is clear, therefore, that the Tribe was aware of all of the facts that it asserts constitute a breach of trust no later than 1964, when the Big Bend Dam became operational. *See, e.g.*, *San Carlos Apache Tribe*, 639 F.3d at 1350 (Tribe's breach of trust claim accrued at the time of the government's action, not when the full extent of damages are known); *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (same).

This is confirmed by the Tribe's participation in 1975 in a Senate Hearing, at which the Tribe's representative made a claim that is nearly identical to the one pressed in this lawsuit. *See* Appx113 (reproducing *Sale of Water from the Upper Missouri River Basin by the Federal Government for the Development of Energy: Hearings before the S. Subcomm. on Energy Research and Water Resources, Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 386-90 (1975). At that hearing, Tribal councilman Ray Leanna stated that "in the opinion of the Crow Creek Sioux Tribe, … the Secretary of the Army and Secretary of the Interior have acted beyond their scope of authority, not in the best interest of the Indian tribes on the Missouri River Basin"; and that "[f]urther, that the Interior Department has willfully neglected its trust responsibility to protect Indian water rights." Appx113. The Tribe's chairman also participated in a 2007 Senate Hearing during which the Chairman of the Lower Brule Tribe explicitly articulated harms identical to those alleged here. *See Impact of the Flood Control Act of 1944 on Indian Tribes Along the Missouri River: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong.,

1st Sess. 59 (2007) (statement of Michael B. Jandreau that the "United States took our best land and our water (under the *Winters* doctrine) to produce electricity"); *see also Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (treating tribal participation in congressional proceedings as demonstrating awareness of purported injuries).

The Tribe alleges that it "was denied essential information necessary to be aware of the wrongs committed by Defendant," but the only support for this assertion is that "[t]o this day, Plaintiff's *Winters* doctrine rights have never been fixed, quantified, or resolved." Appx29. But the accrual date of a cause of action will be suspended in only two circumstances which are "strictly and narrowly applied": the plaintiff "must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable'" at the time the cause of action accrued. *Martinez v. United States,* 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc) (*quoting Welcker v. United States,* 752 F.2d 1577, 1580 (Fed. Cir. 1985)); *Menominee Tribe of Indians*, 726 F.2d at 721 (facts of alleged forest mismanagement not inherently unknowable where facts were available if Tribe launched an inquiry through its agents). As discussed above, the first exception does not apply because the Tribe has been aware of the operation of the dams since at least 1964, and because the Tribe articulated its allegations of harm from the dams no later than 1975. Injury to water rights is not "inherently unknowable" simply because the water right is not quantified; the Tribe would certainly be aware if it were

prevented from using the water it needed. Further, if (as the Tribe suggests) its federal reserved water right must be quantified in order for its breach-of-trust claim to accrue, then that claim has *not yet accrued* and thus is not ripe.

Nor does the continuing-claim doctrine save the Tribe's breach-of-trust claim. That doctrine only applies when "the plaintiff's claim [is] inherently susceptible to being broken down into a series of independent or distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). The alleged breach of trust here stems from a discrete event—the United States' construction and operation of two dams on the Missouri River, both of which were operational by 1964. "[T]he continuing claims doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time." *Ariadne Financial Services Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998); *see also Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). The Tribe's Complaint has pointed to no sufficiently "independent and distinct events" that incurred identifiable damages occurring in the six years prior to the filing of its Complaint.

B. The Tribe's Takings Claim Accrued No Later Than 1964.

The Tribe's Complaint identifies no specific government action that could have affected or "taken" its water right after 1964, when the Big Bend Dam became operational. Thus, if the Tribe's water use right has been "taken" at all, this taking occurred no later than that date, and it is far outside the statute of limitations. *Cf.*

Estate of Hage v. United States, 687 F.3d 1281, 1289 (Fed. Cir. 2012) (finding water rights takings claim barred by statute of limitations where fences around springs and streams were constructed more than six years before complaint); *see also Boling*, 220 F.3d at 1373-74 (continuing claims doctrine does not apply to takings claim where single government action resulted in ongoing damage to property).

Dismissal of the Tribe's claims should be affirmed for the additional reason that they accrued more than six years ago and are barred by the statute of limitations.

III. The Tribe Has Not Identified a Money-Mandating Statute That Could Support Jurisdiction Over Its Breach-of-Trust Claim.

The Court of Federal Claims correctly concluded that it lacked jurisdiction over the Tribe's breach-of-trust claim for an additional reason: the Tribe failed to identify any statute that creates a duty, enforceable in a suit for money damages, to affirmatively manage the Tribe's water rights or natural resources. Appx5.

A. Jurisdictional Requirements for a Breach-of-Trust Claim.

The Tucker Act, 28 U.S.C. § 1491(a)(1), grants the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. . . ." The Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting

25 U.S.C. § 1505). However, "[n]either the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g. statutes or contracts)." *United States v. Navajo Nation* (*Navajo II)*, 556 U.S. 287, 290 (2009); *accord Hopi Tribe*, 782 F.3d at 666. That other statute or source of law must establish a specific right enforceable against the federal government by a claim for money damages. *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 217 (1983); *Navajo II*, 556 U.S. at 290.

Accordingly, a tribal plaintiff must clear "two hurdles" to satisfy the jurisdictional requirements of the Indian Tucker Act. *Navajo II*, 556 U.S. at 290 (citing *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003)). First, the plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506; *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). At this stage, "a statute or regulation that recites a general trust relationship between the United States and Indian people is not enough to establish any particular trust duty." *Hopi Tribe*, 782 F.3d at 667 (citing *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 542-44 (1980)). Instead, the reviewing court's analysis "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 507. "When the

Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, … neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Jicarilla Apache*, 564 U.S. at 177; *accord Navajo II*, 556 U.S. at 301-02.

If the plaintiff passes the first hurdle, it must then show that the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Id.* At the second stage, principles of trust law might be relevant 'in drawing the inference that Congress intended damages to remedy a breach.'" *Navajo II*, 556 U.S. at 291 (citing *White Mountain Apache Tribe*, 537 U.S. at 477).

The Tribe's claim cannot clear either hurdle. First, the general instruction in 25 U.S.C. § 162a(d)(8) to "appropriately manag[e] … natural resources" does not establish any "specific" duty regarding tribal water rights. *See Navajo I*, 537 U.S. at 506. Second, even if this provision did contain a fiduciary duty to manage water rights, it does not mandate monetary compensation.

B. Section 162a(d)(8) Does Not Establish a Specific Fiduciary Duty Regarding the Management of Water or Water Rights.

1. Section 162a(d)(8) Lacks the Specific Rights-Creating or Duty-Imposing Terms to Support Indian Tucker Act Jurisdiction.

Section 162a of Title 25 provides authorities and instructions to the Secretary of the Interior regarding the management of Indian *money* held by the United States,

not the management of natural resources. The section is titled "Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required." It is entirely concerned with matters such as the deposit of trust funds into banks (subsection (a)) and the investment of tribal funds into particular investment vehicles and public debt obligations (subsections (b) and (c)). Subsection (d) lists eight items as included within "the Secretary's proper discharge of the trust responsibilities of the United States," seven of which plainly concern the management of money. *Id.* The eighth item is "appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8). The Tribe bases its breach of trust claim on this final provision.

But these fifteen words are not the sort of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the Supreme Court requires to support Indian Tucker Act jurisdiction. *Navajo I*, 537 U.S. at 507 (Indian Mineral Leasing Act does not give Secretary sufficient managerial control or other specific responsibilities to support Indian Tucker Act jurisdiction). Section 162a lacks any specific guidance to the Secretary: it does not define "natural resources," and it does not mention water or water rights. Indeed, it is not clear that a water right—a usufructuary right, rather than a tangible resource—should be considered a "natural resource" or that a water right is properly considered to be "located within the boundaries of [the Tribe's] reservation or trust lands."

This statute authorizes no role for the Secretary with regard to water projects or water rights. *Cf. Hopi Tribe*, 782 F.3d at 669 (affirming dismissal for lack of jurisdiction where neither the statute nor the executive order "refers to drinking water on the reservation, much less instructs the United States to manage drinking water quality"). The statute does not define "appropriate management" of natural resources. Nor does it provide any guidance, standards, or specific obligations to direct the Secretary of the Interior in administering this supposed fiduciary responsibility.[5]

The Supreme Court has held that statutes granting the Secretary of the Interior a far greater role in managing a specific, identified trust asset nonetheless fail to establish a specific fiduciary duty. For example, in *Navajo I*, the Court found that the Indian Mineral Leasing Act of 1938 (IMLA) did not assign specific fiduciary duties to the Secretary of the Interior in connection with the Secretary's approval of coal lease amendments. 537 U.S. at 507. This was true even though the IMLA assigned an

[5] The Tribe suggests that "no greater specificity" than the language in Section 162a(d)(8) is required. Br. 14. But the majority of the cases cited by the Tribe predate *Mitchell II, Navajo,* and *White Mountain Apache* and thus do not reflect the Supreme Court's direction as to fiduciary duty claims. *See Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980). And *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 737 (2011), the sole recent case cited, concerned claims for mismanagement of trust funds and a finding that a network of statutes "vest the United States with management control over the trust funds, discretion with respect to their investment, and detailed responsibilities to account to the tribal beneficiaries." *Id.* at 732-32. That case is not relevant here, where water rights (not trust funds) are at issue, and there is no statute or regulation vesting the Secretary with any duties or control over tribal water rights, much less the type of detailed responsibilities in *Jicarilla*.

approval role for the Secretary and authorized him to promulgate regulations on the subject. *Id.* But the Court concluded that this was not sufficient, because "the IMLA and its regulations do not give the Federal Government full responsibility to manage Indian resources … for the benefit of the Indians," nor do they "assign to the Secretary managerial control over coal leasing." *Id.*; *cf. Mitchell II*, 463 U.S. at 221-22 (finding specific fiduciary duty where a network of statutes and regulations imposed specific management duties on the Secretary, and provided detailed standards to guide the Secretary's actions). The paltry instruction to the Secretary in Section 162a(d)(8) falls far short of the standard set by *Navajo I*.

The Tribe argues that the "plain language" of the provision imposes an enforceable trust duty (Br. 16), but this ignores the quartet of Supreme Court opinions that must guide the jurisdictional inquiry.[6] As the D.C. Circuit explained after reviewing and synthesizing this law, "[a] statute's invocation of trust terminology is not itself dispositive, since the statute may create either a judicially enforceable trust as in *White Mountain* or a "bare trust," not judicially enforceable, as in *Mitchell I*." *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014); *see also Jicarilla Apache Nation*, 564 U.S. at 174 ("Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee"); *Hopi Tribe*, 782

[6] The Tribe also suggests that the "Indian canons of construction" help their cause here (Br. 17), but the Supreme Court has never suggested that these canons play a role in the Indian Tucker Act inquiry.

F.3d at 669 (language indicating that land would be held "in trust" "does not establish any particular fiduciary duty to manage water resources on the land").[7]

The better reading of Section 162a is that it addresses the management of trust funds, not water rights. Its provisions, its title, and the entirety of the subchapter in which Section 162a is found concern the management of Indian money held by the United States. The Tribe argues that "a section title cannot substitute for the operative text of the statute." Br. 17 (citing *Pennsylvania Dep't of Corrections v. Yesky*, 524 U.S. 206, 212 (1998)). But the section title provides insight regarding whether paragraph (d)(8) clearly assigns specific, enforceable fiduciary duties as to tribal water rights, or natural resources more generally. *See Mitchell I*, 445 U.S. at 542 (considering provision in the context of the statute as a whole); *see also Pennsylvania Dep't of Corrections*, 524 U.S. at 212 (A statute's title can help with interpretation by "shed[ing] light on some ambiguous word or phrase."). Here, it strains credulity that Congress would have imposed a specific fiduciary obligation to manage a critical and expansive subject such

[7] The Government's brief in *United States v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), is not inconsistent with its position here. *See* Br. 15 (citing Brief for the Petitioners, No. 99-1871, 2000 WL 1706727 (Nov. 9, 2000)). This pre-*Navajo* case concerned the applicability of a Freedom of Information Act exemption to documents passing between Indian tribes and the Department of the Interior regarding water rights proceedings. The Government's brief cited Section 162a(d)(8) along with other statutes and cases as further support for a general trust relationship relating to tribes' natural resources and the need for the Department to be able to consult with tribes confidentially. The brief did not state or suggest that Section 162a(d)(8) created a specific and enforceable fiduciary duty to manage water rights.

as Indian water rights or other undefined "natural resources" by burying it in just a few words in a statute regarding the management of trust funds.

The legislative history confirms this view. *See Mitchell I*, 445 U.S. at 543 (considering legislative history). Section 162a(d) was added to the statute by the Indian Trust Fund Management Reform Act, a stated purpose of which was "to bring about better accountability and management of Indian trust funds by the Department of the Interior and to provide an opportunity for Indian tribes to directly manage their trust funds." H.R. Rep. No. 103-778, at 8 (1994). The statute "sets out the Secretary of the Interior's responsibilities to American Indian trust fund account holders," provides the Secretary with authority to settle claims on individual accounts for uncredited interest, requires the Secretary to assist tribes in implementing trust fund investment plans, and establishes a Special Trustee for American Indian trust funds to plan and oversee management reforms. *Id.* at 8-9. The House committee report contains no indication that Congress intended to impose any specific responsibilities on the Secretary regarding the management of water rights or natural resources more generally; indeed, it does not even contain the word "water."[8]

[8] That Congress was only contemplating trust *funds* in Section 162a(d)(8) is also supported by the original draft of that provision, which specified that it was directed at funds derived from tribal natural resources: "The Congress recognizes that the trust responsibility of the United States extends to tribal and individual Indian owners of natural resources located within the boundaries of Indian reservations and trust lands. This includes the fiduciary responsibility to manage funds held in trust by the United States for Indian tribes and individual Indians derived from actions including, but not

Cont.

Nor can the Tribe rely on common-law principles (Br. 18) until it identifies a statute that establishes a specific fiduciary duty; common-law trust principles cannot create such a duty in the first instance. *See Navajo II*, 556 U.S. at 302 (where "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, … common-law trust principles" do not matter); *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 757 (2016) ("any specific obligations the Government may have under [the general trust] relationship are 'governed by statute rather than the common law'" (quoting *Jicarilla Apache*, 564 U.S. at 165)). The Tribe has not cleared that threshold.

The Tribe cites *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972), in support of its theory that "the Government has a common law fiduciary duty to assert its authority to the fullest extent possible." Br. 19. But that Administrative Procedure Act case, which pre-dates all of the Supreme Court case law addressing the Indian Tucker Act, held only that the Secretary could not issue a regulation that directly interfered with the Tribe's water right. The remaining cases cited by the Tribe (Br. 19) address tribal fisheries or fishing rights, and do not bear at all on the question whether the United States has an enforceable duty to manage Indian water rights.

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limited to, the use and sale of leased lands, judgments, mineral leases, oil and gas leases, timber permits and sales, and water resources." H.R. 1846, 103d Cong., 1st Sess. (1993).

Moreover, the Tribe presents no reason to treat the management of water rights differently from the management of any other asserted "natural resource." Under the Tribe's reasoning, these fifteen words in the statute impose a specific duty on the Secretary to manage all "natural resources" within reservation boundaries, across the nation—even though the statute does not define "natural resources" or provide a single direction or guidepost for the Secretary as to how to fulfill this immense task, much less any specific authorities by which to carry it out. Congress cannot reasonably be thought to have imposed this massive responsibility on the Secretary without more specific direction or authority.

2. No Court Has Held that Section 162a(d)(8) Creates a Specific Fiduciary Duty as to Water Rights or Any Other Natural Resource.

The Tribe asserts that "[c]ourts have expressly found 25 U.S.C. 162a to be money-mandating." Br. 12-13. But the cases cited by the Tribe do not suggest, much less "expressly find," that Section 162a(d)(8) creates a specific or money-mandating duty to manage tribal water rights or natural resources. In *Mitchell II*, the Supreme Court mentioned Section 162a only twice; in both instances, the Court simply described Section 162a as addressing the management of Indian funds. *See* 463 U.S. at 211 (describing Section 162a as a "statute[] governing Indian funds and government fees"); *id.* at 222 n.24 (describing Section 162a as giving the Secretary the authority to invest tribal and individual Indian funds held in trust under certain conditions). Nothing in *Mitchell II* suggests that Section 162a, standing alone, creates an

enforceable fiduciary duty. *See id.* at 230 (Powell, J., dissenting) ("The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy.").

The Tribe also cites three other cases, none of which aid the Tribe's argument. Br at 13. *Evans v. United States*, 107 Fed. Cl. 442 (2012), cited *Mitchell II* for the proposition that Section 162a is money-mandating, but then found that plaintiff had not alleged any violation of the provision. *Id.* at 457. *Evan*'s discussion of Section 162a is thus dicta. *Jicarilla Apache Nation* involved "the United States' accounting, management, and investment of Jicarilla's trust funds from 1972 to 1992," 100 Fed. Cl. at 731, not tribal water rights or natural resources. And in *Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 26 (2010), the court described 25 U.S.C. §§ 161a, 161b, 162a, and other sources of law as an "applicable legal requirement" for the management of royalties from the Osage mineral estate, but made no findings regarding whether section 162a met the *Mitchell II* test. Lastly, the Tribe also cites (Br. 14) *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 33 (D.D.C. 1998), but that APA case concerned the management of individual Indian money accounts, not natural resources; it did not address whether, much less conclude that, Section 162a creates an enforceable fiduciary duty under the Indian Tucker Act.

At most, these cases acknowledge that some portions of Section 162a, combined with other statutes, may support a specific fiduciary duty as to *funds* that are held by the United States and are managed pursuant to a robust statutory and

regulatory scheme. But a statute that creates an enforceable fiduciary duty as to the management of one asset (e.g., money) does not establish a similar duty as to management of other assets. *Cf. Shoshone Indian Tribe of Wind River Reservation*, 364 F.3d at 1350 (finding Court of Federal Claims erred when it equated the mismanagement of trust assets with losses to trust funds for purposes of statute deferring accrual of breach-of-trust cause of action). These cases do not establish that Section 162a(d)(8) creates a specific fiduciary duty to manage tribal water rights.

Relying on *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005), the Tribe suggests that these cases permit the Court to shortcut the *Navajo II* analysis of Indian Tucker Act jurisdiction. Br. 13. But *Fisher* did not alter the Indian Tucker Act analysis; to the contrary, it confirmed that the trial court must first determine "whether the Constitutional provision, statute, or regulation is one that is money-mandating," and if it is not, it "shall dismiss the cause for lack of jurisdiction." *Id.* at 1173. The *Fisher* court pointed to *Mitchell II* and its progeny as governing the money-mandating inquiry. *Id.* at 1174.[9] If the court finds that a particular statute meets this standard, "the court shall declare that it has jurisdiction over the cause," and the court does not need to reevaluate at the merits stage whether the "plaintiff has a money-mandating source on

[9] The *Fisher* court noted that there was some question as to whether *White Mountain Apache* altered the *Mitchell II* test. *Id.* Since *Fisher*, the Supreme Court has decided *Navajo II* and *Jicarilla Apache*, which clarify that the test outlined in *Mitchell II* and *Navajo I* has not been relaxed in any way. *Navajo II*, 556 U.S. at 296-301.

which to base his cause of action." *Id.* at 1173.[10] But if it does not meet the standard, "the absence of a money-mandating source [is] fatal to the court's jurisdiction under the Tucker Act." *Id.* That is the case here: Section 162a(d)(8) does not establish a specific fiduciary duty, and Court of Federal Claims correctly determined that it lacked jurisdiction over the breach of trust claim.

C. Even If Section 162a(d)(8) Creates a Specific Fiduciary Duty, It Does Not Mandate Compensation for Breach of Those Duties.

Even if Section 162a(d)(8) could clear the first hurdle for Indian Tucker Act jurisdiction, it fails at the second hurdle because it cannot "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Navajo II*, 556 U.S. at 301-02. Section 162a contains no express provision for monetary relief. More significantly, paragraph (d)(8) lacks the hallmarks of a statutory provision that contemplates monetary relief, such as a measure of damages.

Mitchell II is illustrative. In that case, the Court recognized that the statutes and regulations at issue required the Secretary to manage the tribal timber resources "so as to generate proceeds for the Indians." 463 U.S. at 227. The Court concluded that it

[10] According to *Fisher*, whether a statute supports Indian Tucker Act jurisdiction is a question of law. *See* 402 F.3d at 1173. As such, the question of the court's subject matter jurisdiction cannot be "inextricably intertwined with the merits of the Tribe's claim." Br. 23. None of the "legion of exemplar cases" cited by the Tribe (Br. 25) deferred ruling on the jurisdictional questions of whether a statute supports Tucker Act or Indian Tucker Act jurisdiction, standing, or ripeness, and the Tribe has not made a showing that a deferral is appropriate here.

"would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties were not performed." *Id.* Thus, in the case of the Indian timber statutes, the Court found a statutory direction for the Secretary to follow—to manage the asset to generate proceeds for the tribe—and therefore a measure of damages if that direction were not fulfilled.

In contrast, Section 162a(d)(8) indicates that trust duties include "appropriately managing" natural resources, but it does not provide any guidance as to what this means for water or any other natural resource, much less what it could mean for managing more abstract rights to such resources. This language could conceivably require the Secretary to "generate proceeds" like the timber statutes in *Mitchell II*, but it could instead mean to manage a resource in a way that conserves it for the future or to manage in a way that preserves environmental values. If Congress intended either of these latter two directions, there is no readily available measure of monetary damages if that duty were breached, unlike in *Mitchell II*. This lack of direction in the statute not only indicates that it does not create a specific fiduciary duty, but also that a breach of any such duty is not of the nature that permits monetary compensation, and thereby confers Indian Tucker Act jurisdiction.

In sum, the Tribe's failure to identify a money-mandating statute is yet another jurisdictional deficiency that compels dismissal of its breach-of-trust claim against the United States.

CONCLUSION

For the foregoing reasons, the Court of Federal Claim's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

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