IN THE UNITED STATES COURT FEDERAL CLAIMS

Ute Indian Tribe of the Uintah and Ouray Indian Reservation, Plaintiff, v. **United States**, Defendant.	Case No. 18-357 L Senior Judge Robert H. Hodges, Jr.

UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

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UNITED STATES' MOTION TO DISMISS

Defendant United States of America (the "***United States***" or "***Defendant***") respectfully moves, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("***RCFC***"), to dismiss Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation's (the "***Tribe***") complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, and only in regard to the United States' argument that the Tribe waived and released its claims in relevant settlement agreements, the United States seeks summary judgment under Rule 56 of the RCFC.

This Motion is made upon the following Memorandum in Support, the attached exhibits, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral and/or documentary evidence as may be presented at, before, and after the hearing, if any, on this Motion.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This case is one in a line of cases stretching into the last century regarding the extent and management of the Tribe's alleged trust property and is premised on an argument the Tribe has been making in one form or another for at least eighty years: that certain public lands in Utah are or should be held in trust for the Tribe's benefit. In fact, it is one of four cases filed within a week of each other this past spring in both this Court and the United States District Court for the District of Columbia.[1] The present cases arise out of the United States' alleged "failures in its

[1] In addition to this case, the Tribe has filed the following cases: *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359 L (Fed. Cl.)

exercise of administration, supervision, control, and management of . . . lands and resources under applicable legal duties." Compl. ¶ 2, ECF No. 1. The Tribe seeks $500,000,000 in monetary damages for an alleged failure to deposit funds into its trust account and allegedly improper trust management (Claims 1 and 2) and an alleged violation of the Tribe's Fifth Amendment rights (Claim 3). The Tribe also seeks an order mandating the United States provide an accounting to the Tribe and preserve relevant records (Claims 4 and 5).

These claims should be dismissed for several reasons: the Tribe has failed to identify any money-mandating statutory or regulatory trust duties (Claims 1 and 2); the accounting claims fall outside of this Court's jurisdiction (Claims 4 and 5); the Tribe has expressly waived and released in whole, or in part, its claims (Claims 1 – 5); the claims are barred by the applicable statute of limitations (Claims 1–3); and this Court lacks jurisdiction over this case under 28 U.S.C. § 1500, as a nearly identical action (filed one day after this one) is currently pending in a federal district court.

STATEMENT OF THE CASE

I. Relevant Factual Allegations

The Tribe is a federally recognized Indian Tribe, made up of three bands of Ute people (the Uintah Band, the Whiteriver Band, and the Uncompahgre Band) located in the Uintah Basin of northeastern Utah, and more specifically, in two

(Hodges, J.); *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. U.S. Dep't of the Interior*, No. 1:18-cv-547 (D.D.C.) (Collyer, J.), and *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States, et al.*, No. 1:18-cv-00546 (D.D.C.) (Lamberth, J.).

geographical areas the Tribe refers to as the Uintah Valley Reservation and the Uncompahgre Reservation.[2] *See* Compl. ¶¶ 3-4, ECF No. 1. The area known as the Uintah Valley Reservation is not at issue in this lawsuit. *Id.* ¶ 4. Instead, the Tribe's complaint is focused on portions of the original Uncompahgre Reservation area. *See id.*

The Tribe's relevant association with the lands in question dates back to 1880, when the Tribe agreed to cede lands received under an earlier treaty with the United States and relocate to lands in Colorado and Utah. *Id.* ¶¶ 15–20. As part of the transaction, the Uncompahgre Band agreed to remove either to agricultural lands on the Grand River in Colorado, if found to be sufficient, or in the alternative, unoccupied agricultural lands in Utah. *Id.* ¶ 17. On January 5, 1882, and in keeping with the prior 1880 agreement, President Chester Arthur issued an executive order withholding from sale or other public disposal the original Uncompahgre Reservation (then consisting of 1.9 million acres of public domain lands in the Utah Territory) and setting those lands aside as a reservation for the Uncompahgre Band (the "***1882 Order***"). *Id.* ¶ 24.

A little over a decade later, in 1894, Congress passed an act (the "***1894 Act***") authorizing allotment of the original 1882 Uncompahgre Reservation and requiring

[2] For purposes of this Rule 12 motion and the factual background applicable thereto, the Federal Defendants assume that the factual allegations in the Tribe's complaint are true. *See e.g. Toro v. United States,* 126 Fed. Cl. 60, 62 (2016), *aff'd*, 684 F. App'x 969 (Fed. Cir. 2017). However, in the event the Court denies this motion and the case proceeds, the United States reserves the right to challenge the validity of any of the Tribe's allegations.

that any un-allotted lands[3] be "restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *See id.* ¶ 28; Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 286, 337. Tribal members protested the 1894 Act and, ultimately no allotments were certified under that act. *See* Compl. ¶ 29, ECF No. 1. Three years later, in 1897, Congress passed another act with respect to the 1882 Uncompahgre Reservation (the "***1897 Act***"). *Id.* ¶ 30; Act of June 7, 1897, ch. 3, 30 Stat. 62, 87. In the 1897 Act, Congress again authorized allotment of the area and provided that unallotted lands would, on and after April 1, 1898, be "open for location and entry under all the land laws of the United States." 30 Stat. at 87. Ultimately, 83 Indian allotments were issued.[4] Compl.¶ 32, ECF No. 1. The United States did not pay the Tribe for any unallotted portions that were patented or otherwise disposed of after the April 1, 1898 deadline. *Id.* ¶ 35.

By the 1920s, non-Indian settlers within the original 1882 Uncompahgre Reservation had increased to the point where their activities began to threaten the "Tribe's growing livestock industry." *Id.* ¶ 36. In order to conserve the grazing range, and while Congress came up with a permanent solution, in 1933 the Secretary of the Interior temporarily withdrew the vacant, un-entered, and

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[3] For purposes of this Motion, the term "allotted" refers to Congress's past practice of "dividing," or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members. *See Solem v. Bartlett*, 465 U.S. 463, 466–67 (1984). Therefore, "unallotted lands" refers to those lands contained within the original 1882 Uncompahgre Reservation area that were not assigned or associated with any particular Indian claimant and left open for non-Indian settlement.

[4] As a point of reference, the Court of Claims noted in a 1910 opinion that the Uncompahgre Band then had 470 members. *The Ute Indians v. United States,* 45 Ct. Cl. 440, 443 (1910).

undisposed of public lands covered by the 1882 Order from further disposition as a grazing reserve. *Id.* ¶ 37. Thereafter, those lands were managed "under a complicated joint management regime of two [Federal] agencies," which managed the lands in keeping with the Taylor Grazing Act. *Id.* ¶¶ 42–43.

In 1948, Congress passed legislation (the "***1948 Act***") that increased the size of the Uintah and Ouray Reservation by adding more than 270,000 acres of land within what had been part of the original 1882 Uncompahgre Reservation. *Id.* ¶¶ 52, 59. In addition, the 1948 Act directed the Secretary of the Interior to revoke the earlier 1933 Grazing Withdrawal Order, and BLM took over management of the remaining lands within the original 1882 Uncompahgre Reservation area, which we refer to hereafter as the "***Public Domain Lands***"[5]. *Id.* ¶¶ 53–54. "The BLM has managed the [Public Domain Lands] since 1948, leasing the[m] for grazing and oil and gas purposes." *Id.* ¶ 55. According to the factual allegations in this case, the United States holds legal title to the Public Domain Lands, and those lands are held in trust by the United States for the benefit of the Tribe. *Id.* ¶¶ 5, 60, 69. According to the Tribe, it "has never received any payment from the United States for the

[5] The United States' use of the term "Public Domain Lands" is consistent with the Deputy Secretary of the Interior's classification of those lands in his 2018 letter denying the Tribe's request for restoration of "an area of public domain lands that was withheld from sale pursuant to an 1882 Executive Order." *See* Compl., Ex. A at 1 & Ex. B, *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 1:18-cv-00546 (D.D.C.) (Lamberth, J.) (the "***DDC Action***"), attached hereto—along with the complaint filed in the DDC Action and other exhibits thereto—as **Exhibit 1**. As described in the Solicitor's Memorandum Opinion M-37051, these "Public Domain Lands" are currently administered for multiple-use and sustained yield by the Bureau of Land Management under the Vernal Resource Management Plan. Ex. 1 (DDC Complaint) Ex. B at 7.

BLM's leasing and other utilization of these lands from 1933 to the present." Compl. ¶ 56, ECF No. 1.

Based on this background, the Tribe has asserted five claims against the United States. Claims 1 and 2 (the "***Breach of Trust Claims***") seek monetary damages based on alleged breaches of fiduciary duties to deposit revenue from the Public Domain Lands into tribal trust accounts and "to appropriately manage [the Tribe]'s lands and natural resources located within the boundaries of the [Public Domain Lands]." *Id.* ¶¶ 65–81.[6] Claim 3 (the "***Taking Claim***") seeks monetary damages for an alleged taking, without just compensation, of the Public Domain Lands, including "land, natural resources, and proceeds from the same." *Id.* ¶¶ 82–84. Claims 4 and 5 (the "***Accounting Claims***") seek "injunctive relief" from the Court by requiring the United States (1) to produce "proper and complete accounting, reconciliation, and certification" with respect to the Public Domain Lands and (2) "preserve all records relating" to the same. *Id.* ¶¶ 2, 85–94.

II. Relevant Procedural Background

In 1934 and, again, in 1938, the Tribe petitioned the Department of the Interior seeking restoration of the Public Domain Lands to tribal ownership under section 3 of the Indian Reorganization Act, U.S.C. § 5103. *See* Letter from Secretary Harold Ickes to Oran Curry, Chairman, Ute Tribal Comm. (Jan. 12, 1935), attached hereto as **Exhibit 2**; Hr'g on S. Res. 241, S. Res. 147, & S. Res. 39 before the

[6] Claim 2 seeks monetary damages based on allegations substantially similar to those asserted in the Tribe's first claim, with the difference being that it is titled as "[v]iolation of 1880, 1894, and 1897 Acts" rather than as a breach of trust/fiduciary duty. *See* Compl. ¶¶ 77–81, ECF No. 1.

Subcomm. of the Comm. on Pub. Lands & Surveys, United States Senate, 78th Cong. 2210–11 (1943) (setting forth February 3, 1939 Letter from Assistant Sec'y Oscar L. Chapman to Ernest L. Wilkinson, Esq.), attached hereto as **Exhibit 3**. Both petitions were denied on the grounds that the Public Domain Lands were "not recognized as being of the class intended for restoration to tribal ownership under section 3 of the [Indian Reorganization Act]." Ex. 2 (Ickes Letter), at 1; Ex. 3 (Chapman Letter) at 2211.

Thereafter, in 1951, the Tribe filed a petition (the "***1951 Petition***") with the Indian Claims Commission related specifically to the 1882 Uncompahgre Reservation area with allegations similar to those currently before this Court. *See* Petition, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349 (I.C.C. Aug. 11, 1951), attached hereto as **Exhibit 4.** The 1951 Petition included allegations that the United States (1) owed the Tribe "a high degree of fiduciary obligation," (2) violated the 1880 Act by disposing of "[a]t least, to wit, 400,000 acres of the Uncompahgre Reservation area . . . under the public land laws, for school purposes, and for public reservations . . . . without just compensation," and (3) failed to "maintain[] the Uncompahgre Reservation in Utah as a reservation for said Uncompahgre Utes." *Id.* ¶¶ 5, 10–12. According to the Tribe's 1951 Petition, as a result of the alleged breach of "its fiduciary obligations," the Uncompahgre Band was "rendered homeless" and "lost the income and produce of the said lands." *Id.* ¶¶ 11, 13. As compensation, the Tribe sought, among other things, "the value of

the [1,900,000[7] acres set aside under the 1882 Order], taken from th[e Tribe] by the [1897 Act] . . . , together with the value of the use or income of the said lands." *Id.* at 8 (prayer for relief).

The Tribe settled the claims asserted in the 1951 Petition fourteen years later, in 1965 (the "***1965 Settlement Agreement***"). *See* Findings of Fact on the Stipulated Settlement of Claims & Offsets, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349 (I.C.C. Feb. 18, 1965), ¶ 4 attached hereto as **Exhibit 5**. Under the 1965 Settlement Agreement, the Tribe agreed that

> the entry of a final order . . . shall finally dispose of all claims or demands which the petitioner has asserted or could have asserted against the defendant . . . and petitioner shall be barred from asserting all such claims or demands in any further action.

Id. ¶ 4 (2). A final judgment confirming the 1965 Settlement Agreement was entered on February 18, 1965. Final Judgment, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 349 (I.C.C. Feb. 18, 1965), attached hereto as **Exhibit 6**.

In 1986, the United States filed an amicus brief in opposition to a petition for certiorari filed by the State of Utah following a Tenth Circuit decision in a case between the State of Utah and the Tribe.[8] *See* Br. for the United States as Amicus Curiae, *Utah v. Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821), attached

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[7] The Tribe's current complaint alleges that there were 1,900,000 acres set aside for the Tribe under the 1882 Order, while the 1951 Petition alleges 1,800,000 acres. *Compare* Compl. ¶ 24, ECF No. 1, *with* Ex. 4 (1951 Petition) ¶ 8.

[8] This case was *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), commonly referred to as "*Ute III*."

hereto as **Exhibit 7**. In arguing against review, the United States (which was not a party to the lawsuit) stated that "the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe." *Id.* at 21. And in a supplement amicus brief filed in the same case responding to the State of Utah's argument "the holding below might entitle the Tribe to receive the proceeds of the oil and gas leasing [on the Public Domain Lands]," the United States further elaborated that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands], and it accordingly has no claim to receive any revenue from the leasing of them." *See* Suppl. Mem. for the United States as Amicus Curiae at 5, *Utah v. Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821), attached as **Exhibit 8**.

In 2006, the Tribe filed an action against the United States in the Court of Federal Claims seeking monetary damages related to the alleged mismanagement of trust funds and non-monetary assets. *See generally* Compl., *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl.) (Dec. 19, 2006). The Tribe's complaint in that case was not limited to the Public Domain Lands specifically, but instead generally alleged mismanagement and failure to account for all of the Tribe's trust assets and funds.[9] *See id*. Ultimately, the 2006 lawsuit was resolved when the Tribe and the United States executed a settlement agreement on March 8, 2012 (the "***Settlement Agreement***"). A true and correct copy of the 2012 Settlement Agreement is attached hereto as **Exhibit 9**; *see also* Joint Stipulation of Dismissal with Prejudice, *Ute Indian Tribe of the Uintah and*

[9] If the Public Domain Lands are or were held in trust, as the Tribe claims in its complaint filed in this action, its 2006 complaint would have encompassed those lands.

Ouray Reservation v. United States, No. 06-866 L (Fed. Cl.) (June 1, 2012) ECF No. 43.

Under the relevant terms of the 2012 Settlement Agreement, and for payment to the Tribe in the amount of $125,000,000, the Tribe

> waive[d], release[d], and covenant[ed] not to sue in any administrative or judicial forum on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of the execution of this Settlement Agreement by both Parties and that relate to the United States' management or accounting of [the Tribe]'s trust funds or [the Tribe]'s non-monetary trust assets or resources.

Ex. 9 (2012 Settlement Agreement), ¶¶ 2, 4. The Settlement Agreement went on to explain that this waiver included, but was not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "failed to report, provide information about the United States' actions or decisions relating to, or prepare an accounting of [the Tribe]'s non-monetary trust assets or resources," "failed to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner," "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources," and "failed to report or provide information about its actions or decisions relating to [the Tribe]'s trust fund accounts." *Id.* ¶ 4.

As to its claims regarding the United States' past accounting practices, the Tribe agreed in the 2012 Settlement Agreement that it "accept[ed] as accurate the

balances of all of [the Tribe]'s trust fund accounts, as those balances are stated in the most recent periodic Statements of Performance issued by the Office of Special Trustee for American Indians . . . and dated January 31, 2012." *Id.* ¶¶ 7–8. The Tribe also agreed that the United States had satisfied any past accounting requirements up to the date of the Settlement Agreement. *Id.* As to future accountings, the Tribe agreed that the United States would satisfy any future "duty and responsibility to account for and report to [the Tribe] . . . through . . . compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations." *Id.* ¶ 9.

The Tribe further agreed in the 2012 Settlement Agreement that, before filing suit on claims related to the United States' management of its trust assets, the Tribe would first submit those claims in writing to the Department of the Interior and give that agency an opportunity to address the claims.[10] *Id.* ¶¶ 13.a–d. Any claims not first submitted in writing to the Department of the Interior, as required by paragraph 13 of the 2012 Settlement Agreement, would be released and waived. *Id.* ¶ 13.d. The Tribe also agreed that "if there is a dispute over compliance with any term or provision of the Settlement Agreement, the disputing Party will notify the other Party in writing" and "[t]he Parties will attempt to work out the dispute informally . . . before seeking judicial review." *Id.* ¶ 23.

[10] The 2012 Settlement Agreement states that the claims that must be submitted to the Department of Interior prior to a lawsuit are: "(1) the United States failed to invest tribal income in a timely manner; (2) the United States failed to obtain an appropriate return on invested funds; (3) the United States failed to disburse monies in a proper and timely manner from trust accounts listed on a Statement of Performance or similar report; or (4) the United States disbursed monies without [the Tribe]'s proper authorization." Ex. 9 (2012 Settlement Agreement) ¶ 13.a.

Finally, and as it had done previously in 1934 and 1938, the Tribe submitted formal requests to the Secretary of the Interior seeking restoration of the Public Domain Lands to tribal ownership, pursuant to Section 3 of the Indian Reorganization Act, on September 19, 2016, January 5, 2017, and April 25, 2017 (the "***Restoration Requests***"). *See* Ex. 1 (DDC Complaint) ¶ 78. On March 2, 2018, the Deputy Secretary denied the Restoration Requests. *Id.* ¶ 82. The Tribe filed this action less than a week after the Department of the Interior's decision on March 7, 2018. One day later, on March 8, 2018, the Tribe filed the DDC Action challenging the Department of the Interior's decision not to restore the Public Domain Lands and, among other things, seeking a declaratory judgment that the Public Domain Lands should be held in trust for the Tribe's benefit. *See generally id.*

III. The Current Ownership Status of the Public Domain Lands and the Tribe's Notice of the Same.

The Tribe's complaint presents a theory of statutory and regulatory interpretation to arrive at a conclusion that the Public Domain Lands *should* have been restored to Tribal ownership. *See* Compl. ¶¶ 33–57, ECF No. 1. And the Tribe makes the conclusory allegation that those lands are held in trust. *Id.* ¶¶ 60, 69. However, this Court need not accept the Tribe's legal conclusion as to the actual state of ownership of the Public Domain Lands—under either 12(b)(1) or 12(b)(6)—in light of public records clearly demonstrating the opposite. *See, e.g., Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed. Cir. 2017) (addressing 12(b)(6) standard); *Reynold*, 846 F.2d at 747 (addressing 12(b)(1) standard).

Here, each of the Tribe's claims date back more than 120 years, starting with the 1897 Act. And there have been numerous events within the past century

demonstrating that the Public Domain Lands are not (and have not) been held in trust or treated as trust assets, including:

- the 1897 Act (which opened up the Public Domain Lands to non-Indian Settlement);
- the Tribe's 1934 and 1938 petitions for restoration asking that the Public Domain Lands *be restored to tribal ownership*, and the denial of both petitions;
- the 1948 Act whereby the Public Domain Lands were again opened to non-Indian interests and resulted in BLM control and management of those lands thereafter;
- the 1951 Petition before the Indian Claims Commission wherein the Tribe specifically alleged that the United States had "disposed" of at least some of the Public Domain Lands, had not provided the Tribe with a reservation, and that the Tribe was not receiving proceeds from those lands; and
- the 1965 Settlement Agreement whereby the Tribe received just compensation for the United States' alleged taking of the original 1882 Uncompahgre Reservation area (including resources).

If there was any confusion as to whether the United States held the Public Domain Lands in Trust or was placing proceeds from those lands into tribal trust accounts, the United States eliminated that confusion. Specifically, in opposing certiorari review of Ute III (to which the Tribe was a party), the United States expressly repudiated any trust duties or obligations with respect to the Public Domain Lands (and clarified the status of those lands) by stating "the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe," Ex. 7 (Br. for the United States as Amicus Curiae), at 21, and that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands]," Ex. 8 (Suppl. Mem. for the United State as Amicus Curiae), at 5.

And the Tribe's recent actions also demonstrate that the Public Domain Lands are not held in trust and the Tribe is (or should have been) aware of this fact. Just last year, the Tribe submitted the Restoration Requests to the Secretary of the Interior seeking restoration of the Public Domain Lands "*to tribal ownership* pursuant to Section 3 of the IRA." Ex. 1 (DDC Complaint) ¶¶ 78–79 (emphasis added); Ex. 1 (DDC Complaint) Ex. A at 1 (responding to the Restoration Request), Ex. B (same). And, in the currently pending DDC Action, the Tribe alleges that the United States does not currently hold the Public Domain Lands in trust. Ex. 1 (DDC Complaint) ¶¶ 68, 78, 88, 93; *but see id.* ¶ 95 (alleging the Public Domain Lands "are held in trust"). Indeed, the very heart of the DDC Action is the Tribe's contention that the United States does not currently hold the Public Domain Lands in trust but that it *should*. *See generally id.* And "[i]t is well established . . . that [a pleading] from one proceeding is indeed admissible and cognizable as an admission in another." *See Enquip, Inc. v. Smith-McDonald Corp.,* 655 F.2d 115, 118 (7th Cir. 1981). Thus, putting the Tribe's theory aside, whether or not the Public Domain Lands *should* be held in trust does not alter the fact that those lands *are not* (and have not been) held in trust for many years or the fact that the Tribe has been (or should have been) on notice of this fact. *See W. Shoshone Nat. Council v. United States*, 415 F. Supp. 2d 1201, 1206 (D. Nev. 2006) (noting that "[t]he extensive litigation that preceded the current action makes it impossible to conclude that South Fork Band neither knew nor should have known that the United States claimed an interest in the land covered by the Treaty of Ruby Valley, adverse to that of South Fork Band, more than 12 years ago").

LEGAL STANDARDS

The United States moves to dismiss the Complaint under RCFC 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, and only in regard to its argument that the Tribe has waived and released its claims in the Settlement Agreement, the United States seeks summary judgment under Rule 56.

Rule 12(b)(1) provides for dismissal of a claim if the court lacks jurisdiction. A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Hall v. United States*, 91 Fed. Cl. 762, 769 (2010). In considering motions to dismiss, federal courts "presume [they] lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's Constitutional and statutory jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (Scalia, J., dissenting) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute")). If the defendant or the court questions jurisdiction, then a plaintiff cannot rely solely on factual allegations in the complaint but must bring forth relevant adequate proof to establish jurisdiction. *McNutt*, 298 U.S. at 189. Accordingly, in deciding a 12(b)(1) motion, a court may look to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of

subject matter jurisdiction. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations contained in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). In addressing a 12(b)(6) motion, courts "are [also] not limited to the four corners of the complaint," but "may also look to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record." *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (internal quotations marks, brackets, and citation omitted).

In addition, and even where not referred to or attached to the complaint, a Court may also consider relevant settlement agreements where the parties do not dispute their validity. *See Collier v. CSX Transportation Inc.*, 673 F. App'x 192, 197 (3d Cir. 2016) (noting that "on consideration of a motion to dismiss, a court may consider unquestionably authentic exhibits in determining whether a plaintiff plausibly would be entitled to relief"); *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006); *Halldorson v. Sandi Grp.*, 934 F. Supp. 2d 147, 152 (D.D.C. 2013). In the alternative, however, summary judgment is appropriate if the record before the court establishes "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). To avoid summary judgment, the opposing party must identify specific facts establishing a

genuine and material factual dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

ARGUMENT

Dismissal of this action is proper for numerous reasons. First, the Tribe has failed to identify any actionable trust duties to support its Breach of Trust Claims. Second, this Court lacks jurisdiction over the Accounting Claims (which are claims for equitable relief). Third, the Tribe has waived and released its Takings Claim and that claim is barred by 28 U.S.C. § 2501 and the Indian Claims Commission Act (the "***ICCA***"). Fourth, the Breach of Trust Claims are also barred by section 2501, and—to the extent they survive this Motion—the Breach of Trust Claims and the Accounting Claims would be limited to post-2012 Settlement Agreement conduct and harms. And, fifth, the complaint should also be dismissed for a lack of jurisdiction pursuant 28 U.S.C. § 1500 in light of the pending DDC Action.

I. The Tribe's Breach of Trust Claims should be dismissed because it has failed to identify a money-mandating statutory or regulatory trust duty.

Dismissal of its Breach of Trust Claims is proper because the Tribe has failed to identify a money-mandating statutory or regulatory trust duty. The Tucker Act's waiver of sovereign immunity grants the Court of Federal Claims jurisdiction to award damages upon proof of

> 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, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). 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) (citing 28 U.S.C. § 1505). Before a tribal plaintiff can invoke jurisdiction under the Indian Tucker Act, it must clear two hurdles. *United States v. Navajo Nation ("**Navajo II**")*, 556 U.S. 287, 290 (2009).

First, "a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation ("**Navajo I**")*, 537 U.S. 488, 506 (2003) (citing *Mitchell II*, 463 U.S. at 216–217). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). Thus, the analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II,* 556 U.S. at 301. "[A]n Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and bear the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation and quotation marks omitted). "[A] statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Id*.

Second, and only after a tribe identifies a substantive source of law, "the court must then determine whether 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 [the governing law] impose[s].'" *Navajo I*, 537 U.S. at 506.

Here, the Ute Tribe alleges the United States has breached its fiduciary duties in: (1) failing to deposit proceeds from the sale of surplus lands into tribal trust accounts, Compl. ¶¶ 70, 80, ECF No.1, (2) failing to deposit compensation from any Public Domain Lands exchanged or sold into tribal trust accounts, *id.,* (3) failing to deposit proceeds or royalties from grazing and mineral leases into tribal trust accounts, *id.*, and (4) wrongfully appropriating these same proceeds, *id.* ¶ 81. The problem with the Tribe's case is that, of the eleven alleged sources of fiduciary obligations, not a single one amounts to an obligation to deposit the monies in question in a tribal account. *See id.* ¶ 8 (listing alleged sources). Specifically:

- The Treaty of October 7, 1863, makes no reference to monies from land sales or exchanges or grazing or mineral leasing. *See* 13 Stat. 673.

- The Treaty of March 2, 1868, though setting aside a sum of money to be held in trust, makes no reference to land sales or exchanges or grazing or mineral leasing, let alone where any proceeds from those actions should be held. *See* 15 Stat. 619.

- The Act of April 29, 1874, ratifies an earlier agreement between the Tribe and the United States whereby the Tribe agreed to transfer lands in Colorado to the United States in exchange for the United States holding in trust a sum of money in exchange for that trust. *See* 18 Stat. 36, Art. I & III. It says nothing, however, about subsequent land sales or exchanges or grazing or mineral leasing.

- The Act of June 15, 1880, though providing a payment to the Tribe for consenting to the underlying agreement, makes no reference to land sales within the original 1882 Uncompahgre Reservation area or land exchanges, grazing, or mineral leasing, let alone where any proceeds of those actions should be held. *See* 21 Stat. at 201, 204. The Act itself authorized the Secretary to allot lands to individual Indians and provided all land not allotted would become public lands open to entry. *Id.* at 203. Proceeds from those sales were to be used to reimburse the United States, then applied to payments for lands outside the reservation ceded to the Indians by the United States, and then (if any remained) to be deposited in Treasury for the benefit of the Indians. *Id.* at 20304. Neither the Treaty nor the Act say

anything about future lands sales or exchanges or grazing and mineral leasing.

- The Executive Order or January 5, 1882, established the original 1882 Uncompahgre Reservation, but says nothing about land exchanges or sales or grazing or mineral leasing. *See* 1 Kapp. 901 (2d ed. 1994).

- The Act of March 3, 1887, addressed railroad rights of way; it does not address land exchanges or sales or grazing or mineral leasing. *See* 24 Stat. 548.

- The Act of August 14, 1894, authorized a commission to allot grazing and agricultural lands to individual Uncompahgre Indians (not the Tribe), and opened any unallotted lands to entry under the homesteading and mineral laws. *See* 28 Stat. 286, 337–38. The Act says nothing about monies from subsequent lands sales or exchanges or grazing or mineral leasing.

- The Act of June 7, 1897, directed the allotment of agricultural lands to the Uncompahgre Ute Indians and directed that all unallotted lands would be open for location and entry under the United States' land law. *See* 30 Stat. 62, 87. The Act says nothing about subsequent lands sales or exchanges or grazing or mineral leasing.

- The Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934), is not money-mandating. *See Wopsock v. Natchees*, 454 F.3d 1327, 1332–33 (Fed. Cir. 2006).

- 10 Fed. Reg. 12,409 (Oct. 2, 1945), is a Secretarial decision, not a statute or regulation as would be required to create any money-mandating trust obligations.

- The Hill Creek Extension Act, Pub. L. No. 440, 62 Stat. 72 (Mar. 11, 1948), added lands to the Uintah and Ouray Reservation, but says nothing about land sales or exchanges; references grazing only to reserve a stock watering right of way; and references minerals only to reserve certain rights for the United States. *See* 62 Stat. 72, 77.

The allegation by the Tribe that these sources create money-mandating duties within this Court's Tucker Act jurisdiction ignores the Supreme Court's holding

that "not every claim invoking the Constitution, a federal statute, or a regulation is cognizable . . . ." *Mitchell II*, 463 U.S. at 216.

The Tribe is also wrong in implying that the United States' "broad authority and control" over these lands creates money-mandating fiduciary obligations. *See* Compl. ¶ 66, ECF No. 1. "The Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. The Supreme Court's conclusion in *Mitchell II* is apt. There, the Court found that a money-mandating duty existed based upon the "pervasive" role the Department of the Interior played—primarily through its regulations—in

> virtually every aspect of forest management including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source.

Mitchell II, 463 U.S. at 219–20. "The regulatory scheme was designed to assure that the Indians receive the benefit of whatever profit [the forest] is capable of yielding." *Id.* at 221–22 (citation and internal quotations omitted). The Ute Tribe has presented nothing even close to that here. The Breach of Trust Claims should be dismissed.

II. The Court Lacks Jurisdiction over the Accounting Claims.

As with its Breach of Trust Claims, the Tribe's Accounting Claims fail because, this Court lacks jurisdiction over the Accounting Claims (which are claims for equitable relief). The Court of Federal Claims lacks general jurisdiction to provide declaratory and injunctive relief. *See Evans v. United States*, 107 Fed. Cl.

442, 451-52 (2012). Instead, this Court's ability to award equitable relief is limited to those circumstances when such relief is "incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2). Only if liability were established could the Court hear evidence to aid in judgment to assess damages, including ordering an accounting. *See Muscogee (Creek) Nation of Okla. v. United States*, 103 Fed. Cl. 210, 218 (2011). The Accounting Claims seek (1) standalone accountings of all transactions and revenue related to the Public Domain Lands, and (2) an order requiring that the United States "be ordered to preserve all records relating to" those transactions. Compl. ¶¶ 88, 94, ECF No. 1. These standalone claims are clearly claims for injunctive relief, and the Tribe admits as much. *Id.* ¶ 2 ("Plaintiff is entitled to . . . injunctive relief including an accounting of Plaintiff's surplus property rights.").

Because they are claims for injunctive relief, this Court lacks jurisdiction over the Accounting Claims.[11] *See Am. Indians Residing on the Maricopa-Ak Chin*

[11] Additionally, and even if this Court did have jurisdiction over the Accounting Claims (it does not), those claims would still be subject to dismissal pursuant to the 2012 Settlement Agreement. As explained in section IV.B., *infra*, the Tribe expressly waived and released any claims for an accounting that existed prior to the date of the 2012 Settlement Agreement. Additionally, the Tribe has also waived any post-2012 Settlement Agreement accounting claims as a result of its failure to comply with the dispute resolution procedures agreed to therein. Specifically, the Tribe agreed that before filing claims related to the United States' management of its trust assets, it would first submit those claims in writing to the Office of the Special Trustee for American Indians ("***OST***") and give the Department of the Interior "60 days . . . [to] provide [the Tribe] with a written response, explaining how it proposes to respond to the claim or advising [the Tribe] that it needs additional time to respond to the claim." Ex. 9 (2012 Settlement Agreement) ¶¶ 13.a–13.d. However, "[a]t no time since March 8, 2012, has the Tribe submitted . . . a written complaint or otherwise challenged the . . . accountings of its trust accounts nor has it made reference to the notice requirement and procedures for any such challenge set forth in paragraph 13 of the 2012 Settlement Agreement." Decl. of

Reservation v. United States, 667 F.2d 980, 983 (Ct. Cl. 1981) (per curiam) ("Unlike the Indian Claims Commission, this court has no equity jurisdiction to entertain a suit for an accounting except in aid of a judgment of liability against the Government." (citation omitted)); *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 491 (1966) ("To require the Government ab initio to render a general accounting on the basis of unproved allegations and before its liability is determined would convert this proceeding from a suit for money damages to an independent equitable action for a general accounting.").

III. The Tribe Waived and Released its Takings Claim, and that Claim is Also Barred by the Applicable Statute of Limitation and the ICCA.

Separate and apart from the prior defenses, the Tribe still could not state a claim within this Court's jurisdiction. First, the Tribe waived its Takings Claim in both the 1965 Settlement Agreement and the 2012 Settlement Agreement. Second, the Takings Claim is time barred under both 28 U.S.C. § 2501 and the ICCA.

A. The Tribe's Takings Claim is barred by the 1965 and 2012 Settlement Agreements.

The Tribe previously waived and released any takings claim in prior settlements. A settlement, for enforcement purposes, has the same attributes as a contract. *Gonzalez v. Dep't of Labor*, 609 F.3d 451, 457 (D.C. Cir. 2010). Settlements to which the government is a party are interpreted according to federal law.

Robert C. Craff, ¶ 7, attached hereto as **Exhibit 10**; *see also id.* ¶ 8. The Tribe's failure to follow these agreed-upon procedures forecloses any claims based on alleged post-2012 Settlement Agreement conduct. *See* Ex. 9 (Settlement Agreement) ¶ 13.d.

Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986); *Keydata Corp. v. United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974). If the language of a settlement clearly bars future claims, the plain language governs. *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997). Indeed, it is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. *See, e.g., Peckham v. United States*, 61 Fed. Cl. 102, 109 (2004). And any exclusions from a waiver or release must be clear, explicit, and "manifest" in the agreement itself. *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *Merritt-Champman & Scott Corp. v. United States,* 458 F.2d 42, 44–45 (Ct. Cl. 1972) (en banc) (per curiam).

In the 1951 Petition, the Tribe asserted, among other things, that the United States had taken lands without "just compensation" and left the Uncompahgre Band without a promised reservation. *See* Ex. 4 (1951 Petition) ¶¶ 11–13. For this alleged harm, the 1951 Petition sought to recover no less than the value of that portion of the original 1882 Uncompahgre Reservation area taken by the 1897 Act—which consisted of at least 400,000 acres. *See id.*, at 8 (prayer for relief). Following fourteen years of litigation, the Tribe agreed that the 1965 Settlement Agreement "finally dispose[d] of all claims or demands which the petitioner has asserted or could have asserted against the [United States] in [the 1951 Petition] and [the Tribe] shall be barred from asserting all such claims or demands in any further action." Ex. 5 (Findings of Fact) ¶ 4.

In light of this history, the Tribe's allegations that the United States failed to pay the Tribe just compensation for the Public Domain Lands disposed of or exploited after 1897, but before the 1946 ICCA claim date, are clearly barred by the 1965 Settlement Agreement. These claims arose long before the 1951 Petition was filed and could have been (and were) brought in that suit. Indeed, pursuant to the 1965 Settlement Agreement, the Tribe has already been compensated for those portions of the original 1882 Uncompahgre Reservation area (including resources) allegedly taken by the United States following the opening of the Public Domain Lands in 1897 to non-Indian settlers.

Additionally, and if the 1965 Settlement Agreement was not enough, the Tribe again waived and released its Takings Claim in 2012. Specifically, and pursuant to the 2012 Settlement Agreement, the Tribe broadly waived and released

> *any and all* claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, *known or unknown, regardless of legal theory*, for any damages or any equitable or specific relief, that are based on harms or violations occurring before [March 8, 2012] and that relate to the United States' management or accounting of [the Tribe]'s trust funds or . . . non-monetary trust assets or resources.

Ex. 9 (Settlement Agreement) ¶ 4 (emphasis added). This waiver specifically included claims the United States "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources." *Id.*

The Tribe's Takings Claim falls within this broad waiver and release. The alleged harm from the Takings Claim occurred in either 1897, when the United

States opened up the Public Domain Lands for non-Indian settlement, or 1948, when the United States maintained decided to maintain the public status of the Public Domain Lands. Compl. ¶¶ 27–35, 52–55, ECF No. 1. These harms occurred decades prior to the Tribe's execution of the 2012 Settlement Agreement, and—as set forth in section III of the Statement of the Case, *supra*—the Tribe was aware of (or should have been aware of) these harms as far back as 1897 but certainly no later than 1986 when the United States expressly repudiated any trust duties or obligations with respect to the Public Domain Lands. *See* Ex. 8 (Suppl. Mem. for the United State as Amicus Curiae), at 5 (stating that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands]").

B. The Tribe's Takings Claim is barred by 28 U.S.C. § 2501 and the ICCA.

Even setting aside the relevant settlement agreements, the Tribe's Takings Claim is barred under section 28 U.S.C. § 2501 and the ICCA because that claim likely accrued in 1897 or 1948, and certainly no later than 1986. "The statute of limitations provision of 28 U.S.C. § 2501 places an express limit on the Government's waiver of sovereign immunity for every claim within the jurisdiction of the Court of Federal Claims." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (citation omitted). Under section 2501, a claim must be "filed within six years after such claim first accrues." 28 U.S.C. § 2501. Because plaintiff seeks to invoke this Court's jurisdiction, plaintiff bears the burden of proving that its claims are timely by a preponderance of the evidence. *See Fid. & Guar. Ins. Underwriters, Inc. v. United*

States, 805 F.3d 1082, 1087 (Fed. Cir. 2015) (citing *Brandt v. United States*, 710 F.3d 1369, 1373 (Fed. Cir. 2013)); *Reynolds*, 846 F.2d at 748.

Plaintiff's claims accrue "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (citation omitted); *Mitchell v. United States*, 13 Cl. Ct. 474, 477 (1987). Because an objective standard applies, "a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (citation omitted). In addition, the fact that plaintiff is the alleged beneficiary of a trust relationship does not itself impact the accrual date—plaintiff must show either concealment by the defendant or show that the facts were unknowable in order to delay accrual of the limitations period. *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984); *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 69 (2006), *aff'd*, 279 F. Appx. 980 (Fed. Cir. 2008).

Here, and as set forth in detail above, the Tribe's Takings Claim dates back to the 1897 Act when the United States first opened the original 1882 Uncompahgre Reservation area to non-Indian settlement. Since that time, a string of events have taken place demonstrating that the Tribe was (or should have been aware) that the Public Domain Lands were not held in trust and the Tribe was not receiving revenue from these lands (i.e. the 1897 Act and the 1948 Act). More than that, the Tribe has manifested its knowledge that the Public Domain Lands are not held in trust through its own affirmative actions (i.e. the Tribe's 1934 and 1938 petitions for

restoration, the 1951 Petition, and the 1965 Settlement Agreement). Nevertheless, and even if the preceding did not provide sufficient notice, the Tribe received clear and direct notice of the basis for its Takings Claim no later than 1986, when the United States expressly repudiated any trust associated with the Public Domain Lands. Thus, the Tribe's taking claim is barred because it was not brought within six-years from the date it learned that the Public Domain Lands were not being held for its benefit.

With respect to the ICCA, Congress enacted that law in 1946 to "dispose of the Indian claims problem with finality" and to "transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims." *United States v. Dann*, 470 U.S. 39, 45 (1985).[12] "The ICCA gave the [Indian Claims Commission] exclusive jurisdiction to hear claims brought within five years of the passage of the Act." *W. Shoshone Nat. Council*, 279 F. App'x at 982. The Commission had wide-ranging and exclusive authority for, as relevant here,

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit . . . .

ICCA § 2, 60 Stat. at 1050. Congress also included a strict time limitation on possible claims. Any pre-August 13, 1946, claims against the United States not

[12] "Until 1946, Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987).

brought before the Commission by August 13, 1951, were forever barred. *See* ICCA § 12, 60 Stat. 1052.; *Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974); *Catawba Indian Tribe of S.C. v. United States*, 24 Cl. Ct. 24, 29 (1991).

As explained in detail above, the Tribe's 1951 Petition referenced the 1882 Order (setting aside lands for the original Uncompahgre Reservation Area), the 1897 Act (opening the 1882 Uncompahgre Reservation area for settlement by non-Indians), and asserted a claim for takings that allegedly deprived the Tribe of ownership in and profits from the Public Domain Lands without just compensation. As explained, these claims were known to Tribe prior to 1946, and—to a large extent—were presented to the Indian Claims Commission by the Tribe. Accordingly, these claims are absolutely barred by the ICCA.

IV. The Tribe's Breach of Trust Claims are Barred under Section 2501, and the Tribe Released its Pre-2012 Breach of Trust Claims and Accounting Claims in the 2012 Settlement Agreement.

The Tribe's Breach of Trust Claims and Accounting Claims are also subject to dismissal or limitation when viewed in light of section 2501 and the 2012 Settlement Agreement.

A. The Breach of Trust Claims are barred by section 2501.

As stated, the Breach of Trust Claims are based on the United States' alleged failure—going back to 1897—to deposit revenue from the Public Domain Lands into tribal trust accounts. In an effort to avoid section 2501's application to its Breach of Trust Claims, the Tribe raises the specter of the continuing claims doctrine by alleging that the United States' failure to deposit proceeds from the Public Domain Lands constitute "continuous acts and omissions." *See* Compl. ¶¶ 75–76, ECF No. 1.

However, these arguments are ultimately unavailing because the alleged missing deposits are not continuous *acts*, but cumulative *effects* from a single governmental action that falls outside of the limitations period.

In order for the continuing claims doctrine to apply, "the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997); *Ariandne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) ("[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."); *see also Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000) (same). When considering the potential application of the continuing claims doctrine, the proper focus is upon the time of the wrongful acts, not when the consequences become most painful. *See Del. State College v. Ricks*, 449 U.S. 250, 258 (1980).

The continuing claims doctrine does not apply here because the Tribe's claims are not "inherently susceptible to being broken down into a series of independent and distinct events or wrongs." *Brown Park Estates*, 127 F.3d at 1456. Rather, the alleged harms here all relate back to the government's alleged failure to hold the Public Domain Lands in trust. According to the Tribe, the "continuing nature" of the United States' breach is based on the allegation that the United States "continually takes from [the Tribe]'s natural resources within the exterior boundaries of the [Public Domain Lands] and fail[s] to deposit the proceeds into the Tribe's account." Compl. ¶ 76, ECF No. 1. However, this simply means that the *effects* of the United States' earlier decisions not to hold the Public Domain Lands in trust the Tribe's

benefit—through the 1897 Act, the 1948 Act, or (at the latest) the United States' 1986 repudiation—are continuing.

The fact that the government action at issue allegedly has long-term consequences (no ongoing payments related to the Public Domain Lands) does not justify application of the continuing claim doctrine where such harms stem from a single government action (the United States' decision not to hold the Public Domain Lands in trust). *See, e.g., Bohling*, 220 F.3d at 1374 (holding long-term consequences (continued erosion) did not justify application of the continuing claim doctrine because the alleged harm stemmed from a single government action (construction of a waterway)); *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 733 (2013) (holding plaintiff "could not pursue a claim seeking payment from leases that otherwise might have been executed if not for [government's earlier] waste and contamination").

Nor should the Tribe be allowed to argue that it "was denied essential information necessary to be aware of the [alleged] wrongs committed by [the United States]" or that the statute of limitations on these claims does not begin to run under the Indian Trust Accounting Statute (the "***ITAS***"). Compl. ¶¶ 72, 89, ECF No. 1. First, the ITAS was last enacted in the Fiscal Year 2014 Appropriations Act. *See Wyandot Nation of Kan. v. United States*, 124 Fed. Cl. 601, 604 (2016) (acknowledging cessation of Appropriations Act riders after 2014). Thus, there is no tolling provision currently in place upon which the Tribe can rely.

Second, in light of the United States' express repudiation in 1986 of the Tribe's rights in or ownership of the Public Domain Lands, an accounting is not necessary to put the Tribe on notice of its potential claims nor is the applicable

statute of limitations tolled under the ITAS. *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) (analyzing the ITAS and holding it is inapplicable in cases where "a claim concerns an open repudiation of an alleged trust duty, a final accounting is unnecessary to put the claimants on notice of the accrual of their claim" (internal quotation marks and citations omitted)).[13]

Third, and even if a full accounting had to be provided to the Tribe before its claims accrued (it does not), the Tribe was sent an accounting of its trust fund accounts on February 22, 2012—more than six years before the filing of this lawsuit—in the form of Statements of Performance, dated January 31, 2012. *See* Decl. of Anthony Hoang, ¶¶ 4–5, attached hereto as **Exhibit 11**; Ex. 9 (2012 Settlement Agreement) ¶ 7. And the Tribe expressly agreed that those Statements of Performance constituted "accurate, full, true, and correct statements of all of [the Tribe]'s trust fund accounts as of the date of the Statements [January 31, 2012]." *Id.* The time for the Tribe to file its Breach of Trust Claims has long since past.

B. *The Tribe's Breach of Trust Claims and Accounting Claims are limited to post-2012 conduct.*

Additionally—and to the extent its Breach of Trust Claims and Accounting Claims are not dismissed on the other grounds raised in this Motion, including because they are time-barred— the scope of those claims would be limited to post-2012 Settlement Agreement conduct. As set forth in section III.A., *supra*, the Tribe

[13] The ITAS is also not applicable in this case because, as set forth in section I, *supra*, the Public Domain Lands are not (and have not been) held in trust. *Wolfchild*, 731 F.3d at 1291 (holding that the ITAS does not apply "where no trust duty applie[s] to the [assets at issue]").

waived and released "any and all claims . . . known or unknown . . . that are based on harms or violations occurring before [March 8, 2012]." Ex. 9 (Settlement Agreement) ¶ 4. This broad waiver clearly applies to both the Breach of Trust Claims and the Accounting Claims.

For example, the Tribe's Breach of Trust Claims rest on an allegation that the United States failed to deposit monies into the Tribe's trust accounts related to the sale or transfer of Public Domain Lands or proceeds from the leases or other royalties associated with those lands. Compl. ¶¶ 70–71, 80, ECF No. 1. These alleged failures are barred under the 2012 Settlement Agreement's broad waiver of "any and all claims . . . known or unknown," including claims for failure "to deposit monies into trust funds," and claims the United States "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources." Ex. 9 (Settlement Agreement) ¶ 4.

The Tribe's accounting claims are no different. In the 2012 Settlement Agreement the Tribe specifically waived and released any claims that the United States failed to "report, provide information about the United States' actions or decisions relating to, or prepare an accounting of [the Tribe]'s non-monetary trust assets or resources" or "report or provide information about its actions or decisions relating to [the Tribe]'s trust fund accounts." *Id.* More than that, however, the Tribe also affirmatively agreed that it "accept[ed] as accurate the balances of all of [the Tribe's] trust fund accounts, as those balances are stated in the most recent periodic Statements of Performance . . . dated January 31, 2012," and that the United States had satisfied any past accounting requirements up to the date of the 2012

Settlement Agreement. *Id.* ¶¶ 7–8. But, in any event, the Breach of Trust Claims and Accounting Claims should be dismissed in whole for the reasons stated above.

V. 28 U.S.C. § 1500Precludes the Court's Jurisdiction over this Case.

Finally, the Court lacks jurisdiction to consider this case under 28 U.S.C. § 1500 because the claims in this suit are "for or in respect to" the Tribe's claims in the DDC Action. As the Supreme Court has stated, "[t]he CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311 (2011) (explaining 28 U.S.C. § 1500) and "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id.*, at 317. To determine whether claims are the same for purposes of section 1500, this Court considers four separate questions:

> (i) Are the issues of fact and law raised by the two claims largely the same?
> (ii) If an adverse merits decision were rendered on the earlier claim, would the doctrine of res judicata bar a subsequent suit on the later filed claim?
> (iii) Will the plaintiff rely on substantially the same evidence to support each of the two claims?
> (iv) Is there any other logical relationship between the two claims?

Skokomish Indian Tribe v. United States, 115 Fed. Cl. 116, 124 (2014). "[A]n affirmative answer to any one of the questions should lead to two claims being viewed as the same for purposes of section 1500." *Id.*

As between the claims pending in this Court and those pending in the DDC Action, the answers to all four of these "enquiries" are affirmative. The Complaints

filed by the Tribe in both this action and the DDC Action allege breaches of the United States' fiduciary duty to the Tribe in mismanaging allegedly "surplus" property within the boundaries of the Public Domains Lands. *Compare* Compl. ¶¶ 1–2, ECF No. 1 *with* Ex. 1 (DDC Complaint) ¶ 1. Both actions are premised on alleged violations of the 1880, 1894 and 1897 Acts. *Id.* More than fifty paragraphs of nearly identical factual assertions appear in both complaints. *Compare* Compl. ¶¶ 10–64, ECF No. 1 *with* Ex. 1 (DDC Complaint) ¶¶ 13–76. And the operative facts which must be proven in order to recover on the Tribe's claims are the same, i.e., that the United States allegedly had an obligation to hold the Public Domain Lands (and revenue derived therefrom) in trust for the benefit of the tribe and did not hold those lands (or their revenue) in trust. *Id.*[14] Accordingly, the Court should dismiss this case for a lack of jurisdiction over the claims presented.

[14] In response to this argument, the Tribe may assert that section 1500 cannot apply in this case under the Federal Circuit's decision in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 946 (Ct. Cl. 1965) (holding that Section 1500 does not apply where the plaintiff filed its Court of Federal Claims case prior to its district court case). This so-called "*Tecon*" or "time of filing" rule—which was decided 46 years before *Tohono O'odham*—has a complicated history. *See Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549 & n.10 (Fed. Cir. 1994) (concluding that prior statements by the Federal Circuit overruling *Tecon* were non-binding dicta); *see also Brandt*, 710 F.3d at 1380–82 (Prost, J., concurring) (detailing history of *Tecon* rule). In *Tohono O'odham*, the Supreme Court concluded the time of filing issue was not before it, but noted that the Federal Circuit's interpretation left the statute "without meaningful force." 563 U.S. at 314. But the Federal Circuit has stated that the *Tecon* rule remains the law in this Circuit. *Res. Investment, Inc. v. United States*, 785 F.3d 660, 669–70 (Fed. Cir. 2015) . We believe that Section 1500 is properly interpreted as precluding Court of Federal Claims jurisdiction when a district court case is pending, regardless of the order in which the two suits were filed and preserve that argument here. We moved to dismiss all the Tribe's claims in the DDC Action other than the APA claim challenging the Secretary's denial of the restoration request. Briefing on that motion is not yet complete.

CONCLUSION

The United States respectfully requests that the Tribe's complaint filed in this matter be dismissed in its entirety. First, dismissal of the Breach of Trust Claims is proper because, while it has cited 11 different statutes or acts in the complaint, the Tribe has failed to identify any statute or regulation that creates an actionable trust duty to support its Breach of Trust Claims. Second, this Court lacks jurisdiction over the Accountings Claims. Third, the Takings Claim has either been released and waived or is time-barred under section 2501 and the ICCA. Fourth, the Tribe's Breach of Trust Claims are barred under section 2501, and to the extent either the Breach of Trust Claims or the Accounting Claims are not dismissed in their entirety, those claims are limited to post-2012 Settlement Agreement conduct and harms. Finally, the complaint should be dismissed in its entirety for a lack of jurisdiction pursuant 28 U.S.C. § 1500 in light of the pending DDC Action.

Respectfully submitted this 24th day of October, 2018.

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