IN THE UNITED STATES COURT OF FEDERAL CLAIMS

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION *Plaintiff*, v. THE UNITED STATES OF AMERICA, *Defendant*.	Case No.: 1:18-cv-00357-RHH

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

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INTRODUCTION

The Tribe's argument in this case is based upon the premise that the Act of June 15, 1880 created the Tribe's "recognized title" to the lands in the Uncompahgre Reservation. Once this Court agrees with the Tribe's interpretation of that Act of Congress, the remaining pieces of the substantive analysis in this case are simple.[1] The United States, as the Tribe's trustee, agreed to sell the Tribe's Uncompahgre lands as the Tribe's broker for sale, with the Tribe having beneficial ownership of the proceeds. Act of June 9, 1897, 30 Stat. 62. The United States sold in fee some of those lands. It also, in effect, gave some of those lands to others. While the Tribe lost its recognized title to lands disposed of under the public land laws, some of it has never been compensated for any lands disposed of after 1946. Further, the United States never sold the vast majority of the land. It continues to own that land. It continues to sell minerals from those lands. It continues to profit from that land. But, instead of depositing those funds in the Tribe's accounts, the United States takes the money for itself.

The United States' disagreement with the Tribe's interpretation of the 1880 Act is the core substantive disputes in this matter. If, as the Tribe asserts, the 1880 Act created recognized title, then the money the United States received from the land is the Tribe's money, not the United States money.

[1] As noted, the legal issues in the Tribe's claims for the money the United States is receiving for use or sale of land to which the Tribe had recognized title are very simple. The Tribe's argument in the related District Court suit, regarding rights in the land beyond those of receipt of proceeds, are substantially more complex. As will be discussed below, the District Court case begins from the same premise as this case: the Executive Branch must comply with the 1880 Act, as that act is properly interpreted. But in this case, the remaining premises of the argument are all simple. In the District Court case, the remaining premises are not simple. In its brief in this case, the United States wrongly attempts to interject those more difficult issues from the District Court case into this case. It has no logical or legal basis for raising those issues here, because this case is solely about a money judgment for the proceeds from the use of the land.

Bluntly the United States has no plausible basis for disputing the Tribe's interpretation that the 1880 Act and the Executive Order issued thereunder. The Tribe submits that if the plaintiff in this case were anything other than an Indian Tribe, the United States would not be able, with a straight face, to make the arguments it is making against the Ute Indian Tribe. Because it lacks any plausible basis for disputing the Tribe's interpretation of the 1880 Act, the United States constructs a merits argument through a false prism that the 1880 Act does not exist.

The 1880 Act does exist. The United States does have to comply with that statute, and this Court has jurisdiction and the duty to require the United States to comply with the 1880 Act and the subsequent related acts of Congress.

Because the United States starts from the pretense that the 1880 Act does not exist, it grossly misstates the Tribe's claims, and Defendant then analyzes its own straw man arguments instead of the claims the Tribe has brought. As a simple example, and as the Tribe expects that even the United States would admit, if the Tribe's interpretation of the 1880 Act is correct, then the Tribe has stated a cognizable claim for monetary damages for breach of that Act, breach of the United States trust responsibilities, and taking of property without reasonable compensation. If the Tribe's interpretation of federal statutes is correct, the United States argument for dismissal of or summary judgment on claims based upon prior settlements similarly disappears. The United States would be left with only an argument (which would also be disputed) that *parts*, but not the whole, of *some* claims, for some damages accruing before 2012, are within the scope of the prior settlements.

Because the Tribe had recognized title, the United States cannot take the land or the minerals on the land, without paying for it; and cannot give the land or minerals to others without those others paying the money to the United States as the Tribe's broker for sale. *E.g.*, United

States Const. Amend. 5. But the United States is now doing exactly that—selling the minerals that are on the land and leasing the land, but pocketing the money. As the Tribe's broker for sale, the United States is, by law, required to give those proceeds from sale or use to the Tribe. It is the Tribe's money.

QUESTIONS PRESENTED

1. Did the Ute Indian Tribe obtain recognized title to the Uncompahgre Reservation when the United States President created that Reservation as a replacement Reservation for the Tribe's recognized title Reservation in Colorado?

2. Does this Court have jurisdiction to provide a monetary judgment for the amount of money that the Executive Branch would have provided to the benefit of the Ute Indian Tribe if the Executive Branch were correctly interpreting and executing existing acts of Congress?

3. Are the Ute Indian Tribe's claims for monetary damages under existing federal statutes barred by the statute of limitations or prior settlements of other claims?

STATEMENT OF THE CASE

Much of the United States' Statement of the Case is legal argument and analysis of legal documents. To avoid duplication, the Tribe will respond to the United States' legal discussion in the body of this brief. As the Tribe will discuss therein, the United States statement of the case misstates the Tribe's claims in this case and in the related District Court case, misstates prior suits and settlement agreements between the Tribe and the United States, and misstates the law.[2]

DISCUSSION OF LAW

[2] The Tribe's understanding of the United States' motion to dismiss is that the United States is challenging the Tribe's complaint on the pleadings, only as supplemented by attached settlement documents from 1965 and 2012. U.S. Br at 3, n. 2 (stating the motion is based upon the presumption that the factual allegations of the complaint are true). Contrary to its own footnote 2, the United States, on page 15, asserts that the Court cannot accept the allegations of the complaint as true. The Tribe relies upon footnote 2 to the United States brief.

I. CONGRESS' 1880 ACT GAVE THE TRIBE COMPENSABLE TITLE TO THE UNCOMPAHGRE RESERVATION IN UTAH, AND THE TRIBE CAN BRING A SUIT FOR DAMAGES FROM THE EXECUTIVE BRANCH TAKING THE TRIBE'S COMPENSATION, IN VIOLATION OF THE EXISTING 1880 ACT.

If, as the Tribe alleges, the Tribe had recognized title to the Uncompahgre Reservation, then money the United States receives from sale of minerals or other sales from that land are the property of the Tribe or the property of the United States in trust for the Tribe. If it were not fatal to its current motion, and fatal to its attempt to defeat the Tribe's suit on the merits, the United States would agree with this simple, well supported statement of law. As the most authoritative secondary source on federal Indian law summarizes: "The United States must pay compensation when it takes tribal title recognized by treaty or statute." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 15.09[1][d][ii] (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] (citing *United States v. Sioux Nation*, 448 U.S. 371 (1980); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-278 (1955)); *see also United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) (holding that tribal members can maintain suit for monetary damages for breaches of regulations governing leasing of allotment lands). In *Brown* and *Mitchell*, the plaintiffs' claims were much more difficult than those in the present matter. In those case, the plaintiffs were asserting that the United States had done a poor job of managing those tribes' trust assets or that the United States had entered into below market-rate sales or leases. We have no such nuance in the present matter. Here, as the United States acknowledges, the Tribe asserts claims that the United States has been taking all proceeds from the sales of the assets, in violation of federal statutes which recognized and guaranteed the Tribe's rights to those proceeds.

The United States' argument in Section I of its brief is premised upon its claim that the Tribe did not have recognized title. But to make that argument, the United States misstates the Tribe's claims and ignores the pivotal provision of the Act of June 15, 1880.

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV § 3, cl. 2. The Supreme Court has consistently interpreted this provision in the broadest possible terms, and has repeatedly held that because the Constitution expressly conferred the federal power regarding property to Congress, neither the courts nor the executive branch can proceed contrary to an act of Congress in this area. *E.g., Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941); *See also* §I.A, *infra* (citing multiple cases, including cases involving Indian and non-Indian lands). Here, through an 1868 Treaty approved by Congress, the Uncompahgre Band ceded vast areas of land to the United States in exchange for the United States, through Congress, recognizing a Reservation for the Band in Colorado.[3] The 1868 Treaty states that the lands reserved by the federal government for the Ute homeland are "hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named." 1868 Treaty, Art. 2, p. 3. Congress later decided to take the Tribe's Reservation in Colorado and it directed the President of the United States to

[3] The Tribe notes its particular disagreement with Defendant's assertion that "[t]he Tribe's relevant association with the land in question dates back to 1880." U.S. Br at 3. The land on which the Uncompahgre Reservation sits is part of the land that the Tribe ceded to the United States in 1868 in exchange for the creation of the "permanent" Reservation in Colorado. Charles C. Royce, Indian Land Cessions in the United States, Utah map 1, Area 515. The 1880 Act, as carried out by the Executive Branch in 1882, then gave those Uncompahgre Reservation lands back to the Tribe.

create a replacement Reservation in a different location in Colorado or in Utah.[4] Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880 Act); Compl. ¶¶16-17. The Executive Branch carried out that directive. It took the Band's Colorado Reservation. And it created the required replacement Reservation in Utah. Compl. ¶¶17-20, 24. Defendant admits as much, but sophistically label the federal statute as "the 1880 agreement," U.S. Br. at 3, and then premises the remainder of its argument upon an assertion that the Tribe cannot bring a suit challenging the United States' breach of that "agreement."

Notably, and as has been unfortunately typical in its relationship with the Tribe and other tribes, the United States asserts that the Tribe must abide by the treaty provisions and congressional takings of tribal land which are favorable to the United States, while the United States is free to violate its reciprocal obligations. The United States holds the Tribe to the Tribe's cessation of lands in 1868, which was in exchange for, *inter alia*, the Colorado reservation. And the United States has no qualms with Congress deciding to take the Tribe's Reservation in Colorado. But the United States does not want to be held to the *quid pro quo* that Congress placed into the very same statute taking the Tribe's Colorado Reservation. The United States asserts this Court cannot make the Executive Branch comply with that part of Congress' actions. The Executive Branch's position is morally abhorrent, and fortunately it is also legally incorrect.

[4] The plain language of the 1880 Act required the Executive Branch to locate the replacement Reservation in Colorado, because there was suitable land in Colorado. Based upon political considerations, the Executive Branch "interpreted" the 1880 as allowing it to create the Band's replacement Reservation on un-arable land in Utah regardless of whether there was land in Colorado. P. David Smith, *Ouray: Chief of the Utes* 189-90 (1990). One of the Tribe's claims in its Indian Claims Commission case was based upon damages from this violation of law, of failing to create the replacement Reservation in Colorado and then putting the replacement Reservation on barren land. Portions of the United States' argument related to the scope of the ICC case stem from the United States mis-interpretation of that ICC claim. U.S. Br. at 7-8

A. DEFENDANT'S MOTION TO DISMISS FAILS BECAUSE THE UNCOMPAHGRE RESERVATION WAS A STATUTORY RESERVATION, NOT AN EXECUTIVE ORDER RESERVATION.

There are numerous factual and legal errors in Defendant's motion to dismiss, but the primary error, the one which underlies all of the others, the one upon which Defendant builds its argument, is its misstatement of definitively documented and definitively established historical facts. The United States Congress had created a permanent statutory Reservation for the Uncompahgre Band. That Reservation was initially located in western Colorado. Unfortunately for the Uncompahgre Band, prospectors discovered hard minerals on the Uncompahgre lands, and Congress determined that the Uncompahgre Band's permanent Reservation would have to be re-located to land which was not believed to contain such minerals. Compl. ¶¶ 14-15. Congress, by statute, directed the Executive Branch to replace the Tribe's Reservation in Colorado with a different Reservation, either in Colorado if sufficient land not coveted by non-Indians could be located, or in Utah. 1880 Act. Consistent with its basic duty to execute the statutes of the United States, the Executive Branch complied with that statute by establishing the boundaries of that replacement Reservation—the Uncompahgre Reservation, a portion of which is at issue in this

case. Compl. ¶¶18, 19, 24.[5] The Tribe's treaty rights established under the 1868 Treaty were transferred to the new Reservation. *E.g., Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017) (The United States agreement to pay for on-Reservation damage caused by "bad men among the whites" in the 1868 Treaty transferred to the Reservation created under the 1880 statute and remains enforceable in federal court suits against the United States). These are the historical facts from about 140 years ago.

The Uncompahgre Reservation was therefore a "statutory reservation," with all land owned by the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation. That trust ownership was created pursuant to an act of Congress, and can therefore only be altered by an Act of Congress. *E.g.*, *Nebraska v. Parker*, 136 U.S. 1072 (2016); *Idaho v. United States*, 533 U.S. 262 (2001); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985); *United States v. California,* 332 U.S. 19, 40 (1947); *Royal Indem. Co. v. United States,* 313 U.S. 289, 294 (1941); *United States v. Celestine,* 215 U.S. 278 (1909); *Warren v. United States* 234 F.3d 1331, 1338 (D.C. Cir. 2000); 25 U.S.C. § 177. This rule is a specific application of the rule that Congress is

[5] The Uncompahgre Reservation was not coveted by non-Indians. Before the Uintah Valley Reservation was established in 1861, Brigham Young, the Territorial Governor of the Territory of Utah and President of the Mormon Church, dispatched a survey term to determine whether the proposed reservation lands would instead be suitable for Mormon settlement. The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together." *Report of Utah Expedition*, *printed in* Deseret News, Sept. 25, 1961, *quoted in* Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004). *See also* U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1886*, 225. ("The Uncompahgre Reserve is a desert. Of the 1,933,440 acres embraced therein not one can be relied on to produce a crop without irrigation, and not more than 3 per cent[sic] of the whole is susceptible of being made productive by process of irrigation."). Contrary to the impression Defendants seek to create, the Uncompahgre Reservation remains remote and virtually unpopulated by non-Indians. There is only one census area on the Uncompahgre Reservation, and in the most recent decennial census that census area, Bonanza, had a population of 1. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF. There are, however, at least two ghost towns on the Reservation.

the supreme legislative authority in this country, and that a federal statute is valid until superseded by a contrary federal statute. Tribes do not lose their homelands by adverse possession or by the Executive Branch's violations of the laws of Congress.

Defendant's substantive arguments and primary portions of its current motion to dismiss in this case are dependent upon, *inter alia*, its historically erroneous assertion that the Uncompahgre Reservation was an "executive order reservation," when in fact the Reservation was a "statutory reservation." An executive order reservation is one which the executive branch created of its own volition, based upon its general powers to treat with Indians, not one based upon Congress' directive to create a reservation. Where the Executive creates a reservation by its own volition, the executive has greater authority to undo its own prior actions. Where Congress creates a reservation, only Congress can eliminate or alter that reservation. *E.g., Parker*, 136 U.S. 1072.

In the present matter, Congress had already approved a prior reservation for the Uncompahgre Indians, and it was in effect evicting the Uncompahgre from that Reservation. Congress directed the president to create the new replacement Reservation, and the President complied with that statutory directive, creating a statutory reservation.

Over a decade after the President carried out his duty to create the replacement statutory Reservation, Congress authorized the President to act as the Tribe's broker for sale of land on the Reservation. 1897 Act. The Tribe in this case is not challenging the President's exercise of that authority to sell portions of the Tribe's land as the Tribe's broker for sale. But much of the land on the Uncompahgre Reservation was never sold or subject to other acts of Congress altering its ownership. The United States still owns that land, and it still has the duty to provide the proceeds of sales from that land to the Tribe. Congress' 1880 law directing the President to create the replacement Reservation is still on the books. It was fully executed by the President, and the

Executive Branch's theory in this case—that the courts cannot require the Executive Branch to come back into compliance with the statute—is meritless.

B. THE UNITED STATES' ASSERTION THAT THE TRIBE HAS NOT IDENTIFIED A STATUTE WHICH REQUIRES DEPOSITION OF MONIES INTO TRIBAL ACCOUNTS SUFFERS FROM ADDITIONAL PROBLEMS.

The United States incorrectly asserts that the Indian Reorganization Act (IRA) is not a money mandating statute. For this assertion, the United States' sole citation is *Wopsock v. Natchees*, 454 F.3d 1327 (Fed. Cir. 2006). The Court in *Wopsock* did not make the sweeping overbroad holding that the United States claims. Instead, and as is standard practice for experienced federal court judges, the Court issued a holding on the case before it, not broad *dicta* covering all parts of the IRA. The Court held: "The IRA, however, cannot fairly be interpreted as mandating compensation by the federal government for *the injury claimed by the plaintiffs*." 454 F.3d at 1332 (emphasis added). The "injury claimed by the plaintiffs" was an alleged violation of a provision requiring the Secretary to call and oversee elections adopting or amending a tribal constitution. IRA §16, 25 U.S.C. § 476(c) (now recodified at 25 U.S.C. § 5123).

The IRA contained 19 sections. The subsection of one of those 19 which was at issue in *Wopsock* was not money-mandating. But many of the sections of the IRA require the United States to protect tribal real property and extend federal trust ownership over real property. Act of June 18, 1934 §§1-7. As discussed above, tribes definitely do have the right to bring cases in this Court for monetary damages from federal takings of tribal money. *Wopsock*, specific to federal supervision of some tribal elections, is not contrary to those cases.

The United States also asserts that the 1945 Restoration Order is not money mandating because it is not a statute or regulation. In addition to being legally incorrect this argument is irrelevant. The argument is incorrect because the Restoration Order restores land to tribal trust. While the Restoration Order is not itself a statute, the restoration of the land to tribal trust would

impose upon the United States the well-established real property trust duties which are created by statutes. This argument is irrelevant because this case, unlike the related District Court case, centers on the theory that the undisposed-of, unallotted Reservation lands have retained the status of surplus lands since 1897.

II. THE TRIBE'S ACCOUNTING CLAIMS CANNOT BE DISMISSED ON A RULE 12 MOTION.

In Counts I, II and III of its complaint, the Tribe sets forth claims that the United States is violating the United States Constitution, federal statutes, and its duties as the Tribe's trustee. The Tribe further alleges that it has suffered enormous financial damage from those federal violations. As discussed in more detail in the complaint and above, the Tribe has discovered that the United States, the Tribe's trustee, has been receiving vast sums of money from sales, leases, and fees which the United States is required, by law, to provide to the Tribe. Instead of giving that money to the Tribe or placing it into the Tribe's accounts, the United States has been pocketing the money.

The Tribe has no way of knowing how much money the United States has unlawfully deposited into federal accounts. As a simple example, the Tribe knows that the United States is receiving royalty payments from sales of what are, under proper interpretation of federal law, minerals that the United States owns in trust for the Ute Indian Tribe. But the Tribe does not know and has no way of determining, the amount the United States is receiving and unlawfully retaining from those sales. The only entity privy to that information is the Tribe's trustee, the United States.

In counts IV and V of its complaint, the Tribe requests that the Court order the United States to provide an accounting of how much money the United States has unlawfully taken or kept from the Tribe based upon the unlawful actions described in Counts I, II, and III.

The United States admits it has not been making such payments or deposits into the Tribe's accounts, and the United States does not contest the allegation in the complaint that the United States has not told the Tribe how much money the United States has received from the disputed

lands. The United States merits defense is an assertion, without any plausible interpretation of the underlying federal statutes, that the Tribe's interpretation of the applicable federal laws is erroneous. The Tribe is confident that its interpretation of federal law is correct.

In section II of its brief, the United States acknowledges that this Court has jurisdiction to order an accounting, and the United States itself cites cases which support that this Court has that jurisdiction. *E.g.*, *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 490 (1966) ("We agree with plaintiffs that the court has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim."); *Am. Indians Residing On Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (Ct. Cl. 1981). Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 Ind. L.J. 83 §II.B.2.b (2013), provides a thorough summary of this Court and the Federal Circuit's case law supporting an accounting claim by an Indian Tribe under the current facts.[6] *See also, e.g.*, *Confidential Informant 59-05071 v. United States*, case no. 1:11-cv-00153, ECF Dct. 16 at 22 (sealed order, Fed. Cl. Nov. 22, 2011), *summarized in Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698, 711 (Fed. Cl. 2017) (denying United States motion to dismiss accounting claim on preliminary motion to dismiss).

[6] The Tribe briefly notes, so as to avoid claims to the contrary, that it does not agree with some of Professor Sisk's criticisms of the federal district courts' decisions regarding tribal accounting claims. Professor Sisk appears to view the jurisdiction of the district courts and Court of Claims as an "either/or" proposition. The Tribe's understanding of the majority opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) is that that there are areas where a plaintiff, as master of its own complaint, can plead an accounting claim or other claims to come within the jurisdiction of either court. But his discussion of why this Court would have jurisdiction is correct.

The Tribe pled its claim to fit within this Court's authority to order an accounting. *E.g.*, Compl. ¶2.[7] Its complaint sets forth why an accounting is necessary in furtherance of this Court's jurisdiction to order the United States to disgorge the money the United States has received and then pocketed from Uncompahgre lands.

The United States has not provided any basis for its assertion that the Court should *dismiss* the accounting claim. To the best the Tribe can determine, it appears that the United States is asserting that the Court should dismiss the accounting claim because this Court has not yet reviewed and agreed with the Tribe's interpretation of the underlying federal statutes and orders. U.S. Br. at 22. If that is their argument, it is plainly wrong.[8] If the Tribe's interpretation of the federal statutes is correct, then this Court has the power to order the United States to provide the required accounting and this Court will need to require an accounting.

The United States argues, without any supporting case citation, that the Tribe's accounting claim should have been brought in the Federal District Court,[9] but when parties bring accounting

[7] Paragraph 2 of the Tribe's complaint summarizes that the Tribe is requesting an accounting in furtherance of this Court's jurisdiction and based upon this Court's limited equitable authorities. The United States assertion that the Tribe's accounting claim is barred is based upon it selectively quoting parts of paragraph 2 of the complaint. In that discussion, and throughout its brief, the Defendant uses its own straw man arguments as a basis for its attempts to disparage the competence of the Tribe's attorneys. The Tribe's attorneys know the Tribe's history, know the applicable substantive law, and know the authority of the District Court and this Court. They pled their claims with care. The United States should be responding to the well-researched and constructed claims the Tribe made, not straw man arguments of the United States own creation.

[8] In footnote 11 to its brief in support of its motion to dismiss, the United States asserts that two of its arguments for dismissal of other claims apply to the accounting claims also. To avoid redundancy, the United States incorporates by cross-references those two arguments. The Tribe disagrees with the United States on both arguments, and to avoid redundancy the Tribe incorporates by cross reference its responses on those two issues.

[9] If this Court were to agree with the United States' argument, this Court would be required to consider whether to transfer the claim or any other claims that it concluded were non-monetary, to the District Court under 28 U.S.C. § 1631. Under 28 U.S.C. § 1631, if this Court were to dismiss a claim, it should transfer that claim to the District Court for the District of Columbia, where it could be consolidated with the Tribe's pending claims in that Court.

claims in the district courts under analogous facts, the United States argues, *with* case citations to support its argument, that the claim should have been brought in this Court. *E.g., Suburban Mortg. Assoc. Inc. v. U.S. Dept. of Housing & Urban Dev.*, 480 F.3d 1116 (Fed. Cir. 2007) (ordering case transferred to Court of Federal Claims based upon United States' motion, and holding "At bottom, it is a suit for money for which the Court of Federal Claims can provide an adequate remedy and it therefore belongs in that court."). In fact, in the pending District Court suit, the United States has moved to dismiss the non-monetary claims the Tribe did bring in the District Court based upon, *inter alia*, an assertion that those non-monetary claims are, at bottom, suits for money. *Cf. Lummi Tribe of the Lummi Reservation, Washington, et al. v. United States,* 870 F.3d 1313 (Fed. Cir. Sept. 12, 2017)[10] (concluding that the United States had argued with "two faces," 870 F.3d at 1320, moving to dismiss claims in this Court based upon an assertion that they were non-monetary claims while moving to dismiss the same claims in a district court based upon an assertion that they were monetary claims); *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997) (same, and Court noting that the United States' attempt to whipsaw the plaintiff "threatens to turn this case into a jurisprudential Flying Dutchman, casting about in search of a court that can reach the merits of [the] claims.")

Defendant cites only four cases in section II of its brief. Those cases either support the Tribe's position or are inapposite. Defendant cites *Muscogee (Creek) Nation of Oklahoma v. United States*, 103 Fed. Cl. 210, 218 (2011), which holds that in the Court of Federal Claims, "[t]he United States, as trustee, would have to meet plaintiff's prima facie case of breach with a full accounting for its conduct. Defendant cites *American Indians Residing On Maricopa-Ak Chin*

[10] The government's attempt to whipsaw the Lummi Tribe returned to the Federal Circuit for oral argument on March 7, 2019. Case 18-1720.

Reservation, 667 F.2d 980, a case in which the Court of Federal Claims continued to exercise jurisdiction over an accounting claim even after all claims other than the accounting claim had been resolved. The trial court judge had previously ordered that the United States conduct that accounting, but the United States had failed to conduct the accounting. Rather than prolong the case, the trial judge made various presumptions against the United States because of the federal failure to complete an accounting, and the Court entered a judgement, *id.* at 1005, which was affirmed in relevant part by a three judge panel, *id.* at 983. Defendant also cites *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 491 (1966), in which the Court limited the Tribe's accounting claim. It allowed the claim for an accounting to proceed, but dismissed to the extent the claim sought a general accounting. The only other cases the United States cites merely stand for the undisputed proposition that this Court's equitable powers are limited to those in furtherance of the Court's limited jurisdiction. *Evans v. United States*, 107 Fed Cl. 442 (2012). In summary, Defendant does not cite any case granting a federal motion to dismiss an accounting claim under Federal Rule of Civil Procedure 12, and it cites cases which show that such claims can and do proceed in this Court. Its motion to dismiss the accounting claim therefore must be denied.

III. THE 1965 AND 2012 SETTLEMENT AGREEMENTS DID NOT WAIVE THE TRIBE'S TAKINGS CLAIM.

Contrary to the United States assertion in section III.A of its brief, the Tribe's Fifth Amendment Takings claim is not barred by either the 1965 or 2012 Settlement Agreements.

Defendant asserts that the Tribe's claims regarding lands disposed-of between 1897 and 1946 are barred by the 1965 Settlement agreement. This is a non-issue. The Tribe acknowledges that the 1965 Settlement Agreement settled claims regarding the small portion of surplus Reservation lands the United States disposed-of to non-Indians between 1897 and 1946 under the

public land laws. The Tribe expressly excluded claims related to those lands precisely because the Tribe received compensation for those lands.

Next, Defendant claims that the 2012 Settlement Agreement bars the Tribe's takings claims because the harm from the takings claims occurred in either 1897 or 1948. In Fifth Amendment Takings claims, however, the harm occurs when the plaintiff's property is taken without just compensation. And neither the 1897 nor the 1948 Acts served to take the surplus Reservation lands from the Tribe.

First, the United States did not take the Tribe's unallotted Reservation lands via the 1897 Act. As the U.S. Tenth Circuit Court of Appeals explained in *Ute Indian Tribe v. Utah*, nothing in the 1894 or 1897 Acts promised the Uncompahgre Band a sum certain for their lands. 773 F.2d 1087, 1092 (10th Cir. 1985). In fact, the court found that the 1894 and 1897 Acts contained "no explicit language of cession, termination, or any other reference to 'the present and total surrender of all tribal interests,'" to the Uncompahgre Band's Reservation lands. *Id*. (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). The 1897 Act instead served to transform the unallotted Reservation lands to surplus lands, a type of Indian lands that the United States holds while it disposes of the land for the economic benefit of a tribe. *Solem*, 465 U.S. at 468 (explaining that under *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians."). After the 1897 Act therefore, the United States became a land broker for its trustee, the Tribe, holding the surplus land and disposing of it for the economic benefit of the Tribe. Thus, the 1897 Act did not serve to take the Reservation lands from the Tribe.

Second, the 1948 Act did not constitute a taking of the surplus Reservation land. Under the 1948 Act, Congress ordered the revocation of the 1933 Departmental Order temporarily withdrawing the surplus Reservation lands for a grazing reserve managed by the U.S. Grazing Service and Indian Affairs. Part of the land that had been within this reserve was placed into Tribal trust status. The U.S. Bureau of Land Management, previously the U.S. Grazing Service, then took over the sole management of the remaining lands. Revocation of Departmental Order of Sept. 26, 1933, as Modified, Fed. Reg. 4105 (July 17, 1948). This managerial transfer of land did not nor could not constitute a taking of the surplus Reservation lands. Nothing in this intra-departmental transfer severed the Tribe's remaining interest in the surplus lands. Notably, Defendant does not provide any support for how such a transfer could.

Third, the present suit is about money, and regardless of how one characterizes the status of the land, the United States has the ongoing duty under federal statute to provide the proceeds from the ongoing sale and use of the land and mineral to the Tribes. In the 2012 settlement, after paying the Tribe for some of its past violations of duties to the Tribe, the United States expressly agreed that it would start complying with "the applicable provisions of the United States Constitution, treaties, and federal statutes and regulations." Settlement ¶9. As alleged in the complaint, the United States is not complying with that federal law. It is therefore subject to suit. The duty to pay the Tribe for sales of minerals and other receipts for use of the land to which the Tribe had compensable title remains ongoing until the fee for that land is sold or until the Tribe's

compensable title is bought out by the United States.[11] That is simply what it means to have compensable title. It is what it means for non-Indians, and contrary to the United States assertions, it is what it means for Indian Tribes.

Neither the 1897 nor the 1948 Act served to take all Reservation lands at issue from the Tribe. Defendants therefore do not have any support to their argument that the 2012 Settlement Agreement waived the Tribe's takings claim in its entirety. For this reason, this Court should deny Defendants' motion to dismiss the Tribe's takings claim, or alternatively, Defendants' motion for summary judgment on the Tribe's takings claim.

IV. PRE-2012 BREACH OF TRUST AND ACCOUNTING CLAIMS ARE NOT BARRED BY THE 2012 SETTLEMENT AGREEMENT.

In Section IV.B of its brief, the United States reasonably assumes that this Court is not going to dismiss the Tribe's claims for breach of trust and accounting, and the United States asserts that the Court should limit the Tribe's claims, so that the United States would have to disgorge the income it has received off of the lands at issue since the 2012 settlement, but would not have to disgorge money that it unlawfully pocketed before that date.

The parties agree on the main legal rules which govern the legal analysis of this issue, and that application of those rules to the facts of this case will require detailed discussion of the scope of the prior settlement. When the Court conducts that analysis, it will see that the United States'

[11] Many of the United States arguments are based upon its failure to understand that the Tribe's claim for the money from the use of the land is not dependent on whether the Executive Branch categorizes the Uncompahgre lands as fee, as trust, as "restored," etc. *E.g.*, U.S. Br. at 14 (incorrectly asserting that because the Tribe's position is that under correct interpretation of federal law, the United States is or should be holding the lands at issue in trust, the Tribe was somehow conceding that Executive Branch disagreed, the Tribe cannot recovery); U.S. Br. at 13 (incorrectly asserting the United States had, in 1986, claimed the lands at issue were not held in trust, and further incorrect asserting this precludes the Tribe's monetary claim); U.S. Br. at 31 (same); U.S. Br. at 14 (incorrectly asserting that the Tribe's District Court claims are based upon the United States not holding the land in trust, and then compounding that error by asserting this precludes recovery for monetary damages in the present case).

argument is based upon its substantial overstatement of the scope of the case settled in 2012. The 2012 settlement was related to mismanagement of specific federal accounts held in trust for the Tribe. Those accounts were listed with specificity in attachments to that settlement agreement, and each of those accounts appears to have had specific and limited purposes. The United States, in its current motion, has not asserted and has not provided any basis upon which this Court could conclude, that if the Tribe's claims in this case are true, the money the United States has been pocketing should have been placed in any of those specific accounts that were at issue in the prior suit. For example, the United States has been receiving money from sales of oil from the disputed land, and apparently has been pocketing that money. But the United States does not claim in its current motion that any of the accounts at issue in the prior suit were the accounts into which the United States would deposit funds from the sale of land and resources within the Uncompahgre Reservation.[12]

Because it is not alleging that the claims in the current case, if successful, would result in increases in the amounts held in any of the accounts at issue in the prior suit, the United States turns to an overbroad argument that the prior settlement resolved any and all claims between the Tribe and the United States as of 2012. As discussed in detail below, the United States interpretation of the 2012 settlement is wrong.

The 2012 Settlement Agreement does not limit the Tribe's breach of trust and accounting claims to post-2012 conduct. This section explains that the 2012 Settlement Agreement did not cover all claims at issue in this case. As an initial matter, the 2012 Settlement Agreement did not

[12] Because the United States has not made that showing in its current motion, the current motion should be denied. Based upon the Tribe's current, albeit incomplete, information regarding the purposes and federal deposit criteria for each of those 34 accounts, the Tribe does not believe that the United States would be able to correct the current defect in any subsequent motion for summary judgment.

broadly waive "any and all claims . . . that are based on harms or violations occurring before [March 8, 2012]" as Defendant asserts. More accurately, the 2012 Settlement Agreement waived any and all claims "based on harms or violations occurring before [March 8, 2012] *and that relate to the United States' management or accounting of Plaintiff's trust funds* or Plaintiff's non-monetary trust assets or resources." This section explains that neither this waiver nor the enumerated provisions the Defendant points to within this waiver bar all pre-2012 breach of trust and accounting claims.

The Tribe's breach of trust claims are not limited to post-2012 conduct. The Defendant first asserts that the Tribe's breach of trust claim rests on the allegation that the United States failed to pay the Tribe for the proceeds it obtained from the sale or lease of the Uncompahgre Reservation's lands and resources and that such an allegation is barred by the 2012 Settlement Agreement. In support of this, the Defendant references two provisions from the 2012 Settlement Agreement. Neither of these provisions, however, waived the United States' responsibility to pay the Tribe for its disposal of the Reservation's lands or resources before or after 2012.

The first provision that Defendant points to provides that the Tribe waived claims that the United States "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe's] non-monetary trust assets or resources." Importantly, the Tribe is not arguing that the United States did not have the statutory authority to sell the surplus lands at issue. The Tribe acknowledges that the 1897 Act opened the Uncompahgre Reservation and gave the United States the authority to sell the surplus lands. Rather, the Tribe is arguing that, after the lands or resources were sold, the Defendant failed to give these funds to the Tribe as required under the 1880 Act read in conjunction with the 1894 and 1897 Acts. This argument is thus not affected by

the 2012 Settlement Agreement's waiver regarding the improper and inappropriate sale of non-monetary trust assets.

The second provision the Defendant references, stating the waiver regarding the United States' failure to "deposit monies into trust funds," is also inapplicable.[13] In full, this provision related to the waiver of:

> (c) The United States' alleged mismanagement of Plaintiff's trust funds, including but not limited to any claim or allegation that:
>
> . . . .
>
> (3) The United States failed to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner"

As an initial matter, it should be noted that the waiver regarding depositing "monies into trust funds" should have properly stated "deposit monies into *trust fund accounts*." A footnote inserted right after the term "trust funds" explains that:

> For purposes of this Settlement Agreement, Plaintiffs trust funds include but are not limited to *any monies that have been received by Plaintiff* in compensation for or as a result of the settlement of Plaintiffs pre-1946 claims brought before the Indian Claims Commission ("ICC"); *the monies in any* Tribal-related accounts; any proceeds-of-labor accounts; any Tribal Individual Indian Money ("Tribal-related IIM") or special deposit accounts; any Indian Money Proceeds of Labor ("IMPL'") accounts; any Treasury accounts; any legislative settlement or award accounts; and any judgment accounts, regardless of whether the above-described accounts are principal or interest accounts, whether they were established pursuant to Federal legislation, and whether they are or were maintained, managed, invested, or controlled by either the Department of the Interior ("Interior") or the Department of the Treasury ("Treasury").

Settlement Agreement ¶ 4(c) n.1. Under this definition, trust funds are plainly a type of monies. *See NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1165 (Fed. Cir. 2004) (canon of contract interpretation is to interpret contract consistently). It would be nonsensical for the waiver to

[13] The Tribe sets forth this interpretation of "trust fund accounts" as one interpretation of the phrase for the purposes of responding to Defendant's Motion to Dismiss and Alternative Motion for Partial Summary Judgment regarding the Tribe's pre-2012 claims.

provide that the United States failed to deposit monies into monies. Thus, this provision must be referring to the Defendant's failure to deposit monies into trust fund accounts.

With this point explained, it is now necessary to discuss the type of monies that constitute "trust funds" as the term is used in the 2012 Settlement Agreement. The term "trust funds" refers to funds that the United States holds or held in trust for the Tribe. This is clear from the plain meaning of the term "trust funds," the 2012 Agreement as a whole, and the Tribe's 2006 Complaint which initiated the entire process that resulted in the 2012 Settlement Agreement and which first defined the term "trust funds" for purposes of that proceeding.

"Interpretation of the settlement agreement, as with any contract, begins with the agreement's plain language." *Pucciariello v. United States*, 116 Fed. Cl. 390, 412-413 (2014). Next, a court applies the principle of contract interpretation that a contract "be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." *NVT Techs., Inc.,* 370 F.3d at 1159.

The plain language of the phrase "trust funds" clearly refers to funds that the United States holds or held in trust for the Tribe. This interpretation is further bolstered by the dictionary definition of "trust funds." *Ralph Larsen & Son Inc.*, 17 Cl. Ct. 39, 44 (1989) (explaining that a dictionary definition that is "consistent with the understanding of the term derived from reviewing the contract specifications" can be used in interpreting a contract's plain meaning.). A trust fund is "[t]he property held in a trust by a trustee." *Trust Fund*, Black's Law Dictionary 1657 (9th ed. 1990); *Trust Fund*, Merriam-Webster, https://www.merriam-webster.com/dictionary (last visited January 2, 2019) ("property (such as money or securities) settled or held in trust").

From the 2012 Settlement Agreement overall, it is also clear that the phrase "trust funds" was not intended to address funds the United States never held in trust for the Tribe. The trust

fund claims in the 2012 Settlement Agreement only related to the United States' *accounting* and *management* of Plaintiff's trust funds. As detailed later in this Section, the accounting claims settled all claims related to the funds which the United States has held or held in a myriad of accounts for the Tribe. This is shown in paragraph 8 of the 2012 Settlement Agreement where, as part of the Agreement, the Tribe accepted the United States' Statements of Performance "in fulfillment of any accounting of Plaintiff's trust fund accounts." The Statements of Performance, attached to the Settlement Agreement as Exhibit 1, provided the balances of all 34 of the accounts, none of which held or were meant to hold funds derived from the sale of the Reservation lands and resources. Additionally, as part of the settlement process, the United States sent the Tribe its Tribal Account Databases so that the Tribe could review how the United States had historically managed the Tribe's trust accounts. The accounting claims were plainly intended to cover accounting issues for how the United States had handled the trust funds in the Tribe's various trust accounts, not to address funds that the United States never recognized as trust funds, never created a trust account for, and never notified the Tribe of.

The management provisions similarly related to funds the United States held for the Tribe. All of the management claims very clearly related to how the United States was managing monies it held or had held for the Tribe. For example, the management provisions included claims that the United States failed to "invest tribal income in a timely manner," "obtain an appropriate return on invested funds," and "report or provide information about its actions or decisions relating to Plaintiff's trust fund accounts." The management provisions all thus related to monies the United States was managing or had managed for the Tribe, not to address funds that the United States never recognized as trust funds, never notified the Tribe of, and never managed for the Tribe.

Moreover, the definition of trust funds in the 2012 Settlement Agreement itself supports this interpretation of "trust funds." As detailed above, for the purposes of the 2012 Settlement Agreement, the term "trust funds" included appropriated Congressional funds that the United States was responsible for distributing to the Tribe and monies placed into accounts for the benefit of the Tribe. Under the doctrine of ejusdem generis, this provision could not be interpreted to refer to funds that the United States never recognized as held for the Tribe.

Ejusdem generis is "the principle that 'where specific words precede or follow general words in an enumeration describing a particular subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words.'" *Chestnut Hill Benevolent Ass'n v. Burwell*, 142 F. Supp. 3d 91 (D.D.C. 2015) (quoting *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250 (D.C. Cir. 1978)). In *Chestnut Hill*, this Court applied the doctrine to hold that "national accrediting bodies" only included organizations that meet certain minimum standards because the rule stated that "national accrediting bodies include, but are not limited to" a list of organizations which, upon review, all met certain minimum standards. In supporting this conclusion, this Court cited to the quote from *Post v. St. Paul Travelers Insurance Co.*, 691 F.3d 500 (3d Cir. 2012) that

> [i]t is widely accepted that general expressions such as '*including, but not limited to*' that precede a specific list of included items should not be construed in their widest context, but *apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples*.[14]

Here, the paragraph defining "trust funds" broadly discusses funds Congressionally appropriated for the Tribe, funds currently in accounts, and funds formerly in accounts that have

[14] Although *Chestnut Hill* dealt with the interpretation of a rule, it cited to *Post*, a case where the court was interpreting a term in a contract. The doctrine of ejusdem generis, meaning "the same kind," applies similarly whether interpreting statutes or contracts.

since been closed. This paragraph thus only encompasses monies that the United States had recognized were funds it was holding or had held for the Tribe. Notably absent from the definition was mention of funds that the United States *should have held* for the Tribe.

Further, even if this Court finds the term "trust funds" ambiguous and turns to extrinsic evidence to aid in its interpretation, the Tribe's 2006 Complaint defines the term "trust funds" as funds the United States held for the benefit of the Tribe. A contract provision is ambiguous if it is susceptible to more than one reasonable meaning and "each meaning 'is found to be consistent with the contract language.'" *Shaw v. United States*, 131 Fed. Cl. 181, 192 (Fed. Cir. 2017) (quoting *Enron Fed. Sols., Inc. v. United States*, 80 Fed. Cl. 382, 394 (Fed. Cir. 2008)). If a contract provision is ambiguous, a court "may appropriately look to extrinsic evidence to aid in [its] interpretation of the contract." *Metro. Area Transit, Inc. v. Nicholson,* 463 F.3d 1256, 1260 (Fed. Cir. 2006).

The Tribe's 2006 Complaint, which initiated the entire process that resulted in the 2012 Settlement Agreement, defines the term "trust funds" as funds held in trust by the United States. In the section of the Complaint entitled "The Ute Indian Tribe's Trust Funds," the Tribe explains that:

> the Defendant has held funds in trust for the Tribe pursuant to treatises, laws, acts of Congress, executive orders of the President, and/or regulations . . . . Presently, Defendant holds the Tribe's trust funds in a myriad of approximately sixty (60) separate accounts under the dominion and control of the OTFM.

Ex. (Complaint) ¶ 12. The Tribe further explained that "[f]or purposes of this lawsuit, the *Tribe's trust funds are divided into two general categories*: (a) the CUPCA Trust Funds . . .; and (b) the Other Trust Funds (as defined below in Paragraph 20 of this Complaint)." *Id*. at ¶ 14. Paragraph 20 then stated that "[t]ogether all tribal trust funds *maintained by the Defendant for the benefit of*

the Ute Indian Tribe, except the CUPCA Trust Funds, are referred to in this Complaint as the "Other Trust Funds." *Id*. at ¶ 20 (emphasis in the original removed and emphasis added).

From the Complaint, it is abundantly clear that the tribal trust funds, as the Tribe defined them, were the funds in accounts maintained by the United States for the benefit of the Tribe. In its Complaint, the Tribe directly laid out that it was seeking accounting and mismanagement claims for the funds the United States held in trust for the Tribe. From the very beginning of *Ute Indian Tribe v. United States*, therefore, it was clear that the Tribe (1) understood the term "trust funds" by its traditional dictionary definition, and (2) was seeking damages for claims related to the accounting and management of the funds in the myriad of accounts in which the United States held funds in trust for the Tribe, i.e. the trust funds.

In sum, the "trust funds" are funds that the United States holds or held in trust for the Tribe. Thus, the 2012 Settlement Agreement's waiver of claims related to the United States' management of the Tribe's trust funds is inapplicable to these breach of trust claims. As explained above, the 2012 Settlement Agreement was intended to address issues related to funds that the United States had recognized it held in trust. It was not intended to cover claims regarding monies that the United States had never recognized as trust funds. Similarly, the accounts at issue in the 2012 Settlement Agreement are the accounts the United States created to hold funds for the Tribe. These accounts are the 34 currently existing accounts or the historical accounts that had since been closed or merged into the current accounts. None of the 34 accounts held or were designated to hold funds from the Uncompahgre lands and resources at issue in this case. For the foregoing reasons, the provision waiving the claim that the United States failed to "deposit monies into trust fund[] [accounts]" did not waive the Tribe's ability to bring claims related to the United States' misappropriation of funds from the sale of surplus Reservation lands and resources. Thus, neither

the broad waiver or the two enumerated provisions cited by the Defendant preclude the Tribe from bringing its pre-2012 breach of trust claims regarding the United States' misappropriation of funds from the sale of the Reservation lands and resources.

Furthermore, the 2012 Settlement Agreement does not cover the accounting claims brought in this case. The Defendant points to three provisions in the 2012 Settlement Agreement in support of its assertion that the 2012 Settlement Agreement waived the pre-2012 accounting claims brought in this case. As discussed above and further herein though, the accounting claims in the 2012 Settlement Agreement plainly only waived accounting claims for the historical and existing trust fund accounts.

For example, one provision Defendant references provides that the Tribe "accept[ed] as accurate the balances of all of [the Tribe's] trust fund accounts as those balances are stated in" the January 31, 2012 Statements of Performance, included as Exhibit 1 in the 2012 Settlement Agreement. As Exhibit 1 shows, at the time of the 2012 Settlement Agreement, the United States held 34 accounts for the Tribe, each created to hold various funds for specific purposes.[15] By accepting each balance of the 34 trust fund accounts as accurate, the Tribe was only accepting that each account, such as the Uintah & Ouray Forest Rehabilitation account, contained the amount it was supposed to hold in relation to the purposes of that account. Of the Tribe's 34 accounts with the United States, not a single one of the accounts was designated to hold or did hold any funds from the disposal of the Reservation lands and resources. Because the 34 accounts neither held nor were meant to hold funds from the sale of the Reservation lands and resources, accepting the balance of those 34 accounts did not waive the Tribe's claims regarding these funds.

[15] If Defendant believes that any of the 34 trust fund accounts were intended to hold or did hold revenue from the surplus land disposals, then additional discovery is needed on this issue, and the matter is not appropriate for a motion to dismiss or summary judgment.

Moreover, Exhibit 1 was included in the 2012 Settlement Agreement precisely so that the Tribe could *review the purposes of each account and the accompanying balance* and then waive accounting claims regarding those accounts. If the United States had also wanted the Tribe to waive claims related to monies not held in trust for which there was not a designated account for, the 2012 Settlement Agreement should have stated precisely this.

The second provision states in full that the Tribe waived its claims regarding "[t]he United States' alleged mismanagement of Plaintiff's trust funds, including but not limited to any claim or allegation that . . . . (5) [t]he United States failed to report or provide information about its actions or decisions relating to the [Tribe's] trust fund accounts." As explained *supra*, the accounts at issue in the 2012 Settlement Agreement are the accounts the United States created to hold funds for the Tribe. Similar to the provision regarding the deposit of monies into trust fund accounts, this provision addressed how the United States provided information regarding accounts it actually managed for the Tribe, not how the United States had provided information regarding non-existent accounts for funds it never held in trust.

The final provision the Defendant points to provides that the Tribe 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." Settlement Agreement ¶ 4. This provision is inapplicable, however, to the part of the Tribe's request for an accounting of the misappropriated funds from the sale and lease of the surplus Reservation lands and resources because these monies are by definition not a non-monetary asset.

In conclusion, Defendant has not pointed to any provision in the 2012 Settlement Agreement that bars all pre-2012 breach of trust and accounting claims brought in this case. This

court should therefore deny the Defendant's motion to dismiss, or alternative motion for summary judgment regarding the breach of trust and accounting claims based on pre-2012 conduct.

V. THE UNITED STATES' ASSERTION THAT SOME CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS IN 28 U.S.C. § 2501 IS BASED UPON MISCHARACTERIZATION OF THE TRIBE'S CLAIMS, AND IS WITHOUT MERIT.

In Sections III.B and IV.A of its motion to dismiss the United States asserts that the takings claim and breach of trust claims are barred by the statute of limitations contained in 28 U.S.C. § 2501.

A. UNDER THE INDIAN TRUST ACCOUNTING STATUTE, THE STATUTE OF LIMITATIONS HAS NOT RUN AGAINST THE TRIBE BECAUSE THERE HAS NOT BEEN AN ACCOUNTING.

The United States asserts that the applicable statute of limitations is six years and the United States admits that, at least prior to FY 2015, the Indian Trust Accounting Statute (ITAS) provided: "the statute of limitations *shall not commence to run* . . . until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." Pub. L. 113-76 §1Div.G, Title I, 128 Stat 5, 305-306 (2014).

If the United States has not provided the required accounting, the statute of limitations would not expire until about the start of FY 2021.

But on pages 31 and 32 of its brief in support of its motion to dismiss, the United States makes three undeveloped assertions that the statute of limitations commencement provision in the ITAS somehow does not apply to the Tribe's claims. This Court would be free to deny those arguments because the arguments are undeveloped, leaving this Court and the Tribe to guess at the arguments or to develop the arguments for the United States before analyzing the arguments. *E.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). If this Court were to even consider the United States rapid-fire assertions, none of them have merit.

The whole of the United States first argument is:

> the ITAS was last enacted in the Fiscal Year 2014 Appropriation 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.

Whether there is a "tolling provision currently in place" is immaterial. The issue is, instead, whether the statute of limitations has run. Under the ITAS, the statute of limitations did not *commence* while the ITAS was in place, and the United States admits that the ITAS was in place through at least FY 2014, and the 6 year statute of limitations did not commence to run until sometime after that. It therefore will not expire until the start of FY 2021. *E.g. Shoshone Indian Tribe of Wind River Reservation v United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) ("By the plain language of the Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided.").

Next, the United States asserts, based upon a plain misreading of *Wolfchild v. United States*, 31 F.3d 1280, 1291 (Fed. Cir. 2013), that the ITAS does not apply to this case.

In *Wolfchild*, a group of individuals claiming to be Indians brought various claims regarding land and regarding proceeds from land on three Indian reservations in Minnesota. The *Wolfchild* plaintiffs asserted they were the rightful owners of the land or the proceeds from the land of the three reservations. Ultimately they lost on all of their claims.

As relevant here, the misguided *Wolfchild* claims are distinguishable in at least three major ways.

First, the United States here is seeking dismissal on a preliminary motion to dismiss, but the claims at issue in the 2013 decision in *Wolfchild* were *not* dismissed on a preliminary motion to dismiss. In fact the United States had moved to dismiss the claims, but that motion was denied,

and the Court required the claims to proceed to development of a full trial court record and to a judgment.

Second, the holding in *Wolfchild* was that an Act of Congress defined the federal claim to land. That statute had been adopted in 1980, and it clearly provided that Congress was claiming the land was owned by the United States in trust for three Indian tribes. The *Wolfchild* plaintiffs were challenging the validity or effect of that 1980 Act of Congress, and asserting that it resulted in a taking of their land or rights in land. The Court held that the statute of limitations commenced no later than the date of the 1980 Act of Congress (and therefore ran no later than 1986). In contrast, the Tribe's claims here are based upon the existing federal statutes, and it is the United States which is attempting to prevent enforcement of the existing federal statute. *Wolfchild* is therefore persuasive precedent favoring the Tribe in the present case.

Third, the Court concluded that because the *Wolfchild* plaintiffs were asserting that the 1980 Act effected a taking, their alleged damages accrued from that congressional act. Here, the Tribe's claims include damages that are currently accruing because of the Executive Branch's ongoing refusal to comply with the applicable act of Congress.

The United States attempt to rely upon *Wolfchild* demonstrate that the United States fails to understand the Tribe's claims in this matter and/or fails to understand that courts can require the Executive Branch to comply with acts of Congress. In *Wolfchild*, the United States was complying with the Act of Congress related to tribal land, and plaintiffs had not timely challenged the act of congress. Here the United States is violating the acts of Congress.

The United States' third undeveloped argument to attempt to avoid the ITAS is that the Tribe was provided an accounting for 34 accounts in 2012. But as discussed above, Defendant does not claim those accounts should hold the money at issue in this case; and the 2012 accounting

would not bar the Tribe's claims related to the United States wrongly taking tribal funds since 2012.

B. THE UNITED STATES ASSERTION THAT THE TRIBE'S CLAIMS ARE NOT "CONTINUING CLAIMS" IS CONTRARY TO THE CASE LAW THE UNITED STATES CITES.

In Section IV.A of its brief, the United States asserts that the Tribes' claims are barred because they are not "continuing claims." As with many of the United States arguments in this case, the United States begins with a stock discussion of a legal rule, but then fails to apply that rule to the facts of this case. Here, the United States stock legal discussion is generally correct, but the applicable legal rule, as applied to the facts here, shows that the Tribe's claim is not barred.

As pled by the Tribe, this case is a paradigm example of one involving an ongoing series of violations of law. As discussed above, if the Tribe's interpretation of laws is correct, then for each and every sale or lease of land, and each and every sale of minerals, the United States is the Tribe's broker for sale, and the United States has the duty, under federal law, to deposit the proceeds into the Tribe's account. Each federal taking of the money in violation of the acts of congress begins a new statute of limitations.

The cases which Defendant itself cites to this Court support the Tribe's argument, and contradict the United States argument. The United States counterproductively cites *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). At that pin cite, the Federal Circuit summarized

> The court went on to state that "where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." [*Friedman v. United States, 310 F.2d 381 (1962)] a*t 385. *Accord Batten v. United States,* 220 Ct.Cl. 327, 597 F.2d 1385, 1387 n. 10 (1979); *Bruno v. United States,* 214 Ct.Cl. 383, 556 F.2d 1104, 1106 (1977); *Burich v. United States,* 177 Ct.Cl. 139, 366 F.2d 984, 986 (1966); *see also Beebe v. United States,* 226 Ct.Cl. 308, 640 F.2d 1283, 1293 (1981).

127 F.3d at 1456.

In *Brown Park Estates*, the Federal Circuit discussed multiple other cases in which the courts have rejected the same erroneous argument based upon 28 U.S.C. § 2501 that the United States makes in this case. Because that analysis is clear, correct, and binding in this Court, the Tribe will rely upon that Court's writing.

> In the first case, Aktiebolaget Bofors ("Bofors") entered into a license agreement with the United States, under which the United States was permitted to make, use, or have made a certain type of anti-aircraft gun which Bofors had developed. *Aktiebolaget Bofors,* 153 F. Supp. at 398–99. The agreement contained a provision prohibiting the United States from exporting such guns to other countries. *Id.* Allegedly, shortly after entering into the agreement in 1941, and continuing for a number of years thereafter, the United States exported the Bofors guns to other countries in violation of the agreement. *Id.* at 399. Bofors brought suit in 1953, alleging breach of the agreement. *Id.* In response to the government's argument that the action was barred by section 2501, the court stated that "each act of violation, whenever it occurred, would constitute a violation of the agreement." *Aktiebolaget Bofors,* 153 F. Supp. at 399. Thus, Bofors was not barred from bringing suit for alleged violations of the license agreement occurring within the six year period before its suit was filed. *Id.* at 400.

127 F.3d at 1458

> In *Mitchell,* the plaintiffs—allottees of land on an Indian reservation—sued the government to recover damages allegedly arising from the mismanagement of their timber resources. 10 Cl.Ct. at 65. The plaintiffs claimed that the Secretary of the Interior, acting through the Bureau of Indian Affairs ("BIA"), had failed to properly discharge his duties under federal statutes that assigned to him various responsibilities with respect to the timber. *Id.* The government moved to dismiss for lack of timeliness those portions of the plaintiffs' claims that it contended involved events occurring more than six years prior to the commencement of the suit.
>
> The focus of the limitations issue was on the plaintiffs' stumpage and regeneration claims. The basis for the stumpage claims was the allegation that the BIA had sold the plaintiffs' timber at inadequate prices. *Id.* at 77. In their regeneration claims, the plaintiffs alleged that the BIA had failed to restock those portions of the timber allotments that had been cut or burned over. *Id.* As far as the stumpage claims were concerned, the Claims Court determined that "each such sale of a portion of timber generated a new and separate cause of action." *Mitchell,* 10 Cl.Ct. at 77. Accordingly, the plaintiffs could attempt to recover damages resulting from any timber sales in the six-year period before the filing of suit. *Id.*
>
> Turning to the regeneration claims, the court concluded that the BIA had a continuing duty to maintain the tracts of timberland in a state of productivity. *See*

> *Mitchell,* 10 Cl.Ct. at 788. The court viewed an ongoing breach of this "continuing duty as creating a series of individual actionable wrongs." *Id.* According to the court, "the existence of a continuing duty to regenerate mean[t] that on each day the BIA failed in its duty to regenerate a given [area], there arose a new cause of action." *Id.* The court concluded that "those causes of action which arose in the six-year limitations period may be sued upon." *Id.* The court stated: "[I]f the BIA allowed a particular tract to remain unproductive for decades, plaintiffs' claim regarding that tract is not forever lost. Rather, plaintiffs can sue for damages stemming from those breaches which occurred in the six years immediately preceding the filing of suit." *Mitchell,* 10 Cl.Ct. at 788. Finally, the court contrasted the BIA's obligations respecting regeneration and stumpage. Because the duty to replant was an ever-present one, "the non-performance of the duty [was] properly viewed as giving rise to a series of actionable breaches." *Id.* at 789. The duty to obtain adequate timber prices, however, arose at a specific point in time, namely, when the timber was sold. "The purported wrong [occurred] at that [specific point], and the subsequent failure to make plaintiffs whole is not a continuation of the original wrong, but merely a continuing effect of that wrong." *Id.* Thus, the Claims Court ruled that the plaintiffs could not pursue their stumpage claims with respect to timber harvested before the six-year limitations period, but that they could go forward with regeneration claims with respect to those harvests. *Id.*

127 F.3d at 1458–59

To attempt to get around the clearly established law discussed above, the United States attempts to change the facts. It asserts that its violation of law was many years ago, and that it is only the consequences of its breach of duty to the Tribe that are ongoing. It is simply wrong. Here, the United States is regularly allowing others to take minerals off of the lands at issue, and the United States is wrongly keeping the proceeds. A claim arises each time it does this. If the United States does not want to be sued for failing to provide the proceeds of such sales to the Tribe, it should stop violating the law.

VI. THE UNITED STATES ACKNOWLEDGES THAT ITS REQUEST TO DISMISS UNDER 28 U.S.C. § 1500 MUST BE DENIED UNDER LONG-STANDING AND RECENTLY REAFFIRMED FEDERAL CIRCUIT CASE LAW.

28 U.S.C. § 1500 states:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto,

> acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500.

Under this Court's precedent, there are two elements to a motion to dismiss under 28 U.S.C. § 1500: "(i) whether the district court action was 'pending' at the time jurisdiction under section 1500 is measured; and (ii) *if so*, whether the claims presented to the district court were the same as those in the instant case." *Skokomish Indian Tribe v. United States*, 115 Fed. Cl. 116, 123 (2014) (string citation omitted, emphasis added).

Here, as Defendant forthrightly admits, under the Federal Circuit precedent which is binding on this Court, Defendant cannot meet the first of these two elements. U.S. Br. at 35 n. 14. Circuit precedent interprets "pending in any other court" based upon the plain language of the statute. The Tribe had not filed a district court suit regarding the Uncompahgre Reservation at the time that the Tribe filed this CFC case, and therefore under long-standing and recently reaffirmed Circuit Court precedent interpreting 28 U.S.C. § 1500, the Tribe did not have a suit pending in the district court at the time the Tribe filed this case. *Id.*

This Circuit's precedents create a simple bright line test that a suit is pending after it has been filed. *See also* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). And as the emphasized phrase "if so" in the quotation above from *Skokomish Indian Tribe* directs, because the Defendant does not meet that first, simple, element, the Court does not

go on to analyze the more complicated second element. Here, Defendant admits it cannot meet the first element, and the Court's inquiry is done.[16]

Defendant, of course, understands that this Court cannot overturn or refuse to follow the Federal Circuit Court precedent on this issue, and it notes that it is raising the issue in section V of its brief because it disagrees with that Federal Circuit precedent and wants to "to preserve that argument here," U.S. Br. at 35 n. 4, for possible later appeals to a court which would have the

[16] Even if the Tribe had filed its CFC case after the district court case, this case would not be subject to dismissal because the claims presented to the district court are not "the same as those in the instant case." *Skokomish Indian Tribe*, 115 Fed. Cl. at 123. The two cases do have one relatively simple issue in common: Under the correct interpretation of the applicable acts of Congress from the 1800s, did the Tribe have recognized title to the Uncompahgre Reservation? The other core issues in this case are factually complex and factually intensive monetary damage issues: how much of the Tribe's money did the United States pocket when it was acting as the Tribe's broker for sale of land and minerals to which the Tribe had title. The primary fact-intensive issues in this case are not present at all in the District Court. Instead, the District Court suit starts from the same simple foundational legal issue (did the Tribe have recognized title?) but then requires determinations of other complex legal issues that are not present in this case. As the district court case proceeds, the United States will, no doubt, be making that same point.

power to overturn this Circuit's precedents on the issue.[17] Based upon binding and recent Circuit Court precedent, this Court must deny the United States motion to dismiss under 28 U.S.C. § 1500.

CONCLUSION

The Tribe has stated claims for money damages which are within this Court's jurisdiction. For all the reasons stated above, this Court should deny the United States Rule 12 motion to dismiss.

Respectfully submitted this 12th day of March, 2019.

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[17] The Tribe's position is that the Federal Circuit precedent on the issue are correct. 28 U.S.C. § 1500 defines an exception to the jurisdiction of this Court. The Federal Circuit's precedent is based upon the plain language of the statute. The Federal Circuit's interpretation of when a claim is "pending" for purposes of applying that exception was first adopted in 1965. Congress has amended the statute twice since that time, but did not amend the language relevant here. 96 Stat. 25 (1982); 106 Stat. 4516 (1992).
Additionally, the United States interpretation is likely barred by the First Amendment to the United States Constitution. That interpretation would at least be contrary to "the stream of authority which admonishes courts to construe statutes narrowly so as to avoid constitutional questions." *Schneider v. Smith*, 390 U.S. 17, 26 (1968). That rule of interpretation is particularly important to avoid infringement of first amendment rights. *E.g. United States v. Reeves*, 752 F.2d 995, 1001 (5th Cir. 1985); *Arnett v. Kennedy,* 416 U.S. 134 (1974) (applying rule to protect the first amendment right to petition). Here, the United States would prefer an interpretation of 28 U.S.C. § 1500 which would require a plaintiff to choose which grievances it would petition to cure. The Tribe would hope and expect that the Supreme Court would reject that interpretation if the issue is presented to them. But we need not be concerned with such lofty and complex issue at present. We are not at the Supreme Court, and we have binding Circuit precedent, and can follow those without rearguing the issues that the Circuit has decided consistently and repeatedly.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2019, I electronically filed the **RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of the Court via the ECF filing system, which will send notification of such filing to all parties of record.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen