IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHEMEHUEVI INDIAN TRIBE,	)	
	)	
Plaintiff,	)	**Case No. 16-492 L**
	)	
V.	)	
	)	**Chief Judge Patricia Campbell-Smith**
UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORADNUM IN OPPOSITION TO DEFENDANTS MOTION FOR DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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QUESTIONS PRESENTED

1. Whether the Chemehuevi Tribe's claims are barred in part by the Indian Claims Commission Act?

2. Whether the Chemehuevi Tribe's claims related to the MWD payments and the shoreline lands are time-barred.

3. Whether the Chemehuevi Tribe's trust fund mismanagement claims are barred by the general six-year statute of limitations.

4. Whether the Chemehuevi Tribe's trust fund mismanagement claims are barred by the statute of limitations.

5. Whether the Chemehuevi Tribe adequately states a claim upon which relief can be granted.

6. Whether the Chemehuevi Tribe is entitled to declaratory and injunctive relief that is tied and subordinate to a money judgement.

STATEMENT OF THE CASE

This case involves breach of trust claims by the Chemehuevi Indian Tribe[1]

[1]The Federal Government erroneously states that *"[a]t the time of this payment by the MWD in 1940, the Chemehuevi Tribe was not federally recognized; federal recognition was not reinstated until June 5, 1970."* (Brief in Sup., p. 2 (emphasis added).) The Chemehuevi Tribe was when federally recognized, but existed without an organized tribal government from 1939 until 1970, the Tribe adopted a federally-approved constitution under Section 16 of the 1934 Indian Reorganization Act of June 18, 1934 ("IRA"), ch. 576, 48 Stat. 987, 25 U.S.C. § 5123. See Exhibit 1 *infra* for a copy of the Tribal Constitution. The reason no organized tribal and government existed between 1939 and 1970 was because the Government, in 1939, condemned and flooded nearly all of fertile, habitable lands on the Chemehuevi Reservation for the Parker Dam Project, thereby forcing nearly the entire tribal membership off of the reservation. (*See* Second Amend. Compl., ¶¶ 2, 21, 27 and 81).

resulting from the United States' failure to collect, deposit, invest, manage, and account for the trust funds derived from its trust land and natural resources, and the United States failure to hold, protect, manage and maintain the Tribe's interests in the said trust funds in the manner prescribed by law. (Second Amend. Compl., ¶ 1*)*.

PERTINENT STATUTES IN THE CASE

RCFC 12 (b).

The United States' Motion to Dismiss is premised on Rule 12(b) of the Rules of the U.S. Court of Federal Claims, which states in pertinent part as follows:

> How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction;
>
> (2) lack of personal jurisdiction;
>
> (3) improper venue;
>
> (4) insufficient process;
>
> (5) insufficient service of process;
>
> (6) failure to state a claim upon which relief can be granted; and
>
> (7) failure to join a party under Rule 19.
>
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

RCFC 12(b).

Indian Claims Commission Act

The Indian Claims Commission Act, 25 U.S.C. § 70k (1946) (omitted from the U.S. Code pursuant to Commission termination on September 30, 1978. The Act provides that any tribal claim that accrued before August 13, 1946 and not filed with the Indian Claims Commission ("ICC") by August 13, 1951 could not "thereafter be submitted to any court or administrative agency for consideration," nor "thereafter be entertained by Congress."

General Court of Federal Claims Statute of Limitations

The General Court of Federal Claims Statute of Limitations, 28 U.S.C. § 2501. The Act states in part that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Act of December 22, 1987

The Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329. The Act imposed certain requirements on the United States, the relevant portions of which are reprinted in the separate Plaintiff's Appendix to Memorandum in Opposition to Defendant's Motion for Dismissal of Plaintiff's Complaint. (App. A1-A8.)

American Indian Trust Management Reform Act

The American Indian Trust Management Reform Act, 25 U.S.C. § 4001 *et seq*. Specifically, 25 U.S.C. § 4044 which states that:

> The Secretary shall transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995. In carrying out this section, the Secretary shall consult with the Special Trustee. The report shall include—
>
> (1) a description of the Secretary's methodology in reconciling trust fund accounts;
>
> (2) attestations by each account holder that—

(A) ***the Secretary has provided the account holder with as full and complete accounting as possible of the account holder's funds to the earliest possible date, and that the account holder accepts the balance as reconciled by the Secretary***; or

(B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance; and

(3) statement by the Secretary with regard to each account balance disputed by the account holder outlining efforts the Secretary will undertake to resolve the dispute. (emphasis added).

Interior Appropriation Act Riders

Relevant portions of the following Interior Department Appropriation Act Riders are contained in the separate Appendix to this Memorandum In Opposition To Defendants' Motion For Dismissal Of Plaintiff's Second Amended Complaint. See, Act of November 5, 1990, Pub. L. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. 104-134, 110 Stat. 1341; Act of September 30, 1996, Pub. L. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub. L. 105-83, 111 Stat. 1543; Act of October 21, 1998, Pub. L. 105-277, 112 Stat. 2681; Act of November 29, 1999, Pub. L. 106-113, 113 Stat. 1501; Act of October 11, 2000, Pub. L. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. 107-63, 115 Stat. 414; Pub. L. 109-158, 119 Stat. 2954 (December 30, 2005). (App. at A9-A103.)

COUNTERSTATEMENT OF THE FACTS

From time immemorial the Chemehuevi Indians ("Chemehuevi"), known to themselves as Nuwum, "The People," exclusively used and occupied the Mojave Desert's mountains and

canyons and the Colorado River shoreline. The Chemehuevi Tribe asserted a claim for aboriginal Indian title to this area in the Indian Claims Commission ("ICC"). See *Chemehuevi Tribe of Indians et al. v. United States*, 14 Ind. Cl. Comm. 651, 653-654 (January 18, 1965). (Second Amend. Compl., ¶ 7; *see also* Map showing the Chemehuevi Tribe's aboriginal title area attached to the Final Report of The Indian Claims Commission, dated September 30, 1978, a portion of which is attached to the Second Amended Complaint as Exh. A). By the mid-1800s, the Chemehuevi were living with the Mojave Indians near the present-day Fort Mojave Indian Reservation, and in 1865, both the Chemehuevi and Mojave were encouraged to move to the newly established Colorado River Indian Reservation in Arizona. (Second Amend. Compl., ¶ 8.)

The Secretary of the Interior, by order dated February 2, 1907, withdrew certain lands for the Chemehuevi on the California side of the Colorado River with the Colorado River as the eastern boundary. The withdrawal was made pursuant to the Act of January 12, 1891 (26 Stat. 712), as amended by the Act of March 1, 1907 (34 Stat. 1022), and established the 36,000-acre Chemehuevi Indian Reservation ("the Reservation"). (*Id.*, ¶ 11.)

A majority of the Reservation consisted of high mesa desert that was not suitable for farming, cattle grazing, or any other form of development. Harsh soil conditions, combined with temperatures commonly exceeding 120° Fahrenheit in the summer, made it difficult to inhabit. The other, far smaller, portion of the Reservation was a steep valley leading down to the Colorado River. Periodic flooding from the river left deposits of fertile soil along the riverbanks at the base of the valley, which, combined with the cool air from the shadowed river bottom caused by the walls of the valley, made the strip of land suitable for both agriculture and human habitation. All of the tribal members resided in the valley. (*Id.*, ¶ 12.)

Parker Dam Compensation Monies

In 1927, the Metropolitan Water District ("MWD") of southern California obtained rights to build canals, roads and dams through Chemehuevi tribal lands. (*Id.*, ¶ 13.) On February 10, 1933, the Interior's Bureau of Reclamation contracted with MWD for the cooperative construction and operation of Parker Dam on the Colorado River. Under the terms of the agreement, the MWD advanced funds to the United States for the construction of the dam, the dam's chief purpose was to provide a reservoir of clear water from which the MWD could pump a maximum supply of 1,500 cubic feet per second (cfs) of Colorado River water. (*Id.*, ¶ 14.)

In the Rivers and Harbors Act of August 30, 1935, Pub. L. 74-409, 49 Stat. 1028, Congress belatedly authorized the construction of the Parker Dam and Reservoir Project and ratified previous contracts made in aid of its construction. President Roosevelt signed the Act into law the same day. The Act, however, did not authorize the taking of any Indian land for the project. (*Id.*, ¶ 19.)

In a December 15, 1939 Solicitor's Opinion, Interior Department Solicitor Nathan R. Margold concluded that the Chemehuevi Indians were entitled to payment by the United States for "damages to certain lands . . . which will be flooded by the Parker Dam," i.e, by the Dam's creation of the Parker Reservoir (Lake Havasu), and that the MWD, for whose benefit the Parker Dam and Reservoir was being constructed, was the entity required to pay compensation for the taking pursuant to the contract between the Federal Government and the MWD dated February 10, 1933. (*See* Solicitor's Opinion (M.30318), 57 I.D. 87 (December 15, 1939).)

In Section 1 of the Act of July 8, 1940 (54 Stat. 744) Congress provided that "in aid of construction of the Parker Dam Project, . . . there is hereby granted to the United States, its

successor and assigns . . . all right, title and interest of the Indians in and to the tribal and allotted lands of the . . . Chemehuevi Reservation in California as may be designated by the Secretary of the Interior." In Section 2 of the Act, Congress further provided that "[t]he Secretary shall determine the amount of money to be paid to the Indians as just and equitable compensation for the rights granted under section 1 hereof. Such amount of money shall be paid to the Secretary by the [MWD], in accordance with the terms of the contract made and entered into on February 10, 1933 between the Interior, and the [MWD]. In the case of tribal lands, the amount due to the appropriate tribe shall be deposited by the said Secretary in the Treasury of the United States, pursuant to the Act of May 17, 1926 (44 Stat. 560), as amended."

On October 9, 1940, Acting Secretary of the Interior A.J. Wirtz approved payment to the Chemehuevis of $108,104.95. On November 25, 1941, Secretary Ickes approved a description of the reservation lands to be taken. (Second Amend. Compl., ¶ 26.) The Chemehuevi lands taken pursuant to the 1940 Act (54 Stat. 744) amounted to 7,776.14 acres. Of this total, tribal lands constituted 7,136.53 acres and allotted lands constituted 639.59 acres. The net taking was approximately 19.7% of the overall reservation that was established in 1907. The Project destroyed thousands of acres of rich and fertile crop lands and caused many families to be removed from their farm lands, with some moving back to the Colorado River Indian Reservation in Arizona. (*Id.*, ¶ 27.)

Payment was made to the Federal Government by the MWD in the amount of approximately $107,000.00, plus $1,069.00 for improvements, for inundating tribal and allotted lands for the Parker Dam and Reservoir, for a total compensation award of $108,104.95. Eleven (11) public domain allotments made on the Reservation were within the river- bottom area that

was taken, and $22,225.50 was set aside from the total award for payment of the allottees, leaving a balance of $80,879.45. It is undisputed that these funds were placed in a Treasury Account from 1940 until at least June 5, 1970. (*Id.*, ¶¶ 30, 36.) In response to the Tribe's jurisdictional discovery requests, the Federal Government has provided no documentation demonstrating that these funds were ever audited and reconciled at any time between 1940 and 1970, and there is documentary evidence indicating that some of these funds did not draw interest during that time period. (*Id.*, ¶¶ 34-35, 84.) Nor has the Government ever provided the Tribe with an accounting of the Parker Dam Compensation monies from 1970 until the filing of the Second Amended Complaint. (*Id.*, ¶ 86.)

It is unclear, based on the Federal Government's responses to the Tribe's jurisdictional discovery requests, whether these Parker Dam Compensation Monies, or any portion of them, were ever paid to the Tribe at any time between 1970 and 1972, or whether they became part of the 1992 Arthur Andersen Report account balances from 1972 to 1992, or whether they have ever been paid to the Tribe at any time from 1940 up until the date this Second Amended Complaint was filed with the Court. (*Id.*, ¶¶ 37, 83, 85, 86.)

Chemehuevi Land Claims

The Chemehuevi Indians filed two petitions in the Indian Claims Court (ICC). Docket No. 283 was filed on August 10, 1951 and Docket No. 351 was filed on August 11. 1951. Docket No. 351 was later separated into two claims on January 11, 1955: (a) Docket No. 351, which was a claim for a taking of Chemehuevi aboriginal title land in the present states of California, Arizona and Nevada, and (b) Docket No. 351-A, which was a claim for the accounting and other relief. (Second Amend. Compl., ¶¶ 40, 41.) On August 8, 1958, Docket

No. 283 was withdrawn and dismissed by the ICC by mutual agreement of the Chemehuevi parties. (*Id.*, ¶ 42.)

The claims in Docket Nos. 351 and 351-A were later settled for $996,834.81. (*Id.*, ¶¶ 44-47.) The Chemehuevi Tribe's ICC Judgment funds for Dockets 351 and 351-A were appropriated by the Act of June 30, 1965 (79 Stat. 81), and authorized for distribution in per capita payments to tribal members by the Act of September 25, 1970 (84 Stat. 868; 25 U.S.C., Subchapter LXV, §§ 1231-1236). (*Id.*, ¶ 48.) No accounting has ever been made by the Government to the Tribe regarding the retention, from June 1965 until at least September 1970, and/or the ultimate disbursement or disposition of the ICC Judgment Funds. (*Id.*, ¶ 94.)

In ¶ 50 of the Second Amended Complaint, the Chemehuevi Tribe has made a formal application to "claim, all unclaimed per capita payments, with interest, from the ICC judgment award for Dockets 351 and 351-A" under 25 U.S.C. § 164 and 25 C.F.R. § 115.820. (*Id.*, ¶ 50.)

The 1992 Arthur Andersen Report

By the Act of December 22, 1987, Pub. L. 100-202, 101 Stat. 1329, Congress imposed two requirements on the Federal Government: (1) to audit and reconcile tribal trust funds and (2) to provide the Chemehuevi Tribe and other tribes with an accounting of such funds. Congress reaffirmed these two mandates in subsequent statutes, namely, the Act of October 22, 1989, Pub. L. 101-121, 103 Stat. 701; the Act of November 5, 1990, Pub. L. 101- 512, 104 Stat. 1915; and the Act of November 13, 1991, Pub. L. 102-154, 105 Stat. 990. By these Acts, Congress further required that the Federal Government certify, through an independent party, the results of the reconciliation of tribal trust funds as the most complete reconciliation possible of such funds.

To satisfy the requirements of the Act of December 22, 1987, the Government, among

other things, retained the accounting firm of Arthur Andersen LLP ("Arthur Andersen") to prepare and issue reports to the Chemehuevi Tribe and other federally recognized tribes. The 1992 Arthur Andersen Reconciliation Report ("Arthur Andersen Report" or "Report") that the Chemehuevi Tribe received, however, was not sufficient to draw any conclusion on the accuracy of the accounting of the Tribe's trust funds, or the acceptability of the investment management of those funds by the Government. The Report failed to cover account activity during a sizable period of the time during which the Government exercised control and management over the Tribe's trust assets and did not provide any type of assessment of, or accounting for, other trust assets such as the Tribe's land and natural resources which are now, and have been, under the management and control of the Government. (Second Amend. Compl., ¶¶ 58, 140.) Specifically, the Report made no effort to audit the Chemehuevi Tribe's trust accounts before FY 1988, and instead merely carried forward unaudited starting balances. (*Id.*, ¶¶ 62, 142.) In addition to failing to cover the entire period during which the Federal Government managed the Tribe's trust funds and assets, the Report also failed to reconcile the Tribe's trust fund balances, and is therefore incomplete. (*Id.*, ¶ 61, 141.)

Mismanagement Of Tribal Water Rights

The Chemehuevi Tribe has long possessed quantified water rights under the *Arizona v. California* Supreme Court litigation. This litigation began in 1952 when Arizona invoked the Supreme Court's original jurisdiction to settle a dispute with California over the extent of each State's right to use water from the Colorado River system. Nevada intervened, seeking a determination of its water rights, and Utah and New Mexico were joined as defendants. (*Id.*, ¶ 99.) The United States intervened in the *Arizona v. California* case, seeking water rights on

behalf of various federal establishments, including five Indian reservations: the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation. The Supreme Court appointed Simon Rifkind as Special Master. (*Id.*, ¶ 100.)

The first round of litigation culminated in the Supreme Court's decision in *Arizona v. California,* 373 U.S. 546 (1963) (*Arizona I*). Among other determinations, the Supreme Court agreed with Special Master Rifkind that the United States had reserved water rights for the five Indian reservations under the doctrine of *Winters v. United States*, 207 U.S. 564 (1908). *See Arizona I*, 373 U.S. at 565, 599-601. Because the Tribes' water rights were effective as of the time each reservation was created, the water rights were considered as having "vested" before June 25, 1929, the effective date of the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617 et seq., and thus were "present perfected rights" under Section 6 of the Act, 43 U.S.C. § 617e, and given priority under the Act. *Arizona I*, 373 U.S. at 600.

The Supreme Court in *Arizona I* further agreed with the Special Master's conclusion that the quantity of water reserved for the Indian Reservations under the *Winters* doctrine "was intended to satisfy the future as well as the present needs of the Indian Reservations" and that therefore "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." *Arizona I*, 373 U.S. at 600.

The Court also found to be "reasonable" the various acreages of irrigable land that the Special Master fount to exist on the different reservations. *Arizona I*, 373 U.S. at 600. These findings were incorporated in the Supreme Court's decree of March 9, 1964, which specified the quantities and priorities of the water entitlements for the States, the United States, and the Tribes.

Arizona v. California, 376 U.S. 340 (1964). The water rights for the Chemehuevi Reservation were specifically quantified as "annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction 1of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907." *Id.* These quantified water rights were confirmed by the supplemental orders entered by the Supreme Court in 1979 and 1984, *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California*, 439 U.S. 419 (1979) (per curiam), and, most recently, by the Supreme Court's consolidated decree entered in 2006. *Arizona v. California*, 547 U.S. 150, 157 (2006).

Since the final adjudication of the Tribe's quantified water rights by the Supreme Court in *Arizona v. California* in 1964, the Chemehuevi Tribe has used or consumed on the Chemehuevi Reservation only a small portion of the Tribe's annual allocation of water from the Colorado River. (Second Amend. Compl., ¶ 107.) Since the final adjudication of the Tribe's quantified water rights by the Supreme Court in 1964, moreover, the Department of the Interior has declared the bulk of the Tribe's annual allocation "surplus water" and has made the Tribe's surplus water rights available to other junior users, such as the MWD, without any compensation to the Tribe. Thus, an Environmental Assessment (EA) prepared in December 1998 for the Bureau of Indian Affairs ("BIA") by TRC Mariah Associates of Albuquerque, New Mexico, regarding the Tribe's proposed 25-year lease of 5,000-acre feet per year of its quantified water rights, states as follows:

> Under the decree issued by the United States Supreme court (Arizona vs. California 376 U.S. 340 (1964), the Chemehuevi Indian Tribe (Tribe) has the right to divert up to 11,340 acre-feet of water each year from the Colorado River. *In the past, the Metropolitan Water District of Southern California (MWD) diverted*

> *5,000 acre feet of this water allocation annually without providing compensation to the Tribe.* To correct the status of water use, the Tribe proposes to lease the 5,000 acre feet of water to the Southeastern Nevada Water Company, Inc. (Lessee). The Lessee, in turn, will have the right to sublease the water to MWD, the San Diego Water Authority (SDCWA), the Golden State Water Company (GSWC), and other entities approved by the Tribe and the Secretary of Interior.

(Second Amend. Compl., ¶¶ 108, 109 and Exh. H attached to the Second Amend. Compl (emphasis added).) In his comments on the December 1998 EA, Supervisory Hydraulic Engineer Teh-hong Hsu went even further by admitting, "*Probably all the Tribe's past unused water*, not just 5,000 AF/yr, *was used by southern California*." (*Id.*, ¶ 110 (emphasis added).)

Pursuant to its powers under the Tribe's federally-approved constitution,[2] the Chemehuevi Tribal Council in 1998, negotiated a 25-year lease of 5,000-acre feet its surplus water rights to the Southeastern Nevada Water Company, Inc. (*See* Exh. I attached to the Second Amend. Compl.) The purpose of this long-term lease was to correct the legal situation concerning water use by MWD and provide money to the Tribe for Economic Development. Unemployment rate at the Chemehuevi Indian Reservation (Reservation) are high, and the Reservation's proximity to Lake Havasu City, Arizona, results in a tribal economy dependent on tourism. Natural resources on the reservation are limited, and the Tribe has few economic development options. The Tribe is

[2] Article IV, Sections 1 and 3 of the Chemehuevi Tribe's IRA Constitution provides in relevant part that "[t]he governing body of the Chemehuevi Indian Tribe shall be known as the Chemehuevi Tribal Council," and "[t]he Tribal Council shall consist of (9) voting members: a chairman, vice-chairman, secretary-treasurer, and six (6) councilmen." Article VII, Sections 1 (h) and (i) empowers the Tribal Council "[t]*o initiate, approve*, grant or reject *any* acquisition, disposition, ***lease***, encumbrance or condemnation ***of tribal lands or property***," *and "[t]o manage*, protect and preserve all lands, minerals, wildlife and ***other natural resources of the Chemehuevi Reservation***." See Exhibit 1 *infra*; https://archive.org/stream/tribal-constitutions-western/Chemehuevi%20Indian%20Tribe%20-%20Constitution#page/n25/mode/2up (emphasis added).

actively seeking other revenue sources to reduce poverty and provide funds for economic development in the areas of education, employment, health and agriculture. (Second Amend. Compl., ¶ 109 & Exh. H attached to the Second Amend. Compl.)

The Secretary of the Interior, however, failed and refused to exercise his power and authority under 25 U.S.C. § 81 and 25 U.S.C. § 415 to approve of the proposed 25-year lease by the Tribe of 5,000-acre feet of the Chemehuevi quantified water rights to the Southeastern Nevada Water Company, Inc. As a consequence of such failure and refusal, the Department of the Interior has continued to make the bulk of the Tribe's annual *Winter* water allocation available to other junior users, such as the MWD, without any compensation being paid to the Tribe, from 1999 up until the time of filing of this Second Amended Complaint. (*Id.*, ¶ 112.)

Mismanagement Of Shoreline And Suspense Accounts

By an order of the Secretary of the Interior handed down on November 1, 1974, equitable title to lands lying along twenty-one (21) miles of shoreline along the Colorado River was returned to the Chemehuevi Tribe after thirty-three (33) years. The Order provided that it "corrects the designation by Secretary Ickes of November 25, 1941, that certain lands of the Chemehuevi Indian Reservation should be taken for use in the construction of Parker Dam pursuant to the Act of July 8, 1940, 54 Stat. 744," and declared that "[t]he Chemehuevi Tribe has full equitable title to all those lands within the Chemehuevi Indian Reservation designated to be taken by Secretary Ickes in 1941 between the operating pool level of Lake Havasu on the east (elevation 450 feet m.s.l. [mean sea level]) and [certain described] north and south boundaries[.]" (Secretarial Order, p. 1 (DOI Nov. 1, 1974), Exh. J attached to the Second Amend. Compl.) The Secretary's November 1, 1974 Order further provided that:

> The Tribe shall have the exclusive right to use and occupancy of any lands below the operating pool level of the west bank of Lake Havasu (elevation 450 feet m.s.l.) located between the north and south boundaries of this corrected designation for hunting, fishing, recreational and other similar purposes, and, may with the prior approval of the Secretary of the Interior, construct or install or permit the construction or installation of improvements on such lands.

Secretarial Order, p. 3 (DOI Nov. 1, 1974).

The Government has never provided the Tribe with an accounting of the value of the loss to the Tribe of the twenty-one (21) miles of shoreline and associated assets, improvements and riparian rights for the thirty-three (33) years between November 1941 and November 1974. (Second Amend. Compl., ¶ 127.)

Following the promulgation of the Secretary of the Interior's November 1, 1974 Order, the two major sources of the annual income of the Chemehuevi Tribe have been (1) income from rents and leases and (2) income in the form of audited net profit distributions from the Havasu Landing Resort. The BIA has not held in trust any revenues generated and received by the Havasu Landing Resort, as income distributions from the Resort have been distributed directly from the Resort to the Chemehuevi Tribal Government. As for income from rents and leases, some of these payments are made directly to the Chemehuevi Tribe, and the remainder are made to the BIA for deposit to the Tribe's BIA "suspense accounts," also referred to as "special deposit accounts."[3] To receive the monies in the BIA suspense accounts, the Tribe's Tribal Council adopts resolutions calling for the draw down from the suspense accounts and disbursement of the proceeds to the Tribe's General Fund Account. (Second Amend. Compl., ¶¶ 131-134.)

[3] According to the BIA Realty Department for Colorado River Agency, Parker, Arizona, "the suspense accounts are primarily established for the purpose of receiving payment on pending leases, litigation actions, trespass and non-compliance activities." (Second Amended Complaint Exhibit "N").

The documentation provided by the Federal Government in response to the Tribe's jurisdictional discovery requests does not show that the Tribe's BIA suspense and/or special deposit accounts, or any of them, have ever been audited. (*Id.*, ¶ 136.)

STANDARD OF REVIEW

The United States' Motion to Dismiss is brought under RCFC 12(b)(1) and (6). A motion to dismiss under RCFC 12(b)(1) challenges the subject-matter jurisdiction of the Court of Federal Claims. In reviewing the sufficiency of a complaint for lack of subject- matter jurisdiction, "the court's task 'is necessarily a limited one,' whereby '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *George Family Trust ex rel. George v. United States*, 91 Fed. Cl. 177, 190 (2009) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

As a general rule, federal courts reviewing a motion to dismiss under Rule 12(b)(1) "consider the facts alleged in the complaint to be true and correct." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). In addition, courts indulge all reasonable inferences in favor of the nonmoving party. *George Family Trust*, 91 Fed. Cl. at 190. However, if the motion to dismiss "challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." *Reynolds*, 846 F.2d at 747. In such instances, the plaintiff "must demonstrate facts sufficient to support jurisdiction." *George Family Trust*, 91 Fed. Cl. at 190.

Pursuant to RCFC 12(b)(6), a complaint may be dismissed, in whole or in part, for failure to state a claim upon which relief can be granted. A motion to dismiss under RCFC 12(b)(6) tests

the sufficiency of the allegations of the complaint "and requires the court to determine whether a plaintiff has met the threshold standard of RCFC 8." *Bussie v. United States,* 96 Fed. Cl. 89, 95, *aff'd*, 443 Fed. App'x 542 (Fed. Cir. 2011). When considering such a motion, the court must accept as true all well-pleaded factual allegations in the complaint, and those allegations and the inferences arising therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007); *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999).

Under RCFC 12(b)(6), dismissal is appropriate only if, accepting as true all of the facts alleged in the complaint, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)).

The complaint is subject to dismissal under RCFC 12(b)(6) only if it "appears beyond doubt that the complaining party can prove no set of facts upon which relief may be granted." *Ford Motor Co.*, 497 F.3d at 1336; *see also Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999). If the factual allegations are sufficient to "raise a reasonable expectation that discovery will reveal evidence of" each necessary element of the plaintiff's claim, dismissal is unwarranted. *Twombly*, 550 U.S. at 556.

In the present case, the Court has subject-matter jurisdiction over the action such that dismissal is not appropriate under RCFC 12(b)(1). In addition, the Chemehuevi Tribe's Complaint cannot be dismissed outright under RCFC 12(b)(6). The Tribe has stated a claim for

relief that is facially plausible, and it does not appear beyond doubt that the Tribe can prove no set of facts upon which relief may be granted.

ARGUMENT

I. THE TRIBE'S CLAIMS ARE NOT BARRED BY THE INDIAN CLAIMS COMMISSION ACT.

At the outset, the United States incorrectly contends (Brief in Sup., pp. 11-13) that some of the Chemehuevi Tribe's breach-of-trust claims are barred by the ICC, which provided that all tribal claims that accrued before August 13, 1946 had to be filed within a five-year statute of limitations period, i.e., by August 13, 1951. *White Mtn. Apache Tribe of Ariz. v. United States*, 8 Cl. Ct. 677, 681 (1985).

In its motion papers, the United States concedes that the Chemehuevi Tribe filed two land claim petitions before the ICC by August 1951.[4] (Brief in Sup., p. 2.) Encompassed within these petitions were pre-August 13, 1946 claims, including a claim for damages and an accounting based on the Federal Government's failure to pay over and account for the funds the MWD paid to the United States for the benefit of the Tribe for the taking of the Tribe's lands by the 1940 Act for the Parker Dam and Reservoir Project. These claims were unquestionably filed within the five-year limitations period established by the ICCA. Hence, the Chemehuevi Tribe's claims that arose before August 13, 1946 were timely filed.

Further, case law has established that "if a wrongful course of government conduct began

[4] The two ICC petitions were Docket 283 and Docket 351 A. Docket 283 was withdrawn and dismissed by the ICC by mutual agreement of the Chemehuevi parties. (Second Amended Compl., ¶ 42). Docket 351 was separated into two claims; Docket 351 was a claim for a taking of Chemehuevi aboriginal tile land and Docket 351-A was a claim for an accounting and other relief. (Second Amended Compl., ¶ 41 (b)).

before August 13, 1946, and continued thereafter, the court may properly take account of, and award relief for, the damages suffered after the critical date resulting from the continuing wrongful conduct." *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 790 (1996); *see also Navajo Tribe v. United States*, 586 F.2d 192, 198, 218 Ct.Cl. 11 (1978), *cert. denied*, 441 U.S. 944 (1979). Here, the Chemehuevi Tribe has alleged that the Federal Government's wrongful course of conduct pertaining to the matters asserted in the two petitions began before August 13, 1946 and continued thereafter through the present date. Hence, the Court here has jurisdiction over the Tribe's trust management claims based on the Government's continuing course of wrongful conduct. *See Pueblo of San Ildefonso*, 35 Fed. Cl. at 790; *Navajo Tribe*, 586 F.2d at 1198.

II. THE TRIBE'S CLAIMS RELATED TO THE MWD PAYMENTS AND THE SHORELINE LANDS ARE NOT TIME-BARRED.

For the reasons set forth *supra* in Argument Part I, the Chemehuevi Tribe's claims pertaining to the payments the MWD made to the United States in March 1942 as compensation to the Tribe for the taking of tribal and allotted lands are not barred by the ICCA. The uncontroverted evidence shows that the Tribe filed two petitions with the ICC within the five-year limitations period established by the ICCA. These petitions included claims based on the Federal Government's taking of the Tribe's lands for the benefit of the MWD by the 1940 Act for the Parker Dam and Reservoir Project, and the Federal Government's subsequent failure to pay over and account for the funds the MWD paid to the United States for the benefit of the Tribe. (Second Amended Compl. ¶¶ 23-37, 40-41.)

The evidence is undisputed that the Federal Government has never provided an accounting of the monies the MWD paid to the United States as compensation to the Tribe for

the lands the MWD took for the Parker Dam and Reservoir Project. (Second Amended Compl. ¶¶ 23-37.) This amounts to a continuing wrong that began before August 13, 1946 and continued thereafter through the present date.

Similarly, the United States' temporary taking of the shoreline lands in November 1941, which were not restored to the Tribe until thirty-three years later in November 1974, amounted to a continuing wrong that began on November 25, 1941, the date of Secretary Ickes' designation of the land to be taken, and continued until November 1, 1974, the date of the Department of the Interior's Order that corrected that designation and thereby restored equitable title to the shoreline lands to the Tribe. (Second Amended Compl., ¶¶ 125 – 126.)

Case law has established that a court may "properly take account of, and award relief for, the damages suffered after the critical date resulting from the continuing wrongful conduct." *Pueblo of San Ildefonso*, 35 Fed. Cl. at 790; *see also Navajo Tribe*, 586 F.2d at 198. As a result, the Tribe's claims based on (a) the payments the MWD made to the United States in 1942 and (b) the deprivation of revenue from the shoreline lands from November 1941 until November 1974, are not time-barred. *See Pueblo of San Ildefonso*, 35 Fed. Cl. at 790; *Navajo Tribe*, 586 F.2d at 198.

III. THE TRIBE'S TRUST FUND MISMANAGEMENT CLAIMS ARE NOT BARRED BY THE GENERAL SIX-YEAR STATUTE OF LIMITATIONS.

The United States incorrectly relies on the general six-year statute of limitations, 28 U.S.C. § 2501 as barring all of the Tribe's claims "that accrued or existed before April 20, 2010 (*i.e.,* six year before the filing of this case)." (Brief in Sup., p. 13.)

The six-year statute of limitations applicable to Indian tribal trust fund claims accrues only after a tribe receives a complete and meaningful accounting of trust funds from the United

States and the United States, as trustee, repudiates the trust. See 25 U.S.C. § 4044; 28 U.S.C. § 2501; *see also Shoshone Indian Tribe of Wind River Reservation v. United States* ("*Shoshone Indian Tribe II"*), 672 F.3d 1021, 1030, 1034 (Fed. Cir. 2012); *Goodeagle v. United States*, 111 Fed. Cl. 716, 721 (2013). Neither part of this test is satisfied here.

Under the first part of this accrual test, a claim for losses to or mismanagement of Indian or tribal trust funds does not arise until the date that the affected tribe or individual Indian has been furnished with a complete and meaningful accounting of such funds from the Federal Government. See *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316-17 (2011), *on remand*, 423 Fed. App'x 997 (Fed. Cir. 2011); *Shoshone Indian Tribe of Wind River Reservation v. United States* ("*Shoshone Indian Tribe I*"), 364 F.3d 1339, 1346 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005); *Osage Nation v. United States*, 57 Fed. Cl. 392, 398 (2003). This is true even if the "operative facts" show the Federal Government's mismanagement of tribal trust funds "began occurring decades ago." *Quapaw Tribe of Okla. v. United States* ("*Quapaw Tribe I*"), 111 Fed. Cl. 725, 732 (2013). In effect, the statutory language is reflective of a Congressional intent "to allow Indian tribes to file tribal trust fund mismanagement claims within six years after an accounting of the trust fund is furnished to the Tribe no matter when the mismanagement may have occurred." *Osage Nation*, 57 Fed. Cl. at 398 (emphasis added).

Pursuant to the second part of the accrual test, the statute of limitations does not run against an Indian tribe as beneficiary of a trust and in favor of the Federal Government as trustee until the trust is repudiated and the fiduciary relationship terminated. *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, 130 F.Supp.3d 391, 396-97 (D.D.C. 2015); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1238, 1249 (N.D. Cal. 1973); *see also*

Oldland v. Gray, 179 F.2d 408, 416 (10th Cir.), *cert. denied*, 339 U.S. 948 (1950) (statute of limitations does not begin to run against a trust "until it is openly disavowed by the trustee"); *Cobell v. Norton*, 260 F.Supp.2d 98, 104 (D.D.C. 2003) (statute of limitations "does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated" (internal quotation marks omitted)).

In regard to an action for an accounting of an Indian tribal trust account, the Federal Government repudiates a claim when it rejects the findings of a reconciliation report or compels a tribe to file a lawsuit. *Quapaw Tribe of Okla. v. United States* ("*Quapaw Tribe II*"), 123 Fed. Cl. 673, 678 (2015).

In *Sisseton Wahpeton Oyate*, ten federally recognized Indian tribes filed suit on April 30, 2013 against certain Federal Government authorities and agencies for breach of fiduciary duty in the management of tribal trust accounts. Because it was undisputed that the tribes had received reconciliation reports 14 years earlier, in 1996, the Federal Government filed a motion to dismiss on statute of limitations grounds. 130 F. Supp. 3d at 396. However, the court found that neither the ITAS nor the legislative history related to the statute clearly provided that a tribe's mere receipt of a reconciliation report was sufficient to trigger the statute of limitations applicable to tribal trust claims against the United States based on the Federal Government's mismanagement of such funds. *Id.* at 397.

Rather, the *Sisseton Wahpeton Oyate* court acknowledged that the tribes' claims against the Federal Government may have accrued, for statute of limitations purposes, on the date the trust was repudiated by the Federal Government. *Id.* at 396-97. This result accorded with common-law principles applicable to trusts and fiduciaries. *Id.*

Here, the Chemehuevi Tribe's trust fund management claims have not yet accrued for statute of limitations purposes because (1) the Tribe was never furnished with a complete and meaningful accounting of trust funds from the Federal Government, and (2) the Federal Government has not repudiated the trust and terminated the fiduciary relationship by rejecting the findings in the Tribe's Arthur Andersen Report. As a result, the Tribe's trust fund mismanagement claims, including those based on the inadequacy of the Arthur Andersen Report, are not time-barred, and the action is not subject to dismissal on statute of limitations grounds.

IV. NONE OF THE TRIBE'S TRUST MISMANAGEMENT CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Nonmonetary Trust Asset Claims Predating April 20, 2010

The Chemehuevi Tribe filed the instant lawsuit against the United States on April 20, 2016. Incorrectly relying on the general six-year statute of limitations set forth 28 U.S.C. § 2501, the United States contends that all of the Tribe's nonmonetary trust asset claims against the Federal Government that arose more than six years prior to the date the Complaint was filed (that is, before April 20, 2010) are time-barred.

The Federal Government's assertions contravene the express language of the ITAS and, therefore, are not legally meritorious. *Shoshone II*, 672 F.3d at 1034; *Goodeagle*, 111 Fed. Cl. at 721. The Chemehuevi Tribe's claims based on the flawed Arthur Andersen Report the Federal Government provided never accrued because the Tribe never received a complete and meaningful accounting of nonmonetary trust assets from the United States. See 25 U.S.C. § 4044; *Tohono O'Odham Nation*, 563 U.S. at 316-17; *Osage Nation*, 57 Fed. Cl. at 398. The Tribe should be permitted to file both nonmonetary trust asset mismanagement and trust fund mismanagement claims within six years after a complete and meaningful accounting of the trust

asset or trust fund is finally furnished to the Tribe "no matter when the mismanagement may have occurred." *Osage Nation*, 57 Fed. Cl. at 398.

In addition, the Federal Government's arguments completely overlook certain well-established principles of common law. When a fiduciary relationship between the parties exists, "the universal rule is that 'a statute of limitation does not begin to run . . . until the relationship is repudiated.'" *Manchester Band of Pomo Indians*, 363 F. Supp. at 1249 (quoting *Kasey v. Molybdenum Corp. of Am.*, 336 F.2d 560, 569 (9th Cir. 1964)); s*ee also Oldland*, 179 F.2d at 416; *Cobell*, 260 F. Supp. 2d at 104. This rule applies with equal force in cases seeking relief for the United States' alleged breaches of fiduciary duty in regard to the management of tribal trust accounts under the Trust Fund Reform Act. *Sisseton Wahpeton Oyate*, 130 F. Supp. 3d at 396-97. Even if the tribe receives a reconciliation report, its breach-of-fiduciary-duty claims do not begin to accrue until the date that the Federal Government, as trustee, actually repudiates the trust. *Id.*; *see also Oldland*, 179 F2d at 416; *Cobell*, 260 F. Supp. 2d at 104. Repudiation occurs when the Federal Government rejects the findings of the reconciliation report or compels the tribe to file a lawsuit. *Quapaw Tribe II*, 123 Fed. Cl. at 678.

Here, the Federal Government has never repudiated the findings of the Arthur Andersen Report that was provided to the Tribe. In addition, the United States has never provided the Tribe with a complete accounting of trust assets and trust funds. (Compl. ¶ 16.) Accordingly, the earliest date that the United States reasonably could be found to have repudiated the Tribe's trust claims was on April 16, 2016, the date that the Tribe filed the instant lawsuit. It follows that the six-year statute of limitations set forth in 28 U.S.C. § 2501 does not serve to bar any of the Tribe's trust mismanagement claims against the Federal Government that arose prior to April 20,

2010, as the United States incorrectly contends. Thus, the United States' motion to dismiss all claims that arose prior to this date must be denied.

B. Effect Of Interior Department Appropriations Riders

The Interior Department's Appropriations Act contains a tolling provision. This provision expressly provides that "[N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe . . . has been furnished with [a complete] accounting of such funds from which the beneficiary can determine whether there has been a loss." *Shoshone Indian Tribe II*, 672 F.3d at 1034 (citing Department of the Interior Appropriations Act of 2009, Pub.L. No. 111-88, 123 Stat. 2904 (2009)).

Also see Appropriation Acts cited on page 4 *supra*. These appropriation acts, collectively known as the Indian Trust Accounting Statutes ("ITAS"), suspend accrual of the statute of limitations for certain tribal trust claims. *Shoshone II*, 672 F.3d at 1034. Specifically, the ITAS "displace[s] 28 U.S.C. § 2501 as to claims 'concerning losses to or mismanagement of trust funds.'" *Quapaw Tribe I*, 111 Fed. Cl. at 732; *see also Goodeagle*, 111 Fed. Cl. at 721.

Contrary to the United States' contentions, the language of the 2016 appropriations act did not render the Tribe's trust fund mismanagement claims untimely. The appropriations acts of prior years did not change existing law but, rather, corresponded with and supplemented such laws. Those laws could not be repealed by implication merely through the absence of certain language in the 2016 appropriations act. See *Wolfchild v. United States*, 559 F.3d 1228, 1258 n.13 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1086, and *cert. denied*, *Zephier v. United States*, 559 U.S. 1067 (2010); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1369 (Fed. Cir. 2002).

In effect, the absence of certain language in the 2016 appropriations act is insufficient to change or negate existing statutory law, specifically, the Trust Fund Reform Act. Accordingly, the 2016 appropriations act cannot be relied upon to render untimely the Tribe's trust fund mismanagement claims against the United States.

Accordingly, the Chemehuevi Tribe is entitled to assert trust fund mismanagement claims against the United States that predate April 20, 2010. The Federal Government's arguments to the contrary must be rejected as unmeritorious.

C. Existence Of Factual Disputes

In its Memorandum in Support, the United States raises various factual issues or disputes to argue that the Tribe's Second Amended Complaint was untimely filed. These factual claims are contrary to the allegations of the Second Amended Complaint and the reasonable inferences drawn therefrom.

It is axiomatic that for purposes of the Federal Government's Motion to Dismiss, all factual assertions and inferences must be construed in the Chemehuevi Tribe's favor. *See Ford Motor Co.*, 497 F.3d at 1336; *Ritchie*, 170 F.3d at 1097; *Reynolds*, 846 F.2d at 747; *George Family Trust*, 91 Fed. Cl. at 190. Viewing the allegations of the Complaint in this light, as the Court is compelled to do, it must be concluded that questions of fact exist which preclude the disposition of the case at this early stage of the litigation.

To begin with, for a Complaint to be subject to dismissal under RCFC 12(b)(1), the defendant's motion to dismiss generally "must challenge[] the truth of the jurisdictional facts alleged in the complaint." *Reynolds*, 846 F.2d at 747. Here, the United States has not asserted any facts or arguments that in any way contradict the truth of the jurisdictional facts the Tribe raises

in the Second Amended Complaint.

As the Federal Government concedes, the Chemehuevi Tribe timely filed two petitions before the ICC that encompassed the matters in dispute in this litigation. The United States has failed to raise any facts to contradict the Tribe's assertion that the Federal Government has engaged in a continuing course of wrongful conduct through the present date with regard to the matters asserted in those petitions. Hence, the Complaint is not subject to dismissal pursuant to RCFC 12(b)(1). *See Reynolds*, 846 F.2d at 747.

Indeed, the jurisdictional arguments raised by the Federal Government in this case were wholeheartedly rejected by the district court in the analogous case of *Sisseton Wahpeton Oyate*, 130 F. Supp. 3d at 391. There, ten federally recognized Indian tribes filed suit in 2013 against the Federal Government for breach of fiduciary duty in the management of tribal trust accounts. The Federal Government moved to dismiss the action on the ground that the tribes had received Arthur Andersen reconciliation reports fourteen years earlier, in 1996. *Id.* at 396.

As discussed above, the *Sisseton Wahpeton Oyate* court determined that tribes' mere receipt of a reconciliation report was insufficient to trigger as a matter of law the accrual of the statute of limitations. *Id.* at 397. In reaching this decision, the court stated: "The parties have not yet had the opportunity to develop a record through discovery on when Plaintiffs' claims accrued, and the factual issues related to accrual preclude deciding the issue of the statute of limitations at the motion to dismiss stage." Id.

The *Sisseton Wahpeton Oyate* court's reasoning is directly applicable to the present case. Because the United States chose to file a motion to dismiss rather than to answer the Complaint, the Tribe has not had any opportunity to engage in discovery to develop a record on when its

claims against the Federal Government accrued. Further, the question as to when accrual occurred involves factual determinations, such as the date, if any, that the Tribe received a complete and meaningful reconciliation report that was sufficient to trigger the accrual of the statute of limitations and the date, if any, that the United States repudiated the trust. *See id.*

Given the presence of these factual issues, it would be inappropriate for the Court to dismiss the Chemehuevi Tribe's Complaint outright, without providing the Tribe with an opportunity to engage in further pretrial discovery on the issue as to when the its claims against the Federal Government accrued. *See id.*; *see also Richards v. Mileski*, 662 F.2d 65, 73 (D.C.Cir. 1981). Accordingly, the United States' 12(b)(1) Motion to Dismiss is not well taken and should be denied.

V. THE TRIBE ADEQUATELY STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Dismissal is not appropriate under RCFC 12(b)(6) for failure to state a claim upon which relief may be granted. In this regard, the United States has failed to meet its burden of demonstrating that it was "beyond doubt that [the Tribe] can prove no set of facts which would entitle [it] to relief." *Davis ex rel. LaShonda D.*, 526 U.S. at 654; see also *Ford Motor Co.*, 497 F.3d at 1336. As a result, the Federal Government has failed to meet the high burden of proof necessary to entitle it to an order of outright dismissal.

A. The Tribe Adequately States Breach of Trust Claims Regarding Failure Of The Government To Maximize The Income From The Tribe's Trust Funds, As The Investment Statutes – 25 U.S.C. §§ 161, 161a, 162(a), 4011 and 4044 – Create Specific Fiduciary Duties Whose Breach Gives Rise To Money-Mandating Tucker Act Claims For Damages.

The decision of the Court of Claims in "*Cheyenne-Arapaho* [*Tribes of Indians of Oklahoma v. United States*, 206 Ct.Ct. 340, 348, 512 F.2d 1390, 1394 (1975)] recognizes that the

Indian Tucker Act [, 28 U.S.C. § 1505,] combined with the investment statutes — 25 U.S.C. §§ 161a, 161b and 162a — provide jurisdiction over [breach of trust] claims predicated upon the assertion that defendant has not maximized the income of a tribal trust by prudent investment." *Jicarilla Apache Nation v. U.S.*, 100 Fed.Cl. 726, 732 (2011). Thus, "[t]he Court of Claims has addressed the statutory obligations under 25 U.S.C. §§ 161a, 161b, and 162a on a number of occasions and has uniformly held the United States responsible for investing Indian trust funds in the highest yielding investment vehicles available to the funds in question." *Osage Tribe of Indians of Okla. v. United States*, 72 Fed.Cl. 629, 668 (2006). "The requirement to invest Indian trust funds in the highest yielding investments available is a legal requirement mandated by the applicable statutes—here, 25 U.S.C. § 161a and 162a – and not solely a prudential one." *Id.*

Most recently, in *Western Shoshone Identifiable Group v. United States*, ___ Fed.Cl. ___, 2019 WL 2480154 (June 13, 2019) (No. 06-8961), the Court recognized that "[p]reviously, the United States Court of Claims, as indicated above, a predecessor court to this court, and Judges of the United States Court of Federal Claims have determined that the government has a fiduciary duty to invest tribal trust funds pursuant to 25 U.S.C. § 162a." *Id.,* *52. The Court held that, based on the language of 25 U.S.C. § 162a, "which was in effect during the entire time the government held in trust plaintiffs' three tribal trust fund," and "its implementing regulations, which were promulgated during the investment period at issue for plaintiffs' three tribal trust funds, the Department of the Interior, and not the tribes, retained final control and supervision of plaintiffs' three tribal trust funds during the thirty-three-year period covered in the current case, including for the investment of the funds in government backed securities." *Id.* "The government, thus, assumed a fiduciary duty when investing plaintiffs' tribal trust funds pursuant

to 25 U.S.C. § 162a." *Id.* The Court ultimately concluded that "there were various times during the investment periods at issue . . . when the government's investment of all three tribal trust funds fell below the required standard of prudence." *Id.*, *104.

In this case, the factual allegations of the Second Amended Complaint show that, for many years, the Government, and not the Chemehuevi Tribe, "retained final control and supervision" of the Tribe's trust accounts, including the accounts holding the Parker Dam Compensation monies and the ICC Judgment Funds accounts. The Government thereby assumed fiduciary duties to invest the Tribe's tribal trust funds in accordance with the requirements of the investment statutes – 25 U.S.C. §§ 161a, 161b and 162a, and 25 U.S.C. §§ 4011 and 4044. The Government may therefore be held liable for breach of these fiduciary duties, and damages for the breach may be recovered under the Indian Tucker Act.

B. The Tribe Adequately States A Breach Of Trust Claim Regarding Its Surplus *Winters* Reserved Water Rights, As The Government's Statutory Trust Duty To Give Priority To Those Rights And Its Total Control Over The Use And Disposition Of The Tribe's Surplus *Winters* Water Rights Gave Rise To A Common Law Trust Relationship Between The United States And The Tribe.

The Tribe's *Winters* reserved water rights, "having vested before the [Boulder Canyon Project] Act became effective [by the issuance of a Presidential Proclamation] on June 25, 1929, are 'present perfected rights,' [under Section 6 of the Act, 43 U.S.C. § 617e] and, as such, *are entitled to priority under the Act*." *Arizona v. California* I, 373 U.S. at 600 (emphasis added). Indeed, the Supreme Court recognized that "[o]ne of the most significant limitations in the Act is that *the Secretary is required to satisfy present perfected rights . . ..*" *Id.* at 584 (emphasis added). Thus, under the Project Act, the Government had (and continues to have) a trust obligation to ensure the enforcement of the priority of the Chemehuevi Tribe's *Winters* reserved

water rights, including the Tribe's surplus *Winters* water rights, over the appropriative water rights of more junior users of Colorado River water. Given this "'specific, applicable, trust-creating statute . . . that the Government violated,'" *see U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (quoting *U.S. v. Navajo Nation* [*Navajo II*], 556 U.S. 287, 302 (2009)), the Government's exercise of complete control over the use and disposition of the Tribe's surplus *Winters* reserved water rights gave rise to a common law trust relationship between the United States as trustee and the Tribe as beneficiary. "Once federal law imposes [fiduciary] duties [on the Government], the common law 'could play a role,'" and the Court may "look[] to common-law principles to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed." *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *Navajo II*, 556 U. S. at 301).

It is well established that a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [tribe or] allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). *United States v. Mitchell* [*Mitchell II*], 463 U.S. 206, 225 (1983) (footnote omitted).

In this case, the Government for many years, beginning sometime before 1998, has

exercised complete control and supervision over the use and disposition of the Tribe's surplus *Winters* reserved water rights, by prohibiting the Tribe from leasing such water rights for off-reservation use and instead consistently diverting such surplus water rights to the use of junior water users, such as MWD, apparently free of charge, in violation of the Government's trust obligation under the Project Act to give priority to the Tribe's *Winters* reserved water rights. All of the necessary elements of a common-law trust are present, namely a trustee (the United States), a beneficiary (the Tribe), and a trust corpus (*Winters* water rights). Because the Government took on the control and supervision of the Tribe's surplus *Winters* reserved water rights, a common law fiduciary relationship existed even in the absence of any statute or treaty imposing an express trust duty.

The Supreme Court long ago recognized that the Government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should . . . be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). Thus, "the conduct of the Government as a trustee [of tribal assets] is measured by the same standards applicable to private trustees." *Manchester Band of Pomo Indians*, 363 F. Supp. at 1245; *accord, Cobell v. Norton*, 283 F. Supp.2d 256, 261 (D.D.C. 2003), *vacated in part on other grounds*, 392 F.3d 461 (D.C.Cir. 2004).

"A trustee has a duty to make the trust corpus productive." *Pennsylvania Department of Environmental Resources v. Warren Sand & Gravel Co., Inc.*, 62 Pa.D.&C.2d 679, 685 (Pa. Environmental Hearing Board 1973), citing 2 Scott, Trusts §181 (3rd ed. 1967), and holding, under public trust doctrine, the State of Pennsylvania, as trustee, had the duty and authority to sell sand and gravel from the bed of the Allegheny River, subject to environmental restrictions.

This Court likewise has recognized that the Government has a "trust duty to 'make the trust property productive' with respect to the Tribes' mineral and other assets." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 51 Fed.Cl. 60, 68 (2001), citing *Restatement (Second) of Trusts* § 181 (1959) ("[T]rustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality.").

A trustee is also required to exercise "*reasonable skill and care* to make the trust property productive[.]" *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161, 1168 (1982) (emphasis added) (applying federal Indian law to land trust for benefit of Native Hawaiians). The federal courts likewise has recognized that the Government has a fiduciary duty to the Tribes "'to use *reasonable care and skill* to make the trust property productive[.]" *Shoshone Indian Tribe of the Wind River Reservation*, 51 Fed.Cl. at 68 (emphasis added); *Manchester Band of Pomo Indians*, 363 F. Supp. at 1245 ("[I]t is well recognized that the trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."); *see generally United States v. Mason, Administrator*, 412 U.S. 391, 398 (1973) (while serving in a fiduciary capacity regarding Indians, the Government "is duty bound to exercise great care in administering its trust"). While the Government is not thereby made "an insurer of trust property," it must, in administering the trust, "'exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'" *Mason*, 412 U.S. at 398 (quoting 2 A. Scott, Trusts 1408 (3d ed. 1967)). By the Secretary of the Interior's failure or refusal to exercise his or her power under 25 U.S.C. §§ 81 and 415 to allow the Chemehuevi Tribe to lease its surplus water allocation for off-reservation use, the Government has failed to

exercise reasonable skill and care to make this trust asset productive.

Finally, the trust must be administered by the Government "solely in the interest of the beneficiary." *Manchester Band of Pomo Indians*, 363 F. Supp. at 1245, citing *Restatement (Second) of Trusts*, § 170(1) (1959); accord, *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. at 340, 640 P.2d at 1169. Thus, in *Ahuna,* the Hawaii Department of Hawaiian Home Lands (the department) awarded a Hawaiian Home Lands trust beneficiary a lease of about 6.5 acres of a 10-acre lot, withholding the remainder because the parcel would be affected by a proposed highway. The trial court directed that the department issue a lease for the full 10 acres. Affirming, the Hawaii Supreme Court held that the department "impermissibly weighed the interests of certain third parties" — including the State, the County of Hawaii, and Hawaii taxpayers in general — when it refused to lease the entire ten acres. 64 Haw. at 340, 342, 640 P.2d at 1169, 1171. On information and belief, the Federal Government likewise impermissibly weighed the interests of third parties, in particular the interests of junior water users such as the MWD and its California users and ratepayers, in failing and refusing to approve the Tribe's proposed long-term lease of its surplus water allocation for off-reservation use.

The Government's reliance on *Gros Ventre Tribe v. United States,* 469 F.3d 801 (9th Cir. 2006), *cert. denied*, 552 U.S. 824 (2007), is entirely misplaced. In that case, the plaintiff tribes "argue[d] that the government . . . failed to properly consider tribal interests in the approval and permitting of the [upriver, off-reservation] Zortman and Landusky [gold] mining operations. Moreover, they argue[d] that the [Bureau of Land Management's] failure to fully reclaim the mines and restore the quantity and quality of the Tribes' water resources constitutes an ongoing breach of the government's trust obligations." 469 F.3d at 811. The Ninth Circuit, in rejecting

the tribes' breach of trust claim, initially pointed out that this claim "is no different from that which might be brought under the generally applicable environmental laws available to any other affected landowner, subject to the same statutory limitations." *Id.* The Court further reasoned that "[a]lthough the Tribes may disagree with the current state of Ninth Circuit caselaw, as it now stands, 'unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" *Id.* at 810 (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

The appeals court further observed that "this situation is unique from other cases where courts have required the United States to comply with a specific fiduciary obligation; here, the Tribes seek to impose a duty, not found in any treaty or statute, to manage non-tribal property for the benefit of the tribes." *Id.* The court elaborated on this alternative holding by saying:

> We are not aware of any circuit or Supreme Court authority that extends a specific *Mitchell*-like duty to non-tribal resources. Indeed, as we recently stated in *Marceau* [*v. Blackfeet Housing Auth.*, 455 F.3d 974 (9th Cir. 2006), *opinion adopted in part, modified in part on rehearing,* 540 F.3d 916 (9th Cir. 2008), *cert. denied,* 556 U.S. 1235 (2009)], the government does not bear complete fiduciary responsibility unless it has "take[n] full control of a *tribally-owned* resource and manage[d] it to the exclusion of the tribe." 455 F.3d at 984 (emphasis added)[.]

Id. at 813 (emphasis the court's).

In this case, unlike in *Gros Ventre Tribe*, the Tribe's breach of trust claim is premised, not on a general trust obligation of the Government, but rather on a specific, applicable, trust-creating statute, namely the provision of the Boulder Canyon Project Act granting the Tribe's *Winters* reserved water rights priority, as "present perfected rights," over the rights of junior

water users of the Colorado River water. The Tribe therefore is not, as the Government argues, attempting to "bootstrap general trust duties into money-mandating trust duties." (Brief in Sup., p. 24.) Furthermore, the facts of this case, unlike those in *Gros Ventre Tribe*, demonstrate that the Government took full control of a *tribally-owned resource* – namely the Tribe's surplus *Winters* reserve water rights – and managed that resource to the exclusion of the Tribe.

Similarly, the decision in *Standing Rock Sioux Tribe v. U.S. Army Corp of Engr's*, 255 F. Supp. 3d 101, 144, 155 (D.D.C. 2017), cited and relied upon by the Government (Brief in Sup., pp. 24-25), is distinguishable from the instant case. The plaintiff tribes in that case failed to "point . . . to a specific statute, treaty, executive order, or other provision that gives rise to specific fiduciary duties." 255 F.Supp.3d at 144. Again, the Tribe in this case points to § 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e, as interpreted by the Supreme Court in *Arizona v. California I*, granting the Tribe's *Winters* reserved water rights, as "present perfected rights," priority over the rights of more junior water users of the Colorado River water. This statutory provision necessarily implies a trust obligation on the part of the United States to enforce the priority of the Tribe's *Winters* reserved water rights vis-a-vis the rights of more junior water users, such as MWD.

Likewise, the Government's reliance (Brief in Sup., p. 25) on certain dicta in *Crow Creek Sioux Tribe v. United States,* 900 F.3d 1350 (Fed. Cir. 2018) is unavailing. In that case, the plaintiff tribe argued that "various government actions and inactions with respect to the Missouri River, including the operation of the Pick-Sloan dams, constitute[d] . . . a breach of the government's fiduciary duty under 25 U.S.C. § 162a(d)(8) to 'appropriately manage[]' the Tribe's vested, *Winters* water rights . . .." 900 F.3d at 1355. In addressing this argument, the Federal

Circuit initially commented that:

> While it is clear that the tribe possesses *Winters* [water] rights, it is not clear whether those rights are protected by § 162a(d)(8) [as "natural resources" within the meaning of the statute]. Because § 162a(d)(8) does not define "appropriate management" of natural resources and does not assign the Secretary any standards or specific obligations as to natural resources, the government argues that § 162a(d)(8) is not the kind of "specific rights-creating or duty-imposing statutory or regulatory prescription[]" required to support jurisdiction under the Indian Tucker Act. *United States v. Navajo Nation* [*Navajo Nation I*], 537 U.S. 488, 506-07, 514 . . . (2003) (holding that the Indian Mineral Leasing Act does not give the Secretary sufficient specific responsibilities to support Indian Tucker Act jurisdiction). But we need not decide that question. If § 162a(d)(8) does not cover *Winters* rights, the Tribe has suffered no injury under the statute. And even if *Winters* rights are "natural resources" for purposes of the statute, the Tribe still has not established standing.

Id. at 1355-56.

Unlike the questions surrounding 25 U.S.C. § 162a(d)(8), which were left unresolved by the Federal Circuit in *Crow Creek Sioux Tribe*, § 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e, has been held by the Supreme Court in *Arizona v. California I* to grant the Tribe's *Winters* reserved water rights, as "present perfected rights," priority over the rights of more junior water users of the Colorado River water, and that provision is therefore a "specific rights-creating . . . statutory . . . prescription." *U.S. v. Navajo Nation* [*Navajo Nation I*], 537 U.S. 488, 506 (2003). The Project Act thus implicitly imposes a trust duty on the United States to enforce the Tribe's statutory right to the priority of its *Winters* reserved water rights over the water rights of more junior users.

Finally, it makes no difference whether or not the Indian Nonintercourse Act, 25 U.S.C. § 177 prohibits "the leasing of *Winters* water rights for off-reservation use without express congressional authorization," as argued by the Government. (*See* Brief in Sup., p. 26.) First, as argued below, the Indian Long Term Leasing Act, 25 U.S.C. § 415(a), when properly and broadly

construed, permits the long-term lease of a tribe's water rights for off-reservation use. Secondly, the Nonintercourse Act does not apply to the Government, *see Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) ("The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, *except the United States*, without the consent of Congress[.]") (emphasis added), and, thus, the Government was free to carry out its trust obligation by selling or leasing the Tribe's surplus *Winters* water rights on behalf of the Tribe and placing the proceeds of such sale or lease in a trust account, instead of giving those rights away for free to junior water users.

In short, because the Tribe's allegations demonstrate a breach by the United States of a specific rights-creating statutory provision, rather than of a mere "general trust relationship," the Tribe's breach of trust claim survives the Government's 12(b)(1) and 12(b)(6) motion to dismiss. (*See* Brief in Sup., p. 25.)

C. The Tribe Adequately States A Claim For A Temporary Taking Of The Tribe's Shoreline Property From 1941 Until 1974.

The Government argues that the Tribe "fails to state a claim for an unconstitutional [temporary] taking of its shoreline lands" because, pursuant to "the Act of July 8, 1940, 54 Stat. 744, . . . Plaintiff received just compensation in exchange for its property." (Brief in Sup., p. 33.) This argument fails to take into account the November 1, 1974 Order of the Secretary of the Interior that "corrected" Secretary Ickes' November 24, 1941 designation of the lands to be taken for use in the construction of the Parker Dam. (*See* Second Amend. Compl., ¶ 125, quoting Secretarial Order, p. 1 (DOI Nov. 1, 1974), Exh, J attached to the Second Amend. Compl.) The corrected designation, which accurately reflects the reduced extent of the reservation lands that were actually taken as necessary for the Parker Dam project, shows that the shoreline lands were

never properly part of the November 1941 "take" for the dam project.

Consequently, the Tribe never received *any* just compensation for the 33-year, temporary physical occupation and taking of its shoreline lands by the Government, from November 1941 until 1974, as those shoreline lands were not part of the lands legitimately taken for the Parker Dam project in 1941 and for which MWD paid just compensation. The Government must therefore pay a separate award of just compensation for its temporary but total physical taking of the Tribe's shoreline lands, just as the Government was required to pay just compensation for its total and complete, but temporary physical occupation of certain properties during World War II. *See, e.g., Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. Petty Motor Co.,* 327 U.S. 372 (1946); *United States v. General Motors Corp.,* 323 U.S. 373 (1945).

D. The Tribe Adequately States A Claim For An Accounting Of The Suspense Accounts.

The Government argues that, with regard to suspense accounts, which are also known as special deposit accounts, "no specific person or tribe has an ownership interest in the special deposit accounts, even though they may eventually acquire an interest in the funds from such an account once that tribe has been identified and the funds have been disbursed to the tribe's trust account." (Brief in Sup., p. 34.) Thus, so goes the Government's argument, no duty is owed to the Tribe to conduct an accounting regarding the suspense accounts.

The Interior Secretary's regulations, however, expressly provide that generally, any interest earned on trust funds in a special deposit account will follow the principal (i.e, *the tribe* or individual *who owns the trust funds in the special deposit account will receive the interest earned*). 25 C.F.R. § 115.900. It is clear from this regulation that a tribe has an ownership interest in its trust funds while they are deposited into a suspense account, and that it is entitled

to any interest earned on those trust funds while they remain deposited in the suspense account. Furthermore, the regulations regarding suspense or special deposit accounts (25 CFR Part 115, Subpart H) are incorporated as part of the regulations (25 CFR Part 115) whose "purpose . . . is to describe how the Secretary, primarily through the BIA and the Office of Trust Funds Management (OTFM) within the Office of the Special Trustee (OST), *carries out the trust duties owed to tribes* and individual Indians *in managing and administering trust assets for the exclusive benefit of tribes* and individual Indian beneficiaries." Department of the Interior, BIA, "Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust," 66 FR 7068-01, 7075, 2001 WL 47437 (Jan. 22, 2001) (emphasis added).

In short, the Secretary of the Interior, acting through BIA and the Office of Trust Funds Management within the Office of the Special Trustee does in fact "owe an accounting duty" to the Tribe with respect to the Tribe's trust funds while they are deposited in suspense or special deposit accounts. (*See* Brief in Sup., p. 34.)

E. The Tribe Adequately States A Claim For The Return To The Tribe Of Unclaimed Per Capita Payments.

The Government asserts that the Tribe's claim for the return of all unclaimed *per capita* payments, with interest, from the ICC judgment award for Dockets 351 and 351-A, pursuant to 25 U.S.C. § 164 and 25 C.F.R. § 115.820, is "fatally flawed." (Brief in Sup., p. 34.) All of the Government's arguments, however, are meritless.

First, while admittedly the Secretary of the Interior has no "self-triggering affirmative duty" to return these unclaimed funds to the Tribe *(id.)*, the Tribe may "apply" under 25 U.S.C. § 164 "to have the unclaimed per capita funds transferred to its account for the tribe's use after six years have passed from the date of distribution." 25 C.F.R. § 115.820. By filing its claim in this

Court, the Tribe has "applied" for the transfer of the unclaimed funds. (Second Amended Complaint, ¶ 50.) "Apply" is defined as meaning "[t]o make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some . . . order, which is within his or their power or discretion." *Black's Law Dictionary* 128 (4th ed. 1968). An identical application was made to the Federal Claims Court by the plaintiff tribe in *Quapaw Tribe of Oklahoma v. U.S.*, 120 Fed.Cl. 612 (2015). There is no need to go through any "regulatory process" (Brief in Sup., p. 34), as neither the statute nor the regulation sets forth any such process that the tribe is required to exhaust.

Secondly, despite the Government's contention to the contrary, there is no need for the Tribe to allege that one or more "of the *per capita* payments remain unclaimed." (*Id.*) The claim of the plaintiff tribe in *Quapaw Tribe* was "to recover *any* unclaimed per capita payments from the ICC judgment funds, *if any exist*." *Quapaw Tribe of Oklahoma v. U.S.*, 120 Fed.Cl. at 615 (emphasis added). The Court in that case ultimately held in favor of the tribe, holding that "*any* unclaimed judgment funds are properly credited to the Quapaw Tribe under the plain language of 25 U.S.C. § 164." *Id.* at 617 (emphasis added).

Finally, the Government's attempt to distinguish the prior holding of this Court in *Quapaw Tribe of Oklahoma* is unavailing. As the Government admits, the distribution of per capita payments from Dockets 351 and 351-A was made primarily to "a list of individual lineal descendants of Chemehuevi tribal members from 1860" (Brief in Sup., p. 36). *See* 25 U.S.C. § 1232. In *WOLw Tribe of Oklahoma*, this Court held that unclaimed distributions to lineal descendants of a tribal group could be restored to the tribe under 25 U.S.C. § 164, despite Government arguments similar to those raised here. The Court reasoned that:

> *The Government ignores the fact that the fund was awarded to the Tribe in the first place, and only upon distribution of the fund was it decided that per capita payments would be made.* Based upon the plain meaning of § 164, any unsuccessful per capita payments should be credited to the Tribe in satisfaction of the judgment it obtained against the Government . . ..

120 Fed.Cl. at 617 (emphasis added).

In sum, the Tribe adequately states a claim for the return to the Tribe of any unclaimed per capita payments made from ICC Dockets 351 and 351-A.

F. The Tribe Adequately Alleges A Claim For A Taking Of Its *Winters* Water Rights.

1. The Tribe Has An Ownership Interest In Its *Winters* Water Rights.

The Government erroneously argues that the Tribe's *Winters* reserved water rights constitute "a usufructuary interest, *not a* possessory or *ownership interest*." (Brief In Support, p. 37 (emphasis added).) While it is true that an owner of *Winters* reserved water rights,[5] like the owner of prior appropriative water rights upon which the *Winters* water rights doctrine is largely modeled,[6] "does not have a possessory property interest in the corpus or molecules of the water itself," *Casitas Municipal Water Dist. v. United States* ["*Casitas"*], 708 F.3d 1340, 1354 (Fed.Cir. 2013), "appropriative water rights (such as those at issue here) have long been recognized by California [and other Western States] courts as private property subject to ownership and

[5] "The government holds title to the [*Winters* water] right in trust for the benefit of the Indians." Joseph R. Membrino, "Indian Reserved Water Rights, Federalism and Trust Responsibility," 27 *Land & Water L. Rev.* 1, 2 (1992). The Tribe, however, owns equitable title to or the beneficial use of the *Winters* water rights.

[6] "The settlement of the western United States and the related development of the prior appropriation doctrine bear directly upon the development and present shape of the Indian reserved water rights doctrine." Conference of Western Attorneys General, *American Indian Law Deskbook*, § 8.1, "Historical Backgrounds and Pre-*Winters* Cases" (May 2019 Update).

disposition." *Id.*, citing *Thayer v. Cal. Dev. Co.,*164 Cal. 117, 125, 128 P. 21 (1912) ("Under the law of this state as established at the beginning, the water-right which a person gains by diversion from a stream for a beneficial use is a private right, a right subject to ownership and disposition by him, as in the case of other private property."); *accord*, *Paug Vik, Inc., Ltd. v. Wards Cove Packing Co. Inc.*, 633 P.2d 1015, 1020 (Alaska 1981) ("The water right acquired by appropriation under [43 U.S.C.] § 661 is an interest in real property. . . . When it is acquired, it becomes private property." [citing *Thayer*]); *Paloma Inv. Ltd. Partnership v. Jenkins*, 194 Ariz. 133, 138, ¶ 22, 978 P.2d 110, 115 (Ariz.App. 1998) ("In general, water rights are property rights.") (citing *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992) ("Water rights are property rights.")). As the Colorado Supreme Court has put it, "a water right is a property right that can be bought and sold." *People ex rel. Danielson v. City of Thornton*, 775 P.2d 11, 20 (Colo. 1989) (en banc).

Thus, "'although a [*Winters* reserved] water right may be incorporeal, and only a right to the use of the water, it is, nevertheless, a private property right which will be treated and protected as such.'" *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. at 235, 830 P.2d at 447 (quoting 93 C.J.S. *Waters* § 181 (1956 & Supp. 1991)). "'[O]nce rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by government action without due process and just compensation.'" *Casitas*, 708 F.3d at 1354 (quoting *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 101, 227 Cal.Rptr. 161, 168 (1986)).

The Government concedes that "[a] water right is a thing of value" (Brief In Support, p. 38, citing *Casitas*, 708 F.3d at 1353-54), but only for use *on* the reservation. (*See id.* ("If the

United States were to deny Plaintiff its *use of water* from the Colorado River, Plaintiff might have a basis for asserting a taking claim." (emphasis in original)). Essentially, the Government is denying that the Tribe has a property right to dispose of its surplus water rights by sale or lease for use elsewhere, even though the uniform rule of water law throughout the West is that an owner of a water right can sell or otherwise dispose of water rights just like any other property right.

2. The Tribe's Ownership Interest In Its *Winters* Water Rights Is Rea Property.

"That a water right is real property is well settled." *Adamson v. Black Rock Power & Irr. Co.*, 12 F.2d 437, 438 (9th Cir. 1926); *accord*, *In re Green River Drainage Area*, 147 F.Supp. 127, 139 (D.Utah 1956) ("while partition must involve real property, water rights in Utah are treated as, and are deemed to be, real estate," citing *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894, 898 (1937) ("But the right to the use of water, once established or obtained, is a valuable property right and upon its sale or transfer requires the same form and solemnity as a transfer of real estate.")); *Sain v. Montana Power Co.*, 20 F.Supp. 843, 846 (D.Mont. 1937) ("[A] water right and its exercise are hereditaments, corporeal and incorporeal. . . . They are real property." [citing *Adamson*]); *Paug Vik, Inc.*, 633 P.2d at 1020; *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406, ¶ 12, 207 P.3d 654, 659 (Ariz.App. 2008) ("Water rights are real property interests.") (citing *Paloma Inv. Ltd. Partnership v. Jenkins*, 194 Ariz. at 138, ¶ 22, 978 P.2d at 115 (water rights "are interests in real property")); *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 363, 54 P. 1020 (1898) ("Under our decisions a water right is real estate, not personal property.") (citation omitted); *see also Watkins v. Restorative Care Center, Inc.*, 66 Wash.App. 178, 188 n. 6, 831 P.2d 1085, 1090 n. 6 (1992) ("Under Washington law, a water right is considered real property which is

appurtenant to and passes with a conveyance of the land which receives its beneficial use.") (citing *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash.2d 395, 400, 687 P.2d 841 (1984) (en banc)).

Thus, suits to adjudicate water rights "'are to quiet title to realty . . . Such suits are not in personam but in rem or quasi in rem.'" *U.S. v. Walker River Irr. Dist.*, 2012 WL 1424178, *5 (D.Nev. April 23, 2012) (Nos. 3:73–cv–00127–ECR–WGC, 3:73–cv–00128–ECR–WGC) (quoting *Sain v. Mont. Power Co.*, 20 F.Supp. at 846); *accord*, *Rickey Land & Title Co. v. Miller & Lux*, 152 F. 11, 14 (9th Cir. 1907), *aff'd*, 218 U.S. 258 (1910) .

Given that *Winters* reserved water rights are largely modeled after prior appropriative rights that are treated as real property, *Winters* water rights should likewise be characterized as real property. As such, they are subject to being long-term leased pursuant to 25 U.S.C. § 415, as explained in greater detail below.

3. The Tribe's *Winters* Water Rights May Be Conveyed Independently For Use Elsewhere Other Than On The Reservation.

Moreover, water rights have traditionally been considered "*independent*, not only of the ditch or the canal which carried it, but *of the ownership or possession of any land, and subject to disposal separately therefrom by the appropriator*." *In re Determination of Relative Rights, to Use of Waters of Pantano Creek In Pima County*, 45 Ariz. 156, 164, 41 P.2d 228 (1935) (emphasis added). Thus, "*water rights may be bought and sold without regard to the real property over which the water flows*. . . . Thus, water can be conveyed and the quality of the title may be warranted much like with real property." *Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374, 1377-78 (Colo. 1982) (en banc) (citations omitted and emphasis added). More specifically, "*a prior appropriator of water from a stream may change the point of diversion and*

the place of use without affecting his rights of priority . . . [subject to] the condition that the change shall not injuriously affect others." *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12, 18-19, 19 P. 836, 839 (1888) (emphasis added); *accord*, *High Plains A&M LLC v. Southeastern Colorado Conservancy Dist.*, 120 P.3d 710, 718 (Colo. 2005); *Knowles v. Clear Creek, Platte River & Mill Ditch Co.*, 18 Colo. 209, 210, 32 P. 279, 280 (1893). Thus, "the priority of a use right obtained by irrigating a particular parcel of land is a property right that can be separated from the land" and "the owner of the use right may sell it to another person or governmental entity." *High Plains A&M LLC*, 120 P.3d at 718, citing *Stickler v. Colorado Springs*, 16 Colo. 61, 68-70, 26 P. 313 (1891) (involving a city's purchase of agricultural water rights for change to municipal uses).

As the California Supreme Court long ago recognized in *Davis v. Gale,* 32 Cal. 27, 34 (1867): "[w]hen he [, the prior appropriator,] has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated *at any place where he may choose to convey it*, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges." (Emphasis added.) *Accord, Nicoll v. Rudnick*, 160 Cal.App.4th 550, 560, 72 Cal.Rptr.3d 879, 887 (2008); *Orange County Water Dist. v. City of Riverside*, 173 Cal.App.2d 177, 195, 343 P.2d 450, 483 (1959) ("[A]n appropriator may at his discretion change the place of application of his water, though not where the change causes injury to those having superior rights."); *see also Barnes v. Hussa*, 136 Cal.App.4th 1358, 1367-68, 39 Cal.Rptr. 659, 666 (2006) ("In 1934, however, it had long been the law of California (as it still is today) "that the person entitled to the use of water may change the place of diversion, *or the place where it is used*, or

the use to which it was first applied, if others are not injured by such change.") (quoting *Ramelli v. Irish*, 96 Cal. 214, 217, 31 P. 41 (1892)) (emphasis added and footnote omitted).

Again, since *Winters* reserved water rights are modeled after prior appropriative rights recognized under the laws of many Western States, they likewise should be capable of being separated from the land and sold or leased to another person or governmental entity for use at a different place, off the reservation.

4. Under The *Winters* Reserved Water Rights Doctrine, The Tribe's Water Rights May Be Leased For Off-Reservation Use, A Use Of The Reserved Water Rights That Is Appropriate To The Tribal Homeland As It Progresses And Develops.

Despite the fact that appropriative water rights can be conveyed for use on other land or at other places, the Government argues the Tribe's *Winters* implied or reserved water rights, as recognized and quantified in *Arizona v. California I*, are limited to "the right to divert up to 11,340 acre feet of water from the Colorado River to make the reservation a livable homeland," and do not include any right to market, lease or sell the Tribe's vested water rights for off-reservation use. (Brief in Sup., p. 39.) This crabbed view of the *Winters* doctrine fails to take into account that, in *Winters*, after noting that the reservation in question in that case was created as "a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the state (then territory) of Montana, designated and known as the Fort Belknap Indian Reservation," *Winters v. U.S.*, 207 U.S. 564, 565 (1908) the Supreme Court posed the question presented as follows:

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. *The Indians had command of the lands and the waters — command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this?* Did

> they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. . . .

Winters, 207 U.S. at 576-77 (emphasis added).

The term "beneficial use," as used in the *Winters* opinion, means "*[t]he right to use and enjoy property* according to one's own liking or *so as to derive a profit or benefit from it*, including all that makes it desirable or habitable, as light, air, and access; as distinguished from a mere right of occupancy or possession." *Black's Law Dictionary* 199 (4th ed. 1968) (emphasis added); *see Matter of State & City Sales Tax Liability of Quality Service Railcar Repair Corp.*, 437 N.W.2d 209, 211 (S.D. 1989) (holding the "beneficial use" of the repair service is "the location where the repaired railroad car is put to use to make a profit"); *see also Black's Law Dictionary* at 198 (defining "beneficial" as meaning "[t]ending to the benefit of a person; *yielding a profit, advantage, or benefit; enjoying or entitled to a benefit or a profit*") (emphasis added). "Civilization" (the *Winters* opinion refers to the "arts of civilization") has been defined as "[a] term which covers several states of society; it is relative, and has no fixed sense, *but implies an improved and progressive condition of the people, living under an organized government.*" *Black's Law Dictionary* 313 (4th ed. 1068) (emphasis added), citing *Roche v. Washington*, 19 Ind. 53, 56 (1862). "Civilization" has also been defined as "an ideal state of human culture characterized by complete absence of barbarism and nonrational behavior, *optimum utilization of physical*, cultural, spiritual, and human *resources*, and perfect adjustment of the individual within the social framework." *Webster's Third New International Dictionary* 413 (1976) (emphasis added).

In *Arizona v. California*, 373 U.S. 546 (1963) [*Arizona v. California I*], after finding that it was impossible to believe that the United States created the Colorado River Indian reservations, including the Chemehuevi Reservation, without reserving "that water from the river [which] would be essential to the life of the Indian people," 373 U.S. at 599, the Supreme Court followed *Winters* and held that "the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created." *Id.* at 600.

Certainly, the Chemehuevi Reservation, like other Indian reservations, "was created as a 'permanent home and abiding place' for the Indian people, as explained in *Winters*." *See In re General Adjudication of All Rights to the Use of the Gila River System and Source* ["*Gila River System"*], 201 Ariz. 307, 315, ¶ 23, 35 P.3d 68, 76 (2001) (en banc), citing *Winters*, 207 U.S. at 535. This "[g]eneral purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)); *accord*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir.), *cert. denied,* 138 S.Ct. 468, 469 (2017). "The rule of liberal construction should [also] apply to reservations created by Executive Order," including the Chemehuevi Reservation. *Walton*, 647 F.2d at 47 n. 9, citing *Arizona v. California I*, 373 U.S. at 598. In determining the specific purposes for which *Winters* implied water rights may be used, the Court should consider not only "the [reservation's formative] document and circumstances surrounding its creation, and the history of the Indians for whom it was created," but also the tribe's "need to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 47; *accord*, *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1270.

"Such a [liberal] construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency." *Gila River System*, 201 Ariz. at 315, ¶ 23, 35 P.3d at 76, citing *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 98, 712 P.2d 754, 768 (1985) ("The purposes of Indian reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self-sufficiency."). *See also Hackford v. Babbitt*, 14 F.3d 1457, 1461 n. 3 (10th Cir. 1994), recognizing that "[r]eserved or 'Winters' water rights are federally created and spring from the act of reserving lands for a particular purposes, such as transforming nomadic Indians into productive agrarians *or promoting Indian self-sufficiency,*" citing Michael C. Blumm, *Reserved Water Rights*, in 4 *Waters and Water Rights* § 37.02(a) – (a)(1) (Robert E. Beck ed. 1991) ["Blumm"]. (Emphasis added).

Thus, properly interpreted, "the implied reservation of water rights attaching to an Indian reservation [under *Winters*] assumes *any use that is appropriate to the Indian homeland as it progresses and develops*." *In re General Adjudication of All Rights to Use Water in Big Horn River System* ["*Big Horn River System*"], 753 P.2d 76, 119 (Wyo. 1988) (Thomas, J. dissenting, joined by Hanscum, D.J.) (emphasis added), *aff'd by an equally divided court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989),[7] *abrogated on other grounds by Vaughn v. State*, 962 P.2d 169 (Wyo. 1998); *see also id.* at 135 (Hanscum, D.J., dissenting) ("I join in the dissent. Specifically, I would agree with the dissent's proposed holding that the implied reservation of

[7] The Supreme Court in *Big Horn River System* granted the petition for writ of certiorari only on the question of whether the PIA (practical irrigated acreage) standard should have been applied in determining the quantity of reserved water rights.

water rights attaching to an Indian reservation should assume any use that is appropriate to the Indian homeland as it progresses and develops."). The Government's contention for a restrictive interpretation of the *Winters* reserved water rights doctrine improperly "assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization." *Id.* To the contrary, the tribal "homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops." *Id.; accord*, *Gila River System*, 201 Ariz. at 315, ¶ 24, 35 P.3d at 76; *see also Walton*, 647 F.2d at 47 (courts consider Indians' "need to maintain themselves under changed circumstances" when determining a reservation's purpose).

"Even where reservations were created so that tribes could engage in agricultural pursuits, Congress only envisioned this as 'a first step in the 'civilizing' process.'" *Gila River System*, 201 Ariz. at 315, ¶ 24 n. 4, 35 P.3d at 76, n. 4 (quoting *Walton*, 647 F.2d at 47 n. 9 (citing 11 Cong. Rec. 905 (1881)). "This vision of progress implies a flexibility of purpose." *Watson*, 647 F.2d at 47 n. 9; *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 2015 WL 13309103, *7 (C.D.Cal. March 24, 2015) (No. EDCV 13-883-JGB) (recognizing that "[t]he Ninth Circuit has specifically emphasized such a purpose's elasticity; a tribal reservation's reason for being is not etched in stone, but shifts to meet future needs."), *aff'd*, 849 F.3d 1262 (9th Cir.), *cert. denied,* 138 S.Ct. 468 (2017).

Furthermore, *Winters* reserved water rights "are not lost through non-use." *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1272 (citing *Walton*, 672 F.2d at 51); *accord*, *Navaho Nation v. Department of the Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017) (*"Winters*

rights, unlike water rights gained through prior appropriation, are not lost through non-use.") (citing *Walton*, 672 F.2d at 51); *Hackford v. Babbitt*, 14 F.3d at 1461 n. 3 ("Unlike most other water rights, it is generally accepted that 'Winters' rights held by Indians are neither created by use nor lost by nonuse.") (citing Blumm); *Ute Distribuiton Corp. v. Secretary of the Interior*, 584 F.3d 1275, 1281 n. 6 (10th Cir. 2009) (same), *cert. denied*, 560 U.S. 905 (2010). "Instead, they are flexible and can change over time." *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1272 (citing *Walton*, 672 F.2d at 47-48, and *United States v. Anthanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956)). Thus, in *Agua Caliente Band of Cahuilla Indians*, the Ninth Circuit concluded that "the fact that the Tribe did not historically access groundwater does not destroy its right to groundwater now." *Id.* (citing *Walton*, 672 F.2d at 51). Similarly, the fact that the Chemehuevi Tribe did not attempt to lease its water rights for off-reservation use before 1998 did not destroy its right to do so.

As the Arizona Supreme Court has observed, "[o]ther [water] right holders are not constrained in this, the twenty-first century, to use water in the same manner as their ancestors in the 1800s. Although over 40% of the nation's population lived and worked on farms in 1880, less than 5% do today." *Gila River System*, 201 Ariz. at 315, ¶ 25, 35 P.3d at 76 (citing U.S. Census Bureau, *Historical Statistics of the United States, Colonial Times to 1970,* 240, 457 (1975)). "Likewise, agriculture has steadily decreased as a percentage of our gross domestic product," from 10.7% in 1930 to 2.84% in 1997. *Id.* (citing U.S. Census Bureau, *Statistical Abstract of the United States,* 881, 886 (1999)). "Just as the nation's economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality." *Id.*

As the Government admits in a footnote (Brief in Sup., p. 38 n. 8), the Supreme Court in 2006, in *Arizona v. California (2006 Consolidated Decree)*, 547 U.S. 150 (2006) took care to note that practically irrigable acreage "shall constitute the means of determining [the] quantity of [each tribe's] adjudicated water rights *but shall not constitute a restriction of the usage of them [, i.e., of the tribe's water rights] to irrigation or other agricultural application*." 547 U.S. at 168 (emphasis added). It should be pointed out that "[d]omestic and related use has traditionally been subsumed in agricultural reserved rights." *Big Horn River*, 753 P.2d at 99 (majority opinion) (holding that the trial court properly allowed a *Winters* reserved water right for municipal, domestic, and commercial use as "included within the agricultural reserved water award"). Thus, the 2006 statement by the Supreme Court implicitly repudiated the narrow view of the three-member majority of the Wyoming Supreme Court in *Big Horn River* that *Winters* reserved water rights may only be used for agricultural purposes (including livestock grazing, and domestic and related uses), and not for, for example, mineral or industrial uses. *Big Horn River*, 753 P.2d at 98 ("The district court did not err in denying a reserved water right for mineral and industrial uses.").

The Government nevertheless argues, with regard to the Supreme Court's 2006 statement, that "[t]his does not mean, however, that the water rights may be transferred to third parties for off-reservation use." (Brief in Sup., p. 38, n. 8). This issue was raised but not decided by the Wyoming Supreme Court majority opinion in *Big Horn River*, which noted that "[t]he Tribes did not seek permission to export reserved water," 753 P.2d at 100, and that, in view of the Wyoming Supreme Court's holding that *Winters* reserved water rights doctrine "does not extend to

groundwater," *id.*,[8] "we need not address the separate constitutional attack on the prohibition of exportation of groundwater." *Id.* The Wyoming Supreme Court majority also noted, without further comment, the federal government's position that "no federal law permits the sale of reserved water to non-Indians off the reservation." *Id.*[9]

District Judge Hanscum nevertheless correctly opined in his separate dissenting opinion in *Big Horn River* that the exportation or "sale of water off the reservation should be permitted [under *Winters*], provided that, as a factual matter, it could be demonstrated that such marketing contribute[s] to the progress and development of the Indian homeland." *Big Horn River*, 753 P.2d at 135 (Hanscum, D.J., dissenting). To prevent such sale or lease "would [unduly] restrict and hamper the prospective development of the Indian homeland in the future." (*Id.*)

In short, when the purpose of the Chemehuevi Reservation, to serve as a permanent homeland for the Nuwum people, is liberally construed, the marketing and sale or long-term lease of the Tribe's surplus water rights is an allowable use of *Winters* water rights by contributing to the continued progress and development of the Indian homeland. Such a liberal

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[8] As recently noted by the United States District Court for the Central District of California, "the weight of authority on the issue [of whether *Winters* reserved water rights extends to groundwater] has shifted." *Agua Caliente Band of Cuhuilla Indians v. Coachella Valley Water Dist.*, 2015 WL 13309103, * 6 n. 5. Thus, with the sole exception of *Big Horn River System*, "every court to address the issue agrees that *Winters* rights encompass groundwater resources, as well as surface water, appurtenant to reserved land." *Id.* at *6 (collecting cases). On appeal, the Ninth Circuit also so held. *Agua Caliente Band of Cuhuilla Indians*, 849 F.2d at 1270 ("[W]while we are unable to find controlling federal appellate authority explicitly holding that the Winters doctrine applies to groundwater.").

[9] The Government erroneously asserts that, due to "lack of explicit federal consent, the Wyoming Supreme Court [in *Big Horn River System*] indicated that another tribe with *Winters* water rights could not market its water for off-reservation use." (Brief in Sup., p. 28.) As pointed out above, however, the Wyoming Supreme Court majority did not reach or decide this issue.

construction also serves the twin goals of tribal self-determination and economic self-sufficiency. Finally, nothing in the *Winters* water rights doctrine prevents the Tribe from diversifying its economy if Tribe so chooses and is reasonably able to do so by selling or long-term leasing its surplus water rights for off-reservation use. "The permanent homeland concept allows for this flexibility and practicality." *Gila River System*, 201 Ariz. at 315, ¶ 25, 35 P.3d at 76.

5. The Tribe Was Allowed To Lease Its Surplus *Winters* Water Rights Under 25 U.S.C. § 415(a).

Section 415(a) of Title 25, the Indian Long-Term Leasing Act (ILTLA) of 1955, Act of August 9, 1955, Pub.L.No. 255, ch. 615, 69 Stat. 539, provides in relevant part that *Any restricted Indian lands*, whether tribally, or individually owned, *may be leased by the Indian owners, with the approval of the Secretary of the Interior, for* public, religious, educational, recreational, residential, or *business purposes*, *including the development or utilization of natural resources in connection with operations under such leases*, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years .

25 U.S.C. § 415(a) (emphasis added).

"Congress' 'major purpose' in enacting the ILTLA [in 1955] 'was to increase Indian income by opening Indian land to market forces and encouraging long-term leasing for commercial purposes. Congress was concerned that [previously] restricted lease periods had discouraged lessees from obtaining long-term construction financing and had thus foreclosed uses of land which required substantial investment." *Skull Valley Band of Goshute Indians v.*

Davis, 728 F.Supp.2d 1287, 1305 n. 30 (D.Utah 2010) (quoting Reid Peyton Chambers & Monroe E. Price, "Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands," 26 *Stan. L. Rev.* 1061, 1074 (May 1974) ["Chambers & Price"]; *see also Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1412 (9th Cir.) ("Congress first authorized the long-term leasing of Indian lands in order to bring Indians much needed income that they could not receive under short-term leases."), *cert. denied*, 513 U.S. 1044 (1994); *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074 (9th Cir.) ("Congress adopted section 415 to encourage long-term commercial leases of Indian land and thereby to enhance its profitable development."), *cert. denied*, 464 U.S. 1017 (1983).

It has been recognized that "extended leases of valuable reservation resources can be the cornerstone of a reservation economic development program." Chambers & Price, 26 Stan. L. Rev. at 1063. Indeed, the purpose of the 25-year lease that the Tribe entered into in January 1998, but was unable to have approved by the Secretary of the Interior, was "to provide money to the Tribe for economic development" (Exhibit H **to** Second Amended Compl.). Specifically, the Tribe was "actively seeking other revenue sources to reduce poverty and provide funds for economic development in the areas of education, employment, health, and agriculture." (*Id.*)

The term "lands" as used in 25 U.S.C. § 415(a) is undefined. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *accord, Food Marketing Institute v. Argus Leader Media*, ___ U.S. ___ 139 S.Ct. 2356, 2362 (2019). So the question to be asked is what was the "ordinary, contemporary, common meaning" of the term "lands" when Congress enacted the ILTLA in 1955?

By 1955, the term "lands", when "used in designating a classification of property," had been held to be "ordinarily synonymous with 'real estate' or 'real property' and as including lands, tenements and hereditaments, or all property properly classified as real property." *Lincoln National Bank & Trust Co. of Fort Wayne v. Nathan*, 215 Ind. 178, 187, 19 N.E.2d 243, 247 (1939); *Southern Pacific Co. v. Riverside County*, 35 Cal.App.2d 380, 387, 95 P.2d 688, 692 (1939) (concluding that the California legislature, in the Storm Water District Act of 1909, used the terms "land" and "lands" as "interchangeable and synonymous with the term 'real property'").

By 1955, the term "land" had also been used "interchangeably with 'property'; it may include anything that may be classed as 'real estate' or 'real property'." *Reynard v. City of Caldwell*, 55 Idaho 342, 42 P.2d 292, 297 (1935); *accord*, *In re Estate of Smatlan*, 1 Neb.App. 295, 300, 501 N.W2d 718, 721 (1992) ("land" means "anything that can be classed as real estate or real property"). In other words, by 1955, "[t]he use of the word 'land' as synonymous with real property has become its historical, ordinary and accepted meaning in connection with title, ownership, conveyance or transfer by deed or inheritance, with the exercise of the right of eminent domain, with execution sales and redemption, with dower, and similar evidences of ownership or modes of transfer." *Krouser v. San Bernardino County*, 29 Cal.2d 766, 770, 178 P.2d 441, 443 (1947).

Moreover, it had been held that "land" "in a statute of this general nature, must necessarily be given a broad and comprehensive meaning. 'Land,' in such sense, includes waters upon the land, *and water claimed to be appropriated for use in the development, by irrigation, of the land*." *North Side Canal Co. v. Twin Falls Canal Co.*, 12 F.2d 311, 314 (D.Idaho 1926) (emphasis added).

As pointed out above, prior appropriative water rights have generally been treated as real property rights, and thus, *Winters* reserved water rights, which are largely modeled after prior appropriative water rights, should likewise be classified as real property. Because the term "lands" as used in 25 U.S.C. § 415(a), when broadly construed in accordance with its "ordinary, contemporary, common meaning" as of 1955, includes and is synonymous with real property, § 415(a) allows for the long-term lease of surplus *Winters* water rights, which are real property rights.

A broad construction of the term "lands" as used in 25 U.S.C. § 415(a) "is appropriate for this remedial legislation," *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977), given "the canon of construction that remedial statutes should be liberally construed." *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Cloer v. Secretary of Health & Human Services*, 654 F.3d 1322, 1350 (Fed.Cir. 2011) ("The Supreme Court has long recognized the canon of construction that remedial legislation should be construed liberally."), *cert. denied sub nom. Cloer v. Sebelius*, 565 U.S. 956 (2012). The ILTLA "'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" *See Caputo*, 432 U.S. at 268 (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)).

Such a liberal construction of the term "lands" is also favored by the special canons of statutory construction that apply in cases involving the special trust relationship between the United States and American Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."). Thus, "[w]hen we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply

rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Yakima v. Confederated Tribes*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766).

Furthermore, it makes no difference that the Secretary of the Interior has long interpreted the term "Indian lands" in § 415(a) as excluding the long-term lease of Indian water rights not appurtenant to a surface land lease. The Indian canons of construction have been held to supersede the *Chevron* doctrine in cases where they conflict. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The D.C. Circuit Court of Appeals has explained this principle as follows:

> While ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, *Chevron* deference is not applicable in this case. The governing canon of construction requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). Therefore, even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation "careful consideration" but "we do not defer to it." *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, 1445 n. 8 (D.C.Cir. 1988) [, *cert. denied*, 488 U.S. 1010 (1989)]. This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C.Cir. 1991)[.]

Cobell v. Norton, 240 F.3d 1081, 1101 (D.C.Cir. 2001). *Accord*, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (holding that "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes"); *but see Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989) (declining to apply canon of construction favoring Native Americans "in light of competing deference given to an agency charged with the statute's administration").

The Government asserts that 25 U.S.C. §§ 81 and 415 "appl[y] only to the leasing of Indian land held in trust and [are] not relevant to the leasing of natural resources, such as water rights, separate and apart from trust land," without citing to any relevant authority. (Brief in Sup., p. 26.) The Government nowhere addresses the proper definition or meaning of the term "lands" as used in these statutes. Nor does the Government address whether appropriative and/or *Winters* water rights are real property rights that fall within the term "lands" when broadly construed. It thus appears that the Government simply assumes, without any analysis, that 25 U.S.C. § 415(a) does not apply to the lease of water rights for off-reservation use, and that a tribe's lease of water rights for such off-reservation use therefore requires special authorization legislation from Congress. (Brief in Sup., pp. 28, 29.)

When properly, broadly, and liberally construed in favor of the Indian Tribes, and to promote the statute's remedial purpose to increase tribal income, however, the term "lands" as used in 25 U.S.C. § 415(a) includes and allows for the long-term lease of the Chemehuevi Tribe's surplus *Winters* reserved water rights.

6. By Diverting The Tribe's Surplus *Winters* Water Rights To Junior Water Users, Such As MWD, Free of Charge, The Government Engaged In A Taking Of The Tribe's Water Rights Without Just Compensation.

The Government erroneously characterizes the Tribe's takings claim as a regulatory taking claim governed by the Supreme Court's decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). (Brief in Sup., p. 38.) Rather, this case involves a direct physical appropriation of the Tribe's surplus water rights that the Tribe could have marketed and sold or long-term leased at a profit for off-reservation use. The Government prevented the Tribe from selling or leasing its surplus water rights and, instead, diverted the surplus water rights, free of

charge, to junior water users such as MWD.

"A seizure of water rights need not be a physical invasion of land." *Dugan v. Rank*, 372 U.S. 609, 625 (1963). "[A]ction not occurring on a plaintiff's land can still lead to a physical taking of water rights." *CRV Enterprises, Inc. v. U.S.*, 626 F.3d 1241, 1246 (Fed.Cir. 2010), *cert. denied*, 563 U.S. 989 (2011). Thus, in *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed.Cl. 313 (2001), the Court concluded that, where the plaintiffs had contractual rights entitling them to the use of a specified quantity of water, Government water restrictions imposed pursuant to the Endangered Species Act effected a physical taking of the water rights, rather than a regulatory taking, by preventing the plaintiff users from using the water to which they would otherwise have been entitled, thereby rendering the usufructuary right to that water valueless. 49 Fed.Cl. at 318-19.

In *International Paper Co. v. United States*, 282 U.S. 399 (1931), the United States, during World War I, issued a requisition order for all of the hydroelectric power of the Niagara Falls Power Company (Niagara Power). *Id.*at 405. At the time that the United States' order was issued, Niagara Power leased a portion of its water to International Paper Company (International Paper), which diverted the water via a canal to its mill. *Id.* at 404-405. In response to the United States' direction to "cut off the water being taken" by International Paper in order to increase power production for the war effort, Niagara Power terminated the diversion of water to International Paper. *Id.* at 405-406. This termination resulted in International Paper being unable to operate its mill for nearly nine months. *Id.* The United States did not take over the operations of either Niagara Power or International Paper, nor did it physically direct the flow of the water. Instead, the United States caused Niagara Power to stop International Paper from diverting water

to its mill so that the water would instead be available for third party use—"private companies for work deemed more useful [by the government] than the manufacture of paper." *Id.* at 404. This third-party use served a public purpose of supplying power for the war effort. The Supreme Court found that the government directly appropriated water that International Paper had a right to use.

This case involves a similar direct appropriation of the Tribe's surplus, *Winters* reserved water rights that the Tribe had a right to sell or lease for off-reservation use. The United States did not take over the operations of either the Tribe or its proposed lessee of the Tribe's surplus water rights, the Southeastern Nevada Water Company, Inc. Rather, the United States refused to allow the Tribe to enter into the long-term lease of its surplus water rights to the Southeastern Nevada Water Company, and then diverted those surplus water rights so that those rights would instead be available for third party use by junior water users, including MWD, free of charge. This third-party use served a public purpose of subsidizing the cost of water to the junior water users, and their customers and ratepayers, in Southern California. The United States thereby appropriated surplus water rights, that the Tribe had a right to sell or lease to provide a revenue stream to aid in the continued progress and development of the Chemehuevi homeland, for an alternate public use without just compensation.

The Government's chief defense to the Tribe's takings claim is that "[t]he property that the United States has allegedly taken, the right to market *Winters* reserved water rights off-reservation, is property that Plaintiff does not have and that does not exist." (Brief in Sup., p. 38.) As shown above, however, the Tribe does have a property right in its surplus *Winters* water rights which can be sold or leased for off-reservation use and which therefore cannot be taken by the

Government without paying the Tribe just compensation.

7. The Tribe Has Standing To Pursue Its Takings Claim.

The Government argues that the Tribe has not suffered any "injury in fact" to its *Winters* reserved water rights, and that therefore the Tribe lacks standing to bring a Fifth Amendment taking claim against the Government, citing *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (9th Cir. 2018). In *Crow Creek Sioux Tribe*, however, the facts do not reveal any attempt by the tribe in that case to market, sell or lease surplus *Winters* reserved water rights for off-reservation use. Rather, the tribe in that case attempted to complain that "any subsequent action [by the Government] affecting the waters of the Missouri River constitutes an injury of those [, i.e., the tribe's *Winters* reserved water] rights, even if the action does not affect the Tribe's ability to draw sufficient water to fulfill the purposes of the Reservation." 900 F.3d at 1357. The tribe, however, "has no right to any particular molecules of water, either on the Reservation or up- or downstream, that may have been used or diverted by the government." *Id.* (citing *Casitas*, 708 F.3d at 1353). Thus, "[t]he [Crow Creek Sioux] Tribe's *Winters* rights, which give the Tribe the right to use sufficient water to fulfill the purposes of the Reservation, simply cannot be injured by government action that does not affect the Tribe's ability to use sufficient water to fulfill the purposes of the Reservation." *Id.*

In this case, by contrast, the Chemehuevi Tribe is not complaining about Government making physical diversions of water from the Colorado River. Rather, the Chemehuevi are complaining about the Government's refusal to allow the Tribe to market, sell or lease the Tribe's surplus water rights to provide a revenue stream to help fulfill the purposes of the Chemehuevi Reservation as a permanent homeland for the Tribe's people, so that the Government could

instead provide these surplus water rights free of charge to junior users, including MWD. The surplus water rights are the private property of the Tribe, which the Tribe has the right to dispose of, for a profit, in order to assist in achieving the continued progress and development of the Indian homeland. By denying the Tribe the beneficial use of its surplus water rights in order to divert that water to what the Government deems to be a more important public use, the Government in this case has, unlike in *Crow Creek Sioux Tribe*, adversely "affect[ed] the Tribe's ability to use sufficient water to fulfill the purposes of the Reservation." 900 F.3d at 1357. Thus, the Tribe has adequately alleged a "concrete and particularized" injury to its *Winters* water rights, sufficient to give the Tribe standing to pursue its Fifth Amendment takings claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

G. The Tribe Adequately Alleges A Claim For An Accounting And Damages For Mismanagement Of The Shoreline Lands From 1941 to 1974.

The Government argues that the Tribe "lacks standing to claim damages [f]or the alleged mismanagement of funds from the shoreline lands between 1941 and 1974." (Brief in Sup., p. 41.) The Government argues that the Chemehuevi Tribe "did not have any ownership interest in these lands during that time period," and that therefore the Tribe "is unable to allege an injury sufficient to provide standing for this claim." (*Id.* at 42.)

The Government's argument overlooks that the Order of the Secretary of the Interior handed down on November 1, 1974 "*corrects* the designation by Secretary Ickes of November 25, 1941, that certain lands of the Chemehuevi Indian Reservation should be taken for use in the construction of Parker Dam pursuant to the Act of July 8, 1940, 54 Stat. 744," by declaring that ""[t]he Chemehuevi Tribe has full equitable title to all those lands within the Chemehuevi Indian Reservation designated to be taken by Secretary Ickes in 1941 between the operating pool level

of Lake Havasu on the east (elevation 450 feet m.s.l. [mean sea level]) and [certain described] north and south boundaries[.]" (Second Amended Complaint, ¶ 125, quoting Secretarial Order, p. 1 (DOI Nov. 1, 1974), attached to the Second Amended Complaint as Exhibit "J").

The verb "correct" means "to make or set right: remove the faults or errors from: AMEND." *Webster's Third New International Dictionary* 511 (1976). It means "to right what is wrong" "by altering what is inaccurate, untrue or imperfect in it or about it so that it is accurate, true or perfect, or by putting against it or substituting for it what is accurate, true or perfect." *Id.* *See also Mumid v. Abraham Lincoln High School*, 618 F.3d 789, 798 (8th Cir. 2010) ("'Correct' means 'to make or set right,' or 'to alter or adjust so as to bring to some standard or required condition.' *Webster's Third New International Dictionary* 511 (1971)."), *cert. denied*, 562 U.S. 1218 (2011). In short, "[c]orrect means to 'free from error.'" *Natural Resources Defense Council, Inc. v. Perry*, 302 F.Supp.3d 1094, 1099 (N.D.Cal. 2018) (quoting *Correct,* Oxford Living Dictionary, North American English (last visited Feb. 14, 2018) [https://perma.cc/BN8L-AGQA]).

Thus, the Secretary of the Interior's Order of November 1, 1974 essentially altered or amended Secretary Ickes' November 25, 1941 designation of the lands to be taken for use in the construction of the Parker Dam, so that the designation, as amended, accurately reflected the extent of the reservation lands that were actually "necessary for the Parker Dam project . . .." (Brief in Sup., p. 42.) As amended by the Order of November 1, 1974, the November 25, 1941 designation excludes from the taking all those lands "between the operating pool level of Lake Havasu on the east (elevation 450 feet m.s.l. [mean sea level]) and [certain described] north and south boundaries," i.e., the shoreline lands. Consequently, the Tribe retained equitable title to

these lands from 1941 until 1974, as the corrected designation excluded these lands from the original taking.

Thus, because the Tribe retained an equitable ownership interest in the shoreline lands from 1941 until 1974, they suffered an injury in fact as a result of the Government's alleged mismanagement of the shoreline and/or of the funds derived from the shoreline during that time period. The Tribe therefore has standing to pursue its claims regarding such mismanagement.

VI. DECLARATORY AND INJUNCITVE RELIEF SOUGHT BY THE TRIBE IS TIED AND SUBORDINATE TO A MONEY JUDGMENT.

"Limited equitable relief sometimes is available in Tucker Act suits," *James v. Caldera*, 159 F.3d 573, 580 (Fed.Cir. 1998), so long as that equitable relief is "an incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2). In other words, "the Court of Federal Claims has no power 'to grant affirmative non-monetary relief unless it is tied and subordinate to a money judgment.'" *James v. Caldera*, 159 F.3d at 580 (quoting *Austin v. United States,* 206 Ct.Cl. 719, 723, *cert. denied*, 423 U.S. 911 (1975)).

A. Accounting

First, where a claim for money damages is sufficient to withstand the Government's motion to dismiss, this Court "has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim[.]" *Klamath & Madoc Tribes & Yahooskin Band of Snake Indians v. U.S.*, 174 Ct.Cl. 483, 490 (1966); *accord*, *The Tohono O'odham Nation v. U.S.*, 79 Fed.Cl. 645, 653 (2007), *rev'd on other grounds*, 559 F.3d 1294 (Fed.Cir. 2009), *rev'd*, 563 U.S. 307 (2011). Thus, where the evidence shows the "the existence of a trust as well as a breach, then '[t]he United States, as trustee, would have to meet plaintiff's prima facie case of breach with a full accounting for its conduct. In short, assuming this action were to proceed in

this court, and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment.'" *Rosebud Sioux Tribe v. U.S.*, 102 Fed.Cl. 429, 437 (2011) (quoting *Tohono O'odham Nation*, 79 Fed.Cl. at 653).

Thus, because the Tribe seeks an accounting in aid of obtaining a money judgment on its claims against the Government, its request for declaratory and injunctive relief regarding a full accounting of the Tribe's trust funds and assets should not be dismissed.

B. Declaratory Relief

It is well established that this Court has authority to issue a declaratory judgment where it is tied and subordinate to a monetary award. *Ellis v. U.S.*, 222 Ct.Cl. 65, 69, 610 F.2d 760, (1979); *Gentry v. U.S.*, 212 Ct.Cl. 1, 24, 546 F.2d 343 (1976). The Tribe has demonstrated that its "[Fifth Amendment takings] claim could ultimately lead to a recovery of 'actual, presently due money damages.'" *Dwen v. U.S.*, 62 Fed.Cl. 76, 81 (2004) (quoting *U.S. v. Testan*, 424 U.S. 392, 397-98 (1976)). Indeed, a taking claim for just compensation is a claim for money damages. *Id.* (citing *Fourdi v. U.S.*, 22 Cl.Ct. 290, 296 n. 11 (1991)).

Thus, in aid of its takings claim, the Tribe may seek a declaratory judgment that the ILTLA, 25 U.S.C. § 415(a), allowed the Tribe in 1998, with the approval of the Secretary of the Interior as to terms and conditions, to engage in a long-term lease of its surplus *Winters* reserved water rights for off-reservation use. The requested declaratory relief is therefore tied and subordinate to a money judgment, not "outside this Court's jurisdiction" (*see* Brief in Sup., p. 46), and thus should not be dismissed.

CONCLUSION

For the foregoing reasons, the United States' Motion to Dismiss the Chemehuevi Tribe's

Second Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the RCFC should be denied. An Order should be entered directing the United States to answer the Second Amended Complaint and for the parties to proceed with pretrial discovery.

Respectfully submitted, this 11th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2019, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

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