IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHEMEHUEVI INDIAN TRIBE, Plaintiff, v THE UNITED STATES OF AMERICA, Defendant.	No. 16-492L Judge Patricia Campbell-Smith

THE UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Even after two years of jurisdictional discovery where the United States produced over 20,000 responsive documents to Plaintiff's broad-reaching requests, Plaintiff's Second Amended Complaint ("Compl."), ECF No. 51, failed to set forth claims over which this Court has subject-matter jurisdiction or upon which relief could be granted, so the United States moved to dismiss Plaintiff's claims. *See generally* United States' Mot. to Dismiss Pl.'s Second Am. Compl. ("Mot."), ECF No. 56. In opposition, Plaintiff has again failed to present any set of facts to support that its claims are within the relevant limitations periods or could otherwise plausibly lead to judgment in its favor. Pl.'s Mem. in Opp'n to Def.'s Mot. for Dismissal of Pl.'s Second Am. Compl. ("Pl.'s Opp'n"), ECF No. 61.

The Indian Claims Commission Act ("ICCA") extinguished Plaintiff's claims that predate 1946, including Count I, its claim regarding payments by the Metropolitan Water District ("MWD") for the construction of the Parker Dam. All of Plaintiff's other claims are also barred by the six-year statute of limitations found in 28 U.S.C. § 2501 because the events that would have fixed any liability of the United States occurred from 1935 to 1998. Additionally, both the Trust Fund Reform Act and the six-year statute of limitations preclude Plaintiff from challenging the adequacy of the Arthur Andersen report in this suit under Count V. For these reasons, this Court should dismiss for lack of subject matter jurisdiction all of Plaintiff's claims because they should have been brought before April 20, 2010.

Plaintiff acknowledges that the standard of review for a motion to dismiss is whether the factual allegations "raise a right to relief above the speculative level" or whether "the facts asserted by the claimant . . . entitle him to a legal remedy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). Plaintiff's claims fail to

do either. The United States does not have any money-mandating duties to Plaintiff regarding the claims in Counts III (Water Rights) and IV (Shoreline) of the Second Amended Complaint. Additionally, Plaintiff fails to state claims in Counts II (ICC Judgment Funds), III, and IV upon which relief can be granted. Therefore, the Court should grant the United States' motion to dismiss.

II. ARGUMENT

A. Plaintiff Has Failed To Show That Its Claims Are Not Extinguished Or Time-Barred.

Plaintiff's claims fail because they have been extinguished by operation of the ICCA or they are barred by the six-year statute of limitations. The ICCA divests this Court of jurisdiction over any of Plaintiff's claims that accrued prior to August 13, 1946. Also, Plaintiff's claims are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act. See *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-78 (Fed. Cir. 1988). For those reasons, under RCFC 12(b)(1), these claims must be dismissed.

Plaintiff provides no factual allegations or legal support to oppose the government's position that its claims that pre-date 1946 are barred by the ICCA. Pl.'s Opp'n 18-19. Instead, Plaintiff admits that it already brought two petitions before the Indian Claims Commission ("ICC") concerning the exact claims it brings in this action—a claim for damages and an accounting for the funds the MWD paid for the taking of the shoreline lands. *Id*. at 18. Those two petitions settled for almost one million dollars after a trial, Compl. ¶¶ 43-44, 47, and those funds were authorized for distribution to the Tribe's lineal descendants in *per capita* payments in 1970. *See* Act of September 25, 1970, Pub. L. No. 91-417, 84 Stat. 868. And in fact, those funds were so distributed. Compl. ¶ 48. By operation of the ICCA, Plaintiff's claim in Count IV challenging the taking of

shoreline in 1941 is extinguished as it pre-dates August 13, 1946. More so, Plaintiff offers no explanation as to why claims that were previously litigated and settled should now be reopened before this Court. Those claims are barred by res judicata. *See United States v. Dann*, 470 U.S. 39, 45 (1985) ("When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims.").

In reliance on *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 790 (1996), Plaintiff asserts that its claims have not accrued under the continuing breach doctrine because the United States' "wrongful course of conduct pertaining to the matters asserted in its two petitions began before August 13, 1946, and continued thereafter through the present date." Pl.'s Opp'n 18-19. But, Plaintiff's reliance is misplaced. The Court in *Pueblo of San Ildefonso* was considering whether the United States had used money from the Pueblo Compensation Fund for other purposes and the extent to which the United States could account for said funds. 35 Fed. Cl. at 788. The Court noted that under the ICCA, "no claim accruing after August 13, 1946, shall be considered" unless "a wrongful course of governmental conduct began before August 14, 1946, and continued thereafter." *Id*. at 790. "Plaintiff has the burden of establishing a continuing wrong." *Id*. However, the court found that the plaintiff failed to show that the expenditures were part of a continuous wrongful course of action that began before August 13, 1946. *Id*. at 791. That case clearly does not stand for the proposition that pre-1946 claims are not barred by the ICCA simply because a plaintiff alleges that the United States has continued to engage in various acts of wrongful conduct since before 1946. Moreover, the Second Amended Complaint does not contain factual allegations of a continuing wrong by the United States. As such, it provides no support for Plaintiff's attempted argument.

For the same reasons, Plaintiff's claims are also time-barred. The six-year statute of limitations in 28 U.S.C. § 2501 applies to all of Plaintiff's claims in the Second Amended Complaint that accrued or existed before April 20, 2010 (*i.e.*, six years before the filing of this case). Plaintiff does not allege any facts that dispute the key facts and events all occurred from 1935 to 1998 or that Plaintiff lacked knowledge of these events during that time. The latest that Plaintiff should have brought its most recent claim was 2004, and its other claims accrued much earlier. Instead, Plaintiff waited until 2016, and thus, it follows that these claims are time-barred. In summary, to the extent that Plaintiff asserts the same claims that accrued prior to 1946 that were filed in the ICC, those claims are barred by res judicata. To the extent that these are claims that accrued before 1946 that were not part of the petitions, they are barred by the ICCA.

Attempting again to rely on the alleged lack of an accounting to save its long overdue claims, Plaintiff asserts that the statute of limitations has not accrued because it never received an accounting such as the one it seeks in this action. Pl.'s Opp'n 21. The appropriate inquiry, however, is to look at when the tribe was able "to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984). Plaintiff's circular arguments must fail. Plaintiff had sufficient notice of its claims when the public events occurred. The same questions that Plaintiff raises now could have been raised decades ago. *See* Compl. ¶¶ 37, 73, 86. Further, Plaintiff ignores the various accountings that it has received over the years, including the 1961 accounting from the General Accounting Office that showed the compensation paid for the lands taken for the Parker Dam Project and the Arthur Andersen report. *See* ECF No. 7-2. Thus, Plaintiff cannot rest on its assertion of not receiving an accounting, and Plaintiff has failed to identify one valid reason why it was unable to bring any of these claims before 2016.

Similarly, Plaintiff's argument that the United States as trustee has not repudiated the trust fails. Pl.'s Opp'n 20-22. Despite the case not discussing repudiation, Plaintiff cites *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl. 673, 678 (2015), to link repudiation to the United States' alleged rejection of the findings in its tribal trust reconciliation project report ("TRP"). Pl.'s Opp'n 22. Yet, in *Shoshone Indian Tribe of the Wind River Reservation v. United States ("Shoshone II"),* the court found "[a] trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." 364 F.3d 1339, 1348 (Fed. Cir. 2004). Thus, repudiation occurs when a trustee fails to fulfill his trust responsibilities. As another example, the United States Court of Appeals for the Federal Circuit found in *Ramona Two Shields v. United States* that repudiation occurred when the government approved leases at below-market rates and plaintiffs did not argue that they lacked knowledge of the below-market rates. 820 F.3d 1324, 1329 (Fed. Cir. 2016). Plaintiff's allegations in this case present behavior that they contend is inconsistent with the United States' responsibility as a trustee. Thus, assuming Plaintiff's allegations are true, repudiation would have occurred at the time the United States' took the alleged actions, which all took place well before 2010.

Plaintiff asserts in its opposition that its trust mismanagement claims are not barred by the statute of limitations, Pl.'s Opp'n 23, but Plaintiff's Second Amended Complaint does not identify any such claims in the specified counts. Thus, no such claims are properly before this court.

As its rationale for arguing that its claims have not accrued, Plaintiff references the 1994 American Indian Trust Fund Management Reform Act as a source for tolling the statute of limitations. Pl.'s Opp'n 24. This argument is unavailing and unpersuasive. Plaintiff's claim regarding the adequacy of the Arthur Andersen Report or the TRP is barred by the specific statute governing the reports, the American Indian Trust Fund Management Reform Act of 1994, Pub. L.

No. 103-412, 108 Stat. 4239 (1994). Plaintiff admits that the United States provided its report in January 1996. Compl. ¶ 58. Notwithstanding actually receiving the Arthur Andersen Report in 1996, all tribes were "deemed" to have received the reports by December 31, 2000. *See* Compl. ¶ 65; 25 U.S.C. § 4044. Based on this date of receipt, Congress clearly set the statute of limitations for claims challenging the sufficiency of the Arthur Andersen Reports or account balances as December 31, 2006.[1] *See* 25 U.S.C. § 4044 note. Thus, Plaintiff's challenges to the adequacy of the report are untimely.

Lastly, Plaintiff's reliance on the Interior Department appropriations act provisions to toll its claims is also misplaced because those provisions only applied in the years in which they were passed. The cases cited by Plaintiff to the contrary are inapposite. The appropriations acts at issue in *Wolfchild v. United States* date from the 1800's, and were unsuccessfully relied on by plaintiffs in that case as a source of substantive rights. 731 F.3d 1280, 1286 (Fed. Cir. 2013), cert denied, 572 U.S. 1009 (2014). And *Inter-Coastal Xpress v. United States* does not deal with the effect of appropriations acts at all, but addresses the general topic of statutory repeals by implication. 296 F.3d 1357, 1369 (Fed. Cir. 2002).

Therefore, Plaintiff's argument that the absence of this provision in the 2016 Appropriations Act did not repeal the prior acts by implication has no logical effect. Pl.'s Opp'n 25. The absence of a tolling provision on which Plaintiff could rely in the 2016 Appropriations Act has no relation to whether prior acts did. The point is that Plaintiff cannot rely on a provision that was not in effect to toll the statute of limitations when it filed its suit.[2] Further, even if the

[1] Pub. L. No. 107-153, 116 Stat. 79 (2002), stated that the "deemed received" date was December 31, 1999, thus tolling the statute of limitations until 2005. The Act was amended in 2005 to change the "deemed received" date to December 30, 2000, thereby making the time to file suit December 30, 2006. Pub. L. No. 109-158, 119 Stat. 1954 (2005).

[2] The United States Court of Appeals for the District of Columbia Circuit held that

tolling provision had been in effect, Plaintiff has received accountings from which it could have determined if it had suffered any loss. The fact that Plaintiff has seemingly ignored those accountings does not toll the statute of limitations.

Plaintiff also asserts that the appropriation acts, which they call the Indian Trust Accounting Statutes or ITAS, language extends to the delayed accrual of tribal claims for non-monetary trust assets. Pl.'s Opp'n 23-24. There is no legal basis for such a claim. *Shoshone* makes it clear that claims for mismanagement of nonmonetary trust assets were never extended by the appropriation acts.

> The Act covers claims concerning 'losses to . . . trust funds' rather than losses to mineral trust assets. While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust assets. The Court of Federal Claims therefore erred in equating the mismanagement of trust assets with 'losses to . . . trust funds.'

Shoshone II, 364 F.3d at 1350 (emphasis omitted).

Given the information received over the years by the tribe, Plaintiff knew or should have known about its claims. Even with substantial jurisdictional discovery, Plaintiff has identified no factual support to plausibly argue that its claims have not yet accrued. Instead, Plaintiff's Second Amended Complaint shows that Plaintiff had sufficient notice and knowledge of its alleged claims

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> [w]hile appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year. In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.

Building & Constr. Trades Dep't v. Martin, 961 F. 2d 269, 273-74 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1992).

for this Court to find that those claims are time-barred. Accordingly, this Court should dismiss the claims in the Second Amended Complaint.

B. This Court Lacks Jurisdiction Over Plaintiff's Claims In Counts III And IV Because Plaintiff Fails To Plead Any Money-Mandating Duties.

Plaintiff has failed to plead a money-mandating duty that invokes this Court's jurisdiction for its claims in Counts III (Water Rights) and IV (Shoreline), and for that reason, under RCFC 12(b)(1), those claims must be dismissed.

1. Plaintiff's breach of trust claims regarding its water rights in Count III have no basis in statute, regulation, or treaty.

While Plaintiff has water rights pursuant to *Winters* and *Arizona v. California*, Plaintiff does not establish a trust duty based on statute, regulation, or treaty for its claim in Count III of the Second Amended Complaint. Without a specific duty, Plaintiff's claim fails.

Quoting *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*), Plaintiff argues:

> Indeed, the Supreme Court recognized that '[o]ne of the most significant limitations in the [Boulder Canyon Project] 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.

Pl.'s Opp'n 30-31. The argument distorts the meaning of the quoted language, which said nothing whatsoever about the government's trust obligations to Plaintiff or to anyone else. Instead, *Arizona I* stands for the unremarkable proposition that the reserved water rights held by the United States in trust for the specified Indian tribes along the lower Colorado River, being vested upon the establishment of their respective reservations, fall under the Boulder Canyon Project Act's concept of "present perfected rights" and, thus, have priority over users with contracts with junior priority dates pursuant to that Act. 373 U.S. at 596-601. The Court later issued a decree that

quantified the reserved rights of Plaintiff and other lower basin tribes. *Arizona v. California*, 376 U.S. 340 (1964).

Plaintiff similarly misstates the facts when it concludes, based on the foregoing misreading of *Arizona I*, that the Boulder Canyon Project Act is a "specific, applicable, trust-creating statute" within the meaning of *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) and *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009)) ("*Navajo II*"). Pl.'s Opp'n 31. The Boulder Canyon Project Act is nothing of the kind. As the Court discussed at length in *Arizona I*, the Act had two purposes. First, it "authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works in order to control floods, improve navigation, regulate the river's flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power." 373 U.S. at 560 (footnote omitted). Second, the Act provided the Secretary with a method for "apportioning the waters among the States of the Lower [Colorado River] Basin." *Id.* But Plaintiff can offer no authority for the proposition that The Boulder Canyon Project Act is a money-mandating statute. To the contrary, the Act does not enumerate any specific trust duties, and does not contain any language even suggesting that it is creating a trust.

In the Second Amended Complaint, Plaintiff suggested that the long-term leasing provisions of 25 U.S.C. § 81 and § 415, and the protection of a tribe's privileges and immunities vis-a-vis other Indian tribes set forth in 25 U.S.C. § 5123(f) and (g), provide the money-mandating statutory duties required for Tucker Act jurisdiction. Compl. ¶¶ 114-119. As we showed in our motion, the suggestion is untenable because (a) the United States' statutory responsibility to evaluate and approve Plaintiff's long-term land leases does not create specific money-mandating duties in the United States with respect to Plaintiff's desire to lease water for off-reservation use, and (b) the anti-discrimination provisions of 25 U.S.C. § 5123(f) and (g) do not delineate any

specific trust or other duties with respect to the management of Indian water rights or any other Indian resources. Def.'s Mem. 26-29. Plaintiff raises no issue with the United States' showing that the referenced provisions do not create enforceable fiduciary duties on the facts alleged here and, therefore, do not waive the United States' sovereign immunity.[3] Further, 25 U.S.C. § 81 does not cover transactions prohibited by 25 U.S.C. § 177. *See Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 907 (9th Cir. 2014) (the tribe's proposed assignments of tribal lands to its members violated Section 177 and thus fell outside of the purview of Section 81).

Instead, the Boulder Canyon Project Act is the *only* statute Plaintiff points to in an attempt to satisfy the Supreme Court's often-reiterated insistence that actionable trust duties can only be conferred by clear Congressional action. Pl.'s Opp'n 37. But as noted, the Act does not create trust responsibilities at all, implicitly or otherwise. Nothing can or will change Plaintiff's "priority," which the Supreme Court has decreed, but that is as far as *Arizona I* goes. A senior right holder can either use its right or the water continues to the next users in priority. At most, the Act directs the Secretary to respect this system of priority. Plaintiff does not allege here that the United States did not comply with that directive. And nothing in the Act "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the Act impliedly] impose[s].'" *Navajo II*, 556 U.S. at 290–91 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")).

The recent opinion in *Navajo Nation v. United States Dep't of Interior*, No. CV-03-00507-PCT-GMS, 2019 WL 3997370 (D. Ariz. Aug. 23, 2019) is therefore squarely on point. In *Navajo*

[3] In very different circumstances, 25 U.S.C. § 415(a) has been found to create enforceable fiduciary duties – specifically where the long-term lease of lands, as opposed to water rights, is involved. *See generally Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996). But here, where only water rights are in issue, section 415(a) does not apply.

Nation,[4] the plaintiff sought to amend its complaint to allege, *inter alia*, "that the Federal Defendants have breached their trust responsibilities . . . by failing to protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet [their needs]." *Id*. at *1 (internal quotation marks omitted). The court denied leave to amend on the basis that the amendment would be futile because the United States had no specific statutory trust duties with respect to *Winters* water rights, the breach of which would be actionable.

The court in *Navajo Nation* began its analysis with the familiar principles that "[t]he *general* [trust] relationship between the United States and the Indian tribes is not comparable to a private trust relationship." *Id*. at *2 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011)). The court goes on however and delineates the specific requirements for stating " a cognizable claim of breach of trust against the government[:] a tribe must 'identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to perform those duties.'" *Id*. (quoting *Navajo I*, 537 U.S. at 506). Thus "[w]hen [a] Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over Indian assets nor common-law trust principles matter.... The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id*. (quoting *Navajo II*, 556 U.S. at 301); *see also Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016); *Shoshone Indian Tribe v. United States*, 672 F.2d 1021, 1039-40 (Fed. Cir. 2012).

The court went on to analyze several enactments proffered by the plaintiff as furnishing the requisite "specific, applicable, trust-creating statute or regulation." These included the Indian

[4] The controversy had a long history in the courts. For a full recitation, *see Navajo Nation v. Dep't of Interior*, No. CV-03-00507, 2018 WL 6506957 (D. Ariz. Dec. 11, 2018).

Health Care Amendments of 1988, 25 U.S.C. § 1632; the Indian Non-Intercourse Act, see 25 U.S.C. § 177; The Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789); the Snyder Act, 25 U.S.C. § 13; the American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239; and the Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601–36.[5] *Navajo Nation*, 2019 WL 3997370 at *5-6. In the end, the court concluded that "[s]ince none of these substantive sources of law create the trust duties the Nation seeks to enforce, and the Nation 'cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right,' its breach of trust claim must fail, and amendment would be futile." *Id*. at *7 (citations omitted).

Moreover, Plaintiff does not assert that the United States has failed to deliver water to the Reservation or interfered with its ability to use its *Winters* rights on its Reservation. In fact, Plaintiff acknowledges that it generally does not use its full allocation of water, hence, Plaintiff's desire to market its "excess" water for use off the Reservation. Compl. ¶ 107.

For the same reasons, Plaintiff's trust claims related to water rights here must be dismissed.

2. Plaintiff has no valid legal basis for the many accountings that it has demanded in Count IV.

Plaintiff's argument that it has never received various accountings is without merit because there is no independent requirement for the government to have provided those accountings. Plaintiff provides no response to the United States' argument that it fails to plead any money-mandating duty for the accounting sought in Count IV. So, the Court should grant the United States' motion to dismiss. *See Pandrol USA, LP v. Airboss Railway Products, Inc.*, 320 F.3d 1354,

[5] It is noteworthy that plaintiff in that case did not even argue that the Boulder Canyon Project Act provided such duties because it does not enumerate any specific trust duties or contain anything to suggest it is creating a trust. *See United States v. Mitchell*, 445 U.S. 535 (1980) (finding that the General Allotment Act was not a money-mandating statute).

1366-67 (Fed. Cir. 2003) (finding that arguments not made in response to a motion for summary judgment were waived).

C. Counts II, III, and IV Fail To State A Claim Upon Which Relief Can Be Granted In Part Or In Whole.

In addition to Plaintiff filing these claims outside the statute of limitations period, Plaintiff has failed to show that relief could be granted on its claims under Counts II (ICC Judgment Funds), III (Water Rights), and IV (Shoreline), and for that reason, under RCFC 12(b)(6), those claims must be dismissed.

1. Plaintiff fails to state a claim regarding the taking of its shoreline property under Count IV.

Plaintiff fails to state a claim for an unconstitutional taking of its shoreline lands because it was compensated for the property when it was taken. Plaintiff suggests that when the land was returned in 1974, the Secretary of the Interior's order somehow implied that the land should not have been taken and was being returned in order to correct a mistake. Pl.'s Opp'n 64-66. This argument wholly ignores Plaintiff's admission that it previously brought and settled claims regarding the taking of the shoreline lands before the ICC. It also is not consistent with the plain language of the Secretary's order or the facts.

From 1941 to 1974, Plaintiff did not hold fee title to the relevant shoreline property. In 1974, the issue was raised that the land that was taken for the Parker Dam exceeded the land that was actually inundated by that project. *See* Solicitor's Op., dated August 15, 1974 at 3-4, ECF No. 7-1. As a result, the Secretary's 1974 order was intended to return that land to Plaintiff by modifying the original designation. *Id*. The order did not reverse that the land was properly taken in 1941 and that a total amount of $80,879.45 was paid to Plaintiff as just compensation for that land. Compl. ¶ 30. In fact, at the time of the shoreline return, the government considered whether

Plaintiff should return part of the compensation for the original taking, and it was determined that it should not. ECF No. 7-1 at 6 n.4. Ultimately, Plaintiff received just compensation for the taking of this land, as well as an additional "payment" in the form of the beneficial interest in the returned land itself. Plaintiff cannot argue now, 45 years after the land was returned, that a different kind of taking occurred that was inadequately compensated, *i.e.*, a temporary physical occupation, when they have already received compensation for the Congressionally-authorized permanent taking. Thus, Plaintiff fails to state a claim for the taking of the shoreline property.

2. Plaintiff fails to state a claim for an accounting of suspense accounts.

Plaintiff's claim for an accounting of suspense accounts in Count IV also fails because Plaintiff provides no legal basis for this claim. A suspense or special deposit account is "a temporary account for the deposit of trust funds that cannot immediately be credited to the rightful account holders." 25 C.F.R. § 115.002. Plaintiff tries to manipulate a regulation concerning who owns the interest from the funds in a special deposit account to argue that it means that the tribe has an ownership interest in the account. Pl.'s Opp'n 39-40. Not so. 25 C.F.R. § 115.900 does not state that all funds in special deposit accounts or suspense accounts belong to the tribe. Plaintiff fails to identify any legal requirement for the United States to provide an accounting of these temporary accounts. Thus, Plaintiff fails to state a claim for an accounting of suspense accounts.

3. Plaintiff fails to state a claim regarding the diversion of unclaimed *per capita* accounts to tribal ownership.

Plaintiff's claim for all unclaimed *per capita* payments (*i.e.*, payments to a list of individual lineal descendants of tribal members) from the ICC judgment award for Dockets 351 and 351-A should be dismissed. Plaintiff acknowledges that it has the option to apply for the unclaimed *per capita* funds "after six years have passed from the date of distribution." Pl.'s Opp'n 40 (citing 25

C.F.R. § 115.820). Plaintiff also acknowledges that it has not done so prior to this suit. *Id*. at 40-41. Instead, Plaintiff asserts that it is able to apply for those funds via litigation in this Court because neither the statute nor the regulation sets forth any process for the tribe to exhaust administratively. *Id*. at 41. Plaintiff's admission that it never actually applied to the Interior Department for the money is dispositive. Nonetheless, there can be no claim for breach of fiduciary duty if the government has not even been requested to disburse any unclaimed funds.

Plaintiff cites *Quapaw* as a case where the court did not dismiss a claim for unclaimed *per capita* funds. Pl.'s Opp'n 41. However, the basis for dismissal raised by the government in Quapaw was very different than those raised here. *Quapaw Tribe of Okla. v. United States*, 120 Fed. Cl. 612, 616-17 (2015) (finding that lineal descendants of specific tribal group as of date certain were the type of *per capita* distributions to tribal members that is eligible under 25 U.S.C. § 164 for return to tribal coffers as opposed to Treasury). With respect to the distribution of judgment funds involved in Plaintiff's claim here, the distribution was made to a group of individuals specifically disclaimed by Congress as constituting the membership of the Chemehuevi Tribe. 25 U.S.C. § 1235. Additionally, in *Quapaw*, the plaintiff presented factual evidence that undistributed *per capita* payments actually existed. 120 Fed. Cl. at 618. Plaintiff has proffered no such information here.

Plaintiff also complains that the government never provided it with an accounting of the ultimate disbursement of the ICC judgment funds. Pl's Opp'n 29-30. However, with respect to the actual ICC funds distribution, the distribution was completely *per capita*, so Plaintiff would not hold any right to receive an accounting of the payments because the Tribe held no ownership interest in those payments; only the recipients of the *per capita* distribution payments of the ICC judgment funds held a property interest in those payments.

4. Plaintiff fails to state a claim regarding the taking of its water rights.

Plaintiff has failed to establish that it is entitled to sell or lease its water rights for off-reservation use, and therefore, Plaintiff cannot establish a taking based on the Secretary's failure to approve such transactions. Plaintiff's water rights related claims are based on a policy argument that tribes should be able to market their *Winters* rights for off-reservation use, but Plaintiff fails to cite any binding supporting statutory or case law. Pl.'s Opp'n 11-12.

To the extent that Plaintiff complains about the alleged failure to approve the 1998 leasing agreement, that claim is barred by the statute of limitations as discussed *supra* Section II.A. Additionally, the statutes Plaintiff cites in support of the government's duty to approve such a lease presume that those statutes extend to leases of water rights independent of a lease of land. Plaintiff concedes that "[t]he [Boulder Canyon] 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." Pl.'s Opp'n 37. Plaintiff's concession that the Act merely imposes an alleged implicit duty to enforce is fatal to its efforts to use this Act to meet the money-mandating doctrine requirement that there be a specific rights-creating statute for a trust duty.

Moreover, 25 U.S.C. § 81 does not cover transactions prohibited by 25 U.S.C. § 177.[6] *See Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 907 (9th Cir. 2014) (holding that tribe's proposed assignments of tribal lands to its members violated Section 177 and thus fell outside the purview of Section 81). Plaintiff cites *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960), for the faulty position that the Non-Intercourse Act does not apply to the

[6] It has been long recognized that Section 177 precludes marketing tribal water in the absence of separate Congressional approval. *See* David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 542 (1988).

government. Pl.'s Opp'n 38. Contrary to Plaintiff's assertion, *Tuscarora Indian Nation* actually stands for the proposition that the Non-Intercourse Act cannot be the basis of a claim by a tribe *against* the United States. 362 U.S. at 119-120.

Plaintiff argues that the United States "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."[7] Pl.'s Opp'n 60-61. However, the United States has not diverted Plaintiff's water to anyone along the Colorado River. In actuality, Plaintiff's claim is that other junior water users were allowed to use water that might not have been available for use if the Tribe had been able to use its maximum decreed amount of water rights on its Reservation. *See* Compl. ¶¶ 108, 111. In other words, junior users only had access to the water because Plaintiff did not fully utilize its water rights on its reservation, rather than any action by the Secretary.

Such a claim cannot succeed without Plaintiff possessing the property interest it alleges was taken—the right to market its water rights for off-Reservation use. Plaintiff does not have this right. So, the Court should dismiss this claim.

D. Plaintiffs Lacks Standing To Pursue Counts III And IV.

Plaintiff lacks standing to bring Counts III and IV, which allege takings of its *Winters* water rights and its shoreline land because it cannot demonstrate any injury in fact with respect to these counts.

[7] Additionally, Plaintiff mistakenly refers to the amount of water above which it uses as "surplus," but surplus water refers to the excess consumptive use above the mainstream water available for release to satisfy the annual consumptive use in Arizona, California, and Nevada. *See* Art. II.B.2, *Arizona v. California*, 547 U.S. 150, 155 (2006).

1. Plaintiff has suffered no injury to its usufructuary water rights.

Plaintiff's claim regarding its water rights is not that the United States has diminished its rights in terms of quantity of water or its priority position to access the water. Without such diminution, Plaintiff can assert no injury to its rights and does not have standing to pursue Count III of its Second Amended Complaint.

Plaintiff attempts to distinguish its claim from that of *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018). Pl.'s Opp'n 63-64. In *Crow Creek*, a tribe brought action against the United States claiming a Fifth Amendment taking and mismanagement of its reserved water rights. 900 F.3d at 1352. The Federal Circuit found that the tribe suffered no injury with respect to its *Winters* water rights and was unable to establish standing. *Id*. at 1357. Here, Plaintiff makes a very similar claim. Instead of an argument that the government was interfering with Plaintiff's own use of the water, Plaintiff here makes the more attenuated argument that the interference is to its ability to market and sell that water to a third-party, which, as discussed above, no money-mandating duty supports. Thus, like in *Crow Creek*, this Court should find that Plaintiff lacks standing to pursue this claim.

2. Plaintiff suffered no injury regarding the shoreline lands between 1941 and 1974.

Plaintiff asserts a claim for damages for the alleged mismanagement of funds from the shoreline lands between 1941 and 1974, but Plaintiff suffered no injury regarding the shoreline lands during this time because it admittedly had no ownership interest in that land. "Only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). So, Plaintiff is unable to allege an injury sufficient to provide standing for this claim. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiff alleges that when the land was returned in 1974, the Secretary of the Interior's order somehow implied that the land should not have been taken, so as a result, Plaintiff retroactively retained equitable title to the land. Pl.'s Opp'n 64-66. There is no plausible legal basis for Plaintiff's argument, and Plaintiff again offers no supporting authority.

E. The Court Lacks Jurisdiction Over Plaintiff's Claims Seeking Declaratory And Injunctive Relief.

Plaintiff requests declaratory and injunctive relief that this Court is unable to provide. In order to remedy that problem, Plaintiff attempts to argue that relief is all in aid of judgment. However, it is clear that it is not. Plaintiff requests that this Court "[a]ward a full and complete accounting of the Tribe's trust accounts that meets that meets [sic] the requirements of the Act of December 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329 and of the subsequent federal statutes reaffirming those requirements" after asking for "an accounting in aid of jurisdiction to render the compensation award and monetary judgment." Compl. § VI, Prayer for Relief. Thus, Plaintiff seeks a separate and independent accounting, which this Court is unable to provide. *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 582 (1990) (citing *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 490-91 (1966)).

This Court also cannot enjoin the United States to approve water rights lease agreements, nor can it declare that Plaintiff has a right to market its *Winters* water rights. *See Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998). Thus, this Court should dismiss any claims seeking relief outside the jurisdiction of this Court.

III. CONCLUSION

As set forth in the United States' motion and above, Plaintiff has failed to establish subject matter jurisdiction to allow its claims to proceed in this Court. Plaintiff's claims that accrued before 1946 are barred by the ICCA. Furthermore, Plaintiff's claims are untimely and should be

dismissed for lack of subject matter jurisdiction and a failure to state a claim that would entitle Plaintiff to relief. Therefore, the United States respectfully asks this Court to grant its motion and dismiss Plaintiff's Second Amended Complaint.

Respectfully submitted, this 23rd day of September, 2019.

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