THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Ute Indian Tribe of the Uintah and Ouray Reservation, Plaintiff, v. **United States Department of the Interior, *et al.*,** Defendants.	Case No. 1:18-cv-00547-CJN Judge Carl J. Nichols

PLAINTIFF'S OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS THE TRIBE'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES

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Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (Ute Indian Tribe or Tribe), respectfully submits its opposition to the Federal Defendants' Motion for Partial Dismissal, and alternative Motion for Summary Judgment. ECF No 68 ("Defs. Mtn." herein).

REFERENCES TO THE RECORD

Evidentiary materials for the Tribe's opposition are contained in a three volume exhibit appendix. References are to the appendix volume and page number(s), i.e., "App. I, 1-10."

INTRODUCTION

The Ute Indian Tribe is suing the United States for, *inter alia*, the federal government's repudiation of its trust obligations to the Tribe vis-à-vis the Tribe's *Winters* reserved water rights and the Ute Indian Irrigation Project, the "UIIP." Indeed, Defendants' repudiation of the federal government's trust responsibility to the Tribe is clear from the outset in Defendants' description of the case. According to Defendants, this case involves the Tribe's "*alleged water rights*" and "*water management in northeastern Utah*." Defs. Mtn. at 1. Similarly, Defendants describe the UIIP as a "*multi-purpose water management project … for Indians and non-Indians alike*." Defendants then imply that federal funds were used to construct the UIIP. *Id*. at 1, 3. All these statements are highly misleading. This case involves the Defendants' *mismanagement* of the Tribe's presently perfected *Winters* reserved waters on the Uintah and Ouray Indian Reservation, and it was the Tribe itself who paid for construction of the UIIP.

The foremost authority on Federal Indian law, *Cohen's Handbook of Federal Indian Law*, emphasizes that "[h]istorical perspective is of central importance in the field of Indian law." *Cohen's Handbook of Federal Indian Law*, §1.01, p. 5 (Nell Jessup Newton ed., 2012). Here, it is not possible to fully understand or analyze the legal issues in this case without a clear-eyed appreciation for the events of a century ago when the United States unilaterally broke apart the Tribe's reservation, allotted tribal lands in severalty to individual tribal members, opened the

remaining "surplus" reservation lands to non-Indian settlement, and authorized the UIIP. It is essential for the Court to have some understanding of the "allotment era" in American Indian history, and importantly, the later repudiation of federal allotment policies and law through the enactment of the 1934 Indian Reorganization Act, 25 U.S.C. § 5101 *et seq*. Not surprisingly, Defendants' dismissal motion is devoid of any reference to this essential history. It is, therefore, imperative for the Tribe to provide the Court with an accurate description of the historical underpinnings to the questions of law and fact presented by this case.

A. It was the Ute Indian Tribe that Paid for Construction of the UIIP.

The historical record does not support Defendants' suggestion that the federal government paid for construction of the UIIP. Defs. Mtn. at 3. Instead, the United States appropriated the sale proceeds from the forced sale of the Tribe's "surplus" reservation lands to reimburse the government for the UIIP's construction. As discussed by the Honorable Bruce S. Jenkins, U.S. District Court for the District of Utah:

> The [Ute Indian Irrigation] Project covered 80,000 acres, most of the [Indian] allotted lands, and contained 22 canal systems which diverted water from most of the streams in the Uintah Basin. A program was initiated to level, clear, plow, and fence the Indian allotments to get them into cultivation. *Tribal funds were used for this purpose*.[1] (emphasis added)

Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah, 521 F. Supp. 1072, 1126 n.165 (D. Utah 1981) ("*Ute I*") (quoting Floyd A. O'Neil & Kathryn L. Mackay, *A History of the Uintah-Ouray Lands*, at 34 (U. Utah, American West Center 1977), *aff'd in part, rev'd in part*, 773 F.2d 1087 (10th Cir. 1985) ("*Ute III)* (en banc), *rev'd in part*, *Hagen v. Utah*. 510 U.S. 399 (1994).[2]

[1] An Indian allotment is a parcel of land "allotted" in severalty to an individual Indian, a practice authorized by the General Allotment Act of 1887, 24 Stat. 388 (also known as the Dawes Act). *See Cohen's Handbook*, §1.04; Ch. 16, § 1603[2][b].

[2] *See also Hagen v. Utah*, 510 U.S. at 404 ("The proceeds from the sale of [tribal] lands restored to the public domain were to be used for the benefit of the [Ute] Indians."). The history of the

Judge Jenkins' ninety-three page decision in *Ute I*, 521 F. Supp. 1072, is an excellent reference for the events of 1902-1905, when the United States forcibly opened the Uintah and Ouray Reservation to non-Indian settlement. Recounting how Indian Inspector James McLaughlin was directed to meet with the Utes, ostensibly to obtain the Ute's consent to the allotment of their tribal lands, Judge Jenkins noted that "McLaughlin was in the peculiar position of one who was delegated to negotiate Indian consent to a chain of events that would occur regardless of the outcome of the negotiations." *Ute I*, 521 F. Supp. at 1117. Judge Jenkins then wrote:

> Inspector McLaughlin's approach to the Utes was reminiscent of the Athenian's approach to the Melians recounted by Thucydides in his History of the Peloponnesian War (ca. 416 b.c.):
>
> > ATHENIANS: "Then we on our side will use no fine phrases saying, for example, that we have a right to our empire because we defeated the Persians, … a great mass of words that nobody would believe …. Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think: since you know as well as we do that when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept."
>
> Thucydides, *The Peloponnesian War*, 401-402 (Penguin ed. 1954).
>
> As the City of Melos was besieged and captured by the Athenians, so the Uintah Reservation was allotted and opened by the [federal] Government against its residents' wishes.

Id., n. 36. The General Allotment Act of 1887 was meant to herald the "beginning of the end" of the American Indians and their reservation homelands. That era in American history, lasting from 1871 to 1928, is known as the period of Indian "Allotment and Assimilation." Under these twin

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UIIP) and the tribal water rights in the UIIP are discussed at length in multiple federal court decisions, including, *Hackford v. Babbit*, 14 F.3d 1457, 1468 (10th Cir. 1994), where the Court noted, *inter alia*, that "though the individuals with irrigable land [within the UIIP] may have a right of user [sic] to the water, the water right itself is a tribal right."

policy objectives, tribal lands were to be allotted in severalty to individual Indians, and the individual Indians were then to be assimilated into the larger American society.[3] *Ute I*, 521 F. Supp. at 1151 ("President Theodore Roosevelt colorfully described the General Allotment Act as 'a mighty pulverizing engine to break up the tribal mass.'"). It was these twin federal policies—Indian allotment and assimilation—that account for the language in the 1906 Appropriations Act cited by Defendants in support of their contention that the UIIP was intended to benefit "*Indians and non-Indians alike*" (language stating that the UIIP could be used by "*any person, association or corporation*…"). Defs. Mtn. at 1, 3. However, if the UIIP was intended to benefit "*Indians and non-Indians alike,*" it was only to the extent that a majority of Congressmen in 1906 believed Indians would cease to exist as a separate people within one to two generations. Moreover, if the UIIP was intended to benefit "*Indians and non-Indians alike*," then surely the project would not have been named the "The *Ute Indian* Irrigation Project." Nor would the project have been funded entirely with funds deducted out of the proceeds from the forced sale of the Tribe's "surplus" Indian lands at $1.25 per/acre. *Ute I*, 521 F. Supp. at 1099. That the UIIP was authorized exclusively to benefit Indians, and that it was the Utes themselves who paid for the UIIP is obvious from the text of the 1906 Act. The congressionally-authorized funds were:

> For constructing irrigation systems to irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah … **the cost of said entire work to be reimbursed from the proceeds of the sale of the [surplus] lands within the former Uintah Reservation**;[4] *Provided*, that … **the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians**, and he may sue and be sued in matters relating thereto . . . .

[3] *See Cohen's Handbook*, Ch. 1, §1.04.

[4] The use of the phrase "former Uintah Reservation," reflects the prevailing understanding in 1906 that the opening of the Uintah and Ouray Reservation had the legal effect of terminating the status of tribal lands as "reservation lands."

As noted in the Tribe's Second Amended Complaint, the 1906 Act was enacted two years before the United States Supreme Court issued its seminal decision in *Winters v. United States*, 207, 564 (1908), holding that when the United States established Indian reservations, it impliedly reserved sufficient water to establish a permanent homeland for the Indians. This rule, now known as the "*Winters Doctrine*," was later reaffirmed by the Supreme Court in another seminal ruling, *Arizona v. California*, 373 U.S. 546, 598-601 (1963), holding that the priority date of the Indian reserved water rights is the date on which the reservation was established. *See* Second Am. Compl. at 17-18, ¶¶ 42-47. Accordingly, the references in the 1906 Act to the applicability of Utah state law were judicially abrogated by the *Winters* decision in 1908. It is now undisputed that Indian reserved water rights are determined by federal, not state law. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985), citing *Cappaert v. United States*, 426 U.S. 128, 145 (1976).

The Indian Reorganization Act (IRA), enacted in 1934—and continuing in effect today—25 U.S.C. § 5101 *et seq.*, implements a federal policy that is 180-degrees the opposite of allotment and assimilation. The IRA's goal is to reestablish tribal governments, reconstitute tribal land bases, and revitalize tribal economies and cultures. *Cohen's Handbook*, §4.04[3][a], p. 256.

B. Indian Water Rights are Property Interests.

Federal Defendants improperly instruct the court to assume "for the purposes of this motion" that the Tribe "only has a right to a use a determined amount of water necessary to fulfull the purposes of the reservation." Defs. Mtn. at 6, n. 8. This statement should be stricken, rejected, or simply ignored by the Court. First, as movants seeking dismissal, Federal Defendants are not in a position to instruct the Court to make "assumptions" for the limited purpose of deciding their dismissal motion, especially when the "assumption" benefits the movant at the expense of the

Plaintiff. Second, the "assumption" Federal Defendants instruct the Court to make adopts an overly restrictive interpretation of Indian reserved water rights under the *Winters* doctrine. Defendants' instruction to the Court to assume the Tribe has the right to use a "determined amount of water" is far too vague to support the "assumption" the Federal Defendants instruct the Court to make, and moreover, fails to even account for who it is who makes that "determination."

Defendants also state, rather derisively, that the *Winters* doctrine vests "only a usufructuary interest in water," and thus, the Tribe does not own "any particular molecules of water." Defs. Mtn. at 6, n.8. In fact, all water rights—not just *Winters* rights—are usufructuary rights; yet in the arid western states, this usufructuary property right in water is highly valuable. See Declaration of Jason Bass, CPA, CFA, App. II, 369, ¶ 9. *See also, Hage v. United States*, 35 Fed. Cl. 147, 159 (1996) ("the Fifth Amendment's protection is not confined to real property"). Further, the creation of an Indian reservation generally involves the diminishment of a tribe's traditional homelands in return for a guarantee of permanent and protected territory. *See Winters*, 207 U.S. at 576. Thus, Indian tribes have a proprietary interest in waters that is recognized under their treaties with the United States. *See* A. Dan Tarlock, *Law of Water Rights & Resources* § 9:38 (2016). As pertinent here, the Ute Indians once "ranged from the Wasatch Front all the way to the Colorado Front Range—from present-day Salt Lake City to Denver." Charles Wilkinson, *Fire on the Plateau, Conflict and Endurance in the American Southwest*, 128 (1999). In return for the Ute Indians' cession of vast tracts of valuable land, the United States executed treaties with the Utes that guarantee the Tribe a tribal homeland. Ute Treaty of 1863 (13 Stat., 673); Ute Treaty of 1868 (15 Stat., 619); Act of April 29, 1874, Chapter 136 (18 Stat., 36). Therefore, the Ute Indian Tribe has a proprietary interest in its reserved water right that is recognized implicitly in its treaties with the United States.

LEGAL ARGUMENT

I. THE TRIBE IS NOT REQUESTING AN ADJUDICATION OF WATER RIGHTS, AND THE MCCARRAN AMENDMENT HAS NO APPLICATION

Defendants contend the Court lacks jurisdiction over an "adjudication or quantification of water rights," arguing that the McCarran Amendment only waives the federal government's sovereign immunity for a general stream adjudication. Defendants then argue that the United States cannot be compelled to initiate proceedings to adjudicate Indian reserved water rights. Both of these arguments are premised on a fundamental misreading of the Tribe's claims and supporting allegations. The Tribe is not requesting an adjudication or quantification of Indian reserved water rights, nor could it since the Tribe is clearly and distinctly alleging that the Tribe's Indian reserved water rights have already been quantified. Consistent with the *Winters* doctrine, the Tribe clearly states in its Second Amended Complaint that its Indian reserved water rights became vested on the date that its reservation was established, and that its water rights have already been quantified in the Decker Report and recognized under the 1965 Deferral Agreement and subsequent congressional legislation acknowledging the Deferral Agreement as a legally binding instrument.

Defendants assert that the McCarran Amendment "withholds the United States' consent to be sued in actions involving an adjudication of water rights unless the action involves joinder of the United States as a defendant in a general stream adjudication in which the rights of all competing claimants are adjudicated." Defs. Mtn. at 19. The Tribe is not seeking an adjudication of its water rights, and the Tribe is not relying upon the McCarran Amendment as a basis for either the Federal Defendants' waiver of sovereign immunity. The Tribe's claims for declaratory relief and enforcement of the full quantity of its Indian reserved water rights, as established upon the creation of the Uintah and Ouray Reservation and quantified under the Decker Report and the 1965 Deferral Agreement, is more accurately characterized as an action for *enforcement* of water rights

that already have been quantified. This Court recently ruled that the McCarran Amendment does not limit or restrict the enforcement of existing and legally recognizable Indian reserved water rights. In its 2020 opinion in *Hawkins v. Bernhardt*, non-Indian landowners sued the BIA to enjoin the BIA from implementing agreements with the Klamath Tribe establishing protocols and procedures for enforcing the Tribe's water rights. The non-Indian Plaintiffs argued that the McCarran Amendment prohibited the Tribe from independently enforcing its water rights. 436 F. Supp. 3d 241, 254 (D.C. Dist. 2020). However, this assertion was rejected outright by this Court:

> Plaintiffs rely first on the McCarran Amendment, 43 U.S.C. § 666, a federal statute enacted in 1952 that waives federal sovereign immunity to allow for "the joinder of the federal government in state suits for the general adjudication of all water rights in river systems and for the administration of the adjudicated rights." Cohen's Handbook at 1242; *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 802–03, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)…The fact that the Klamath Tribes' reserved rights were quantified in state proceedings, and are physically enforced by the state's water department, does nothing to alter the substantive rights themselves. That is to say, the McCarran Amendment does not—as plaintiffs seem to suggest, *see* Pl.'s Opp'n at 11–13—compromise, revise, or otherwise diminish the Klamath Tribes' water rights.

Id. Federal courts have applied this same principle in the context of a judicial action to enforce water rights. For example, in the 1996 case *Hage v. United States*, *supra*, the defendant United States argued that the McCarran Amendment compelled dismissal of ranch owners' water takings claim against the United States. 35 Fed. Cl. at 160. This court rejected that argument as an overreaching misconstruction of the McCarran Amendment:

> [T[he language of the McCarran Amendment does not limit this court's jurisdiction to hear plaintiffs' water rights taking claim. The McCarran Amendment serves a limited purpose which defendant now seeks to expand. Senator McCarran, who introduced the legislation, stated in the Senate report that the legislation was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream"….The court thus cannot abstain from its obligation to exercise its jurisdiction based upon a statute enacted merely as a waiver of the federal government's sovereign immunity in state stream adjudications.

> Defendant's position, in some ways, would be to turn the McCarran Amendment on its head.

Id. Because the Tribe is seeking neither an adjudication nor a quantification of its Indian reserved water rights, the McCarran Amendment is simply are not applicable to the Tribe's suit here.

II. COUNTS ONE THROUGH ELEVEN IDENTIFY A PROPER CAUSE OF ACTION OVER WHICH THE COURT HAS SUBJECT MATTER JURISDICTION

Defendants contend the Tribe has failed to identify a justiciable cause of action supporting its claims. Once again, the United States' assertion is based on an inaccurate characterization of the legal grounds supporting the Tribe's claims. The Tribe's claims arise from Defendants' violation of enforceable fiduciary duties and Defendants' unlawful actions and omissions relating to a trust corpus that is beneficially owned by the Tribe—rights and duties arising under treaties and contract, each of which constitute justiciable causes of action. Consistent with the appropriate function of the Declaratory Judgment Act, and in accord with the case law cited by Federal Defendants, the Tribe has invoked the Declaratory Judgement Act, not as an independent cause of action, but as a basis for the *relief* requested in Claims One through Eleven.

Defendants contend the Declaratory Judgment Act itself does not provide an independent cause of action absent the existence of an underlying enforceable right. Defs. Mtn. at 16-17. Defendants presume the Tribe's underlying cause of action is "final agency action" under Section 704 of the Administrative Procedure Act. Then, relying on this inaccurate premise, Defendants argue the Tribe has failed to allege a specific "final agency action" providing a basis for the Tribe's claims. However, the Tribe's First through Tenth claims each seek declaratory and equitable relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, based on Federal Defendants' enforceable fiduciary, statutory, and contractual obligations, and the Defendants' unlawful interference with the Tribe's possessory right to its tribal waters. *See Oneida Cty., N.Y. v. Oneida*

Indian Nation of N.Y., 470 U.S. 226, 233-36 (1985); *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 677 (1974) (Indian tribes have a federal common law right to sue for infringements on their possessory rights in tribal property). The Tribe's First through Eleventh claims do not necessitate an allegation or showing of "final agency action" under Section 704 of the APA. These claims are based on Defendants' acts and omissions in violation of enforceable fiduciary duties imposed on Defendants under a number of federal statutes and regulations existing outside of the APA. When, as here, there exists law supporting an enforceable fiduciary duty on the part of federal defendants, these statutorily-imposed duties are enforceable through legal claims that can be brought separate from and independent of Section 704 of the APA. *E.g.*, *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) ("A cause of action will be inferred from a fiduciary relationship only where a plaintiff can identify specific trust duties in a statute, regulation, or treaty"); *Cobell v. Norton,* 240 F.3d 1081 (D.C. Cir. 2001) (finding a cause of action exists where the federal government has been under an obligation to discharge the fiduciary duties owed to…trust beneficiaries," lest "agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action."); (*Standing Rock Sioux Tribe v. U.S. Army Corps. of Engineers*, 255 F. Supp. 3d 101, 145 (D.D.C. 2017) (finding that the requisite cause of action for a breach of trust claim is found in the substantive source of law establishing fiduciary duties, separate from the APA).

The sovereign immunity waiver under Section 702 applies to any action for non-monetary relief brought against the United States based on the actions and inactions of federal agencies or officials, irrespective of whether the claims arise under the substantive provisions of the APA. *El Paso Natural Gas Co.* at 892 ("…the second sentence of § 702 of the APA waives sovereign immunity not just for APA claims but also, more broadly, for claims 'seeking relief other than

money damages.'"); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). Therefore, the Tribe's invocation of Section 702 of the APA as a waiver of Defendants' sovereign immunity does not imply that the substantive causes of action must also arise under the APA.

Alternatively, the APA waives sovereign immunity for, and vests federal courts with jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. The Tribe's claims fall under this grant of jurisdiction because the Tribe's complaint alleges that the Secretary's refusal to comply with federal statutes, through actions and inactions, is wrongful and is depriving the Tribe of its legal right to access its *Winters* reserved water rights and to put the water to beneficial use. "Under both general equitable powers and powers granted under the APA, courts can insure that statutory rights are not denied by agency inaction." *Caswell v. Califano*, 583 F.2d 9, 15 (1st Cir. 1978) (citations omitted). *See also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("if, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose."); *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003), *aff'd in relevant part*, 392 F.3d 461 (D.C. Cir. 2004) (holding that the court has jurisdiction under the APA to compel the Secretary of the Interior to accord plaintiffs their statutory or constitutional rights).

Although Defendants suggest that the Tribe's asserted failure (*i*) to allege a cause of action, and (*ii*) failure to show an enforceable fiduciary duty are separate and distinct arguments, in actuality, the Defendants' success on the former assertion depends upon its success on the latter. As long as the Tribe has sufficiently alleged the violation of an enforceable fiduciary duty (an issue that is addressed more fully *infra*, in the next section of this brief), then the Tribe has sufficiently alleged a cause of action irrespective of "final agency action" under the APA.

III. THE TRIBE'S SECOND AMENDED COMPLAINT IDENTIFIES AN ENFORCEABLE TRUST DUTY AND THE DISTRICT COURT IS THE PROPER FORUM FOR RELIEF UNDER THE TRIBE'S THIRD, FIFTH, SIXTH, SEVENTH, NINTH, TENTH AND ELEVENTH CLAIMS

Defendants argue that the Tribe has failed to demonstrate any enforceable fiduciary duty giving rise to a justiciable claim. Defendants also argue that, even if the Tribe has alleged an enforceable fiduciary duty, this Court lacks jurisdiction because there exists an adequate remedy in the U.S. Court of Federal Claims. Both of these assertions are without merit. The Tribe has established that the 1899 Act, the 1906 Act, and subsequent statutes and regulations that provide definition to these two federal statutes, are far above and beyond the minimum requirements to allege enforceable fiduciary duties. Further, because monetary damages cannot substitute for the equitable remedies the Tribe is seeking, there is not an adequate remedy available in the Court of Federal Claims.

a. The Tribe has Shown Enforceable Trust Duties that have been Violated through Defendants' Acts and Omissions

It is undisputed that a trust relationship exists between the United States and Indian tribes. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (hereinafter "*Mitchell II*"). However, to establish a justiciable cause of action, the Tribe must identify a "substantive source of law that establishes [a] specific fiduciary duty." *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014) (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)) (internal quotation marks omitted). "[W]here the Federal Government takes on or has control or supervision over tribal monies and 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." *Cobell v. Norton*, 240 F.3d at 1098 (quoting *Mitchell II* at 225). This principle is especially applicable where the government assumes comprehensive,

pervasive, or elaborate control over tribal trust property, such that the Tribal beneficiary does not have primary managerial control over the trust property. In that case, the court will infer enforceable fiduciary obligations. *Mitchell II* at 225. (citing the Government's "comprehensive" and "pervasive" responsibility over the management of Indian timber harvesting in finding that "[a] fiduciary relationship necessarily arises when the Government assumes such elaborate control over…property belonging to Indians."); *United States v. Navajo Nation*, 537 U.S. at 507 (finding that, under the principles outlined in *Mitchell II*, an enforceable fiduciary duty arises when the Government assumes a "comprehensive managerial role" over the trust asset); *Cobell v. Norton*, 240 F. 3d at 1098; *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980).

The Tribe's Second Amended Complaint sufficiently alleges that Defendants are under enforceable fiduciary duties to secure, manage, protect, and develop the Tribe's Indian reserved water rights and the UIIP pursuant to the 1899 Act, the 1906 Act, and subsequent federal statutes and regulations providing further definition to these two duty-creating Acts of Congress. In what seems to be yet another effort to provide the Court with an alternative reading of the Tribe's Second Amended Complaint, Defendants have taken the extensive list of federal laws cited by the Tribe showing that the Tribe's claims arise under federal law (an issue that is separate and distinct from the existence of an enforceable fiduciary duty), and Defendants address each federal law in isolation from the others, attempt to show that none of these federal laws individually establish an enforceable fiduciary duty. Defendants would have the Court believe that the Tribe has simply thrown everything to the wall to see what sticks, ignoring the Tribe's Statement of Facts containing a detailed explanation of the fiduciary duties established under the 1899 Act and the 1906 Act, and further defined in subsequent laws and regulations of the United States. The 1899 Act and 1906 Act are explained in turn below.

i. 1899 Act

As the Tribe states in its Second Amended Complaint, the 1899 Act imposed a specific duty on the Secretary of the Interior to use his authority to secure and protect the Tribe's Indian reserved water rights. The 1899 Act authorized the Secretary to grant rights-of-way for the construction of ditches and canals on or through the Reservation for the purpose of diverting and appropriating said waters, subject to the following impositions related specifically to the Ute Indians' water rights:

> all such grants shall be subject at all times to the paramount rights of the Indians on said reservation to so much of said waters as may been appropriated, or may hereafter be appropriated or needed by them for agricultural and domestic purposes; and it shall be the duty of the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the Indians and the Indian service.

Thus, this Act goes above and beyond the minimum requirements to establish an enforceable fiduciary duty. The 1899 Act undoubtedly "establishes rights and duties that characterize a conventional fiduciary relationship." *El Paso Natural Gas Co.* at 895. To track the analytical framework employed by the U.S. Supreme Court in *Mitchell II*, all the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Ute Indian Tribe), and a trust corpus (reservation water resources). Beyond these foundational trust elements, the plain language of this statute imposes a specific fiduciary duty on the Secretary to secure water for the Ute Indians so that the Utes can utilize their "paramount" water rights in satisfying their "present and prospective wants." By recognizing the Tribe's "paramount" water rights and conferring upon the Secretary of Interior a specific duty to secure and protect these rights and to support the Tribe's present and future uses, Congress has imposed trust obligations that are enforceable against Defendants in this Court. The Government's assumption of supervision and

control over trust property gives rise to a *presumption* of an enforceable fiduciary relationship. *El Paso,* 750 F.3d at 896. Accordingly, the trust responsibilities established in the 1899 Act extend well beyond the "limited trust" examined by the Supreme Court in *United States v. Mitchell,* 445 U.S. 535, 542 (1980) ("*Mitchell I")*, falling within the realm of judicially enforceable fiduciary duties.

Further, the 1899 Act (as well as the 1906 Act and CUPCA, discussed *infra*) places the Tribe in the unenviable position of being completely reliant on the Secretary for adequate protections to insure that non-Indian appropriators do not adversely impact the Tribe's present and future water development needs. And these facts demonstrate precisely the type of comprehensive and pervasive control that compels an inference that Congress intended the Secretary's fiduciary duties to be enforceable. *Mitchell II* at 225; *U.S. v. Navajo Nation*, 537 U.S. 488, 497 (2003).

Defendants' enforceable fiduciary obligation to "secure" water resources necessary to satisfy the Tribe's "present and prospective wants" includes an enforceable fiduciary duty to develop the Tribe's Indian reserved water rights appurtenant to its Reservation lands or, at the very least, to provide storage infrastructure necessary to (1) insure that the Tribe's federally-adjudicated and reserved water rights provide adequate irrigation water throughout the irrigation season on a yearly basis; (2) preserve unused Indian water rights for future uses that will economically benefit the Tribe; and (3) prevent the Tribe's fully vested Indian reserved water rights from being appropriated by downstream users at no compensation to the Tribe. This interpretation of the 1899 Act is necessary to realize Congress's unequivocal directive to secure water for the Tribe's present and future uses.

The enforceable fiduciary duty to develop and/or provide storage in order to "secure" Tribal water under the 1899 Act is particularly clear when viewed in conjunction with the Tribe's

allegation that the Tribe's Indian reserved water rights are "present perfected" water rights, as the term is used in Article VIII of the 1922 Colorado River Compact, stating that "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." Second Am. Compl. at 15 ¶ 47; *Arizona v. California*, 373 U.S. 546, 600 (1963). As "present perfected" water rights, the full quantity of the Tribe's Indian reserved water rights is deemed vested for both present and future uses from the date that the Tribe's reservation was established. *Arizona* at 600-01. When the Secretary fails to develop the Tribe's present perfected water rights or, at the very least, assist in providing storage infrastructure for future use, the Secretary is allowing the Tribe's vested property rights to flow off the reservation and/or be utilized by non-Indian water users with no economic return to the Tribe.

In their attempt to refute the Tribe's argument that the 1899 Act created an enforceable fiduciary duty, Defendants neglect to cite the relevant language of the statute, citing only the portion of the statute authorizing the Secretary to grant rights-of-way. The only substantive argument Defendants provide is a scant, one-sentence assertion that the 1899 Act cannot provide the requisite enforceable fiduciary duty because "[n]either discretionary authorizations to act nor appropriations such as these create enforceable trust duties." Defs. Mtn. at 25. The "discretionary" language Defendants cite relates to the Secretary's authority to issue rights-of-way necessary for non-Indians to appropriate on-Reservation water resources, which, as noted above, is not the relevant portion of the statute that creates and imposes an enforceable fiduciary duty. To the contrary, Congress used decidedly non-discretionary language in conferring duties upon the Secretary to secure and protect the Tribe's paramount water rights, stating that it "*shall be the duty* of the Secretary…to prescribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise

protect the rights and interests of the Indians and the Indian Service." (emphasis added). Defendants appear to imply that because Congress did not identify the precise steps the Secretary must take to fulfill his statutory mandate of securing and protecting the Tribe's water rights, the Act's directives are merely "discretionary." This fact only strengthens the enforceability of the fiduciary obligations prescribed by Congress. *U.S. v. White Mountain Apache Tribe v. United States*, 537 U.S. 465, 466-67 (2003) (citing the "discretionary authority" of the United States to occupy and manage trust corpus to support its finding that the statute in question conferred enforceable fiduciary duties upon the United States.). *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371-72 (D.D.C. 1973) (Federal Government has an enforceable fiduciary obligation to "protect aboriginal lands against intrusion by third parties until such time as Congress acts to extinguish possessory rights therein.").

Moreover, the existence of discretion does not limit or otherwise qualify the actions or omissions constituting a violation of the Secretary's trust responsibilities. The standard for assessing a breach of trust by the government is: "Did the Federal Government do whatever it was required to do in the circumstances?" *Gila River Pima-Maricopa Indian Comm. v. United States*, 427 F.2d 1194, 1198-1199 (Ct. Cl. 1970). Applying that standard here, the salient inquiry is not whether discretion exists, but whether such discretion was used appropriately in accordance with the trust relationship. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-258 (D.C. Cir. 1973) (a 'judgment call' by the Secretary, even in good faith, breached the United States' fiduciary responsibility to the tribe by not resolving conflicting claims in a precise manner); *Edwardsen v. Morton*, supra, at 1371-72. *See also Oenga v. United States*, 91 Fed. Cl. 629, 639-640 (Fed. Cl. 2010) (by not conducting appropriate inspections, the government breached its trust responsibilities to monitor the lease, discover the violation and take appropriate remedial actions).

Defendants cite the Federal Circuit case of *Wolfchild v. United States* in support of their assertion that the existence of Secretarial discretion negates any fiduciary obligation to the Tribe. In *Wolfchild*, the court found that a federal statute authorizing the Secretary to set aside certain public lands for individual Sioux Indians who had exhibited loyalty to the federal government was "simply too discretionary to support a viable claim for damages on its own." *Wolfchild v. United States,* 731 F.3d 1280, 1292 (Fed. Cir. 2013). The 1899 Act is fundamentally distinguishable from the statute at issue in *Wolfchild*. In *Wolfchild*, the alleged "duty" was itself framed in purely discretionary language (i.e., "[T]he Secretary of the Interior is hereby authorized to set apart of the public lands…"). The 1899 Act, on the other hand, prescribes a non-discretionary duty in plain terms ("it shall be the duty of the Secretary…"). The only arguably "discretionary" component of the 1899 Act is that the Secretary is responsible for determining precisely what measures are necessary to carry out Congress's prescribed duty, which, as explained above, does not limit the Tribe's right to enforce the mandatory fiduciary duty under the Act. Defendants' reliance on *Wolfchild* is therefore unavailing.

ii. 1906 Act and Federal Regulations Surrounding Defendants' Administration of the UIIP

The 1906 Act, which authorized the construction of the UIIP, expressly provided that the UIIP "shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto." The plain language of the 1906 Act alone exceeds the minimum requirements needed to establish enforceable fiduciary obligations on the part of the Secretary. However, that interpretation of the Act is bolstered in light of subsequent federal laws and regulations that further solidify the United States' elaborate and pervasive control over both the UIIP and the Tribe's Indian reserved water rights delivered through the UIIP.

Defendants incorrectly assert that the plain language of the 1906 Act, stating that the UIIP "shall" be held in trust, is insufficient to establish enforceable fiduciary duties. Defendants have selectively quoted only a portion of the statutory language, ignoring the key clause stating that the Secretary may "sue and be sued in matters relating thereto." This "sue and be sued" provision unambiguously confirms the enforceability of the Secretary's trust obligations in a judicial forum. In discerning the meaning of statutory language, the statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The only possible interpretation of the "sue and be sued" clause is that the clause confirms the judicial enforceability Secretary's trusteeship of the UIIP and the Tribe's reserved water rights. To the extent the 1906 Act is ambiguous as to whether the statutory language establishes an enforceable fiduciary obligation, the Indian canons of construction require that such ambiguity be "liberally construed in favor of the Indians" and "interpreted for their benefit." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Therefore, even if the enforceability of the Secretary's trust duties is not obvious from the plain language of the statute, the Indian canons of construction require that this "sue and be sued" clause be construed as congressional confirmation that the Secretary's trust duties can be enforced.

Further, even if Congress had not included the "sue and be sued" clause in the 1906 Act, the statutory language establishing that the UIIP shall be owned "in trust" by the Secretary, read in context, is more than sufficient to establish enforceable fiduciary obligations. In the 2003 U.S. Supreme Court case *United States v. White Mountain Apache Tribe*, the Court ruled that enforceable fiduciary obligations arose from a 1960 Congressional Act stating that the Fort Apache Military Reservation shall be "held by the United States in trust for the White Mountain Apache Tribe." 537 U.S. 465, 469 (2003). The Court distinguished this 1960 Act from the "in trust"

language of the General Allotment Act invoking only a "bare trust" per the Court's *Mitchell I* opinion by placing these respective statutes in context. *Id*. at 474-75. The Court reasoned that, unlike the Allotment Act, which gave the allottees full power to occupy and manage the land, the 1960 Act, in contrast, made the trust property subject to the Government's use, occupation, and control. *Id*. at 475. The Court found this distinction dispositive in its finding that the "in trust" language of the 1960 Act established enforceable fiduciary obligations despite similar language in the General Allotment Act invoking only a "bare trust." *Id*.

The 1906 Act is far more analogous to the 1960 Act at issue in *White Mountain Apache* than the General Allotment Act at issue in *Mitchell I*. Like the statute in *White Mountain Apache* – and unlike the General Allotment Act – the 1906 Act quite definitively subjects the UIIP to the Government's use, occupation, and control. Not only does the 1906 Act provide that the Secretary with the authority to construct and appropriate water for the UIIP, it also authorizes the Secretary to extend and enlarge the water works of the UIIP. Thus, when read in context, the language of the 1906 Act, stating that the UIIP shall be held "in trust," establishes enforceable fiduciary duties.

Moreover, even if the 1906 Act does not by itself establish enforceable fiduciary duties, the 1906 Act is only one part of a larger legal framework giving Defendants pervasive and comprehensive control, not only over the UIIP itself, but also over the Tribe's Indian reserved water rights delivered through the UIIP. Administration of the UIIP has been governed by federal regulations giving the BIA exclusive administrative authority over the UIIP and its component structures since 1957, and such exclusive authority still exists today. 22 Fed. Reg. 10479, 10637-38 (Dec. 24, 1957); 25 C.F.R. Part 171. In addition, the Congressional Act of May 28, 1941 (55 Stat. 209) ("1941 Act") authorized the Secretary to transfer water rights within the UIIP to different lands in order to maximize project efficiency. Second Am. Compl. ¶¶ 104-106. In enacting the

1941 Act, Congress gave the Secretary managerial control over the disposition of Indian reserved water rights delivered through the project. As exemplified by the foregoing, Defendants have assumed a comprehensive and pervasive role in managing the UIIP and its associated Indian reserved water rights, giving rise to enforceable fiduciary duties based on the Defendants' collective role as trustee for the Ute Indian Tribe and its members.

Having established the existence of an enforceable fiduciary obligation under the 1906 Act and related federal laws, the Defendants' specific requirements for satisfying its role as fiduciary derive from the common law of trusts. Although the "general contours of the government's obligations may be defined by statute," the D.C. Circuit has found that the "interstices must be filled in through reference to general trust law." *Cobell*, 40 F.3d at 1101. Common law trust principles play an especially important role in "controversies involving direct management of tribal resources and funds," in which "the government's role is most akin to that of a private fiduciary." *Cohen's Handbook*, §5.05[2], p. 428. In *White Mountain Apache*, the Supreme Court relied on common law trust principles in ruling that the United States had breached its trust obligations, citing § 176 of the Restatement (Second) of Trusts as support for the "commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." 537 U.S. at 475. Other common law trust duties applicable to Defendants' management and administration of the UIIP include, without limitation, the duty to administer the trust "solely in the interest of the beneficiary," the duty to "provide returns or other benefits from trust property," and the duty to keep adequate records and furnish information relating to the trust assets to the beneficiaries. Restatement (Third) of Trusts §§ 76-78, 82-83. In accord with these fundamental common law trust duties, the Tribe has alleged – and Defendants have failed to rebut – that Defendants have an enforceable trust duty to manage and maintain the UIIP and its

associated Indian reserved water rights for the benefit of its tribal beneficiary, as well as to provide an accounting in relation to Defendants' administration of these trust assets.

iii. Central Utah Project Completion Act

The Defendants also have an enforceable fiduciary duty to provide Tribal water storage under the 1992 Central Utah Project Completion Act (CUPCA). As stated in the Second Amended Complaint, Section 203(f) of CUPCA authorized appropriations for construction of the Uinta Basin Replacement Project (UBRP) to replace the never-constructed Uintah and Upalco Units of the Central Utah Project. App. II, 271. The same section of CUPCA states that "[t]he Secretary shall retain any trust responsibilities to the [UIIP]." *Id.*, Section 203(f)(2). Later, specifically addressing the Ute Indian Tribe's reserved water rights, Section 501(b) of the CUPCA states that one purpose of the CUPCA was to "allow increased beneficial use" of the Tribe's Indian reserved water rights. These statutory provisions of the CUPCA, read in conjunction with the 1899 Act and the 1906 Act, establish an enforceable trust duty to construct the UBRP to provide storage to secure and protect the Tribe's Indian reserved water rights. App. II, 274.

In fact, Defendant DOI has acknowledged that the Secretary must account for its preexisting trust responsibilities to the Ute Indian Tribe in planning and constructing the UBRP. In 1993, as required under Section 201(c) of the CUPCA, Defendant DOI entered into a Cost Sharing Agreement with the CUWCD allocating costs associated with UBRP. The third recital of this Cost Sharing Agreement states that "the Secretary is required to ensure that replacement features planned, designed and constructed for the Uintah and Upalco Units of the Central Utah Project are consistent with the Secretary's trust responsibilities to the Ute Indian Tribe on [sic] the Uintah and Ouray Reservation." App. I, 64. Through this recital, Defendant DOI has expressly acknowledged CUPCA's statutory requirement that the Secretary proceed with the UBRP in strict

accordance with the 1899 Act, 1906 Act, and other related statutes and regulations cited herein establishing and/or defining the Secretary's fiduciary obligations to the Ute Indian Tribe.

Defendant DOI has further admitted that the purpose of CUPCA was to provide storage necessary for the Tribe to develop these decreed water rights through irrigation. In an October 13, 1995, memorandum from the DOI Field Solicitor Lynn Collins to the CUPCA Program Director, the Solicitor opined in his legal memorandum that "Congress intended that Indian reserved water rights water for the 1906 Project be stored in CUPCA Section 201(c) and Section 203 replacement facilities." App. I, 71-90, 86. Understanding that Reservation lands with a UIIP water right could not be adequately irrigated without access to storage, the Solicitor concluded that "the 1906 Act authorization for irrigation facilities includes storage when the necessary facilities are funded." App. I, 80. The CUPCA provided funding for the storage of Tribal water in the UBRP facilities.

Citing the express purposes recited by Congress in the CUPCA, Solicitor Collins concluded that Congress "intended to 'quantify the Tribe's reserved water rights" and "allow increased beneficial use of such [reserved' water].'" App. I, 87. Based on this well-supported determination of the CUPCA purpose, Solicitor Collins stated that "[b]ecause an increased beneficial use of reserved water on Tribal lands can *only* be obtained *by storage*, we conclude storage of the Tribe's reserved water rights was intended as an incremental part of the CUPCA." *Id*. (emphasis in original). In adopting this position, the Solicitor was referring not just to the Tribe's federally-decreed water rights, but to the full quantity of the Tribe's Indian reserved water rights.

Because the admitted purpose of the UBRP authorized under CUPCA was to provide storage to supplement the Tribe's Indian reserved water rights, including but not limited to the Tribe's federal-decreed and reserved water rights delivered through the UIIP, the CUPCA must be read in conjunction with both the 1899 Act and the 1906 Act, along with the other federal laws

and regulations cited herein which give definition to these two statutes. The 1899 Act (imposing a fiduciary duty to secure and protect the Tribe's paramount water rights for present and future uses), the 1906 Act (imposing a fiduciary duty to construct, maintain, and administer the UIIP for the benefit of the Ute Indian Tribe and its members) and CUPCA, read together, collectively impose an enforceable fiduciary duty on the United States to construct the UBRP to provide storage for the benefit of the Ute Indian Tribe. When read in the context of the Defendants' existing trust obligations, the CUPCA conferred upon Defendants (1) a specific fiduciary duty to ensure that the UBRP benefitted the Tribe in part, and (2) comprehensive control over the process of supplying storage to supplement and support the Tribe's Indian reserved water rights.

b. The United States Court of Federal Claims does not Provide an Adequate Remedy for the Tribe's Equitable Claims for Relief

Secondary to their argument that the Tribe has failed to identify any enforceable trust duties, Defendants argue that this Court does not have jurisdiction over the Tribe's breach-of-trust claims (i.e. the Tribe's third, fifth, sixth, seventh, ninth, tenth, and eleventh claims), because an adequate remedy exists in the United States Court of Federal Claims. Defs. Mtn. at 28-31. Defendants assert that, because there is an adequate remedy in the Court of Federal Claims, there can be no waiver of sovereign immunity under Section 702 of the APA.

As an initial matter, Defendants inaccurately assume the Tribe is relying wholly upon 5 U.S.C. § 702 as its basis for the waiver of Defendants' sovereign immunity. Yet, as expressly stated in both this response memorandum and the Second Amended Complaint, the requisite waiver also derives from the "sue and be sued" clause of the 1906 Act. The waiver of sovereign immunity under the 1906 Act applies to each of the Tribe's Claims for Relief based on the trust status of the UIIP or the Federal Defendants' fiduciary obligations surrounding the construction, operation, and maintenance of the UIIP.

To the extent the requisite waiver of Federal Defendants' sovereign immunity derives from the APA, the Court of Federal Claims cannot provide an adequate remedy for the Tribe. Defendants suggest that the equitable relief sought by the Tribe "lacks considerable value independent of any future potential for monetary relief." Defs. Mtn. at 30 (quoting *Bublitz v. Brownlee*, 309 F. Supp. 2d 1, 7 (D.D.C. 2004)). Defendants' assertion is reductive and contradicts the detailed factual narrative in the Tribe's Second Amended Complaint explaining the deep and inextricable connection between water and the health, well-being, and sovereign integrity of the Ute Indian Tribe and its members. The non-monetary relief sought by the Tribe would, for instance, help ensure the availability of water resources to sustain the health and well-being of the Tribe and its members into the future, minimize the fallowing of the Tribe's homeland, and providing a framework through which the Tribe can work collaboratively in applying respective administrative roles toward the protection and development of Tribal water resources and in furtherance of the federal policy of Indian self-determination. Thus, even if the APA's provision limiting review to final agency actions with "no other adequate remedy available in another court" applied here, Defendant's argument that the Court of Federal Claims provides such adequate remedy is based on a misinformed view that the only value derived from the Tribe's claims is monetary in nature. *See* Bass Declaration, App. II, 369-70, ¶ 10.

Finally, except for the specific purpose of calculating monetary damages, the Court of Federal Claims does not have jurisdiction to mandate an accounting of trust corpus. *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. U.S.,* 174 Ct. Cl. 483, 487-88 (1966) ("It is fundamental that an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting… From the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief."). The Tribe's Eleventh Claim is

based on Federal Defendants' failure to provide the Tribe with an accounting of various assets and records surrounding Federal Defendants' management of trust corpus, and the Tribe's prayer for relief attached to this Claim is for an order mandating such an accounting. The requested accounting is integral to identifying the nature and scope the Federal Defendants' mismanagement of tribal trust resources. Because the Tribe is seeking equitable, non-monetary relief outside the purview of the Court of Federal Claims, and such equitable relief has value beyond any "future potential for monetary relief," Federal Defendants' argument that the Court of Federal Claims provides an adequate remedy for the Tribe's breach of trust claims lacks merit.

IV. THE TRIBE'S THIRD AND ELEVENTH CLAIMS WERE NOT EXPRESSLY WAIVED AND RELEASED IN THE 2012 SETTLEMENT

The Tribe agrees with Defendants that settlement agreements are interpreted as contracts; however, the cardinal rule in interpreting a contract is to read the contract in its entirety, making sure that no provision is ignored or rendered "'inconsistent, superfluous, or redundant.'" *Medlin Constr. Group Ltd. V. Harvey*, 449 F.3d 1195, 1200 (Fed. Cir. 2006) (citation omitted). Defendants disregard this rule. The parties to the 2012 Settlement Agreement, the Tribe and the United States, expressly agreed to *preserve*—not to waive and release—the Tribe's claims relating to the United States' mismanagement of the Tribe's water resources. The Tribe's statement of disputed material facts in opposition to summary judgment is contained in the appendix, App. II, 344-351. Significantly, the 2012 Agreement contains several express exceptions to the release, waiver, and covenant not to sue. Section 6 of the 2012 Agreement states that "nothing in this Settlement Agreement shall diminish or otherwise affect" in any way:

a. Plaintiff's ability … to assert a claim for harms or damages allegedly caused by Defendant after the date of execution of this Settlement Agreement;

b. Plaintiff's water rights, whether adjudicated or unadjudicated; Plaintiff's authority to use and protect such water rights; and Plaintiff's claims for

> damages for loss of water resources allegedly caused by Defendants' failure to establish, acquire, enforce, or protect such water rights….

Defendants' Exhibit D, ECF No. 68-4, p. 7. By these terms, the Tribe preserved its claims for the United States' failure to "establish, acquire, enforce, or protect" the Tribe's water resources. Claim Three of the Tribe's amended complaint alleges the United States has repudiated its trust responsibilities to the Tribe in relation to the UIIP, and seeks both "a declaration … that the UIIP is a trust asset," and "appropriate judicial enforcement under 28 U.S.C. § 2202." Second Am. Compl. at 76, ¶ 254. Hence, Claim Three falls within the exception to the release under the 2012 Agreement. Similarly, an accounting, sought under Claim Eleven, Second Am. Compl. at 85, is necessarily incidental to the Tribe's claims based on the Tribe's right to "use and protect" its water rights. Finally, the Tribe's complaint allegations, which must be accepted as true, assert that the Tribe did not learn of Defendants' UIIP water carriage agreements and "informal" operating procedures" until 2013 at the earliest—meaning these claims fall under Section 6(a) of the 2012 Agreement, as "harms or damages … caused by Defendant after the date of execution of this Settlement Agreement." *See* Second Amended Compl. ¶ 145; Second Declaration of Frances C. Bassett, App. III, 517.

V. THE TRIBE'S FIRST, SECOND, FOURTH AND FIFTH CLAIMS WERE NOT EXPRESSLY WAIVED AND RELEASED IN § 507 OF CUPCA

a. The Tribe's Legal Rights Under the 1965 Deferral Agreement Have Never Been Settled, Waived, and Extinguished

The Ute Indian Tribe has never entered into arms-length negotiations with the parties to the 1965 Deferral Agreement to compromise the Tribe's rights under the Agreement. App. I, 84-128. Declaration of Luke Duncan. Nor has the Tribe ever executed a written agreement that purports to settle, waive, and extinguish the Tribe's rights and legal claims under the 1965 Agreement. App. I, 92, ¶¶ 28-30. To be enforceable—that is, to comply with the Statute of Frauds

and other federal and tribal laws—any waiver would have to be in writing and signed by the Tribe. *E.g., Green v. Menominee Tribe of Indians*, 233 U.S. 558, 570-71 (1914) (oral agreement with Indian tribe was illegal). Insofar as there is no written and executed agreement between the parties to the 1965 Deferral Agreement, there has not been an enforceable settlement and waiver of the Tribe's rights under the Agreement. And herein lies a dispositive distinction between this case and *Grey v. United States*, 21 Cl. Ct. 285 (1990), *aff'd* 935 F.2d 281 (Fed. Cir. 1991), cited by Defendants. Defs Mtn. at 47. *Grey* is not controlling because in *Grey* there *was* (*i*) an arms-length negotiation between the Indian tribe and the other necessary parties, and (*ii*) a fully executed written settlement agreement that was presented to Congress for approval and enactment. The existence of a predicate written agreement is noted by both the *Grey* court and the federal act:

> The 1988 Settlement Act *confirmed* a comprehensive settlement agreement between the Salt River Indian Community and the state of Arizona, the Salt River Federal Reclamation Project, large water districts, as well as all of the cities in the Salt River Valley. (emphasis added)

Grey, 21 Cl. Ct. at 296. The Congressional act—the Salt River Pima-Maricopa Indian Community Water Rights Settlement—defined the underlying settlement agreement as follows:

> (a) "Agreement" means that agreement dated February 12, 1988, among the Salt River Pima Maricopa Indian Community; the State of Arizona; the Salt River Project Agricultural Improvement and Power District; the Salt River Valley Water Users' Association; the Roosevelt Water Conservation District … and the Central Arizona Water Conservation District, together with all exhibits thereto.

Pub.L. No. 100-512, 102 Stat. 2549, Sec. 3(a) (1988). A condensed copy of the Salt River settlement agreement is included in the Tribe's appendix, App. II, 270-283. Here, in contrast, there is no equivalent written settlement agreement executed by all necessary parties. Indeed, the Tribe's undersigned counsel is not aware of any other purported "unilateral" Congressional settlement of a Tribe's water rights, i.e., a settlement in which Congress was not first provided

with a predicate written settlement agreement executed by all necessary parties. App. III, 372-75, Declaration of Frances C. Bassett.

b. Tribal Chairman Luke Duncan Did Not, and Could Not, Unilaterally Approve Title V of CUPCA

Luke Duncan, Chairman of the Tribal Business Committee, had no authority under the Tribe's Constitution and its Corporate Charter to contractually bind the Tribe unilaterally.[5] Moreover, the draft bill to which Chairman Duncan testified on September 18, 1990 was not the same bill that Congress enacted more than two years later on October 30, 1992—the "Reclamation Projects Authorization and Adjustment Act of 1992," Pub. L. 102-575, 106 Stat. 4600.[6] When Chairman Duncan testified to Congress in September 1990, Exhibit C to his testimony included a copy of the draft 1980 Ute Indian Water Compact. Defendants' Exhibit F, ECF No. 68-6 at 16-18. However, the bill that Congress ultimately enacted two years later included an entirely different draft compact, referred to in CUPCA as the "*proposed Revised Ute Indian Compact of 1990*." CUPCA, Title V, Sections 501(b) and 503(a). App. I, 84-88, ¶¶ 3-16. Chairman Duncan's Declaration describes the many substantial and material revisions that were made to the draft compact following his 1990 testimony to Congress. Chairman Duncan even describes one change made to the compact as akin to "*a cruel joke … perpetrated with malice on the Tribe*." App. I, 85-88, ¶¶ 8-12.

[5] The Tribe asks the Court to take judicial notice of the Tribe's Constitution and Bylaws, and its Corporate Charter. App. II, 288, 298. The Chairman can exercise only that authority that has been "delegated to him" by the Tribe's six-member Business Committee. App. II, 298. And the Tribal Business Committee is a unitary executive and legislative body that can act only through a majority vote of its members sitting in formal session with a four member quorum being present. App. II, 299-301.

[6] Titles II through VI of which are titled the "Central Utah Project Completion Act" (CUPCA).

c. There Was no Meeting of Minds and no Realization of the Congressional Purpose Under CUPCA Due to a Mutual Mistake of Fact

Accord and satisfaction is a contract doctrine that requires a meeting of the minds. *Minnesota Chippewa Tribe v. United States*, 229 Ct. Cl. 678 (1981). In finding no meeting of the minds, the Court in *Minnesota Chippewa* said:

> [T]he relevant actions of the parties here spanned 8 years, from the 1882 agreement which was approved neither by the Chippewas nor by Congress, to the 1886 inchoate agreement which was approved by the Indians but not by Congress, to the 1890 appropriation which refers to the 1882 commission. Out of this jumble and lapse of time it is impossible to find any meeting of the minds which would constitute accord and satisfaction.

The "jumble and lapse of time" is even worse in this case. Moreover, a colossal error was made in computing the amount of compensation that is paid to the Tribe annually under CUPCA, Section 502(a). Declaration of Woldezion Mesghinna, Ph.D, P.E., App. II, 354-56, ¶¶ 24-33. Due to this error and the absence of mutual assent, there will never be a realization of the Congressional purpose under Title V of CUPCA. Mesghinna Declaration, App. II, 355-56, ¶¶ 29-33.

d. Title V of CUPCA is a Misnomer. At most, the "Settlement," if any, was Proposed, Aspirational, and/or Contingent

It is axiomatic that the "title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947). In the event of an ambiguity, a statute must "be construed liberally in favor the Indians, with ambiguous provisions interpreted to their benefit.'" *Cty. of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citation omitted). The caption to Title V of CUPCA—"Ute Indian Rights Settlement"—is a misnomer because Congress specified in

CUPCA that Title V was, at most, a *contingent* settlement.[7] The settlement is described by Congress, in Title V, Section 501(a)(4)(b), as consisting of *all* the provisions of "[t]his Act *and* the proposed Revised Ute Indian Compact of 1990." (emphasis added) App. II, 265. Multiple contingencies are identified throughout the Act. For one, the settlement is expressly conditioned upon a "re-ratification" of the *proposed Revised Ute Indian Compact of 1990* "by the State [of Utah] and the Tribe." Title V, Section 503(a). App. II, 266. This contingency has not been met. Another contingency is that Title II of CUPCA, Section 203, authorized funds for the construction of a "Uintah Basin [storage] Replacement Project," and the United States has admitted that the Uintah Basin Replacement Project must include storage for Indian water. *See* Dept. of Interior, Mem., 10/13/1995, "*Storage of Indian Water Rights Water in the Uinta Basin Replacement Project Facilities*," App. I, 62-83. However, to date no part of the Uintah Basin Replacement Project includes storage for Indian water. Finally, Title V required the payment of certain amounts to the Tribe; however, the United States' own "Summary of Title V Settlement Funds, *see* ECF No. 15-4, does not establish that all the Title V funds were paid. App. II, 366-69, ¶¶ 6, 11-12, Declaration of Jason Bass, CPA, CFA.

e. Alternatively, this Court Should Refuse to Enforce the So-Called Settlement Because it is Unconscionable

The Tribe's amended complaint details the many deficiencies and inequities under Title V of CUPCA. These deficiencies and inequities, taken together, render any so-called settlement unconscionable. Second Am. Compl. at 57-65, ¶¶ 191-218. The Tribe therefore asks this Court to deny enforcement of to the CUPCA waiver, § 507, on the same ground that the United States Supreme Court once articulated as follows:

[7] Parenthetically, the caption is not "Ute Indian *Water* Rights Settlement;" in contrast to the Act in *Grey*, the word "water" has been omitted from the statutory title.

> … from time to time immemorial it has been the recognized duty of [equity] courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts . . . .

Haffner v. Dorbrinski, 215 U.S. 446, 450 (1910). Leading scholars and commentators have described the CUPCA settlement as "*dependent on water development that may never be completed*." Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights, Fulfilling Promises in the Arid West*, 79 (Univ. Az. Press 2005). And Professor Daniel McCool, past director of the American West Center at the University of Utah, states that the United States never appropriated all of the funding authorized under CUPCA. In fact, Professor's McCool includes in his book a chart which shows that the United States still owes the Tribe nearly $61-million dollars. Daniel McCool, *Native Waters, Contemporary Indian Water Settlements and the Second Treaty Era*, 51-52 (Univ. of Az. Press, 2002). A copy of Professor's McCool's chart in included in the Appendix, App. III, 575. The Tribe asks the Court to take judicial notice of these sources under Rule 201 of the Federal Rules of Evidence. The Tribe urges this Court to reject the U.S.'s argument that Title V of CUPCA effected a settlement and waiver of the Tribe's Third and Fourteenth claims.

VI. THE TRIBE ALLEGES A PROPER CLAIM FOR RELIEF UNDER ITS EIGHTH CLAIM AND THIS COURT POSSESSES JURISDICTION TO RULE ON THAT CLAIM

Defendants assert the Tribe cannot sustain a claim for declaratory relief that the improvident disposition of Tribal water under the Midview Exchange Agreement violated the Non-Intercourse Act, 25 U.S.C. § 177, because § 177 is inapplicable to the United States. This assertion lacks merit when applied to the facts of this case. As alleged, the Midview Exchange is an agreement among the BIA, the BOR, the Tribe, and the Moon Lake Water Users Association, under which the BIA agreed to transfer a portion of the Tribe's 1923 federally-decreed Indian reserved water rights in the Lake Fork River to the BOR to be used in serving non-Indian lands

administered by the Moon Lake Water User's Association; in exchange, the United States was granted the right to use BOR's junior-priority, state-based water rights in the Duchesne River for the UIIP. *See* Defs. Mtn. Ex. B, ECF No. 68-2.

Section 177 requires Constitutional authority or Congressional consent for any valid disposition of Indian lands, which includes Indian reserved water rights. Because, the transfer of Indian reserved water rights to non-Indian lands pursuant to the Midview Exchange Agreement has not yielded any fair or equitable returns to the Tribe, this transfer exemplifies precisely the type of "unfair, improvident, or improper disposition" of Indian trust property that § 177 is intended to protect against, including through an enforcement action in the federal courts. *Federal Power Commission v. Tuscarora Indian Nation*, 360 U.S. 99, 119 (1960); *Seneca Nation of Indians v. U.S.*,173 Ct. Cl. 917, 925-26 (1965) ("improvidence, unfairness, the receipt of an unconscionable consideration would likewise be of federal concern….The Supreme Court referred to the prevention of "unfair, improvident or improper disposition by Indians of [their] lands. The concept is obviously one of *full fiduciary responsibility*, not solely of traditional market-place morals." [emphasis added and internal quotation marks omitted]).

Defendants rely on the U.S. Supreme Court's statement in *Federal Power Commission v. Tuscarora Indian Nation* that "there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; 'nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State.'" 360 U.S. at 119. This statement was specifically addressing the respondent tribe's interpretation that § 177 required a separate Congressional authorization for the United States and its delegees to condemn Indian lands, notwithstanding the United States' preexisting condemnation authority under the eminent domain clause of the United States Constitution. *Id*. at 118-20. Consistent with the plain language

of § 177, the Supreme Court correctly concluded that § 177 did not require separate Congressional authorization for federal dispositions of land accomplished under the Federal Government's "takings" authority under the Fifth Amendment of the U.S. Constitution. This simply is not the case in the present matter. The transfer of Indian reserved water rights under the Midview Exchange was not an exercise of the Government's Fifth Amendment authority to take private land for public use; it was an exchange of property rights, no different than as between private property right holders, implemented without the requisite authorization from Congress. Accordingly, the Tribe has raised a cognizable claim that this transfer is invalid under § 177.

Defendants also argue that the six-year statute of limitations under 28 U.S.C. § 2401(a) bars the Tribe's invocation of § 177. Defendants thus attempt, in vain, to render an invalid transfer valid by operation of the statute of limitations. The statute of limitations could not have accrued upon the execution of the 1967 Midview Exchange, because at that time the Tribe had no injury to give the Tribe standing to assert its claim. A claim accrues when it "first comes into existence as an enforceable claim or right." *Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.D.C. 2006); *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (a claim accrues "on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" [emphasis added]). For there to be an "enforceable claim or right," Article III of the Constitution requires that plaintiff have suffered an "injury-in-fact" that is "both concrete and particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Simply executing the Midview Exchange does not alone meet this threshold requirement. *Id*. at 1549 (a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III"). As the Tribe has alleged, the Midview Exchange became injurious to the Tribe upon (1) Defendants' unreasonable delay in transferring the Midview

Property to the BIA in trust for the Tribe, and (2) Defendant BIA's ongoing designation of Reservation lands to be served by the Duchesne River as temporarily or permanently non-assessable, thus enabling Moon Lake Water User's Association to take more water from the Tribe than the Tribe is able to take in exchange. Second Am. Compl. at 36-37, ¶¶ 126-28. Defendants' assertion that the Tribe has simply sat on its rights since 1967 is contrary to the facts alleged under the Tribe's complaint, and as such, cannot support Defendants' statute of limitations defense.

Second, the cause of action has not accrued for the purpose of applying the statute of limitations, because Tribe's Indian reserved water rights are continuously subjected to the invalid transfer under the Midview Exchange to this day. Due to the continuing nature of this invalid transfer, the statute of limitations does not bar the Tribe's request for declaratory judgment as to the legal validity of Midview Exchange Agreement, lest Defendants simply have a greenlight to commence this ongoing, unlawful transfer in perpetuity. *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 191 (D.D.C. 2011) (the continuing claims doctrine "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period."); *Felter v. Norton*, 412 F. Supp. at 125 (a claim "will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations."); *Mitchell v. United States*, 10 Cl. Ct. 63, *modified on reh'g*, 10 Cl. Ct. 787 (1986).

Finally, Defendants argue that this Court lacks jurisdiction over the Tribe's claim for mandamus relief requiring Defendants BOR and BIA to formally transfer the Midview Property into trust as part of the UIIP, because the "Tucker Act and Little Tucker Act … make a claim for money damages the sole remedy in a breach of contract action against the government and

therefore impliedly forbid declaratory relief and specific performance." Defs. Mtn. at 35. This argument fails because the basis for the Tribe's relief does not lie in contract, but in its rights as a trust beneficiary. *Megaplus, Inc. v. Lewis*, 672 F.2d 959, 969 (D.C. Cir. 1982) ("The classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate).") Where the alleged government infringement is not "ultimately based" on breach of contract, it is not a contract action for the purpose of applying the Tucker Act's limitations. *Id*. Here, there is no claim for breach of the Midview Exchange, only a request that the Defendants take the affirmative steps necessary to break their ongoing violation of their trust obligations. Therefore, the Tucker Act does not bar this Court's jurisdiction.

VII. THE TRIBE'S FIRST, SECOND, FOURTH, AND FIFTH CLAIMS ARE WITHIN THE COURT'S JURISDICTION AND ARE NOT TIME-BARRED

Federal Defendants argue the Tribe's Claims under the 1965 Deferral Agreement must be dismissed because this Court does not have jurisdiction over breach of contract actions against the United States. The Tribe's First, Second, Fourth and Fifth claims do not seek relief for breach of contract. The Tribe's First and Second Claims for Relief are based on the Federal Defendants' failure to recognize existing trust corpus and the Tribe's concurrent jurisdictional authority over these trust assets. Similarly, the Tribe's Fourth and Fifth Claims for Relief seek a declaration as to impacts of a federal statute – the 1992 CUPCA – on this trust corpus and the federal trust obligations related thereto. Thus, like the Tribe's other Claims for Relief, the core allegation is not breach of contract, but Federal Defendants' current and ongoing failure to adhere to federal law comply with a web of federal statutes and regulations, including, *inter alia*, the 1899 Indian Appropriations Act, requiring the Secretary to "protect" the Tribe's "paramount" rights and interests in the waters on its reservation; the 1906 Act authorizing the Secretary to hold legal title

to the UIIP "in trust for the Indians;" and the 1992 CUPCA, providing for the construction of a Uintah Basin [water storage] Replacement Project that would, in part, allow "increased beneficial use" of the Tribe's water. Additionally, all four of the Tribe's claims rest, in equal part, on the Secretary's ongoing breach of fiduciary duties to the Tribe.

Because the 1965 Deferral Agreement imposed restraints on tribal property, the Tribe itself lacked the legal capacity to enter into the Agreement without the United States' prior approval. *E.g.*, 25 U.S.C. § 177; *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 677-78 (1974) (federal consent is required for any contract affecting possessory rights to tribal lands). Indeed, the restraints on contracts with Indians are so familiar they are discussed in Williston on Contracts, in a section on legal incapacity:

> The Indian tribes in the United States have limited contractual capacity and have been described as "wards" of the federal government. The government, in turn, is declared to be the "guardian" of these Native Americans and "trustee of their property rights."

5 Williston on Contracts, § 11:12 (4th ed.). The 1965 Deferral Agreement is signed by the Deputy Commissioner of the Bureau of Indian Affairs, on behalf of the United States, as the Tribe's trustee. *See* ECF No. 68-1, p. 8. The United States, therefore, undertook specific trust obligations to the Tribe by virtue of the Secretary's approval and execution of the 1965 Agreement. The Secretary of the Interior is now failing to comply with federal law governing the Tribe's rights under the cited statutes and the deferral agreement. The Secretary's violation of federal law is ongoing and will continue to be ongoing without judicial intervention. No waiver of immunity is required for such an enforcement action. From the earliest Supreme Court cases providing for judicial review of executive branch actions, federal courts have viewed the general grant of federal jurisdiction to permit suits for prospective order requiring federal officers to comply with federal law. *E.g., Ickes v. Fox*, 300 U.S. 82 (1937).

> The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from … depriv[ing] respondents of vested property rights not only acquired under Congressional acts … and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without [a waiver of sovereign immunity] has been established by many decisions of this court….

Id. at 96-97. The cases cited by Defendants are inapposite. U.S. Mtn. at 36. However, in *Sharp v. Weinberger*, 798 F.2d 1521 (D.C. App. 1986), the appellate court specifically recognized that subject matter jurisdiction existed separate and apart from the Little Tucker Act, remarking that the district court in *Sharp* "properly exercised jurisdiction to consider appellant's claim that his reassignment would violate federal regulations, statutes and the Constitution, *and its judgment on this claim was not based on the Little Tucker Act*." *Id.* at 1525. (emphasis added)

The Tribe's First, Second, Fourth and Fifth claims are not time-barred because these claims all seek prospective relief against the Defendants' ongoing violations of federal law and trust obligations, not recourse to make the Tribe whole from past harms. Furthermore, because the unlawful omissions underlying the Tribe's First, Second, Fourth, and Fifth Claims for Relief are ongoing, the continuing violation doctrine precludes the Federal Defendants' statute of limitations defense. *The Wilderness Society v. Norton*, 434 F.3d 584, 588-89 (D.C. Cir. 2006) (the D.C. Circuit has "repeatedly refused to hold" that claims based on unreasonable delay of mandated government acts are time-barred, even if the claim is filed more than six years after a specific statutory deadline for these actions); *In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. 1999) ("Because the [plaintiff] does not complain about what the agency has done but rather about what the agency has yet to do, we reject the suggestion that its petition is untimely and move to a consideration of the merit."); *Yukon Kuskokwim Health Corp. v. United States*, 444 F.Supp.3d 215, 219 (D.D.C. 2020). The Federal Defendants' fiduciary obligations to acknowledge trust corpus and manage it as such are established by statutes that "impose[] a

continuing obligation to act or refrain from acting." *Earle v. District of Columbia*, 707 F.3d 299, 307 (D.C. Cir. 2012); *Yukon, supra*, at 219. Therefore, the Tribe's claims are not barred by the statute of limitations.

Alternatively, the earliest possible accrual date on these claims is March 8, 2012, the day the parties executed the 2012 Settlement Agreement. ECF No. 28-4, p. 18. Parenthetically, the Tribe's 2006 complaint was filed at a point in time when the Congressional appropriation acts for the Department of Interior expressly tolled the statute of limitations on claims "concerning losses to or mismanagement" of Indian trust assets. Public Law 109-54, 119 Stat. 499, and Continuing Appropriations Resolution, 2007, Public Law 109-289. *E.g., Felter v. Kempthorne*, 473 F.3d 1255, 1260-61 (D.C. Cir. 2007); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004); *see also Cohen's Handbook*, Ch. 5, §5.06[5], 445.

Parties can contractually alter the accrual date for the running of a limitations bar. *Nager Elec. Co. v. United States*, 177 Ct. Cl. 234, 237-38 (1966). Under the 2012 Settlement, the Tribe bargained for, and the United States agreed to, the preservation of the Tribe's claims related to the Tribe's water rights. *See* Defendants' Exhibit D, ECF No. 28-4, p. 7. The 2012 Agreement thus established the Tribe's right to institute a separate action related to its water resources. That recognition in turn effected the commencement of a new accrual period. This means that the Tribe's complaint, filed on March 8, 2018, was timely filed.

Alternatively, the facts establish that the Tribe's claims did not accrue until March 15, 2012, or October 12, 2012, when the Department of Interior advised the Tribe in writing, *for the first time*, that DOI would not support anything beyond "*minor revisions to the [proposed] 1990 Compact*," and that DOI viewed Title V of CUPCA as constituting "*a complete and final settlement of the Tribe's water rights claims*." App. I, 120, Declaration of Irene Cuch; see also App. II, 139-

41, ¶¶ 6-18. DOI's assertion in its letter of 10/12/2012 was a 180-degree reversal of DOI's earlier position in which DOI had acknowledged that the Uintah Basin Replacement [water storage] Project, authorized under Tile II of CUPCA, had to include storage for the Tribe's water. A DOI Solicitor's Memo dated October 13, 1995, stated, in pertinent part:

> The Central Utah Project Completion Act [CUPCA], while terminating authorization for the Upalco and Uintah Units, authorized replacement facilities to provide for the increased beneficial use of [Indian] reserved water rights water. Because storage is the only means whereby this purpose can be accomplished for Indian water right lands, we conclude that it is a purpose of the CUPCA to store [Indian] reserved water rights water.

App. I, 92. A cause of action against the government does not accrue until "all of the events which fix the government's alleged liability" have occurred, and the plaintiff was or should have been aware of their existence. *Fort Mohave Indian Tribe v. United States*, 23 Cl. Ct. 417, 431 (1991) (quotation omitted). Remember that CUPCA was intended as obligations substituted for the unfulfilled commitments made to the Ute Indian Tribe under the 1965 Deferral Agreement. This means that the Tribe's claims under the Deferral Agreement would not accrue unless and until the substituted commitments made to the Tribe under CUPCA were themselves first satisfied. However, CUPCA itself was expressly made conditional upon the occurrence of future events, including (*i*) the storage of tribal water in facilities to be constructed under the Uintah Basin Replacement Project, and (*ii*) the State of Utah and the Ute Indian Tribe's "re-ratification" of the *Revised Ute Indian Compact of 1990*. Title V, Section 503(a). App. I, 275. The Tribe reasonably understood these contingencies to mean that there could be no "*complete and final settlement*" of the Tribe's claims unless and until all of the CUPCA contingencies were satisfied. *See* Declarations of Luke J. Duncan, App. I, 93-137; Irene C. Cuch, App. I, 138-150; and Ronald J. Wopsock, App. I, 151-156. The allegation under the Tribe's complaint—which must be taken as true—is that the CUPCA-authorized construction on the Central Utah Project was nearing

"completion" when the Tribe's complaint was filed, and that not all the CUPCA contingencies have been satisfied. *See* Second Am. Compl. pp. 51-61, ¶¶ 182-217. *See also*, Duncan Declaration, App. I, 101, ¶ 31. Under these facts, the Tribe's complaint was timely filed within the six-year limitation period.

VIII. THE TRIBE HAS STANDING AND STATES A CLAIM UNDER CLAIM SIXTEEN FOR DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Defendants are flat wrong in asserting that (*i*) the Ute Indian Tribe "as a group" is not protected by the U.S. Constitution; (*ii*) that the Tribe lacks *parens patriae* standing; and that (*iii*) the Tribe's property right in its tribal waters belong to individual trial members. Defs. Mtn. at 40-42. Contrary to Defendants' argument, the Tribe's water rights belong to the Tribe itself, not individual tribal members or Indian allottees. *Hackford v. Babbitt*, 14 F.3d 1457, 1468 (10th Cir. 1994) ("the water right itself is a tribal right."). Further, Defendants cite no evidence or authority to support their assertion that only individual allotment lands are irrigated by tribal water. Defs. Mtn. at 42 ("rights and benefits … attach to individual allotments."). To the contrary, the allegations of the Tribe's complaint, which must be accepted as true under Rule 12(b)(6), state that the Tribe's *Winters'* Reserved water irrigate *both* Indian allotments and tribal lands that are held in trust for the Tribe itself. *E.g.,* Second Am. Compl. at 21, ¶ 66; 30, ¶ 102.

Secondly, the Tribe does not exist exclusively as a "sovereign government." Defs. Mtn. at 41. As permitted by the Indian Reorganization Act of 1934, the Tribe is organized in two separate and distinct capacities: first, as tribal sovereign government under 25 U.S.C. § 5123, and secondly, as a corporation chartered under federal law, 25 U.S.C. § 5124. The purpose of the Tribe's federal corporation is to further the Tribe's "economic development … [and] to secure for the members of the Tribe an assured economic independence." App. II, 311 (Corporate Charter). The corporation's shareholders consist of all the Tribe's individual members. *Id*. The United States

Supreme Court has long recognized that corporations are entitled to certain constitutional protections, including due process and equal protection. *E.g., Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (corporations "have business and property for which they claim [constitutional] protection," and this court "has gone very far to protect against loss threatened" by unconstitutional deprivations). In fact, the Supreme Court recently explained:

> A corporation is simply a form of organization used by human beings to achieve desired ends. . . .When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (finding corporation entitled to statutory religious freedom protections); *see also Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (recognizing that corporations are protected against the deprivation of First Amendment protections). Also contrary to Defendants' argument, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 608 (1982), supports, rather than defeats, the Tribe's standing as a government suing as *parents patriae* on behalf of its tribal members. Indeed, the Tribe's quasi-sovereign interests in this case are nearly identical to Puerto Rico's quasi-sovereign interests in *Snapp*. The Tribe has an interest in ensuring that the State and Federal Defendants do not discriminate against the Tribe and its members in favor of non-Indian water users in Utah. The Tribe also has an interest in ensuring that Defendants allow tribal waters to be stored in federally-constructed water storage reservoirs in Utah the same as non-Indian water. *Id*. It is widely recognized that Indian tribes have standing to sue as *parens patriae*. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996) (litigating on behalf of tribal members); *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994); *Navajo Nation v. Dist. Court for Utah County, Fourth Judicial Dist.*, 831 F.2d 929 (10th Cir. 1987) (litigating on behalf of an Indian

child under the Indian Child Welfare Act); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1137 (8th Cir. 1974) (litigating on behalf of tribal members); *Apache County v. United States*, 256 F. Supp. 903, 906 (D.C.C. 1966).

In contrast to *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179-80 (D.C. Cir. 2019)—and the case on which *Manitoba* relies, *Massachusetts v. Mellon*, 262 U.S. 447 (1923)—the Tribe's suit does not involve a state sovereign suing the federal government to challenge the legality of a federal statute. To the contrary, this case involves a suit brought by a tribal sovereign "to vindicate the congressional will" by preventing what it asserts are statutory violations being committed by the administrative agencies charged with implementing those statutes. *Washington Utilities & Transp. Comm'n v. F.C.C.*, 513 F.2d 1142l 1153 (9th Cir. 1975) (distinguishing *Mellon*). *See also Abrams v. Heckler*, 582 F. Supp. 1155, 1160 (S.D.N.Y. 1984) ("[T]he Court declines to apply *Mellon* to a suit brought to enforce a federal statute and to enjoin agency action allegedly in contravention of that statute."); *City of New York v. Heckler*, 578 F. Supp. 1109, 1123 (E.D.N.Y. 1984) (*Mellon* doctrine is not applicable where the suit does not dispute the validity of a federal statute, nor invoke the Supreme Court's original jurisdiction as did *Mellon*). Like plaintiffs in the above-cited cases, the Tribe seeks declaratory and injunctive relief against Defendants' failure to adhere to and enforce Congressional policy and mandates under multiple federal statutes, including, *inter alia*, the Indian Nonintercourse Act, 25 U.S.C. § 177; the Act of March 1, 1899, 30 Stat. 941; the Act of June 21, 1906, Pub. L. 59-258, Stat. 325, 375; the Act of May 28, 1941, 55 Stat. 209; the Central Utah Project Completion Act Pub. L. 102-575, 106 Stat. 4600. Therefore, the *Mellon* bar is not applicable here, and the Tribe has standing to sue, whether as a property owner suing to defend its property interests, *Pierce*, a corporation suing on behalf of its

shareholders, *Burwell* and *Citizens United*, or as a tribal government suing as *parents patriae* on behalf of its tribal members, *Snapp*. Moreover, *Morton v. Mancari*, 417 U.S. 535 (1974), does not give Defendants a green light to discriminate against the Tribe. Rather, the applicable law is:

> [w]hether discriminatory treatment of Indians is correctly classified as based on race, ancestry, national origin, or is directed against them as a "discrete and insular minority," it is illegal . . . ."

Cohen's Handbook, § 14.02[2][b] at 937. *See, e.g., Ely v. Klahr*, 403 U.S. 108, 118-19 (Douglas, J., concurring) (unconstitutional legislative reapportionment), *on remand*, *Klahr v. Williams*, 339 F. Supp. 922, 926-28 (D. Ariz. 1992) (three-judge court); *Navajo Nation v. San Juan County*, 929 F.3d 1270, 1280 (10th Cir. 2019) (illegal racial gerrymandering); *Pyke v. Cuomo*, 258 F.3d 107 (2d Cir. 2001) (disparate treatment of Native Americans); *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (illegal deprivation of voting rights); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1253 (D. Nev. 2001) (unconstitutional deprivation of utility services). To survive Defendants' 12(b)(6) dismissal motion, the Tribe's complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

"'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Harris v. D.C. Water and Sewer Auth.*, 791 F.3d 65, 68 (D.C. App. 2015) (quoting *Twombly*, 550 U.S. at 570).

> Factors probative of whether a [party] was motivated by discriminatory intent include (1) evidence of a consistent pattern of actions by a [party] disparately impacting members of a particular class of persons; (2) the historical background of the decision, which may take into account any history of discrimination by the [party]; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by the [party] on the record or in minutes of their meetings.

16B Am. Jur. 2d Constitutional Law § 837; *Southside Fair Housing Committee v. City of N. Y.*, 928 F.2d 1336 (2d Cir. 1991); *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810 (4th Cir. 1995). "[D]iscriminatory intent may be found even where the record contains no direct evidence of bad faith, ill will, or any evil motive on the part of public officials." 16B Am. Jur. 2d Constitutional Law § 837 (*citing Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 84 Ed. Law Rep. 122 (11th Cir. 1993)). The Ute Indian Tribe consists entirely of Native American individuals who comprise a protected class on the basis of race, national origin, and religion. The Tribe sufficiently alleges that Defendants have deliberately followed a systematic and discriminatory pattern of conduct that disproportionately benefits non-Indian water users in the State of Utah while at the same time disproportionately inflicting economic harm on the Tribe and its members. Indeed, the Tribe alleges that the State and Federal Defendants conspired and acted in concert with a specific "design" to "disproportionately allocate benefits to non-Indians and burdens to the Tribe and its members." *See* Second Am. Compl. at 95-98, ¶¶ 346-359. These allegations, taken together, are sufficient to permit the Court to reasonably infer that the Tribe has sufficient alleged and may succeed in proving Federal Defendants are "liable for the misconduct alleged" under the federal laws that are applicable to the Federal Defendants. *Harris*, 791 F.3d at 68.

CONCLUSION

"Great nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at 142 (Justice Black dissenting). It was the Ute Indian Tribe's deferral of the development of its *Winters* reserved water rights that enabled the State of Utah and the United States to secure federal funding for construction of the Central Utah Project that today benefits only the non-Indian residents of the State of Utah. The Tribe respectfully requests that the Court deny Federal Defendants' motion for summary dismissal of the Tribe's complaint.

Respectfully submitted this 19th day of October 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2020, I filed the foregoing **PLAINTIFF'S OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS THE TRIBE'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES** electronically through the Court's CM/ECF system, which caused notice to be sent to the parties of record.

/s/ Frances C. Bassett
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