IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE WHITE MOUNTAIN APACHE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 17-359 L
	)	
THE UNITED STATES OF AMERICA,	)	Judge Richard A. Hertling
	)	
Defendant.	)	
	)	

THE UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS, OR FOR SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S PHASE I CLAIMS

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I. INTRODUCTION

The White Mountain Apache Tribe's claims in Phase I of this case, which seek monetary damages for the existence of open dumps on the Tribe's lands, should be dismissed because the Tribe has failed to identify a statute or regulation imposing a mandatory duty to clean open dumps on the Tribe's lands. Indeed, no such duty exists. Rather than require the United States to pay monetary damages if it fails to clean up every piece of solid waste on Indian lands, the Indian Lands Open Dump Cleanup Act – the statutory basis for the Tribe's claim – does not "create a conventional fiduciary relationship that is enforceable as a breach of trust." *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 899 (D.C. Cir. 2014). The Tribe's effort to seek monetary damages related to the existence of open dumps on the Reservation fails because paying damages to the Tribe would actively undermine Congress's statutory scheme directing limited Federal appropriations to sites nationwide based on expert agency prioritizations. The Phase I claims should be dismissed because the Tribe has not identified a statute or regulation vesting this Court with jurisdiction.

The Tribe's claim seeking damages for the existence of open dumps on the Tribe's lands should also be dismissed because the Complaint fails to set out any factual or legal basis for the Tribe's claim. The Court denied the United States' motion to dismiss and "indulge[d] the Plaintiff's request for limited discovery on the non-monetary asset claims of breach of fiduciary duty involving minerals, contamination, rights-of-way, and leases." Order, ECF No. 22 at 9-10. Given a second bite at these apples through more than two years of jurisdictional discovery, the Tribe again fell short of pleading facts supporting its claim. Indeed, the Tribe withdrew its mining, leasing, and right-of-way claims, as well as its contamination claims that are not based upon open dumps. And even with respect to its open dumps claim, the Tribe's specification fails

to identify any dump that is part of its claim and any basis for the United States having a mandatory duty to clean a dump.

Paying the Tribe damages would be contrary to law under the indisputable facts here because Congress did not impose a fiduciary duty for the United States to pay damages to a Tribe based upon that Tribe's government and members illegally dumping waste. First, four Federal agencies have invested millions of dollars in remedying the Tribe's public health issues, including cleaning up open dumps that held agency garbage prior to creation of the Tribe's landfill, funding the landfill's construction, and changing agency waste disposal policies to avoid contributing to the proliferation of open dumps on the Reservation. Neither statute nor caselaw imposes a duty for the United States to clean up solid waste dumped by others. Second, paying the Tribe damages relating to open dumps on the Reservation would be inappropriate because the Tribe's members, including the Tribal agency in charge of solid waste disposal, are responsible for the open dumps. Finally, Congress's statutory scheme provides tribes with a voice in prioritizing the limited Federal funds appropriated to address public health issues. The Tribe itself prioritized spending limited Federal appropriations on other projects ahead of cleaning up open dumps. The facts of this case therefore reinforce the United States' motion to dismiss and also support granting summary judgment.

The United States respectfully submits that the Court should dismiss all of the Tribe's Phase I mining, leasing, right-of-way, and environmental claims under Rules of the Court of Federal Claims 12(b)(1), 12(b)(6), and 12(c) because: 1) the Tribe withdrew its minerals, rights-of-way, and lease claims, as well as the majority of its contamination claims; 2) Congress imposed no money mandating duty relating to the open dump claim the Tribe has not withdrawn; and 3) the Tribe has not plead facts supporting its open dump claim. Alternatively, the Court

should grant summary judgment with respect to all of the Tribe's Phase I claims because the Tribe has not established that the United States owes the Tribe a money mandating duty to clean up solid waste that the Tribe's members – not the United States – placed on the Reservation.

II. STATEMENT OF UNDISPUTED FACTS[1]

A. Open Dumping Background

1. The White Mountain Apache Tribe ("Tribe") is the beneficial owner of the Fort Apache Indian Reservation ("Reservation"). The Reservation encompasses more than 1.66 million acres. White Mt. Apache Tribe Solid Waste Mgmt. Plan at 2 (Aug. 1994) (Ex. 1) ("1994 Tribal Plan").

2. The Tribe regulates and oversees solid waste management on its Reservation through its Tribal Public Works Department. *Id*. at 8; Open Dump Cleanup Project at H51EPA0001691-92 (Jan. 31, 2005) (Ex. 2) (Since 1995 "solid waste disposal practices are regulated by Tribal law" and Public Works is "responsible for the operation and maintenance of the Tribe's solid waste disposal."); Tribal Res. No. 05-2019-102 (May 22, 2019) (Ex. 3); Tribal Envtl. Code §§ 2.1, 2.4, 2.7, 2.8 (May 18, 2015), available at http://www.wmat.nsn.us/Legal/contents.html.

3. The Tribe's Environmental Planning Office ("EPO"), Permitting Authority, and Law Enforcement also assist in solid waste management, including illegal dumping, on the Reservation. Integrated Solid Waste Mgmt. Plan, 2019-2024 at 9 (Ex. 4) ("2019 Tribal Plan").

4. The Tribe may prosecute individuals who illegally dump waste. General Assistance Program ("GAP") Online Progress Rep. at 16 (Sept. 30, 2016) (Ex. 5); 2019 Tribal Plan at 19

[1] As set forth below, pages 20-37, the undisputed facts are not material because the Tribe's claims should be dismissed on the law alone due to the Tribe's failure to identify a money mandating duty. But because the Tribe did not specify its claims until the close of jurisdictional discovery, the Parties developed a substantial factual record. These facts support the United States' jurisdictional arguments and provide an alternative basis for resolving the Phase I claims, that the United States is entitled to summary judgment.

(Ex. 4) ("4.3.1. Enforcement. The Establishment of Tribal Solid Waste Ordinance . . . is the foundation for enforcement actions against illegal dumping. . . . Tribal law enforcement officers and Tribal Court need to coordinate to ensure that citations are being addressed").

5. The Tribe estimated that, as of 2019, only 3,290 of its more than 13,000 members received waste removal services from the Tribe. 2019 Tribal Plan at 8, 11 (Ex. 4).

6. The Tribe's members have illegally dumped solid waste throughout the Reservation for years and continue to do so. *Id*. at 11, 14 (members illegally dump waste); Email from B. Begay (Mar. 13, 2019) (Ex. 6) (members "leav[e] trash behind at lakes and rivers . . . . Enforcement is strongly needed . . . the Tribe has to step in to enforce its own laws and ordinances."); 1994 Tribal Plan at 2 (Ex. 1) ("unmanaged, unhealthful solid waste disposal . . . is nothing new. [It] has grown in part out of the Apache people's acceptance of the 'throw away society'"), *id*. at H52DIS0008128-29 (eight open dumps); *id*. at H52DIS0008159 (as of 1992, "most solid wastes . . . are disposed of at an open dump"); Open Dump Cleanup Project at H51EPA0001691 (Ex. 2) ("old practices of burning and dumping trash in open dump sites . . . still exist"), 1695-96.

7. In 2017, the Tribe's Public Works Department, which manages solid waste on the Reservation, was "improperly disposing of solid waste on Public Works' property." Letter from B. Begay, Envtl. Prot. Office, to A. Brooks, Pub. Works (Jan. 9, 2017) (Ex. 7).

8. The Tribe's Public Works Department illegally dumped waste at the McNary Lagoon in 2017. The Tribe's members continued to dump solid waste at the McNary mill site through at least November 17, 2017. Email from B. Begay (Nov. 14, 2017) (Ex. 8); Mem. from T. Hill, Envtl. Prot. Office, to A. Brooks, Pub. Works (Nov. 17, 2017) (Ex. 9).

9. The Tribe's Public Works Department fails to pick up waste from members, contributing to open dumping. Email from B. Begay, Tribe, to Chairwoman Lee-Gatewood, Tribe at WMAT

0067128 (Sept. 24, 2018) (Ex. 10) ("trash services are always behind, they do sloppy work, and they have excuses left and right."); Email from B. Begay to J. Kasey (Jan. 7, 2020) (Ex. 11) (Public Works improperly uses funding and vehicles); Email from B. Begay to J. Kasey (May 31, 2018) (Ex. 12) (describing Public Works' failures).

10. The Tribe created a video to combat open dumping by Tribal members. It states that the Tribe's "lands are being disrespected, not by enemy people, but by our own Apache people" by dumping. Letter from L. Ebbert, EPA, to R. Lupe, Tribe (June 4, 2015) (Ex. 13); *Respect Our Land*, White Mtn. Apache EPO, available at https://www.youtube.com/watch?v=_ZuNnuH_its.

11. The Tribe's EPO is working to reduce illegally dumping by tribal members. GAP Online Work Plan Commitment #8.1 (Sept. 30, 2019) (Ex. 14).

B. Construction of the Tribe's Landfill, Cleanup of Dumps Predating the Landfill, and Related Federal Funding

12. Between 1990 and 1993, IHS, BIA, and the Tribe inventoried and began closing open dumps on the Reservation, including seven dumps containing BIA waste. By August 1993, BIA had "taken some initiative on dump closure, offering to provide equipment and manpower and by already providing closure of dump sites at Fort Apache and McNary" – two of the sites BIA contributed to. 1994 Tribal Plan at H52DIS0008146-52 (BIA "offered equipment and operator time for further dump closure") (Ex. 1).

13. By 1993, BIA and IHS began paying "a private contractor to haul all agency waste off-reservation for disposal." *Id*. at 6-9, 11, H52DIS0008147; Letter from R. Lupe, Tribe, to B. Nuvamsa, BIA (Feb. 2, 1995) (Ex. 15) ("your agency cease[d] using dump sites on the Reservation" following the 1990 *Blue Legs* decision); Contract Mod. Scope of Work § C (June 16, 2020) (Ex. 16) (IHS "[w]aste will be delivered to an authorized disposal site").

14. The 1994 Tribal Plan proposed to prospectively address open dumps, in part, by working with EPA to plan, design, and construct a landfill. *Id*. at H52DIS0008210.

15. The Department of Housing and Urban Development ("HUD") provided the Tribe with $1,096,527 to construct the Tribe's landfill in 1994. *Id*. at 9. The funds were awarded through a competitive process in which only 27 of 78 tribes received funds. *Id*.

16. IHS contributed at least $172,038 to developing the Tribe's landfill. *Id*.

17. BIA contributed at least $359,674 to developing the Tribe's landfill. *Id.*

18. The United States Department of Agriculture ("USDA") loaned the Tribe $840,000 for its landfill and related equipment. Tribal Res. No. 02-96-036 (Feb. 14, 1996) (Ex. 17).

19. By 1995, the Tribe stated that closing all 19 dumps would cost $500,000 and obtained $260,000 from IHS and HUD. Letter from R. Lupe, Tribe, to BIA (Feb. 2, 1995) (Ex. 15).

20. By April 4, 1995 the Tribe stated that, in connection with opening the Tribal landfill, "all existing open waste dumps on the reservation will be closed in accordance with federal regulations." Request for Release of Funds and Certification (Apr. 4, 1995) (Ex. 18).

21. Since 1996, the "majority" of the Reservation's solid waste is transported to the landfill. Integrated Solid Waste Mgmt. Plan 2013-2018 at 11 (June 2013) (Ex. 19) ("2013 Tribal Plan").

22. On June 23, 1995, BIA allocated $100,000 "in support of cleanup and clos[ure] of 20 dump sites on the . . . Reservation." BIA Suballotment Doc. (Apr. 17, 1995) (Ex. 20).

23. In 1996 and 1997, BIA allocated funds to the Tribe to clean up BIA waste. Mem. from Phoenix Area Dir. (Feb. 24, 1997) (Ex. 21).

24. By 1998, 15 of 24 identified open dumps were permanently closed. Mem. to J. Krause (Feb. 12, 1997) (Ex. 22) (identifying 11 of 24 open dumps as permanently closed and estimating

BIA contribution to certain remaining dumps); Letter from R. Lupe, Tribe, to BIA (Feb. 26, 1998) (Ex. 23) (15 of 24 dumps closed).

25. By 1998, the Tribe used several hundred thousand dollars in Federal funds to close its largest open dump, the 19-acre Whiteriver community dump. *Id.*; IHS Funding Spreadsheet, Row 51 (Ex. 24) ($280,000 in Fiscal Year 1997 for "Ft. Apache Dump Cl").

26. By 2002, the Tribe had closed 22 open dumps in addition to the Whiteriver dump. Letter to B. Hinton, BIA (Mar. 21, 2002) (Ex. 25).

27. In 2005, the Tribe reported that eight open dumps existed on the Reservation. Four of the dumps – Turkey Creek, Seven Mile, Chinatown, and Whiteriver – were newly caused by "some Tribal Members still illegally dumping their trash." Open Dump Cleanup Project at H51EPA0001695, 1691 (Ex. 2).

28. IHS provided the Tribe with at least $281,500 between 2004 and 2009 to clean up the Maverick, Gooseberry Creek, Hondah, and Hawley Lake dumps. IHS also offered to provide technical resources and construction management to clean up the four dumps. STARS PDS Narrative re: Ft. Apache Open Dumps (Ex. 26); IHS Funding Spreadsheet, Row 4 (Ex. 24); Open Dump Cleanup Project at H51EPA0001711 (Ex. 2).

C. Post-2010 Efforts to Inventory Tribal Open Dumps

29. The Tribe committed to use EPA grant funds to inventory open dumps in 2010. Gen. Assistance Program Rep. at Commitments 2.1 & 6.1 (Sept. 30, 2012) (Ex. 27).

30. EPA provided the Tribe with grant funds in 2016 to develop an illegal dumpsite list. The Tribe committed to establish an "inventory protocol by December 2015 [and to] submit [the] inventory to EPA and IHS." GAP Online Progress Rep. at 14-15 (Ex. 5); *id*. at 16 (EPO "developed [a] protocol for open dump inventory" and updating its list).

31. As of March 3, 2016, the Tribe's open dump inventory contained eight open dumps. White Mt. Apache Tribe Regulated Facilities at WMAT 0054882 (Mar. 5, 2018) (Ex. 28).

32. By October 7, 2016, the Tribe's EPO drafted a list of 85 alleged open dumps. Email from B. Begay to O. Tessay (Oct. 7, 2016) (Ex. 29).

33. The Tribe's 2019-2024 Solid Waste Management Plan contained an "Illegal Dumping 2018" list of 34 alleged open dumps. 2019 Tribal Plan at 38-39 (Ex. 4).

34. As of April 2019, the Tribe used an inventory to prioritize cleanup of dumps with limited EPA funds. Email from B. Begay (Apr. 5, 2019) (Ex. 30); email from B. Begay (Apr. 11, 2019) (Ex. 31) ("need to decide today which we can clean up with EPA funds"); GAP Online Work Plan Commitment #8.1 (Sept. 30, 2019) (Ex. 14) (prioritize inventory and select sites).

35. In August 2019, the Tribe received a grant from EPA to, among other things, "updat[e] the illegal dump inventory." EPA Notices of Award (2006-19) (Ex. 32).

36. In June 2020, IHS completed a nationwide resurvey of open dumps on Indian land using satellite imagery. The survey, which took eight months, determined that approximately 45 sites on the Reservation appeared to be open dumps. IHS Resp. to Interrog. No. 1 (Oct. 7, 2020) (Ex. 33); IHS Open Dumps List, Column N (Ex. 34).

D. EPA and IHS Funding for Solid Waste Cleanup, Including Open Dumps

37. Between 2002 and 2019, the Tribe successfully applied for a total of $3,386,405 in EPA GAP grants. These funds were used, among other things, to clean up open dumps, construct a transfer station to address dumping by Tribal members, purchase solid waste management and recycling equipment, educate members about waste disposal, and update environmental codes. EPA Notices of Award (2006-19) (Ex. 32); EPA Commitment Notices (2002-05) (Ex. 35); Open

Dump Cleanup Project at H51EPA0001691-94, 1697-99 (Ex. 2); Letter from L. Ebbert, EPA, to Tribe (June 4, 2015) (Ex. 13); Federal funding table (Ex. 36) (collecting and describing grants).

38. The Tribe's 2019 Waste Management Plan sought a transfer station to address illegal dumping at Cibecue and Carrizo. 2019 Tribal Plan at 14, 19 (Ex. 4).

39. In 2019, EPA awarded the Tribe $158,933 for, among other things, "conducting solid waste enforcement training, developing a transfer station, . . . [and] updating the illegal dump inventory." EPA Notices of Award (2006-19) (Ex. 32); *id*. at H51EPA0001909 (including "$48,400 for the purchase of equipment for the new transfer station").

40. The Tribe has stated its intent to "apply for funding in the future for cleanup" of "illegal dumpsites." GAP Online Progress Rep. at 15 (Sept. 30, 2016) (Ex. 5).

41. Between 1982 and 2019, IHS provided at least $94,600,798 in funding to the Tribe. IHS Funding Spreadsheet (Ex. 24). At least $561,500 was for cleaning up open dumps. *Id.* at Rows 4 and 51; STARS PDS Narrative re: Ft. Apache Open Dumps (Ex. 26).

42. Between 2011 and 2020, the Tribe received approximately 14% of IHS's Phoenix Area Office's $83,899,383 of Regular Funds, which can be used to clean up open dumps. It also received approximately 16% of the Office's $141,903,932 of Sanitation Facilities Construction ("SFC") funds, which include both Regular Funds and other funding sources that can be used to address, among other things, drinking water safety issues. IHS Funding Summary (Ex. 37); IHS Resp. to Interrog. No. 1 (Oct. 7, 2020) (Ex. 33).

43. The IHS SFC Program provides tribes with an annual opportunity to assign "priority points" to request that IHS fund certain projects. From 2016 through 2019, the Tribe assigned its priority points in a manner that prioritizes many other projects over cleaning up open dumps. Letters from C. Burnette, Tribe, to L. Santana, IHS (2016-19) (Ex. 38).

44. The Tribe has passed Tribal resolutions that both acknowledge the need to prioritize limited IHS funds and assign the Tribe's priority points in a manner that prioritizes projects that are unrelated to open dumps. Tribal Res. No. 05-99-97 (May 6, 1999) (Ex. 39).

45. IHS incorporates the Tribe's prioritization of its needs into IHS's prioritization of SFC projects and the Tribe often convinces IHS to prioritize the Tribe's projects. Compare Letter from C. Burnette to IHS (June 1, 2018) (Ex. 38) (prioritizing "Cibecue & Whiteriver – sewer main replacement", " HONDAH/McNARY WWTP AOC Improvement" and "MINER FLAT – Transmission Main Planning") with IHS FY 2018 Rep. of Sanitation Deficiency Levels at 39 (Ex. 40) (placing those three projects in the Phoenix Area's top eight priority projects).

46. IHS provided $1,494,000 to fund the "Cibecue & Whiteriver – sewer main replacement" project in Fiscal Year 2019 after the Tribe made the project its top priority in 2018. IHS Funding Spreadsheet, Row 181 (Ex. 24).

47. With respect to solid waste, IHS provided $140,000 for the Tribe's "Landfill – Expansion of Phase One" in Fiscal Year 2018 after the Tribe prioritized the project in 2017. Letter from C. Burnette, Tribe, to IHS (June 15, 2017) (Ex. 38); IHS Funding Spreadsheet, Row 179 (Ex. 24).

E. Cleanup of Open Dumps That Existed Prior to Geronimo Pass Landfill, Including Dumps Containing Agency Waste

48. The Tribe recently admitted that it "does not have specific information regarding any persons acting on behalf of the United States dumping or placing materials unlawful[ly]" on the Reservation and that "the existing open dumps appear to be composed of largely waste from residents of the Reservation." Tribe's Resp. to Interrog. No. 18 (Oct. 14, 2020) (Ex. 41).

49. While BIA no longer places waste in open dumps, BIA waste that preexisted the Tribal landfill's construction may remain at one unpermitted site. BIA retained Cardno ATC to investigate Sunrise Landfill, northeast of the Sunrise Ski Area parking lot. The "approximately

120 feet by 500 feet" area contained "crushed steel drums, possible petroleum products and other solid wastes." Soil sampling found that a single analyte exceeded EPA's screening levels. And Arizona has high background concentrations of that analyte – arsenic. Arsenic at Sunrise is therefore "likely . . . attributable to background levels of arsenic rather than a release." Cardno determined "that no further assessment or remediation activities are warranted." Limited Subsurface Investigation: Sunrise Ski Resort Dumpsite at iii, 1-3 (Nov. 13, 2013) (Ex. 42).

50. With the potential exception of Sunrise landfill, every open dump that contained Federal waste (as well as many that did not) has been cleaned up. PFOFs 12-28, 41, 48-49.

III. BACKGROUND

A. Procedural Background

The Tribe filed its Complaint on March 15, 2017. ECF No. 1. It alleges breaches of fiduciary duties by the United States as trustee of "funds, land, timber and other assets held by the United States for the benefit of the Tribe" from 1946 to the present. *Id*. at ¶ 1. In contrast to the multi-paragraph descriptions of its timber, *id*. at ¶¶ 42-60, and trust fund claims, *id*. at ¶¶ 29-41, the Complaint contained a single paragraph with the vague allegations that "[s]ome Reservation trust lands have been contaminated by non-Tribal entities with hazardous waste, pollution, and other harmful substances. Some non-Tribal entities make use of expired right of ways and leases on the Reservation." ECF No. 1 at ¶ 15. The Tribe's one sentence about its suspicions of environmental contamination is the only factual allegation regarding environmental issues in the 56-paragraph Complaint. And the Tribe identifies two statutes that might be relevant to its environmental claims: 1) 25 U.S.C. § 162a (d)(8); and 2) 25 U.S.C. §§ 3901-3908, the Indian Lands Open Dump Cleanup Act ("Indian Dump Cleanup Act"). *Id*. at ¶20.

The United States moved to dismiss, in part, because of the Tribe's "failure to plead sufficient facts to establish this Court's jurisdiction" over any minerals, rights-of-way, leases, or environmental claims. ECF No. 9-1 at 20-21. The Court denied the motion to dismiss these claims. Order, ECF No. 22 at 9-10 (Denying in part motion to dismiss because "the Court is willing to indulge the Plaintiff's request for limited discovery on the non-monetary asset claims of breach of fiduciary duty involving minerals, contamination, rights-of-way, and leases.").[2]

After partially granting the motion to dismiss, the Court divided this case into phases. Phase I consists of the Tribe's claims concerning minerals, leases, rights-of-way, and alleged environmental contamination. ECF Nos. 31, 57, 60, 61. The Parties engaged in substantial discovery for Phase I, during which the Tribe agreed to provide a claim specification. ECF No. 63 ¶10. The Court ordered the Tribe to specify its Phase I claims by September 1. ECF No. 64.

The Tribe confirmed that it "will not be making any [minerals] claim." Email from B. Chestnut to M. Marinelli (July 31, 2020), (Ex. 44). The Tribe also confirmed that it "will not be making any Phase I leases or rights of way claims." Email from B. Chestnut to M. Marinelli (Sept. 1, 2020), (Ex. 45). The Tribe retained a single Phase i claim – seeking damages related to open dumps on the Reservation. *Id.* Based upon the Tribe's confirmations, the United States

[2] The United States submits that the Tribe's admission that it could not state its claims confirms that the Tribe's request for discovery was nothing more than an improper fishing expedition. Tribe's Resp. to Interrog. #2 (Ex. 43). Requiring discovery to state claims flips the pleading standard on its head. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. . . .While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.) (citation omitted). And the Tribe's withdrawal of the bulk of its Phase I claims after discovery proves that the United States' concerns regarding discovery expenses were well founded: "Where the court lacks subject matter jurisdiction, 'opening discovery in response to defendant's motion to dismiss would result in a waste of resources for both parties.'" ECF No. 9-1 at 6 (quoting *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408, 409 (2017)).

moves to dismiss or alternatively for summary judgment on the Tribe's mining, leasing, and right-of-way claims, as well as any contamination claims that are not based upon open dumps.

On September 1, 2020, the Tribe specified that its sole Phase I claim is based upon the "Indian Lands Open Dump Cleanup Act, as informed by relevant provisions of the Resource Conservation and Recovery Act and implementing regulations and the Snyder Act and 25 U.S.C. § 162(d)(8) [sic]." Tribe's Phase I Claims Specification (Ex. 46) ("Specification"). This claim, like all of the Tribe's claims in this case, is one for money damages under the Indian Tucker Act. Compl. ¶¶ 1, 7. This motion focuses on these alleged statutory bases. As set forth below, none provide the necessary statutory basis for this claim.

B. Legal Background

1. The Indian Tucker Act

The Indian Tucker Act, 28 U.S.C. § 1505, is "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . . [T]he Act merely confers jurisdiction upon [the Court of Federal Claims] whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976). "To state a claim cognizable under the Indian Tucker Act, . . . a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Chemehuevi Indian Tribe v. United States*, No. 16-492L, 2020 U.S. Claims LEXIS 1867, at *25 (Fed. Cl. Sep. 29, 2020). The Federal Circuit therefore uses a two-part test to determine jurisdiction over Indian Tucker Act claims. *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). To satisfy the first prong, the Tribe "'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.'" *Id.* (quoting *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*")); *Wolfchild v. United States*, 731 F.3d 1280, 1288-89 (Fed.

Cir. 2013). Such "trust obligations [of the United States] to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). "[W]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . , neither the Government's 'control' over [assets] nor common-law trust principles matter." *Id.* at 177 (quoting *Navajo II*, 556 at 302).

The test's second prong is satisfied only if "the substantive source of law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]." *Hopi*, 782 F.3d at 667 (quoting *Navajo II*, 556 at 290-91); *Wolfchild*, 731 F.3d at 1288-89. It is the tribe's burden to identify a specific, rights-creating duty that mandates compensation. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 145 Fed. Cl. 609, 624 (2019). A tribe must therefore demonstrate that a statute establishes an unambiguous intent by Congress to create a specific, enforceable, money mandating trust duty, and that the United States breached that duty.

"In addition, the Tucker Act includes a statute of limitations, under which a claim in this Court expires 'six years after such claim first accrues.'" *Avery v. United States*, Case No. 19-1774C, 2020 U.S. Claims LEXIS 1204, at *7 (Fed. Cl. July 13, 2020) (quoting 28 U.S.C. § 2501). Section 2501's limitation on the United States' waiver of sovereign immunity "must be strictly construed." *Id.* (citation omitted).

2. The Indian Lands Open Dump Cleanup Act

The Indian Dump Cleanup Act directs IHS, in conjunction with EPA, to study and inventory open dumps on Indian lands, including the location of the dumps, to evaluate the contents and assess the threat to public health and the environment posed by the open dumps, and to develop cost estimates for closure and postclosure maintenance. 25 U.S.C. §§ 3901-3908;

El Paso Nat. Gas Co. v. United States, 774 F. Supp. 2d 40, 51 (D.D.C. 2011) ("It is up to IHS to conduct the inventory and evaluations, prioritize across different Indian tribal lands, and develop cost estimates."). The statute broadly directs IHS to "provide financial and technical assistance to the Indian tribal government . . . to carry out the activities necessary to (1) close such dumps; and (2) provide for postclosure maintenance of such dumps." 25 U.S.C. § 3904 (b). That assistance is to be made "available on a site-specific basis in accordance with priorities developed by the Director . . . in consultation with the Indian tribal government . . . [that] take into account the relative severity of the threat to public health and the environment posed by each open dump and the availability of funds." *Id.* § 3904(c). There is nothing in the Act that can be used as a sword to compel the United States to fund any specific clean up or to pay damages if IHS directs limited funds to Tribes based on its severity assessment.

3. 25 U.S.C. § 162a(d)(8)

25 U.S.C. § 162a(d)(8) provides that:

> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
> . . .
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d)(8). Section 162a(d)(8) does not explicitly reference any natural resource. Nor does it reference open dumps or solid waste.

4. Resource Conservation and Recovery Act

The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, was the nation's first comprehensive Federal legislation addressing waste management. RCRA set national goals for protecting human health and the environment from the potential hazards of waste disposal, reducing the amount of waste

generated, and managing wastes in an environmentally sound manner. Among other things, RCRA addresses: hazardous waste (42 U.S.C. §§ 6921-6939g), solid waste (42 U.S.C. §§ 6941-6949a), and underground storage tanks (42 U.S.C. §§ 6991-6991m).

With respect to solid waste, RCRA created a framework to aid states in developing their own solid waste management plans and tasked EPA with developing and publishing suggested guidelines. 42 U.S.C. § 6902(a)(1) (objective is to provide technical and financial assistance in development of plans). Under RCRA, state governments are responsible for the physical management of solid waste. 42 U.S.C. § 6945(c)(1)(A) ("each State shall adopt and implement a permit program . . . and conditions to assure that each solid waste management facility . . . will comply with the applicable criteria promulgated under [EPA's guidelines]"); *see also* 42 U.S.C. § 6907(a)(3) (EPA will **"**provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste"); 42 U.S.C. § 6947(a) (after submission of state plan, EPA "shall, . . . approve or disapprove of the plan.").

Tribes are included within the definition of "municipality" for RCRA purposes. 42 U.S.C. § 6903(13). Therefore, EPA lacks authority under RCRA to approve tribal solid waste management plans for administration of RCRA's solid waste management program. And the D.C. Circuit has expressly rejected EPA's attempts to treat tribes as states under RCRA for the purposes of solid waste management. *Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147, 150-151 (D.C. Cir. 1996). While RCRA has been read to "preempt" tribal sovereignty with respect to solid waste disposal sites operated by a tribe on its reservation, tribes retain their inherent sovereignty to regulate solid waste activities pursuant to their own tribal codes, ordinances and other authorities. *Blue Legs v. U.S. Envtl. Prot. Agency*, 668 F. Supp. 1329, 1338 (D.S.D. 1987). And, EPA may exercise its discretion to take enforcement to enforce RCRA's prohibition against

open dumps located within Indian country using two primary RCRA civil enforcement provisions to address solid waste and illegal dumping in Indian country.

5. The Snyder Act, 25 U.S.C. § 13

The Snyder Act governs BIA's general appropriations. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001). The Snyder Act provides that BIA "shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for" a number of purposes. 25 U.S.C. § 13. These purposes include "relief of distress and conservation of health." *Id*. Snyder Act funds may be directed to purposes as diverse as "employment of . . . Indian judges" and "purchase of horse-drawn and motor-propelled passenger-carrying vehicles." *Id*.

IV. STANDARD OF REVIEW

"Plaintiffs must (1) establish a court's power to hear their case, subject matter jurisdiction; (2) establish their own right to relief from particular conduct, a cause of action; and (3) allege facts that satisfy the elements of their cause of action." *Szuggar v. United States*, 145 Fed. Cl. 331, 334-35 (2019). A complaint must contain sufficient factual matter to support both the Court's jurisdiction and the elements of the plaintiff's claims. *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1354-55 (Fed. Cir. 2018). If the Plaintiff does not establish jurisdiction, the case should be dismissed under Rule 12(b)(1).

A facial jurisdictional attack challenges whether the plaintiff failed to plead jurisdiction or, though properly pleaded, "the allegations – even when assumed to be true – fail to establish jurisdiction under the relevant statute or constitutional provision." *Chemehuevi*, 2020 U.S. Claims LEXIS 1867, at *19 (citation omitted). This Court tests a complaint's sufficiency "as a matter of law, accepting as true all non-conclusory allegations of fact, construed in the light most

favorable to the plaintiff.'" *Szuggar*, 145 Fed. Cl. at 334 (quoting *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005)). When a plaintiff's jurisdictional facts are challenged, however, the plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence. *Dixon v. United States*, 147 Fed. Cl. 469, 474 (2020) (citation omitted). The Court must dismiss a claim if it lacks subject-matter jurisdiction. *Id.* at 474.

A defendant may move for judgment on the pleadings under RCFC 12(c). "[T]he court applies substantially the same test [to a RCFC 12(c) motion] as it does for a motion to dismiss for failure to state a claim under RCFC 12(b)(6)." *Sikorsky Aircraft Corp. v. United States*, 122 Fed. Cl. 711, 719 (2015). A plaintiff must allege facts supporting the necessary elements of its claim. *Sommers v. United States*, 149 Fed. Cl. 529, 537 (2020). "A complaint must be dismissed under [RCFC] 12(b)(6) when the facts asserted do not give rise to a legal remedy or do not elevate a claim for relief to the realm of plausibility." *Pac. Coast Cmty. Servs. v. United States*, 147 Fed. Cl. 811, 814 (2020). Although the court must "assume [the] veracity" of "well-pleaded factual allegations," *Iqbal*, 556 U.S. at 679, "conclusory" allegations are "not entitled to be assumed as true." *Id*. at 681 (citation omitted). To survive a motion to dismiss, a court "must conclude that 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *20-21 (quoting *Iqbal*, 556 U.S. at 678); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (allegations must "raise a right to relief above the speculative level.").

"Summary judgment is appropriate when no material fact is in genuine dispute and the law entitles the moving party to judgment." *Jones v. United States*, 149 Fed. Cl. 335, 348 (2020) (citing RCFC 56(a)). A "defendant can demonstrate that no material fact is genuinely disputed is by showing that the plaintiffs lack sufficient evidence to prove an essential element of their

claim." *Id*. To successfully oppose summary judgment, plaintiffs "'must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient.'" *Id*. (quoting *SRI Int'l v. Matsushita Elec. Corp. of Am*., 775 F.2d 1107, 1116 (Fed. Cir. 1985).

V. ARGUMENT

A. The Tribe Fails to Identify Any Statute or Regulation Imposing Any Mandatory Duty, Much Less a Money Mandating Duty.

While Congress provides several agencies with some general authority to assist the Tribe in addressing sanitation issues on its Reservation, Congress imposed no specific, enforceable duties on any agency. While IHS, BIA, and EPA have used discretionary authority to assist the Tribe, this case should be dismissed under RCFC 12(b)(1) because no statute establishes a duty to compensate the Tribe for the existence of open dumps.

In *Jicarilla*, the Supreme Court made clear that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities *by statute*." 564 U.S. at 177 (emphasis added). Thus, "[w]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over [Indian assets] *nor common-law trust principles matter*." *Id*. (quoting *Navajo II*, 556 U.S. at 302) (emphasis added); *accord Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 757 (2016) ("any specific obligations the Government may have under [the general trust] relationship are 'governed by statutes rather than the common law.'") (quotation omitted); *Ute Indian Tribe*, 145 Fed. Cl. at 623 (dismissing claims absent "statutes giving the Government full responsibility to manage land and resources for their benefit"). And "taking action to solve a problem can hardly be equated with the creation of a trust." *Begay v. United States*, 16 Cl. Ct. 107, 128 (1987). The Tribe's failure to plead any statute imposing any mandatory duty on the United States to clean up the open dumps on the Reservation is fatal to the Tribe's claim.

Even if control was relevant, the Tribe retains control over the collection and disposal of solid waste on the Reservation. PFOFs 2-12, above. That several Federal agencies have awarded a portion of their appropriated funds to the Tribe through grants or prioritization processes does not change the Tribe's control over solid waste management. Because the laws the Tribe relies on "do not establish a specific fiduciary obligation on the United States" to clean up any open dumps, this Court does "not need to reach the second step of the jurisdictional inquiry—whether the specific obligation is money mandating." *Hopi*, 782 F.3d at 671.

But even if a statute explicitly imposed the necessary mandatory duty, such a duty could not require the payment of damages to the Tribe. Most statutes are not money mandating. *Adair v. United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007) (citing *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 473 (2003)). The statutes at issue here are aimed at prioritizing limited appropriations to remedy public health deficiencies. They cannot be fairly read to impose a damages remedy. Indeed, such a remedy runs contrary to Congress's direction to prioritize limited appropriations. This is particularly true with respect to the Tribe's claims, as the United States cannot breach a money mandating duty when an agency declines to direct funds away from other tribes' sanitation projects to clean up solid waste dumped by the Tribe's own members, especially where the Tribe itself has elected to prioritize other sanitation projects.

1. The Tribe's Phase I claim should be dismissed because the Indian Dump Cleanup Act and the facts provide no basis for jurisdiction.

a. The Indian Dump Cleanup Act imposes no specific fiduciary obligation upon the United States

The Indian Dump Cleanup Act, 25 U.S.C. § 3901, imposes no general mandatory duty on the United States to clean open dumps on Indian land, much less a money mandating duty to pay damages because an open dump exists on a tribe's lands. The Act addresses the cleanup of open

dumps, which "means the termination of operations at open dumps on Indian land . . . and bringing such dumps into compliance with applicable Federal standards and regulations, or standards promulgated by an Indian tribal government." 25 U.S.C. § 3902. Rather than require any agency to clean up any open dump or otherwise establish a mandatory duty to tribes, Congress required IHS to "report to the Congress" on the priority of "solid waste deficiencies," "the methodology of determining the priority listing," the funding needed to "close or bring into compliance all open dumps on Indian lands," and "the progress made in addressing . . . solid waste deficiencies." 25 U.S.C. § 3903. And while 25 U.S.C. § 3904 provides for the limited "financial assistance" to close dumps, Congress explicitly conditioned any assistance to tribes:

> **Conditions.** All assistance provided pursuant to subsection (b) shall be made available on a site-specific basis in accordance with priorities developed by the Director. Priorities on specific Indian lands or Alaska Native lands shall be developed in consultation with the Indian tribal government or Alaska Native entity. The priorities shall take into account the relative severity of the threat to public health and the environment posed by each open dump and the availability of funds necessary for closure and postclosure maintenance.

25 U.S.C. § 3904(c). Rather than impose a duty to clean every dump on Indian lands, Congress required IHS to prioritize limited appropriated funds and limited any assistance in three ways: 1) the tribe must initiate a prioritization process; 2) any assistance is for funding cleanup activities; and 3) any assistance is contingent on IHS prioritizing based on the "availability of funds." 25 U.S.C. § 3904(a)-(c). Each of Section 3904's limitations is fatal to the Tribe's claims.

The D.C. Circuit recently rejected a tribe's effort to compel the United States to clean open dumps under the Indian Dump Cleanup Act – the foundation of the Tribe's Phase i claim. In *El Paso Natural Gas Co.*, the D.C. Circuit held that:

> Any trust claim founded on the Indian Dump Cleanup Act [must be rejected because] . . . the statute does not vest in the Government — either expressly as in *Mitchell II* or by implication as in *White Mountain* — any responsibility for *management* or *control* of Indian property. To the contrary, the statute imposes a duty upon the

> Director of the Indian Health Service to assist tribal governments as *they* 'carry out the activities necessary' to close open dumps. *Id*. § 3904(b). Because the statute contemplates management and control in the hands of tribal governments, the Indian Dump Cleanup Act falls comfortably within the ambit of *Mitchell I*.

750 F.3d at 899 (emphasis added). In other words, the "Indian Dump Cleanup Act . . . [does not] create a conventional fiduciary relationship that is enforceable as a breach of trust either under the APA or as a separate cause of action implied from the nature of the trust relationship as provided by the *Mitchell* doctrine." *Id*., *see id*. at 893-95 (discussing *United States v. Mitchell*, 445 U.S. 535 (1980) and other Indian Tucker Act cases). The D.C. Circuit correctly applied the Supreme Court's precedent interpreting the Indian Tucker Act – the basis for the Tribe's case – to determine that the Indian Dump Cleanup Act cannot impose a mandatory duty because it places solid waste management in the Tribe's hands.

The D.C. Circuit's rejection of tribal Administrative Procedure Act ("APA") claims based on the Open Dump Cleanup Act is also instructive because, as in *El Paso*, the Tribe has not satisfied necessary predicate conditions.[3] Any "purportedly mandatory duty is contingent on a series of predicate acts in" 25 U.S.C. § 3904(a). *Id*. at 891. Among these predicates is a "request by an Indian tribal government" to "conduct an inventory and evaluation of the contents of open dumps," and "develop cost estimates for the closure and post-closure maintenance of such dumps." 25 U.S.C. § 3904(a). The Tribe identifies no such request here. Tribe's Resp. to Interrog. No. 6 (Ex. 43) (Tribe is "generally unaware of specific communications" regarding environmental concerns); PFOFs 41-47. The absence of any indication that the Tribe requested inventory and cost estimates under Section 3904(a) is fatal to the Tribe's claims under Section

[3] The D.C. Circuit's APA discussion notably held that the Indian Dump Cleanup Act does not require IHS to take a discrete action because it conditions any assistance on IHS's priorities. *El Paso*, 750 F.3d at 890-91.

3904(b). *El Paso*, 750 F.3d at 891 (absence of completing necessary predicates defeated Indian Dump Cleanup Act claim). The Tribe's claims here should be dismissed because the Tribe does not identify the elements of its claim, much less allege facts that could conceivably support those elements. *Sommers*, 149 Fed. Cl. at 537.

Even if Congress imposed a mandatory duty to clean up dumps on Indian lands, which it did not, any such duty is not money mandating. Under Federal Circuit law, statutes providing an agency with substantial discretion are not money mandating. *Wolfchild*, 731 F.3d at 1292 (Fed. Cir. 2013) ("statutes granting officials 'substantial discretion' are 'not considered money-mandating,' . . . [Act] does not impose any duty on the Secretary to make the land grants that it authorizes. It therefore cannot 'fairly be interpreted as mandating compensation for damages sustained' from a failure to provide such lands.") (citations omitted); *Samish*, 419 F.3d at 1364 (discretionary schemes are money-mandating only if they: (1) provide "clear standards for paying" money to recipients; (2) state "precise amounts" that must be paid; or (3) "compel payment on satisfaction of conditions."); *Avery*, 2020 U.S. Claims LEXIS 1204, at *10 ("Because the decisions . . . are discretionary under the statute and its accompanying regulations, there is no money-mandating law"). The Indian Dump Cleanup Act is not money mandating because it vests IHS with substantial discretion, provides no standards for paying any money to any tribe, and does not compel payment on satisfaction of certain conditions.

There can be no reasonable dispute that Congress made any assistance to clean open dumps "conditional on the 'priorities developed by the Director.' 25 U.S.C. § 3904(c)." *El Paso*, 750 F.3d at 891. Because IHS "has discretion in doling out assistance, the [tribe] has not pled any 'legally required' duty to act." *Id.* (citation omitted). In other words, the Indian Dump Cleanup Act imposes no mandatory duty because IHS's discretion in distributing limited funds

defeats any argument that Congress required IHS to clean up any particular dump. *Id*. The Tribe's claim fails because Congress vested IHS with discretion to carry out general objectives.

And rather than compel payment to tribes or provide a standard for paying money to tribes, Congress at most required IHS to prioritize cleanup of open dumps with limited funds provided by Congress. 25 U.S.C. § 3904(c) ("**Conditions.** All assistance provided pursuant to subsection (b) shall be made available on a site-specific basis in accordance with priorities developed by the Director."). Congress explicitly made its process for prioritizing assistance subject to the "availability of funds necessary for closure and postclosure maintenance." *Id*. The legislative history confirms the clear statutory mandate to prioritize limited funds to address the greatest public health threats on Indian lands. Indian Lands Open Dump Cleanup Act of 1994, S. Rep. No. 103-253 at 6 (1994) ("In setting the priorities, the Director must take into account such factors as the relative severity of the threat to public health and the environment posed by each site and the availability of funds necessary for closure and postclosure maintenance."). To be clear, Congress imposed a discretionary scheme[4] that cannot reasonably be interpreted to compel any payment to the Tribe. Indeed, it would thwart Congress's scheme if the Tribe – or any tribe – could override IHS's exercise of its discretion to prioritize its limited appropriations.

[4] The Indian Health Care Improvement Act, which the Tribe does not cite, also authorizes IHS to expend appropriations to remedy certain sanitation deficiencies, including solid waste issues. Pub. L. No. 94-437, 90 Stat. 1400 (Sept. 30, 1976). The Act similarly required IHS to prioritize its distribution of limited, appropriated funds. 25 U.S.C. § 1632(g)(1)(A) (requiring report setting forth IHS's "Indian sanitation facility priority system"); *id*. at (g)(4) (establishing five sanitation deficiency levels). Rather than require or fund the immediate remediation of all deficiencies, Congress required IHS to report on "the amount of funds necessary to raise all Indian tribes" to various "deficiency" levels. 25 U.S.C. § 1632(g)(1)(D-E); 25 U.S.C. § 1632(f) (limiting funds tribes could receive to administer sanitation programs to "funds appropriated" by Congress); Indian Health Care Amendments of 1988, 100 Pub. L. No. 713, 102 Stat. 4784, 4802-03 (Nov. 23, 1988) (providing appropriations and encouraging "parity among Indian tribes").

Finally, the Tribe seeks money damages rather than cleanup of open dumps the Tribe's members created. Paying damages to the Tribe would subvert Congress's direction that limited funds "shall be made available on a site-specific basis" to cleanup sites in accordance with IHS's priorities because no site would be cleaned by paying damages to the Tribe. The Indian Dump Cleanup Act cannot be considered money mandating. *Hopi*, 782 F.3d at 666-67 ("claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for damages") (citation omitted); *Wolfchild*, 731 F.3d at 1292-94; *Samish*, 419 F.3d at 1364-67. The Act provides for cleaning up dumps rather than "authoriz[ing] a free and clear transfer of money." *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313, 1319 (Fed. Cir. 2017). The Tribe therefore cannot obtain money damages for any breach and the Tribe's Phase i claims should be dismissed.

b. The facts confirm that the Tribe's Indian Dump Cleanup Act claim should be dismissed.

While this Court's analysis need, and should, proceed no further, the undisputed facts establish that the Tribe regulates the management of solid waste on its Reservation. And the Tribe has repeatedly admitted that its members are responsible for creating open dumps on the Tribe's lands. PFOFs 6-11, 27, 37-39, 48. The Tribe assumed responsibility over disposing of solid waste, managing the Tribal landfill, and enforcing its solid waste ordinances, among other things. PFOFs 2-11. In other words, the Tribe is responsible for open dumping on its Reservation, as well as efforts to convince its own members and Solid Waste Department to cease open dumping on the Reservation. PFOFs 6-11, 29-47. The Tribe also has the ability to consult on the prioritization of how limited IHS funds available to address sanitation deficiencies are expended. The D.C. Circuit's conclusion that the Indian Dump Cleanup Act does not impose a mandatory duty on the United States is particularly appropriate here.

The Tribe's claim for damages is particularly inappropriate given that four Federal agencies have actively assisted the Tribe for decades to address its members dumping solid waste on the Reservation. PFOFs 12-50.[5] As the Tribe recognizes, it retains the ability to "apply for funding in the future for cleanup" of "illegal dumpsites." PFOF 40. It may obtain further Federal assistance for a transfer station that might deter its members from illegal dumping. PFOFs 38-40. The ongoing struggle to address open dumping by Tribal members highlights that Congress authorized, at most, discretionary funding of programs aimed at addressing open dumping – not a free and clear transfer of funds. *See Lummi Tribe*, 870 F.3d at 1319. The Indian Lands Dump Cleanup Act therefore cannot provide the necessary money mandating duty and the Tribe's claims should be dismissed for lack of jurisdiction.

2. The Snyder Act imposes no money mandating duty

The Tribe's reliance on the Snyder Act, Specification at 2 (Ex. 46), is likewise misplaced. The Snyder Act provides that BIA "shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for" several purposes. 25 U.S.C. § 13. As the Supreme Court held, "the Snyder

[5] Four Agencies have provided the Tribe with funding over the past 30 years to clean up open dumps, construct a landfill and transfer station, and educate tribal members to cease open dumping. The United States has consulted with the Tribe and, based upon that consultation, prioritized limited appropriations to address the most pressing public health needs. The Tribe is correct that since 2011 IHS has prioritized other health projects above cleaning open dumps. Specification at 1-2 (Ex. 46). But this simply highlights that IHS must prioritize appropriations.

The Indian Dump Cleanup Act made providing "financial and technical assistance" conditional by giving IHS discretion to provide assistance "in accordance with priorities" developed by HIS in consultation with tribes. 25 U.S.C. § 3904(c). IHS did just that. It has consulted with the Tribe regarding the Tribe's prioritization of sanitation projects. The Tribe could have chosen to prioritize cleanup of at least some of its open dumps. For the past four years, at a minimum, the Tribe instead prioritized other projects. And IHS's Phoenix Area Office responded to these more urgent priorities by allocating roughly 15% of its Regular and SFC Funds to the Tribe – despite the fact that the office serves 44 other tribes. PFOFs 41-47; IHS Resp. to Interrog. No. 1 (Oct. 7, 2020) (Ex. 33).

Act . . . speak[s] about Indian health only in general terms" that do not establish "legally binding obligations." *Lincoln v. Vigil*, 508 U.S. 182, 193-94 (1993). To the contrary, IHS has "discretion to reorder its priorities" and expenditures. *Id*. at 194-95. The "decision to terminate" programs under the Snyder Act is thus committed to agency discretion. *Id*. at 194. The Tribe's effort to locate a money mandating duty in the Snyder Act fails because the Act mandates no duty at all.

Just as the Snyder Act does not mandate that BIA and IHS fund particular programs, the Act imposes no money mandating duty. The Federal Circuit made this point clear, holding that "the Supreme Court has already determined the Snyder Act does not provide a damage remedy because it does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans." *Samish*, 419 F.3d at 1366 (citing *Lincoln*, 508 U.S. at 194). It similarly rejected the Tribe's attempt to find a money mandating duty because the Snyder Act "fails 'to provide a basis for a money-mandating claim.'" *White Mountain Apache Tribe*, 249 F.3d at 1372 (citation omitted); *Allred v. United States*, 33 Fed. Cl. 349, 355 (1995) (Snyder Act is "in essence discretionary lump-sum appropriations, 'the very point of [which] is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.'") (quoting *Lincoln*, 508 U.S. at 192). Simply put, the Snyder Act does not impose the necessary money mandating duty.

3. 25 U.S.C. § 162a(d)(8) imposes no money mandating duty.

25 U.S.C. § 162a(d)(8) imposes no mandatory duty, much less a money mandating duty, to clean open dumps on the Reservation. The Tribe's reliance on Section 162a(d)(8), *see* Compl. ¶¶ 62-63, p. 22, Specification at 2 (Ex. 46), is therefore misplaced. The statute states only:

> (d) Trust responsibilities of Secretary of the Interior
> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
> . . .

> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

Section 162a(d)(8) does not create specific "rights creating or duty-imposing" prescriptions for managing natural resources, much less open dumps, on the Tribe's lands. The statute concerns Interior's management and investment of Indian trust funds, rather than non-monetary assets. *Jicarilla*, 564 U.S. at 178 ("These provisions [including 25 U.S.C. § 162a] define the trust responsibilities of the United States with respect to tribal funds.") (internal quotation marks and citation omitted); *Hopi*, 782 F.3d at 670 n.1 (Section 162a(d)(8) "detail[s] the United States' trust responsibilities in managing tribal funds and investments, which are not relevant to the management of drinking water quality."). Because Section 162a(d) applies only to trust fund management, it does not impose the necessary specific mandatory duties regarding management of natural resources, including the management of solid waste.

As this Court held in dismissing a damages claim premised on Section 162a(d)(8):

> 25 U.S.C. § 162a(d)(8) does direct the government to manage the natural resources of Indian tribes, but does not direct any specific actions to be taken by the government in that management. This stands in contrast to much of the rest of 25 U.S.C. § 162a and § 162a(d), which are principally concerned with trust funds and assets and which provide clear instructions for their management. Absent statutory authority to direct the government to more affirmatively manage Indian natural resources, and absent an actual compensable injury, this court lacks jurisdiction to hear "the Tribe's] claim.

Crow Creek Sioux, 132 Fed. Cl. at 411. This case is similar to *Hopi*, where Section 162a(d)(8), the Indian Health Improvement Act, and the Indian Sanitation Facilities Act created no money mandating duty by "involv[ing] the United States in the provision of drinking water." *Hopi*, 782 F.3d at 669-71 (no mandatory duty in statutes that "only require the United States to assist in the provision of safe drinking water, and do not restrict the . . . Tribe from managing the resource itself."). Section 162a(d)(8) simply does not provide the "specific, applicable, trust-creating statute" necessary to support this Court's jurisdiction. *Jicarilla*, 564 U.S. at 177.

And unlike the Indian Dump Cleanup Act, Section 162a(d)(8) does not even address open dumps. Neither open dumps nor solid waste are "natural resources." Nor do open dumps generate trust funds. Indeed, the Tribe does not suggest how the United States has breached, or even conceivably could breach, any duty to appropriately manage natural resources by failing to stop the Tribe's members from depositing solid waste on their own lands. To the contrary, Section 162a(d)(8) imposes no money mandating duty on the United States to police dumping or clean up illegally dumped waste. As with the Snyder Act, Section 162a(d)(8) speaks about "natural resources" in general terms that do not establish legally binding obligations. *Lincoln*, 508 U.S. at 193-94, much less address them specifically enough to impose a trust duty

In sum, none of the statutes the Tribe references in its Complaint or claim specification impose the necessary specific, applicable, trust-creating statute. The Tribe therefore cannot sustain its open dumping claim. And, as set forth at pages 24-28, above, the remedy for any breach of a duty to clean up every open dump on the Reservation cannot be a payment of money damages to the Tribe. Such a payment would not remedy the alleged breach. Therefore, even if one of the identified statutes imposed a specific, applicable, trust-creating duty, that statute is not money mandating in breach. The Tribe's claim should therefore be dismissed.

4. RCRA imposes no money mandating duty

RCRA similarly imposes no money mandating duty on the United States. In *El Paso Natural Gas*, the tribe did "not contend that, under the *Mitchell* doctrine, these generally applicable statutes afford it a cause of action for breach of trust." 750 F.3d at 899. The D.C. Circuit made clear that this was for a "good reason", as "generally applicable statutes — *e.g.*, RCRA and the Clean Water Act — do not establish a conventional fiduciary relationship." *Id*. The Tribe likewise seems to avoid relying on RCRA, failing to cite any provision of RCRA or its

implementing regulations to allege that Congress imposed a trust duty. Specification at 2 (Ex. 46). This failure to specify any portion of RCRA imposing a money mandating duty, standing alone, should be fatal to any claim based on RCRA. *Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *79-80. Regardless, as in *El Paso Natural Gas*, the Tribe's failure to properly invoke RCRA is irrelevant because RCRA: 1) supplies no money mandating duty; and 2) can only be enforced in District Court.

RCRA prohibits the open dumping of both solid and hazardous waste, and mandates that states include provisions in their solid waste management plans to close or upgrade existing open dumps. 42 U.S.C. § 6945(a) (prohibiting "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste"); *id*. at § 6943(a)(3) (state's waste management plan "shall provide for the closing or upgrading of all existing open dumps"). RCRA requires EPA to neither clean up open dumps nor enforce RCRA's open dumping ban. Instead, Congress granted EPA limited and discretionary enforcement powers. 42 U.S.C. § 6945(c)(2)(A) ("the Administrator ***may*** use the authorities available . . . to enforce the [open dumping] prohibition") (emphasis added). In other words, RCRA does not impose a mandatory trust duty on the United States. *See Navajo II*, 556 U.S. at 302 ("Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . [,] neither the Government's 'control' over [trust resources] nor common-law trust principles matter."); *Jicarilla*, 564 U.S. at 177 ("government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). RCRA provides no basis for a breach of trust claim. *El Paso*, 750 F.3d at 895, 899.

Moreover, Congress divested this Court of jurisdiction by vesting District Courts with exclusive jurisdiction over RCRA claims. Actions alleging the United States "to be in violation

of any permit, standard, regulation, condition, requirement, prohibition, or order" under RCRA "shall be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. § 6972. And actions alleging that the United States "contributed or . . . is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment" must be brought in either the district where the violation occurred or in the District Court for the District of Columbia. *Id.* Congress vested District Courts with jurisdiction over alleged RCRA violations and does not allow monetary damages. *See id.* at § 6972 ("The district court shall have jurisdiction . . . to enforce the . . . prohibition . . . or to order the Administrator to perform the act or duty."); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (in open dumping lawsuit "RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to Section 6972(a)(1)"); *Blue Legs*, 668 F.Supp. at 1337 ("It was also Congress's intent that persons seeking to enforce the open dumping prohibition bring suit . . . against persons engaged in the act of open dumping and that the Federal District Courts be authorized to enjoin such persons directly"). This Court lacks jurisdiction over any claim that the United States owes the Tribe a mandatory duty under RCRA. The Tribe's claim should be dismissed on that basis, alone.

RCRA's provisions authorizing EPA to provide technical and financial assistance for solid waste management highlight that Congress here too established a discretionary scheme that is not money mandating. *See* pages 24-30, above. Funding grants, particularly grants that might be awarded to many tribal and non-tribal parties, is discretionary. *See, e.g.*, 42 U.S.C. § 6948(d)(1); § 6948(a)(2)(A). These authorities were not renewed after 1988, highlighting that Congress imposed no money mandating duty through temporary funding. 42 U.S.C. § 6948.

While funds are not available to tribes for solid waste management projects under RCRA, tribes can apply for funds under EPA's GAP grants. *See* 42 U.S.C. § 4368b(g)(1) ("tribal government . . . may apply for general assistance grants"); 40 C.F.R. § 35.548 (limiting award to no "more than 10 percent of the total annual funds appropriated").[6] As with the Indian Dump Cleanup Act, pages 21-26, above, RCRA's discretionary grant program mandates no payment to the Tribe disbursing limited appropriations. The Tribe does not, and cannot, point to any statute that imposes an action mandating, much less a money mandating, duty relating to cleaning up open dumps on the Reservation. The Tribe's Phase I claims should therefore be dismissed.

B. The Tribe fails to state a claim on which relief can be granted because it fails to plead facts establishing jurisdiction.

1. The Tribe's Complaint failed to plead sufficient facts.

The United States also renews its motion to dismiss on the basis of the Tribe's "failure to plead sufficient facts to establish this Court's jurisdiction" over the Tribe's contamination claim. ECF No. 9-1 at 20-21 (citing *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015)). The Court noted that the record related to the Tribe's Phase I claims was not well developed. Order, ECF No. 22 at 9-10. But the Court denied the relevant portion of the motion without prejudice and "indulge[d] the Plaintiff's request for limited discovery." *Id*. This Court recently criticized a similar jurisdictional discovery process. *Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *4. The Tribe's Complaint here fares no better. Indeed, it only mentions "open dumps" in a string cite, ECF No. 1 ¶ 20, and does not even allege that a single open dump exists on the Reservation. With or without the Tribe's two-page claim specification, the Complaint should be dismissed because it fails to allege sufficient facts to state a claim for relief.

[6] The Tribe has successfully applied for numerous GAP grants. (Ex. 44) ($3,386,405 between 2002 and 2019). This motion does not address Federal funds provided through other programs.

"For a plaintiff's complaint to survive a motion to dismiss, the Court — viewing the facts in the light most favorable to the plaintiff — must conclude that 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *20-21 (quoting *Iqbal*, 556 U.S. at 678). The Complaint should be dismissed under Rule 12(b)(6) and 12(c) if it does not allege facts that plausibly suggest that the Tribe is entitled to relief. *Id.* Here, the Tribe fails to offer even a threadbare recital of the elements of a claim seeking damages for the existence of open dumps. Its single allegation that "[s]ome Reservation trust lands have been contaminated by non-tribal entities with hazardous waste, pollution, and other harmful substances" alleges nothing about the location of alleged contaminated properties, the nature of the contamination, or the responsible individuals. ECF No. 1 at ¶ 15. While the Complaint includes the Indian Dump Cleanup Act in a string cite, it fails to identify a single dump. *Id*. at ¶ 20. The Tribe's failure to identify a single open dump should have been fatal to any claim. *See Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *80 (citing *Iqbal*, 556 U.S. at 662). And the Tribe's interrogatory responses confirm that this case should be dismissed by admitting that its "ability . . . to state its claims [relating to alleged contamination by non-tribal entities] is almost entirely dependent on the Plaintiff obtaining records from Defendant." Resp. to Interrog. #2 (Ex. 43).

This Court's analysis must begin and end with the Tribe's Complaint. To the extent the Complaint seeks damages relating to open dumps, it must be dismissed because the Tribe identifies no facts supporting its claim. The single, potentially-applicable allegation, is that "[s]ome Reservation trust lands have been contaminated by non-tribal entities with hazardous waste, pollution, and other harmful substances." ECF No. 1 ¶ 15.

2. Despite over two years of discovery, the Tribe's Claim Specification still fails to set forth facts supporting the Tribe's claim.

Despite the United States producing over 75,000 documents and serving Interrogatory Responses on the Tribe's mining, leasing, right-of-way claims, and contamination claims from EPA, IHS, and Interior over more than two years of jurisdictional discovery, the Tribe's September 1, 2020 claim specification only highlights the pleading deficiency. The Tribe seeks to expand its single sentence to claim that the United States breached an alleged trust duty by "failing to provide adequate financial and technical assistance to: (1) inventory dumps; (2) develop a plan to close dumps; (3) close dumps; and (4) provide postclosure maintenance of such dumps." Specification at 1 (Ex. 46). The Specification fails to remedy the absence of specific allegations that non-tribal entities are responsible for dumping, the location of the dumps, or what is in the dumps. The Tribe's threadbare allegations would not meet the pleading standard even if they were properly set forth in the Complaint.

First, the Tribe's "failure to inventory" subclaim is based upon a single concrete allegation – that the Tribe requested assistance to inventory dumps in 1995. *See* Specification at 2 (Ex. 46) (citing Letter from R. Lupe, Tribe, to B. Nuvamsa, BIA (Feb. 2, 1995) (Ex. 15)). The Tribe does not identify a single post-2000 request for funding that the United States has failed to grant. Indeed, it is indisputable that the United States has repeatedly provided the Tribe with funds to inventory the open dumps on its Reservation. PFOFs 12, 29-36. The Tribe's failure to identify a single request for assistance inventorying dumps that went unfunded is fatal to the Tribe's failure to inventory dumps claim.[7]

[7] The Tribe likely does not allege that the United States failed to assist it in inventorying dumps because the United States has repeatedly provided the Tribe with funds to inventory open dumps. PFOFs 29-36, above. Regardless, as discussed above, the Indian Dump Cleanup Act imposes no action mandating, much less money mandating, duty.

The Tribe cannot, having based its claims on an alleged failure to inventory, seek to rely on an inventory. Specification at 1-2 (Ex. 46) (asserting that a "recent" IHS inventory documents 12 pages of open dumps). But this "recent" inventory was actually conducted in 2006. Letter from C. Tenley, EPA (Mar. 6, 2006) (Ex. 47) (introducing survey); *Compare* Inventory at Nos. 161-165, 180 (Nov. 29, 2006) (Ex. 48) with Specification at 5-6 (Ex. 46) (identifying identical numbers and site names). The Tribe limits its claims "to closure or post-closure maintenance of open dumps that the Tribe first knew about or should have known about from March 16, 2011 to the present." Specification at 2 (Ex. 46).[8] In other words, the Tribe's attempt to formulate its claims highlights that any claims related to dumps identified in the 2006 inventory are both excluded from the Tribe's claims and barred by the statute of limitations. Put another way, the Tribe pleads its claim out of existence because it fails to identify: 1) a single dump that the Tribe "first know about or should have known about' after March 16, 2011; and 2) a single assurance by the United States that it would provide more assistance than it has. *Id*.

Even if the Tribe's subclaims seeking a plan to close dumps, closure, and post-closure maintenance were not barred because the Tribe identifies no money mandating duty, they fail on their own terms. The Tribe does not suggest how the United States could develop a plan to close dumps without the inventory the Tribe claims is missing. Regardless, the Tribe neither alleges that it requested the United States develop a closure plan nor that the United States has a duty to do so absent a Tribal request. *Id*. Nor does the Tribe allege which dumps the United States

[8] It must so limit its claims, as it is well established that claims that accrued more than six years before the Tribe's 2017 Complaint, such as claims based on this 2006 Inventory, are barred by the statute of limitations. *See Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *50-60. As set forth in IHS's responses to the Tribe's Interrogatories, the majority of dumps on the "IHS inventory" that the Tribe relies upon do not appear to be visible open dumps based upon IHS's June 2020 resurvey of historic open dumps throughout Indian lands. That truly recent resurvey identified approximately 45 sites that still appeared to be open dumps. PFOF 36.

failed to close and maintain. To the contrary, the Tribe states a nonspecific "understanding . . . that for at least the last seven years the funding has been inadequate and the illegal dump problem has both not been resolved and gotten worse with new dumps." *Id*. It does not allege that it requested any specific assistance at any specific time, much less that any agency was required to close a specific dump. In other words, even if the Tribe had identified a money mandating duty, the Tribe alleges no facts that could lead this Court to determine that the Tribe has met the elements of its own claim. *Id*. The Tribe's failure to allege with any particularity that it made a request that went unmet is fatal to the Tribe's claim. *Chemehuevi*, 2020 U.S. Claims LEXIS 1867 at *81 (quoting *Iqbal*, 556 U.S. at 678).

The Specification notably fails to identify: 1) a single non-tribal entity that dumped any waste on the Reservation, much less that any such waste remains on the Reservation; and 2) contamination. Specification at 1-3 (Ex. 46). And the Tribe recently confirmed its inability to identify any location where waste has been dumped by anyone who is not a member of the Tribe, including the United States. Tribe's Resp. to Interrog. No. 18 (Ex. 45). Even if it had identified a money mandating duty to clean up solid waste on the Reservation, the Tribe fails to plead sufficient facts to set forth that claim.

C. *Blue Legs v. United States* makes clear that the United States has breached no money mandating duty. The United States is entitled to summary judgment because it remedied open dumps containing Federal waste.

The Tribe's claim specification notably cites to the Eighth Circuit's *Blue Legs* decision, alleging that BIA and IHS first focused on the Tribe's illegal dumping issues following that decision. Specification at 2 (Ex. 46). *Blue Legs* required Federal agencies to clean up agency waste from illegal dumps on reservations. It did not require the United States to pay monetary damages related to agency waste, much less pay damages for waste dumped by tribal members.

The Tribe is correct, *id.*, that BIA and IHS took a number of steps to address illegal dumping on the Reservation following *Blue Legs*. Indeed, the United States cleaned up open dumps that held agency garbage prior to creation of the Tribe's landfill, funded the landfill's construction, and changed agency waste disposal policies going forward to avoid contributing to the proliferation of open dumps on the Reservation. *Blue Legs* therefore illustrates both factual and legal flaws in the Tribe's efforts to obtain damages for illegal dumping.

In *Blue Legs*, a tribal member sued the Oglala Sioux Tribe, EPA, BIA, and IHS to require cleanup of illegal dumps on the Pine Ridge Indian Reservation. 867 F.2d at 1094. Oglala, BIA, and IHS were all required to participate in "compliance efforts" to clean illegal dumps containing agency waste. *Id*. at 1098 (citing RCRA and the Snyder Act as basis for injunction). The Court's finding that the agencies "violat[ed] RCRA's open dumping provisions" was based on factual findings: "BIA and IHS contributed to open dumping . . . by generating solid waste, contracting for its disposal and, in some instances, transporting solid waste to dumps operated in violation of federal law. They were therefore 'engaged in activity resulting in the disposal of solid waste' within the meaning of the statute." *Id*. at 1098-99. The Court also held that BIA violated the Snyder Act, despite being "vested with some discretion in deciding how to expend fixed sums toward fulfilling statutory goals, where BIA engages in injurious conduct toward the intended statutory beneficiaries." *Id*. at 1100. In sum, the Court found that BIA had a duty to clean up its waste that was illegally dumped, in part by BIA personnel, on a Reservation. *Id*.

As discussed above, pages 27-33 neither RCRA nor the Snyder Act impose a money mandating duty. *Blue Legs'* locating an agency duty to clean up its own waste in RCRA and the Snyder Act is neither binding nor apposite. Because it was decided in 1989, *Blue Legs* predates the Supreme Court's clarification that a Tribe must "identify a specific, applicable, trust-creating

statute or regulation that the Government violated" to successfully pursue a breach of trust claim. *Jicarilla*, 564 U.S. at 177. Indeed, the Eighth Circuit's acknowledgement that BIA is vested with discretion in fulfilling the Snyder Act's general statutory goals, *Blue Legs*, 867 F.2d at 1100, makes clear that the statute imposes no mandatory duty under a series of subsequent Supreme Court opinions. *Lincoln*, 508 U.S. at 193-94; *El Paso*, 750 F.3d at 891 (collecting and discussing cases requiring a specific statute or regulation). Moreover, Congress's passage of the Indian Dump Cleanup Act in 1994 made clear that illegal dumps on many reservations may be addressed in a manner that prioritizes limited Federal funds. *See* pages 21-27, above. In sum, neither RCRA nor the Snyder Act imposes any mandatory duty to spend limited appropriations on addressing solid waste issues, including illegal dumps, on any particular reservation.

Blue Legs similarly highlights that any agency duty to clean up its own solid waste cannot be money mandating. *Blue Legs* was filed in District Court because RCRA places exclusive jurisdiction for such suits in District Court. *Id*. at 1098 (citing 42 U.S.C. § 6972(a)(1), which imposes other limitations on citizen suits, as well). The Court ordered the Tribe, BIA and IHS to submit "a proposal for bringing the dump sites into compliance" – injunctive relief that is unavailable in this Court – based upon "a duty to clean up the dumps." *Id*. at 1100-01.[9] The Tribe notably does not seek injunctive relief bringing dump sites into compliance. Compl., ECF No. 1. It instead seeks monetary damages. As set forth above, neither RCRA nor the Snyder Act are money mandating because Congress did not permit the Tribe to obtain monetary damages from the government for the existence of illegal dumps on its Reservation. This is particularly so where, as here, the dumps are caused by the Tribe rather than the United States.

[9] This Court "has no general power to provide equitable relief against the Government." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 313 (2011); *United States v. King*, 395 U.S. 1, 5 (1969) (no "authority to issue declaratory judgments.").

Blue Legs is also factually inapposite because, with the possible exception of a single site, BIA and IHS cleaned up all of their waste that was placed in illegal dumps on the Reservation. BIA and IHS waste was deposited in illegal dumps on the White Mountain Apache Reservation, just as on the Pine Ridge Reservation. PFOFs 12-28, 41, 48-50. But *Blue Legs* and the Indian Dump Cleanup Act spurred both agencies to clean up, or assist in cleaning up, the illegal dumps that existed on the Reservation prior to commencement of operations at the Tribe's landfill. *Id*. Unlike in *Blue Legs*, the United States already cleaned up its waste – and also assisted the Tribe in cleaning up dumps that did not contain agency waste. *Id*.; PFOF 37.[10] BIA and IHS also ensured that they would no longer contribute to the profusion of open dumps on the Reservation. PFOFs 13, 20. And BIA, IHS, EPA, HUD, and USDA all assisted the Tribe with addressing the structural problems that led to the creation of open dumps by funding the creation of the Tribe's landfill. PFOFs 12-21. Indeed, the United States has repeatedly provided the Tribe with assistance in addressing illegal dumping by the Tribe's members, as well as to identify and clean up certain open dumps with available appropriations for assisting all Tribes. PFOFs 12-28, 37-50.[11] In sum, *Blue Legs* is inapplicable because, with the exception of a single site, the United States has cleaned up its own waste from illegal dumps on the Reservation. *Blue Legs* instead underscores that: 1) no agency bears responsibility for cleaning illegal dumps on the Reservation

[10] A single site may contain BIA waste from BIA's construction of a road to the Tribe's ski mountain. PFOF 49. Regardless, the Tribe has not identified a basis for cleaning up this site, much less paying damages relating to it. *Id*. Moreover, any lawsuit seeking cleanup of open dumps requires an injunction, which is unavailable in this court.

[11] While United States control is not enough to impose a trust duty, pages 14-15, 20-21, above, the Tribe's high degree of control over waste, including enforcing the Tribe's solid waste ordinance, PFOFs 2-11, 37-47, militates against a mandatory trust duty here. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) ("When on-reservation conduct involving only Indians is at issue, . . . interest in encouraging tribal self-government is at its strongest."); *A & A Concrete, Inc. v. White Mt. Apache Tribe*, 781 F.2d 1411, 1415 (9th Cir. 1986).

where they are not responsible for the solid waste in those dumps; and 2) no statute requires the United States to take pay damages to the Tribe here.

D. The Tribe fails to establish standing

The Tribe bears the burden of proof to establish jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff must establish three elements. *Id.* at 560. First, the Tribe must show that it has suffered an "injury in fact" that is "concrete and particularized" and actual or imminent, not "conjectural" or "hypothetical." *Id.* (citations omitted). Allegations of possible future injuries are insufficient. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013). Indian tribes suffer no injury from, and thus lack standing to challenge, the distribution of funds to which they have no entitlement. *Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283-84 (Fed. Cir. 2010). Second, the Tribe must establish a causal connection between its alleged injuries and the United States' action. *Lujan*, 504 U.S. at 560-62 (citations omitted). Third, the Tribe must show it is likely, as opposed to speculative, that the injury will be addressed by a favorable decision. *Id.*

As set forth above, no statute entitles the Tribe to any funds. IHS and EPA have discretion to distribute limited funds among tribes, including many with higher priority public health issues than cleaning up open dumps, particularly when the Tribe has not assigned its priority points to dump cleanup projects for at least the last four years. *See* PFOFs 41-47. So any claim based upon the possibility that the Tribe will suffer unspecified harm if unspecified open dumps are not cleaned is predicated on a conjectural and hypothetical injury. Furthermore, Tribe cannot demonstrate that the United States caused its alleged injuries. To the contrary, the Tribe admits that it lacks "specific information regarding any persons acting on behalf of the United States dumping or placing materials unlawful[ly]." PFOF 48. Finally, the Tribe cannot

establish that its open dumping breach of trust claim would be redressed by a favorable outcome. Specifically, the Tribe has not shown that an award of damages to the Tribe would lead to the cleanup of any open dumps, much less structural improvements that would address the proliferation of open dumps on the Reservation. So while the Tribe's claim should be dismissed because no statute imposes a money mandating duty, they also should be dismissed for lack of standing because paying damages to the Tribe would not remedy the alleged injury. The Tribe's Phase I claims should therefore be dismissed under RCFC 12(b)(1).

VI. CONCLUSION

The United States respectfully submits that the Tribe's Phase I claims should be dismissed under RCFC 12(b)(1)because the Tribe fails to identify a statute or regulation imposing a money mandating duty to clean up open dumps on the Tribe's Reservation. Congress did not require the United States to clean up every piece of solid waste on Indian lands, much less pay monetary damages if it fails to do so. Moreover, the Tribe's open dump claim should be dismissed under RCFC 12(b)(6) and 12(c) because the Tribe failed to plead any facts supporting its claim. The Tribe's open dump claim should be dismissed because the Tribe fails to identify a single open dump that the United States cWhitontributed to, much less a basis for the United States to pay the Tribe damages based upon the Tribe's members dumped waste on the Reservation. Alternatively, the Court should grant summary judgment over the Tribe's claims because the facts establish that Federal agencies cleaned waste that they dumped on the Tribe's lands and that the Tribe is responsible for its current open dumps.

In addition, the Tribe effectively withdrew its mining, leasing, and right-of-way claims, as well as the Tribe's contamination claims that are not based upon open dumps. The Court should therefore dismiss, or grant summary judgment on, those claims.

Respectfully Submitted: November 16th, 2020

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