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 Kathryn C. Davis
	)	
Defendant.	)	
	)	

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S PHASE I CLAIMS

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I. INTRODUCTION

Congress did not require the Indian Health Service ("IHS") to clean up any dump on the White Mountain Apache Tribe's Reservation, much less require the United States to pay damages to the Tribe if the IHS prioritizes funds toward more severe threats on the Reservation or projects on other tribes' reservations. The Tribe's Response to the United States' motion to dismiss notably fails to identify any statutory language imposing the money mandating duty required to sustain the Tribe's claim. Indeed, the Response highlights that the Indian Lands Open Dump Cleanup Act's ("Open Dump Act") requires IHS to prioritize limited funds. This condition defeats the Tribe's argument that the Act imposes a money mandating duty.

The Complaint should also be dismissed because the Tribe identifies no dump within its claim, which is limited to dumps the Tribe first knew or should have known about after 2011. The Tribe's Response nonetheless seeks damages for the period before 2011. Such alleged damages are both outside the claims and barred by the statute of limitations.

Finally, the Tribe's Response does not overcome the fact that, with the possible exception of one site, the United States cleaned its waste from the Tribe's lands, the Tribe is responsible for existing open dumps, and IHS actually prioritized limited funds to address the Tribe's primary concerns based on Tribal consultation. Therefore, even if this Court does not grant the motion to dismiss, it should grant the United States' motion for summary judgment.

II. FACTS

The Tribe generally concedes both the veracity of the United States' exhibits and Proposed Findings of Fact. Pl.'s Resp. to U.S. Mot. for Dismissal ("Resp."), ECF No. 70 at 17 (objecting that characterizations are "incomplete"). The Tribe responded to only twelve proposed facts. Those responses generally made additional allegations rather than challenge the

facts' substance. The United States hereby replies to the Tribe's responses by the numbered proposed facts and adds one new proposed fact:

Proposed Fact 4. The Tribe suggests that it lacks authority "on fee lands and over non-members." Resp. at 17. But tribes may regulate non-Indian conduct that "has some direct effect on . . . the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). The Tribe is responsible for enforcing its environmental code against its members and visitors. U.S. Mem in Supp. of Mot. to Dismiss Phase I Claims ("Mem."), ECF No. 66-1 at 3-4.

Proposed Facts 5-6. The Tribe's claim that non-member residents and visitors are responsible for open dumps is unsupported. Mem., Proposed Facts 6-11 (Tribe's members and agencies responsible for open dumping). The document the Tribe cites to, Resp. at 18, admits that some residents "are not serviced" and that "trash is often not collected" due to problems with the Tribe's public works department. ECF No. 66-5 at 11, 14. The IHS inventory and the Tribe's own open dump survey forms confirm that the majority of open dumps consist of "household waste," "furniture" or "appliances," and the proximity of the dumps to Tribal population centers compels the conclusion that these items are deposited by residents. Open Dump Survey Form (June 15, 2020) (Ex. 1); Complaint Forms (household items, including mattresses, couches, and clothes) (Ex. 2); Tribe's map of dump sites (Oct. 11, 2016 (Ex. 3). "Community members" and residents responsible for open dumps are primarily Tribal members because almost all residents on the Reservation are members. White Mountain Apache Tribe Info., available at https://itcaonline.com/member-tribes/white-mountain-apache-tribe/ (12,000 members on Reservation); American Indian and Alaska Native Population: 2010 at 14, available at https://www.census.gov/history/pdf/c2010br-10.pdf (over 95% of residents are Indian).

Proposed Fact 43. As reflected in the Tribe's discussion of ECF No. 66-39, Resp. at 19, and

addressed at pages 15-18, below, the Tribe has not requested that IHS clean up dumps within the post-2011 claim period. It instead prioritized other IHS projects since 2011.

Proposed Facts 49-50. With the potential exception of Sunrise Landfill, every open dump on the Reservation that contained Federal waste has been cleaned up. Mem. at 5-11. The Tribe's response that it does not know if other dumps contain Federal waste is contradicted by the Tribe's admission that the United States ceased using open dumps on the Reservation almost 30 years ago. *Id*. at 5, Proposed Fact 13. It also highlights that, even after using Federal funds to inventory dumps and substantial discovery, the Tribe cannot allege that the United States is responsible for open dumping. *Id*. at 7-8, Proposed Facts 29-36. The Tribe cites no support for its claim that testing the last open dump on the Reservation that may contain Federal waste is necessary. Resp. at 19. In fact, a Federal consultant concluded otherwise. Mem. at 10-11.[1]

Proposed Fact 51. Dumps on the Reservation have been repeatedly inventoried over the past 30 years. Mem. at 5-8, Proposed Facts 12-36. The Tribe is incorrect, Resp. at 1, 5, 35, that IHS never conducted the inventory required by 25 U.S.C. § 3904(a). IHS satisfied "Section 4(a) by publishing the *1998 Report to Congress on the Status of Open Dumps on Indian Lands* on October 13, 1999." Proposed Approach to Improve Open Dumps Data and Solid Waste Projects and Programs at 2 (2016) (Resp. at 13 n.5).

III. ARGUMENT

A. The Court's allowance of the Tribe's broad discovery to support its poorly pled claims does not preclude dismissal now that those claims have been specified.

The Tribe is incorrect, Resp. at 6, that on January 5, 2018, the "Court impliedly determined that the Tribe had met the pleading standard" for open dump claims that the Tribe

[1] Despite the consultant's conclusion, BIA is again evaluating cleaning up Sunrise Landfill.

specified on September 1, 2020. The Court in actuality found that the Tribe's Phase I claims were not adequately specified. ECF No. 22 at 10 ("the factual record related to the other nonmonetary assets is not . . . thoroughly developed . . . . Therefore, the Court is willing to indulge the Plaintiff's request for limited discovery"). It noted the Tribe's representation that "[t]hrough discovery, the Tribe intends to determine the status and nature of the . . . contamination so it can specify claims in detail based on the legal duties of the Government to enforce applicable law." ECF No. 22 at 10 (quoting Plt. Resp. to Govt. Mot. to Dismiss at 22-23). The Court could not determine that the Tribe met the pleading standard before specifying its claims. Now, the Tribe's specification reveals that its claim should be dismissed.

B. The Tribe identifies no language in the Open Dump Act imposing a mandatory duty to clean up any open dumps.

As the United States established, Mem. at 19-26, the Open Dump Act imposes no mandatory duty to clean up any dumps on any reservation. Rather, the Act requires IHS to use its discretion to prioritize scarce funds. The Tribe's response, Resp. at 4-5, 22-29, elides 25 U.S.C. § 3904(c)'s explicit "conditions." The Tribe's description of the Open Dump Act, Resp. at 4-5, omits words that explicitly make any assistance to close and maintain open dumps "subject to" several "conditions." 25 U.S.C. § 3904(b)-(c). And the Tribe is incorrect, Resp. at 23, that 25 U.S.C. § 3904(c) "does not temper the mandatory duty to fund dump closure." To the contrary, the Open Dump Act refutes any notion that there is a "mandatory duty" by making any assistance available only "on a site-specific basis in accordance with priorities developed by the Director . . . in consultation with the Indian [tribe] . . . [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." 25 U.S.C. § 3904(c). Rather than impose a mandatory duty, Section 3904(c) conditions any assistance on IHS discretion. And the Act establishes that not every open

dump on Indian lands would be cleaned up by requiring IHS to prioritize scarce funds. The Court's analysis need proceed no further than Section 3904(c)'s plain words.

The D.C. Circuit persuasively determined that the Open Dump Act imposes no fiduciary duty. Mem. at 21-23 (citing *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 891-99 (D.C. Cir. 2014)). The Tribe's efforts to distinguish *El Paso* are unavailing. Instead of distinguishing Indian Tucker Act law in a manner that "undermine[s] any persuasive authority," Resp. at 27, the D.C. Circuit rejected asserted distinctions and applied the Indian Tucker Act law that controls here. *El Paso*, 750 F.3d at 895-96. ("[W]e nevertheless apply the lessons articulated in the *Mitchell* cases. . . . [W]e are constrained to apply the standards articulated in the Indian Tucker Act cases to the trust claim before us."). And rather than limit its analysis to Administrative Procedure Act jurisdiction as the Tribe contends, Resp. at 27, the D.C. Circuit analyzed Indian Tucker Act precedent and held that the Open Dump 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." *El Paso*, 750 F.3d at 893-95, 899. The Tribe's Phase I claim should be dismissed because the Open Dump Act imposes no "specific, applicable, trust-creating" duty. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *Ute Indian Tribe v. United States*, Case No. 1:18-cv-359 L, Order and Op. at 8 (Fed. Cl. Feb. 12, 2021) (ECF No. 38) (no duty to "ensure adequate water delivery or storage").

Relatedly, the Tribe is incorrect, Resp. at 24, that the Open Dump Act "sets forth a comprehensive scheme" imposing mandatory trust duties. The Act's authorization of limited, discretionary aid bears no relation to regulations that this Court determined accepted "control"

over oil and gas leasing. *See Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 644 (2003). Again, *El Paso* rejected the Tribe's argument:

> 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*.

El Paso, 750 F.3d at 899 (emphasis in original). *See also United States v. Navajo Nation*, 537 U.S. 488, 507-08 (2003) (No duty for funds-generating coal leases). *El Paso's* holding that the Open Dump Act does not vest control in IHS is reinforced by the Act's purpose to provide "financial and technical assistance to Indian tribal governments and Alaska Native entities, either directly or by contract, to close [open] dumps." 25 U.S.C. § 3901(b)(3). And Section 3904(c) makes clear that, far from assuming control on any tribe's land, IHS assistance is limited by the availability of funds and focused on providing assistance to address more severe health threats. To the extent *El Paso* is distinguishable, it cuts in favor of the United States. Whereas there is no suggestion the Navajo Nation was responsible for the waste at issue, *e.g*. *El Paso*, 750 F.3d at 871, it is undisputed that the Tribe's agencies and members are responsible for open dumping here. Mem. at 2-5, Proposed Facts 2-11. *El Paso* is applicable and persuasive.[2]

To the extent that the Tribe seeks to distinguish *El Paso* because Reservation land is held in trust for the Tribe, Resp. at 28, the Tribe misses the mark because *El Paso* involved trust

[2] The Tribe's citation to "25 U.S.C. § 3509," Resp. at 24, for the proposition that the Open Dump Act imposes mandatory duties by using the word "shall" appears to be in error. No such section exists. Regardless, the Act's use of the word "shall," did not impose a mandatory fiduciary duty to the Tribe. 25 U.S.C. § 3904(b) (assistance subject to conditions); 25 U.S.C. § 3903 (IHS to inventory open dumps and "report to the Congress" and then "develop and begin implementation of a 10-year plan" that identified the funds necessary to close open dumps).

lands. *El Paso*, 750 F.3d at 898-99. Regardless, Federal "control" over trust land is insufficient to establish a trust duty. *Jicarilla*, 564 U.S. at 177 ("[W]hen the Tribe cannot identify a specific, applicable, trust-creating statute . . . that the Government violated . . . , neither the Government's 'control' over [assets] nor common-law trust principles matter.") (citation omitted).

The Tribe is incorrect that the mere "existence" of open dumps breaches the Open Dump Act. Resp. at 21. If the Tribe was correct, it would eliminate Congress's prioritization of cleanup based on "the relative severity of the threat . . . posed by each open dump and the availability of funds." 25 U.S.C. § 3904(c). The Tribe is incorrect that Congress recognized that every dump "pose[s] a severe threat to human health and the environment." Resp. at 22. Indeed, the Tribe admits that the Open Dump Act "dictates" that funds be made available "in accordance with priorities" and that 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 post-closure maintenance." Resp. at 5. This fact – that Congress required IHS to prioritize scarce government resources – is fatal to the Tribe's arguments that the Act can be fairly read to impose a duty to clean up every open dump on the Reservation and that the United States is liable for damages if IHS failed to do so.

C. The Open Dump Act does not impose a money mandating duty.

As the United States established, Mem. at 19-26, the Open Dump Act imposed no duty to pay damages to the Tribe because it vested IHS with discretion in prioritizing limited funds to address dumps on many reservations, rather than requiring IHS to transfer funds to the Tribe. Mem. at 23-25, 38-40. The Tribe "must demonstrate that the source of substantive law [it] relies upon can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Hopi Tribe v. United States*, 782 F.3d 662, 666-67 (Fed. Cir. 2015). The

Tribe is incorrect, Resp. at 29, that the mere existence of a trust relationship satisfies this requirement. *Hopi*, 782 F.3d at 666-67. The Tribe's response also relies on cases where: 1) statutes or regulations vested Interior with control over trust fund-generating resources; and 2) statutes mandated payment of specific amounts to specific entities. Resp. at 29-34. As discussed below, the cases the Tribe cites illustrate that the Open Dump Act, which neither imposes a duty to manage a fund-generating resource nor requires the United States to pay any Tribe, particularly Plaintiff, cannot fairly be read to mandate damages.

The United States established that the Open Dump Act requires nothing more than an inventory and discretionary prioritization of limited funds, and that this vesting of substantial discretion in IHS defeats the Tribe's claim. Mem. at 23-26. The Tribe's argument that the Act mandates damages because it uses the word "shall," Resp. at 29, misses the point – instead of stating that IHS "shall" pay the Tribe a fixed sum of money, Congress stated that IHS "shall" use its discretion to prioritize the distribution of scarce resources. 25 U.S.C. § 3904(c). Section 3904(c) is more fairly read to state that IHS "shall not clean up all open dumps on any Reservation because it must prioritize the use of scarce funds." The Tribe identifies no case that would mandate damages under such a statute.

The Tribe misapplies, Resp. at 30-31, cases that find a money mandating duty in statutes that direct specific payments to specific individuals or classes. Mem. at 23, 25.[3] The Open Dump Act is not analogous. *E.g.*, *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)

[3] The cases collected at Resp. at 30 n.13, are inapposite because they mandate that individuals be paid for work on behalf of the United States. But *City of Wilmington, Del. v. United States*, 136 Fed. Cl. 628 (2018), is instructive. That case identified a money mandating duty in a Clean Water Act provision requiring the United States to pay "reasonable service charges" for certain discharges of pollutants "to the same extent as any nongovernmental entity." 33 U.S.C. § 1323. In contrast, the Open Dump Act does not require direct payments to third parties.

(act providing "that an employee at a remote duty site 'is entitled' to the remote duty allowance . . . [and] that 'the allowance *shall be paid*'" is money mandating) (internal citation omitted). Similarly, the Payment in Lieu of Taxes Act required appropriated funds to be paid pursuant to a Congressionally-established formula without discretion. *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 874, 877 (Fed. Cir. 2007) ("'Interior *shall make a payment* for each fiscal year to each unit of general local government . . . as set forth in this chapter,' and . . . a detailed mechanism for calculating these payments."). And the one statute that the Federal Circuit found to be money mandating in *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed. Cir. 2011), *vacated as moot*, 568 U.S. 936 (2012), was an act "to provide fiscal assistance" directly to governments. *See* Federal-State Revenue Sharing Act, Pub. L. No. 92-512, 86 Stat. 919 (Oct. 20, 1972). The Revenue Sharing Act "allocated" entitlements to specific governments without discretion "in accordance with a complex formula based on population, general tax effort, and relative income." *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 134 (2009).

Rather than directing payments to particular, qualifying governments or individuals pursuant to a formula, the Open Dump Act requires a discretion-based prioritization to address Congress's explicit funding limitations. Mem. at 23-25; 25 U.S.C. § 3904(c). The Tribe is simply incorrect, Resp. at 31, that the Open Dump Act mandates payments to the Tribe upon satisfaction of conditions. The Act does the opposite of requiring IHS to provide assistance to any Tribe that requests aid. It instead requires IHS to prioritize dump cleanup (not payments directly to any Tribe as compensation) based on the "relative severity of the threat . . . and the availability of funds," 25 U.S.C. § 3904(c), making any assistance "conditional on the 'priorities developed by the Director.' 25 U.S.C. § 3904(c)." *El Paso*, 750 F.3d at 891. The cases the Tribe cites therefore illustrate that the Open Dump Act did not mandate payments to the Tribe.

The Tribe's reliance on cases involving management of fund-generating resources are similarly unavailing. The Tribe's reliance, Resp. at 22-23, 28-29, on *Shoshone*, 56 Fed. Cl. 639, is particularly misplaced. That case turned on regulations governing timber, oil, and gas that vested Interior with "control over advertising and bidding of sales and leases of the Tribes' resources," required Interior to "establish guidelines for sales and to approve all contracts and leases," to "closely supervise the lease during contract performance," and to "conduct an economic analysis." *Id*. at 644. Interior's "control" over aspects of managing certain funds-generating resources was held to impose a money-mandating duty. In contrast, *Navajo Nation* held that Interior owed no such duty even where approving funds-generating coal leases where "no pertinent statutory or regulatory provision requires the Secretary, on pain of damages, to" take action. 537 U.S. at 511; *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009). The open dumps at issue here generate no funds. And as discussed above, pages 7-8, the Act does not vest IHS with control over tribal property. *Shoshone* therefore supports dismissal.

The Tribe's citation to *White Mountain Apache Tribe v. United States*, 537 U.S. 465, 478 (2003), Resp. at 32-33, is also illustrative. In that case, the United States made "direct use of" Fort Apache for its own purposes. *White Mt. Apache Tribe*, 537 U.S. at 475. The case stands for the proposition that in exercising its statutory right to "use" trust property, the United States can be liable if it causes that property to "fall into ruin." *Id.; see also El Paso*, 750 F.3d at 896-97 (statute in *White Mountain Apache*, unlike Open Dump Act, afforded "the government the right to use the land in question"). Plaintiff identifies one location, Sunrise Landfill, which may contain Federal waste. Mem. at 10-11. But this potential exception proves the rule. Rather than cause the Reservation to "fall into ruin" through its use of open dumps, the United States cleaned up every other open dump containing its waste. Mem. at 11, Proposed Fact 50.

Finally, the Tribe contends that it recently sought funding for open dump closure. Resp. at 19 (requests to IHS for landfill expansion funding and requests to EPA and BIA for funds for open dump cleanup). This only highlights that EPA, IHS, and the Tribe's Environmental Protection Office continue to address multiple environmental issues. The Tribe identifies no basis for shortcutting the orderly prioritization of those efforts in favor of damages.

D. Legislative history confirms that the Open Dump Act imposes no money mandating duty.

Discussion of legislative history is unnecessary because the Open Dump Act's plain language makes clear that the Act is not money mandating. This Court must "start with the language of the statute itself." *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 954 (Fed. Cir. 2013) (citation omitted). Courts must give words "their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). Only where the statutory language does not clearly resolve the disputed issue will courts consider legislative history. *Syngenta Crop Prot., LLC v. Willowood, LLC*, 944 F. 3d 1344, 1359 (Fed. Cir. 2019). "Legislative history cannot supply a waiver [of sovereign immunity] that is not clearly evident from the language of the statute." *FAA v. Cooper*, 566 U.S. 284, 290-91 (2012). Ambiguities must "be construed in favor of immunity" and "exist[] if there is a plausible interpretation of a statute that would not authorize money damages." *Id.* (citations omitted). But while the Court should not look beyond the Open Dump Act's plain language, legislative history confirms that Congress did not impose a money mandating duty to clean up waste on any reservation, including the Tribe's.

The legislative history reinforces the only reasonable interpretation of the Open Dump Act – that instead of mandating compensation to any tribe, Congress vested IHS with substantial discretion to prioritize limited resources to address severe public health threats. The Tribe

misreads legislative history, Resp. at 12, that indicates that Congress focused on: 1) cleaning up approximately 600 then-existing dumps at a rate of roughly 100 per-year because the United States contributed to many of the dumps; and 2) providing for 30 years of post-closure maintenance. S. Rep. No. 103-253, at 11 (1994); 139 Cong. Rec. at 7315 (Apr. 1, 1993) (Sen. McCain); 140 House Cong. Rec. at 27727-28 (Oct. 4, 1994) (Rep. Gejdenson) (many open dumps used by Federal government and the Act is a "first step"); H.R. Rep. No. 103-783, at 3387 (1994) (Act was response to *Blue Legs*, which tied Federal share of cleanup costs to open dump use). Indeed, the full language from the House Report the Tribe quotes, Resp. at 12, clearly limits any obligation: "**Because many of the landfills located on tribal lands were originally constructed by [Federal Agencies], there is a** continuing obligation on the part of the Federal government to ensure that these landfills meet the Federal landfill criteria. **This Federal responsibility was recognized by the court in the *Blue Legs* decision and is recognized and reaffirmed by this Committee**."). H.R. Rep. No. 103-783 at 9 (omitted portions highlighted). The Tribe similarly overreads a stray statement in a Senate Report to suggest that Congress imposed a perpetual duty, Resp. at 12 (quoting S. Rep. No.103-253 at 3). But the Report makes clear that Congress only indicated that IHS could provide more cost-effective maintenance of cleaned up dumps due to its expertise – again focusing on limiting costs. S. Rep. No. 103-253 at 3. Legislative history, at most, suggests that the United States must clean up its own waste.[4]

[4] Congress has not appropriated funds specifically to clean up open dumps under the Open Dump Act for the entire post-2011 claim period. *E.g.* FY 2020 Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534, 2730-34 (Dec. 20, 2019). IHS's most recent proposed budget sought $192.9 million for "Sanitation and Facilities Construction" with up to $5.0 million available for projects "to clean up open dump sites and upgrade solid waste sites that present a health hazard . . . pending coordination with the EPA on oversight and evaluation of Tribal solid waste management programs." Fiscal Year 2021 Justification of Estimates for Appropriations Comm. at CJ-204-05, available at https://www.ihs.gov/budgetformulation/congressionaljustifications/.

Contrary to the Tribe's assertion that IHS must consider open dumps and other public health issues separately, Resp. at 14-16, legislative history confirms that Congress sought to "ensure that all of the activities . . . regarding solid waste facilities will be coordinated to ensure protection of the public health and the environment on a cost effective basis." S. Rep. No. 103-253 at 4. Indeed, the Committee stressed the Act's limitations and conditions, stating that it expected IHS "to exercise prudent discretion to determine how best to proceed at each site" and make "rational decisions . . . about the allocation of scarce financial and technical resources." *Id.* at 5-6 (also explicitly directing prioritization); *id.* at 7 (need to be "cost effective"). Rather than suggest that IHS pay damages if it did not clean up all open dumps, the Committee explained that Section 3904(c) required IHS to "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" and stressed the need to "achieve cost efficiency" in coordinating the purposes of several statutes. *Id.* at 6; *Accord* H.R. Rep. No. 103-783 at 3393 (intention to "prioritize[] the allocation of resources"). The Tribe's brief even illustrates that IHS may use its statutory discretion to prioritize landfill expansion on the Reservation, as cost-effective, coordinated prioritization can recognize that "landfill expansion . . . helps prevent open dumps." Resp. at 19.

Finally, the Tribe mistakenly relies upon portions of the Indian Claims Commission Act's legislative history to argue that Congress broadly provided tribes with a day in court today for these claims. Resp. at 4 (citing 92 Cong. Rec. 5312 (1946)). The Tribe's citation to the Indian Claims Commission Act ("ICCA") actually supports the United States' arguments. The ICCA's jurisdiction was "sweeping, including even claims 'based upon fair and honorable dealings' which did not otherwise constitute recognized actions at law or equity . . . to finally provide a forum for the resolution of all possible accrued claims." *Navajo Tribe of Indians v. New Mexico*,

809 F.2d 1455, 1465 (10th Cir. 1987) (including "purely moral" claims). The Supreme Court made clear that this Court's jurisdiction is not as broad as the Indian Claims Commission's, and that the Tribe's failure to identify "a specific, applicable, trust-creating statute" is fatal to its claim. *Jicarilla*, 564 U.S. at 177.[5]

E. The Tribe has not pled elements that it contends are necessary to maintain its claim.

The Tribe's claims are not cognizable in this Court because the Tribe identifies no money mandating duty. Mem. at 19-31. The Tribe's claims also fail because the purported duty is contingent on predicate acts that the Tribe failed to allege, much less establish. Mem. at 22-23 (citing *El Paso*, 750 F.3d at 891), 32-36. The Tribe asserts that "upon request from a Tribe" **IHS** is required to inventory, evaluate, close, and maintain all dumps. Resp. at 23-24. The Tribe contends that it "repeatedly requested assistance," but elides what it contends is the critical step – a request to **IHS** to take action during the post-2011 period when the Tribe claims IHS breached a duty to act. *Id*. at 27 (citing *id.* at 19 at Proposed Fact 43). The Tribe's response does not identify any relevant request that IHS inventory or clean up any dumps. This is fatal to its claim.

The first two "requests" the Tribe relies upon reflect communications with BIA, not IHS. Resp. at 19 (citing ECF No. 66-16 and ECF No. 70-1). The Tribe cites **EPA** grant documents stating the Tribe's goals in 2016 to collaborate with EPA and IHS in updating the Tribe's

[5] The Tribe's failure to identify a trust-creating statute means that common law does not apply. Mem. at 13-14 (quoting *Jicarilla*, 564 U.S. at 165, 177). Regardless, the Tribe is incorrect, Resp. at 26, that "principles of common law support the conclusion that the Open Dump Act creates a specific fiduciary duty" here. Even if common law were applicable, which it is not, Plaintiff identifies no basis for a common law duty to clean up waste dumped on Indian lands. *Id*. To the contrary, if common law applied, the United States would be "entitled to indemnity out of the trust estate for expenses properly incurred" in administration. Restatement 3d of Trusts, § 38 (2020). Indeed, the absence of a Tribal request to IHS and the Tribe's prioritization of other projects defeats any suggestion that IHS was imprudent to not prioritize limited funds away from other tribes to clean up open dumps that the Tribe itself did not seek to have cleaned up.

Integrated Solid Waste Management Plan, ECF No. 66-6 at 14,[6] and to "update the illegal dumpsite inventory with Indian Health Service, prioritize the dumpsite inventory, ands select sites for cleanup" in 2019. ECF No. 66-15 at 7. Rather than suggest that the Tribe requested IHS to clean up any open dump, the documents establish the opposite – that the Tribe has not yet, but plans to "apply for funding in the future for cleanup" of dumpsites based on an internal prioritization that it has not communicated to any agency. ECF No. 66-6 at 15.[7]

The single request to IHS that the Tribe identifies buttresses the United States' position that the Tribe has not even requested that IHS clean up any open dumps in the claim period. Resp. at 19 (citing ECF No. 66-39 at 5). The June 14, 2019, letter sought funding for **landfill expansion** because "landfill expansion . . . helps prevent open dumps." *Id*.[8] The Tribe **requested** that IHS prioritize funding landfill expansion instead of requesting IHS funding to clean up open dumps. To be clear, the Tribe prioritized limited funds to address the more severe structural threat of insufficient landfill capacity, a threat that it ties to open dumps, over the lesser threat of individual open dumps. *See* 25 U.S.C. § 3904(c). The Tribe fails to identify any Tribal request to HIS that would trigger, much less mandate, a response from IHS that prioritizes

[6] The United States cites to each document's page numbers where possible. The Tribe appears to cite to pages in a pdf. For example, the Tribe cites ECF No. 66-6 at 14 as "ECF No. 66-6 at 3."
[7] To the extent that the Tribe seeks to transform its Complaint into a challenge to alleged "delay" by IHS in conducting an inventory the Tribe did not request, Resp. at 37, this raises another problem. The Tribe's argument is "akin to those underlying a claim to 'compel agency action unlawfully withheld or unreasonably delayed' under the Administrative Procedure Act, . . . [which] does not permit money damage." *Allen v. United States*, No. 14-179C, 2014 U.S. Claims LEXIS 730, at *11 (Fed. Cl. July 30, 2014). And rather than request an IHS inventory under Section 3904(a), the Tribe requested – and received – EPA funding for inventories during the post-2011 claim period. Mem. at 7-8, Proposed Facts 29-35. To the extent that the United States has any duty to inventory, it complied with that duty by funding Tribal inventories and conducting its own inventories in the 1990s. *Id*. at 5-8, 35.
[8] The Tribe has used its consultation with IHS to prioritize many other projects over cleaning up open dumps and IHS funded landfill expansion studies. Mem. at 9-10, Proposed Facts 43-47.

cleaning up the Tribe's open dumps over dumps on other reservations or the issues that the Tribe actually prioritized. The documents the Tribe relies upon prove that IHS's prioritization of scarce funds is consistent with the Open Dump Act.

As the United States established, the Tribe failed to identify a single dump within its claim, which is limited to dumps the Tribe first knew or should have known about after March 16, 2011. Mem. at 14, 32-36. The Tribe's specification relies on a 2006 inventory that places every listed dump outside of the claim specification and subjects the Tribe's damages claims to the statute of limitations. *Id*. at 35. The Tribe conceded this fact by failing to respond. Resp. at 36 (relying on inventory without disputing that it was from 2006). And the Tribe's discussion of alleged "damages" only reinforces that the Tribe's only payments to clean up open dumps were prior to 2011 - outside the Tribe's claims because the Tribe knew prior to 2011 of the existence of dumps that were cleaned up in 1998. *Id*. at 15 (citing ECF No. 66-24, a 1998 letter regarding cost sharing of completed Whiteriver landfill cleanup, and Proposed Facts 15-18, which address cost sharing for pre-1999 landfill construction).[9] The Tribe's specification therefore pleads itself out of Court. Mem. at 35.

The Tribe's focus on Sunrise Landfill similarly highlights the absence of any cognizable claim. While BIA is willing to consider a request by the Tribe to remove waste from Sunrise Landfill despite a consultant's conclusion "that no further assessment or remediation activities are warranted," Mem. at 10-11, this highlights that: 1) the Tribe has not requested, much less prioritized, Sunrise Landfill's cleanup; and 2) the only conceivably reasonable request is to clean

[9] The Tribe's spending $140,000 of the $572,000 required to close a 19-acre dump in 1998 means the Tribe paid less than 25% of the costs. Any damages claim is barred by the statute of limitations and consistent with tribal responsibility for cleaning up open dumps. *Blue Legs v. United States EPA*, 732 F. Supp. 81, 84 (D.S.D. 1990) (Tribe enjoined to pay 25% of cleanup).

up Sunrise Landfill rather than to pay the Tribe damages to not clean it up. Moreover, Sunbelt Geophysics, who BIA retained to study Sunrise Landfill in 2007, documented that it was "within sight of the Sunrise Ski Resort parking lot" and that the waste is visible. Geophysical Survey for Buried Waste, Sunrise Landfill near the Sunrise Ski Resort at 1 (Dec. 2007) (Ex. 4). Sunrise Landfill was known prior to 2007 and therefore is outside of the Tribe's post-2011 claim. That the Tribe may yet request that the United States take additional actions at Sunrise Landfill and prioritize limited government funds differently illustrates that Congress did not mandate a damages remedy even if the Tribe's claim specification included Sunrise Landfill.

F. Summary judgment is appropriate

The Court should grant summary judgment to the United States in the alternative because BIA and IHS cleaned up all illegal dumps on the Reservation that contained Federal waste, with the possible exception of a single site. Mem. at 36-40 (citing *Blue Legs v. BIA*, 867 F.2d 1094 (8th Cir. 1989)).[10] The Tribe does not squarely address the United States' summary judgment argument, Resp. at 36-38, instead suggesting that the Court should grant the Tribe summary judgment because IHS "has not funded open dump closure since 2004." Resp. at 37. That argument is wrong as a matter of fact and law. IHS regularly funds closing open dumps that, among other things, are rated as severe health threats. *See* ECF No. 66-41 at 39 (prioritizing open dump closures at the Hopi and Colorado River Indian Tribes' Reservations); https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/Report_To_Congress_FY17_SanitationFacilitiesDeficiencies.pdf at 23-24, 26, 28-29, 31-32, 34-37, 52, 61, 66. Moreover, the Open Dump Act imposes no money mandating duty to:

[10] The Tribe is incorrect that a 1990 IHS report "remains accurate today," Resp. at 9-10, to the extent that it suggests that the Reservation's open dumps are large or contain Federal waste. It is undisputed that such dumps were cleaned up after 1990. Mem. at 5-11.

1) clean up any dump on any reservation;

2) Clean up any dump on the Reservation instead of prioritizing projects on other Tribes' reservation; or

3) Provide any amount of funding to the Tribe.

Relatedly, the Tribe is mistaken that IHS "has not developed 'site specific' priorities" that reflect the severity of open dumps on the Reservation. Resp. at 37-38. To the contrary, IHS assigns a health threat score for each dump "based on a range of site characteristics and hazard factors." Sanitation Deficiency System Guide at 27 (Sept. 2019) (Ex. 5). IHS's Health Impact Scoring Framework characterizes any health threat score less than 250 as "low." *Id*. at 28. IHS developed an individualized "health threat score" for each open dump. ECF No. 66-35 (Column I). The highest health threat score of any open dump on the Reservation is 140. *Id*.[11] So, while the Court's analysis should begin and end with Section 3904(c)'s incompatibility with the Tribe's argument that Congress mandated IHS to clean up all open dumps on the Reservation, the facts illustrate that IHS complied with any duty to "take into account the relative severity of the threat to public health and the environment posed by each open dump." 25 U.S.C. § 3904(c). The Act surely does not require IHS to clean up dumps on the Tribe's lands even though the dumps impose a "low" heath threat. *Id*.

The Tribe is incorrect, Resp. at 10, that *Blue Legs*, in which Federal responsibility to clean open dumps was based on the dumps containing Federal waste, is distinguishable as a RCRA claim. To the contrary, *Blue Legs* is part of the Open Dump Act's legislative history and frames the Act's conditions. *Id*. at 10, 24-25; Pages 13-14, above. And the Tribe's claim is

[11] Contrary to the Tribe's claim that IHS has not explained its scores, Resp. at 37, IHS produced data supporting its assessment. *E.g.* Excerpt of OMDS Open Dumps Narrative – Draft (Sept. 9, 2020) (details on "surface area," "contents," "precipitation," "site drainage and leachate potential," and "flooding potential.") (Ex. 6).

"informed by relevant provisions" of RCRA. ECF No. 66-47 at 2. Those "relevant provisions" stand for the proposition that a Tribe cannot seek damages for an alleged failure to clean up open dumps because RCRA undermines any claim for money damages, particularly one in this Court. Mem. at 37-40. The Tribe does not, and cannot, dispute that BIA and IHS cleaned up all Federal waste that was deposited in illegal dumps on the Reservation, with the possible exception of a single site. *Id.* at 5-11, Proposed Facts 12-28, 37-50.[12] Summary judgment is thus appropriate for all claims except those relating to Sunrise Landfill due to the United States cleaning up its waste. And summary judgment is appropriate with respect to any damages claims relating to Sunrise Landfill because the Tribe knew of the waste prior to 2011 and never requested cleanup.

G. The Tribe lacks standing

The United States established that the Tribe lacks standing. Mem. at 40-41 (citing Supreme Court and Federal Circuit law). While the United States rests on its opening brief, the Tribe's response incorrectly asserts, Resp. at 40, that a failure to satisfy statutory requirements establishes standing. To the contrary, even if a statute imposes requirements, "bald allegations of state procedural violations that did not result in any concrete harm are insufficient to confer standing before this court." *Lyshe v. Levy*, 854 F.3d 855, 861 (6th Cir. 2017); *Shinnecock Indian Nation v. U.S.*, 782 F.3d 1345, 1351 n.7 (Fed. Cir. 2015) (court "generally adheres to traditional justiciability standards applicable to" Article III courts). Similarly, the Tribe cites, Resp. at 40, out of circuit cases that undermine its standing argument in an effort to establish redressability.

[12] Despite years of discovery and access to its own Agencies, the Tribe does no more than admit that it does not know who creates all the open dumps. The Tribe does not dispute that BIA and IHS ceased using open dumps on the Reservation after 1990. Mem. at 5, 10. There is no need for the additional discovery the Tribe seeks, Resp. at 37-38, to determine its alleged damages from dumps that: 1) IHS has no money mandating duty to clean up; 2) the Tribe has never requested IHS clean up; and 3) the Tribe did not prioritize to IHS.

Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc., 958 F.3d 38, 48-49 (1st Cir. 2020) (no causation where "plaintiff alleges a causal chain dependent on actions of third parties" and no redressability because no party would be bound to address the alleged injury). And while "[m]onetary harm is a classic form of injury-in-fact", *Artesanias Hacienda Real S.A. de C.V. v. N. Mill Capital, LLC*, 968 F.3d 273, 281 (3d Cir. 2020), that misses the point. The Tribe's allegation that waste has not been inventoried or cleaned up alleges no monetary harm, and therefore no injury. Similarly, the Tribe's asserted injury of "potential RCRA liability," Resp. at 38, is the type of speculative injury that cannot establish standing even if this Court had jurisdiction over RCRA claims. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–10 (2013). "[A]llegations of possible future injur[ies] are not sufficient." *Id.* at 409 (quotation omitted). The Tribe fails to cite to any precedent for the proposition that monetary damages are an appropriate remedy for an alleged breach of a duty to inventory or clean up open dumps. The Tribe's claim should be dismissed for lack of standing.

IV. CONCLUSION

It "has long been recognized that a trustee is not an insurer of trust property." *United States v. Mason*, 412 U.S. 391, 398 (1973). The Open Dump Act did not transform IHS into an insurer that Indian lands would be free from waste, particularly waste deposited by a Tribe's members. The Act imposes no mandatory duty, much less a money mandating duty, to prioritize limited funds to clean up any dumps. Nor does the Act mandate that IHS prioritize limited funds away from other Tribes. The Court should therefore dismiss or, in the alternative, grant summary judgment with respect to all of the Tribe's Phase I claims.

Respectfully Submitted: February 18, 2021

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