No. 2021-1880

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH & OURAY
INDIAN RESERVATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims,
No. 1:18-cv-00359-RHH
(Hon. Armando O. Bonilla, and Hon. Robert H. Hodges, Jr.)

APPELLEE'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Court Rules

STATEMENT OF RELATED CASES

Plaintiff filed a similar suit in the United States District Court for the District of Columbia. That suit included twelve claims sounding in breach of trust based on substantially the same operative facts as the claims asserted in this case, and presented similar if not identical legal theories. The district court dismissed each of these claims on threshold grounds and transferred the remaining claims to the District of Utah. *Ute Indian Tribe of Uintah & Ouray Reservation v. United States Department of Interior*, 560 F. Supp. 3d 247 (D.D.C. 2021). The case remains pending in the District of Utah. *See* No. 2:21-cv-00573 (D. Utah). The District of Utah has since allowed Plaintiff to amend its Complaint in an attempt to revive claims dismissed in the District of Columbia, albeit without engaging in a full futility analysis. A decision by this Court affirming the judgment below could have claim or issue-preclusive effect on at least some of Plaintiff's pending claims in Utah, though we do not address that topic in detail here.

INTRODUCTION

This case concerns a series of decades-old water management and infrastructure disputes involving the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (Plaintiff). The Court of Federal Claims (CFC) dismissed the case on threshold grounds, including failure to identify a money-mandating duty and timeliness. That decision was correct and the CFC's judgment should be affirmed.

Over the last century, the United States has addressed water resource issues within Plaintiff's reservation on several occasions. In the early 1900s, Congress authorized the Uintah Indian Irrigation Project (Project), an irrigation system that benefited both Indians and non-Indians. In 1967, Plaintiff entered into the Midview Exchange Agreement, under which it transferred some water received through Project canals in exchange for state-based water rights held by a third party. In 1956, Congress authorized the Central Utah Project (CUP), which included authorization for two units designated to supply water to reservation lands. Then in 1965, Plaintiff signed a Deferral Agreement under which Plaintiff deferred the use of some of its water in exchange for recognition of certain water rights and a promise to complete the units by 2005.

But it later became clear that the United States would not complete these units. So in 1992 Congress passed a statute providing for the settlement of Plaintiff's water rights and giving Plaintiff more than $2 million per year and other benefits for which

Plaintiff waived claims, including "any and all claims relating to its water rights covered under the" Deferral Agreement. Then in 2006 Plaintiff filed an action against the United States for alleged mismanagement of its trust funds and non-monetary trust assets. That lawsuit resulted in more compensation; the action was resolved in a 2012 settlement agreement (Settlement Agreement) under which Plaintiff received $125 million in exchange for a broad release of its claims.

It is in this context that Plaintiff brought the present suit. Plaintiff asserts twenty-one claims, contending that the United States has for over a century breached duties owed to it with respect to its water rights, the Project, and the CUP. Plaintiff's allegations and claims are neither new nor even based on recent events.

As to the vast majority of those claims—involving alleged breaches of various asserted trust duties—the CFC correctly concluded that Plaintiff failed to identify specific money-mandating duties that the Government allegedly violated, as required to invoke the CFC's jurisdiction. The CFC also correctly dismissed Plaintiff's two takings claims for just compensation and a breach-of-contract claim as untimely. All of these claims accrued decades before Plaintiff filed this suit. One takings claim seeks compensation for the 1967 Midview Exchange and the other challenges the adequacy of the compensation Congress provided in 1992. Similarly, the contract claim is based on purported breaches of the 1965 Deferral Agreement, which Congress resolved in 1992. The CFC also correctly dismissed one breach-of-

contract claim—based on an asserted failure to transfer certain property into trust—as barred by the 2012 Settlement Agreement. And even if the CFC erred in the particular bases for dismissal on which it resolved these claims (it did not), almost all the claims are barred for additional reasons that are legal in nature and that were fully briefed below.

The CFC's judgment should be affirmed.

STATEMENT OF JURISDICTION

(A) Plaintiff invoked the CFC's jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. Appx106. As discussed below, the CFC lacked subject-matter jurisdiction.

(B) This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

(C) That judgment was entered on February 16, 2021. Plaintiff timely filed its notice of appeal on April 19, 2021.

STATEMENT OF THE ISSUES

1. Whether the CFC correctly dismissed Plaintiff's breach-of-trust claims for failing to identify a specific, money-mandating fiduciary duty owed by the United States to Plaintiff.

2. Whether the CFC correctly dismissed Plaintiff's two takings claims and a breach-of-contract claim as barred by the six-year statute of limitations.

3. Whether the CFC correctly dismissed for failure to state a claim Plaintiff's breach-of-contract claim alleging that the United States failed to transfer property into trust.

4. Whether, if necessary, the CFC's dismissal can be affirmed on alternative grounds.

STATEMENT OF THE CASE

A. Factual background

1. The Ute Indian Tribe

Plaintiff is a federally recognized Indian Tribe made up of three bands of Ute people, with a reservation (Reservation) in the Uintah Basin in Northeastern Utah. Appx105-106. The Reservation is located on an arid plateau within the drainage of the Colorado River, and multiple streams flow through it. Appx111.

2. The Uintah Indian Irrigation Project

In 1906, Congress authorized construction of—and appropriations for—the Project. *See* Indian Department Appropriations Act of 1906, 34 Stat. 325, 375-76 (1906) (1906 Act). Under the authority of the 1906 Act, the United States subsequently constructed an extensive system of canals and ditches from three river drainages (the Strawberry-Duchesne, Lakefork-Yellowstone, and the Uintah-Whiterocks rivers) flowing through a portion of Plaintiff's Reservation. Appx120.

Construction of the Project continued until about 1922, at which time it was considered substantially completed. Appx122.

3. The Midview Exchange Agreement

In 1941, Congress authorized the Secretary of the Interior to transfer water rights, with the consent of the interested parties, to other Project lands and to make necessary contracts to effectuate any transfers. *See* Act of May 28, 1941, 55 Stat. 209 (1941) (1941 Act). In 1967, Plaintiff entered into the Midview Exchange Agreement. That Agreement—among Plaintiff, the United States, and the Moon Lake Water Users Association (Association)—transferred some of the water Plaintiff receives through Project canals to non-Indian water users in exchange for state-based water rights held by the Association. Appx261-266. The Agreement specifically exchanged water between Indian lands served by the Lake Fork River, and the Association's lands higher up the Lake Fork drainage. Appx262-263. The Agreement authorized property transfers between the Bureau of Indian Affairs and Bureau of Reclamation, and provided that "[t]itle to the facilities as transferred shall remain in the United States until Congress provides otherwise." Appx263.

4. The Central Utah Project and the Deferral Agreement

In 1956, Congress passed the Colorado River Storage Project, which authorized the CUP. *See* 70 Stat. 105 (1956). The CUP's aim was to construct irrigation and storage facilities for the water in the Uintah Basin. As originally

conceived, it was to be divided into six units: the Vernal, Jensen, Bonneville, Upalco, Uintah, and Ute Indian Units. The Vernal and Jensen Units have been completed, and several systems of the Bonneville Unit were constructed.

The planned Uintah and Ute Indian Units would have included reservoirs designated to supply water to the land of Tribal members. *See* Appx148 (Complaint discussing Uintah Unit); Appx145 (Complaint discussing Ute Unit). The Upalco Unit would have provided storage and related infrastructure. Appx147-148. As discussed below, however, those three Units were never built. *See infra* p. 8

When Congress authorized the CUP, Utah had already ordered a general adjudication of all water rights in the Uintah Basin. Plaintiff subsequently commissioned a report by E.L. Decker, a former Reclamation employee, to identify its water rights. Appx117-118. The Decker Report organized lands into seven groups and, except for the first group (which was already subject to judicial decree), purported to claim, under *Winters v. United States*,[1] reserved water rights based upon, and tabulated by, practicably irrigable acreage. Appx117-118.

In 1965, Plaintiff entered the Deferral Agreement with the United States, and the Central Utah Water Conservancy District. Under that Agreement, Plaintiff deferred the use of water for 15,242 acres of its land, from the CUP's initial phase

[1] In *Winters v. United States*, the Supreme Court held that the establishment of an Indian reservation impliedly reserved the amount of water necessary to fulfill the purposes of the reservation. 207 U.S. 564 (1908).

(as part of the Bonneville Unit) to its final phase (then planned to be the Uintah Unit). Appx143-146, Appx256-257. In exchange, the Deferral Agreement provided for "full and complete recognition of" Plaintiff's water rights as described in the Decker Report and previously filed with the State of Utah. Appx256. The Agreement further established January 1, 2005, as the "maximum date of deferment and that all phases of the [CUP] will in good faith be diligently pursued to satisfy all Indian water rights at the earliest possible date." Appx257.

5. The Central Utah Project Completion Act of 1992

Some of the Deferral Agreement's provisions were not fulfilled as originally envisioned. The Upalco Unit was never built and, according to the Complaint, was abandoned in 1986. *See* Appx148. The Ute Indian and Uintah Units were also never built; according to the Complaint, the Bureau of Reclamation issued a report in 1980 "that effectively abandoned study of the Ute Indian Unit," and provided several reasons for doing so, Appx149, while "[p]lanning for the Uintah Unit continued through the early 1980s," but "eventually [Reclamation] decided to postpone the Uintah Unit indefinitely," Appx149.

In 1992, Congress passed and President Bush signed the Central Utah Project Completion Act of 1992 (CUPCA), which addressed the unfulfilled portions of the Deferral Agreement as well as other water-related issues. *See* Pub. L. No. 102-575 §§ 501-07, 106 Stat. 4600, 4650-55 (1992). CUPCA acknowledged that

"construction of the Upalco and Uintah Units has not been undertaken," and the "Ute Indian Unit has not been authorized by Congress, and there is no present intent to proceed with Ultimate Phase construction." *Id.* § 501(a)(3). CUPCA was "intended to. . . put the Tribe in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 Agreement been constructed." *Id.* § 502(b)(3).

To that end, Congress provided funding to complete various other projects, as well as substantial federal funds in lieu of the Deferral Agreement's promised storage projects. *Id.* § 502(a). Congress established annual payments (approximately $2.1 million per year) to Plaintiff in perpetuity from certain Bonneville Unit repayments. *Ibid.* CUPCA also authorized the appropriation of $45 million to permit tribal development of farming operations, *id.* § 504; authorized the appropriation of $28.5 million to carry out a number of reservoir, stream, habitat, and road improvements in cooperation with Plaintiff, *id.* § 505; and directed the Secretary to establish a $125 million tribal development fund, *id.* § 506 (collectively, the section 504-506 payments).

In exchange for these and other benefits, CUPCA provided for a broad waiver of claims. Specifically, upon receipt of the section 504-506 payments, the "Tribe shall waive . . . any and all claims relating to its water rights covered under the" Deferral Agreement, "including claims by the Tribe that it retains the right to

develop lands as set forth in the Ute Indian Compact and deferred in such agreement." *Id.* § 507(b). Congress intended that waiver to be a broad one, encompassing "all historical claims which the Tribe may have." *See* S. Rep. No. 102-267, at 124. "Since the purpose of the settlement is to resolve, once and for all, these outstanding matters, it is appropriate that as a condition to the receipt of the Tribal Development Fund and the other benefits under title V, that a comprehensive waiver be undertaken by the Tribe." *Ibid.* Plaintiff admitted in 2006 that the funds under section 504-506 had been paid. Appx395-396.

6. The 2006 Lawsuit and 2012 Settlement

In 2006, Plaintiff filed an action against the United States in the CFC. Appx390. The complaint sought money damages for alleged mismanagement of trust funds and non-monetary trust assets. *See* Appx399-406. On March 8, 2012, Plaintiff and the United States entered a Settlement Agreement resolving that lawsuit. Appx272. In exchange for $125 million, Plaintiff waived all claims "known or unknown, regardless of legal theory" based on harms or violations pre-dating the Settlement Agreement "and that relate to the United States' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources." Appx273-276; *see also infra* p. 43.

B. Proceedings below

Plaintiff filed this action in the CFC against the United States on March 7, 2018. Following amendment, the operative complaint (Complaint) contains twenty-one claims. We discuss the specifics of particular claims in the Argument section, but provide an overview here. The claims fall into three categories: (1) seventeen breach-of-trust claims; (2) two takings claims; and (3) two breach-of-contract claims. Appx162-191. The trust claims encompass alleged violations concerning, inter alia, the construction of the Project, its alleged descent into disrepair, failure to provide storage for Plaintiff's water rights, failure to protect Plaintiff's reserved water rights from conversion, alleged unlawful transfers of water rights, designation of lands as "non-assessable," poor water quality, the Midview Exchange, and CUPCA. *See infra* pp. 46-50. Of the two takings claims, one is based on the Midview Exchange Agreement and one is based on CUPCA. *See infra* pp. 32-39. The two contract claims include claims for breach of the Midview Exchange Agreement and for breach of the 1965 Deferral Agreement. *See infra* pp. 39, 42.

The CFC dismissed the case in full. The CFC held that it lacked Tucker Act jurisdiction over all seventeen breach-of-trust claims, because Plaintiff failed to identify breach of an enforceable fiduciary duty. Appx3-8. The CFC then dismissed both takings claims as time-barred. As to the claim based on the Midview Exchange (Claim Ten), the CFC noted—as the Complaint acknowledges—that the deprivation

of Plaintiff's rights occurred with the execution of the Agreement, in 1967. Appx9. Similarly, Plaintiff's takings claim based on CUPCA's allegedly inadequate compensation accrued in 1992. Appx9. Plaintiff's claim for breach of the 1965 Deferral Agreement (Claim Fourteen) was time-barred because it accrued in 1992, when Congress passed CUPCA—which Plaintiff knew "was intended to extinguish the Government's obligations under the Deferral Agreement." Appx11. The CFC also dismissed the claim for breach of contract based on failure to transfer the Midview Property into trust (Claim Eleven) as released by the 2012 Settlement Agreement. Appx11.

Claim Twenty-One also asserted denial of due process and equal protection as well as civil conspiracy. Appx190-191. The CFC found that a civil conspiracy claim is not cognizable under the Tucker Act and that the Due Process Clause is not money-mandating, Appx11; Plaintiff has not contested these rulings on appeal.

Plaintiff sought reconsideration of the CFC's order and, before that motion was resolved, noticed an appeal to this Court. Appx21. This Court deactivated the appeal. In the CFC, the case was reassigned from Judge Hodges to Judge Bonilla, who denied Plaintiff's motion for reconsideration on March 18, 2022. Appx22. This Court then reactivated the appeal.

C. Other Litigation

On March 8, 2018—one day after filing the action on appeal here—Plaintiff filed a companion case in the United States District Court for the District of Columbia. *See* No. 1:18-cv-547 (D.D.C.). The operative complaints in the two cases were based on the same alleged facts and similar legal theories; indeed, the two complaints are virtually verbatim until the actual claims for relief. Appx105-162, Appx290-347. The United States moved to dismiss the claims in the companion case that overlap with this case, and to transfer the four remaining claims to the District of Utah—those claims challenge a water-exchange contract between the United States and Utah under the APA. *See* No. 1:18-cv-547 (D.D.C.), ECF No. 69.

The district court granted both motions. *See Ute Indian Tribe of Uintah & Ouray Reservation v. Department of Interior*, 560 F. Supp. 3d 247 (D.D.C. 2021). The court held that five of Plaintiff's claims were barred by the statute of limitations. *Id.* at 256. The court also concluded that all eleven of the claims sounding in breach of trust were subject to dismissal because Plaintiff failed to identify specific enforceable trust duties. *Id.* at 259-63. The court transferred the remaining APA claims to the District of Utah.[2] *Id.* at 265-68.

[2] The District of Utah subsequently granted Plaintiff's motion to amend its complaint for a third time, purportedly to address the DDC opinion. *See* No. 18-cv-547 (D. Utah), ECF No. 185. The court exercised its "discretion to decline to engage in a

SUMMARY OF ARGUMENT

1. The CFC correctly dismissed Plaintiff's breach-of-trust claims for failure to identify the United States' breach of any money-mandating duties that could give rise to a breach-of-trust claim. None of the sources of law Plaintiff invokes "both impose a specific obligation on the United States and bear the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). Plaintiff predominantly relies on the 1899 and 1906 Acts but the former is an appropriations provision coupled with a discretionary authorization to act, and the latter merely authorized construction of the Project. Neither creates any specific enforceable trust obligations.

Plaintiff also cites a series of 19th century treaties and supposed "judicial admissions" from the early 20th century. Plaintiff has forfeited reliance on these sources and, in any event, none demonstrates enforceable money-mandating duties related to water rights or infrastructure. Plaintiff also emphasizes what it describes as the United States' "pervasive control" of water infrastructure, but the "Federal Government's liability cannot be premised on control alone." *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009). In any event, the United States' authority

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futility analysis in the context of a motion to amend if the futility arguments would be more properly addressed in dispositive motions." *Id.* at 11. The United States intends to renew its motion to dismiss, which is presently due on or before November 18, 2022.

here does not come close to establishing control so pervasive that it suggests Congress imposed any specific, money-mandating trust duties.

In addition, Plaintiff has not demonstrated either that the Government breached any asserted trust duties, or that any breaches are money-mandating. But since Plaintiff has failed to identify enforceable duties in the first place, the Court need not reach these other issues.

2. The CFC correctly dismissed Plaintiff's takings claims and one of the two breach-of-contract claims as time-barred under the six-year limitations provision in 28 U.S.C. § 2501. The first takings claim alleges that the United States has deprived Plaintiff of rights "[s]ince the execution of the Midview exchange" in 1967 and that "[w]hat the Tribe received under the Midview Exchange . . . did not constitute just compensation." The second involves a challenge to the adequacy of the compensation scheme Congress passed in 1992. Plaintiff's argument that these claims—brought 26 and 51 years after they accrued—are timely because the scope of the alleged taking had purportedly not "stabilized" until less than six years prior to March 2018 is meritless. Similarly, the CFC correctly dismissed Plaintiff's breach-of-contract claim as untimely. That claim is based on alleged breaches of the 1965 Deferral Agreement. Congress extinguished that Agreement through CUPCA and Plaintiff has known since even earlier than that that the relevant units would not be built. To the extent there were any doubt about the timeliness of these claims—

there is not—this Court has made clear that, because section 2501 is jurisdictional, the plaintiff bears the burden of demonstrating timeliness. Plaintiff has not met that burden.

3. The CFC also correctly dismissed the remaining breach-of-contract claim—based on an asserted failure to transfer the Midview Property into trust—for failure to state a claim. That claim plainly falls under the broad terms of the 2012 Settlement Agreement. The claim also fails because nothing in the Midview Exchange Agreement requires the Midview Property's transfer into trust.

4. Even if the CFC erred in dismissing Plaintiff's claims for these reasons —it did not—almost all the claims are barred for other reasons. All but four of the trust claims are also time-barred. Seven other claims were waived and released under the Settlement Agreement. And both the breach-of-contract claim based on the Deferral Agreement, as well as a claim faulting the United States for failing to construct adequate storage, were released by Congress through CUPCA.

STANDARD OF REVIEW

This Court reviews questions of law de novo, including whether the CFC properly dismissed an action for lack of jurisdiction. *Taha v. United States*, 28 F.4th 233, 237 (Fed. Cir. 2022). This Court similarly reviews de novo a decision to dismiss a suit as barred by the statute of limitations, *Brown v. United States*, 195 F.3d 1334, 1337 (Fed. Cir. 1999), and questions concerning the interpretation of a

settlement agreement, *Augustine Medical, Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1370 (Fed. Cir. 1999).

ARGUMENT

This suit seeks to impose money-mandating obligations Congress has not prescribed, raises complaints that have already been addressed (for which Plaintiff has been compensated), and brings challenges Plaintiff was required to bring years if not decades ago. The CFC correctly dismissed Plaintiff's claims on multiple threshold grounds and that dismissal should be affirmed.

I. The CFC correctly determined that Plaintiff failed to identify a breach of a specific, enforceable money-mandating trust duty for any of the breach-of-trust claims.

Before a Tribe can invoke the CFC's jurisdiction under the Indian Tucker Act for a breach-of-trust claim, it must meet three requirements. First, "a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 506 (2003). Second, Plaintiff must "allege that the Government has failed faithfully to perform those duties."[3] *Ibid.* And third, "the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law]

[3] These first two requirements are often combined into one (including in the United States' briefing below), but the requirements that a plaintiff identify a duty and adequately allege a breach of that duty are distinct.

impose[s].” *Navajo I*, 537 U.S. at 506 (quotation marks omitted). Plaintiff cannot satisfy any of these requirements. Most importantly, Plaintiff does not identify any specific, enforceable fiduciary or other duties.

Plaintiff initially discusses the generalized trust relationship between the United States and Indian Tribes. Br. 15. While the United States has a “general trust relationship” with Tribes, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011), this relationship does not itself establish any specific judicially enforceable duties, *Navajo I*, 537 U.S. at 506 (the “‘general trust relationship’” “alone is insufficient to support jurisdiction under the Indian Tucker Act”). Similarly, although Plaintiff invokes what it describes as the “United States’ trust responsibility over Plaintiff’s reserved water rights under the *Winters* doctrine,” Br. 17, *Winters* merely reserves “right[s]” “by implication,” *Cappaert v. United States*, 426 U.S. 128, 138 (1976). *Winters* does not establish any trust duty to be exercised by the United States.

The “Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute,” *Jicarilla*, 564 U.S. at 177. The general trust relationship and reserved water rights are not affirmative duties—let alone duties that the government has “expressly accept[ed].” *Jicarilla*, 564 U.S. at 177. And as explained in the following sections, none of the specific sources Plaintiff identifies create enforceable duties.

A. Plaintiff fails to identify a statute or regulation creating an enforceable duty.

With respect to statutes and regulations, Plaintiff primarily relies on an 1899 Indian Appropriations Act (1899 Act) and the 1906 Act. Neither imposes a specific obligation to ensure adequate water delivery or storage on Plaintiff's reservation.

In the 1899 Act, Congress authorized the Secretary—"in his discretion"—to "grant rights of way for the construction . . . of dams, ditches, and canals, on or through the [Reservation] for the purpose of diverting . . . waters of the streams in said reservation for useful purposes." 30 Stat. 941 (1899). That authorization was made subject "to the paramount rights of the Indians on said reservation to so much of said waters as may been appropriated, or may hereafter be appropriated or needed by them for agriculture and domestic purposes" and provided that "it shall be the duty of the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the Indians and Indian service." *Ibid.*

Plaintiff states that this statute "unequivocally imparts a 'duty' on the part of the Secretary to secure and protect the Indians' present and future water uses to sustain its reservation homeland," Br. 39, but the Act does no such thing. Rather, as the CFC and DDC noted, it merely imposes a *condition* on the discretionary power

it confers (to let non-Indians divert tribal waters).[4] A limitation on an agency's discretionary authority to act is of course quite different than an affirmative duty that gives rise to enforceable trust obligations. And even that limitation in the 1899 Act is merely a directive to issue regulations "*as he may deem necessary* to secure to the Indians the quantity of water needed," 30 Stat. at 941 (emphasis added). It cannot be the source of the specific asserted trust duties Plaintiff identifies.

Nor does the 1906 Act give rise to specific fiduciary duties. The Act principally did three things. First, it approved the Project to be built "under the laws" of "Utah," with "title" to "be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto." 34 Stat. at 375. Second, it provided that the "irrigation systems may be used" by non-Indians, including "any person, association, or corporation under and upon compliance" with Utah law. *Ibid.* And third, it stated that "when the Indians have become self-supporting" they will "pay back into the Treasury the cost of the work done." *Id.* at 375-76. None of these provisions impose specific fiduciary duties on the United States. Although the Act provides generally that the Project is held "in trust for the Indians," "it is well-settled that statutory provisions that merely declare that assets are held 'in trust' do not create specific, enforceable trust duties." *Ute Tribe*, 560 F. Supp. 3d at 262; *see also*

[4] *See Ute Tribe*, 560 F. Supp. 3d at 261; Appx5 ("The statute limits the Secretarial authority conferred but it does not transform the reference to Plaintiff's paramount rights into a money mandating duty to protect water rights.").

United States v. Mitchell, 445 U.S. 535, 541-42 (1980) (*Mitchell I*) (statute under which land held "in trust for the sole use and benefit of the [Indian owner]" did not create a specific trust duty to manage timber on that land); *Hopi Tribe*, 782 F.3d at 667 ("a statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty"). And as the DDC observed, Interior's mandate under the 1906 Act—to manage the Project for the benefit *of both* Indians and non-Indians—is incompatible with the notion that it imposes enforceable fiduciary duties owed specifically to Plaintiff. *Ute Tribe*, 560 F. Supp. 3d at 262; *see also Nevada v. United States*, 463 U.S. 110, 128 (1983) (when Congress tasks Interior to represent the interests of both Indian and non-Indian users, "the Government cannot follow the fastidious standards of a private fiduciary").

On appeal, Plaintiff heavily emphasizes that the 1906 Act contains a sue-or-be-sued clause. Br. 18-22. But as the DDC noted, a waiver of sovereign immunity "does not speak to whether the Act creates specific trust duties at all." 560 F. Supp. 3d at 262; *see also El Paso Natural Gas Co. v. United States*, 750 F.3d 892-99 (D.C. Cir. 2014) (holding that APA waived sovereign immunity for breach-of-trust claim but that the claim failed because Plaintiff failed to identify a substantive source of law establishing specific fiduciary duties).

Plaintiff also contends that it need not identify specific enforceable money-mandating trust duties because the 1906 Act—and its waiver of sovereign immunity—means that Plaintiff need not establish jurisdiction under the Tucker Act. Br. 19. Indeed, Plaintiff's lead argument on the trust issues is that the CFC erred in applying the Tucker Act's jurisdictional standard. Br. 19. This argument is doubly forfeited and wrong. The Complaint identifies the Tucker Act and the Indian Tucker Act—not the 1906 Act—as the source of the CFC's subject-matter jurisdiction. Appx106. So did Plaintiff's opposition to the United States' motion to dismiss, Appx432-444, which never argued that the 1906 Act meant that Plaintiff did not need to satisfy the Tucker Act.

Even if it was not forfeited, this argument is meritless for at least two reasons. First, the 1906 Act's waiver of sovereign immunity is not a *grant of jurisdiction*, let alone a grant of jurisdiction to the CFC specifically. *See U.S. v. Park Place Associates, Ltd.*, 563 F.3d 907, 923 (9th Cir. 2009) (noting that "[a] waiver of sovereign immunity means the United States is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum"). For that Plaintiff must look to the Tucker Act and Indian Tucker Act, as even it recognizes. *See* Br. 2 (stating that CFC had jurisdiction "pursuant to the 28 U.S.C. § 1491, and 28 U.S.C. § 1501"). But even if the 1906 Act constituted both a waiver of sovereign immunity and source of subject-matter jurisdiction, it does not impose any specific money-mandating trust

duties that support Plaintiff's claims. Put another way, it does not supply Plaintiff with a distinct cause of action. *See El Paso Natural Gas Co.*, 750 F.3d at 892 ("[T]he Tribe faces three threshold requirements to stating a viable claim for relief at the pleading stage: it must establish federal subject matter jurisdiction, a waiver of sovereign immunity, and a cause of action.").

B. Plaintiff's reliance on treaties and government documents fails.

Plaintiff also references treaties between the United States and Plaintiff that the Senate ratified in 1849, 1863, and 1868. Br. 10. Any reliance on these sources has also been forfeited multiple times over. Plaintiff's Complaint does not mention any of them. Plaintiff did briefly mention the 1863 and 1868 treaties in its opposition to the United States' motion to dismiss, Appx434, but did not suggest that either was a source of enforceable fiduciary duties. But even if the Court were to consider them, those treaties do not advance Plaintiff's position.[5]

[5] Plaintiff heavily relies on the Ninth Circuit's decision in *Navajo Nation v. U.S. Department of the Interior*, 996 F.3d 623, 638 (9th Cir. 2021), *amended on denial of rehearing*, 26 F.4th (9th Cir. 2022), in which the Ninth Circuit held that the Navajo Nation stated a breach-of-trust claim for failure to consider the Nation's as-yet-undetermined water rights in managing the Colorado River. *Navajo Nation* was wrongly decided and, on November 4, the Supreme Court granted the United States' petition for a writ of certiorari to review that decision. *See* No. 22-51 (S. Ct.). Putting that aside, the Ninth Circuit's erroneous decision in *Navajo Nation* does not help Plaintiff for at least three reasons. First, the Ninth Circuit (incorrectly) held that, since it was an APA case, the Supreme Court's Tucker Act jurisprudence was nonbinding and indeed had no bearing on its breach-of-trust analysis. 996 F.3d at 638. Second, the statutes at issue here—the 1899 Act, 1906 Act, and CUPCA—

The 1849 Treaty provides that Plaintiff "acknowledge[s] and declare[s] they are lawfully and exclusively under the jurisdiction of the" United States and that they "unconditionally submit" to its power and authority. 9 Stat. 984 (Dec. 30, 1849). It does not even arguably create any fiduciary duties related to water rights or infrastructure.

As to the 1863 Treaty, Plaintiff contends that Article 10 of that Treaty "required the Ute Indians to begin to 'follow agricultural or pastoral pursuits by farming or raising stock, and growing wool upon' its Reservation lands, and" that "the 1863 Treaty obligates the United States to protect the Ute Indians 'in the quiet and peaceable possession of their said lands and property.'" Br. 32. This is both inaccurate and beside the point. Article 10 does not require Plaintiff to follow agricultural or pastoral practices on its Reservation. Rather, it provides that "[i]n case the chiefs of [the Ute band] shall announce to the agent a willingness and determination . . . to begin and follow agricultural or pastoral pursuits by farming or raising stock" and follow regulations Interior "may prescribe," then Ute members

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were not at issue in *Navajo Nation* and the treaties Plaintiff characterizes as analogous to those in *Navajo Nation* are not part of this case because Plaintiff forfeited reliance on them below. Third, the claim at issue in *Navajo Nation* (seeking to compel the United States to determine the extent to which the Navajo Nation's reservation requires water from sources other than the Little Colorado River and to develop a plan to secure such water) is fundamentally different than those in this case (which involves water sources on which the United States has undertaken numerous efforts to resolve Plaintiff's *Winters* rights associated with its Reservation).

"shall receive . . . donations of stock to aid them in their endeavor." 13 Stat. 673 (Oct. 7, 1863). In other words, the Treaty establishes a conditional framework to provide Plaintiff with certain benefits, in the event it chose to undertake certain actions. In any event, this language says nothing about water rights or infrastructure, let alone enforceable obligations.

As to the 1868 Treaty, Article 7 of that Treaty outlines a process for creating individual property allotments: "If any individual [of Plaintiff] . . . shall desire to commence farming . . ." 15 Stat. 620 (Mar. 2, 1868). Article 9 then states that those tribal members who elect to receive separate lands and pursue farming shall receive "seeds and agricultural implements." *Id.* at 621. Similar to the 1863 Treaty, this Treaty conditionally allowed Tribal members to acquire certain benefits if they chose to pursue farming. It also says nothing about water rights or infrastructure.

Plaintiff also invokes what it describes as "judicial admissions acknowledging" the United States' "money-mandating fiduciary duties to Plaintiff," citing two complaints the United States filed more than a century ago. Br. 7-9. Plaintiff's reliance on these purported "admissions" fails for at least three reasons. First, it too is forfeited (though briefly mentioned, Plaintiff never invoked them as sources of specific fiduciary duties in its Complaint or motion-to-dismiss briefing). Second, none of the language that Plaintiff quotes even arguably amounts to an acknowledgment of enforceable fiduciary duties as to Plaintiff's water rights and

infrastructure. *See* Br. 8. And third, litigation allegations cannot be the source of money-mandating fiduciary duties—only the Constitution, statutes, treaties, and Executive Orders of the President can be. *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009); *cf. also OPM v. Richmond*, 496 U.S. 414, 428 (1990) ("If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive.").

Finally, Plaintiff cites a series of administrative materials from the 1980s and 1990s. Br. 13. These include a 1988 internal memorandum from an Interior Regional Solicitor prepared "in preparations for negotiations with Plaintiff," Appx871-888; a 1995 memorandum from a Field Solicitor in Interior's Salt Lake City office, Appx896-916; and a 1996 memorandum to the Secretary from an Assistant Secretary, Appx1114-1116. Plaintiff does not quote particular language from these sources (indeed, the documents consist largely if not entirely of internal analysis and otherwise appear to be deliberative in nature). In any event and again, only the Constitution, statutes, treaties, and Executive Orders of the President can support Tucker Act jurisdiction for breach-of-trust claims.

C. Plaintiff cannot create specific enforceable duties by extrapolating from multiple sources or by reference to principles of "control".

Having failed to identify any specific source of enforceable fiduciary duties, Plaintiff faults the CFC for examining "each source of law cited by Plaintiff in isolation" rather than collectively. Br. 36. To the extent Plaintiff is arguing that a Court can infer enforceable duties through broad extrapolation from multiple legal sources, that is not the law and contradicts the principle that the United States only assumes those trust duties that it specifically accepts. *See supra* p. 18.

Plaintiff's main argument on this topic is thus that the United States assumed enforceable trust duties by virtue of the 1906 Act's bare "in trust" language and the United States' "pervasive and elaborate control over" its water rights and water infrastructure. Br. 22-28. In the case Plaintiff describes as "the hallmark case for breach-of-trust claims brought under the Tucker Acts," Br. 22—*United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)—the Court did consider "the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber," in concluding that the United States assumed enforceable trust obligations with respect to timber management. *Id.* at 222. But for multiple reasons, neither that decision nor principles of control more generally support Plaintiff's assertion of trust duties here.

Most fundamentally, the "Federal Government's liability cannot be premised on control alone" because "the Indian Tucker Act makes clear that only claims arising under 'the Constitution, laws or treaties of the United States, or Executive orders of the President' are cognizable." *Navajo Nation*, 556 U.S. at 301. For this reason, the Supreme Court clarified in 2009 "that the analysis must begin with specific rights-creating or duty-imposing statutory or regulatory prescriptions" and *only if* the plaintiff identifies such a duty, "*then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Ibid.* (some quotation marks omitted). Thus, Plaintiff is wrong to say that it must "identify[] a specific trust duty *or* establish elaborate and pervasive federal control over property that is recognized as trust corpus." Br. 28. A specific duty must be identified, and at most pervasive control is relevant to the *contours* of any such identified duty. That principle is all the more relevant here, as the United States does not hold the Project for the sole use and benefit of Plaintiff; it must manage the Project for the benefit of both Indians and non-Indians.

Mitchell II is consistent with this point. The Court there found the United States to have comprehensive responsibilities with respect to timber management. But importantly for present purposes, the Court also concluded that "Congress expressly directed that the Interior Department manage Indian forest resources 'on

the principle of sustained-yield management,'" 463 U.S. at 221 (citing 25 U.S.C. § 466), and that "[r]egulations promulgated under the Act required the preservation of Indian forest lands in perpetually productive state." *Id.* The duties set forth in the regulatory scheme "[were] designed to assure that the Indians receive the benefit of whatever profit [the forest] is capable of yielding." 463 U.S. at 221-22. Because Plaintiff here has not identified any specific enforceable duty, principles of control are irrelevant, as they were in *Navajo Nation*.

But even assuming principles of control were relevant, Interior's limited control here simply does not support Plaintiff's argument. Again, *Mitchell II* is instructive. Interior there controlled "virtually every aspect of forest management, including the size of sales, contract procedures, advertisements, and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed." *Id.* at 220. The United States' authority under the 1906 Act and the regulatory scheme governing irrigation projects, *see* 25 C.F.R. § 171 *et seq.*, bears no resemblance to this. Interior's limited control does not prevent Plaintiff from irrigating its own land, or amount to managing irrigation on Tribal lands generally (let alone managing "virtually all" aspects of irrigation on Plaintiff's lands). Indeed, the CFC long ago held that the irrigation regulations do not create

the same type of comprehensive responsibility as do the statutes and regulations at issue in *Mitchell II*. *See Grey v. United States*, 21 Cl. Ct. 285 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992). And when Interior revised those irrigation regulations, it reiterated that it "does not have a trust obligation to operate and maintain its irrigation projects." 73 Fed. Reg. 11,028, 11,031 (Feb. 29, 2008).[6] Thus, Plaintiff cannot rely on principles of "control" to establish enforceable duties.

D. Plaintiff cannot show a breach of any alleged duty.

Plaintiff's failure to identify any enforceable duties is sufficient to affirm the CFC's dismissal. But Plaintiff's trust claims also fail because Plaintiff fails to show a *breach* of the alleged duties it identifies. Put another way, Plaintiff makes no attempt to connect any of the purported duties it identifies to the specific claims it brings. Plaintiff's opening brief is replete with generalized assertions that the United States owes it duties in the abstract or at an extremely high level of generality. *See, e.g.*, Br. 4-5, 9-10, 14. By contrast, in arguing that the CFC wrongly dismissed its breach-of-trust claims, Plaintiff does not discuss the specifics of those claims at all. *See* Br. 15-40. But Plaintiff cannot sue to enforce an asserted trust obligation against

[6] And unlike another case on which Plaintiff relies, Interior does not have an exclusive right to use and occupy for its own benefit the Project or its infrastructure. Appx6; *compare United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (finding enforceable trust duties where statute, inter alia, authorized the United States' exclusive use of the trust property).

the United States unless Plaintiff can "identify a specific, applicable, trust-creating statute or regulation *that the Government violated*." *Jicarilla*, 564 U.S. at 177 (quotation marks omitted) (emphasis added); *accord Navajo I*, 537 U.S. at 506 (stating that "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").[7] Plaintiff has not done so here.

Finally, Plaintiff does not specifically address the third requirement for CFC jurisdiction—that any breaches of enforceable duties be money-mandating—other than to label them as such in conclusory terms. Br. 4-5, 7, 9. Its claims fail for that reason, too. But because Plaintiff failed to identify and allege breach of any enforceable fiduciary duties, this Court need not address whether any trust duty would be money-mandating. *See* Appx8. The CFC properly dismissed Plaintiff's trust claims.

II. The CFC correctly determined that Plaintiff's takings claims and breach-of-contract claim based on the 1965 Deferral Agreement are time-barred.

Section 2501 of Title 28 provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition

[7] To take just one example, Plaintiff relies on the 1906 Act as a source of enforceable duties. As discussed previously, that Act does not impose any specific money-mandating duties. But even if it did, that Act merely authorizes construction of the Project and would be relevant (at most) to a small subset of Plaintiff's breach-of-trust claims.

thereon is filed within six years after such claim first accrues." "A claim against the United States accrues when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (citation omitted). "Compliance with the statute of limitations is a jurisdictional requirement." *Holmes v. United States*, 657 F.3d 1303, 1317 (Fed. Cir. 2011) (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008)). And because section 2501 is jurisdictional, Plaintiff has the burden of establishing that its suit is timely. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998).

Applying this framework, the CFC correctly held that Plaintiff's two takings claims (Claims Ten and Fifteen) and a breach-of-contract claim (Claim Fourteen) were time-barred.

A. Claim Ten is time-barred.

Claim Ten is a takings claim based on the Midview Exchange Agreement, which was finalized in 1967. Plaintiff alleges that "[w]hat the Tribe received under the Midview Exchange . . . did not constitute just compensation." Appx176. And Plaintiff asserts that "[s]ince the execution of the Midview Exchange, the United States . . . has deprived the Tribe of a portion of the Tribe's senior-priority *Winters* Reserved Water Rights in the Lake Fork River Basin and has given those Reserved

Water Rights to the Moon Lake Water Users Association." Appx176. This alleged "depriv[ation]" is merely *a description* of the Midview Exchange. This claim thus accrued no later than November 16, 1967 when the Agreement became effective, and the statute of limitations for this claim expired on November 16, 1973—almost 45 years before Plaintiff filed this lawsuit.

Plaintiff invokes the "stabilization" doctrine, insisting that "[t]he scope" of the taking under the 1967 Agreement could not be ascertained until recently. Br. 44. Plaintiff does not specify precisely when, in its view, Claim Ten and the other takings claim "stabilized," stating only that it did not stabilize before some indeterminate point within six years of March 7, 2018—indeed, Plaintiff suggests that its takings claims may *still not* have stabilized. Br. 47. This is so, according to Plaintiff, because Interior has subsequently designated land non-assessable, reducing the number of irrigated acres and resulting in economic losses to Plaintiff. Br. 42.[8]

[8] Plaintiff also contends that Claim Ten did not stabilize until it learned that the Midview Property was not transferred into trust. Br. 42. This does not make sense. If the Agreement required transfer of the Midview Property into trust, Plaintiff's remedy (if any) for a failure to make that transfer would be a claim for breach of the Agreement (which Plaintiff has attempted to separately assert, *see infra* p. 42). Conversely, if the Agreement *does not* require any such transfer (which it does not), Plaintiff was not entitled to wait decades to bring a takings claim based on that Agreement until Plaintiff purportedly discovered that the United States had never done something that the Agreement did not require it to do in the first place.

This argument fails for multiple reasons. Most obviously, Plaintiff does not provide any logical reason these designations allow it to challenge *the Midview Exchange Agreement*, the subject of this claim. The transfers and compensation scheme authorized by the Midview Exchange Agreement were not conditioned on or tied to subsequent Interior designations in any way. Appx262-263. Nor were the designations taken "under the auspices of [the Midview Exchange] Agreement," Br. 44; the Complaint itself alleges that lands have become non-assessable as a result of poor Project maintenance and rehabilitation, an unrelated grievance. Appx129. Any subsequent Interior designations as to which Plaintiff might have a legitimate and timely grievance do not entitle Plaintiff to collaterally attack the *1967 agreement* as a taking.

Even putting aside this defect, the "stabilization" doctrine does not apply here. As this Court has explained, "[w]hen there is a gradual physical process, such as erosion or flooding, the 'stabilization doctrine' delays claim accrual until the situation has 'stabilized.'" *Banks v. United States*, 741 F.3d 1268, 1281 (Fed. Cir. 2014). "Both the Supreme Court and the Court of Claims have narrowly construed the applicability of the stabilization doctrine, more or less limiting it to the class of flooding cases to which it belonged," *DeJong Trustee of Alvin S. DeJong Exempt Trust v. United States*, 149 Fed. Cl. 194, 203 (2020) (quotation marks omitted) (cleaned up), so it is at best doubtful that the doctrine applies in this context. But

even if it does, the point of the doctrine is that the statute of limitations begins to run only when it is clear that the Government "has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined." *Boling v. United States*, 220 F.3d 1365, 1370-71 (Fed. Cir. 2000). Here, the permanent nature of the alleged deprivation—the claimed loss of Plaintiff's senior-priority water rights—was clear in 1967. If Interior's subsequent designations bear on this claim at all (which is doubtful), they would be relevant only to the amount of Plaintiff's damages. Plaintiff itself appears to acknowledge this. *See* Br. 44 (contending that the "value of what Plaintiff has actually received in compensation" was not clear until later).

Finally, even if Plaintiff were right that a claim based on the Midview Exchange Agreement accrued only upon subsequent land designations (and Plaintiff is not right), Plaintiff has not met its burden to prove timeliness. Among other problems, Plaintiff never specifies which designations it believes triggered accrual of this claim, when those alleged designations occurred, and when Plaintiff knew or reasonably should have been aware of them. The Complaint alleges that Interior "has designated a substantial portion" of the Project's acreage as temporarily or permanently non-assessable "[s]ince [Interior] began operating a system to irrigate 78,950 acres of land." Appx130. Elsewhere, Plaintiff states that the Project's alleged "disrepair has also been a contributing factor in [Project] lands being

rendered temporarily or permanently non-assessable," Appx129, disrepair that according to Plaintiff dates back to *at least 1982* and likely earlier, Appx128. Claim Ten is time-barred.

B. Claim Fifteen is time-barred.

Claim Fifteen is a takings claim based on CUPCA. It contends that the waiver in Section 507 "divests the Tribe of cognizable property interests," that the "Tribe did not receive just compensation for this deprivation of its Property," and that "the funds received by Plaintiff under the CUPCA [were] based on a severe miscalculation of the value that the promised Upalco, Uintah, and Ute Indian Units would have brought to Plaintiff had these units been constructed." Appx181-182. The statute of limitations for this claim began to run on October 30, 1992 when President Bush signed CUPCA into law, and expired on October 30, 1998—nearly 20 years before Plaintiff filed this lawsuit.

Plaintiff insists that a takings claim based on CUPCA had not stabilized upon enactment of CUPCA because CUPCA "mandated" the development of replacement systems to meet Plaintiff's needs, so Plaintiff was "entitled to first see whether the United States would fulfill its promise to mitigate the impacts of" CUPCA's waiver by building the replacement projects before bringing suit. Br. 46-47. Every part of this argument fails.

For one, CUPCA did not mandate development of the Uintah Basin Replacement Projects. It merely authorized construction of such systems, while contemplating that they might not be built—providing for expiration of authorization if, among other possibilities, "the Secretary determines that such feature is not feasible." Pub. L. No. 102-575, § 203(b)(2). Indeed, the replacement projects were authorized (not required) in Title II of CUPCA, not Title V (which was the Tribal Settlement). *Id.* §§ 201, 501-07. They simply were not tied to or part of the waiver and compensation scheme in any way, so Plaintiff's suggestion that it could wait and see if the replacement projects were built to its satisfaction is without merit.

Indeed, Claim Fifteen does not even cite the failure to build replacement projects as a basis for Plaintiff's takings claim—the Claim states that it is "[b]ased on" CUPCA's waiver and inadequate compensation scheme, Appx182 (as well as "the lack of a compact securing [the] Tribe's water rights in the Green River," Appx182, an argument Plaintiff has abandoned on appeal[9]). Indeed, although Plaintiff quotes an excerpt of its Complaint alleging that the replacement projects were "nearing completion" in 2018, the gravamen of Plaintiff's allegations here is to *complain about* those systems. *See* Br. 46-47 (these systems "were 'designed to

[9] CUPCA ratified and approved the Revised Ute Indian Compact of 1990, subject to re-ratification by Utah and Plaintiff. Pub. L. No. 102-575, § 503(a). But nothing in the statute even arguably makes finalization of that Compact—which Utah has re-ratified but Plaintiff has not—a condition of the Section 507 waiver.

disproportionately allocate benefits to non-Indians and burdens to the Tribe [and] its members' rather than provide Plaintiff with the water storage infrastructure it was yet again promised." (quoting Appx161)).

In any event, all of this is improper bootstrapping. Even if Plaintiff had a legitimate grievance in the subsequent building of replacement systems—that CUPCA does not require, and that are not mentioned in Claim Fifteen—that would still not entitle Plaintiff to reach back and challenge a compensation scheme that was finalized 26 years before it filed this lawsuit.

Even putting all of this aside, Plaintiff's reliance on the stabilization doctrine for Claim Fifteen fails. For one, as the CFC noted, there is no clear precedent even applying the stabilization doctrine to regulatory takings claims. Appx10. As discussed above, the point of the doctrine is that "[w]hen there is a gradual physical process, such as erosion or flooding," it makes sense to delay claim accrual until it is clear that the gradual physical process the Government has put into motion amounts to a permanent taking. *Banks*, 741 F.3d at 1268. The same logic does not apply to a takings claim based on a statute or regulation, which effects an immediate and permanent change in the status quo from the moment it becomes law.

But even if the stabilization doctrine could apply to some regulatory takings claims, it does not apply to this one. The stabilization doctrine delays accrual until the permanency of a taking is clear, not until the amount of damages is fully

determined. *See supra* p. 35. Similar to Claim Ten, the permanence of the alleged taking effected by CUPCA—the waiver of Plaintiff's contractual rights under the Deferral Agreement—was clear when CUPCA became law. Again, nothing required construction of the replacement projects—CUPCA provided Plaintiff substantial money and other benefits in exchange for release of Plaintiff's claims. But even if relevant, the United States' work on replacement systems has nothing to do with the permanence of any taking CUPCA effected. Plaintiff implicitly acknowledges this. *See* Br. 47 (contending that "construction of the Uintah Basin Replacement Projects" would "mitigate the impacts of" CUPCA's waiver of claims under the Deferral Agreement). Claim Fifteen is time-barred.

C. Claim Fourteen is time-barred.

This breach-of-contract claim is based on the 1965 Deferral Agreement and asserts that the United States breached that Agreement by failing to complete the CUP, by failing "to satisfy Tribal Reserved Water Rights as promised in the 1965 Deferral Agreement," and by failing to adjust the diversion point in several canals for Plaintiff. Appx180. The Complaint shows that Plaintiff knew as early as 1980 that the units contemplated by the Deferral Agreement would not be built, and certainly upon CUPCA's enactment in 1992. Appx11. Plaintiff does not dispute this, but insists that this claim is not based on the failure to construct the Uintah and Ute Indian Units, that it "arises from the United States' failure to take the measures

it was required to *beginning* in 2005," and thus that its claim is timely. Br. 48-49. This argument fails for at least four independent reasons.

First, although Plaintiff denies that this claim is based on failure to construct the units, it never specifies what other "obligations" it purports to derive from the relevant language of the Deferral Agreement. *See* Br. 49 (characterizing Agreement as encompassing an "obligation to 'diligently pursue' all phases of the [CUP] to 'satisfy all Indian water rights'"). Second, CUPCA *extinguished* the Government's obligations under the Deferral Agreement to pursue the CUP "to satisfy all Indian water rights": the statute releases "any and all claims relating to [Plaintiff's] water rights covered under the" Deferral Agreement. *See supra* p. 9. As the CFC put it, "because Plaintiff had notice that the Act was intended to extinguish the Government's obligations under the Deferral Agreement twenty-six years ago, Claim Fourteen is untimely." Appx11. CUPCA's enactment thus means that the terms of the Deferral Agreement are irrelevant to accrual of this claim.

But third, even if Congress *had never passed CUPCA*, this claim still would have accrued no later than January 1, 2005. Before CUPCA released the United States' obligations under the Deferral Agreement, that Agreement provided that use of Plaintiff's water "may be deferred at this time," Appx256, and "that the first day of January, 2005, shall be mutually considered as the maximum date of deferment and that all phases of the Central Utah project will in good faith be diligently pursued

to satisfy all Indian water rights at the earliest possible date," Appx257. The Agreement further stated that "[i]f the ultimate phase of the Central Utah project is not completed sufficiently to supply said Indian water rights by" January 1, 2005, equitable adjustment would be made "to permit the *immediate* Indian use of the water so reserved." Appx257 (emphasis added).

Taken together then, this language specifies: (i) the United States would diligently pursue all phases of the CUP to satisfy all Indian water rights by the earliest date possible; but (ii) would complete this task no later than January 1, 2005; and (iii) if the project was not completed by January 1, 2005, equitable adjustments would be made to allow the "immediate" use of Plaintiff's rights. Plaintiff characterizes the Agreement as merely imposing "a specified *commencement* date of January 1, 2005, [with] no specified deadline to *complete* this obligation," Br. 49—essentially, allowing the United States to sit on its hands for nearly 40 years following the Agreement. But this is not what the Agreement says. Indeed, even the Complaint acknowledges that 2005 was a completion deadline, not a commencement date. Appx146. Even absent CUPCA then, the statute of limitations for this claim expired no later than January 1, 2011, more than seven years before Plaintiff filed this suit.

Fourth, even if CUPCA had not released this claim *and* even if Plaintiff were correct that January 1, 2005 is merely a commencement date, Plaintiff *still* has not

established that this claim is timely. Plaintiff does not plead any facts suggesting that, beginning on January 1, 2005, the United States began complying with its obligations under the Deferral Agreement as Plaintiff understands those obligations or that Plaintiff reasonably believed that it was doing so—let alone that the United States was complying until March 7, 2012 (six years before Plaintiff filed this suit). And again, at the very least Plaintiff has not met its burden of *demonstrating* that this claim was timely filed on March 7, 2018.

III. The CFC correctly dismissed Plaintiff's claim for breach of contract based on failure to transfer the Midview Property into trust for failure to state a claim.

Finally, the CFC correctly dismissed Claim Eleven, which asserts that the United States breached the Midview Exchange Agreement by failing to transfer the Midview Property into trust. Appx177-178. This claim is barred by the 2012 Settlement Agreement, which released all claims "that relate to the United States' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources." Appx273. It makes no difference that this claim is styled as one for breach of contract—the release applies to all claims "regardless of legal theory." Appx273. Nor does it matter that Plaintiff alleges it only became aware of this non-transfer recently, Br. 42—the release applies to claims "known or unknown." Appx273.

Plaintiff asserts that, because the Midview Property was never transferred into trust, it "never came to be" as a trust asset. Br. 51. But a claim that the United States was required to transfer a particular asset into trust for Plaintiff but failed to do so is plainly a claim that "relate[s] to the United States' management" of Plaintiff's non-monetary trust assets or resources. *See Todd Construction, L.P. v. U.S.*, 656 F.3d 1306, 1312 (Fed. Cir. 2011) (noting that the "Supreme Court has interpreted the term 'related to' broadly" and citing numerous cases).

This is clearer still when one looks at the rest of the exceedingly broad waiver. In addition to the broad phrase "relate to," the waiver states that it includes, but is not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain Plaintiff's non-monetary trust assets or resources," "failed to manage Plaintiff's non-monetary trust assets or resources appropriately," "failed to prevent trespass on Plaintiff's nonmonetary trust assets or resources," "improperly or inappropriately *transferred*, sold, encumbered, allotted, managed, or used Plaintiff's nonmonetary trust assets or resources," and "failed to undertake prudent transactions for the sale, lease, use, or disposal of Plaintiff's non-monetary trust assets or resources." Appx274-275 (emphasis added). And the claims settled by that Agreement include claims that the United States failed to "provide a historical accounting or reconciliation of Plaintiff's trust funds and non-monetary

trust assets or resources," Appx273-274, which encompasses the possibility of assets never being transferred into trust in the first place.

Plaintiff also argues (Br. 51-52) that Claim Eleven is exempt from the release as a claim "for damages for loss of water resources allegedly caused by [the United States'] failure to establish, acquire, enforce, or protect [Plaintiff's] water rights." Appx277. But the United States' failure to transfer the Midview Property into trust for Plaintiff is not tantamount to a failure to establish, acquire, enforce, or protect water rights. Instead, the claim relates to an alleged failure to protect and preserve, as alleged by Plaintiff, a non-monetary trust asset or resource (the Midview Property). Plaintiff plainly waived such claims.

The CFC's dismissal can also be affirmed on the basis that nothing in the Midview Exchange Agreement required the United States to transfer the Midview Property into trust for Plaintiff.[10] Plaintiff does not cite any language in the Agreement imposing any such requirement. The Complaint notes that the Agreement provides that the Midview Property "shall become part of the project works of the Uintah project" and that the BIA will operate the Midview Property as

[10] The United States did not argue below that Claim Eleven should be dismissed on this additional basis, but this argument can be raised at any time prior to final judgment. *See* RCFC 12(h)(2). Because the Midview Exchange Agreement is in the record and it is apparent from that Agreement that this alleged contractual duty does not exist, the United States respectfully submits that the Court should address this argument now if it concludes that the 2012 Settlement Agreement did not release this claim.

part of the Project. Appx137. From this, Plaintiff asserts that it "was promised and understood that the Tribe would hold equitable title to the Midview Property." Appx137. But this language does not provide "equitable title" of the Midview Property to Plaintiff—i.e., it does not "give[] the [Tribe] the right to acquire formal legal title." Black's Law Dictionary (11th ed. 2019), TITLE(2). To the contrary, the Agreement expressly states that "[t]itle to the [Midview Property] shall remain in the United States until Congress otherwise provides." Appx263. And even if the Agreement could be read as conveying some kind of beneficial title to Plaintiff—which it cannot—it did not require the formal transfer of the Midview Property into trust. The CFC correctly dismissed Claim Eleven for failure to state a claim.

IV. This Court may also affirm dismissal of at least sixteen of Plaintiff's claims on alternative grounds.

This Court "may affirm the Court of Federal Claims' dismissal on any ground supported by the record." *Wyandot Nation of Kansas v. United States*, 858 F.3d 1392, 1397 (Fed. Cir. 2017). Although the CFC relied on only one ground for dismissing each of Plaintiff's claims, the vast majority of those claims fail for additional reasons as well. Because those additional grounds were fully briefed below and are readily apparent, this Court should affirm dismissal on alternative grounds to the extent it disagrees with the CFC's holding on any particular claim.

A. All but three of Plaintiff's trust claims are also time-barred.

Even if Plaintiff had successfully identified a money-mandating source of law for its trust claims, the alleged events that form the basis of the majority of those claims occurred more than six years ago—and at the very least, Plaintiff has not met its burden of showing otherwise.

Claim One alleges that the United States has failed "to sustain [a Project] capable of irrigating the full amount of Reservation lands the [Project] was designed to serve." Appx162. Claim Two alleges that the United States has breached its alleged duty to provide sufficient storage for Plaintiff's federally-reserved water rights, while Claim Three asserts a similar failure-to-provide-storage claim for Plaintiff's non-decreed water rights. Appx163-167. Claim Four asserts that the United States has violated a supposed fiduciary obligation to protect Plaintiff's *Winters* reserved water rights from trespass, theft, and conversion by downstream water users. Appx167-168. Claim Five alleges that the Project is in a "grievous state of disrepair," Appx169, and that the United States has breached a duty to preserve and maintain it, Appx168-169.

There is a clear timeliness problem with these claims: these are all quintessentially *historical* alleged wrongs. Plaintiff has known for decades that the United States would not meet obligations (as Plaintiff understands those obligations) to maintain the Project, provide it water storage, and protect its water rights from

downstream users. The Complaint pleads no facts establishing that these claims only accrued within six years of March 7, 2018. *See* Appx120 (Complaint alleging efforts to establish Plaintiff's permanent homeland have "never recovered from the Government's earliest failure to preserve and protect the waters of the Reservation for the Tribe and its members").

Claim Six alleges that "[s]ince the construction of the" Project, the United States has designated substantial land as "non-assessable," thus reducing the number of irrigated acres and resulting in economic losses to Plaintiff. Appx170. But Plaintiff also alleges that the poor condition of the Project has contributed to lands being designated as temporarily or permanently non-assessable, and the Complaint references maintenance reports from 1982 through 2008, which would have given rise to a claim well before March 2012. The Complaint also does not appear to cite any designations that occurred after March 2012. This claim is time-barred.

Claim Seven contends that Interior has made transfers of Plaintiff's Reserved Water Rights under the 1941 Act that are unlawful and "continues to recognize" previous unlawful transfers. Appx171-172. But the Complaint does not allege any unlawful water transfers that occurred in March 2012 or later. And even if it did, at most a claim *as to that specific transfer* would be timely, not any transfers taken "under the color of the 1941 Act." Appx172.

Claim Nine contends that "the Midview Exchange has always been, and remains today, an illegal conveyance of tribal trust assets," and asserts that "the United States was obligated to rectify this inequity" through nullification or "negotiating a new water transfer scheme." Appx175. As with the analogous takings claim, *see supra* pp. 32-36, this claim accrued in 1967 when that agreement was executed, and certainly long before March 2012.[11]

Claim Twelve asserts that the United States breached a duty to supply water to Plaintiff of a sufficient quality. Appx178-179. But the Complaint does not allege any government actions in or after March 2012 that have created diminished water quality—nor does it allege any facts suggesting that the United States' alleged failure to supply quality water only began recently.

Claim Thirteen asserts that the United States repudiated trust responsibilities by failing to recognize and treat the Project as a trust asset beneficially owned by Plaintiff. Appx179. According to Plaintiff, this failure has manifested itself in the United States transferring Project water rights to non-Reservation lands, execution of "carriage" agreements with non-Indian water users (agreements by which the

[11] Claim Eight alleges that the United States breached a trust duty by not transferring the Midview Property into trust for Plaintiff. Appx172-174. It is far from clear that Plaintiff has met its burden of showing that this claim (or the analogous contract claim, *see supra* p. 42) is timely. Plaintiff pleads lack of awareness until recently but does not plead any facts demonstrating that it *could not* reasonably have become aware of the non-transfer until six years before it filed suit. But because these claims are barred on other grounds, the Court need not resolve their timeliness here.

United States agrees to deliver water to users outside of the Project), and informal agreements allowing non-Indian irrigators to utilize Project water and infrastructure. Appx179-180. But again, Plaintiff does not allege any such action that occurred in or after March 2012, and does not contend that the United States only recently failed to treat the Project as a trust asset.

Claim Sixteen asserts a breach of trust claim based on what it describes as the United States' provision of inaccurate information to Congress prior to CUPCA, resulting in inadequate compensation. Appx183-184. This claim accrued with the 1992 passage of CUPCA—and its compensation package—if not sooner.

Claim Seventeen alleges that, following CUPCA, the United States breached a supposed duty to construct replacement storage systems and facilities. Appx184-186. As noted, CUPCA contemplated that these systems may not be built at all. This claim accrued in 1992—when Congress passed a statute that does not contain a duty to construct replacement systems—and no later than 1999 (when Plaintiff stated that it was withdrawing from the Uintah Basin Replacement Project, Appx415).

Claim Nineteen alleges that the United States breached a trust duty when it transferred two specific water rights claimed by Plaintiff to the City of Duchesne—transfers that, as Plaintiff acknowledged, "Congress specifically directed the Secretary" to make in 2000. Appx188; *see also* Duschesne Water Rights

Conveyance Act, Pub. L. No. 106-370, 114 Stat. 1421 (Oct. 27, 2000). Plaintiff *did not oppose* this legislation in 2000 because, among other reasons, "the Tribe and its members will receive substantial benefits through such legislation." Pub. L. No. 106-370, § 2(10); *see also id.* § 3(b). In any event, the statute of limitations for this claim expired no later than 2006.[12]

Finally, the trust-claim part of Claim Twenty One contends that the United States breached a supposed trust duty to administer the Project and Plaintiff's water rights with undivided loyalty. Appx190-191. But Plaintiff provides only generalized allegations of, for example, "discriminatory management of tribal water rights" and "deny[ing] the Ute Tribe storage for its tribal waters," Appx191, alleged failings that the Complaint makes clear date back decades. The Complaint does not cite any actions by the United States supposedly evidencing divided loyalty within six years of the Complaint—and again, even if it did, Plaintiff could at most timely seek damages for *those specific actions*.

In the CFC, Plaintiff made several general arguments that these claims were timely, all of which are easily dispatched.

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[12] The Complaint notes that this Act contains a directive that the transfer be carried out "in accordance with all applicable law," Appx188, but this standard language does not nullify the very purpose of the Act—to transfer these specific water rights. In any event, to the extent the Court finds it relevant, we can represent that the United States deeded the water rights to the City of Duchesne in December 2001, well before March 2012.

First, Plaintiff argued that the 2012 Settlement agreement "preserved the right to sue for damages related to the U.S.'s mismanagement of Plaintiff's water rights" and "established an accrual date of March 8, 2012, for Plaintiff's present breach of trust claims." Appx444-445. Not so: the Settlement Agreement simply carved out certain categories of claims from the Agreement's waiver, while providing that nothing in the Agreement "shall diminish or otherwise affect in any way . . . [a]ny defenses that [the United States has] or may have regarding any claims that Plaintiff may assert in subsequent litigation or administrative proceedings." Appx279; *see also Ute Tribe*, 560 F. Supp. 3d at 257 ("The Tribe's 2012 Settlement Agreement with the United States includes no provisions about tolling or claim accrual."). In any event, Section 2501 is jurisdictional and cannot be tolled by agreement. *See First Annapolis Bancorp, Inc. v. United States*, 54 Fed. Cl. 529, 540 (2002).

Second, Plaintiff argued that its claims were tolled by the Indian Trust Accounting Statute (ITAS), which Congress included in Interior's appropriations act for fiscal years 1990 through 2014. Appx447-450. When applicable, the ITAS served to suspend, until an accounting was provided, the accrual of a Tribe's claims "concerning losses to or mismanagement of trust *funds*" but not "claims involving trust *assets*." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1347, 1350 (Fed. Cir. 2004) (quotation marks omitted); *see also, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 (2014). None of

Plaintiff's claims here sounds in losses to or mismanagement of trust funds. *Ute Tribe*, 560 F. Supp. 3d at 257-58 (ITAS "tolled only claims involving tribal trust funds, not nonmonetary assets like water rights"); *see also Rosales v. United States*, 89 Fed. Cl. 565, 580 (2009) (ITAS is not applicable where "claims for breach of fiduciary duty center on [title to] . . . land").

Third, Plaintiff argued that it is entitled to recover some damages under the "continuing claims doctrine." Appx452-453. That doctrine "operates to save parties who have pled a series of distinct events—each of which gives rise to a separate cause of action—as a single continuing event." *Ariadne Financial Services v. U.S.*, 133 F.3d 874, 879 (Fed. Cir. 1998). But "the continuing claims doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time." *Ibid.* Here, Plaintiff's takings and contract claims are based on distinct events—the Deferral Agreement, the Midview Exchange, CUPCA, as well as alleged breaches of the latter two—that occurred outside the limitations period and allegedly still have ill effects, not a series of distinct events that gives rise to a separate cause of action. Similarly the trust claims all arise from single discrete events (e.g., failure to construct storage facilities, failure to supply sufficient water, transfer of Duchesne Townsite water rights) as do the actions Plaintiff contends constitute repudiation of trust duties (e.g., execution of a carriage agreement, water

transfers).[13] The continuing claims doctrine thus does not apply and these trust claims are untimely.[14]

B. Seven of Plaintiff's trust claims are also barred by the 2012 Settlement Agreement.

Seven breach-of-trust claims (Claims Five, Six, Eight, Nine, Thirteen, Sixteen, and Seventeen) also were released in the 2012 Settlement Agreement.

Claim Five alleges a "failure to protect, maintain, repair, rehabilitate, construct, and Preserve" the Project. Appx168 (some capitalizations omitted). This falls squarely within the portion of the Agreement releasing claims that the "United States failed to preserve, protect, safeguard, or maintain Plaintiff's non-monetary

[13] To the extent Plaintiff's claims rest on the United States' *failure* to do certain things (such as construct or maintain particular facilities or infrastructure), "the vast weight of authority holds that the continuing violations doctrine does not apply to failure-to-act claims under" the APA. *Wild Horse Observers Ass'n v. Salazar*, 2012 WL 13076299, at *7 (D.N.M. Sept. 28, 2012) (collecting cases). Although this is of course not an APA case, this principle should apply even more strongly to a case like this in which *money damages* are sought from the United States.

[14] Plaintiff also argued that it did not have notice until 2012 of allegedly unlawful water transfers under the 1941 Act and alleged "informal" practices of allowing non-Indian users to use Project water and infrastructure for their own benefit. Appx450-451. But putting aside that this factual contention is not even relevant to most of Plaintiff's trust claims, it has been clear since the 1906 Act authorizing the Project that the Project serves both Indians and non-Indians. *See supra* p. 20. And neither the 1941 Act nor the 1906 Act restricts the Project delivery area to trust land or former allotted land—since Indians are allowed to sell their allotments to non-Indians, resulting in conversion to fee, the Project serves fee land within the service area. This fact was made known to Plaintiff as early as 1971 by E.L. Decker. Appx500.

trust assets or resources." Appx274. Similarly, Claim Six alleges that "[s]ince the construction of the" Project, the United States has designated substantial land as temporarily or permanently non-assessable, thus reducing the number of irrigated acres and resulting in economic losses to Plaintiff. Appx170. This falls within the same language because Plaintiff also alleges that the designations are attributable, at least in part, to the United States' failure to maintain the Project. *See supra* p. 47. This claim also falls within the portion of the release for claims alleging that the "United States failed to make Plaintiff's non-monetary trust assets or resources productive." Appx274.

Claim Eight alleges that the United States breached a fiduciary duty in not transferring the Midview Property into trust for Plaintiff. Appx172-174. This claim is thus barred for the same reasons as Claim Eleven. *See supra* pp. 42-45.

Claim Nine alleges that the Midview Exchange itself constituted mismanagement of an alleged trust resource. Appx174-175. This claim is also one that the "United States failed to preserve, protect, safeguard, or maintain Plaintiff's non-monetary trust assets or resources" and falls within other language as well. *See* Appx274-275 (releasing claims that the United States, inter alia, "misuse[d]" Plaintiff's "non-monetary trust assets or resources," "improperly inappropriately transferred, sold, encumbered, allotted, managed, or used Plaintiff's non-monetary

trust assets or resources" and "failed to manage Plaintiff's non-monetary trust assets or resources appropriately").

Claim Thirteen, as previously discussed, asserts that the United States repudiated trust responsibilities through, inter alia, improper transfer of Project water rights, execution of carriage agreements, and agreements allowing use of Project water and infrastructure. This claim falls within several clauses, including for claims that the United States "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used Plaintiff's non-monetary trust assets or resources," "failed to prevent trespass on Plaintiff's non-monetary trust assets or resources" and "permitted the misuse or overuse of Plaintiff's non-monetary trust assets or resources." Appx274-275.

Claim Sixteen asserts a trust claim based on the United States' alleged "failure to enforce and protect the Tribe's right to just compensation in the 1992 CUPCA." Appx183 (some capitalizations omitted). In addition to being untimely, *see supra* p. 49, this claim is precluded by the language in the Agreement quoted above, as well as by the Agreement's release of claims that the "United States failed to obtain an appropriate return on, or appropriate consideration for, Plaintiff's non-monetary trust assets or resources." Appx274.

Finally, Claim Seventeen—breach of a duty to construct replacement systems, Appx184—falls squarely within the language previously cited. And in addition to

this and the jurisdictional bases for dismissal, this claim also fails to state a claim in light of CUPCA itself, which is explicit that the building of replacement systems is *not* required. *See supra* p. 37.

C. Claims Three, Fourteen, and Fifteen are barred by CUPCA.

As previously noted, CUPCA was "intended to. . . put the Tribe in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 Agreement been constructed." Pub. L. No. 102-575 § 502(b)(3). And in exchange for receiving substantial funds, it provided that the "Tribe shall waive . . . any and all claims relating to its water rights covered under the" Deferral Agreement." *Id.* § 507(b).

Claims Three and Fourteen allege pre-October 30, 1992 breaches of the Deferral Agreement. Claim Three alleges that, "[p]ursuant to the 1965 Deferral Agreement, the United States agreed to the 'full and complete recognition' of the Tribe's water rights as identified in" the Decker Report but that the "United States has failed to develop Plaintiff's water rights outside of the [Project] as identified in the Decker Report" and the United States' prior commitment. Appx165-167. Similarly, Claim Fourteen is a direct claim for breach of the Deferral Agreement. Appx180-181. We previously explained why both claims were time-barred and why Claim Fourteen in particular accrued no later than 1992, when CUPCA became law. *See supra* p. 39. But even if these claims were somehow timely and could be

entertained on the merits, they fail in light of CUPCA. The Ute Indian Rights Settlement (and specifically, the section 504-506 funds) was intended to resolve Plaintiff's water rights and compensate Plaintiff in lieu of performance of the Deferral Agreement. 106 Stat. at 4651-55. Plaintiff has received those funds and has specifically acknowledged that the payments were "designed to redress certain of the Tribe's claims arising from the failure of the United States to construct specified water projects required by various agreements between the Tribe and the United States." Appx394-395.

That leaves Plaintiff's claim that CUPCA itself constituted a taking (Claim Fifteen). That claim accrued in 1992 and became time-barred in 1998. *See supra* p. 36. In any event, the claim fails because, even assuming CUPCA could be characterized as a regulatory taking, CUPCA compensated Plaintiff for any such taking. Federal statutes enjoy a presumption of constitutionality, and the D.C. Circuit has upheld a Congressional scheme for compensation to Indian allottees where the scheme was "a good faith effort to compensate plaintiffs fairly." *Littlewolf v. Lujan*, 877 F.2d 1058, 1065 (D.C. Cir. 1989). So too here. Congress carefully considered the compensation to Plaintiff for waiving its claims, Plaintiff itself participated in the negotiations that established the scheme, Appx183, and Plaintiff's chairman testified in support of the settlement, Appx369-375. Any attempt by Plaintiff to challenge the constitutionality of CUPCA fails.

D. All but one of Plaintiff's claims is barred by 28 U.S.C. § 1500

Lastly, all but one of Plaintiff's claims would be barred by 28 U.S.C. § 1500, but the United States acknowledges that this argument is currently foreclosed by Circuit precedent. The CFC does not have jurisdiction over "any claim for or in respect to which the plaintiff . . . has . . . any suit or process against the United States" or its agents "pending in any other court." 28 U.S.C. § 1500. A CFC claim is "for or in respect to" a claim in another court if the claims are based upon substantially the same operative facts, regardless of the relief requested. *United States v. Tohono Nation*, 563 U.S. 307, 311-17 (2011). The operative complaints in this case and the DDC action are based on the same alleged facts and similar if not identical legal theories. *See supra* p. 13. And all but one of Plaintiff's claims here are based on the same operative facts as the DDC action; the sole exception is Claim Fifteen (the takings claim based on CUPCA). Appx162-191, Appx347-360. Plaintiff did not dispute any of this below.

In an apparent effort to avoid section 1500, however, Plaintiff filed this action in the CFC *one day* before it filed the DDC action. *See supra* p. 13. This Court has held that Section 1500 does not apply where the plaintiff filed its CFC action prior to its district court case. *See Resource Investments, Inc. v. United States*, 785 F.3d 660, 669-70 (Fed. Cir. 2015). The Supreme Court criticized this Court's precedent on section 1500 more generally as leaving the statute "without meaningful force."

United States v. Tohono O'odham Nation, 563 U.S. 307, 314 (2011). This interpretation also has no basis in the text of Section 1500, which bars CFC jurisdiction whenever a plaintiff "has pending" a covered suit in another court, and includes no temporal limitation (let alone a strict day-of-complaint cut off). But *Tohono O'odham* declined to opine on the validity of this rule and this Court held in *Resource Investments* that the rule continues to represent the law of this Circuit. Therefore, the United States preserves this argument in the event of further review.

CONCLUSION

The judgment of the CFC should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 13,944 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 2016 in 14-Point Times New Roman, a proportionally-spaced font.

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