

Case No. 2021-1880

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE No. 1:18-cv-00359-RHH, THE HON. ARMANDO O. BONILLA,
SENIOR JUDGE, THE HON. ROBERT H. HODGES, JR.

***CORRECTED* OPENING BRIEF OF PLAINTIFF-APPELLANT**

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Oral Argument Requested

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, the undersigned certifies the following:

1. **Represented Entities.** The full names of all entities represented by undersigned counsel in this case are: **The Ute Indian Tribe of the Uintah and Ouray Reservation (the “Tribe”).**

2. **Real Party in Interest.** The full names of all real parties in interest for the entity, if different from the parties named above are: **Not applicable.**

3. **Parent Corporations and Stockholders.** All parent corporations for the entity in No. 1 and all publicly held companies that own 10% or more of the stock of any party represented by the undersigned. **None.**

4. **Legal Representatives.** The names of all law firms and the partners and associates that appeared for the plaintiffs-appellants in the trial court or are expected to appear in this court are:

Michael W. Holditch
Frances C. Bassett
Robert T. Lawrence
Rollie E. Wilson
Joanne H. Curry
Jeremy J. Patterson

5. **Related Cases.** The case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal: **Not applicable.**

6. Organizational Victims and Bankruptcy Cases. Any information required under Fed. R. App. P. 26(1)(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): **Not applicable.**

Dated: September 22, 2022

/s/ Michael W. Holditch

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, the Appellant states that:

1. There is no other appeal in or from the same civil proceeding in the lower court that was previously before this Court or any other appellate court.

2. There is no other case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal, *provided* that the Appellant acknowledges that Case No. 2:21-cv-00573-JNP, *Ute Indian Tribe v. United States Department of Interior, et al.*, which is currently pending before the U.S. District Court for the District of Utah, arises under a similar set of operative facts and, as such, could affect or be affected by this court's decision in the pending appeal.

STATEMENT OF JURISDICTION

The U.S. Court of Federal Claims had original jurisdiction over the civil action that is the subject of the current appeal pursuant to the 28 U.S.C. § 1491, and 28 U.S.C. § 1501. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims erred in ruling that the Tribe failed to identify enforceable trust duties on the part of the United States falling under the subject matter jurisdiction of the Court of Federal Claims.

2. Whether the Court of Federal Claims erred by ruling that the Tribe's claims based on unconstitutional taking under the Fifth Amendment and Breach of Contract were untimely under 28 U.S.C. § 2501.

3. Whether the Court of Federal Claims erred in ruling that the Tribe's Claim for breach of the 1967 Midview Exchange Agreement was waived under the 2012 Settlement Agreement between the Tribe and the United States.

STATEMENT OF THE CASE

The Plaintiff/Appellant, the Ute Indian Tribe of the Uintah and Ouray Reservation, is a federally recognized Indian tribe. 87 Fed. Reg. 4640 (Jan. 28, 2022). The Tribe is comprised of three bands of the Greater Ute Nation, the Uintah,

Whiteriver, and Uncompahgre Bands, who today reside on the Uintah and Ouray Indian Reservation in northeastern Utah.

The Tribe sued the United States in March 2018, alleging multiple claims for breach of trust, unconstitutional takings, and breach of contract, all claims involving the Tribe's federally-reserved Indian water rights. APPX8-85. The United States moved to dismiss the Tribe's claims on various grounds, including the absence of a money mandating trust duty and the government's contention that the Tribe's claims were either time-barred or previously waived and released. APPX197-415. The Tribe filed a memorandum in opposition to dismissal, APPX416-467, and also submitted multiple documentary exhibits and sworn witness statements to establish and substantiate subject matter jurisdiction. APPX831-1410. The case was heard on the Tribe's First Amended Complaint, APPX101-192.

On February 12, 2021, the Court of Claims issued an opinion granting the United States' motion to dismiss the Tribe's complaint in its entirety. APPX1-12. Judgment was entered four days later on February 16, 2021. APPX13. The Tribe timely filed a motion for reconsideration under RCFC 59(a) on March 16, 2021. APPX611-646.

Significantly, less than three months after the Court of Federal Claims dismissed the Tribe's claims, the U.S. Court of Appeals for the Ninth Circuit issued an important decision in another Indian breach of trust case, *Navajo Nation v. U. S.*

Dep't. of Interior, 996 F.3d 623, 628 (9th Cir. 2021). While the fiduciary claim in *Navajo* is one for injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 702 (instead of money damages under the Tucker Act), nonetheless, as explained *infra*, the specific treaty, statutory and regulatory provisions that the Ninth Circuit construed, *in pari materia*, to impose fiduciary obligations on the United States can, by analogous logic, be held to apply to damage claims under the Tucker Act as well.

Thus, the Ute Tribe filed a Notice of Supplemental Authority, alerting the Court of Claims to the decision in *Navajo*, and drawing the Court's attention to analogous facts and to similarities between the specific treaties, statutory and regulatory provisions at issue in *Navajo* and those involved in this case. APPX655-697.

The Tribe's Notice of Supplemental Authority was filed on May 4, 2021. More than nine months later, on February 28, 2022, the parties were notified that the case had been reassigned to a different judge. APPX826. Shortly thereafter, the court issued an order denying the Tribe's motion for reconsideration. APPX14-15.

STATEMENT OF FACTS

The Court of Federal Claims dismissed all but four of the Tribe's claims on grounds that that there is no money mandating fiduciary duty on the part of the federal government to trigger the court's jurisdiction over those claims under the Tucker Act. Yet, the record in this case makes clear that there are multiple money

mandating fiduciary duties imposed on the federal government in this case. These duties have been successively imposed over the past 173 years in a succession of treaties, statutes, executive orders, federal court decrees, contracts, and administrative regulations, all of which—taken together—leave no doubt that the federal government itself has assumed enforceable fiduciary duties to the Ute Tribe, expressly and unequivocally. Moreover, the legal and historical record makes clear the United States itself, in multiple judicial and administrative admissions, has in the past repeatedly acknowledged—and acted upon—the statutorily-imposed money mandating fiduciary duties that it owes to the Ute Tribe. Finally, the intricate web of federal treaties, statutes, executive orders, federal court decrees, contracts, and administrative regulations—the legal framework that establish these enforceable fiduciary duties—have, at the same time, placed the United States in the position of possessing and exercising comprehensive, pervasive, and exclusive power and control over *both* the Tribe’s Indian reserved water rights and the necessary infrastructure through which the Tribe’s waters are put to beneficial use, through which the Tribe’s very existence and well-being are dependent.

A. Facts Pertinent to the Ute Tribe

The Ute Indians once “ranged from the Wasatch Front all the way to the Colorado Front Range—from present-day Salt Lake City to Denver.” Charles Wilkinson, *Fire on the Plateau, Conflict and Endurance in the American Southwest*,

128 (1999). In return for the Tribe's cessions of vast tracts of valuable tribal lands to the federal government, the United States executed treaties with the Utes which guarantee the Tribe a tribal homeland. The Tribe's Uintah and Ouray Reservation is located in the Green River Basin in the northeast corner of Utah at the foot of the Uinta Mountains. Although the Reservation lies within the drainage of the Colorado River Basin, the Reservation itself is situated on an arid and sparsely settled high plateau. When President Abraham Lincoln established the initial portion of the Tribe's Reservation in 1861, the Federal government was fully informed that the land it was reserving for the Utes was virtually worthless: a team of surveyors had described the entire Uinta Basin as "one vast contiguity of waste, and measurably valueless, except for nomadic purposes, hunting grounds for Indians, and to hold the world together." Wilkinson, *Fire on the Plateau*, 149-150. Notwithstanding this bleak description, as detailed *infra*, the United States entered into three separate treaties with the Ute Indians, all three of which were subsequently ratified by Congress and enacted into law as federal statutes. By their terms, these three treaties required the Ute Indians to cede millions of acres of valuable land to the United States and to relinquish the Tribe's traditional nomadic lifestyle. In return, the United States obligated itself to assist the Tribe in transitioning to an agrarian lifestyle and to transforming the Tribe's bleak and inhospitable Reservation into a viable homeland. APPX101-192. The historical record makes clear that

these treaties were, at best, what would today be characterized as unilateral and “unconscionable contracts.” The Ute Indians were on the brink of starvation. In early 1861, when the federal Superintendent of Indian Affairs arrived in Utah, he described the Utes as a defeated people, suffering in a “state of nakedness and starvation, destitute and dying of want.” *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1094 (D. Utah 1981) (quoting from Report of the Commissioner of Indian Affairs, 1861).

B. The United States’ Judicial Admissions Acknowledging its Money-Mandating Fiduciary Duties to the Ute Tribe

In 1908, the United States Supreme Court issued its seminal decision in *Winters v. United States*, 207 U.S. 564 (1908), a ruling now known as the “*Winters Doctrine*”—a doctrine that was subsequently reaffirmed by the Supreme Court in another seminal ruling, *Arizona v. California*, 373 U.S. 546, 598-601 (1963). The *Winters Doctrine* holds that when the United States establishes an Indian reservation, it impliedly reserves enough water to fulfill the purpose of the reservation.

By 1916, increasing conflicts had arisen between the Ute Indians and their non-Indian neighbors over water allocations in the Lakefork, Yellowstone, Uinta, and Whiterocks Rivers. Thus, that year the United States filed suit to protect the Tribe’s Indian reserved water rights in the U.S. District Court for the District of Utah. *United States v. Dry Gulch Irrigation Company et al.*, No. 4418 (D. Utah.), APPX840-870, and *United States v. Cedarview Irrigation Company et al.*, No. 4427

(D. Utah), APPX1425-1464. In its complaints in *Dry Gulch* and *Cedarview*, the United States readily admitted that the United States has assumed enforceable trust obligations to the Ute Indians. In pertinent part, the United States affirmatively alleged:

- that the Ute Indians are “wards” of the United States;
- that the Tribe’s reservation lands are “of less value” than the lands the Tribe was forced to cede to the United States at the point of starvation;
- that “all” of the Tribe’s reservation lands are “arid in character and will not produce crops without irrigation” and that “unless irrigated” the Tribe’s lands “are comparatively valueless;”
- that it is the “intent and policy and the *duty*” of the United States “to protect” the Ute Indians “in their rights ... and material welfare;”
- that the Ute Indians “on account of their lack of development ... and their dependent condition, are unable to cope with white men in the scramble for water;”
- that non-Indian interference with the flow of surface waters through the Reservation has “caused ...[the Ute] Indians to suffer the damage of and to lose large and valuable agricultural crops,” resulting in “great and irreparable damage and injury” to the Indians.

See U.S. complaints in *Dry Gulch* and *Cedarview*, APPX840-870, and APPX1425-1464.

The United States’ admissions in *Dry Gulch* and *Cedarview* constitute *judicial admissions* that the United States is now estopped from repudiating. See, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (the doctrine of judicial estoppel

prohibits parties from playing “fast and loose with the courts,” thus parties are estopped from asserting one legal position in earlier litigation and a diametrically opposing legal position in later litigation).

Moreover, the federal court in *Dry Gulch* and *Cedarview* adjudicated title to the Tribe’s Indian reserved water rights in the United States “as trustee” for the Ute Indians, and ruled that the Ute Indians have the senior-most priority water rights on the Lakefork, Yellowstone, Uinta, and Whiterocks rivers. In addition, at the request of the United States, the court’s decrees permanently enjoin the non-Indian water users from interfering with the Ute Tribe’s senior priority water rights. *See Cedarview Decree*, entered on March 16, 1923, APPX1425-1464, and *Dry Gulch Decree*, also entered on March 16, 1923, APPX1477-1481.

The Ute Tribe asks the Court to take judicial notice of the *Dry Gulch* and *Cedarview* complaints and decrees under Rule 201(d) of the Federal Rules of Evidence, which provides that judicial notice may be taken at “any stage of the proceeding.” *See, e.g., Osage Tribe of Indians of Okla. v. United States*, 95 Fed. Cl. 469, 472 (Fed. Cl. 2010) (“courts ... take notice of their own respective records in the present litigation ... and in pervious trials and hearings.”).

C. The Initial Money-Mandating Statutes, Executive Orders, and Federal Decrees

For more than a century and a half, from the United States’ initial 1849 treaty with the Utes and the 1861 establishment of the Tribe’s Reservation, the United

States has affirmatively assumed enforceable trust duties to make the Tribe's reservation a viable homeland. Between 1849 and 1868, the United States Senate ratified three separate treaties with the Ute Indians, (i) an 1849 Treaty, ratified on September 9, 1850, 9 Stats. 984, APPX1422-1423; (ii) an 1863 Treaty, ratified on March 25, 1864, 13 Stat. 673, APPX1295-1299; and (iii) an 1868 Treaty, ratified on March 2, 1868, 15 Stats., 619, APPX1301-1312, together with the Act of June 15, 1880, 21 Stat. 199, APPX1313-1323, confirming the United States' treaty obligations to the Utes. Collectively, these federal statutes obligate the United States to protect the Ute Indians "in the ... possession of their said lands and property" and to assist the Tribe in making its Reservation a viable homeland. As emphasized by the Ninth Circuit in its 2021 decision in *Navajo*:

Under *Winters*, Federal Appellees have a duty to protect the [Navajo] Nation's water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation. . . . The Treaty's farming-related provisions, which sought to encourage the Nation's transition to an agrarian lifestyle, would have been meaningless unless the Nation had sufficient access to water.

Navajo, 996 F.3d at 639-40. The Ute Tribe has included a copy of the Navajo Treaties of 1849 and 1868 in APPX1411 and APPX1414, and asks the Court to take judicial notice of the Navajo treaties. See, e.g., *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1151 n.1 (Fed. Cir. 2021) (taking judicial notice of documents); *Pawnee Indian Tribe of Okla. v. United States*, 109 F. Supp. 860, 341 (1953) ("That these were facts of which the court is bound to take judicial notice,

and for information as to which it may consult ... there can be no doubt.”) (citation omitted). The Navajo treaties contain nearly identical language to the Ute Treaties of 1849, 1863 and 1868. And the factual backdrop for both Tribes’ claims are similar insofar as both the Ute Tribe and the Navajo Nation’s Indian reserved water rights are sourced from the Colorado River Basin.

In addition to the federal statutes and court decrees and the *Winters* decision and doctrine cited above, there are additional federal statutes enacted in the late nineteenth century and early twentieth century—and federal regulations implementing those statutes—under which the federal government assumed specific statutory obligations that are enforceable against the United States under common law principles of trust law. Those statutes are discussed in more detail, *infra*, under the Tribe's arguments. It suffices here to briefly identify those statutes as including the Act of March 1, 1899, 30 Stat. 941 (“1899 Act”), which states, in pertinent part, that:

... it shall be the duty of the Secretary of the Interior to proscribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the Indians and the Indian service.

APPX836. These specific statutes also include the Act of 1906, in which Congress authorized construction of an irrigation project for the Ute Indians. The previous year, the Superintendent of Indian Affairs had warned in 1905 that “[t]he future of

these [Ute] Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate,” *Ute Tribe v. Utah*, 521 F. Supp. at 1126 (citing Rept. of the Comm. of Ind. Aff., 1906). Congress responded by authorizing construction of the Uintah Indian Irrigation Project, stipulating expressly that:

... such irrigation systems shall be constructed and completed and held and operated ... and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto[.]

Pub. L. 59-258, Stat. 325, 375, APPX8376.

D. Successive Statutes, Regulations, Contracts and Administrative Admissions

Throughout the remainder of the twentieth century, the United States continued to assume—and to readily acknowledge—enforceable trust obligations to manage, protect, and develop the Ute Tribe’s Indian reserved water rights. In the interest of brevity, the description of those specific federal laws is left to the Argument portion of the Tribe’s brief. It is important, however, for this Court to know that at every juncture—following each successive statute, regulation and contract—the United States Department of Interior affirmatively acknowledged the federal government’s trust obligations to manage, protect and ensure the development of the Tribe’s waters. Official federal government memoranda and correspondence with the Tribe acknowledging the United States’ trust obligations to the Ute Tribe are contained in the Tribe’s appeal appendix, and the Tribe asks the

Court to take judicial notice of the Defendant's judicial and administrative admissions contained in those official governmental records. *See, e.g.*, Department of Interior Regional Solicitor's 1988 Memorandum on the United States' Trust Obligations to the Ute Tribe, APPX871-888; Department of Interior Solicitor's Memorandum of 1995, captioned "Storage of Indian Water Rights Water in the Uinta Basin Replacement Project Facilities;" APPX896-916; Department of Interior Memorandum of 7/11/1996, certifying lands served by the Uintah Indian Irrigation Project to secure federal funding for the Uintah Basin Replacement Project, APPX117-118; and the Department of Interior Regional Solicitor's 1988 Memorandum on the United States' Trust Obligations to the Ute Tribe, APPX1324-1349.

SUMMARY OF THE ARGUMENT

The lower court's dismissal of the Tribe's Amended Complaint is premised on misapplications of law, selective consideration of jurisdictional facts, and misreadings of the Tribe's well-pled Claims for Relief.

First, in finding no federal law establishing the government's fiduciary duties the lower court wrongly presumed that the Tribe relied solely upon the waivers of sovereign immunity contained in the Tucker Act and the Indian Tucker Act for its breach of trust claims. It failed entirely to consider the United States' clear waiver of sovereign immunity in the Act of June 21, 1906 ("1906 Act").

Moreover, the Tribe identified numerous other federal laws that, taken together, firmly establish fiduciary duties relating to the United States' management and oversight of the Tribe's water rights and infrastructure. The lower court applied the wrong standard when determining whether these laws gave rise to fiduciary duties and failed to consider them collectively as binding precedent requires.

The lower court further erred by ruling the Tribe's claims for unconstitutional taking and breach of contract are untimely. Because the scope of the takings alleged – and thus the corresponding amount of compensation required – had been indeterminate until very recently, the “stabilization doctrine” allowed the Tribe to wait until the gravity of the takings became clear. The lower court erred by likening the evolving scope of the United States' unconstitutional taking to a single unlawful event with predictable harms extending into the future. Similarly, the lower court's finding that the Tribe's breach of contract claim accrued when the contract was executed decades ago defies logic because the contractual obligation breached did not arise until 2005.

Finally, the Tribe did not waive its breach of contract claim under its 2012 Settlement Agreement with the United States because this claim falls well outside the scope of the Agreement's waiver.

STANDARD OF REVIEW

When a complaint is dismissed for lack of subject matter jurisdiction under

Rule 12(b)(1), or for failure to state a claim upon which relief can be granted under Rule 12(b)(6), this Court reviews the legal basis of the lower court's dismissal *de novo*. *Walby v. U.S.*, 957 F.3d 1295 (Fed. Cir. 2020).

In determining whether dismissal for lack of subject jurisdiction was warranted, the Court “must view the alleged facts in the complaint as true, and if the facts reveal any reasonable basis upon which the non-movant may prevail, dismissal is inappropriate.” *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002). “If a motion to dismiss for lack of subject matter jurisdiction...challenges the truth of the jurisdictional facts alleged in the complaint, the district court may consider relevant evidence in order to resolve the factual dispute.” *Moyer v. U.S.*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) (quoting *Reynolds v. Army and Airforce Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988)). Engaging in findings of fact on a motion to dismiss for lack of subject matter jurisdiction is proper only where “the jurisdictional facts in the complaint are challenged.” *Id.*

ARGUMENT

I. The Lower Court Erred in Ruling that the Tribe Failed to Identify Enforceable Trust Duties on the Part of the United States Falling under the Lower Court's Subject Matter Jurisdiction

The trust relationship between the United States and Indian tribes is a foundational tenet of federal Indian law. The United States has “charged itself with moral obligations of the highest responsibility and trust.” *Seminole Nation v.*

United States, 316 U.S. 286, 297 (1942). The United States’ “conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards.” *Id.* The United States and its agencies and officials have had a fiduciary relationship with the Ute Indians since the Tribe’s aboriginal lands were ceded to the United States by Mexico under the 1848 Treaty of Guadalupe Hidalgo. *Ute Indians v. United States*, 45 Ct. Cl. 440, 442-3 (Ct. Cl. 1910). Indeed, in 1849—the year following the Treaty of Guadalupe Hidalgo—the United States executed treaties with the Indian inhabitants of the lands ceded by Mexico, and those 1849 treaties placed the Indian inhabitants of the ceded lands, including the Ute Tribe, “under the exclusive jurisdiction and protection of the ... United States.” *Navajo Nation v. U. S. Dep’t. of Interior*, 996 F.3d at 628 (citing Treaty with the Navajo, 1849 art. I (Sep. 9, 1849), 9 Stat. 974. APPX1411-1413. The 1849 Treaty with the Utah [Indians]—including the Ute Indians—contains substantially similar language, stating:

The Utah tribe of Indians do hereby acknowledge and declare they are lawfully and exclusively under the jurisdiction of the Government of said [United] States, and to its power and authority they now unconditionally submit.

Treaty with the Utah, 1849, art. I (Sep. 9, 1850), 9 Stat. 984.¹ APPX1421-1423.

¹ As authorized by the Indian Reorganization Act of 1934, 25 U.S.C. § 5123, three bands of the Greater Ute Nation organized as the present-day Ute Indian Tribe of the Uintah and Ouray Reservation in 1936. APPX105.

Today, the United States' trust responsibility to the Ute Tribe is manifest in the Tribe's critical need for sufficient and reliable access to water to sustain a permanent homeland on the arid land upon which it was placed at the hands of the Federal Government. In 1908, the U.S. Supreme Court issued its seminal opinion in *Winters v. United States*, 207 U.S. 564, in which the Court found that the United States reserved water for the benefit of the Indians upon establishing an Indian reservation, even where the instrument setting aside land for the reservation was silent on the issue of water rights. The *Winters* doctrine mandates that "when the Federal Government withdraws its land from the public domain" for the purpose of establishing an Indian reservation, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)). Indian water rights reserved pursuant to the *Winters* doctrine, referred to herein as "reserved water rights," have a priority dating back to the establishment of the reservation. *Arizona v. California*, 373 U.S. 546, 601 (1963).

The United States' trust responsibility over the Tribe's reserved water rights under the *Winters* doctrine is especially strong where, as here, the Tribe's reserved water rights are sourced from the Colorado River and its tributaries. As the Ninth Circuit recently recognized in *Navajo Nation, supra*, the *Winters* doctrine confers

upon the Federal Government an “irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the [Tribe]’s inhabitants in their permanent home reservation.” *Navajo Nation*, 996 F.3d at 638-41. This trust duty is bolstered by the Federal Government’s “pervasive control over the Colorado River.” *Id.* at 632, 641.

The Tribe’s federal trustee has continuously placed the Tribe in a position of reliance to ensure the Tribe’s reserved water rights are secured, protected, and managed in the interests of the Tribe and its members. The United States has accepted an enforceable trust responsibility over tribal trust corpus, including the Tribe’s *Winters* reserved water rights and associated water infrastructure, not only by exercising pervasive control over the Tribe’s reserved water rights and the Colorado River from which they are sourced, but also by accepting a specific duty to secure and protect the Tribe’s “paramount right” to its Reservation water resources through federal legislation.

Yet, the lower court has mistakenly concluded that the Tribe has failed to identify any federal law establishing a trust duty on the part of the United States that is enforceable in the Court of Federal Claims. The lower court erred in dismissing the Tribe’s breach of trust claims under Rule 12(b)(1) by (i) applying an incorrect standard in its jurisdictional analysis of the Tribe’s breach of trust claims arising under the 1906 Act (ii) failing to review and consider the various sources of federal

law cited by the Tribe *in pari materia*; (iii) misapplying the standard for determining the existence of a fiduciary duty enforceable in the Court of Federal Claims under the Tucker Act and Indian Tucker Act; and (iv) misconstruing the 1899 Act and the specific, non-discretionary trust duties established thereunder.

A. The Lower Court Erred in Applying the Tucker Act Jurisdictional Standard for Breach of Trust Claims Arising under the 1906 Act

The lower court dismissed all sixteen (16) of the Tribe’s breach-of-trust claims against the United States for lack of subject matter jurisdiction. While this ruling was erroneous for a number of reasons discussed in further detail throughout this Brief, one reason was that the lower court mistakenly presumed that the Tribe relied exclusively on federal statutes known respectively as the Tucker Act and the Indian Tucker Act as its sole source of law waiving the United States’ sovereign immunity from suit. The lower court failed altogether to consider the waiver of sovereign immunity contained in the Act of June 21, 1906, 34 Stat. 325 (“1906 Act”).

“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*). In its Opinion and Order, the lower court found that for all breach of trust claims, the Tribe must “identify a substantive source of law that establishes specific fiduciary duties or other duties,

and allege that the Government has failed faithfully to perform those duties.” APPX4. However, this standard only applies where the plaintiff is relying on the 1887 Tucker Act, 28 U.S.C. § 1491, and/or the Congressional Act commonly referred to as the “Indian Tucker Act,” 28 U.S.C. § 1505 (collectively, the “Tucker Acts”) as its source of the United States’ waiver of sovereign immunity.

The Supreme Court has confirmed that the Tucker Acts establish a waiver of the United States’ sovereign immunity from suit for monetary damages. However, the Supreme Court has also found that the Tucker Act “does not create any substantive right enforceable against the United States for money damages.” *U.S. v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *U.S. v. Testan*, 424 U.S. 392, 398 (1976)). The same is true for claimants under the Indian Tucker Act. *Id.* At 538-39. Thus, the claimant must look outside the Tucker Acts to identify a separate source of federal law establishing a cause of action against the United States that falls within the scope of the waiver of sovereign immunity contained in the Tucker Acts.

However, despite the lower court’s presumption to the contrary, the Tucker Acts are not the exclusive source of law cited by the Tribe that waive the United States’ sovereign immunity for the Tribe’s breach of trust claims. The Tribe also cites the 1906 Act in its Amended Complaint. The operative language of the 1906 Act states that that title to the irrigation facilities that became known as the UIIP shall belong to the United States, through the Secretary of Interior, “in trust for the

Indians” and that the Secretary “may sue or be sued in matters relating thereto.” 1906 Act, APPX837.

It is well-settled that the United States’ consent to “sue and be sued” is a waiver of its sovereign immunity. In *Federal Housing Administration, Region No. 4 v. Burr*, 309 U.S. 242, 244-45 (1940), the Supreme Court held a statute allowing the Federal Government to “sue and be sued” constitutes a waiver of sovereign immunity that must be “liberally construed.” In *F.D.I.C. v. Meyer*, 510 U.S. 471, 472 (1994), the Supreme Court held a statutory provision allowing a federal agency to “sue and be sued” has the effect of “fully waiv[ing]” the agency’s sovereign immunity from suit absent a “clear showing” that Congress did not intend the clause to have this effect.

The 1906 Act thus includes a clear waiver of sovereign immunity through its “sue and be sued” clause, particularly when adopting the requisite “liberal construction” of this clause, in accordance with Supreme Court precedent. Further, the waiver under the 1906 Act is distinguishable from the waiver under the Tucker Acts because the 1906 Act ties its waiver specifically to “matters relating” to the Interior Department’s Congressional directive to hold the UIIP as a trust asset for the benefit of the Indians. Thus, while the Tucker Act’s waiver requires plaintiffs to look outside that statute for a separate source of law creating a cause of action,

Congress has expressly stated the waiver in the 1906 Act applies to claims to enforce the United States' obligation to hold the UIIP in trust for the benefit of the Indians.

Because the 1906 Act independently establishes a federal trust duty over “matters relating” to the UIIP and a waiver of the United States' sovereign immunity for express purpose of enforcing this trust, the 1906 Act was sufficient to establish the subject matter jurisdiction of the lower court to preside over its breach of trust claims without the need to invoke the Tucker Acts or the jurisdictional analysis thereunder.

B. The Lower Court's Conclusion that the Tribe Failed to Identify Enforceable Fiduciary Duties on the Part of the United States Contradicts Binding Supreme Court Precedent

Irrespective of the 1906 Act discussed in the preceding Section, the lower court has subject matter jurisdiction over the Tribe's breach-of-trust claims pursuant to the Tucker Acts.

The U.S. Supreme Court's 1983 *Mitchell II* decision is the hallmark case for breach-of-trust claims brought under the Tucker Acts, establishing the requirements that claimants must meet to show there is a fiduciary responsibility enforceable against the United States in the Court of Federal Claims. In *Mitchell II*, Indian landowners from the Quenalt Tribe sought monetary damages from the United States for breaching its fiduciary duties by mismanaging timber resources held in trust for the allottees. The Supreme Court concluded that the federal timber management

statutes and regulations relied upon by the Indian landowners, read in conjunction with one another, established an enforceable fiduciary duty to properly manage Indian timber because they conferred upon the U.S. a “pervasive” role in the sale of timber from Indian land touching “virtually every aspect of forest management.”

Id. at 219-20. In arriving at this conclusion, the Court reasoned:

[a] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. at 225.

The Court’s *Mitchell II* decision came at the heels of the Court’s 1980 decision in *United States v. Mitchell*, 445 U.S. 535 (1980), in which the Court found the General Allotment Act’s reference to allotted lands being held in trust was by itself insufficient to establish a cause of action for money damages against the United States for its alleged failure to adequately manage allotted forest lands. The Court distinguished between the unenforceable “bare trust” language used in the General Allotment Act and the enforceable fiduciary duties created by the federal statutes and regulations dealing with Indian timber management:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Id. at 224.

On March 4, 2003, the Supreme Court issued two decisions expounding upon the standard articulated in its *Mitchell II* decision. The first addressed here is *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). In *White Mountain Apache*, the White Mountain Apache Tribe had sued the United States for breach of trust, seeking monetary damages against the United States for allowing a former military post owned by the United States in trust for the Tribe to fall into disrepair. The statute in giving rise to the enforceable fiduciary duty was a 1960 Act of Congress stating that the military post would be “held by the United States in trust for the White Mountain Apache Tribe.” *White Mountain Apache* at 469 (citing Pub.L. 86–392, 74 Stat. 8 (1960 Act)). The Court concluded that this 1960 Act was sufficient to establish enforceable fiduciary duties on the part of the United States. The Court distinguished the limited language of the 1960 Act directing the Government to hold the property in trust for the Tribe from similar trust language in the General Allotment Act creating only a “bare trust” unenforceable under the Tucker Acts based on the degree of control exercised by the United States over the asset in question. The Court found that while the General Allotment Act allowed

the Indian landowners to occupy and exercise manage their lands, the 1960 Act rendered the trust property in question subject to the Government's use, occupation, and control. *Id.* at 475. Following the precedent set by *Mitchell II*, the Supreme Court in *White Mountain Apache* concluded:

The [1960 Act] expressly defines a fiduciary relationship in the provision that Fort Apache be held by the Government in trust for the Tribe, then proceeds to invest the United States with discretionary authority to make direct use of portions of the trust corpus. It is undisputed that the Government has to this day availed itself of its option. As to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*. Although the 1960 Act, unlike the statutes cited in that case, does not expressly subject the Government to management and conservation duties, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the Government as trustee.

Id. at 466-67.

The Court found that the fiduciary relationship in matters relating to the trust property established under the 1960 Act gave rise to a "fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee." *Id.* at 475. Invoking common law trust principals, the Court held the Tribe had an enforceable breach of trust claim based on the "commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.*

That same day, the Supreme Court issued its ruling in *United States v. Navajo*

Nation, 537 U.S. 488 (2003) (*Navajo I*). In *Navajo I*, the Supreme Court held that the Indian Mineral Leasing Act (“IMLA”), which gave the Secretary authority to approve mineral leases negotiated by Indian tribes, did not establish a fiduciary duty needed to underpin the Navajo Nation’s claim that the Secretary breached its trust responsibility by approving coal leases with an improperly low royalty rate. *Navajo I* at 488-89. The Supreme Court determined this controversy fell “within the domain of *Mitchell I*” because the Navajo Nation’s claims “[did] not derive from any liability-imposing provision of the IMLA or its implementing regulations.” *Id.* at 489. The Navajo Nation was therefore required to “identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.” *Id.* at 490. Because the IMLA “simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective” and gave the Secretary neither a managerial role over the trust assets nor a duty to protect the best interests of its beneficiaries, the statute could not give rise to money damages against the United States. *Id.* at 490-91.

The “pervasive control” standard under *Mitchell II* was very recently applied in the context of Indian reserved water rights in the Ninth Circuit’s 2021 opinion in *Navajo Nation v. U.S. Department of Interior, et al.*, 996 F.3d at 641. In *Navajo Nation*, the Navajo Nation had alleged that the U.S. Department of Interior breached

its trust responsibility by failing to take the Navajo Nation's unadjudicated *Winters* reserved water rights into account when adopting shortage contingency guidelines for the Colorado River. *Id.* at 632-33. The U.S. District Court for the District of Arizona dismissed the suit on subject matter jurisdiction grounds, finding that the plaintiff had failed to identify any source of law conferring an enforceable trust duty on the United States. *Id.* at 633.

The Ninth Circuit reversed the district court's dismissal, finding that the *Winters* doctrine, especially when viewed in conjunction with the Federal Government's "pervasive control" over the Colorado River at large and a provision from the Navajo Nation's 1868 Treaty that contemplated the land set aside for the Navajo Nation was intended for agricultural development, created a judicially enforceable fiduciary duty. *Id.* at 640-42.

The Ninth Circuit found that, under *Winters*, the Federal Government has "an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation." *Id.* at 634. The court further found that the provisions from the 1868 Treaty contemplating agricultural development of the Navajo Reservation affirmed and strengthened the "promise of water rights" that is inferred into Indian treaties under *Winters*. *Id.* at 640.

Although the Navajo Nation's lawsuit was not brought in the U.S. Court of

Federal Claims under the Tucker Acts, the Ninth Circuit applied *Mitchell II*'s "pervasive control" standard, finding that the United States' pervasive control over the management of the Colorado River bolstered the enforceability of the trust duties established under *Winters*:

the Supreme Court's reasoning in *Mitchell II* is pertinent: just as the statutes and regulations in that case gave the Secretary a "pervasive role in the sales of timber from Indian lands, 463 U.S. at 219, 103 S.Ct. 2961," so too do the [Boulder Canyon Project Act] and other components of the Law of the River confer broad authority upon the Secretary to manage and contract for Colorado River water, *see, e.g.*, BCPA, 43 U.S.C. § 617d ("No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."). This pervasive control over the Colorado River, coupled with the Nation's *Winters* rights, outlines the scope of Federal Appellees' trust duties.

Id. at 641.

Pursuant to the foregoing precedent, a claimant meets its burden of "identify[ing] a substantive source of law that establishes specific fiduciary duties or other duties" when the source(s) of law cited by the claimant, viewed together, contain statutory language identifying a specific trust duty or establish elaborate and pervasive federal control over property that is recognized as trust corpus beneficially owned by the Tribe. The Tribe has easily satisfied this threshold requirement for subject matter jurisdiction under the Tucker Acts, as the Tribe has cited a myriad of federal laws not only conferring upon the United States a specific duty to secure and protect tribal water rights, but also giving the United States pervasive and elaborate

control over the management and disposition of tribal water rights and related water infrastructure owned in trust for the benefit of the Tribe.

C. The Lower Court Misapplied the Legal Standard for Determining Whether Federal Law Establishes a Fiduciary Duty Sufficient for Claims against the United States for Monetary Damages under the Tucker Acts

The Tribe identified a myriad of federal laws that establish a fiduciary duty within the subject matter jurisdiction of Court of Federal Claims. The lower court misconstrued the standard for establishing matter jurisdiction and erroneously ruled the Tribe failed to set forth a breach of trust action against the United States as follows:

In sum, the sources of law relied on by the Tribe do not establish that the United States has a specific trust obligation to ensure adequate water delivery or storage on the Tribe’s Reservation. In *Mitchell I*, the Supreme Court found that “the [Allotment] Act [did] not unambiguously provide that the United States ha[d] undertaken full fiduciary responsibilities as to management of allotted lands.” Here, too, these statutes and regulations contain no language unambiguously establishing the Secretary’s full fiduciary responsibility to manage the Tribe’s water delivery and storage.

APPX8.

The elements necessary for a breach of trust claim within the subject matter jurisdiction of the Court of Federal Claims are set forth in *Mitchell II*, *White Mountain Apache*, and *Navajo I*. These cases establish fiduciary obligations on the part of the United States whenever one or more sources law give the United States “pervasive” or “elaborate” control over the management of Indian trust property and

“[a]ll the elements of a common law trust are present: a trustee...a beneficiary...and a trust corpus.” *Mitchell II* at 225. The laws set forth by the Tribe need not expressly state that the property at issue is being managed in trust for Indian beneficiaries; the United States owes fiduciary duties wherever it may exercise control or occupation of trust property. *White Mountain Apache* at 475.

The lower court’s dismissal of the Tribe’s claims on the basis that “sources of law relied on by the Tribe do not establish that the United States has a specific trust obligation to ensure adequate water delivery or storage on the Tribe’s Reservation” does not adhere to the Supreme Court precedent set forth above. It erroneously required the Tribe to identify a source of law that expressly articulates a particular duty to “ensure adequate water delivery or storage on the Tribe’s Reservation.” APPX8. The federal laws cited by the Tribe are not wanting of specificity, and requiring an explicit announcement of a fiduciary duty to find one present is wholly inconsistent with both *Mitchell II* and *White Mountain Apache*, both of which revolved around statutes and regulations that an enforceable fiduciary responsibility despite not containing express language spelling out the precise actions required to uphold the fiduciary duties at issue.

To establish a fiduciary duty owed by the United States, the Tribe need only demonstrate pervasive control and the existence of a trust corpus. Express announcements of a fiduciary duty are not required. *See Mitchell II* at 225

(fiduciary relationship established when the law grants pervasive or elaborate government control over trust property and “[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus.); *White Mountain Apache* at 474-475 (statute “defines a fiduciary relationship” in its provision mandating property would be held in trust for the Tribe and giving the United States “discretionary authority to make direct use of portions of the trust corpus.”) The lower court disregarded this precedent when ruling the Tribe was required to identify statutory language specifically requiring the United States to “ensure adequate water delivery or storage on the Tribe’s Reservation.” APPX8.

Here, the United States assumed elaborate and pervasive control over tribal trust corpus, leaving the Tribe in the unenviable position of reliance on its federal trustee to properly manage and protect its critical water resources. Through its elaborate and pervasive control – to the exclusion of the Tribe – of critical water infrastructure, the United States has asserted complete dominance over the Tribe’s Indian reserved water rights and threatened the Ute Indians’ continued existence as a community and a culture.

Numerous federal laws illustrate the federal government’s comprehensive dominion over these precious resources, and the Tribe’s consequent powerlessness. This analysis must begin with the Treaties between the United States and the Ute

Indians. Just like the 1868 Treaty analyzed by the Ninth Circuit in *Navajo Nation v. United States*, the Ute Treaties were specifically written to enable the Ute Indians to pursue agricultural development of their lands and to facilitate these agricultural pursuits. Article 10 of the 1863 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 the 1863 Treaty obligates the United States to protect the Ute Indians “in the quiet and peaceable possession of their said lands and property.” Ute Treaty of 1863, Article 10, APPX462. The language in the 1868 Treaty is even more expansive, providing that Ute Indians who “desire to commence farming ... shall have the privilege to select” land for farming and assistance from the United States to bring the land into cultivation. Ute Treaty of 1868, Articles 7 and 9, APPX468-469.

Just as in *Navajo Nation*, the Ute Treaties contain federal covenants to support and foster the agricultural future of the Ute Indians and thereby provide the statutory foundation to enforce the “irreversible and dramatically important trust duty...to ensure adequate water for the health and safety of the [Tribe]’s inhabitants in their permanent home reservation” conferred under the *Winters* doctrine. *Navajo Nation*, 996 F.3d at 634. Furthermore, just like the Navajo Nation, the Ute Indian Tribe’s *Winters* reserved water rights are sources from the Colorado River system. Therefore, the Federal Government’s “pervasive control” over the Colorado River

bolsters the enforceability of this Federal Government's trust duties under the *Winters* doctrine. *Id.* at 641.

While the Navajo Nation prevailed with only its Treaty providing the statutory foundation to enforce the United States' trust duties to uphold the Nation's *Winters* reserved water rights, the Ute Indian Tribe finds additional and independently significant statutory support in the Act of March 1, 1899, 40 Stat. 941 ("1899 Act"). As outlined *supra*, the 1899 Act gave the Secretary authority to grant rights-of-way to non-Indians to support their use and appropriation of water in and around the Tribe's reservation homeland, subject at all times to the "paramount" rights of the Ute Indians to their Reservation water resources and the Secretary's duty 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..." 1899 Act, APPX836. The 1899 Act, read in conjunction with the Ute Treaties and viewed in light of the Federal Government's pervasive control over the Colorado River, gives the Ute Indian Tribe an even stronger basis for enforcing the trust duties attached to the *Winters* doctrine than the prevailing Navajo Nation, which had no analogous statute to cite.

The 1899 Act is significant not just in the federal duties it independently establishes and upholds vis-a-vis *Winters*, but also in laying the groundwork for the United States' pervasive and elaborate control over the Tribe's reserved water rights

that define the United States' treatment of the Tribe's reserved water rights for the century-plus to follow. The underpinning of the Secretary's duty to secure and protect the "paramount" water rights of the Ute Indians was the Secretary's authority to grant rights-of-way to allow non-Indians to appropriate water in and around the Tribe's reservation, placing the Tribe at the mercy of the United States with ensure a sustainable water future for the Tribe and its members. This course of conduct continued after the *Winters* decision. In 1916, the United States unilaterally filed a Bill of Complaint to adjudicate the Tribe's reserved water rights in the Lake Fork and Uinta River Basins. APPX1424-1464. This effort resulted in two 1923 federal decrees not only adjudicating these tribal reserved water rights but also requiring these reserved water rights to be delivered to Indian lands through the UIIP. APPX116; APPX1465- 1481. As a result of the United States' actions to assume control over the Tribe's reserved water rights, the Tribe has been given no choice but to rely upon its federal trustee to administer and manage its water rights on its behalf – to the Tribe's great detriment.

The United States further exercises control over the Tribe's reserved water rights through its construction and management of water storage infrastructure in the Uinta Basin. In the 1956 Colorado River Storage Project Act, Congress gave the Secretary the exclusive authority to "construct, operate, and maintain" the Central Utah Project, a major water infrastructure project designed to facilitate the

development of unused waters in Utah. APPX143; Colorado River Storage Project Act of 1956, 70 Stat. 105, 43 U.S.C. § 617, *et seq.* The principal unit of the Central Utah Project was the Bonneville Unit, intended to divert water from the Uinta Basin to the populous Wasatch Front. APPX143. The federal government exploited its vast advantage in bargaining position to coax the Tribe into an agreement promising it critical water storage infrastructure in exchange for the Tribe's agreement to defer developing a portion of its unadjudicated reserved water rights. APPX143-146. The Tribe's resulting deferral of its water rights allowed the Bonneville Unit to move forward. APPX143. At bottom, the United States (1) assumed pervasive control over the Tribe's reserved water rights, (2) failed to abide by the fiduciary duties that arose therefrom, and then (3) leveraged its own failures divert the Tribe's water to downstream users and make it even more reliant upon the United States for critical water infrastructure.

The trust corpus at issue in the Tribe's claims includes the UIIP infrastructure itself. Like the property at issue in *White Mountain Apache*, Congress expressly designated UIIP infrastructure as trust assets – in this case, through the 1906 Act. Federal regulations promulgated in 1957 specific to the UIIP, and other subsequent federal regulations that govern all Indian irrigation projects confirm the BIA retains exclusive administrative authority over the operation and maintenance of the UIIP. APPX126-129.

Similarly, the Act of May 28, 1941, Pub. L. 77-83, 55 Stat. 209 (“1941 Act”) authorized the Secretary to transfer water rights between lands within the UIIP project area. APPX133. Congress intended this Act to optimize UIIP operations and rectify the “desperate economic situation” caused by the United States’ mismanagement of the project. APPX133. The 1941 Act further illustrates the United States’ pervasive and elaborate control over both categories of trust corpus – the Tribe’s reserved water rights and the UIIP infrastructure – by allowing United States to dispose of tribal water rights to optimize UIIP operations.

Because these laws collectively establish pervasive and elaborate control over a specific tribal trust corpus, these laws necessarily establish fiduciary duties with respect to the United States’ management of these assets as the Tribe’s trustee.

D. The Lower Court Erred in Failing to Review and Consider the Sources of Federal Law Cited by the Tribe *in Pari Materia*

In determining whether federal law established an enforceable fiduciary duty within the waiver of its sovereign immunity under the Tucker Acts, the lower court addressed each source of law cited by the Tribe in isolation contradicting Supreme Court precedent. APPX5-8.

For instance, the Supreme Court in *Mitchell II* evaluated the federal statutes and regulations governing the United States’ management of Indian timber resources not as isolated sources of law, but as a body of law to be read and construed together.

Mitchell II at 219-22. However, the Court did not seek to determine merely whether any one of these laws individually established fiduciary duties relating to the management and sale of Indian owned timber. Rather, the Court read these sources of law together and concluded “[t]he timber management statutes and the regulations promulgated thereunder, establish the ‘comprehensive’ responsibilities of the Federal Government in managing the harvesting of Indian timber.” *Id.* at 222. See also, *U.S. v. Navajo Nation*, 556 U.S. 287, 994 (2009) (In *Mitchell II*, “We understood [25 U.S.C. § 406(a)] – *in combination with several other provisions and the applicable regulations* – to create a fiduciary duty with respect to Indian timber.” (emphasis added)). The Ninth Circuit in *Navajo Nation v. Department of Interior* followed suit, applying the Navajo Treaties, the *Winters* doctrine, and various sources of federal law giving the United States pervasive control over the Colorado River together in ruling that the United States had an enforceable trust duty manage and protect the Navajo Nation’s reserved water rights. *Navajo Nation*, 996 F.3d 641-42.

As outlined in the preceding section, the Tribe has cited a myriad of federal laws that collectively demonstrate United States’ longstanding assumption of pervasive and elaborate control over the Tribe’s reserved water rights and the UIIP, leaving the Tribe with little or no agency over its own water rights. The lower court was required to review these sources of law together in determining whether the

Tribe had demonstrated a level of control over trust corpus sufficient to support a cause of action for breach of trust under the Tucker Acts. The lower court erred by merely assessing the impact of each law in isolation, flouting Supreme Court precedent.

E. The Lower Court Erred in Concluding the 1899 Act is a “Discretionary” Statute that did not establish a Binding Duty to Secure and Protect the Tribe’s Water

The lower court has failed to accurately consider and account for the specific fiduciary duties set forth in the statutory language of the 1899 Act in conducting its jurisdictional analysis under the Tucker Acts.

The 1899 Act authorized the Secretary to grant rights of way for dams, ditches and canals to support non-Indian settlement in and around the homeland of the Ute Indian Tribe, on the express conditions that:

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

1899 Act, APPX836. The statutory language of the 1899 Act specifically identifies the Indians’ “paramount” rights to water on their reservation and expressly requires the Secretary to take measures necessary to (i) secure water needed by the Indians to satisfy their present and future water uses, and (ii) protect the rights and interests

of the Indians in overseeing the authorized activities affecting reservation water resources.

Inexplicably, the lower court found the 1899 Act conferred only a “discretionary duty to issue regulations” that did not rise to the level of a fiduciary relationship. APPX5. The term “discretionary duty” is an oxymoron. One is either given discretion on whether or act, or one is given a duty requiring them to act. The 1899 Act 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. The 1899 Act’s directive to the Secretary to issue regulations “as he may deem necessary” to uphold this duty in no way renders the duty itself discretionary. To conclude otherwise would render the term “duty” obsolete, controverting the “cardinal principle” that a statute must construed so that “no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Thus, even assuming *arguendo* that the lower court accurately applied the Tucker Act standard in requiring that the Tribe “unambiguously establish[] the Secretary’s full fiduciary responsibility to manage the Tribe’s water delivery and storage,” the express statutory language of the 1899 Act satisfies even the heightened Standard fabricated by the lower court.

II. The Lower Court Erred by Ruling the Tribe's Claims for Unconstitutional Taking and Breach of Contract are Untimely

The applicable statute of limitations for claims brought in the Court of Federal Claims is 28 U.S.C. § 2501, which states that “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.” Generally, a claim “accrues” for the purpose of triggering the six-year statute of limitations when “all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.” *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). However, a claimant will not be required to “resort to either piecemeal or premature litigation” in circumstances where the scope of the unlawful act or omissions giving rise to the claim cannot be ascertained. *U.S. v. Dickinson*, 331 U.S. 745, 749 (1947). Because the statute of limitations under 28 U.S.C. § 2501 is jurisdictional, the court may consider evidence outside the pleadings where jurisdictional facts contained in the complaint are disputed. *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United States*, 672 F.3d 1021, 1029 (Fed. Cir. 2012).

The Tribe's Amended Complaint asserts two Claims for Relief for the United States' unconstitutional taking of tribal property rights without just compensation. APPX179-181. The first arises from the 1967 Midview Exchange Agreement and subsequent acts and omissions of the United States depriving the Tribe of its senior-

priority reserved water rights without just compensation. The second arises from the United States' asserted "waiver" of the Tribe's contractual property rights under the 1965 Deferral Agreement and the 1992 Central Utah Project Completion Act and subsequent failure to provide just compensation to the Tribe. The Amended Complaint also asserts a breach of contract claim for the United States' failure to perform under the 1965 Deferral Agreement.

The lower court incorrectly held these claims were barred by the six-year statute of limitations under 28 U.S.C. § 2501. With respect to the Tribe's unconstitutional taking claims, it failed to properly apply the "stabilization" doctrine and failed to consider jurisdictional facts where necessary to determine when the Tribe's claims actually accrued. As to the breach of contract claim, the lower court ignored the plain language of the Tribe's Claim for Relief and failed to account for the 1965 Agreement's undetermined performance deadline when ascertaining that claim's accrual date.

A. The Tribe's Claims of Unconstitutional Taking are Timely

The lower court dismissed the Tribe's unconstitutional taking claim upon finding that it "accrued upon execution of the Midview Exchange Agreement in 1967, well before the six-year statute of limitations period prescribed by 28 U.S.C. § 2501." APPX9. But this claim is not premised solely upon the terms of the 1967 Midview Exchange Agreement, but also subsequent acts and omissions by the

United States that gradually increased the disparities between the value of the senior-priority water rights it divested from the Tribe under that Agreement and that of what the Tribe received in exchange. APPX176-177. These include (1) failing to transfer the Midview Property into trust for the Tribe – a failure the Tribe only recently became aware of – and (2) the United States’ classification of Indian lands that would otherwise receive irrigation water from Duchesne River pursuant to the Midview Exchange as temporarily or permanently non-assessable, without fulfilling its responsibility to render such lands assessable again.

The lower court erred by not applying the stabilization doctrine to these underlying facts and thus failing to accurately determine when this claim accrued. The stabilization doctrine was first articulated in *United States v. Dickinson*, 341 U.S. at 749. The plaintiff in *Dickinson* sued the United States for taking property without just compensation, alleging a dam it authorized and constructed was impounding water and flooding of their lands. *Id.* The dam began to impound water in 1936, but the plaintiff did not assert claims until seven years later in 1943. Although the plaintiff failed to file suit within six years after the unconstitutional taking took place, the Supreme Court ruled the claim could nevertheless move forward because the flooding and resulting harm continued to recur long after the unconstitutional taking itself took place. To account for the fact that the scope of the taking and corresponding amount of just compensation could not immediately

be ascertained when the taking first occurred, the Court set forth the “stabilization” doctrine as follows:

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding ‘causes of action’—when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him— for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided” and that the property owner “is not required to resort to piecemeal or premature litigation to ascertain just compensation for what is really ‘taken’”.

Id. at 748-49.

This Court consistently applies the stabilization doctrine when the United States has made promises to the party impacted to rectify or mitigate a taking. *See, e.g., Applegate v. U.S.*, 25 F.3d 1579, 1582 (Fed. Cir. 1994) (finding that the “gradual character” of the alleged taking, “compounded by the Government’s promises” to

mitigate its effects, have “made the accrual [date] of the landowner’s claim uncertain.”).

The Tribe’s unconstitutional taking claim falls squarely within the principle at the heart of the stabilization doctrine, which is that a claimant should not have to resort to piecemeal or premature litigation in order to preserve the timeliness of their claim. Contrary to the lower court’s conclusion that this claim accrued when the Midview Exchange Agreement was executed, the harms arising from this unconstitutional taking were nowhere near “stabilized” at this time. Subsequent actions and omissions by the United States under the auspices of this Agreement have ultimately robbed the Tribe of its water and continue to diminish the value of its senior-priority water rights and other property intended to serve as compensation for deferral of those rights. APPX176-177. As set forth in the Tribe’s Claim for Relief, these misdeeds include both the United States’ failure to transfer the Midview Property into trust for the Tribe and its continued illegitimate designation of more and more Indian lands as non-assessable. *Id.* The value of what the Tribe has actually received in compensation for the continuous loss of water it now suffers could not have been determined until these subsequent acts occurred and the scope of harm arising from them became apparent. The Tribe’s taking claim clearly had not “stabilized” upon the execution of the Midview Exchange Agreement in 1967 and cannot have accrued until years later when the scope of harm was realized.

Notwithstanding, the lower court wrongly concluded the stabilization doctrine did not apply. Quoting *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 164 (1999), it stated “[i]f a claim is “based upon a single distinct event, although it may have continued ill effects later on, [it] is not a continuing claim.” APPX9-10. As an initial matter, this *Apache Tribe* holding concerns application of the continuing claims doctrine to a breach of trust claim and thus does not even address unconstitutional taking claims or how the stabilization doctrine impacts the accrual of such claims. And crucially, the Tribe’s takings claims do not arise from a single discrete event that took place outside the limitations period. The lower court thus failed to recognize which actions truly set in motion the harms now felt by the Tribe, when the ensuing harms became apparent, and how binding precedent requires courts to take these factors into account when determining when a takings claim accrued.

The stabilization doctrine also applies to the Tribe’s takings claims by virtue of the United States’ asserted “waiver” of the Tribe’s contractual property rights under the 1965 Deferral Agreement. As stated in the Tribe’s Fifteenth Claim for Relief, if deemed enforceable the involuntary “waiver” of the 1965 Deferral Agreement contained in the 1992 CUCPA constitutes an unconstitutional taking. APPX181-183.

Adopting a selective interpretation of the Tribe’s Claim for Relief, the lower

court found the 1992 Act itself marked the accrual date for the Tribe's claim. The lower court reasoned that the Tribe "participated in negotiations establishing the scheme and accepted funds pursuant to the [1992] Act, demonstrating that the Tribe had knowledge of the facts forming the basis of its claim in 1992." APPX10.

Implicit in this reasoning is the lower court's incorrect understanding that the inadequate CUPCA payment is the sole basis for the Tribe's taking claim, ignoring the Tribe's other allegations. The factual allegations underlying the Tribe's takings claims make it abundantly clear it was impossible for these claims to have stabilized upon the enactment of the CUPCA.

The lower court failed to appreciate that the CUPCA required more than just monetary payment to the Tribe to make up for the United States' past failure to satisfy its promises under the 1965 Deferral Agreement, but also construction of water storage infrastructure for the future use and benefit of the Tribe through the Uintah Basin Replacement Projects. CUPCA "mandated the development of 'replacement' systems and facilities to provide necessary tribal storage and supplemental water necessary to meet the Tribe's present and future needs given the United States' failure to satisfy its promised under the 1965 Deferral Agreement." APPX185. The Uintah Basin Replacement Projects, which were "nearing completion" at the time of the Tribe's Amended Complaint, were "designed to disproportionately allocate benefits to non-Indians and burdens to the Tribe its

members” rather than provide the Tribe with the water storage infrastructure it was yet again promised. APPX161. These critical facts were not disputed by the United States in its Motion to Dismiss, and in any event the lower court was required to accept these allegations as true in ruling on the Motion. *Moyer v. U.S.*, 190 F.3d at 1318.

The alleged “waiver” of the 1965 Deferral Agreement came in the same statutory package as a renewed requirement to construct water storage infrastructure to benefit the Tribe intended as a substitute for the long-awaited storage infrastructure promised under the 1965 Deferral Agreement that never came to fruition. Under the stabilization doctrine, the Tribe was entitled to first see whether the United States would fulfill its promise to mitigate the impacts of the purported “waiver” of the 1965 Deferral Agreement through construction of the Uintah Basin Replacement Projects before the Tribe’s taking claim accrued. *Applegate*, 25 F.3d at 1582.

Because the Tribe’s unconstitutional taking claims either have not yet stabilized or, at the very least, did not stabilize until a time falling within the six-year limitations period, they are timely and the lower court has committed reversible error by dismissing them.

B. The Tribe's Claim for Breach of Contract is Also Timely

The United States' failure to uphold its obligations under the 1965 Deferral Agreement was not limited to its unfulfilled promise to provide water storage infrastructure enabling the Tribe to use its adjudicated reserved water rights throughout the irrigation season. As stated in the Tribe's Amended Complaint, Paragraph 5 of the Deferral Agreement states that the "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." APPX11. The Tribe's Fourteenth Claim for Relief alleges that the United States failed to perform under this provision of the Deferral Agreement.

The lower court found this breach of contract claim accrued upon the enactment of the 1992 CUPCA at the latest, rendering this claim untimely. APPX11. Once again ignoring the plain language of the Amended Complaint, the lower court found:

the Tribe knew as early as 1980 that the Uintah and Ute Indian Units contemplated by the 1965 Deferral Agreement would not be constructed. Thus, because the Tribe 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.

Id. Contrary to this statement, the Tribe's Fourteenth Claim for Relief is not based on the United States' failure to construct the Uintah and Ute Indian Units of the

Central Utah Project. Per the plain language of the Complaint, the Tribe's breach of contract claim arises from the United States' failure to take the measures it was required to *beginning* in 2005 – obligations that did not even arise until thirteen years after the CUPCA was enacted. APPX180-181. The lower court thus erred yet again by concluding that this breach of contract claim accrued in 1992.

While the obligation to “diligently pursue” all phases of the Central Utah Project to “satisfy all Indian water rights” has a specified *commencement* date of January 1, 2005, there is no specified deadline to *complete* this obligation. Where a contract does not include a specified performance deadline, performance must take place “within a reasonable amount of time.” *Asco-Falcon II Shipping Co. v. U.S.*, 32 Fed. Cl. 595, 602 (1994); *Williston on Contracts* § 46:1 (4th ed.) (unreasonable delay in performance constitutes a remedial breach of contract). In determining whether the Tribe's breach of contract claim is timely, the lower court was therefore required to (1) make a determination of whether the United States' delay was reasonable, and (2) if deemed unreasonable, establish a date in which this delay was rendered unreasonable, marking the accrual date for the claim. The lower court did neither.

III. The Lower Court Erred by Ruling the Tribe's Claim for Breach of the 1967 Midview Exchange Contract was Waived under the 2012 Settlement Agreement

As a third-party beneficiary to the Midview Exchange Agreement, the Tribe included a claim for breach of contract based on the United States' failure transfer the Midview Property into trust for the benefit of the Tribe and administer the Midview Property as part of the UIIP. APPX95. The lower court ruled that this claim had been waived in the 2012 Settlement Agreement settling the Tribe's 2006 breach of trust action against the United States. Specifically, the lower court invoked Section of the 2012 Settlement Agreement, in which the Tribe waives "any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, know or unknown, regardless of legal theory, for any damages...based on harms or violations occurring before the date of the execution of this Settlement Agreement by both Parties and that relate to the United States' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources." The lower court found that, "because the Midview Property is a non-monetary trust asset, this claim was waived and released by the 2012 Settlement Agreement" (emphasis added). This expansive construction of the 2012 Settlement Agreement contradicts its plain language.

As with any contract, the "first step in the interpretation of a written [settlement] agreement is to determine whether the written understanding is clearly

stated and was clearly understood by the parties.” *King v. Department of Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997). The “words used by the parties to express their agreement are given ordinary meaning, unless it is established that the parties mutually intended and agreed to some alternative meaning.” *Id.*

Pursuant to the plain language of the 2012 Settlement Agreement, the waiver and release in Section 4 applies only to liabilities “that relate to the United States’ management or accounting of Plaintiff’s trust funds or Plaintiff’s non-monetary trust assets or resources.” Contrary to the lower court’s conclusion, the Tribe’s breach of contract claim does not relate to the management of trust resources but rather asserts the United States had a contractual obligation to transfer certain assets into trust for the Tribe but failed to do so. The Tribe’s breach of contract claim for failure to perform under the Midview Exchange Agreement thus cannot relate to the management of trust assets because the trust assets at issue never came to be.

Even assuming *arguendo* the Tribe’s breach of contract claim could fall within the scope of the waiver in the 2012 Settlement Agreement, claims relating to the Tribe’s water rights were expressly exempted from this waiver under the terms of the Agreement, including “claims for damages for loss of water resources allegedly caused by [the United States’] failure to establish, acquire, enforce, or protect such water rights.” The obligation to transfer the Midview Property into trust for the benefit of the Tribe was meant to ensure these properties supplied

irrigation water to Indian lands and ameliorate the impact of the United States' allowing non-Indian, junior-priority water users to avail themselves of the Tribe's adjudicated reserved water rights from the Lake Fork River Basin. As such, the Tribe's breach of contract claim arises from the United States' "failure to establish, acquire, enforce, or protect" the Tribe's water rights and are thus outside the scope of the waiver set forth in the 2012 Settlement Agreement.

CONCLUSION

For over a century the United States has asserted pervasive control over the Tribe's water and ultimately forced the Tribe into an involuntary state of complete dependence on its federal trustee for continued survival. The extent of the federal government's dominion over this critical resource leaves the Tribe with no recourse by which it can perpetuate its existence absent the imposition of fiduciary duties upon the entity that so completely controls its water. The law is clear that when the United States assumes such a comprehensive degree of control over a tribal trust asset, it necessarily assumes fiduciary duties and must be held to the highest standard of care. As the history of its management of the Tribe's water indicates, to hold otherwise paves the way for manifest injustice.

ORAL ARGUMENT STATEMENT

Due to the significance of the issues raised, oral argument is requested.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation under Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12672 words excluding the parts of the brief exempted under Rule 32(f). This brief complies with the type-face requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced type-face using 14 pt Times New Roman font.

By: /s/ Michael W. Holditch
Michael W. Holditch

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2022, a copy of this **OPENING BRIEF OF PLAINTIFF-APPELLANT** was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

Andrew M. Bernie
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I hereby certify that within five (5) days after notification of acceptance from the Court, seven (7) copies of the foregoing **OPENING BRIEF OF PLAINTIFF-APPELLANT**, will be delivered by courier to the Clerk of the Court, U.S. Court of Appeals for the Federal Circuit.

By: /s/ Catherine Wiland
Assistant to Michael W. Holditch

ADDENDUM

Corrected

United States Court of Federal Claims

No. 18-359 L
Filed: February 12, 2021

**UTE INDIAN TRIBE OF THE UNITAH
AND OURAY INDIAN RESERVATION,**

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Frances C. Bassett, Patterson, Earnhart, Real Bird, & Wilson, LLP, Louisville, CO, for plaintiff.

Sally Sullivan, U.S. Department of Justice, Washington, DC, for defendant.

ORDER AND OPINION

I. INTRODUCTION

This is a case about water rights in northeastern Utah.¹ Plaintiff, the Ute Indian Tribe, asserts claims against the United States Department of the Interior for breach of trust, breach of contract, and constitutional rights violations arising out of the Department's participation in the Central Utah Project and the Uintah Indian Irrigation Project. The Tribe alleges that the Department breached common law, constitutional, fiduciary, statutory, regulatory, and contractual duties owed to the Tribe. The Tribe asserts that the United States' alleged mismanagement and

¹ The Tribe filed a companion case in the United States District Court for the District of Columbia. See *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States Dep't of Interior, et al.*, No. 1:18-cv-547 (D.D.C.) (Collyer, J.). Plaintiff has filed two other similar cases: *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-357 L (Fed. Cl.) (Hodges, J.); and *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 1:18-cv-546 (D.D.C.) (Lamberth, J.).

allegedly illegal taking of tribal trust assets in the form of Indian reserved water rights entitles it to monetary damages.

The Government has filed a motion to dismiss the Amended Complaint's twenty-one claims for various deficiencies including failure to identify a money mandating duty, waiver and release, and statute of limitations. In the alternative, and only with respect to those claims previously waived and released by a 2012 Settlement Agreement, the Government asks that summary judgment be granted in its favor under Rule 56.

II. BACKGROUND

Plaintiff, the Ute Indian Tribe, is a federally recognized Indian Tribe made up of three bands of Ute people. The Tribe's Reservation, the Uintah and Ouray Reservation, is located on an arid plateau in the Green River Basin of northeastern Utah at the foot of the Uinta Mountains. The United States holds legal title as trustee to the Tribe's lands, waters, water works, and trust funds relating to these assets. The entire Reservation lies within the drainage of the Colorado River Basin. Several rivers run through the land, including the Duchesne River, Rock Creek, Lake Fork River, Yellowstone River, Uinta River, and Whiterocks River, but there is little rainfall over the summer. Thus, irrigation and water storage are important for a year-round water supply.

Plaintiff brought this suit claiming that defendant, through the Department of the Interior, committed a breach of trust by failing to provide Plaintiff with adequate water delivery and storage on its Reservation and failing to preserve Plaintiff's reserved water rights. Plaintiff claims that Defendant's trust duties flow from a series of treaties in which the Tribe ceded land to the United States in exchange for its Reservation, as well as various statutes and regulations appropriating federal funds for irrigation development. Plaintiff claims that by establishing the Tribe's Reservation and holding the land in trust, Defendant accepted a trust duty to guarantee the Tribe's water delivery and storage.

Plaintiff previously filed an action in this Court seeking money damages and an accounting for alleged mismanagement of its trust funds and non-monetary trust assets. *See generally*, Complaint, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl. Dec. 19, 2006). The lawsuit was resolved when the parties executed a settlement agreement on March 8, 2012.² In exchange for \$125 million, the Tribe waived and released the United States from any claims relating to the United States' management or accounting of Plaintiff's trust funds or non-monetary trust assets or resources. The Settlement Agreement provided for exceptions to the Tribe's release and waiver, including for claims related to alleged loss of the Tribe's water resources caused by any alleged failure by the United States to establish, acquire, enforce, or protect such water rights.

III. LEGAL STANDARDS

In deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court must accept as true the undisputed factual allegations in the complaint and must construe reasonable inferences in favor of the plaintiff. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). The plaintiff bears the burden of establishing subject matter

² ECF No. 22, Ex. D.

jurisdiction by a preponderance of the evidence. *Id.* The court may look to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988); *Hanover Ins. Co. v. United States*, 116 Fed. Cl. 303, 306 (2014); *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (stating that if the Rule 12(b)(1) motion denies or controverts the pleader’s allegations regarding jurisdiction, however, the movant is deemed to be challenging the factual basis for the court’s subject matter jurisdiction).

Pursuant to the Tucker Act, the court has jurisdiction “to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). The Indian Tucker Act, 28 U.S.C. § 1505, confers a similar waiver of sovereign immunity for tribal claims that “otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (*White Mountain Apache*) (citing § 1505).

To avoid dismissal for failure to state a claim, under Rule 12(b)(6), a “complaint must allege facts ‘plausibly suggesting (not merely consistent with)’ a showing of entitlement to relief.” *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The court must accept as true all factual allegations in the complaint and “indulge all reasonable inferences in favor of the non-movant.” *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). The court, however, is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* (quoting *Twombly*, 550 U.S. at 555). The court may also consider settlement agreements where the parties do not dispute their authenticity. *See Collier v. CSX Transp. Inc.*, 673 F. App’x 192, 197 (3d Cir. 2016).

Summary judgment is appropriate under Rule 56(a) where there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

IV. ANALYSIS

A. Breach of Trust Claims (Claims One through Nine, Twelve, Thirteen, Sixteen through Twenty, and portions of Claim Twenty-One)

Each of the Tribe’s breach of trust claims alleges a breach of common law trust duty. The Tribe alleges that the Department has breached eight fiduciary duties: (1) failure to ensure that all lands receive irrigation water (Claim One, Am. Compl. ¶ 214); (2) failure to preserve and protect reserved water rights or water;³ (3) failure to prevent lands from becoming temporarily or

³ This alleged breach is articulated in several ways in the Amended Complaint: failure to provide for water storage (Claim Two, ¶¶ 226–27; Claim Three, ¶¶ 235–36; Claim Seventeen, ¶¶ 350, 353); failure to prevent trespass theft and conversion of the Tribe’s reserved water rights (Claim Four, ¶ 241); failure to maintain the Irrigation Project to enable efficient delivery (Claim Five, ¶ 246); making expenditures to disproportionately benefit non-Indian users (Claim Five, ¶ 250); failure to prevent unnecessary loss or waste (Claim Twenty, ¶¶ 373–75); failure to effectuate legal

permanently non-assessable (Claim Six, Am. Compl. ¶¶ 255–58); (4) failure to administer water rights with undivided loyalty;⁴ (5) failure to develop Tribal water rights (Claims Two and Three, Am. Compl. ¶¶ 221–39; Claims Nineteen and Twenty, Am. Compl. ¶¶ 365–68, 373–75); (6) failure to ensure adequate water quality (Claim Twelve, Am. Compl. ¶¶ 311–13); (7) failure to administer the Irrigation Project as a trust asset (Claim Thirteen, Am. Compl. ¶¶ 317–19); failure to recognize the Tribe’s beneficial ownership of the Tribe’s right, title, and interest in the Midview Property (Claim Eight, Am. Compl. ¶¶ 272–81); and (8) failure to secure additional water rights (Claim Eighteen, Am. Compl. ¶ 358).

The Amended Complaint contains various sources of law that purportedly give rise to money mandating fiduciary obligations owed by the Government to the Tribe. The Tribe argues that these statutes and regulations “establish comprehensive, pervasive, or elaborate Government control over tribal trust property, such that the tribal beneficiary does not have primary managerial control” and that therefore, Congress “intended the duties explicitly or implicitly conferred” to be “enforceable in damages.”⁵

The Government seeks dismissal of these claims on a jurisdictional basis, arguing that the Amended Complaint does not identify a money mandating fiduciary duty that would trigger the Court’s jurisdiction over these claims under the Tucker Act.

1. Indian Tucker Act

To invoke jurisdiction under the Indian Tucker Act for a breach of trust claim, a tribal plaintiff must clear two hurdles. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (*Navajo II*). First, the 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.” *United States v. Navajo Nation*, 537 U.S. 488, 506, (2003) (*Navajo I*) (citing *United States v. Mitchell*, 463 U.S. 206, 216–17, 219 (1983) (*Mitchell II*)). “The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law....” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (*Jicarilla*). Under this first inquiry, the analysis “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *Jicarilla*, 564 U.S. at 173–74 (quoting *Navajo I*, 537 U.S. at 506). “It is the precise trust duty, rather than the United States’ status as trustee, that determines the substantive right.” *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 47 (2013).

transfer of the Midview Property (Claim Eight, ¶ 276); and failure to rectify inequities allegedly created through alleged failure to implement the Midview Exchange Agreement (Claim Nine, ¶¶ 283, 287).

⁴ This alleged breach is articulated in different ways: in making Congressionally-authorized transfers of water rights (Claim Seven, ¶¶ 264–68); in representing the Tribe’s interests before Congress leading up to the passage of the 1992 Central Utah Project Completion Act (Claim Sixteen, ¶¶ 341, 344–45); and in managing the Irrigation Project for the benefit of non-Indian users (Claim Twenty-One, ¶¶ 378–80).

⁵ ECF No. 25 at 8.

Thus, to establish a trust duty, it is insufficient to cite a statute or regulation that recites a general trust relationship between the United States and the Indian People. *United States v. Mitchell*, 445 U.S. 535, 542–44 (1980) (*Mitchell I*) (finding a statutory provision declaring land to be held “in trust for the sole use and benefit of the [Indian owner]” did not by virtue of using trust language impose any specific duty to manage timber resources on the land); *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (*Hopi*). “[T]he organization and management of the trust is a sovereign function subject to the plenary authority of Congress.” *Jicarilla*, 564 U.S. at 175. Accordingly, the United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation. *Id.* at 177; *Navajo I*, 537 U.S. at 506. “[A]n Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and ‘bear the hallmarks of a conventional fiduciary relationship.’” *Hopi*, 782 F.3d at 667 (citation omitted) (quoting *Navajo II*, 556 U.S. at 301).

Second, if a tribal plaintiff identifies a substantive source of law establishing a specific fiduciary or other duty, “the court must then determine whether the relevant sources 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] impose[s].’” *Navajo I*, 537 U.S. at 506 (citing *Mitchell II*, 463 U.S. at 219).

2. Sources of Law Do Not Establish Specific Trust Duties

a. 1899 Act

First, the Tribe relies upon the 1899 Act, 30 Stat. 924 (Mar. 1, 1899), as a source of specific fiduciary duties owed to the Tribe. The Act provides the Secretary of the Interior the discretionary authority to grant certain construction-related rights of way on the Uintah Reservation to non-Indian users. It references the Tribe’s paramount rights to the water they need or appropriate themselves for agricultural and domestic purposes on the Reservation.

The Tribe argues that the statute imposes a “duty to develop and/or provide storage in order to ‘secure’ Tribal water,” but the statute does not impose such a specific duty. The Secretarial duty arising from the clause beginning “it shall be the duty of the Secretary...” is a discretionary duty to issue regulations “as he may deem necessary to secure to the Indians the quantity of water needed...” 30 Stat. at 941 (emphasis added). The statute limits the Secretarial authority conferred but it does not transform the reference to the Tribe’s paramount rights into a money mandating duty to protect water rights. Because “[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute,” and no such trust responsibilities are contemplated in this statute, the Tribe’s contention that the 1899 Act gives rise to money mandating duties must be rejected. *Jicarilla*, 564 U.S. at 177.

b. 1906 Act

Second, the Tribe cites the Department of the Interior Appropriations Act of 1906, Pub. L. No. 59-258, 34 Stat. 325, as a source of law giving rise to specific fiduciary duties. The 1906 Act appropriated funds for the construction of the Uintah Indian Irrigation Project. The Act places title to the Project in the Secretary of the Interior in trust for the Indians, but bare “in trust” language does not in itself create specific trust duties. *Mitchell I*, 445 U.S. at 541–2 (finding a statutory provision declaring land to be held “in trust for the sole use and benefit of the [Indian owner]” did

not by virtue of using trust language impose any specific duty to manage timber resources on the land). Likewise, the “sue and be sued” clause is a waiver of sovereign immunity, not a money mandating clause. The statute provides that the irrigation systems may be used “by any person, association or corporation” so long as the entity complies with the laws of the State of Utah. Thus, the Act does not create specific private fiduciary obligations between the Secretary and the Tribe. *See Nevada v. United States*, 463 U.S. 110, 128 (1983) (when Congress gives the Secretary responsibility for supervision of projects for Indian and non-Indian users, “the Government cannot follow the fastidious standards of a private fiduciary”).

Still, the Tribe contends that the 1906 Act “definitively subjects the [Uintah Indian Irrigation Project] to the Government’s use, occupation and control” like the statutory provisions in *Mitchell II* and *White Mountain Apache* because the it gives the Secretary authority to construct and appropriate water for the Project and to extend and enlarge its water works. In *Mitchell II*, the Supreme Court addressed a series of statutes and regulations that granted the United States exclusive authority to sell or approve the sale of timber on Indian lands. *Mitchell II*, 463 U.S. at 220. The statutes and regulations in that case described “comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber,” and addressed “virtually every aspect of timber management.” *Id.* Because these laws gave the United States “full responsibility” over the Indian resources and simultaneously contained trust-evoking language, the Supreme Court held that the United States had accepted a fiduciary duty to manage timber resources according to the statutory and regulatory specifications. *Id.* at 224–25. Similarly, in *White Mountain Apache*, the Supreme Court inferred that the United States had accepted a fiduciary duty to preserve specific land improvements the government created for its own use because the statute in question contained “in trust” language and authorized the United States to use the land exclusively. 537 U.S. 465 (2003).

The 1906 Act is not analogous to the statutory provisions at issue in *Mitchell II* or *White Mountain Apache*. First, the statute contains no language granting the United States exclusive control over the Uintah Indian Irrigation Project. Therefore, despite having “in trust” language, it does not meet the criteria set forth in *Mitchell II* because it lacks provisions granting the Government exclusive control of a tribal resource for the Tribe’s benefit. Second, the 1906 Act cannot be interpreted to accept a common law trust duty to preserve trust property that the trustee administers because it does not impose any duty on the Government to manage the Project. “The Supreme Court identified a common-law trust duty in *White Mountain Apache* because the statute, by simultaneously using trust language and authorizing exclusive use of the land, evoked common-law trust principles, leading to the inference that Congress intended to accept that particular trust duty.” *Hopi*, 782 F.3d at 670–71. However, there is no language authorizing exclusive use of the land in this statute. Furthermore, in *White Mountain Apache*, the Supreme Court’s finding of money mandating duties was based on the Government’s use of the trust asset for the Government’s own purposes, not management of it for tribal benefit. 537 U.S. at 468–69.

Congress acknowledged that the United States holds the lands in trust for the Tribe that are the subject of the 1906 Act, but it did not grant the government use and occupancy of the Irrigation Project. The Tribe has not cited any provisions collectively authorizing the kind of plenary control the Supreme Court found significant in *Mitchell II* and *White Mountain Apache*. Accordingly, we cannot interpret that Congress “expressly accepted” a common-law fiduciary duty to manage water resources from the trust language of the 1906 Act. *Jicarilla*, 564 U.S. at 177.

c. 1992 Central Utah Project Completion Act

Third, the Tribe alleges that Section 203(f) of the 1992 Central Utah Project Completion Act, Pub. L. 102–575, 106 Stat. 4600, gives rise to specific trust duties. The 1992 Act authorized appropriations for the construction of the Uintah Basin Replacement Project to replace the Uintah and Upalco Units of the Central Utah Project, which were not constructed.⁶ According to the legislative history, the purpose of the Act was to “put the Tribe in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 [Deferral] Agreement been constructed.” 106 Stat. at 4560–51.

Section (f)(1) of this statutory provision authorizes the Secretary to contract with “the Uintah Indian Irrigation Project Operation and Maintenance Company, or any other organization representing the water users within the Uintah Indian Irrigation Project area” to operate, maintain, or rehabilitate to the project. This language does not provide for exclusive use or control of the project by any specified user, including the Government. Section (f)(2) states that “the Secretary shall retain any trust responsibilities to the Uintah Indian Irrigation Project,” but no specific trust responsibilities are definitively stated. The statute recognized the possibility that the Uintah Basin Replacement Project may not proceed in Section 203(b). Likewise, the cost share agreement and memorandum cited by the Tribe do not state a specific trust duty to construct the project. Accordingly, the 1992 Act does not provide a basis for jurisdiction.

⁶ The Central Utah Project was first authorized by Congress in 1956. *See* Colorado River Storage Project Act, Pub. L. No. 84-485, 70 Stat. 105 (1956). Its aim was the collection and distribution of water in the Uintah Basin. Of the six Project units, the Upalco, Uintah, and Ute Indian units were never built. To participate in the Project, the Tribe hired E.L. Decker to identify tribal water rights, which the Tribe implemented in 1965. In the same year, the United States, the Central Utah Water Conservancy District, and the Tribe signed the Deferral Agreement. Under the Agreement, the Tribe gave up its right to divert water from the streams running through 15,242 acres of “Group 5” lands, per Decker’s recommendation, and accepted substitute water delivered from the Green River through Central Utah Project facilities. The diversion became known as the Ute Indian Unit; it ensured roughly 60,000 acre-feet of water per year for the Bonneville Unit of the Central Utah Project. As a result, Bonneville Unit construction proceeded. The Agreement established January 1, 2005 as the “maximum date of deferment and that all phases of the Central Utah Project [would] in good faith be diligently pursued to satisfy all Indian water rights at the earliest possible date.” Am. Compl. ¶¶ 152–159; ECF No. 22, Ex. A ¶¶ 3–5. Over time, some provisions of the Agreement were not fulfilled. To settle “once and for all” any claims under the Agreement and other historical claims, Congress passed the 1992 Central Utah Project Completion Act. *See* Pub. L. No. 102-575 §§ 501–07, 106 Stat. 4600, 4651 (1992). The Act sought to quantify the Tribe’s reserved water rights, allow increased beneficial use of water, and provide economic benefits to the Tribe to replace those that would have resulted from the Deferral Agreement’s planned projects. § 501(a)-(b), 106 Stat. at 4650–51. As compensation for unmet terms and in relation to the diverted lands in the Agreement, Congress established annual payments to the Tribe in perpetuity from Bonneville Unit operation and maintenance repayments made by irrigators. As of the filing of the motion to dismiss, the Tribe has received over \$354 million in compensation pursuant to the Act.

d. Other Federal Statutes and Regulations

The Tribe cites other federal statutes and regulations for the proposition that they establish specific trust duties owed to the Tribe. The Department of Interior Appropriation Acts of June 21, 1906, Pub. L. 59-258, 34 Stat. 325 (1906), and March 3, 1909, Pub. L. No. 60-316, 35 Stat. 781, 811 (1909), set aside federal funds for irrigation systems, but they do not create specific trust duties or compel payment to any tribe. *See Hopi*, 782 F.3d at 670; *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed. Cir. 2011) (holding that the appropriations acts at issue were not money mandating because they “[did] not provide a clear standard for paying money to recognized tribes, state the amounts to be paid to any tribe, or compel payment on satisfaction of certain conditions.”) Likewise, the Boulder Canyon Project Act of 1928, Pub. L. No. 70-642, 45 Stat. 1057, fails to confer jurisdiction because this statute granted the Secretary authority to construct, operate, and maintain a dam on the Colorado River and makes no reference to the Tribe. Next, the Department of the Interior Regulations cited as 22 Fed. Reg. 10,479, consolidated into 25 C.F.R. Part 171, establish specifications for delivery of water and operation of assessments but do not establish fiduciary duties.

Additionally, the Act of May 28, 1941, Pub. L. No. 77-83, 55 Stat. 209, refers to non-Indian owned lands of the Uintah Indian Irrigation Project and does not create fiduciary duties. Also, the 1956 Colorado River Storage Project Act, 43 U.S.C. SS 620-620o, references only Navajo Nation lands. The single reference to Ute Tribe-specific projects in the statute is for prioritizing planning reports. The Reclamation Projects Authorization and Adjustments Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, authorizes the Secretary to enter agreements with third parties and establishes that the Secretary retains any trust responsibilities without delineating them specifically. Finally, regarding the Department of Interior Regulations at 25 C.F.R. Part 171, the Department’s Final Rule, 73 Fed. Reg. 11,028 11,031 (Feb. 29, 2008) established that the Department does not have a trust obligation to operate and maintain irrigation projects.

In sum, the sources of law relied on by the Tribe do not establish that the United States has a specific trust obligation to ensure adequate water delivery or storage on the Tribe’s Reservation. In *Mitchell I*, the Supreme Court found that “the [Allotment] Act [did] not unambiguously provide that the United States ha[d] undertaken full fiduciary responsibilities as to management of allotted lands.” Here, too, these statutes and regulations contain no language unambiguously establishing the Secretary’s full fiduciary responsibility to manage the Tribe’s water delivery and storage. Because the Tribe has not “identif[ied] a specific, applicable, trust-creating statute or regulation that the [United States] violated,” *Navajo II*, 556 U.S. at 302, we do not need to reach the second step of the jurisdictional inquiry—whether any trust duty was money mandating. We conclude that this Court does not have jurisdiction over the Tribe’s breach of trust claims under the Indian Tucker Act. Accordingly, Claims One through Nine, Twelve, Thirteen, and Sixteen through Twenty-One are dismissed.

B. Takings Claims (Claims Ten and Fifteen)

The Government argues that the Takings Claims, Claim Ten and Claim Fifteen, should be dismissed because they are time-barred and because Claim Fifteen fails to state a claim.

1. Claim Ten

In Claim Ten, the Tribe alleges an unconstitutional taking of Tribal assets under the Midview Exchange Agreement of 1967. The Tribe asserts that the Agreement was a *per se* physical taking because a) the Agreement deprived the Tribe of its senior-priority in a portion of reserved water rights in the Lake Fork River Basin by giving them to the Moon Lake Water Users Association and b) the Bureau of Indian Affairs subsequently designated Irrigation Project lands as temporarily or permanently non-assessable.⁷ The Tribe claims that “[w]hat the Tribe received under the Midview Exchange – the right to a portion of the [Bureau of Reclamation’s] state-based water rights, with a priority date inferior to the Tribe’s *Winter* Reserved Rights and with the prospect of forfeiture through non-use – did not constitute just compensation for the United States’ taking of tribal property.”⁸

The Government argues that Claim Ten should be dismissed because it accrued upon execution of the Midview Exchange Agreement in 1967, well before the six-year statute of limitations period prescribed by 28 U.S.C. § 2501 expired. “The statute of limitations provision of 28 U.S.C. § 2501 places an express limit on the Government’s waiver of sovereign immunity for every claim within the jurisdiction of the Court of Federal Claims.” *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (citation omitted). In its Response, the Tribe counters that the scope of the taking was not fully manifest at the onset of the Agreement because the extent of the taking is still in flux.

The Tribe has the burden of proving that its claims are timely by a preponderance of the evidence. *Fidelity and Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015). 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) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

As the Tribe asserts in the Amended Complaint, the Tribe’s senior-priority in its reserved water rights were deprived on November 16, 1967 when it executed the Agreement. The Tribe seeks to invoke the stabilization doctrine prescribed in *United States v. Dickinson* to toll the statute of limitations, but the deprivation of the Tribe’s priority rights was a single event, not a continuous one like the intermittent flooding of land at issue in *Dickinson*. 331 U.S. 745 (1947). In that case, the Supreme Court found significant that “[t]he Government left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in [an ongoing] process of acquisition by the United States when the fact of taking could no longer be in controversy” because “the source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous.” 331 U.S. at 748–9.

By contrast, here, the source of the claim is the execution of the Agreement. If a claim is “based upon a single distinct event, although it may have continued ill effects later on, [it] is not a

⁷ ECF No. 18 at ¶¶ 291–302.

⁸ *Id.* at ¶ 295.

continuing claim.” *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 164 (1999). As a party to the Agreement, the Tribe had knowledge of the terms of the agreement that serve as the basis for its current allegations against the Government. Thus, based on the facts presented, the claim is untimely and, therefore, dismissed.

2. Claim Fifteen

a. Timeliness

In Claim Fifteen, the Tribe seeks just compensation for an alleged regulatory taking. Specifically, the Tribe asserts that funds it received pursuant to Section 507 of the 1992 Central Utah Project Completion Act were inadequate because they were “based on a severe miscalculation of the value that the promised Upalco, Uintah, and Ute Indian Units would have brought to the Tribe had they been constructed in accordance with the 1965 Deferral Agreement.”⁹

The Government argues that the Tribe’s challenge to the compensation scheme is untimely because the scheme was finalized when the Act became law in 1992, twenty-six years before the Tribe filed this lawsuit, outside the applicable six-year limitations period. Nonetheless, the Tribe argues that the claim is timely under the stabilization doctrine because, six years before the filing of this lawsuit, the Government was constructing water storage facilities that could have mitigated the scope of the taking. The Tribe asserts that “[t]he precise *extent* to which the United States failed to justly compensate the Tribe for its taking of the Tribe’s contract-based property rights in the 1992 CUPCA must be measured against the United States’ promise to construct the Uintah Basin Replacement Projects for the benefit of the Tribe.”¹⁰

While it is unclear whether the stabilization doctrine can be applied to a regulatory taking, as opposed to a physical taking, the doctrine turns on when the permanent nature of a government action is apparent, not when damages are calculable. *Frazer/Exton Development, LP v. United States*, 809 Fed. App’x. 866, 870 (2020) (“[T]he obligation to sue arises once the permanent nature of the government action is evident, regardless of whether damages are complete and fully calculable.”). It is the events that fix the Government’s alleged liability that count. *San Carlos Apache Tribe v. United States*, 639 F.3d at 1350. The Tribe participated in negotiations establishing the scheme and accepted funds pursuant to the Act, demonstrating that the Tribe had knowledge of the facts forming the basis of its claim in 1992. Claim Fifteen is therefore untimely and is dismissed.

C. Breach of Contract Claims (Claims Eleven and Fourteen)

In Claim Eleven, the Tribe alleges that the United States breached the Midview Exchange Agreement by failing to transfer the Midview Property into trust for the Tribe. However, the Government argues in its Motion that this claim was specifically waived by the 2012 Settlement Agreement.

⁹ ECF No. 25 at 29.

¹⁰ ECF No. 25 at 29.

According to the executed settlement document, the Tribe waived and released the United States from claims, known and unknown, for “improper[] or inappropriate[]” transfer of non-monetary trust assets or resources and “fail[ure] to undertake prudent transactions for the sale, lease, use, or disposal of [the Tribe]’s non-monetary trust assets or resources.”¹¹ Therefore, because the Midview Property is a non-monetary trust asset, this claim was waived and released by the 2012 Settlement Agreement. Thus, Claim Eleven is dismissed for failure to state a claim pursuant to Rule 12(b)(6).

In Claim Fourteen, the Tribe alleges that the United States breached the 1965 Deferral Agreement through non-performance of various terms involving the satisfaction of Tribal Reserved Water Rights. However, the Government contends that the Tribe knew the 1992 Central Utah Project Completion Act would address these unmet obligations under the 1965 Deferral Agreement.¹²

As previously mentioned, Congress’ intent in enacting the 1992 Central Utah Project Completion Act was to “put the Tribe in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 [Deferral] Agreement been constructed.” 106 Stat. at 4560–51. The Tribe testified before Congress in 1990 to address the compromise sought by the passage of the Act and accepted statutorily granted compensation. According to the Amended Complaint, the Tribe knew as early as 1980 that the Uintah and Ute Indian Units contemplated by the 1965 Deferral Agreement would not be constructed. Thus, because the Tribe 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.

D. Civil Conspiracy, Denial of Due Process, and Equal Protection Claim (Claim Twenty-One)

In Claim Twenty-One, the Tribe seeks damages related to the Government’s management and administration of Tribal water rights and water resources under the theories of breach of trust, civil conspiracy, and denial of due process and equal protection. However, the Amended Complaint cites no statute or regulation that supports a conclusion that a civil conspiracy claim falls within the Tucker Act jurisdiction. Additionally, the Fifth Amendment’s due process clause is not money mandating.¹³ Therefore, Claim Twenty-One is dismissed.

V. CONCLUSION

The breach of trust claims (Claims One through Nine, Twelve, Thirteen, Sixteen through Twenty, and part of Claim Twenty-One) and conspiracy and constitutional claim (part of Claim Twenty-One) are dismissed for lack of jurisdiction. In addition, Claim Ten and Claim Fifteen are barred by the applicable statute of limitations. Finally, the breach of contract claims are dismissed because Claim Eleven fails to state a claim pursuant to Rule 12(b)(6) and Claim Fourteen is

¹¹ Ex. D ¶ 4(b)(10)–(11).

¹² *Id.*; ECF No. 25 at 30–31.

¹³ *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that the Court of Federal Claims lacked jurisdiction over claims for violations of plaintiff’s rights under due process clause of Fifth Amendment because they did not mandate payment of money by the government).

untimely. For the foregoing reasons, Defendant's motion to dismiss is **GRANTED**. The Clerk is directed to take the necessary steps to dismiss this matter. The motion to strike the second declaration of Frances Bassett is **MOOT**.

IT IS SO ORDERED.

s/Robert H. Hodges, Jr.

Robert H. Hodges, Jr.
Senior Judge

In the United States Court of Federal Claims

No. 18-359 L

Filed: February 16, 2021

**UTE INDIAN TRIBE OF THE
UNITAH AND OURAY INDIAN
RESERVATION**

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Order and Opinion, filed February 12, 2021, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' claims are dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is \$505.00.

United States Court of Federal Claims

No. 18-359 L
Filed: September 3, 2021

**UTE INDIAN TRIBE OF THE UNITAH
AND OURAY INDIAN RESERVATION,**

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

On February 12, 2021, we granted Defendant's Motion to Dismiss pursuant to Rules 12(b)(1) and (6), and subsequently closed this case according to the Rules of this Court. *See* ECF Nos. 22, 38. Plaintiff filed a Motion to Reconsider and to Alter or Amend the Judgment of Dismissal on March 16, 2021. ECF No. 41. Plaintiff's Motion contends that we (1) erred in failing to adhere to the *Mitchell II*, 463 U.S. 206 (1983), and *White Mountain Apache*, 537 U.S. 465 (2003), holdings regarding the existence of an enforceable trust duty; (2) erred in ruling that Plaintiff presented insufficient evidence to establish an enforceable fiduciary duty; (3) misapprehended applicable facts and law in ruling that Plaintiff's Fifth Amendment claims are untimely; and (4) misapprehended facts and law in its decision to dismiss Plaintiff's claims arising under breach of contract, resulting in manifest injustice to Plaintiff.

Plaintiff filed a Notice of Supplemental Authority for its pending Motion for Reconsideration on May 4, 2021. ECF No. 44. The supplemental authority is a case from the Ninth Circuit filed in April 2021. *See Navajo Nation v. U.S. Department of the Interior, et. al.*, No. 19-17088 (*Navajo Nation*). According to Plaintiff, the Ninth Circuit's holding supports the Motion for Reconsideration and particularly its argument that the Ute Tribe's treaties with the United States establish enforceable fiduciary duties. Plaintiff argues that the Ninth Circuit in *Navajo Nation* found that the *Winters* doctrine, viewed together with provisions from the Navajo Nation's 1868 Treaty with the United States, established an enforceable duty to "protect the [Navajo]

Nation’s water supply.” The Treaty in that case allowed “individual members to select plots of land if they ‘desire[d] to commence farming.’” ECF No. 44 at 2.

Plaintiff asserts that treaties between the United States and the Ute Indians contain similar covenants. For example, Article 10 of the 1863 Treaty required the Utes to begin to “follow agricultural or pastoral pursuits by farming or raising stock, and growing wool” on its Reservation lands. *See* Ute Treaty of 1863, art. 10, App. III, ECF No. 25-3 at 97–98. Plaintiff asserts that the facts and covenants in this case are analogous to those in *Navajo Nation* such that they confer fiduciary duties on the United States.

By this Order, we ask that Defendant file a Response to Plaintiffs’ Motion for Reconsideration. *See* Rule 59 of the United States Court of Federal Claims. Defendant shall have thirty (30) days from the filing of this Order within which to respond to Plaintiff’s Motion.

IT IS SO ORDERED.

s/Robert H. Hodges, Jr.

Robert H. Hodges, Jr.
Senior Judge