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.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

It has been known and documented for over a century that reliable access to water is indispensable to the viability of the Uintah and Ouray Reservation, the homeland of the Ute Indian Tribe ("Tribe"). The present matter revolves around the basic right of the Tribe to hold its Federal trustee accountable for its gross mismanagement of these existentially important resources.

The U.S. Court of Federal Claims (referred to herein as the "lower court") disregarded applicable Supreme Court precedent and chose instead to apply an unduly restrictive standard to establish subject matter jurisdiction in claims against the United States for breach of trust. The standard applied by the lower court renders it virtually impossible for any Indian tribe to pursue recourse against its Federal trustee, while the United States continues to assume ownership and control over Tribal lands and properties in the name of the trust relationship. The lower court has also, in essence, found that the statutory period for bringing causes of action before the U.S. Court of Federal Claims is not just a statute of limitations, but a blank check for the United States to continue to repudiate its ongoing fiduciary, contractual, and constitutional obligations in perpetuity with unbridled impunity. Congress has not established such windfalls for the United States in its relationship and responsibilities toward Indian tribes.

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

The Appellee's Statement of the Case contains several factual errors and/or omissions that should be rectified. The "aim" of the CUP ("Central Utah Project") was not to construct "irrigation and storage facilities for the water in the Uintah Basin" where the Tribe's reservation is located. Resp. Br. at 6. Instead, as acknowledged on the Government's website, the CUP was designed to effect a "transmountain" *diversion* and *transfer* of water away from the Uintah Basin across the Wasatch Mountains to Salt Lake City and other population centers along the Wasatch Mountains' western front.[1]

Secondly, the Court should disregard Appellee's reference to Senate Report 102-267, Resp. Br. at 10, insofar as that Report is not included in the court record. As the Tribe argued below, the caption to Title V of the 1992 Central Utah Project Completion Act, P.L. 102-575 ("CUPCA") is clearly a misnomer because Congress specified in CUPCA that Title V was, at most, a *contingent* settlement, subject to express contingencies contained in the Act itself. APPX459-464.

Finally, Appellee's Statement fails to acknowledge the express exception to the Tribe's waiver and release of claims under the 2012 Settlement Agreement. That exception, §6(b), explicitly exempts from the waiver any claim "for harm or damages" relating to the Tribe's "water rights" and any damage claims "for loss of

[1] *See*, *e.g.*, https://www.doi.gov/cupcao/overview (last visited on 1/26/2023).

water resources caused by [the United States'] failure to establish, acquire, enforce, or protect such water rights." APPX277.

ARGUMENT

I. The Lower Court Erred in Ruling that the Tribe Failed to Identify Trust Duties Enforceable in the U.S. Court of Federal Claims

A. The Tribe has not Forfeited its Arguments Concerning the "Sue and be Sued" Clause in the 1906 Act

Throughout these proceedings the Tribe has argued that the Act of June 21, 1906, 34 Stat. 325 (1906 Act)—requiring the U.S. to hold the Uintah Indian Irrigation Project (UIIP) in trust for the benefit of the Ute Indians and to "sue and be sued in matters related thereto"—serves *both* as a waiver of sovereign immunity *and* a cause of action to which the sovereign immunity waiver applies. APPX437-438.

Appellee contends this argument has been "doubly forfeited" because the Tribe cited the Tucker Act and the Indian Tucker Act (the "Tucker Acts" collectively) as the source of the lower court's subject matter jurisdiction in both its Complaint and its Memorandum in Opposition to the Motion to Dismiss. Resp. Br. at 22. This assertion is baseless. The Tribe indeed relies on the Tucker Acts to establish subject matter jurisdiction, not only because the Tribe seeks monetary damages against the United States in excess of $10,000, *see* 28 U.S.C. § 1346(a)(2), but also because the Tucker Acts provide the requisite sovereign immunity waiver for enforcing certain claims in the Tribe's Amended Complaint. However, any

separate requirement to establish subject matter jurisdiction under the Tucker Act by identifying a source of law establishing money-mandating fiduciary duties derives from the fact that the sovereign immunity waiver in the Tucker Act "does not create any substantive right enforceable against United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216-217 (1983) (*Mitchell II*). Where, as with the 1906 Act, a statute both establishes a waiver of sovereign immunity (i.e., the Secretary "may sue and be sued…") and in addition, ties the sovereign immunity waiver to a substantive cause of action (i.e., "in matters relating" to the trust status of the UIIP), there exists both a waiver of the United States' sovereign immunity and a cause of action tied to that waiver. All requisites for Tucker Act jurisdiction are satisfied without further analysis under *Mitchell II* and its progeny to infer congressional intent for conferred duties to be enforceable, or "money-mandating."

The Tribe thoroughly articulates this position in its Memorandum in its Opposition to the Motion to Dismiss:

> This "sue and be sued" provision unambiguously confirms the enforceability of the Secretary's trust obligations in a judicial forum…The only possible interpretation of the "sue and be sued" clause is that the clause confirms the judicial enforceability of the Secretary's trusteeship of the UIIP and the Tribe's reserved water rights.

APPX437-438. Accordingly, the Tribe's argument on the legal effect of the "sue and be sued" clause was not forfeited and should be considered by this Court on appeal.

B. Appellee's Standard for Determining Money-Mandating Fiduciary Duties is Inaccurate and Misleading

The lower court failed to consider pertinent sources of federal law *in pari materia* and failed to afford proper weight to the pervasive control the U.S. exercises over the Tribe's *Winters* reserved water rights and its operation of the Uintah Indian Irrigation Project ("UIIP"). Opening Br. at 29-38. Appellee attempts to insert the proverbial square peg into a round hole, skewing Supreme Court precedent retroactively to fit the lower court's analysis. The Appellee selectively relies on *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 506 (2003), providing that "a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties," followed by *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) ("the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). Appellee contends the Federal Government's control over a trust asset is "at most…relevant [only] to the *contours* of any" enforceable fiduciary duty but is immaterial to the question whether an enforceable fiduciary duty exists. Resp. Br. at 28.

This argument is baseless. The Supreme Court ruled in *Mitchell II* that "a fiduciary relationship *necessarily* arises" when the U.S. assumes "elaborate control" over trust assets. *Mitchell II*, 463 U.S. at 225 (emphasis added). Twenty years later the Court reaffirmed *Mitchell II* in *United States v. White Mountain Apache Tribe*, holding that a statute allowing the United States to use and occupy a facility

held in trust for the Indian beneficiaries "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach." 537 U.S. 465, 474 (2003). In both cases, the Federal Government's degree of control over the trust asset(s) was central to the threshold inquiry of whether an enforceable fiduciary duty exists—federal control was *not* a secondary, non-jurisdictional question of whether the alleged breach fit within the "contours" of the fiduciary relationship.

Appellee wrongly presupposes that *Navajo Nation* and *Jicarilla* represented a paradigm shift, or overruling of, *Mitchell II*, urging this Court to ignore the entire web of federal statutes and regulations by which the United States' exercises complete and pervasive control over the Tribe's waters and its utilization of its water rights. Appellee also cites to specific language in *United States v. Navajo Nation*, 556 U.S. 287 (2009) (*Navajo II*), wherein the Court said that "liability cannot be premised on control alone" but must train on "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II* at 301. However, Appellee takes the referenced language out of context. In full context, *Navajo II* states:

> …the analysis must begin with specific rights-creating or duty-imposing statutory or regulatory prescriptions. *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a conventional fiduciary relationship…*then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages…"

Id. (internal citations omitted). Of course, one of the necessary elements and essential "hallmarks of a conventional fiduciary relationship" is a trustee's *control* over the trust corpus. *Mitchell II*, 463 U.S. at 225 ("'where 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)'") (quoting *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980). Therefore, federal control over the trust corpus cannot be ignored, as Appellee urges.

C. The Lower Court and Appellee's Statutory Analysis Ignores the Indian Canon of Construction and is Otherwise Flawed

The Indian canon of construction requires courts to liberally construe treaties, statutes, executive orders and agreements in favor of American Indians. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The rule of liberal construction arises not from ordinary exegesis but "from principles of equitable obligations and normative rules of behavior" applicable to the trust relationship between the United States and the Native American people. *Cobell v. Norton*, 240 F.3d 1082, 1102 (D.C. Cir. 2001). Here, both the lower court and Appellee ignore the Indian canon of construction and otherwise rely on a selective and superficial reading of applicable statutes to conclude that no enforceable fiduciary duty exists.

1. The "discretionary" Language in the 1899 Act Reinforces the Tribe's Position

Appellee minimizes the Act of March 1, 1899, 40 Stat. 941 (1899 Act) as a discretionary appropriations act that merely imposes a "condition" on the "discretionary power it confers (to let non-Indians divert tribal waters)." Resp. Br. at 19-20. First and foremost, there is absolutely nothing in the 1899 Act that allows non-Indians to "divert tribal waters." The 1899 Act allows the Secretary to grant rights of way necessary to allow non-Indian water development, *not* to divert Indian reserved water rights. It is important to point out this egregious misreading of the 1899 Act at the outset, particularly in light of Appellee's position, further described *infra*, that federal legislation allowing non-Indians to benefit from tribal trust assets diminishes the enforceability of the United States' trust responsibilities vis-á-vis Indian trust assets.

The alleged "discretionary" nature of the 1899 Act is a false characterization. Appellee fails to read the statutory language as a whole, focusing exclusively on the clause "as he may deem necessary" in the following congressional directive: "[I]t 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…" APPX836. To the extent this language confers discretion, that discretion exists only within the confines of a non-discretionary duty to ensure that present and future uses of the Tribe's "paramount"

water rights are secured and protected from non-Indian obstruction. Appellee's self-serving interpretation of the 1899 Act is inconsistent with and subverts the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, (2000); *Lal v. M.S.P.B.*, 821 F.3d 1376, 1378 (Fed. Cir. 2016).

Moreover, neither the lower court nor Appellee has cited any authority for the conclusory assertion that statutory language giving the executive discretion in how it performs a non-discretionary duty *ipso facto* negates the presence of enforceable fiduciary duties. Federal court jurisprudence is to the contrary: the executive branch's discretion in carrying out its statutorily-imposed functions is subject to and limited by the fiduciary relationship, not the other way around. *White Mountain Apache*, 537 U.S. at 466-67 (2003) (federal statute that "expressly defines a fiduciary relationship in the provision that Fort Apache be held by the Government in trust for the Tribe, <u>then proceeds to invest the United States with discretionary authority to make direct use of portions of the trust corpus</u>" gives rise to money-mandating fiduciary duties) (emphases added); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 588 (10th Cir. 1982) ("United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion to approve communitization agreements"). *Navajo Nation v. U.S. Department of the Interior*,

996 F.3d 623, 638 (9th Cir. 2021), *amended on denial of rehearing*, 26 F.4th (9th Cir. 2022), ("… statutes that grant the Secretary authority to exercise pervasive control over the Colorado River" augments the duties of the United States to protect *Winters* reserved water rights). Thus, discretionary language is not only reconcilable with the presence of enforceable fiduciary duties, but in fact complements and gives shape to these fiduciary duties.

2. Statutory Language Allegedly Permitting Non-Indians to Utilize the UIIP does not Impact the Money-Mandating Fiduciary Duties Created Under the 1906 Act.

The 1906 Act established money-mandating fiduciary obligations to manage the UIIP for the benefit of the Tribe and its members. The statute directs the Secretary to hold the UIIP in trust for the Ute Indians and authorizes the Secretary to sue and be sued in matters relating to his management of the trust corpus. By its plain language the Act invokes a trust relationship which "bears the hallmarks of a conventional fiduciary relationship," *United States v. Navajo Nation*, 556 U.S. 287 (2009), and the United States' elaborate and pervasive control over the UIIP and the reserved water rights diverted and delivered through the UIIP supports the "fair inference" that the United States' trust responsibility is enforceable in damages.

Appellee contends that the 1906 Act clause allowing "ditches and canals of such irrigation systems [to] be used, extended, or enlarged for the purpose of conveying water to any person, association, or corporation" in compliance with state

law single-handedly divests the United States of any enforceable trust duties in relation to its management of the UIIP. Appellee argues that "Interior's mandate under the 1906 Act—to manage the Project for the benefit *of both* Indians and non-Indians—is incompatible with the notion that it imposes enforceable fiduciary duties owed specifically to Plaintiff." *Id*. This argument fails for at least three reasons. First, there is no reference to the rights of "non-Indians" found anywhere in the 1906 Act, and even if the reference to "any person, association, or corporation" is construed in this way, there is no statutory "mandate" to manage the UIIP for Indians and non-Indians alike. To the contrary, the 1906 Act provides that the express purpose of the UIIP was to "irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah."[2]

Second, permissive language allowing the Secretary to provide for the conveyance of water to non-Indians does not place non-Indians on equal footing with the Indian trust beneficiaries, who are explicitly recognized by Congress as the beneficial owners of the UIIP. As outlined *supra,* this type of discretionary authorization is subservient and subject to a prescribed trust responsibility, not the other way around.

[2] The three Bands referenced in this statutory language comprise what is today the federally-recognized Ute Indian Tribe of the Uintah and Ouray Reservation.

Finally, all water rights appropriated by the United States for delivery through the UIIP were adjudicated in 1923 as *Winters* reserved water rights beneficially owned by the Tribe. APPX1423-1464, 1477-1481. Unlike the Tribe, non-Indians have no property interest in the UIIP water rights that were appropriated by the United States pursuant to the 1906 Act and thus have no legal standing to enforce, validate, or claim any entitlement to water rights that were appropriated for the UIIP, regardless of whether these water rights were originally appropriated under state law.

Where both the infrastructure comprising the UIIP and the water rights diverted and delivered through the UIIP are trust assets beneficially owned by the Tribe, there simply is no support for Appellee's position that the Secretary is under any "mandate" to place the interests of non-Indians on equal footing with the interest of the Indian trust beneficiaries.

D. This Court Should Give Due Consideration to the Ninth Circuit's Decision in *Navajo Nation v. Department of Interior*.

1. *Navajo Nation* is Germane to the Present Matter

The similarity between the Ninth Circuit's *Navajo Nation* decision and the case at bar is striking. Both cases involve the enforceability of the United States' trust responsibility over its management of *Winters* reserved water rights in the Colorado River, beneficially owned by Indian tribes with correlating treaty rights intended to encourage agricultural development on reserved Indian lands.

Appellee has relegated the *Navajo Nation* to a footnote in its Response Brief, Resp. Br. at 23, n. 5, contending *Navajo Nation* is immaterial because (i) it is an APA case and thus does not involve a Tucker Act jurisdictional analysis, (ii) it does not involve the same federal statutes at issue here, and (iii) it is distinguishable because the present matter "involves water sources on which the United States has undertaken numerous efforts to resolve Plaintiff's *Winters* rights associated with its Reservation." Response Br. at 23-24, n. 5. None of these arguments is persuasive.

First, while subject matter jurisdiction in *Navajo Nation* derived from the APA, the Ninth Circuit expressly invoked both *Mitchell II* and *Jicarilla* in determining that the United States has legally enforceable trust duties. *Navajo Nation*, 26 F. 4th at 811-812.

Second, the Ute Tribe has not "forfeited" citation to its Treaties. Not only is this argument factually false, but it contravenes black letter law that a court should not dismiss complaints based on mere "technicalities" of pleading. *Foman v. Davis*, 3771 U.S. 178, 181-82 (1962). Not only did the Tribe cite its Treaties in the proceedings below, but it did so to demonstrate the existence of money-mandating fiduciary duties. Indeed, the Tribe's Memorandum in Opposition to dismissal relied on its Treaties to demonstrate a proprietary interest in its reserved water rights, refuting the United States' assertion that *Winters* supports only a "usufructuary" interest in water rights and not title ownership vested in the Tribe's federal trustee.

APPX431. The Tribe also cited its Treaties as evidence that the Tribe's *Winters* reserved water rights constitute trust corpus, an element to the inquiry of whether an enforceable fiduciary relationship exists. After *Navajo Nation* was issued, the Tribe promptly filed its Notice of Supplemental Authority, noting the similarities between treaty provisions analyzed in *Navajo Nation* and analogous provisions found in the Ute Treaties. APPX655-697. The United States chose not to oppose or respond to the Tribe's Notice of Supplemental Authority.

Finally, it is immaterial that the present lawsuit "involves water sources on which the United States has undertaken numerous efforts to resolve Plaintiff's *Winters* rights associated with its Reservation." Resp. Br. at 24, n. 5. Any actions purportedly undertaken by the United States to satisfy its trust obligations is relevant only to the question whether a breach has taken place, *not* whether an enforceable duty exists as a legal predicate. Subject matter jurisdiction under the Tucker Acts hinges on the latter inquiry, not the former.

2. Just as in *Navajo Nation*, The Ute Treaties Advance the Tribe's Position

Just like the treaties addressed in Navajo, the Ute Treaties of 1849, 1863, and 1868 "encourage the [Ute Indian Tribe's] transition to an agrarian lifestyle." *Navajo Nation* at 810-11. The Treaty of 1849 is foundational and contains language identical to the 1849 Treaty cited in *Navajo Nation*, reserving lands from the Tribe's much larger historical land base and establish federal control and supervision over

these lands. APPX1422-1423. The Ute Treaty of 1868 contains provisions that are similar in form and indistinguishable in purpose from the "farming provisions" of the Navajo Nation's 1868 Treaty, ensuring federal support for agricultural development by supplying land, seeds, and agricultural implements to the Indians. APPX1301-1312. Beyond these two treaties, each having an analogous treaty that was cited in *Navajo Nation,* the United States' duty to provide means for agricultural development was also acknowledged in the Ute Treaty of 1863, requiring the United States to support agricultural development by supplying livestock and establishing a blacksmith shop to repair agricultural implements. APPX1295-1299. Significantly, in both the 1863 and the 1868 Treaties, agricultural development was the only manner of civilization that the United States committed to support.

Appellee contends the treaties are inapposite because they do not mention any enforceable obligations relating to water or water infrastructure. However, this argument is profoundly ignorant of controlling precedent. Central to the Tribe's contention "and rooted in *United States v. Winans*, *supra*, is the concept that under the treaty the Indians were the grantors of a significant land cession and the United States was the grantee." *United States v. Michigan*, 471 F. Supp. 192, 212 (W.D. Mich. 1979):

> The [treaty] transaction is better understood if the focus is upon the concept of "reservation." The Indians gave up some rights, reserving all those not specifically conveyed.

> * * * *
>
> Western Indian tribes … reserved whatever water they needed to make use of their land….They are not required to show that the United States granted them [that water], but only that they reserved it. They need not show that they explicitly reserved it.
>
> * * * *
>
> The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. The grant from the Indians must be narrowly construed, especially in light of the wardship existing between the Indian grantors and the grantee United States.
> * * * *
>
> [T]he Winans doctrine … applies not only to reserved rights to land, but to reserved rights to…water and reserved or retained rights of sovereignty, i.e., the right to tribal self-government.

Id. at 213, 253-54, *aff'd*, 653 F.2d 177 (6th Cir. 1981) (citing, *e.g.*, *Winters*, *United States v. Winans*, 198 U.S. 371 (1905), *United States v. Wheeler*, 435 U.S. 313 (1978) (superseded by statute)).

E. The Tribe has Alleged Violation of Money-Mandating Fiduciary Duties

Appellee argues for the first time on appeal that the Tribe has failed to allege any breach of the United States' fiduciary duties, contending the allegations in the Amended Complaint are too "abstract" or "generalized" to "connect any of the purported duties it identifies to the specific claims it brings." Resp. Br. at 30. This contention is frivolous. And to affirm the lower court on this ground would

contravene black letter law that a court should not dismiss complaints based on mere "technicalities" of pleading. *Foman*, 3771 U.S. at 181-82.

At no point in the proceedings below did the United States request a more definite statement under Rule 12(e); thus, the U.S. is estopped from belatedly raising this argument now. "A cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust." *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 634 F.3d 1339, 1348 (Fed. Cir. 2004). And a trustee cannot avoid accountability by feigning ignorance of the beneficiaries' grievances relating to trust corpus mismanagement. *Goodeagle v. United States*, 111 Fed. Cl. 716, 722 (2013). The Tribe's Amended Complaint sufficiently alleges multiple breaches of fiduciary duty. Each and every claim in the Amended Complaint alleges that the United States has repudiated its trust obligation to secure, protect, and manage Tribal water rights. Nothing more is necessary.

II. The Tribe's Takings and Breach of Contract Claims are Timely

A. The Tribe's Takings Claims are Timely under the Stabilization Doctrine

The stabilization doctrine permits a plaintiff to delay filing suit for an unconstitutional taking when the taking is continuing and the scope of the deprivation of property and/or lack of just compensation for the deprivation is unknown or unknowable. *U.S. v. Dickinson*, 331 U.S. 745, 748-49 (1947). The purpose of the stabilization doctrine is to relieve the damaged party from having to

undergo piecemeal litigation to recover the full scope of his or her entitlement to damages, and to prevent *res judicata* from precluding fair recourse. *Id*.

The stabilization doctrine clearly applies to the Tribe's taking claim predicated on the Midview Exchange. Year in and year out, the disparity between the value of the Tribe's *Winters* reserved water rights taken for the benefit of non-Indians and the Duchesne River water rights the Tribe receives in exchange continues to widen. This is a direct result of (i) the expanding quantity of Tribal land designated by the United States as permanently or temporarily non-assessable ("TNA/PNA"), and (ii) the United States' continuous failure to bring these TNA/PNA lands back to assessability. As a result, the Tribe loses at least 7,500-acre feet of its *Winters* reserved water rights each year, while the Tribe's ability to utilize the Duchesne River water rights it purportedly received in exchange continues to diminish. APPX56-58. This constitutes a continuing devaluation of the "compensation" the Tribe receives in exchange for the United States' appropriation of its *Winters* reserved water rights. The scope of the taking thus remains in flux.

Appellee argues that the stabilization doctrine cannot apply to the Tribe's taking claim because the "transfers and compensation scheme authorized by the Midview Exchange Agreement were not conditioned on or tied to subsequent Interior designations in any way." Resp. Br. at 34. This argument conflates the

right and obligations under the Midview Exchange Agreement with the scope of the deprivation of Tribal property rights resulting from the United States' ongoing implementation of this Agreement. These are wholly separate issues and only the latter is relevant to the applicability of the stabilization doctrine. Appellee also argues that the statute of limitations applies when the taking becomes permanent and that the "permanent nature of the alleged deprivation…was clear in 1967." Resp Br. at 35. This argument fails to appreciate the legal elements of an unconstitutional taking claim. An unconstitutional taking has two elements: (i) deprivation of a property right, (ii) without just compensation. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation"). Even if the Tribe knew it might be deprived of property rights when the Midview Exchange was first executed (which it did not), it was impossible in 1967 to know or understand the ever-widening disparity in value between the "compensation" it would be receiving and the property rights it would be losing year in and year out.

The stabilization doctrine also applies to the Tribe's taking claim arising under the CUPCA. Enactment the CUPCA constituted a taking if the CUPCA did - as the United States insists - result in a unilateral termination of the Tribe's right to enforce the 1965 Deferral Agreement. The Appellee asserts that any taking claim arising under the CUPCA necessarily accrued upon enactment of the CUPCA in 1992.

However, this claim was not stabilized in 1992 because the Tribe justifiably relied upon its trustee to construct the Uintah Basin Replacement Project ("UBRP") facilities to substitute the water storage facilities promised under the Deferral Agreement.

Appellee states that the stabilization doctrine cannot apply because it was never under any obligation to construct the UBRP facilities. This argument fails. As the Tribe argued in the proceedings below, the U.S. was indeed obligated to construct the UBRP to provide water storage infrastructure for the Tribe in order to satisfy its ongoing trust responsibility to the Tribe and fulfill the statutory purpose of placing the Tribe "in the same economic position it would have enjoyed had the features contemplated by the [Deferral] Agreement been constructed." APPX1098. Regardless, application of the stabilization doctrine does not hinge on whether UPRP construction was compulsory. Whenever the Government endeavors to mitigate the scope or effect of the taking, the aggrieved party is entitled to await the results of this mitigation before any taking is considered "stabilized" for the purpose of commencing the limitations period. *Applegate v. United States*, 25 F.3d 1579, 1582-83 (Fed. Cir. 1994). It is immaterial whether these mitigation efforts are discretionary or compulsory.

Under CUPCA, Congress appropriated funds for the specific purpose of constructing facilities to replace the water storage infrastructure the Tribe was

promised under the 1965 Deferral Agreement. APPX1090-1092. This appropriation of funds, read in concert with the express legislative purpose of placing the Tribe in the same economic position it would have been in if the United States had satisfied its obligations under the Deferral Agreement, permitted the Tribe to await the results of the UBRP construction before its taking claim became stabilized.

The Appellee's argument that the stabilization doctrine does not apply to regulatory takings is also baseless. Appellee cites no authority indicating that the principles of fairness and equity underlying the stabilization doctrine would apply with any less force to regulatory takings.

B. The Tribe's Claim for Breach of the Deferral Agreement is Timely

In ruling the Tribe's claim for breach of the 1965 Deferral Agreement untimely, the lower court mistakenly assumed the Tribe's allegations rest solely on the United States' failure to construct the water storage infrastructure promised under the Deferral Agreement. The Tribe's claim is actually based on the United States' failure to satisfy its contractual covenant 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," an obligation which did not commence until January 1, 2005. Opening Br. at 48; APPX11. Appellee reiterates its arguments from the lower court proceedings that: (i) if any obligations under 1965 Deferral Agreement were extinguished by Congress under the CUPCA; and (ii) the limitations period to

enforce the covenant cited by the Tribe began no later than January 1, 2005.

The enforceability of the 1965 Deferral Agreement was fully briefed in the lower court proceedings. APPX1-12. To summarize, the CUPCA clause providing that the Tribe "shall waive, upon receipt of the section 504, 505, and 506 moneys, any and all claims relating to its water rights covered under the [Deferral] agreement," did *not* extinguish the Tribe's contractual rights under the 1965 Deferral Agreement. That is because: (i) Congress cannot force the Tribe to waive its contractual rights where there has been no arms-length negotiation or meeting of the minds, (ii) any such prescribed "waiver" was contingent upon the Tribe's receipt of its full entitlement to funds under Sections 504, 505, and 506 of the CUPCA, which has yet to take place, and (iii) Congress never intended to compel a "waiver" of the Deferral Agreement absent a ratified water compact among the Tribe, the State, and the U.S. APPX459-464.

In arguing that January 1, 2005 "was a completion deadline, not a commencement date," Appellee fails to appreciate that 2005 was <u>both</u> a completion date (for the water storage infrastructure units contemplated under the Deferral Agreement) and a commencement date (to "diligently pursue" satisfaction of the Tribe's reserved water rights), with the latter being triggered by the United States' failure to satisfy the former.

III. The Tribe's Breach of Contract Claim States was not Waived in 2012

The CFC ruled that the Tribe's breach of contract claim related to the Midview Exchange Agreement was waived by the 2012 Settlement Agreement's waiver of claims based on "management of Plaintiff's nonmonetary trust assets or resources." However, the failure to transfer assets "into trust" cannot logically fall within the scope of a waiver that is limited unequivocally by its terms to the "management" of *preexistent* trust assets. Appellee urges a broad interpretation of the term "related to;" however, irrespective of how broad "related to" is defined, a claim for mismanaging a trust asset and a claim for failure to transfer an asset into trust *in the first place* are mutually exclusive of one another. Moreover, Appellee fails to account for the explicit exception to the Tribe's release of claims under §6(b) of the Settlement Agreement, excepting from the waiver any damage claims "for loss of water resources caused by [the United States'] failure to establish, acquire, enforce, or protect such water rights." APPX277.

IV. The Court Should Reject the Additional Grounds Appellee Cites to Affirm the Lower Court's Dismissal

Appellee invokes legal arguments that were fully briefed in the CFC proceeding but not addressed in the CFC's Opinion granting the Motion to Dismiss. None of these arguments is persuasive.

A. The Tribe's Breach of Trust Claims are Timely

1. The Continuing Claims Theory Applies

While Appellee is correct in asserting the continuing claims theory "operates to save parties who have pled a series of distinct events—each of which gives rise to a separate cause of action—as a single continuing event," *Ariadne Financial Services v. U.S.*, 133 F.3d 874, 879 (Fed. Cir. 1998), the continuing claims theory also saves claims where the alleged unlawful conduct is "inherently susceptible to being broken down into a series of independent and distinct events and wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Development Co. v. U.S.*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). Therefore, a plaintiff does not have to actually plead "a series of distinct events" so long as the alleged conduct can be broken down in this manner.

The continuing claims doctrine applies "when the government owes a continuing duty to the plaintiffs." *Boling v. U.S.*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). The doctrine applies to save claims for longstanding violations of the Indian trust responsibility. *E.g.*, *Mitchell v. United States* 10 Ct. Cl. 63, 77 (1986) (claims arising from the United States' longstanding mismanagement of timber resources survived the timeliness analysis because "[a] duty to replant…arguably arose after its harvest and each failure to fulfill that duty gave rise to a separate claim."); *Goodeagle v. United States*, 111 Fed. Cl. 716, 724 (2013) (holding the Government's

continuous duty to manage and supervise mining operations on tribal land arose "*each day* mining activity occurred on the land, with each failure to fulfill that duty giving rise to a separate claim."). *Mitchell* and *Goodeagle* both involved ongoing and unrectified breaches of a continuing fiduciary duty, each with associated damages continuing to arise, whether on a daily or seasonal basis, or both—precisely what the Tribe alleges here.

If Appellee's argument is accepted, it will mean the Tribe has lost all legal recourse for breach of an *ongoing* trust duty simply because the Tribe did not sue within six years of the initial breach. In turn, that means the Tribe's failure to bring suit within six years effectively releases the U.S. from any ongoing trust duties. That outcome is untenable. Not only would it subvert the very purpose of the continuing claims doctrine, but it would also effectively nullify any semblance of a trust relationship between the United States and Indian tribes.

2. The Tribe has Never Asserted that the Statute of Limitations was Tolled

Insofar as the term "tolling" implies that a prescribed limitations period is halted or prolonged at the onset of some event, the Tribe has never argued that the 2012 Settlement Agreement's preservation of claims constituted a "tolling" of the statute of limitations. Throughout the lower court proceeding, the Tribe has argued that this provision in the Settlement Agreement established a mutual assented accrual date for such claims. APPX445-446. While the jurisdictional character of

the statute of limitations under 28 U.S.C. § 2501 generally prohibits tolling, this restriction does not apply to mutually assented accrual dates for a claim. *Hopi Tribe v. U.S.*, 55 Fed. Cl. 81, 88 (2002) (finding that "conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law.").

3. <u>The Claim for Relief Based on the 1941 Act Exchange did not Accrue Until the Tribe had Knowledge of the Unlawful Acts</u>

A claim against the U.S. accrues when "events which fix the government's alleged liability have occurred <u>and</u> 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). In determining whether the plaintiff "should have been aware" of the acts and omissions establishing liability, this Circuit has found that Indian trust beneficiaries "are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets." *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004).

The Tribe's breach of trust claim based on unlawful transfers of Tribal water rights under the color of the 1941 Act is timely because the Tribe was not aware – nor had any reason to be aware – of these unlawful water transfers until a non-Indian fee land owner claiming water rights produced a "schedule" of transferred water rights during a court proceeding. Second Declaration of Frances C. Bassett, Esq.,

APPX1350-1355. The Tribe's receipt of this "schedule" instigated further investigation, which yielded two agreements from 1943 and 1946 to transfer to Tribal reserved water rights to this non-Indian fee landowner. APPX1352. The Tribe was not a party or signatory to these agreements. APPX1352-1353. The manner in which the Tribe became aware of this unlawful activity aptly illustrates why trust beneficiaries are "under a lesser duty to discover malfeasance relating to their trust assets," 364 F.3d at 1347, as its trustee did not involve or consult with the Tribe in relation to these transactions.

B. 28 U.S.C. § 1500 Does not Bar Relief

28 U.S.C. § 1500 does not bar relief in in the lower court, because the Tribe filed its action in the lower court before filing its related action in the U.S. District Court for the District of Columbia. In *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389 (1965), the Court of Federal Claims found that 28 U.S.C. § 1500 evinced a clear congressional intent to divest the Court of Federal Claims of jurisdiction only when the district court action had already been commenced at the time the action is filed in said court. This "*Tecon* rule" has been affirmed by the Federal Circuit and remains good law in this jurisdiction. *Resource Investments, Inc. v. United States,* 785 F.3d 660, 670 (Fed. Cir. 2015); *Brandt v. United States*, 710 F.3d 1369, 1379 n. 7 (Fed. Cir. 2013).

CONCLUSION

Based on the facts and authorities cited herein and in the Tribe's opening brief, this Court should reverse the CFC dismissal.

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 6,500 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 26th day of January, 2023, a copy of this **APPELLANT'S REPLY BRIEF** was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

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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 **APPELLANT'S REPLY BRIEF**, 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