No. 2021-1366

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHEMEHUEVI INDIAN TRIBE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeal from the United States Court of Federal Claims,
Case No. 1:16-cv-00492-MHS (Judge Matthew H. Solomson)

UNITED STATES' CORRECTED ANSWERING BRIEF

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STATEMENT OF RELATED CASES

(a) No other appeal from the September 29, 2020 opinion and order of the Court of Federal Claims has been taken.

(b) The undersigned is not aware of any cases currently 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.

INTRODUCTION

The operative complaint of the Chemehuevi Indian Tribe ("Chemehuevi" or "the Tribe") has five counts seeking an accounting of various trust accounts and unspecified damages based on a number of events in Chemehuevi's relationship with the Federal Government from 1865 to 1999. Count I seeks an accounting and damages for alleged mismanagement relating to a $108,104.95 payment the United States made to Chemehuevi in 1940 as compensation for the taking of a portion of Chemehuevi's Reservation for the Parker Dam and Reservoir Project. Count II consists of two claims, relating to $996,834.81 appropriated for Chemehuevi following its settlement of claims against the United States in the Indian Claims Commission ("ICC") which Congress authorized for distribution to individual tribal members in 1970: (a) claims seeking an accounting and damages for alleged mismanagement of the ICC judgment funds; (b) claims seeking restoration of any unclaimed individual payments of those funds. Count III claims a taking of Chemehuevi's "water rights" regarding water that it did not put to use (excess water) and citing events between 1964 and 1998-99. Count IV claims a temporary taking of a 21-mile strip of land along the reservoir created by the Parker Dam (Lake Havasu) for which Chemehuevi was compensated in 1940 but which the Department of the Interior ("Interior") returned to the Reservation in 1974, and also seeks an accounting and damages for alleged mismanagement of unspecified

"suspense accounts." Count V claims that the accounting of Chemehuevi's trust funds that the Government provided in the 1996 Arthur Andersen Report was inadequate and seeks a further accounting of all trust accounts for Chemehuevi to determine whether it has claims against the United States.

The Court of Federal Claims ("CFC") correctly granted the United States' motion to dismiss Chemehuevi's Complaint. The CFC's judgment should be affirmed.

STATEMENT OF JURISDICTION

The CFC determined that it lacked jurisdiction over Chemehuevi's claims because they were either time-barred or failed to state a claim upon which relief could be granted. Appx2-52.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1295(a)(3).

This appeal is timely under Fed. R. App. P. 4(a)(1)(B) because Chemehuevi filed its notice of appeal on November 25, 2020, 57 days after the CFC entered judgment on September 29, 2020.

STATEMENT OF THE ISSUES

1. Whether the CFC correctly dismissed Count I, involving the compensation funds for the Parker Dam and Reservoir Project, either as time-barred under 28 U.S.C. §2501 or for failure to state a claim.

2. Whether the CFC correctly dismissed the Count II claims

a. involving the Government's accounting of the ICC judgment funds as time-barred under 28 U.S.C. §2501 and for failure to state a claim; and

b. involving Chemehuevi's claims for restoration of unclaimed per capita payments that might exist from the ICC judgment funds for failure to state a claim.

3. Whether the CFC correctly dismissed Count III, involving Chemehuevi's water right, for failure to state a claim and as time-barred under 28 U.S.C. §2501.

4. Whether the CFC correctly dismissed Count IV, involving the strip of land taken for the Parker Dam Project but returned to the Reservation in 1974, as time-barred under 28 U.S.C. §2501 and for failure to state a claim.

5. Whether the CFC correctly concluded that it has no equity jurisdiction over Count V's independent claim for an accounting and for the claims for a general accounting contained within Counts I, II, and IV because Chemehuevi seeks this accounting for the impermissible purpose of discovering potential claims.

STATEMENT OF THE CASE

A. Factual background

1. The Chemehuevi Indian Reservation and the Parker Dam and Reservoir Project

The Chemehuevi aboriginally used and occupied the "Mojave Desert's mountains and canyons and the Colorado River shoreline." Appx199, ¶7. In 1907, the Secretary of the Interior "withdrew certain lands for the Chemehuevi on the

California side of the Colorado River" thus "establishing the 36,000-acre Chemehuevi Indian Reservation." Appx200, ¶11.

In the 1930s, Interior entered into an agreement for the Parker Dam and Reservoir Project ("Parker Dam Project" or "Project"), which consisted of the construction and operation of a dam and attendant reservoir (later named "Lake Havasu") on the Colorado River. Appx201, ¶¶14-15. Interior determined that the Dam and Reservoir would eventually flood a portion of Chemehuevi's Reservation and that Chemehuevi was entitled to compensation for such damage. Appx203, ¶¶21-22.

In 1940, Congress authorized the taking of Chemehuevi's land for the Project, and Interior approved payment to the Chemehuevi Tribe for the value of the land taken. Appx203-204, ¶23, Appx205, ¶26. In 1974, Interior determined that a 21-mile strip of the acquired land would not be flooded and, therefore, returned the equitable title to that land to the Tribe. Appx245-26, ¶¶125-126; Appx50.

2. The ICC Judgment Funds

In 1951, Chemehuevi filed a petition with the ICC claiming a taking of its aboriginal land in California, Arizona, and Nevada. Appx212, ¶¶40, 41.[1] The

[1] The Indian Claims Commission Act ("ICCA") vested the ICC with exclusive jurisdiction over all legal, equitable, and moral claims of Indian tribes against the United States that existed as of August 13, 1946. ICCA, Ch. 959, Pub. L. No. 725,

parties settled that claim in December 1964. Appx213, ¶¶45, 47. Congress appropriated funds to pay the judgment to the Tribe (the "ICC Judgment Funds") in the Act of June 30, 1965, 79 Stat. 81, and authorized the distribution of the ICC Judgment Funds by way of per capita payments to individual qualifying tribal members in the Act of September 25, 1970, 84 Stat. 868. Appx231, ¶93.

3. The Winters doctrine and Arizona Decree

Under the "*Winters*" doctrine, the establishment of the Chemehuevi Indian Reservation impliedly reserved for the Tribe water to the extent necessary to fulfill the Reservation's purposes. *See Winters v. United States* ("*Winters*"), 207 U.S. 564, 576-77 (1908); *Arizona v. California* (referred to herein as "*Arizona I*"), 373 U.S. 546, 597 n.100 (1963). In 1964, the Supreme Court issued a decree quantifying the annual amount of water Chemehuevi could use pursuant to its water right under *Winters*. *See Arizona v. California*, 376 U.S. 340, 344 (referred to herein as "*Arizona II*") (1964) (the decree is referred to herein as the "*Arizona Decree*" or "*Decree*").

4. The 1996 Arthur Andersen Report

In 1994, Congress required Interior to perform an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of Indian

§ 2, 60 Stat. 1049, 1050 (1946) (repealed). Here, the ICC designated Chemehuevi's petition as two dockets: Docket No. 351 and Docket No. 351-A. *See* Appx6; Br. 6.

tribes and issue "a report identifying for each tribal trust fund account for which [Interior] is responsible a balance reconciled as of September 30, 1995." 25 U.S.C. §4044. Interior retained Arthur Andersen, LLP to prepare the required accounting and issue reconciliation reports for all federally recognized tribes. Appx43. Chemehuevi received its accounting report (the "Andersen Report" or "Report"), covering the period July 1, 1972 to September 30, 1992, in 1996.[2] Appx7; Appx38.

B. Procedural background

On April 20, 2016, Chemehuevi filed its original complaint in the CFC. Appx30. The complaint sought monetary damages against the United States for alleged "breaches and continuing breaches of the United States' constitutional, statutory and common law fiduciary duties owed to [the] Tribe." Appx7. The Government moved to dismiss asserting primarily that the statute of limitations in 28 U.S.C. §2501 barred the claims. *Id.*

The CFC denied the motion, on the ground that Chemehuevi's complaint "include[d] a wide range of allegations" that were "so expansive" the court could not "confidently determine which of plaintiff's claims might survive defendant's motion to dismiss." Appx8. The court directed Chemehuevi to file an amended complaint and stayed the deadline for the Government's response so the parties

[2] The Complaint refers to the Report as the 1992 Arthur Andersen Report.

could confer about whether limited jurisdictional discovery was necessary to resolve questions about this court's jurisdiction. Appx8. Chemehuevi filed a first amended complaint in April 2017. Appx8. The parties engaged in jurisdictional discovery for more than two years. Appx8.

In April 2019, Chemehuevi filed a second amended complaint (the "Complaint"). Appx197-326. The Government moved to dismiss, arguing that the statute of limitations in 28 U.S.C. §2501 barred each of the Counts and that Chemehuevi failed to state a claim on which the court could grant relief. Appx8.

The CFC heard oral argument on the Government's motion and, on September 29, 2020, issued a 51-page Opinion and Order dismissing the Complaint. Appx1-52. The court concluded that Chemehuevi's claims in Counts I through IV were time-barred under 28 U.S.C. §2501 (Appx30-44) and/or failed to state a claim (Appx44-51), and that the claims in Count V and the parts of the other Counts similarly seeking a general accounting of the Tribe's trust funds were outside the CFC's jurisdiction (Appx27-30).

SUMMARY OF ARGUMENT

This matter was decided by the CFC after the parties had conducted more than two years of jurisdictional discovery. In a thorough opinion, the CFC correctly granted the Government's motion to dismiss, concluding that Chemehuevi's claims were "barred by the statute of limitations [under 28 U.S.C.

§2501], erroneous as a matter of law, so equivocal as to fail to state a claim, or plainly outside of th[e] Court's jurisdiction."

1. Count I seeks an accounting and damages for alleged mismanagement involving payments the Government made to Chemehuevi in 1940 as compensation for the taking of a portion of Chemehuevi's Reservation for the Parker Dam Project. These claims are time-barred because, as the CFC correctly found, there is "not one shred of a fact even suggesting that the Tribe learned something new" to trigger the accrual of its claim in the six year period before filing its 2016 complaint. Indeed, the Government had provided Chemehuevi with an accounting of its trust funds in 1996.

Chemehuevi instead asserts that its claims "have not yet accrued for statute of limitations purposes." That admission is a proper basis for dismissing Count I because the CFC has authority to adjudicate only *accrued* claims for damages. Regarding Chemehuevi's argument that the statute of limitations is tolled until Interior provides the Tribe with an accounting of the Parker Dam funds and repudiates the trust, Chemehuevi does not demonstrate any legal error in the CFC's detailed analysis rejecting that argument. Moreover, Chemehuevi's tolling theory derives from a provision contained in Interior's *former* Appropriations Act riders that were not in effect when the Tribe filed its complaint in 2016. Those past provisions were included only in riders from 1990 through 2014. No riders

thereafter contained such a provision thus leaving Chemehuevi with no basis for a tolling argument.

Finally, Count I requests an accounting under to uncover potential claims. The CFC has no equity jurisdiction over claims for such a purpose.

2. Count II similarly seeks an accounting and damages for alleged mismanagement of the Indian Claims Commission Judgment Funds congressionally authorized in 1970 for distribution to qualified Chemehuevi members. Those claims are time-barred because Chemehuevi received an accounting in 1996, and the Tribe points to no relevant facts after 1996.

As with Count I, Chemehuevi argues that its accounting and mismanagement claims in Count II have not yet accrued for statute of limitations purposes. That concedes that Count II, like Count I, fails to state a claim. In addition, the fundamental flaw in the Tribe's tolling argument for Count I likewise applies to Count II. And Count II suffers from the same basic defect as Count I because the CFC lacks jurisdiction to order an accounting for purposes of uncovering possible claims.

Count II contains a second set of claims seeking restoration of unclaimed per-capita payments of the ICC Judgment Funds. Chemehuevi, however, does not dispute the CFC's finding that the complaint contains no factual allegations that any per capita payments actually remain unclaimed or even exist. Thus,

Chemehuevi has failed to state a claim. Chemehuevi has likewise failed to state a claim because the statutory remedy for restoration can be provided only through an administrative process, not through a complaint.

3. Count III fails to state an uncompensated-takings claim. It alleges that the Government has taken Chemehuevi's "water rights" by allowing junior users in the Colorado River System to use the water that Chemehuevi does not divert from the River for its own use and by paying the Tribe no compensation for the taken "water rights."

a. Under the *Winters* Doctrine, Chemehuevi has a water right that is usufructuary in nature, consisting not of the fluid itself but, rather, of the advantage of its *use*. Thus, the Tribe has no property right in water that it does not use. Chemehuevi alleges no facts establishing that the Government has taken the Tribe's *Winters* water right. Chemehuevi always had its *Winters* right to use water for its Reservation's purposes.

b. To the extent Chemehuevi intends for its "water rights" claims to apply to the quantum of water allocated to the Tribe under the *Arizona Decree*, the *Decree* established only the maximum amount of water that Chemehuevi is entitled to use annually; it did not provide a "right" in the water molecules themselves, nor did it bestow any property right in the maximum amount of water allocated under the *Decree* regardless of use. Chemehuevi, therefore, has no compensable property

interest in the decreed water it does not use and, thus, has no valid claim of a taking of such water.

c. Chemehuevi raises for the first time a breach of fiduciary duty claim that is predicated on the Boulder Canyon Project Act and alleges that the Government breached its duty by prohibiting the Tribe from leasing water the Tribe did not use. Chemehuevi has forfeited this argument by failing to raise it in the Complaint. In any event, to invoke the CFC's jurisdiction under the Indian Tucker Act, the Tribe must identify a substantive source of law that establishes the specific fiduciary duty. The Boulder Canyon Project Act imposes no such duty. Finally, to the extent Chemehuevi's new breach arguments seek to challenge the Government's failure to approve the water lease Chemehuevi proposed in 1998, those grievances should have been brought under the Administrative Procedure Act.

d. Count III's claims are also time-barred. Assuming Chemehuevi's takings and breach arguments even state a claim, they accrued at the time the Tribe knew or should have known that it was not receiving compensation for water that it did not use and that was made available to junior water users. Chemehuevi's complaint alleges that those very circumstances occurred from 1964 until 1998. Thus, Chemehuevi's claims accrued no later than 1998.

Count III's claims are not saved by Chemehuevi's new arguments invoking the continuing claims doctrine. As the CFC correctly found, Chemehuevi asserted

the doctrine for the first time in response to the Government's motion to dismiss. The CFC appropriately concluded that Chemehuevi's "mere invocation of the continuing claims doctrine—without so much as identifying to which claims the doctrine applies—does not satisfy the Tribe's burden." On appeal, Chemehuevi presents only cursory continuing-claims arguments that Chemehuevi has newly-fashioned. Such arguments should be deemed forfeited. In any event, the continuing claims doctrine does not apply to Chemehuevi's claims because no allegations in the Complaint establish that the Government interfered with the Tribe's exercise of its *Winters* right at all, let alone by "independent and distinct" acts.

4. Count IV consists of two separate claims involving a 21-mile strip of land along what eventually became the shoreline of Lake Havasu.

The first claim, which alleges a temporary taking of that land beginning in 1941, is time-barred because, by Chemehuevi's own assertions, the duration of the alleged taking was 1941 to 1974, and the complaint alleges no relevant facts that postdate 1974. The first claim also fails to state a claim for a temporary taking as a matter of law. The shoreline strip of land was undisputedly part of the land that the Government acquired from Chemehuevi in 1941. The Government paid Chemehuevi just compensation and then later returned the land to the Tribe. There is no basis on which the Tribe could recover a third time for a purported temporary

taking of the same land. Arguing that it held full title to the land between 1941 and 1974, Chemehuevi contends that the Government breached its fiduciary duties by failing to manage the land for the benefit of the Tribe. But Chemehuevi identifies no basis for such a duty and, therefore, has failed to allege a requisite element of a fiduciary-duty claim.

The second claim in Count IV seeks an accounting of any "suspense accounts" that may be related to the strip of land and seeks damages for alleged mismanagement of such accounts. But as the CFC correctly found, in the complaint Chemehuevi "equivocally opines that it may or may not have been entitled to funds in some unidentified suspense accounts which the government may or may not already have disbursed to the Chemehuevi." Moreover, the Complaint "is devoid of any factual allegations that the government mismanaged any funds held in any suspense accounts." Chemehuevi, therefore, has failed to state a claim. Finally, the CFC lacks jurisdiction to order an accounting for purposes of finding possible claims regarding suspense accounts.

5. Count V seeks an accounting of all of Chemehuevi's trust funds, asserting that the Andersen Report the Tribe received in 1996 was an inadequate accounting. Such a claim for declaratory and injunctive relief belongs in federal district court, as the CFC correctly concluded.

ARGUMENT

I. Standard of review

This Court reviews the grant of a motion to dismiss de novo. *Prairie County v. United States*, 782 F.3d 685, 688 (Fed. Cir. 2015). Underlying factual findings are reviewed for clear error. *Katzin v. United States*, 908 F.3d 1350, 1358 (Fed. Cir. 2018). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This Court may affirm "on any ground supported by the record." *Music Square Church v. United States*, 218 F.3d 1367, 1373 (Fed. Cir. 2000).

II. The CFC correctly dismissed Count I, involving the Parker Dam Project compensation funds, because it is either time-barred or fails to state a claim.

Count I involves the compensation funds awarded to Chemehuevi in 1940 for a portion of the Tribe's land that the Government acquired for the Parker Dam Project. First, the Tribe alleges that it does not know whether "the Parker Dam Compensation Monies, either with or without interest, were ever paid to the Tribe." Appx228-229, ¶¶83-86. Second, the Tribe alleges that, contrary to 25

U.S.C.§4044, the Government failed to provide Chemehuevi with a "complete accounting of the Parker Dam [Funds] from 1970 up to the time this Second Amended Complaint was filed," Appx228-229, ¶¶84, 86; Appx230-231, ¶¶90-91, and the Tribe seeks such an accounting, Appx230, ¶90. Third, the Tribe alleges that the Government mismanaged the Parker Dam Funds, and the Tribe seeks damages for that alleged mismanagement. Appx230-231, ¶¶89, 91.

A. Count I is time-barred.

It is undisputed that the applicable statute of limitations for Count I and all other Counts in the case is 28 U.S.C. §2501, which provides 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." *See, e.g.,* Br. 19-20. Section 2501 thus bars any of Chemehuevi's claims that accrued before April 20, 2010—*i.e.*, six years before the Tribe brought this action in 2016. This limitations period is "a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). A claim accrues under Section 2501 "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." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1359 (Fed.

Cir. 2013). "The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995).

The CFC properly held that the claims in Count I are time-barred because "there is no allegation—not one shred of a fact—even suggesting that the Tribe learned something new *after* April 20, 2010 (*i.e.,* six years prior to the 2016 original complaint) that triggered the accrual of its claim." Appx32. As to the Tribe's accounting claims, there were "no factual developments following the 1996 Arthur Andersen Report." *Id*. And "every factual allegation in the Complaint related to putative trust fund mismanagement was known to the Tribe before April 20, 2010, including the alleged lack of accounting documentation." *Id*.

The Complaint bears out the CFC's findings and conclusions, revealing that the Tribe knew or should have known about the accounting facts alleged in Count I as of 1940, at the earliest, and by 1996, at the latest. The Complaint alleges, for example, that in October 1940, after Congress authorized the Government's acquisition of portions of the Tribe's land, Interior approved a compensation award and deposited the compensation funds into a Treasury account "to the credit of the Chemehuevi Tribe" where the funds remained from "1940 until at least June 5, 1970." Appx205, ¶26; Appx207, ¶30. The Complaint further states that the Tribe

received the Government's accounting of all of the Tribe's funds in 1996, in the Arthur Andersen Report. *See, e.g.,* Appx217, ¶58. The CFC found that there were "no factual developments following the 1996 … Report." Appx32. Chemehuevi does not argue that the CFC overlooked some relevant post-1996 factual development, *see* Br. 22-25, nor is there such an allegation in the Complaint.

Moreover, an alternative ground for affirmance with respect to facts and events that gave rise to Chemehuevi's Count I claims and existed on or before August 13, 1946 is that those claims are extinguished by the ICCA. *See supra* at p. 4 n.1. The ICCA provided a cause of action for all Indian claims against the government that accrued before 1946, provided they were filed within a five-year statute of limitations period. ICCA §12, 25 U.S.C. §70k (1976). The ICCA expressly barred pre-1946 claims from future litigation, instructing that "no claim existing before [August 13, 1946] but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." ICCA §12, 60 Stat. at 1052.

Chemehuevi's Complaint alleges that Interior deposited the Parker Dam just-compensation funds awarded to the Tribe into a Treasury account to the credit of the Tribe, and those funds remained there from "1940 until at least June 5, 1970." Appx205, ¶26; Appx207, ¶30. The Complaint further alleges that the Tribe does not know whether the compensation funds "have ever been paid to the

Tribe at any time from 1940 up until the date th[e] Second Amended Complaint was filed," Appx211, ¶37; Appx228-229, ¶¶83-86, and that the Government breached its fiduciary duty by "mismanag[ing]" the funds, Appx230-231, ¶¶89, 91. As described by Chemehuevi, those claims accrued before August 13, 1946; thus they are extinguished by operation of the limitations period in the ICCA.

Chemehuevi contends that the statute of limitations is tolled for Count I until Interior provides the Tribe with an accounting of the Parker Dam Project funds and repudiates the trust. Br. 22-25. But the Tribe does not demonstrate any legal error in the CFC's detailed analysis rejecting that argument. Appx19-22; Appx35-43. Chemehuevi's tolling theory derives from a provision included in Interior's Appropriations Act riders from 1990 through 2014. *See* Appx19-20. The provision stated that the statute of limitations did not commence to run on any claim concerning mismanagement of trust funds until Interior furnished the affected tribe with an accounting of such funds.

Congress enacted the last appropriations act rider with the tolling provision on which Chemehuevi relies in 2014. *See* Consolidated Appropriations Act, 2014, 128 Stat. 5, 305-06 (Jan. 17, 2014). That Act and its attendant tolling provision applied to Fiscal Year 2014, and they contained no language indicating that they were to be in effect any longer. The subsequent appropriation acts, including the one in effect when Chemehuevi filed its 2016 Complaint here, contained no such

tolling provision. *See, e.g.,* Pub. L. No. 113-235, Div. F, Title I, 128 Stat. 2130, 2413 (2014); *Wyandot Nation of Kansas v. United States*, 124 Fed. Cl. 601, 605-06 (2016) *aff'd,* 858 F.3d 1392 (Fed. Cir. 2017) (acknowledging cessation of Appropriations Act riders after 2014). Thus, the last enacted tolling provision had already expired when Chemehuevi brought this action.[3] There is no basis for tolling the accrual of Count I and, thus, Count I is time-barred. And, even if the former appropriations riders somehow applied, the Tribe received an accounting in 1996, so as the CFC correctly pointed out, no tolling would be applicable. Appx18-22; Appx24-26; Appx35-36.

B. Count I also fails to state a claim.

Contradicting Chemehuevi's argument that it has timely asserted a claim for damages involving the Parker Dam funds, Chemehuevi admits that its claims "have not yet accrued for statute of limitations purposes." Br. 24. Specifically, Chemehuevi argues that accrual of Count I cannot commence until Interior provides the Tribe with an accounting of the Parker Dam Funds and repudiates the

[3] Tellingly, the Tribe does not refer expressly to these *former* appropriations act riders on which it relies. Instead, the Tribe cites cases that refer to or rely on the tolling provisions that were included in appropriations act riders between 1990 and 2014. *See* Br. 20. The Tribe's failure to specifically name the provision on which it relies is revealing. There is no *basis* for tolling the Tribe's claims, and that is fatal to its Complaint.

trust, which Chemehuevi contends has not occurred. Br. 22-25.[4] That admission is a sufficient basis for dismissing Count I for failure to state a claim. The CFC has authority to adjudicate only *accrued* claims for damages. *See* 28 U.S.C. §2501.

III. The CFC correctly dismissed Count II, involving the ICC Judgment Funds, because it is either time-barred or fails to state a claim.

A. The Count II accounting and mismanagement claims are untimely.

The first set of claims that Chemehuevi raises in Count II are accounting claims that involve the ICC Judgment Funds awarded to the Tribe following its settlement with the Government. Appx231-232, ¶¶93-94, 96; *supra* p. 4-5. Count II alleges that no accounting has been made by the Government regarding ICC Judgment Funds from "June 1965 until at least September 1970." Appx231-232, ¶¶94, 96. Appx33. The CFC properly concluded that the Count II accounting claims are time-barred.

The relevant facts alleged for the Count II accounting claims, for purposes of claim accrual, were either matters of public record or events that Chemehuevi knew or should have known beginning in 1970. *See* Appx6; Appx30-33. In particular, after Chemehuevi and the Government reached a settlement in 1964,

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[4] Chemehuevi also seeks an accounting of the Parker Dam compensation funds for the purpose of *uncovering* potential claims. *See, e.g.,* Appx228-229, ¶¶83-86; Appx231-232, ¶¶90, 91. As explained in Section VII, *infra* at pp. 55-59, the CFC has no equity jurisdiction over claims for such a purpose.

Congress appropriated funds the following year in accordance with the ICC judgment, Appx231, ¶93. Congress authorized distribution of the ICC Funds to Chemehuevi tribal members under the Act of September 25, 1970. *Id.* That public, Congressional act, establishes that as of 1970, Chemehuevi contemporaneously knew or should have known that it had trust funds for which an accounting was allegedly required.

With 1970 as the determinative starting date, Chemehuevi does not dispute the CFC's finding that "[n]othing about the Tribe's situation or knowledge with respect to those ICC judgment funds ... has changed since the 1970s." Appx33. The next relevant date is 1996, when the Government provided Chemehuevi with an accounting of its trust funds in the Andersen Report. Appx7. Chemehuevi does not disagree with the CFC's finding that facts alleged in support of the Count II claims "were *derived* from the 1996 Arthur Andersen Report" itself. Appx33 (emphasis added). Nor does Chemehuevi allege that its knowledge regarding the ICC Funds changed after the 1996 Report issued. Appx33.

Thus, Chemehuevi's Complaint, and the undisputed findings of the CFC, establish that the Tribe knew or should have known of its Count II accounting claims no later than 1996. Count II, therefore, is time-barred.

Similar to Count I, Chemehuevi argues that the statute of limitations is tolled for Count II until Interior provides the Tribe with an accounting of the ICC

Judgment Funds and repudiates the trust. Br. 19-23. As we have explained *supra* at p. 18-19, Chemehuevi's tolling theory originates solely from a provision that was contained in *former* Interior Appropriations Act riders but was not included in any such Act at the time Chemehuevi filed its complaint. Thus, the Tribe has no basis for alleging that its Count II accounting claims are tolled.

B. The Count II accounting claims also fail to state a claim.

In Count II, as with Count I, Chemehuevi contradicts its argument that it has timely asserted a claim for an accounting and damages involving the ICC Judgment Funds (Br. 19-22). Chemehuevi argues that those claims have *not yet accrued* for statute of limitations purposes" because the Tribe "has received no accounting of these funds." Br. 21 (emphasis added).[5] Chemehuevi thus concedes that Count II, like Count I, fails to state a claim under its own theory because no claim has accrued for the CFC's consideration. Additionally, because Chemehuevi did receive the Government's 1996 Andersen Report providing an accounting of the Tribe's trust funds, Appx217, ¶¶57-58, the CFC correctly found that to the extent the Tribe argues that it lacks sufficient facts to bring a claim because of any

[5] Chemehuevi also seeks an accounting of the ICC Judgment Funds for the purpose of uncovering potential claims. *See, e.g.,* Appx231, ¶¶92-94; Appx231-232, ¶¶95(b), 96, 97. As explained in Section VII, *infra* at pp. 55-59, the CFC has no equity jurisdiction over claims for such a purpose.

alleged inadequacy in that Report, "the Tribe fails to state a claim and its Complaint must be dismissed." Appx33.

IV. The CFC correctly dismissed the Count II per-capita payment claims involving the ICC Judgment Funds for failure to state a claim.

The second set of Chemehuevi's claims involving the ICC Judgment Fund concerns the Government's distribution of the money from that Fund. Appx214, ¶¶48-50; Appx231-232, ¶95(b). The Tribe's argument that it properly alleged a claim for restoration of any unclaimed per capita payments is wholly unpersuasive. Br. 27-30.

Congress authorized distribution of the ICC Judgment Fund through per capita payments to qualifying Chemehuevi members. *See* Act of September 25, 1970 (84 Stat. 868); Appx214, ¶48, Appx231, ¶93; Appx45. In 25 U.S.C. §164, Congress authorized tribes, including Chemehuevi, to seek restoration of unclaimed per capita payments. Section 164 provides in relevant part that an individual tribal member's share of a per capita distribution shall be "restored to tribal ownership" if such share "cannot be paid to the individual entitled thereto" and "remains unclaimed" for the statutorily-mandated period of time. 25 U.S.C. §164. Interior's regulations implementing Section 164 establish a specific

administrative process by which tribes may seek to have unclaimed payments restored to tribal ownership.[6]

Chemehuevi contends that under Section 164 and its implementing regulations (1) the Tribe is entitled to restoration of any unclaimed per capita payments that *might still remain* from the ICC Judgment Funds; and (2) the Tribe may use its Complaint in this litigation to administratively "apply" for the restoration of any such unclaimed payments. Appx214, ¶50; Br. 17-19. The CFC correctly concluded that Chemehuevi failed to state a claim under Section 164.

A. Chemehuevi's Complaint fails to allege that any unclaimed per capita payments actually exist.

Chemehuevi does not dispute any of the CFC's determinative findings about the Tribe's per-capita payment claims:

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[6] When per-capita payment checks issued by the United States are either not cashed or returned to Interior as undeliverable, those funds are deposited into a "returned per capita account" where the funds are maintained until Interior "receive[s] a request for disbursement" by a tribe pursuant to 25 C.F.R. §115.820. 25 C.F.R. §115.818(a), (b). Section 115.820 provides that "a tribe may *apply* under 25 U.S.C. 164" to have funds in a returned per capita account "transferred to [the tribe's] account." *Id.* §115.820 (emphasis added).

- "The Tribe is *unsure whether* the government distributed all of the funds in per capita payments to the Tribe's members." Appx6 (emphasis added);
- "The Tribe's Complaint contains no factual allegations that *any* of the per capita payments actually remain unclaimed." Appx45 (emphasis added);
- "[T]he Tribe fails to include *any* factual allegation that *any* unclaimed funds actually exist." Appx46 (emphasis in original).

For a plaintiff to avoid dismissal for failure to state a claim, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. The CFC correctly explained that "[p]ermitting the Tribe to pursue a claim for unclaimed per capita payments when the Tribe does not (and apparently cannot) even assert that any unclaimed per capita payments exist would fly in the face of more than a decade of Supreme Court and Federal Circuit precedent." Appx47 (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557). Chemehuevi's claims regarding purported unclaimed payments must be dismissed because they lack the most basic factual allegations necessary to state a claim even after the parties conducted more than two years of jurisdictional discovery. *See* Appx8.

Chemehuevi's argument to the contrary misplaces reliance on *Quapaw Tribe of Oklahoma v. United States*, 120 Fed. Cl. 612 (2015). *See* Br. 27. Pointing to a few words referring to the recovery of "any unclaimed per capita payments …, *if*

any exist," Chemehuevi incorrectly suggests that the court allowed the Quapaw Tribe to proceed with its lawsuit involving unclaimed per capita payments without alleging that any unclaimed payments existed. *Id.* But the Quapaw Tribe, unlike Chemehuevi here, provided evidence from an accounting obtained through a federal district court action that a specific percentage of the per capita payment distributions were "unaccounted for and *could not have been made*." *Quapaw*, 120 Fed. Cl. at 618 (emphasis added); Appx47. That evidence on which the Quapaw Tribe relied in its CFC action, enabled the Quapaw Tribe to satisfy its burden to present facts on which relief could be granted. *See* 120 Fed. Cl. at 614-15, 618. *Quapaw* provides no support for Chemehuevi's contention that it can pursue a claim to recover unclaimed per capita funds in the CFC without a factual allegation that any such funds exist.

B. Chemehuevi has also failed to state a claim because the process of applying for unclaimed-payment restoration is an administrative process.

Chemehuevi has also failed to state a claim for the restoration of unclaimed per capita payments because that statutory remedy can be provided only by Interior through an administrative process. Interior has never disputed that Chemehuevi may apply to Interior for restoration of unclaimed per capita payments through the specified application process. Appx214, ¶50. But the Tribe's Complaint is not an

administrative application; nor may a lawsuit be used to evade the established, administrative-application process. *Id.*

On this point, the CFC—having found that Chemehuevi failed to provide "*any* factual allegation that *any* unclaimed funds actually exist"—determined that the court "need not decide whether the Tribe's filing of its claim in this Court constitutes a proper application for the transfer of the unclaimed funds under the statute [25 U.S.C. §164] and regulation." Appx46. But the CFC noted that it was "highly skeptical—putting it mildly—that the Tribe's Complaint satisfies the application for funds contemplated by the regulatory scheme." Appx46 n.56 (citations omitted). The CFC further pointed out that it was "*despite* the plain language of the regulation" that Chemehuevi tries to claim that it "applied" for the restoration of unclaimed funds through its CFC Complaint. Appx46 (emphasis added). The CFC also noted this Court's acknowledgement that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." Appx46 n.56 (quoting *Palladian Partners, Inc. v. United States*, 783 F.3d 1243, 1254 (Fed. Cir. 2015)).

Section 164 identifies no role for the CFC in the restoration process for unclaimed payments. Interior manages the accounts that hold unclaimed payments for which tribes may apply, and it manages transfers from such accounts consistent with the relevant regulations. *See* 25 C.F.R. §115.818; 25 C.F.R. §115.820. And

while Interior is charged with this administrative responsibility, a tribe must *apply* to Interior to have the funds transferred; "[f]unds in a returned per capita account will not automatically be returned to a tribe." 25 C.F.R. §115.820.[7]

Finally, Chemehuevi is not helped by its argument that Section 164 and the implementing regulations place no time limit on a tribe's *application* to Interior for administrative restoration of unclaimed per capita payments. *See* Br. 17-19. Chemehuevi has brought a *judicial claim* against the United States. Claims cognizable in the CFC are governed by the six-year limitations period in 28 U.S.C. §2501.

V. The CFC correctly dismissed Count III's claims involving Chemehuevi's *Winters* water right for failure to state a claim and as time-barred.

Count III addresses "water rights" that Chemehuevi allegedly has in excess water that the Tribe does not use.[8] The Count alleges that the United States took

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[7] If Chemehuevi properly adheres to the requisite administrative process and believes Interior erred in deciding a claim, the Administrative Procedure Act ("APA"), 5 U.S.C. §702, provides the mechanism for non-monetary challenges to federal agency actions.

[8] Chemehuevi uses the term "*surplus* water" to refer to the difference between the amount of water the Tribe uses annually and the maximum amount of water the Tribe is allocated annually under the *Arizona Decree*—in other words, the water that is in excess of what the Tribe diverts for use for the relevant year. In this brief, we refer to that unused water as "excess" water because, in the Colorado River System, "surplus water" is a term of art. It refers to circumstances in which the amount of water in the River *available* for release to satisfy the consumptive uses of certain States exceeds the actual consumptive use of those states. *See*

such water and failed to compensate the Tribe in violation of the Fifth Amendment. Appx233-245, ¶¶98-123; Br. 31-41. The Count also alleges that the United States breached its fiduciary responsibilities in failing to approve Chemehuevi's 1998 proposal to lease such excess water. Appx236-237, ¶108; Appx239, ¶¶113-114. The CFC properly dismissed Count III as time-barred and for failure to state a claim.

A. Count III alleges no set of facts supporting the claim that Chemehuevi's reserved *Winters* water right has been taken.

As shown below, Chemehuevi has failed to state a takings claim because the Tribe alleges no interference by the United States with the its water right as reserved by the establishment of its reservation, *see Winters v. United States*, and as quantified and decreed in *Arizona v. California*.

1. Chemehuevi's *Winters* water right, a usufructuary right that was quantified in the *Arizona Decree*, does not include a compensable property right in the water itself.

Under the Supreme Court's opinion *Winters v. United States*, and subsequent case law applying it (the "*Winters* Doctrine"), the establishment of an Indian reservation implicitly reserves sufficient water to accomplish the purposes of the reservation. 207 U.S. at 576; *Arizona I*, 373 U.S. at 597-602.

Arizona v. California, 547 U.S. 150, 155 (2006) (Art. II.B.2. defining surplus water and apportioning among States).

The purposes of an Indian reservation have been interpreted broadly to support the establishment of a self-sustaining tribal homeland, and under the *Winters* Doctrine, a tribe possesses a right to as much then-unappropriated water as is necessary to fulfill the purposes of its reservation. *Winters*, 207 U.S. at 565, 576; *see also Arizona I*, 373 U.S. at 599-600 (describing the rationale of *Winters* as the Government's intent "to deal fairly with the Indians" and implicitly reserving for the Reservation "the *waters without which their lands would have been useless*." (emphasis added)).

As part of the original action before the Supreme Court in *Arizona I*, the United States claimed such "*Winters* rights" for five Indian reservations along the Lower Colorado River mainstream, including for the Chemehuevi Reservation. 373 U.S. at 595 & n.97. The Court held that, under *Winters,* the creation of those reservations reserved sufficient water to make the reservations "livable" in amounts "intended to satisfy the future as well as the present needs" of the respective reservations. *Id.* at 599-600.

Following its landmark decision in *Arizona I* in 1963, the Supreme Court issued its judgment and a decree in 1964 quantifying the annual amounts of water associated with the tribes' *Winters* rights. *Arizona II*, 376 U.S. 340; *see also Arizona v. California,* 547 U.S. 150 (2006) (current consolidated decree). The *Arizona Decree* enjoins the United States from releasing water in the Colorado

River System except in accordance with the specified allocations and priority dates. *Id.* at 341-45. In the *Decree*, the Court quantified the amount of water Chemehuevi could use under its water right based on the "practicably irrigable acres" ("PIA") standard, *see Arizona I*, 373 U.S. at 600,[9] and the *Decree* allocates to the "Chemehuevi Indian Reservation" (with a priority date of 1907) "annual quantities not to exceed:"

> (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required of irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less.

Arizona II, 376 U.S. at 344.[10] Under the *Decree*, water allocated to Chemehuevi and the other Indian reservations has priority over the water rights of junior water users. *See id.* at 342-43.

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[9] Although the Supreme Court's quantification was based on use for irrigation, the Court later clarified that *Winters* rights may be used for any lawful purpose for the reservation. *Arizona v. California*, 439 U.S. 419, 422 (1979) (quantification "shall not constitute a restriction of the usage … to irrigation or other agricultural application"); *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48-49 (9th Cir. 1981). Given that clarification, we agree with the Tribe that the PIA standard represents one tool by which courts quantify *Winters* rights and that the lower court incorrectly stated that the Tribe possesses only the right to use a certain amount of water "for irrigation." Br. 37-38 (quoting Appx49). However, that mistake is immaterial to the CFC's correct decision regarding Count III.

[10] To access its decreed water, Chemehuevi diverts water from the Colorado River using wells and pumps located on the Reservation. Chemehuevi may pump up to the maximum annual amount/quantity allocated for the Reservation in the *Arizona Decree.* Any amount of the annual water allocation that Chemehuevi does not divert remains in the Colorado River water System and is available for use by

The *Winters* rights reserved for tribes' reservations "[v]ested no later than the date each reservation was created." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 574 (1983). Once vested or otherwise recognized, a tribe's interest in this water right becomes "property" protected by the Fifth Amendment. *See, e.g.*, *United States v. Creek Nation*, 295 U.S. 103 (1935). However, for Fifth Amendment purposes, the water rights reserved to tribes under *Winters* are not rights to ownership of the water itself. Like all water rights, *Winters* rights do not extend beyond the "advantage" of "using" the water. *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018). That is because, as this Court has determined, the *Winters* water right is "usufructuary in nature—meaning that the property right consists not so much of the *fluid itself* as the *advantage of its use*." *Id.* (emphasis added); *see also* Appx48-49.

Accordingly, an Indian tribe "has *no right* to any particular molecules of water, either on the Reservation or up- or downstream." *Id.* (emphasis added). The same proposition holds true for water rights established under general principles of state water law. *See, e.g.*, *Casitas*, 708 F.3d at 1353-54; *cf. Federal Power Comm'n.*, 347 U.S. at 246 (water rights at issue "are usufructuary rights to

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junior water users. *See, e.g., Arizona II*, 376 U.S. at 344; *see also infra* p. 32 (discussing *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018).

use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself"). Thus, a senior user has no right to water that it does not use, and that water is then available to junior users.[11]

The *Arizona Decree*, therefore, established the maximum amount of water that Chemehuevi is entitled to use annually. The *Decree* did not provide a "right" in the water molecules themselves, nor did it bestow any property right in the maximum amount regardless of use. Accordingly, to the extent a portion of Chemehuevi's allocation of water goes unused, that amount of water becomes available to junior users consistent with the *Decree*. Thus, for purposes of the Fifth Amendment, Chemehuevi's *Winters* right provides the right to *use* water as decreed in *Arizona II*. Chemehuevi does not have a compensable right in the *water itself* and thus has no compensable right in any *excess water* that the Tribe does not use.

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[11] One fundamental distinction from general Western water law principles is relevant in this case: *Winters* rights are not lost for non-use under concepts such as abandonment and forfeiture. *See, e.g.*, *Winters*, 207 U.S. at 577; *San Carlos Apache*, 463 U.S. at 574 (Indian tribes' *Winters* rights "are not forfeited if they are not used"). Only Congress can diminish Indian rights. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999). Chemehuevi's contention (Br. 26) that its *Winters* right "expires" if not used is mistaken. Any excess water that the Tribe does not use is available to junior users consistent with the *Arizona Decree*.

2. Count III fails to state a claim because Chemehuevi alleges no facts establishing that its *Winters* right was taken.

To state a claim for just compensation under the Fifth Amendment for the taking of property, Chemehuevi must demonstrate government interference with a cognizable property interest. *Baley v. United States*, 942 F.3d 1312, 1326-27 (Fed. Cir. 2019).

Chemehuevi possesses a use-interest in its *Winters* water right, subject to Fifth Amendment protections. *See id.* at 1335. But Chemehuevi failed to assert a viable takings claim regarding that interest because it failed to allege that the United States acted to prevent *the Tribe from using* water allocated to it under the *Decree*, or affirmatively interfered with the Tribe's ability to use that water to fulfill its "reservation's need for water," *Crow Creek*, 900 F.3d at 1356. Chemehuevi makes no claim that the United States interfered in any way with the Tribe's *Winters* right to divert water for the Tribe's use. Thus, absent any allegation of affirmative Government interference with its compensable *Winters* water right, Chemehuevi has failed to state a takings claim and CFC correctly so concluded. *See* Appx48-49.

B. Count III claims involving water Chemehuevi does not divert for its use fail to state a claim because they implicate no compensable property right

Chemehuevi alleges that, since 1964, (1) the "Tribe has used or consumed on the Chemehuevi Reservation only a small portion of the Tribe's annual allocation of water" provided for in the *Arizona Decree*; and (2) the Government has made the Tribe's annual "surplus water" "available to other junior users" without paying compensation to the Tribe. Appx236-237, ¶¶107-108; Appx238, ¶111. Chemehuevi contends that such actions constitute an uncompensated taking in violation of the Fifth Amendment. Appx239, ¶113.[12]

But that argument misconstrues the nature of water rights. Indeed, Chemehuevi "conced[es]" that "an owner of *Winters* reserved water rights" does not have a "possessory property interest in the corpus or molecules of the *water itself*." Br. 31 (emphasis added). Chemehuevi further concedes that "the Tribe's [*Winters*] water rights are property rights, *though the Tribe does not own the water*

[12] Chemehuevi asserts that when the Government apportions the Tribe's excess water to junior water users, the Government takes some unspecified action to divert the water to those users. Br. 15-16, 39-40, 43. That characterization is inaccurate. The water that is available for use by Chemehuevi under the *Arizona Decree* but is unused by the Tribe simply remains in the Colorado River System, and is available for use by junior water right holders to use pursuant to their respective allocations provided under the *Arizona Decree*. Junior users have had access to Chemehuevi's excess water not because the Government has diverted it to those other users, as Chemehuevi's argument incorrectly suggests, but because Chemehuevi *itself* chooses not to use the full amount of water to which it is entitled under the *Decree*, which leaves the excess water available for use by others.

itself." Br. 32 (emphasis added)). Thus, there is no dispute that while Chemehuevi's *Winters* right is a cognizable and compensable property interest that entitles the Tribe to divert water for its use (up to the maximum amount prescribed in the *Arizona Decree*), the Tribe holds no property interest in the physical water itself and, thus, has no such interest in the excess water that the Tribe chooses not to divert for its use. Because Chemehuevi has no legally-cognizable property interest in the excess water, the Tribe has failed to state a takings claim regarding such water.

Chemehuevi next asserts that its purported "water rights" under the *Arizona Decree* "include the right to market, lease, or voluntarily sell all or a portion of those rights." Appx234-235, ¶105; Br. 32-33. Chemehuevi's bare assertions regarding alleged marketability of its "water rights"—whether the term "right" is meant to refer to the Tribe's *Winters* right generally or some purported right in the physical molecules of water allocated under the *Arizona Decree*—states no clear *takings* claim. At best, the assertion seeks some sort of injunctive or mandamus relief directed at marketing or leasing the water itself that is allocated to Chemehuevi under the *Arizona Decree*. The CFC, however, can adjudicate only claims for damages. 28 U.S.C. §1491(a)(1). Thus, Chemehuevi's bare marketing contention fails to state a takings claim.

C. Chemehuevi's newly-raised breach of fiduciary duty arguments regarding the Tribe's *Winters* right are forfeited and, in any event, are a claim outside the CFC's jurisdiction.

On appeal, Chemehuevi raises for the first time a breach of fiduciary duty claim that is predicated on the Boulder Canyon Project Act ("the Act"), 43 U.S.C. §617e, and alleged the Government breached its duty by "prohibit[ing] the Tribe from leasing such [excess] water rights for off-reservation use." Br. 41-43. Chemehuevi has forfeited these arguments. First, Chemehuevi's Complaint does not raise the issue of alleged fiduciary duties imposed by the Act involving the Tribe's leasing of excess water. And, tellingly, the CFC makes no mention of the Act or any such duties arising under it. Second, Chemehuevi's appellate brief provides no argument in support of the Tribe's bare assertion that the Act establishes such fiduciary obligations on the part of the Government. *See* Br. 41-42. Accordingly, Chemehuevi's newly-crafted, unsupported arguments asserting an alleged fiduciary duty imposed by the Act should be deemed forfeited. *See SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1320 (Fed. Cir. 2006) (citation omitted).

In any event, Chemehuevi contends that (1) the Government has a fiduciary obligation under the Boulder Canyon Project Act to "enforce the priority of the Tribe's *Winters* reserved water rights, including [excess-water] rights" over others who use water from the Colorado River consistent with the Act and Decree; and

(2) the Government violated its fiduciary duty under that Act by "prohibit[ing] the Tribe from leasing water rights [regarding excess water Chemehuevi does not use] for off-reservation use." Br. 40-43. These allegations are incorrect.

To invoke the CFC's jurisdiction under the Indian Tucker Act, the Tribe was obligated to "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* ("*Navajo II*"), 556 U.S. 287, 290 (2009). Chemehuevi has not satisfied that requirement. The essence of Chemehuevi's claim is that under the Boulder Canyon Project Act, prioritization—which the Tribe also refers to as "impermissibly weigh[ing] the interests of third parties," Br. 44—*requires* the Government to approve any of the Tribe's efforts to market for off-Reservation use excess water that the Tribe does not use on its Reservation. Br. 41-46. But Chemehuevi provides no support for its bare allegations of the United States' purported fiduciary duty.

In particular, Chemehuevi does not even attempt to identify language in the Boulder Canyon Project Act that can be fairly read as imposing any fiduciary duty on the Government to (1) approve leasing of excess water by a third party; and (2) prioritize the leasing of excess water over use of that water by junior water users on the Colorado River. Indeed, the plain language of the Act makes clear that it does not impose any such fiduciary obligation on the Government. The Act says

nothing at all about marketing or any tribes' ability or right to sell water that it does not divert for its use. Nor does the Act place Interior in the position of guaranteeing any such marketability for tribes. Chemehuevi, therefore, has provided no basis on which such a fiduciary duty could be found. *See Ramona Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016) ("where the relevant statute cannot be fairly read as imposing the specific fiduciary duty alleged to be breached, the [Supreme] Court has refused to impose the obligation on the government"). That ends the Court's inquiry, as there is no basis for the CFC's jurisdiction. Thus, this new argument of an alleged breach of fiduciary duty should be dismissed.

Finally, to the extent the grievances underlying Chemehuevi's new breach arguments seek to challenge the Government's failure to approve a particular water lease Chemehuevi proposed in 1998, *see* Appx238-239, ¶112, those grievances should have been brought under the APA. That statute waives sovereign immunity for challenges to federal agency actions seeking relief "other than money damages," 5 U.S.C. §702, and generally authorizes *district courts* either to "set aside agency action" that is "not in accordance with law," *id.* §706(2), or "compel agency action unlawfully withheld," *id.* §706(1). But any such APA claim by Chemehuevi would be untimely and, in any event, beyond the jurisdiction of this

Court. *See, e.g., Boaz Housing Authority v. United States*, 994 F.3d 1359, 1364 (Fed. Cir. 2021).[13]

In short, Chemehuevi's new breach of fiduciary claims that are founded on the Boulder Canyon Act are forfeited and, in any event, fail to invoke the CFC's jurisdiction.

D. Count III's claims alleging a taking and breach of fiduciary duty regarding Chemehuevi's *Winters* water right are also untimely and are not saved by Chemehuevi's new arguments invoking the continuing claims doctrine.

1. Count III's claims are time-barred.

As explained above, Count III alleges that Interior has (1) violated the Fifth Amendment by making the water that Chemehuevi does not divert for use available to junior water users without compensating the Tribe; and (2) breached its fiduciary responsibilities regarding the leasing of such water. Appx236-237, ¶108; Appx239, ¶¶113-114. The CFC correctly found that Chemehuevi's

[13] Relying solely on the new and unsupported allegation that the Boulder Canyon Act imposes a fiduciary duty on the Government, the Tribe goes on to argue that Government breached that purported fiduciary obligation. Br. 42-46. We have shown that Chemehuevi has forfeited this breach argument and, in any event, offers no support for the Tribe's underlying assertion of the Government's fiduciary duty. *See supra* pp. 37-39. Accordingly, Chemehuevi's subsequent arguments of the Government's alleged breach plainly have no basis in fact or law and thus warrant no response.

Complaint establishes that the claims of a taking and Government breach concerning excess water are time-barred.

Chemehuevi's grievance is based on its contention that it has a compensable property interest in the molecules of water annually decreed to the Tribe under the *Arizona Decree.* Thus, assuming that grievance states a claim upon which relief could be granted (which it does not), Chemehuevi's takings and breach claims would accrue at the time the Tribe knew or should have known that it was not receiving compensation for excess water that it did not use and that was available for use by junior water users. The CFC correctly concluded that the Complaint establishes that Chemehuevi had notice of the Government's alleged taking "in 1998 *at the absolute latest*." Appx34 (emphasis in original). Indeed, the Complaint alleges that from *1964 through 1998*, junior users used excess water that Chemehuevi did not use, and that Interior did not pay the Tribe compensation for such use. Appx236-237, ¶108; Appx239, ¶113. Thus, based on the Tribe's own allegations, the 2016 Complaint is untimely.

The Complaint also alleges that, as of 1998, Chemehuevi had proposed leasing to a third party a portion of the total amount of water allocated to the Tribe in the *Arizona Decree*. *See* Appx34; Appx237-238, ¶109. And, as the CFC found, the Complaint alleges that the Government failed to approve that lease and made water that Chemehuevi did not use available to junior water users without paying

the Tribe just compensation. *See* Appx238-239, ¶112; Appx34. The Complaint alleges that the timeframe of those events was "1999 up until the time of filing of this Second Amended Complaint." Appx239, ¶112; Appx34. The CFC properly concluded that, based on Chemehuevi's pleadings, Count III is "clearly barred by the statute of limitations." Appx34.

2. Chemehuevi's new arguments do not establish that the continuing claims doctrine applies to Count III's claims.

Chemehuevi attempts to evade the untimeliness of its Count III claims by invoking the continuing claims doctrine. Br. 25-26. The CFC correctly found that, as an initial matter, Chemehuevi asserted the doctrine for the *first time* in its response to the Government's motion to dismiss. Appx44. And while Chemehuevi asserted the doctrine *generally* in its CFC response brief, it never invoked the doctrine, or presented any argument supporting the application of it, for the Count III takings and breach claims, in particular. *See* Appx44.

The CFC correctly pointed out that, under the doctrine, Chemehuevi had the "burden of establishing a continuing wrong," but the Complaint "nowhere alleges facts or even legal conclusions to support the favorable application of the continuing claims doctrine." Appx44, n.55. Significantly, the "Complaint does not contain a single factual allegation of a continuing wrong that can be 'broken down into a series of independent and distinct events or wrongs.' " Appx44

(quoting *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)).

Based on its findings, the CFC appropriately concluded that Chemehuevi's "mere invocation of the continuing claims doctrine—without so much as identifying to which claims the doctrine applies—does not satisfy the Tribe's burden." Appx44. The CFC also properly determined that it was "not bound to accept the Tribe's naked, conclusory legal assertions that the government breached its fiduciary duties." Appx44. Last, the CFC concluded that it would "not … find that these legal conclusions—without any factual support—represent continuing wrongs for the purposes of establishing jurisdiction." Appx44. Chemehuevi identifies no error in the CFC's analysis or findings concerning the decisive deficiencies in the Tribe's invocation of the continuing claims doctrine. For that reason, alone, this Court should affirm. *See Colida v. Nokia, Inc*., 347 F. App'x 568, 569 (Fed. Cir. 2009) (affirming lower court decision where appellant "identifie[d] no particular errors in the … court's decision").

And as to the cursory continuing claims arguments that Chemehuevi has newly-fashioned on appeal, *see* Br. 25-26, this Court should deem them forfeited because they were not properly raised or developed in the CFC. *See California Ridge Wind Energy v. United States*, 959 F.3d 1345, 1351 (Fed. Cir. 2020) ("We may deem an argument forfeited when a party raises it for the first time

on appeal."); *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 582 F.3d 1288, 1296 (Fed. Cir. 2009) (noting that "[i]f a party fails to raise an argument before the trial court, or presents only a skeletal or undeveloped argument to the trial court, we may deem that argument waived on appeal").

In any event, the continuing claims doctrine does not apply to Chemehuevi's otherwise untimely claims. This Court has held that, for the doctrine to apply, "the plaintiff's claim must be *inherently susceptible* to being broken down into a series of *independent and distinct* events or wrongs, each having its own associated damages." *Brown Park Estates*, 127 F.3d at 1456 (emphasis added). Chemehuevi's claims do not satisfy these determinative criteria.

Chemehuevi contends, for example, that from 1998 until the time it filed its initial complaint in the CFC, the Government took the Tribe's "*Winters* water rights," and also breached the Government's fiduciary duty concerning those rights, every year the Government made available to junior water users the excess water the Tribe did not use. Br. 25-26. But Chemehuevi points to no facts or allegations in the Complaint establishing that the Government interfered annually with the Tribe's exercise of its *Winters* right by "independent and distinct" acts. *Brown Park Estates*, 127 F.3d at 1456. Likewise, Chemehuevi provides no explanation of how the Tribe's "*Winters*" right was allegedly "taken" *every year* since 1998. These failures are not only fatal to Chemehuevi's assertions of

"continuing" wrongs under this Court's precedents, *see supra*, but are also illustrative of the fundamental flaws underlying the Tribe's position.

For example, Chemehuevi's contention that its *Winters* right was taken every year since 1998 is founded on three erroneous premises: (1) that a new *Winters* "water right" is reserved to the Chemehuevi Reservation each year; (2) that a new "taking" of the *Winters* right results each year the excess water that Chemehuevi does not use remains in the Colorado River System available to junior users; and (3) that it is possible for the Government to have "taken" Chemehuevi's *Winters* water right year-after-year and, yet, the Tribe could still possess that right for its own use. These premises lack a valid basis.

First, the Supreme Court in *Winters* did not give Chemehuevi a *series* of "right*s*" that are reserved annually and thus could be "taken" annually. Rather, *Winters* reserved, by virtue of the establishment of Chemehuevi's Reservation, a *single* "right" to use water to support the purposes of its Reservation. *See supra* pp. 29-33. Under that water right, the Tribe is annually entitled to receive a maximum amount of water in accordance with the *Arizona Decree*. *Arizona II*, 376 U.S. at 344; *see supra* pp. 30-33. Thus, when the Government makes available to junior users water allocated under the *Decree* for use by Chemehuevi but which Chemehuevi does not use during any given year—*i.e.,* the action that Chemehuevi complains of—that government action does not even affect

Chemehuevi's water "right," much less effect a taking of the water right. Chemehuevi still possesses its full *Winters* water right and still receives annual water allocations each and every year in accordance with that right and the *Arizona Decree*.

Second, if the Government "took" Chemehuevi's *Winters* water right in 1998, as Chemehuevi alleges, then the Tribe would have been *dispossessed* of the right at that time. And, as a result, the Tribe would no longer have had its *Winters* right, and a takings claim would have accrued *at that time*. But the Government could not go on to "take" that already-dispossessed right each subsequent year as a "series of independent and distinct events." *Brown Park Estates*, 127 F.3d at 1456, as Chemehuevi's arguments suggest. Thus, the continuing claims doctrine could not apply to the Tribe's claims concerning its *Winters* right.

Third, the continuing claims doctrine does not apply even to those arguments that Chemehuevi has based not on its *Winters* right but, rather, on the physical *water* that is annually allocated to the Tribe under the *Arizona Decree*. As we have shown *supra*, Chemehuevi has no legally-cognizable property interest in the water itself; thus, the water cannot be the subject of a compensable taking claim, continual or otherwise.

VI. The CFC correctly dismissed Count IV, involving the 21-mile strip of lands taken in 1941, because it is either time-barred or fails to state a claim.

Count IV includes two separate claims relating to the 21-mile strip of land along what eventually became the west shoreline of Lake Havasu (i.e., the shoreline that formed after the Parker Dam and Reservoir Project was completed). Appx245-249. First, Chemehuevi claims a temporary taking with damages separate from the compensation paid to the Tribe in 1941 for what was assumed to be a permanent taking of that land. Second, the Tribe seeks an accounting of any "suspense accounts" that might exist related to that land and claims damages for alleged mismanagement of any such accounts. The CFC correctly concluded that the temporary takings claim was time-barred, Appx34-35, and that both the takings and the suspense account claims failed to state a claim for which relief could be granted, Appx49-51.

A. The temporary taking claim involving the 21-mile strip of land is time-barred because the underlying facts occurred no later than 1974.

Chemehuevi does not challenge the CFC's dismissal of Count IV based on the statute of limitations. There is no basis for doing so.

In the 1930s, Interior determined that certain areas of Chemehuevi's land along the Colorado River would be submerged by the reservoir constructed as part of the Parker Dam Project (i.e., Lake Havasu). Appx203, ¶¶21-22. In 1940,

Congress enacted a statute declaring that the United States was granted title to Chemehuevi's lands and, that same year, Interior placed into a federal Treasury account for the benefit of the Tribe "funds for inundating tribal … lands for the Parker Dam and Reservoir." Appx203-204, ¶23; Appx205, ¶26; Appx207, ¶30. In 1941, Interior approved the designation of the "reservation lands to be taken." Appx205, ¶26.

Decades later, after the Parker Dam Project was completed and the final contours of the ensuing Lake Havasu had formed, a 21-mile strip of the land the United States had acquired from Chemehuevi for purposes of the Project was not flooded but, instead, turned out to be dry land that formed a shoreline along the Lake. Appx86-93. In 1974, after having paid just compensation to Chemehuevi in 1940 for the permanent taking of the Tribe's lands, including the 21-mile strip, Interior returned that strip of now-shoreline land to the Tribe. Appx245-246, ¶¶125-26; Appx49-50.

The facts alleged in Chemehuevi's Complaint establish that the purported temporary taking of the 21-mile strip of land began in 1941, when the United States acquired Chemehuevi's land for the Parker Project, and ended in 1974, when the United States returned to the Tribe the land that had become shoreline. Appx203-206, ¶¶ 23, 26-27; Appx245-246, ¶¶125-126, 128. Indeed, that is the

timeframe that Chemehuevi now asserts, and it does not challenge the CFC's dismissal of Count IV based on the statute of limitations. Br. 11-12; 46-49.

B. Count IV fails to state a claim for a temporary taking.

The CFC correctly held that Count IV fails to state a claim for a temporary taking as a matter of law. Appx49-51. The shoreline strip at issue was undisputedly part of the land that the United States acquired from the Tribe in 1941, anticipating that it would be submerged upon completion of the Parker Dam Project, and for which the United States paid the Tribe just compensation. Appx245-246, ¶125; Br. 46. As the CFC observed, "the Tribe already has double recovered, in some sense, by both retaining the compensation that the government originally had provided for the permanent taking and also now possessing title to the land that the government originally thought it would need for the Parker Dam project." Appx50; *see supra*. The CFC correctly rejected the Tribe's request to "triple recover by forcing the government to pay again for its so-called temporary taking of land the government already paid for and then returned." Appx50.

Chemehuevi unpersuasively argues that the CFC erred in two respects. *See* Br. 46-49. It first argues that the United States did not lawfully take the shoreline strip in 1941 because "Congress only authorized, and Secretary Ickes in 1941 only intended to designate, taking reservation lands necessary for the Parker Dam and reservoir project, i.e., *lands that were to be submerged by Lake Havasu*." Br. 46.

The Complaint does not allege that anyone knew in 1940-41 that the 21-mile strip would not ultimately be submerged or any other facts that could arguably support a claim that Interior's designation of the land to be taken was unlawful. Nor does Chemehuevi offer any legal authority for the proposition that a taking can be declared unlawful retroactively if it turns out in the future that the land is no longer needed by the United States. The Tribe misplaces reliance on cases involving temporary occupation of land during World War II, which do not present such a situation. Br. 48.

More fundamentally, the CFC has no subject-matter jurisdiction over Chemehuevi's claims of an "illegal" taking or temporary taking. For the CFC to possess jurisdiction over a takings claim, the "claimant *must concede the validity* of the government action which is the basis of the taking claim." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802-03 (Fed. Cir. 1993) (emphasis added).[14] Also, the ICCA extinguished Chemehuevi's claims of a taking and temporary taking. Chemehuevi's Complaint establishes that those claims accrued between 1940 and 1941. *See supra*. Thus, the ICCA divests the CFC of jurisdiction over those

[14] Likewise, if, as Chemehuevi alleges (Br. 46-48), the 1941 taking of the 21-mile strip of land was not lawful, then no compensation was owed the Tribe in 1941, and the Tribe could potentially be required to return those monies to the United States Treasury. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("A compensable taking arises only if the government action in question is authorized.").

claims because they pre-date August 13, 1946. ICCA § 12, 60 Stat. at 1052; *supra* at pp. 4 n.1; 17-18.

Nevertheless, Chemehuevi argues that the compensation it was paid in 1941 "most likely" did not constitute sufficient value for the 21-mile strip because it was valued as agricultural bottomlands that would not be submerged rather than land whose highest and best use was lakeside residential and commercial development. Br. 48-49. Apart from the fact that its "Complaint contains no allegations of the inadequacy or unjustness of the compensation it received," Appx35, Chemehuevi offers no legal support for this novel retroactive-valuation argument.

C. Count IV fails to state a claim for breach of fiduciary duty.

Chemehuevi alleges that, from 1941 to 1974, the Government breached its "fiduciary duties" in managing "the Tribe's" lands that became shoreline lands. Br. 49-52. The basis for this claim is Chemehuevi's unsupported assertion that (1) the Tribe held "full equitable title" to those lands from 1941 until 1974 because the United States' 1941 taking of those lands was unlawful; and (2) during that 33-year period, Interior was "under a fiduciary duty to administer those lands and any monies derived therefrom for the benefit of the Tribe." Br. 47-49.

Those bare assertions fail to state a claim because Chemehuevi's Complaint alleges no set of facts establishing that the 1941 taking was not lawful. *See supra* pp. 50. Hence, during the 33-year timeframe to which Chemehuevi refers, the

United States held title to the lands, not the Tribe. Therefore, the Government could have no fiduciary duty to the Tribe.

Finally, even if Chemehuevi did have equitable title during that period, the Tribe identifies no statute, regulation, or treaty under which the United States assumed the specific land-administration, money-mandating duty that Chemehuevi alleges. Thus, Chemehuevi has failed to allege a requisite element of a fiduciary-duty claim. *See Navajo II*, 556 U.S. at 290.

D. Count IV fails to state a claim for an accounting and damages associated with purported suspense accounts.

Count IV includes a separate claim that seeks an accounting of purported "suspense accounts" [15] and damages for alleged mismanagement of such accounts. Appx249, ¶¶136-137.[16] The CFC correctly dismissed Chemehuevi's suspense-account claim, finding first that the Complaint "is devoid of any factual allegations that the government mismanaged any funds held in any suspense accounts." Appx51. As the court pointed out, Chemehuevi seeks damages for "*any* and

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[15] Suspense accounts, also known as "special deposit accounts," are "temporary accounts for the deposit of trust funds that cannot immediately be credited to the rightful account holders." 25 C.F.R. §115.002. When ownership is determined, the funds are transferred from the suspense account to, for example, a specific tribe's trust account. 25 C.F.R. §115.901.

[16] Chemehuevi also seeks an accounting of purported "suspense accounts" for the purpose of uncovering potential claims. *See, e.g.,* Appx249, ¶¶136-137. As explained in Section VII, *infra* at pp. 55-59, the CFC has no equity jurisdiction over claims for such a purpose.

all" mismanagement of such accounts from 1946 to the present, Appx249, ¶137 (emphasis added), but the Complaint pleads no "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Appx51 (quoting *Iqbal*, 556 U.S. at 663, 678).

Chemehuevi argues that the CFC was "too demanding of specificity and too intrusive." Br. 53. But it can hardly be said that the CFC required too much given the *fundamental* deficiencies in Chemehuevi's claim, including the elemental failure to allege that any suspense accounts actually exist, much less that the Government failed to collect interest or to disburse the funds to the rightful owners. As the CFC well summarizes, the Tribe even "equivocally opines that it may or may not have been entitled to funds in some unidentified suspense accounts which the government may or may not already have disbursed to the Chemehuevi." Appx51. And this Court should reject the Tribe's suggestion now (Br. 52-53) that the Government can be presumed to have mismanaged accounts without the need for any specific allegations in the Complaint. *Iqbal*, 556 U.S. at 663, 678. This is especially true given that the parties engaged in jurisdictional discovery for more than two years. Appx3; Appx8.

Finally, the CFC correctly faulted Chemehuevi for failing to allege in its Complaint that the Government owed the Tribe any "specific legal duty" involving any suspense accounts. Appx51. The Tribe's mere citation (Br. 52) of a regulation

providing that "the tribe or individual who owned the trust funds in the special deposit account will receive the interest earned," 25 C.F.R. 115.900, is an insufficient basis for a claim, even if it had been pled, given the lack of any factual allegation that the Government failed to pay earned interest along with principal when transferring funds to the owner.

Chemehuevi next contends erroneously that the CFC concluded that the Government "does not have 'any specific legal duty that is owed to the Tribe with regard to any suspense accounts.'" Br. 52 (citing Appx51). The CFC reached no conclusion about whether the Government *has* such a duty. Rather, the CFC correctly found that, as a factual matter, Chemehuevi had not *alleged* in its Complaint that the Government has such a duty. Appx51. Chemehuevi does not dispute that failure.

Rather, Chemehuevi now argues, in essence, that identifiable, specific tribes are associated with suspense accounts, that such tribes have an ownership interest in those accounts, and that Interior owes a trust duty to those tribes regarding the accounts. Br. 52-53. Chemehuevi has forfeited this argument by failing to raise it in the Complaint. In any event, Chemehuevi misunderstands the nature of suspense accounts. The accounts constitute a temporary repository for funds until the Government can determine ownership of the funds. 25 C.F.R. §115.002. Once ownership is determined, the funds are transferred from the suspense account to the

identified tribe's trust account. 25 C.F.R. §115.901. Thus, the very nature of, and reason for, suspense accounts establishes that no specific tribe is associated with them. And once an identifiable tribe *is* determined, the funds in the suspense account are removed for proper disbursal. Chemehuevi's bare assertion that Interior has a trust duty to the Tribe concerning suspense accounts disregards the actual nature of those accounts and, thus, cannot form the basis of a viable claim.

In short, the CFC properly dismissed the Count IV suspense-account claim because Chemehuevi failed to lay the most basic foundation for the claim.

VII. The CFC has no equity jurisdiction over Chemehuevi's Count V claims, as well as claims in Counts I, II, and IV, for an accounting sought for purposes of uncovering potential claims.

Count V is an "independent claim" for an accounting of all of Chemehuevi's trust funds and is based on the assertion that the Andersen Report the Tribe received in 1996 was an inadequate accounting. Appx28; Appx249-251, ¶¶138-145. The CFC correctly explained that such a claim for declaratory and injunctive relief belongs in federal district court. Appx27-30. It correctly dismissed Count V for lack of jurisdiction because the CFC has jurisdiction to order an accounting only "as a means of determining the quantum of damages resulting from a successful claim," not "so that the Tribe can figure out whether it has any claim at all." Appx27-28. The CFC also correctly dismissed the claims for an accounting contained within Counts I to IV to the extent those Counts sought an accounting

for the purposes of determining whether the Tribe has claims for breach of fiduciary duties, and not for the purposes of quantifying damages to be awarded for a successful claim. Appx29.

Under the Tucker Act, the CFC "has power to require an accounting" but only after it has already found liability. *Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698, 720-21 (2017). The court "does not have such authority" where "the plaintiff is not entitled to money damages." *Id.* That is because, while "[i]t is fundamental that an action for accounting is an equitable claim and that *courts of equity* have original jurisdiction to compel an accounting," this Court's "general jurisdiction under the Tucker Act does not include actions in equity." *Klamath & Modoc Tribes v. United States* ("*Klamath*"), 174 Ct. Cl. 483, 487-88 (1966) (emphasis added). This Court can, however, require an accounting "in aid of a judgment of liability against the Government," *Ft. Mojave Tribe v. United States*, 210 Ct. Cl. 727, 728 (1976), for purposes of "determin[ing] the amount which plaintiffs are entitled to recover," *Klamath*, 174 Ct. Cl. at 491.

There is no doubt that Chemehuevi asserts Count V for the impermissible purpose of searching for claims. The Tribe states as much by its own assertions. *See* Appx251, ¶144 ("To the extent that such a reconciliation and accounting, to which the Chemehuevi Tribe is entitled, determines or otherwise reveals that the Tribe has one or more additional monetary claims against the United States, the

Tribe seeks damages on those claims in this civil action."). Chemehuevi similarly concedes that (1) no judgment of liability against Interior has yet been rendered; and (2) the requested accounting is sought to assist the Tribe in "obtaining" such a judgment in the first place. Br. 55. The claims for damages that Chemehuevi hopes to uncover by way of the requested accounting, *see* Appx251, ¶144, "must be developed independently and not as the result of an accounting ordered by this court," *Am. Indians Residing On Maricopa-Ak Chin Rsrv. v. United States*, 667 F.2d 980, 983 (Ct. Cl. 1981).

In response to the CFC's analysis on this issue, the Tribe quotes the statement in *Klamath* that the Claims Court "has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim." Br. 54 (quoting *Klamath*, 174 Ct. Cl. at 490). That statement is entirely consistent with the CFC's reading of *Klamath*. The plaintiffs in *Klamath* asserted a "claim for a general accounting," 174 Ct. Cl. at 485-86, and the court pointed out that if the Government were required to render a general accounting "on the basis of unproved allegations and before its liability is determined," such a requirement would change the lawsuit from a permissible "suit for money damages" to an impermissible "independent equitable action for a general accounting." *Id.* at 491. *Klamath* confirms that this Court cannot order a general accounting for Chemehuevi to attempt to uncover claims.

Accordingly, Chemehuevi's Count V must be assessed on the basis of the factual allegations in the Complaint, not on the basis of speculation about facts that the Tribe might potentially learn in the future. The same holds true for Counts I, II, and IV to the extent they seek an accounting for purposes of uncovering potential claims. *See, e.g.,* Appx228-229, ¶¶83-86, Appx230-231, ¶¶90, 91 (Count I: (1) asserting that Chemehuevi does not know whether the Parker Dam compensation funds "were ever paid to the Tribe" because "the Federal Government has never provided the Tribe with a complete accounting of" those funds; and (2) requesting a "full accounting from the Government of the retention and/or ultimate disbursement or disposition of those funds," and seeking "damages for any and all mismanagement by the Federal Government … disclosed by any accounting ordered by the Court); Appx231-232, ¶¶92-94, 95(b), 96-97 (Count II: (1) asserting that the Government has not provided the Tribe with an accounting of the ICC Judgment Funds; and (2) requesting a "full accounting from the Government of the retention and ultimate disbursement or disposition of the ICC Judgment Funds," and seeking damages for "any and all mismanagement by the Federal Government" that is "disclosed by any accounting ordered by the Court"); Appx249, ¶¶136-137 (Count IV: (1) asserting the Government's documentation "does not show that the Tribe's BIA suspense and/or special deposit accounts have ever been audited" as part of an accounting; and (2) requesting "an accounting of

and to recover compensation and damages for any and all mismanagement of the Tribe's BIA suspense and/or special deposit accounts that were maintained from time to time for the Tribe by the BIA during the time period from 1946 until the present").

In short, the CFC lacks jurisdiction to order an accounting for Counts I, II, IV, and V for the purpose of looking for a claim, which is what Chemehuevi seeks to do here.

CONCLUSION

For the foregoing reasons, the CFC's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 13,920 words.

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

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