IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Ute Indian Tribe of the Uintah and Ouray Indian Reservation, Plaintiff, v. **United States of America, et al.**, Defendants.	Case No. 1:18-cv-546-RCL **FEDERAL DEFENDANTS' MOTION TO DISMISS COUNTS 1, 2, 3, AND 5 AND SUPPORTING STATEMENT OF POINTS AND AUTHORITIES**

FEDERAL DEFENDANTS' MOTION TO DISMISS COUNTS 1, 2, 3, AND 5

Defendants United States of America, United States Department of the Interior, Ryan Zinke, in his official capacity as Secretary of the Interior, and David Bernhardt, in his official capacity as Deputy Secretary of the Interior (collectively, the "***United States***" or "***Federal Defendants***") respectfully move, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure, to dismiss the first, second, third, and fifth claims asserted in the operative complaint, filed by Plaintiff Ute Indian Tribe of the Unitah and Ouray Indian Reservation (the "***Tribe***"), for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, and only in regard to the Federal Defendants' argument that the Tribe waived and released its first, second, and fifth claims in a

2012 settlement agreement, the United States seeks summary judgment under Rule 56 of the Rules of Civil Procedure.

SUPPORTING STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Put simply, and based on the allegations contained in the Tribe's complaint, this action arises out of the Federal Defendants' (or their predecessors') alleged mismanagement of purported trust assets and/or violations of certain statutory provisions following Congress's enactment of a 1948 law related to Indian reservation lands.[1] According to the Tribe, as a result of Congress's action, "surplus land" within what was known as the Uncompahgre Reservation was, should have been, or should now be "restored" to the Tribe to be held in trust by the United States for the Tribe's benefit. Accordingly, the Tribe has filed suit seeking, *inter alia*, declaratory and injunctive relief finding that the Federal Defendants have breached their fiduciary duties (Count 1), requiring the United States to place the land at issue in trust (Count 2), quieting title in the land at issue in favor of the Tribe (Count 3), and enjoining the United States from accessing or entering the land without the Tribe's approval (Count 5).

[1] Notably, this case is just one of four cases filed within a week of each other last spring in both the Court of Federal Claims and this Court. In addition to this case, Plaintiffs have filed the following cases: *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-357 L (Fed. Cl.) (Hodges, J.); *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359 L (Fed. Cl.) (Hodges, J.); and *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. U.S. Dep't of the Interior*, No. 1:18-cv-547 (D.D.C.) (Collyer, J.).

The above cited claims should be dismissed for a number of reasons. First, with respect to the Tribe's first, second, and fifth claims, the Tribe affirmatively waived each of these claims in a 2012 settlement agreement with the United States. Second, the Tribe's first, second, third, and fifth claims are each time-barred under the applicable statutes of limitations. In addition, the Tribe's first, second, and fifth claims should also be dismissed because the Tribe has failed to state a claim (for the first and fifth claim) and the APA does not afford relief with respect to these claims.

RELEVANT FACTUAL ALLEGATIONS[2]

The Tribe is a federally recognized Indian Tribe, made up of three bands of Ute people (the Uintah Band, the Whiteriver Band, and the Uncompahgre Band) located in the Uintah Basin of northeastern Utah, and more specifically, in two geographical areas the Tribe refers to as the Uintah Valley Reservation and the Uncompahgre Reservation. *See* Compl. ¶¶ 2-3, ECF No. 1. The area known as the Uintah Valley Reservation is not at issue in this lawsuit. *Id.* ¶ 3. Instead, the Tribe's complaint is focused on portions of the original Uncompahgre Reservation. *See id.*

The Tribe's relevant association with the lands in question dates back to 1880, when the Tribe agreed to cede lands received under an earlier treaty with the

[2] For purposes of this Rule 12 motion and the factual background applicable thereto, the Federal Defendants assume that the factual allegations in the Tribe's complaint are true. *See e.g. Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014). However, in the event the Court denies this motion and the case proceeds, the Federal Defendants expressly reserve the right to challenge the validity of any of Plaintiff's allegations.

United States and relocate to lands in Colorado and Utah. *Id.* ¶¶ 16–19. As part of the transaction, the Uncompahgre Band agreed to remove either to agricultural lands on the Grand River in Colorado, if found to be sufficient, or in the alternative, unoccupied agricultural lands in Utah. *Id.* ¶ 20. On January 5, 1882, and in keeping with the prior 1880 agreement, President Chester Arthur issued an executive order withholding from sale the original Uncompahgre Reservation (then consisting of 1.9 million acres of public domain lands in the Utah Territory) and setting those lands aside as a reservation for the Uncompahgre Band (the "***1882 Order***"). *Id.* ¶ 27.

A little over a decade later, in 1894, Congress passed an act (the "***1894 Act***") authorizing allotment of the original 1882 Uncompahgre Reservation and requiring that any un-allotted lands[3] would be "restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *See id.* ¶ 31; Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 286, 337-338. Tribal members protested the 1894 Act and, ultimately no allotments were certified under that act. *See* Compl. ¶ 32, ECF No. 1. Three years later, in 1897, Congress passed another act with respect to the 1882 Uncompahgre Reservation (the "***1897 Act***"). *Id.* ¶ 33; Act of June 7, 1897, ch. 3, 30 Stat. 62, 87. In the 1897 Act, Congress again

[3] For purposes of this Motion, the term "allotted" refers to Congress's past practice of "dividing," or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members. *See Solem v. Bartlett*, 465 U.S. 463, 467 (1984). Thus, "un-allotted lands" refers to those lands contained within the original 1882 Uncompahgre Reservation area that were not assigned or associated with any particular Indian claimant and thus left open for non-Indian settlement.

authorized allotment of the area and provided that un-allotted lands would, on and after April 1, 1898, be "open for location and entry under all the land laws of the United States." 30 Stat. at 87. Under the 1897 Act, 83 Indian allotments were ultimately issued.[4] Compl.¶¶ 34–35, ECF No. 1. The United States did not pay the Tribe for any unallotted portions that were patented or otherwise disposed of after the April 1, 1898 deadline. *Id.* ¶ 38.

By the 1920s, non-Indian settlers located within the original 1882 Uncompahgre Reservation had increased to the point where their activities began to "threaten[] the [Tribe]'s growing livestock industry." *Id.* ¶ 39. In order to conserve the grazing range, and while Congress came up with a permanent solution, in 1933 the Secretary of the Interior temporarily withdrew the vacant, un-entered, and undisposed of public lands covered by the 1882 Order from further disposition as a grazing reserve. *Id.* ¶ 40. Thereafter, those lands were managed "under a complicated joint management regime of two agencies," while at the same time, according to the Tribe, "non-Indian interests working with the Bureau of Land Management's (the "***BLM***") predecessor began attempting to wrest control of the . . . lands from the Tribe." *Id.* ¶¶ 45–46.

In 1948, Congress passed legislation (the "***1948 Act***") that increased the size of the Uintah and Ouray Reservation by adding more than 270,000 acres of land within what had been part of the original 1882 Uncompahgre Reservation. *Id.* ¶¶

[4] As a point of reference, the Court of Claims noted in a 1920 opinion that the Uncompahgre Band then had 470 members. *The Ute Indians v. United States,* 45 Ct. Cl. 440, 443 (1910).

61, 70. In addition, the 1948 Act directed the Secretary of the Interior to revoke the earlier 1933 Grazing Withdrawal Order, and BLM took over management of the remaining lands within the original 1882 Uncompahgre Reservation area, which we refer to hereafter as the "***Public Domain Lands***"[5]. *Id.* ¶¶ 61–64. The 1948 Act is significant in this case because—in the Tribe's view—under a 1945 order issued by the Secretary of the Interior (the "***1945 Order***"), the Public Domain Lands were supposed to be returned to tribal ownership following the Secretary of the Interior's revocation of the 1933 Order.[6] *See id.* ¶ 63. Nevertheless, according to the Tribe, "[t]he BLM has managed the [Public Domain Lands] since 1948, leasing the[m] for grazing and oil and gas purposes." *Id.* ¶¶ 65, 70. "The [Tribe] has never received any payment from the United States for the BLM's leasing and other utilization of these lands from 1933 to the present." *Id.* ¶ 66. The Tribe acknowledges, however,

[5] The Federal Defendants' use of the term "Public Domain Lands" is consistent with the Deputy Secretary of the Interior's classification of those lands in his letter denying the Tribe's request for restoration of "an area of public domain lands that was withheld from sale pursuant to an 1882 Executive Order." *See* Ex. A to Compl. at 1, ECF No. 1-1; Ex. B to Compl., ECF No. 1-2. As described in the Solicitor's Memorandum Opinion M-37051, these "Public Domain Lands" are currently administered for multiple-use and sustained yield by the Bureau of Land Management under the Vernal Resource Management Plan. Ex. B to Compl., at 7, ECF No. 1-2.

[6] It should be noted that the Federal Defendants disagree with the Tribe's interpretation and application of the 1945 Order and the 1948 Act. *See generally* Ex A to Compl., ECF No. 1-1; Ex. B to Compl., ECF No. 1-2. While the Tribe's complaint refers to these lands as undisposed-of "remaining surplus lands" of the "Uncompahgre Reservation," the Solicitor's Opinion details Interior's contrary position that they could not be considered "remaining surplus lands" for the purposes of restoration under the Indian Reorganization Act. *See* Ex. B to Compl., at 14–15, ECF No. 1-2.

that the United States does not currently hold legal title to the Public Domain Lands in trust for the Tribe,[7] nor does the Tribe currently have an ownership interest in those lands. *Id.* ¶¶ 68, 78; Ex. A to Compl. at 1, ECF No. 1-1; Ex. B to Compl., ECF No. 1-2.

In September 2015, the Tribe began meeting with officials from the Department of the Interior in furtherance of the Tribe's effort to obtain restoration of the Public Domain Lands to tribal ownership. Compl. ¶ 77, ECF No. 1. A year later, in September 2016, the Tribe submitted a formal request to the Secretary of the Interior seeking restoration of the Public Domain Lands to tribal ownership pursuant to Section 3 of the Indian Reorganization Act. *Id.* ¶ 78. On March 2, 2018, the Deputy Secretary denied the Tribe's restoration request (the "***Restoration Denial***"). *Id.* ¶ 82; Letter from Deputy Secretary David L. Bernhardt to Chairman Luke Duncan, Ute Tribal Business Committee (Mar. 2, 2018) (Ex. A to Compl., ECF No. 1-1). The Tribe filed this action less than a week after the Department of the Interior's decision.

In its complaint, the Tribe has brought five claims against the Federal Defendants. Count 1 seeks a declaratory order holding that the Federal Defendants are in violation of their alleged trust duties associated with the Public Domain Lands and an order enjoining further violations. *See* Compl. ¶¶ 89–98, ECF No. 1. Count 2 seeks an order finding that the 1945 Order requires the Federal

[7] With respect to this Motion, lands that are held in trust by the United States refers to "any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or an individual Indian." 25 C.F.R. § 115.002.

Defendants to place the Public Domain Lands into trust for the benefit of the Tribe. *See id.* ¶¶ 99–103. Count 3 seeks an order quieting title in the Public Domain Lands in favor of the Tribe. *See id.* ¶¶ 104–111. Count 4 is a claim challenging the Restoration Denial under section 706(2)(A) of the Administrative Procedure Act (the "***APA***"). *See id.* ¶¶ 112–117. And Count 5 is a claim against the Federal Defendants for trespass, which seeks to enjoin the United States from accessing or entering the Public Domain Lands without the Tribe's consent. *See id.* ¶¶ 118–124.

This Motion is directed at the first, second, third, and fifth claims.

RELEVANT PROCEDURAL BACKGROUND

In 1951, the Tribe filed a petition (the "***1951 Petition***") with the Indian Claims Commission wherein it alleged, among other things, that "at least, to wit, 400,000 acres of the Uncompahgre Reservation area has been disposed of by [the United States] under the public land laws, for school purposes, and for public reservations." *See* Petition, *Ute Indian Tribe of the Unitah and Ouray Reservation v. United States*, No. 349 (I.C.C. Aug. 11, 1951), ¶ 10, attached hereto as **Exhibit 1**. The Tribe further alleged—in relevant part—that

> Defendant disposed of all lands in the Utah reservation for the Uncompahgre Utes as set forth in paragraphs 9 and 10 hereof without just compensation to said Uncompahgre Utes, or compensation agreed to by them, or any compensation whatever,

id. ¶¶ 11, and,

> in not maintaining the Uncompahgre Reservation in Utah as a reservation for said Uncompahgre Utes, the defendant has not dealt fairly and honorably with said Indians, or has dealt inequitably, or has taken the lands of said Indians for

> its own uses or purposes or disposed of them to others without just compensation, or any compensation whatever to said Indians or its members, to their great loss and damage,

id. ¶¶ 12.

The Tribe later settled these claims—including the claim that "the Uncompahgre Band is the only band of the Ute Indians that did not receive a reservation under the 1880 Agreement"—in 1965 for $300,000. *See* Finding of Fact on the Stipulated Settlement of Claims and Offsets, *Ute Indian Tribe of the Unitah and Ouray Reservation v. United States*, No. 349 (I.C.C. Feb. 18, 1965), ¶¶ 1, 4 attached hereto as **Exhibit 2**. This settlement included the Tribe's agreement that "the entry of a final order in the above-entitled case shall finally dispose of all claims or demands which the petitioner has asserted or could have asserted against the defendant in that case and petitioner shall be barred from asserting all such claims or demands in any further action." *Id.* ¶ 4. A final judgment confirming the settlement was entered in February 18, 1965. Final Judgment, *Ute Indian Tribe of the Unitah and Ouray Reservation v. United States*, No. 349 (I.C.C. Feb. 18, 1965), attached hereto as **Exhibit 3**.

Thereafter, in 1986, the United States filed an amicus brief in opposition to a petition for certiorari filed by the State of Utah following the Tenth Circuit's decision in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985).[8] *See* Brief for the United States as Amicus Curiae, *State of Utah v. Ute Indian Tribe*,

[8] This case is commonly referred to as "*Ute III*."

479 U.S. 994 (1986) (No, 85-1821), attached hereto as **Exhibit 4**. In arguing against review, the United States (which had not been a party to the lawsuit) stated that "the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe." *Id.*, at 21. And in a supplement amicus brief filed in the same case, the United States further elaborated that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands], and it accordingly has no claim to receive any revenue from the leasing of them." *See* Suppl. Mem. for the United States as Amicus Curiae at 5, *State of Utah v. Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821), attached as **Exhibit 5**.

Most recently in 2006, the Tribe filed an action against the United States in the Court of Federal Claims seeking monetary damages related to the alleged management of trust funds and non-monetary assets. *See generally* Complaint, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl.) (Dec. 19, 2006). The Tribe's complaint in that case did not refer to the Public Domain Lands specifically but, instead, generally alleged mismanagement and failure to account for all of the Tribe's trust assets and funds. *See id.* Ultimately, the 2006 lawsuit was resolved when the Tribe and the United States executed a settlement agreement on March 8, 2012 (the "***Settlement Agreement***"). A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit 6**; *see also* Joint Stipulation of Dismissal with Prejudice, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl.) (June 1, 2012) ECF No. 43.

Under the relevant terms of the Settlement Agreement, and in exchange for a monetary payment to the Tribe in the amount of $125,000,000, the Tribe

> waive[d], release[d], and covenant[ed] not to sue in any administrative or judicial forum on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of the execution of this Settlement Agreement by both Parties and that relate to the United States' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources.

Ex. 6 (Settlement Agreement), ¶¶ 2, 4. The Settlement Agreement went on to explain that this waiver included, but was not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "failed to manage [the Tribe]'s non-monetary trust assets or resources appropriately," "failed to prevent trespass on [the Tribe]'s nonmonetary trust assets or resources," "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources," and "failed to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner." *Id.* ¶ 4.

In addition, pursuant to the Settlement Agreement, the Tribe agreed that it "accept[ed] as accurate the balances of all of Plaintiff's trust fund accounts, as those balances are stated in the most recent periodic Statements of Performance" provided by the United States on January 31, 2012. *Id.* ¶¶ 7–8. The Tribe also agreed that the United States had satisfied any accounting requirements up to the

date of the Settlement Agreement and that it would satisfy any future "duty and responsibility to account for and report to [the Tribe] . . . through . . . compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations." *Id.* ¶¶ 8–11.

STANDARD OF REVIEW

The United States moves to dismiss the Tribe's first, second, third, and fifth claims under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, and only in regard to our argument that the Tribes have waived and released their first, second, and fifth claims in the Settlement Agreement, the United States seeks summary judgment under Rule 56.

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim if the court lacks jurisdiction. A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Commodity Futures Trading Com'n v. Nahas*, 738 F.2d 487, 492 n.9 (D.C. Cir. 1984). In considering motions to dismiss, federal courts "presume [they] lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's Constitutional and statutory jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (Scalia, J., dissenting) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*,

511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute")). "[I]n deciding a 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52 (D.D.C. 2004); *Haase v. Sessions*, 835 F.2d 902, 905–906 (D.D.C. 1987).

To survive a Rule 12(b)(6) 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). In addressing a 12(b)(6) motion, courts may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 867 n* (D.C. Cir. 2008).

In addition, and even where not referred to or attached to the complaint, a Court may also consider relevant settlement agreements where the parties do not dispute their validity. *See Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006); *Halldorson v. Sandi Grp.*, 934 F.Supp.2d 147, 152 (D.D.C. 2013). In the alternative, however, summary judgment is appropriate if the record before the court establishes "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary

judgment, the opposing party must identify specific facts establishing a genuine and material factual dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

ARGUMENT

The Tribe's first, second, and fifth claims should be dismissed under Rule 12(b)(6)—or, in the alternative, Rule 56—as a result of the broad waiver and release in the Settlement Agreement. Further, and even if these claims were not completely waived by the Settlement Agreement, these claims (along with the Tribe's third claim) are each time-barred under the applicable statutes of limitations. And, finally, the Tribe's first and fifth claim fail because the Tribe has failed to state a claim upon which relief can be granted, and the Tribe's first, second, and fifth claims fail for a lack of jurisdiction under the APA (as other "adequate remedies" are available).

I. The Tribe Expressly Waived and Released its First, Second, and Fifth Claims in the 2012 Settlement Agreement.

The 2012 Settlement Agreement waived the Tribe's first, second, and fifth claims. A settlement, for enforcement purposes, has the same attributes as a contract. *Gonzalez v. Dep't of Labor*, 609 F.3d 451, 457 (D.C. Cir. 2010). Settlements to which the government is a party are interpreted according to federal law. *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986); *Keydata Corp. v. United States,* 504 F.2d 1115, 1123 (Ct. Cl. 1974). If the language of a settlement clearly bars future claims, the plain language governs. *Halldorson*, 934 F. Supp. 2d at 153. Indeed, it is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent

actions to bar re-litigation of the compromised or resolved claims. *See, e.g.*, *Peckham v. United States*, 61 Fed. Cl. 102, 109 (2004). Any exclusions from a waiver or release must be clear, explicit, and "manifest" in the agreement itself. *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *Merritt-Champman & Scott Corp. v. United States*, 458 F.2d 42, 44–45 (Ct. Cl. 1972) (en banc) (per curiam). As noted above, in exchange for $125,000,000, the Tribe waived and released

> *any and all* claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, *known or unknown*, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before [March 8, 2012] and that relate to the United States' management or accounting of [the Tribe]'s trust funds or . . . non-monetary trust assets or resources.

Ex. 6 (Settlement Agreement) ¶ 4 (emphasis added). And this waiver specifically included claims the United States failed "to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "manage [the Tribe]'s non-monetary trust assets or resources appropriately," "prevent trespass on [the Tribe]'s nonmonetary trust assets or resources," "deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner," or that it "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources." *Id.* Claims one, two, and five fall within this broad waiver and release, as they are based on the United States' handling of the Tribe's alleged monetary or non-monetary trust assets and

resources (the Public Domain Lands and any revenues therefrom) dating back seventy years.

For example, the Tribe's first claim asserting a breach of fiduciary duty rests on an allegation that the Federal Defendants failed to place the Public Domain Lands into trust or pay the Tribe proceeds obtained from the sale or lease of the lands following passage the 1948 Act. Compl. ¶¶ 92–96, ECF No. 1. These alleged failures occurred long before the Settlement Agreement and are barred under the 2012 Settlement Agreement broad waiver "any and all claims . . . known or unknown," including claims for failure "to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "deposit monies into trust funds," and claims the United States "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe]'s non-monetary trust assets or resources." Ex. 6 (Settlement Agreement) ¶ 4.

With respect to the Tribe's second claim, again, the alleged harm occurred in 1948, when the Federal Defendants allegedly failed to place the Public Domain Lands into trust or recognize the Tribe's ownership interest in those lands. Compl. ¶¶ 100–101, ECF No. 1. And, again, the Tribe's claim is barred under the terms of the Settlement Agreement reference above. Ex. 6 (Settlement Agreement) ¶ 4 (waiving "any and all claims . . . known or unknown," including failure "to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources"). Similarly, in the Tribe's fifth claim for trespass, the alleged harm again occurred in 1948, when the Federal Defendants allegedly failed to recognize the

Tribe's ownership interest in the Public Domain Lands and began licensing employees and others "to conduct activities [within the Public Domain Lands] without Tribal authorization." Compl. ¶¶ 119–120, ECF No. 1. These claims too are waived. Ex. 6 (Settlement Agreement) ¶ 4 (waiving "any and all claims . . . known or unknown," including failure "to prevent trespass on [the Tribe]'s nonmonetary trust assets or resources").

The Tribe's decades-old trust harms do not survive the Settlement Agreement's waiver and release.[9] Accordingly, the Tribe's first, second, and fifth claim should be dismissed under to Rule 12(b)(6) or—in the alternative—Rule 56.

[9] The allegations in the Tribe's complaint make it unclear at this time as to whether there is a complete geographical overlap of the original 1882 Uncompahgre Reservation area at issue in the Tribe's 1951 Indian Claims Commission action and the Public Domain Lands at issue here, but to the extent there is geographical overlap, the Tribe's claims are also likely wholly precluded under either the Indian Claims Commission Act or the settlement entered into between the Tribe and the United States in 1965. *See generally* Ex. 2 (Finding of Fact on the Stipulated Settlement of Claims and Offsets); Ex. 3 (Final Judgment); *see also Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974) (explaining that the Indian Claims Commission Acts bars any claims existing prior to August 13, 1946, that were not filed within five years of 1946). In addition, and to the extent the Tribe is seeking relief based on allegations that "the United States did not pay the Uncompahgre Band . . . for unallotted surplus lands of the [Public Domain Lands] that were disposed of after 1897," see, e.g. Compl. ¶ 38, ECF No. 1, those claims were definitely settled and waived through the Indian Claims Commission action and related settlement agreement.

II. The Tribe's First, Second, Third, and Fifth Claims are Barred by Applicable Statutes of Limitations.

A. The Tribe's first, second, and fifth claims are barred because it has failed to identify any final agency action, and, in any event, the actions it does identify do not fall within the six-year statute of limitations.

In asserting its first, second, and fifth[10] claims for relief, the Tribe relies on section 706(2)(A) of the APA as the legal authority "entitl[ing]" it to assert a claim for relief against the United States. (*See* Compl. ¶¶ 97, 102). While the APA provides a general cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," this cause of action is limited to review of a "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704; *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). And the Supreme Court has stated that an agency action is considered final when it meets two general requirements:

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[10] With respect to the Tribe's fifth claim for relief, the Tribe does not actually cite any statute or authority waiving the United States' sovereign immunity within that claim. *See* Compl. ¶¶ 118–124, ECF No. 1. Nevertheless, and for purposes of this Motion, the Federal Defendants will assume the Tribe's general citation to the APA in paragraph 10 of its complaint was intended to apply to Count 5. *Id.* ¶ 10. However, this Court need not do the same. *See Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (noting that it is plaintiff's burden to establish jurisdiction). The Tribe's fifth claim should be dismissed without further consideration.

> First, the action must mark the consummation of the agency's decision[-]making process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (citations omitted) (internal quotation marks omitted).

Whether there has been a final agency action for purposes of an APA claim is a "threshold" question; if a party fails to point to a final agency action, the cause of action fails to state a claim pursuant to Rule 12(b)(6). *Fund for Animals, Inc.*, 460 F.3d at 18 & n.4. Additionally, and even where a party has sufficiently alleged a final agency action under the APA, the party must bring such claim within six years after the right of action first accrues for such claim to be cognizable. *Sendra Corp. v. Magaw*, 111 F.3d 162, 165 (D.C.Cir.1997). The right of action first accrues on the date of the final agency action. *Impro Prod., Inc. v. Block*, 722 F.2d 845, 850–51 (D.C. Cir. 1983). An untimely claim is a jurisdictional defect, subject to dismissal under Rule 12(b)(1). *See, e.g., Havens v. Mabus*, 759 F.3d 91, 96 (D.C. Cir. 2014)

In this case, and while the Tribe has cited to section 706(2)(A) of the APA, the Tribe has failed to identify any circumscribed, discrete agency action that it could challenge under the APA. Indeed, the only action which the Tribe does identify in its first, second, and fifth causes of action, and from which all their alleged harms flow, is the 1945 Order and the Federal Defendants' alleged failure or refusal to recognize the Tribe's beneficial interest in the Public Domain Lands following the passage of the 1948 Act. *See* Compl. (Count 1) ¶¶ 92–93, ECF No. 1 (alleging that

the Public Domain Lands "were restored through the 1945 Restoration Order, or alternatively . . . the 1948 Act," and that "Defendants, however, have failed to treat these lands as restored"); (Count 2) ¶ 101 (alleging that "[s]ubsequent to the [1945] Order, Defendants have failed and refused to abide by the [1945 Order or 1948 Act]. That is, in violation of Federal law, Defendants have not treated the land as being beneficially owned by the Tribe."), (Count 5) ¶¶ 119–120 (alleging that "[a]ll undisposed-of, surplus lands within the Uncompahgre [Lands] were restored to trust status through the 1945 [Order or 1948 Act]" and that "[s]ince these lands were restored to trust status, the Defendants and their employees have continued to enter these lands to conduct activities, many of which are not performed on behalf of the Tribe"). However, the Federal Defendants' alleged failure or refusal to transfer the Public Domain Lands into trust or recognize Tribal ownership occurred 70 years ago. The applicable statute of limitations—and this Court's jurisdiction to hear claims under the APA—expired long ago.

Nor should the Tribe be allowed to argue that it was unaware of the facts underlying its claims and, thus, freed from applicable time limitations. The 1951 Petition before the Indian Claims Commission demonstrate that the Tribe was at that point aware that the United States had "disposed" of at least some of the Public Domain Lands and that the Tribe's ownership rights in at least some of those lands had been entirely extinguished. *See* Ex. 1 (1951 Petition) ¶¶ 11–12 (alleging that Public Domain Lands had been "disposed of . . . without just compensation" and the

United States had "not maintain[ed] the [Public Domain Lands] as a reservation for [the Tribe]").

Nevertheless, and if there was any confusion as to the status of the Public Domain Lands, the United States clarified its position through express statements made to the U.S. Supreme Court in *State of Utah v. Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821). In *State of Utah* the United States stated (in response to a filing by the Tribe) that "the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe." Ex. 4 (Brief for the United States as Amicus Curiae), at 21. And that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands], and it accordingly has no claim to receive any revenue from the leasing of them." Ex. 5 (Suppl. Mem. for the United State as Amicus Curiae), at 5. Thus, even assuming the Tribe was blind to everything else occurring on the Public Domain Lands and the allegations in the 1951 Petition, it received direct notice of the Federal Defendants' position with respect to the Public Domain Lands no later than 1986.[11] *See W. Shoshone Nat. Council v. United States*, 415 F. Supp. 2d 1201, 1206 (D. Nev. 2006) (noting that "[t]he extensive litigation

[11] Additionally, it should be noted, that in 1935 and again in 1939, the Tribe submitted petitions to the Department of the Interior seeking restoration of the Public Domain Lands to tribal ownership under section 3 of the Indian Reorganization Act; both petitions were denied. *See* Letter from Secretary Harold Ickes to Oran Curry, Chairman, Ute Tribal Business Committee (Jan. 12, 1935), attached hereto as **Exhibit 7**; Hearing on S. Res. 241, S. Res. 147, & S. Res. 39 Before the Subcomm. of the Comm. On Public Lands and Surveys, United States Senate, 78th Cong. 2210–11 (1944) (setting forth February 3, 1939 Letter from Assistant Secretary Oscar L. Chapman to Ernest L. Wilkinson, Esq.), attach hereto as **Exhibit 8**. This history should also be taken into account in considering the Tribe's notice of the Federal Defendants' claims on the Public Domain Land.

that preceded the current action makes it impossible to conclude that South Fork Band neither knew nor should have known that the United States claimed an interest in the land covered by the Treaty of Ruby Valley, adverse to that of South Fork Band, more than 12 years ago").

Because the Tribe's first, second, and fifth claims do not identify or challenge a final agency action that occurred within the last six years, those claims should be dismissed pursuant to 12(b)(6) (failure to identify an agency action) or 12(b)(1) (action barred by six-year statute of limitations).

B. The Tribe's third claim is barred by the twelve-year statute of limitations in 28 U.S.C. § 2409a(g).

The Tribe asserts its third claim under the Quiet Title Act. That act's waiver of sovereign immunity, however, bars a suit unless it is "commenced within twelve years of the date upon which [the claim] accrued." 28 U.S.C. § 2409a(g). If a claim accrued outside that twelve-year period, the courts lack jurisdiction. *See Block v. North Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). This twelve-year period is not subject to equitable tolling. *United States v. Beggerly,* 524 U.S. 38, 48–49 (1998). And the bar must be strictly construed in the United States' favor. *Block*, 461 U.S. at 292.

A claim accrues under the Quiet Title Act on "the date the plaintiff . . . knew or should have known of the [property] claim of the United States." 28 U.S.C. § 2409a(g). Under this standard, courts apply "a test of reasonableness." *Warren v. United States*, 234 F.3d 1331, 1335 (D.C. Cir. 2000). "Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the

Government claims some interest adverse to the plaintiff's." *Id.* The relevant date in this case is the date on which the Tribe became aware that the "United States . . . d[id] not recognize [the Public Domain Lands] as land held in trust for the benefit of the Tribe." Compl. ¶ 105, ECF No. 1. If this occurred before March 8, 2006—twelve years before the Tribe filed the present Complaint—the claim is time-barred.

Here, the Tribe had actual knowledge (or should have known) in 1948 that the United States did not consider the Public Domain Lands to be trust lands by simple virtue of the United States' actions on and towards those lands after passage of the 1948 Act. Nevertheless, the Tribe demonstrated its awareness of this issue only three years later when it raised this very issue in the 1951 Petition. Further, and just as with the Tribe's first, second, and fifth claims, the Tribe was expressly put on notice in 1986 of the United States' claim to sole ownership of the Public Domain Lands by the United States' statements in *State of Utah*.

Nor is there anything to the Tribe's assertion that

> because the United States has not until this year responded to the Tribe's pending inquiry regarding whether the United States was going to claim the lands adverse to the Tribe's interests, there is no applicable statute of limitations or the Tribe's claim is brought within the applicable statute of limitations for a quiet title claim.

Compl. ¶ 111, ECF No. 1. This allegation is flatly contradicted by the 1951 Petition and statements in *State of Utah*. No later than 1986, the Tribe was aware that it was the United States' position that "[t]he Tribe has no remaining equitable interest in [the Public Domain Lands], and it accordingly has no claim to receive any revenue from the leasing of them"—this was clear notice "the United States

was going to claim the lands adverse to the Tribe's interests." *See* Ex. 5 (Suppl. Mem. for the United States as Amicus Curiae) at 5. The Tribe's claim to quiet title, like the other claims addressed in this Motion, accrued decades ago.

Because the Tribe did not sue to quiet title in the Public Domain Lands until March 2018—or 32 years after the filing the United States 1986 Amicus Curiae Brief, 67 years after the 1951 Petition, and 70 years after the 1948 Act—the Quiet Title Act's statute of limitations bars the claim. The Tribe's third claim should be dismissed pursuant to Rule 12(b)(1).

III. Setting Aside the Complaint's Other Failings, the Tribe's First, Second, and Fifth Claims Should be Dismissed Based on Other Deficiencies.

Putting aside the waiver and release of claims under the 2012 Settlement Agreement and the applicable statutes of limitations, dismissal of the Tribe's first, second, and fifth claims would still be warranted. Taking the Tribe's allegations as true, the Tribe has failed to state viable claims for breach of trust or trespass because the Public Domain Lands are not held in trust. Additionally, the Tribe's contemporaneous filing of nearly identical claims in the Court of Federal Claims demonstrates that the Tribe's first, second, and fifth claims brought under the APA should be dismissed because the thrust of those claims is to obtain damages from the United States.

A. The Tribe Has Failed to State a Claim for Its First and Fifth Claims Because the Lands are Not in Trust.

Though the Tribe's complaint presents a theory of statutory and regulatory interpretation to arrive at a conclusion that the Public Domain Lands should have

been restored to Tribal ownership, *see generally* Compl. ¶¶ 57–63, ECF No. 1, the allegations in the complaint—and the undisputed fact—is that the Public Domain Lands are just that: public lands not currently held in trust for, nor owned by, the Tribe. *See id.* ¶¶ 68, 78, 88. As the Tribe acknowledged in its complaint, the Federal Defendants' position is "that there [is] no convincing evidence that the Tribe had a compensable ownership interest in the Uncompahgre Reservation that would have been the basis to hold proceeds for the benefit of the Tribe or any predecessor group of Indians." Compl. ¶ 84, ECF No. 1 (internal quotation marks omitted); *see also* Ex. A to Compl. at 1, ECF No. 1-1 (stating "history and applicable statutes reveal no convincing evidence of Congressional intent that the Tribe had a compensable ownership in the [Public Domain Lands]"); Ex. B to Compl., ECF No. 1-2 (discussing whether the Public Domain Lands "may now be transferred to be held in trust for the "Tribe"). Thus, while the Tribe alleges that the Public Domain Lands *should* be held in trust for the Tribe, its complaint concedes that the lands at issue *in fact, are not* trust lands; the Tribe lacks standing to assert both its first claim (alleging breach of fiduciary duties) and its fifth claim (alleging trespass).

First, a fiduciary duty can only exist where there is a trustee, a beneficiary, and a trust corpus. *See* Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959); *United States v. Mitchell ("Mitchell II")*, 463 U.S. 206, 225 (1983). Where land is not held in trust, there is no "control or supervision over tribal monies or properties" from which "the fiduciary relationship normally exists with respect to those money or properties." *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C.

Cir. 2001) (citation omitted). Given that the Public Domain Lands are "not held in trust by the United States, . . . the essential element of a trust corpus is missing." *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1155 (D. Kan. 2013).[12] The Tribe cannot state a claim for breach of fiduciary duty relating to the Federal Defendants' management of land (or monies deriving from that land) for which the Federal Defendants owe the Tribe no duty.

Similarly, in order to bring a claim for trespass, a claimant must allege *a possessory interest* in the real property at issue. *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.*, No. C 11-1597 PJH, 2012 WL 832879, at *6 (N.D. Cal. Mar. 12, 2012); Restatement (Second) of Torts § 158 (1965). A mere ownership or other interest is not sufficient. *Gregory Vill.*, 2012 WL 832879, at *6; *Diego Beekman Mut. Hous. Ass'n Hous. Dev. Fund Corp. Hdfc v. Dish Network, L.L.C*, No. 15 CIV. 1094 (KPF), 2016 WL 1060328, at *4 (S.D.N.Y. Mar. 15, 2016) ("A landlord's duty to remediate unsafe conditions is a far cry from the exclusive possession required to maintain an action for trespass."). Here the allegations in the complaint indicate that the Tribe does not have any current interest (possessory, beneficial, or otherwise) in the Public Domain Lands—indeed, the Tribe's fourth claim arises

[12] It should be noted that, even if these land were held in trust, the Tribe's first cause of action would be subject to dismissal because the Tribe has failed to "identif[y] a substantive source of law establishing specific fiduciary duties, a failure which is fatal to its trust claim regardless of whether [a court] read[s] the claim as brought under the APA or under a cause of action implied by the nature of the fiduciary relationship itself." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014).

from the denial of a petition seeking "restoration" of such an interest. Accordingly, the Tribe has failed to state a claim for trespass.

B. The APA is Inapplicable to the Tribe's First, Second, and Fifth Causes of Action.

The APA waives sovereign immunity only where there is "no other adequate remedy" available elsewhere. 5 U.S.C. § 704; *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005). And money damages under the Tucker Act (or Indian Tucker Act[13] as the case may be) "is presumptively an 'adequate remedy' for § 704 purposes." *Id.* As explained by the Federal Circuit, "[a] party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States." *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004) (quoting *Consol. Edison Co. of New York v. U.S., Dep't of Energy*, 247 F.3d 1378, 1385 (Fed. Cir. 2001); *Kidwell v. Dep't of Army, Bd. for Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995) (noting that "we have stated that 'jurisdiction under the Tucker Act cannot be avoided by ... disguising a money claim' as a claim requesting a form of equitable relief").

[13] 28 U.S.C. § 1505, or the Indian Tucker Act, was intended to ensure "tribal claimants have the same access to the Court of Claims provided to individual claimants by [the Tucker Act], and the United States is entitled to the same defenses at law and in equity under both statutes." *U.S. v. Mitchell*, 445 U.S. 535, 540 (1980); *Mitchell II*, 463 U.S. at 212 n.8.

Though artfully pled, the first, second, and fifth claims brought under the APA should be dismissed because, if the claims are cognizable at all,[14] a monetary judgment in the Court of Federal Claims would provide an adequate remedy. In considering this issue, this Court "must look beyond the form of the pleadings to the substance of the claim[s]." *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.,* 480 F.3d 1116, 1124 (Fed. Cir. 2007); *Kidwell*, 56 F.3d at 284 ("[W]e look to the complaint's substance, not merely its form.").

> Where the equitable relief lacks considerable value independent of any future potential for monetary relief, or when the equitable relief requested in the complaint is negligible in comparison with the potential monetary recovery, the complaint will be deemed one for damages.

Bublitz v. Brownlee, 309 F. Supp. 2d 1, 7 (D.D.C. 2004) (internal citations and quotation marks omitted). And it is the plaintiff's burden to demonstrate the remedies available in the Claims Court are not adequate. *Consol. Edison Co. of New York v. U.S., Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001).

The Tribe's allegations can all be summed up as follows: the Federal Defendants have allegedly violated several laws by not treating the Public Domain Lands as Indian trust lands and by not paying the Tribe the revenue generated by those lands. *See generally* Compl., ECF No. 1. Each claim in this lawsuit is aimed at establishing this legal theory and ensuring future payment and tribal interest in the Public Domain Lands. This reading is reinforced by the parallel proceedings

[14] Even if the Tribe later attempts to assert these claims before the Court of Federal Claims, their validity is dubious. For starters, and as noted above, the 2012 Settlement Agreement waived and released these claims.

currently pending in the Court of Federal Claims and filed one day prior to this action (the "***CFC Action***"). *See* Complaint, ECF No. 1, *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-357 L (Fed. Cl.) (Hodges, J.), attached hereto as **Exhibit 9**. The factual allegations in the CFC Action are substantially similar to those in this case (if not identical in some portions), all culminating with the idea that the United States has violated fiduciary duties allegedly owed to the tribe with respect to the Public Domain Lands. *See generally id.*[15] The chief difference between the lawsuits is that the CFC Action seeks monetary damages for past harm, while this lawsuit seeks prospective relief.

But the Court of Federal Claims can nonetheless provide an adequate remedy in each instance. First, it goes without saying that the Court of Federal Claims is authorized to award monetary damages on any cognizable claims against the

[15] We note that the CFC Action does not presently include a claim for trespass against the United States. As stated above, we do not believe the trespass claim to be viable, even under the Tucker Act, because, among other reasons, the Tribe has not identified any money-mandating duty for purposes of Tucker Act jurisdiction. *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) ("An Indian tribe must identify statute or regulations that both impose a specific obligation on the United States and 'bear the hallmarks of a conventional fiduciary relationship.'"). In any event, we note for the Court that 28 U.S.C. § 1631 provides that when a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer [the] action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed . . . ." *Id.* In the present circumstances, however, the pending APA claim in this Court—which we have not moved to dismiss—would likely preclude Court of Federal Claims jurisdiction over any transferred claims under 28 U.S.C. § 1500. *See United States v. County of Cook*, 170 F.3d 1084, 1090-91 (Fed. Cir. 1999). Should the Court reach the transfer question, the stay requirements in 28 U.S.C. § 1292(d)(4)(B) would apply.

United States for past conduct. *See* 28 U.S.C. §§ 1491(a)(1), 1505. Second, and again assuming the Tribe's claims are actually cognizable, an award by the Court of Federal Claims would also provide the prospective relief that the Tribe seeks. In particular, "a final decision in [an] [Indian] Tucker Act case . . . will finally resolve the issue and as a practical matter make repeated suits unnecessary." *Telecare Corp.*, 409 F.3d at 1350; *Consol. Edison*, 247 F.3d at 1384–85. This is so because "[r]es judicata principles" would require payment for future breaches and the United States would be unlikely to breach following a judgment against it. *Consol. Edison*, 247 F.3d at 1384–85. And the Federal Circuit has expressly ruled that district courts do not have jurisdiction to entertain "predicate" lawsuits, i.e. lawsuits brought to establish rights for later money damages suits in the Court of Claims. *See Christopher Vill.*, 360 F.3d at 1329 (Fed. Cir. 2004).

Here, the equitable relief sought by the Tribe—a determination that the Federal Defendants must hold the Public Domain Lands in trust and deliver revenues from those lands to the Tribe in the future—" lacks considerable value independent of any future potential for monetary relief." *Bublitz*, 309 F. Supp. 2d at 7. This action is a predicate lawsuit to ensure monetary payment, nothing more. And "if a money judgment will give the [Tribe] essentially the remedy [it] seeks[,] then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the [Indian] Tucker Act." *Suburban Mortg.*, 480 F.3d at 1126; *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (stating that an "alternative remedy need not provide relief identical to relief under

the APA, so long as it offers relief of the 'same genre'"). Thus, to the extent the Tribe's first, second, and fifth claims are cognizable—it is the United States' position that they are not—those claims can only be brought before the Court of Federal Claims. The APA limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is *no other adequate remedy* in a court . . . ." 5 U.S.C. § 704 (emphasis added). Dismissal of these claims in this case is therefore proper pursuant to Rule 12(b)(1).[16]

CONCLUSION

The Federal Defendants respectfully request that the Tribe's first, second, third, and fifth counts be dismissed with prejudice. First, and as set forth above, the 2012 Settlement Agreement waived and released the first, second, and fifth claims. Second, the first, second, third, and fifth claims are barred by the applicable statutes of limitations. Finally, the Tribe's first and fifth claims are subject to

[16] There is some disagreement in the D.C. Circuit as to whether dismissal would be proper under Rule 12(b)(1) or Rule 12(b)(6). Specifically, it appears cases in the DC Circuit have generally dismissed actions involving the Tucker Act under Rule 12(b)(1)—as jurisdictional—because Court of Claims jurisdiction is exclusive where the claims "explicitly or in essence seek money damages in excess of $10,000." *Greenhill v. Spellings*, 482 F.3d 569, 573 (D.C. Cir. 2007); *see also Desert Sunlight 250, LLC v. Lew,* 169 F. Supp. 3d 91, 98 (D.D.C. 2016). Nevertheless, in *Trudeau v. Federal Trade Commission*, the D.C. Court held that a district court had erred (albeit, harmlessly) in dismissing an action under 12(b)(1) where there was no "final agency action." 456 F.3d 178, 187 (D.C. Cir. 2006). According to the *Trudeau*, section 702's waiver of sovereign immunity "is not limited to APA cases—and hence that [waiver] applies regardless of whether the elements of an APA cause of action [under section 704] are satisfied." *Id.* Thus, where a party fails to identify a final agency action, the claims fail for failure to state a claim rather than for want of jurisdiction. Whether this holding extends to cases where a party fails to meet 704's requirement that "no other adequate remedy" is available is not clear. What is clear is that the first, second, and fifth claims in this case should be dismissed.

dismissal for lack of standing and its first, second, and fifth claims because the APA does not afford the Tribe relief on those claims.

Respectfully submitted this 16th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I filed the foregoing electronically through the Court's CM/ECF system, which caused notice to be sent to the parties.

/s/ Brigman L. Harman