IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF THE INTERIOR, RYAN ZINKE, Secretary of the Interior, and DAVID BERNHARDT, Deputy Secretary of the Interior Defendants.	)	Civil Action No. 1:18-cv-00546 -RCL

RESPONSE TO UNITED STATES MOTION TO DISMISS

CONTENTS

INTRODUCTION

Defendants' motion to dismiss four of the five counts in this case (Dkt. 35) is based upon straw man arguments. Most of its arguments seek to conflate counts 1, 2, and 5 in this case (requesting orders requiring the United States to abide by acts of congress and existing secretarial orders on a forward-going basis) with claims in a related Federal Court of Claims case seeking monetary compensation for some of past federal violations of the Tribe's rights under those federal statutes and other laws. The current case is primarily about the future: the United States must be required to start complying with federal law.

As such, counts 1, 2, and 5 of the complaint presents routine claims within this Court's jurisdiction, and these claims are not barred by statutes of limitations or by prior settlements in which the United States paid the Tribe for some of the United States' other past violations of the Tribe's rights. And, contrary to Defendants' assertion, the current case is not a proxy for a monetary suit. The monetary suit is in the Court of Claims, as it should be, but this case is about the United States being required to comply with acts of Congress and the Restoration Order in the future. Therefore Defendants' attempt to use arguments which apply to a monetary suit is incorrect. As applied to this case, the Defendants' motion to dismiss Counts 1, 2 and 5 is plainly without merit.

Defendants also move to dismiss the Tribes' Quiet Title Act (QTA) claim based upon the statute of limitations. Defendants' motion is limited to two alleged pieces of evidence. Defendants assert that without any further factual development, those two pieces of evidence show that the statute of limitations was triggered more than 12 years ago. As discussed in detail below, those two pieces of evidence do not even support, let alone establish, Defendant's limitations argument.

I. THE TRIBE'S FIRST, SECOND AND FIFTH CLAIMS ARE WITHIN THIS COURT'S JURISDICTION AND ARE NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

In its own brief, Defendants state exactly why this Court cannot dismiss the Tribe's first, second and fifth claims:

> the Tribe's complaint presents a theory of statutory and regulatory interpretation to arrive at a conclusion that the . . . Lands should have been restored to Tribal ownership.

U.S. Br. at 25. This Court must determine if the Tribe's legal theory is correct. If it is, then the Court must require the United States to start complying with the law. This Court plainly has that jurisdiction.

Defendants' assertion that the Tribe's first, second, and fifth claims are barred under the statute of limitations for an APA action is based upon the agency's substantial misstatement of the Tribe's claims and misstatement of the scope of this Court's jurisdiction under 5 U.S.C. § 706. The Tribe's first, second, and fifth claims include, but are not limited to, run of the mill federal court jurisdiction based upon allegations that the United States, in either its own name or acting through named individuals, is currently failing to follow applicable acts of Congress and the existing 1945 Restoration order.

A. 5 U.S.C. § 706 PROVIDES JURISDICTION FOR THE TRIBE'S CLAIMS OF FEDERAL FAILURE TO COMPLY WITH FEDERAL STATUTES AND PRIOR ORDERS.

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV § 3, cl. 2. The Supreme Court has consistently interpreted this provision in the broadest possible terms, and has repeatedly held that because the power is expressly conferred upon Congress, neither the courts nor the executive branch could proceed contrary to an act of Congress in this area. *E.g., Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941). *See also* §I.C., *infra* (citing multiple cases, including cases involving Indian and non-Indian lands). Here, through an

1868 Treaty approved by Congress, the Uncompahgre Band ceded vast areas of land to the United States in exchange for the United States recognizing a Reservation for the Band in Colorado. The 1868 Treaty states that the lands reserved by the federal government for the Ute homeland are "hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named." 1868 Treaty, Art. 2, p. 3. Congress later decided to take the Tribe's Reservation in Colorado and it directed the President of the United States to create a replacement Reservation in a different location in Colorado or in Utah. Act of June 15, 1880, ch. 223, 21 Stat. 199 (1880 Act); Compl. ¶¶18-20. The Executive Branch carried out that directive. It took the Band's Colorado Reservation. And it created the required replacement Reservation in Utah. Compl. ¶ 27. Defendants admit as much, but sophistically label the federal statute as "the 1880 agreement," U.S. Br. at 4, and then premise the remainder of their argument upon an assertion that the Tribe cannot bring a suit challenging the United States' breach of that "agreement."

Notably, and as has been unfortunately typical in its relationship with the Tribe and other tribes, the United States asserts that the Tribe must to abide by the provisions which are favorable to the United States, while the United States is free to violate its reciprocal obligations. The United States holds the Tribe to the Tribe's cessation of lands in 1868, which was in exchange for, *inter alia*, the Colorado reservation. And the United States has no qualms with Congress deciding to take the Tribe's Reservation in Colorado. But the United States does not want to be held to the quid pro quo that Congress placed into the very same statute taking the Tribe's Colorado Reservation. It asserts this Court cannot make the Executive Branch comply with that part of Congress' actions. The Executive Branch's position is morally abhorrent, and fortunately it is also legally incorrect.

As the Tribe alleges and as Defendants cannot dispute under the current procedural posture, Defendants' violations of federal statutes and the Restoration Order are ongoing. In fact, as the Tribe notes and as Defendants do not dispute and cannot dispute, Defendants are violating the federal statutes regularly. Defendants are failing to comply with the congressional mandate to treat the lands at issue as tribal lands, they are failing to stop others from using, taking, and damaging tribal trust lands without the requisite tribal approval, and they are otherwise failing to comply with laws applicable to tribal trust lands. In fact, Defendants admit the numerous alleged failures to comply with laws applicable to lands in which the Tribe holds an interests, and Defendants merits defense is based upon an assertion that their failures are not violations of law because, they claim, the lands are not tribal trust lands. It is doubtful that Defendants can muster even a colorable argument for that merits argument, but they cannot avoid the merits issue. This Court has the power to interpret the statutes and Restoration Order and then determine if Defendant or its individually named officers are failing to comply with the federal laws. Counts 1, 2 and 5 request prospective relief, requiring the United States and the named officers to act in compliance with federal law on a forward-going basis. These are claims over which federal courts routinely exercise jurisdiction.

In order to support their contrary assertion, Defendants attempt to re-write 5 U.S.C. § 706. Defendants assert that this Court's jurisdiction under section 706 is limited to reviewing agency decisions. Defendants then assert that, other than in Count 4, the Tribe has not specified a federal decision for which it is seeking review. Contrary to the Defendants' attempt to re-write the statute, 5 U.S.C. § 706 also provides federal court jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed."

The Tribe's claims in this case come within this grant of federal jurisdiction. As Defendants acknowledge, the Tribe is claiming that the agency has a duty to comply with acts of Congress and with prior secretarial orders, and that the agency is failing to comply with those duties. The agency is failing to comply with federal laws.

> Under both general equitable powers and powers granted under the APA, courts can insure that statutory rights are not denied by agency inaction. *See, e. g., Nader v. FCC*, 172 U.S.App.D.C. 1, 520 F.2d 182 (1975); Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093 (1970).

Caswell v. Califano, 583 F.2d 9, 15 (1st Cir. 1978). *See also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose."); *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003), *aff'd in relevant part*, 392 F.3d 461 (D.C. Cir. 2004) (holding that the court has jurisdiction under the APA to compel the Secretary of the Interior to accord plaintiffs their statutory or constitutional rights).

B. THIS COURT HAS JURISDICTION TO ORDER THE NAMED FEDERAL OFFICERS TO COMPLY WITH FEDERAL LAW ON A FORWARD-GOING BASIS.

For the reasons discussed above, 5 U.S.C. § 706 provides a waiver of the United States' sovereign immunity, but the Tribe also pled its claims in a manner that does not even require a federal waiver of sovereign immunity. In addition to and independent of invoking 5 U.S.C. § 706, the Tribe patterned its claims on, and expressly cited in its complaint, the pre-APA (and still valid) method of pleading a claim seeking to bring an agency's actions into compliance with federal statutes. The Tribe alleged that the named officers were acting contrary to federal statute, and that the federal court has jurisdiction to order them to comply. No waiver of immunity is required for that claim. *E.g.*, *Ickes v. Fox*, 300 U.S. 82 (1937).

From the earliest Supreme Court cases providing for judicial review of executive branch actions, the courts in this nation have determined that the general grant of federal jurisdiction permits suits for prospective orders requiring federal officers to comply with federal law. Federal executive branch officers are simply not permitted to violate federal law, and the courts have the power to stop such violations.

In *Ickes*, the plaintiffs claimed they had acquired property rights under federal statute, and asserted that the federal courts had jurisdiction to enjoin federal officers from taking actions which violated those federally-protected property rights. The Supreme Court readily agreed with plaintiffs on that point, and it further held the United States was not even an indispensable party to the suit. No waiver of federal sovereign immunity was therefore required.

> They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court . . . .

Ickes v. Fox, 300 U.S. 82, 96–97 (1937)

Ickes, decided in 1937, predates the adoption of the APA in 1946. Plaintiffs in *Ickes* therefore did not even have an argument that there was an applicable waiver of the United States' sovereign immunity. But even before Congress had adopted the waiver of sovereign immunity in the APA, the suit to force federal officers to comply on a forward-going basis with federal law was within the jurisdiction of the federal courts.

Even though the Tribe's complaint specifically cited *Ickes,* Compl. ¶¶ 97, 102, and the Tribe plainly patterned its complaint to include all of the requisite allegations to state a claim under that line of cases, Defendants did not provide <u>any</u> legal argument regarding that pled legal theory. The Tribe assumes that Defendants did not provide a legal argument on that theory because they

simply do not have any argument, but regardless of why Defendants did not present an argument, the relevant fact is that Defendants did not present an argument. For that reason alone, Defendants' motion to dismiss counts one, two and five must be denied.

C. DEFENDANTS' MOTION TO DISMISS FAILS BECAUSE THE UNCOMPAHGRE RESERVATION IS A STATUTORY RESERVATION, NOT AN EXECUTIVE ORDER RESERVATION.

There are numerous factual and legal errors in the Defendants' motion to dismiss, but the primary error, the one which underlies all of the others, the one upon which Defendants build their argument, is their misstatement of definitively documented and definitively established historical facts. The United States Congress had created a permanent statutory Reservation for the Uncompahgre Band. That Reservation was initially located in western Colorado. Unfortunately for the Uncompahgre Band, prospectors discovered hard minerals on the Uncompahgre lands, and Congress determined that the Uncompahgre Band's permanent Reservation would have to be located to land which was not believed to contain such minerals. Compl. ¶¶ 17-19. Congress, by statute, directed the Executive Branch to replace the Tribe's Reservation in Colorado with a different Reservation, either in Colorado if sufficient land not coveted by non-Indians could be located, or in Utah. 1880 Act. Consistent with its basic duty to execute the statutes of the United States, the Executive Branch complied with that statute by establishing the boundaries of that replacement Reservation—the Uncompahgre Reservation, a portion of which is at issue in this case. Compl. ¶¶20-27.[1] The Tribe's treaty rights established under the 1868 Treaty were

[1] The Uncompahgre Reservation was not coveted by non-Indians. Before the Uintah Valley Reservation was established in 1861, Brigham Young, the Territorial Governor of the Territory of Utah and President of the Mormon Church, dispatched a survey term to determine whether the proposed reservation lands would instead be suitable for Mormon settlement. The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians

transferred to the new Reservation. *E.g., Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017) (The United States agreement to pay for on-Reservation damage caused by "bad men among the whites" in the 1868 Treaty transferred to the Reservation created under the 1880 statute and remains enforceable in federal court suits against the United States). These are the historical facts from about 140 years ago.

The Uncompahgre Reservation was therefore a "statutory reservation," with all land owned by the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation. That trust ownership was created pursuant to an act of Congress, and can therefore only be altered by an Act of Congress. *E.g.*, *Nebraska v. Parker*, 136 U.S. 1072 (2016); *Idaho v. United States*, 533 U.S. 262 (2001); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985); *United States v. California,* 332 U.S. 19,40 (1947); *Royal Indem. Co. v. United States,* 313 U.S. 289,294 (1941); *United States v. Celestine,* 215 U.S. 278 (1909); *Warren v. United States* 234 F.3d 1331, 1338 (D.C. Cir. 2000); 25 U.S.C. § 177. This rule is a specific application of the rule that Congress is the supreme legislative authority in this country, and that a federal statute is valid until superseded by a contrary federal statute. Tribes do not lose their homelands by adverse possession or by the Executive Branch's violations of the laws of Congress.

Defendants' substantive arguments and primary portions of their current motion to dismiss in this case are dependent upon, *inter alia*, their historically erroneous assertion that the Uncompahgre Reservation was an "executive order reservation," when in fact the Reservation was

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and to hold the world together." *Report of Utah Expedition*, *printed in* Deseret News, Sept. 25, 1961, *quoted in* Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004).

Contrary to the impression Defendants seek to create, the Uncompahgre Reservation remains remote and virtually unpopulated by non-Indians. There is only one census area on the Uncompahgre Reservation, and in the most recent decennial census that census area, Bonanza, had a population of 1. There are, however, at least two ghost towns on the Reservation.

a "statutory reservation." An executive order reservation is one which the executive branch created of its own volition, based upon its general powers to treat with Indians, not one based upon Congress' directive to create a reservation. Where the Executive creates a reservation by its own volition, the executive has greater authority to undo its own prior actions. Where Congress creates a reservation, only Congress can eliminate or alter that reservation. *E.g.*, *Parker*, 136 U.S. 1072.

In the present matter, Congress had already approved a prior reservation for the Uncompahgre Indians, and it was in effect evicting the Uncompahgre from that Reservation. Congress directed the president to create the new Reservation, and the President complied with that statutory directive, creating a statutory reservation.

Over a decade after the President carried out his duty to create the replacement statutory Reservation, Congress authorized the President to act as the Tribe's broker for sale of land on the Reservation. The Tribe in this case is not challenging the President's exercise of that authority to sell portions of the Tribe's land as the Tribe's broker for sale. But much of the land on the Uncompahgre Reservation was never sold or subject to other acts of Congress altering its ownership. Defendants' theory of this case, which the United States asserted in the deputy secretary's 2018 decision denying the Tribe's restoration request, is that for the lands that the United States failed to sell when it was acting as the Tribe's trustee and broker for sale, the United States simply gets to keep those land for itself, not in trust for the Tribe. Compl ¶¶82-88 and Ex. A to the Complaint. Congress' 1880 law directing the President to create the replacement Reservation is still on the books. It was fully executed by the President, and the Executive Branch's theory in this case—that the courts cannot require the Executive Branch to come back into compliance with the statute—is meritless.

II. THE TRIBE'S QUIET TITLE CLAIM IS NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Defendants assert that without any further development of the facts regarding the relationship and interactions between the Tribe and the United States, this Court should dismiss the Tribe's Quiet Title claim based upon two pieces of evidence. 28 U.S.C. § 2409a provides for federal court jurisdiction over a quiet title action against the United States. "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a).

In the present case, as Defendants themselves acknowledge, the Tribe presents a legal theory that the United States should be holding the lands at issue as trustee for the Tribe. U.S. Br. at 25. But of course, the United States, in its role as the Tribe's trustee, is not going to sue itself in its role as the alleged fee owner. The Tribe therefore is required to bring the suit that its own trustee will not bring because of the trustee's own conflicting interests.[2]

The statute of limitations begins to run when a trust beneficiary knows or should know of the beneficiary's claim against the trustee. Nonetheless, because the beneficiary is entitled to rely upon the good faith and expertise of the trustee, the beneficiary's duty to discover claims against the trustee is somewhat lessened. *Loudner v. United States,* 108 F.3d 896, 901 (8th Cir. 1997); *Azalea Meats, Inc. v. Muscat,* 386 F.2d 5, 9 (5th Cir. 1967) ("The presence of a fiduciary relationship ... bears heavily on the issue of due diligence."); *Manchester Band of Pomo Indians*

[2] Although the United States asserts the statute of limitations as a defense, case law under the QTA clearly establishes that the QTA statute of limitation only applies to non-federal parties, and that dismissal of a suit based upon the QTA statute of limitations does not quiet title in the United States. That is, now that there clearly is uncertainty regarding title, it is going to have to get resolved, either in the current suit or by the United States bringing suit against the Tribe to quiet title in the United States. The problems are not going to go away until title is quieted.

v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). The test is still one of reasonableness, but it is not blind to the unique relationship inherent in all the Tribe's dealings with the United States.

A. THE STATUTE OF LIMITATIONS WOULD ONLY BE TRIGGERED BY FEDERAL ACTION WHICH SHOWS THAT THE UNITED STATES IS CLAIMING THE LAND IN FEE.

Both parties agree that the United States holds title to the lands at issue. One of the primary disputes is whether the federal statues and 1945 Restoration Order as properly interpreted and applied to this matter, require the United States to hold the land *in trust* for the Ute Indian Tribe or *in fee* for the United States.

The QTA statute of limitations would only be triggered if the Tribe had notice that the United States was asserting *fee* ownership for over 12 years. Federal actions which are based upon federal trust ownership, which are consistent with federal trust ownership, or which do not provide notice to the Tribe of a federal claim of fee ownership, are therefore immaterial. *E.g.*, *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978); *Elk Mtn. Safari, Inc. v. United States*, 645 F. Supp. 151 (D. Wyo. 1986).

In *Kinscherff*, plaintiff sought an easement of necessity over federal land, to a parcel of land which plaintiff's predecessor in interest had acquired from the United States many decades earlier. The district court had dismissed the claim, but the Tenth Circuit reversed, holding that the claim for an easement of necessity was within the scope of the QTA, and further holding that the case had to be remanded for the district court to develop the factual record and then issue a decision on the mixed question of fact and law of whether the plaintiff "knew or should have known of the government's claim of no easement or of a limited easement" for more than 12 years. A court reached the same legal holding in *Elk Mountain Safari, Inc* 645 F. Supp. 151. In that case, the parties agreed that the United States possessed an easement to use a roadway across plaintiff's lands to federal lands, and that the United States had been using that easement for well over 12

years. In its QTA suit, plaintiff asserted the federal easement was solely for federal agents to access the nearby federal lands, and that it had been put on notice only two years prior to suit that the United States claimed that its easement also allowed use of the roadway for public purposes. After development of the factual record, the Court determined that the QTA statute of limitations had not run on plaintiff's claim that the federal easement should be limited to use by federal agents.

These holdings arise from the QTA requirement that there be notice of the "disputed title." Applying the holding here, the Court is required to determine whether the Tribe was on notice that the United States was asserting fee ownership instead of trust ownership.

B. THE FEDERAL PRESENCE AND AUTHORITY ON INDIAN LANDS HAS BEEN AND CONTINUES TO BE PERVASIVE, AND THE UNITED STATES IS THEREFORE NOT CLAIMING THAT ANY ACTION IT TOOK "ON THE GROUND" WHICH TRIGGERED THE QTA STATUTE OF LIMITATIONS.

In the present matter, the parties agree that the United States owns the land. Where the United States owns land in trust for a tribe, it regularly accesses the land, regulates the land, provides police and other services on the land, prosecutes crimes occurring on the land, and takes other action on the land. As the U.S. Supreme Court summarized, Congress has "pervasive authority . . . to control tribal property." *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 83 (1977). Congress has regularly asserted and exercised that authority over tribal lands, and federal presence on tribal trust lands is ubiquitous. In fact it is that pervasive federal control which leads to the federal fiduciary duty in favor of the Tribe on tribal land issues. *United States v. Mitchell*, 463 U.S. 206 (1983).

The Secretary of the Interior has the general power to grant rights of way on tribal trust land for any purpose that he wants. 25 U.S.C. § 323. He has authority to create roadways on the Tribe's land, 25 U.S.C. § 311, to allow railroads and related facilities, telephone and other communication transmission facilities, 25 U.S.C. § 319, oil and gas pipelines, 25 U.S.C. § 321,

and to allow other federal and private activities. 25 U.S.C. § 326. The Secretary also has the power to allow for extraction and sale of minerals, timber, and other natural resources. 25 U.S.C. §§ 396, 396a; 396b, 396d, 397, 398, (federal regulation of tribal minerals); 25 U.S.C. §§ 406-407 (federal regulation and approval of timber sales from tribal lands); *Wyoming v. United States*, 136 F. Supp. 3d 1317 (D. Wyo. 2015) (United States asserts that the exact same regulatory requirements apply to oil and gas production on tribal lands as those that apply on federal public lands). None of those actions create notice of a federal fee ownership, as opposed to federal trust ownership.

Further, regardless of the status of the land, the Tribe cannot sell the land or natural resources; *e.g.*, 25 U.S.C. § 81 (prior to 2000, tribes could not enter into any contracts "relative to their lands" without federal trustee approval, and after 2000, tribes cannot enter into any such contracts which run for over seven years).

The United States appears to well understand this. In fact, Defendants final argument in their brief is based upon its assertion that, other than impact on monetary accounts, a holding that the United States owns the land in fee instead of trust "lacks considerable value." U.S. Br. at 30. As the Tribe discusses below, the United States' argument on that point is wrong, inter alia, because it fails to understand the importance of the Tribe having a homeland. But Defendants' argument correctly captures the difficulty isolating federal actions that put the Tribe on notice that the United States was claiming the land in fee, not trust.

C. THE TWO PIECES OF EVIDENCE THAT DEFENDANTS ASSERT SHOW A FEDERAL CLAIM OF FEE OWNERSHIP AND THUS DO NOT SUPPORT THEIR ARGUMENT.

Defendants admit, as they must, given their recent assertion of fee ownership, that there is now a dispute regarding whether the United States owns the land in fee or in trust. Defendants now assert that this dispute has existed for more than 12 years. The Tribe adamantly disagrees. In fact the Tribe's view is that until sometime after 2012, it could not have brought a quiet title

action because it could not have satisfied the requirement that there was a disputed title. That is exactly why the Tribe had sought, and obtained, a federal decision regarding whether the federal claim was a claim of ownership in fee. Notable although Defendants now assert that the United States had been claiming fee ownership for decades, it took the United States 18 months to review and issue a decision on the Tribe's request that the United States explain whether it was claiming the land in fee or in trust.

But now, to attempt to defeat the Tribe's QTA claim, Defendants assert that the United States has been making this claim of fee ownership for decades. In their current motion, Defendants do not cite to anything which supports that argument. Contrary to the numerous laws that give the United States broad access and authority to tribal lands, the United States, without any specifics, asserts that the Tribe should have known that the United States was claiming it owned the land in fee "by simple virtue of the United States' actions on and toward the land after passage of the 1948 Act." U.S. Br. at 23. Presumably if Defendants had any actual evidence or examples of actions which the United States took which are inconsistent with trust ownership, they would have specified them in their opening brief, so that the Tribe could then respond. Their conclusory assertion is plainly insufficient to support a motion to dismiss.

Defendants point to only *two* actions more than twelve years ago which they now claim were sufficient, as a matter of law, to trigger the statute of limitations.[3] One of the two cited actions contradicts Defendants' assertion, and the second does not support Defendants' assertion. In short,

[3] In this response, the Tribe confines its argument to the two pieces of evidence that Defendants cited. Because those two pieces of evidence do not support the federal argument, the Tribe anticipates that the Defendants might seek to cite different evidence in their reply. The Tribe would object to any such attempt.

Defendants have failed to provide any support for their assertion that the statute of limitations was triggered more than 12 years ago.

1. The Tribe's claim for compensation for 400,000 acres taken prior to 1951 contradicts Defendants' assertion that the Tribe understood that the other 1,500,000 acres on the Uncompahgre Reservation had been taken prior to 1951.

First, shooting itself in the foot, Defendants assert that the Tribe's claims in an Indian Court of Claims case show that the Tribe understood, as far back as 1951, that the United States asserted fee ownership of the land at issue in this case. Defendants' sole support for their assertion is the Tribe's claim, in 1951, that "400,000 acres of the Uncompahgre Reservation area has been disposed of by defendant under public land laws, for school purposes, and for public reservations." U.S. Br. at 8 (citing Ex. 1).

The Uncompahgre Reservation is over 1,900,000 acres. The Tribe's 1951 complaint distinguishes between the 400,000 acres (which the Tribe, in 1951, claimed the United States had taken) and the remaining acres (which the Tribe did not claim the United States had taken from the Tribe). Just as it did in 1951, the Tribe, in its current complaint, distinguishes between the 400,000 acres that the United States took prior to 1946 and the remainder of the Uncompahgre Reservation which had not been taken. As the Tribe noted in its complaint in this case and above in this brief, the Tribe understands that Congress passed laws which authorized the Executive Branch to sell land as the Tribe's broker and that some of the Tribe's land was subsequently sold under these laws. Those lands are not at issue in this case. It is the other lands, the lands that were not sold, that are at issue.

The Tribe's 1951 complaint was filed under a statute which provided jurisdiction for claims by tribes that the United States had taken tribal land, and the sole remedy was monetary

compensation for the taking. *E.g., Osage Nation of Indians v. United States*, 1 Ind. Cl. Comm. 54, 82, *rev'd on other grounds*, 97 F. Supp. 381 (Ct. Cl. 1951).

The Tribe's 1951 complaint actually shows the exact opposite of what the Defendants are now asserting—it shows that the Tribe understood that the United States had not taken most of the Uncompahgre Reservation, but that the United States had taken about 400,000 acres of the Uncompahgre Reservation.

The Tribe ultimately settled its 1951 claim for the federal taking of the portion of the Uncompahgre that is *not* at issue in this case, with the United States providing compensation for that taking. But by the same token, the United States did not provide compensation for the larger part of the Uncompahgre that the United States had not taken and could not take without congressional approval.[4]

Defendants' argument in this case appears to be patterned on an argument the United States made in *Cheyenne-Arapaho Tribe of Oklahoma v. United States*, 517 F. Supp. 365 (D.D.C. 2007), coupled with the Defendants' failure to understand the facts of the current case. In *Cheyenne-Arapaho Tribe*, the tribe brought a QTA suit for 9,493 acres of land that initially had been part of a much larger executive order reservation, but that had been turned into a military reservation by subsequent executive order. That tribe, in its ICC suit, expressly asserted a claim for compensation for those 9,493 acres, and the tribe later settled that ICC suit.

In *Cheyenne-Arapaho Tribe*, this Court held that the Cheyenne-Arapaho Tribe's assertion of that claim to 9,493 acres in its ICC suit was sufficient to trigger the statute of limitation for

[4] If the United States interpretation of the 1951 settlement were correct, some of the Tribe's claims in this case could be restated, through a motion to amend the complaint, as more legally complex claims based upon breaches of trust responsibilities or breaches of related federal obligations to the Tribe. The Tribe does not believe that will be needed, but if it were the Tribe would request leave to amend.

those acres. If the Ute Tribe, in the current case, were bringing a claim for the 400,000 acres at issue in its 1951 suit, *Cheyenne-Arapaho Tribe* might be an apt analogy on the QTA claim for those acres (but inapposite as related to claims 1, 2, and 5).

Unlike the Cheyenne-Arapaho Tribe, the Ute Tribe expressly limited its claims in this case to the acres which had not been taken prior to the filing of the ICC suit.[5] The Tribe knew the land that the United States took from the Tribe prior to 1946, and the Tribe sued for compensation for those acres in 1951. It did not sue for the current acres for the simple reason that the United States had not taken the other acres.

2. The United States' statement in a brief opposing Supreme Court review of a decision in favor of the Ute Tribe does not provide notice of a federal claim.

Defendants' only remaining factual assertion is that the United States put the Tribe on notice that it was claiming fee ownership when it stated in an amicus brief that "the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe." Dkt. 35 at 10 (citing Ex. 4, p. 21). There are two independent problems with this supposed assertion of federal fee ownership of all lands on the Uncompahgre Reservation.

[5] The Tribe notes for its trustee that it is particularly disappointed that the United States is falsely accusing the Tribe of duplicity. The United States' allegations use the same losing play that the State of Utah recently tried against the Tribe. *Ute Indian Tribe v. Utah*, 790 F.2d 1000 (10th Cir. 2015); *Ute Indian Tribe v. Utah*, 835 F.3d 1255 (10th Cir. 2016). The State of Utah lost that case because the Tribe there, as here, understands its own history and because the Tribe understands and abides by the issue and claims preclusion requirements. A litigant must take the good with the bad from prior cases. The Tribe's claims, there, as here, reflect that understanding. In its complaint in this case the Tribe forthrightly excluded the 400,000 acres for which it had asserted a takings claim in 1951, and Defendants' accusation against the Tribe is based upon Defendants misunderstanding, not on the Tribe's errors.

First, and very simple, the cited language is not, by any stretch of the imagination, a claim of fee ownership of the lands at issue. It is, instead, merely a tautology based upon the statutory definition of "public lands."

> The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except . . . (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702(e) (emphasis added). Of course "the public lands" on the Reservation, or any other Indian reservation within the United States, are not held for the benefit of a tribe, because the "public lands" and tribal lands are mutually exclusive categories of federal ownership. There are, in fact, "public lands" on nearly all large Indian Reservations, and neither the United States nor anyone else has ever even argued in the past that a federal assertion that it owns public lands on a reservation means that there are no tribal trust lands on that same reservation. To illustrate this point, we need look no further than the Uintah Valley part of the Tribe's Reservation. In the Uintah Valley Reservation, the United States asserts that there are hundreds of thousands of acres of public lands, coexisting with hundreds of thousands of acres of non-public tribal lands on that same Reservation. *Ute Indian Tribe v. State of Utah*, 789 F.3d 1000 (10th Cir. 2015).

The parties agree that there are public lands on the Uncompahgre Reservation. The public lands within the Uncompahgre are, by definition, not tribal lands. The current QTA claim is not seeking to quiet title to the public lands. It is instead seeking to quiet title to the lands that, under act of Congress, are *not* public lands.

Defendants' attempt to rely upon a statement the United States made in an amicus brief opposing certiorari is also unpersuasive because the material statement and the overarching message in that federal brief was that the United States Supreme Court should not review the Tenth Circuit decision that most of the land on the Uncompahgre Reservation was never returned to the

public domain. In their brief to this Court, Defendants assert that although the United States wrote in 1986 that the Tenth Circuit decision should remain standing, the United States was putting the Tribe on notice that the United States owned the lands in fee because, in addition to saying, in effect, "leave the Tenth Circuit decision in place," the federal attorneys stated "but if you were to review the merits of the case, we think that for one point raised in the petition, the Tenth Circuit was wrong." The Defendants' argument that by filing a brief asking that the Supreme Court leave a Tenth Circuit decision in place, the United States was actually asserting a position which had been rejected in that very same Tenth Circuit decision is, the Tribe asserts, oxymoronic.

Defendants' current argument is particularly untenable because the Supreme Court eventually agreed with the United States, denying certiorari and leaving that Tenth Circuit decision in place. One could argue whether, under these facts, the United States would even be permitted to raise an issue that it noted in its amicus brief but then successfully persuaded the Supreme Court *not* to review. But Defendants attempt to go many steps further and say that its opposition to Supreme Court review amounted to putting the Tribe on notice of the claim that it was saying the Supreme Court should not review. That position must be rejected.

The two pieces of evidence that Defendants have brought forward in its current motion do not, at all, support Defendants' assertion that the Tribe knew or should have known that the United States was asserting fee ownership of the lands at issue. Defendants' motion to dismiss Count 3 must therefore be rejected.

III. THE 2012 AND 1965 SETTLEMENT AGREEMENTS AND THE ICCA DO NOT SUPPORT THE DISMISSAL OF THE TRIBE'S FIRST, SECOND, AND FIFTH CLAIMS.

As discussed above, Defendants themselves acknowledge that the Tribe has stated a claim that Defendants are continuing to violate statutes that Congress adopted under its Property Clause authority. In Section I of their opening brief, Defendants assert that this Court cannot hear claims

based upon those ongoing violations of federal law because, Defendants assert, the Tribe waived claims for past violations of some federal laws. There are multiple independent flaws with Defendants' argument,[6] but in simplified form the answer under the current posture is that the United States does not provide any basis for dismissal related to its violations after 2012, and therefore does not provide a basis for dismissal of any *claims*.

The Tribe's first, second, and fifth claims cannot be dismissed for failure to state a claim under Rule 12(b)(6) because Defendants have failed to show why these claims should be dismissed in their entirety. Under Rule 12(b)(6), a party can move to dismiss a claim on the grounds that the plaintiff failed to "state a claim upon which relief can be granted." Importantly, a party cannot move to dismiss only part of a claim under Rule 12(b)(6). C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1356 ("the purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case. Thus, the provision must be read in conjunction with Rule 8(a) which sets forth the requirements for pleading a claim for relief in federal court . . . ."); *see BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) ("A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims"). Moreover, Defendants have not requested anything less than the dismissal of Claims 1, 2, and 5 in their entirety. While Defendants asserts that Claims 1, 2, and 5 should be dismissed, Defendants fail to show why they these claims should be dismissed

[6] Defendants' argument is additionally in error because Defendants are vastly misinterpreting the settlement agreements. For example, the 2012 settlement was based upon the Tribe's suit over specific trust accounts, with the United States then paying a monetary settlement related to the Tribe's suit regarding those specific trust accounts through the date of the settlement. It was not a settlement of any claims in the current case.

in their entirety under either the 2012 Settlement Agreement, the 1965 Settlement Agreement or the Indian Claims Commission Act ("ICCA").

Defendants first assert that the first, second, and fifth claims should be dismissed because these claims were waived and released under the 2012 Settlement Agreement. However, even assuming that the 2012 Settlement Agreement resolved any pre-2012 liabilities at issue in Claims 1, 2, and 5, which the Tribe does not concede, the 2012 Settlement Agreement explicitly did not resolve any post-2012 liabilities. The 2012 Settlement Agreement specifically states that it did not diminish in any way the Tribe's ability "to assert a claim for harms or damages allegedly caused by Defendant after the date of execution of this Settlement Agreement." Settlement Agreement ¶ 6(a) (U.S. Mot. to Dismiss Ex 6). Although the Defendants mischaracterize the Tribe's claims as "decades old," the Tribe's Complaint plainly provides in Claims 1, 2, and 5, that Defendants' actions constitute continuing violations. In fact, the Tribe seeks primarily prospective relief for Defendants' continuing violations in Claims 1, 2, and 5.

Claim 1 provides that Defendants violated the 1880, 1894, 1897, and 1927 Acts and breached their trust and fiduciary obligations to the Tribe under these acts by failing to treat the undisposed-of, surplus lands of the Uncompahgre Reservation as restored as provided for in the 1945 Restoration Order, or, alternatively, by mismanaging and wrongfully appropriating revenue from the surplus lands of the Uncompahgre Reservation. Under either theory, the Defendants violations are continuing. Assuming the lands were restored to trust status, the Defendants continue failing to treat these lands as restored. Assuming the lands were not restored and remain surplus lands, the Defendants continue to mismanage and wrongfully appropriate revenue from these surplus lands today.

Claim 2 asserts that Defendants have failed to abide by the 1945 Restoration Order and the congressional statute that this order was lawfully carrying out. Defendants' failure to abide by the 1945 Restoration Order and treat these lands as tribal trust lands continues today.

In Claim 5, the Tribe asserts that Defendants continue to trespass on the Uncompahgre Reservation lands that were restored to trust status pursuant to the 1945 Restoration Order by, at the latest, 1948. As asserted in the Tribe's complaint, Defendants actions amount to a continuing trespass, repeating on an annual if not daily basis.

As plainly presented in Claims 1, 2, and 5, the harms and damages asserted in these claims continued even after 2012. And the 2012 Settlement Agreement specifically preserved the Tribe's ability to assert a claim for harms or damages caused by Defendants after 2012. Because the Tribe has claims that are unaffected by the 2012 Settlement Agreement, the 2012 Settlement Agreement cannot justify the dismissal of the entirety of Claims 1, 2, and 5, as Defendants request.

Moreover, and most importantly, the legal argument that Defendants raise in support of their argument that the 2012 Settlement Agreement waived Claims 1, 2, and 5 is based on a fundamental mischaracterization of these claims. Defendants assert that Claims 2 and 5 and a portion of Claim 1 rest on the allegation that Defendants failed to place the lands at issue into trust status in the 1940s.[7] This is not what the Complaint asserted. The Complaint in fact asserts that Defendants have failed to treat the lands at issue as restored even though the 1945 Restoration Order effected the restoration of these lands by 1948 at the latest. Defendants appear to support its mischaracterization of the Tribe's claims on the fact that, in other portions of the Tribe's

[7] In Claim 1, the Tribe alternatively asserts that Defendants have and continue to mismanage and wrongfully appropriate revenue from the surplus lands of the Uncompahgre Reservation. The Defendants assert that Defendants' duty to pay the Tribe for the proceeds obtained from the sale or lease of these lands ended long before the 2012 Settlement Agreement, but does not provide any reason for why this duty would have ended.

Complaint, the Tribe proceeds under the theory that the Uncompahgre Reservation lands at issue are surplus lands, not restored trust lands. A litigant is allowed, however, to assert alternative theories in one complaint "regardless of whether such theories [are] consistent with one another." *Scott v. District of Columbia*, 101 F.3d 748 (D.D.C. 1996); Fed. R. Civ. P. 8(d)(3). Because Defendants' legal argument for how the 2012 Settlement Agreement waived Claims 2 and 5 and a portion of Claim 1 is not founded on the actual claims raised in the Complaint, the Defendants have provided no support for the dismissal of Claims 1, 2, and 5.

The 1965 Settlement Agreement also does not support Defendant's request for the dismissal of Claims 1, 2, and 5 in their entirety. Defendants summarily conclude that "to the extent there is geographical overlap [between the lands at issue in the Tribe's 1951 Indian Claims Commission action and the lands at issue here], the Tribe's claims are also likely wholly precluded" under the 1965 Settlement Agreement. The Defendants, however, do not assert any legal arguments to support this conclusion or even point to any provisions in the 1965 Settlement Agreement that could support such a conclusion. Further, the legal standard for a motion to dismiss is not "likely precluded." The Defendants also assert that the 1965 Settlement Agreement settled all claims that the United States did not pay the Tribe for the surplus lands disposed of after 1897. Once again, Defendants fail to point to any provisions of the 1965 Settlement Agreement or raise any argument supporting this theory. The Defendants have the burden of proof to justify a dismissal under Rule 12(b)(6). *In re Cash*, 2018 Bankr. LEXIS 3322 (Bankr. D.D.C. 2018); *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). Defendants, however, have failed to set forth any legal argument for how the 1965 Settlement Agreement waived Claims 1, 2, and 5 in their entirety.

The Defendants also assert that the Indian Claims Commission Act ("ICCA") requires the dismissal of Claims 1, 2, and 5 in their entirety. As Defendants acknowledge, however, the ICCA only bars claims existing prior to August 13, 1946. Claims 1, 2, and 5, however, address violations and harms that stretch through present-day. The Defendants have thus not shown how the ICCA justifies the dismissal of Claims 1, 2, and 5.

Because neither the 2012 Settlement Agreement, the 1965 Settlement Agreement nor the ICCA waived Claims 1, 2, or 5, this Court should deny Defendants' motion to dismiss these claims.

IV. THE 2012 SETTLEMENT AGREEMENT ALSO DOES NOT SUPPORT THE GRANTING OF SUMMARY JUDGEMENT ON THE FIRST, SECOND, AND THIRD CLAIMS.

The Defendants alternatively move for summary judgment on the first, second, and fifth claims on the grounds that the 2012 Settlement Agreement waived these claims.

> Parties moving for summary judgment have the initial burden of 'identifying' each claim, defense, or part thereof on which they seek summary judgment. They thus isolate the battleground for the summary judgment contest (and, consequently, the nonmoving parties generally need not offer contesting evidence on the issues and points not raised by the moving [parties]).

BAICKER-MCKEE, JANSSEN & CORR, FED. CIV. R. HANDBOOK 1177 (2016) (citing *United States v. King-Vassel*, 728 F.3d 707, 711-12 (7th Cir. 2013)). A court shall only grant summary judgment if the record shows that "there is no genuine dispute as to any material fact and the moving party is entitled to judgment." Fed. R. Civ. P. 56(a); *Beard v. Banks*, 548 U.S. 521, 529 (2006). "The burden is always on the movant to demonstrate why summary judgment is warranted." *Grimes v. District of Columbia*, 794 F.3d 83, 97 (D.C. Cir. 2015).

As explained in the preceding section, Defendant's argument regarding how the 2012 Settlement Agreement waived Claims 1, 2, and 5 takes an all or nothing approach based on an incorrect articulation of the claims. Thus, Defendants have not asserted any legal argument for how the 2012 Settlement Agreement waived Claims 1, 2, and 5 as asserted in the Complaint.

Moreover, Defendants have not supported an argument for the dismissal of Claims 1, 2, and 5 in their entirety. The Defendants' request for summary judgment on Claims 1, 2, and 5 in their entirety should therefore be denied.

V. DEFENDANTS' REMAINING ARGUMENTS LACK MERIT.

Defendants' arguments in section III of their brief are merely repackaged versions of arguments that Defendants presented in greater detail in sections I and II of their brief, and those arguments are without merit for the same reasons discussed in more detail above.

In Section III.A of their brief in support of their motion to dismiss, Defendants present one of the primary merits issues: under proper application of the United States laws and the 1945 Restoration Order to the facts in this case, are the lands at issue held to be owned by the United States in fee or in trust. The Tribe wholly agrees with the United States that this Court should apply the applicable statutes and executive actions to the facts of this case and resolve that merits issue. But that is not properly an issue for a preliminary motion to dismiss.

In Section III.B of their brief, Defendants return to where they started their brief in support of their motion to dismiss: they claim, contrary to the complaint, contrary to the record evidence that will be presented, and contrary to the basic DNA of the Tribe and nearly every other tribe, that the Tribe is only really interested in money, not in preservation and protection of its homeland. Defendants assert that, from the face of the Complaint, this Court should conclude that, as pled, the Tribe's claims "lack considerable value independent of any future potential for monetary relief." U.S. Br. at 30. From that incorrect premise Defendants then correctly states that if the claims were for monetary relief, the claims should be brought in the Court of Claims. The Tribe, of course, knows this law. It did bring its monetary claims in the Court of Claims. The present suit seeks to have this Court interpret and apply the existing acts of Congress and the Restoration

Order to the facts of this case. And so, as the Tribe noted above, this is a routine federal district court complaint. It falls squarely within this Court's jurisdiction.

There is simply no authority which supports Defendants' assertion that the Tribe's claims in this case should have been brought in the federal court of claims. The Tribe has been unable to locate any case from any federal court which held that a claim like those here should be dismissed because the defendant asserts that the claim is actually for money. As the Tribe explained in more detail above, the Tribe's claims are not claims for money.[8]

CONCLUSION

"Great nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Justice Black dissenting.) In this case, the Tribe is presenting claims that the United States or the named officers are failing to comply with federal law. The United States promised the Tribe a permanent Reservation in exchange for millions of other acres of the Tribe's land. The United States then expelled the Tribe from that Reservation to a replacement Reservation. It then decided that the Executive Branch could act as the Tribe's broker for sale of the replacement Reservation. Under federal law, that is all water under the bridge. But now the United States asserts that when it, as the Tribe's broker for sale, failed to sell the Tribe's land, the United States could just take that land without compensation. This is perhaps the last of the large cases regarding the United States breaking its promises by taking land from Indian people. It is not subject to dismissal. The Executive Branch must come into this Court and defend its action on the merits. The motion to dismiss must be denied for the reasons stated above.

[8] The Tribe believes its claims as pled clearly show that the thrust of this suit is not a claim for money. If this Court were to conclude that the complaint as written is inadequate on this point, the Court should allow the Tribe leave to amend. Leave to amend at this point in a case is, of course, freely given. Here, the Tribe did not submit a motion to amend to attempt to "cure" the issue raised by the United States for the simple reason that it does not believe any cure is necessary.

Respectfully submitted this 19th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2019, I electronically filed the foregoing **RESPONSE TO UNITED STATES MOTION TO DISMISS** with the Clerk of the Court via the CM/ECF filing system, which will send notification of such filing to all parties of record.

/s/ Sarah M. Harrington
Sarah M. Harrington, Legal Assistant