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' REPLY IN SUPPORT OF MOTION TO DISMISS COUNTS 1, 2, 3, AND 5, AND, IN THE ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT**

Counts 1, 2, 3, and 5 should be dismissed. First, the Tribe has failed to meaningfully respond to several arguments and it has therefore forfeited those arguments under D.C. Circuit case law. Second, the Tribe's retreat into mandamus in an effort to establish Administrative Procedure Act jurisdiction fails because the Complaint does not list 5 U.S.C. § 706(1) as a basis for its claims. And—even if it had—claims for mandamus under either section 706(1) or under a theory of non-statutory review would need to be dismissed for want of a clear, mandatory duty and because other remedies are available. Third, both the United States' and the Tribe's filings in *State of Utah v. Ute Indian Tribes* show that the Tribe had actual knowledge for statute of limitations purposes no later than 1986 that the United States did not hold the Public Domain Lands at issue in this case in trust for the Tribe. Finally, the plain language of the 2012 Settlement Agreement and applicable case law demonstrate that the Tribe's waiver and release of claims includes

violations that occurred prior to the parties' execution of the Settlement Agreement, as well as the continued consequences of those violations.[1]

ARGUMENT

I. The Tribe has Waived any Opposition to the Federal Defendants' Arguments that (1) the Indian Tucker Act Provides an Adequate Alternative Remedy to Relief Under the APA, and (2) the Tribe Lacks Standing to Maintain its First and Fifth Causes of Action.

In the D.C. Circuit "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). As one district court has explained, "[i]t is not the obligation of this Court to research and construct the legal arguments available to the parties. To the contrary, perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived." *See Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013) (internal citations and quotation marks omitted); *see also, e.g., Robinson v. Farley*, 264 F. Supp. 3d 154, 162 (D.D.C. 2017); *Stoller v. United States*, 216 F. Supp. 3d 171, 176 n.8 (D.D.C. 2016). Where a movant argues an issue—and cites relevant case law—the non-movant is expected to respond in kind or forfeit that issue.

In the Motion, we sought dismissal of the Tribe's first, second, and fifth claims (brought under the APA) because, among other reasons, an adequate

[1] We have not moved to dismiss the Tribe's fourth cause of action challenging the Department of the Interior's denial of the Tribe's petition to restore the Public Domain Lands to tribal ownership. *See* Compl. at 29, ECF No. 1 ("Count 4, Declaratory Relief: Violation of the APA, 5 U.S.C. § 706").

remedy—if one is justified—is available in the Court of Federal Claims under the Indian Tucker Act. *See* Motion at 27–31, ECF No. 35. We also sought dismissal of the Tribe's first and fifth claims based on the fact that the Public Domain Lands are not actually held in trust.[2] Motion at 24–27, ECF No. 35. In both cases, we presented fully developed argument with citation to supporting case law and other authorities.

For example, in arguing that the Tribe's first, second, and fifth claims could only be proper before the Court of Federal Claims (the "***CFC***"), we cited to the Tribe's pleadings to show this lawsuit seeks to establish the right to "future payment [of Public Domain Lands revenue] and tribal interest in the Public Domain Lands," i.e. prospective relief. *See id.* at 28–29. We then cited authority from the D.C. Circuit, D.C. District Court, and the Federal Circuit establishing (1) the APA waives sovereign immunity only where there is "no other adequate remedy available elsewhere," (2) the Indian Tucker Act can provide prospective relief, and (3) it is the Tribe's burden to demonstrate that the CFC cannot provide an adequate

[2] To avoid this fact, the Tribe asserts that it has engaged in "alternate pleading," claiming the Complaint alleges both that the Public Domain Lands are not held in trust (but should be) and, in the alternative, that the lands are held in trust and the United States is breaching its duties with respect to that trust. *See* Resp. to Motion at 23–25, ECF No. 46; *compare* Compl. ¶ 68 *with* ¶ 95. But the Court should not accept the alternate allegation that the Public Domain Lands are held in trust because the alleged fact is contradicted by both Exhibits A and B to the Complaint. *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004) ("Nor must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice."); Motion at 25, ECF No. 35 (citing Ex. A to Compl., ECF No. 1-1 and Ex. B to Compl., ECF No. 1-2). The Public Domain Lands are simply not held in trust for the Tribe.

remedy in this case. *Id.* at 27–31.

Similarly, in arguing that the Tribe lacks standing to assert its first and fifth claims, we cited Exhibits A and B to the Tribe's complaint, which demonstrate that the Public Domain Lands are not currently held in trust. *Id.* at 25. We then provided authority demonstrating that, in the absence of a trust corpus (i.e. the Public Domain Lands being held in trust), the Tribe cannot maintain an action for breach of fiduciary duty. *Id.* at 25–26. And, in the absence of a current beneficial interest in the Public Domain Lands, the Tribe cannot maintain an action for trespass. *Id.* at 26–27.

With respect to these arguments, which the Tribe refers to as "Defendants' Remaining Arguments," the Tribe limits its response to "perfunctory and undeveloped arguments . . . unsupported by pertinent authority." *Johnson*, 953 F. Supp. 2d at 250. On the issue of whether the Indian Tucker Act can provide adequate prospective relief, the Tribe does nothing more than confirm that the purpose of this lawsuit is "prospective relief." Resp. to Motion at 3, 6, 23, 27–28, ECF No. 46. The Tribe cites no case law and makes no effort to discuss or distinguish authority cited by the United States. *Id.* On the issue of standing and trust ownership, the Tribe does not respond to the argument at all, other than to generally state it is "without merit" and to characterize it as improperly calling for a determination of the merits. *Id.* at 27. As with the prior issue, the Tribe does not address the authorities cited by the United States. *Id.* By not meaningfully responding to either of these "Remaining Arguments," the Tribe has waived any

opposition to them and the first, second, and fifth claims can be dismissed on that basis alone.

II. The Complaint is Not Plead as One for Mandamus under 5 U.S.C. § 706(1) and, In Any Event, Fails to Make the Necessary Showing for Such a Claim.

Setting aside the fact that the Indian Tucker Act can provide an "adequate remedy" in regards to the Tribe's first, second, and fifth claims, the Motion also showed that these three claims are deficient because the Tribe fails to identify any final agency action occurring within the previous six-years as required for claims seeking judicial review under 5 U.S.C. § 706(2)(A). *See* Motion at 18–20, ECF No. 35.[3] In its response, the Tribe asserts that it has stated a valid cause of action under the APA—despite the absence of a recent final agency action—because section 706(1) allows a claim to "compel agency action unlawfully withheld or unreasonably delayed" and the Complaint, by citing *Ickes v. Fox* (30 U.S. 82 (1938)), also seeks non-statutory review. Resp. to Motion at 6–9. But the effort does not save the claims because the Complaint includes no reference to section 706(1), fails

[3] The Tribe argues that "5 U.S.C. § 706 provides jurisdiction for the Tribe's claims of federal failure to comply with federal statutes and prior orders." Resp. to Motion at 4, ECF No. 46. The APA, however, including section 706, is not jurisdictional. *Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 184 (D.C. Cir. 2006). Here, the Tribe has asserted subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362. *See* Compl. ¶ 10. And the United States has not argued that there is no waiver of sovereign immunity for counts one, two, and five. Thus, the question at issue with respect to claims one, two, and five is not whether the APA provides jurisdiction, but whether the Tribe can assert valid causes of action under the APA and whether any such claims would be time-barred by the applicable statute of limitations. *See Floyd v. D.C.*, 129 F.3d 152, 155 (D.C. Cir. 1997) (noting that to trigger federal court jurisdiction for a claim against the United States, a plaintiff must identify a waiver of sovereign immunity, subject matter jurisdiction, and a cause of action).

to identify a clear and mandatory duty, and because other adequate remedies—in lieu of mandamus—are available.

A. The Tribe pled its APA claims under section 706(2)(A), not 706(1).

In defending against a motion to dismiss, "the plaintiff cannot amend its complaint de facto . . . by asserting new claims for relief in its responsive pleadings." *Coll. Sports Council v. Gov't Accountability Office*, 421 F. Supp. 2d 59, 71 n.16 (D.D.C. 2006). The Complaint specifically cites section 706(2)(A) as the cause of action for the first and second claims and references no cause of action at all for its fifth claim. *See* Motion at 18, ECF No. 35; Compl. ¶¶ 97, 102, 118–124, ECF No. 1. And not once does the Complaint even cite to section 706(1). *See generally* Compl., ECF No. 1. Given that the Complaint did not assert section 706(1) as a basis for its claims, and the fact that the Tribe has still not identified an actionable final agency action for purposes of section 706(2)(A), the Tribe's claims under the APA set forth in Counts 1, 2, and 5, should be dismissed under 12(b)(6) (for failing to identify a final agency action) and 12(b)(1) (as time-barred).

B. Any claim for mandamus would need to be dismissed because the Complaint does not identify any clear, mandatory duty that the Court could compel.

Even assuming the Complaint had adequately asserted section 706(1) as a basis for its claims, the Tribe has still not shown the Court would have jurisdiction to compel the Department of the Interior to act. Under 706(1), a court can only compel an agency "to take a discrete agency action that it is required to take." *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("***SUWA***"). "This standard

reflects the common law writ of mandamus, which the APA carried forward in § 706(1)." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (internal quotation marks omitted). Thus, relief under section 706(1) is proper only if a statute provides "a specific, unequivocal command" or a "precise, definite act about which an official has no discretion whatever." *SUWA*, 542 U.S. at 63 (internal brackets and ellipsis omitted).

> Such a duty must be so plainly prescribed as to be free from doubt and equivalent to a positive command. Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Consol. Edison Co. of New York v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (internal brackets and ellipsis omitted).

As noted in the Motion, the Tribe's first, second, and fifth claims generally ask for an order requiring the Federal Defendants to place the Public Domain Lands in trust for the benefit of the Tribe and to prevent trespass on the same. *See* Motion at 19–20, ECF No. 35; Compl. ¶¶ 98, 103, 124 ECF No. 1. But these requests are not ones that could be the subject of mandamus. The Complaint does not identify a specific, unequivocal command from Congress directing the Department of the Interior or its officers to create an additional reservation for the Uncompahgre Tribe (much less one stating that the additional reservation must be located within the Public Domain Lands). Nor is there a single statute or order cited by the Tribe clearly and unequivocally mandating a "restoration" of the Public

Domain Lands to Tribal ownership. To the contrary, the Tribe spends numerous pages in both its complaint and response citing executive orders, treaties, secretarial reports and orders, and statutes ranging in date from 1861 to 1948 in an attempt to create an allegedly "non-discretionary duty."

This is exactly the situation where relief under section 706(1) is improper. It is a situation where "the duty is not . . . plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt." *Ashcroft*, 286 F.3d at 605. In any event, the authority cited by the Tribe does not mandate an additional reservation. Solicitor Opinion M-37051, attached to the Complaint as Exhibit B, is just the latest statement setting forth the Department of the Interior's position.[4] The Department's latest decision and the history cited in the Complaint just go to demonstrate that the meaning of the statutes and orders cited have been the subject of debate between the United States, the Tribe, the state of Utah, and the courts for over a century.

The Tribe's reliance on *Ickes v. Fox*, 300 U.S. 82 (1937), is also misplaced. *Ickes* is one of a line of cases, including *Larson v. Domestic & Foreign Commerce*

[4] *See also, e.g.,* Ex. 4 to Motion at 5, ECF No. 35-4; Exhibit 5 to Motion, ECF No. 35-5; *H.R. Rep. No. 1372* (1948) at 7, attached hereto as **Exhibit 11** (Letter from the Department of Justice detailing that 270,820 acres of the original 1,800,000 acres withdrawn by the Executive Order of 1882 were in the lands being restored to the Tribe by the 1948 Act Defining the Exterior Boundaries of the Uintah and Ouray Reservation in the State of Utah). The letter further states that "[t]he Supreme Court has made it abundantly clear that the Indians received no interest in lands so withdrawn by Executive Order." Ex. 10 (House Report), at 7.

Corp., 337 U.S. 682 (1949),[5] *Dugan v. Rank*, 372 U.S. 609 (1963), and *Leedom v. Kyne*, 358 U.S. 184 (1958), providing for "non-statutory review" of an agency acts alleged to be *ultra vires* or unconstitutional. *Terveer v. Billington,* 34 F. Supp. 3d 100, 123 (D.D.C. 2014). In the D.C. Circuit, "[t]his review doctrine is often called '*Leedom* jurisdiction' or the '*Kyne* exception' after the leading case approving its application, *Leedom v. Kyne*." *Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 166, AFL-CIO v. Griffin*, 590 F. Supp. 2d 171, 174 (D.D.C. 2008).

The Tribe cannot rely on non-statutory review for the same reason its claims fail under section 706(1): it has not identified a specific directive that is clear and mandatory. Indeed, the Tribe's burden under non-statutory review is even higher than that for mandamus under section 706(1); the doctrine "is intended to be extremely limited in scope" and "[t]he showing a plaintiff must make to obtain [it] is nearly insurmountable." *Id.* at 175 (internal quotation marks omitted). The Tribe must demonstrate "that the [Federal Defendants] acted 'in excess of [their] delegated powers and contrary to a *specific* prohibition' which 'is *clear and mandatory*.'" *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (emphasis added). "Garden-variety errors of law or fact are not enough;" the error must be "so extreme that one may view it as jurisdictional or nearly so." *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). And—of particular note in this case—"non-statutory

[5] In *Larson*, the Court specifically addressed *Ickes* and confined *Ickes* to those grounds consistent with its ruling in *Larson*. *Larson*, 337 U.S. at 702 n.26.

review must be based on a statute or regulation *that is subject to only one reasonable interpretation*." *Griffin*, 590 F. Supp. 2d at 178 (emphasis added); *Nat'l Air Traffic Controllers*, 437 F.3d at 1264 (finding no "specific and unambiguous statutory directive" where the agency had "reasonably questioned" the meaning of the directives at issue and both parties had "raised compelling arguments").

Because there is no clear and certain statutory duty in this case, any claims for mandamus—under either 706(1) or the doctrine of non-statutory review—should be dismissed.

C. Even if the Complaint included a claim for mandamus, the remedy would be unavailable because other adequate remedies would be available elsewhere.

Relief under section 706(1) or non-statutory review would also not be proper here because both are only available where "there is no other adequate remedy in a court." *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (quoting 5 U.S.C. § 704); *Nat'l Air Traffic Controllers*, 437 F.3d at 1263 (noting non-statutory review is unavailable unless a party will be "wholly deprive[d] of a meaningful and adequate means of vindicating its [alleged] statutory rights"). According to the Tribe, "[t]he current case is primarily about the future." Resp. to Motion at 3, ECF No. 46. The Tribe wants an order from this Court declaring that the Public Domain Lands belong to it. *See id.*; *see also generally* Complaint ¶¶ 89–124, ECF No. 1. However, if the Tribe's legal arguments are correct, it does not need mandamus to obtain beneficial title to the Public Domain Lands. The Tribe

already has two methods of vindicating its alleged prospective right to the Public Domain Lands.

The Tribe's first avenue of relief is Count 4 of the Complaint: the Tribe's challenge to the Federal Defendants' determination not to restore the Public Domain Lands to tribal ownership. Compl. ¶¶ 112–117, ECF No. 1. The Tribe believes that this denial was made in error, and it has a right to challenge the Restoration Denial under section 706(2)(A) of the APA. We have not moved to dismiss this claim, which could provide more than sufficient relief to preclude mandamus. *See, e.g., Nat'l Air Traffic Controllers*, 437 F.3d at 1265 (ruling that the availability of further administrative proceedings was a sufficient remedy).

In addition, and to the extent its claim is not time-barred by 28 U.S.C. § 2409a(g), the Tribe can also seek to establish its claim to the Public Domain Lands by virtue of the Quiet Title Act. In fact, the Quiet Title Act is "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983) (rejecting non-statutory review as a means to challenge title in favor of the Quiet Title Act). Given the availability of these two avenues of relief, the Tribe is not entitled to pursue mandamus under either section 706(1) or through non-statutory review. Counts 1, 2, and 5 should be dismissed.

III. The Tribe had Actual or Constructive Notice of the United States' Adverse Interest in the Public Domain Lands no Later Than 1986 and Count 3 is Therefore Time-Barred.

With respect to its third claim for relief seeking to quiet title, the Tribe

argues that its "duty to discover claims against the [United States] is somewhat lessened" compared to those of a normal litigant. Resp. to Motion at 12, ECF No. 46. But the case law the Tribe cites in support of this statement is not good law. *Loudner v. U.S.*, 108 F.3d 896 (8th Cir. 1997), did not involve claims brought under the Quiet Title Act, nor did the two cases cited by *Loudner* (and also relied upon by the Tribe): *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238 (N.D.Cal.1973); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir.1967). In addition, *Loudner*'s holding has since been disclaimed by the Eighth Circuit in the Quiet Title Act context. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 745 (8th Cir. 2001) ("*Loudner* did not involve a QTA claim, and, in our view, *Loudner* does not apply to QTA suits"). *Azalea* also involved a state statute of limitations rather than a federal one, and even pre-dates the Quiet Title Act. *Azalea*, 386 F.2d at 8 (considering the effect of section 95.11 of the Florida Statutes Annotated); *Block*, 461 U.S. at 280–81 (noting the United States' waiver of sovereign immunity to some real property suits following passage of the Quiet Title Act in 1972).

The Supreme Court, by contrast—and after the *Manchester* and *Azalea* cases—has recognized that "[f]ederal law rightly provides Indians with a range of special protections[, b]ut even for Indian plaintiffs, a waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed." *United States v. Mottaz*, 476 U.S. 834, 851 (1986) (internal brackets and quotation marks omitted). Congress was clear and unequivocal about the "central condition of [Congress'] consent" to suit under the Quiet Title Act; a suit against the United States seeking

to quiet title must be brought within 12 years of the date the claimant "knew or should have known of the claim of the United States." *Id.* at 843 (quoting 28 U.S.C. § 2409a(f)). This limitations period "must be strictly observed," and courts "must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" *Block,* 461 U.S. at 287 (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979). There is simply no lowered or "lessened" standard for claims by a Native American Tribe or its members under the Quiet Title Act.

As set forth in the Motion, a plaintiff will be considered on notice for purposes of section 2409a(g) where he or she "knew or should have known" of the United States' claim. Motion at 22–23, ECF No. 35. "All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id.*; *Arapaho Tribes of Okla. v. United States*, 558 F.3d 592, 595 (D.C. Cir. 2009). Notice "does not require the government to provide explicit notice of its claim. The government's claim need not be 'clear and unambiguous.'" *Spirit Lake Tribe*, 262 F.3d at 738. Here, the Tribe received sufficient notice of a potential quiet title action, at the latest, thirty-three years ago through the United States' filing in the *State of Utah v. Ute Indian Tribe*, U.S. Supreme Ct. No. 85-1821. *See* Motion at 9–10, 21–23, ECF No. 35; *see also* Exhibit 4 to Motion, ECF No. 35-4; Exhibit 5 to Motion, ECF No. 35-5.

Notably, faced with evidence that it received notice of its potential claims no later than 1986 (and likely much earlier), the Tribe does not claim to never have

received the United States' briefs. Nor does the Tribe cite any case law stating that a court filing cannot provide sufficient notice. Instead, the Tribe relies on an argument that the briefs' use of the term "public lands" amounts to "merely a tautology." According to the Tribe, the term "public lands" could have referred to any portion of the original Uncompahgre Reservation area and, thus, did not provide the Tribe with specific notice of the United States' adverse claim to title. *See* Resp. to Motion at 20, ECF No. 46. However, this argument is refuted by the circumstances of *State of Utah v. Ute Indian Tribes*, the Tribe's own filings in that case, and the overriding historical context.

State of Utah v. Ute Indian Tribe involved a petition for writ of certiorari to the Supreme Court following the Tenth Circuit's determination that "both the original Uncompahgre and Uintah Reservations still exist undiminished." Pet. for Writ of Cert., *State of Utah v. Ute Indian Tribe* at 7, Supreme Ct. No. 85-1821, 1986 WL 766674 (U.S.), at *7. In May 1986, Utah filed its petition asking the Court to consider "[w]hether the original Uncompahgre reservation was disestablished in light of the express statutory language and the facts that the United States has not treated the disputed area as a reservation since 1897 . . . ." *Id.* at *i. The Tribe opposed Utah's petition, and in its June 1986 opposition stated that nearly all "of the Uncompahgre Reservation opened by the 1897 Act . . . [is] presently owned either by the United States or the Ute Indian Tribe," and, further, that "except for the 1948 congressional action creating the 500,000 acre Hillcreek Extension of the Ute Indian Reservation . . . the United States owns nearly all of the lands contained

within the national forest boundary [located in the Uintah Reservation] and the Uncompahgre Reservation."[6] Brief in Opp'n to Pet. for a Writ of Cert. at 1, 3, , attached hereto as **Exhibit 12**.

Thereafter, in November 1986, the United States filed an amicus brief, arguing against certiorari because "[t]he court of appeals . . . correctly held that the Uintah Reservation was not diminished in 1905." Ex. 4 to Motion at 5, ECF No. 35-4. With respect to the Uncompahgre Reservation, the United States argued that, while the court of appeals erred in its holding as to the Reservation status, review was not warranted because "[the circuit] court followed the analytical framework of *Solem v. Bartlett* . . . [and] because the land in the original Uncompahgre Reservation is largely uninhabited and *is primarily owned by the United States*." *Id.* at 6 (emphasis added). The United States then further explained—in response to Utah's argument that "all current federal permits for grazing in the area must be canceled if the Uncompahgre Reservation has not been disestablished"—that "*virtually no trust land remains*" within the original Uncompahgre Reservation and that "[b]ecause the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe, they are available for grazing under 43

[6] As explained in both the Complaint and the Motion, the Hillcreek Extension consists of approximately 270,000 acres of land that was taken from the original Uncompahgre Reservation area and added to the Uintah and Ouray Reservation by Congress under the 1948 Act. *See* Motion, at 5, ECF No. 35; Compl. ¶¶ 61, 70, ECF No. 1. According to the Complaint, the Hillcreek Extension is currently managed as tribal trust land and does not appear to be at issue in the current lawsuit.

U.S.C. 1752." *Id.* at 20–21 (emphasis added).[7]

The United States' amicus brief provided ample notice to the Tribe of the United States' claim to sole ownership of all of, or "virtually all" of, the lands located within the original Uncompahgre Reservation. In fact, the Tribe expressly agreed with the United States in its own supplemental brief filed later that same month. *See* Suppl. Brief of the Tribe, *State of Utah v. Ute Indian Tribe*, Supreme Ct. No. 85-1821, attached hereto as **Exhibit 13.** In its supplemental brief, the Tribe explained that

> Virtually all of . . . the Uncompahgre Reservation [is] uninhabited lands, owned by the United States, *except that a substantial portion of the Uncompahgre Reservation is made up of Hillcreek Extension Indian lands held in trust by the United States for the benefit of the Ute Indian Tribe*. Nothing in the judgment of the court of appeals affects anyone's title.

Id. at 1 (emphasis added). Thus, the Tribe itself recognized that, of the lands within the original Uncompahgre Reservation, only the "Hillcreek Extension" and a few remaining allotments were still held in trust for its benefit.

In a later supplemental brief, Utah again argued for review because, with respect to the original Uncompahgre Reservation, the court of appeals ruling would allegedly mean that all monies collected by the United States from oil shale leasing programs located on the original Uncompahgre Reservation "must be deposited to

[7] The few remaining parcels of trust land alluded to by the Solicitor General's statement, likely consist of whatever remained held in trust status from the original "83 allotments" referred to in paragraph 70 of the Complaint, which are still held "in trust status" and do not appear to be at issue in this lawsuit. *See* Compl. ¶ 70.

the credit of the Tribe," rather than the general coffers of the United States and Utah. *See* Suppl. Brief for Pet., *State of Utah v. Ute Indian Tribe*, Supreme Ct. No. 85-1821, at 12, attached hereto as **Exhibit 14**.[8]

In its December 1986 supplemental amicus brief, the United States responded that Utah's fears that the Tribe might claim entitlement to revenue from oil and gas leases located within the original Uncompahgre Reservation were groundless. This was so because

> any such claim by the Tribe would be without merit. The statutory allocation of the revenues realized by the United States from mining on lands *to which the United States holds absolute title, and in which the Tribe has no beneficial interest,* is in no way affected by whether those lands are within the original boundaries of an undiminished Indian Reservation—just as the location of other non-Indian lands within the boundaries of an Indian reservation does not entitle the Tribe to a share of the royalties and other income from mining on those lands.

Ex. 5 to Motion at 2, ECF No. 35-5 (emphasis added). The United States then explained the statutes Utah cited in support of its argument had no application to

> lands . . . , *such as those within the original Uncompahgre Reservation at issue in this case*, that have been restored to full and unencumbered public ownership. *The Tribe has no remaining equitable interest in such lands*, and it accordingly has no claim to receive any revenue from the leasing of them.

[8] Notably, this appears to be the result the Tribe now seeks. *See, e.g.* Compl. ¶¶ 90 ("Under the 1880, 1894, 1897, and 1927 Acts, Congress required Defendants to deposit all money received by the United States from the sale or leasing of land or natural resources on the Uncompahgre Reservation in a government account for the Tribe"), 95 ("The lands and natural resources on the Uncompahgre Reservation are held in trust by the United States for Plaintiff, and Plaintiff is the beneficial owners of these lands and natural resources contained therein.").

Id. at 5 (emphasis added). In essence, the United States explained that Utah did not need to worry about the Tribe claiming oil or mineral proceeds in the future because the Tribe was not entitled to proceeds from public lands and—as stated in its first Amicus brief—there were "virtually no trust land remain[ing]" within the original Uncompahgre Reservation. Ex. 4 to Motion at 21, ECF No. 35-4.

In sum: (1) the issue before the Supreme Court involved the status of the entire original Uncompahgre Reservation; (2) the United States stated, and the Tribe agreed, that virtually all of the lands within that original reservation other than the Hill Creek Extension and a few remaining allotments—which are not at issue in this case—were public lands; and (3) the United States stated its position that the Ute Tribe had no remaining equitable interest in those public lands. There is no support for the Tribe's contention that the "public lands" referenced in 1986 could have excluded the public lands that are the subject of the Tribe's present suit.

To be deemed to have received notice for purposes of the Quiet Title Act's statute of limitations, the Tribe only needed "a reasonable awareness that the Government claim[ed] some interest adverse to the [Tribe]'s" interest in the Public Domain Lands that are at issue in this suit. Motion at 22–23, ECF No. 35. That notice did not need to be "explicit" or even "clear and unambiguous," but in this case it was both. Moreover, the briefs before the Supreme Court show that the Tribe specifically reviewed the United States' claim to the land, responded to it, and

agreed with it. In light of this, and the other reasons set forth in the Motion, the Tribe's third claim is barred under section 2409a(g) and should be dismissed.[9]

IV. The 2012 Settlement Agreement Requires Dismissal of the Tribe's First, Second, and Fifth Claims in their entirety.

Finally, the Tribe's first, second, and fifth claims should also be dismissed because they were waived in the 2012 Settlement Agreement. In a footnote, the Tribe argues that the Settlement Agreement "was not a settlement of any claims in the current case." Resp. to Motion, at 22 n.6, ECF No. 46. In making this argument, however, the Tribe makes no effort to analyze the applicable contract language, cite relevant case law, or otherwise demonstrate why the very broad language of the Settlement Agreement waiver and related Joint Dismissal would not be applicable to the present claims, particularly in light of facts pre-dating the Agreement by many decades. *See id.* at 21–22. Accordingly, the Tribe has forfeited any argument that the Settlement Agreement did not cover the types of claims raised in counts one, two, and five in this suit. *See Johnson*, 953 F. Supp. 2d at 250 ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived.").

The Tribe's focus is instead to argue that it did not contractually waive the

[9] In addition, 28 U.S.C. § 1402(d) provides a further ground for dismissal of the Tribe's Quiet Title Claim. Specifically, "[a]ny civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States *shall be brought in the district court of the district where the property is located . . . .*" *Id.* (emphasis added). This requirement is jurisdictional. *See W. Shoshone Nat. Council v. United States*, 357 F. Supp. 2d 172, 176 (D.D.C. 2004). And the Public Domain Lands are located in Utah.

first, second, and fifth claims in their entirety because they result from "continuing violations" and the 2012 Settlement Agreement "did not resolve any post-2012 liabilities." Resp. to Motion at 23, ECF No. 46. But the "continuing violations" of which the Tribe complains are nothing more than continuing harmful effects resulting from an alleged violation that occurred decades ago and are therefore covered and waived by the 2012 Settlement Agreement.[10]

The Tribe does not cite any case law to develop or support its "continuing violations" argument. The case law, however, does not support the Tribe's point. "Settlement Agreements are intended to end litigation on a particular matter and free the parties from any concern of resurrection of the claims." *Halldorson v. Sandi Grp.*, 934 F. Supp. 2d 147, 154 (D.D.C. 2013). And, as stated in the Motion, "[a]ny exclusions from a waiver or release must be clear, explicit, and manifest in the agreement itself." Motion at 15, ECF No. 35. In the contractual context, a "continuing violation" or "continuing wrong" will only be found "in circumstances where there are continuing obligations under the contract." *Roberta L. Marcus, Inc. v. New Cingular Wireless PCS, LLC*, No. 12-20744-CIV, 2013 WL 12093810, at *3 (S.D. Fla. Apr. 29, 2013). Where a party releases prior conduct, it also release any

[10] The Tribe's response also includes arguments with respect to the preclusive effect of a separate 1965 settlement (arising from the 1951 Petition before the Indian Claims Commission). Resp. to Motion, at 25, ECF No. 46. Though we referenced that settlement in the Motion, we have not relied upon it as a basis for dismissal. Rather, as explained in the Motion, the geographical overlap between the lands at issue in the 1965 settlement and the Public Domain Lands is not clear at this time. The 1965 settlement may become an issue at a later date depending on the results of the Motion and the ultimate scope of the Tribe's claims. *See* Motion at 17 n.9, ECF No. 35.

continuing "harmful effects" of that conduct. *Id.*

Thus, for example, in *Record Club of Am., Inc. v. United Artists Records, Inc.*, the Southern District of New York found that a prior release precluded claims—even where "the complaint alleges illegal conduct extending past the date of the release"'—where "all of the harm alleged flows from and is related to the terms and conditions under which [the plaintiff] settled the original antitrust lawsuits." 611 F. Supp. 211, 217 n.8 (S.D.N.Y. 1985). "[T]here may have been a continuing effect, but plaintiff's cause of action arose before the release was signed." *Id.* Taking this principal a step further, the same court in *Madison Square Garden, L.P. v. Nat'l Hockey League* dismissed antitrust claims based on *post*-release conduct because that conduct was merely a continuation of the conduct occurring prior to the release, rather than "subsequent conduct by the defendant that goes beyond what was released in the first instance." No. 07 CV 8455 (LAP), 2008 WL 4547518, at *6–*9 (S.D.N.Y. Oct. 10, 2008).

The D.C. Circuit had adopted this logic in other contexts. In determining whether an ongoing unlawful IRS levy constituted a continuing violation, the Court of Appeals explained

> that a continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period, typically because it is only its cumulative impact (as in the case of a hostile work environment) that reveals its illegality.

Keohane v. United States, 669 F.3d 325, 329 (D.C. Cir. 2012) (quoting *Taylor v.*

F.D.I.C., 132 F.3d 753, 765 (D.C. Cir. 1997)).

Similarly, in the Federal Circuit, the continuing claims doctrine applies where a claim is "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Tamerlane, Ltd. v. United States*, 550 F.3d 1135, 1145 (Fed. Cir. 2008). The doctrine is inapplicable where "a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach." *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). Thus, following this precedent, the Court of Federal Claims in *Wolfchild v. United States*, found that an alleged failure by the United States to transfer lands to tribal ownership that occurred in 1895, accrued that same year and "d[id] not renew or replicate each day or with each physical incursion upon the twelve sections of land." 101 Fed. Cl. 54, 75 (2011), *aff'd in part, rev'd in part*, 731 F.3d 1280 (Fed. Cir. 2013).

Here, the Settlement Agreement waives and releases "any and all claims [or] causes of action" seeking either damages or equitable relief that "are based on harms or violations occurring before the date of the execution of this Settlement Agreement," including the myriad examples laid out in the Settlement Agreement and addressed in the Motion. Motion at 14–17, ECF No. 35; Ex. 6 to Motion at 1, ECF No. 35-6. The Settlement Agreement was a general settlement of "any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory." Ex. 6 to Motion at ¶ 4,

ECF No. 35-6. This release included claims that the United States violated the 1945 Order and/or the 1948 Act by not taking the Public Domain Lands into trust for the Tribe prior to the 2012 Settlement Agreement, and, for the reasons explained above, also included the continued actions or harms in keeping with that "violation." Indeed, the United States' alleged ongoing failure to pay the Tribe revenue from the Public Domain Lands, to manage those lands for the Tribe's benefit, and to allow third-parties to access that land without Tribal consent are all the direct and logical result—or a reaffirmation—of the United States' prior alleged disregard of the 1945 Order and 1948 Act. And the Tribe has not based its first, second, or fifth claim on any new "subsequent conduct" by the United States that "goes beyond" the consequences of those previously released violations. Instead, the claims simply challenge the status quo that has been in place since the 1940s.

Nor can the Tribe rely on an alternate pleading theory to escape the logical results of its release. As noted, *see supra* note 2, the Tribe cannot engage in alternate pleading where its allegation that the Public Domain Lands are *currently* held in trust are contradicted by both Exhibits A and B to the Tribe's complaint, not to mention the public documents cited by the United States (such as the 1986 amicus briefing). *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004); Ex. A to Compl., ECF No. 1-1 ("The areas contemplated by the request are currently managed as public lands by the [BLM]"); 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]"). And, even if the Tribe could make factual allegations that the Public

Domain Lands *are* held in trust, the distinction would not save the claims. The Tribe has not disputed our Statement of Material Facts nor seriously argued that the Settlement Agreement would not preclude pre-2012 conduct for counts one, two, and five, even under the Tribe's alternative pleading theory. Summary judgment would therefore need to be granted in favor of the United States for that pre-2012 conduct. The remaining parts of counts one, two, and five would need to be dismissed because, as discussed above, the Tribe has forfeited our argument that those claims belong in the Court of Federal Claims. *See supra* p. 2–5.

But the Court need not even reach that issue. As argued in the Motion, the genesis of claims one, two, and five in this case flow from a single alleged violation that occurred almost a century ago. Claims challenging that alleged violation—and its purported resulting and continuing harms—have been waived. For these reasons, Counts 1, 2 and 5 should be dismissed with prejudice in their entirety.

CONCLUSION

All but Count 4 in the Tribe's Complaint should be dismissed.

Counts 1 and 5 should be dismissed because:

(1) other adequate remedies are available in place of the Tribe's claims under section 706(2)(A), section 706(1), and non-statutory review;

(2) the Tribe fails to identify a final agency action within the last six years, for purposes of section 706(2)(A), and fails to list section 706(1) in the Complaint as a basis for relief;

(3) the Tribe lacks standing to assert breach of trust or trespass claims where the pleadings and related documents establish the Public Domain Lands are not held in trust; and

(4) the Tribe expressly waived and released its claims in the 2012 Settlement Agreement.

Count 2 should be dismissed because:

(1) other adequate remedies are available in place of the Tribe's claims under section 706(2)(A), section 706(1), and non-statutory review;

(2) the Tribe fails to identify a final agency action within the last six years, for purposes of section 706(2)(A), and fails to list section 706(1) in the Complaint as a basis for relief; and

(3) the Tribe expressly waived and released its claims in the 2012 Settlement Agreement.

Count 3 should be dismissed because this Court lacks jurisdiction over that claim pursuant to both 28 U.S.C. § 2409a(g) and 28 U.S.C. § 1402(d).

For these reasons, the Federal Defendants respectfully requests that this Court dismiss the Tribes First, Second, Third, and Fifth claims pursuant to Rules 12(b)(1) or 12(b)(6). In the alternative, and only with respect to the United States' argument that the First, Second, and Fifth claims are barred by the 2012 Settlement Agreement, for summary judgment should be granted in favor of the United States under Rule 56.

Respectfully submitted this 12th day of March, 2019.

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