IN THE UNITED STATES COURT OF FEDERAL CLAIMS

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 18-359L Judge Edward H. Meyers

THE UNITED STATES' MOTION TO PARTIALLY DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

TABLE OF EXHIBITS

INTRODUCTION

This case revolves around the management of water and water infrastructure in northeastern Utah. It specifically focuses on the Uintah Indian Irrigation Project ("UIIP"), a century-old, multi-purpose water management project that serves both Indians and non-Indians in the Uintah Basin. Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("Tribe"), alleges that the United States has breached trust and contractual duties owed to the Tribe in maintaining and managing the UIIP, in not constructing additional water storage infrastructure, and in managing the Tribe's purported water rights. The operative Second Amended Complaint, ECF No. 65, follows a decision from the Federal Circuit that partially affirmed and partially reversed dismissal of the Tribe's previous complaint. On appeal, the Federal Circuit addressed, or in some cases explicitly left open, many of the issues raised by the Second Amended Complaint. The Circuit's decision shapes this motion to dismiss.

The factual and procedural history behind this case is lengthy and at points complex, but the various reasons for dismissing the bulk of the operative complaint are relatively straightforward. All of the Tribe's claims are barred, at least in part, by some combination of threshold failures to identify trust duties or contractual obligations the United States allegedly breached, the statute of limitations, and prior waivers and release of claims. And across the board, the Tribe does not have standing to assert claims and seek damages on behalf of individual tribal members as *parens patriae*. What is left for further proceedings are claims alleging the United States failed to adequately maintain or operate UIIP infrastructure in the period since March 2012, resulting in alleged injuries *to the Tribe*. The various reasons for arriving at this result are discussed in detail below and summarized by claim in the chart attached as Exhibit 1.

BACKGROUND

I. Factual Background

The Uintah and Ouray Indian Reservation is located in northeastern Utah's Uintah Basin. Second Amended Complaint ¶ 8, ECF No. 65 ("SAC"). In the early 1900s, Congress directed the federal government to grant allotments by trust patents to individual Ute Indians in accordance with the Indian General Allotment Act, Pub. L. No. 49-105, 24 Stat. 388 (1887), and otherwise provided for the opening of the Reservation to non-Indian settlers. *See* Acts of May 27, 1902, 32 Stat. 263; March 3, 1903, 32 Stat. 998; April 21, 1904, 33 Stat. 207; and March 3, 1905, 33 Stat. 1069; *see also Hackford v. Babbitt*, 14 F.3d 1457, 1459-60 (10th Cir. 1994). Allotment refers to the since discontinued practice of dividing (or "allotting") communal Indian lands into individualized parcels for private ownership by individual Indians. *See Hackford*, 14 F.3d at 1459-60; Indian General Allotment Act, Pub. L. No. 49-105, 24 Stat. 388. The Indian Reorganization Act of 1934 ended the practice of allotment. Indian Reorganization Act, Pub. L. No. 73-383, § 2, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 5101 *et seq.*). Today, some of the previously allotted lands of the Ute reservation are owned in fee by or held in trust for individual Indians, others are owned in fee by non-Indian successors to allottees, and still others have been conveyed back to the Tribe (or to the United States in trust for the Tribe). *See Hackford*, 14 F.3d at 1461 n.2 (reporting in 1994 that "more than one-third of the land served by the [UIIP] [was] held in fee by non-Indian successors to Indian allottees.").

Through the Indian Department Appropriations Act of 1906 ("1906 Act"), Congress authorized funds for, and construction of, the UIIP. *See* Indian Department Appropriations Act of 1906, Pub. L. No. 59-258, 34 Stat. 325, 375–76 (1906). The purpose of the UIIP was to "irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah." *Id.* at 375. The 1906 Act provided that "irrigation systems shall be constructed and completed and

held and operated, and water therefor appropriated under the laws of the State of Utah, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians." *Id.* The 1906 Act also provided that "the ditches and canals" of the UIIP "may be used, extended or enlarged for the purpose of conveying water by any person, association, or corporation under and upon compliance with the provisions of the laws of the State of Utah." *Id.*

Pursuant to the 1906 Act, the United States Indian Irrigation Service (a predecessor to the Bureau of Indian Affairs) constructed an extensive system of canals and ditches to convey water from the rivers that flow through the Reservation. After the Reservation was opened for homesteading, conflicts over water use arose between Indian and non-Indian water users. In 1916, the United States filed two actions in the U.S. District Court for the District of Utah to enjoin various irrigation companies from interfering with Indians' use of waters from the Lake Fork, Whiterocks, and Uintah Rivers that flowed through the UIIP area. SAC ¶ 43. In 1923, the court granted "the United States, and the Secretary of the Interior as Trustee of the Indians on the former Uintah and Ouray Indian Reservation, and also the owners by grant of the allotments of deceased Indians on said Reservation," an 1861 priority date for water serving the UIIP that had previously been certificated by the Utah State Engineer, consistent with the U.S. Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). Decree ¶ 1, *United States v. Dry Gulch Irrigation Co.*, No. 4418 (D. Utah 1923) (attached as Ex. 2); Decree ¶ 1, *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923) (attached as Ex. 3) *see also Hackford*, 14 F.3d at 1469.

The costs of constructing and operating the UIIP were to be recouped from irrigators who used the UIIP. *See* Act of May 29, 1908, Pub. L. No. 60-156, 35 Stat. 444, 450 (1908). However, operations and maintenance fees charged to irrigators were insufficient to cover actual

costs. U.S. Gov. Accountability Off., GAO-06-314, Indian Irrigation Projects: Numerous Issues Need to be Addressed to Improve Project Management and Financial Sustainability 1-2 (2006), https://www.gao.gov/products/GAO-06-314 (last visited Mar. 13, 2025). This led Congress in 1941 to cancel more than $300,000 in unpaid assessments and charges. *See* Act of May 28, 1941, Pub. L. No. 77-83, § 1, 55 Stat. 209 (1941) ("1941 Act"). As another form of relief to landowners, the 1941 Act contemplated shifting water use from unproductive land to more desirable lands capable of being served by the UIIP. *See* Adjustment of Irrigation Charges, Uintah Indian Project, Utah, H.R. Rept. 77-370, at 1-3 (1941) (attached as Ex. 4). To facilitate this, the 1941 Act authorized the Secretary of the Interior, with the consent of the interested parties, to transfer water rights to other lands under the UIIP and to make contracts necessary to effectuate such transfers. 1941 Act § 2.

In 1967, the United States, the Moon Lake Water Users Association, and the Tribe signed the Midview Exchange Agreement, attached as Exhibit 5. The Moon Lake Water Users used water from the Moon Lake Project, a Bureau of Reclamation irrigation project. Through the Agreement, the Bureau of Reclamation agreed to transfer certain Moon Lake Project infrastructure, such as the Midview Reservoir, to the Bureau of Indian Affairs for operation as part of the UIIP. *Id.* ¶ 8. "Title to the facilities so transferred [was to] remain in the United States until Congress otherwise provide[d]." *Id.* The Agreement enabled use of those facilities to deliver water from the Duchesne River to UIIP lands previously served by the Lake Fork River, water from which was then available to Moon Lake users as a result of an exchange of water rights in the Agreement. *Id.* ¶¶ 6-7.

II. The Central Utah Project and the Central Utah Project Completion Act of 1992

Separate from the UIIP is the Central Utah Project, which was first authorized by

Congress in 1956. *See* Colorado River Storage Project Act, Pub. L. No. 84-485, 70 Stat. 105 (1956). At a high level, the purpose of the Central Utah Project is the collection and distribution of water in the area of Utah spanning from the Uintah Basin to the Wasatch Front. The Central Utah Project was divided into six units, three of which (the Upalco, Uintah, and Ute Indian Units) were never constructed. *See* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575 §§ 501–02, 106 Stat. 4600, 4650–51 (1992) ("CUPCA"). The Uintah and Ute Indian Units were planned to include reservoirs to supply water to individual Indian lands.

To make use of water in the Central Utah Project, a user must hold water rights. By the time Congress originally authorized the Project in 1956, the State of Utah had ordered a general adjudication of all water rights in the Uinta Basin. *See In re Drainage Area of Uintah Basin and the Lower Green River Basin* (filed at ECF No. 22-7). In the following years, the Affiliated Ute Citizens[1] and the Tribe jointly hired E.L. Decker to identify Tribal and Affiliated Ute water rights. First Am. Compl. ¶ 47, ECF No. 18. The completed Decker Report organized lands into seven groups. *Id.* ¶ 48. Except for lands it designated as "Group 1" within the UIIP (those already subject to the 1923 decrees), the Decker Report generally asserted *Winters* reserved water rights based upon, and tabulated by, practicably irrigable acreage.[2] *Id.*

[1] In 1954, Congress enacted the Ute Partition and Termination Act, Pub. L. No. 83-671, § 6, 68 Stat. 868, which provided for the partition and distribution of the assets of the Ute Tribe of the Uintah and Ouray Reservation between mixed and full-blood members. *See Ute Distribution Corp. v. Sec'y of Interior,* 584 F.3d 1275, 1276–79 (10th Cir. 2009), *cert. denied,* 560 U.S. 905 (2010), for the history of the partition. Under the Act, the mixed-blood members organized the Affiliated Ute Citizens as an unincorporated association which, as authorized by the statute, created the Ute Distribution Corporation to jointly manage the distribution of assets to individual mixed-blood members.

[2] Not all water falling in the scope of a Tribe's *Winters* reserved water rights necessarily go to the Tribe itself. When reservation land is allotted to an individual Indian owner, that owner

Also in 1965, the United States, the Central Utah Water Conservancy District, and the Ute Tribe signed what is called the "Deferral Agreement," which is attached as Exhibit 6. The Agreement, among other things, deferred irrigation development for water use on 15,242 acres of the Decker Report's "Group 5" lands—those to be served by the Duchesne River and not presently under irrigation, but identified as productive and economically feasible to irrigate—until the Central Utah Project's "ultimate phase," which was then planned to be the Uintah Unit. Ex. 6 at 4. The Group 5 lands covered by the Deferral Agreement were not part of the UIIP. The Deferral Agreement allowed the water rights associated with those lands to be used for an earlier-constructed unit of the Central Utah Project, but established January 1, 2005, as the "maximum date of deferment." *Id.* at 6.

Over the following decades, some of the Deferral Agreement's provisions were not fulfilled, including construction of the Uintah Unit. Similarly, the separately-planned Ute Indian Unit was never authorized by Congress. *See* CUPCA § 501(3)-(4); Comm. on Energy & Nat. Res., Reclamation Project Authorization and Adjustment Act of 1992, S. Rep. No. 102-267 at 98 (1992) (describing Upalco Unit as "indefinitely postponed," Uintah Unit as "inactive," and Ute Indian Unit as having "never been authorized").

Congress passed the Central Utah Completion Act ("CUPCA") in 1992. Pub. L. No. 102-575 §§ 501–07, 106 Stat. 4600, 4650–55 (1992). Title II of CUPCA authorized funding for the Uinta Basin Replacement Project, which the Tribe discusses in its complaint. *Id.* § 203. Title V consisted of the Ute Indian Rights Settlement, in which Congress addressed, among other

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obtains a "right to use some portion" of the reserved water right "essential for cultivation." *United States v. Powers*, 305 U.S. 527, 532 (1939); *see also* 25 U.S.C. § 381. And if an Indian allottee sells their allotted land to a non-Indian, that non-Indian successor may become entitled to some portion of the federal reserved water right. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981).

things, the unfulfilled portions of the Deferral Agreement. *See id.* § 501(b)(3) (Act and revised compact "intended to . . . [among other things,] put the Tribe in the same economic position it would have enjoyed had the features contemplated by the [Deferral Agreement] been constructed."). Under Title V, Congress provided substantial federal funds in lieu of the Deferral Agreement's promised storage projects. Upon receipt of funds authorized by Congress in Sections 504-506 of CUPCA, the Ute Indian Rights Settlement provided that the "Tribe shall waive . . . any and all claims relating to its water rights covered under the [Deferral Agreement,] including claims by the Tribe that it retains the right to develop lands . . . deferred in such agreement." *Id.* § 507(b).[3]

III. 2012 Settlement and Release of Claims

In 2006, the Tribe filed an action against the United States in the Court of Federal Claims seeking money damages and an accounting for alleged mismanagement of its trust funds and non-monetary trust assets. Compl., *Ute Indian Tribe of the Uintah & Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl. Dec. 19, 2006). The 2006 lawsuit was resolved by a settlement between the Tribe and the United States executed on March 8, 2012 ("2012 Settlement Agreement"). *See* Joint Stipulation of Dismissal with Prejudice, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* No. 06-866 L (Fed. Cl.) (June 1, 2012), ECF No. 43. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit 7. In exchange for $125 million, the Tribe "waive[d] and release[d]…any and all claims…known or unknown, regardless of legal theory" based on harms or violations occurring before March 8,

[3] This is not to say Title V waived only claims related to the Deferral Agreement's storage provisions. *See id.* ("The Tribe shall waive . . . any and all claims *relating to its water rights covered by* [the Deferral Agreement] . . . ."). But the storage aspect is the issue most relevant to the arguments made here. The United States preserves an argument that any water rights-related claims that may survive the motion to dismiss and are properly identified through a more definite statement were waived under Title V of CUPCA.

2012 that relate to the United States' "management or accounting of [the Tribe]'s trust funds or . . . non-monetary trust assets or resources." *Id.* ¶ 4. An exception to this waiver and release were claims stemming from the United States' alleged "failure to establish, acquire, enforce, or protect [the Tribe's] water rights." *Id.* ¶ 6(b).

IV. The Present Case

The Tribe filed its original complaint in this case in March 2018, followed by a First Amended Complaint in February 2019. ECF Nos. 1, 18. The First Amended Complaint brought twenty-one claims challenging far-reaching aspects of Interior's management of water and water infrastructure in the Uintah Basin. At a high level, the claims in the Tribe's First Amended Complaint could generally be sorted into four groups: 1) breach of trust claims alleging the United States had an affirmative duty to secure water rights or build water infrastructure, 2) breach of trust claims alleging the United States had failed to properly maintain and operate UIIP infrastructure or manage water rights, 3) taking and contract claims related to the Midview Exchange Agreement, and 4) claims related to the 1965 Deferral Agreement. The Tribe's operative Second Amended Complaint, ECF No. 65, does not bring a takings claim, so we do not discuss it here. We also do not address specific breach of trust and other claims previously pled that do not relate to the claims in the operative complaint.

The United States moved to dismiss the First Amended Complaint on a number of grounds. *See* ECF No. 22. The United States moved to dismiss all of the breach of trust claims on the grounds that they failed to identify a money-mandating statutory or regulatory duty. *Id.* at 16-23. Alternative grounds for dismissing the breach of trust claims included the six-year statute of limitations set by 28 U.S.C. § 2501, waivers and releases in the 2012 Settlement Agreement, and the waivers and releases in Section 507 of CUPCA. *Id.* at 23-38. The United States argued

that the 2012 Settlement Agreement likewise barred the Tribe's breach of contract claim related to the Midview Exchange Agreement. *Id.* at 35. And the United States argued that the Tribe's breach of contract claim alleging the United States failed to construct storage infrastructure contemplated by the 1965 Deferral Agreement was time-barred and waived by Section 507 of CUPCA. *Id.* at 26-27, 30.

The Court of Federal Claims dismissed all twenty-one claims in the Tribe's First Amended Complaint. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359, 2021 WL 1602876, at *9 (Fed. Cl. Feb. 12, 2021) (ECF No. 38) ("*Ute CFC*"). The Court first held that the Tribe had not identified a source of law establishing trust duties that could sustain their breach of trust claims. *Id.* at 3-6. One of the statutes evaluated by the Court as the potential basis for such a duty was the 1906 Act. *Id.* at 4-5. Having found no basis for a trust duty, and thus no basis for the Tribe's breach of trust claims, the Court did not reach the United States' alternative arguments for dismissal for those claims. *See generally id.* The Court then held that the Tribe's breach of contract claim focused on the Government's alleged failure to transfer Midview Exchange Agreement property into trust was waived and released in the 2012 Settlement Agreement. *Id.* at 8. The Court also held the Tribe's breach of contract claim with respect to the Deferral Agreement was untimely. *Id.* at 9. The Court later denied the Tribe's motion for reconsideration of dismissal of the Tribe's claims. ECF No. 51.

On appeal, the Federal Circuit affirmed, in part, and reversed, in part. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation*, 99 F.4th 1353 (Fed. Cir. 2024) ("*Ute Fed. Cir.*"). The Federal Circuit agreed that none of the sources of law identified by the Tribe—including the 1906 Act—imposed a duty on the United States to secure additional water for the Tribe, build new water infrastructure, or otherwise complete the UIIP. *Id.* at 1363 n.4, 1365-66, 1371. The

Federal Circuit did find, however, that the 1906 Act imposed money-mandating trust duties on the United States in "hold[ing] and operat[ing] [UIIP] infrastructure." *Id.* at 1366-70. This was sufficient, at the motion to dismiss stage, to sustain the Tribe's claims that the United States had failed to adequately "maintain and operate the 1906 Act infrastructure." *Id.* at 1369. The Circuit thus reversed and remanded that group of the Tribe's breach of trust claims. *Id.* Breach of trust claims that pleaded both a duty to maintain and operate existing infrastructure and a duty to construct additional infrastructure were not reversed in full, with the court upholding the dismissal of the latter category. *Id.* at 1369-70. Further, the court did not decide "whether allowing third-party use [of the UIIP] is a breach of the United States' fiduciary duties" or whether the 1906 Act created an obligation "to protect and preserve water rights," remanding those issues to this Court to address as necessary in the first instance. *Id.* at 1370. The Court of Appeals did not address the United States' alternative arguments for dismissal of the breach of trust claims, noting that this Court could consider those arguments on remand. *Id.* at 1370, 1375.

The Federal Circuit then addressed the Tribe's breach of contract claims regarding the Midview Exchange Agreement and Deferral Agreement. The Federal Circuit affirmed this Court's finding that the Tribe's Deferral Agreement claim was time-barred. *Id.* at 1371-72. The court then addressed the Tribe's claim regarding the Midview Exchange Agreement, which alleged the United States breached the Agreement by failing to transfer property covered by the agreement into trust. The Circuit held that, to the extent the Tribe's claim was based on a failure to transfer infrastructure into trust, the claim was barred by the 2012 Settlement Agreement. *Id.* at 1373. However, the Federal Circuit also read the First Amended Complaint to include an allegation that the Tribe "received particular water rights under the Midview Exchange Agreement, and that the federal government has improperly diverted water owned by the Tribe

to other users in violation of the agreement." *Id.* at 1373-74. The Federal Circuit remanded for consideration of three questions—1) "whether there are water rights under the Midview Exchange Agreement"; 2) "whether the complaint adequately pled a breach of contract with respect to water rights"; and 3) whether the water rights exception to the 2012 Settlement Agreement would apply to such a claim. *Id.*

Following remand, the Tribe filed the operative Second Amended Complaint. ECF No. 65. That complaint includes three claims, though the first two claims contain multiple sub-claims. The claims generally are based on alleged failure to complete the UIIP and provide storage infrastructure, alleged failure to adequately maintain and operate the UIIP, alleged unlawful transfers of water rights, alleged unlawful carriage agreements, and alleged deficiencies in the terms and execution of the Midview Exchange Agreement. The claims in the Second Amended Complaint are summarized in Exhibit 1.

STANDARD OF REVIEW

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) ("*Navajo I*") (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). "Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 290–91 (2009) (citing *United States v. Testan*, 424 U.S. 392, 400 (1976)). The Court is presumed to lack subject matter jurisdiction, and it is a plaintiff's burden to prove by a preponderance of the evidence that jurisdiction exists. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Courts may look to evidence outside the pleadings and inquire into jurisdictional facts to determine the

existence of subject matter jurisdiction. *Id.* at 747. If the Court lacks jurisdiction over a claim, the claim should be dismissed under Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC").

In addition to establishing the court's jurisdiction, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id. (*quoting *Twombly*, 550 U.S. at 555). In addressing a motion to dismiss for failure to state a claim under RCFC 12(b)(6), courts "are not limited to the four corners of the complaint," but "may also look to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record." *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (internal quotations marks and brackets omitted).

ARGUMENT

Following the Federal Circuit's mandate, the only viable claims in the Second Amended Complaint are the subparts of Claim 1 based on an alleged failure to adequately maintain and operate UIIP infrastructure since March 2012. The other claims (or subparts) in the Second Amended Complaint are subject to dismissal because they fail to identify a trust duty the United States failed to perform, fail to state a claim, are barred by the statute of limitations, and/or were waived by the 2012 Settlement Agreement. Several of these claims were addressed by the Federal Circuit and are barred by the mandate rule. Further, those claims that properly focus on an alleged failure to adequately maintain or operate existing UIIP infrastructure must be limited to alleged wrongs occurring after 2012 due to both the statute of limitations and the Tribe's waiver and release of claims in the 2012 Settlement Agreement. These various grounds for dismissal are summarized by claim in Exhibit 1. Finally, across the board, the Tribe is limited to

its own claims and alleged damages; it cannot bring a claim here as *parens patriae* on behalf of individual tribal members.

I. Aside from those claims alleging a failure to adequately maintain or operate UIIP infrastructure, the Tribe's breach of trust claims either fail to identify an applicable trust duty or to state a claim for violation of an applicable duty.

The Court of Federal Claims lacks jurisdiction over non-contract claims unless the plaintiff has identified a specific money-mandating duty, as is required to trigger the Court's jurisdiction under the Tucker Act. The Tucker Act's waiver of sovereign immunity grants the Court of Federal Claims jurisdiction to award damages upon proof of "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Indian Tucker Act "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citing 28 U.S.C. § 1505).

Before a tribal plaintiff can invoke jurisdiction under the Indian Tucker Act for a breach of trust claim, it "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506 (citing *Mitchell II*, 463 U.S. at 216–217, 219). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *see Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016). Thus, the analysis under this first hurdle "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *See Jicarilla*, 564 U.S. at 173–74 (quoting *Navajo I*, 537 U.S. at 506). "[A]n Indian tribe must identify statute or regulations that both impose a specific obligation on

the United States and 'bear the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation omitted) (quoting *Navajo II*, 556 U.S. at 301). Indeed, the Federal Circuit affirmed these principles in the prior appeal in this case. *Ute Fed. Cir.*, 99 F.4th at 1364.

Aside from its claims based on an alleged failure to adequately maintain and operate UIIP infrastructure (Claim 1.b and 1.d, in part), the Tribe's breach of trust claims fail to identify an applicable, enforceable and money-mandating trust duty that the United States failed to perform. The Tribe's breach of trust claims based on an alleged failure to provide storage infrastructure or otherwise expand the UIIP (Claims 1.a and 1.d, in part) are barred by the Federal Circuit's prior resolution of such claims in the United States' favor. The Tribe does not identify a duty-creating source of law barring Interior from designating lands as non-assessable (Claims 1.c and 2.c) or from entering into carriage agreements (Claim 2.d). The Tribe likewise does not identify a trust duty applicable to its Midview Exchange Agreement claims (Claims 1.e and 2.b). But even assuming the Tribe had identified money-mandating trust duties applicable to these claims, the Tribe has not alleged facts that would allow a finding the United States violated those duties. Finally, assuming without conceding that there is a trust duty applicable to the Tribe's claim regarding water rights transfers under the 1941 Act (Claim 2.a), the Tribe has again failed to plead sufficient facts to allow a finding that the United States authorized transfers in a way Congress did not authorize. All of these claims should therefore be dismissed.

A. Breach of trust claims alleging the United States had an obligation to construct water storage infrastructure or otherwise expand the UIIP are barred by the mandate rule (Claims 1.a and 1.d, in part).

The Tribe's breach of trust claims alleging the United States breached a duty to construct storage infrastructure or otherwise expand the UIIP rest on arguments resolved in the United

States' favor by the Federal Circuit, running afoul of the mandate rule. "[T]he mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal." *SUFI Network Servs., Inc. v. United States*, 817 F.3d 773, 779 (Fed. Cir. 2016) (quoting *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1341-42 (Fed. Cir. 2013)). "[T]he mandate rule precludes reconsideration of any issue within the scope of the judgment appealed from" aside from those left open by the appellate court, "not merely those issues actually raised." *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (2008).

The Second Amended Complaint asserts two claims that appear at least partially based on an alleged failure to construct additional water infrastructure. Claim 1.a alleges that the United States committed a breach of trust by failing to "complete" the UIIP and "provid[e] storage infrastructure as part of the UIIP irrigation system." SAC at 27. Claim 1.d alleges that the United States failed to implement quality control measures "at the irrigation facility level." *Id.* 77. By referring to irrigation facilities and "implement[ation]" of unspecified additional measures, *id.* at 27, Claim 1.d appears to rest at least in part on an allegation that there is additional infrastructure that the United States should have built as part of the UIIP.

The Federal Circuit found that none of the sources of law the Tribe relied on in its First Amended Complaint created enforceable trust duties obligating the United States to build additional water infrastructure or otherwise expand the UIIP. The Circuit first held that the 1899 Act did not place a duty on the United States "to construct new infrastructure or affirmatively secure new water for the Tribe." *Ute Fed. Cir.*, 99 F.4th at 1366. The court likewise held the 1906 Act did not impose a duty "to construct the full scope of the [UIIP] initially contemplated." *Id.* at 1371. Finally, the Circuit held that none of the "various other treaties and statutes" or "supposed judicial admissions by the United States in prior litigation" relied on by the Tribe

"create[d] a specific trust obligation." *Id.* at 1363 n.4.

None of the sources of law to which the Second Amended Complaint could be read to attribute a duty to construct additional water storage or other infrastructure are new, and the Tribe's claims are thus barred by the mandate rule. The Second Amended Complaint most directly attributes the alleged duty supporting Claims 1.a and 1.d to the 1906 Act, SAC at 26, and also generally cites a 1899 Act as creating trust duties, *id.* ¶ 6. In various places it also appears to rely on the 1923 Decrees entered by the U.S. District Court for the District of Utah, *id.* ¶¶ 6, 45-46, and CUPCA, *id.* ¶¶ 55-57, as creating a trust duty to provide the Tribe with water storage infrastructure. The Federal Circuit specifically rejected the argument that the 1899 and 1906 Acts created a trust duty to construct additional infrastructure, dispensing with those two statutes as capable of sustaining the Tribe's claims. *Ute Fed. Cir.*, 99 F.4th at 1365, 1371.

CUPCA fares no better. As an initial matter, the relevant portions of CUPCA cited by the Tribe concerned replacement infrastructure for the Central Utah Project, which is separate from the UIIP and thus not relevant to the Tribe's claim here that the United States failed to provide storage infrastructure as part of the UIIP. SAC at 27. But in any case, the Tribe's First Amended Complaint brought a claim alleging that the United States had breached fiduciary duties owed to the Tribe by not developing the storage facilities contemplated by CUPCA. ECF No. 18 at ¶¶ 349-356 (Claim 17). The Court of Federal Claims dismissed that claim on the ground that CUPCA "does not provide a basis for jurisdiction," *Ute CFC*, 2021 WL 1602876, at *5-6, and the Federal Circuit affirmed dismissal, *Ute Fed. Cir.*, 99 F.4th at 1366.

CUPCA was among the "various other treaties and statutes" that the Federal Circuit found did not "create a specific trust obligation." *Id.* at 1363 n.4. The mandate rule bars reconsideration of this issue. Further, the Federal Circuit also stated that Section 203 of CUPCA,

which the Tribe cites as "obligat[ing] the United States to provide water storage," SAC ¶ 56, provided that the relevant storage "project[s] were discretionary and contingent on feasibility and environmental studies." *Ute Fed. Cir.*, 99 F.4th at 1372. The government's "authority to act does not support inference of the asserted *duty* to act (enforceable by a suit for money damages)." *Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013) (emphasis in original). Section 201(c) of CUPCA, which the Tribe also cites, SAC ¶ 56, simply set timing conditions on authorizations of funding for construction projects and likewise did not obligate the Government to take any action.

To the extent the Second Amended Complaint's breach of trust claim (or sub-claims) is based on an alleged failure to construct the storage projects contemplated by the 1965 Deferral Agreement, the Federal Circuit also affirmed dismissal of the version of that claim in the First Amended Complaint (there, Claim 3) for failure to identify a trust duty. *Ute Fed. Cir.*, 99 F.4th at 1366. A claim on that basis would therefore be barred by the mandate rule. It would also be time barred, as the Agreement itself set January 1, 2005 as the maximum date of deferral. This was the Federal Circuit's basis for affirming dismissal the Tribe's breach of contract claim with respect to the Deferral Agreement and applies equally to a breach of trust claim. *Id.* at 1371-72. Such a claim would also fall under the waiver and release of claims in Section 507 of CUPCA. Section 507 of CUPCA waived "any and all claims relating to [the Tribe's] water rights covered under the [Deferral Agreement]" upon receipt of funds authorized by Sections 504-506 of CUPCA. In its 2006 lawsuit against the United States, the Tribe acknowledged that payment of the funds identified in Sections 504–506 had been made. *See* Compl, *Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 06-866 L ¶¶ 15–18, 36.

Finally, the 1923 Decrees and statements by the United States in the proceedings that led

to those decrees were among the "supposed judicial admissions" that the Federal Circuit did not "see any significance in[.]" *Id.* at 1363 n.4; *see also* Appellant's Opening Brief 5, 8-9, 34, ECF No. 17 (Fed. Cir. No. 2021-1880) (arguing the United States admitted in the *Dry Gulch* and *Cedarview* complaints that it had enforceable trust duties and citing the Decrees). The Tribe cannot reassert these arguments, which were within the scope of the Federal Circuit's decision. Additionally, judicial decisions and supposed admissions by the United States in judicial proceedings cannot create enforceable trust duties. The United States only accepts trust duties through treaties, statutes, or regulations. *See Arizona v. Navajo Nation*, 599 U.S. 555, 563-64 (2023); *see also Gilham v. United States*, 164 Fed. Cl. 1, 11-12 (2023). Relying on this principle, the District of Utah explicitly rejected the argument that supposed admissions by the United States in the *Cedarview* and *Dry Gulch* proceedings could create trust duties. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. U.S. Dep't of the Interior*, No. 21-cv-573, 2023 WL 6276594, at *8-9 (D. Utah Sept. 26, 2023) ("*Ute D. Utah*"). Claim 1.a and Claim 1.d (to the extent it rests on an alleged failure to construct new infrastructure) should therefore be dismissed.

B. The Tribe fails to identify a trust duty barring the United States from entering into carriage agreements or designating land as non-assessable (Claims 1.c, 2.c, and 2.d).

Claim 2.d alleges the United States has committed a breach of trust by "[e]ntering into carriage agreements allowing non-Indians to use UIIP infrastructure to transport and receive their water rights without consent or consultation from the Tribe[.]" SAC at 29. This claim fails because the Tribe has not identified any treaty, statute, or regulation that would bar Interior from entering into carriage agreements with non-Indians. In fact, the 1906 Act explicitly allowed the UIIP to "be used, extended, or enlarged for the purpose of conveying water by any person, association, or corporation[,]" not just allotment holders (or their successors such as the Tribe).

The Act did not require consultation with, consent from, or compensation to the Tribe in connection with such use of the UIIP. Because the Tribe has not "identif[ied] a specific, applicable, trust-creating" treaty, statute, or regulation "that the government violated," its claim should be dismissed. *Jicarilla*, 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. at 301).

Claims 1.c and 2.c allege that Interior's designation of lands within the UIIP service area as non-assessable was a breach of trust. SAC at 27, 29. Like Claim 2.d, these claims should be dismissed because the Tribe has not identified any treaty, statutory, or regulatory provision that designating land as non-assessable would violate. The Tribe's argument appears to be that inadequate maintenance may result in a parcel being designated as non-assessable. The United States is not able to assess whether that is the case without knowing what designation the Tribe is challenging. But even if it was the case, it would be the maintenance of the UIIP infrastructure—not the resulting land designation—that would be anchored to the trust duty the Federal Circuit found in the 1906 Act. The alleged inadequate maintenance is the basis for Claim 1.a, which is discussed further below. Because claims 1.c and 2.c do not identify any source of law that designating lands as non-assessable violates, they should be dismissed.

C. The Tribe has failed to plead a breach of trust with respect to the Midview Exchange Agreement (Claims 1.e and 2.b).

The Second Amended Complaint asserts two breach of trust claims related to the Midview Exchange Agreement. As a reminder, the Midview Exchange Agreement exchanged water rights and water infrastructure between the Bureau of Reclamation, Bureau of Indian Affairs, the Tribe, and the Moon Lake Water Users Association. Claim 1.e challenges the Exchange Agreement's allegedly "unlawful Secretarial transfers of project water rights" and other allegedly "illegal and/or improper acts and omissions related to the Midview Exchange Agreement[.]" SAC at 27. Claim 2.b alleges that the United States breached fiduciary duties by

"[e]ntering, implementing, and continuing to uphold the Midview Exchange Agreement," which the Tribe believes negatively impacted their water rights, and by "refusing to administer the Midview Reservoir as a part of the UIIP irrigation system[.]" *Id.* at 28. These claims each have two subparts that appear to fall into two contradictory categories, with one part alleging that the Exchange Agreement is itself a breach of trust, and the other part alleging that a failure to implement the Exchange Agreement is a breach of trust.

The Federal Circuit addressed analogous claims in the First Amended Complaint. Claim 8 of the First Amended Complaint was a breach of trust claim based on the alleged failure to transfer Midview Property into trust, which the Court found "plead[ed] a breach of trust premised on the alleged failure of the United States to maintain and operate the 1906 Act infrastructure for the benefit of the Tribe."[4] *Ute Fed. Cir.*, 99 F.4th at 1369. The Federal Circuit characterized Claim 9, which challenged the terms of the Exchange Agreement concerning water rights, as "alleg[ing] . . . that the United States' execution of the Midview Exchange Agreement somehow constituted mismanagement of the Tribe's water rights." *Id.* at 1370. The Court declined to address whether the 1906 Act created trust duties with respect to management of water rights, leaving the issue to be addressed on remand if necessary. *Id.* Now on remand, these claims (re-pled as Claims 2.b and 1.e, respectively) should be dismissed.

First, even if the Tribe had identified a trust duty applicable to its claim regarding the

[4] From where the Federal Circuit derived a trust duty applicable to this claim is unclear. The 1906 Act says nothing about transfer of additional infrastructure to become part of the UIIP. *See generally* 1906 Act. And the Midview Exchange Agreement itself cannot create trust duties because it is not a treaty, statute, or regulation. *See Arizona v. Navajo Nation*, 599 U.S. 555, 563-64 (2023). Indeed, the holding is inconsistent with the Federal Circuit's reading of the 1906 Act as *not* requiring the construction of additional infrastructure. *Ute Fed. Cir.*, 99 F.4th at 1371. The Circuit itself remarked that it was "unclear whether a breach of trust claim could be stated for failure to transfer assets into trust." *Id.* at 1373 n.8.

transfer of Midview Property under the Midview Exchange Agreement, which the Federal Circuit's opinion made seemingly contradictory statements on, *see supra* n.4, the Tribe has not stated a claim for breach of any such duty. Claim 2.b of the Second Amended Complaint asserts that it was a breach of trust to "refus[e] to administer the Midview Reservoir as a part of the UIIP irrigation system." SAC at 28. This claim rests on the assertion that the Midview Reservoir should have been transferred into trust for the Tribe under the terms of the Exchange Agreement. SAC ¶ 88. The Circuit did not decide what the terms of the Midview Exchange required or whether the United States performed those requirements. The plain text of the Exchange Agreement did not require that the property be transferred into trust. Indeed, the Agreement states that title to transferred facilities "shall remain in the United States." Exchange Agreement § 7, Ex. 5. The Agreement did not say that property would be the property would be transferred to the United States to be held in trust for the Tribe or that the Tribe would have any beneficial interest in the property.[5]

Second, the Second Amended Complaint fails to plead a breach of trust claim related to water rights exchanged under the Midview Exchange Agreement. These claims in the Second Amended complaint would appear to be Claim 2.b, to the extent it challenges the terms of the agreement itself, and 1.e, to the extent it rests on the Tribe's allegation that the United States violated the Exchange Agreement by "using water from the Midview Reservoir to irrigate lands other than those designated for irrigation under the Agreement." SAC ¶ 96.

[5] Additionally, the 1906 Act directs Interior to hold the UIIP in trust for "the Indians" in the context of allotment, which is "not coextensive with 'in trust for the tribe.'" *Hackford*, 14 F.3d at 1468. While the Federal Circuit generally referred to the UIIP being held in trust for the Tribe, we interpret that to refer to the Tribe in its capacity as a successor to former allotment holders in light of the text and context of the 1906 Act and the Tenth Circuit's opinion in *Hackford*.

With respect to Claim 2.b's challenge to the agreement itself, the Tribe does not identify any law the United States violated in entering into the Midview Exchange Agreement in the first place. And even if there were an applicable duty, it is not clear how the Tribe could allege that entering into an Agreement that the Tribe itself signed and "deemed to be in the best interest of the [Tribe]" could constitute a breach of fiduciary duties to the Tribe. Ex. 5 at 8.

Claim 1.e, which challenges alleged improper diversion of water exchanged through the Agreement, also does not identify a trust duty the United States failed to perform. For present purposes, we will assume without conceding that the 1906 Act created enforceable fiduciary duties requiring Interior to carry out the terms of the Midview Exchange Agreement.[6] But even with that assumption, the Tribe has failed to state a claim that Interior is violating the Exchange Agreement by "using water from the Midview Reservoir to irrigate lands other than those designated for irrigation under the Agreement." SAC ¶ 96. As discussed above, the Midview Exchange Agreement transferred water rights in the Lake Fork River from 10,000 acres served by the UIIP to Moon Lake Project lands, in exchange for water rights from the Duchesne River to be used in the UIIP. Ex. 5 at 2. Even assuming the water received for use in the UIIP was to be first used on the 10,000 UIIP "exchange acres," simply alleging that water from the Duchesne River is being used elsewhere is not sufficient to show that Interior has violated the Exchange Agreement. Section 13 of the Exchange Agreement provides that "as long as there is Duchesne River Exchange water available . . . not otherwise committed to use by the Indians or on Indian water right lands, [BIA] agrees to deliver water" to Moon Lake Water users capable of being

[6] At this point of proceedings, the United States does not believe it can address the contours of any applicable trust duty with respect to water rights in the abstract. Should the Tribe's claims survive the instant motion to dismiss, the United States reserves the right to advance additional arguments about any potentially applicable trust duties as the case proceeds.

served by the UIIP.[7] *Id.* at 4-5. The Tribe has failed to allege facts that would allow a finding that water rights exchanged through the Exchange Agreement are being used in a way inconsistent with the terms of the Agreement. It has therefore failed to allege that United States has failed to perform a duty requiring it to comply with the Agreement.

D. The Tribe's breach of trust claim regarding water right transfers under the 1941 Act (Claim 2.a) should be dismissed for failure to state a claim, and if it is not dismissed, the Court should order a more definite statement.

Claim 2.a of the Second Amended Complaint, which alleges that Interior has breached fiduciary duties in transferring water rights under the 1941 Act, should be dismissed for failure to state a claim. Section 2 of the 1941 Act authorizes Interior "to transfer water rights, with the consent of the interested parties, to other lands under [the UIIP] and to make necessary contracts to effectuate such transfers." The Tribe's claim alleges that the United States has violated the 1941 Act by "transferring federally decreed Tribal water rights to non-tribal lands . . . without consulting with or compensating the Tribe or Indian landowners." SAC at 28. The Complaint elsewhere alleges that Interior has transferred tribal water rights to lands outside the UIIP service area and that Interior transferred "water rights from about 10,000 acres of trust lands to other non-Indian lands in violation of its fiduciary duties to the Tribe as trustee." *Id.* at ¶¶ 81, 82.

Again assuming without conceding that there is a trust duty applicable to the Tribe's claim, the Tribe has not pleaded the facts necessary to support a claim that Interior authorized water rights transfers in a manner that Congress did not authorize through the 1941 Act. The Tribe's vague allegations do not identify any particular water right transfer for which the Tribe was an interested party but did not consent, and therefore do not adequately plead a claim for relief. The Tribe's disparate allegations do not allow the United States (and would not allow a

[7] Further, nothing in the Exchange Agreement purported to limit Interior's authority approve transfers of water rights under the 1941 Act.

fact finder) to determine for any particular transfer who the transferor was, who the transferee was, who consented, and what lands and water rights were involved. Without allegations drawing the lines between all of these dots for a transfer, the Tribe has not alleged "more than a sheer possibility that [the United States] has acted unlawfully." *AlexSam, Inc. v. Aetna, Inc.*, 119 F.4th 27, 39 (Fed. Cir. 2024) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). More is required, and the Tribe's claim should be dismissed under Rule 12(b)(6).

If the Tribe's claim regarding the 1941 Act is not dismissed, the Tribe should be required to provide a more definite statement identifying with particularity the water rights transfers it believes were unlawful. "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." RCFC 12(e). A motion for a more definite statement is an "appropriate device[] to narrow the issues and disclose the boundaries of the claim and defense." *Williams v. United Credit Plan of Chalmette, Inc.*, 526 F.2d 713, 714 (5th Cir. 1976). The United States is entitled to know specifically the transfers for which the Tribe is seeking damages.

II. The Tribe's breach of contract claim regarding the Midview Exchange Agreement should be dismissed for failure to state a claim (Claim 3).

In addition to its breach of trust claims, the Tribe's Second Amended Complaint asserts a breach of contract claim regarding the Midview Exchange Agreement. Claim 3 alleges "[t]he United States has breached the Midview Exchange by non-performance in failing to effectuate a transfer of the Midview Property in trust, and as a component part of the UIIP irrigation system, for the benefit of the Tribe." SAC at 30. This claim mirrors nearly exactly Claim 11 in the Tribe's First Amended Complaint. Firs Am. Compl. ¶¶ 303-308, ECF No. 18. The Federal Circuit read that claim as essentially containing two separate claims—1) that the United States

allegedly failed to transfer Midview Property into trust in violation of the Exchange Agreement and 2) that the United States had impermissibly diverted exchanged water rights. *Ute Fed. Cir.*, 99 F.4th at 1373-74.

Both aspects of the Tribe's breach of contract claim should be dismissed for the reasons discussed above in connection with its breach of trust claims. A breach of contract claim requires showing that a party breached an "obligation or duty arising out of the contract." *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). First, as discussed above, the Midview Exchange Agreement did not require that the Midview Property be transferred to the United States to be held in trust for the Tribe. *See supra* pp. 19-22. As a matter of law, the contractual obligation the Tribe alleges the United States violated does not exist. Second, the Tribe has not alleged the factual predicate necessary to find that the United States is administering water rights in a way inconsistent with the terms of the Exchange Agreement. Because the Tribe has not pleaded a breach of the Exchange Agreement, Claim 3 should be dismissed.

III. Each of the Tribe's claims is barred, at least in part, by the statute of limitations.

Even assuming other jurisdictional and pleading requirements were met, all of the Tribe's claims are barred, at least in part, by the statute of limitations. The applicable statute of limitations states that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The statute of limitations is "applied against the claims of Indian tribes in the same manner as against any other litigant[.]" *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). A claim against the United States accrues "when all the events which fix the government's alleged liability have occurred and the

plaintiff was or should have been aware of their existence[,]" which is considered under an objective standard. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011); *see also Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (citation omitted). Because the Tucker Act's statute of limitations is jurisdictional, the Tribe as the plaintiff has the burden of proving by a preponderance of the evidence that each of its claims is timely. *See Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1087 (Fed. Cir. 2015) (citing *Brandt v. United States*, 710 F.3d 1369, 1373 (Fed. Cir. 2013)); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

All of the Tribe's claims are time-barred in some respect. Claims based on a failure to complete the UIIP or otherwise construct additional infrastructure (Claims 1.a and 1.d, in part) are time-barred because they are based on decades-old alleged failures to develop water infrastructure. However, given the clear bar that the Federal Circuit's decision poses with respect to these claims, discussed above at pages 14-18, Defendant does not belabor the statute of limitations point on these claims.

Many of the Tribe's other claims should be dismissed for failure to identify any alleged wrongdoing that occurred after March 7, 2012 (six years before the Tribe filed its original complaint in March 2018). And those claims based on a continuing failure to adequately maintain or operate UIIP infrastructure must be limited to alleged inadequate maintenance or operation since March 2012.

A. The majority of the Tribe's claims fail to identify any alleged wrongdoing occurring within the six-year limitations period.

Claims 1.c, 1.e, 2 (all subparts), and 3 are all based on discrete events that the Tribe alleges were either a breach of trust or breach of contract. However, none of these claims identifies, much less challenges, an alleged breach occurring after March 2012. These claims

should therefore be dismissed as time-barred.

i. The Tribe has not challenged any land redesignations that occurred after March 2012 (Claims 1.c and 2.c).

The Tribe asserts two sub-claims (Claims 1.c and 2.c) challenging Interior's alleged designation of lands as non-assessable. SAC at 27, 29. But the Second Amended Complaint does not identify any designation that occurred after March 2012 or any designation at all with specificity. Any claim based on land designations would have accrued at the time the land was redesignated. Because the Tribe has not identified any re-designations occurring after March 2012, Claims 1.c and 2.c are time-barred.

ii. The Tribe has not challenged any carriage agreements post-dating March 2012, and instead appears to challenge decades-old agreements (Claim 2.d).

Claim 2.d alleges the United States breached fiduciary duties by entering carriage agreements, but the Tribe has also not identified any allegedly unlawful carriage agreements entered since 2012. Rather, the Tribe's claim specifically challenges agreements that are several decades old, alleging "the United States has failed to renegotiate these carriage agreements for decades[.]" SAC ¶¶ 64, 101. The facts underlying any claim challenging those agreements would have been fixed when the agreements were entered. While it is unclear whether the Tribe subjectively knew about those agreements when entered, that is ultimately not the standard for claim accrual and the start of the statute of limitations clock. Suspending claim accrual for statute of limitations purposes would require the Tribe "either show that the [United States] has concealed its acts with the result that [the Tribe] was unaware of their existence . . . or that [the Tribe's] injury was 'inherently unknowable' at the accrual date." *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008). "Indeed, absent active concealment by [a] defendant, accrual suspension requires what is tantamount to sheer impossibility of notice." *Rosales v. United*

States, 89 Fed. Cl. 565, 578 (2009). The Tribe has not alleged that the United States concealed carriage agreements or that the Tribe's alleged injury was "inherently unknowable." *Id.* Any claim challenging carriage agreements entered into before 2012 is therefore time barred. Because the Tribe has not identified (let alone challenged) any carriage agreements entered into after March 2012, Claim 2.d should be dismissed. If not dismissed, the Tribe should be ordered to provide a more definite statement identifying with particularity any carriage agreements entered after March 2012 being challenged.

iii. The Tribe has not challenged any post-March 2012 water rights transfers (Claim 2.a).

Finally, Claim 2.a challenges unspecified transfers of water rights under the 1941 Act. But the Tribe has not identified, and the Second Amended Complaint does not challenge, any post-2012 water rights transfers under the 1941 Act. Transfers under the 1941 Act stretch back to the 1940s, far beyond the statute of limitations window. Each transfer is a discrete event, and the factual basis for a claim challenging any given transfer would be fixed at the time of the transfer. The Tribe claims it did not have subjective knowledge about transfers until 2013, though it does not identify the transfers it is referencing or offer any explanation for why it could not have known about them earlier. SAC ¶ 81. And based on correspondence from the then-Tribal Chairman to Interior, it would appear that the Tribe did have actual knowledge of water transfers connected to fee lands (as opposed to trust lands) by at least the 1960s. Letter from Harvey Natchees, Uintah and Ouray Tribal Business Committee Chairman, to the Comm'r of Indian Affairs (Dec. 27, 1962) (attached as Ex. 8).

Regardless of whether the Tribe actually knew about specific water transfers, it has not offered any reason it should not have known about them. Water is a tangible resource. If water rights were transferred away from lands in which the Tribe had an interest, the Tribe should have

noticed that those lands were no longer receiving water. This should have spurred the Tribe to "seek advice, launch an inquiry, and discover . . . the facts underlying their current claim." *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984). The Tribe has not shown that the United States actively concealed information about water rights transfers such that the Tribe "could not have discovered the basis of [its] claim," or that the facts forming their claim were inherently unknowable. *Hopland*, 855 F.2d at 1577; *see also Mitchell v. United States*, 10 Cl. Ct. 63, 67-68 (1986) ("[T]he Indian beneficiary of a trust, no less than any other, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered."). Thus, because a claim regarding water transfers under the 1941 Act would have accrued at the time of the challenged transfer, any claim challenging a transfer that occurred before 2012 is time-barred. Claim 2.a should therefore be dismissed. If not dismissed, the Tribe should, as requested above, provide a more definite statement identifying with particularity any post-2012 transfers the Tribe is challenging.

iv. The Tribe has failed to establish that its claims related to the Midview Exchange Agreement are timely (Claims 1.e, 2.b, and 3).

The Tribe's claims related to the Midview Exchange Agreement (Claims 1.e, 2.b, and 3) are also untimely. The Tribe's challenges to the Agreement itself—the first halves of Claims 1.e and 2.b—come approximately 45 years too late, as any claim based off entry into, or the terms set by, the Agreement would have accrued at the time it was executed in 1967. The Tribe obviously would have been aware of the facts underlying any such claim, as it was a signatory to the Agreement. Ex. 5. Indeed, in a case the Tribe brought parallel to this one challenging the United States's management of water rights and infrastructure under the Administrative Procedure Act ("APA"), the U.S. District Court for the District of Utah held that the Tribe's challenge to the Midview Exchange Agreement was time-barred under the six-year statute of

limitations in 28 U.S.C. § 2401(a). *Ute D. Utah*, 2023 WL 6276594, at *16-17.

The Tribe's claims challenging an alleged failure to transfer the Midview Property into trust (Claims 2.b and 3) likewise come several decades too late. The Midview Exchange was entered in 1967 and indicated who would hold the property. And the Second Amended Complaint itself alleges that the parties to the Exchange Agreement—which included the Tribe—signed an agreement transferring the Midview Property to BIA in 1968. SAC ¶ 91. That agreement indicated to whom the property was going, and the Tribe does not allege it was ever indicated that any beneficial interest was being conveyed to the Tribe or allottees, much less that the United States actively concealed the status of the property. In the same parallel case mentioned above, the District of Utah found that the Tribe's claim challenging the alleged failure to transfer Midview Property into trust accrued in 1967 and was time-barred. *Ute D. Utah*, 2023 WL 6276594, at *16-17. The U.S. District Court for the District of Columbia had reached the same conclusion before the case was transferred to Utah. *Ute Indian Tribe of the Uintah & Ouray Reservation v. U.S. Dep't of the Interior*, 560 F. Supp. 3d 247, 258 (D.D.C. 2021).

Finally, with respect to any alleged improper diversion of water that the Tribe believes is contrary to the 1967 Exchange Agreement (part of Claim 3 and the second half of claim 1.e), the burden is on the Tribe to identify the water use it believes is improper and establish that its claim regarding that water use accrued after March 2012. It has failed to do so.

B. Claims based on an alleged failure to adequately maintain and operate UIIP infrastructure are partially time-barred (Claims 1.b and 1.d, in part).

The Tribe's breach of trust claims alleging that the United States has failed to adequately maintain and operate UIIP infrastructure (Claim 1.b and 1.d to the extent it concerns existing infrastructure) must also be limited to alleged breaches occurring after March 7, 2012. The Second Amended Complaint asserts that "[d]amages are due from the inception of the United

States' breaches through to the present," SAC at 27, and alleges that the UIIP has fallen into disrepair "over the past several decades," *id.* ¶ 60. The Tribe has previously argued that the continuing claims doctrine gets its claims over the time bar. Appellant's Reply Brief 24, ECF No. 27 (Fed. Cir. No. 2021-1880). But even under the continuing claims doctrine, the great bulk of these claims are still time barred and should be dismissed.

The "continuing claims" doctrine does not preserve an otherwise time-barred challenge to an alleged wrong simply because an injury is still being felt from the alleged breach. Instead, the doctrine "operates to save parties who have pled a series of distinct events—each of which gives rise to a separate cause of action—as a single continuing event. In such cases, the continuing claims doctrine operates to save later arising claims even if the statute of limitations has lapsed for earlier events." *Ariadne Fin. Servs. Pty. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998). But that does not mean that a timely challenge to a later distinct event revives a separate untimely challenge to an alleged breach occurring more than six years before the complaint was filed. *See, e.g.*, *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 572 (1990). As with any independent claim, a claim based on that earlier breach would accrue when the facts fixing the government's liability occurred and the plaintiff knew or should have known of their existence. In applying the continuing claims doctrine, the proper focus is upon the time of the wrongful acts, not when the consequences become most painful. *See Del. State College v. Ricks*, 449 U.S. 250, 258 (1980). And a plaintiff cannot seek damages "for the cumulative effect of alleged breaches by the Government that were outside of the six-year statute of limitations period." *Goodeagle v. United States*, 111 Fed. Cl. 716, 724 (2013) (quoting *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1035 n.9 (Fed. Cir. 2012)).

Under the continuing claims doctrine, the Tribe can only seek damages resulting from

alleged inadequate maintenance of UIIP infrastructure since 2012. If the trust duty to maintain UIIP infrastructure is viewed as a continuing duty such that "on each day the BIA [allegedly] failed in its duty . . . there arose a new cause of action"—which is the only way the continuing claim doctrine could save any part of the Tribe's claim—only the causes of action arising since March 7, 2012 are timely. *Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1986); *see also Confederated Tribes of the Colville Reservation v. United States*, 171 Fed. Cl. 622, 651 (2024). Any earlier claims would be based on alleged breaches beyond the statute of limitations period.

The Tribe knew or should have known about alleged inadequate maintenance or operation of the UIIP as it occurred, or at least well before 2012. The Second Amended Complaint cites a 1982 report discussing how alleged inadequate maintenance was allegedly causing negative effects, as well as a 2008 report discussing the UIIP's deferred maintenance needs. SAC ¶¶ 60, 61. Further, Interior's difficulties in collecting operations and maintenance costs have been a matter of public record since at least the 1940s. *See, e.g.*, Exhibit 4 (House Report regarding 1941 Act); Gov. Accountability Off. Rept No. GAO-06-314, cited *supra* p. 3. The Tribe's claims that the United States has inadequately maintained or operated the UIIP should therefore be dismissed "insofar as [they] . . . accrued more than six years before the filing of [the] complaint" in March 2018. *Confederated Tribes of the Colville Reservation*, 171 Fed. Cl. at 655. The claims are limited to discrete instances of inadequate maintenance or operation since March 7, 2012.

IV. Claims not based on water rights or alleged wrongs committed after 2012 were waived by the 2012 Settlement Agreement (Claims 1.b-1.c, 2.b-2.d, and 3).

Many of the Tribe's claims were also waived and released, at least in part, by the Tribe's 2012 Settlement Agreement with the United States. Binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the

compromised or resolved claims. *See, e.g.*, *Peckham v. United States*, 61 Fed. Cl. 102, 108-09 (2004). In addressing a motion to dismiss under Rule 12(b)(6), a court may consider matters of public record and items subject to judicial notice without converting the motion to one for summary judgment. *Dimare Fresh, Inc.*, 808 F.3d at 1306. The Court may thus consider the Settlement Agreement as a public record because it was entered by a court, or as an item not subject to reasonable dispute and thus appropriate for judicial notice under Federal Rule of Evidence 201.

Under the terms of the Settlement Agreement, and in exchange for $125 million from the United States, the Tribe:

> waive[d], release[d], and covenant[ed] not to sue in any administrative or judicial forum on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before [March 8, 2012] and that relate to the United States' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources.

Ex. 7 ¶¶ 2, 4. This waiver included, but was not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "permitted the misuse or overuse of [the Tribe's] non-monetary trust assets or resources," "failed to manage [the Tribe]'s non-monetary trust assets or resources appropriately," "failed to prevent trespass on [the Tribe]'s nonmonetary trust assets or resources," and "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe's] nonmonetary trust assets or resources." *Id.* ¶ 4(b). An exception to the waiver was claims "for damages for loss of water resources allegedly caused by [the United States'] failure to establish, acquire, enforce, or protect [the Tribe's] water rights." *Id.* ¶ 6(b).[8]

[8] As noted above, *supra* p. 7 n.3, the waiver and release in CUPCA Title V may apply to claims

The Settlement Agreement at least partially bars those claims in the Second Amended Complaint based on management of UIIP infrastructure, designations of land as non-assessable, and entrance into carriage agreements. The Tribe's claims that the United States has inadequately managed UIIP infrastructure (1.b and 1.d in part) allege the United States "failed to . . . maintain" or "manage . . .appropriately" an alleged trust asset. Those claims are thus barred to the extent founded on alleged mismanagement occurring prior to March 8, 2012. To the extent Claims 1.c or 2.c concern designation of trust land, those claims relate to the United States' management of a non-monetary trust asset. And Claim 2.d, which focuses on decades old carriage agreements, alleges that the United States "permitted the misuse or overuse" of an alleged trust asset. Claims 1.c, 2.c, and 2.d thus fall within the scope of the Settlement Agreement's waiver and release of claims. Unlike the statute of limitations, whether the Tribe knew or should have known of any of these breaches is irrelevant under the clear language of the waiver and release. Ex. 7 ¶ 2 (waiving claims of "any kind or nature whatsoever, *known or unknown*" (emphasis added))

The Tribe's breach of contract and breach of trust claims regarding the infrastructure involved in the Midview Exchange Agreement are also barred by the Settlement Agreement. As discussed above, *supra* p. 24., the breach of contract claim in the Second Amended Complaint is nearly identical to the First Amended Complaint's breach of contract claim regarding the Midview Exchange Agreement. The Federal Circuit held that the portion of the breach of contract claim alleging the United States failed to transfer Midview Property into trust was waived by the Settlement Agreement. *Ute Fed. Cir.*, 99 F.4th at 1373. This was because the

involving certain water rights. But given that Second Amended Complaint does not identify what, if any, water right transfers the Tribe believes to have given rise to its claim, the applicability of the waiver cannot be analyzed at this stage.

claim "relate[d] to the United States' management" of a purported trust asset and was "based on harms or violations occurring before the date of the execution of [the 2012] Settlement Agreement." *Id.* Thus, under the mandate rule, Claim 3 should be dismissed "insofar as it concerns infrastructure" (and should be dismissed in full for the reasons discussed above). *Ute Fed. Cir.*, 99 F.4th at 1373.

The Federal Circuit noted that the Tribe had also brought a breach of trust claim with respect to the alleged failure to transfer the Midview Property into trust, but remarked "it [was] unclear whether this claim has independent significance" from the breach of contract claim. *Id.* at 1373 n.8. The court left the issue to be addressed on remand. *Id.* There is no meaningful difference between the breach of contract and breach of trust claims when it comes to applicability of the Settlement Agreement. Like the breach of contract claim addressed by the Federal Circuit, the Tribe's breach of trust claims concerning the Midview Property are related to the United States' management of what the Tribe alleges should have been a trust asset prior to 2012. These breach of trust claims (1.e and 2.b to the extent they concern infrastructure) were therefore likewise waived by the 2012 Settlement Agreement.

V. The Tribe can only bring its own claims and seek its own damages.

The Tribe does not have standing to seek money damages for alleged injuries suffered by individual tribal members who own land served by the UIIP. In addition to asserting its own claims, the Tribe alleges that the United States has violated fiduciary duties owed to individual Tribal members by designating Indian-owned land as non-assessable, delivering poor quality water, and transferring water rights without consulting individual Indian landowners, among other alleged breaches. SAC at 3, 26, 28. But a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third

parties." *Starr Int'l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004)); *accord Warth v. Seldin*, 422 U.S. 490, 515–16 (1975) (explaining why the remedy of damages cannot be pursued by uninjured third parties). "This is true even where a plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement of Article III." *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 142 (D.D.C. 2002). The Tribe's standing to seek damages it itself suffered (such as to Project lands the Tribe itself has an interest in) does not grant it standing to assert claims based on injuries to others.[9] And simply as a matter of equity, the Tribe is not entitled to monetary compensation going beyond its own injuries.

The Tribe cannot rely on the doctrine of *parens patriae* to seek damages for its members' alleged injuries. SAC ¶ 2. Under the *parens patriae* doctrine, a state may have standing to litigate quasi-sovereign interests "in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982). But the doctrine does not apply to claims against the United States. *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023) (quoting *Alfred L. Snapp & Son*, 458 U.S. at 610) (holding that a state may not bring a *parens patriae* action against the federal government); *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179–80 (D.C. Cir. 2019); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986) (applying equally to tribes). In the parallel case brought by the Tribe challenging the United States' management of water and water infrastructure mentioned above, the District of Utah found that the Tribe was "generally preclude[d] . . . from standing as *parens patriae* in an action against the federal government." *Ute D. Utah*, 2023 WL 6276594, at *20.

[9] The United States is not conceding the Tribe has standing for any particular claim and reserves the right to challenge the Tribe's standing as the factual record develops.

In any event, the doctrine is reserved for situations in which a sovereign brings claims on behalf of *all* its citizens. *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *United States v. Santee Sioux Tribe*, 254 F.3d 728, 734 (8th Cir. 2001). But not all Ute Tribal members own Project lands such that they would be injured by the United States' alleged breaches in connection with the Project. The District of Utah recognized this additional barrier to *parens patriae* standing. Even if the Tribe could bring a *parens patriae* action against the United States in some other circumstance, the court found the Tribe could not proceed as *parens patriae* with claims based on alleged wrongs that "harm[] a limited class of owners of irrigable tribal lands in particular[.]" *Ute D. Utah*, 2023 WL 6276594, at *21.

Finally, allowing the Tribe to seek damages suffered by individual landowners would pose significant practical difficulties. Even within the subset of tribal members who own Project lands, the Tribe's claims on behalf of its members seek damages suffered by individuals in their capacities as landowners that would take individualized proof to determine. Assessing damages resulting from designating a property as non-assessable, delivering poor quality water, and/or transferring water rights would likely be particular to a given piece of land and the landowner's use of it. Allowing the tribe to bring these claims would invite the "hazard of litigating [the] case to the damages stage only to find the [Tribe] lacking detailed records or the evidence necessary to show the harm with sufficient specificity." *Travelers United, Inc. v. Hyatt Hotels Corp.*, No. 23-2776, 2025 WL 27162, at *12 (D.D.C. Jan. 3, 2025) (quoting *United Food & Commercial Workers*, 517 U.S. at 556). This hazard is one of the justifications behind the general prohibition on third-party standing. That prohibition bars the Tribe from seeking damages allegedly suffered by tribal members here and cannot be worked around through the *parens patriae* doctrine. Instead, the claims that survive the motion to dismiss must necessarily

be based on damages suffered by the Tribe as the Tribe. Most significantly, this would exclude from the case land served by the UIIP but owned by individuals or non-tribal entities.

CONCLUSION

While there are various routes to arrive at this result, the only claims in the Second Amended Complaint that should proceed further are those based on alleged failures to adequately maintain and operate UIIP infrastructure since March 2012 that have injured the Tribe. The Court should dismiss Claims 1.b, 1.c., 1.e, all of the subparts of Claim 2, and Claim 3. Reasons for dismissing these claims, multiple of which frequently apply to any one claim, include failures to identify a trust or contractual duty the United States breached, the statute of limitations, and the waivers and releases in the 2012 Settlement Act. The Tribe's remaining claims—1.a and 1.d—should also be dismissed insofar as they 1) are based on alleged breaches of trust occurring before March 2012, 2) are based on the allegation that the United States should have built additional infrastructure as part of the UIIP, and 3) are based on alleged injuries to individuals or entities other than the Tribe. These aspects of partial dismissal reflect, respectively, the applicable statute of limitations, the law governing breach of trust claims against the United States, and the rule against third party standing.

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