IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO PARTIALLY DISMISS

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1	Agreement among the United States, Moon Lake Water Users Association, and the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, Contract No. 14-06-400-4822 (November 16, 1967)
2	Declaration of Frances C. Bassett (May 29, 2019)
3	Declaration of Superintendent Antonio Pingree, *Ute Indian Tribe v. McKee*, No. 2:23-cv-00257 (D. Utah April 7, 2025).
4	Karnel Murdock Interview & Report (September 28, 2012).

Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Indian Tribe" or "Tribe"), hereby respectfully submits its Response in Opposition to the United States' Motion to Partially Dismiss, ECF 72. In support hereof, the Tribe states as follows:

BACKGROUND

The Ute Indian Tribe is suing the United States for breach of its fiduciary duties to the Tribe vis-à-vis its deficient management of the Uintah Indian Irrigation Project (the "UIIP"), a major Indian irrigation project held in trust by the United States for the benefit of the Tribe. The Tribe has brought two claims for relief based on the United States' breach of trust. The Tribe's first claim for relief seeks damages arising from the United States' failure to properly operate, maintain, oversee, and administer the UIIP, as exemplified through various acts and omissions of the United States that have resulted in a suboptimal project that wastes massive quantities of Tribal water year in and year out. The Tribe's second claim for relief seeks damages arising from the United States' repudiation of its trust duties, i.e., acts and omissions by the United States that are inconsistent and irreconcilable with the status of the UIIP as a trust asset.

The Tribe has also brought a third claim for relief for the United States' breach of a 1967 contract known as the Midview Exchange Agreement, under which the United States was obligated to transfer certain water storage infrastructure into trust for the Tribe as component part of the UIIP. The United States failed to hold its end of the bargain and, unbeknownst to the Tribe until recently, neglected to take this infrastructure (referred to herein and in the Tribe's Second Amended Complaint as the "Midview Property") into trust as part of the UIIP irrigation system.

While a more comprehensive chronological history of the pertinent facts surrounding the UIIP can be found in the Tribe's Second Amended Complaint, a summary of the salient facts concerning the United States' construction, operation, administration, and oversight of the UIIP is provided below:

A. Events Leading up to the Authorization and Construction of the UIIP

The aboriginal land base of the Ute Indian Tribe is vast in scope and rich in resources, extending from the Wasatch Front in central Utah to the Colorado Front Range. The lands occupied by the Ute Indians were "abundant in fish, game, forage for horses and fresh water." *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1093 (D. Utah 1981) (*Ute I*) *aff'd in part, rev'd in part*, 773 F.2d 1087 (10th Cir. 1985) (en banc). By contrast, the Tribe's present-day Uintah and Ouray Reservation, reserved by the Ute Indians through treaties with the United States, is comprised of lands once described as "one vast contiguity of waste, and measurably valueless, except for nomadic purposes, hunting grounds for Indians, and to hold the world together." CHARLES WILKINSON, FIRE ON THE PLATEAU, CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST, 149-50 (1999).

The United States exploited the desperate state of the Ute Indians—a direct result of forcible removal and other acts of violence from non-Indian settlers to the region—to cede all valuable and productive lands once belonging to the Utes in exchange for its promise to recognize and uphold the Tribe's right to maintain a permanent Tribal homeland on its reserved lands. Indeed, in early 1861, when a federal Superintendent of Indian Affairs arrived in Utah, he described the Utes as a defeated people, suffering in a "state of nakedness and starvation, destitute and dying of want." *Ute I* at 1094 (citing Letter from Sup. Davies to Comm. Dole of June 30, 1861, in Report of the Commissioner of Indian Affairs, 1861, at 129).

In the wake of the Ute Indian Tribe's forced removal from its aboriginal land base and subsequent coerced reservation of a comparatively diminutive and unproductive homeland in the arid Uinta Basin, the United States inflicted a new existential threat to the Tribe and its members through implementation of the General Allotment Act of 1887.

The General Allotment Act of 1887 was meant to herald the "beginning of the end" of the American Indians and their reservation homelands. That era in American history, lasting from 1871 to 1928, is known as the period of Indian "Allotment and Assimilation." Under these twin policy objectives, tribal lands were to be allotted in severalty to individual Indians and the individual Indians were then to be assimilated into the larger American society, while large swaths of land would be opened up for non-Indian settlement. As described by the Honorable Judge Bruce Jenkins in *Ute I*, 521 F. Supp. at 1126 n.165 (D. Utah 1981).

> President Theodore Roosevelt colorfully described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass."

Judge Jenkins' ninety-three-page decision in *Ute I*, 521 F. Supp. 1072, provides a detailed recitation of the events of 1902-1905, when the United States forcibly opened the Tribe's reservation to non-Indian settlement. In particular, Judge Jenkins recounted how Indian Inspector James McLaughlin was directed to meet with the Utes, ostensibly to obtain their consent to the allotment of their tribal lands:

> McLaughlin was in the peculiar position of one who was delegated to negotiate Indian consent to a chain of events that would occur regardless of the outcome of the negotiations. Accordingly, he argued to the Utes that they had no choice but to agree [to the forced allotment of their tribal lands] (quotation omitted).

Ute I, 521 F. Supp. at 1117.

While the General Allotment Act and its progeny statutes contained very few built-in protections to ensure the allotted lands could actually be rendered viable to support the very survival of the Indian landowners, Congress did include a provision to ensure Indian allottees would have access to water. Section 7 of the General Allotment Act, now codified at 25 U.S.C. § 381, states:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the

> Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations.

Specific to the Ute Indian Tribe, and in advancement of the General Allotment Act's objective of opening up Indian lands for permanent non-Indian settlement, Congress enacted the Act of March 1, 1899, 30 Stat. 941 ("1899 Act"), authorizing the Secretary of the Interior to grant rights-of-way for the construction of ditches and canals on or through the Reservation for the purpose of diverting and appropriating those waters, provided explicitly that:

> all such grants shall be subject at all times to the **paramount rights** of the Indians on said reservation to so much of said waters as may been appropriated, or may hereafter be appropriated or needed by them for agriculture and domestic purposes; and it shall be the duty of the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to **secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the Indians and the Indian service**.

Section 7 of the General Allotment Act and the 1899 Act both illustrate Congress' continuous recognition that *water* was the one indispensable asset that the Federal Government must preserve and protect for the Indians.

B. Authorization and Construction of the UIIP

For the Ute Indian Tribe, now relegated to an arid, unforgiving, and fractured homeland, the United States quickly recognized that further affirmative action was needed in order to secure and develop the Tribe's access to water. In 1906, the Commissioner of Indian Affairs described conditions on the Uintah and Ouray Reservation, stating that "[t]he future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate." Rept. of the Comm. of Ind. Aff., 1906, as quoted in *Ute I* at 1072. In response, Congress enacted the 1906 Appropriation Act, Publ. L. 59-258, Stat. 325, 375 ("1906 Act") that is at the center of the Tribe's present lawsuit. The 1906 Act appropriated funds

> [f]or constructing irrigation systems to irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah … the cost of said entire work to be reimbursed from the proceeds of the sale of the [surplus] lands within the former Uintah Reservation;[1] *Provided*, that … **the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians**, and he may sue and be sued in matters relating thereto.

The United States appropriated the sale proceeds from the forced sale of the Tribe's "surplus" reservation lands to reimburse the government for the UIIP's construction. The Tribe invested its own limited resources to help facilitate the crucial function of the UIIP. As discussed by the Honorable Bruce S. Jenkins in *Ute I*:

> The [Ute Indian Irrigation] Project covered 80,000 acres, most of the [Indian] allotted lands, and contained 22 canal systems which diverted water from most of the streams in the Uintah Basin. A program was initiated to level, clear, plow, and fence the Indian allotments to get them into cultivation. *Tribal funds were used for this purpose*. (emphasis added).

Ute I at 1126 n.165 (quoting Floyd A. O'Neil & Kathryn L. Mackay, *A History of the Uintah-Ouray Lands*, at 34 (U. Utah, American West Center 1977).

Pursuant to the plain language of the 1906 Act, the UIIP has always been, and remains, a trust asset held by the United States for the benefit of the Ute Indian Tribe.

C. UIIP Water Rights

The 1906 Act called for the Secretary to appropriate water for the UIIP "under the laws of the State of Utah." At the time, there was no recognized legal mechanism through which Indian tribes could claim an independent property right to water. Accordingly, pursuant to this statutory language, the Secretary procured state certificated water rights to supply the UIIP with water.

[1] The use of the phrase "former Uintah Reservation," reflects the prevailing understanding in 1906 that the opening of the Uintah and Ouray Reservation had the legal effect of terminating the status of tribal lands as "reservation lands."

In 1908, just two years after the 1906 Act, the U.S. Supreme Court issued its watershed opinion in *Winters v. United States*, 207 U.S. 564 (1908), holding that when Indian reservations are established, the Indians also reserve water rights of a sufficient quantity to sustain a permanent homeland on their reservation, regardless of whether the treaty of other instrument memorializing the reservation makes reference to water rights at all. These tribal water rights are referred to herein as "Indian reserved water rights."

In 1916, in the wake of the *Winters* decision and amid growing conflicts over rights to water between Indian and non-Indian water users in the Uinta Basin, the United States filed two Bills of Complaint in the Federal District Court in Utah to adjudicate a portion of the Ute Indian Tribe's Indian reserved water rights to be served through the UIIP. The United States filed these two Bills of Complaint in its capacity as trustee for the Tribe and specifically stated in its pleading, *inter alia*, that (i) Ute Indians are "wards" of the United States; (ii) that the Tribe's lands are "comparatively valueless" without reliable access to irrigation water, and (iii) that it is the "intent and policy and the *duty*" of the United States "to protect" the Ute Indians "in their rights … and material welfare." Second Am. Compl. at Exs. A-1, A-2 (emphasis supplied).

The United States' legal action resulted in two decrees issued by the Federal District Court in Utah in 1923. The first decree, *United States v. Dry Gulch Irrigation Company*, No. 4418 (D. Utah 1923) adjudicated a portion of the Tribe's Indian reserved water rights in the Lake Fork River Basin. The second decree, *United States v. Cedarview Irrigation Company*, No. 4427 (D. Utah 1923), adjudicated a portion of the Tribe's Indian reserved water rights in the Uinta River Basin. The two federal decrees affirm Indian Reserved Water Rights for irrigation of 59,771.69 acres of Reservation land from the Lake Fork and Uintah Rivers, with a total diversion duty of 3.0 acre-

feet per year per acre, for a total annual diversion[2] right of 179,315.07 acre-feet per year.

The United States' summary of the 1923 decrees in its Motion to Dismiss does not accurately capture the legal gravamen of these 1923 decrees. The United States indicates that "the court granted the United States, as trustee, an 1861 priority date for "water serving that 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)." Mtn. to Partially Dismiss, ECF 72 at 12. However, the U.S. District Court did not "grant" water rights or any associated priority date under the decrees. Rather, the U.S. District Court adjudicated these water rights as Indian reserved water rights that had been in existence as vested, tribal property rights since the Tribe's Uintah Valley Reservation was created in 1861. *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (finding that the reservation of Indian water rights as affirmed by the *Winters* doctrine becomes "effective as of the time the Indian Reservations were created.") The United States acknowledged that these water rights, though originally procured under state law, were adjudicated as Indian reserved water rights belonging to the Tribe in a 1995 Memorandum from Interior Field Solicitor Lynn Collins, who stated:

> Water rights were obtained by the Department in 1905 from the State of Utah to serve the Uintah Indian Irrigation Project. The Project was authorized by the Congress in 1906. These 1906 project water rights were adjudicated in 1923 as Indian reserved water rights, called Winters Doctrine water rights.

Second Am. Compl. at Ex. B. *See also, Hackford v. Babbit*, 14 F.3d 1457, 1469 (10th Cir. 1994).

In addition to their 1861 priority date (giving them one of the earliest, if not ***the*** earliest priority date of all water right holders in the Uinta Basin), the Tribe's Indian reserved water rights

[2] "Diversion" refers to the total amount that can be diverted from the natural flow of the stream source under the water right, regardless of whether the use of the water is consumptive or results in any return flow downstream.

are considered "present perfected"[3] water rights, meaning the full scope of the water right is considered a vested tribal property right regardless of whether it is being put to beneficial use. *Arizona,* 373 U.S. at 600. This characteristic differentiates Indian reserved water rights from water rights administered under a state prior appropriation system, where prolonged non-use can result in forfeiture of the water right. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

The 1923 decrees marked a seismic shift in the United States' operation and management of the UIIP. As a direct result of the United States' unilateral action, a substantial quantity of the Tribe's Indian reserved water rights—vested property rights belonging to the Tribe—were designated for delivery to Indian lands through the UIIP irrigation systems. This added a whole new dimension to the Tribe's induced reliance on its federal trustee's proper management and operation of the UIIP. Not only did the Tribe rely on these irrigation systems to deliver water necessary for the very survival of its members, but the Tribe had now involuntarily invested its own water rights in this project, leaving nothing for the Tribe to fall back on if the United States failed to deliver on its obligations to the Tribe.

RELEVANT PROCEDURAL BACKGROUND

A. Prior Dismissal and Appeal

The Tribe's First Amended Complaint contained twenty-one distinct claims for relief arising from the United States' mismanagement of the UIIP, as well the Tribe's Indian reserved water rights more broadly (including Indian reserved water rights not tied to the UIIP). This Court dismissed the Tribe's Complaint, primarily on its finding that the Tribe had not shown any federal

[3] The term "present perfected" water rights comes from Article VIII of the 1922 Colorado River Compact, stating that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." This provision was meant to ensure vested water rights in place at the time of the compact would not be impacted by the Compact's terms.

statute or regulation establishing any specific fiduciary duties over Tribal water or Tribal water infrastructure that was enforceable in an action for money damages, as required to invoke jurisdiction under the Tucker Act (28 U.S.C. § 1491) or the Indian Tucker Act (28 U.S.C. § 1505) (collectively the "Tucker Acts"). The Court also found that the Tribe's claim for breach of the 1967 Midview Exchange Agreement had been waived under a certain 2012 Settlement Agreement (*see* Mtn. to Partially Dismiss, ECF 72, Ex. 7, hereinafter "2012 Settlement Agreement") between the Tribe and the United States.[4] The Tribe appealed the court's final judgment to the Federal Circuit.

B. Federal Circuit Order

After briefing and oral argument, the Federal Circuit issued its opinion on April 25, 2024. *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024). The Federal Circuit affirmed this Court's dismissal of the Tribe's claims for breach of trust that were "premised on a purported duty of the United States to construct new infrastructure or secure new water for the Tribe." *Id*. at 1366. However, the Federal Circuit reversed this Court's dismissal of the Tribe's breach of trust claims based on the United States' fiduciary duty to hold, operate, and maintain the UIIP for the benefit of the Tribe. *Id.* at 1369. The Federal Circuit found that the 1906 Act created an enforceable fiduciary duty to hold, operate, protect, and preserve the UIIP for the benefit of the Tribe. *Id*. at 1367-69. The Federal Circuit also found that, while the 1906 Act did not impose a trust obligation to "expand the [UIIP] infrastructure at the government's

[4] The Court also dismissed certain claims for breach of a September 20, 1965, agreement between the Tribe, the United States, and the Central Utah Water Conservancy District referred to in the pleadings as the "1965 Deferral Agreement" and for regulatory taking under the 1992 Central Utah Project Completion Act, Pub. L. 102-575 (Oct. 30, 1992). These particular claims are not relevant to the current pleading.

expense," the 1906 Act did obligate the United States to "construct[] and complete[] the irrigation systems" for the Tribe. *Id.* at 1371.

Regarding the Tribe's claim that the United States had breached the 1967 Midview Exchange Agreement, the Federal Circuit agreed with the Tribe that such claim was likely not waived under the 2012 Settlement Agreement between the parties (*see* Mtn. to Partially Dismiss, Ex. 7) insofar as the claim involves water rights. Therefore, as to this particular claim, the Federal Circuit remanded the issue back to this Court for consideration of the three salient inquiries: "(1) whether there are water rights under the Midview Exchange Agreement, (2) whether the complaint adequately pled a claim for breach of contract with respect to water rights, and (3) whether the exception in the 2012 settlement applies." *Id*. at 1373-74.

The Federal Circuit also remanded on the issue of the alleged unlawful transfers of Tribal water rights. *Id.* at 1370.

C. The Tribe's Second Amended Complaint

The Tribe filed its Second Amended Complaint on December 6, 2024, pursuant to a stipulated, Court-approved scheduling order. ECF 67. The primary purpose of the Second Amended Complaint is to narrow the scope of the Complaint, with a focus on bringing the Tribe's claims into alignment with the Federal Circuit's mandate. Hence, what began as a complaint asserting twenty-one claims for relief spanning the full panoply of the Tribe's Indian reserved water rights is now limited to three claims for relief based exclusively on the United States breach and repudiation of its trust responsibilities vis-à-vis the UIIP under the 1906 Act, as well as the United States breach of the 1967 Midview Exchange Agreement.

LEGAL ARGUMENT

The United States' Motion to Partially Dismiss should be denied in full because (i) all of the Tribe's breach of trust claims arise under fiduciary duties that the Federal Circuit specifically

found to be enforceable in this Court under the Tucker Acts; (ii) all of the Tribe's claims for relief either fall outside the scope of the waiver of claims under the 2012 Settlement Agreement or were specifically exempted from said waiver under the terms of the Settlement; (iii) the Tribe's claims are not barred by the statute of limitations, and (iv) each of the Tribe's claims is brought on its own behalf and on behalf of its membership at large.

A. The Tribe's Breach of Trust Claims Arise Under the Enforceable Fiduciary Duty under the 1906 Act, as Determined by the Federal Circuit

The United States argues that each of the Tribe's breach of trust claims should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) for failure to identify an enforceable fiduciary duty under the Tucker Acts and violation of the mandate rule, except for claims based specifically on the United States' "failure to adequately maintain and operate UIIP infrastructure." Mtn to Partially Dismiss, ECF 72 at 12. Based on this proposition, the United States asserts that the entirety of the Tribe's second claim for relief (repudiation of trust responsibilities toward the UIIP) must be dismissed, as well as so-called "sub-claims" within the Tribe's first claim for relief which, in the United States' view, is not sufficiently tied to the United States' "failure to adequately maintain and operate UIIP infrastructure." This argument fails because it is premised on distorted readings of, and an improper attempt to rewrite, the Tribe's Second Amended Complaint. The Tribe's breach of trust claims falls squarely within the scope of the United States' enforceable, money-mandating fiduciary duties under the 1906 Act.

1. The Tribe has Put Forward Claims that Fall under the Money-Mandating Duty Found by the Federal Circuit

As the United States correctly points out in its Motion, the Tucker Acts do not, by themselves, create a cause of action against the United States. Thus, to surmount dismissal under Rule 12(b)(1), the Tribe "must identify a substantive source of law that establishes specific fiduciary duties and allege that the Government has failed to faithfully perform those duties." *U.S.*

v. Navajo Nation, 537 U.S. 488, 506 (2003) (*Navajo I*). Once a qualifying source of law has been identified, the "court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]." *Id*.

Once a plaintiff has demonstrated the existence of a statutorily imposed fiduciary duty, common-law trust principals can be applied to ascertain the parameters of the duty and what actions or omissions such duty may entail. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). The scope of such duties must also be construed in accordance with the Indian canons of construction. The Indian canons of construction require courts to liberally interpret treaties, statutes, executive orders, regulations and contracts between the United States and Indians in favor of the Indians. *E.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). The Indian canons of construction "are rooted in the unique trust relationship between the United States and the Indians." *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The rule of liberal construction arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior" applicable to the trust relationship between the United States and the Native American people. *Cobell v. Norton*, 240 F.3d 1082, 1102 (D.C. Cir. 2001).

Consistent with the foregoing standard, the threshold jurisdictional issue under the Tucker Acts is limited to whether the Tribe has demonstrated a fiduciary duty enforceable in money damages, not whether the Tribe has proven that this duty was actually breached. *United States v. Mitchell*, 463 U.S. 206, 228 (1983) (*Mitchell II*) (remanding the case to the Court of Federal Claims for further proceedings on the merits of "alleged" breaches of trust upon finding that there was a statutory duty giving the Court of Federal Claims jurisdiction under the Tucker Acts).

The Federal Circuit conclusively determined that the 1906 Act created an enforceable, money-mandating fiduciary duty to hold and manage the UIIP for the benefit of the Tribe. The Federal Circuit used broad terminology to define this trust duty, finding that the 1906 Act imposed a duty to "hold and operate" the UIIP for the benefit of the Tribe, and further ruling that the 1906 Act "imposes trust duties on the United States sufficient to support a claim at least with respect to management of existing water infrastructure." *Ute Indian Tribe*, 99 F.4th at 1358, 1369. The Federal Circuit did not provide a comprehensive definition for the terms "hold", "operate", or "manage", nor was it required to. The scope of these money-mandating fiduciary duties is informed by the Indian canons of construction and common law trust duties, such as the duty to administer the trust "solely in the interest of the beneficiary," the duty to "provide returns or other benefits from trust property," and the "commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch," Restatement (Third) of Trusts §§ 76-78; *White Mountain Apache* at 475.

The Tribe has asserted two – and only two – claims against the United States for breach of trust, both of which are based on the United States' money-mandating fiduciary duty to hold, operate, and manage the UIIP for the benefit of the Tribe. In each of the Tribe's breach of trust claims, the Tribe has listed certain act and omissions by the United States as conduct exemplifying violations of this enforceable trust duty. Second Am. Compl., ECF 65 at 27-29. In its Motion to Dismiss, the United States attempts to rewrite the Tribe's claims for relief by casting these listed acts and omissions as a series of isolated "sub-claims," with each "sub-claim" arising under its own separate and highly specific fiduciary duty. Relying on this strategic, but inaccurate, reframing of the Tribe's Complaint, the United States then argues that the Tribe has not cited any statute specifically prohibiting the United States from, *e.g.*, unilaterally entering into carriage

agreements for non-Indian use of UIIP infrastructure, adopting informal operating practices for the UIIP, and designating Indian lands within the UIIP service area as non-assessable.

The degree to which the United States' strategic reframing distorts the Tribe's claims cannot be overstated. The United States' statutory duty to hold, operate, and manage the UIIP cannot be reduced to an assemblage of black-and-white actions that the United States categorically can or cannot undertake. For instance, the United States would have the Court believe that the Tribe is asserting a blanket trust duty to refrain from designating lands within the UIIP service area as permanently non-assessable ("PNA") or temporarily non-assessable ("TNA"). No so. As the Tribe's Second Amended Complaint reflects, the United States' PNA and TNA designation, which have disproportionately impacted Indian lands within the UIIP service area, both illustrate and exemplify deficient operation and maintenance of the UIIP irrigation systems. Second Am. Compl. ¶¶ 66-74, ECF 65 at 19-20. Similarly, the Tribe is not asserting a blanket statutory prohibition on carriage agreements, as the United States here suggests. Rather, the Tribe has asserted that the manner by which the United States enters carriage agreements with non-Indian water users to use UIIP infrastructure, *i.e.,* with no consultation or input from the Tribe and no measures to mitigate wear and tear on UIIP infrastructure, constitutes a repudiation of the United States' trust duties.

As discussed above, whether the conduct cited in the Tribe's claims for relief constitutes a breach of the money-mandating fiduciary duties cited by the Tribe is **not** a jurisdictional issue, *Mitchell II* at 228. The threshold jurisdictional issue has been resolved by the Federal Circuit, and the Tucker Acts do not require the Tribe to show a specific statutory prohibition of each example of conduct constituting a breach of the enforceable fiduciary duty already found to exist. At most, if the United States is of the position that the cited conduct cannot, as a matter of law, constitute a breach of trust, the United States should have put this argument forward under Rule 12(b)(6) for failure to state a claim for which relief can be granted, instead of Rule 12(b)(1) for lack of subject

matter jurisdiction. With one limited exception addressed in the following subsection, the United States has not done so here.

ii. Neither of the Tribe's Breach of Trust Claims Should be Dismissed for Failure to State a Claim

The United States argues that the Tribe has failed to state a claim upon which relief can be granted in alleging that United States' unlawful transfers of UIIP water rights from Indian lands to non-Indian lands under the color of the 1941 Act is a repudiation of the United States' trust responsibility. Arguably, the United States is also asserting that the Tribe has failed to state a breach of trust claim upon which relief can be granted vis-à-vis the Midview Exchange Agreement, though the U.S. does not cite Rule 12(b)(6) or the Rule 12(b)(6) standard when raising the latter argument. Regardless, both of these arguments fail.

As an initial matter, it bears repeating that neither the United States' unlawful UIIP water rights transfers nor the United States' actions relating to the Midview Exchange comprise separate claims (or "sub-claims"). Rather, the Tribe has alleged these actions as evidence of conduct that, alongside other acts and omissions cited by the Tribe throughout its Second Amended Complaint, constitute a breach of the United States' money-mandating fiduciary duty to hold, operate, and manage the UIIP in trust for the Tribe. As such, these United States' 12(b)(6) arguments pertaining to specific allegations of misconduct cannot form the basis to dismiss either of the Tribe's breach-of-trust claims in their entirety. The only relief available to the United States should it prevail on these arguments would be a potential reduction in the scope of its liability for breach of trust.

Setting aside the limited reach of the United States' Rule 12(b)(6) argument(s), these arguments simply lack merit. To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the "[f]actual allegations must be enough to raise a right to relief above the speculative level…on the assumption that all the allegations in the complaint are true (even if doubtful in

fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). While a well-pled complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," the complaint "does not need detailed factual allegations." *Id*. In fact, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id*. at 556 (internal quotation marks omitted). A claim is sufficiently pled if it alleges facts that, when assumed to be true, "raise a reasonable expectation that discovery" will substantiate the claim. *Id*.

The Tribe's allegations meet and exceed these minimum requirements to survive a 12(b)(6) motion. Regarding the United States' unlawful transfers of UIIP water rights to non-Indian lands, the Tribe specifically alleges that the "Secretary ultimately transferred Tribal water rights from about 10,000 acres of trust lands to other non-Indian lands in violation its fiduciary duties to the Tribe as trustee," and that the Tribe "has never been compensated for these losses." Second Am. Compl. ECF 65 at 21. Taking these factual aversions as true, this provides more than enough to "raise a reasonable expectation that discovery" will substantiate the Tribe's claim, *Twombly*, 550 U.S. at 556. Contrary to the United States' position, Rule 12(b)(6) does not require the Tribe to identify each specific unlawful transfer of water rights, or <u>any</u> specific transfer for that matter. Because the United States, as the trustee and title owner of the UIIP irrigation systems, is the custodian of the records documenting these 1941 water right transfers, the specific water right transfers substantiating the Tribe's allegation will come to light during the discovery process. Accordingly, there are no grounds under Rule 12(b)(6) to dismiss or otherwise disregard this component of the Tribe's breach-of-trust claim.

Similarly, the acts and omissions of the United States concerning the 1967 Midview Exchange Agreement provide viable support for the Tribe's breach of trust claim. The gravamen of the United States' argument to the contrary is that there is nothing in the Midview Exchange

Agreement that ever required the United States to take the Midview property into trust as part of the UIIP. This assertion is patently false. Section 8 of the Midview Exchange Agreement specifically states:

> Reclamation and the Association hereby agree to transfer to Indian Affairs the **jurisdiction of the right, title, and interest** in and to the Midview Dam and Reservoir, Duchesne Diversion Dam, Duchesne Feeder Canal, and Midview Lateral together with all facilities and property appurtenant thereto and Indian Affairs will henceforth, **as part of the Uintah Project** operate and maintain such facilities…

Mtn. to Partial Dismiss, Ex. 5. Per the recitals of the Midview Exchange Agreement, "Uintah Project" refers to the UIIP.

The parties to the Midview Exchange reiterated their mutual intent to transfer the Midview property into trust as part of the UIIIP in the 1968 Transfer Agreement among the parties to the Midview Exchange, which was intended to implement the terms of the Midview Exchange Agreement. Section 2 of the Transfer Agreement states:

> The Bureau of Indian Affairs hereby accepts jurisdiction of the facilities and property and will operate and maintain said facilities including necessary replacements as a part of the Uintah Indian Irrigation Project without expense to the Bureau of Reclamation or the Moon Lake Water Users Association.

Agreement among the United States, Moon Lake Water Users Association, and the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, Contract No. 14-06-400-4822 (November 16, 1967) ("Transfer Agreement"), attached hereto as **Exhibit 1**.

It is challenging to think of a clearer record of the United States' stipulation to operate the Midview property as part of the UIIP. The United States argues that the Midview Exchange contemplates transfer of title to the Midview Property to the BIA, not to the Tribe. Mtn to Dismiss, ECF 72 at 30. But this just proves the Tribe's point. Legal title to trust property is always held by the United States, with the Tribe holding beneficial ownership of the property. Hence, the 1906 Act itself specifically provides that title to the UIIP will be in the Secretary. The fact that the

contract language did not specify that the Midview property will be taken into trust is immaterial. The language clearly and specifically provides that the Midview property will be administered as part of the UIIP, and the Federal Circuit has held in no uncertain terms that the UIIP is held in trust for the benefit of the Tribe.

iii. The Tribe's Citation to the United States' Failure to Store UIIP Water Rights in its Breach of Trust Claim does not Violate the Mandate Rule

As one example (among several provided) of the United States' acts and omissions constituting a breach of its money-mandating trust duty to hold, operate, and manage the UIIP for the benefit of the Tribe, the Tribe cites the United States' failure to provide storage of UIIP tribal water rights. The United States asserts that this allegation violates of the mandate rule because the Federal Circuit found the 1906 Act did not create a fiduciary duty to "expand the 1906 Act infrastructure at the government's expense." *Ute Indian Tribe*, 99 F.4th at 1371.

However, arguing that the United States breached its trust obligations by failing to provide storage for UIIP water rights is not the same as arguing that the United States must expand UIIP infrastructure. The Federal Circuit specifically found that the trust duties established under the 1906 Act included an obligation to "construct[ ] and complete[ ] the irrigation systems," *Id* (internal quotation marks omitted). The term "irrigation systems" is significant because it encompasses more than just a summation of separate structures; the term "irrigation systems" refers to an integrated and operational system for delivering irrigation water. The federal regulations governing Indian irrigation projects provides the following definition for an "irrigation facility," as used synonymously with irrigation "system": An "irrigation facility" includes "all structures and appurtenant works for the delivery, diversion, and storage of irrigation water. These facilities may be referred to as projects, systems, or irrigation areas." 25 C.F.R. § 171.00 (emphases added).

As outlined by the Tribe in its Second Amended Complaint, storage is an integral component of a complete irrigation system, especially after the United States unilaterally procured an adjudication of the Tribe's Indian reserved water rights to source the UIIP with only a 3.0 acre-foot per acre water duty. The United States itself has acknowledged in Field Solicitor Lynn Collins' 1995 Memorandum, *supra* pg. 8, that "there is no other way to purpose of the 1906 Project Act than to provide access to water storage."

> [T]he court granted a right to divert water when there are no crops in the fields in order to allow for storage to enable a total diversion of 3 acre-feet per acre for 1906 Project lands. It is these additional 2 ½ months of diversion, including carry over water diverting during October. that will enable the United States to put 3 acre-feet on 1906 Project lands. We believe that there was no other way to accomplish the purpose of the 1906 Project Act, and that all of this was understood and is part of the fabric of the decree.

Second Am. Compl. Ex. B.

Accordingly, the irrigation systems under the 1906 Act are not "complete" without access to storage. Moreover, there is no basis to assume that providing access to storage necessarily entails an expansion of UIIP infrastructure. As the record reflects, storage for UIIP water rights could be accomplished through the use of existing or planned storage infrastructure in the Colorado River basin that is not, itself, part of the UIIP infrastructure held in trust for the Tribe. For example, part of the Tribe's bargained-for consideration under the 1965 Deferral Agreement was access to federally administered storage infrastructure being developed as part of the Central Utah Project to store UIIP water rights. Second Amended Compl. ¶¶ 50-53, ECF 65 at 15-16. For these reasons, there has been no violation of the mandate rule.

B. None of the Tribe's Claims were Waived under the 2012 Settlement Agreement

The United States argument the Tribe's claims "not based on water rights" were waived in the 2012 Settlement Agreement between the Tribe and the United States is groundless, because all

of the Tribe's claims are "based on water rights" for the purpose of exempting these claims from the cited waiver.

The Indian canons of construction apply to contracts between the United States and Indian tribes. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (applying the Indian canons to interpret a contract between the U.S. and the Choctaw and Chickasaw tribes). Therefore, like the 1906 Act discussed above, the terms of this 2012 Settlement Agreement must also be liberally construed in favor of the Tribe and in accordance with the Tribe's understanding of the terms. But even *without* application of the Indian canons of construction, general principals of contract construction yield only one possible conclusion: that the Tribe and the United States specifically exempted the present claims from the waiver under the 2012 Settlement Agreement.

In the 2012 Settlement Agreement, the Tribe and the United States expressly agreed to *preserve*—not to waive and release—any claims relating to Tribal water. Section 6 of the 2012 Agreement states that

> nothing in this Settlement Agreement shall diminish or otherwise affect in any way:
>
> …
>
> Plaintiff's water rights, whether adjudicated or unadjudicated; Plaintiff's authority to use and protect such water rights; and Plaintiff's claims for damages for loss of water resources allegedly caused by Defendants' failure to establish, acquire, enforce, or protect such water rights…

U.S. Mtn. to Partially Dismiss at Ex. 7, ECF 72-7.

By these terms, the Tribe preserved its claims for the Tribe's water rights. This preservation of claims is not limited to any particular type or theory of claim. It is instead broadly based on whether the claim in question was put forward to enforce or protect the Tribe's water rights. The

United States' effort to isolate the UIIP from the Tribe's water rights is unavailing. As described *supra* and in the Tribe's Second Amended Complaint, as a direct result of the United States' unilateral decision to procure an adjudication of the Tribe's Indian reserved water rights to source the UIIP irrigation systems and the United States' failure to operate and maintain UIIP is tantamount to the United States' failure to protect Tribal water rights.

Moreover, the preservation of water-related claims expressly encompasses both adjudicated and unadjudicated Tribal water rights. *Id.* It is an established canon of statutory construction that "[p]rovisions of a contract must be so construed as to effectuate its spirit and purpose ... an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Hunt Construction Group, Inc. v. United States*, 48 Fed. Cl 456, 459 (2001). At the time of this Settlement Agreement (and up to the present), the *only* adjudicated Tribal water rights were the 1923 decreed water rights, designating Indian reserved water rights in the Lake Fork and Uinta River Basins for delivery to through the UIIP irrigation systems. Second Am. Compl. ¶ 37, ECF 65 at 12. Therefore, to give this reference to "adjudicated" Tribal water rights meaning, and to prevent rendering the parties' specific inclusion of this term "useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous…weird and whimsical," the 2012 Settlement Agreement's preservation of claims must be construed to encompass claims arising from the United States mismanagement of the UIIP.

At the very least, applying the Indian canons of construction, the Tribe certainly understood this preservation of claims to encompass claims concerning the United States' mismanagement of the UIIP. The Tribe was keenly aware of the situation created by their federal trustee, whereby the Tribe's ability to use and derive value from its Indian reserved water rights in the Lake Fork and

Uinta River Basins went only as far as the UIIP irrigation systems would allow, and that deficient operation and maintenance of the UIIP irrigation systems meant more than just depreciation of infrastructure held in trust for the Tribe: deficient operation and maintenance of the UIIP irrigation systems meant the waste and loss of the Tribe's own vested, senior-priority water rights. In light of these circumstances, the Tribe would not have understood the 2012 Settlement Agreement's preservation of claims to imply any artificial severance of claims to protect "adjudicated" Tribal water rights from claims for mismanagement of the UIIP. The Tribe would have seen these two items for what they are, which is to say, indivisible and one in the same.

C. None of the Tribe's Claims are Barred by the Statute of Limitations

As discussed, the United States is improperly attempting to rewrite the Tribe's complaint by expanding the claims alleged (which number three in total) into no less than ten. This distorted rewriting of the Tribe's complaint then permit the United States to argue that the majority of the Tribe's claims lie outside the Federal Circuit remand. In the context of the statute of limitations, it sets up the straw-man argument that the Tribe's claims are mostly barred. Perhaps most devastating, however, it exhibits the United States' continued repudiation of and active hostility towards the Federal Government's solemn trust obligation to the Tribe in relation to the life blood of the Tribe's parched Reservation: its water.

i. <u>The accrual date for the Tribe's breach of trust claims is March 8, 2012, the date of execution of the 2012 Settlement Agreement</u>

The first and second claims for relief allege breach of trust through deficient operation, maintenance, oversight, and administration of the UIIP and repudiation of the trust responsibility and the trust status of the UIIP respectively. Both of these claims are timely because the Tribe and the United States entered into a Settlement Agreement on March 8, 2012, and therein expressly preserved the right to sue the United States for damages related to the U.S.'s mismanagement of

the Tribe's water rights. By mutual assent of the parties, this Settlement Agreement established an accrual date of March 8, 2012 for the Tribe's present breach of trust claims.

The Parties entered into the 2012 Settlement Agreement with the mutual intent of reaching a final disposition of a 2006 lawsuit claiming, inter alia, that the United States mismanaged the Tribe's "non-monetary trust assets or resources." ECF 72-7 at 1. The Settlement Agreement released the Tribe's claims against the United States while specifically preserving the Tribe's right to bring suit for damages incurred from the United States' mismanagement of the Tribe's water rights.

As discussed *supra*, the 2012 Settlement Agreement specifically carved out an exception to the overall waiver of claims in the underlying suit to preserve such claims relating to "Plaintiff's water rights, whether adjudicated or unadjudicated; Plaintiff's authority to use and protect such water rights; and Plaintiff's claims for damages for loss of water resources allegedly caused by Defendants' failure to establish, acquire, enforce, or protect such water rights." ECF 72-7 at 6-7.

By specifically preserving "Plaintiff's claims for damages for loss of water resources allegedly caused by the United States' failure to establish, acquire, enforce, or protect such water rights." as an express *exception* to the waiver and release of the Tribe's breach of trust claims, the United States acknowledged that the Tribe's 2006 breach of trust suit encompassed the United States' mismanagement of Tribal water rights and resources. The Tribe successfully bargained for the preservation of its right to protect its water rights and seek damages from the United States relating to its mismanagement of the Tribe's water rights, marking the accrual date for the breach of trust claims raised by the Tribe in the present matter.

For purposes of triggering the six-year limitations period under 28 U.S.C. § 2501, the accrual date can be altered or established through mutually agreed upon contractual terms between the parties. *Hopi Tribe v. U.S.*, 55 Fed. Cl. 81, 97 (2002) (quoting *Friedman v. U.S.*, 159 Ct. Cl. 1,

16 (1962)) ("In appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law, and that where such a condition precedent has been created the claim does not ripen until that condition has been fulfilled."); *Nager Electric Company v. United States*, 177 Ct. Cl. 234, 241-242 (1966). Additionally, the Federal Circuit has found that the "general rules of contract interpretation apply to contracts to which the government is party," and, as such, "[a] reasonable interpretation must 'assure that no contract provision is made inconsistent, superfluous, or redundant.'" *Medlin Construction Group, Ltd. v. Harvey*, 449 F.3d 1195, 1200 (quoting *Lockheed Martin IR Imaging Sys. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997)).

The 2012 Settlement Agreement contained a separate provision stating that the Tribe's waiver, release, and covenant not to sue did not apply to claims accruing *after execution of the Settlement Agreement*. ECF 72-7, ¶ 6. Therefore, as necessary to avoid reading superfluous terms into the agreement, the Tribe's separately established right to assert claims for damages based on the United States' failure to "establish, acquire, enforce, or protect" the Tribe's water resources must be construed to apply to all such claims that were already encompassed within the Tribe's 2006 lawsuit.

Further still, the Settlement Agreement contemplated "dismissal of this case with prejudice." *Id.* at ¶16. The Parties specifically agreed to dismissal "*of this case"* altogether, not to dismissal of *certain claims* in the case. Without the Tribe retaining the right to assert water-related claims in its 2006 lawsuit following full and final settlement, the only possible interpretation giving meaning to the preservation of the Tribe's water-related breach of trust claims in the Settlement Agreement is that it gave rise to a separate and distinct cause of action with an accrual date of March 8, 2012.

ii. The Six-Year Statute of Limitations does not bar relief because the Tribe's Trustee has not met its statutory and common law trust duties to supply the information necessary to mark accrual of the claim

The United States attempts to brush aside the critical role of the trust-beneficiary relationship in determining the accrual date for the Tribe's breach of trust claims by incorrectly relying on the general six-year statute of limitations to argue that all of the Tribe's claims are barred "at least in part." Mtn. to Partially Dismiss, ECF 72 at 25-26 (citing 28 U.S.C. §2501). This is wrong.

As a matter of both statutory and common law, the United States must provide its beneficiary with an accounting of trust assets before the statute of limitations for breach of trust begins to run. Because no such accounting has been provided, the Tribe's breach of trust claims one and two are timely.

Beginning in 1990, and every year thereafter up until FY 2015, the Indian Trust Accounting Statute (ITAS) provided: "the statute of limitations shall not commence to run . . . until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." Consolidated Appropriations Act of 2014, Pub. L. 113-76, 128 Stat 5, 305-306 (Jan. 17, 2014). Because the United States has not provided the required accounting, the statute of limitations would not expire until around the start of FY 2021 at the earliest, more than three years after the Tribe filed its complaint here. The United States has altogether failed to acknowledge the statutory prerequisite of an accounting in asserting that the Tribe's claims accrued more than six years ago.

This statutory requirement that an accounting be provided before the limitations period commences embodies long-established common law principles characterizing the federal trust relationship toward Indian tribes and their members. In fact, in its 2004 decision in *Shoshone*

Indian Tribe v. United States, the Federal Circuit found that this statutory accounting prerequisite is rooted in "fundamental trust law principles," interpreting the ITAS accounting requirement as follows:

> The clear intent of the Act is that the statute of limitations will not begin to run on a tribe's claims until an accounting is completed. We therefore hold that the Act provides that claims falling within its ambit shall not accrue, i.e., "shall not commence to run," until the claimant is provided with a meaningful accounting. This is simple logic--how can a beneficiary be aware of any claims unless and until an accounting has been rendered?
>
> The interpretation of the Act provided by this court also comports with fundamental trust law principles. Beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets.
>
> ***
>
> The beneficiary, of course, may bring his action as soon as he learns that the trustee has failed to fulfill his responsibilities. It is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust.

Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1347-48 (Fed. Cir. 2004) (internal citations omitted).

As support for its interpretation of the ITAS accounting requirement as an embodiment of existing and oft-applied common law trust principles, the Federal Circuit cited *Mitchell II*, in which the Supreme Court concluded that any requirement for Indian trust beneficiaries to continuously monitor the activities of its trustee would undermine the very purpose of the trust:

> A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.

Mitchell II at 227. *See also*, *Cohen's Handbook of Federal Indian Law* § 5.06[5], p. 445 (citing *Dumarce v. Scarlett*, 446 F.3d 1294 (Fed. Cir. 2006) ("As trustee, the government is obligated to inform the beneficiary of the facts giving rise to a cause of action."); *Loudner v. United States*, 108

F.3d 896, 901 (8th Cir. 1997) ("because the beneficiary is entitled to rely upon the good faith and expertise of the trustee, the beneficiary's duty to discover claims against the trustee is somewhat lessened" in relation to the determination of whether the beneficiary "knows or should know of" the claim).

The ITAS accounting requirement also embodies the doctrine that a plaintiff must be able to ascertain the nature and scope of the unlawful acts and omissions before the statute of limitations begins to run. *U.S. v. Dickinson*, 331 U.S. 745, 749 (1947); *Applegate v. U.S.*, 25 F.3d 1579, 1583 (Fed. Cir. 1994). This doctrine reinforces the common law principle that a trust beneficiary must be supplied with the information necessary to ascertain the full extent of the breach, lest the beneficiary be required to "resort to piecemeal or premature litigation." *Dickinson* at 749.

The common law underpinnings of the ITAS accounting requirement are highly applicable to the Tribe's breach of trust claims. As explained in greater detail *supra*, and in the Second Amended Complaint, applicable federal statutes and regulations give the United States a degree of pervasive control, exclusive of Tribal participation, over the UIIP and related Indian reserved water rights that is analogous to the United States control over timber management at issue in *Mitchell II*. Due to the United States' pervasive control over the subject trust assets—and the U.S.'s ongoing trust violations though today's date—the Tribe cannot ascertain the full nature and extent of the United States' violations without receiving an accounting from its trustee.[5] Therefore, pursuant to

[5] The accounting required for the Tribe to ascertain the nature and extent of U.S.'s breaches is illustrated in the Tribe's pending lawsuit in the Utah District Court seeking non-monetary relief in relation to the Federal Government's mismanagement of the Tribe's Indian reserved water rights. There, the Tribe seeks reconsideration of a decision which in part denied a request for a full and complete historical accounting of: the BIA's TNA/PNA designations (including the ownership status of UIIP lands so designated and the basis for such designation); the BIA's informal operational practices throughout the course of its management of the UIIP; Secretarial transfers of Indian reserved water rights that have taken place since passage of the 1941 Act; annual Operating Plans submitted to the BIA by the UIIP O&M Company; mitigation measures that have been taken by Defendant as required under the1992 CUPCA; funds that were appropriated for the

both statute and common law, the Tribe is entitled to rely on its trustee to provide an accounting of its management of tribal trust assets before the statute of limitations begins to run. Because no accounting has been provided, the Tribe's claims are not time-barred.

iii. The Tribe did not have actual or constructive knowledge of the United States' unlawful transfers under the 1941 Act, the United States' informal operating practices, or its violations of the Midview Exchange Agreement until within six years of the present lawsuit

Even disregarding, strictly for the sake of argument, preservation of the Tribe's claims in the 2012 Settlement Agreement and the accounting requirement outlined above, the Tribe's First and Second Claims for Relief alleging unlawful transfers of Tribal water rights under the 1941 Act and its Third Claim for Relief alleging violation of contract could not have accrued before March 7, 2012, because the Tribe did not have knowledge, nor should it have had knowledge, of the United States' unlawful acts and omissions until after that date.

The Tribe was not aware of any Secretarial transfer of Tribal water rights to private fee lands outside the UIIP until being presented with a BIA document entitled "SCHEDULE OF TRANSFERS OF CERTIFIED AND/OR DECREED WATER RIGHTS, UINTAH INDIAN IRRIGATION PROJECT, UTAH" during the Tribe's litigation against a non-Indian illegally diverting Tribal water. Declaration of Frances C. Bassett (May 29, 2019), attached hereto as **Exhibit 2**. The Tribe did not receive this document until a preliminary injunction hearing that took place after the Tribe filed suit against this non-Indian water user on September 6, 2012. *Id.* Prior to receiving this document, the Tribe had no knowledge that any Tribal water rights had been transferred to private fee lands outside the UIIP without Tribal consent. Because (*i*) the 1941 Act

development of the Uinta Basin Replacement Projects; and any carriage agreements providing for the transfer of non-Tribal water through UIIP facilities. Fourth Amended Complaint, *Ute Indian Tribe v. United States*, (10/11/2023) (D. Utah)(No. 21-00573 at ECF Doc. 246). *See also Id.* at ECF Doc. 272, Motion for Reconsideration of the Court's Memorandum Decision and Order of September 26, 2023 (10/04/2024).

expressly requires "consent of the interested parties" in transferring UIIP water rights, and (*ii*) the Tribe, as trust beneficiary, is placed in a position of reliance on its trustee to provide information on the disposition of trust corpus, the Tribe was in no position to have obtained knowledge of these unlawful transfers prior to discovering the Schedule of Transfers in September 6, 2012, less than six years before commencing this suit.

In fact, the United States' transfer of Indian reserved water rights without obtaining the Tribe's consent as expressly required under the 1941 Act amounts to an "imposition of secrecy" as to the information necessary for the Tribe to obtain the requisite knowledge in order to be able to enforce its rights as trustee. *Dumarce v. Scarlett*, 446 F.3d at 1299 (citing *Menominee Tribe v. U.S.*, 726 F.2d 718, 721 (Fed. Cir. 1984)).

The practice of the United States in transferring the Tribe's federally decreed water rights to *non-Reservation lands* in violation of numerous provisions of federal law including the 1906 Act, the 1923 Cedarview Decree, the 1941 Act was brought to light through a declaration filed less than two weeks ago on April 7, 2025 in *Ute Indian Tribe v. McKee*, No. 23-00257 (D Utah). In that case, the United States stated that "BIA considers lands to be within the UIIP (and eligible to receive water via a transfer under the 1941 Act) if they are within the footprint of UIIP water delivery infrastructure and capable of receiving water from that infrastructure." Declaration of Superintendent Antonio Pingree, *Ute Indian Tribe v. McKee*, No. 2:23-cv-00257 (D. Utah April 7, 2025), attached hereto as **Exhibit 3.** This is directly counter to statements made around September 2012 to the Tribe by the BIA recognizing as unlawful diversions of Tribal water to off-Reservation lands. Karnel Murdock Interview & Report, attached hereto as **Exhibit 4**. Furthermore, Superintendent Pingree's statement is in direct contravention of the Congress' expressly-stated legislative intent that the UIIP was to be built in order to "irrigate the [Indian] allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah." Act of 1906, *supra*, p. 6. To the extent the

BIA is using UIIP infrastructure to irrigate off-Reservation and non-allotted lands of non-Indians, the BIA is thwarting the express Congressional intent of the 1906 Act.

The BIA's interpretation is also at direct odds with the United States Supreme Court's ruling that the Uintah and Ouray Reservation was diminished by the Congressional acts of 1902-1905. As explained by the Supreme Court, the 1902-1905 Acts first allotted lands to individual Ute Indians and then opened all the remaining "surplus" lands within the Reservation to non-Indian settlement. By virtue of those 1902-1905 Acts, the Supreme Court ruled that Congress "restored" the "unallotted remaining lands to the public domain," thereby diminishing the Uintah and Ouray Reservation and placing all non-allotted fee lands outside of the Reservation's boundaries. *Hagen v. Utah*, 510 U.S. 399, 407-08, 414, 421-22 (1994). Consequently, by the time Congress authorized construction of the UIIP in 1906, the Uintah and Ouray Reservation had already been diminished by the Congressional Acts of 1902-1905. And, understanding that diminishment, Congress specified that the UIIP was to be built—using proceeds from the sale of the Tribe's "surplus" lands—to irrigate only the "allotted lands of the Uncompahgre, Uintah, and White River Utes." The United States' contrary argument would require this Court to both ignore the express language of the 1906 Act and the Supreme Court's holding in *Hagen* that all lands restored to the public domain were diminished from the Reservation as of 1905. In short, there is no basis in law for the BIA to operate the UIIP in order to irrigate lands that since 1905 have been outside of the Tribe's reservation boundaries, and thus no reason for the Tribe to have any knowledge of these unlawful transfers.

And while the BIA's September 2012 disclosure put the Tribe on notice that part of the United States' breach of trust included transferring federally decreed Tribal water rights to non-Tribal lands (as alleged in its Second Claim For Relief at ¶ 13), the April 7, 2025, Pingree Declaration is the first public admission by the United States that it interprets the 1941 Act as

allowing the transfer the Tribe's water rights to any lands "within the footprint of UIIP water delivery infrastructure . . . ." To be clear: this is the United States proposing a regime change (without Tribal consent, consultation, or input) over how it operates, oversees, and administers the Tribe's federally decreed water rights. The United States is now claiming that it is not constrained in its operation of the UIIP to intra-Reservation transfers (for Tribal water) or carriage agreements (for non-Tribal water). As now evidenced in the April 7, 2025, Declaration, the United States is transferring federally decreed Tribal water rights off the reservation causing direct harm to the Tribe. And this is not the only such transfer that came to light in the *McKee* litigation: the United States admits that there are "238 other such agreements." Ex. 3 at ¶5. The Tribe did not have, nor could it have had, knowledge of the United States' purported transfers or its unlawful position on the scope of its authority to effectuate such purported transfers until after March 7, 2012, and its claims alleging unlawful transfers are timely.[6]

It was also during this litigation that it was first discovered that the United States administers the UIIP under the "informal operational practices" ECF 25, App. III, 521. These "informal operational practices" have been implemented by the United States without consultation with the Tribe. Second Am. Compl., ECF 65 at ¶102. As with the unlawful transfers under the color of the 1941 Act, the absence of any tribal participation or consent in developing and implementing these unwritten practices, viewed in light the Tribe's position of reliance as trust beneficiary, demonstrates that the accrual date for claims based on these "informal operational practices" did not occur until they were actually discovered by the Tribe.

[6] Irrespective of any intentional concealment on the part of the United States, the Tribe could not have discovered these unlawful transfers without assuming the level of day-to-day supervision of the United States' management of the UIIP that was expressly rejected by the Supreme Court in *Mitchell II*. *Mitchell II* at 227.

Similarly, the Tribe did not learn of the United States' violation of the Midview Exchange Agreement until 2014. Second Am. Compl. at ¶93. After such discovery and seeking to hold the United States to its side of the bargain, the Tribe sought confirmation and assurance of placement of the Midview Property into trust, only to be denied in 2016. *Id.* at ¶94.

iv. The continuing claims doctrine applies

Even if, in spite of the foregoing, the statute of limitations precludes recovery of the full amount of the damages the Tribe has incurred from the United States' unlawful acts and omissions, the Tribe is still entitled to recover some damages pursuant to the continuing claim doctrine. Under the continuing claim doctrine, a plaintiff is entitled to recover for damages incurred during the statute of limitations period where the unlawful conduct is "inherently susceptible to being broken down into a series of independent and distinct events and wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Development Co. v. U.S.*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). The United States accurately cites to this Court's application of the continuing claims doctrine in its 1986 *Mitchell v. United States* opinion, in which this Court found that the continuing claim doctrine applied to the tribal allottees' claim that the U.S. had breached its duties to regenerate timber resources because "[a] duty to replant arguably arose after its harvest and each failure to fulfill that duty gave rise to a separate claim." *Mitchell v. United States*, 10 Ct. Cl. 63, 77 (1986). In *Mitchell*, there was a specific temporal element built into the trust duty (i.e. a duty to replant each harvest season), illustrating a clear-cut framework for breaking down the violation into a series of distinct events. Where a breach is continuous in nature, this Court has found that a separate claim accrues each day of the breach. *Goodeagle v. United States*, 111 Fed. Cl. 716, 724 (2013) (finding the Government's continuous duty to manage and supervise mining operations on tribal land arose "each day mining activity occurred on the land, with each failure to fulfill that duty giving rise to a separate claim." (emphasis added).

The United States' ongoing breaches of trust here are, beyond a doubt, "inherently susceptible to being broken down into a series of independent and distinct events and wrongs." *Brown Park Estates- Fairfield* at 1456. These breaches are continuous and ongoing in nature, and each day the United States acts or fails to act in accordance with its money-mandating fiduciary duties, resulting in economic losses suffered by the Tribe, constitutes a new cause of action. Further, like the timber harvesting at issue in *Mitchell*, irrigation indisputably takes place on a seasonal basis. Thus, even if a new claim does not arise each day, a new set of claims accrues with the passing of each irrigation season in which the Tribe incurs damages based on the United States' mismanagement of Tribal water resources and related irrigation infrastructure.

D. The Tribe has Stated a Viable Breach-of-Contract Claim Arising Under the 1967 Midview Exchange Agreement

The United States argues that the Tribe's third claim for relief – breach of the 1967 Midview Exchange Agreement – fails to state a claim upon which relief can be granted because the Midview Exchange Agreement establishes no contractual "obligation or duty" to transfer the Midview property into trust for the Tribe. Mtn. to Partially Dismiss, ECF 72 at 34. As discussed in detail *supra*, this assertion is facially inaccurate. The obligation to take title to the Midview property as part of the UIIP is established in the plain language of the Agreement, Mtn. to Partially Dismiss, Ex 5, and the Federal Circuit has already concluded that the UIIP is a Tribal trust asset under the 1906 Act. There is nothing in the 1906 Act providing for only certain components of the UIIP to be held in trust; the trust status applies to the UIIP as a whole. Therefore, by expressly stipulating that the Midview property will be held, operated, and administered as part of the UIIP, the United States has accepted a contractual obligation to hold this property as a trust asset.

The United States also asserts that "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." Mtn. to Partially Dismiss, ECF 72 at 34. But this issue has no bearing on the Tribe's claim, which is that "[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." Second Am. Complaint, ECF 65 at 30.

E. The Tribe has not Brought any Claims on Behalf of Individual Tribal Members

Finally, the United States has argued that the Tribe cannot assert any damages claim on behalf of specific members of the Tribe in a *parens patriae* capacity. This argument wrongly presumes that the Tribe is seeking compensation for damage to individual Tribal member property rights. This is inaccurate. The harms suffered from the United States' mismanagement of the UIIP are harms to the Tribe as a whole. First and foremost, the UIIP is a Tribal trust asset, and the associated facilities are beneficially owned by the Tribe. Thus, the Tribe suffers direct harm from the degradation and resulting devaluation of these facilities. Perhaps even more importantly, the United States' mismanagement of the UIIP irrigation systems results in loss and waste of Tribal water.

While it is true that the damages resulting from the United States' mismanagement of the UIIP include, *inter alia*, lost agricultural viability on individually-owned allotted lands, these agricultural losses harm not just the individual landowners, but also to the Tribal economy as a whole and the ability of the Tribe to sustain a viable homeland on its Reservation. These are sovereign interests that fall squarely within the Tribal government's role as *parens patriae* for its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel., Barez*, 458 U.S. 592, 600-01 (1982).

CONCLUSION

The Tribe has satisfied all threshold requirements to invoke the jurisdiction of this Court under the Tucker Acts. Furthermore, all claims for relief asserted by the Tribe in its Second Amended Complaint are timely, have not been waived through prior settlement between the parties, and properly assert claims on behalf of the Tribe and its membership as a whole. Accordingly, the United States' Motion to Partially Dismiss should be summarily denied, and this matter should proceed to the merits in accordance with the Federal Circuit's mandate.

Respectfully submitted this 18th day of April 2025.

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