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' REPLY IN SUPPORT OF ITS MOTION TO PARTIALLY DISMISS

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The Court should grant the United States' Motion to Partially Dismiss the Second Amended Complaint, ECF No. 72 ("Mot."). 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 releases of claims. The Tribe also cannot bring claims here as *parens patriae*. The Tribe's Response, ECF No. 73, fails to respond to some of these arguments and to rebut the others. As result, the only claims that should proceed are those alleging the United States failed to adequately maintain or operate UIIP infrastructure since March 2012, resulting in alleged injuries to the Tribe itself.

ARGUMENT

I. Most of the Tribe's breach of trust claims should be dismissed because they either fail to identify an applicable trust duty or adequately allege violation of such a duty.

Aside from those claims alleging a failure to adequately maintain UIIP infrastructure, the Tribe's breach of trust claims should be dismissed either for lack of jurisdiction or failure to state a claim. For the Court to have jurisdiction over a breach of trust claim, a plaintiff "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 Nation v. United States*, 537 U.S. 488, 506 (2003) ("*Navajo I*"). Analyzing whether this requirement is met "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.*

The United States addresses specific claims below, but the Tribe's Response to the United States' motion raises two wide-reaching issues. First, the Tribe argues that "if the United States is of the position that the cited conduct" forming the bases of the Tribe's claims "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)" instead of Rule 12(b)(1). Resp. at 14. But failure to identify a substantive source of law creating a fiduciary duty and to allege a violation of that duty is

jurisdictional. *Confederated Tribes of the Colville Reservation v. United States*, 171 Fed. Cl. 622, 631 (2024). Rule 12(b)(1) is thus a proper vehicle for moving to dismiss on those grounds.

Second, the Tribe's Response creates confusion by arguing it has only brought two breach of trust claims and that it was improper for the United States to argue for dismissal based on the specific acts and omissions alleged within each "claim." Resp. at 13-15. But claims can be partially dismissed, and that is what the United States has moved for with respect to Claim 1. If the Tribe is arguing it was improper to make arguments specific to the alleged actions and inactions forming the bases of its claims, rather than focusing on what the Tribe sees as the themes of its claims, that argument makes little sense. The Second Amended Complaint alleges that each action or inaction contained in the letter-labeled points under Claims 1 and 2 constitutes a breach of fiduciary duty. SAC at 26, 28. The Tribe cannot place several claimed breaches of trust under the same header and then argue that one or two partially viable claims bootstrap the rest, including ones for which the Federal Circuit previously affirmed dismissal. Further, a breach of trust claim must identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" the United States allegedly violated. *Navajo I*, 537 U.S. at 506. While the Tribe does not at this stage need to *prove* a breach of trust, it must connect the alleged fiduciary duty to an action or inaction *allegedly* violating that duty to establish jurisdiction. *Id.* There is no way to properly plead, or to evaluate, a breach of trust claim without focusing on a specific alleged action or inaction.

Regardless of how the Tribe labels its claims or how dismissal is phrased, the bulk of the Tribe's breach of trust claims should be dismissed for either failing to identify an applicable trust duty or to allege the United States failed to perform an applicable duty. This includes claims based on alleged failures to construct additional infrastructure, land designations, entrance into

carriage agreements, the Midview Exchange Agreement, and transfers of water rights.

A. Breach of trust claims alleging a failure to construct water storage infrastructure or otherwise expand the UIIP are barred by the mandate rule.

The Tribe's argument that it can bring claims based on an alleged failure to construct water storage infrastructure or otherwise "complete" the UIIP mischaracterize the Federal Circuit's opinion. Claim 1.a alleges the United States breached fiduciary duties 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 the United States failed to implement quality control measures "at the irrigation facility level." *Id.* at 20, 27. As the United States noted in its motion, Claim 1.d appears to rest in part on an allegation that there is additional infrastructure the United States should have built as part of the UIIP, which the Tribe does not address. Mot. at 15. The Federal Circuit rejected claims alleging the United States had a duty to construct additional infrastructure as part of the UIIP. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353, 1366, 1371 (Fed. Cir. 2024) ("*Ute Fed. Cir.*"). These claims in the Second Amended Complaint are thus barred by the mandate rule. *See* Mot. at 14-18.

The Tribe incorrectly asserts that the Federal Circuit found a trust duty in the 1906 Act to complete the UIIP and to construct storage infrastructure. The Tribe quotes the Circuit's statement that the 1906 Act obligated the United States to "construct[] and complete[] the irrigation systems." Resp. at 18 (quoting *Ute Fed. Cir.*, 99 F.4th at 1371). Reliance on this quote ignores its surrounding language—"[w]hile" the Federal Circuit found the 1906 Act created such an obligation, it "d[id] not read the 1906 Act as imposing any such obligation on the government as trustee." *Ute Fed. Cir.*, 99 F.4th at 1371. At base, the Tribe's argument is simply incompatible with the Federal Circuit affirming dismissal of claims based on an alleged failure to construct or complete infrastructure beyond existing "facilities actually built" as part of the UIIP. *Id.*

The Tribe next argues that the storage infrastructure allegedly necessary to complete the UIIP does not have to be part of the UIIP, Resp. at 19, but this does not comport with the claim the Tribe has pleaded or with governing law. The Second Amended Complaint alleges it was a breach of trust to fail to "establish the UIIP as a complete and fully functional irrigation system" and provide "storage infrastructure *as part of the UIIP irrigation system*." SAC at 27 (emphasis added). The Tribe cannot expand its claim beyond the UIIP in its response to a motion to dismiss. *Attainx, Inc. v. United States*, No. 21-2156, 2021 WL 6808452, at *5 (Fed. Cl. Dec. 10, 2021). Further, the Tribe has not identified any source of law creating a trust duty to construct or utilize storage infrastructure outside of the UIIP. To the extent the Tribe is arguing the United States should have constructed additional infrastructure as part of the Central Utah Project, Resp. at 19, the Federal Circuit affirmed dismissal of the Tribe's previous claims alleging the United States breached fiduciary duties by not developing the storage facilities contemplated by the Central Utah Project Completion Act and 1965 Deferral Agreement. *Ute Fed. Cir.*, 99 F.4th at 1366; *see also* Mot. at 16-17. This claim too would thus run afoul of the mandate rule.

B. The Tribe has not identified a trust duty barring the United States from entering into carriage agreements or designating land as non-assessable.

The Tribe's claims challenging unspecified carriage agreements and land designations should be dismissed (Claims 1.c, 2.c, and 2.d). With respect to carriage agreements, the Tribe alleges it was a breach of trust to "allow[] non-Indians to use UIIP infrastructure to transport and receive their water rights without consent or consultation from the Tribe[.]" SAC at 29. But the Tribe has pointed to no source of law requiring the United States consult with or gain the Tribe's consent before entering carriage agreements or that agreements include mitigation measures. Rather, the alleged resulting wear and tear and supposed failure to maintain UIIP infrastructure, separate from entrance into the carriage agreement, would be the alleged breach falling within

the duty the Federal Circuit found in the 1906 Act. *Ute Fed. Cir.*, 99 F.4th at 1368.

Next, the Tribe alleges that Interior's designation of lands within the UIIP service area as non-assessable was a breach of trust. Here too the Tribe does not identify any law barring designation of these lands as non-assessable. Rather, the Tribe's Response states that the designations "illustrate . . . deficient operation and maintenance of the UIIP irrigation systems." Resp. at 14. But this furthers the point made in the United States' motion. If deficient maintenance has resulted in designation of land as non-assessable, "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." Mot. at 19. While the land designation might arguably be a factor to consider in measuring damages, it is not itself the breach of trust.

C. The Tribe has failed to plead a breach of trust with respect to the Midview Exchange Agreement.

The Tribe brings two breach of trust claims regarding the Midview Exchange Agreement, which exchanged water rights and water infrastructure between the Bureau of Reclamation, Bureau of Indian Affairs, Tribe, and Moon Lake Water Users Association (Claims 1.e and 2.b). The Tribe's claims appear to allege three actions or inactions breached trust duties: 1) entrance into the agreement; 2) alleged failure to transfer Midview Property into trust; and 3) management of water rights exchanged under the agreement. The Tribe does not respond to the United States' arguments regarding the first or third items, and it is proper to treat those arguments as conceded. *Melwood Horticultural Training Ctr., Inc. v. United States*, 151 Fed. Cl. 297, 309-10 (2020).

The Tribe's claim alleging a failure to transfer Midview Property into trust should be dismissed because it fails to identify a trust duty the United States violated. A threshold issue is that the Federal Circuit found no trust duty in the 1906 Act to add infrastructure to the UIIP. *Ute Fed. Cir.*, 99 F.4th at 1371; Mot. at 20 n.4. As a contract, the Exchange Agreement itself cannot

create trust duties. *Gilham v. United States*, 164 Fed. Cl. 1, 11-12 (2023). There is thus no applicable trust duty to sustain the Tribe's claim. But even if there were, the Agreement does not direct the Midview Property be taken into trust. The Tribe's argument rests on what it sees as the implication of the Agreement stating the Midview Property would be administered as part of the UIIP. Resp. at 16-17. But the United States' trust duties are not governed by implication. The United States knows how to clearly indicate property will be held in trust; for example, the 1906 Act states that title to the irrigation systems authorized therein would be held by "the Secretary of the Interior *in trust for the Indians*[.]" Indian Dep't Appropriations Act of 1906, Pub. L. No. 59-258, 34 Stat. 325, 375-76 (1906) (emphasis added). There is no similar trust language in the Exchange Agreement, and the Tribe's claim should be dismissed. *See* Mot. Ex. 5 ¶ 8.

D. The Tribe's breach of trust claim concerning water rights transfers under the 1941 Act should be dismissed for failure to state a claim.

The Tribe's arguments in support of its claim challenging water rights transfers under the 1941 Act (Claim 2.a) rely on an overly broad characterization of the Tribe's water rights and an overly restrictive view of the UIIP. The Tribe makes the bulk of these arguments in addressing the statute of limitations, but the United States addresses them here because they go to the heart of the Tribe's 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.]" Act of May 28, 1941, Pub. L. No. 77-83, § 2, 55 Stat. 209 (1941) ("1941 Act"). The Tribe has failed to state a claim because it has not challenged any particular transfer. Mot. at 23-24. Without doing so, the Tribe has not alleged the facts necessary to determine for any transfer who the transferor and transferee were, who consented, and what lands and water rights were involved. The Tribe thus has not alleged the facts necessary to determine whether the United States transferred water rights "to other lands

under [the UIIP]" without the consent of an interested party. *Id.*

In response, the Tribe essentially argues that it is an interested party in *every* transfer of water rights under the 1941 Act and that water rights can *only* be transferred to Indian-owned land already served by the UIIP. But nothing in the 1941 Act suggests that anyone other than the transferor and transferee have an interest in a particular transfer. The 1941 Act was focused on providing relief to individual landowners served by the UIIP (as opposed to some broader tribal interest). Adjustment of Irrigation Charges, Uintah Indian Project, Utah, H.R. Rept. 77-370, at 1-4 (1941) (Mot. Ex. 4). Congress also enacted the 1941 Act based in part on a proposal from the Secretary of the Interior to provide relief to UIIP landowners, including by transferring water rights "as to non-Indian lands . . . to more desirable non-Indian lands." *Id.* at 4. The Tribe's interpretation would contradict the language and intent of the 1941 Act by giving the Tribe a veto over any transfer, even those involving only non-Indian lands. The Tribe is not an interested party in transfers of water rights appurtenant to land in which it has no interest.

The Tribe's arguments concerning water rights ignore the context of allotment, which is integral to understanding the UIIP and operation of the 1941 Act. The 1906 Act authorized the UIIP "to irrigate the *allotted lands* of the . . . Utes[.]" *Hackford v. Babbitt*, 14 F.3d 1457, 1468 (10th Cir. 1994) (emphasis in original) (quoting 1906 Act). Allotment divided communal reservation land into individual parcels "held in severalty by individual Indians." *Id.* Establishment of an Indian reservation reserves water rights needed to "support the purpose" of the reservation, including water rights for irrigation. *Winters v. United States*, 207 U.S. 564, 576-77 (1908). When reservation land is allotted to individual Indians, as it was on the Uintah Reservation, allottees obtain 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.

When an allottee conveys their land, the right to use a portion of the reserved water right can pass to their successors, including non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981). The allottees served by the UIIP, and their Indian and non-Indian successors, thus obtained rights to a portion of the reserved water right associated with the establishment of the Uintah Reservation.

The Tribe is wrong that the 1923 Decrees created a "vested property right belonging to the Tribe" and "designated for delivery to Indian lands." Resp. at 8. The Decrees were entered in favor of 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[.]" Mot. Ex. 2 ¶ 1; Ex. 3 ¶ 1. In light of the allotment of the Uintah Reservation, the United States acting on behalf of "the Indians" is not coterminous with the Tribe. *Hackford*, 14 F.3d at 1468. Nothing in the Decrees purports to alter the dynamic between *Winters* water rights and allotments under *Powers* and *Walton*. In fact, the decrees recognized that the plaintiffs' rights could pass to "their assigns." Mot. Ex. 2 ¶ 6; Ex. 3 ¶ 6.

Next, the Tribe runs into several issues arguing that a transfer of water rights to non-Indian-owned lands violates the law. Resp. at 29-31. First, The Tribe's description of the historical legal status of its reservation appears irrelevant to what falls "under the UIIP." 1941 Act § 2. The 1906 Act did not provide that UIIP infrastructure was intended to "irrigate only [] allotted lands" as the Tribe contends. Resp. at 30 (internal quotations omitted). Rather, the 1906 Act explicitly allows the use and expansion of UIIP infrastructure to deliver water to "any person" or entity, which would include owners of surplus lands. *See* 34 Stat. at 375. Second, the Tribe ignores that some former allotments passed to non-Indians. *Hackford*, 14 F.3d at 1461 n.2. Third, the 1941 Act and its legislative history, discussed above, contradict the Tribe's conception

of the UIIP's scope. *See supra* pp. 6-7. And finally, Section 5 of the 1941 Act directed the Secretary to resolve delinquent charges related to the "non-Indian owned lands *of the [UIIP]*," further indicating Congress's understanding of the UIIP was not so limited as the Tribe's. 1941 Act § 5 (emphasis added).

Coming back to the Tribe's Second Amended Complaint, it does not plead sufficient facts that, taken as true, would allow a factfinder to conclude the United States transferred water rights in a manner inconsistent with the 1941 Act. The Tribe alleges that "transferring federally decreed Tribal water rights to non-tribal lands . . . without consulting with or compensating the Tribe or Indian landowners" violated the 1941 Act. SAC ¶ 81. But this relies on legally incorrect premises regarding 1) who is an interested party under the 1941 Act, in turn incorrectly characterizing the 1923 Decrees, and 2) the lands to which water rights can be transferred.

The Tribe also alleges that the "Secretary ultimately transferred Tribal 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," and that the Tribe "has never been compensated for these losses." SAC ¶ 82. But this likewise does not plead facts necessary to find a violation of the 1941 Act. For one, the allegation the Secretary acted in violation of fiduciary duties is a legal conclusion, not a factual allegation, and should be disregarded. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts alleged do not establish whose trust lands are at issue (the Tribe's or an individual Indian's). Additionally, the 1941 Act requires that interested parties consent, not that they be compensated. 1941 Act § 2. While the Tribe alleges it was never compensated, it does not allege an interested party did not provide consent. Further, the allegations in Paragraph 82 appear to reference the transfer of water rights under the Midview Exchange Agreement, which was not done under the 1941 Act and to which, in any case, the Tribe consented. Mot. Ex. 5 at 9.

The argument that the Tribe would need discovery before it could identify the transfers it believes were unlawful is unavailing. The Tribe acknowledges it received a schedule of transfers in 2012, and it should thus at least be able to identify pre-2012 transfers. Resp. at 29. There must also be a factual basis for the Tribe's allegations the Tribe can provide. *See Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 200 (2020). The United States' maintenance of records regarding transfers does not excuse the Tribe from the pleading requirements of Rule 8(a). By failing to allege the factual predicate necessary to find that a transfer violated the 1941 Act, the Tribe has failed to show it is entitled to relief and its claim should be dismissed.

In sum, most of the Tribe's breach of trust claims (Claims 1.a, 1.c, 1.d to the extent not based on existing infrastructure, 1.e, and 2) should be dismissed for failing to identify an applicable trust duty the United States allegedly violated.

II. The Tribe's breach of contract claim fails to state a claim.

The Tribe's breach of contract claim (Claim 3) mirrors its breach of trust claims regarding performance under the Midview Exchange Agreement and should be dismissed for largely the same reasons. The Federal Circuit read a nearly identical claim in the Tribe's First Amended Complaint as containing two arguments—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 this claim should be dismissed. With respect to the first, as discussed above, the Exchange Agreement did not require that the Midview Property be placed in trust for the Tribe. With respect to the second, the Tribe's Response disclaims any such element of its contract claim. In its motion, the United States argued 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." Mot. at 25. The Tribe responds that

"this issue has no bearing on the Tribe's claim," which concerns the alleged "fail[ure] to effectuate a transfer of the Midview Property in trust." Resp. at 34. Any aspect of the Tribe's claim that the Federal Circuit saw as concerning water rights should therefore be dismissed.

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

Each of the Tribe's claims is barred at least in part by the statute of limitations. The Tribe's claims are subject to a jurisdictional six-year statute of limitations, and it is the Tribe's burden to establish its claims are timely. The United States moved to dismiss the bulk of the Tribe's claims because they did not identify any alleged wrongdoing occurring in the statute of limitations period, and to partially dismiss the remaining claims to the extent based on alleged wrongs occurring outside the statute of limitations period. Mot. at 25-32. The Tribe's Response primarily relies on a faulty interpretation of the Tribe's 2012 Settlement Agreement with the United States and on the Indian Trust Accounting Statutes ("ITAS"). In turn, the Tribe fails to meaningfully respond to the United States' arguments regarding the statute of limitations.

A. The 2012 Settlement Agreement did not, and could not, restart or toll the statute of limitations.

The Tribe first attempts to overcome the statute of limitations by arguing that its 2012 Settlement Agreement with the United States "preserved the right to sue . . . for damages related to the U.S.'s mismanagement of the Tribe's water rights" and that, "by mutual assent," the Agreement "established an accrual date of March 8, 2012, for the Tribe's present breach of trust claims." Resp. at 22-23. These arguments find no support in the law or the Agreement itself.

First, the statute of limitations in 28 U.S.C. § 2501 is jurisdictional and cannot be tolled by written agreement. *See BP Am. Prod. Co. v. United States*, 142 Fed. Cl. 446, 455 (2019); *Admiral Fin. Corp. v. United States*, 51 Fed. Cl. 366, 368 (2002). The cases cited by the Tribe, *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002), and *Nager Electric Co. v. United States*, 177

Ct. Cl. 234 (1966), do not hold the statute of limitations can be tolled or even discuss the idea.

Second, even if the parties could agree to toll the limitations period, nothing in the Agreement did so. *Ute Indian Tribe of the Uintah & Ouray Reservation v. U.S. Dep't of the Interior*, 560 F. Supp. 3d 247, 257 (D.D.C. 2021) ("*Ute D.D.C.*"). Paragraph 6(b) excluded from the Agreement's waiver "[the Tribe's] claims for damages for loss of water resources allegedly caused by Defendants' failure to establish, acquire, enforce or protect such water rights." Mot. Ex. 7 ¶ 6(b). As discussed below, this would not apply to those of the Tribe's claims concerning management of UIIP infrastructure. In any event, though, not waiving claims is not the same as reviving already untimely claims or extending the statute of limitations for then-timely claims. Further, Paragraph 6 states that nothing in the Agreement "shall diminish or otherwise affect in any way . . . [a]ny defenses that [the United States has] or may have regarding any claims that Plaintiff may assert in subsequent litigation or administrative proceedings." *Id.* ¶¶ 6, 6(m).

B. Neither the Indian Trust Accounting Statutes nor common law accounting requirements toll the statute of limitations.

The Tribe's argument that the statute of limitations could not have begun to run because of an allegedly-lacking accounting under the ITAS is wrong as a matter of law. *Ute D.D.C.*, 560 F. Supp. 3d at 257-58. The ITAS—which Congress annually included in the Department of the Interior's appropriations act for fiscal years 1990 through 2014—provided in relevant part that:

> notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected Indian 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, 2014, Pub. L. 113-76 §1, Div. G, Title I, 128 Stat. 5, 305-06 (2014) (emphasis added). ITAS "must be construed strictly and must clearly express the intent of Congress to permit a suit against the Government." *Shoshone Indian Tribe of the Wind River*

Reservation v. United States, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (citation omitted).

To start, the 2012 Settlement Agreement expressly addressed the non-applicability of the ITAS. *See* Mot. Ex. 7 ¶ 5. But even absent the Settlement Agreement, the ITAS would not apply to the Tribe's claims here, which allege mismanagement of alleged non-monetary trust assets. When applicable, the ITAS served to suspend, until an accounting was provided, accrual of a tribe's claims "concerning losses to or mismanagement of trust funds," but not "claims involving trust assets." *Shoshone*, 364 F.3d at 1348-50. Thus, the ITAS would have suspended claim accrual for losses based on a failure to collect revenues derived from a trust asset. But it would not have suspended claim accrual for claims for losses resulting from a failure to properly manage or preserve that same trust asset, as is alleged in this lawsuit. *Id.* at 1349–50; *see also Rosales v. United States*, 89 Fed. Cl. 565, 580 (2009).

The Court should also disregard the Tribe's unsupported arguments that common law trust duties impact the accrual date of their claims. Resp. at 27-28. Courts generally cannot "apply common-law trust principles" to the Indian trust relationship. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 178 (2011). And, as noted in the Tribe's Response, the District of Utah recently rejected the Tribe's claim that there is a common law duty to provide an accounting of trust assets. *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 21-cv-573, 2023 WL 6276594, at *18 (D. Utah Sept. 26, 2023) ("*Ute D. Utah*"). Nor can the common law work to alter a statute of limitations that is jurisdictional and statutory by design. 28 U.S.C. § 2501; *see also Shoshone*, 364 F.3d at 1346. For these reasons, the Court should reject any claim under common law that the United States owed an accounting here.

C. The majority of the Tribe's claims fail to identify any alleged wrongdoing occurring within the statute of limitations period.

The Tribe filed its original complaint in this case in March 2018. ECF No. 1. The United

States thus moved to dismiss the Tribe's claims regarding land designations, carriage agreements, water rights transfers, and the Midview Exchange Agreement because the Tribe has not identified any alleged wrongdoing it is challenging that occurred after March 2012. Mot. at 26-30.

The Tribe does not address the United States' arguments with respect to several claims beyond the Settlement Agreement and ITAS arguments addressed above. The Tribe does not separately address its claims concerning land designations, carriage agreements, or entrance into the Midview Exchange Agreement. With respect to the aspect of the Tribe's Midview Exchange Agreement claims concerning alleged diversion of water, the United States argued that "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" within the statute of limitations. Mot. at 30. The Tribe has not done so. The Tribe has not established these claims are timely and they should be dismissed.

With respect to its claims concerning alleged failure to transfer Midview Property into trust, the Tribe fails to meaningfully engage with the standard for claim accrual. The Tribe argues it "did not learn of the United States' violation of the Midview Exchange Agreement until 2014." Resp. at 32. But the question is not when the Tribe knew of the facts fixing the government's alleged liability, but when it "was *or should have been* aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis added). This standard applies to tribes as trust beneficiaries "in the same manner as against any other litigant[.]" *Id.* at 1576. The trust status of property is not "inherently unknowable" or actively concealed such that the Tribe could not have been aware of the facts underlying its claims. *Id.* Like other courts who have assessed the issue, the Court should dismiss these claims as untimely. *Ute D. Utah*, 2023 WL 6276594, at *16-17; *Ute D.D.C.*, 560 F. Supp. 3d at 258.

The Tribe also argues in its Response that it did not know about alleged "informal

operational practices" until it filed this case, Resp. at 31, but this argument runs into two problems. The first is that the Tribe has not brought a claim challenging "informal operational practices," and this argument is irrelevant to assessing the timeliness of the claims the Tribe has asserted. The second is again that when the Tribe had actual knowledge is not the standard for claim accrual. Thus, even if the Tribe had brought a claim challenging informal operating practices, the Tribe has failed to establish that such a claim would be timely.

Finally, the Tribe has failed to establish that its claim challenging water right transfers under the 1941 Act is timely. As the United States argued in its motion, any claim concerning a transfer of water rights would have accrued at the time of the transfer, and the Tribe has not identified any post-2012 transfers it is claiming were unlawful. Mot. at 28-29. Much of the Tribe's argument in response reflects the Tribe's assertion that its consent is necessary for every transfer made under the 1941 Act. Resp. at 28-31. This is legally incorrect for the reasons discussed above. *See supra* pp. 7-9. But in any case, the Tribe's argument that it had no reason to be aware of water right transfers to land held in fee is unsupported. The Tribe does not address Exhibit 8 to the United States' motion, which indicates the Tribe did in fact know about transfers involving fee lands no later than the 1960s. And the legislative history of the 1941 Act itself contemplated transfers between non-Indian lands. Mot. Ex. 4.

The Tribe offers two exhibits as evidence it did not know about transfers involving fee lands, both of which should be disregarded. As to the declaration of Frances Bassett, a previous attorney for the Tribe in this case, it is a basic principle of evidence that a witness must have personal knowledge. Resp. Ex. 2. Ms. Bassett's declaration inappropriately testifies on behalf of the Tribe, among other issues. *See DataMill, Inc. v. United States*, 91 Fed. Cl. 722, 738 (2010). Next, statements from BIA employees in the Tribe's Exhibit 4 simply recognize that land without

an associated water right is not entitled to water. There is nothing inconsistent between this and the fact that owners of fee lands that *do* have a water right can transfer it under the 1941 Act.

D. Claims based on alleged inadequate maintenance of UIIP infrastructure are limited to alleged wrongs committed within the statute of limitations period.

The Tribe makes a generalized argument about the continuing claims doctrine but does not tie it to any specific claim. Resp. at 32-33. The United States moved to dismiss the breach of trust claims alleging inadequate maintenance of UIIP infrastructure to the extent based on alleged wrongdoing occurring outside of the statute of limitations period. Mot. at 31-32. The Tribe does not respond to this beyond its incorrect arguments regarding the 2012 Settlement Agreement and ITAS. Indeed, it acknowledges it was "keenly aware" of challenges facing UIIP maintenance by March 2012. Resp. at 21. These claims should therefore be dismissed in part.

It is not clear to what extent the Tribe is arguing the continuing claims doctrine should apply to other claims. It thus bears repeating that the statute of limitations is jurisdictional, and the Tribe has the burden of proving its claims are timely. Broad invocation of the continuing claims doctrine without tying it to a claim, much less the facts underlying a claim, is not enough to carry that burden. And a claim "based upon a single distinct event, although it may have continued ill effects later on, is not a continuing claim." *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed Cl. 155, 164 (1999). The Tribe's claims not based on ongoing alleged inadequate maintenance should be dismissed for the reasons discussed above.

IV. Claims not based on water rights or alleged wrongs committed after 2012 were waived in the 2012 Settlement Agreement.

The Tribe's argument that none of its claims here were waived in the 2012 Settlement Agreement relies on an overly expansive and legally incorrect reading of an exception from the Agreement's waiver. In the Settlement Agreement, the Tribe waived "any and all claims . . .

based on harms or violations occurring before [March 8, 2012] . . . and that relate to the United States' management or accounting of . . . [the Tribe's] non-monetary trust assets or resources." Mot. Ex. 7 ¶ 4. In its motion to dismiss, the United States argued that the Tribe had therefore waived its claims that were not based on water rights themselves or on alleged wrongs occurring after 2012. Mot. at 32-35. This included claims concerning maintenance of UIIP infrastructure (in part), carriage agreements, land designations, and the Midview Exchange Agreement.

The Tribe's Response argues that none of these claims were waived in the Settlement Agreement because they fall under an exception in the Agreement for claims concerning water rights. Resp. at 19-22. That exception provides that the Tribe did not waive any "claims for damages for loss of water resources allegedly caused by [the United States'] failure to establish, acquire, enforce or protect such water rights." Mot. Ex. 7 ¶ 6(b). The Tribe expands this to "any claims relating to Tribal water." Resp. at 20. But that is not what the exception says. The Tribe effectively seeks to categorize all its claims as concerning water rights simply because water flows through UIIP infrastructure. A water right, however, is an entitlement to use water and is separate from the physical water itself. *See Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018). The owner of land designated as non-assessable with a related water right, for example, still has the same entitlement to use water even if not actively receiving water. A claim that there is a loss of water resources due to poor maintenance, then, would be one "allegedly caused by" the United States' failure to maintain UIIP infrastructure, not a failure to "establish, acquire, enforce or protect" a legal entitlement to use water. Similarly, carriage agreements, which allow delivery of water to users based on those users' own water rights, have no impact on the Tribe's entitlement to use water. The same can be said of the Tribe's claims concerning land designations (an alleged result of poor maintenance) and the Midview Property.

Any exclusions from a waiver or release must be clear, explicit, and manifest in the agreement itself. *Merritt-Champman & Scott Corp. v. United States*, 458 F.2d 42, 44–45 (Ct. Cl. 1972) (en banc) (per curiam). The exception here does not clearly exclude all claims related to water from the Settlement Agreement's waiver; rather, it clearly limits the exclusion to certain claims for damages stemming from failure to establish, acquire, enforce, or protect water rights. The Indian canons of construction are used to resolve ambiguity and have no application when, as here, the plain language is clear. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). The Tribe's discussion of adjudicated versus unadjudicated rights is irrelevant here, as the Tribe's claims do not concern water rights of either type. Rather, they concern maintenance of UIIP infrastructure. Nor are the water rights recognized by the 1923 Decrees inherently tied to the UIIP such that they are "indivisible and one in the same." Resp. at 22.

The Tribe's reading of the Settlement Agreement also cannot be squared with the Federal Circuit's opinion. The Federal Circuit affirmed dismissal of the First Amended Complaint's breach of contract claim regarding the Midview Exchange Agreement—which is nearly identical to the Tribe's current claim—"insofar as it concerned infrastructure." *Ute Fed. Cir.*, 99 F.4th at 1374. The Tribe argued the storage infrastructure transferred under the Exchange Agreement related to the Tribe's water rights and thus fell under the exception in the Settlement Agreement. Appellant's Opening Brief at 51-52. However, the Circuit found the alleged failure to transfer the infrastructure into trust related to the United States' management of a purported trust asset and was therefore waived. *Ute Fed. Cir.*, 99 F.4th at 1374. The Tribe's contract claim regarding Midview Property is thus barred by the mandate rule. And as discussed in the United States' motion, and as the Tribe does not dispute, there is no meaningful distinction between the contract claim and trust claim concerning the Midview Property when it comes to applying the Settlement

Agreement. *See* Mot. at 34-35. The Circuit's opinion also recognizes the difference between water infrastructure and water rights in applying the Settlement Agreement. The Tribe's claims regarding the UIIP, too, are based on allegations that "infrastructure was mismanaged," and were therefore waived at least in part in the Settlement Agreement. *Ute Fed. Cir.*, 99 F.4th at 1374.

V. The Tribe is limited to its own claims and its own damages.

In its motion, the United States argued that, across all claims, the Tribe is limited to its own alleged damages as the owner or beneficial owner of lands served by the UIIP. Mot. at 35-38. The Tribe's argument to the contrary rests primarily on a faulty conception of the UIIP as a "Tribal trust asset," alleged mismanagement of which results in loss of "Tribal water." Resp. at 34. As discussed above, the Tribe oversimplifies the UIIP and Indian reserved water rights. As the Tenth Circuit held, "the phrase[] 'in trust for the Indians' in the 1906 Act is not coextensive with 'in trust for the tribe[,]'" because "[t]he 1906 Act's purpose was to provide irrigation for the allotted, not tribal, lands." *Hackford*, 14 F.3d at 1468. And not all water flowing through the UIIP or serving former allotments is water the Tribe has a right to receive such that the Tribe would be damaged by its alleged loss or misuse. *See supra* pp. 7-8.

The Federal Circuit's opinion is not to the contrary. While the Circuit held that the 1906 Act created a duty to "hold and operate [UIIP] infrastructure for the Tribe's benefit," 99 F.4th at 1369, the Circuit was not concerned with the contours of that trust relationship. Rather, the question before the court was whether a trust duty exists in the first place. *Id.* at 1364. The Circuit did not hold that the Tribe is the only beneficiary of the trust duty it found in the 1906 Act. Nor did it find the trust duty owed to the Tribe goes beyond the terms of the 1906 Act connecting the UIIP to allotments. *Hackford*, 14 F.3d at 1468. It is accurate, under the Federal Circuit's opinion, to say that the United States owes a trust duty to the Tribe under the 1906 Act.

But under the terms of the Act that duty is linked, and limited, to the Tribe's capacity as the owner or beneficial owner of former allotments served by the UIIP. *Id.* Further, even if the UIIP was a "tribal trust asset," the Tribe would still not have standing to seek damages suffered by third parties due to alleged mismanagement of that asset. This means the Tribe's claims here are limited to alleged damages the Tribe has suffered in connection with lands served by the UIIP in which the Tribe itself has an interest. The Tribe cannot litigate on behalf of (and, if successful, receive compensation for) third party landowners served by the UIIP.

As to the *parens patriae* doctrine, the Tribe states that it is not seeking compensation for damages suffered by individuals, but also that individuals' losses damage the tribal economy and thus fall under the *parens patriae* doctrine. Resp. at 34. The Tribe does not respond to the argument that the *parens patriae* doctrine does not apply to claims against the United States. Nor does it acknowledge the District of Utah's holding that the Tribe could not bring claims as *parens patriae* regarding the UIIP, as the doctrine is limited to claims based on wrongs affecting all citizens. *Ute D. Utah*, 2023 WL 6276594, at *21. Here, a claim would be on behalf of a subset of tribal citizens owning land irrigated by the UIIP, making it inappropriate for the *parens patriae* doctrine. If simply alleging general, unspecified harm to the economy was enough to sustain a *parens patriae* claim, the limits on the doctrine would have no meaning.

CONCLUSION

The only claims that should proceed further are those based on alleged failures to adequately maintain and operate UIIP infrastructure within the statute of limitations period and resulting in injury to the Tribe itself. For the reasons described above and in the United States' motion, the Court should dismiss Claims 1.b and 1.d in part and Claims 1.a, 1.c., 1.e, 2, and 3 in their entirety.

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