IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, and THE STATE OF UTAH, CENTRAL UTAH WATER CONSERVANCY DISTRICT, GARY HERBERT, in his official capacity as Governor of the State of Utah, and THERESA WILHELMSEN, in her official capacity as Utah State Engineer and Director, Utah Division of Water Rights, Defendants.	Civil No. 1:18-cv-00547-CJN

UNITED STATES' MOTION FOR PARTIAL DISMISSAL
AND MEMORANDUM IN SUPPORT

UNITED STATES' MOTION FOR PARTIAL DISMISSAL

The United States Department of the Interior ("DOI" or "Interior"), David Bernhardt, in his official capacity as Secretary of the Interior, Bureau of Reclamation ("BOR"), and the Bureau of Indian Affairs ("BIA") (collectively, the "United States" or "Federal Defendants") respectfully move for partial dismissal of Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation's ("Tribe") second amended complaint (ECF No. 57, "Compl." or "Complaint") for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In the alternative, and only with respect to the argument that a 2012 Settlement Agreement waived and released certain claims, Federal Defendants move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Claims 1-11, and 16 are each subject to dismissal on various grounds, as detailed in the accompanying Memorandum in Support of the United States' Motion for Partial Dismissal.

Dated: July 16, 2020

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MEMORANDUM IN SUPPORT OF
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Exhibit No.	Name
A	1956 Deferral Agreement
B	1967 Midview Exchange Agreement
C	Chart Summarizing Grounds for Dismissal of Claims
D	2012 Settlement Agreement
E	Amended Complaint, ECF No. 18, *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359 L (Fed. Cl.)
F	Testimony of Chairman Luke Duncan (Sept. 18, 1990)
G	*In re Drainage Area of Uintah Basin and the Lower Green River Basin*, Utah (1956)
H	Complaint, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl. December 19, 2006)
I	Rule 56 Statement of Undisputed Material Facts

INTRODUCTION

This case involves water management in northeastern Utah. Plaintiff Ute Indian Tribe's sixteen-claim Complaint touches on the Tribe's alleged water rights, BOR's Central Utah Project—the largest and most complex water resource development project in the state of Utah—and the Uintah Indian Irrigation Project ("Irrigation Project")—a century-old, multi-purpose water management project involving an extensive irrigation system for Indians and non-Indians alike.[1] The Tribe alleges that Interior has breached fiduciary, statutory, or contractual duties owed to the Tribe with respect to its water rights and in management of the Central Utah Project and Irrigation Project. None of the Tribe's claims respecting either are new or even based on recent events.

For the reasons discussed more fully below, the Court should dismiss Claims 1-11, and 16. Each of these claims suffers from numerous, and, in most cases, overlapping deficiencies including: lack of jurisdiction, lack of standing, waiver and release, failure to identify a cognizable cause of action, and failure to identify an actionable fiduciary duty. In the alternative, with respect to those claims previously waived and released by a 2012 Settlement Agreement, the Court should grant summary judgment in favor of Federal Defendants as there is no genuine dispute as to any material fact.

[1] The Tribe also filed a companion case in the Court of Federal Claims alleging many overlapping causes of action. *See Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359 L (Fed. Cl.) (Hodges, J). The United States' motion to dismiss that action has been fully briefed and argued; as of this filing, it remains pending. In addition, the Tribe filed two other cases relating to what it refers to as the Uncompahgre Reservation: *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-357 L (Fed. Cl.) (Hodges, J.); and *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 1:18-cv-546 (D.D.C.), which is also before this Court.

In addition, through its second amended complaint, the Tribe now seeks to advance four new claims under the Administrative Procedure Act (the "APA"), related to the Green River Block Exchange Agreement, a water rights exchange agreement between BOR and the state of Utah. As explained in the United States' concurrently-filed motion to transfer, the Court should transfer these four claims (Claims 12-15) to the federal district court for the District of Utah.[2]

FACTUAL AND OTHER BACKGROUND[3]

I. The Irrigation Project & Midview Exchange

Plaintiff is a federally recognized Indian Tribe, made up of three bands of Ute people (the Uintah Band, the Whiteriver Band, and the Uncompahgre Band), with a reservation—the Uintah and Ouray Indian Reservation—in northeastern Utah's Uintah Basin. Compl. ¶ 6. Several rivers run through the Reservation, which is located on an arid plateau. *Id*. ¶ 28.

[2] In the event that any of the Tribe's other twelve claims survive dismissal, the Court would maintain the authority to sever those claims pursuant to Federal Rule of Civil Procedure 21 and hear them in this Court, while separately transferring Claims 12-15 to the District of Utah pursuant to 28 U.S.C. § 1404(a). *See, e.g., M.M.M. on behalf of J.M.A. v. Sessions*, 319 F. Supp. 3d 290, 295 (D.D.C. 2018) (noting standard under Rule 21); *see also Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18, 32 (D.D.C. 2011) ("The federal rules permit the Court to sever claims within the same action at any stage of the proceedings.") (citing Rule 21). Alternatively—though this does not appear to be the case on the face of the second amendment complaint—should the Court conclude under Rule 21 that any claims surviving dismissal are connected to Claims 12-15 such that severance would not be appropriate, the entire case (or what remains of it) should be transferred to the District of Utah for the reasons stated in the concurrently-filed motion to transfer. The United States also notes that the Tribe conceded at the February 12, 2020, status conference that this case and the action styled, *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 1:18-cv-546 (D.D.C.), also pending before this Court, are not related. The Court subsequently terminated as moot the Tribe's motion to consolidate the cases. *See* Minute Order, Feb. 18, 2020. Thus, this separate pending action should have no impact on the United States' motion to transfer.

[3] Given the stage of proceedings, the United States relies upon the factual (as opposed to legal) allegations in the Complaint, though, we will note where those allegations are shown to be false by judicially noticeable documents. *See e.g., Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014). The United States does not admit any of the Tribe's allegations.

Beginning in the early 1900s, the United States allotted approximately 100,000 acres of irrigable lands to individual Ute Indians and later commenced construction of irrigation systems for 78,950 acres of those lands pursuant to the Indian Department Appropriation Act of June 21, 1906 ("1906 Act"), which authorized the appropriations and construction of the Uintah Indian Irrigation Project.[4] *See* Indian Department Appropriations Act of 1906, Pub. L. No. 59-258, 34 Stat. 325, 375-76 (1906); *see also* Compl. ¶¶ 36-39. The 1906 Act appropriated funds for several Indian tribes, including for allottees who were members of the Ute Indian Tribe, but it was also intended to benefit non-Indians by providing irrigation systems to be used by "any person, association, or corporation under and upon compliance with the provisions of the laws of the State of Utah." *Id*.

Under the authority of the 1906 Act, the United States Indian Irrigation Service, subsequently part of the BIA, constructed an extensive system of canals and ditches to convey water from the drainages of the Strawberry-Duchesne rivers (west and northwest of Duchesne), Lake Fork-Yellowstone rivers (northwest of Roosevelt), and the Uinta-Whiterocks rivers (north of Roosevelt), all of which flow through at least some portion of the Uintah and Ouray Reservation. *See* Compl. ¶ 69. Congress, in authorizing BIA to recoup all costs associated with operating and maintaining its irrigation systems, intended that the irrigators served by the irrigation projects repay and fund construction, operation, and maintenance. *See* Act of May 29, 1908, Pub. L. No. 60-156, 35 Stat. 444, 450 (1908). Over time, however, low annual operations and maintenance fees resulted in insufficient funding for projects and maintenance. *See* U.S. GOV'T ACCOUNTABILITY OFF. GAO-06-314, INDIAN IRRIGATION PROJECTS: NUMEROUS ISSUES

[4] For purposes of this motion, the term "allotted" refers to Congress's past practice of "dividing," or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members, then known as "allottees." *See Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

NEED TO BE ADDRESSED TO IMPROVE PROJECT MANAGEMENT AND FINANCIAL SUSTAINABILITY 1-2 (2006), https://www.gao.gov/products/A47799 (last visited July 6, 2020). Thus, in 1941, Congress authorized the cancellation of more than $300,000 in unpaid construction assessments and operation and maintenance charges, and, among other provisions, authorized the Secretary of the Interior to transfer water rights, with the consent of the interested parties, to other Irrigation Project lands and to make necessary contracts to effectuate the transfer(s). *See* Act of May 28, 1941, Pub. L. No. 77-83, §§ 1–2, 55 Stat. 209 (1941).[5]

In 1967, the United States, the Moon Lake Water Users Association, and the Ute Tribe signed the Midview Exchange Agreement. *See* Midview Exchange Agreement, attached hereto as Exhibit B. The Agreement's principal purpose was an exchange of water between Indian lands served by the Lake Fork River, on one hand, and the Moon Lake Water Users' lands higher up the Lake Fork drainage, on the other. *Id.* ¶¶ 6-8. The key provisions authorized property transfers between the Bureaus of Indian Affairs and Reclamation, with title to remain in the United States. *Id.* ¶ 8. The Agreement did not authorize the Midview Property to be transferred to the Tribe.

II. The Central Utah Project

Separate from the Irrigation Project is the Central Utah Project, first authorized by Congress in 1956. *See* Colorado River Storage Project Act, Pub. L. No. 84-485, 70 Stat. 105

[5] The Tribe contends that it opposed the 1941 Act, never consenting to transfers which it perceives as unlawful. Compl. ¶¶ 108-11. The Act's purpose, however, was to provide financial relief to both Indian and non-Indian landowners and to make the Irrigation Project financially sustainable by shifting resources to more productive lands. *Adjustment of Irrigation Charges, Uintah Indian Project, Utah*, H.R. Rep. No. 77-370 at 3-4 (1941). In recent years, a number of bills have been brought before Congress to appropriate funds for this funding shortfall and the resulting deferred maintenance. *See, e.g.*, IRRIGATE Act, S. 438, 114th Cong. (2016); S. REP. NO. 115-258 on S. 2975 (2018) (energy and water development appropriations).

(1956).[6] The Central Utah Project's essential aim is the collection and distribution of water in the Uintah Basin, including for irrigation. *See id*. To accomplish this, the Project was divided into six units. The Vernal Unit (near Vernal in northeastern Utah) and Jensen Unit (in Uintah County, Utah) have been completed. The Bonneville Unit, the Project's largest, has several systems fully constructed and collects and distributes water in both the Uintah Basin and central Utah's Bonneville Basin. The remaining units were the Upalco, Uintah, and Ute Indian Units. These units were never built. The latter two are important here because they would have included reservoirs to supply water (from the Uintah and Whiterocks and Green Rivers, respectively) to, among other users, the lands of individual Indians.

III. The Deferral Agreement & Central Utah Project Completion Act of 1992 (CUPCA)

To make use of water in the Central Utah Project, one must hold water rights. By the time Congress originally authorized the Project in 1956, the State of Utah had ordered a general adjudication of all water rights in the Uinta Basin. *See In re Drainage Area of Uintah Basin and the Lower Green River Basin*, attached hereto as Exhibit G; *see also* UTAH CODE ANN. §§ 73-4-1–73-4-24 (LexisNexis 2016) (governing water rights adjudications, and defining the overall process and procedures for allocation of water and adjudication of conflicting claims). In the following years, the Affiliated Ute Citizens and the Ute Tribe jointly hired E.L. Decker to identify Tribal and Affiliated Ute water rights.[7] Compl. ¶ 52. The completed Decker Report

[6] Additional authorizations for the Colorado River Storage Project Act, which included the Central Utah Project, occurred with the Act of September 2, 1964, Pub. L. No. 88-568, 78 Stat. 852; Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968); the Act of August 10, 1972, Pub. L. No. 92-370, 86 Stat. 525; and the Act of October 31, 1988, Pub. L. No. 100-563, 102 Stat. 2826.

[7] In 1954, Congress enacted the "Ute Partition and Termination Act," Pub. L. No. 83-671, § 6, 68 Stat. 868, which provided for the partition and distribution of the assets of the Ute Tribe of the Uintah and Ouray Reservation between the "mixed-blood" and "full-blood" members. *See Ute Distribution Corp. v. Interior*, 584 F.3d 1275, 1276-79 (10th Cir. 2009), for the history of the partition. Under the Act, the mixed-blood members (for whom federal supervision would be

organized lands into seven groups. *Id.* ¶ 53. Except for lands it designated as "Group 1" within the Irrigation Project (those already subject to judicial decree), the Decker Report generally asserted *Winters* reserved water rights based upon, and tabulated by, practicably irrigable acreage.[8] *Id.* This tabulation included previously quantified water rights and unquantified potential water rights. *Id.* The Decker Report based its tabulation on more than just lands held in trust for the Tribe as part of the Reservation. *Id.* And, contrary to its present allegations, the Tribe acknowledged in 2009 that the "identification of [practicably irrigable acreage] on the Reservation has remained virtually unchanged since Mr. Decker first identified those lands for the Tribe and the [Affiliated Ute Citizens]." *Compare* Corrected Response Brief for Appellee, *Ute Distribution Corp. v. Sec'y of Interior*, 584 F.3d 1275 (10th Cir. 2009), No. 08-4147, 2009 WL 674440 *with* Compl. ¶¶ 236-43. The Tribe implemented Mr. Decker's recommendations in 1965.

Also in 1965, the United States, the Central Utah Water Conservancy District, and the Ute Tribe signed what is called the "Deferral Agreement." *See* Deferral Agreement, attached

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terminated) organized the Affiliated Ute Citizens as an unincorporated association which, as authorized by the statute, created the Ute Distribution Corp. to jointly manage the distribution of assets to individual mixed-blood members.

[8] In *Winters v. United States*, the Supreme Court held that the establishment of an Indian reservation impliedly reserved the amount of water necessary to fulfill the purposes of the reservation. 207 U.S. 564, 576–77 (1908). *Winters* doctrine rights may be used for any lawful purpose on the reservation and "gives the United States the power to exclude others from subsequently diverting waters that feed the reservation." *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (citation omitted); *see also Arizona v. California*, 439 U.S. 419, 421–22 (1979) (per curium), *amended*, 466 U.S. 144 (1984). Water rights, including those held under the *Winters* doctrine, vest "only a usufructuary interest in water, not an ownership interest." *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). It does not give a tribe ownership of any particular molecules of water, either on the reservation or up- or downstream of the reservation. *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 202 F.2d 190, 198 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239, 247 n.10 (1954). For purposes of this motion, the Court should assume that the Tribe only has a right to use a determined amount of water necessary to fulfill the purposes of the reservation.

hereto as Exhibit A. That agreement, among other things, deferred irrigation development for 15,242 acres of the Decker Report's "Group 5" lands—those to be served by the Duchesne River and not presently under irrigation, but identified as productive and economically feasible to irrigate—from the Central Utah Project's initial phase (as part of the Bonneville Unit) to the ultimate phase (then planned to be the Uintah Unit). *See* Compl. ¶¶ 53, 155; Ex. A ¶¶ 3-5 (Deferral Agreement).[9] These Group 5 lands were not part of the Irrigation Project. Instead, under the Deferral Agreement, the Tribe deferred water use and development on Group 5 lands to ensure roughly 60,000 acre-feet of water per year for the Central Utah Project's Bonneville Unit, which then allowed the Secretary to certify to Congress that construction on the Bonneville Unit could proceed. *See* Deferral Agreement ¶¶ 4-5. The Deferral Agreement also established January 1, 2005, as the "maximum date of deferment and that all phases of the Central Utah [P]roject will in good faith be diligently pursued to satisfy all Indian water rights at the earliest possible date." *Id.* ¶ 5.

Over the following decades, some of the Deferral Agreement's provisions were not fulfilled, including construction of the Uintah Unit. Compl. ¶¶ 169, 175-76. Congress acknowledged that the Upalco and Uintah Units had not been constructed "in part because the

[9] For Group 5 lands, the Decker Report recommended that the Tribe forgo its right to divert water from the streams running through those land and accept substitute water delivered from the Green River through Central Utah Project facilities. The Green River-based diversion became known as the Ute Indian Unit, for which Congress authorized a feasibility study in 1968. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968). The Deferral Agreement was not, as the Tribe now claims, a one-sided bargain. *See, e.g.*, Compl. ¶¶ 155-81. It provided benefits to the Tribe by recognizing that, upon the establishment of the reservation in 1861, water rights were perfected sufficient to meet the needs of all practicably irrigable land on the reservation. *See* Ex. A ¶ 9 (Deferral Agreement); *see also Ute Indian Water Settlement Act of 1988: Hearing on H.R. 5307 Before the H. Comm. on Interior and Insular Affairs*, 100th Cong. 24 (1988) (Statement of Rep. Howard Nielson) ("1988 H.R. Hrg.").

Bureau [of Reclamation] was unable to find adequate and economically feasible reservoir sites." Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 501(a)(3), 106 Stat. 4600, 4651–52. Similarly, the separately-planned Ute Indian Unit was never authorized by Congress. , *Id*.; *see also* COMM. ON ENERGY AND NAT. RES., RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992, S. REP. NO. 102-267, at 98 (1992) (describing Upalco Unit as "indefinitely postponed," Uintah Unit as "inactive," and Ute Indian Unit as having "never been authorized").

Congress, however, ultimately addressed the unfulfilled portions of the Deferral Agreement. In the Ute Indian Rights Settlement, found in Title V of the Central Utah Project Completion Act of 1992 ("CUPCA"), Congress intended to "once and for all" settle any claims under the Deferral Agreement and other historical claims, including any related to the separate Upalco Unit. *See* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575 §§ 501–07, 106 Stat. 4600, 4650–55 (1992). The purpose of the Act and the incorporated Revised Ute Indian Compact of 1990 ("1990 Compact") was to quantify the Ute Tribe's reserved water rights, allow increased beneficial use of water, and to provide economic benefits to the Tribe to replace those that would have resulted from the Deferral Agreement's planned projects.[10] *Id*. § 501(b), 106 Stat. at 4651.

Under Title V, Congress provided funding to complete various projects, as well as substantial federal funds in lieu of the Deferral Agreement's promised storage projects. *Id*. §

[10] Congress ratified the 1990 Compact in Section 503 of CUPCA, subject to re-ratification by the Tribe and the State of Utah. *See* 106 Stat. 4652. While there have been negotiations among the Tribe, the State, and the United States to revise portions of the 1990 Compact, there has been no final agreement. The 2018 Session of the Utah State Legislature enacted Section 73-21-101, UTAH CODE ANN. §§ 73-22-101–73-22-105 (2018), which ratified the 1990 Compact on behalf of the State. The Tribe, however, has not re-ratified the 1990 Compact post-CUPCA.

502, 106 Stat. at 4651–52. As it relates to the 15,242 acres of Group 5 lands in the Deferral Agreement and as compensation for unmet terms, Congress established annual payments (approximately $2.1 million per year) to the Tribe in perpetuity from Bonneville Unit operation and maintenance repayments made by the irrigators.[11] *See id*. In exchange for quantifying the Tribe's reserved water rights, allowing increased beneficial use of water, and putting the Tribe in the same economic position it would have enjoyed under the Deferral Agreement, the Ute Indian Rights Settlement waived and released any and all historical claims which the Tribe may have had, including claims arising out of or relating to the Deferral Agreement.[12]

It is well documented that CUPCA was a compromise agreement among the Tribe, the State of Utah, the Central Utah Water Conservancy District, and the federal government to settle all potential claims under the Deferral Agreement. *Ute Indian Water Settlement Act of 1988: Hearing on H.R. 5307 Before the H. Comm. on Interior and Insular Affairs*, 100th Cong. 24

[11] Other provisions of CUPCA define the purpose and scope of the 1990 Compact and the water rights conferred thereunder (§503, 106 Stat. at 4652-53), authorize the appropriation of $45 million to permit tribal development of farming operations (§504, 106 Stat. at 4653), authorize the appropriation of $28.5 million to be made available to the Secretary to carry out a number of reservoir, stream, habitat and road improvements in cooperation with the Tribe, (§505, 106 Stat. at 4653-54) and authorize and direct the Secretary to establish a tribal development fund, as part of the overall settlement (§506, 106 Stat. at 4654-55).

[12] "(a) GENERAL AUTHORITY.—The Tribe is authorized to waive and release claims concerning or related to water rights as described below.

(b) DESCRIPTION OF CLAIMS.—The Tribe shall waive, upon receipt of the section 504, 505, and 506 moneys, **any and all claims relating to its water rights covered under the agreement of September 20, 1965**, including claims by the Tribe that it retains the right to develop lands as set forth in the Ute Indian Compact and deferred in such agreement. Nothing in this waiver of claims shall prevent the Tribe from enforcing rights granted to it under this Act or under the Compact. To the extent necessary to effect a complete release of the claims, the United States concurs in such release." § 507, 106 Stat. at 4655 (emphasis added). *See also* S. REP. NO. 102-267, at 124 ("Since the purpose of the settlement is to resolve, once and for all, those outstanding matters, it is appropriate . . . that a comprehensive waiver be undertaken by the Tribe.").

(1988) (Statement of Rep. Howard Nielson). For example, as it relates to the Tribe's allegations that the United States failed to secure storage and related water works, *see, e.g.*, Compl. ¶¶ 236-54, 264-71, the Tribe proposed an agricultural commitment in Section 504 to identify approximately 7,000 acres for farming operations, "in lieu of constructing the Upalco and Uintah Units." *See* S. REP. NO. 102-267, at 123-124 (1992); *see also* § 504, 106 Stat. at 4653. In 1990, the Tribe's then and current Chairman also testified in support of the Ute Indian Rights Settlement. *See* Exhibit F at 225 (Testimony of Luke Duncan). The findings and purpose provisions of Title V addressed unresolved claims from the Deferral Agreement and Congressional intent not only to quantify the Tribe's reserved water rights but also "put the Tribe in the same economic position it would have enjoyed had the features contemplated by the [Deferral Agreement] been constructed." § 501(a)-(b), 106 Stat. at 4650–51.[13]

IV. Prior Settlement and Release of Claims

In 2006, the Tribe filed an action against the United States in the Court of Federal Claims seeking money damages and an accounting for alleged mismanagement of its trust funds and non-monetary trust assets. *See generally* Complaint, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl. December 19, 2006), attached hereto as Exhibit H; *see id.*, *e.g.*, ¶¶ 54–58, 63–67. This 2006 lawsuit was resolved when the Tribe and the United States executed a settlement agreement on March 8, 2012 (the "Settlement Agreement"). A true and correct copy of the Settlement Agreement is attached hereto as Exhibit D; *see also*

[13] Although the Tribe now challenges the computation of the Bonneville Unit Credits paid annually to the Tribe under Section 502, Compl. ¶ 196, the proposed formula was expressly acknowledged and accepted by Chairman Duncan in his testimony before Congress. Ex. F at 216 (Testimony of Luke Duncan).

Joint Stipulation of Dismissal with Prejudice, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl.) (June 1, 2012).

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

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

Ex. D ¶¶ 2, 4 (Settlement Agreement). The Settlement Agreement explains that this waiver included, but was not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "failed to manage [the Tribe]'s non-monetary trust assets or resources appropriately," "failed to prevent trespass on [the Tribe]'s nonmonetary trust assets or resources," "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used Plaintiff's non-monetary trust assets or resources," and "failed to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner." *Id*. ¶ 4.[14]

In addition, pursuant to the Settlement Agreement, the Tribe agreed that it "accept[ed] as accurate the balances of all of Plaintiff's trust fund accounts, as those balances are stated in the most recent periodic Statements of Performance" provided by the United States on January 31,

[14] The Settlement Agreement provides for certain limited exceptions to the Tribe's waiver and release. *See* Ex. D ¶ 6. While the Tribe may argue that one of those exceptions relating to water rights, *id*. ¶ 6(b), applies here, such reliance would be mistaken as this is not a suit for "*damages* for loss of water resources allegedly caused by [Federal Defendants'] *failure to establish, acquire, enforce or protect* [ ] water rights." , *Id*. (emphasis added).

2012.[15] *Id*. ¶¶ 7-8. The Tribe also agreed that the United States had satisfied any accounting requirements up to the date of the Settlement Agreement and that the United States would satisfy any future "duty and responsibility to account for and report to [the Tribe] . . . through . . . compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations." *Id*. ¶¶ 8–11.

V. The Tribe's Present Complaint

The Tribe brought suit against Federal Defendants in this Court on March 8, 2018. ECF No. 1. Federal Defendants moved to dismiss the Tribe's complaint on October 16, 2018. ECF No. 22. The Tribe subsequently filed its first amended complaint, on January 22, 2019 (ECF No. 25), which Federal Defendants also moved to dismiss. ECF No. 28 (filed March 22, 2019). On February 5, 2020, the Court granted the State of Utah's motion to intervene (ECF No. 52), and, following a telephonic status conference on February 12, 2020, the Court granted the Tribe leave to file a second amended complaint against both state and Federal Defendants. The Tribe filed its second amended complaint on April 3, 2020. ECF No. 57. This operative complaint includes sixteen claims for relief. Twelve of those claims, Claims 1-11, and 16, are each subject to dismissal on various grounds as summarized in the chart attached hereto as Exhibit C. The

[15] The Settlement Agreement defined "trust funds" to:

> include but are not limited to any monies that have been received by Plaintiff in compensation for or as a result of the settlement of Plaintiff's pre-1946 claims brought before the Indian Claims Commission ("ICC"); the monies in any Tribal-related accounts; any proceeds-of-labor accounts; any Tribal-Individual Indian Money ("Tribal-related IIM") or special deposit accounts; any Indian Money-Proceeds of Labor ("IMPL") accounts; any Treasury accounts; any legislative settlement or award accounts; and any judgment accounts, regardless of whether the above-described accounts are principal or interest accounts, whether they were established pursuant to Federal legislation, and whether they are or were maintained, managed, invested, or controlled by either the Department of the Interior ("Interior") or the Department of the Treasury ("Treasury").

Ex. D, at 4 n.1.

remaining four claims, Claims 12-15—APA claims which the Tribe has alleged for the first time—should be transferred to the federal district court for the District of Utah, as shown in the United States' motion to transfer, filed concurrently herewith.

LEGAL STANDARDS

The United States moves to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim. In the alternative, the United States moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 as to certain claims that were waived and released under the 2012 Settlement Agreement.

A threshold issue in every federal case is whether the court maintains jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's Constitutional and statutory jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute")). Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co.*, 523 U.S. at 88-89. In suits against the United States, an express waiver of sovereign immunity is a prerequisite to subject matter jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. King*, 395 U.S. 1, 4 (1969). A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 n.9 (D.C. Cir. 1984). The Supreme Court presumes that

federal courts lack jurisdiction unless the contrary appears affirmatively from the record. *See Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

Where the Court lacks jurisdiction over a plaintiff's claims, it must dismiss them pursuant to Federal Rule of Civil Procedure 12(b)(1). "[I]n deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52 (D.D.C. 2004); *see also Haase v. Sessions*, 835 F.2d 902, 905–06 (D.D.C. 1987) (holding that a court's consideration of materials outside the pleadings in deciding a 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). In addressing a 12(b)(6) motion, courts may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 867 n* (D.C. Cir. 2008) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (3D ED. 2004)).

Without triggering conversion of a Rule 12(b) motion to a Rule 56 motion, a court may take judicial notice, pursuant to Federal Rule of Evidence 201(b), of publicly available records, reports of administrative bodies, and records of prior litigation. *New Vision Photography*

Program v. Dist. of Columbia, 54 F. Supp.3d 12, 23 (D.D.C. 2014); Fed. R. Evid. 201(b). Tribal resolutions have been found to be in that category of publicly available records whose accuracy cannot be reasonably questioned. *Klamath Claims Comm. v. United States*, 541 Fed. Appx 974, 979 n.8 (Fed. Cir. 2013) (denying motion to strike tribal resolutions appended to United States' brief).

In addition, and even where not referred to or attached to the complaint, a court may also consider relevant settlement agreements where the parties do not dispute their validity. *See Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006); *see also Halldorson v. Sandi Grp*, 934 F. Supp. 2d 147, 152 (D.D.C. 2013). In the alternative, however, summary judgment is appropriate if the record before the court establishes "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, the opposing party must identify specific facts establishing a genuine and material factual dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

ARGUMENT

The Court should dismiss the Complaint for numerous reasons. As a threshold matter, nearly all of the Tribe's claims fail for one simple overarching reason: the Tribe has not identified a cognizable cause of action (Claims 1-11). But the Tribe's claims also suffer from numerous other deficiencies. First, the Court lacks jurisdiction over Claims 1, 2, 5, 8, and 10, under the McCarran Amendment and because the United States cannot be compelled to quantify water rights. Second, to the extent the Tribe alleges a breach of trust in Claims 3, 5-7, and 9-11, the Tribe has failed to identify any enforceable trust duty. Third, the Tribe previously waived and released certain claims through the 2012 Settlement Agreement (Claims 3 and 11) and Section 507 of CUPCA (Claims 1, 2, 4, and 5). Fourth, the Tribe cannot seek specific performance or declaratory relief against the federal government for contract-based claims

related to the Midview Exchange or Deferral Agreements, and, in any event, these claims are time-barred (Claims 1, 2, 4-5, and 8). And, finally, Claim 16, through which the Tribe alleges violations of its constitutional rights and the Civil Rights Act of 1964, must be dismissed because the Tribe, as a sovereign government, lacks standing to assert such a claim and has failed to state a claim upon which relief could be granted.

I. The Tribe Fails to Identify a Valid Cause of Action (Claims 1-11)

The Court should dismiss Claims 1-11 because the Tribe has not identified a cognizable cause of action. To proceed in federal court on a claim against the United States, a plaintiff must identify a waiver of sovereign immunity, a grant of subject matter jurisdiction, and a cause of action. *See Floyd v. Dist. of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997). Here, the Tribe has asserted a waiver of sovereign immunity under the APA (5 U.S.C. § 702) and the 1906 Act (Public Law 59-258), and subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362. Compl. ¶¶ 16, 20. But the Tribe has not identified a viable cause of action for Claims 1-11.

The Tribe styles Claims 1-10 as requests for "Declaratory and Enforcement Relief"[16] and cites to the Declaratory Judgment Act, 28 U.S.C. § 2202. *See* Compl. ¶¶ 243, 249, 254, 262, 271, 276, 283, 290, 295, 301. The Tribe styles Claim 11 as a "Failure to Provide Accounting" and likewise cites the Declaratory Judgment Act. Compl. ¶ 306. It is black letter law, however, that the Declaratory Judgment Act does not provide an independent cause of action. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) ("Nor does the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201, provide a cause of action."); *see also Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 6 (D.D.C. 2009) (citing *Schilling v. Rogers*, 363 U.S. 667, 677 (1960)). The Act is

[16] While the Tribe styles Claim 4 as a request for "interpretation," the relief sought is declaratory in nature and likewise cites the Declaratory Judgment Act. Compl. ¶¶ 255-63.

simply a procedural statute that expands the "range of remedies available in the federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). It "presupposes the existence of a judicially remediable right." *Schilling*, 363 U.S. at 677; *see* 28 U.S.C. § 2202 (authorizing further relief based upon an existing declaratory judgment). Thus, for each claim, the Tribe must identify an underlying cause of action to avoid dismissal. Because it fails to do so for Claims 1-11, those claims fail as a matter of law and must be dismissed.

The Tribe's general citation to the APA (Compl. ¶ 20) cannot save these claims because the APA's cause of action is limited to challenges to "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704; *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). Whether there has been a final agency action for purposes of an APA claim is a "threshold" question; if a party fails to point to a final agency action, the claim fails to state a claim pursuant to Rule 12(b)(6). *Fund for Animals, Inc.*, 460 F.3d at 18 n.4; *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (defining what makes an agency action "final"). In Claims 1-11, the Tribe does not identify any "final agency action" that could be subject to judicial review.

To the extent that the Tribe argues that various governmental actions referenced within these claims—such as executing the Deferral and Midview Exchange Agreements, entering the 1923 decree, or enacting CUPCA in 1992—constitute final agency actions subject to challenge (*see, e.g.*, Compl. ¶¶ 217, 285, 262-63, 273), it is mistaken. Those actions occurred well outside the applicable six-year statute of limitations, *see* 28 U.S.C. § 2401(a); thus, the Tribe's challenges thereto would be time-barred. *See Sendra Corp. v. Magaw*, 111 F.3d 162, 165 (D.C. Cir. 1997); *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850–51 (D.C. Cir. 1983) (right of action accrues on the date of the agency action). That any such challenge is time-barred is clear on the

face of the Complaint. *See, e.g.*, Compl. ¶130 (parties to Midview Exchange signed water transfer agreement in 1968), ¶ 155 (Paragraph 5 of 1965 Deferral Agreement establishing forty-year time frame to complete Central Utah Project), ¶ 169 (1986 indefinite postponement to Upalco Unit); ¶¶ 175-76 (Ute Indian Unit "abandoned" in 1980 Bureau of Reclamation report); ¶ 185 (CUPCA enacted in 1992); ¶¶ 274-76 (with respect to the 1923 decree, the Tribe identifies no final agency actions occurring in the past six years).

Likewise, the Tribe's citation to the mandamus statute, 28 U.S.C.§ 1361 (Compl. ¶ 18), cannot save these claims because the Tribe has not identified any mandatory, nondiscretionary duty that the United States was required, but failed, to perform—as is required for a mandamus claim. *See In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). In any event, the only claim that potentially seeks mandamus relief is Claim 11, which seeks a historical accounting. Compl. ¶¶ 302-06. But the Tribe has not identified any mandatory, nondiscretionary duty to provide such an accounting. *See id*. Thus, to the extent the Tribe seeks to rely upon the mandamus statute as its cause of action for Claim 11, it has failed to state a claim upon which relief could be granted, and the Court also lacks jurisdiction to entertain such a claim.

In sum, the Court must dismiss Claims 1-11 under Rule 12(b)(6) because the Tribe fails to identify a cognizable cause of action and, thus, fails to state a claim upon which relief could be granted.

II. This Court Does Not Have Jurisdiction To Adjudicate And Quantify Water Rights (Claims 1, 2, 5, 8, and 10)

The federal district courts lack jurisdiction to adjudicate water rights between the Tribe and the United States or to compel the Attorney General to quantify the Tribe's water rights, which is not a government action subject to mandamus. For that reason, the Court should

dismiss Claims 1, 2, 5, 8, and 10 to the extent they relate to water rights quantification or seek an adjudication of water rights in the Uintah Basin.[17]

A. The McCarran Amendment Does Not Authorize Private Suits to Adjudicate Water Rights Between the Tribe and the United States

The Tribe broadly claims that the United States has trust duties "to protect, preserve, and develop" the Tribe's *Winters* water rights. Compl. ¶¶ 1, 237, 177, 243, 265, 270. But such claims cannot proceed in this Court because the McCarran Amendment, enacted by Congress in 1952, withholds the United States' consent to be sued in actions involving an adjudication of water rights unless the action involves joinder of the United States as a defendant in general stream adjudications in which the rights of all competing claimants are adjudicated. 43 U.S.C. § 666(a)[18]; *see Dugan v. Rank*, 372 U.S. 609, 618-19 (1963); *United States v. Dist. Court for Eagle Cty*, 401 U.S. 520, 525 (1971), *Gardner v. Stager*, 103 F.3d 886, 888 (9th Cir. 1996). As the Supreme Court emphasized nearly sixty years ago, the McCarran Amendment's waiver of sovereign immunity only applies if the case involves "all of the rights of various owners on a given stream." *Dugan*, 372 U.S. at 618. This case is not a general stream adjudication, and the McCarran Amendment therefore preserves the United States' sovereign immunity as to any claims seeking, directly or indirectly, to adjudicate the Tribe's water rights. Moreover, the State of Utah is currently engaged in an ongoing general adjudication of water rights within the Uintah Basin to which the United States is a party. *See In the Matter of the General Determination of*

[17] To the extent Claim 4 seeks to quantify the Tribe's reserved water rights, it too should be dismissed for these same reasons.

[18] The McCarran Amendment provides in relevant part: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

all the Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Uinta Basin in Utah, Dist. Ct. for Duchesne County, State of Utah, Civil No. 56080056 CV.

Moreover, neither the APA nor the 1906 Act provide a valid jurisdictional basis for the Tribe's water rights claims, to the extent it seeks an adjudication of those rights. The APA withholds judicial authority to grant relief in situations where another waiver impliedly forbids the relief sought. 5 U.S.C. § 702 ("Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."); *accord* § 704 (making APA relief unavailable where an adequate remedy is available in another court). The McCarran Amendment withholds consent from suit in circumstances such as those presented here, and, for that reason, the Tribe cannot rely upon the more general APA waiver to assert its water-rights-related claims. *Dugan*, 372 U.S. at 618-19. Similarly, the "sue and be sued" provision in the Irrigation Project's authorizing statute, even if read as a limited waiver of sovereign immunity, only relates to the Irrigation Project, not water rights generally. *See* 34 Stat. at 375 ("Provided, That such irrigation systems shall be constructed and completed and held and operated, . . . and [the Secretary of the Interior] may sue and be sued in matters relating thereto."). Thus, the Tribe cannot rely upon this project-specific waiver to bring its generalized water rights claims. Accordingly, this Court should dismiss Claims 1, 2, 5, 8, and 10 for lack of jurisdiction.

B. The United States Cannot be Compelled to Quantify Water Rights

Alternatively, the Court lacks jurisdiction over these claims because the United States cannot be compelled to quantify water rights. Such relief in the form of mandamus is only available where a plaintiff can demonstrate a clear, undisputed duty to act and there is no other adequate remedy. *See United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011). Here, the

Tribe points to no clear, undisputed duty. Moreover, even if it had, an adequate remedy would exist in the form of a general stream adjudication under the McCarran Amendment (which neither the Tribe nor this Court can compel), or a congressionally-enacted settlement and quantification of the Tribe's water rights (which Congress enacted through CUPCA in 1992).

To the extent that the Complaint can be interpreted to contend that the United States has failed in an alleged duty to institute *judicial* proceedings to quantify or otherwise secure (through an adjudication) the Tribe's *Winters* rights, such claims must similarly be dismissed. Conduct of litigation on behalf of the United States "is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516; *see also* 25 U.S.C. § 175. The Supreme Court has "recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)). It is well established that the commencement and conduct of litigation by the Attorney General traditionally has been regarded as being committed to that officer's discretion. *See, e.g.*, *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *see also Creek Nation v. United States*, 318 U.S. 629, 639 (1943) (discussing the Secretary of the Interior's discretion to handle Indian affairs). This is also true in the particular context of whether the United States has a duty to file water rights claims on behalf of Indian Tribes. *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1481 (D.C. Cir. 1995). Because the United States cannot be compelled to quantify the Tribe's water rights—and, in any event, the Tribe already has a congressional settlement of its water rights—the Court should dismiss Claims 1, 2, 5, 8, and 10.

III. The Tribe Fails to Identify Any Enforceable Trust Duty and, Even if It Had, an Adequate Remedy Exists in the Court of Federal Claims (Claims 3, 5-7, 9-11)

The Court should dismiss Claims 3, 5-7, and 9-11 because the Tribe fails to identify a substantive source of law that establishes a specific fiduciary duty. This failure is fatal to each of its breach of trust claims. In any event, even if the Tribe had identified enforceable trust duties, any cognizable claims alleging breach of those duties could not be brought in this Court because an adequate remedy would be available in the Court of Federal Claims.

A. The Tribe Fails to Identify any Statute or Regulation that Creates a Mandatory Statutory Trust Duty

Claims 3, 5-7, and 9-11 allege that the United States has acted contrary to some "trust obligation" in its management of water rights or water projects. *See* Compl. ¶¶ 254, 265, 275-76, 293, 295, 304. But the Tribe has failed to state a claim upon which relief can be granted because it has failed to identify any substantive source of law that establishes specific fiduciary obligations.[19] *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) ("a cause of action will be inferred from a fiduciary relationship only where a plaintiff can identify specific trust duties in a statute, regulation, or treaty."). While there is "a general trust relationship between the United States and the Indian people," that general trust relationship does not, by itself, create legally enforceable obligations for the United States. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*")). Instead, the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at

[19] The Tribe has not invoked the APA for its breach of trust claims, and it therefore fails, as addressed above, to state a claim for the separate reason of failing to identify a cognizable cause of action. *See El Paso Natural Gas Company v. United States of America*, 750 F. 3d 863, 871 (D.C. Cir. 2014).

177. Even then, however, "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *Id*. at 165.

In order to bring a claim for breach of trust, "a Tribe 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." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*") (citation omitted) (emphasis added). "The analysis [under this first hurdle] must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *El Paso Nat. Gas Co. v. United States*, 774 F. Supp. 2d 40, 51–52 (D.D.C. 2011), *aff'd*, 750 F.3d 863 (D.C. Cir. 2014). "[A]n Indian tribe must identify statute or regulations that both impose a specific obligation on the United States and 'bear the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation omitted) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) (*Navajo II*)). Further, and importantly in this case, "a statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Hopi Tribe*, 782 F.3d at 667 (citation omitted).

Here, Claims 3, 5-7, and 9-11 allege that the United States breached fiduciary duties by failing to provide an accounting of the Tribe's reserved water rights and maintenance of the Irrigation Project, and, more broadly, failing to enforce, preserve, protect, secure, and develop the Tribe's reserved water rights and resources.[20] The problem, however, is that, of the twenty-

[20] This allegation is articulated in several ways: failure to provide for water storage (Claim 5, ¶¶ 264-71; Claim 9, ¶¶ 291-95); failure to secure sufficient water rights (Claim 6, ¶ 275; Claim 7, ¶ 282; Claim 10, ¶¶ 300-01); and failure to maintain the Irrigation Project to enable efficient delivery (Claim 3, ¶ 253). To the extent the Tribe is arguing that the duty in question arose in a contract, this would be insufficient because the United States' trust responsibilities are governed by statute and regulation, not contract.

five alleged sources of fiduciary duties, not a single one creates an enforceable trust obligation under the Supreme Court precedent discussed above. *See* Compl. ¶ 17. Two of the twenty-five alleged sources can be immediately dispensed with because they are sources other than the Constitution or a statute or regulation. *Id*. ¶ 17 (m), (o). Most of the remaining twenty-three do not even relate to accounting, irrigation, or water rights at all, let alone create the alleged fiduciary duties that form the bases of the Tribe's trust claims. For ease of reference, we list the alleged sources in the same order as the Complaint and briefly explain why each is insufficient:

a. The Treaty of Guadalupe Hidalgo of 1848 does not suffice because Congress previously passed legislation to resolve any claims under that Treaty, requiring that any claims be brought within two years of enactment. *See Daniels v. United States*, No. 17-1598 C, 2018 WL 1664476 at *7 (Fed. Cl. Apr. 6, 2018) (referencing Act to Settle Private Land Claims in California, 9 Stat. 631 (1851)). The Treaty itself ceded lands in what had been Mexico to the United States. *See Martinez v. Gonzales*, No. 13-cv-922, 2014 WL 12650983 at *3 (D.N.M. June 30, 2014).

b. Neither the Ute Treaty of 1863 nor the Ute Treaty of 1868 establish any fiduciary duties or make any reference to water rights or irrigation. Likewise, the Act of April 29, 1874 (Chapter 136, 18 Stat. 36), makes no reference to water rights or irrigation. Its single reference to any trust duty relates to a sum of money, or its equivalent, that was to be invested at the "discretion of the President … for the use and benefit of the Ute Indians …" This sum is not at issue in this litigation.

c. The Executive Order of October 3, 1861, established the Uintah Valley Reservation, but says nothing about water rights or irrigation. *See* 1 Kapp. 900.

d. The Act of May 5, 1864, directs the Secretary of the Interior to survey and apportion Indian lands in Utah for sale, and appropriated $30,000 for the Commissioner of Indian Affairs to expend on agricultural improvements in the Uintah Valley. *See* 13 Stat. 63. Neither discretionary authorizations to act nor appropriations such as these create fiduciary duties. *See Wolfchild v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013); *Hopi*, 782 F.3d at 670.

e. The Act of June 15, 1880, only references irrigation in requiring commissioners who were to negotiate with the Indians to report on the acreage of allotted lands that were tillable without irrigation and the amount irrigation that may be required. *See* 21 Stat. 199.

f. The Executive Order or January 5, 1882, established what was known as the Uncompahgre Reservation, but says nothing about water rights or irrigation. *See* 1 Kapp. 901.

g. The Act of February 8, 1887 (25 U.S.C. §§ 381 et seq) does not provide grounds for a suit alleging breach of a statutorily-created trust duty. *See Grey v. United States*, 21 Cl. Ct. 285, 293-294 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991).

h. The Act of March 1, 1899, appropriated money to, among other things (and in the Secretary's discretion), "construct ditches and reservoirs, purchase and use irrigation tools and appliances, and purchase water rights on Indian reservations," and authorized the Secretary, "in his discretion, to grant rights of way for the construction and maintenance of dams, ditches, and canals through the Uintah Indian Reservation in Utah, for the purposes of diverting and appropriating waters of the streams in said reservation for useful purposes." *See* 30 Stat. 924, 940, 941. Neither discretionary authorizations to act nor appropriations such as these create enforceable trust duties. *See Wolfchild*, 731 F.3d at 1292; *Hopi*, 782 F.3d at 670.

i. The Reclamation Act of 1902 (32 Stat. 388) only provides for authority to purchase or condemn lands for irrigation purposes. 32 Stat. 388; *See also Grey*, 21 Cl. Ct. at 295–96.

j. The Act of June 19, 1902, required that allotments made to the Indians of the Uintah Indian Reservation be allotments on agricultural lands, but delineates no Secretarial responsibilities for agriculture or irrigation. *See* 32 Stat. 744.

k. The Act of March 3, 1905 (33 Stat. 1048, 1069–70) and amendment thereto in the Act of May 14, 1920 (41 Stat. 599, 599-600) relate to grazing on the Uintah Reservation and the opening of unallotted lands for public entry; they say nothing of irrigation other than to provide that the Secretary "*may* also set apart and reserve a reservoir site or other lands necessary to preserve and protect water supply for Indians or for general agricultural development, and *may* confirm such rights to water thereon as have already accrued." 33 Stat. at 1070. Discretionary authorizations do not create any enforceable trust duties. *See Wolfchild*, 731 F.3d at 1292.

l. The Department of Interior Appropriation Act of June 21, 1906Pub. L. No. 59-258), merely set aside money for constructing the irrigation system and did not create enforceable trust duties. *See Hopi*, 782 F.3d at 670; *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed.Cir.2011), *vacated in part on other grounds*, 133 S. Ct. 423 (2012). The 1906 Act states that the Irrigation Project is to be held in trust for Tribe. *See* Pub. L. No. 59-258 ("the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians"). But bare "in trust" language is not sufficient to establish a fiduciary duty to manage, develop, protect or fund resources and infrastructure on the Irrigation Project. *See United States v. Mitchell*, 445 U.S. 535, 541-542 (1980); *Hopi Tribe*, 782 F.3d at 665; *see also N. Slope Borough v. Andrus*, 642 F.2d

589, 612 (D.C. Cir. 1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.")

m. *Winters v. United States*, 207 U.S. 564 (1908), and its "progeny" are court rulings, not constitutional, statutory, or regulatory obligations. In any event that body of case law did not create any specific fiduciary trust duties. *Winters* simply held that the establishment of an Indian reservation impliedly reserved the amount of water necessary to fulfill the purposes of the reservation. The "*Winters* doctrine" guides courts in evaluating the nature, scope and priority date of a tribe's water rights.

n. The Act of March 3, 1909 (35 Stat. 811), merely set aside additional funds for the continued construction of irrigation systems pursuant to the 1906 Act and did not create any enforceable trust duties. *See Hopi*, 782 F.3d at 670.

o. *Cedarview Irrigation Company*, No. 4427, slip op. (D. Utah 1923) and *Dry Gulch Irrigation Company*, No. 4418, slip op. (D. Utah 1923) ("1923 Decrees") are court rulings, not constitutional, statutory, or regulatory obligations.

p. The 1936 Leavitt Act, 25 U.S.C. §§ 389, 389a-e, does not create fiduciary duties. *See Grey*, 21 Cl. Ct. at 294 n.11.

q. The Act of May 28, 1941 (55 Stat. 209) clarified the Secretary's authority under the 1936 Leavitt Act with respect to the Irrigation Project. The statute addresses cancellation, deferment, and adjustment of irrigation charges. The Act also authorizes the Secretary to transfer water rights or contract for operation and maintenance. It does not delineate any management duties.

r. The 1956 Colorado River Storage Project Act's (43 U.S.C. §§ 620–620o) sole reference to Indian lands is to those of the Navajo Nation, *id*. § 620e, and only references Ute Tribe-specific project units in the context of prioritizing planning reports, *id*. § 620a.

s. 25 U.S.C. § 177, which addresses conveyances of land or interests in land between Indians and non-Indians, does not set forth any specific, mandatory fiduciary duties with respect to the United States. It is also referenced in the 1992 Reclamation Projects Authorization and Adjustments Act, Pub. L. No. 102-575, 106 Stat. 4600, as not applying to any water rights in the 1990 Compact.

t. The Interior regulations cited as 22 Fed. Reg. 10479, 10,637–38 (Dec. 24, 1957), were found at 25 C.F.R. Part 199 (C.F.R. 1966 ed.) but were replaced in 42 Fed. Reg. 30361 (June 14, 1977) and consolidated into 25 C.F.R. Part 171.

u. The Interior regulations in 25 C.F.R. Part 171 do not create an enforceable trust duty. Even in the more-recent amendments to Part 171, the Department of the Interior was clear that it does not have a trust obligation to operate and maintain irrigation projects. *See* Final Rule, 73 Fed. Reg. 11,028, 11,031 (2008).

v. The 1992 Reclamation Projects Authorization and Adjustments Act, Pub. L. No. 102-575, 106 Stat. 4600, confirms that the Secretary retains any trust responsibilities that *may* exist for the Irrigation Project (§ 203(f)(2)), though it does not delineate what those responsibilities may be, if any exist. The Act also authorizes the Secretary to enter agreements with third parties to operate, maintain, rehabilitate, and construct some or all of the irrigation project facilities (§ 203(f)(1)(B)).

w. The Equal Protection and Due Process Clauses of the Fifth Amendment do not delineate specific duties with respect to the management of Indian water rights, irrigation, or any other Indian resources.

x. The Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, establishes a private right of action for citizens to bring suit against state and local actors for alleged violations of their constitutionally-protected rights. These provisions do not create a private right of action against the federal government, nor do they establish any fiduciary relationship between the United States and Indian peoples.

y. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, prohibits discrimination on the basis of race, color, or national origin, in the context of programs or activities receiving federal financial assistance. It does not create a private right of action against federal agencies or officials or establish any fiduciary relationship between the United States and Indian peoples.

To the extent the Tribe is attempting to allege that these sources collectively create a system of comprehensive federal control to trigger jurisdiction, it is mistaken. For one, the United States does not have a general trust duty to provide, develop, or fund agricultural infrastructure. *See White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 630 (1987), *aff'd* 31 F.3d 1176 (Fed Cir. 1994); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852, 865 (Ct. Cl. 1982). The fact that the United States has some role in (or even control over) irrigation is irrelevant because "[t]he Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. But, in any event, the disparate statutes and regulations the Tribe identifies "do not give the kind of 'full responsibility' and 'elaborate

control' over water resources that the Supreme Court found to support a fiduciary relationship regarding timber resources in *Mitchell II* . . . ." *Hopi*, 782 F.3d at 671.

In *Mitchell II*, the Supreme Court based its conclusion on the "pervasive" role the Department of the Interior played in "virtually every aspect of forest management including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source." 463 U.S. at 219–20. "The regulatory scheme was designed to assure that the Indians receive the benefit of whatever profit [the forest] is capable of yielding." *Id*. at 221–22 (citation and internal quotations omitted).

Here, the Tribe has presented nothing close to that type of control with regard to water rights and irrigation. Indeed, another court addressing the issue has held, applying the *Mitchell II* analysis, that 25 C.F.R. Part 171 does not create the same type of comprehensive responsibility for the delivery and apportionment of water as do the statutes and regulations covering the preservation and sale of timber on allotted lands. *Grey*, 21 Cl. Ct. at 293-94. Because the Tribe has failed to establish a pervasive, comprehensive system of control akin to that in *Mitchell II*, or identify a substantive source of law that creates specific, enforceable fiduciary obligations, its breach of trust claims fail.

B. The Court of Federal Claims Would Provide an Adequate Remedy for Breach of Any Enforceable Trust Duties

Even if the Tribe had identified enforceable trust duties, its claims alleging breach of those duties could not be brought in this Court. The APA's cause of action applies only where there is "no other adequate remedy" available in another court. 5 U.S.C. § 704; *Citizens for*

Resp. & Ethics in Wash. v. U.S. Dep't of Justice, 846 F.3d 1235, 1244–45 (D.C. Cir. 2017). Here, however, an adequate remedy would be available in the Court of Federal Claims.

Claims 3, 5-7, and 9-11 each stem from the same basic premise: the United States is violating its fiduciary obligations to the Tribe by failing to manage the Irrigation Project and the Tribe's water rights and resources in a way that accomplishes the Tribe's interest of developing water rights through infrastructure. But, assuming the Tribe is correct on the alleged fiduciary duties (which, as detailed above, it is not)—and assuming all other threshold requirements for justiciability are met—the Tribe would have an adequate remedy available to it in the Court of Federal Claims in the form of a suit under the Indian Tucker Act, 28 U.S.C. § 1505, for breach of money-mandating fiduciary duties.[21] *See Mitchell II*, 463 U.S. at 212–19, *Navajo II*, 556 U.S. at 290–91. A claim for money damages in the Court of Federal Claims under the Tucker Act, or Indian Tucker Act, as applicable here, "is presumptively an 'adequate remedy' for § 704 purposes." *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005); *but see Kidwell v. Dep't of Army*, 56 F.3d 279, 284-85 (D.C. Cir. 1995). It is the Tribe's burden to demonstrate that the remedies available in the Court of Federal Claims are not adequate. *Consol. Edison Co. of N.Y. U.S., Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001). The Tribe cannot meet that burden here.

Indeed, the Tribe filed suit in the Court of Federal Claims (the "CFC Action") the day before it filed this action. *See* Amended Complaint, *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, No. 18-359 L (Fed. Cl. Feb. 26, 2019), ECF No. 18,

[21] The Indian Tucker Act, was intended to give a "tribal claimant [] the same access to the Court of Claims provided to individual claimants by [the Tucker Act, 28 U.S.C. § 1491], and the United States is entitled to the same defenses at law and in equity under both statutes." *U.S. v. Mitchell*, 445 U.S. 535, 540 (1980); *see also Mitchell II*, 463 U.S. at 212 n.8.

attached hereto as Exhibit E. The factual allegations in the CFC Action are substantially similar—and in many cases identical—to those in this case, all culminating in the theory that the United States has violated fiduciary, statutory, and contractual duties owed to the Tribe in its protection of the Tribe's water rights and resources. *See generally id*. The chief difference between the lawsuits is that the CFC Action seeks monetary damages for past harm, while this lawsuit seeks primarily prospective declaratory and injunctive relief.[22]

The Court of Federal Claims could provide an adequate remedy on the Tribe's breach of trust claims by granting retrospective monetary relief for the alleged breaches of fiduciary duty.[23] *See* 28 U.S.C. §§ 1491(a)(1), 1505; *Consol. Edison*, 247 F.3d at 1384–85. But the same is true for any prospective relief. Any determination in the Court of Federal Claims with respect to the United States' trust obligations will necessarily require that court to opine on the very declaratory questions of law that the Tribe has presented to this Court. If those questions were resolved (with finality) in the Tribe's favor, mutual collateral estoppel would resolve those questions going forward. *See Telecare Corp.*, 409 F.3d at 1350 ("[A]s final decision in [an Indian] Tucker Act case . . . will finally resolve the issue and as a practical matter make repeated suits unnecessary"). Because the Court of Federal Claims could provide the Tribe with an adequate remedy, the APA bars suit in this Court.

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[22] The Tribe states, however, in its prayer for relief in this case that it seeks "[m]onetary damages as permitted by law" (Compl., Prayer ¶ 23). Damages are, of course, not available in this Court for actions brought pursuant to the APA, which the Tribe relies upon here. *See* Compl. ¶ 20.

[23] The United States does not concede that the claims are viable under the Indian Tucker Act as presently pled because, among other reasons, the Tribe has not identified any money-mandating duties, *see Navajo II*, 556 U.S. at 302 (2009). The United States has moved to dismiss the Tribe's Amended Complaint in the CFC Action for this and numerous other deficiencies. But the fact that the Court of Federal Claims could provide an adequate remedy, for a properly pled claim, makes the APA's cause of action unavailable in district court.

That the Tribe styles this action as one seeking "nonmonetary" relief does not alter this conclusion. *See* Compl. ¶ 20. In considering this issue, this Court "must look beyond the form of the pleadings to the substance of the claim[s]." *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1124 (Fed. Cir. 2007); *see Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (stating that an "alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre'"); *Kidwell*, 56 F.3d at 284 ("[W]e look to the complaint's substance, not merely its form.").

> Where [, as here,] the equitable relief lacks considerable value independent of any future potential for monetary relief . . . , or when the equitable relief requested in the complaint is negligible in comparison with the potential monetary recovery, the complaint will be deemed one for damages.

Bublitz v. Brownlee, 309 F. Supp. 2d 1, 7 (D.D.C. 2004) (internal citations and quotation marks omitted).

Moreover, the Tribe cannot use any declaratory relief sought in this Court for a future case in the Court of Federal Claims. The Federal Circuit has expressly held that district courts do not have jurisdiction to entertain "predicate" lawsuits, *i.e.* lawsuits brought to establish rights for later money damages suits in the Court of Federal Claims. *See Christopher Vill. L.P. v. United States*, 360 F.3d 1319, 1329 (Fed. Cir. 2004).

Because the Tribe fails to identify an actionable trust duty, and, in any case, the Court of Federal Claims would provide an "adequate remedy" for any cognizable claim alleging a breach of any such duty, the Court should dismiss Claims 3, 5-7, and 9-11.[24]

[24] There is some disagreement in the D.C. Circuit as to whether dismissal is proper under Rule 12(b)(1) or Rule 12(b)(6). Courts in the D.C. Circuit have generally dismissed actions involving the Tucker Act under Rule 12(b)(1)—as jurisdictional—because Court of Claims jurisdiction is exclusive where the claims "explicitly or in essence seek money damages in excess of $10,000. . ." *Greenhill v. Spellings*, 482 F.3d 569, 573 (D.C. Cir. 2007); *see also Desert Sunlight 250, LLC*

IV. The Tribe Expressly Waived and Released Claims Relating to the Irrigation Project in the 2012 Settlement Agreement (Claims 3 and 11)

Claim 3 (alleging breach of trust relating to management of the Irrigation Project) and Claim 11 (alleging failure to provide an accounting) should be dismissed because they were expressly waived and released in the 2012 Settlement Agreement. A settlement, for enforcement purposes, has the same attributes as a contract. *Gonzalez v. Dep't of Labor*, 609 F.3d 451, 457 (D.C. Cir. 2010). Settlements to which the government is a party are interpreted according to federal law. *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986); *Keydata Corp. v. United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974). If the language of a settlement clearly bars future claims, the plain language governs. *Halldorson v. Sandi Grp.*, 934 F. Supp. 2d 147, 153 (D.D.C. 2013). Indeed, it is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. *See, e.g., Peckham v. United States*, 61 Fed. Cl. 102, 109 (2004). Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Any exclusions from a waiver or release must be clear, explicit, and "manifest" in the agreement itself. *United States v. William*

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v. Lew, 169 F. Supp. 3d 91, 98 (D.D.C. 2016). Nevertheless, in *Trudeau v. Federal Trade Commission*, the D.C. Circuit held that a district court had erred (albeit, harmlessly) in dismissing an action under 12(b)(1) where there was no "final agency action." 456 F.3d 178, 187 (D.C. Cir. 2006). According to *Trudeau*, section 702's waiver of sovereign immunity "is not limited to APA cases—and hence that [waiver] applies regardless of whether the elements of an APA cause of action [under section 704] are satisfied." *Id.* Thus, where a party fails to identify a final agency action, the claims fail for failure to state a claim rather than for want of jurisdiction. Whether this holding extends to cases where a party fails to meet 704's requirement that "no other adequate remedy" is available is not clear. In any event, the Tribe's breach of trust claims fail and must be dismissed.

Cramp & Sons Ship & Engine Bldg. Co., 206 U.S. 118, 128 (1907); *Merritt-Champman & Scott Corp. v. United States*, 458 F.2d 42, 44–45 (Ct. Cl. 1972) (en banc) (per curiam).

Here, in exchange for $125 million, the Tribe "waived and released any and all claims . . . known or unknown" based on harms or violations occurring before March 8, 2012 that relate to the United States' "management or accounting of [the Tribe]'s trust funds or . . . *non-monetary trust assets or resources*." Ex. D ¶ 4 (emphasis added) (Settlement Agreement). This waiver covers Claims 3 and 11.

With respect to Claim 3, the Tribe alleges that fiduciary duties attach to the United States' management of the Irrigation Project. Compl. ¶¶ 68, 75, 251. The United States disagrees with that legal conclusion. But, even if accepted as true, it would mean that any claim related to or arising from the United States' alleged mismanagement of the Irrigation Project—a non-monetary trust asset or resource—would be covered by the terms of the 2012 Settlement Agreement. Through Claim 3, the Tribe alleges that Federal Defendants breached their trust duties to the Tribe through carriage agreements and "informal operating procedures," and mismanaged, deferred maintenance, or otherwise failed to complete the Irrigation Project. *See* Compl. ¶¶ 87-96, 144-48, 250-54. These allegations are based on harms or violations occurring before March 8, 2012, and, thus, fall squarely within the Settlement Agreement's waiver and release. *See* Ex. D ¶ 4 (Settlement Agreement).

Claim 11, which seeks a historical accounting related to administration of the Irrigation Project, is likewise barred by the waiver and release provision. *See* Compl. ¶¶ 302-06. Paragraph 4 of the 2012 Settlement Agreement expressly waived and released historical claims relating to the United States' accounting of the Tribe's trust funds and non-monetary trust assets

or resources. *See* Ex. D ¶ 4 (Settlement Agreement). Claim 11 is not based on any events post-dating the Settlement Agreement, and thus, like Claim 3, falls squarely within that waiver.

Accordingly, the Court should dismiss Claims 3 and 11 pursuant to Rule 12(b)(6) for failure to state a claim, or, in the alternative, grant summary judgment to the Federal Defendants on both claims under Rule 56 because there is no material fact in dispute. *See* Exhibit I (statement of undisputed material facts).

V. The Tribe Expressly Waived and Released its Claims Arising under the Deferral Agreement in Section 507 of CUPCA (Claims 1, 2, 4-5)

Claims 1, 2, 4 and 5 fall under the scope of the waiver and release provision in Section 507 of CUPCA because they each relate to, and arise from, alleged breaches of the Deferral Agreement that pre-date the enactment of CUPCA (October 30, 1992). *See* Compl. ¶¶ 236-49, 255-71. Congress expressly provided in CUPCA that upon receipt of certain monies (defined in Sections 504-06), the Tribe would waive and release "any and all claims relating to its water rights" including the "right to develop lands" covered by the 1965 Deferral Agreement. *See* Pub. L. No. 102-575, §507(b), 106 Stat. at 4655. This Ute Indian Rights Settlement embodied in CUPCA and these statutorily-defined monies were intended to compensate the Tribe in lieu of performance of the Deferral Agreement. *Id*. at 4651-55; *accord Grey*, 21 Cl. Ct. at 298 (Salt River Water Rights Settlement Act extinguished claims against the United States for damages for deprivation of water rights through its implementation but Congress recognized a cause of action for claims arising out of the Settlement Act).

Judicially-noticeable documents demonstrate that the Tribe has received the CUPCA monies. In a 2006 lawsuit, the Tribe admitted that payment of the funds identified in Sections 504-506 had been made. *See* Ex. H ¶¶ 15-18, 36. The Tribe further acknowledged that these CUPCA payments were "designed to redress certain of the Tribe's claims arising from the failure

of the United States to construct specified water projects required by various agreements between the Tribe and the United States." *Id*. ¶ 15. This receipt of funds has triggered the statutory waiver defined in Section 507 of CUPCA. Thus, claims relating to or arising from the Deferral Agreement (Claims 1, 2, and 4-5) have been waived and released, and the Court should dismiss them pursuant to Rule 12(b)(6) for failure to state a claim.

VI. The Court Lacks Jurisdiction and the Tribe Fails to State a Claim for Relief Related to the Midview Exchange Agreement (Claim 8)

In Claim 8, the Tribe seeks either specific performance of the Midview Exchange Agreement or its invalidation. The Tribe alleges that under the Midview Exchange Agreement it was given beneficial ownership of the Midview Property and that Federal Defendants have "acted in a manner that is inconsistent with the Tribe's beneficial ownership of the Midview Property" by issuing a right-of-way without the Tribe's consent. Compl. ¶¶ 284-90. Specifically, the Tribe requests a decree requiring specific performance, including the transfer of the Midview Property into trust for the benefit of the Tribe, or, in the in alternative, a declaration from this Court that the Midview Exchange Agreement is invalid. *Id*. ¶¶ 289-90. The claim is not viable in this Court under either theory.

First, the plain language of the Midview Exchange Agreement does not authorize the Midview Property to be transferred to the Tribe. *See* Ex. B ¶¶ 6-8 (Midview Exchange). But, even if it had, there would be no claim against the United States under the Indian Non-Intercourse Act, which the Tribe relies upon here (Compl. ¶¶ 286, 290), for failing to do so. For purposes of this motion, the United States does not dispute the Tribe's assertion that "Indian Reserved Water Rights are appurtenant to Reservation Lands, and therefore fall within the purview of the Indian Non-Intercourse Act, 25 U.S.C. § 177." Compl. ¶¶ 287. The Tribe acknowledges, however, as it must, that the statute's purpose was "to prevent unfair, improvident

or improper disposition by Indians of lands owned or possessed by them to other parties, *except the United States*, without the consent of Congress." Compl. ¶ 286 (emphasis added) (internal quotation omitted). Any right-of-way or property transfer *by the United States* would not be prohibited by 25 U.S.C. § 177. The case the Tribe cites in Claim 8 recognizes this very principle. (Compl. ¶ 286) (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960)). "[T]here is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; 'nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State.'" *Id.* at 119; *see also Henkel v. United States*, 237 U.S. 43, 50-51 (1915) (Secretary within his authority to condemn the land).

In any event, a claim that 25 U.S.C. § 177 invalidated the Midview Agreement would have accrued decades ago when the Agreement was signed in 1967. 28 U.S.C. § 2401(a)("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"). The Tribe's attempt to invalidate that agreement over five decades later is clearly time barred.

Second, the Tribe's request for specific performance of the alleged contractual duty is beyond the scope of this Court's jurisdiction. The Tucker Act grants the Court of Federal Claims exclusive jurisdiction over contract-based claims.[25] 28 U.S.C. §§ 1346(a)(2), 1491(a); *see Bill Barrett Corp. v. U.S. Dep't of Interior*, 601 F. Supp. 2d 331, 336 (D.D.C. 2009) (citing *Amber Res. Co. v. United States*, 538 F.3d 1358, 1378 (Fed. Cir. 2008) (affirming Court of Federal Claims' jurisdiction over contract-based claims)). And the sole remedy for a breach of contract action against the federal government is money damages. *Sharp v. Weinberger*, 798 F.2d 1521,

[25] The Little Tucker Act grants concurrent jurisdiction in the district courts where a plaintiff seeks damages of no more than $10,000. 28 U.S.C. § 1346(a)(2).

1523 (D.C. Cir. 1986). Specific performance is not available. *Id*. at 1524 ("We know of no case in which a court has asserted jurisdiction either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligation . . . .").

Accordingly, the Court must dismiss Claim 8 for either failure to state a claim under Rule 12(b)(6) or lack of jurisdiction under Rule 12(b)(1).

VII. The Court Lacks Jurisdiction and the Tribe Fails to State a Claim for Relief Related to the Deferral Agreement (Claims 1, 2, and 4-5)

Claims 1, 2, and 4-5 are likewise contract-based claims over which this Court lacks jurisdiction. In Claim 1, the Tribe requests a declaration that the 1965 Deferral Agreement is a binding quantification of the Tribe's *Winters* reserved water rights and asks the Court to "estop" Federal Defendants from "repudiating their agreement." Compl. ¶ 243. In Claim 2, the Tribe alleges that Interior has failed to recognize the 1965 Deferral Agreement as a binding quantification of the Tribe's *Winters* reserved water rights and requests a declaration that the Tribe has administrative, regulatory, legislative, and adjudicatory jurisdiction, and the authority to encumber its *Winters* reserved water rights. *Id*. ¶ 249. Claim 4, which seeks an interpretation of CUPCA, is premised on the Tribe's contention that the Deferral Agreement remains a valid contract among the Federal Defendants, the Central Utah Water Conservancy District, and the Tribe and requests a declaration that the Deferral Agreement is a valid and binding agreement, or alternatively, a declaration that CUPCA's § 507 waiver is limited to "contract-based claims" arising from the Deferral Agreement. *Id*. ¶¶ 262-63. And Claim 5 alleges Federal Defendants have failed to "secure storage and related water works" that were recognized in the Deferral Agreement and requests a declaration that Federal Defendants have an ongoing statutory, contractual, and trust obligation to develop the full amount of the Tribe's *Winters* reserved water

rights. *Id.* ¶¶ 268-271. Each of these claims should be dismissed because the district courts do not have jurisdiction to issue declaratory relief in breach of contract cases against the United States and, in any event, the claims would fall outside the applicable six-year statute of limitations.

First, as discussed above, the Tucker Act grants the Court of Federal Claims (with the exception of cases seeking less than $10,000) exclusive jurisdiction over breach of contract claims against the federal government. 28 U.S.C. §§ 1346(a)(2), 1491(a); *see Bill Barrett Corp.*, 601 F. Supp. 2d at 336. The "sole remedy for an alleged breach of contract by the federal government is a claim for money damages"—declaratory relief in the federal district courts is not available. *Sharp*, 798 F.2d at 1523. Claims 1, 2, and 4-5 seek precisely the type of declaratory relief that is not permitted in the district courts. Compl. ¶¶ 243, 249, 263 271. For that reason, this Court lacks jurisdiction over these claims and must dismiss them.

Second, these claims are time-barred because the Complaint was filed decades after the statute of limitations expired. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Claims accrue as soon as a Plaintiff can "maintain a suit in court." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56-57 (D.C. Cir. 1987), *overruled on other grounds by*, *Jackson v. Modly*, 949 F.3d 763 (D.C. Cir. 2020), *petition for cert. docketed*, No. 20-19 (U.S. July. 14, 2020); *see also Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (en banc) (statutes of limitations accrue when plaintiffs "were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim"). Thus, claims under the Deferral Agreement accrued when the Tribe "knew or should have known" that provisions of the Deferral Agreement had not been, or would not be, met.

The Deferral Agreement was signed by the parties in 1965. *See* Ex. A. While it is true that some of the provisions of the Deferral Agreement were not met, these facts were known to the Tribe since the 1980s. *See* Compl. ¶ 161 (Deferral Agreement set a forty-year timeframe to complete Central Utah Project), ¶ 169 (1986 indefinite postponement to Upalco Unit); ¶ 176 (Ute Indian Unit "abandoned" in 1980 Bureau of Reclamation report). Moreover, CUPCA, enacted in 1992, by its express terms made clear that it, in conjunction with the 1990 Compact, was intended to "quantify the Tribe's reserved water rights" and "put the Tribe in the same economic position it would have enjoyed had the features contemplated by the [Deferral Agreement] been constructed." § 501(b)(1), (3), 106 Stat. at 4651. CUPCA was a congressionally-enacted compromise to settle claims under the Deferral Agreement—a fact that the Tribe's Chairman acknowledged during his testimony on the subject at a congressional hearing in 1988. *See* Ex. F at 214-15, 225 (Testimony of Luke Duncan). The Tribe cannot credibly claim it was unaware in the process of CUPCA's enactment in 1992 that certain provisions of the Deferral Agreement had not been implemented. Having knowledge of the material facts giving rise to claims under the Deferral Agreement at least as early as the1980s and at latest when CUPCA was enacted in 1992, claims arising from that agreement are now time-barred or waived pursuant to Section 507 of CUPCA, as described in Section V, *supra*.

While the Tribe alleges that the controversy surrounding the legal interpretation of the 1965 Deferral Agreement "did not arise until mid-2012, during the course of the Tribe's negotiations with the State and Federal Defendants," (Compl. ¶¶ 241-42), this allegation is belied by the substance of the claim itself and the remaining allegations in the Complaint. As shown above, CUPCA, by its clear terms, was intended to resolve and settle any remaining claims relating to or arising from the unfulfilled provisions of the Deferral Agreement. § 501, 106 Stat.

at 4650-51. To the extent the Tribe was dissatisfied with that statutory resolution, it should have brought its challenge within six-years following enactment of CUPCA in 1992. Its attempt to litigate this question now, nearly twenty-eight years later, is time barred.

Accordingly, the Court must dismiss Claims 1, 2, and 4-5, for either lack of jurisdiction under Rule 12(b)(1) or failure to state a claim under Rule 12(b)(6).

VIII. The Tribe Lacks Standing and Fails to State a Claim for Violation of its Constitutional Rights or the Civil Rights Act of 1964 (Claim 16)

Claim 16 should be dismissed because the Tribe lacks standing, as a sovereign government, to assert a violation of its members' constitutional rights, and fails to state a claim upon which relief could be granted. In addition, the Tribe may not rely on the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for this cause of action because that statutory provision does not create a private right of action against the United States or its agencies.

A. The Tribe Lacks Standing to Assert Equal Protection or Due Process Rights on Behalf of Its Members

The Tribe cannot base its claim on Federal Defendants' allegedly discriminatory practices violating the Constitutional rights of the "Tribe and its members" (Compl. ¶ 356) because the Tribe, as a group, is not protected by the U.S. Constitution's guarantees that the law will equally protect individuals. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (explaining that the Equal Protection clause "protect[s] *persons*, not *groups*"). The Tribe has not alleged that the United States discriminated against any individual tribal member. Rather, the Tribe claims, generally, that it and its members have suffered "economic harm and losses" due to the Federal Defendants' "discriminatory management of tribal waters" in violation of the "due process and equal protection guarantees of the Fifth Amendment to the U.S. Constitution." Compl. ¶¶ 356-58. The Tribe, however, lacks standing to assert a claim based on

the alleged disparate and discriminatory treatment of the Ute Tribe (as a group) or of its members (as individual persons).

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). One "irreducible constitutional minimum" element of standing is an injury-in-fact suffered by the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The injury must affect the plaintiff in a "personal and individual way." *Id*. at 560 n.1. The Tribe cannot assert any "personal and individual" injury to its equal protection or due process rights because, as a governmental entity, it has no equal protection rights. The Tribe is not an individual. As a sovereign government, it has no equal protection rights to assert separately from its members' rights. Therefore, the Tribe's equal protection claim fails insofar as it is brought on the Tribe's behalf.

The Tribe also cannot rely on the doctrine of *parens patriae* to litigate this claim on behalf of its members. *See* Compl. ¶ 7. Under that doctrine, a state may have standing to litigate quasi-sovereign interests "in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982). But the doctrine does not apply to claims against the United States. *See id*. at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)); *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179–80 (D.C. Cir. 2019); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986) (applying equally to tribes). In any event, the doctrine is reserved for situations in which a sovereign brings claims on behalf of *all* its citizens. *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001). Here, as the Tribe admits, the Irrigation Project was constructed to irrigate "the allotted lands" of the Ute Tribe's members. Compl. ¶ 37 (internal quotation

omitted). Rights and benefits related to irrigation attach to individual allotments. *See, e.g.*, *id.* ¶ 39. Thus, not all tribal members are similarly-situated and the Tribe could only be seeking to litigate the claims on behalf of those of its members who suffered economic loss or harm to their individual allotments. The Tribe would be litigating in place of its members as individuals, rather than *on behalf of* its members as the tribal public. That is not a claim in *parens patriae*. *See Alfred L. Snapp*, 458 U.S. at 600 (no *parens patriae* standing where the state is merely "stepping in to represent the interest of particular citizens"); *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990). And, even if it was, is not one that could be brought for a violation of those members' equal protection or due process rights, as explained above.

Because the Tribe lacks standing to assert a violation of its or its members' constitutional rights and cannot bring this claim under the *parens patriae* doctrine, the Court should dismiss Claim 16.

B. The Tribe Fails To State A Claim For Violation Of Its Constitutional Rights Or The Civil Rights Act Of 1964

Standing aside, the Tribe fails to state a claim upon which relief could be granted. To state a cognizable equal protection claim under the Fifth Amendment, a plaintiff must plead animus. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). "To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision." *Id.* (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)). Possible evidence includes disparate impact on a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body . . . ." *Arlington Heights*, 429 U.S. at 266–68. The Tribe has not alleged that Federal Defendants departed from "the normal procedural sequence" in managing water resources in Utah, nor has

the Tribe alleged that any federal officials made statements exhibiting a discriminatory purpose. *See* Compl. ¶¶ 346-59. While the Tribe alleges that Federal Defendants have managed water "in a discriminatory manner that benefits non-Indian water users in the State of Utah at the expense of the Tribe and its members," *id*. ¶ 351, and "acted with both a discriminatory purpose and a discriminatory effect," *id*. ¶ 356, the Tribe has not alleged that it has suffered a *disparate* impact, and has provided no factual allegations from which the Court could plausibly infer that members of the Tribe have suffered disparate impacts as a result of the federal government's actions.

Even if the Tribe had plausibly alleged animus, its Equal Protection claim would still fail because, as a matter of law, the type of discrimination alleged by the Tribe is not racial discrimination. "An injured plaintiff has standing to raise an equal protection claim when the state imposes 'unequal treatment' on the basis of a protected characteristic, such as race." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45 (2d Cir. 2017), *as amended* (Aug. 2, 2017) (citing *Heckler v. Mathews*, 465 U.S. 728, 738 (1984)). But tribal membership is a political, not a racial, classification. *See Narragansett Indian Tribe v. Nat. Indian Gaming Comm'n*, 158 F.3d 1335, 1340-41 (D.C. Cir. 1998); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("[T]he recognition of Indian tribes remains a political, rather than racial determination."); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). And political classifications, as a matter of law, are not afforded the same protections under the Fifth Amendment. *See, e.g., United States v. Shavanaux*, 647 F.3d 993, 1001-02 (10th Cir. 2011) (explaining that "'Indian' is not a racial classification, but a political one," and thus subject to rational basis review).

While the Tribe attempts to frame some of its allegations in racial terms, *see, e.g.*, Compl. ¶¶ 351, 356 (alleging the U.S. has diverted water away from the Tribe in favor of the "non-

Indian white-majority population of Utah"), this framing further underscores the flaws in its claim. The Tribe does not have standing to assert a discrimination claim on behalf of all non-white or Indian water users in Utah. The Tribe itself could only be relevant to a discrimination claim to the extent it represents individual members who have allegedly been treated disparately on account of their Tribal affiliation. Therefore, the Tribe could only be alleging discrimination on that basis, which, is political, not racial.

Finally, to the extent the Tribe relies on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, it fails to state a claim upon which relief could be granted. This provision states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The statutory definition of "program or activity" in Title VI, however, "excludes federal agencies, and therefore it is well-recognized that Title VI does not reach "the operations of the federal government and its agencies." *Estate of Boyland v. Young*, 242 F. Supp. 3d 24, 28 (D.D.C. 2017) (internal quotation omitted), *aff'd sub nom. Estate of Boyland v. United States Dep't of Agric.*, 913 F.3d 117 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 947 (2020); *see also DynaLantic Corp. v. U.S. Dep't of Def.* 885 F.Supp.2d 237, 291 (D.D.C. 2012). The Tribe cannot bring a claim against the United States or any of its agencies pursuant to this statutory provision.

CONCLUSION

Claims 1-11 should be dismissed because the Tribe has not identified a cognizable cause of action. In any event, each of those claims could be dismissed for one of several other jurisdictional or cause of action-related reasons. And Claim 16 should be dismissed because the

Tribe lacks standing and has failed to state a claim upon which relief could be granted. The United States respectfully requests that the Court grant its motion.

Dated: July 16, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2020, I filed the foregoing Motion for Partial Dismissal and Memorandum in Support electronically through the Court's CM/ECF system, which caused notice to be sent to the parties of record.

/s/ Sally J. Sullivan

SALLY J. SULLIVAN