The Honorable Edward F. Shea

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

DONNELLY R. VILLEGAS, Plaintiff, v. **UNITED STATES OF AMERICA, et al.,** Defendants.	No. 2:12-cv-00001-EFS **FEDERAL DEFENDANTS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS**

Defendants, Department of the Interior ("DOI), Bureau of Indian Affairs ("BIA"); Bureau of Land Management ("BLM"); Bureau of Safety and Environmental Enforcement ("BSEE"); Office of Natural Resources Revenue ("ONRR"); Environmental Protection Agency ("EPA"); Lisa P. Jackson, EPA Administrator, in her official capacity; Stan Speaks, BIA Regional Director,

Northwest Regional Office, in his official capacity; Kenneth L. Salazar, Secretary of the Interior, in his official capacity; Robert Abbey, Director, BLM, in his official capacity; and James Watson, Director, BSEE, in his official capacity, (hereinafter, "Federal Defendants")[1] hereby submit this Memorandum of Authorities in support of their Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7).

I. STATEMENT OF FACTS

Plaintiff, Donnelly R. Villegas brings suit for declaratory and injunctive relief against Federal Defendants arising out of events concerning an allotment ("Allotment 156") in which he shares an interest with his sister, Ortencia Ford, and the Spokane Tribe of Indians. Compl., ¶ 42. Allotment 156 is located within the Spokane Indian Reservation in Stevens County, State of Washington. Compl., ¶ 1. Plaintiff generally alleges that Federal Defendants committed an unconstitutional "taking of valuable minerals, other resources, and rights in [the allotment]" (Compl., ¶ 4), and have failed to consult him regarding actions taken on the land, impairing his interests (*Id*.). *See, e.g.*, Comp., ¶ 22 (heirs were not consulted), ¶ 34 (failed to provide Plaintiff with accounts and records), ¶ 49 (failed to account for uranium stockpiles), ¶ 69 (falsely represented actions).

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[1] Federal Defendants note that they are currently working on a joint motion with Plaintiff to dismiss, correct, and substitute some of the named Federal Defendants.

A. The Midnite Mine and Allotment 156.

In 1954, Spokane Tribal members discovered uranium on the Spokane Reservation on what would become the Midnite Mine site. *See* Consent Decree ("CD"), Appendix A, Record of Decision ("ROD") entered in *United States v. Newmont USA Ltd.*, No. CV-05-0202-JLQ, ECF No. 553-A at 76.[2] Title to the majority of the mine site is held by the United States in trust for the use and benefit of the Spokane Tribe. *Id*. An adjoining 120 acre parcel of land, which eventually became part of the Midnite Mine site, consists of allotted Reservation land, Plaintiff's allotment. *See* Findings of Fact and Conclusions of Law ("FOF") entered in *United States v. Newmont USA Ltd.*, No. CV-05-0202-JLQ, ECF No. 514 at 8.[3]

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[2] A more full and complete discussion of the history of the Midnite Mine is provided in the Record of Decision and the Findings of Fact, which are available from the Court's docket, as cited above. Due to their length, 249 and 101 pages respectively, they have not been attached. If requested, however, Federal Defendants will provide copies to the Court and all parties.

[3] Plaintiff has alleged that fee title to Allotment 156 was never issued to Edward Boyd in "direct breach of the statement issuing the Allotment." Compl., ¶ 74. Executive Order 6939 –Extension of Trust Period on Allotments Made to Indians of the Spokane Reservation and 25 C.F.R. Subchapter O-Miscellaneous, Appendix to Chapter 1-Extension of the Trust or Restricted Status of Certain Lands,

In late 1955, assessments of Allotment 156 indicated that it might contain uranium deposits. *Id*. On April 26, 1955, the heirs of Robert Boyd requested that the Department of the Interior ("Interior") advertise Allotment 156 for lease to the highest and best bidder. Declaration of Donna Smith ("Smith Dec."), Ex. A. In 1956, the BIA informed Dawn Mining Company ("Dawn") that the allotment was available. FOF at 17. On February 14, 1956, the Superintendent of the Colville Agency wrote to Sadie Boyd informing her of receipt of a telegram from the Secretary of the Interior stating that the lease for the Allotment would not be negotiated or granted on a negotiated basis but would only be approved on the basis of competitive bids received in response to public advertising. Smith Dec., Ex. A. On March 30 and April 4, Ms. Boyd acknowledged receipt of the Secretary's letter and requested that the Superintendent advertise the Allotment for sale to the highest bidder. *Id*. In June, after an advertised sale, the BIA consented (on behalf of the heirs to the original grantee of the allotment) to a mining lease, lease No. 14-20-0503-824 ("Mining Lease"), with Dawn for mining on the allotment. FOF at 17; Compl., ¶¶ 32-35. In 1959, Plaintiff's mother created a trust for him to manage the proceeds of any mining leases on his behalf. Smith Dec., Ex. B.

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however, indefinitely extended the time period of trust on allotments made to Indians of the Spokane Reservation.

Over the years, subsequent leases were entered into with Dawn for the Midnite Mine site. On March 1, 1976, Plaintiff entered into a royalty agreement with Dawn for a ten year period on the Mining Lease, from October 1, 1974 through September 30, 1984. Smith Dec., Ex. F; *see also* Declaration of Jody H. Schwarz ("Schwarz Dec."), ¶ 3, Ex. B (Written Testimony of Donna Smith filed in *United States v. Newmont USA Ltd.*, No. CV-05-020-JLQ (E.D. Wash. May 23, 2008) ECF No. 413 at 9-13 (discussing history of the negotiation of the 1976 leases). On June 15, 1977, the parties entered into an addendum to the royalty agreement with respect to division of pollution related costs. Smith Dec., Ex. F. Mining occurred from 1955-1964 and 1969-1981.

Plaintiff was informed of BIA's intention to terminate lease rights in 1981 and given an opportunity to respond. *See* Schwarz Dec., Ex. B at 13-15 (discussing the history of the mining suspension and Tribe and allotment owners participation). Plaintiff responded and raised concerns about responsibility for remediating the site and further noted that he was investigating his rights regarding rentals and royalty payments. Smith Dec., Ex. K. Operations ceased on November 6, 1981, and no mining has occurred at the site, including on Allotment 156, since then. FOF at 25-36; Compl., ¶¶ 41, 69. In 1995, BIA determined that Dawn was not obligated to continue making rental payments on the Midnite Mine leases

because of the termination of its mining rights and loss of production royalties. Smith Dec., Ex. J. Plaintiff and his sister were both cc'd on the decision letter. *Id*.

B. Specific Agreements and Disputes Concerning Interests in Allotment 156.

On June 15, 1962, Plaintiff entered into an agreement with the Spokane Tribe to establish the boundary lines at the Midnite Mine site between the Tribal property and Allotment 156. Smith Dec., Ex. C. The agreement established the boundary between the properties for the purpose of dividing all mining royalties and other income, but only for the division of mining royalties and other payments resulting from the current and any future leases with Dawn. The agreement automatically terminated upon the conclusion and final termination of said leases. *Id*.

On May 4, 1973, the Interior Office of Hearings and Appeals entered an order approving compromise concerning the will contest of Richard Edward Boyd between Boyd's heirs and the Spokane Tribe in which attorney William Sharpe represented Plaintiff. Smith Dec., Ex. F. The order approved the award of numerous fractional allotments to Plaintiff and his sister in equal shares and also Edward Boyd's undivided half interest in Allotment 156. The agreement awarded Plaintiff, his sister, and Sadie Boyd one half of the royalties that had accrued to Richard Boyd's estate since his death and one half of future royalties on the mining lease until the expiration of said lease on September 30, 1974, together with one

half of the royalties from stockpiled ore in existence on said date (September 30, 1974) provided, however, that the amount to be paid would not exceed $550,000. *Id*. All future royalties for Plaintiff were to be paid to Mr. Sharpe, with 15% of royalties up to September 30, 1974, paid to Mr. Sharpe for lawyer's fees.

In 1976, Plaintiff was paid the balance due of mining royalties collected under the Mining Lease, through his attorney, in accordance with the 1973 Order Approving Compromise. Smith Dec., Ex. D; *see also* Schwarz Dec., Ex. B at 15-17 (discussion of how royalty payments were made to Tribe and allotment owners). The voucher of payment noted that it "constitute[ed] payment in full to the $550,000.00 limitations imposed under Will Compromise Agreement in Estate of Richard Boyd . . . dated May 4, 1973." *Id*. (emphasis in original). This payment was determined from an audit by BIA of Dawn's production records. Smith Dec., Ex. H. The Superintendent sent correspondence to Plaintiff's sister on December 20, 1976, outlining the steps taken to determine the royalty payment and further provided for the right to appeal the decision to the Area Director. Smith Dec., Ex. E. *Id*.

In 1989, Plaintiff and his sister requested verification of ore produced from their lease and the existing ore/protore stockpiled and further requested information on whether any ore had been removed from the mine in an unauthorized manner since 1981. Smith Dec., Ex. K. The BIA investigated this

request and determined that ore had not been removed from the site. Smith Dec., Ex. G. Plaintiff's wife and sister were cc'd on BIA's correspondence. *Id*.

On December 14, 1990, Plaintiff's sister wrote to the BIA stating her concerns with the division of Allotment 156 and her and Plaintiff's receipt of royalties. Smith Dec., Ex. M. The BIA again investigated these concerns regarding payment and splits of mining royalties and held a meeting with several BIA officials and Plaintiff's sister and wife on December 17, 1990. Smith Dec., Ex. L.

In December 1990, Plaintiff's wife and sister wrote to Senator Adams requesting that he investigate their claims that money was due to Plaintiff and his sister for rental and royalty payments for Allotment 156. Smith Dec., Ex. I. Senator Adams forwarded their correspondence to the BIA in February 1991. *Id*. The BIA responded to Senator Adam's request and answered the questions raised in his letter. *Id*. The BIA described Plaintiff and his sister's ownership interests and explained that a recent transfer to the Spokane Tribe in the approximate amount of $80,000 represented royalties to which Plaintiff and his sister did not have an interest. *Id*. The BIA stated that it regularly audited the mine production and accounted for all royalty income received. It also stated that there had not been any sales of stockpiled ore since 1982 and was unaware of any amounts that

would be attributable to a sale after that time. *Id*. The BIA offered to work with Plaintiff and his sister to resolve any unanswered questions. *Id*.

C. Remediation Efforts for Midnite Mine and Notice and Community Involvement.

In July of 1998, EPA sought support to list the Mine on the Superfund National Priorities List of sites eligible for cleanup funds ("NPL"). FOF at 69. As part of this process, in 1999, EPA conducted a Remedial Investigation and Feasibility Study ("RI/FS") to determine the nature and extent of the contamination and develop and evaluate the remedial alternatives. FOF at 73; *see also* Declaration of Ellen Hale ("Hale Dec.") at ¶¶ 4-5. In order to complete the process, EPA obtained consent from the allotment owners to access the property and on September 21, 1999, EPA obtained Plaintiff's consent when he signed a Consent for Access to Property form. Hale Dec., ¶ 6, Ex. A. The form notified Plaintiff that EPA sought to enter the allotment pursuant to its CERCLA responsibilities. *Id*.

In May of 2000, Midnite Mine was listed on the NPL. ROD at 78. In conducting its RI/FS to select a remedy, EPA provided public notice and solicited public comments on proposed remedial alternatives. *Id*. at 79. EPA maintained its own mailing list and also received from the Spokane Tribe mailing labels with the addresses for Tribal enrollees, which it referenced to mail hard copies of notices and comments. Hale Dec., ¶ ¶ 7-8, Ex. B. Plaintiff is listed on EPA's list and, as a

Tribal enrollee, would be included in the mailing labels forwarded by the Tribe. *Id*. EPA also developed a comprehensive Community Plan, which detailed all the steps EPA took and would continue to take to keep the public informed, including holding community meetings on the reservation, creating an information depository, holding workshops, and maintaining a website, www.epa.gov/r10earth. ROD at 79; Hale Dec., ¶¶ 8-10, 12, Exs. C and E; Schwarz Dec., Ex. B.

In February of 2004, the EPA engaged the Technical Outreach Services for Native American Communities ("TOSNAC") program through Kansas State University, which provides technical assistance to Native Americans dealing with hazardous substance issues. Schwarz Dec., Ex. B. Through the program, TOSNAC assisted the EPA in outreach to the Spokane Tribe, conducted meetings and site visits, and technical outreach concerning the proposed clean-up plan. *Id*. Meetings with the Spokane Community were conducted on the resetvation in 2004-2006. *Id*. The community involvement plan (CIP), periodically updated, identified ways to reach out to the public. *Id*.; *see also* ROD at 79; Hale Dec., ¶ 12, Ex. E. Written site updates were issued at least annually (twice yearly for the first several years), and public meetings occurred with a similar frequency. Meetings were held in Wellpinit, a community on the Spokane Reservation where most of the tribal government and federal agency offices, as well as schools and services, are located. Schwarz Dec., Ex. B; *see also* Hale Dec. at ¶8-10.

Furthermore, hard copies of documents are available to the public, both at EPA and the Spokane Tribe. *Id*.

EPA provided information for inclusion in the Rawhide Press, a monthly publication of the Spokane Tribe. Hale Dec., ¶ 8, 11, Ex. D; ROD at 79. To raise community awareness of Midnite Mine activities, EPA staff often combined trips to the reservation with visits to classrooms and meetings with community members and groups interested in the Site. EPA staff also presented information at several meetings of the Sovereignty Health Air Water Land (SHAWL) Society and Community Uranium/Radiation Education (CURE) community groups. ROD at 79.

EPA issued the Proposed Plan on October 5, 2005. Hale Dec., ¶ 9, Exs. C and D. On this date, a complete copy of the Administrative Record was placed in the information repository at the Spokane Tribal College and Community Library on the Spokane Reservation in Wellpinit. *Id*., ¶¶ 9-10; ROD at 79. A copy was available at the Superfund Records Center in the EPA Region 10 office in Seattle. ROD at 79.

EPA provided an initial 30-day comment period on the Proposed Plan. *Id*. EPA then extended the comment period by 30 days, to December 7, 2005. On November 2, 2005, several individuals and groups requested additional time for

comment, and EPA further extended the comment period to January 18, 2006. *Id*. Including extensions, the public comment period totaled 105 days.

Public meetings related to the Proposed Plan were held on October 19, 2005, November 2, 2005, and January 18, 2006. *Id*. At the first meeting, EPA presented the Proposed Plan and informally answered community questions. The latter two meetings were formal hearings, with comments recorded by a court reporter for consideration by EPA. All of the alternatives considered by the EPA required removing and covering waste rock, treating contaminated water at the site, restricting access to covered waste areas and pits, preventing exposure to contaminated water, and maintaining a presence to monitor the clean-up. Hale Dec., Ex. C.

D. Plaintiff's Specific Claims Regarding Allotment 156.

Plaintiff asserts five claims for relief against Federal Defendants relating to his interest in the Allotment: (1) an unconstitutional taking under the Fifth Amendment (Compl., ¶¶ 72-83); (2) breach of contract and fiduciary duty (Compl., ¶¶ 84-88); (3) fraud, constructive fraud, and breach of fiduciary duty and contract (Compl., ¶¶ 89-94); (4) breach of fiduciary duty (Compl., ¶¶ 95-109); (5) trespass, continuing trespass, trespass to chattels, and breach of contract and fiduciary duties

(Compl., ¶¶110-112); (7)[4] tortuous damage to the environment (Compl., ¶¶ 113-114); and (8) violation of the Administrative Procedure Act (Compl., ¶¶ 115-117).[5]

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[4] There is no count 6; the complaint proceeds from count 5 to 7.

[5] Plaintiff is a class member of a certified class pending in the United States District Court for the District of Columbia, *Cobell v. Salazar*, No. 96-cv-1285 (amended Dec. 21, 2010), and the United States Court of Appeals for the District of Columbia, Nos. 11-5205 and 11-5229 (collectively "*Cobell* Litigation"). In the *Cobell* Litigation, Plaintiff, as an individual Indian with an interest in allotted trust land, alleges, among other things, that the United States, as trustee to individual Indians, breached its fiduciary duties to Plaintiff by mismanaging non-monetary trust assets, including mineral resources, and funds held in IIM accounts. On July 27, 2011, the District Court entered its order granting final approval of a settlement of the lawsuit. *Cobell*, ECF Dkt. No. 3850. As part of the Settlement Agreement, Plaintiff agreed to release "any and all claims and/or causes of action that were, or should have been, asserted in the Amended Complaint." *Id*., ¶ 10. Notices of appeal of the District Court's final approval of the settlement were filed on August 6 and September 1, 2011. *Cobell*, ECF Dkt. Nos. 3863 and 3854. Those appeals have been docketed with the United States Court of Appeals for the District of Columbia. The *Cobell* Litigation remains unresolved because of the pending appeals of the final order approving the settlement and the releases contained in the settlement agreement remain inchoate. Federal Defendants note that the resolution of this matter will present a substantial defense on the merits that is not addressed in the motion to dismiss.

The Court must dismiss Plaintiff's claims against federal defendants for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), for failure to join a party pursuant to Fed. R. Civ. P. 12(b)(7), or for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

II. STANDARDS OF REVIEW FOR A MOTION TO DISMISS

1. F. R. Civ. P. 12(b)(1).

Pursuant to Fed. R. Civ. P. 12(b)(1), a complaint, or any claims therein, may be dismissed for lack of subject matter jurisdiction. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may . . . attack[] the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When considering a motion that challenges the existence of jurisdiction in fact, no presumption of truthfulness attaches to the plaintiff's allegations. *Id*. Jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). A party invoking federal jurisdiction, once challenged, has the burden of proving its existence. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court is not limited to allegations in the complaint, but may consider materials outside the pleadings. *Assoc. of American Medical Colleges v. United States*, 217 F.3d 770, 778 (9th Cir.

2000). Review of such extrinsic evidence does not convert the motion to dismiss into a motion for summary judgment. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (citing, inter alia, *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983)).

2. Fed. R. Civ. P. 12(b)(6).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is a challenge to the sufficiency of the pleadings set forth in the complaint. A Rule 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although the court must accept plaintiff's allegations of fact as true, it is not required to accept as correct the legal conclusions the plaintiffs would draw from such facts. "Legal conclusions . . .," "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "'naked assertion[s]' devoid of further factual enhancement.'" do not suffice to state a cause of action and must be disregarded. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). Claims should be dismissed under Rule 12(b)(6) where "it appears beyond doubt that the plaintiff can provide no set of facts in support of his legal claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

3. Fed. R. Civ. P. 12(b)(7).

Fed. R. Civ. P. 12(b)(7) provides for dismissal for failure to join a party under Rule 19. In deciding a motion to dismiss for failure to join a party required by Rule 19, the court may consider material outside the pleadings. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960).

III. ARGUMENT

A. Plaintiff's Action Is Barred because the United States has not Waived its Sovereign Immunity.

"It is elementary that the United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court defined that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 548, 586 (1941) (internal quotations, alterations, and omissions removed)). Waivers of sovereign immunity must be "unequivocally expressed in the statutory text . . . strictly construed in favor of the United States . . . not enlarged beyond what the language of the statute requires." *United States v. Idaho*, 508 U.S. 1, 6-7 (1993) (internal quotations and citations omitted); *see also Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). A suit against a federal agency, which seeks relief against the sovereign is, in effect, a suit against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88 (1949). Accordingly, the principles of sovereign immunity apply to that agency. *Id.*; *see*

Beller v. Middendorf, 632 F.2d 788, 796-98 (9th Cir.1980), *cert. denied*, 452 U.S. 905 (1981).

The burden is on the plaintiff to find and prove an explicit waiver of sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007); *see also McNutt v. General Motor Acceptance Corp. of Indiana*, 298 U.S. 178, 188-89 (1936) (holding that because the plaintiff is the party seeking relief, that "it follows that he must carry throughout the litigation the burden of showing that he is properly in court."). This bar is jurisdictional—unless a statutory waiver exists, the district court lacks jurisdiction to properly entertain a suit against the United States or its agencies. *Sherwood*, 312 U.S. at 586. Plaintiff does not identify an unequivocal waiver of immunity in his Complaint. Instead, he identifies several bases for the Court's jurisdiction, which are discussed below.

1. Reliance on General Jurisdictional Provisions Contained in 28 U.S.C. §§ 1331, 1332, 2201-2202; and 25 U.S.C. § 345 Is Insufficient Because the Provisions Do Not Constitute Waivers of Sovereign Immunity.

Plaintiff cites to 28 U.S.C. § 1331, the general federal question statute, as basis for federal jurisdiction. However, it is well settled that while that section affords a grant of jurisdiction to the district courts for matters raising federal questions, it does not, itself, constitute a waiver of federal sovereign immunity. The United States and its agencies must consent to be sued, and section 1331 is not a general waiver of sovereign immunity. *Dunn & Black, P.S.*, 492 F.3d at 1088

(Section 1331 does not provide a waiver of sovereign immunity). Plaintiff cannot rely on section 1331 as a jurisdictional basis unless another statute provides an applicable waiver of sovereign immunity.

Plaintiff next asserts jurisdiction under section 1332, which confers upon the federal district courts original jurisdiction where the matter in controversy exceeds $50,000, and where complete diversity of citizenship exists. This statute neither confers upon the Court jurisdiction of a dispute between Plaintiff and an agency or entity of the United States, *see Greenwich v. Mobil Oil Corp.*, 504 F. Supp. 1275, 1278 (D.N.J. 1981); *Jizmerjian v. Department of Air Force*, 457 F. Supp. 820, 822 (D.S.C. 1978), *aff'd without op.*, 607 F.2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), nor does it state an unequivocal waiver of the sovereign immunity of the United States. *See McMillian v. Dep't of the Interior*, 907 F. Supp. 322, 326 (D. Nev. 1995).

Plaintiff also alleges jurisdiction pursuant to 25 U.S.C. § 345. Section 345 provides in part that "persons who are . . . entitled to an allotment of [Indian] land under any law of Congress . . . may commence . . . [an] action, suit, or proceeding . . . in the proper district court." The district courts "are given jurisdiction" and "the United States [shall be] party defendant." 25 U.S.C. § 345.

As interpreted by the Supreme Court, section 345 performs two functions. First, it confers jurisdiction to the district courts over two types of cases: those

"seeking the issuance of an allotment" and those "involving the interests and rights of the Indian in his allotment . . . after he has acquired it." *Jachetta v. United States*, 653 F.3d 898, 906 (9th Cir. 2011) (quoting *United States v. Mottaz*, 476 U.S. 834, 845 (1986) (internal quotation marks omitted). And, second, it "waives the Government's immunity [but] only with respect to the former class of cases: those seeking an original allotment." *Jachetta*, 653 F.3d at 906 (quoting *Mottaz*, 476 U.S. at 845–46); *see also Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184, 187 (9th Cir.1988) ("In *Mottaz*, the Supreme Court made clear that section 345 waives the government's immunity only with regard to . . . cases seeking an original allotment, and not those involving the interests and rights in an allotment after it has been acquired."). Here, Plaintiff already has an allotment and has filed suit regarding his interests and rights in that allotment. *See* Compl., ¶ 1. Accordingly, Plaintiff's action cannot be an "action[ ] for [an] allotment[ ]" and section 345 cannot waive Federal Defendants' sovereign immunity. *Jachetta*, 653 F.3d at 906 (quoting *Mottaz*, 476 U.S. at 846) (internal quotation marks omitted).

To the extent Plaintiff asserts a waiver of sovereign immunity pursuant to 28 U.S.C. §§ 2201-2202, the Declaratory Judgment Act, that statute does not constitute a waiver of sovereign immunity. *Delano Farms Co. v. Cal. Table Grape Comm'n*, No. 1:07-CV-1610, 2010 WL 2952358, at * 4 (E.D. Cal., July 26, 2010); *accord United States v. King*, 395 U.S. 1, 4-5 (1969); *Morongo Band of Mission*

Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1382-83 (9th Cir. 1988) (finding that Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction, but does not constitute independent basis for jurisdiction).

The only statute Plaintiff alleges that may possibly serve as a waiver of Federal Defendants' sovereign immunity is the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See* Compl., ¶¶ 115-117. Thus, for this action to proceed, Plaintiff must meet the jurisdictional requirements of the APA. The APA waives sovereign immunity for suits seeking relief other than money damages from federal agencies. *See* 5 U.S.C. § 702. However, the APA's waiver of sovereign immunity contains several limitations. *Id.*, *Gallo Cattle Co. v. United States Dep't of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998).

2. The APA does not Serve as a Waiver of Sovereign Immunity.

The APA provides a limited waiver of sovereign immunity that "permits a citizen suit against an agency when an individual has suffered 'a legal wrong because of agency action' or has been 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Rattlesnake Coalition v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting 5 U.S.C. § 702). Section 701(a) of the APA provides that review is not available where "(1) statutes preclude judicial review; or (2) agency action is committed to agency

discretion by law." 5 U.S.C. § 701. A similar restriction appears in section 702 which denies review "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

Section 704 further limits review to only those instances when agency action is "made reviewable by statute" or when it constitutes "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Gallo Cattle*, 159 F.3d at 1198. No other statute provides for judicial review of the agency action at issue. Accordingly, the "action" challenged by Plaintiff is reviewable under the APA only if it constitutes "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704.

An agency action is "final" when (1) the agency reaches the "consummation" of its decision-making process and (2) the action determines the "rights and obligations" of the parties or is one from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Absent "agency action" within the meaning of the APA, the action is not reviewable. And Section 704 specifies that agency action is not final for purposes of Section 704 if the agency "requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. In other words, agency action is not final for purposes of Section 704 until "an aggrieved party has

exhausted all administrative remedies expressly prescribed by statute or agency rule." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

a. Plaintiff Fails to Plead a Claim under the APA.

Plaintiff's claims concerning alleged violations of the APA are threadbare recitals of the elements of a cause of action and legal conclusions that do not suffice to state a cause of action. *See Iqbal*, 129 S. Ct. at 1949. Plaintiff alleges that Federal Defendants "fail[ed] to meaningfully consult with Plaintiff . . . throughout much of the life of Plaintiff's interest in the Allotment" and have "violated numerous laws, regulations, and nondiscretionary mandates, . . . and the federal common law." Compl., ¶ 116. Plaintiff then baldly asserts that "[t]hese acts and/or omissions resulted in numerous arbitrary and capricious decisions . . . in violation of 5 U.S.C. § 706," without providing any further information on what those actions, omissions, and decisions were. Compl., ¶ 117.

Judicial review under the APA is expressly conditioned on the existence of a final agency action, if no other statute provides for this review. *See Gallo Cattle*, 159 F.3d at 1198. Plaintiff, however, fails to identify the particular final agency action taken that he challenges. Based on the Complaint's allegations, Federal Defendants do not know if the actions taken were final agency actions that marked the consummation of the agency's decision-making and whether it was one from

which legal consequences would flow. Therefore, Plaintiff fails to state a claim under the APA.

b. Plaintiff Failed to Exhaust Administrative Remedies.

Plaintiff's claims are based upon Federal Defendants' alleged actions spanning a period of time from as early as 1939 to the present, which include, in part, approving lease without allottees' permission (Compl., ¶ 36), moving boundary markers (Compl., ¶¶ 40, 78), failure to insure Plaintiff received full royalties (Compl., ¶¶ 43, 48, 63, 101), failure to provide an accounting or audit (Compl., ¶¶ 50, 65, 76), failure to collect under current leases (Compl., ¶¶ 59-60, 112), and breaching contracts and fiduciary duties (Compl., ¶¶ 87-8891,99). Here, despite having knowledge at least as early as 1989 that Plaintiff believed there were issues with Allotment 156 and his share of royalties and accounting, Plaintiff never pursued any administrative remedies with the Interior Department. Interior provided Plaintiff and his sister with notice of their administrative appeal rights under 43 C.F.R. §§ 4.310-4.340. *See* Smith Dec., Ex. E (notifying of right to appeal determination of division of royalties).

The doctrine of exhaustion of administrative remedies prevents a party from seeking judicial review of either agency action or inaction prior to having fully pursued all administrative remedies. "Under the doctrine of exhaustion of administrative remedies, 'no one is entitled to judicial relief for a supposed or

threatened injury until the prescribed administrative remedy has been exhausted.'" *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)) (additional citation omitted). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required." *Id*. (citing *White Mountain Apache Tribe v. Hodel*, 840 F. 2d 675, 677 (9th Cir. 1988)). "Without an exhaustion requirement, people would be encouraged to ignore the administrative dispute resolution structure, destroying its utility." *Fort Berthold Land and Livestock Ass'n v. Anderson*, 361 F. Supp. 2d 1045, 1051 (D.N.D. 2005) (citing *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984)).

At no time has Plaintiff ever attempted to appeal any of his claims administratively, and the APA therefore prevents this Court from reviewing Plaintiff's claims. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, suit filed before exhausting available administrative remedies is premature and should be dismissed); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) ("On three occasions, we have upheld the dismissal of lawsuits challenging BIA decisions under the [APA] on the ground that the plaintiff failed to take the required administrative appeal. In doing so, we have noted the jurisdictional nature of the administrative appeal requirement.") (citations omitted).

c. Plaintiff Brought his Suit outside the Limitations Period.

Another constraint on the APA's waiver of sovereign immunity is the statute of limitations. Section 706 of the APA does not contain a statute of limitations. Instead, the general six-year statute of limitations found in 28 U.S.C. § 2401(a) applies. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010). Section 2401(a) provides, in part, that "every 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." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130,132-36 (2008); *Spannaus v. United States Dep't of Justice*, 643 F. Supp. 698, 700 (D.D.C. 1983), *aff'd*, 824 F.2d 52 (D.C. Cir. 1987) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)) ("Unlike general statutes of limitations, . . . section 2401(a) is not merely a procedural requirement; it is a condition attached to the sovereign's consent and, like all waivers of sovereign immunity must be strictly construed"); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) ("The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction"); *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1237 (E.D. Wash. 2010) (citing *United States v. Williams*, 514 U.S. 527 (1995); *Gandy Nursery, Inc. v. United States*, 318 F.3d 631 (5th Cir. 2003)); *Dunn-McCampbell Royalty Interest, Inc. v.*

Nat'l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997)). "Failure to sue the United States within the limitations period is not merely a waiveable defense. It operates to deprive federal courts of jurisdiction." *Dunn-McCampbell Royalty Interest, Inc.*, 112 F.3d at 1287.[6] Furthermore, "[e]xceptions to the limitations and conditions upon which the government consents to be sued are not to be implied." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (citing *Soriano*, 352 U.S. at 276). Thus, the APA's limited waiver of sovereign immunity, combined with the statute of limitations in § 2401(a), created a period of six years, starting from the date Plaintiff's cause of action first accrued, in which Plaintiff could file a complaint.

In deciding an issue of dismissal on the grounds of statute of limitations, the proper focus is on "first accrual." Accordingly, the relevant question is when the

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[6] *But see Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770-71 (9th Cir. 1997), wherein the Ninth Circuit held pre-*John R. Sand and Gravel*, that section 2401's six-year statute of limitations "erects only a procedural bar . . . [but] is not jurisdictional." *Contra W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 142 (D. D.C. 2008) (2401(a) and 2501 must be construed similarly after *John R. Sand and Gravel*, and are jurisdictional); *Georgalis v. United States Patent and Trademark Office*, 296 Fed. Appx. 14, 16 (Fed. Cir. 2008) (same). Nevertheless, whether jurisdictional or not, here, section 2401(a)'s statute of limitations is a complete bar to Plaintiff's Complaint.

events entitling the claimant to bring suit alleging the breach first transpired. "A cause of action accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy*, 688 F. Supp. 2d at 1233 (citing *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)).

A plaintiff need not have actual knowledge of the events fixing liability for a claim to accrue. *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, ---F.3d---, 2012 WL 34382, *8 (Fed. Cir. 2012); *see Shiny Rock Mining Corp.*, 906 F.2d at 1364. In *Shiny Rock*, the Ninth Circuit held that the statute of limitations period began once the plaintiff had constructive notice, specifically, after the agency published notice in the Federal Register preventing mining on the land at issue. A plaintiff is not entitled to sit on his rights and challenge alleged wrongful actions that took place over six years ago. *See Brown v. United States*, 195 F.3d 1334, 1338 (Fed. Cir. 1999) (court found that claim concerning leases was barred because at least one of the allottees, though not a party to the suit, discovered the claim and court saw no reason why his diligence should not be imputed to the other plaintiffs).

As to Plaintiff's allegations concerning the current remediation of Midnite Mine and the associated activities on Allotment 156, Plaintiff had more than adequate notice that remedial action was going to occur that would affect his

allotment and any interest he had in any ore stockpiles. As early as 1998 EPA conducted a site assessment and took samples on Plaintiff's property, obtaining his consent. *See* Hale Dec., Ex. A. EPA held numerous meetings and in May 2000, EPA added the Midnite Mine to the NPL under CERCLA. 60 F.R. 30482. EPA then prepared its RI/FS and provided public notice of it, and accepted public comments on the proposed remedial alternatives, all of which Plaintiff either received or of which he should have been on notice. EPA identified their preferred remedy for the site and laid out alternatives, all of which—aside from the "no action alternative—involved some degree of remedial action on Plaintiff's allotment. Throughout this process, Plaintiff should have received notice from EPA through his inclusion on two separate mailing lists for Midnite Mine-related notices, published notices in the Spokane Tribe's official newspaper, The Rawhide, the availability of the tribal Superfund Coordinator, and general community knowledge and involvement as provided in notices, reservation meetings, and information repository. *See* Hale Dec., ¶¶ 6-14, Exs. A-E.

Likewise, Plaintiff was on notice of his allegations concerning royalties, lease income, and general accounting of money and ore stockpiles more than six years prior to filing this suit. As detailed above, Plaintiff and his sister contacted the BIA on several occasions, expressing their concerns that they were not receiving adequate royalties or lease income, that their ore was being blended, and

requesting an accounting. *See Supra* Sec. I.B. The BIA timely responded to these concerns and fully investigated the allegations. In 1989, Plaintiff was provided notice through his attorney of BIA's intent to terminate Dawn's mining lease and provided an opportunity to respond. Plaintiff and his sister responded with concerns that Dawn would not assume responsibility for remediation and that they, as landowners, could be responsible for reclamation. Smith Dec., Ex. K. Further, Plaintiff and his sister stated that they were in the process of pursing a claim against Dawn for rental of the property during clean-up and were in the process of investigating their rights regarding back rentals, annual rentals, and royalty payments. *Id*. In 1990, the BIA held a meeting with Plaintiff's sister and his wife to address their concerns and problems with payments and the status of the Midnite Mine site. Smith Dec., Ex. L. The BIA also provided its investigation of Plaintiff's claims in response to a letter received from Plaintiff's Senator. The BIA addressed Plaintiff's claims and again stated that there had not been any sale of stockpiled ore since 1982. Smith Dec., Ex. I.

Applying section 2401(a), it is clear that Plaintiff's claims for relief exceed the six-year statute of limitations applicable to Plaintiff's claims. Plaintiff was on notice as early as 1989 of his claims concerning management of his funds and allotment and as early as 1998 of any action to remediate the Midnite Mine site.

Because he did not file this action in a timely manner, his claims are time barred and must be dismissed.

3. There Exists an Adequate Remedy in the CFC Pursuant to the Tucker Act.

Another important limitation on the United States' waiver of sovereign immunity is for claims for which an adequate remedy is available elsewhere—such claims are explicitly excluded from the APA's waiver. 5 U.S.C. § 704 (waiving sovereign immunity for "final agency action for which there is *no other adequate remedy* in a court....") (emphasis added). Section 704 thus makes clear that where agency action is otherwise reviewable in a court and an adequate remedy is available in conjunction with that review, the APA's waiver of sovereign immunity under Section 702 is not available. *See Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir.1994); *Mitchell v. United States*, 930 F.2d 893, 895-96 (Fed. Cir. 1991); *Consolidated Edison Co.*, 247 F.3d at 1382-1385.

a. Breach of Trust and Takings Claims

An adequate remedy for breach of trust and takings claims exists under the Tucker Act. The Tucker Act—the statutory mechanism for pursuing damages against the United States—provides the United States' consent to suit for damages claims founded "either upon the Constitution, or any Act of Congress, or any regulation of an executive department" that creates substantive rights to money damages. 28 U.S.C. §§ 1346(a)(2) and 1491. Under the Tucker Act, the Court of

Federal Claims possesses the authority to entertain equitable claims as long as the relief sought is "incident of and collateral to" a proper claim for money judgment before the Court. *See James v. Caldera*, 159 F.3d 573, 580 (Fed.Cir.1998) (1991) (citing 28 U.S.C. § 1491(a)(2)); *Mitchell*, 463 U.S. at 218, n. 15. The Tucker Act remedy for compensation is generally available unless Congress has explicitly precluded its application. A statute must "reflect an unambiguous intention to withdraw the Tucker Act remedy" before the courts will hold that it has done so. *Ruckelshaus*, 467 U.S. at 1019. No such intent is evident here.

While the Plaintiff claims to seek declaratory and injunctive relief, it is clear that the ultimate relief he seeks is damages.[7] In any event, "the availability of the Tucker Act guarantees an adequate remedy at law for any taking . . ." *Rail Reorganization Act Cases*, 419 U.S. 102, 149 (1974). Indeed, Plaintiff pursues those damages in the Court of Federal Claims, where Plaintiff has filed a nearly identical suit. *See, e.g.*, *McKeel*, 722 F.2d at 590 ("The only value to appellants of the declaratory judgment they seek would be to have it serve as res judicata in the Claims Court [where they could obtain money damages]."). Therefore because

[7] Plaintiff directly alleges in the complaint, for instance, that "[a]s a result of these breaches of trust and fiduciary duties, Plaintiff has been denied at least $500,000.00 in royalties and other funds, very likely more." Compl., ¶ 108.

this is ultimately a suit for money damages, the Tucker Act provides an "adequate remedy" and thus deprives this court of jurisdiction under the APA.

An analogous case is *Enos v. U.S.*, 672 F. Supp. 1391 (D. Wyo. 1987). In *Enos*, Indians brought suit alleging that they had not been paid royalties, and seeking injunctive and declaratory relief. The court held "the Claims Court's exclusive jurisdiction cannot be avoided by framing a complaint in the district court as one seeking injunctive, mandatory, or declaratory relief when the essential purpose of the complaining party is to obtain money from the federal government."

The rule that a litigant cannot properly invoke the APA by framing a claim for money damages as one requesting a form of equitable relief has been echoed by the Ninth Circuit and many other circuits. *See Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir.1990) ("A party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of $10,000"); *Consol. Edison Co. v. United States*, 247 F.3d 1378, 1385 (Fed. Cir.) (en banc), *cert. denied*, 534 U.S. 1054 (2001); *see also Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *Western Shoshone Nat'l Council v. United States*, 357 F.Supp.2d 172, 175-76 (D. D.C. 2004), *aff'd*, 279 Fed. App'x. 980 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1098 (2009); *Kanemoto v. Reno*, 41 F.3d

641, 646 (Fed. Cir. 1994) ("[R]elief available for [the plaintiff's] claims in the Court of Federal Claims is 'adequate' ... [and the plaintiff] cannot escape this conclusion merely by framing her claim for relief in declaratory or injunctive terms....").

b. Breach of Contract Claims.

Likewise, the United States has not waived sovereign immunity from suits seeking equitable relief based on a breach of contract. The Tucker Act gives the Court of Federal Claims jurisdiction over "any claim against the United States founded ... upon any express or implied contract with the United States," 28 U.S.C. § 1491(a)(1); it exercises this jurisdiction concurrently with the district courts for actions claiming less than $10,000. 28 U.S.C. § 1346(a)(2).

The Act is more than just a grant of jurisdiction over government contract claims; it is also a limited waiver of sovereign immunity and a limitation on the remedies available in actions on government contracts. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir.1982). The Tucker Act has been construed as permitting the Claims Court to grant money damages against the government in contract actions but not injunctive or declaratory relief. *United States v. King*, 395 U.S. 1 (1969) (Court of Claims may not grant declaratory relief); *United States v. Jones*, 131 U.S. 1 (1889) (Court of Claims may not grant

equitable relief). These restrictions on the relief that the Court of Federal Claims may grant also limit the relief that the district courts may grant when exercising their concurrent Tucker Act jurisdiction under 28 U.S.C. § 1346(a)(2). *Richardson v. Morris*, 409 U.S. 464 (1973). Thus the Tucker Act "impliedly forbids" declaratory and injunctive relief and precludes a section 702 waiver of sovereign immunity in suits on government contracts. In fact, the legislative history of section 702 specifically mentions the Tucker Act as a statute that "impliedly forbids" relief within the meaning of section 702. *North Side Lumber*, 753 F.2d at 1485 (quoting H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13, reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6133).

c. This Court Lacks Subject Matter Jurisdiction Over an "Unconstitutional Taking" Claim Because Compensation Is Available in the Court Of Claims and Thus No Unconstitutional Taking Can Occur.

Plaintiff's first claim seeks equitable relief for an alleged taking. *See* Compl., ¶¶ 72-83. However, because compensation is available in the Court of Federal Claims, no unconstitutional taking has yet occurred and therefore this Court lacks jurisdiction.

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This clause is not an absolute bar on taking private property, rather it mandates that if private property is taken for public use, compensation must be provided, or the taking is

unconstitutional. Congress has provided a means for individuals to seek just compensation: The Tucker Act, which authorizes "a suit for compensation ... subsequent to the taking" in the United States Court of Federal Claims. 28 U.S.C. §§ 1346, 1491. The Tucker Act remedy for compensation is generally available unless Congress has explicitly precluded its application, and there is no indication that is the case. Indeed, Plaintiff has filed a nearly identical complaint in the CFC. *See Villegas v. United States*, Case No. 1:11-cv-00903-LJB (filed Dec. 27, 2011).

The Ninth Circuit observed that: "[t]he simple fact is that we have no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred." *Bay View Inc. v. AHTNA, Inc.*, 105 F.3d 1281, 1285 (9th Cir.1997) (internal alteration and quotation marks omitted). Therefore the Tucker Act is "an impediment to equitable relief .... Because a compensation remedy is available, any taking that may have occurred simply cannot violate the takings clause." *Id*. at 1286. *See also In re National Sec. Agency Telecommunications Records Litigation*, No. 09–17133, --- F.3d ----, 2011 WL 6825051 at *2-3 (9th Cir. Dec. 29, 2011) (collecting cases, noting agreement in various Circuits on this point).

B. This Court Lacks Jurisdiction Regarding Plaintiff's Request for Injunctive Relief as to Plaintiff's Alleged Uranium Rights under CERCLA's Pre-Enforcement Review Provision.

In the absence of a valid APA claim, this Court lacks subject matter jurisdiction regarding Plaintiff's request to preliminarily and permanently enjoin Federal Defendants from "further damaging, devaluing, and interfering with Plaintiff's uranium, and rights therein" (Compl., Prayer for Relief),because such relief challenges remedial action under CERCLA. Section 104 of CERCLA authorizes the President, in response to a release or threatened release of a hazardous substance, to "remove [the substance] or ... provide for remedial action ... or take any other response measure consistent with the national contingency plan ["NCP"] ... to protect the public health or welfare or the environment."[8] 42 U.S.C. § 9604(a)(1). CERCLA responses can be "removal" or "remedial" actions. *See* 42 U.S.C. § 9601(25); *see also* 40 C.F.R. § 300.5. "Removal actions are typically described as time-sensitive responses to public health threats for which the [overseeing agency] is granted considerable leeway in structuring the cleanup." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1227-28 (9th Cir. 2005). "Remedial actions, on the other hand, are often described as permanent remedies to

[8] In Executive Orders 12,580 and 12,777, the President delegated most functions and responsibilities to the EPA that were vested in him by CERCLA. *See* 40 C.F.R. § 300.100.

threats for which an urgent response is not warranted." *Id.* at 1228 (internal footnote omitted).

Section 113(h) of CERCLA provides that "[n]o Federal court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action selected under section [104 of CERCLA]." 42 U.S.C. § 9613(h) (The statute lists five exceptions to the jurisdictional bar, none of which is relevant here. 42 U.S.C. § 9613(h)). Section 113(h) provides "a blunt withdrawal of federal jurisdiction." *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011); *Washington Environmental Council v. Mount Baker-Snoqualmie Nat. Forest*, 2009 WL 1543452 at *3-*4 (W.D. Wa 2009) (quoting *North Shore Gas Co. v. E.P.A* ., 930 F.2d 1239, 1244 (7th Cir. 1991)). Section 113(h) applies to "any challenge," whether the challenge is brought under CERCLA or not. *See McClellan Ecological Seepage Situation v. Perry ("MESS"*), 47 F.3d 325, 328 (9th Cir. 1995)).[9]

[9] Thus the limits proscribed by section 113(h) apply notwithstanding Plaintiff's allegation that jurisdiction over this claim is based on 28 U.S.C. §§ 1331-2, 28 U.S.C. §§2201-2. *Fairchild*, 984 F.2d at 288 (holding that the "pre-enforcement review provision governs all actions arising out of CERCLA"); *MESS*,47 F.3d at 328 (enforcing the section 113(h) bar against claims alleged under various statutes

Courts lack jurisdiction to hear a case if it "challenges" a remedial or removal action that the EPA has "selected" pursuant to section 104. *See Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir.1995). When deciding whether a lawsuit constitutes a "challenge" to a cleanup, the Ninth Circuit has framed the test broadly, asking only whether the lawsuit is "related to the goals of the cleanup." *Razore*, 66 F.3d at 239. Even "injunctive relief that 'for all practical purposes, seeks to *improve* on [a] CERCLA cleanup ... qualifies as a "challenge" to the cleanup.'" *Hanford Downwinders Coal. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995) (*quoting MESS*, 47 F.3d at 330) (emphasis added).

In this case, Plaintiff's request for injunctive relief is based on a challenge to a removal or remediation action at the Midnite Mine site. This Court has approved a consent decree among the United States and mining companies (Dawn and Newmont USA Limited ("Newmont")) related to remedial action at the site. *See* Consent Decree entered in *United States v. Newmont USA Ltd.*, No. CV-05-0202-JLQ, Dkt. No. 553 (Jan. 17, 2012). Pursuant to this Consent Decree, remediation of the site includes, *inter alia*, making existing mining pits suitable for disposal of ore stockpiles and then backfilling ore into them. *Id*. at pp. 2-92 to 2-115.

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other than CERCLA).

Plaintiff seeks injunctive relief including enjoining "all Defendants from further damaging, devaluing, and interfering with Plaintiff's uranium and rights therein" and "from any acts or omissions that affect [his] rights to Allotted properties without first initiating meaningful, informed, and prior consultation." Compl., Prayer for Relief ¶ A. Plaintiff's request for an injunction constitutes a "challenge" to the clean up. It is therefore barred by the pre-enforcement review provision in CERCLA § 113(h), and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

C. To the Extent Plaintiff Asserts a Tort Claim, this Court Lacks Jurisdiction to Hear Such a Claim.

Because Plaintiff failed to exhaust his administrative remedies under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2679 *et seq.*, this Court must dismiss any of Plaintiff's claims sounding in tort. *See United States v. Smith*, 499 U.S. 160, 166 (1991) (FTCA's administrative-exhaustion requirement is jurisdictional).

The FTCA provides the exclusive remedy for any action sounding in tort based on actions committed by a federal official while acting within the scope of his or her office or employment. § 2679(b)(1); *Rasul v. Myers*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009). Although Plaintiff does not expressly invoke the FTCA, he asserts claims for trespass, Compl., ¶¶ 110-112, and also that through Federal

Defendants' "tortious conduct, Plaintiff has suffered damage to his interest in the Allotment related to the environment… ." Compl., ¶ 114.

Plaintiffs' tort claims are barred by § 2675(a) of the FTCA. Section 2675(a) imposes upon claimants an absolute bar to bringing suit in federal court until they have exhausted their administrative remedies. *McNeil v. United States*, 508 U.S. 106, 113 (1993). This administrative-exhaustion requirement applies "even when the FTCA itself precludes Government liability." *United States v. Smith*, 499 U.S. 160, 166 (1991)). As a prerequisite to their suit, Plaintiff had to—but did not—file an administrative claim with the Department of the Interior. *See* Declaration of James L. Weiner. Further, because the claims accrued more than two years before this suit was filed, they are also barred by the FTCA's statute of limitations. 28 U.S.C.§ 2401(b) (claims barred unless "presented in writing to the appropriate federal agency within two years after such claim accrues."). Accordingly, this Court must dismiss any of Plaintiff's Causes of Action that sound in tort for lack of subject matter jurisdiction. *See United States v. Smith*, 499 U.S. 160, 166 (1991).

D. In the Absence of a Valid and Exhausted APA Claim, Any Declaratory or Injunctive Relief must be Denied for Failure to Join the Spokane Tribe, an Indispensable Party.

In the absence of a valid APA claim, fully exhausted through the administrative process, dismissal is appropriate under Fed. R. Civ. P. 19. Plaintiff seeks to challenge remedial actions that affect his interest in his allotment at Midnite

Mine. However, Plaintiff is not alone in his interest in this allotment—the Spokane Tribe has an undivided ½ interest in it as well. *See* Compl., ¶ 42. Plaintiff's request for injunctive relief as to the stockpiled ore and any rights therein concerning Allotment 156 would affect the Tribe's interest in this allotment; therefore, absent a showing that the Tribe has waived its sovereign immunity from this suit and therefore can be joined as a party defendant, this action as it concerns Plaintiff's request for relief must be dismissed pursuant to Fed. R. Civ. P. 12(b)(7), which provides for dismissal for failure to join a party under Rule 19.

The Federal Rules of Civil Procedure provide that a party "shall" be joined if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest." Fed. R. Civ. P. 19(a)(B). If such a person "cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. P. 19(b).

1. Rule 19(a): "Persons Required to be Joined if Feasible"

The first step in the analysis is to determine whether the nonparty tribe meets the criteria in Rule 19(a) for persons who must be joined if feasible. If the Rule 19(a) criteria are met, and the tribe cannot be joined because it enjoys sovereign immunity from suit, it is necessary to examine whether the case should be dismissed

under Rule 19(b).

a. Rule 19(a)(1)(B): Whether the Tribe has an Interest Relating to the Subject of the Action and is so Situated that the Tribe's Absence from the Case may, as a Practical Matter, Impair or Impede the Tribe's Ability to Protect that Interest.

Rule 19(1)(B) has two parts: whether the nonparty tribe has an "interest" in the litigation; and whether the tribe's ability to protect that interest will as a practical matter be impaired or impeded by its absence from the proceeding.

Courts have construed the "interest" requirement fairly broadly to cover any "significantly protectable" or "legally protectable" interest in the subject of the litigation. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Nonparty tribes can claim a sufficient interest under Rule 19(1)(B) in a wide range of circumstances, including cases where the litigation may result in an adjudication of the nonparty tribe's property or contract rights, or where the tribe is itself a party to a relevant commercial agreement, lease, trust or treaty with one of the parties to the suit. *See, e.g., Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) (Hopi Tribe had interest in litigation challenging the terms of lease agreements between the Tribe and Navajo individuals).

Here, the Tribe has an undivided ½ interest in the allotment at issue—this represents an "interest" in litigation over the allotment almost as a purely definitional matter. *See, e.g., Pit River Home and Ag. Coop. Assoc. v. United States*,

30 F.3d 1088, 1099 (9th Cir. 1994) (Non-party Indian tribe and beneficial owner of property at the center plaintiff's claims, "clearly has a legal interest in the litigation, which could be impaired by the disposition of this action without its presence."). Consequently, the Tribe has a clear interest in this litigation, satisfying the requirement of Rule 19(a)(1)(B).

The second part of the inquiry considers the absent tribe's ability to protect its interest. Plaintiff requests an injunction that would prevent Federal Defendants from "damaging," "devaluing," or otherwise "interfering with" uranium located at the mine site. *See* Compl. at ¶ 67 and Section XIV, ¶ ¶ A & C. Plaintiff does not purport to act in any official capacity as officers of the Tribe and no officer of the Tribe has appeared in this action to protect its interests. The Tribe's interest in furthering the remediation of the mine, as evidenced by its support of the consent decree, would be impaired by the granting of relief in this case. *See* Consent Decree.

b. Rule 19(b): "Determination by Court whenever Joinder not Feasible."

If a nonparty tribe meets the criteria in Rule 19(a), the next step is to analyze whether it may be joined as a party. *Pit River*, 30 F.3d at 1099. Where the "necessary" party is a tribe, the threshold inquiry is whether the tribe enjoys sovereign immunity from suit. Absent an unequivocal waiver of immunity, tribes

are not subject to state or federal court jurisdiction.[10] *Pan Am. Co. v. Sycuan Tribe of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989).

Plaintiff has not alleged that the Tribe has waived its sovereign immunity from suit. Therefore, if this Court were to find that the Tribe is an indispensable party because it has an interest in the litigation (its right to control its interest in the allotment) and because its ability to protect that interest will be impaired by its absence from the litigation, dismissal is appropriate. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) (where plaintiffs did not contend tribe waived sovereign immunity, dismissal follows if court determines tribe is indispensable party).

Where joinder is impossible because a tribe enjoys sovereign immunity from suit, the Rule 19(b) analysis next considers "whether, in equity and good conscience, the action should proceed among the existing parties [before the Court] or should be

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[10] All federally recognized tribes enjoy sovereign immunity from suit. *Pit River*, 30 F.3d at 1100. In 2010, the BIA published its list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs." 75 Fed. Reg. 60,810-01 (Oct. 1, 2010). The Tribe, listed under its full, formal name, "Spokane Tribe of the Spokane Reservation, Washington" is included.

dismissed." Fed. R. Civ. P. 19(b). The factors that the court must consider include: (1) the extent to which a judgment might prejudice either the absentee or the parties; (2) the extent to which such prejudice might be lessened or avoided, for example, by the careful shaping of relief; (3) whether a judgment entered in the person's absence would be adequate; and (4) whether the plaintiff would have another adequate remedy if the action were dismissed. *See* Fed. R. Civ. P. 19(b). In cases where a nonparty tribe meets the Rule 19(a) criteria, the courts generally have concluded that the equities weigh in favor of dismissal under Rule 19(b) rather than proceeding in the tribe's absence.[11]

The first factor, prejudice to the absent party, "largely duplicates the consideration that made a party necessary under Rule 19(a)." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002). As discussed above, the tribe will suffer prejudice if Plaintiff is successful in obtaining injunctive relief halting the remediation of the site and otherwise affecting the Tribe's interest in its allotment. Such prejudice weighs overwhelmingly in favor of a dismissal. *See*

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[11] *See, e.g.*, *Clinton*, 180 F.3d at 1081; *Kescoli*, 101 F.3d at 1304; *Quileute Indian Tribe*, 18 F.3d at 1456; *Pit River*, 30 F.3d at 1088; *Shermoen*, 982 F.2d at 1312; *Confederated Tribes of Chehalis*, 928 F.2d at 1498 (9th Cir. 1991); *Fluent*, 928 F.2d at 546; *Makah Indian Tribe*, 910 F.2d at 555.

Confederated Tribes of Chehalis, 928 F.2d at 1498-99.

Consideration of the second and third factors (shaping of relief or adequate remedy/judgment) yields a similarly negative result for Plaintiff. Plaintiff seeks to stop Federal Defendants from "damaging," "devaluing," or otherwise "interfering with" uranium located at the mine site. *See* Compl. at ¶ 67 and Section XIV, ¶ ¶ A & C. It is hard to imagine a way in which this Court could shape any relief granted in response to the Plaintiff's prayer in a way which would not prejudice both the Federal Defendants' ability to perform their statutory duties to remediate the site, as well as the Tribe's right to determine what occurs on its property.

Finally, this Court should consider whether Plaintiff will not have an adequate remedy if the action is dismissed for nonjoinder. Because the Tribe enjoys sovereign immunity, Plaintiff has no alternative forum where he can seek injunctive relief against Federal Defendants under the circumstances alleged in the Complaint. The lack of an alternative forum, however, does not prevent this Court from finding that the Tribe is an indispensable party and dismissing this case. The Ninth Circuit has routinely held that the tribal interest in maintaining its sovereign immunity outweighs a plaintiff's interest in litigating its claim. *Am.Greyhound*, 305 F.3d at 1025; *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002); *Pit River*, 30 F.3d at 1088. Given the arguments set forth above, this Court should conclude, as the court in *Pit River* did, that "[a]lthough the [plaintiff] does not have an

alternative forum in which it may seek injunctive and declaratory relief against the government, we dismiss the [plaintiff's] claims with prejudice, since the [tribe] is an indispensable party under Rule 19(b)." *Pit River*, 30 F.3d at 1103.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court dismiss all of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(b)(7).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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