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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

Federal Defendants hereby submit their Reply in Support of their Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7).

I. Introduction.

Plaintiff cannot evade dismissal of his complaint by ignoring the claims he has pled and seek instead to assert new ones in his opposition. Plaintiff filed a

complaint seeking injunctive and declaratory relief to enjoin Federal Defendants "from further damaging, devaluing, and interfering with Plaintiff's uranium and rights therein." (ECF No. 1 at XIV.A.). But in his response he alleges that Federal Defendants "have breached a fiduciary duty to account for funds and assets held in trust" and seeks "sufficient information" in the form of an accounting. *See* ECF No. 118, pp. 1-3, 55. These new accounting claims are not properly before the Court. However, even if they were—like the claims initially pled in the complaint—they must be dismissed.

Plaintiff's claims originally pled in his complaint fail because he has not demonstrated an applicable waiver of sovereign immunity. Plaintiff asserts a claim for judicial review under the APA and also seeks injunctive and declaratory relief. But he has failed both to exhaust administrative remedies as required by the APA and to bring his claims within the limitations period. Moreover, the property at issue is currently subject to a provision of the CERCLA that explicitly withdraws federal jurisdiction from cases that would interfere with CERCLA remediation. Further, in the absence of an exhausted APA claim within the jurisdiction of the Court, a third party, the Spokane Tribe, is an indispensable party that cannot be joined.

Plaintiff's newly asserted accounting claims and requests also fail. Plaintiff's initial complaint asked this Court to review Federal Defendants' alleged failure to

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protect his interests in uranium ore stockpiles at the Midnite Mine CERCLA site by enjoining the removal or movement of the stockpiled ore and preventing Federal Defendants from any acts that would affect Plaintiff's rights in the allotment and ore stockpiles. ECF No. 1 at XIV. A. and C. Plaintiff now requests an accounting as well, a request absent from his initial complaint. ECF No. 118 at 1-3, 55. For this reason, he cannot use his response brief to now amend his complaint and assert such a claim. But to the extent Plaintiff's complaint can be read as seeking an accounting, Plaintiff is a party to a settlement agreement that has resolved this claim. That settlement agreement is pending final approval on August 20, 2012, at which point Plaintiff's request in this Court will be barred by the doctrine of res judicata. Therefore, Plaintiff can plead no claim in this Court and, for all these reasons, Plaintiff's complaint must be dismissed.

II. Plaintiff still fails to show subject matter jurisdiction.

A. Plaintiff still cannot demonstrate a valid waiver of sovereign immunity.

In his Response, Plaintiff still fails to demonstrate a valid waiver of the United States' sovereign immunity. It is "axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *U.S. v. Mitchell,* 463 U.S. 206, 212 & n.9 (1983) (citing *U.S. v. Sherwood,* 312 U.S. 584, 586 (1941)). Consent to suit must be "'unequivocally expressed' in the statutory text" and strictly construed in favor of the government.

Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Plaintiff has not met his "'burden of pointing to . . . an unequivocal waiver of [sovereign] immunity.'" *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992) (quoting *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984)). For that reason alone, his complaint must be dismissed.

Plaintiff asserts three waivers of sovereign immunity here. First, he argues that the United States has waived its sovereign immunity "under APA Section 702 for 'judicial review of federal agency action' taken in violation of 5 U.S.C. § 706"; second he argues the United States has waived sovereign immunity under Section 702 for "nonmonetary relief from . . . violations of federal law;" and finally Plaintiff argues "Federal Defendants have no sovereign immunity from the Plaintiff's claims brought under the Mandamus Act." ECF No. 118 at 12. Because the Mandamus Act does not provide a waiver of sovereign immunity, and the APA provides a limited waiver not properly invoked in this case, Federal Defendants have not waived sovereign immunity and this case must be dismissed.

1. The Mandamus Act does not provide a waiver of sovereign immunity.

First, while the Mandamus Act may confer a basis of jurisdiction, this is distinct from a waiver of sovereign immunity—which the Mandamus Act does not

provide.[1] *See White v. Admn'r of Gen. Serv. Admin. of United States*, 343 F.2d 444, 447 (9th Cir. 1965); *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999); *Smith v. Grimm*, 534 F.2d 1346, 1353 n.9 (9th Cir. 1976). The APA does contain a waiver of the United States' sovereign immunity, but this waiver is limited, and though Plaintiff's view of the broad waiver of sovereign immunity has been adopted in some cases, it is typically limited to Constitutional claims or claims

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[1] Even if the Mandamus Act did provide a waiver of sovereign immunity, the availability of mandamus is limited, and it is not available here. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 392 (2004) (Stevens, J., concurring). "Mandamus is an extraordinary remedy and is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003) (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998)). By Plaintiff's own claims, a remedy is alleged to exist; and this remedy was utilized in the settlement of Plaintiff's claims in *Cobell v. Salazar*, No. 96-cv-1285 (D.D.C. amended Dec. 21, 2010), *see* supra V. (discussing *Cobell*). Plaintiff's other claims could be remedied through an appeal to the Agency.

meeting the very restrictive criteria for remedying ultra vires actions, unlike those brought here.

2. The APA provides no waiver of sovereign immunity for Plaintiff's claims.

Plaintiff asserts two separate waivers of sovereign immunity under the APA. First, he asserts that APA section 702 waives the United States' sovereign immunity for review of final agency action under section 706. ECF No. 118 at 12. But such a waiver only exists where plaintiffs can show an administratively exhausted, final agency action as defined by the APA. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Because Plaintiff has failed to administratively exhaust his claims, this waiver does not apply. But Plaintiff also asserts that section 702 provides an independent waiver of sovereign immunity for his statutory and common law claims. Binding Ninth Circuit precedent holds that it does not, however, and the single case finding otherwise was limited to an extraordinary Constitutional claim not present here. For these reasons, as elaborated below, no waiver of sovereign immunity and therefore no subject matter jurisdiction exists and Plaintiff's claims must be dismissed.

a. Plaintiff has failed to show an administratively exhausted, final agency action sufficient to invoke the APA's waiver of sovereign immunity.

Plaintiff brings some claims under the APA, and relies on the waiver of sovereign immunity therein. Plaintiff acknowledges this waiver is limited: APA

section 704 limits the scope of section 706 review only to "person[s] suffering legal wrong because of" a "final agency action for which there is no other adequate remedy in a court . . . ." ECF No. 118 at 17. One important precondition for finality is administrative exhaustion. Because Plaintiff's claims have not been administratively exhausted, they are not "final" as defined by the APA and therefore are not amenable to review.

APA section 704 specifies that agency action is not final 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 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). Accordingly, the BIA action (and inaction) challenged by Plaintiff is reviewable under the APA only if it constitutes *exhausted* final agency action for which there is no other adequate remedy in court. 5 U.S.C. § 704.

BIA regulations provide that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704." 25 C.F.R. § 2.6(a); *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (E.D. Cal. 2010) ("Before Plaintiffs can challenge BIA decisions in federal court, 'BIA regulations require the exhaustion of

administrative remedies.'") (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988)). Plaintiff wholly fails to come to grips with this binding Ninth Circuit authority, relying instead on unreported Oklahoma and D.C. district court cases on a matter, a request for an accounting, not even at issue in Plaintiff's complaint. ECF No. 118 at 49-50 (citing *Tonkawa Tribe of Indians of Okla. v. Kempthorne*, No. 06-1385, 2009 WL 742896 (W.D. Okla. Mar. 17, 2009) and *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130 (D.D.C. 2007)). Nowhere has Plaintiff shown he complied with the mandatory regulations seeking a final decision on claims of BIA mismanagement. No attempt is even made to distinguish *White Mountain Apache Tribe*. *See* ECF No. 62 at 24.

Specifically, part 2 of Title 25 of the code of Federal Regulations contains the administrative appeal procedures regarding decision of BIA officials. *See* 25 C.F.R. § 2.3. As part of these procedures, the regulations establish a hierarchy of who will decide which appeals under what circumstances. If the decision of a BIA official under the authority of a Regional Director (formerly known as an "Area Director") adversely affects a person, that person may appeal the decision to the Regional Director. 25 C.F.R. § 2.4(a). The regulations also provide for appeals of inaction, as the Plaintiff has alleged here. 25 C.F.R. § 2.8(a). If a Regional Director's decision adversely affects a person, that person may appeal to the

Interior Board of Indian Appeals ("IBIA"). 25 C.F.R. §2.4(e). Pursuant to 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314, a BIA decision that is subject to appeal to a higher authority in the Department is not final and effective agency action unless a determination is made that exigent circumstances require the decision to be made effective immediately. *See also* 25 C.F.R. § 2.6(b), and 43 C.F.R. § 4.314(a) ("No decision of . . . a BIA official . . . will be considered final [and] subject to judicial review . . ., unless it has been made effective pending a decision on appeal by order of the [IBIA]").

Here, Plaintiff has provided no evidence or advanced any arguments to show that an administrative appeal within the agency would have been futile and instead merely asserts that exhaustion would be futile. ECF No. 118 at 51. Plaintiff carries the burden of demonstrating that the administrative appeals process would be futile and here he has not done so. *See generally* Exhaustion of the Administrative Process, 33 Charles A. Wright and Charles H. Koch, Wright, Federal Prac. and Proc. Judicial Review, § 8398 (1st ed.) (Citing cases, and noting "[t]he presumption in favor of exhaustion must be emphasized however and hence courts are very skeptical of exception claims and such claims only rarely succeed. The burden rests with the party claiming an exception.").

Plaintiff's assertion that it would be futile to appeal his complaints is belied by the facts. Since at least 1989, Plaintiff believed there were issues with

Allotment 156 and his share of royalties and accounting. However at no time did Plaintiff pursue any administrative remedies. Plaintiff even failed to pursue administrative remedies after Interior explicitly provided Plaintiff and his sister with notice of their administrative appeal rights under 43 C.F.R. §§ 4.310-4.340. *See* ECF No. 62, Ex. E (notifying of right to appeal determination of division of royalties). Therefore, because Plaintiff has not even attempted internal review of his claims, he has not upheld his burden of demonstrating that administrative appeal would be futile. *See David Laughing Horse Robinson v. Salazar*, No. 09-cv-01977-BAM, slip op. at 35 (E.D. Cal. Aug. 7, 2010) (ECF No. 240) ("no plausible claim excusing exhaustion can be stated because the administrative process has not been attempted.") (Attached as Exhibit A).

As a result, Plaintiff's claims are in no way administratively exhausted, and the APA prevents this Court from reviewing these claims. *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (under doctrine of exhaustion, a suit filed before exhausting available administrative remedies is premature and should be dismissed); *Stock W. 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). Because

Plaintiff has not exhausted his administrative remedies, no jurisdiction exists under the APA for this action and it must be dismissed.

b. Plaintiff's APA claims have already accrued and Plaintiff fails to demonstrate that equitable tolling is applicable.

As Plaintiff admits, his APA claims are subject to the six-year statute of limitations provided in 28 U.S.C. § 2401(a). ECF No. 118 at 41. Plaintiff, however, brought this suit outside the limitations period. As Plaintiff's own pleadings demonstrate, he was well-aware of the factual basis for his lawsuit at least twenty years prior to filing this complaint. Thus even if Plaintiff had otherwise demonstrated a valid waiver of sovereign immunity, because his claims are time-barred, the United States has not waived sovereign immunity for these claims, and this Court lacks jurisdiction to hear them. *See Sisseton-Wahpeton*, 895 F.2d at 592 ("failure to sue [the United States] within the period of limitations . . . deprives the district court of jurisdiction to entertain the action.").

Federal Defendants contest Plaintiff's declaration's appropriateness and assert that the declaration and exhibits do not meet the rules of evidence.[2] However, for purposes of this motion, assuming that Plaintiff's declaration is

[2] *See* ECF Nos. 98, 113 (Defendant Newmont USA Limited's Objections to Declaration of Donnelly R. Villegas and Its Exhibits and Reply in Further Support of Its Objections).

admissible, his statements do not support his claim that he was not on notice of his claims until April 26, 2011. Plaintiff mistakenly argues that his claim did not accrue until he knew he had a legal claim. But that is not the legal standard. Rather, as Plaintiff states, the statute of limitations "begins to run when the plaintiff knows or has reason to know of the existence and cause of injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." ECF No. 118 at 41 (quoting *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994)); *see also Wild Fish Conserv. v. Salazar*, 688 F. Supp. 2d 1225, 1235 (E.D. Wash. 2010) (a claim accrues for purposes of the statute of limitations when plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong). Ignorance of a legal claim—rather than the facts underlying it—cannot toll the statue of limitations. *See Medina v. State Farm Fire and Cas. Co.*, No. 89-56067, 1991 WL 7604, at *2 (9th Cir. Jan. 28, 1991) (the court noted numerous cases which held that "ignorance of legal theories does not toll the statute of limitations") (citations omitted); *see United States v. Kubrick*, 441 U.S. 111, 120-22 (1979); *Littlewolf v. Hodel*, 681 F. Supp. 929, 941-42 (D.D.C. 1988), *aff'd* 877 F.2d 1058 (1989). If it could, the six-year statute of limitations under 28 U.S.C. § 2401(a) would be rendered meaningless by the mere assertion that a plaintiff did not know he had a cause of action.

Here, Plaintiff knew of his claims more than twenty years prior to filing this suit. Plaintiff states:

> In the early 1980s, my family and I became suspicious of Dawn and Federal Defendants' calculations. At times, the company's ledgers were inconsistent with the grade of ore that was located on my portion of Allotment 156. There were also instances where the numbers did not add up – I was not receiving the rate agreed to. At other times the ledgers and typed entries were missing altogether. My family and I were suspicious that the ore that I was granted in the May 7, 1973, Order Approving Compromise [ ] was not being properly maintained or that it was being milled without my consent.
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> Since the early 1980s, when we became suspicious of Dawn and Federal Defendants' accounting practices and conduct on Allotment 156, we have persistently requested information about Dawn, Newmont, and Federal Defendants' ledgers and typed entries, only to be met with excuses.

Villegas Decl., ¶¶ 8, 10. Plaintiff's cause of action was certainly triggered when he believed he was not receiving correct royalties and that ore in which he claimed an interest was not being properly maintained. Plaintiff exercised diligence in pursuing these claims in the 1980s and early 1990s. *See* ECF No. 118 at 6 ("[I]n 1990 Plaintiff put Federal Defendants on notice that large sums of trust monies "were stolen, put into wrong accounts and [that] several very large royalty checks . . . were . . . unaccounted for."). Yet Plaintiff did not bring a legal action to challenge the management of Allotment 156 for almost twenty years. Instead, Plaintiff asserts that he "has consistently maintained that he did not know or have reason to know of the existence and cause of some of his injury until April 26,

2011. On that date, Plaintiff became aware that he is entitled, at any time, to seek an accounting of his trust properties to confirm his suspicions regarding Federal Defendants' mismanagement." ECF No. 118 at 41. But the cause of action does not arise when a plaintiff seeks to confirm his suspicions; it arises when a plaintiff has those suspicions. *Littlewolf*, 681 F. Supp. at 941 ("Similarly, the fact that the allotments were held in trust neither makes plaintiffs' claims unknowable nor suggests that plaintiffs could not have sought advice during the past half-century about the nature of their claims.") (citing *Menominee Tribe v. United* States, 726 F.2d 718, 721 (Fed. Cir. 1988)). Therefore, Plaintiff's claims have long ago accrued and are time barred.

Likewise, Plaintiff's APA claims are not subject to any continuing violation theory that allows escape from the statute of limitations. *See* ECF No. 118 at 42. Such a theory is not recognized for APA claims in this Circuit. *San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1228 (E.D. Cal. 2011) (citing *Hall v. Regional Transp. Com'n of S. Nev.*, 362 Fed. Appx. 694, 695-96 (9th Cir. 2010) (unpublished) (citing with approval *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1229 (D. Mont. 2004) *aff'd* at 469 F.3d 801 (9th Cir. 2006)).

Moreover, as is the case here, the "continuing impact from past violations is [by itself] not actionable." *Grimes v. San Francisco*, 951 F.2d 236, 238 (9th Cir. 1991) (quoting *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir.

1980)). The continuing violation doctrine has been rejected in similar contexts. *See, e.g., Wilton Miwok Rancheria v. Salazar*, Nos. C-07-02681-JF-PVT, C-07-05706-JF, 2010 WL 693420 at *5 (N.D. Cal. Feb. 23, 2010) (rejecting reliance on continuing violation doctrine in rancheria termination case) (citing *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007)). Here, any injury began in 1939 when Plaintiff claims an allotment should have issued. The continuing violations doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time. *See Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir.1997); *Friedman v. United States*, 159 Ct. Cl. 1, 310 F.2d 381, 384–85 (1962); *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir.1990). Plaintiff claims injuries stemming from single distinct events that accrued at the time they happened and any alleged ill effects are not actionable.

c. Plaintiff's breach of contract claims cannot be equitably tolled.

Plaintiff's claims of equitable tolling for his contract claims, ECF No. 118 at 37, 46-49, are unavailing and irrelevant. Even if equitable tolling were proper for this claim, Plaintiff has failed to respond to Federal Defendants' arguments that the United States has not waived sovereign immunity from suits seeking equitable relief based on a breach of contract. ECF No. 62 at 33-34; *see North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985)

(Tucker Act "impliedly forbids" declaratory and injunctive relief and precludes a section 702 waiver of sovereign immunity in suits on government contracts.); *Russell v. United States*, No. C 09-03239 WHA, 2009 WL 4050938, *9 (N.D. Cal. Nov. 20, 2009).[3] Additionally, to the extent that Plaintiff's contract claim sounds in tort, it is barred under the Federal Tort Claims Act. ("FTCA"), 28 U.S.C. §§ 2679 *et seq*. ECF No. 62 at 39; *see United States v. Smith*, 499 U.S. 160, 166 (1991).

d. Section 702 does not provide the requisite waiver of sovereign immunity for non-APA claims.

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[3] Additionally, because the claim is not limited to less than $10,000, the claim is within the exclusive jurisdiction of the Court of Federal Claims, with review in the Federal Circuit, *United States v. Hohri*, 482 U.S. 64, 73-74 (1987), and the applicable statute of limitations is governed by 28 U.S.C. §2501. *Floor Pro, Inc. v. United States*, 680 F.3d 1377, 1380 -1381 (Fed. Cir. 2012) ("This six-year limitations period is jurisdictional and may not be waived or tolled. . . .") (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136–39 (2008); *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) ('[T]he statute of limitations applicable to Tucker Act claims ... is jurisdictional and not susceptible to equitable tolling.'); *see also Georgalis v. U.S. Patent & Trademark Office*, 296 Fed. Appx. 14, 16 (Fed. Cir. 2008) (unpublished, per curiam decision) ("While we are presented with a different statute in this case— § 2401 rather than § 2501—we conclude that the Supreme Court's rationale applies with equal force because both are 'jurisdictional' statutes of limitations.").

Despite the fact that Plaintiff challenges as unlawful the actions and inactions of federal agencies—claims properly raised under the APA—Plaintiff nonetheless asserts independent causes of action based on federal statutory and common law, and a standalone waiver of sovereign immunity for these actions from section 702 in isolation, without the limitations contained in the rest of the APA. Plaintiff has not properly stated a claim for common law or other violations of federal law. However even if he had, the broad waiver asserted by Plaintiff does not apply—if it applies in any case at all—under the circumstances of this case.

Here, Plaintiff asserts that where the right to judicial review arises under federal law other than APA section 706, section 702 is not limited by the rest of the APA including the final agency action requirement. ECF No. 118 at 23. However the Supreme Court has stressed that section 702 "insist[s] upon an 'agency action'" *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 62 (2004). In *SUWA*, the Court made clear that

> "The APA [in § 702] authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' Where no other statute provides a private right of action, the "agency action" complained of must be '*final* agency action.'"

SUWA, 542 U.S. at 61-62 (citing 5 U.S.C. §§ 702, 704) (emphasis in original). Therefore, if no statute clearly provides the right of action—and Plaintiff has not

identified a statute that does[4]—the APA's waiver of sovereign immunity is limited, including by the requirement of final agency action.

The Ninth Circuit has also rejected Plaintiff's broad view of the APA's waiver, holding that "the APA's waiver of sovereign immunity contains several limitations [including. . .] § 704, which provides that only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.'" *Gallo Cattle Co. v. U.S. Dep. of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (quoting 5 U.S.C. § 704); *accord Nippon Miniature Bearing Corp. v. Weise*. 230 F.3d 1131, 1137 (9th Cir. 2000) (claim must challenge "final agency action" in order to fall within "the ambit of the APA's waiver of sovereign immunity").

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[4] "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress.") (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

One Ninth Circuit case, however, held that section 702 is "an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). The Ninth Circuit has not resolved this split. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (declining to resolve split); *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010) (same); *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (same).

But *Presbyterian Church* was an exceptional case, and the facts in that case and others that applied its reasoning are distinguishable from the circumstances here. The plaintiffs in *Presbyterian Church* alleged egregious violations of their First and Fourth Amendment rights when employees of various federal agencies surreptitiously recorded church services. The court found that sovereign immunity was waived for the constitutional challenges raised in the case, even though the challenges were not to "agency action" as that term is used in the APA. *See David Laughing Horse*, slip op. at 23-24.

In so finding, the court looked to the legislative history of section 702, which was added to the APA in 1976. *Presbyterian Church*, 870 F.2d at 524-27. The *Presbyterian Church* court found it "particularly significant" that in amending the APA, Congress was disapproving of the "*Ex parte Young* fiction" whereby a

plaintiff could name a government official personally as the defendant instead of the United States. *Id.* at 525-526. This fiction allowed plaintiffs to "maintain an action for equitable relief against *unconstitutional government conduct*, whether or not such conduct constituted 'agency action' in the APA sense. . . Congress' plain intent in amending § 702 was to waive sovereign immunity for all *such suits*, thereby eliminating the need to invoke the *Young* fiction." *Id.* at 525-526 (emphasis added). *See, eg.*, *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010) ("[S]ince 1976 federal courts have looked to [§ 702] to serve the purposes of the *Ex parte Young* fiction in suits against federal officers"). Therefore the application of *Presbyterian Church* is a narrow one, limited to the kind of Constitutional claims or *ultra viries* that that case involved.

Plaintiff cites a recently-reversed Ninth Circuit case, *Veterans for Common Sense v. Shinseki*, that endorsed *Presbyterian Church*'s reasoning. *Id*., 644 F.3d 845, 865 (9th Cir. 2011) *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011) and *opinion vacated on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012). As in *Presbyterian Church*, the *Veterans for Common Sense* court indicated that the waiver of sovereign immunity in section 702 is not limited to actions in which the APA creates the rights to judicial review in the context of a constitutional challenge to an agency program that was not "agency action." However, on rehearing, *en banc*, the Ninth Circuit reversed, and though it did not reach or

resolve this specific issue, it noted the earlier decision may "not be cited as precedent by or to any court of the Ninth Circuit." *Shinseki*, 2012 WL 1574288, at *20.

Plaintiff also attempts to rely on *Valentini v. Shinseki*, No. 11-4846, 2012 WL 1512111, at *19 (C.D. Cal. Mar. 16, 2012), as a recent case to have endorsed his broad interpretation of sovereign immunity under section 702. However, the holding of *Valentini* does not support Plaintiff's interpretation of the APA. In *Valentini*, plaintiffs brought, *inter alia*, actions for accounting and violation of fiduciary duty related to a charitable trust. In *dicta* the court discusses and indicates support for the broad interpretation of section 702 adopted in *Presbyterian Church*. However, the court did not base its holding on this interpretation. Instead, the court found that the plaintiffs had demonstrated final agency action, as required by section 704. *Valentini*, 2012 WL 1512111, at *19 ("Moreover, even if the waiver of sovereign immunity in § 702 only applied to the extent that the agency action complained of was 'final' under § 704, Plaintiffs in this case *have alleged final agency action*.") (emphasis added). Therefore it was not necessary for the court to reach the issue of whether *had there been no final agency action* as required by section 704, the United States' sovereign immunity would still be waived under section 702.

Thus, only one case that is binding authority in this Circuit has endorsed the broad interpretation of section 702—namely, *Presbyterian Church*. And this case only adopted this interpretation in regard to a constitutional action of a type not present here. All the claims here are properly understood as challenges to allegedly unlawful actions or inactions which can be brought under section 706 of the APA. As such it is appropriate to read the APA as a whole, with section 704—captioned "actions reviewable"—as a limit on the APA's waiver of sovereign immunity in section 702 and the type of review available under the statute. This is the approach taken by the Ninth Circuit cases to have ruled on non-constitutional actions similar to those alleged here. *See Gallo Cattle Co.*, 159 F.3d at 1198. For these reasons, the best interpretation of section 702—and the interpretation supported by precedent—requires that section 702 be read in conjunction with section 704's final agency action limit. Therefore because no final, exhausted agency action has been alleged here, the United States has not waived its sovereign immunity and Plaintiff's non-APA claims must be dismissed.

e. Plaintiff cannot allege the Federal Defendants violated any federal statutory or common law duties outside the APA.

Plaintiff argues that his breach of trust and fiduciary duty, accounting for profits, accounting, and breach of contract claims are not APA claims because he is pursuing them under federal common law. ECF No. 118 at 23-38. Plaintiff then

specifically argues that the Indian Trust Fund Management Reform Act, 25 U.S.C. § 4001 *et seq.* (1994) ("Reform Act") and 25 U.S.C. §§ 161-162 provide him a right to judicial review outside of the APA.[5] *See id.*, pp. 23-31. First, Plaintiff has not pled any breaches with respect to these statutes in his complaint and he cannot seek to amend his complaint through a responsive pleading. Under FRCP 8, the "short and plain" statement in the complaint must "give the defendant fair notice of what the plaintiff's claims and the grounds upon which it rests." *Swierkiewicz v.*

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[5] Although Plaintiff argues that the "1930 Act, 25 U.S.C. §§ 161-62" provides a waiver of sovereign immunity, Plaintiff has not alleged with any specificity breaches pursuant to these statutes. ECF No. 118 at 32. Furthermore, these statutes cannot be grouped together to broadly assert a claim for breach of fiduciary duty. For example, 25 U.S.C. § 161 is not applicable to this case because this statute authorizes the Secretary of the Interior to deposit into the Treasury all sums received on account of redemption of United States bonds, or other stocks and securities belonging to the Indian trust fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment. *Id.* Plaintiff does not allege that Federal Defendants sold any securities or trust land in his complaint. As to Plaintiff's claim concerning 25 U.S.C. §162, that statute was repealed on June 24, 1938.

Sorema N.A., 534 U.S. 506, 513 (2002) (quotations omitted). Plaintiff did not raise his Reform Act, accounting for profits, and accounting claim in his complaint as grounds for seeking relief from Federal Defendants. Raising these claims in an opposition to a motion to dismiss is insufficient to present the claim to a court. *Navajo Nation v. U.S.F.S.*, 535 F.3d 1058, 1079 (9th Cir. 2008); *see e.g., Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'"); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006) (holding that the complaint did not satisfy the notice pleading requirements of Fed. R. Civ. Pro. 8(a) because the complaint "gave the [defendants] no notice of the specific factual allegations presented for the first time in [the plaintiff's] opposition to summary judgment"). Therefore, because Plaintiff did not identify these claims as grounds upon which to enjoin Federal Defendants from allegedly damaging, devaluing, and interfering with his uranium rights, he may not bring those claims now. This Court should decline to address those arguments.

Furthermore, Plaintiff cannot plead a claim for "Accounting for Profits" against Federal Defendants. Accounting for profits is one of the remedial remedies recognized by the Supreme Court to protect Indian lands from trespass but is not a cause of action that may be asserted against Federal Defendants because it is a tort. *See U.S. v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n. 8 (9th Cir.

1994), *cert. denied*, 514 U.S. 1015 (1995); *see United States v. Milner*, 585 F.3d 1174, 1182-83 (9th Cir. 2009) (stating that "[f]ederal common law governs an action for trespass on Indian lands" and asserting that federal common law of trespass generally comports with the Restatement of Torts").

As discussed above, Plaintiff cannot assert a tort claim against Federal Defendants because of his failure to exhaust administrative remedies under the FTCA, which provides the exclusive remedy for any action sounding in tort, such as trespass. ECF No. 62 at 39; *see Smith*, 499 U.S. at 166. Plaintiff has not pled that he exhausted his administrative remedies and, accordingly, this Court must dismiss any causes of action sounding in tort, which is the only possible basis for Plaintiff's "Accounting for Profits" claim.

Rather, a review of Plaintiff's complaint shows that these claims are directly based upon his APA claim in which he alleges that Federal Defendants:

> [H]ave violated numerous federal laws, regulations, and nondiscretionary mandates, including United States Presidential Executive Order 13175, numerous agency-specific laws, regulations, and nondiscretionary mandates; and the federal common law.

ECF No. 1 at ¶ 116. Plaintiff seeks the same relief in his APA claim under section 706 directly challenging Federal Defendants' alleged inaction and in his claims for declaratory and injunctive relief. *See* ECF No. at 23-30. Plaintiff, however, has not identified a common law or statutory basis to support a non-APA claim. Plaintiff's complaint does not clearly set out the statutory or common law basis for his breach

of contract and fiduciary duties claims against Federal Defendants. Without an independent legal basis for these claims, the only way Plaintiff can challenge the Federal Defendants' alleged failure to manage ore stockpiles in which he claims an interest is under the APA. *See Gilmore v. Salazar*, 748 F. Supp. 2d 1299, 1307 (N.D. Okla. 2010) (court found that plaintiffs did not clearly set out the statutory or common law basis for their claims and, without an independent basis for the claims, the only way to challenge BIA's failure to provide an accounting or halt removal of chat was under the APA).

III. Plaintiff fails to demonstrate why his claims are not independently barred by CERCLA.

Congress has the power to define the jurisdiction of the lower federal courts. *See Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1440 (9th Cir. 1997). And under CERCLA, Congress has done so in a fashion that forecloses jurisdiction over Plaintiff's claims here.

A. The Court lacks jurisdiction because injunctive relief will impair or impede the remediation at Midnite Mine.

Section 113(h) of CERCLA is a "blunt withdrawal of federal jurisdiction," *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011), that 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)). This section is jurisdictional and if it applies, no subject

matter jurisdiction can lie. *Pakootas* at 645 F.3d 1220 ("[b]ecause the words are 'no Federal court shall have jurisdiction,' the statute means that no federal court shall have jurisdiction.") (internal quotations omitted).

Plaintiff does not dispute this law, but rather argues that Federal Defendants have not shown that "CERCLA cleanup is in anyway [sic] related to the Plaintiff-specific ore stockpiles under which the relief is requested." ECF No. 118 at 52. But this argument is belied by the relief Plaintiff seeks. Plaintiff seeks to enjoin "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." ECF No. 1, Prayer for Relief ¶ A.

Plaintiff's argument is also factually incorrect. Remediation of the site requires the excavation and permanent disposal of mining-related material and waste, including any uranium stockpiles on the allotment and tribal lands. *See* SOW at Sections 2.4.2, 4.2.H. These elements of the remedy will take place on the allotment as well as other areas of the mine site. *See* ROD at Figure 6-1. Thus, the CERCLA cleanup is in fact related to the stockpiles in which Plaintiff asserts an interest. Granting Plaintiff's requested injunction, even one only requiring consultation prior to approved remediation, will at the very least delay the ultimate cleanup. And if Federal Defendants were enjoined from "damaging" or

"interfering with Plaintiff's uranium," this prohibition will directly impede the remediation. This is exactly what Section 113(h) was designed to prevent. *See Pakootas* at 645 F.3d 1220.

Plaintiff also asserts that in the event the relief he requests will "delay or interfere with CERCLA cleanup, he would stipulate not to pursue that relief until after the CERCLA cleanup has been completed." ECF No. 118 at 53. However, if the relief requested interferes with remediation, this Court simply has no jurisdiction—and Plaintiff's proffered stipulations cannot alter that. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause,' other than to 'announc[e] the fact and dismiss[]' the case.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)).

MESS provides an example. In that case, the plaintiffs sought an injunction requiring a Clean Water Act permit for discharges from a site undergoing cleanup. The court dismissed for lack of jurisdiction, holding that the requested injunction was "directed at an integral part of the cleanup and, as such, may not be sustained *until cleanup is completed*." *MESS*, 47 F.3d at 328 (emphasis added). That is, the court lacked jurisdiction to hear the suit until remediation was completed. The same result should apply here: Plaintiff's complaint demands relief that would delay or interfere with remediation of a superfund site, and thus must be dismissed for lack of subject matter jurisdiction pursuant to Section 113(h) of CERCLA and

Federal Rule of Civil Procedure 12(b)(1).

IV. In the Absence of Valid Exhausted APA Claims within the Court's Jurisdiction, Plaintiff's Claims for Injunctive Relief Should be Dismissed Under FRCP 19 and 12(b)(7).

Plaintiff's claims should be dismissed under FRCP Rule 19 and 12(b)(7) because the Spokane Tribe ("Tribe"), an indispensable party, cannot be joined in this lawsuit because of its sovereign immunity. Plaintiff alleges that the Tribe is not indispensable because its interests are speculative and he would not otherwise have an adequate remedy. Both assertions are unavailing. In this case, the Tribe has interests in the property that will be affected (including the allotment and other portions of the Midnite Mine site where Plaintiff alleges to have an interest in uranium), in governing the Reservation lands, and in the remedial action. Because of the Tribe's extensive involvement with and interest in the subject matter of this lawsuit, complete relief cannot be had without its joinder. Further, the absence of an adequate remedy for Plaintiff if this case were dismissed does not weigh heavily and in fact, as provided in Federal Defendants' discussion of the *Cobell* litigation, Plaintiff has been provided relief in an alternative court.

A. The Tribe's interests are not speculative.

Plaintiff argues that joinder is unnecessary because the Tribe's interest is speculative and it is unknown if Plaintiff's requested relief will affect the Tribe's interests. But the relief sought by Plaintiff absolutely concerns the Tribe's

interests. In determining whether an absent party's interests will be impacted, a court examines whether the party possesses an interest in the pending litigation that is "legally protected." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). This is a fact-specific inquiry. *Id*. The interest at stake need not be "property in the sense of the due process clause" *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002), but it must be more than a financial stake or speculation of a future event. *Makah*, 910 F.2d at 558. In his complaint, Plaintiffs seeks relief "[p]reliminarily and permanently enjoin[ing] all Defendants from further damaging, devaluing, and interfering with Plaintiff's uranium rights therein." ECF No. 1 at XIV.A. Plaintiff admits that the Tribe has a legally protected interest in its own property and its sovereign ability to manage its internal affairs. ECF No. 86 at 15. Plaintiff further admits that the Tribe "has an undivided half interest in the Allotment, and that the Allotment is currently under CERCLA remediation." ECF No. 118 at 54. These interests alone are sufficient to satisfy the requirement of Rule 19 to demonstrate an absent party has a legally protectable interest.

The Tribe also has an interest in ensuring implementation of the remedy. The Tribe has stated on several occasions that it wants the lands within the Reservation to be cleaned up and available for a number of land uses. For example, the Tribe has explained that its concurrence in the remedy was based on

its belief that the remedy would be "protective of our people and of our Reservation Environment." ROD at Appx. A, Spokane Tribe Letter of Concurrence. As described in the ROD, the Tribe passed a tribal resolution stating its intention to use the land for tribal commercial enterprises, including uses requiring remediation of the on-site ore stockpiles and mine waste. *See* ROD at pp. 2-36.

The Tribe provided extensive comments on the remedy during EPA's selection process, and concurred in the chosen remedial action. ROD at Appx. B. The Tribe's comments are included in the Responsiveness Summary attached to EPA's ROD. *Id.* In addition, during the course of the remedy selection process, the Tribe vigorously advocated for specific remedial actions at the Midnite Mine, and engaged in an Alternative Dispute Resolution ("ADR") process with EPA to insure that EPA would consider actions the Tribe felt were necessary. *See, generally, United States v. Newmont USA Ltd.*, No. 2:05-cv-00020-JLQ, ECF No. 101, Spokane Tribe of Indians Memo. of Pts. and Auth. in Supp. of M. for Protec. Order (described ADR process). The Tribe, by virtue of its sovereignty, has an interest in determining what is in its best interests by remediating the Midnite Mine site and providing for the future use of the land for its people and Reservation. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (tribes were indispensable parties because action could affect their interests in lease agreements and ability to

obtain the bargained-for royalties and jobs); *Pit River Home and Agric. Coop Ass'n v. United States*, 30 F.3d 1088, 1099, 1101 (9th Cir. 1994).

Granting Plaintiff's request for an injunction that would prevent any interference with uranium stockpiles at the site would prejudice the Tribe's property interests because it would not be able to receive the benefits of the cleanup, including future land uses more varied than those currently possible. In addition, relief that prevents cleanup, even if only limited to stockpiles in which Plaintiff claims an interest, will be prejudicial to the Tribe's sovereign interests in governing its internal affairs and managing the use and protection of its lands within the Reservation. The Tribe has an interest in the land. Any injunction, even one Plaintiff alleges will only be tailored to stockpiles in which he claims an interest, will severely impact the land because the remedy is premised on a site-wide clean-up and is not limited to include or exclude particular stockpiles.

B. Plaintiff will have adequate relief if the complaint is dismissed.

In determining whether a party is indispensable, a court balances four factors: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli*, 101 F.3d at 1310-11. If no alternative forum exists, the court should be "extra cautious" before dismissing the suit. *Makah*, 910 F.2d at 560.

Plaintiff argues that Federal Defendants' Rule 12(b)(7) motion must be denied because he would not have an adequate remedy and that factor alone mandates denial. ECF No. 118 at 54-55. The Ninth Circuit has recognized, however, "that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Kecoli*, 101 F.3d at 1311 (quoting *Confederated Tribes v. Lujam*, 928 F.2d 1496, 1500 (9th Cir. 1991)). This is because if the necessary party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Kecoli*, 101 F.3d at 1311 (quoting *Confederated Tribes*, 928 F.2d at 1499). In *Kecoli*, *Confederated Tribes*, *Pit River Hime, Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994), and *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.1992), although the court determined that the plaintiff would be without an alternative forum, the absent Indian tribe was indispensable.

Here, the Tribe is indispensable in the absence of a valid and exhausted APA claim within the jurisdiction of this Court. The fact Plaintiff argues that he does not have an adequate remedy if his case were dismissed is not determinative. In fact, as discussed above, Plaintiff has an alternative forum where he has asserted similar claims and is waiting for the appeals period to expire in order for final judgment to be entered. *See* Supra V.A. (discussing impact of *Cobell v. Salazar*,

No. 96-cv-1285 (D.D.C. amended Dec. 21, 2010).

V. To the extent this Court finds that Plaintiff has adequately pled a claim for an accounting, such claim should be stayed pending "Final Approval" of the *Cobell* Settlement.

If this Court holds, however, that Plaintiff adequately pled a claim for accounting in his complaint, such claim should be stayed pending the expiration of final appeals in the *Cobell* litigation on August 20, 2012, should no petition for writ of certiorari be filed with the Supreme Court. At that time, Federal Defendants will file a motion to dismiss the accounting claim as barred by the *Cobell* Settlement Agreement, which settles and provides compensation for claims made against the United States by individual Indians alleging failure to provide a historical accounting, breach of trust and mismanagement of individual Indian trust funds, and breach of trust and fiduciary mismanagement of land and resources, including mineral resources.

A district court possesses the inherent power to control its docket and promote efficient use of judicial resources. *See Landis v. N. American Co.*, 299 U.S. 248, 254-55 (1936); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case."). When considering a motion to stay, the court weighs a series of competing

interests: (1) the possible damage which may result from the granting of the stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). "A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Leyva*, 593 F.2d at 864. Here, the competing interests favor a stay as to Plaintiff's alleged accounting claim. No party will be damaged by a stay and, in fact, the parties will waste judicial resources should Plaintiff's claim be litigated. A stay will simplify the issues before this Court and the other proceedings, as described below, will conclude within a reasonable time.

As stated in footnote 5 to Federal Defendants' Motion to Dismiss (ECF No. 62), Plaintiff is a class member of a certified class action filed in the United States District Court for the District of Columbia ("DDC"), *Cobell v. Salazar*, No. 1:96-cv-01285-TFH (D.D.C. filed June 10, 1996), and the United States Court of Appeals for the District of Columbia, Nos. 11-5205 and 11-5229 (collectively "*Cobell* Litigation"). In 1996, beneficiaries of IIM trust accounts brought a putative class action in the DDC against the Secretaries of the Interior and Treasury and the Assistant Secretary—Indian Affairs alleging mismanagement of

the IIM accounts. *See Cobell v. Salazar*, No. 1:96-cv-01285-TFH, slip op. at 1 (D.D.C. July 27, 2011) ("*Cobell* Settlement Order"). The IIM accounts hold funds from a variety of sources, but a majority of the funds are derived from income earned off of individual land allotments. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998).

The *Cobell* plaintiffs sought "declaratory and injunctive relief construing the trust obligations of defendants to members of the [] class and declaring that the defendants had breached, and were in continuing breach, of their trust duties to the plaintiff class members, an order compelling defendants to perform those legally mandated obligations, an accounting, and the correction and restatement of their IIM accounts." *Cobell* Settlement Order 1.

After years of litigation, in December of 2009, the parties in *Cobell* entered into a settlement agreement providing that an amended complaint would be filed as part of the agreement. The amended complaint described two classes, The Trust Administration Class and The Historical Accounting Class. *Id*. at 14.

The amended complaint alleged "Funds Administration Claims," "Land Administration Claims," and "Historical Accounting Claims." *See id.* at 16. The Funds Administration Claims alleged "breach of trust and mismanagement of individual Indian trust funds" and was based on conduct specified in the settlement agreement, such as, for example, failure to collect or credit funds owed under a

lease, sale, easement, or other transaction. *Id*. at 8. The Land Administration Claims "alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights . . . situated on, in or under Land" and was based on conduct specified in the settlement agreement, such as, for example, "[f]ailure to lease Land, approve leases or otherwise productively use Lands or assets." *Id*. at 11. The Historical Accounting Claims were "common law or statutory claims, including claims arising under the Trust Reform Act, for a historical accounting . . . of any and all IIM Accounts and any asset held in trust or restricted status, including but not limited to Land . . . and funds held in any account, and which [were], or ha[d] been, beneficially owned or held by an Indian trust beneficiary who [was] a member of the Historical Accounting Class." *Id*.

The settlement agreement provided that each member of the Historical Accounting Class was "deemed to have released, waived and forever discharged" the defendants "from the obligation to perform a historical accounting of his or her IIM Account or any individual Indian trust asset," including any right to an accounting in aid of the jurisdiction of a court, except as provided elsewhere in the settlement agreement. *Id*. at 43. Each member of the Historical Accounting Class was "forever barred and precluded" from bringing Historical Accounting Claims. *Id*. Plaintiffs could not opt out of the Historical Accounting Class. Each member

of the Trust Administration Class who did not properly and timely opt out was "forever barred and precluded" from bringing Funds and Land Administration Claims. *Id*. at 44.

On July 27, 2011, the DDC entered an order granting final approval of a settlement of the lawsuit. Attached to the July 27, 2011, order were lists of individuals who were excluded from the Trust Administration Class. *Cobell*, ECF No. 3850, Exhs. A–B. Plaintiff's name does not appear on those lists. The DDC also held that the settlement agreement and the court's judgment were binding on all members of the Historical Accounting Class and that they "shall be deemed to have released, waived and forever discharged" the defendants in accordance with the settlement agreement. ECF No. 3850, ¶ 10.

Notices of appeal to the D.C. Circuit from the DDC's approval of the settlement were filed by certain class members, including Plaintiff. *Cobell*, ECF No. 3863. Plaintiff's appeal was voluntarily dismissed. *Id*., ECF No. 3884. The D.C. Circuit recently affirmed Judge Hogan's approval of the settlement. *See Cobell v. Salazar*, No. 11-5205, 2012 WL 1843982 (D.C. Cir. May 22, 2012); *Cobell v. Salazar*, Nos. 11-5270, 2012 WL 1884702 (D.C. Cir. May 22, 2012). On July 24, 2012, the D.C. Circuit issued mandate. The time for petitioning to the Supreme Court for review has not elapsed and the *Cobell* Litigation is still technically pending until such time lapses on August 20, 2012. On that date, the

Cobell settlement agreement will have "Final Approval," as defined in the agreement, and the settlement agreement will be binding on Plaintiff.

A. The Indian Trust Accounting Statute can only toll Plaintiff's alleged accounting claim and not his APA claims.

The Indian Trust Accounting Statute ("ITAS"), Pub. L. No. 108-108, 117 Stat. 1263 (2003), cannot toll Plaintiff's claims unrelated to his request for an accounting. The version of that statute in place at the time of the filing of Plaintiff's complaint provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

117 Stat. at 1263. In *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348-50 (Fed. Cir. 2004), the Federal Circuit emphasized that the ITAS applies only to trust funds and does not toll claims for breach of fiduciary duties regarding trust assets. *See also Rosales v. United States*, 89 Fed. Cl. 565, 580 (2009) (ITAS did not apply to claims of breach of fiduciary duty where plaintiffs claimed they were rightful beneficial owners of parcels of land held in trust by government for Indian tribe); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (2006) (ITAS did not apply to a claim for breach of fiduciary duty for government mismanagement of timber assets). Plaintiff seems to argue

that ITAS applies to toll the statute of limitations as to all of his claims. *See* ECF No. 118 at 45. This is not the case. ITAS, to the extent it is applicable, only applies to potentially toll claims for mismanagement of trust funds should the Court find that Plaintiff has pled a claim for failure to provide an accounting and has not been provided that accounting.

VI. 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 August 3, 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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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

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