TODD KIM, Assistant Attorney General
SALLY J. SULLIVAN, Trial Attorney
BRIGMAN HARMAN, Senior Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 514-9269 (Sullivan)
(202) 616-4119 (Harman)
Fax: (202) 305-0275
Email: sally.sullivan@usdoj.gov
brigman.harman@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. UNITED STATES OF AMERICA, *et al*., Federal Defendants.	**UNITED STATES' MOTION FOR PARTIAL DISMISSAL AND MEMORANDUM OF LAW IN SUPPORT** Civil No. 2:21-cv-00573-JNP

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INTRODUCTION

This marks the Tribe's *fourth* attempt to plead justiciable claims in this case. Following two prior amendments, extensive briefing, and oral argument, the U.S. District Court for the District of Columbia ("DC Court") dismissed the Tribe's nearly identical claims after concluding they were barred by the statute of limitations and failed to state cognizable claims for relief.[1] On the United States' motion, the DC Court transferred to this Court the Tribe's remaining claims challenging a water exchange agreement under the Administrative Procedure Act ("APA"). The Tribe then sought and received leave to amend for a third time to attempt to resurrect many of its previously-dismissed claims. As shown below, however, the Tribe has not cured the pleading deficiencies identified by the DC Court and the United States, and this Court should again dismiss the Tribe's claims.

This case involves water management in northeastern Utah.[2] The Tribe's eleven-claim, Third Amended and Supplemented Complaint (ECF No. 186, "Compl." or "Complaint")[3] touches on the Tribe's alleged water rights, the Central Utah Project—the largest and most

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[1] *Ute Indian Tribe of Uintah & Ouray Rsrv. v. United States Dep't of Interior*, 560 F. Supp. 3d 247, 252 (D.D.C. 2021) ("*Ute DC Op.*").

[2] The Tribe also filed a companion case in the Court of Federal Claims with substantially similar—and in many cases identical—factual allegations and overlapping causes of action. *See Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, Civil No. 1:18-cv-359 (Fed. Cl. filed March 7, 2018) (the "*CFC Action*"). In February 2021, the CFC Action was dismissed. *See* Order and Op., CFC Action, ECF No. 38. The Tribe moved for reconsideration in March 2021, which the Court denied. CFC Action, ECF No. 51. The Tribe appealed to the Federal Circuit, where briefing is currently underway. *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States*, No. 21-1880 (Fed. Cir).

[3] The parties include: Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation's ("Tribe"); the United States Department of the Interior ("DOI" or "Interior"), Deb Haaland in her official capacity as Secretary of the Interior, Bureau of Reclamation ("BOR"), and the Bureau of Indian Affairs ("BIA") (collectively, the "United States" or "Federal Defendants"); the State of Utah ("Utah"); and the Central Utah Water Conservancy District ("CUWCD").

complex water resource development project in the state of Utah—and the Uintah Indian Irrigation Project ("Irrigation Project" or "UIIP")—a century-old, multi-purpose water management project involving an extensive irrigation system for Indians and non-Indians alike. The Tribe alleges that the Department of the Interior has breached fiduciary, statutory, or contractual duties owed to the Tribe with respect to its water rights and in management of water infrastructure. None of the Tribe's claims respecting either are new or even based on recent events.

For the reasons discussed more fully below, the Court should dismiss Claims 1-8 and 11. Each of these claims suffers from numerous and, in most cases, overlapping deficiencies including: lack of jurisdiction, lack of standing, barred by the statute of limitations, barred by waiver and release, failure to identify a cognizable cause of action, and failure to identify an actionable fiduciary duty.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Irrigation Project & Midview Exchange

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

Beginning in the early 1900s, the United States allotted approximately 100,000 acres of irrigable lands to individual Ute Indians and later commenced construction of irrigation systems for 78,950 acres of those lands pursuant to the Indian Department Appropriation Act of June 21, 1906 ("1906 Act"), which authorized the appropriations and construction of the Irrigation

Project.[4] *See* 1906 Act, Pub. L. No. 59-258, 34 Stat. 325, 375-76 (1906); *see also* Compl. ¶ 61. The 1906 Act appropriated funds for several Indian tribes, including for individual Indian allottees who were members of the Tribe, but it was also intended to benefit non-Indians by providing irrigation systems to be used by "any person, association, or corporation under and upon compliance with the provisions of the laws of the State of Utah." 1906 Act, 34 Stat. at 375; *see also Hackford v. Babbitt*, 14 F.3d 1457, 1460-61 (10th Cir. 1994).

Under the authority of the 1906 Act, the United States Indian Irrigation Service, subsequently part of BIA, constructed an extensive system of canals and ditches to convey water from the drainages of the Strawberry-Duchesne rivers (west and northwest of Duchesne), Lake Fork-Yellowstone rivers (northwest of Roosevelt), and the Uinta-Whiterocks rivers (north of Roosevelt), all of which flow through at least some portion of the Uintah and Ouray Reservation. *See* Compl. ¶ 77. Congress, in authorizing BIA to recoup all costs associated with operating and maintaining its irrigation systems, intended that the irrigators served by the irrigation projects repay and fund construction, operation, and maintenance. *See* Act of May 29, 1908, Pub. L. No. 60-156, 35 Stat. 444, 450 (1908). Over time, however, low annual operations and maintenance fees resulted in insufficient funding for projects and maintenance. *See* U.S. GOV'T ACCOUNTABILITY OFF. GAO-06-314, INDIAN IRRIGATION PROJECTS: NUMEROUS ISSUES NEED TO BE ADDRESSED TO IMPROVE PROJECT MANAGEMENT AND FINANCIAL SUSTAINABILITY 1-2 (2006), https://www.gao.gov/products/A47799 (last visited Nov. 8, 2022). Thus, in 1941, Congress authorized the cancellation of more than $300,000 in unpaid construction assessments and

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

operation and maintenance charges, and, among other provisions, authorized the Secretary of the Interior to transfer water rights, with the consent of the interested parties, to other Irrigation Project lands and to make necessary contracts to effectuate the transfer(s). *See* Act of May 28, 1941, Pub. L. No. 77-83, §§ 1–2, 55 Stat. 209 (1941).[5]

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

II. The Central Utah Project

Separate from the Irrigation Project is the Central Utah Project, first authorized by Congress in 1956. *See* Colorado River Storage Project Act, Pub. L. No. 84-485, 70 Stat. 105 (1956).[6] The Central Utah Project's essential aim is the collection and distribution of water in

[5] The Tribe contends that it opposed the 1941 Act, never consenting to transfers which it perceives as unlawful. Compl. ¶¶ 103-05. The Act's purpose, however, was to provide financial relief to both Indian and non-Indian landowners and to make the Irrigation Project financially sustainable by shifting resources to more productive lands. *Adjustment of Irrigation Charges, Uintah Indian Project, Utah*, H.R. Rep. No. 77-370 at 3-4 (1941) . In recent years, a number of bills have been brought before Congress to appropriate funds for this funding shortfall and the resulting deferred maintenance. *See, e.g.,* IRRIGATE Act, S. 438, 114th Cong. (2016) ; S. REP. NO. 115-258 on S. 2975 (2018) (energy and water development appropriations).

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

the Uintah Basin, including for irrigation. *See id*. To accomplish this, the Project was divided into six units. Compl. ¶ 128. The Vernal Unit (near Vernal) and Jensen Unit (in Uintah County) have been completed. The Bonneville Unit, the Project's largest, has several systems fully constructed and collects and distributes water in both the Uintah Basin and central Utah's Bonneville Basin. *Id*. ¶129. The remaining units were the Upalco, Uintah, and Ute Indian Units. These units were never built. *Id*. ¶¶ 142-43. The latter two are important here because they would have included reservoirs to supply water to, among other users, the lands of individual Indians.

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

To make use of water in the Central Utah Project, one must hold water rights. By the time Congress originally authorized the Project in 1956, the State of Utah had ordered a general adjudication of all water rights in the Uintah Basin. *See In re Drainage Area of Uintah Basin and the Lower Green River Basin*, attached as Exhibit F; *see also* UTAH CODE ANN. §§ 73-4-1–73-4-24 (LexisNexis 2016) (governing water rights adjudications, and defining the overall process and procedures for allocation of water and adjudication of conflicting claims). In the following years, the Affiliated Ute Citizens and the Tribe jointly hired E.L. Decker to identify Tribal and Affiliated Ute water rights.[7] Compl. ¶ 42. The completed Decker Report organized lands into seven groups. *Id*. ¶¶ 43-44. The Decker Report generally asserted *Winters* reserved

[7] In 1954, Congress enacted the "Ute Partition and Termination Act," Pub. L. No. 83-671, § 6, 68 Stat. 868, which provided for the partition and distribution of the assets of the Tribe of the Uintah and Ouray Reservation between the "mixed-blood" and "full-blood" members. *See Ute Distribution Corp. v. Interior,* 584 F.3d 1275, 1276-79 (10th Cir. 2009), *cert. denied,* 560 U.S. 905 (2010), for the history of the partition. Under the Act, the mixed-blood members (for whom federal supervision would be terminated) organized the Affiliated Ute Citizens as an unincorporated association which, as authorized by the statute, created the Ute Distribution Corp. to jointly manage the distribution of assets to individual mixed-blood members.

water rights based upon, and tabulated by, practicably irrigable acreage.[8] *Id.* ¶¶ 42-44. This tabulation included previously quantified water rights and unquantified potential water rights. *Id*. The Decker Report based its tabulation on more than just lands held in trust for the Tribe as part of the Reservation. *Id.* The Tribe implemented Mr. Decker's recommendations in 1965. *Id*. ¶ 131.

Also in 1965, the United States, the CUWCD, and the Tribe signed what is called the "Deferral Agreement." *See* Deferral Agreement, attached as Exhibit A; Compl. ¶ 131. The Agreement, among other things, deferred irrigation development for 15,242 acres of the Decker Report's "Group 5" lands—those to be served by the Duchesne River and not presently under irrigation, but identified as productive and economically feasible to irrigate—from the Central Utah Project's initial phase (as part of the Bonneville Unit) to the ultimate phase (then planned to be the Uintah Unit). Ex. A ¶¶ 3-5.[9] These Group 5 lands were not part of the Irrigation Project discussed above. Instead, under the Deferral Agreement, the Tribe deferred water use and development on Group 5 lands to ensure roughly 60,000 acre-feet of water per year for the

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

[9] For Group 5 lands, the Decker Report recommended that the Tribe forgo its right to divert water from the streams running through those land and accept substitute water delivered from the Green River through Central Utah Project facilities. The Green River-based diversion became known as the Ute Indian Unit, for which Congress authorized a feasibility study in 1968. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968).

Central Utah Project's Bonneville Unit, which then allowed the Secretary to certify to Congress that construction on the Bonneville Unit could proceed. *See id.* ¶¶ 4-5. The Deferral Agreement also established January 1, 2005, as the "maximum date of deferment and that all phases of the Central Utah [P]roject will in good faith be diligently pursued to satisfy all Indian water rights at the earliest possible date." *Id.* ¶ 5.

Over the following decades, some of the Deferral Agreement's provisions were not fulfilled, including construction of the Uintah Unit. *See* Compl. ¶¶ 142-43. Congress acknowledged that the Upalco and Uintah Units had not been constructed "in part because the Bureau [of Reclamation] was unable to find adequate and economically feasible reservoir sites." Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 501(a)(3), 106 Stat. 4600, 4651–52. Similarly, the separately planned Ute Indian Unit was never authorized by Congress. *Id.*; *see also* COMM. ON ENERGY AND NAT. RES., RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992, S. REP. NO. 102-267, at 98 (1992) (describing Upalco Unit as "indefinitely postponed," Uintah Unit as "inactive," and Ute Indian Unit as having "never been authorized").

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

economic benefits to the Tribe to replace those that would have resulted from the Deferral Agreement's planned projects.[10] *Id*. § 501(b), 106 Stat. at 4651.

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

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

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

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

(b) DESCRIPTION OF CLAIMS.—The Tribe shall waive, upon receipt of the section 504, 505, and 506 moneys, **any and all claims relating to its water rights covered under the agreement of September 20, 1965**, including claims by the Tribe that it retains the right to develop lands as set forth in the Ute Indian Compact and deferred in such agreement. Nothing in

It is well documented that CUPCA was a compromise agreement among the Tribe, the State of Utah, the CUWCD, and the federal government to resolve the Tribe's water rights and settle all potential claims under the Deferral Agreement. *See Ute Indian Water Settlement Act of 1988: Hearing on H.R. 5307 Before the H. Comm. on Interior and Insular Affairs*, 100th Cong. 24 (1988). For example, as it relates to the Tribe's allegations that the United States failed to secure storage and related water works, *see, e.g.,* Compl. ¶¶ 215-25, the Tribe proposed an agricultural commitment in Section 504 to identify approximately 7,000 acres for farming operations, "in lieu of constructing the Upalco and Uintah Units." *See* S. REP. NO. 102-267, at 123-124 (1992) ; *see also* § 504, 106 Stat. at 4653. In 1990, the Tribe's then Chairman also testified in support of the Ute Indian Rights Settlement. *See* Exhibit E (Testimony of Luke Duncan) at 225. The findings and purpose provisions of Title V addressed unresolved claims from the Deferral Agreement and Congressional intent not only to quantify the Tribe's reserved water rights but also "put the Tribe in the same economic position it would have enjoyed had the features contemplated by the [Deferral Agreement] been constructed." § 501(a)-(b), 106 Stat. at 4650–51.[13]

IV. Prior Settlement and Release of Claims

this waiver of claims shall prevent the Tribe from enforcing rights granted to it under this Act or under the Compact. To the extent necessary to effect a complete release of the claims, the United States concurs in such release." § 507, 106 Stat. at 4655 (emphasis added). *See also* S. REP. NO. 102-267, at 124 ("Since the purpose of the settlement is to resolve, once and for all, those outstanding matters, it is appropriate . . . that a comprehensive waiver be undertaken by the Tribe.").

[13] Although the Tribe now challenges the computation of the Bonneville Unit Credits paid annually to the Tribe under Section 502, Compl. ¶¶ 158-59, the proposed formula was expressly acknowledged and accepted by Chairman Duncan in his testimony before Congress. Ex. E at 216.

In 2006, the Tribe sued the United States in the Court of Federal Claims seeking money damages and an accounting for alleged mismanagement of its trust funds and non-monetary trust assets. *See generally* Complaint, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 06-866 L (Fed. Cl. December 19, 2006), attached as Exhibit G; *see id.*, e.g., ¶¶ 54–58, 63–67. This 2006 lawsuit was resolved when the Tribe and the United States executed a settlement agreement on March 8, 2012 (the "Settlement Agreement"). A true and correct copy of the Settlement Agreement is attached as Exhibit D; *see also* Joint Stipulation of Dismissal with Prejudice, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States,* No. 06-866 L (Fed. Cl.) (June 1, 2012).

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

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

Ex. D, ¶¶ 2, 4. The Settlement Agreement explains that this waiver included, but was not limited to, any claims or allegations that the United States "failed to preserve, protect, safeguard, or maintain [the Tribe]'s non-monetary trust assets or resources," "failed to manage [the Tribe]'s non-monetary trust assets or resources appropriately," "failed to prevent trespass on [the Tribe]'s nonmonetary trust assets or resources," "improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used Plaintiff's non-monetary trust assets or resources," and

"failed to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner." *Id.* ¶ 4.[14]

V. The Present Litigation

A. Proceedings in the DC Court

The Tribe sued the United States in the DC Court in March 2018. ECF No. 1. The United States moved to dismiss the Tribe's complaint, ECF No. 22, and the Tribe subsequently filed its first amended complaint in January 2019, ECF No. 25. The United States again moved to dismiss. ECF No. 28 (filed March 22, 2019). In February 2020, the DC Court granted the State of Utah's motion to intervene, ECF No. 52, and subsequently granted the Tribe leave to file a second amended complaint against both state and federal defendants. The Tribe filed its second amended complaint in April 2020. ECF No. 57. All defendants moved to dismiss that complaint, ECF Nos. 68 (United States), 67 (State of Utah), 70 (CUWCD), and the United States moved to transfer the remaining APA claims, relating to a water exchange contract with Utah, to this Court, ECF No. 69. On July 16, 2021, the DC Court heard argument on the motions to dismiss and the United States' motion to transfer. On September 15, 2021, the DC Court granted all motions. ECF Nos. 114, 115.

B. Proceedings in Utah

The case arrived in this Court on September 30, 2021. ECF No. 116. Following transfer, the Tribe moved for leave to file a third amended complaint. ECF No. 163. The United States opposed, arguing that amendment was futile because the Tribe's proposed claims suffered from

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

the same deficiencies as those previously dismissed by the DC Court. ECF No. 168. Following briefing and argument, Magistrate Judge Oberg granted the Tribe's motion, ECF No. 185, and the Tribe filed its third amended complaint on August 29, 2022. ECF No. 186.

This operative complaint includes eleven claims for relief. Nine of those claims, Claims 1-8 and 11, are subject to dismissal on various grounds as summarized in the chart attached as Exhibit C and discussed below.

LEGAL STANDARDS

The United States moves to dismiss the Complaint under Federal Rule of Civil Procedure 12 (b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim.

A threshold issue in every federal case is whether the court maintains jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). As courts of limited jurisdiction, federal courts may only decide cases after the party asserting jurisdiction demonstrates that the dispute falls within the court's Constitutional and statutory jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) (federal courts "possess only that power authorized by Constitution and statute")). Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 88-89. In suits against the United States, an express waiver of sovereign immunity is a prerequisite to subject matter jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. King*, 395 U.S. 1, 4 (1969). A party seeking federal court jurisdiction bears the burden of demonstrating that jurisdiction exists. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Michelson v. Enrich Intern, Inc.*, 6 F. App'x 712, 716 (10th Cir. 2001). The Supreme Court

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

Where the Court lacks jurisdiction over a plaintiff's claims, it must dismiss them pursuant to Federal Rule of Civil Procedure 12(b)(1). And where a "Rule 12(b)(1) motion challenges the facts upon which subject matter jurisdiction depends, 'a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'" *Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) (explaining that a court's consideration of materials outside the pleadings in deciding a 12(b)(1) motion does not require that the court treat the motion as one for summary judgment).

To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court "must take all of the factual allegations in the complaint as true," it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). In addressing a 12(b)(6) motion, courts may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

Without triggering conversion of a Rule 12(b) motion to a Rule 56 motion, a court may take judicial notice, pursuant to Federal Rule of Evidence 201(b), of publicly available records, reports of administrative bodies, and records of prior litigation. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004); Fed. R. Evid. 201(b). In addition, and even where not referred to or attached to

the complaint, a court may also consider relevant settlement agreements where the parties do not dispute their validity. *See, e.g., Diva's Inc. v. City of Bangor*, 411 F.3d 30, 38 (1st Cir. 2005) ("when a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), then the court can review it upon a motion to dismiss") (cleaned up); *see also Deutsch v. Pressler, Felt & Warshaw, LLP*, 535 F. Supp. 3d 322, 327 (S.D.N.Y. 2021); *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006).

ARGUMENT

The Court should dismiss all but two of the Tribe's claims for numerous reasons. As a threshold matter, nearly all of the Tribe's claims fail for one simple overarching reason: the Tribe has not identified a cognizable cause of action (Claims 1-8). But the Tribe's claims also suffer from numerous other deficiencies. First, the Tribe has failed to identify any enforceable trust duty (Claims 1-4, 7, and 8). Second, the Tribe previously waived and released certain claims through the 2012 Settlement Agreement (Claims 4 and 8) and Section 507 of CUPCA (Claims 1-4). Third, the Tribe cannot seek specific performance or declaratory relief against the federal government for contract-based claims related to the Midview Exchange or Deferral Agreements (Claims 1, 3, 5-6), and, in any event, these and other claims are time-barred (Claims 1-6). And, finally, Claim 11, through which the Tribe alleges violations of its and its members' constitutional rights, must be dismissed because the Tribe lacks standing to assert it and, even if brought as a class action, as the Tribe now styles it, all plaintiffs fail to adequately allege animus.

I. The Tribe Fails to Plead Cognizable Claims (Claims 1-8).

To proceed in federal court on a claim against the United States, a plaintiff must identify a waiver of sovereign immunity, a grant of subject matter jurisdiction, and a cause of action. *See Flute v. United States*, 808 F.3d 1234, 1239 (10th Cir. 2015). Here, the Tribe has asserted a

waiver of sovereign immunity under the APA (5 U.S.C. § 702) and the 1906 Act (Public Law 59-258), and subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362. Compl. ¶¶ 27, 23. But, despite a third opportunity to amend, the Tribe has still not pled cognizable causes of action.

The DC Court previously dismissed the Tribe's nearly identical claims for this very reason: the Tribe failed to identify cognizable causes of action. *Ute DC Op.*, 560 F.Supp.3d at 259-63. In the prior iteration of its complaint, the Tribe styled nearly all of its claims as requests for "Declaratory and Enforcement Relief," and cited the Declaratory Judgment Act. 28 U.S.C. § 2202. *See* ECF No. 57 ¶¶ 243, 249, 254, 262, 271, 276, 283, 290, 295, 301. The Declaratory Judgment Act, of course, does not provide an independent cause of action. *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671–74 (1950). In an attempt to remedy this, the Tribe has now added a "breach of trust" title to many of its claims. *See, e.g.,* Compl. (Claims 1-4, 7). This moniker, however, cannot save them. As explained further below, the Tribe has not identified an enforceable fiduciary duty to support any of its claims; thus, to the extent they allege breaches of trust, they must be dismissed. To the extent the Tribe alleges contract-based claims (Claims 1, 3, 5-6), those claims must be dismissed because this Court lacks jurisdiction over such contract claims against the United States; thus, they have no cause of action in this Court. Finally, the Tribe does not identify any statutory or treaty-based source for its requested accounting (Clam 8), meaning that claim also must fail.

Nor has the Tribe pled actionable APA claims. As an initial matter, the Tribe's new (and repeated) citation to section 706(1) of the APA does not, standing alone, amount to a viable cause of action. *See* Compl. ¶¶ 201, 213, 224, 245, 251, 269, 277, 296, 310 (citing 5 U.S.C § 706(1)). These new citations were likely prompted by a footnote in the DC Court's opinion where it recognized that in the *D.C. Circuit* "the continuing-violation doctrine tolls claims

alleging an unreasonable delay of agency action," under section 706(1). *Ute DC Op.*, 560 F. Supp. 3d at 258 n. 5. While this appears to be an open question in the Tenth Circuit, "the vast weight of authority holds that the continuing violations doctrine does not apply to failure-to-act claims under Section 706(1)" and the Tenth Circuit has stated more broadly that the doctrine will not apply where "the Plaintiffs' injury was discrete and discoverable and . . . nothing prevented plaintiff[] from coming forward to seek redress." *Wild Horse Observers Ass'n v. Salazar*, No. 1:11-CV-00335-MCA-RHS, 2012 WL 13076299, at *7–9 (D.N.M. Sept. 28, 2012), *aff'd sub nom. Wild Horse Observers Ass'n, Inc. v. Jewell*, 550 F. App'x 638, 641 (10th Cir. 2013) (relying on *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1431 (10th Cir. 1996)).

In any event, the DC Court rightly concluded that the Tribe had not pled claims under section 706(1). *Ute DC Op.*, 560 F. Supp. 3d at 258 n. 5. And this remains true here. In order to state a claim under section 706(1), a plaintiff must identify a mandatory, nondiscretionary duty that the United States was required, but failed, to perform. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required to take*."). Nowhere does the Tribe's complaint identify any such mandatory, nondiscretionary duties that the United States has failed to perform or has unreasonably delayed performing.

The only claim that comes close to identifying such a duty is Claim 7, regarding the Bottle Hollow Reservoir and section 505(c) of CUPCA. Compl. ¶¶ 263-70. There, the Tribe seeks a declaration from the Court that under this provision the United States has "an ongoing statutory and fiduciary obligation to secure water rights in the Bottle Hollow reservoir sufficient to enable the Bottle Hollow Reservoir to be used as a cold water fishery…" Compl. ¶ 270. But subsection 505(c), by its plain terms, does not require the United States to secure water rights.

The subsection addresses how funds *may* be spent and states, in relevant part, that "$500,000 in an initial appropriation shall be *available to permit* the Secretary to clean the Bottle Hollow Reservoir … and to secure minimum flow of water to the reservoir to make it a suitable habitat for a cold water fishery." § 505(c), 106 Stat. at 4653 (emphasis added). Such permissive language does not create a mandatory, nondiscretionary duty that can be compelled under section 706(1). *See Norton*, 542 U.S. at 63-65. Section 505(c) does not support the Tribe's section 706(1) claim.

The Tribe is also mistaken to the extent it argues that various governmental actions referenced in Claims 1 through 8—such as executing the Deferral and Midview Exchange Agreements, entering the 1923 decree, or enacting CUPCA in 1992—constitute final agency actions subject to challenge under section 706(2) of the APA (*see, e.g.,* Compl. ¶¶ 110, 131, 151, 183). Those actions occurred well outside the applicable six-year statute of limitations, *see* 28 U.S.C. § 2401(a); thus, the Tribe's challenges thereto would be time-barred. *Smith v. Marsh*, 787 F.2d 510, 512 (10th Cir. 1986) (right of action accrues on the date of the agency action). That any such challenge is time-barred is clear on the face of the Complaint. *See*, *e.g.,* Compl. ¶110 (parties to Midview Exchange signed water transfer agreement in 1967), ¶ 131 (parties execute the Deferral Agreement in 1965), ¶ 142 (1986 indefinite postponement to Upalco Unit); ¶¶ 143 (Ute Indian Unit "abandoned" in 1980 Bureau of Reclamation report); ¶ 151 (CUPCA enacted in 1992); ¶¶ 183, 222 (with respect to the 1923 decree, the Tribe identifies no final agency actions occurring in the past six years).

In sum, the Court should dismiss Claims 1-8 because the Tribe fails to identify a cognizable cause of action and, thus, fails to state claims upon which relief could be granted.[15]

II. The Tribe Fails to Identify Any Enforceable Trust Duty (Claims 1-4, 7, and 8).

The Court should dismiss Claims 1-4, 7, and 8 because the Tribe fails to identify a substantive source of law that establishes a specific fiduciary duty. This failure is fatal to each of its breach of trust claims.[16] The DC Court, considering nearly identical claims and the *very same* legal sources the Tribe still relies upon here, concluded that, because the Tribe "ha[d] not identified an enforceable duty, it fails to allege a necessary predicate for establishing an implied cause of action," and dismissed the Tribe's breach of trust claims for failure to state a claim.[17] *Ute DC Op.*, 560 F.Supp.3d at 263. This Court should do the same.

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[15] Separately, the federal district courts lack jurisdiction to adjudicate water rights between the Tribe and the United States or to compel the Attorney General to quantify the Tribe's water rights. The McCarran Amendment, 43 U.S.C. § 666(a), withholds the United States' consent to be sued in actions involving an adjudication of water rights unless the action involves joinder of the United States as a defendant in general stream adjudications in which the rights of all competing claimants are adjudicated. *See, e.g., United States v. Dist. Court For Eagle County*, 401 U.S. 520, 525 (1971) (explaining that the United States can only be joined as a defendant in comprehensive water rights adjudications that include all of the rights of various owners on a given stream); *see also Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479-83 (D.C. Cir. 1995) (confirming litigation discretion of Attorney General and rejecting breach-of-trust claim based on failure to assert certain claims in general stream adjudication absent clear obligation found in treaty, statute, or agreement). This is not such a case. For that reason, the Court should dismiss Claims 1-8 to the extent they relate to water rights quantification or seek an adjudication of water rights in the Uintah Basin. The Tribe has previously stated that it does not seek a quantification of its water rights through this lawsuit, ECF No. 81 at 7, nevertheless, the United States raises the issue to preserve it, in the event the Tribe argues differently here.

[16] To the extent the Tribe's claims arising under the Midview Exchange Agreement, Claims 5 and 6, allege breaches of fiduciary duty or rely upon alleged fiduciary obligations, they likewise fail for the reasons discussed in this section.

[17] The only new source of law the Tribe identifies is the Treaty of 1849, discussed *infra*. *Compare* ECF No. 57 ¶ 17 *with* ECF No. 186 ¶ 24. Notably, the Tribe has abandoned seven other alleged sources of trust duties on which it previously relied. *Id*.

Claims 1-4, 7, and 8 allege that the United States has acted contrary to some trust obligation in its management of the Tribe's water rights or water projects and infrastructure. *See* Compl. ¶¶ 202-52, 263-77. But the Tribe has failed to identify any substantive source of law that establishes specific fiduciary obligations. *See Flute*, 808 F.3d at 1244. While there is "a general trust relationship between the United States and the Indian people," that general trust relationship does not, by itself, create legally enforceable obligations for the United States. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*")). Instead, the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177. Even then, however, "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *Id*. at 165. "'[N]either the general trust relationship between the federal government and Indian Tribes nor the mere invocation of trust language in a statute (as in the Allotment Act) is sufficient to create a cause of action for breach of trust.'" *Flute*, 808 F.3d at 1244 (quoting *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 893 (D.C. Cir. 2014)).

In order to bring a claim for breach of trust, "a Tribe must identify a substantive source of law that establishes *specific* fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003) ("*Navajo I*") (citation omitted) (emphasis added). The Court's "inquiry must focus on the express language of the statute or regulation to determine whether it expressly creates rights or imposes duties of a fiduciary nature." *Flute*, 808 F.3d at 1244. "[A]n Indian tribe must identify statute or regulations that both impose a specific obligation on the United States and 'bear the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States*, 782 F.3d 662,

667 (Fed. Cir. 2015) (citation omitted) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) (*Navajo II*)). Further, and importantly in this case, "a statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Hopi Tribe*, 782 F.3d at 667 (citation omitted).

Here, Claims 1-4, 7, and 8 allege that the United States has breached fiduciary duties relating to the Tribe's water rights, resources, and infrastructure.[18] The problem, however, is that, of the eighteen alleged sources of fiduciary duties, not one creates an enforceable trust obligation under the Supreme Court precedent discussed above. *See* Compl. ¶ 24. Two of the eighteen alleged sources can be immediately dispensed with because they are sources other than the Constitution or a statute or regulation. *Id*. ¶ 24 (g), (i). Most of the remaining sixteen do not even relate to accounting, irrigation, or water rights at all, let alone create the alleged fiduciary duties that form the bases of the Tribe's trust claims. For ease of reference, we list the alleged sources in the same order as the Complaint and briefly explain why each is insufficient:

a. The Treaty of Guadalupe Hidalgo of 1848 does not suffice because Congress previously passed legislation to resolve any claims under that Treaty, requiring that any claims be brought within two years of enactment. *See Daniels v. United States*, No. 17-1598 C, 2018 WL 1664476 at *7 (Fed. Cl. Apr. 6, 2018) (referencing Act to Settle Private Land Claims in California, 9 Stat. 631 (1851)). The Treaty itself ceded lands in what had been Mexico to the United States. *See Martinez v. Gonzales*, No. 13-cv-922, 2014 WL 12650983 at *3 (D.N.M. June 30, 2014). The United States did not recognize these areas as "Indian country" upon cession from Mexico until initial treaties and assignment of reservations established them as such. *See Hayt v. United States*, 38 Ct. Cl. 455, 460-465 (1903).

b. The Treaty of 1849 is a treaty to cease "hostilities" between the United States and various bands of "the Utah tribe of Indians;" whereby, territorial boundaries would eventually be defined and wherein the Utahs may eventually "settle in such other manner as will enable them most successfully to cultivate the soil, and pursue such other industrial pursuits as

[18] The Tribe styles Claim 8 as a request for accounting, but it rests on the Tribe's allegation that the United States has some fiduciary obligation to provide an accounting. Compl. ¶¶ 271-77. Because it does not, this claim likewise fails. *Flute*, 808 F.3d at 1246-47.

will best promote their happiness and prosperity." *See* Treaty with the Utah, Dec. 30, 1849, 9 Stat. 984. The treaty does not establish any fiduciary obligations with respect to water rights, irrigation, or infrastructure. *See id*. Likewise, neither the Ute Treaty of 1863 nor the Ute Treaty of 1868 establish any fiduciary duties or make any direct reference to water rights, infrastructure, or irrigation. These three treaties merely establish a conditional framework to provide the Tribe with certain benefits, in the event it chose to undertake certain actions. The Act of April 29, 1874 (Chapter 136, 18 Stat. 36), similarly, makes no reference to water rights or irrigation. Its single reference to any trust duty relates to a sum of money, or its equivalent, that was to be invested at the "discretion of the President … for the use and benefit of the Ute Indians …" This sum is not at issue in this litigation.

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

d. The Act of March 1, 1899, appropriated money to, among other things (and in the Secretary's discretion), "construct ditches and reservoirs, purchase and use irrigation tools and appliances, and purchase water rights on Indian reservations," and authorized the Secretary, "in his discretion, to grant rights of way for the construction and maintenance of dams, ditches, and canals through the Uintah Indian Reservation in Utah, for the purposes of diverting and appropriating waters of the streams in said reservation for useful purposes." *See* 30 Stat. 924, 940, 941. Neither discretionary authorizations to act nor appropriations such as these create enforceable trust duties. *See Wolfchild v. United States*, 731 F.3d 1280 at 1292 (Fed. Cir. 2013); *Hopi*, 782 F.3d at 670.

e. The Reclamation Act of 1902 (32 Stat. 388) only provides for authority to purchase or condemn lands for irrigation purposes. 32 Stat. 388; *See also Grey v. United States*, 21 Cl. Ct. 285 at 295–96 (1990).

f. The Department of Interior Appropriation Act of June 21, 1906 (Pub. L. No. 59-258), merely set aside money for constructing the irrigation system and did not create enforceable trust duties. *See Hopi*, 782 F.3d at 670; *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed.Cir.2011), *vacated in part on other grounds*, 133 S. Ct. 423 (2012). The 1906 Act states that the Irrigation Project is to be held in trust for Tribe. *See* Pub. L. No. 59-258 ("the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians"). But bare "in trust" language is not sufficient to establish a fiduciary duty to manage, develop, protect or fund resources and infrastructure on the Irrigation Project. *See United States v. Mitchell,* 445 U.S. 535, 541-542 (1980); *Hopi Tribe v. United States*, 782 F.3d at 665; *see also N. Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.")

g. *Winters v. United States*, 207 U.S. 564 (1908), and its "progeny" are court rulings, not constitutional, statutory, or regulatory obligations. In any event that body of case law did not create any specific fiduciary trust duties. *Winters* simply held that the establishment

of an Indian reservation impliedly reserved the amount of water necessary to fulfill the purposes of the reservation. The "*Winters* doctrine" guides courts in evaluating the nature, scope and priority date of a tribe's water rights.

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

i. *Cedarview Irrigation Company*, No. 4427, slip op. (D. Utah 1923) and *Dry Gulch Irrigation Company*, No. 4418, slip op. (D. Utah 1923) ("1923 Decrees") are court rulings, not constitutional, statutory, or regulatory obligations. In any event both decrees involved allotments for individual Indians, not the Tribe.

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

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

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

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

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

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

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

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

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

To the extent the Tribe is attempting to allege that these sources collectively create a system of comprehensive federal control to trigger an enforceable trust obligation, it is mistaken. For one, the United States does not have a general trust duty to provide, develop, or fund agricultural infrastructure. *See White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 630 (1987), *aff'd* 31 F.3d 1176 (Fed Cir. 1994), *cert. denied*, 511 U.S. 1030 (1994); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852, 865 (Ct. Cl. 1982). The fact that the United States has some role in (or even control over) irrigation is irrelevant because "[t]he Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. Contrary to what the Tribe may argue, *Mitchell II* does not hold otherwise.

In *Mitchell II* the Supreme Court concluded that the United States had comprehensive responsibilities with respect to timber management. 463 U.S. at 219–20. The Court rooted this conclusion in its findings that "Congress expressly directed that the Interior Department manage Indian forest resources," via statute (25 U.S.C. § 466) and that "[t]he regulatory scheme was designed to assure that the Indians receive the benefit of whatever profit [the forest] is capable of yielding." *Id.* at 221–22 (citation and internal quotations omitted). As the Court explained, Interior controlled "virtually every aspect of forest management including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements,

administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source." *Id*. at 219–20

Here, the Tribe has presented nothing close to that type of control with regard to water rights and irrigation. Thus, even assuming principles of control were relevant, the disparate statutes and regulations the Tribe identifies "do not give the kind of 'full responsibility' and 'elaborate control' over water resources that the Supreme Court found to support a fiduciary relationship regarding timber resources in *Mitchell II* . . . ." *Hopi*, 782 F.3d at 671. Instructively, another court addressing the issue has held, applying the *Mitchell II* analysis, that 25 C.F.R. Part 171 does not create the same type of comprehensive responsibility for the delivery and apportionment of water as do the statutes and regulations covering the preservation and sale of timber on allotted lands. *Grey*, 21 Cl. Ct. at 293-94.

In sum, because the Tribe fails to identify a substantive source of law that creates specific, enforceable fiduciary obligations, its breach of trust claims fail, and the Court should dismiss Claims 1-4, 7, and 8 for failure to state a claim.

III. The Tribe Expressly Waived and Released Claims Relating to the Irrigation Project in the 2012 Settlement Agreement (Claims 2, 4, and 8).

Claim 2 (alleging a failure to provide storage facilities as part of the Irrigation Project), Claim 4 (alleging breach of trust relating to management and maintenance of the Irrigation Project) and Claim 8 (alleging failure to provide an accounting) should be dismissed because they were expressly waived and released in the 2012 Settlement Agreement.

A settlement, for enforcement purposes, has the same attributes as a contract. *Anthony v. United States*, 987 F.2d 670, 673 (10th Cir. 1993). Settlements to which the government is a party are interpreted according to federal law. *Prudential Ins. Co. of Am. v. United States*, 801

F.2d 1295, 1298 (Fed. Cir. 1986); *Keydata Corp. v. United States,* 504 F.2d 1115, 1123 (Ct. Cl. 1974). If the language of a settlement clearly bars future claims, the plain language governs. *See, e.g., Denver Homeless Out Loud v. Denver, Colorado*, 32 F.4th 1259, 1277 (10th Cir. 2022). Indeed, it is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. *See, e.g., Peckham v. United States*, 61 Fed. Cl. 102, 109 (2004). Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Any exclusions from a waiver or release must be clear, explicit, and "manifest" in the agreement itself. *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *Merritt-Champman & Scott Corp. v. United States*, 458 F.2d 42, 44–45 (Ct. Cl. 1972) (en banc) (per curiam).

Here, in exchange for $125 million, the Tribe "waived and released any and all claims . . . known or unknown" based on harms or violations occurring before March 8, 2012 that relate to the United States' "management or accounting of [the Tribe]'s trust funds or . . . *non-monetary trust assets or resources*." Ex. D ¶ 4 (emphasis added). This waiver covers Claims 2, 4 and 8.

With respect to Claims 2 and 4, the Tribe alleges that fiduciary duties attach to the United States' management of the Irrigation Project. Compl. ¶¶ 63, 71, 220, 222, 252. The United States disagrees with that legal conclusion. But, even if accepted as true, it would mean that any claim related to or arising from the United States' alleged mismanagement of the Irrigation Project—a non-monetary trust asset or resource—would be covered by the terms of the 2012 Settlement Agreement. Through Claims 2 and 4, the Tribe alleges that the United States breached their trust duties to the Tribe by failing to "provide storage facilities," *id.* ¶ 222, through carriage agreements and "informal operating procedures," and mismanaging, deferring

maintenance, or otherwise failing to complete the Irrigation Project. *See id.* ¶¶ 91-95, 125-26, 215-25, 246-52. These allegations are based on harms or violations occurring before March 8, 2012, and, thus, fall within the Settlement Agreement's waiver and release. *See* Ex. D ¶ 4.

Claim 8, which seeks a historical accounting related to administration of the Irrigation Project, is likewise barred by this waiver and release provision. *See* Compl. ¶¶ 271-77. Paragraph 4 of the 2012 Settlement Agreement expressly waived and released historical claims relating to the United States' accounting of the Tribe's trust funds and non-monetary trust assets or resources. *See* Ex. D ¶ 4. Claim 8 is not based on any events post-dating the Settlement Agreement, and thus, like Claims 2 and 4, falls squarely within that waiver.

Accordingly, the Court should dismiss Claims 2, 4, and 8 for failure to state a claim.

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

Claims 1-4 fall under the scope of the waiver and release provision in Section 507 of CUPCA because they each relate to, and arise from, alleged breaches of the Deferral Agreement that pre-date the enactment of CUPCA (October 30, 1992). *See* Compl. ¶¶ 202-252. Congress expressly provided in CUPCA that upon receipt of certain monies (defined in Sections 504-506), the Tribe would waive and release "any and all claims relating to its water rights" including the "right to develop lands" covered by the 1965 Deferral Agreement. *See* Pub. L. No. 102-575, §507, 106 Stat. 4600, 4655. This Ute Indian Rights Settlement embodied in CUPCA and these statutorily-defined monies were intended to compensate the Tribe in lieu of performance of the Deferral Agreement. 106 Stat. at 4651-55; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (describing Congress's power to "modify or eliminate tribal rights" via statute).

Judicially-noticeable documents demonstrate that the Tribe has received the CUPCA monies. In a 2006 lawsuit, the Tribe admitted that payment of the funds identified in Sections

504-506 had been made. *See* Ex. G ¶¶ 15-18, 36. The Tribe further acknowledged that these CUPCA payments were "designed to redress certain of the Tribe's claims arising from the failure of the United States to construct specified water projects required by various agreements between the Tribe and the United States." *Id.* ¶15. This receipt of funds triggered the statutory waiver defined in Section 507 of CUPCA.

The DC Court—evaluating nearly identical claims alleging "breaches of the Defendants' obligations under the 1965 Deferral Agreement,"—agreed. *Ute DC Op.*, 560 F.Supp.3d at 263 n. 12. The DC Court explained:

> [section] 507 of the [CUPCA] expressly waived 'any and all claims relating to [the Tribe's] water rights covered under the [1965 Deferral] [A]greement,' as soon as the tribe received the 'moneys' described in §§ 504, 505, and 506. See 106 Stat. at 4655. The Tribe acknowledged its receipt of those funds in a 2006 complaint filed in the Court of Federal Claims."

Id. (citing *New Vision Photography Program*, 54 F. Supp. 3d 12, 23 (D.D.C. 2014) (noting on a Rule 12(b)(6) motion, that courts may consider prior litigation records)).

Thus, claims relating to or arising from the Deferral Agreement (Claims 1-4) have been waived and released, and the Court should dismiss them for failure to state a claim.

V. The Court Lacks Jurisdiction and the Tribe Fails to State Claims for Relief Related to the Midview Exchange Agreement (Claims 5 and 6).

In Claims 5 and 6, the Tribe seeks either specific performance of the Midview Exchange Agreement or its invalidation. The Tribe alleges that under the Midview Exchange Agreement it was given beneficial ownership of the Midview Property and that the agreement was "an illegal conveyance of tribal property . . . ." Compl. ¶ 258. The Tribe requests a declaration from this Court that the Midview Exchange Agreement is invalid or that the Court impose a constructive trust on the Tribe's alleged water rights (Claim 5), or, in the alternative, a decree requiring

specific performance, including the transfer of the Midview Property into trust for the benefit of the Tribe (Claim 6). *Id.* ¶¶ 260, 262. Neither claim is viable.

First, the plain language of the Midview Exchange Agreement does not authorize the Midview Property to be transferred to the Tribe. *See* Ex. B (Midview Exchange), ¶¶ 6-8. But, even if it had, there would be no claim against the United States under the Indian Non-Intercourse Act, which the Tribe relies upon here (Compl. ¶¶ 253-62), for failing to do so. The Tribe acknowledges, as it must, that the statute's purpose was "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, *except the United States*, without the consent of Congress." Compl. ¶ 255 (emphasis added). Any right-of-way or property transfer *by the United States* would not be prohibited by 25 U.S.C. § 177. The case the Tribe cites in Claim 5 recognizes this very principle. *Id.* ¶ 255 (citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960)). As that case concluded, "there is no such requirement with respect to conveyances to or condemnations by the United States or its licensees; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State." *Federal Power Comm'n*, 362 U.S. at 119 (cleaned up).

In any event, as the DC Court explained, such claims under the Midview Exchange Agreement are time barred because they "accrued back in 1967, when the allegedly unlawful conveyance occurred[,]" and "emerged from 'a single governmental action.'" *Ute DC Op.*, 560 F.Supp.3d at 258 (citing *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000)); 28 U.S.C. § 2401(a). The Tribe's new unsupported and conclusory allegations that it did not discover the "material facts" until 2014 or exhaust its administrative remedies until 2016, Compl. ¶ 259, do not cure the statute of limitations problem identified by the DC Court. The fact

remains that the agreement was signed in 1967 and the Tribe has been aware of its existence and terms since that time.

Second, the Tribe's request for specific performance of the alleged contractual duty is beyond the scope of this Court's jurisdiction. The Tucker Act grants the Court of Federal Claims exclusive jurisdiction over contract-based claims.[19] 28 U.S.C. §§ 1346(a)(2), 1491(a); *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080-2 (10th Cir. 2006). And the sole remedy for a breach of contract action against the federal government is money damages. *Id*. at 1082. Specific performance is not available. *Id*. ("the Tucker and Little Tucker Acts 'impliedly forbid' federal courts from ordering declaratory or injunctive relief, at least in the form of specific performance, for contract claims against the government, and [ ] the APA thus does not waive sovereign immunity for such claims."); *see also Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) ("We know of no case in which a court has asserted jurisdiction either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligation.").

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

VI. The Court Lacks Jurisdiction and the Tribe Fails to State a Claim for Relief Related to the Deferral Agreement (Claims 1 and 3).

Claims 1 and 3 are likewise contract-based claims over which this Court lacks jurisdiction. In Claim 1, the Tribe requests, for example, a declaration that the 1965 Deferral Agreement is a binding quantification of the Tribe's water rights and asks the Court to "estop[ ]" the United States from "repudiating" the Deferral Agreement. Compl. ¶ 214. Claim 3, which

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

seeks an interpretation of CUPCA, is premised on the Tribe's contention that the Deferral Agreement remains a valid contract that supports both the quantification of its water rights and the United States alleged duty to "provide water storage." *Id*. ¶¶ 238, 240-42. Both of these claims should be dismissed because the district courts do not have jurisdiction to issue declaratory relief in breach of contract cases against the United States and, in any event, the claims would fall outside the applicable six-year statute of limitations.

First, as discussed above, the Tucker Act grants the Court of Federal Claims (with the exception of cases seeking less than $10,000) exclusive jurisdiction over breach of contract claims against the federal government. 28 U.S.C. §§ 1346 (a)(2), 1491(a); *see Robbins*, 438 F.3d at 1080-81. The sole remedy for an alleged breach of contract against the federal government is a claim for money damages; declaratory or injunctive relief "in the form of specific performance, for contract claims against the government," is not available and the APA "does not waive sovereign immunity for such claims." *Id*. at 1082. Claims 1 and 3 seek precisely the type of declaratory relief that is not permitted in the district courts. Compl. ¶¶ 210-14; 238-45. For that reason, this Court lacks jurisdiction over these claims and must dismiss them.

Second, these claims are time-barred because the Complaint was filed decades after the statute of limitations expired. 28 U.S.C. § 2401(a). The Deferral Agreement was signed by the parties in 1965. *See* Ex. A. While it is true that some of the provisions of the Deferral Agreement were not met, these facts have been known by the Tribe since the 1980s. *See, e.g.,* Compl. ¶ 142 (1986 indefinite postponement to Upalco Unit); ¶ 143 (Ute Indian Unit "abandoned" in 1980 Bureau of Reclamation report). Moreover, CUPCA, enacted in 1992, by its express terms made clear that it, in conjunction with the Revised Ute Indian Compact of 1990, was intended to "quantify the Tribe's reserved water rights" and "put the Tribe in the same

economic position it would have enjoyed had the features contemplated by the [Deferral Agreement] been constructed." 106 Stat. 4600, Section 501. CUPCA was a congressionally-enacted settlement of the Tribe's water rights and its claims under the Deferral Agreement—a fact that the Tribe's then-Chairman acknowledged during his testimony on the subject at a congressional hearing in 1988. *See* Ex. E at 214-15, 225 (Testimony of Luke Duncan); *see also Ute Indian Water Settlement Act of 1988: Hearing on H.R. 5307 Before the H. Comm. on Interior and Insular Affairs*, 100th Cong. 24 (1988). The Tribe cannot credibly claim it was unaware in the process of CUPCA's enactment in 1992 that certain provisions of the Deferral Agreement had not been implemented. Having knowledge of the material facts giving rise to claims under the Deferral Agreement at least as early as the 1980s and, at latest, when CUPCA was enacted in 1992, claims arising from that agreement are now time-barred or waived pursuant to Section 507 of CUPCA, as described in Section IV, *supra*.

While the Tribe alleges that the controversy surrounding the legal interpretation of the 1965 Deferral Agreement "did not arise until mid-2012 at the earliest, during the course of the Tribe's negotiations with the State and Federal Defendants," Compl. ¶ 211, this allegation is belied by the substance of the claim itself and the remaining allegations in the complaint. As shown above, CUPCA, by its clear terms, was intended to resolve and settle any remaining claims relating to or arising from the unfulfilled provisions of the Deferral Agreement. 106 Stat. 4600, Section 501. The Tribe has been aware of its terms since its enactment in 1992. To the extent the Tribe was dissatisfied with that statutory resolution, it should have brought its challenge within six years following enactment of CUPCA in 1992. The Tribe's attempt to litigate this question now, nearly thirty years later, is time barred.

For these reasons, the DC Court dismissed nearly identical claims relating to the 1965 Deferral Agreement as time barred. It explained: "[A]as of the 1980s, and certainly by 1992, the Tribe knew that Defendants would not meet the specific obligations described in the 1965 Deferral Agreement, as well as in other alleged sources. It could have long ago sought judicial declarations about the source and scope of its enforceable water rights, as well as relief for the Defendants' failures to secure those rights." *Ute DC Op.*, 560 F.Supp.3d at 257. The DC Court likewise rejected the Tribe's same savings arguments finding that the Tribe "fail[ed] to show that accrual began in 2012," and that neither the Indian Trust Accounting Statute or the continuing violation doctrine saved these claims. *Id.* at 257-58.

The Court should dismiss Claims 1 and 3 for either lack of jurisdiction or failure to state a claim.

VII. The Tribe Lacks Standing and All Plaintiffs Fail to State a Claim for Violation of Their Constitutional Rights (Claim 11).

The Court should dismiss Claim 11 because: (a) the Tribe lacks standing as a sovereign government to assert a violation of its members' constitutional rights, or to represent individual plaintiffs as a class representative; and (b) both the Tribe and purported class plaintiffs fail to state a claim upon which relief could be granted.[20]

A. The Tribe Lacks Standing to Bring this Claim.

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). One "irreducible constitutional minimum"

[20] Neither the Tribe nor the purported class plaintiffs may rely on the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for their cause of action against the United States because that statutory provision does not create a private right of action against the United States or its agencies. *See* 42 U.S.C. § 2000d-4a (excluding federal agencies from the definition of "program or activity.") Thus, to the extent the Tribe relies on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, it fails to state a claim upon which relief could be granted.

element of standing is an injury-in-fact suffered by the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The injury must affect the plaintiff in a "personal and individual way." *Id*. at 560 n.1. Here, the Tribe lacks standing to sue the United States as plaintiff or "on behalf of" the purported class plaintiffs, Compl. ¶ 184, for allegedly discriminatory practices violating the Constitutional rights of the Tribe and its members. This is true for several reasons.

First, the Tribe is not protected by the U.S. Constitution's guarantees that the law will equally protect individuals. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-25, 227 (1995); *Coal. For Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997). The Tribe cannot assert any "personal and individual" injury to its equal protection or due process rights because, as a governmental entity, it has no equal protection rights. *Adarand*, 515 U.S. at 227. The Tribe is not an individual. As a sovereign government or corporation (organized under the Indian Reorganization Act, 25 U.S.C. § 2154, Compl. ¶ 7), it has no equal protection rights to assert separately from its members' rights. It therefore lacks standing to assert a claim based on the alleged disparate and discriminatory treatment of the Tribe (as a group) or of its members (as individual persons). Its equal protection claim thus fails insofar as it is brought on the Tribe's behalf.

Second, the Tribe may not rely on the doctrine of *parens patriae* to litigate this claim on behalf of its members. *See* Compl. ¶ 7. Under that doctrine, a state may have standing to litigate quasi-sovereign interests "in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982). But the doctrine does not apply to claims against the United States. *See id*. at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)); *see also State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (determining a state did not have standing as a *parens patriae* because a "generalized grievance

that the [government] is not acting in a way in which [the State] maintains is in accordance with federal laws . . . is insufficient to demonstrate standing") (cleaned up) (alterations in original); *N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986) (applying equally to tribes).

In any event, the doctrine is reserved for situations in which a sovereign brings claims on behalf of all its citizens. *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *United States v. Santee Sioux Tribe*, 254 F.3d 728, 734 (8th Cir. 2001) ("The *parens patriae* doctrine cannot be used to confer standing on the Tribe to assert the rights of a dozen or so members of the Tribe."). Here, not all tribal members are similarly situated. As the Tribe admits, the Irrigation Project was constructed to irrigate "the allotted lands" of the members of the Tribe's historic constituent bands. Compl. ¶ 79.[21] Rights and benefits related to irrigation attach to the allotments, and not all tribal members have an individualized beneficial ownership interest in allotted lands within the Reservation or the geographic area serviced by the Irrigation Project. *See, e.g., id.* ¶ 81. Because not all tribal members are similarly situated, the Tribe would be seeking to litigate the claims on behalf of those who suffered economic loss or harm relative to their interests in individual allotments. The Tribe would, thus, be litigating in place of allotment holders, or on behalf of itself as an allotment holder, rather than on behalf of *all* its members as the tribal public. That is not a claim in *parens patriae*. *See Alfred L. Snapp*, 458 U.S. at 600 (no *parens patriae* standing where the state is merely "stepping in to represent the interest of particular citizens").

Finally, the Tribe cannot serve as class representative under Rule 23 because it is not a member of the purported class. The Tribe alleges that the class consists of "all 2,070 individual

[21] As noted above, however, under the 1906 Act, the Irrigation Project serves both Indian and non-Indian users. *See supra* at 1-2.

Tribe members," Compl. ¶ 184, and alleges that the United States has violated their equal protection rights, *id*. ¶¶ 311-37. But the Tribe—a governmental and corporate entity, *id*. ¶ 7—cannot represent individual tribal members as class representative because it does not have a claim in common with the class members. "The class representative must possess a claim typical of the class and a common question must exist between the representative's claim and the claims of the other class members." § 1771 The Application of Rule 23(a) in Civil and Constitutional Rights Cases, 7A Fed. Prac. & Proc. Civ. § 1771 (4th ed.). Here, the Tribe possess no such claim because, as discussed above, it does not have standing to bring an equal protection claim, whereas, individual tribal members may.

Because the Tribe lacks standing to assert a violation of its or its members' constitutional rights, cannot bring this claim under the *parens patriae* doctrine, and cannot serve as class representative, the Court should dismiss the Tribe as a Plaintiff in Claim 11.

B. Both the Tribe and Purported Class Plaintiffs Fail To State A Claim.

Standing aside, both the Tribe and alleged class plaintiffs fail to state a claim upon which relief could be granted. To state a cognizable equal protection claim under the Fifth Amendment, a plaintiff must plead animus. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *16 (U.S. June 18, 2020); *see also Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 280-81 (1979) (explaining that where a plaintiff challenging a facially neutral law "fail[s] to demonstrate that the law in any way reflects a purpose to discriminate," there is no equal protection violation). "To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision." *Id*. (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)). Possible evidence includes disparate impact on

a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 266–268.

The DC Court previously dismissed a nearly identical version of this claim for failure to plead animus. *Ute DC Op.*, 560 F.Supp.3d at 264-65. The attempt to join class plaintiffs has not cured this fundamental defect. The operative complaint does not allege that the United States departed from "the normal procedural sequence," *Arlington Heights*, 429 U.S. at 267, in managing water resources in Utah, or that any federal officials made statements exhibiting a discriminatory purpose. *See* Compl. ¶¶ 311-37. The complaint does not provide, as it must, any factual allegations from which the Court could plausibly infer that class plaintiffs have suffered disparate impacts as a result of their tribal status or that any federal actions were motivated by an invidious discriminatory purpose. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). The complaint's bare allegations that the United States has, for example, managed water "to benefit non-Indian water users at the expense of the Tribe, its members, and Class Action Plaintiffs," Compl. ¶ 316, and "acted with both a discriminatory purpose and a discriminatory effect," *id.* ¶ 329, are conclusory and should be disregarded.

But even if plaintiffs had plausibly alleged animus, their claim still fails because though pled as a racial discrimination claim, they have not identified a racial class. "An injured plaintiff has standing to raise an equal protection claim when the state imposes 'unequal treatment' on the basis of a protected characteristic, such as race." *MGM Resorts Int'l Glob. Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 45 (2d Cir. 2017), *as amended* (Aug. 2, 2017) (quoting *Heckler v. Mathews*, 465 U.S. 728, 738, (1984)). But tribal membership is a political, not a racial,

classification. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *see also Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1340-41 (D.C. Cir. 1998); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005) ("[T]he recognition of Indian tribes remains a political, rather than racial determination."). And political classifications, as a matter of law, are not afforded the same protections under the Fifth Amendment. *See, e.g., United States v. Shavanaux*, 647 F.3d 993, 1001 (10th Cir. 2011) (explaining that "'Indian' is not a racial classification, but a political one," and thus subject to rational basis review).

Finally, even if individual purported class plaintiffs could state a viable constitutional claim, there is no basis for allowing them to assert it in this litigation, which otherwise seeks to vindicate the Tribe's alleged rights. Multiple plaintiffs may join in one action if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). If both elements are not met, the Court may sever misjoined parties if no substantial rights are prejudiced. *Cruz v. Bristol-Myers Squibb Co. PR, Inc.*, 699 F.3d 563, 568-69 (1st Cir. 2012). Here, no legal or factual question is common to both the Tribe (which does not have standing to bring the discrimination claims) and the purported class action plaintiffs. For that reason, the Court should not allow them to join in this action and Claim 11 must fail.

CONCLUSION

Claims 1-8 should be dismissed for any one of the several deficiencies the United States identifies above, ranging from lack of jurisdiction, failure to state a claim, subject to waiver and release, and barred by the statute of limitations. And Claim 11 should be dismissed because the

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

Dated this 18th day of November, 2022.

Respectfully submitted,

TODD KIM
ASSISTANT ATTORNEY GENERAL
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Sally J. Sullivan
Sally J. Sullivan (D.C. Bar No. 1021930)
Trial Attorney
Brigman L. Harman (Utah Bar No. 12538)
Senior Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
4 Constitution Square
150 M Street NE
Room 3.142
Washington, DC 20002
Tel: (202) 514-9269 (Sullivan)
(202) 616-4119 (Harman)
Fax: (202) 305-0275
Email: sally.sullivan@usdoj.gov
brigman.harman@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2022, I filed the foregoing electronically through the Court's CM/ECF system, which caused notice to be sent to the parties of record.

/s/ Sally J. Sullivan
SALLY J. SULLIVAN